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HUMAN RIGHTS AND JUS CONTRA BELLUM

Introduction

The practice of human rights is one of the most important contemporary legal phenomena not only because it concerns the protection of individual human beings, and then is worthy and relevant per se, but also because, according to the continuity between constitutional rights and international human rights, their protection represents the most important commitment for political and legal actors both in the domestic and in the international scenarios. It can be considered the most relevant and titanic attempt to universalize a content of justice as a limit to any power, in particular, of States, but not only.[1]

Human rights are not only a legal practice, but a more complex phenomenon, with political, social, and moral dimensions. Nevertheless, they are strongly attracted by law. In other words, human rights "want" to be "legal." We want them to be legal, because we considered their legal protection to be crucial for their success. This calling has important implications for the concept of law. The due respect for human beings is introducing a necessary content into a notion otherwise pretending to be content-independent.[2] The latter was the dominant mind-set in the last century, together with the idea that the main element for the definition of law was coercion.

Looking from human rights, States have duties and limits, more than absolute power and force. Human rights are the content of a project of protecting human beings by the States and by the whole international community, including non-governmental and private organizations. This goal clashes with a State-oriented paradigm of law in which the use of force is its crucial

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[1] Isabel Trujillo and Francesco Viola, *What Human Rights Are Not (Or Not Only). A Negative Path to Human Rights* (New York: Nova Science Publishers, 2014).

[2] At the time of the beginning of the legal practice of human rights, after the second world war, even the most strenuous supporter of a content-independent concept of law – Hans Kelsen – agreed with the idea that peace was the goal of law. As well known, this was not the case of justice (Hans Kelsen, *Peace through Law* (Chapel Hill: The University of North Carolina Press, 1944), 3; Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Vienna: Franz Deuticke Verlag, 1934), §8). On content-independence as a feature of law see Stefan Sciaraffa, "On Content-independent Reasons: It's Not in the Name," *Law and Philosophy* 28 (2009): 233–60.

character. From the perspective of a law conceived as a State product, war is the last word of States affirming their power unilaterally in the context of an international community in which they are almost the only players and the most powerful ones. And yet, on the one hand, international law has made a long road since the second world war and States are no longer the only legal actors, and, on the other hand, human rights introduce limits to their actions, in particular, against the possibility of warfare.[3] My perspective on the topic of war starts from human rights but has the focus on the concept of law, and, in particular, on the transformation that human rights have stimulated (or were supposed to stimulate) in the legal domain.

Not everything is already clear in the practice of protecting human rights. There is an articulated and complex debate on their features, on their role and on the very meaning of the whole enterprise of protecting human rights. Recently, the most compelling debate has regarded their relationships with equality and neoliberalism, but many other points are under analysis: their concept, interpretation and limits, as well as their differences from other legal phenomena such as natural rights. The Natural-rights tradition is just one of the traditions that (controversially) converged into the new practice of human rights, but there are relevant differences between natural rights and human rights.[4] Human rights do not imply a general moral order and are developing their own ethical conception that is different from that of natural rights of modernity. Natural rights arose in the thoughts of philosophers for the purpose of dictating the conditions of existence and legitimacy of political society. Human rights, instead, have been sanctioned in international treaties and in national constitutions as a reaction to the second world war, and have developed through a legal practice that is in continual expansion today. They are the content of a process of humanization of the legal systems and institutions. These differences are evident also when considering their list: some primary goods such as life, liberty, and property in the case of natural rights; an open and long list in the case of human rights.[5]

The critics of the link between human rights and neoliberalism affirm that human rights increase inequalities. In other words, it seems that despite their long list of social, cultural, and economic rights, they are not a programme of social justice.[6] The point is obviously disputable. But, notwithstanding the current war in Ukraine, it is hard to deny that human rights are (or were) a project against wars. After the second world war, the practice of protecting rights was certainly planned "to save succeeding generations from the scourge of war" (Preamble of the United Nation Charter).

What I want to emphasize in this paper is that in order to achieve that goal, human rights put on the agenda a legal revolution, beginning with the revision of the dominant concept

[3] Erik Melander, Therése Pettersson, and Lotta Themnér, "Organized Violence," *Journal of Peace Research* 53 (5) (2015): 727–42.

[4] According to Beitz human rights don't fit the mold of natural rights because they are not pre-institutional, they don't belong to people naturally and they are not timeless. See Charles Beitz, "What Human Rights Mean," *Daedalus* (2003): 36–46.

[5] Trujillo and Viola, *What Human Rights Are Not (Or Not Only)*, 2–10 and 79–89.

[6] Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015).

of law. Some steps have been taken in that direction, but history is never linear. The challenge concerns law and the modern State, and it has some corollaries on the question of the status of international law as true law. To be defied is also the idea that the distinctive feature of law is the use of force. From this point of view, the looking for sanctions in international law – reprisals and wars – in analogy with State law features is out of context.[7] Obviously a new theory of law in accordance to these elements goes beyond the scope of this article. My limited aim here is to work on the germinal antinomy between wars and human rights.

Unluckily, the starting point is a story of failure. In fact, it is possible to observe that the practice of protecting human rights after the second world war promised but (sadly) did not achieve the non-violent legal revolution in which individuals' rights were paramount for all legal systems, domestic and international, and wars were eliminated or prohibited. But any paradigm shift requires time and efforts and involves attempts and failures. I will present two sides of the problem. The first one regards the internal evolution/departure of the practice of human rights from the original rejection of war and the undermining of the right to peace, a trend that I consider a defective implementation of their legal enterprise. The second one regards some evident contradictions between the logic of human rights and the logic of wars. Before following those two arguments, I will analyse the status of self-defence in international law, a question that can be considered independently of human rights, but not of the paradigm of natural rights.

I. Individual and Collective Self-defence in International Law

The whole traditional doctrine of *bellum justum* made plausible the idea that war was not permitted. Nevertheless, its status in international law was uncertain until the second world war. But, if in the 1940s Kelsen could keep the question open as to whether war was or was not prohibited under international law, after the United Nations Charter and the Universal Declaration of Rights, this question has a clear-cut answer. War is prohibited. In the case of aggression – unambiguously, an illicit warfare –, self-defence is permitted. The justification is, roughly, the admissibility of the reaction for the survival of the State and its citizens.

As it is well known, Grotius built the laws of international warfare – in his famous *De iure belli ac pacis* – on the grounds of the old principle of natural law that it is permissible to repel violence by force (Ulpian, DIG 43.16.1.27).[8] This idea belonged to the tradition of *jus gentium* and common law for centuries, and it consolidated – once mixed with the theory of inalienable natural rights to life, liberty and property – in the right to self-defence and self-preservation by using deadly force. As a recent confirmation of this line of reasoning, in 2008, the U. S. Supreme court's decision in *District of Columbia v. Heller* affirms the natural right "to use arms in defence of hearth and home," interpreting the Second Amendment

[7] Hans Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940–41* (Cambridge, Mass.: Harvard University Press, 1942).

[8] Hugo Grotius, *On the Law of War and Peace*, translated by Francis W. Kelsey (Oxford: Oxford University Press, 1925).

of the U. S. Constitution as covering not only the right to a collective defence by arming a militia, but also as an individual right to the use of force.[9] The European tradition on the use of arms is more restricted than the American one. But what it is worth noticing is that the recalled decision considers the use of force in self-defence as a natural right and not a human right. Self-defence fits with the link among life, liberty, and properties, typical of the natural rights tradition. It is not then by chance that when the Human Rights Council has faced a similar question, it has considered the use of small arms and light weapons as a threat to human rights, and in no case it has recognized it as a human right. The intentional lethal use of small arms may only be made when strictly unavoidable in order to protect life,[10] according to the exceptional character of self-defence, with the disappointment of some commentators.[11] In the same resolution, the Human rights council has insisted upon the need of preventing the use of force and of encouraging alternative forms of dispute resolutions, both crucial features of the practice of human rights since its beginnings. It is true that this kind of resolutions are not compelling, but its relevance is related to the consistency with the general meaning of the practice of human rights.

In any case, the natural right to individual and collective self-defence, even when considered justified, has always limitations: it is possible to use force but not at any cost. Here is where the analogy with personal self-defence in the criminal field comes up.[12] In the individual case, a justified self-defence requires an imminent and serious danger, as well as a proportionate reaction. Self-defence is generally excused by the attacked victim's state of mind and circumstances, that have to be verified by a judge.[13] Collective self-defence is grounded on the analogy between the rights of the State and the exceptional individual permission to kill in order to preserve her own life from aggression,[14] but the leap between the individual and the collective level is not trivial.

The justification of the individual natural right to self-defence is obviously the protection of life, together with the protection of properties, according to the idea that there is a link between them. On the one hand, the protection of individual life and the survival of a collective existence of the State are two different things and they can be uncoupled.

[9] *District of Columbia, et al. v. Dick Anthony Heller*, 554 U. S. 570 (2008).
[10] A/HRC/Sub.1/58/L.11/Add.1 24 August 2006.
[11] David B. Kopel, "The Natural Right of Self-defense: Heller's Lesson for the World," *Syracuse Law Review* 59 (2008): 165–308. Kopel assumes that natural rights and human rights are equivalent and criticizes the Human Rights Council for not recognizing the right to the use of arms.
[12] Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009). For a strong criticism against self-defense, to the point of denying any plausibility to the justification of the preference for saving our lives on lives of enemies, see Yitzak Benbaji, "Culpable Bystanders, Innocent Threats and the Ethics of Self-Defense," *Canadian Journal of Philosophy* 35 (4) (2005): 585–622.
[13] Against the analogy between self-defence in criminal law and the collective self-defence, see the recent work of Thom Brooks, *Just War Theory and Self-defence*, unpublished ms, 2023.
[14] The model worked clearly as a legacy of an organic theory of State, and it followed the logic of exceptionalism. Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014).

Individual survival is possible even though outside the State. On the other hand, the territory of a State should not be regarded as a collective property.[15]

Collective self-defence could hardly fit other exceptional circumstances of individual self-defence, as the imminence of danger. Recent anthropological research has shown that war is an unnatural evolutionary adaptation of the human species and that, at a certain point, three hundred thousand years ago, there has been a clear line of evolution towards the prevalence of proactive aggressions over reactive wars. Reactive aggression is impulsive and warm, whereas proactive aggression is calculated, premeditated, actuated only when it is likely to be successful. This means that war is decided on the basis of a calculation of costs and benefits and not under imminent danger.[16]

Apart from the controversial analogy between individual and collective self-defence, there are other objections to the war in international law. War – even as a counter-war, that is, as a response to an illicit war of aggression – can be hardly considered as a legal sanction for some technical reasons. As Kelsen used to say: it is not decided by an impartial judge and there is no equivalence between wrong and sanction.[17] International law has rejected war as a punishment: it is initiated by a biased judge (the victim of a claimed aggression) and it has to be won for being considered a payback. It reminds the old practice of the duel, in which it is necessary to win to vindicate the wrong. In addition, even a war for retribution can transform in revenge and anger, lacking proportionality towards the wrongdoing or even missing the very wrongdoers. The disasters of wars are distributed regardless culpability.[18]

For sure, wars cannot be understood as means of settling conflicts. In order to settle conflicts, we need an impartial judge or a form of arbitration. From this point of view, it is worth noticing that in perfect harmony with the protection of human rights, international law has developed a huge number of procedures and courts able to settle international disputes, according to the first article of the UN Charter. This non-belligerent proposal, that went hand in hand with the flourishing of the practice of human rights, was at a turning point at the beginning of the 21st Century when the protection of human rights has enlarged and potentiated the laws of wars. But from this point of view, the current practice of human rights must be considered paradoxical or at least controversial.

II. Human Rights and Wars

In the last two decades, instead of giving birth to a *jus contra bellum*, the doctrinal debate on human rights has emphasized different roles of human rights in the laws of war: in the

[15] Even if there are some similarities, territorial rights entail a public right of jurisdiction. See Margaret Moore, "Territorial Rights and Territorial Justice," in *The Stanford Encyclopedia of Philosophy*, ed. by Edward N. Zalta, (Summer edition 2020), https://plato.stanford.edu/archives/sum2020/entries/territorial-rights/ (20 February 2023).

[16] Richard W. Wrangham, "Two Types of Aggression in Human Evolution," *Proceedings of the National Academy of Science* 115 (2) (2018): 245–53 and *The Goodness Paradox: The Strange Relationship Between Virtue and Violence in Human Evolution* (New York: Pantheon 2019).

[17] Hans Kelsen, "Peace through Law," *Journal of Legal and Political Sociology* 2, no. 1 and 2 (October 1943): 52–67.

[18] David Luban, "War as Punishment," *Philosophy & Public Affairs* 39 (4) (2011): 299–330.

jus ad bellum (the law of waging wars) human rights can justify wars.[19] In the *jus in bello* (the law in wartime), they fix limits for actions within wars.[20] In the *jus ex bello*[21] (the law of revoking wars, also known as "peace keeping"), they can transform an unjust war into a just one and justify continuing to fight.[22] In the jus post bellum (also called 'peace building'), human rights establish criteria for transitional justice.[23] The justification for this crucial involvement is linked to the idea that human rights make it possible to identify objective injustices. It is argued that if we do not react to their violations, human rights will inevitably seem irrelevant. From this point of view, wars would be no longer only about self-defence, but also about the protection of human rights.

The first chapter of this transformation can be identified in the revision of conventional just war theories. The new theories contest the lack of relevance of violations of individual rights in the classic accounts.[24] This pattern has been completed by the so-called "doctrine of responsibility to protect" (R2P), which establishes that it is primarily the responsibility of a State to protect its own people.[25] Under certain circumstances (a serious harm to the people and/or an inability of the State to protect), the principle of non-intervention gives way to an international responsibility. As is well known, this doctrine has been controversially interpreted as opening a door to armed interventions. The link is made by raising the issues of genocide or other war crimes, and of the absence of universally binding tribunals. The lack of an international army closes the circle. But international organizations – as well as States – use to externalize coercion,[26] giving to third States the chance of reacting (even militarily) against the disobedient.

In truth, there has been a point of ambiguity since the very beginning of the human rights practice, but it has its origin in the resistance of States. States' worry of external interference

[19] Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press Scholarship Online, 2012).
[20] Juana María Ibañez Rivas, "El derecho internacional humanitario en la jurisprudencia de la Corte Interamericana de Derechos Humanos," *Revista Derecho del Estado* 36 (2016): 167–98.
[21] Darrel Moellendorf, "Jus ex Bello," *Journal of Political Philosophy* 16 (2008): 123–36.
[22] Cecile Fabre, "War Exit," *Ethics* 125 (3) (2015): 631–52.
[23] Athanasia Hadjigeorgiou, "The Relationship Between Human Rights and Peace in Ethnically Divided, Post- Conflict Societies: Theory and Practice" (PhD diss., King's College, 2016). Quoted with Author's permission.
[24] Cf. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1978).
[25] A/RES/60/1, 16 September 2005.
[26] Oona Hathaway and Scott J. Shapiro, "Outcasting: Enforcement in Domestic and International Law," *The Yale Law Journal, Faculty Scholarship Series,* paper no. 3850 (2011), http://digitalcommons.law.yale.edu/fss_papers/3850. This essay is very interesting and innovative. It illustrates eight different forms of externalized outcasting regimes. It also shows how States externalize coercion, even in the domestic domain. But the main point is that it supports the idea that it is wrong to identify the force of the State with its physical version: outcasting means excluding from cooperation, not necessarily using physical force. The authors show how law can be enforced with devices different from physical coercion. Nevertheless, outcasting makes the use of economic sanctions disputable. Otherwise, only the worst off could be subjected to force. See also, on this specific problem, Michael Sandel, *What Money Can't Buy. The Moral Limits of Markets* (New York: Farrar, Strauss and Giroux, 2012).

motivated the explicit introduction of limits on the protection of rights, with the possibility of suspending them in the event of public emergency for national and security reasons.[27] These limits inevitably suggested that human rights were for peacetime. There is then a wartime when it is possible to suspend human rights. Only recently has the International Court of Justice developed a doctrine against this idea, establishing that international human rights law is for both peace and wartime.[28]

The result is that human rights come closer to justice than to peace. Their link to war derives precisely from their link to justice because war is about justice.[29] But even the conventional just war theories were devoted to limiting wars, not only unjust ones, but also those that are disproportionate, without chance of success, and illegitimate. The legal regulation of wars concerns not only the status of the wrong to react to, but also the kind of remedy proposed, which must also be just, proportionate, legitimate. Justice is then not only about just causes, but also and especially about just remedies. And this is the problem.

To pass from justice to war, there is a supplementary leap that is neither logically necessary nor consistent with the human rights programme. It is the idea of the inevitability of war as a legal remedy. But, as said, the way in which law typically solves conflicts is through the recourse to a third party. Again, it is usually argued that the main problem here is that in the international scenario there is no third and impartial party to appeal to. Nevertheless, this reasoning is circular because the way of imagining this third party as a central authority with legitimate force depends on the concept of modern State; a paradigm that, unluckily, is still the normative pattern for any kind of law, including international law. On the contrary, law is a differentiated phenomenon and can change and evolve, together with its remedies, to the extent that they are no longer appropriated for any reason. Human rights are very good reasons for eliminating wars. Human rights are trumps against wars.

III. The Missing Right to Peace

At a certain point of the history of human rights, the close relationship between rights and peace was the reason for proposing the codification of a human right to peace.[30] In 1969, the Istanbul Declaration, adopted during the 21st International Conference of the Red Cross, proclaimed the right to a lasting peace as a human right. Later, this declaration was also endorsed by Unesco, which was established in 1945 with a commitment to promoting peace and making war impossible.[31] Very soon the right to peace was transformed into a more general programme of a culture of peace.

[27] Art. 15 European Convention of Human Rights (1950).
[28] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement, I. C. J. Reports* 2005, 168ff. See Alexander Orakhelashvili, "The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflicts, Parallelism, or Convergence?" *The European Journal of International Law* 19 (1) (2008): 161–82.
[29] David Luban, "Just War and Human Rights," *Philosophy and Public Affairs* 9 (2) (1980): 160–81.
[30] William O. Peterfi, "The Missing Human Right: The Right to Peace," *Peace Research* 11 (1) (1979): 19–25.
[31] Fernando Valderrama, *A History of Unesco* (Paris: Unesco Publishing, 1995), 30.

But before losing its legal status, the right to peace was put forward as part of a new generation of rights. In addition to the first generation of rights (inspired by freedom) and the second (inspired by equality), there was a third one, inspired by the third and forgotten principle of the French Revolution: fraternity.[32] The interests to be promoted were collective in nature and they could be obtained only through cooperation among States.[33] This generation of rights would reverse the trend of the Western individualism in declining human rights, but at the same time it makes the balance between the priority of individuals and the collective dimension problematic. The right to peace is not alone in this category. There were also the rights to self-determination, participation, development, and humanitarian relief.

Among those rights there are differences in terms of legal implications. There are collective rights that claim to be transformed into collective powers, and others that claim shared goods. The balancing between them and with individual rights is different. Some rights are problematic insofar as they turn into powers, and in particular into collective powers such as self-determination. But the logic of human rights is characterized by the priority of individuals. The contextualization within the legal practice of rights implies that the two conflicting rights must be made compatible. The conflict is not obviously a problem for a legal practice, which is used to balancing rights, provided that they are all of equal relevance and must be implemented as far as possible. Rights deal with protecting individuals' fundamental interests, and, in doing so, they indicate a duty to optimize their normative impact. From a legal point of view, they work as principles,[34] i.e. normative claims to be implemented as far as possible without compressing completely the right in balance. The work of balancing produces a contingent rule of prevalence but does not debase the weight of the opposite principle. Rights do not trump other rights.

Eventually, the United Nations codified the right to peace as a Peoples' right, with the Declaration of rights of Peoples to Peace in 1984.[35] This brief Declaration insisted on the UN aspiration to eradicate war from the life of mankind and on the conviction that life without war serves as the primary requisite for the full implementation of the rights proclaimed in the UN framework. At the time, the main concern was with nuclear wars. States should renounce the use of force in international relations and opt to settle international disputes by peaceful means on the basis of the UN Charter. This is also the trend of the last resolution of the General Assembly containing a Declaration on the Right to Peace (2016).[36]

[32] Douglas Roche, *The Right to Peace* (Ottawa: Novalis, 2003), 133.
[33] The idea of a third generation of rights involves collective rights and was suggested by Karel Vasak in 1979. Stephen P. Marks, "Emerging Human Rights: A New Generation for the 1980s?" *Rutgers Law Review* 33 (1981): 435–52.
[34] Robert Alexy, "On the Structure of Legal Principles," *Ratio Juris* 13 (3) (2000): 294–304.
[35] David Keane, "UNESCO and the Right to Peace," in *The Challenge of Human Rights. Past, Present, and Future*, ed. by David Keane and Yvonne McDermott (Chettelhem: Edward Elgar, 2012), 74.
[36] A/HRC/32/L.18, 24 June 2016.

It is also worth noticing that the development of the culture of peace coming out of this evolution in the practice of human rights challenged the link between genetics and aggressive behaviours. The Seville Statement on Violence (1986), which was adopted by scientists from around the world and by Unesco, affirmed that the same species that invented war is capable of inventing peace, and that there is no reason for believing in human beings' biological tendency to war. Perhaps the point is that also peace is a possibility. At the same time, the Unesco's statement also underlined that political and economic agreements are not enough to build a lasting peace, which should be set up on the basis of humanity, education, intellectual progress and solidarity.

IV. The Logic of Human Rights v. the Logic of Wars

Coming to their role in the legal systems and thanks to their status as principles, human rights claim the supremacy of individuals over collective concerns. They establish an institutional priority for individuals.[37] From this point of view, rights are trumps against the prevalence of collective interests. And wars always follow a collective logic. As Jeremy Waldron has clearly noticed, the undeniable collective approach to war is still evident in the condition of "massive or gross violations of human rights" as admissible cause of war in international law. Paradoxically, armed interventions are very rare in spite of the huge number of human rights violations, and this is because judgements about military interventions involve a lot of other factors: costs, alternative possibilities, chance of success, political unpopularity of the decision, and so on. A single right violation does not trigger an armed intervention. This confirms that war has to do with costs and benefits, more than with the protection of individuals.[38] Logically, if the implementation of human rights had not aimed at making war impossible, war would have to be more frequent. The reason is that in the logic of human rights, each individual matters. Likewise, human rights are against any instrumentalization of human beings, and against the jeopardizing of their rights. Then they are against the admissibility of sacrificing some individuals for the sake of the whole, first of all the soldiers, but also the casualties of any kind. What from the point of view of individuals could be justified on the basis of their self-determination (soldiers or people refusing to evacuate), from the point of view of the States protecting human rights must be avoided.

States should protect rights, even if individual rights are dangerous for the collective interest. Within the logic of rights, collective claims are not goals in themselves but only if oriented to individuals' protection, that is always prominent. Then, the exercise of the right to self-determination cannot collide with and prevail over individuals' rights. The reason is that collective rights have to be compatible with, and be directed towards,

[37] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), 269.
[38] Jeremy Waldron, "Human Rights: A Critique of the Raz/Rawls Approach," *Public Law & Legal Theory Research New York University School of Law Paper Series* no. 13–32 (2013): 9.

individuals' protection. This is clearly a structural limit of the legal practice of human rights. Within that practice any collective claim is prima facie controversial.

V. Challenges for the New Theory of Law

The only way of explaining the paradoxical outcome of belligerent human rights is to abandon their original rationality, and to look at States, and at their realpolitik. On the one hand, it is certainly difficult to contest the model of an instrumental State in the abstract, but once a State is established, with a people, an identity, and a common history,[39] collective and local reasons try to resist to individuals' priority. Behind this, there is the problem of the parochial altruism, the idea according to which the capacity of empathy is always limited. The problem of wars comes up when the limited domain of empathy is connected to an aggressive attitude towards those who are not the object of our allegiance and altruism. But human rights have extended the concern and responsibility of every legal actor for each human being. Human rights are the right of others for which each one ought to work.

On the other hand, the identification of law as a product of States endowed by the monopoly of force went hand by hand with a content-independent concept of law. This version is just one possible reading. State-law is perhaps a special concept of law but not its central case. State-law is special because it is a form of law rooted in a territorial political community, as developed in the last two centuries. But law has always been a differentiated phenomenon and it has been recognizable for its ability to coordinate and solve conflicts peacefully (even when its only way was limiting wars). The challenge is to work on the features of a broader and inclusive concept of law, starting from developing the original mission of human rights against wars.

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[39] David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), 17–47.

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Isabel Trujillo. Human Rights and *jus contra bellum*

Abstract. The practice of protecting human rights, initiated after the second world war with the purpose of avoiding wars for future generations, has evolved with some ambiguities to the point that the initial opposition between the protection of rights and war, seems reversed. Human rights have become elements of a *jus ad bellum*, *jus in bello*, and *jus ex bello*, instead of elements of a *jus contra bellum*. This evolution ought to be considered a failure of the original project. It is to be attributed to the resistance of the States to change in accordance to their own propositions, as well as to the survival of the vocabulary and the logic of natural rights that are not human rights. The logic of human rights and the logic of war are still incompatible.

Keywords: human rights; rule of law; war; jus contra bellum; self-defence.

Ізабель Трухільо. Права людини та *jus contra bellum*

Анотація. Практика захисту прав людини, започаткована після Другої світової війни з метою уникнення воєн для майбутніх поколінь, еволюціонувала неоднозначно до такої міри, що початкове протиставлення захисту прав і війни здається таким, що перетворилося на свою протилежність. Права людини стали складовою *jus ad bellum*, *jus in bello* та *jus ex bello*, замість того, щоб бути складовою *jus contra bellum*. Цю еволюцію слід вважати провалом початкового проєкту. Це пояснюється небажанням держав змінюватись відповідно до їхніх власних пропозицій, а також збереженням словника та логіки природних прав, які не є правами людини. Логіка прав людини і логіка війни все ще несумісні.

Ключові слова: права людини; верховенство права; війна; *jus contra bellum*; самозахист.

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