

## Introduction

Under the UN Charter, the use of force can be justified either in self-defence or under the authorisation of the UN Security Council, where “necessary to maintain or restore international peace and security.”<sup>1</sup> The modern challenge to these exceptions is from a debate surrounding humanitarian intervention originating from the Kosovo conflict of 1999. This debate has transpired into a movement to embed a doctrine of “responsibility to protect”<sup>2</sup> within international law. Both of these grapple with one fundamental litmus test, most recently aired in the context of Syria. When can war be justified to prevent the widespread loss of life? This essay discusses where law and morality depart and meet in addressing the question.

## A Complex Division

Firstly at the outset, prefixing a debate where morality is pitched against law is designed to see “law lose”. Why does such a division have to be accepted? In the spirit of the late Ronald Dworkin our laws have always had recourse to moral principle. Indeed there is dependence of morality on law; they are intermeshed and laws help complete, embed and give meaning to our moral instincts,<sup>3</sup> perhaps particularly in the case of war. Nonetheless it must also be recognised that their convergence is problematic. Laws are valuable for their qualities of objectivity, independence and transparency, but morality does not enjoy those qualities. The history of war tells us that an unchecked morality which is not lawfully and institutionally constructed is both dangerous and undemocratic, precisely because morality is so slippery a notion.

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<sup>1</sup> Article 42 of the United Nations Charter

<sup>2</sup> “The Responsibility to Protect” Report of the International Commission on Intervention and State Sovereignty (2001) Available <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (Accessed 20<sup>th</sup> November 2013)

<sup>3</sup> Tony Honoré The Dependence of Morality On Law Oxford J Legal Studies (1993)13(1) and “The Necessary Connection between Law and Morality Oxford Journal of Legal Studies (2002) 22(3)

### Law, Evidence and Morality

The question of “*when is war justified*” must be made distinct from a narrower evidence-based question of what is the “*justification for war.*” This is critical because the motivation behind a decision is too easily conflated with the broad justness of war itself. Narrowly, the justification for war is the preserve of lawyers and intelligence gatherers. It is about identifying the threshold for war<sup>4</sup> and providing the evidence landscape upon which the motivation for war is established. Where evidence surrounding a cause for war is tampered with value-laden morality, the legal justification becomes a cocktail recipe for manipulation. It was the unproven claims of quickly launched Iraqi WMD mixed with heavy moral arguments of how an oppressive regime would not be missed, that had the deliberate effect of making legality cloudy in 2003. It was this overhang that created a divided Commons on a possible intervention in Syria. War should be a last resort, and as morally shocking as a chemical weapons attack is, this does not diminish the value of an objective review of evidence. This was best captured through Ed Miliband’s most emphatic argument “evidence should precede decision, not decision precede evidence.”<sup>5</sup> The restraint that law must provide here is its resistance to subjective morality and persistence in objectively scrutinising and establishing the facts.

### Law, Legitimacy and Morality

However the broader question of *when war is justified* privileges legal and moral arguments and includes whether such actions are desirable given their purpose and that the value of going to war has been weighed up with inaction. It would typically include conversation of last resort, proportionality and the reasonable prospects of success<sup>6</sup>. These are

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<sup>4</sup> Within the context of R2P this would amount to a “just cause” generally including where there is serious and irreparable harm occurring to human beings amounting to genocide or large scale ethnic cleansing, coupled with the failure of the state.

<sup>5</sup> Ed Miliband’s Opening Statement in the House of Commons on Syria Reported BBC News Online (29<sup>th</sup> August 2013) Available at <http://www.bbc.co.uk/news/uk-politics-23886747> (Accessed 20th November 2013)

<sup>6</sup> See above, R2P at n2

fundamentally sound legally but are also based in the moral foundations of the *just war tradition*, where war is waged to foster a just and lasting peace. Such moral arguments though are shaped by the forum where they take place and the chamber for international legal consensus on war, is the UNSC. Yet the nature of the UNSC is fundamentally at odds with allowing law to develop and flourish through genuine moral debate. Iraq provoked legal arguments around UNSC resolutions not only within legal circles and at protest rallies, but in our living rooms through a 24/7 media. Sadly the law was exposed as weak because it was shown to be a plaything for global power politics by veto-wielding Security Council members. The fact that no further legal authority by a second resolution was granted was trumped by the hollow reality that any legal justification was destined to be the product of vested power struggles and hard diplomacy. This is not the right domain for the law.

The decision to go to war may be made by political will, but it cannot be acceptable that the law is beholden to that same will. Any legal body must enjoy the highest standards of legitimacy; a popular confidence in the institution's mandate. Legitimacy in the law comes from its independence. Confidence in the law's independence is its ultimate moral bedrock. The Kosovo intervention was widely labelled as "illegal but legitimate", which was a reflection of the lack of consent provided by the UNSC but it was also a failure of law that law was disconnected from the legitimacy it needs. It would be more preferable to establish an inclusive and independent legal body such as an international war commission that has a universally approved constitution with a diverse composition of members. A commission that is able to prospectively determine legality of war free from geo-political shackles, and to relocate law into a proper judicial sphere. A commission that critically can institutionalise moral arguments and therefore enhance the legitimacy of the law it determines.

**Conclusion**

Such is the scourge of war itself, the worthiness of the law that justifies it will always be measured against a morality yardstick. No decision about the legality of going to war is going to be free from moral criticism in any country that values free expression. This is desirable. Such free expression will help define public debate and often political direction. In considering the cause for war there is clear place for law ahead of a loose form of morality. However moral arguments should play an overall role in the decision to go to war provided this is in a legitimate body which can give such morality due legal credibility. The question ought to be not morality versus legality, but morality because of legality.