

DEVELOPMENTS

Book Review - David Kennedy's Of War and Law

By Corey Wall*

**[David Kennedy, *Of War and Law* (2006),
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In an age when global conflicts have evolved into low intensity asymmetric affairs and taken center stage, modern conceptions of both law and war are of paramount importance to our ability to make informed decisions regarding our role in these conflicts. David Kennedy's assertions in *Of War and Law* are a clear description of what occurs at the modern nexus of law and war. However, in the midst of a culture awash in images of casualties piped directly into modern living rooms (something he calls the "CNN effect") Kennedy takes on the task of providing the realignment that seems all the more vital for the reeducation of both professionals and the wider public audience alike.

Of War and Law, starts out assaulting the traditional definition of war with the various phenomena upon which the label has been bestowed. Traditional wars of combat are contrasted with metaphorical wars, the cold war, international interventions, the 9/11 attacks, and even the notion that security is more a state of mind than a set of factual circumstances.¹ While law is often seen as a means to avoid and constrain war, *Of War and Law* extirpates this notion from our minds refocusing our conception of both modern war and law. In the epilogue to *Of War and Law* David Kennedy states, "*The hand of force animates the world of law.*"² It is this

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¹ On this theme, see also the work by the German political scientist, HERFRIED MÜNKLER, *THE NEW WARS* (2004), and of the Canadian political scientist and legal scholar, MICHAEL BYERS, *WAR LAW* (2005).

² DAVID KENNEDY, *OF WAR AND LAW* 165 (2006).

ultimate underpinning of law that reminds us of the intimate connection the law has with the use of force and its ultimate expression through the violence and chaos that fills our popular notion of war. It is with these thoughts that Kennedy prepares our conception of war before forging ahead to explore the relationship between war and law.

A. A Legal Context For War?

Before launching into any detailed retelling of the historical relationship between law and war Kennedy clarifies the concept of war as a legal institution, providing us with a starting point by going back almost 200 years and paraphrasing Clausewitz, “war is still the continuation of politics by other means.”³ The reader is made aware of how an elite class of international professionals drawn from the ranks of military personnel and humanitarians with their respective skill sets and imperatives, participate in the discourse upon which the political and legal context for war is constructed. It becomes clear that this modern context has arisen through technological improvements in communication and the adoption of a common language based on law between and among the professionals.⁴ A seriously disconcerting assertion arising out of Kennedy’s context for war, at least for the general public, is that knowledge of the politics of these professions is required to understand the politics of war and peace.⁵

It is after explaining his own history as a humanitarian voice among these professionals that Kennedy declares war was not what he had imagined once he had moved his ear closer to the professional voice of the military. This tension of a humanitarian-military dichotomy among the professionals that provide the context for war, is present throughout the book helping to highlight the different interests, which must be balanced by the law. Although it achieves its unifying purpose through out the text, for Kennedy, this dichotomy has started to break down and such hard distinctions have started to bleed into one another to such a point that law has become the arena in which war is justified, whilst war deploys the law as a strategic technique for gaining advantage over one’s adversary. On either side of a conflict, however, there is the reliance on the law’s ability to limit violence and ensure some safety and decency among professionals, a function supported by both the humanitarian and military professional voices alike. In addition, there are also all the background legal rules covering arms sales, recruitment, fighting force

³ *Id.*, 13.

⁴ *Id.*, 25.

⁵ *Id.*, 26.

discipline, and the privileged violence on the battlefield.⁶ From the outset, Kennedy successfully challenges readers to think of war not as the completely anarchic state of nature often presented by popular culture but as a phenomenon with its own distinct legal regime.

B. Remnants of the Old Regime

In his second chapter, *The Historical Context: How did we get here?*, Kennedy provides the historical evolution of the relationship between law and war. Starting with Just War theory which states, if specific conditions are present at the outset along with the following of particular procedures during, then waging war may be just.⁷ He walks the reader through the history: the earlier thinkers in Just War theory, Emerich de Vattel's war as a remedy, Napoleon whose innovations made war a national project, the hard legal categories of war and peace of the 19th century,⁸ and finally, arriving at the present day. Kennedy provides an overview of the intellectual history of the law of war from which arguments may be conscripted for deployment in debates within the current context and shows how we have arrived at our present state where law has become the vernacular of political judgment.

C. Deploying the law, A Humane Application?

Kennedy's self identified affiliation with the humanitarian side of the military-humanitarian dichotomy treats the reader to a very critical focus on the challenges facing the humanitarian voice. Humanitarians supported the distinctions of the 19th century in an attempt to shrink the domain of war through "moral suasion, agitations, shaming, and proselytizing their view"⁹ whereas today's modern international lawyers have replaced the law of distinctions with what is described as "a more pragmatic unbundling of government action on both sides of the war/peace and public/private divides."¹⁰ The eroding of these distinct categories creates conflicts between different aspects of the law in war. Kennedy recalls the push to bomb civilians in Belgrade that supported the Milosevic regime. The

⁶ *Id.*, 32.

⁷ *Id.*, 48; see also MICHAEL WALZER, *JUST AND UNJUST WARS* (1977)

⁸ *Id.*, 48, 52, 57, 63.

⁹ *Id.*, 65.

¹⁰ *Id.*, 67. See, for this movement, also the powerful contributions by Martti Koskeniemi, 'The Lady doth protest too much': *Kosovo and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002), and Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 EUR. J. INT'L L. 679 (1999).

argument for doing so was based on an extension of the Nuremberg principle of individual responsibility.¹¹ This stands in stark contrast with the general humanitarian notion of not targeting civilians. In application, law in war can lead to perplexing situations, leading him to question, "is it sensible to clear a cave with a firebomb because teargas, lawful when policing, is unlawful in combat?"¹² It seems, however, that the specific problems Kennedy highlights are those that arise from the law in war as opposed to the law of war, the latter being a realm governed largely by the military professional community. This focus foreshadows Kennedy's later conclusion about the law in war's destiny in relation to the law of war.

The challenges to the humanitarian voice within the context of the law of war are more difficult to state as boldly. The humanitarian voice is limited by the problem that force can have humanitarian uses in a wicked world and that moral determination can be strengthened when individuals kill and die for a given value.¹³ The importance of this should not be lost on the reader, especially when Kennedy points out that universal claims of human rights seem to promise the existence of an international community that is actually not there to back them up.¹⁴ If the very idea of the universality of the human rights underpinning humanitarian arguments still requires strengthening, which paradoxically may be achieved if and when individuals are willing to kill and die for them, is this not the largest challenge facing the humanitarian voice?¹⁵

The nature of war itself has changed from the industrial scale world wars to the asymmetrical and metaphorical wars of the post-colonial period. This has led to military personnel stressing the continuities of transition from war to peace. The term post-conflict is a misnomer as it simply implies the continuation of the conflict by other means.¹⁶ When looking at state actors, application of law seems sensible but of increasing relevance in today's conflicts for Kennedy is that discussion of the law of war and law in war is premised on both sides in the conflict sharing an interest in the law.¹⁷ In today's asymmetrical conflicts this interest is not a guaranteed norm and where there is plurality in the law opposing sides simply

¹¹ *Id.*, 90.

¹² *Id.*, 104.

¹³ *Id.*, 107-108; see again Koskenniemi and Orford, *supra* note 10.

¹⁴ *Id.*, 108.

¹⁵ See Koskenniemi, *supra* note 10.

¹⁶ *Id.*, 111-113.

¹⁷ *Id.*, 126.

choose that which is most advantageous,¹⁸ if they show any interest in the law at all.

The remnants of distinct categories of the 19th century have also given rise to problems with the allocation of responsibility when there is a dispute as to with whom such responsibility should lie. Responsibility is separated between military and political leadership, the former predominantly governed by the law in war and the latter governed by the law of force.¹⁹ When there is an incident, within which sphere does responsibility fall, civilian or military?²⁰ Which professionals will be held accountable? A cynic may ask forgiveness for thinking that this ability to obfuscate responsibility is part of the law's function in war. It would seem that this flexibility that remains imbedded in the law's ability to allocate responsibility actually characterizes the present contextual regime in which the law of force is practiced.

D. The Institutional Framework

After WWII and the rise of the United Nations (UN) the law of war was renamed to the 'law of force', allowing its application to conflicts that were not fully categorized as war.²¹ Kennedy clarifies that for him it is not in fact the UN as a body that provides the institutional framework for the basis of war, but rather the UN Charter itself.²² With this institutional framework the judicial function, which has been cut loose from any particular institution, is actually exercised by Kennedy's professional global elite. These professionals are now free to pass judgment on forms of conflict that no longer fit into the distinct legal categories of war or peace.

With the UN Charter, or for those that disagree with Kennedy's assertion about the Charter the UN, providing the framework for this discourse, certain problems have emerged which Kennedy highlights. Attempts to steer a neutral path have become considerably more difficult, as rejecting the language of the UN has become synonymous with rejecting the international community.²³ For supporters of the

¹⁸ *Id.*, 127.

¹⁹ *Id.*, 102.

²⁰ *Id.*, 154.

²¹ *Id.*, 78.

²² *Id.*, 79.

²³ *Id.*, 81-82.

UN, and critics of the Bush administration, this could be seen as contradictory in that the UN seems to be echoing the infamous quote from President G.W. Bush of “you are either with us or against us.” The law in this framework has changed from an external or *ex post* judge of military behavior to a vocabulary for arguing about the legitimacy or illegitimacy of military operations.²⁴ In the wake of all this, Kennedy sees the UN as failing to be an accurate proxy for both humanitarian outcomes and world public opinion.²⁵ Kennedy asserts that the law of war has become the law in war’s destiny, in effect impacting how it is interpreted.²⁶ But, if the UN is truly failing to be an accurate proxy, is Kennedy implying that current interpretations are somehow illegitimate? This question remains unanswered.

E. Lawfare

With popular conceptions of war so often ruled by the glory and horror of combat experience, *Of War and Law* properly highlights the bureaucracy that is deployed in conflict and how the impact of such bureaucratic institutional structures influence both the course and outcomes of conflicts. The law’s involvement in war can be both strategic, as is the case when it comes to debates around the legitimacy of the conflict using the language of the law of war, but there are also more tactical deployments of the law made by the bureaucracy. The law’s involvement in war becomes more direct and explicit when one considers tactics such as the purchasing of satellite information to deny one’s adversary access to it, or the certification of a specific group as terrorist, both examples of how the law can be “weaponized”.²⁷

The law of war, which parses the application of force into permissible and non-permissible, is the most familiar nexus between law and war for most of us. According to Kennedy, these laws provide us with the vocabulary for assessing the legitimacy of a given conflict. They are the basis for the decision of where a military operation falls in the legal taxonomy, which can be a strategic asset to the military in their efforts to influence perception of their operations as legitimate.²⁸

The various states of conflict, occupation, police action, and open conflict, but to name a few, all give rise to different expectations. The deployment of legal

²⁴ *Id.*, 86.

²⁵ *Id.*, 161.

²⁶ *Id.*, 156.

²⁷ *Id.*, 36-37.

²⁸ *Id.*, 41.

taxonomy exemplifies the combined management of the war and law which Kennedy labels lawfare. As parts of this taxonomy collapse and combat blurs with stabilization and law enforcement, the allocating of the privilege to kill becomes more difficult. As communicating the war becomes synonymous with fighting it, the legal categorization becomes both a communication tool and a basis on which actions will be judged due to the accompanying expectations of a given categorization.²⁹

The law of war is no longer simply about following the valid legal norms; the court of world public opinion rather chooses the rules, which apply based on their persuasiveness in the particular political context of a given conflict.³⁰ If the law argued is not persuasive then the law may be valid but be of no force. The question arising from Kennedy's description of the legal categorization of the use of force and the resulting expectations is to what degree the wider court of public opinion, outside of the Kennedy's professionals, discerns the nuanced expectation differences in this legal taxonomy.

F. Conclusion

Throughout the book Kennedy wrestles with the false dichotomy of humanitarian vs. military to highlight the different uses and purposes of law in relation to war and in doing so challenges less sophisticated notions of exactly what war is. Kennedy looks at the modernization of the law of war as a means to enhance our ability to link decisions as to whether to use military force to responsibility. For him this is what is meant by the use of the law as a vernacular of legitimacy.³¹ Readers are not left to answer this on their own however, as the book raises questions of responsibility, suggesting that both military and humanitarian professionals sense that the real political judgment takes place outside of their careful calculations.³²

One is left with the notion that despite the careful calculations and considerations of the professionals that make up the context for the law of war that there is still the mob justice of world public opinion that is the final arbiter of what will be seen as legitimate or just. This contrasts with the disconcerting notion that Kennedy asserts at one point, that to know the politics of war and peace one needs to know the

²⁹ *Id.*, 122-123.

³⁰ *Id.*, 96.

³¹ *Id.*, 163.

³² *Id.*, 164.

politics of the professions that are involved in providing the context.³³ The careful calculations of Kennedy's professional elite are in tension, to the extent that they disagree, with popular public opinion which at times may be considered less sophisticated, due to its ignorance of the politics of these professions. However, Kennedy's excavation of the bureaucracy behind war, and the context provided by the professionals who inhabit it, provides a sharpened picture of the entire phenomenon.

This international court of public opinion has turned the law of force/war into a sliding scale with those possessing greater technology and intelligence being held to a higher standard.³⁴ This might leave a more callous individual to wonder, if such advantages are only to become liabilities in the court of public opinion then why should such strong efforts be put into maintaining and strengthening them?

Kennedy states that his hope is that the book contributes to a more strategic sensibility about the law among military and humanitarian professionals, a goal, which it achieves without question.

Kennedy's clearing of the fog that tends to obfuscate the role professionals play in both the law of war and law in war is equally applicable to *jus post bellum* or, law post war.³⁵ His presentation of the subject matter is such that it can provide a general member of the public with an essential understanding while still providing a vital realignment for professionals.

³³ *Id.*, 26.

³⁴ *Id.*, 139.

³⁵ For more on this doctrine see, Brian Orend, *Jus Post Bellum*, 31 JOURNAL OF SOCIAL PHILOSOPHY 117 (2000).