

Breaking International Law in Syria. US-NATO's “Humanitarian Air Strikes”

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Global Research, November 29, 2015

[RT](#) 25 November 2015

The war drums are getting louder in the aftermath of ISIS attacks in Paris, as Western countries gear up to launch further airstrikes in Syria. But obscured in the fine print of countless resolutions and media headlines is this: the West has no legal basis for military intervention. Their strikes are illegal.

“It is always preferable in these circumstances to have the full backing of the United Nations Security Council (UNSC) but I have to say what matters most of all is that any actions we would take would...be legal,” explained UK Prime Minister David Cameron to the House of Commons last Wednesday.

Legal? No, there's not a scrap of evidence that UK airstrikes would be lawful in their current incarnation.

Then just two days later, on Friday, the UN Security Council unanimously adopted Resolution 2249, aimed at rallying the world behind the fairly obvious notion that ISIS is an *“unprecedented threat to international peace and security.”*

“It's a call to action to member states that have the capacity to do so to take all necessary measures against (ISIS) and other terrorist groups,” British UN Ambassador Matthew Rycroft told reporters.

The phrase *“all necessary measures”* was broadly interpreted – if not explicitly sanctioning the *“use of force”* in Syria, then as a wink to it.

Let's examine the pertinent language of UNSCR 2249:

The resolution “calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter...on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq.

Note that the resolution demands *“compliance with international law, in particular with the UN Charter.”* This is probably the most significant explainer to the *“all necessary measures”* phrase. Use of force is one of the most difficult things for the UNSC to sanction – it is a last resort measure, and a rare one. The lack of Chapter 7 language in the resolution pretty much means that *‘use of force’* is not on the menu unless states have other means to wrangle *“compliance with international law.”*

What you need to know about international law

It is important to understand that the United Nations was set up in the aftermath of World War 2 expressly to prevent war and to regulate and inhibit the use of force in settling disputes among its member states. This is the UN's big function – to “*maintain international peace and security*,” as enshrined in the [UN Charter's very first article](#).

There are a lot of laws that seek to govern and prevent wars, but the Western nations looking to launch airstrikes in Syria have made things easy for us – they have cited the law that they believe justifies their military intervention: specifically, Article 51 of the UN Charter. It reads, in part:

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, until the Security Council has taken measures necessary to maintain international peace and security.

So doesn't France, for instance, enjoy the inherent right to bomb ISIS targets in Syria as an act of self-defense – in order to prevent further attacks?

And don't members of the US-led coalition, who cite the “*collective self-defense*” of Iraq (the Iraqi government has formally made this request), have the right to prevent further ISIS attacks from Syrian territory into Iraqi areas?

Well, no. Article 51, as conceived in the UN Charter, refers to attacks between territorial states, not with non-state actors like ISIS or Al-Qaeda. Syria, after all, did not attack France or Iraq – or Turkey, Australia, Jordan or Saudi Arabia.

And here's where it gets interesting.

Western leaders are employing two distinct strategies to obfuscate the lack of legal justification for intervention in Syria. The first is the use of propaganda to build narratives about Syria that support their legal argumentation. The second is a shrewd effort to cite legal “*theory*” as a means to ‘stretch’ existing law into a shape that supports their objectives.

The “*Unwilling and Unable*” Theory – the “*Unable*” argument

The unwilling and unable theory – as related to the Syria/ISIS situation – essentially argues that the Syrian state is both unwilling and unable to target the non-state actor based within its territory (ISIS, in this case) that poses a threat to another state.

Let's break this down further.

Ostensibly, Syria is ‘*unable*’ to sufficiently degrade or destroy ISIS because, as we can clearly see, ISIS controls a significant amount of territory within Syria's borders that its national army has not been able to reclaim.

This made some sense – until September 30 when Russia entered the Syrian military theater and began to launch widespread airstrikes against terrorist targets inside Syria.

As a major global military power, Russia is clearly ‘able’ to thwart ISIS –certainly just as well as most of the Western NATO states participating in airstrikes already. Moreover, as Russia is operating there due to a direct Syrian government appeal for assistance, the Russian military role in Syria is perfectly legal.

This development struck a blow at the US-led coalition’s legal justification for strikes in Syria. Not that the coalition’s actions were ever legal – “*unwilling and unable*” is merely a theory and has no basis in customary international law.

About this new Russian role, Major Patrick Walsh, associate professor in the International and Operational Law Department at the US Army’s Judge Advocate General’s Legal Center and School in Virginia, [says](#):

The United States and others who are acting in collective defense of Iraq and Turkey are in a precarious position. The international community is calling on Russia to stop attacking rebel groups and start attacking ISIS. But if Russia does, and if the Assad government commits to preventing ISIS from attacking Syria’s neighbors and delivers on that commitment, then the unwilling or unable theory for intervention in Syria would no longer apply. Nations would be unable to legally intervene inside Syria against ISIS without the Assad government’s consent.

In recent weeks, the Russians have made ISIS the target of many of its airstrikes, and are day by day improving coordination efficiencies with the ground troops and air force of the Syrian Arab Army (SAA) and its allies -Iran, Hezbollah and other foreign groups who are also in Syria legally, at the invitation of the Syrian state.

Certainly, the balance of power on the ground in Syria has started to shift away from militants and terrorist groups since Russia launched its campaign seven weeks ago – much more than we have seen in a year of coalition strikes.



Militant Islamist fighters. © Stringer / Reuters

The “*Unwilling and Unable*” Theory - the “*Unwilling*” argument

Now for the ‘*unwilling*’ part of the theory. And this is where the role of Western governments in seeding ‘*propaganda*’ comes into play.

The US and its allies have been arguing for the past few years that the Syrian government is either in [cahoots](#) with ISIS, benefits from ISIS’ existence, or is a major recruiting magnet for the terror group.

Western media, in particular, has made a point of underplaying the SAA’s military confrontations with ISIS, often suggesting that the government actively avoids ISIS-controlled areas.

The net result of this narrative has been to [convey the message](#) that the Syrian government has been ‘*unwilling*’ to diminish the terror group’s base within the country.

But is this true?

ISIS was born from the Islamic State of Iraq (ISI) in April, 2013 when the group’s leader Abu

Bakr al-Baghdadi declared a short-lived union of ISI and Syria's Al-Qaeda branch, Jabhat al-Nusra. Armed militants in Syria have switched around their militia allegiances many times throughout this conflict, so it would be disingenuous to suggest the Syrian army has not fought each and every one of these groups at some point since early 2011.

If ISIS was viewed as a '*neglected*' target at any juncture, it has been mainly because the terror group was focused on land grabs for its "*Caliphate*" in the largely barren north-east areas of the country – away from the congested urban centers and infrastructure hubs that have defined the SAA's military priorities.

But ISIS has always remained a fixture in the SAA's sights. The Syrian army has fought or targeted ISIS, specifically, in dozens of battlefields since the organization's inception, and continues to do so. In Deir Hafer Plains, Mennagh, Kuweires, Tal Arn, al-Safira, Tal Hasel and the Aleppo Industrial District. In the suburbs and countryside of Damascus – most famously in Yarmouk this year – where the SAA and its allies thwarted ISIS' advance into the capital city. In the Qalamun mountains, in Christian Qara and Faleeta. In Deir Ezzor, where ISIS would join forces with the US-backed Free Syrian Army (FSA): al-Husseiniyeh, Hatla, Sakr Island, al-Hamadiyah, al-Rashidiyah, al-Jubeileh, Sheikh Yasseen, Mohassan, al-Kanamat, al-Sina'a, al-Amal, al-Haweeqa, al-Ayyash, the Ghassan Aboud neighborhood, al-Tayyim Oil Fields and the Deir ez-Zor military airport. In Hasakah Province – Hasakah city itself, al-Qamishli, Regiment 121 and its environs, the Kawkab and Abdel-Aziz Mountains. In Raqqa, the Islamic State's capital in Syria, the SAA combatted ISIS in Division 17, Brigade 93 and Tabaqa Airbase. In Hama Province, the entire al-Salamiyah District – Ithriyah, Sheikh Hajar, Khanasser. In the province of Homs, the eastern countryside: Palmyra, Sukaneh, Quraytayn, Mahin, Sadad, Jubb al-Ahmar, the T-4 Airbase and the Iraqi border crossing. In Suweida, the northern countryside.

If anything, the Russian intervention has assisted the Syrian state in going on the offensive against ISIS and other like-minded terror groups. Before Russia moved in, the SAA was hunkering down in and around key strategic areas to protect these hubs. Today, Syria and its allies are hitting targets by land and air in the kinds of coordinated offensives we have not seen before.

Seeding '*propaganda*'

The role of propaganda and carefully manipulated narratives should not be underestimated in laying the groundwork for foreign military intervention in Syria.

From "*the dictator is killing his own people*" to the "*regime is using chemical weapons*" to the need to establish "*No Fly Zones*" to safeguard "*refugees fleeing Assad*"...propaganda has been liberally used to build the justification for foreign military intervention.

Article 2 of the UN Charter states, in part:

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.

It's hard to see how Syria's sovereignty and territorial integrity has not been systematically violated throughout the nearly five years of this conflict, by the very states that make up the US-led coalition. The US, UK, France, Saudi Arabia, Turkey, Qatar, the UAE and other nations

have poured weapons, funds, troops and assistance into undermining a UN member state at every turn.

“Legitimacy” is the essential foundation upon which governance rests. Vilify a sitting government, shut down multiple embassies, isolate a regime in international forums, and you can destroy the fragile veneer of legitimacy of a king, president or prime minister.

But efforts to [delegitimize](#) the government of Syrian President Bashar al-Assad have also served to lay the groundwork for coalition airstrikes in Syria.

If Assad is viewed to lack *“legitimacy,”* the coalition creates the impression that there is no real government from which it can gain the necessary authority to launch its airstrikes.

This mere *‘impression’* provided the pretext for Washington to announce it was sending 50 Special Forces troops into Syria, as though the US wasn’t violating every tenet of international law in doing so. *“It’s okay – there’s no real government there,”* we are convinced.

Media reports repeatedly highlight the *‘percentages’* of territory outside the grasp of Syrian government forces – this too serves a purpose. One of the essentials of a state is that it consists of territory over which it governs.

If only 50 percent of Syria is under government control, the argument goes, *“then surely we can just walk into the other ‘ungoverned’ parts”* – as when US Ambassador to Syria Robert Ford and US Senator John McCain just strolled illegally across the border of the sovereign Syrian state.

Sweep aside these *‘impressions’* and bury them well. The Syrian government of Bashar al-Assad is viewed by the United Nations as the only legitimate government in Syria. Every official UN interaction with the state is directed at this government. The Syrian seat at the UN is occupied by Ambassador Bashar al-Jaafari, a representative of Assad’s government. It doesn’t matter how many Syrian embassies in how many capitals are shut down – or how many governments-in-exile are established. The UN only recognizes one.

As one UN official told me in private: *“Control of surface territory doesn’t count. The government of Kuwait when its entire territory was occupied by Iraq – and it was in exile – was still the legitimate government of Kuwait. The Syrian government could have 10 percent of its surface left – the decision of the UN Security Council is all that matters from the perspective of international law, even if other governments recognize a new Syrian government.”*

Countdown to more illegal airstrikes?

If there was any lingering doubt about the illegality of coalition activities in Syria, the Syrian government put these to rest in September, in two letters to the UNSC that denounced foreign airstrikes as unlawful:

If any State invokes the excuse of counter-terrorism in order to be present on Syrian territory without the consent of the Syrian Government whether on the country’s land or in its airspace or territorial waters, its action shall be considered a violation of Syrian sovereignty.

Yet still, upon the adoption of UNSC Resolution 2249 last Friday, US Deputy Representative to the United Nations Michele Sison insisted that “in accordance with the UN Charter and its recognition of the inherent right of individual and collective self-defense,” the US would use “*necessary and proportionate military action*” in Syria.

The [website](#) for the European Journal of International Law (EJIL) promptly pointed out the obvious:

The resolution is worded so as to suggest there is Security Council support for the use of force against IS. However, though the resolution, and the unanimity with which it was adopted, might confer a degree of legitimacy on actions against IS, the resolution does not actually authorize any actions against IS, nor does it provide a legal basis for the use of force against IS either in Syria or in Iraq.

On Thursday, UK Prime Minister David Cameron plans to unveil his new “*comprehensive strategy*” to tackle ISIS, which we are told will include launching airstrikes in Syria.

We already know the legal pretext he will spin – “*unwilling and unable*,” Article 51, UN Charter, individual and collective self-defense, and so forth.

But if Cameron’s September 7 comments at the House of Commons are any indication, he will use the following logic to argue that the UK has no other choice than to resort to ‘*use of force*’ in Syria. In response to questions about two illegal drone attacks targeting British nationals in Syria, the prime minister emphasized:

These people were in a part of Syria where there was no government, no one to work with, and no other way of addressing this threat...When we are dealing with people in ISIL-dominated Syria—there is no government, there are no troops on the ground—there is no other way of dealing with them than the route that we took.

But Cameron does have another route available to him – and it is the only ‘*legal*’ option for military involvement in Syria.

If the UK’s intention is solely to degrade and destroy ISIS, then it must request authorization from the Syrian government to participate in a coordinated military campaign that could help speed up the task.

If Western (and allied Arab) leaders can’t stomach dealing with the Assad government on this issue, then by all means work through an intermediary – like the Russians – who can coordinate and authorize military operations on behalf of their Syrian ally.

The Syrian government has said on multiple occasions that it welcomes sincere international efforts to fight terrorism inside its territory. But these efforts must come under the direction of a central legal authority that can lead a broad campaign on the ground and in the air.

The West argues that, unlike in Iraq, it seeks to maintain the institutions of the Syrian state if Assad were to step down. The SAA is one of these ‘*institutions*’ – why not coordinate with it now?

But after seven weeks of Russian airstrikes coordinated with extensive ground troops (which the coalition lacks), none of these scenarios may even be warranted. ISIS and other extremist groups have lost ground in recent weeks, and if this trend continues, coalition states should fall back and focus on other key ISIS-busting activities referenced in UNSCR 2249 – squeezing terror financing, locking down key borders, sharing intelligence...“all necessary measures” to destroy this group.

If the ‘international community’ wants to return ‘peace and stability’ to the Syrian state, it seems prudent to point out that its very first course of action should be to stop breaking international law in Syria.

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