

From Right to Intervene to Duty to Protect: Michael Walzer on Humanitarian Intervention

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Abstract

For Michael Walzer, arguing about war is political rather than philosophical, a matter of persuasion rather than proof. His discussion of humanitarian intervention since the publication of Just and Unjust Wars tracks political events and debates, including the transformation of a debate focused on the right to intervene into one about situations, like those in Rwanda or Libya, in which it might be wrong not to intervene. If there is a duty to thwart atrocities, based on a responsibility to protect, one must consider on whom the duty to intervene falls, whether it goes beyond rescue to repairing the harm or preventing further violence, and whether it might also extend to protecting people from other harms, at least when these are the result of violence. In discussing these issues, Walzer deepens our understanding of humanitarian intervention by treating it both as an aspect of just war theory and as a historic practice able to reconcile the rights of states and persons in the changing circumstances of political choice.

Michael Walzer likes to say that for him just war theorizing is not an academic exercise – a philosophical effort to find coherence in a set of ideas and to state that coherence systematically, dispassionately, and in abstraction from policies and decisions. Others may treat just war as a topic in philosophy, but he sees his own contribution to the discussion as practical, not philosophical, a contribution to politics, not political theory. This stance creates tensions in his work that academic critics sometimes pounce upon as evidence of philosophical incoherence. But that incoherence is inherent in political debate because political arguments are persuasive rather than demonstrative. The resulting discourse is a matter of many voices advancing sometimes incommensurable considerations that can be reduced to univocal certainty only by tyranny – and tyranny is the denial of politics. We expect proofs in geometry and sometimes in philosophy but

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not in politics. The occasional inconsistencies in Walzer's arguments reflect their political character and his resistance to turning political questions into philosophical ones.

It is not surprising, then, that Walzer's discussion of humanitarian intervention tracks political events and debates, from India's 1971 invasion of East Pakistan (now Bangladesh) – the case he relies upon in *Just and Unjust Wars* – to the bombing of Serbia by NATO in 1991 in the war over Kosovo, the post 9/11 invasion of Iraq, and the 2011 intervention in Libya. His discussion also engages the failure of anyone to intervene militarily in Rwanda in 1994 or in the Darfur region of Sudan since 2003 (though the UN Security Council did authorize sanctions against Sudan and the International Criminal Court indicted its president, Omar al Bashir, and several others). These cases, especially Rwanda, have moved the debate from the circumstances in which a state or group of states – the UN, a regional alliance such as NATO, or the league or concert of democracies that some American liberals have recently joined neoconservatives in advocating – has a right to intervene to whether there are situations in which it would be wrong *not* to intervene.

Can there be a duty to intervene? Walzer addresses this question in his prefaces to the third and fourth editions of *Just and Unjust Wars* as well as in several essays written long after the publication of the first edition, including 'The Politics of Rescue' (1995), 'The Argument about Humanitarian Intervention' (2002), and 'Beyond Humanitarian Intervention: Human Rights in a Global Society' (2004). And he considers some further questions to which this one leads: if there is a duty to intervene, whose duty is it? Is it limited to rescuing the victims of genocide, ethnic cleansing, and similar wrongs, or must the rescuers ensure that the killing does not resume when they depart? If there is such a duty, does this not imply that such wrongs should be prevented, not merely repaired? And if there is a duty to protect people from becoming victims of atrocity, might there also be a duty to protect them from other harms, such as natural disasters, famine, or endemic poverty, at least when these are the direct or even indirect result of injustice? Where should we draw the line between humanitarian intervention and humanitarian assistance, and on what grounds? I will discuss these

questions, starting with those Walzer treats in *Just and Unjust Wars*, and assess how well his conclusions hold up in the light of subsequent events and criticism.¹

1 Grounds for Intervention

The discussion of humanitarian intervention in *Just and Unjust Wars* is a landmark. It reclaimed the expression from obscurity and made the topic inescapable in arguments about war. Walzer defines humanitarian intervention as a response to massive human rights violations, and he distinguishes it from other kinds of intervention: intervention to protect one's own nationals, intervention in a civil war to preserve a balance of local forces against intervention by another state ('counter-intervention'), and intervention to assist a national community to gain independence from a state whose government the secessionists regard as alien and oppressive. Like most of those who have attempted to define the grounds and limits of humanitarian intervention, he presumes the validity of the non-intervention rule and defends intervention on humanitarian grounds as justified only as a response to shocking crimes for which there is no other remedy, not as a way of freeing people from the oppression of alien domination or ordinary home-grown tyranny. Following J.S. Mill, he argues that the non-intervention rule holds in cases of national liberation unless the community is already engaged in a sustained military struggle.² By successfully exercising authority in a territory and defending that exercise by force, the secessionist community demonstrates its *de facto* independence.

These exceptions to the non-intervention rule indicate that its rationale, morally speaking, is to protect the state as the legal embodiment of a people or nation. That rationale explains why there is an exception for humanitarian intervention, for a government that commits great crimes against its own people or some portion of them cannot be said to represent them. Its misconduct undermines its claim to sovereignty. In such cases, there is no requirement that those to be protected by an intervention must struggle to resist their oppressor: victims of massacre do not have to pass the test of self-help to qualify for assistance.³ But there is a presumption in favour of sovereignty: intervention must be justified as 'an exception to the general rule, made necessary by

¹ References to the prefaces of different editions of *Just and Unjust Wars* (1977, 1992, 2000, and 2006) are identified by edition number. The essays are cited as reprinted in *Arguing about War* (2004) or *Thinking Politically: Essays in Political Theory* (2007).

² Mill, 'A Few Words on Non-intervention', in J.S. Mill, *Dissertations and Discussions* (2nd edn, 1867), iii, at 153–178.

³ Walzer, *Just and Unjust Wars*, *supra* note 1, at 106.

the urgency or extremity of a particular case'.⁴ An intervening state bears the burden of showing that the case is indeed exceptional and that the victims cannot be protected in any other way.

This argument does not contradict the claim that force is justified as a defence against aggression; it simply extends the principle grounding that claim to a different kind of situation. We acknowledge that one state may help another to resist aggression. In the case of humanitarian intervention, the intervening state is assisting not another state but the subjects of a state whose own government is the 'aggressor', which makes these subjects the victim of aggression. In such a situation, an intervention is no less justifiable than self-defence, which in the context of international relations is simply a state protecting itself against aggression rather than protecting someone else. The appeal to sovereignty has weight, but only up to a point. If the victims of aggression are under the jurisdiction of another state, the sovereign rights of that state are reduced, for no state can have the right to violate the rights of the people it is supposed to protect. It is, in other words, not the 'self' in 'self-defence' that provides the just cause, but rather the defence of human rights.

The argument for humanitarian intervention illuminates the ultimate ground for using force more clearly than does self-defence, which from the perspective of morality is a special case within a larger class of justifications. It also answers the question whether an aggressor state – one that forcibly violates the rights of other states or even its own people, thereby inviting a military response – can plead self-defence to justify continued fighting if its aggression is resisted. Clearly it cannot, unless that resistance itself turns into a war of aggression. An assailant cannot plead self-defence to justify further blows against a victim who tries to fight back. But neither can the victim, having thwarted the assault, proceed to kill or enslave the subdued assailant. This is the kind of reasoning that Walzer deals with, in *Just and Unjust Wars*, when he argues that a just war in Korea – which was a response to the North's effort forcibly to unify the entire

⁴ *Ibid.* at 91. The urgency of the case explains why intervention may be justified to thwart an ongoing or imminent slaughter, but not to overthrow a tyrant whose ordinary cruelties may be current but whose extraordinary crimes occurred long ago. An example is Iraq under Saddam Hussein, whose regime attacked Kurdish communities in northern Iraq several times during the 1980s, killing or maiming hundreds of thousands of people in mass executions or with mustard gas attacks on Kurdish villages. Those atrocities would have justified a preventive intervention at the time, but the argument that they justified the American invasion of Iraq in 2003 is not an argument for 'humanitarian intervention' as that expression is traditionally understood.

country – became an unjust war to overthrow the North Korean regime.⁵ It is also the kind of reasoning the United States rejected in the Persian Gulf War when it chose not to take advantage of its victory over Iraqi forces in Kuwait to occupy Baghdad and depose Saddam Hussein. Walzer's general point, that 'just wars are limited wars',⁶ holds for humanitarian interventions as well as other kinds of military action.

2 Objections

There are many objections to this understanding of humanitarian intervention, and Walzer responds at one point or another to most of them. One objection, considered in *Just and Unjust Wars*, is that few interventions are undertaken for humanitarian reasons. He answers that in every case known to him 'the humanitarian motive is one among several' but that 'it is not necessarily an argument against humanitarian intervention that it is, at best, partially humanitarian'.⁷ This seems right to me, though I would question the implication that humanitarianism is a matter of motives: one might argue that an intervention that ends a massive atrocity is morally justified and for that reason qualifies as 'humanitarian', whatever the motives of those who decide to intervene. If the end to which the actions of a government, or some of them, are directed is to stop the killing, its motives for doing so – or, perhaps we should say, the motives of the officials who decided to intervene – are of secondary importance in judging the justice of the intervention. The action is humanitarian in intent and, if successful, in result, even if self-interest provides the motive that makes it happen.

If this reasoning is sound, it suggests the vacuity of the argument that only states that respect human rights at home can rightly intervene to protect human rights abroad. Acting to thwart a slaughter is the right thing to do even for governments and officials whose motives are not entirely pure and whose hands are not entirely clean. Leaving aside hypothetical cases in which monstrous tyrants get to have their interventions justified by such reasoning, the point might have application in a case like Vietnam's intervention to oust the Khmer Rouge in Cambodia – Vietnam not being notable for respecting human rights. The real reason for invoking the 'clean hands' criterion is a concern with politics, not morality. If one opposes an intervention, pointing out the

⁵ Walzer, *Just and Unjust Wars*, *supra* note 1, at 117–124.

⁶ *Ibid.*, at 122.

⁷ *Ibid.*, at 101, 102.

moral defects of those who intervene might be rhetorically effective. Any stick will do to beat a dog.

Walzer considers other objections in subsequent writings. One of the most common, and tiresome, of these objections is that interventions are selective. How can a state claim the right to intervene in one situation and then refuse to intervene in another? Is it not guilty of hypocrisy? It is surprising how often this argument appears, usually in a highly politicized context in which the critics want not only to dispute an intervention but also to repudiate those who support it. To take but one recent example, the historic decision of the Arab League to endorse an intervention in Libya on humanitarian grounds, and then of the UN Security Council to authorize it and of the US and other governments to carry it out, have been attacked by commentators as disingenuously selective. Andrew Sullivan wonders how President Obama can say that the US cannot stand idly in Libya when it does nothing in Burma and the Congo.⁸ Noting that every year millions die from hunger or malaria, another commentator asks ‘Why this?’⁹ A justification can be demanded for any intervention, but as an objection the rhetorical question is pointless because the decision to intervene in a particular case depends on prudential considerations as well as moral ones. And this is Walzer’s view. There were, he suggests, compelling moral reasons to intervene in Tibet, Chechnya, and East Timor, but the risks would have been daunting and the chances of success small.¹⁰ A state does not have to intervene in every case in which to intervene would be morally justifiable. It can consider the costs and benefits of intervening.¹¹ But whether a decision to intervene or refrain from intervening is right or wrong, it does not affect the moral status of the non-intervention rule. That a rule has been selectively applied may cause us to question a particular decision, but it does not invalidate the rule itself. It makes little sense to argue that because a state has failed to rescue the victims of violence in one situation it should refrain from doing so in another. Walzer rightly detects the political premise of the selectivity objection, which is that humanitarian intervention is a mask for aggression, and its political aim, which is to undermine the case for intervention in a

⁸ Sullivan, *The Atlantic*, 18 Mar. 2011, available at: http://andrewsullivan.theatlantic.com/the_daily_dish/2011/03/the-imperial-president.html.

⁹ Klein, ‘What do we know about our commitment to Libya’, *Washington Post*, 18 Mar. 2011, available at: www.washingtonpost.com/blogs/ezra-klein/post/what-do-we-know-about-our-commitment-to-libya/2011/03/18/AB0mNHR_blog.html.

¹⁰ Walzer, *Just and Unjust Wars* (3rd edn), *supra* note 1, at p.xiii.

¹¹ Walzer, *Thinking Politically*, *supra* note 1, at 250.

particular situation or by a particular state (usually the United States), even when intervention is morally justifiable, by arguing against humanitarian intervention in general.

A more plausible objection is that humanitarian intervention infringes the rights of citizens of the intervening state. When a state resorts to military force, it exposes its soldiers to injury and death and spends money that has been raised by taxing its citizens. If a state exists to protect its citizens, incurring such costs to protect those who are not citizens violates the rights of soldiers and citizens by compelling them to risk their lives or give up income for the benefit of foreigners. Walzer provides a prudential response to this objection when he observes that states have an interest in suppressing uncivilized behaviour abroad because that behaviour can have undesirable consequences at home as violence spreads, refugees flee, and tyrants are emboldened. He does not spend much time discussing the issue of individual rights, however, saying on one occasion only that the question whether volunteers or conscripts should bear the risks of fighting as part of an interventionary or peacekeeping force is a complicated one,¹² and on another that humanitarian interventions should be carried out by volunteers because, although states may have a duty to intervene, individuals cannot be obligated, except by a choice of their own, to risk their lives in such a mission.¹³

I am not persuaded by this argument. The question is politically complicated, but morally speaking the answer seems reasonably clear. It is already implicit in Walzer's own argument against appeasement, which is that it betrays the obligation of every state to resist aggression, if it can, wherever it occurs.¹⁴ States do not exist only to serve the interests and protect the rights of their citizens; they have responsibilities that extend to the interests and rights of non-citizens as well. If force is justified not only in self-defence but more generally to defend the innocent, and if defending the innocent is sometimes a duty, a state can justifiably incur the costs of performing that duty and citizens will have to share those costs. It should try to limit the costs, within the bounds of what is needed to get the job done,¹⁵ but force cannot be used without expense and without the risk of death. Choosing to intervene under rules that require peacekeepers to watch killers murder their victims, which is what happened in Bosnia, or by dropping

¹² Walzer, *Arguing about War*, *supra* note 1, at 74.

¹³ Walzer, *Thinking Politically*, *supra* note 1, at 243.

¹⁴ Walzer, *Just and Unjust Wars*, *supra* note 1, at 67–73.

¹⁵ Walzer, *Thinking Politically*, *supra* note 1, at 244.

bombs, as in Kosovo, shifts the costs of war from the intervening forces to people on the ground. It should not matter that the victims a government is being called upon to protect belong to a community other than its own: Walzer agrees that it cannot just sit and watch.¹⁶ But if a government has a duty to act, how can it do that effectively without using the human and other resources at its command? It may be true that ‘there are no “lower orders,” no invisible, expendable citizens in democratic states today’,¹⁷ but it is not clear how this amounts to an argument that a state can compel military service only in wars of self-defence. One could argue that we should never compel human beings to be used as resources, especially in ways that pose the risk of death, but that objection is aimed broadside at the state as a non-voluntary association, not at humanitarian intervention specifically.

The objection that has been advanced most vigorously, however, is that if a state can intervene to end massive human rights violations, it should intervene to end lesser ones. There is no good reason, the argument goes, to limit humanitarian intervention to situations of mass atrocity. There is a continuum of abuses from systematic genocide and ethnic cleansing down through the murders, rapes, and mutilations perpetrated by tyrants and warlords to the ugly reality of routine oppression in the armies, police forces, prisons, and slums of every country. The most obvious reply to this slippery slope objection is a pragmatic one: intervention is a costly and not necessarily effective way to protect human rights, an option that should be considered only if there is no good alternative to using military force. But there is also a morally grounded reply: a rule that permitted military intervention as a remedy for routine abuses would deny political communities the right to manage their own affairs. This is in fact Walzer’s judgement. It reflects his view of international society as a regime of toleration in which internal and external legitimacy are distinguished. To intervene in situations in which the abuses do not ‘shock the conscience of mankind’¹⁸ would be improperly to infringe the independence to which states are morally entitled, within wide limits. It may be hard to draw a line between great and little crimes, but not that hard: we are *not* looking at a continuum here, Walzer insists, but at ‘a chasm, with nastiness on one side and

¹⁶ Walzer, *Arguing about War*, *supra* note 1, at 103.

¹⁷ Walzer, *Thinking Politically*, *supra* note 1, a 244–245.

¹⁸ Walzer, *Just and Unjust Wars*, *supra* note 1, at 107; Walzer, *Arguing about War*, *supra* note 1, at 69.

genocide on the other'.¹⁹

3 Beneficence or Justice?

It follows, at least on the traditional understanding of humanitarian intervention that Walzer is defending, that its aims are always limited. They are limited to rescuing the victims of massive violence and do not extend to ameliorating other wrongs, certainly not ordinary human rights violations. Nor are interventions justified for the sake of democracy or other values or institutions some might like to see in other countries. But, he thinks now, the story of humanitarian intervention told in *Just and Unjust Wars* is too simple. According to that story, the purpose of intervening is to rescue the victims of atrocity: to end the killing – and, if necessary, remove the tyrant who ordered it – and then get out, letting politics in the target country return to normal. But this assumes that the cause of the atrocity is ‘external and singular’, the work of a tyrant or invader, rather than internal, a matter of deeply rooted attitudes or institutions (as seems to have been the case in Rwanda and Sudan) or of failed institutions and open war among gangs of warlords (as in Bosnia and Somalia). Situations like these do not fit the victim/victimizer model assumed by the traditional view of humanitarian intervention.²⁰ Such situations require not only a rescue but longer-term involvement as well: military occupation, trusteeship arrangements, nation building, and other measures designed to ensure that self-determination is possible after the killing stops. Such policies are expensive, put soldiers at risk, and require continuing political support at home. The government of a nation that has been attacked will not find it difficult to mobilize people in its defence, but the initial charitable impulse to rescue distant victims of aggression may be hard to maintain, especially when it means supporting an operation that had forestalled a larger massacre, in which case ‘no one would know what hadn’t happened’.²¹

Most of what Walzer has to say about humanitarian intervention after *Just and Unjust Wars* deals with questions of this sort, political questions. One of the hazards of

¹⁹ Walzer, *Thinking Politically*, *supra* note 1, at 238.

²⁰ Walzer, *Arguing about War*, *supra* note 1, at 70–71.

²¹ *Ibid.*, at 76. This may have been the case in Libya, where the debate shifted from preventing a massacre to removing a tyrant because the attacks on Gaddafi’s forces probably *did* prevent a massacre. The success of this campaign left NATO in search of a rationale for continuing its military activities in Libya. That military action by the US and others might have forestalled a larger catastrophe – the threshold required for the intervention to be called ‘humanitarian’ – is, however, an unprovable counterfactual.

moral thinking is to think that every question is a moral question or that moral inquiry can prescribe particular actions or policies. Moral reflection can tell us that when a government is massacring its own people, someone should try to stop the violence. But it cannot tell us when that threshold has been reached, or who should try, or what we should adopt as ‘plan B’ when those who should try do not. ‘The decision to intervene, whether it is local or global, whether it is made individually or collectively, is always a political decision.’²² It must be heartening to Walzer, whose approach has been at odds with the moralism of political theory in the past few decades, that the kind of realism he has consistently urged – a realism based not on *realpolitik* but on an understanding of the interpretative and argumentative character of political deliberation and its collective character – has once again come into fashion. It remains to be seen whether this new realism, which is based on criticism of a politically and philosophically naïve ‘applied ethics’, can avoid slipping into the ethically questionable political realism signalled by expressions like *realpolitik* and *raison d’état*.²³ In Walzer’s case, it does not, as his 1973 essay ‘Political Action: The Problem of Dirty Hands’ and his argument that the laws of war should be overridden in a genuine supreme emergency make evident.²⁴

The genocide in Rwanda, which no state intervened to prevent, raised this tension between the moral and the political in a dramatic way. Here, the world did just sit and watch. The problem, Walzer joins others in observing, is that even when it is obvious that somebody ought to intervene, it is not clear who that somebody is. The responsibility to act is what philosophers call an ‘imperfect duty’, a duty that is assigned to no specific agent.²⁵ Many solutions have been proposed to the so-called agency problem, the problem of finding ‘a better, more reliable, form of agency’.²⁶ Perhaps, Walzer suggests, the duty falls most clearly on the country that can intervene quickly and effectively. Often this will be a neighbouring state such as India in East Pakistan,

²² Walzer, *Just and Unjust Wars* (3rd edn), *supra* note 1, at pp.xiii–xiv.

²³ Recent critics of applied ethics include Bernard Williams, who contrasts political realism with political moralism, and Raymond Geuss, who rejects what he calls an ‘ethics-first’ approach to political argument. I criticize their arguments along with Walzer’s in Nardin, ‘Middle-Ground Ethics: Can One be Politically Realistic Without Being a Political Realist?’, 25 *Ethics & International Affairs* (2011) 1.

²⁴ Walzer, *Thinking Politically*, *supra* note 1, at 278–295; *Just and Unjust Wars*, *supra* note 1, at 251–263.

²⁵ On the distinction between perfect and imperfect duties and its implications for humanitarian intervention see my discussion in the ‘Introduction’ to T. Nardin and M.S. Williams (eds), *Humanitarian Intervention*, *Nomos XLVII* (2006), at 14–18.

²⁶ Walzer, *Just and Unjust Wars* (3rd edn), *supra* note 1, at p.xiii.

Tanzania in Uganda, or Vietnam in Cambodia.²⁷ Alternatively, an imperfect duty can be turned into a perfect one by being assigned to someone. In the case of a general duty to protect, the puzzle is to determine who has the responsibility or the authority to assign it. If we think the duty to protect lies with the international community collectively, it would imply a duty to agree on a representative to conduct or authorize interventions on behalf of the community. Perhaps the UN is that representative. But although a UN authorized intervention might be more likely than a unilateral intervention to be seen as legitimate and to gain wide support, it would not necessarily be more just or more effective. This is not an argument against efforts to create a regime to discharge what has come to be called ‘the responsibility to protect’. It is simply to acknowledge that there is no escaping the question whether, when the designated agent fails to act, other states ‘could act legitimately in its place’.²⁸

The agency problem is just one of many questions that can be identified if one grants that there is a duty or responsibility to protect. There is also a question whether humanitarian intervention should be viewed as an exercise in beneficence (assisting the victims) or justice (resisting the perpetrators). On an old view of the matter, there is a duty to intervene in the affairs of others not only to protect the victims of violence but also to enforce the rules that prohibit it. The Muslim principle of commanding right and forbidding wrong, for example, prescribes that it is the duty of one Muslim to intervene when another is acting wrongly, in an expanding circle that starts with one’s neighbours and ends with the world.²⁹ A similar principle is found in Christian just war theory from Augustine to Grotius, according to which force may be used to prevent and punish violations of natural law, wherever they may occur. We are more likely today to speak of human rights than of natural law. The duty to intervene when human rights are violated is a duty not only to assist the victims of violence but also to rectify the wrong by resisting the violation and bring the violator to justice. It is an expression of justice as well as of beneficence.

If the duty to protect is a duty of justice, the claim that humanitarian intervention must be limited to rescue will need to be amended. Rescuing the victims of a massacre

²⁷ Walzer, *Thinking Politically*, *supra* note 1, at 240.

²⁸ Walzer, *Just and Unjust Wars* (3rd edn), *supra* note 1, at p.xiv.

²⁹ M. Cook, *Forbidding Wrong in Islam* (2003), at p.xi. Forbidding wrong ‘is not a duty to help people in trouble, but rather to stop people doing wrong’ (at 165). The principle is broad but includes coercive intervention (action ‘with the hand’ in contrast to verbal admonition) in some circumstances.

may leave the killers free to continue or resume their killing. Rescue is only one of many measures required to protect people from being murdered. If conditions are such that crimes against humanity can occur, it is not enough to put out the flames; one must ensure that they will not immediately flare up again. And crimes must be punished or – if one chooses the path of forgiveness and reconciliation – at least acknowledged.

The Libyan case is relevant here. For some, it is manifestly right for NATO to go beyond ‘rescue’ to ensure that those who protested and then rebelled against Gaddafi will not be murdered if his regime survives the rebellion and ensuing intervention. But this is not Walzer’s view, or at least was not his view at the time the intervention began. Writing in *The New Republic*, he opposed the intervention on many grounds, starting with the obscurity of its ends and ending with the absence of genuine support from other Arab states, notably Egypt, which shares a border with Libya and has the military capacity to intervene effectively. But the main reason is that the military action against Gaddafi’s forces is not, in Walzer’s view, properly seen as a humanitarian intervention to stop a massacre. ‘There would have been a cruel repression after a Qaddafi victory ... but the overthrow of tyrants and the establishment of democracy has to be local work, and in this case, sadly, the locals couldn’t do it.’³⁰ Nor, presumably, can the intervention be justified in terms borrowed from J.S. Mill as justified support for a war of national liberation since arguably there is no foreign yoke to be thrown off, just the well-worn yoke of the local tyrant. ‘The problem with a secessionist movement is that one cannot be sure that it in fact represents a distinct community until it has rallied its own people and made some headway in the “arduous struggle” for freedom.’³¹ Libya’s tribalism points to its unrealized character as a nation, but not to the sort of foreign domination that for Mill, and Walzer, would justify an intervention. Like every other judgement, this one will be contested, but the relevance of the ‘foreign yoke’ criterion is evident, it seems to me, in the eagerness with which the media seized upon reports that Gaddafi was employing ‘foreign mercenaries’, for the presence of foreign forces on Gaddafi’s side would make it easier to defend the intervention as a justified liberation effort or even a counter-intervention (assuming, against the evidence, that the scale of foreign involvement was significant).

³⁰ Walzer, ‘The Case Against Our Attack on Libya’, *The New Republic*, 20 Mar. 2011, available at: www.tnr.com/article/world/85509/the-case-against-our-attack-libya.

³¹ Walzer, *Just and Unjust Wars*, *supra* note 1, at 93.

The Libyan intervention is also relevant to the question of how to define success in an intervention to protect the victims of violence and bring the violators to justice. At what point should those who are intervening withdraw their forces? And what must be done, after that, to ensure that the duty to protect is discharged? In *Just and Unjust Wars*, Walzer criticizes the United States, following its intervention in Cuba in 1898, for refusing to recognize the insurgent provisional government and occupying the country instead, and he suggests that India's invasion of East Pakistan provides a 'better example' of humanitarian intervention because it imposed no political controls on the new state of Bangladesh. The argument implies that India, as the intervening power, did not have a moral duty to repair the damage in Bangladesh after it had defeated the Pakistani army and brought the massacre to an end. Perhaps this is because Bangladesh, with a strong and unified people, was able to repair itself without foreign supervision. But this underlines the importance of having a functioning government through which self-determination can be exercised. When a country cannot govern itself because it is riven by ethnic passions or its affairs are in the hands of armed criminals, the duty to protect might mean governing until the conditions for self-determination have been established. Such considerations help us to understand why the discussion of Libya has moved so quickly from protection to getting rid of Gaddafi, for (as one observer put it), 'it is hard to see how the intervention could save the Libyan people from Gadhafi's wrath – he has openly stated his murderous intentions – without getting rid of him'.³²

4 Arguments for Regime Change

Such reasoning brings us to the venerable ideas of trusteeship (where the intervening power governs) and protectorate (where it merely defends the local government, which it has helped to establish, against internal or external threats). That such arrangements were common in the age of European empire is no argument against reviving them, if the intervention is legitimate and they provide a solution to post-intervention problems.

Many objections are advanced against the institution of trusteeship, just as there are many objections to humanitarian intervention. (I will focus on trusteeship as more intrusive and therefore presumably more objectionable than a protectorate.) Some call attention to the tension between trusteeship and self-determination. It is argued, for

³² Slater, 'An Uneasy Defense of the Libyan Intervention', *Buffalo Evening News*, 3 Apr. 2011, available at: www.buffalonews.com/editorial-page/viewpoints/article383383.ece.

example, that the idea of trusteeship denies self-determination by requiring stability as a precondition for the exercise of sovereignty and fostering dependence on the trustee.³³ One purpose of trusteeship, to establish a non-violent order, contradicts another, to encourage domestic ownership. But order is a precondition of ownership, which is the exercise of independence and rights: there must be an ordered 'self' before there can be 'determination'. It is argued that trusteeship denies self-determination because the trustee is accountable to the international organization that empowered it rather than to the local people.³⁴ That may be true, legally speaking, but if the trustee were legally accountable to the people it would be their own government, not a trustee. The trustee still has moral duties to those whose affairs it administers, regardless of the laws that empower it. It is argued that a trustee might favour one faction or another or reinforce the inequalities between the factions that generated the humanitarian crisis in the first place. Yes, this might happen, but if one of those sides were genocidal, it would be both prudent and morally justifiable to reduce its power in the new regime. It is argued that there will be tensions if the laws the trustee imposes clash with local practices and preferences.³⁵ In East Timor, for example, the UN mission that governed the country between 1999 and 2002 stirred resentment by applying Indonesian law after it had ended the violence instigated by the Indonesian military and pro-Indonesian militias. True, but the question of how to balance the laws and customs of different groups in an ethnically divided country is inescapable and a matter for political resolution. An internationally appointed trustee might find it difficult to respect traditional practices that did not conform to Western ideas of human rights and justice.³⁶ If humanitarian intervention is to be defined and regulated within a global regime of law and rights, the basic principles of that regime will have to be observed even if they originated in Western practices.

From the perspective of the trustee, democratization and market liberalization might appear to be the key to stability.³⁷ But such policies favour factions that can organize themselves effectively, including ethnic factions that had been involved in violence before the intervention, and this can be highly destabilizing. Elections can

³³ M. Newman, *Humanitarian Intervention: Confronting the Contradictions* (2009), at 140.

³⁴ A.J. Bellamy, *Responsibility to Protect* (2009), at 176.

³⁵ *Ibid.*, at 177.

³⁶ Newman, *supra* note 33, at 141.

³⁷ Bellamy, *supra* note 34 at 168.

encourage a ‘winner-take-all’ mentality that invites political intimidation and renewed conflict.³⁸ In Bosnia, for example, US pressure for early elections allowed nationalist parties to consolidate power, entrenching the ethnic divisions that had fuelled the war in the first place.³⁹ Replacing the state as a driver of development or provider of public goods deprives the state of an effective way to acquire legitimacy. It may leave the country with no institutional capacity to monitor and enforce complex economic transactions and may result in a situation in which privately supplied goods are unaffordable or under-supplied. Without stable political institutions and effective laws, property rights remain poorly defined while corruption and criminal activities flourish. In Kosovo, economic reforms aimed at liberalizing markets were undertaken despite a weak infrastructure and large income disparities between rural and urban areas, stoking resentment and renewed violence.⁴⁰

Such problems do not mean that efforts to bring about a change of regime cannot be justified. As Walzer emphasizes in his preface to the most recent edition of *Just and Unjust Wars*, when a government is engaged in murdering many of its own people, its murderousness makes it ‘a legitimate candidate for forcible transformation’. And the intervening power necessarily takes on ‘some degree of responsibility for the creation of an alternative government’.⁴¹ A new regime must be put in place and enforced until it can maintain itself without outside assistance. How this can be done effectively depends on the circumstances, but it is clear that the responsibility to protect includes a responsibility to replace or reform the government that so signally failed to perform its own responsibilities.

There are, moreover, good reasons why the new regime should be a democratic one: democratic governments are legitimate because they are the most likely outcome of authentic self-determination, even if set up under a trusteeship, and they are less likely than non-democratic ones to abuse the moral rights of their citizens. There are many obstacles to establishing a democratic post-intervention regime, especially if there are indigenous anti-democratic traditions that have to be accommodated. In such cases, democratic changes might have to be delayed or democratic principles compromised. But, as Walzer sees it, self-determination cannot be entirely anti-democratic. This does

³⁸ *Ibid.*, at 173.

³⁹ Newman, *supra* note 33, at 148.

⁴⁰ *Ibid.*, at 158.

⁴¹ Walzer, *Just and Unjust Wars* (4th edn), *supra* note 1, at pp.x, xi.

not necessarily undercut the view, which he defends in *Just and Unjust Wars*, that self-determination is a right to self-government, not democratic government.⁴² Movements to resist a foreign oppressor may express the will of the people, but they are not necessarily driven by a desire for democracy. Nor are national liberation movements always democratic. Self-determination is ‘a political process that also has its value, even if it isn’t always pretty, and even if its outcome doesn’t conform to philosophical standards of political and social justice’.⁴³ All regimes, no matter what their origin and politics, have to answer to the demands of human rights, however. An intervention to promote democracy cannot be justified as humanitarian, but an intervention to thwart mass murder cannot avoid calling for a new regime that respects human rights, and today these are increasingly seen as including democratic rights. If there are obstacles to establishing a decent and effective regime, efforts must be made to overcome them. But the existence of obstacles to such a regime is no reason to refrain from the effort to construct it.

The argument that it might be necessary to establish a new regime to prevent violence from recurring implies that intervention might be justified to prevent its occurring in the first place. Instead of an argument that limits intervention to situations in which a massacre is already under way, we now have an argument for intervention to pre-empt an imminent massacre or prevent a possible one. This raises issues that in *Just and Unjust Wars* Walzer discusses in relation to international aggression. He argues there that a pre-emptive strike to deflect a probably fatal and credibly imminent attack might be justified, but not a war to prevent a long-term shift in the balance of power. We can also use that argument to distinguish pre-emptive from preventive humanitarian intervention. If states cannot wage preventive war to deal with long-term threats to security, neither can they do so to prevent possible but not imminent crimes against humanity. What they should do is work to strengthen laws protecting human rights in countries where such rights are abused by helping such countries to ameliorate ethnic or religious conflicts and by supporting arrangements to deal with human rights abuses before they reach a crisis level. But there may be times – Rwanda in 1994 might have been one of them – when genocidal violence is being plotted and reasonably appears to be imminent, and pre-emptive intervention to forestall the violence therefore justified.

⁴² *Ibid.*, at 88.

⁴³ Walzer, *Thinking Politically*, *supra* note 1, at 226.

There may also be times when it is right to use coercive measures, such as embargoes and no-fly zones, that do not rise to the level of war (even if international law calls them acts of war). The latter argument is not an argument for preventive war but for ‘the preventive use of force-short-of-war’ to control a possibly genocidal regime without overthrowing it.

5 The Limits of Protection

Prevention is just one of the issues that arise as soon as the debate on humanitarian intervention is reframed from a debate about the right of states to intervene to one about the duty of states to protect. Protection is an open-ended concept: one can draw a line between protecting people from violence and protecting them from other harms, but where to draw that line is often a political question. If the duty to intervene is a duty to suppress wrongful violence, we have a criterion that puts mass murder on one side of the line and natural disasters on the other. But if the ground for intervening is concern for the welfare of those suffering harm, the duty to protect would seem to cover a wider range of harms, such as famine.

This extension of the occasions for justifiable armed intervention invites the response that there is no controversy over the duty to protect, only over the duty to protect by means of force. And where force is justified to resist violent harms it may not be justified to remedy harms resulting from natural causes. But, as Walzer and others observe, famine is both a ‘natural’ disaster and a political one: starvation is sometimes – some, like Amartya Sen, would say almost always – the result of deliberate policy or culpable negligence.⁴⁴ Perhaps more often negligence, or just general indifference: though it is sometimes possible to identify those who are responsible, there is usually no straightforward liability. It is only in exceptional cases that some tyrant or warlord is wilfully causing the famine, which *would* justify a military intervention to end the wrongdoing and enforce respect for human rights.⁴⁵ More often there are practices that have famine as one of their unintended and even unrecognized consequences (famines usually occur in remote rural areas and are, at least initially, often underreported,

⁴⁴ Sen argues that great famines like the one in Bengal in 1943 or in China between 1958 and 1961 could occur in part because authoritarian governments were able to ignore or suppress the evidence of famine and the failure of their policies. ‘No major famine has ever occurred in a functioning democracy with regular elections, opposition parties, basic freedom of speech and a relatively free media (even when the country is very poor ...):’ A. Sen, *The Idea of Justice* (2009), at 342.

⁴⁵ Walzer, *Thinking Politically*, *supra* note 1, at 258.

especially in countries with poor communications or without a free press). There is no ‘violence’ to be thwarted, but there are people to be rescued or a foreseeable disaster to be prevented, and therefore an obligation to address the predisposing conditions. It might be hard to determine which of those conditions were the result of violence and which the result of misfortune. The practices that sustain poverty and famine are often violent and oppressive, or the outcome of past violence and oppression. To the extent that this is so, the boundary zone between violent and non-violent harm is wide and not well marked. Practically speaking, it may be hard to separate cases of beneficence from cases of justice even if beneficence and justice are conceptually distinct.⁴⁶ Protection, then, invites attention to the underlying conditions that lead to oppression and violence – land or water shortages, poverty, corruption, and other threats to a decent and secure life – conditions that are often, moreover, themselves the outcome of past violence and oppression.

The principle of responsibility to protect has recently been invoked, not without controversy, in relation to the failure of the government of Myanmar to cooperate with countries seeking to provide assistance to deal with the consequences of the devastating cyclone that struck the country in 2008. Cyclone Nargis may have killed 150,000 people immediately and displaced ten times that number. That situation led French Foreign Minister Bernard Kouchner to invoke the principle of responsibility to protect to justify forcible action to deliver aid to the victims. His suggestion was quickly repudiated on the ground that the principle justifies international action only in relation to genocide, war crimes, crimes against humanity, and ethnic cleansing, and that it could not apply in a natural disaster unless a government’s actions before or after the disaster fell into one of these categories. The suggestion might seem to go beyond current understandings of the responsibility to protect, as stated in United Nations documents like the 2005 World Summit Outcome Document⁴⁷ and the Secretary General’s 2009 report,⁴⁸ though the Gaddafi regime arguably committed war crimes with its shelling and use of cluster bombs in populated areas. Those documents affirm that each state has a responsibility to protect those it governs against the designated crimes, but that responsibility passes to

⁴⁶ As Cook puts it, the duty to rescue and the duty to forbid wrong are conceptually distinct but practically enmeshed. The former is more common in Western and the latter in Islamic discourse: Cook, *supra* note 29, at 167.

⁴⁷ UN GA A/60/L.1 2005.

⁴⁸ UN GA A/63/677 2009.

the international community if a state fails to do so, and that the Security Council may authorize forcible action if voluntary measures fail. Whether or not the facts support bringing the Libyan intervention within the scope of the rapidly-changing international law on responsibility to protect, the fact that the debate occurred at all makes clear that once one embraces the idea of a duty to protect, the limits of that duty will need to be specified, politically as well as philosophically.

We must also consider the unexpected and sometimes unfortunate consequences of humanitarian action. As a growing literature documents, humanitarian policies can not only fail but can also make things worse.⁴⁹ The growth of humanitarian assistance in the past 40 years has created opportunities for criminal exploitation that should not surprise anyone because wherever there are resources there will be opportunities for corruption and crime. It may or may not be true that the amputations in Sierra Leone were part of a strategy by rebel warlords to gain media attention and attract foreign aid.⁵⁰ But famine relief can end up in the hands of well-fed officials or armies, and mass murderers who have been driven out of a country can continue to operate from refugee camps, as the Khmer Rouge did after they were expelled from Cambodia and Rwandan killers did from resettlement camps in the eastern Congo. And the soldiers who make humanitarian interventions possible are as capable of misconduct as any other soldiers. Anticipating and dealing with the ‘revenge effects’ of humanitarian action must be part of policy-making, but it does not raise novel ethical questions: clearly, both morality and prudence dictate that those who act must consider the consequences and costs of their decisions.

Though circumstances are always changing, just war theory changes only slowly. The casuistry of the day can cause the theory to assume baroque or even rococo forms, but the underlying classic structure is seldom much affected. It consists today, as it has for centuries, of a *jus ad bellum* identifying the conditions for going to war, a *jus in bello* prescribing rules governing the conduct of military operations, and a *jus post bellum* prescribing proper conduct in restoring peace and justice after the fighting has

⁴⁹ Some books in this vein include D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (2003); M. Barnett and T.C. Weiss (eds), *Humanitarianism in Question: Politics, Power, Ethics* (2008); and L. Polman, *The Crisis Caravan: What's Wrong with Humanitarian Aid?* (2010). Barnett provides a broader and less polemical account, placing recent humanitarian activity in its historical context, in *Empire of Humanity: A History of Humanitarianism* (2011).

⁵⁰ Gourevitch, ‘Alms Dealers: Can You Provide Humanitarian Aid without Facilitating Conflicts?’, *The New Yorker*, 11 Oct. 2010, at 5, drawing on Polman, *supra*, note 48.

ended. Walzer suggests that we also need a *jus ad vim* – a theory of the conditions for using force short of war – but this, too, is already part of just war thinking, and of his own thinking, for people have long argued about the rights and wrongs of blockades, border raids, reprisals, assassinations, and other coercive acts that do not quite rise to the level of war. Philosophers have questioned and will continue to question these concepts and the principles they name, but being rooted in practice the concepts and principles are resistant to change. Walzer has contributed to our understanding of humanitarian intervention by providing a coherent account of it as a historic practice, showing its place in the structure of just war theory, and illuminating the moral and political issues it raises. He makes no excuse for avoiding philosophical perplexities and focusing on substantive moral and political questions. Bridging the domains of philosophy and politics, Walzer educates and provokes the inhabitants of each.