

# **Yearbook of International Humanitarian Law**

Volume 24

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Heike Krieger · Pablo Kalmanovitz ·  
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Editors

# Yearbook of International Humanitarian Law, Volume 24 (2021)

Cultures of International Humanitarian Law



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# Editorial

The Yearbook of International Humanitarian Law (IHL) has always strived to be at the forefront of the debate of pressing doctrinal questions of IHL and will continue to do so in the future. However, in this volume, we have decided to take a step back and reflect on the broader theoretical issues that inform the practice and thinking about the field. Nowadays, practitioners and scholars of IHL cannot overlook the fact that different interpretive communities approach questions of IHL from differing perspectives. This is not the case only in IHL. Rather, it has been recognized more broadly as a general feature of contemporary international law.<sup>1</sup> Indeed, academic debates about “universalism versus particularism” have dominated much of the critical scholarship in international law over the past two decades, but they remain relatively underexplored in the field of IHL. This volume of the YIHL is therefore dedicated to investigating IHL’s universalist claims from different perspectives and regarding different areas of law.

Our call for papers encouraged authors to identify diverging “cultures” and epistemic and interpretive communities—academic or institutional—that shape the concrete practices associated with IHL. However, we intentionally left open the term “cultures of IHL” in order to let authors signify it in their proposals. Authors were invited to use the concept of culture to deconstruct and take a critical distance from the production, interpretation, and application of IHL, but those keen on challenging the idea that IHL needs critical deconstruction were also invited to argue their case.

The volume contains four chapters dedicated to the subject of cultures of IHL.

*Alonso Gurmendi Dunkelberg* draws on historical archives to investigate the practice of the laws of war in nineteenth-century Latin America, specifically in the context of the 1879 War of the Pacific between Chile and the Peruvian–Bolivian Alliance. He looks at arguments made before the Chilean Mixed Commissions, which were created in order to adjudicate claims for damages caused by Chile during the War. Gurmendi Dunkelberg’s central claim is that it is possible to find in the proceedings of the Mixed Commission—and, more generally, in regional public opinion—more restrictive views on *jus in bello* than those registered in Lieber’s Code, which was

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<sup>1</sup> See, e.g., Roberts A (2017), *Is International Law International?* Oxford University Press, Oxford.

already well known in Latin America and beyond at the time of the War. Gurmendi Dunkelberg argues that these restrictive views on jus in bello were linked to wider regional beliefs about the primary importance of settling international disputes peacefully, rather than by regulating and humanizing the use of force during hostilities. Gurmendi Dunkelberg conjectures that these beliefs, which are apparent in the Mixed Commissions reports, can go some way in explaining Latin America's relative historical disengagement from the negotiations of the Geneva instruments in the twentieth century. They certainly show that, while formally separated in law, the doctrine and practice of jus in bello and jus ad bellum have deep cultural and political connections, which may be reflected in regional attitudes toward the substantive content and relation between the legal doctrines of jus in bello and jus ad bellum.

*Rotem Giladi* turns to historical narratives of IHL within the professional community of IHL practitioners, particularly "official histories" offered by the ICRC, as opposed to accounts by professional historians, of which there has been an important surge over the past decade. Using a wide array of archival sources to reconstruct the "collective memory" of the community of IHL practitioners, Giladi identifies two prominent macro-narratives that underpin widely circulated historical narratives: one about the progressive humanization of war and the other about timeless and universal truths relative to human protection and duties of restraint in war. While seemingly inconsistent, Giladi argues, these two narratives in fact serve common purposes within the professional project of humanizing war through law. They both contribute in giving legitimacy and practical orientation to the project, in particular by articulating common professional myths of origin, canons of texts, and historical authoritative figures. Giladi provocatively argues that these narratives share the specific purpose of postponing the fulfillment of the humanitarian promise, and as such are ways of coping with the perennial insufficiency of professional efforts to protect in war through law. Along these lines, he identifies and delineates several specific functions that the two narratives can have for IHL practice. Among these functions, he includes the constitution of a *cult*, that is, the elicitation of reverence for texts and painstakingly refined legal analysis of problems, instruments, and commentaries, which may be characteristic of IHL but stand in sharp contrast to the utterly destructive and coarse practices of war.

*Juana Inés Acosta-López* and *Ana Idárraga* look at the case of hostage-taking by members of the FARC guerrillas during Colombia's decades-long civil war. A central element in the 2016 peace accords between the Colombian government and FARC leaders was the creation of a "special jurisdiction for peace" (*Justicia Especial para la Paz* or JEP (its Spanish acronym)) which would select and investigate a number of representative "macro-cases" in which alleged perpetrators of international crimes and gross human rights violations are to be held accountable under a special regime of criminal law and procedure. The authors look specifically at Case 001 before the special tribunal, in which FARC high- and mid-level commanders are being charged for the war crime of hostage-taking.

The authors use Case 001 as a medium to reflect on the contested legal question of whether non-state armed groups can, under some circumstances, lawfully detain members of state forces under IHL, which is at the heart of the case. Partly drawing

on the specifics of the Colombian case, the authors helpfully distinguish three legal dimensions of detention by non-state groups and propose legal criteria for each—the legality of retention of members of state forces, the conditions of captivity, and the obligation to liberate. Significantly for the theme of IHL cultures, they draw on testimony by FARC commanders before the JEP in which attempts were made to justify—from their views as combatants and their own understandings of IHL—the practice of taking Colombian soldiers and policemen as equivalent to the taking of prisoners of war by state forces. The authors partially endorse this claim on technical legal grounds—although with restrictions which the FARC appear far from having observed—and defend a wider recognition of the legality of limited detention powers in non-state armed groups under IHL.

*Rebecca Sutton* shifts her gaze to the ways in which IHL functions in the hands of different actors, specifically by focusing on the beliefs and practices of frontline humanitarian negotiators, who formally operate under IHL, but interact on the ground with armed groups which may have little sympathy or receptivity to legal argument. Based on fieldwork in the Central African Republic and Southeast Asia, she strikingly finds that humanitarian practitioners often keep the law to themselves when negotiating with armed groups. This is partly due to the emotional and political effects that bringing up IHL may have in such contexts. In her analysis, Sutton employs the theoretical outlook of law and emotions, exploring how both law and emotions feature in humanitarian negotiations. As she shows, there are many limitations in adopting a legalistic stance during negotiations, inter alia because of legal indeterminacy, and since it is unclear whether the law itself is up for negotiation. Sutton suggests therefore to give more attention to the positive role played by emotions, which are ever-present—and cannot be avoided—during humanitarian negotiations with armed groups.

For Volume 24, we have, for the first time, included a “Focus Section.” This new section of the YIHL will zoom in on thematic subjects that are specifically related to the year covered by the volume. This year, the volume features a book symposium on Samuel Moyn’s *Humane: How the United States Abandoned Peace and Reinvented War* (2021). Moyn’s general argument is that in recent decades there has been a shift of focus in US public discourse, whereby the “humanization” of war through increasingly restrictive interpretations of IHL has been emphasized, and broader discussions of the justification for American wars have been sidelined. For our symposium, we invited *Craig Jones* and *Nisha Shah* as well as *Doreen Lustig* to reflect on themes from Moyn’s book.

Jones and Shah argue that the concept of “humanity” in war is broader and more complicated than suggested by Moyn. They argue that attempts to legitimize wars through humanization can be found already in the nineteenth century, and furthermore, that in the late twentieth century “humanity” did not only figure as relating to the means of war, but was also constructed as its end. This leads them to question whether humanity as a concept has any room within the discussion and critique of war. On the other hand, Lustig chooses to focus on Moyn’s discussion of peace movements, which advocated for the prevention of wars, and in her view figure in his analysis primarily as precursors to the contemporary attempts to humanize war itself.



As Lustig demonstrates, the vision of these nineteenth century peace movements was wider, as they served not only as important precursors to the current regime of IHL, but offered an alternative, grassroots vision for the greater project of international law.

*Samuel Moyn* then offers a brief response to these engagements. In response to Jones and Shah, he emphasizes the differences between the earlier gestures to humanization, to which Jones and Shah allude, and the current process of humanization which he views as much more substantial. He also argues that although humanity indeed became an end for many contemporary wars, most of the discourse regarding the humanization of war took place in the context of defensive wars—which shows that the process of humanization of IHL is broader than supporting humanity as the end of war. In response to Lustig, Moyn concedes the importance of directing more attention to the peace movements and agrees with much of Lustig’s analysis, but highlights that peace movements had their own racialized and elite politics, and suggests that many of the peace movements’ achievements can be dated to the twentieth, rather than the nineteenth century.

Lastly, as usual, Volume 24 includes a Year in Review section, compiled by the T.M.C. Asser Institute’s *James Patrick Sexton*, *Florent Beurret* and *Nathan O’Regan*. It assesses potential situations of armed conflict that took place in 2021, including their classification; it offers a summary of relevant proceedings and developments relating to the prosecution of war crimes; and an overview of developments in the IHL-related fields of arms control and disarmament.

We are grateful to the authors for their contributions and hope that the volume offers an engaging, helpful, and thought-provoking read, at least as much as it was for us editors during our work.

Mexico City, Mexico  
Berlin, Germany  
Tel Aviv, Israel  
July 2022

Pablo Kalmanovitz  
Heike Krieger  
Eliav Lieblich

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