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Stephen C. Neff

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INTRODUCTION

This is a history of the phenomenon of war, as viewed through the lens of international law. There is, to be sure, no such thing, strictly speaking, as *the* phenomenon of war, majestically constant throughout history and across the various human cultures. War, like other human practices, has always been a protean thing, incessantly changing its face throughout the course of recorded history in response to a dizzying array of factors – religious, technological, economic, psychological, political and so forth. And its history has been duly analysed from many of these standpoints. But the perspective of international law has been strangely neglected. Some attention (but surprisingly little) has been devoted to the history of the development of rules governing the *conduct* of war.¹ Our concern, however, is different: it is with the deeper ideas about the legal nature of war itself and how those have changed over the course of human history. This is, in short, a history of the way in which fundamental legal conceptions of war have evolved from the most distant retrievable past to the present day.

Much of our current picture of war is coloured by images of nineteenth-century conflicts between European states. This stereotype calls to mind solemnly proclaimed declarations and the summoning of ranks of uniformed troops (sometimes rather gaudily uniformed at that), in orderly arrays. These forces then engaged in combat on a field of battle against forces similarly decked out. The winning side imposed peace terms onto the other, at which point the contest was at an end; and the two nations resumed their interrupted course of friendship, though with the strategic balance between them now altered. International law provided the set of rules by which this type of contest was conducted. War of this type was seen to be so routine, so widely accepted, as to assume something of the character of a sporting contest or a ritual. In legal terms, it was said that war was an ‘institution of international law’. It would be a great error to assume, however, that this view of war possessed some kind of universal validity. On the contrary, this nineteenth-century picture of war was the product of a very long historical process. Nor was it even very enduring, since many important changes lay ahead in the twentieth century (and beyond). Our task is

¹ For a notable example, see Best, *Humanity in Warfare*.

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to trace the whole process of transformation of the legal nature of war, insofar as records enable us to do so, from the earliest periods of recorded history up to the present day, without falling into subservience to nineteenth-century stereotypes.

The focus of this history will not – or not exclusively – be on ideas in the abstract. It will also deal with the reciprocal impact of theory on practice and of practice on theory. We will see that, over the course of history, war has moulded law at least as surely as law has moulded war. Those who believe that ideas or doctrines have no impact on ‘real life’ are mistaken, though their error is an understandable one. But they are also mistaken who suppose that ideas or doctrines have a life entirely of their own, that they evolve through some kind of wholly innate dynamic in the manner of an embryo developing steadily along a predictable path into a person or an acorn into an oak tree. Indeed, even embryos must be nourished and acorns provided with soil and water. The interweaving of doctrine and practice in the area of war has been a complex and often untidy process through much (or rather all) of history – and never more than at the present day. Sometimes, as in the nineteenth century, the two have marched fairly closely in step. At other times, as in the Middle Ages, the divergence has been very wide. But never has the match been perfect. Our story therefore has always these two grand components, ever in wary (and sometimes jealous) partnership.

This story is not designed as a history of attempts to regulate the conduct of war – that is to say, it is not a history of how the rules governing warfare were drafted and agreed. Instead, it is a history of ideas about the legal nature and character of war as such. Specific rules about the waging of war have never existed in a vacuum. They have emerged from more deep-seated conceptions about the nature and role of war itself in international relations. It is those more deep-seated conceptions about war that are the subject of this narrative. For this reason, we will not immerse ourselves in the minutiae of, say, restrictions on particular weapons or categories of weapons, such as asphyxiating gases, or on the employment of certain tactics, such as assassination, ruses and perfidy, or the destruction of civilian infrastructure. Due notice will be taken of these developments, but not with the fastidious eye of the practising lawyer. Instead, our attention will be on the deeper – and more elusive – *general* conceptions of war that lawyers have entertained over the course of some twenty-five centuries. This history is therefore designed not exclusively – or indeed even primarily – for professional lawyers (although it is modestly hoped that they too will find much of interest in it). It is for those who wish to understand, in a general

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way, what war has meant to lawyers through the course of history, and what lawyers have made of war. Consequently, no prior knowledge of law is assumed on the part of persons embarking on this voyage.

If this history were to be truly comprehensive, it would have to be many times the length that it is. But constraining factors such as the stamina of authors, the patience of readers and the economics of the publishing industry conspire to keep this account at the level of grand theme or contour rather than of exacting detail. It is therefore sadly inevitable that certain aspects of the history of war must receive less attention here than their intrinsic interest might demand. For example, there will be comparatively little said about the material aspects of war, such as technology, logistics and strategy. Nor, sadly, will there be much about colonial warfare, which in many ways was quite distinct from conflict amongst developed (chiefly European) countries. Treatment of non-Western ideas of war will be more limited than is ideal, since they too exerted comparatively little impact on the main line of thought that produced modern international law. Nonetheless, an attempt will be made to give at least a modest insight into Islamic conceptions of war, which are of considerable intrinsic interest, as well as offering instructive comparative insights into Western ways. All too little attention will be given as well to the impact of socialist thought on war, on the ground that it made relatively little contribution to this area of law. Consideration of pacifist ideas will be largely confined to their contribution to medieval natural-law and just-war thought, with the peace movement of the nineteenth century and later left aside. In short, this account makes no claim to being an exhaustive treatment of the legal history of war. It should be considered as a pioneering exploration of the subject and not as the final word.

This pioneering expedition will take us through four historical eras. The first one runs from the misty beginnings up to about the year 1600. In that period, our focus will be on the development of an association between justice and war, culminating in the grand intellectual edifice of just-war doctrine in the European Middle Ages. In keeping with our broad-based approach, the concern will not be so much with the substance of just-war doctrine as with its general character – and particularly, of course, with the conception of war which both underpinned it and arose out of it. During this period, the dominant legal framework was that of natural law, with war seen primarily as a means of enforcing that law. Wars were fought on earth, but (at least in theory) for purposes made in heaven.

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The second period, from about 1600 to 1815, was preeminently a time of transition, the great formative period of modern international law. The natural-law framework inherited from the Middle Ages continued to play an important role, but it was now supplemented in many important respects by what was sometimes called the law of *nations* or the 'voluntary law'. This period witnessed the gradual, and rather halting, metamorphosis of war from a tool of God into a tool of men. As a result, the law relating to war had a distinctly dualistic character at this time, smacking partly of nature and partly of culture. In its cultural guise, war took on many of the legal trappings that are familiar today, and which would reach their full maturity in the nineteenth century. It was a time when wars were considered to be 'perfect' if they were decked out in the fullest and most formal array, and otherwise 'imperfect'. This was a period of significant intellectual ferment, with dissident schools of legal thought concerning war arising to challenge the orthodox (or mainstream) tradition that descended from medieval just-war doctrine.

The third major period was the nineteenth century, the high tide of legal positivism. War was now seen unashamedly as a clash of rival national interests rather than as the pursuit of heavenly ideals or (more mundanely) of the rule of law. For war-makers, it was a *laissez-faire* era, with war so firmly ensconced as a routine feature of international life that it was unblushingly accorded the honourable status of an institution of international law. From this institutionalised conception of war, the natural-law or moral content was, for all practical purposes, entirely drained away. Earlier natural-law conceptions of war did not, however, perish altogether. Instead, they carried on in a sort of underground existence, outside the ornate legal framework of war properly speaking, under the sobriquet of 'measures short of war'. These comprised such actions as armed reprisals, interventions and emergency measures of various kinds. In addition, the nineteenth century brought civil wars, for the first time, into something like the mainstream of legal analysis, largely as a result of the crumbling of older conceptions of legitimacy and the rise of new aspirations for democracy and the self-determination of peoples. The result was the emergence of a body of law on the recognition of belligerency and also of something called 'insurgency'. This was one of the most striking examples of state practice taking the lead, with theory following meekly in its wake.

The fourth period, following the Great War of 1914–18, is the one in which we continue to live (if we are lucky). The outstanding feature of this era has been a reversion to the medieval just-war outlook. The process was tentative and halting at first, for the conceptual terrain

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had lost its familiarity to lawyers. In the interwar period, the League of Nations Covenant made (or revived) a distinction between lawful and unlawful resorts to war. But the League's approach was frustrated, in substantial part because the attempts to restrict the previously *laissez-faire* approach to war could not be made effective in the absence of similar constraints on the employment of coercive measures short of war. After the Second World War, an effort was made to correct this oversight by comprehensively prohibiting the resort to armed force – while also, at the same time, reinstating a full just-war system. The ambition was to harness war and justice more tightly together than ever before in the form of United Nations enforcement action. This led many lawyers to proclaim the death of war as a legal institution in the nineteenth-century sense. It gradually became apparent, however, that war was dispiritingly tenacious, even if it now marched under different banners than before – chiefly under the ever broader flag of self-defence (real or invented). This post-1945 period also provided ample evidence of the metamorphic power of war, as new kinds of conflict came to be 'welcomed' (if that is the right expression) into the institutional framework of war. First were wars of national liberation, as a result of anticolonial movements and Third-World pressure for racial equality. Then came the challenge of a new (or revived) scourge: international terrorism, against which the institutional weaponry of war was brought to bear. By the early twenty-first century, the practical exigencies of a coarse world showed every sign of continuing to press hard on the delicate constructions of legal theory.

To this broad story – with its dense combination of profound thought and brutal practice, of humanitarianism and savagery, of idealism and greed – we may now turn our full attention.

PART I

War as law enforcement (to 1600)

[J]ust as within a state some lawful power to punish crimes is necessary to the preservation of domestic peace; so in the world as a whole, there must exist, in order that the various states may dwell in concord, some power for the punishment of injuries inflicted by one state upon another; and this power is not to be found in any superior, for we assume that these states have no commonly acknowledged superior; therefore, the power in question must reside in the sovereign prince of the injured state . . . ; and consequently, war . . . has been instituted in place of a tribunal administering just punishment.

Francisco Suárez

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The earliest instances of collective armed struggle predate recorded history and so remain the subject of speculation rather than of settled fact. Indeed, if the Christian story of the battle in heaven between the good and wicked angels be given credence, then war may be regarded as prehistoric in origin in the most thoroughgoing sense possible. Our concern, happily, is the more modest one – though difficult enough – of finding the origin not of war as such, but rather of the formation of coherent legal ideas about war. Here too, however, speculation occupies higher ground than established fact. But it seems likely that certain important, and long-lasting, distinctions were made very early on – between, for example, individual, interpersonal violence and collective, interstate conflict; or between wars against wholly foreign peoples, and conflicts against neighbouring polities which might be of the same, or very similar, language, religion and life-style. There is evidence that, between certain types of peoples, war was, for all practical purposes, a ‘natural’ occurrence, having something of the regularity and predictability of the seasons. The most obvious example was the eternal struggle around the great Asian steppe-lands between agricultural and nomadic ways of life, a conflict as ancient (in mythology at least) as the clash between Cain and Abel and as recent as (comparatively) the day before yesterday.¹

A very decisive turning point must have come when war ceased to be regarded as natural or inevitable and came instead to be seen as a matter of conscious human choice. This is the point at which war may be said to have migrated from the realm of instinct or of divine command to the domain of reason. Stated in mythological terms, this was the point at which war ceased to be the domain of the impetuous and rambunctious god Ares and became instead the preserve of the cool and rational Athena. This change is unlikely to have occurred at any precisely identifiable point in the history of any civilisation, but its importance cannot be overestimated. From that time onward, it became necessary to think about war – about *offensive* war, that is – as a purposive activity. Why, in any given case, was it more important to embark upon war than to remain at peace? Various kinds of answers, from various points of view, could have been given to this question, in ancient times as today. The utilitarian, for example, may ponder whether the costs and risks were worth the expected gains. The ambitious ruler might estimate how much

¹ On prehistoric war, see generally Davie, *Evolution of War*; Turney-High, *Primitive War*; Keeley, *War Before Civilization*; Bohannon (ed.), *Law and Warfare*; Jonathan Haas (ed.), *The Anthropology of War* (Cambridge: Cambridge University Press, 1990); Dawson, *Origins*, at 13–33; and Ferrill, *Origins of War*.

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wealth or glory or how many additional subjects a war was likely to produce. The priest may wonder whether a decision to make war would have the approval of the gods, without which there could be no possibility of success.

The real beginning of our story came when people began to think about war in terms of a general rationalistic framework that could be applied to *any* specific decision about war. Here, finally, we start to come upon something like solid historic ground for the first time. By about the middle of the first millennium BC, the Confucian tradition in China had devised a set of systematic ideas about government that was impressive not merely for the generality of its scope but also for the prominent role played in it by moral ideas. For the first time in history, a conception of war was integrated into a cohesive general structure of social, political and moral theory. War was seen as a means of last resort, to counteract antisocial conduct and reinforce the norms which integrated the society into a harmonious whole.

At about the same time, classical Greece and Rome were taking similar steps. This process began very haltingly with Plato and Aristotle. It became much more systematic in the hands of the stoics, whose views influenced Roman writers such as Cicero and Seneca in the first centuries BC and AD. The principal stoic achievement was the framework of thought known as natural law – the idea that the entire world was under the rule of a single universal, transcultural set of moral principles. This notion found some echo in later Roman law and was later clothed (though only very loosely) in a Christian garb, as one of classical antiquity's major legacies to the Middle Ages.

Our principal attention will be on this European intellectual adventure, since it was the one that gave birth, eventually and very gradually, to modern international law. The stoic-*cum*-natural-law picture of war was idealistic in the extreme. Stated with the greatest possible brevity, it was the belief that war, in its most proper and perfect sense, was a handmaiden of justice. Its purpose was not conquest or revenge or glory, but rather the vindication of the rule of law. This will be referred to as the just-war viewpoint in the broad or generic sense, although our initial focus will be on the specific form that this idea assumed under the auspices of medieval Christian society.² For intellectual coherence and detail of ideas about war, it is doubtful whether this achievement has ever been surpassed.

² On this generic conception of just war, see Kelsen, *Principles*, at 290.

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It cannot be claimed that this idealism had much effect on the actual waging of war in the Middle Ages, when cynicism, greed and brutality had at least as wide a field of play as they ever have. Indeed, the radical contrasts of medieval times continue to amaze such distant observers as ourselves, not least in the area of war. It was an age that exalted chivalry, piety, self-discipline and altruism to the greatest heights, as evidenced in the great romances such as *Amadis of Gaul*, and which perhaps reached its highest pitch in the quest of the Arthurian knights for the holy grail. But the reality of medieval warfare was woefully different. It was an age of pillage, rapine, destruction and cruelty, best exemplified in the Hundred Years War between England and France in the fourteenth and fifteenth centuries. Perhaps the most apt picture of this combination of extremes was the conquest of Jerusalem in 1099, when the Christian knights indulged in a horrible massacre in liberating the tomb of their saviour, who had urged all men to turn the other cheek when smitten.³

If the pious theologians of the Middle Ages had little success in curbing the brutalities of contemporary warfare, it should not be thought that their ideas about the fundamental nature of war were without influence. On the contrary, the just-war framework laid down in the medieval period would endure and shape international legal conceptions of war for many centuries to come. It never entirely died out, although (as will be seen in due course) it underwent some remarkable transformations and changes of direction over time. Given that the general principles of just-war theory would be strongly revived after 1945, its first – and perhaps greatest – incarnation in the European Middle Ages is of more than ‘merely’ historical interest.

³ On medieval warfare, see generally Contamine, *Middle Ages*; and Maurice Keen (ed.), *Medieval Warfare: A History* (Oxford: Oxford University Press, 1999).

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Ares and Athena

There is no greater good than for a warrior to fight in a righteous war.

*Bhagavad Gita*¹

Wars, then, ought not to be undertaken except for this purpose, that we may live in peace, without injustice; and once victory has been secured, those who were not cruel or savage in warfare should be spared.

*Cicero*²

Perhaps the single most obvious and widely agreed feature of war, throughout its long history, has been its character as a public and collective enterprise, arraying a whole people against a foreign foe. In the face of such an emergency, war has called typically for reserves of collective discipline and self-sacrifice beyond those required in ordinary times, thereby making it an exercise in social solidarity of the highest order. It is accordingly a great error to think of war primarily in terms of turbulence, confusion and anarchy. These factors are often present, to be sure, sometimes in very generous measure. But warfare, throughout recorded history at least, has also called for careful planning, meticulous preparation of many kinds – psychological, spiritual, logistical and so forth – as well as rational execution. That is to say, it has always been an activity that may be described, very loosely and with pardonable anachronism, as scientific. If the most obvious skills called for are those of the hardy and valiant warrior, it should not be forgotten that other, and quieter, activities also make important contributions to military victory. The arts of the priest, the tax-gatherer, the bureaucrat and the ruler are all required.

¹ *The Bhagavad Gita*, translated by Juan Mascaró (Harmondsworth: Penguin, 1962), at 51. (Original after 500 BC.)

² Cicero, *On Duties*, at 14–15.