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THE MORAL CASE ON SYRIA WHEN THE LAW IS LACKING

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If, as seems increasingly likely, compelling evidence does emerge of chemical weapons use by the Assad regime in Syria, the moral case for taking appropriate military action against it will be overwhelming. But in the absence of a UN Security Council mandate for such action, the legal case is much more problematic. And so too is the question of exactly what military action would be appropriate in these circumstances.

There is no doubt whatever that any use of chemical weapons is a grave breach of international law under either the 1925 *Geneva Convention* or *Chemical Weapons Convention* of 1992. Equally, proven use of chemical weapons would be profoundly in breach of Syria's "responsibility to protect" its people from crimes against humanity or war crimes – the new international norm unanimously agreed in 2005, which was the foundation for the Security Council-endorsed military action against Libya and Cote d'Ivoire in 2011.

The trouble is that even the most extreme breach of international law does not in itself legally authorise a coercive military response. States individually or in coalition can apply sanctions, or arms embargoes, or seek to bring individuals to account under international criminal law. But under Chapter VII of the UN Charter coercive military force can only be applied in self-defence, which is not here relevant. Or with the approval of the Security Council, which is, unhappily, not here likely given Russia's apparent continued willingness to wield its veto power.

With the Arab League joining the chorus of condemnation against Syria, and some of its members perhaps willing to play a military part, there is a slim possibility – applying some West African precedents – that such action could be a permissible regional response under Chapter VIII of the UN Charter. But technically this requires at least subsequent, if not prior, Security Council approval, which just postpones the problem.

Despite the continuing efforts of some US and UK lawyers to find one, there is no exception available under customary international law. If you want a legal justification, you have to find one in the Charter. To invent a legal justification, when there isn't one, as the UK in particular tried to in Iraq in 2003, is to put at risk the credibility of the whole humanitarian, civilian protection enterprise.

But that's not the end of the argument. A similar dilemma arose in 1999 when Russia made clear it would veto Security Council endorsement of NATO's proposed intervention to stop Milosevic's genocidal attacks in Kosovo. The weight of world opinion supported the view that military action might not be legal, but here it was morally legitimate. And it might well do so again here, provided the evidence of the Syrian government's culpability is absolutely clear.

The most credible way of overcoming the lack of formal legal authority would be to offer the equivalent of a domestic court plea in mitigation: "We may have breached the letter of the law, but don't challenge its applicability and won't make a habit of it– it's just that in the

very particular circumstances there was an overwhelming moral imperative to act as we did, and any censure should reflect that.”

But for that moral case to stand up, without undermining either the principle of a rule-based international order or the evolving responsibility to protect norm, four conditions will have to be satisfied by US policymakers and those, like Australia now, travelling with them:

First, ensure that the evidence of Syrian government culpability really does stack up. No-one can afford another debacle like Iraq in 2003.

Second, ensure that each of the five relevant criteria of legitimacy for military action, which have been the currency of the use-of-force debate for the last decade, are satisfied. That means arguing that the scale of the threat *prima facie* justifies a military response; that no lesser measure would meet the threat; that the motivation is that threat, with no other agenda; that the response proposed is proportional; and that a military response will not put those one is meaning to protect in even greater peril.

Third, make it very clear that the particular military action proposed is appropriate: specifically aimed at deterring the regime from ever using chemical weapons again, and if possible physically inhibiting its capacity to do so. That will be hard in practice to calibrate, but is crucial.

Fourth, make it absolutely clear that the proposed action really is all about civilian protection from the use of a totally unconscionable weapon, and not about securing regime change.

If the US, UK and France have learnt nothing else about the collapse of consensus over the intervention in Libya – which does so much to explain the Security Council’s paralysis over Syria since mid-2011 – it is that this distinction matters enormously to most of the international community, including Russia and China. And their votes count.

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