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Moral Internationalism and the Responsibility to Protect

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Abstract

The post-Cold War era has seen the increased significance of moral argument as a force in international relations. Arguments such as those developed in Michael Walzer's Just and Unjust Wars *have shaped debates about the relative weights to be given to non-intervention and human rights as core values of international law over the past three decades. This article analyses the form of moral internationalism that is exemplified by Walzer's work, and the ways in which that moral internationalism has sought to justify humanitarian intervention, foreign involvement in civil wars, regime change, and, most recently, the responsibility to protect concept. It concludes by exploring the political stakes of the turn to what Walzer calls 'practical morality' as a basis for reforming international institutions and laws, and the ways in which new forms of internationalism are redrawing the realism/moralism map.*

1 Introduction

The publication of this special issue exploring the significance of Michael Walzer's *Just and Unjust Wars* offers a valuable opportunity to reflect upon the emergence of moralism as an important feature of the contemporary internationalist landscape. In the post-Cold War era, we have seen the growing influence of Walzer's mode of thinking about international relations – one that can be understood as a form of realist idealism or, in his words, 'practical morality'.[1] Arguments such as those developed in *Just and Unjust Wars* have significantly shaped debates about the relative weights to be given to non-intervention and human rights as core values of international law over the past three decades. Walzer positioned *Just and Unjust Wars* as a challenge to the arguments made both by realists and by international lawyers within those debates, urging that the commitment to state sovereignty and the prohibition on the use of force in international relations must give way in situations where those principles hamper the defence of human rights or self-determination.

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[1] M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn, 2006), at xxiii.

This article analyses the form of moral internationalism that is exemplified by Walzer's work, and the ways in which that moral internationalism has sought to justify humanitarian intervention, foreign involvement in civil wars, regime change, and, most recently, the responsibility to protect concept. The emergence and embrace of the responsibility to protect concept over the past decade offers an insight into the place that moral arguments now occupy in internationalist debates and the political stakes of the turn to moral internationalism as a basis for reforming institutions and laws. The article concludes by exploring the responsibilities of moral internationalists in light of their significant role in contemporary international politics.

2. Walzer's Method: Practical Morality versus International Law

Since at least the 18th century, the question of which disciplinary framework offers the most fruitful means for thinking about war and peace has been the subject of critical reflection. Immanuel Kant, for example, famously dismissed the possibility that lawyers such as Grotius, Pufendorf, and Vattel could offer any insights into the troubled question of how peace might be achieved on this earth. For Kant such lawyers were merely 'sorry comforters'.[2] Although their words were 'still dutifully quoted in *justification* of military aggression', Kant argued that 'their philosophically or diplomatically formulated codes do not and cannot have the slightest *legal* force'.[3] He was scathing about the political moralists or worldly-wise politicians who were 'just like lawyers' in their propensity to treat 'the problems of political, international and cosmopolitan right as mere *technical tasks*'.[4] Kant instead put his faith in the '*moral politician*, for whom it is a *moral task*' and a duty to bring about perpetual peace.[5] To these moral actors, Kant gave the following advice: '[s]eek ye first the kingdom of pure practical reason and its *righteousness*, and your object (the blessing of perpetual peace) will be added unto you'.[6]

Although Michael Walzer does not refer to Kant in *Just and Unjust Wars,* his approach resembles Kant's in many ways. Like Kant, Walzer seeks to develop general principles that might guide moral actors seeking to bring about perpetual peace and, like Kant, he dismisses the contribution that international lawyers can make to such a project. Walzer was part of the American anti-war movement during the late 1960s and early 1970s, and began to think about war not 'as a philosopher, but as a political activist and a partisan'.[7] The experience of resisting the Vietnam War raised for Walzer the key question of how to take seriously the language in which people argue about war. The way that his generation of anti-war protestors thought about the war in Vietnam

2 Kant, 'Perpetual Peace: A Philosophical Sketch', in H.S. Reiss (ed.), *Kant: Political Writings* (1970), at 103.
3 *Ibid.*
4 *Ibid.*, at 119, 122.
5 *Ibid.*, at 122.
6 *Ibid.*, at 123.
7 Walzer, *supra* note 1, at xix.

was shaped by the vocabulary that was available to them. Without that vocabulary, Walzer says, 'we could not have thought about the Vietnam war as we did, let alone have communicated our thoughts to other people'.[8] Walzer aims to build on this experience in order to 'account for the ways in which men and women who are not lawyers but simply citizens (and sometimes soldiers) argue about war, and to expound the terms we commonly use'.[9] He will therefore 'describe the judgments and justifications that people commonly put forward' when arguing about war.[10]

Walzer strongly resists the idea that the moral vocabulary of war is determined (or even informed) by international legal argument. He wants to distinguish what he is doing from the work of international law, both as a language and as a way of relating to the world. Thus although he recognizes that 'the language with which we argue about war and justice is similar to the language of international law', Walzer considers that international law 'in the age of the United Nations has become increasingly uninteresting'.[11] It is worth pausing to see what he means by that claim:

> The UN Charter was supposed to be the constitution of a new world, but, for reasons that have often been discussed, things have turned out differently. To dwell at length upon the precise meaning of the Charter is today a kind of utopian quibbling. And because the UN sometimes pretends that it already is what it has barely begun to be, its decrees do not command intellectual or moral respect – except among the positivist lawyers whose business it is to interpret them. The lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in.[12]

Walzer thus rejects the legitimacy both of the UN and of the international law that has come into being in the UN era.

As this passage suggests, Walzer's explicit reason for rejecting international law is its unreality. Walzer wants to be able to develop a shared moral code for judging the justice of war through a proper engagement with the real world, unlike international lawyers who relate only to a paper world and whose attempt to understand conflicting interpretations of terms such as aggression, intervention, self-determination, or self-defence is merely a kind of 'utopian quibbling'. He stresses throughout that his approach will be properly 'scientific'. He wants to show that moral arguments are not 'excluded from the world of science' or 'social science'.[13] Moral criticisms of American conduct in Vietnam, for example, 'had the form at least of reports on the real world, not merely on the state of our own tempers. They required evidence, they pressed us, however trained we were in the loose use of moral language, toward analysis and investigation'.[14] It is for this reason that he will make use of 'historical illustrations' to develop his moral argument:

[8] *Ibid.*
[9] *Ibid.*, at xxi.
[10] *Ibid.*, at xxiii.
[11] *Ibid.*, at xx.
[12] *Ibid.*, at xxi.
[13] *Ibid.*, at xx.
[14] *Ibid.*

> Since I am concerned with actual judgments and justifications, I shall turn regularly to historical cases … In order to make them exemplary, I have had to abridge their ambiguities. In doing that, I have tried to be accurate and fair, but the cases are often controversial and no doubt I have sometimes failed. Readers upset by my failures might usefully treat the cases as if they were hypothetical – invented rather than researched – though it is important to my own sense of my enterprise that I am reporting on experiences that men and women have really had and on arguments that they have really made.[15]

Walzer wants us to take this seriously as a 'scientific' process. He repeatedly stresses the importance of 'evidence' to the arguments he seeks to make: '[a] war called unjust is not … a war misliked; it is a war misliked for particular reasons, and anyone making the charge is required to provide particular sorts of evidence'.[16] This then places a lot of weight on the process by which he will conduct his research, choose his examples, decide upon his archive, and attempt to think himself into the position of different actors in his historical drama.

Walzer also seeks to displace international law in favour of a moral code founded on the arguments made by ordinary citizens for democratic reasons.[17] His aim is to recover the just war theory for ordinary people, and to take it back from politicians and statesmen. Politicians and lawyers as the representatives of states create positive international law.[18] While that positive international law may set forth some aspects of the moral code governing war, it is not necessarily concerned with justice or prudence, and politicians are not necessarily reliable guides on matters of conscience.[19] The morality (or amorality) of politicians and lawyers shapes the law they bring into being.

Walzer not only wants to recover the language of just war for ordinary citizens, but in displacing both the utopian fantasies of international law and international organizations, Walzer aims to articulate a moral code that is sufficient to encompass the whole of humanity. He wants to reveal the 'shared commitments' and 'general principles' that provide the moral basis for judging the justice and injustice of force in international affairs. This is therefore an extremely ambitious remit for any book, but particularly one written during the late 1960s and early 1970s. To be able to establish a shared basis for judging the justice and injustice of resort to force in the context of the Cold War, the nuclear arms race, and the serial crises of decolonization was a huge task. The universalist nature of Walzer's ambition is reinforced by the geographical and temporal scope of the 'historical illustrations' to which he makes reference. His discussion of aggression and intervention alone uses the examples of the 1870 Franco-Prussian War, the 1938 German occupation of the Sudetenland, the 1939–1940 Winter War between the Soviet Union and Finland, the 1701–1714 War of the Spanish Succession between the allies of Louis XIV and the Grand Alliance, the 1967 Six Day War between Israel and Egypt, the 1849 Russian intervention in response

[15] *Ibid.*, at xxiv.
[16] *Ibid.*, at 12.
[17] *Ibid.*, at 15, 44.
[18] *Ibid.*, at 44.
[19] *Ibid.*, at 67, 107.

to the Hungarian Revolution, the 1955–1975 American War in Vietnam, the 1898 American invasion of Cuba, and the 1971 Indian invasion of East Pakistan. What kind of sources can Walzer draw upon to articulate the shared moral code underpinning collective judgements about these events?

Walzer explains his method for engaging with historical sources in these terms:

> Hence the method of this book: we look to the lawyers for general formulas, but to historical cases and actual debates for those particular judgments that both reflect the war convention and constitute its vital force. I don't mean to suggest that our judgments, even over time, have an unambiguous collective form. Nor, however, are they idiosyncratic and private in character. They are socially patterned, and the patterning is religious, cultural, and political, as well as legal. The task of the moral theorist is to study the pattern as a whole, reaching for its deepest reasons.[20]

This leaves open the question of how the moral theorist will study 'the pattern as a whole'. This is of course a familiar problem both for historians seeking to make sense of the past and for lawyers seeking to find relevant precedents for current situations. What should the moral philosopher use as his source of knowledge about the religious, cultural, political, and legal patterning that shapes the war convention? What languages would the moral philosopher need to be able to speak in order to grasp this pattern? What knowledge of other religions, other cultures, and other politics would be necessary? How would he decide which sources best reflect what ordinary citizens argued and thought about all those wars? When did they prefer rebellion and battle to order and peace? What passions and injustices moved them to violence? What sacrifices were they willing to make and to what ends? It is difficult to imagine what kind of method and what choice of sources would be adequate to the goal of producing an account of the social patterning of judgements about war that can encompass the world as a whole.

It is, however, perhaps unfair to Walzer's method to expect some kind of engagement with actual arguments made by actually existing spectators of and participants in all the conflicts he studies. For Walzer, historical cases work as examples of the universal he is seeking to reveal. War is a social practice that has a 'moral reality' – and this moral reality is something that we have made, 'not arbitrarily, but for good reasons'.[21] Our critical judgements about war are informed by our understanding of the world we have made. Those understandings are 'simultaneously the historical product of and the necessary condition for the critical judgments that we make every day; they fix the nature of war as a moral (and an immoral) enterprise'.[22]

The method that Walzer develops in these passages can best be grasped through a comparison with Kant's notion of reflective judgement. For Kant, the faculty of judgement is the faculty that mediates between our faculties of understanding and of reason – between our knowledge of the world as we have made it and our desire for the world as we believe it ought to be.[23] When we judge, we seek to make sense of the

[20] *Ibid.*, at 45.
[21] *Ibid.*, at 22.
[22] *Ibid.*, at 22.
[23] I. Kant, *Critique of the Power of Judgment* (2000), at 64, 80–82.

world as we have made it, from the perspective of a hypothetical universal that we seek to bring into being through our interpretation of the examples we study.[24] What we are seeking to know when we judge past examples is a 'history of future times' written with a conception of 'the *whole* of humanity' in mind.[25] Reflective judgement 'takes account (*a priori*) of everyone else's way of representing in thought, in order as it were to hold its judgment up to human reason as a whole'.[26] The philosopher achieves this 'by holding his judgment up not so much to the actual as to the merely possible judgments of others, and putting himself into the position of everyone else, merely by abstracting from the limitations that contingently attach to our own judging'.[27] Walzer's method seems directed to just this kind of reflective judgement – the attempt to develop a universal morality that works from examples rather than being rooted 'in a transcendent community or in a timeless rationality', but still maintains its coherence.[28]

> Reflective judgment has *exemplary* validity; it does not subsume the particular case under a general rule, nor does it determine a general rule on the basis of a particular case, but regards the particular case as an example of a hypothetical universal.[29]

Walzer seeks to make use of historical illustrations precisely in order to reveal their status as examples of a universal 'moral law' or set of 'general principles that we commonly acknowledge' about the justice of war.[30] It is in this sense that he is 'concerned precisely with the present structure of the moral world'.[31]

> We justify our conduct; we judge the conduct of others. Though these justifications and judgments cannot be studied like the records of a criminal court, they are nevertheless a legitimate subject of study. Upon examination they reveal, I believe, a comprehensive view of war as a human activity and a more or less systematic moral doctrine, which sometimes, but not always, overlaps with established legal doctrine.[32]

The goal of studying the actual judgements and justifications that ordinary citizens make in arguing about war is to reveal the shared commitments that underpin these arguments:

> We can analyze these moral claims, seek out their coherence, lay bare the principles that they exemplify. We can reveal commitments that go deeper than partisan allegiance and the urgencies of battle; for it is a matter of evidence, not a pious wish, that there are such commitments.[33]

[24] Kant refers to this as 'philosophical history': Kant, 'Idea for a Universal History with a Cosmopolitan Purpose', in Reiss (ed.), *supra* note 2, at 41, 53. For an example of Kant's articulation and practice of this kind of philosophical history see Kant, *supra* note 2.

[25] Kant, 'The Contest of Faculties', in Reiss (ed.), *supra* note 2, at 176, 177.

[26] Kant, *supra* note 23, at 174.

[27] *Ibid.*

[28] Bartelson, 'The Trial of Judgment: A Note on Kant and the Paradoxes of Internationalism', 39 *Int'l Studies Q* (1995) 255, at 276.

[29] *Ibid.*

[30] Walzer, *supra* note 1, at xxi.

[31] *Ibid.*

[32] *Ibid.*

[33] *Ibid.*, at xxiii.

Yet the stakes of such a method were much higher in 1977 than they were when Kant wrote his works on history and judgement in the late 18th century. Reflective judgement about the morality of particular wars in the UN era takes place within an international system that is characterized by extremes of wealth and poverty, by vocabularies and identities formed out of very different histories, by plural religious and political values, and by real conflicts over the distribution of resources. It does so within a post-colonial intellectual environment in which any claim to know what is good for everyone without being open to alternative views will be treated with justified suspicion,[34] and within a political system that includes articulate representatives of newly independent states. Thus the claim to be able to put oneself into the position of everyone else in relation to the conflicts described in *Just and Unjust Wars* could not be made lightly.

In the next section, I explore the ways in which Walzer goes about this reflective judgement in his treatment of aggression and non-intervention, and compare that approach to the debates that were taking place during the same period within the international legal community.

3 The Moralist Argument for Intervention

Walzer describes the 'legalist paradigm' for comprehending the morality of war as follows. The existing international society of independent states has as its fundamental laws the rights of territorial integrity and political sovereignty of its members. The resort to force against the territorial integrity or political sovereignty of any state is prohibited and constitutes aggression. The use of force is lawful only in situations of self-defence or when resort to force is authorized collectively in order to keep the peace or respond to aggression.[35] Thus non-aggression and non-intervention are, according to Walzer, the key principles in the 'legalist paradigm'. This paradigm then shapes the way that lawyers respond to many morally complex situations. For example, in cases of civil war, says Walzer, lawyers permit assistance only to the established government, unless the insurgents establish control over some part of the territory and gain an equality of status with the government, in which case lawyers 'enjoin a strict neutrality'.[36] The legalist paradigm rules out any attempts to stop mass slaughter in another state, thus showing that law 'cannot account for the moral realities of military intervention'.[37] Lawyers 'prefer to stick to the paradigm' because they worry that under cover of humanitarianism 'states will come to coerce and dominate their neighbour'.[38] And the legalist paradigm treats preventive self-defence, such as the Israeli first strike in the Six Days War, as unlawful, thus failing to acknowledge that 'there are threats with which no nation can be expected to live'.[39]

[34] See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), at 498–500.

[35] Walzer, *supra* note 1, at 61–62.

[36] *Ibid.*, at 96.

[37] *Ibid.*, at 108.

[38] *Ibid.*, at 106.

[39] *Ibid.*, at 85.

Walzer suggests that this rigidity on the part of lawyers ignores the underlying purpose of the legalist paradigm – the protection of 'life and liberty'.[40] It is this underlying purpose that provides the basis for a series of revisions that Walzer proposes to the non-intervention principle. According to Walzer, the continued 'moral standing of any particular state depends upon the reality of the common life it protects and the extent to which the sacrifices required by that protection are willingly accepted and thought worthwhile'.[41] The defence of any state is morally justified if the state defends the lives of its inhabitants and 'the common life they have made'.[42] The purpose of the commitment to non-aggression and non-intervention is thus, according to Walzer, knowable in an uncontroversial way – the legalist paradigm exists to protect life, liberty, and the right to self-determination. This requires judging 'when a community is in fact self-determining, when it qualifies, so to speak, for nonintervention'.[43]

This then provides the basis of Walzer's argument for revising the principled opposition to aggression and intervention. For Walzer, the state exists to protect the individual lives and the common life of the people within a territory. If the state fails to fulfil that function, it will no longer qualify for the principle of non-intervention – the defence of such a state will have no moral justification. That will be the case where one group within a state is fighting for secession or national liberation, in situations of civil war where one party is being supported by a foreign power, or in cases of massive human rights violations. The arguments that are made for intervention in such situations 'open the way for just wars that are not fought in self-defense or against aggression in the strict sense'.[44] Of course such revisions are risky, as states are only too willing to invade one another. So justifications for intervening in the name of protecting self-determination or human rights must be judged with great care, and with careful attention to evidence.[45]

It is precisely his approach to these issues of moral argumentation and evidence that make Walzer's intervention such a radical one. In order to understand why Walzer's argument for intervention was radical, we need to understand what international lawyers were actually saying during the 1960s and 1970s. What international lawyers were actually saying in fact bears little relation to what Walzer calls the 'legalist' position. That's not to say that the language of legalism and anti-legalism would have been an unfamiliar one to international lawyers at the time when *Just and Unjust Wars* was published. This was the language in which many American officials and advisers at the time couched their arguments rejecting legalist constraints

[40] *Ibid.*, at 86.

[41] *Ibid.*, at 54.

[42] *Ibid.*, at 54–55.

[43] *Ibid.*, at 89.

[44] *Ibid.*, at 90.

[45] E.g., if support is to be provided for a secessionist movement, 'evidence must be provided' about the existence of a community 'whose members are committed to independence and ready and able to determine the conditions of their own existence' (at 93). Counter-intervention in a civil war in response to intervention by an outside power is required in order to sustain values of autonomy and independence, but only if the party to be supported 'has already passed the self-help test' (at 99).

on intervention in the Dominican Republic, the Cuban quarantine, and the Vietnam war.[46] To be anti-legalist was thus a way of rejecting constraints on unilateral interventions in the mode of Kissinger. Legalism was often opposed to moralism by those justifying interventionism on the part of the US, India, or other dominant powers during the 1960s and 1970s.[47] Official explanations of US involvement in Vietnam, for example, were described in moralistic terms. As Falk argued, 'Those who support the role of the United States in the Vietnam War often emphasize the absence of any selfish American interests in Vietnam. We want no territory or foreign bases, and we have no economic holdings or ambitions.'[48] Justifications for US action were dominated by 'the moralistic insistence that the United States was acting to show that aggression doesn't pay, or that collective self-defense works, or that we are a government that upholds its commitments … But up until President Johnson's speech of March 31, 1968, no government official moved the debate about the war off the terrain of selfless promotion of moral and legal principles.'[49]

Yet what Walzer calls the 'legalist' approach did not seem to bear much relation to what international lawyers actually said and did. Far from being dogmatically concerned with the rules of their 'paper world' to the exclusion of either reality or morality, international lawyers during this period were extremely concerned with the difficulties of relating legal categories with 'real world' facts, very much aware of the competing interpretations about the justice and injustice of war and intervention that divided the Western, Eastern, and Non-Aligned blocs, and attentive to the demands that the expansion of the international community to include newly independent states had placed upon traditional jurisprudential categories and sensibilities.

The 'real world' with which international lawyers were attempting to come to terms in their writing during the late 1960s and 1970s was shaped by the Cold War, decolonization, the threat of nuclear annihilation, and the emerging self-perception of the US and the USSR as superpowers with moral missions. The period in which Walzer was writing *Just and Unjust Wars* was shaped by heated debates in international law about the meaning and limits of the commitment to non-use of force, and more broadly to non-intervention. Non-intervention of course remained a sacred principle in relation to Western European and North American states. Yet it was clear that the older pattern of intervention in the internal affairs of states was beginning to repeat in the context of the newly independent states that were perceived to be within the US and Soviet spheres of influence. The new UN Charter ruled out resort to force. The involvement of the UN in the Suez and Congo crises vindicated the view that older forms of colonial intervention were an anachronism. It seemed clear that former colonial powers could

[46] For an influential dismissal of 'legalism' see Kissinger, 'The Viet Nam Negotiations', 47 *Foreign Aff* (1969) 211. See further the discussion of the official tendency to contrast a particular conception of legalism and anti-legalism at that time in Falk, 'Law, Lawyers, and the Conduct of American Foreign Relations', 78 *Yale LJ* (1969) 919.

[47] Farer, 'Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife', 82 *Harvard L Rev* (1969) 511.

[48] Falk, *supra* note 46, at 926.

[49] *Ibid.*

no longer readily be engaged in police action, humanitarian intervention, or temporary occupation in order to secure access to resources or strategic advantage.[50] While the UN may have 'started out as a mechanism for defending and adapting empire in an increasingly nationalist age',[51] its willingness to stand up to the ambitions of former imperial powers suggested that it might yet be transformed into a vehicle for enabling meaningful decolonization.

Yet it was also becoming clear that the UN would have a more difficult time restraining the new superpowers in their creation of spheres of influence in Eastern Europe, Asia, the Middle East, and Latin America. The inability of the UN to take any action against the USSR for its invasion of Hungary, occurring at the same time as the UK and French invasion of Egypt during the Suez Crisis, made the contrast a very stark one.[52] The Soviet intervention in Hungary illustrated a trend that would shape debates about the use of force from the 1960s onwards, in which arguments for the unilateral use of force began to fit themselves to the exceptions allowed for under the Charter. The Soviet invasion of Hungary, the US invasions of the Dominican Republic and Vietnam, and the Indian invasion of Pakistan were all defined as exercises in collective self-defence or interventions at the invitation of governments that had requested military assistance.

The key difference between this period and that of the 19th and early 20th centuries, however, was that representatives of newly independent states were now formal players in public debates about intervention. The composition of the UN General Assembly and of the International Court of Justice meant that jurists and government officials from states outside Western Europe and North America were involved in shaping the 'new international law',[53] whether through judicial opinions, state practice, or attempts at law-making through parliamentary processes of drafting General Assembly resolutions or declarations. It was no longer possible simply to argue in the abstract about what was in the best interests of subject peoples, or to ignore the deep-seated philosophical and political differences that underpinned differing visions of the common good.[54]

In addition, for both international lawyers and international relations scholars, the advent of nuclear weapons had markedly shaped the climate in which the resort to force was debated. The idea of maintaining peace as a key purpose of international

[50] A. Orford, *International Authority and the Responsibility to Protect* (2011), at 67.

[51] See M. Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (2009), at 26–27.

[52] See the discussion in B. Urquhart, *Hammarskjöld* (1972), at 231–248.

[53] *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 128, at 174 (per Judge Alvarez).

[54] To take one example, significant philosophical and political debates marked the attempt to give legal substance to notions of friendly relations, international cooperation, and non-intervention in the context of drafting what would become the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Friendly Relations Declaration), GA Res 2625 (1970). For a revealing reflection upon that negotiation process see McWhinney, 'The "New" Countries and the "New" International Law: The United Nations' Special Conference on Friendly Relations and Co-operation among States', 60 *AJIL* (1966) 1.

law and international organizations took on new significance in the context of the potential for nuclear war. As Richard Falk put it at the time, 'A discretionary basis for foreign policy in the nuclear age seems to increase the risks of self-destructive warfare. The scale of violence is now so large that it becomes less and less tenable to entrust decisions affecting the interests and welfare of the world community to the particular appraisals of policy made by small numbers of executive officials at the national level'.[55] Even hard-nosed realists considered that the stakes of war had been significantly raised by the thermo-nuclear revolution.[56] A more chastened kind of realism emerged around that period, shaped by the realization that nuclear weapons meant the real possibility of mutual annihilation. With the development of intercontinental guided missiles, the massive arming of both the US and the USSR, and repeated instances of Cold War brinkmanship, American realists such as Reinhold Niebuhr and Hans Morgenthau had ceased to believe that a just nuclear war was possible. The destructiveness of nuclear weapons made it necessary to prevent resort to war rather than to try and limit war once begun.[57] It was no longer possible to think about the struggle between the 'children of light' and the 'children of darkness' as 'morally unambiguous', when technological developments meant that the battle itself might lead to global annihilation.[58] The existence of weapons of mass destruction, and the potential for their use not just against foes with similar arsenals but also against rebels at home and abroad, changed the equation that had informed previous just war theorizing.

> Both counterinsurgency and nuclear warfare create such a disproportionate relationship between the destruction caused and the political end served that the very issue of war itself demands reexamination.[59]

Within this context, humanitarian intervention played a limited role both in official justifications for the use of force and in scholarly commentary. Humanitarian intervention was still at that time perceived as an anachronistic doctrine that was closely tied to imperialism.[60] General Assembly resolutions passed during the 1970s unambiguously outlawed forcible intervention.[61] Throughout the Cold War, states themselves did not seek to justify their resort to force as 'humanitarian intervention'.[62] Thus, while India's intervention in East Pakistan, Vietnam's intervention in Cambodia, and Tanzania's intervention in Uganda have all since been justified by commentators as

[55] Falk, *supra* note 46, at 927–928.

[56] C. Craig, *Glimmer of a New Leviathan: Total War in Niebuhr, Morgenthau, and Waltzer* (2003).

[57] *Ibid.*, at 85.

[58] *Ibid.*, at 89. Craig there discusses the profound shifts in argument from R. Niebuhr's *The Children of Light and the Children of Darkness* (1944) to the pieces he contributed to *Christianity and Crisis* and *New Leader* in the aftermath of the confrontation in Berlin of 1961 and the Cuban Missile Crisis of 1962.

[59] Falk, 'Book Review: Frances Fitzgerald, *Fire in the Lake*', 51 *Texas L Rev* (1972–1973) 613, at 629.

[60] Sornarajah, 'Power and Justice in International Law', 1 *Singapore J Int'l & Comp L* (1997) 28, at 48 (noting that most 19th century claims to be engaged in humanitarian intervention were 'nakedly hegemonistic' and generally made by the European powers against the rapidly declining Ottoman Empire).

[61] Friendly Relations Declaration, *supra* note 54; Declaration on the Definition of Aggression, GA Res 3314 (1974).

[62] See further C. Gray, *International Law and the Use of Force* (3rd edn, 2008), at 33–35.

Cold War examples of humanitarian intervention, none of the intervening states justified their actions on humanitarian grounds at the time.[63] This was not because the governments of India, Vietnam, or Tanzania lacked a sense of justice or an account of morality that was adequate to their actions, but because they considered the prohibition on unilateral intervention in the UN Charter as itself a moral statement. Humanitarian intervention was 'not a doctrine that responsible states would want to espouse' because it was 'a doctrine capable of uncontrollable abuse'.[64] The notion that a powerful state or a coalition of allies might intervene to rescue or protect the people of another state could not easily be represented as an apolitical action. The Brezhnev doctrine of intervention to protect the self-determination of socialist countries in the face of capitalist threats and the Reagan doctrine advocating the legitimacy of pro-democratic invasion were met with protest and scepticism.

For international legal scholars at the time, the challenges of decolonization, Cold War strategizing, and nuclear technology posed questions that went to the very heart of what role international law should play in foreign policy.[65] American scholars such as Wolfgang Friedmann, Detlev Vagts, and Richard Falk, for example, considered that debates over the legitimacy of US interventions gave rise to 'fundamental reflections on the rôle of international law' in situations that deeply divided 'the country, and especially the scholarly community' and that stirred up 'deep emotions and passionate partisanship'.[66] International lawyers paid careful attention to disputes over facts, to interpretative disagreements between parties to a conflict about the meaning and applicability of legal concepts, and to the implications of changes in world order for comprehending the nature and role of international law itself. Writing in the *American Journal of International Law* in 1967, Friedmann pointed out that disputes over the facts, and the evidence used to establish those facts, was at the heart of debates about the lawfulness of US involvement in Vietnam.[67] Given the absence of any impartial judicial body that could provide an 'authoritative evaluation' of the arguments made by governments, Friedmann urged his colleagues not to ignore 'inconvenient facts' and instead to produce scholarship that engaged in careful analysis of the arguments,

[63] For India's justification of its use of force against Pakistan in the SC debate on this question see S/PV.1606 (1971), at 14–18. See also the useful materials related to this incident collected as 'Documents: Civil War in Pakistan', 4 *NYU J Int'l L & Pol* (1971) 524. For Vietnam's justification of its use of force against Kampuchea as self-defense in a border war see the SC debate: S/PV.2108 (1979), at 12. As the SC 'passed over in silence the several efforts to have it convened' in relation to the Tanzanian intervention that ousted Idi Amin, there is no SC debate on this question, but Tanzania claimed to be responding to Ugandan border incursions: see T.M. Franck, *Recourse to Force: State Action Against Threats and Armed Attack* (2002), at 143–145.

[64] Sornarajah, 'Power and Justice: Third World Resistance in International Law', 10 *Singapore Yrbk Int'l L* (2006) 19.

[65] Ehrlich, 'The Legal Process in Foreign Affairs: Military Intervention – A Testing Case', 27 *Stanford L Rev* (1975) 637; Friedmann, 'Law and Politics in the Vietnamese War: A Comment', 61 *AJIL* (1967) 776; Friedmann, 'United States Policy and the Crisis of International Law', 59 *AJIL* (1965) 857.

[66] Friedmann, 'Law and Politics', *supra* note 65, at 776; Vagts, 'International Law under Time Pressure: Grading the Grenada Take-Home Examination', 78 *AJIL* (1984) 169; Falk, 'Law, Lawyers, and the Conduct of American Foreign Relations', 78 *Yale LJ* (1969) 919.

[67] Friedmann, 'Law and Politics', *supra* note 65.

statements, memoranda, and briefs produced by all sides to a conflict.[68] In addition, much legal scholarship paid attention to the arguments that governments made to justify their actions. Thus articles in law journals pored over the archive of official explanations of behaviour, in order to attend to what the parties put forward as their public reasons for action. The failure to attend with proper care to the arguments made by all sides to a dispute,[69] or the failure to attend at all to the ways in which governments justified their actions,[70] was grounds for critiquing the contributions of other legal scholars. Legal scholars also struggled to articulate a vision of international law that was capable of responding to the real transformations that were taking place in the composition and conditions of international society in the aftermath of decolonization.[71]

It is in the context of these self-reflective debates amongst international scholars that we can see how radical Walzer's anti-legalist intervention was, both in form and in substance. Walzer's dismissal of the debates about intervention that were taking place amongst international lawyers as 'utopian quibbling' allowed him to recover an argument for privileging the view of justice gained through abstract and impartial reflection. Where international lawyers sought to take factual and interpretative disagreements seriously as the markers of dialogue or negotiation between states as bearers of pluralism, Walzer dismissed such disagreements as irrelevant to the work of moral internationalism. *Just and Unjust Wars* avoids engaging with competing interpretations of the 'facts'. For Walzer, the facts of any given situation are given, not constituted. If there is a disagreement over what really happened, this is attributable to the bad faith of one of the parties.

[68] *Ibid.*, at 778–779. Friedmann was there critiquing the 'method of thinking, the ambiguous use of terminology and the bias in the selection of facts' made by John Norton Moore, and comparing Moore's approach unfavourably with the scholarly method of Quincy Wright. For the two articles in question see Moore, 'The Lawfulness of Military Assistance to the Republic of Viet-Nam', 61 *AJIL* (1967) 1 and Wright, 'Legal Aspects of the Viet-Nam Situation', 60 *AJIL* (1966) 750.

[69] Friedmann, 'Law and Politics', *supra* note 65, at 778–779.

[70] See, e.g., Farer, 'Human Rights in Law's Empire: The Jurisprudence Wars', 85 *AJIL* (1991) 117, at 119, critiquing the tendency of realist legal scholars such as Antony D'Amato to 'deemphasize what governments say, however solemnly, in favor of what they do' on the grounds that 'it is from the actual behavior of states … that we can induce the considerations that inform their nations about permissible behavior'.

[71] See, e.g., Jessup, 'Non-Universal International Law', 12 *Columba J Transnat'l L* (1973) 415; R.P. Anand, *New States and International Law* (1972); R.P. Anand (ed.), *Asian States and the Development of Universal International Law* (1972); Anand, 'Rôle of the "New" Asian-African States in the Present International Legal Order', 56 *AJIL* (1962) 383; Fatouros, 'International Law and the Third World', 50 *Virginia L Rev* 783 (1964). Legal scholars also sought to respond to the legal questions relating to the management of decolonization that began to appear before the ICJ and the GA during the 1950s and 1960s, many raised as part of the 20-year attempt to hold South Africa to account for its conduct in governing what was then South West Africa: see, e.g., Dugard, 'The Revocation of the Mandate for South West Africa', 62 *AJIL* (1968) 78 and Higgins, 'The International Court and South West Africa', 42 *Int'l Aff* (1966) 573. For later attempts to grasp what this period meant for the development of a post-colonial international jurisprudence see Abi-Saab, 'The International Court as a World Court', in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996), at 3; Highet, 'Reflections on Jurisprudence for the "Third World": The World Court, the "Big Case", and the Future', 27 *Virginia J Int'l Law* (1986–1987) 287; R. Falk, *Reviving the World Court* (1986).

> The first questions asked when states go to war are also the easiest to answer: who started the shooting? who sent troops across the border? These are questions of fact, not of judgment, and if the answers are disputed, it is only because of the lies that governments tell.[72]

In addition, *Just and Unjust Wars* avoids engaging with competing interpretations of the meaning and applicability of what Walzer describes as 'general principles' grounding 'the moral law'. The problem for international law in the 1960s and 1970s was precisely the content that should be given to principles such as non-intervention or aggression or self-determination in the unstable and often revolutionary situations thrown up by decolonization and Cold War expansionism. By dismissing international legal debates at the outset of his argument, Walzer did not have to engage with the profound interpretative disagreements that existed at that time over the purpose of the international legal order or the meaning to be made of particular uses of force. By dismissing as morally irrelevant both the public justifications that governments gave for their actions (lies) and the subsequent analysis of those justifications by international lawyers (utopian quibbling), Walzer could present certain moral principles as universally valid and ignore any interpretative disagreements over the meaning of those principles and their applicability to concrete situations.

Thus to any critic who dares pose the question of '"What is this morality of *yours*?"' Walzer replies that such a question excludes the questioner 'not only from the comfortable world of moral agreement, but also from the wider world of agreement and disagreement, justification and criticism. The moral world of war is shared not because we arrive at the same conclusions as to whose fight is just and whose unjust, but because we acknowledge the same difficulties on the way to our conclusions, face the same problems, talk the same language. It's not easy to opt out, and only the wicked and the simple make the attempt'.[73] Later in setting out what he calls the moral reality of war, Walzer comments:

> I am going to assume throughout that we really do act within a moral world; that particular decisions really are difficult, problematic, agonizing, and that this has to do with the structure of that world; that language reflects the moral world and gives us access to it; and finally that our understanding of the moral vocabulary is sufficiently common and stable so that shared judgments are possible. Perhaps there are other worlds to whose inhabitants the arguments I am going to make would seem incomprehensible and bizarre. But no such people are likely to read this book.[74]

Yet we do not get a sense from reading *Just and Unjust Wars* that the particular decisions involved in the cases discussed by Walzer *are* difficult, problematic, or, more importantly, contested. This is precisely because of the ways in which certain arguments are ruled out of bounds and their supporters characterized as incapable of participating in moral debate – because they are 'wicked' or 'simple', from 'other worlds' whose inhabitants find these arguments 'incomprehensible', or perhaps just because they are lawyers or politicians. Walzer's dismissal of any actually existing law in

[72] *Ibid.*, at 74.
[73] *Ibid.*, at xxii–xxiii.
[74] *Ibid.*, at 20.

favour of his practical morality strips debates about war (or indeed about lawfulness) from any constraining institutional, official, or political realities.

Substantively, the anti-legalist position adopted by Walzer worked in the way that anti-legalism worked for realists like Kissinger – to dismiss restrictions on military action. Whereas for Kissinger legalism was understood as a barrier to action taken in the national interest, for Walzer legalism was understood as a barrier to action taken in the interest of humanity. Here Walzer's book played a significant role. While international lawyers were and remained largely sceptical about the idea or language of humanitarian intervention,[75] *Just and Unjust Wars* was a major contribution to redefining interventions, such as those that had recently taken place in Bangladesh, as moral actions undertaken in the interests of individual rights and collective self-determination.[76] For Walzer, the Indian intervention 'to defeat the Pakistani forces and drive them out of Bangladesh' was the paradigm case of humanitarian intervention. It involved military action 'on behalf of oppressed people' and the Indian government did not seek to take over the territory in the aftermath of its action. For Walzer, people who participate in massacres lose their right to govern. 'Their military defeat is morally necessary.'[77] When the law 'runs out', as it does in the context of mass atrocity, it is necessary to refer to 'our common morality, which doesn't run out, and which still needs to be explicated after the lawyers have finished'.[78] Thus Walzer urged the abandonment of the rigid commitment to international legal principles and to collective action through the UN:

> Humanitarian intervention is justified when it is a response (with reasonable expectations of success) to acts 'that shock the moral conscience of mankind'. The old-fashioned language seems to me exactly right. It is not the conscience of political leaders that one refers to in such cases. They have other things to worry about and may well be required to repress their normal feelings of indignation and outrage. The reference is to the moral convictions of ordinary men and women, acquired in the course of everyday activities. And given that one can make a persuasive argument in terms of those convictions, I don't think that there is any moral reason to adopt that posture of passivity that might be called waiting for the UN (waiting for the universal state, waiting for the messiah …)[79]

In the next section, I explore the ways in which the language of 'humanitarian intervention' slowly began to be taken up in legal debates both within and beyond the academy from the early 1970s.[80]

[75] See famously Brownlie, 'Thoughts on Kind-Hearted Gunmen', in R. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973), at 140.

[76] There were few international lawyers who supported a characterization of the Indian invasion as humanitarian intervention at the time, but for contemporary arguments in favour of that interpretation see Nanda, 'A Critique of the United Nations Inaction in the Bangladesh Crisis', 49 *Denver LJ* (1972–1973) 53 and the contributions of Ved Nanda and Burns Weston to 'Conference Proceedings' in Lillich (ed), *supra* note 75, at 105–153.

[77] Walzer, *supra* note 1, at 106.

[78] *Ibid.*, at 107.

[79] *Ibid.*

[80] For a key early text from within the discipline of international law see Lillich (ed.), *supra* note 75.

4 From Humanitarian Intervention to the Responsibility to Protect: Moral Internationalism as the New Realism

Just and Unjust Wars was ahead of its time. The institutional and ideological conditions of the post-Cold War period led to the slow growth of support amongst scholars and activists for the idea that force could legitimately be used as a response to situations of massive human rights violations within a state. With the end of the Cold War, the concept of security, and thus the ends to which the conflict prevention machinery of the UN was to be put, became more ambitious. In addition, the ideological climate of the 1990s also contributed to the plausibility, for some, of the notion that military intervention might be benevolent and disinterested – that powerful states might really come to liberate and not to occupy. It was in this new environment that the Security Council proved willing to interpret its jurisdiction to authorize force to address situations of civil war or humanitarian crisis.

The willingness of the Security Council to expand its jurisdiction with a broad reading of 'threats to the peace' was first evidenced by the statement issued from its 1992 Summit Meeting. The members of the Security Council there declared that the 'absence of war and military conflicts amongst States does not in itself ensure international peace and security' and that 'non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security'.[81] The range and nature of resolutions passed by the Security Council in the decade following the end of the Cold War reinforced the sense that the Council was willing to treat the failure to guarantee democracy or human rights, or to protect against humanitarian abuses, as a threat to peace and security.

While (it seems strange now to recall) these resolutions were hotly debated, they were generally thought to have 'stretched the literal text of Chapter VII' rather than to have violated the Charter prohibition on recourse to force.[82] These decisions were not seen to threaten the key principles of sovereign equality, territorial integrity, and self-determination. Collective humanitarian intervention was largely conceived of as an exceptional measure undertaken in situations of emergency and extreme human suffering, brought somewhat uneasily under an international jurisdiction to protect peace and security, or, more controversially, to represent universal values. The notion that international police action was exceptional still governed.

Throughout the 1990s, international executive action in response to humanitarian crises expanded dramatically.[83] With that expansion in the scope and complexity of international operations, it became clear that existing political and legal concepts could not fully grasp the nature of this form of rule or address the questions about legitimacy, authority, and credibility to which it gave rise. The authority of the UN to exercise increasing amounts of executive power had been explained in terms of the minimalist principles of neutrality and impartiality. The goal, as Walzer had put it,

[81] The President of the Security Council, Note by the President of the Security Council, at para. 11, delivered to the SC, UN Doc S/23500 (31 Jan. 1992).

[82] Franck, *supra* note 63, at 137.

[83] The following paras draw on Orford, *supra* note 50.

was that 'intervention' should 'be as much like non-intervention as possible'.[84] Yet those basic principles of neutrality and impartiality were increasingly unable to offer either operationally useful or politically satisfying answers to questions about authority that arose as a result of the expansion in the scope and ambition of international intervention.[85] Those questions took two main forms. The first set of questions about authority concerned issues of recognition. With which local actors should the UN engage? Was impartiality an appropriate or useful principle to draw upon in answering that question? International humanitarians, as well as their critics, increasingly felt that it was not. International intervention, whether through military action or through other forms of humanitarian assistance, necessarily involved controversial decisions about which local actors to recognize as collaborators, whether on the basis of pragmatic decisions about who could effectively exercise control in a region or more formal decisions about who could properly claim to represent the people.

To take one example, the political issues raised by the decision to engage with *de facto* leaders became an issue of pressing concern during the 1990s for humanitarians working in the refugee camps of eastern Zaire and Tanzania following the Rwandan genocide. *Génocidaires* had taken control of many of those camps, dividing them into prefectures, killing and threatening people who disobeyed them, and using the camps as a base from which to launch raids into Rwanda.[86] While the UNHCR and other humanitarian agencies had 'developed speedy and sophisticated mechanisms to deliver medicine, food, sanitation, and shelter to refugees in crisis',[87] the *génocidaires* 'manipulated the aid system to entrench their control over the refugees and diverted resources to finance their own activities'.[88] The UNHCR's special envoy to the Great Lakes commented, 'The UNHCR emergency field manual said, "Find the natural leaders and get them to help you distribute relief" … We didn't think this through, but it meant: Give the genocidal leaders more power.'[89] The French section of MSF took the view that aid was contributing to the conflict, that the distribution of resources was creating a vehicle for control over the population that could be abused by the *génocidaires,* and consequently took the controversial decision to withdraw its assistance from the camps.[90] It became increasingly difficult to argue that humanitarian action could be neutral or impartial in a strong sense.

The second set of issues about authority concerned the legitimacy of international actors. Both the achievements and the failures of UN operations during the 1990s placed the legitimacy of international authority on the table. In East Timor, for example, local actors challenged the legitimacy of the authority exercised by international administrators. They asked why the UN, rather than the people, should have the authority to decide who should govern. The East Timorese, for example, were shocked

[84] Walzer, *supra* note 1, at 104.
[85] See further Orford, *supra* note 50, at 97–103, 164–188.
[86] S. Power, *Chasing the Flame: Sergio Vieira de Mello and the Fight to Save the World* (2008), at 192.
[87] *Ibid.*
[88] F. Terry, *Condemned to Repeat?: The Paradox of Humanitarian Action* (2002), at 2.
[89] Power, *supra* note 85, at 193.
[90] Terry, *supra* note 87, at 1–16.

when the Security Council took decision-making about East Timor out of their hands, announcing the establishment of the UN Transitional Administration in East Timor and endowing it with the power 'to exercise all legislative and executive authority'.[91] José Ramos-Horta commented, 'Imagine a transition in South Africa, where Mandela wasn't given the ultimate authority. Imagine if some UN official were given all the power and told it was up to him whether he felt like consulting Mandela or not.'[92] In the aftermath of the genocides in Rwanda and Srebrenica, on the other hand, critics argued that the commitment of the UN to protecting its own personnel and its adherence to principles of impartiality and neutrality had contributed to the failure of UN peacekeepers to protect civilian populations from genocide. UN reports questioned the viability of the long-standing commitment to impartiality and neutrality on the part of UN peacekeepers and humanitarian agencies when confronted with situations of war or genocide.[93] In the words of a major report on the future of UN peace operations, although impartiality should remain one of the 'bedrock principles' of peacekeeping, there are cases where 'local parties consist not of moral equals but of obvious aggressors and victims'.[94] In such situations, a commitment to impartiality 'may amount to complicity with evil'.[95]

Many of those concerns came to a head in 1999 when NATO intervened in Kosovo without Security Council authorization. NATO's intervention in Kosovo exposed the fault-lines that divided world opinion on issues of international authority and intervention. While some states and commentators saw the NATO intervention as illegal and ineffective, others asserted that there was strong 'moral or humanitarian justification for the action' and welcomed the intervention as 'a long overdue internationalization of the human conscience'.[96] Key to the division of opinion on the legitimacy of humanitarian intervention in general, and NATO's action in particular, was its link to imperialism. Was it really possible to divorce the interests of powerful states from their role as humanitarian interveners? Did the UN and other humanitarian organizations lose their authority and their claim to impartiality if they aligned themselves with powerful states to defend human rights or end human suffering?[97] Yet if humanitarian actors or international organizations did not create alliances with powerful states, how could they ensure a supply of the resources (whether financial, administrative, or military) necessary to bring about the social change or the end to suffering that they

[91] S/RES/1272, 25 Oct. 1999, para 1.

[92] Power, *supra* note 85, at 300.

[93] UN Secretary-General, 'Report of the Secretary-General pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica', A/54/549, 15 Nov. 1999; 'Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda', S/1999/1257, 16 Dec. 1999, annex.

[94] Panel on United Nations Peace Operations, 'Report to the Secretary-General', A/55/305-S/2000/809, 21 Aug. 2000, at ix, 9.

[95] *Ibid.*, at ix.

[96] International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (2001), at vii.

[97] D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (2003); F. Weissman (ed.), *In the Shadow of "Just Wars": Violence, Politics and Humanitarian Action* (2004).

sought? Indeed, some commentators argued that if the UN failed to make the right decisions, failed to protect populations at risk effectively, and failed to conduct itself in conformity with fundamental human rights values, there was nothing wrong with coalitions of the willing, powerful states, or regional organizations taking its place as executive agents of the world community, particularly if they could do so more efficiently. The precedent represented by Kosovo thus threatened not only the authority of the sovereign state, but also that of the UN. Revealing a keen understanding of the threat that the NATO action in Kosovo represented to UN jurisdiction, then Secretary-General Kofi Annan warned in his 1999 Annual Report to the UN General Assembly, 'If the collective conscience of humanity … cannot find in the United Nations its greatest tribune, there is a grave danger that it will look elsewhere for peace and for justice.'[98]

In response to this challenge, the Canadian government announced at the General Assembly in 2000 its establishment of the International Commission on Intervention and State Sovereignty (ICISS) tasked with producing a report on the issues involved in this debate. The ICISS report, entitled *The Responsibility to Protect*, sought to transcend the perceived tension between sovereignty and humanitarian intervention that had divided opinion in relation to Kosovo.[99] According to Gareth Evans, who was the co-chair with Mohamed Sahnoun of ICISS, the inspiration for the responsibility to protect concept came from the work of Francis Deng on conflict management in Africa.[100] In *Sovereignty as Responsibility*, Deng and his co-authors had argued that responsibility rather than control should be seen as the essence of sovereignty, and that in African states the government was often a 'partisan' and thus acted as a 'barrier', 'preventing the international community from providing protection and assistance to the needy'.[101] *Sovereignty as Responsibility* explicitly raised the question of the lawfulness of authority, arguing that if a government could no longer guarantee the security and welfare of the population, it might no longer be recognizable as the lawful authority over a territory. Sovereignty, understood in that sense of an obligation to preserve life, has become 'a pooled function'.[102] If local claimants to authority in Africa – whether they be 'governments, rebel leaders, militia leaders, civil society, or the general population' – fail to exercise the responsibility to protect citizens, 'they cannot legitimately complain against international humanitarian intervention'.[103] Indeed, a government that cannot protect its citizens may no longer even be recognizable as the lawful authority in a territory.

[98] UN, 'Secretary-General Presents His Annual Report to General Assembly', Press Release SG/SM/7136, GA/9596, 20 Sept. 1999.

[99] ICISS, *supra* note 95.

[100] Evans, 'From Humanitarian Intervention to the Responsibility to Protect', 24 *Wisconsin J Int'l L* (2006) 708.

[101] F.M. Deng, S. Kimaro, T. Lyons, D. Rothchild, and I.W. Zartman, *Sovereignty as Responsibility: Conflict Management in Africa* (1996), at 1–2.

[102] *Ibid.*

[103] *Ibid.*, at xvi.

> After all, internal conflicts in Africa as elsewhere often entail a contest of the national arena of power and therefore sovereignty. Every political intervention from outside has its internal recipients, hosts, and beneficiaries. Under those circumstances, there can hardly be said to be an indivisible quantum of national sovereignty behind which the national stands united.[104]

Following Deng's lead, the ICISS report argued that 'the changing international environment' required a rethinking of the fundamental notion of authority. ICISS proposed a 'necessary re-characterization' of sovereignty from '*sovereignty as control* to *sovereignty as responsibility*'.[105] According to ICISS, thinking of sovereignty in those terms facilitated a clearer focus upon the 'functions' of 'state authorities'.[106] Sovereignty as responsibility 'implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare'.[107] That responsibility to perform the functions of protecting citizens and promoting their welfare 'resides first and foremost with the state whose people are directly affected'.[108] However, those functions are often not performed by the state, as evidenced by the fact that '[m]illions of human beings remain at the mercy of civil wars, insurgencies, state repression and state collapse'.[109] In such circumstances, where the state does not have the power, the capacity, or the will to meet its responsibility to protect, the need for international action arises. In that situation a 'residual' or 'fallback' responsibility to protect on the part of the 'broader community of states' is activated.[110]

The responsibility to protect concept came of age with its unanimous adoption by the General Assembly in its *World Summit Outcome* of 2005.[111] The General Assembly there endorsed the notion that both the state and the international community have a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. Though the General Assembly confined the situations in which the international community might intervene militarily to those in which a state was 'manifestly failing' to protect its population, it endorsed a broad range of preventive, early warning, and capacity-building actions to assist states 'before crises and conflicts break out'.[112] The inclusion of the responsibility to protect concept in the *World Summit Outcome* 'transformed the principle, from a commission proposal actively supported by a relatively small number of like-minded states' to a concept 'endorsed by the entire UN membership'.[113] The concept has since colonized internationalist debates about conflict prevention, humanitarian action, peacekeeping, and territorial administration, and has garnered the support of a strikingly diverse range of states, international and regional organizations, and non-governmental

[104] *Ibid.*, at 16.
[105] ICISS, *supra* note 95, at 13 (emphasis in original).
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*, at 17.
[109] *Ibid.*, at 11.
[110] *Ibid.*, at 17.
[111] *2005 World Summit Outcome*, GA Res. 60/1, 24 Oct. 2005, paras 138–139.
[112] *Ibid.*
[113] A.J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (2009), at 95.

organizations over the past decade.[114] Its embrace is evidence of the increased influence of moral argument as a force in international relations, manifested particularly through the powerful role played by international civil society networks in shaping the language and focus of foreign relations.

The responsibility to protect concept is the logical end-point of the arguments made in *Just and Unjust Wars* and more broadly by the pro-humanitarian intervention activists of the 1990s. Those arguments exploded the distinction between sovereignty and intervention, inside and outside, nation-state and international community, or us and them. While the state continues to be seen as the primary mechanism for enabling social order and protecting individual freedom, the question of who decides what form the state should take or what ends it should achieve is radicalized by this pro-intervention argument. Yet, as Kant might have predicted, it is not possible to escape the incommensurability between politics and morality that easily. As one form of imperfect worldly authority is transcended and one set of political problems resolved, new forms of authority and new problems emerge. In the concluding section, I turn to explore the new problems to which the attempt to institutionalize the responsibility to protect concept gives rise, and the broader significance of the troubled relationship between the ideals of moral philosophy and the reality of institutional life.

5 Between Ideal and Real: Moral Philosophy and/as International Law

The logic of Walzer's argument for intervention has in many ways lost its radical character. The book ushered in an era in which moral internationalism would merge with realism to justify increased international intervention by coalitions of the willing. Contemporary internationalist debates are marked by attempts, in the words of US President Barak Obama in his Nobel Prize speech, 'to think in new ways about the notions of just war and the imperatives of a just peace'.[115] Indeed, we could say that idealism is today the new realism.[116] Focusing upon the normative shift represented by the emergence of the responsibility to protect concept illustrates this well. We can compare the 'structure of the moral world' represented by the legal debates in the 1960s and 1970s with the structure of the moral world at operation in shaping international reactions to the Arab Spring since 2011. *Just and Unjust Wars* prefigured the idea that the international community, acting through the United Nations, has a responsibility to protect populations at risk of genocide, war crimes, ethnic cleansing,

[114] See further Orford, *supra* note 50, at 17–22.

[115] Obama, 'A Just and Lasting Peace', Nobel Lecture, Oslo, 10 Dec. 2009, available at: www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html?print=1.

[116] For the argument that 'realism is the new idealism' see Guilhot, 'Introduction: One Discipline, Many Histories', in N. Guilhot (ed.), *The Invention of International Relations Theory: Realism, the Rockefeller Foundation, and the 1954 Conference on Theory* (2011), at 1, 5. For the argument that the revival of neo-realist approaches to international law in the context of the war on terror should be understood in opposition to idealism and has meant the 'dismantling of the international law built on principles, justice and fairness' see Sornarajah, *supra* note 64.

or crimes against humanity. The UN and its organs are now understood to derive their jurisdiction to police the conduct of governments not only from state consent, but also from their role as executive agents of an international community that represents our common humanity. International intervention is now routinely justified as an expression of 'the collective conscience of humanity'. In this sense, Walzer's claim that '[t]he important thing is the conscience and moral convictions of ordinary people' seems vindicated.[117]

And yet the question whether any actor – whether the UN, the US, or a coalition of the willing – can act both as the representative of collective conscience and as the guarantor of peace and security remains an open one. For many centuries, the moral authority of conscience has been invoked in *opposition* to the activities of politicians and the world of statecraft. The most influential modern representatives of this tradition of 'conscience' as the enemy of 'sovereignty' are the international human rights and international criminal law movements.[118] Is it possible for the UN to create order and maintain security while refraining from political calculation and from the more unsavoury aspects of statecraft, including collecting intelligence, using force, and deciding who should be sacrificed to protect the greater good? If not, what are the implications of appealing to the moral authority of human rights to justify the exercise of power by international actors? In other words, while the challenge to state sovereignty in the name of conscience may limit the worldly power of governments or princes, it does not do away with the problem of justifying worldly authority altogether. Philosophical argument about conscience and individual rights has been at the centre of rationalizations for certain kinds of political authority since at least the 17th century. While in earlier centuries those rationalizations served to empower states, today they serve to empower other actors. It is not simply cynical reason to suggest that the claim to speak on behalf of humanity's law is not a politically innocent claim, but is instead a claim that serves to found the jurisdiction and authority of particular actors. The claim to speak on behalf of the law in a particular time and place is central to the organization of power relations in the modern world. While human rights activists and cosmopolitans may challenge the authority and unity of states in the name of humanity, the claim to be representing humanity strengthens the authority of new actors and justifies their resort to force. In the words of Walzer:

> We want to live in an international society where communities of men and women freely shape their separate destinies. But that society is never fully realized; it is never safe; it must always be defended.[119]

Attention to some of the issues raised in the attempt to institutionalize the responsibility to protect concept illustrates the nature of this problem.[120] For example, justifying the authority of states or international actors on the basis of the capacity to

[117] Walzer, *supra* note 1, at 107.

[118] For the idea that 'conscience' is the enemy of 'sovereignty' in the modern world see C. Fasolt, *The Limits of History* (2004), at 28; R. Koselleck, *Critique and Crisis* (1988).

[119] Walzer, *supra* note 1, at 72. For an analysis of this logic in the context of the European state see M. Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975–76* (trans. D. Macey, 2004).

[120] See further Orford, 'From Promise to Practice? The Normative Significance of the Responsibility to Protect Concept', 3 *Global Responsibility to Protect* (2011) 400, at 420–423.

protect raises a new question: who decides? Who decides what protection will mean in a particular time and place, how it can be realized, and which claimant to authority is able to provide it? The turn to protection as the foundation of authority does not have a predetermined political effect. To argue that the capacity to protect grounds legitimate authority is itself a normative claim. *De facto* authority, the capacity to protect in fact, is perceived as giving legitimacy to power only where protection itself is invested with a normative value. Differences in the nature of that underlying normative claim give rise to important differences in the project of creating institutions that can realize protection in this world. Should implementing the responsibility to protect mean the attempt to control all aspects of life within securitized states in order to defeat the enemies of international peace? Should it mean the adoption of pacification techniques aimed at insurgent groups? Should it mean the implementation of liberal policing to manage the tensions between wealthy and poor inherited from colonialism and entrenched by an international division of labour? Or should it mean the development of new forms of action that are shaped by the communities being policed? Which authority, representing which normative commitments and acting on behalf of which people, will have the jurisdiction to state what protection means and which claimant to authority is capable of delivering it? These are questions that go to the very heart of politics. Answering them involves deciding upon the normative commitments that will shape the institutionalization of protection and how these commitments will be achieved.

In addition, grounding authority on the capacity to protect has historically tended to privilege certain kinds of institutions and certain forms of action over others. To characterize a situation as one of civil war or anarchy is to register the absence of some preconceived form of integrative force.[121] The turn to protection focuses upon conjuring up that integrative force, and thus focuses upon creating institutions that privilege coherence, control, and centralization. In that respect, authority justified in terms of its capacity to guarantee protection has historically had a tendency to become authoritarian. It might seem extreme to suggest that there could be any relationship between the growth of authoritarian security states and the benign ambitions of the responsibility to protect concept. Yet while much attention is currently being paid to building the international capacity to respond to protection challenges through developing more efficient and integrated forms of surveillance and policing mechanisms, there has been much less discussion of the legal limits to international action undertaken to guarantee protection. We are only now starting to see the emergence of an institutional discussion about the need to set limits on the power of international actors, for example in debates about Brazil's concept note of November 2011 entitled 'Responsibility while protecting: elements for the development and promotion of a concept'.[122] It is those questions about the proper limits and ends of authority that

[121] K. Tribe, *Strategies of Economic Order: German Economic Discourse 1750–1950* (1995), at 199.

[122] Annex to the letter dated 9 Nov. 2011 from the Permanent Representative of Brazil to the UN addressed to the Secretary-General, *Responsibility While Protecting: Elements for the Development and Promotion of a Concept*, A/66/551 – S/2011/701, 11 Nov. 2011.

must now be addressed if the absolutist tendencies inherent in the turn to protection are to be avoided.

The lack of attention to the worldly effects of idealist arguments is perhaps a broader tendency of a certain kind of philosophical thought. The inward-looking forms of Protestant religion that have shaped Western moral philosophy from Kant onwards have focused away from the worldly power of the political communities they form. Like many of his generation in the German-speaking world, Kant was influenced by the Pietist notion that acquiring *Bildung* – a 'cultivated, learned, and, most importantly, *self-directing*' grasp of things – was the ideal.[123] This ideal 'meshed with other strains of emotionalist religion emerging in Germany and elsewhere in Europe'.[124] Many Protestant thinkers of the time called on Christians to look inward and 'find God's presence and his will by looking into their hearts'.[125] Kant's Pietist faith taught that self-transformation through personal and group reflection would make it possible to learn 'whether one was *directing* one's life in accordance with God's wishes'.[126] Christians in turn had a duty to reform society and the world 'in order to realize God's kingdom on earth'.[127] And, like today's moral internationalists, enlightened Germans at this stage in the history of European empire understood themselves to be directing their lives and reforming their societies 'as actors on a world stage'.[128] It is this aspect of Kantian humanism as 'unrevealed religion' that Gillian Rose subjects to critique in her book *Love's Work*.[129] According to Rose, the variant of Protestantism that abandoned the idea of a state church also lost any sense of the practical constraints of community. The inward-looking focus of such versions of religiosity means that their adherents do not attend adequately to the work involved in realizing their ideals in the world. Enlightenment rationalism as the inheritor of the Protestant ethic 'devotes us to our own inner-worldly authority, but with the loss of the inner as well as the outer mediator. This is an ethic without ethics, a religion without salvation.'[130]

If anything, the inwardness of the appeal to rationality has intensified since the 18th century. Kant's focus was on the public use of reason. For Kant, public-ness was vital as a 'criterion of rightness'.[131] The faculty of thinking depended upon communicating that which is thought to others, and in that way testing it – the faculty of thinking 'exerted in solitude will disappear'.[132] Where Kant assumed that the public use of reason would necessarily mean that reason would be faced with conflicting interpretations, and perhaps even with restrictions from church or state, this is not the case in our time. Philosophy too often enters the public sphere today as 'an overweening

[123] T. Pinkard, *German Philosophy 1760–1860: The Legacy of Idealism* (2002), at 8.
[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.*
[127] *Ibid.*, at 9.
[128] Noyes, 'Commerce, Colonialism, and the Globalization of Action in Late Enlightenment Germany', 9 *Postcolonial Studies* (2006) 81, at 95.
[129] G. Rose, *Love's Work* (1995).
[130] *Ibid.*, at 136.
[131] H. Arendt, *Lectures on Kant's Political Philosophy* (1982), at 62.
[132] *Ibid.*, at 40.

claim to absolute and universal authority, without awareness of history, language or locality', and in this way 'enlightened reason sweeps all particularity and peculiarity from its path'.[133] 'We are protestants; impatient with ourselves, outraged by others, righteous, we claim a justice that we never yield.'[134] To the extent that moral internationalism understands itself as the representative of reason, it struggles to articulate the proper limits to the forms of power it seeks to bring into being.[135] This tradition of self-directing reformism still does not sufficiently attend to the work that must take place in the movement between ideal and real, or universal and particular.[136]

The 21st century has seen the emergence of international actors that reflect upon, organize, define, and defend their roles and their choices from within philosophical systems.[137] As a result, philosophers must rethink their relation to authority, and particularly the forms of authority that are justified in the name of humanity or of universal values.[138] More specifically, the making of normative pronouncements about the legitimacy of governments and state leaders is now deeply implicated in a practice of worldly power – it has real effects on the distribution of resources, the conduct of government, the rise and fall of leaders, and the life and death of human beings. One of the key battles in international relations today concerns precisely whether a particular crisis, whether involving climate change, population displacement, armed conflict, or access to resources, should be characterized in idealist (human rights, humanitarian, environmental) or realistic (security, stability, survival) terms.[139] The political effects of such battles are not predetermined. Thus when philosophers denounce tyrants or champion the cause of the individual in the face of the sovereign state, they are not (or not only) speaking truth to power, teaching princes how to conduct themselves

[133] Rose, *supra* note 128, at 137.

[134] *Ibid.*, at 142.

[135] Orford, 'The Passions of Protection: Sovereign Authority and Humanitarian War', in D. Fassin and M. Pandolfi (eds), *Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions* (2010), at 335.

[136] See further Orford, *supra* note 50, at 210–212.

[137] For the related argument that the 19th century 'saw the emergence in Europe of something that had hitherto never existed: philosophical States, I would say state philosophies, philosophies that are at the same time states, and states that think, reflect, organize themselves and define their fundamental choices from philosophical propositions, from within philosophical systems, and as the philosophical truth of history' see Foucault, 'La philosophie analytique de la politique', in M. Foucault, *Dits et Écrit II: 1976–1988* (2001), at 534, 538–539 (author's translation).

[138] I have sought to provide a sense of this philosophically-informed rationalization of international authority in A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003) and Orford, *supra* note 50. The movement between the two books, one published in 2003 and one in 2011, tracks the shifting emphases across the first decade of the 21st century from a humanitarian to a protection focus for international authority. While this looks like a movement from a more idealist or morality-focused to a more realist or security-focused argument for international authority, *International Authority and the Responsibility to Protect* shows that the argument for international authority on the basis of protection is (like the arguments made by Hobbes, Kant, Walzer, and the ICISS) at once idealist and realist.

[139] For an illustrative discussion of the politics involved in deciding whether to define the crisis in Darfur as genocide or civil war see de Waal, 'Reflections on the Difficulties of Defining Darfur's Crisis as Genocide', 20 *Harvard Human Rts J* (2007) 25; Mamdani, 'Making Sense of Political Violence in Postcolonial Africa', 3 *Identity, Culture and Politics* (2002) 1.

more virtuously, or courageously asserting their independence from worldly authority. Rather, in making such interventions philosophers participate in the exercise and consolidation of new forms of power. We may truly believe that those new forms of power are preferable to the old forms that exist throughout the world, but it is dangerous to imagine that we are somehow independent from the creation of new political forces or without responsibility for their actions.

If we draw only upon moral idealizations of reason and freedom in developing our programmes for a just world order, we are left with an unlimited and expansionist vision of the destiny of moral internationalism as self-directing reformism. Yet Kant himself did not understand the role of reason as unlimited in this way. For Kant, the limitations on reason come from the realm of nature. The natural limitations to the grand plans of reason are an effect of our faculty of understanding. In an international context, these limitations include the differences of language, of culture, and of history that shape competing interpretations of international law and politics.[140] Bridging the gulf between reason and nature, universal and particular, ideal and real is for Kant the work of critical reason or of judgement. In this Kantian spirit, the question of and for international law becomes not how we may defeat the enemies of humanity, but rather how we may encounter, comprehend, and negotiate with other laws.[141]

[140] See the discussion in Bartelson, *supra* note 28, at 270.

[141] For an attempt to reconceptualize European international law as a particular (rather than universal) set of ceremonies, languages, and obligations that might facilitate encounters between the plural laws that pattern the decolonized world see Orford, 'Ritual, Mediation and the International Laws of the South', 16 *Griffith L Rev* (2007) 353.