

LEBOHANG MATSOSO**TOPIC: BOOK REVIEW OF LAW AND WAR**

BOOK REVIEW OF DAVID KENNEDY'S OF LAW AND WAR (David Kennedy, Of War and Law (2006), Princeton University Press: Princeton (2006) ISBN: 0-691-12864-2 191 pp)

I. WAR TODAY!! Legal Context thereof

Of law and War is one of the most powerful works published in the field of International law and use of force, written by David Kennedy a professor at Harvard Law School where he teaches international law, international economic policy, legal theory, law and development and European law. He is also the author of numerous articles on international law and global governance. In reviewing the book in question it is imperative to enquire on some crucial questions which amongst others include, what are the author's main points? What kind of evidence does the author use to prove his points? How does this book compare to other books on the same topic?

In his book of War and Law, the author seems to have done his level best in redefining what law really is, he does this by taking into consideration the fact that we are definitely living in the age of world conflicts and as

such we cannot afford to overlook war and all its implications. The issues it touches are very current, this is so because we are living in the age whereby global conflicts have taken the centre stage; there have been misconceptions about what war is and what it entails in this day and age. It is as a result of which David Kennedy elucidates what war is today in an attempt to explore the intricacies of the correlation between law and war. According to Kennedy law is a profound topic, like truth, love or the divine.

David Kennedy's of War and Law is an interestingly challenging and thought provoking analysis of the evolving role which law plays in shaping law of armed conflicts otherwise known as humanitarian law. He offers a fresh view of the notion of law of war arguing that law, politics and war have merged in contemporary society. He further argues that war law has turned away from its traditional emphasis on rules and formalism, in favour of creating a political and ethical vocabulary for conflict. This vocabulary is then used to explain, and ultimately legitimize, conflict and violence. That is why he even asks the question, "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?” According to Kennedy law does no longer serve the purpose it was intended for, it is no longer just an external, ex-post judge of military behaviour, instead it has evolved to shape the institutional, logistical, and physical landscape of war both before and during the conflict. Kennedy therefore warns that this reliance on law has eroded personal decision making and responsibility amongst soldiers and politicians alike. Justifying violence exclusively through law limits a more robust appreciation of the other considerations of conflict. He concludes that in this new landscape, one must strive to understand both the roles and limitations of law.

It is worth mentioning that the book is divided into three chapters, the first chapter (pp. 13–45) examines war as a legal institution. Kennedy argues that law now manages the relationship between war and peace by creating the necessary institutional pathways through which war is made. David Kennedy, starts out criticizing 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 7/11 attacks, and even the notion that security is more a state of mind than a set of factual circumstances.

While law is often seen as a means to avoid and constrain war, *Of War and Law* clarifies this notion and 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.” It is this ultimate foundation of law that brings to our awareness the inextricable connection that 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 on the basis of that assertion that Kennedy makes it easy for the reader to understand the notion of war before forging ahead to explore the relationship between law and war.

He clarifies the concept of war as a legal institution, providing us with a starting point by going back almost two hundred years and paraphrasing Clausewitz, “war is still the continuation of politics by other means.” 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. 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. 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 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.

A. The Historical Context: How did we get here?

In the second chapter, *The Historical Context: How did we get here?* Kennedy provides the historical development 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. 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, 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 dialect of political judgment. The historical background is very much helpful as it enables the reader to draw a line of demarcation between law as it is now and how it used to be.

B. Changes in Legal Thought: An Opening for Humanitarianism

The second chapter also chronicles the rise of humanitarianism and legal realism as important theoretical frameworks relating to modern warfare. Ex facie it may seem as if though the two frameworks are different but as it will be shown below Kennedy is of the view that by speaking the same language they have to a greater extent become co dependent.

It is also important to mention that the author first starts by acknowledging that in the late nineteenth century changes in legal consciousness transformed what is meant for war to be exclusive act of a public sovereign. Most importantly, Kennedy goes further to answer unanswered questions about challenges facing humanitarian law . He mentions that humanitarians supported the legal separation of war from the domain of peace of the 19th century in an attempt to shrink the domain of war through what is termed moral suasion, agitations, shaming and proselytizing because in their view, blurring war with peace was both dangerous and immo-

ral. While on the other hand international lawyers have replaced the law of distinctions with what is described as a mere pragmatic unbundling of government action on both sides of the war peace and public/private divides.

It is an undeniable fact that the evoding of these different categories creates conflicts between different aspects of the law in war. Kennedy brings back to the readers memory the push to bomb civilians in Belgrade that supported Milosevic regime. It is on page 90 of the book that we get to understand clearly that his contention was based on extension of the Nuremberg principle of individual responsibility. Nuremberg principles were a set of guidelines for determining what constitutes a war crime. This therefore according to Kennedy is a complete opposite of the principle of law of armed conflict (jus in bello) of not targeting the civilians. In particular the Geneva Conventions and Protocols thereto. Article 51 thereof provides in clear and unambiguous terms that the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.

In so far as application is concerned law in war can lead to rather perplexing situations that is why Kennedy asks a question whether it is sensible to clear a cave with a fire

bomb because teargas lawful when policing is unlawful in combat? It would therefore seem that according to Kennedy the problems which he observes are those that come about from the law in war as opposed to the law of war, the latter being governed largely by the military professional community. At page 107-108 Kennedy acknowledges that the challenges and perhaps put more clearly the problems of the humanitarian voice within the context of the law are more complicated to concisely mention. That is why he mentions that the humanitarian voice is restricted/limited by the problem that force can have humanitarian uses in the wicked world and that moral determination can be strengthened when individuals kill and die for a given value.

War has indeed changed from industrial scale world wars to the asymmetrical and metaphorical wars of the post colonial period according to David Kennedy. Resultantly members of the military stresses the continuities of transition for war and peace. It stands to reason that according to Kennedy at page 111 the term post conflict is a modern misnomer because it implies the continuation of the conflict by other means.

It is equally imperative to proceed and discuss how Kennedy talks about the institutional framework. As it is known that after

World War II and the rise of the United Nations the law renamed the “Law of Force”, thereby allowing it to be applicable to conflicts that were not previously regarded as law. Kennedy further argues that the UN charter itself provides the institutional framework not the United Nations as a body. He goes even further to mention problems brought about by the UN which amongst others include the fact that attempts to steer a neutral path has become a bit more complicated.

On the other hand for those who are Pro UN and critics of the administration of Bush, this could be argued as some form of contradiction in that the UN seems to be repeating the famous words of President George W Bush which are to the effect “You are either with us or against us”. Kennedy argues that the UN is dismally failing to be the accurate proxy for both humanitarian outcomes and would public opinion.

Kennedy asserts that the law of war has become the law in war’s destiny, in effect impacting how it is interpreted. However the question which still remains unanswered is whether the interpretations are per se inaccurate?

II. LAWFARE

Chapter three mainly focuses on the results of the contemporary legal influence on war, one of the most significant effect is what Kennedy calls the use of lawfare which can simply be explained as the implementation of war by means of the law. It doesn't take a rocket scientist to tell that it is actually a combination of the words "law" and "warfare". Kennedy highlights the bureaucratic nature of war, that is to say how the impact of such bureaucratic institutional structures influence not only the course but also the outcomes of the armed conflicts. Kennedy mentions that the involvement in law can either be strategic in situations whereby it comes to debates around the legitimacy of the conflict using the language of the law and war. But is also becomes tactical in situations such as buying of satellite information to deny one's adversary access to it, certification of specific group as terrorist. The law of war according to Kennedy provides us with the vocabulary for accessing the legitimacy of a given conflict. It can therefore be derived from Kennedy's book that lawfare is as an illegitimate use of domestic international law with the intention of damaging an opponent and on the other hand it can be described as simply the use of law as weapon of war.

CONCLUSION

In a nutshell, when all is said and done, it can be concluded from the book that Kennedy attempted to at least explore the political context within which merger of law and war has become essential. Kennedy's contribution to the analysis of the role of law in military decision-making is not only original but educational and can illuminate the mental faculties of many critical legal thinkers. His methods of inquiry give rise to a unique and engaging perspective to the subject matter and his conclusions as to the interplay of politics and law are not only enlightening but also informative. Just like David Kennedy, Michael Byers shares same views as in his epilogue he contends that super powers like the United States ignore international law if it does not serve their immediate interests, it is as a result of which the world witnesses the situation whereby unjust military pursuits proceed under the guise of legal legitimacy. Professor Kennedy's book is therefore highly recommended, and as such it deserves close and thoughtful reading by a large audience in the legal fraternity.