

Legal Sidebar

U.S. Strike on Syrian Airbase: Legal under International Law?

04/17/2017

In his [letter to Congress](#) under the [War Powers Resolution](#), President Trump cited his Article II powers as his domestic legal authority for the April 6 missile strike on Al Shayrat airbase in Syria, [but did not describe a legal basis to justify the action under international law](#). The missile strike may raise [questions under international law](#) including, in particular, whether the action is consistent with U.S. obligations under the [U.N. Charter](#). The answer may in turn raise questions about whether the validity of the international legal basis has any bearing on the validity of the action pursuant to U.S. domestic law. This Sidebar provides a brief overview.

[Article 2\(4\)](#) of the U.N. Charter prohibits the “threat or use of force against the territorial integrity or political independence” of another Member state unless an exception exists. There are at least three sets of circumstances that do – or may – constitute exceptions to this prohibition.

The first basis for an exception is U.N. Security Council authorization grounded in the powers granted to it by [Chapter VII of the U.N. Charter](#) to respond to threats to international peace and security. That Chapter authorizes the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to “make recommendations and take other actions to maintain or restore international peace and security.” Express authorization from the Security Council would provide the clearest legal basis for military action in response to Syria’s use of chemical weapons. However, while the U.N. Security Council has adopted resolutions regarding the situation in Syria (e.g., [U.N.S.C. Resolution 2118](#), issued in 2013) that include language condemning the use of chemical weapons as a breach of international law and a threat to international peace and security, the Security Council has stopped short of authorizing the use of military force to enforce the prohibition.

The second basis for an exception to Article 2(4) limitations on the use of force is when such action is taken in self-defense. [Article 51 of the Charter](#) explicitly recognizes the right of self-defense as an exception to Article 2(4)’s prohibition. Specifically, Article 51 states, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations” There has been no claim that Syria has conducted an armed attack against another nation. However, [some theorists and practitioners](#), consider that there also exists a customary doctrine of inherent self-defense outside of the circumstances identified by Article 51. This doctrine would permit military action to counter a grave threat to regional peace and stability, even if that threat seems to be contained within the borders of a state and there is no threat of imminent armed attack against other states. Under this view, armed intervention to counter a valid threat is not a prohibited “use of force” under Article 2(4) so long as it is not aimed at taking a state’s territory or subjecting the state’s people to political control, and is not otherwise inconsistent with the purpose of the U.N. Charter. Although the [letter to Congress](#) asserted that the missile strike would “promote the stability of the region,” the Trump Administration has not claimed that the missile strike was necessary to defend against the threat of an armed attack against the United States, its citizens, or its allies in the region. Nor has the Administration to date informed the Security Council of measures taken in self-defense, as would be required when acting under the terms of Article 51.

Third, some have [argued](#) that emerging norms of international human rights law provide that states are no longer free to treat their people as they see fit under the guise of sovereignty, but are instead obligated to respect their people’s

fundamental human rights. When a government engages in widespread abuse of the human rights of its own people, it has been asserted, that government loses a measure of its sovereignty. Other states, the argument continues, have the right or even the responsibility to intervene in order to put a stop to crimes against humanity, genocide, or other crimes of a similar nature. This emerging doctrine of humanitarian intervention – sometimes described as the “[responsibility to protect](#)” (or “R2P”) – is not yet fully developed in international law, and there is no consensus affirming its contours, including whether it constitutes an exception to the prohibition on the “threat or use of force.” Some [believe](#) that only the U.N. Security Council can authorize humanitarian intervention, but there is a [minority view](#) that claims that states may take unilateral or collective action if the U.N. Security Council is unable to take action to counter a threat to peace and security. The U.S. executive branch has not officially adopted this view.

Supporting the validity of R2P, the [United Kingdom took the position in 2013](#) that a proportional armed attack would be lawful to counter the Syrian use of chemical weapons in the event meaningful action in the Security Council remained blocked and a number of other criteria were satisfied. While it appears that [humanitarian intervention without a Security Council resolution has taken place a number of times](#), no nations [other than the U.K. and Denmark](#) appear to have adopted humanitarian intervention as an official legal rationale supporting the use of force. U.S. Ambassador to the United Nations Nikki Haley [suggested](#) prior to the U.S. missile strike that the failure of the Security Council to take action to prevent the Syrian use of chemical weapons could justify unilateral action, but did not couch her position in legal terms. In any case, the inability of the U.N. Security Council to take action seems most likely to result from the exercise of veto power under [Chapter V of the Charter](#) by one of the five permanent members of the Security Council. (In the case of Syria, [Russia, sometimes with China, has vetoed](#) a number of resolutions.) Yet the veto privilege may be seen as a feature built into the U.N. Charter to preserve the roles of the most powerful nations in ensuring world security. The view that the U.N. Charter implicitly approves the use of force without a Security Council mandate *due to* the threat of a veto seems difficult to square with the text of the Charter.

This quandary has [reignited debate](#) as to whether military actions without Security Council approval, like the Al Shayrat missile strike, should be regarded as *not lawful* but nevertheless *legitimate* under international law. Some observers have [noted](#) the importance of the distinction between “lawful” and “legitimate” with regard to the President’s authority to order the use of military force under the Constitution. Presidents have sometimes [buttressed](#) their claims of legal authority to use military force without congressional approval by pointing to international sources of authority, such as a U.N. Security Council Resolution or decision of NATO member states. If the President’s responsibility under [Article II of the Constitution](#) to give effect to treaties as the “supreme law of the land” under [Article VI](#) provides support to a unilateral action on the part of the President, it may stand to reason that the same responsibility would impede his authority to act in breach of a treaty. Under this [view](#), the use of military force without congressional authorization in such a case would be unconstitutional even if it abides by the limits of the [War Powers Resolution](#), or is deemed not to constitute “[war in the constitutional sense](#)” interpreted to require legislative authorization. On the other hand, the executive branch has in the past [described](#) article 2(4) of the U.N. Charter as non-self-executing under U.S. law and thus not binding on the legislative and executive branches, in which case the President could claim the authority to breach it without congressional authorization.

It remains to be seen whether the Trump Administration will release a statement explaining its legal basis for the missile strike under international law, but even if such a statement is forthcoming, it seems unlikely that it would put an end to this debate.

Posted at 04/17/2017 09:41 AM