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THE LEGALITY OF PRESIDENT TRUMP'S MISSILE STRIKE ON AL-SHAYRAT AIR FORCE BASE IN SYRIA

BY JACOB BEHMER¹

I. SYRIA HAS BEEN FIGHTING A CIVIL WAR IN WHICH PRESIDENT BASHAR AL-ASSAD HAS CONTINUALLY USED CHEMICAL WEAPONS IN CONFLICT WITH THE INTERNATIONAL COMMUNITY ULTIMATELY LEADING PRESIDENT TRUMP TO TAKE MILITARY ACTION.

Before delving into the illegality or legality of President Trump's actions—when he ordered the Tomahawk missile bombings from the USS Ross and the USS Porter to the al-Shayrat Syrian Air Force Base—the first question that must be answered is what led to the strike. This paper will begin with a brief synopsis of the Syrian Civil War, which led to the use of chemical weapons against the Syrian people. Next, it will discuss the international sentiment on the use of chemical weapons and define the position of the United States on President Bashar al-Assad's continued use of these weapons in the Syrian Conflict. Third, it will detail the strike ordered by President Trump in response to the chemical weapon attack. Finally, this paper will provide a discussion on the competing international law stances on the legality of President Trump's action, ultimately concluding that it was lawful.

The Syrian Civil War

The Syrian Civil War started around the time of the Arab Spring in 2011.² Syria's sitting president, Bashar al-Assad, who had taken power as heir in 2000, was faced with a demand for reform.³ Originally, he had convinced the public to believe that he sided with the revolution and had received

¹ Jacob Behmer, J.D. University of St. Thomas, School of Law, 2019. The author is very appreciative to Professor Robert Delahunty for his input and counsel with this Note.

² *Syrian President Bashar al-Assad: Facing down rebellion*, BBC NEWS (Oct. 21, 2015), <http://www.bbc.com/news/10338256>.

³ *Bashar al-Assad*, Wikipedia, https://en.wikipedia.org/wiki/Bashar_al-Assad (last visited Oct. 3, 2017).

considerable political support through his introduction of Western economics. However, despite being capitalistic, the Syrian government showed no signs of democracy nor the type of intragovernmental reform that the rebels wanted.⁴ When the time of the Arab Spring began, Bashar al-Assad took a stern stance; he “gave orders to crush the dissent, rather than tolerate it, and he refused to meet protesters’ demands.”⁵ The use of force did not stop the protesters and the fighting escalated.⁶ The “UN says the conflict has left 250,000 people dead . . . 11 million others have been forced from their homes as forces loyal to Mr. Assad and those opposed to his rule battle each other – as well as jihadist militants from Islamic State (IS).”⁷

The country now is in turmoil: President al-Assad is still in power in Damascus, the opposing rebel forces intermingle near Aleppo and the Southeast part of the country, and the Kurdish forces and ISIL are exploiting the chaos by holding ground in the Northeast part of Syria.⁸ As the fighting has continued, many countries have been monitoring the situation and have taken sides. The Sunni rebels are supported by Western countries, including the United States, while the Alawite-led government military is supported by Russia and Iran.⁹ The conflict is ongoing, and Bashar al-Assad believes that he is fighting terrorists who are supported by the West.¹⁰ This controversy has led to the use of chemical weapons.

The Chemical Strike on Khan Shaykhun

On April 4, 2017, the Syrian town of Khan Shaykhun was hit by an airstrike that released a chemical weapon nerve agent, sarin, and caused massive civilian poisoning.¹¹ The first numbers reported 58 deaths, 11 of which were children.¹² The death toll promptly rose to 84 civilians, including 27 children and 19 women.¹³ This is not the first time gas has been used to try to break the spirit of the rebels in Syria. In the past, the Syrian government has used chlorine strikes sporadically and sarin gas in the suburbs of Damascus in

⁴ Zoe Hu, *Why Bashar al-Assad is still in power*, AL JAZEERA NEWS (Oct. 4, 2016), <http://www.aljazeera.com/news/2016/09/syria-bashar-al-assad-power-160904081138141.html>.

⁵ BBC News, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ Shakeeb Asrar, *Syrian Civil War Map*, AL JAZEERA NEWS (Sept. 6, 2017), <http://www.aljazeera.com/indepth/interactive/2015/05/syria-country-divided-150529144229467.html>.

⁹ *Id.*

¹⁰ BBC News, *supra* note 1.

¹¹ *Khan Shaykhun chemical attack*, Wikipedia, https://en.wikipedia.org/wiki/Khan_Shaykhun_chemical_attack (last visited Oct. 6, 2017).

¹² *Id.*

¹³ Newsy, *Khan Shaykhun chemical attack just the latest* (Apr. 6, 2017), <https://www.youtube.com/watch?v=TARqiFqGblg>.

2013.¹⁴ The attack on Damascus was the largest attack utilizing chemical weapons until the attack at Khan Shaykhun in 2017.¹⁵

The Syrian government sent the air strike into Khan Shaykhun because it believed the town to be a rebel hold, or in its vernacular, a location where terrorists were hiding.¹⁶ The government claims the bombs hit a terrorist depot of sarin gas, resulting in the viral spread.¹⁷ The government continually denies responsibility for the use of the sarin gas and Russia supports this denial.¹⁸ Some argue it makes sense; President Assad used chemical weapons at this time of the conflict. He has been fighting for six years. His “military gains since 2015 have been slow and costly,” and when that happens, it is common for militaries to look for one decisive blow instead of a long drawn out conflict potentially killing more people.¹⁹

The United States, along with the U.K. and many other countries, firmly believes that President Bashar al-Assad is responsible for the use of sarin gas. Sir Geoffrey Adams—the UK Permanent Representative to the Organization for the Prohibition of Chemical Weapons (OPWC)—stated that, “[t]he United Kingdom’s assessment is that it is almost certain that the Syrian Government was responsible for a sarin attack . . . There is no evidence to suggest that any party . . . other than the Syrian Government, has access to a complex nerve agent such as sarin gas.”²⁰ The United Nations OPCW reported the villages were indeed poisoned by sarin gas.²¹ It did not answer the question of who was responsible for the attack; rather, confirmed the outcome everyone already knew: simply that sarin gas was present.²² After the investigations, it is reasonable to conclude the attack was effectuated by President Bashar’s military.

International Stance on Chemical Weapons

¹⁴ Ghouta chemical attack, Wikipedia, https://en.wikipedia.org/wiki/Ghouta_chemical_attack.

¹⁵ Newsy, *supra* note 12.

¹⁶ Syrian government denies U.N. chemical attack report, Reuters (Sept. 8, 2017), <https://www.reuters.com/article/us-mideast-crisis-syria-un/syrian-government-denies-u-n-chemical-attack-report-idUSKCN1BJ1XA>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Emma Graham-Harrison, *Syria nerve attack: why it made sense to Assad*, THE GUARDIAN (Apr. 7, 2017), <https://www.theguardian.com/world/2017/apr/07/syria-nerve-agent-attack-why-it-made-sense-to-assad>.

²⁰ Sir Geoffrey Adams, 55th Special Session of OPWC Executive Council, Foreign & Commonwealth Office (Jul. 5, 2017), <https://www.gov.uk/government/speeches/55th-special-session-of-opcw-executive-council>.

²¹ Rick Gladstone, *Report Confirms That Chemical Arms Were Used on Syrian Villagers*, N.Y. TIMES (Jun. 29, 2017), <https://www.nytimes.com/2017/06/29/world/middleeast/syria-sarin-chemical-weapons-united-nations.html>.

²² *Id.*

The reason the attacks have been given so much media attention is not only because of the gripping images of the inhuman way in which the Syrian civilians died, but also because the use of chemical weapons is in direct conflict with international sentiment. The sentiment is, the use of these weapons is an egregious violation of international and natural law. The OPCW actually won the Nobel Peace Prize in 2013 “for its extensive efforts to eliminate chemical weapons.”²³ In 1997, the OPCW put into force the Chemical Weapons Convention (“CWC”), which Syria, along with 192 other countries, signed.²⁴ That is ninety-eight percent of the world’s population.²⁵ The treaty, under Article 1, makes sure that each party “never under any circumstances” develops, holds, uses, prepares to use, or assists a party in using chemical weapons.²⁶ This treaty leaves no room for gray area, rather it provides specific expectations for the countries who are party to it.

In 2013, Syria was responsible for the Ghouta chemical attack. This attack used rockets controlled by the Syrian government to deliver sarin gas to the suburbs of Damascus, resulting in the death of at least 200 people.²⁷ After this attack Syria internationally acknowledged that it had chemical weapons and agreed to the CWC.²⁸ The national governments were in such international agreement, that chemical weapons were wrong, that Russia and the United States actually worked together to develop an accelerated plan for the destruction of Syria’s chemical weapons.²⁹ This plan was endorsed by United Nations Security Council in Resolution 2118 which was unanimously voted into effect and detailed the nuts and bolts for destruction.³⁰ Ninety-eight percent of the countries agreed not to use chemical weapons, this paints a clear picture of the international stance on their use. Additionally, Russia and the United States were able to work together on something that was unanimously passed by the security council. All of these factors point to the obvious—that chemical weapon use is not condoned by the international community.

Since the use of chemical weapons is condemned, the next inquiry is into the consequences of breaking the CWC. Richard Price—of the University of British Columbia—suggests, if someone breaks the CWC it may trigger

²³ *The Nobel Peace Prize 2013*, Nobel Prize, https://www.nobelprize.org/nobel_prizes/peace/laureates/2013/.

²⁴ *Chemical Weapons Convention*, Wikipedia, https://en.wikipedia.org/wiki/Chemical_Weapons_Convention (last visited Sep. 29, 2017).

²⁵ *Id.*

²⁶ Chemical Weapons Convention, C.N.246.1994.TREATIES-5, art. 1, ¶ 1 August 31, 1994).

²⁷ Wikipedia, *supra* note 13.

²⁸ Wikipedia, *supra* note 23.

²⁹ *Id.*

³⁰ S.C. Res. 2118 (Sept. 27, 2013).

Security Council action under Chapter VII of the UN Charter.³¹ It would invoke Chapter VII as “a threat to international peace and security.”³² The Security Council, if so inclined, could then authorize action by other member states against the party in breach of keeping international security and peace.³³ This international norm of not using chemical weapons demands reprisal with U.N. authorization.

United States Stance on the Chemical Weapon Use by Syria

In 2012, President Obama created a “red line” or a “line in the sand” stance towards Syria’s use of chemical weapons, stating he would use force if Syria “crossed the red line” by using chemical weapons.³⁴ This “red line for us is we start to see a whole bunch of chemical weapons moving around or being utilized.”³⁵ To be very clear, President Obama’s stance in 2012, was that the use of chemical weapons by President al-Assad “would cross the ‘red line’ triggering an American military response.”³⁶

The next year in 2013, President Bashar al-Assad used chemical weapons in the aforementioned Ghouta attack. Much to the surprise of the community, President Obama did not carry through with his threat of force. Instead, he applauds himself on “broker[ing] a deal without a strike to get those chemical weapons out . . . an outcome that would not have been possible with airstrikes.”³⁷

There has been significant debate about whether President Obama should have followed through with military action, but former Secretary of State John Kerry believes that President Obama had made the right call.³⁸ Kerry states that deference to Congress is always preferable in deciding whether to

³¹ Maarten Rikken, *Consequences of Assad’s chemical weapons use in Syria, and the world*, Research Gate (Sept. 23, 2016), <https://www.researchgate.net/blog/post/consequences-of-assads-chemical-weapons-use-in-syria-and-the-world>.

³² *Id.*

³³ U.N. Charter art. 39.

³⁴ Greg Jaffe, *The problem with Obama’s account of the Syrian red-line incident*, THE WASHINGTON POST (Oct. 4, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/10/04/the-problem-with-obamas-account-of-the-syrian-red-line-incident/?utm_term=.2590b8cdf453.

³⁵ Glenn Kessler, *President Obama and the ‘red line’ on Syria’s chemical weapons*, THE WASHINGTON POST (Sept. 6, 2013), https://www.washingtonpost.com/news/fact-checker/wp/2013/09/06/president-obama-and-the-red-line-on-syrias-chemical-weapons/?utm_term=.d991555137df.

³⁶ Gaffe, *supra* note 33.

³⁷ *Id.*

³⁸ Nikita Vladimirov, *Kerry: ‘Obama never retreated from his red line’ in Syria*, THE HILL (Jan. 10, 2017), <http://thehill.com/policy/defense/313574-kerry-obama-never-retreated-from-his-red-line-in-syria>.

use force. However, President Obama would not have been unwilling to use force to remove the chemical weapons. The chemical weapons were being removed; consequently, there was no reason to act on the threat.³⁹ Prior to the Khan Shaykhun chemical attack; President Obama, Russia, and the Security Council viewed this as a victory for international peace. President Obama did not condone the use of chemical weapons. Even though he did not punish the Syrian government for its horrific act, because of the work done by the United States and Russian governments, he believed Syria no longer had chemical weapons. Unfortunately, despite the efforts and agreements to eliminate the weapons, sarin gas was used again in Syria in 2017. Why cease this use if you are never held accountable?

President Trump's Attack in Response to Khan Shaykhun

On April 7, 2017, President Trump ordered a response to the chemical attacks that took place at Khan Shaykhun. The strike took place at 3:40 a.m. local time, and targeted specific portions of the al-Shayrat Syrian Air Force base, where intelligence believed the sarin attacks originated.⁴⁰ The attack was carried out by Tomahawk missiles that were launched from United States Navy's Arleigh Burke-class guided-missile destroyers—the USS Porter, and the USS Ross.⁴¹ Thirty-six of the missiles were fired from the USS Ross, and twenty-three from the USS Porter.⁴² They were fired at night when the base was likely to have the least amount of movement and destroyed the intended targets.⁴³ According to Syria's Armed Forces General Command, six people were reported killed in the missile strike.⁴⁴

President Trump stated, “[t]here can be no dispute that Syria used banned chemical weapons, violated its obligations under the Chemical Weapons Convention and ignored the urging of the UN Security Council. Years of previous attempts at changing al-Assad’s behavior have all failed and failed very dramatically.”⁴⁵ Various news outlets report that this is a change in Trump’s stance toward Syria and indicate that, based on his campaign promises, his actions are hypocritical.⁴⁶ However, Secretary of State Rex Tillerson believes that the attacks were in line with Trump’s policy, claiming that “President Trump is willing to act when governments and actors cross

³⁹ *Id.*

⁴⁰ Barbara Starr and Jeremy Diamond, *Trump launches military strike against Syria*, CNN (Apr. 7, 2017), <http://www.cnn.com/2017/04/06/politics/donald-trump-syria-military/index.html>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Diamond & Starr, *supra* note 39.

the line . . . and cross the line in the most heinous of ways . . . and that the attack was appropriate and proportional.”⁴⁷

Not everyone feels as emphatic as President Trump's administration does about this matter. Dimitri Peskov—a spokesman for President Vladimir Putin—relays that this is “a significant blow to relations between Russia and America, which are already in a poor state.”⁴⁸ Russia claims this as an act of aggression.⁴⁹ Peskov adds, “this creates a serious obstacle for building of an international coalition to fight it and to effectively resist this universal evil.”⁵⁰ This is of course, after the Russians previously claimed Syria never used the chemical weapon sarin gas in the first place.

Not only is there foreign distaste for President Trump's action, but there is also domestic dissatisfaction. There has been criticism that President Trump's actions were too rushed. The day of the strike, CNN posted that the attack “represents a substantial escalation of the U.S. military campaign in the region, and could be interpreted by the Syrian government as an act of war.”⁵¹ This also represents the first time the United States has acted with force in the Syrian Civil War.⁵² While President Trump's action received support from a majority of lawmakers in Congress, there are still people in opposition and his actions remain in debate today.⁵³

While the Syrian government did not approve of President Trump's response to Syria's chemical attack, there were some Syrians who did. The Syrian government described it as a “disgraceful” and “short-sighted” act.⁵⁴ But those who are tired of the Syrian Civil War, and the actions taken by President Assad because of it, have praised President Trump.⁵⁵ These are the words of Kassem Eid—a survivor of the 2013 Ghouta chemical attacks—“I cried out of joy, I jumped . . . we have been asking for protection, we have been asking for consequences for more than six years, and today for the first time it happened . . . he [President al-Assad] was held accountable for his crimes against humanity.”⁵⁶

⁴⁷ *Id.*

⁴⁸ Michael Gordon, Helene Cooper and Michael Shear, *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html>.

⁴⁹ Diamond & Starr, *supra* note 39.

⁵⁰ Gordon et al., *supra* note 47.

⁵¹ Diamond & Starr, *supra* note 39.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ CNN, *Syrian survivor to Trump: Thank you*, CNN (Apr. 7, 2017), <https://www.youtube.com/watch?v=s3uaf1NFxXc>.

⁵⁶ *Id.*

There is much speculation as to whether President Trump had the legal authority to conduct the missile strike on al-Shayrat Syrian Air Force Base. The following sections of this paper will discuss the competing arguments for the illegality or legality of President Trump's actions.

II. PRESIDENT TRUMP'S ACTION WERE ARGUABLY ILLEGAL VIOLATIONS OF INTERNATIONAL LAW BECAUSE: (1) IT WAS AN ACT OF AGRESSION; (2) IT WAS NOT DONE IN SELF-DEFENSE; (3) IT WAS NOT APPROVED BY THE UNITED NATIONS; AND (4) IT WAS NOT IN LINE WITH THE PRINCIPLES OF *JUS IN BELLO*.

As earlier discussed, it is evident that the international community does not condone the use of chemical weapons.⁵⁷ Despite this consensus, the use of force is only justified against another sovereign state in acts of self-defense, or by the Security Council of the United Nations' authorization, which is granted through a sanction.⁵⁸ The first three arguments deal with *jus ad bellum*, or the law of war, arguing that action should not have been taken in the first place. The final argument deals with *jus in bello*, or the law in war, stating, even if acting was legal the way action was taken was not.

First, it is true that striking a Syrian Airbase would be considered a use of force and would be defined as an act of aggression. Second, this action clearly was not done in defense of the American people, but this does not necessarily make the action illegal unless it wasn't authorized by the U.N. This leads to the third question of whether that authorization existed. The third argument for the action's illegality is that there was no specific resolution authorizing the use of force against Syria without clear advanced approval by the U.N. Finally, some argue the United States did not follow the principles of *jus in bello* in the strike against Syria. Considering all of these arguments, the strongest is the United States did not have U.N. authorization to use armed force against Syria.

The strike on al-Shayrat was an unjustifiable act of aggression by the United States against Syria violating Article VII of the United Nations Charter.

The tomahawk missile strike was, without question, a use of military force against a sovereign state. Thus, if the United States can claim no other legal

⁵⁷ See *supra* Part I.

⁵⁸ U.N. Charter.

authority allowing its action, it may be considered an unlawful act of aggression. In an effort to promote international peace and security, the United Nations condemns acts of aggression. The definition of aggression given by the United Nations General Assembly is “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations.”⁵⁹ The definition is further expanded in Article 2, which purports, “the first use of armed force by a state in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression.”⁶⁰ However, the Article grants the Security Council the ability to decide whether an act of aggression would be justified or not given the relevant circumstances.⁶¹ The Security Council’s ability to make this determination is similarly provided in Chapter VII of the U.N. Charter and expressly deals with acts of aggression.⁶²

Here, the use of fifty-nine United States tomahawk missiles against a Syrian airbase is obviously a use of armed force under the Article 2 definition of aggression. CNN reported people believe this may be an act of aggression under international law, or greater still, an act of war.⁶³ Those who argue that may be correct in the fact that this is *prima facie* aggression and it was not used for self-defense under Article 51 of the U.N. Charter.⁶⁴ Syria denies having used chemical weapons with Russia’s backing, and although an investigation clearly established that sarin gas was used, no responsibility was assigned. President al-Assad even goes so far as to say the attacks were made up; claiming that the children really didn’t die and answering questions concerning the attacks with, “Definitely, 100 percent for us, its fabrication.”⁶⁵ Certainly, if the United States did not believe that the sarin gas attack came from Syrian forces the attack would be an unjustifiable act of aggression making it illegal.

On the other hand, if the United States did believe sarin gas was used to kill the civilians, and it did come from Syrian forces, the U.S. response may not have been illegal if the Security Council authorized it. The real question in determining legality is whether the act is one the United Nations would condemn as an act of aggression or one it would approve or authorize. Whether such authorization exists will be discussed later in this Note.

⁵⁹ G.A. Res. 3314 (XXIX), annex, art. 1.

⁶⁰ *Id.* at art 2.

⁶¹ *Id.*

⁶² U.N. Charter Chap. VII.

⁶³ See Diamond & Starr, *supra* note 39.

⁶⁴ U.N. Charter art. 51.

⁶⁵ Rick Gladstone, *Assad Says Videos of Dead Children in Syria Chemical Attack Were Faked*, N.Y. TIMES (Apr. 13, 2017), <https://www.nytimes.com/2017/04/13/world/middleeast/assad-syria-video-faked.html>.

However, absent authorization, the act may be considered an illegal act of aggression against Syria.

The strike was not an act of self-defense, because President Bashar did not attack the sovereign United States of America.

The attack on al-Shayrat was not done in defense of the United States of America. Although this point may be obvious, it is worth mentioning, because it can be used as a reason for proscribing President Trump's action as illegal. If the only way the use of armed force can be considered permissible is for self-defense or by Security Council resolution, then it first must be established the action was not done in self-defense.

The law on self-defense can also be found in Chapter VII of the U.N. Charter as well. Article 51 holds, “[n]othing 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 the measures necessary to maintain international peace and security.”⁶⁶ Daniel Webster, in a case known as the *Caroline Case*—in which a U.S. citizen was killed by the U.K. when attacking Canada—established a test to identify what may be considered self-defense. He says that there must be “a necessity of self-defence,[that is] instant, overwhelming, leaving no choice of means, and no moment of deliberation.”⁶⁷ The force used must also not be in excess of more than what is necessary.⁶⁸

It is easy to surmise President Trump's actions were not in self-defense. The sarin gas attack was not an imminent threat against the United States because it had already happened. Although Article 52 allows for the self-defense of a membered nation, the rebels within Syria are not a member to the U.N. and this attack occurred after the fact. A far-reaching argument could be made that the bombing of the airbase, from which the chemical weapons came from, could have prevented future chemical weapon attacks and, as a result, would be justifiable as preemptive self-defense. However, the attack was not against the United States or a member state to the U.N. and therefore, cannot be justified by the international law of self-defense.

The United Nations did not authorize the use of force against Syria.

⁶⁶ U.N. Charter art. 51.

⁶⁷ Webster, Daniel. *Letter to Henry Stephen Fox in K.E Shewmaker (ed.). The Papers of Daniel Webster: Diplomatic Papers, vol. 1. 1841-1843* (1983)62. Dartmouth College Press.

⁶⁸ *Id.*

If armed force is not used in self-defense, then it is typically deemed justifiable only if it was authorized by the Security Council. Being that it was not done in self-defense, the main argument for illegality is that Resolution 2118 did not authorize the United States to act against Syria, rather, it prohibited it. The Security Council passed Resolution 2118 after Syria violated the Chemical Weapons Convention.⁶⁹ After the Ghouta attack, the international community realized Syria still possessed the chemical weapons it had earlier claimed to have disposed of. Before the attack, President Obama stated the use of chemical weapons would not be tolerated at all.⁷⁰ Then, when Syria disobeyed, Russia and the United States united to disarm Syria of their chemical weapons and the Security Council passed Resolution 2118.⁷¹

The controlling portion of Resolution 2118 for the argument of illegality condemns the actions of Syria and provides the removal of chemical weapons, prohibits any action if the Syria breaches without going back to the Security Council. Paragraph 21 states, “[the U.N.] [d]ecides, 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.”⁷² This paragraph is open to serious debate. Article 39 of Chapter VII, provides the U.N. must first discern if there is a breach of peace and then it may use the remaining provisions in the chapters to act.⁷³ The debate is whether paragraph 21 implies that action will automatically be taken in the case of a breach, or if there needs to be a decision determining a breach of the peace first and then go back to the Security Council again. Either way, those who argue that President Trump’s actions are illegal argue it was the Security Council who needed to act, and not the United States on their own accord.

An additional argument is that President Trump’s actions were illegal under domestic law. Shortly after the attack, ACLU National Security Lawyer Hina Shamsi stated, “[u]se of chemical weapons is horrific, but Trump’s military action violates the Constitution and U.N. Charter. No legit domestic or international law basis.”⁷⁴ This domestic argument does not hold ground. Under the United States Constitution, President Trump would need Congress

⁶⁹ S.C. Res. 2118.

⁷⁰ Wikipedia, *supra* note 23.

⁷¹ S.C. Res. 2118.

⁷² *Id.*

⁷³ U.N. Charter art. 39.

⁷⁴ David M. Tafuri, *Why Trump’s attack on Syria is legal*, POLITICO (Apr. 16, 2017), <https://www.politico.eu/article/syria-war-chemical-attack-why-donald-trump-attack-is-legal-assad-putin/>

to declare war.⁷⁵ Here, President Trump is not waging war, nor does he want to declare war by himself. Nowhere in the Constitution does it say the Commander-in-Chief is required to get Congress to sign off on any military action. In fact, doing so would only delay any use of force, making it near useless in moments of necessity.

President Trump’s missile strike did not follow the principles of jus in bello.

Assuming momentarily the U.S. response to Syria’s attack was legal, the response itself could still be considered illegal if it did not follow *jus in bello*; the law in war. In practice, *jus in bello* has evolved to mean the law in armed conflict, because its pillars apply when armed force is used; either with or without a declared state of war. The law has multiple pillars: necessity, distinction, proportionality, and a potential fourth pillar which forbids unnecessary suffering.⁷⁶ Under this doctrine, the main argument is that it was not necessary for President Trump to fire 59 missiles at Syria because the use of that many missiles and the killing of Syrians, was not proportional to the task needed to be accomplished nor did it achieve any advantage. A brief examination of the law of *jus in bello* will show that this simply is not the case.

Necessity has been interpreted differently among scholars; ranging from a free license to use whatever force “necessary” to get the job done to a limitation that permits only the minimal force necessary to achieve the task on the other.⁷⁷ Generally, distinction is the law ensuring the targets chosen to be attacked in an armed conflict must be enemy combatants and not civilians.⁷⁸ Finally, there is proportionality, a major part of *jus in bello*,⁷⁹ which sometimes appears to overlap with necessity and distinction. It is an analysis requiring a balance of the military advantage sought by the attack against the risk of civilian life and destruction which the attack will cause.⁸⁰

The rules articulated by the Geneva Convention or by an individual nation’s military, typically try to conform with customary international law. Both

⁷⁵ U.S. Const. Art. 1, sec. 8.

⁷⁶ Gary Solis, *The Law of International Armed Conflict: International Humanitarian Law in War*, 250-51 (2010).

⁷⁷ Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering From the Declaration of St. Petersburg to Additional Protocol I of 1977*, 299 IRRC 98, 106-07 (1994).
Contra Nobuo Hayashi, *Requirement of Military Necessity in International Humanitarian Law and International Criminal Law*, 28 BOSTON U. INT’L L. J. 39, 44-45 (2010).

⁷⁸ *Public Committee against Torture in Israel v. Gov’t of Israel*, HCJ 769/02 at ¶23 (sup. Ct. Israel 2005).

⁷⁹ Jeremy Rabkin, *Proportionality in Perspective: Historical Light on the Law of Armed Conflict*, 16 SAN DIEGO INT’L L. J. 263 (2015).

⁸⁰ *Id.*

proportionality and distinction are discussed in Additional Protocol I of the Geneva Convention.⁸¹ Article 52 states, “civilian objects shall not be the object of attacks” and they “shall be limited strictly to military objectives.”⁸² It explains, “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action whose total or partial destruction . . . offers a definite military advantage.”⁸³ Article 57(5)(b) states, “an attack which may be expected to cause incidental loss of civilian life . . . objects . . . or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” is illegal.⁸⁴

The United States is not party to Additional Protocol I of the Geneva Convention. Instead it has its own Law of War Manual. The provisions within seem to lean more in favor of a broader scope for permissible action in war. For instance, the definition of “military necessity” in the U.S. Manual is “the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”⁸⁵ “Proportionality” is defined as “the principle that even where one is justified in acting, one must not act in a way that is unreasonable or excessive.”⁸⁶ The U.S. Manual also takes a broader view of distinction. Under the Geneva Convention, a combatant is typically considered someone who take up arms against a country, while under the U.S. Manual, a person could not take up arms against the United States and still be considered a valid object of attack.⁸⁷ Regardless of whether the claim of illegality is under the Manual of War or the Geneva Convention, it appears the law in war was followed in the strike against al-Shayrat.

Fifty-nine tomahawk missiles may seem excessive, especially when each one of those missiles has a one-thousand-pound warhead.⁸⁸ News reports have given varying outcomes of the strike. As previously mentioned, Syria’s Armed Forces General Command reported six people had died.⁸⁹ According

⁸¹ Int’l Committee of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ U.S. Dept. of Defense, *Department of Defense Law of War Manual* (Jun. 12, 2015), ¶ 2.2.

⁸⁶ *Id.* at ¶ 2.4.

⁸⁷ *Id.* at ¶ 4.1.1.1.

⁸⁸ Dan Lamothe, *Why the Navy’s Tomahawk missiles were the weapon of choice in strikes in Syria*, THE WASHINGTON POST (Apr. 6, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/04/06/why-the-navys-tomahawk-missiles-are-the-most-likely-option-for-a-strike-in-syria-against-assad/?utm_term=.22abde669d39.

⁸⁹ Diamond & Starr, *supra* note 39.

to The LA Times, Syria reported six people dead at the base, while nine civilians were killed in nearby villages.⁹⁰ Russian Defense Ministry Spokesman Maj. Gen. Konashenkov, says the attack was ineffective and alleges that only twenty-three of the fifty-nine missiles hit their target, while the location of the other missiles is unknown.⁹¹ Captain Jeff Davis—a pentagon spokesman—stated, “[m]ilitary planners took precautions to minimize risk to Russia or Syrian personal located at the airfield.”⁹² Secretary Tillerson said the act was proportional.⁹³ CNN posted, leaders believed the missiles had demolished their intended targets.⁹⁴ Still others criticize the attack because Syrian planes still took off from the airbase the very next morning, implying the strike did not achieve any military advantage at all.⁹⁵

In the instant case, President Trump’s actions were well within the legal limits of *jus in bello*. When examining the legality of action taken in war, one must extrapolate what the commanders believed would occur when they ordered the strike. The “Rendulic Rule” asserts “the law of war recognizes that persons must assess the military necessity of an action based on the information available to them at that time.”⁹⁶ Applying the Rendulic Rule, the U.S. was convinced the airstrike that delivered the sarin gas and killed the civilians came from al-Shayrat Airbase. Not only did the strike specifically target the combatant airbase, but according to Captain Davis, the U.S. warned Syria and Russia that they were going to attack the base.⁹⁷ The strike was ordered to happen at night when traffic on the military base was low, not only to limit civilian casualties but also to make sure the lowest number of combatants were killed as well. The missiles destroyed multiple planes and a large portion of the airfield. The commanders could not have predicted, planes would still be able to take off the next morning. It would be horrible if civilians died, but the deaths were not foreseeable. The U.S. met the necessity element because in the past, U.N. orders to President al-Assad to get rid of the sarin gas had not worked and hitting the planes delivering the gas would have a direct impact. Secretary Tillerson correctly asserts that this attack was proportional. The attack not only aligned with the Department of Defense’s Law of War Manual, but also with Additional Protocol I of the Geneva Convention which the U.S. has not adopted. Therefore, President

⁹⁰ Molly Hennessy-Fiske and Nabih Bulos, *Syrians report 15 dead in U.S. airstrike*, LA TIMES (Apr. 7, 2017), <http://beta.latimes.com/world/middleeast/la-fg-syria-airstrike-20170406-story.html>.

⁹¹ *Id.*

⁹² Diamond & Starr, *supra* note 39.

⁹³ Gordon et al., *supra* note 47.

⁹⁴ Diamond & Starr, *supra* note 39.

⁹⁵ Morgan Winsor, Julia Jacobo, Tom Kutsch, and Benjamin Siegel, *Syrian jets take off from air base hit by US*, ABC NEWS (Apr. 7, 2017), <http://abcnews.go.com/US/syrian-jets-off-air-base-hit-us/story?id=46646770>.

⁹⁶ *Supra* note 83 at ¶ 2.2.3.3

⁹⁷ Diamond & Starr, *supra* note 39.

Trump's strike did not violate *jus in bello* and cannot be cited as the reason the attacks were illegal.

In summation, many arguments have been made for the illegality of President Trump's action against Syria, but the sole persuasive argument for its illegality is that it was not authorized by the U.N.. The U.S. followed the principles of *jus in bello* by conducting a strike against combatants and by planning for the lowest number of casualties that would produce the highest military impact at the time of the attack. Regardless, it was an act of aggression that was not done out of self-defense. However, in order for it to be illegal those factors must be coupled with an act, lacking authorization from the U.N. Security Council.

III. PRESIDENT TRUMP'S ACTIONS HAVE BEEN DEFENDED BY POINTING TO: (1) AN OBLIGATION UNDER THE "RESPONSIBILITY TO PROTECT"; AND (2) LEGAL AUTHORIZATION FROM THE U.N. IN RESPONSE TO SYRIA'S VIOLATIONS OF THE CHEMICAL WEAPONS CONVENTION AND SECURITY COUNCIL RESOLUTION 1540 AND 2118.

First, there is a claim; the President's actions were an obligation under the "Responsibility to Protect" (R2P). This argument would be fitting because the attack was proportional and would fall within the same rationale; however, the R2P has not been adopted by the U.N. as officially binding, and it cannot be claimed as a legal justification, despite the emergence of International Humanitarian Law. Next, one could argue Syria violated the Security Council Resolutions and Chemical Weapons Convention it was bound to follow. Further, the U.S. had authorization by the U.N. to act. Additionally, it can be argued allowing those violations to go unpunished is illogical. While there is debate as to whether the Security Council Resolutions allow for action to be taken, it seems the Resolutions intended Syria to face consequences for future violations, and it appears that they may have given the U.S. authority to act, in the event of humanitarian issues.

President Trump's action was legal under the "Responsibility to Protect."

David M. Tafuri—an author for *Politico*—defends President Trump's action by claiming legality under the R2P.⁹⁸ While the emerging R2P is extremely on point and would justify the attack on al-Shayrat Airbase, it is not yet

⁹⁸ *Supra* note 73.

considered binding international law and cannot be used as a justification for the tomahawk strike. The R2P was adopted by the U.N. General Assembly at the 2005 World Summit in paragraph 138 and 139⁹⁹, it was reaffirmed in 2006 in Security Council Resolution 1674 which dealt with the protection of armed conflict for civilians in Somalia¹⁰⁰, and remains under debate as of 2009.¹⁰¹ The R2P essentially brings forth the proposition that “each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. . . the international community should, as appropriate, encourage and help States to exercise this responsibility.”¹⁰²

Mr. Tafuri’s argument sheds light on International Human Rights Law, or International Humanitarian Law (IHL). This law “applies to the belligerent parties irrespective of reasons for the conflict or the justness of the causes for which they are fighting. If it were otherwise, implementing the law would be impossible, since every party would claim to be a victim of aggression.”¹⁰³ The Red Cross explains, the R2P exists so “that the international community never again fails to act in the face of genocide and other gross forms of human rights abuse.”¹⁰⁴ Specifically, the R2P was created as a response to the atrocities in Uganda.¹⁰⁵ The R2P stands behind the proposition, if people are killed with sarin gas then the country that was attacked has the right to defend itself, and if it is unable to do so, the international community is obligated to step in and prevent such atrocities from happening.

First, Syria signed the Chemical Weapons Convention acknowledging international sentiment; the use of chemical weapons constitutes an egregious act.¹⁰⁶ President Obama threatened action if President Bashar al-Assad used chemical weapons.¹⁰⁷ Next, Syria used sarin gas in the Ghouta attack, killing hundreds of civilians near Damascus.¹⁰⁸ The international community responded by implementing a strategy to eliminate the chemical

⁹⁹ “U.N. General Assembly Resolution 60/1 (Sept. 16, 2005)” (PDF). U.N. GCR2P. Oct. 24, 2005.

¹⁰⁰ “Resolution of the General Assembly 63/308: The responsibility to protect” (PDF). U.N. GCR2P. Sept. 14, 2009.

¹⁰¹ S.C. Res. 1674 (Apr. 28, 2006).

¹⁰² Meyrowitz, *supra* note 76.

¹⁰³ International Committee of the Red Cross, *What are jus ad bellum and jus in bello?*,

International Committee of the Red Cross (Jan. 22, 2015),

<https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Supra* part I.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

weapons that Syria should not have had in their country in the first place.¹⁰⁹ Then, Syria used sarin gas again in this retaliatory attack. If ever there was a time to implement the R2P this would have been it, because Syria did, and continues to, violate IHL in their civil war efforts. The attack was a proportional and swift response to human rights violation, fitting within the parameters of the R2P.

Unfortunately, as convenient and logical as it may be to cite the R2P as a legal justification, it cannot be considered one. The International Committee for the Red Cross acknowledges this when it disclaims, “IHL provides no such basis for legalizing or legitimizing the resort to force in international relations” and “[a]lthough R2P is referred to sometimes as an ‘emerging norm,’ it is not a binding legal obligation committing the international community, but a political one.”¹¹⁰ One could argue that Article 89 of Protocol I to the Geneva Convention allows states “to act, jointly or individually, in cooperation with the United Nations.”¹¹¹ However, the United States has not adopted Protocol I. Therefore, R2P cannot be a legal justification for the tomahawk strike.

President Trump’s action was authorized by the Security Council in Response to Syria’s Violations of Security Council Resolutions 1540, 2118, and the Chemical Weapons Convention.

President Trump’s actions have been justified by all the violations Syria has committed. Syria violated the Chemical Weapons Convention and ignored both Security Council Resolution 1540, and 2118. However, despite good intentions, acting without authorization may be considered a form of international vigilantism and might still be illegal. Whether the U.S. was authorized to use force is debated in text of the resolutions themselves. Ultimately, the language of the Security Council Resolutions and the condemnation of this crime by the international community are the strongest arguments for the justification of President Trump’s tomahawk missile strike.

The Chemical Weapons Convention does not allow the possession of chemical weapons, let alone the use of them.¹¹² Similarly, Security Council Resolution 1540 forbids the use of chemical weapons, demanding that countries establish domestic law to prevent the proliferation of these weapons.¹¹³ To eliminate weapons of mass destruction—including chemical

¹⁰⁹ *Id.*

¹¹⁰ International Committee of the Red Cross, *supra* note 102.

¹¹¹ *Id.*

¹¹² S.C. Res. 2118.

¹¹³ S.C. Res. 1540 (Apr. 28, 2004).

weapons—the Security Council created Resolution 1540. Under the authority of Chapter VII of the U.N. Charter, the Council recognizes, in paragraph 6, “that some States may require assistance in implementing the provisions of this resolution [to get rid of chemical weapons] and invites States in a position to do so to offer assistance as appropriate in response to specific requests to States lacking regulatory infrastructure.”¹¹⁴ At first glance, this looks like a winning ticket for legal justification. The victims of President al-Assad’s chemical weapon attacks have cried out for help, but they lack the infrastructure necessary to stop him. The United States military has the infrastructure; however, the victims are not a “state” asking for help; rather, rebels and victims within a state, so it sadly cannot be cited as a reason.

Resolution 2118 stresses seven different times that chemical weapons are a threat to international peace and security.¹¹⁵ As mentioned earlier in the argument for illegality, the U.N. in Resolution 2118, “[d]ecides, in the event of non-compliance . . . to impose measures under Chapter VII.”¹¹⁶ Notice that the provision does not say the Security Council may decide to impose action under Chapter VIII. Instead, it says it will impose Chapter VII measures. Furthermore, the removal plan laid out in the resolution created an action group with the United States as a member.¹¹⁷ One of the responsibilities of the action group is laid out in section 10 entitled “Safety, stability and calm.”¹¹⁸ It states, in Annex II, section 10, paragraph (b) that safety, stability, and calm “requires: . . . (b) [e]ffective steps to ensure that vulnerable groups are protected and that immediate action is taken to address humanitarian issues in areas of need.”¹¹⁹ This language is the U.N. authorizing action to be taken to address humanitarian issues. Returning to the Security Council to obtain further permission would defeat the purpose of section 10, because it does not allow for “immediate action to be taken ‘to address humanitarian issue’ and make sure that ‘vulnerable groups are protected.’”¹²⁰

Still one could argue, imposing Chapter VII measures mandate the writing of another resolution. Entertaining this argument requires multiple considerations. First, this means the Security Council would have to vote for action to be taken against Syria even after Syria already violated Security Council Resolution 1540, the Chemical Weapons Convention, and Resolution 2118. How many times can a country egregiously violate an international norm they agreed to uphold and get away with it? It appears Syria was trying to find out. Second, if the Security Council had to authorize

¹¹⁴ *Id.*

¹¹⁵ S.C. Res. 2118.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ S.C. Res. 2118.

¹²⁰ *Id.*

action to uphold Resolution 2118, it would not be able to pass since both Russia and the United States have veto power as one of the five permanent members of the Security Council. Russia sides with President al-Assad, while the United States firmly believes he is responsible for the heinous act. This inability to act means the strong language from the resolution claiming, “that the use of chemical weapons constitutes a serious violation of international law, and stressing that those responsible for any use of chemical weapons must be held accountable,” will go unheeded as nothing more than strong words on a sheet of paper. Finally, the language of the resolution looks as though it gave the U.S. authority to act, and why would the U.N. threaten the use of force under Chapter VII if it could not deliver.

In conclusion, the R2P, although a very fitting doctrine, does not justify President Trump's action in Syria, but the language of and sentiment behind Resolution 2118 may have given him the authority he needed to act.

IV. PRESIDENT TRUMP'S STRIKE WAS LEGAL BECAUSE THE UNITED NATIONS AUTHORIZED IT; AND, EVEN IF IT WAS ILLEGAL, IT WAS MORALLY NECESSARY TO HOLD SYRIA ACCOUNTABLE FOR ITS ACTIONS, AND WAS JUSTIFIABLE REGARDLESS.

Ultimately, it appears President Trump's action in using the Tomahawk missiles against al-Shayrat Airbase was legal under international law. The arguments against the legality do not squash the overwhelming sentiment against the use of chemical weapons and the fact that authority was given. This was an act of aggression as defined by the U.N. It was also not done in self-defense against an imminent threat to the United States. Although the argument that the United States did not have authorization from the U.N.—because the Security Council would have to examine a violation and decided which action to take—is somewhat persuasive, the language in the Annex II of Resolution 2118 gave the United States the necessary authorization. The action itself was planned against combatants, and calculated the smallest number of civilian and combatant deaths to destroy the planes that did, and could, carry out a chemical attack on Syrian civilians. The United States had authority from the U.N. and followed *jus in bello*, thus making President Trump's action legal.

Even if President Trump's actions were not legal under international law, the attack was morally justifiable. The Trump administration, along with most of the international community, knew that President Bashar al-Assad was using chemical weapons in a civil war against his own people. He has defied the Chemical Weapons Convention, multiple Security Council

Resolutions, President Obama's warning. This situation is slightly analogous to President Clinton's air campaign with NATO in Kosovo, where they could have gone to the Security Council, but it would have gotten shot down. It is better to defy the authority of the United Nations and risk punishment, then to simply permit egregious atrocities when they could have been prevented. Therefore, any language possibly allowing action in response to the multiple violations President al-Assad has committed is worth considering, and even if it doesn't prevail, it was still morally justifiable. In conclusion, President Trump's tomahawk missile strike on the al-Shayrat Airbase was legal, and if it wasn't it, it was morally justifiable.