of whether the final product is "a Commentary" or, more accurately, a set of commentaries.

If the Oxford Commentary on the *UNDRIP* remains in effect a collection of somewhat differing views capturing part of the range of opinion on the *UNDRIP*, it is still a useful work. At the same time, this state of affairs speaks to a field still in development and a Commentary grappling with that situation. It remains a significant scholarly contribution, but one that could not yet attain a more complete cohesiveness. Although there are not at present rapid new developments in international Indigenous rights law, there is nonetheless significant need for ongoing scholarly work. Each work will make its own contributions, with Hohmann and Weller's Oxford Commentary certainly welcome and worthwhile.

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The Law of Maritime Blockade: Past, Present, and Future. By Phillip Drew. Oxford: Oxford University Press, 2017. 173 + xvii pages.

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Phillip Drew's book offers a compact, and highly readable, treatment of an important issue: the law applicable to belligerent action at sea during an armed conflict to prevent shipping, including neutral shipping, entering or leaving enemy ports. The law of maritime blockade has been neglected for some time and is a field crying out for a comprehensive and current monograph.[1] Indeed, there has not been a significant monograph on the

[1] Most studies in the field have been either historic or focused on Israel's blockade of Gaza. On the latter, see James Farrant, "The Gaza Flotilla Incident and the Modern Law of Blockade" (2013) 66:3 Naval War Col Rev 81; Russell Buchan, "The International Law of Naval Blockade and Israel's Interception of the Mavi Marmara" (2011) 58 Neth Intl L Rev 209; Andrew Sanger, "The Contemporary Law of Blockade and the Gaza Freedom Flotilla" (2010) 13 YB Intl Human L 397; James Kraska, "Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?" (2010) 13 YB Intl Human L 367; Douglas Guilfoyle, "The Mavi Marmara Incident and Blockade in Armed Conflict" (2010) 81 Brit YB Intl L 171; Wolff Heintschel von Heinegg, "Naval Blockade" in Michael N Schmitt, ed, *International Law across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green*, International Law Studies Series, vol 75 (Newport: US Naval War College, 2000) 203.

law of blockade in the era of the *Charter of the United Nations* of which I am aware in the last twenty years.[2]

The Law of Maritime Blockade advances three core propositions. The first is that there is no universally accepted "law of blockade," which largely follows from the lack of any generally agreed definition, or the codification of any significant part of the law, beyond the criteria for establishing a blockade.[3] The second is that blockade is inherently an "indiscriminate method of warfare," which may result in "arbitrary deprivation of life" if "widescale starvation of civilian populations" results.[4] That is, Drew proposes that blockade law as it presently exists in customary international law will, in its application, almost invariably violate the international humanitarian law principle of distinction (as established no later than the 1977 *Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict*).[5] Or, more succinctly,

> [since] in most situations the economy of [the enemy] cannot be considered to be a military objective within the meaning of Article 52.2 of *Additional Protocol I*, it is contended that the wilful starvation of a civilian population during a blockade is analogous to the deliberate targeting of civilians in kinetic operations.[6]

The third and final proposition is that, in light of modern humanitarian and human rights law, substantial reform to the law of blockade will be required. Several subsidiary points follow. Importantly, Drew does not consider the proportionality test of modern international humanitarian law applicable to blockade. This is because blockade is either inherently illegal *ab initio* as an indiscriminate form of warfare or because the test is impossible to apply in practice because the effects of the blockade against

[2] Honourable mentions go to Elizabeth Chadwick, *Traditional Neutrality Revisited: Law, Theory, and Case Studies* (The Hague: Kluwer Law International, 2002) (a largely historical treatment); LA Ivanashchenko, *Blockade at Sea and Contemporary International Law*, translated with a foreword by William E Butler (Seoul: Korea University, 1989) (a Soviet perspective); Michael N Schmitt, *Blockade Law: Research Design and Sources* (Buffalo: Hein, 1991) (a study guide). *Charter of the United Nations*, 26 June 1945, 1 UNTS 15 (entered into force 24 October 1945).

[3] Philip Drew, *The Law of Maritime Blockade: Past, Present, and Future* (Oxford: Oxford University Press, 2017) at 2.

[4] *Ibid.*

[5] *Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978).

[6] Drew, *supra* note 3 at 2.

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the entire economy will be very difficult to predict.[7] He also raises the issue that there may be a "humanitarian gap" in the form of a "deliberately imposed gap in humanitarian protection in Article 49.3 of *Additional Protocol I* that permits states to engage in blockade operations without having to apply" ordinary humanitarian considerations.[8]

The substantive part of the book consists of eight relatively short chapters dealing with: maritime neutrality law; the law of contraband (in part, to distinguish it from blockade properly understood); the historical practice of blockade; blockade law; case studies of blockade and its effects on the civilian population; international humanitarian law and blockade; blockade in non-international armed conflict and the doctrine of recognition of belligerency; and international human rights law and blockade. Despite its relatively short span of pages, there is thus a great deal for international humanitarian law scholars to sink their teeth into. While the historical material and preliminary work put into establishing relevant legal distinctions in Chapters 2–6 is well researched and rewarding, it is the final three substantive chapters that carry the core argument and that will be the focus of this review.

Chapter 8 deals with an important preliminary issue: can blockade in the modern era be invoked in a conflict with a non-state actor? This is obviously critical in the case of Israel's blockade of the Gaza Strip.[9] Drew turns to the role of the historic doctrine of recognition of belligerency in the modern law of armed conflict and makes a deft argument. It is disputed in the literature whether the law of blockade can be applied in a non-international armed conflict. The difficulties are twofold. First, the usual authority for the proposition that blockade can apply during a civil war is taken to be the US *Prize Cases*.[10] This case law essentially invented the legal doctrine of implicit recognition of belligerency. The doctrine of belligerency acknowledges that under certain circumstances highly organized armed groups capable of challenging the survival of the state itself may enjoy the burdens and privileges of combatant status. Thus, in the US Civil War, the Union's proclamation of the blockade against the Confederacy effectively recognized the latter as a legitimate opponent and turned their contest into one governed by the laws of war. The doctrine of belligerency up until that point had largely been bilateral — that is, neutrals could choose to acknowledge or not the belligerent status of parties to a conflict. Obviously, as this would effectively grant a right to the belligerent non-state actor to intercept the shipping of the

[7] *Ibid* at 3.

[8] *Ibid.*

[9] See the works referenced in note 1 above.

[10] 67 US (2 Black) 635 (1863).

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recognizing state in order to enforce a blockade, there was quite limited incentive to do so. This was never more apparent than in the Spanish Civil War in which neutral states generally denied that blockade could legally be invoked, despite the scale and complexity of the conflict (with the result that this episode is often seen as sounding the death knell for recognition of belligerency).

The subjective and arbitrary nature of recognition of belligerency offended the ever-logical and systematizing Hersch Lauterpacht.[11] Lauterpacht proposed that belligerency should follow by automatic operation of law from certain objective facts, including: that the conflict be widespread (not localized); that it involve organized forces under responsible command capable of following the rules of war; and that those non-state forces control a substantial part of the state's territory. Drew deftly traces Lauterpacht's proposed rules for the recognition of belligerency into the very similarly formulated test in Article 1 of *Additional Protocol II* of 1977 for the existence of a non-international armed conflict.[12] Drew hangs two further claims on this. The first is that we know that international criminal law applies to armed conflicts of sufficient organization, intensity and duration following the seminal *Tadić* case before the International Criminal Tribunal for the former Yugoslavia.[13] *Additional Protocol II* also tells us when international humanitarian law confers a certain status on non-state actors. The thrust of the argument, then, is that the defects that made recognition of belligerency such a highly suspect doctrine (its operation being dependent on the political convenience of each neutral state) have effectively been replaced. That is, *Additional Protocol II* (in the manner advocated for by Lauterpacht) sets out an objective factual yardstick that triggers legal consequences. It follows that if the principal uncertainties in applying the doctrine surrounding the availability of blockade in international armed conflict can be resolved, then there is no reason in principle that the law should not be able to apply.

The only difficulty with moving from such a *de lege ferenda* argument to concrete legal change remains state practice. The fact that *Additional Protocol II* may resolve key difficulties in the traditional law of blockade in civil war is not enough to prove that those laws can be read into the legal

[11] Hersch Lauterpacht, *Oppenheim's International Law*, 7th ed (London: Longmans Green and Company, 1952) at 803.

[12] *Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflict (Additional Protocol II)*, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

[13] *Prosecutor v Tadić*, Case No IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber (2 October 1995).

framework of the *Geneva Conventions* and the *Additional Protocols*.[14] Some interpretive state practice would be required, and all we really have is Israel's blockade of Gaza and the fact that it has generally taken place without state protest. In any event, one may not agree with the thrust of Drew's argument, but one has to admire how neatly the job is done.

Chapter 7 engages with what one might expect to be reasonably straightforward questions: the application of international humanitarian law to blockade in cases of international armed conflict. Nonetheless, Drew exposes the difficulty of applying the basic rule of modern international humanitarian law, the principle of distinction, to blockade. Distinction, obviously, embodies the principle that military operations are not to be directed against civilians and civilian objects. As Drew puts it, "although it is widely agreed the principle of distinction applies to military operations that result in harm, there is some disagreement as to whether or not the principle applies when an operation does not cause direct harm through the use of violence."[15] The difficulty arises in that specific protections for civilians in a time of armed conflict were first introduced in *Additional Protocol I* of 1977. There was however disagreement amongst the drafters as to whether the principle of distinction applied to operations at sea that affected civilians (whether at sea or on land), including blockade. As Drew explains, "[i]nsofar as blockade law is grounded in customary international law, the lack of universal consensus on this fundamental point makes it impossible to positively establish the obligations of blockading forces" towards civilian populations.[16]

This unsatisfactory position is obviously reinforced by the fact that Article 49(1) of *Additional Protocol I* defines attacks as meaning "acts of violence against the adversary, whether in offence or in defence." However, the question then becomes whether that narrow and kinetic definition of attack may have changed since it was formulated in the late 1970s. That is, can we move away from a literal interpretation of concepts such as "attack" and "military operations" to something more purposive or teleological? Here Drew endorses Michael Schmitt's argument that the appropriate approach to these concepts is to think of "violent consequences rather than violent acts."[17] Schmitt makes the argument in order to suggest that

[14] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287.

[15] Drew, *supra* note 3 at 95.

[16] *Ibid* at 96.

[17] *Ibid* at 97. See further Michael N Schmitt, "Wired Warfare: Computer Network Attack and Jus in Bello" (2002) 84 Intl Rev Red Cross 365.

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cyber-attacks causing significant damage should fall under the law of *Additional Protocol I*. The question is then whether the same logic can be applied to maritime blockade. An expansive concept of "attack" will surely be capacious enough to embrace the secondary, but inevitable, consequences of blockade that can result in great hardship, suffering, and death for the civilian population. The only way around such a conclusion would be the proposition that the economy of a state is itself a legitimate object of attack (as an object that makes an effective contribution to military action the destruction of which would offer a definite or direct military advantage). While some states might adopt such a (very) wide definition of legitimate military objectives, Drew argues persuasively that most state practice supports the idea that the destruction of an economy would be too remote or indirect in terms of military advantage to qualify.

This still leaves us with the difficult question of whether the rules found in Article 49(1) of *Additional Protocol I* were intended to apply in cases of blockade. On this point, Article 49(3) is a masterpiece of intentionally ambiguous drafting. It states in part that the definition of attack applies "to all attacks from the sea or from the air against objectives on land *but* [*does*] *not otherwise affect the rules of international law applicable in armed conflict at sea or in the air*" (emphasis added). This leads to the possible conclusion that *Additional Protocol I* principally applies to operations directly attacking targets on land, such as the deliberate bombardment from the sea or air of civilians, but may otherwise leave the customary international law of blockade untouched.

In this context, Drew's assessment of whether the prohibition on intentional starvation of civilians applies to blockade in a manner capable of closing the "humanitarian gap" is nuanced and cautious. Certainly, Article 54 of *Additional Protocol I* contains a provision on "starvation of civilians as a method of warfare," but, as noted, there was genuine debate in 1977 as to whether such new rules would apply to blockade. Thus, given that "the law of blockade is based entirely on customary international law, ... [and] because there exists such a wide variety of interpretations respecting the provisions on starvation, it is impossible to state categorically that there is definitive customary law on the issue."[18]

The final question arising from the ordinary principles of modern humanitarian law, then, is how one might apply the proportionality test to maritime blockade. The difficulty, of course, is that, "while in a kinetic attack it is generally relatively easy to determine the damage that will likely be caused within a certain radius of a weapon's detonation point, there is truly no way to approximate the effects of an operation that may last several years, particularly in situations where the harm to civilians becomes

[18] Drew, *supra* note 3 at 106.

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exponentially worse with time."[19] A further critical difficulty with the proportionality test is that, as has been widely observed, it involves, essentially, a value judgment. There is no objective way in which to measure military advantage against civilian damage because the two things lack any common unit of measurement.[20] The test thus requires military commanders to weigh incommensurate factors. Drew ultimately concludes that the law of blockade requires reform to protect civilians from starvation but that the law on proportionality is insufficiently clear to reliably achieve that end.

Can the "humanitarian gap" be plugged? In Chapter 9, Drew turns to international human rights law. The chapter begins with a brisk and useful review of the vexed question of the extraterritorial application of human rights law to those within a state's jurisdiction, noting the broad conception of jurisdiction taken in the case law of the European Court of Human Rights (especially after *Al Skeini*).[21] Slightly more discussion of the approach taken in national jurisdictions, and by other international human rights bodies such as the Committee against Torture, would perhaps have been useful. Drew, however, is on safe ground in making the point that many NATO states must be cognizant of such case law and that it may have future implications for the jurisprudence of other regional human rights courts. Drew proceeds to consider the key cases of the International Court of Justice, which must now be taken to stand for the proposition that international human rights law continues to apply in situations of armed conflict, albeit as modified by international humanitarian law functioning as the *lex specialis*.[22] Thus, Drew focuses on the right "not arbitrarily to be deprived of one's life," which the ICJ has clearly enunciated as continuing to apply in hostilities.[23] The trick, of course, is to work out how and to what extent human rights law might be modified by international humanitarian law in a given context. In the context of blockade, the differences of expert opinion on the content of custom and the lack of treaty law mean there remains considerable "uncertainty with respect to obligations for humanitarian protection for civilians … affected by maritime blockades."[24]

[19] *Ibid* at 109.

[20] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, 3rd ed (Cambridge: Cambridge University Press, 2014) at 295.

[21] *Al-Skeini v United Kingdom*, Application no 55721/07, European Court of Human Rights Grand Chamber (7 July 2011).

[22] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Rep 136 at para 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, [2005] ICJ Rep 168 at para 220.

[23] Drew, *supra* note 3 at 138.

[24] *Ibid.*

As Drew notes, three principal stances have been taken on the controversy, namely: "[t]here is no obligation for a blockading party to allow humanitarian goods to pass through a blockade"; "[a] blockade will be legal so long as its primary purpose is not to cause starvation amongst the civilian population"; or "[a] blockade will be unlawful if the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated."[25]

Without providing a concrete *lex lata* answer, Drew points the way to a practical solution. Faced with uncertain legal standards, and the possibility that the conduct of military operations in blockade may be reviewed by human rights courts, it would be pragmatic for militaries to adopt a set of humanitarian principles applicable to blockade. In proposing such guidelines, Drew concurs with the proposition that establishment of a blockade with the goal or effect of starving the civilian population would be unlawful and that blockading powers should have an absolute duty to permit humanitarian assistance to a population suffering undue hardship as a result of a blockade. Some might consider this not to go much further than the existing non-binding expert guidance provided by the *San Remo Manual*.[26] This would be a mistake. Drew's proposals are drawn against the rich and detailed context that only a monograph study of the specific question of blockade can provide. He eschews easy answers and acknowledges the genuine uncertainty of many aspects of the law. His proposal, in particular, that the principle of proportionality is irrelevant to blockade is bold. It is a book that will be of great interest to scholars and military lawyers alike.

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[25] *Ibid* at 139.

[26] Louise Doswald-Beck, ed, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge: Cambridge University Press, 1995).

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