

OF WAR AND LAW BY DAVID KENNEDY (PRINCETON, NEW JERSEY: PRINCETON UNIVERSITY PRESS, 2006) 206 PAGES. PRICE US\$18.95 (HARDCOVER) ISBN 9780691128641.

In the lead-up to Australian participation in the 2003 Iraq war, 43 prominent legal academics published their view that the initiation of such a war 'would be a fundamental violation of international law'.¹ The article prompted rigorous debate in our country,² and was met with the publication of a joint Attorney-General/Department of Foreign Affairs and Trade legal opinion that asserted the contrary, namely that Australian participation was indeed in compliance with international law.³

This riposte represented a precipitous moment in the political discourse of international law within this country. As a Naval lawyer dedicated to drafting maritime rules of engagement and dealing with all manner of legal issues arising from the operation, it was plainly evident to this reviewer that 'the law' had become an issue of popular concern as the debate played out through mainstream media outlets. Indeed, young sailors deployed to the region sought confirmation through their chain of command that the war they were about to enjoin was in fact 'legal'.

The salience of this issue in the popular consciousness should not be surprising. The legal regulation of social and economic activity is omnipresent in modern life, and the integration of law into the initiation and conduct of warfare is similarly complete. Indeed, this truism is the realisation of a conscious long-term realist strategy of humanitarian organisations such as the International Committee of the Red Cross ('ICRC') to inculcate legal concepts into the planning processes of modern military forces.⁴

It is against this backdrop of heightened awareness of the place of 'law' in military operations that Professor David Kennedy's recent book, *Of War and Law*, is written. Kennedy offers an original insight into the role of law in military decision-making from a perspective not frequently experienced in this area. His analysis transcends the formalistic approaches that have traditionally typified debate on this issue within Australia. Hence, there is a composite international law methodology employed in Kennedy's book that draws on elements of the New Haven school, as well as the international law and international relations approach and even a flavour of the critical legal studies 'deconstruction' orientation. That he brings these tools of analysis to bear on such a unique topic

¹ Don Anton et al, 'Howard Must Not Involve Us in an Illegal War', *The Age* (Melbourne, Australia) 26 February 2003, 17.

² See, eg, Thomas Crampton, 'Australians Chew Over a New Topic: War', *International Herald Tribune* (Paris, France) 7 March 2003, 1.

³ Memorandum of Advice to the Commonwealth Government on the Use of Force against Iraq, Tabled by the Prime Minister in the House of Representatives, Parliament of Australia: Commonwealth, *Votes and Proceedings of the House of Representatives*, 18 March 2003, 788 (John Howard, Prime Minister); and by the Leader of the Government in the Senate, Parliament of Australia: Commonwealth, *Journals of the Senate*, 18 March 2003, 1577 (Senator Robert Hill, Leader of the Government in the Senate and Minister for Defence). Prepared by the Commonwealth Attorney-General's Department and the Department of Foreign Affairs and Trade on 12 March 2003.

⁴ See David Kennedy, *Of War and Law* (2006) 10, 111–12.

as the role of law in military operations is itself a refreshing perspective that warrants serious consideration.

I THEMES

Kennedy offers three main themes in his book. First, that modern war has become a legal institution in itself. He advances the idea that law has so dominated military decision-making that it has become a political and ethical discourse for all sides, military and humanitarian professionals alike, as well as relevant elites with a stake in the political outcome. Second, that the law of armed conflict is ‘fluid’, namely, it is an amalgam of different historical schools of international law that have been variously ascendant and have marked their influence with the imposition of both ‘bright-line’ rules and, alternatively, broad standards.⁵ This phenomenon, in Kennedy’s assessment, has the potential to expand the application of violence and authorise greater destruction in the name of the ‘law’.⁶ Finally, Kennedy explores and celebrates the opportunities that this new legal milieu offers to military decision-makers and professional humanitarians alike, yet warns against the stark dangers that such a polyglot represents.

A *War as a Legal Institution*

The rule of law impacts on the minutiae of all contemporary military behaviour. Kennedy observes that military operations take place against a complex tapestry of local and national rules, where laws ‘shape the institutional, logistical, even physical, landscape on which military operations occur’.⁷ This is true even in his own experience:

Some years ago, before the second war in Iraq, I spent some days on board the *USS Independence* in the Persian Gulf. Nothing was as striking about the military culture I encountered there as its intensely *regulated* feel. Five thousand sailors, thousands of miles from base, managing complex technologies and weaponry, with constant turnover and flux ... The carrier, like the military, is a social system, requiring a complex and entrenched culture of standard practices and shared experiences, of rules and discipline.⁸

When grappling with this theme of the role of law in warfare, Sir Hersh Lauterpacht once famously stated that ‘[i]f international law is ... at the vanishing point of law, the law of war is perhaps even more conspicuously at the vanishing point of international law’.⁹ Such a sentiment, though true in 1952, could not be more inapplicable in modern times. Consistent with Kennedy’s observation about the entrenched nature of regulation within the military,¹⁰ the inculcation of the ‘rule of law’ culture into the military decision-making cycle finds its most decisive expression today in the application of the law of armed

⁵ Ibid 87.

⁶ Ibid 88–90, 106, 169–172.

⁷ Ibid 6.

⁸ Ibid 32–3 (emphasis in original).

⁹ Sir Hersh Lauterpacht, ‘The Problem of the Revision of the Law of War’ (1952) 29 *British Yearbook of International Law* 360, 382.

¹⁰ Kennedy, *Of War and Law*, above n 4, 33.

conflict. Concepts such as ‘military necessity’¹¹ and ‘unnecessary suffering’¹² are fully entrenched within the Western military psyche and the pervasive role of military lawyers in the process of planning military operations is well established.¹³ Indeed, this outcome is the result of an effective collaboration between the military and organisations such as the ICRC.¹⁴

What is intriguing in the analysis offered by Kennedy is the observation that these tenets of humanitarian law are so well ingrained that they have formed a ‘common vernacular’ that has ‘leached into our political life’.¹⁵ Thus Kennedy concludes that the right to go to war and the rights in war form an integral part of the political discourse on the legitimacy of intervention and warfare. He points out that: ‘It is hard to imagine an effective international political initiative that does not rely on some mix of visible and latent violent and legal modes of authority’.¹⁶ He goes on to state that: ‘War today takes place on a terrain that is intensely governed — not by unified global institutions, but by a dense network of rules and shared assumptions among the world’s elites. ... There is law at every turn ...’¹⁷

Through this prism of interpretation, Kennedy asserts the politicisation of law as a natural consequence of its ubiquitous nature, a result of the decisive victory of the 20th century humanitarian strategy to permanently render law’s imprint into the crucible of military decision-making and power politics. Rather than standing outside or above the political fray, law has become central to such decision-making. This ensures its relevance but seems to come at the price of distortion and exploitation. The underpinning value paradigm that influences the role of law naturally has a consequence in questions of legitimacy, which seeks to couple law and politics. Kennedy notes simply that ‘[i]nternational law has become the metric for debating the legitimacy of military action. ... [L]aw now shapes the politics of war’.¹⁸ Indeed, this sets up a framework of interpretation that is less concerned with the ‘authority’ or ‘status’ of the legal rule than its underlying persuasiveness. Hence Kennedy observes:

Once elites began thinking about international norms in this way, it was a short step to the idea that a norm was valid law only if it turned out, in fact, to *have been* persuasive. The point about a norm is not its pedigree, but its persuasiveness. The more persuasive norms have more of an effect — and only those norms that have an effect should rightly be considered ‘legal’. In this framework, statements about one’s entitlements — or an adversary’s crimes and misdemeanors — are assertions, hypotheses, wagers on how the community of relevant interpreters will react.¹⁹

¹¹ Ibid 87.

¹² Ibid 90.

¹³ See generally Michael Lewis, ‘The Law of Aerial Bombardment in the 1991 Gulf War’ (2003) 97 *American Journal of International Law* 481.

¹⁴ Kennedy, *Of War and Law*, above n 4, 85.

¹⁵ David Kennedy, ‘Modern War and Modern Law’ (Speech delivered at the Center for International and Comparative Law, Baltimore Law School, Baltimore, 26 October 2006).

¹⁶ Kennedy, *Of War and Law*, above n 4, 22.

¹⁷ Ibid 25.

¹⁸ Kennedy, ‘Modern War and Modern Law’, above n 15.

¹⁹ Kennedy, *Of War and Law*, above n 4, 93 (emphasis in original).

B *The Fluidity of the Law*

Building on this first theme concerning the impact and character of the law in the politico-military realm, the second theme of Kennedy's book relates to the 'fluidity'²⁰ of the law. This fluidity relates to the theme of 'anti-formalism and legal pluralism'²¹ that shapes the interpretation of the modern law of armed conflict. He identifies this to be a consequence of the historical roots of this specific body of the law, as well as the more general rise and fall of formalism as a technique of international law.

In a very comprehensive survey of the historical character of the law of war, Kennedy observes that in the 16th and 17th centuries, issues of legitimacy and legality were heavily predicated upon ethical standards. Early writers such as Vitoria and Suárez did not distinguish between legal and moral authority or between national and international law.²² 'Natural law, international law, civil law, divine law — all were part of the same soup'.²³

Such anti-formalism was in contrast to 19th century techniques in which formalism was at its peak. Kennedy notes that the 19th century approach to the law of war was to draw stark distinctions between war and peace and to infuse the former with prescriptive 'bright-line' rules.²⁴ Kennedy observes that humanitarian strategies of the era were clear:

In short, the late nineteenth-century developed an alliance between two rather different sets of ideas: a humanitarian moral conviction that the forces of peace stand outside war, demanding that swords be beaten into ploughshares, and a legal project to sharpen the distinction between public powers and private rights. The result was a legal conception of war as a public project *limited to its sphere*.²⁵

Acting within its 'sphere' of warfare, the law reflected the formalist style of its era by being heavily prescriptive in nature. There were, for example, sharp distinctions between 'combatants' and 'non-combatants' as well as between 'belligerents' and 'neutrals'.²⁶ All of these categories possessed particular status and were invested with bundles of legal rights and duties.²⁷ The formalist conception of the law of war conceived a very linear relationship between parties with clear lines of demarcation applying to all manner of topics ranging from weapons systems to areas of conflict. Status and consequences were spelled out in exacting specificity, and great discretions were accorded to war fighting opportunities. This was all undertaken under the unassailable validity of the applicable norms.

Such a formalist approach was best embodied in the *Hague Conventions* at the turn of the 20th century. Kennedy observes that from the mid-20th century onwards, the more pragmatic approach of humanitarian law in ensuring

²⁰ Ibid 38.

²¹ Kennedy, 'Modern War and Modern Law', above n 15.

²² Kennedy, *Of War and Law*, above n 4, 48.

²³ Ibid 48–9.

²⁴ Ibid 64–6.

²⁵ Ibid 66 (emphasis in original).

²⁶ Ibid 65.

²⁷ Ibid.

sufficient political ‘traction’ prevailed, and hence:

Modern international lawyers have abandoned the nineteenth-century scholar’s focus on the sovereign without recovering the earlier faith in a unified social/moral order. They have replaced a law of distinctions with what seems a more pragmatic unbundling of governmental action on both sides of the war/peace and public/private divides.²⁸

It is here that the fusion of these historic forces occurs. The argument that Kennedy mounts is that the style of the modern law (both in its substance and interpretation) with its adoption of a pragmatic and politically savvy orientation, has resulted in its reliance upon ‘standards’ as opposed to ‘bright-line’ rules.²⁹ Such a technique departs from the formalist emphasis on ‘status’ by incorporating an automatic requirement to assess military action against dictates of necessity and humanitarian cost.³⁰ While designed to ensure a constant balance and an ongoing calibrated discretion as to the application of force, this approach also carries its own deficit, hence Kennedy asserts:

The tendency to focus on standards when describing the modern law in war is the consequence of a broader shift in ideas about the significance and usefulness of the law in war as a whole. Foregrounding standards like ‘proportionality’ or ‘military necessity’ presents the law in war simultaneously as broad ethical discourse and as a framework for judgment capable of making the cost–benefit calculations necessary for it to be a useful tool for military professionals. The classic distinctions — between belligerent and neutral, or civilian and combatant — are still there, but their status has been transformed. They *may* be useful benchmarks for the humanitarian limits of warfare — but they may not be.³¹

C *Opportunities and Dangers*

Kennedy’s conclusions on the efficacy of the modern law of armed conflict are ambivalent. By inculcating the military psyche with an ingrained acceptance of the application of ‘law’, there is the eternal promise that warfare may indeed be tamed and bloodshed reduced. There is the hope that the law might ignite a sense of personal responsibility³² for actions and allow for a self-awareness of one’s own humanity,³³ and there is an equal chance that it might not.

In framing the dangers inherent in the current posture of the law of armed conflict, Kennedy is cautious about the proceduralisation of the law and the loss of moral responsibility that accompanies a methodical and clinical assessment of decisions relating to who lives and dies under the canons of modern interpretation. There is concern by Kennedy that the military decision-making apparatus has become so complex, and so diffuse, that the key moment of moral responsibility is difficult to ascertain. He notes that:

all these formulations, encouraged by the language of law, displace human responsibility for the death and suffering of war onto others ... indeed, in warfare

²⁸ Ibid 67.

²⁹ Ibid 88.

³⁰ Ibid 88–90, 143–144.

³¹ Ibid 88–9 (emphasis in original).

³² Ibid 167.

³³ Ibid 170.

today, we are better at assigning responsibility than experiencing it. ...[M]odern law has built an elaborate discourse of evasion, offering at once the experience of safe ethical distance and careful pragmatic assessment, while parcelling out responsibility, attributing it, denying it — even sometimes embracing it — as a tactic of statecraft and war rather than as a personal experience of ethical jeopardy. Violence and injury have lost their author and their judge as soldiers, humanitarians, and statesmen have come to assess the legitimacy of violence in a common legal and bureaucratic vernacular. ... If there is a way forward, it will require a new posture and professional sensibility among those who work in this common language. Recapturing the human experience of responsibility for the violence of war will require a professional style discouraged by the modern interpenetration of war and law.³⁴

II CRITIQUE

Kennedy's examination of the role of law in military decision-making is both original and revealing. The law of armed conflict is, not surprisingly, an extremely topical issue at present and yet it is typically analysed and debated through the single lens of classic positivism. Such legalism is often seen as separate from the political frame in which the law is contextualised. There is a pervading sense of artificiality and incompleteness about this method of analysis that is redressed in Kennedy's review. Surely the self-evident relationship between international law and international relations that Kennedy highlights is a symbiotic one that must be fully acknowledged so as to more meaningfully understand the persuasiveness of legal norms generated in this most primal area. Indeed, one wonders whether in the environment existing at the time, a fulsome decision by the United Nations Security Council in March 2003 to endorse military action against Iraq would have been the definitive answer to the question of legality that the group of 43 legal academics were grappling with.³⁵ There is a sense that the issue of legitimacy was more at stake in that public appeal and the law was, as Kennedy has asserted, merely a factor (albeit a significant one) in that particular equation.³⁶

To acknowledge the veracity of his methodology is not to say that Kennedy's conclusions are entirely free from criticism. The rejection of formalism that characterises the current 'standards' based orientation of the modern law of armed conflict does certainly open up the discretions accorded to soldiers, sailors and airmen in a manner that seems to urge licence rather than constraint.³⁷ Yet this is only one side of the coin. Decisions concerning the application of force are always balanced against the humanitarian imperative of ensuring proper target identification and minimising incidental civilian injury. Aircraft do return to base having not dropped the ordnance, and soldiers do refrain from 'taking the shot' because of the exercise of individual discretion.

While Kennedy does seem to accept the role of individual judgment, he nonetheless identifies a complex politico-military decision-making structure that appears to lack a moral 'fail-safe'. His impression is one of an impersonal

³⁴ Ibid 168–9.

³⁵ See above n 1 and accompanying text.

³⁶ Kennedy, *Of War and Law*, above n 4, 40.

³⁷ Ibid 106.

'proceduralisation' of bloodshed that seems to anaesthetise decision-making from the personal impact of violence. Thus he notes the potential for the law to be open to subversion, writing that:

if law can increase friction by persuading relevant audiences of a campaign's illegitimacy, it can also grease the wheels of combat. Law is a strategic partner for military commanders when it increases the perception of outsiders that what the military is doing is legitimate.³⁸

This question of ethical responsibility is a key element of Kennedy's thesis and it is one that deserves further examination. It is true that the planning and execution of contemporary military operations is underpinned by extensive 'process'. The law plays a significant part in this process and yet still affords great discretion in decision-making by operational staff when it comes to decisions regarding direct action. The depersonalisation of the action does seem to give rise to the stereotypical view of the 'military automaton'. Such perception appears frequently enough in the literature³⁹ and yet is elusive in reality. The modern military officer and soldier is a product of his or her society and he or she carries much the same value set as the rest of the citizenry when undertaking military service. Concepts such as personal rights and principles of fairness and diversity are deeply ingrained and reinforced in modern military service, probably more so than in most other private employment streams. Judgments made as to 'acceptable' civilian and own force casualties under the principle of proportionality in operations routinely reflect a conscientious, morally charged and carefully considered application of principles to the facts at hand. Indeed, this reviewer's enduring experience is that when these questions of 'proportionality' or 'military necessity'⁴⁰ are posed to civilian student audiences in university classes on international humanitarian law, both in Australia and the United States, the same factual choices and discerning ethical calibrations are exhibited as would occur in a purely military audience. Indeed, if anything, civilian audiences tend to show a more clinical risk-benefits analysis to issues such as acceptable civilian loss than does a military audience.

The law itself is dealing with decisions undertaken in combat which are bluntly related to the question of who lives and who dies: an irrational question that demands a rational decision. Kennedy insightfully notes at one point in his analysis that the military seeks 'in law assurance that their killing is authorized and legitimate'.⁴¹ This is undoubtedly true. Compliance with legal norms reinforces the value base underpinning targeting choices and acts to palliate the moral anxieties often experienced on the battleground. The military rely upon the law as a touchstone of reassurance. The sense of personal investment and ethical risk in making targeting choices is, notwithstanding Kennedy's doubts, a deeply personal one for the majority of serving members.

Kennedy is correct in his assertion that military professionals and professional humanitarians speak the same language. This has been a decisive victory for the

³⁸ Ibid 41.

³⁹ See generally Roger Normand and Chris af Jochnick, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 *Harvard International Law Journal* 49.

⁴⁰ Kennedy, *Of War and Law*, above n 4, 89.

⁴¹ Ibid 32.

post-World War II humanitarian strategy. It also highlights, however, an enormous humanitarian socialisation process that has quietly been undertaken within military forces. The exponential increase in UN sponsored peace operations through the 1990s⁴² has obliged contributing countries to comply with external UN-endorsed human rights and humanitarian standards. Over the past 15 years, literally hundreds of thousands of peacekeeping soldiers have been trained under universal legal standards and are held accountable under these same standards. Indeed, the ratification of the *Rome Statute*⁴³ has further reinforced the imposition of external standards on military forces. This is not to imply that these standards and authorities do not carry with them the same sort of discretions with which Kennedy is concerned, but that they are less susceptible to ‘auto-interpretation’⁴⁴ when the majority is invested in ensuring their compliance, and there exists an informal international consensus as to the standards.

Where Kennedy’s analysis is particularly insightful is his examination of the relative perspectives of both the professional humanitarian advocate and the military professional. Both professions are invested in the integrity of the process and the effectiveness of the outcomes and both need to contextualise their respective roles. In dealing with this issue he has written:

Although humanitarians may be tempted by the presumption that they stand outside the military profession, that their standards are higher, their rules stricter, the appeal of an outsider posture — and the promise of clear rules — can be deceiving. In some instances, the modern military’s own internal rules of engagement are stricter than what the traditional law in war requires. In the last years, moreover, we have seen military professionals among those most disturbed by the Bush administration’s efforts to shrink or skirt humanitarian standards in their war on terror. Has the military gone soft? Become less willing than their civilian masters to condone harsh tactics? Or is the scandal rather that the JAG corps was for a long time far stronger in their opposition to harsh tactics than civilian humanists who stood outside, wringing their hands, but uncertain whether they were in fact qualified to judge?⁴⁵

The role of the military lawyer is one that is little examined in the literature. Kennedy likens the function of the contemporary military lawyer to that of a commercial lawyer whose task it is to provide strategies to business to navigate through the matrix of dense rules and regulations to maximise commercial gain, while all the time ensuring a residual obligation to the integrity of the system so as to facilitate continued commercial advantage.⁴⁶ In this reviewer’s mind, this analogy has some resonance. The military legal advisor is neither a partial ‘advocate’⁴⁷ nor an ephemeral ‘conscience’,⁴⁸ but is a facilitator of military

⁴² UN Peace and Security Section, Department of Public Information and Department of Peacekeeping Operations, *United Nations Peacekeeping from 1991 to 2000: Statistical Data and Charts* (2001) <<http://www.un.org/Depts/dpko/dpko/pub/pko.htm>> at 18 October 2007.

⁴³ *Rome Statute of the International Criminal Court*, opened for signature 17 June 1998, 2187 UNTS 3 (entered into force 1 July 2002) (*‘Rome Statute’*).

⁴⁴ Kennedy, *Of War and Law*, above n 4, 81.

⁴⁵ *Ibid* 104–5.

⁴⁶ *Ibid* 34, 115–6.

⁴⁷ Matthew Winter, “Finding the Law” — The Values, Identity and Function of the International Law Adviser’ (1990) 128 *Military Law Review* 1, 21.

action whose allegiance is to the principles underpinning the law of armed conflict in a manner that maximises mission accomplishment. Self-awareness of the military lawyer's own functional role, values and identity is critical to fulfilling this duty.⁴⁹ To that end, there is symmetry between Kennedy's call for ethical responsibility and the need for self-awareness that the military lawyer must possess when acting responsibly under the law of armed conflict.

III CONCLUSION

Kennedy's contribution to the analysis of the role of law in military decision-making is both original and revealing. His methodology and tools of inquiry give rise to a unique and engaging perspective to the subject matter. To this reviewer, his conclusions as to the interplay of politics and law are particularly illuminating. The ongoing political debates about Australian military involvement in Afghanistan and Iraq, and even in our more immediate region, are plainly informed by legal considerations. Responsible military decision-makers and lawyers must accommodate these modalities of interpretation and appreciate the role law plays in these debates.

The anti-formalist victory in the design and character of contemporary norm creation in the law of armed conflict carries with it great promise and also, concomitantly, great threat. The notion of free flowing politico-legal channels of communication brings forth the advantage of greater legal 'traction' but also offers the possibility of erosion of leadership and a diminution of the 'law'. Law must be understood as applying in an acknowledged policy context and while legal arguments may be more or less persuasive in respect of determining the legitimacy of action, the quality of 'law' itself must be preserved and not abrogated in favour of political expediency.

The concern that Kennedy expresses as to the diffusion of legal and ethical responsibility for operational decisions under the law of armed conflict is understood. Certainly, the proceduralisation of warfare has the potential to minimise responsibility for actions taken, but the subject matter itself imposes a personal moral investment that is not easily dispensed with. What it does indicate is that self-awareness by both professional humanitarians and military professionals alike is critical to ensure that refuge is not easily taken in positivist safety nets of the 'law'.

Professor Kennedy's analysis of the role and purpose of the law of war (and law in war) as outlined in his book *Of War and Law* is highly recommended to anybody with an interest in understanding this most critical of legal issues. Kennedy is to be commended for making an impressively original and valuable contribution to the field.

DALE STEPHENS*

⁴⁸ Ibid 31.

⁴⁹ Ibid 10.

* BA (Flinders); LLB (Hons) (Adelaide); GDLP (SAIT); LLM (Melbourne); LLM (Harvard); Captain, Royal Australian Navy; Deputy Director, Asia Pacific Centre for Military Law, The University of Melbourne. The views expressed in this review are those of the author alone and do not necessarily represent the views of the Australian Government.