

## The “Dangerous Concept of the Just War”: Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions

Just war is dead in international law. The United Nations Charter killed it, and rightly so.

—John Norton Moore, “A Theoretical Overview of the Laws of War in a Post-Charter World,” 1982<sup>1</sup>

In 2002, the North American political theorist Michael Walzer announced the “triumph of just war theory.”<sup>2</sup> Walzer provided a potted history of this theory, which he depicted as originating in the fifth century A.D. in the theological writings of St. Augustine of Hippo as an argument of the “religious centre” against both pacifists and holy warriors.<sup>3</sup> It is in this center that Walzer situated his own influential writings on just and unjust wars: just war theory, even when it criticizes particular wars, is neither pacifistic nor radically suspicious of state power, he contended; it “is the doctrine of people who do expect to exercise power and use force.”<sup>4</sup> Walzer’s narrative traced the triumph of the “just war” over a realist political culture that had relegated questions of justice to the theology departments of Catholic universities. It was the Vietnam War, he argued, that revealed the inadequacy of nonmoralizing languages of prudence and interests in articulating (and denouncing) the brutality of United States conduct. “Almost against its will,” he wrote, “the left fell into morality.”<sup>5</sup> In the wake of the war, he suggested, the success of the antiwar movement was reflected in the moralization of political discourse, while disillusioned veterans made morality central to military curriculum.<sup>6</sup> All this, according to Walzer, represented genuine moral progress, as moral theory was “incorporated into war-making as a real constraint on when and how wars are fought.”<sup>7</sup>

In the first decades of the twenty-first century, this “triumph” of just war theory is reflected in the increasing prominence of the language among those who do exercise power: successive U.S. presidents, from George Bush senior to Donald Trump, have mobilized the language of the just war to justify American force.<sup>8</sup> In March 2017, Trump justified punitive strikes against the Syrian regime of Bashar Al Assad, without the authorization of the Security Council or the U.S. Congress, by declaring that “America stands for justice.”<sup>9</sup> Barack Obama’s aides explained that the then-United States president directly approved “kill lists” for drone strikes in Pakistan because, as “a student of writings on war by Augustine and Thomas Aquinas, he believes that he should take moral responsibility for such actions.”<sup>10</sup> Gareth Evans, who chaired the International Commission on State Sovereignty and Intervention, which produced

the “Responsibility to Protect” concept, notes that all its criteria for the use of force have an “explicit pedigree in Christian ‘just war’ theory.”<sup>11</sup> U.S. military lawyers refer explicitly to Aquinas’s theological writings in justifying so-called collateral damage.<sup>12</sup> Scientists funded by the U.S. army to research autonomous lethal robots are even working on prototypes for an “ethical control and reasoning system” that would embed the principles of just war theory into the design of their killer machines.<sup>13</sup>

In this context, the claim in the 2015 United States Law of War manual that the laws of war are “rooted in the Just War tradition” has passed as unremarkable.<sup>14</sup> In explicating this tradition, the Department of Defense turns to William O’Brien’s 1981 *Just and Limited Wars*—a book whose treatment as authoritative is attributable to its contorted argument that (contra Walzer) the U.S. war in Vietnam was a just war. Despite this disagreement, O’Brien’s condensed, teleological historical narrative of just war thinking largely coincides with Walzer’s account of its triumph. According to O’Brien, as cited by the U.S. Department of Defense:

The just war tradition begins with the efforts of St. Augustine to justify Christian participation in Roman wars. From this foundation, St. Thomas Aquinas and other Scholastic thinkers developed the Scholastic just war doctrine. The doctrine reached its mature form by the time of the writings of Vitoria and Suarez in the sixteenth and seventeenth centuries. Various Protestant moralists and secular writers dealt with just-war issues during the Reformation, but by the eighteenth century, just war doctrine was becoming a curiosity that was not taken seriously. It remained for the twentieth century reaction against total war to spark renewed studies in the just-war tradition.<sup>15</sup>

O’Brien’s narrative of the refinement and secularization of a tradition of moral restraint on warfare treats the theory of the just war in the way Richard Tuck has suggested earlier disciplinary histories treated international law: as a well-defined subject that was “gradually uncovered and understood in less primitive terms from the Middle Ages onwards.”<sup>16</sup> This narrative depicts the Department of Defense’s current and contested interpretation of the laws of war as the culmination of a centuries-old tradition of Western moral and theological thinking. Not only does the manual depict this tradition as “the foundation of modern *jus ad bellum* rules” (that is rules governing the right to wage war);<sup>17</sup> more controversially, it depicts the *jus in bello* rules that regulate the conduct of war, including the Geneva Conventions, as “also rooted in the just war tradition.”<sup>18</sup>

Here I seek to challenge both this progressive narrative and the claim that the Geneva Conventions are rooted in the just war tradition. Rather than examining the way the attempt to construct a unified just war “tradition” or “theory” distorts the theological writings of Aquinas and Augustine, by anachronistically projecting onto them concerns with the “humanization” of warfare or the protection of civilians, I turn instead to the often acrimonious debates about just and unjust wars that accompanied the drafting of the Additional Protocols to the Geneva Conventions. The Diplomatic Conference called by the International Committee of the Red Cross to revise international humanitarian law in the mid-1970s was the site for multiple

conflicts, not only over the justice of particular wars but also over whether justice had any place in debates about the laws of war.

As the Diplomatic Conference debates were underway, Walzer justified his own decision to focus on morality rather than law by disparaging what he termed the “legalist paradigm” for its “utopian quibbling.”<sup>19</sup> Against those who stressed the plurality of structures of meaning, Walzer upheld a universal moral stance that is “in its philosophical form a doctrine of human rights.”<sup>20</sup> The “moral world is shared,” Walzer argued: “It’s not easy to opt out, and only the wicked and the simple make the attempt.”<sup>21</sup> A focus on the conflicts over the Additional Protocols demonstrates that, at the high-point of anticolonial legal activism, neither the language of the just war nor the doctrine of human rights had a single meaning, and nor were the boundaries of a shared moral world defined in advance.<sup>22</sup>

This essay shows that during the drafting of the Additional Protocols it was the anticolonial delegates who used the language of the just war to distinguish wars of national liberation from wars of “imperialist aggression”—particularly the U.S. war in Vietnam. In distinguishing just from unjust wars, they sought to extend privileged belligerent status, and thus prisoner of war provisions, to those who “fight against colonial and alien domination and against racist regimes in the exercise of their right to self-determination.”<sup>23</sup> Although they mobilized the language of the just war, anti-colonialists drew on the principles of anti-imperialism and self-determination—and not on Christian theological thinking—in order to articulate a contrasting vision of justice. In doing so, they framed their struggle to revise international law as a progressive one that pitted the realities of the decolonizing present against the legal norms of the colonial past.

Faced with the assertiveness of the newly independent states, the Western states attacked what the head of the U.S. delegation George Aldrich called “the dangerous concept of the just war.”<sup>24</sup> Far from seeking to ground the Additional Protocols in the just war tradition, as the U.S. Law of War manual suggests, the Western delegates framed this tradition as a medieval license to cruelty, which had only been restrained by the modern, humanitarian philosophy underpinning the laws of war. While the Third World delegates spoke of modernizing the laws of war, the Western powers accused them of seeking a return to the Middle Ages.<sup>25</sup> While they sought to extend privileged belligerent status to national liberation fighters, in order to include them in the same legal regime that governed regular soldiers, the Western states accused them of seeking to abandon all legal constraints on warfare in the name of the just cause.

The path from this Western position to the more recent embrace of just war theory by successive U.S. presidents and the U.S. military, I argue, cannot be ascribed to moral progress. Rather, the moralization of international politics and the appropriation of the just war by the U.S. state reflects the transformed balance of power in the wake of the Cold War and the decline of the anticolonial defense of self-determination. Anticolonial successes in framing colonialism and the war in Vietnam as unjust pushed the United States into an antimoralist position, and its delegates to oppose the language of the just war in legal forums. Only once the Vietnam War was over, as Barbara Keys has noted, did “American liberals feel they could credibly moralize to the world.”<sup>26</sup> The subsequent period saw the rise of a new, moralized

human rights politics and increasing demands for intervention in the internal affairs of postcolonial, sovereign states. As the statist order of international law came under increasing pressure, the sovereignty of former colonies proved far more qualified than the old European sovereignty. Meanwhile, the rising prestige of just-war language legitimized U.S. military interventions whose legal status was dubious at best. Rather than constraining military action, the language of justice served to make unlawful violence palatable and to justify humanitarian interventions, police efforts, and “wars on terror” across the globe.<sup>27</sup>

### **Modernizing the Laws of War**

In the wake of the aerial bombardments of World War II, the International Committee of the Red Cross prepared a set of “Draft Rules for the Limitation of Dangers Incurred by the Civilian Population in Times of War.” Unwilling to act, states ignored the rules, which were left—in the words of Richard Baxter, chief counsel to the U.S. delegation during the drafting process—“to wither on the vine.”<sup>28</sup> By the late 1960s, pressure to amend the laws of war was building from a surprising direction: as Baxter notes, it was “interest on the part of the human rights constituency in the United Nations,” and the UN’s threat to move into Red Cross territory, that pushed the latter body to act.<sup>29</sup> Far from referring to Western NGOs like Amnesty International, in 1977 Baxter’s “human rights constituency” comprised anticolonialists who used the language of human rights to assert their right to self-determination and challenge the inherited structures of international law.<sup>30</sup>

Fears among Western states that the UN would politicize the laws of war were exacerbated in the wake of the 1968 UN Human Rights Conference in Tehran. Held to mark the twentieth anniversary of the Universal Declaration of Human Rights, and presided over by the authoritarian Shah Pahlavi, the Tehran conference has been depicted as a massive failure.<sup>31</sup> Roland Burke, for instance, criticizes the “absence of positive results” from a conference more concerned with economic development than with human rights.<sup>32</sup> Seen through the lens of the laws of war, the results of the conference do not look so paltry. Its resolution on “Human Rights in Armed Conflicts” noted that “minority racist or colonial regimes” frequently resort to inhuman treatment of those struggling against them, and it directed the secretary general to begin a consultation process aimed at revising the laws of war.<sup>33</sup> Seizing the opportunity, Third World and Soviet Bloc states used this process to condemn the “sordid” U.S. war in Vietnam, “Israel’s aggression against the Arab States,” apartheid in South Africa, and Portuguese colonialism, and to criticize the colonial biases of international humanitarian law.<sup>34</sup>

The 1968 Tehran conference provided impetus for the process that resulted in the Additional Protocols to the Geneva Conventions. The year after Tehran, the ICRC presented a report on the revision of humanitarian law to its 1969 conference in Istanbul then followed up with two meetings of a Conference of Government Experts in 1971 and 1972.<sup>35</sup> In 1974, when the ICRC called a “Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts” in Geneva, the United States approached the conference “more as a hazard than an opportunity,” as the head of its delegation, George Aldrich, reflected.

While the United States hoped that the ICRC sponsored event would provide a “neutral and humanitarian” forum for discussing the laws of war, these hopes were soon dashed, and Aldrich was left to reprimand delegates to “stop treating the conference as an extension of the United Nations General Assembly.”<sup>36</sup> Inevitably, the debates were influenced by the new balance of power and priorities in the General Assembly in the period of decolonization. The position of the anticolonialists was that they were not seeking anything new from the Diplomatic Conference; they simply wanted international humanitarian law brought into conformity with principles accepted by the UN as binding international law.<sup>37</sup>

When the Diplomatic Conference opened in 1974, the original 51 UN member states had been joined by 87 new states, bringing total UN membership to 138 and giving former colonies a numerical weight that enabled them to pass resolutions in the General Assembly.<sup>38</sup> The newly independent states sought to use this weight to decolonize international law, to rid it of colonial legal doctrines and discourses—from the standard of civilization to trusteeship—and to overcome inherited inequalities. They were, as the Algerian delegate to the Diplomatic Conference Raof Boudjakdji warned, “determined to reject the constraints of a system of international law conceived in bygone days” and imbued with “colonial concepts.”<sup>39</sup> By then, the UN had passed several important resolutions that recognized the right of colonized peoples to self-determination and went beyond the UDHR in characterizing self-determination as a human right.<sup>40</sup>

Of particular significance was the 1970 “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations” (Gen. Ass. Res. 2625). Not only did this declaration affirm the duty of states to refrain from depriving people of their right to self-determination (1/7); it also gave all states a duty to “bring a speedy end to colonialism”—which it depicted as a violation of both human rights and the UN Charter (5/2b). Its affirmation that the territory of a colony had “a status separate and distinct from the territory of the State administering it” until the people exercised their right to self-determination (5/6) served to legitimate national liberal movements as what Geoffrey Best terms “states in waiting” and challenged metropolitan arguments that anticolonial struggles were merely internal disturbances.<sup>41</sup>

On the eve of the Diplomatic Conference, anticolonialists in the General Assembly passed Resolution 3103 (XXVIII), affirming the international status of “combatants struggling against colonial and alien domination and racist regimes.”<sup>42</sup> That year, Algeria’s Abdelaziz Bouteflika had accepted the presidency of the General Assembly on behalf of “generations of freedom fighters who contribute to making a better world with weapons in their hands.”<sup>43</sup> The status of those Bouteflika termed “freedom fighters” (and whom certain European delegates viewed as terrorists) became the key point of contention at the Diplomatic Conference. Armed with General Assembly resolutions, anticolonial delegates arrived at the ICRC Conference determined to see national liberation struggles classified as *international* armed conflicts, and prisoner of war status extended to national liberation fighters.

Prior to the conference, anticolonial struggles were regarded as internal conflicts that fell within the domestic jurisdiction of the territory in which they took place.<sup>44</sup>

The consequent denial of POW status to anticolonial fighters, the Algerian legal theorist Mohammed Bedjaoui had noted earlier, meant they could be treated as mere terrorists by colonial governments and “tried, sentenced to death and executed.”<sup>45</sup> Until 1956, France refused to recognize the Algerian War as either an international or an internal armed conflict (regulated by common article three of the 1949 Geneva Conventions). After 1956, France was forced to recognize that the war was indeed an “armed conflict,” yet, as it maintained that Algeria was part of France, the metropolitan government refused to recognize the international character of the conflict.<sup>46</sup> France, Bedjaoui wrote, is thus able to “settle down amidst the bloodstained horrors of an unforgivable war under shelter of a plea that the laws of humanitarian conventions do not apply.”<sup>47</sup> During the drafting of the 1949 Geneva Conventions, the colonial powers were united in characterizing their colonial wars as “non-international” conflicts and in struggling to prevent the extension of the laws of war to such “internal” conflicts.<sup>48</sup> Applying the conventions to “civil wars,” France argued, would “strike at the root of national sovereignty.”<sup>49</sup> Similarly, the British attorney general warned against entering into any convention “that would prevent us treating insurgents as traitors.”<sup>50</sup>

Unlike Britain, however, the recent French experience of occupation, and the denial of combatant status to resistance fighters during World War II, made the French concerned to apply minimal standards to internal conflicts and created a precedent that would later be drawn on by anticolonialists.<sup>51</sup> For France, along with the USSR, Greece, Yugoslavia, and Poland, wartime popular resistance was a source of national pride, and it was unthinkable that the laws of war not vindicate it.<sup>52</sup> As delegates from recently occupied and small countries clashed with major powers over the rights of occupiers vis-à-vis civilian populations, the question of the just war returned to the forefront and influenced attitudes to the conduct of war. The question, as Geoffrey Best notes, was “should not the *jus in bello* go easy on irregular combatants fighting for a cause which the *jus ad bellum* pronounced to be just?” And what was more just than fighting to defend one’s homeland against an aggressor?<sup>53</sup> Demarcations between *ad bellum* and *in bello* questions were not fixed, and views about the justice of war informed understandings of appropriate treatment of combatants.<sup>54</sup>

In opposing weakening the distinction between combatant and civilian, the major powers appealed to what they portrayed as “traditional law.” Indeed, the nineteenth-century publicists who codified the modern laws of war—men like the Prussian-born Francis Lieber, the “ardent servant of the Russian empire” Fedor Martens, and the Swiss lawyer Johann Caspar Bluntschli—were deeply informed by a Grotian tradition that limited privileged belligerency to states and their regular armies.<sup>55</sup> For this tradition, as Carl Schmitt put it bluntly, “war is conducted between states by regular armies of states.”<sup>56</sup> The publicists contended that any concession to the rights of civilian belligerency would weaken protections for the civilian population. Yet their professed concerns for the protection of civilians coexisted with their prioritization of order over justice, as Karma Nabulsi persuasively argues, and with their fears that an armed citizenry would lead to popular uprisings. Martens, for instance, cited the revolutionary Paris Commune of 1871 in the wake of the Franco-Prussian war as evidence of the dangers of enlisting civilians in defense of the nation: “the history of the Paris

Commune is an example destined forever to remind all nations of this fundamental truth: it is easier to hand out weapons than it is to retrieve them,” he wrote.<sup>57</sup>

It remained for the anticolonialists to challenge the privileging of the rights of occupiers over those of resistant civilians and to contest the characterization of anticolonial struggles as internal conflicts. The Algerian Front de Libération Nationale (FLN) led the campaign to internationalize such struggles and to extend the protections of international humanitarian law to anticolonial fighters. The Algerian Provisional Government was aware that conformity with the Geneva and Hague Conventions had formed an aspect of the classical “standard of civilization” that had influenced whether non-European states (notably Japan and China) could be granted a place in “international society.”<sup>58</sup> They adeptly mobilized the standards of “civilized” conduct to pressure the French, releasing a “White Paper on the Application of the Geneva Conventions” and formally acceding to the Geneva Conventions.<sup>59</sup>

Jean-Paul Sartre argued in his infamous preface to Frantz Fanon’s *The Wretched of the Earth* that the Algerians “don’t give a damn” about the contention of French leftists that “these guerillas should be bent on showing that they are chivalrous.”<sup>60</sup> On the contrary, the Algerians consciously appealed to what Talal Asad has described as the “modern” belief that “that unlike barbarians and savages, civilized fighters act within a legal and moral framework.”<sup>61</sup> The FLN used this dichotomy to undermine France’s claim to be the representative of the Rights of Man, engaged in a civilizing mission in Algeria.<sup>62</sup> The FLN newspaper regularly discussed French violence and torture as barbarous violations of the laws of war. Drawing explicitly on the language of “civilization,” the FLN depicted French refusals to apply the wars of law as contrary to the “humanitarian principles of justice and compassion” that must “govern and determine the treatment of man by man if *our* civilization is to be worthy of the name.”<sup>63</sup>

Accepting the laws of war, Helen Kinsella notes in her incisive history of the principle of distinction, facilitated FLN claims that “Algeria was competent, rational, and, most importantly, civilized enough to demand and deserve self-rule.”<sup>64</sup> Kinsella depicts this FLN strategy as an attempt to “prove they were capable of self-rule according to the standards set by the colonists.”<sup>65</sup> Yet, in the wake of World War II, figures like Bedjaoui did not seek the recognition extended to Japan after its brutal 1894–95 conflict with China, which led one cynical Japanese diplomat to remark, “We show ourselves at least your equals in scientific butchery, and at once we are admitted to your table as civilized men.”<sup>66</sup> While Japan had sought to internalize the standard of civilization by following the nineteenth-century European practice of defining its own civilized status against that of a “barbarian” (Chinese) other, twentieth-century anticolonialists struggled to rid international law of civilizational hierarchies.<sup>67</sup> An early victory was the success of non-European and Soviet Bloc delegates in removing the phrase “civilized nations” from the draft Universal Declaration of Human Rights.<sup>68</sup> These delegates recognized that without its “uncivilized” outside, the category of civilization breaks down. This breakdown remains a source of anxiety for liberal critics like Jack Donnelly, who argues that the anticolonial reframing of standards of civilization as neocolonial was the guise in which “considerations of justice were . . . banished from decisions on membership in international society.”<sup>69</sup>

Contra Donnelly, the anticolonialists at the Diplomatic Conference continued to mobilize the language of justice, even as they challenged the monopolization of its definition by colonial powers. Their conviction that justice was on their side was combined with their recognition of the changing balance of forces in international law-making bodies. The earlier Geneva Conventions were ratified in 1949 by 59 states.<sup>70</sup> The drafting of the Additional Protocols involved “more than 150 delegations, 11 national liberation movements, and 50 IGOs.”<sup>71</sup> By 1974, the balance of power had changed—at least on the floor of international conferences—and anticolonialists believed that law should change too. While Walzer criticized the “legalist paradigm” for constructing a “paper world” disconnected from contemporary realities, Bedjaoui was central to articulating an account of international law as the stabilization of existing social and economic relations, which must evolve along with those relations.<sup>72</sup> Like Friedrich Nietzsche, Bedjaoui understood rights as “recognized and guaranteed degrees of power” susceptible to change when the balance of power shifts.<sup>73</sup>

While Nietzsche’s genealogical approach to legal rights was bound up with a critique of progress, however, for Bedjaoui and the nonaligned delegates at the Diplomatic Conference, decolonization was a progressive movement toward a more just world. From such a perspective, recent UN General Assembly resolutions had recoded what Joseph Slaughter terms “the emancipatory teleology of modernization and liberation” to support an anticolonial position.<sup>74</sup> The independence of former colonies was replacing “colonial law” with the “law of decolonization,” Bedjaoui argued, but this independence had been achieved only through resort “to fire and sword.”<sup>75</sup> Reflecting back at the end of the 1970s, Bedjaoui argued that the “world has made the sparks of progress fly.”<sup>76</sup> These sparks, he believed, would set alight the obsolete texts of a legal science that sought to consolidate a world that had faded away. The Algerian War had transformed the terrain on which international humanitarian law was discussed—as the delegates at the Diplomatic Conference soon realized.

### **The War in Vietnam and the “Sparks of Progress”**

If the Algerian War was central to the anticolonial attempt to reformulate international humanitarian law, the war in Vietnam is central to Walzer’s account of the “triumph of just war theory.” While opponents of the U.S. war originally embraced the realist international relations language of “interests,” Walzer argues, the experience of the war pushed them toward morality. “All of us in the anti-war camp suddenly began talking the language of just war,” Walzer recounts, “though we did not know that that was what we were doing.”<sup>77</sup> In searching for a shared moral language with which to denounce the war, the language of just war was the most readily available, he recalls, and opponents of the war reclaimed a vocabulary realism had deprived them of: terms like “aggression, intervention, proportionality, prisoners of war, civilians, double effect, terrorism, war crimes.”<sup>78</sup> Walzer’s “just war” vocabulary is a perplexing mix of terms that were established in existing international law long before the Vietnam War (for example “prisoners of war”) and terms like “double effect” that can be traced to Aquinas’s theological writings but that hardly played a major role in the anti-Vietnam War movement.<sup>79</sup> Walzer contends that attending to the meanings of these terms involved his contemporaries in a conversation with a distinct structure:



“Like characters in a novel,” he writes, “concepts in a theory shape the narrative or the argument in which they figure.”<sup>80</sup> Given this, it is worth attending to the terms Walzer excludes from his list: “imperialism,” “racism,” “colonialism,” “capitalism,” “self-determination.” Excluded terms, no less than included ones, serve to privilege a certain cast of characters and to give shape to a narrative and argument. While Walzer does attribute a place to self-determination in his broader just war theory, the absence of these terms from his account of the conceptual vocabulary used to oppose the Vietnam War obscures the role of anticolonialists in the struggle against the war, and their role in transforming international law in this period.<sup>81</sup> Such a strategy also obscures the extent to which the Algerian War had generated skepticism about a universal moral vocabulary by revealing the hypocrisy of what Sartre called Europe’s “racist humanism” which makes Europeans human by “creating slaves and monsters.”<sup>82</sup>

Vietnam was undoubtedly central to the revision of international law in the period of decolonization, but not in the way Walzer suggests. Meeting against the backdrop of the U.S. war, anticolonial delegates in Geneva portrayed U.S. conduct as evidence of law’s double standards. The priorities of these states were reflected early on in heated arguments about whether national liberation movements, including the “the Provisional Revolutionary Government of the Republic of South Vietnam,” or the Viet Cong, should participate on the same terms as states. Anticolonial delegates argued that national liberation movements were parties to international armed conflicts and must therefore be included. Unsurprisingly, the United States violently opposed such proposals, which it framed as motivated by political rather than humanitarian concerns. U.S. major David Graham—who was then professor of international law at the U.S. Judge Advocate General’s School and whose closeness to the U.S. delegation “strongly suggest that his views reflect those of his government”—reflected the following year that Vietnamese denunciations of the United States were “particularly unsuited for a conference aimed at supplementing the Laws of War and advancing the cause of human rights in armed conflicts.”<sup>83</sup> For many Third World and Soviet Bloc delegates, in contrast, nothing was more pertinent than condemning violations of existing laws by “imperialist states” and modifying the laws of war to protect national liberation fighters. The Chinese delegate, Pi Chi-Lung, captured the mood, arguing: “The Viet-Nameese people, with their long history of struggle against a cruel war of imperialist aggression, were very well qualified to discuss the 1949 Geneva Conventions and the question of protection of the civilian population.”<sup>84</sup> After much U.S. “arm twisting and recourse to threats,” the motion to welcome the Viet Cong was lost by a single vote, but the debate over the invitations shaped subsequent conflicts about wars of national liberation and belligerency.<sup>85</sup>

A key U.S. concern was to maintain existing protections for its own captured soldiers, particularly those in Vietnam. The 1949 Geneva Conventions had given what Best terms “a rather extraordinary amount of comfort, protection and privilege” to prisoners of war, and the United States was anxious to ensure this remained the case.<sup>86</sup> Article 85 of the PoW convention provided that PoWs prosecuted under the laws of the detaining power for acts committed prior to their capture would retain all the

benefits of the convention even if convicted of war crimes. The consequence of this, Best notes, was that

even the most awful of (war) criminals, fallen as a prisoner into the hands of an enemy State, brought to trial, found guilty, and sentenced to a long imprisonment, must throughout the whole experience be treated to the standards of food, accommodation, visits by representatives of the Protecting Power and the ICRC etc. prescribed for PoWs instead of the (almost certainly lower) standards applied to the Detaining Power's own nationals.<sup>87</sup>

In the 1940s, Soviet Bloc delegates vehemently opposed this provision; "No one will ever understand such a decision," a Soviet Bloc delegate remarked at the time.<sup>88</sup>

The Vietnamese did not understand it. In 1957, when the Democratic Republic of Vietnam ratified the Geneva Convention on Prisoners of War, it included a reservation to Article 85.<sup>89</sup> Almost three decades later, during the drafting of the Additional Protocols, the North Vietnamese delegation introduced a draft article concerning "Persons not entitled to PoW status" which sought to deny this status to "war criminals." According to the supporting statement:

United States pilots taken in *flagrante delicto* are at once protected by the 200 or so articles of the third Geneva Convention of 1949. They are immediately looked after and given shelter under material living conditions equal to those enjoyed by our ministers while at the same time the Vietnamese citizens who are victims of the bombs just dropped by these same war criminals are still weeping over the bodies of their dead parents and children and their burnt houses.<sup>90</sup>

"Justice," the Vietnamese argued, "demands that there should not be equal treatment between war criminals and their victims."<sup>91</sup> As we see below, this argument would produce a concerted counterattack from the Euro-Atlantic delegates, who rejected the very idea that justice had a place in the laws of war.

In the 1970s, delegates anxious to preserve the inherited order adopted a formalist stance and dismissed the demands of the new states as political and, thus, irrelevant. As one dissatisfied Western delegate noted in private, the Western response was marked by "a strong element of legalism" and a tendency to maintain that "the traditional law said X and Y and that was the way it had to be."<sup>92</sup> The "United Nations and the ICRC pursued their action on entirely different levels," the French delegate argued. Framing these levels in temporal terms, he argued that the UN dealt with "specific problems of the moment," while humanitarian law must "provide protection for all war victims at all times."<sup>93</sup> In these arguments for the apolitical timelessness of international law, Third World delegates saw an attempt to arrest progress and enshrine anachronistic colonial relations. Vietnam may have been a "specific problem of the moment" but it nonetheless highlighted the political stakes of a legal framework that constituted what the North Vietnamese delegate termed an "injustice in the case of ill-armed and weak peoples who are attacked on their own territory."<sup>94</sup>

Against attempts to characterize their own arguments as political rather than humanitarian, anticolonial delegates retorted that their opponents were masking their own political positions in the language of neutrality.<sup>95</sup> While the United States

portrayed itself as the guardian of neutrality, humanity, and nondiscrimination in international law, the new states presented themselves as struggling to eradicate the existing double standard that protected occupying powers while treating anticolonial fighters as “treasonous elements.”<sup>96</sup> Both were right. The neutrality of traditional law, as Nabulsi suggests, was “deeply slanted” in favor of occupying armies at the expense of populations who resisted them.<sup>97</sup> Having succeeded in having this bias consolidated in 1949, the United States and its allies now sought to rest on “tradition.” Anticolonial struggles, in contrast, revealed the political uses of neutrality. Reflecting on the competing claims to justice and lawfulness generated by the conference, even an ICRC observer noted that “there would always be a double standard”—the question was whether it favored “liberation fighters or colonial elites.”<sup>98</sup>

### **“The True Spirit of Humanity Should be Based on Justice”<sup>99</sup>**

Anxious to defend the universality of traditional international law against the charge that it was an antiquated product of colonialism, capitalism, and Christianity, the United States had no reason to ground its arguments in a Christian tradition.<sup>100</sup> More surprising is the extent to which the new states and the Soviet Bloc used the language of the just war to distinguish anticolonial violence from the wars of colonial powers.<sup>101</sup> “It was undeniable that there were such things as just wars,” the delegate of Mauritania argued. “When a nation was driven to the wall, it could not forget its right to self-determination.”<sup>102</sup> The Chinese delegate concurred: “a distinction between just and unjust wars, should be made in the new Protocols.”<sup>103</sup> The Albanian delegate agreed, arguing that the text should provide “for the condemnation of the aggressors.”<sup>104</sup> Despite the prominence of this just war language, its stakes were often modest: the key demand of these delegates was simply that the law provide equal treatment by extending privileged belligerent status and POW protection to national liberation fighters.

Kinsella has suggested that in mobilizing this language, the new states were “consciously invoking the medieval concept of just wars as fought by a legitimate authority in pursuit of justice and peace.”<sup>105</sup> If this were true, it would bolster Walzer’s account of the triumph of just war and universalize that tradition’s vision of justice. Here, I pursue another argument: while Western states characterized the just-war language of the new states as medieval, the anticolonial delegates did not refer either to medieval just war thinkers or to Christian theology. Rather, they drew on the principles of anti-imperialism and self-determination to articulate a contrasting vision of justice that challenged the colonial configuration of international law and the privileging of Christian civilization. Nor did their account of self-determination share in the racial hierarchies that animated the account of self-determination Walzer borrows from J. S. Mill, who excluded from his account of the individual’s sovereignty over himself “those backwards states of society in which the race itself may be considered as in its nonage” (or infancy).<sup>106</sup>

The evocations of just war on the conference floor were influenced more by Vladimir Lenin and Mao Zedong than by Augustine and Aquinas. For the Russian Bolshevik and the Chinese anticolonialist, violence was justified to overcome colonial domination and achieve self-determination. Far from being inspired by the Middle

Ages, both thinkers saw anticolonial revolutions as progressive struggles on the path to world revolution. As early as 1915, Lenin stressed that any war that furthers the proletarian struggle for socialism is defensive and just; “if tomorrow, Morocco were to declare war on France, India on England, Persia or China . . . those would be ‘just,’ ‘defensive’ wars, irrespective of who attacked first,” he wrote.<sup>107</sup> For Lenin, “justice” was not an autonomous doctrine but a “mere handmaiden of ‘revolutionary progress.’”<sup>108</sup> His position mirrored Jean-Jacques Rousseau’s contention that “wars coming from the old world [of empire and inequality] were unjust wars of conquest, while wars from the new world were just wars of self-defence.”<sup>109</sup> With Stalin’s ascendancy, distinguishing just from unjust wars became common Soviet practice and the resistance to the Nazis was upheld as the paradigmatic just war. The role of Soviet international lawyers, a Soviet publicist explained, was to secure legal recognition for partisans fighting on territories occupied by “imperialist aggressors, keeping in mind the Leninist-Stalinist teachings on just and unjust wars.”<sup>110</sup>

Mao, whom even Schmitt credited as the “greatest practitioner of revolutionary war in our time” as well as its most famous theorist, similarly upheld progress as the criterion for determining the justice of wars.<sup>111</sup> “We Communists oppose all unjust wars that impede progress,” Mao wrote in 1938. “Not only do we Communists not oppose just wars; we actively participate in them.”<sup>112</sup> The centrality of conflict to Mao’s account of progress reflected his early disillusionment with the gradualist, evolutionary perspective of Wilsonian liberalism. As a twenty-five-year-old student, Mao had greeted the betrayal of Chinese hopes at the 1919 Paris Peace Conference by denouncing the “shameless” way in which leaders used the rhetoric of self-determination while denying it in practice.<sup>113</sup>

Into the 1970s, the United States continued to view the extension of self-determination as “gradual, earned and peaceful” and its officials were “appalled” by armed anticolonial self-determination struggles.<sup>114</sup> In defending such struggles, anti-colonial delegates took up arguments that resembled Mao’s rather than the medieval just war tradition. The Chinese delegate Pi Chi-Lung argued imperialist wars were unjust wars, and that it was necessary “to mobilize the people of the world in a resolute struggle against the policies pursued by the imperialist countries.”<sup>115</sup> In doing so, he followed Mao’s argument that (just) revolutionary war was the only means to abolish war. When society “advanced” sufficiently to abolish classes and states, there will be no more wars, “unjust or just,” Mao argued; “that will be the era of perpetual peace for mankind.”<sup>116</sup> Such a vision owed more to Immanuel Kant’s Enlightenment account of progress than to the medieval theology of Augustine and Aquinas.<sup>117</sup> The wager of Third Worldism was that this progressive vision could be divorced from the racial and civilizational hierarchies that permeate Kant’s cosmopolitanism and his metaphysics of universal history.<sup>118</sup>

The Egyptian legal scholar Georges Abi-Saab captured the significance Third World delegates ascribed to the distinction between just and unjust wars when he reflected later that justice is central to the asymmetrical character of wars of national liberation. In these wars, he argued, one party controls the state, and therefore the police, a conventional army and sophisticated weaponry. “The other is composed of irregular combatants whose only asset is their high motivation and faith in the justice

of their cause.”<sup>119</sup> While the Soviet bloc and anticolonial delegates shared the view that this focus on the justness of war marked a break with a realist stance for which “might makes right,” they did not necessarily agree either on the criteria of justice or on its consequences for *in bello* considerations.

Two contrasting visions of justice were reflected in two distinctive amendments submitted prior to the 1974 Conference, both of which characterized wars of national liberation as international armed conflicts. The first, moved by the Soviet Bloc with the support of Algeria, Tanzania, and Morocco, stated that international armed conflicts included “conflicts where people fight against colonial and alien discrimination and against racist regimes.” The second, moved by a coalition of fifteen nonaligned states and introduced by Abi-Saab, sought to extend international status to “armed struggles by people exercising their right to self-determination.”<sup>120</sup> While these amendments were ultimately merged, their initial separation reflected Soviet anxieties about the extension of the language of self-determination to Eastern Europe, and nonaligned concerns to avoid accusations of politicizing the laws of war.

The latter bloc portrayed the question of the international status of national liberation fighters as a legal question, consequent to the right to self-determination, which required no basis in contested political assumptions about justice.<sup>121</sup> “Was it political to take into consideration some of the atrocious and murderous armed conflicts being waged in the present?” Abi Saab asked the conference.<sup>122</sup> The question was rhetorical, but Abi Saab’s morally loaded language signals the inadequacy of any rigid distinction of law, politics, and morality for debating colonial wars. His question received contrasting answers from his allies as the debates about the justice of war extended beyond the specific question of the international character of anticolonial self-determination struggles to inform *in bello* questions like the treatment of PoWs.

For the Soviet Bloc delegates, an unjust war was an unlawful war of aggression, and anticolonial movements were “resistance movements opposing aggression.”<sup>123</sup> In focusing on aggression, they drew on a form of legal thinking that jurists as different as Jean Pictet, the head of the ICRC’s legal commission, and Schmitt, the chief legal theorist of National Socialism traced to the U.S.-sponsored Kellogg-Briand pact of 1928, which both saw as conflating injustice and aggression.<sup>124</sup> For Pictet, the attempt to outlaw war led to “the unexpected resurgence of the antique myth of the just war, which caused so much evil in the past.”<sup>125</sup> For Schmitt, the designation of aggression as a crime expressed the moralism of the U.S. empire, which “makes war on the ‘just’ side into an execution or cleansing operation and the war on the unjust side into a resistance contrary to all justice and morals, led by vermin, trouble makers, pirates and gangsters.”<sup>126</sup> Although Schmitt tasked the U.S. empire with moralism, in recent law-making bodies, as we have seen, it had taken an antimoralist stance, relying on the slanted neutrality of “traditional law” to preserve its rights as an occupying power.<sup>127</sup>

For many Third World delegates, distinguishing just from unjust wars was not simply a matter of criminalizing “the first shot,” in Schmitt’s words; rather, they drew on the lexicon of anti-imperialism to argue that the substantive justice of struggles against colonialism and racism should be acknowledged by international law. Those

who waged these just struggles, they argued, should not be deprived of law's protections.<sup>128</sup> Viewing the contemporary "triumph of just war theory" through the lens of the Third World contributions to the Diplomatic Conference upsets Walzer's account of moral progress by confronting it with a dramatically different vision of the progressive transformation of international law—a vision whose subject is not the U.S. state but the (often violent) national liberation struggles of colonized peoples. These debates challenge Walzer's narrative of the development of a moral consensus about warfare, by highlighting the deep political antagonisms generated by any attempt to determine the justice of war.<sup>129</sup>

### The "Dangerous Concept of the Just War": Anglo-European Objections

During the Diplomatic Conference, the most significant conflicts concerned the implications of just war language for *in bello* questions. This dispute was not new. As discussed above, during the drafting of the 1949 Geneva Conventions, the popular belief in the justice of popular resistance to Nazi occupation led to arguments that blurred the border between *ad bellum* and *in bello* considerations. Yet as long as it was "European experience that filled the minds and the speeches of delegates," these disputes were viewed by both sides as having a legitimate place in the development of international law.<sup>130</sup> It was otherwise in the 1970s when anticolonial delegates asserted the justice of their own cause and their right to belligerent status. Then, Western delegates responded to the progressivist arguments of the anticolonialists by accusing them, with some irony, of seeking the abandonment of all legal strictures on the use of force and a return to the Middle Ages.

It was U.S. delegate Aldrich who launched the most sustained argument against just war thinking. The U.S. government, Aldrich stated, "firmly held the view that the conference should reaffirm the philosophy of the Geneva Conventions and reject any efforts to introduce into the law discriminating levels of protection based on subjective criteria such as the justness of the cause for which a particular group was fighting."<sup>131</sup> Similarly, UK delegate Sir Colin Crowe warned that moves to divide wars into just and unjust wars "were extremely dangerous approaches and totally alien to all the principles of international law."<sup>132</sup> Far from the claim in the recent U.S. law of war manual that international humanitarian law is rooted in the just war tradition, the United States and its allies sought to rigorously distinguish what they depicted as the "modern" humanitarian philosophy underpinning the Geneva Conventions from its barbarous medieval antithesis. In a typical instance, the UK delegate contrasted the just war tradition with what he characterized as the humanist philosophy underpinning the Geneva Conventions and argued for a humanitarian approach, "more in conformity with the work of Henry Dunant," referring to the founder of the Red Cross.<sup>133</sup>

The attempt by the Western states to uphold the "traditional" humanitarian philosophy of the ICRC was compromised by the brutality of colonial conflicts. The "principle of humanity," on which the work of the ICRC was founded, marked out both the belonging to a single species and a moral stance assumed to flow from that belonging. It generated a commitment to alleviate suffering, protect life and health, and ensure respect for human being, and it served as a cipher for the mobilization of

moral sentiment.<sup>134</sup> Wars of decolonization generated deep skepticism about the universality of such sentimentalism, which increasingly appeared as a distinctive moral culture, drawing on Christian charity and imbricated with colonial violence.<sup>135</sup>

Moreover, the “traditional” account of law, which excluded questions of justice and privileged the rights of occupiers, had faced serious challenge in the wake of World War II. One of those postwar challengers was Richard Baxter, who would go on to act as the U.S. delegation’s chief counsel during the drafting of the 1977 Additional Protocols. Writing in 1950, Baxter had noted that the “traditional” view, according to which those Lieber called “war rebels” should be punished and deprived of POW status, had been opposed by small states since at least the Brussels conference of 1874.<sup>136</sup> Baxter approvingly cited the examples of the Netherlands, Belgium, and Switzerland, who defended the *levee en masse*, or mass uprising, and objected to providing the enemy “advance jurisdiction over citizens who were responding to the highest sentiments of patriotism and to a positive duty to defend their country.”<sup>137</sup> Baxter rejected the validity of the “traditional concepts” of the “war traitor” and the “war rebel,” which imposed a duty to obey the occupier, as relics of a law of conquest that subsisted only due to “inertia in the law.”<sup>138</sup> Moreover, he depicted moral sensibilities as directly relevant to the development of the laws of war; citing the renowned German jurist Lassa Oppenheim’s contention that using treason and espionage against an occupying army was “detestable and immoral,” Baxter argued that such a view was not “in conformity with modern views of morality in warfare.”<sup>139</sup> Stressing that existing international law advantaged the aggressor over defending forces, and the occupier over the inhabitant, he concluded:

If international law is to have a moral content, it is difficult to see how an ethical basis can be found for the principle that international law intervenes to quell acts of resistance which, in the moral sense of the world, are regarded as heroic rather than criminal.<sup>140</sup>

In the wake of World War II, “the terms of the moral discourse of irregular fighters had changed,” and Baxter’s arguments would have an afterlife in the service of anti-colonial struggles.<sup>141</sup>

When these arguments were taken up by anticolonialists during the Diplomatic Conference, Baxter, now legal counsel to the U.S. delegation, took a very different stance. Along with other Western military figures and publicists, Baxter portrayed considerations of justice and morality as extremely dangerous and prejudicial to the very notion of restraint in warfare. Writing in 1975, Baxter explained that, in the view of his delegation, applying the laws of international armed conflict to wars of national liberation would “import once more into the law of war the notion of *bellum iustum* [the just war].”<sup>142</sup> For many delegates, he noted, wars of national liberation are “good wars” and should therefore be governed by the laws of armed conflict. “But the idea of the just war,” Baxter warned, “has in the past been productive of some of the worst offenses against the victims of war.”<sup>143</sup> Baxter approvingly cited the words of his illustrious predecessor, Colonel Draper, who wrote that it was “not until the Christian idea of the ‘Just War’ had lived out its long life and its usefulness that belligerents came to accept more civilized usages in war.”<sup>144</sup>

Writing in 1975, U.S. major Graham went furthest in arguing that legitimating armed struggles for national self-determination “can readily and validly be analogized to the eleventh century ‘just war’ concept, used during the Crusades to justify killing in the name of God.”<sup>145</sup> To recognize that fighters, the Vietnamese guerillas for instance, were waging a just war, the major claimed, demanded that those waging it be “unfettered by legal principles that would stand in the way of [their] goals.”<sup>146</sup> If the United States failed to preserve the existing legal order, Graham argued, this will “only hasten the world’s return to the eleventh century.”<sup>147</sup>

Just as the new states proclaimed their determination to break with the colonial past and modernize international law, the Western delegates depicted the Third World challenge as medieval. In stark contrast to the position in the 2015 law of war manual, the U.S. delegates represented the just war tradition as licensing unlimited brutality. Yet despite the exaggerated claims of the Western delegates, anticolonial delegates never argued that the justice of the anticolonial cause licensed the abrogation of existing laws of war. Even the North Vietnamese proposal that “war criminals” be deprived of PoW status did not aim to free the “just” party from the strictures of law but stressed that such captives should be guaranteed a right to legal defense and a “fair and proper trial” and be treated according to the “irreducible minimum of principles governing humanitarian treatment” laid out in common article three of the 1949 Geneva Conventions.<sup>148</sup>

Far from believing that all was fair in a just war, anticolonial delegates also fought for stronger legal protections for civilian populations. While the U.S. delegation protested just war language on the basis that it would weaken civilian protection, it also managed to secure more permissive standards of so-called collateral damage than proposed by Third World states.<sup>149</sup> It was the Iraqi delegate who argued most forcefully that all “civilian areas should be regarded as prohibited targets.”<sup>150</sup> Against such proposals, the United States lobbied successfully for the codification of what it depicted as the customary law standard of “proportionality,” despite the protestations of the North Vietnamese delegation, which argued that proportionality “had been used to justify the American air attacks against them.”<sup>151</sup> Ironically, this “proportionality” standard is a key aspect of what Walzer terms the “just war tradition” and it is to Aquinas that contemporary U.S. military lawyers turn in justifying “proportionate” “collateral damage.”<sup>152</sup>

Far from the debates over the Additional Protocols reflecting an emerging moral consensus expressed in Christian just war language, the conference was the site for a conflict of moral positions and understandings of justice. Contra the Western delegates, who depicted just war language as the gate through which the four horsemen of the apocalypse would enter, the effects of this language for the *jus in bello* were not defined in advance. Certainly, just war language was used to legitimate anticolonial violence, but those who affirmed the justice of such violence aimed to extend the realm of international law, not to exempt anticolonial fighters from legal restraints. By attesting to the justice of their cause, they sought to give national liberation fighters equal belligerent status and to secure greater protection of their civilians from aerial bombardment by invading powers. While the Western states argued that any concession to civilian belligerency would weaken civilian protection and jeopardize



the foundations of the laws of war, their own goal was to preserve the freedom of occupying powers to treat those who resisted them as mere criminals or terrorists, exempted from the laws that regulate international armed conflicts.

### **The Demise, and the Triumph, of the Just War**

What was the outcome of all this “just war” discussion? Its key legacy is Article 1, paragraph 4 of Additional Protocol 1, which recognizes that the situations to which the protocol applies “include armed conflicts in which people are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination.”<sup>153</sup> Reflecting the prestige of the language of self-determination at the conference, this “just war” article was ultimately adopted 87 to 1, with 11 (Western) abstentions.<sup>154</sup> Explaining its lone “no” vote, the Israeli delegate argued that the conference “had revived the spectre of ‘just war’ theory, with its different rules for different conflicts and different parties.”<sup>155</sup> Upholding his own country as the guardian of “the spirit and accepted norms of international humanitarian law,” the Israeli delegate told the conference that the delimitation of international and noninternational conflicts must be based on objective criteria. “It should apply to the just and the unjust, to the one who might be considered the aggressor by some and the victim by others.”<sup>156</sup>

In reality, Article 1 (4) did not apply different rules to different parties but instead brought certain national liberation fighters into the same set of rules that regulated warfare between states. This was later acknowledged by Aldrich himself, who by 1985 was desperately trying to counter the Reagan administration’s refusal to send the protocol to the U.S. Senate for ratification, by reassuring contemporary critics who continued to condemn its just war rhetoric. Although the United States had reacted negatively to the inclusion of paragraph 4, “primarily out of concern that it imported into humanitarian law the dangerous concept of the just war,” Aldrich wrote in 1985, United States fears that this would result in the restriction of legal protections to those determined to be fighting just wars had not been realized: “Members of armed forces of liberation movements are not granted protections simply because they may be deemed to be fighting for a just cause,” he wrote. “The Protocol and the Conventions must apply equally to both sides if they are to apply to the conflict at all.”<sup>157</sup> Despite Aldrich’s efforts, President Reagan justified his refusal to send Additional Protocol 1 to the Senate by stating that the United States “would not give protection to terrorist groups as a price for progress in humanitarian law.”<sup>158</sup>

The very equality of treatment that Aldrich would eventually acknowledge was the outcome of the drafting debates represented a decisive victory for the anticolonial delegates. Their position was emblemized by the Palestinian Liberation Organization observer Chawki Armali, who expressed “deep satisfaction” that the “international community had re-confirmed the legitimacy of the struggles of peoples exercising their right to self-determination.”<sup>159</sup> This victory was sufficient to ensure that, almost forty years later, the new U.S. Department of Defense Law of War manual criticizes Additional Protocol 1 for having “relaxed the requirements for obtaining the privileges of ‘combatant status’ and incorporated “subjective and politicized criteria”

for the applicability of the conventions that “eliminate the distinction between international and internal armed conflicts.”<sup>160</sup>

That U.S. opposition to Additional Protocol I has remained consistent while that country has moved from being an implacable opponent of the language of just war to affirming the just war tradition as the foundation of the Geneva Conventions helps to clarify the real nature of the contemporary “triumph” of just war theory. I have suggested that the language of the just war was used during the drafting of the Additional Protocols in the service of a very different vision of justice, articulated by anticolonialists against the most powerful states. In a sense, Walzer is right to note that the end of the Vietnam War was central to the uptake of the language of just war by the U.S. administration. At the Diplomatic Conference, the U.S. delegation was faced with Third World states lecturing it about the My Lai massacre and confronting it with the evidence of the Russell Tribunal.<sup>161</sup> In such a context, in a legal forum dominated by anticolonialists, the U.S. delegate could not possibly have suggested, using the words of Obama’s Nobel Peace Prize speech, that “America will always be the voice of those aspirations that are universal.”<sup>162</sup>

In 1974, the U.S. delegation was well aware that those Third World states that wished to decide on the justice of wars would not decide in its favor. It responded by depicting just war arguments as a relic of medieval cruelty: the brutal other of the modern humanitarian movement and the laws of war. As the eminent English international lawyer Colonel Draper noted, however, “the story of the ‘just and pious war’ is one of successive contents flowing through an ancient concept.”<sup>163</sup> The extension of international status to wars of national liberation was only one of the anticolonial legal victories that reshaped international law during the twentieth century. In the wake of decolonization, prohibitions on aggressive wars and norms of nonintervention that had served to protect the sovereign independence of a select group of countries, many of them colonial powers, were called on to protect former colonies from the interventions of their former rulers. In this context, the neutral humanitarianism defended by major powers in the 1970s soon came under pressure. Affirmations of sovereignty by postcolonial states were challenged by a new moral politics of human rights that was deeply suspicious of state sovereignty and worked to justify “humanitarian interventions,” not least in former colonies. Rather than simply restraining violence, this moral language has served to justify military force and to blur the borders between aggressive and defensive wars.<sup>164</sup>

The triumph of just war, announced by Walzer as evidence of moral progress, reflects the shifting balance of power in that bitter struggle that pitted “the imperialist countries and their lackeys” against “the struggling people of Africa, Latin America and Asia,” to quote the Cuban delegate. In the wake of decolonization, newly independent states saw their new sovereignty and the recognition of the belligerency of national liberation fighters as steps toward the progressive decolonization of international law. Instead, formal independence led to increasing demands for new standards of “civilized” conduct, and for constraints on the internal actions of those Gareth Evans disparagingly terms “developing-country-sovereignty addicts.”<sup>165</sup> The subsequent period saw the rising prestige of a cluster of moral justifications for military intervention, from humanitarian intervention, to the responsibility to protect, to the

war on terror and the just war. Today, *jus ad bellum* rules that developed in a state-centric colonial order to prevent aggressive wars are increasingly portrayed as inadequate in the face of crimes against humanity, mass human rights abuses, and terrorist attacks by nonstate actors.<sup>166</sup> The erosion of the paradigm of nonintervention enshrined in the UN Charter has been accompanied, as Edward Said noted soon after 9/11, by a renewed appraisal of contemporary American imperial power as “enlightened and even altruistic.”<sup>167</sup>

Anticolonialists used the language of the just war to legitimize violent anticolonial struggles aimed at establishing an international order free of colonial domination and civilizational hierarchies. The U.S. state has used the same language to legitimize the use of imperial force, by providing a moral gloss to military interventions that lack the sanction of international law. Today, as the post-9-11 “war on terror” blurs into an unending war to defeat ISIS, the claim to be fighting a just war allows the United States to portray its own wars as universal police actions against the enemies of humanity and legitimizes abrogating the laws of war and depriving the adversary of law’s protection.

The claim in the new law manual that the laws of war are founded on the just war tradition fuses the humanitarianism of the Geneva Conventions with a distinctly theological vision of universal justice.<sup>168</sup> This was also the message of Obama’s Nobel Peace Prize speech, in which the then-president called on nations “to think in new ways about the notion of just war.”<sup>169</sup> Obama spoke then of the “burden” the United States had taken up in promoting global peace, prosperity, and democracy. Anxious to distinguish his administration from that of his predecessors, he proclaimed that what makes America different is that, faced with a “vicious adversary that abides by no rules,” the United States remains a “standard bearer in the conduct of war.”<sup>170</sup>

Such a message portrayed the U.S. military as the guardian of both universal justice and international law. It reflected what Walzer acknowledges may well be “the deepest cause” of the triumph of just war theory: that “there are now reasons of state for fighting justly.”<sup>171</sup> It may be that Walzer is correct that today the “usefulness of morality” in winning wars is widely acknowledged, although the recent bombings of hospitals by Russia in Syria, Saudi Arabia in Yemen, the United States in Afghanistan, and Israel in Gaza suggests that the use of “disproportionate force” against civilians and civilian infrastructure retains a central place in the arsenal of “military necessity.”<sup>172</sup> Even if it were true that powerful states had recognized that incorporating morality into their fighting strategies gave them a military advantage, this was hardly the vision of justice articulated on behalf of the “wretched of the earth” at the Geneva conferences. Moreover, as Obama’s intensification of drone strikes with their extensive “collateral damage” suggested, the moralization of warfare is double edged, serving not only to restrain killing but also to make it more effective—and less contested by citizens of liberal states.

While still a candidate for the U.S. presidency, Donald Trump signaled his intent to move away from the “burden” of moral universalism in favor of a starker language of good versus evil, proclaiming that “the problem is the Geneva Conventions, all sorts of rules and regulations, so that soldiers are afraid to fight.”<sup>173</sup> As president, Trump inherited not only the ongoing drone wars of the Obama Administration but

also its moralizing language. In March 2017, he authorized military strikes against Syria's Shayrat Airfield without the prior authorization of the U.S. Congress or the Security Council, to punish the Assad regime for its alleged use of chemical weapons and to deter further use of such weapons.<sup>174</sup> In a televised address following the strikes, Trump called on "all civilized nations" to join the struggle against terrorism and bloodshed, proclaiming: "We hope that as long as America stands for justice, then peace and harmony will in the end prevail."<sup>175</sup> Whatever the hopes of the U.S. president, the embrace of the just war by recent U.S. administrations has produced not perpetual peace but seemingly endless war.

## NOTES

This research was supported by an Australian Research Council DECRA fellowship, awarded for the project "Inventing Collateral Damage: The Changing Moral Economy of War." Earlier versions of this essay were presented at the Australian History Association (2015), the Institute of Culture and Society (Western Sydney University) (2016), and at the University of New South Wales Law School (2016). My thanks to Tim Rowse and Daniel McLoughlin for the invitations, and to all those who engaged in the fruitful discussions. I am very grateful to the following for generous and astute comments on earlier drafts: Ian Hunter, Mark Kelly, Daniel McLoughlin, Vicky Sentas, and Ihab Shalbak. Thanks also to the two anonymous referees for their extremely detailed and helpful comments and to Nehal Bhuta at *Humanity*.

1. John Norton Moore, "A Theoretical Overview of the Laws of War in a Post-Charter World, with Emphasis on the Challenge of Civil Wars, 'Wars of National Liberation,' Mixed Civil-International Wars, and Terrorism," *American University Law Review* 31, no. 4 (1982): 841–42.

2. Michael Walzer, "The Triumph of Just War Theory (and the Dangers of Success)," *Social Research* 69, no. 4 (Winter 2002): 926.

3. *Ibid.*, 925.

4. *Ibid.*, 935.

5. *Ibid.*, 935.

6. *Ibid.*, 929.

7. *Ibid.*, 333.

8. United States Department of Defense, *Law of War Manual*, 2015, accessed June 15, 2015, <http://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf>, 26.

9. Donald Trump, "Statement by President Trump on Syria," April 6, 2017, accessed April 7, 2017, <http://www.whitehouse.gov/the-press-office/2017/04/06/statement-president-trump-syria>.

10. Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *New York Times*, May 29, 2012, accessed June 15, 2015, [http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?\\_r=0](http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=0).

11. Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (New York: Brookings, 2008), 140.

12. See (United States Lieutenant Colonel) Chris Mayer, "The Doctrine of Double Effect: Its Relevance to Collateral Damage Cases," in *Accountability, Restorative Justice and Reconciliation: Report of a Civil Society Seminar on the Review of the Report of the UN Secretary General's Panel of Experts on Accountability in Sri Lanka and Connected Papers* (Ethul Kotte: Marga Institute, 2011), 81.

13. Ronald C. Arkin, "Governing Lethal Behaviour: Embedding Ethics in a Hybrid Deliberative/Reactive Robot Architecture," *Technical Report GIT-GVU-07-11*, 2.
14. United States Department of Defense, *Law of War Manual*, v. But see the contributions by Sean Watts and Rachel Van Landingham to the *Just Security* forum on the manual, noting its resurrection of the principle of "honour," accessed March 20, 2017, <https://www.justsecurity.org/tag/law-of-war-manual-forum/>.
15. O'Brien cited in United States Department of Defense, *Law of War Manual*, 2015, note 104, 25.
16. Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 12.
17. United States Department of Defense, *Law of War Manual*, 2015, 26.
18. United States Department of Defense, *Law of War Manual*, 2015, 25.
19. Walzer, *Just and Unjust Wars*, xii. Anne Orford associates Walzer with a moral antilegalism and suggests that, at the time he wrote, to be "anti-legalist" meant "rejecting constraints on unilateral interventions in the mode of Kissinger." Anne Orford, "Moral Internationalism and the Responsibility to Protect," *European Journal of International Law* 24, no. 1 (February 2013): 93, 91. This essay shows, in contrast, that during the drafting of the Additional Protocols, U.S. representatives depicted themselves as guarding "traditional law" against the moralism of anticolonialists.
20. Walzer, *Just and Unjust Wars*, xxiv. My concern is with Walzer's retrospective account of the "triumph" of just war theory, rather than the detail of his own theory. Nonetheless, his methodological argument against "historical relativism" is relevant to his later account of moral consensus (16). While he acknowledges that "the moral reality of war is not the same for us as it was for Ghengis Khan," Walzer nonetheless argues that fundamental social and political transformations "may well leave the moral world intact or at least sufficiently whole that we can still be said to share it with our ancestors" (16). In a critique of historical and cultural relativism, Walzer argues that when studying the world of these ancestors we should assume that "they saw the world much as we do" (16). Conversely, contextualist (or in Walzer's term "historical relativist") intellectual historians like Quentin Skinner drew on the cultural anthropology of figures like Clifford Geertz to challenge the assumption that we share an intellectual world with those we study. See Teresa Bejan and Quentin Skinner, "Quentin Skinner on Meaning and Method," *The Art of Theory: Conversations in Political Philosophy*, 2014, accessed September 10, 2016, <http://www.artoftheory.com/quentin-skinner-on-meaning-and-method/>.
21. Michael Walzer, *Just and Unjust Wars*, xxiii.
22. On conflicts over human rights in this period, see Roland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2010); Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2010); Joseph Slaughter, *Human Rights Inc.: The World Novel, Narrative Form, and International Law* (New York: Fordham University Press, 2007).
23. See Georges Abi Saab, "Wars of National Liberation in the Geneva Conventions and Protocols," *Collected Courses of the Hague Academy of International Law* 165 (Leiden and Boston: Brill, Nijhoff, 1979), 388.
24. George H. Aldrich, "Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I," *Virginia Journal of International Law* 26, no. 3 (1985–86): 701.
25. See, for instance, Richard Baxter, "Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law," *Harvard International Law Journal* 16 (1975): 17.

26. Barbara J. Keys, *Reclaiming American Virtue* (Cambridge, Mass.: Harvard University Press, 2014), 54.
27. I have written about the influence of decolonization on efforts to redefine sovereignty as responsibility in Jessica Whyte, "Always on Top: The Responsibility to Protect and the Persistence of Colonialism," in *Postcolonial World*, ed. Jyotsna Sing and David Kim (London: Routledge, 2016.)
28. R. R. Baxter, "Modernizing the Law of War," *Military Law Review* 78 (Fall 1977): 178.
29. *Ibid.*, 67.
30. Just as former colonies used their influence in the General Assembly to transform international law, Walzer declared that "legal positivism . . . has become in the age of the United Nations increasingly uninteresting." Walzer, *Just and Unjust Wars*, xx.
31. See Roland Burke, *Decolonization and the Evolution of International Human Rights*.
32. *Ibid.*, 93.
33. United Nations, "Human Rights in Armed Conflicts," *Final Act of the Tehran Conference*, May 12, 1968, A/CONF.32/41, accessed September 3, 2016, [http://legal.un.org/avl/pdf/ha/fatchr/Final\\_Act\\_of\\_TehranConf.pdf](http://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf).
34. See Byelorussian Soviet Socialist Republic submission, "Comments by Governments on the Reports of the Secretary-General on Respect for Human Rights in Armed Conflicts," June 7, 1971, A/8313, 8. This characterization of Israeli aggression stands in stark opposition to Walzer's position; an avowed Zionist, Walzer argues the Israeli preemptive strike in the 1967 Six Days War was just. Walzer, *Just and Unjust Wars*, 85.
35. Abi Saab, "Wars of National Liberation in the Geneva Conventions," 374.
36. David P. Forsyth, "The 1974 Diplomatic Conference on Humanitarian Law: Some Observations," *American Journal of International Law* 69, no. 1 (January 1975): 87; George H. Aldrich in "Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts," Geneva (1974–1977) vol. 5, 110 CDDH/SR.II, 49.
37. See Abi Saab, "Wars of National Liberation in the Geneva Conventions," 377. This position relied on a (deeply contested) argument that the UN General Assembly was a source of international law. On these contestations, see Antony Anghie, "Legal Aspects of the NIEO," *Humanity* 6, no. 1 (Spring 2015): 149.
38. United Nations, "Growth in United Nations Membership, 1945–present," accessed August 5, 2016, <http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945present/index.html>.
39. Fabian Klose, "The Colonial Testing Ground: The International Committee of the Red Cross and the Violent End of Empire," *Humanity* 2, no. 1 (Spring 2011): 109.
40. See Abi Saab, "Wars of National Liberation in the Geneva Conventions," 370.
41. Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, Gen. Ass. Res. 2625, October 24, 1970, accessed September 10, 2016, <https://www.ilsa.org/jessup/jessup15/DeclarationonFriendlyRelations.pdf>; Geoffrey Best, *War and Law since 1945* (Oxford: Oxford University Press, 1994), 227.
42. Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, Gen. Ass. Res. 3103, December 12, 1973, accessed September 9, 2016, <http://www.palis-d.de/archive/text/UNResolution3103.pdf>. On the significance

of this declaration for international humanitarian law, see Abi Saab, “Wars of National Liberation in the Geneva Conventions,” 372.

43. Cited in David. E. Graham, “The 1974 Diplomatic Conference on the Law of War: A Victory for Political Causes and a Return to the ‘Just War’ Concept of the Eleventh Century,” *Washington and Lee Law Review* 32, no. 1 (1975): 43.

44. See Abi Saab, “Wars of National Liberation in the Geneva Conventions,” 367.

45. Mohammed Bedjaoui, *Law and the Algerian Revolution* (Brussels: International Association of Democratic Lawyers, 1961), 218. As Algerian foreign minister and ambassador to France during the Algerian War, Bedjaoui was central to the Algerian Front de Libération Nationale (F.L.N.) campaign to extend the laws of war to anticolonial struggles and grant belligerent status to national liberation fighters. As Amanda Alexander usefully recalls, this preexisting exclusion of guerillas from belligerent status was not a “gap” in the law—it was the intent of existing law. Amanda Alexander, “International Humanitarian Law, Postcolonialism and the 1977 *Geneva Protocol I*,” *Melbourne Journal of International Law* 17, no. 1 (2016): 19, 21–23.

46. Klose, “The Colonial Testing Ground,” 110.

47. Bedjaoui, *Law and the Algerian Revolution*, 218.

48. Klose, “The Colonial Testing Ground,” 109. On the characterization of colonial conflicts as “internal” ones, see Best, *War and Law*, 172.

49. Cited in Best, *War and Law*, 172.

50. Cited in Helen Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Ithaca, N.Y.: Cornell University Press, 2011), 119.

51. Klose, “The Colonial Testing Ground,” 109. Karma Nabulsi, *Traditions of War: Occupation, Resistance and the Law* (Oxford: Oxford University Press: 1999), 14.

52. See Best, *War and Law*, 127.

53. *Ibid.*, 129.

54. On the final conditions for granting PoW status to irregular fighters, see International Committee of the Red Cross, “Convention (III) relative to the Treatment of Prisoners of War,” Geneva, August 12, 1949, accessed June 16, 2018, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=2F681B08868538C2C12563CD0051AA8D>.

55. Nabulsi, *Traditions of War*, 160.

56. Carl Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political*, trans. A. C. Goodson (East Lansing: Michigan State University Press, 2004), 6.

57. Quoted in Nabulsi, *Traditions of War*, 173.

58. Gerrit Gong, *The “Standard of Civilization” in International Society* (Oxford: Clarendon Press, 1984), 28. As Martti Koskenniemi rightly stresses, there was never a “standard,” in the sense of an objective criteria that excluded states could use to their advantage. Every European concession was a matter of quid pro quo, while the “language of a standard” provided an appearance of objectivity. Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2004), 135.

59. Kinsella, *The Image before the Weapon*, 130

60. Jean Paul Sartre, “Preface,” in Frantz Fanon, *The Wretched of the Earth* (Middlesex: Penguin, 1963), 18.

61. Talal Asad, “Reflections on Violence, Law, and Humanitarianism,” *Critical Inquiry* 41, no. 2 (Winter 2015): 412.

62. Kinsella, *The Image before the Weapon*, 131.

63. *Ibid.*, 131.
64. *Ibid.*
65. *Ibid.*
66. *Ibid.*, 106.
67. See Arnulf Becker Lorca, *Mestizo International Law: A Global International History* (Cambridge: Cambridge University Press, 2014), 71.
68. During the drafting debates, the Soviet Bloc delegates campaigned to remove all references to “civilized nations” from the document. See Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (London: Verso, 2019). Kinsella is right that the “discourse of civilization remains operative even when it is layered with that of humanity.” Kinsella, *The Image before the Weapon*, 119.
69. Jack Donnelly, “Human Rights: A New Standard of Civilization?,” *International Affairs* 74, no. 1 (January 1998): 13.
70. Klose, “The Colonial Testing Ground,” 108.
71. See Kinsella, *The Image before the Weapon*, 133.
72. See Walzer, *Just and Unjust Wars*, xxi. For a critique of Walzer’s account of the legalist paradigm, see Orford, “Moral Internationalism and the Responsibility to Protect.”
73. Friedrich Nietzsche, “The Dawn,” in *The Genealogy of Morals and Eco Homo*, trans. Walter Kaufmann (New York: Vintage Books, 1989), 189.
74. Joseph Slaughter, *Human Rights Inc.*, 221.
75. Bedjaoui, *Law and the Algerian Revolution*, 218.
76. Mohammed Bedjaoui, *Towards a New International Economic Order* (New York: Homes and Meier, 1979).
77. Walzer, “The Triumph of Just War,” 929.
78. *Ibid.* “Civilian” entered common parlance in the nineteenth century and was formally introduced into the 1949 Geneva Conventions. See Kinsella, *The Image before the Weapon*, 104.
79. More recently, U.S. military lawyers have turned to Aquinas and to what contemporary moral philosophers call the “Doctrine of Double Effect” to *justify* killing civilians. See Mayer, “The Doctrine of Double Effect,” 81.
80. Walzer, “The Triumph of Just War,” 929.
81. This exclusion is particularly telling given Walzer’s contention that “our moral vocabulary is sufficiently common and stable so that shared judgments are possible.” Walzer, *Just and Unjust Wars*, 20.
82. Jean-Paul Sartre, *Colonialism and Neocolonialism* (Abingdon: Routledge Classics, 2006), 169.
83. Graham, “The 1974 Diplomatic Conference on the Law of War,” 33. On Graham, see James E. Bond, “Amended Article 1 of Draft Protocol 1 to the 1949 Geneva Conventions: The Coming of Age of the Guerilla,” *Washington and Lee Law Review*, 32, no. 1 (1975): 66.
84. Pi Chi-lung, *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 5 (CDDH/SR.4 at 42), 40.
85. The vote to welcome the Viet Cong as a participating state was lost by a single vote after a diplomatic blunder by the North Vietnamese delegation, which stormed out before the vote to protest the slandering of the Viet Cong. The reference to “arm twisting” is from Bedjaoui, who cites Jean Siotis’s account of the “threats related to the discontinuation of food aid” that secured this result. Bedjaoui, *Towards a New International Economic Order*, 150.



86. Best, *War and Law*, 136.
87. *Ibid.*
88. *Ibid.*, 138.
89. The reservation declared “that prisoners of war prosecuted and convicted for war crimes or for crimes against humanity, in accordance with principles laid down by the Nuremberg Court of Justice, shall not benefit from the present Convention, as specified in Article 85.” See David E. Graham, “Repatriation of Prisoners of War during Hostilities—A Task Unsuitable for the Private Citizenry,” *International Lawyer* 8, no. 4 (October 1974): 836.
90. Nguyen Van Huong (Democratic Republic of Viet Nam) “Draft Article 42 ter. ‘Persons not entitled to Prisoner-of-War status,’” *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 14 (CDDH/III/SR. 33–36, at 26), 469.
91. *Ibid.*, CDDH/III/SR. 33–36, at 27, 469.
92. Forsyth, “The 1974 Diplomatic Conference on Humanitarian Law: Some Observations,” 81.
93. See Abi Saab, “Wars of National Liberation in the Geneva Conventions,” 377.
94. Nguyen Van Hong, “Statement Made at the Thirty Third Meeting, 19th March 1975, by Mr. Nguyen Van Hong, Democratic Republic of Viet Nam,” *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 14 (CDDH/III/SR.33–36, Annex at 10), 464.
95. El Misbah El Sadig (Sudan), *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 5 (CDDH/SR.6), 63.
96. Forsyth, “The 1974 Diplomatic Conference on Humanitarian Law,” 84.
97. Nabulsi, *Traditions of War*, 176.
98. Forsyth, “The 1974 Diplomatic Conference on Humanitarian Law,” 84.
99. Nguyen Van Hong, “Statement Made at the Thirty Third Meeting,” 16.
100. As Graham notes, anticolonialists depicted international law as “a product of Western European and industrialized North American countries, formulated on the concepts of colonialism, capitalism and Christianity.” Graham, “The 1974 Diplomatic Conference,” 38.
101. See Charles L. Cantrell, “Humanitarian Law in Armed Conflict: The Third Diplomatic Conference,” *Marquette Law Review* 61, no. 2 (Winter 1977): 259.
102. Ould Dada, “Statement by the President of the Islamic Republic of Mauritania,” *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law* (CDDH/SR.I at 30).
103. Pi Chi-Lung (China), *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 5 (CDDH/SR.12 at 15), 120.
104. Plaka (Albania), *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 5 (CDDE/SR.14 at 25), 146.
105. Kinsella, *The Image before the Weapon*, 137.
106. J. S. Mill, *On Liberty* (Indianapolis: Hackett Publishing, 1978), 10.
107. Lenin’s argument inverts Hegel’s justification of colonialism. Hegel gave a “right of heroes” to those who establish the state and the family in “uncivilized [*ungebildeten*]” conditions. While it may appear that the coercion used against “savagery and barbarism” is a *primary* coercion, he argued, it is in fact a *response* to the force directed by the merely “natural will” against the idea of freedom. For Hegel, colonization is thus always “defensive.” For Lenin, it is anticolonial war

that is logically defensive. G. W. F. Hegel, *Elements of the Philosophy of Right*, trans. H.B. Nisbet (Cambridge: Cambridge University Press, 2003), 120.

108. George Ginsburgs, “‘Wars of National Liberation’ and the Modern Law of Nations: The Soviet Thesis,” *Law and Contemporary Problems* 29, no. 4 (Autumn 1964): 933.

109. Rousseau quoted in Nabulis, *Traditions of War*, 192.

110. Cited in Ginsburgs, “‘Wars of National Liberation’ and the Modern Law of Nations,” 935.

111. Schmitt, *Theory of the Partisan*, 39

112. Mao Tse Tung, “On Protracted War,” 1938, accessed Jukne 16, 2018, [https://www.marxists.org/reference/archive/mao/selected-works/volume-2/mswv2\\_09.htm](https://www.marxists.org/reference/archive/mao/selected-works/volume-2/mswv2_09.htm).

113. See Erez Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford: Oxford University Press, 2007), 194.

114. Brad Simpson, “The United States and the Curious History of Self-Determination,” *Diplomatic History* 36, no. 4 (September 2012): 681. As Joseph Slaughter notes, development was previously viewed as a process of preparing “dependent peoples for eventual self-governance and the right to practice self-determination amongst the ‘civilized’ peoples.” Joseph Slaughter, *Human Rights Inc.*, 220.

115. Pi Chi-Lung (China), *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 5 (CDDH/SR.12 at 15), 120.

116. Mao Tse Tung, “Problems of Strategy in China’s Revolutionary War (December 1936),” *Selected Works of Mao Tse-Tung*, vol. 1 (Beijing: Foreign Languages Press, 1967), 182–83.

117. Immanuel Kant, “Perpetual Peace: A Philosophical Sketch,” in *Kant: Political Writings*, ed. H. S. Reiss (Cambridge: Cambridge University Press, 1991), 93–130. Walzer asks: is not “repressive communism a child of universalizing enlightenment?” Walzer, “Spheres of Affection,” in Martha Nussbaum, *For Love of Country?* (Boston: Beacon Press, 1996), 126–27.

118. Immanuel Kant, “Idea for a Universal History with a Cosmopolitan Purpose,” in *Kant: Political Writings*, ed. Reiss, 41–53.

119. Abi Saab, “Wars of National Liberation in the Geneva Conventions,” 416.

120. *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 3, 5.

121. Georges Abi Saab, Fourth Session, *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law* (CDDH/SR.36), 43. Self-determination did not provide a solid ground for determining questions of justice. In 1953, Eisenhower had promised that nations “who have been subjected to the captivity of Soviet despotism, shall again enjoy the right of self-determination.” See Simpson, “The United States and the Curious History of Self-Determination,” 687.

122. Abi Saab, *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, 43. Nonetheless, as Umut Özsu notes: “Self-determination remains a right (or principle) whose scope is murky, content imprecise, and application inconsistent.” Umut Özsu, “An Anti-Imperialist Universalism? *Jus Cogens* and the Politics of International Law,” in *International Law and Empire: Historical Explorations*, ed. Martti Koskenniemi, Walter Rech, and Manuel Jiménez Fonseca (Oxford: Oxford University Press, 2017), 308.

123. See, for instance, Alexei (Romania), Fourth Session (CDDH/SR.36), 129.

124. See Carl Schmitt, “The Turn to the Discriminating Concept of War (1937),” in *Writings*

on War, trans. Timothy Nunan (Cambridge: Polity, 2011), 63; and Jean Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht: Martinus Nijhoff Publishers, 1985), 15.

125. Pictet, *Development and Principles of International Humanitarian Law*, 83.

126. Carl Schmitt, "The Turn to the Discriminating Concept of War," note 168, 216.

127. The U.S. delegation drew on Realist critiques of moralism articulated most notably by Hans Morgenthau, for whom the language of the just war produces a "moral duty to punish and to wipe off the face of the earth the professors and practitioners of evil." Quoted in Koskeniemi, *The Gentle Civilizer of Nations*, 462. As Ian Hunter notes, the American founding fathers, in contrast, had relied on a law of nations tradition for which there could be no universal normative principles that could govern relations between states. See Ian Hunter, "'A *Jus Gentium* for America': The Rules of War and the Rule of Law in the Revolutionary United States," *Journal of the History of International Law* 14, no. 2 (2012): 173–206.

128. The association of injustice with imperialism was sufficiently hegemonic that the Saigon delegate opposed the Viet Cong's participation by warning that its rival was not a national liberation movement but a foreign entity, attempting to "impose on the South Viet-Nameese people a form of imperialist domination." See Le Van Loi (Republic of Viet Nam), *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 5 (CDDH/SR.5 at 40), 48.

129. Emer de Vattel was doubtless right to note that attempts to distinguish just from unjust wars would "open the door to endless discussions and quarrels." Quoted in Hunter, "'A *Jus Gentium* for America,'" 185. Yet the anticolonialists stressed that, because the questions of war and law were necessarily political, neutrality already served a particular political agenda.

130. Best, *War and Law*, 118.

131. George Aldrich (United States), *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 5 (CDDH/SR.II at 46), 110.

132. Colin Crowe (United Kingdom), *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law* (CDDH/SR.13 at 37), 136.

133. Hughes-Morgan (United Kingdom), *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 14 (CDDE/III/SF.34 at 83) 350. The humanist Alberico Gentili recognized that "it is the nature of wars for both sides to maintain that they are supporting a just cause" and justified a relativism, for which both sides could be just on the argument that we are mostly unacquainted with "the purest and truest form of justice" so must aim at justice as it appears to men. Quoted in Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 31.

134. See Asad, "Reflections on Violence, Law and Humanitarianism"; David Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge: Cambridge University Press, 2005), 163.

135. On the politics of humanitarianism, see Miriam Ticktin, *Casualties of Care: Immigration and the Politics of Humanitarianism in France* (Berkeley: University of California Press, 2011); Didier Fassin, *Humanitarian Reason* (Berkeley: University of California Press, 2011).

136. Richard Baxter, "The Duty of Obedience to the Belligerent Occupant," *British Yearbook of International Law* 27 (1950): 254.

137. Ibid.

138. Ibid.

139. *Ibid.*, 258, note 2.
140. *Ibid.*, 259.
141. Sibylle Scheipers, *Unlawful Combatants: A Genealogy of the Irregular Fighter* (Oxford: Oxford University Press, 2015), 147.
142. Baxter, “Humanitarian Law or Humanitarian Politics?,” 17.
143. *Ibid.*
144. *Ibid.*
145. Graham, “The 1974 Diplomatic Conference,” 44.
146. *Ibid.*, 41.
147. *Ibid.*
148. Nguyen Van Huong (Democratic Republic of Viet Nam), “Draft Article 42 ter. ‘Persons not entitled to Prisoner-of-War status,’” *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 14 (CDDH/III/SR. 33–36, at 26), 470. The Vietnamese delegation’s position in 1977 sought to exclude not only those *convicted* of war crimes but also “persons taken in *flagrante delicto* when committing crimes against peace or crimes against humanity” from PoW status.
149. See Guy B. Roberts, “The New Rules for Waging War: The Case against Ratification of Additional Protocol I,” *Virginia Journal of International Law* 26, no. 1 (1985): 123.
150. Government of the Republic of Iraq, “Comments by Governments on the Reports of the Secretary-General on Respect for Human Rights in Armed Conflicts,” April 20, 1971, A/8313, 38.
151. Aldrich, “Establishing Legal Norms through Multilateral Negotiations,” Case W. Red. Journal of International Law 9, no. 1 (1977): 11. On Third World objections to proportionality, see Alexander, “International Humanitarian Law, Postcolonialism and the 1977 *Geneva Protocol I*,” 31.
152. See Mayer, “The Doctrine of Double Effect,” 81.
153. Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol 1), Article 1, paragraph 4.
154. Abstaining states were the United States, the United Kingdom, France, Canada, the Federal Republic of Germany, Monaco, Spain, Guatemala, Ireland, Italy, and Japan.
155. The Israeli delegate described this as a theory totally opposed to the basic principles of international humanitarian law. Hess (Israel), *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law*, vol. 6 (CDDH/SR.56 at 110), 216.
156. Hess (Israel), *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law* (CDDH/SR.36), 41.
157. Aldrich, “Progressive Development of the Laws of War,” 702.
158. President Ronald Reagan, “Message from the President of the United States Transmitting the Protocol II . . .,” 1987, accessed June 4, 2018, [https://www.loc.gov/frd/frd/Military\\_Law/pdf/protocol-II-100-2.pdf](https://www.loc.gov/frd/frd/Military_Law/pdf/protocol-II-100-2.pdf), iv. The “Letter of Submittal” also noted the Protocol was “militarily unacceptable” as it “unreasonably restricts attacks” on previously legitimate targets. George P. Shultz, “Letter of Submittal,” December 13, 1986.
159. Armali, *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law* (CDDH/SR.58 at 164), 312.
160. U.S. Department of Defense, *Law of War Manual*, 77. The manual lists provisions concerning “national liberation movements” and “lawful combatant status” among those to which the United States has objected (1162).
161. Van Huong, “Statement Made at the Thirty Third Meeting, 19th March 1975,” .

162. Barack Obama, “2009 Nobel Lecture: A Just and Lasting Peace,” December 10, 2009, accessed June 4, 2015, [https://www.nobelprize.org/nobel\\_prizes/peace/laureates/2009/obama-lecture.html](https://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture.html).
163. GIAD Draper, “The Origins of the Just War Tradition,” *New Blackfriars* 46, no. 533 (November 1964): 82.
164. See Talal Asad, “Thinking about Terrorism and Just War,” *Cambridge Review of International Affairs* 23, no. 1 (March 2010): 3–24.
165. Gareth Evans, “From Humanitarian Intervention to the Responsibility to Protect,” *Wisconsin International Law Journal* 24, no. 3 (2006–2007): 718. Donnelly, “Human Rights: A New Standard of Civilization?”
166. See Whyte, “‘Always on Top’: The Responsibility to Protect and the Persistence of Colonialism.” See also Orford, “Moral Internationalism and the Responsibility to Protect.”
167. Edward Said, “Always on Top,” *London Review of Books*, March 20, 2003.
168. See Talal Asad, “Redeeming the ‘Human’ through Human Rights,” in *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, Calif.: Stanford University Press, 2003), 127–58.
169. Obama, “A Just and Lasting Peace.”
170. *Ibid.*
171. Walzer, “The Triumph of Just War,” 931.
172. On Israel’s Dahiya doctrine as a policy of “disproportionate force,” see the retired Israeli major generals and colonels cited in Adam Horowitz, Lizzie Ratner, and Philip Weiss, *The Goldstone Report: The Legacy of the Landmark Investigation of the Gaza Conflict* (New York: Nation Books, 2001). See particularly the explanation of the basis of the doctrine, which takes its name from Beirut’s Dahiya neighborhood, provided by Major General Gadi Eisenkot, Israeli Northern Command chief. In every neighborhood from which Israel receives fire, Eisenkot stated: “We will apply disproportionate force on it and cause great damage and destruction there. From our standpoint, these are not civilian villages, they are military bases” (191).
173. Ben Schreckinger, “Trump Calls the Geneva Conventions ‘the Problem,’” *Politico*, March 20, 2016, accessed April 3, 2017, <http://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/03/donald-trump-geneva-conventions-221394>.
174. “Statement from Pentagon Spokesman Capt. Jeff Davis on U.S. strike in Syria,” Release No: NR-126-17, April 6, 2017, accessed April 6, 2017, <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1144598/statement-from-pentagon-spokesman-capt-jeff-davis-on-us-strike-in-syria>.
175. Trump, “Statement by President Trump on Syria.”