

**THE DARK SIDES OF VIRTUE: REASSESSING  
INTERNATIONAL HUMANITARIANISM<sup>1</sup>**

REVIEWED BY DALE STEPHENS<sup>2</sup> & ROSALIND DIXON<sup>3</sup>

In most writings on international law, it seems convenient to portray the military and international humanitarian lawyers as talking different and opposing languages. The military speak the language of Washington, while humanitarians speak the language(s) of Geneva. The military are the “insiders” and international humanitarians the “outsiders.” The military use force; humanitarians restrain it. The military represent power and humanitarians try to speak truth to power.

There is, of course, something fundamentally wrong in this picture. The modern humanitarian law project has, in fact, very successfully inculcated military decision-making with a resolute humanitarian vocabulary and sensibility. Organizations such as the International Committee of the Red Cross have successfully worked in close partnership with many professional militaries to ensure the effective realization of many universally accepted humanitarian goals.

Most writings by international law scholars do not seem to fully appreciate these developments. Not so, David Kennedy’s new book, *The Dark Sides of Virtue*, which provides an extremely novel and important contribution to our understanding of the relationship between international humanitarianism and the military. In contrast to previous scholarship, *The Dark Sides of Virtue* highlights the successful nature of the military-humanitarian collaboration. In doing so, however, the book also highlights the ambivalence that both sides bring to this collaboration, and it provides real insight into questions about why things can go wrong on the ground, when military and humanitarian projects are joined.

Additionally, the book will be of interest to civilians and to military officers outside the Judge Advocate Generals’ Corps, for its portrayal of life aboard the *USS Independence*. In recounting the week he spent in the Gulf in 1998 aboard the aircraft carrier, Kennedy brings an acute sense of

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1. DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004).

2. Commander, Royal Australian Navy, BA (Flin.), LL.B. (Hons) (Adel.), GDLP (SAIT), LL.M. (Melb.) LL.M. (Harvard).

3. B.A./LL.B. (UNSW), LL.M. (Harvard), SJD Candidate, Harvard University.

observation and a wonderful gift for language. In particular, his reflections on the manner in which legal issues are processed in good faith by operators facing a combat situation are particularly uncanny. Indeed, it would be hard to point to a better literary portrait of life aboard a warship than that provided by Kennedy.

In his arguments for reform, Kennedy's message also speaks in another way to the military as a whole. Throughout the book, he poses some hard questions about how we should think about the manner in which we see ourselves as military and humanitarian professionals, and the relationship between law, military efficiency, and other discourses which are deserving of serious reflection.

#### A. Outline

The book is built around Kennedy's provocative 2001 article, *The International Human Rights Movement: Part of the Problem?*,<sup>4</sup> in which he outlined nine potential "dark sides" to the international human rights project.<sup>5</sup> In the various chapters of the book, Kennedy goes on to illustrate these dark sides, by drawing on his previous writing about the human rights movement,<sup>6</sup> law and development,<sup>7</sup> law and European integration,<sup>8</sup> and refugee law and protection.<sup>9</sup> (Those familiar with his work will note that the book includes revised versions of his extremely well-known previous articles, "*Spring Break*"<sup>10</sup> and "*Autumn Weekends*."<sup>11</sup>) Previously unpublished in its entirety, Kennedy illustrates his arguments concerning the dark sides of international humanitarianism by reference to the military context.<sup>12</sup> He concludes with reflections on "*What Humanitarianism Should Become*"—proposing some tentative answers to the provocative questions asked by Kennedy in 2001.<sup>13</sup>

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4. 3 EUR. HUM. RTS. L. REV. 245 (2001), reprinted in 15 HARV. HUM. RTS. J. 99 (2002).

5. KENNEDY, *supra* note 1, at 3.

6. *See id.* at 37-83 (ch. 2).

7. *See id.* at 111-46 (ch. 4); 149-67 (ch. 5).

8. *See id.* at 169-97 (ch. 6).

9. *See id.* at 199-233 (ch. 7).

10. 63 TEXAS L. REV. 1377 (1985).

11. Autumn Weekends: An Essay on Law and Everyday Life in AUSTIN SARAT & THOMAS R KEARNS, LAW AND EVERYDAY LIFE 191 (1993).

12. KENNEDY, *supra* note 1, ch. 8, at 235.

13. *See id.* ch. 9, at 327.

## B. Kennedy's Arguments

In Chapter 8 of the book, Kennedy starts by outlining the history of the law governing the resort to war (*jus ad bellum*) and the law in war (*jus in bello*).<sup>14</sup> Of particular interest, he shows how much of the impetus for the regulation of war came from those in, and close to, the military itself. For instance, the 1868 St. Petersburg Declaration renouncing the use of specific explosive projectiles was sponsored by the Russian war minister.<sup>15</sup> The U.S. Government instructions for Union troops in the field was written by Columbia Professor Francis Lieber, who had sons fighting on both sides.<sup>16</sup>

Interestingly, Kennedy also analyzes the political strategy of the international humanitarian movement and its historic shift of emphasis from promoting “bright line” rules in war in the late Nineteenth Century to its focus on broader all encompassing “standards” of regulation in the Twentieth and Twenty-First centuries<sup>17</sup> (*i.e.* the introduction of concepts such as necessity, proportionality, incidental/collateral damage, concrete military advantage). Kennedy is critical in viewing these developments as a “great march forward” for the Law of Armed Conflict, and is intent on highlighting their inherent biases and blind spots.<sup>18</sup>

### 1. *Privileging the Status Quo*

In his critique of *jus ad bellum*, Kennedy observes that the law takes state sovereignty as its norm and puts the onus on those “intervening” to justify their actions. This, according to Kennedy, is a state-centered way of thinking which may tip the balance against military intervention when it in fact would be desirable.<sup>19</sup> Once one sees things in this way, it is perhaps not surprising that international law scholars have developed a concept of “illegal but legitimate” humanitarian intervention. Kennedy argues that we should have a less binary, status quo favoring view of “intervention.” He says that we intervene all the time through development, trade, and other commercial policies—and that, perhaps, military intervention should not be seen as *so* radically discontinuous from that. We should

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14. *See id.* at 242.

15. *See id.* at 238.

16. *See id.* at 238-39.

17. *See id.* at 271, 298, 317.

18. *See id.* at 298-307.

19. *See id.* at 262-6.

be pragmatic about what good intervention will do, rather than focused on legal onuses.<sup>20</sup>

## 2. *Confusing the Project with Progress*

In what is possibly the enduring theme of the humanitarian/military analysis, Kennedy posits that international humanitarians champion the *jus ad bellum* and *jus in bello*. The institutions which develop these bodies of law and give them effect, more as ideology than as a useful measure for realizing humanitarian goals.<sup>21</sup> Kennedy consistently argues that this perspective on the law can obscure realistic assessment of humanitarian utility.

In the context of military intervention, Kennedy argues that this focus on legality and institutional legitimacy may divert us from a more substantive inquiry about whether military force is actually going to deal with problems on the ground. He suggests that the focus among international lawyers in 2003 on the necessity for clear Security Council authorization for the war in Iraq became a substitute for a truly pragmatic inquiry about whether military means were a good way of achieving democracy-building or dealing with weapons proliferation or the threat of Saddam Hussein.<sup>22</sup> Lawfulness, Kennedy argues, can become a substitute for practical benefits—in the same way that heroic talk at the United Nations on Third World conditions can become a substitute for real progress on fighting poverty on the ground.

Kennedy thus argues that humanitarians and military lawyers need to be careful not to mistake progress on international law for progress on the ground. We should worry more about concrete outcomes and not risk everything on long-term institution-building goals. That is, pragmatic and concrete cost/benefit analysis should shape the direction of the law more concertedly than allegiance to the ‘law as ideology’ perspective of the law of armed conflict. In this context he questions, for example, our allegiance to the principle of distinction, poignantly asking why a young draftee should get the ‘benefit’ of being a lawful combatant (and therefore target) in an armed conflict while the civilian power structure that is likely the key propagator of the war remains immune from attack,<sup>23</sup> even when

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20. *See id.* at 351.

21. *See id.* at 277-80.

22. *See id.* at 279.

such an attack would surely shorten the length and suffering of a conflict. As professional military officers we might first recoil from such a direct assault on *jus in bello* orthodoxy, but, in terms of practical and humanitarian outcomes, such arguments have some appeal.

### 3. *Amorphous Standards*

According to Kennedy, the limits of the law are manifested in the very ambiguities of the standards adopted. Moreover, the ‘enchantment’ of the tools of analysis contained within the law of armed conflict means that these ambiguities are too readily glossed over in favor of promoting the “upward spiral of humanitarianism.”<sup>24</sup> Concepts such as proportionality remain amorphous and, Kennedy suggests, are dependent more on the perceived legitimacy of the conflict than any kind of absolute measure.<sup>25</sup>

He notes that the infusion of legally amorphous concepts into Rules of Engagement can result in unclear guidance where, in certain factual situations, legal permissions and prohibitions collide and a “judgment call” from the operator is often required.<sup>26</sup> Victory is seen as the great vindicator of decisions made. The law ceases to govern and guide, but rather “common sense” is necessary to achieve the best possible outcome all in a slightly disassociated name of the law.

In making the argument about the limits of the international law vocabulary, Kennedy also points to the International Court of Justice’s decision on the legality of nuclear weapons. He notes that the Court in that case clearly had difficulty in applying the principles of the law of armed conflict in the context of assessing the lawfulness of nuclear weapons.<sup>27</sup> Indeed, while not specifically highlighted by Kennedy, the opinion itself famously contains the view of one Justice opining that the concept of proportionality is basically ‘meaningless’ in the realm of nuclear weapons.<sup>28</sup>

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23. *See id.* at 270-1.

24. *See id.* at 279.

25. *See id.* at 274-7.

26. *See id.* at 270, 290-1.

27. *See id.* at 319-22.

28. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice (July 8, 1996), available at <http://www.icj-cij.org/icjwww/icasel/iunan/iunanframe.htm> (last visited Oct. 29, 2004) (providing the dissenting opinion of Judge Weeramanantary).

#### 4. *Pulling Back from Responsibility*

Kennedy further argues that humanitarians and military professionals often pull back from embracing the ultimate consequences of the legal standards they advocate, as applied on the battlefield. For example, Kennedy notes:

The humanitarian seems to reserve the right to exit the conversation, to depart the vocabulary of pragmatism about consequences, while the military planner must remain within it. Watching discussions between students with military and humanitarian backgrounds, one often feels the military's frustration after walking through a lengthy analysis of costs and benefits and proportionality and necessity, only to be denounced as inhumane — "these civilians can just say *anything*." They lack discipline.<sup>29</sup>

Kennedy, however, also suggests that military professionals may pull back from the full implications of proportionality-style reasoning.

In this regard, he notes:

Humanitarians are not alone in experiencing a taboo around the pragmatic assessment of consequences. The military strategist is rarely any more willing to complete the pragmatic analysis called for by the humanitarian law vocabulary. When critics ask how many civilians the military is willing to kill in pursuit of this or that objective, the strategist will also often simply restate the principle — "our soldiers have the right to defend themselves" — or explain that the answer is a matter of "judgment." Like humanitarians, strategists may also step outside to a more absolute vocabulary — here of consequences, invoking the military mission, force protection or simply victory — we will "do our job" or "protect our soldiers."<sup>30</sup>

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29. KENNEDY, *supra* note 1, at 282.

30. *Id.* at 332.

5. *Further Denial—International Law as Empowering Rather than Restraining?*

Kennedy further argues that, as international humanitarians and military strategists, we deny the way in which our common vocabulary can encourage and empower the use of force as much as restrain it. Banning land-mines, for example, when they are no longer particularly useful or desirable for military purposes, may simply act to further legitimize other forms of warfare as “clean” or legitimate.<sup>31</sup> Legal branch talk of the concepts of necessity and proportionality may simply make military officers feel more justified in killing civilians when faced with difficult choices about trading-off civilian and military lives. The vagueness of international law standards seems to relieve us of taking responsibility for these difficult trade-offs—so that, ultimately, no one feels responsible for making them.<sup>32</sup> That is, civilians get killed without *anyone*—either in the chain of military command, or in the offices of civilian and humanitarian control—feeling responsible.

In this pragmatic vein, Kennedy asserts that when other discourses prove helpful to the humanitarian project, we should embrace them. In the military decision-making context, religious and ethical discourses<sup>33</sup> have been largely silenced in favor of advocating the universality of legal standards in armed conflict. Against this trend, Kennedy suggests that it is perhaps time to revisit such discourses, at least when the law reaches its own limits of usefulness.

Most importantly, Kennedy argues that there will not be a truly effective form of pragmatic humanitarianism—either in the deployment of the military, or in any other sphere of international action—without a more fundamental shift in our self-understanding. That is, he argues that humanitarians need to stop thinking of themselves as strangers to and critics of power; they need to favor a self-conscious awareness of actual power and a will to governance.<sup>34</sup> Military readers may feel that this injunction is not directed to them; after all, they already know the awesome power which comes with the hardware they deploy.

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31. *See id.* at 297.

32. *See id.* at 314.

33. *See id.* at 278, 276.

34. *See id.* at 277, 348-49.

Kennedy argues, however, that military professionals—like humanitarian lawyers—also shy away from taking full responsibility for their actions. They do not fully acknowledge the power each individual has to make decisions within our sphere of responsibility, instead seeking refuge from individual and collective responsibility behind military codes, chains of command, and vague international law concepts of necessity and proportionality.<sup>35</sup>

### C. Comment

Kennedy's book provides a very real challenge to military professionals, along with international humanitarians, to rethink how they approach issues of power and decision-making. Many of Kennedy's suggestions for reform may be readily embraced by decision-makers in the military context. For example, a "status quo" bias in favor of sovereignty has come under significant challenge in recent missions such as that in Kosovo, and even more starkly, in Iraq. Within the military, attachment to the project of "international law building" has, arguably, always been more pragmatic than many non-governmental contexts. Given the nature of most combat operations, military decision-makers are likely to be sympathetic to a call for greater attention to short- and medium-term consequences on the ground. Many officers will readily accept the need to take even greater responsibility for their decisions, though they will likely also rightly point to the challenges this entails given the complex structures of decision-making and responsibility in the chain of command.

Some of Kennedy's proposals for reform may, however, meet more resistance in other contexts. For instance, Kennedy's call for a more pragmatic calculus might be thought to support the argument that the *jus in bello* has no useful role to play in the context of the war against terrorism. In this context, while military lawyers will readily admit the limitations of the current *jus in bello* and the potential need to adapt its rules to new conditions and its demonstrated failures, most would argue that *jus in bello* has the potential to develop in ways which respond to these challenges. That is, we would not give up on the potential to reform the *jus in bello*, to provide both a stronger set of bright-line constraints, and a set of norms more

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35. *See id.* at 312-13, 332.



adapted to the imperatives of new military challenges—whatever dangers of distortion it may bring.

Recent events suggest that it may be a particularly precarious time to abandon a project of legal reform in favor of a vocabulary of pure pragmatic decisionism.

Whether or not one accepts the entirety of his proposals for reform, however, Kennedy's book should spark a very important debate within the military about the ways in which power and responsibility may be deflected and denied under the rubric of the law of armed conflict and how humanitarian goals consistent with mission success may be truly achieved. It is therefore important reading for all military professionals.