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BOOK REVIEW

Mats Deland, Mark Klamberg, Pål Wrange, International Humanitarian Law and Justice: Historical and Sociological Perspectives (Routledge, 2020) 242 pp. ISBN 9780367498566 (ebook)

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This book is edited by a trio of Swedish professors and was born of a 2016 academic conference in Sweden centered around the history of international law and justice, organized because the editors believed that scholarship on the topic was lacking. As such, the book can be situated within the current 'historical turn' in international law,[1] but with a specific focus on international humanitarian law ('IHL'). The book is divided into four themes: historiographies (Part I); navigating through legal gaps and fault lines (Part II); emotions and identities as factors in international law (Part III); and, finally, how personalities can influence history (Part IV). Each part begins with an introductory chapter prefacing the theme that weaves throughout the subsequent chapters.

Part I, historiographies, introduces the core idea behind the book: the importance of historicizing international law. Wrange opens this section by arguing the benefits of historiography. In his view, lawyers must understand what the law is, and to do so they must know the origins and context of that law. An example he cites here are treaties: they have to be "assessed and

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** The views expressed are those of the author alone, and do not reflect the position of the US government or the US Department of Defense.

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[1] Ignacio de la Rasilla, *International Law and History: Modern Interfaces* (Cambridge University Press 2021).

understood in the context of [their] contemporary legal universe" (p 12). This focus on contextualisation is another important element of the book, which emphasizes sociological perspectives and therefore the benefits of multidisciplinarity.[2]

Damien Rogers illustrates this theme in his chapter on the evolution of international criminal law ('ICL'). He explores the rise of several ICL institutions – the International Military Tribunal for the Trial of German War Criminals and for the Far East, the International Criminal Tribunal for the former Yugoslavia and for Rwanda, and the International Criminal Court – through the context of modernity. Rogers argues that such analysis is necessary because mainstream ICL legal scholarship focuses almost entirely on the politico-strategic dimension. This is problematic for Rogers because these accounts fail to "contextualize international criminal trials alongside various state reconstruction efforts" (p 20) or consider the politico-economic dimension.

Sebastian M. Spitra provides the second example of why historiography is important in his chapter on the history of the protection of cultural heritage in international law.[3] He identifies what he sees as shortcomings in the "mainstream history" of this field, based on the research from three leading authors in the field.[4] Spitra then briefly presents his own research into 19th century international law textbooks from several countries, including Germany, Austria, Switzerland, the United States, Spain, and Latin America. In his view, this research adds new perspectives and creates space for "revising old narratives and constructing potential new ones" (p 36).

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[2] Social sciences approaches to law – and international law – are increasingly common. See Daniel Abebe, Adam Chilton and Tom Ginsburg, The Social Science Approach to International Law (2021) 22(1) Chicago Journal of International Law.

[3] Spitra notes his emphasis is on contrasting the "wartime narratives of this field with the peacetime histories of cultural heritage protection" to highlight what IHL has neglected (p 30).

[4] Here he highlights the work of Kerstin Odendahl, her work "appears to be the most elaborate and all-encompassing study" on the protection of cultural heritage (p 32); Wayne Sandholtz, "delves into the normative debates and arguments on the rules in their historical settings" (p 32); and John Henry Merryman ("one of the most influential academics in the field of art and law" (p 33).

Mark Lewis argues the rise of international law was not limited to efforts by legal scholars, foreign officials, or humanitarian organizations. The internationalization of police cooperation also advanced international law, as police officials built new national policing systems and increased inter-agency communication and cooperation. Lewis maps the path to present-day Interpol, starting with its roots in 1898 at an anti-anarchist police conference in Rome, and focuses his chapter on the influence the pre-World War I Austro-Hungarian counter-espionage service had in developing international policing.

Finally, Wrange traces the history of the recognition of belligerency to analyze whether the state-centric view of authority and force is changing. He frames the question as one of "sovereign rights versus belligerent rights" (p 61); what is the relationship between the non-state party and the sovereign? International law historically assumed only the sovereign has the authority to use military force – meaning, members of non-state armed groups were exposed to liability under domestic criminal law, even if their actions complied with the laws of war. As part of his analysis, he also examines the question of whether the application of IHL is triggered by someone (Did the sovereign grant the non-state armed group belligerent status?) or by a legal fact (Has the violence crossed the threshold of armed conflict?). Wrange looks to state practice to answer these questions, limiting his analysis to the development of article 6(5) of the Second Additional Protocol to the 1949 Geneva Conventions.[5] He concludes that the rise of amnesty agreements[6] in the post-Cold War era[7] meant that states have given belligerent rights to non-state armed groups, which has, in turn, undermined the sovereign's monopoly on the use of military force.

Part II introduces the evolutionary approach to IHL. Klamberg asserts such analysis should focus on how the concepts and rules within IHL have

[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[6] "The practice of amnesties is now so common that a [non-state armed group] fighter has a reasonable chance of avoiding the exercise of sovereign rights in the form of prosecution" (p 72).

[7] Wrange notes that starting in the 1990s, IHL was generally accepted as applying to all belligerent parties, even in civil war (p 69).

changed (How are new legal concepts generated? How are the successful variations separated from the unsuccessful ones? Why does a legal norm remain after the conditions for selection change?). He advocates this should take place on three levels: individual actors (a person, an organization, a state); the interaction between two actors; and, the system as a whole. Klamberg sees the IHL system as one with gaps and fault lines that leave space for exploitation by states[8] and other actors; it is in these gaps and fault lines where IHL can change and evolve.

The ensuing chapters illustrate three fault lines to support this theme. The first, by Rebecca Sutton, flows from the principle of distinction and is termed the "civilian-civilian fault line." Sutton theorizes the principle of distinction is an exploitable fault line, and gives the example of how humanitarian actors have carved out a special civilian category for themselves, distinguishing themselves from both combatants and other civilians. To demonstrate this fault line, Sutton conducted field research at three military training sites in Sweden, Italy, and Germany, where she studied the humanitarian actors at the center of international interventions through both observation at training sessions and interviews with the trainers and trainees. Through this research, Sutton found that humanitarian actors are distancing themselves from not just the military actors, but also from other types of civilian actors.

Anna Evangelidi introduces the second exploitable fault line – the use of unmanned aerial vehicles ('UAVs') – and analyzes their use through the lenses of humanity and reciprocity. Evangelidi first establishes the interaction between reciprocity and humanity; she asserts the former worked its way into the codified law of war while the latter serves to "explain the evolution of IHL" (p 104). Evangelidi then turns to UAVs, noting advocates for their use in warfare claim they advance restraint, since UAVs can "affect the behavior of

[8] See, for example, Myra Williamson, *Terrorism, War and International Law* (Routledge 2009) on the question of whether a state may invoke an Article 51 self-defense argument in response to an armed attack by a non-state actor; and Carol Rosenberg, 'The Legacy of America's Post-9/11 Turn to Torture' *New York Times* (12 September 2021) <https://www.nytimes.com/2021/09/12/us/politics/torture-post-9-11.html> accessed 13 November 2021 (on the United States' use of torture after 9/11).

parties on the other side who do not follow the rules of war" (p 108). But for Evangelidi, the use of UAVs both precludes the expectation of reciprocity and disregards humanity, and are not an advance in restraint after all. Evangelidi's insight that, "[d]rones bring about a reality of warfare where the elimination of risk is exclusively reserved for oneself in disregard for the humanity of the adversary" (p 107) is especially profound in light of the continued use of drones in counterterrorism operations.[9] For example, consider the August 2021 strike in Kabul that killed ten civilians.[10]

Finally, Mateusz Piątkowski highlights the September 1939 aerial bombing of the Polish town Wieluń to illustrate the third fault line: the (in)effectiveness of international law. The idea of aviation as a method of warfare was born in the late 1700s, and the first regulation of air bombardment came from the 1899 Hague Peace Conference through article 25 of the IV Hague Convention. This regulation was intended to "protect *undefended places* against attacks made by *whatever means*" (p 115). However, despite this regulation, IHL was unable to protect the civilian population in Wieluń. The effectiveness – and related questions of enforceability – of international law is a perennial issue. While some branches of international law have adjudicatory bodies established to enforce them (such as the UN human rights treaty bodies, the International Criminal Court, or the International Tribunal for the Law of the Sea), IHL enforcement is particularly problematic as it has no such dedicated body.

Part III of the book moves into the theme of "emotions and identities as factors in international law" – a topic gaining in prominence.[11] It aims to demonstrate how emotions – the human element – affect the development of the law. First, Nele Verlinden highlights three "points of contact" between emotion and IHL – lawmakers, the fighting parties, and the victims – and

[9] See Stuart Casey-Maslen and others, *Drones and Other Unmanned Weapons Systems under International Law* (Brill 2018).

[10] See Ali M. Latifi, 'Kabul families say children killed in US drone attack' *Al Jazeera* (30 August 2021) <https://www.aljazeera.com/news/2021/8/30/an-afghan-family-killed-by-a-us-airstrike-in-kabul> accessed 6 November 2021.

[11] See for example Susan A. Bandes, Jody Lyneé Madeira, Kathryn D. Temple, and Emily Kidd White (eds) *Research Handbook on Law and Emotion* (Edward Elgar 2021); TA Maroney, A Field Evolves: Introduction to the Special Section on Law and Emotion (2016) Emotion Review 8(1).

analyzes the role emotion plays within each one. Her thesis is that IHL was codified *because of* emotions (for example, Henry Dunant's emotional account of the battle in Solferino led to the creation of the National Red Cross Societies, the International Red Cross Committee, and IHL conventions). Verlinden notes the irony that IHL requires soldiers to deactivate their emotions, such as when having to protect certain persons, despite the negative feelings a soldier may have toward such person, or not killing prisoners of war out of revenge. She reminds the reader that "[t]he suffering of victims of armed conflict has always been a core concern of IHL rules," (p 140), before questioning whether the use of autonomous weapon systems is really an advantage for the victims of armed conflict, given the absence of emotion.

Ka Lok Yip examines the question of how much human agency should be allowed in war with her chapter on the debate over the International Committee of the Red Cross-commissioned Study on the Roots of Behaviour in War.[12] She introduces Dale Stephens' critique of the study – he believes individuals should draw upon their own morals and ethics in order to make legally-compliant decisions in warfare – and then offers her own critique of Stephens' approach. Yip rightfully points out the dangers of "abandoning legal normativity in favour of personal morality' (p 156). Alexandra Hofer then concludes Part III with an illustration of how each side in the Israeli-Palestinian conflict relies on their collective memories (shared narratives about the past in a given community) and identities (the thing that tells an actor who they are) in interpreting international law. She uses the International Court of Justice advisory opinion[13] on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" to illustrate how each side frames the conflict: Palestine refers to the wall as an "expansionist wall" and a "land grab" (p 161); for Israel it is a "security fence" (p 163). Each side's counter-narrative contradicts the other side's collective memory. She concludes that "law can help channel and frame the dispute" in this intractable conflict, but peace

[12] Daniel Muñoz-Rojas and Jean-Jacques Frésard, 'The roots of behaviour in war: Understanding and preventing IHL violations' [2004] International Review of the Red Cross 189.

[13] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion [2004] ICJ 136.

cannot be achieved if "the proposed outcome threatens the foundations of either group's identity" (p 170).

Lastly, Part IV touches on how personalities can influence history. By this the authors mean not just the lawyers, legislators, or judges; this also means the individuals who were motivated by passion, ideology, and religion. Klamberg starts by tracing the history of the protection of cultural works and historical monuments in international law. He argues this protection developed in different parts of international law, with a strong push by Raphaël Lemkin[14] to include cultural genocide in the 1948 Genocide Convention.[15] Next, Daniel Marc Segesser's chapter highlights Gustave Moynier's efforts to set up an international legal body tasked with trying violations of the Geneva Convention of 1864. The chapter not only portrays his work in the field of IHL, but along with the previous chapter shows the reader that even failed efforts can be influential. Finally, Mats Deland closes Part IV with the story of Rosalie Olivecrona and Sophie Leijonhufvud, the two women who started the first feminist journal in Sweden. Their journal evolved over time, and eventually led to the creation of the Swedish Red Cross.

This book's strength is in its themed parts. Each chapter builds upon the previous one to illustrate different aspects of the theme, and this is done well. Parts II and IV are where the book really shines. The historical analyses combined with illustrations of exploitable fault lines confirms the book's thesis; studying the history of international law is essential to fully understanding what that law is. And, the stories of the men and women who worked tirelessly to advance IHL makes them and their efforts come alive. By detailing the work of a handful of individuals, the reader is able to visualize how much IHL has evolved, and, again, gain a deeper understanding of the law. The theme effectively weaves throughout the book's chapters.

What the book lacks is diversity; it is quite Euro-centric. One example of this shortcoming is found in Wrange's chapter on the *de facto* combatant privilege of non-state armed groups though amnesty. Although he briefly

[14] Raphaël Lemkin, *Axis Rule in Occupied Europe* (1944).

[15] Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948.

references the peace agreement in Colombia to support his thesis, this is a missed opportunity to fully explore the lengthy history behind the historical peace agreement. The book's editors do recognize this flaw, noting that while their conference did include "participation beyond the usual Anglo-Saxon realm . . . [t]his diversity is not fully reflected in this book" (p 2). Despite this, the book is still well-done overall, and is capable of inspiring the reader to conduct their own historiography.