



CHATHAM HOUSE

Chatham House, 10 St James's Square, London SW1Y 4LE
T: +44 (0)20 7957 5700 E: contact@chathamhouse.org
F: +44 (0)20 7957 5710 www.chathamhouse.org

Charity Registration Number: 208223

International Law Discussion Group Summary

Syria and International Law: Use of Force and State Responsibility

Chair: Elizabeth Wilmshurst

Associate Fellow, International Law Programme, Chatham House

30 September 2013

The views expressed in this document are the sole responsibility of the author(s) and do not necessarily reflect the view of Chatham House, its staff, associates or Council. Chatham House is independent and owes no allegiance to any government or to any political body. It does not take institutional positions on policy issues. This document is issued on the understanding that if any extract is used, the author(s)/ speaker(s) and Chatham House should be credited, preferably with the date of the publication or details of the event. Where this document refers to or reports statements made by speakers at an event every effort has been made to provide a fair representation of their views and opinions, but the ultimate responsibility for accuracy lies with this document's author(s). The published text of speeches and presentations may differ from delivery.

INTRODUCTION

The purpose of this meeting was to bring together lawyers, academics and NGO representatives to discuss the legal implications of the use of force and various other issues relevant to the conflict in Syria. Discussion focused on the legality of humanitarian intervention in non-international armed conflicts as well as the arguments surrounding the responsibility to protect.¹ This meeting was conducted under the Chatham House Rule.

The Chatham House Rule

'When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.'

R2P AND THE LEGALITY OF THE USE OF FORCE

While the UN Security Council has unanimously adopted a resolution on Syria and the destruction of chemical weapons (res. 2118(2013)), civilians continue to be killed in large numbers. The responsibility to protect (R2P) and the question of the legality of the use of force under Article 2(4) of the UN Charter are still relevant.

States have a responsibility to protect their own population; where this does not occur the international community has committed to stepping in and taking collective action in accordance with Chapter VII of the UN Charter.²

So far as Syria is concerned, there is no agreement within the Security Council to take collective action authorizing the use of force. R2P is not as such a sufficient basis for the use of force by one state against another. Is the use of military force for humanitarian purposes but without the authorization of the Security Council lawful?

Humanitarian intervention

The UK government has stated that it views humanitarian intervention as legally justified in circumstances where three conditions are met:

¹ The summary of this meeting was prepared by Kate Newson.

² United Nations Charter, Chapter VII. <http://www.un.org/en/documents/charter/chapter7.shtml>. See also the 2005 World Summit Outcome. <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN021752.pdf>

- 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;
- it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- 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).³

Thus there is no *carte blanche* for humanitarian intervention. Instead there are stringent conditions with a high threshold test. The conditions were met in the case of Syria following the chemical weapons attack in eastern Damascus on 21 August 2013, the aim of military intervention being to deter and disrupt the further use of chemical weapons by the Syrian regime.

It may be that the adoption of Security Council resolution 2118 (2013) and the Syrian action on chemical weapons would not have taken place without the threat to use force by the United Kingdom, United States and others. It is important to note that humanitarian intervention is not dependent on the use of chemical weapons by a state: it applies where the aforementioned three conditions are met. The UK doctrine on humanitarian intervention followed from Iraq (1991) and Kosovo (1999) where it was expressly relied upon by the government.

That is the legal position of the UK government. Others question whether military intervention on humanitarian grounds is permitted in international law. Four questions arise.

- Should international law permit unilateral intervention?
- If so, does the law as developed to date permit this?
- If so, what are the contours of that right?
- How can a right of humanitarian intervention develop under international law?

Underlying these questions are others: what does this do to the structure of the law on the use of force? Does the right of humanitarian intervention arise

from custom or is it preserved by the UN Charter i.e. not prohibited by Article 2(4)?

Customary international law

Customary international law is based on state practice and *opinio juris*. Humanitarian intervention is a complicated issue because there is limited *opinio juris*, mainly a number of assertions by states. In fact many states explicitly rejected the right to humanitarian intervention following the NATO intervention in Kosovo, as made clear in the Declaration of the South Summit by the Group of 77.⁴ However, some participants noted that it was important to look at states' actions as well as what they said, and said that while controversial, a case for humanitarian intervention as a legal basis for the use of force could be made out. In addition, it was pointed out that customary international law develops where states perceive a need. The International Law Commission is expected to provide a study of customary international law. It may be that instant customary international law can arise if a state takes action and there is agreement or acquiescence from other states. There has, however, been widespread resistance to the proposition that there is a right of humanitarian intervention without Security Council resolution.

One participant suggested that, by looking at the position before Iraq 1991, one can ask how a right to humanitarian intervention developed in the first place. What was the process by which the government overturned its previous view that there was no right to humanitarian intervention? It was noted that in a Foreign Office paper in 1984 it was stated that the best case in support of humanitarian intervention was that it could not be said to be 'unambiguously illegal'.

Article 2(4)

The proposition that custom may supersede Article 2(4) of the UN Charter is problematic. First, it is difficult to argue that custom overrides treaty; to do so one would need to show that the treaty has fallen into disuse or that the international community no longer regards the treaty as binding. Second, the treaty in question is the UN Charter, which leads us to question whether it is ever possible for customary international law to modify it. Article 103

³ UK government Guidance, Chemical weapon use by Syrian regime: UK government legal position, 29 August 2013, paragraph 4. <https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/>

specifically states that charter obligations prevail over obligations owed by states under other treaties; how much the more so in respect of customary international law. Third, it may be argued that Article 2(4) is a peremptory norm and as such can only be modified by another peremptory norm.

The alternative argument would be that Article 2(4) does not prohibit humanitarian intervention either in its original form or by interpretation – that it is not comprehensive but limited by its wording to acts against territorial integrity or political independence. The difficulty with this view is that interpreting Article 2(4) in this way is inconsistent with the drafting history. In addition, there is not sufficient support in subsequent state practice to allow such an interpretation. Further, the consequences of the argument are of concern for other uses of force: the wording of Article 2(4) cannot be used to assert that a limited use of force for humanitarian purposes is not inconsistent with the provision yet simultaneously exclude uses of force for other purposes. Another problem with the use of customary international law to change Article 2(4) in this way is that it invites the same claim in respect of other rules in the UN Charter.

The development of the use of abstentions in the Security Council by the permanent members (rather than having to vote for or against a resolution) is an example of the UN Charter evolving. This is an example of its interpretation that has developed through state practice and has been accepted by the international community and indeed by the International Court of Justice. It can thus be distinguished from the case in point.

While it has been maintained that necessity could be the basis for the use of force for humanitarian purposes, under the ILC Draft Articles on State Responsibility, necessity is a valid basis for action only where there is no primary obligation regulating the conduct of states, for example, the use-of-force principle.⁵

A participant mentioned that if the doctrine of humanitarian intervention were not allowed, then even where it is generally accepted that there is extreme distress to the civilian population, there is no practicable alternative to the use of force, and the force used is limited to what is necessary and proportionate, nothing can be done to save lives. Another participant argued that action that

4 Declaration of the South Summit, 10–14 April 2000, para 54. http://www.g77.org/summit/Declaration_G77Summit.htm

5 Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, paragraph 20, http://www.ijf.cjf.gob.mx/cursosesp/2012/derhumancontrolconvencionalidad/LecturasBloque6/International%20Law%20Commission%20Responsibility%20of%20States%20w%20comentarios%209_6_2001.pdf

was not illegal might still be legitimate. Others said that was not a proper distinction; it was more dangerous to say that illegal action was legitimate than to set out parameters for humanitarian action to take place.

THE INTERNATIONAL CRIMINAL COURT

If Syria were a party to the Rome Statute the International Criminal Court (ICC) could investigate the use of chemical weapons whether as a war crime against civilians generally or, more controversially, as an illegal act in itself. But Syria is not a party, and although some governments had wanted the Security Council to refer the situation to the ICC, there was no agreement on this. As it is, the ICC has no jurisdiction.

It was noted that if the ICC had jurisdiction in relation to Syria and if the Kampala amendments on aggression had come into force (neither of which conditions were met), the use of force by states in humanitarian intervention would be within the jurisdiction of the court.

SUPPLYING ARMS TO THE OPPOSITION

Are there norms of international law against supplying arms to the opposition in a non-international armed conflict? The same question arises as regards financing and training. The main concerns are: the prohibitions on the use of force, the principle of non-intervention in the affairs of other states, and respect for state sovereignty (although this final principle does not add much).

The ICJ addressed the issue in *Nicaragua*⁶ and *DRC v Uganda*⁷. In *Nicaragua* the court found that the US actions in training the Contras breached Article 2(4). In *DRC v Uganda* the court held that the threshold test for a breach of Article 2(4) was one of magnitude and duration of interference.⁸ The non-intervention principle always applies but Article 2(4) applies only where actions are perceived as a threat or use of force and again this is a question of fact and degree. The question is whether the intervening state is trying to coerce the sovereign state in its ability to decide freely.

There is a distinction in types of assistance; so for example, the supply of funds is an intervention but not a use of force. The type of action in assisting

6 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US) (1984)*. <http://www.icj-cij.org/docket/files/70/6485.pdf>.

7 *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda) (2005)* <http://www.icj-cij.org/docket/files/116/10455.pdf?PHPSESSID=d22a6140f6327a3a292ede9bde770c51>.

8 *Ibid* at 165.

the rebels is important; the question will always be one of fact and degree. In the UK government's view, where a situation meets the conditions for humanitarian intervention then it does not breach the non-intervention principle or the prohibition on the use of force. The question of arming rebels is thus the same question as for humanitarian intervention: is there a legal basis?

An interesting comparison was drawn with the view of the government as to the right to intervene in civil wars. One participant noted that in a Foreign Office report in 1984 arming rebels and governments in civil war was viewed as a breach of the principle of non-intervention arising from a people's right to self-determination. But no such discussion has arisen in the case of Syria. No one has argued that there is a principle of abstention in civil war cases by virtue of the principle of self-determination, as there was in the 1980s.

DRAFT ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

The question was raised as to whether a state that provides assistance in any form could be regarded as aiding and abetting the violation or abuse of human rights by the state or entities receiving the assistance. Reference was made to the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts.

Article 16 (which has been accepted by the UK government as broadly reflecting customary international law) provides that a state must not aid or assist another state to commit an internationally wrongful act. The aid must be with knowledge and intent to facilitate the commission of that act. Article 8 covers acts of a state under the instruction, direction or control of another state. One participant stressed that due to this states must be careful whom they are assisting and the relation between their actions and the assistance. The cases of *Tadic*⁹ and *Nicaragua* referred to the degree of control concerned.

One participant asked about assistance to non-state groups. The response was that assistance might be unlawful but the issues would become one of attribution of the actions of the non-state group to a state. There may also be a question of responsibility of individual actors under international criminal law. What is the standard for individuals to be liable for aiding and abetting

⁹ *Prosecutor v Tadic* (1997). <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

war crimes? That is a matter for international criminal law, and the standards are developing.

RECOGNITION

If states were to recognize the opposition as the government of Syria in accordance with the normal criteria, they would be free of any international law prohibition on military intervention if the new government consented to the intervention. The Arab League has recognized the Syrian National Council as the legitimate representative of the Syrian people, while other governments have issued a number of variously worded statements as to the recognition of an opposition. The UK government have said that they recognize the National Coalition for Syrian Revolutionary and Opposition Forces as the 'sole legitimate representative of the Syrian people'.¹⁰ This statement has political, not legal, effect. The statement means that the opposition reflect the legitimate aspirations of the Syrian people and they are the main channel of political dialogue. In other words, they are the credible alternative to the Assad regime.

The criterion for recognizing a government as ruling a state is one of 'effective control'. The United Kingdom has a policy of recognizing states but not governments. While the use of the phrase 'sole legitimate representative' is an important statement of political support that delegitimizes the government in power, it has no legal effect – so, for example, diplomats from the opposition could not represent Syria.

HUMANITARIAN ASSISTANCE

In the absence of any action by the Security Council, is there an obligation on the Syrian government and other parties to the conflict to allow the passage of humanitarian assistance? While there is such an obligation in international humanitarian law it is subject to the consent of the parties concerned. However consent cannot be refused arbitrarily. Attacks on humanitarian relief personnel constitute a war crime.

¹⁰ Statement made by Foreign Secretary William Hague, 20 November 2012. <http://www.bbc.co.uk/news/uk-politics-20406562>.

CLOSING COMMENTS

Finally, the question was raised as to the frequent use of the term 'legitimacy' as opposed to 'legality'. UK ministers are required under the ministerial code of conduct to act in accordance with international law; it was not sufficient when sending troops into battle, that an act be 'legitimate' rather than 'legal'. ICC jurisdiction requires legality; it is not enough to be legitimate. The current discourse that accepts unlawful actions because they are 'legitimate' is having a detrimental effect in allowing illegal forms of use of force. The danger was that in using the term 'legitimacy' moral approval was extended to actions that were illegal. In response the point was made that if legality were the only test, the law had to be stretched very widely (too widely) in order that an action be termed legal.