

# On War as Law and Law as War

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Loin des anciens assassins.

A. Rimbaud, 'Barbare', *Illuminations* (1873–5)

Voici les temps des *Assassins*.

A. Rimbaud, 'Matinée d'ivresse', *Illuminations* (1873–5)

## I. INTRODUCTION

A *locus classicus* of international law, the study of the regulation of the legality of the use of force has an unavoidable ring of tragic fanciness about it. War, as acknowledged by David Kennedy in the very first sentence of his book, is indeed 'a profound topic – like truth, love, death or the divine'. A Pandora's box of multiple distilled intellectual emotions behind which lurk the horrid memories of its survivors, war only truly breathes in the mirrors of the mutilated, in the eyes of the tortured, in the memories of the displaced, in withering flowers over graves crowned, most of the time, by religious symbols. A vague intellectual scent of it, a sort of aseptic intellectual variant, still remains, nonetheless, a field of professional interest for international lawyers.

The state of the art on an art of the law as the regulation of the threat and use of force in international relations is in a state of doctrinal exception. The classical legal framework provided by the UN Charter is once again the scenario of a multifaceted doctrinal tour de force. Crafted by a group of neo-conservative theorists of international law, the 2002 and 2006 National Security Strategies of the United States<sup>1</sup> seemingly aim, to echo a well-known Condoleezza Rice ready-to-quote statement, at shifting its tectonic plates. Statements like that made by the former president of the Inter-American Court of Human Rights, Antonio Cançado Trindade, show the degree of perceived doctrinal threat that this now seemingly reversed 'present

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1 *The National Security Strategy of the United States of America* (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>; *The National Security Strategy of the United States of America*, (2006) available at <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>.

danger<sup>2</sup> poses in this area: ‘Every true jus-internationalist has the ineluctable duty to stand against the apology of the use of force, which is manifested in our days through distinct “doctrinal” elaborations’.<sup>3</sup> The use-of-force dimension has, nonetheless, been depicted as being merely one of the components of a wider ‘doctrine of illimitable sovereignty’<sup>4</sup> as put forward by ‘a newly empowered radical right’,<sup>5</sup> a ‘bid for legitimacy through defiance’<sup>6</sup> by the Bush Jr administration that disguises ‘imperialism as self-defence’,<sup>7</sup> the fruit of ‘an objectively organised mode of academic activism around a comprehensive shift of methodological perspectives’<sup>8</sup> in the first ‘neo-conservative interregnum’<sup>9</sup> of the twenty-first century.

Against this backdrop, and being in Kennedy’s own assessment, ‘the twentieth-century model of war, interstate diplomacy, and international law are all unravelling in the face of low-intensity conflict and the war on terror’ (p. 12), the introductory part of this essay will attempt to procure a synthesized perspective on the doctrinal state of the art regarding the contours of the ‘laws of war’ or *jus ad bellum*. By providing such a background perspective, one will be able to contrast the author’s own views of the subject matter with the major axis of the resulting doctrinal map. While, in our assessment, Kennedy’s own alternative perspectives deserve not to appear devoid of such a previous informative effort of doctrinal contextualization, the rest of this essay will be dedicated to examining and explaining the author’s present work on its own merits. It will, furthermore, attempt to locate it in a broader scholarly field in the light of some of the major influences that appear to nurture Kennedy’s own challenging perspective on the interface of war and law for the twenty-first century, as well as to present the context in which his approach would succeed in channelling a convincing scholarly call to ‘experience politics as our vocation and responsibility as our fate’ (p. 172).

## 2. THE STATE OF THE ART ON AN ART OF THE LAW

The Afghanistan and Iraq war wars have been the new millennium’s most prominent occasions so far for a debate in which an array of doctrinal positions have used ‘the legal tools for defending and denouncing military action’ in a common legal jargon that ‘has itself become a political vocabulary for assessing the legitimacy of

2 The use of the term ‘present danger’ in this context is intended to denote ironically the impact on the field of the use of force of the set of foreign-policy prescriptions advocated in 2000 by a number of highly influential neo-conservative thinkers. See R. Kagan and W. Kristol (eds.), *Present Dangers: Crisis and Opportunity in American Foreign and Defense Policy* (2000).

3 A. A. Cançado Trindade, ‘The Primacy of International Law over Force’, in M. G. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber Amicorum Lucius Caflish* (2007), 1037, at 1054.

4 T. M. Franck, ‘Is Anything “Left” in International Law?’, (2005) *Unbound: Harvard Journal of the Legal Left* 59, at 61.

5 *Ibid.*

6 N. Berman, ‘Intervention in a Divided World: Axes of Legitimacy’, (2006) 17 *EJIL* 743.

7 A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), 291.

8 A. Lorite Escorihuela, ‘Cultural Relativism the American Way: The Nationalist School of International Law in the United States’, (2005) 5 *Global Jurist* 1, at 114

9 I. de la Rasilla del Moral, ‘El interregno neoconservador’, preliminary study for R. Kagan and W. Kristol (eds.), *Peligros Presentes* (2005), 3.

military operations' (p. 39). The current expert dissension on *jus ad bellum* among background international legal elites, as opposed to the 'expert consensus' (p. 17), that would – in transposing Kennedy's 'inter and intra-elite' (p. 25) sociological perspective anchored on a common vernacular of the political context for war – determine the share of influence pertaining to the *invisible college* in this domain, could be contemporarily embodied in three broadly generic doctrinal postures. A doctrinal tag will be attached to each of the current positions that, within the general framework of the law of force, concerns itself with the laws of war or *jus ad bellum*, as traditionally distinguished from the laws in war – *jus in bello* or law of armed conflict.

The revisionist labelling in this domain would today correspond to a doctrinal trend first captured as 'hegemonic international law'<sup>10</sup> and subsequently examined at length by Alejandro Lorite, in terms of the 'American nationalist school of international law'.<sup>11</sup> Identified with the post-9/11 official US government stance towards the legality of warfare, the doctrinal work of John C. Yoo stands as one of the paramount expositions of this position. This author is technically skilled in both 'the inner and outer realm',<sup>12</sup> with a special stress on his 'inner realm'-oriented legal endeavours to aggrandise the US president's powers vis-à-vis formally restraining constitutional and domestic judicial reviews.<sup>13</sup> Yoo's interpretation of law in war so as to deny prisoner-of-war status to terrorists and Taliban forces, and their ensuing legal status as 'unlawful combatants',<sup>14</sup> pertains to the *jus in bello* realm. This acknowledged, the first component that identifies his work in the revisionist's *jus ad bellum* category is his notorious defence of the existence of 'sufficient legal authority for the 2003 conflict with Iraq'.<sup>15</sup> His is a defence that, although it argumentatively includes the US government's official legal position based on the bearing of UN Security Council Resolution 1441 (2002) on Resolutions 687 (1991) and 678 (1990),<sup>16</sup> reaches outspokenly to the legality of anticipatory self-defence 'beyond mere imminence'.<sup>17</sup> His consideration of the 9/11 terrorist acts as amounting to armed attacks that, independently of their attribution to a state actor, trigger the state's inherent right to self-defence,<sup>18</sup> constitutes the second broad component that categorizes his position in the law of war's revisionist category. This position is, however, broadly shared, although not solely, by many of those to whom the general adaptationist's label<sup>19</sup> could be attached.<sup>20</sup> Not so shareable by the so-called adaptationist position appears, nonetheless, Yoo's harshly critical reaction to the reforms proposed by the former

10 D. F. Vagts, 'Hegemonic International Law' (2001) 95 AJIL 843, at 884.

11 Lorite, *supra* note 8.

12 For the use of this terminology to refer respectively to 'foreign affairs law' and 'foreign policy', see *ibid.*

13 J. C. Yoo, *The Powers of War and Peace* (2005).

14 J. C. Yoo and J. C. Ho, 'The Status of Terrorists', (2003–4) 44 *Virginia Journal of International Law* 207.

15 J. C. Yoo, 'International Law and the War in Iraq', (2003) 97 AJIL 563, at 564.

16 R. Wedgwood, 'The Multinational Action in Iraq and International law', in A. Thakur and W. Pal Singh Sidhu (eds.), *The Iraq Crisis and World Order: Structural, Institutional and Normative Challenges* (2006), 420.

17 See Yoo, *supra* note 13.

18 See Yoo and Ho, *supra* note 14, at 207–15.

19 M. Glennon, 'Platonism, Adaptivism, and Illusion in UN Reform', (2006) 6 *Chicago Journal of International Law* 613.

20 T. M. Franck, 'Terrorism and the Right to Self-Defence', (2001) 95 AJIL 839.

UN Secretary-General's *In Larger Freedom*<sup>21</sup> and the High-Level Panel's reports.<sup>22</sup> These, according to Yoo, constitute a failed attempt to revisit an outmoded UN Charter-based 'law enforcement paradigm toward the use of force'<sup>23</sup> that does not take account of the realities of new 'political and technological developments'.<sup>24</sup> An adaptationist's defence of the legality of the anticipatory use of force in terms of imminence would thus fail to satisfy Yoo's preferred 'cost-benefit analysis of expected harm'<sup>25</sup> to replace the criterion in the *Caroline* case. This author also opposes the deferral to the Security Council of the 'preventive' and 'protective' – the latter as such inspired by the 'responsibility to protect' idearium – uses of force so highly praised by Anne Marie Slaughter,<sup>26</sup> as they would, in Yoo's analysis, constitute obstacles to the 'development of new international law doctrine through practice'.<sup>27</sup> After minimizing the challenge posed 'to the legitimacy of international law pertaining to the use of force by states' by 'the jurisprudential theories of a few scofflaws',<sup>28</sup> an adaptationist would retort by identifying today's challenges to legitimacy as falling into the categories of both humanitarian intervention and self-defence against an anticipated armed attack. For an adaptationist, the former is, in view of the Security Council's veto-paralysis, a domain in which 'the rules have adapted',<sup>29</sup> while the latter constitutes an area where 'the law is adapting, it is bound to adapt, and its legitimacy will be enhanced thereby'.<sup>30</sup>

As is widely known, both the revisionist's and the adaptationist's categorized 'claims of legal change'<sup>31</sup> in this field have been opposed by the jurisprudence of the International Court of Justice (ICJ), 'understood as a statement of the law as it now stands'.<sup>32</sup> It becomes, thus, worthwhile briefly to revisit recent ICJ jurisprudence to frame this introductory overview of the doctrinal state of the art in this domain. In its Advisory Opinion of July 2004, the ICJ stated that 'Article 51 of Charter thus recognises the existence of an inherent right of self-defence in the case of armed attack by one state against another state'.<sup>33</sup> This has been broadly interpreted as opposing the broadening of self-defence to cover non-state acts when these are not attributable to a state.<sup>34</sup> This interpretation is reaffirmed and consolidated by the

21 *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General, UN Doc. A/59/2005 (2005).

22 *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004).

23 J. C. Yoo, 'Using Force', (2004) 71 *University of Chicago Law Review* 729, at 797.

24 J. C. Yoo, 'Force Rules: UN Reform and Intervention', (2005–6) 6 *Chicago Journal of International Law* 641, at 649.

25 *Ibid.*, at 642.

26 A. M. Slaughter, 'Security, Solidarity and Sovereignty: The Grand Themes of UN Reform', (2005) 99 *AJIL* 619.

27 See Yoo, *supra* note 13, at 661.

28 T. M. Franck, 'The Power of Legitimacy and the Legitimacy of Power in an Age of Power Disequilibrium', (2006) 100 *AJIL* 88, at 99.

29 *Ibid.*, at 100.

30 *Ibid.*, at 101.

31 A. Orakhelashvili, 'Legal Stability and Claims of Change: The International Court's Treatment of *Ius ad Bellum* and *Ius in Bello*', (2006) 75 *Nordic Journal of International Law* 371.

32 *Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, para. 33 (Judge Higgins, Separate Opinion).

33 *Ibid.*, para. 139.

34 For a defence, see I. Scobbie, 'Words My Mother Never Taught Me: In Defence of the International Court', (2005) 99 *AJIL* 76.

Court in its judgment of December 2005 in the *Congo–Uganda* case, in which the ICJ rejected Uganda’s claims of self-defence since ‘the preconditions for the exercise of self-defence’, also termed ‘the legal and factual circumstances for the exercise of a right of self-defence’, did not exist on the basis that the relevant acts were not attributable to a state.<sup>35</sup> A further argument in defence of this position could be found in the ICJ judgment of February 2007 in the *Bosnia and Herzegovina v. Serbia and Montenegro* case. In this instance the Court insisted on the *Nicaragua* case standard of attribution by subjecting it directly to the ‘overall control’ test set up by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case in terms that seemingly tighten up even more the state attribution requirement in this area: ‘In this regard the “overall control” test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State’s organs and its international responsibility.’<sup>36</sup> As for the much debated issues of anticipatory and preventive self-defence, in the recent *Congo–Uganda* case the ICJ seemingly discarded even considering the former as a legal issue in stating, ‘Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down.’<sup>37</sup> Less definitive appears to be its analysis of the legality of anticipatory self-defence or ‘anticipated attack’:<sup>38</sup>

As was the case also in the *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) case, ‘reliance is placed by the Parties only on the right of self-defence in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised’ (I.C.J. Reports 1986, p. 103, para. 194). The Court there found that ‘[a]ccordingly [it] expresses no view on that issue’. So it is in the present case.<sup>39</sup>

In completing this brief general survey of the state of the art as far as the much debated *jus ad bellum* is concerned, one could thus attach the conservationist label to those authors who, like A. Orakhelashvili, seek explicit guidance in a strict reading of the Court’s *dicta* in this domain and consider that ‘the approach based on the criteria of strict legality is the only permissible approach in terms of the application of *jus ad bellum*’.<sup>40</sup> The labels of ‘revisionists’, ‘adaptationists’, and ‘conservationists’, although perhaps loosely indicative, have not been put forward, however, to be understood as watertight doctrinal categories. Suffice it to note how Judge Simma argued that the restrictive reading of Article 51 found in the *Wall* opinion ‘ought urgently to be reconsidered’ ‘in the light of more recent developments not only in State practice but also with regard to accompanying *opinio juris*’.<sup>41</sup> This three-level categorization should, therefore, be seen within the multifaceted and cross-bred spectrum covered

35 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, paras. 146–147 (not yet published).

36 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para 406 (not yet published).

37 *Armed Activities*, *supra* note 35, paras.146–147.

38 *Ibid.*, at para. 143.

39 *Ibid.*, at para. 143.

40 Orakhelashvili, *supra* note 31, at 375.

41 *Armed Activities*, *supra* note 35 (Judge Simma, Separate Opinion, para. 11). For a doctrinal defence of this position see C. J. Tams, ‘Note Analytique – Swimming with the Tide or Seeking to Stem it? Recent ICJ Rulings on the Law of Self-Defence’, (2005) 18 *Revue québécoise de droit international* 275.

by the extensive doctrinal work in the field of the law of war. The acknowledged aim of this introduction was for it to serve as an instrumental background against which to place the book under review. The question that ensues is, thus, that of understanding how David Kennedy approaches in his book the doctrinal polemic involving the law of force as the provider ‘of the best-known legal tools for defending and denouncing military action’ (p. 39).

Kennedy begins by coldly contradicting those opponents of the Bush administration ‘that have routinely claimed that the United States has disregarded these rules’ (p. 40) by pointing out that both opponents and supporters of the Iraq war as well as both opponents and supporters of the great panoply of US legal measures related to the war on terror ‘were playing with the same deck’ (p. 40) in presenting ‘professional arguments about how recognised rules and standards, as well as recognised exceptions and jurisdictional limitations, should be interpreted’ (p. 40). The author’s only concession with reference to the Bush administration’s legal advisers is to point out that ‘as professionals, these lawyers failed to advise their client adequately about the consequences of the interpretations they proposed, and about the way others would read the same texts – and their memoranda’ (p. 39). Thus Kennedy does not adopt any legal position to the detriment of any other, as his assessment does not seemingly pretend to persuade his reader at the level of the world of legal validity presented in the vocabulary of the UN Charter. The extent to which that excludes the author from the category of being a ‘true jus-internationalist’, according to A. Cançado Trindade’s understanding of those who actually ‘comply with the ineluctable duty to stand against the apology of the use of force which is manifested in our days through distinct “doctrinal” elaborations’,<sup>42</sup> is not for us to judge. Suffice it to note that the starting point of Kennedy’s convoluted perspective on the matter is that ‘the law of force’ is a form of ‘vocabulary for assessing the legitimacy’ (p. 41) of a form of conduct (e.g. a military campaign) or ‘for defending as well as attacking the “legality”’ (p. 41) of an act (e.g. distinguishing legitimate from illegitimate targets) in which the same law of force becomes a two-edged sword, everybody’s and no one’s strategic partner in a contemporary world where ‘legitimacy has become the currency of power’ (p. 45). For the author, in today’s age of ‘lawfare’ (p. 12), ‘to resist war in the name of law . . . is to misunderstand the delicate partnership of war and law’ (p. 167). In Kennedy’s view, therefore, ‘there is little comfort in knowing that law has become the vernacular for evaluating the legitimacy of war and politics where it has done so by itself becoming a strategic instrument of war and the continuation of politics by similar means’ (p. 132).

### 3. LAW AS A MODERN LEGAL INSTITUTION

*Of War and Law* seems, indeed, to be animated by a certain philosophical perplexity regarding the ambiguous relation between the apparently antithetical nature of the terms appearing in its title. Since antiquity both jurists and philosophers have taught

<sup>42</sup> Cançado Trindade, *supra* note 3, at 1054.



that the law's *raison d'être* is that of making social peace possible, of overcoming what would later be commonly known as the Hobbesian state of nature: *bellum omnium contra omnes*. Kant noted that law should be perceived first and foremost as a pacifying tool – in other words, ‘the establishment of peace constitutes, not a part of, but the whole purpose of the doctrine of law’<sup>43</sup> – and Lauterpacht projected that same principle onto the international sphere: ‘the primordial duty’ of international law is to ensure that ‘there shall be no violence among states’.<sup>44</sup> The paradox lies, of course, in that law performs its pacifying function not by means of edifying advice, but by the threat of the use of force. In this sense, as Kennedy points out, ‘to use law is also to invoke violence, at least the violence that stands behind legal authority’ (p. 22). Hobbes himself never concealed the fact that the state, ‘that mortal god, to which we owe under the immortal God our peace and defence’, would succeed in eradicating inter-individual violence precisely due to its ability to ‘inspire terror’;<sup>45</sup> but Weber – ‘the State is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory’<sup>46</sup> – Godwin,<sup>47</sup> and Kelsen<sup>48</sup> have also provided support for the same proposition. This ambivalent and paradoxical relationship between law and violence, which is obvious in the domestic or intra-state realm, becomes even more obvious in the interstate domain with its classical twin antinomy of *ubi jus, ibi pax* and *inter arma leges silent* until the law in war emerges as a bold normative sector which dares to defy this conceptual incompatibility; even war can be regulated, be submitted to conditions and limitations. The hesitations of Kant in addressing *jus in bello*<sup>49</sup> or the very fact that the Latin terms *jus ad bellum* and *jus in bello* were coined, as R. Kolb has pointed out,<sup>50</sup> at relatively recent dates, seem to confirm that this has never been per se an evident aspiration.<sup>51</sup>

43 I. Kant, *Die Metaphysik der Sitten*, in I. Kant, *Kants Werke* (1968), 355.

44 H. Lauterpacht, *The Function of Law in the International Community* (1933), 64.

45 ‘[The Leviathan] hath the use of so much power and strength conferred on him, that by terror thereof, he is enabled to perform the wills of them all, to peace at home, and mutual aid against their enemies abroad’. T. Hobbes, *Leviathan*, in T. Hobbes, *The English Works of Thomas Hobbes of Malmesbury*, ed. W. Molesworth (1966), III, at 158.

46 Quoted by T. Couture, ‘State’, in C. B. Gray (ed.), *The Philosophy of Law: An Encyclopedia* (1999), II, at 836.

47 ‘The object of government is the suppression of such violence as might . . . bring into jeopardy the well being of the community or its members; and the means it employs are constraint and violence of a more regulated kind’. W. Godwin, *An Enquiry Concerning Political Justice* (1976).

48 ‘Ist das Recht aber – rein positivistisch betrachtet – nichts anderes als eine äussere Zwangsordnung, dann wird es nur als eine spezifische soziale Technik begriffen: der erwünschte soziale Zustand wird dadurch herbeigeführt, dass an das menschliche Verhalten, das das kontradiktorische Gegenteil dieses Zustandes bedeutet, ein Zwangsakt (das ist, die zwangsweise Entziehung eines Gutes: Leben, Freiheit, wirtschaftlicher Wert) als Folge geknüpft wird’. H. Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik* (1934), 28–9.

49 ‘Ein Gezetz in diesem gesetzlosen Zustande zu denken, ohne sich selbst zu widersprechen’. Kant *supra* note 43, at 347.

50 This author dates the origin of these Latin labels at around 1930. R. Kolb, ‘Origin of the Twin Terms Jus ad Bellum/Jus in Bello’, (1997) *International Review of the Red Cross* 553. The expression *jus belli* is, of course, centuries old, as shown, for example, by the titles of the works of Francisco de Vitoria, *Selectio de iure belli* (1539), and Hugo Grotius, *De iure belli ac pacis* (1625).

51 ‘[T]he relatively recent coinage of Latin phrases to describe these fields of law and the more recent renaming of *jus in bello* as “international humanitarian law” appear to reflect a persistent discomfort about the semantic conjunction of law and war.’ N. Berman, ‘Privileging Combat? Contemporary Conflict and the Legal Construction of War’, (2004–5) 43 *Columbia Journal of Transnational Law* 1.

Kennedy explains his own calling as international lawyer as being partly inspired by his will to participate in the law's civilizing mission (p. 29)<sup>52</sup> as something utterly distinct from war:

We think of these rules [law in war] 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. (p. 167)

The author notes how this virginal confidence in the pacifying efficiency of international law – its presumed ability to forbid, limit, humanize war 'from outside' – becomes progressively nuanced, eroded, almost discredited by a series of considerations. The disquieting image of the 'delicate partnership of war and law' becomes more and more evidenced; the lawyer who attempts to regulate warfare inevitably also becomes its accomplice. As Kennedy puts it,

The laws of force provide the vocabulary not only for restraining the violence and incidence of war – but also for waging war and deciding to go to war. . . . [L]aw no longer stands outside violence, silent or prohibitive. Law also permits injury, as it privileges, channels, structures, legitimates, and facilitates acts of war. (p. 167)

Unable to suppress all violence, law typifies certain forms of violence as legally admissible, thus 'privileging' them with regard to others and investing some agents with a 'privilege to kill' (p. 115). Law thereby becomes, in Kennedy's view, a tool not so much for the restriction of war as for the legal construction of war.<sup>53</sup>

Elsewhere we have labelled Kennedy 'a relative outsider'<sup>54</sup> who, peering from the edge of the vocabulary of international law, tries to 'highlight its inherent structural limits, gaps, dogmas, blind spots and biases', as someone 'specialised in speaking the unspeakable, disclosing ambivalences and asking awkward questions'.<sup>55</sup> The 'unspeakable', in the case of the 'law of force', is precisely, in Kennedy's view, this process of involuntary complicity with the very phenomenon one supposedly wants to prohibit. Prepared to 'stain his hands' *à la* Sartre, in his attempt to humanize the military machine from within, to walk one step behind the soldier reminding him constantly, as an imaginary CNN camera, of the legal limits of the legitimate use of force, the lawyer starts to realize, in the author's view, that he is becoming but

52 'As an international lawyer, I trained to be a professional outsider to warfare . . . . When I studied history and political science, war and peace seemed utterly distinct: "Make peace, not war" was the slogan.'

53 As was also noted by Nathaniel Berman. '[L]aw's role in relation to war is primarily not one of opposition but of construction – the facilitation of war through the establishment of a separate legal sphere immunizing some organized violence from normal legal sanction.' See Berman, *supra* note 51, at 1. 'I argue that it is misleading to see law's relationship to war as primarily one of the limitation of organized violence . . . . Rather than opposing violence, the legal construction of war serves to channel violence into certain forms of activity engaged in by certain kinds of people, while excluding other forms engaged in by other people.' *Ibid.*, at 4–5. Kennedy expressly acknowledges Berman's influences on his own work. See Kennedy, *Of War and Law*, at x.

54 F. J. Contreras and I. de la Rasilla, 'Humanitarismo crítico y crítica del humanitarismo', preliminary study for D. Kennedy, *El lado oscuro de la virtud*, trans. F. J. Contreras and I. de la Rasilla (2007), 11, at 30. See, e.g., 'I wanted to be in the field, but I wanted to develop and make known an intuition about the field's limits and dark side that seemed impossible to speak in the disciplinary vocabulary.' D. Kennedy, 'Thinking against the Box, (1999–2000) 32 *New York University Journal of International Law and Politics* 397.

55 Contreras and de la Rasilla, *supra* note 54, at 28.



an accessory to the war machine. Kennedy maintains that law, in its attempt to subject war to its rule, has been absorbed by it and has now become but another war instrument (p. 32);<sup>56</sup> law has been weaponized (p. 37).<sup>57</sup> Contemporary war is by definition a *legally organized* war: ‘no ship moves, no weapon is fired, no target selected without some review for compliance with regulation – not because the military has gone soft, but because there is simply no other way to make modern warfare work. Warfare has become rule and regulation’ (p. 33). War ‘has become a modern legal institution’ (p. 5), with the result that the international lawyer finds himself before an evident instance of Marxian reification, in other words ‘the consolidation of our own products as a material power erected above us beyond our control that raises a wall in front of our expectations and destroys our calculations’.<sup>58</sup> Ideas and institutions develop ‘a life of their own’, an autonomous, perverted dynamism.

#### 4. AMBIGUITIES AND CONTINGENCIES OF THE CONTEMPORARY LAW OF WAR

The institutional scheme and the rules of the use of force set up by the UN Charter were initially conceived as a sincere attempt definitively to overcome interstate war. The UN purpose, as stated in the Preamble of the UN Charter – ‘to save succeeding generations from the scourge of war’ – was that the age of war be superseded by the age of collective security. The system was, as noted by Franck, a two-tiered one. The upper tier contained ‘a normative structure for an ideal world’; it included the absolute banning ‘of the use of force against the territorial integrity or political independence of any state’ (Art. 2(4)) and a mechanism of collective (diplomatic and/or military) action against states having violated such prohibition (Arts. 39–43). The lower tier, by contrast, represented the interim preservation of an older international legal concept (dating from the ‘age of war’): the individual or collective right to self-defence (Art. 51). We are thus confronted by a hybrid system (‘a bifurcated regime’<sup>59</sup>), halfway between the ‘age of war’ and the ‘age of collective security’. This is a system which has supposedly failed, partly due to causes not foreseeable in 1945: the outbreak of the Cold War made agreed action by the permanent members of the

56 ‘For those of us outside the military who think about law restraining warfare, it is easy to overlook the many war-generative functions of law: the background rules and institutions for buying and selling weaponry, recruiting soldiers, managing armed forces, encouraging technological innovation, making the spoils of war profitable, channelling funds to and from belligerents or organizing public support. The military also turns to law to discipline the troops, to justify, excuse and privilege battlefield violence, to build the institutional and logistical framework from which to launch the spear.’

57 ‘When the United States uses the Security Council to certify lists of terrorists to force seizure of their assets abroad, we might say that they have weaponized the law. . . . Military action has become legal action, just as legal acts have become weapons.’

58 K. Marx, *Die deutsche Ideologie*, in K. Marx and F. Engels, *Werke* (1978), III, 33. For an application of Marxian analysis to international law see S. Marks, ‘Big Brother is Bleeping Us – With the Message that Ideology Doesn’t Matter’, (2001) 12 EJIL 1, at 109. See also C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2005); and M. Koskenniemi, ‘What Should International Lawyers Learn from Karl Marx?’, (2004) 17 LJIL 229. Further reading would include B. Bowring, ‘Ideology Critique and International Law: Towards a Substantive Account of International Human Rights’, in C. Warbrick and S. Tierney (eds.), *Towards an International Legal Community: The Sovereignty of States and the Sovereignty of International Law* (2006), 193; and S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008).

59 T. M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002), 3.

Security Council almost unthinkable; confrontational interstate aggressions were replaced by more subtle techniques of indirect conflict (the export of insurgency, covert meddling in civil wars, etc.); and the development of nuclear and chemical weapons convinced some of the necessity of defending a broader interpretation of the right to self-defence in the light of Article 51, including a 'right to anticipatory self-defence'.<sup>60</sup> Thus Kennedy can argue that 'what began as an effort to monopolise force has become a constitutional regime of legitimate justifications for warfare' (p. 79). The UN Charter, far from ensuring the dawning of an 'age of collective security', has rather become the contemporary legal language for the justification and organization of war: 'it is hard to think of a use of force that could not be legitimated in the Charter's terms' (p. 80). In order to support his argument Kennedy points out how 'the Bush and Blair administrations argued for the [Iraq] war in terms drawn straight from the UN Charter, and they issued elaborate legal opinions legitimating the invasion in precisely those terms' (p. 40).

Once Kennedy has stressed what we could term the teleological ambiguity of the law of war, he proceeds with his deconstructive analysis by noting a second type of ambivalence or relativity in *jus belli*: the historical and political contingency of all its categories.<sup>61</sup> These categories have been rightly reshaped by N. Berman into two major questions – what is a war? who is a warrior? A shift from an initial formalist-statist framework to what we could label a 'factualist-pluralist' approach is observable in the treatment of these questions during the twentieth century. Thus, prior to the Second World War, *jus belli* granted states the monopoly of the combatant's privilege: states themselves determined what was a war and officially declared whether they were at war, and only their regular armies were recognized as combatants, answering, thereby, the question of 'who is a warrior?' This standpoint was 'formalist' insofar as the legal existence or non-existence of a war depended on the formal declaration of war by the states involved in the conflict, according to the traditional 'state of war doctrine'. But, as the twentieth century advanced, states failed increasingly to issue formal declarations of war (e.g. the Japanese attack on Pearl Harbor) (p. 67).<sup>62</sup> Accordingly, *jus in bello* had to find new empirical criteria enabling jurists to ascertain objectively the existence of a conflict (and, consequently, the applicability of its rules), irrespective of the formal recognition of a 'state of war' by governments. Thus common Article 2 of the Geneva Conventions (1949) establishes that the Conventions are applicable to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even

60 '[T]he acceleration and escalation of means for launching an attack soon confounded the bright line drawn by the law, effecting a reductio ad absurdum that, literally, seems to require a state to await an actual attack on itself before instituting countermeasures. Inevitably, states responded to the new dangers by claiming a right of "anticipatory self-defence"'. Ibid., at 4.

61 Kennedy's approach is here similar to that adopted by Berman. Compare: '[T]he forms of this legal construction of war are highly contingent, the subject of historical variation and political contestation' (Berman, *supra* note 51, at 1). See also 'The forms of this legal construction are highly contingent, both in the sense of having varied historically and in the sense of having been contested within each period. Every time *jus in bello* was renegotiated . . . the scope of the combatants' privilege was hotly contested.' Ibid., at 6.

62 'The notion that a public declaration by a sovereign marks the boundary between war and peace now seems unduly formal and remarkably out of touch with the play of forces within and without sovereign territories that generate interstate violence.'

if the state of war is not recognised by one of them'. While this formulation was still characterized by a state bias – as it presupposed that the subjects of the conflict would at any rate be states – since then various non-governmental players have been pressing for an extension of the legal categories of 'war' and 'combatant'.<sup>63</sup> As a result, the 1977 Protocol I to the Geneva Conventions added 'armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'. This criterion seemed, however, to render the applicability of the Conventions dependent on the motivations that allegedly inspired the fighters of a non-governmental guerrilla war – that is, aspects that were traditionally dealt with by *jus ad bellum*, in other words, in Francisco de Vitoria's terminology, the problem of the 'just entitlements', as A. Sofaer has noted.<sup>64</sup> No significant progress towards the 'objectivity' promised by the new 'factualist-pluralist' approach has therefore seemingly been made. If the anti-colonial or anti-racist fighters are 'combatants' as far as *jus in bello* is concerned, should fighters struggling for other causes not now be counted as 'combatants' too? Are there any limits whatsoever to those claimed causes?<sup>65</sup> This relativity, of course, not only applies to the subjects of *jus in bello* but also affects its contents. Against this backdrop, Kennedy stresses that both the actual and the potential subjects of law in war will now be entitled to hold different views as to the limits of tolerable military conduct. If, from a Western perspective, the tactics of the Afghan or Iraqi insurgents appear intrinsically perfidious – terrorists disguising themselves as civilians, or using civilians as human shields, immolating themselves in suicide attacks, shooting from mosques and so forth – the insurgents would retort that only the use of those tactics could enable them to offset the huge technological asymmetry of the opposing forces (p. 139).<sup>66</sup> They would also claim that, from their perspective, perfidy rather lies in bombing from an altitude of 5,000 metres – which trades the security of the pilot for the increased likelihood of 'collateral damage' – checking civilians systematically in search of weapons, and so on. Contemporary law in war turns out to be, in the author's formally egalitarian perspective, the legal language in which a global 'conversation' about the moral limits of military conduct

63 The evolution is correctly summarized by Berman in these terms: '[I]ts [*ius in bello*'s] movement from subjective determinations by sovereigns of the existence of war to purportedly objective evaluations of the facts of armed conflicts; from limitations to certain kinds of states to universalization to all states; from exclusion of colonial peoples, whether or not organized into states, to a still-contested expansion to certain oppressed peoples not organized into states; from wholesale exclusion of internal armed conflicts to partial, and also still-contested, inclusion of some of them.' Berman, *supra* note 51, at 22.

64 'Never before has the applicability of the laws of war been made to turn on the purported aims of a conflict.' A. Sofaer, 'Terrorism and the Law, (1986) 64 *Foreign Affairs* 901.

65 In fact, Kennedy enlarges perhaps too much the range of possible actors, to the point that the boundary between war and ordinary delinquency almost vanishes: '[V]iolence has become a tactic for all sorts of players – warlords and drug lords and freelance terrorists and insurgents and religious fanatics and national liberation armies and more. States have lost the monopoly on metaphoric as well as actual warfare.' Kennedy, *Of War and Law*, 19.

66 '[P]erfidious attacks on our military – from mosques, by insurgents dressing as civilians or using human shields – . . . are very likely to be interpreted by many as reasonable, 'fair' responses by a massively outgunned, but legitimate, force. There is no question that technological asymmetry erodes the persuasiveness of the 'all bound by the same rules' idea. It should not be surprising that forces with vastly superior arms and intelligence capacity are held to a higher standard in the court of world public opinion than their adversaries.'

unfolds – a conversation in which, moreover, an increasing variety of actors, with a growing number of heterogeneous outlooks, are taking part.<sup>67</sup>

Kennedy's book thus appears as an attempt to show how the shift from formalism to realism<sup>68</sup> – and from statism to pluralism – in the response to the questions 'what is a war?' and 'who is a warrior?' entails a blurring of the edges – once seemingly distinct – of both categories. In this sense, *Of War and Law* presents itself as a story of the 'rise and fall of a traditional legal world that sharply distinguished war from peace and in which law was itself cleanly distinguished from both morality and politics' (p. 46). For the author it is not just that formal 'declarations of war' and 'states of war' (which used to provide a sharp and intellectually reassuring (p. 30)<sup>69</sup> line of separation between war and 'non-war') have fallen into oblivion, but that we are witnessing what might be called 'a revenge of Clausewitz' and his conspicuous formulation of war as 'the continuation of politics by other means'. The use of force appears as just another area within a range of foreign policy measures at the disposal of governments. That range is a continuum within which it is very hard to ascertain where diplomacy and politics end and where war begins (p. 114).<sup>70</sup> As Kennedy notes, 'the point about war today . . . is that these distinctions have become 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' (p. 3).<sup>71</sup> This blurring of the war/politics boundary was already a feature of the long Cold War period: was the tug of war between the superpowers genuine war, or was it peace? (p. 3).<sup>72</sup> The *contraditio in terminis* of the very concept 'Cold War' was precisely meant to express the ambiguous nature of that situation, which went beyond the patterns of the formalist-statist *jus belli*. Following the termination of the Cold War, this continuity has only increased and the use of 'a bit of' military force (in a new age of 'distotalized' (p. 11)<sup>73</sup> or 'virtualized'<sup>74</sup> war) has become another tool within

67 At least humanitarian international law provides a common arena in which the global conversation about the limits of war legitimacy can unfold: 'What is striking, however, is the extent to which even enemies who stigmatize one another as not sharing in civilization nevertheless find themselves using a common vocabulary. . . . The common vernacular for these inter- and intra-elite conversations is increasingly provided by law.' Kennedy, *Of War and Law*, 24–5.

68 We are of course employing the term 'realism' in the sense connoted by the American 'realist' tradition of jurisprudential thought (Llewellyn, Pound, etc.); we are not alluding to the political realist tradition of Morgenthau, Herz, and Kennan.

69 Kennedy evokes – with a certain tender self-irony – that conceptual world of sharp boundaries that presided in his youth, in which war was still clearly distinguishable from peace: 'War, we learned, "broke out" when "disputes" could not be resolved peacefully, when cosmopolitan reason gave way to nationalist passion, when the normal "balance of power" was upset by abnormal statesmen. These bad-guy statesmen pursued outmoded projects of aggrandizement, domination, aggression, or imperialism. They were in cahoots with what we called "the military industrial complex" – not knowing we were quoting Eisenhower.'

70 '[T]he strategies of peace continue in war, and vice versa.'

71 Similarly, '[a] more important doubt about a traditional law in war came from the loss of confidence that war was, in fact, so sharply distinct from peace.' *Ibid.*, at 107.

72 '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.'

73 '[T]he nature of war 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.'

74 According to some analysts, the new "intelligent" weapons enable armies to attack a country in a relatively harmless way, striking its headquarters "surgically" without damaging civilian population and/or civilian infrastructures in an indiscriminate fashion. M. Ignatieff, *Virtual War: Kosovo and Beyond* (2001).

the foreign-policy toolkit (diplomatic pressures, economic sanctions) of the great powers. Thus the ‘opponents of the Iraq wars faced the immediate question – is the UN sanctions regime more or less humanitarian? More or less effective?’ (p. 107). In Kennedy’s view the final image is one where no categorical gap between the use of force and other means of state pressure exists. Today’s scenario would, therefore, be one where the qualitative boundary, previously taken for granted, has simply disappeared and where considerations of efficiency, opportunity, or humanity are bound to determine the state’s final choice.

## 5. ALTERNATIVES FOR A NEW ERA OF BLURRED LEGAL DISTINCTIONS?

While noting that Kennedy’s perspective seems to want to offer an extension of the political margin of manoeuvre now available to a very limited number of states in the field of the use of force to every state of the international community, this new situation, full of dim and ambiguous areas, halfway between war and peace or war and politics, still seems, in the authors’ view, to require a new type of *jus belli*: a law which will not be based on strict dualities or binary classifications, a law that will not rest on the ‘on-off war/not war dichotomy’ (p. 107).<sup>75</sup> This law will contain, as Veuthey noted back in the early 1980s, few or no categorical prohibitions or unequivocal rules, but ‘a series of flexible provisions, an absence of rigidity in [the conditions of] their application, [and] a range of protective rules’.<sup>76</sup> If contemporary ‘war’ turns out to be a *sfumato* of vague outlines – hardly distinguishable from ‘peace’, hardly distinguishable from politics – the law of war needs to respond by making its own categories more versatile and flexible. Kennedy presents this as a shift from a ‘law of rules’ to a ‘law of principles’ (p. 86).

His book offers, in this respect, an interesting analysis of the difference between rules and principles, an analysis in which traces of the influence of Oliver Wendell Holmes,<sup>77</sup> Roscoe Pound,<sup>78</sup> and Ronald M. Dworkin<sup>79</sup> can be discerned.<sup>80</sup> Rules usually ‘attribute’ – the Kelsenian *Zurechnung* – a legal consequence to the verification of a legal condition (‘both accurately defined’), while a principle rather ‘states a reason that argues in one direction, but does not necessitate a particular decision, . . . [as] there may be other principles or policies arguing in the other direction’.<sup>81</sup> Rules

75 ‘The absolute on/off nature of the 19th-century distinctions – either it was war or it was peace – seemed too rigid to facilitate the more nuanced approach to diplomacy opened up by unbundling sovereignty into a collection of competences, and arranging diplomatic efforts to influence other sovereigns along a continuum from diplomatic suggestion to invasion.’ See also Berman, *supra* note 51, at 26.

76 M. Veuthey, *Guérilla et droit humanitaire* (1983), 356.

77 See *ibid.*, at 91.

78 Dworkin’s famous doctrine about rules and principles was to a large extent foreshadowed by Roscoe Pound in R. Pound, *Justice According to Law* (1951).

79 See R. M. Dworkin, *Taking Rights Seriously* (1977); *A Matter of Principle* (1983); *Law’s Empire* (1986).

80 Kennedy has recently co-edited and co-presented a comprehensive anthology of American legal thought, including brief introductory essays to the full text of 20 landmark articles since 1890; among these are works by US legal realists such as Holmes, Cardozo, Pound, etc. D. Kennedy and W. Fisher III (eds.), *The Canon of American Legal Thought* (2006). See, in Spanish, D. Kennedy, ‘Lon L. Fuller y el canon del pensamiento legal estadounidense’, in (2008) 4 *Revista Internacional de Pensamiento Político* 230.

81 R. M. Dworkin, ‘The Model of Rules I’, in Dworkin, *Taking Rights Seriously*, *supra* note 79, at 26.

have a categorical nature and are applied under an ‘all or nothing’ mode, whereas principles may be weighed, qualified, partly applied, and so on. While the validity of rules depends on their formal pedigree – the fact of having been enacted by competent authorities, through procedures pre-established by the legal order – the validity of principles relies on their inherent reasonableness or persuasiveness (pp. 91–2);<sup>82</sup> in other words, a principle would be ‘valid’ if it succeeds in convincing many people.

If one accepts Kennedy’s analysis, we would be moving towards something which resembles a Poundian–Dworkinian law of force, consisting more of a set of standards and principles than of a code of rules. Those principles would take shape in the polyphonic ‘conversation’, to which Kennedy often refers, among many agents (governmental and, increasingly, non-governmental), about what is admissible in a war. Principles would not be applied in the ‘all-or-nothing’ way,<sup>83</sup> but in a sort of ‘more or less’ manner: ‘Re-imagined as tools of persuasion, the validity, or bindingness or force of norms becomes itself a matter of more or less’ (p. 95). Usually the more-or-less reasoning will be informed by an estimate of costs and benefits in which the costs may be addressed, not just in utilitarian terms, but also in moral terms: is it legitimate to cause civilian casualties in order to achieve this or that military or political objective? How many civilian victims? and so on (p. 143).<sup>84</sup> Proportionality thus becomes the prime yardstick of law in war: ‘an antiformal law in war of broad standards represents a triumph for grasping the nettle of costs and benefits’ (p. 89). No absolute prohibitions can coexist with a perspective in which everything is a matter of proportionality and of ‘more or less’: even the use of torture (p. 110)<sup>85</sup> or of nuclear weapons (p. 109)<sup>86</sup> would be susceptible of a ‘non-dogmatic’ evaluation in terms of opportunity and necessity.

82 ‘[According to the classical, ‘normativist’ approach] something is legal if it complies with a valid norm. A norm is valid if it was promulgated by the appropriate authority using the authorized procedure. But, in the new law of force, the “model of standards” displaces the “model of rules”. The binding force of a standard depends on its inherent persuasiveness or reasonableness, and not on its pedigree or formal validity: an alternative way of thinking about the status – and enforceability – of norms has developed which emphasizes the persuasiveness, rather than the validity of norms. . . . You might be persuaded because you believe the norm is valid and think you should follow the valid rules. But you might also be persuaded because you think the rule is wise or ethically compelling.’

83 This is also a Dworkinian idea: ‘Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. . . . But this is not the way . . . principles operate. Even those which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met.’ Dworkin, *Taking Rights Seriously*, *supra* note 79, 24–5.

84 Actually, saying that ‘everything is a matter of calculation and proportionality’ does not take us very far, as there do not seem to exist universally accepted ‘units of moral measure’. For every individual decision-maker – let alone for international society as a whole – each of these decisions continues to be a dramatic dilemma: ‘The idea of proportionality – or necessity – encourages a kind of strategy, and ethic, by metaphor: the metaphor of weighing and balancing. [But] I have learned that if you ask a military professional precisely how many civilians you can kill to offset how much risk to one of your men, you won’t receive a straight answer.’

85 ‘[U]ltimately, the questions are no different for torture. When, if ever, does it work?’

86 ‘Some commentators reacted . . . to the 1996 International Court of Justice opinion on the legality of the threat or use of nuclear weapons . . . by shaming the court for speaking with nuance about an apocalypse . . . [But] placing nuclear weapons on the other side of a sharp conceptual boundary from “conventional war” is no different from sharply differentiating war from peace. What happens when the political tactics on the “good” side of the boundary seem worse?’



This *sfumato* of the dividing line between war and politics and of the ‘model of rules’, now giving way to a ‘model of standards’ in the law of war, finds an obvious correlate in the spatial and temporal blurring of the front line that appears to characterize contemporary war. The twentieth century has witnessed an evolution from the 1914–18 trench warfare (with perfectly identifiable national armies holding on to a stable and completely recognizable front line) to the 1939–45 ‘war of motion’ (with more shifting front lines and the significant involvement of irregular guerrillas). This latter kind of conflict has proliferated in the second half of the twentieth century (from anti-colonial insurgency<sup>87</sup> and the proxy wars and ‘low intensity conflicts’ of the Cold War to the interventions on behalf of the United Nations or the international community in the 1990s), culminating in the ‘war against the West’ proclaimed by Al-Qaeda and the ‘war on terror’ decreed by the US government in response. As a result of this evolution, ‘it’s asymmetric, it’s chaotic, it’s not linear’ (p. 112).<sup>88</sup> The vanishing of the spatial front line (the territorial line of separation between ‘zones of war’ and pacified zones) reaches its climax in the war on terror, waged against a somehow ‘immaterial’ – and thereby ubiquitous – enemy who can strike anywhere (pp. 113–14). The temporal line of separation (between the time of peace and the time of war) also disappears, as shown by the intermittent conflict between the United Nations and Iraq between 1991 and 2003 or the again evident discontinuity in the current ‘war’ against Al-Qaeda. Even the subjective line of separation between combatants and non-combatants is greatly eroded, as is seen in Iraq or Afghanistan: ‘there are civilians all over the battlefield – not only insurgents dressed as refugees, but special forces operatives dressing like natives, private contractors dressing like Arnold Schwarzenegger, and all the civilians running the complex technology and logistical chains “behind” modern warfare’ (p. 119).

War’s ubiquity, its discontinuity, and the blurring of its outline are not without psychological and moral consequences in the military: ‘Experts have long observed that when warfare itself seems to have no clear beginning or end, no clear battlefield, no clear enemy, military discipline, as well as morale, breaks down’ (p. 119). This dispiriting confusion that affects soldiers also concerns the international lawyer, who sees the old rules of *jus belli* evaporate and be replaced by much vaguer ‘standards’. The last pages of *Of War and Law* convey, in fact, a clear feeling of defeat or loss, showing the demoralization of the international lawyer who still tries to take the law of war seriously: ‘How can ethical absolutes and instrumental calculations be made to lie down peacefully together? How can one know what to do, how to judge, whom to denounce?’ (p. 117). The former categorical imperatives (‘thou shalt not bomb cities’, ‘thou shalt not execute prisoners’, etc.) give way to an elastic and blurred logic of more and less, within which instrumental might triumphs definitively over the

87 Conflicts are characterized – like the other wars following the Second World War – by ‘the ubiquity of confrontation’ and ‘the interpenetration and reciprocal encirclement’ of the opposing parties. See Veuthey, *supra* note 76, at 21.

88 ‘Who was the enemy – and where was the battlefield? The old days of industrial warfare are over . . . The battlespace is at once global and intensely local; there are no front lines. Here at home, we hardly seem at war – the enemy, the conflict, the political goal, all have become slippery.’

ethical (p. 132).<sup>89</sup> As the new flexible ‘standards’ seem more susceptible to strategic exploitation and modulation than do the old strict rules, the various actors will play with the labels of *jus belli* – now definitively versatile – according to their strategic needs:

Ending conflict, calling it occupation, calling it sovereignty – then opening hostilities, calling it a police action, suspending the judicial requirements of policing, declaring a state of emergency, a zone of insurgency – all these are also tactics in the conflict. . . . All these assertions take the form of factual or legal assessments, but we should also understand them as arguments, at once messages and weapons. (p. 122)<sup>90</sup>

Kennedy reiterates a new aspect of the ‘weaponization of the law’: the legal qualification of facts appears as a means of conveying messages to the enemy and to public opinion alike, because in the age of immediate media coverage, wars are fought as much in the press and opinion polls as they are on the battlefield. The skilled handling of *jus belli* categories will benefit one side and prejudice the other (p. 127);<sup>91</sup> as the coinage of the very term ‘lawfare’ seems to reflect, the legal battle has already become an extension of the military one (p. 126).<sup>92</sup> In cataloguing some of the dark sides of the law of war, Kennedy also stresses how the legal debate tends to smother and displace discussions which would probably be more appropriate and necessary. Thus the controversy about the impending intervention in Iraq, which developed basically within the discursive domain of the law of war, largely deprived lawyers of participating in an in-depth discussion on the neo-conservative project of a ‘great Middle East’ – more democratic and Western-friendly and less prone to tyranny and terrorism – the feasibility of ‘regime change’, an adequate means of fostering democracy in the region, and so on:

We never needed to ask, how should regimes in the Middle East . . . be changed? Is Iraq the place to start? Is military intervention the way to do it? . . . Had our debates not been framed by the laws of war, we might well have found other solutions, escaped the limited choices of UN sanctions, humanitarian aid, and war, thought outside the box. (p. 163)

## 6. CONCLUSIONS

Those familiar with the author’s previous works<sup>93</sup> will certainly have already identified the Derridean streak in Kennedy’s thought in the underlying claim that every discourse generates dark zones and silences or represses certain aspects, renders the formulation of certain questions impossible (a Foucauldian streak in the author could be suspected as well: every discourse – be it administrative, legal, medical, or psychiatric – implies simultaneously ‘knowledge’ and ‘power’; each discourse

89 ‘Something is undeniably lost when an ethically self-confident law is transformed into a strategic discourse.’

90 On a similar note, Berman: ‘Rather than contesting the line between war and not-war, those engaged in such instrumentalization employ the distinction itself for partisan advantage – seeking to achieve practical or discursive gains through shifting back and forth between war and not-war.’ Berman, *supra* note 51, at 7.

91 ‘[T]he law in war will have winners and losers. Battling in the shadow of the law, some will find their strength multiplied, others will find their available tactics stigmatized.’

92 ‘We have left the world of legal validity behind, except as a claim made to an audience.’

93 See Contreras and de la Rasilla, *supra* note 54.

amounts somehow to a system of domination, insofar as it defines ‘conditions of admission’ into the realm of the legally valid, the ‘sane society’, etc.).<sup>94</sup> In the picture resulting from the application of this analytical framework to the domain of the use of force, international lawyers and humanitarian professionals appear gagged, restricted by the language they try to utter effectively to themselves and others. As if the legal language had imposed on them its own logic, it now speaks through their voices<sup>95</sup> and what is, evidently, once again, the Marxian-structuralist idea of cultural products gaining a life of their own and turning against their own creators.

Kennedy, however, does not stop at noting that jurists have become ‘spoken’ by their language amidst a dramatically changing war scenario. More disquietingly, he stresses the evident corollary of the previous proposition: the evaporation of a sense of individual moral responsibility:

[A]ll these formulations, encouraged by the language of law, displace human responsibility for the death and suffering of war onto others . . . In all these ways, we step back from the terrible responsibility and freedom that comes with the discretion to kill. . . . 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. (pp. 168–9)

While depersonalization and a lack of sense of personal responsibility are evidently also favoured by external structural factors, among which is the bureaucratic-political complexity of modern states themselves (p. 17),<sup>96</sup> Kennedy stresses that the language of international law would thus trivialize and conceal the gravity of decisions:

In all these ways, we step back from the terrible responsibility and freedom that comes with the discretion to kill. . . . The problem is loss of the human experience of responsible freedom and free decision – of discretion to kill and let live. (p. 170)

It would go beyond the scope of this work to engage in the area of meta-theory discourse, especially in view of the fact that no explicit reference is made in Kennedy’s book to Martti Koskenniemi’s work – or to that of almost any other author – by

94 See, for example, M. Foucault, *Surveiller et punir* (1975); *L’ordre du discours* (1971).

95 ‘It seems hard to imagine ambitious and creative people repeatedly transforming their disciplinary vocabulary . . . and faithfully endeavoring to innovate, only to find themselves, in effect, being spoken by their professional vocabularies. It is easy to imagine that there must be some kind of “deep structure” here, guiding the hand of these hapless international lawyers as they repeatedly push for new thinking which turns out to be a rearrangement of their pre-existing ambivalences.’ Kennedy, *supra* note 54, at 407.

96 Kennedy alludes to ‘the unbundling of the “sovereign power to make war” into a range of public and private competences, shared out among many departments . . . . Many departments of government will be involved, their responsibilities and powers parcelled out by complex administrative arrangements.’ See Kennedy, *Of War and Law*, at 149. Responsibility for the decision is thus diluted in a variety of planes and instances, giving the impression that it is the state machinery as a whole that gravitates irremediably in a given direction, so that not even the highest authorities exercise a true discretion: ‘We now know that although September 11 opened a window of plausibility for the invasion of Iraq, the campaign had already long been under way – and not simply because the leadership, the Bush family, say, was “obsessed” with Iraq, but also, and more importantly, because an entire administrative machine had been set in motion, with its own timetables and credibility requirements. . . . By the time we focused on “the president deciding”, it is not at all clear how much room to manoeuvre he still had. “The United States” had made a commitment to overthrow Saddam Hussein – a commitment whose political and bureaucratic momentum could not easily have been stopped without incurring all manner of further costs.’

attempting to explore the possibility of reconciling Kennedy's overall resulting position and the 'culture of formalism as a progressive choice' – 'with the proviso that whatever virtue this might have must be seen in historical terms' – as recently argued for by Koskeniemi.<sup>97</sup> This noted, Kennedy's *omnium dubitandum* can recall some of the argumentative structure of international law which Koskeniemi described as one 'which is capable of providing a valid criticism of each substantive position but which in itself cannot justify any'.<sup>98</sup> Koskeniemi completed his appraisal by stating that 'it seems possible to adopt a position only by a political choice: a choice which must ultimately defend itself in terms of a conception of justice',<sup>99</sup> in other words, depicting international law as the continuation of international politics by other means. Kennedy's analysis of contemporary war, on the other hand, is directed at evidencing that international politics itself has now become the continuation of international law by means which are, as already noted, also political in origin. The evident corollary, if one accepts Kennedy's analysis, is that the range of influence of the 'international political lawyer' has enormously increased. Kennedy thus appears to have found his own personal response to the criticism of nihilism that has so often been addressed to the deconstructionist technique of not providing avenues for action<sup>100</sup> by embracing all available possibilities of action and calling it 'humanitarian self-empowerment'.<sup>101</sup> Thus he can argue that

Rather than fleeing from the exercise of responsible decision to the comfortable interpretative routines of their professional discourse, humanitarians should learn to embrace the exercise of power, acknowledge their participation in governance, cultivate the experience of professional discretion and the posture of ethically responsible freedom. (p. 170)

Or, echoing the slightly more provocative terms also used by the author, 'For all of us, recapturing a politics of war would mean feeling the weight and the lightness of killing or allowing to live' (p. 171).

97 M. Koskeniemi, *From Apology to Utopia: The Structure of the International Legal Argument* (2005), at 616. See further M. Koskeniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870–1960* (2001), at 501: 'What a culture of formalism cannot tolerate – the transformation of the formal into a façade for the material in a way that denies the value of the formal as such.'

98 M. Koskeniemi, 'The Politics of International Law', (1990) 1 EJIL 4, at 8.

99 *Ibid.*, at 8.

100 'Si lo que se consigue es la incapacidad o la impotencia para actuar, entonces la pérdida es terrible: sólo los filósofos pueden permitirse, en sus seminarios, el lujo de no tomar decisiones prácticas; el hombre de la calle, los políticos, los jefes de Estado, no. Y si, por el contrario, de la deconstrucción queremos sacar una línea de conducta o un modo de actuar, entonces brota la contradicción. . . . También el deconstructivista más intrépido, cuando corta las ramas en que está sentado, acaba cayéndose.' M. Pera, 'El relativismo, el cristianismo y Occidente', in M. Pera and J. Ratzinger [Benedict XVI], *Sin raíces: Europa, relativismo, cristianismo, Islam*, trans. B. Moreno (2006), 26–7.

101 D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2005).