

Syria: Humanitarian intervention outside the Security Council

*Report by the Secretariat to the
All-Party Parliamentary Group Friends of Syria*

5 DECEMBER 2016

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SUMMARY

The UK position is that a state is permitted under international law to take exceptional measures including military action in order to avert a humanitarian catastrophe, but only where three strict criteria are met, namely that:

- (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;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (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 prohibition of force in Article 2(4) of the Charter of the United Nations is limited in scope and allows humanitarian action where such action does not compromise the territorial integrity or political independence of the state in question and is consistent with the purposes of the UN.

UN Security Council Resolution 2139, reinforced by subsequent resolutions, demands an end to shelling and aerial bombardment in populated areas, and demands that in particular the Syrian authorities promptly allow rapid, safe and unhindered humanitarian access for UN humanitarian agencies and their implementing partners, including across conflict lines and across borders.

Following UNSCR 2139, monthly reports by the UN Secretariat to the UN Security Council have provided ample evidence of extreme humanitarian distress on a large scale, requiring immediate and urgent relief.

In failing to respond to these monthly reports with measures to enforce its own resolutions, the UN Security Council has failed to fulfil its function under the Charter.

It follows that conditions (i) and (ii) have been met. A humanitarian intervention by the UK, whether aid drops, no-bomb zone, or other measure, would be legal provided it was in support of purposes laid down by the UN Security Council in Resolution 2139 and subsequent resolutions and that it also complied with the UK Government's third test for humanitarian intervention: that '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.'

As the aim is to protect civilians, any action should avoid harm to civilians. A clear legal framework would be required, including concrete examples of what military action may be considered, a clear and transparent list of criteria, and a clear explanation of the parameters.

A General Assembly 'Uniting for Peace' resolution would offer recommendations only and not binding measures, and is not necessary in order for the UK to take action.

As the UK Government has long maintained that humanitarian intervention outside the Security Council is legal if implemented in accordance with its three tests, the dire emergency in Aleppo and wider Syria allows legally justified action now without any further delay by a superfluous General Assembly process.

International law and military intervention in Syria

CURRENT UK MILITARY ACTION in Syria as part of the International Coalition is legally justified as collective self-defence of the state of Iraq against ISIS/ISIL/Da'esh at the request of Iraq's government,¹ and is therefore in accordance with Article 51 of the Charter of the United Nations which recognises Member states' 'inherent right of individual or collective self-defence.' Any military action in Syria as a humanitarian intervention would have to rely on a quite different legal justification.

Article 2(4) of the UN Charter states that member states shall refrain 'from 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.'

Chapter VII of the Charter sets out the functions of the UN Security Council (UNSC) in order to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken,' including measures involving armed force, while recognising member states' right of individual or collective self-defence.

SECURITY COUNCIL FAILURE ON SYRIA

During the Syria crisis, the Security Council has been unable to fully carry out its functions under Chapter VII due to divisions amongst its five permanent members. The Security Council has determined breaches to the peace within Syria in several resolutions, but has failed to decide on measures after the parties to the conflict, in particular the Assad regime—the de facto Syrian state, failed to meet the demands of successive resolutions. The question is whether individual states can now lawfully use armed force against the Syrian state which, while it has breached multiple UN Security Council resolutions, has not made an armed attack against another state but only against its own population.

R2P DOES NOT ADDRESS INTERVENTION OUTSIDE THE UNSC

The principle of 'Responsibility to Protect' (R2P) set out in the 2005 World Summit Outcome document, and adopted as a non-binding UN General Assembly resolution, is often raised as a basis for a military intervention without an explicit UN Security Council resolution. However this document does not address the question of unilateral state action in the face of humanitarian catastrophe and Security Council failure to act. Rather, it envisages collective action via the Security Council in the event that individual states fail in their primary responsibility to protect their own populations.²

THREE ARGUMENTS FOR LEGAL INTERVENTION OUTSIDE THE UNSC

There are three views under which proponents for a military humanitarian intervention argue that it may be legal without explicit UN authorisation. One is that there has been a loss of force of Article 2(4) of the UN Charter through repeat violations by numerous

states. This argument is unattractive for reasons of its implications in other cases.

A second is that an individual state has lost sovereignty through engaging in the worst kinds of human rights abuses of its citizens. In the case of Syria, the Assad regime has invited foreign terrorist forces, foreign militias, and a foreign air force, to aid it in attacking its own civilian population, displacing over half of that population and driving over a quarter of them out of their home country.

A third view is that Article 2(4) is limited in scope and allows humanitarian action where such action does not compromise the territorial integrity or political independence of the state in question and is consistent with the purposes of the UN.

In this third view, as acts by the Syrian state which violate multiple UN resolutions and violate International Humanitarian Law (IHL) cannot be regarded as legitimate political acts, an intervention which aims solely to halt these violations but not to impose a change in government nor to alter the territory of the state may therefore be legal.

In a parliamentary debate on the Kosovo intervention in 1999, UK Defence Minister George Robertson declared that:

The use of force in such circumstances can be justified as an exceptional measure in support of purposes laid down by the UN Security Council, but without the Council's express authorisation, when that is the only means to avert an immediate and overwhelming humanitarian catastrophe. UN Security Council resolution 1199 clearly calls on the Yugoslav authorities to take immediate steps to cease their repression of the Kosovar Albanians and to enter into a meaningful dialogue, leading to a negotiated political solution.³

In the case of Syria, 'purposes laid down by the UN Security Council' can be found in a series of resolutions including Resolution 2139 which demands an end to shelling and aerial bombardment in populated areas, and demands that in particular the Syrian authorities promptly allow rapid, safe and unhindered humanitarian access for UN humanitarian agencies and their implementing partners, including across conflict lines and across borders.

THE UK VIEW ON HUMANITARIAN INTERVENTION

The UK position is that a state is permitted under international law to take exceptional measures in order to avert a humanitarian catastrophe, but only where three strict criteria are met. From evidence given to the Foreign Affairs Select Committee by the Rt Hon Hugh Robertson MP, Minister of State, Foreign and Commonwealth Office, in 2014: ⁴

As set out in the note of the Government's legal position published on 29 August 2013 in connection with possible UK military action against Syria, if action in the Security Council is blocked, the position of the Government is that it is permitted under international law to take exceptional measures in order to avert a humanitarian catastrophe. Such a legal basis is available provided three conditions are met:

- (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;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
 - (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).

In October 1998 a Government note was circulated to NATO allies identifying these three key criteria.

Baroness Symons also set out the Government's position to Parliament in November 1998:

'There is no general doctrine of humanitarian necessity in international law. Cases have nevertheless arisen (as in northern Iraq in 1991) when, in the light of all the circumstances, a limited use of force was justifiable in support of purposes laid down by the Security Council but without the council's express authorisation when that was the only means to avert an immediate and overwhelming humanitarian catastrophe. Such cases would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of relevant decisions of the Security Council bearing on the situation in question.'

The United Kingdom has relied on this doctrine on three occasions:

- (i) In protecting the Kurds in Northern Iraq in 1991;
- (ii) In maintaining the No Fly Zones in Northern and Southern Iraq from 1991; and
- (iii) In using force against the Federal Republic of Yugoslavia in relation to Kosovo in 1999.

This established UK Government view is then that a military humanitarian intervention in Syria without a further UN resolution would be legal provided the three conditions are met: that there is convincing evidence of extreme humanitarian distress; that there is no practicable alternative to the use of force if lives are to be saved; and that the use of force is strictly limited to that necessary to achieve the aim of humanitarian relief.

COULD A HUMANITARIAN INTERVENTION PASS THESE THREE TESTS ?

On condition (i): The UN Security Council has since the passing of UN Security Council Resolution 2139 on 22 February 2014 been presented with monthly reports by the UN Secretariat on the scale of extreme humanitarian distress and on violations of successive UN Security Council resolutions.

On condition (ii): Despite monthly reports since February 2014 from the UN Secretariat on grievous violations of UN Security Council resolutions resulting in large

scale loss of life, these violations continue and the UN Security Council continues to fail to take action to end these violations.

On condition (iii): Meeting this condition requires clearly defined aims and clearly defined limits on ways to achieve those aims. Condition (iii) doesn't require setting a timetable in advance for completion of action, but does require that once the aims have been achieved then action must cease.

WHAT ACTION MIGHT A HUMANITARIAN INTERVENTION INCLUDE?

The three previous operations where the UK has engaged in a military humanitarian intervention outside of the UN Security Council have all used air power, whether to patrol a no-fly zone or to strike military or dual use targets on the ground; including targets that directly threaten civilians, or that enable military operations that threaten civilians, or that threaten UK or allied forces engaged in the intervention. Of those three operations, the Kosovo intervention had the widest range of types of targets hit and the highest toll of civilians killed by intervening forces. Cluster bombs were used extensively by NATO forces in Kosovo,⁵ but cannot now legally be used in any intervention as the UK is a party to the Convention on Cluster Munitions.

The range of military actions that might be considered in a humanitarian intervention in Syria include:

- Aid drops with military aircraft;
- Enforcement of a no-fly zone;
- Enforcement of a no-bomb zone.

Of these, the first might not necessarily require the use of force but would likely require the threat of force in order to protect UK air crews and aircraft. The UK would need to hold the de facto Syrian government in particular responsible for the safety of UK aid flights and to make clear that there would be a military response to any attack. The UK would need also to consider deploying combat aircraft along with transport aircraft in a force protection role.⁶ Nonetheless this would represent a much more limited intervention than either the Iraq no-fly zones or the Kosovo intervention.

At one point the Iraq no-fly zones might have provided a precedent for how a no-fly zone could be enforced in Syria, but the direct participation of Russian combat aircraft in Assad's bombing campaign now makes a comprehensive no-fly zone difficult to contemplate. Nonetheless the US Air Force has recently enforced a geographically limited no-fly zone against Assad regime aircraft in Syria's north east, justified as a force protection measure rather than as a humanitarian intervention to protect civilians.⁷ Another option is a no-fly zone limited by aircraft type, specifically a helicopter no-fly zone applying to helicopters used only by the Assad regime for bombing.⁸

A no-bomb zone was proposed by Jo Cox MP as a 'prudent and limited use of force' to deter the Syrian government from its unlawful indiscriminate aerial bombardments.⁹ A no-bomb zone would be a prohibition on bombing in a defined area, whether all or part of Syria, enforced through deterrence and retaliation using stand-off weapons launched outside Syrian territory against Assad regime military targets on the ground. A no-bomb zone would not require targeting aircraft in flight. A no-bomb zone might not amount to a de facto occupation of Syria's sovereign airspace because unlike a no-fly zone, a no-bomb zone would not require overflights by UK aircraft, nor would it restrict

the freedom of aircraft to fly in Syrian airspace, nor would it require pre-emptive strikes on anti-aircraft defences.

On the legality of a no-bomb zone, the central question concerns the circumstances in which a military attack in response to violations of the no-bomb zone would be lawful, and the constraints. A clear, precise, foreseeable and workable definition, of 'prudent and limited use of force' is required if this is the basis for the enforcement. Any use of force to enforce the no-bomb zone would have to prove a clear nexus with enforcement. As the aim is to protect civilians, the enforcement should avoid harm to civilians. A clear legal framework would be required, including concrete examples of what military action may be considered prudent and limited, a clear and transparent list of criteria, and a clear explanation of the parameters. If the words 'prudent and limited' are used without proper clarification it is impossible to decide whether military operations would be necessary and proportionate under condition (iii) of the humanitarian principle.¹⁰

Further military actions that might be considered in a humanitarian intervention in Syria include:

- Precision attacks to reduce military threats to civilians;
- Attacks on ground forces, artillery, and armour, that directly threaten civilians;
- Defence of a safe zone.

Precision attacks to diminish the Assad regime's capacity to attack civilian targets were the response proposed by the UK Government to the August 2013 chemical weapons attacks on Damascus suburbs. Precision attacks on Assad regime airbases were previously proposed as a means of diminishing the Assad regime's capacity to carry out air attacks on civilians.

Attacks on ground forces, artillery, and armour, that directly threaten civilians formed the major part of NATO's 2011 intervention in Libya as the Libyan regime's air force was disabled in short order. Attacking a wider range of ground targets to protect civilians also brings greater risk of directly causing civilian targets, as well as risk of striking Russian forces fighting alongside the Assad regime.

Defence of a safe zone carries distinct costs and risks. By defining a safe zone, an intervening power would risk encouraging population movement into the zone and increasing the humanitarian cost of any failure to defend the zone. Defence of a safe zone would depend on ground forces as well as air power, whether they be UK ground forces or more likely local allies' ground forces. While a safe zone is perhaps the least attractive option for the UK, it is notable that Turkey's Euphrates Shield intervention in alliance with Free Syrian Army forces is creating a de facto safe zone in a limited area of northern Syria. The justification for the Euphrates Shield operation is not humanitarian but self defence by Turkey against ISIS and the PKK. This points to a potential future issue where, if the UK cooperates with local allies to take territory from ISIS, the UK may then be seen as responsible for the continued safety of the populations of those areas and come under pressure to protect them from any attack by the Assad regime.

LEGAL CONSTRAINTS ON ANY HUMANITARIAN INTERVENTION ¹⁰

For any humanitarian intervention option, the question of whether force is necessary or proportionate in compliance with condition (iii) is a question of fact and law which requires scrutiny in the context of the particular circumstances at the relevant time.

The laws of armed conflict apply. If the UK were to mount any military intervention, the rules of attack would apply in precisely the same way with UN Security Council authorisation or without it by way of a humanitarian intervention. The relevant laws of armed conflict include the principle of distinction, such that military operations are only directed against military objectives; proportionality; and the requirement to take precautions in attack.

The application of the Additional Protocol 1 (AP1) principles must be applied to the type of ‘prudent and limited’ military action envisaged.

- (i) Any attack must consider the incidental harm to civilians and their property;
- (ii) Strikes must be conducted in a way which minimised harm to the population to the greatest possible extent;
- (iii) In enforcing a no-bomb zone, the general rule is that airfields and air defences may not be attacked unless they are used, or about to be used, to violate the zone (e.g. bombing);
- (iv) The mere fact that an airstrip make qualify as a military objective does not necessarily mean it can be lawfully attacked if such an attack is expected to cause incidental (or excessive) harm to civilians;
- (v) Different rules apply in relation to attacks on aircraft. It is important to establish the status of those on board. The law of armed conflict requires that if doubt exists regarding a person status they shall be considered to be a civilian. Precautions must be taken in relation aircraft because of the risk that civilians may be on board.

Precaution must be taken as to the operations, means and methods, and rules of engagement. AP1 Art 57(1) requires ‘constant care... to be taken to spare the civilian population, civilians, and civilian objects.’ This is subject to several further constraints in terms of taking every feasible step to verify the objectives to be attacked and establishing the nature of any aircraft before engaging it etc.

This approach seeks to answer the question of whether military attacks would be necessary and proportionate to achieve humanitarian considerations to protect civilians. The question of what types of attacks are envisaged is critical and where the balance lies (necessity/proportionality) would depend on the individual facts and circumstances.

UNITING FOR PEACE: A GENERAL ASSEMBLY ALTERNATIVE?

While it is the established position of the UK Government that a military humanitarian intervention may be legal without explicit UN Security Council authorisation subject to the three tests set out earlier, it is clearly preferable for the legitimacy of any action to be recognised by international bodies and in particular be recognised by the UN.

A potential alternative to a UN Security Council mandate for military action is a UN General Assembly resolution recommending action based on the precedent of General Assembly Resolution 377 A (V), titled ‘Uniting for Peace,’ which:

Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to

making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

The ‘Uniting for Peace’ resolution sets out a path for the General Assembly to offer ‘recommendations’ only and not binding measures, unlike a Security Council resolution under Chapter VII of the UN Charter. It therefore seems the General Assembly can add little in terms of legal force to the existing Security Council resolutions on Syria.

Over 220 civil society organizations from 45 countries, including over 25 from the UK, have issued a declaration that the UN Security Council has ‘failed to uphold its responsibility to protect the Syrian people.’ They call on member states to ‘request an Emergency Special Session of the UN General Assembly to demand an end to all unlawful attacks in Aleppo and elsewhere in Syria, and immediate and unhindered humanitarian access so that life-saving aid can reach all those in need,’ and to ‘explore possible avenues to bring perpetrators of serious crimes under international law on all sides to justice,’ and to ‘actively promote meaningful action through the UN General Assembly.’

The civil society statement stops short of an outright call for the General Assembly to back military humanitarian intervention.

Recognition of the political potential of a General Assembly resolution should be balanced against the time needed to achieve it, and its limited legal force compared to the UK Government’s position that there already exists a legal basis for military humanitarian action outside the UN Security Council.

CONCLUSION

The prohibition of force in Article 2(4) of the Charter of the United Nations is limited in scope and allows humanitarian action where such action does not compromise the territorial integrity or political independence of the state in question and is consistent with the purposes of the UN.

UN Security Council Resolution 2139, reinforced by subsequent resolutions, demands an end to shelling and aerial bombardment in populated areas, and demands that in particular the Syrian authorities promptly allow rapid, safe and unhindered humanitarian access for UN humanitarian agencies and their implementing partners, including across conflict lines and across borders.

Following UNSCR 2139, monthly reports by the UN Secretariat to the UN Security Council have provided ample evidence of extreme humanitarian distress on a large scale, requiring immediate and urgent relief.

In failing to respond to these monthly reports with measures to enforce its own resolutions, the UN Security Council has failed to fulfil its function under the Charter.

A humanitarian intervention by the UK, whether aid drops, no-bomb zone, or other measure, would be legal provided it was in support of purposes laid down by the UN Security Council in Resolution 2139 and subsequent resolutions and that it complied with the UK Government’s three tests for humanitarian intervention.

As the UK Government has long maintained that humanitarian intervention outside the Security Council is legal if implemented in accordance with its three tests, the dire emergency in Aleppo and wider Syria allows legally justified action now without any further delay by a superfluous General Assembly process.

NOTES

- 1 Legal basis for UK military action in Syria, House of Commons Library, 1 December 2015.
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- 2 Resolution adopted by the General Assembly, 60/1, 2005 World Summit Outcome, 24 October 2005.
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- 5 Explosive remnants of war: Cluster bombs and landmines in Kosovo, International Committee of the Red Cross, August 2000, revised June 2001.
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- 6 Tobias Ellwood MP: 'It is not simply about the Hercules transport or C-17 aircraft to provide that, but the air cover required, the emergency operations in case the pilots have to bail out and the rescue missions that may have to take place.'
House of Commons debate on Aleppo, 28 November 2016.
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- 7 Syria regime empties Qamishli Airport from warplanes following American threats, by Okab Malek, Zaman Al Wasl, 11 September 2016.
<https://en.zamanalwsl.net/news/18050.html>
- 8 Remarks by Hamish de Bretton-Gordon, APPG Friends of Syria meeting, 13 September 2016.
<http://www.appgfriendedofsyria.org/2016/09/remarks-by-hamish-de-bretton-gordon.html>
- 9 Jo Cox MP: 'I believe it is time for the Government urgently to consider deterring the indiscriminate aerial bombardment of civilians in Syria through the willingness to consider the prudent and limited use of force. A no-fly zone would be an enormous military undertaking, and would entail significant risks, particularly now that Russia has joined the regime in the Syrian skies. But what I call a no-bombing zone, enforced from maritime assets in the Mediterranean so as to avoid engaging Syrian air defences, would save lives, uphold international humanitarian law and breathe life into the political process.'
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ALL-PARTY PARLIAMENTARY GROUP FRIENDS OF SYRIA

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