

'Morality versus legality: When is war justified?'

'I am Syrian. Children are dying this minute in Syria. Help them.'

With such arresting words, an otherwise banal coach journey from London to Oxford was interrupted on 24 November 2013. Passengers remained silent as the crying man was ushered off. Yet one could also sense a certain uneasiness, as the moral imperative of armed conflict was viscerally brought home. Could the justification for war be as simple as this?

In practice: no. In the wake of the Second World War, the United Nations (UN) was formed 'to save succeeding generations from the scourge of war'. Article 2(4) of the UN Charter holds that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the UN'. There are implicit moral underpinnings to such a legal assertion, such as the right of states to govern themselves. The particular exception of self-defence further asserts this right. Yet the context was such that a legal bulwark was deemed necessary to withstand the morally precarious behaviour of individual nations.

However, contexts change. This has led to various reinterpretations of the strict legal framework provided by the UN Charter, in the light of growing moral concerns. It will be argued here that the strict legal prohibition of the use of force has been eroded in recent decades. The rise of human rights and the development of a doctrine of humanitarian intervention have meant that war is

increasingly justified first on a moral basis and only then supported by law. It will be seen that we are at a critical moment in the evolution of international law in this area. Events in Syria are pressing for this shift in the balance between morality and legality to be reflected in law.

Firstly, it has been contested whether Article 2(4) is actually a prohibition, or rather a warrant to pursue force in ways that are consistent with the purposes of the UN. To put it another way: can international law be bent to suit moral justifications for war? According to the United States and United Kingdom the answer seems to be 'yes', as this is how they argued for the 2003 invasion of Iraq. Although there was no specific resolution authorizing this invasion, it was argued that the action was necessary to rid Iraq of Weapons of Mass Destruction and to enforce the resolution passed in 1990 authorizing the expulsion of Iraq from Kuwait. This did not stop many commentators condemning the action as illegal, due to the fact that the coalition did not succeed in persuading other member states of the UN of their arguments. Nevertheless, the UN's refusal to condemn the United States and United Kingdom on this ground suggests that the balance between morality and legality has been significantly tipped towards the former.

Increasing emphasis on humanitarian intervention has accelerated this. When NATO engaged in a 78-day air campaign in Kosovo in 1999, it justified its actions by claiming implicit authority from the UN as well as humanitarian concerns. It viewed Yugoslavia's treatment of ethnic Albanians in Kosovo as a moral imperative to act. China, Russia and the Non-Aligned Movement may well have

viewed NATO's behaviour as illegal, but the UN did not (at least not explicitly). Since then, human rights have accrued even more credence on the international stage. The British Attorney General has recently indicated that he regards humanitarian intervention without Security Council resolution as lawful. Most recently, President Obama of the United States threatened force in Syria for Assad's human rights abuses. Some have argued that Russia's veto on this front would have rendered Obama's action illegal *per se*. In contrast, Professor Hongju Koh of Yale has posited that the proposed military action was lawful, or 'illegal but legitimate' under international customary law. It is thus becoming more obvious that strict adherence to UN rules is no longer a satisfactory approach to international relations. Morality is prevailing over legality to such an extent that the law must change.

Justifying war is a process fraught with difficulty. As adumbrated above, the relationship between law and morality is very close and liable to change. Over the past decades, moral justifications for war appear to have become increasingly persuasive. The UN Charter is no longer being interpreted literally, but rather as a tool to legitimise conflicts where the justification is essentially a moral one. The UN Charter is out of date.

That said, there is no easy solution to this change in attitudes. It could be argued that humanitarian intervention should be codified in international law, but what would be the scope of this? Wars that are justified on a moral basis are still wars, and still likely to incur loss of life that in some way undermines the whole endeavour. Moreover, who is to say when humanitarian intervention is

necessary? Could this be used as a pretext for all kinds of conflicts as definitions of what is 'humane' are themselves stretched and reinterpreted?

The tension between morality and legality will always exist in relation to justifying war. Whatever emotional reactions to crying men and horrific atrocities may be, the decision to go to war is never easy. The international community grapples with this every day and if nothing else, of this we can be sure as the crisis in Syria continues.