

THE HANDBOOK OF
INTERNATIONAL
HUMANITARIAN LAW

SECOND EDITION

EDITED BY
DIETER FLECK

The Handbook of International
Humanitarian Law

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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 Kolbe, *in* *Casey* (Ed.), 207–285; *McLain* (1989), 346 (1993); Greenwood, *in* *De Lorenz* (Ed.), 107, 113–114; 1999.

² See teleconsultations (Ed.), 107–110 (1999), 4309–4385; *in* *Journal of Military Medicine*, 230 (1999), 16–21; *in* *Journal of Military Medicine*, 241 (2000), 419e–420f.

³ Barthe, *in* *Further to the Study of the Rules of War* (Ed.), 135 (1999); for current activities see in particular the work of the ICRC and its Advisory Service, *de publication juridique* (1999) as the process of confirmation and development of international humanitarian law created by Switzer, and with the former Program on Humanitarian Policy and Conflict Research, *de publication juridique* (1999). See also *Journal of Military Medicine*, 241 (2000), 419e–420f, and the recent establishment of the Geneva Academy of International Humanitarian Law and Human Rights, *de publication juridique* (1999).

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 AP I 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 AP I).

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 AP I did exist. White House press release on aerial bombardments, commonly used language of Art. 51 (2) of the Protocol I was at the most controversial provisions in the perception of the U.S. Administration which had been used as one of its arguments against ratification, besides 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 AP I were, for the most 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 *IZJL* (2006), 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 respecting 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/2007/46, at 28 November 2006), para. 12.

⁹ SC Res. 1717 (2006) of 28 April 2006 and 1789 (2007) of 23 December 2006 *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 L. 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 Humanitarian Law in Armed Conflict* (Oxford: Oxford University Press, 1994 paperback reprint 1999).

¹² Fleck, *ibid.* (1994), 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 ensure 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), 4780-4307, 4308-4319; Martin F. Schindler, Noj Wilson, R. L. Zimmer, & S. Tisseret-Mat (Eds.), *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis* (Cambridge, 2016) (Cambridge University Press, 2016); Sarah Berman, *Using International Law: How to Use? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva, 2011), 1999; *International Law in the East* (Cambridge, UK), <http://www.cambridge.org/9780521875886>; *International Law in Brief*, <http://www.icj.org/pressandpublications/infobrief.html>; <http://www.ilo.org>.

¹⁶ For former decades see International Committee of the Red Cross, Henry Dunant Institute (Ed.), *Bibliography of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, ICRC, 1987), ex. 3, 105 pp.; for post-1990s see the annual bibliographies included in IHL.

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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>BILin.</i>	<i>Deutsche Zeitschrift des Völkerrechts</i>
<i>BITJ</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/R	Comité International de la Croix Rouge
<i>ICHL</i>	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, accepted 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
DHR	Disarmament, demobilization, and reintegration
Decl.	Declaration
DPKO	United Nations Department of Peacekeeping Operations
Dam Dam Bull.	Dam Dam Bulletin
Hague Decl. 1864	Hague Declaration concerning Expanding Bullets of 29 July 1864
ICCPR	European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950
ECOWAS	Economic Community of West African States

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