13. Terrorism and the international law on the use of force

Michael Wood

1 INTRODUCTION

This chapter addresses the international law on the use of force (*jus ad bellum*) as it applies to terrorism.[1] It does not deal with distinct issues covered elsewhere in this volume, such as the use of force domestically, in the context of law enforcement, public emergencies, or non-international armed conflicts. Nor does it deal with the issues that may arise under international humanitarian law, such as whether a use of armed force against terrorists is to be classified as an armed conflict or not[2] or the legality of 'targeted killings' and the use of aerial drones.

The international law on the use of force did not change following the 9/11 attacks in New York, Washington and Pennsylvania. A few authors questioned whether the existing rules were adequate to meet current threats, especially from terrorists and weapons of mass destruction,[3] but most considered that they were.[4] The member states of the United Nations responded in clear terms in the 2005 World Summit Outcome Document, reaffirming:

---

[1] The following reading list is very selective, as the literature is enormous: R Higgins and M Flory (eds), *Terrorism and International Law* (Routledge, 1997); E Wilmshurst, 'Chatham House Principles on self-defence' (2006) 55 *International and Comparative Law Quarterly* 936; C Tams, 'The use of force against terrorists' (2009) 20 *European Journal of International Law* 359; N Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP, 2010); L Moir, *Reappraising the Resort to Force: International Law*, Jus ad Bellum *and the War on Terror* (Hart, 2010); T Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (CUP, 2010) 419–510; L van den Herik and N Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (CUP, 2013); O Corten, *Le droit contre la guerre. L'interdiction du recours à la force en droit international contemporain* (2nd edn, Pedone, 2014) 195–305; H Duffy, *The 'War on Terror' and the Framework of International Law* (2nd edn, CUP, 2015); D Bethlehem, 'Self-defense against an imminent or actual armed attack by non-state actors' (2012) 106 *American Journal of International Law* 769, and comments thereon, including E Wilmshurst and M Wood, 'Self-defense against non-state actors: Reflections on the "Bethlehem Principles"' (2013) 107 *American Journal of International Law* 390; C Gray, *International Law and the Use of Force* (4th edn, OUP, 2018) 200–61; C Henderson, *The Use of Force and International Law* (CUP, 2018) 208–46; International Law Association, *Aggression and the Use of Force*, Report adopted at the Sydney Conference (August 2018); A Peters and C Marxsen (eds), *Max Planck Trialogues on the Law of Peace and War: vol I – Self-defence against non-state actors* (co-authored by ME O'Connell, C Tams, D Tladi, *Max Planck Trialogues on the Law of Peace and War: Self-defence against Non-State Actors* (CUP, 2019).

[2] See ME O'Connell (ed.), *What is War? An Investigation in the Wake of 9/11* (Martinus Nijhoff, 2012); E Wilmshurst (ed.), *International Law and the Classification of Conflicts* (OUP, 2011).

[3] See, e.g., M Glennon, 'How international rules die' (2005) 93 *Georgia Law Journal* 939.

[4] M Wood, 'Towards new circumstances in which the use of force may be authorized? The cases of humanitarian intervention, counter-terrorism, and weapons of mass destruction', in N Blokker and N Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality – A Need for Change?*

> that 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. We stress the importance of acting in accordance with the purposes and principles of the Charter.[5]

A focus on 'terrorists' or 'terrorist groups' is legally unsatisfactory, at least in the context of the *jus ad bellum*. 'Terrorism' is not a term of art in general international law and there is no generally agreed definition.[6] It is all too easy to refer to some person or group, or even a state, as 'terrorist', and then to suppose that legal consequences follow. They do not.

The actions of terrorist groups are properly treated as crimes under the internal laws of various states. Events on a scale like those of 9/11, which may qualify as armed attacks for the purposes of the *jus ad bellum*, are the exception. 'Ordinary' acts that might be described as 'terrorist', such as those in Madrid in March 2004, or London in July 2005, are properly viewed as crimes, albeit often crimes of international concern and the subject of international criminal conventions.

2 THE INTERNATIONAL LAW ON THE USE OF FORCE (*JUS AD BELLUM*): GENERAL CONSIDERATIONS

> Traditionally, there were no terrorism-specific rules in the law on non-intervention and non-use-of-force.... [T]he factual phenomenon of terrorism has assisted in the clarification of the general law, but terrorism is just one manifestation or instantiation of non-state armed force to which the general legal principles apply.[7]

The international law on the use of force is found in the UN Charter and in customary international law. The Charter contains, among the Principles of the UN, a general prohibition of the threat or use of force.[8] It refers to two circumstances in which the prohibition does not apply:

(Martinus Nijhoff, 2005); M Wood, 'The law on the use of force: Current challenges' (2007) 11 *Singapore Yearbook of International Law* 1; M Wood, 'The International Law on the Use of Force. What Happens in Practice?' (2013) 53 *Indian Journal of International Law*.

[5] UN General Assembly Res 60/1 (16 September 2005) [79]. There were similar statements in *In Larger Freedom: Towards Security, Development and Human Rights for All – Report of the Secretary-General*, UN Doc A/59/2005 (21 March 2005); *Report of the UN High-level Panel on Threats, Challenges and Change – A More Secure World: Our Shared Responsibility*, UN Doc A/59/565 (2 December 2004).

[6] See R Baxter, 'A skeptical look at the concept of terrorism' (1974) 7 *Akron Law Review* 380; R Higgins, 'The general international law of terrorism', in R Higgins and M Flory (eds), *Terrorism and International Law* (Routledge, 1997) 27; B Saul, 'The emerging law of international terrorism', in B Saul (ed.), *Documents in International Law: Terrorism* (Hart, 2012) lxii, lxx–lxxiii (and accompanying references). In 2011 the Appeals Chamber of the Special Tribunal for Lebanon found there was a crime of transnational terrorism under customary international law: *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* (STL, Case No STL-11–01/I, 16 February 2011). This decision, in particular the methodology employed, has been strongly criticized: see, e.g., B Saul, 'Legislating from a radical Hague: The United Nations Special Tribunal for Lebanon invents an international crime of transnational terrorism' (2011) 24 *Leiden Journal of International Law* 677.

[7] Saul, above n 6, lxxix–lxxxi.

[8] Charter of the United Nations, adopted 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) art 2(4).

forcible measures taken or authorized by the Security Council under Chapter VII; and the use of force in self-defence, recognized by Article 51. A possible third exception, not mentioned in the Charter and not widely accepted, could be a right to use force to avert an overwhelming humanitarian catastrophe.[9]

It has occasionally been suggested that the law on the use of force underwent some great change on 9/11,[10] in particular since before 9/11 attacks by non-state actors did not count as armed attacks triggering the right of self-defence while now they do. More cogently, it has been suggested that there was a more restrictive view of the rules on the use of force in 1989 compared with the position 20 years later.[11] While that may be so, the change seems to be chiefly apparent in the works of writers; it is not obvious that states generally now adopt a radically different position. A better way of looking at things might be that there was not so much a change in the law as an application of existing law to new – or, recalling the *Caroline* case,[12] not so new – circumstances.

The law on the use of force is not always obeyed and there are numerous examples, or seeming examples, of this in the context of the use of force against terrorists.[13] Drone strikes and other 'targeted killings' in third states are often viewed as illegal.[14] But in applying the *jus ad bellum*, each such attack needs to be assessed in the light of the facts, which may not always be widely known and which are by no means always apparent from media reports.

---

[9] Other exceptions that have been suggested have received little or no support from states. The use of force in retaliation (as punishment, revenge or reprisals) is illegal. Nor is there any right, without the consent of the territorial state, to engage in extraterritorial law enforcement, such as the transboundary abduction of suspects.

[10] Gray, above n 1; Tams, above n 1.

[11] Tams, above n 1.

[12] M Wood, 'The *Caroline* Incident (1837)', in T Ruys, O Corten and A Hofer (eds), *The Use of Force in International Law: A Case-based Approach* (OUP, 2018), 5–14.

[13] G Nolte, 'Targeted Killings', in *Max Planck Encyclopedia of Public International Law* (2012).

[14] As US President Obama acknowledged in his speech of 23 May 2013 at the National Defense University, Fort McNair, Washington DC: 'America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty'. See also UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, 'Statement Concerning the Launch of an Inquiry into the Civilian Impact, and Human Rights Implications of the Use of Drones and Other Forms of Targeted Killing for the Purpose of Counter-terrorism and Counter-insurgency' (2013).

Such attacks may be lawful, under the *jus ad bellum*, because of the consent of the territorial state[15] or because that state is unable or unwilling to take action itself.[16]

3 THE USE OF FORCE AGAINST TERRORISTS AUTHORIZED BY THE UN SECURITY COUNCIL

We are here concerned with the use of force by or authorized by the UN Security Council, not the General Assembly.[17] The Security Council has an extensive practice of determining that acts of 'terrorism' are threats to international peace and security, thus paving the way for action under Chapter VII of the Charter. Its action in this field has so far been confined to the adoption of measures not involving the use of force.[18] Yet there is no reason why, in appropriate circumstances, the Council should not authorize the use of force against terrorist threats. This could be done not only in cases where a state which has been attacked might exercise the right of self-defence but also where such right is not available, particularly where the terrorist threat, though real, is not imminent or of the necessary scale or gravity. It has been suggested that:

---

[15] For a recent study of 'military assistance on request', see the reports of G Hafner for the Institute of International Law: Preliminary Report (2009) 73 *Annuaire de l'Institut de Droit International* 302; Final Report (2011) 74 *Annuaire de l'Institut de Droit International* 364. Unlike these useful reports, the debates among the members of the Institute in 2009 and 2011 were disappointing: see G Nolte, 'The resolution of *the Institut de droit international* on military assistance on request' (2012) 45 *Revue Belge de Droit International* 241. A recent debate over the nature of 'consent' in this context has been stimulated by the remark in Bethlehem, above n 1, and the responses thereto. See also the Statement by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, above n 14, in which he said:

> A third way of analysing the issue is to ask whether a terrorist organisation is engaging in an internal (or non-international) armed conflict with a particular government such as the governments of Pakistan, Yemen and Somalia; and then to ask whether and in what circumstances it is lawful for a third State to become engaged as a party to an internal armed conflict in support of the government forces. It is clear that as a matter of international law such engagement may be lawful if it takes place at the express request of the government of the State concerned. It is much less clear whether it can be lawful for an outside State such as the US to use military force without the express consent of the State concerned. International lawyers disagree on whether tacit consent or acquiescence is sufficient; on whether the deployment of remote targeting technology in such circumstances amounts to a violation of the sovereignty of the State on whose territory it is used; and on whether it may nonetheless be lawful if the State concerned is either unwilling or unable to tackle the terrorist threat posed by an insurgent group operating on its territory.

[16] See Section 4 below.

[17] Notwithstanding the 'Uniting for Peace' resolution, the General Assembly does not have the power to authorize a use of force that would otherwise be contrary to international law and has not sought to recommend the use of force invoking that resolution: C Binder, 'Uniting for Peace Resolution (1950)', in *Max Planck Encyclopedia of Public International Law* (last updated 2011). The Institute of International Law has resolved that 'the General Assembly should exercise its competence under the "Uniting for Peace" resolution to *recommend* such measures as it deems appropriate': Institute of International Law, Resolution on Authorization of the Use of Force by the United Nations (9 September 2011) art 7 (emphasis added).

[18] J Boulden, 'The Security Council and terrorism', in V Lowe et al. (eds), *The United Nations Security Council and War* (OUP, 2008) 608; C Walter, 'Terrorism', in *Max Planck Encyclopedia of Public International Law* (last updated 2017).

> Consideration should be given to enhancing the Security Council's role in respect of the use of force against terrorists, so as to develop multilateral approaches to the matter wherever possible.... It should be recognised that Security Council authorisation under Chapter VII is sometimes legally necessary.... Security Council endorsement should be seen as 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.[19]

4 THE USE OF FORCE AGAINST TERRORISTS IN EXERCISE OF THE RIGHT OF SELF-DEFENCE[20]

Article 51 of the Charter recognizes the inherent right of self-defence under customary international law. It 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.' Three main questions arise in connection with self-defence against terrorist attacks. Does the right of self-defence in principle apply in the face of attacks by non-state actors, including transnational terrorist groups? Is there a right of anticipatory self-defence? If these first two questions are answered in the affirmative, how does the requirement of imminence apply in relation to terrorist attacks?

A Does the Right of Self-defence in Principle Apply in Response to Attacks by Non-state Actors?

Some commentators question whether the right of self-defence is available at all in response to attacks by non-state actors, such as transnational terrorist groups. Yet in resolution 1368 of 12 September 2001 and resolution 1373 of 28 September 2001, adopted in the immediate aftermath of 9/11, the Security Council reaffirmed the right of self-defence in the context of terrorist attacks. The third preambular paragraph of resolution 1368 recognized 'the inherent right of individual or collective self-defence in accordance with the Charter',[21] and the fourth preambular paragraph of resolution 1373 reaffirmed 'the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)'.[22]

Following the commencement of hostilities against Al-Qaeda in October 2001, the US and UK wrote to the President of the Security Council stating that the action was taken in accordance with the inherent right of individual and collective self-defence following the terrorist attacks on the US of 9/11.[23] They reported orally to the members of the Council on 8 October

---

[19] M Wood, 'The role of the UN Security Council in relation to the use of force against terrorists', in van den Herik and Schrijver (eds), above n 1, 317, 332.

[20] See generally, Wilmshurst, 'Chatham House Principles on self-defence', above n 1; S Ratner, 'Self-defence against terrorists: the meaning of armed attack', in van den Herik and Schrijver (eds), above n 1, 334.

[21] UN Security Council Res 1368 (12 September 2001), preamble.

[22] UN Security Council Res 1373 (28 September 2001), preamble.

[23] *Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, UN Doc S/2001/946 (7 October 2001); *Letter dated 7 October 2001 from the Permanent Representative of the United Kingdom of Great*

2001, following which the President of the Council issued a 'Press Statement on terrorist threats' recording that '[t]he permanent representatives made it clear that the military action that commenced on 7 October was taken in self-defence and directed at terrorists and those harbouring them' and that '[t]he members of the Council were appreciative of the presentation made by the United States and the United Kingdom'.[24]

State practice, including the practice of the members of the North Atlantic Treaty Organization,[25] the members of the Organization of American States,[26] and others,[27] supports such a right. This is notwithstanding the opaque, possibly misunderstood, observations by the International Court of Justice (ICJ) in the *Israeli Wall Advisory Opinion*,[28] which were qualified but not wholly clarified in the *Armed Activities on the Territory of the Congo* judgment.[29] In so far as the Court may have suggested there was no such right, its views were not well founded in state practice and have not been followed by states since 9/11.

A Chatham House study, which developed a set of *Principles on the Use of Force in Self-Defence*, concluded that such action could be taken where the territorial state is itself 'unable or unwilling' to take the necessary action.[30] The *Leiden Policy Recommendations on Counter-terrorism and International Law* came to a similar conclusion,[31] as did the *Bethlehem Principles*.[32] The 'unable or unwilling' test has been challenged by certain writers,[33] but it is firmly based in practice, including in other fields such as the rescue of nationals. It is closely connected to the requirement of necessity for the application of the right of self-defence.

It is sometimes argued that such action would only be permissible where the acts of the non-state actors are attributable to the territorial state for the purposes of state responsibility. But that line of argument presupposes that the attack against which action is taken in self-defence must be that of a state (or attributable to a state). Even if one adopts a 'more lenient standard of attribution',[34] the link to the state is an unduly narrow – indeed counterintuitive – reading of Article 51 of the Charter, which nowhere says that the armed attack must be

---

Britain and Northern Ireland to the United Nations addressed to the President of the Security Council UN Doc S/2001/947 (7 October 2001).

[24] UN Security Council, Press Statement on Terrorist Threats by Security Council President, UN Doc SC/7167 (8 October 2001).

[25] 'North American Treaty Organization: Statement by the North Atlantic Council' (2001) 40 ILM 1267.

[26] 'Organization of American States: Resolution on Terrorist Threat to the Americas' (2001) 40 ILM 1273.

[27] See examples in Tams, above n 1.

[28] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 194.

[29] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 223.

[30] Wilmshurst, 'Chatham House Principles on self-defence', above n 1.

[31] 'Leiden policy recommendations on counter-terrorism and international law' (2010) 57 *Netherlands International Law Review* 531; also published, with background studies, in van den Herik and Schrijver (eds), above n 1, 706.

[32] See Bethlehem, above n 1, principles 11–12.

[33] See, e.g., ME O'Connell, 'Adhering to law and values against terrorism' (2012) 2 *Notre Dame Journal of International and Comparative Law* 289.

[34] As does, for example, Tams, who proposes 'aiding and assisting' as the test: see above n 1, 286–7.

that of a state.[35] Commentators' conflation of state responsibility and the right of self-defence against non-state actors is not based in state practice, nor has it any necessary theoretical justification.[36]

Another limitation on the right of self-defence concerns the scale of the attack. Whatever the position may be in the case of self-defence against an armed attack by a state,[37] it seems to be accepted that in the case of the use of force against non-state actors the attack must be of a certain gravity. This has led to a revival of the 'accumulation of events' theory, whereby every pinprick counts towards reaching the threshold of gravity. But this theory has not gained significant traction among writers or in state practice.

Since the first edition of this book, there has been some significant practice in relation to Da'esh (ISIS) in Syria.[38] 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).[39] In a letter to the UN Secretary-General dated 25 June 2014, Iraq sought assistance in its struggle against Da'esh.[40] 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'.[41] In a letter dated 20 September 2015, 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'.[42]

The case for action in Syria against Da'esh, in collective self-defence of Iraq, also seems clear on the facts. Of course it is based upon acceptance of a right of self-defence against Da'esh, a non-state actor, 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 seem 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 and Germany – and others, such as

---

[35] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 241–3 (Judge Buergenthal); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 310–16 (Judge Kooijmans), 335–7 (Judge Simma).

[36] Becker's attempt to combine the two, while interesting, and very well done, is ultimately unconvincing: T Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart, 2006).

[37] The ICJ has controversially developed a doctrine whereby the right of self-defence is only available against grave breaches of the prohibition on the use of force. Thus, to be an armed attack for the purposes of self-defence, the use of force must be on a certain scale.

[38] M Wood, 'The use of force against Da'esh and the jus ad bellum', 1 *Asian Yearbook of Human Rights and Humanitarian Law* (2017) 9–34; O Corten, 'The military operations against the "Islamic State" (ISIL or Da'esh) – 2014' in T Ruys, O Corten and A Hofer (eds), *The Use of Force in International Law: A Case-based Approach* (2018) 873–98.

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

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

[41] S/PRST/2014/20.

[42] 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).

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 ISIS in Syria. This resolution has been the subject of much debate; at most it may be seen as giving political endorsement to the use of force in collective self-defence against Da'esh.

B Is There a Right of Anticipatory Self-defence?

The question whether the Charter recognizes a right of anticipatory self-defence remains controversial, among states as among writers.[43] During the Cold War, the USSR and its allies seemed to take the position that action in self-defence was only lawful if an armed attack had actually been launched. The US, the UK and some of their allies maintained the *Caroline* approach, that is, that force may be used in self-defence in the face of an imminent attack. The ICJ has not yet taken the opportunity to address the matter.[44] The end of the Cold War, and the new threats, have not yet led to general agreement among states on the question of anticipatory self-defence. In some respects, new divisions have emerged, in part as a result of language in the US *National Security Strategy* of 2002 referring to 'preventive' action.

C How Does the Requirement of Imminence Apply in Relation to Attacks by Terrorists?

The third question is perhaps the most difficult. What constitutes an imminent attack in the context of transnational terrorist groups and weapons of mass destruction? The *Caroline* language is familiar: 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'. However, as the UK Attorney General said in the House of Lords in April 2004:

> The 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.[45]

---

[43] E. Wilmshurst, 'Anticipatory self-defence against terrorists?', in van den Herik and Schrijver (eds), above n 1, 356.

[44] The Court expressly left the question open in *Military and Paramilitary Activities in and Against Nicaragua* [1986] ICJ Rep 14, 103. It did so again in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 222. In the latter case, however, after saying that the prohibition on the use of force was 'a cornerstone of the United Nations Charter' and citing Article 2(4), the Court continued (at 223):

> Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.

[45] United Kingdom, *Parliamentary Debates*, House of Lords, 21 April 2004, vol 660, cols 370–71 (Lord Goldsmith). William H Taft IV, when Legal Adviser to the State Department of the United States, made similar remarks on a number of occasions. For example, on 27 October 2004 he said:

> The right of self-defense could be meaningless if a state cannot prevent an aggressive first strike involving weapons of mass destruction. The right of self-defense must attach early enough to be meaningful and effective, and the concept of 'imminence' must take into account the threat posed

In the same speech, the Attorney General explicitly distanced the British Government from an American doctrine of preventive action, as set out in the 2002 *National Security Strategy*, stating: 'It is... the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive attack against a threat that is more remote.'[46] The application of the imminence criterion can be difficult in practice. A classic example is the Israeli attack on a nuclear plant in Iraq on 7 June 1981. Israel bombed a research centre near Baghdad, destroying the Osirak nuclear reactor which, it was said, was developing nuclear bombs that would have been ready for use against Israel in 1985. The Security Council, after extended debate,[47] unanimously and strongly condemned 'the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct'.[48] The debate focused on the necessity of Israel's actions. It was agreed that Israel had failed to exhaust all peaceful means for resolution of the matter. Israel had also failed to produce evidence that it was threatened with an imminent nuclear attack.

Principle D of the *Chatham House Principles* says that 'the criterion of imminence must be interpreted so as to take into account current kinds of threat' and that:

(a) Force may be used only when any further delay would result in an inability by the threatened State effectively to defend against or avert the attack against it.
(b) In assessing the imminence of the attack, reference may be made to the gravity of the attack [e.g. WMD], the capability of the attacker [e.g. possession of WMD], and the nature of the threat, for example if the attack is likely to come without warning.[49]

The commentary, after referring to the *Caroline* incident, notes that in the context of contemporary threats 'imminence cannot be construed by reference to a temporal criterion only, but must reflect the wider circumstances of the threat'.[50] A key element is whether 'it is believed

---

by weapons of mass destruction, the intentions of those who possess such weapons and the catastrophic consequences of their use.

Digest of United States Practice in International Law (OUP, International Law Institute, 2004) 971.

[46] See, to the same effect, Response of the Secretary of State for Foreign and Commonwealth Affairs to the Seventh Report of the Foreign Affairs Committee of the House of Commons (Cm 6340) of September 2004, response to recommendation 65; and the Attorney General's advice of 7 March 2003 (2006) 77 *British Year Book of International Law* 819, in which he said (at [3]):

> There must be some degree of imminence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in my opinion, exists or is recognized in international law.

The High-level Panel, above n 5, expressed it well, stating (at [188]):

> Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened. Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security.

[47] UN Security Council, *Verbatim Records of the 2280th–2288th Meetings*, UN Doc S/PV 2280–2288 (1981).

[48] UN Security Council Res 487 (4 December 1979) [1].

[49] Wilmshurst, 'Chatham House Principles on self-defence', above n 1, principle D.

[50] Ibid.

that any further delay in countering the intended attack will result in the inability of the defending State effectively to defend itself against the attack. In this sense necessity will determine imminence'.[51]

5 THE 2013 US' POLICY STANDARDS AND PROCEDURES

On 23 May 2013, US President Obama approved 'written policy standards and procedures that formalize and strengthen the Administration's rigorous process for reviewing and approving operations to capture or employ lethal force against terrorist targets outside the United States and outside areas of active hostilities', and made public 'certain key elements of these standards and procedures'.[52]

The 'policy standards and procedures' appear significant in the context of the international law on the use of force against terrorists. They make clear that lethal force is a last resort. They state that it will only be used against 'a target that poses a continuing, imminent threat to US persons'. They require an 'assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to US persons'. They reaffirm America's commitment to 'respect... international law'. The key passage of the 2013 policy standards and procedures, entitled 'Standards for the Use of Lethal Force', reads:

> Any decision to use force abroad – even when our adversaries are terrorists dedicated to killing American citizens – is a significant one. Lethal force will not be proposed or pursued as punishment or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission. Lethal force will be used only to prevent or stop attacks against US persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively. In particular, lethal force will be used outside areas of active hostilities only when the following preconditions are met:
>
> *First*, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks.
>
> *Second*, the United States will use lethal force only against a target that poses a continuing, imminent threat to US persons. It is simply not the case that all terrorists pose a continuing, imminent threat to US persons; if a terrorist does not pose such a threat, the United States will not use lethal force.
>
> *Third*, the following criteria must be met before lethal action may be taken:
>
> (1) Near certainty that the terrorist target is present;
> (2) Near certainty that non-combatants will not be injured or killed;
> (3) An assessment that capture is not feasible at the time of the operation;
> (4) An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to US persons; and
> (5) An assessment that no other reasonable alternatives exist to effectively address the threat to US persons.

---

[51] Ibid.

[52] It is unclear how far these standards and procedures are yet being implemented, since the published document says that it provides information regarding counterterrorism policy standards and procedures that are either already in place 'or will be transitioned into place over time': White House, 'US Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities' (23 May 2013) 1 www.whitehouse. gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf.

> *Finally*, whenever the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally – and on the way in which the United States can use force. The United States respects national sovereignty and international law.[53]

6 OTHER RECENT STATEMENTS

If it is accepted that force may be used in self-defence against attacks from non-state armed groups, and if anticipatory self-defence is admitted, the question of imminence becomes crucial.

Recent statements indicate that the imminence criterion is applied more flexibly today, particularly in the face of threats from non-state armed groups than in the past in connection with attacks by states. 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, by the Obama Administration, in December 2016 as follows:

> 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 analyses 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.[54]

The United Kingdom Government, which had explained its position on imminence under modern conditions in 2004,[55] did so again, in more detail, in January 2017 along similar lines,[56] as did the Australian Government in April 2017.[57]

---

[53] Ibid 2 (citations omitted).

[54] The quotations are from Principle 8 of the 'Bethlehem Principles': see Daniel Bethlehem, 'Principles relevant to the scope of a state's right of self-defense against an imminent or actual armed attack by non-state actors' (2012) 106 *American Journal of International Law* 769.

[55] See above n 45.

[56] 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*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminence_Speech_.pdf.

[57] On 11 April 2017, the Australian Attorney General, The Hon George Brandis QC, delivered a speech entitled 'The right of self-defence against imminent armed attack in international law', available at https://law.uq.edu.au/files/25365/2017%2004%2011%20-%20Attorney-General%20-%20Speech

7 CONCLUSION

In an article written more than a decade ago, the present writer concluded:

> Existing rules of international law on the use of force, in particular as regards Security Council authorisation and self-defence, properly interpreted and applied, are adequate to address current threats. Whilst they are by no means perfect, they are preferable to any alternative rules that could be agreed. Efforts radically to amend or reinterpret the rules are neither desirable, nor likely to succeed.[58]

In July 2004, the UK Government responded in similar terms to Parliament's Foreign Affairs Committee:

> In the Government's view, the right approach is to continue to seek to build a political consensus on the circumstances in which it is appropriate to resort to military action within the current legal framework rather than seeking to change existing rules of international law on the use of force. Existing rules are sufficiently flexible to meet the new threats we face. The role of the Security Council is central to that process. Seeking to develop the rules of international law other than on a case-by-case basis would be very difficult, and probably unsuccessful.[59]

This remains the position.

%20-%20The%20Right%20of%20Self-Defence%20Against%20Imminent%20Armed%20Attack%20in%20International%20Law%20-%20for%20publication.pdf.

[58] Wood, 'The law on the use of force', above n 4, 13.

[59] Letter from the Parliamentary Relations and Devolution Department, Foreign and Commonwealth Office (5 July 2004).