

attention as of late. The deployment of big data analytics is seen by many as having the potential to “revitalize the identification of . . . international law formation and evolution,” generating discoveries that are “born from the data” as opposed to “hypotheses that are identified first and then tested on the dataset” (Megiddo, pp. 283, 291). Whatever the method used, the collection and analysis of experimental evidence is aimed at providing “workable, implementable insights” (Venzke, p. 56) to help policymakers and practicing lawyers “understand what is going on” and contribute to the “development and dissemination of behaviourally informed . . . practice” (Van Aaken and Elm, pp. 37, 44).

The contributors in the critical camp, for their part, are deeply skeptical of the “commitment to positivism” and the “assumptions of rationality” that underlie experimental behavioral studies (Venzke, p. 57). The latter’s “obsession with method and empiricism,” it is argued, is but another form of dogmatism that ossifies the imagination and “loses sight” of the real issues to be tackled (Bianchi, pp. 172–73). For critical scholars, then, the mission is not to tame the impact of cognitive frames but, on the contrary, to embrace the “indeterminacy” and the “contingencies” those frames engender (Venzke, p. 55) and mobilize them in the pursuit of counter-hegemonic or emancipatory goals. Seen from this angle, framing can constitute “an important strategy in the hands of norm entrepreneurs” wishing to secure adherence to good causes—as was the case with the “labeling” of the Framework Convention on Tobacco Control as an “evidence-based treaty” (Melillo, pp. 141, 148). Alternatively, frames can be put at the service of “counterstorytelling,” that is, the telling of “alternative stories” that “call dominant narratives into question, and pave the way for new ones” (Windsor, p. 242). Above all else, unveiling the hidden dynamics of knowledge production can be a powerful antidote against international lawyers’ “resignation to the present order of things” (Venzke, p. 66) and an opportunity to “regard old problems from a new angle” (Bianchi, p. 178).

The divide between the empiricist and the critical streams is nowhere resolved, despite some sporadic attempts to build bridges between the two (there, another water-related metaphor). But its very existence raises intriguing questions about the social, intellectual, and disciplinary relationships among the editors and the contributors of the book. Perhaps the juxtaposition of seemingly irreconcilable sensibilities was part of the project by design, as an attempt to provoke intra-disciplinary dialogue. Or perhaps the editors themselves unwittingly fell prey to the “culture of liberal agnosticism,” that is, “the commonly shared assumption that there is not really one right answer or one right approach to ‘doing’ international legal theory” (Rasulov, p. 183). Either way, the encounter and the confrontation that lie at the core of the book—or, if you prefer, the invisible frames that tie together *these* contributions by *these* international lawyers—constitute one of the most fascinating aspects of the book’s hydrography.

TOMMASO SOAVE  
Central European University

*Preparing for War: The Making of the Geneva Conventions.* By Boyd van Dijk. Oxford, UK: Oxford University Press, 2022. Pp. xiv, 376. Index.  
doi:10.1017/ajil.2023.21

The 1949 Geneva Conventions, which occupy center stage in Boyd van Dijk’s *Preparing for War: The Making of the Geneva Conventions*, are often considered to be humanity’s beacons in the darkest of times of war. Along with their 1899 and 1907 Hague counterparts and the complementary 1977 Protocols, they make up the twentieth century regulatory regime governing armed conflict.

This regime has been subject to withering critique. Scholars have criticized the Hague Laws as being permissive rather than restrictive in nature, containing fatal blind spots and affording a central role to vague notions such as military

necessity.<sup>1</sup> In his book *Humane: How the United States Abandoned Peace and Reinvented War*, Samuel Moyn argued more generally that nineteenth and twentieth century efforts to humanize war have had the unintended consequence of effectively preparing the ground for more war and specifically for endless U.S. wars in the current century.<sup>2</sup> The arguments in *Preparing for War* have close synergies with such claims as the book critically scrutinizes the intentions of the drafters of the 1949 Geneva Conventions. Van Dijk, a McKenzie Fellow at the University of Melbourne, offers a crisp account of the drafting process, which transcends and challenges the one-dimensional and mainstream presentation of the 1949 Geneva Conventions and their preparatory works as a consensus affair predominantly aimed at codifying the Nuremberg accomplishments and the “Never Again” axiom. Van Dijk instead presents the negotiation table as a site of high politics. The author’s main claim, signaled by the book’s title, is that the drafters of the Geneva Conventions were driven not only by a moral urge to preempt a recurrence of past horrific acts but also, and even more so, by a forward-looking ambition to retain unregulated discretion over their conduct in upcoming wars. Van Dijk presents the drafters as “active protagonists trying to shape the future of warfare” (p. 5). Instead of portraying the 1949 Geneva Conventions as a “liberal blueprint” (p. 4) or as a World War II monument,<sup>3</sup> Van Dijk offers a more complex picture. Through a detailed, and at times very lively, examination of the intricacies of the negotiations, Van Dijk reveals underlying political struggles, fortuitous outcomes, and the role and influence of

individual actors. In highlighting how preoccupations over future wars essentially informed which matters were strategically included and which were excluded from the Conventions, he also reveals how some of the efforts to exclude matters from the treaties’ reach unexpectedly failed. *Preparing for War* is thus, to a large extent, also a work about “roads not taken,” and contributes to a growing literature that foregrounds the contingency of international law.<sup>4</sup>

The book is built around five themes that go “to the heart of the Conventions” (p. 22). They concern: (1) the making of the “Civilian Convention,” which concerns the key questions of who counts as a civilian and how civilians should be protected during wartime; (2) the types of wars that were being regulated and specifically the question of whether civil and colonial wars should be subject to international regulation; (3) the position of resistance and partisan fighters, and more particularly the issue of who merits protection as a prisoner of war; (4) the regulation of indiscriminate warfare, or rather the failure to do so properly, zeroing in on bombing, nuclear weapons, and starvation; and (5) questions of enforcement ultimately also leading to the grave breaches regime. The analysis zooms in on the contributions and positions of five major drafting parties, namely the International Committee of the Red Cross, the United States, the United Kingdom, France, and the Soviet Union, although other actors, such as China, Burma, and the World Jewish Congress, are also discussed. Another reviewer has observed that Van Dijk’s choice to “focus on only five delegations points to the fact that there is plenty of scope for more studies, revealing different States’ attitudes and backroom manoeuvres.”<sup>5</sup> Indeed, while some readers will want discussion of additional actors, a certain selectivity is

<sup>1</sup> Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49 (1994).

<sup>2</sup> SAMUEL MOYN, *HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR* (2021).

<sup>3</sup> This image was used by William Schabas in relation to the Genocide Convention as he argued that the drafters of the Convention probably envisaged the erection of a monument commemorating the Holocaust, rather than conceiving a Convention they thought would apply to genocides yet to occur. W.A. Schabas, *The Genocide Convention at Fifty*, United States Institute of Peace Special Report (Jan. 7, 1999).

<sup>4</sup> As more generally explored in: CONTINGENCY IN INTERNATIONAL LAW; ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES (Ingo Venzke & Kevin Jon Heller eds., 2021).

<sup>5</sup> Katherine Fortin, *Symposium on Boyd van Dijk’s Preparing for War: Preparing for War – Demythologising the Post WWII Years and Charting the Untraveled Paths of CA3*, OPINIO JURIS (Apr. 28, 2022).

inevitable, and overall the book stands out for its breadth rather than its narrowness. Notable in this regard is also the compelling spotlighting of important contributions by women, including those of the French delegate Andrée Jacob, a former resistance fighter; Joyce Gutteridge, the first woman to act as legal advisor for the UK Foreign Office; and Elisabeta Luca, part of the Romanian delegation and an anti-fascist veteran.

*Preparing for War* shows how the 1949 Geneva Conventions were products of their time. Many delegates came to the negotiations marked by deeply personal and often tragic World War II experiences. Van Dijk refers to them as the “traumatized” architects of the Conventions (p. 168). Based on his detailed and in-depth archival research, Van Dijk vividly records occasional U.S. and UK frustration over the narrow gaze of their continental European counterparts, whenever the World War II recollections of occupation seemed to prevail over strategic forward-looking considerations flowing from the status as a current or potential future occupying power (p. 169). This Janus-faced split of some delegations became particularly obvious during discussions on the position of resistance fighters (discussed in Chapter 4), although ultimately the present and the future would prevail over the past. As Van Dijk shows, the French delegation, even though composed mainly of resistance fighters, was also keenly aware of the French position as a colonial power in combat in Indochina. Indeed, notwithstanding their World War II experiences, many of the drafters came to Geneva with a colonial mindset intent on avoiding regulatory interference in their country’s own ongoing colonial wars or looming independence struggles.

Van Dijk also pays attention to the decisive role that the USSR at times played to ensure a humanitarian breakthrough, while subtly noting that the USSR position was often accompanied by political rather than humanitarian considerations. He quotes a Canadian delegate who explains the USSR support for regulating civil and colonial wars by noting that “such a clause could create enormous legal troubles for a government trying to put down a Communist-

inspired rebellion” (p. 127).<sup>6</sup> Van Dijk also highlights tensions within delegations and between delegations and their capitals, as well as changes in negotiating positions as delegations encountered unignorable opposing views in the course of negotiations (pp. 164–65).<sup>7</sup> Further, he scrutinizes the ICRC’s multilayered role as it navigated between its own agenda and those of the Great Powers in an effort to keep everybody on board. With concrete examples, Van Dijk convincingly argues that the contents of the Geneva Conventions that emerged from these negotiations were anything but inevitable. They are the product of intense politics, individual leadership, and no small number of unexpected twists and turns.

*Preparing for War* itself is likewise a product of its time. In making a crucial argument about purposeful exclusion, and effectively about double standards, the book connects with other recent works that look beyond a treaty’s text to reveal the story behind that text.<sup>8</sup> It deciphers ulterior motives as well as the relationship between the 1949 Geneva Conventions and the prevailing *Zeitgeist* when it was negotiated. The book’s underlying argument on the selectivity of international regulation is not new in the abstract; it is a perennial claim accompanying arguments that international law is a product of competing interests. What is new is the claim being made in relation to the 1949 Geneva Conventions with such detail and with such evidentiary rigor. It presents the Conventions in a new, and more complex light. The book’s timing is impeccable, given ongoing and politically charged public debates in formerly colonial states about the legality of some of their acts committed during brutal independence wars in and around the time of the making of the Geneva Conventions.

<sup>6</sup> With further references.

<sup>7</sup> See, for instance, on internal French divisions between former resistance fighters and officials from the Ministry of Overseas Territories, the Ministry of War, and the Ministry of Foreign Affairs.

<sup>8</sup> *E.g.*, GIOVANNI MANTILLA, *LAWMAKING UNDER PRESSURE; INTERNATIONAL HUMANITARIAN LAW AND INTERNAL ARMED CONFLICT* (2020).

Indeed, a recurrent theme in the book is the quest of European powers to retain a free hand in their ongoing or upcoming colonial wars. Van Dijk's book mainly traces the positions and contributions of the UK and France as colonial powers during the negotiations. Yet, the Netherlands, the state where both Van Dijk and this reviewer were born, was in a similar position. At the very time that the Netherlands was participating in negotiations in Geneva, it was also fighting a war in Indonesia, which had proclaimed independence on August 17, 1945 (p. 21).<sup>9</sup> While not explored in this book, understandable for reasons discussed above, Van Dijk has contrasted official Dutch narratives with Dutch transgressions of the law in other publications.<sup>10</sup>

Van Dijk's arguments regarding efforts to exclude certain issues from the ambit of the Geneva Conventions are very relevant for processes that are currently occurring as former colonial states revisit their past. For example, a historical inquiry into Dutch past practices concluded in 2022, that Dutch armed forces committed extreme violence in the period of 1945–1949 and that this violence had been widespread and structural.<sup>11</sup> Yet, the book presenting the conclusions of the historical study avoided the use of legal terms, specifically the term “war crimes.” It stated:

<sup>9</sup> The Netherlands only transferred sovereignty in 1949. Not being recognized by European powers, the young Indonesian Republic was not invited to Geneva as Van Dijk notes on page 21.

<sup>10</sup> Boyd van Dijk, *Nederland en het oorlogsrecht; De normen van toen (The Netherlands and the Laws of War; the Norms of that Time)*, 14 DE GROENE (Apr. 6, 2022); see also Boyd van Dijk, *Aggression, War Crimes, and the Indonesian Revolution*, VERFASSUNGSBLOG (Jan. 25, 2022).

<sup>11</sup> For more on the research program “Independence, Decolonization, Violence and War in Indonesia 1945–1950,” see here: <https://www.ind45-50.org/en>. The author of this review was a member of the Scientific Advisory Board. The research program has resulted in a series of books. The concluding findings are assembled in GERD OOSTINDIE ET AL., *BEYOND THE PALE: DUTCH EXTREME VIOLENCE IN THE INDONESIAN WAR OF INDEPENDENCE, 1945–1949* (2022).

The question of the applicability of international humanitarian law is not easy to answer, given the different viewpoints concerning the characterization of the war, and also because it was precisely this area of law that was very much in development during this period. There are, however, powerful arguments for the view that the core rules of international humanitarian law were already applicable during the conflict—or in any case were declared applicable by the Netherlands—and that many of the actions that we, following the lead of many scholars, categorize as “extreme violence” were at odds with these rules, just as much of the extreme violence was in conflict with national law.<sup>12</sup>

Although this passage can be read as an implicit recognition that war crimes were committed on a grand scale by Dutch forces, the concluding work of the inquiry was nonetheless severely criticized by various scholars and civil society agents for not explicitly using the label “war crimes.”<sup>13</sup> In line with such critiques, Van Dijk has elsewhere argued<sup>14</sup> that formal inquiries should also examine the contributions of colonial states to international lawmaking with particular attention to their efforts to ensure that colonial actions would escape the law's reach. In December 2023, the Dutch government endorsed the main conclusions of the historical study and took full responsibility for Dutch actions during the Indonesian War of Independence. Yet, on the applicability of legal terms, and specifically the concept of war crimes, the government remained

<sup>12</sup> OOSTINDIE ET AL., *supra* note 11, at 30 (footnotes omitted).

<sup>13</sup> See, e.g., Wouter Veraart, *Over de mogelijkheid van functioneel extreem geweld [About the Possibility of Functional Extreme Violence]*, 22 NEDERLANDS JURISTENBLAD 1771 (2022).

<sup>14</sup> Van Dijk, *Aggression, War Crimes, and the Indonesian Revolution*, *supra* note 10; Boyd van Dijk, *The Guardians; An International History of the Dutch and “Hague Law,” 1944–1949*, in *SHAPING THE INTERNATIONAL RELATIONS OF THE NETHERLANDS, 1815–2000; A SMALL COUNTRY ON THE GLOBAL SCENE* (Ruud van Dijk, Samuël Kruizinga, Vincent Kuitenbrouwer & Rimko van der Maar eds., 2018).

evasive and it stated that war crimes committed in a non-international armed conflict—which it was in this government’s view, since the Netherlands transferred sovereignty only in 1949 and did not formally recognize the Indonesian claim of independence claim of 1945—had not been criminalized under international law at the time.<sup>15</sup> In Chapter 3 of his book, Van Dijk shows that efforts to regulate non-international armed conflict pre-date the Geneva Conventions. He also exposes how the colonial powers of the time tried to avoid, or at least water down, regulation of civil and colonial wars in Geneva. His analysis thus offers a more nuanced picture than that of the Dutch government.

Chapter 5 considers indiscriminate warfare. This Chapter opens with the story of the U.S. bombing of Tokyo and Kobe in March 1945, resulting in more civilian casualties than the nuclear bombings of Hiroshima and Nagasaki together. Van Dijk recalls how two U.S. pilots responsible for the bombing were captured and put on trial by the Japanese and subsequently executed as war criminals. Later, after Japan surrendered, a special war crimes tribunal established by the United States found Japanese officials involved in the proceedings against the U.S. servicemen guilty of violations of the laws of war for not offering them a fair trial. Meanwhile, the Tokyo bombings were not adjudicated by any U.S. court or special war crimes tribunal, and in Geneva, the legality of aerial bombing and nuclear warfare remained purposefully unregulated. Van Dijk dismisses arguments that this silence can be explained by the Hague/Geneva distinction. He shows that this omission was instead the result of conscious and deliberate efforts by the United States, as well as the United Kingdom, to exclude the issue of air-atomic warfare, as well as blockades, from proper regulation.

<sup>15</sup> Letter to Parliament by Prime Minister Rutte Containing a Second Reaction of the Government on the Conclusions of the Research Programme Independence, Decolonization, Violence and War in Indonesia 1945–1950 (Dec. 14, 2022), available at [www.rijksoverheid.nl](https://www.rijksoverheid.nl).

Throughout his work, Van Dijk more generally focuses on and problematizes the use of international law as a product made primarily by the powerful and intended to be applied to others. This dynamic in international law arguably remains omnipresent today. It is apparent, for example, in ongoing discussions regarding the prosecution of the aggression occurring in Ukraine, in the reluctance to accept and streamline International Criminal Court (ICC) jurisdiction for all crimes, as well as in the reluctance by some states to share evidence with the ICC. It is a dynamic that severely undermines the credibility of international law at a time of uncertainty, when the world needs a robust and even-handed international legal system. Van Dijk’s book is excellent for exposing this dynamic in relation to the Geneva Conventions and for unearthing some of the politics behind those crucial treaties. *Preparing for War* is a compelling read. It is powerfully written and offers us the richest and most nuanced account of the negotiations leading to adoption of the Geneva Conventions currently on offer.

LARISSA VAN DEN HERIK  
*Leiden University, School of Law*

## BOOKS RECEIVED

### *Human Rights*

- Langille, Brian, and Anne Trebilcock (eds.). *Social Justice and the World of Work – Possible Global Futures: Essays in Honor of Francis Maupin*. Oxford; New York: Hart Publishing, 2023. Pp. xvii, 381. Index.
- Sparks, Tom. *Self-Determination in the International Legal System: Whose Claim, to What Right?* Oxford; New York: Hart Publishing, 2023. Pp. x, 267. Index.
- Witting, Sabine K., *A Commentary on the United Nations Convention on the Rights of*