

CONTENTS

Preface to the Third Edition	<i>page</i> xv
Preface to the Second Edition	xvii
Preface to the First Edition	xix
Table of Cases	xxi
Tables of Treaties, Legislation and Other Instruments	xxiv
List of Abbreviations	xxix
Introduction	1
1 Historical Development of International Humanitarian Law	4
1.1 Introduction	4
1.2 Henri Dunant and the Battle of Solferino	5
1.3 The 1864 Geneva Convention	6
1.4 The 1863 Lieber Code	7
1.5 The 1868 St Petersburg Declaration	8
1.6 The 1868 Additional Articles, 1874 Brussels Declaration and 1880 Oxford Manual	9
1.7 The 1899 and 1907 Hague Conventions	10
1.8 The 1949 Geneva Conventions	13
1.8.1 Common Article 3	15
1.9 The 1977 Additional Protocols	16
1.9.1 Additional Protocol I, Wars of National Liberation and Guerrilla Fighters	16
1.9.2 Additional Protocol II	17
1.10 Other IHL Instruments	19
1.11 The Development of International Criminal Law: The ICTY and ICTR, the ICC and the Hybrid and Ad Hoc Courts and Tribunals	19
1.11.1 The International Criminal Court	20

1.11.2	The Ad Hoc Criminal Tribunals for the Former Yugoslavia and Rwanda	23
1.11.3	Hybrid and Ad Hoc Courts and Tribunals	25
1.12	Conclusion	27
2	The Contemporary Legal Basis of International Humanitarian Law and Its Fundamental Principles	29
2.1	Introduction	29
2.2	The Law of Armed Conflict: Purpose, Concepts, Scope, Application	29
2.2.1	The Separation of <i>Jus ad Bellum</i> and <i>Jus in Bello</i>	30
2.2.2	Hague Law and Geneva Law	32
2.2.3	Terminology: Wars vs Armed Conflicts, Law of Armed Conflict vs International Humanitarian Law	32
2.2.4	Scope and Application of the Law of Armed Conflict	34
2.3	Sources of the Law of Armed Conflict	36
2.3.1	Treaties	37
2.3.1.1	The Treaty Law Distinction between International and Non-international Armed Conflict	38
2.3.2	Custom	39
2.3.3	Other Sources: Soft Law	40
2.4	The Fundamental Principles of the Law of Armed Conflict	42
2.4.1	The Principle of Distinction	42
2.4.1.1	The Principle of Discrimination (Prohibition on Indiscriminate Attacks)	44
2.4.2	The Principle of Military Necessity	45
2.4.3	The Principle of Proportionality	45
2.4.4	The Prohibition on Causing Unnecessary Suffering and Superfluous Injury	46
2.4.5	Neutrality	47
2.4.6	The Principle of Humanity	48
2.5	Conclusion	50
3	Types of Armed Conflicts	53
3.1	Introduction	53
3.2	International Armed Conflicts	54
3.2.1	Common Article 2 Armed Conflicts	54
3.2.1.1	‘War’ vs ‘Armed Conflict’	54

	Contents	vii
3.2.1.2 What Is an ‘Armed Conflict’?	55	
3.2.1.3 Occupation	57	
3.2.2 Wars of National Liberation	57	
3.3 Non-international Armed Conflicts	61	
3.3.1 Common Article 3 Armed Conflicts	63	
3.3.1.1 Intensity and Organisation	66	
3.3.1.2 Geographical Field of Application	69	
3.3.1.3 The Shortcomings of Common Article 3	70	
3.3.2 Additional Protocol II Armed Conflicts	70	
3.3.2.1 Material Field of Application	71	
3.4 Internationalised and ‘Transnational’ Armed Conflicts	75	
3.4.1 Internationalised Armed Conflicts	76	
3.4.1.1 Military Intervention by a Foreign State in a NIAC	76	
3.4.1.1.i <i>The Conflict Becomes an International Armed Conflict, Regardless of Which Side the Foreign State Supports</i>	77	
3.4.1.1.ii <i>If the Foreign State Supports the Territorial State, the Conflict Remains Non-international</i>	77	
3.4.1.1.iii <i>If the Foreign State Supports the Armed Group the Conflict between the Foreign State and the Territorial State Is International; That between the Armed Group and the Territorial State Remains Non-international</i>	78	
3.4.1.1.iv <i>If the Foreign State Supports the Armed Group, the Whole Conflict Becomes International</i>	78	
3.4.1.2 One of the Parties Is Acting on Behalf of a Foreign State	79	
3.4.1.2.i <i>The Nicaragua Test: Effective Control</i>	79	
3.4.1.2.ii <i>The Tadić Test: Overall Control</i>	81	
3.4.2 ‘Transnational’ Armed Conflicts	84	
3.4.2.1 Conflict between State A and Armed Group X Based in State A, Fighting in State A	85	
3.4.2.2 Conflict between State A and Armed Group X Based in State B, Fighting in State A	86	
3.4.2.3 Conflict between State A and Armed Group X, Fighting in State A Spills across Border into State B	86	
3.4.2.4 Conflict between State A and Armed Group X Based in Neighbouring State B, Fighting in State B Only	88	
3.4.2.5 Conflict between State A and Armed Group X Based in State C (and Elsewhere), Fighting in Various States	89	
3.4.3 ‘De-internationalised’ Armed Conflicts	91	
3.5 Conclusion	92	

4	Individual Status in Armed Conflict: Combatants, Non-combatants, Direct Participation in Hostilities, Prisoners of War and Detention in Non-international Armed Conflict	97
4.1	Introduction	97
4.2	Combatant Status: Criteria, Privileges and Responsibilities	98
4.2.1	Early Rules on Combatant Status: The US Civil War to the Geneva Conventions of 1949	99
4.3	The Current Law Regarding Combatant Status	99
4.3.1	Members of the Armed Forces	100
4.3.2	Partisan and Resistance Fighters	100
4.3.2.1	Being Commanded by a Person Responsible for Their Subordinates	101
4.3.2.2	Having a Fixed Distinctive Sign	102
4.3.2.3	Carrying Arms Openly	102
4.3.2.4	Obedying the Laws of War	103
4.3.3	National Liberation and Guerrilla Fighters under Protocol I	103
4.3.4	<i>Levée en Masse</i>	105
4.3.5	Participants in Non-international Armed Conflicts	106
4.4	Non-combatants Entitled to POW Status and Treatment	107
4.5	Irregulars in Hostilities Not Entitled to Combatant Status	107
4.5.1	Spies	108
4.5.2	Mercenaries	109
4.5.3	‘Unlawful’ Combatants	112
4.5.4	Private Military and Security Contractors	115
4.5.5	Civilians Taking Direct Part in Hostilities	120
4.6	Prisoner of War Status	124
4.6.1	Determining POW Status	124
4.6.2	Treatment of POWs	125
4.6.2.1	Rights of POWs	125
4.6.2.2	Rules on Conditions of Captivity	126
4.6.2.3	Rules on Penal and Disciplinary Proceedings	128
4.6.2.4	Obligations for Detaining Authorities Regarding Transmission of Information, Monitoring by Protecting Powers and the ICRC, and Repatriation of POWs	128
4.7	Detention in Non-international Armed Conflicts	129
4.8	Conclusion	133

	Contents
5 Protection of the Wounded, Sick and Shipwrecked	136
5.1 Introduction	136
5.2 The Origins of the Protection of the <i>Hors de Combat</i> in Armed Conflict	136
5.3 The Rules Regarding Respect for and Care of the Wounded, Sick and Shipwrecked	137
5.3.1 In International Armed Conflicts	137
5.3.2 In Non-international Armed Conflicts	140
5.4 Provisions on the Dead and Missing	142
5.5 Medical Personnel and the Protection of Medical Goods and Objects, Including Hospitals, Ambulances and Hospital Ships	144
5.5.1 Medical and Religious Personnel	145
5.5.2 Medical Goods and Objects, Including Hospitals, Ambulances and Hospital Ships	146
5.6 The Protective Emblems: The Red Cross, Red Crescent and Red Crystal	148
5.6.1 Background to the Adoption of the Emblems: The Red Cross	148
5.6.2 The Red Crescent	150
5.6.3 The Red Shield of David	152
5.6.4 The Red Crystal	154
5.6.5 Substance of the International Law on the Distinctive Emblems	155
5.7 Conclusion	156
6 The Protection of Civilians and the Law of Occupation	160
6.1 Introduction	160
6.2 General Protections for Civilians	161
6.3 Protected Persons	166
6.3.1 Meaning of ‘Protected Person’	167
6.3.2 Rules Applying to All Protected Persons	170
6.3.3 Rules Applying to Enemy Aliens	171
6.3.4 Rules Applying to Occupied Territory	172
6.3.5 Persons Deprived of Their Liberty	173
6.4 Rules on the Treatment of Civilians in Non-international Armed Conflicts	175

6.5	The Law of Occupation	176
6.5.1	The Historical Development and Philosophical Underpinnings of the Modern Law of Occupation	176
6.5.2	When Is Territory Occupied?	177
6.5.3	End of Occupation	179
6.5.4	Administration of Occupied Territory	180
6.5.5	Problems Regarding Long-Term Occupation	181
6.6	Conclusion	187
7	Targeting	191
7.1	Introduction	191
7.2	The Philosophical Underpinnings of the Law of Targeting	192
7.3	The Basic Rule: Article 48 of Additional Protocol I	193
7.4	Military Objects and Objectives	194
7.4.1	‘Objects’ and ‘Objectives’	195
7.4.1.1	A Side Note: Are People Lawful Military Objectives?	195
7.4.2	Nature, Location, Purpose, Use	196
7.4.2.1	Nature	196
7.4.2.2	Location	196
7.4.2.3	Purpose	197
7.4.2.4	Use	197
7.4.3	Destruction, Capture or Neutralisation	198
7.4.4	Circumstances Ruling at the Time	198
7.4.5	Definite Military Advantage	199
7.5	Additional Rules on Targeting Military Objectives	201
7.5.1	Indiscriminate Attacks	201
7.5.2	Proportionality	203
7.5.3	Precautions in Attack and Defence	204
7.5.3.1	Precautions in Attack	204
7.5.3.2	Precautions in Defence	206
7.6	Specific Rules on Targeting Certain Types of Objects	208
7.6.1	Cultural Property	208
7.6.2	The Environment	213
7.6.3	Medical Facilities	215
7.6.4	Works and Installations Containing Dangerous Forces	215
7.6.5	Objects Necessary for the Survival of the Civilian Population	217
7.6.6	Civil Defence, Non-defended Localities and Demilitarised Zones	218

	Contents
7.7 Dual-Use Objects: A New Category in the Law of Targeting?	220
7.8 A Note on the Law of Targeting in Non-international Armed Conflicts	221
7.9 Conclusion	223
8 Means and Methods of Warfare	230
8.1 Introduction	230
8.2 The General Rules: The Prohibitions on Causing Unnecessary Suffering and Superfluous Injury and on Indiscriminate Means and Methods	230
8.3 The Obligation to Assess the Legality of New Means and Methods of Warfare	234
8.4 Specifically Prohibited Weapons and Restricted Weapons	235
8.4.1 Explosive and Dum-Dum (Expanding) Bullets	235
8.4.2 Mines and Booby-Traps	236
8.4.2.1 Booby-Traps	237
8.4.2.2 Landmines	238
8.4.3 Incendiary Weapons	241
8.4.4 Non-detectable Fragments	242
8.4.5 Blinding Laser Weapons	242
8.4.6 Explosive Remnants of War	243
8.4.7 Cluster Munitions	244
8.4.8 Chemical Weapons and Poison	246
8.4.9 Biological and Bacteriological Weapons	248
8.5 Prohibited Methods of Warfare	249
8.5.1 Orders of ‘No Quarter’	250
8.5.2 Perfidy	250
8.5.3 Siege Warfare and Starvation of Civilians	251
8.5.4 Pillage	253
8.6 Other Rules Relating to Methods of Warfare	254
8.6.1 Belligerent Reprisals	254
8.6.2 Mercenaries	256
8.6.3 Parachutists in Distress	256
8.6.4 Espionage	257
8.6.5 Blockades and Exclusion Zones	258
8.7 Means and Methods of Warfare of Indeterminate or Contested Status	259

8.7.1 Depleted Uranium	260
8.7.2 White Phosphorus	261
8.7.3 Thermobaric Weapons and Fléchettes	263
8.7.4 Nuclear Weapons	264
8.7.5 Cyberwarfare	268
8.7.6 Targeted Killing and Drone Warfare	271
8.7.7 Autonomous Weapons	276
8.8 Conclusion	278
9 The Interaction between International Humanitarian Law and International Human Rights Law	282
9.1 Introduction	282
9.2 IHL and IHRL: Different Origins, Similar Objectives	283
9.3 Areas of Similarity, Areas of Difference	287
9.3.1 Similarity: Protection of the Human Person	287
9.3.2 Differences: Situations Allowing for Derogations from IHRL	288
9.3.3 Differences: Scope of Application of IHRL and Extraterritorial Application of IHRL	289
9.3.4 Differences: Addressees of IHRL and IHL	290
9.4 Reconciling and Resolving Areas of Overlap and Difference	291
9.5 The Benefits of IHRL for IHL	293
9.6 Conclusion	294
10 Implementation, Enforcement and Accountability	297
10.1 Introduction	297
10.2 Common Article 1: The Obligation to Ensure Respect	297
10.3 Measures to Be Taken in Peacetime	300
10.3.1 Dissemination to the Armed Forces	301
10.3.2 Dissemination to Civil Society	302
10.3.3 Implementation in Domestic Legislation	303
10.4 Role of the Protecting Powers and the International Committee of the Red Cross	303
10.5 The International Humanitarian Fact-Finding Commission	306
10.6 Accountability through International Criminal Law	308

	Contents	xiii
10.6.1 Individual Responsibility for Violations of the Law of Armed Conflict	309	
10.6.1.1 War Crimes and Grave Breaches	309	
10.6.1.2 Violations of the Law of Armed Conflict Not Amounting to Grave Breaches	311	
10.6.1.3 Crimes against Humanity and Genocide	311	
10.6.2 Command Responsibility	312	
10.7 The International Criminal Court, the International Tribunals and the Hybrid and Internationalised Courts	315	
10.8 Reparations for Violations of the Law of Armed Conflict	318	
10.9 The Role of the United Nations and International and Non-governmental Organisations	322	
10.10 Implementation, Enforcement and Accountability in Non-international Armed Conflicts	325	
10.10.1 What Law Applies?	325	
10.10.2 To Whom Does the (NIAC) Law Apply?	327	
10.10.3 Implementation, Enforcement and Accountability	331	
10.10.3.1 Dissemination	331	
10.10.3.2 Special Agreements	332	
10.10.3.3 Unilateral Undertakings or Commitments	332	
10.10.3.4 Accountability through International Criminal Law	333	
10.11 Conclusion	334	
Conclusions	339	
Bibliography	341	
Index	370	