

# The Responsibility to Protect from Terror: The Ethics of Foreign Counter-terrorist Interventions

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## Abstract

The use of military force abroad is a significant part of some states' counter-terrorist efforts. Can these operations be ethically justified? This paper considers whether the underlying principles that philosophers have put forward to justify humanitarian interventions (which may underlie the international norm of the responsibility to protect (R2P)) can also give support for foreign counter-terrorist interventions of this sort. While it finds that the limits to international action that are imposed by the need to respect state sovereignty do not rule out counter-terrorist interventions, it urges caution in supporting an international norm permitting them. Because such a norm would be open to manipulation and abuse, it may be preferable to discourage appealing to it in order to justify military counter-terrorism.

## Keywords

basic rights – counter-terrorism – humanitarian intervention – just war theory – responsibility to protect – sovereignty

## 1 Introduction<sup>1</sup>

Despite conscious efforts by the international community to steer towards more preventative measures,<sup>2</sup> the use of military force remained a significant part of some states' counter-terrorist efforts in the decades following the attacks of 11 September 2001. This was certainly true of US policy, where the use of drone strikes has been a much-discussed tool in counter-terrorism abroad. These sorts of operations, because they involve action within the borders of foreign sovereign states, can be termed 'counter-terrorist interventions'. The fact that they are sometimes done without the consent of the state in which they are conducted makes this a controversial strategy.<sup>3</sup> Whether it is one that will ultimately be permitted or shunned according to the emerging and fluid international norm regime surrounding counter-terrorism remains an open question.

Of course, at least since the responsibility to protect (R2P) emerged as an international norm in the 1990s and 2000s, state sovereignty has no longer been thought of as an absolute barrier to the use of force across borders. The United Nations General Assembly's 2005 World Summit Outcome Document, which is perhaps the first authoritative statement of this, places the responsibility to prevent the atrocity crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity on the international community.<sup>4</sup> Subsequent developments of the idea have seen three pillars specified: the (initial) responsibility of states to prevent the four atrocity crimes occurring within their borders (the first pillar), the responsibility of states to assist each other in their protection responsibilities (the second pillar); and the responsibility of the international community to take collective action to remedy cases of failure (the third pillar).<sup>5</sup> Because the third pillar permits external interference in some circumstances (for example, through humanitarian interventions) it has had the effect of limiting the claims that states can make to be left alone on the

1 I am very grateful to Shannon Zimmerman and two anonymous reviewers for comments on earlier drafts of this paper.

2 'Plan of Action to Prevent Violent Extremism: Report of the Secretary-General', UNGA A/70/674, 29 May 2015.

3 The former Prime Minister of Pakistan Nawaz Sharif called the counter-terrorist drone strikes conducted by the United States in Pakistan 'a violation of our territorial integrity'. See BBC, 'Pakistan PM Sharif Discusses Drones with Barack Obama', *BBC News*, 23 October 2013, <https://www.bbc.com/news/world-asia-24636444>.

4 '2005 World Summit Outcome', UNGA Res. 60/1, 16 September 2005.

5 United Nations General Assembly, 'Implementing the Responsibility to Protect: Report of the Secretary General', A63/677, 12 January 2009, <https://www.un.org/ruleoflaw/blog/document/report-of-the-secretary-general-implementing-the-responsibility-to-protect/>.

basis of sovereignty. It might be thought that foreign counter-terrorist interventions will come to be viewed as another instance of permissible interference on the basis of similar considerations.<sup>6</sup>

My concern in this paper, however, is not whether norms permitting counter-terrorist interventions will come to be accepted by the international community, but rather whether they *should* be. In particular, I will assess whether this line of thought – the idea that the considerations behind allowing humanitarian interventions should lead us to also permit counter-terrorist interventions – can be justified. This is not the only possible justification of counter-terrorist interventions but, as I will show in due course, it is a particularly important one to consider.

After providing some background on existing international law surrounding the use of military force, as well as the just war literature that is thought to underlie its rationale (section two), I move on to examine more closely two explanations about why at least some humanitarian interventions do not violate state sovereignty. While a collectivist explanation put forward by Michael Walzer does not extend easily to counter-terrorist interventions (section three), a more individualist account provided by David Luban might suggest that counter-terrorist interventions may be consistent with a proper respect for sovereignty (section four). Nonetheless, I argue, we should not necessarily welcome permissions to engage in these operations being institutionalised as international laws or norms. The potential for abuse and manipulation of such norms – another important factor to consider – may be too great a cost to pay (section five).

I have thus far spoken unproblematically about counter-terrorism, but the barrier between counter-terrorist actions and other sorts of policy is not always clearly made in discussions. Before proceeding, then, terrorism needs to be defined. For the purposes of this paper, I will understand terrorism to be the use of violence against civilian targets with the aim of spreading fear among a wider population. This is a purely stipulative definition. I make no claim that this definition, either in whole or in part, can explain the unique wrongness of terrorism, which has been the task of philosophers putting forward their own accounts.<sup>7</sup> We often define political concepts with particular purposes in mind and, as we will see below, my definition of terrorism picks out a form

6 For an account of the complex interplay between R2P and the counter-terrorism norm regime more generally, see Shannon Zimmerman, 'Strange Bedfellows: Terrorism/Counter-Terrorism and the Responsibility to Protect' in Charles T. Hunt and Phil Orchard (eds.), *Constructing the Responsibility to Protect* (London: Routledge, 2020).

7 See, for example, Robert E. Goodin, *What's Wrong with Terrorism?* (Cambridge: Polity, 2006); Tamar Meisels, *The Trouble with Terror: Liberty, Security, and the Response to Terrorism*

of violence which cannot neatly be addressed with existing principles from mainstream theories in the ethics of war. It thus represents a category of action that warrants further investigation to determine whether forceful responses to it can be justified and, if so, what form these can permissibly take.<sup>8</sup>

## 2 From Humanitarian Intervention to Counter-terrorist Intervention

State sovereignty has long been thought of as a strong normative barrier to international action. Existing frameworks governing the ethics of war and peace are built around a prohibition on aggression, which the UN General Assembly defined in 1974 as ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations’.<sup>9</sup> Later developments – most notably in the Rome Statute of the International Criminal Court and subsequent amendments to it<sup>10</sup> – have seen more detail be filled out with respect to what sorts of actions can constitute aggression: primarily the use of military force across borders and blockades. In addition, a distinction is made between an *act* of aggression and a *crime* of aggression. The latter differs from the former in meeting a standard of sufficient ‘gravity’. Such a standard, which is to be applied by the UN Security Council in determining whether an act of aggression also amounts to a crime, can be understood in a ‘common-sense’ manner where crimes of aggression are characterised as constituting a threat to international peace and security.<sup>11</sup> All in all, existing normative frameworks in this area are ‘aggression-centered’.<sup>12</sup> They place restrictions on the use of military force against foreign states, and the most significant legitimating reason for going to war is thought to be responses to (certain forms of) aggression.

As previously mentioned, this picture began to change in the 1990s with the emergence of R2P, which weakened the taboo on military border crossing by states. Far from being out of step with the aggression-centred underpinning of

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(Cambridge: Cambridge University Press, 2008), pp. 7–29; Samuel Scheffler, ‘Is Terrorism Morally Distinctive?’, *Journal of Political Philosophy* 14(1) 1–17 (2006).

8 Also note that my definition does not require that terrorists only be non-state actors (as some legal definitions do); states can commit acts of terrorism on this view.

9 ‘Definition of Aggression’, UNGA Res. 3314 (XXIX), 14 December 1974.

10 International Criminal Court, *Rome Statute of the International Criminal Court* (International Criminal Court: The Hague, 2011), article 8 *bis*.

11 David Scheffer, ‘The Complex Crime of Aggression under the Rome Statute’, *Leiden Journal of International Law* 23(4) 897–904 (2010), p. 899.

12 In the terms of Laura Valentini, ‘Just War and Global Justice’ in David Held and Pietro Maffettone (eds.), *Global Political Theory* (Cambridge: Polity Press, 2016), p. 145.

international law, though, R2P might in fact be thought to be derivable from the normative basis of that law. Just war theory is a tradition in philosophy, developed over the course of centuries, that specifies the moral principles which states (and other actors) must meet in order to engage in warfare permissibly. One such principle is that of just cause – the requirement that a war may only be pursued for certain sorts of reasons, which was taken up by the framers of international law in the twentieth century. A response to aggression is held to be one such cause by many just war theorists. But, more recently, many have held that humanitarian intervention to prevent serious violations of human rights is another just cause.<sup>13</sup>

A successful defence of humanitarian interventions, as these just war theorists seek to provide, must accomplish (at least) two tasks. First, it must be shown that such interventions do not undermine state sovereignty. Since sovereignty is taken to be an important barrier to action in just war theory, just as it is in international law, no action that violates it will be permitted on this framework. In the following two sections, I will consider two attempts at doing this found within the literature. Second, it must also be shown that there are no significant negative effects of institutionalising a norm that permits humanitarian intervention. When we permit a particular action in the international sphere, the effects may not be limited to that one event. We may in fact change the normative landscape, altering what is and what is not allowed, and the sorts of justifications for action that states and others can offer. We should thus ensure that these wider effects on the international community are acceptable. This is thus an important task, yet one that has often been neglected by philosophers.<sup>14</sup> Nonetheless, just war theorists sometimes do attempt to show that alleged problems with their theories being deployed in practice are not sufficient to warrant abandoning them. In responding to worries about the co-option of just war theory by military practitioners, for example, Walzer has argued that the theory can still restrain unjust violence through a process of immanent critique.<sup>15</sup>

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13 See, for example, David Luban, 'Just War and Human Rights', *Philosophy & Public Affairs* 9(2) 160–181 (1980); David Rodin, 'Rethinking Responsibility to Protect: The Case for Human Sovereignty' in Don E. Scheid (ed.), *The Ethics of Armed Humanitarian Intervention* (Cambridge: Cambridge University Press, 2014); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006 [1977]), pp. 86–108.

14 Allen Buchanan, *Institutionalizing the Just War* (Oxford: Oxford University Press, 2018), pp. 7–8.

15 Michael Walzer, 'The Triumph of Just War Theory (and the Dangers of Success)', *Social Research* 69(4) 925–944 (2002), p. 942.

As previously mentioned, states are increasingly using force across borders in more limited counter-terrorist operations. The status of such acts in international law is disputed. On the one hand, they might be thought of as acts of aggression and thus ruled out, on the other, some claim that customary international law permits the targeted killing of terrorist suspects.<sup>16</sup> My focus here, however, is not what the law says, but what it *should* say. I will consider whether counter-terrorist interventions can be thought of as a more general instance of permissible interventions within just war theory, which so far have been thought to have been limited to humanitarian interventions. If this is the case, the practice of counter-terrorist intervention, like the practice of humanitarian intervention, must be shown to both not necessarily violate state sovereignty and to have no unacceptable effects of being institutionalised. I will ultimately argue that the proposed justification of counter-terrorist interventions can accomplish the first task (at least on some understandings of the nature and value of sovereignty) but will fail to accomplish the second.

Investigating whether counter-terrorist interventions are consistent with the commitments of just war theory – and, in particular, whether they can be understood as a type of permissible intervention – is not the only way in which one might try to justify these operations. Other theorists sought to characterise them as acts of policing,<sup>17</sup> acts of punishment,<sup>18</sup> or acts of self-defence,<sup>19</sup> for instance, and thus subject to different moral principles than the standard ones of just war theory (at least those which have been adopted by the international community). But I focus on what potential justifications can be offered from within just war theory for two reasons. First, it is a justificatory strategy that has received comparatively little attention in the literature. It is thus important in itself to consider whether this strategy can succeed (especially given objections to the other strategies on offer).<sup>20</sup> Second, given that the success

16 Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum*, A/HRC/14/24/Add.6, 28 May 2010, <https://digitallibrary.un.org/record/685887?ln=en>.

17 Stephen Coleman, 'Just War, Irregular War, and Terrorism' in Paolo Tripodi and Jessica Wolfendale (eds.), *New Wars and New Soldiers: Military Ethics in the Contemporary World* (Farnham: Ashgate, 2011).

18 Christian Nikolaus Braun, 'The Morality of Retributive Targeted Killing', *Journal of Military Ethics* 18(3) 170–188 (2019); Anh Lee, 'Targeted Killing for Retribution Only is Practically Impossible: A Rejoinder to Christian Braun', *Journal of Military Ethics* 20(2) 145–151 (2021).

19 Bradley Jay Strawser, *Killing bin Laden: A Moral Analysis* (New York: Palgrave MacMillan, 2014).

20 Jeff McMahan, 'War, Terrorism, and the "War on Terror"' in Chris Miller (ed.), *War on Terror: The Oxford Amnesty Lectures* (Manchester: Manchester University Press, 2009); Isaac Taylor, *The Ethics of Counterterrorism* (London: Routledge, 2018), p. 94.

of new international norms may depend on their being congruent with the wider normative environment,<sup>21</sup> it may be thought likely that any future norm permitting counter-terrorism will be built on the already established norm of R2P, and this will affect the permissions and limits that the norm will impose on international actors. Such a justification is likely to draw from the principles of just war theory. It is therefore vital to determine if this justification is sound.

Even if the suggested justification succeeds, however, this does not mean that any given counter-terrorist intervention will be morally permissible. There may be more particular objections to any given proposed intervention – maybe it will be a disproportionate response, for example. There may even be objections to various types of interventions more generally. Neil Renic, for instance, has argued that the asymmetry that drones bring about in warfare means that their use is problematic from the perspective of just war theory.<sup>22</sup> The justification for counter-terrorist interventions that I will consider, however, seeks to defend *all* forms of military intervention with this aim against potential objections that they will violate state sovereignty and lead to counterproductive effects when laws and norms are adjusted to allow them. The fact that I ultimately find it to be unable to answer both these sorts of objections calls into question a far greater range of potential permissions that we might grant to states.

### 3 Collectivist Just War Theory

Just war theory is a long and heterogeneous tradition in philosophy. It is consequently not possible in a paper such as this to survey all the variations within it, and all the possible accounts of humanitarian intervention that correspond to these. I will instead limit myself to considering only a few strands within the tradition which warrant particular attention for current purposes. In this section, I consider what can be called ‘collectivist just war theory’, which ascribes rights and obligations primarily to political collectives (like states). I focus on the influential version of this theory put forward by Michael Walzer,<sup>23</sup> in

21 Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’, *International Organization* 52(4) 887–917 (1998), p. 908.

22 Neil C. Renic, ‘Justified Killing in an Age of Radically Asymmetric Warfare’, *European Journal of International Relations* 25(2) 408–430 (2019). For another objection, see Daniel Brunstetter and Megan Braun, ‘The Implications of Drones on the Just War Tradition’, *Ethics & International Affairs* 25(3) 337–358 (2011).

23 On the place of Walzer’s theory in the just war tradition more broadly, see Chris Brown, ‘Michael Walzer (1935–present)’ in Daniel R. Brunstetter and Cian O’Driscoll (eds.), *Just War Thinkers: From Cicero to the 21st Century* (London: Routledge, 2018).

part because his theory can be viewed as a critical reconstruction of existing international law. Since I want to consider possible justifications for counter-terrorist interventions that might be built on existing practice, this is the best place to begin. I do consider another thinker – John Stuart Mill – in the discussion that follows, but his ideas, too, appear to be in line with contemporary international law (particularly the prohibition on aggressive war), and so also warrant discussion in the present context.

Walzer explains the rationale behind his collectivist approach by appealing to what he calls the ‘domestic analogy’. From this perspective, we are to think of states largely as we think of individuals within a society (with a few exceptions, one of which will be discussed below). Individuals within a well-functioning state have rights, such as the right against assault, the right against theft of their property, and so on. But, Walzer argues, so should states in international society: primarily the rights of territorial integrity and political sovereignty.<sup>24</sup> Of course, states have no independent value aside from the people who make them up. Consequently, says Walzer, we must explain the value of the rights of states in terms of the individual interests they serve if these rights are to be morally defensible. And Walzer thinks such an explanation is possible. It is the exercise of their individual rights as a collective which generates the collective rights of the state, and it is this that generates the presumption against aggressive war. ‘When states are attacked,’ says Walzer, ‘it is their members who are challenged, not only in their lives, but also in the sum of things they value most, including the political association they have made.’<sup>25</sup> Walzer thus endorses international law’s prohibition on aggressive war, which he thinks gives protection to the common life that people have formed, which in turn is inextricably linked with the political institutions that they have developed to govern this.

Before considering the question of how humanitarian interventions fit into Walzer’s theory, we need to consider an initial possibility for justifying counter-terrorist interventions against the claims of state sovereignty on his theory. It may be thought that terrorist acts, when they have an international dimension, constitute acts of aggression. When a terrorist group in one country targets citizens of another country, for instance, this might be considered to be aggression that justifies a forceful response by those citizens’ state. For two reasons, however, I view this possibility as a non-starter.

For one thing, many acts of terrorism are often perpetrated by groups who do not constitute sovereign states. While they may operate within the territories

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<sup>24</sup> Walzer, *Just and Unjust Wars*, p. 53.

<sup>25</sup> *ibid.*, p. 53.

of states, crossing those states' borders without their consent may thus be more problematic than when the threat that justifies intervention comes the state itself. Of course, nothing in the definition of terrorism used here rules out the conceptual possibility of states carrying out acts of terrorism: in such cases, there may be a stronger case for intervening in that state in response. There may even be a case to be made that states which support, fund, or protect terrorist groups operating within their borders are the appropriate target of intervention in response to terrorism.<sup>26</sup> But, since terrorism is often carried out by non-state groups without the support of any state,<sup>27</sup> the proposed justification will be unsuccessful in many cases.

More significantly, though, many acts of terrorism – even terrorist attacks that states are complicit in – cannot be considered to be acts of aggression, even on the most permissive reading of the term as it is used in existing doctrine. Such terrorism does not threaten the integrity of national borders in the way that an invasion does. The attacks in New York and Washington DC on 11 September 2001 killed US citizens, but US territory was not threatened in the same way as an invasion would threaten it. Of course, acts of terrorism could also be committed in the course of an invasion (an invading army might target civilians as well as combatants, for example). In such a case, an act of aggression would have taken place, but it would be the unauthorised border crossing by military forces rather than the terrorism. Since we are primarily concerned with the question of whether terrorism itself might justify foreign interventions here, we can set these cases aside.

So, *if* the only just cause for war is a response to aggression, counter-terrorist interventions will not generally be justified as an act of war. However, Walzer accepts that the rights-based domestic framework should not be transferred to the international sphere (where states, and not individuals, are the holders of rights) without modification. Most relevant for our purposes, he thinks that, in certain cases, intervention to prevent severe government repression might be permissible. In such cases, it is not aggression that provides a just cause for war. Rather, it is the plight of people in foreign countries. It may be thought that this argument could be adopted to justify counter-terrorist interventions as well.

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26 This rationale is suggested with respect to the 2001 invasion of Afghanistan in Nicholas Fotion, *War and Ethics: A New Just War Theory* (London: Continuum, 2007), p. 29.

27 The fact that non-state groups tend to lack the resources of sovereign states may mean that there are incentives for them to pursue their goals through terrorism. Cf. Nicholas Fotion, Joanne K. Lakea, and Boris Kashnikov, *Terrorism: The New World Disorder* (London: Continuum, 2007), p. 92.

In thinking about the permissibility of humanitarian interventions, Walzer begins by considering the views that John Stuart Mill put forward in his influential piece 'A Few Words on Non-Intervention'. Mill asks whether military force aimed at freeing a people from the rule of a dictator should be used. He arrives at a negative conclusion. For Mill, if a society is to effectively maintain freedom after getting rid of a dictatorial regime, its people must possess certain virtues, and '[t]he only test possessing any real value, of a people's having become fit for popular institutions, is that they, or a sufficient portion of them to prevail in the contest, are willing to brave labour and danger for their liberation'.<sup>28</sup> It is only through struggling for their own freedom, in other words, that they can become properly prepared for that freedom. Crucially, Mill thinks, even outside assistance in the fight for freedom can compromise the development of the necessary virtues: 'if they have not sufficient love of liberty to be able to wrest it from merely domestic oppressors, the liberty which is bestowed on them by other hands than their own, will have nothing real, nothing permanent'.<sup>29</sup>

If Mill is read as making the empirical point that foreign interventions will never create stable democracies, this might be disputed. More recent research suggests that humanitarian interventions can lead to just such a stable regime so long as they are carried out in certain ways.<sup>30</sup> On Walzer's reading, however, the point is at least partly conceptual. The very nature of freedom requires a form of self-determination as a nation which, in turn, involves overcoming one's own challenges without any help.<sup>31</sup> Outside intervention precludes this possibility.

Although Walzer shares Mill's scepticism about the desirability of attempting to 'export democracy' through force, he nonetheless allows that there might be cases in which humanitarian intervention could be justified. These are cases 'when the violation of human rights within a set of boundaries is so terrible that it makes talk of community or self-determination or "arduous struggle" seem cynical and irrelevant, that is, in cases of enslavement or massacre'.<sup>32</sup> In such cases, Walzer's reasons for thinking that states should be treated

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28 John Stuart Mill, 'A Few Words on Non-Intervention' in John M. Robson (ed.), *The Collected Works of John Stuart Mill*, vol. 21, *Essays on Equality, Law, and Education* (Toronto: University of Toronto Press, 1984), p. 122.

29 *ibid.*

30 See, for example, Theodora-Ismene Gizelis and Kristin E. Kosek, 'Why Humanitarian Interventions Succeed or Fail: The Role of Local Participation', *Cooperation & Conflict* 40(4) 363–383 (2005).

31 Walzer, *Just and Unjust Wars*, pp. 87–88.

32 *ibid.*, p. 90.

of having rights against external intervention – namely, that the state represents the common life of the individuals, and attacking the state involves an attack on that common life – do not apply. This permission might come close to the principle contained in key R2P documents – in particular the permission to intervene in cases involving the four atrocity crimes, which seem to be paradigmatic cases of a denial of self-determination.

Could this permission generate a justification for counter-terrorist interventions as well, perhaps in countries where terrorists threaten the population? If it does, it will have limited application. Acts of terrorism that would be serious enough to trigger intervention, for Walzer, are unlikely to be perpetrated by sub-state groups, who would lack the resources to conduct them on a scale big enough to count. Some forms of state terrorism might be serious enough, but generally only if it is accompanied by the ‘enslavement or massacre’ that Walzer envisages undermining state sovereignty. Without reaching that level, the state in question may remain self-determining. Once again, responding to terrorism, by itself, will rarely be considered to be a just cause for war according to collectivist just war theory: few counter-terrorist interventions will be justified.

However, it may be thought that the theory at least has the tools with which we can come to grips with these sorts of conflicts. In the preface to the fourth edition of *Just and Unjust Wars*, Walzer argues that the standard principles of just war theory need to be supplemented with a new set of principles for dealing with cases like this. Because these measures fall short of a full-scale war (and are less destructive as a result), placing requirements meant only for wars would seem to be too stringent: ‘We urgently need a theory of just and unjust uses of force. This shouldn’t be an overly tolerant or permissive theory, but it will certainly be more permissive than the theory of just and unjust war.’<sup>33</sup> Could such a theory of ‘*jus ad vim*’, as Walzer calls it, justify counter-terrorist interventions, which tend to look precisely like the uses of force short of war that he has in mind, against the claims of state sovereignty? Since, as we saw above, Walzer’s account of a just war is unable to justify these because terrorism rarely rises to the level of either aggression or ‘enslavement and massacre’, this route may appear to be promising.

Such a theory, though, would take us far from the principles of just war theory as standardly understood. Recall that, on Walzer’s account, the only two just causes for war are responses to aggression and the prevention of atrocities so serious that the national community suffering them is no longer self-determining. Note that both aggression and self-determination are all-or-nothing

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33 *ibid.*, p. xv.

matters: they do not admit of degrees. An invasion constitutes aggression irrespective of the scale of it. Self-determination occurs when a people have a certain degree of control over their shared life; it does not require the maximum degree of control (for example, through democratic mechanisms). What this means is that Walzer cannot rely on a simple modification of the principle of just cause in order to arrive at a corresponding principle for *jus ad vim*. He cannot, that is, simply formulate the principle to say that force short of war would be permissible whenever there is aggression which does not reach the level that would justify warfare, or lack of self-determination which does not reach the level that would justify humanitarian intervention. He would need to identify different sorts of problems that would be appropriately responded to via the force short of war.<sup>34</sup> I conclude that Walzer's collectivist approach will not justify counter-terrorist interventions as acts of war: the value of sovereignty tells against these. This is not to say that they could be justified using another framework, but it goes beyond the scope of this paper to consider this.

#### 4 Individualist Just War Theory

The collectivist approach has come in for much criticism more generally, especially with respect to its apparent inability to justify many humanitarian interventions. Walzer's qualifications aside, the approach appears to require the international community to stand by even when governments are engaged in heinous acts against their own people. The success of R2P suggests that this is a view that most are not willing to endorse on reflection. An alternative approach, which may be gaining traction in international opinion, would treat individuals as the primary holders of rights. The value of sovereignty on this view, is understood in more individualistic terms. In this section, I consider whether one influential treatment of humanitarian intervention of this sort – put forward by David Luban<sup>35</sup> – will provide more promising resources for defending counter-terrorist interventions against claims of state sovereignty.

34 Walzer seems to be aware of this point as he suggests that the prevention, as opposed to the preemption, of aggression might be permitted under *jus ad vim*. See *ibid*. Preventative war is ruled impermissible by Walzer's theory.

35 Luban, 'Just War and Human Rights'. For other individualistic approaches to the just cause for war, see, for example, Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); Jeff McMahan, 'Unjust War and the Crime of Aggression' in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, vol. 2 (Cambridge: Cambridge University Press, 2017).

For Luban, the domestic analogy, by granting rights to states liberally, places value in them too uncritically. Of course, states can be valuable and so we might think that in some circumstances they should be granted rights against non-interference, but this value must ultimately depend on it serving the interests of its citizens. Not all states will do this, but only ones that are legitimate:

one should distinguish mere de facto exercise of sovereign power from legitimate exercise of it. The natural argument would then be that the duty of non-intervention exists only toward states which are legitimate (in the sense of the term employed in normative political theory).<sup>36</sup>

Individuals, and not states, are the primary possessors of moral rights in this view. If states are properly protected by sovereignty, this is because they are in some sense the collective exercise of individual rights of their citizens. And this is only going to be the case in what Luban terms 'legitimate' states. Something like this idea may underlie the recognition of sovereignty as involving responsibility, which may be viewed as a precursor to the emergence of R2P.<sup>37</sup>

But what conditions need to be in place for a state to be legitimate? Here Luban turns to social contract theory for an answer. According to this view, 'a political community is made legitimate by the consent (tacit or explicit) of its members; it thereby acquires rights which derive from the rights of its members'.<sup>38</sup> But this in turn raises a further question, namely: how can we know whether consent is given? There may of course be rare cases where a political community rises up together in an authentic expression of opposition to a government.<sup>39</sup> But more commonly the question of whether a population has in some sense consented to their state, and even what consent would look like, is more difficult to discern.

Instead of trying to specify the various ways in which a people could express their consent, or lack thereof, Luban turns instead to a framework that makes state sovereignty dependent on human rights. A just cause for war, says Luban, is one in defence of (certain) human rights.<sup>40</sup> Crucially for our purposes, this suggestion looks much more likely to justify humanitarian intervention that

<sup>36</sup> Luban, 'Just War and Human Rights', p. 164. Note that legitimacy here refers to normative legitimacy, meaning a moral right to rule, and not sociological legitimacy, which refers to being recognised as an agent with a right to rule by others.

<sup>37</sup> Francis M. Deng, 'From "Sovereignty as Responsibility" to the "Responsibility to Protect"', *Global Responsibility to Protect* 2, 353–370 (2010).

<sup>38</sup> Luban, 'Just War and Human Rights', p. 167.

<sup>39</sup> Luban considers a case of this sort in *ibid.*, pp. 170–171.

<sup>40</sup> *ibid.*, p. 175.

Walzer's collectivist approach. When states are violating the rights of their own citizens, a just cause for war would be present here even if they are not at the level of seriousness that Walzer requires for intervention to be permissible. Two questions need to be adequately answered if this approach can be sustained, though. First, which rights should be the ones whose violation generates a just cause for war? Second, why should violations of these rights, and only violations of these rights, be considered a just cause for war?

While one possible human rights approach to warfare would hold that *any* violation of human rights would constitute a just cause for war, such a position seems difficult to motivate. Suppose that we think there is a human right to the highest attainable standard of health, and that existing healthcare policies in the United States violated this right. Would a country like Canada be justified in military intervention to ensure the right is met?<sup>41</sup> Most would say not, and not merely because such an intervention would be disproportionate or had undesirable effects on the broader international system, for example. It looks like there are certain rights whose violation does not justify intervention, even in principle.

Luban avoids the implausible implication that such interventions would be potentially justified by restricting just causes for war as a defence of what are called 'basic rights'.<sup>42</sup> In an influential treatment of this concept, Henry Shue writes that a basic right is a right whose enjoyment is a necessary condition of enjoying any other right.<sup>43</sup> The most obvious example of a basic right is a right to security: if individuals lack security – if there is a high risk that they will face physical harm – then they will be unable to enjoy a right to protest, for example. The point is not simply that the right to protest contingently requires a degree of security. The link is more conceptual: the right to protest is normally understood to involve a right to protest *in conditions of security*.<sup>44</sup> (Shue argues that there is also a basic right to subsistence,<sup>45</sup> but we need not concern ourselves with this idea here.)

This explains why basic rights are particularly important and thus also, I think, why there is a presumptive case that violations of basic rights constitute a just cause for intervention in a state. Given that war is an inevitably risky

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41 The example is set out in Christopher Kutz, 'Democracy, Defence, and the Threat of Intervention' in Cécile Fabre and Seth Lazar (eds.), *The Morality of Defensive War* (Oxford: Oxford University Press, 2014), pp. 234–235.

42 Luban, 'Just War and Human Rights', p. 175.

43 Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton: Princeton University Press, 1980), p. 19.

44 *ibid.*, pp. 21–22.

45 *ibid.*, pp. 22–29.

and damaging activity, it seems likely that we should only pursue it if we think we can achieve something particularly valuable. But why should the failure to meet basic rights be the point at which the prohibition on intervention disappears? Why should it not also be permissible, for example, to intervene to protect other important rights, even if they are not basic? While Luban gives no explicit answer to this question, I think that a rationale for this can be constructed from what he says.

Recall that Luban views political authority to be based on a social contract. The same is true of Walzer, who explains that “[c]ontract” is a metaphor for a process of association and mutuality, the ongoing character of which the state claims to protect against external encroachment.<sup>46</sup> The sort of consent that this contract is made valid by is not supposed to be the actual, explicit consent of the governed: few people have actually promised to obey their state. Rather, it is simply by being part of the formation of a common life. Insofar as a state protects that common life, it can be viewed as having a right to rule and a right against external intervention (which derives from the rights of individuals). When a state fails to protect this, it loses these rights, and can no longer claim the protections that go along with sovereignty.

Luban might agree that, through participation within a common life, individuals in some sense consent to a government that protects that life. Nonetheless, he would want to place additional limits on state sovereignty. Walzer’s view appears to suggest that any participation is sufficient: short of rule by sheer force, any interaction between a government and a people would constitute a form of consent. For Luban, however, it seems that a more meaningful form of participation is required. On my reading, this is where basic rights come in. If individuals’ basic rights are met, they will at least have the necessary preconditions for shaping their society and changing aspects of it that they disagree with. Although it may be difficult to push for change in a society where the full list of democratic freedoms is not respected, one can at least do so in the knowledge that one can be sure of a basic standard of security. This is why I think Luban limits a just cause for humanitarian intervention as the defence of basic rights: when they are met, it looks like there is some participation from society.

Luban’s human rights approach is potentially capable of justifying a number of humanitarian interventions. Certainly, a state perpetrating one of the four atrocity crimes of R2P would qualify, but Luban’s proposal would probably mean that there is a just cause in other cases too. This is because all violations of basic rights create a presumptive case for intervention, and not just those

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46 Walzer, *Just and Unjust Wars*, p. 54.

violations that are widespread enough to collectively qualify as genocide, war crimes, ethnic cleansing, or crimes against humanity. Nonetheless, we might think that relying on something like R2P's more limited permissions is an appropriate way to combine Luban's principled position with more pragmatic factors that need to be considered when formulating an international norm.

Could the approach be used to justify any counter-terrorist interventions? Could the prevention of terrorism be understood as a just cause for war? A potential problem here is that the way in which terrorism tends to undermine rights does not appear to constitute a just cause for war on this approach. Security, of course, is taken to be a basic right by both Luban and Shue, and certain people's security is certainly undermined by acts of terrorism (namely: those who are killed and maimed in terrorist incidents). But this does not show that the presence of terrorism in a country means that basic rights are not met there, and thus that intervention is permissible.

The reason is the following. If governments are to meet the obligations that basic rights place on them, they only need to prevent 'standard threats' to those rights materialising.<sup>47</sup> Just because someone is murdered within a country, this does not mean that the government fails to meet the right to security. For there will always be cases, no matter what the government does, where these sorts of incidents will happen. What governments *are* required to guarantee, however, is to ensure that attacks on the person that arise from *widespread, predictable and remediable* causes. It is by protecting their citizens against these sorts of threats that a government most plausibly gains its right to rule. This requirement is most obviously violated when a government turns its power against its own citizens and uses violence to repress any opposition to their rule. But it might also be violated if the state was simply unable to prevent widespread violations of basic rights by sub-state groups operating within its territory. In such cases, citizens owe no obedience to their state as a matter of right (although it may be in their interest to continue to support the failing state if this provides them with the best chances of escaping poverty and insecurity in the long run).

Does terrorism constitute a standard threat to security? Whether this is the case may depend on whether we are talking about state terrorism or non-state terrorism (my definition encompasses both). When a state or state-like entity rules with the use of terrorism, there are certainly standard threats to individuals' security. Those who intervene to rescue the terrorised plausibly have a just cause for war, according to the human rights view. The state terrorism would most likely violate basic rights to security, as understood by Shue, and

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47 Shue, *Basic Rights*, pp. 32–33.

might even involve one of the four atrocity crimes of R2P. But terrorist groups, particularly non-state groups, do not always commit violence on such a scale. Their actions tend to be one-off acts of violence that kill or maim a more limited number of targets. On the face of it, this would not be systemic enough to constitute a just cause for war on the approach considered here.

I want to suggest, however, that such an approach might, despite appearances, be fruitfully appealed to in such cases.<sup>48</sup> This will require us to rethink how security as a basic right should be defined, though. Security in this context is normally understood in terms of physical integrity: a condition of security is one in which there is a low probability of being physically harmed. But, on reflection, we might want to expand our conception beyond these concerns. To see this, consider someone who lives in a totalitarian state. She knows that, if she steps out of line, she will be the victim of the repressive state apparatus. Knowing this, she decides to refrain from opposing or even criticising the government. As a result, it may be very unlikely that she will be the victim of physical harm. Nonetheless, many would be reluctant to describe her situation as one of security.

Intuitions aside, I think that there are good reasons to expand our conception of security to cover cases like this. Recall that security is taken to be a basic right because it is necessary for all other rights to be enjoyed. Some forms of physical safety are of course necessary, but one must also be sufficiently free from fear if other rights are to be effectively exercised. This is not to say that all forms of fear are like this: those of us who live in any state may obey laws in part because of a fear of criminal punishment, but it would be implausible to say, on the basis of this, that we are deprived of our basic rights (and this is true even if the laws are not fully just). Rather, I want to suggest, only a certain form of fear undermines our ability to enjoy other rights.

I mean that form of fear that the political theorist Hannah Arendt identifies as the *modus operandi* of totalitarian regimes. In her work *The Origins of Totalitarianism*, she describes ‘the bestial, desperate terror which, when confronted by real, present horror, inexorably paralyzes everything that is not a mere reaction’.<sup>49</sup> What Arendt has in mind here, I think, is a form of fear that, unlike ordinary state coercion, which leaves our autonomy intact, undermines any autonomous functioning in those who feel it. They become conditioned to

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48 Another strategy, not considered here, is to develop a theory of *jus ad vim* by adjusting the principles of individualistic *jus ad bellum*. See Daniel Brunstetter and Megan Braun, ‘From *Jus ad Bellum* to *Jus ad Vim*: Recalibrating Our Understanding of the Moral Use of Force’, *Ethics & International Affairs* 27(1) 87–106 (2013).

49 Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1968), p. 441.

follow proscribed manners of behaviour which are unthreatening to the ruling elite, perhaps without even realising that they are doing so.

Jeremy Waldron has suggested that it is by appealing to this sort of fear – he refers to it as ‘Arendtian terror’ – which might be useful in distinguishing terrorism from other forms of coercion.<sup>50</sup> The strategy of some terrorists may not simply be to threaten a group with enough violence that they will rationally choose to make political concessions rather than suffer the promised threat. Rather, they seek to undermine the very capacity for rational deliberation in those who witness acts of violence. They seek to cause a knee-jerk reaction to their deliberately high-profile attacks.

Whatever the intentions of actual terrorists, the effect of their actions might be this form of Arendtian terror in a population. And, by bringing this about, they may undermine individuals’ ability to exercise their rights effectively. What good are formal rights to free movement, to peaceful protest, and to vote, for example, if one adapts one’s preferences not to engage in the actions that these rights permit as a result of being terrorised? What this shows is that freedom from terror, just as much as freedom from physical assault, should be understood as a precondition for all other rights. And this, in turn, may necessitate expanding the concept of the basic right to security to include freedom from terror as well.<sup>51</sup>

If I am right that freedom from terror should be included within the basic right of security, this suggests a way in which Luban’s theory might be appealed to in order to justify counter-terrorist interventions as well as humanitarian interventions, against claims of state sovereignty. In both cases, the rationale is the same: disregarding the sovereignty of a foreign state can be justified in order to protect the basic right to security of those in the target state. Just because terrorist groups generally do not pose a standard threat to physical safety, this does not mean that they do not pose a standard threat to security. And responding to such a standard threat, just as much as responding to a standard threat to physical safety, might be considered to be a just cause for war.

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<sup>50</sup> Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford: Oxford University Press, 2010), pp. 48–79.

<sup>51</sup> One might, alternatively, think that there is a basic right to freedom from terror that is distinct from the basic right to physical safety. Nothing in my argument here hinges on how concerns about terror are incorporated into a framework of basic rights.

## 5 Institutionalisation

I have suggested that state sovereignty – which is given significant weight in just war theory – need not pose a barrier to counter-terrorist interventions, so long as we adopt certain individualistic premises. But this does not tell us whether such operations should be permitted by international law and norms more generally. It has often been noted that the overall permissibility of an international practice regarding war must take into account the effects of institutionalisation of the practice. In some cases, having an institution in place may make otherwise problematic actions permissible.<sup>52</sup> In other cases, however, institutionalisation may result in unintended and undesirable side-effects,<sup>53</sup> or agents may lack the necessary knowledge to correctly apply principles specifying permissible action.<sup>54</sup> While these might be common problems for institutionalising frameworks surrounding war and peace, I will suggest in this section that there are particularly acute problems that would plague any prospect of permitting counter-terrorist interventions in international norms.

In a recent paper, Elisabeth Forster and Isaac Taylor argue that various influential norms governing the use of force in the international sphere are problematic because they can be co-opted by international actors to justify particularistic actions that go against the intention of the norms' framers. Insofar as the actions that are made possible by appeal to these norms subvert the stated goal that the normative frameworks as a whole are supposed to serve – normally understood as peace – we might view their use in the international sphere as self-defeating.<sup>55</sup> Implementing these sorts of norms will take us further away from the goal that their institutionalisation was supposed to bring us closer to.

52 Allen Buchanan and Robert O. Keohane, 'The Preventative Use of Force: A Cosmopolitan Institutional Proposal', *Ethics & International Affairs* 18(1) 1–22 (2012). Relatedly, it might be thought, the move to different types of war that existing institutions do not neatly cover is problematic because it makes going to war easier. See Michael Ignatieff, *Virtual War: Kosovo and Beyond* (London: Picador, 2001).

53 Ken Booth, 'Ten Flaws of Just Wars', *The International Journal of Human Rights* 4(3–4) 314–324 (2007), pp. 316–317. Relatedly, it has been thought that actors can often pursue illegitimate goals by using law that they would otherwise pursue with more conventional military operations. See Charles J. Dunlap, Jr, 'Lawfare Today...and Tomorrow', *International Law Studies* 87, 315–325 (2011).

54 Janina Dill, 'Should International Law Ensure the Moral Acceptability of War', *Leiden Journal of International Law* 26(2) 253–270 (2013).

55 Elisabeth Forster and Isaac Taylor, 'Asking the Fox to Guard the Chicken Coop: In Defense of Minimalism in the Ethics of War and Peace', *Journal of International Political Theory* 18(1) 91–109 (2022).

What is the problem with these norms? Forster and Taylor argue that they involve ‘essentially contested concepts’, that is concepts whose internally complex nature means that there is no universally recognised way of adjudicating between rival interpretations of them.<sup>56</sup> Because a number of different, and incompatible, definitions of the concepts in question can be put forward, self-serving international actors are free to deploy whatever specification of them best suits their purposes. For example, as we saw above, many existing frameworks governing warfare state that a just cause for war will normally be a response to aggression, where aggression is understood as a threat to the territorial integrity of a state. But issues arise once we begin to try to draw the line between aggression and non-aggression. Where do borders really lie? What if two states disagree about the legitimacy of a claimed border? Since both sides in such a case could claim that the other has engaged in an unlawful border crossing, the norm against aggression would lack any of the constraining effect that the framers of international law intended. This, Forster and Taylor maintain, is precisely what happened in the Korean War of 1950–1953.<sup>57</sup>

We are now in a position to see a problem with developing any norms justifying counter-terrorist interventions. Such norms would permit military action across borders in response to terrorism. But terrorism itself might be considered to be an essentially contested concept. The platitude ‘one man’s terrorist is another man’s freedom fighter’ is at least correct if it is understood as making a sociological claim about the way in which the label of terrorism is used. Many groups have been called terrorists, but these accusations are often controversial and made without clear criteria. Since the concept of terrorism is elastic in this way, it looks dangerous to grant a permission to engage in warfare dependent on one’s opponents being plausibly portrayed as terrorists. It would be too easy for unscrupulous actors to co-opt such a framework and launch unjustified wars on the basis of a mere accusation of terrorism. Although Forster and Taylor do not mention the concept of terrorism, it looks like an essentially contested concept in much the same way as aggression is. And, if worries about the use of essentially contested concepts in international norms governing armed conflict are well-founded, this is a problem for the sort of norm under consideration.

It may be objected here that there is a quick fix to this. So long as we set out a clear definition of terrorism – maybe along the lines of the one I sketched in

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56 *ibid.*, pp. 98–99. The idea of an essentially contested concept originates in W. B. Gallie, ‘Essentially Contested Concepts’, *Proceedings of the Aristotelian Society* 56, 167–198 (1955–56).

57 Forster and Taylor, ‘Asking the Fox to Guard the Chicken Coop’, pp. 101–102.

the introduction – there would be no possibility of manipulation. We could then welcome a norm that permitted (and even encouraged) counter-terrorist interventions without worrying too much about it being abused. Just because terrorism lacks a universally acknowledged definition now, we can imagine one being specified in the future.<sup>58</sup>

However, I am not sure that this strategy would solve the problem entirely. There are, in fact, two reasons why institutionalising a definition of terrorism may not allay the worries discussed here. The first is that, given the sort of actors who tend to use terrorism, it may often be difficult to prove that a certain group has committed acts of terrorism and, more importantly, it may also be difficult to prove that they have not. Terrorist groups, especially groups that emerged in the last few decades, are often highly decentralised. The individuals who commit acts of terrorism often have only a very loose connection with the overall group. The extreme case of this, of course, is the so-called ‘lone wolf’ terrorist who merely relies on leaders to provide inspiration and guidance. But other cases in which resources are provided to the ‘franchises’ of a fragmented terrorist organisation have also been seen: this was the way in which Al-Qaeda operated under Osama bin Laden, for example.<sup>59</sup> It may well be difficult to conclusively prove the link between a group and an individual terrorist in such circumstances, and it might thus be difficult to justify military action against the group as an act of terrorism. But some political actors may well play on the inevitable uncertainty that is involved in such assessments to argue that a tight connection need not be proven in order for a counter-terrorist intervention to be warranted.

The second reason is that the concept of terrorism has an emotive content. It is not merely a label that one attaches to an individual or group for the purposes of conceptual clarity. Rather, when we make the case that an organisation are terrorists, we mean to condemn them on the basis of this. What this means is that the plausibility of an accusation of terrorism may depend just as much on how the target of the accusation is viewed by a constituency as its meeting certain objective standards. Thus, even if an international body were to set out a precise definition of terrorism, it would still be possible for unscrupulous actors to depart from it. Just because a particular concept ceases

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58 Coming to authoritative definitions of terms is suggested as a solution to the more general problem of the co-option of normative frameworks in Lonneke Peperkamp, ‘Restraining the Fox: Minimalism in the Ethics of War and Peace’, *Journal of International Political Theory* 18(1) 110–122 (2022), pp. 112–113.

59 Peter L. Bergen, *Holy War, Inc.: Inside the Secret World of Osama bin Laden* (New York: Touchstone, 2002).

being essentially contested, this does not mean that it would not continue to be *contestable* by those acting in bad faith.

The potential for international norms to be co-opted in this way, of course, is not unique to those norms surrounding counter-terrorism. Indeed, R2P itself might be similarly vulnerable. This is what some commentators think happened, for example, when the Sri Lankan government appealed to R2P in order to justify military action against the Liberation Tigers of Tamil Eelam in 2009, where between 150,000 and 300,000 civilians were caught up in the conflict – on some readings this might in fact count as an atrocity crime itself.<sup>60</sup> Nonetheless, it might be thought that counter-terrorist norms might be even more vulnerable, given certain limiting tendencies of R2P.<sup>61</sup> Even if we think that misapplications of R2P can be reined in, and thus that the problems of institutionalising it are minimal, then, it may still be the case that any counter-terrorist norm regime built on similar principles would be problematic.

Is there any alternative to using essentially contested concepts (or concepts that are contestable)? Forster and Taylor argue for a principle of ‘minimalism’ to guide the development of international norms surrounding armed conflict. This would require these norms to be formulated without essentially contested concepts, in such a way that would reduce the possibilities for manipulation. While working in an international environment while constrained by minimalist norms may well form a barrier to some justified uses of armed conflict, the overall benefits in reining in illegitimate forms of violence may be worth the cost. When applied to counter-terrorism, this principle suggests that the optimal normative framework would not encourage or allow foreign interventions to fight terrorists, since this would invite abuse. It may be better to limit (legal) just causes for wars and other uses of force to simpler, less contestable, evils, such as the four atrocity crimes of R2P.

While an individualistic version of just war theory – such as the human rights approach of Luban – appears capable of justifying counter-terrorist interventions in isolation, then, an international norm based on this permission might be undesirable. Of course, the problems that Forster and Taylor identify may plague a wide variety of international norms governing the use of force, these problems might be particularly acute in the case at hand, considering the emotive nature of the concept of terrorism, as well as the sociological

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60 Zimmerman, ‘Strange Bedfellows’, pp. 136–138.

61 Ned Dobos, ‘On the Uses and “Abuses” of Responsibility to Protect’, in C. A. J. Coady, Ned Dobos, and Sagar Sanyal (eds.), *Challenges for Humanitarian Intervention: Ethical Demand and Political Reality* (Oxford: Oxford University Press, 2018).

factors that make proving (or disproving) that a certain group is engaged in terrorism difficult.

## 6 Conclusion

This paper has urged caution in welcoming a norm that would legitimate foreign interventions as part of a counter-terrorist strategy. While the importance of respecting state sovereignty may not pose a moral barrier to such operations, the question of institutionalisation of norms permitting them raises further issues that should limit our enthusiasm. Nonetheless, we should remember that counter-terrorism can and should be a multifaceted phenomenon. The other aspects of the emerging counter-terrorism norm regime – especially those that support building states' capacity to prevent and combat terrorism – may look less susceptible to manipulation than norms governing the use of force.<sup>62</sup> For this reason, any support that this aspect of the norm regime can receive from the corresponding second pillar of R2P might be viewed as more desirable.

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62 Forster and Taylor argue that it is norms surrounding the use of military force that are the most problematic in this regard. See Forster and Taylor, 'Asking the Fox to Guard the Chicken Coop', p. 105.