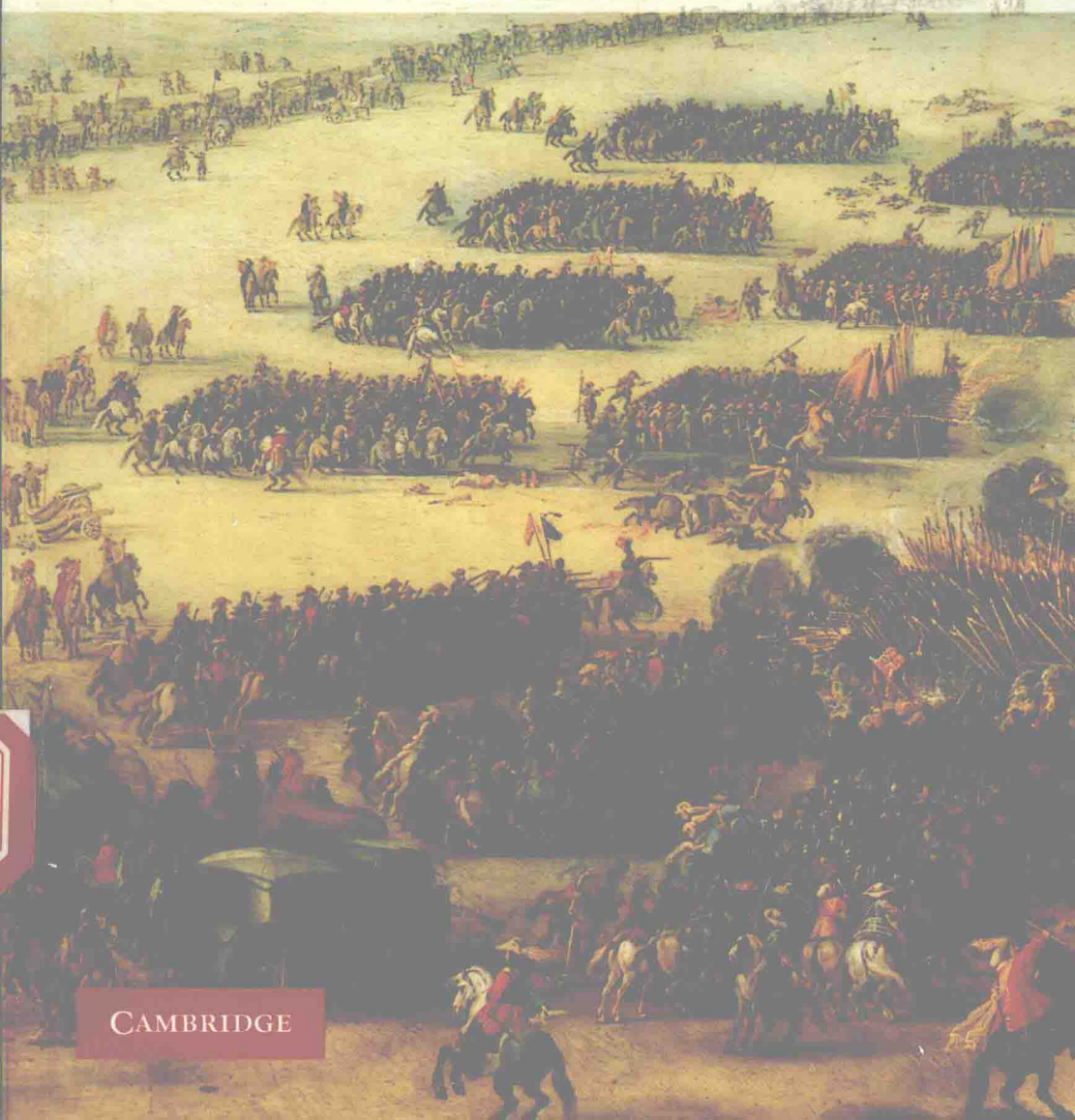
STEPHEN C. NEFF

War and the Law *of* Nations

A General History



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WAR AND THE LAW OF NATIONS

This book is a history of war, from the standpoint of international law, from the beginning of history to the present day. Its primary focus is on legal conceptions of war as such, rather than on the substantive or technical aspects of the law of war. It tells the story, in narrative form, of the interplay through the centuries between, on the one hand, legal ideas about war and, on the other hand, state practice in warfare. Neff covers the emergence, in various ancient societies, of an association between justice and warfare, which matured into the just-war doctrine of the Middle Ages. He then traces the decline of this conception of war in favour of a view of war as an instrument of statecraft, culminating in the evolution of what became known as the legal institution of war in the nineteenth century. There is also coverage of the much-neglected topic of measures short of war, most notably of reprisals, but also including the evolution of self-defence doctrines and practices over the years. International legal aspects of civil wars are also considered, notably the development of recognition of belligerency and of insurgency in the nineteenth century. The attempt by the League of Nations to restrict war is analysed, with an explanation of the deeper reasons for its failure and the way in which this paved the way for the substantial discarding, after the Second World War, of war as a legal institution, in favour of the alternate conception of aggression-and-self-defence. Treatment of new approaches to civil wars after 1945 and of the advent of war against terrorism brings the story to the present day.

STEPHEN C. NEFF is a Reader in Public International Law at the University of Edinburgh. He is the author of two previous books on international legal history: *Friends But No Allies: Economic Liberalism and the Law of Nations* (1990) and *The Rights and Duties of Neutrals: A General History* (2000).

To my nephews and nieces:

Eric	Delaney
John	Cameron
Alexander	Katherine Clark
Jocelyn	Thomas

War holds a great place in history, and it is not to be supposed that men will soon give it up – in spite of the protests which it arouses and the horror which it inspires – because it appears to be the only possible issue of disputes which threaten the existence of States, their liberty, their vital interests.

– Institute of International Law,
Preface to the Manual on the Laws of War on Land (1880)

PREFACE

My great thanks go to my home institution, the University of Edinburgh School of Law, for sabbatical periods that were essential to the completion of this project – and also for intellectual stimulation in countless ways. The hospitality of two fine institutions was invaluable to me: the Max Planck Institute for Comparative Public and International Law, in Heidelberg, Germany (in 2000); and the George Washington University School of Law in Washington, DC (in 2003–4). For research and editorial assistance, I am grateful for the invaluable services of Dimitra Nassimpian, Ashley Theunissen, Kyle Sammin, Paul Margolis and Ozan Jaquette (and friends). In dealing with the perils of the New Technology, I have had the invaluable assistance of Roger Marlowe and of my brother Tom Neff. The following people (in prosaic alphabetical order) have assisted or inspired in manifold ways that were sometimes indirect but always much appreciated: Adnan Amkhan, Alan Boyle, Michael Byers, James Crawford, Yoram Dinstein, Thomas Giegerich, William Gilmore, Christine Gray, Susan Karamanian, Frederick Shiels, Ralph Steinhardt, Simonetta Stirling and Colin Warbrick. Only inspiration, and not errors, may be put to their charge. Finally, a most special thanks to the long-suffering staff at Cambridge University Press – to Leigh Mueller for heroic editing labours, and most specially to Finola O'Sullivan for her unique (and all too rare) combination of patience and vision.

LIST OF ABBREVIATIONS

AC	Appeal Cases (UK)
AFDI	*Annuaire Française de Droit International*
AJIL	*American Journal of International Law*
Annuaire	*Annuaire de l'Institut de Droit International*
BFSP	*British and Foreign State Papers* (UK)
Brit YB	*British Year Book of International Law*
C Rob	Admiralty Reports of Christopher Robinson (UK)
Columbia J Tr L	*Columbia Journal of Transnational Law*
CTS	*Consolidated Treaty Series*
Dods	John Dodson, Reports of Admiralty Cases (UK)
Dumont	Jean Dumont (ed.), *Corps universel diplomatique du droit des gens*
EHRR	European Human Rights Reports
F	Federal Reporter (USA)
Fed Cas	Federal Cases (USA)
FRUS	*Foreign Relations of the United States*
GAOR	General Assembly Official Records (UN)
GP	*Gazette du Palais* (France)
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ILM	*International Legal Materials*
ILR	International Law Reports
Inter-Am CHR	Inter-American Court of Human Rights
JDI	*Journal de Droit International*
Lieber Code	General Orders No. 100, 'Instructions for the Government of Armies of the United States in the Field' (1863), found in Hartigan, *Lieber's Code*, at 45–71
LNOJ	*League of Nations Official Journal*
LNTS	*League of Nations Treaty Series*
Moo NS	Edmund F. Moore, Reports of Cases of the Judicial Committee and the Lords of Privy Council, New Series (UK)
Op A-G	Opinions of the Attorneys-General (USA)
Parl Papers	Parliamentary Papers (UK)

PCIJ	Permanent Court of International Justice
RAI	*Recueil des arbitrages internationaux*
RDILC	*Revue de Droit International et de Législation Comparée*
Res and Dec	Resolutions and Decisions (UN)
RGDIP	*Revue Général de Droit International Public*
RIAA	Reports of International Arbitral Awards
SCOR	Security Council Official Records (UN)
Stat	Statutes at Large (USA)
UNTS	*United Nations Treaty Series*
US	United States Supreme Court Reports (USA)

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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.*

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

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.

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

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.