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≡ The Oxford Handbook of
INTERNATIONAL LAW
IN ARMED CONFLICT

THE OXFORD HANDBOOK OF

INTERNATIONAL
LAW IN ARMED
CONFLICT

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THE OXFORD HANDBOOK OF
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In memoriam Antonio Cassese

PREFACE

.....

This *Handbook* started life as a series of 'Academy Lectures', inaugurated in 2007 by the late Antonio Cassese, and subsequently delivered by leading scholars in their fields of expertise. A number of the original lectures can still be viewed online and they add another dimension to the edited Chapters in this *Handbook*.¹ Each lecturer was forced to fit their main points into a one-hour presentation and tackle a series of questions for an informed audience. The result is that the Chapters work as self-contained essays, which can be used along with the videos, for single seminars on multiple aspects of international law in armed conflict.

We deliberately chose to emphasize international law *in* armed conflict, rather than the humanitarian law *of* armed conflict. First, we wanted to emphasize that multiple branches of international law apply in times of armed conflict. In this *Handbook* you will find, inter alia, Chapters on human rights law, refugee law, international criminal law, and environmental law. Of course each Chapter has to explore the interaction between these branches and international humanitarian law ('IHL'), but our main message is that, today, one needs to master multiple branches of law to be able to understand the international law applicable to armed conflicts (or what might now be termed the *laws of war*). Developments, particularly at the level of the International Court of Justice ('ICJ'),² and in the doctrine,³ have highlighted that, in times of armed conflict, international humanitarian law (or the law of war) is complemented by human rights law, which applies with important consequences with regard to monitoring and international adjudication. The modalities for the

¹ <<http://www.geneva-academy.ch/the-academy/events/academy-lecture-series>>.

² *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, esp §§ 178ff and Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, § 106.

³ Greenwood, writing before these pronouncements were made by the ICJ, highlighted the intersections between IHL and human rights law and concluded that each branch 'may have more to contribute to the other than has generally been recognized'. C. Greenwood, 'International Humanitarian Law (Laws of War)', in F. Kalshoven (ed), *The Centennial of the First International Peace Conference* (The Hague: Kluwer Law International, 2000), 161 at 190; see also Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 20–2; for a recent set of useful essays on this topic, see R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Elgar, 2013).

applicability of the two branches of law is complex,⁴ and contested in certain contexts, but what is clear is that there is significant resistance to assimilating human rights law within international humanitarian law or vice-versa.⁵

Secondly, the question of what parts of the laws of war should be included as part of *humanitarian* law, strictly speaking, remains the subject of debate.⁶ Furthermore, the US Departments of Defense and State prefer the expressions ‘law of war’, or ‘laws and customs of war’, and continue to use these terms rather than international humanitarian law, even when commenting on the ICRC’s *Customary International Humanitarian Law* study.⁷ One might then consider a better title the ‘Law of War’ or ‘War Law’. There are various recent books with titles that play on this rhyme,⁸ but one has to consider that a new law *Handbook* with war in the title could be seen as contributing to an emphasis on the demands of war and military necessity,⁹ rather than the desirability of protection through law.

Thirdly, the International Committee of the Red Cross, however, describe the development of hybrid instruments in the following way: ‘While IHL and IHRL [international human rights law] have historically had a separate development, recent treaties include provisions from both bodies of law. Examples are the Convention on the Rights of the Child, its Optional Protocol on the Participation of Children in Armed Conflict, and the Rome Statute of the International Criminal

⁴ See A. Clapham ‘The Complexity of the Relationship between Human Rights Law and the 1949 Geneva Conventions’, in A. Clapham, P. Gaeta, and M. Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press (forthcoming)).

⁵ Dinstein, like Greenwood, is keen to keep the branches separate. Dinstein’s explanation of the terminological significance is representative of many lawyers working on the law of armed conflict: ‘When LOIAC [the law of international armed conflict] is referred to as “International Humanitarian Law” (IHL), it is easy to assume—wrongly—that it is “a law concerning the protection of human rights in armed conflicts”. This can be a misconception. Although the expressions “human” and “humanitarian” strike a similar chord, it is essential to resist any temptation to regard them as intertwined or interchangeable. The adjective “human” in the phrase “human rights” points at the subject in whom the rights are vested: human rights are conferred on human beings as such (without the interposition of States). In contrast, the adjective “humanitarian” in the term “International Humanitarian Law” merely indicates the considerations that may have steered IHL—or LOIAC—is the law channelling conduct in international armed conflict, with a view to mitigating human suffering’ (Dinstein (n 3), 20).

⁶ Greenwood (n 3), 161; note Greenwood inverts the order in a later publication C. Greenwood, ‘The Law of War (International Humanitarian Law)’, in M. Evans (ed), *International Law* (Oxford: Oxford University Press, 2003), 789.

⁷ See, most recently, letter to the ICRC of 3 November 2006, <http://www.defenselink.mil/home/pdf/Customary_International_Humanitarian_Law.pdf>.

⁸ M. Byers, *War Law: Understanding International Law and Armed Conflict* (New York: Grove Press, 2005); I. Detter, *The Law of War* (3rd edn, London: Ashgate Press, 2013); M. Sassòli, A. Bouvier, and A. Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd edn, Geneva: ICRC, 2011); D. Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006).

⁹ For a non-legal companion, see, J. Lindley-French and Y. Boyer (eds), *Oxford Handbook of War* (Oxford: Oxford University Press, 2012).

Court.¹⁰ By referring to international law *in* armed conflict rather than international law *of* armed conflict one can openly address the relevant human rights law without being seen as assimilating human rights law as part of the law of humanitarian law. As the quote from the ICRC implies, the relevant law now includes, not only human rights and humanitarian law, but also international criminal law. Similarly, we should add that any appreciation of the legal framework in context of armed conflicts almost inevitably should include a discussion of refugee law.

These three factors represent the primary reasons for seeking to use 'law in armed conflict' as the organizing principle. In order to illustrate the delicacy of the choice of title it may be worth entering into even more explanation. This debate goes way beyond the discussions of the interaction of different branches of international law. We can open a parenthesis here and contemplate the increasing emphasis on human rights in the doctrine being developed by humanitarian field operations and the concerns that this brings for the prospect of mixing up this work with advocacy for humanitarian intervention. The commentator David Rieff has argued against such a broadening of the traditional humanitarian role as 'silent neutrals' in armed conflict situations as he sees the embrace of human rights as inevitably linked to conditionality, militarization, and humanitarian intervention. Rieff documents the convergence of humanitarians and the human rights movement over several pages.

[T]he language of rights has proven commanding. In the minds of many aid workers, the right of victims under international humanitarian law and the Universal Declaration of Human Rights to receive assistance restored their human dignity and made them more than passive recipients of the charity of others. This shift did not take place in a vacuum. Rather, in the minds of many of its most intelligent and scrupulous practitioners, the transformation of humanitarianism was part of a broader shift in the post-Cold War era towards a rights-based universalism.¹¹

Rieff's fear is of humanitarianism being co-opted by those who would support the use of force to achieve humanitarian or human rights objectives. 'For the reality is that no version of the intermingling of humanitarianism and human rights makes sense except in the context of a world order in which humanitarian military intervention, or at least its credible threat, is one standard response (it need not, however, be frequent) to a so-called humanitarian crisis.'¹²

On the other hand, Nick Stockton, formerly Executive Director of the Humanitarian Accountability Partnership based in Geneva, has argued that the 'humanitarian community has embarked upon a radical journey from being the rather selective and ad hoc conduit of charitable giving [...] towards being the champion and monitor of universal humanitarian rights and sometimes fulfiller of humanitarian claims.'¹³ His

¹⁰ International Humanitarian Law and International Human Rights Law: Similarities and differences (Advisory Service, 01/2003).

¹¹ D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (London: Vintage, 2002), 311.

¹² Rieff (n 11), 321.

¹³ 'Performance Standards and Accountability in Realising Rights: The Humanitarian Case' Nicholas Stockton, Talk given at ODI, London, 17 March 1999 at 1, <<http://www.odi.org.uk/speeches/stockton.html>> and quoted by Rieff (n 11), 294.

point is not to build the case for military intervention but rather to emphasize that in providing assistance humanitarian actors take on 'a duty of care and a duty of impartiality'.¹⁴

There is a perceived need from the humanitarian sector for extra clarity with regard to the terms: human rights law, humanitarian law, international criminal law, and refugee law. There have been several attempts to disentangle the complex web of interacting regimes but none have moved beyond historical description and some rather obvious points of interaction. This *Handbook* takes the discussion to a more sophisticated level, and addresses some of the complex questions of law that arise when one tackles the harder questions. Which human rights violations or war crimes allegations result in exclusion from the refugee regime? What human rights protections apply to someone declared an unlawful combatant? Which human rights apply in the context of armed forces acting abroad? Are armed non-state actors bound by human rights law? When is a violation of international law an international crime in armed conflict?

The Introductory Part opens with a set of challenges thrown down by the sadly missed Antonio Cassese and continues with an introduction to the Role of the International Committee of the Red Cross by Jakob Kellenberger. From their separate perspectives of the international criminal bench and the operational humanitarian organization they take us to the heart of the problem of protecting the victims of war. We will not mention all the remaining contributors by name in this preface, suffice it to say that they all combine an ability to lecture, immense experience, a critical and scholarly approach to their writing, and perhaps most memorably from our perspective as editors, infinite patience.

The Part on Sources starts with a reflection on how judges are today shaping customary international law in new and accelerated ways. Complementing this is a Chapter on treaties which takes the reader through the multiple instruments that have been adopted over the last 150 years.

The Part on Legal Regimes covers land, air, and maritime warfare as well as the law of occupation. We chose to add specific Chapters on the law applicable to peace operations and neutrality as these topics generate particular interest in Geneva and deserve greater attention in the contemporary context.

The Part on Key Concepts tackles in quite philosophical terms a number of thorny issues relating to the law of weapons, the principle of distinction, proportionality, and non-international armed conflicts. These Chapters do not pretend to provide a comprehensive outline of all the applicable law, instead they provide a springboard for discussion and reflection on the fundamental ideas operating deep down in the DNA of the laws of war.

¹⁴ 'Performance Standards and Accountability in Realising Rights' (n 13).

The Part on Key Rights emphasizes some of the themes outlined above. Rather than looking at the traditional law of targeting, we start with an essay on the right to life and the question whether those who go to war might not have to consider the lives of all those attacked from a human rights perspective. Similarly, the other Chapters in this Part dealing with torture, fair trial, the environment, cultural property, and human rights as they relate to members of the armed forces, all force the reader to see armed conflict from another angle.

The Part on Key Issues addresses topics that were not traditionally dealt with in manuals on the law of armed conflict. Aggression and self-defence are not always included due to a perceived need to keep *jus ad bellum* and *jus in bello* separate. Moreover many manuals start life as military manuals and these topics are seen as more properly the preserve of the Executive or the Legislature. But the recent inclusion of the crime of aggression in the Rome Statute of the International Criminal Court has given all leaders cause to pause for thought as the topic becomes less academic and doctrinal. The Academy lectures were delivered over the period 2008 to 2011 and issues of terrorism, unlawful combatants detained at Guantánamo, human rights, gender, and forced migration were, and sadly remain, particular preoccupations.

The last Part on Accountability presents some of the most recent developments affecting the operation of law in times of armed conflict. The Chapters on war crimes and armed groups illustrate how international law has adapted beyond a focus on states and the sole actors on the international legal stage. The obstacles to holding states themselves accountable are highlighted in the Chapter on individual claims before national courts, and the last Chapter explores some of the most pressing dilemmas in the post-conflict situation and details some of the international community's most recent initiatives.

This project was made possible due to the generosity and support of a number of institutions. First we must thank the Oak Foundation. Their generous support enabled us to mount the lecture series and develop this *Handbook*. We are extremely grateful, not only for the financial support, but also for the way in which Adrian Arena and Greg Mayne offered suggestions and help along the way. Next we should like to express our gratitude to the Graduate Institute of International and Development Studies and the Faculty of Law of the University of Geneva. All the Academy Lectures were given in one or other of these two venues and both provided generous help in arranging for filming and technical support. We should like in this context to thank particularly Jacqueline Côté, Director of Communications at the Graduate Institute, who helped ensure that we reached into the furthest crevices of International Geneva; Edgardo Amato who ensured that the technology worked perfectly; and Jean-David Curchod who expertly filmed and edited the lectures.

The Lectures, discussions, and subsequent chapters were a project of the Geneva Academy of International Humanitarian Law and Human Rights. The Academy provides post-graduate teaching, conducts academic legal research, undertakes

policy studies, and organizes training courses and expert meetings. The Academy concentrates on the branches of international law applicable in times of armed conflict. We are supported, not only by the Graduate Institute and the University (as just mentioned), but also by the Swiss Federal Department of Foreign Affairs, and this project could not have been completed without their generous involvement and support.

Finally let us acknowledge the dedication and huge effort which has gone into the organization and editing of this volume from a remarkable team which started under the leadership of Aline Baumgartner, who did so much to launch this project, organize the lectures, and coordinate the editorial process, and to whom we are extremely grateful. Claire Mahon, Scott Jerbi and Katie O'Byrne took on the editing of a number of chapters and their contribution is also gratefully acknowledged. The assistant editors, Alice Priddy and Tom Haeck, have tirelessly revised and polished the texts until they shine. We owe them a huge debt of gratitude and the volume is undoubtedly immeasurably improved thanks to their careful edits. In the very last phase we were lucky to have the guiding hand of Merel Alstein on the tiller, enthusiastic help from Molly Davies from Oxford Online, Briony Ryles and Barath Rajasekaran in the final stages of proofreading and production.

The painting reproduced on the cover of this *Handbook* is by the renowned Japanese artist Yayoi Kusama. It is entitled *Lingering Dreams* and was recently featured in the retrospectives in London and New York where we came across it. This piece, painted in 1949, remains particularly poignant in the aftermath of the atomic bombing of Japan and the devastation of the War. The catalogue explains: 'In *Lingering Dreams* Kusama deftly employs the dark crimson tone laid in the foreground to suppress the entangled withered sunflowers, which conjure up the grim realities of war. The unified tone of the foreground establishes a visual shield, guiding the viewers' attention to a faint light over the horizon, alluding to an uncharted world beyond.'¹⁵

Our intention with this *Handbook* is simply to provide a grounding for those who would like to go further with their understanding of the law applicable in armed conflict. We do not pretend to provide all the answers, rather we should like to provide the reader with some tools to tackle the challenges of venturing into this rather bleak landscape. Our hope is that future generations will not shy away from this adventure—but rather venture on—taking with them the spirit of humanity that permeates the contributions in this book.

Andrew Clapham and Paola Gaeta
Villa Moynier, Geneva August 2013

¹⁵ M. Yamamura 'Rising from Totalitarianism: Yayoi Kusama 1945–1955', in F. Morris (ed), *Yayoi Kusama* (London: Tate Publishing, 2012), 168–75 at 171.

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