

Morality versus legality: When is war justified?

'There never was a good war or a bad peace.' – Benjamin Franklin

On 10 September 2013, President Obama called for a US military strike in Syria in response to chemical weapons attacks on civilians during the nation's fierce civil war. 'When dictators commit atrocities,' he said, 'they depend upon the world to look the other way until those horrifying pictures fade from memory.'¹ In this essay I will examine one of the situations in which the conflict between morality and legality in international relations arises in the starkest terms: the event of a humanitarian catastrophe perpetrated by a government against its own citizens. In this context more than any other, states must choose between strict adherence to their legal obligations under international law and their sense of moral duty to protect those at risk.

Legal justifications

In legal terms, the starting point is article 2(4) of the Charter. This prohibits the threat or use of force 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' The precise meaning of these terms and the true extent of the prohibition have been the subject of fierce debate – particularly with regard to whether humanitarian intervention may be justified on a bare reading of the article. However, the *travaux préparatoires* to the provision and its position in the Charter's collective action structure suggest that it was intended to constitute a general prohibition on the use of force.

There are, however, two recognised exceptions to the article 2(4) prohibition. The first is the article 51 right to individual or collective self-defence which arises in the event that a state is the victim of an armed attack. In the context of humanitarian intervention, the requirement of an armed attack means that a state's right to self-defence is of limited help where a foreign regime is planning to

¹ Full transcript of his speech available at:

http://articles.washingtonpost.com/2013-09-10/politics/41939044_1_chemical-weapons-poison-gas-sarin-gas

commit, or is committing, atrocities against its own people rather than using force beyond its own borders.

The second exception, found in Chapter VII of the Charter, is of more obvious help to a potential intervener. This provides that where the Security Council determines that there exists a threat to the peace, a breach of the peace, or an act of aggression it may authorise the use of collective force under articles 42 and 43. However, the problem with this route has been illustrated all too clearly by the Syrian conflict itself: any of the five permanent members of the Council (the US, UK, France, Russia and China) may veto plans for military action under Chapter VII. Indeed, the paralysing effect of the veto power has raised serious questions about the functioning of the Charter's collective action structure ever since the Cold War.

The result is that where human rights abuses are conducted on a purely domestic footing and the Security Council is deadlocked, the established legal justifications for the use of force are of no use to the would-be humanitarian intervener. Arguments that an exception to the article 2(4) prohibition exists in such circumstances have been raised, but they are controversial². Indeed, it is telling that President Obama appended nebulous self-defence claims to his calls for action in Syria rather than relying solely on a legal ground of humanitarian intervention³.

Moral justifications

The question then arises whether action in such circumstances may be morally justified regardless of the lack of legal justification. Arguments that it can be generally find their roots in 'just war theory'. This was a doctrine developed primarily in the context of Christian theological thinking by scholars including Saint Augustine of Hippo and Thomas Aquinas: it holds that war may be morally justified if certain criteria are fulfilled including, for example, that the war is for a just cause, that all

² Gray, *International Law and the Use of Force*, OUP 2008, 3rd edn, Chapter 2

³ See supra n.1 '...what happened to those people...[is] also a danger to our security.'

alternatives to war have been exhausted, and that the recourse to force is proportionate to the end that the war seeks to achieve.

Just war theorists would suggest that, contrary to Benjamin Franklin's view above, a war can be 'good' if it is conducted in line with these criteria. This line of thinking could also be used to suggest that a peace may indeed be 'bad' if it involves a failure to prevent a humanitarian catastrophe. An example would be the horrific Rwandan Genocide of 1994, which involved the slaughter of Tutsis by Hutus over the course of around 100 days with a death toll estimated in the hundreds of thousands. Many who condemn the inaction of the international community during this period argue that states were under a moral duty to intervene in such circumstances which they did not fulfil.

The conflict between morality and legality was clearly illustrated by NATO's aerial bombing campaign in 1999 in response to the repression of ethnic Albanians in Kosovo by the government of Yugoslavia. The justifications for military action put forward were varied, but humanitarian concerns were clearly an important motivating factor. NATO's actions received a mixture of condemnation and support, with an independent report labelling the intervention 'illegal but legitimate'⁴.

Morality or legality?

Compelling as the Rwanda case is, it is suggested that in the event of a conflict between a state's moral and legal obligations, the latter should be preferred. While the Charter's collective security structure is not perfect, its aim of international stability and peace is vitally important. Allowing deviation in such cases sets a dangerous precedent which risks undermining the normative force of the entire structure of international law. Humanitarian disasters are tragic, but cannot be allowed to undermine the fragile stability of international law as it currently stands.

⁴ The Kosovo Report, Independent International Commission on Kosovo, http://sitemaker.umich.edu/drwcasebook/files/the_kosovo_report_and_update.pdf