



## Conditions for using force in humanitarian intervention

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The Government's legal position on intervention in Syria states that humanitarian intervention without authorisation from the UN Security Council is permitted under international law if three conditions are met:

- strong evidence of extreme and large-scale humanitarian distress;
- no practicable alternative to the use of force; and
- the proposed use of force is necessary, proportionate, and the minimum necessary.

World leaders' agreed position on the principle of military intervention as a last resort to respond to mass atrocities is set out in the Outcomes Document of the World Summit on the Responsibility to Protect. It gave only very general conditions – peaceful means are inadequate and national authorities are manifestly failing to protect their populations – and did not say what happens if the Security Council fails to authorise such intervention.

Although the conditions set out in the Government's legal position reflect several other sources on humanitarian intervention, it is not clear whether under current international law meeting such conditions could be an alternative to Security Council authorisation. Could this position contribute to setting a new precedent?

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## 1 The UK government's legal position on intervention in Syria

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.<sup>1</sup> This says 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).

It goes on to give evidence for its view that these conditions are met. But it is not clear from the document where the three conditions come from. Nor is it clear whether they are intended to form an alternative to Security Council authorisation.

There is no mention in the document of the concept of Responsibility to Protect (R2P). The Outcomes Document of the World Summit on R2P (see below) set out an agreed position on military intervention as a last resort, but does not give any such criteria, or any clarity on what happens if there is no Security Council authorisation. And it does not appear that there is

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<sup>1</sup> [Chemical weapon use by Syrian regime - UK Government legal position](#), 29 August 2013

enough state practice and legal opinion yet to make customary international law on the criteria for humanitarian intervention clear (see below).

As the only way for customary law to evolve is for state practice to change, any UK action which breaks new ground could contribute to setting a precedent. Marko Milanovic argues that “the UK is essentially trying to change international law by asserting a position and waiting to see how other players will react and possibly validate its view”.<sup>2</sup>

## **2 The World Summit Outcome Document: little guidance on the criteria for intervention**

The vast majority of world leaders have agreed a statement on military intervention for humanitarian reasons as a last resort. This is contained in the [Outcome Document](#) of the [2005 World Summit](#) on R2P, paragraphs 138 and 139:

- states have a responsibility to protect their own citizens from genocide, war crimes, ethnic cleansing and crimes against humanity;
- the international community has a duty to help states fulfil this responsibility; and
- if a state manifestly fails to protect its citizens from these crimes, the international community should take action, with the ultimate step being military force.<sup>3</sup>

The document does not shed much light on humanitarian intervention without Security Council approval:

...we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate...<sup>4</sup>

So it remains unclear whether the UN is the only actor that can exercise the R2P or whether it is merely the preferred actor.

The triggers for the use of force set out in the Outcome Document are very brief:

- peaceful means are inadequate; and
- national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity<sup>5</sup>

Although various reports (set out below) which were published before the World Summit set out detailed criteria for intervention to be legitimate, and argue that the Security Council veto should be used with restraint in this context, the Outcome Document dropped those provisions.

## **3 The International Commission’s criteria of legitimacy**

The International Commission on Intervention and State Sovereignty (ICISS) brought together an international panel of experts to respond to Kofi Annan’s challenge to Member States to address the problems where humanitarian intervention clashes with state sovereignty. The ICISS’s 2001 report looked at when military intervention should be used,

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<sup>2</sup> Marko Milanovic, “[Breaking: UK Government Discloses Legal Rationale for Syria Intervention](#)”, *EJIL talk! blog*, 29 August 2013

<sup>3</sup> Para 139

<sup>4</sup> Para 139

<sup>5</sup> Para 139

what situations this should apply to, what safeguards should exist against abuse, and who should authorise action:

## **The Responsibility to Protect: Principles for Military Intervention**

### **(1) The Just Cause Threshold**

Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

- a. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- b. large scale "ethnic cleansing", actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

### **(2) The Precautionary Principles**

A. Right intention: The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.

B. Last resort: Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.

C. Proportional means: The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.

D. Reasonable prospects: There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

### **(3) Right Authority**

A. There is no better or more appropriate body than the United Nations Security Council to authorise military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.

B. Security Council authorisation should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorisation, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.

C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large-scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.

D. The Permanent Five members of the Security Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorising military intervention for human protection purposes for which there is otherwise majority support.

E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:

I. consideration of the matter by the General Assembly in Emergency Special Session under the "Uniting for Peace" procedure; and

II. action within area of jurisdiction by regional or sub-regional organisations under Chapter VIII of the Charter, subject to their seeking subsequent authorisation from the Security Council.

F. The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation — and that the stature and credibility of the United Nations may suffer thereby.

It also set out six operational principles for military intervention:

#### **(4) Operational Principles**

A. Clear objectives; clear and unambiguous mandate at all times; and resources to match.

B. Common military approach among involved partners; unity of command; clear and unequivocal communications and chain of command.

C. Acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.

D. Rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law.

E. Acceptance that force protection cannot become the principal objective.

F. Maximum possible coordination with humanitarian organisations.<sup>6</sup>

The ICISS set out two alternatives for when the Security Council does not authorise intervention, but it did not address the issue of whether an intervention which was never authorised by the Security Council could be regarded as legal or legitimate.

## **4 The 2004 UN High-Level Panel largely reflected the ICISS's criteria**

As part of the preparation for the 2005 World Summit, the UN Secretary General appointed a sixteen-member High Level Panel (HLP) to recommend clear and practical measures for ensuring effective collective action. The panel's findings were published in December 2004 as the *Report of the High-Level Panel on Threats, Challenges and Change*.<sup>7</sup>

In general, the HLP's recommendations largely reflected those of the ICISS. For instance the HLP endorsed the idea that R2P was an emerging norm and recommended that P5

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<sup>6</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001

<sup>7</sup> Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: our Shared Responsibility*, 2004

members voluntarily refrain from using their veto and use a system of 'indicative voting' without vetoes before a formal vote with the possibility of vetoes.<sup>8</sup>

There were some differences from the ICISS report. These included the HLP's addition of 'serious violations of humanitarian law' to the list of actions that may give just cause for action, which would have widened the international community's responsibilities. Also some of the 'precautionary principles' alluded to by the ICISS were renamed: 'right intention' became 'proper purpose' and 'balance of consequences' became 'likelihood of success'. The general substance and thrust of these conditions however, remained the same.

## 5 The UN Secretary General's 2005 report echoed the ICISS and HLP

Kofi Annan's response to the HLP's report, entitled *In Larger Freedom: Towards Development, Security and Human Rights for All* was published in March 2005 – shortly ahead of the World Summit.<sup>9</sup> He endorsed the principle of R2P, and set out a series of principles for the use of force for the Security Council to consider, which echo those of the ICISS and the HLP:

The task is not to find alternatives to the Security Council as a source of authority but to make it work better. When considering whether to authorize or endorse the use of military force, the Council should come to a common view on how to weigh the seriousness of the threat; the proper purpose of the proposed military action; whether means short of the use of force might plausibly succeed in stopping the threat; whether the military option is proportional to the threat at hand; and whether there is a reasonable chance of success. By undertaking to make the case for military action in this way, the Council would add transparency to its deliberations and make its decisions more likely to be respected, by both Governments and world public opinion. **I therefore recommend that the Security Council adopt a resolution setting out these principles and expressing its intention to be guided by them when deciding whether to authorize or mandate the use of force.**<sup>10</sup>

The Security Council has not adopted a resolution along these lines.

## 6 The Secretary-General's 2009 implementation report adds little

Ban Ki-moon's 2009 report, *Implementing the Responsibility to Protect*,<sup>11</sup> was intended to develop the UN's role in the practical implementation of the R2P concept.

It reminds us that the UN General Assembly's 'Uniting for peace' procedure is available when the Security Council cannot agree. This procedure empowers the General Assembly to intervene in cases of international conflict.<sup>12</sup> However, "doctrine is divided whether [the 'Uniting for peace' procedure] has ever been used as a legal basis to recommend effective

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<sup>8</sup> Ibid, para 257. Alex Bellamy has questioned the value of the indicative voting approach arguing that is based on an "unproven assumption that external pressure can persuade states to act in humanitarian crises. He adds, "there is little evidence to suggest that states intervene in foreign emergencies because they are in some sense morally shamed into doing so by either domestic or global public opinion." See Alex Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit", *Ethics & International Affairs*, pp149-151

<sup>9</sup> Kofi Annan, *In Larger Freedom: towards Development, Security and Human Rights for All*, A/59/2005 21 March 2005

<sup>10</sup> Para 126

<sup>11</sup> Document A/63/677, 12 January 2009

<sup>12</sup> UN General Assembly Resolution 377 A [V], 3 November 1950, UN Doc A/1775, part A

enforcement action”,<sup>13</sup> and because General Assembly resolutions can only recommend, not require, action, the legal effects of a “Uniting for Peace” resolution are limited.

However, the report adds little on the criteria for military intervention with or without Security Council authorisation:

As noted above, the credibility, authority and hence effectiveness of the United Nations in advancing the principles relating to the responsibility to protect depend, in large part, on the consistency with which they are applied. This is particularly true when military force is used to enforce them. In that regard, Member States may want to consider the principles, rules and doctrine that should guide the application of coercive force in extreme situations relating to the responsibility to protect. This issue was addressed in the 2001 report of the International Commission on Intervention and State Sovereignty and by my predecessor, Kofi Annan, in his 2005 report entitled “In larger freedom: towards development, security and human rights for all (see A/59/2005, para. 126).

The General Assembly has an important role to play, even under pillar three. Its peace and security functions are addressed in Articles 11, 12, 14, and 15 of the Charter. Article 24 of the Charter confers on the Security Council “primary”, not total, responsibility for the maintenance of peace and security, and in some cases the perpetration of crimes relating to the responsibility to protect may not be deemed to pose a threat to international peace and security. Moreover, under the “Uniting for peace” procedure, the Assembly can address such issues when the Council fails to exercise its responsibility with regard to international peace and security because of the lack of unanimity among its five permanent members. Even in such cases, however, Assembly decisions are not legally binding on the parties.<sup>14</sup>

The 2009 report again urges restraint in the use of the veto:

Within the Security Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter. I would urge them to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in paragraph 139 of the Summit Outcome, and to reach a mutual understanding to that effect.<sup>15</sup>

## **7 Academic opinion proposes some possible conditions**

Most academic writing concludes that there has not yet been enough State practice and legal opinion to say that humanitarian intervention is established as a new exception to the general prohibition on the use of force:

there is very little State support for the view that international law permits States to use force in other States on humanitarian grounds. The UK is of course one of the few States that does accept that international law provides a right of humanitarian intervention. However, this view has been rejected by the vast majority of States. See for example the [2000 Declaration of the South Summit by the G77 composed of about 130 member States](#) [‘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 ]. Also, even other European States have failed to advocate such a right. In the ICJ proceedings regarding the [Legality of the Use of Force](#) (by

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<sup>13</sup> Christina Binder, “[Uniting for Peace Resolution \(1950\)](#)”, *Max Planck Encyclopedia of Public International Law*, last updated August 2006

<sup>14</sup> Para 62-63

<sup>15</sup> Para 61

NATO in Yugoslavia), only the UK and Belgium expressly relied on the doctrine of humanitarian intervention. Other NATO countries refrained from doing so.<sup>16</sup>

The usual conclusion is that one of the recognised exceptions to the prohibition on the use of force – invitation, self-defence or Security Council authorisation – is also needed.

But there is nonetheless much discussion about what the conditions for a possible right of humanitarian intervention might be. The Max Planck Encyclopedia summarises:

There can be no definitive statement or authoritative decision on the conditions that must be present for the use of force to qualify as an exercise of a putative right of humanitarian intervention; but there are a number of conditions that are commonly asserted in the writings of various publicists and by the few States to have exceptionally explicitly referred to a right (whether legal or moral) of humanitarian intervention. These include:

- a) the existence of a humanitarian ‘emergency’ or ‘disaster’ or ‘crisis’ or ‘catastrophe’ or ‘necessity’ or ‘tragedy’, usually related to the widespread and gross or egregious violation of human rights of (a part of) the population of a State or to the commission of grave international crimes;
- b) the inability or unwillingness of the territorial State to act to address the situation;
- c) the exhaustion of all other realistically possible remedies, including all peaceful remedies and recourse to the UN Security Council (and arguably also the UN General Assembly under the ‘Uniting for Peace’ procedure), which are unwilling or unable to act;
- d) the acceptance of limitations (both in scope and in time) upon the use of force (as the necessary and sole available course of action), confining it to strictly humanitarian objectives that must be expected to do more harm than good, respecting the principle of [proportionality](#).

To these, some add a preference towards multilateral (rather than unilateral, and as second best to collective) action, as well as towards the (relative) disinterestedness of the intervening States and/or organizations.<sup>17</sup>

## 8 Conclusion

The UK Government’s legal position on intervention in Syria argues that humanitarian intervention is permitted under international law even without Security Council authorisation – a position not currently supported by most states or lawyers. Whether it is nevertheless legitimate, or should be permitted, are different questions.

The conditions for humanitarian intervention outlined in its legal position reflect those suggested in various reports. But there does not appear to be strong legal authority for saying that meeting these conditions provides an alternative to Security Council authorisation. If the UK Government’s position is breaking new ground here, it may contribute to establishing a precedent.

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<sup>16</sup> Dapo Akande, “[The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect](#)”, *EJIL talk! blog*, 28 August 2013

<sup>17</sup> Vaughan Lowe, Antonios Tzanakopoulos, “[Humanitarian Intervention](#)”, *Max Planck Encyclopedia of Public International Law*, May 2011