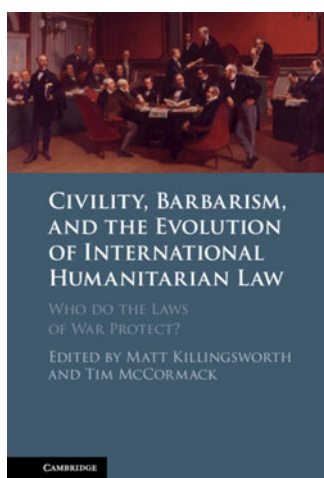


## LIBRARIAN'S PICK



# Civility, Barbarism, and the Evolution of International Humanitarian Law: Who Do the Laws of War Protect?

Edited by Matt Killingsworth and Tim McCormack\*

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As any international law textbook will explain, international humanitarian law (IHL) is designed to protect those who do not, or no longer, take part in hostilities in situations of armed conflict. How universal is this protection, in history and in application? Edited by Matt Killingsworth and Tim McCormack, *Civility, Barbarism, and the Evolution of International Humanitarian Law: Who Do the Laws of War Protect?* examines the historical exclusion of people deemed as “uncivilized” from the protection afforded by IHL and explores contemporary resonances, consequences and blind spots. The result of a cross-disciplinary workshop held at the University of Tasmania in 2016, the book gives the floor in turn to international law scholars, international relations specialists and historians. It adds to a growing body of scholarship focusing on the intersections between international law and post-colonial international relations, finding a solid intellectual foundation in Frédéric Mégrét’s conceptualization of IHL’s exclusion of the “uncivilized” as its “original sin”.<sup>1</sup>

In their introductory chapter, the book editors present a concise history of the origins and development of IHL, directly addressing the paradoxes and tensions intrinsic to the project of constraining warfare through law. They set the frame of reference for the volume by presenting three central research questions informed by recurring critiques of IHL:

- 1 Frédéric Mégrét, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Law’s ‘Other’”, in Anne Orford (ed.), *International Law and Its Others*, Cambridge University Press, Cambridge, 2006.

first, is there an historical continuity with legal protections in war being informed by notions of “civility” and “barbarity”?; second, what is the relationship between the ideals and operational realities in IHL?; and third, what are the limitations of international laws designed to restraint excess in war?<sup>2</sup>

Chapters 2 and 3 are entrusted to specialists in European legal history, who probe into the normative conflicts over restraint in warfare predating the modern IHL regime. Gavin Daly finds in siege warfare – the oldest form of total war – an important site for studying the impact of the rise of principles of “humanity” and “civility” on conduct in war. By analyzing military writings, he shows how the practice of sacking besieged cities and harming their inhabitants evolved throughout the long eighteenth century. His contribution brings to light the double-edged effect of discourses promoting morality, honour and virtue in military conduct. Rooted in Enlightenment conceptions of civilization, these discourses served to promote restraint in warfare and delegitimize violence against civilians – but they were also used to glorify the defence of besieged cities to the end, which in turn increased the likelihood that those cities would eventually be stormed and sacked. Finally, they proved most useful in distinguishing between “civilized” and “uncivilized” enemies, and in justifying unrestrained violence against the latter. In Chapter 3, Miloš Vec examines resistance to the juridification of warfare in the writings of international lawyers and military officials before the First World War. The “limits of limits”, he finds, argued in the name of State sovereignty and military necessity, were also rooted in imperialism, nationalism and, at times, violent militarism.

Richard Devetak’s rather original contribution in Chapter 4 is inspired by the recent “emotional turn” in international relations scholarship, which rehabilitates emotions as a subject of study. His analysis anchors the nineteenth-century development of IHL in the emergence of a culture of moral sentiment, sympathy, and compassion that aimed to “civilize” society, with all the baggage that the notion carries. It is an important reminder that the concept of “humanity” in war was shaped by actors convinced of their own moral, civilizational superiority – the same superiority that justified the othering of so-called “uncivilized” populations and their exclusion from the protections offered by emerging international law. Devetak finds here an inherent ambivalence in the translation of moral sentiments into rules for the conduct of hostilities in the nineteenth century, which echoes Gavin Daly’s earlier analysis of discourses on military honour and virtue in the eighteenth century.

With this framework well in place, the book then tackles the foundational texts, treaties and principles of IHL. Chapter 5 sees Tim McCormack, Siobhain Galea and Daniel Westbury contrast the humanitarian elements of early legal texts with the brutal realities of contemporaneous colonial warfare. Recalling that the Geneva Convention of 1864 was born out of Henry Dunant’s plea for better

2 *Civility, Barbarism, and the Evolution of International Humanitarian Law*, p. 5.

care of the war wounded in *A Memory of Solferino*, they caution against interpreting Dunant's humanitarian motives without considering the rest of his biography, including his colonial business ventures. Dunant – although perhaps the ICRC's other co-founder Gustave Moynier, likely the main drafter of the 1864 treaty, would have been an even more apt illustration – comes to epitomize how nineteenth-century precursors of IHL could promote humanitarian restraint in warfare while remaining fully immersed in the colonial enterprise of their time. The authors then shift their focus to the Lieber Code, the rules of conduct during hostilities for Union soldiers promulgated by President Lincoln in April 1863. They stress that the Code was never intended to be applied in wars against America's native peoples, and present a convincing explanation as to why. Lincoln's hope for eventual reunification was the primary incentive for the Code's application in the Civil War; the Native Americans, on the other hand, were to be subdued.

The discussion of colonial double standards culminates in the example of the British Army's use of dum-dum bullets against Indian fighters in the 1895 Chitral Campaign, explicitly justified by the latter's categorization as "savages".<sup>3</sup> The United Kingdom was a State party to the 1868 St Petersburg Declaration, which banned the use of expanding bullets. As stated in its preamble, the Declaration was intended to apply to hostilities between contracting parties only; it was not meant to regulate colonial warfare. And yet, the authors find in the Declaration's reference to pre-existing "laws of humanity" an acknowledgment of a customary norm underpinning the ban on expanding bullets. This exposes, they argue, a fundamental incoherence in the Declaration's scope of application. Central here is the question of precisely who was, and who was not, considered part of the "humanity" that the "laws of humanity" were meant to protect. Understood in context, this discrepancy appears less as an incoherence than as a manifestation of entrenched racial and colonial prejudices.

In its concluding section, Chapter 5 cautions the reader against regarding such exclusions and double standards as relics of the past, given the egregious violations of IHL in contemporary armed conflicts and the persistent efforts of belligerents to deny the protection of the law to their adversaries. Chapter 6, titled "The State, Civility, and International Humanitarian Law", underlines this point. It looks at how the pendulum has swung throughout history between the principle of military necessity and the principle of humanity. Analyzing discourses of American and Australian (former) combatants and politicians over the last twenty years, Matt Killingsworth argues that a "civilization standard" continues to inform decisions about restraint in warfare and is used to legitimize violations of IHL or to deny its application to this day.

3 For a thorough historical analysis of the prohibition of expanding bullets in warfare, dispelling a few myths along the way, see Maartje Abbenhuis, Branka Bogdan and Emma Wordsworth, "Humanitarian Bullets and Man-Killers: Revisiting the History of Arms Regulation in the Late Nineteenth Century", *International Review of the Red Cross*, Vol. 104, No. 920–921, 2022.

In its second half, the book shifts gears and broadens its scope. It moves away from the impact of the concepts of “civilization” and “barbarism” on the contemporary application of IHL to examine gaps in protection during armed conflict. The next four chapters each focus on a particular category of actor as a legal subject under IHL and consider challenges in how they fit into the categories of the law. Rebecca Sutton opens with a chapter on humanitarian actors who face the dilemma of using military resources or armed escorts to safeguard humanitarian space or access communities in need. She frames the issue as a tension between two central tenets of IHL: the principle of distinction between civilians and combatants on the one hand, and the principle of humanity on the other. The discussion also serves to problematize how the concept of civilian, which is defined in the negative in IHL (anyone who is not a combatant is a civilian), is invested with meaning in practice. Rebecca Shaw follows with a chapter on the status of private military and security companies under international legal and regulatory frameworks, and Rain Liivoja with a chapter on the protection of combatants through the prohibition on the use of weapons causing superfluous injury or unnecessary suffering.

Protection under IHL depends on a person’s legal status, but people caught up in war can be difficult to categorize. This is especially true, Rosemary Grey argues, of young women and girls enrolled in armed groups: are they civilians, combatants, children, victims of war crimes? In Chapter 10, she follows the trajectory of former child soldier “P-0883” (a court pseudonym), a prosecution witness in the *Ntaganda* case at the International Criminal Court (ICC). Grey praises the ICC’s decision to recognize rape and sexual slavery occurring within an armed group as war crimes as a reaffirmation of who is protected by the law, while recalling the tragic fact that P-0883 was in reality denied that protection.

War crimes prosecution remains the final theme of the book, which concludes with a chapter by Mark Kersten on the ICC’s interventions in active conflicts. The chapter departs from the book’s central questions, yet addresses who is ultimately held accountable for breaking the law and thus also touches on gaps in protection. In this respect, it serves as a fitting conclusion to a second half of the book that frequently highlights shortcomings in enforcement and accountability.

As we mark the 75th anniversary of the cornerstone treaties of modern IHL, the universally ratified 1949 Geneva Conventions, *Civility, Barbarism, and the Evolution of International Humanitarian Law* is a timely examination of how the protection they afford remains wholly dependent on good-faith application and a steadfast refusal to dehumanize or label the opponent as “other”. “Just as we judge nineteenth-century racist colonial attitudes”, the book argues, “future generations will judge contemporary attitudes, values and assumptions that facilitate exclusions from the protections of the law”.<sup>4</sup> The book provides compelling arguments for challenging such assumptions, ultimately affirming the universality of the law. It shows how interrogating the past can help us

4 *Civility, Barbarism, and the Evolution of International Humanitarian Law*, p. 107.

understand the persistent coexistence of humanitarian language appealing to rights and sentiments with the justification of extraordinary violence in warfare, sometimes under the same pen. The book is at its most prescient when it addresses the role of prejudice, at the individual or societal level, in rationalizing gaps between discourse and practice, and between law and its implementation. It invites further analysis into how means and methods of warfare are racialized and moralized, how adversaries are deemed uncivilized and dehumanized, and how, when armed conflict breaks out, we can resist the pervasive temptation to exclude the opponent from our conception of humanity. Last but not least, it reminds us that the concept of “humanity” itself should not remain unexamined and, in order to live up to its promise, should be stripped of all vestiges of a colonial past.