

Restraints on Violence

and the Recontruction of International Order Since 1945

by Daniel Moran

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Perhaps the least interesting thing that can be said about war and terrorism at the moment is that both are illegal under international law. The indifference that this statement inspires arises from the perceived incapacity of law to impose any meaningful restraint on international violence. The criminalization of war, and the recognition of terror as a problem of international significance, were a consequence of the two world wars, whose scale and conduct demolished any hope that industrialized warfare could have a place within a stable international order. The foundations of contemporary international order with respect to the suppression of violence were laid in the immediate aftermath of the Second World War. Among those agreements and precedents three stand out as forceful statements of the rules intended to govern recourse to violence: the Charter of the United Nations, the record and judgment of the International War Crimes Tribunal at Nuremberg, and the four Geneva Conventions for the protection of victims of war, concluded in 1949.

Not the least striking feature of the years immediately following the Second World War is the manifest desire of the victors to reaffirm the rule of law as a governing principle of international relations. The legalism of the new order was owed chiefly to the influence of the United States, which had inspired the creation of the League of Nations, and would now become the prime mover behind its more robust successor, the United Nations. Franklin Roosevelt envisioned the UN as a quasi-constitutional international confederation, patrolled by the most important of the victorious powers – the United States, the Soviet Union, Great Britain, and China – whom Roosevelt dubbed "the Four Policemen." The highest of its purposes, as the Charter's Preamble proclaimed, was "to save succeeding generations from the scourge of war."

The significance of the UN Charter for the modern law of war lies less in its path-breaking but ineffective police mechanisms – a halting step, as some hoped and others feared, toward "world government" of a kind that might finally give the law of nations real teeth – and more in its affirmation of the absolute sovereignty of states, and of what in earlier times had been called *jus ad bellum* – the right to go to war, provided the cause is just. The Charter makes peace the supreme value of the international system not by assuring that all breeches will be punished, but by the indirect means of guaranteeing the independence and autonomy of UN members, whose freedom of action may not be interfered with for any reason, so long as they do not forcibly infringe the equally sacrosanct sovereignty of their neighbors.

The two most fundamental norms governing the use of force under the Charter – non-aggression, and non-intervention – were thus inextricably linked at their moment of birth, and have circled around each other ever since. What seems certain is that the UN's embrace of sovereignty as the supreme mechanism for keeping the peace has hampered it in addressing what would prove to be the most persistent challenge to world order in the future: not international, but civil war – albeit civil war arising for the most part from the distinctly international phenomenon of decolonization.

It was in this connection that renewed claims of *jus ad bellum* — the right to conduct just war — would be advanced by those engaged in wars of "national liberation" against imperialist regimes, a cause for which the UN General Assembly has repeatedly expressed its sympathy, the more insistently as its membership has been swelled by the victors in such conflicts. The proposition that lawful resistance to aggression is a right held by peoples and not just by states is not one the UN Charter supports directly. But it has proven difficult to resist, given the Charter's underlying supposition that international peace and social justice must inevitably go hand in hand.

A VICTOR'S TRIAL

The punishment of aggression also underlay what, in the eyes of the general public, was surely the most riveting spectacle thrown up by the legal aspects of post-war reconstruction: the International Military Tribunal convened at Nuremberg to try the senior Nazi leaders who had fallen into Allied hands. Two flaws stand out. The first is that Nuremberg was a victor's trial, in which the misdeeds of those who had lost the war were held up to scrutiny and censure, while the crimes of the winners were passed over in silence; a complaint that has been retrospectively strengthened by the reluctance of the states that sat in judgment to apply the resulting precedents to their own subsequent conduct. The second flaw, compounding the first and more far-reaching, is that the crimes charged at Nuremberg had no recognized place in international law when they were committed, a violation not merely of "equal justice" but of the basic logic of law as such.

Nuremberg is remembered for having introduced an irreducible element of personal responsibility into the conduct of war and international relations, and for elaborating upon three major categories of international crime, one of which was entirely new: that of crimes against humanity. Both achievements are important, but the latter especially so for our purposes, because it was in respect to this issue that the post-war international order first came face to face with the problem of terror. It did so in step-wise fashion, reasoning outward from the principle of non-aggression, toward a more direct confrontation with human evil.

The legal foundation for the court's work was the Kellogg-Briand Pact, by which Germany, eleven years before its attack on Poland, had renounced war as an instrument of policy. This became the basis for the first of the crimes specified in the Nuremberg indictment: crimes against peace, which included "planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements and assurances"; and also of conspiring to do any of these things. The Nuremberg formula governing crimes against peace is in effect an expansion and application of treaty law, rather than a wholly new creation. Aggression now became a crime not just of states but of individuals, and extended even to those who had conspired in its commission, an unusual step, given that the idea of conspiracy had little or

no standing in international law up to then, but one that was thought necessary if the court's rulings were to apply below the highest levels of government.

To crimes against peace were then added "war crimes," a long-familiar concept to which the Nuremberg proceedings added little. The prosecution was sufficiently confident that everyone knew what war crimes were that it did not even feel the need to supply a complete list, but merely illustrative examples, including:

Murder, ill-treatment, or deportation [for] slave-labour or for any other purpose of the civilian population of or in occupied territory; murder or ill-treatment of prisoners of war, or [of] persons [shipwrecked] on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns, or villages; or devastation not justified by military necessity.

TRUMPING DOMESTIC LAW

Nor could military necessity excuse crimes against humanity. The main motivation to bring this innovative charge was a wish to elevate the Tribunal's proceedings to a higher plane, and to justify its independent existence, apart from the hundreds of other war crimes trials conducted by national or military courts in the countries where the crimes had occurred. The point of Nuremberg was to address acts that violated or transcended the most fundamental norms, territorial as well as moral and political. These aspirations were compressed into the following brief definition:

Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Much can be made of these few words. In legal terms the final claim that international jurisdiction trumps settled domestic law is striking. To a historian, however, for whom the order in which things happen can become a matter of obsessive concern, the word that stands out is a simple one: before. "Inhumane acts committed ... before ... the war." What are we to make of that? When do those acts become crimes? During the war? or only because they lead war? What if a state decides to judicially murder some fraction of its citizenry, but war does not ensue, because its sovereignty is respected? What then?

One anticipated effect of the Nuremberg judgment was that it would add the weight of personal legal liability to the systemic prohibition of war embodied in the UN Charter. It was also expected to strengthen the more traditional laws of war enumerated in the Hague Conventions of 1899 and 1907, which went no further than to assign responsibility for war crimes to the state whose soldiers had committed them, and to recommend compensation. In the wake of the Second World War, however, the question of how far war crimes should continue to demand the attention of the world was contested. That the war had been conducted with scant regard for any legal or customary restraints was not doubted. Yet the enormity of the violations discouraged reform, in favor of more radical measures, intended, if not to make war a thing of the past, then at least to drive it to the periphery of the world order, in the same way that crime inhabits the margins of a well-ordered civil society. Many doubted that such a vision would be realized any time soon. Yet it was difficult for the United Nations to address the question of how legally to engage in a practice it was created expressly to abolish.

It is for this reason that the task of revising international law governing the conduct of war would be taken up not by the UN, but by the International Committee of the Red Cross. The Red Cross had been founded in 1859 to care for sick and wounded soldiers, and since the 1860s it had lent its prestige and organizing skill to developing rules governing their treatment. In the 1920s its official interest came to include prisoners of war as well, to whom relief could not be provided except by an organization that practiced the most unbending neutrality. This spirit pervades the four Geneva Conventions concluded under Red Cross auspices in 1949. The Conventions make no reference to the rights and wrongs of aggression and self-defense, nor of social justice. Their sole interest is in protecting the victims of war from its inherent cruelty.

Each of the four Conventions deals with a separate class of victim. The first three classes – sick and wounded soldiers, shipwrecked sailors, and prisoners of war – were already subjects of a substantial body of law. The Fourth Convention, which deals with the rights of civilians in war, is concerned almost entirely with the fate of civilians subjected to an enemy occupation, a setting for much recent barbarity, but scarcely the only circumstance by which civilians can be victimized by war. All four Conventions also include ten "common articles," which (rather in the Nuremberg spirit) enumerate absolutely prohibited actions – murder, torture, hostage-taking, and so on – and establish bare minimum standards of decent behavior – that the sick and wounded must be cared for, that no one charged with a crime may be punished without trial, etc. – which are to apply "at any time and in any place whatsoever," including during "armed conflict not of an international character."

TOWARD A LAW OF HUMAN RIGHTS

Like the Nuremberg trials, the Geneva Conventions press against the limits of a system whose most central value is state sovereignty, but in a slightly different direction: toward the law of human rights, an expression the Conventions do not use, but to which their underlying logic implicitly refers. Before Geneva, the law of war stood squarely upon two pillars: the rights of neutrals, and the reciprocal interests of belligerents. Actions that abridge neutral rights risk transforming a neutral into an opponent; while actions that

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mistreat the armed forces of the enemy were liable to be met with reprisals against one's own troops. Geneva does not take this approach, but treats its various victims as protected classes of persons, who are entitled to the benefits of law not because of the possibility of reprisal, but simply because of who and what they are. This is especially clear in the effort to extend some protection even to rebels and revolutionaries, who almost by definition cannot undertake any reciprocal obligation toward their opponents (though some have tried, by way of seeking to legitimize themselves internationally).

The logic of belligerent reciprocity is also inherently weak with respect to the protection of civilians. Even a commander who cares nothing for the lives of his own soldiers still has reason to wish to see POWs and the wounded protected, for instance, since it is in his interest that defeated enemy forces should surrender, rather than carry out a last-ditch, last-round resistance that can only harm the efficiency of his own operations. The protection of POWs thus affords a clear tactical benefit, independent of its humanitarian effect. This is much less clear when the victims are civilians. Protecting and caring for civilians usually entails substantial extra effort, if not extra risk, while offering no reciprocal advantage for one's own, unoccupied population. Moreover, brutality toward civilians is often rationalized as a means of putting extra pressure on the other side to lay down its arms, and so of "saving lives."

Efforts to expand that field of application have not fared well. Apart from the Geneva common articles, it has proven difficult to extend the protections of international law to armed forces other than those of established states. A major effort was made in this direction in 1977, in the form of two Additional Protocols intended to expand upon the original Geneva protections, the first dealing with international conflict, the second with internal wars. These have not achieved the near-universal acceptance of the original conventions. A number of their provisions tread too close to what are often somewhat delicate questions of military judgment, such as what exactly constitutes a legitimate military target. Application of the Second Protocol has also been hampered by the fact that even post-colonial regimes, which initially promoted its formulation and have widely ratified it, have nevertheless been disinclined to extend legal recognition to those whose sole purpose is to destroy them.

A WARRANT FOR SUICIDE

If it has proven difficult to extend the principles of *jus in bello* to revolutionary war, it will likely prove even more difficult to apply it to the problem of terrorism. To see why one may consult the language of the Second Protocol, which proposes to extend Geneva protections to insurgent movements provided they meet certain requirements, including adherence to "the laws and customs of war." To this any revolutionary worth his salt would have to respond that such a requirement is a warrant for suicide.

To a terrorist, moreover, Geneva Law is not merely out of reach, but absurd. The "laws and customs of war" are not boilerplate. Their minimal requirements are in fact easily summarized. The use of force in war is legal provided it is directed against military objectives, is not likely to cause unnecessary suffering, and is not treacherous. Although figuring out exactly what the first two of these customary rules mean is in practice no small problem, there is no difficulty about treachery. It is easy to recognize. There can be no treachery without law, without norms whose protection is betrayed. There can be no terror without such betrayal.

What, then, of counter-terrorism? For the moment I think the answer does not extend much beyond the Geneva common articles, whose provisions apply in all cases of armed conflict. The modern law of war aims to discriminate between the civil and the military, between belligerents and by-standers, between the use of lethal force and the larger interests of humanity. Its capacity to interpret events and render justice will be sorely tested by new forms of massive social violence designed precisely to blur all such distinctions. It is also generally true that international legal structures fall short when confronted with worst-case scenarios and "unprecedented" events. Law, after all, is a backward-looking enterprise, whose life's blood, as Justice Holmes famously observed, is not logic, but experience. Where experience is lacking, the law is as likely to add to the confusion as it is to clarify events.

RAISING THE STANDARD

If there is a way forward at the moment on the terrorism question, at any rate, it does not seem to lie in any further expansion of the laws of war – already stretched to tatters by the wars of national liberation – and more in the area of human rights law, which was grafted somewhat uneasily onto the laws of war at Nuremberg and Geneva, and which may now save them from complete irrelevance. Human rights law is usually associated with demands for an end to violence – the violence of a state against its own citizens – but that is not its only import. The law of human rights has already raised the standards that govern a state's responsibility for what happens within its own borders, and may someday evolve to provide a legal basis for intervention against states that are too incompetent or corrupt to suppress terrorists that operate under their aegis. Counter-terrorism, in other words, may become a recognized exception to the non-intervention norm, as humanitarian intervention seems poised to do. Nuremberg deprived individuals of the right to excuse terror by hiding behind the principle of sovereign immunity. The time may come when states can be held to the same standard.

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