

Lessons from Intervention in the 21st Century: Legality, Legitimacy and Feasibility

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The question at the heart of this enquiry, so far as it relates to mass atrocity crimes committed behind sovereign state borders, is exactly that posed by the International Commission on Intervention and State Sovereignty at the outset of our 2001 report which introduced to the world the concept of the “responsibility to protect” (R2P): “When, if ever, is it appropriate for states to take coercive – and in particular military – action against another state for the purpose of protecting people at risk in that other state”.¹ Our answer, in effect, although we never stated it quite this concisely, is when such an intervention is legal, legitimate and feasible.

These are indeed exactly the right three lenses through which to explore the appropriateness of coercive external military intervention in any given case of genocide, ethnic cleansing, other crimes against humanity, or major war crimes perpetrated in a civil war context – as in the classic cases of Rwanda in 1994, Bosnia in 1995, Kosovo in 1999, Libya and Cote d’Ivoire in 2011, and now Syria. Each of these dimensions is necessary, and together they are sufficient, to raise all the specific questions that need to be asked, and answered, in any specific case.

Legality, legitimacy and feasibility are also the right lenses through which to evaluate coercive interventions undertaken, or at least considered, in other situations – where a state has waged aggressive cross-border war (as with Iraq in 1991); has harboured or launched terrorist offensives (as with Afghanistan in 2001); or is believed, by some at least, to be acquiring weapons of mass destruction with the intent to use them, or threaten their use, to advance hegemonistic objectives (as with Iraq in 2003 and now Iran). Provide good, clear answers – reason-based and evidence-based – to the questions as to whether a particular proposed intervention is legal, legitimate and feasible, and you know everything you need to know as to whether that intervention is appropriate.

Of course the devil is in the detail, and there is plenty of remaining room for argument as to what exactly *is* legal, legitimate and feasible in any given case. But after the protracted political and academic debates, and UN resolutions, of the last two decades, the conceptual ground is now much clearer than it used to be. There is, simply, much less scope or excuse for muddle and obfuscation, at least for those with no particular ideological or other axes to grind.

On the question of *legality*, it ought now to be beyond argument that the UN Charter is the only possible source of authority, which means that coercive military intervention has to be either justified as Article 51 self-defence (which was arguably the case at the outset in the case of the US-led response to Afghanistan, but became much less plausible as the

¹ International Commission on Intervention and State Sovereignty, Gareth Evans and Mohamed Sahnoun Co-Chairs, *The Responsibility to Protect* (Ottawa: International Development Research Centre for ICISS, 2001). Foreword, p.vii, available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

intervention wore on); or specifically mandated by the Security Council by resolution under Chapter VII; or conducted by a regional organisation acting under Chapter VIII and authorised at least subsequently by the Security Council, as with some ECOWAS-initiated interventions in West Africa. But that is it. Authorisation of military action by the General Assembly under the Uniting for Peace resolution², as is sometimes considered when the Security Council is paralysed by actual or threatened vetoes, would give formidable political support, but doesn't help legally.

The heroic efforts by UK (and some US) government lawyers to argue that customary international law allows action outside the Charter – in the case of exceptional measures taken to alleviate overwhelming humanitarian catastrophe—are quite unpersuasive. There may be some logic in the proposition that the very nature of customary international law, dependent as it is on accepted custom and practice, means that in a sense you do have to break it to make it. But what happened in Kosovo in 1999, when a “coalition of the willing” did take military action against Serbia's Milosevic in defiance of a threatened Russian veto in the Security Council, and were more applauded than criticised internationally for doing so, is manifestly insufficient precedent to claim that any new *law* has been made.

On the question of *legitimacy*, there is now very widespread agreement about the relevant criteria to be applied, following successive efforts to articulate them (and in a way which relied on universal cultural and religious values, not just those associated with medieval Christian “just war” theory) in the 2001 ICISS report, and the reports prepared by the Secretary-General's High Level Panel³ and Kofi Annan himself⁴ in the lead-up to the 2005 World Summit. Put simply, the five criteria are:

- *Seriousness of Threat*: is the threatened or occurring harm of such an alarming kind and magnitude as to at least *prima facie* justify the use of military force?
- *Proper Purpose*: is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?
- *Last Resort*: has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing lesser measures will not succeed?
- *Proportional Means*: is the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?
- *Balance of Consequences*: is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction? Or, putting this even more briefly, will military intervention do more harm than good?

These criteria have not yet been formally incorporated in any UN General Assembly or Security Council resolution, and it may well be counterproductive to try to force this, but they are informally already very much now the currency of international debate, and it is important that they become an even more central part of the discourse in future. I do not argue that more systematic attention to these benchmarks in the Security Council and

² UN General Assembly Resolution A/RES/377 (V) of 3 November 1950

³ High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (New York: United Nations, 2004), available at <http://www.un.org/secureworld/>

⁴ Kofi A. Annan, *In larger freedom: towards development, security and human rights for all*. Report of the Secretary-General (New York: United Nations, A/59/2005, 21 March 2005), available at <http://www.un.org/largerfreedom/>

elsewhere will produce consensus with push-button consistency: life is never that easy. But there *is* plenty of reason to believe that if an understanding develops that those arguing a case for military intervention must in practice make a detailed and compelling case that all five criteria would be satisfied, the chances of reaching consensus – one way or the other – will be significantly improved.

The *feasibility* of mounting an effective coercive intervention is a function of physical capability and the political will to apply that capability by the relevant international actors. This involves addressing, in each particular context in which it arises, a multitude of different analytical and practical issues⁵ – but the bottom line is that all the legal authority and moral legitimacy in the world will count for naught without the necessary military and other resources being professionally and intelligently applied, and for as long as it takes to complete the task (and ensure that enough societal and institutional rebuilding has been done to ensure that the conclusion of an intervention will not simply re-ignite the conflict which originally provoked it).

Some military interventions for which one's conscience may cry out are always going to be unfeasible, because the resources are simply not there, or those that have them won't use them, or simply because no-one can be confident that, even if potentially available, their application will do more good than harm in the particular case in question. This last consideration (which mirrors the 'balance of consequences' criterion of legitimacy noted above) is important in understanding why coercive military intervention was never really a serious option in Darfur or Syria. And also why it never has been, or would be, against major powers like China or Russia or Indonesia, however badly they may have behaved in the past, or will in the future, in Xianjing or Tibet, or the Southern Caucasus or East Timor: the scale of the conflagration, and human immiserisation, that would be thus triggered would be out of all proportion to even the most grievous harm suffered by the minority in question. It's not double standards being applied here, just a realistic calculation of the balance of harm. And of course it does not follow that simply because it is unfeasible to intervene everywhere, there should never be a coercive intervention anywhere. You do what you can.

The most difficult conceptual problem to deal with when legality, legitimacy and feasibility do not march neatly in step, is what to do when an intervention is manifestly legitimate (in the sense of appearing to reasonably satisfy all the criteria listed above) and appears practically feasible, but lacks legal formal authority because of the use, or threatened use, of a Security Council veto by a Permanent Member, for self-interested or *realpolitik*-driven reasons which appear to the rest of the world to have little or nothing to do with the objective merits of the case: Russia's obstruction of the Kosovo intervention in 1999 being the most widely (if not universally) accepted example.

For those of us who do passionately believe in a rule-based international order, but whose conscience equally rebels against doing nothing to halt or avert a genocidal catastrophe or similarly egregious breach of international law and morality, this is a dilemma and a half. But there may be a way of justifying an intervention proceeding – in the court of global opinion, if not one of law – which stops short of asserting simply that legitimacy trumps legality in this kind of case. The most credible way of overcoming the lack of formal legal

⁵ For one checklist, in a mass atrocity context, see e.g. Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington DC: Brookings Institution Press, 2008, pbk ed 2009), Ch 8 'Institutional Preparedness: The Actors', Ch 9 'Building Diplomatic, Civilian and Military Capability, and 10 'Mobilizing Political Will'.

authority may be just to offer the equivalent of a domestic court plea in mitigation, of the kind that one might use when caught running a red-light with your wife about to have a baby in the back-seat: “We acknowledge that we have breached the letter of the law, but we don’t challenge its applicability. And we won’t make a habit of it. It’s just that in the very particular circumstances of this case there was an overwhelming moral imperative to act as we did, and any censure should reflect that.” Such a popularly-understandable approach, which was not dissimilar to that ultimately adopted by the NATO-led coalition in Kosovo, seems to me much less likely to destroy the chances of future Security Council consensus than to invent a legal justification when there isn’t one, as the UK in particular tried to do in Iraq in 2003, and again more recently in Syria in the context of a possible military response to the use there of chemical weapons.

These are all, needless to say, complex and difficult questions, on which informed and reasonable opinions are bound to differ. But conceptual clarity is always a necessary, if not sufficient, condition for good policymaking. And when any question arises about the appropriateness of coercive intervention, using the three lenses of legality, legitimacy and feasibility to illuminate and frame the issues is as good a starting point as we’re ever going to get.

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