

GOVERNMENT MEMORANDUM TO THE JCHR

The policy

It is the first duty of any Government to ensure the safety and security of the people they serve. This is a responsibility which this Government takes very seriously and which it will discharge by all lawful means it considers necessary. The Government has made very clear that when there is an identified direct and imminent threat to the UK and British interests abroad it will take action to counter that threat.

Effective action requires a full-spectrum response. At one end of that spectrum, the Government has made it clear that it is prepared to use force in accordance with international law where it is necessary to do so and there is no alternative. International law has long recognised the inherent right of individual and collective self-defence, which is clearly set out in Article 51 of the Charter of the United Nations.

Lethal action will always be a last resort, when there is no other option to defend ourselves against an attack and no other means to detain, disrupt or otherwise prevent those plotting acts of terror. The principles of necessity and proportionality underpin all our decision-making.

Legal basis

The legal basis for the Government's activity against ISIL in Syria is therefore the inherent right of individual and collective self-defence as recognised by Article 51 of the UN Charter. Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under

the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Individual terrorist attacks, or an ongoing series of terrorist attacks, may rise to the level of an “armed attack” for these purposes if they are of sufficient gravity. This is demonstrated by UN Security Council resolutions 1368 (2001) and 1373(2001) following the attacks on New York and Washington of 11 September 2001. Whether the gravity of an attack is sufficient to give rise to the exercise of the inherent right of self-defence must be determined by reference to all of the facts in any given case. The scale and effects of ISIL’s campaign are judged to reach the level of an armed attack against the UK that justifies the use of force to counter it in accordance with Article 51.

It has been the long-held position of successive Governments that force may be used in self-defence, not only where an armed attack is underway, but also where an armed attack is imminent. Where the UK determines that it faces an imminent armed attack from ISIL, it is entitled to use necessary and proportionate force to repel or forestall that attack in exercise of the inherent right of individual self-defence.

Additionally, it is clear that ISIL are engaged in an ongoing attack on Iraq, and have been since 2014. On 20 September 2014 the Government of Iraq wrote to the UN Security Council seeking military assistance of other States to bring an end to ISIL’s attack on Iraq, including through action against ISIL bases outside Iraqi territory. The US and other members of the Coalition (including the UK) have therefore asserted the right to take action against ISIL in Syria on the basis of the collective self-defence of Iraq. The UK asserted this right in its letter to the UN Security Council of 25 November 2014.

The UK always adheres to International Humanitarian Law when applying military force, including upholding the principles of military necessity, distinction, humanity and proportionality. This applies as much to our use of remotely piloted aircraft systems as it would to any other manned or remotely controlled military capability. The policy for the use of remotely piloted aircraft is the same as that for manned aircraft. Pilots operate under the same strict Rules of Engagement.

Following the vote in Parliament on 2 December, the UK has extended its contribution to coalition efforts in Iraq and Syria. Specifically, our Armed Forces are now authorised to conduct air strikes against ISIL targets in Syria as part of the coalition effort. Such action will be taken in exercise of the inherent right of self-defence as recognised in the United Nations Charter.

Reyaad Khan

In the case of Reyaad Khan, who was targeted in an RAF air strike in Syria on 21 August, the legal basis for military action was the inherent right of individual and collective self-defence. There was clear evidence of Khan's involvement in planning and directing a series of attacks against the UK and our allies, including a number which were foiled. That evidence showed that the threat was genuine, demonstrating both his intent and his capability of delivering the attacks. The threat of attack was current; and an attack could have become a reality at any moment and without warning. In the prevailing circumstances in Syria, this airstrike was the only feasible means of effectively disrupting the attacks planned and directed by this individual. There was no realistic prospect that Khan would travel outside Syria so that other means of disruption could be attempted. The legal test of an imminent armed attack was therefore satisfied. The UK would not have acted had it not been necessary in the self-defence of the UK.

Additionally, the UK has supported and contributed to the US-led efforts to target ISIL in Syria as a necessary aspect of effectively bringing an end to ISIL's armed attack on Iraq, at the request of the Government of Iraq. Military action against members of ISIL in Syria that is necessary and proportionate to bring an end to ISIL's attack on Iraq is in accordance with the right of collective self-defence of Iraq. The strike targeting Khan was therefore also lawful in the collective self defence of Iraq.

As indicated above, any action taken under Article 51 must be both necessary to deal with the threat and proportionate to the threat, ie no more than required to deal with it. Care was taken in the planning of this operation to limit force only to what was necessary to disrupt the activities that Khan was planning and directing. No civilian casualties were sustained.

This was therefore a lawful use of force in the individual self-defence of the United Kingdom and the collective self defence of Iraq. The Government reported it to the Security Council on 7 September 2015, in accordance with the requirements of Article 51 of the Charter of the United Nations.

Decision making and Accountability

Decisions concerning the use of force in self-defence are taken by the Prime Minister in consultation with other senior ministers and advisers. In the case of Reyaad Khan, at a meeting of the most senior members of the National Security Council, it was agreed that should the right opportunity arise, military action should be taken. The Defence Secretary authorised the operation.

There is a long standing convention, reflected in the Cabinet Manual, that neither the fact nor the content of the Law Officers' advice is disclosed outside Government without the consent of the Law Officers. In the case of Reyaad Khan, the Prime Minister made clear in his statement to Parliament on 7 September that the Attorney General attended the meeting of the most senior members of the National Security Council and confirmed that there was a legal basis for action.

The use of military force in the exercise of the inherent right of self-defence is within the Government's discretionary powers under the Royal Prerogative. It is important that the Government has the ability to act effectively and decisively to protect the country.

The Government is accountable for its actions to Parliament. The Prime Minister reported the airstrike of 21 August to Parliament at the first available opportunity, and he has been clear that he would ensure independent Parliamentary scrutiny of the action. The Government notes that issues touching on the use of intelligence are a matter for the Intelligence and Security Committee of Parliament. The Government also acknowledges the Joint Committee's review, and will continue to take all reasonable steps to cooperate in the spirit of transparency and openness.