

HUMANITY — IN — WARFARE

The Modern History of the
International Law of Armed
Conflicts · GEOFFREY BEST



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*The Modern History of
the International Law of
Armed Conflicts*

Geoffrey Best

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Preface

Having worked on and off for ten years towards this book, and put into it thoughts brewing over some years before that, I am unusually conscious of the extent of my debt to the people who have, sometimes no doubt without knowing it, helped me along the road. None of them, I must emphasize, bears any responsibility whatever for the use I happen to have made of their help. Some of them, probably, won't wholly like it. But that is my affair, not theirs. In any case I feel I should be less than honest were I not to try to mention all I can remember, and to thank them as best I can.

First and foremost, I must mention two great academic institutions, one very old, the other quite new. The old one is All Souls College, Oxford. The visiting fellowship it gave me for 1969–70 enabled me to make a start. The new one is the Woodrow Wilson International Center for Scholars, Washington DC. It celebrated its tenth birthday while I was one of its Fellows in 1978–9. My debts in general to the Warden and Fellows of the one, the Trustees and Director of the other, are fundamental. Oxford and Washington are hives of intellectual activity and meccas of scholarship. But it is not just the scholars at such places from whose friendly interest one benefits. Those who cope with their fellows' non-intellectual problems are equally to be thanked. At All Souls, for instance, I was endlessly grateful for the friendly help of Norma Potter in the Codrington Library; while it is difficult to imagine what life would have been like at the Wilson Center without the vigilant solicitude of the librarian, Zdenek David, his immediate staff, and Fran Hunter, Louise Platt, Mildred Pappas, Eloise Doane, and the rest. Cambridge, my Alma Mater, must be mentioned too. The Master and Fellows of Trinity honoured me with an invitation to give the Lees Knowles Lectures in the University of Cambridge in the spring of 1970. My theme was 'Conscience and the Conduct of War, 1789–1900'. This book is a regrettably late flowering of what was then, I very soon realized, a rather premature bud.

I turn from the institutions which have supported my work to the people who have most inspired it and whose approval I should most value. The opinion of the one who matters most, alas!, I shall never know: Pierre Boissier, member of the International Committee of the Red Cross and Director of the Institut Henry-Dunant from 1968 until his tragic death six years later. What I owe to that fine and wonderful man I have tried to say in a contribution to the memorial volume published by the Institut in his honour: *Pierre Boissier, 1920-1975* (Geneva 1977). Then there are several schoolmasters, especially Paul Longland and Walter Oakeshott, and some dons at Cambridge, particularly George Kitson Clark, who first gave me to understand how serious a thing it is to handle history, Herbert Butterfield, whom I did not meet till much later but whose lectures and books helped me acquire the relish for the history of ideas I have never lost, and Noel Annan, whose lectures in that field were singularly exciting.

At Edinburgh, and at Sussex, the sources of my bread and butter for most of the time that I have been having war-and-peace thoughts, I happily have found colleagues to enjoy talking this sort of shop with; I may dare to mention particularly Victor Kiernan, George Shepperson, Owen Dudley Edwards, Gerald Draper, Rowie Mitchison, Maurice Hutt, John Röhl, Rupert Wilkinson, Christopher Chaffin, Marcus Cunliffe and Christopher Thorne. At Oxford I was privileged to begin a late discipleship to Michael Howard, whose importance to me as a beacon of wisdom and knowledge has been second only to that of Pierre Boissier. I must acknowledge much help received from people outside my own institutions: Arthur Marwick and Christopher Harvie of the Open University (before that, of Edinburgh); Norman Hampson of York; Brian Bond and Derek McKay of London; John Keegan, David Chandler and Paddy Griffith of the RMA, Sandhurst, and Andrew Wheatcroft of Hagworthingham, who introduced me to them; Michel Veuthey of the ICRC and Jiri Toman of the Institut Henry-Dunant; Manfred Messerschmidt and Wilhelm Deist of the Militärgeschichtliches Forschungsamt; François Bédarida of the Institut d'Histoire du Temps Présent (CNRS); Sam Williamson of Chapel Hill, Jim Eayrs of Toronto, and John Pocock of Johns Hopkins; Sam Wells (and Sherry), David MacIsaac, Stephen Pelz, Genaro Arriagada, Frank Sayre and John Watson within the Wilson Center during my time there, and Hays Parks,

Dean Allard, Tom Mallison and William O'Brien in Washington's array of all the talents. I must also mysteriously thank a score of distinguished British military men and scholars who kindly took the trouble to answer a few questions I put to them in the early summer of 1978. As they will realize if they do me the honour of reading this book, I did not in the end find it necessary to use anything they particularly told me. But their thoughtful responses (only two never answered) encouraged me a lot.

I have never yet had the misfortune to come across a library or archive which was not more or less pleasant to work in. The libraries of the universities of Edinburgh and Sussex in particular, under their admirable chiefs Dick Fifoot and Peter Lewis, seem to me models of their different kinds. But I have also laboured with not much less ease and profit in other libraries: the British Museum (which has taken to calling itself the British Library), the Bodleian, the Cambridge University Library, the National Library of Scotland, and the Library of Congress. Archives have not lain much in my way (for which I was thankful when the British Public Record Office moved so much out of everyone's way), but I acknowledge a debt in particular to the Liddell Hart Centre for Military Archives at King's College, London, which has graciously permitted me to quote from its papers; as I am grateful to F. R. Scott for permission to use one of his fine *Selected Poems* (OUP 1966) among the epigraphs to Chapter IV. Over the years I have gratefully received modest research grants from the universities of Edinburgh and Sussex, and from the British Academy.

In conclusion, I happily acknowledge how much I feel I have benefited from the comradeship, comments, and sometimes wholesomely acerbic criticism, not just of matters related to this book but also (which is more important) relative to life in general, received from Simon, Edward, Rosie, and Marigold, my children and my wife.

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Introduction

Definitions and Connexions

Facts must be faced. Homo sapiens, the only creature endowed with reason, is also the only creature to pin its existence to things unreasonable.

Henri Bergson, *The Two Sources of Morality and Religion*, 1932

It is common experience in the history of warfare that not only wars but actions taken in war as military necessities are often supported at the time by a class of arguments which, after the war is over, people find are arguments to which they never should have listened.

George Bell, Speech in the House of Lords,
9 February 1944

The distinction between moral rules and rules that are better described as procedural or customary is not always easy to draw, but war is as a matter of fact an inherently normative phenomenon; it is unimaginable apart from rules by which human beings recognize what behavior is appropriate to it and define their attitudes towards it. War is not simply a clash of force; it is a clash between the agents of political groups who are able to recognize one another as such and direct their force at one another only because of the rules that they understand and apply. Above and beyond this, because human beings have moral feelings and make moral choices, they have these feelings and make these choices when they are at war . . .

Hedley Bull, *World Politics*, Volume 31, 1979

I The idea of the book

This book is about an idea: the idea that, if there are to be wars, and so long as wars go on, it is certainly better for the warring parties, and probably better for mankind at large, that the persons fighting should observe some prohibitions and restraints on how

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they do it; the idea, to put it at its briefest, of humanity in warfare.

Such a juxtaposition of concepts bristles with paradox, and of course provokes scepticism. Is not the essence of warfare a denial of humanity? Are not wars often justly condemned as failures of humanity? Are not these concepts and the institutions which typically embody them incompatible opposites? Such serious criticism and complaints have to be met. Fortunately for the writer of this book and, he believes, humanity at large, they can be. The historian has the support of colleagues in many other fields of scientific study and philosophical inquiry in recording that most (though certainly not all) societies and cultures known to us, including most of those of our own day, display some readiness to observe this idea, although the attempts sometimes come to little more than breast-beating about failure to live up to it. The wish to preserve something of humanity in warfare is more commonly met with than success in doing so; yet the measure of success, carrying from war to war and from time to time, is, as the main part of this book will show, not negligible. It seems to me just as reasonable to suppose that all this signifies something fundamental about humankind, as to conclude, as most of us do for lack of convincing evidence one way or the other, that ordinary 'human nature' contains within it the stuff of both social harmony and social conflict, yearnings towards both war and peace. The spectacle is paradoxical; from some points of view, absurd. But the fact nevertheless seems to be that, even in the most unpromising circumstances of war, humanity can often quite surprisingly break through. Expressing myself in this introduction as a man and citizen besides a historian, such breakthroughs seem to me to be worth study, admiration, and encouragement, no less than the accompanying breakdowns are worth study, reflection, and regret.

Historically, this attempt to preserve and exercise some humanity even *in extremis* has normally clothed itself in codes of custom and even 'laws' mutually recognized by both warring parties. It is the purpose of this book to present the history of this idea in that clothing since the middle of the eighteenth century, an age which is, for reasons which Chapter I will make clear, a good time to pick it up. What was going strong by then in Europe and Europe's North American extensions has since spread all over the world and become, not without pangs and problems with which the second half of the book will be much concerned, a truly international

possession. Superficial evidence of this universality is offered wherever appears through the dust of conflict a white flag or a red cross; or whenever issues from the mouth of some troubled combatant an echo, no matter how faint or garbled, of the language of the Geneva Conventions.

That white flag, once no more than the conventional sign made by professional European men of war when they wanted a truce, has become known the world over as a sign to be made with reasonable hope that those seeing it will temporarily suspend hostilities and engage in cautious dialogue instead. The Red Cross began its world career in the eighteen-sixties simply as the badge agreed to be worn by those engaged in the single task of relieving the sufferings of the wounded in battle. It has now attained the astonishing status of the only symbol normally accepted throughout all races and countries (some recent regrettable exceptions are not yet proved persistent or deliberate enough to invalidate the generalization) as representing the interests of humanity at large. The Geneva Conventions must share celebrity with the Universal Declaration of Human Rights and perhaps the Charter of the United Nations as the most nearly universally known and seemingly accepted statements about what is due to man from man. These global recognitions are equally the historical product of Europe's imperial expansion and the psychological and moral product of inherent human preference and need; something like a natural readiness – natural at any rate to a large proportion of mankind – to recognize what an excellent recent writer has called 'the moral reality of war',¹ and to worry about it.

2 Why this book is not about 'just war'

Just and Unjust Wars, by Michael Walzer, is the title of the book just referred to. Like most of the serious writing about moral values in relation to war, its language comes out of two related great traditions: the ancient Christian one, substantially founded by St Augustine, and developed to a high pitch of refinement by the close of the Middle Ages, and intermittently resuscitated since then; or the modern, explicitly marxist tradition developed by Lenin and other marxist commentators on the 'imperialist' and 'colonialist' conflicts of the twentieth century. Their shared roots and common channelling through the Enlightenment help to explain why they both distinguish wars that are worth fighting from

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wars that are not, and likewise lay down such rules for the conduct of wars as will make more likely than not the achievement of the (by definition) 'just' objective pursued. Each invites, indeed demands, responsibility in decision-making, and each is well capable of counselling strict observance of limitations and prohibitions, though neither is absolutely bound to do so. Not surprisingly, therefore, these two related moral traditions are attractive modes or styles for guiding the thoughts not only of committed believers and ideologues within those traditions (whose interests in their war-justifying elements might appear, on close inspection, to be greater than their interest in the war-moderating ones) but also of anyone who is interested in limiting the incidence and the incidents of war. Since I admire some of these 'just war' books greatly and often recommend them, I must now explain why nevertheless I am going to eschew their approaches and their language.²

I never thought of writing in terms of 'just' or 'unjust' wars and war conduct, primarily because the world's principal experts on the matter of humanity in warfare avoid such language like the plague. I refer to the International Committee of the Red Cross, by whose example in general and by several of whose officers in particular (above all, he to whose memory this book is dedicated) I have been much influenced. By all means let people approach this matter by way of 'just war' theory if that suits them. For many it may be the way that makes most sense. But the example of the ICRC proves at least that 'just war' thought and language is not indispensable; and there are reasons, to which I shall come presently, for suspecting that it may sometimes be positively unhelpful. The Red Cross has always administered relief to sufferers in wartime without regard to the quality of the causes for which they may have been fighting; for the excellent and explicit reason, that human suffering is human suffering, whether incurred in the course of a 'just war' or not. Privately, members of the Red Cross (*a fortiori*, the ICRC, its permanently neutral and impartial cortex) no doubt have their own views as to the relative rightness and wrongness of the causes invoked by those fighters. Simply as Red Cross members, however, they ought to have no opinions on the matter, their movement's philosophy being that it is better that they should have no such opinion, since to engage in the business

of judgement of motives and purposes would be to commit them in an area where it is essential that they remain uncommitted.

Most national Red Cross societies, it must be confessed, understandably tend to fail to maintain such lofty indifference. I shall comment on that inevitable degree of lapsing later. But the ICRC, with its unique position and its special role in the neutral centre of the world's humanitarian concerns, has less difficulty in living true to its principles. Accordingly we observe that it never, never engages in judgement about the rights and wrongs of the armed conflicts amidst which it does its work; as if it knows all too much about the demands made by War, and the indispensability of meeting them, to be able to rise at the same time to the height of the demands made by Justice. Humanity, not Justice, is its *prime* concern. The only judgements it will venture to make, and these only reluctantly and only when it is thought helpful, are as to whether the Geneva Conventions and related laws and conventions about humanity in warfare are being observed or not. It may thus happen (and one suspects that it has happened) that a belligerent possessing what would generally be judged the less worthy cause, may nevertheless have been the more assiduous observer of humanitarian law. This may be another of the paradoxes, the near-absurdities, in which the subject is undeniably rich; I only beg readers to suspend judgement until they have finished the book, in the course of which the grounds for the ICRC's principles will become clearer.

Wars may then be 'just' or 'unjust', in the view of anyone who cares to classify them thus; international humanitarian law and its particular application to circumstances of war go on regardless, and the words 'just' and 'unjust' make no appearance in its earliest, its best-known, and to date its most effective instruments, the Geneva Conventions; nor, for that matter, do they appear in the Hague Conventions and Regulations for Land Warfare, with which we shall later be at least as much concerned. From the practical regulator's point of view, these moral inquiries into the motivations of wars are at least irrelevant. One of the most effective regulators ever was Louis Renault, Professor of International Law at the Sorbonne and France's leading representative at the Hague Conferences of 1899 and 1907, and by all accounts one of the two or three most outstanding men there. Hear what he said in his preface to the French army's manual on the law of war, 1913:

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War is not, as some have said, force put to the service of Right in international relations, or an act of legitimate defence aimed at repulsing an aggression or obtaining reparation, or, more simply, an extreme means of defending one's own rights. These definitions should be rejected, because they don't correspond to reality – not all of it anyway. From the point of view where one has to start in order to regulate warfare, war must be seen simply as *a state of affairs*: a variety of acts of violence by means of which each belligerent is trying to submit the other to his will.³

I adopt this non-ideological humanitarian standpoint, and am pleased to borrow a fellow-worker's description of it:

... judging particular situations on their own merits, weighing the consequences of actions by the standard of the humanitarian view itself ...; it checks the future against the past, [proceeding] from precedent to precedent. ... It becomes possible to define what is right by defining what is wrong ...⁴

One may, then, exercise a concern for humanity in warfare without necessarily and consciously bothering about how any particular war stands in relation to the 'just/unjust' criteria; which, I repeat, is not to say that preoccupation with such criteria may not produce the most valuable of books. But there are other and less innocent practical aspects of the 'just/unjust' debate, as to which its more theoretical practitioners can seem to be inadequately alert.

Every well-informed student of the history of warfare knows that some of the most inhumane wars ever fought have been proclaimed to be 'just' by those who fought them. James Turner Johnson, who has written one of the best books about the history of 'just war' theory, argues strongly that those singularly inhumane 'religious wars' of the sixteenth and seventeenth centuries, usually advanced as examples of how conviction of 'just' cause can evoke horrible behaviour, ought to be classified not as 'just wars' but as 'holy wars', distinct from and (mainly because of their other-worldly frame of reference) more unmeasured than the classical 'just war' proper. Like Walzer, he seeks to rescue the idea of 'just war' from the 'realist' condemnation expressed in A. J. P. Taylor's remark: 'Bismarck fought "necessary" wars, and killed thousands;

the idealists of the twentieth century fight "just" wars and kill millions.'

Whatever justice in war *should* mean, however, several facts about the actual conduct of war and the behaviour of people in war force themselves upon the notice of anyone who seeks to study the observance of humanitarian law. First: conviction of righteousness elides easily into self-righteousness, and self-righteousness is not the best state of mind for moderation, objectivity, and the practice of human kindness. Second: although 'just war' language has for many years been part of the *lingua franca* of international marxism, just as 'holy war' remains part of the *lingua franca* of international islam, it seems in both cases to be taken most seriously by groups and governments whose acts and policies show them to be the most ruthless. Third: belligerent states neither marxist nor islamic have sometimes been led by overmuch conviction of righteousness into policies most immoderate and inept; witness for instance 'unconditional surrender' in world war two, the second phase of the Korean war, the Anglo-French 'Suez adventure', Vietnam. Fourth: courts administering the law of war, and jurists expounding and analysing it, have concurred to maintain that its very existence and viability, precarious as in the nature of the case they must be, depend upon an unstated assumption that each party is neither more right nor wrong than the other *in having gone to war in the first place*; 'all laws of war . . . must . . . assume that both parties are equally in the right.'⁵ And fifth: whatever jurists and outside commentators may be saying or deliberately not saying about the merits of any particular conflict, men fighting willingly in it (unwilling conscripts may of course be a different matter) tend to profess that their cause is a just one; something they will, something they psychologically *must* make themselves believe, whether God and his agents on earth really consider it so or not.

The whole fine language about justice in war thus gets dragged through the mire of the battlefield, and is made in practice meaningless; regularly called into use as part of the panoply of emotional self-intoxication so often found necessary (as actual alcoholic intoxication has sometimes been found necessary) to get people fighting furiously, and calculated to cloud judgement about right and wrong. But fortunately for the ultimate interests of humanity, this ferocious, and by any standards immoral, language of war appears

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to have less than the completely demoralizing effect one might expect. Actual fighting men can very well show by their actual conduct towards their enemies that they don't wholly believe everything they have been egged on or bullied to say; as if, instinctively exercising some dispassionate objectivity about the situation they all find themselves in, they know that the men on the other side have to believe likewise. Much historical evidence, some of it to be drawn upon in these pages, shows that even 'just'-feeling men, unless worked up to an unusually intense level of emotional frenzy or ideological temper, can observe towards equally 'just'-feeling foes all the chivalrous or humane regard compatible with the given situation.

3 *Jus ad bellum and jus in bello*

Attempting what I am attempting, then – a history of the laws and customs by which the more developed countries have thought fit to control their conduct of war amongst themselves through the past couple of centuries – it is not difficult to justify a deliberate bypassing of 'just war' theory. But at this point I must recognize and admit that 'just war' categories can only be dispensed with when a work is as precisely delimited as this one. 'Just war' theory, as I have already mentioned, is concerned to evaluate both the causes of war and the conduct of war. The classical terms for these two main branches of the subject (like so much else in international law, derived originally from the Romans, and very useful on account of their conciseness) are, respectively, *jus ad bellum* and *jus in bello*: the law governing your going to war in the first place, and the law governing what you do when you get there. My book is about nothing but *jus in bello*. Its restriction to that branch of the whole great subject does not embarrass me, since it is on its own, without necessary regard to kindred systems, an institution of considerable significance to mankind, and no one has yet written its history. To write its history and at the same time, appropriately intertwined, the history of the causes of wars, would be a colossal undertaking. I am not up to it. But my half of the whole is not without direct relevance to the other. Serious study of the law of war on its own has this therapeutic quality, that it calls attention to its own limitations, and suggests their remedy. One cannot for long contemplate the cruel and pointless aspects of war without reflecting upon the phenomenon of war itself. It seems quite a

natural progression, to advance from inquiry into the conduct of wars to the inquiry as to why they happened to begin with; to which the conclusions might be that it was a pity they happened at all. Which of us, thinking calmly about the matter, would disagree with what Thomas Arnold wrote in his interesting 'war and society' lecture of 1842: 'Though I believe that theoretically the Quakers are wrong in pronouncing all wars to be unjustifiable, yet I confess that historically the exceptions to their doctrine have been comparatively few . . .'⁶

Writing neither about the causes of war (a branch of social science by now in a high and exciting state of development), nor about the morality of engaging in wars, the momentous matter with which 'just war' writers are primarily engaged, I close this section of my introductory argument with the suggestion that, although it springs from different sources and flows through somewhat different channels, this empirical humanitarian stream of inquiry in the end joins forces with those others. One cannot contemplate restraint in the conduct of war without being driven to consider restraint in the recourse to war. The law of war on its *jus in bello* side – the side which appears alone in the manuals by which armed forces are supposed to regulate their conduct of operations, and by which international juridical opinion evaluates their faithfulness in doing so – says nothing, dares not say anything, about *jus ad bellum*. But thought about the one is barely separable from thought about the other, and even those humanitarian activists who have most insistently and explicitly kept out of the debate about 'just' and 'unjust' wars may have been doing more about the general war problem than meets the eye. At any rate, this seems to have been, and presumably remains, the covert faith of the ICRC. For obvious reasons it is committed to no particular opinion about war in general (other than implicit acceptance of the lawfulness of wars entirely of self-defence, the only sort of war the Swiss need contemplate) and its influence has always been exerted to damp down overtly pacifistic motions within the Red Cross movement at large. But the general tenor of its preferences is unmistakable, and the implications of the Geneva Convention are equally so. Only a mentally-dulled militarist could study them and be made more warlike; they must make mentally and morally active people less accepting of war.

This attitude was nicely expressed by Gustave Moynier, the