

Book Review of “Revisiting the Geneva Conventions: 1949-2019”*

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The standard disciplinary history of the Geneva Conventions of 1949 tended to depict a picture that was exclusively a triumph of humanitarian principles. Only much later did revisionist scholarly accounts emerge that analyzed the present day issues of humanitarian law by invoking a broader historical trajectory.¹ A markedly different understanding of the origins, development and existing rules has since emerged in this body of literature.² The edited volume under review can similarly be broadly located within this recent trend. The volume provides both an analysis of present issues in humanitarian law and possible future trajectories while maintaining particular focus on a broader historical context across its chapters.

Borhan Uddin Khan and Mohammad Nazmuzzaman Bhuiyan provide an extended historical account on the “Development of the Geneva Conventions” in Chapter 1. They trace this development through five historical phases starting from the battle of Solferino (1859) to the contemporary period. Their account of the development of the Geneva Conventions is not a narrative of linear progression. Instead, they narrate a story of uneven development through the contingencies of wars, colonialism, anti-colonial struggles, and technological innovations. While they note that present-day armed conflicts pose several critical challenges to the rules of war, they still argue that these Conventions retain their significance amid changed legal and operational landscapes.

* Md Jahid Hossain Bhuiyan and Borhan Uddin Khan (eds.), Brill-Nijhoff, Leiden | Boston, 2019. XVII + 332 pp.

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

² Among others, Giovanni Mantilla, “The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols”, in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?*, Oxford University Press, Oxford, 2017; Boyd van Dijk, *Preparing for War: The Making of the 1949 Geneva Conventions*, Oxford University Press, Oxford, 2022.

Md Jahid Hossain Bhuiyan offers an elaborate account of how the rules of war regarding the treatment of prisoners of war (POWs) have developed over time in Chapter 2 on “The Legal Status and Protection of the Rights of Prisoners of War”. He foregrounds the particular vulnerability of POWs in war in his discussion of the specific rules designed to protect this group. He notes that the Geneva Conventions provide robust protection to POWs. However, he argues that similar protection is now available to every detainee during war under the applicable rights regime. He goes on to argue that the corpus of detainee rights effectively renders inconsequential the distinction between an individual having the status of POW and the one without it as far as the protections both will have.

In his chapter on “The Prohibition of Deportation and Forcible Transfer of Civilian Populations in the Fourth Geneva Convention and Beyond,” Etienne Henry provides an account of the emergence and later development of the prohibition on deportation. He argues that international law failed to prohibit individual forcible transfers as well as forcible transfers within territories under belligerent occupation prior to 1949. In his assessment, the available evidence indicates that this prohibition has now attained the status of *jus cogens*. However, he highlights the problematic assumption underlying the prohibition that the civilian population may spontaneously run away before the onset of armed conflict or occupation. He also points out that not all forcible transfers are illegal by virtue of this prohibition. For instance, evacuations are permitted for security or military reasons under Article 49(2) of the Fourth Geneva Convention.

Yutaka Arai-Takahashi examines the scope of liability of medical aircraft flying over a neutral state in Chapter 4 on “Combatants Aboard Medical Aircraft Who Fall into the Hands of a Neutral Power - the Scope of Their Liability to Detention Under the 1949 Geneva Conventions and the 1977 Additional Protocol I”. The specific problem that he addresses is under what circumstances a Neutral Power may lawfully detain members of the armed forces and other related civilian officials aboard medical aircraft under its authority. He argues that while the relevant provisions in different Geneva Conventions do not provide a clear answer, it is reasonable to assume that removing passengers who are not permitted onboard a medical aircraft is a necessary condition for allowing onward journey of the aircraft with lawful passengers. Through this, the protected status of the medical staff can be respected.

In Chapter 5 on “Forced Transfer of Aliens during Armed Conflicts,” Pablo Antonio Fernán-dez Sánchez provides an account of development over time of rules regulating the transfer of populations during armed conflict and occupation. He highlights how World War II drew attention to the issue of forcible transfer of populations and incidents thereof were subsequently examined at Nuremberg. He elaborates how the Geneva Convention IV later developed specific protections for civilians, as well as criminal prohibition, though much later, of the same offence under the institutional structures of international criminal law. However, he notes that the transfer of populations may be a legal imperative for humanitarian considerations in a given situation; specifically as a measure to avert harm to the civilian population. He insists that even in such situations, the principle of *non-refoulement* sets the outer limits of permissible conduct.

In her chapter on “The Geneva Conventions and Non-International Armed Conflicts,” Noelle Higgins analyses the evolution of the regulatory framework governing non-international armed conflicts. She outlines how non-regulation of this category of armed conflicts at the international level before 1949 gave way to the minimum protections incorporated in Article 3 common to all four Geneva Conventions of 1949, and later the more onerous set of protective provisions incorporated in Additional Protocol II. However, she points out that gaps in the protection afforded continue to exist in non-international armed conflicts on account of the lesser number of ratifications of Additional Protocol II, that many of its provisions have not attained the status of customary international law, and above all, its high threshold for applicability in a given situation. Nevertheless, she notes that State practice and judicial creativity have managed to close at least some of these gaps.

In Chapter 7 on the “Four Geneva Conventions of 1949: A Third World View,” Srinivas Burra offers a Third World critique of the Geneva Conventions by focusing on the occlusion of problems of colonial conflicts, colonial occupation and the Red Cross emblem. He develops a persuasive account of how the European experience of armed conflicts was prioritized at Geneva to the effective exclusion of historical and ongoing experience of extensive colonial violence in Asia and Africa. He shows how Western States prevailed over the Third World States in ensuring that no explicit reference was made to colonial conflicts in the Conventions. He further notes that Western States prevailed yet again in extending the Conventions to civil wars despite opposition from the Third World States. Similarly, Western

preferences reflecting cultural and religious considerations succeeded in determining humanitarian symbols. Uncertainty regarding the neutrality claim of the Red Cross symbol and its clear association with Christianity undermines its universal credibility. Burra observes that questions regarding the universal and neutral character of the Red Cross persisted with the decision to use the Red Crescent and Red Lion and Sun along with the Red Cross.

In his chapter on “Criminalising Rape and Sexual Violence in Armed Conflicts: Evolving Criminality and Culpability from the Geneva Conventions to the Bangladesh International Crimes Trial,” M Rafiqul Islam assesses the extent of criminalisation of wartime rape and other sexual violence that exists in the relevant instruments. He notes that rape or sexual violence was originally not even included in the definition of war crimes in the Geneva Conventions. He argues that rape is implicitly considered a war crime because the specified war crimes logically include it. In his view, this implicit criminality fails to capture the trauma of victims. Furthermore, the post-conflict preference for peace over accountability leads to further marginalisation of justice for survivors of wartime sexual violence. He specifically discusses the example of the Bangladesh liberation war to illustrate this phenomenon.

In Chapter 9 on the “Principles of Distinction, Proportionality and Precautions under the Geneva Conventions: The Perspective of Islamic Law,” Mohd Hisham Mohd Kamal offers an extended account of the Islamic law of war focusing particularly on requirements of distinction, proportionality and precautions. He notes that the requirement of targeting only those who are fighting implicitly prohibits the targeting of civilians. He further observes that all alternatives must be considered before identifying the final targets with a view to avoiding unnecessary bloodshed. He notes that the intentional targeting of civilians which is characteristic of acts of terrorism, make them un-Islamic. He also observes that the principle of precautions mandates that all efforts should be made to ensure protection of civilian populations on all sides. Finally, he argues that any violation of any of these three principles is punishable under Islamic law.

Borhan Uddin Khan and Nakib M. Nasrullah in their chapter on “Implementation of International Humanitarian Law and the Current Challenges,” discuss problems of implementation and other current

challenges to the laws of war. They identify lack of adequate cooperation, collaboration and political will among the relevant actors as critical problems plaguing these laws today. They further identify issues with application and institutional measures of implementation emanating from both a combination of the design of these frameworks and new challenges brought about by the changing character of war and technological innovation. They make a number of suggestions to remedy these issues. These suggestions for ensuring the preservation of humanitarian standards range from undertaking normative innovations following Common Article 1, to institutional changes involving the International Committee of the Red Cross, the International Criminal Court, international humanitarian organisations, and even the United Nations Security Council.

In the final chapter on “The Geneva Conventions and Enforcement of International Humanitarian Law,” Derek Jinks delves into the compliance dilemma faced by the Geneva Conventions. He considers this issue by helpfully discussing the dynamic of compliance operating under the classical law of war. He argues that the Geneva Conventions provide a much better enforcement mechanism than the classical law including by providing a logical basis of inter-belligerent sanctions while restricting resort to reprisals. He further argues that while the provision for war crimes trials as retaliation under the Conventions is not designed to prevent the initial violations, it provides a better alternative to the risks inherent to a full-fledged inter-belligerent enforcement mechanism.

Based on an elaborate account of the origins, evolution, challenges and possible future development, this volume constitutes a very important contribution to the existing literature on the need to reassess and revisit the Geneva Conventions. The fact that the majority of chapters have been authored by scholars based in the Global South counts as one of its distinct achievements. This is evident in the way the volume brings attention to several of the blind spots of the Geneva Conventions of 1949; especially marginalisation of issues of colonial occupation, colonial conflicts and generally the disproportionate space given to the European experience of armed conflicts and Western concerns. The volume would have benefitted from a more concrete reconstructive agenda while focusing on the need to revisit the Geneva Conventions and added greater specificity in elaborating the way forward. That said, this volume will be useful for practitioners, academics and students of international law.