Ordering the Power to Protect and Destroy Civilian Lives

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The four 1949 Geneva Conventions – the most important rules ever formulated for regulating warfare – were shaped by liberal humanitarianism and the idea of progress through international law. In his book Preparing for War *(OUP 2022), Boyd van Dijk counters this classic narrative: he refers to multiple identities, ideas, and (legal) visions shaping the 1949 negotiations. A conversation about (legal) politics of humanizing war, multiple identities, and discursive black holes.*

Dear Boyd, in 1949, in the wake of the atrocities of the Second World War and the Holocaust, delegates from all over the world gathered in Geneva to revise existing rules of armed conflict and establish new ones. As you argue in *Preparing for War*, the delegates were indeed concerned with the humanization of violence and the protection of civilians – but at the same time, this limitation of violence also included the legitimization of their states' own violence to destroy civilian lives. How does that fit together?

We are familiar with the paradoxical role of the state in humanizing warfare, acting as both its most powerful guarantor and its largest threat. The puzzle I grappled with was similarly twofold: explaining the emergence of crucial new international legal principles for empowering civilian protection during occupation and improved POW (Prisoners of War) protection in response to Axis atrocities (e.g. summary executions); and understanding the first post-1945 binding international law applying to conflicts within states and empires for humanitarian reasons. However, this very same legal regime proved unwilling to stigmatize, let alone criminalize, similar practices of indiscriminate warfare, such as area bombing and starvation blockade. Nor did the drafters question the colonial state's sovereign discretion to decide if any of these principles indeed applied to what imperial observers called 'lower level insurgencies,' like the ones which broke out after 1945 in Indonesia and Palestine. In my view, this puzzle raised fundamental questions about existing theories and explanations of how norms and institutions like the 1949 Geneva Conventions emerge.

Among other things, the puzzle challenges dominant views among both scholars and practitioners regarding the origins of our contemporary legal regime for regulating warfare. These observers typically view it either as a product of lessons learned following a major war (in this case: WWII and genocide), or as a reflection of a longer liberal humanitarian tradition dating back to IHL's nineteenth-century birth myth of Henry Dunant's visit to the 1859 Battle of Solferino.

As I tried to solve parts of this puzzle, I was initially struck by the conspicuous absence of any extensive discussion surrounding some of the most iconic features of the Holocaust, whether being Sobibor, gas chambers, or the genocide of European Jewry as such, within the drafting debates. This astonishing discursive black hole posed fundamental challenges, I felt, to existing epistemologies and methodologies, as well as current explanations regarding the emergence of civilian protection as a key concern within international law in 1949. Simultaneously, at an individual level and as a transformative experience, the mechanisms of racial discrimination, state destruction, denaturalization, and statelessness profoundly shaped notions of occupation, the inviolability of individual rights' during wartime, and the obligations of occupying states post-fascism.

This 'discursive black hole' is indeed astonishing. How do you explain it?

French-Jewish drafters like Andrée Jacob, a female resistance fighter advocating for the rights of deportees, and Georges Cahen-Salvador, a close associate of René Cassin (a founding member of the Universal Declaration of Human Rights) at the Conseil d'État, were profoundly shaped by these experiences of genocidal occupation. However, their collective identity as representatives of the post-war French (and Gaullist) state, formally under occupation and resisting against alien and racist occupation, rather than as individual Jewish survivors of genocide, ultimately prevailed on many key issues.

I show in my book that France's self-perception and drafting debate identity as a victimized and occupied state, rather than as a current occupier in North Africa and a potential occupier in the future who aspired for Great Power status, enduring years of Nazi occupation marked by, among other atrocities, collective penalties and the summary executions of French resistance fighters, played a crucial role. This prioritization of specific identity formations over others initially pushed De Gaulle's Provisional Government and subsequent ones to advocate for the law's revision on behalf of resistance fighters and civilian rights, seeking a radical reinterpretation of pre-1940 laws of war safeguarding those rights amidst interstate occupation in particular.

This self-identification becomes even more striking when we compare it to pre-1940 French attitudes towards similar but interwar proposals for a binding treaty for civilians in belligerent and occupied territory. Despite their experiences of German occupation during World War I, French government officials resisted in the 1920s this notion of protecting enemy civilians through a binding Convention. Part of their resistance originated in their role as occupiers of German (and Mandated) lands following Versailles and their identification as a (future) occupier and Great Power first – rather than identifying as a victimized state subjected to aggression and revitalized through a mythicized idea of collective resistance, as was the case after 1944.

While this may seem to support existing theories of emerging global principles suggesting that existing norms are often revised in peacetime to incorporate lessons from past wars and their atrocities, thereby implying a retrospective, backward-looking perspective on international ordering processes, this notion fails to capture

the law's making in the 1940s, let alone the crucial role French drafters played in its formation. Indeed, it fails to fully address the implications of civil wars and colonial violence that took place post-1945, including those in France's colonies such as Algeria, Madagascar, and Indochina, where brutal violence was immediately used after Hitler's downfall to uphold racial domination. While French drafters engaged in debates about securing civilian rights in Geneva – as well as in Paris, New York, and San Francisco, they were simultaneously representing a state involved in destroying them in the colonies.

So, what was the ultimate goal of the French drafters?

In the book I suggest that their ultimate objective was to maintain racial hierarchy and domination – that is, to limit the powers of potential European occupiers of metropolitan France, whether a revived Germany or the Soviet Union, while perpetuating the French colonial state's sovereign discretion to uphold its imperial project's so-called promise of emancipatory rights through the proclaimed civilizing mission. I think this tension, which was immediately called out by Soviet drafters, hints at some of the deeper structural hierarchies existing within the international system during the 1940s. It also forces us to think about the extent to which these have been fully dismantled since then – and if not, what that tells us about the so-called liberal international order today.

Your reference to the simultaneity of multiple individual and collective identities that played a role in the negotiations suggests that your work is characterized by constructivist theory?

I have been lucky that my book has been read by not only practitioners, international lawyers, theorists, and some historians, but also by my colleagues in IR. As I have previously mentioned, if you want to understand why the Conventions (or international institutions and norms more generally) emerged in the way they did, it is absolutely crucial to better understand the significance and constructions of identity formations, norms contestation, and world ordering. Indeed, I heavily draw upon constructivist approaches to IR and recent trends in Historical IR, finding inspiration in the influential works of scholars such as Giovanni Mantilla, Helen Kinsella, Oumar Ba, Patricia Owens, Claire Vergerio, and many others.

At the same time, the idea of historicizing the Conventions' making has its origins not just in broader debates among IR scholars, but also in my own personal experience – as a former graduate student at the EUI and Columbia University, under the influence of the IR scholar Tanisha Fazal, intellectual historian Dirk Moses, and legal historian Samuel Moyn. Following the aftermath of 9/11, Moyn and Fazal each offered classes at Columbia on the laws of war and human rights, directly shaping my thinking on the question – and eventually my own future personal trajectory too. Fazal's seminar, in particular, sparked the idea of writing a dissertation on the laws of war, as she is an expert of related questions, from lawmaking processes to identity formation and IHL. Her work introduced me to the field of IHL – with all its richness and flaws. Meanwhile, Moyn's class and my former PhD supervisor Dirk Moses, both well-known for their crucial work on human rights and genocide (law) during the 1940s, further shaped my thinking in crucial ways. Their emphasis

on bringing together intellectual and international history, coupled with the insights from critical and historical approaches to international law (think of Frédéric Mégret, Emma Stone Mackinnon, Naz Modirzadeh, Surabhi Ranganathan, Jess Whyte, Umut Özsu, and various others), laid the groundwork for my research on the Conventions during my PhD.

One of the methodologies I used most in depth to uncover the impact of identity formations and ideas on the law's remaking in the 1940s was the extensive archival work I did across various continents. This enabled me to explore the drafters' own reporting regarding the ideas, interests, and world visions that helped shape their thinking with regard to the principle of using law to regulate warfare.

To be sure, each of these reports created their own respective challenges – racial biases, self-congratulatory reporting, exclusions, gaps, etc., but they also offered an interesting, and sometimes highly revealing, lens through which to study international law's remaking as an interconnected field of ethics, rights, and internationalism, touching upon questions of sovereignty, human rights, genocide, laws of war, self-determination, and empire. I tried to bring those archival insights together by integrating them with existing discussions among both theorists and empiricists – if not broader debates among legal scholars, IR scholars, and historians, and how these can help us better understand the role of the state, as well as non-state actors and international organizations, in shaping our contemporary legal compass in wartime.

Where was the greatest normative agreement between the delegates and where were the biggest discrepancies?

One of the interesting normative shifts in 1949 was the growing bipartisan support for the protection of POWs in armed conflict, despite the Cold War's outbreak just before. In hindsight, this may seem obvious, especially considering the mass killings of certain types of POWs during World War II, but it gains greater significance when we examine the perspective of a central player – the Soviet Union. The implications of this shift become even greater when we realize that its successor state today – the Russian Federation – is now holding thousands of Ukrainian POWs in its hands.

In the first place, for most of the drafting process, the Soviets failed to take part in its preliminary meetings, leading to major doubts about their participation in the final diplomatic conference in 1949. The absence of a Soviet signature under the POW Convention would have turned the entire drafting effort into a fiasco, it was feared, particularly amidst concerns of an East-West military confrontation around this time. Not to forget, the Korean War was around the corner. The Soviets fiercely disliked the International Committee of the Red Cross (ICRC), the drafting process's guardian, primarily due to its anti-communist outlook and its wartime appeasing of the fascist Italians (during their aggression against Ethiopia in the 1930s) and German national socialists (during WWII by failing to publicly denounce the crimes against Soviet POWs and Jewish civilians). But even more crucially, the Soviet Union had deliberately *not* signed up to the 1929 POW Convention (unlike the Sick and Wounded Convention of that same year) for both ideological and political reasons.

The Soviets opposed several requirements of the 1929 POW Convention, such as the one enabling external oversight by actors like the ICRC – which they viewed after 1945 as controlled by pro-capitalist forces, following Mussolini and Hitler's downfall. As a consequence, despite having developed its own interwar POW code – which was not accepted by capitalist states, the Soviet Union entered World War II without a comprehensive and reciprocal POW legal code, including binding inspection rights, unlike future enemies such as Poland, Latvia, Estonia, and Nazi Germany. As we all know, Nazi government jurists then used this lack of immediate legal reciprocity to justify their genocidal starvation of millions of Soviet POWs, among other war crimes.

One of the remarkable shifts during the Conventions' making was the unexpected appearance of a Soviet delegation in Geneva, in 1949, reversing their initial boycott of the Swiss. This shift has various underlying causes, but it was clearly linked to Stalin's concerns of an upcoming war with the West. Following the experience of genocidal war, his recognition that reciprocity on the POW question might be politically and militarily more advantageous than replicating his prior un-reciprocal experience in the gigantically destructive struggle against fascism is difficult to falsify. The ensuing normative consensus between East and West in 1949 regarding the question of POW, despite enduring Stalinist skepticisms towards the idea of granting rights to 'capitalist war criminals' after 1949, marked an important shift. To be sure, the issue remained highly contentious during the Cold War, with several socialist states expressing major reservations about the idea of granting what they perceived as excessive POW rights, as demonstrated by North Vietnam's unwillingness to grant POW rights to US ('war criminals') bomber pilots in the late 1960s. It is hard not to hear the echoes of these mixed sentiments in the recurring (but flawed) claims from post-Soviet Russia that many Ukrainian POWs are 'war criminals' who should face trial, rather than permitting international observers to consistently inspect their detention conditions, let alone making sure that such trials are held in line with global standards.

A related normative agreement between the Great Powers of the East and West was the necessity of resurrecting state sovereignty following the experience of brutal Axis warfare and state destruction. Even though Stalinist drafters pushed for a broader application of international law to wars within states and empires than colonial powers ever wished to admit, they never gave up on the state's discretionary power. Some socialist drafters were genuinely concerned about the lack of protections for their comrades during the Greek Civil War and national liberation movements fighting for the right to self-determination in the colonies. Soviet support for extending the law's protection to what came to be known as 'non-international armed conflicts' was clearly not without its problems, but it remains both historically and normatively significant; and even more so, it brought the Soviet position surprisingly close on this point to that of the ICRC, despite them being ideological archenemies.

At the same time, Stalin would never accept any international supervision of his Gulag archipelago. In essence, he agreed with his Western liberal counterparts concerning the need to protect their sovereign discretionary power to decide whether an armed conflict existed on their territory – or, for that matter, whether a civilian life could be destroyed in a non-metropolitan territory (e.g. in Ukraine, Algeria,

or Malaya), or an international criminal court had to be established (this would ultimately require first the collapse of the Soviet empire in the 1990s), bringing the positions of East and West increasingly closer. In this context, we should not forget that, as they were negotiating in Geneva, the Soviets were simultaneously fighting brutal wars of counterinsurgency against, for instance, Ukrainian nationalists. These overlapping interests and visions among several different imperial powers made bipartisan normative agreement on Common Article 3 (CA3) increasingly feasible.

When reading that, one might think, to put it pointedly, that legal progress – or its absence – was ultimately nothing more than an expression of imperialist *realpolitik*. In your book, you describe the nexus between power and law to be more complicated. In what way?

The point here is not to cynically reduce the law's formation to exclusively the overlapping interests among the Great Powers. Rather, it is to underscore the limitations and opportunities that arose from expanding legal imaginations post-1945 – especially for smaller powers, a sensitivity I carry as an offspring born in one of them. While we can easily acknowledge that international law during this era facilitated a broader reconstruction of European sovereignty and empire – see the restraints it placed on the Genocide Convention, the non-binding UDHR, and the UN Charter, creating massive frustration among the smaller powers, and especially Latin American states –, this is not the whole story. Drafters in 1949 also adopted various concepts and principles seemingly at odds with this trend of reinforcing state sovereignty post-imperial occupation. Think of the adoption of universal jurisdiction, or the convergence of human rights law, ICL, and the laws of war during this period, leading to the birth of the Grave Breaches' regime (now at the core of the ICC's founding statute) and numerous crucial prohibitions against ill-treatment of civilians, such as hostage taking.

In my view, that cross-fertilization facilitated the emergence of a fundamental recognition among many key drafters of the indivisibility of rights in wartime, potentially leading to cascading effects, although I have argued elsewhere that this required constant political struggle. However, this process fell short in extending coverage to political prisoners under the Conventions, for example, despite them having been the central legal victim category of Nazi persecution during World War II. Nevertheless, this non-category of political prisoners would later emerge as one of the ICRC's most important protection focus areas, as it sought to expand the Conventions scope to gain access to prisons across Latin America, the Middle East, and elsewhere. It is this force field of occlusion, hierarchy, in-/exclusion, and cascading effects, along with the so-called unintended consequences of lawmaking, that sits at the core of my thinking regarding international law and its remaking for regulating war and peace.
