

# What is IHL history now?

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## Abstract

*Over the last few decades, an extraordinary amount has changed in our understanding of the history of international humanitarian law (IHL). This article addresses the latest findings in this new historiography, placing contemporary IHL issues in a broader historical context and sharing the author's own experiences as a researcher exploring the discipline's practice from a historical perspective. Ultimately, he makes a passionate case for history – by showing why this discipline has a lot to offer for practitioners of international law.*

**Keywords:** Geneva Conventions, International Committee of the Red Cross, international humanitarian law, history, archives.

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## Introduction

Over the last few decades, an extraordinary amount has changed in our understanding of the history of international humanitarian law (IHL). Until the 1990s, many historical accounts took at face value the recollections and reflections of Western IHL protagonists, such as the drafters of the 1949 Geneva Conventions.<sup>1</sup> In so doing, they tended to depict the discipline's historical trajectory as gradually bending the arc of global justice in the direction of more humane warfare. More recently, however, scholars using historical approaches have challenged this narrative.<sup>2</sup> Responding to calls for new research based on archival materials, the renewed analysis of secondary sources, and more

innovative research methods, they have developed cutting-edge approaches to studying IHL history.

Recent years have seen a renaissance in IHL historiography, brought on by the emergence of a new generation of Third World and critical legal scholars, the renewed US interest in studying IHL since the events of 11 September 2001 (9/11), the “historicizing moment” in international law, as well as the opening of new archives, principally those of the International Committee of the Red Cross (ICRC) covering the period up until the mid-1970s. In addition to scrutinizing IHL’s self-indulgent historical narratives, contemporary critical legal scholars have invested much of their effort in developing new methodologies and collecting different sources through which to reimagine the past and future of IHL.<sup>3</sup> These remarkable changes have given rise to a much more subtle understanding of how the Hague and Geneva Conventions were made;<sup>4</sup> the role played by Third World actors in this process;<sup>5</sup> how ideas about punishment and humanity reshaped the discipline from the First World War onwards;<sup>6</sup> why African national liberation movements promoted ideas of self-determination through the humanization of warfare;<sup>7</sup> the extent to which the Great Powers were willing to tolerate these efforts; and how ideas of sovereignty, humanity and rights have been radically transformed since the 1990s.

After doing years of archival research exploring the history of the 1949 Conventions and discussing my findings with practitioners from across the world, I often have the feeling that the two worlds of academia and IHL practice are still not well-enough connected, leading to various misunderstandings and missed opportunities for demonstrating why IHL history matters. This article tries to overcome some of these problems by addressing the latest findings in the

- 1 One important exception is Geoffrey Best’s path-breaking book from 1980. Geoffrey Best, *Humanity in Warfare: Modern History of the International Law of Armed Conflicts*, Columbia University Press, New York, 1980.
- 2 Good examples of this new approach are Giovanni Mantilla, “The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols”, in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?*, Oxford University Press, Oxford, 2017; James Crossland, *War, Law and Humanity: The Campaign to Control Warfare, 1853–1914*, Bloomsbury Academic, London, 2018; and Anna Chotzen, “Beyond Bounds: Morocco’s Rif War and the Limits of International Law”, *Humanity*, Vol. 5, No. 1, 2014.
- 3 Frédéric Mégret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other’”, in Anne Orford (ed.), *International Law and its Others*, Cambridge University Press, Cambridge, 2006; and Jennifer Pitts, “The Critical History of International Law”, *Political Theory*, Vol. 43, No. 4, 2015.
- 4 Maartje Abbenhuis, *The Hague Conferences and International Politics, 1898–1915*, Bloomsbury Academic, London, 2018.
- 5 Amanda Alexander, “International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I”, *Melbourne Journal of International Law*, Vol. 17, No. 1, 2016.
- 6 Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950*, Oxford University Press, Oxford, 2014.
- 7 Eleanor Davey, “Decolonizing the Geneva Conventions: National Liberation and the Development of Humanitarian Law”, in A. Dirk Moses, Marco Duranti and Roland Burke (eds), *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics*, Cambridge University Press, Cambridge, 2020. See also Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self-Determination*, Princeton University Press, Princeton, NJ, 2019.

historiography of IHL, placing contemporary IHL issues in a broader historical context, sharing my own experiences as a researcher exploring the discipline's practice from a historical perspective, and showing why history has a lot to offer for practitioners.

Overcoming disciplinary boundaries and recognizing IHL's historical mechanisms have the potential to enrich contemporary discussions of a broad range of issues relating to the practice of restraint in warfare—from treaty-making and compliance, through inclusion and diversity, to even contemporary issues such as cyber-warfare. This article ranges across a broad temporal scope, extending from pre-modern debates regarding humanity in warfare to recent discussions about the Conventions' future. The first part addresses some of the larger methodological questions in IHL history, from problems relating to the archive to difficulties in historical interpretation. To situate these specific issues in relation to a broader discussion of IHL, the second section surveys the most recent findings in the discipline's history, which can inform and assist practitioners in imagining a more humane future.

## The IHL archive – and its problems

The most recent push towards a more historical understanding of IHL has been facilitated by some of the extraordinary changes in archival accessibility. Since the 1990s, a significant proportion of crucially important archival materials regarding IHL's history has become available to both academics and practitioners.<sup>8</sup>

This new body of archival materials includes a wide range of new sources: the African Union's repository, with its unique documentation of pan-African visions of humanitarian law; the Israeli National Archives, with their digitalized collection of materials relating to Zionist visions and practices of belligerent occupation; the Mayibuye Archive at the University of Western Cape, which contains the personal papers of legal actors of the African National Congress (ANC) and other anti-apartheid groups; as well as the famous ICRC Archives, featuring an impressive collection of IHL materials reflecting on the period preceding the Additional Protocols' adoption in 1977.

On the one hand, this growing collection of IHL primary sources provides historians and other researchers with plenty of opportunities to explore the discipline's past from different perspectives as a way of reinvigorating its future. They can now digitally access ICRC films and countless newspapers to write a more culturally attuned history, inspired by the Annales School, of the usages of international law in wartime,<sup>9</sup> read the memoirs of anti-colonial IHL thinkers

8 Matt Craven, "Introduction: International Law and its Histories", in Matt Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law*, Leiden, Brill Nijhoff, 2006, p. 4.

9 Nicoletta F. Gullace, "Sexual Violence and Family Honor: British Propaganda and International Law During the First World War", *The American Historical Review*, Vol. 102, No. 3, 1997.

such as the Algerian Mohammed Bedjaoui,<sup>10</sup> as well as the speeches delivered in the 1960s and 1970s by those same actors, through which they can counter the Eurocentrism of the established literature. On the other hand, each of these newly available sources raises different questions about how IHL collections have been assembled and organized, to whom they are addressed, and why certain archival materials have survived into the present whereas most others have not.

Why have IHL archivists made some sources available and kept others isolated from external researchers? What accounts for the fact that the archives of many international courts—which play a central role in creating IHL jurisprudence—are entirely closed off?<sup>11</sup> How does that shape our grasp of IHL history? To what extent have the archivists from these and other international institutions, which are often based in expensive cities, such as Geneva, The Hague and New York, tried to accommodate those researchers with scarce resources—while ensuring that the data of witnesses and survivors remain sufficiently protected? How do these limitations affect the study of IHL history? And how might massive digitalization programmes such as the League of Nations Archives Project address these structural problems in IHL’s research communities?<sup>12</sup>

Before any of these questions can be answered, it is important to realize that archives are always fragmentary, whether or not they relate to IHL. They can never provide conclusive answers to all of the questions that we might have. Let me give an example from my own experience. In researching the history of the 1949 Conventions, I visited the Swiss Federal Archives in Bern, which house the official records of the diplomatic conference(s) at which the Conventions were formulated. I hoped to find the voting records of the adoption of Article 3 common to the four Geneva Conventions (common Article 3; CA3), which today forms a vital legal bulwark in situations of “non-international armed conflict” (NIAC). The voting records, I thought, might prove useful in reconstructing the process by which this provision was drafted, and how we should understand its core principles in light of contemporary concerns.

Unfortunately, however, the Federal Archives did not have the copies of every single voting round that took place at the conference, including that which led to the adoption of CA3. The fact that powerful State drafters had deliberately prevented the outside world from knowing about the exact voting record of this provision’s adoption by pushing for a secret ballot made reconstructing this history even more difficult.<sup>13</sup> I was left with no other choice than to look

10 Mohammed Bedjaoui, *Une révolution algérienne à hauteur d’homme*, Riveneuve, Paris, 2018.

11 For a discussion of the archival politics of the International Criminal Tribunals for Rwanda, see Henry Alexander Redwood, *The Archival Politics of International Courts*, Cambridge University Press, Cambridge, 2021. See also Barrie Sander, *Doing Justice to History: Confronting the Past in International Criminal Courts*, Oxford University Press, Oxford, 2021.

12 The ICRC Assembly also adopted in 2020 a plan to make the organization’s archives more accessible through “becoming digital by design”. The ICRC Library also has an impressive digital collection of the drafting history of the Conventions and Protocols. “The Strategy for Archives, Records and Library Collections, 2019–2023”, ICRC Library, Geneva.

13 Boyd van Dijk, *Preparing for War: The Making of the Geneva Conventions*, Oxford University Press, Oxford, 2022.

elsewhere for answers about CA3's hidden drafting history. In the years before the pandemic, I had the unique privilege of being able to visit different archives across several continents. This allowed me to collect the copies of the final reports produced by influential States' delegations, including those from the United States, Australia, Canada, Great Britain and Ukraine, one of the Soviet Union's central allies at this conference.

These materials provided a unique—though highly Western or Eurocentric—perspective on IHL history. Among other things, they shared information about their government's various instructions, voting estimations, sense of the drafting process, personal anecdotes, outlines, minutes of cabinet meetings, short drafting summaries, and assessments of foreign delegation members. I could use these reports to reconstruct important parts of the drafting process, for they allowed me to recover the instructions given to influential delegations and read their versions of the unfolding process of CA3's adoption. These materials enabled me to confirm, for instance, that important States such as Canada continued resisting the adoption of CA3 until the very last stage of these negotiations, which finished in August 1949 with the article's adoption.<sup>14</sup>

Although they are extremely rich, none of these final reports provided an immediate answer to the question of how the Great Powers had voted during the process of adopting CA3. For instance, the leader of the British delegation Robert Craigie, in his report on the 1949 diplomatic conference, admitted that he had preferred a far more restrictive proposal than CA3's final text. What is more, he revealed that during the negotiations he had pushed for a secret ballot in a stealthy bid to convince hesitant allies to support him in his resistance to CA3 without having to suffer immediate public relations' damage. Given that the secret ballot was accepted, it is unclear which of the Great Powers supported CA3's final text and whether any abstained (one vote) or rejected the proposal (twelve votes) in August 1949. Indeed, the report casts doubt on whether Craigie's delegation finally voted in favour of the article.<sup>15</sup>

The example of CA3's highly contingent drafting process shows not just that archival collections are always incomplete, but also that the most important reflections of a historical event are never written down, and that IHL lawmaking is a profoundly political process.<sup>16</sup> In addition to these points, it also demonstrates that archival materials can never be entirely relied upon when analysing the history of CA3, or that of any other IHL phenomena. The State delegations' reports of the 1949 conference were intended to deceive us, featuring a great deal of self-congratulation as well as a lack of honest self-reflection about the drafters' own shortcomings. They often amplified their accomplishments and

14 *Ibid.*

15 *Ibid.*

16 Helen M. Kinsella and Giovanni Mantilla, "Contestation before Compliance: History, Politics, and Power in International Humanitarian Law", *International Studies Quarterly*, Vol. 64, No. 3, 2020, pp. 654–5.

spoke in condescending terms about their enemies, all in the interest of trying to meet their superiors' expectations of the conference.

The so-called *travaux préparatoires* are another example of an unreliable primary source for analysing IHL history in general and the making of the Conventions in particular. What is striking about these documents, which allegedly provide a direct insight into the meetings that facilitated the treaties' adoption, is their historical imprecision. Although they are often used by academics and practitioners to trace the discourses and ideas behind the formulation of the Conventions in order to get a grasp of contemporary legal phenomena, the *travaux* are often not *verbatim* records of the drafting process. In reality, they are usually mere summaries of the drafting debates and, as such, provide neither reliable information about what was actually said nor detailed insights into drafters' specific goals.<sup>17</sup>

This does not mean that the *travaux* are completely useless for analysing the manufacture of the Conventions, however tempting it might be to throw them into the dustbin of history. For example, the *travaux* can act as a useful first step into the unknown world that is IHL's drafting history. Indeed, these records reveal important facts, such as the names of the protagonists, their affiliations, dates of crucial meetings, and information about when drafters went public with their proposals. The *travaux* also help identify crucial moments at which those protagonists decided to reverse the codification's drafting direction. If we recognize the *travaux*'s limitations as a source for analysing IHL history and seek additional archival sources from places beyond Geneva, The Hague and New York, then in the future we will be able to use them far more effectively to explore the discipline's past from a wide range of perspectives.

As we seek to expand and diversify the collection of IHL primary sources at our disposal, in thinking critically about the law's practice, we should not forget to ask ourselves what has been lost in the process of organizing these inventories. For instance, why do we have such a rich understanding of the history of IHL violations but know shockingly little about its long record of compliance?<sup>18</sup> Why is there an abundance of IHL scholarship addressing the First World War and a dearth of studies analysing twentieth-century wars of decolonization?<sup>19</sup> And why do some international organizations such as the ICRC devote significant resources to making their archival collections more accessible whereas others (e.g. the International Association of Democratic Lawyers) keep them virtually unattainable?

17 Nathan A. Kurz, "'Hide a Fact Rather Than State It': The Holocaust, the 1940s Human Rights Surge, and the Cosmopolitan Imperative of International Law", *Journal of Genocide Research*, Vol. 23, No. 1, 2021.

18 Another important study reflecting on the history of IHL compliance during the First World War is Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law During the Great War*, Cornell University Press, Ithaca, NY, 2014.

19 One historian who is trying to overcome this juxtaposition is Kimberly Lowe. Kimberly Lowe, "The Red Cross and the Laws of War, 1863–1949: International Rights Activism Before Human Rights", in Jean Quataert and Lora Wildenthal (eds), *The Routledge History of Human Rights*, Routledge, New York, 2020. Another notable exception is Raphaëlle Branche, "Entre droit humanitaire et intérêts politiques : les missions algériennes du CICR", *Revue historique*, 1999.

Some of these questions can be answered by pointing towards the dramatic impact of institutional codes of confidentiality on archival materials' accessibility. In many cases, actors have reclassified or destroyed archival records that concern sensitive parts of a given institution's history. Even the ICRC archives, which are credited as being among the most accessible IHL archives, are not entirely unproblematic in this regard. Think of not just the temporal limitations of the archives reaching until the mid-1970s, but also how the papers of Jean Pictet, one of the most important ICRC legal experts in history and a former historian of the Native American Wars, remain largely classified.<sup>20</sup>

Still, State archives arguably present IHL researchers with greater difficulties. A recent example from the United Kingdom is a case in point. Several years ago, sustained legal efforts forced the British government to release a tranche of secret files once thought lost. The collection featured a great deal of sensitive materials involving the country's atrocious track record in colonial Kenya, for instance.<sup>21</sup> They revealed the structural use of Britain's violent methods, such as torture and other major violations of CA3,<sup>22</sup> to suppress the Mau Mau uprising in the 1950s, as well as how the government tried to cover this up by destroying materials and keeping the surviving documents stored in an unknown facility.<sup>23</sup>

Using these colonial archives of IHL history raises troubling questions. I know from experience how difficult it can be to access these records; why some former colonial powers are trying to make this even more troublesome; the challenges, often linguistic and resource-based, that historians face in trying to move beyond these colonial archives; and why studying the questions of race and exclusion remains of crucial importance for understanding IHL history.<sup>24</sup>

When I say that I draw from personal experience, I mean that using archival materials to write a more global history of the Geneva Conventions for the period after 1949 (as I am) is a recipe for methodological disaster – and even more so following the pandemic's outbreak. It demands that I learn new languages, engage with historiographies that are completely foreign to me, venture into new theoretical fields of study, deal with political resistance from State and non-State actors, spend extended periods of time on writing tiring grant proposals, and at times work under precarious labour conditions. But the problem that I have faced most often is that the archives of States, foreign ministries, courts and non-governmental organizations, in trying to police their most sensitive files regarding war and peace, frequently curtail researchers' access to their materials. Examples include the ICRC's decision to keep its records

20 The restrictive role of Pictet's family archives is arguably even more important in this context.

21 For a broader context of the insurgency, see Huw Bennett, *Fighting the Mau Mau, The British Army and Counter-Insurgency in the Kenya Emergency*, Cambridge University Press, Cambridge, 2012.

22 David M. Anderson, "British Abuse and Torture in Kenya's Counter-Insurgency, 1952–1960", *Small Wars and Insurgencies*, Vol. 23, No. 4–5, 2012.

23 Holly Wallis, "British Colonial Files Released Following Legal Challenge", *BBC News*, 18 April 2012, available at: <https://www.bbc.com/news/uk-17734735> (all internet references were accessed in April 2022).

24 James Thuo Gathii, "Studying Race in International Law Scholarship Using a Social Science Approach", *Chicago Journal of International Law*, Vol. 22, No. 1, 2021.

relating to the Holocaust closed until the 1990s,<sup>25</sup> as well as the disappearance of sensitive files regarding IHL violations in post-colonial archives.

This lack of institutional accessibility has serious implications for how we understand and practise IHL history today. We cannot rely exclusively on the historical perspectives captured in the *travaux* or documents that provide retrospective views of the past. Rather, we need to push for greater transparency on the part of institutions and supplement the *travaux* with other (archival) materials. International lawyers, military officers, rebel groups, humanitarians and numerous other IHL advocates left behind a vast quantity of unexplored sources in private archives or outside their institutions. Of particular value here are the personal papers of the drafters involved in the making of the Protocols and those legal advisers who shaped the character of Cold War proxy wars and wars of decolonization in the decades after 1949. From diaries to autobiographies, many of these private collections of former IHL protagonists have been loaned or given to university libraries and national archives. Some are still kept by their authors themselves, as are the personal papers of José Oscar Monteiro, a former Mozambican guerrilla and drafter of the Protocols, or members of their extended family.<sup>26</sup>

These private materials are unique in that they shed new light on well-known historical subjects, such as the process of preparing the delegations of national liberation movements for the drafting of the Protocols in the 1970s. Some of these materials can provide far more penetrating insights into the history of IHL than the *travaux*. I noticed this while I was going through the files of East German legal advisors who participated in formulating the Protocols. In the Politisches Archiv des Auswärtigen Amts, based in Berlin, I found a legal diary from an East German drafter in which he had written down a set of detailed comments about his experiences as a socialist delegate in Geneva. This personal document provided unique details relating to his perceptions and ideas, his expectations of other delegations and their actions, and so on. It also allowed me to take a look from behind the iron curtain to discover how socialist drafting parties (such as the East German State to which this document's author belonged) experienced the process of drafting the Protocols. This is crucial, for the literature in this research area still lacks such perspectives of non-liberal and/or non-Western actors.

In some ways, primary sources such as this legal diary have the potential to show “how things actually were”, to paraphrase Leopold von Ranke's famous phrase. They also reveal a more human face of a discipline of international law that is best known for its love of abstract abbreviations such as NIAC or LOAC. By showing what went on behind the scenes, these primary sources allow us to see the past differently. Exploring such sources can also help us determine the

25 Before the ICRC archives opened up, most scholars were forced to use only publicly available sources (e.g. the *Revue*, secondary sources, non-ICRC archives, etc.) in order to reconstruct the ICRC's history, or that of the Geneva Conventions. One example is Dieter Riesenberger, *Für Humanität in Krieg und Frieden. Das Internationale Rote Kreuz, 1863–1977*, Vandenhoeck & Ruprecht, Göttingen, 1992, pp. 214–18.

26 Personal papers of José Oscar Monteiro, Maputo, Mozambique.



extent to which the *travaux* reflect these insights, whether they have been corrupted or not, if their authenticity should be questioned, and so on. Addressing these questions can bring us closer to knowing which of the available tellings of IHL history is the most reliable one.<sup>27</sup>

That, at least, is the aspiration of historicist IHL. In reality, the imperatives to be “true to our sources” and recapture the “authenticity” of the historical moment in which they were born ultimately represent a dead end. Methodologically, these tasks are impossible to fulfill. Since we are unable to escape the privilege of hindsight, we cannot know what our historical actors precisely thought at the time. Nor can we claim that our sources need to “speak for themselves”: these materials always require historical interpretation. We are expected to separate relevant from irrelevant facts and cannot hide from the reality of incomplete sources that are scattered across various archives.

This means that scholars have to accept that archives can be read in various ways, that there is not one “true” way of seeing things, and that we return to particular historical episodes for all-too contemporary reasons. It also suggests that historians cannot remove their personality from their research – which is not necessarily a bad thing. Although I am sometimes frustrated by the lack of scholarly interest into the riches of IHL archives, I am the first to admit that knowledge about the past can be acquired just as much by reinterpreting old sources as by discovering new ones. Indeed, we should be careful not to create major hierarchies or boundaries between scholars excavating the archives and those focusing exclusively on existing materials, much of which was uncovered years ago.

Relying on techniques from other fields of study and lowering disciplinary bridges have always been a major strength of IHL scholarship. Over the years it has benefitted greatly from insights gleaned and knowledge produced in disciplines other than history, from anthropology,<sup>28</sup> through “third-generation international relations”,<sup>29</sup> to political geography.<sup>30</sup> These different disciplines have raised new kinds of questions about IHL’s history and offered historians plenty of hypotheses to test in refining our understanding of this topic.<sup>31</sup>

What distinguishes historians most from scholars working in other disciplines is their ability to place their subjects in the relevant contexts.<sup>32</sup> As

27 N. A. Kurz, above note 17.

28 Helen M. Kinsella, *The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian*, Cornell University Press, Ithaca, NY, 2011.

29 H. M. Kinsella and G. Mantilla, above note 16, p. 650.

30 Craig Jones, *The War Lawyers: The United States, Israel, and Juridical Warfare*, Oxford University Press, Oxford, 2020.

31 One example is Mantilla’s study of social pressuring mechanisms in the history of IHL’s making. Giovanni Mantilla, *Lawmaking Under Pressure: International Humanitarian Law and Internal Armed Conflict*, Cornell University Press, Ithaca, NY, 2020.

32 For a broader discussion of the recent method wars in international legal scholarship, see Natasha Wheatley, “Law and the Time of Angels: International Law’s Method Wars and the Affective Life of Disciplines”, *History & Theory*, Vol. 60, No. 2, 2021; Anne Orford, “On International Legal Method”, *London Review of International Law*, Vol. 1, No. 1, 2013; and Anne Orford, “International Law and the Limits of History”, in Wouter Werner, Marieke de Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi*, Cambridge University Press, Cambridge, 2017.

such, they have endowed the study of IHL with a much greater sense “of being grounded and located in time”, to paraphrase Naz Modirzadeh, and “a feeling that one ought to be cautious about becoming overly panicked about the notion that new (...) threats require new (...) approaches to international law”.<sup>33</sup> By reconnecting the discipline of IHL with the contexts and ideas that anticipated it, researchers are both better preparing practitioners and researchers for the future as well as giving them a fuller understanding of former legal practices.<sup>34</sup> They have offered us more subtle insights into why the use of particular weapons and military tactics has gradually declined whereas the use of others has persisted or re-emerged,<sup>35</sup> and why Great Powers sign up to IHL treaties despite the apparent restrictions that they place on their conduct of warfare.<sup>36</sup>

This should not induce nostalgia for some golden age of IHL. Rather, we can use historical contexts as a lens through which to recognize the facts and tendencies that can make wars less destructive and save the lives of civilians, as well as the conditions under which these mechanisms can fall apart, and why they have done so at various points in time. Instead of seeing the past as an escape from contemporary reality, we should consider it as a prelude to the present and scrutinize the dominant collective memories of this history. For instance, some present-day commentators champion the Civilian Convention of 1949 as the product of a post-war utopian liberal moment,<sup>37</sup> hoping to replicate this outcome into the post-Trumpian present while facing the challenges of cyber-warfare. However, we must never ignore the Convention’s deliberate silence on the threats of indiscriminate bombing and hunger blockade.<sup>38</sup>

If nostalgic visions eulogize IHL’s past, progressive counter-narratives of the discipline’s historical trajectory often portray it as one of gradually developing from a horrific past to a more enlightened future of humane warfare. Writers in this vein have all too often regarded IHL history as a process of learning, from which more humane conceptions of warfare continue to emerge as time goes on. Their eulogist histories have turned the foundational stories of Solferino and the Geneva Conventions into the discipline’s defining myths in an attempt to provide a veneer of legitimacy for Western (i.e. Swiss) self-images and interests.<sup>39</sup>

33 Naz K. Modirzadeh, “Cut These Words: Passion and International Law of War Scholarship”, *Harvard International Law Journal*, Vol. 61, No. 1, 2020, p. 48.

34 See Brian Drohan, *Brutality in an Age of Human Rights, Activism and Counterinsurgency at the End of the British Empire*, Cornell University Press, Ithaca, NY, 2017.

35 Nina Tannenwald, “The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use”, *International Organization*, Vol. 53, No. 3, 1999; and Richard M. Price, *The Chemical Weapons Taboo*, Cornell University Press, Ithaca, NY, 1997.

36 Giovanni Mantilla, “Forum Isolation: Social Opprobrium and the Origins of the International Law of Internal Conflict”, *International Organization*, Vol. 72, No. 2, 2018.

37 See Brad Smith, “Transcript of Keynote Address at the RSA Conference 2017: The Need for a Digital Geneva Convention”, *Microsoft On the Issues*, 14 February 2017, available at: <https://blogs.microsoft.com/on-the-issues/2017/02/14/need-digital-geneva-convention/>.

38 Boyd van Dijk, “Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions”, *American Journal of International Law*, Vol. 112, No. 4, 2018, pp. 553–6.

39 For a discussion of the debate around the question whether IHL restricts or legitimizes violence, see the classic Chris af Jochnick and Roger Normand, “The Legitimation of Violence: A Critical History of the Laws of War”, *Harvard International Law Journal*, Vol. 35, No. 1, 1994.

Historians have recently challenged these one-dimensional popular memories of IHL's past and questioned some of the foundational premises on which they rest. At the same time, they have developed new narratives in response. These new interpretations are often grounded in empirical sources, based on different theoretical assumptions, and inspired by comparative approaches to international law. Among other things, they show the extent to which sovereign concerns have shaped IHL's outlook, how readings of IHL's past have been promoted or erased for political and racialized ends,<sup>40</sup> and that it is a mistake to assume that this history was mainly guided by the forces of humanity. This scholarship shows that, in reality, advocates of the discipline have always played an important role in the formation of nation-States and their mythologizing narratives of themselves.<sup>41</sup> Indeed, the codification of humanitarian law was informed by ideas of nationality, race, religion and gender to a much more significant extent than has been often assumed in retrospect – especially in contemporary commemorative rituals of IHL.

## New histories of IHL

Recent scholarly interventions have radically altered our understanding of IHL history. Historical researchers are now writing about almost every conceivable aspect of IHL history while relying on insights and methodologies from disciplines other than history. Under the influence of Third World approaches to international law (TWAIL),<sup>42</sup> they are exploring the roles played by hierarchy and race in the development of IHL; under the tutelage of constructivist international relations theory, they are investigating the significance of moral norms and social mechanisms in this history;<sup>43</sup> through the lens of gender studies, they are transforming our understanding of IHL's attitudes towards the genders in wartime;<sup>44</sup> and under the influence of memory studies and oral history, they are fundamentally changing how the discipline visualizes its past.

Five important tendencies in this new scholarship of IHL history stand out. The first, and the most influential one in recent years, is the deconstruction and reimagination of IHL history, that is, attempts to transform its orientation radically such that the field no longer reproduces imperial domination, breaks with racialized approaches to humanizing warfare, and puts the interests of civilians and peace first.<sup>45</sup> These studies show in detail how mechanisms of

40 For a discussion of the erasure of IHL history and the Vietnam War, see N. K. Modirzadeh, above note 33.

41 Eyal Benvenisti and Doreen Lustig, "Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874", *European Journal of International Law*, Vol. 31, No. 1, 2020.

42 Antony Anghie, "TWAIL: Past and Future", *International Community Law Review*, Vol. 10, No. 4, 2008.

43 Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing*, Cambridge University Press, Cambridge, 2014; and Christian Reus-Smit, "Reading History Through Constructivist Eyes", *Millennium: Journal of International Studies*, Vol. 37, No. 2, 2008, pp. 397–8.

44 H. M. Kinsella, above note 28.

45 Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War*, Farrar, Straus and Giroux, New York, 2020; and A. Dirk Moses, *The Problems of Genocide: Permanent Security and the*

empire, race and militarism are shaping contemporary battlefield ethics at the expense of civilians, and what role power has played in the making and practice of humanitarian law.<sup>46</sup> In sharing these insights, they are forcing us to think about why IHL too often takes the side of aerial warfare instead of protecting civilians against its brutal effects, and whether it is truly willing to act as an effective deterrent in the struggle against the violence of seemingly endless wars.

Building upon this critical line of thought, the second trend in this new IHL scholarship is a greater emphasis on the role of marginalized and racialized groups on and around the battlefield – under the banner of history from below. Most IHL studies still concentrate heavily on the role of “great white men” in shaping the efforts to humanize warfare, thereby excluding countless women and other marginalized groups from canonical accounts. In seeking to correct this oversight, feminist international law has tried to recover the practices and ideas of those women who shaped the discipline’s history in remarkable ways.<sup>47</sup> Examples include women such as Marguerite Frick-Cramer, one of the first female drafters of the Conventions and the first woman to sit on the ICRC Committee; and Amrit Kaur, the Indian minister who was the first woman to chair a global Red Cross conference. Recent scholarly attempts to restore women’s agency in international law and present new micro-histories of IHL aim to make our analysis of the past more inclusive, if not transformative, than received accounts.<sup>48</sup>

In addition to giving women a greater voice in international law, feminist interventions into the field also seek to radically alter its progressivist understanding of itself, in parallel with the previous trends described here.<sup>49</sup> To this end, scholars have presented a range of different perspectives on gender and sexuality, which is reshaping the very foundations of the discipline.<sup>50</sup> For instance, they have questioned archaic views concerning women’s honour and notions of modesty that have often prevailed in IHL, as encapsulated in the Conventions’ provisions.<sup>51</sup> Indeed, archconservative agendas, including attempts

*Language of Transgression*, Cambridge University Press, Cambridge, 2021. For a broader discussion of how war entered the human rights field, see Linde Lindkvist, “When the War Came: The Child Rights Convention and the Conflation of Human Rights and the Laws of War”, in Jean Quataert and Lora Wildenthal (eds), *The Routledge History of Human Rights*, Routledge, New York, 2020.

- 46 A. Dirk Moses, “Empire, Resistance, and Security: International Law and the Transformative Occupation of Palestine”, *Humanity*, Vol. 8, No. 2, 2017.
- 47 See Immi Tallgren, *Portraits of Women in International Law: New Names and Forgotten Faces?*, Oxford University Press, Oxford, forthcoming.
- 48 Hilary Charlesworth, “The Women Question in International Law”, *Asian Journal of International Law*, Vol. 1, No. 1, 2011.
- 49 For one example, see Tuba Inal, *Looting and Rape in Wartime: Law and Change in International Relations*, University of Pennsylvania Press, Philadelphia, PA, 2013.
- 50 Important examples of this shift are: Laura Sjoberg, “Gendered Realities of the Immunity Principle: Why Gender Analysis Needs Feminism”, *International Studies Quarterly*, Vol. 50, No. 4, 2006; and Christine Chinkin, “Rape and Sexual Abuse of Women in International Law”, *European Journal of International Law*, Vol. 5, No. 3, 1994. For a critical practitioners’ account of this shift, see Helen Durham, “Women, Armed Conflict and International Law”, *International Review of the Red Cross*, No. 84, No. 847, 2002.
- 51 See also Helen M. Kinsella, “Securing the Civilian: Sex and Gender in the Laws of War”, in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance*, Cambridge University Press, Cambridge, 2004; and Karen Engle, “Judging Sex in War”, *Michigan Law Review*, Vol. 106, No. 6, 2008.

to police women's sexuality and reproductive rights, have shaped and pre-configured the foundations of these treaties, with crucial implications for how we understand these key issues today.<sup>52</sup>

The third trend shaping contemporary IHL studies is their increasing focus on contingency and rescuing lost pasts – the interruptions, disruptions and detours of history, so as to reimagine the discipline's future.<sup>53</sup> Along these lines, I have recently co-written a new history of starvation as a weapon of (in-)humane war, in collaboration with another historian.<sup>54</sup> We asked whether contemporary crimes of starvation could have been avoided or rendered less destructive if the drafters of humanitarian law had strictly outlawed this weapon when they were finalizing the Civilian Convention's text in 1949 – and during various other crucial historical junctures. What might have transpired, we wondered, if advocates of a strict prohibition in that period had been willing to push the powerful Anglo-American powers further to end inhumanity on the seas?<sup>55</sup> Would this have simply endangered the Conventions' future or might it actually have led to a legal breakthrough, stigmatizing one of the most pervasive forms of inhumanity in wartime?

Again, there are no easy answers to these questions, but it is clear that an effort to prohibit hunger blockades would have created significant controversy had it been raised in such terms at the 1949 diplomatic conference. It might well have elicited reservations on the part of resistant delegations forming the Anglo-American counter-block. Still, it is equally likely that a codified prohibition of starvation blockades would have set a useful precedent, which could be used to further erode the weapon's legitimacy in future armed conflicts. In this scenario, an emphasis on contingency alerts us to different historical possibilities, bringing together different legal alternatives in an effort to address pressing moral needs today.

At the same time, we should be careful not to overestimate the potential impact of these contingent approaches to IHL history. For example, it is hard to imagine that a prohibition of blockades in 1949 would have dramatically altered the course of the Cold War, leading combatants involved in proxy wars and wars of secession to refrain from starvation policies altogether. There is little reason to believe that States or rebel groups would have immediately relinquished this weapon if Geneva had outlawed it or that they would find no other international legal means to justify its use in war- or peacetime. In making this observation, I do not mean to claim that IHL cannot make an impact on the conduct of warfare (in-)directly or that the urgency of military necessity always means that law gets

52 See Boyd van Dijk, "Gendering the Geneva Conventions", *Human Rights Quarterly*, Vol. 44, No. 2, 2022.

53 One example of such an attempt to rescue lost pasts is Katharine Fortin, "Complementarity Between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948–1968", *International Review of the Red Cross*, Vol. 94, No. 888, 2012.

54 Nicholas Mulder and Boyd van Dijk, "Why Did Starvation Not Become the Paradigmatic War Crime in International Law?", in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories*, Oxford University Press, Oxford, 2021.

55 For descriptions of nineteenth-century blockade and privateering, see Jan Martin Lemnitzer, *Power, Law and the End of Privateering*, Palgrave Macmillan, Basingstoke, 2014.

trumped in wartime. Instead, it suggests that attempts to save lost pasts or rescue IHL contingencies from oblivion, despite yielding many fruitful insights into the discipline's past, will only ever have limited effects, for we will never know what actually would have happened had Geneva drafted differently.

The fourth trend shaping contemporary IHL studies is the increasing recognition of socialist and/or anti-colonial contributions to its historical development.<sup>56</sup> From the Peruvian international lawyer Alonso Gurmendi, the Australian scholars Eleanor Davey and Jessica Whyte, to the Indian scholar of Third World humanitarian law Srinivas Burra, researchers from across the Global South and beyond are doing groundbreaking work in reshaping the field's outlook by shedding light on how Asian, Latin American and Black actors have shaped the formation of IHL. This new scholarship, which diverges from existing work by radically challenging Eurocentric and racialized understandings of IHL, accommodates more voices and different ideas in the unfolding of international legal history.<sup>57</sup> This is all the more important because of the impact of Third World actors in reimagining the discipline's recent past.<sup>58</sup> Indeed, especially from the 1950s onwards, the Global South has played a central role in reshaping the practice and codification of IHL.<sup>59</sup>

The scholars who have participated in this strand of the literature have raised fundamental questions about IHL's canon and statues – which herald figures such as the ICRC founding member Gustave Moynier despite his involvement in Leopold II's brutal regime in Congo.<sup>60</sup> Up to now, most IHL studies have taken the perspectives that centred Western international legal action as their analytical starting points for exploring the discipline's history: the role of socialist, anti-colonial and post-colonial actors has often figured only marginally in such analyses. This needs to change. We cannot overcome the field's structural problems – from racial hierarchies, through compliance failures, to exclusion – merely by addressing their symptoms. Replacing the names of Western legal experts with others from the Global South or substituting a new canon for the old one will not resolve the field's enduring problems.

Addressing IHL's legacies of empire and racial exclusion is far from easy and requires a different way of doing history.<sup>61</sup> It demands that we identify with

56 E. Davey, above note 7, p. 381.

57 Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*, Cambridge University Press, Cambridge, 2011.

58 See also Andrew Thompson, "'Restoring Hope Where All Hope Was Lost': Nelson Mandela, the ICRC and the Protection of Political Detainees in Apartheid South Africa", *International Review of the Red Cross*, Vol. 98, No. 903, 2016, pp. 812–13.

59 See also Srinivas Burra, "Was There the Third World in Geneva in 1949?", *EJIL Talk! – Blog of the European Journal of International Law*, 26 September 2019, available at: <https://www.ejiltalk.org/was-there-the-third-world-in-geneva-in-1949/>.

60 One of the most powerful examples is: Jessica Whyte, "The 'Dangerous Concept of the Just War': Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions", *Humanity*, Vol. 9, No. 3, 2018.

61 See Fabian Klose, "The Colonial Testing Ground, The International Committee of the Red Cross and the Violent End of Empire", *Humanity*, Vol. 2, No. 1, 2011; and Will Smiley, "Lawless Wars of Empire? The International Law of War in the Philippines, 1898–1903", *Law and History Review*, Vol. 36, No. 3, 2018;

actors from beyond the metropole and learn from them, explore their ideas differently, engage with scholars and journals from the Global South, uncover the field's deeper origins, search for new materials, and read sources against the grain.<sup>62</sup> IHL historians' task is to broaden the scope of their analysis such as to encompass not just Western advocates and critics but subaltern IHL experts too—from the legal advisor of the South West Africa People's Organization Kader Asmal, through the North Vietnamese critics of the Geneva Conventions, to the Indian and Nigerian advocates of humanitarian law's provisions with regard to blockade. The latter's place needs to be much more central to narratives of humane warfare in the twentieth century.<sup>63</sup> There are many, many good reasons why the history of IHL beyond Europe and North America is worth analysing. What is more, the increasing availability of new archival materials presents a historic opportunity to reimagine this past.

This lesson is equally applicable to analyses that concentrate on reconstructing the intellectual history of IHL—and this is the fifth major trend.<sup>64</sup> This historiography often revolves around the usual Western suspects such as Grotius, Vattel, Lieber and others whose intellectual contributions to the field have been described as establishing its conceptual framework. Today, however, most scholars of international law emphasize the need to understand these doctrinal thinkers in their relevant contexts. Research in this vein has shown how their ideas were profoundly shaped by exclusionary processes such as settler colonialism and slavery, and why these elements ought not to be qualified as excusable mistakes.<sup>65</sup>

Analysing IHL intellectual history raises numerous important questions. This is hardly surprising, for IHL concepts are always products of history: whereas some lose their importance over time, others acquire a new meaning as the field is reinvigorated. But how then can we reconstruct the precise meaning of IHL terms such as “non-international armed conflict” and “international

and Petra Groen, “Colonial Warfare and Military Ethics in the Netherlands East Indies, 1816–1941”, *Journal of Genocide Research*, Vol. 14. No. 3–4, 2012.

62 One inspiring example of this type of work is Cindy Ewing, “The Colombo Powers: Creating Diplomacy in the Third World and Launching Afro-Asia at Bandung”, *Cold War History*, Vol. 19, No. 1, 2019.

63 Two good examples of this new type of analysis are Umut Özsu, “Determining New Selves: Mohammed Bedjaoui on Algeria, Western Sahara, and Post-Classical International Law”, in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South–North Perspectives on the Decolonization Era*, Oxford University Press, Oxford, 2019; and Emma Stone Mackinnon, “Contingencies of Context: Contested Legacies of the Algerian Revolution in the 1977 Additional Protocols to the Geneva Conventions”, in Ingo Venzke and Kevin Jon Heller (eds), *Contingency and the Course of International Law: On the Possibility of Different Legal Histories*, Oxford University Press, Oxford, 2021.

64 One successful example is Kerstin von Linggen, “Legal Flows: Contributions of Exiled Lawyers to the Concept of ‘Crimes Against Humanity’ During the Second World War”, *Modern Intellectual History*, Vol. 17, No. 2, 2020.

65 Pablo Kalmanovitz, *The Laws of War in International Thought*, Oxford University Press, Oxford, 2020; Lauren Benton and Richard Ross, *Legal Pluralism and Empires, 1500–1850*, New York University Press, New York, 2013; Helen Kinsella, “Francis Lieber and Native American Wars”, forthcoming; and Jennifer Pitts, *Boundaries of the International: Law and Empire*, Harvard University Press, Cambridge, MA, 2018.

humanitarian law” itself,<sup>66</sup> for that matter? How do we know which interpretation of these concepts should be considered the most accurate? How do we convey this knowledge to IHL practitioners without committing the sin of anachronism?<sup>67</sup> And what are the benefits and risks of imposing labels on formative IHL thinkers to whom they would have had little meaning?

One example is Jean Pictet’s incredibly influential Commentary project from the 1950s, which sought to provide an intellectual reconstruction of the process of drafting the Conventions. This document has had a tremendous impact on our understanding of the law’s making, for instance by trying to trace the construction of every single one of the treaties’ provisions. It is astonishing, however, how many readers of Pictet’s Commentary have been unable to fully grasp that this text should be considered as just one account, written by a team of former drafters, with their own particular objectives. As a consequence, this Commentary project—with its continuing emphasis on the law’s inclusiveness on behalf of victims of war and its heavy reliance on European legal history for tracing IHL customs—has made it far more difficult for practitioners to recognize the law’s exclusionary mechanisms. This is important, for these mechanisms continue to affect their work, despite revisions of the Protocols in the 1970s.<sup>68</sup>

Attempts to rewrite intellectual history go to the heart of IHL studies. On the one hand, this strand of analysis shows what IHL history can offer those concerned to recover untapped legal potentials in the Conventions’ past. Scholars have pointed, for instance, at the resources latent in the provisions of the Civilian Convention, from the rights it confers on so-called “unlawful combatants” to principles promoting anti-torture norms. Ultimately, these sorts of insights can help practitioners achieve more progressive legal outcomes and incorporate historical knowledge into their daily practices. On the other hand—and this points to the limitations of using IHL history to reinvigorate contemporary lawyering—why should a lawyer care if the original intention behind a provision is at odds with the more humane one that they have seen accepted in court, for instance, potentially leading to the punishment of a notorious war criminal?

If the original intention of the treaties’ drafters plays only a “subordinate role” in how we interpret them,<sup>69</sup> why then does IHL history matter?, they might wonder.

66 Amanda Alexander, “A Short History of International Humanitarian Law”, *European Journal of International Law*, Vol. 26, No. 1, 2015.

67 H. M. Kinsella and G. Mantilla, above note 16, p. 651; and A. Alexander, *ibid.*

68 See B. van Dijk, above note 13.

69 At least according to Article 32 of the 1969 Vienna Convention. See also David J. Bederman, “Foreign Office International Legal History”, *Public Law & Legal Theory Research Paper Series*, Research Paper No. 05-24, 2004, p. 6.



## Conclusion

From this perspective, it is tempting to ignore IHL history altogether. Why bother with inconvenient historical facts or insights if we can achieve a more humane future now?

Although I have struggled with this question for some time, my experience as a historian of international (humanitarian) law suggests to me that the opposition between academic legal history and the imperatives of contemporary legal practice is often false. Returning to the past is always a worthwhile process, especially given the political if not popular purchase of historical knowledge – witness the success of John Fabian Witt’s epic *Lincoln’s Code*.<sup>70</sup> Hiding from uncomfortable facts or difficult stories is never wise, whether for an international lawyer or a humanitarian in the field.

Ignoring the past will hamper lawyers’ and practitioners’ ability to develop the skills necessary for executing their work effectively, seeing what they do in a wider context, recognizing what is at stake in their own time, recovering lost institutional memory, tracing hidden legal potentials, coming to terms with the dark pages of IHL history, and producing new insights to help them generate more progressive outcomes. In my view, practising IHL entails being – at the very least – informed, acting responsibly, thinking critically about oneself, and putting contemporary practices in a broader perspective. All of these essential competencies are difficult to nurture and implement without the use of history. Every practitioner must have a sense of the past if they are to acquire necessary skills and insights for the pursuit of a more humane future.

Historians hardly enhance their popularity by debunking or questioning existing interpretations of the discipline’s past.<sup>71</sup> At the same time, this should not lead us to become complacent or respond defensively when we are confronted with criticisms. Indeed, historians have been notoriously weak at predicting future events and we need to realize that history is not always the best guide to the present. There are many ways of navigating the past, drawing creative energy from history, solving historical conundrums and charting the trajectories of IHL’s past. Studying history allows for a wide range of interpretations: these branching roads, which lead toward both IHL’s past and its future, represent diverse possibilities, which few could have imagined beforehand and many should see as a major source of inspiration for creating emancipatory outcomes.

70 John Fabian Witt, *Lincoln’s Code: The Laws of War in American History*, Free Press, New York, 2012.

71 S. Moyn, above note 45.