Buchbesprechungen

Fleck, Dieter (ed.): The Handbook of International Humanitarian Law. Second Edition. Oxford/New York: Oxford University Press 2008. ISBN 9780199232505. xxxix, 770 p. US$ 190,-

International humanitarian law (IHL) has developed considerably since the first edition of Dieter Fleck's handbook was first published in 1994 (German version). New treaties have been concluded. The Ottawa Convention of 1997, the Rome Statute of 1998, the third Additional Protocol to the Geneva Conventions (2005), and the Cluster Munitions Treaty of 2008 only constitute the most conspicuous examples. The ICRC, in its customary law study, has taken stock of humanitarian customary law rules and the jurisprudence especially of the ICTY and ICTR, but also of the ICJ, has influenced the humanitarian legal framework. What is more, since the terrorist attacks of 9/11, IHL has entered public conscience and public debate and more than ever before it has become a political issue – not always to its advantage. The political instrumentalization of IHL, most importantly the proclaimed and literally meant "war on terror" as well as the designation of certain persons as "unlawful combatants", have sparked fierce debates. Structural developments, asymmetric warfare and the increasing "privatization of war", as well as the at times difficult interrelation between human rights law and IHL, have also challenged the existing legal framework. Manoeuvring through this labyrinthine terrain is often difficult, especially in view of the scarcity of up-to-date comprehensive volumes dealing with IHL. In other words, in 2008 it is high time for a second edition of this formidable handbook in which Dieter Fleck, the former Director for International Agreements and Policy of the German Federal Ministry of Defence, together with twelve eminent academic experts and practitioners provides adroit guidance to the legal framework of IHL.

What is new? Apparent at first sight, the title has changed from "The Handbook of Humanitarian Law in Armed Conflicts" to the "Handbook of International Humanitarian Law"; the new edition is 181 pages longer (770 pages in total) and contains two entirely new chapters on "non-international armed conflict" (Chapter 12) and "international peace operations" (Chapter 13). Unlike the first edition, this volume is no longer formally connected to a single national manual. As is well known, the key statements of the first edition, printed in bold type, were identical to the German Joint Service Regulations ("Zentrale Dienstvorschrift", ZDv 15/2) that had been promulgated for the German armed forces in August 1992. Instead, the new edition, in the words of the editor, aims at offering a best practice manual to assist scholars and practitioners worldwide. In spite of extensive up-dates (see the chapter-by-chapter analysis below), the handbook's overall structure largely mirrors the structure of the previous edition and the majority of the black letter section headings are identical to the 1992 German Joint Service Regulations. This constitutes no detriment; the original Service Regulations are generally closely connected to widely accepted IHL prescriptions. Only on a few insular occasions

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some of the Service Regulations' idiosyncrasies are perpetuated in the new handbook. Contrary to section headings 308 and 309, for example, IHL neither refers to the requirement of a permanent distinctive sign (emphasis added) nor does Art. 44, paragraph 3, 2nd sentence AP I make any explicit mention of occupied territories or wars of national liberation. These, however, are mere marginalities and the remainder of this review will focus on the various substantial novelties of this new edition.

Christopher Greenwood's depiction of the historical development of IHL in Chapter 1 provides an excellent, comprehensive introduction with a particular focus on the multicultural basis on which this body of law founded. Chapter 2, likewise written by Greenwood, provides a solid account of the scope of application of IHL. Despite ongoing controversies regarding the qualification of various recent conflicts and the treatment of transnational violence by non-state actors, the author, who has so eminently written on these issues, merely analyses the US-led military operation in Afghanistan 2001-02 and confines himself to describe the "war against terrorism" as a "controversial concept". Neither the Lebanon war of 2006 nor the *Hamdan* decision of the US Supreme Court or the Israeli Supreme Court's targeted killings judgment (2006) are mentioned here. While these omissions may well be due to a distribution of work among the different authors – Dieter Fleck in Chapter 12 on non-international armed conflicts attends to these issues – in view of the title of Greenwood's chapter "scope of application of humanitarian law", the reader would naturally expect a more comprehensive depiction.

Knut Ipsen provides a very concise summary of the legal rules applicable to combatants and non-combatants and rightly devotes special attention *inter alia* to civilian contractors, mercenaries, spies and special forces. In defiance of those who have deemed the notion of non-combatancy as obsolete – *nota bene* in this chapter this term, which is mentioned in Art. 3 of the 1907 Hague Regulations but does not occur in AP I, does not, as one could expect, refer to civilians but to members of the armed forces who, by virtue of national law are excluded from any direct participation in hostilities – Ipsen delivers a serene illustration of the different categories of members of the armed forces. However, the inclusion of the term "unlawful combatants" in the bold black letter key statements of his chapter accords this precarious term a standing that is unfounded in IHL. Hans-Peter Gasser in Chapter V rightly emphasizes that IHL does not refer to anything like "unlawful combatants". It must be clearly stated that the status of persons now commonly designated as "unlawful combatants" is civilian, and perhaps a chapter that by its title exclusively deals with members of the armed forces, is ill-suited for a depiction of this "category".

Stefan Oeter contributes the longest chapter of this handbook. It is an excellent up-to-date illustration on the methods and means of combat. Given the chapter's broad coverage, occasional overlap with some other chapters is inevitable. The chapter comprises recently adopted treaties, e.g. the so-called Ottawa Convention or the Protocol on Explosive Remnants of War, and it contains ample references to

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recent armed conflicts. In this resourceful depiction the reader finds answers to a panoply of timely issues but also lucid explanations of IHL's fundamental principles, especially of the ambiguous, often misconceived and only rarely comprehensively depicted principle of military necessity. Psychological warfare and asymmetric conflict structures, the specificities of air and missile warfare, human shielding and more generally the consequences of the "civilianization" of war, all of these topics are treated here, together with a masterly evaluation of the legality of nuclear weapons.

Hans-Peter Gasser writes an equally strong chapter on the protection of the civilian population. In an exhaustive depiction, the author analyses the protection of civilians against the effects of military operations (p. 237-270) and the protection of civilians under the control of the adversary (p. 270-323). Gasser rightly devotes considerable attention to the timely and complex issue of direct participation in hostilities. In the wake of the so-called privatization of war and in times of asymmetric and urban conflict scenarios that increasingly blur the traditional distinction between civilians and combatants, the identification of the precise contours of this notion is crucial for the protection of peaceful civilians. It is not entirely clear whether the author regards the assumption of permanent tasks of a military nature for a party to the conflict (membership functionally defined?) as a circumstance precluding civilian status or as a particular form of direct participation in hostilities. The bold black letter phrases of Section 519 speak of "persons who have regained their civilian quality" (emphasis added) whereas the author concludes the remainder of this section by – correctly – stating that the fact of having taken an active part in hostilities does not confer the status of a combatant to a civilian. In this context some further elaboration regarding the circumstances that could lead to the adumbrated loss of civilian status might have been conducive.

Jann Kleffner in Chapter 6 ably depicts the protection accorded to the wounded, sick and shipwrecked and the corollary protection granted to medical personnel, units and transports. Wolff Heintschel von Heinegg contributes a section on medical aircraft to this chapter. The various topics dealt with here, in spite of their complexity, often lead a rather shadowy existence in the legal literature. Yet, they are of enormous practical relevance. Kleffner's articulate illustration of the use of the distinctive emblems or the preconditions for loss of protection of medical units and personnel are issues in point. International humanitarian law goes far beyond the rules pertaining to the conduct of hostilities and it is one of the important assets of this handbook that it provides ample space for the various facets of this legal order. The same holds true for Nilendra Kumar's Chapter 8 on religious personnel, although one may wonder why this short chapter (13 pages) has not been incorporated in Chapter 6 given that the protection granted to religious and medical personnel is largely equivalent (see e.g. Art. 15 (5) AP I).

50 pages are all it takes Horst Fischer to depict the protection of prisoners of war in a very clear, concise and complete manner (Chapter 7). The author focuses on timely issues, many of which are related to the proclaimed "war on terror", such as transfers of prisoners of war and the requirements for the procedure of

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status-determination foreseen in Art. 5 GC III. Only on a very marginal note would the present reviewer disagree with the author's conclusion that the identity card mentioned in Art. 4 A (4) GC III is a constitutive element for prisoner of war status. IHL foresees no directly detrimental consequences, least of all sanctions, if a person does not carry such a card. Proof of status may be aggravated but even absent a valid ID-card persons accompanying the armed forces would benefit from the protective presumption of Art. 5, para. 2 GC III which refers to Art. 4 GC III in its entirety.

Roger O'Keefe's very up-to-date new chapter 9 on the protection of cultural property deserves equal commendation. The commentaries to the bold black letter section headings show a strong analytical character, the author vastly refers to older as well as recent material and thoroughly analyzes the *travaux préparatoires* of the respective instruments, especially in his elaborate depiction of the interrelation of Art. 1 of the 1954 Hague Convention and Art. 53 AP I and 16 AP II. Wolff Heintschel von Heinegg's chapter on the law of armed conflict at sea is a classic and one of relatively few modern day illustrations of the rules pertaining to armed conflict in this particular theatre of war. The main focus of the update lies on maritime exclusion zones. On the basis of a copious analysis of state practice before 1945 and up until Operation Iraqi Freedom, the author cautiously affirms that exclusion zones may be considered as generally recognized under customary IHL. Michael Bothe has updated his illustrative and stimulating chapter on neutrality, especially by analyzing recent state practice in relation to the 2003 invasion of Iraq. Bothe points out that changes in customary law have "… produced only modifications of single specific rules of the law of neutrality, not a general revocation of this whole body of law". As the author is of course well aware, this, like his rejection of a customary law status of the notion of non-belligerency, is controversial terrain. Bothe adds important insight and impetus to a much needed revived debate surrounding a branch of IHL, the last comprehensive update of which dates back to 1907.

Dieter Fleck's entirely new Chapter 12 on the law of non-international armed conflicts constitutes a crucial addition and completes the scope of this handbook. The author presents a copious, timely analysis of the topic and devotes vast attention to challenging issues such as the asymmetric nature of many contemporary non-international armed conflicts and the binding effects of IHL on non-state actors. Specific sub-sections on "operational relevance" or "policy considerations" make provision for operational needs. Novel developments in treaty law, especially the extension of applicability of certain arms related treaties to non-international armed conflicts, as well as recent jurisprudence of the ICTY, the US and the Israeli Supreme Court are scrutinized here. Fleck lays substantial emphasis on the dichotomy of international and non-international armed conflicts and diligently elaborates remaining differences in the applicable legal framework as well as areas of homogeneity. With equal clarity the author illustrates the differences between law enforcement measures and the conduct of hostilities. Fleck voices reservations against a "unified use of force rule" and regarding the conduct of hostilities

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takes a clear stance in stipulating that "… enemy combatants may be targeted and attacked with lethal force, regardless of whether they could be captured or arrested". Despite reservations of some authors, this statement probably correctly reflects the situation *de lege lata*. Yet, in view of the current difficulties to precisely delineate law enforcement actions from the actual conduct of hostilities, and in a best-practice guide like the one at hand, further discussion of this far-ranging stipulation and perhaps at least the promulgation of a policy consideration not to kill when capture is possible without risk, may have been feasible.

Ben F. Klappe, in Chapter 13 on international peace operations, writes about the modern conception of peace operations, their historic evolution and modern day definition as well as the composition of their mandates and rules of engagement. Undeniably, IHL can have an important bearing on peace operations that "cannot be underestimated" (Fleck, p. xvi). However, as the editor likewise points out in the introduction, such operations are not normally conducted in armed conflict. This comprehensive chapter would have been well placed in any edition devoted to peace-keeping and peace operations. However, in its present form and in spite of its high quality, this chapter does not fit well into a manual that is otherwise specifically focused on the law applicable in armed conflict. Out of the 51 sections of this chapter only very few sections, most importantly sections 1308 and 1309, contain any explicit reference to IHL. Section 1343, on child soldiers, has already been comprehensively treated by Gasser (section 505) and it appears that the focus on human rights law and UN-Charter provisions by far outweighs the consideration of IHL. Most of the bold black letter rules reflected here – due to the absence of consolidated legal rules – are "should be", "would be", "typically may"-policy rules and considerations. Thus, already linguistically the chapter's key statements differ significantly from the rather straightforward section headings of the remainder of this manual, most of which are closely connected to the wording of specific legal provisions.

In the introduction, the editor describes the enforcement of IHL as "the most important part of IHL" (Fleck, p. xvi). Accordingly, the final chapter of the handbook, co-authored by Rüdiger Wolfrum and Dieter Fleck, is dedicated to this particular subject. This illustrative chapter has been extensively updated and a strong focus is laid on such topical and complex issues as, for example, the treatment of IHL within human rights judicial bodies and fora, state responsibility for the compensation of victims of war, and the implementation roles of the UN and NGOs. As in the previous edition, strong attention is also devoted to the prosecution of war crimes, particularly in light of the jurisprudence of the ICTY and ICTR. Only on a marginal note to section heading 1422 should it be noted that while the currently 18 members of the "ICRC-Committee" are Swiss citizens in accordance with Art. 7 (1) of the ICRC-Statute, ICRC delegates are nowadays recruited from all over the world.

This new edition is an encyclopaedic work, concise and informative. Altogether 13 experts have contributed to this manual and as before, the chapters have retained their individual character. They differ in linguistic style and analytical ap-

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proach. Singular chapters could have benefited from a more extensive update and in view of the new handbook's aspired universality occasionally greater autonomy from the 1992 German Joint Service Regulations may have been conducive. Yet, despite these insular reservations, this up-dated handbook contains a splendid combination of high analytical quality, pragmatism and diversity. The manual's omnifariousness is one of its particular assets. Where else can one find such elaborate up-to-date depictions of the law pertaining to naval warfare, neutrality, the protection of cultural property or religious and medical personnel, enforcement of IHL and occupation alongside the more "classical" IHL-issues concerning the scope of application and the conduct of hostilities, all in one place? In this resourceful handbook the reader finds conclusive explanations regarding IHL's fundamental principles, as well as seminal insights into crucial questions of our time. The handbook is a must have for anyone interested or working in the field of IHL.

Robin Geiß, Geneva

Lowe, Vaughan: International Law. Clarendon Law Series. Oxford, New York: Oxford University Press 2007. ISBN 9780199230839. 250 p. £ 55,-

"The world needs international law, because no State acting alone can achieve its aims." This is the phrase with which Vaughan Lowe opens the very first chapter of his textbook on international law. It is also the leading motto that underlines every following chapter. It indicates the author's attempt to go back to the basics of international law, to provide the reader with clear and concise explanations about international law, and not of international law, and to invoke common sense rather than overwhelming theories and encyclopaedic information. For this purpose he avoids footnotes and technical details, since, as he explains, the relevant references can be found quickly and easily with Google – a decision which the reader might regret, since precisely in the era of abundant information a reference to the most important and reliable sources by such an authority as Vaughan Lowe would be most welcome.

The author himself announces his book as a successor to Law of Nations, in which the author James Brierly called for a critical assessment of the role that international law plays in international relations and of the conditions upon which an effective legal order depends, without using any *a priori* methods. Such attempt to explain the phenomenon of international law, however, requires the author to assume a "meta position", from which he can analyse international law as an object of his work, without using its own tools, its own standard terminology and legal argumentation. It seems that the author is well aware of this. Thus, he often deploys arguments from related disciplines, such as political sciences, history, economics, or indeed even linguistics. He also dedicates an important part of his book to the global economy and the global environment in order to point to the general political and socio-economic conditions in which international law works – and why it works.

In the first-person narrative style, and in clear and concise language, the author first introduces the reader to the more general questions of international law, such

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as what is "The Ambit of International Law" (Part 1), "How International Law is Made" (Part 2), and "The Principles of the International Legal System" (Part 3). These are followed by the parts "States" (Part 4) and "Inside the State" (Part 5), and further elaborated in "The Global Economy" (Part 6) and "The Global Environment" (Part 7). The final part is entitled "The Use of Force" (Part 8), in which the author, being consistent with his approach until the very end of the book, does not hesitate to look into the morals and purposes of the legal rules governing this field of international law.

It comes as no surprise that when resorting to arguments from non-legal disciplines, the author offers non-legal answers to various questions of international law, different from those found in the traditional orthodox textbooks on international law. Thus, when answering the question "Why do people comply with international law?" he does not follow the usual reasoning that this is so because international law is binding, and that international law is binding because states consented to this, or are required to do so by a *Grundnorm,* or because states self-limited their powers, or – to go even further back into the history of legal thought – because this is the will of God. These answers are spared for the question "Why s h o u l d people comply with international law." This suggests the intriguing conclusion that international law is not complied with for the reasons it should.

However, the author does not resort to the hard calculations of *Realpolitik*. Instead, he first points out that international law is made by states to serve their interests, so it is likely that it will be in their interest to comply with it. Then he takes a closer look into those individuals who in fact decide whether international law is to be respected, and sketches an average profile of those who are actively engaged in the state's foreign affairs. The author argues that most of them, from a state leader or a senior official to a trainee at the Foreign Ministry, are prone to acquire a conformist behaviour and follow the letter of international law out of their personal interest, if not for the sake of their promotion then for the sake of their quiet life. Moreover, most of them underwent a *déformation professionnelle*, having been trained to apply international law, most likely in one of a handful of universities in Europe and North America. This all, the author argues, contributes further to their inclination to comply with international law.

The author thus examines the legal axiom of a binding nature of international law by empirical observation and by deploying common sense arguments, which brings into his reasoning also moral, social and other dimensions. In this way, he contributes to the understanding of the Law as a human construct. He interprets the sources of authority and validity of international law in connection with their actual holders and, at least implicitly, addresses also the relationship between law and power.

However, while it is true that the compliance with – as well as creation of – international law falls into one of the core tasks and competencies of the Heads of State, Heads of Government, and those working for the Ministry for Foreign Affairs, the reader would perhaps also appreciate an analysis of the motives for respecting international law by other relevant decision-makers, such as national

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judges, in particular since their compliance with international law is also considered as state practice, thereby amounting to one of the sources of international law. Yet, most national judges have not undergone high-quality training in international law at any of those few excellent universities in North America and Europe. It is also not obvious that in case of a conflict between an international and a national rule they would prefer to follow the letter of international law instead of their national law. Indeed, their conformist behaviour with regard to the national law instead of international law might sometimes well bring them a quiet life, if not their promotion.

It might be that the decision of an individual, such as a national judge, to follow international law, is owed to a much more complex process of decision-making than only to social inertia. Perhaps the reasons why people d o comply with international law are nevertheless not so much apart from the reasons why people s h o u l d comply with international law. On the latter question the author offers a brief but succinct introduction to the most relevant theories on the sources of binding nature of international law, and admits that "quite what the theoretical basis of that objective order might be is a matter that can in practice usually remain a mystery". Thus, he adopts a pragmatic approach to the problem and suggests that we should not ask what makes international law binding. Instead, we should simply say that international law consists of those rules that are treated as being legally binding. This is an acceptable way out for an introduction to international law, although, in the end, the author merely rephrases the question into "Why are international rules treated as legally binding?", but does not offer an answer to it.

The Part on "How International Law is Made" is the most comprehensive one. Different sources of international law are discussed in detail and are not limited to the traditional sources enumerated in Article 38 of the Statute of the ICJ. The author addresses the latest developments in international law and considers as relevant sources also unilateral acts of states, decision-making of international organisations and non-legal sources of norms. He does not follow the example of many other textbooks where efforts are made to fit new sources of international law into a framework of traditional sources. Instead, he analyses why they cannot be viewed merely as a subgroup of any of those and justifies their independent existence.

In the Part "The Principles of the International Legal System" the author similarly extends the classical catalogue of the principles of international law, as embodied in Article 2 of the UN Charter and further elaborated in the Declaration on Principles of International Law Concerning Friendly Relations, by dedicating half of the chapter to State Responsibility. It is worth noting that the UN International Law Commission adopted Articles on Responsibility of States for Internationally Wrongful Acts only in 2001, and that the Governments were to be requested in 2008 for the second time to submit their comments on the future possible adoption of the Articles in the form of a binding instrument. The author, however, does not hesitate to suggest that the Articles are binding as a matter of customary international law. He does not refer to any exception with regard to a particular provi-

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sion, despite the fact that not all the provisions merely codify international law but also contribute to progressive development of international law.

Having examined the question of international responsibility of states, the author avoids doing the same for international organisations and other non-state actors. Instead, he re-addresses the issue of who has rights and duties under international law and consequently international personality, and points to the limited competences – and consequently personality – of international organisations. This time the author does not refer to the work of the International Law Commission and its mandate to work on the topic of responsibility of international organisations. He also calls for a cautious approach when assessing whether corporations and individuals have international personality, although he acknowledges that they all have access to various forums in which they can invoke their rights. Instead of giving the ultimate answer as to their personality, he concludes that "it is really a matter of taste," whether or not we should say that they are in some general sense "persons", or "objects" or "beneficiaries" of certain duties imposed on States. International criminal responsibility of individuals thus remains unexamined in the book, and international criminal courts are only briefly mentioned in the Part "Inside the State", which deals with state jurisdiction and the duty of states to extradite the accused.

In the Part "States" the author first presents the common criteria for statehood, and then dedicates a substantial part of this chapter to the recognition of a State. The reader will be again thankful for the approach of the book not to present legal institutions as detached from politics and social developments in general, but in their connection and interdependence. Thus, the author presents recognition of states as a legal as well as political instrument, and uses numerous examples in order to show how it has been used in the past, what effects it has had, and what role it has played at those occasions. He also dedicates a whole chapter to the examination of the role that national courts play in recognition of states. Yet, merely a sole paragraph is dedicated to the recognition of governments. The author apparently attaches a minor importance to this topic, arguing that even with an unrecognised regime there may be a wide range of unofficial dealings.

The Part "The Global Economy" is dedicated to international economic law. The author included it in the book in order to illustrate from what economic and social order contemporary international law has developed, how it has been used to maintain that order, and how it has been in turn also changing that order and promoting its further development. The historical overview is used to demonstrate how global economic stability has been pursued through multilateral treaties and a range of international organisations up-to-date, and how an initial power-based international economic relation have increasingly become rule-based. With impressive ease and in a simple language the author explains complex macro-economic conditions and the functioning of the international monetary and trading systems. With no reservations or hesitations he also assesses certain trade arrangements as "startlingly hypocritical" and addresses in the concluding chapter the concerns of those striving for fair trade and economic justice.

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In the Part "Global Environment" the author reflects on political, economic and scientific considerations that have influenced the development of international environmental law, as well as legal controversies that have delayed this process. In particular he points out how a specific reasoning had to be developed in order to introduce in international law the notions such as "shared resources" or "international liability", which did not fit into traditional concepts of property, right and duty. Further advancements of international environmental law, initiated by the Stockholm and Rio Declarations, are discussed in length, especially the techniques that these legal instruments employ to achieve their aims. The author, however, underlines that the environmental issues should not be studied in isolation but in connection with the issues of trade and development, since actions in those other fields are of immense importance in the pursuit of environmental goals.

The closing part of the book is dedicated to "The Use of Force". Here the author presents all the most important legal norms governing this field of international law. The discussions go again well beyond the lapidary prose common to other legal textbooks and deal also with moral and political considerations related to the use of force. The first chapter is thus intended to address the controversial idea to lend killing and destruction of property "the colour of legitimacy by accommodating them within the law". The author argues that a distinction should be drawn between *jus ad bellum*, which regulates the right to resort to war, and *jus in bello*, which governs the means and manner of fighting and the legal issues pertaining to neutrality of a State. As the argument goes, it is *jus ad bellum* that addresses the question when it is permissible to go to war and to use force, so this is where we should look also for its moral justification. In the following chapters the author then elaborates on the legal justifications to use force. To the conventional two legal justifications, the authorisation of the UN Security Council and the right to self-defence, the author adds also humanitarian intervention, by stating expressly that it falls outside the scope of the UN Charter.

Some readers would perhaps prefer an argument longer than one sentence with regard to the acceptance of yet another exception to the general prohibition to use force. It therefore remains unclear who is ultimately to assess whether the intervention is indeed "humanitarian," or whether the force used amounts to aggression and thereby to a breach of *jus cogens*. Exceptions are to be interpreted narrowly, and it is indeed hard to fit all the aspirations of states to use force in a legitimate way in those two provided by the UN Charter – as it is obvious from the author's discussion on the right to self-defence and the US doctrine of pre-emption. It is also true that the limits of the Security Council's decision-making with regard to authorisation of the use of force may sometimes lead one to frustration. But it is also true that further possible exceptions were already needed in the past, and sometimes also found within the system of the United Nations – like for example in 1950, when the Security Council was unable to discharge its mandate during the Cold War due to paralysis of the decision making process; at that time the General Assembly assumed some of the powers falling primarily to the Security Council and adopted the "Uniting for Peace" Resolution, pursuant to which it established a

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temporary UN presence in Korea. After all, if the United Nations were founded for a reason, it was precisely to grant the sole source of legitimacy to the use of force to the UN Charter.

Overall, the book focuses primarily on states and their competencies on international level. Non-state actors are hardly dealt with, and even international organisations are presented rather as extensions of their member states' powers. Although the author himself refuses to understand international law as inter-state law, he, on the other hand, also denies that the activities of non-state actors would form part of international law. Hence, in his "Postscript" he leaves non-state actors to be studied by the neighbouring legal subjects, or indeed by other disciplines. It may be questioned how much such an understanding of international law contributes to the author's method of reaching out for non-legal arguments in order to explain the phenomenon of international law.

However, it is precisely this approach that makes the book so exceptional in comparison to other legal textbooks on international law, and so revealing, inspiring and informative for lawyers and non-lawyers alike. And although the format of the book does not always allow for more elaborate and detailed reasoning and thus requires short and concise explanations, it is precisely this careful selection of the most important information that makes the book the best introduction to international law on the market, at least in English.

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Tudor, Ioana: The Fair and Equitable Treatment Standard in the International Law of Foreign Investment. Oxford Monographs in International Law. Oxford: Oxford University Press (2008). ISBN 978099235063. xxvii, 315 S. £ 60.-

Der Herausgeber der Schriftenreihe kündigt einen Beitrag zum "*re-balancing of the investor-State-relationship*" an (S. v). Angesichts solcher Ankündigung ist die Zielsetzung dann eher bescheiden: Die zunächst erarbeiteten "*legal characteristics*" von FET (*fair and equitable treatment standard*) sollen eingesetzt werden, um "*new methods and ideas for its application*" (S. xiii) bzw. "*layers of novel methodes and structures*" (S. 6) vorzuschlagen.

Den drei unterschiedlich umfangreichen Teilen des Werkes geht eine Einleitung voraus, die den historischen Hintergrund des Standards als "*long, but accelerated story*" skizziert und hervorhebt, FET unterscheide von Inländer- und Meistbegünstigungsbehandlung der "*non-contingent character*" (S. 2, 33). Erst seit Ende der 90er Jahre sei es zu einer wahren Flut von Fällen vor allem vor dem ICSID (International Center for the Settlement of Investment Disputes) gekommen, wobei sich FET als "*a unilateral obligation of the home State*" erwiesen habe "*requiring no specific duties from the investors*" (S. 3 f.).

Teil I ("*sources of the FET standard*") beginnt – wie die beiden anderen – mit einer kurzen "*introductory note*", wobei hier die relevanten Völkerrechtsquellen identifiziert werden. Das erste Kapitel befasst sich mit dem Standard in "*international investment agreements*" und entwirft eine "*typology of drafting formulations*". Um zu zeigen, dass die Vielfalt von FET-Klauseln nicht zufällig ist, unter-

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nimmt Tudor eine empirische Analyse des völkervertraglichen Rahmens auf bilateraler, regionaler und international-globaler Ebene. Der Text wird dabei durch insgesamt vier Anhänge mit näheren Details zu einzelnen Regelungen abgerundet. Bemerkenswerterweise werden bei den insgesamt 365 behandelten (S. 233) die von Deutschland geschlossenen Investitionsförderungs- und –schutzverträge nicht systematisch, sondern nur punktuell einbezogen, obwohl Tudor sieht, dass die Bundesrepublik die ersten modernen und meisten solcher Abkommen geschlossen hat. Auf der regionalen Ebene werden zwar die älteren AKP (S. 37, 40) -Abkommen der EG angesprochen, die Entwicklung seit Cotonou 2000 jedoch nicht mehr erwähnt. Globale Klauseln werden über eine Zeitspanne von 50 Jahren, von der Havanna Charta bis zur WTO beleuchtet; berücksichtigt werden hier auch Entwürfe und Empfehlungen (vor allem der OECD). Tudor kommt zu dem Ergebnis, es gebe fünf "*main draft variations of the FET obligation*" (S. 50). Letztlich könne sogar zwischen sieben verschiedenen Versionen unterschieden werden, denen sich Tudor dann in den folgenden Kapiteln (2, 5 und 6) näher zuwendet.

Das zweite Kapitel ordnet den "*FET standard*" genauer als "*part of the body of general international law*" ein. Hierbei geht es Tudor weniger um die Zuordnung zum Völkergewohnheitsrecht bzw. zu allgemeinen Rechtsprinzipien als um das Verhältnis zum internationalen Mindeststandard (IMS). Sie greift den "klassischen Ansatz" an, indem sie beide trennt. Auf einem "*minimum level of treatment*" könne die gewohnheitsrechtliche FET-Klausel lauten: "*Each State shall accord, at all times, to the foreign investors and their investments in its territory, fair and equitable treatment, in accordance with international law.*" (S. 84). Überdies könne der FET-Standard auch (mit gebührender Vorsicht) als allgemeines Rechtsprinzip gewertet werden: "*The situation as it stands today is that most developed and developing countries do recognize in their domestic laws that FET is to be applied to foreign investment. This is the case even though the term FET itself may not be employed as such but the content of FET, namely procedural and substantive guarantees for foreign investors, is found in national provisions.*" (S. 104)

Teil II konzentriert sich daher auf "*the content of the FET standard*". Da es sich um einen Begriff mit vielfältigen Anwendungen handle, werden zunächst seine allgemeinen Konturen nachgezeichnet. Tudor benennt objektive und subjektive Elemente und unterstreicht die wichtige Rolle des Richters bei der Anwendung von Standards (S. 121 f.). Speziell im Investitionsrecht seien heute "*fairness*" oder "*equitableness*" kaum mehr direkt relevant (S. 129). (Schieds-)Richtern werden die beiden subjektiven Aspekte des FET-Standards anempfohlen, sein "*evolutionary character*" (S. 130 f.), sowie die gebotene Berücksichtigung der "*general situation of the State*"(S. 132). Daraus ergeben sich vier Implikationen: "*(T)he wording of the FET clause is essential because it constitutes the starting point for the arbitrator. (T)he arbitrator is in practice controlled in his discretion by th(e) objective element. (T)he standard … is an evolutionary notion*", und schließlich: "*(G)iven the flexibility of the notion and the ways in which it is adapted and applied to a case, the FET has no stable or fixed content" (S. 132 f.*). Als Grundlage für die Analyse des Fall-

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rechts widmet sich Kapitel 4 dann "*preparation phases for a successful FET based claim*".

Hierfür seien vier Voraussetzungen nötig: "*action attributable to the State*", "*damage suffered by the Investor*", "*causality between State action and damage*" und "*burden of proof*", die allein dem Investor obliege (S. 138). Erst nach dieser Auflistung wendet sich Tudor den "*shared expectations*" (S. 139) der Parteien eines Schiedsverfahrens in Bezug auf den Inhalt des FET-Standards zu und versucht, diese so weit wie möglich aus den Schriftsätzen zu destillieren. Dem folgt der Vorschlag einer "*methodology for the arbitrators faced with a FET claim*".

Zuerst sei ein objektives Element zu analysieren (im Hinblick auf "*object and purpose*" eines Vertrags), sodann ein subjektives, bei dem sich der Schiedsrichter mit der Anwendung von FET auf die konkreten Umstände des zu entscheidenden Falles befasse (S. 144). Die Ähnlichkeit mit Art. 31 WVRK ist unverkennbar. Wichtig sei hier die Bestimmung einer Schwelle, d.h. "*the determination of the level of treatment that will breach or, on the contrary, respect the international obligation of the State*" (S. 149). Dem sollten drei Schritte vorausgehen: in Bezug auf "*the ordinary meaning of the FET clause*", "*its place in the general context of the BIT*" sowie "*the study of the facts*" (S. 153).

Eingehender mit "*actual situations in which the FET standard has been applied*" beschäftigt sich Kapitel 5. Hier werden 34 Entscheidungen – von denen 21 zugunsten des Investors ausgingen (S. 228) – näher betrachtet (ergänzt durch Schaubilder in Anhängen VII und VIII), wobei Tudor zwei Kategorien von "*factual situations*" unterscheidet. In der einen führt bereits die Verletzung einer den Staat treffenden Pflicht dazu, seine "*responsibility*" herbeizuführen ("*self-sufficient*"), während bei der anderen ("*accessories*") noch etwas hinzukommen müsse, um Einfluss auf den Verstoß gegen FET zu haben (S. 155). Freilich verzichtet sie in der Folge auf diese Zuordnung, um insgesamt neun Gruppen von Fehlverhalten zu benennen (S. 156). Als Ergebnis hält Tudor fest: "*(T)he requirements of predictability and stability are a central element of the FET obligation.*" (S. 181)

Das letzte (6.) Kapitel des zweiten Teils wendet sich dem Verhältnis von FET und anderen Vertragsbestimmungen zu. FET sei der einzige nicht kontingente Standard, weil sein Inhalt auf internationaler Ebene konstituiert werde (S. 182, 202). Er ergänze bzw. werde ergänzt durch "*full protection and security*" (S. 186) und existiere neben der Pflicht zur Nichtdiskriminierung (S. 188). Zu Meistbegünstigung finden sich zwei Verknüpfungen, beide Male zugunsten des Investors (S. 189 ff.). Die Beziehung zu *pacta sunt servanda* bzw. zu "*non-impairment clauses*" erachtet Tudor als überaus komplex und wenig eindeutig. Insoweit zieht sie eine zentrale Folgerung: "*(T)he final answer as to the content of FET, when included in a treaty, can only be given by the wording of the specific clause*" (S. 201).

"*Balancing the breach of the FET standard*" ist der Titel des III. Teils, in dem die zwei letzten Schritte eines Schiedsverfahrens behandelt werden, die Berechnung der Entschädigung und die Durchsetzung des Schiedsspruchs. Beide seien nicht nur prozeduraler, sondern auch materieller Art (S. 205). Während aber der "*calculation of compensation*" durch ein Abwägen von staatlichem und Investor-

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Verhalten ein eigenes Kapitel (7.) gewidmet wird, wird "*enforcement of FET standard*" nur auf 4 Seiten behandelt. Tudor beschränkt sich in Kapitel 7 darauf, eine einzige These zu verteidigen, dass nämlich "*elements that may excuse, justify, or that may have contributed to the behavior of the State may be taken into account only in the last*" – "*phase of the proceedings, namely the calculation of compensation*" (S. 206) – und nicht, wie es überwiegende Auffassung sei, bereits "*at the liability stage*". Typische relevante Verhaltensweisen werden dann genauer beleuchtet. Zunächst in Bezug auf den Investor – vor allem "*corrupt practices*", "*absence of due diligence*", "*error in assessing the risk presented by the host State*" und "*breach of human rights*" (S. 222). Vor allem am Beispiel Argentiniens erläutert Tudor dann, dass Staaten "*force majeure*" oder "*state of necessity*" allenfalls in Hinblick auf Zeitpunkt und Höhe einer Entschädigung einwenden könnten. Letztlich folge die an den Investor gezahlte Summe einem Mittelweg zwischen "*reparation and compensation*" (S. 228), so dass "*far from being a cause of imbalance, FET allows investors and host State to have a relationship based on international law standards, creating a stable and predictable framework for investment*" (S. 228).

Annullierung eines Schiedsspruchs komme (nach Art. 52 ICSID-Übereinkommen) nur ausnahmsweise in Betracht (S. 230); bezüglich der normalen "*recognition and enforcement phases*" hält Tudor fest, regelmäßig werde noch über die Höhe der letztlich geleisteten Zahlung verhandelt. Bisher berücksichtigten Schiedsgerichte diese (absehbare) Reduzierung der Entschädigung bereits bei ihrem Spruch; die andere (bessere) Option sei aber, einen "*mechanism of publicity and enforcement*" zu schaffen: "*(T)hen, the amount decided by the tribunal will be the amount paid by the investor.*" (S. 232)

In einer "*conclusion*" werden wesentliche Erkenntnisse noch einmal zusammengefasst: Der FET-Standard habe "*both an apologetic and a utopian element*", seine "*built-in level of flexibility allows it to mediate between both sides*" (S. 236). Anders und klarer ausgedrückt: "*The FET is an instrument which allows arbitrators to deny relief to foreign investors seeking compensation for a loss which is not the result of the host State's behavior*" (S. 236). Ihm wohne "*an element of non-dit*" inne, was "*its paradox and its fortune*" zugleich ausmache. Die zunehmende Zahl von Rechtsstreitigkeiten führe zu einem "*process of relative harmonization*", jedoch ergebe sich aus der "Natur" von FET in Verbindung mit der Eigenart von Schiedsverfahren "*that a decentralization element will always be present and contribute to maintaining a certain freedom of interpretation*" (S. 237).

Die Studie enthält leider etliche Flüchtigkeitsfehler, bei Ortsangaben – etwa "Cologne" statt "Colonia" für das Mercosur-Investitionsabkommen, Namen – "Klöcker" mehrfach statt "Klöckner", Daten – 1960 statt 1967 für den OECD-Entwurf zum Schutz von Auslandsvermögen, Ziffern – 1101 statt 1105 (in Fn. 25 auf S. 187) oder Organisationen S. 46). Nicht glücklich sind auch Verweise nach unten auf exakte Fundstellen (z.B. S. 73 Fn. 82) und sinnentstellende Schreibfehler wie "*filled*" statt "*filed*", "*principle*" statt "*principal*", "*cope*" statt "*scope*". Auf S. 219 schließlich führt Tudor den Schiedsspruch im *Fraport*-Fall an, den sie zuvor (S. 167 Fn. 66) als noch ausstehend bezeichnete.

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Wenig überzeugend ist in der Tat die Feststellung, dass FET trotz vagen Inhalts eine Norm des Völkergewohnheitsrechts und zugleich (?) ein allgemeines Rechtsprinzip sei. Selbst wenn nicht bereits die "Flexibilität" des Konzepts dem entgegensteht, so hätte doch jedenfalls ein kleinster gemeinsamer Nenner unterschiedlicher Bedeutungen aufgezeigt werden müssen. Das Abstellen auf den jeweils konkreten Wortlaut (als Grundlage und Grenze der Auslegung) ist aber auch Tudor zufolge immer – und nur – dort wesentlich, wo es um völkervertragliche FET-Klauseln geht. Dies gilt offensichtlich auch und gerade in Schiedsverfahren, so dass zumindest kein offensichtlicher Widerspruch zu der von Tudor zu Recht hervorgehobenen Rolle des "*arbitrator*" bei der Konkretisierung von FET im Streitfall ersichtlich ist. Freilich ist es unmöglich "*to tie it*" – "*the standard of FET*" – "*to a definition*". Die Auflösung dieses Paradoxes dürfte auch für Tudor darin liegen, dass es keine allgemeine Definition gibt und nicht zuletzt hierin der Unterschied von "*standard*" und "*rule*" (S. 119 ff.) liegt.

Ludwig Gramlich, Chemnitz

Volger, Helmut (Hrsg.): Grundlagen und Strukturen der Vereinten Nationen. München/Wien: R. Oldenburg Verlag 2007. ISBN 9783486582024 XIX, 576 S. € 49,80

Der Titel des Buches lässt einen systematischen Abriss der Organisation der Vereinten Nationen erwarten. Wer danach sucht, wird enttäuscht. Die Enttäuschung muss aber nicht von Dauer sein. Denn der Band enthält eine Reihe von Einzelstudien erlesener Kenner der Materie, die nicht unbedingt Grundlagen und Strukturen der Weltorganisation betreffen, aber doch alle mit ihr in Zusammenhang stehen und in ihrer Gesamtheit einen großen Teil dessen abdecken, was wissenswert von den und über die UN ist.

Die Beiträge sind vier Kapiteln (mit wiederum zumeist nicht sehr treffenden Überschriften) zugeordnet und von durchaus unterschiedlicher Qualität. Heraus ragt der umfangreiche, detaillierte und vorzüglich belegte Aufsatz über "Die Vereinten Nationen und die Entwicklung des Völkerrechts" aus der Feder von Eckart Klein (Potsdam), der nicht nur beleuchtet, wie die UN auf die Entwicklung des allgemeinen Völkerrechts Einfluss genommen haben, sondern auch, wie sich das Verständnis der UN-Charta unter dem Einfluss der Praxis dieser Organisation entwickelt hat. Auf hohem Niveau stehen ebenfalls die komprimierten Ausführungen des Wirtschaftswissenschaftlers Klaus Hüfner (Berlin), eines renommierten Kenners der Vereinten Nationen, der über deren Finanzierung schreibt. Sehr gründlich sind weiterhin die von intimer Kenntnis zeugenden Bearbeitungen von Spezialthemen durch Josef Prantl (Oxford) und Thomas Fitschen (Auswärtiges Amt) zur Entscheidungsfindung in den Vereinten Nationen bzw. über die Einbeziehung nichtstaatlicher Organisationen in die Arbeit der UN; lesenswert ist, wie Brigitte Hamm (Institut für Entwicklung und Frieden, Duisburg) das Konzept der *Global Governance* in Beziehung zu den Vereinten Nationen und zum Völkerrecht setzt. Diese Beiträge sind selbst für jene interessant, die mit den Vereinten Nationen vertraut sind.

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Einen guten Überblick über einzelne Aufgabenbereiche der UN geben die Abhandlungen über Abrüstung (Adolf von Wagner, ehemals Auswärtiges Amt), Menschenrechtsschutz (Norman Weiß, Potsdam), Umweltschutz (Jürgen Maier, Forum Umwelt und Entwicklung) sowie über die multilaterale Entwicklungspolitik). Eine weitere Gruppe von Beiträgen ist von früheren und gegenwärtigen Mitarbeitern der UN verfasst, die – wie nicht anders zu erwarten – kenntnisreich und mit vielen Details über ihre Themen informieren, aber doch eher einem offiziellen Verlautbarungsstil verhaftet bleiben, Fakten ohne analytischen Zugriff aneinanderreihend; sie lassen jede Tätigkeit und jeden Beschluss der UN wie eine (positive) Leistung erscheinen, was mitunter zum Selbstlob der Autoren wird. In diese Rubrik gehören die Darstellungen von Markus Pallek (Rechtsabteilung des UN-Sekretariats) über die Aufgaben der Vereinten Nationen, wie sie sich aus den Zielbestimmungen des Art. 1 der UN-Charta ergeben, von Manfred Eisele (ehemals Beigeordneter Generalsekretär) über die Friedenssicherung, von Axel Wüstenhagen (ehemaliger Direktor verschiedener UN-Informationszentren) über die Öffentlichkeitsarbeit der Vereinten Nationen und von Yves Beigbeder (früher FAO und WHO, jetzt UNITAR) über Koordinierungsprobleme in den UN. Im Stil ähnlich, aber deutlich kritisch äußern sich Dieter Göthel (Beigeordneter Generalsekretär) und Karl Theodor Paschke (ehemals Untergeneralsekretär) zu Personalauswahl und -führung bzw. zur externen und internen Kontrolle der UN. Wer an Entwicklungsprozessen in den Vereinten Nationen interessiert ist, findet in diesen Beiträgen viel Anschauungsmaterial.

Wenig ertragreich ist hingegen der zweite Aufsatz von Paschke über das Verhältnis zwischen dem Mitteleinsatz und dem politischen Ertrag. Auch das Bild über die Vereinten Nationen in der öffentlichen Meinung, das der Herausgeber Helmut Volger – im Wesentlichen begrenzt auf Deutschland und die USA – zeichnet, enthält kaum Greifbares; der Autor nutzt die Gelegenheit für Kritik an der Regierungspolitik, vieles ist recht spekulativ. Die einleitenden Bemerkungen des Herausgebers zur "Diskussion über die ethischen Grundlagen der Vereinten Nationen" werden dem Thema nicht gerecht. Seine abschließende Abhandlung über die Reformbestrebungen ist hingegen sehr detailliert; sie verliert sich aber des Öfteren in Einzelheiten und ufert dadurch aus. Bedauerlich ist, dass es gerade der Herausgeber ist, der mit diesem Beitrag die einzigen nennenswerten inhaltlichen Dopplungen des Buches zu verantworten hat.

Insgesamt handelt es sich um einen Sammelband mit Stärken und Schwächen, dessen Zielgruppe nicht recht klar wird. Die Beiträge befinden sich zumeist auf dem Stand um die Jahreswende von 2005 zu 2006 mit der Folge, dass über den Menschenrechtsrat nur aus seinen ersten Anfängen berichtet wird. Wünschenswert wäre neben einem zeitnäheren Erscheinen des Buches ein Stichwortverzeichnis gewesen.

Ulrich Fastenrath, Dresden

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