CHAPTER 2

The Use of Force against Da'esh and the *Jus ad Bellum*

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Abstract

The international law on the use of force is recalled, as is the controversy, among academics in particular, about the right to use force in self-defence against non-State armed groups. The question of anticipatory self-defence and the related notion of imminence is considered in the context of the use of force against non-State armed groups. An attempt is then made to describe how the *jus ad bellum* applies to the use of force against Da'esh, primarily in Syria. Finally, the 2016 report of the UK Parliament's Joint Committee on Human Rights on 'the Government's policy on the use of drones for targeted killings' is briefly considered.

Keywords

jus ad bellum – self-defence – non-State armed group – drones – imminence – armed attack – targeted killings – Joint Committee on Human Rights

Introduction

The present contribution considers the international law on the use of force as it applies to the fight against the non-State armed group referred to as Da'esh.[1] It focuses on the *jus ad bellum*, not on the applicability of the *jus in*

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1 Various expressions, including the abbreviations ISIL, ISIS, IS and Da'esh, are used to refer to the armed group which now refers to itself as 'Islamic State'. It is not recognized as a State under international law. See the editorial of AYBHRHL for further elaboration of the above noted terms.

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bello (international humanitarian law), international human rights law or international criminal law,[2] nor on questions of 'Islamic international law' (the subject of another contribution to this volume),[3] nor on constitutional issues. It focuses on action against Da'esh in Syria and Iraq since September 2014,[4] which raises important issues under the *jus ad bellum*, including the right of individual and collective self-defence, and the role of the UN Security Council.[5]

2 For a 'holistic examination' of the law relating to the use in armed conflict of UAVs (unmanned aerial vehicles/remotely piloted aircraft (RPAs), commonly referred to as 'drones') (*jus ad bellum*, international humanitarian law and international human rights law), see C. Heyns, D. Akande, L. Hill-Cawthorne, T. Chengeta, 'The International Legal Framework Regulating the Use of Armed Drones' (2016) 65 *ICLQ* 791. On the lawfulness of actions below the level of use of force, see T. Ruys, 'Of Arms, Funding and "Non-Lethal Assistance" – Issues Surrounding Third-State Intervention in the Syrian Civil War', (2014) 13 *Chinese JIL* 13-53.

3 See in this volume, M.E. Badar, 'The Self-Declared Islamic State (Da'esh) and *Ius ad Bellum* under Islamic International Law'.

4 Da'esh also controls territory in Libya, and has acted elsewhere: for example, the killing of 38 tourists, 30 of whom were British, in Sousse, Tunisia, the bombing of a Russian passenger plane over Sinai on 31 October 2015, and the Paris attacks of 19 November 2015 have all been attributed to Da'esh.

5 There is already extensive writing on the subject: see, in addition to many blogs, M. Wood, 'The Use of Force in 2015 with Particular Reference to Syria', Hebrew University of Jerusalem Legal Research Paper No. 16-05, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714064>; M. Scharf, 'How the War Against ISIS Changed International Law' (2016) 48 *Case Western Reserve Journal of International Law* 15; 'Symposium on the Fight against ISIL and International Law', (2016) 29 *Leiden Journal of International Law*, 737-852 (comprising T. Christakis, 'Editor's Introduction'; K. Bannalier-Chistakis, 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent'; O. Corten, 'The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?'; N. Tsagourias, 'Self-Defence against Non-state Actors: The Interaction between Self-Defence as a Primary Rule and Self-Defence as a Secondary Rule'; V. Koutroulis, 'The Fight Against the Islamic State and *Jus in Bello*'); L. O'Connor, 'Legality of the use of force in Syria against Islamic State and the Khorasan Group' (2016) *Journal on the Use of Force and International Law* 70; F. Latty, 'Le brouillage des repères du *jus contra bellum*. A propos de l'usage de la force par la France contre Daesch', (2016) 120 *Revue générale de droit international public* 11; F. Alabrune, 'Fondements juridiques de l' intervention militaire française contre Daech en Irak et en Syrie' (2016) 120 *Revue générale de droit international public* 41; T. Ruys, L. Ferro, 'Divergent Views on the Content and Relevance of the *Jus ad Bellum* in Europe and the United States? The Case of the U.S.-led Military Coalition Against 'Islamic State', in C. Giorgetti, G. Verdirame (eds), *Concepts on International Law in Europe and the United States* (Cambridge University Press, forthcoming); M.E. O'Connell, C. Tams and D. Tladi,

That is not to suggest that other issues are not important. They are. In particular, it must never be forgotten that, having established a sound legal basis for action in self-defence under the *jus ad bellum*, full compliance with the *jus in bello* is required.

While this contribution does not directly address issues of international human rights law, the *jus ad bellum* may be an important part of the background when it comes to assessing the application of that law. Unlike the relationship between international humanitarian law and international human rights law, that between the *jus ad bellum* and international human rights law is largely unexplored.[6] One question that could be posed is whether a killing that is *ad bellum* unlawful is also necessarily arbitrary or unlawful for establishing whether there is a violation of the right to life. It would seem to be going too far to suggest that deaths resulting from a use of force conducted in violation of the *jus ad bellum* would necessarily be 'arbitrary'.[7]

In any event, especial difficulties arise when addressing complex conflict situations, often involving a number of States and non-State armed groups on various sides, and when more than one (type of) armed conflict may be taking place, at the same time and in the same area.[8] Such situations require a very

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in A. Peters and C. Marxsen (eds), *Max Planck Trialogues on the Law of Peace and War, Self-defence against Non-state Actors* (vol. 1, forthcoming); F. Paddeu, 'Use of Force against Non-state Actors and the Circumstance Precluding Wrongfulness of Self-Defence' (2017) 30 *Leiden Journal of International Law* 93.

6 For the view that, as with international humanitarian law, the application of international human rights law should not be affected by the lawfulness of action under the *jus ad bellum*, see W. Schabas, '*Lex specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*' (2007) 40 *Israel Law Review* 592.

7 The British Government has indicated that they propose to protect the Armed Forces from persistent legal claims by introducing a presumption to derogate from the European Convention on Human Rights in future overseas operations (joint announcement by the Prime Minister and Secretary of State for Defence, 4 October 2016 <https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>. See also *House of Lords, Library Note, Armed Forces: Legal Challenges and Derogation from the European Convention on Human Rights* LLN 2016/059, 16 November 2016) <http://researchbriefings.files.parliament.uk/documents/LLN-2016-0059/LLN-2016-0059.pdf>. It might, for example, be asked whether Article 15(2) of the Convention, which allows for derogations from the right to life in respect of deaths resulting from 'lawful acts of war', covers deaths occurring in actions that are unlawful in the *ad bellum* sense.

8 In his remarks on 1 April 2016 to the American Society of International Law, the State Department Legal Adviser, Brian J. Egan said, 'The United States is engaged in an armed conflict with a non-State actor that controls significant territory, in circumstances in

clear view of the applicable law,[9] and a careful analysis of the facts, though neither is likely to be particularly easy, even for those directly involved.

Da'esh presents some exceptional features, that may affect the application of the law, not least its control over large and varying areas of territory in Iraq, Syria and Libya. As we shall see, since 2014, the United States, the United Kingdom, France, Germany and others have issued important statements on the use of force in self-defence against non-State armed groups.

This contribution is in five sections:

First, it recalls the international law on the use of force, which is the framework for what follows.

Second, it notes the controversy, among academics in particular, about the right to use of force in self-defence against non-State armed groups.[10]

Third, the question of anticipatory self-defence and the related notion of imminence is considered in the context of the use of force against non-State armed groups.

Fourth, an attempt is made to describe how the *jus ad bellum* applies to the use of force against Da'esh, primarily in Syria.

Fifth, the 2016 report of the UK Parliament's Joint Committee on Human Rights on what it termed 'the Government's policy on the use of drones for targeted killings' is briefly considered.

The *Jus ad Bellum*

The present contribution does not seek to restate the law on the use of force.[11] Instead, it concentrates on the application of that law since 2014 in the fight against Da'esh, particularly in Syria. The rules of international law on the use

which multiple States and non-State actors also have been engaging in military operations against this enemy, other groups, and each other for several years." *International Law, Legal Diplomacy, and the Counter-ISIL Campaign* (2016) 110 *Proceedings of the American Society of International Law* 299.

9 On the ICRC's abandonment of the ambiguous terminology 'internationalized internal armed conflict', see T. Ferrraro, 'The ICRC's legal position on the notion of armed conflict involving foreign intervention and on determining the IHL applicable to this type of conflict' (2015) 97 *International Review of the Red Cross* 1227.

10 The term 'terrorists' is avoided, since it is emotive and undefined in general international law. It is neither a useful nor a necessary category of general international law.

11 For a summary of the author's views, see M. Wood, 'The International Law on the Use of Force. What Happens in Practice?' (2013) 53 *Indian Journal of International Law* 345.

of force are relatively easy to state, though often difficult to apply. They are to be found in the United Nations Charter and in customary international law. The Charter contains, among the Principles of the United Nations, a prohibition of the threat or use of force (Article 2, paragraph 4). It refers to two not unrelated circumstances in which the prohibition does not apply. Forcible measures may be taken or authorised by the Security Council, acting under Chapter VII. And force may be used in the exercise of the right of individual or collective self-defence, which is recognized in Article 51. A further possible exception, promoted by the United Kingdom but which has not yet gained a great deal of traction, is the use of force to avert an overwhelming humanitarian catastrophe (sometimes referred to as 'humanitarian intervention'). Force used with the consent, duly given, of the government of the territorial State does not give rise to issues under the *jus ad bellum*[12] (though, of course, like any use of force, it may give rise to questions under international humanitarian law, international human rights law, and international criminal law). It should further be recalled that a State may bear responsibility if it aids and assists others to commit an internationally wrongful act.[13]

The use of force by the United Kingdom between 1999 and 2003 raised a number of the issues relevant to the use of force against Da'esh:

- Kosovo in 1999 raised a major issue of principle. Was there a right of humanitarian intervention[14] or, as the British Government then put it, 'an

12 K. Bannalier-Chistakis (n 5).

13 Draft articles on responsibility of States for internationally wrongful acts, article 16, *Yearbook of the International Law Commission, 2001*, vol. II, Part Two, p. 26. See Chatham House, Research Paper (H. Moynihan) *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* (14 November 2016), available at: <https://www.chathamhouse.org/publication/aiding-and-assisting-challenges-armed-conflict-and-counterterrorism#sthash.FMjeUzD9.dpuf>.

14 At its 2015 session the Institute of International Law concluded its work on *Humanitarian Intervention* by taking note of its Tenth Commission's report (Rapporteur: Michael Reisman): *Yearbook of Institute of International Law – Tallinn Session* – Vol. 76, 379-411. For contrasting views, see M. Schmitt, 'The Syrian Intervention: Assessing the Possible International Law Justifications' (2013) 89 *International Law Studies*, U.S. Naval War College, 744–756 and A. Sarvarian, 'Humanitarian Intervention after Syria' (2016) 36 *Legal Studies* 20.

exceptional right to use force to avert an overwhelming humanitarian catastrophe'?[15]

- The intervention against Al-Qaida in Afghanistan in 2001, following 9/11, also raised an important issue, self-defence against imminent attacks by non-State actors, which is considered below.
- Iraq in 2003 raised no issue of principle. The legality of the use of force in March 2003 turned solely on whether or not it had been authorized by the Security Council. No one disputed that the Council could authorize the use of force. The question was whether it had done so. That turned on the interpretation of a number of Security Council resolutions. For those interested in the legal issues, there is ample material in the UK Iraq Inquiry Report (the 'Chilcot' report), and on the Inquiry's website.[16]

The use of force against Da'esh since 2014 confirms that the international rules on the use of force are adequate, and that they are capable of developing incrementally to meet modern threats. As Heads of State and Government reaffirmed in the UN General Assembly's 2005 Summit Outcome Document:

> the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security…[17]

The Use of Force against Non-State Actors

The view that the inherent right of self-defence may under certain circumstances be exercised within a third State's territory to counter attacks by non-State actors has gained ground over the last few years, in large part as a result of the activities of Da'esh.[18]

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15 In 2013, the British Government seem to have somewhat modified their position, referring not to 'an exceptional right' but to 'the doctrine of humanitarian intervention': *Chemical weapon use by Syrian regime: UK government legal position*, 29 August 2013, (2013) 84 *British Yearbook of International Law* 806.

16 <http://www.iraqinquiry.org.uk/>

17 General Assembly resolution 60/1 of 16 September 2005, para. 79.

18 See, for example, the evolution of the French position, as explained by the Legal Adviser to the French Ministry for Foreign Affairs: F. Alabrune (n 5). Alabrune recalls that France

There is nothing particularly new about the use of force, on the territory of a third State, in self-defence against attack by non-state actors. The *Caroline* incident (1837) is a clear example. Following the 9/11 attacks in New York, Washington and Pennsylvania, the Security Council adopted resolutions 1368 (2001) and 1373 (2001), recognizing the right to use force against armed groups such as Al-Qaida. This was followed, a few years later, by the Chatham House Principles;[19] the Leiden Principles;[20] and the 'Bethlehem' Principles.[21]

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had shown itself to be reserved about the possibility of invoking the right of self-defence to face up to attacks perpetrated by non-State groups without a link of attribution to a State. He then says that the French authorities nevertheless considered that in the particular case of Da'esh, particular circumstances, taken together, had to be taken into account. First, the attacks on Iraq were the equivalent, in their gravity, to an armed attack within the meaning of Article 51 of the Charter. The very survival of the State was at issue. Second, Da'esh was a terrorist organization whose actions had been qualified by the Security Council as the threat to international peace and security, which controlled a vast territory, straddling Iraq and Syria, and which disposed of considerable resources and means of combat comparable to those of a State.

19 E. Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence' (2006) 55 *ICLQ* 963.

20 'Leiden Policy Recommendations on Counter-Terrorism and International Law' (2010) 57 *Netherlands International Law Review* 531; also published, with background studies, in L. van den Herik, N. Schrijver (eds) *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013) 706–726. This volume contains a number of articles concerning the use of force against non-State actors, including S. Ratner, 'Self-defence against terrorists: the meaning of armed attack' 334–355; E. Wilmshurst, 'Anticipatory self-defence against terrorists' 356–372; C. Tams, 'The necessity and proportionality of anti-terrorist self-defence' 373–421. See also C. Tams 'The Use of Force against Terrorists' (2009) 16 *EJIL* 359; M. Wood, 'Terrorism and the international law on the use of force' in B. Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2014) 195–207.

21 D. Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 *American Journal of International Law* 770. For comments, see (2013) 107 *American Journal of International Law* 378–395, 563–579, including (390–395) E. Wilmshurst, M. Wood, 'Self-Defense Against Nonstate Actors: Reflections on the "Bethlehem Principles"', concluding that 'the suggested principles need to be approached with some caution' and expressing the hope that 'they are not regarded as the last word'. For a response, see D. Bethlehem, 'Principles of Self-Defense – A Brief Response' (2013) 107 *American Journal of International Law* 579, explaining inter alia (at 580) that the principles do not purport 'to be a statement of existing law or to reflect the *opinio juris* or practice of any state'.

Common to each these sets of principles is the 'unable or unwilling' standard. This has been explained in a report issued by President Obama in December 2016 in the following terms:

> … The unable or unwilling standard is not a license to wage war globally or to disregard the borders and territorial integrity of other States. Indeed, this legal standard does not dispense with the importance of respecting the sovereignty of other States. To the contrary, applying the standard ensures that the sovereignty of other States is respected. Specifically, applying the standard ensures that force is used on foreign territory without consent only in those exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using the State's territory as a base for attacks and related operations against other States. With respect to the "unable" prong of the standard, inability perhaps can be demonstrated most plainly where, for example, a State has lost or abandoned effective control over the portion of its territory where the armed group is operating. With respect to the "unwilling" prong of the standard, unwillingness might be demonstrated where, for example, a State is colluding with or harboring a terrorist organization operating from within its territory and refuses to address the threat posed by the group.[22]

State practice increasingly supports the use of force in self-defence against non-State armed groups. This is evidenced, in particular, by the reporting of self-defence measures taken against Da'esh to the Security Council in accordance with Article 51 of the Charter,[23] and the general absence of adverse reactions on the part of other States.

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22 *Report on the legal and policy frameworks guiding the United States' use of military force and related national security operations* (White House, 5 December 2016) (hereafter *White House Report*), at p. 9. (section II.B.2). <https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf>. (hereafter *White House Report*) at 10 (section II.B.4). A. Deeks, '"Unwilling or Unable": Toward a Normative Framework for Extra-territorial Self-Defense' (2012) 52 *Virginia Journal of International Law* 483.

23 Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General (S/2014/695); Identical Letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council (S/2014/851); Letter dated 22 February 2015 from the Permanent Representative of Turkey to the United Nations

Given the terms of Article 51 and the wealth of practice thereunder, it is hardly necessary to address yet again the single paragraph in the ICJ's 2004 *Wall* Advisory Opinion that is still read, by some, as ruling out a right of self-defence against non-State armed groups except where the attack is by or imputable to a State.

After reciting the first sentence of Article 51 of the UN Charter, the International Court continued:

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

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addressed to the President of the Security Council (S/2015/127); Letter dated 31 March 2015 from the Permanent Representative of Canada to the United Nations addressed to the President of the Security Council (S/2015/221); Letter dated 24 July 2015 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council (S/2015/563); Letter dated 7 September 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (S/2015/688); Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council (S/2015/745); Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council (S/2015/693); Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (S/2015/928); Letter dated 10 December 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council (S/2015/946); Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations to the President of the Security Council (S/2016/34); Letter dated 3 June 2016 from the Permanent Representative of Norway to the United Nations addressed to the President of the Security Council (S/2016/513); Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council (S/2016/523). See, generally, on the reporting requirement, J. Green, 'The Article 51 Reporting Requirements for Self-Defense Actions' (2015) 55 *Virginia Journal of International Law* 563. For a notification explicitly not relying on self-defence for limited strikes in Houthi-controlled territory in Yemen on radar facilities involved in attacks perpetrated by Houthi insurgents threatening US Navy warships, but on the consent of the territorial State (Yemen), see Letter dated 15 October 2016 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (S/2016/869).

> The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (200l), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.
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> Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.[24]

This 'brief and opaque'[25] passage does not say that it is only where there is an attack by or attributable to a State that a right of self-defence applies. Given the wording of Article 51 of the UN Charter (which refers simply to 'an armed attack'), it could not reasonably have said that. What it actually said was that Article 51 recognized the existence of an inherent right of self-defence in the case of armed attack by one State against another State. It noted that Israel did not claim that the attacks against it were imputable to a foreign State, and also noted that Israel exercised control in the Occupied Palestinian Territory and that, as Israel itself stated, the threat which it regarded as justifying the construction of the wall originated within, and not outside, that territory. The Court concluded that the situation was thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (200l). Israel therefore could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence, and so Article 51 had no relevance in the particular case.

It appears that the Court did not wish to delve into the question of the use of force against non-State actors. It was not called upon to do so, and left open whether, under different circumstances (for example, if the attacks had not been coming from territory in which Israel exercised control) the right of self-defence recognized by Article 51 could have come into play.[26]

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24 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004,* 136, at 194 (para. 139).

25 C. Gray, 'The International Court of Justice and the Use of Force', in C. Tams, J. Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013) 237, 259.

26 This is well explained by Judge Kooijmans in his Separate Opinion: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004,* 229–230 (paras. 35–36); and by Judge Buergenthal in his Declaration, ibid. 241–243, (paras. 5 and 6). For an illuminating account, see S. Murphy 'Self-Defense and the Israeli *Wall* Advisory Opinion: an *Ipse Dixit* from the ICJ?'(2005) 99 *AJIL* 62.

Some eighteen months later, in the *Armed Activities on the Territory of the Congo* case, the Court had an opportunity to clarify matters, but did not do so. Indeed, immediately after concluding that the actions of the ADF were not attributable to the DRC, the Court asserted, rather strangely, that 'the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.'[27] On this occasion, Judges Kooijmans and Simma expressed their strong dissatisfaction with what they saw as the Court's unreasonable position.[28]

Anticipatory Self-defence and the Meaning of 'Imminence'

If it is accepted that force may be used in self-defence against attacks from non-State armed groups, a number of further questions arise, including those under applicable international humanitarian law, such as the range of legitimate targets. Attention has focused particularly on the question of imminence. In its report of 10 May 2016 entitled *The Government's policy on the use of drones for targeted killings*,[29] the UK Parliament's Joint Committee on Human Rights (hereafter, 'Committee' or 'JCHR') sought clarification of the Government's position on a number of legal questions, including: *its understanding of the meaning of the requirements of "armed attack" and "imminence" in the international law of self-defence.*[30]

The Government's response of 7 September 2016 was published on 19 October 2016, together with the Committee's comments on the response.[31]

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27 *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), *Judgment, ICJ Reports 2005*, 168, 223 (para. 147).

28 Ibid. Separate Opinion of Judge Kooijmans, 313–315 (paras. 25–32); Separate Opinion of Judge Simma, 336–337 (paras. 7–12). Many authors have written about these controversial judgments: see, by way of example, L. Moir, *Reappraising the Resort to Force: International Law, Jus and Bellum and the War on Terror* (Hart 2010) 131–140.

29 House of Lords, House of Commons, Joint Committee on Human Rights, *The Government's policy on the use of drones for targeted killings*, Second Report of the Session 2015-2016 (HL Paper 141, HC 574) (hereafter 'Second Report').

30 Second Report (para. 6.17).

31 House of Commons, House of Lords, Joint Committee on Human Rights, *The Government's policy on the use of drones for targeted killings: Government Response to the Committee's Second Report of the Session 2015-16*. Fourth Report of Session 2016-17, HC 747, HL Paper 49, published on 19 October 2016 (hereafter 'Fourth Report').

The Government had already explained its position on imminence in this context as long ago as 2004.[32] But it has explained it in more detail recently. Much attention has been paid to the imminence criterion over the last couple of years. Of necessity, it seems to be applied more flexibly, today, in the face of threats from non-State armed groups, including from Da'esh, than in the case of attacks by States. In the case of non-State actors, the planning stages seem to be viewed as closely intertwined with the attacks. The problem here, of course, is that, absent an actual attack like 9/11 or Paris on 13 November 2015, we have to rely on what Governments tell us about the imminence of an attack.

The meaning of the requirement of imminence arose in relation both to the UK strike of 21 August 2015 and its involvement, from November 2015, in more general self-defence action in Syria. As regards action in Syria in collective self-defence of Iraq, this question does not arise since Da'esh is engaged in an ongoing armed attack on that country. But it is relevant in so far as action is being taken in exercise of the right of individual self-defence (of the United Kingdom) or in collective self-defence of others, such as France.

In a December 2015 Memorandum to the JCHR, the British Government explained that:

> 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 air strike 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

32 The then Attorney General, Lord Goldsmith, explained in the House of Lords that '[]t]he concept of what constitutes an 'imminent' armed attack will develop to meet new circumstances and new threats [...]. It must be right that States are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack.': Hansard, House of Lords, 21 April 2004 (cols. 370–371).

> satisfied. The UK would not have acted had it not been necessary in the self-defence of the UK.[33]

In its September 2016 response to the JCRC, the Government cited the 2004 statement by Lord Goldsmith,[34] and went on to say that –

> [T]he Government's view continues to be that imminence must be interpreted in the light of the circumstances and threats that are faced. As new forms of attack and new means of delivery of such attacks develop, so must our ability to take lawful action to defend ourselves. Combating an enemy which may have covertly infiltrated our country, and can control attacks from abroad with sophisticated communications technology means that it will be a rare case in which the Government will know in advance with precision exactly where, when and how an attack will take place. An effective concept of imminence cannot therefore be limited to be assessed solely on temporal factors. The Government must take a view on a broader range of indicators of the likelihood of an attack, whilst also applying the twin requirements of proportionality and necessity.[35]

On 11 January 2017, the British Attorney General, the Rt. Hon Jeremy Wright QC MP, delivered a speech entitled *The modern law of self-defence*, among other things endorsing, on behalf of the British Government, the factors included in Principle 8 of the 'Bethlehem' Principles.[36] The Attorney General said:

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33 *Government Memorandum to the JCHR* (3 December 2015), available at <https://www.parliament.uk/documents/joint-committees/human-rights/Government_Memorandum_on_Drones.pdf>. See also the then Prime Minister's answer to a Parliamentary question asking what criteria the Government used to decide whether to carry out targeted strikes against individuals in Syria (21 April 2016).

34 (n 32)

35 Fourth Report, Appendix 1, 16. The Committee commented that by saying that '[a]n effective concept of imminence cannot therefore be limited to be assessed solely on temporal factors. The Government must take a view on a broader range of indicators of the likelihood of an attack …', the Government had 'mudd[ied] the waters somewhat' (Fourth Report, para. 14). The Committee went on to say that '[o]n the Government's formulation in its response, it is not clear what it considers to be the relevance of when a threatened attack might take place. We will be seeking further explanation from the Government of the relevance of the timing of any possible future attack when deciding whether the right to self-defence is triggered.' (Fourth Report, para. 16).

36 (n 21) The Attorney General's speech is available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminence_Speech_.pdf>. Principle 8 of the 'Bethlehem' Principles reads: 'Whether an armed attack may be regarded

In 2012 Sir Daniel Bethlehem, former Legal Adviser to the Foreign and Commonwealth Office, set out in an article published in the American Journal of International Law a series of principles that warrant serious reflection.

The one I would like to focus on here is the series of factors that he identified should be taken into account when assessing imminence. That paper, and the principles he set out more generally, were informed by detailed official-level discussions between foreign ministry, defence ministry, and military legal advisers from a number of states who have operational experience in these matters. I think Principle 8 on imminence, as part of the assessment of necessity, is a helpful encapsulation of the modern law in this area.

Sir Daniel's proposed list of factors was not exhaustive, but included (at Principle 8), the following:

a. The nature and immediacy of the threat;
b. The probability of an attack;
c. Whether the anticipated attack is part of a concerted pattern of continuing armed activity;
d. The likely scale of the attack and the injury, loss or damage likely to result therefrom in the absence of mitigating action; and
e. The likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss or damage.

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as "imminent" will fall to be assessed by reference to all relevant circumstances, including (a) the nature and immediacy of the threat, (b) the probability of an attack, (c) whether the anticipated attack is part of a concerted pattern of continuing armed activity, (d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action, and (e) the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage. The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of a right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent. The Principles contain an important note saying that the 'reasonable and objective basis' formula 'requires that the conclusion is capable of being reliably supported with a high degree of confidence on the basis of credible and all reasonably available information.' The Chatham House Principles contain similar elements.

> It is my view, and that of the UK Government, that these are the right factors to consider in asking whether or not an armed attack by non-state actors is imminent and the UK Government follows and endorses that approach.

The Attorney General went on to say:

> Another observation by Sir Daniel, as part of Principle 8 addressing imminence, also warrants comment, namely:
>
> '[t]he absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of a right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.'
>
> This statement reflects and draws upon what has been a settled position of successive British Governments.

The United States position on the two questions, whether anticipatory self-defence is permitted, and if so how the criterion of imminence is to be applied in the case of self-defence against non-State armed groups, was set out in the *White House Report* in the following terms:

> Under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have already occurred, but also in response to imminent attacks before they occur. When considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against another State or on its territory, the United States analyzes a variety of factors. These factors include "the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage." Moreover, "the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an

armed attack is imminent." Finally, as is now increasingly recognized by the international community, the traditional conception of what constitutes an 'imminent' attack must be understood in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.[37]

How the Rules Apply to the Use of Force against Da'esh, Primarily in Syria

Action within Iraq by third States in support of the Government of Iraq, and at its request, is a straightforward case of intervention by invitation (intervention with consent).[38] In a letter to the UN Secretary-General dated 25 June 2014, Iraq sought assistance in its struggle against Da'esh.[39] Already in its Presidential statement of 19 September 2014, the Security Council had 'urge[d] the international community, in accordance with international law to further strengthen and expand support for the Government of Iraq as it fights ISIL and associated armed groups.'[40] In a further letter, dated 20 September 2014, Iraq informed the Security Council that it had 'requested the United States of America to lead international efforts to strike ISIL sites and military strongholds, with our express consent.'[41]

Action in Syria in support of the Government of Syria, with its consent, as is the case with Russia, is also legally unproblematic under the *jus ad bellum*. In addition, action against Da'esh within Syria, in collective self-defence of Iraq, also seems straightforward. Of course it is based upon acceptance of a right of self-defence against Da'esh, a non-State armed group, which as explained in the preceding section has – at least in the past – been controversial. And it depends upon certain facts being established. Imminent and ongoing attacks upon Iraq from Da'esh are undeniable. The fact that the territorial State – Syria – is unable to take the necessary action to prevent the attacks speaks for itself, given that it is not in control of large areas of its territory which are under the control of Da'esh.

Security Council resolution 2249 (2015), adopted unanimously on 20 November 2015, was followed closely by the decisions by the United Kingdom

37 (n. 22). The quotations are from Principle 8 of the 'Bethlehem' Principles (n 36).

38 *Policy paper, Summary of the government legal position on military action in Iraq against ISIL*, 25 September 2014, (2014) 85 *British Yearbook of International Law* 621–2.

39 Letter dated 25 June 2014 from the Permanent Representative of France to the United Nations addressed to the Secretary-General (S/2014/440).

40 S/PRST/2014/20.

41 Letter dated 20 September 2015 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council (S/2014/691).

and Germany– and others, such as Denmark, Norway and Belgium, to name only those who have since sent in Article 51 letters– to step up their military activities in relation to Da'esh in Syria.

Resolution 2249 (2015) was the subject of much instant comment in legal blogs and articles (and by politicians), describing it as ambiguous, a hybrid, confusing etc. It has been suggested that it 'might also portend a new blurring of the long-standing bright line between Chapter VII resolutions that authorize force and those that do not.'[42] It is none of these. On the contrary, it is a welcome development in Security Council practice. As far back as 2010, the *Leiden Policy Recommendations on Counter-terrorism and International Law* had suggested that

> Security Council endorsement should be seen as generally politically desirable, even in cases of self-defence (and need not affect the right of self-defence). Measures taken with Security Council endorsement will usually have stronger domestic and international support, and for that reason should be more effective than if they are taken without such endorsement. A State contemplating the use of force against terrorists should therefore normally first go to the Security Council, except when there is no time, or where the Security Council is manifestly unable to act.[43]

It has been suggested that for the Security Council to 'legitimize' self-defence is in the long-term to reverse the underlying Charter scheme, even if it is understandable where no agreement can be reached within the Council to authorise action. Self-defence is the exception; collective action the rule.[44] That may be true, but the fact is that in many cases self-defence will be necessary because the Council will not act to authorise force, or will not act quickly enough.

Security Council resolution 2249 (2015) was a French-driven text adopted seven days after the atrocities in Paris on the evening of 13 November 2015.

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42 A. Deeks, 'Threading the needle in Security Council Resolution 2249', *Lawfare*, 25 November 2015, 3.25 PM. See also P. Hilpold, 'The fight against terrorism and SC Resolution 2249 (2015): Towards a more Hobbesian or a more Kantian International Society?' (2015) 55 *Indian Journal of International Law* 535; P. Hilpold, 'The evolving right of counter-terrorism: An analysis of SC resolution 2249 (2015) in view of some basic contributions in International Law literature' (2016) 24 *Questions of International Law* 15.

43 L. van den Herik, N. Schrijver (n 20) 715 (para. 36); M. Wood, 'The role of the UN Security Council in relation to the use of force against terrorists', ibid. 317–333.

44 P. Starski, ' "Legitimized Self-Defense"–Quo Vadis Security Council?', (10 December 2015) EJIL*Talk!* <http://www.ejiltalk.org/legitimized-self-defense-quo-vadis-security-council/>.

It was adopted unanimously. In it, the Security Council reaffirmed 'that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security'. It determined that Da'esh 'constitutes a global and unprecedented threat to international peace and security'. It noted letters from the Iraqi authorities 'which state that Da'esh has established a safe haven outside Iraq's borders that is a direct threat to the security of the Iraqi people and territory'. It unequivocally condemned the terrorist attacks perpetrated by Da'esh in Sousse, in Ankara, over Sinaï, in Beirut and in Paris, among others, and noted that it has the capability and intention to carry out further attacks. In its key provision, paragraph 5, the Security Council:

> *Calls upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law, … , on the territory under the control of … Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by … Da'esh as well as [others], and to eradicate the safe haven they have established over significant parts of Iraq and Syria;[45]

It will be seen that the Security Council did not authorize the use of force with Security Council resolution 2249. It did not purport to do so. Instead, it '*call*[*ed*] *upon*' States to take 'all necessary measures' (which includes the use of force) 'in compliance with international law' on the territory under the control of Da'esh in Syria and Iraq, to prevent and suppress terrorist acts and, most importantly to eradicate Da'esh's safe haven.[46] This call was reiterated

45 Paragraph 5 reads in full: '5. *Calls upon* Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as ANF, and all other individuals, groups, undertakings, and entities associated with Al-Qaida, and other terrorist groups, as designated by the United Nations Security Council, and as may further be agreed by the International Syria Support Group (ISSG) and endorsed by the UN Security Council, pursuant to the statement of the International Syria Support Group (ISSG) of 14 November, and to eradicate the safe haven they have established over significant parts of Iraq and Syria;'.

46 For the French view of resolution 2249, see Alabrune, (n 5), at 48–49: '«La résolution n'est cependant pas placée explicitement sous chapitre VII de la Charte. Par ailleurs, le Conseil «demande» aux Etats de prendre les mesures nécessaires. La résolution ne précise pas que le Conseil «autorise» ces mesures, ni n'en «décide», selon les formules traditionnellement employées par le Conseil de sécurité pour autoriser le recours à la force. Il n'en demeure pas moins que, par la résolution 2249, le Conseil formule, de manière unanime, une demande claire portant sur le recours à la force contre Daech sur le territoire contrôlé

one month later in Security Council resolution 2254 (2015),[47] and yet again a year later in Security Council resolution 2332 (2016).[48]

The adoption of resolution 2249 led to some rather transparent 'straw-man' arguments. It has been asserted that the resolution was not adopted under Chapter VII of the Charter, and that consequently it did not authorize the use of force. But no State suggested that it did. It has been pointed out that although resolution 2249 uses 'Chapter VII language' the Council did not state that it was 'acting under Chapter VII'. To say that resolution 2249 was not adopted under Chapter VII is probably wrong. There was, for example, a clear determination of a threat to international peace and security, as required by Article 39. But the question whether it was adopted under Chapter VII is a false issue. 'Calls upon' (although it is the language in Article 42 of the Charter) is not generally intended to indicate a legally binding decision. It has more the sense of strongly urging. There is no hint in resolution 2249 of an authorization by the Council. On the contrary, the call is to act in conformity with international law. All this was no doubt rather clear to Governments, and is presumably what was intended. It was certainly clear to the UK Government. The UK Permanent Representative's statement upon the adoption of resolution 2249 (2015) underlined that the resolution was a powerful international recognition of the threat Da'esh poses and a call for lawful action and all necessary measures to counter Da'esh.[49]

But this is not to say that resolution 2249 was not important; it was obviously very important politically, and also legally. Legally it is important because, once again, the Council had spoken, and spoken unanimously, in such a way as to indicate that the inherent right of individual and collective

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par cette organisation en Irak et en Syrie. Ceci manifeste le soutien du Conseil de sécurité aux actions entreprises, y compris par la France, sans pour autant écarter leur base juridique antérieurement invoquée." (note omitted).

47 Paragraph 8 of resolution 2254 (2015) of 18 December 2015 reiterated the call in resolution 2249 (2015).

48 In the sixth preambular paragraph of resolution 2332 (2016) of 21 December 2016, the Security Council, while noting 'the progress made during 2016 in taking back areas of Syria from the Islamic State in Iraq and the Levant (ISIL, also known as Daesh), and Al-Nusrah Front (ANF)', expressed its grave concern 'that areas remain under their control and about the negative impact of their presence, violent extremist ideology and actions on stability in Syria and the region, including the devastating humanitarian impact on the civilian populations which has led to the displacement of hundreds of thousands of people' and called for 'the full implementation of Security Council resolutions 2170 (2014), 2178 (2014), 2199 (2015), 2249 (2015) and 2253 (2015)'.

49 S/PV.7565, 9.

self-defence can apply to armed attacks by terrorists, and that it did apply in the face of the current attacks by Da'esh.

The Council was fully aware of what was happening, and what was contemplated, when it adopted resolution 2249; it is difficult to read the resolution otherwise than as an endorsement, in the circumstances, of the use of force in self-defence against an ongoing or imminent armed attack by Da'esh, a non-State armed group. Paragraph 5 itself referred to the need 'to prevent and suppress terrorist acts committed specifically by ISIL also known as Da'esh as well as [by other specified terrorist groups]'. No one at the Council meeting at which the resolution was adopted suggested otherwise.

The UK Government's position was clear. The Prime Minister set it out in a Parliamentary statement on 26 November 2015,[50] and in a Memorandum of November 2015 in response to a Foreign Affairs Committee report.[51] On 2 December 2015, the House of Commons voted 397 to 223 to approve the motion supporting UK military action against Da'esh in Syria. Action was taken within hours, and on 3 December the UK Permanent Representative in New York reported to the President of the Security Council in accordance with Article 51 of the Charter saying that the UK was taking necessary and proportionate measures against Da'esh in Syria, as called for in resolution 2249 (2015), in exercise of the inherent right of individual and collective self-defence.[52] On the same day the UK set out its legal position in a memorandum to the JCHR, which was conducting the inquiry into so-called 'targeted killings'.[53]

Unlike in 2003, in 2015 domestic opposition to the action was not based on legal concerns. The action relied on both collective self-defence of Iraq and individual self-defence of the UK; it was not suggested that the legal basis was Security Council authorization, though the unanimous resolution of the Security Council was of course very important politically. This extension of

50 Hansard, House of Commons, 26 November 2015, cols 1489-1494, available at <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151126/debtext/151126-0001.htm#15112625000002>.

51 *Memorandum to the Foreign Affairs Select Committee. Prime Minister's Response to the Foreign Affairs Select Committee's Second Report of Session 2015-16: The Extension of Offensive British Military Operations to Syria*, available at <https://www.parliament.uk/documents/commons-committees/foreign-affairs/PM-Response-to-FAC-Report-Extension-of-Offensive-British-Military-Operations-to-Syria.pdf>.

52 Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (S/2015/928).

53 *Government Memorandum to the JCHR* (3 December 2015) (n 33).

the action already underway in Iraq thus had a very different legal basis. The action against Da'esh in Iraq was based on the invitation and consent of the Government of Iraq.

Shortly after the UK action, Germany took a similar decision, also based on the right of self-defence. The German Government described the legal basis as 'Art. 51 of the UN Charter, Art. 42(7) TEU as well as resolutions 2170 (2014), 2199 (2015), 2249 (2015) of the Security Council.' It is not unusual, in order to secure Parliamentary approval for the deployment of armed forces abroad, for a government to use all kinds of arguments, legal, political, sometimes mixed legal-political, to secure the necessary votes. Provided that one sound legal basis is present, the fact that other, possibly legally less convincing arguments are thrown into the pot should not be of great concern, except perhaps to a legal purist.

It would seem that for Germany, as for the United Kingdom, the main legal basis to act in Syria was self-defence recognised by Article 51 of the UN Charter. It is mentioned first. As summarised by Anne Peters,

> The Parliamentary scientific service had on 23th and 30th November 2015 issued a two-part legal opinion on the question of State defence against terrorists and the legal implications of SC res. 2249 (2015). In this legal opinion, the service came to the conclusion that "obviously, last but not least against the background of the recent Paris attacks – an evolution of customary law" has occurred in the direction of admitting self defence against non-state actors. The government and parliament heavily relied on this legal opinion and on that basis claim that the German decision is fully covered by international law.[54]

Article 42(7) of the Treaty on European Union had been invoked, for the first time ever, by President Hollande and his Defence Minister on 16 November 2015, after the attacks of 13 November.[55] It provides that

54 A. Peters, 'German Parliament decides to send troops to combat ISIS – based on collective selfdefense "in conjunction with" SC Res. 2249' EJIL: *Talk,* 8 December 2015 <https://www.ejiltalk.org/german-parlament-decides-to-send-troops-to-combat-isis-%E2%88%92-based-on-collective-self-defense-in-conjunction-with-sc-res-2249/>.

55 F. Gouttefarde,'L'invocation de l'article 42.7 TUE ou la solidariste militaire européenne à l'épreuve de la guerre contre le terrorisme', (2016) 120 *Revue générale de droit international public* 51.

> If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.

It would seem that Article 42(7) of the TEU provides for some sort of loose obligation of aid and assistance (rather than collective self-defence) among EU Member States.[56] Clearly it cannot enlarge the right of collective self-defence under international law vis-à-vis third States.

Recourse to Article 42(7) TEU, with its reference to Article 51 of the Charter, in the face of the attacks in Paris on 13 November 2015, would seem to amount to acceptance by all 28 EU Member States that the right of self-defence, including collective self-defence, is available against such attacks by Da'esh, a non-State armed group.[57]

JCHR Report on 'the Government's Policy on the Use of Drones for Targeted Killings'

On 10 May 2016, the UK Parliament's Joint Committee on Human Rights[58] published a report entitled *The Government's policy on the use of drones for targeted killings*.[59] The Committee did not limit itself to human rights issues, but extended its inquiry to the *jus ad bellum* and the *jus in bello*. Perhaps unsurprisingly, given that it is a Committee of parliamentarians with a human

56 See 'Remarques introductives de la Haute Représentante et Vice-Présidente Federica Mogherini lors de la conférence de presse avec Jean Yves Le Drian, Ministre de la Défense Français, 17 novembre 2015': <http://www.eeas.europa.eu/statements-eeas/2015/151117_01_fr.htm>.

57 To the same effect, Alabrune, above (n 5) 47.

58 'The Joint Committee on Human Rights consists of twelve members, appointed from both the House of Commons and the House of Lords, to examine matters relating to human rights within the United Kingdom.': <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/role/>.

59 (n 29). The occasion for the inquiry and report is described in the executive summary of the report in the following terms: 'On 21 August 2015 Reyaad Khan, a 21 year old British citizen from Cardiff, was killed by an RAF drone strike in Raqqa, Syria. He had appeared in a recruitment video for ISIL/Da'esh and was suspected of being involved in plotting and directing terrorist attacks in the UK and elsewhere.' The term 'drone' is often employed as shorthand for remotely piloted aircraft (RPAs).

rights remit, its report has been criticised for showing some misunderstanding of controversial issues of public international law, including the *jus ad bellum* and international humanitarian law.[60]

The Report concluded that the strike of 21 August 2015 was part of the armed conflict between the UK (and others) and Da'esh, and thus international humanitarian law was applicable. Nevertheless, the Committee interpreted, or rather over-interpreted, a number of statements by the UK Government, which it suggested were 'confused and confusing', as indicating that there was a 'Government policy of using lethal force abroad outside of armed conflict'.[61] On this incorrect assumption, the Committee sought the Government's legal position on what were in fact hypothetical questions.

The Government's evidence to the Committee during its inquiry consisted of an initial four-page memorandum of 3 December 2015[62] followed by oral evidence from the Defence Secretary on 16 December 2015.[63] The Government's response, dated 7 September 2015, was published on 19 October 2016, together with the Committee's comments on the response.[64]

The Committee's Report, and the Government's response, ranged well beyond the subject of the present article. In particular, they covered the role of Parliament in authorizing the use of force, and decision-making arrangements within Government including the taking of legal advice. And they dealt not only with the *jus ad bellum* but also with the application of the *jus in bello* and international human rights law.

The inquiry followed the United Kingdom attack in Syria, on 21 August 2015, when the United Kingdom, acting in self-defence, targeted (by means of

60 See 'Op-Eds on The Joint Committee Drones Report', with an introduction by C. Henderson and short articles by C. Gray ('Targeted killing outside armed conflict: a new departure for the UK?'); M.E. O'Connell ('The law on lethal force begins with the right to life'); N. White ('The Joint Committee, drone strikes and self-defence: Caught in a no man's land?': C. Bannelier-Christakis ('The Joint Committee's drones report: Far-reaching conclusions on self-defence based on a dubious reading of resolution 2249'); S. Breau 'Reflections on the treatment of the decision-making process in section 4 of the Joint Committee's drone strikes report' (2016) 3 *Journal on the Use of Force and International Law* 194; D. Turns, 'The United Kingdom, Unmanned Aerial Vehicles, and Targeted Killings', 21 ASIL Insights Issue 3 (24 February 2017), available at <https://www.asil.org/insights/volume/21/issue/3/united-kingdom-unmanned-aerial-vehicles-and-targeted-killings>.

61 Second Report, (para. 3.20).

62 *Government Memorandum to the JCHR* (3 December 2015) (n 33)

63 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-uk-governments-policy-on-the-use-of-drones-for-targeted-killing/oral/27633.html>.

64 (n 31).

a precision air strike) and killed three Da'esh members (including UK citizen, Reyaad Khan, and another UK citizen) in an area and in a State (Syria) where the United Kingdom was not, prior to the strike, engaged in an armed conflict. This precision air strike raised important international legal issues: under the *jus ad bellum*, international humanitarian law and international human rights law. The Government's position was clear; in engaging in this military action, it was acting in exercise of the right of self-defence against members of Da'esh, in circumstances where the territorial State, Syria, was unwilling or unable to do so. This was stated in the Article 51 letter from the UK Permanent Representative dated 7 September 2015, which referred both to collective self-defence of Iraq as well as the individual self-defence of the United Kingdom:

> On 21 August 2015, armed forces of the United Kingdom of Great Britain and Northern Ireland carried out a precision air strike against an ISIL vehicle in which a target known to be actively engaged in planning and directing imminent armed attacks against the United Kingdom was travelling. This air strike was a necessary and proportionate exercise of the individual right of self-defence of the United Kingdom.[65]

When asked by the JCHR about the grounds on which the Government considered the law of war to apply to a use of lethal force outside armed conflict,[66] given that there was in fact no Government policy of using lethal force abroad outside of armed conflict, the Government responded by saying:

> this is a hypothetical question and if this scenario arose as a live issue it would require detailed analysis of the law and all the facts. However, the Government considers that in relation to military operations, the law of war would be likely to be regarded as an important source in considering the applicable principles.[67]

The right to use force (under the *jus ad bellum*) and the existence or otherwise of an armed conflict (a requirement for the application of international humanitarian law) are separate questions. It does not automatically follow that once you have the right to use force under the *jus ad bellum*, then the applicable law governing the actual use of force will be the *jus in bello*. In

65 Letter dated 3 December 2015 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (S/2015/928).

66 Second Report (para. 3.92).

67 Fourth Report, Appendix 1, 16.

each specific case, one has to consider whether there is, as a matter of fact, an armed conflict.[68] But where military force is used, that is very likely to be the case.

Conclusions

Academic commentators may criticise without full knowledge of the facts. That is often not their fault, though the risk is perhaps exacerbated by modern technology and the tendency to favour instant blogging. They are not alone in reading into statements and actions that which is not there. The British Parliament's Joint Committee on Human Rights has even managed to conjure up a radical Government policy (of using lethal force abroad outside of armed conflict) which simply does not exist.

Article 51 of the Charter cannot be viewed in a vacuum. It needs to be interpreted in light of State practice, not least recent events such as the struggle against Da'esh. The last couple of years have seen some interesting practice on familiar issues. The view that the inherent right of self-defence may apply to counter attacks by non-State armed groups has gained ground.

The factual and legal circumstances are complex. That is all the more reason for lawyers to maintain a clear-headed approach, based not on abstract principle or emotion, but on what States say and do. If it were argued that that practice is confined to only a few States who are directly engaged in the use of force against Da'esh in Syria, a number of points could be made in reply. An impressive array of States is involved in the struggle against Da'esh. Some ten States (Australia, Belgium, Canada, Denmark, France, Germany, Norway, Turkey, US, UK) have expressly invoked self-defence in notifications to the Security Council under Article 51 of the UN Charter. Others, such as the EU Member States, have indicated clear positions in other ways. Some 66 States are part of the broader Global Coalition against Da'esh. Syria apart, very few States have suggested that such attacks are unlawful. Inaction is a recognised form of State practice. States increasingly reject the view, still found in the literature, that paragraph 139 of the 2004 *Wall* Advisory Opinion means that the right of self-defence is only available against armed attacks by or imputable to States.

68 For discussion of the circumstance in which there is a non-international armed conflict, see the ICRC's (2016) Commentary to First Geneva Convention, article 3 (paras 452–482); and the ICRC Report on *International humanitarian law and the challenges of contemporary armed conflicts*, October 2015 (32IC/15/11), especially 12–16.

There are two possible explanations. States may well not read the paragraph as ruling out self-defence except where an armed attack is attributable to a State. As the Court itself pointed out, the case concerned a situation where 'Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory'. In the alternative, in so far as the paragraph may be read as suggesting that self-defence is only available against attacks by a State, it was wrong. In any event, and in the light of events since 2004, and particularly since 2014, it must be hoped that the Court would not simply repeat without explanation the paragraph from the *Wall* Opinion if it had occasion to decide the issue today.