Global Histories of International Law's Practice in Wartime

Hendrik Simon, Boyd van Dijk 2024-06-04T08:00:58

While we talked about the making of the 1949 Geneva Conventions in Part I of our interview with Boyd van Dijk, the second part is about more global histories of international law's practice in wartime and certain historical lessons in view of the current wars and crises.

You are currently working on a new project on Global South, non-aligned, and socialist engagements with the Geneva Conventions in wartime post-1949. Can you tell us something about this project? What role did the nexus of norms and power play here?

This new project stems from three phenomena that emerged during my research for my previous book. First, I was struck by the breathtakingly Eurocentric nature of the Conventions' making in the 1940s. However, I was equally fascinated by the extent to which socialist states like the Soviet Union actively participated in shaping these rules in the late 1940s, more so than at any other point in their history, and despite the odds clearly working against their favor. Second, while doing work on CA3's birth, I observed how both Indonesian Republicans and Vietnamese nationalists and communists engaged with these laws of war during the 1940s in formative yet distinct ways, achieving different impacts – one having major success, while the other struggled to exploit the law's instruments to support their struggle for self-determination on a global scale.

The Republicans were remarkably successful in framing the post-1945 Dutch military offensives to reoccupy Indonesia, following the failure of Japan's competing imperial project of Greater East Asia co-prosperity, as a Dutch aggressive war of colonial reconquest defined by war crimes. This prompted my interest in the question about what motivated anti-colonial movements like these to adopt rules originally designed by their imperial masters, aiming to curtail their own violence in pursuit of liberation from these same European rulers.

Third, particularly in the wake of Russia's aggression against Ukraine, it became increasingly unavoidable not to recognize the historical echoes of my work in current global discussions involving the issue of international law in wartime, including the use of force and questions of peacemaking. This inspired me to slowly transition away from examining merely the creation of law, as I did in my previous monograph, to exploring their actual practice in wartime beyond compliance alone, the core theme of my new book.

In line with these three principles, I have had the privilege of further developing this new project in first Melbourne and now Oxford, both theorizing and empirically analyzing what hints at a global history of international law's practice in wartime. My temporal scope starts with the Algerian War of Independence (1954-1962), a critical juncture in the histories of decolonization, race, and world ordering, then follows up with a series of other case studies covering different key international legal questions (e.g. the weapon of starvation, air bombing, national liberation movements, and so on) spanning various parts of the world (Nigeria, Vietnam, Southern Africa, Latin America, etc.). It culminates with a discussion of the renegotiation of these key principles during the formulation of the Additional Protocols in the 1970s through the lens of non-aligned actors, national liberation movements, socialist states, postcolonial states, international organizations, and activists.

Unlike my previous book, this one focuses far more on the practice of restraint in war, developing a new theory and narrative that presents a far more global perspective. I build on the insights of scholars in/from these regions and other experts, and I draw from archival materials from actors beyond (Western) Europe and North America, covering South Africa, Algeria, East Germany, Nigeria, Latin America, among other regions.

Can you give an example of this emergence of plural legal vocabularies in times of war?

Take, for example, one of my case studies, the Algerian War of Independence, when the *Front de Libération Nationale* (FLN) and *Gouvernement Provisoire de la République Algérienne* (GPRA) did not merely adapt existing international (legal) frameworks for anti-colonial and sovereigntist ends, as some scholars have suggested, but actively formulated their own conception of international law in asymmetrical wartime. Algerian legal experts developed their own interpretation of what restraint in anti-colonial warfare entailed – from the perspective of an occupied state fighting an asymmetrical settler colonial aggressor. While engaging with various other international legal models – from Vietnamese nationalists, through 1940s Czechoslovak international jurists in exile, to nineteenth-century Latin American freedom fighters, they eventually developed their own model, with far-reaching implications for both their own struggle, postcolonial state-making project, and that of the international order's future trajectory. Indeed, these subaltern practices of engaging with international law in their own revolutionary ways served as an inspiration for fellow Third World liberationists, also engaged in asymmetrical warfare against settler colonial occupiers, in the subsequent decades, even up to today.

The history of the laws of armed conflict has long been told as an almost teleological story of legal progress. More recently, critical objections have increasingly been formulated. Why was (or is) the progress narrative so effective for so long?

That's an interesting question. On several occasions, I have been able to present my work's findings to practitioners at international organizations, courts, and states. I have been impressed by the level of engagement with my book from many of

these practitioners, but I'm equally astonished how some, while citing my book and even sharing it with colleagues, still adhere to traditional narratives of how these international (legal) norms and practices emerge and fall, rooted in the same old IHL myths – from Dunant, through Auschwitz, to Geneva 1949.

Some of these IHL advocates, as well as numerous other practitioners working in different fields of international law, seem reluctant to acknowledge the significance or utility of alternative approaches beyond their own doctrinal or normative frameworks within particular institutional contexts. Their approaches are too entrenched; for them, there appears too much at stake in accepting any fundamental changes to their well-established discursive, historical, and legal outlooks – even at the cost of internal institutional analysis, while trying to understand certain normative changes in more historical terms. Others have perceived my book even as a fundamental attack on the discipline as a whole. This is a pity, considering that my work hopes to offer new ways of thinking about questions involving war and peace, rather than foreclosing conversations about such crucial topics.

The most interesting practitioners – and scholars, whose numbers are greater than is sometimes assumed in critical legal circles, are those striving to critically expand their discipline or institution's legal, political, and historical horizons, rather than clinging to well-established paradigms that fail to address current issues satisfyingly. Given the civilian carnage in Gaza and Sudan today, there could not be a more opportune time to start developing such new narratives and assumptions on what wartime restraint and peace has meant – and should mean, drawing from both historical and legal precedents while avoiding some of the conceptual pitfalls of the past.

In view of the recent excesses of mass violence, for example in Ukraine or the Middle East, reference is often made to the Geneva Conventions and their making in 1949. Which specific myths continue to be perpetuated in the discourses surrounding current military conflicts?

As I mentioned before, I am occasionally struck by the historical narratives IHL practitioners share about their discipline, whether they are calling for greater respect for the law, or even occasionally instrumentalizing it to (un-)consciously justify certain forms of violence under the rubrics of proportionality, inflating combatant categories, or emptying civilian (object) statuses. Regardless of one's stance – be it so-called originalist, arguing that 'this is not how the drafters saw things in 1949,' or leveraging certain historical precedents to assert special legal rights over particular subjects or methods of warfare, the importance of history in legal claim-making is more than evident. States, armed groups, and even international organizations plus courts constantly seek to support their legal arguments with surprisingly crucial historical narratives.

While it is not too difficult to agree that there are various methods of using history to persuade or compel actors – whether being states, IOs, courts, or armed groups – to change or adhere to legal principles, as a trained historian, I believe it is important to consider which historical narratives are emphasized or downplayed when urging these actors to reassess their policies. If we acknowledge the significance of history,

then we must also question which historical epistemologies and narratives tend to dominate, and which ones are marginalized or silenced, and the implications of such decisions for how we see today's legally saturated battlefield.

What follows from this?

Considering that the majority of armed conflicts still occur beyond the regions where the so-called primary stakeholders of IHL are based, and that perspectives from these areas are not consistently regarded as integral to the making of state practice or customary law, I observed, along with many others, a mismatch in some parts of our conversations, particularly in International History, International Law, and Historical IR. There is an urgency to broaden the scope of these disciplines to include those experiences and ideas and readapt our overarching historical narratives. In my book, these encompass non-aligned, nationalist, socialist, and revolutionary viewpoints, but also settler colonial ones, and several others, on the twentieth-century concept of restraint in warfare.

For example, in my new project, I present actors who questioned the (impossibly strict) conditions under which armed groups were forced to operate since essentially the late nineteenth century, if not far earlier, while using guerrilla warfare tactics in asymmetrical armed conflicts. At times, they asserted even special or different types of rights, including novel imaginations of legal protection, in response to what they regarded as existential threats. At a fundamental level, these tensions were already familiar to Jewish drafters in the 1940s who had survived the Holocaust, actively questioning the principle of belligerent equality during the Conventions' remaking; as well as to Black ANC lawyers living under racial terror in Apartheid South Africa in the 1970s.

However, this question did not prevent ANC leader (and lawyer) Oliver Tambo from coming to Switzerland in 1980 to officially adhere to the Geneva Conventions, just as the Algerian lawyer Mohammed Bedjaoui had done two decades earlier, setting the precedent from what I regard as varying conceptions of Third World humanitarian law. All these different subaltern legal specialists discussed the extent to which irregulars violently resisting existential threats to their collective rights should have different rights and obligations when fighting an asymmetrical (settler) colonial occupier, and how these conceptions aligned with evolving ideas of justice (i.e. just war), humanity, and world order at a time of decolonization and non-alignment. These questions have not lost their significance in light of current debates surrounding the legality (and (im-)possibility) of armed struggle, whether in Palestine or in the Western Sahara.

Let's take a look at "lessons of history": can we learn something from the historiography of the Geneva Conventions that will help us to better understand the role of law in the current multiple crises and excesses of violence?

Recently I gave a talk regarding the Conventions' past in front of a number of representatives from NATO states – both diplomats and members of the armed forces – and international organizations as part of their celebrations of the 75th

anniversary of the Geneva Conventions. I was asked by the organizers to reflect on the lessons of Geneva's past in what I saw as an attempt to move beyond existing responses from IHL lawyers oscillating between 'IHL is the best we have' to the phrase that 'most states obey IHL for most of the time.' The same question of course echoed at previous anniversaries of the Conventions. In 2009, amidst the aftermath of the Israeli Operation Cast Lead in Gaza, those celebrating grappled with the same issue as they marked the sixtieth anniversary of these treaties.

A different way to approach the organizers' question, I felt, was to revisit the fundamental purpose of IHL. In the midst of escalating tensions among the Great Powers, with preparations for war and ongoing mass violations, do we still see a future for the humanization of warfare? After the transgressions of the First World War, Anglo-American and continental European responses shifted away from humanizing war towards building new mechanisms for preventing or ending it – from peace pacts, through the League's Covenant and collective security, to Schmitt-ian regional hegemon doctrines. In more recent times, certain observers have suggested that enduring conflicts, such as the so-called War on Terror, should force us to question the future and purposes of IHL altogether, opting for different international legal vocabularies (permanent security, partitioning, mediation, people's tribunals, trusteeship, and so on) instead, or focusing on abolishing war especially in the face of those so-called forever wars – in Ukraine, the Middle East, East Africa, and so on. Or is the discipline of the laws of war far from fatally flawed and actually capable of reinventing itself, as it did around the Algerian War of Independence and with the collapse of two massive socialist state projects – the Soviet Union and Yugoslavia – in the 1990s, culminating in what many have regarded as the 'breakthrough'-decades of both human rights and IHL?

Other questions that may arise include the moral goals of IHL. What is the moral or ethical imperative driving the advocacy for this body of law at a time where respect for international norms and institutions is widely seen to be in crisis? What role can IHL guardians such as the ICRC play in navigating this changing world order with new shocks and seemingly less space for traditional conceptions of impartiality? And how can history contribute towards rethinking our assumptions regarding the effort to protect victims of war and uphold rights in wartime – including the-all-too-often-ignored right to self-determination?

These are indeed important questions. Do you have answers to them? Do you find analogies between the current crises and the historical cases you are investigating?

In some respects, the period of the 1940s, in which the Conventions were redesigned, shares several striking parallels to our present-day reality. Just as preparations for war are currently underway in the 'Indo-Pacific region,' they were also ongoing in the late 1940s as the Conventions were being drafted, directly shaping the character and scope of these treaties. Moreover, the displacement of millions of people, as witnessed now in partitioned Sudan, draws clear parallels to the experiences of Central Europe and South Asia following their partitioning post-1945, which produced mass statelessness and a surge of concern about how to eradicate this practice forever.

In some respects, as practitioners encounter challenges similar to those faced by the drafters in 1949, it becomes all the more astonishing to observe how more successful they were compared to us. This is even more true when considering our own inability to gain Great Power support for new IHL principles, even on comparatively lesser questions such as the application of IHL to outer space, compared to the ground-breaking norms of civilian protection first established for terrestrial warfare in 1949. Unlike the previous diplomatic conference in 1929, the drafters in 1949 sought to create nothing less than a radically new legal system.

So, there is reason to celebrate the 1949 Geneva Conventions as a major milestone in the history of the international rule of law?

The creation of the Conventions is rightfully (cautiously) celebrated, but it is too often attributed solely to those forces behind the so-called liberal international order. Indeed, a common historical error is to believe that IHL was based on a liberal and humanitarian blueprint. In reality, many drafters held contrasting and evolving beliefs and were far from liberal. This insight gains even more significance in light of today's shifting world order, where liberal states are receding and illiberalism is gaining traction, and the question emerges whether these shifts represent a good or a bad thing for IHL, especially given its counter-revolutionary origins.

As a historian, I am sceptical about our ability to learn from the past, but if we can, several lessons may stand out, but I want to end with one in particular. More than seven decades later, it appears that we have broken through many of Geneva's exclusionary legacies. A record-number of states and armed groups has signed up to the Conventions. A system of ratifications now stretches across the globe. The Conventions have become a true lingua franca for armed conflict, in part because of the ICRC's crucial efforts to disseminate IHL on a global scale. They are being invoked by various actors in sometimes unexpected places – at student encampments, by the Pentagon, and among Tigrayan exiles.

However, this uplifting portrayal of Geneva's moral progress misses a crucial point. For various proponents in the Global South, whose role on the world stage is growing year by year, the Conventions are far from being universally applied. The Palestinians rightfully argue that the selectivity in adhering to the Conventions and their criminal legal provisions results in gross injustices. At a discursive level, the optics of powerful Western actors, often seen as the guardians of the so-called liberal international order, quickly intervening to aid Ukrainian children and women, while neglecting the plight of Palestinian women and children – and some now even flagrantly attacking the ICC, replicating an even older colonial repertoire of hierarchy and difference, are not just cruel, but also indicative of international law's deeper structural problems. The systemic disparities inherent in Geneva's work endure too – the belief that Europeans fully deserved the law's protection while other peoples not in the same way appears not an anomaly of 1949, but all too often appears a lasting continuity, particularly from the perspective of those living under occupation now.

How can a look at history help to overcome these shortcomings?

For the Global South – and particularly for those legal specialists representing the second and third generations of Third World humanitarian law, who follow in Bedjaoui's footsteps, today presents a crucial moment where the international legal system stands at a crossroads and must decide whether to listen to some of these warnings from history, if not the present. These force us to learn from the structural shortcomings of Geneva's drafters – not only to make war more humane but also to make it more universally and consistently applicable, possibly striving to recognize the right to peace, as non-aligned and socialist advocates of humanitarian law have almost constantly advocated for since the 1920s. My objective here is not so much to criticize the drafters for their actions, but rather to learn from their work, including their errors. Most crucially, despite tensions among the Great Powers and brutal proxy wars raging, the law's architects were able to reach consensus on several fundamental issues regarding the question of restraint in armed conflict. However, this prospect seems more distant than ever, as I noticed during what was meant to be a celebration marking the seventy-fifth anniversary of these Conventions.
