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Author(s): James Turner Johnson
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HUMAN RIGHTS AND VIOLENCE IN CONTEMPORARY CONTEXT

James Turner Johnson

ABSTRACT

Since World War II human rights language has come to occupy a central place in moral and legal discourse on the justification and limitation of armed conflict. At the core of contemporary international humanitarian law, concern for human rights has also developed as a vehicle for identifying and expressing moral concerns held in common across diverse cultural systems.

KEY WORDS: *force, human rights, international law, just war, violence*

CONCERN FOR PROTECTION OF HUMAN RIGHTS has come to occupy a central place in contemporary understandings of the justification—or nonjustification—of resort to violent force and limitations on such force. Such understandings assume not only that violence can be justified—as opposed to the position that it is always wrong in itself—but also that it must be justified and, if justified, used in a manner consistent with its justification. Similarly, these understandings assume that there are identifiable human rights, rights common to all people, and that these rights bear on moral behavior, so that one person may not morally violate the human rights of another or even, arguably, his or her own.

These two morally significant subjects, human rights and violence, intersect in a variety of contexts; in this brief discussion, I will focus on the one I know best: the use of governmentally and internationally authorized military force across national borders.

1. International Humanitarian Law

It needs to be said first, as a kind of caveat, that in the moral traditions of the world, human rights appeals have only relatively lately come on the scene as reference points for determining the justification of resort to violent force and limits on the use of such force. Traditional codes of military behavior like that of the samurai, the Aztec warrior, or the medieval knight focused instead on the virtue of the warrior. Islamic juristic tradition on the warfare of the *dar al-Islam* spoke in terms of the duty of individual Muslims and of the Muslim state to spread behavior in accord with the law of God and to protect the territory in

which such behavior was enforced. In ancient Israel's "wars of Yahweh," God's call to arms was the only justification required, and the persons and property of the vanquished enemy—men, women, and children—were to be "dedicated to destruction." These are but a few examples of a general phenomenon.

It is also useful to bear in mind that just war tradition coalesced, not around the idea of rights, but around quite different clusters of value. In classic just war thought, the values to be served by public use of violent force were those of Augustinian political theory: order, justice, and peace, which correlated directly with the three core requirements of the *jus ad bellum,* competent authority, just cause, and right intention. When medieval writers discussed the need to avoid direct, intentional harm to noncombatants, they did not refer to this as a requirement of the human rights of the noncombatants but as a requirement of justice: "These take no part in war, and they should therefore not have war made against them," as the fifteenth-century writer Christine de Pisan stated the case (Pisan 1932, 224; cf. Bonet 1949, 189). Vitoria in the sixteenth century and Hugo Grotius in the seventeenth still employed the language of natural law and natural justice. Only with John Locke and the French *philosophes* did the focus shift to the natural rights of people not to have violence used against them unless they had by their actions forfeited these rights. This is fundamentally the form of Michael Walzer's contemporary reasoning about just warfare, as we shall see later on. But when international agreements limiting the use of violence began to solidify in the late nineteenth and early twentieth centuries, they typically employed the language of duty, not rights. Recent just war theory, as illustrated by the reasoning of Paul Ramsey, often focuses on motivations and obligations, not the rights of potential victims of violence in war.

The coming to primacy of human rights language in international discourse on the justification and limitation of violent force is effectively symbolized by the change in international law governing the use of such force. Historically, though, this change is relatively recent. Up through World War II and for some time afterwards, the relevant portion of international law was called the "law of war" (Roberts and Guelff 1989, 23–337). It consisted of regulations on the means of warfare (often called "Hague law" after the conferences that produced these rules) and protections extended to various classes of noncombatants (widely termed "Geneva law" since the protections were spelled out in a series of Geneva Conventions beginning with that of 1864). What was regulated by these rules and conventions was international war; the agreements in question stipulated clearly that the regulations were binding only in such warfare between belligerents who mutually accepted them. Through the

1960s, considerable pressure began to develop to extend the rules and protections of the law of war to other forms of armed conflict that had proliferated since the foundation of the United Nations and the most recent reformulation of the Geneva Conventions in 1949. These other forms of conflict included various forms of undeclared international wars, civil wars, "wars of national liberation," international terrorism, and the use of military means by governments of various states to oppress their citizens. By the 1970s, the "law of war" had become the "law of armed conflicts," regularized in two new Geneva Protocols that reinterpreted the language of the 1949 Conventions so as to apply them to domestic armed conflicts, undeclared cross-border warfare, and unconventional warfare (Roberts and Guelff 1989, 3387–468; cf. 469–89). This expansion of the nature of conflicts addressed was not the only new development. Under the auspices of the United Nations, international sanctions could, in principle, be imposed on violators, and the Security Council could, in principle, take steps, including the use of military force, to right the violations. During the Cold War, of course, what was possible in principle was impossible in reality; so adherence to the laws of armed conflicts, through the decade of the 1980s, was effectively determined by decisions of the individual actors involved in such conflicts.

Parallel to these developments, a new form of international law took root and grew. The Nuremberg and Tokyo war crimes trials had introduced into international law a new concept, that of "crimes against humanity," which went beyond those actions specifically prohibited in the law of war to behavior understood to be against humanity itself (Roberts and Guelff 1989, 153–56). Implicit here was an appeal to a set of human rights common to all persons; the war crimes trials began to specify some of these by the process of creating case law. In 1948 the *Universal Declaration of Human Rights* approached this subject more systematically, and from the top down rather than the bottom up, so that it was no longer necessary, in principle, to discover inviolable rights by first violating them and then being brought to trial and convicted; rather, these rights were spelled out in the form of a Universal Declaration within the frame of the United Nations and, again in principle, to be enforced by means of the authority of that body. Thus began the development of international human rights law, which has since been augmented by additional international covenants and protocols.

Historically these two branches of post–World War II international law came into being separately and, for a time, developed in parallel. By the 1980s, however, there was substantial recognition of the interrelationship of the law of armed conflicts and those elements of human rights law having to do with violations incurred during armed conflict, and a new term, which unified the two, came to be used with increasing

frequency: international humanitarian law. This is the term employed, for example, in the Statute of the International Tribunal for the Former Yugoslavia, which has authority to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" (S.C. Res. 808 [1993]), as well as that of the International Tribunal for Rwanda, whose authority extends to the prosecution of "persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states" during calendar 1994 (S.C. Res. 955 [1994], Annex, Art. 1). These two contemporary war crimes trials, the first under international auspices since those of Nuremberg and Tokyo, are also the first to address the violation of human rights specified in post–World War II international law.

There are other evidences of the increased importance of human rights as a component in contemporary international order. One particularly important example is the dusting off of what is sometimes colloquially called "Article Seven and a Half" of the United Nations Charter (that portion of Article VII that provides for Security Council authorization of military force in cases of "threats to international peace and security") and the application of it to situations in which human rights are being egregiously violated over an extensive period. This reasoning has been used successfully to justify United Nations interventions not only in the former Yugoslavia and Rwanda but also in Somalia, and with less success in other cases.

2. Moral Commonalities

Underlying the emergence of human rights as an element of international law bearing on armed conflict is, of course, human rights as a moral concept. Indeed, the effectiveness of the legal conception and of the sanctions that may be used to enforce it depends on not only the assumption that this conception builds on commonly held moral convictions, but also on the presence of such moral convictions in the cultures of the nations of the world and the various civilizations to which they belong. That these civilizations are, in fact, deeply different and that the differences tend to make for conflict, not commonality, is, of course, the widely promulgated thesis that Samuel Huntington developed in "The Clash of Civilizations?" (1993). It is also reflected in arguments that "Asian values" or "Islamic values" are different from those of the West and that this difference should be recognized in international human rights law. Put together, such arguments tend to undermine the

idea of international humanitarian law as reflecting a genuine moral consensus.

There are, though, various ways of refuting such arguments. One is to emphasize that law takes three broad forms: hegemonic, consensual, and reciprocal (Schwarzenberger 1962, chap. 1). Consensual or community law is the ideal toward which democratic societies continually strive; it is also the form that law takes in deeply traditional societies, or in any society that shares a consensus as to the values and behaviors embodied in its law. Huntington and the proponents of "Asian values" and "Islamic values," among others, effectively stop with this conception, stressing the often stark differences among local moral traditions that are the basis of the legal consensus.

There are, however, other forms of law. In the international sphere, hegemonic law remains particularly important. While the idea of hegemony tends to be dismissed as inherently evil in an age that values self-determination as good in itself, the moral character of hegemonic law in fact depends on the nature of its contents. The just war concept that violence is justified when it operates to punish evil or to recover what has been wrongly taken may exemplify hegemonic law, if the violator does not accept the punisher's understanding of good and evil, right and wrong. The old standard phrase in international law was that the law of war was based in the dictates of *civilization,* which implies consensus within a particular cultural frame but hegemony in dealing with people outside it. The hegemonic law imposed a higher standard.

Thirdly, law may be based on reciprocal interaction between actors. This implies a sphere of commonality reflecting what is discovered by means of their interaction to be in common. The early efforts at defining formal rules for war depended explicitly on the recognition of such commonality, and this dependence remains an important underpinning of stable international order. To take a straightforward example, in conflicts between two relatively equal adversaries, whatever one party to a conflict thinks of the enemy, it is generally to the mutual advantage of both parties to provide for the protection of noncombatants. Rules of restraint based on reciprocity are more powerful than might be thought at first look, and they can be held in place and reinforced by hegemonic pressures exerted by other actors within the international order, either particular states, regional alliances, or the United Nations.

Thus, the absence of genuine worldwide value consensus as to the nature of human rights, the protection due them, and the possibility of the use of violence for such protection does not impeach the significance or the power of international humanitarian law to regulate violence in relation to human rights. Rather, the law operates also as a normative

statement of patterns of behavior solidified by reciprocal interactions and by hegemonic pressures from elsewhere in the international order.

These reflections establish a floor for protection of human rights in situations of armed conflict, even by force if necessary, a floor significantly higher than the Huntington thesis or similar assertions of cultural difference seem to imply by themselves. But there is more to say: the lines of division between major cultural or civilizational boundaries do not have to be understood as impermeable barriers fixed for all time. Rather, the growth of consensus across those barriers, based not only on reciprocity but more deeply on mutually held values, is possible and should be pursued. This is a line of approach to disarming the "clash of civilizations" that Huntington himself introduced, almost as an afterthought, in the last paragraph of his original article on this subject (Huntington 1993, 49); yet it challenges the whole idea that differences in civilizations—or, I would prefer to say, moral traditions—lead necessarily to conflict. Rather, there may, in fact, be considerable commonality embedded in the different normative conceptions of different civilizations, and effort to identify these would be well worth the while.

The first place we in our culture are likely to look for moral expressions of the importance of human rights in relation to justifying and limiting violence is to examples from our own culture. Thus, it is important to find express reliance on human rights reasoning in influential works like Walzer's *Just and Unjust Wars* (1977), where noncombatant immunity follows from a specific right Walzer takes to be universal, that is, a common human right—the right not to be harmed by another. This is the normal state of affairs, as Walzer develops the argument; combatants expressly lose the right not to be harmed by the harm or threat of harm they represent.

As noted earlier, this is a kind of reasoning that can be traced back to Locke and the French *philosophes.* Such a line of reasoning, though, is exactly opposite that found in pre-1949 international law on war, where protection of noncombatants is an exceptional obligation placed on belligerents in a context in which harm to the enemy is the norm. This latter line of reasoning was also that of Grotius, who described the observation of noncombatant immunity as reflecting Christian moral concerns and embodying "charity" toward the persons affected (Grotius 1949, 73; bk. 2, chap. 1.4). In this Grotius revealed his deep indebtedness to the Augustinian tradition, an indebtedness shown to the same end in our own time by Ramsey's development of the idea of noncombatant immunity as a requirement of Christian charity (Ramsey 1961, chap. 3 and elsewhere).

But is this uniquely Christian? Consider the following passage from the Muslim jurist Mahmud Shaltut in his *The Koran and Fighting,*

quoted by John Kelsay in *Islam and War:* "When the [leader of the Muslims] has caused havoc in the land and when the taking of captives has been allowed to him, he may choose between liberating them out of kindness . . . and taking ransom from them. . ." (Kelsay 1993, 72–73). Shaltut here cites the very similar language of Qur'ān 47:4 as his justification. There is also, I suggest, a striking similarity with Grotius's and Ramsey's appeal to charity as the source of noncombatant immunity. Now, obviously both Islamic and Christian traditions have more to say about the nature and source of noncombatancy and the treatment to be given noncombatants; likewise, doctrine on noncombatant immunity is not all there is to say about moral behavior and violence. Nonetheless, here is a strikingly suggestive point of contact between these two moral traditions and their attaching civilizations, a point of contact that implies that there may be a good deal more commonality and implicit consensus than recognized by those persons who, like Huntington, find sources of conflict in civilizational differences. How, though, can we exploit such commonalities? In the contemporary world, human rights discourse functions as a way to do so.

Let me offer a further example—the question of when military intervention in ongoing conflicts is justified—to illustrate further the degree to which there is a floor of commonality across moral traditions as well as the usefulness of human rights discourse as a way of conveying such agreement. Walzer again serves as a reference point when, in *Just and Unjust Wars,* he makes explicit human rights arguments for when such intervention is justified and when it is not (Walzer 1977, chap. 6): it is justified when it serves the cause of self-determination and when what is at stake is "the bare survival or minimal liberty" of significant numbers of people within a given political entity (1977, 101). Intervention is not justified under other circumstances, for then the "legalist paradigm" that protects the sanctity of national borders should be observed (1977, 86, 90–91). A similar line of reasoning is taken up in the American Catholic bishops' 1993 pastoral letter, *The Harvest of Justice Is Sown in Peace* (NCCB 1993, 15–16). Despite a continuing aversion to war and to the destruction it causes, the bishops stake out a position in support of humanitarian intervention. Citing John Paul II to the effect that such intervention is "obligatory" when "the survival of populations and entire ethnic groups is seriously compromised," the bishops find that intervention by military force may be employed in situations of "internal chaos, repression and widespread loss of human life," in order "to protect life and basic human rights."

Such arguments are found widely in recent American debate over intervention involving military force. Consider, though, that very similar arguments have been made by contemporary Islamic writers seeking

to justify the use of force on behalf of the Palestinian people or against governments they understand as taking away the rights of Islam as a religion and way of life (Abedi and Legenhausen 1986, 87–88). Whatever judgment one makes of the causes these writers support or the methods they sometimes sanction, consider that their argument is based on appeal to human rights, not to the divine command moral structure of Islamic law. So once again, human rights language provides a point of contact between two civilizations that have often been presented as the archetypes for the idea of conflict between civilizations.

Indeed, one of the most important benefits of the growth of human rights discourse in international affairs since World War II is the functional use of such discourse as a common language for debates between moral perspectives and traditions that, on their own preferred terms, seem substantially different and, at the extreme, in conflict. While human rights language originated within the frame of Western culture, it has now been taken up and used creatively within many other distinct cultural frames, to translate values and concerns proper to those cultures. In this way, human rights discourse has been developed to address a broad variety of issues: religious rights, economic rights, women's rights, children's rights, the rights of indigenous peoples, linguistic rights, and so on. A Westerner may find a good deal to question or dispute in statements of "Confucian rights" or "Islamic rights," among others, and, to be sure, there are important differences in substantive content and normative implications for behavior. Nonetheless, human rights language performs the vital function of providing a common vehicle for confrontation and potential resolution of these differences. It would be selling short the moral traditions of Western culture to expect that they will not hold up robustly in the ensuing debate.

3. Conclusion

As we see vividly illustrated by the case of international legal regulations on the justification and limitation of violent force, contemporary appeals to human rights in the international arena seek to provide a common moral language for all humanity. There is, in fact, broad consensus on what constitute basic human rights and serious violations of those rights. There also remains considerable room to achieve greater agreement. In the process of moving toward that goal of commonality, the paradox is that first human rights language must be developed indigenously within the diverse moral traditions of the world so that it adequately translates and expresses the concerns found there; only then can the debate proceed among these traditions. At the same time, accepting this process does not mean accepting an open moral relativism.

Again, the case of internationally agreed human rights constraints on violence illustrates the degree of consensus already in place and provides a reference against which the developing debate must judge itself.

The language of protection of human rights provides the major frame of discourse within which violent force is justified and limited in international affairs today. Human rights language seems increasingly to be emerging also as the frame of international discourse for addressing other important moral issues on which there is divergence in the particular societies that make up the world. Appeals to human rights in such cases represent an effort to find a common basis for moral judgments and behavior, a basis that transcends civilizational or cultural differences and the hegemonic or imperial tendencies of states to serve their own interests. It is important that a common floor of consensus exists, and it is important that some success is being achieved in translating diverse moral traditions into the language of human rights. It is clear that there is much potential here for reducing conflict inflamed by the differences across such traditions. What is not clear is what to do about the differences that may remain as a residue, that is, in cases in which a common language for moral discourse reveals intractable differences, not commonalities.

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