
Pre-empting Proliferation: International Law, Morality, and Nuclear Weapons

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Abstract

Michael Walzer is right that dwelling on the United Nations Charter's use-of-force rules constitutes 'utopian quibbling'. But he is wrong that 'practical morality' of the sort defended in his Just and Unjust Wars presents a useful analytic framework for addressing issues such as the advisability of using force to counter threats of nuclear proliferation. Walzer's moral evaluations do not meet the standard of consistency that he himself demands, and the foundational inconsistency of his moral appraisals produces the same context-oriented relativism that he rejects. Policy analysis offers a preferable approach because it makes fewer assumptions. Its vocabulary interposes no problematic metaphysical infrastructure between ends and means, and it generates no debate that is not directly pertinent to the decision at hand. However, neither international law, practical morality, nor a consequentialist calculus of national interest can eliminate the need for judicious choice and subjective judgement.

'[N]uclear weapons serve no useful purpose whatsoever', Robert McNamara wrote. 'They are totally useless – except only to deter one's opponent from using them'.¹ Some have extended McNamara's argument and contend that, because of their very ghastliness, nuclear weapons actually promote stability. Not only do nuclear-armed states not attack each other with nuclear weapons, the argument goes, states do not attack each other with conventional weapons, fearing the possibility of nuclear escalation.² These analysts suggest that the dangers of nuclear escalation are over-blown, in that no rational policymaker would risk annihilation by initiating their use.³ 'The correlation between nuclear weapons and great-power peace is perfect – 65 years, the

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¹ McNamara, 'The Military Role of Nuclear Weapons: Perceptions and Misperceptions', 62 *Foreign Affairs* (1983) 79.

² R. Jervis, *The Meaning of the Nuclear Revolution: Statecraft and the Prospect of Armageddon* (1989), at 45.

³ See generally M. Bundy, *Danger and Survival: Choices About the Bomb in the First Fifty Years* (1988).

longest such period in world history.⁴ At a minimum, it is suggested, this consistent record of forbearance demonstrates that nuclear weapons are, indeed, ‘totally useless’ except as deterrents.

In truth, because the track record, happily, is bare, no one knows whether conventional war between nuclear powers would risk nuclear escalation.⁵ Nonetheless, I share the belief of Scott Sagan,⁶ Bruce Blair,⁷ and others that the danger of nuclear escalation in such circumstances is not negligible. The claim that peace among the nuclear powers ‘has been the product of’⁸ their nuclear arsenals assumes without evidence that other factors have not contributed to these decades of peace. Deterrence no doubt has played a role, but surely the story is a bit more complex. Whatever stability the possession of nuclear weapons might provide at the margins is, in any event, likely to be offset by the risks entailed by proliferation. The more states that acquire nuclear weapons the more states will want them; the more states that want them the more available will be the technology and fissile materials needed to make them, and the greater will be the chance that those weapons will be used, rationally or irrationally. Use by one state against another would break the taboo against further use and risk a world of ‘nuclear armed anarchy’.⁹ Use by terrorists could generate a witch hunt to ferret out and punish the perpetrators that would crack the legal and political foundations of liberal democracy. Any use would almost surely cause massive, horrific suffering. Nuclear proliferation therefore poses a threat to both the United States and the international community.

This threat is now presented most immediately by the nuclear programmes of Iran and North Korea. With respect to both, the United States has said that the ‘military option’ remains ‘on the table’.¹⁰ Whether armed force may be used to forestall this threat presents both legal and moral questions, which are addressed in turn. The article then considers the comparative advantages of a third approach: policy analysis. The object is to weigh the relative merits of these three frameworks – to think about how we should think about the problem – rather than to draw firm conclusions about what, specifically, should be done.

1 International Law

In *Just and Unjust Wars*,¹¹ Michael Walzer considers, and dismisses, the bounds placed by international law, or at least by the UN Charter, on the waging of war. In a key introductory passage he writes as follows:

⁴ Joffe and Davis, ‘Less than Zero: Bursting the New Disarmament Bubble’, 90 *Foreign Affairs* (2011) 7, at 11.

⁵ J.J. Mearsheimer, *The Tragedy of Great Power Politics* (2001), at 31.

⁶ S.D. Sagan, *The Limits of Safety: Organization, Accidents and Nuclear Weapons* (1993).

⁷ B.G. Blair, *The Logic of Accidental Nuclear War* (1993).

⁸ Joffe and Davis, *supra* note 4.

⁹ R. Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-first Century* (2003), at 63.

¹⁰ Brzezinski, ‘Been There Done That’, *Los Angeles Times*, 23 Apr. 2006, available at: www.latimes.com/news/opinion/commentary/la-op-brzezinski23apr23.0.3700317. See also Sanger and Shanker, ‘Gates Says U.S. Lacks a Policy to Thwart Iran’, *New York Times*, 17 Apr. 2010, available at: www.nytimes.com/2010/04/18/world/middleeast/18iran.html.

¹¹ M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn, 2006).

Legal treatises do not ... provide a fully plausible or coherent account of our moral arguments. ... To dwell at length upon the precise meaning of the Charter today is a kind of utopian quibbling. And because the UN sometimes pretends that it already is what it has barely begun to be, its decrees do not command intellectual or moral respect – except among the positivist lawyers whose business it is to interpret them. The lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in.¹²

Provocative words – and courageous words, written, as they were, only seven years after the avalanche of criticism generated by Tom Franck's piece, 'Who Killed Article 2(4)?'¹³ – after which Tom (at least intermittently) recanted.¹⁴ But Walzer's conclusion is even more justified today, following dozens, if not hundreds, more violations of the Charter's use-of-force regime since 1977, when the first edition of his book was published. I agree with him: the *jus ad bellum* rules that the Charter laid down have, tragically, become paper rules: rules that lay out aspirational goals for the management of state-sponsored force rather than binding precepts of international law. The story of how and why the Charter's use-of-force regime foundered is one that bears directly upon the moral elements that Walzer considers more illuminating, so before proceeding it is worth briefly reviewing that sad tale.¹⁵

The record, alas, is indisputable. As the Secretary General's High-Level Panel on Threats, Challenges and Change put it, 'for the first 44 years of the United Nations, Member States often violated [the Charter] rules and used military force literally hundreds of times, with a paralyzed Security Council passing very few Chapter VII resolutions and Article 51 rarely providing credible cover'.¹⁶ By one count, the Panel said, from 1945 to 1989 'force was employed 200 times, and by another count, 680 times'.¹⁷ Other studies have reported similar results.¹⁸ The question is no longer whether the Charter's use-of-force regime has failed; the questions are why it failed, and what legal consequences obtain.

¹² *Ibid.*, at xx–xxi.

¹³ Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States', 64 *AJIL* (1970) 809.

¹⁴ E.g., Franck, 'Legitimacy in the International System', 82 *AJIL* (1988) 705; T.M. Franck, *The Power of Legitimacy Among Nations* (1990), at 32.

¹⁵ See generally M.J. Glennon, *The Fog of Law: Pragmatism, Security and International Law* (2010).

¹⁶ Secretary General's High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, Rep. of the Secretary General's High-Level Panel on Threats, Challenges and Change, UN Doc A/59/565 (2 Dec. 2004), at para. 186.

¹⁷ *Ibid.*, at 140.

¹⁸ E.g., A.M. Weisburd, *Use of Force: The Practice of States Since World War II* (1997) (Weisburd counted 100 interstate wars between 1945 and 1997); see also K.J. Holsti, *The State, War, and the State of War* (1996), at 24 (Holsti counted 38 between 1945 and 1995); Sarkees, 'The Correlates of War Data on War: An Update to 1997', 18 *Conflict Management & Peace Science* (2000) 123, at 135 (The Correlates of War Project has counted 23 between 1945 and 1997); H.K. Tillema, *Risks of Battle and the Deadliness of War: International Armed Conflicts: 1945–1991* (16 Apr. 1996, unpublished manuscript) (quoted in Wallensteen, 'New Actors, New Issues, New Actions', in P. Wallensteen (ed.), *International Intervention: New Norms in the Post-Cold War Era?* (1997), at 5, 6) (Tillema counted 690 overt foreign military interventions between 1945 and 1996); Carter Center, *Conflict Resolution Update: Update on World Conflicts* (1998) (identifies 30 'major ongoing wars' today). Also see Glennon, *supra* note 15, at 67–100.

Why did the rules not work? The reason can be succinctly stated. Law is a species of cooperation, and cooperation occurs only under specific conditions. Evolutionary biologists, psychologists, sociologists, game theorists, and behavioural economists have noted that those conditions include, among other things, a high degree of trust among the parties, relative equality, an infrastructure of supportive social norms, high costs for non-cooperation, and a shared agreement on pertinent, underlying values.¹⁹ The rules collapsed because these conditions have not been present to the degree necessary to generate consistent international cooperation in managing the use of force.

That conclusion is particularly striking with respect to the most important condition, the need for a common understanding concerning whether and when the use of force is justified. This was one of the issues addressed in a lengthy study published in November 2009 by the Council on Foreign Relations that compiled recent international polls comparing the views of different nations' populations.²⁰ The attitudinal differences concerning use of force, terrorism, and the proliferation of weapons of mass destruction are striking.

- When asked whether the UN SC should or should not have the right to authorize the use of military force to restore by force a democratic government that has been overthrown, 57 per cent of Americans said yes – but only 35 per cent of Russians and 37 per cent of Chinese.
- People were asked to imagine that North Korea has acquired weapons of mass destruction, and that the US government has decided to attack North Korea to force that country to give up these weapons. They were then asked whether they would support a decision by their government to take part in this military action. In the US, 58 per cent said yes and 31 per cent no – but in Germany, only 20 per cent said yes and 76 per cent said no; in Italy, 24 per cent said yes and 70 per cent said no. In the European Union as a whole, 31 per cent said yes and 63 per cent said no. If such action against North Korea were undertaken by NATO, Americans continued to approve, 68–24, but military action was still disapproved of by Germans (34–64), Italians (32–63), and Europeans (41–54). Even authorization by the UN SC had little effect. Americans continued to approve the action (72–24), but it was opposed by Germans (33–66), Italians (37–59), and Europeans (43–53).
- The results differed little with respect to Iran. People were asked to imagine that Iran has acquired weapons of mass destruction, and that the US government has decided to attack Iran to force that country to give up these weapons. They were then asked whether they would support a decision by their government to take part in this military action. In the US, 67 per cent said yes and 23 per cent said no – but in Germany, only 32 per cent said yes and 66 per cent said no; in Italy, 26 per

¹⁹ S. Maxwell, *Why Cooperate?* (23 Jan. 2004) (unpublished manuscript) (distributed at the World Economic Forum's Annual Meeting Workshop entitled 'Reforming the United Nations Once and for All' in Davos, Switzerland, 2004).

²⁰ Council on Foreign Relations, 'Public Opinion on Global Issues: A Web-based Digest of Polling from Around the World' (2009), available at: www.cfr.org/public_opinion (last visited 14 Jan. 2011).

cent said yes and 68 per cent said no. In the European Union as a whole, 38 per cent said yes and 56 per cent said no. If such action against Iran were undertaken by NATO, Americans continued to approve, 78–17, but military action was still disapproved of by Germans (29–67), Italians (34–62), and Europeans (48–48). Even authorization by the UN SC again had little effect. Americans continued to approve of the action (75–16), but it was opposed by Germans (46–51), Italians (44–52) – but now supported by Europeans (50–44).

- In 2009, 66 per cent of Americans believed that the NATO mission in Afghanistan should be continued, but only 14 per cent of Russians, 14 per cent of Chinese, and 13 per cent of Pakistanis thought so.
- Asked in 2006 whether the possibility of an unfriendly country becoming a nuclear power represented an important threat, 3 per cent of Americans said it was not important, compared with 17 per cent of Chinese and 12 per cent of Indians who considered it an unimportant threat.

The lesson of these and many similar polls²¹ is clear: the consensus needed for the formulation and enforcement of effective international rules governing the use of force does not exist. This factor above all others explains why the rules have become, in Walzer's blunt assessment, 'paper'²² rules, not working rules.

How, then, are these attitudinal divisions and the breakdown of use-of-force rules reflected in the international legal system? How ought paper rules to be described in the language of international law? Let me emphasize the word *described*. The task is to describe, not prescribe. The question is not what the rules *should* be, not whether international law is really law, not whether the Charter's desiccated use-of-force rules are in some moral sense good or bad, not whether there is, or was at some point, a moral obligation to obey these rules, and not what has become of other sub-regimes (such as *jus in bello*). The issue is one of analytical clarity and relates, ultimately, to international law's rule of recognition: in light of the prevailing international legal standard by which legal rules are recognized, is it accurate to continue to describe these rules of the *jus ad bellum* as law?

I think not. Settled jurisprudence has it that the international legal system is consent-based. That view traces at least to 1927 and the words of the Permanent Court of International Justice in *The Lotus*,²³ which are worth recalling:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.²⁴

²¹ The German Marshall Fund of the United States, *Transatlantic Trends* (2003). In 2003, e.g., 53% of Americans believed that war is sometimes necessary to obtain justice – compared with only 18% of Europeans.

²² *Ibid.*

²³ *SS Lotus (Fr. v. Turk.)* [1927] PCIJ (ser. A) No. 10 (7 Sept.).

²⁴ *Ibid.*, at 19, para. 44.

Given the established view that states are bound only to rules to which they consent by ‘their own free will’, the status of a putative rule is an empirical question: in light of all the evidence, states’ words as well as their deeds, is it reasonable to conclude that they have consented to the supposed rule? No: when a rule has been violated many times by many states over many years, it is sensible to suppose that they do not consent to it, and that it is not international law. This does not mean that some policy-makers in some states are not influenced by the rule, or that the rule is not honoured in some regions. But it does mean that a tipping point has been reached, that the quantum of violation has become too great, and that the international community as a whole no longer views the rule as a binding rule of international law. That is what happened to the first treaty banning war, the Kellogg-Briand Pact.²⁵ And that, sadly, is what has happened to the use-of-force rules of the UN Charter. Walzer sums it up well: the legalist paradigm ‘is more restrictive than the judgments we actually make’.²⁶

I have addressed elsewhere various objections that have been raised to this view.²⁷ Three in particular are worth revisiting.

The first is that a rule of international law is not diminished but rather is confirmed and strengthened when violation of the rule is coupled with a claim of compliance. The International Court of Justice made this argument in justifying its conclusion in the 1984 *Nicaragua Case*.²⁸ ‘If a State acts in a way prima facie incompatible with a recognized rule’, the Court said, ‘but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then *whether or not the State’s conduct is in fact justifiable on that basis*, the significance of attitude is to confirm rather than to weaken the rule’.²⁹

It is true that what a state says is entitled to some weight. Because the question is whether the state consents (or continues to consent) to the rule in question, all probative evidence of its intent must be considered. But it makes no sense to accord a state’s words *dispositive* effect in all circumstances, ignoring all evidence to the contrary. A state’s conduct counts, too, and when a state’s words and deeds conflict, what the state does would seem to be more persuasive evidence of what it believes than what it says. States’ words – even assuming that they represent an ‘appeal’ to the rule, which they frequently do not³⁰ – need to be taken with a grain of salt; it would often,

²⁵ General Treaty Providing for the Renunciation of War (Kellogg-Briand Pact), Art. 1, 27 Aug. 1928, 2 Bevens 732, UKTS (1929) 29, Cmd 3410.

²⁶ Walzer, *supra* note 11, at 72.

²⁷ See Glennon, *supra* note 15.

²⁸ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. US)* [1986] ICJ Rep 14 (27 June).

²⁹ *Ibid.*, at para. 186 (emphasis added).

³⁰ It is often claimed that US policymakers justify non-compliance with the Charter’s use-of-force rules by appeal to the Charter itself. In fact, numerous statements of US officials over the last decade, in Franck’s words, ‘boldly proclaim a new policy that openly repudiates the Article 2(4) obligation’. See Franck, ‘Future Implications of the Iraq Conflict: What Happens Now? The United Nations After Iraq’, 97 *AJIL* (2003) 607, at 608. E.g., the national security strategy statement issued by the executive branch in Sept. 2002 was said by John Ikenberry to ‘render international norms of self-defense – enshrined by Article 51 of the UN Charter – almost meaningless’ see Ikenberry, ‘America’s Imperial Ambition’, 81 *Foreign Affairs* (2002) 44, at 51. On 10 Nov. 2002, Secretary of State Colin Powell said that the US would not consider itself bound by the SC’s decision concerning Iraq, even though it expected Iraq to comply

indeed, be naïve to accept states' own explanations of their motives and beliefs as the final word. Words prove only so much. In the *North Sea Continental Shelf Cases*, the ICJ opined that a rule can be 'carried out in such a way' as to indicate whether a state actually believes that the rule is obligatory.³¹ Many excellent international law scholars have been among the first to question states' self-serving justifications in other contexts. Elsewhere in its opinion the *Nicaragua* Court was more realistic: '[t]he mere fact that States declare their recognition of certain rules', it said, 'is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States'.³² If a state flouts a rule, it is more sensible to conclude that its policy-makers disagree with the rule than to assume that their 'cheap talk' authoritatively reveals their deeper motives. As the WikiLeaks cables confirm on issue after issue, what policymakers say publicly is not always consistent with what they in fact believe or do.³³

The second objection is that the notion of desuetude I have outlined gives unjustified, asymmetric weight to instances of non-compliance. An accurate evaluation of a rule's effect, it is argued, must examine not only evidence of non-compliance but also evidence of compliance. One cannot judge the 'vitality of a law by looking only at its failures. ... A better test is whether state decision-makers continue to accept it as a general standard of accepted conduct powerful enough to constrain state behavior.'³⁴

The concerns underpinning this objection are valid but misdirected. Desuetude, as I refer to it, *does* reflect both sides of the ledger. All pertinent evidence of what 'state decision-makers continue to accept' is considered, for whatever that evidence might be worth. Sometimes the evidence in question will be decision-makers' approving words. When words and deeds conflict, however, it is necessary to decide which evidence is more probative. For the reasons indicated above, deeds often seem more persuasive than contradictory speech. Sometimes that evidence will be deeds – behaviour

with the Council's decisions. Nothing in the charter exempts the US from the obligation to comply but imposes an obligation upon other countries to do so. Powell said on 26 Jan. 2003, 'We continue to reserve our sovereign right to take military action against Iraq alone or in a coalition of the willing': Gordon, 'Threats and Responses: Strategy: Serving Notice of a New U.S., Poised to Hit First and Alone', *New York Times*, 27 Jan. 2003, at A1. Of course, states' 'sovereign right' to take military action is limited by Art. 2(4) of the Charter; if it is reserved, the limitation of the Charter does not apply. In his 2003 State of the Union Address, President Bush said, 'The course of this nation does not depend on the decisions of others': Gordon, 'State of the Union: The Iraq Issue; Bush Enlarges Case for War by Linking Iraq With Terrorists', *New York Times*, 29 Jan. 2003, at A1. But the Charter has it that the authority of a state to use armed force depends, absent an armed attack, on the decision of the SC; the course of the nation does in that sense depend upon the decision of the SC. President Bush, in his 2004 State of the Union Address, said, 'America will never seek a permission slip to defend the security of our country': Sanger, 'State of the Union: Diplomacy; Emphasis on Iraq Remains, but From a Different Angle', *New York Times*, 2 Jan. 2004, available at: www.nytimes.com/2004/01/21/us/state-of-the-union-diplomacy-emphasis-on-iraq-remains-but-from-a-different-angle.html (last visited 19 Feb. 2010). But again, only when an armed attack occurs does the Charter permit a state to act without permission.

³¹ *North Sea Continental Shelf* (Ger. v. Den.; Ger. v. Neth.) [1969] ICJ Rep 3, at para. 77 (20 Feb.).

³² *Supra* note 28, at 97, para. 184.

³³ Shane and Lehen, 'Leaked Cables Offer a Raw Look Inside U.S. Diplomacy: Dispatches Chronicle Threats and Tensions', *New York Times*, 29 Nov. 2010, at 1.

³⁴ Wippman, 'War on Terror Symposium: The Nine Lives of 2(4)', 16 *Minnesota J Int'l L* (2007) 387.

that leads their state to act in a manner consistent with a given rule. Obviously that evidence, too, must be evaluated. But in light of the number of officials involved in decisions to comply or not to comply and in light of the multifariousness of causes that invariably animate such decisions – and which can create an illusion of compliance – it must be acknowledged that evidence of behaviour consistent with a rule is seldom as probative as evidence of clear-cut violation. Behaviour that is consistent with a rule creates only a possibility that a rule worked. Violation establishes to a certainty that it did not. Put another way, two propositions on each side of the ledger are at issue: (1) there are numerous instances of non-compliance; and (2) there might be instances of compliance. The first proposition is falsifiable. The second is not.

A third objection is related but slightly different. Even if there exist more instances of non-compliance than of compliance, it is suggested that negative balance ought not necessarily to be taken as evidence of desuetude. A given legal rule might have some effect upon behaviour without necessarily carrying the day. That a rule has been violated, even frequently violated, does not mean that the rule has no effect and has fallen into desuetude. Although its effects might not rise to the level of compliance, the salutary effects of such a rule might not be non-existent. Too broad a view of desuetude could be destructive of rules that are suboptimal but still beneficial.

This third objection raises, in effect, a category question. Is it sensible to categorize as non-law a rule the effects of which do not meet a certain minimal level? It is true that labelling such a rule as ‘no longer law’ could induce further deviant behaviour. The objection seems to suggest, however, that no amount of non-compliance should ever trigger a not-law categorization if any possibility exists that the decaying rule continues to exert even a scintilla of compliance pull. It is possible, for example, even after the massive flouting of the Kellogg-Briand Pact during World War II, that the Pact continued to generate some salutary effect. But the question is whether it ought still have been considered binding law. To suggest as much would seemingly disregard overwhelming evidence, in the form of states’ deeds, that they no longer considered the Pact to be obligatory. It is worth recalling that the traditional methodology of customary international law does not counsel that evidence of non-compliance with an eroding customary rule be disregarded so as to preserve potential vestigial effects. What is at issue in the context of desuetude is something virtually identical – the replacement of an existing rule not with another substantive rule but with, in effect, a null-set rule that triggers application of the freedom principle.³⁵ The reasons that support recognition of a tipping point that gives way to a new substantive rule also support recognition of a tipping point that gives way to no rule.

So it makes no sense to engage in what Walzer calls ‘utopian quibbling’ over the breadth of the self-defence exception to a prophylactic ban on use of force that does not exist. Whether Article 51 requires an actual ‘armed attack’ or merely an imminent threat of attack, whether it permits preventive or pre-emptive force, whether it permits humanitarian intervention or cyberwarfare, whether the acquisition of nuclear weapons provides *casus bellum* – these are utopian quibbles for Walzer, as they

³⁵ *Supra* note 23.

are for me, and will, at best, only distract us from what is really at issue. For that, we must look not to international law but elsewhere.

Elsewhere, for Walzer, is morality. One may take a pass on the legal debate; law does not 'provide a fully plausible or coherent account of our moral arguments'.³⁶ But from the moral debate, '[i]t's not easy to opt out, and only the wicked and simple make the attempt'.³⁷

2 Morality

'Morality' is not self-defining. Some believe that moral precepts originate with God; others believe that they are made by human beings. Some believe that pure reason can produce *a priori* moral precepts; others believe that empirical evidence is needed. Some believe that moral precepts have universal application; others believe that they are culturally variant. Some believe that the morality of an act is a function of its purpose; others believe it to be a function of the act's consequences. Some believe that moral judgements are the results of rational thought; others believe that they are like aesthetic judgements.³⁸ Some believe that a casuistic process of analogizing and distinguishing different cases can obviate the need to identify underlying moral principles. Some even doubt that there is any such thing as morality, traditionally conceived. Moral principles, to socio-biologists, are but material artifacts of the brain, adaptive by-products of the interplay between environmental conditioning and genetic make-up, epigenetic biases that evolved over thousands of generations and are experienced as parts of sacred narratives.³⁹ All the same can be said of justice, which overlaps morality. The simple, important point is that, their validity aside, different approaches to morality can produce different outcomes, and consistent outcomes require a consistent approach.

When Walzer alerts us that the touchstone of his evaluation of war will be morality, therefore, one is curious to learn which camp he falls into. His larger purpose, he acknowledges, is to 'defend the business of arguing ... in moral terms'.⁴⁰ What, then, does he mean by 'moral'? He suggests that justice and morality are not coterminous, that an action can be just but not moral;⁴¹ how does he know this? What does Walzer regard as morality's source? The question is pivotal because his answer will provide the major premise on which every appraisal in the book, concerning aggression, pre-emption, proportionality, terrorism, and so on, will ultimately turn:

X is immoral.
This use of force is X.
∴ This use of force is immoral.

³⁶ Walzer, *supra* note 11, at xx.

³⁷ *Ibid.*, at xxi.

³⁸ J. Lehrer, *How We Decide* (2009), at 172 (refers to the work of Jonathan Heidt who argues that moral judgement is like aesthetic judgement).

³⁹ E.O. Wilson, *Consilience* (1998), at 276.

⁴⁰ Walzer, *supra* note 11, at xx.

⁴¹ *Ibid.*, at xx–xxi.

Unless **X** is spelled out in a non-trivial way so as to favour one competing claim over another in contentious circumstances, and unless **X** is held constant throughout the book, the whole exercise will become, in Phillipa Foot's phrase, 'just the expression of an attitude'.⁴²

Walzer is aware of this danger, and thus posits consistency as the one crucial yardstick by which moral appraisals might themselves be appraised. We need to make 'consistent moral judgments'⁴³ about war, he avers. Whatever peoples' convictions about the sources of morality, we can at least 'hold ... people to their own principles'.⁴⁴ We can analyse 'their moral claims, seek out their coherence, lay bare the principles that they exemplify'.⁴⁵ We can 'expose the hypocrisy'⁴⁶ of those who say one thing and do another. The exposure of hypocrisy may be 'the most important form of moral criticism'.⁴⁷

The problem is that Walzer's moral evaluations do not meet the standard of consistency that he himself demands, and the foundational inconsistency of his moral appraisals produces precisely the context-oriented relativism that he himself rejects.

He begins by telling us that, when it comes to the question of morality's foundations, he is not really sure which camp he is in. 'Were I to begin with the foundations [of morality], I would probably never get beyond them', he writes. '[I]n any case, I am by no means sure what the foundations are'.⁴⁸ 'I am not sure whether the morality of war is wholly coherent'.⁴⁹ Instead of making the case for one school of morality over another, or even merely associating himself with one approach over another, Walzer's preference is for something different: 'practical morality'. Practical morality consists of 'judgments and justifications in the real world'.⁵⁰ It is unnecessary to spell out the source of these moral intuitions: 'practical morality is detached from its foundations, and we must act as if that separation were a possible (since it is an actual) condition of moral life'.⁵¹ The arguments he will make about war, he writes, are thus efforts to 'recognize and respect the rights' of people – though he 'shall say nothing'⁵² about the ideas that a doctrine of rights presupposes. Sometimes, he will shift from rights to '[c]onsiderations of utility', but without addressing the suppositions underpinning utilitarianism. True to his word, he begins his argument by asserting that the morality he will be applying throughout the book derives from the rights of states, which in turn derive from the rights of their inhabitants. 'How these rights themselves are founded', he writes, 'I cannot try to explain here. It is enough to say that they are

⁴² Lloyd, 'Influential Thinker on Ethics who Devised the "Trolley Problem"', *Financial Times*, 16 Oct. 2010, available at: www.ft.com/cms/s/0/5f6dce0e-d897-11df-8e05-00144feabdc0.html#axz z1EcchR4kW.

⁴³ Walzer, *supra* note 11, at xxiii (emphasis added).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, at 22.

⁵⁰ *Ibid.*, at xxiii.

⁵¹ *Ibid.*

⁵² *Ibid.*, at xxiv.

somehow entailed by our sense of what it means to be a human being. If they are not natural, then we have invented them.'⁵³

After disclaiming association with any one school, however, he immediately proceeds to reveal that he has no use for relative morality, specifically, morality of the sort that underpins realist theory. It is epitomized in Hobbes's *Leviathan*. What is justice to one man is cruelty to another, Hobbes wrote.⁵⁴ Not so, Walzer writes. Perceptions of justice are not entirely subjective. A war must be called unjust for 'particular reasons', not merely because it is merely disliked.⁵⁵ In explaining why one would regard a war as unjust, 'I am severely constrained in what I can say. I must say this or that, and at many points in the long argument, this or that will be true or false.'⁵⁶ The truth or falsity of moral assertions can be objectively determined. If we assert that a man is a traitor and charge him with treason and the evidence is lacking, 'we are not just using words inconstantly', as relativists like Hobbes would have us believe; 'we are lying'.⁵⁷

This embrace of moral universalism is reaffirmed in other parts of the book. Walzer rejects 'Hobbesian relativism' that 'changes over time or varies among political communities'.⁵⁸ It is 'wrong to begin a war'.⁵⁹ '[O]ur understanding of the moral vocabulary is sufficiently common and stable', he writes, 'so that shared judgments are possible'.⁶⁰ The pronouns *our*, *us*, and *we* are used repeatedly, suggesting a global, trans-cultural singularity in moral perception and application. There exists one, unified 'war convention' consisting of all the 'articulated norms, customs, professional codes, legal precepts, religious and philosophical principles, and reciprocal arrangements that shape our judgments of military conduct'.⁶¹ The war convention includes, for example, principles of non-combatant immunity that protect civilians from 'being robbed and ravaged by guerrilla bands'.⁶² The precepts of the war convention 'cannot simply be set aside; nor can they be balanced, in utilitarian fashion, against this or that outcome'.⁶³ The rights of people 'cannot be eroded or undercut; nothing diminishes them; they are still standing at the very moment they are overridden'.⁶⁴ Thus '[n]on-combatant protections are closely connected to universal notions of right and wrong'.⁶⁵ States, he believes, 'actually do possess rights more or less as individuals do'.⁶⁶ He does not like the Athenian generals' line that they had their gods, their morality, and the Melians theirs, or the Athenians' subtext – that the morality of neither could be validated by

⁵³ *Ibid.*, at 54.

⁵⁴ *Ibid.*, at 10.

⁵⁵ *Ibid.*, at 12.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, at 13.

⁵⁸ *Ibid.*, at 16.

⁵⁹ *Ibid.*, at 22.

⁶⁰ *Ibid.*, at 20.

⁶¹ *Ibid.*, at 44.

⁶² *Ibid.*, at 228.

⁶³ *Ibid.*, at 228.

⁶⁴ *Ibid.*, at 231.

⁶⁵ *Ibid.*, at 42.

⁶⁶ *Ibid.*, at 58.

appeal to some authoritative, independent metric. This is ‘Hobbist relativism’ at its ugliest, and Walzer wants none of it.

Yet elsewhere in the book Walzer relies upon a morality that is plainly contextual and situational. It may be wrong to begin a war, but not, it turns out, in certain circumstances, such as those surrounding the Six Day War.⁶⁷ It is not possible to specify which threats provide sufficient justification, ‘because state action, like human action generally, takes on significance from its context’.⁶⁸ Restrictions on pre-emptive war ‘can only be unpacked with reference to specific cases’.⁶⁹ ‘Some wars are not hell’,⁷⁰ and the fate of volunteers can’t be called unjust⁷¹ (unless they are desperately impoverished and find no other way to feed their families⁷²). ‘[M]oral rights are subject to the vicissitudes of the common life.’⁷³ There is a convention of war – but it should be ‘overridden ... in the face of an imminent catastrophe’.⁷⁴ He rejects ‘moral absolutism’⁷⁵ and any requirement to ‘do justice though the skies may fall’⁷⁶ as a ‘hard line to take, especially in the modern age’.⁷⁷ He refers, as above, to empirically verifiable ‘shared judgments’; critics of the Vietnam War partake in a ‘common morality’.

The polemical advantage of this philosophical hopscotch is obvious. ‘Practical morality’, unbounded in its variability and elasticity, lets one land wherever one likes. No square is too small or too far. No set of facts defies agile moral appraisal of one sort or another. The terms ‘moral’ and ‘morality’ must be used hundreds, if not thousands, of times throughout the book. Every threat, real or imagined, has some moral valence, which makes it possible to evaluate morally every conceivable military response to every threat.⁷⁸

Yet Walzer’s refusal to pick one approach, defend it, and stick with it undermines his whole project. He purports to pursue an approach that is both principled yet foundationally uncommitted. But this notion is fanciful, a square circle: our convictions about the foundations of morality *are* our principles. It is all in our major premises: if we can change moral templates whenever we want to reach a different policy outcome, why would we say that we are engaged in *principled* moral analysis? Walzer continually moves back and forth between universalism and contextualism. At one point he identifies casuistry as his method,⁷⁹ but this approach is abandoned and re-adopted along with various others. Inconstancy in normative application is one form of moral relativism, the ‘morality’ of the Athenian generals, the Hobbist *amorality*

⁶⁷ *Ibid.*, at 82–85.

⁶⁸ *Ibid.*, at 80.

⁶⁹ *Ibid.*, at 85.

⁷⁰ *Ibid.*, at 25.

⁷¹ *Ibid.*, at 26.

⁷² *Ibid.*, at 27.

⁷³ *Ibid.*, at 56.

⁷⁴ *Ibid.*, at 231.

⁷⁵ *Ibid.*, at 230.

⁷⁶ *Ibid.*, at 230.

⁷⁷ *Ibid.*, at 230.

⁷⁸ *Ibid.*, at 79.

⁷⁹ *Ibid.*, at xxiv.

that Walzer says he finds abhorrent. How are his own fluctuating templates any different? Hobbes's argument is that those who rely upon 'right reason' to decide a controversy mean, in fact, 'their own'.⁸⁰ Why is the morality on which Walzer relies not 'his own' – the 'luxury of [his] own opinion', in Bismark's phrase?⁸¹ Are Walzer's moral judgements in some way falsifiable – is there some evidence that could be adduced demonstrating that they are not true? What would the evidence be? If no evidence can prove him wrong, why are his moral claims anything more than simple assertions, and why are they superior to the conflicting moral claims of, say, Adolf Eichmann or Osama bin Laden? What is the *source* that suggests that Walzer's 'moral' conclusions are something more than mere subjective preferences? He cannot have rejected Hobbist relativism without some basis; what is it? If the basis is that his intuitions are at some level *shared*, why should that matter? Does morality depend upon polls? As the above poll results demonstrate, different cultures exhibit dramatically different moral instincts. Which are correct? Do these polls reveal 'shared judgments' or a 'common morality' – or the opposite? Walzer avers that we can know when the just war theory is being misused;⁸² prior to the second American war on Iraq, opposing opinion-editorials appeared in the *New York Times* contending that under just war doctrine an attack was permissible (Senator John McCain)⁸³ – and impermissible (former President Jimmy Carter).⁸⁴ Who, in this case, was misusing just war doctrine; how can we determine objectively who was right? Were the German soldiers right, in World War I, who wore belt buckles inscribed 'God On Our Side'?

It was perhaps for reasons such as these that Justice Holmes believed that analysis would be advanced if 'every word of moral significance could be banished from the law altogether'.⁸⁵ Unless practical moral intuitions have been reified through accepted lawmaking processes into authoritative legalist norms, their uncertainty, manipulability, and adaptability to incompatible claims render those impulses deficient as a basis for decision-making on use of force.⁸⁶ Such intuitions do not provide a stable decisional framework adequate for resolving the question whether force may be used against Iran's or North Korea's nuclear programmes.

It is true that governments publicly justify war in the vocabulary of morality. Morality is, admittedly, the preferred war-language of the general public, in this country and abroad, and the galvanizing effects of that rhetoric prove ever useful. 'If the trumpet give an uncertain sound, who shall prepare himself to the battle?'⁸⁷ Walzer's approach no doubt resonates with the *vox populi* in the United States and elsewhere, where war is considered first and foremost in moralist terms. 'Americans', Seymour Martin Lipset wrote, 'are utopian moralists who press hard to institutionalize virtue, to destroy evil

⁸⁰ R. Tuck, *Hobbes: A Very Short Introduction* (2002), at 131.

⁸¹ Speech to the Prussian Diet, 17 Dec. 1873.

⁸² Walzer, *supra* note 11, at xx.

⁸³ McCain, 'The Right War for the Right Reasons', *New York Times*, 12 Mar. 2003, at A25.

⁸⁴ Carter, 'Just War – or a Just War?', *New York Times*, 9 Mar. 2003, at 13.

⁸⁵ O.W. Holmes, *The Path of the Law* (1920), at 179.

⁸⁶ See Glennon, *supra* note 15, for a longer critique of the just war theory.

⁸⁷ 1 Corinthians 14:8.

people, and eliminate wicked institutions and practices'.⁸⁸ It is also true, however, that some of the most prominent and well-respected critics of various military initiatives have declined the temptation to condemn as 'immoral' what they believed to be policy mistakes, however grievous. 'What we're doing in Vietnam isn't bad in the light of history', Senator Fulbright said. 'It's the same thing that powerful countries have always done.'⁸⁹ He warned of the 'morality of absolute assurance fired by the crusading spirit',⁹⁰ of the messianic sense of mission that can accompany the belief that one occupies the moral high ground. Fulbright earlier condemned the 'holier-than-thou' moralism of John Foster Dulles.⁹¹ George Kennan⁹² expressed similar concerns.

And it is also true that, behind closed doors, policy-makers rarely invoke morality as such as a reason for initiating or foregoing a given course of action. Theirs is, rather, the language of national interest, at least within the high policy councils of the United States. Dean Acheson, recalling the discussions within the Executive Committee during the Cuban Missile Crisis, wrote as follows:

The most perplexing aspect of the decision was the difficulty of comparing, of weighing, competing considerations. How could one weigh the desirability of less drastic action at the outset against the undesirability of losing sight of the missiles, or having them used against us, which might be avoided by more drastic action from the onset, such as destroying the weapons. The President had no scales on which to test those weights, no policy litmus paper.⁹³

As John Mearsheimer has put it, 'the elites who make national security policy speak mostly the language of power, not that of principle'.⁹⁴ Having sat in on perhaps hundreds of closed meetings of the Senate Foreign Relations Committee as its Legal Counsel, that surely is my own observation. The government's objective invariably is seen as ensuring the safety and well-being of the American people. Internationally this involves resisting developments that would result in an unfavourable adjustment of the correlation of forces. These objectives are pursued through a mode of analysis directed at broadly assessing the real-world consequences of competing policy options, weighing the costs of each option against its benefits, balancing one set of risks against another set of risks, and recognizing and accepting the trade-offs that must always be made when some option must be chosen but no good option is available.⁹⁵

⁸⁸ S.M. Lipset, *American Exceptionalism: A Double-Edged Sword* (1997), at 63.

⁸⁹ H.B. Johnson and B.M. Gwertzman, *Fulbright: the Dissenter* (1968), at 245.

⁹⁰ J.W. Fulbright, *The Arrogance of Power* (1967), at 245–246.

⁹¹ J.W. Fulbright and S. Tillman, *The Price of Empire* (1989), at 180.

⁹² Kennan, 'Morality and Foreign Policy', 64 *Foreign Affairs* (1985) 205.

⁹³ 'Remarks by Alberto R. Coll', 82 *ASIL Proceedings* (1988) 195, at 209.

⁹⁴ Mearsheimer, *supra* note 5, at 25.

⁹⁵ Policy analysts have suggested a variety of structures. One, e.g., sets out a 5-part framework:

1. *Establishing the Context*. What is the underlying problem that must be dealt with? What specific objectives are to be pursued in confronting the problem?
2. *Laying Out the Alternatives*. What are the alternative courses of action? What are the possibilities for gathering further information?
3. *Predicting the Consequences*. What are the consequences of each of the alternative actions? What techniques are relevant for predicting these consequences? If outcomes are uncertain, what is the estimated likelihood of each?

3 Policy Analysis

That is not to say that moral impulse plays no role in decisions such as those concerning whether to use pre-emptive force. Rather, policy-makers' moral concerns typically are subsumed within the formulation of options and appear implicitly rather than explicitly. During the Executive Committee's deliberations, for example, Robert Kennedy objected to a surprise attack on Cuba as a reprise of Pearl Harbor. 'My brother is not going to be the Tojo of the 1960's',⁹⁶ he said. I recall, in meetings of the Foreign Relations Committee during the evacuation of South Vietnam, Senators agonizing over Senator Javits' question whether we could turn our backs in the face of the South Vietnamese government's 'cry for help'. Considerations of altruism played a decisive role in the decision to intervene in Somalia to help end a devastating famine during the final days of the administration of the first President Bush in 1992. Interest analysis does not, in short, preclude weighting factors that go to self-image, that relate to the 'internal life' of decision-makers or the people they represent. A nation's interest in believing that it is true to its ideals is a real interest. Interest analysis thus need not necessarily involve the advancement *only* of a nation's own material interests; a nation might care about the welfare of people in another nation and thus wish to advance their interests as well. Interest analysis is not shorthand for selfishness.

Nor is it to say that interest analysis provides precise or even dispositive answers. The methodology of balancing costs against benefits and risks against risks requires assigning a given weight to the factors that go onto the scales. As Acheson pointed out, no objective metric tells us what weight to give competing factors. In part this is because cost-benefit analysis requires assigning not only weight but *probability* as well: how likely is it, for example, that the weapons will be used against us? Probabilities also determine which factors get placed on the scales: how likely is it, say, that the state in question will share fissile material or technology with other states or terrorists? Most importantly, weighing competing interests does not answer the one question on which the entire analysis rests: what are the ultimate ends we should seek? Should we be willing, for example, to accept a world in which Iran is a nuclear power? Policy analysis does not tell us 'what we should want to want', as Holmes put it.⁹⁷

Policy analysis thus makes no moral claims.⁹⁸ Its implicit starting point is not that states and individuals must be judged by different moral standards, or that moral

4. *Valuing the Outcomes*. By what criteria should we measure success in pursuing each objective? Recognizing that inevitably some alternatives will be superior with respect to certain objectives and inferior with respect to others, how should different combinations of valued objectives be compared with one another?

5. *Making a Choice*. Drawing all aspects of the analysis together, what is the preferred course of action? E. Stokey and R. Zeckhauser, *A Primer for Policy Analysis* (1978) 5–6.

⁹⁶ A. Chayes, *The Cuban Missile Crisis* (1974), at 38.

⁹⁷ Holmes, Jr., 'Natural Law', 32 *Harvard L Rev* (1918) 40, at 43.

⁹⁸ Policy analysis is not synonymous with utilitarianism, as Walzer implies in *supra* note 12, at xxi. Utilitarianism as classically formulated assumes that one ought to prefer the greatest good for the greatest number and that one is obliged to honour such outcomes: see J. Bentham, *An Introduction to the Principles of Morals and Legislation* (1781), at paras 10, 11, and 12 (where he argues that '[o]f an action that is

standards do not apply to states, or – least of all – that might makes right. The moral desirability of one option versus another (reflected, perhaps, in poll results of the sort indicated above) is, again, folded into its calculus. Thus the two approaches do not necessarily argue for different substantive outcomes. ‘It is not about the question of how we ought to define rights’, Duncan Kennedy has written, critiquing the rights discourse that Walzer finds attractive. It is about ‘how we should *feel about the discourse in which we claim them*’.⁹⁹ There is, again, no reason that the concrete outcomes indicated by policy analysis need be any less humanitarian or altruistic than those that are claimed to flow from practical morality. Indeed, in many instances Walzer seems to be engaged in the same interest-reconciling process, with the only difference being that what he dislikes is labelled ‘immoral’ and what he likes ‘moral’.

Why, then, prefer standard policy analysis over Walzer’s moralist discourse? The reason follows Ockham’s Razor: policy analysis is more attractive because it makes the fewest assumptions. Walzer’s practical moralism rests upon myriad unproven and unprovable assumptions, each requiring its own justification. The elaborate metaphysics that results provides no added value and clouds rather than sharpens our analysis. On the other hand, interest analysis advances analytical clarity because it addresses directly and exclusively what is at stake. Its vocabulary interposes no problematic metaphysical infrastructure between ends and means, between preference and policy. It generates no debate that is not directly pertinent to the decision at hand. What does policy analysis add? *Nothing*: that is the whole point. Policy analysis skips the intermediating vocabulary of moralism and moves directly to the interests at stake – to the preferences of policymakers and the comparative costs and benefits of different means of vindicating those preferences.

4 Conclusion

If I am correct that neither law nor Walzer’s notion of practical morality can resolve the question whether pre-emptive force may be used against North Korea or Iran, and correct also that the issue will be resolved, in the end, through a weighing of costs against benefits and balancing of competing interests, it is appropriate, finally, to consider in the most cursory form how those interests might balance.

A pre-emptive strike against North Korea’s nuclear facilities probably would not eliminate all of its nuclear resources but would, almost certainly, trigger a massive counter-attack with conventional weapons against civilian population centres throughout South Korea, probably involving the loss of tens of thousands of lives. It is possible that that retaliatory attack could extend further, potentially involving the

conformable to the principle of utility ... one may always say that it is one that ought to be done, or at least that it is not one that ought not to be done. One may say also, that it is right that it should be done ... [T]he rectitude of this principle’, however, is not ‘susceptible of direct proof. ... To give such proof is as impossible as it is needless’). Policy analysis makes no such assumption; one is free to accept or disregard its outcomes.

⁹⁹ D. Kennedy, *A Critique of Adjudication* (1997), at 305 (emphasis in original).

use of nuclear weapons by North Korea, perhaps against not only South Korea but also Japan (North Korea's missiles can reach Tokyo). North Korea's nuclear arsenal is estimated to include around five to ten nuclear devices, although it is uncertain whether any has been successfully weaponized and can be placed atop a missile. No one knows how a rising China would react to the enormous loss of face entailed by decisive American military action on its immediate periphery; China did, after all, go to war with the United States in the 1950s when North Korean security was then thought to be at risk. Weighed against these potential costs are a continuing threat of aggression by North Korea against South Korea; the North Korean navy is known to have been the author of a March 2010 torpedo attack that sank a South Korean naval vessel, killing 46 sailors, and the November 2010 shelling of a South Korean island, killing two soldiers.¹⁰⁰ There exists, further, a continuing threat of proliferation (North Korea is known to have assisted Syria in the construction of a nuclear plant that was destroyed by an Israeli air strike in September 2007), and a more general, but equally real, threat that North Korea will use a nuclear weapon to do something gravely provocative, destabilizing, or, in one seasoned diplomat's word, 'weird' (as it did in seizing the *USS Pueblo* in 1968). Secretary of Defense Robert Gates estimated that North Korea may be capable of hitting the West Coast of the United States with a missile by 2016.¹⁰¹

The scales, in my view, tip against military action and in favour of (1) continuing reliance upon sanctions, (2) opening direct talks between the United States and North Korea aimed at forestalling aberrational behaviour and reassuring it that the United States does not seek forcible regime change, (3) enticing its leadership to destroy its nuclear weapons and facilities in return for economic assistance, and (4) continuing efforts to induce China to lean more heavily on its hermit client, emphasizing China's interest in discouraging Japan and South Korea from thinking about acquiring nuclear weapons.

A pre-emptive 'strike' against Iran's nuclear facilities would, in fact, comprise not one but multiple bomber and missile strikes, which would have to be sustained over a period of time to reach nuclear assets that are dispersed, hidden, and heavily protected. Such strikes would undercut the domestic opposition movement, for Iran's public strongly supports the nuclear programme as a source of much-needed electricity and a wedge to transform its economy and spur development. Pre-emptive strikes would precipitate retaliatory attacks against Israel and US troops in the region and perhaps trigger a blockage of oil moving through the Persian Gulf. They could spark a wider regional war if Iranian assets in Hezbollah units in Lebanon acted against Israel, or if Iran's counter-strikes were directed at Saudi Arabia or other Gulf states friendly to the United States. Pre-emptive war would inflame the Muslim world and intensify hostility against the United States, particularly in Pakistan and Afghanistan. As with a pre-emptive attack on North Korea, there is no guarantee that all nuclear facilities and materials would be eliminated, for here, too, it is doubtful that all locations

¹⁰⁰ McDonald, "'Crisis Status' in South Korea After North Shells Island', *New York Times*, 23 Nov. 2010.

¹⁰¹ Bumiller and Wines, 'Gates Warns of North Korea Missile Threat to U.S.', *New York Times*, 11 Jan. 2011.

have been identified by Western intelligence. Weighed against these likely costs are the probable benefits of delaying the development of nuclear weapons that could be used against Israel, either by Iran directly or by terrorist clients; forestalling a regional nuclear arms race involving, possibly, Egypt and Saudi Arabia;¹⁰² and injecting credibility into a wilting international non-proliferation regime by showing that the violation of IAEA agreements and Security Council resolutions has drastic consequences.

The scales, in my view, again tip against military action and in favour of continued reliance upon sanctions (which are having an effect), covert action, support of the domestic opposition, and the negotiation of a fully-inspected ‘swap’ arrangement that would provide fuel for peaceful nuclear power facilities but eliminate any possibility of nuclear enrichment. If all else fails, the options of containment and deterrence are still preferable to rolling the dice of pre-emptive war.

While the case for restraint in responding to the North Korean and Iranian nuclear programmes seems persuasive, it is not air-tight. That case relies, in part, on the hypothesis that these regimes will respond to the traditional sorts of ‘carrots’. President Obama summarized the US negotiating strategy with Iran on 1 July when he signed the Iran Sanctions Act. He said, ‘We offered the Iranian government a clear choice. It could fulfill its international obligations and realize greater security, deeper economic and political integration with the world . . . or it could continue to flout its responsibilities and face even more pressure and isolation.’¹⁰³ Essentially the same premise underlies the US diplomatic approach to North Korea, which is in effect being offered greater economic and political integration in return for giving up its nuclear weapons programme. Yet there are reasons to doubt that the sorts of carrots that are effectively on offer to North Korea and Iran positively incentivize authoritarian regimes. Do such regimes really want deeper economic and political integration? The interests of an authoritarian regime and the interests of its people conflict. An authoritarian regime’s primary goal is not the welfare of its people; its primary goal is to stay in power. It does that not through opening up to the outside world, but by remaining closed. It finds safety in isolation. The United States and its allies may be offering North Korea and Iran a carrot not only that they do not want but that they may, in fact, actually find threatening.

Secondly, the premise of engaging North Korea and Iran diplomatically seems to be that we can find precisely the right mix of incentives and disincentives to get them to give up their nuclear programmes. But suppose either concludes that, for whatever reason, it wants nuclear weapons more than anything else? India, Pakistan, and Israel all seemed to reach that conclusion. Suppose a North Korea or Iran – spurred, perhaps, by the fate of Iraq and Libya after Saddam Hussein and Muammar Qaddafi dropped their nuclear weapons programmes – concludes that its survival cannot be assured without nuclear weapons? How can diplomacy succeed in such a case if it is not backed by a credible threat of force?

¹⁰² But see Bergenas, ‘The Nuclear Domino Myth’, 89 *Foreign Affairs* (2010).

¹⁰³ ‘Obama Remarks at signing of Iran Sanctions Act’, *Washington Post*, 1 July 2010.

Thirdly, Western policy seems to have assumed that if threats of force do not work, it is possible simply to shift to a new policy of deterrence and containment after one of those states acquires a deliverable nuclear arsenal. The United States and various allies have repeatedly said that it would be unacceptable for Iran to acquire nuclear weapons; at least the United States, as noted earlier, has often said that the option of force can never be taken off the table. Yet responsible analysts have now concluded that no realistic military option is available with respect to Iran or North Korea, and have come to believe that deterrence and containment, which worked, after all, with China and Russia, are in the end likely to be the most sensible policy toward them. If the use of force is not a real option to halt Iran's nuclear weapons programme and if ultimately it will be necessary to rely upon a credible policy of deterrence, will the believability of that deterrent not have been undermined by making threats to use force that were not fulfilled? If the ultimate plan is to contain Iran, perhaps with use of force, *after* it acquires nuclear weapons, should the United States not stop making hollow threats to use force *before* Iran joins the nuclear club? Yet if the United States does tone down its rhetoric and relies in the short run upon further talks, does the sorry record of negotiation with Iran not demonstrate the fecklessness of diplomacy backed by diplomacy?

The argument for restraint, therefore, is one on which reasonable people can differ. The permissibility of using pre-emptive force against Iran or North Korea is given no satisfactory answer either by the international legal system or by Walzer's notion of practical morality. Weighing the costs against the benefits suggests that it would not currently be in the United States' national interest to do so. That, in any event, is my view. Whether one favours the use of force, pre-emptive or otherwise, depends, in the end, upon what kind of world one wishes to live in and what risks one is willing to take. Neither international law nor practical morality – nor a consequentialist calculus of national interest – can eliminate the need for judicious choice and subjective judgement.