BOOK REVIEWS

The Verdict of Battle: The Law of Victory and the Making of Modern War by James Q Whitman [Harvard University Press, Cambridge, MA, 2012, 336pp, ISBN: 978-0-674-067141, £22.95 (h/bk)]

On the morning of 10 April 1741, during the war of Austrian Succession which had begun with Emperor Frederick II of Prussia's violation of the 1713 Pragmatic Sanction (making Maria Theresa the heir to the Habsburg throne), Frederick's troops surprised the Austrian troops at Mollwitz. The Prussians could have stealthily attacked and annihilated the enemy; but they did not. The following year, after his 'complete victory' at the battle of Chotusitz, Frederick again stopped short of pursuing and annihilating his enemy (71–2). These and other examples of self-restraint in war have garnered the eighteenth century the epithet of 'golden age of battle warfare' (6). Why was warfare limited and restrained in this century, in a way in which it had not been before and would never be after?

American legal historian James Q Whitman investigates this question, by reference primarily to Frederick's seizure of Silesia ('a famous case of supposed lawlessness', 54), in *The Verdict of Battle*, an erudite work that challenges the standard account of historians and military historians about this 'golden age'. Like those accounts, Whitman's argument centres on the role of pitched battle as the preferred means of warfare in the eighteenth century. Pitched battles, by their very nature, distinguish between combatants and non-combatants, and limit the spread of violence to the general population (4–5). At their very best, pitched battles last one day, sometimes only a couple of hours, and produce clear results that can put an end to the dispute with a high degree of finality (29). In battle, 'you could win a Kingdom', as Bodin wrote (cited at 93); the implication is that 'you could lose one' too, and at very high human cost. Pitched battles, for all their orderly appearance with colourful troops and infantry in organized formation, were chaotic and hazardous; without doubt more dangerous than other, more common, means of warfare (41).

Unlike the standard accounts, however, Whitman argues that the prominence of battle warfare in this period was a consequence of the international legal order in force at the time. Under what Whitman, recycling an older expression, calls the *jus victoriae* (10, 71ff), the victor in battle acquired legal property rights: monarchs won dynastic and territorial rights (Bodin's 'Kingdom'), and troops won rights to booty and other spoils of war. The *jus victoriae* also guaranteed the unchallengeability of the battle's result. Battles were characterized as a form of legal wager, a 'tacit contract of chance' in Pufendorf's words (77), and the parties accepted that victory depended to a large extent on fortune. The irrationality of chance lent victory its unchallengeable finality, for one cannot reasonably appeal the result of a wager (81, 92). Thus understood, under the *jus victoriae* battles, had '*legal* significance': they had the potential to end disputes with a degree of finality (47–8), and this made them appealing to monarchs involved in dynastic disputes.

The eighteenth-century international legal order of western Europe also set in place a system for the limitation of, and restraint in, the conduct of war. At the time, the law recognized a '*ius belli infinitum*' (96, 192). Though during the eighteenth century the so-called *Kriegsmanier*, or the 'manner' or 'laws and customs' of war, developed to limit the behaviour of belligerents in war (96). The 'manner' of war, Whitman argues, was a continuation of the etiquette of courtly society, inspired by the civilizing ethos that pervaded western European royal households during the century, to the battlefield (164–7).

Whitman acknowledges that these 'manners' were not always respected (172–3). For instance, he notes that the rule of retreat, pursuant to which the victor in battle was the belligerent who forced the enemy to flee, was frequently ignored: victorious belligerents often pursued their retreating enemy, engaging in so-called 'wars of devastation' (174, 179). But he counters the relevance of these instances of non-fulfilment in a two-step argument, which appeals to the 'philosophy of law' (188). First, Whitman maintains that it is not inherent in the 'nature of law' that it always be respected. Instances of breach do not call into question the status of these rules as *law* (190).

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Second, Whitman prefers to view *Kriegsmanier* as establishing a (Holmesian) system of incentives and risks, and not as rules imposing obligations (202–3). For example, the retreat rule did not oblige sovereigns and troops to stop short of exterminating the enemy; but it encouraged them to do so: if victory (and ensuing property rights) were granted merely after the enemy's retreat, why assume the risks of pursuing the enemy (190–2)?

Insofar as it produced legal results and was conducted in accordance with legal incentives, battle was a form of legal procedure; in particular, it was analogous to civil litigation over property. Whitman thus refutes theories of eighteenth-century battles as a form of aristocratic duel: battles were public wars lawfully fought by princes and monarchs; duels, in contrast, were unlawfully fought by a nobility, who, by this stage, had lost its ancient power to engage in private war (153). The civil litigation analogy also challenges the view of war as a form of criminal procedure to punish evil. The author's argument here becomes iconoclastic, recasting just war theory as no more than the application of private property law to sovereigns (105ff). Contrary to the contemporary understanding of just war theory (101–4), Whitman argues that, in its original medieval formulation, just war theory concerned property claims: it was no more than the extension of feudal property law to the relations between princes. And by the eighteenth century, it had become concerned with the private law of succession as it applied between monarchical sovereigns: just wars were about claims of dynastic succession (118).

For Whitman, then, war in this period was limited because it was fought by civilized princely monarchs, for narrow objectives (dynastic claims), within a legal system which provided incentives for self-restraint. The demise of this system occurred during the nineteenth century as a consequence of two developments. First, the rise of republics brought about a change in the aims of war: political and territorial aims were replaced by ideals (eg, national unity), and in wars fought for ideals, the loser does not (and cannot) accept the 'verdict of history' (244). Kant's aspirations of *Perpetual Peace* and his predictions turned out to have exactly the opposite result: republics not only fought wars, they fought bloodier wars than monarchs. The second development was the humanization of the law of war. While these humanitarian aims are certainly commendable, the new *jus in bello*, not concerning itself with victory (who wins and what they win) failed to give finality to the results of war.

Lessons from history are difficult to draw (if any can be drawn at all), and the lesson that Whitman draws from the 'golden age of battle' is a startling one: wars worked best in the eighteenth century because they constituted a legal means through which politics could be continued, to paraphrase Clausewitz (246–7). In contemporary international relations wars continue to be fought for political gain (legitimacy, capital, etc)—but contemporary international law no longer accepts war as a dispute settlement mechanism. So states' political goals are masked in the language of the contemporary *jus ad bellum*: self-defence, collective security—and even 'responsibility to protect'. Whitman does not use this realist conclusion to challenge the effectiveness (and status) of international law. And though it makes one wonder whether, for the author, contemporary international lawyers are simply a new breed of Kantian 'sorry comforters', Whitman's conclusion forms the basis of his plea for a new *jus victoriae* compatible with the premises of our current international legal system (258ff).

The Verdict of Battle is an important contribution to the historiography of war; its account of the legal significance of battles, and war more generally, throughout this period has elucidated aspects of this 'golden age' with which other disciplines have not traditionally engaged. From a legal standpoint, however, the work oversimplifies the legal order existing in the eighteenth century by failing to distinguish the notions of just war and legal war (war 'in form'). The result is a one-dimensional narrative of a dualist normative order; ultimately leading the author to debatable assertions, best exemplified in the author's ultimate characterization of Frederick's seizure of Silesia as a 'lawful' war (*passim*). Frederick's war may have been a war 'in form', but it was certainly *not* a just war: not even on the (unpersuasive) reading of just war as concerned (only) with property rights. Frederick had no claim to Silesia, he had no *justa causa*. And that made a difference in the eighteenth century. To say that a 'pretext' was sufficient to provide a 'just cause'

(126–9) is a self-serving argument. This oversimplification aside, *The Verdict of Battle* is an insightful work, from which not only historians and historians of international law but also international lawyers have much to learn.

Federica Paddeu*

The Prohibition of Torture in Exceptional Circumstances by Michelle Farrell [Cambridge, University Press, Cambridge, 2013, 291pp, ISBN: 978-1-10-7030794, $99 (h/bk)]

'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' So says Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights, and the absolute prohibition on torture is routinely cited as not only a paradigmatic norm of customary international law but also of *ius cogens*. The absolute nature of this prohibition has not, however, silenced the debate surrounding the use of torture and this elegantly written and thoughtfully argued volume is an important contribution to what has become an increasingly surreal discussion. The great merit of this book is that its real focus is the surreal nature of that debate itself and, by seeking to move beyond it, aims to relocate that debate into a place where the absolute prohibition on torture can once again be appreciated for what it is—the meeting place of humanity with inhumanity, and a touchstone through which we can discern the difference. The weakness of the book is that in doing so, it points to the shadows of practices which it does not fully explore and, perhaps, it dismisses too easily the ethical questions which the absolute prohibition poses. As a result, there is a risk that the central—and convincing—message that this book conveys might not be thought to be as firmly grounded as it ought.

As with so many other discussions of the prohibition of torture, the starting point is, ultimately, the infamous 'ticking bomb' scenario. However, rather limiting itself to dissecting its realism or relevance, the author goes further and argues that even engaging in the discussion from this perspective has the consequence of opening up the space for justifying the use of torture in a way which makes it too easy to justify. Having concluded that the ticking bomb scenario offers a distorted frame of reference and 'is an artificial construct, unlikely to manifest in reality and an inappropriate basis on which to construe a moral or legal justification for torture' (128), the author then suggests that other theoretical constructs offer a better paradigm from within which to consider the arguments raised. The alternative paradigm offered draws on the work of Schmitt and Agamben and is that of there being 'states of exception' where necessity meets legality, this being 'both a judicial concept and an extra-legal concept .... open[ing] up a zone of indistinction, prescribed by law but devoid of law'. This then leads to the question of whether torture can be accommodated within the limits of such reasoning, and whether as a practice it falls within that 'zone of indistinction'. The point is that if it can be, then both the absolute prohibition and the 'exceptional use' of torture might remain in some form of unresolved tension of competing legitimacy. Neither the rule of law nor the exceptional use of torture need be abandoned: the exceptional use of torture 'retains a connection to the juridical order ... the exception takes on normative force. It is in this sense that the exception becomes the norm' (173).

It is against this background that the positions of three well-known writers are then rehearsed. The first is Alan Dershowitz's argument concerning the issuance of 'torture warrants' which would permit the judicial regulation of torture, whilst the second is that of Oren Gross, who veers towards an 'extra-legal' approach which refuses to legitimate torture as a matter of law but accepts the tragic necessity of its use and considers that the consequences must be a matter for subsequent public judgment which might include ex post ratification. Farrell ultimately dismisses both of these approaches, arguing that 'the rule of law cannot bring torture under its control, as Dershowitz advocates, nor can the rule of law separate itself from torture, in the way Gross claims (174). These positions, it seems, stray too far from the 'greyness' which characterizes the exceptional use of

* Queens' College, Cambridge University, fip20@cam.ac.uk.

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