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REVIEW OF JAMES Q. WHITMAN, *THE VERDICT OF BATTLE: THE LAW OF VICTORY AND THE MAKING OF MODERN WAR* (2012)

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***The Verdict of Battle: The Law of Victory and the Making of Modern War.* By James Q. Whitman. Cambridge, MA: Harvard University Press, 2012. Pp. vii, 323. Index.**

For evident reasons, scholarship on the law of war has been a growth industry for the past two decades. But only recently have legal historians added their voice to the vigorous debates that rage from the ivory tower to political fora to the battlefield.¹ This is doubtless a laudable trend: focusing diverse disciplinary lenses on an issue promotes clarity, creativity, and analytic rigor. Still, it is not immediately clear what reflection on the comparatively orderly wars of the eighteenth century between monarchs might contribute to current debates, which, for all their diversity, tend to revolve around difficulties generated by novel forms of non-state belligerence.

Begin with the scenario portrayed at the outset of *The Verdict of Battle*:

Two armed groups meet in pitched battle. There is a chaotic struggle. Many of the combatants are killed. At the end of a conflict lasting a few hours or perhaps an entire day, one group flees, or perhaps both do. One group, usually the one that manages to hold its ground amid the terror and killing, is deemed the victor.

How should we think about such an event? (p. 1)

James Q. Whitman, Ford Foundation Professor of Comparative and Foreign Law at Yale Law School, offers a remarkably erudite and original answer. He elucidates the *sui generis* nature of pitched battle during what he denotes “the long eighteenth century” (c. 1660-1790) (p. 54), recasts the phenomenon to clarify, above all, its distinctly legal significance, and explains its evolution and demise in terms that call traditional accounts into serious question. *The Verdict of Battle* concludes with reflections about what this analysis counsels for the modern law of war.

The Verdict of Battle is in most respects a paragon of legal and historical scholarship. It further cements the author’s reputation as one of our most thoughtful, erudite, and creative legal historians. The critical dimensions of this review will be commensurately modest: at times, I think, the book elides or minimizes evidence of distinct, if related, developments in the complex

¹ E.g., JOHN FABIAN WITT, LINCOLN’S CODE (2012); MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS

history of just war theory and international law, both of which defy reduction to a seamless narrative. In part for that reason, *The Verdict of Battle's* (albeit limited) polemical dimensions often seem misplaced or overstated. After sketching the core arguments, I suggest how and why.

Three questions frame *The Verdict of Battle's* descriptive and normative agenda: “Why was it ever possible to limit warfare to the concentrated collective violence of pitched battle? Why did the classic pitched battle go into decline in the age of the American Civil War and the Franco-Prussian War? Is there anything we can still learn from the battle warfare of the past?” (p. 8) To answer them requires inquiry into the sociohistorical nature of the pitched battle, its conceptual foundations, and its perception among eighteenth-century contemporaries.

Scholars identify three prototypes of premodern land warfare: the pitched battle, the siege, and the raid. The latter two refer to variations on the definition of war in Aristotle's *Politics*, a “brutal hunt for human prey” (p. 26). Armed men attack hapless, often surprised and always unarmed, victims (p. 35). Unrestrained violence is the rule. Atrocity is commonplace. The comparatively humane and constrained pitched battle, in contrast, is unusual—although, intriguingly, also culturally and historically ubiquitous (pp. 6, 28-29). It reached its meridian, however, during what many scholars regard as Europe's “golden age of civilized, enlightened, warfare” (p. 55). Orchestrated consensually by monarchs, pitched battles denote orderly conflicts between professional soldiers facing one another on a geographically and temporally confined battlefield (p. 29). In paradigm, if not always fact, they last a few hours, perhaps a day, concluding with retreat, or surrender of the battlefield, by one of the belligerents. The other, for that reason, will typically be regarded as the victor (pp. 1, 29), even if its forces sustained more casualties or lost the battle along another, equally logical, measure. In short, *success* and *victory* in pitched battle should be distinguished and need not be coterminous (p. 194). Well-known

pitched battles of the era include “Marengo, Austerlitz, Jena, Leipzig, and Waterloo” and, latterly, “Solferino and Königgrätz” (p. 7).

Whitman argues that during this time, a pitched battle amounted to a kind of wager, what Pufendorf called a “tacit contract of chance” (pp. 52, 77). The wager of battle could, and often did, resolve epic *legal* disputes. Monarchs accepted pitched battle as an appropriate way to resolve competing claims to territory, property rights, and dynastic succession. To settle issues of this magnitude by a process predicated on the vicissitudes of fortune, pitched battles perforce relied on “a widespread, if somewhat mysterious, legal intuition: that it is through taking risks that we acquire rights” (p. 82). Yet because of this intuition, during the long eighteenth century, war as a brutal hunt for human prey periodically yielded to war as a constrained, rule-governed battle that could settle major international disputes (p. 56). This of course begs the question why monarchs would relegate epic disputes to what at first blush looks like a roll of the dice.

It is difficult to do justice in a brief review to the rich answer Whitman defends, which synchronously combines history, philosophy, political science, and legal theory. But two points merit particular emphasis: first, as high as the stakes were, pitched battles did not threaten (to the contrary, they reinforced) the legitimacy of the monarchical state and its Weberian monopoly on lawful violence (pp. 226, 247, 249); and second, to an extent modern readers may initially find difficult to comprehend, European élites saw the role of *luck* in warfare as both ineluctable and meaningful. A quotation captures the former point well: “The very fact that war counted as a legal procedure meant that it could be fought in a procedural, orderly way. If eighteenth century rulers had fought . . . what the jurists condemned as ‘wild beast wars,’ their claim to be lawful sovereigns would have been weakened” (p. 249). Hence the absence of an eighteenth-century European Genghis Khan. The latter contention (about the role of luck) requires the reader to

appreciate at least three related dynamics: fortune (1) enabled élites to ascribe the verdict of battle to supernatural forces; (2) relieved them of ultimate responsibility for the outcome (just as modern international dispute-settlement can offer sovereigns a way to save face); and (3) deterred relitigation, so to speak, of the verdict—for one cannot sensibly appeal the result of a coin flip (p. 81).

Pitched battles therefore offered monarchs a measure of both legitimacy and finality in an international political and legal order, which, then as now, lacked a centralized authority capable of adjudicating among juridically coequal sovereigns. Alone among the prototypes of warfare, pitched battles could settle international disputes in a way that, while risky, held out the potential for durable verdicts that could confer epic gains. “Frederick could potentially ‘gain a kingdom’ in the words of Bodin” (p. 93). Pitched battles, as Pufendorf and Vattel emphasized, incentivized “civilized sovereign behavior,” rendering their verdicts “worthy of enhanced diplomatic respect” (p. 249). Belligerents, like modern litigants, often (but not always) respected them.

The *jus victoriae*, or law of victory, connected to pitched battle also answered crucial questions that we regrettably tend to neglect in the modern law of war: “first, *how do we know who won?* and second, *what do you win by winning?*” (p. 10).² *The Verdict of Battle* argues that the answers to these questions—for example, that one belligerent retreated and vindication of the other’s territorial claim, respectively—qualified as *law*, not merely custom or the like. If so, it is surely correct that “[o]dd though it may sound, we cannot do satisfying military history without doing a bit of philosophy of law” (p. 180). Hersch Lauterpacht’s famous dictum comes to mind in this regard: “if international law is, in some ways, at the vanishing point of law, the law of war

² For one scholar’s reflection on these issues in the context of modern warfare carried out by liberal democracies, see Gabriella Blum, *The Fog of Victory*, 24 EUR. J. INT’L L. 391 (2013).

is, perhaps even more conspicuously, at the vanishing point of international law.”³ Yet as Whitman argues, correctly in my opinion, it *is* law. War is not massacre.⁴ It is “not just violence; it is a legal act with legal meaning, and that legal meaning is of great symbolic importance for the organization of society” (pp. 154-55).

Reciprocity is almost always an indispensable component of the law of war,⁵ and pitched battle is no exception (p. 191). Yet we can only understand the eighteenth-century *jus victoriae* by looking beyond reciprocity to more subtle dynamics that were equally at work (p. 192). Referencing H.L.A. Hart’s critique of John Austin, Whitman emphasizes in this regard that most legal rules influence conduct not only, or even primarily, by threatening sanctions. Law includes rules and principles that confer power and “promise at least potential advantages,” incentivizing obedience. Conversely, it creates risks for those who violate the rules: gains thereby derived may be ephemeral or marred by illegitimacy, for example. So too, Whitman notes with reference to Holmes’s “bad man”—one who simply “asks whether he is likely to profit or suffer by following the rules” and ignores them if he thinks he can with impunity—the existence of an applicable legal rule, *mutatis mutandis*, renders compliance with that rule beneficial and its disregard hazardous; and within the social context of eighteenth-century Europe, “[p]remodern military commanders were a class of Holmesian bad men if there ever was one” (pp. 190-91). Nor does the lack of categorical obedience to the rules of pitched battle cast doubt on their legal status, for “[i]t is in the nature of legal rules that they are never uniformly obeyed” (p. 190).

By underscoring the symbolic force and legitimacy of fortune in premodern Europe (pp. 81-83), Whitman renders comprehensible why belligerents might acknowledge that it conferred

³ Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 1952 BRIT. Y.B. INT’L. L. 360, 382.

⁴ Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 444-45 (2007).

⁵ See generally MARK OSIEL, *THE END OF RECIPROCITY* (2009).

authority on the outcome. The wager of battle vindicated the verdict (p. 81). This is not to say, he hastens to add, that élites relegated vital issues like dynastic succession or territorial claims to dumb luck. Pitched battles were “*mixed* games of chance” (p. 91, emphasis added). Human effort and resources (technology, strategy, the quantity and quality of a sovereign’s forces, and the like) considerably influenced the outcome but did not alone determine it.

Insofar as the *jus victoriae* of pitched battle constituted the law of war in the long eighteenth century, then, notwithstanding the contemporaneous existence of theological, chivalric, natural law, and other *antecedents* to modern international humanitarian law (IHL), the operational law of war had little if anything to do with its focus today: limiting resort to war (*jus ad bellum*) and needless suffering (*jus in bello*). That observation is doubtless true but alone unremarkable. Yet because the pitched battle limited armed conflict in time and space, it incidentally insulated civilians from bloodshed and reduced the scope of war (pp. 4-5): “Wars with limited aims tend by their nature to be limited wars” (p. 169). It may therefore be of normative and not only historical interest to ask what conditions enabled pitched battles and why they gradually receded.

Whitman illustrates their demise by reference to momentous nineteenth-century conflicts on each side of the Atlantic, the Franco-Prussian and U.S. Civil Wars (p. 211), which also show that pitched battles did not vanish overnight (p. 7). For even in the latter nineteenth century, wealthy “battle tourists” expected them. They set up amphitheaters nearby, replete with servants and picnic baskets, to enjoy the anticipated spectacle of a pitched battle as one might a boxing match (p. 210). Yet they found that pitched battles failed to deliver the “quick and decisive resolution” that typified early “open confrontation on the battlefield” (*id.*). The contrast between the norms of war in the eighteenth and nineteenth centuries, respectively, turned out to be

palpable. In 1777, the Continental victory at Saratoga culminated in French recognition of and an alliance with the nascent Republic that proved critical to the success of the American Revolution. A century later, at the Battle of Bull Run, General Robert E. Lee won a comparable victory, which the Confederacy expected would elicit similar European recognition, a paramount early aim of the secessionists (pp. 209-210). Less than a decade later in Europe, Prussia demolished French forces at the 1870 Battle of Sedan, one of the most devastating pitched battles in history, culminating in the capture of Emperor Napoleon III and the surrender of hundreds of thousands of French soldiers (p. 208).

By the latter nineteenth century, however, states and their populations ceased to *accept* the verdict of battle and its norms, such as the retreat rule (p. 230), chiefly because of changes in the stakes, on the one hand, and norms of political legitimacy, on the other (p. 215). That is why, Whitman argues, neither the Union nor France, the conventional losers at Bull Run and Sedan, adhered to the old rules in connection with the Confederate and Prussian victories, respectively. Instead, they modified their tactics and initiated “irregular” techniques of warfare (pp. 208-09). *Franc-tireurs* evolved to resist Prussian forces (pp. 208-09). Similar tactics came to characterize the Civil War, culminating in the notorious scorched-earth campaign waged by General Sherman (pp. 210-11). It would be difficult to imagine a more stark contrast to the pitched battle.

Earlier studies explain the collapse of pitched battle by focusing on military technology (the substitution of rifles for muskets) or the supposed decline of an eighteenth-century culture of chivalry among aristocratic combatants (p. 213). Recent scholarship and a growing body of evidence, however, demolish the former explanation. At the time, rifles evidently made pitched battles no less feasible (p. 217). As for the putative decline of an aristocratic culture of chivalry, the truth is to the contrary: “far from being the period when the chivalric, dueling idea of war

went into decline, [the nineteenth century] was the period when that idea was born and triumphed” (p. 216). Whitman stresses this (often misunderstood) point throughout *The Verdict of Battle*. The privilege to inflict violence, which dates to the Middle Ages and had traditionally distinguished the aristocracy, is the *antithesis* of a monarchical monopoly on legitimate violence (p. 138); and the latter is a *sine qua non* of pitched battle (pp. 19, 215-16, 226). The idea that eighteenth-century limits on war reflect aristocratic *noblesse oblige* is therefore not only a fiction of the Romantic era but “little short of perverse as a matter of historical interpretation” (p. 226).

Pitched battles rather declined, Whitman argues, because of changes in war’s stakes and ideological dimensions. Once dominated by discrete claims to property or dynastic succession, its objectives increasingly became the pursuit of more intangible ideals: national unification, honor, and millenarian conceptions of warfare (p. 224). At the same time, the rise of republicanism eroded monarchical legitimacy (p. 236), leading to the advent of the standing army and citizen-soldiers and sounding the death knell for “[p]rincely warfare . . . fought by a paid, uniformed trained soldiery” (p. 236). These developments coincided, not coincidentally, with the ascendance of teleological theories of history promulgated by Hegel, Marx, and their intellectual heirs. Belief in a grand design or purpose to historical events, battles included, could not subsist with the belief that the verdict of battle depends on fortune (pp. 238, 242-43). Hence “[p]itched battle . . . lost its eighteenth-century juristic significance. No longer a wager turning on dynastic succession and property claims, it began to represent something much grander. It began to represent . . . the verdict of history” (p. 244).

Is this narrative accurate? From the perspective of an international lawyer rather than a historian, I hesitate to venture a categorical answer. In general, however, Whitman’s lucid, forceful prose and assiduous research, including original translations of the French, German, and

Latin classics that inform his arguments, yield compelling arguments, and he generally preserves a laudable scholarly detachment, candidly acknowledging qualifications or limitations—although it may be that he sometimes elides “inconvenient evidence.”⁶ But for this reviewer, a historical critique would be largely hearsay. I will focus instead on the jurists, theologians, and other thinkers whose writings *The Verdict of Battle* analyzes, its characterization of certain legal and ethical concepts, its polemical facets, and its normative conclusions for the modern law of war.

First, classics by Aquinas, Augustine, Grotius, Vattel, Pufendorf, and others suggest a more protean narrative than does *The Verdict of Battle* of the evolution of just war theory and international law—and of their influence on the comparatively recent emergence of a major humanitarian dimension to the law of war. The book tends to emphasize certain of their ideas and developments and deemphasize others, yielding a relatively seamless, coherent narrative, which, at times, obscures a more complex but balanced account. Modern just war theory and IHL emerged from multiple, and at times inconsistent, intellectual trends and antecedents.⁷ Pufendorf, for example, indeed wrote of battle as a “tacit contract of chance” (pp. 52, 77), as did Grotius (pp. 88-89). But Grotius also reflected at length on legitimate self-defense, the (just) causes of war, and (perhaps most germane here) the idea of moderation in war, to which he devoted much of the third volume of *De Jure Belli ac Pacis*.⁸ True, Grotius did not assert these ideas as positive international law. But early writers on what became the public international law of Europe and eventually the world, including Grotius, Gentili, and Spanish scholastics (Francisco de Vitoria, Francisco Suárez, and others), drew a much less rigid distinction than many lawyers do today

⁶ See, e.g., David A. Bell, *Is War Civilized?*, NEW REPUBLIC, Mar. 3, 2013.

⁷ See, e.g., STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 11, 96 (2005); James Turner Johnson, *The Just War Idea: The State of the Question*, SOC. PHIL & POL’Y, Jan. 2006, at 167, 168-71; WILLIAM V. O’BRIAN, THE CONDUCT OF JUST AND LIMITED WAR 5, 11, 13 (1981).

⁸ Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 61 (2009).

between positive legal, on the one hand, and ethical or theological, on the other, injunctions. Similarly, it is true that early and medieval theologians did not promulgate doctrines of just war intended mainly to punish evil (p. 103). Augustine and Aquinas indeed recognized that the vindication of property rights, among other causes, could be just (p. 106). But they also developed criteria (p. 101) that, for better or worse, serve as antecedents to modern debates about, for example, the legality or prudence of humanitarian intervention.

It therefore goes too far, I think, to condemn as “mistaken” (p. 101) the modern focus on *aspects* of medieval just war theory and, latterly, the reflections of luminaries like Grotius, Gentili, and Pufendorf,⁹ as *antecedents* that might (or might not) helpfully inform debates in IHL today. It would certainly be anachronistic to acontextually compare the contemporaneous concerns of war at these earlier times to those in our own. But it does not follow that it is misguided to draw upon, perhaps marginal but nonetheless present, ideas that early writers developed and that have been adopted by or adapted to the humanitarian dimensions of modern IHL—even if those ideas were not (and I agree, they were not) their general or paramount focus.

We must also take care to distinguish these theological *jus ad bellum* antecedents, and, centuries later, Immanuel Kant’s arguably more quixotic suggestions in *Perpetual Peace*,¹⁰ from the oft distinct sources of premodern *jus in bello* antecedents. *The Verdict of Battle* sometimes elides the distinction or ambiguously treats (and often critiques) the two as a homogenous tradition. It ascribes the revival of just war theory to Alfred Vanderpol, who evidently distorted early medieval just war theory into a quasi-pacifist doctrine in the early twentieth century (p. 103). That is certainly unfortunate and, as Whitman stresses, misleading—although given the robust influence Vanderpol is said to have exerted on modern just war theory and international

⁹ See, e.g., *id.* at 60-61 & nn. 81-86.

¹⁰ IMMANUEL KANT, *PERPETUAL PEACE* (1795).

law, it strikes me as odd that his works have not been translated into English to date. But at any rate, the “creation of a *humanitarian* law of war” (p. 101, emphasis added), the focus of modern IHL, should not be traced to Vanderpol and other early twentieth-century or interwar just war theorists who tried (with notoriously poor results) to adapt early scholastic ideas to their aspiration to produce a radically new *jus ad bellum* for international law. The origins and antecedents of the modern *jus in bello*, or IHL, lie far less in the foregoing strand of just war theory and far more in the creation of the International Committee of the Red Cross (ICRC) after Solferino, the first Geneva Convention of 1864, President Lincoln’s promulgation of the Lieber Code during the Civil War, the Hague Conventions of 1899 and 1907, and other late nineteenth and early twentieth-century antecedents. To be sure, modern IHL draws upon some medieval just war concepts, such as, to cite one prominent example, the doctrine of double effect. But the common practice among contemporary writers of citing early theological, chivalric, and other constraints on war in Europe, Asia, and elsewhere serves principally, not to suggest the origins of modern IHL, still less that these constraints constituted premodern positive law, but rather to emphasize their historical and cultural ubiquity—that is, to show that war has always and everywhere been subject to norms that distinguish it from massacre (as Whitman indeed argues).

As historical scholarship, *The Verdict of Battle* is compelling; as a polemic, less so. Perhaps the most troubling issue is Whitman’s foil: the “modern humanitarian” (*passim*). He does not define this person explicitly. Implicitly, it is equally difficult to know to whom it refers. The views ascribed to the modern humanitarian range broadly across the spectrum of opinions about the ancient and modern law of war and both the *jus ad bellum* and the *jus in bello*. Modern humanitarians refer variously to just war theorists, lawyers, pacifists, human rights advocates, and others to whom Whitman ascribes flawed, naïve, anachronistic, or quixotic views.

Descriptively, for example, it is stated or implied that modern humanitarians believe that IHL applied to premodern wars (p. 195); anachronistically regard Frederick the Great's seizure of Silesia as the paradigmatic act of illegal criminal aggression (*passim*); view war chiefly as "a species of crime" (pp. 54, 108-09); regard medieval and theological just war antecedents as "a primitive version of the modern humanitarian *jus ad bellum*, dedicated to the proposition that the law of war was a close cousin to the law of criminal prosecution" (p. 113); and therefore fail even to understand that "medieval just war theory was . . . not law in the modern sense at all, but counsel of conscience" (p. 103). Because of these supposed misapprehensions, Whitman writes that eighteenth-century pitched battles would surely sound "barbaric to modern humanitarians" (p. 99), no more than "senseless collective slaughter" (p. 46). Modern humanitarians, he thinks, would "find it difficult to grasp that eighteenth-century readers could have accepted . . . the law of succession as justification for . . . war" (p. 121).

Normatively, "modern advocates of a humanitarian law of war" are said to endeavor quixotically "to construct a world of perfect justice or to impose standards of unimpeachably high conduct . . . [and] to limit war to the task of punishing or preventing evil" (p. 129). The lawyers among modern humanitarians thus insist on denouncing evil regimes and encourage intervention abroad to "run thugs out of power," heedless of the dangers of failed states (pp. 254-55). Emblematic of this modern humanitarianism, in Whitman's view, is the recent promotion by international lawyers "of the [albeit aspirational] 'responsibility to protect,' which would oblige the international community to use coercive measures against evil regimes" (p. 255).¹¹

¹¹ Even the most extreme version of this aspirational idea, which is far from a consensus ethically or among international lawyers, does not "oblige the international community to use coercive measures against evil regimes." That is a mischaracterization. In fairness, however, it is true that some influential documents refer to a responsibility to protect and enumerate criteria for it redolent of those found in early just war theory. See SEC'Y-GEN.'S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY

Assertions like these permeate *The Verdict of Battle* and could be multiplied many times over. But these quotations suffice to illustrate why they may well be unfair characterizations. It is doubtless true that some overzealous or misguided advocates of IHL or humanitarian ethics hold the beliefs or promote the normative ideals ascribed to the “modern humanitarian.” But they are the exception and not, as *The Verdict of Battle* suggests, the rule. Whitman also says candidly that his polemical target, other than military historians, is the international lawyer who allegedly fails to appreciate that the law of war is not fundamentally a “humanitarian enterprise, often close in spirit to *criminal law*,” (p. 9) and chiefly preoccupied with punishing evil. That target is largely a straw man. In general, neither modern just war theorists nor, and *a fortiori*, international lawyers—many of whom work alongside soldiers and military élites, advising combatants on the battlefield—fail to appreciate the political, strategic, and ethical complexity of modern war or think that the law of war is “all about punishing evil” (p. 113). Polemical characterization of this sort is unfortunate because it tarnishes Whitman’s sensible admonitions against, for example, politicians who favor foreign military adventures or seek regime change, lawyers who overzealously advocate military intervention, or those who regard war as a tool to remake the world in an ideological image. Whitman seems to have the Iraq War of 2003 in mind. I suspect that modern humanitarians would share his critiques of it.

A more accurate portrayal of modern humanitarianism would be the ICRC. Henri Dunant, its founder, fully appreciated war’s inevitability. After Solferino, he sought to establish an organization and legal standards that, within the realistic and inevitable context of military necessity, could nonetheless mitigate superfluous harm by encouraging dynamics of reciprocity,

¶ 207 (2004).

drawing upon transcultural norms of the warrior's honor,¹² and emphasizing, as Telford Taylor insightfully observed, the psychological value of “the laws of war” insofar as they “diminish the corrosive effect of mortal combat on the participants.”¹³ The ICRC tellingly, as a matter of institutional mandate, avoids any characterization of particular wars as just or unjust. Indeed, its mandate is strikingly *similar* to the putatively more modest objective ascribed in *The Verdict of Battle* to eighteenth-century jurists: to “create a world in which sovereigns . . . at least refuse to behave like wild beasts, like Attila or Genghis” (p. 129).

The Verdict of Battle concludes with a lament and some apparent nostalgia for the orderly pitched battles of the eighteenth century. Whitman critiques the reasons proffered by David Bell, Carl Schmitt, Michael Howard, Stephen Neff, and others (pp. 12-14) for the nature of eighteenth-century pitched battle but seems substantially to share their account of its nature, legitimacy, and comparative gentility (pp. 160-61, 188, 252-53). He recognizes, of course, that contemporary circumstances and a “brutal disregard for the value of human life that we are no longer prepared to accept” (p. 253) render it impossible, even if it were desirable, to revive eighteenth-century norms of war. But he argues that while the “transformation [from war as civil justice . . . to war as necessity and ideology] has taken place for noble reasons, . . . it has resulted in sprawling and amorphous wars and it has come at a high cost in human lives” (p. 250).

This argument appears to be a variant on a familiar objection to IHL that is often traced to Clausewitz: that the most humane war is a brief one. IHL, it has often been said, by mitigating war's horrors, ironically prolongs and exacerbates rather than limits war's aggregate harms.¹⁴ *The Verdict of Battle*, to my knowledge, is the first work of scholarship to advance this critique

¹² See generally MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR* 109-63 (1999)

¹³ TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 40 (1970).

¹⁴ E.g., Roger Normand & Chris af Jochnick, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. L. REV. 49 (1994).

based on a sophisticated historical analysis. But the critique continues to suffer from a lack of empirical evidence. Whitman also argues that “[i]t is not a good thing if the humanitarian tone of our international law prevents us from cutting deals” (p. 257). Again, I tend to agree, but how often does it?

Whitman’s (1) skepticism of regime change and the prudence or advisability of humanitarian intervention (except, he would allow, in cases of systematic atrocity on the order of Nazi Germany or the Rwandan genocide), (2) his remarks on the folly and futility of seeking to spread ideology through war, and (3) his criticism of the Manichean simplicity of viewing opposing belligerents as evil are all, in my view, sagacious. I also share his views that “[h]igh morality is an exceedingly treacherous foundation for the law of war” and that “[w]ars enter their most dangerous territory . . . when they aim to remake the world” (p. 251). But high morality is not the foundation of the modern law of war, and modern wars seldom seek to remake the world.

The Verdict of Battle’s conclusions combine many sensible normative admonitions with often dubious descriptive contentions, for example, that “ever since 1863 and 1870 our wars have consistently ended up raising basic, revolutionary questions about the organization of society and the legitimacy of states” (p. 251). In fact, the vast majority of armed conflicts since World War II have been transnational, internal, or otherwise “irregular,” not clashes between states based on ideological legitimacy. And in the early twentieth century, neither the Spanish-American nor the First World War, to cite two prominent examples, seem like particularly ideological conflicts about “the organization of society and the legitimacy of states.” Even during the Cold War, ideology served more as a pretext for geostrategic and security interests than the actual motivation for its “hot” wars. Most armed conflicts today tend to be about issues that do not differ much from those of the long eighteenth century: borders, resource control, modern

variants on dynastic succession, security, and so forth. (For all its prominence in recent history and the public imagination, the Iraq War of 2003 is not paradigmatic of modern wars.)

The pitched battles and, in general, more confined wars of the eighteenth century were indeed more humane (if that means, essentially, limited and rule-governed) than epic, extended ideological wars, although the latter do not seem unique to modernity. Nor is it always easy to separate the two. The Crusades combined intense religious fervor and efforts to remake regions of the world to conform to medieval Christian ideals with mundane territorial claims and venal opportunities for looting and pillaging. One might also contrast the 1991 Iraq War, a brutal effort to vindicate a nonetheless plausible territorial claim to Kuwait by a functional monarch (and thus a war apparently similar to the eighteenth-century paradigm), with the far more humanely fought and consciously limited ouster of Iraq's forces by collective military action in accordance with IHL—based in part on adherence to the *jus ad bellum* of the U.N. Charter. The Charter, tellingly, is not a pacifist instrument animated by a just war mandate to punish evil. Efficacy aside, it only prohibits, with ideological neutrality, “the threat or use of force against the territorial integrity or political independence of any state.”¹⁵ And today, unlike in the eighteenth-century, it is not just customary but, under the law of armed conflict, illegal to, for example, massacre retreating forces (pp. 178-79), summarily execute prisoners of war, or deny quarter to prisoners of war. Arguably, this reflects progress, not evidence that eighteenth-century wars were more civilized than what came before or after (pp. 129-30, 206, 250). To paraphrase Churchill, contemporary IHL, for all its faults, may be the worst law of war except for all the others we have tried.

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¹⁵ U.N. CHARTER, Art. 2(4).