doi:10.1017/ajil.2018.84

Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions

*By Boyd van Dijk**

Abstract

The relationship between human rights and humanitarian law is one of the most contentious topics in the history of international law. Most scholars studying their foundations argue that these two fields of law developed separately until the 1960s. This article, by contrast, reveals a much earlier cross-fertilization between these disciplines. It shows how "human rights thinking" played a critical generative role in transforming humanitarian law, thereby creating important legacies for today's understandings of international law in armed conflict.

I. Introduction

The relationship between human rights and humanitarian law is one of the most contentious topics in the history of international law.[1] Most scholars studying the foundations of these two fields argue that each body of law developed autonomously and remained distinct until the second half of the twentieth century. For example,[2] Swiss legal expert Dietrich Schindler has argued that "[p]rior to the 1950s, the law of war and the law of human rights developed separately and were unrelated."[3] Stressing that none of the four Geneva

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[1] This article was first presented at the workshop *Political Thought and Intellectual History* at the University of Cambridge, and the seminar *Global Intellectual History* at the University of Amsterdam. Special thanks to Karin Loevy, Joshua Smeltzer, Dirk Moses, Samuel Moyn, Paul van Trigt, Brian Drohan, Karin van Leeuwen, Paul Betts, Federico Romero, Edward Cavanagh, Mira Siegelberg, Andrei Mamolea, and the four anonymous reviewers for their useful insights and feedback.

[2] For additional examples, see Arthur Robertson, *Humanitarian Law and Human Rights*, *in* Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet (Christophe Swinarski ed., 1984); Keith Suter, An International Law of Guerilla Warfare: The Global Politics of Law-Making 35 (1984); Stefan-Ludwig Hoffmann, *Introduction: Genealogies of Human Rights*, *in* Human Rights In The Twentieth Century 11–19 (Stefan-Ludwig Hoffmann ed., 2011); Samuel Moyn, The Last Utopia 220 (2010); Gerald Draper, *The Relationship Between the Human Rights Regime and the Law of Armed Conflicts*, Isr. Y.B. Hum. Rts. (1971); Constantine Antonopoulos, *The Relationship Between International Humanitarian Law and Human Rights*, Revue Hellénique De Droit International 599–634 (2010). In his excellent dissertation, Giovanni Mantilla has admitted that there existed a tenuous connection between human rights and humanitarian law in the 1940s. Still, he largely follows the orthodox view in the literature by arguing that a real overlap came about "[o]nly until decades later." Giovanni Mantilla Casas, Under (Social) Pressure: The Historical Regulation of Internal Armed Conflicts Through International Law 194 (Univ. of Minnesota Ph.D. dissertation, 2013).

[3] Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 Am. U. L. Rev. 935 (1982). Swiss jurist Robert Kolb has similarly argued that during the 1940s "[Human rights law and international

Conventions make any direct reference to human rights, many scholars argue similarly that the two fields remained fundamentally distinct until the 1950s,[4] or until 1968,[5] when the Teheran Resolution called for the application of human rights in wartime.[6]

Traditional accounts like these typically describe humanitarian law and human rights as two conceptual opposites—one applying to peacetime, the other in wartime; one dating back to the Atlantic Revolutions,[7] the other originating in Genevan humanitarianism;[8] and one focusing on the limitation of group suffering in war, the other seeking to protect individual rights against disciplinary state power, or war itself.[9] In theories of international law,[10] humanitarian law is often characterized as a product of balancing the demands of humanity and military necessity, and of utopianism and realism, in a more humanitarian direction. Central to this belief is the assumption that, unlike human rights, humanitarian law is rooted in reciprocity-thinking that works through rather than against the state. These rules for warfare are said to be based on sentiments of compassion, chivalry, and

humanitarian law] were neatly and completely separated, intellectually and in practice. Nothing illustrated this fact better than the almost complete lack of attention paid by the delegates to the contemporaneous conferences for the adoption of the Universal Declaration of Human Rights and for the Geneva Conventions of 1949 to the efforts of the other body." Robert Kolb, *Human Rights and Humanitarian Law*, Max Planck Encyclopedia Of Public International Law, para. 5, *available at* http://www.corteidh.or.cr/tablas/r17219.pdf. The influential human rights activist Aryeh Neier has said so as well: "[t]hough international humanitarian law and international human rights law [have] developed independently, in our time they have converged and are now deeply interwoven." Aryeh Neier, The International Human Rights Movement: A History 137 (2012).

[4] American jurist Richard Baxter noted as early as 1955 that several of the Civilian Convention's provisions against inhumane treatment were "basically a bill of rights for enemy civilians in time of war." However, he added, "human rights is, I realize, a dirty word these days, and I shall therefore refrain from characterizing these provisions as a human rights convention." It is partly for this reason that the connection between human rights and the Geneva Conventions has generally been overlooked since 1949. Humanizing the Laws of War. Selected Writings Of Richard Baxter 117 (Detlev F. Vagts, Theodor Meron, Stephen Schwebel & Charles Keever eds., 2014). A few contemporary legal scholars do investigate this connection. Katharine Fortin, for example, has shown skillfully the crucial overlap between human rights and the Geneva Conventions. However, as she focuses on public records rather than internal discussions, Fortin underemphasizes the ICRC's mixed track record, and suggests that the Stockholm preamble featuring human rights was created by the ICRC, instead of Cahen and Castberg, as explained later. Katharine Fortin, *Complementarity Between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948–1968*, 94 Int'l Rev. Red Cross 1433, 1445 (2012). Similarly, the ICRC historian Catherine Rey-Schyrr and Bruno Cabanes have pointed to the close connection between human rights and the Civilian Convention. However, they do not explain how, or to what extent, this connection was drawn by the drafters. Catherine Rey-Schyrr, De Yalta à Bien Phu: Histoire du Comité International de la Croix-Rouge 1945–1955 (2007); Bruno Cabanes, The Great War and the Origins of Humanitarianism 312–13 (2014). A similar approach is found in Leslie Green's study of the Civilian Convention. Leslie Green, Essays on the Modern Law of War (1999).

[5] *See* Louise Doswald-Beck & Silvain Vité, *International Humanitarian Law and Human Rights Law*, 33 Int'l Rev. Red Cross 94 (1993); Steven Jensen, The Making of International Human Rights: The 1960s, Decolonization and The Reconstruction of Global Values 206 (2016). For a history of human rights and IHL since the 1960s, see Amanda Alexander, *A Short History of International Humanitarian Law*, 26 Eur. J. Int'l L. 109 (2015). Other accounts stress general complementarity between human rights and humanitarian law in this era. One example: Ruti Teitel, Humanity's Law (2011).

[6] Int'l Conference on Human Rights, Teheran, April 22–May 13, 1968, Final Act of the International Conference on Human Rights, UN Doc. A/CONF. 32/41 (1968).

[7] Lynn Hunt, Inventing Human Rights: A History (2008).

[8] John Fabian Witt, *Two Conceptions of Suffering in War*, *in* Knowing the Suffering of Others (Austin Sarat ed., 2014).

[9] Michael Ignatieff, The Warrior's Honor: Ethnic War and the Modern Conscience 119–20 (1998).

[10] For an insightful overview of the theories of humanitarian law, see Frédéric Mégret, *Theorizing the Laws of War*, *in* The Oxford Handbook of the Theory of International Law (Anne Orford & Florian Hoffmann eds., 2016).

https://doi.org/10.1017/ajil.2018.84 Published online by Cambridge University Press

pity, not of claiming rights and accountability. This widely accepted legal dichotomy suggests two conceptually distinct genealogies, each having its own separate origins, foundations, and future.

Strikingly, the leading drafters of the 1949 Geneva Conventions had a very different view of this historical relationship. The prominent French drafter Georges Cahen-Salvador affirmed that he and other drafters had succeeded in safeguarding "human rights" in wartime.[11] Claude Pilloud, the head of the International Committee of the Red Cross's (ICRC) Legal Division, admitted that there existed "*des points communs évidents*" between the Universal Declaration of Human Rights (UDHR) and the drafts that he had co-designed for the diplomatic conference. Like other influential drafters, the leading ICRC delegate, Jean Pictet, suggested that the non-binding UDHR had remained largely theoretical, whereas its binding equivalent of "Geneva Law [was leading] the way."[12]

Equally disappointed with the UDHR's non-binding nature, British human rights lawyer Hersch Lauterpacht agreed that the binding Civilian Convention (i.e. the Fourth Geneva Convention) was the true "instrument laying down legal rights obligations as distinguished from a mere pronouncement of moral principles and ideal standards of conduct."[13] The authoritative Belgian drafter and Geneva-based professor of international law, Maurice Bourquin, also claimed that the Conventions' "objective [was] to guarantee the respect of the human person, they [were] to safeguard the essential Rights of Man and his dignity."[14] Even the skeptical UK drafter, Joyce Gutteridge, one of the few women in this highly male-dominated and Eurocentric drafting process, acknowledged a close link between human rights and the Geneva Conventions.[15]

Challenging the literature's rigid understanding of the bifurcation between human rights and humanitarian law, this article demonstrates the transformative impact of "human rights

[11] Georges Cahen-Salvador, *Les nouvelles conventions de Genève pour la protection des victimes de la guerre seront signées aujourd'hui*, LE FIGARO, Dec. 8, 1949. For his contemporary views on the UDHR as an inspirational source for the Geneva Conventions' development, see Final Record of the Diplomatic Conference of Geneva of 1949, Vol. II, Section A, at 694–96, Library of Congress (LOC), Washington, DC. On Cahen's life and his interwar attempts to protect the economic and social rights of French citizens: Alain Chatriot, *Georges Cahen-Salvador, Un réformateur social dans la haute Administration Française (1875–1963)*, 7 REVUE D'HISTOIRE DE LA PROTECTION SOCIALE 103 (2014).

[12] Cited from: Agenor Krafft, *The Present Position of the Red Cross Geneva Conventions*, 37 TRANSACTIONS GROTIUS SOCIETY 131, 146 (1951). Claude Pilloud, *La déclaration universelle des droits de l'homme et les conventions internationales protégeant les victimes de la guerre*, 31 REVUE INTERNATIONALE DE LA CROIX-ROUGE ET BULLETIN INTERNATIONAL DES SOCIÉTÉS DE LA CROIX-ROUGE 252–58 (1949). For similar views from other Francophone contemporaries, see CLAUDE DU PASQUIER, PROMENADE PHILOSOPHIQUE AUTOUR DES CONVENTIONS DE GENÈVE DE 1949 (1950); Henri Coursier, *Les éléments essentiels du respect de la personne humaine dans la convention de Genève du 12 Août 1949, relative à la protection des personnes civiles en temps de guerre*, REVUE INTERNATIONALE DE LA CROIX-ROUGE ET BULLETIN INTERNATIONAL DES SOCIÉTÉS DE LA CROIX-ROUGE 354–69 (1950).

[13] Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 362 (1952) ("[I]n fact it might be said that this [reference from the Civilian Convention], in its limited sphere, is a veritable universal declaration of human rights; unlike the Declaration adopted by the General Assembly in December 1948, it is an instrument laying down legal rights and obligations as distinguished from a mere pronouncement of moral principles and ideal standards of conduct.").

[14] *See* Maurice Bourquin, Brochure, The Geneva Convention for the Protection of Civilian Persons in Time of War, 1949, No. 3043, Code-Archief Ministerie van Buitenlandse Zaken, National Archives of the Netherlands (NA), The Hague; Maurice Bourquin, *La position de l'individu dans l'ordre juridique international*, 36 REVUE INTERNATIONALE DE LA CROIX-ROUGE ET BULLETIN INTERNATIONAL DES SOCIÉTÉS DE LA CROIX-ROUGE 880, 888–89 (1954).

[15] Joyce Gutteridge, *The Geneva Conventions of 1949*, 26 BRIT. Y.B. INT'L L. 294, 296–97, 325–26 (1949).

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thinking" on the making of the Conventions. Borrowing from the work of intellectual historians and the legal philosopher David Luban, it conceptualizes "human rights thinking" not just as a metonym for different projects promoting human dignity and limiting state sovereignty but also as a conceptual generator for viewing individuals as holders of universalistic rights in armed conflict.[16] In the sense used here, "human rights thinking" is not necessarily the inherent opposite of "humanitarianism," nor does it imply disregarding the law's deeply historical nature. The project of recovering humanitarian law's entangled foundations requires tracing the influence of evolving rights and justice notions on their historical paths, which facilitated new legal trajectories of humanity in war still relevant today.

The article examines how legal cross-fertilization destabilized conceptual oppositions within international law, revealing a much greater convergence between human rights and humanitarian law than is often assumed in retrospect. Appropriating human rights thinking and blending it with existing humanitarian frameworks as a means to challenge a preexisting exclusive legal regime that heavily privileged wartime occupiers' rights, the leading drafters of the 1949 Conventions played a crucial role in questioning a whole range of Nazi-style counterinsurgency policies. In their eyes, measures like hostage taking and collective penalties were no longer appropriate tools to enforce the laws of war and to safeguard the political order of Europe. These policies, they argued, were not just inhumane or lacking in military necessity, but also—and this represents a decisive conceptual shift—a violation of the fundamental rights and dignity of individuals.

An important cause for this shift was a much larger legal-moral alteration in focus from soldiers' rights to protecting civilians in war.[17] This was partly a result of Allied wartime declarations condemning colonial-style counterinsurgency for "civilized" Europeans,[18] which would later boomerang back at them. Indeed, once the Allies, and later their drafters, had agreed to publicly condemn Nazi hostage killings on the basis of universalistic principles,[19] they were forced to reckon with other measures of counterinsurgency as well—potentially including their own. If you condemn hostage killing, critics argued, you cannot ignore the destructive effects of collective penalties for the rights of civilians, including those living in the colonies. Once post-war plans to protect the dignity and rights of European citizens against brutality in interstate wars became bound up with similar proposals for international regulation of civil and colonial wars, imperial powers were faced with a new and totally unexpected reality.[20] While never fully realized, this agency-driven logic of "cascad[ing]

[16] David Luban, *Human Rights Thinking and the Laws of War*, *in* THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS 46–47 (Jens Ohlin ed., 2016); Milinda Banerjee, *Sovereignty as a Motor of Global Conceptual Travel: Sanskritic Equivalents of "Law" in Bengali Discursive Production*, MODERN INTELLECTUAL HIST. 1–20 (2018).

[17] *See* TANISHA FAZAL, WARS OF LAW: UNINTENDED CONSEQUENCES IN THE REGULATION OF ARMED CONFLICT (2018); William Hitchcock, *Human Rights and the Laws of War: The Geneva Conventions of 1949*, *in* HUMAN RIGHTS REVOLUTION: AN INTERNATIONAL HISTORY 96–97 (Akira Iriye, Petra Goedde & William Hitchcock eds., 2012).

[18] Dirk Moses, *Empire, Resistance, and Security: International Law and the Transformative Occupation of Palestine*, 8 HUMANITY 379 (2017).

[19] *See* Punishment for War Crimes, The Inter-Allied Declaration Signed at St. James's Palace, London, January 13, 1942; Joint Declaration by Members of the United Nations, December 10, 1942.

[20] Report Conference of Government Expert at Geneva, Introduction, 1947, No. 3795, FO369 (Foreign Office), The National Archives (TNA), Kew.

https://doi.org/10.1017/ajil.2018.84 Published online by Cambridge University Press

effects"[21] led to new calls for more universalization and less tolerance for brutality in wars, including those involving anti-colonial resistance.

This article contributes to interdisciplinary conversations about the relationship between human rights and humanitarian law in a number of ways. First, it questions traditional accounts by demonstrating how the making of the Geneva Conventions cannot be understood exclusively in terms of promoting humanitarianism, or in metaphoric terms of linearity, or teleology, like "progress" and "advancement." Second, it reveals when human rights thinking first began to infringe upon humanitarian law,[22] and why the ambiguity surrounding this relationship has "fester[ed] so long" since 1949.[23] In particular, the article makes clear how leading drafters at first widely embraced human rights thinking but finally proved reluctant to fully adopt its key discourse as part of the Conventions' final texts, thereby obscuring their intellectual debt to human rights in the name of upholding *lex specialis*. In recovering the impact of human rights reasoning, this article opens up new avenues for thinking about the contentious divisions between so-called "enthusiasts" and "skeptics" of these two fields of law—one arguing in favor of applying human rights law to armed conflict, the other fiercely resisting it.[24]

Third, the article builds upon the "historicizing moment" in international law and the critical historiography of human rights[25] to explore the transformative impact of a "moral revolution,"[26] of how human rights thinking became instrumentalized to strengthen the protection of victims of war. Part II briefly traces the doctrinal differences between the two legal traditions, as well as the origins of a preexisting exclusive legal regime for warfare, revealing how these were first seriously challenged in the wake of the "Greater War" (1912–1923).[27] The same section, which centers on analyzing treaty law rather than custom,

[21] I agree here with Samuel Moyn's incisive critique of "cascading logics" as a means to explain the rise or fall of particular concepts. *See* Samuel Moyn, *On the Nonglobalization of Ideas*, *in* GLOBAL INTELLECTUAL HISTORY 190–91 (Samuel Moyn & Andrew Sartori eds., 2013).

[22] Luban, *supra* note 16.

[23] Jens Ohlin, *Introduction: The Inescapable Collision*, *in* THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS 1 (Jens Ohlin ed., 2016).

[24] These specific terms were first coined by Marko Milanović. Marko Milanović, *The Lost Origins of* Lex Specialis*: Rethinking the Relationship Between Human Rights and International Humanitarian Law*, *in* THEORETICAL BOUNDARIES OF ARMED CONFLICT AND HUMAN RIGHTS 78–79 (Jens Ohlin ed., 2016).

[25] Jennifer Pitts, *The Critical History of International Law*, 43 POL. THEORY 541 (2015). The most outspoken publications recognizing a direct human rights influence on the 1949 Geneva Conventions are William Hitchcock's impressive (and pioneering) chapter and Anne Peters's distinguished legal analysis. Based on Anglophone sources, the historically selective *ICRC Commentary*, and/or the conferences' translated and edited minutes, they have shown how human rights conceptions played a major part during these discussions regarding the extent to which persons and soldiers were to be granted intangible rights under these treaties. However, Hitchcock's important account, like that of Peters, is incomplete and it does not explain in a detailed and satisfying way why, by whom, and when human rights and humanitarian law precisely connected, and how this connection was challenged in various ways by the very same people who had first promoted it. The role of leading French and Swiss drafters is not further explored either, nor the significance of human rights in war, as well as its internal contradictions, paradoxes, unintended consequences, and conceptual limits. *See* ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 194 (2016); Hitchcock, *supra* note 17, at 97–98, 106. Mark Bradley's tour de force, which stresses a connection between post-1945 human rights and the Geneva Conventions is "informed by Hitchcock's analysis." MARK BRADLEY, THE WORLD REIMAGINED: AMERICANS AND HUMAN RIGHTS IN THE TWENTIETH CENTURY 96–97, 262 (2016).

[26] Final Record of the Diplomatic Conference of Geneva of 1949, *supra* note 11, Vol. II, Section A, at 696.

[27] This term "Greater War" comes from the Oxford University Press series led by Robert Gerwarth, which focuses on armed conflict between 1912 and 1923.

https://doi.org/10.1017/ajil.2018.84 Published online by Cambridge University Press

further investigates how plans for the First Civilian Convention were first rejected by the French and then later neglected by the ICRC itself, with major consequences for the ICRC's response to the Holocaust. Part III demonstrates how these two key Francophone actors radically changed their views after 1945, laying the groundwork for the 1949 Conventions by placing different human rights conceptions (e.g. anti-communist, Gaullist, socialist, Zionist, exile, conservative, liberal) at their core.[28] Unfolding new opportunities for reimagining contemporary international law, the Conclusion shows how a diverse coalition, from ICRC delegates to Soviet representatives, created both the very first binding rules for civilian protection and a contentious legacy for contemporary legal questions regarding human rights in war.

II. Drafting the First Civilian Conventions

Traditional theories of the laws of war usually define their core aims as limiting the effects of war and mitigating human suffering. These rules, it is said, were designed to uphold the principle of humanity in war (*inter arma caritas*), not to protect rights; to humanize war, not to end or outlaw it; to work together with states, not to meddle in their internal affairs; to relieve pain in a utilitarian fashion, not to demand entitlements; to protect soldiers, not to empower noncombatants; and not to promote human dignity, but rather to alleviate human suffering. The laws of war gained their strength, advocates argued, from balancing the demands of humanity with those of military necessity in order to maximize state support.[29]

This state-centric approach to regulating warfare, as adopted by the drafters of the 1907 Hague Regulations and other rules for warfare before the "Greater War," left a highly selective and punitive legacy for those living under occupied rule.[30] Empowering the occupier, international law in this period never strictly outlawed the use of reprisals, collective penalties, or hostage taking—despite continuing criticisms of these measures[31]—and set an extremely high bar for the recognition of belligerency.[32] Nor did the drafters of the Hague Regulations wish to renounce the practice of internment ("concentration") camps.[33] Being

[28] This point resonates with Bruno Cabanes's sweeping analysis stressing the importance of the Great(-er) War as a formative experience for the "post-1945 assertion of human rights as the bulwark of human dignity." Cabanes, *supra* note 4, at 307.

[29] Mégret, *supra* note 10.

[30] Eyal Benvenisti & Doreen Lustig, *Taming Democracy: Codifying the Laws of War to Restore the European Order, 1856–1874*, at 3–5 (University of Cambridge Faculty of Law Research Paper, 2017).

[31] Doris Graber has noted that jurists remained divided, for instance, over whether collective penalties were legal. Doris Appel Graber, The Development of the Law of Belligerent Occupation 1863–1914, at 159 (1949).

[32] Only when an insurgency in times of civil or colonial war complied with very strict criteria and was recognized as a belligerent power could it become a subject of the international laws of war. This decision to recognize a situation of belligerency (or insurgency) required all parties to adhere to the laws of war. *See* P.K. Menon, The Law of Recognition in International Law: Basic Principles (1994); Anthony Cullen, The Concept of Non-international Armed Conflict in International Humanitarian Law (2010); Sandesh Sivakumaran, The Law of Non-international Armed Conflict (2012).

[33] Philippe Papelier, Le Droit de la Guerre et la Population Civile 10 (1955). The internment of civilians generated serious debate among international lawyers, who generally agreed that many of its forms should be considered unlawful. Matthew Stibbe, *The Internment of Civilians by Belligerent States During the First World War and the Response of the International Committee of the Red Cross*, 41 J. Contemp. Hist. 5–19 (2006). For the vast

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the objects rather than subjects of international law, enemy citizens who violently resisted the sovereign's rule could be harshly punished. Rather than broadly protecting rights, the discipline's aim was to limit war itself and to protect regular soldiers against attacks by civilians, so as to safeguard the existing orders of Europe.[34]

Even though the drafters of the codified laws of war at this time gave some noncombatants a set of basic rights protections,[35] none of these rights were intangible or absolute, let alone universal, in scope.[36] Building upon racial and other types of hierarchies within the existing law of nations, international jurists in fact widely accepted that indigenous populations deemed not "civilized" were to be excluded from international law's shield of protection.[37] Rather than a universalizing language applying to the whole of humanity, the laws of war in this increasingly violent period excluded a whole range of non-European victims of war. The rights of European noncombatants, it was further argued, remained conditioned on the individual's behavior, or that of the collective, as well as what was deemed militarily necessary by the occupier.[38]

During the "Greater War," contemporaries witnessed the effects of the law's coercive impulses: how entire societies were mobilized, how total war blurred old legal boundaries, how prisoners of war were directly targeted,[39] and how "civilians" —a term which owes its origins to this period[40]—were greatly affected on a global scale. Allied propagandists told horrific stories about civilian suffering in German-occupied areas and the breaking of the codified laws of war, partly in order to justify their own war effort.[41] These radically changing legal understandings of what was permitted and required in European warfare featured prominently in the 1919 Allied Commission's report, which listed a whole range of what had come to be regarded as civilian atrocities, from deportations, collective penalties, sexual violence, terrorism, and hostage killing to torture—all elements that would be first strictly banned only three decades later.[42]

As a result of this formative wartime experience, intertwining with the "humanitarian moment" of the early 1920s, advocates of a fundamental revision of the existing laws of

historiography of civilian internment during World War I, see RÜDIGER OVERMANS, IN DER HAND DES FEINDES: KRIEGSGEFANGENSCHAFT VON DER ANTIKE BIS ZUM ZWEITEN WELTKRIEG (1999); PANIKOS PANAYI, THE ENEMY IN OUR MIDST: GERMANS IN BRITAIN DURING THE FIRST WORLD WAR (1991); ANNETTE BECKER, OUBLIÉS DE LA GRANDE GUERRE: HUMANITAIRE ET CULTURE DE GUERRE, 1914–1918: POPULATIONS OCCUPÉES, DÉPORTÉS CIVILS, PRISONNIERS DE GUERRE (1998).

[34] Benvenisti & Lustig, *supra* note 30.

[35] GRABER, *supra* note 31, at 194–95.

[36] Amanda Alexander, *The Genesis of the Civilian*, 20 LEIDEN J. INT'L L. 359, 362 (2007).

[37] *See* Frédéric Mégret, *From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other," in* INTERNATIONAL LAW AND ITS OTHERS (Anne Orford ed., 2006); HELEN KINSELLA, THE IMAGE BEFORE THE WEAPON: A CRITICAL HISTORY OF THE DISTINCTION BETWEEN COMBATANT AND CIVILIAN (2011).

[38] GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAWS OF ARMED CONFLICT 96 (1980); GRABER, *supra* note 31, at 207–15; Alexander, *supra* note 36, at 361.

[39] HEATHER JONES, VIOLENCE AGAINST PRISONERS OF WAR IN THE FIRST WORLD WAR: BRITAIN, FRANCE, AND GERMANY, 1914–1920 (2011).

[40] Alexander, *supra* note 36, at 361.

[41] *Id.* at 368–69. *See* also ISABEL HULL, A SCRAP OF PAPER: BREAKING AND MAKING INTERNATIONAL LAW DURING THE GREAT WAR (2014).

[42] *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AJIL 95, 112–15 (1920).

https://doi.org/10.1017/ajil.2018.84 Published online by Cambridge University Press

war proposed new rules for intrastate warfare and a binding convention to protect soldiers and civilian internees in interstate wars. As the head of the special civilian section of the ICRC's Prisoner of War Agency and wartime veteran of prison visits to prisoners of war (POWs) and civilian internees, the Swiss medical doctor Frédéric Ferrière made a radical proposal to create a new basket treaty protecting those persons against ill-treatment.[43] Ironically, the Czarist Red Cross, revising its prewar rejection of plans to allow Red Cross intervention in times of civil war for reasons of anti-communist propaganda,[44] introduced the period's other major legal innovation—providing the Red Cross, as the guardian of the Geneva Conventions, with a legal mandate to assist political prisoners and hostages held in Bolshevik hands. This anti-communist plan with a deliberate Francophone touch—to demand protection "*des droits élémentaires*" for fighters and non-combatants alike as a response to the breakup of European empires and the consecutive outbreak of the Russian Civil War (1917–1923)[45]—had first been suggested by Georges Lodygensky, a White Russian anti-communist living in exile in Geneva.[46]

These two radical proposals to protect civilians in war were born out of a broader post-war shift toward international legal personality of the individual and elementary human rights thinking, with its embryonic references to rights concepts and its inherent potential for "cascading effects" within the strict legal boundaries of state sovereignty.[47] While originating in different political ancestries, Lodygensky and Ferrière shared a desire to place some limits on state sovereignty to protect the rights of individuals in wartime. While blending rights concepts with a still dominant humanitarian discourse, the Swiss doctor discussed the importance of saving civilians from "slavery" and protecting political prisoners against state terror. Even though he spoke mainly of rights in terms of the state's powers, he strongly disputed its wartime practices of employing reprisals, arbitrary detention, and "concentration camps."[48] His attempts, and those of Lodygensky, to fundamentally alter the legal status quo were presented at the first "post"-war Red Cross Conference in Geneva, in 1921.

The delegates at this meeting discussed the two humanitarian plans fairly extensively, eventually endorsing a non-binding resolution declaring that all victims of European fratricidal violence had the right to be helped,[49] as well as a broad prisoners' code which would initially cover both prisoners of war and civilian internees. Furthermore, the ICRC suggested to ban

[43] *Rapport présenté par le Comité international à la Xme Conférence*, 3 REVUE INTERNATIONALE DE LA CROIX-ROUGE ET BULLETIN INTERNATIONAL DES SOCIÉTÉS DE LA CROIX-ROUGE 100 (1921); Frédéric Ferrière, *Projet d'une Convention internationale réglant la situation des civils tombés à la guerre au pouvoir de l'ennemi*, 5 REVUE INTERNATIONALE DE LA CROIX-ROUGE ET BULLETIN INTERNATIONAL DES SOCIÉTÉS DE LA CROIX-ROUGE 560 (1923).

[44] Report American delegation, 1912, No. 73, American Red Cross, National Archives and Records Administration (NARA), College Park, MD; Report Russian Red Cross for Red Cross Conference, 1921, ICRC Library.

[45] Kimberly Lowe, *Humanitarianism and National Sovereignty: Red Cross Intervention on Behalf of Political Prisoners in Soviet Russia, 1921–23*, 49 J. CONTEMP. HIST. 652 (2014).

[46] *See* Georges Lodygensky, *La Croix-Rouge et la Guerre Civile*, 1 REVUE INTERNATIONALE DE LA CROIX-ROUGE ET BULLETIN INTERNATIONAL DES SOCIÉTÉS DE LA CROIX-ROUGE 1159 (1919); Georges Lodygensky, *La Croix-Rouge et la Guerre Civile (2me article)*, 2 REVUE INTERNATIONALE DE LA CROIX-ROUGE ET BULLETIN INTERNATIONAL DES SOCIÉTÉS DE LA CROIX-ROUGE 654 (1920); Georges Lodygensky, FACE AU COMMUNISME, 1905–1950: QUAND GENÈVE ÉTAIT LE CENTRE DU MOUVEMENT ANTICOMMUNISTE INTERNATIONAL (2009).

[47] *See* PETERS, *supra* note 25, at 18–20; CABANES, *supra* note 4, at 10–11.

[48] Ferrière, *supra* note 43.

[49] Lowe, *supra* note 45.

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the internment of women and children, except with regard to spying (e.g. Mata Hari), revealing a gradually changing understanding of women as persons with (some) agency in war.[50]

Equally critical, the Red Cross drafters effectively rejected the disjuncture of rights and nationality, creating a permanent legacy for humanitarian law by making the individual war victim's rights dependent upon his or her nationality, which meant that only nationals of an adverse belligerent would be protected under this new prisoners' code. Displaying the sovereignty-based limitations of elementary human rights thinking in this period, persons lacking nationality (e.g. stateless persons), those imprisoned for political reasons (such as conscientious objectors), and the state's own nationals (for instance, Ottoman Armenians), were banned from having the right to have international rights in wartime.[51]

Notwithstanding these major restrictions, the delegates adopted key parts of Ferrière's elementary human rights thinking, with its mixture of qualified rights concepts and heavy emphasis on humanitarian discourse. They made some groundbreaking steps in banning the use of various rights-violating measures, such as reprisals, which represented a turning point in the history of the laws of war.[52] They also instructed the ICRC to establish a special committee that would be led by Ferrière himself to prepare a new prisoners' code for a future diplomatic conference. This new Special Committee decided, however, to break[53] with the Red Cross movement's original demand: thanks to Ferrière's suggestions, it endorsed a separate and fairly broad Civilian Convention that built upon states' acceptance during the war of civilian protection-related principles included in various bilateral agreements.[54] This future treaty, the ICRC argued, would have to cover a whole range of different groups of civilians, from evacuees to refugees.

For the next Red Cross Conference, in 1923, which followed the ICRC's unsuccessful intervention in the Russian Civil War, the organization took a more restrictive approach, shifting its attention to matters other than regulating civil wars and suggesting a much less ambitious Civilian Convention.[55] Considering the question of civilians infinitely more complex than that of prisoners of war—which illustrates the ICRC's continuing predilection for soldiers' rights, and fears of undermining its position of neutrality—the organization advanced a much less far-reaching Convention. In continuing the laws of war's preexisting disposition toward safeguarding state sovereignty and military interests, the ICRC hoped to improve the chances that its plans would be eventually accepted by the Great Powers, although it faced an uphill battle when it first presented the plans in 1923.[56]

[50] *Rapport présenté par le Comité international à la Xme Conférence*, *supra* note 43, at 107.

[51] The conference covered only those political prisoners held in civil war or in time of revolution. As we saw previously, this idea formed an anti-communist response to the imprisonment of anti-Bolshevik individuals during the Russian Civil War.

[52] Frits Kalshoven, Belligerent Reprisals 71–72 (1971).

[53] The International Law Association had already previously distinguished between civilian and military detainment. *Id.* at 74.

[54] Letter Lescaze to Werner, June 2, 1923, No. CR-119-1, Les Archives du Comité international de la Croix Rouge (ACICR), Geneva; Letter Ferrière to Lescaze, May 8, 1923, No. CR-119-1, ACICR. One example of such a bilateral agreement was the Franco-German Convention of May 1917. The ICRC also issued declarations calling for the release of civilian prisoners. Stibbe, *supra* note 33, at 15–16.

[55] Lowe, *supra* note 45.

[56] Ferrière, *supra* note 43.

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At the Red Cross Conference, and in the wake of the French occupation of the Ruhr area of Weimar Germany, the previously absent French delegation was especially resistant to the idea of a separate and binding Civilian Convention.[57] The French were particularly immune to Ferrière's plans for occupied territory and more detailed restrictions against hostage taking, for instance. At various occasions, they disputed the ICRC's suggestions, arguing that matters like these fell virtually exclusively within the domain of state sovereignty, a concept already under significant international scrutiny since 1919.[58] In principle, the French, as a victorious and occupying power, were unwilling to give up their extensive wartime authority and, despite Ferrière's opposition, succeeded in dealing a severe blow to his attempt to create a separate Civilian Convention.[59] By showing a lack of urgency, if not complacency, with respect to the need for protecting civilians more strongly, the Red Cross movement as a whole destroyed the core of Ferrière's project already at an early stage.

After the failed 1923 conference, Ferrière's elementary human rights thinking lost support within and outside the ICRC. This was the result of opposition from France and many National Red Cross Societies,[60] and because of Ferrière's death one year later. The remaining ICRC officials lacked his enthusiasm and expertise, and they remained divided over how they were to deal with the question of civilian protection.[61] Following discussions with Bern as the official depository of the Geneva Conventions, the ICRC decided to temporarily suspend its plans for a Civilian Convention due to objections from "especially France." Privileging the rights of soldiers and state (and neutrality) interests over the rights of civilians, the organization shifted its attention away from making a Civilian Convention. In the following months, it received pressure from Bern to not raise this question before the POW Convention had been adopted. The Swiss feared that it might otherwise negatively impact the French government's skepticism toward the existing drafts for that future treaty, the ICRC's other critical interwar drafting project.[62] By 1925, the ICRC had largely abandoned Ferrière's project due to a combination of internal division and pressure from Paris and Bern.

The Genevans broke their silence over the question of civilian protection only in 1929, when the diplomatic conference gathered in their city for the discussion of the POW Convention. The ICRC had suggested in its humanitarian-framed proposals for the meeting not only to reiterate parts of Ferrière's elementary human rights thinking by banning reprisals

[57] The French had boycotted the 1921 conference in response to the German unwillingness to condemn their country's wartime violations of the laws of war, and this proved to be a critical fact. BEST, *supra* note 38, at 232–33.

[58] *See* SUSAN PEDERSEN, THE GUARDIANS: THE LEAGUE OF NATIONS AND THE CRISIS OF EMPIRE (2015).

[59] Minutes of 1923 Red Cross Conference, Commission IV, August 29–30, 1923, ICRC Library.

[60] Few National Red Cross Societies responded to an ICRC circular asking for information about the question of civilian protection. Minutes of Meeting Commission Diplomatique, February 12, 1925, No. CR-119-1, ACICR.

[61] *See* Minutes Meeting Commission des Civils, November 28, 1923, No. CR-119-1, ACICR. Some thought, naively, that a largely symbolic measure like banning civilian internment for "non-mobilizable persons" would be a major first step. *See* Renée Marguerite Frick-Cramer, *A propos des projects de conventions internationales réglant le sort des prisonniers*, 7 REVUE INTERNATIONALE DE LA CROIX-ROUGE ET BULLETIN INTERNATIONAL DES SOCIÉTÉS DE LA CROIX-ROUGE 73, 79 (1925). For Rolin's skepticism toward the Civilian Convention, see Letter Albéric Rolin to Lescaze, January 2, 1924, No. CR-119-1, ACICR.

[62] Minutes of Meeting ICRC and Swiss Federal officials, February 12, 1926, No. CR-119-2, ACICR. This point echoes with that of Isabelle Vonèche Cardia concerning the Swiss government's role in shaping the ICRC's decision making during World War II. ISABELLE VONÈCHE CARDIA, NEUTRALITÉ ENTRE LE COMITÉ INTERNATIONAL DE LA CROIX-ROUGE (CICR) ET LE GOUVERNEMENT SUISSE 239–46 (2012).

https://doi.org/10.1017/ajil.2018.84 Published online by Cambridge University Press

against POWs, but also to extend the treaty's scope for civilian internees, an idea that received opposition from several delegations, leading to its eventual rejection by the conference. While adopting the suggested preamble referencing the humanitarian duty to mitigate the rigors of war—which illustrates the dominance of humanitarian discourse at this stage[63]—the drafters ultimately gave the Swiss a mandate to prepare a set of drafts for an alternative convention covering enemy civilians alone.[64] However, revealing its lack of conviction that states would ever accept such a treaty and because of its competing drafting interests, the ICRC, motivated by the children's rights activist Suzanne Ferrière (Frédéric's niece), presented a new plan for protecting civilian rights in interstate war only five years later.

In 1934, at the Red Cross Conference in Tokyo, the ICRC suggested a limited treaty protecting only *some* enemy civilians in *some* armed conflicts against *some* counterinsurgency measures.[65] This Tokyo Draft, as it became known, largely focused on the protection of enemy aliens in belligerent territory to complement the existing Hague Regulations concentrating on occupied territory, leaving many other important categories of civilians excluded. The rising number of deportees and political prisoners in fascist Italy, Nazi Germany, the Soviet Union, and across other empires were thus mostly excluded from this text.[66] Echoing Ferrière's elementary human rights thinking, the Tokyo Draft placed some limitations on state sovereignty, banned the severe punishment of hostages, and applied to armed conflict even if a belligerent was not a party to the Convention. But the Draft proved allergic to rights talk and included numerous reservations privileging state sovereignty in critical ways. Indeed, even if this humanitarian text had been applied faithfully during World War II, it would not have protected numerous civilians, such as American-Japanese internees (as the state's own nationals), Italian Jews (co-belligerent nationals), Poles (denationalized persons), or German Jews (stateless individuals).

Interwar Human Rights in War: The 1934 Monaco Draft

At the same time, demonstrating the ICRC's continuing inclination toward the humanitarian project at the expense of human rights' frameworks, the organization had rejected the only explicit human rights law text for regulating warfare of the entire period—the so-called Monaco Draft.[67] In the same year as the Red Cross Conference met in Tokyo, a group of Francophone military doctors and international jurists gathered in Monaco. Among them was Albert De la Pradelle, a prominent liberal international jurist from Paris, who had previously taken part in the creation of the Hague Air Rules (1923) and the Declaration of the

[63] Report Propositions et Observations des Gouvernements sur l'Avant-Projet de Convention Internationale Relative au Traitement de Prisonniers de Guerre, 1929, No. CD_1929_DOC_02, ICRC Library.

[64] *See* Documentation Diplomatic Conference, 1929, No. CR-119-2, ACICR; Letter Federal Council to ICRC on Civilian Protection, February 21, 1930, No. CR-119-2, ACICR.

[65] *See, e.g.*, Minutes of Meeting CV, April 12, 1934, No. CR-119-2, ACICR. The concept of "armed conflict" became first extensively used in the 1920s, when aggressive war became legally prohibited under the Kellogg-Briand Pact and states were much less inclined to declare war formally. Thus, the process of recasting civil war and interstate war as "armed conflict" has its origins in the interwar period, rather than in the years after 1945, as is often assumed in retrospect. Oona Hathaway & Scott Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World (2017).

[66] Jean-Claude Favez, The Red Cross and the Holocaust 15–16 (1999).

[67] Avant-Projet de Convention adopté à Monaco, February 1934, ICRC Library.

https://doi.org/10.1017/ajil.2018.84 Published online by Cambridge University Press

International Rights of Man (1929).[68] His legal fingerprints are all over the final text of the future Monaco Draft, with its implicit references to the Hague Air Rules and mixture of humanitarian discourse with interwar human rights talk ("*des droits de l'humanité en temps de guerre*").[69]

Representing a missed opportunity in interwar legal history, the Monaco Draft, as it came to be called, is an often overlooked but truly extraordinary human rights text of the laws of war, covering a whole range of different issues crucial to future legal regulation of warfare. The drafters' stated aim, as an early example of a later shift to fully prioritizing individual rights of civilians as part of a broader human rights thinking, was to gain respect for "*la vie humaine pendant la guerre*," a unique reference to interwar republican discourses on human rights among especially French wartime veterans.[70] Applying also to occupied territory, the text featured five chapters and, in some respects, was more comprehensive than the 1949 Geneva Conventions would ever be.

Most strikingly, adopting both human rights thinking and discourse, the Monaco Draft protected the "*l'intégrité physique et la dignité morale de la personne*,"[71] the civilian's freedom of worship, rights of property, "*droit à la vie*,"[72] and rights in detention, even though it weakened these wartime rights by several major reservations and a strict duty of allegiance to the occupier's rule as a concession to state sovereignty.[73] Equally striking, the drafters attributed these rights for civilians to "*la conscience humaine*," not the "public conscience" from the Martens Clause.[74] The Monaco Draft also included legally unique sections on matters such as sanctions, and, unlike the later Geneva Conventions, featured basic rules on the use of air bombardment that were loosely based upon the Hague Air Rules—an early example of entangling "legal flows."[75]

However, these extraordinary proposals to "humanize war" and to protect human rights in (air) war received little support, let alone enthusiasm, among the ICRC and Great Powers, which were slowly preparing for the upcoming war. With its treatment of individual rights and human dignity as the foundation of a future international legal order, the Monaco Draft

[68] Jan Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 HUM. RTS. Q. 447, 452–53 (1992).

[69] Avant-Projet de Convention adopté à Monaco, *supra* note 67, Art. 1, "Sanctions" section; Art. 9, "Sanitary Cities and Localities" section.

[70] Later, this principle would form the core of the International Congress of Military Medicine and Pharmacy's sister organization, named L'Association pour la Protection Internationale de l'Humanité (1936). *See* ALBERT DE LA PRADELLE, JULES VONCKEN & FERNAND DEHOUSSE, LA RECONSTRUCTION DU DROIT DE LA GUERRE 137–47 (1936). For interwar notions of human rights in France, see JAY WINTER & ANTOINE PROST, RENÉ CASSIN AND HUMAN RIGHTS: FROM THE GREAT WAR TO THE UNIVERSAL DECLARATION (2013); CABANES, *supra* note 4, at 18–75; and Glenda Sluga, *René Cassin: Les droits de l'homme and the Universality of Human Rights, 1945–1966*, *in* HUMAN RIGHTS IN HISTORY 107, 110–11 (Samuel Moyn & Stefan-Ludwig Hoffmann eds., 2011).

[71] Avant-Projet de Convention adopté à Monaco, *supra* note 67, Art. 3, "Protection of the Civilian Population" section.

[72] *Id.* Art. 7, "Sanctions" section.

[73] *Id.* Art. 3, "Protection of the Civilian Population" section.

[74] *Id.* Art. 10, "Protection of the Civilian Population" section.

[75] Kerstin von Lingen, *Legal Flows: Contributions of Exiled Lawyers to the Concept of "Crimes Against Humanity" During the Second World War*, MODERN INTELLECTUAL HIST. (2018). For interwar discussions on international criminal law, see MARK LEWIS, THE BIRTH OF THE NEW JUSTICE: THE INTERNATIONALIZATION OF CRIME AND PUNISHMENT 1919–1950 (2014).

https://doi.org/10.1017/ajil.2018.84 Published online by Cambridge University Press

touched directly upon matters already covered by the Tokyo Draft as well as the POW Convention. As confirmed by ICRC President Max Huber, the Monaco Draft gained little support among the Great Powers—especially France. The combination of a lack of political space for imaginative lawmaking, the international system's breakdown, the lack of state support, and the ICRC's elementary human rights thinking (which rejected the burden of strictly regulating the conduct of air warfare) led to the Monaco's Draft gradual demise in the following years.[76] Unlike the Monaco drafters, the ICRC was unwilling to go any further than formulating a draft convention of hospital towns and safety localities for soldiers, a trivial legal project for regulating air warfare that received little support and ultimately collapsed in 1939.[77]

The Tokyo Draft has never been signed or ratified by any belligerent. The Sisyphean plan to hold a diplomatic conference in 1937, amidst the Spanish Civil War and Sino-Japanese War, was skeptically received by France and Great Britain.[78] By this time, with the breakdown of the international system and major wars taking place across Eurasia, crucial plans to create any Civilian Convention, or any other legal product of human rights thinking—elementary or not—were doomed to failure. The Swiss government decided to temporarily postpone its plan for a diplomatic conference, triggering the downfall of the Tokyo Draft and leaving Jewish civilians with no robust rights under the existing laws of war—an important dimension missing in contemporary debates about the ICRC's wartime struggle to protect European Jews.[79]

However, the most promising drafts for the protection of individual rights in war had already been rejected by the French years earlier, and both Swiss actors (i.e. the ICRC plus the federal government) were not entirely free of blame either. Their later suggestions that either the outbreak of World War II in Europe had led to the early death of plans for a binding civilian treaty, or that "states" (no specific countries were usually mentioned) lacked interest and should therefore be held responsible for this interwar failure,[80] are historically imprecise. Although one of the few voices during the interwar period to demand a basic Civilian

[76] Minutes Meetings Legal Division, May 13, 1936, June 8, 1936, No. A PV JUR.1, ACICR.

[77] Le Projet de Convention pour la Création de Localités et Zones Sanitaires en Temps de Guerre, 1938, ICRC Library.

[78] Letter Swiss Political Department to Huber, December 10, 1936, No. CR-119-3, ACICR. Letters Motta to ICRC, February 19, 1937 and March 12, 1937, No. CR-119-4, ACICR. As one of the few, Best has noted this French opposition before. Best, *supra* note 38, 233.

[79] The significance of the Civilian Convention's belated approval was its role in enabling the ICRC's silence in the face of Nazi genocide, declared some World Jewish Congress officials after 1945. In their view, a binding Civilian Convention "would [have] mitigate[d] [the ICRC's] precarious position [during the Second World War]. Specifically, the lack of action on the part of the [ICRC] with respect to the . . . murdered Jewish civilian population in the ghettos and in the concentration camps might have been avoided if adequate legal safeguards had been available." Draft Proposals of the World Jewish Congress for the Inclusion in a Convention on the Treatment of the Civilian Population in Case of War, 1948, Series B69, No. 17, American Jewish Archives (AJA), Cincinnati, OH.

[80] The ICRC's official response to Jean-Claude Favez's crucial account focusing on the ICRC's actions in relation to the Shoah is a bit one-sided. While accepting many of Favez's conclusions, the ICRC criticized his lack of reflection on the organization's efforts up to the outbreak of the war to promote the Tokyo Draft. This criticism neglects, however, the ICRC's own disinterest during parts of this period in this topic. Before 1939, the issue never really was a major priority for the ICRC. Favez, *supra* note 66, at 10; Sébastien Farré, *The ICRC and the Detainees in Nazi Concentration Camps (1942–1945)*, 94 Int'l Rev. Red Cross 1381 (2012).

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Convention, the ICRC did remarkably little to spark interest in its ideas and usually acted with extreme hesitation out of fear of provoking the Great Powers.

Equally important, the organization decided at the most decisive moments to prioritize its rival drafting projects. Whereas in the interwar period international human rights in peacetime were largely trumped by minority rights,[81] the protection of enemy civilians in wartime, as a product of elementary human rights thinking, came to be overshadowed by the ICRC's continuing concern for safeguarding its own interests and those of soldiers as well as states, with crucial implications for its later response to the Holocaust.[82] For various reasons, the ICRC rejected human rights discourse and, thanks to the non-binding nature of the 1921 Red Cross resolution, faced major problems when trying to gain access to victims of state terror in the 1930s. Thus, even though human rights thinking had conceptual effects on ICRC proposals, it stayed very much at the periphery of the organization's legal reasoning in the interwar period.

The Tokyo Draft, which was discussed within the organization as a possible means to condemn the Holocaust,[83] could have been lifted out of its obscurity by the ICRC, Allies, (Swiss) neutrals, or Axis powers during World War II. But they paid little heed to it. During the war, only Jewish organizations tried to use the text as a means to put pressure on Nazi Germany to stop its genocidal policies against Jewish civilians, but the ICRC proved extremely reluctant to endorse their proposals as a result of its own non-denunciation policy, the Tokyo Draft's non-binding nature, political considerations, and because of its primary focus on protecting binding soldiers' rights.[84] The organization recognized, too, that, if ever applied, the text would have had limited impact as a result of its major birth defects.[85] Publicly condemning Nazi atrocities as a violation of "human rights,"[86] the Allies transformed this concept into an universalistic battle-cry, while entirely ignoring the Tokyo Draft.[87]

III. Reinventing the Geneva Conventions After 1945

Paradoxically, however, the rival human rights conceptions coined by the Allies and Free French would play a transformative role after 1945 in resurrecting the spectral Tokyo Draft, as well as the discursive birth of "humanitarian law." Unlike before the war, the ICRC's Legal Division, playing an instrumental role, strongly endorsed both the discourse and thinking of

[81] Mark Mazower, *The Strange Triumph of Human Rights, 1933–1950*, 47 Hist. J. 379 (2004).

[82] This section, which stresses the role of power and competing rights projects, somewhat broadens Hitchcock's narrow understanding of these pre-1939 debates. Apart from neglecting the Tokyo Draft, he largely blames the interwar's silence regarding civilian protection on a lack of "imagination." Hitchcock, *supra* note 17, at 96, 101.

[83] Favez, *supra* note 66, 85–88.

[84] *See* Dominique-Debora Junod, The Imperiled Red Cross and the Palestine-Eretz-Yisrael Conflict 1945–1952: The Influence of Institutional Concerns on a Humanitarian Operation 51–54 (1996); Jean-Claude Favez, *1942: Le Comité international de la Croix-Rouge, les déportations et les camps*, 21 Vingtième Siècle. Revue d'Histoire 45–56 (1989); Gerald Steinacher, Humanitarians at War: The Red Cross in the Shadow of the Holocaust 47–48 (2017); Arieh Ben Tov, Facing the Holocaust in Budapest: The International Committee of the Red Cross and the Jews in Hungary, 1943–1945 (1988).

[85] To give a few examples, the ICRC would have been unable to lobby on behalf of Polish Jews as a consequence of the Nazi destruction of the Polish state; to question the use of collective penalties; or to sufficiently protect civilians against hostage taking in occupied territory.

[86] Joint Declaration by Members of the United Nations, *supra* note 19.

[87] Samuel Moyn, The Last Utopia (2010).

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human rights and dignity as a means to condemn Nazi-style counterinsurgency measures, suggesting plans to substantially broaden the Tokyo Draft's scope and to strengthen its basic provisions regulating civilian protection in occupied territory.[88] Breaking with interwar elementary rights thinking, the ICRC's drafters, supervised by Pictet and given "valuable" advice from Bourquin and Ferrière,[89] suggested a complete prohibition against hostage taking, for instance.[90] For Pictet, the atrocities of the war and the revolutionary historical changes indicated by decolonization, the rise of new hegemonic powers, and mass statelessness required a new interpretation of humanitarian law that sought a structural reimagination of the discourse, concepts, and scope of the discipline itself. The engraving of human rights onto the existing laws of war equipped Pictet's team with the legal and political instruments to react to Hitler's wartime atrocities, to reflect on the damaged key concept of human dignity, and to reinvent the ICRC in the wake of the criticisms it had received from Jewish and Allied commentators for its dubious wartime decisions.[91]

Signaling a major shift in legal understandings with respect to belligerent occupation as compared to the interwar period, the Red Cross experts who gathered in mid-1946 enthusiastically approved of the ICRC's open-ended human rights agenda, with its stated aim of protecting the human person's dignity in armed conflict, as a unifying moral imperative in their collective response to Nazi empire.[92] They condemned the use of now considered "inhumane" enforcement measures for European warfare. Like the socialist Yugoslavs, Frede Castberg, an influential Norwegian human rights lawyer and former exile in London, suggested that the Tokyo Draft ought to be entangled and substantially revised on the basis of the UN's agenda of safeguarding human rights. Fully embracing human rights thinking, he called for the abolition of arbitrary treatment in wartime, especially torture and collective penalties. In the end, he and other Red Cross experts approved of not only stricter limitations upon the occupying state's extensive wartime powers, but also his other, far more radical suggestion to apply human rights thinking to internal wars as well, potentially leading to the internationalization of civil and colonial wars.[93]

The plan to apply binding international law to armed conflicts within states or empires had already been internally discussed within the ICRC as a continuation of its interwar conversation on this topic. Whereas some preferred a bold approach, suggesting the direct

[88] Paul De la Pradelle, La Conférence Diplomatique et les Nouvelles Conventions de Genève Du 12 Août 1949, at 68–69 (1951).

[89] This was the view as expressed in the ICRC's obituary of Suzanne Ferrière, a remarkable female ICRC drafter who had participated (with Eglantyne Jebb) in the foundation of the International Union for Child Welfare. *Décès de Mlle S. Ferrière, membre honoraire du CICR*, 52 Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge 235–36 (1970).

[90] *See* Report ICRC, 1946, No. CSN_1946_DOCCIR_ENG_03, ICRC Library.

[91] This key point echoes Stefan-Ludwig Hoffmann's critical remarks regarding the political instrumentality of rights. Hoffmann, *supra* note 2, at 2.

[92] *Id.* at 14. The relevant 1946 commission agreed that "*que les prochaines Conventions contiennent une partie générale garantissant, en tout état de cause, les droits essentiels de la personnalité ainsi que le respect de la dignité humaine des personnes qui . . . seraient aux mains de l'ennemi ou d'un pouvoir non reconnu par elles. Ces droits sont intangibles et reconnus à tous, sans distinction d'opinion, de race, de religion, de nationalité*." Report Commission II, 1946, at 202–03, No. CSN_1946_COMM2_PV_03, ICRC Library.

[93] *See* Procès-Verbaux de la Commissions I et II, No. CSN_1946_COMM1_PV_01, CSN_1946_COMM2_PV_02, ICRC Library; Norwegian and Yugoslav Memoranda, No. CSN_1946_DOCSN_02, ICRC Library.

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application of international law to internal war, the conservative (and now former ICRC President) Huber, aware of the sensitive link between the entangled questions of colonial sovereignty, belligerency, and partisans, opted for a far more cautious path. Playing a fairly dominant role within this preparatory body, he pressured the organization's Legal Division to act discreetly in light of Anglophone sensitivities by raising the matter of civil war at future conferences only at "its margins."[94] At another meeting, ICRC drafter Jean Meylan tried again, with Pictet's support, to discuss the issue, but it again led to nothing substantial, revealing the ICRC's initially mixed attitude toward confronting absolute colonial sovereignty head-on.[95]

As a former student in interwar Paris and law graduate from the local university in Geneva, Pictet's tentative support for applying international law to internal wars testifies to his wider enthusiasm for exploiting Allied and republican human rights thinking, with its stress on Rooseveltian freedoms and rights-of-man traditions, as key drafting principles for regulating warfare. Pictet's team began to conceptualize humanitarian law not in terms of exclusively promoting humanitarian beliefs, or of safeguarding the individual's human dignity in wartime, but rather as a balancing act integrating the discourses and concepts of sovereignty, justice, rights, duties, and humanitarianism. In the following months, Pictet's wide-ranging and open-ended human rights agenda, lacking a strict predetermined legal boundary but featuring a generative potential due to its universalistic tendencies, began to slowly materialize.

At this critical early stage of the drafting process, his team began discussing a revolutionized Tokyo Draft that included a wide range of previously neglected human rights concepts, from rights in detention, and individual responsibility, to non-renunciation and saving clauses as a response to wartime state destruction.[96] In his extraordinary but entirely forgotten brochure, entitled *La défense de la personne humaine dans le droit future* (1947),[97] Pictet emphatically adopted the language of human rights, acknowledging that his team's main objective was to safeguard "*le respect de la personne humaine et . . . les droits essentiels de l'homme et sa dignité*," a radical break with the ICRC's interwar reluctance to recognize the conceptual and discursive centrality of this type of legal thinking.[98] Pictet's internal memorandum from 1946, which suggested stronger rights for partisans, equally revealed his broader human rights agenda.[99]

The future POW Convention, he argued, should guarantee intangible rights for specific categories of irregulars, potentially including female fighters as a response to their empowerment during the war.[100] At a later stage, inspired by his disappointment about the Nuremberg

[94] Minutes of Meeting Commission Juridique, May 1, 1946, No. A PV JUR. 1, Vol. I, ACICR.

[95] *Id.* at 24, July 1946. This point nuances the view that the "ICRC officials moved rapidly to assert the applicability of certain basic standards of humane treatment during any and all conflicts . . . ." Hitchcock, *supra* note 17, at 104.

[96] The Legal Division continued to advocate a non-renunciation plan of trying to ensure protection for those stateless persons whose status was questioned as a result of the destruction of their indigenous state, for example, citizens from occupied Western Poland. Draft Civilian Convention, 1948, No. CI_1948_B3_01_ENG_03, ICRC Library. On the legal dimensions of the Conventions' non-renunciation clauses: PETERS, *supra* note 25, at 196–202.

[97] JEAN PICTET, LA DÉFENSE DE LA PERSONNE HUMAINE DANS LE DROIT FUTURE (1947).

[98] *Id.* at 20.

[99] Draft Pictet Notice Concernant l'Article Premier de la Convention Relative au Traitement des Prisonniers de Guerre, 1946, No. CR-240-5, ACICR.

[100] With legal empowerment, I mean specifically the increasing role of women in the fighting as part of wartime resistance groups or regular armies. Pictet's agenda for European women in war and class had a dissonant character

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Trials' decision to stay silent on the recent war's terror bombings, Pictet went so far as to endorse a special Red Cross resolution to protect not only the individual, but also the collective rights of civilians against all "*armes aveugles*," such as atomic and carpet bombing.[101] Unlike Pictet, Pilloud, his drafter-in-arms and head of the ICRC's Legal Division, believed such a resolution would seriously upset their Anglo-American drafting allies, threatening the future of the Civilian Convention for individual rights in war, ultimately causing the downfall of Pictet's radical suggestion.

In its reports for the upcoming Allied Government Expert Conference, Pictet's team, influenced by the ICRC's broader concerns over its marginalization by the Allied powers, adopted parts of Castberg's cosponsored plan for internationalizing internal wars. Using this human rights idea mixed with humanitarian concepts and discourse as a means to securing its own institutional future, the ICRC's proposals also responded to its ongoing struggle in Indochina and Palestine to persuade insurgents and colonial powers to apply humanitarian rules reciprocally.[102] Despite these far-reaching proposals questioning colonial sovereignty in unique but judicious ways, the ICRC adopted a selective and distinct human rights agenda. Yet in his brochure, Pictet admitted that they would endorse only a measured convention for "enemy civilians," a limited category that would continue to cause controversy among Jewish observers and within the ICRC.[103]

Some ICRC officials, including Pictet, who had taken part in the wartime debates about not filing a public ICRC appeal against the Holocaust, questioned the Tokyo Draft's exclusion of political prisoners and the state's own nationals in light of the Nazi terror against German Jews and Communists. Disillusioned by his wartime experiences, Huber, by contrast, believed that covering the state's own nationals would trigger severe opposition and be ineffective since "reciprocity was [not] granted."[104] While publicly admitting the central importance of the language and concepts of human rights at the Government Expert Conference held in 1947,[105] Huber, like Pilloud, emphasized the importance of the preexisting humanitarian principle of reciprocity, stressing that sovereignty-related matters like political imprisonment should be left to states or the UN Commission on Human Rights (UNCHR).[106]

by questioning some gender hierarchies (e.g. the unequal treatment of female POWs) while perpetuating others; and by giving officers' rights more legal weight than those of privates. PICTET, *supra* note 97, at 1–6, 11–15.

[101] Minutes of Meeting Bureau Stockholm Conference, February 17, 1948, No. CRI-25 IV-Dossier 4, ACICR.

[102] JUNOD, *supra* note 84, at 67–68.

[103] PICTET, *supra* note 97, at 15. This point stressing the ICRC's measured drafting agenda complicates accounts suggesting that it wished to "universally" cover "the rights of all persons" affected by armed conflict. Hitchcock, *supra* note 17, at 97–98, 103. Excluding the question of political prisoners had frustrated the observer for the World Jewish Congress, Gerhart Riegner, who called it absolutely unsatisfactory. The drafts, he argued, dealt insufficiently with the questions of statelessness and human rights protections more generally. Report Riegner on Red Cross Conference Plans, July 17, 1946, Series D106, No. 10, AJA.

[104] Report Riegner Conference on the Study of Treaty Stipulations Relative to the Spiritual and Intellectual Needs of POWs and Civilian Internees, March 1947, Series D106, No. 10, AJA.

[105] *See* Speech Huber at Plenary Meeting Government Expert Conference, April 14, 1947, No. CEG_1947_ASSPLEN, ICRC Library; Report Riegner Conference on the Study of Treaty Stipulations, *supra* note 104.

[106] While in agreement, Pictet had wished to broaden the definition for enemy civilian and create greater protections for "Jews and other minorities." But these undefined proposals led to no substantial change. Minutes of Meeting Commission Juridique, December 6, 1946, No. A PV JUR. 1, Vol. I, ACICR.

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Concurring with these restrictive views, the ICRC's Legal Division finally rejected Pictet's cosponsored proposal, suggesting a distinct and non-UN-involved Civilian Convention with a limited scope that would apply to "enemy civilians" only.[107] By adopting this selective approach to human rights and rejecting the "political" concept of genocide—a move that also largely secured state sovereignty as well as the ICRC's own role as humanitarian law's leading drafter—the ICRC appropriated human rights thinking without adopting all of its key discourse while developing its own draft for the future Civilian Convention. By doing so, the Genevans hoped to gain widespread support from the Great Powers.

With the language of human rights gradually disappearing from the ICRC's drafting radar, this preliminary outcome affirms Marco Duranti's crucial remarks stressing the multiplicity of human rights, with their various interdependent and competitive qualities.[108] On the one hand, the turn to human rights thinking placed Pictet's team in a unique position to push for ever more rights' protections long before the Teheran Conference had adopted the specific discourse of human rights in wartime. On the other hand, this turn remained highly selective and somewhat ambiguous. The removal of several categories of persons and the ICRC's cautious approach toward limiting state sovereignty increased the chances of future drafting success and reflected the historical lessons drawn from the Tokyo Draft's failure. At the same time, it complicates the still-dominant view in the contemporary literature that downplays the impact of the human rights revolution on the ICRC's quickly evolving drafting position in the late 1940s, as well as heralding its role on behalf of political prisoners more generally.[109]

Gaullism at War

The most radical post-war shift in attitudes toward rights and civilian protection in wartime, however, had been taken on the part of the French government. Unlike its prewar predecessor, which had basically rejected the Tokyo Draft, the new Gaullist provisional government not only embraced this text, but also wished to radically transform its scope and nature in line with French legal visions and interests. The experience of total defeat and brutal counterinsurgency as an occupied country, combined with the dominant influence of human rights thinking in debates among the former victims of war on its preparatory commission, triggered a critical shift in French legal attitudes. The future Civilian Convention, Paris argued, was to be based upon, among other things, the Tokyo Draft and a human rights report which had been written by René Cassin, the Gaullist representative at the UNCHR.[110]

Drawing inspiration from Cassin's wider efforts to reconstruct liberal and democratic values after the Vichy era, the French preparatory commission put a heavy stress on the concepts

[107] *Id.*

[108] Marco Duranti, The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention 392 (2017).

[109] "Since 1945 the ICRC has paid increasing attention to one of the most fundamental human rights issues—political prisoners . . . ." David Armstrong, *The International Committee of the Red Cross and Political Prisoners*, 39 Int'l Org. 615, 626 (1985). *See also* Jacques Moreillon, *The ICRC and the Future*, 65 Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge 231 (1983).

[110] Minutes Meeting Interdepartmental Commission, December 4, 1946, No. 160-BIS, Unions Internationales, 1944–1960 (Unions), Les Archives Diplomatiques (LAD), Paris. This point adds an element to existing studies about Cassin's wider influence on post-1945 human rights' initiatives. Winter & Prost, *supra* note 70.

https://doi.org/10.1017/ajil.2018.84 Published online by Cambridge University Press

and language of human rights.[111] In the first place, it significantly widened the Tokyo Draft's originally limited scope by opening its doors to virtually all civilians in occupied territory. Furthermore, it strengthened the text's protections against the occupier's arbitrary counter-insurgency measures and, contrary to the ICRC, banned deportations and collective punishment of villages (a response to the Nazi atrocity at Oradour-sur-Glane).[112] Under influence of military officials, the French initially expressed reluctance, however, to adopt a comprehensive human rights agenda by strictly banning the use of reprisals, which they considered a potentially useful means to "retaliate" against structural violators of the law.[113] Further revealing the limitations of their human rights thinking, the French also opposed extending their plans to protect partisans in occupied territory to Viet Minh fighters.

When these French proposals were finally presented at the meeting of Allied government experts in mid-1947, the delegates witnessed fierce clashes between continental Europeans, who supported greater protections for civilians and partisans in occupied territory, and their Anglo-American colleagues, who sought to protect their security interests as present (and potential future) occupiers in Palestine, Germany, and Japan. Due to continuing pressure from the ICRC and other continental Europeans, the conference—which ended its plenary meeting with great applause after the president had talked warmly about the need for peace and the protection of "*les droits de l'homme*"[114]—accepted a groundbreaking reference to colonial wars (the result of Castberg's continuing interventions to limit state sovereignty in war[115]) and strict prohibitions against various arbitrary measures, to French surprise.[116]

Apart from the continental Europeans' voting majority, the ICRC's decision to avoid prioritizing issues other than the Civilian Convention, as it had done before the war, played a crucial part in this success. Equally important, the U.S. government initially took a fairly flexible position on the Civilian Convention's sections dealing with occupation, as it realized that it could no longer resist the normative shift which had taken place since 1945 favoring stricter regulation of an occupier's powers. Combined with the conceptual impact of different human rights agendas, these factors together laid the groundwork for an early and legally revolutionary drafting success in obtaining an ambitious draft of a Civilian Convention. At the same time, the delegates realized that, due to fierce Anglo-American opposition, they had been unable to provide neither partisans nor victims of air bombing with sufficient legal protection.

[111] *See* Minutes Meeting Interdepartmental Commission, December 4, 1946 and January 10, 1947, No. 160-BIS, Unions Internationales 1944–1960, LAD.

[112] The SS massacred and destroyed the French village of Oradour-sur-Glane allegedly in retaliation for partisan activities.

[113] *See* Minutes Meeting Interdepartmental Commission, December 4, 1946, *supra* note 110. When Cahen himself endorsed the right of reprisals for governments in times of internal war while stressing the need to protect human rights in war, other delegations reacted surprised, if not puzzled. Report of U.S. delegation to the Stockholm Red Cross Conference, 1948, Provost Marshal General, No. 672, NARA; Minutes of Meetings Legal Commission, August 1948, American Red Cross, No. 22, NARA.

[114] Speech President Conference, 1947, No. CEG_1947_ASSPLEN, ICRC Library.

[115] See Minutes Meeting Civilian Commission Government Expert Conference, 1947, No. 37514, ICRC Library; Minutes Meeting Bureau, 1947, No. CEG_1947_BURCONF_PV, ICRC Library.

[116] Cable Lamarle on Civilian Convention and Government Expert Conference, April 17, 1947, No. 160, Unions Internationales 1944–1960, LAD.

https://doi.org/10.1017/ajil.2018.84 Published online by Cambridge University Press

The Stockholm Moment

In the following months, Pictet's team began creating the first comprehensive drafts for a separate Civilian Convention to be presented at the upcoming Red Cross Conference in Stockholm. While doing so, Pictet indicated a serious interest in the work of the UNCHR: he read reports about the Commission's work and even attended as an observer its meetings in Geneva, in December 1947.[117] The effects of this continuing engagement with human rights thinking can be illustrated by his team's first drafts for the Conventions. Unlike previous texts, these drafts now expressly banned collective penalties and guaranteed basic rights for every person held in detention, including those partisans excluded from the POW Convention, thereby calling into question the older distinction between combatants and non-combatants, complained UK officials.[118] By mid-1948, showing their pragmatic impulses and political awareness, the ICRC's drafters had largely given up on Pictet's older plan to widen the POW Convention's restrictive outlook, focusing their attention instead on creating a robust Civilian Convention for enemy civilians and excluded irregulars.[119]

At the same time, however, Pictet's team suddenly opposed using the specific discourse of "human rights,"[120] suggesting that such a reference might imply protecting civilians against their own government—a topic that the ICRC wished to outsource to the UNCHR.[121] For different reasons, Huber continued to defend a narrower human rights vision than Pictet, arguing that the ICRC could only act successfully when "reciprocity was granted," which was not the case with "nationals of persecuting states."[122] By prioritizing its own interests and framing human rights discourse as a UN doctrine for civilian categories to be excluded from humanitarian law, the ICRC opposed any reference to human rights in armed conflict, turning this particular vocabulary into a spectral legal phenomenon. This prioritization also reflected the organization's wish to have its own distinct Convention for enemy civilians alone. These decisions help to explain the later disappearance of "human rights" from the legal memory of most observers of humanitarian law. Indeed, it is remarkable how the human rights revolution, as a discourse, momentum, and a collection of concepts, was first appropriated by the ICRC, but then situated in a discursive borderland, as a casualty of

[117] Note Pictet for Michel on UN Commission of Human Rights, March 17, 1947, No. CR-240-10, ACICR. In this note, Pictet admitted to have a serious interest in the Commission's work. Pictet, like Duchosal and Pilloud, attended the Commission's meetings as an observer. See Letter on ICRC Observers to UN Secretariat CDH in Geneva, November 21, 1947, No. CR-243-11, ACICR; Letter Martin Bodmer to Eleanor Roosevelt, November 3, 1947, No. CR-243-11, ACICR; Mémoire du CICR sur les droits de l'homme, April 30, 1948, No. CR-243-11, ACICR.

[118] Draft Civilian Convention, 1948, No. CI_1948_B3_01_ENG_03, ICRC Library.

[119] Minutes Prisoners of War Committee, June 25, 1948, No. 673, Provost Marshal General, NARA. No minutes of this meeting have been found in the ACICR.

[120] In essence, Hitchcock draws a straight line between 1946 and 1949, thereby overlooking the significant changes in the ICRC's understandings of human rights during this period. Hitchcock, *supra* note 17, at 97.

[121] The fear of UN interference (either through invitation or outside meddling) failed to materialize as the UN International Law Commission finally decided not to revise the existing rules for warfare. See Letter Dunand to Pictet, December 8, 1947, No. CR-243-11, ACICR; Summary Minutes of Meetings Sub-Committees, August 1948, No. CI_1948_COMJUR_SC, ICRC Library; Minutes Plenary Meeting, March 20, 1947, No. A PV A PI.18, ACICR; YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1949. SUMMARY RECORDS AND DOCUMENTS OF THE FIRST SESSIONS INCLUDING THE REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY 51-53 (1956).

[122] Cited from: Report Riegner Conference on the Study of Treaty Stipulations, *supra* note 104.

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concerns about potential opposition from the Great Powers, ideas of legal exceptionalism, and fears of restricting the ICRC's own institutional role at the global stage.

For similar reasons, at the final preliminary drafting meeting in Stockholm in August 1948, Pilloud opposed a proposal from a Danish delegate prohibiting transfer of the occupier's own nationals into occupied territory. In Pilloud's eyes, this proposal overly infringed upon state sovereignty, including control over a state's own nationals. Bringing to light the limitations of the ICRC's selective human rights agenda, Castberg, the Norwegian human rights lawyer, argued that the ICRC focused disproportionally on appeasing state demands and safeguarding the occupier's own sovereignty, thereby ignoring the fact that this proposal sought to protect enemy civilians against the occupier's arbitrary will, not vice versa. Stressing the rights of occupied nationals vis-à-vis the occupier's own nationals, Castberg saw this plan as being aimed at prohibiting settlers from taking the food supplies and homes of indigenous populations.[123]

Partly due to Castberg's continuing interventions to adopt a more ambitious human rights agenda, the Stockholm Conference finally accepted a whole range of plans against arbitrary treatment. Emboldened by this breakthrough, Cahen-Salvador, a French Holocaust survivor and Cassin's subordinate at the Conseil d'État, drafted together with Castberg a special preamble for the Civilian Convention—the Frenchman later spoke of a "moral revolution."[124] Clearly influenced by the recently accepted draft text of Cassin's UNCHR, the document they formulated sought to protect human rights "at any time and in all places,"[125] and it included protections against violence to life (Article 3 of the UNCHR draft text), torture (Article 4), and summary executions (Articles 8 and 9).[126] In the end, the Red Cross drafters accepted with overwhelming support the first comprehensive human rights text in history protecting civilians in belligerent, occupied, and even colonial territory, symbolizing the increasingly circumscribed nature of state sovereignty in this period.

Most remarkably, the Stockholm drafts, as they became known, featured a reference to "human rights" (despite ICRC skepticism), as well as a set of protections against summary executions and other forms of arbitrary treatment, even for "child soldiers,"[127] causing exhilaration among the victims of former Nazi empire. To be sure, these texts contained various loopholes, but they remained much smaller in size and number compared to the Tokyo Draft. On the whole, this outcome represented a major success for France and, to a large extent, Pictet as well. The absence of a restrictive British delegation, combined with the ICRC's Faustian bargain to protect crucial parts of state sovereignty in exchange for robust protections for enemy civilians, made it possible for Western Europeans to push for more far-reaching

[123] Summary Minutes of Meetings Sub-Committees, August 1948, No. CI_1948_COMJUR_SC, ICRC Library.

[124] Final Record of the Diplomatic Conference of Geneva of 1949, *supra* note 11, Vol. II, Section A, at 696.

[125] Revised and New Draft Convention for the Protection of War Victims, 1948, at 113, LOC.

[126] William Schabas, The Universal Declaration of Human Rights: The Travaux Préparatoires 1940–1942 (2013).

[127] Following a request from the Geneva-based International Union for Child Welfare, the conference further agreed to ban corporal punishment for "persons under eighteen years of age," in order to protect the "child partisan" of World War II, or the "child soldier" as such (a term coined only much later), a now largely forgotten page in the transnational history of protecting child soldiers. *See* David Rosen, Child Soldiers in the Western Imagination: From Patriots to Victims (2015).

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proposals (an example of the "cascading effects" discussed earlier) to protect human rights in armed conflict.

Urging a more robust sanctions mechanism, the ICRC's Legal Division even asked four international jurists, including human rights advocate Lauterpacht, to come to Geneva for a special meeting to draft a set of penal provisions for the future Conventions. While originally viewing criminal prosecution as anti-humanitarian, the ICRC now endorsed it as an important instrument in protecting the rights and dignity of individuals in wartime.[128] The rise of criminal accountability and individual responsibility connected with the surge of human rights thinking: these "legal flows" got entangled and indeed strengthened each other.[129] Merging them with older legal principles,[130] the jurists created several articles legislating individual criminal responsibility and fair trials. They also criminalized acts against the body, personal liberty, and dignity of individuals—another illustration of "cascading effects."[131]

The British government reacted furiously to these criminal law proposals from the ICRC as well as to the Stockholm Conference's larger outcome. Influenced by its anxieties as a result of the East-West tensions and wars of decolonization, the War Office wished to protect its (overstretched) armed forces from rear attacks by guerrillas, and it disliked the continental efforts at Stockholm to draw connections among and between the Conventions, human rights law, criminal law, and efforts to regulate colonial war. Striving to either scrap or disentangle these issues, one War Office representative argued that "it will need all our skill . . . to prevent overlap with the 'Human Rights' proposals."[132] While simultaneously trying to exclude colonial war from texts discussed at global and European fora,[133] UK officials also opposed the preamble, as they believed it cast a "blanket" over the two Conventions "to safeguard the 'principles of human rights' in peace as well as in war."[134]

While less restrictive than its British counterpart, Washington also hardened its views in the wake of the "Stockholm moment." The United States' main concern lay with securing the interests of its armed forces while protecting them against inhumane treatment and rear attacks by Communist spies and saboteurs—a concern that grew in the wake of East-West tensions following the Berlin Crisis. The Americans, like the British, eventually opposed core elements of both human rights thinking and discourse. They suggested cutting the link between the POW and Civilian Conventions by means of extrajudicial editing techniques, by placing unwanted persons between rather than under these two treaties, as well as a special security clause. This particular provision would place captured (Communist) agents temporarily outside humanitarian law's scope. By trying to prevent these detainees from spreading intelligence through prison visits by outside observers, Washington aimed to protect its most vital security interests at this stage of the Cold War.[135]

[128] LEWIS, *supra* note 75, at 257–62.
[129] Von Lingen, *supra* note 75, at 3.
[130] LEWIS, *supra* note 75, at 257–62.
[131] Remarks and Proposals submitted by the ICRC, 1949, ICRC Library.
[132] Letter Roseway to Kirkpatrick on Draft Texts, November 1, 1948, No. 3970, FO369, TNA.
[133] BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION (2001).
[134] Briefing UK delegation for diplomatic conference, 1949, No. 4145, FO369, TNA.
[135] Minutes Prisoners of War Committee, March 31, 1949, No. 673, Provost Marshal General, NARA.

https://doi.org/10.1017/ajil.2018.84 Published online by Cambridge University Press

The Diplomatic Conference: Codifying "Human Rights"—Or Not?

The crucial final drafting debate over the Civilian Convention took place in the diplomatic conference's Third Committee, which was chaired by two Holocaust survivors—Chairman Cahen-Salvador, and the Bulgarian Vice-Chairman Nissim Mevorah. The Committee also included delegates from the Soviet Union and a number of postcolonial states, like India and Burma. The result was a rich but numerically weak concert of delegates from Asia, Latin America, and the Middle East, even though the diplomatic conference as a whole remained very Eurocentric. What is most striking about the Committee's work is that human rights-talk went from being at the core of humanitarian law's discursive future, to circulating around the periphery of the debates, to finally disappearing from large parts of the final texts. Although several key delegations—including some unexpected actors—continued to engage impactfully with human rights thinking, they also questioned the principle of applying individual rights and dignity to armed conflict not only from a political standpoint, but also discursively and conceptually.

The Scandinavian delegates, while often seen as major advocates of human rights in the twentieth century, vigorously opposed plans to completely outlaw the employment of prisoners of war for the removal of mines.[136] In their eyes, the collective rights of their own civilian populations weighed heavier than the individual rights of enemy soldiers, whom they held responsible for the minefields laid during the Nazi occupation, with potentially catastrophic effects for future POWs. In a similar fashion, Israeli and other delegates suggested prioritizing the collective rights of endangered civilian groups over the individual rights of enemy soldiers. For them, the concept of "belligerent equality," a cardinal principle which said that the law's obligations and rights apply equally to every belligerent regardless of whether its acts of war had been unlawful or not, had lost its relevance in the age of genocide. An Israeli delegate, "bearing in mind the terrible suffering undergone by [my] people," said that:

> Up to the last war combatants alone were involved in the event of conflict. That was no longer the case during the Second World War, in the course of which a belligerent Power was manifestly bent on exterminating a whole people, massacring women and children in cold blood. What should a people do in such circumstances? Should it not rightly and dutifully seek to defend itself?[137]

As one of the few direct references to the Holocaust during the entire drafting process,[138] the main goal of the Israeli proposal was to lower the threshold for resistance groups operating with a so-called "just cause" and in a combined legal space of aggression and genocide.

[136] A New Zealand report makes note of "Scandinavian countries." Report of New Zealand Delegation to Diplomatic Conference of Geneva 1949, at 37–38, AAYS 8638 W2054 ADW2054/1220/3/3 (R18524114), Archives New Zealand (ANZ), Wellington.

[137] Final Record of the Diplomatic Conference of Geneva of 1949, *supra* note 11, Vol. II, Section A, at 426–27.

[138] While some authors have pointed to the Holocaust in explaining the Conventions' genealogy, the drafters stayed mostly silent on this topic. This adds another layer to Duranti's critical analysis of the silence of the UDHR's drafters with respect to the Holocaust as an inspiration or formative experience for their work. Marco Duranti, *The Holocaust, the Legacy of 1789 and the Birth of International Human Rights Law: Revisiting the Foundation Myth*, 14 J. GENOCIDE RES. 159 (2012); Daniel Cohen, *The Holocaust and the "Human Rights Revolution": A Reassessment*, *in* THE HUMAN RIGHTS REVOLUTION: AN INTERNATIONAL HISTORY 53–72 (Akira Iriye, Petra Goedde & William Hitchcock eds., 2012). For examples of the "Holocaust argument," see Leslie

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A recent example of such a case was the group of former Jewish partisans in Nazi-occupied Belarus who lacked protection under the then existing laws of war. Such armed groups, advocates argued, would only have to comply with some basic rules set by the Hague Regulations to receive the future law's backing.[139] These ideas remained silent, however, on measures that would subvert the aggressors' human rights (e.g. those of German POWs held by Jewish partisans). Expressing concern about these proposals, the Anglo-American drafters ultimately crushed them to pieces—not because they cared so much about human rights, but rather due to fears of having to face similar partisans in the near future.

Illuminating the shrinking political space for imaginative lawmaking, the UK and United States also defeated numerous plans at the diplomatic conference to broadly protect the rights and dignity of civilians and soldiers in armed conflict. They rejected, among other things, attempts to question indiscriminate air bombing, substantially lower the POW Convention's threshold, or allow irregulars to fall under the Civilian Convention's shield of protection, as had been originally suggested by Pictet's team.[140] The Third Committee, where the Anglo-American security clause to the treaty was discussed under supervision of Committee president Cahen, had witnessed a major split between the ICRC and French, seeking to protect human rights for every "protected person," and the closely collaborating British and American delegates mostly successfully arguing in favor of excluding Communist irregulars from both Conventions.

The remaining tool for creating a legally meaningful backup for irregulars excluded from the restrictive POW Convention was the preamble featuring a notable reference to human rights. Calling it an "integral part" of the Conventions,[141] Cahen's delegation continued to use human rights as a rallying cry at the diplomatic conference. While acting as a Monegasque delegate under French control, the son of De La Pradelle, the liberal Parisian jurist of international law, similarly argued that the preamble should "ensure that individual liberties which were recognized in peace-time were also respected in time of war,"[142] a reflection of a fairly consistent Francophone aim of converging human rights and humanitarian law. However, once the Western delegations supported an essentially anti-Communist proposal from the Vatican to include a reference to the "Divine Origins of Man,"[143] the preamble's debate became a major Cold War battleground, subsequently resulting in the instrument's

Green, *Grave Breaches or Crimes Against Humanity*, U.S.A.F. ACAD. J. LEGAL STUD. 19, 21 (1997); and ALEXANDER GILLESPIE, A HISTORY OF THE LAWS OF WAR VOL. II, at 183 (2011).

[139] These basic rules, set by Article 23 of the Hague Regulations of 1907, banned the use of poisoned weapons and the killing of wounded soldiers, for instance.

[140] The last point connects with Knut Dörmann's argument about the Civilian Convention's legal potential for so-called "unlawful combatants." Knut Dörmann, *The Legal Situation of 'Unlawful/Unprivileged Combatants,'* 85 INT'L REV. RED CROSS 45–74 (2003). Most drafters agreed that the POW Convention's scope-defining article, with its reference to "resistance movements," was not so much meant as a robust legal safeguard, as some have suggested previously, but rather as a means to break a diplomatic impasse. Raymund Yingling & Robert Ginnane, *The Geneva Conventions of 1949*, AJIL 393, 402 (1952). Castberg, too, admitted euphemistically that the "solution offered by the Conventions . . . was by no means in accord with the hopes of many members of the Conference." Frede Castberg, *Franc Tireur Warfare*, NETH. INT'L L. REV. 83–84 (1959). For the view that "the new 1949 Conventions went considerably further by extending Geneva protections to long-term resistance movements," see Hitchcock, *supra* note 17, at 99.

[141] Final Record of the Diplomatic Conference of Geneva of 1949, *supra* note 11, Vol. II, Section A, at 696.

[142] *Id.* at 693.

[143] Report of Irish Delegation at Geneva Diplomatic Conference 1949, 25 November 1949, at 22–25, No. Series DFA-5-341-137-2, National Archives of Ireland (NAI), Dublin.

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elimination. This omission created lasting ambiguity about the relationship between human rights and humanitarian law—a love that dared not speak its name until the Teheran Resolution of 1968.

More tragically, however, Castberg's destroyed human rights preamble was given new life and meaning by the French in a manner that undermined his other key plan—to apply the Conventions directly to civil and colonial wars. Bringing the diplomatic negotiations out of their impasse, the French delegation, "embarrassed by [their] position in Indochina,"[144] had suggested applying the preamble's very general principles to "non-international armed conflicts" (NIAC).[145] In practice, however, this meant that the French, seeking to protect their colonial interests, prevented any serious encroachments on their sovereign discretion, to British satisfaction.[146] Many of the (post-)colonial powers therefore viewed it positively, partly because the drafters removed the original text's reference to human rights.[147] The new text was finally adopted by the conference as Common Article 3 (CA3).

So, while causing tension, the malleable concepts of human rights, humanitarian law, and empire were eventually brought into harmony with each other by means of shrewd French drafting techniques. In French eyes, there was no necessary contradiction between promoting human rights on the international stage and protecting colonial sovereignty. Their new draft for CA3,[148] which was based on Cahen's coedited human rights preamble, did not so much contradict empire as allay its concern about outside interference in its own affairs. France had already successfully removed, in 1948, Castberg's suggested reference to colonial wars in favor of embracing "non-international armed conflicts," and they blocked CA3 from potentially recognizing the Viet Minh as a belligerent. (The concept of self-determination was legally enshrined only after the end of formal empire three decades later.)[149] By significantly limiting the article's scope and its legal obligations, the French succeeded in protecting their colonial state's authority to decide whether it would apply it to so-called "policing" operations, which exemplifies the colonial encounter's constitutive impact on the making of humanitarian law. In a stealthy move, they cracked the enigma of absolute sovereignty without collaterally damaging their colonial state's discretionary powers.

Even though some concepts and vocabulary of human rights were removed or hidden at the margins of the Conventions' texts, the diplomatic drafters remained largely committed to applying human rights thinking to situations of armed conflict. Showing the impact of "cascading effects," they adopted the right to a fair trial;[150] the right to freedom of religion;[151] the

[144] Report of New Zealand Delegation to Diplomatic Conference of Geneva 1949, *supra* note 136.

[145] Final Record of the Diplomatic Conference of Geneva of 1949, *supra* note 11, Vol. II, Section B, at 78.

[146] Letter UK Delegation to Caccia, 10 June 1949, No. 4152, FO369, TNA.

[147] It is unclear whether this was done first by the French, or later by the delegates together, although it seems that the former explanation is more plausible than the latter.

[148] For the highly complex drafting debate of CA3, see Giovanni Mantilla, *Forum Isolation: Social Opprobrium and the Origins of the International Law of Internal Conflict*, 72 Int'l Org. 317–49 (2018).

[149] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocal I), June 8, 1977, Art. 1.

[150] Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, Art. 5 [hereinafter Civilian Convention].

[151] *Id.* Art. 27.

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right to counsel;[152] the right to appoint an interpreter;[153] the right of communication with Protecting Powers;[154] the right of appeal;[155] the right to humane treatment; the principle of non-discrimination;[156] the principle of human dignity;[157] and the right to have rights.[158] In addition to these innovations, the drafters also accepted surprisingly quickly a whole range of prohibitions against brutal counterinsurgency measures, from "extermination" (not genocide) to hostage taking.[159] Contrasting with the codification difficulties of the interwar years, the suggested ban on hostage taking failed to spark any debate at all, leading to its acceptance at the first reading and making newspaper headlines across the globe. Whereas the Americans had given up on this point at an early stage, the British finally did as well once they realized the overwhelming resistance they would be facing.[160]

Equally important, to the surprise of the ICRC as well as the French,[161] the Soviets strongly supported many of those plans to empower the rights of civilians and POWs, often closely collaborating with the Western European powers, while creating the conditions for the revolutionary drafting success in August 1949. Anglo-American attempts to undermine the proposed limitations on the death penalty were successfully deflected by a surprisingly united opposition of former victims of the Nazi empire. The two major liberal powers that sought to maintain their sovereign wartime powers were ultimately forced by, among other things, the universalistic potential of their own wartime declarations to accept significant political costs at the final diplomatic conference.[162]

As most observers recognized, the signing of the four Geneva Conventions after a great game of lawmaking represented a "revolutionary" shift in the history of the laws of war.[163] Whereas preexisting international treaties generally agreed on the legality of vicious counterinsurgency measures like summary executions,[164] the Civilian Convention banned many of these with a stroke of the pen, providing occupiers the right to repeal those penal laws that

[152] Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, Art. 105 [hereinafter POW Convention].

[153] Civilian Convention, *supra* note 150, Art. 72.

[154] POW Convention, *supra* note 152, Art. 78.

[155] *Id.* Art. 106.

[156] Civilian Convention, *supra* note 150, Art. 27.

[157] *Id.* Art. 3.

[158] *Id.* Art. 8.

[159] *Id.* Art. 32. In a savvy move, a U.S. delegate had revised the Soviet proposal banning group extermination (i.e. nuclear holocaust) by making it applicable to merely individual protected persons, rather than the whole civilian population, as the original text did. By focusing on individual rights, the U.S. delegation had banned Nazi-style extermination while leaving the destruction of groups and cities deregulated.

[160] Minutes Meeting UK delegation, May 3, 1949, No. 4150, FO369, TNA.

[161] Conference Diplomatique. Rapport Spécial Etabli par Pilloud, September 16, 1949, No. CR-254-1, AICRC.

[162] At the same time, it is important to treat the war-declarations-argument carefully and to stress the historical importance of drafting agency. The Allied wartime declarations were hardly mentioned by the drafters during the drafting process. Nor did the previous Allied wartime declarations automatically lead to a Civilian Convention after 1919. For the war-declarations-argument, see KARMA NABULSI, TRADITIONS OF WAR: OCCUPATION, RESISTANCE AND THE LAW 12–13 (1999).

[163] Lauterpacht, *supra* note 13, at 360.

[164] On the legality of reprisals and collective penalties: *Id.* at 361. On the legality of summary executions: KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 207–12 (2012).

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sought to turn back the clock.[165] The treaty's architects had made remarkable steps in pivoting the laws of war from focusing on soldiers' rights to protecting enemy civilians. They accepted, for the first time in history, a "bill of rights" for individuals other than soldiers and questioned absolute state sovereignty in myriad ways.[166] In fact, they imposed obligations on parties even if they had not signed the Conventions or simply lacked subjectivity under international law. Whereas under previous laws of war the protection of individuals remained contingent upon the state's diplomatic obligations, this principle came under severe pressure as a result of the law's embrace of individual legal personality.

Despite its birth defects, Common Article 3 represents the first binding post-1945 international legal provision that tried to break with absolute state sovereignty in domestic and colonial affairs.[167] The Civilian Convention also symbolizes the first binding international agreement in history recognizing human rights protections for civilians in belligerent and occupied territory. In 1945, the drafters of the UN Charter had paid merely lip service to the idea of human rights,[168] the European Convention of Human Rights was adopted only a year after the diplomatic conference's closure,[169] while the UDHR remained a nonbinding statement of moral principles.[170] Those two provisions of the Conventions personify the first major post-1945 challenge to the idea of absolute state sovereignty,[171] and illustrate the entangled emergence of interacting "legal flows" such as human rights, humanitarianism, international criminal justice, and postcolonial sovereignty in this post-war epoch.

IV. Conclusion

This article has demystified a crucial misconception—that human rights had nothing to do with humanitarian law until the legal revolution of "1968," rather than having a transformative effect on the 1949 Geneva Conventions' foundations. Recovering this past matters not just historically, but also theoretically and conceptually. Unearthing international law's history brings to life the original registers of key terms, thereby fracturing entrenched understandings of its principal ideas and norms.

This genealogical approach also has significance for scholars exploring the development of international law. In challenging conventional theories, this article has demonstrated the

[165] Civilian Convention, *supra* note 150, Art. 64.

[166] *See* Humanizing the Laws of War, *supra* note 4, at 117.

[167] Contrary to a view in recent scholarship, this was the first post-1945 binding provision seeking to break state sovereignty in domestic affairs. The European Convention on Human Rights (ECHR) did so one year later as well, although its temporal and spatial dimensions were far more limited. Duranti, *supra* note 107, at 384. Some historians appear to be unaware of the existence of CA3, arguing that the 1949 Geneva Conventions are concerned with "international conflict" alone. Steven Jensen, The Making of International Human Rights 206 (2016).

[168] Mark Mazower, No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations (2009).

[169] Duranti, *supra* note 108.

[170] Moyn, *supra* note 87.

[171] It is often ignored in the literature that the original version of CA3, i.e. the Civilian Convention's preamble, had a distinct history featuring a reference to human rights. Most accounts only recognize an overlap between CA3 and human rights law for the period from the 1960s onward. *See* Sivakumaran, *supra* note 32, at 42–46; Mantilla Casas, *supra* note 2, at 194. Some scholars who have drawn attention to this connection between both fields of international law are Rosemary Abi-Saab and Theodor Meron. *See* Rosemary Abi-Saab, Droit Humanitaire et Conflits Internes: Origines et Évolution de la Réglementation Internationale 59–60 (1986); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239, 246 (2000).

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impact of contingency and competing legal trajectories on the Geneva Conventions' drafting process. Advocates of humanitarian law supported human rights in their own way while clashing over which and whose rights should come first.[172] For example, the Civilian Convention seeking to protect enemy civilians against inhumane treatment failed to strictly forbid the use of starvation as a weapon of war. Similarly, it closed its doors on many different categories of civilians, such as the states' own nationals and political prisoners.

This element, which alludes to the deeper intricacies in the history of international lawmaking,[173] problematizes those accounts emphasizing conceptual stability and segregation in international law. Moreover, the drafters faced competition from rival projects (such as self-determination, genocide law, soldiers' rights, human rights law) and were supposed to respect the demands of the institutions, as well as their partners, that they represented. The history rediscovered in this article exemplifies how the rise of human rights remained contingent upon the interplay of strategy, power, and of agency, as well as the political space available for imaginative lawmaking.[174]

In terms of historical legacies, it is striking that the ICRC's post-1949 efforts to preserve humanitarian law's distinctiveness tended to minimize the role of human rights thinking on its historical development. For example, in 1966, with the publication of his famous essay coining the term of "international humanitarian law" (IHL), Pictet relegated human rights to a junior position under IHL's umbrella, calling the latter "a province in its own right."[175] He also archived his own human rights brochure. Similarly, Pictet's *Commentary* from the 1950s, which has deeply shaped scholarly understandings of humanitarian law's history, referred only "tentatively . . . to human rights."[176] Reinforced by the Anglo-American desire to disentangle human rights from humanitarian law, the ICRC's stress on the latter's distinctiveness has entrenched the literature's view of disciplinary partition and conceptual stability.

These stories of the past and present reveal three crucial details about humanitarian law for contemporary legal scholars. First, they demonstrate the discipline's ability to clothe its efforts in historical terms while noting that there is nothing "new" about them.[177] The field's historical narratives not only evolve according to generational demands but also create more humane interpretations when speaking to particular needs.[178] The *Commentary*'s effacing of history provided the ICRC with the political instruments to reclaim its role as legal expert and to revive the discipline's future in the years after the destructive world wars. For Pictet, this required first legally reconfiguring and then making real a distinctive international legal discipline consisting out of "fundamental principles," "guardians," "unique origins," and

[172] This point draws upon Marco Duranti's excellent analysis of the ECHR's drafting history. DURANTI, *supra* note 108, at 392.

[173] Eric Weitz, *Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right*, 120 AM. HIST. REV. 462, 464–65 (2015).

[174] Moyn, *supra* note 21, at 196.

[175] Jean Pictet, *The Principles of International Humanitarian Law*, 48 REVUE INTERNATIONALE DE LA CROIX-ROUGE ET BULLETIN INTERNATIONAL DES SOCIÉTÉS DE LA CROIX-ROUGE 455 (1966).

[176] KINSELLA, *supra* note 37, at 136.

[177] Austin Sarat & Thomas Kearns, *Introduction*, *in* HISTORY, MEMORY, AND THE LAW 5–6 (Austin Sarat & Thomas Kearns eds., 2002).

[178] Benvenisti & Lustig, *supra* note 30, at 47.

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other invented traditions, which have deeply shaped our understandings of humanitarian law and human rights, as well as their historical relationship.[179]

Second, these stories show, too, that despite the immense controversy surrounding CA3's making, the ICRC carried on with its agenda of combining human rights thinking with internationalizing internal armed conflicts. It often went much further than its newly updated codebook strictly allowed for, using vernacular human rights norms as a means to pressure states to treat detainees more humanely, regardless of their legal exclusion, or other legal barriers. This illustrates how former drafters like Pictet wished to escape from the prison of history through embracing pioneering attempts to apply human rights thinking to wars of various kinds, which had generated a normative shift in attitudes toward sovereignty itself.

When the International Commission of Jurists lobbied for a human rights resolution to be introduced at the Teheran Conference, in 1968, as a response to CA3's perceived malfunctioning in the Global South,[180] the resolution's advocates continued rather than defied past efforts of Pictet and others who had called for the protection of human rights in armed conflict. Yet these remarkable steps raise important and contentious questions for contemporary scholars about CA3's formative scope, the idea of exterritoriality, and the idea of humanity in war. This is not just morally challenging—for it requires us to recognize the violence sanctioned under humanitarian law that may threaten to destroy human life on a truly global scale.[181] But it also accentuates the article's larger relevance to contemporary legal questions about international law in wartime.

This connects to the third and last point; namely, that the Conventions' significance lies not so much in codification itself, but rather in the rights' concepts and norms that emerged from them.[182] As suggested previously, it is crucial to bear in mind that these norms had the potential of strengthening *and* undermining other rights regimes, as they featured inclusive and exclusive impulses,[183] and both humane and inhumane consequences, and they could be understood and arranged in seemingly contradictory ways (seemingly, because the actors themselves saw things often in a starkly different light).[184] Among other seeming contradictions, drafters banned racial segregation (after repeated demands from Jewish survivors) while leaving Jim Crow and colonial laws unaddressed;[185] they opposed maltreatment while aiming

[179] Sunil Purushotham, *World History in the Atomic Age: Past, Present and Future in the Political Thought of Jawaharlal Nehru*, 14 Modern Intellectual Hist. 837, 847 (2017).

[180] Fabian Klose, Menschenrechte im Schatten Kolonialer Gewalt: Die Kolonisierungskriege in Kenia and Algerien, 1945–1962 (2009); Brian Drohan, Brutality in an Age of Human Rights: Activism and Counterinsurgency at the End of the British Empire (2018).

[181] Mégret, *supra* note 10.

[182] Frédéric Siordet, *Croix-Rouge et Droits de l'Homme*, 50 Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge 104, 118–19 (1968).

[183] Mégret, *supra* note 10, at 775–76.

[184] Lora Wildenthal, The Language Of Human Rights In West Germany 8–9 (2012).

[185] This principle represented a break with the 1929 POW Convention's legalizing of racial segregation, a matter that had created significant controversy both during World War II, with the segregation of Jewish POWs, and during the post-1945 negotiations, with Jewish survivors asking for a total ban. *See* Timothy L. Schroer, *The Emergence and Early Demise of Codified Racial Segregation of Prisoners of War Under the Geneva Conventions of 1929 and 1949*, 15 J. Hist. Int'l L. 53–76 (2013); Report Riegner Conference on the Study of Treaty Stipulations, *supra* note 104.

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their "telescopic philanthropy" beyond the suffering of animals in war;[186] they rejected deportations while expelling millions of Germans from their homes; and they outlawed extermination in response to the Holocaust while privately contemplating its nuclear equivalent.

Reviving an old Tolstoyan criticism of the laws of war, these legal blind spots raised fundamental questions about the project itself in the years after 1949. Some critics believed that the project's core idea of humanizing warfare through rights' promotion was not just highly selective, but also deeply ambiguous and hierarchical in its aims. Why, they asked, should we concentrate our moral energy on limiting the effects of war through rights' norms, rather than eliminating its root causes—a critical question that certainly has not lost its relevance in the age of endless war?[187] Others feared that leaving "major evils" (e.g. strategic bombing) deregulated while strictly outlawing "minor evils" (torture) would send a wrong signal: humanized war, they feared, would fail to shock the "conscience of mankind" and, signaling a wider fear of a resurgence of war, lower the threshold of war itself.[188] At issue here was not just the legitimacy of a field "at the vanishing point of [international] law"—which, in turn, placed human rights at its own vanishing point,[189] but also that of the post-1945 international legal order as a whole.

In sum, claims that persons in war other than soldiers possessed rights as victims of war, combined with the drafters' appropriation of human rights thinking, led to major conceptual shifts and flows in the meaning and significance of international law in wartime, as well as in the specific relations between civilians and soldiers, colonizers and colonized, and between human rights and humanitarian law. Unlike what many have suggested previously, these two rights' regimes often overlapped, triggered conceptual tension, lacked stable meanings, caused unintended consequences, and created unique possibilities at crucial points in time that are now largely forgotten. Analysis of these revolutionary legal interactions and trajectories from a less disciplinary-confined and more process-oriented perspective reveals a much richer history, present, and future for international law, than the current literature recognizes. Amplifying this point, scholars and practitioners should pay closer attention to the meaning and specific contexts of the making of humanitarian law, as a site for exploring legal thought and reimagining international law. During the drafting of the 1949 Geneva Conventions, actors from across the political spectrum discussed questions relating to state sovereignty, human rights, criminal law, citizenship, race, and empire—all key matters that deserve much broader scholarly consideration beyond the niche of the laws of war field alone.

[186] One prominent example of animal suffering around World War II was the mass killing of British pets in late 1939. Hilda Kean, The Great Cat and Dog Massacre: The Real Story of World War Two's Unknown Tragedy (2017). For the law of animal protection in wartime, see Karsten Nowrot, *The Status of "Animals Soldiers" Under International Humanitarian Law*, 40 Hist. Soc. Res. 128 (2015).

[187] *See* Samuel Moyn, *Civil Liberties and Endless War*, Dissent (2015); David Cole, *A Defense of Civil Libertarianism*, Dissent (2018).

[188] Lauterpacht, *supra* note 13, at 371–72.

[189] *Id.* at 382.

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