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David Kennedy: Of War and Law

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INTRODUCTION

War Today

War is a profound topic—like truth, love, death, or the divine. Intellectuals from every field have cut their teeth on it: political scientists, historians, ethicists, philosophers, novelists, and literary critics. But war is not one thing, always and everywhere. People write about the wars of their own time and their own country.

The wars of my time and my country—the America of the “postwar” half century—have been varied. We have fought a cold war, postcolonial wars, and innumerable metaphoric wars on things like “poverty” and “drugs.” Our military has intervened here and there for various humanitarian and strategic reasons. The current war on terror partakes of all these. When framed as a clash of civilizations or modes of life—secular and fundamentalist, Christian and Muslim, modern and primitive—the war on terror is reminiscent of the Cold War.

Like the Cold War, the war on terror seems greater than the specific conflicts fought in its name. It transcends the clash of arms in Iraq or Afghanistan. On their own, those wars resemble postcolonial and anticolonial conflicts from Algeria to Vietnam. When we link the war in Afghanistan to women’s

rights or the war in Iraq to the establishment of democracy, we evoke the history of military deployment for humanitarian ends. In our broader political culture, the phrase “war on terror” echoes the wars on drugs and poverty as the signal of an administration’s political energy and focus. At the same time, the technological asymmetries of battling suicide bombers with precision guided missiles and satellite tracking has made this war on terror seem something new—as has the amorphous nature of the enemy: dispersed, loosely coordinated groups of people or individuals imitating one another, spurring each other to action, within the most and the least developed societies alike.

Strictly speaking, of course, terror is a tactic, not an enemy. We use the phrase “war on terror” not only to disparage the tactic, but to condense all these recollections in a single term. By doing so, we situate this struggle in our own recent history of warfare. The phrase also frames the broader project with fear, and marks our larger purpose as that of reason against unreason, principle against passion, the sanity of our commercial present against the irrationality of an imaginary past. In this picture, we defend civilization itself against what came before, what stands outside, and what, if we are not vigilant, may well come after.

It is not novel to frame a war in the rhetoric of distinction—us versus them, good versus evil—nor to evoke a nation’s history of warfare each time its soldiers are again deployed. When we call what we are doing “war,” we mean to stress its discontinuity from the normal routines of peacetime. War is different. To go to war means that a decision has been taken: the soldier has triumphed over the peacemaker, the sword over the pen, the party of war over the party of peace. Differences among us are now to be set aside, along with the normal budgetary con-

straints of peacetime. This is serious and important—a time of extraordinary powers and political deference, of sacrifice and national purpose.

The point about war today, however, is that these distinctions have come unglued. War and peace are far more continuous with one another than our rhetorical habits of distinction and our wish that war be truly something different would suggest. A phrase like “the war on terror” can evoke so much precisely because wars of metaphor have blurred with the wars of combat on the ground. The distinction between them is far more tactical assertion than material fact.

This can be easier to see in hindsight. Take the Cold War. It was an enormous military and diplomatic—and economic and ideological—struggle, carried on by the political, military, and commercial elites of both superpowers for more than a generation. At the same time, until the Soviet Union’s surprising collapse, it was always plausible to insist that the Cold War had long ago ended, that the many proxy wars and great power interventions we now remember to have taken place in its name each had its own more specific logic, and that the long and stable peace between the blocs was itself frozen, rendering the rhetoric of “Cold War” a somewhat retro political vocabulary for justifying this or that policy priority. In this account, relations between the blocs were governed not by the law of war, but by the stable law of “coexistence.”

Was it war—or was it peace? Looking back, as historians, we could argue either way, for surely the Cold War was both a titanic global struggle *and* a period of remarkable stability among the great powers. Throughout the period, however, experts and politicians, citizens and pundits disagreed about which to emphasize. And their disagreements had stakes for policy and politics. Was *détente* a dramatic “opening,” or the

belated recognition of an established order among the world's powers? Was the nuclear standoff itself the end of history, at least the history of great power military struggle? Or would that end only come after we had accelerated our spending on arms to a level unsustainable for our adversary? As these questions have become matters for historical interpretation, it is easier to see positions about them arrayed on a spectrum, and to treat those who would argue one *or* the other as straining in a way that seems tendentious or partisan. We feel we can tell something about someone who argues one way rather than the other—something about his or her politics or personality. Distinguishing war from peace is both a serious political decision and a symbol of partisan positioning.

There are parallels in our current “war on terror.” Should we have responded to September 11 as an attack—or as a terrible crime? Are the prisoners held at Guantanamo enemy combatants, criminals, or something altogether different? These are partly questions of tactic and strategy, about the appropriate balance between our criminal justice system and our military in the struggle to make the United States secure. Strategic debates about the relative merits of offense—taking the fight to the enemy abroad—and defense here at home are likewise framed by the question of whether this is, in fact, a war we are fighting. But security is a feeling as much as a fact, and these are also questions of political interpretation. We can imagine a spectrum of positions, from insistence that the country remain on a war footing, at home and abroad, to the view that we treat the problem of suicide bombing or terrorist attacks as a routine cost of doing business, a risk to be managed, a crime to be prevented or aggressively prosecuted.

In short, the boundary between war and peace has become something we argue about, as much or more than something

we cross. War today is both continuous with—and sharply distinguishable from—peace. As policy, the difference will be one of degree—what *balance* of policing and military action? What balance of offense and defense? But these differences are also matters of ideology and political commitment. War today is both a fact and an argument.

This book follows the threads of these two observations—the increasing continuity between war and peace, on the one hand, and the continued rhetorical assertion of their distinctiveness, on the other—to understand what makes the wars of our time and place unique. Both threads lead to law. It has become routine to observe the omnipresence of law in our peacetime culture. The same has become true for war, and the result has knit war and peace themselves ever closer together. Warfare has become a modern legal institution. At the same time, as law has increasingly become the vocabulary for international politics and diplomacy, it has become the rhetoric through which we debate—and assert—the boundaries of warfare, and insist upon the distinction between war and peace or civilian and combatant. Law has built practical as well as the rhetorical bridges between war and peace, and is the stuff of their connection and differentiation.

To understand—and accept—these continuities between the politics and practices of war and peace, we must understand more clearly what it means to say that warfare has become a legal institution. When we think of war as sharply distinct from peace, it is easy to imagine it also as outside of law. War is often the exception to the routine legal arrangements of peacetime; contracts, for example, routinely exempt acts of war alongside “acts of God.” If we pause to think about the law relevant to war, we are likely to focus on international rules designed to limit the incidence of warfare, from the ancient “just war”

tradition, to the institutional machinery set in place by the United Nations Charter to “save succeeding generations from the scourge of war.” Or the many disarmament treaties limiting the use or availability of the most heinous weapons—exploding bullets, gas, chemical, or nuclear weapons. Or the rules of humanitarian law regulating the treatment of prisoners of war or those wounded on the battlefield. We are likely to think of these rules as coming from “outside” war, limiting and restricting the military. We think of international law as a broadly humanist and civilizing force, standing back from war, judging it as just or unjust, while offering itself as a code of conduct to limit violence on the battlefield. Indeed, it is common to associate this entire legal universe with the International Committee of the Red Cross, itself borrowing something from the neutral and humanitarian image of its Swiss hosts.

But law is relevant to war in many other ways. The military, like other public and private bureaucracies today, operates in war and peace against the background of innumerable local, national, and international rules regulating the use of territory, the mobilization of men, the financing of arms and logistics and the deployment of force. Taken together, these laws can shape the institutional, logistical—even physical—landscape on which military operations occur. Today’s military is also itself a complex bureaucracy whose managers discipline their forces and organize their operations with rules. Armies have always been disciplined by rules, usually legal rules. The national regulations by which Nelson disciplined the Royal Navy at Trafalgar were tough, parallel to those of British criminal law of the era. Under the Articles of War, a man could be hanged for mutiny, treason, or desertion. Routine discipline was to be enforced through flogging and “starting,” or striking a man across the back with a rope or rattan cane.

The interesting point is that in Nelson's day, these rules were distinct both from contemporaneous international legal debates about the "justice" of warfare and from the rules governing the French and Spanish fleets. In the years since, as the military has become a more complex modern bureaucracy, linked to the nation's commercial life, integrated with civilian and peacetime governmental institutions, and covered by the same national and international media—and as our ideas about law have themselves changed—the rules governing military life have merged with the international laws about war to produce a common legal vocabulary for assessing the legitimacy of war, down to the tactics of particular battles. Was the use of force "necessary" and "proportional" to the military objective—were the civilian deaths truly "collateral?" What is difficult to understand is the extent to which this vocabulary—of just war, legitimate targeting, proportionate violence, and prohibited weaponry—has been internalized by the military. Not every soldier—not every commander—follows the rules. Rules are bent and ignored. Rules are violated. But this is less surprising than the astonishing way the legitimacy of war and battlefield violence has come to be discussed in similar legal terms, by military professionals and outside commentators alike. As such, law today shapes the politics, as well as the practice, of warfare.

In the first chapter of this book, I explore the political context within which this merger of law and war has become significant. The forms war and law assume vary with the nature of politics and statecraft. The legalization of our political culture, and the emergence of a global policy class of experts who respond to the same media and speak the same language, has altered the relationship between war and law. It is only in this context that we can understand what it means that lawyers are increasingly forward deployed with the troops, or that

planned targets are routinely pored over by lawyers. This is the context in which it seemed sensible for opponents of the Iraq conflict to frame their opposition in legal terms. The war, they said, was *illegal*. For all his contributions to legal codification, it is hard to imagine Napoleon consulting a lawyer to discuss targeting. In the same way, it would have been bizarre to oppose Hitler's invasions—let alone the Holocaust—principally because they were *illegal*.

The emergence of a powerful legal vocabulary for articulating humanitarian ethics in the context of war is a real achievement of the intervening years. What does it mean, however, to find the humanist vocabulary of international law mobilized by the military as a strategic asset? How should we feel when the military “legally conditions the battlefield” by informing the public that they *are entitled* to kill civilians, or when our political leadership justifies warfare in the language of human rights? We need to remember what it means to say that compliance with international law “legitimizes.” It means, of course, that killing, maiming, humiliating, wounding people is legally privileged, authorized, permitted, and justified. At the same time, how should the U.S. military itself react to the escalating public demand that it wage war without collateral damage—or to the tendency to hold the military to an ever higher standard as its technological capabilities increase?

The legalization of modern warfare has a history. It is customary to relate changes in modes of warfare to the political history of ideas about sovereignty and the nation, and to changes in the material and technological capacities of the military profession. But the changing nature of warfare is also a function of changing ideas about law. The second chapter of this book explores that story. When law saw *itself* as an autonomous discipline, external to the institutions it regulated, it

was more difficult for legal ideas and rules to infiltrate the military professions, or to become the political vocabulary for assessing the legitimacy of strategy and tactic. When the legal profession understood law as a framework of sharp distinctions and formal boundaries, it was easier to think about war and peace as sharply distinguishable legal statuses, separated by a formal “declaration of war.”

As late as 1941, it seemed natural for the United States to begin a war with a formal declaration, as Congress did in response to Pearl Harbor. In the lead-up to both world wars, the United States carefully guarded our formal status as a “neutral” nation until war was declared. That Japan attacked the United States without warning—and without *declaring* war—in violation of our neutrality was a popular way of expressing outrage at the surprise attack. In the years since, the formal status of neutrality has eroded. Moreover, when Israel launched a preemptive strike against Iraq’s nuclear capability, there was plenty of outrage—but it was not expressed as a failure of warning or declaration. Something had changed. In the late nineteenth century, law provided a set of categories and distinctions whose violation could seem an outrage. These categories persisted thru the middle of the last century, and their vocabulary of distinction is with us still. Meanwhile, however, the broad legitimacy of warfare and military tactics were not evaluated in legal terms prior to the Second World War. A legal institutional process and doctrinal vocabulary for doing so had begun to be developed for that purpose by the start of the twentieth century, but it would only catch on after 1945. As a result, across the twentieth century, the legal experience of war reversed. The categories came to seem far too spongy to be the occasion for outrage, while in a broader sense, warfare had become a legal institution.

Across the twentieth century, more antiformal and flexible ideas about law joined hands with a more professional and bureaucratic idea about warfare to make the interrelationship between law and war more pronounced. And it became far easier to think of war as a matter of “more or less,” separated from peace (as belligerents were separated from neutral powers) more by the political claim to be engaged in the serious business of war than by any formal or institutional boundary. These changes had particular significance for efforts to restrain warfare through law. The humanist legal strategy of standing outside the military while insisting upon compliance with external humanitarian standards was joined by efforts to infiltrate the military with bureaucratic legal restrictions. Today’s humanitarians blend these two strategies, seeking to restrain war’s violence by oscillating between external denunciation and internal partnership with colleagues in the military. In large measure, their strategies have been successful. Military professionals find the same external standards conditioning the political environment within which war is fought, and use the same internal norms of conduct to mobilize and discipline the force. Military and humanitarian professionals are speaking the same legal vocabulary.

All this was in place by the end of the Cold War. Since then, of course, the international order has been dramatically transformed. The emergence of a global economic and commercial order has amplified the role of background legal regulations as the strategic terrain for transnational activities of all sorts, including warfare. Sharp boundaries between the political and institutional cultures of the first, second, and third worlds have dissolved, heightening the significance of the shared legal language of the world’s political elites. In the years after the fall of the Berlin Wall, the humanitarian institutions

and professions that call themselves “civil society” quickly became more prominent players on the world stage, heightening the significance of their humanitarian and human rights vocabulary for global political and legal debate. The legacy of successful—and decidedly unsuccessful—partnerships between global humanitarian, diplomatic, and military actors over the last decade has complicated all of their relationships to an increasingly shared legal vocabulary.

It is not new to observe that at the same time, the nature of warfare has itself changed. The Second World War—a “total” war, in which the great powers mobilized vast armies and applied the full industrial and economic resources of their nation to the defeat and occupation of enemy states—is no longer the prototype. Experts differ about what is most significant in the wars that have followed. Our wars are now rarely fought between roughly equivalent nations or coalitions of great industrial powers. They occur more often at the peripheries of the world system, among foes with wildly different institutional, economic, and military capacities. The military increasingly trains for tasks far from conventional combat: local diplomacy, intelligence gathering, humanitarian reconstruction, urban policing, or managing the routine tasks of local government. It is ever less clear where the war begins and ends—or which activities are combat, which “peacebuilding.” In combat, enemies are dispersed and decisive engagement is rare. Battle seems at once intensely local and global in new ways, as informal networks of fellow travelers exploit the financial and communications infrastructures of the global economy to bring force to bear here and there, or global satellite systems guide precision munitions from deep in Missouri to the outskirts of Kabul. Violence itself seems to follow patterns better understood by study of epidemiology or cultural fashion than military

strategy. Taken as a whole, the political, cultural, and diplomatic components of warfare, both globally and within the sphere of battle, have become more salient.

The third chapter of this book explores the significance of war's legalization for these developments. As many in our own military have already well understood, there are new opportunities for creative strategy. They have a term for the waging of war by law—"lawfare."¹ In today's asymmetric wars, moreover, law can be weaponized quite differently by our own technologically sophisticated forces and by the dispersed groups of terrorists and insurgents against whom they have found themselves in combat. At the same time, the legalization of warfare offers new opportunities for those who seek to restrict the use and violence of military force. Millions of people marched against the Iraq war buoyed by the claim that the war was an illegal violation of the UN Charter.

But there are not only opportunities. In the last part of the book, I focus on what can go wrong when humanitarian and military planners share the same legal strategic vocabulary—wrong for humanism, and wrong for warfare. The relatively stable modern legal management of warfare has been put under new stress with the rise of asymmetric modes of warfare. Indeed, the twentieth-century model of war, interstate diplomacy, and international law are all unraveling in the face of low-intensity conflict and the war on terror. Most worryingly, the legalization of warfare has made it difficult to locate a moment of responsible political discretion in the broad process by which humanitarians and military planners together manage modern war.