

THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM BY DAVID KENNEDY (PRINCETON, US: PRINCETON UNIVERSITY PRESS, 2004) 386 PAGES. PRICE \$US29.95 (HARDCOVER). ISBN 0691116865.

At some point in 2004, the war in Iraq ceased to be principally a hunt for weapons of mass destruction, and was reborn as a more emphatic project of Iraqi liberation and democracy-building. The language of military necessity and legal authorisation was replaced by squarely humanitarian discourses of liberation, freedom, self-government, and reconstruction.

And yet the sense lingered among many international humanitarians that, off-screen, there persisted goals, interests and policies on the part of the ‘coalition of the willing’ that were not entirely humanitarian in aspiration. International humanitarians were thus left feeling torn between their antagonism towards the occupation of Iraq, and the impetus to embrace explicitly humanitarian commitments; between resentment of the events of 2003, and a strong will to relevance.

Even as the United States-led coalition transferred sovereignty to an interim Iraqi Government, this internal conflict did not disappear. Rather, a sense remained for many international lawyers of the need to re-examine the potential ‘dark sides’ of humanitarian discourse, as it had been deployed in Iraq.

Against this background, the release of *The Dark Sides of Virtue: Reassessing International Humanitarianism*¹ could not be more timely. David Kennedy has been one of the definitive critical voices in international law theory over the last two decades, and in this book he ties together many of the strands of that criticism to present a powerful commentary on international humanitarianism today, even in its more self-critical, pragmatic incarnation. Kennedy argues that it is not only the *misuses* of humanitarian discourse by ‘other people’, or blind spots and biases of implementation, which cause the humanitarian project to go wrong at the level of consequences. Rather, Kennedy argues that, from a pragmatic viewpoint, the humanitarian project is flawed in a much deeper, structural sense.

I OUTLINE

The book is built around Kennedy’s provocative 2001 article, ‘The International Human Rights Movement: Part of the Problem?’,² in which he outlined nine potential ‘dark sides’ to the international human rights project. In the book, Kennedy goes on to illustrate these dark sides more profoundly, by drawing on his previous writing about the human rights movement,³ law and development,⁴ law and European integration,⁵ and refugee law and protection.⁶

¹ David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004) (*The Dark Sides of Virtue*).

² Originally published in (2001) 6 *European Human Rights Law Review* 245; (2002) 15 *Harvard Human Rights Journal* 101; see *ibid* ch 1 for the revised version of the article.

³ *Ibid* chs 2, 3.

⁴ *Ibid* chs 4, 5.

⁵ *Ibid* ch 6.

Those familiar with his work will note that the book includes in chs 2 and 3 revised versions of two of his extremely well-known previous articles, 'Spring Break'⁷ and 'Autumn Weekends'.⁸ In addition, Kennedy draws on a week-long experience in 1998 in the Persian Gulf on the *USS Independence*, and his reactions to the recent Iraq war, to write a powerful essay on the relationship between humanitarianism and force, and the 'dance' between civilian humanitarian and military professionals.⁹ The book then concludes with reflections on 'What Humanitarianism Should Become', proposing some tentative answers to the provocative questions asked by Kennedy in 2001.¹⁰

II THE CRITIQUE

The 'dark sides' identified by Kennedy might be summarised as falling into roughly four categories: namely, as problems of (i) distortion; (ii) displacement; (iii) diversion; and (iv) denial.

International humanitarianism, according to Kennedy, distorts action for social change by reason of its state-centric and institution-centric character. The human rights movement has generally sought to speak truth to state power, rather than to background forms of economic and social power.¹¹ It thus fails to contest background forms of regulation, and economic practice, in ways which neglect the inequality or violence caused in the domain of the 'private' or the interstices of state power.¹² As international humanitarians, we speak about a 'right to development', and the need for states in the South to be transparent and law-adherent, and ignore the way in which international trade and foreign investment flows shape and even undermine development.¹³ As international humanitarian lawyers, we talk about 'intervention' as a sharp deviation from normal practice, and ignore the ways in which foreign and trade policy constantly intervene to shape experience on the ground.¹⁴ We attempt to restrain violence through rules and standards governing war, allowing the workings of the arms industry to recede into the background.¹⁵

Further, in its increasing dominance, the apolitical vocabulary of international humanitarianism displaces forms of political struggle which may be more effective in contesting sources of violence or inequality.¹⁶ As a professional vocabulary, it displaces discourses based on faith, which might ultimately provide more traction against practices we oppose, such as torture, or mass killing.¹⁷ As an individual rights-based vocabulary, it displaces the possibility of

⁶ Ibid ch 7.

⁷ (1985) 63 *Texas Law Review* 1377.

⁸ 'Autumn Weekends: An Essay on Law and Everyday Life' in Austin Sarat and Thomas Kearns (eds), *Law in Everyday Life* (1993) 191.

⁹ Kennedy, *The Dark Sides of Virtue*, above n 1, ch 8.

¹⁰ Ibid ch 9.

¹¹ Ibid 11.

¹² Ibid 12–13.

¹³ Ibid 156–66.

¹⁴ Ibid 23.

¹⁵ Ibid 305.

¹⁶ Ibid 9.

¹⁷ Ibid.

more collective, compromise-based solutions.¹⁸ And as a discipline which defines itself in terms of a triad of perpetrator/victim/observer–advocate, it displaces more complex understandings of roles and responsibilities, and casts victims as objects rather than authors of their own liberation.¹⁹

Kennedy argues that, in participating in this depoliticised, professionalised practice of representation, international humanitarians often mistake humanitarian institutions, instruments, or programs, for progress.²⁰ As professionals, we enchant the humanitarian project, and mistake progress on the project for progress on the ground. Frantic working groups and earnest general resolutions at a meeting of activists in Lisbon becomes a substitute for progress on East Timorese liberation.²¹ Arguing over the definition of ‘refugee’ in Geneva becomes a substitute for ensuring that displaced persons in Africa find meaningful, permanent asylum or are able to return home.²² The campaign to force the US to obtain clear Security Council support for its military actions becomes a substitute for worrying about whether war in Iraq is in fact justified, desirable, or preventable.²³

Finally, Kennedy argues that international humanitarian practice is accompanied by a very deep form of denial. Kennedy challenges the unwavering self-image of humanitarians as *outside* the practice of government — as speaking truth/law to power, rather than exercising power²⁴ — and as speaking for others rather than themselves.²⁵ He argues that this self-image contributes to humanitarians shying away from a truly pragmatic attention to consequences, in favour of formalistic commitments, and a willingness to blame others for negative consequences.²⁶ In development policy, humanitarians advocate anti-corruption and ‘rule of law’ policies, without seeing themselves as making trade-offs between access to capital and the distribution of income.²⁷ Humanitarians thus tend to blame market forces when the new legal regime creates increased income inequality. In refugee policy, officers of the United Nations High Commission for Refugees (‘UNHCR’) do not see themselves as *controlling* mass movements in population. Rather, the UNHCR ‘classifies’, and national governments are allocated blame when refugees remain displaced, victimised or malnourished.²⁸ Within international humanitarian law, humanitarian advisers see themselves as an outside *limiting* force on military decision-makers, and thus attribute to military strategists the ultimate decision to kill civilians or enemy soldiers.²⁹ Humanitarians deny their own vocabulary as *empowering* as well as limiting the use of force — where it could be said to be

¹⁸ Ibid 17.

¹⁹ Ibid 15.

²⁰ Ibid 23–4.

²¹ Ibid 98–107.

²² Ibid 209–12.

²³ Ibid 279.

²⁴ Ibid 30–2.

²⁵ Ibid 29.

²⁶ Ibid 30.

²⁷ Ibid 162–7.

²⁸ Ibid 204–6.

²⁹ Ibid 282.

necessary or proportionate — and thus distance themselves from the ‘misuse’ of the vocabulary by political leaders.

As outsiders and *critics*, international humanitarians also deny the way in which their tools may act further to legitimise violence or injustice.³⁰ As Kennedy worried in ‘Spring Break’, an international human rights delegation making arguments in front of a puppet military judge may simply reinforce his sense of legitimacy.³¹ Banning landmines when they are no longer particularly useful or desirable for military purposes may simply act further to legitimise other forms of warfare as ‘clean’ or legitimate.³² Creating rules about the (un)lawfulness of war may encourage the belief that the use of force is always incorrigibly bad, even in circumstances where the resort to force is the only means to check egregious humanitarian violations of a foreign government.

Many of these criticisms, in past work, have provoked anger and discomfort on the part of those in the human rights community. There has been a sense that Kennedy is perhaps too critical, and insufficiently engaged in rebuilding a humanitarian project.³³ In this book, Kennedy in many ways answers that criticism. However, his proposals for renewal are likely to meet with a mixed response.

III PROPOSALS FOR RENEWAL

One may expect that some of Kennedy’s proposals for renewal will readily be absorbed by those embracing the existing humanitarian framework. Kennedy calls, for example, for more attention to background economic and social conditions, and for a less binary concept of intervention.³⁴ Insofar as he is calling for an expanded focus for the human rights movement, one suspects that this call will likely be heeded. The human rights movement has in some ways already begun to grapple with the challenge set out by Kennedy, by involving itself in debates on corporate responsibility and, in the US, by supporting litigation under the *Alien Tort Claims Act*³⁵ to make corporations liable as accessories to violations of human rights.³⁶

Kennedy also argues that humanitarians must constantly remind themselves that ‘tools are tools’, not ends, and that ‘progress is not [a] program’.³⁷ In this respect, pragmatic humanitarians will find renewed impetus toward projects which realise short-term to medium-term results on the ground, over projects which have precarious, long-term institution building goals. One is reminded in

³⁰ Ibid 25.

³¹ Ibid 76.

³² Ibid 297.

³³ Hilary Charlesworth, ‘Author! Author!: A Response to David Kennedy’ (2002) 15 *Harvard Human Rights Journal* 127.

³⁴ Kennedy, *Dark Sides of Virtue*, above n 1, 349–50.

³⁵ 28 USC § 1350 (2004).

³⁶ See, eg, *Doe v Unocal*, 2002 WL 31063976 (9th Cir, 2002), vacated for en banc review, 2003 WL 359787 (9th Cir, 2003); *Wiwa v Royal Dutch Petroleum Company*, 226 F 3d 88 (2nd Cir, 2000); *Sarei v Rio Tinto, plc*, 221 F Supp 2d 1116 (CD Cal, 2002); *Estate of Rodriguez v Drummond Co, Inc*, 256 F Supp 2d 1250 (ND Ala, 2003); *Sosa v Alvarez-Machain; Alvarez-Machain v United States*, Nos 03-339 and 03-485, slip op (US, 29 June 2004).

³⁷ Kennedy, *Dark Sides of Virtue*, above n 1, 352–3.

this context of the success of the ad hoc war crimes tribunal, the Special Court for Sierra Leone. This court has a three year mandate and a US\$25 million budget, compared to the far more ambitious and costly project of creating the International Criminal Court. The decisively unenchanted attitude of Special Prosecutor David Crane might be seen to embody this spirit of renewed, pragmatic humanitarianism.³⁸

However, Kennedy clearly rejects the sufficiency of these somewhat familiar, pragmatic reforms to avoid the pitfalls of international humanitarianism as we now know it. Rather, Kennedy argues that the most promising basis for renewal lies in letting go of our self-conception as strangers to, and critics of, power, in favour of a self-conscious awareness of our power and a will to governance.³⁹ Kennedy seems to argue that, only when humanitarians fully acknowledge that they — *personally, collectively and institutionally* — routinely make decisions which displace, impoverish and even kill people, will a true pragmatism of intentions, consequences and decisions emerge.

IV COMMENT

In this latter respect, Kennedy's book is far more than a challenge to pragmatic humanitarians to improve their performance — it is a challenge to those who identify as international humanitarians at the level of psychology, identity and even philosophy. Kennedy wants international humanitarians to become decision-makers who acknowledge moral uncertainty, feel emboldened but also frightened — and ultimately, who exercise power in an existentialist spirit of responsibility. It is the completion of Kennedy's contribution, as part of a loose theoretical collaboration, to developing new approaches to international law.

One may therefore suspect that some readers will reject a large part of what Kennedy has to say in the final section of the book. There is a strong tendency, demonstrated in interviews and talks by Kennedy about *The Dark Sides of Virtue*, for his audience to want to grasp on to the more orthodoxly pragmatic parts of his argument.⁴⁰ For those in the human rights community, his final ch may seem like a call to abandon too much of what is good, successful, and worthwhile — or even, just familiar.

Readers in government or military life may in many ways relate more easily to Kennedy's proposals for renewal, given a professional sensibility based more strongly on a sense of decision-making power and responsibility. In addition, in earlier chs, the book provides very vivid portrayals of certain forms of bureaucratic decision-making, and ordinary military life, which will be of interest in their own right. Indeed, it is suggested that the portrayal of military life aboard the *USS Independence* and the decision-making calculus resident in the naval warfare realm are described with uncanny accuracy. Kennedy notes, for example, how members of the *USS Independence* were constantly assessing

³⁸ See, eg, remarks by Crane about the concrete aims of his mandate: Letter from Mr David Crane, Special Prosecutor, Special Court for Sierra Leone, to House of Commons Select Committee on International Development, 9 March 2003 <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmintdev/548/3031804.htm>> at 1 October 2004.

³⁹ Kennedy, *Dark Sides of Virtue*, above n 1, 354–7.

⁴⁰ See, eg, 'Darkness Visible: The Costs of International Humanitarianism' (Summer 2004) *Harvard Law Bulletin* 6 <http://www.law.harvard.edu/alumni/bulletin/2004/summer/bookshelves_main.html> at 1 October 2004.

the compliance of their pre-war operations with legal norms and observes how they, as military officers, aspired to be legitimate not only in the eyes of the world, but also in their own eyes.⁴¹

Whatever different readers ultimately take from the book, however, humanitarians in all areas will be deeply interested and engaged by it. They will find it an important and tight compilation of a career's worth of very important and influential writing in the area. And they will find it extremely enjoyable reading, given Kennedy's humour and literary style. This, of course, will come as no surprise to those who have read 'Spring Break' or 'Autumn Weekends'.

The book contains so few footnotes that it is being sold in some US bookshops in the section on 'Current Affairs'. Like all good pieces of literature, it leaves us guessing as to the allusions it contains to other great works of legal theory. The influence of Duncan Kennedy,⁴² Roberto Unger⁴³ and others in the critical legal studies movement lies just below the surface in many parts of the book, especially in its call for pragmatic renewal. One can also clearly see the American legal realist influence — of Hale,⁴⁴ Cohen⁴⁵ and others — in the focus on background/foreground conditions of violence and inequality, and in the critique of form over substance. Other influences and allusions are harder to detect with any certainty, however. There is perhaps an echo of the McDougal law choice paradigm, within a mixed policy/legal framework.⁴⁶ In Kennedy's critique of rights as displacing talk of compromise and community, one is tempted to see flashes of Michael Sandel⁴⁷ and Mary Ann Glendon,⁴⁸ both also at Harvard, but writing from a very different perspective. The book is thus highly readable and accessible, but also brings theoretical depth, the contours of which are worthy of further analysis and debate.

Many international lawyers will have encountered Kennedy's work before. However, this most recent book brings that work together in a very cogent and engaging way, and adds proposals for renewal which merit serious debate and consideration. It thus merits the attention of those new to critical scholarship in this area, as well as those in Australia at the centre of the ongoing debate on what international humanitarianism is, and what it should become.

ROSALIND DIXON*
DALE STEPHENS†

⁴¹ Kennedy, *Dark Sides of Virtue*, above n 1, 292.

⁴² See, eg, Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* (1997); Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685.

⁴³ See, eg, Roberto Mangabeira Unger, *What Should Legal Analysis Become?* (1996).

⁴⁴ See, eg, Robert Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470.

⁴⁵ See, eg, Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809.

⁴⁶ See, eg, Myres McDougal, 'Law and Power' (1952) 46 *American Journal of International Law* 102.

⁴⁷ See, eg, Michael Sandel, *Liberalism and the Limits of Justice* (2nd ed, 1998).

⁴⁸ See, eg, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).

* BA, LLB (New South Wales), LLM (Harvard), SJD Candidate (Harvard).

† BA (Flinders), LLB (Hons) (Adelaide), GDLP (SAIT), LLM (Melbourne), LLM (Harvard); Commander, Royal Australian Navy.