

War Law: Understanding International Law and Armed Conflict

by Michael Byers, Grove Press, 2005, 214 pp.

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Also under review: *Of War and Law* by David Kennedy, Princeton University Press, 2006, 191 pp.

I.

Consider the following claims about American and Israeli foreign policy, all of them fairly typical of left discourse on foreign affairs [1]:

(1) ‘The violence of the Iraq War, the chaos that has come to Iraq, can be traced directly to the illegality of the invasion and occupation of that country and the illegality of the tactics and weapons being used to maintain the occupation.’

(2) ‘A chief prosecutor of Nazi war crimes at Nuremberg has said George W. Bush should be tried for war crimes along with Saddam Hussein.’

(3) ‘By passing the Military Commissions Act, the United States Congress has, in effect, given its stamp of approval to human rights violations committed by the USA in the ‘war on terror.’ This legislation leaves the USA squarely on the wrong side of international law, and has turned bad executive policy into bad domestic law.’

(4) ‘Israel has violated 28 resolutions of the United Nations Security Council (which are legally binding on member-nations), and almost 100 resolutions of the United Nations General Assembly (which are not binding, but represent the will and understanding of the international community). And Israel is now in violation of the advisory opinion of the International Court of Justice of 2004, condemning the separation wall Israel is building throughout the occupied West Bank.’

(5) ‘[U]nder international law, the Palestinians have the right to return.... [W]e have to be honest about the rights and the wrongs and the question

of rights and wrongs. It was a wrong inflicted on the Palestinians, and it was their right, their right. This is not a tragedy, and this is not about morals. It's about legal rights.'

These claims all share several things in common. The first and perhaps most obvious is their *legalistic* character: each invokes international law to make a moral judgement and a set of policy recommendations. This legalism is implicitly linked to a presumption of *moral authority*: unlike our merely personal 'morals,' the law is supposed to be clear, impartial, and objective; hence its claims override all others. This latter claim to authority involves a sort of legal *reductionism*: in each case, legal considerations are the *only* relevant ones; if a consideration isn't codified in law, it's irrelevant, period. And so in each case the pattern is the same: invoke a law, apply it, infer the deductively inevitable conclusion, and issue a condemnation.

What makes these claims powerful is, of course, just what makes them vulnerable to challenge. We all know that laws can be unjust and irrational. When they are, both their presumptive authority and implicit reductionism become a threat to our well-being. What is true of law in general can, obviously enough, be true of any particular branch of it, including the laws of war. Given the extraordinary status that the laws of war have recently come to acquire, it's worth asking about their normative status. In short, are they well-founded, or is their authority an illusion?

You would expect the books under review – the state of the art in the field of international war law – to acknowledge and address these questions. In fact, neither does. Michael Byers's *War Law*, a tendentious polemic masquerading as a textbook, evades them with a kind of belligerent militancy. David Kennedy's *Of War and Law*, a more thoughtful treatment of the subject, agonizes over them while expressing anxiety about the field's ability to answer them. Neither appraisal, I suppose, is precisely a ringing endorsement of either book. And yet both books are worth reading, if only for what they reveal, with varying degrees of candor, about the intellectual disarray of the field of law they discuss.

II.

Michael Byers's *War Law* (WL) 'aims to provide the interested non-lawyer with a readily comprehensible overview of the law governing the use of force in international affairs ... against the backdrop of recent political developments ...' (p. ix). It begins with a section on 'United Nations Action' intended to familiarise readers with the

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vocabulary and mechanics of international war law, followed by a section on 'self-defence,' one on 'humanitarian intervention,' and one on 'international law during armed conflict.' The book ends with an epilogue on the relationship between war law 'and the single superpower' and includes the text of the UN Charter along with bibliographical and Internet suggestions for further research.

The 'backdrop of recent political events' to which Byers alludes refers 'most notably' to 'the United States' rise to military predominance' (p. ix). 'Much of the book,' we are told, 'refers to actions by the United States, which, in relative terms, is militarily more powerful than any political entity since the Roman Empire' (p. 10). Putting the point somewhat differently, Byers's book is a critique of Anglo-American foreign policy by way of an exposition of international war law. Though it begins blandly enough as an 'overview' of the law, it proceeds to describe Tony Blair as 'unable to grasp what it means to live under the rule of law' (p. 108), goes on to describe the architects of American foreign policy as war criminals (p. 135), and ends with a rousing call to oppose 'the rule-twisting megalomaniacs who have dominated and corrupted US and global politics since 11 September 2001' (p. 155). Thus Byers's book is squarely in the tradition of the appeals to international law with which I opened this review.

As anyone who has the misfortune of dealing with it knows, legal language can be highly misleading: it can sound ordinary but be technical; be technical but sound ordinary; sound moral but prescind from morality; and sound amoral while making strong moral presuppositions. At a minimum, then, clarity demands that writers on legal topics distinguish between *legality*, *morality*, and *optimality*. *Legality* concerns no more and no less than what the law says. *Morality* concerns what is right. *Optimality* concerns the nature of the best outcome, all things considered, from among the available alternatives. [2] A moment's reflection should tell us that there is an obvious potential for conflict between legality on the one hand and morality and optimality on the other. Few systems of law correspond perfectly to the requirements of morality or optimality, and when the gap between the three sorts of norms becomes particularly wide or systemic we need to ask which norm overrides which. It certainly isn't self-evident that law overrides morality or optimality whenever they conflict, and an author who thinks that it does owes us an argument to that end.

It is radically unclear where Byers stands on this initial – and rather elementary – issue. He sometimes writes as though his book were about no more and no less than

the content of international war law, abstracting from all questions of morality and optimality (p. ix). If that were the case, however, he would be obliged to stick to a discussion of what the law says, and leave it at that. He would not be entitled to make claims or presuppose anything about the morality or optimality of the law, nor to assume that where law and morality/optimality conflict, law overrides them.

But Byers is clearly not one to let such distinctions stand in the way of a hearty polemic. When his polemical needs require him to equate legality with morality, he does so (p. 154). When they require him to distinguish legality from morality, he does that (pp. 63, 99). When they require him to equate legality with optimality, he does so (pp. 75, 128-29). When they require him to distinguish the two, he does *that* (pp. 123-26). When he senses a conflict between legality and either morality or optimality, he asserts that it is obvious that law overrides both (pp. 99, 108). But when he confronts a legal argument he doesn't like, he has no qualms about offering non-legal reasons for rejecting it (pp. 142, 145, 149, 150). It doesn't help that he simultaneously tells us that the law should be interpreted according to the 'ordinary meaning' of the language involved (pp. 48-9), *and* that law involves 'intentional ambiguity' (pp. 41, 45). Nor is cogency served by the claim that international lawyers demand correct answers to legal questions (pp. 45-6), *and* that the most crucial legal questions have no correct answer (p. 70). We reach a kind of apotheosis of incoherence with the claim (about UN Resolution 1441) that in wording the Resolution ambiguously, 'the Security Council effectively de-legalized the situation' to protect 'the international legal system from the damage that would otherwise have resulted when politics prevailed' had the resolution been more clearly worded (p. 45).

The result is a book, to put it somewhat legalistically, that strives mightily for the advantages of toil by the methods of theft. Byers is clearly enamored of what he takes to be the moral authority of international war law: it affords him a vehicle for condemning policies he dislikes, and allows him to do so from what seems a position of impartiality and objectivity. But he thinks, wrongly, that the law wears its moral authority on its sleeve so that his work is done when he's explained its 'ordinary meaning.' As we'll see, nothing could be further from the case.

III.

It is (or should be) a truism that an unenforceable law is a contradiction in terms. As a basic conceptual matter, the rule of law presupposes enforcement and enforcement

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requires a government – an agency or institution, in familiar Weberian terms, that possesses a legitimised monopoly on the use of force in a specific geographic area, which it uses to ensure that its rules are followed. In the context of international law, the closest analogue of a ‘government’ is the United Nations (UN), whose purposes and procedures, as outlined in its Charter, look very much like those of a world government. Accordingly, Byers devotes Part One of *WL* to ‘UN Action,’ describing in very general terms how the UN works, and has worked, and discussing what he calls ‘implied authorization and intentional ambiguity’ in war law. His discussion throughout these chapters is driven heavily by case studies, but is very weak on basic legal concepts.

The most obvious conceptual problem is whether war law really deserves to be called ‘law,’ and if so, why. Law presupposes government, but observation tells us that the UN is not a government in any intelligible sense of that term. It claims for itself the authority to regulate the use of force throughout the world, and ‘the discretion to determine the scope of its own legal competence’ (p. 26). But lacking a global monopoly on the use of force, it lacks the power to enforce a single decision it makes. It thus binds every state by its authority while being at the mercy of states (some more than others) for purposes of enforcement. This leads to the paradoxical state of affairs that a sovereign that claims greater authority than any sovereign in human history commands less power than the judge of the average traffic court – and acts like it.

Though Byers offers no explicit discussion of this topic, he clearly feels the force of the problem it poses (pp. 24, 60). His manner of dealing with it, alas, is a classic case of trying simultaneously to have one’s cake and eat it. On the one hand, he insists that the UN has the sole and exclusive authority to enforce the ‘law’ (pp. 15-16, 25-6, 31-2). On the other hand, he insists that the failure to uphold UN resolutions is never a failure *of* the UN, but of its individual members (pp. 23, 92, 100). And what if, in the teeth of crisis, the members backslide or fail to agree on a course of action? In that case, the UN absolves itself of responsibility or liability for a remedy while forbidding any unilateral attempt to provide a remedy. In short, what we have here is a world government with the pretensions, efficacy, and accountability of the Wizard of Oz.

This may all seem excessively abstract, but the consequences have been all-too-real. I commend to the reader’s attention Byers’s very brief descriptions of the UN’s contributions to the rule of law during the Korean War (p. 17), as well as in

Bosnia (pp. 20-3), Somalia (pp. 26-7), Rwanda (pp. 28-9), Haiti (pp. 29-33), East Timor (pp. 33-5), Kosovo (p. 42), Iraq (pp. 43-5), during the India/Pakistan war of 1971 (pp. 93-4), and in the Corfu Channel case of 1949 (p. 100). Ignoring Byers's desperate apologetics on behalf of international law and the United Nations, and focusing simply on the facts he recounts, one is led to the following conclusions about the track record of international war law as 'enforced' by the UN:

1. Strict adherence to international law has led to thousands of deaths that might not have been lost had international law been flouted.
2. Violations of international law have prevented thousands of deaths that would have been lost had international law been more strictly observed.
3. Despite (1) and (2), the UN operates on the explicit principle that adherence to international law is an absolute, regardless of the human cost.

This track record raises some obvious questions about the moral and political legitimacy of the UN and international war law. What sense does it make to call something a government if it conspicuously lacks a monopoly on the use of force in the territory it purports to govern? What sense does it make to call something a 'law' when enforced by a government like the preceding? What are to we make of the use of such phrases in UN resolutions as 'remains seized of the matter,' 'final opportunity to comply,' 'use all necessary means,' and 'serious consequences' if it is common knowledge that such phrases mean the opposite of what they say? What sense is there to the term 'law enforcement' if permission must be sought to 'enforce' a law and permission can invariably be refused? Finally, why is anyone obliged to obey a 'government' that repeatedly makes 'resolutions' it cannot uphold while insisting that its resolutions must be complied with regardless of its capacity or intention to uphold them? Suffice it to say that for all the moral and political grandstanding in *WL*, Byers doesn't venture to answer any of these questions.

IV.

A reader might think it unfair of me to dwell at such length on questions of enforcement. Let's concede (one might say) that international law has historically had its problems of enforcement through the UN. Surely the fundamental issue is not how badly it has been enforced, but what it says?

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The main purpose of war law is to govern the use of force in international conflicts – principally to decide when it is legitimate to use force *ab initio*, and how force may legitimately be used once its use has itself been legitimised. Part Two of *WL*, called ‘Self-defence,’ begins discussion of the first topic, which continues into Part Three under the heading ‘Humanitarian Intervention.’ Part Four, ‘International Law during Armed Conflict’ concerns *jus in bello*, or the laws governing the use of force *during* armed conflict. In each case Byers offers up an account of the laws of war that he intends not merely as an exposition of those laws, but as a moral critique of the nations that violate them (principally the US and Israel). In each case the critique fails for Byers’s failure to deal with complexities ignored by the law.

Consider his treatment of the recourse to force. Liberals since Locke have argued that the recourse to force may only be justified by the need for self-defence against some previously initiated threat or act of force. Obviously, the controversial questions concern the scope of and qualifications to this claim. What counts as an initiation? Can threats be dealt with pre-emptively? How much retaliatory force is permissible? None of these questions is easily answered, and none of the answers is easily applied to real-world conditions.

Undeterred by considerations of complexity, Byers attempts to discuss self-defence by way of two sources: (a) a single confused sentence from a nineteenth-century legal case, and (b) an extremely vague excerpt from Article 51 of the UN Charter. With these exiguous sources in hand, he trots us through a set of cases intended to sketch the contours of ‘the inherent right of self-defence.’ Taken absolutely literally, the right of self-defence that emerges from this analysis amounts to a right to respond to an attack currently taking place, *while* it is taking place, by proportional means, where the right terminates once the attack terminates, at which time decision-making authority reverts to the UN Security Council.

Strict adherence to this rule would oblige a country to prefer annihilation to pre-emption of a threat even in the face of conclusive evidence of an imminent attack. It would likewise oblige a country to forswear the use of weapons or tactics deemed ‘disproportional’ even if this meant the difference between victory and defeat over an aggressor. It would, finally, oblige a country to prefer insecurity to defiance of the Security Council if the Security Council chose a course of action that put its security at risk; to sacrifice the lives of its citizens to this end; and to be willing, if legally necessary, to put its security at the mercy of a political regime in which its avowed enemies enjoyed political predominance.

So understood, the international lawyer's conception of self-defence is a drastically narrow one. For one thing (as Byers cheerfully admits in chapter 5) it delegitimises the *least* controversial feature of the war on terrorism – the war on the Taliban and Al Qaeda in Afghanistan (p. 65). It is also easy for aggressors to exploit: in order to prevail, they need merely rely on covert attacks, asymmetrical warfare, and the predictable slowness of the UN. Byers has almost nothing to say about these obvious problems. He defends the rule by telling us that while a nation surrenders its right to self-defence fairly early in the legal game, 'there is nothing to stop the country that has been attacked from asking the UN Security Council to respond' (p. 60). Of course, there's nothing to guarantee a timely response, either. 'In most domestic systems,' he continues, 'the right of self-defence terminates the moment an attack has ceased and there is time to call the police' (p. 60). But that is only because in those contexts, if you call the police, you know they'll come!

Now consider the issue of *jus in bello*, or the use of force during hostilities. *Jus in bello* 'governs *how* wars may be fought,' as codified 'in the four Geneva Conventions of 1949 (and the predecessor Hague Conventions of 1907)' (p. 115). A preliminary but crucial point is that *jus in bello* rules are 'distinct' from the rules governing the recourse to force (p. 115). Though Byers understates the point, this means that the rules that govern how a war may be fought apply to all parties to war, regardless of which of the parties has initiated aggression and which is merely responding to the initiated aggression of the other party. For purposes of *jus in bello*, aggressors and defenders are legally on par: each is obliged to fight by the same rules even if one side is responsible for the need to fight, and the other side is simply a victim.

Though Byers elsewhere makes use of analogies from domestic law enforcement, he doesn't remark on the oddity of this arrangement. Imagine police officers and criminals being legally obliged to obey the same rules during violent confrontations between them – with the police expected to obey the rules despite the moral asymmetry between criminals and the police, and obliged to obey them even if the criminals routinely got away with violating them. Almost anyone would call this an absurdity, and yet in the context of international war law, it has the status of an axiom.

Byers spends more space in these chapters condemning the US for its failure to abide by international humanitarian law than he does either explaining or justifying the law itself. The result is an account of *jus in bello* that is long on anti-American polemics but short on analysis of fundamental concepts, and *very* short on reflection

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about cases of conflict between morality, optimality, and legality.

As is so often the case in legal writing, Byers's explication of the law relies on the quasi-mathematical metaphors that sound impressive but have no literal (much less mathematical) content. He tells us over and over that the use of force must be 'necessary and proportionate' to the threat it confronts, and that in cases of competing legal values, we must 'balance' this consideration against that and that against this to resolve the conflict (e.g., pp. 119, 125, 126). In the absence of any explication of these concepts, however (and none is offered), I think it is safe to regard them as meaningless.

Take 'proportionality.' Even the most metaphorical conception of proportionality presupposes a rough distinction between numerator and denominator, as well as of a standard that commensurates the two. What standard does Byers have in mind? And how does he fix values for numerators and denominators? He doesn't say.

He's no more forthcoming about 'balancing.' 'Balancing' is an *inherently* metaphorical notion. One way to give it literal content is to supply a standard of value, and engage in a sort of cost-benefit analysis by way of it. But Byers will have none of this: cost-benefit analyses, he tells us, are 'not only inappropriate, but also immoral' (p. 124). Having condemned cost-benefit analyses, Byers is noticeably reticent on what 'balancing' actually amounts to. Reticent as he is, however, he is quite sure that when the balancing is done, military necessity must yield to international humanitarian law (pp. 123, 124). He doesn't tell us why; we have to be content with the assertion.

Byers is not particularly interested in 'hard cases' – or even in relatively mundane cases that would upset his confidence in the ultimacy of law. His discussion of the 'protection of civilians' in chapter 10 evades even the simplest and most obvious of objections to the combatant/non-combatant distinction. It has by now become obvious to most commentators (including some international lawyers) that the traditional legal distinction between combatants and non-combatants is neither clear, nor exhaustive, nor exclusive, nor particularly well-justified. A person can make a significant causal contribution to combat without being *either* a combatant *or* a non-combatant in the sense defined by international law. He can, for instance, be part of an indispensable supply line to combatants, or finance them, or play a non-combat support role. He can be in training. He can support training. He can offer moral support. He can operate a safe house. He can be a chauffeur. He can

be a scout. He can be a cook. He can launder money. [3] Etc. The disruption of such activities is indispensable to victory in warfare, and yet international war law proscribes targeting them. A look at southern Afghanistan, northwestern Pakistan, or central Iraq shows the result.

Even if the distinction between combatants and non-combatants was clear, it can be impossible or unfeasibly costly to put into practice. What are we to do about the many cases in which it is too difficult to discern whether someone is a combatant or a non-combatant, or cases in which combatants use non-combatants as innocent shields? Byers writes as though such cases never arose, but they may well constitute the majority of the cases that military commanders confront. Byers tells us that by definition non-combatants play no 'direct or active' part in hostilities (p. 118). But why should playing an indirect or less-than-fully active part confer immunity? In any case, he evades the obvious mismatch between the definition of a non-combatant and the content of the law: 'directness' is a *matter of degree*, whereas the prohibition on targeting non-combatants is *absolute*. How can an absolute prohibition be predicated on a non-absolute criterion? Byers is silent on the issue.

Though Byers makes the *pro forma* concession that 'international humanitarian law accepts that wars are fought to be won' (p. 119), he consistently evades the fact that strict adherence to international law can undermine the aggrieved party's capacity to achieve victory. He thereby ignores or downplays the fact that the law of war can, in its impartiality between warring sides, systematically conduce to the victory of injustice over justice. On the few occasions on which he confronts this fact, he shrugs it off as a sort of sunk cost (e.g., pp. 121, 122, 123). In the American case, he insists that the issue doesn't arise because the US is militarily invincible: 'After decades of massive defence spending, the United States is today assured of victory in any war it chooses to fight' (p. 120); '[T]he US military can defeat any opponent with only minimal losses' (p. 148). The contrary evidence from Korea, Vietnam, Lebanon, Somalia, Afghanistan, and Iraq seems not to have registered.

I lack the space here to discuss the other topics discussed in Byers's book – humanitarian intervention, the treatment of combatants captured during warfare, war crimes and trials, and his treatment of the war in Iraq. But a review of the book would be incomplete if it failed to mention the brazen tendentiousness of Byers's handling of factual matters throughout the book. A few examples will suffice.

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On pp. 49-50, Byers suggests that ‘behind closed doors’ the United States pressed for UN Secretary General Kofi Annan’s departure before the end of his 2006 term in reprisal for Annan’s anti-American legal views. Byers offers no credible evidence for the claim, and fails even to mention Annan’s responsibility for the oil-for-food scandal. [4] On p. 63, we’re told that in 1998 the CIA ‘was convinced that the [Shifa Pharmaceuticals Plant in Khartoum] was producing precursors to chemical weapons; it subsequently emerged that the intelligence was flawed.’ We aren’t told that the CIA remains convinced that the plant was producing those precursors, and that its evidence for this claim remains unrebutted to this day. [5]

On p. 80, Byers reproduces a passage from a UN report that in his description ‘was a stinging rebuke to the Bush Administration.’ In fact, the excerpted passage fails to address the Administration’s arguments altogether. On p. 128 we’re blithely told that the Taliban ‘for the most part abided by international humanitarian law’; no evidence is given for the claim. On pp. 152-3, Byers writes that ‘In October 2004, most Americans were unconcerned by the possibility that the president was being coached through an earpiece during the election debates’; he produces no evidence that the president was being coached, and contrary to his claim, the ‘earpiece issue’ consumed about six weeks of (inconclusive) national controversy.

I could go on, but it is perhaps enough to note that this is an author who cheerfully avows his reliance on crude ‘stereotypes’ of Americans to make his case for international law (p. 152), and suggests (naturally without evidence) that the Bush Administration’s policy agenda derives from the content of Tom Clancy’s espionage novels (p. 153). Such claims serve at least one salutary diagnostic function: they vividly illustrate how putatively intelligent academics can lose touch with reality and compensate for their lack of contact with it by writing extended temper-tantrums like *WL*.

V.

After Byers’s book it’s a relief to turn to David Kennedy’s *Of War and Law*. Where Byers’s book is intended as a primer on war law, Kennedy’s is a sort of extended essay on the interface of war and law. The book begins with a brief account of ‘war as a legal institution,’ intended as a preliminary survey of the topic, followed by a historical account of the rise of war law, and a final chapter on the problematics of ‘lawfare’ in the contemporary context. As Kennedy puts it, ‘we must understand more clearly what it means to say that warfare has become a legal institution’ (p. 5).

Part of understanding that is to see the incongruity involved in trying to combine them. Law is paradigmatically a peacetime institution. Warfare is paradigmatically an institution of violence. The attempt to combine them in one institution, war law – to govern the conduct of violence by norms drawn from peacetime life – is neither a self-evidently stable nor obviously coherent enterprise. Though highly sympathetic to war law, Kennedy has a much better eye than Byers for the paradoxes, hypocrisies, and incoherence's to which it gives rise, and offers a usefully reality-oriented corrective to the dogmatic and triumphalist story Byers has to offer.

In discussing Byers's book, I made a distinction between legality, morality, and optimality. Where Byers systematically conflates these concepts, Kennedy is alive to the distinctions between them, and also alive to the significance of those distinctions to the topic at hand. Unlike Byers, he recognizes that legality can conflict with optimal outcomes, and lead to legalised insanity. 'Is it sensible,' he asks, 'to clear the cave with a firebomb because tear gas, lawful when policing, is unlawful in "combat"?' (p. 104). It may not be sensible, but that doesn't change the fact that the law, as written, is insensitive to common sense. He also sees through the hypocrisy and incoherence of the international lawyer's sanctimonious rejection of cost-benefit analyses in the name of law:

Although humanitarians *talk* about the long-run benefits of building up the UN system or promoting the law of force, they do not make such long-run calculations. Current costs are discounted, future benefits promised – as if there were nothing to weigh against expansion of humanitarian institutions and ideas, no civilians who needed to be allowed to die for the legitimacy of the United Nations. (p. 161)

That claim could well be a direct riposte to Byers on 'balancing.'

Perhaps most importantly, Kennedy sees that war law has become a kind of proxy for morality, and that appeals to it now function as a substitute for moral judgement. The historical section of his book points out that war law began as an extension of the moral theology of the mediaeval 'natural lawyers' and applied to the international context the moral and theological precepts of mediaeval Christian morality (as filtered through Plato, Aristotle, and Cicero). In the nineteenth century, as advocates of international law tried to disconnect it from moral theology, they found themselves espousing a form of 'legal positivism' that pushed moral considerations into the background, and urged deference for the

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claims of the state. With the rise of ‘total warfare,’ however – warfare that targeted a whole population as distinct from the specifically military class – positivism was seen to have unpalatable consequences: a system of law that merely deferred to the state would lack an in-principle stopping point, and might well legalise the worst conceivable atrocities. And so, in the twentieth century, an alternative was sought and found in the Hague and Geneva Conventions, as well as the UN Charter.

But, as Kennedy correctly points out, ‘[m]odern international lawyers have abandoned the nineteenth-century scholar’s focus on the sovereign without recovering the earlier faith in a unified social/moral order’ (p. 67). In consequence, appeals to law take the place of that unified social/moral order, and have *become* it. ‘The result is often a confusing mix of distinctions that can melt into air when we press on them too firmly: a law of firm rules and loose exceptions, of foundational principles and counterprinciples, pitched as a vocabulary of ethics and saavy political calculation’ (p. 47).

This is not the kind of admission one can imagine Byers making. But Kennedy makes it and goes farther. He is at pains to stress the essential indeterminacy of law in the absence of a deeper non-legal framework for interpreting its claims – an analysis that knocks the ground out from under Byers’s tortured and dogmatic readings of legal documents. He goes farther still. Where Byers is content to appeal ritualistically to the concepts of ‘balancing,’ ‘proportionality,’ and ‘necessity’ to reach fairly specific legal conclusions (never explaining how invocation of the concept gets him to the conclusion), Kennedy is one of the few scholars I have read to argue for the essential vacuity of all three concepts (at least as typically conceived). A passage on ‘balancing’ drives the point home:

[I]t is extremely difficult to see how one might, in fact, weigh and balance civilian deaths against military objectives 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 own men, you won’t receive a straight answer ... Indeed, at least so far as I have been able to ascertain, there is no background exchange rate for civilian life. What you find instead are rules kicking the decision up the chain of command as the number of civilians increases, until the decision moves offstage from military professionals to politicians. (pp. 143-44)

It would be a mistake to interpret these passages as merely expressive of cynicism, or of the simplemindedness of military personnel, or even as describing failures of information or imagination. The problem here is not that the practitioners in the field are abusing or failing to understand the law – as though the practitioners fell short of *its* standards of precision and cogency. It is that the law itself lacks precision and cogency. A law of ‘necessity’ has to specify *what* is necessary to *whom* and for *what*. If it doesn’t, it says nothing of an action-guiding nature. A law based on ‘balancing’ has to specify commensurable objects of measurement and an objective *unit* of measurement. If it doesn’t, ‘balancing’ becomes an impossibility and a fraud. Though he is less explicit about the point than he might be, at least by implication, Kennedy raises the possibility that the law asks the impossible of those under its jurisdiction. To his credit, he also at least indirectly disputes the supposedly clear and immutable distinction between combatants and non-combatants (p. 89), as well as the rigid bifurcation of *ad bellum* and *in bello* considerations (p. 102).

Having praised the book, however, I found no shortage of things to criticise. An initial problem is the mirror image of the problem with Byers’s book. Where Byers’s book is a polemic masquerading as a primer, Kennedy’s book often has the feel of a primer masquerading as a polemic. The book opens, polemically enough, with a remarkable confession about the grandiosity behind the international lawyer’s enterprise (pp. 29-30), and continues with some harsh words about the ignorance underlying that grandiosity: ‘Our image of the military came more from the movies than from experience’ (p. 31). The book ends by describing war law as ‘an elaborate discourse of evasion, offering at once the experience of safe ethical distance and careful pragmatic assessment ...’ (p. 169). But too much of what lies between these provocative claims consists of rhetorical questions, appeals to relativism, and shruggings of the shoulders: Kennedy tends to be a lot better at raising questions than at answering them. Likewise, too much of the book meanders without structure from topic to topic without quite developing any one topic in sufficient depth to offer conclusive answers to the questions he raises. The text is dotted with striking claims that are made but never supported, and with colossal generalisations that are asserted but never particularised.

Finally, for a book that has so much to say about the failures of international law, I found it amazing that Kennedy had almost nothing to say about failures of *enforcement*: almost everything he has to say about the United Nations is either vaguely laudatory or vaguely neutral. ‘The United Nations Charter,’ he tells us with remarkable understatement, ‘laid out an ambitious scheme to establish

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an international monopoly of force. The UN Security Council would have responsibility for maintaining the peace' (p. 78). One could not infer anything about the blood, treasure, and agony concealed by those two sentences.

VI.

Whatever their flaws, these books offer a salutary if perhaps unintended lesson: they reveal invocations of international war law as a rhetorical bluff. A person who condemns the Iraq war as 'illegal' ought to be asked what he thinks about Byers' claim that UN Resolution 1441 'de-legalized the situation.' A person who equates George Bush with Saddam Hussein should be asked whether he regularly equates policemen with criminals. A person who condemns the Military Commissions Act as 'illegal' should be asked to supply the details of a better alternative. A person who condemns Israel by way of international law should be asked why Israeli security ought to be placed at the mercy of those hostile to Israel's very existence. And a political scientist who equates the 'rights and wrongs' of the Arab-Israeli conflict with 'legal rights' while distinguishing both from 'morals' should be queried about how he defines his terms, and why we are obliged to follow suit.

I think such responses will quickly make clear that appeals to international war law are at best the beginning of a long argument, not the end of one. Given the stakes, it's probably high time that such arguments got started, and a shame that so many people think that an appeal to 'law' precludes the need for one. [6]

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Notes

[1]References for the quotations, in order, are: (1) Information Clearinghouse 2006, (2) Glantz 2006, (3) Amnesty International 2006, (4), Save Palestine Now 2007, (5) Democracy Now 2006.

[2]There can, of course, be a morality of optimal outcomes that equates moral rightness with the best available outcome; I subscribe to such a view myself. My point is that Byers clearly does not hold such a view, and yet fails to indicate when he means to be talking about the one concept or the other.

[3]For a sense of the complexity of this issue, see Felter and Brachman 2007, especially pp. 19-21. I benefited from an excellent lecture on this subject by Professor Rene Provost of McGill University, at John Jay College of Criminal Justice, 15 March 2007 ('Killing with Distinction: On Categorizing Victims and Targets in the Laws of War'). However, the claims made in the text are my own, not Professor Provost's.

[4]Meyer and Califano 2006, pp. 217, 220: 'Although there is no evidence to suggest that the officers of The Thirty-Eighth Floor [i.e., the UN's 'senior management'] knew of [Benon] Sevan's corrupt receipt of oil allocations or that they themselves were corrupt, they exercised little competent oversight of Sevan's activities ... The cumulative management performance of the Secretary-General and the Deputy Secretary-General fell short of the standards that the UN should strive to maintain.' Benon Sevan was the UN official in charge of the oil for food program. Meyer and Califano 2006 is an authorized summary of the Report of the Independent Inquiry Committee headed by Paul Volcker, Chairman of the Committee.

[5]See Benjamin and Simon 2003, pp. 350-64, especially pp. 355-56.

[6]Thanks to Carrie-Ann Biondi for editorial feedback.