1-1-1994

International Law and Civil Wars

Gregory H. Fox
Wayne State University

Recommended Citation
Available at: https://digitalcommons.wayne.edu/lawfrp/321

This Article is brought to you for free and open access by the Law School at DigitalCommons@WayneState. It has been accepted for inclusion in Law Faculty Research Publications by an authorized administrator of DigitalCommons@WayneState.
Writing in the wake of America's unhappy involvement in Vietnam, Michael Walzer argued for a broad prohibition on outside intervention in national civil wars. For Walzer, the American experience in Vietnam epitomized the inability of outsiders to understand, let alone to resolve, the divisions that might lead a nation to go to war with itself. To those who professed humanitarian motives for intervention, Walzer responded that such efforts are at best futile: outsiders simply cannot create tolerant democratic cultures in societies unable or unwilling to do so for themselves. Walzer acknowledged that a policy of non-intervention might permit some nations to endure long and brutal struggles between pro- and anti-democratic forces, rival ethnic groups, or those simply seeking power. Yet, he regarded such internecine conflict as crucial to the process of nation-building, and vastly preferable to an order imposed from abroad. "Citizens of a sovereign state," Walzer concluded, "have a right, insofar as they are to be coerced and ravaged at all, to suffer only at one another's hands."

For many years, Walzer's atomized conception of the international community reflected the dominant theory in international relations. Many scholars expressed a profound skepticism as to the capacity of sovereign states to form a stable
political community based on shared mutual interests. In their view, divisions of various kinds—first and foremost those of nationality, but also divisions of culture, values, military might, productive capacity, and historical experience—constituted the defining features of international society. Civil wars epitomize the type of issue that, in their view, the international community was ill-equipped to address. Such conflicts involved questions that rarely transcended these points of division, and indeed, by their very insularity, boldly highlighted the estrangement of different international constituencies from one another.

Much has changed since Walzer first made these arguments in 1977. Only history can judge the ultimate validity of his position as an empirical theory of social evolution. But in 1994 the international community has rather decidedly rejected the normative prescription arising from Walzer's statist worldview—a rule prohibiting intervention in civil wars except in a few extreme cases. Operating primarily through the organs of the United Nations, states have shown a heightened and even aggressive interest in resolving not only civil wars, but also the many attendant human crises they spawn. In so doing, states have begun to develop new international norms designed to place the actions of the United Nations and others in these conflicts on a firm legal footing.

II

Before examining these new norms, it is important to note that two broad challenges to the assumptions underlying Walzer's principle of non-intervention are implicit in this process of legal innovation. The first directly confronts Walzer's view that outsiders cannot, in any meaningful fashion, assist the development of democratic civil societies in states torn by internal conflict. In contrast to ad hoc unilateral interventions such as Vietnam, which apparently provoked Walzer's enmity, the international community has manifested an increasing confidence in the capacity of international organizations to mediate an end to civil conflicts and to manage, at least in some rudimentary way, the most egregious consequences of

---

protracted civil war. Beginning in the late 1980s, the United Nations played an integral part in agreements ending internal conflicts in Angola, Cambodia, El Salvador, Liberia, Mozambique, Namibia and the Western Sahara. While the United Nations was not a party to the negotiated end to Apartheid in South Africa, the years of U.N.-directed pressure against the white minority regime clearly influenced its decision to cede power through majority-rule elections. Missions dispatched with the goal of securing accords to avoid or to end civil wars are currently underway in Afghanistan, Azerbaijan, Burundi, East Timor, Georgia, Guatemala, Tajikistan, and Zaire.

The need for third party mediation in the above mentioned conflicts was clear: the parties were acutely mistrustful of each other’s motives and had little faith in the viability of comprehensive peace plans negotiated solely amongst themselves. At the same time, many potentially influential nations were effectively disqualified from serving as mediators by lin-

gerng memories of colonial rule over some states and of superpower proxy wars conducted in others.

International organizations, however, carried little such hegemonic baggage. The United Nations brought to these missions a forty-year history of relative success in maintaining neutrality during peacekeeping missions, as well as the mediation services offered by the Secretary-General in exercising his good offices function. In playing the role of broker, the United Nations and certain regional organizations provided a forum for discussion where none previously existed.

The often successful compromises achieved by the United Nations suggest that the services it offers do not interfere with "indigenous" choices of the parties involved. Rather, it presents combatants with a broader range of options for resolving their differences than would exist without the presence of a neutral third party. Additionally, it provides resources essential to wind down protracted and destructive conflict. Walzer's contention that outside intervention in civil wars interrupts an organic process of national self-definition appears to have little relevance to U.N. practice in mediating disputes, monitoring elections, and dispatching peacekeeping troops to oversee crucial periods of demilitarization.

The second challenge to Walzer comes from an emerging consensus on humanitarian values that may be seen as tempering the worst excesses of civil conflicts. Walzer's argument assumes that when external actors become involved in civil wars they necessarily seek to resolve the conflicts themselves, and thus must make questionable judgments regarding the warring parties' entitlement to govern. Yet the broad body of human rights law consists of norms that effectively divorce the means of prosecuting civil conflicts from their ends. The conduct of many civil wars raises a host of human rights issues: government troops deliberately target civilians; "death squads" and other quasi-official groups seek to silence those sympathetic to rebels; ethnic kinsmen of rebels are singled out for persecu-


tion; and states of emergency are declared during which civil liberties are suspended, elections are postponed, and persons are detained without charge or trial. In Walzer's view, these are instruments by which states seek to define their national identities and not merely side-effects of the process of national self-definition. He argues that the international community's first priority must be to leave both the ends and means in this process to the people of a state.

Many challenged Walzer's argument as unduly callous when he first published his book. This challenge is even more persuasive today. Increasingly, we no longer witness traditional wars fought against soldiers, but genocidal wars against entire civilian populations. Perhaps responding to this phenomenon of "total" civil war, international bodies now routinely address human rights abuses that arise during internal conflicts. More than two-thirds of U.N. member states are treaty-bound to accord their own citizens a broad range of human rights, and a core of essential rights is immune from wartime suspension. The U.N. Security Council regularly condemns the excesses of one or both sides engaged in civil wars. The conflicts in Yugoslavia and Rwanda have been fought with such ruthlessness that the Security Council has established international tribunals to prosecute violators of applicable international norms.


15. See, for example, the descriptions of conflicts in Bosnia-Herzegovina, Liberia, Mozambique, and Sudan in AMNESTY INT'L, 1994 REPORT 76-79, 196-98, 215-17, 272-75 (1994).


Walzer's elevation of national borders to sharp fault-lines, defining differing levels of legal protection for basic human rights, stemmed from his belief that rights originate and become meaningful only in specific political communities.\textsuperscript{20} The universalism evident in these new norms and institutions, however, suggests that states are not willing to wait for all communities to evolve toward an acceptable level of protection. All persons are entitled to rights of dignity and autonomy, no matter how chaotic or mendacious their countries' political institutions may be.

III

While human rights law has begun to scrutinize aspects of the prosecution of civil wars, its norms have not been developed to address the conflicts as such. Direct intervention into civil wars implicates two other areas of international law. The first is the U.N. Security Council's collective security apparatus. The second is unilateral intervention in domestic conflicts.

In the first area, the U.N. Security Council has broadened its own jurisdiction to include civil conflicts within the ambit of the Charter's collective security system. The most striking feature of this development for international lawyers is that the formal requirements for initiating collective action have not changed. Where, as in the case of a civil war, the Council is not confronted by aggressive acts of one state against another, Chapter VII of the Charter requires that in order for the U.N. to respond with force the conduct in question must constitute a "threat to the peace."\textsuperscript{21} The drafters of the Charter clearly did not intend this phrase to encompass internal conflicts. Nor, as a strictly grammatical matter, is it easily interpreted as doing so. The drafters' paradigm for acts constituting a "threat to the peace" was a Nazi-like regime preparing for a cross-border invasion. The "peace" potentially threatened, in other words, was international and not domestic.

\textsuperscript{20} Walzer, \textit{The Moral Standing of States}, supra note 1, at 234-35.

\textsuperscript{21} U.N. \textit{CHa-ER} art. 39. Article 39 of the Charter contains the jurisdictional trigger for the Security Council's Chapter VII authority. It requires that before that authority is invoked the Council must find a "threat to the peace, breach of the peace or [an] act of aggression." \textit{Id.}
The Security Council first explicitly crossed this interpretive threshold well before the end of the Cold War when, in 1966 and 1977, respectively, it deemed Apartheid regimes in Southern Rhodesia\(^{22}\) and South Africa\(^{23}\) to be threats to the peace.\(^{24}\) But, while the resolutions addressing both these situations questioned the legitimacy of a group's hold on political power, neither involved a battlefield civil war. Moreover, the anti-Apartheid movement provided a unique rallying point for many of the countries instrumental in galvanizing support for U.N. involvement. When later faced with civil conflicts in their own regions which lacked a racial component, many of these same states were noticeably silent on the question of multilateral intervention.\(^{25}\)

It took the waning of the veto threat at the end of the Cold War to create an atmosphere in which civil wars could be treated as indigenous conflicts with arguable international implications, rather than local manifestations of a global struggle between the superpowers. The Council's condemnation of the Iraqi treatment of its Kurdish minority was the first such case.\(^{26}\) It was followed in the ensuing two years by resolutions


finding conflicts in Angola, the former Yugoslavia, Liberia, and Somalia to constitute "threats to the peace." The Security Council deemed the Haitian military coup and its attendant consequences a threat to the peace on June 16, 1993, although, like Apartheid, it did not involve open warfare.

One commentator has aptly noted that the Council's jurisprudence on this subject is an area "where recent international practice has most clearly run ahead of principle." Neither the Council nor the General Assembly has attempted to devise a coherent set of principles that would explain the international community's interest in these conflicts. As a result, each of these resolutions, in deeming essentially domestic conflicts to be threats to international peace, involves a none-too-subtle linguistic sleight of hand. In essence, the Council reads the words of Chapter VII to mean something they clearly do not: conflicts with few cross-border effects are deemed threats to other states or to the international community at large. In straying so far from the clear meaning of the Charter text, these resolutions call into question the usefulness of the document's specific language as an effective limitation on Security Council jurisdiction. Words capable of being interpreted to mean anything may effectively mean nothing. Wordings in several resolutions stating, as in the case of Somalia, that the conflict in question is "unique and exceptional circumstances." magnifies the problem. This wording is an evident attempt to deprive the resolutions of any

29. S.C. Res. 788, supra note 18.
33. S.C. Res. 794, supra note 30. Similarly, in imposing an embargo on Haiti, the Council described the events constituting a threat to the peace as "unique and exceptional circumstances." S.C. Res. 841, supra note 31.
precedential value that might support a generalized right to intervene in some or all civil wars.\footnote{34}

Given this lack of a coherent jurisprudence, should one conclude that the Council’s involvement in civil wars lacks an essential legitimacy? One might argue that the problems associated with questionable Charter interpretations are overstated, since the Council’s prestige is much more likely to depend on the ultimate success or failure of a mission, than on its origins in an arguably \textit{ultra vires} resolution. But international law cannot afford to have questions of institutional legitimacy turn on often inaccurate perceptions of the U.N.’s capacity to manage large-scale operations.\footnote{35} A more direct defense of the resolutions’ legality is needed. Two primary arguments can be put forward.

The first is that the U.N. Charter, unlike most national constitutions, generally operates in settings in which political and not legal restraints define the limits of permissible action. The International Court of Justice (the Court) does not practice active judicial review of Security Council actions, despite hints that it may have the power to do so.\footnote{36} Rather, the Court has accepted the right of political organs to interpret the Charter creatively through long-standing and unchallenged practice.\footnote{37}

\footnote{34. This attempt will almost surely fail. If the Security Council is willing to engage in loose interpretations of the Charter itself, there is little reason to believe it will feel itself constrained by language in mere resolutions.}

\footnote{35. The Somalia mission, for example, was widely reported to be a failure of U.N. command, resolve, and planning. American politicians repeated this charge in broad attacks on U.S. participation in collective security and peacekeeping operations. However, the event which precipitated the charges of failure—the attempted capture of General Mohammed Aidid in October 1993 during which 18 U.S. Army Rangers were killed—was a U.S. operation from inception to execution. U.N. officials were informed of the raid only hours before it began and were given no opportunity to alter or cancel it. Michael R. Gordon & Thomas L. Friedman, \textit{Details of U.S. Raid in Somalia: Success So Near, a Loss So Deep}, N.Y. Times, Oct. 25, 1993, at A1, A10.}


\footnote{37. In the \textit{Namibia} Advisory Opinion, South Africa objected that several permanent members of the Security Council had abstained from voting on crucial resolutions at issue in the case. It contended that those resolutions}
More fundamentally, theories developed in support of judicial review in national legal systems do not translate easily to the U.N. system. One common justification for judicial review of acts by political majorities is the protection of citizens' basic rights. But apart from norms of *jus cogens*, states lack a set of fundamental rights under general international law similar to those found in national constitutions. The sphere of a state's exclusive domestic jurisdiction is not immutable and has progressively receded as the corpus of international law has expanded. Treaty-based rights of states must yield to U.N. Charter obligations, including the obligation to obey Security Council resolutions.

A second justification for judicial review is that it serves to remedy exclusions from the majoritarian process. On this view, the courts give voice to those groups or individuals who, because of legal impediments to full participation, cannot effectively protect their interests through normal lawmaking processes. Yet, even proponents of this process-enhancing theory acknowledge that its force wanes and eventually disappears once discriminatory barriers to political participation have been removed. This theory does not purport to remedy im-

were thereby invalid under Article 27(3) of the Charter, which requires the "concurring votes of the permanent members." U.N. CHARTER art. 27, para. 3. The Court responded that in practice the Council's members had "consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions." This practice, the Court held, "has been generally accepted by Members of the United Nations and evidences a general practice of that Organization." The Court accepted this practice as modifying "concurring" to include "abstaining." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 4, 10 (June 21) (Advisory Opinion).


39. Tunis & Morocco Nationality Decrees, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 27) (Advisory Opinion) ("[t]he question of whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations.").

40. Article 103 of the Charter provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. CHARTER art. 103; see Lockerbie Case, supra note 36, at 126.

41. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

42. Id. at 169-70.
balances in political power or to compensate for certain immutable characteristics (such as race, gender, or ethnicity) that, even absent overt prejudice, may make it difficult for a group to build political coalitions and to translate its interests into law. In the international system, explanations for why many states are unable to influence Security Council resolutions generally involve issues of this type—disparities in political, military, and economic power—rather than formal barriers to participation in Council decision-making. Indeed, no resolution can pass the Security Council without the affirmative votes of four non-permanent members, each of whom is elected as the representative of a different voting group.

In the absence of judicial review, the Security Council has steadily expanded the scope of its Chapter VII jurisdiction. A burgeoning repertoire of practice now finds various aspects of civil wars to present a “threat to the peace.” Some might object that the overwhelming influence of the permanent five makes these resolutions rather unhelpful in assessing whether the majority of U.N. member states concur in the Council’s reading of the Charter. But as Paul Szasz has pointed out, Council members are acutely aware that undertaking large or risky operations without a broad base of support among the membership is simply pointless: missions involving embargoes, troop commitments, or other cooperative ventures cannot succeed without the active involvement of a large number of countries. Such a sense of prudence is evident in the reso-

43. The most obvious formal barrier to non-permanent members imposing limits on arguably illegitimate Security Council actions is their lack of a veto power. But a state’s capacity to influence Council actions is closely tied to its international standing more generally, a status which may or may not coincide with possession of the veto power. Economically powerful non-permanent members such as Japan and Germany are regularly consulted on important Council actions, while France and Britain, despite having the power to veto resolutions contrary to their interests, have rarely done so without the United States as a voting partner. As David Caron points out, proposals to expand the Council’s permanent membership “would not affect the power of the West in international affairs generally, and would only marginally diminish the capabilities of the West in the Council.” David D. Caron, The Legitimacy of the Collective Authority of the Security Council, 87 Am. J. Int’l L. 552, 576 (1993).

44. In order for a resolution to pass the Council, nine of its fifteen members must vote affirmatively. U.N. Charter art. 27, para. 1.

45. Paul C. Szasz, Centralized and Decentralized Law Enforcement: the Security Council and the General Assembly Acting under Chapters VII and
olutions concerning civil wars. The General Assembly, acting by consensus, has consistently affirmed the Council's decisions regarding the conflicts in Iraqi Kurdistan, Liberia, Somalia, Haiti, and the former Yugoslavia. At least in these cases, the Council apparently has not engaged in interpretive adventures unsupported by most other member states.

The second reason to regard the Council's actions on civil wars as legitimate is that to demand more—either a coherent theory justifying its actions in all cases or a Charter amendment formalizing their legality—is simply to ask too much of a fragile organization. The U.N.'s response to civil wars has involved extrapolations from the Charter's scheme for addressing *inter-state* conflict. That mechanism is itself of recent vintage and highly underdeveloped. The use of force by states became illegal for the entire international community only upon the signing of the Charter in 1945. The General Assembly took until 1974 to agree on a definition of state "aggression." And the first decision of the Court to discuss the dominant form of interstate conflict in the Charter era—proxy warfare through armed insurgencies—came only in


51. War was considered a legitimate tool of statecraft in the Nineteenth century, limited in its conduct but not in its initiation. See Lassa Oppenheim, *International Law* 56 (1906) ("war is not inconsistent with, but a condition regulated by International Law.") The League of Nations Covenant provided for conciliation procedures and automatic sanctions in the event of aggression, but did not outlaw aggressive acts themselves. *League of Nations Covenant* arts. 12, 13, 15. The Kellogg-Briand Pact of 1928, which was the first agreement to prohibit warfare "as an instrument of national policy," applied only to parties to the Pact. *Treaty Providing for the Renunciation of War as an Instrument of National Policy*, art. II, 94 L.N.T.S. 57 (1928).
Moreover, the essential tools of the collective security system as outlined in the Charter—agreements between member states and the United Nations to supply troops upon the Security Council's call—have never been negotiated. A legal system only recently secure in its fundamental principles and having never used its only prescribed mechanism of enforcement is ill-suited for a complete reconceptualization on extremely short notice.

IV

The second area of international law whose evolution arguably has affected the traditional status of civil wars is unilateral intervention. Given the Security Council's evident willingness to grant approval to military actions that are unilateral in all but name, this area of the law may become less controversial. But it is by no means certain that the unity of purpose among the Council's permanent members—so necessary to approve such delegations of authority to individual states or coalitions—will last far into the future. Even where consensus on a particular operation is assured, there are those (especially in the United States) who seek to avoid any sort of multilateral control over their national militaries. Moreover, some states may seek the Council's approval for intervention only after they have commenced (or even completed) an action, leaving the initial incursion to be judged by rules concerning purely unilateral acts. The norms governing unilateralism, therefore, continue to warrant scrutiny.

55. The case of Liberia, while involving a regional organization and not an individual state, suggests a possible model in this regard. A force organized by the Economic Community of West African States intervened in the Liberian civil war on August 25, 1990, pursuant to a resolution issued by its Standing Mediation Committee on August 10. See Georg Nolte, International Legal Aspects of the Liberian Conflict, 53 Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht 603 (1993). However, the intervention was not taken up by the Security Council until January 1991, when the Presi-
The International Court in the *Nicaragua* case restated the traditional position of international law on unilateral intervention in civil wars. Where a *government* requests intervention, other states may provide assistance. However, when an *opposition group* requests intervention, states may not respond. The Court’s opinion makes no mention of qualitative limitations on the right of incumbent governments to seek assistance such as might, for example, be motivated by a regime’s human rights record. Similarly, the Court held that aid to an opposition group does not become legal even if it is designed to remove a government that abuses the rights of its citizens.

These rules have a long pedigree. In the aftermath of the 1815 Congress of Vienna, three conservative European states joined together to form the Holy Alliance (The Alliance) in an effort to suppress popular revolt against monarchical rule. The Alliance’s 1820 Declaration of Principles is worth quoting at length:

> Any state forming part of the European Alliance which may change its form of interior government through revolutionary means, and which might thus become a menace to other states, will automatically cease to form a part of the Alliance, and will remain excluded from its councils until its situation gives every guarantee of order and stability.

The Allied Powers not only formally declare the above to be their unalterable policy, but faithful to the principles which they have proclaimed concerning the authority of legitimate governments, they further agree to refuse to recognize any changes brought about by other than legal means. In the case of states where such changes have already taken place and such action has thereby given cause for apprehension to neighboring states (it lies within the ability of the powers to take such useful and beneficent...
(action) they will employ every means to bring the offenders once more within the sphere of the Alliance. Friendly negotiations will be the first means resorted to, and if this fails, coercion will be employed, should this be necessary.

While the Alliance was short-lived, the legacy of its reactionary internationalism left a palpable distaste in many states against norms that might permit unilateral policing of specific notions of governmental legitimacy. In fairly short order, international law came to hold that any regime in effective control of a state was entitled to be regarded as its legitimate government. This rule began as a norm of recognition, but as international law developed increasingly explicit prohibitions against the unilateral use of force, it became a powerful response to attempts to justify intervention. The Court's rejection of the U.S. argument that in supporting the contra rebels it sought to defend the human rights of Nicaraguan citizens would seem to follow logically from this historical experience.

But does it? Increasingly, those who support a right of unilateral intervention against incumbent governments base their claims on universalist principles of human rights, such as those at issue in Nicaragua. They argue that governmental legitimacy stems not from effective control over territory but from due regard for the interests of the governed. Thus, a regime engaging in persistent human rights violations, by definition, forfeits an entitlement to be regarded as legitimate. The linchpin of this claim is the ubiquity of human rights norms, both in treaty and customary international law. Their general acceptance addresses the central problem posed by hegemonic intervenors such as the Holy Alliance: the lack

59. Quoted in W.P. Cresson, The Holy Alliance; The European Background of the Monroe Doctrine 99 n.2 (1922).


62. The state of ratification of the major global human rights treaties is discussed in the Report of the Secretary-General, supra note 11, at 51-52.

of agreement on the principles to be served by such actions. These norms, it is argued, allow principled distinctions to be drawn between legitimate and illegitimate regimes, and thus may serve to guide states in deciding whether or not to intervene in civil wars and on whose behalf.

Proponents of this view may find support in several cases where the international community has made judgments of a regime's entitlement to govern. While these examples do not involve actual authorization for unilateral intervention, they could be claimed as persuasive grounds upon which a decision to intervene might be based. In 1976, the General Assembly, after declaring the African National Congress and the Pan African Congress to be "the authentic representatives of the overwhelming majority of the South African people," appealed to all member states and organizations "to provide all assistance required by the oppressed people of South Africa and their national liberation movements during their legitimate struggle." General Assembly resolutions on Haiti and Myanmar also made judgments of regimes' entitlement to rule.

In these admittedly limited instances, international law has begun to engage in qualitative assessments of both governments and rebel groups, setting aside the traditional rule strictly favoring incumbent regimes. Proponents of unilateralism would claim that given the contemporary omnipresence of human rights values, this change is hardly surprising. The traditional rule is a profoundly conservative doctrine that functions to entrench, without distinction, democracies, theocracies, monarchies, military juntas and one-party dictatorships alike. It favors the status quo regardless of the abuse a government may impose upon its citizens. In many other contexts,
international law takes a clear position on the permissibility of such acts and, increasingly, on the legitimacy of certain regimes themselves. Where the equities in a civil war are clear, should international law not do so on the question of third-party intervention as well?

The formulation of this question suggests an answer. Easy cases are, of course, uncontroversial; few would condemn third-party assistance to those, say, resisting Khmer Rouge genocide in Cambodia during the 1970s. The difficulty is that the equities are often not so clear: the human rights records of both rebel groups and incumbent governments are frequently mixed, thereby rendering the ultimate value of assistance to either side uncertain. Perhaps more importantly, states often make claims concerning humanitarian intervention that are patently untrue. In the case of such ambiguous or outright dishonest claims of entitlement to intervene, an evident consensus on principles is of little practical use in assessing the legitimacy of a particular intervention. Principles, however commendable in substance, are not self-implementing. When intervening states serve as judges in their own cases, inevitably each will claim that its acts conform to relevant international norms. In the absence of a neutral third-party adjudicator, charged with judging the validity of such claims in some manner that approaches objectivity, the legitimacy of unilateral intervention will have been asserted but never demonstrated. Superpower interventions in Czechoslovakia, the Dominican Republic, Grenada, Guatemala, Hungary, and Panama, among others, bear historical witness to this fact. Thus, there is little assurance that human rights norms will be well-served by unilateral intervention unconstrained by any institutionalized process of review. To the contrary, unilateralism may actually diminish the hard-won legitimacy human rights law has only recently achieved. During the Cold War, when unilateral intervention was rampant, claims of rights violations were invoked in such blatant service of political ends that the rights themselves became debased, often functioning as little more than window dressing. There is a danger of regression to this

era of empty rhetoric if the international community does not continue to support institutions that evaluate claims of normative entitlement to act. Dishonest application of norms so infused with idealism will produce a cynicism about their utility that will be difficult to reverse.

Legal structures do exist to address this problem. The U.N. Charter prohibits pure unilateral intervention and requires that the Security Council evaluate and approve any use of force in advance.\(^69\) A legitimate use of force, in other words, must be the product of collective deliberations. Of course the Security Council has its own problems of legitimacy.\(^70\) Moreover, even missions approved according to Charter procedures, as in the case of Somalia, may be unable to secure long-term stability in target states. But it is of critical importance that these issues be separated from the foundational question of right authority: whether intervention in civil wars must, in all cases, be approved by an international body. If human rights advocates answer this question in the negative, on the arguable theory that unilateral intervention can be accomplished more quickly and efficiently, they must be prepared to answer difficult questions about a mission's legitimacy once the inevitable problems occur. Walzer was certainly correct that civil wars involve intensely local problems which outsiders may be unable to address decisively. It is precisely, however, because this is true that the initial decision to intervene must be beyond reproach. If both the legitimacy of an intervention \textit{and} the methods used to resolve protracted conflict come under attack, the future of such missions will be bleak.

The need for innovative thinking by international lawyers does not end with the decision that some institutional umpiring mechanism is needed. Civil wars present conflicting incentives to third parties that may work directly against the establishment of procedural controls. On the one hand, various forms of global interdependence have all but ended the isolation of civil wars from world public consciousness. Responsible factors include the omnipresence of media coverage (CNN as the Security Council's "Sixth Permanent Member"); the likelihood that in any given country in which a civil war com-

\(^69\) U.N. \textit{Charter} art. 2, para. 4 & arts. 39-42.  
\(^70\) \textit{See generally} Caron, supra note 43.
mences the United Nations will already have some sort of presence—humanitarian relief, refugee assistance, development projects—which may plant the seeds for possible escalation; the virtual elimination of the nuclear tripwire as a barrier to large power involvement in developing countries’ internal conflicts; and, as we have noted, a heightened concern for human rights violations, wherever they occur. These factors combine to make it quite difficult for the international community to ignore protracted and/or brutal civil conflicts for any length of time.

On the other hand, each state continues to have an overwhelming interest in maintaining maximum flexibility should it be faced with an insurrectionist or separatist movement of its own. Of course, the degree to which any state may imagine itself involved in a civil war varies considerably. But, even states that enjoy relative domestic stability may have important allies who do not. The United States, with little prospect of facing a civil war itself, has failed to ratify Protocol II to the Geneva Conventions, which would extend certain legal protections to civilians and combatants involved in or affected by large-scale civil wars. The United States is not alone in this decision. In contrast to the 185 states that have ratified the four main Geneva Conventions, Protocol II has attracted only 122 state parties. 71 Like the members of the Holy Alliance, it is an established, stable power with interests that are generally served by continued stability elsewhere. Its interests are not well-served by a principle of general application allowing (or perhaps even requiring) multilateral intervention against certain incumbent regimes.

The logical accommodation of these two conflicting tendencies is the approach in fact taken by the Security Council: to take jurisdiction over a conflict when inaction becomes politically or morally intolerable, but to make clear that each case stands on its own terms and does not establish a general plan of action. As a psychological matter, each such foray obviously makes the next case appear as less of a watershed. But it is

equally clear that members of the Security Council take the legal implications of their votes favoring intervention quite seriously. The Security Council does reserve the option to decide in the case of particularly intractable conflicts that the international community's collective interests are not implicated.

V

The involvement of international law in civil wars represents the culmination of an immense shift in normative focus that began with the human rights movement. Traditional international law had little, if anything, to say about the relations between governments and their citizens. Human rights law pierced this domestic veil by addressing certain acts by states against their people—for example, torture—which the international community deemed unacceptable. In order to achieve compliance with such human rights norms, states must cease the prohibited acts. The law began to change again at the end of the Cold War when the international community became active in encouraging transitions to democratic government. This new focus moved from condemning discrete acts to challenging entire regimes. In order to achieve compliance with a norm of democratic governance, a regime may not merely alter objectionable policies, but must put in place an electoral process that holds the very real potential of leading to that regime's own removal from power.

Norms and institutions concerned with civil wars involve a still more substantial intrusion into the domestic sphere. As we have noted, the traditional international law described in the Nicaragua case unequivocally favors incumbent governments. Any modification of this rule necessarily functions to assist those opposing such regimes. Allowing direct assistance to rebellious groups is only the most obvious erosion of an incumbent's advantage. Even U.N. negotiation of a cease-fire upon a rebel group's request functions as a form of assistance, since rebels would only seek to halt a conflict they anticipate losing. An opposition confident in its ability to defeat a government militarily has no reason to seek accommodation short of total victory. Similarly, the enforcement of human rights norms in the midst of a civil conflict deprives a government of techniques of warfare that it perceives—perhaps because of
their very brutality—as effective means of combating rebel forces. Creating a space for law in the otherwise unregulated sphere of civil conflict thus moves far beyond the mere potential for electoral defeat embodied in a right to democratic governance. It seeks to have governments recognize legal entitlements for those whom the law of every state would surely prosecute for treason. Many, including the United States, punish such acts by death.

Given this dynamic, the growing involvement of international law in civil wars is, to say the least, remarkable. Yet, the reasons why governments have begun to support the interposition of legal controls are apparent in the conflicts themselves. Many of the conflicts have dragged on for years and the participants have become weary of fighting. Other conflicts have become the focus of international pressure because of their particular brutality. Still others were, in many respects, the products of broader regional or global conflicts and became ripe for resolution once the “parent” struggles were resolved. The evolution of international law has, for the most part, consisted of the repertoire of practices developed in the community’s collective response to individual crises.

However, the fragmented nature of this response suggests that it may be some time before the international community develops a wholly satisfactory reply to Walzer’s argument that outside intervention in civil conflicts is doomed to failure. Walzer presents a fully realized model of social evolution that draws its force primarily from liberal political theory and only secondarily from state practices that have, over time, coalesced into international law. At particularly high or low ebbs in this process of normative evolution, one may discern coherent theoretical arguments that can equal Walzer’s views in their depth and complexity. But these are isolated moments in a much larger process of change. New crises will bring further change. Proposals that the United Nations stand in loco parentis for so-called “failed states”—those mired in seemingly endless con-

72. For this reason, states have been extremely reluctant to extend the extensive protections for combatants and non-combatants contained in the four Geneva Conventions to anti-government forces in civil conflicts. See Laura Lopez, Note, Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts, 69 N.Y.U. L. Rev. (forthcoming 1995).
flict and poverty—may seem attractive in some cases but not in others. And the "lessons" supposedly learned from unsuccessful interventions may be quickly unlearned in the face of particularly brutal struggles. Such inevitable wavering may not provide an intellectually satisfying retort to Walzer, assuming the international community does not come to embrace his views. But this is perhaps for the best: in addressing civil wars international law attempts to marshall institutions and principles that are removed in time, place, and conception from the profoundly local issues giving rise to such conflicts. This acute lack of "fit" between the problem and the solution calls for a pragmatic and cautious approach.