



## BRIEFING PAPER

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# The legal basis for air strikes against Syrian government targets

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## Summary

The Government has published a summary of the legal advice on which it based the decision to participate with the US and France in air strikes on Syrian government targets on 14 April.

There is a general prohibition in international law on the use of force or threat of force directed at other states. This is stated most explicitly in the Charter of the United Nations which is universally recognised as a primary source of international law because the great majority of nations have signed or acceded to it.

The UN Charter envisages that the Security Council will act to maintain international peace and that the preferred source of legal base for any necessary military action to this end will be a Resolution of the Security Council. Failing this, the Charter recognises an inherent right to self-defence which nations may exercise individually or collectively pending action by the Security Action. Because nations are entitled to take part in collective defence, military action may also be legally justified where a state has requested assistance from another country (the basis used to justify Russian intervention in Syria).

The UK legal advice cites a fourth potential legal basis, which is the doctrine of humanitarian intervention founded in customary international law. Customary international law is based on the practice of nations and continues to exist alongside the UN Charter. Where it finds suitable evidence the International Court of Justice may apply appropriate customary law.

Humanitarian intervention based on customary law is described as an exceptional measure subject to strict conditions which the Government believes have been met in the case of Syria and chemical weapons. Humanitarian intervention was also used in 1999 to justify NATO action to protect civilians in Kosovo.

The use of the doctrine is controversial, however and legal opinion is divided.

Other relevant Library papers are:

[Chemical weapons and Syria - in brief](#), up-dated 16 April 2018

[Parliamentary approval for military action](#), up-dated 16 April 2018

[International Humanitarian Law: a primer](#), 8 January 2016

[Legal basis for UK military action in Syria](#) 1 December 2015

# 1. The general prohibition on the use of military force

Ever since the emergence of the modern state system and the concept of international law, there have been debates about the circumstances in which military attacks can be legally justified.

In the aftermath of the First World War most of the nation states then in existence signed and ratified the [General Treaty on the Renunciation of War as an Instrument of National Policy](#), also known as the Pact of Paris, or the Kellogg-Briand Pact. The Pact was vaguely worded and did not provide for exceptions, but its reference to “war as an instrument of national policy” implied that it did not necessarily prohibit international military action for protective or humanitarian purposes. Moreover, the preamble to the Pact asserted that “a state which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty”.

The 1928 Pact has not lapsed, but it has been largely superseded by the adoption of the United Nations Charter in 1945.

Article 2(4) of the UN Charter states:

All Members shall refrain in their international relations 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.

This prohibition is generally agreed to be part of customary international law, even if there is some disagreement between states as to its meaning.

One debate is whether force designed to further the purposes of the UN is legal. Several UN General Assembly resolutions have elaborated on the Charter’s prohibition on using force. For instance, resolution 2131 (1965) on the Inadmissibility of Intervention said:

No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.

The International Court of Justice has played a central role in developing the international law on the use of force. In cases such as *Corfu Channel*, *Nicaragua and DRC v Uganda* it has interpreted Article 2(4) very strictly, and resisted calls to widen the scope of exceptions to it. There are three recognised exceptions to the prohibition on the use of force, each of which can provide a legal basis for using force:

- UN Security Council authorisation
- consent or invitation
- self-defence

In its summary of the legal justification for joint action against Syrian government targets on 14 April 2018, the UK Government does not cite these three recognised exemptions. Instead it states:

The UK is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering. The legal basis for the use of force is humanitarian intervention...

Humanitarian intervention is not fully established or universally recognised as a fourth exception, but since the 1990s the UK has consistently asserted that it can be a lawful basis for military intervention as part of customary international law.

The decision to cite humanitarian intervention as the legal basis for NATO intervention in Kosovo in 1999 (to prevent the mistreatment of the Kosovo population by the Serbian state) is set out in an [article](#) of 2002 by Christopher Greenwood, who later became a judge at the International Court of Justice (ICJ). The author supported the case for humanitarian intervention based on customary international law, but also recognised the counter-arguments.

In advance of the House of Commons debate on intervention in Syria on 29 August 2013, the UK Government published its legal position on intervention. This said that humanitarian intervention without UN Security Council authorisation is permitted under international law if three conditions are met:

If action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention, 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).

The same conditions have been set out in the [summary](#) of the Government's legal position on Syria action published on 15 April.

## 2. What is customary international law?

Customary international law refers to rules that have been established over time as a matter of general practice of states. Until the twentieth century international law was almost exclusively based on the custom and practice of those states that generally had mutual dealings and were accepted as part of the comity of nations. Pairs of groups of states could arrive at legally binding treaties, which also became a source of law, but these existed alongside and against the background of customary law.

During the twentieth century there were many new multilateral treaties and conventions, including the United Nations Charter (which entered into force on 24 October 1945), but these did not abolish customary law.

The [Statute of the International Court of Justice](#), agreed at the same time as the UN Charter and as an integral part of the Charter, sets out in Article 38 the sources of law which the Court has to apply. These are:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. *international custom, as evidence of a general practice accepted as law*; [emphasis added]
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Customary international law cannot contradict the UN Charter or any other specific international convention, but it may supplement those sources of treaty law.

The International Court of Justice also stipulates that international custom must be based on evidence of general practice accepted as law. Evidence could take the form of precedents, obligations previously accepted or declarations that have been made.

In that context the 'responsibility to protect', as embodied in the 2005 World Summit Outcome (which is not legally binding) could be significant. It allows collective action against genocide, war crimes, ethnic cleansing and crimes against humanity, where the state concerned has been unable to protect its citizens. However, the World Summit Outcome states that this must be done through the UN Security Council, so is not in that respect a development of the law on the use of force.

### 3. Interpretation of the UN Charter

The UN Charter was drawn up against the background of a long-standing tension between the desire of states to govern their own affairs without fear of external intervention and their desire to take collective action to avoid future wars. Many of the states that signed the Charter felt both of these desires and sought a balance between them.

The original tension persists. Nations that were previously under colonial rule, or those that look back at a history of foreign intervention, tend to stress the principle of non-intervention, whereas those that have suffered most from wars, or have felt compelled to intervene reluctantly to keep the peace elsewhere, may tend to stress the need for collective international action.

The language of the Charter is therefore open to different interpretations.

For example, Article 2(4) prohibits the threat or use of force, but it qualifies this with “against the territorial integrity or political independence of any state”. The UK Government might argue that the doctrine of humanitarian intervention does not propose the use of force in that way: it is not seeking to threaten the integrity of Syria nor bring about political change, but only to enforce the global ban on chemical weapons. Article 2(4) also prohibits the use of force “inconsistent with the Purposes of the United Nations”. Again, the UK Government could cite the opening words of the Charter: “We the peoples of the United Nations Determined to save succeeding generations from the scourge of war...”

Article 2(7) of the Charter states that “Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state....”.

Here the UK Government could argue that the manufacture and use of chemical weapons is not a matter for domestic jurisdiction: it is a matter of legitimate international concern and the subject of an International Convention. It surely cannot have been the intention of the international community to agree such a convention, but not enforce it on the grounds that it should be left to the domestic jurisdiction of Syria?

This points to the fundamental difficulty with the UN Charter, which is that the Charter confers “the primary responsibility for the maintenance of international peace and security” (Article 24) on the Security Council; but Decisions of the Security Council on all but procedural matters require “the concurring votes of the permanent members” (Article 27).

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In other words, if any of the five permanent members<sup>1</sup> does not concur with a Decision, then the Security Council cannot act.

In the case of self-defence (Article 51) the Charter provides for this situation because individual or collective actions of self-defence are permitted "until the Security Council has taken measures necessary to maintain international peace and security".

No such provision is made in the case of humanitarian action. It is this gap that the doctrine of humanitarian intervention, based on customary international law, seeks to fill.

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<sup>1</sup> China, Russia (formerly the Soviet Union), France, the UK and the US.



## 4. Pro and contra

It is clear from the discussion above that there is no definitive legal position on humanitarian intervention, but there are many legal opinions. To summarise a few of these, applied specifically to the use of chemical weapons in Syria, the US response in 2017 and the US-UK-France response in 2018:

[Jens David Ohlin](#) (Professor at Cornell Law School) has argued that the Syrian people have an *inherent* right to resist repression and to be assisted in this, just as the American people had an inherent right to resist unfair taxation and rebel against British rule. He notes that Article 51 of the UN Charter describes the right to self-defence as *inherent* and not dependent on the Charter.

[Marko Milanovic](#) (Professor at the University of Nottingham) describes the latest intervention as “manifestly illegal” because he does not regard the doctrine of humanitarian intervention as generally accepted by the international community, and even if it were, he does not regard the UK justification as meeting its own criteria.

[Monica Hakimi](#) (Professor at the University of Michigan) notes that although there is no generally accepted position on humanitarian intervention and no apparent general will to create another exception to the prohibition on the use of force, many states supported the US response in 2017 and others acquiesced in it, suggesting that even in the absence of explicit legal statements, there may be a growing body of custom and practice.

The previously quoted article by [Christopher Greenwood](#) (former Professor at LSE and later a judge at the ICJ) also sets out the arguments for and against humanitarian intervention as the legal basis for NATO intervention over Kosovo in 1999, and concludes that:

The NATO operation in Kosovo raised fundamental questions about the nature of modern international law, and the values which it is designed to protect. Since it involved the application of a principle of last resort in circumstances of considerable difficulty, it is not surprising that there has been controversy about its legality. Nevertheless, for the reasons set out above, the resort to force in this case was a legitimate exercise of the right of humanitarian intervention recognized by international law and was consistent with the relevant Security Council resolutions.

## 5. France and the Syria intervention

As in the UK there has been controversy about the decision of President Macron to participate in the 14 April air strikes on Syria.

Article 35 of the [French constitution](#) states:

A declaration of war is authorised by Parliament.

The Government informs Parliament of its decision to involve the armed forces abroad no later than three days after the beginning of the intervention. It specifies the objectives pursued. This information may give rise to a debate that is not followed by any vote.

When the duration of the intervention exceeds four months, the Government submits its extension to the authorization of Parliament. He can ask the National Assembly to decide in the last resort.

If the Parliament is not in session at the end of the four-month period, it shall take a decision at the opening of the next session

According to [France RT](#), 14 April, the opposition is asking similar questions to the opposition in the UK:

Now that the US, France and the UK have carried out strikes against Syria in the night of 13-14 April, French opposition policy-makers are denouncing a 'dangerous' intervention without the consultation of Parliament.<sup>2</sup>

And:

For the first time in its history, France's Emmanuel Macron is not on the side of law", said the Vaucluse MP and Deputy Secretary General of the Republicans, Julien Aubert. "By bombing a sovereign country like Bush in Iraq without Security Council approval, it destroys the UN legal system of which it is one of the first beneficiaries", he said, citing the right of veto available to France on the UN Security Council, along with Russia, the United States, the United Kingdom and China.<sup>3</sup>

[Huffington Post, 14 April](#)

They are right when they say that there was no vote of the French Parliament. But there is no constitutional issue. Indeed Article 35 of the Constitution on which they base their action is clear: it is the "declaration of war (which) is authorized by the Parliament". In the present case, however, no declaration of war has been made by either France or the United States.

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<sup>2</sup> "Alors que les Etats-Unis, la France et le Royaume-Uni ont mené des frappes contre la Syrie dans la nuit du 13 au 14 avril, les responsables politiques français de l'opposition fustigent une intervention «dangereuse», sans consultation du Parlement".

<sup>3</sup> "Pour la première fois de son histoire, la France d'Emmanuel Macron n'est pas du côté du droit», a jugé le député du Vaucluse et secrétaire général adjoint des Républicains, Julien Aubert. «En bombardant sans l'aval du Conseil de sécurité un pays souverain, comme Bush en Irak, elle détruit le système légal de l'ONU dont elle est une des premières bénéficiaires», a-t-il poursuivi, évoquant le droit de veto dont dispose la France au Conseil de sécurité de l'ONU, au même titre que la Russie, les Etats-Unis, le Royaume-Uni et la Chine ».

The same article also says the French Assembly is informed in the context of intervention by the armed forces abroad. But this information must come "at the latest three days after the beginning of the intervention". The President of the Republic is not required to do so before. As chief of the army, he can decide alone to do it.

François de Rugy, the President of the Assembly, confirmed that the Assembly would be informed and that by 17 April Members would be able to listen to Édouard Philippe explaining the reasons for the strikes. On the other hand, there will be no vote. According to the *Huffington Post* this debate will take place on 16 April from 17:00 hours and "after the Prime Minister's speech, each group will have ten minutes to answer". Deputies and senators may be asked to extend this intervention after four months.<sup>4</sup>

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<sup>4</sup> "Députés et sénateurs ne seront invités à décider qu'au bout de quatre mois pour éventuellement prolonger cette intervention. 'Le gouvernement peut demander à l'Assemblée nationale de décider en dernier ressort', précise la Constitution".

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