



**Centre for the Response to
Radicalisation and Terrorism**

At The Henry Jackson Society

The Legal Case for British Military Action Against Islamic State in Iraq and Syria

Centre for the Response to Radicalisation and Terrorism
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Summary

- The proscribed organisation ‘Islamic State’ (IS) is the pre-eminent terrorist group in the Middle East, threatening both international peace and security and the British national interest. With the international military campaign against the group in Iraq underway, strategic assessments have concluded that airstrikes in Syria are a pre-requisite for degrading and destroying IS, given that the group controls territory and resources in both countries and is headquartered in Raqqa, northern Syria.
- An important part of the current debate in the United Kingdom (UK) is focused on the legality of British intervention in Syria specifically, which has been presented as more ambiguous than the UK’s current involvement in Iraq. A key concern is whether the right to self-defence against a non-state actor can be lawfully exercised in the territory of another state without the latter’s consent.
- British military action against IS in both Iraq and Syria is supported under international law by the fundamental principle of self-defence: collectively, at the request of Iraq; and, individually, to protect British nationals held hostage by the group. The request for military assistance from the Iraqi government legally allows the UK to take part in United States (US)-led airstrikes not only against the terrorist group in Iraq but also against its strongholds on Syrian territory. The coalition does not legally require consent from Syrian President Bashar al-Assad because Syria, the host state, has demonstrated an unwillingness and inability to repress the terrorist actions emanating from its territory that continue to threaten Iraq.
- This interpretation is supported by state practice, most notably the international response to the 2001 US-led invasion of Afghanistan to degrade al-Qaeda which also targeted the Taliban. It was reiterated as British policy by the former Attorney General in 2004, sanctioning the use of force “against those harbouring [terrorists]”.
- British military action in Syria could also be undertaken as individual self-defence, limited to all necessary and proportionate measures to protect British citizens from IS. This would likely manifest as targeted Special Air Service (SAS) operations to locate and retrieve British hostages held by IS in Syrian territory.
- In addition, the escalating humanitarian catastrophe in Syria meets the standard required by the UK permitting the use of force without a United Nations Security Council (UNSC) resolution under the doctrine of humanitarian intervention, provided the UK government can show that there are no other non-military options which would better achieve its humanitarian purpose. The British legal position regarding Operation Allied Force against Serbia in Kosovo in 1999 provides precedent for this interpretation.
- Subject to the conditions of necessity and proportionality, there is no legal barrier to British involvement in military action by the growing international coalition against IS in both Iraq and Syria. Intervention would not only be consistent with the UK government’s stated policy position and practice over the last 20 years, but also in the British national interest.

Introduction

On 22 September 2014, the United States (US) launched airstrikes against the proscribed terrorist organisation Islamic State (IS)¹ in northern Syria, in partnership with several Arab allies.² The intervention marks the expansion of the US-led military campaign against IS in Iraq, where the US previously launched approximately 190 airstrikes, into Syrian territory.³ Moreover, the airstrikes were conducted without a United Nations Security Council (UNSC) resolution and without the consent of the Syrian President Bashar al-Assad.⁴

A number of military and strategic assessments have concluded that airstrikes in Syria are a prerequisite for degrading and destroying IS, given that the group controls territory and resources in both countries and is headquartered in Raqqa, northern Syria.⁵ The current debate about United Kingdom (UK) involvement in the US-led coalition has centred on the legality of UK military action in Syria without President Assad's consent, which has been presented as more legally ambiguous than its current involvement in Iraq. A recent House of Commons Library briefing paper, for example, was widely reported in the UK media as suggesting that intervention in Syria "would be more difficult to justify".⁶

In response, this briefing makes the legal case that British military action against IS in both Iraq and Syria is supported under international law by the fundamental principle of self-defence: collectively, at the request of Iraq; and, individually, to protect British nationals held hostage by the group. It further contends that military action would also be supported under the doctrine of humanitarian intervention in order to alleviate humanitarian suffering in Syria, provided certain conditions are met. Moreover, it argues that military action would also be consistent with the British government's stated policy position and practice on self-defence and humanitarian intervention over the last 20 years.

1. Collective Self-Defence Against Islamic State

1.1 *Self-Defence in International Law*

The United Nations (UN) Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state", except where the Security Council has authorised

¹ Formerly (or also) known as Islamic State of Iraq and the Levant (ISIL); Islamic State of Iraq and al-Sham (ISIS); the Islamic State of Iraq (ISI); the Mujahideen Shura Council (MSC); and, al-Qaeda in Iraq (AQI).

² The Pentagon named Bahrain, Jordan, Saudi Arabia, Qatar and the United Arab Emirates as "partners". See: 'Syria: US begins air strikes on Islamic State targets', *BBC News*, 23 September 2014, available at: www.bbc.co.uk/news/world-middle-east-29321136.

³ *Ibid.*

⁴ In August 2014, Syrian Foreign Minister Walid Muallem stated that any action without consent from the Syrian regime would be "considered aggression", a view supported by Syrian allies Russia and Iran. See: 'Syria: US begins air strikes on Islamic State targets', *BBC News*, 23 September 2014.

⁵ Smith, B., Claire Mills and Rob Page, 'Iraq, Syria and ISIS - recent developments', House of Commons Library Standard Note (9 September 2014), available at: www.parliament.uk/briefing-papers/SN06977/iraq-syria-and-isis-recent-developments, p. 18; Former US Assistant Secretary of State P.J.

Crowley, 'Viewpoint: IS won't be destroyed without Syria change', *BBC News*, 12 September, available at: www.bbc.co.uk/news/world-us-canada-29168779.

⁶ 'Iraq, Syria and ISIS - recent developments', House of Commons Library Standard Note, 9 September 2014; see also: 'Islamic State: Air strikes on Isis in Syria could be illegal', *The Independent*, 15 September 2014, available at: <http://www.independent.co.uk/news/world/middle-east/islamic-state-air-strikes-on-isis-in-syria-could-be-illegal-9734474.html>.

the use of force to maintain or restore international peace and security; or, where a state is exercising its fundamental right to self-defence.⁷ As such, legitimate use of force in self-defence does not require a UNSC resolution.

The right of self-defence is recognised in international treaty law by Article 51 of the UN Charter which articulates “the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”. Self-defence, however, is not a static right: it is also recognised in international customary law, understood by the International Court of Justice (ICJ) as “constant and uniform usage, accepted as law”,⁸ the substance of which is found “primarily in the actual practice of and *opinion juris* of states”.⁹

1.2 Collective Self-Defence on Behalf of Iraq

As such, to demonstrate the legality of the use of military action by British forces as collective self-defence on behalf of Iraq against IS in Syria,¹⁰ it is necessary to show that such intervention would be consistent not only with the right articulated in Article 51, but also with the recent practice of states in response to terrorist attacks perpetrated by non-state actors originating from another state (the host state), and their belief that the action was carried out because it was a legal obligation.¹¹

The actions of IS vis-à-vis Iraq, outlined below, meet the criterion of an “armed attack” as understood in international law, namely: that the attacker (IS) has demonstrated intent and capability, i.e. an on-going armed territorial invasion;¹² and, that the attack is directed from outside territory controlled by the state (Iraq), i.e. northern Syria:¹³

- Despite IS precursor groups’ decade-long history of insurgent operations in Iraq, it is over the last 18 months that the group has capitalised on the instability in Syria, created by the on-going conflict and the inaction of the Syrian regime, in order to establish a territorial hold in northern Syria and headquarters in the north-eastern city of Raqqa;¹⁴
- In December 2013, IS militants launched a cross-border attack from Syria into Iraqi territory and took control of the central city of Falluja;¹⁵ while, in June 2014, IS militants took over Iraq’s second largest city, Mosul, and subsequently declared the establishment of a caliphate, or Islamic state, across northern Syria and Iraq;¹⁶
- IS currently controls large swathes of Iraq and Syria, running from Aleppo in northern Syria to the Iraqi province of Diyala north-east of the capital Baghdad,¹⁷ commands huge

⁷ Article 2(4) UN Charter, United Nations, available at: www.un.org/en/documents/charter/index.shtml.

⁸ Article 38(1), Statute of the International Court of Justice, in Harris, D., *Cases and Materials on International Law*, 6th ed., (London: Sweet & Maxwell, 2004), p. 21.

⁹ *Continental Shelf (Libyan/Arab Jamahiriya/Malta)*, Judgement, ICJ reports 1985, p. 29, para. 27; *Legality of Nuclear Weapons*, Advisory Opinion, ICJ, 1997, para. 64, in Harris, D., *Cases and Materials on International Law*, p. 963.

¹⁰ International law regulates the use of military force by states (*jus ad bellum*) and the conduct of hostilities once war has begun (*jus in bello*). While any military action undertaken by British forces would be subject to the latter in the form of international humanitarian law, this briefing is concerned solely with the former, specifically the legality of the use of force by the UK against IS in Syria.

¹¹ Since the 9/11 terrorist attacks perpetrated by al-Qaeda against the US in 2001, it is widely (but not universally) accepted that a state can act in self-defence against a non-state actor as well as another state, most notably in response to terrorism-related attacks or the threat of imminent attack. See: ‘Principles of International Law on the Use of Force by States in Self-Defence’, (2005), International Law Programme Working Paper, *Chatham House*, available at: www.chathamhouse.org/publications/papers/view/108106, p. 11.

¹² ‘Principles of International Law on the Use of Force by States in Self-Defence’, *Chatham House*, p. 11.

¹³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, 2004, para. 139.

¹⁴ ‘Islamic State Rule: Municipal Services and Public Beheadings’, *NPR*, 12 September 2014, available at: www.npr.org/blogs/parallels/2014/09/12/347748371/islamic-state-rule-municipal-services-and-public-beheadings.

¹⁵ ‘What is Islamic State?’, *BBC News*, 12 September 2014, available at: www.bbc.co.uk/news/world-middle-east-29052144.

¹⁶ *ibid.*

¹⁷ ‘Struggle for Iraq: In maps’, *BBC News*, 16 September 2014, available at: www.bbc.co.uk/news/world-middle-east-27838034.

quantities of weaponry and fighters¹⁸ and has significant financial resources, largely as a result of its control of oil producing assets in both countries;¹⁹

- IS has also threatened, attacked and killed Iraqi citizens. Captured members of the Iraqi armed forces have been executed; citizens from religious minorities, notably the Yazidis,²⁰ have been internally displaced amid international fears of ethnic cleansing;²¹ and, those captured, including women and children, have been held against their will, many of them tortured, raped and executed.²²

1.2 *International Responses to Iraq's Request for Assistance*

In the face of overwhelming force, the Iraqi government requested international assistance to deal with the on-going armed attack from IS. The actions of the US vis-à-vis Iraq, outlined below, demonstrate American desire to lead as broad an international coalition as possible, in order to confer political legitimacy on the military campaign:

- On 11 August 2014, US President Barack Obama announced targeted US airstrikes to both halt the progress of IS and protect Iraqi civilians;
- Since then, Iraqi forces have been increasingly supported by Shia militias (often with Iranian backing), Kurdish Peshmerga forces (with Western, including British, backing) and US air strikes;²³
- On 10 September 2014, President Obama announced the expansion of his air campaign against IS, lifting restrictions on American strikes in Iraq and, for the first time, authorising direct attacks against the group in Syria as well.²⁴ He also outlined increased support to forces fighting IS on the ground;²⁵ a more effective use of US counter-terrorism capabilities to prevent IS attacks (defined as funding restrictions, intelligence efforts and the provision of counter-narratives); and, the provision of humanitarian assistance to civilians displaced by IS.²⁶ White House officials described a long-term campaign to degrade the group's ability to act with "impunity" in the territory it holds;²⁷
- US Secretary of State John Kerry built a coalition to support Iraq's efforts against IS, securing support, for example, from ten Muslim-majority countries,²⁸ in order to militate charges of an American-led war against Islam,²⁹ as well as from several Western countries, including Australia and France;³⁰

¹⁸ US officials estimate IS has up to 31,000 fighters in Iraq and Syria, while the group is believed to possess a wide variety of small arms and heavy weapons, including truck-mounted machine-guns, rocket launchers, anti-aircraft guns, portable surface-to-air missile systems as well as tanks and armoured vehicles. See: 'What is Islamic State?', *BBC News*, 12 September 2014.

¹⁹ 'Will Obama's global anti-IS coalition work?', *BBC News*, 14 September 2014.

²⁰ Adherents of an ancient religion based on Zoroastrianism.

²¹ 'Iraq, Syria and ISIS - recent developments', House of Commons Library Standard Note, 9 September 2014, p.3.

²² 'Statement by the President on ISIL', The White House Office of the Press Secretary, 10 September 2014, available at: www.whitehouse.gov/the-press-office/2014/09/10/remarks-president-barack-obama-address-nation.

²³ 'Iraq, Syria and ISIS - recent developments', House of Commons Library (2014), p. 1.

²⁴ 'Statement by the President on ISIL', The White House Office of the Press Secretary, 10 September 2014.

²⁵ On 17 September 2014, the US House of Representatives voted by 273 to 156 to allow the arming and training of Syrian opposition groups fighting IS, with approval also given by the US Senate the following day. See: 'House of Representatives approves Obama plan to arm Syrian rebels', *The Guardian*, 17 September 2014, available at: www.theguardian.com/world/2014/sep/17/house-approves-obama-plan-arm-syrian-rebels; see also: 'Obama hails Congress backing for Syria plan', *BBC News*, 19 September 2014, available at: www.bbc.co.uk/news/world-us-canada-29263937.

²⁶ 'President Obama: "We Will Degrade and Ultimately Destroy ISIL"', The White House Blog, 10 September 2014, available at: www.whitehouse.gov/blog/2014/09/10/president-obama-we-will-degrade-and-ultimately-destroy-isil.

²⁷ 'Obama Says U.S. Will Bomb ISIS in Syria, Train Rebels', *TIME Magazine*, 10 September 2014, available at: <http://time.com/3319658/obama-isis-speech-iraq-syria/>.

²⁸ They are Egypt, Turkey, Jordan, Lebanon as well as six Gulf states, including Saudi Arabia and Qatar. See: 'World leaders vow to do "whatever necessary" to defeat Isis jihadists', *The Guardian*, 15 September 2014, available at: www.theguardian.com/world/2014/sep/15/world-leaders-pledge-defeat-isis-paris-summit.

²⁹ Support included military agreements to use regional bases and air space as well as offers from "several Arab countries" to conduct air strikes. See: *ibid.*

³⁰ Australia pledged 600 military personnel and France committed to joining the US-led airstrikes. See: 'Will Obama's global anti-IS coalition work?', *BBC News*, 14 September 2014.

- An international crisis meeting held in Paris on 15 September 2014 saw 24 countries as well as the Arab League, the European Union (EU) and the UN condemn the “global threat” from IS and pledge their support for Hayder al-Abadi’s new government in Iraq.³¹ No consensus, however, emerged on the viability or legality of attacking IS in Syria.³²

2. Differences in the British Positions on Iraq and Syria

2.1 Current British Positions on Involvement in Iraq and Syria

The possibility of the UK joining US airstrikes against IS militants in Iraq is widely accepted as legal on the grounds that British forces would be coming to the assistance of a sovereign state (Iraq) at the request of a legitimate government.³³ Increased British action against IS in Iraq is also considered highly likely. The British Foreign Secretary Philip Hammond, for example, stated in Paris that the UK would play a key role in the US-led coalition, a comment widely interpreted to mean more than its current involvement in arming the Kurdish Peshmerga forces and flying reconnaissance missions.³⁴

The British position regarding military action against IS in Syria, however, remains ambiguous. A few days before the Paris conference, Hammond said publicly that the UK would “not be taking part in any air strikes in Syria”, explaining that Parliament “had already had that discussion”, a reference to Prime Minister David Cameron’s failure to secure Parliamentary approval for airstrikes against Syria in September 2013 following the regime’s use of chemical weapons.³⁵ The Prime Minister’s office, however, responded promptly stating that it was ruling nothing out, a position then echoed by Hammond in Paris.³⁶

2.2 Is there a Legal Requirement for Syrian Consent?

The key legal concern centres on whether the right to self-defence against a non-state actor can be exercised in the territory of another state without the latter’s consent, an issue which is indivisible from the two fundamental criteria of self-defence: necessity and proportionality. This paper argues that the view that Syrian consent is required, the position outlined in a recent House of Commons briefing and subsequently reported across the British media, is incorrect.

The House of Commons briefing states that:

[Collective self-defence] could conceivably be used in the case of Iraq, whose Government has been described as ‘legitimate’ by David Cameron, but makes little sense

³¹ ‘World leaders vow to do “whatever necessary” to defeat Isis jihadis’, *The Guardian*, 15 September 2014.

³² *ibid.*

³³ ‘Iraq, Syria and ISIS - recent developments’, House of Commons Library Standard Note, 9 September 2014, p.18; in the media see, for example,

‘World leaders vow to do “whatever necessary” to defeat Isis jihadis’, *The Guardian*, 15 September 2014.

³⁴ *ibid.*

³⁵ ‘Back into the fray’, *The Economist*, 20 September 2014, available at: www.economist.com/news/britain/21618825-david-cameron-tries-persuade-war-weary-britons-fight-back-fray?zid=309&ah=80dcf288b8561b012f603b9fd9577f0e.

³⁶ ‘World leaders vow to do “whatever necessary” to defeat Isis jihadis’, *The Guardian*, 15 September 2014.

in the case of Syria, whose President has been described by Cameron as ‘part of the problem, not part of the solution’.³⁷

The logic inherent in this statement, however, is that if Syria were to request assistance from the UK to act against IS, Assad’s lack of legitimacy would be problematic. The exemption to the prohibition on the use of force in self-defence, however, is only applicable when the attack or threat originates from territory outside the victim state. Given that IS territorial conquests began in Syria, and that the group is headquartered on Syrian territory, the Syrian regime has no recourse in international law to request external assistance against IS under self-defence.

This paper argues, instead, that military action in Syria against IS by third-party states, including the UK, would be lawful if conducted at the request of the Iraqi government. Force may only be used in self-defence when the measures taken are “proportional to the armed attack and necessary to respond to it”, a rule described by the ICJ as “well established under customary international law”.³⁸ While necessity limits the use of force in self-defence to the elimination of the attack, the fact that the attack against Iraq originated in Syria and that military assessments have concluded that IS cannot be sufficiently degraded to no longer pose an imminent threat to Iraq without being challenged on Syrian territory,³⁹ it can be argued that, out of lawful necessity, Iraq can exercise self-defence in Syrian territory. As a result, the UK (as well as the US and other members of the proposed coalition) would have a derivative right to the use of force on Syrian territory triggered by an Iraqi request.

Such action is supported by state practice. Due to the peremptory nature of the general prohibition of the use of force, the legal rules governing it are much discussed. In practice, over the last twenty years, states have interpreted the relevant provisions of the Charter in response to the threat from terrorists operating in another country.⁴⁰ It is now widely accepted by states that when a state is unwilling or unable to assert control over a terrorist organisation operating in its territory, the state which is subject to attack may, as a last resort, use force in self-defence within the host state.⁴¹ While US military action against al-Qaeda in Afghanistan in October 2001 was in self-defence of anticipated imminent attacks from the terrorist group, for example, it was accepted as necessary to attack part of the Taliban government as well. UNSC resolutions 1368(2001) and 1372(2001) support this position and the decision by the US to resort to the use of force was widely supported by states.⁴²

While it is not clear whether this position was based on a) the interpretation that the 9/11 attacks were attributable to Afghanistan, or b) the interpretation that, by virtue of being either unwilling or unable, Afghanistan failed to prevent the use of its territory as a base for attacks,⁴³ the British government’s position, outlined in a debate in the House of Lords in April 2004 by the then Attorney General, Lord Goldsmith, was as follows:

³⁷ ‘Iraq, Syria and ISIS - recent developments’, House of Commons Library Standard Note, 9 September 2014, p. 18.

³⁸ *Nicaragua*, ICJ reports 1986, p. 14, para 176, in Harris, D., *Cases and Materials on International Law*, p.894.

³⁹ ‘Iraq, Syria and ISIS - recent developments’, House of Commons Library Standard Note, 9 September 2014, p. 18; see also, for example, this opinion piece by former US Assistant Secretary of State P.J. Crowley: ‘Viewpoint: IS won’t be destroyed without Syria change’, *BBC News*, 12 September.

⁴⁰ Tams, Christian J., ‘The Use of Force against Terrorists’, *The European Journal of International Law* (2009), vol. 20, no. 2, pp.359-397, pp.359-360.

⁴¹ ‘Principles of International Law on the Use of Force by States in Self-Defence’, *Chatham House*, pp. 11-13.

⁴² Harris, D., *Cases and Materials on International Law*, pp.943-944.

⁴³ Milanovic, M., ‘Self-defence and Non State Actors: Indeterminacy and the Jus ad Bellum’, *EJIL: Talk!*, 21 February 2010, available at: <http://www.ejiltalk.org/self-defense-and-non-state-actors-indeterminacy-and-the-jus-ad-bellum/>.

[T]he resolutions passed by the Security Council in the wake of 11 September 2001 recognised both that large-scale terrorist action could constitute an armed attack that will give rise to the right of self-defence and that force might, in certain circumstances, be used in self-defence against those who plan and perpetrate such acts *and against those harbouring them*, if that is necessary to avert further such terrorist acts. It was on that basis that United Kingdom forces participated in military action against Al'Qaeda and the Taliban in Afghanistan [emphasis added].⁴⁴

The Syrian regime has claimed both a willingness and ability to challenge IS. On 25 August 2014, for example, Syrian Foreign Minister Walid al Moallem told Western news agencies that, "Syria is ready to cooperate and coordinate on the regional and international level in the war on terror".⁴⁵ The US-led airstrikes, however, have not been co-ordinated with the Syrian regime.⁴⁶ Similarly, the UK is highly unlikely to solicit consent from President Assad for political reasons, given that the UK Foreign Secretary Philip Hammond stated on 16 July 2014 that President Assad has "zero legitimacy" and should not remain in power.⁴⁷

For the use of force to be legal, the UK would need to demonstrate that, despite claims to the contrary, President Assad's regime remains unwilling and/or unable to effectively challenge IS within its territory. This is credible given President Assad's long-standing permissive attitude towards IS and allegations by Western intelligence agencies that the regime has been buying black market oil from IS militants.⁴⁸ It is also consistent with: the stated position of both the British government, which considers President Assad a "source of terrorism in Syria";⁴⁹ and, the US government, which believes that he "created the conditions that allowed ISIL [IS] and other terrorist groups to gain ground and terrorize [sic.] and slaughter the Syrian population".⁵⁰

The existence of intelligence-led military and strategic assessments by those involved in intervention that the Syrian regime's stated willingness is actually not in good faith would permit the use of force in collective self-defence to degrade IS, subject to the criteria of necessity and proportionality. Additionally, immediate Syrian state responses to the US airstrikes on 22 September 2014 may legally constitute consent. In the aftermath of the first airstrikes, for example, Syrian state television reported statements from the foreign ministry, including one which appears to confer consent: "Syria supports any international effort that aims at fighting terrorism, whatever the terrorist group - IS, al-Nusra Front or any other one".⁵¹

⁴⁴ Bethlehem, D., 'Principles Relevant to the Scope of a State's Right of Self-defense against an Imminent or Actual Armed Attack by Nonstate Actors', *The American Journal of International Law* (2012), vol. 160:000, available at: www.un.org/law/.../Bethlehem%20-%20Self-Defense%20Article.pdf, p. 3.

⁴⁵ 'White House won't commit to asking Congress for Syria strike', *The Hill*, 25 August 2014, available at: <http://thehill.com/policy/defense/215905-white-house-wont-commit-to-asking-congress-for-syria-strike>.

⁴⁶ 'TRANSCRIPT: Hagel testifies to the Senate Armed Services Committee on the Islamic State', *The Washington Post*, 16 September 2014, available at: www.washingtonpost.com/world/national-security/transcript-hagel-testifies-to-the-senate-armed-services-committee-on-the-islamic-state/2014/09/16/a4909e26-3dab-11e4-b0ca-8141703bbf6f_story.html.

⁴⁷ 'Assad inauguration has no legitimacy, says Foreign Secretary', Foreign & Commonwealth Office Press Release, 16 July 2014, available at: www.gov.uk/government/news/assad-inauguration-has-no-legitimacy-says-foreign-secretary.

⁴⁸ 'Syria's Assad accused of boosting al-Qaeda with secret oil deals', *The Telegraph*, 20 January 2014, available at:

www.telegraph.co.uk/news/worldnews/middleeast/syria/10585391/Syrias-Assad-accused-of-boosting-al-Qaeda-with-secret-oil-deals.html.

⁴⁹ 'Assad inauguration has no legitimacy, says Foreign Secretary', Foreign & Commonwealth Office Press Release, 16 July 2014, available at: www.gov.uk/government/news/assad-inauguration-has-no-legitimacy-says-foreign-secretary.

⁵⁰ 'Assad inauguration has no legitimacy, says Foreign Secretary', Foreign & Commonwealth Office Press Release, 16 July 2014, available at: www.gov.uk/government/news/assad-inauguration-has-no-legitimacy-says-foreign-secretary.

⁵¹ See the BBC newfeed at 10:38: 'US begins air strikes against Islamic State in Syria', *BBC News*, 23 September 2014, available at: www.bbc.co.uk/news/world-middle-east-20321236.

2.3 Is there a Legal Effect of British Recognition of the Syrian Opposition?

It has been argued elsewhere that Assad's consent is not required because: Syria has lost control of the territory in which IS operates; and, the legitimacy of the Assad regime is not recognised by multiple international actors, including the UK.⁵² While both points are factually true, they constitute political, rather than legal, arguments. In response, while the Syrian regime does not currently govern parts of its own territory, it remains a *de jure* state, albeit one engaged in internal conflict. Furthermore, while the moderate Syrian opposition is recognised as "the legitimate representative" of the Syrian people by the UK, the US, the European Union, France and the six member states of the Gulf Co-operation Council (GCC),⁵³ this has no legal effect on the current situation as the Assad regime is still recognised as the "government" of Syria.⁵⁴

Another option, therefore, would be for the UK, the US as well as other countries and international bodies engaged in or considering collective self-defence in support of Iraq to recognise the moderate Syrian opposition as the legitimate governing authority in Syria. Although a departure from normal practice of recognising states and not governments, it follows the precedent of the US recognising the Libyan opposition as the "legitimate governing authority in Libya".⁵⁵ Not only would this action unfreeze Syrian assets held by the relevant states and bodies, it would enable the Syrian opposition to declare themselves unable to repress IS activity in their territory which threatens Iraq. While political assurances would need to be sought, the Syrian opposition would likely comply, especially given that the Free Syrian Army (FSA) Chief of Staff General Salim Idriss requested Western support in May 2013 specifically in order to counter the dominance of IS and its ally-turned-rival Jabhat al-Nusra (JN), the al-Qaeda affiliate, in north-eastern Syria. As the governing authority, the Syrian opposition would therefore consent to Iraqi self-defence measures, including collective military action.

3. Individual Self-Defence against Islamic State

3.1 Grounds for Individual Self-Defence

IS has directly threatened the UK (as well as other Western states including the US, France and Canada), demonstrating an escalatory Western focus in recent months, both in terms of recruitment and as a potential target for attack:⁵⁶

- In an IS propaganda video released shortly after the fall of Mosul, for example, a British jihadist proclaimed that IS fighters "understand no borders" and will go "wherever our sheikh wants to send us";⁵⁷

⁵² 'Back into the fray', *The Economist*, 20 September 2014.

⁵³ 'Syria crisis: Guide to armed and political opposition', *BBC News*, 17 October 2013, available at: www.bbc.co.uk/news/world-middle-east-15798218; see also 'About Us', National Coalition of Syrian Revolution and Opposition Forces web page, undated, available at: www.etilaf.us/about.

⁵⁴ Bellinger III, John B., 'UN rules and Syrian intervention', *The Washington Post*, 17 January 2013, available at: http://www.washingtonpost.com/opinions/un-rules-and-syrian-intervention/2013/01/17/4e8661bc-6000-11e2-b05a-605528f6b712_story.html.

⁵⁵ *ibid.*

⁵⁶ 'The Bride of ISIS Revealed', *The Daily Beast*, 3 September 2014, available at: www.thedailybeast.com/articles/2014/09/03/the-bride-of-isis-revealed.html.

⁵⁷ 'Brit Jihadi Film Leaves Family "Heartbroken"', *Sky News*, 21 June 2014, available at: news.sky.com/story/1286159/brit-jihadi-film-leaves-family-heartbroken.

- Between 19 August and 13 September 2014, the group released three propaganda videos showing the beheading of American journalists James Foley and Steven Sotloff, and the British aid worker David Haines, all apparently by the same man with a British accent.⁵⁸ Currently British aid worker Alan Henning and British journalist John Cantlie are being held hostage by IS, reportedly in Syria;⁵⁹
- On 29 August 2014, the Joint Terrorism Analysis Centre (JTAC) raised the threat level in the UK, from “substantial” to “severe”, in response to recent IS activity rather than any specific plot;⁶⁰ and, with an estimated 500 British Muslims involved in the Syrian conflict as foreign fighters, the Security Services and police are concerned about IS both directing and inspiring UK-based plots from Syria, particularly the group sending fighters back to the UK either in an operational capacity or motivated to self-start;
- On Monday 22 September, IS spokesperson Abu Muhammad al-Adnani urged supporters to attack the citizens of countries that have pledged to join President Obama’s coalition against the group, which includes the UK.⁶¹

In addition, IS precursor groups have been connected to a number of terrorist attacks in or related to the UK, including: the June 2007 car bombing against targets in London and Glasgow; Iraqi-born former British resident Taimour Abdulwahab al-Abdaly’s 2010 suicide attack in Stockholm, Sweden; and, a suspected 2013 IS plot to manufacture chemical weapons to smuggle into Canada, the US and Europe.⁶²

As such, the UK could make a legal case that IS represents a continuous terrorist threat that is always imminent, given: a) the group’s intent, demonstrated by its global jihadist ideology and pervasive use of social media and, b) its capacity, demonstrated by its ability to plan, operate and inspire terrorist operations from territory under IS control in Syria as well as Iraq.

3.2 Likely Admissible Action by British Forces

While it is clear that IS poses a genuine and multi-faceted threat to British national security, the rules governing the use of force in self-defence against a non-state actor, however, state that the attack or imminent attack must be large-scale.⁶³ Moreover, given that the UNSC tends to view proportionality as indicating a kind of parity between attack and response,⁶⁴ it could be argued that British military action in Syria against IS undertaken as individual self-defence would lawfully be limited to necessary and proportionate action taken as a last resort to protect British nationals. This would most likely manifest as targeted Special Air Service (SAS) operations to locate and retrieve British nationals being held hostage by the group in Syrian territory.

⁵⁸ ‘Isis video claims to show beheading of British hostage David Haines’, *The Guardian*, 14 September 2014, available at: www.theguardian.com/world/2014/sep/13/isis-video-david-haines-beheading.

⁵⁹ ‘British man held by IS is ex-cabbie from Salford’, *ITV News*, 16 September 2014, available at: www.itv.com/news/granada/story/2014-09-16/british-man-held-by-isis-ex-cabbie-from-salford/.

⁶⁰ ‘Threat level from international terrorism raised’, Prime Minister’s Press Statement, 29 August 2014, available at: www.gov.uk/government/speeches/threat-level-from-international-terrorism-raised-pm-press-conference.

⁶¹ ‘Islamic State urges attacks on U.S., French citizens, taunts Obama’, *Reuters*, 22 September 2014, available at: www.reuters.com/article/2014/09/22/us-iraq-crisis-adnani-idUSKCN0HH1MB20140922.

⁶² Simcox, R., ‘ISIS’ Western Ambitions’, *Foreign Affairs*, 30 June 2014, available at: www.foreignaffairs.com/articles/141611/robin-simcox/isis-western-ambitions.

⁶³ *Nicaragua*, ICJ reports 1986, p. 14, para 195, in Harris, D., *Cases and Materials on International Law*, p.899.

⁶⁴ Sir Daniel Bethlehem Q.C., in ‘Principles of International Law on the Use of Force by States in Self-Defence’, *Chatham House*, p. 53.

4. Humanitarian Intervention

Unlike the principle of self-defence, humanitarian intervention is both a modern and controversial doctrine. For over 15 years, however, British foreign policy has supported, and exercised, the doctrine. The legal framework outlined by the government in its 29 August 2013 legal paper on proposed military airstrikes against Assad in response to his regime's use of chemical weapons was based on the principle of humanitarian intervention.⁶⁵

The paper stated that:

[I]f action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria ... under the doctrine of humanitarian intervention, provided three conditions are met.⁶⁶

4.1 *Is there a Humanitarian Catastrophe in Syria?*

The current situation both in and outside of Syria presents a compelling argument for the existence of an overwhelming and escalating humanitarian catastrophe. The three and a half year-long conflict has had hugely destabilising consequences within Syria:

- In August 2014, the UN death toll figure in Syria reached 191,369.⁶⁷ There are over 3 million refugees,⁶⁸ four-fifths of whom are women and children;⁶⁹
- Current refugee numbers are placing unprecedented strain on the host countries, notably Lebanon (1,188,468), Turkey (847,266), Jordan (618,086), Iraq (214,372) and Egypt (139,775);⁷⁰
- There are more than 31,000⁷¹ refugees awaiting registration and the number continues to rise, while over 4.3 million children inside of Syria are in need of food and water;⁷²
- The crisis has engendered the largest humanitarian funding commitment (£600 million) ever made by the UK in response to a humanitarian disaster;⁷³
- Syrian civilians living under full or partial IS control are subject to an oppressive interpretation of *sharia*, or Islamic law, which severely restricts their fundamental rights of religious freedom and freedom of expression. Women are forced to wear the veil, non-Muslims are forced to pay a special tax and punishments include the use of torture, flogging and executions.⁷⁴

⁶⁵ 'Chemical weapon use by Syrian regime: UK government legal position', HM Government, 29 August 2013, available at: www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version.

⁶⁶ 'Chemical weapon use by Syrian regime: UK government legal position', HM Government, 29 August 2013.

⁶⁷ 'Pillay castigates "paralysis" on Syria, as new UN study indicates over 191,000 people killed', UN Human Rights, 22 August 2014, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14959&LangID=E#sthash.yhoAwbVP.dpuf.

⁶⁸ 'Syria Regional Refugee Response', UNHCR, 18 September 2014, available at: <http://data.unhcr.org/syrianrefugees/regional.php>.

⁶⁹ *ibid.* figures are based on refugee data from Lebanon, Egypt, Iraq and Jordan; and calculations are based on women and children under the age of 18.

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² 'A Devastating Toll: The impact of three years of war on the health of Syria's Children', (2014), *Save the Children*, 2014, available at: www.savethechildren.org/atf/cf/%7B9def2e8e-10ae-432e-9bd0-df91d2eba74a%7D/SAVE_THE_CHILDREN_A_DEVASTATING_TOLL.PDF.

⁷³ 'Syria crisis: Latest updates on UK aid', HM Government, 16 September 2014, available at: www.gov.uk/government/news/syria-the-latest-updates-on-uk-aid.

⁷⁴ 'What is Islamic State?', *BBC News*, 12 September 2014.

In addition, aside from the situation in Iraq, there are increasing levels of spill-over violence into Syria's neighbours:

- Between 19 and 21 September 2014, approximately 130,000 Kurdish refugees entered Turkey after IS advances threatened the Syrian town of Kobane. This latest influx has inflamed long-standing tension between the Kurds and the Turks, with the latter fearing that new recruits to the Kurdish militias fighting IS may also align themselves with the proscribed terrorist organisation the Kurdistan Workers' Party (PKK) and launch attacks on Turkey;⁷⁵
- Spill-over violence from the Syrian conflict has also spread to Lebanon, where the current level of instability is at its highest since the end of the civil war in 1990. There are legitimate fears that the country will become the next front in the Syrian civil war as militants battle for control of the Qalamoun region, between the Syrian cities of Damascus and Homs, which borders eastern Lebanon. In August 2014, a five-day battle between Lebanese forces and militants from IS and JN in the Sunni border town of Arsal resulted in the death of 19 Lebanese soldiers and the capture of 30 more.⁷⁶ Since then, the town, which currently houses one fifth more Syrian refugees than Lebanese inhabitants, has seen frequent violent clashes while 21 soldiers remain in captivity.⁷⁷
- In Jordan, where now one in four people are Syrian,⁷⁸ minor outbreaks of violence are ever-present, including most recently attacks on aid relief trucks by a frustrated Jordanian population.⁷⁹

4.2 Pre-requisites for Humanitarian Intervention

The conditions outlined in the British government's 2013 paper reflected those advanced by the UK in 1998 to NATO allies when the then Labour government stated that Operation Allied Force against Serbia in 1999 to prevent humanitarian catastrophe in Kosovo could be justified "on the grounds of overwhelming humanitarian necessity" without a UNSC resolution.⁸⁰ These conditions, which were subsequently codified in the Responsibility to Protect (R2P) principle in 2005, are:

- (i) 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;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and

⁷⁵ 'Turkey clamps down on Syria border after Kurdish unrest', *BBC News*, 22 September 2014, available at: www.bbc.co.uk/news/world-middle-east-29306088/; see also: 'Al-Qaeda's brutal tactics in Syria force out moderates', *BBC News*, 27 November 2013, available at: www.bbc.co.uk/news/world-25109708.

⁷⁶ J.N., 'Lebanon and the Islamic State: Not us too', *The Economist*, 7 August 2014, available at: www.economist.com/blogs/pomegranate/2014/08/lebanon-and-islamic-state.

⁷⁷ 'New deadly blast rocks Lebanese border town of Arsal', *Middle East Eye*, 19 September 2014, available at: www.middleeasteye.net/news/lebanon-395725240#sthash.TEWT639w.dpuf.

⁷⁸ 'Syrian refugees in Lebanon and the British role', Syrian Observatory for Human Rights, available at: http://syriaohr.com/en/index.php?option=com_articles&aid=32&Itemid=5&task=displayarticle#.VB|wZBPnBf_c.

⁷⁹ Porges, Marisa L., 'Fragile Sanctuary: Jordan Buckles under the Stress of Hosting Syrian Refugees', *Foreign Affairs*, 12 March 2014, available at: www.foreignaffairs.com/articles/141024/marisa-l-porges/fragile-sanctuary.

⁸⁰ Bethlehem, D., 'Stepping Back a Moment - The Legal Basis in Favour of a Principle of Humanitarian Intervention', *EJIL Talk!*, 12 September 2013, available at: www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/.

(iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).⁸¹

While there is little doubt, either by the UK or within the wider international community, that the situation in Syria represents an escalating humanitarian crisis, in order for the UK to lawfully intervene in Syria on humanitarian grounds, the government would need to demonstrate that there is an achievable humanitarian purpose and that there is no other non-military option which would better achieve that purpose.

US Secretary of Defense Chuck Hagel appeared to outline the American humanitarian purpose when he testified to the Senate Armed Services Committee on 16 September 2014. Specifically, he advocated political transition rather than regime change, thus precluding the US from having to demonstrate that a proposed alternative for Assad's regime would be better for the civilian population than the present situation:

[T]he United States will continue to press for a political resolution to the Syrian conflict resulting in the end of the Assad regime. Assad has lost all legitimacy to govern, and has created the conditions that allowed ISIL and other terrorist groups to gain ground and terrorise and slaughter the Syrian population. The United States will not coordinate or cooperate with the Assad regime. We will also continue to counter Assad through diplomatic and economic pressure.⁸²

Additionally, the UK should assess whether action taken in self-defence to degrade IS capabilities in Syria would inadvertently empower the Assad regime to the detriment of the moderate opposition, thereby increasing humanitarian suffering. The US position of increasing the arming and training of the most prominent moderate Syrian opposition group, the National Coalition for Syrian Revolutionary and Opposition Forces (commonly known as the Syrian National Coalition) and its associated Free Syrian Army (FSA), would appear to support (and be designed to militate) such an eventuality.

In the event therefore, of humanitarian intervention, the UK would need to demonstrate that supporting the Syrian National Coalition and the FSA is the only way to achieve the humanitarian purpose of political transition and the relief of suffering. To this end, the UK government could present a compelling argument, as it did in August 2013, that previous attempts by the UK and its international partners to resolve the Syrian conflict and end the associated humanitarian suffering through meaningful action by the UNSC have been blocked by Russia.

5. Legitimacy Derived from International Consensus

⁸¹ 'Chemical weapon use by Syrian regime: UK government legal position', HM Government, 29 August 2013.

⁸² 'TRANSCRIPT: Hagel testifies to the Senate Armed Services Committee on the Islamic State', *The Washington Post*, 16 September 2014, available at: www.washingtonpost.com/world/national-security/transcript-hagel-testifies-to-the-senate-armed-services-committee-on-the-islamic-state/2014/09/16/a4909e26-3dab-11e4-b0ea-8141703bbf6f_story.html.

Recent statements and actions by states and international bodies which condemn IS, restrict its funding or are broadly supportive of action against the group confer further legitimacy, both politically and legally, on military intervention. While the European Council (EC), for example, has condemned IS and recognised the threat to Europe posed by the group, both the UN and NATO have gone further and indicated possible support for military intervention against IS:

- UNSC Resolution 2170 passed in August 2014 escalates UN action against IS, among other Islamist-inspired terrorist groups in the region, by obliging member states to prohibit their “nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts.” While the resolution, designed to curb the group’s oil-related black market economy, was confined to retaliatory measures short of military action the UNSC has established a monitoring body to assess the threat from IS and al-Qaeda related groups in the region as well as make recommendations for “further action”; and, as such, military intervention remains theoretically an option;⁸³
- The 2014 NATO Wales Summit communique expressed concern at the “grave threat [from IS] to the Iraqi people, to the Syrian people, to the wider region, and to our nations”.⁸⁴ While the communique focused on the need for “a political solution based upon an inclusive Iraqi government with cross-sectarian representation” as well as “security and humanitarian assistance to Iraq”, it did not rule out military action, stating: “If the security of any Ally is threatened, we will not hesitate to take all necessary steps to ensure our collective defence”.⁸⁵ Collective self-defence, the principle enshrined in Article 5 of the North Atlantic Treaty, was invoked for the first time in NATO’s history following the 9/11 terrorist attacks against the US.⁸⁶

Conclusion

British military action against IS in both Iraq and Syria is supported under international law by the fundamental principle of self-defence: collectively, at the request of Iraq; and, individually, to protect British nationals held hostage by the group. The request for military assistance from the Iraqi government legally allows the UK to take part in US-led airstrikes not only against the terrorist group in Iraq but also against its strongholds on Syrian territory.

The coalition does not legally require consent from President Assad because Syria, the host state, has demonstrated an unwillingness and inability to repress the terrorist actions emanating from its territory that continue to threaten Iraq. Widespread state and international acceptance of the legality of the NATO invasion of Afghanistan in 2001 supports this interpretation of international law, which is also consistent with stated UK policy.

⁸³ Al-Khatteeb, L., ‘The UN Strikes Back at ISIL’s Black Economy’, *The Huffington Post*, 23 August 2014, available at: www.brookings.edu/research/opinions/2014/08/23-un-strikes-back-at-isil-black-economy.

⁸⁴ ‘NATO Wales Summit 2014: outcomes’, House of Commons Library Standard Note, (12 September 2014), available at: www.parliament.uk/briefing-papers/SN06981/nato-wales-summit-2014-outcomes, p.11.

⁸⁵ ‘NATO Wales Summit 2014: outcomes’, House of Commons Library Standard Note, (12 September 2014), p.11.

⁸⁶ ‘Collective defence’, NATO web page, last updated 2 June 2014, available at: www.nato.int/cps/en/natohq/topics_110496.htm?

In addition, the escalating humanitarian catastrophe in Syria meets the standard required by the UK permitting the use of force without a UNSC resolution under the doctrine of humanitarian intervention, provided the UK government can show that there are no other non-military options which would better achieve its humanitarian purpose. The British legal position regarding Operation Allied Force against Serbia in Kosovo in 1999 provides precedent for this interpretation.

Subject to the conditions of necessity and proportionality, there is, therefore, no legal barrier to British involvement in military action by the growing international coalition against IS in both Iraq and Syria. By contrast, intervention would not only be consistent with the UK government's stated policy position and practice over the last 20 years, but also in the British national interest.

About the Author

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