



City Research Online

City, University of London Institutional Repository

Citation: Kalpouzos, I. (2008). David Kennedy, Of War and Law. *Journal of Conflict and Security Law*, 12(3), pp. 485-492. doi: 10.1093/jcsl/krn004

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/7140/>

Link to published version: <http://dx.doi.org/10.1093/jcsl/krn004>

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

Journal of Conflict & Security Law © The Author [2008].
 Published by Oxford University Press; all rights reserved.
 For permissions, please e-mail: journals.permissions@oxfordjournals.org

Book Review

David Kennedy, *Of War and Law*. Princeton: Princeton University Press, 2006, 191pp. +xi. ISBN 978-0-691-12864-1. Princeton: Princeton University Press, 2006, 191pp. +xi. ISBN 978-0-691-12864-1.

In his new book, Professor Kennedy explores the intricacies of the relationship between war and law, exposing its dynamics, and warning of its consequences. The timing of the book is apposite; the issues it touches upon are current, and hotly debated among lawyers, military and political analysts or operators, and, indeed, the often-bewildered public. Accordingly, Kennedy appears to have designed the book under review for a broader audience than just academic international lawyers. This characteristic of the project, in combination with the author's credentials, is particularly promising. Kennedy is unquestionably an important scholar who, since the 1980s,¹ has shown considerable ability in deconstructing formal narratives and unearthing implicit conflicts and paradoxes in international law, stimulating the imagination and research interests of numerous writers.² Accordingly, his recent turn towards the study of the law of armed conflict³ generates hopes for a much needed theoretically sophisticated discussion of the fundamental concepts and rationales of the discipline. The paradoxes of 'war law' seem fertile soil for critique, and the increasing involvement of humanitarianism, both as language and as rules, seems to accentuate these paradoxes.

The book's first chapter, 'War as a Legal Institution' (pp. 13–45), describes the tangled web of law, politics and war that we have woven on the conceptual,

¹ Kennedy's, widely held as pioneering, contributions in that decade include: David Kennedy, 'Theses about International Law Discourse', (1980) 23 *German Yearbook of International Law* 353; David Kennedy, 'Primitive Legal Scholarship', (1986) 1 *Harvard International Law Journal* 1; David Kennedy, *International Legal Structures* (Nomos Verlagsgesellschaft, Baden-Baden, 1987).

² Such admiration is exemplified by Koskeniemi's appraisal of Kennedy's contribution as 'the most significant contribution to international legal scholarship by a contemporary lawyer'. See Martti Koskeniemi, *From Apology to Utopia: The Structure of the International Legal Argument. Reissue with New Epilogue* (Cambridge University Press, Cambridge, 2005), p. xv.

³ His most recent attempt, in David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, Princeton, 2004), especially pp. 234–325, had focused on international law and the use of force. Kennedy, however, had shown interest in the subject matter earlier on in his book-length theoretical exposition. See Kennedy, *International Legal Structures* supra note 1, pp. 245–287.

2 Book Review

institutional and functional levels. Taking Clausewitz's well-known pronouncement on the relationship of politics and war,⁴ and starting from the maxim that 'modern war reflects modern political life [and] modern politics is legal politics' (p. 13), he paints the picture of the modern bureaucratic politics of war, focusing on two specific groups of expert actors: the military and humanitarian actors. Self-identifying as one of the latter, he describes how, in his youth, he was certain that these categories of people were logical opposites, but how has realised that

A1 they are closer to one another than either side realise. Indeed, they are the key players in the forming of the *expert consensus* that influences the politics of war (p. 17). As he puts it 'to understand the politics of war and peace, we will need to understand the politics of the professions' (p. 26).

Most importantly, these unavoidably complementary professional groups both play the same language game, using the same vernacular (a word he uses repeatedly and that seems to have a pivotal role in his conception of the affinity between the two sets of actors). Coming from the two sides of the spectrum (their difference being only one of perspective, p. 39), they meet in this linguistic/normative universe and converse. Significantly, 'the common vernacular for these inter- and intraelite conversations is increasingly provided by law' (p. 25). Kennedy thus demonstrates how the seemingly technical and apolitical character of legal language, when employed by professional insiders influences both the politics of war, and the law itself. Importantly, as the actors participate in this law-laden field they use legal language to communicate policy goals (p. 39ff), thus confusing law and legitimacy and, to the extent that their participation is effective, they change the landscape of the law (p. 37). Law is employed in claims for legitimacy, it is interpreted to fit specific war-related policy objectives and the validity of any interpretation seems to rest solely on its persuasive effects. Accordingly, the Bush Administration's imaginative interpretation of the 'so-called' Geneva Conventions through the (in)famous Gonzalez memoranda were, for Kennedy, just another example of 'professional arguments from a shared set of texts and historical precedents' that just 'failed to advise their client adequately about the consequences of the interpretations they proposed, and about the way others would read the same texts' (pp. 39–40).

The book continues, in its second part, (pp. 46–98), by describing the historical trajectory of the relationship between law and war in international legal thought. Starting with the sixteenth and seventeenth century classics and leading up to Vattel, he traces the confusion between law and morality, and the interaction between law and politics leading to the imposition of limits to, but also to the granting of license for, war (p. 49). The successful mix of law and advice on diplomacy in Vattel that made his work one of the most read in the eighteenth

⁴ See p. 13 'war is still the continuation of politics by other means' but qualified at p. 19: 'war is now the continuation of a far more chaotic politics, in a far more chaotic political environment'. See also p. 163 where Kennedy quotes Clausewitz, more accurately, describing war as 'a continuation of political intercourse, with a mixture of other means'.

and nineteenth century western world is used as an example of the legitimating fusion of legal norms and political objectives (pp. 50–56). Furthermore, in the nineteenth century, the concept of sovereignty was constructed as being absolute. This conception paired well with the rigid theoretical separation between law and morality. States used the concept of sovereignty accordingly, trying to establish and defend their respective and exclusive public authority, both in their internal relations with individual citizens and external ones with other states. This structure of affairs led to a legal separation between war and peace that, according to Kennedy, was actively supported by the humanitarian voices of the time (pp. 64–67).

The ‘legal consciousness of the classical era’ (p. 68), survived in the twentieth century, but, having been wounded through the First World War, was mixed with the nascent approach of political science and international relations leading to efforts to ‘outlaw war’ through international legal institutions and the norms that those institutions would create.⁵ The absolute legal category of sovereignty was relativised through the law of the League of Nations and, most importantly, the UN Charter (pp. 68–83). Importantly, the law of force became constitutionalised (p. 82). This qualitative development allowed an ethical vocabulary for force, while creating a complex net of principles, rules and interpreters. Kennedy argues that the former are pliable and functional, allowing the latter to thoroughly instrumentalise the law. Parallel developments characterize the *jus in bello* (pp. 83ff). ‘Principles’ and ‘standards’ were developed by humanitarians and the military alike, to flesh out the codified results of negotiations (pp. 87–89). The ‘reality of the ground’ compounded with the abstract nature of the interplay between rules and standards lead to even more distance from legal validity and to the importance of ‘persuasion’ of legal claims. Accordingly, the professionals of war’s legal discourse, the military and the humanitarians, ‘will need to become more adept at operations in the law of persuasion’ (p. 97).

Thus, we reach the present (and Kennedy’s third part) of ‘War by Law’ (pp. 99–164) or ‘lawfare’,⁶ defined as ‘managing law and war together’ (p. 125). Kennedy explains how the modern practice of war has trumped the legal rules and principles expounded in treaty texts and how it has allowed the manipulation of such rules in the pursuit of military goals and political messages. He argues that legal rules cannot bring justice as they erroneously lead us to ‘imagine we know what violence is just, what unjust, always and for everyone’ (p. 104), whereas the unavoidable truth is that ‘justice requires leadership – on the battlefield and off’ (p. 104). On the other hand, he laments that ‘something is undeniably lost when an ethically self-confident law is transformed into a strategic discourse’ (p. 132).

⁵ Kennedy has previously expanded on this in his ‘The Move to Institutions’, (1987) 8 *Cardozo Law Review* 841.

⁶ He refers to Charles Dunlap Jr., ‘Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts’, available at <http://www.duke.edu/~pfeaver/dunlap.pdf>, for this term. Interestingly, he does not seem to view it as perjorative, despite that being the intention of many of the users of this neologism.

4 Book Review

In addition, and to make matters worse, ‘the terrain beneath a soldier’s interpretations of what is and is not appropriate is constantly shifting’ (p. 133). He illustrates the manipulation of legal categories and the fusion of law and strategy with many interesting examples ranging from the Cold War to Iraq, and through some of his own professional experiences. The discontents of the modern law of war experience culminate in Kennedy’s final subchapter ‘Legal War and the Elusive Experience of Responsibility’ (pp. 141–164) where it is argued that ‘the transformation of the law in war into a vocabulary of persuasion about legitimacy can erode the sense of professional and ethical responsibility for our decisions’ (p. 141). To try to resolve the moral and practical dilemmas of the every-day waging of war, e.g. in issues related to targeting and collateral damage, through rules of humanitarian law, according to Kennedy, is both futile and dangerous. When humanitarian law ‘transforms *decisions* about whom to kill into *judgments*’, stemming ‘not from an exercise of human freedom, for which a moral being is responsible, but rather from the abstract operation of professional principles’ (p. 144), rules more often than not fail to address the issues accurately, and the human beings behind the decisions are allowed to hide behind professional rules and avoid responsible moral choices.

Kennedy’s critique is genuinely interesting, but cannot be considered entirely convincing. It seems to revolve around the dual axis of language and institutional structures, which form the argumentative environment of professional politics. The (for Kennedy) unavoidable indeterminacy of language is compounded by the labyrinthine nature of military/political command structures. The recurring theme of the book seems to be that ‘we have left the world of legal validity behind, except as a claim made to an audience’ (p. 126). From whence flow the dangers of the manipulation of the rules, their (real or perceived) inadequacy, the role of professional elites into waging and managing ‘lawfare’ and the formal filtering of choices that leads to the eschewing of moral responsibility and accountability.

In the above-mentioned claim, there seems to be a conflation between legal validity and legal certainty. This reflects Kennedy’s position that structural and linguistic indeterminacy necessarily leads to the impossibility of legal validity. However, the claim that ‘we have left the world of legal validity’ seems rather dramatic. In his brief historical survey, he makes clear that for him absolute legal validity and certainty were never really there. The more strict legal categorisations of the past, as well as the ‘outlawry’ of war, never actually reflected State practice. Whether in the premodern moral/legal soup, Vattel’s worldly advice to diplomats, the absolute doctrine of sovereignty, or the Charter’s constitutionalism, the rules were interpreted, used and manipulated by everyone who could. Although many of these observations are valid and should be heeded, quite often Kennedy’s analysis either (rightly) points out obvious structural flaws in the international legal system or overplays their detrimental effects. We had never achieved a world of legal validity in order to leave it.

On the other hand, the realisation that absolute legal validity of the rules of war has been an ideal hitherto unattained does not mean that a practitioner or

a theorist should resign their commission and plunge into a permitting sea of 'persuasiveness'. The theoretical distinction between absolute legal validity and narrowly persuasive professional arguments can often seem unsubtle. It seems to validate subjective judgments on the sole merit of their technical professionalism and at the same time reminisce about a never-existing realm of formal validity. To use Kennedy's appropriately provocative example, the Gonzalez memoranda were something more than 'ill-advised' or 'not persuasive enough'. Or, rather, their transparent unpersuasiveness seemed to rest on their fundamental clash with clear features of the legal regime, rather than simply the professional shortcomings of their advocates.⁷ The course elected might have been a 'political' decision by the administration, or a 'professional' decision by the advisors, but, as a matter of law, it is an interpretation that can be assessed against legal rules in place. The fiction of absolute legal validity does not excuse absolute interpretative subjectivity.

But what *has* changed? And how is the law of war today different than it was, say, in 1945? There is no doubt that the rules are shifting, or, on a more conservative account, that they are under considerable pressure. Be it the moral/legal tensions behind discussions on humanitarian intervention, or, the effort to apply the law to asymmetric warfare, with so much at stake for all participants, the attempt to formulate, recognise and appropriately apply a legal rule presents important difficulties. Similar issues arise, for example, with respect to the law on targeting and collateral damage. It is true, as Kennedy duly notes, that the adjective 'excessive' in article 57(5) of Additional Protocol I to the Geneva Conventions relating to collateral damage, both in theory and practice, often does not suffice to provide morally satisfactory results. Alarm and even pessimism about the coherence of the legal system might seem warranted, especially when, as Kennedy's analysis helps us understand, particularly powerful actors radically enmesh legal rules with moral language and stretch them towards policy objectives, rendering them almost unrecognisable.

It is important, however, not to sweepingly and debilitatingly generalise discontent about the current situation. The structural disconnects of the legal system do not mean that law and legal language cannot be part of the solution. Actions and motives are abstracted in logical categories that seem to reflect a normative consensus or a structural *status quo*. Admittedly, the intercession of the law-creating process by the structural and conceptual wall of sovereignty differentiates it from the equivalent process in national legal orders. The often-described weaknesses of the international system, the absence of a sovereign to impose formal validity and the often-disheartening problems of enforcement are very real difficulties that plague international law and, especially, the laws of war. The stakes there may seem higher and the scrutinising process weaker. Such problems are sometimes intimidating for legal analysis, but should not be off-putting

⁷ Interestingly, for a similarly narrow criticism that the Gonzalez memoranda lack professional quality, see Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (W.W. Norton & Company, New York, 2007) pp. 141–177.

6 Book Review

and they should not lead to disregard of the importance of law as a tool in the international system. To the extent that war is the continuation of politics with the admixture of other means, and that politics is the interaction between different actors in society, legal regulation of such an interaction, in peace or war, is possible and, indeed, necessary. The task might be discouragingly complex but the better the use of legal tools, the more accurate the observation of practice, and the more legitimate the processes of legal abstraction are, the more the rules will be valid and effective.

Ultimately, Kennedy's diagnosis warrants a prescription. The question that arises is, to which extent focusing on 'lawfare' holds interpretative value in order to address the issues at hand. Although the conflicts within legal concepts and among legal institutions cannot, of course, be resolved once and for all and although there will always be room for manipulation and instrumentalisation of the rules, any approach should seek to clarify the interrelations between concepts and actors. Kennedy does provide interesting insights on this interrelation, but he does so at a rather macroscopic level. The diagnosis of structural and conceptual confusion warrants a technical legal approach for dealing with the specific issues that arise from it. Formal legal thoroughness will never substitute personal moral choices, but it can be an important tool in the effort to minimise the uncertainty in the use of the rules and the weakness of the institutional structure. The law or even a formal *expert consensus* will never substitute the necessary choices by soldiers on the ground or by politicians deciding to wage war, but legal language provides a formal platform for claims to be supported and actions to be justified. This will not substitute the important moral choices, but it can ground them in a legal structure that reflects substantive core values and provide useful tools to assess them.

Furthermore, there is a fear that by focusing on 'lawfare' one can come very close to accept it. Accordingly, the relativisation of the formal validity of legal claims can clear the way for supporting utterly subjective decisions, allowing more powerful actors to manipulate the loopholes. The structural and substantive loopholes of the legal system are real enough, and Kennedy is right to point that out, but by accepting the practice of 'lawfare', a degree of unwarranted justification can be attached to the exploitation of these loopholes. This, arguably, will not work in favour of the cohesiveness of the legal system, especially in an area as legally contentious as the laws of war. Kennedy's disenchantment with the *expert consensus* and its practical use is perhaps understandable, and his exhortation to 'experience politics as our vocation and responsibility as our fate' (p. 172) is altogether laudable, but we need more than that. We need to know exactly how to assess decisions and actions on the ground, and professionalism in 'lawfare' and moral exhortations are not substitutes for legal analysis. Both the strengths and weaknesses of this book reinforce the need for a clearer understanding of the relevant legal rules, their interaction and the nature of the existing legal regime.

The pros and cons of the book are reflected in (and compounded by) Kennedy's writing style. In accordance with his objective of addressing the book to a wider audience, there are no footnotes, only endnotes, and these have been

kept to a minimum. There is also a conspicuous lack of reference to any treaties or (inter)national jurisprudence, something that seems to be in accordance with Kennedy's epistemology. In accordance with the statement that 'we have left the world of legal validity behind', doctrinal pronouncements of the law are, for Kennedy, of only relative relevance. The focus is put on the structures and conceptual tensions that allow the manipulation of any possible pronounced legal rule. There are few examples where Kennedy uses language from the instruments, as in the case of the above-mentioned adjective 'excessive' with respect to 'collateral damage'. The use of more examples illustrating both instrumentalisation and the possibility of consistent interpretation could both support and undermine Kennedy's argument. A more detailed use of legal sources, particularly the prolific case law of the *ad hoc* international criminal tribunals, would help clarify his argument, pointing out cases where the use of legal language has yielded more or less cohesive results.

The writing has a certain oral flow, which, combined with the short length of the book, promise an easy read. Kennedy shows considerable agility in moving from one argument to another, discussing issues arising from current affairs in the light of thorough conceptual deconstruction. It is not that Kennedy's language is difficult. The rather cryptic language of his earlier work has developed towards a more communicative idiom. However, the lack of references combined with an element of repetitiveness of language and arguments seem unhelpful. And this impedes the oral flow of Kennedy's writing from functioning as an analytical *tour de force*, clearly linking and illuminating, in turn, the interesting themes he discusses. It also impedes the clarification and communication of the interesting distinctions between law, justice, ethics, morality, responsibility and politics. Nowhere does Kennedy provide us with a clear definition of the terms he interlinks. The move from argument to argument is often unclear. Perhaps this is a conscious approach by the writer, reflecting his unwillingness to provide answers and solutions, ultimately appealing to the reader's/lawyer's/practitioner's moral choice. Ultimately, however, the above-mentioned characteristics work against the text. The quality of Kennedy's rhetoric, in its logical persuasiveness and its aesthetic appeal is not, here, at its strongest. Ultimately, it is these features of Kennedy's writing, rather than the foundations of his theoretical approach, that impede his ability to delineate the interplay of his themes and assist the reader.

To conclude, Kennedy is always an interesting thinker and writer and the themes he deals with in this book are fascinating. However, the feeling inspired by *Of War and Law* is that the combination of author and subject matter did not yield the hoped-for progression of the existing debate. The book builds upon arguments Kennedy has made elsewhere,⁸ but it might be questioned if it really

⁸ Notably in David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, Princeton, 2004) and in David Kennedy, 'Reassessing International Humanitarianism: The Dark Sides' in Anne Orford (ed.) *International Law and Its Others* (Cambridge University Press, Cambridge, 2006) 131.

8 *Book Review*

takes them much further. To be sure, Kennedy's points should be studied and his effort to disentangle the web of law, war and politics should be wholeheartedly supported and furthered. In this sense, *Of War and Law* can be viewed as an interesting contribution to a useful and intriguing debate.

Ioannis Kalpouzos
University of Nottingham

Furthermore, Kennedy acknowledges his debt to Duncan Kennedy's, *The Rise and Fall of Classical Legal Thought* (Unpublished, 1975) and Nathaniel Berman's, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War', (2004) 43 *Columbia Journal of Transnational Law* 1. Berman, as Kennedy points out, at x, develops some of the themes of this book 'in doctrinal detail'. For an illuminatingly applied analysis of some of the themes discussed by Kennedy and Berman, see Henri Meyrowitz, 'Le statut des guérilleros dans le droit international', (1973) 107 *Journal de Droit International* 875.