Documents on Prisoners of War. Edited with annotations by Howard S. Levie. Newport, Rhode Island. Naval War College Press. 1979. xxxvii + 853 pp. (including index). $15.50 (U.S.).

The Role of International Law and an Evolving Oceans Law. Edited by Richard B. Lillich and John Norton Moore. Newport, Rhode Island. Naval War College Press. 1980. xvii + 699 pp. (including index). $15.00 (U.S.).

The Use of Force, Human Rights and General International Legal Issues. Edited by Richard B. Lillich and John Norton Moore. Newport, Rhode Island. Naval War College Press. 1980. xxii + 758 pp. (including index). $13.00 (U.S.).

These three works are respectively Volumes 60, 61 and 62 in the series of International Law Studies produced by the United States Naval War College at Newport, Rhode Island. This is an important series, the value of which is perhaps not sufficiently appreciated in University circles. There certainly should be no disposition to assume that, because these volumes emanate from a war college, they do not measure up to the highest academic standards.

Volume 60 differs from the other two Volumes in that it is just a collection of documents. However, in the opinion of the present reviewer, it is probably the most useful of the three Volumes. Its editor, Howard S. Levie, Emeritus Professor at the Saint Louis University Law School, is well known for his writings on the laws of war.[1] He has given special attention to the fate of prisoners of war, and therefore it is welcome that, out of his long experience, he has assembled this collection. This is more of an achievement than it sounds because, as Professor Levie explains in the preface, many of these documents can be "found on only a very few library shelves". If that is true of the vast libraries of American law schools, how much more true is it of law libraries the world over?

The documents here assembled number one hundred and seventy-five, and they range from extracts from the Old Testament to the First Geneva Protocol of 1977. In passing we may note that in the course of history at least some improvement has been made in the treatment of prisoners of war. For example in Numbers 31, verse 7, we are told that "they warred against the Midianites, as the Lord commanded Moses, and they slew all the males", whilst in Deuteronomy 3, verse 6, "we utterly destroyed them (Og, king of Bashan, and all his people), as we did until Sihon, king of Heshbon, utterly destroying the men, women, and children, of every city". However, Groitius was not the first to recommend *temperamental belli*. 2 Kings 6, verses 21-22, tell us that:

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[1] See, for example, 50 *A.J.I.L.* 880; 55 *A.J.I.L.* 374; 56 *A.J.I.L.* 433; 57 *A.J.I.L.* 318; 67 *A.J.I.L.* 693.

> And the king of Israel said until Elisha, when he saw them (the Samaritans), My father, shall I smite them? And he answered, Thou shalt not smite them: wouldest thou smite those whom thou has taken captive with thy sword and with thy bow? Set bread and water before them, that they may eat and drink, and go to their master.

This provision brings to mind the provision contained in Article 118 of the Geneva Prisoners of War Convention 1949 to the effect that "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities". The interpretation of this provision has caused considerable controversy, some arguing that all prisoners of war must be repatriated without exception, others maintaining that the provision does not impose compulsory return on those who do not wish to be repatriated.

Professor Levie has included in his collection some decrees of the French National Assembly issued in 1792-93. One of these stated the enlightened, revolutionary principle that prisoners of war, "not having come under the civil power of the nation voluntarily, remain under the protection of the natural law of man and of nations". Another decree threatened reprisals against "every member of the foreign nobility, every officer, and every general" — but not against "the common soldiers of the enemy forces" — in the case of violation of the customary laws of war by enemy Powers in their treatment of members of the French forces "including the officers and soldiers of the voluntary battalions, of the local national guard, and of the regular army, captured in combat". This foreshadows one of the principal controversies at the 1977 Geneva conference, which, while recognizing that "combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack", has in the very next sentence, under pressure from the national liberation movements, accepted that "there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself". Such a person, according to the new dispensation, "shall retain his status as a combatant" and consequently his entitlement to prisoner of war status.[2]

Among the documents are extracts from the trial of *Tanaka Chuichi and Two Others* (Document No. 81. Australian Military Court, Rabaul, 12 July 1946) and the trial of *Lieutenant-General Baba Masao* (Document No. 93. Australian Military Court, Rabaul, 28 May-2 June 1947). Both cases concerned maltreatment of prisoners of war by members of the Japanese forces. Also included naturally is the Judgment handed down in Tokyo by the International Military Tribunal

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[2] See Article 44 of the First Geneva Protocol of 1977.

for the Far East (IMTFE) in the case of *United States and Others* v. *Sadao Araki and Others* (Document No. 101. 4-12 November 1948). This was the equivalent for the Asia/Pacific region of the Nuremberg trial. IMTFE was precided over by Sir William Flood Webb, Chief Justice of Queensland.

Of greater current interest to Australians is perhaps the case of *Public Prosecutor* v. *Oie Hee Koi* (Document No. 153. Judicial Committee of the Privy Council, 4 December 1967; [1968] A.C. 829; [1968] 1 All E.R. 419). This case concerned the important question whether Chinese Malays, members of a force captured in Malaysia while under the command of Indonesian officers during the "confrontation", were entitled to prisoner of war status. Two Australian judges, Sir Douglas Menzies and Sir Garfield Barwick, sat on the Privy Council to hear the case. The unanimous decision that such persons were not protected by the Geneva Prisoners of War Convention 1949 has attracted some critical comment.[3] Even more significant is the statement contained in the dissenting judgment of Sir Garfield Barwick and Lord Guest — these two judges dissented on the question whether there had been a mistrial of one of the prisoners — that "we know of no rule of international law which suggests that the national laws may not be applied to the armed forces of an enemy which invade the territory". These two judges thus held that members of the Indonesian Armed Forces were subject to the provisions of the Internal Security Act 1960 of Malaya.

The attitude of Sir Garfield Barwick and Lord Guest appears difficult to reconcile with the position taken up by the British Government in *McLeod's* case in 1838. McLeod was a member of the British force which had entered United States territory for the purpose of destroying the *Caroline*, a vessel being operated by rebels against British authority in Canada. He was arrested in the State of New York on a charge of murder and arson. A British Note to Washington pointed out that:

> [T]he attack upon the *Caroline* was a public act of persons in Her Majesty's Service, obeying the order of their superior authorities, and according to the usages of nations, that proceeding can only be the subject of discussion between the Two Governments, but cannot be made the ground of proceedings in the United States against the individuals who, upon that occasion, were acting in obedience to the authorities appointed by their Government.

In reply Secretary of State Webster accepted the proposition "that an individual forming part of a public force, and acting under the authority of his Government, is not to be held answerable, as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of

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[3] Susan Elman, 18 *I.C.L.Q.* 178 (1969).

all civilized nations, and which the Government of the United States has no inclination to dispute".[4]

Obviously the main value of a collection such as this lies in the access it provides to material not easily available otherwise, such as trials in United States Military Courts, including the much publicized case of Lieutenant Calley (*United States* v. *William L. Calley, Jr.* Document No. 171, U.S. Court of Military Appeals, 21 December 1973). In these cases the principal issue was usually the validity of the defence of "superior orders". In Calley's case the court-martial judge ruled that "the acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liabiilty upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful". This ruling accords with the anti-military sentiments of the times, and was upheld by two to one in the United States Court of Military Appeals. However, Darden, C.J. dissented, claiming that this attitude was "too strict in a combat environment". He maintained, not without some justification, that "the phrasing of the defence of superior orders should have as its principal objective fairness to the unsophisticated soldier and those of somewhat limited intellect who nonetheless are doing their best to perform their duty".

This collection of documents will be of great value to teachers and students alike of courses on the laws of war. As the cases just mentioned show, these laws raise issues which are of great importance and which deserve to be studied seriously in Universities. A debt of gratitude is thus owed to Professor Levie for rendering such studies more feasible.

Volumes 61 and 62 consist of Readings in International Law from the Naval War College Review between 1947 and 1977. The list of the contributors is sufficient indication of the quality of these Readings. For instance, in Volume 61, Richard Baxter and Manley Hudson, who both served as American judges on the World Court, write on the role of law in the international system; Professors Hazard, Lissitzyn and Lipson write on the Soviet attitude to international law; Professor Falk discusses new trends in international law; and Professors McDougal, Goldie and Jessup (also a former American judge on the World Court) comment on various aspects of the law of the sea. In Volume 62 are to be found contributions from Shabtai Rosenne (on international law and the use of force); Richard Baxter (on the law of war and the Geneva Conventions of 1949); Robert W. Tucker and

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[4] See R. Y. Jennings, "The *Caroline* and *McLeod* Cases", 32 *A.J.I.L.* 82 (1938). According to Jennings the principle as stated in the Notes passing between the British and American governments at that time was "finally established in McLeod's case".

Colonel Gerald Draper (both on the law of war); Howard S. Levie on mine warfare; Hamilton DeSaussure on the laws of air warfare; H. W. Briggs and Alona Evans on the position of individuals in international law; Louis B. Sohn on international law and basic human rights; and Myres McDougal on jurisdiction. In addition to their work as editors, Professors Lillich and Moore, both of the University of Virginia Law School, have made contributions of their own, Professor Lillich on forcible self-help and Professor Moore on the use of American armed forces abroad.

Inevitably, given a collection of articles of the dimensions contained in Volume 61 and 62, there is some variation of quality, and in many cases the contributions consist of abbreviated versions of what the authors have said elsewhere and at greater length. Nevertheless, taken as a whole, it is a useful collection, and the editors have kept a sensible balance between traditional subjects such as the right to use force and the law of war on the one hand, and newer areas such as counter-insurgency and terrorism on the other hand.

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