
Overview

International legal implications of the US-British-French air strikes of 14 April 2018 on chemical-weapons facilities in Syria

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1. The allied military operation against Syria between legality and legitimacy: political, moral and legal positions

In the politically and morally charged debate on the latest air strikes carried out by the United States, the United Kingdom and France against chemical-weapons facilities and military infrastructure in Syria, the issue of the **legality of the military operation in international law** is being sidelined in favour of arguments relating to the **political and moral legitimacy** of the action. This is reflected in the justifications given for the military operation of 14 April 2018 by the three participating NATO allies¹ – as well as in the reactions of the international community – which are largely based on **political and moral arguments** but which, apart from the British statement, make scarcely any clear legal points.² Apart from states such as Russia, Iran and Syria, which, as expected, saw the allied air strikes against Syrian chemical-weapons facilities as an act of aggression in clear violation of international law, the military operation **largely met with political approval** within the international community.³ A **UN Security Council resolution** that was to be tabled condemning the allied military action did not materialise.⁴

The German Government regards the operations as “necessary and appropriate” as a means of dissuading the Assad regime from further violation of the Chemical Weapons Convention and of signalling that the use of chemical weapons in transgression of the ‘red line’ drawn by US President Barack Obama in 2013 is likely to have consequences.

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- 1 Vgl. zur US-Position <https://www.nytimes.com/2018/04/13/world/middleeast/trump-syria-airstrikes-full-transcript.html> sowie zur Position der Briten und Franzosen <https://www.nytimes.com/2018/04/13/world/europe/theresa-mays-statement-on-the-syria-strike.html>. Der französische Präsident *Macron* ließ u.a. verlauten: “The red line set by France in May 2017 has been crossed. (...) We cannot tolerate the trivialization of chemical weapons, which is an immediate danger for the Syrian people and our collective security.”
 - 2 Dabei wird die Urheberschaft des syrischen Präsidenten *Assad* für den Einsatz von Chemiewaffen in Syrien weitgehend unterstellt. Unterdessen gestalten sich die Untersuchungen der *Internationalen Organisation für das Verbot chemischer Waffen* (OPCW) im syrischen Douma schwierig (FAZ v. 17.4.2018).
 - 3 Zu den Auffassungen der Staaten vgl. näher *Ku, Julian*, “Almost Everyone Agrees that the U.S. Strikes Against Syria are Illegal, Except for Most Governments”, *Opinio Iuris* blog v. 16.4.2018, <http://opiniojuris.org/2017/04/07/almost-everyone-agrees-that-the-u-s-strikes-against-syria-are-illegal-under-international-law-except-for-most-governments/>; ferner *Hakimi, Monica*, The Attack on Syria and the Contemporary Jus ad Bellum, *EJIL Talk* v. 15.4.2018, <https://www.ejiltalk.org/the-attack-on-syria-and-the-contemporary-jus-ad-bellum/>.
 - 4 Vgl. zur Diskussion im Sicherheitsrat Dok. SC/13296 v. 14.4.2018: <https://www.un.org/press/en/2018/sc13296.doc.htm>.

In this context, the German Government has emphasised the stalemate in the UN Security Council, which, it says, has prevented diplomatic efforts to influence the conflict in Syria and to put an end to the repeated use of toxic gases against the Syrian population.⁵

The legal assessment of the allies' air strikes of 14 April 2018 against Syrian chemical-weapons facilities does not differ fundamentally from the **missile strike of April 2017** that the United States itself launched against the Shayrat air base; ultimately, that operation of 2017 was also unanimously held to be in **breach of international law**.⁶ In both cases, comparisons were made with the Kosovo intervention of 1999. The discussion on the legality of any military response to toxic gas attacks in Syria goes back to 2013,⁷ when Barack Obama, who was then President of the United States, threatened retaliatory strikes if the 'red line' were breached. Scholars of international law⁸ as well as the German press⁹ have been **unanimous** in classifying the latest allied military action against Syria as **contrary to international law**.

This overview begins by analysing the allied military action against Syria in the light of the **right of reprisal** (section 2) then in the light of the *jus ad bellum* aspect of **humanitarian intervention**

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- 5 Presse- und Informationsamt der Bundesregierung, Pressemitteilung vom 14.4.2018: „Bundeskanzlerin Merkel zu den Militärschlägen der USA, Großbritanniens und Frankreichs in Syrien“ <https://www.bundesregierung.de/Content/DE/Pressemitteilungen/BPA/2018/04/2018-04-14-syrien.html>; Pressemitteilung des Auswärtigen Amtes vom 14.4.2018: „Außenminister Maas zu Syrien“, <https://www.auswaertiges-amt.de/de/newsroom/bm-zu-syrien/1991100>.
- 6 Vgl. für viele *Milanovic, Marko*, Illegal but legitimate?, EJIL Talk v. 10.4.2017, <https://www.ejiltalk.org/illegal-but-legitimate/>; *Vidmar, Jure*, Excusing illegal use of force: From illegal but legitimate to legal because it is legitimate ?, EJIL Talk v. 14.4.2017; <https://www.ejiltalk.org/excusing-illegal-use-of-force-from-illegal-but-legitimate-to-legal-because-it-is-legitimate/>; *Salomon, René*, „Syrien: ‘Operation Sühne’ oder die Erfindung der ‘pädagogischen Intervention’“, JuWiss. Blog v. 7.4.2017, <https://www.juwiss.de/41-2017/>.
- 7 Dazu etwa *Schaller, Christian*, Der Bürgerkrieg in Syrien, der Giftgas-Einsatz und das Völkerrecht, SWP-Aktuell, Sept. 2013, https://www.swp-berlin.org/fileadmin/contents/products/aktuell/2013A54_slr.pdf; *Janik, Ralph*, Intervention in Syrien: Was sagt das Völkerrecht?, <https://derstandard.at/1363710289695/Intervention-in-Syrien-Was-sagt-das-Voelkerrecht>.
- 8 *Kulick, Andreas*, Syria and the Humanitarian Reprisal – President Trump’s Poisonous Gift to International Law?, *VerfBlog*, 14.4.2018, <https://verfassungsblog.de/syria-and-the-humanitarian-reprisal-president-trumps-poisonous-gift-to-international-law/>; *Milanovic, Marko*, The Syria Strikes: Still Clearly Illegal, EJIL Talk vom 15.4.2018, <https://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/>; *Aust, Helmut Philipp*, Völkerrechtswidrigkeit benennen: Warum die Bundesregierung ihre Verbündeten für den Syrien-Luftangriff kritisieren sollte, *VerfBlog*, 16.4.2018, <https://verfassungsblog.de/voelkerrechtswidrigkeit-benennen-warum-die-bundesregierung-ihre-verbuendeten-fuer-den-syrien-luftangriff-kritisieren-sollte>; *Hakimi, Monica*, The Attack on Syria and the Contemporary Jus ad Bellum, EJIL Talk v. 15.4.2018, <https://www.ejiltalk.org/the-attack-on-syria-and-the-contemporary-jus-ad-bellum/>.
- 9 Reinhard Müller, „Ohne Ermächtigung“, in: FAZ vom 17.4.2018, S. 8; Tagesspiegel-online v. 14.4.2018, „Vergeltung verstößt gegen das Völkerrecht“, <https://www.tagesspiegel.de/politik/militaerintervention-in-syrien-vergeltung-verstoest-gegen-das-voelkerrecht/21173364.html>; Taz vom 15.4.2018, „US-Angriff war illegal“, <http://www.taz.de/!5498624/>. Zu den US-Militärschlägen von 2017 vgl. SZ-online v. 7.4.2017, „Trump’s Militärschlag ist völkerrechtswidrig“, <http://www.sueddeutsche.de/politik/syrien-trumps-militaerschlag-ist-voelkerrechtswidrig-1.3456240>.

(section 3). Finally, section 4 deals with the significance of the **legal views of the international community** in the light of the continuing development of international law.

2. Positions on the right of reprisal in international law

Positions on the **admissibility of reprisals** in international law may be formulated as follows:

Reprisals in international law (countermeasures in the form of retaliatory military actions) against a state are **inadmissible in principle**. This even applies if a government has violated a **core norm of international law** by which a state owes obligations towards all other members of the international community and all states have an interest in adherence to that norm (such norms are known as *erga omnes* norms).

The fundamental **prohibition of reprisals** also applies if a state violates an **international agreement** such as the Chemical Weapons Convention¹⁰ and corresponding UN resolutions, such as Security Council Resolution 2118 (2013) and has committed a **war crime**¹¹ by using weapons of mass destruction. The violation of a norm of international law by one state does not give any ‘coalition of the willing’ a blank cheque to take unilateral coercive measures. On the contrary, international law provides for **legal mechanisms**, whether under the Chemical Weapons Convention or in international criminal law, to enforce international conventions and verify compliance with them as well as to call to account those who violate legal rights and take legal action in the event of any violation of international law. The fact that the activation of such legal mechanisms appears **more of a theoretical concept than a practical and effective measure** in the light of **Russian intransigence** in the UN Security Council or the difficulties involved in conducting OPCW investigations in the Syrian city of Douma does not invalidate this assessment of the position in international law. Against this backdrop it becomes all the more significant that the allies had not even waited for the results of the OPCW investigations in Syria before launching their air strikes of 14 April 2018.

The **use of military force against a state to punish that state for violating an international convention** constitutes a **breach of the legal obligation to refrain from the threat or use of force** that is enshrined in Article 2(4) of the UN Charter. This is confirmed by the following major rulings and decisions of international institutions:

10 Übereinkommen über das Verbot der Entwicklung, Herstellung, Lagerung und des Einsatzes chemischer Waffen und über die Vernichtung solcher Waffen vom 13.1.1993. Syrien ist im September 2013 der VN-Chemiewaffenkonvention, welche die Entwicklung, Lagerung und den Einsatz dieser Kampfstoffe untersagt, beigetreten. Vgl. dazu “Chemical Weapons Convention Signatories and States-Parties”: Syria sent a letter to the United Nations Secretary General which said that Assad signed a legislative decree providing the accession of Syria to the Chemical Weapons Convention, <https://www.armscontrol.org/factsheets/cwcsig>.

11 Vgl. Art. 8 b) xvii und xviii) des Römischen Statuts über den Internationalen Strafgerichtshof <http://www.un.org/depts/german/internatrecht/roemstat1.html>.

The document known as the Friendly Relations Declaration that was adopted by the **UN General Assembly** in 1970¹² clearly states that “States have a duty to refrain from acts of reprisal involving the use of force”.

The **UN Security Council** has also condemned armed reprisals as “incompatible with the purposes and principles of the United Nations”.¹³ The **International Court of Justice** made the following remarks concerning reprisals in its judgment in *Nicaragua v. United States*:¹⁴

“While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot, as the Court has already observed, produce any entitlement to take collective countermeasures involving the use of force.[...]”

On the basis of these assessments, the **International Law Commission**, in Article 50(1)(a) of its **Draft Articles on the Responsibility of States for Internationally Wrongful Acts**, rules that the obligation to refrain from the threat or use of force also applies to any countermeasures; while these Draft Articles are, in principle, non-binding, the relevant provisions do codify customary international law.

In view of the aforementioned rulings, the **obligation to refrain from reprisals involving the threat or use of force** must surely be classifiable in practice as **customary international law**.¹⁵

Reprisals in the context of an **ongoing international conflict**, on the other hand, are **not of themselves inadmissible**; such coercive measures, however, may only be adopted to a very limited extent for the sole purpose of persuading a warring party which is acting in breach of international law to comply with the relevant provisions of international law but not to punish it for war crimes that have already been perpetrated. Accordingly, belligerent reprisals are not instruments of retaliation but preventive instruments in international law which serve to deter, to enforce the law and/or to restore the rule of law.¹⁶

12 Erklärung über Grundsätze des Völkerrechts betreffend freundschaftliche Beziehungen und Zusammenarbeit zwischen den Staaten im Einklang mit der Charta der Vereinten Nationen, A/RES/2625 (XXV) v. 24.10.1970, <http://www.un.org/depts/german/gv-early/ar2625.pdf>. Die Deklaration spiegelt die völkergewohnheitsrechtlichen Grundsätze des zwischenstaatlichen Verhaltens wider.

13 VN-Sicherheitsrat, Resolution 188 vom 9. April 1964, UN Dok. S/RES/188 (1964), Rdnr. 1.

14 Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua vs United States), Urteil des IGH v. 27.6.1986, <http://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>.

15 So jedenfalls *Salomon, René*, “Syrien: ‘Operation Sühne’ oder die Erfindung der ‘pädagogischen Intervention’”, JuWiss. Blog vom 7.4.2017, <https://www.juwiss.de/41-2017/>. Vgl. auch *Ipsen* (Hrsg.), Völkerrecht, München, 6. Aufl. 2014, § 52 Rdnr. 54.

16 Vgl. nähere Erläuterungen unter <http://humanitaeres-voelkerrecht.de/page7.php>. Grundlegend dazu *Hebenstreit, Johannes*, Repressalien im humanitären Völkerrecht, Baden-Baden 2004.

There are, however, no grounds for regarding the latest US-British-French air strikes against the Assad regime in Syria as **belligerent reprisals**, if only because the three allies are **not directly engaged in an armed conflict with the Syrian state**. The allies' military engagement in Syria has hitherto been confined to combating so-called Islamic State in Syria, albeit without the consent of the Assad regime, on the basis of the right of self-defence following the IS atrocities in Paris in November 2015 (Operation Inherent Resolve, targeting so-called IS).

3. The allied military operation against Syria in the light of *ius ad bellum* and humanitarian interventions

Like the Kosovo intervention back in 1999, the latest allied military operation against Syria poses a challenge to the **obligation under international law to refrain from the threat or use of force**. The situation that prevailed in Syria in April 2018 before the air strikes is similar to the 1999 scenario in that the allies – the United States, France and Britain – **could not cite self-defence** to justify their military intervention, which could only have been legitimised by the UN Security Council under Chapter VII of the UN Charter as a means of restoring international security.

Resolution 2118 (2103), the purpose of which was to enforce the destruction of all Syrian chemical weapons, did threaten the Assad regime with the use of force but reserved the right to decide on the use of force to the UN Security Council itself.¹⁷

Only **the United Kingdom** set out its own legal position on the military action against Syria, which it did in a **policy paper** dated 14 April 2018.¹⁸ According to that policy paper, international law permitted measures to be taken on an exceptional basis in order to alleviate overwhelming humanitarian suffering. The legal basis for the use of force, it stated, was the doctrine of humanitarian intervention, which required three conditions to be met:

- first, there must be convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief,
- second, it must be objectively clear that there is no practicable alternative to the use of force, and

17 VN-Sicherheitsrat, Resolution 2118 (2013) v. 27.9.2013, Rz. 21: “The UN Security Council ... decides, in the event of non-compliance with this resolution, including unauthorized transfer of chemical weapons, or any use of chemical weapons by anyone in the Syrian Arab Republic, to impose measures under Chapter VII of the United Nations Charter” (online unter: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2118.pdf).

18 Syria action – UK government legal position, <https://www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position>.

- third, the proposed use of force must be necessary and proportionate.¹⁹

The United Kingdom considers that these criteria are fulfilled, since the stalemate in the UN Security Council ruled out any practicable alternative and the targeted and limited attacks on the chemical-weapons infrastructure were necessary and proportionate.

The **British legal position** on the military action against Syria, **which Germany apparently endorsed in principle, is not ultimately convincing.**

Apart from the lack of coherence in the humanitarian elements of this line of argument – first of all, it is questionable whether the air strikes really are likely to prevent further suffering, particularly since the ongoing Syrian conflict will presumably claim future victims, and secondly it must be asked why, given the seven years of civil war in Syria, the specific use of chemical weapons should be the *intrinsically decisive* event that makes humanitarian intervention justifiable – the British approach merely constitutes **another variation on the legal construct of ‘humanitarian intervention’** without a mandate from the Security Council and on the **concept of the international responsibility to protect (R2P).**

Because of the risk of abuses, the admissibility of humanitarian intervention still remains an **extremely contentious issue in the field of international law**, and **the hypothesis that it is an exception based on customary law to the obligation in international law to refrain from the threat or use of force certainly does not seem tenable.**²⁰

As was the case in the Kosovo intervention of 1999, it may be concluded that action in breach of international law cannot be ‘redeemed’ by the fact that it is morally legitimate. **The legality of state action does not automatically ensue from its legitimacy.**

19 “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, which requires three conditions to be met:

- (1) 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;
- (2) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (3) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian suffering and must be strictly limited in time and in scope to this aim.”

20 Die völkerrechtliche Auseinandersetzung mit der Rechtsfigur der „humanitären Intervention“ ist seit der Kosovo-Intervention von 1999 nahezu unüberschaubar. Einen ersten Einstieg mit Nachweisen aus der Literatur bietet die Kommentierung von *Randelzhofer/Dörr*, in: Simma/Khan/Nolte/Paulus (Hrsg.), *The Charter of the United Nations. A Commentary*, Oxford Univ.-Press 2012, Vol. I, Art. 2 (4), Rdnr. 52-57 sowie der Beitrag von *Lowe / Tzanakopoulos*, *Humanitarian Intervention*, in: *Max Planck Encyclopedia of Public International Law (MPEPIL)*, Mai 2011, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e306?rskey=jxbOSM&result=1&prd=EPIL>. Vgl. instruktiv auch die Kurzdarstellung von *Peter Rudolf*, *Schutzverantwortung und humanitäre Intervention*, Bundeszentrale für politische Bildung 2013, <http://www.bpb.de/apuz/168165/schutzverantwortung-und-humanitaere-intervention?p=all>.

The allied military operation against Syria scarcely qualifies as a precedent that would enshrine any kind of grounds justifying ‘humanitarian intervention’ in customary international law, for the concept of responsibility to protect that underlies the legal construct of ‘humanitarian intervention’ is focused solely on the protection of the civilian population and not on the punishment of those who violate the law. The humanitarian element of the military operation in the explanatory statements from the United States and France, however, is essentially confined to enforcement of the ban on the use of chemical weapons.

Unlike the United Kingdom, the other two participants **did not invoke the legal argument of humanitarian intervention at all** in their explanatory statements. This, however, would have been **essential** if a clear *opinio juris*²¹ in favour of humanitarian intervention as a justifying factor were to be derived from those statements.

The allied air strikes then ultimately appear rather like a brazen return to something that international law was thought to have banished,²² namely **armed reprisals cloaked in a humanitarian mantle**.²³

4. Implications for the future development of international law

In the realm of international law, great importance attaches to **states’ interpretations of the law**, which can even shape customary law. Not least among the objectives of legal arguments are **the amendment and evolution of existing international law**;²⁴ this applies especially to the continuing development of rules pertaining to the obligation to refrain from the threat or use of

21 Darunter versteht man in diesem Zusammenhang die gefestigte Rechtsüberzeugung der Staatengemeinschaft, dass ein bestimmtes Verhalten, welches das Gewaltverbot durchbricht, nicht nur legitim, sondern auch „rechters“ ist (näher dazu *Ipsen* (Hrsg.), *Völkerrecht*, München, 6. Auf. 2014, § 17 Rdnr. 12 ff.).

22 Zumindest bis zum 1. Weltkrieg gehörten bewaffnete Repressalien zum akzeptierten Standardrepertoire internationaler Auseinandersetzungen.

23 So relativ einhellig *Hakimi, Monica*, *The Attack on Syria and the Contemporary Jus ad Bellum*, EJIL Talk vom 15.4.2018; *Kulick, Andreas*: *Syria and the Humanitarian Reprisal – President Trump’s Poisonous Gift to International Law?*, *VerfBlog* v. 14.4.2018; *Aust, Helmut Philipp*: *Völkerrechtswidrigkeit benennen: Warum die Bundesregierung ihre Verbündeten für den Syrien-Luftangriff kritisieren sollte*, *VerfBlog*, 16.4.2018.

24 Erwähnt sei hier etwa die nachfolgende Staatenpraxis bei der Auslegung von Verträgen gem. Art. 31 Abs. 3a der Wiener Vertragsrechtskonvention (WVRK). Vgl. dazu *Analytical Guide to the Work of the International Law Commission on subsequent agreements and subsequent practice in relation to interpretation of treaties*, http://legal.un.org/ilc/guide/1_11.shtml.

force under Article 2(4) of the UN Charter and/or the **written and unwritten**²⁵ **exceptions** to that obligation.

The possibility that the military operations of 2017 and 2018 against chemical-weapons facilities will lead in the future to the development of a **new exception to the obligation to refrain from the threat or use of force** in cases of ‘reprisals on humanitarian grounds’ cannot be entirely ruled out.²⁶

Scholars of international law²⁷ who have written commentaries on the allied military operation against Syria have observed in this context that **commitment to a rule-based global order** and its **central foundations**, particularly the obligation in international law to refrain from the threat or use of force, **must be accompanied by a correspondingly clear and unequivocal articulation of interpretations of the law**. Moreover, when assessing the legality of military operations, such as the Russian annexation of the Crimea in 2014, the NATO operation of 1999 in Kosovo and the NATO allies’ air strikes against Syria in 2018, states **must not apply double standards**, otherwise they will forfeit their own political credibility and the credibility of international law.

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- 25 Erinnert sei an das **völkergewohnheitsrechtliche Selbstverteidigungsrecht** einschließlich der sog. „präventiven“ Selbstverteidigung (Frage der Zulässigkeit von sog. „**pre-emptive strikes**“) sowie an die Diskussion über **weitergehende ungeschriebene Ausnahmen** vom Gewaltverbot wie z.B. die anerkannte „**Intervention auf Einladung**“, die umstrittene Rechtsfigur der „**humanitäre Intervention**“ oder die gewohnheitsrechtlich anerkannte Möglichkeit zur „**Rettung eigener Staatsangehöriger aus fremdem Staatsgebiet**“ (vgl. zum Ganzen *Ipsen* (Hrsg.), *Völkerrecht*, München, 6. Aufl. 2014, § 52).
- 26 In diese Richtung plädiert etwa der ehemalige Rechtsberater der Obama-Administration *Harold Koh*, „Not illegal: But now the hard part begins“, *Just Security* blog v. 7.4.2017, <https://www.justsecurity.org/39695/illegal-hard-part-begins/>; ihm zustimmend *David Ohlin*, *Opinio Iuris* blog v. 17.4.2018, <http://opiniojuris.org/2017/04/08/i-agree-with-harold-koh/>.
- 27 So etwa von *Aust, Helmut Philipp*, *Völkerrechtswidrigkeit benennen: Warum die Bundesregierung ihre Verbündeten für den Syrien-Luftangriff kritisieren sollte*, *VerfBlog* vom 16.4.2018.