BOOK REVIEW

THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW

BY DIETER FLECK (ED)

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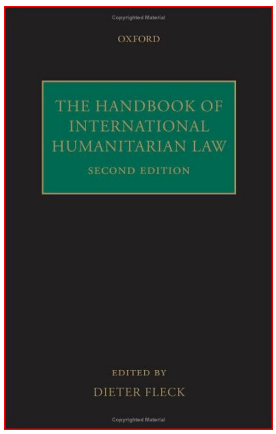
Review by Pierre-Emmanuel Dupont



In the *Handbook*'s Introduction, Dieter Fleck mentions that the first edition, published in German in 1994[1], was built upon the German Armed Forces's (*Bundeswehr*) Manual of international humanitarian law (IHL), an account of Germany's long-standing involvement in the implementation of IHL[2]. Yet the present edition, 'no longer connected to a single national manual, […] aims at offering a best practice manual to assist scholars and practitioners worldwide' (p. xiv).

Dr. Fleck draws a contrasted picture of the current implementation of IHL around the world. He highlights, among the recent achievements in this field, the fact that 'the interrelationship between humanitarian law and the protection of human rights in armed conflicts is largely accepted and better understood today than ever before'. He also observes that : 'A progressive development of international criminal law has led to increased jurisprudence on war crimes and crimes against humanity by national courts, international ad hoc tribunals, and finally to the establishment of the International Criminal Court (ICC). States and international organizations have shown a growing awareness of their obligation under Article 1 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 (AP I) is now in force for 167 states' (pp. xi-xii). But at the same time, he mentions that these

[1] Dieter Fleck (Ed.), *Handbuch des humanitären Völkerrrechts in bewaffneten Konflikten* (München: C.H. Beck, 1994).

[2] It is to be noted that even before the creation of the Bundeswehr in 1956, the German Army contained a legal office, investigating the breaches of the 'laws of war' during both World Wars. See Alfred M. de Zayas, *The Wehrmacht War Crimes Bureau, 1939-1945* (Lincoln and London: University of Nebraska Press, 1989).

achievements are met today by new challenges, mainly as a result of the spread of the phenomenon of 'asymmetric conflicts', characterized by 'unlimited methods of fighting by the poor, and by excessive acts performed even during precision strikes by the rich' (p. xii).

Taking into consideration the density of the book, it would be irrelevant to attempt to review all the developments contained in its 14 chapters, all of them well-structured, offering many bibliographical references and emanating from leading specialists. Chapter 1 is devoted to the historical development and the legal basis of IHL, but it begins with a condensed overview of the legal framework regulating the right to resort to armed force under the UN Charter ('ius ad bellum', as opposed to the 'ius in bello' which corresponds to IHL). The author discusses various recent justifications advanced for the use of force – such as 'anticipatory self-defence' and humanitarian emergency (see pp. 5 sq.). The author seems to admit the existence of a right of anticipatory self-defence (p. 7), but doesn't endorse the distinction made by some scholars between 'anticipatory' or 'incipient' self-defence (which refers to the recourse to force in front of an attack actually mounted and about to begin) and the broader doctrine of 'preemptive self-defence' permitting the use of force in the case of a remote or even hypothetical threat[3]. Chapter 2 revisits the notion of 'armed conflict' – which conditions the application of IHL – in light of the fact that there exists 'no sharp dichotomy between peace and armed conflict in international law such as used to exist between peace and war' (n. 201).

Chapter 3 pays special attention to challenges to combatant status in recent conflicts. It discusses in detail the issue of 'unlawful combatants', but only briefly addresses, under the heading 'Civilian contractors', the growing phenomenon of the outsourcing of tasks belonging to the military domain: the emergence of private military companies or private security companies (see n. 320)[4], which raises crucial questions with respect to IHL, as evidenced e.g. by recent events in Iraq, such as the killing of 17 civilians by Blackwater employees in September 2007.

Chapter 4 on 'Methods and Means of Combat' explores the multiple dimensions of the core principle of IHL, i.e. that the right to choose methods or means of warfare is not unlimited (a rule contained in Article 35, AP I). Among the applications of this general principle is the prohibition, under the terms of Article 2 of the 1980 Protocol on Prohibition or Restrictions on the Use of Incendiary Weapons, to use incendiary weapons against military objectives located within a concentration of civilians, as the Israeli

[3] The author notes, however, that 'although the U.S. has advanced the position that states may enjoy a right of pre-emptive military action even when no armed attack is imminent [with reference to the *National Security Strategy* 2006], this theory has attracted very little support and is difficult to reconcile with state practice or academic commentary'. He quotes Lord Goldsmith, Attorney-General of England and Wales, stating [with respect to the 2003 invasion of Iraq] that 'international law permits the use of force in self-defence against an imminent attack but does not authorize the use of force to mount a pre-emptive strike against a threat that is more remote' (p. 7, note 38). On the above-mentioned distinction, see e. g. Mary Helen O'Connell, M. E., "The Myth of Preemptive Self-Defence", *ASIL Task Force Papers*, August 2002.

[4] See e.g. Simon Chesterman and Chia Lehnardt, (Eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press: Oxford, 2007).

Defence Forces (IDF) did, according to the Red Cross, during the December 2008-January 2009 offensive on Gaza. Analogous remarks on the conduct of military operations by belligerents in many other recent conflicts around the world can be made after reading the section devoted to the protection of civilian objects (n. 451), and Chapter 5 on 'Protection of the Civilian Population' (n. 501 sq.). Chapter 4 also usefully emphasizes the growing concern over protection of the environment from the effects of armed conflict, an issue neglected until the Vietnam war, that prompted the adoption of the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention), as well as the inclusion in Article 35, AP I of prohibition of severe environmental damage (see n. 403). As the author points out, the extent of application of the provisions of the ENMOD Convention and the environment-related provisions contained in AP I, is still subject to debate, partly because of the uncertainties surrounding the definitions of 'widespread', 'long-lasting' and 'severe' damage to the environment, which serve as criteria of application of both treaties. It is understandable, in this context, that many commentators expressed the wish that the ENMOD Convention be reviewed in order to correct the shortcomings of its text and take into account recent technological advances[5].

The issue of protection of the civilian population encompasses, among others, the law of belligerent occupation, which has been the subject of renewed attention from academics in the past few years in the context of the occupation of Iraq[6]. The main criterion of application of the international law on belligerent occupation (that of 'actual control' of a territory by the occupant State, found in Article 42, Hague Regulations of 1907) is the subject of comprehensive developments, related – among others – to the issue of the applicability of the fourth Geneva Convention of 1949 (GC IV) to the occupied Palestinian territories (OPT). While the author reminds us rightly that Israel's position 'on the (non)applicability of GC IV to the territories occupied in 1967 has been rejected by all other states parties to the Geneva Conventions, acting individually and through international organizations, in particular through various UN bodies including the General Assembly, by the ICRC and other non-governmental organizations and by academic writing' (n. 527), he doesn't take into account the renewal of the debate following the Israeli 'disengagement plan' of the Gaza strip implemented in 2005. Since then, experts are indeed divided on the legal status of Gaza: while Israeli officials claim that the disengagement dispels claims regarding Israel's responsibilities as occupying power on the territory, some argue on the contrary that it continues to exercise effective control on the strip[7]. However, as the author of this chapter states in a general way, 'the issue of the legal status and of the fate of occupied land is a question which must be kept distinct from the humanitarian purposes of Geneva Law' (n. 527).

[5] Despite the fact that Article 8 of the ENMOD Convention provides that review conferences are to be held at intervals of not less than five years, the last review conference of the ENMOD Convention dates back to 1992.

[6] See e.g. Marco Sassoli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *European Journal of International Law,* vol.16:4 (2005), 661-694

[7] The debate is well summarized in Y. Shany, *The Legal Status of Gaza after Israel's Disengagement*, Hebrew University International Law Research Paper No. 12-06 (2005).

It is noteworthy that the long Chapter 10, devoted to 'The Law of Armed Conflict at Sea', while it mentions the growing criticism vis-à-vis the law of naval warfare, the provisions of which supposedly 'do neither meet the necessities of modern operations, as e.g. maritime interception operations or non-military enforcement measures decided upon by the UN Security Council, nor do they offer operable solutions to the naval commander' (p. 475), does not explicitly address the issue of the legality of the Proliferation Security Initiative (2003), under which the United States and some of their allies have sought new means to interdict shipments of Weapons of Mass Destruction in international waters[8]. The author argues in this respect that 'Maritime interception operations aimed at combating transnational terrorism or the proliferation of weapons of mass destruction and related components do have a legal basis that is independent from the law of naval warfare' (p. 475). In our view, it remains that the interdiction principles contained in the PSI shall be put in harmony, through a multilateral binding instrument, with the existing law of the seas.

The last chapter is entitled 'Enforcement of International Humanitarian Law'. As regards this issue of great importance, it would have been worthwhile had the author further elaborated on the implications of the 1998 establishment of the ICC for ensuring respect of IHL, since, as Dr Fleck rightly points out, 'there is an urgent and continuing need for investigatory and punitive measures as well as for reparation and for activities to prevent future violations' (p. xiii).

Let us finish by mentioning that the work under review, which has no equivalent at the present day, and is therefore absolutely necessary to everyone interested in IHL, also contains a useful Table of International Instruments and a Table of Judgments and Decisions, as well as a comprehensive Bibliography.

[8] For a detailed discussion of this issue, see Andreas Persbo and Ian Davis, *Sailing Into Uncharted Waters? The Proliferation Security Initiative and the Law of the Sea*, BASIC Research Report (2004), available at http://www.basicint.org/pubs/Research/04PSI.htm .