

The Legality of the UK's Air Strikes on the Assad Government in Syria

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1. I have been asked by Tom Watson MP, Deputy Leader of the Labour Party, to prepare a brief opinion responding to the UK government's position on the legality, under international law, of military action taken against the Syrian government on 13/14 April 2018. As set out in this opinion, the position taken by the government is significantly flawed. The military action taken was not in accordance with the United Nations Charter and international law.
2. The United Nations Charter (Article 2 (4)) prohibits the threat or use of armed force by states against other states. The International Court of Justice has held that prohibition of the use of force is also a principle of customary international law (*Nicaragua Case* 1986). The United Nations Charter provides two explicit exceptions to the prohibition of the use of force. First, states may use force in individual or collective self-defence (Article 51). Second, force may also be authorized by the UN Security Council acting under Chapter VII of the Charter, to maintain international peace and security. In addition, a use of force on the territory of a state that is consented to by the government of that state will not be in breach of the prohibition of the use of force. In recent years, the UK has relied on each of these three legal bases for force: the UK's use of force against ISIS in Syria is being conducted on the basis of the collective self-defence of Iraq; the use of force in Libya in 2011 was authorized by the UN Security Council; and the UK's use of force against ISIS in Iraq is being conducted with the consent of the Iraqi government.
3. In seeking to justify the airstrikes against the Assad government, the government relies on a legal position that is different from those stated in the previous paragraph. The UK government states that "The legal basis for the use of force is humanitarian intervention . . ." and then sets out three conditions for such a use of force. This

argument asserts that under international law, states may, on an exceptional basis, take action in order to alleviate overwhelming humanitarian suffering, even where such action is not carried out in self-defence, authorised by the UN Security Council nor undertaken with the consent of the government of the territorial state.

4. However, despite the fact that the UK has advanced this legal position on a number of occasions, including in August 2013 when the government proposed to take military action in Syria, it is quite clear that the position advocated by the government is not an accurate reflection of international law as it currently stands. International law does not permit individual states to use force on the territory of other states in order to pursue humanitarian ends determined by those states.
5. Although the government appears to suggest that the so-called doctrine of “humanitarian intervention” is an established principle of customary international law, there is very little support by states for this legal position. For the formation of a rule of customary international law, two elements must be shown. First it must be shown that there is general state practice and second, such general state practice must be accepted as law (the requirement of *opinio juris*). There is neither a general state practice of humanitarian intervention nor is any such practice accepted as law. The UK government is one of only a handful of States that accepts that international law provides a right of humanitarian intervention. Indeed, neither the United States nor France has ever advanced such a view of the law nor have they sought to provide any legal justification for the recent strikes. With a couple of exceptions (namely Belgium and Denmark), other European states have also refused to endorse a legal principle permitting humanitarian intervention. On the contrary, a large number of states has rejected this legal position. In April 2000, the Declaration of the South Summit issued by the Group of 77 (which is composed of about 130 member States) states explicitly that: “We reject the so-called “right” of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law” (para. 54). In short, there is little *opinio juris* on which a doctrine of humanitarian intervention might be based under customary international law.
6. Although the matter has not been expressly considered by the International Court of Justice (ICJ), the Court did seem to reject the doctrine of humanitarian

intervention in *Military & Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (1986). In that case, the Court stated that: “while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.” (para. 268).

7. The responsibility to protect doctrine “R2P” does not change this position in any way. The 2005 World Summit Outcome document, agreed by consensus at Head of State level in the UN General Assembly, is the definitive document on what the “R2P” doctrine is intended to mean. Paragraph 139 of the document speaks of collective action, *through the Security Council*, should peaceful means fail. In other words, forceful action to prevent mass atrocity crimes is reserved to the Security Council. The notion that where the Security Council is deadlocked, “R2P” provides a legal framework for the international community to use military force – either by way of a regional coalition or a so-called “coalition of the willing” is absent from the document and would not have been approved were it suggested.
8. The most significant problem with the government’s legal position is that it would require a radical restructuring of the most fundamental rules of the international legal order. The argument that there is a right of humanitarian intervention under customary international law implies that a rule of customary international law can prevail over or modify the prohibition of the use of force in the UN Charter. Such an argument is problematic for three reasons. First, it would suggest that a rule of customary international law can prevail over an explicit and binding treaty rule. Second, such an argument would undermine the provision in the UN Charter (Art. 103) which ensures primacy of the Charter since the argument would suggest that states can override the Charter by pointing to a rule of customary law. Third, the argument would undermine the rule that the prohibition of force is a peremptory or overriding norm of international law (a norm of *jus cogens*) which prevails over inconsistent rules. Thus, even if it could be shown that the conditions existed for a rule of international law permitting humanitarian intervention, it would nonetheless be the case that such a rule of customary international law could not prevail over the prohibition of the use of force contained in the UN Charter.

9. It is possible for parties to a treaty to collectively interpret that treaty in a way which appears at odds with the text, and for such interpretation to become binding and definitive. The government might argue that its legal position is based on an interpretation of the UN Charter. However, for subsequent practice of states to establish a definitive interpretation of a treaty, such practice must establish the agreement of all the treaty parties as to the interpretation to be given to the treaty. For the reasons given earlier, it is clear that there is no agreement among UN members to interpret the prohibition of the use of force in a manner that permits humanitarian intervention.
10. Even if there was a doctrine of humanitarian intervention in international law, along the lines suggested by the government, the strikes against Syria would not appear to meet the tests set out by the government. The first of the three conditions set out by the government is that “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.” While the humanitarian distress caused by the Syrian civil war is appalling and the use of chemical weapons is brutal and barbaric, it is by no means clear that the action taken by the government was one that was designed to bring “immediate and urgent relief” with regard to the specific evil it sought to prevent. Furthermore, although the government’s test requires that the international community as a whole accept the evidence of extreme humanitarian distress, in this particular case the action taken by the government came before the inspectors from the Organization for the Prohibition of Chemical Weapons were able to reach the affected area.
11. One significant problem with the interpretation given by the government to its legal position, is that if accepted by states globally, it would allow for individual assessments of when force was necessary to achieve humanitarian ends. It is precisely because of the risk of abuse that this may give rise to, and the consequent humanitarian suffering that will ensue from such abusive uses of force, that other states and many scholars have been reluctant to endorse the doctrine of humanitarian action. Acceptance of the government’s legal position in this particular case would essentially open up the possibility of a small group of states, or individual

states, taking action based on their own subjective interpretations as to when it is right or proper to use force.

12. While the prospects of Security Council endorsement of strikes in Syria are non-existent, an attempt might have been made to conform to the UN Charter by seeking endorsement of the strikes from the UN General Assembly under the *Uniting for Peace Resolution 377A* (1950) which allows the Assembly to take measures in response to breaches of international peace, where the Council is blocked through the threat or use of force. This is the route that would permit collective international endorsement of both the overwhelming humanitarian suffering and of the need for military action to provide relief.