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IN *RELIGION, VIOLENCE, AND HUMAN RIGHTS*: *Protection of Human Rights as Justification for the Use of Armed Force*, James Johnson provides a typically lucid discussion of an important dilemma for contemporary society: when should transnational military force be permitted, as a matter of law, policy, and ethics, to protect against a widespread deprivation of human rights? Professor Johnson uses the relatively recent concept of a "responsibility to protect" as the centerpiece of his paper, with his principal thesis being that any transnational use of force has implications *both* for the protection of human rights and for the denial of human rights. In other words, while the relevant rules of international law might be loosened so as to allow military force to protect human rights, it must be recognized that the legal prohibition on transnational uses of force is intended, in large part, to help protect persons from the death and destruction that invariably flow from any resort to war.

That cautionary admonition is sound and reflects why the doctrine of "responsibility to protect" has not been generally accepted to date by governments as a basis for authorizing uses of force by a state acting on its own authority. While I share the general thrust of Johnson's thesis, I place the doctrine of "responsibility to protect" in a somewhat different context. In my

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view, the doctrine, as it relates to the use of military force, is not a reaction to the "Westphalian system" but, rather, a reaction to the UN Charter, particularly its relegation to the Security Council of the authority to determine when military force should be used for purposes other than self-defense.

The construction of sovereign states in the period surrounding the Peace of Westphalia in 1648 did not result in a system of international law that forbade the use of military force except in self-defense. There is nothing in the classic writings of the "founders" of international law—such as Vitoria, Suarez, Gentili, or Grotius—or in their successors—such as Vattel or Pufendorf—that limited the transnational use of force to self-defense. Rather, these writers accepted that the principle of "sovereignty" did not mean that one state was legally barred from interfering in the affairs of another state; any state was well within its rights to wage war against another state for reasons other than self-defense.

Grotius, for example, asserted that a state may resort to war (under both natural law and the law of nations) whenever doing so was based on a just cause, such as defense against an injury, recovery of what was legally due, or the infliction of punishment on a wrongdoing state for excessive crimes (Grotius 1925, Bk. II, chap. i, para. 2.2). With respect to excessive crimes, Grotius maintained that states have the right to punish other sovereigns not only for injuries to themselves or their own subjects, but also "on account of injuries *which do not directly affect them but excessively violate the law of nature or of nationals in regard to any persons whatsoever*" (Grotius 1925, Bk. II, chap. xx, para. 2.1). For Grotius, if a ruler "should inflict upon his subjects such treatment as no one is warranted in inflicting," other rulers may exercise a "right vested in human society" to undertake war on behalf of those subjects (Grotius 1925, Bk. II, chap. xxv, para. 8).

For some three hundred years, the idea that one state may resort to war against another state for reasons other than self-defense was fully accepted in international law. Though the term "humanitarian intervention" was not commonly used and "responsibility to protect" was never used, one can discern such thinking in both the writers of the time and the practice of states. For instance, several interventions by the Concert of Europe to protect Christian minorities in the outer orbit of the decaying Ottoman Empire were viewed by key statesmen (such as William Gladstone) and writers (such as John Stuart Mill) as permissible intervention for the purpose of protecting oppressed peoples (Holbraad 1970, 162–76). That practice led the French scholar Antoine Rougier to write the first exhaustive and highly influential article on humanitarian intervention, in which he advocated in favor of collective intervention by a group of "disinterested" states, but only when exceptionally serious violations are occurring (Rougier 1910). Hence, the reason rules on the conduct of warfare (*jus in bello*) that begin to be systematically codified in the 1800s—especially after the 1863 Lieber Code (developed for the U.S. Union Army), which heavily influenced the 1899 and 1907 Hague Conventions—say nothing about "humanitarian intervention" or "responsibility to protect" is that the prevailing law at the time did not bar states from militarily intervening in other states, whether for that reason or for less altruistic purposes, such as seizing and annexing territory, a recurrent feature of inter-state relations in the nineteenth century.

Only in the twentieth century did the idea of outlawing war emerge, notably with the 1928 General Treaty for the Renunciation of War (commonly referred to as the Kellogg-Briand Pact), by which the states' Parties declared that "they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another" (Kellogg-Briand Pact, §1). The Pact (along with the League of

Nations) faded away with the rise of the Axis Powers, but the idea of the Pact did not fade; it was center stage at the 1944 meeting of the Allied Powers at Dumbarton Oaks, convened for the purpose of crafting what would become the United Nations Charter. Article 2.4, perhaps the most important provision of the Charter, provides: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (Kellogg-Briand Pact, §2.4).

There are two important exceptions to Article 2.4. First, Article 51 provides that nothing in the "Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security" (Kellogg-Briand Pact, §51). Second, under Chapter VII of the Charter, the Security Council may determine that there exists a threat to the peace, a breach of the peace, or an act of aggression (§39), and may decide upon either non-forcible (§41) or forcible (§42) measures as necessary to restore peace and security.

As such, the structure of international law concerning the legality of resorting to war (*jus ad bellum*) embodied in the UN Charter prohibits states from resorting to a transnational use of force unless they are acting in self-defense or pursuant to authorization from the UN Security Council. For most international lawyers, this structure was the seminal achievement of international law in the twentieth century. Prior to 1945, transnational warfare was relatively common, with horrendous consequences. After 1945, transnational warfare is not unknown, but is rare, and when it occurs is immediately condemned. States no longer invade and annex other states.

Given that by late June 1945, when the UN Charter was adopted, the atrocities committed by Nazi Germany against its own people were known, why did the Charter not also permit states to use transnational force to prevent such atrocities? First, while the fact of the atrocities committed by the Nazi regime were known from the liberation of concentration camps by Allied forces, the full extent of those atrocities was not fully understood, certainly not during the period when the Charter was being drafted. The "age of human rights" would only commence a few years later; references to such rights in the Charter are few and far between. Second, the Axis Powers themselves had masked some of their aggression as "humanitarian" interventions, notably Japan's invasion of Manchuria in 1931, Italy's invasion of Ethiopia in October 1935, and Germany's occupation of Bohemia and Moravia in 1939, all purportedly undertaken for the protection of the local population. Article 2.4, therefore, was designed to shut the door on aggression undertaken for "good causes." Third, the UN Charter did not limit uses of transnational force only to situations involving self-defense; it established an organ capable of reflecting collective decision-making—a "sovereign above sovereigns"—in the form of the Security Council to address any "threat to the peace." While that concept no doubt originally was viewed as focused on *transnational* threats to the peace, in fact the concept was not so limited, and as early as the 1960s was viewed as embracing Security Council action to impose a coercive embargo on the white racist regime in Southern Rhodesia *for internal actions*. Thus, to the extent that humanitarian intervention was necessary, it could be undertaken within the strictures of the UN Charter, so long as it was authorized by Security Council.

Why, then, did the concept of a "responsibility to protect" suddenly emerge in the late 1990s? During the Cold War, the Security Council was usually deadlocked on the issue of authorizing *any* military force, not just force for humanitarian purposes. While there were some

calls for greater resort to military force, even in the absence of Security Council authorization, for humanitarian or other purposes, those voices were a minority and non-governmental. The confrontation between the East and West, undertaken in the shadow of nuclear weapons, made the stakes far too high for playing around with rules on the transnational use of military force. After the Cold War ended, great hopes arose for a "new world order" in which the Security Council would awaken from its slumber and become actively engaged in addressing threats to the peace. In fact, the Security Council did awaken, authorizing military force to address transnational threats to the peace, such as Iraq's invasion of Kuwait in 1990–91, and internal threats to the peace, such as to end famine in Somalia in 1992, and to restore Haiti's democratically-elected government in 1993–94. Even in Rwanda, often pointed to as an example of global inaction, it is often forgotten that France was authorized by the Council to intervene in 1994, though it proved to be too little and too late.

Then came Kosovo. The Security Council could have authorized military action to suppress Serbian conduct in the province of Kosovo, but resistance by two permanent members—China and Russia—precluded any such action. In 1999, NATO decided to go forward anyway, bombing Serbia for several weeks until Belgrade agreed to withdraw all military and police units from its province. For many observers, this was a natural evolution in international law; intervention to protect persons facing a widespread deprivation of human rights should normally be authorized by the Security Council but, if the Council could not act due to the veto of a permanent member, then the intervention should go forward anyway.

Thus was born the doctrine of "responsibility to protect." The International Commission on Intervention and State Sovereignty (ICISS), a group of non-governmental experts convened by the Government of Canada, issued in December 2001 a report entitled *The Responsibility to*

Protect, which sought to provide a legal and ethical foundation for humanitarian intervention. The report asserted that a responsibility to protect (or "R2P") exists under international law. Further, the report stated that in circumstances when the Security Council fails to discharge that responsibility, "in a conscience-shocking situation crying out for action," then it "is a real question in these circumstances where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by" (ICISS 2001, para. 6.37). The doctrine was born not out of a rejection of the Westphalian system of sovereignty; it was a cautious rebellion against the UN Charter's *jus ad bellum* straightjacket, which granted a monopoly to the Security Council for deciding when transnational force may be used for purposes other than self-defense.

As Johnson notes, the contours of the R2P doctrine are not entirely clear and have been subject to considerable scrutiny and dispute (Focarelli 2008; Stahn 2007). Yet one thing seems rather clear—governments have not welcomed the doctrine with open arms, at least not the bit that favors transnational uses of force in the absence of Security Council authorization. The post-Kosovo wave of enthusiasm for the doctrine crashed upon the shores of the U.S.-led invasion of Iraq in 2003, in which the United States could not obtain Security Council authorization to invade, but went forward anyway, justifying its action in part by reference to Iraq's mistreatment of its nationals (Bush 2003) and the need to help liberate the Iraqi people (Slevin 2002). By 2004, a UN high-level panel convened by Secretary-General Kofi Annan saw things a bit different than the ICISS. While the high-level panel agreed that there existed an "emerging norm that there is a collective international responsibility to protect," it concluded that armed force may be used to ensure fulfillment of that responsibility *only if so authorized by the Security Council* (Annan 2004, para. 196, 203, and 272). Further, the high-level panel identified five

criteria of “legitimacy” when engaging in such intervention, including to the seriousness of the threat, the proper purpose of the interveners, the exhaustion of other means, proportionality, and a balancing of the ensuing consequences (Annan 2004, para. 207). The UN Secretary-General thereafter endorsed the high-level panel’s approach, an approach that continues to reflect the view of the Secretary-General today.

When calls are made to uphold a “responsibility to protect”—whether coming from groups such as the Conference of Catholic Bishops or other American religious bodies—it is not always clear if this means just action through the Security Council or action even in the face of opposition within the Security Council. If the former, then it is not a call for an armed attack on a state in violation of the UN Charter; rather, it is a call for action fully consistent with the purposes and principles of the Charter and the institutions it has created. It is a call for the Security Council to step up and do what it was created to do. Yet, if the latter, then perhaps there are certain values that are being ignored, as Johnson cautions. One value derives from collective decision-making, which may minimize the likelihood of aggression masked as altruism. The Security Council may not be a perfect institution, but it consists of five of the major powers of the world plus another ten countries elected so as to represent the different regions of the world. Their collective view that the human rights at stake in a particular situation merit military intervention has certain advantages over the decision-making by a single state or a small group of states. Another value is the need to preserve peace among the major powers of the world; as it happens, the permanent members of the Security Council all have very significant military capability, including the possession of nuclear weapons. As a general proposition, it is risky for some of those members to pursue military action in the face of strong opposition by one or more of the other permanent members. While in this relative time of peace, it may seem unlikely that a

purportedly humanitarian intervention would escalate into a military confrontation among those powers, that low likelihood must be weighed against the catastrophe that such a confrontation would yield.

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