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The Conduct of Hostilities in International Humanitarian Law

Volume I

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The Conduct of Hostilities in International Humanitarian Law, Volume I

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Series Preface

Over half a century ago, Sir Hersch Lauterpacht, then Whewell Professor of International Law at the University of Cambridge, observed that 'if international law is the vanishing point of law, the law of war is at the vanishing point of international law'. He was wrong. While it is true that the law of war, or international humanitarian law as it has become known, is particularly vulnerable to the vagaries of political, social and economic influences, it has nevertheless proven itself a robust normative regime that positively shapes man's most destructive undertaking – warfare. No other body of law can be credited with saving more lives or alleviating as much suffering.

These six volumes comprise a collection of particularly significant works on humanitarian law. They are intended for use by scholars, practitioners and students who seek to better understand the topics addressed herein, together with their lineage. Just as importantly, they allow users to begin to separate the wheat from the chaff. The proliferation of publications in the field, in part a sad reflection of the fact that armed conflict remains so horribly pervasive, as well as the digitization that facilitates access to journals that would not otherwise be readily available, often results in information overload. A Ministry of Defence legal adviser looking for background material to address a situation involving belligerent occupation will, for instance, uncover scores of articles. The student writing a dissertation on the law of targeting or a scholar penning an article on detention will find him- or herself buried in material. Unfortunately, some of what they unearth will prove misguided, out of context or simply wrong. This collection will not break down these obstacles in their entirety. But it does afford a useful starting-point by offering topically arranged humanitarian law journal essays that have been thoroughly vetted by many of the top experts in the field.

In this regard, a few words on the process used to choose the essays are helpful. It began with the selection of those subjects that we believed comprised the *sine qua non* of international humanitarian law – development, principles, scope, application, conduct of hostilities, detention, occupation, and implementation and enforcement. We then contacted over 60 recognized humanitarian law experts, both academics and seasoned legal advisers. They were provided the topics and asked in a very open-ended fashion to identify pieces they considered 'classics', believed to be 'essential' in a compilation of this nature, have found to be especially influential, used regularly in their work or deserved greater attention on the basis of their quality and insights. The experts were asked to pay particular attention to those essays that may have been 'forgotten' over time, but merited 'rediscovery'. Many of them responded in depth. We also benefited from the work of a five-member team from Emory Law School's International Humanitarian Law Clinic which conducted an exhaustive literature review to locate essays relied on regularly by writers – the 'usual suspects', if you will. Finally, as editors we took the liberty of adding a few pieces to the pool *sua sponte*.

Armed with a daunting inventory of candidates for inclusion, we began the difficult task of whittling it down. Many essays proved to be consensus choices among the experts; often the Emory team had also identified them. These provided the skeleton for the project. We then fleshed out the collection based on two key factors: quality assessments by the experts and topic coverage. The latter criterion proved particularly central to the process, for our objective was to produce a collection that not only contained thoughtful and influential works, but also addressed most key humanitarian law topics.

Beyond esteem factors and topical relevance, some essays were selected on account of their temporal significance, that is, having been written at key junctures in the development of international humanitarian law. As an example, the collection includes pieces written in the immediate aftermath of the First and Second World Wars and the attacks of 11 September 2001. Others were published soon after adoption of the 1949 Geneva Conventions or the 1977 Additional Protocols. We hope they both afford insight into the perspectives at play as humanitarian law was evolving and provide a context for understanding the genesis of contemporary norms.

In the end, we were unable to include many insightful and influential works. Exclusion was frequently a mere matter of being cursed with too many good choices on a particular topic. Although no reader is likely to be entirely satisfied with the essays included, or comfortable with the omission of others, we hope the rigorous selection process has resulted in a collection that is both useful and enlightening.

This project would not have been possible without the help of many supporters. We are, of course, deeply indebted to the many international experts who took time from their busy schedules to offer recommendations and comments over the course of the three-year effort. Although we cannot possibly name them all, particular appreciation is due to Ken Anderson, Yutaka Arai, Louise Arimatsu, Laurie Blank, Gabriella Blum, Bill Boothby, Ove Bring, Claude Bruderlein, Knut Dörmann, Alison Duxbury, William Fenrick, Dieter Fleck, Steven Haines, Agnieszka Jachec-Neale, Dick Jackson, Marie Jacobsson, Claus Kress, William Lietzau, Noam Lubell, Lindsay Moir, John Murphy, Sean Murphy, Mary Ellen O'Connell, Bruce Oswald, Hays Parks, Stephen Pomper, Jean-Francois Queguiner, Noelle Quenivet, Adam Roberts, A.P.V. Rogers, Peter Rowe, Joseph Rutigliano, Robert Sloane, Dale Stephens, Ken Watkin and Sean Watts.

We are equally indebted to the brilliant group of young scholars at Emory Law School, whom we dubbed our 'IHL Detectives' – Flora Manship, Carmel Mushin, Jeannine Privat, Nandini Rao and, in particular, Benjamin Farley. Their ability to identify and locate 'lost treasures' of humanitarian law was awe-inspiring. All have since graduated, and we wish them the very best in their professional careers.

Three people deserve special mention and gratitude. Laurie Blank, Director of the Emory's International Humanitarian Law Clinic, ably and tirelessly supervised her team. Beyond supervision, she also devoted an enormous amount of her own time to the substance and administration of the project. At European University Viadrina, Kaya Kowalski took on the task of collating materials and later working with us as we made the final selections for the collection. She was unflappable in the face of our long and sometimes contentious deliberations and always exceptionally good-natured and professional. Finally, we thank our editor at Ashgate, Valerie Saunders, who showed the patience of Job throughout.

We hope this collection proves valuable in the years to come. For our part, it was a fascinating endeavour.

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Introduction

This is the first of two volumes on the 'conduct of hostilities'. The phrase refers to military operations during an armed conflict that involve the application of force. Conduct of hostilities rules governing methods and means of warfare have traditionally been labelled 'Hague Law', a reference to the fact that many of the early treaties in the field were adopted at the Hague Peace Conferences of 1899 and 1907. Notable in this regard is Hague Convention IV on the Laws and Customs of War on Land, and in particular its annexed Regulations, which the Nuremberg Tribunal and the International Court of Justice have recognized as reflective of customary international law. Hague Law is to be distinguished from 'Geneva Law', a designation that derives primarily from the Geneva Conventions of 1864, 1906, 1929 and 1949. Geneva Law sets forth specific protections for various categories of persons and property, such as civilians, prisoners of war and the wounded and sick.

Today, the distinction has lost much of its relevance. Most significant in this regard is the fact that the 1977 Additional Protocols, especially Protocol I on international armed conflict, combine elements of both aspects of international humanitarian law (IHL). This is a sensible approach, for the distinction has proven artificial in practice. The humanitarian purposes of IHL are realized not only by explicit protections afforded to particular persons and property, but also through limitations on the methods and means that can be employed on the battlefield. These two volumes address issues that are the subject of both of the traditional categories of international humanitarian law.

What is most apparent in these volumes is that all of IHL reflects a balance between the intent of states to retain the ability to engage in actions that are militarily necessary and a desire to pursue humanitarian ends, if only to protect their own citizens and soldiers from the effects of warfare. Nowhere is this balancing more evident than in the law framing the conduct of hostilities. The quintessential example is the principle of proportionality, which permits incidental harm to civilians and civilian objects during attacks on combatants and military objectives so long as the expected harm is not excessive relative to the anticipated military advantage to be gained. Virtually every issue examined in these two volumes is the subject of an analogous balancing of military necessity and humanitarian considerations. The thoughts and opinions expressed by the authors are, in essence, attempts to more appropriately balance the two values.

Of course, as shall become evident, one's perspective inevitably influences arguments as to the correct balance. Those responsible for prosecuting warfare tend to be more sensitive to the realities of the battlefield, either in terms of mounting effective operations or in limiting behaviours that heighten the risk to their soldiers, sailors and airmen. By contrast, individuals and organizations dedicated to ensuring the well-being of the civilian population, such as the International Committee of the Red Cross or non-governmental organizations, are more attuned to the humanitarian considerations at play in the balance. Such differences are healthy, for they fuel a dialectical process through which an optimal balance can be better

reached. The essays chosen for these volumes have exerted, and continue to exert, influence on that process. They offer us a glimpse of the genesis of contemporary IHL, while affording us a sense of its possible future vector. Volume I addresses three broad topics: distinction, maritime warfare and air warfare.

Distinction

The four essays in Part I explore aspects of the principle of distinction. Distinction is IHL's seminal notion. It has been codified in Additional Protocol I, Article 48, which requires parties to a conflict to 'at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly ... direct their operations only against military objectives'. This rule reflects customary international law in both international and non-international conflict. It has been operationalized in such subsidiary norms as the prohibition of indiscriminate attacks, the rule of proportionality and the requirement to take precautions in attack.

'Protection of Civilians against the Effects of Hostilities' (Chapter 1) is Waldemar Solf's survey of the protection civilians enjoy under customary law and Additional Protocol I. Solf was uniquely positioned to comment on the subject, having served as a US army officer, as civilian Chief of International Law for the US army and as a member of the US delegation to the Diplomatic Conference on International Humanitarian Law (1974–77) that produced Additional Protocols I (international armed conflict) and II (non-international armed conflict). What is particularly interesting about his essay is that it was written the year before US President Reagan notified the Senate of the administration's opposition to the ratification of Protocol I on the basis that the treaty was 'fundamentally and irreconcilably flawed'. The President supported ratification of Additional Protocol II, but to date the Senate has not ratified the instrument. In 2011 Secretary of State Clinton notified the Senate that the Obama administration was again seeking advice and consent to its ratification.

In his essay, Solf explores the historical development of restraints on methods and means of warfare, the customary status of some of the norms and the relationship between customary and treaty law, paying particular attention to the core treaties in the field – the Hague Conventions of 1907, the Geneva Conventions of 1949 and the 1977 Additional Protocol I. His discussion of the historical lineage of this law is particularly rich, with examples that illustrate the genesis of principles such as discrimination and proportionality drawn from the writings of, *inter alia*, Sun Tzu, Shakespeare, Vitoria and Lieber.

Tellingly, Solf identifies the tensions inherent in the balance between considerations of necessity and humanity. He notes that the 1907 Hague Conventions omitted the reasons unpinning the rules based on 'the belief of humanitarian scholars that a humanitarian instrument should provide what is to be spared, and should not explicitly authorize violence' (p. 7). Unfortunately, 'this restraint sacrificed clarity' because 'military men tended to consider permissible any measure not expressly prohibited' (pp. 7–8). Solf rejects this perspective, arguing, correctly, that customary law retains its validity in the face of treaty law except as modified thereby. In particular, he points to the Martens Clause of the 1899 and 1907 Hague Conventions, which was subsequently included in Additional Protocol I. By

the clause, 'the inhabitants and the belligerents remain under the protection and rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience', whenever there is no express rule on point. Solf also highlights the dynamic by which treaty law, or at least the general principle set forth therein, can mature into customary law binding even non-parties, the two paradigmatic examples being the 1907 Hague Regulations and the 1949 Geneva Conventions.

The essay is noteworthy for its discussion of the development of post-Second World War conduct of hostilities law. Interestingly, in the aftermath of the war and the adoption of the four 1949 Geneva Conventions, the new United Nations International Law Commission was asked to begin a codification of IHL. It declined, in its report to the General Assembly, on the ground that '"[w]ar having been outlawed, the regulation of its conduct has ceased to become relevant"' (p. 10). Sadly, the Commission could not have been more wrong.

The development of new weaponry, especially that associated with air warfare, nevertheless provided an impetus for development of the law. In this regard, Solf notes that four elements are inherent in the foundational juxtaposition of the necessity and humanity principles:

> (1) there are limitations on the methods and means of warfare; (2) these limitations are expressed in binding international law; (3) loss of life and destruction of property must have some rational tendency to the prompt achievement of a definite military advantage; and (4) such casualties and damage must not be disproportionate or excessive in relation to the military advantage anticipated. (p. 14)

Additional Protocol I, according to Solf, responds to these elements in a variety of ways. It contains provisions which 'revitalize and strengthen the distinction between military objectives and civilians/civilian objects', 'clarify the legal regulation of attacks', 'define in detail the precautionary steps that both the attackers and defenders must take' and set forth prohibitions on attacking particular persons and objects (p. 15). He suggests that the treaty does not create new law, but rather draws on existing customary law, with the exception of the prohibition on reprisals. Thus, he concurs with the International Committee of the Red Cross's self-assessment that in proffering the draft Protocol, the organization 'remained steadfast to the spirit in which, since 1864, it has demanded, for the benefit of individuals, guarantees consistent with the dictates of humanity whilst bearing in mind the realities of national defense and security' (p. 21). Obviously, in light of the non-party status of key war-fighting nations such as the United States and Israel, not all states and commentators have agreed with him.

Chapter 2, 'The Principle of Discrimination in 21st Century Warfare', builds on these foundations by examining how the principle of discrimination is likely to fare in the face of the ever-evolving nature of warfare. Written at the turn of the millennium by one of the editors these volumes, Michael Schmitt, while a military officer just recently graduated from the Naval War College, the essay addresses the impact of the 'revolution in military affairs' (RMA) on the law and vice versa (p. 23).

Schmitt observes that law and war exist in a symbiotic relationship. When changes in warfare occur, new law emerges, old law falls into desuetude or new interpretations of the

law that are more attuned to the contemporary battlefield gain traction. These adjustments play themselves out on future battlefields, thereby creating a feedback loop that influences the further development of law. The classic example of this process was adoption of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War following the horrendous suffering of civilians during the Second World War, and the subsequent decision to update them with the Additional Protocols.

In his essay, Schmitt identifies certain trends of the RMA and offers suggestions as to how they might affect the principle of discrimination. He begins by noting an 'accentuation of global divisibility' into the military (and economic) 'haves' and 'have nots' (p. 33). The trend continues, with the United States becoming increasingly dominant in military wherewithal as its underfunded allies and other states, with the key exception of China, slip further and further behind. The result is asymmetrical warfare, dramatically illustrated in Afghanistan and Iraq. Disparity on the battlefield results in a dangerous dynamic that 'encourages' the disadvantaged side to dispense with the extant legal norms in order to acquire its own asymmetrical advantage over states that remain committed to the norms of international humanitarian law.

The RMA also results in a 'blurring of the lines between protected persons and objects and valid military targets' (p. 38). Schmitt suggests that the blurring is the product of the militarization of previously protected entities and individuals, such as civilians who serve as military contractors. When this happens, '[t]here will be measurable pressure to interpret the universe of targetable objects and individuals more liberally ... because each side will seek to deny its opponent potential advantage' (p. 41).

A further phenomenon of the RMA is the transformation of battlefields into 'battlespaces'. Because of the range of modern weaponry and the sophistication of intelligence, surveillance and reconnaissance assets, advanced militaries can today strike anywhere they wish into an enemy's territory. As a result, the protection of distance from the frontlines that civilians historically enjoyed has disappeared. This new reality dramatically heightens the centrality of the rule of proportionality and the requirement to take precautions in attack.

The 'advent of precision engagement' also affects IHL's implementation (p. 42). Precision attacks have the positive effect of minimizing collateral damage in comparison to strikes employing unguided systems. However, the fact that the 'have' states field precise systems when their opponents do not effectively creates relative legal obligations in the context of the IHL requirement to take precautions in attack, specifically in terms of the choice of methods and means. This may tend to weaken allegiance to IHL norms, for although IHL is not designed to ensure a 'fair fight', the willingness of states to accept legal limits on their activities has always been partly based on a sense that their opponents would be equally constrained. Further, the availability of precision weaponry renders many more targets lawful because they may now be struck without violating the requirement of proportionality. This is particularly true in urban environments. To the extent that more targets are legally targetable, the total collateral damage during a conflict, as distinct from the collateral damage caused by a particular strike, may rise.

Finally, Schmitt draws attention to the existence of 'disparate cognitive approaches' (p. 50). In light of technological asymmetry and the civilianization of the battlefield, advanced states have an incentive to limit the range of lawful targets to those that are strictly military.

This is because they rely heavily on the civilian sector, are generally adept at protecting their forces and can easily penetrate enemy defences. On the other hand, a lesser equipped belligerent, unable to get through its opponent's defences, will probably begin to perceive the enemy's civilian population and civilian objects as fruitful targets, not only because its opponent relies on them, but also because targeting the civilian population may turn popular sentiment against the conflict.

It must be conceded that the term 'revolution in military affairs' has fallen into disfavour as a result of the conflicts in Afghanistan and Iraq, which seem to hark back to classic counterinsurgencies. However, reports of the death of the RMA are greatly exaggerated. Precision strikes by unmanned aerial drones flown from hundreds, even thousands, of miles away against insurgent fighters located through cellphone intercepts serve to remind us that the RMA is alive and well.

Schmitt concludes by cautioning against responding to asymmetry through relaxation of the IHL's norms, reminding readers that 'war is a political decision for which the average citizen bears the burden, but not the responsibility' (p. 62). But he also cautions that military necessity must continue to be accounted for in the law if it is to retain the commitment of states.

The latter point lies at the heart of A.P.V. Rogers's essay, 'Zero-Casualty Warfare' (Chapter 3). Rogers, former Director of the British Army's Legal Services and a Fellow at Cambridge's Lauterpacht Centre, uses the 1999 NATO air campaign during the Kosovo conflict as a point of departure for examining the legal obligations attendant to collateral damage. The twentieth century has witnessed a dramatic rise in the risk of collateral damage for a number of reasons. Air power has made possible strikes deep into enemy territory where civilians are located. The size and mechanization of twentieth-century armies has increased military dependency on civilian-operated industrial production and logistics facilities, thereby making them advantageous targets. Since such entities tend to be based near population centres, attacking them has necessarily resulted in high levels of civilian casualties. Guerrilla warfare, especially prevalent in the post-Second World War era, places civilians at risk because guerillas typically operate among the people. And '[t]he understandable modern attitude of military commanders that they will not expose their subordinates to unnecessary risks tends to increase the danger to civilians' (p. 66). This attitude corresponds with 'growing pressure, especially in the West, to reduce military casualties to a minimum, otherwise public support for the campaign is likely to fall away' (ibid.) The consequence of these trends has been 'a steady increase in the ratio of civilian to military casualties in armed conflict despite the efforts of diplomats and international lawyers to emphasize the principle of civilian immunity' (p. 67).

Some commentators and war-fighters looked to 'smart weapons' – that is, those with highly accurate guidance systems – as the solution to this dilemma. Rogers correctly notes that expectations exceeded reality. Enemy air defence can affect accuracy by frustrating delivery, unreliable intelligence can lead to very accurate attacks on the wrong target, and human error can never be ruled out. A tragic incident during the Kosovo air campaign illustrates the problem. In order to stay outside the threat envelope of enemy surface-to-air missiles, NATO aircraft typically released their weapons from 15,000 feet. During one such attack, a group of civilian vehicles was attacked after being mistaken for a military convoy.

What must be understood is that honest mistakes do not violate international humanitarian law so long as the attacker took adequate precautions to minimize civilian casualties when planning and executing the attack. The law requires an attacker to do everything feasible to verify that the target is a lawful military objective, select weapons and tactics with an eye to reducing collateral damage (without forfeiting military advantage) and, when possible, issue warnings of attack. In cases of doubt as to the status of a potential target, it must be presumed to be civilian. To comply with the principle of proportionality, the expected collateral damage to civilians and civilian objects must not be excessive relative to the military advantage anticipated to accrue from the attack.

Rogers identifies the key dilemma facing those who conduct attacks – that measures taken to limit collateral damage may involve greater risk to an attacker. Nevertheless, he argues that '[m]ilitary necessity cannot always override humanity. In taking care to protect civilians, soldiers must accept some element of risk to themselves' (p. 75), although he acknowledges that the 'rule of proportionality is unclear as to what degree of care is required of a soldier and what degree of risk he must take' (ibid.). Applying his practical experience to the law, Rogers suggests a rule of engagement that might read as follows: 'Are you sure that the target is a military objective? If you are in any doubt, would you or friendly forces be placed in danger if the attack were not carried out? If not, the attack is NOT to be carried out' (p. 77).

Significantly, he points out that situations 'will occur when members of the armed forces will not be able to make ... cool calculations' (p. 78). Therefore, the risk posed to the attacker is an important factor in assessing the proportionality principle in a case involving individual responsibility. Those making the assessment 'would have to put themselves in the position of the armed forces member concerned, taking all the surrounding circumstances into account, so as to experience the situation as he experienced it at the time, before considering the question of culpability' (ibid.).

As should be clear, the law governing attacks is replete with moral, operational and legal issues. For no rule is this truer than for that of proportionality, a topic explored by Kenneth Watkin, former Judge Advocate General of the Canadian forces and current Stockton Professor at the US Naval War College, in his essay 'Assessing Proportionality' (Chapter 4). When he wrote the essay, Canadian forces were heavily involved in combat operations in Afghanistan – a fact that lends the piece particular resonance.

Reflecting his practical experience, Watkin rejects narrow interpretations of the rule that civilians who directly participate in hostilities lose their protection from attack for such time as they so participate. He points out that 'for a state and its military forces waiting to react to an attack from such "civilians", such a narrow interpretation appears dramatically inconsistent with the nature of the threat presented by such members of armed groups' (p. 91).

That said, Watkin highlights the fact that the standard for targeting individuals differs from that which applies to strikes against military objectives. The latter is much more permissive. For instance, although workers in a munitions factory are fully civilians, the factory itself qualifies as a military objective. The workers may not be attacked directly, and any harm to them during an attack on the factory must be factored into the proportionality calculation. This example illustrates how 'humanitarian law can be interpreted to place a higher premium on life than on the damage or destruction to "objects"' (p. 91).

As with the debate over the scope of the notion of direct participation, disagreement prevails regarding the law governing attacks on objects. The most significant of these surrounds the meaning of the term 'military objective'. The United States interprets the term to extend to 'war-sustaining' entities, particularly those that provide the means to finance the war effort, such as oil exports. Most other countries limit it to war-fighting or war-supporting objects. Watkin notes that the US approach 'has been criticised as being too easily open to interpretation that could justify unleashing the type of indiscriminate attacks that occurred during World War II' and as a '"slippery slope" where every economic activity might be interpreted as indirectly sustaining the war effort' (p. 95). Thus, he concludes that '[t]he meaning to be given to this term introduces fundamental questions regarding the goals of armed conflict, how campaigns are waged and the impact of the levels of warfare on "proportionality"' (ibid.).

The rule of proportionality, and IHL more generally, traces its roots to the early Christian doctrine of 'double effect' which served to reconcile the absolute prohibition on attacking non-combatants with the need to fight effectively. In other words, it attempted to balance humanitarian considerations and military necessity. The doctrine provided that:

> ... it is permissible to perform an act that has 'evil' consequences if four conditions are met: the act is good in itself or at least indifferent; the direct effect is morally acceptable; the intention of the actor is a good one and the evil effect is not one of the ends or a means to an end; and the 'good effect' is sufficiently good to compensate for any evil outcome. (p. 104)

But application of this principle, as translated into the legal notion of distinction, is subject to varying analytical frameworks – pacifism, human rights, tactical-level control and the strategic approach. What one sees depends on where one stands.

Watkin concludes that 'it is not clear if any of them provides the sole means by which proportionality can be assessed' (p. 125) since each has strengths and weaknesses. He suggests that the protection of civilians can be enhanced

> ... if the principle of distinction is reinforced by more clearly identifying who can be targeted; greater accountability is demanded regarding the approach of considering attacks as part of a whole in addition to the attention often paid to tactical level effects; the importance of the right to life is emphasised; and those principles are applied rigorously at all levels of warfare. (p. 125)

He further urges the establishment (or reinforcement) of what he labels 'a culture of "due diligence"' (p. 125). Accordingly, he emphasizes the importance of a command climate in realizing both moral and legal ends.

Maritime Warfare

Maritime warfare is the focus of Part II of this volume. Unlike the principle of distinction, which was only codified in a meaningful way in the second half of the twentieth century, the law of maritime warfare has long been the subject of treaty law. At the 1907 Hague Peace Conference, for instance, conventions were adopted on the status of merchant ships,

conversion of merchant ships into warships, the laying of automatic submarine contact mines, naval bombardment, hospital ships, the International Prize Court, and the right of capture and neutrality. In 1913 the Institute of Internal Law adopted a Manual on the Laws of Naval Warfare (the Oxford Manual) in preparation for a later peace conference (which was never held). After the First World War, the five victorious powers adopted a treaty on submarine warfare at the 1922 Washington Conference, although, due to the failure of France to ratify the instrument, it never entered into force. In 1928 a Convention on Maritime Neutrality was adopted, which largely reiterated the provisions of its 1907 Hague Conference counterpart. Two years later, the powers that concluded the abortive 1922 treaty on submarines adopted the Treaty of London for the Limitation and Reduction of Naval Armaments. Although most of the treaty expired six years later, the provision on submarines remained in force. During the Spanish Civil War, nine powers agreed, in the Nyon Agreement, to collective measures in the face of submarine attacks against merchant vessels. The last major treaty on naval warfare was the 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.

In an effort to capture changes in the customary law of naval warfare during and following the Second World War, as well as to reaffirm the earlier law that had survived, the International Institute of Humanitarian Law in San Remo convened a series of Round Tables between 1988 and 1994 attended by a group of international legal and naval experts. The resulting 'San Remo Manual' provides a restatement of the then existing international law applicable to armed conflicts at sea. Although non-binding, the San Remo Manual has become a touchstone for those working in the field.

Nevertheless, maritime operations continue to evolve. The twenty-first century has witnessed a resurgence of piracy, unprecedented international cooperation in addressing threats such as transnational terrorism and weapons of mass destruction and, most significantly from the perspective of the law of naval warfare, the use of blockades. In light of these developments, it is a propitious time to reflect upon the origins and content of the norms governing the conduct of hostilities at sea.

The first essay in Part II, 'Submarine Warfare' (Chapter 5), deals with a topic that has been at the forefront of the law of naval warfare since the turn of the twentieth century. It remains relevant in light of, for instance, the growth of the Chinese submarine fleet. Published in the aftermath of the controversial employment of submarines during the First World War and as the Washington Conference was looming by A. Pearce Higgins, then Whewell Professor of International Law at the University of Cambridge, it argues that the extant law adequately addresses the issues that arose during the conflagration, but urges greater enforcement efforts.

The law was relatively simple. Enemy warships could be attacked without visit or opportunity for surrender, while enemy merchant ships were liable to visit and capture, but steps had to be taken to ensure the safety of the crew. Captured ships were subject to prize proceedings, but could be destroyed on account of unseaworthiness, likelihood of recapture or impracticality of passage to a port. Merchantmen were permitted to be armed in self-defence, but if they forcefully resisted capture, they became subject to attack. Citing both customary and treaty law, Higgins confirms that a 'warship was not allowed to make the merchantman's possible strength the excuse for a surprise attack, or for sinking at sight' (pp. 137–38). Confirmed by the London Protocol of 1936, this generally remains the law today.

Yet, during the First World War such incidents periodically occurred; in the Second World War, they were common.

Neutral merchantmen were also subject to visit and search. In the event of carriage of contraband, attempted breach of blockade or the performance of other non-neutral service, they became liable to capture. Whether they could lawfully be destroyed was, according to Higgins, unsettled.

Submarines tested these requirements. As noted in a 1915 British Declaration to neutral states, German submarines could not put a prize crew on board captured vessels to sail them to a port, did not take captured vessels to prize courts, had difficulty distinguishing neutral from enemy vessels and did not bring aboard the crew of those they sank. The US Secretary of State made the same points, arguing that "'[m]anifestly submarines cannot be used against merchantmen ... without an inevitable violation of many sacred principles of justice and humanity"' (p. 143).[1]

For Higgins, the key legal obstacle lies in the inability to ensure the safety of the crew of captured or destroyed merchantmen. He rejects claims that 'the introduction of new weapons and new conditions of warfare demands the modification or alteration of the old rules' (p. 145), pointing out that other new means and methods, such as torpedoes, have been fielded without having to discard existing norms. In a proposition equally applicable to contemporary technological developments such as unmanned systems and cyber operations, Higgins emphasizes that '[w]ar is not conducted on the analogy of handicapping rules at race meetings ... New weapons are illegitimate if their use necessarily entails violation of fundamental principles' (p. 146).

As to claims that German actions might be characterized as reprisals against alleged British violations of the law, Higgins, without labelling them as such, reminds readers of the requirement that reprisals be proportionate. For Higgins, '[i]t is enough to say that no reprisals directed against enemy and neutral ships alike can be permitted which violate fundamental laws of humanity involving the certainty of death or mutilation to non-combatants, neutral as well as enemy' (p. 147).

Rejecting calls for abolition of the right to capture of private property at sea, ransom and bonding, Higgins concludes that:

> The attack on a merchant ship without previous warning is illegal and officers guilty of violating the rule are guilty of a war-crime. Submarines are legitimate means of attacking enemy commerce only if they conform to the laws of naval warfare hitherto observed by surface warships. (p. 150)

Reiterating a maxim as relevant today as it was then, he points to Article 22 of the 1907 Hague Regulations to remind readers that '[a]ll is not fair in war; in sea warfare as in land warfare, "'belligerents have not an unlimited right as to the choice of means for injuring the enemy"' (p. 151).

In 'The International Law of Mine Warfare at Sea' (Chapter 6), Wolff Heintschel von Heinegg, co-editor of these volumes, addresses a naval warfare technology that has similarly presented legal challenges. Although naval mine warfare stretches back well over a century,

[1] Citing Mr Bryan, US Secretary of State, in a dispatch to the US Ambassador in Berlin, 18 May 1915.

the sole international instrument governing its use is the 1907 Hague Convention VIII. Given subsequent technical developments, he queries whether 'this treaty may still be considered adequate for securing the principle that the right of the parties to the conflict to chose methods and means of warfare is limited' (p. 155).

Treaty negotiations always reflect the particular national interests of the states involved. Hague Convention VIII was a post Russo-Japanese War accommodation between major sea powers such as Great Britain, which opposed the technology out of concern that it might compromise its naval superiority, and the majority of other states, which saw naval mines as a relatively cheap and effective means of countering enemy warships. The compromise adopted in the treaty involved a differentiation between anchored and unanchored mines. Unanchored mines had to become harmless within one hour; anchored mines were required to become harmless if they broke loose from their moorings.

With the Second World War's unrestricted mine warfare still fresh in the minds of commentators, post-war debates questioned the continued applicability of the restrictions. Von Heinegg holds that the convention has achieved customary status, but notes that it is unclear whether its provisions apply to bottom mines, modern anchored mines or remote-controlled minefields since they do not explode on contact, but rather react to magnetic and acoustic signatures or changes in water pressure. Mine warfare therefore offers an interesting case study in the applicability of weapons treaties to technology that has developed beyond that envisaged.

The essay is a *tour de force* on the present international law of mine warfare. Of particular importance are the geographical limits of the activity. Naval mines may only be laid in the general area of naval operations. They may not be placed in the territorial, internal or archipelagic waters of a state that is not party to a conflict and may not prevent passage between neutral and international waters. Parties laying mines must have 'due regard' for the rights of coastal states, such as those attaching in the exclusive economic zone. Importantly, von Heinegg notes that despite the unlimited mine warfare of the Second World War, state practice since then has established the principle that 'unless free and safe passage for peaceful shipping is provided for, the mining of the high seas is contrary to international law' (p. 162) and that closure of an international strait by mining 'will be legitimate only in exceptional cases and may not last indefinitely' (p. 163).

Von Heinegg stresses that, in mine warfare, 'the general principles of the (maritime) *jus in bello* equally apply, in particular the principle of distinction' (p. 164). He goes on to explore additional duties and prohibitions: effective surveillance, risk control, warning, precautionary measures, mine-laying with the sole object of intercepting commercial shipping and the removal or rendering harmless of mines at the close of an armed conflict.

When belligerents fail to meet their legal obligations, questions arise regarding the right of neutrals to take self-help measures to protect their shipping, such as removing free-floating mines. According to von Heinegg, consensus exists on the authority to do so beyond territorial waters, either based on the inherent right of self-defence or to enforce freedom of navigation. The more difficult legal issue is whether such an action is permissible in an international strait, which by definition overlaps territorial waters. Recall that in 1949 the International Court of Justice deemed Great Britain's removal of mines from Albanian waters a violation of international law in the *Corfu Channel* case. Von Heinegg argues that the present law of the

sea transit passage regime supplants the holding. Accordingly, if belligerents engage in illegal mining and no alternative route of similar convenience exists, third states may remove the mines to effect their right of passage.

Naval mines illustrate how legal regimes can fail to keep up with emerging technologies. While it is often possible to interpret extant regimes fairly in changed circumstances, sometimes new law would ease the interpretive burden. In this particular case, von Heinegg concludes that '[t]he only promising means of achieving this aim is an international codification of the laws of naval warfare' (p. 176).

In 'Some Aspects of Modern Contraband Control and the Law of Prize' (Chapter 7), Sir Gerald Fitzmaurice, former Legal Adviser to the Foreign Office and Judge of the International Court of Justice (*inter alia*), examines contraband control, 'the aggregate of the techniques whereby a belligerent in a position to enforce such control by naval action seeks to prevent supplies from overseas reaching his enemy' (p. 177). The principal technique for doing so is:

> ... interception of the ships at sea, their diversion into port, the examination of their cargoes, and the seizure and placing in Prize ... of any consignments suspected on reasonable grounds of having enemy destination – to be eventually followed either by their final condemnation as prize by the Prize Court, or by their release if the case against them cannot be sustained. (p. 177)

The essay bears not only on the narrow topic of contraband and prize, but also on the dynamic of law's adaptation to the shifting realities of warfare. Fitzmaurice notes that the law of prize upon commencement of the Second World War was basically that in place at the end of the Napoleonic Wars. Yet, 'enormous changes had occurred both in the field of international commerce and in methods of warfare, changes not merely of scale and degree, but of kind' (p. 178). The British government, therefore, 'was obliged to have frequent recourse to the [Prize] Court, not merely to obtain the actual condemnation as Prize of ships and goods that had been seized, but also in order to test, directly or indirectly, its right to effect any seizure at all in novel cases' (ibid.).

One point that appears to have been clarified by practices during the war involved a distinction between condemnation and seizure of goods. In the nineteenth century, seized goods had to be condemned. Otherwise, if released for any reason, the goods might find their way to the enemy because the law did not prevent reshipment. However, by *Falk*, a 1921 decision of the Privy Council, the release of seized goods in the United Kingdom did not relieve the owner of legal obligations attendant to their 'export', which might result in denial of an export licence in the event that there was a chance of subsequent trans-shipment to the enemy.

Practice during the war also established the principle that the owner of goods seized in Prize was often entitled only to their fair market value, and not the goods themselves. In some cases, they (or the vessels transporting them) were sold or requisitioned before the Prize proceedings to preclude, for instance, the chance that they might find their way to the enemy. Fitzmaurice concludes that:

> The theory underlying the sale or requisitioning of seized goods is (*a*) that it would be unreasonable that goods the preservation of which was difficult or impossible, or which were urgently required