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The Intervention against the Islamic State under International Law

Is the US-led air campaign against the so-called Islamic State permissible under international law? When it comes to assisting Iraqi forces, Natalino Ronzitti believes that Washington and its allies are on solid ground. However, it's a different story for airstrikes in Syria.

By Natalino Ronzitti for ISN

The West's initial reluctance to become too embroiled in the Syrian conflict has gradually been replaced by a determination to crush the so-called Islamic State's (IS) control of vast swathes of Iraq and Syria. In doing so, the West now confronts an organization that can finance its bid to cement an Islamic Caliphate through the levying of taxes, selling oil on the black market, taking hostages and seizing financial assets. IS has also proven more than capable of ruling the territory under its control with an iron fist. This state of affairs reflects that IS is different from most other terrorist organizations in that it has an obvious territorial dimension: it's currently in charge of what it perceives to be a 'state'.

This begs an obvious question - is the West's and its allies' intervention in Iraq and Syria against a terrorist organization with clear territorial aspirations actually permissible under international law? To answer this, we need to look separately at the case for intervention in both states.

The Iraqi Case

Taking the fight to IS in Iraq does not raise any particular problems under international law. Put simply, intervention with the consent of a territorial sovereign is entirely valid and authorization by the United Nations is not required. Accordingly, the very fact that Washington has intervened upon the invitation of Baghdad is neither controversial nor illegal. In addition, the United States' actions in Iraq are aimed at quelling an armed rebellion that threatens the territorial integrity of a sovereign state. Weapons have been shipped to Kurdish and Peshmerga fighters who, unlike the ineffective Iraqi army, appear to be the only combatants able to cope with IS. This is especially true of the Peshmergas, who have received weapons from the United States with the explicit consent of the Iraqi government.

The same legal rationale employed by the United States also applies as justification for other states' military intervention in Iraq. Italy, for example, recently transferred weapons to Kurdish fighters in Northern Iraq, once again with Baghdad's blessing. In addition, the likes of France, United Kingdom and the Gulf Cooperation Council (GCC) states have also conducted airstrikes and provided other

forms of material support for those groups fighting IS on the ground.

Why Syria is Different

However, strikes against IS in Syria raise a more complex set of problems. In addition to the consent provided by the territorial sovereign, intervention can also be approved by the United Nations Security Council (SC) for humanitarian purposes. The most recent example of this is UN Resolution 1973-2011, which permitted humanitarian intervention in Libya following the collapse of the Gaddafi regime. However, applying humanitarian intervention as the rationale for military engagement in Syria without prior SC authorization rests on far shakier legal foundations. It is true that the doctrine of humanitarian intervention is endorsed by Western countries and was the legal platform for NATO's intervention in Kosovo in 1999. However, this doctrine is not as widely accepted and recognized by the international community as the West likes to think. And, in the shape of China and Russia, the SC has two permanent members that are opposed to any form of intervention in Syria.

As no authorization for intervention has been given by the SC, the question that then needs to be asked is whether there has been any consent provided by the Assad government for the United States' military efforts on the ground and in the air over Syria. Assad would have been keen, for obvious reasons, to join the US in attacking IS and using these strikes to make clear that any incursion into Syrian territory had his government's approval. However, Washington has so far refused to take any military action in conjunction with Syria, and it still remains unclear whether Assad gave his de facto acceptance for such attacks. It's possible that the United States might have asked those Syrian rebels that fall within the internationally-recognized 'Friends of the Syria' grouping for prior approval. However, this would have been an exercise in legal fiction and would not have added to the overall legality of the intervention.

This leaves intervention under the auspices of self-defense - which doesn't require any authorization by the SC - as the only viable option. International law currently affirms that the right to act in self-defense can be triggered by an armed attack by a state *and/or* non-state actor. This is where Iraq comes into its own. Not only is the country under attack from local insurgents, it's also being penetrated by Syrian-based IS fighters. Under international law, Baghdad is therefore legally entitled to enter into Syria on the basis that Damascus is failing to prevent IS fighters from crossing the Iraq-Syria border - even though it is leaving most of the heavy lifting to the United States and its allies.

In this respect, Washington can claim that its strikes on Syrian territory are also justified under Article 51 of the UN Charter. In order to uphold the inalienable right to individual or collective self-defense, all it needs is the consent of the aggrieved party in question to launch them. Baghdad's request for US strikes against IS targets on Iraqi soil was made clear in a letter circulated on 20 September 2014. This was followed three days later by a letter from Washington to the UN Secretary General stating that it had been asked by Baghdad to take the lead in striking IS strongholds in Syria in order to end continued cross-border attacks and incursions into Iraq. The US also made clear that the Syrian regime was either "unwilling or unable" to prevent the use of its territory for IS attacks against Iraq.

To date, the only resolution passed by the SC concerns foreign fighters and Western converts to Islam joining the ranks of IS. The recently passed Resolution 2178-2014 means that states are now obliged to prevent citizens from joining IS and, indeed, other terrorist organizations - something which was once permissible under international law for individuals wishing fight alongside insurgent forces. Only time will tell how this particular resolution shapes the United States' and its allies' military involvement in Syria and the potential response from the likes of China and Russia.

The View from Ankara

The singularity of the Turkish position also merits a brief comment. On 2 October, the Turkish Parliament authorized military intervention in Syria and Iraq to counter the threat posed IS. In addition, Ankara also authorized the use of its military bases for allied strikes inside both states. Ankara has also asked the United States to create and maintain a no-fly zone over Syria, an action that requires prior approval by the SC. Yet, the likelihood of this being granted is extremely slim. As IS does not currently have an air force (even though it has captured Syrian aircraft and may be in the process of training pilots), it's easy to imply that this no-fly zone is directed against Assad's regime and armed forces. Consequently, neither Turkey nor the United States can rely on the rationale of self-defense when trying to enforce a no-fly zone over Syrian airspace.

A different kind of approach might be to establish a 'safety zone' along Turkey's border with Syria that extends deep into Syrian territory. This zone would be protected by Turkish and/or American troops and would not be used by anti-Assad forces as a safe-haven and base for launching cross-border attacks. Yet, even a 'safety zone' will require the approval of the SC, while evoking the need to intervene on humanitarian grounds once again risks the ire of those states which view such concepts with suspicion and disdain.

Stuck in the Legal Minefield

Turkey's request for a no-fly zone further demonstrates that most attempts to militarily engage with IS forces operating in Syria will run the risk of falling into a legal quagmire. The full Security Council is unlikely to give its backing for intervention on humanitarian grounds, and formal consent from the current Syrian regime will not be coming any time soon. It's true that the United States and others are more than capable of overlooking the criticism that could be heaped upon them when they strike IS in the name of self-defense. However, this approach runs the risk of restricting opportunities for the type international consensus that resulted in UN Resolution 2178-2014. At least the legal justification for targeting Islamic State in Iraq rests on more solid foundations.

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