



## Traditions of Just War & Othering

Origins of the Just War: Military Ethics and Culture in the Ancient Near East,  
by Rory Cox, Princeton, Princeton University Press, 2024, 536 pp, \$45.00  
(Hardback), ISBN: 9780691171890

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REVIEW ARTICLE



## Traditions of Just War & Othering

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**Origins of the Just War: Military Ethics and Culture in the Ancient Near East**, by Rory Cox, Princeton, Princeton University Press, 2024, 536 pp, \$45.00 (Hardback), ISBN: 9780691171890

Rory Cox's *Origins of the Just War* is a pleasure to read, and a struggle to review. In 're-viewing' a manuscript, one claims to be looking again at something earlier surveyed. At the first hurdle then, the reviewers of Cox's monograph must fail for this is an area of history and just war theory that is virgin ground. I suspect I was asked to review the book off the basis of an intersecting interest of history and law which Cox and I share. In that aspect, Cox far outstrips me in expertise on the topics of just war and Near-East history.

A review essay also purports to recommend. In that sense, it looks forward: anticipating the reader's subsequent encounter with the reviewed text, or asking the reader to relive their prior reading of the same. Occasionally, a review will ask readers to swallow a book whole, but usually it will attempt to dismember and reassemble a book for the reader's ready consumption. To do so, as this review essay does, is a thankless task for the *Origins of the Just War* must be read as a whole. Any allure of the offer of 'guidance' a review lays on this cutting board depends in part upon that clandestine pre-reading of which it boasts. Reading and re-viewing this book was not a task based upon knowing something that the recommended reader does not. It is a review essay that simply tries to pick up on the themes written by Cox and make some further observations.

### 1. The Premise

Cox's work takes Michael Walzer's seminal remark that: 'For as long as men and women have talked about war, they have talked about it in terms of right and wrong.'<sup>1</sup> In questioning this, he asks the reader to look outside the well-ploughed fields of Greco-Roman traditions, to deep history.<sup>2</sup> The investigation focuses principally on three ancient martial cultures: Egyptian, Hittite, and Israelite. These cultures flourished between the third and

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the first millennium BCE, within a single relatively coherent geographical unit referred to as the 'Near East'. This unit composed those lands fringing the eastern Mediterranean seaboard: Egypt, Sinai, Syria-Palestine, and Anatolia. In doing so, the reader might well ask 'why not look further back?'. To this, Cox articulates:

When examining pre-literate societies, or societies which have left no traces of literature (which amounts to much the same thing for modern researchers), it is almost impossible to reconstruct complex religious, ethical, legal, or political thought. Material and iconographic evidence – including sometimes intricate images and carvings of deities, animals, and more – can offer us a glimpse at the nature of ancient beliefs: a sense of what these people valued, perhaps even a sense of what they hoped or feared. ... While ethical thought and norms concerning violence and warfare may date back to Neolithic, Mesolithic, or even Palaeolithic human communities, the form and content of those traditions and ethics must inevitably remain a mystery. Lacking textual evidence, we are severely constrained in what we can say about the 'ethics' of such cultures, or what they thought about the myriad cultural, religious, social, and psychological challenges created by large-scale acts of violence.<sup>3</sup>

This is a book concerned therefore primarily with textual evidence, and whilst seeking to move beyond the just war canon of text, remains textually based. The articulation of norms of war (including ethics) is not impossible in an illiterate society; but it is a hard task indeed.<sup>4</sup> For the reader, and for the purpose of the Cox's monograph, the focus on the Near East societies from 3000 BCE is a narrow but excellent example of how earlier histories can better inform the pattern of history.

With the scope articulated and justified, readers may take umbrage with the methodology and sources used by the book. They should not. Cox highlights that:

Prayers, poetry, literary tales, and material evidence are often overlooked, yet can tell us much about ethical norms and attitudes towards war and death. Such sources might even provide a more realistic – or at least more emotional – rendering of societal attitudes than, for example, abstract treatises on jurisprudence ... Myth in the ancient world combined history, theology, and entertainment. It provided a guide to both personal and communal identity, and as such carried considerable weight.<sup>5</sup>

Moving beyond the historically beige and orthodox sources not only demonstrates Cox's established reputation as a scholar of note, but also helps pierce the historical veil of these important cultural spheres in the just war tradition. Myth and mythology are an illuminating aspect of a culture, that cuts through social class and caste.

With the theme and basis of the monograph established, Cox embarks on the process of articulating both the *ius ad bellum* (laws relating to war) and the *ius in bello* (laws in the conduct of war). Notwithstanding the Latin language, these are not Latin concepts. They are not even Near East concepts. They are a nineteenth century construct, that used Latin – like many legal concepts do – to add credence to them. Cox acknowledges this, and uses them merely as a tool to drive discussion and comparison. I see nothing wrong with this approach, so long as the comparison is not one that seeks to force the different cultural systems to look alike. Cox does not.<sup>6</sup> He highlights the risk well, and creates 'appropriate units of comparison'<sup>7</sup> through the *ad bellum* / *in bello* divide. Against this framework, he then proceeds to address the just war theory of the Egyptians, within Hatti and Israelite communities of the distant past. The work alone in one chapter would be ground-breaking; combined, they represent a work of excellence.

## 2. Modern Application

As a reviewer, there is nothing much more that I can add to the historical basis upon which Cox's work is done; nor add anything extra to the chapters. What I can perhaps add are some contemporary reflections of the usefulness of the monograph in contemporary armed conflict and just war theory.

Voltaire is purported to have issued the following challenge: 'If you have no more to tell us than that one barbarian succeeded another on the banks of the Oxus or Ixartes, what use are you to the public?'<sup>8</sup> It is a challenge that I seek to always address in my body of work, and that Cox notes in his Introduction as a logical consequence to his study. Cox highlights that:

For those interested in more modern issues, ancient ethical thought is worthy of our attention because of its influence in shaping numerous aspects of modern intellectual, religious, and political life. Our modern cultures are melting pots with many and varied ingredients – some of them very ancient indeed. To better understand the ancient is, therefore, to better comprehend the modern.<sup>9</sup>

To that end, the patterns found across the three substantive historical chapters of Cox's monograph have clear modern applications. The unrelenting advance of technology, paired with unprecedented opportunities for exchanges between and clashes of cultures over the finite resources of a shrinking world sadly promise a dynamic, enduring, and destructive character for future warfare. The comparison is particularly uncanny with the Near East at the time of Cox's research. The move from infantry (of which I was a twenty-first century member of in the Australian Army) to cavalry/chariots introduced a paradigm shift in warfare (what Toffler was characterise as first wave warfare).<sup>10</sup> Armed conflict was quicker, more expensive, more difficult to communicate within and control, and brought with it a radical change in just war theory. What we see within the Hattie is a significant move to prevent and limit the effects of war – just as humanitarians have pushed for off the back of industrialised warfare (second wave wave) and now into third wave warfare.

Yet the patterns are wider, and could be the subject of its own doctorate. We see in the history the beginning of the idea of a justness in the responsibility to protect; issues associated with the idea of power being self-legitimising; the legal fiction of suppressing rebellion on the basis of it being just; the historical argument that *in bello* should be dismissed if just *ad bellum* are not just; the lack of individual rights in armed conflict; and how culture drives legal norms (otherwise known as critical legal theory).

Ultimately, however, I think the most important theme that comes through the pages is what Frédéric Mégret calls 'the original sin' of international humanitarian law / the laws of war / the laws of armed conflict: its othering.<sup>11</sup> Mégret noted this idea of othering turned primarily on cultural differences regarding the nature of warfare.<sup>12</sup> These differences, in turn, drove a schism in the rules relating to protection. The *ius in bello* were consistency reinforced to apply to 'civilized' nations, whilst those 'others' had their protections removed. Chimni notes that:

The alienation of international law from the peoples of the third world was epitomised in the civilisation/barbarian divide that made them and their territory into objects of international law. If third world peoples ever metamorphosed into subjects of international law, it was only ever to surrender sovereignty to colonial masters. The moment of empowerment

was the moment of complete subjection. It was a time of absolute alienation of third world peoples from international law. Death, destruction, pillage, plunder and humiliation are the key words that best capture the relationship between third world peoples and international law in this period.<sup>13</sup>

Mégret refers to the belief that non-Western groups ‘waged war as complete tribes’ to ‘take advantage ... and effect ruses ... and massacres’.<sup>14</sup> This othering – the original sin of the laws of war – pervaded legal frameworks until the twentieth century.<sup>15</sup> It is the historical foundation as to why expanding bullets are still prohibited on the battlefield (where Europeans might be found) but are allowed for domestic security operations.<sup>16</sup>

Mégret starts his discussion of ‘the original sin’ in the colonial era as indicative of fundamental differences in the character of non-Western ethnicities.<sup>17</sup> I have pushed the start date further back, and written on it from the medieval period (with Enemies of the Faith and the laws of chivalry).<sup>18</sup> What Cox highlights is that the ‘othering’ of international law was already prevalent in 3000 BCE.

With the rise of a monotheistic religion, the idea of divine right (and absolute freedom from sin against ‘the other’) emerged. It is here that the original sin evolved in the laws of war; and it is here that discussions of sharp war must begin. Reflecting on biblical history, the rabbis distinguished between *milḥemet ḥova* (obligatory war) and *milḥemet reshut* (optional war):

Rava said: All agree that Joshua’s war of conquest was *ḥova* (obligatory) and the expansionist wars of David were *reshut* (optional). But they differ with regard to [the status of] a pre-emptive war intended to prevent idolaters from attacking them.<sup>19</sup>

The ‘expansionist wars of David’ are seen as more questionable, notwithstanding Psalm 18:48, ‘He has subdued nations beneath my feet’.<sup>20</sup> Elsewhere the Talmud insists that the king would need to seek authorisation from the Great Court of 71 justices, as well as divine approval through the oracle of the High Priest, before engaging in such a war. As these institutions have not existed for 2,000 years the definition of ‘competent authority’ virtually rules out the possibility of non-defensive war; there is no Jewish equivalent to the process by which some seventeenth century English Puritans declared wars to be ‘commanded by God’ simply because they were deemed by the leadership to be in conformity with God’s will.

The Talmudic distinction between *kibbush yaḥid* (individual conquest) and *kibbush rabim* (public conquest) may indicate the need for popular support in addition to the other requirements.<sup>21</sup> War against the Canaanites is based on the *herem*, or holy ban; it is a war of extermination that knows no bounds (verses 15–18). Justification – a sort of *jus ad bellum* – is offered, on the grounds that these nations might teach Israel ‘abominations’ and lead them to sin (verse 18).<sup>22</sup> No restraints are indicated.

Homer recognised the dividing line between humans and animals throughout the *Iliad*. Humans, unlike animals, can be both savage and compassionate. Achilles, in his *aristia*, comments to Hektor:

... I will have no talk of pacts with you, ...

As between men and lions there are none,

no concord between wolves and sheep, but all

hold one another hateful through and through

so there can be no courtesy between us ...<sup>23</sup>

This scene, of Achilles transformed into an animal, is laden with Homer's implied view of what it means to be human: to be willing to parley, to consider self-restraint, to respect others as possible friends.<sup>24</sup> Achilles is not a hero in the story. He is a lesson in Fate, and in the excesses of war. Indeed, the *Iliad* starts with a forewarning of the purpose of the tale:

Rage – Goddess, sing the rage of Peleus' son Achilles,  
murderous, doomed, that cost the Achaeans countless losses,  
hurling down to the House of Death so many sturdy souls,  
great fighters' souls, but made their bodies carrion,  
feasts for the dogs and birds ...<sup>25</sup>

Homer is warning us of what can occur when the laws of war – which, as David Feany noted, were well recorded for the Hellenes – are broken. Yet he also talks to us of the importance of these regulations, lest we end up doomed.

This latter concept – of humanising the foe – is critical in international humanitarian law, and the historic laws of war to a certain point. Yet there is a clear dividing point where the foe has transitioned from an equal, to lesser, and it is this degradation of the enemy that modern international humanitarian law has sought to reintroduce and codify.

Specifically, the story of David and Goliath highlights the use of degrading language to dehumanise, and to vilify the enemy. Goliath, vested in the contemporary symbols of wealth and prestige – mail armour, shield bearer, sword and spear – is met with David, a shepherd and armed with a sling. Often the story ends there; but a literary analysis of the language demonstrates the layers that this choice of weapons means to Goliath.

And David said to Saul, Let no man's heart fail because of him [Goliath]; thy servant will go and fight with this Philistine.

And Saul said to David, Thou art not able to go against this Philistine to fight with him: for thou art but a youth ...

[David answered,] Thy servant slew both the lion and the bear; and this uncircumcised Philistine shall be as one of them, seeing he hath defied the armies of the living God

David said moreover, The LORD that delivered me out of the paw of the lion, and out of the paw of the bear, he will deliver me out of the hand of this Philistine

David, who did not need armour to fight animals, dismisses the weapons in lieu of a sling and stave. He approaches Goliath:

And when the Philistine looked about, and saw David, he disdained him ...

And the Philistine said unto David, Am I a dog, that thou comest to me with staves?

This othering, which Cox highlights in the case studies of Egypt, Hittites and Israelites, has had a direct impact on the wars fought today. The creation of rules for the just (often oneself, although the Hittites seemed to articulate a level of critical self-reflection that highlighted they could indeed not be just) and the loss of those rules for the other

flows into modern discussions around ethics and just war. Cox makes this point himself,<sup>26</sup> as did Plato.<sup>27</sup> Yet it is important for a modern member of the Profession of Arms to note that the arguments in favour of 'sharp war' (wars without laws) are as old as the pyramids themselves. When Lieber wrote that 'the more vigorously wars are pursued, the better it is for humanity.. Sharp wars are brief'<sup>28</sup> I personally doubt he realised he echoed the sentiment of a God King.

Recently, the Israeli Defence Minister continued this tradition when he claimed 'We are fighting human animals, and we act accordingly.'<sup>29</sup> The link between Israelite traditions (that Cox articulates) and modern Israeli operations is articulated clearly in Cox's monograph.<sup>30</sup> Denial of quarter, a particularly brutal concept that goes to the heart of sharp war, has remerged again in the on-going Russian-Ukrainian war notwithstanding its clear prohibition under IHL. On 02 March 2022, Ukrainian Special Forces announced it would no longer capture Russian Ukrainian artillerymen, but would kill them in response for their 'brutal shelling of civilians and cities'.<sup>31</sup> Such an articulation is a dangerous reversal to sharp war tactics.

The rareness of full restraint in conflicts against barbarians and outsiders (implied by the structure of Grotius' *The Laws of War and Peace*<sup>32</sup>) is evident when considering low compliance with international law in European vs. non-European dyads.<sup>33</sup> What are these 'European' nations? Fazal and Greene, through in-depth statistical analysis, show that:

... the states that should be considered 'European' for the purposes of this article are those that (1) participated in the initial codification of the law of war in the late nineteenth century and (2) were generally perceived by European states as members of the European community at the time of codification. Because the identity argument depends on recognition by the deciding state of a target state's in-group or out-group status, European states' perceptions of the target state as European or not is the deciding factor when there is a discrepancy between the two criteria delineated above. Our definition excludes the Eastern European countries and Turkey, and includes Russia as well as the United States, Australia, Canada and New Zealand.<sup>34</sup>

They continue that a stronger correlation of sharp war / soft war rhetoric is found in the original signatories of the second 1899 Hague Convention. These signatories

generated even stronger results on our key independent variable than our preferred coding of Europeans, suggesting that a historical relationship with *jus in bello* may indeed be a key component of identity in predicting civilian targeting.<sup>35</sup>

The substantive effect of this variable rivals or exceeds that of other key control variables. The authors show that when a European state fights a non-European state, the probability of civilian targeting increases by over 250 per cent.<sup>36</sup> They posit that these insecurities are most likely found in differing regional blocs.<sup>37</sup> Cox's excellent historical research would seem to support this point.

### 3. Conclusion

Yet it is not all doom and gloom. Some have argued that 'the law of war was born of intra-European brutality and designed to regulate it'.<sup>38</sup> This is wrong. There is folly in subscribing to the 'straight line history of eternal progression',<sup>39</sup> where a Great White Man (Grotius, Vitoria, Augustine) discovered international law and it was developed progressively into the modern era. For many parts of **European** law, this is without a doubt

correct – one need only read the history of the laws of war in Roman,<sup>40</sup> Medieval Europe,<sup>41</sup> and during the Renaissance<sup>42</sup> laws of war and in turn how they shaped the framework of the American Civil War.<sup>43</sup> It is not the universal experience. There is a deep history of the development and growth of international law (including IHL) outside of Europe. By remaining focused upon the Great White Man of international law, we ignore the wider patterns and lessons of international law. The risk of focusing solely upon Europe in addressing the history of the laws of war was championed in 1795 by Robert War, when he wrote:

We expected too much when we contended for the *universality* of the duties laid down by the Codes of the Laws of Nations ... however desirable such universality might be ... what is commonly called the Law of Nations ... is not the Law of *all* Nations but only of particular classes of them; and thus there may be a *different* Law of Nations for *different* parts of the globe.<sup>44</sup>

It is clear that various cultures across space and time have developed, independently, their own mitigations on the violence of warfare. It is from these shared elements of commonality that military practitioners should rely upon, and seek to advise through. What are these principles? Jean Pictet suggested that:

[H]umanitarian principles are common to all human communities wherever they may be. When different customs, ethics and philosophies are gathered for comparison, and when they are melted down, their particularities eliminated and only what is general extracted, one is left with a pure substance which is the heritage of all mankind.<sup>45</sup>

The author of this paper, having canvassed 36 different, culturally unique laws of war in the *Laws of Yesterday's Wars* series, call this pure substance 'soft war' as it highlights, contrary to sharp war, that every culture has sought to mitigate and control the violence and destruction of warfare. Across nearly every culture, the fundamental and foundational custom of keeping one's word is apparent. It is the 'pure substance' Pictet was hinting at – the heritage of all mankind. Cox's work add three more case studies to the mix, and reinforce that across all cultures upon which there is historical research (be it in the written tradition, or others) there is a clear push to constrain and control the violence of warfare. It is still correct then that 'man is not a 'wolf to his fellow men' – *homo homini lupus* – as the comedian [Plautus] says, but a fellow.'<sup>46</sup>

## Notes

1. Walzer, *Just and Unjust Wars*, 3.
2. Cox, *Just War Theory*, 3.
3. Ibid.
4. White, "Indigenous Australian Laws of War," 959–78.
5. Cox, above note ii, 26
6. Ibid, 19/20
7. Sewell, "Bloch and Comparative History," 215.
8. Berlin, *The Crooked Timber of Humanity*, 52–3.
9. Cox, above note ii, 29.
10. Toffler, *The Third Wave*.
11. Mégret, "From 'Savages' to 'Unlawful Combatants'," 265; see also Kalmanovitz, *The Laws of War in International Thought*.
12. Megret, "From 'Savages' to 'Unlawful Combatants'," 267, 289; Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories*, 10, 19.

13. Chimni, "The Past, Present and Future of International Law," 504.
14. Megret, "From 'Savages' to 'Unlawful Combatants,'" 291, citing Fuller, *The Reformation of War*.
15. Such as the discussions that surrounded the attempt to ban strategic bombers in Europe, but not the colonies.
16. See *The Hague Convention 1899 – Declaration concerning Expanding Bullets*.
17. Megret, "From 'Savages' to 'Unlawful Combatants,'" 267, 289.
18. White, "The Late Middle Ages," 101 – 127.
19. Babylonian Talmud *Sota* 44b.
20. That the rabbinic tradition is not entirely anti-imperialist is demonstrated by a midrash such as *Targum Sheni* on Esther (probably 8th century) that wildly exaggerates the extent of the dominions of Solomon and Ahab.
21. Inbar 94 refers only to the later comments of Rashi (*Gittin* 8b and *Avoda Zara* 20b) and Maimonides (*Terumot* 1:2) for the consensus requirement.
22. Compare Deuteronomy 9:5.
23. *The Iliad* (trans. Robert Fagles) para. 22.308.
24. Shay, *Achilles in Vietnam*, 83.
25. *The Iliad*, para 1.1.
26. Cox, above note ii, 431
27. Cited by Cox, *Ibid*.
28. *General Orders No 100: Adjutant-General's Office, Instructions for the Government of Armies of the United States, in the Field* Art 29.
29. Karanth, "Israeli Defense Minister Announces Siege On Gaza To Fight 'Human Animals'".
30. Cox, above note ii, 439
31. Facebook post, reported in: [https://www.youtube.com/watch?v=5cqlJp3lW\\_w&ab\\_channel=news.com.au](https://www.youtube.com/watch?v=5cqlJp3lW_w&ab_channel=news.com.au)
32. Kinsella, "Martial Piety in Medieval and Chivalric Codes of War," 70.
33. Fazal and Greene, "A Particular Difference: European Identity and Civilian Targeting," 832.
34. *Ibid*. 841.
35. *Ibid*.
36. *Ibid*, 829.
37. *Ibid*, 830.
38. *Ibid*, 849.
39. Dunkelberg, "It's a Trap!" 350.
40. White, "Roman Laws of War," 110–26.
41. White, "The Late Middle Ages," 101–27.
42. Walker, "The Renaissance," 127–50.
43. Bailey, "Code of Necessity – Lawfare During the United States Civil War," 187.
44. *Enquiry into the Foundation and History of the Law of Nations in Europe*, xiii – xiv and 169.
45. Pictet, "Humanitarian Ideas Shared by Different Schools of Thought and Cultural Traditions," 3–4.
46. de Vitoria, *Political Writings*, 278.

## Disclosure Statement

No potential conflict of interest was reported by the author(s).

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