

THE HANDBOOK OF
INTERNATIONAL
HUMANITARIAN LAW

SECOND EDITION

EDITED BY
DIETER FLECK

The Handbook of International
Humanitarian Law

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Contents

Preface	vi	
Introduction, <i>Doris Fleck</i>	xii	
List of Contributors	xxi	
List of Abbreviations	xxiii	
Table of International Instruments	xxix	
List of Judgments and Decisions	xxxv	
I. HISTORICAL DEVELOPMENT AND LEGAL BASIS	101–150	1
<i>Christopher Greenwood</i>		
I. Definition of the Term 'Humanitarian Law'	101–104	1
II. Historical Development	105–124	15
III. Legal Sources	125–130	27
IV. Humanitarian Requirements and Military Necessity	131–133	31
V. Binding Effect of International Law for the Soldier	134–146	39
VI. Tasks of the Legal Adviser	147–150	43
2. SCOPE OF APPLICATION OF HUMANITARIAN LAW	201–263	45
<i>Christopher Greenwood</i>		
I. Armed Conflicts	201–211	45
II. Acts of War	212–215	57
III. Area of War	216–221	59
IV. Termination of Hostilities	222–250	61
1. Parleys and Protecting Powers	223–232	63
2. Cease-Fire and Armistice	233–241	66
3. Capitulation	242–245	70
4. Conclusion of Peace	246–250	70
V. Relevance of Other Fields of International Law	251–262	72
1. Peace-time Rules	252–253	73
2. Human Rights	254–261	74
3. International Criminal Law	262	78
VI. Relevance of International Humanitarian Law in Peace-time and Post-Conflict Military Operations	263	78

3. COMBATANTS AND NON-COMBATANTS	301-331	79
<i>Karl Igier</i>		
I. General Rules	301-303	80
II. Combatants	304-313	81
III. Non-Combatants	314-318	90
IV. Persons Accompanying the Armed Forces	319	106
V. Civilian Contractors	320	107
VI. Special Forces	321	108
VII. Spies	322-325	110
VIII. Special Aspects of Aerial and Naval Warfare	326-331	113
4. METHODS AND MEANS OF COMBAT	401-479	119
<i>Sigfus Öster</i>		
I. General Rules	401-405	126
II. Means of Combat	406-440	137
1. Certain Conventional Weapons	406-429	137
2. NBC Weapons	430-441	160
a) Nuclear weapons	430-435	160
b) Chemical weapons	436-438	170
c) Bacteriological (biological) and toxin weapons	439-440	174
III. Methods of Combat	441-479	175
1. Military Objectives	441-450	175
2. Protection of Civilian Objects	451-463	193
3. Protection of Works and Installations Containing Dangerous Forces	464-470	221
4. Ruses of War and the Prohibition against Perfidy	471-473	226
5. Psychological Warfare	474-475	231
6. Reprisals	476-479	232
5. PROTECTION OF THE CIVILIAN POPULATION	501-591	237
<i>Hans-Peter Gasser</i>		
I. General Rules	501-519	237
II. Civil Detainees	520-524	263
III. Humanitarian Assistance	524-525	269
IV. Belligerent Occupation	526-574	270
1. General Provisions	526-537	273
2. Legal Status of the Population	538-543	282
3. Rights and Duties of the Occupying Power	544-548	286
4. Requisition of Civilian Resources by the Occupying Power	549-560	290

5. Supply Activities in Occupied Territory	561–564	297
6. Penal Responsibility in Case of Violation of International Humanitarian Law	565–574	303
V. Aliens in the Territory of a Party to the Conflict	575–582	311
V. Internment of Civilians	583–591	319
6. PROTECTION OF THE WOUNDED, SICK, AND SHIPWRECKED	601–644	325
<i>Jean S. Kliffner</i>		
I. Wounded, Sick, and Shipwrecked Persons	601–607	327
II. The Dead and Missing	608–609	337
III. Medical Units and Transport	610–612	340
IV. Medical Personnel	613–619	344
V. Medical Aircraft <i>Wald Heinschel von Heinegg</i>	620–623	351
VI. Hospitals and Safety Zones and Localities Neutralized Zones	624–627	353
VII. The Distinctive Emblem	628–634	358
7. PROTECTION OF PRISONERS OF WAR	701–735	367
<i>Clara Fisher</i>		
I. General	701–706	367
II. Beginning of Captivity	707–715	383
III. Conditions of Captivity	716–728	396
IV. Escape of Prisoners of War	729–731	410
V. Termination of Captivity	732–735	412
8. RELIGIOUS PERSONNEL	801–846	419
<i>Andreas Kemmer</i>		
I. General Rules	801–817	420
II. Protection of Religious Personnel	818–826	425
III. Legal Status of Religious Personnel Retained by a Foreign Power	827–846	428
9. PROTECTION OF CULTURAL PROPERTY	901–935	433
<i>Roger O'Keefe</i>		
Definition of 'Cultural Property'	901	436
I. Respect for Cultural Property	902–920	442
1. General Rules	902–908	442
2. Special Protection	909–915	454
3. Enhanced Protection	916–920	456

III. Safeguarding of Cultural Property	921	461
IV. Protection of Cultural Property during Occupation	922–926	464
V. Transport of Cultural Property	927–929	468
VI. Personnel Engaged in the Protection of Cultural Property	930–931	470
VII. Distinctive Marking of Cultural Property	932–935	471
10. THE LAW OF ARMED CONFLICT		
A1. SFA	1001–1064	475
<i>Wolff Heintschel von Heinegg</i>		
I. General	1001–1020	476
1. Definitions	1001–1009	476
2. Scope of Application	1010–1013	481
3. Acts of Naval Warfare, Competences, and Principles	1014–1020	487
II. Military Objectives and Protected Objects in Armed Conflicts at Sea	1021–1038	498
1. Enemy Warships and Military Aircraft	1021	498
2. Enemy Merchant Ships, their Cargo, Passengers, and Crew	1022–1033	499
a) Enemy merchant ships	1022–1026	499
b) Cargo of enemy merchant ships	1027–1031	505
c) Crews and passengers of enemy merchant ships	1032–1033	508
3. Protected Enemy Vessels (Except Hospital Ships and Ships Under Similar Protection)	1034–1035	510
4. Protected Enemy Aircraft (Except Medical Aircraft)	1036	513
5. Other Protected Objects	1037	514
6. Targets on Land	1038	515
III. Special Provisions Concerning Methods of Naval Warfare	1039–1053	517
1. Mine Warfare	1039–1043	517
a) Types of mine warfare: principles	1039–1040	521
b) Mine laying prior to the beginning of an armed conflict	1041	525
c) Mine laying during armed conflicts	1042	528
d) Duties after the cessation of hostilities	1043	531
2. Torpedoes	1044	534
3. Missiles	1045	535
4. Submarine Warfare	1046–1047	535
5. Maritime Exclusion Zones	1048–1050	540
6. Blockade	1051–1053	551

IV. Horizontal Strips	1054–1064	558
1. General	1054	558
2. Concisions for Protection and Identification	1055–1056	560
3. Rights and Obligations	1057–1061	562
4. Discrimination of Protection	1062	567
5. Personnel and Crew	1063–1064	568
11. THE LAW OF NEUTRALITY	1101–1155	571
<i>Michael Bothe</i>		
I. General	1101–1107	571
II. The Rights and Duties of Neutral States	1108–1155	582
1. General Provisions	1108–1114	582
2. War on Land	1115–1117	587
3. Naval Warfare	1118–1125	589
a) General	1118–1125	589
b) Innocent passage through territorial seas and archipelagic waters; transit passage	1126–1137	597
c) Control by the parties to the conflict	1138–1146	595
d) Protection of neutral merchant shipping	1147–1148	599
4. Aerial Warfare	1149–1155	601
12. THE LAW OF NON-INTERNATIONAL ARMED CONFLICTS	1201–1220	605
<i>Dietrich Fleck</i>		
I. General	1201–1206	605
II. Applicable Law	1207–1212	620
III. Legal Distinction Between International and Non-International Armed Conflicts	1213–1215	627
IV. Compliance	1216–1220	629
13. INTERNATIONAL PEACE OPERATIONS	1301–1352	635
<i>Ben J. Klepp</i>		
I. General	1301–1304	635
II. Applicable Law	1305–1309	642
III. Mandates	1310–1315	648
IV. Rules of Engagement (ROE)	1316–1333	655
V. Search, Apprehension, and Detention	1334–1342	667
VI. Child Soldiers	1343–1347	667
VII. Humanitarian Assistance by Armed Forces	1348–1352	670

14. ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW	1401–1434	675
<i>Rüdiger Wolfrum and Dieter Fleck</i>		
I. General	1401–1402	686
II. Public Opinion	1403	689
III. Reciprocal Interests of the Parties to the Conflict	1404	689
IV. Maintenance of Discipline	1405	690
V. Reprisals	1406	690
VI. Command Responsibility	1407	690
VII. Penal and Disciplinary Measures	1408–1416	691
1. War Crimes at National Courts	1409–1413	693
2. War Crimes at International Courts	1414	706
3. Disciplinary Action	1415–1416	706
VIII. Reparation	1417	707
IX. Protecting Powers and their Substitutes	1418–1419	709
X. International Fact Finding	1420–1421	711
XI. The International Committee of the Red Cross	1422	713
XII. Implementation Rules of the UN	1423–1424	715
XIII. The Security Council and International Humanitarian Law	1425–1429	716
XIV. Diplomatic Activities	1430	719
XV. The Role of Non-Governmental Organizations	1431	721
XVI. National Implementing Measures	1432	721
XVII. Dissemination of Humanitarian Law	1433	722
XVIII. Personal Responsibility of the Individual	1434	722
ANNEX: Distinctive Emblems		723
Bibliography		725
Index		739

Preface to the Paperback Edition

The present paperback edition of the *Handbook of International Humanitarian Law* responds to an increased interest in the international community. In a time of a continued need for clarifying the principles and rules described in the book and ensuring respect for their implementation, this interest deserves full support.

The opportunity was used to introduce some updates, mainly to include the Convention on Cluster Munitions of 30 May 2008, as well as to make a few editorial amendments.

In order to facilitate the use of the *Handbook*, the manual text printed in bold type has been made available as a separate document under <http://www.oxp.com/uk/ISBN/9780199573165>. I may again express my gratitude to Oxford University Press, in particular to John Louth and Michel Alouin, for their professional support.

Cologne, March 2009

Dieter Fleck

Introduction

During the past decades international humanitarian law has been subject to a progressive development which culminated in the four 1949 Geneva Conventions, the 1977 Protocols Additional to these Conventions, the 1980 Weapons Convention, the 1997 Ottawa Convention on the Prohibition of Land Mines, and the 1998 Rome Statute of the International Criminal Court. These treaties have defined and specified three general legal restrictions which are described in Section 131 of the present Handbook as follows: an act of war is permissible only if it is directed against military objectives, if it is unlikely to cause unnecessary suffering, and if it is not perfidious.

Extensive international co-operation, which had been encouraged above all by the negotiations on the Additional Protocols from 1974 to 1977 and is today practised by extensive contacts between diplomats and military officers, scholars and practitioners, states and non-governmental organisations and individuals, has contributed decisively to the worldwide dissemination of international humanitarian law. This co-operation has paved the way for a continuously progressing establishment of customary international humanitarian law in all cultures.¹ It has also underlined the significance of humanitarian protection for security and co-operation throughout the world. While many positive efforts have been made by states to implement their obligations under international humanitarian law, fundamental work remains to be done at international and national levels.² This task poses a challenge to political decision makers and to their legal and military advisers, many of whom must shoulder this workload in addition to their other duties and in spite of the presence of other priorities.

Recent achievements of worldwide co-operation in this field are manifold: the interrelationship between humanitarian law and the protection of human rights in armed conflicts is largely accepted and better understood today than ever before. A progressive development of international criminal law has led to increased jurisprudence on war crimes and crimes against humanity by national

¹ Kollewa in *Casey* (Fds.), 307–285; *McLean* (1989), 346 (1993); Greenwood in *De Lorenz/Tkaj* (1993), 63–114; 1999.

² See *Telesman* (national legislation) (Fds.), 111–137; 1999, 4309–4385; *Telesman* (international humanitarian law) (Fds.), 419e–4207.

³ Berthe, in *Further to a Study for the ICRC on* (Fds.), 153 (1993); for current activities see in particular the work of the ICRC and its Advisory Service, at <http://www.icrc.org> for information on the development of international humanitarian law created by Switzer, and with the former Program on Humanitarian Policy and Conflict Research, at <http://www.sipri.org>. The *Année de la Recherche* (biannual) (1996) and the year 2000 were International Institute of Humanitarian Law (at <http://www.iihl.org/>), and the recent establishment of the Geneva Academy of International Humanitarian Law and Human Rights, at <http://www.gai.ch/>.

courts, international *ad hoc* tribunals, and finally to the establishment of the ICC. States and international organizations have shown a growing awareness of their obligation under Article I common to the Geneva Conventions to ensure respect of international humanitarian law, to better implement its rules, and to enforce compliance by state and non-state actors in all armed conflicts. The Geneva Conventions have reached global acceptance and Additional Protocol I to these Conventions is now in force for 167 states. Member states of military alliances have ensured interoperability in the not so rare cases of their adherence to different treaty obligations, a work which for both legal and political reasons must clearly go beyond the lowest common denominator. In multinational military operations non-parties to API have applied its protection standards for policy reasons, thus demonstrating that the alleged 'great schism' between parties and non-parties to the Protocol, which at times still dominates academic debates is not insurmountable in reality.⁸ Despite various back falls in recent armed conflicts including the ongoing 'war on terror', a term based on political rhetoric rather than legal expertise, international law operation has convincingly shown that strict adherence to humanitarian protection standards in military operations is an essential prerequisite for professional effectiveness and lasting solutions.

Achievements in the reaffirmation of international humanitarian law and its further development have not been reached without controversies and they are now today by new challenges. Current armed conflicts are dominated by asymmetries between rich and poor parties, between states and non-state actors, and between technologically advanced forces and those lacking even rudimentary equipment and logistics. These asymmetries are characterized by unlimited methods of fighting by the poor, and by excessive acts performed even during precision strikes by the rich. Humanitarian protection in such new conflicts is too often neglected. This also leads to new vulnerabilities of technologically advanced societies.⁹ Types and amount of wartime atrocities in many cases are no longer contributing to the war effort and are endangering post-conflict peace building. It is, indeed, a timely task to stress again that in any armed conflict, the right to choose methods or means of warfare is not unlimited (Article 35 API).

There have been gross violations of international law which increased the awareness of the importance of humanitarian protection in the general public. The international Red Cross and Red Crescent movement has repeatedly, and with complete

⁸ As mentioned by Green (2003), even during the 1991 war in the Gulf, which was implied by the United States to impact a coalition of 26 states in which no common legal obligations as to API did exist. White House press release on aerial bombardment, especially, used language of Art. 51 (2) of the Protocol (one of the most controversial provisions in the perception of the U.S. Administration which had been used as one of its arguments against ratification) to justify the law permitting strikes in Iraq and Iran planned and executed. The Chairman of the U.S. Joint Chiefs of Staff General Colin Powell, in his Report to Congress on Coalition operations in the Gulf, had gone even further in stating that the provisions of API were, for the main part, applied as if they constituted customary law (see Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress*, (1992), 596, 701–702).

⁹ Heintsche/von Heintze/Spring (Eds.), *in*: 11 (6) Sandhu, 6–2004 IJIL 12066, 3.

justification. In addition, appeals for humanitarian mobilization, to enhance protection in armed conflicts and other situations of armed violence, a task as important as reducing the risk and impact of disasters and diseases.⁶ The heavy task of improving compliance with international humanitarian law calls for new political initiatives, for more and better training, and for the use of international mechanisms.⁷ The UN Secretary-General has underlined very convincingly that compliance with international humanitarian law, international law, refugee law, and international criminal law by all parties concerned provides the strongest assurance concerning respect for the safety of the civilian population in armed conflicts.⁸ The protection of civilians in armed conflicts agenda which was reaffirmed by the Security Council⁹ must be further implemented to its effort. As emphasized by the UN Secretary-General, even the right of self-defence must be carried out in accordance with international law. The recurrent phenomenon of large numbers of civilian casualties from military operations is not acceptable. Also the legal prohibitions protecting combatants against unnecessary suffering and perfidious acts are to be respected. Excessive use of force is unlawful, and has often proven counterproductive, as it exacerbates existing resentments and fuels those who advocate hatred rather than providing conditions for long-lasting security and stable peace.

There is an ongoing and continuing need for investigative and punitive measures as well as for reparation and for activities to prevent future violations. Quite similar to human rights law, international humanitarian law includes obligations owed by states to individual persons. Yecültekin from human rights law state practice and jurisprudence have deduced so far that international humanitarian law also offers rights to individuals corresponding to the duties of states. The obligation of states has been endorsed by the United Nations and by regional organizations. As early as 1955, the Conference on Co-operation and Security in Europe Final Act signed in Helsinki had emphasized in Principle VII the right of the individual to know and act upon his or her rights and duties in the field of human rights. At the same time, it had stressed the duty of participating states constantly to respect these rights and freedoms in their mutual relations and to endeavour jointly and separately (including its co-operation with the United Nations) to promote universal and effective respect for these rights and freedoms. This duty of states is not only relevant during peacetime, but it extends to cases of armed conflict. It is not limited to obligations under human rights law which continues to apply in armed conflicts, but fully includes obligations under international humanitarian law.

⁶ See the Declaration on Principles for Humanitarian Action, adopted in the 1980s, International Red Cross and Red Crescent Conference, No. 852/2558 (1985), 235–236.

⁷ ICRC, *International Humanitarian Law and the Challenge of Contemporary Armed Conflicts*, Report prepared for the 28th International Red Cross and Red Crescent Conference, 23–IC/28, 2003.

⁸ Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict (UN Doc. S/2002/946, at 28 November 2002), para. 12.

⁹ SC Res. 1271 (2000) of 28 April 2000 and 1279 (2000) of 23 December 2000, *Protection of civilians in armed conflict*.

The first edition of the present Handbook, published in 1994¹⁰ and 1995,¹¹ was prepared as a result of close co-operation between scientific research and practice. It was designed to support not only further academic studies but also the legal instruction of the armed forces. The key statements of that edition, printed in bold type, were identical with the German Manual promulgated for the German Armed Forces in August 1992. Ever since its inception in 1956, the *Bundeswehr* has had a legal advisory organization, a service which is now mandatory worldwide under Article 82 AP 1. Its tasks include advising military commanders and instructing the armed forces in relevant international law. Owing to experiences in two World Wars during the last century, Germany has been particularly active in the implementation of international humanitarian law, not least because for several decades the country was divided by the line of confrontation between two opposing military alliances. Accordingly, and in view of the differences in the status of national ratifications of AP I even within the North Atlantic Alliance, German initiatives aimed to settle problems regarding the conduct of combined operations by reaching agreement on common standards for the application of the law, and to support legal co-operation in this area extending far beyond the membership of NATO. Hence the publication of the German Manual was preceded by an intensive co-operation between practitioners and scholars and an international conference of government experts.¹² Both the wording of the German Manual and also the commentaries have greatly benefited from the results of this co-operation. The Handbook was well received in the growing community of international humanitarian law. Numerous reviews in many countries, its use in academic activities to support dissemination and research, the frequent references made to it by international and national courts, as by legal advisers in military headquarters, and the award of the renowned *Church Prize* at the XVth Congress of the International Society for Military Law and the Law of War (Lillehammer, 2000) were encouraging for all contributors.

The present second edition is no longer connected to a single national manual, but aims at offering a best practice manual to assist scholars and practitioners worldwide. For this purpose the group of contributors has been expanded and both the manual text printed in bold type and the commentaries have been extensively revised. The new edition is again the result of close co-operation between academic research and practice. It is designed to support state practice and jurisprudence, academic studies and the legal instruction of armed forces. It shows in context the importance of a by now complex branch of international law for both the conduct of military operations and international co-operation in peacetime.

To fulfil this task both legal and policy arguments are discussed in this Handbook, considering that fundamental values of humanity require a generalised approach which should avoid flawed interpretations and ensure operational standards of

¹⁰ Fleck (Ed.), *Handbuch des humanitären Völkerrechts in bewaffneten Konflikten* (Munich: C. H. Beck, 1994).

¹¹ *Id.*, *The Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 1994 paperback reprint 1999).

¹² Fleck, *HeV* 16 (1993), 313–213.

protection. For any military operation law and policy are interrelated and must be seen in context. Policy principles are normally mandatory for those engaged in operations. They may increase, but not lower the standards set by international law, as expressed in rules of engagement. Hence the role of rules of engagement for military operations is discussed in this Handbook in various respects, not only in the context of air, sea and land warfare, but also in international peace operations.

New developments of international humanitarian law are addressed in each Chapter of this revised edition. In Chapter 1 the historical evolution and the existing legal foundations of international humanitarian law are revisited in the light of current practice. In this context the ethical and political prerequisites for legal development are discussed in their global relevance, as the origins of the fundamental principles of humanitarian law are not exclusively based on a single region, culture or religion. At a time which is characterized by rapid societal changes and diminishing distances, the search for a multicultural basis for humanitarian rules is of the utmost importance.

Chapters 2 to 10 describe the law of the conduct of military operations in all theatres and at all levels. Here, the distinctions between Geneva Law and Hague Law, developed on different occasions in history, have lost their importance, as have those between the law of treaties and customary law. For the latter the ICRC Study on Customary International Humanitarian Law¹² provides excellent source material which has extensively been used and discussed in this edition. In Chapter 2 new attention is paid to law enforcement aspects, to the application of human rights in armed conflicts, to the continued relevance of rules of international law of peace during armed conflict, and to the relevance of humanitarian law at peacetime and post-conflict military operations. Chapter 3 considers challenges for combatants versus in-armed conflicts and diplomatic negotiations. It includes a discussion of topical issues of 'unlawful combatants' or - who may be considered a *hors combat* 'unprivileged belligerents'. Chapter 4 offers an in-depth discussion of tactics and methods of combat, providing commentaries on new treaty law, a discussion of the progressive development of customary law, and border-line situations of *law enforcement* relevant for military operations. Chapter 5 explains current aspects of the protection of civilians in armed conflicts including consequences for civilians directly participating in hostilities, further developments in the law of humanitarian assistance, and the present state of the law of occupation. It also underlines the increasing importance of human rights for the protection of civilians in occupied territories. In Chapter 6 a systematic approach to the protection of medical personnel is undertaken in the light of recent state practice, likewise, the development which resulted in the adoption of a new protective emblem, the Red Crystal, is explained. In Chapter 7 the importance of the determination of prisoner-of-war status is addressed on the background of recent controversies, human rights aspects of the protection of detainees are discussed, and minimum protections of all prisoners explained. Chapter 8 offers a discussion of the protection of religious personnel and

¹² ICRC.

the legal significance of religious tolerance in armed conflicts. Chapter 9 provides a new commentary on the protection of cultural property in armed conflicts which covers recent developments in treaty law and international practice. In Chapter 10 current legal developments and practice with respect to armed conflict at sea are explained and further discussed.

Chapter 11 contains rules of the law of neutrality concerning the protection of the victims of armed conflicts which must be considered as part of international humanitarian law. These rules have been challenged by state practice in recent armed conflicts, hence they are the subject of a continuing international development and exchange among experts. In the new Chapter 12 the law of non-international armed conflicts is assessed in context with its progressive development. The legal distinction between international and non-international armed conflicts is explained and a sound policy rule already included in the first edition of this handbook reaffirmed and further developed: armed forces should comply with the rules applicable in international armed conflicts in the conduct of their operations in all armed conflicts, however such conflicts are characterized.¹² The binding effect of these rules on armed opposition groups is discussed and specific means and methods to ensure compliance in internal armed conflicts elaborated. The new Chapter 13 describes the law of international peace operations comprising both peacekeeping operations and peace enforcement operations conducted in support of diplomatic efforts to establish and maintain peace. This concept deliberately goes beyond traditional peacekeeping, as it combines elements of peacekeeping with peacemaking and post-conflict peace-building. While peace operations normally are not conducted in an armed conflict but rather in situations in which civil-military cooperation and law-enforcement principles provide essential elements of rules of engagement, the relevance of international humanitarian law for peacekeepers cannot be underestimated. The final Chapter 14 deals with the most important part of international humanitarian law, as it describes and evaluates national and international measures to ensure compliance with existing rules and to provide remedies for violations. Highlighting long-lasting legal developments which have eventually led to a strengthening of national and international criminal jurisdiction on war crimes and crimes against humanity, this Chapter also evaluates the legal obligations of states and international organizations and appropriate measures to implement existing obligations, to prevent any violations, and take effective action where breaches are committed.

The Title of the Handbook has been slightly adapted to current terminology in both academic and military courses: while ‘international humanitarian law’ and ‘the law of armed conflict’ – both comprising all aspects of the conduct of hostilities and the protection of war victims – are widely used as synonymous terms, ‘international humanitarian law’ appears to be more precise, first due to the preference given to it by the ICRC and the UN, but also with respect to the fact that this term better conveys that there exist important peacetime obligations for dissemination.

¹² See Sections 217 and 1216.

instruction and training, as well as binding commitments to create respect for existing rules. These obligations must not be missed, if international law is to be applied properly during armed conflict.

The updated Table of International Instruments is supplemented by a Table of Judgments and Decisions which clearly shows an increase of relevant jurisprudence and policy-making by intergovernmental and other organizations in recent years.¹⁵ The Annex shows the relevant international distinctive emblems. The Bibliography is not meant to replace more comprehensive works,¹⁶ but just to give full information on the sources mentioned in the footnotes.

It is the common objective of the contributors of this Handbook not only to provide reliable information on the state of international humanitarian law and relevant legal developments, but likewise to encourage necessary new discussions. In this vein, the interrelationship between international humanitarian law and other branches of international law, in particular human rights, is addressed in this book under various aspects. This interrelationship is not only of academic interest, as it has a distinct practical relevance for the conduct of hostilities and law enforcement operations, e.g. with respect to persons in detention, territories under belligerent occupation, and situations of domestic jurisdiction in non-international armed conflicts. International humanitarian law is not, and never was, confined to issues of the conduct of hostilities. States and international organizations, members of armed forces and civilians, practising lawyers and academics alike remain challenged with the complex task of expanding knowledge of existing rules of humanitarian law, creating its application under ever difficult circumstances, and co-operating in its further development.

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Dietrich Fleck

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¹⁵ See also National Case Law and International Cases Law, 1997-2017, 4786-4307, 4308-4319; Martin F. Schindler, S.J. Wilson, R. Zimmer, & S. Toyser M.V. (Eds.), *International Human Rights and Humanitarian Law: Theory, Cases and Analysis* (Cambridge: Cambridge University Press, 2006); Sarah Berman, *Using International Law: How? Why? Where? Context, Execution and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva: ICRC, 1999); *International Law in the East* (Cambridge: ILO), <http://www.oxfordlawreports.com/>; *International Law in Brief*, http://www.icrc.org/eng/doc/assets/files/other/inf/inf_brief.html; <http://www.oxfordlawreports.com/>.

¹⁶ For former decades see International Committee of the Red Cross & Henry Dunant Institute (Eds.), *Bibliography of International Humanitarian Law Applicable in Armed Conflicts* (Geneva: ICRC, 1987), ex. 3, 105 pp.; <http://www.icrc.org> (mid 1990s); see the annual bibliographies included in 1987.

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Table of Abbreviations

ACHR	American Convention on Human Rights of 22 November 1969
<i>AJIL</i>	<i>American Journal of International Law</i>
AF I	Protocol I of 16 June 1977, Additional to the Geneva Conventions of 12 August 1949
AF II	Protocol II of 16 June 1977, Additional to the Geneva Conventions of 12 August 1949
AP III	Protocol III of 8 December 2005, Additional to the Geneva Conventions of 12 August 1949
AK	<i>Archiv des Völkerrechts</i>
Biological Weapons Conv.	Biological Weapons Convention of 10 April 1972
<i>BVL</i>	<i>Deutsche Zeitschrift für Völkerrecht</i>
<i>BJIL</i>	<i>British Yearbook of International Law</i>
CAH	United Nations Committee Against Torture
Chemical Weapons Conv.	Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction of 13 January 1993
Child Conv.	Convention on the Rights of the Child of 20 November 1989
Cluster Conv.	Convention on Cluster Munitions of 30 May 2008
ICJ	International Court of Justice
ICJL	Henckaerts, Jean-Marie, and Doswald-Beec, Louise (Eds.), <i>Commentary International Humanitarian Law</i> (Cambridge: Cambridge University Press, 2009)
Cult Prop Conv.	Cultural Property Convention of 14 May 1954
Cult Prop Reg.	Regulations for the Execution of the Cultural Property Convention, adopted on 14 May 1954
CNCT	Committee on Security and Cooperation in Europe
DARS	Treaty Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/96/18
DIR	Disarmament, demobilization, and reintegration
Decl.	Declaration
DPKO	United Nations Department of Peacekeeping Operations
Dam Decl. 1899	Hague Declaration concerning Expanding Bullets of 29 July 1899
ECtHR	European Court of Human Rights
ECOWAS	Economic Community of West African States

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