“Morality versus legality: When is war justified?”

The Ruritanian dictatorship is a brutal regime which has ordered the massacre, torture and rape of minority groups in the country. Economic sanctions have no effect on the unrelenting violence. A permanent member of the UN Security Council, acting to protect its own arms exports to Ruritania, vetoes a resolution which would have authorised military intervention. Should we bomb Ruritania?

Morality may or may not answer “yes,” but international law responds with a resounding “no.” This tension requires resolution, not least because the International Criminal Court (ICC) will soon acquire jurisdiction over the international crime of aggression.

Firstly, this essay must explain that tension. Secondly, it will identify the emergent doctrine of humanitarian intervention as an outline for when wars might be justified and placed beyond criminalisation, even if they remain unlawful. Thirdly, it will explain why this approach, recognising moral respect for human rights, must prevail in the face of anachronistic preoccupations with sovereign rights.

Current international law requires some explanation. Article 2(4) of the UN Charter establishes a prima facie obligation to “refrain…from the threat or use of force against the territorial integrity or political independence of any state.” The only exceptions to this prohibition are measures taken either in self-defence or pursuant to Security Council authorisation.

Furthermore, by 2017 the ICC will likely have jurisdiction over the crime of aggression. This means that leaders might be prosecuted for ordering violations of Article 2(4) which, by their "character, gravity and scale," constitute "manifest" violations of the UN Charter. As a result, intervening in Ruritania would be unlawful and possibly also criminal.

The political realities of UN voting expose this legal regime as lacking any moral basis. Irrespective of the merits of intervention in Syria, for example, that prospect was blocked by Russia's strategic interests in the country. Security Council inaction seems an equally formalistic explanation for the world's failure to adequately respond to the Rwandan Genocide in 1994. Conversely, in 1991 the US-led Operation Provide Comfort openly exceeded the restrictions of the relevant Security Council resolution. In doing so, the US and its allies deployed forces in Northern Iraq to prevent further massacres of the Kurdish population and to provide relief to millions of Kurdish refugees. The present legality of war thus has little to do with morality.

The doctrine of humanitarian intervention provides a better outline for when war can be justified. In view of the clear wording of Article 2(4), it is difficult to accept that this doctrine provides a legal basis for intervention, but the doctrine could nonetheless establish a category of justified force which is not a "manifest" violation of the UN Charter. This would place humanitarian intervention beyond criminalisation as "aggression" and is entirely appropriate.

That doctrine was most recently and most clearly invoked in 2013 by the UK government publication, "Chemical weapon use by Syrian regime: UK government

legal position." This explained that the use of force would constitute humanitarian intervention only if the following conditions were satisfied:

> *"(i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;*
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> *(ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and*
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> *(iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose)."*

The use of force in such circumstances can be justified because it prioritises threats to fundamental human rights over anachronistic preoccupations with sovereign rights. The current legal regime emerged from the same Early Modern Europe in which Louis XIV supposedly claimed, "I am the state." The legal personality of the sovereign ruler and the sovereign state were conflated as one. Indeed, popular discourse continues to personify the state ("the US is playing the strong-man over Iran"; "Russia must protect her interests in Syria.") It is unsurprising, then, that international law still treats the territorial integrity of states as analogous to the bodily integrity of natural persons, reflecting municipal law notions of bodily harm and self-defence.

That paradigm was exposed as wholly inappropriate after the Second World War, when the Nuremberg Tribunals and the 1948 Universal Declaration of Human Rights employed international law to respectively delimit the responsibilities and rights of the individual. This marked a recognition that international law does not exist only to benefit abstract, immaterial "states," or preserve lines on maps, but to benefit the real people subjected to those authorities. Although amendment of the UN Charter is politically inconceivable, wider international law must adjust accordingly.

This is all the more urgent due to the nascent crime of aggression. Labelling conduct as "criminal" subjects it to moral stigma. As discussed, however, whether conduct violates the UN Charter is determined by Security Council realpolitik rather than by notions of morality. If international law were to accept instances of humanitarian intervention as less-than "manifest" violations of the UN Charter, such intervention would avoid this morally baseless criminalisation. Compensatory reparations might become due, following an unlawful war, but the prospect of a criminal prosecution would not deter intervention if inaction were morally repugnant.

Fortunately, lawyers do not have to decide whether to bomb Ruritania. Unfortunately, they still have to determine whether it might be lawful. The use of force is presently lawful only if employed in self-defence or pursuant to Security Council authorisation. Soon, wars which meet neither of those criteria might be criminalised. This unacceptably labels wars as morally wrong as a result of their failure to satisfy particular criteria, which are themselves outmoded and without any moral basis. Modification of the UN Charter is politically unrealistic. Nonetheless, international law could better align itself with moral respect for human rights by recognising

humanitarian intervention as a category of justified war, excluded from the crime of aggression.

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