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Legal basis for UK military action in Syria

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Summary

The House of Commons is likely to debate a Government motion on using military force against ISIS/Daesh in Syria, possibly in early December 2015. The [Government's November 2015 response](#) to the [Foreign Affairs Committee report on extending British military action to Syria](#) says that the main legal basis for UK military action in Syria is collective self-defence of Iraq, with the individual self-defence of the UK and collective self-defence of other states (but not Security Council authorisation) as additional legal bases.

Self-defence is one of the three main exceptions to the UN Charter's prohibition on the use of force, the others being Security Council authorisation and consent/invitation.

There is no UN Security Council resolution clearly *authorising* the use of force in Syria. [UN Security Council Resolution 2249 \(2015\)](#) on ISIS/Daesh in Syria and Iraq, whilst using some language familiar from other resolutions on the use of force, seems intended to have more political than legal impact. It is a significant display of unanimity that had previously been notably lacking; but its careful wording implicitly supports states' existing military actions against specific terrorist groups in those countries without either explicitly accepting or rejecting the various justifications or clearly providing a new stand-alone legal basis or authorisation for those actions:

- it determines that ISIS/Daesh is 'a global and unprecedented threat to international peace and security', and
- calls for (not authorises) 'all necessary measures' (code for using force) in compliance with international law to 'redouble and coordinate' existing efforts against ISIS/Daesh, Al-Nusrah Front (ANF), Al-Qaeda and other designated terrorist groups in Syria and Iraq, and 'to eradicate the safe haven they have established' in Iraq and Syria.

This means that the UK and other states will continue relying on the varying legal bases they have been using up until now, despite the dispute between Russia and other states.

[Iraq's request to the UN](#) for military help in combating ISIS/Daesh both in its territory and in Syria has been [cited by the UK and other states](#) to justify military action as collective self-defence. Russia argues that it is acting at the invitation of the state of Syria, represented by the government of Syria led by Bashar Assad. States can use force in the territory of another state whose government has agreed to or invited it – but what if there is disagreement over who is the effective or the legitimate government?

International law allows states to use force in other states as individual or collective self-defence against an actual or imminent armed attack, as long as the force to be used is necessary and proportionate to the threat faced. However, when the armed attack comes from a 'non-state actor' such as ISIS/Daesh, based in a state that is 'unwilling or unable' to prevent the attack, the international law is not entirely clear. UNSCR 2249 could impliedly support the view that using military force in self-defence against such attacks can be lawful, and it has even been read as suggesting that in this particular situation states do not need to show that an armed attack is happening or imminent.

Humanitarian intervention has not yet emerged as a fully-recognised exception in its own right to the prohibition on using force. The UK has been keen to promote it, and used it as part of its 2013 argument for using force against the Assad regime in Syria, but has not cited it in the current debate.

1. General prohibition on using force, and exceptions

The starting point is Article 2(4) of the [UN Charter](#), which prohibits states from resorting to force:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

This prohibition is generally agreed to be part of customary international law, even if there is some disagreement between states as to its meaning. A particular disagreement is whether force designed to further the purposes of the UN is legal.

Several UN General Assembly resolutions have elaborated on the prohibition on using force. For instance, resolution 2131 (1965) on the [Inadmissibility of Intervention](#) said:

No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.

The International Court of Justice has played a central role in developing the international law on the use of force. In cases such as *Corfu Channel*,¹ *Nicaragua*² and *DRC v Uganda*³ it has interpreted Article 2(4) very strictly, and resisted calls to widen the scope of exceptions to it.

There are three recognised exceptions to the prohibition on the use of force, each of which can provide a legal basis for using force:

- Security Council authorisation
- consent or invitation
- self-defence

Humanitarian intervention is not fully established as a stand-alone fourth exception. Each of these exceptions is addressed in turn below.

Even if a condition for using force is met, Governments still have to act lawfully in how they use that force. International Humanitarian Law, human rights law and domestic criminal law can all be relevant.

¹ ICJ Reports (1949)

² ICJ Reports (1986) 14

³ ICJ Reports (2000)

2. Security Council authorisation

UN Security Council authorisation is often seen as the firmest legal basis for states to use force outside their own territory. But Security Council resolutions – including UNSCR 2249 (2015) on ISIS/Daesh in Syria and Iraq – can be difficult to decode.

2.1 How does the Security Council authorise states to use force?

Once the Security Council has determined that there is a threat to the peace, breach of the peace or act of aggression under [Article 39 of the UN Charter](#), it can make recommendations or decisions under the rest of Chapter VII of the Charter (Articles 39 to 51). Decisions are binding on all UN Member States.⁴ Article 42 empowers the Security Council to authorise states to use force ‘to maintain or restore international peace or security’ when it considers that other measures ‘would be inadequate or have proved to be inadequate’.

The wording of resolutions on the use of force is often coded. Neither Article 42 nor the word ‘force’ is usually mentioned expressly. Instead, there is usually (but not necessarily) an explicit reference to ‘acting under Chapter VII’ – which is the only Chapter that allows the Security Council to authorise the use of force – and a phrase such as ‘...authorises Member States ... to take all necessary measures...’ (see appendix for examples of previous Security Council resolutions on using force). The Security Council’s reluctance to specify the precise legal basis for its resolutions often leads to debate, but one leading author suggests that this does not always have any ‘practical significance’.⁵

Security Council resolutions are subject to the veto power of the five permanent members of the Security Council (China, France, Russia, UK and US). Draft resolutions seeking to authorise the use of force are frequently blocked, whether or not they get as far as an actual vote.

2.2 Resolution 2249 (2015) on ISIS/Daesh in Syria and Iraq

Significance

On 20 November 2015, in the wake of the attacks in Paris, Lebanon, Turkey and Tunisia and the downing of a Russian plane over Egypt, the UN Security Council unanimously passed [Resolution 2249 \(2015\) on ISIS/Daesh in Syria and Iraq](#) (UNSCR 2249).

The Resolution’s preamble describes ISIS/Daesh as a ‘global and unprecedented threat to international peace and security’ and says that the Security Council is ‘determined to combat by all means this unprecedented threat to international peace and security’. The main operative paragraph – a long, convoluted sentence – is this:

⁴ [UN Charter Article 25](#)

⁵ Christine Gray, *International Law and the Use of Force*, 3rd edition, 2008, p259

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;

What is the significance of UNSCR 2249? Ashley Deeks, formerly a US State Department legal adviser on the use of force, is among those commentators who argue that its main purpose is not legal but political: to 'forge a compromise between Russia and all other states currently using force in Syria'.⁶

Early legal analysis of the significance of UNSCR 2249 includes:

- Dapo Akande and Marko Milanovic, '[The constructive ambiguity of the Security Council ISIS resolution](#)', *European Journal of International Law* blog, 21 November 2015
- Ashley Deeks, '[Threading the Needle in Security Council Resolution 2249](#)', *Lawfare* blog, 23 November 2015
- Marc Weller, '[UN resolution on IS "extraordinary step"](#)', *BBC news online*, 23 November 2015
- Marc Weller, '[Permanent Imminence of Armed Attacks: Resolution 2249 \(2015\) and the Right to Self Defence Against Designated Terrorist Groups](#)', *EJILtalk! Blog*, 25 November 2015
- Julian Lindley-French, '[UNSCR 2249: Are Power, Strategy and Law Aligned in the Fight Against IS?](#)', Lindley-French blog, 23 November 2015

Does it authorise force?

Does UNSCR 2249 provide a new stand-alone authorisation or legal basis for using force against ISIS/Daesh in Syria and Iraq, or simply add implicit support to the measures already being taken?

It includes language frequently seen in resolutions authorising force. Its preamble says that the Security Council has determined that there is a threat to peace under Article 39 of the UN Charter:

Determining that, by its violent extremist ideology, its terrorist acts, its continued gross systematic and widespread attacks directed against civilians, abuses of human rights and violations of international humanitarian law, including those driven on religious or ethnic ground, its eradication of cultural heritage and trafficking of cultural property, but also its control over significant parts and natural resources across Iraq and Syria and its recruitment and training of foreign terrorist fighters whose threat affects all regions and Member States, even those far from

⁶ Ashley Deeks, '[Threading the Needle in Security Council Resolution 2249](#)', *Lawfare* blog, 23 November 2015

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conflict zones, the Islamic State in Iraq and the Levant (ISIL, also known as Da'esh), constitutes a global and unprecedented threat to international peace and security

Such a determination is required before the Security Council can adopt measures under the rest of Chapter VII of the UN Charter.

However, UNSCR 2249 does not then go on to mention Article 42 of the [UN Charter](#), which allows it to authorise states to use force, or even Chapter VII generally. Nor does it use the word 'decides'.

Several commentators argue that it was not a 'decision' issued under Chapter VII and therefore does not explicitly authorise or provide a new legal basis for the use of force. That chimes with what members of the Security Council have said about it.

Marc Weller, Professor of International Law at the University of Cambridge, argues that UNSCR 2249 gives no new legal authority for using force:

This language suggests that the resolution does not grant any fresh authority for states seeking to take action.

Instead, they will continue to rely on the legal authority they are invoking already as the legal basis for their air strikes.⁷

Dapo Akande (Professor of Public International Law at the University of Oxford) and Marko Milanovic (Associate Professor in Law at the University of Nottingham) agree, attributing particular significance to the fact that UNSCR 2249 'calls on' Member States rather than 'decides' or 'authorises' Member States (as it did in UNSCR 678 (1990) on Iraq, for example – see Appendix):

As the ICJ's *Namibia Advisory Opinion* makes clear, the lack of reference to Chapter VII in a resolution does not mean that it is not to be regarded as binding nor does it mean that the resolution does not have operative legal effect. However, for the resolution to have those effects the Council must actually *decide* to do something or to *authorize* something.⁸

Akande and Milanovic point out other occasions when a resolution has referred to using force without itself authorising it:

Resolution 2249 is not the first time that a Security Council resolution has referenced the right of states to use force without itself authorizing such a use of force. Perhaps the best and clearest examples of such a referencing are resolutions [1368](#) and [1373](#) (2001) which reaffirm the inherent right of individual and collective self-defence after the 9/11 attacks.⁹

They conclude that:

The creative ambiguity in this resolution lies not only in the fact that it does not legally endorse military action, while appearing to

⁷ Marc Weller, '[UN resolution on IS "extraordinary step"](#)', *BBC news online*, 23 November 2015

⁸ Dapo Akande and Marko Milanovic, '[The constructive ambiguity of the Security Council ISIS resolution](#)', *European Journal of International Law* blog, 21 November 2015. The extensive comments on this article go into more detail on this point.

⁹ *Ibid*

give Council support to action being taken, but also that it allows for continuing disagreement as to the legality of those actions.¹⁰

Neither the UK nor France treats UNSCR 2249 as establishing a new authority for using force in Syria. David Cameron said that it 'backed action against this evil death cult in both Syria and Iraq'.¹¹ The French Ambassador to the UN said that 'collective action could now be based on Article 51 of the United Nations Charter' (self-defence).¹²

The legal relevance of all this is that Security Council authorisation could allow a wider use of force than the arguments currently being used to support action against ISIS/Daesh in Iraq and Syria: self-defence and consent/invitation (on which more below).

'All necessary measures'

It is immaterial that UNSCR 2249 does not mention using force: the phrase 'all necessary measures' is usually code for the use of force in other Security Council Resolutions (see Appendix).

However, Dapo Akande and Marko Milanovic suggest that UNSCR 2249 is novel in using the phrase 'all necessary measures' without making a decision or stating that it is acting under Chapter VII:

The use of the "all necessary measures" formula in an operative paragraph of a Council resolution which does not contain a decision appears to be novel. Its closest equivalent could be the rather dated [resolution 221 \(1966\)](#) which in its op. para. 5 "called upon" the UK government "to prevent, by the use of force if necessary," of tankers bringing oil to Southern Rhodesia.

Similarly novel is the use of the "all necessary measures" formula in a resolution that does not state that it is adopted "acting under Chapter VII." The closest equivalent to this formulation that we could find is [resolution 2213 \(2015\)](#), in which the Council expressed grave concern about terrorist groups in Libya proclaiming allegiance to IS and "reaffirm[s] the need to combat by all means, in accordance with the Charter of the United Nations and international law including applicable international human rights, refugee and humanitarian law, threats to international peace and security caused by terrorist acts".

Although that resolution was adopted under Chapter VII, it speaks of "all means" rather than "all necessary means", and more importantly, the text just quoted was in a preambular paragraph, thus making it clearer that the Council was not authorizing anything, let alone the use of force.¹³

'Necessary'

The word 'necessary' in 'all necessary measures' does not imply that force has to be essential or the only means possible. The test is more likely to be that it must be necessary to achieving the objective specified

¹⁰ *Ibid*

¹¹ [PM statement on United Nations Security Council Resolution](#), 23 November 2015

¹² ['Security Council "Unequivocally" Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses "Unprecedented" Threat'](#), UN press release, 20 November 2015

¹³ Dapo Akande and Marko Milanovic, ['The constructive ambiguity of the Security Council ISIS resolution'](#), *European Journal of International Law* blog, 21 November 2015

by the resolution, and proportionate to the threat faced (although this may be difficult to judge).

This condition also appeared in the Libya resolution, UNSCR 1973 (2011) which authorised UN Member States to take 'all necessary measures' to protect civilians. The application of UNSCR 1973 in practice expanded beyond what some states thought they had agreed.

'In compliance with international law'

UNSCR 2249 requires any action taken under it to comply with international law, in particular the UN Charter, as well as international human rights, refugee and humanitarian law. This is not so unusual – there are always limitations on action under Security Council Resolutions, both in the resolution itself and in general international law.

Akande and Milanovic suggest that this wording means that states are only being encouraged to do what they can already do under international law:

This wording suggests that measures taken should comply with other rules of international law, including the *jus ad bellum* rules in the Charter. Thus, the resolution is to be seen as only encouraging states to do what they can already do under other rules of international law. It neither adds to, nor subtracts from, whatever existing authority states already have.¹⁴

Ashley Deeks agrees, arguing that the reference in this case allows states to carry on using their existing justifications for using force in Syria and Iraq:

[Operational paragraph 5] neither rejects nor accepts the legitimacy of any particular legal theory. Instead, it indicates approval for states to use force in Syria and Iraq as long as that force is consistent with the UN Charter. That allows states to continue to rely on their existing theories for using force—which each state asserts is consistent with the Charter—without having to resolve the legal dispute between Russia and the other states using force.

But Professor Julian Lindley-French, author of the *Oxford Handbook of War*, argues that for those states committed to the armed fight against ISIS/Daesh, UNSCR 2249 will be interpreted as an implicit authorisation of the use of force:

In conclusion, any legal impediment to the creation of the grand coalition Paris seeks, and thus the sustained use of force against IS, seems to have been removed. However, Moscow will also interpret 2249 as legalisation of its attacks against all anti-Assad forces.¹⁵

¹⁴ Dapo Akande and Marko Milanovic, '[The constructive ambiguity of the Security Council ISIS resolution](#)', *European Journal of International Law* blog, 21 November 2015

¹⁵ Julian Lindley-French, '[UNSCR 2249: Are Power, Strategy and Law Aligned in the Fight Against IS?](#)', Lindley-French blog, 23 November 2015

The phrase 'in particular the UN Charter' was apparently a Russian amendment.¹⁶

¹⁶ ['Terrorisme: le Conseil de sécurité demande aux États membres de coordonner leur action contre Daech et d'éliminer son « sanctuaire » en Iraq et en Syrie'](#), UN press notice, 20 November 2015

3. Consent/invitation

To justify their military actions in Syria, various states have referred to consent or invitation. The [UK, US and others](#) have relied on Iraq's request to the UN for help in defending itself, and Russia has said that it has an invitation from President Assad.¹⁷

The government of a 'victim' state faced with internal subversion or external intervention can consent to another state using force on its territory; or it may invite allies to use force on its territory to help it.

However, there is often controversy as to who can give the consent or invitation – is it the effective government or the legitimate government, and what counts as either? Sometimes the Security Council pronounces on who is the government, as in Sierra Leone, Côte d'Ivoire, Burundi and Somalia.¹⁸ But a 1998 study argued that state practice had not produced uniform rules on who counted as the government with the right to invite outside intervention.¹⁹ Intervention in response to a government request has been criticised when it is seen as support for an unacceptable government.

Forcible assistance to *opposition* forces is illegal, and states do not tend to claim a legal right to intervene on behalf of 'freedom fighters', usually preferring a self-defence justification. In the *Nicaragua* case, the International Court of Justice held that a government may invite outside help, but a third state may not forcibly help the opposition to overthrow a government, because it would breach the principle of non-intervention and (if force was used) the prohibition on the use of force. If it were allowed, it would permit any state to intervene at any moment in the internal affairs of another state.²⁰ A UK policy paper in 1984 said that any form of interference or assistance to other states was prohibited when the level of unrest amounted to a civil war (ie control of the state's territory was divided between warring parties). However, it added that outside interference in favour of one party permitted counter-intervention on behalf of the other²¹ – which is frequently used as a pretext for intervention.

Consent/invitation can overlap with collective self-defence (see below) One distinction is that collective self-defence is permitted only in response to an actual or imminent armed attack on the 'victim' state. However, in practice the distinctions are often blurred.

¹⁷ '[Russia Says Its Airstrikes In Syria Are Perfectly Legal. Are They?](#)', interview with Marc Weller, *The World Post*, 10 January 2015

¹⁸ See Christine Gray, *International Law and the Use of Force*, 3rd edition, 2008, p113

¹⁹ Roth, *Governmental Illegitimacy in International Law* (1998)

²⁰ ICJ Reports (1986) 14

²¹ UK Foreign Policy Document, 1984, in 'UK Materials on International Law', 57 BYIL (1986) 614

4. Self-defence

Collective self-defence (which can overlap with the consent/invitation basis outlined above) has until recently been the ground most frequently cited for outside states' military action in Syria and Iraq. But states are also increasingly using the individual self-defence justification.

4.1 The right to individual or collective self-defence

[Article 51 of the United Nations Charter](#) preserves the right of states under customary international law to use force in self-defence:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...

States must meet certain requirements to resort to force lawfully in either individual or collective self-defence. Firstly, there must be an 'armed attack' – although whether this must have state involvement is debated. Secondly, the armed attack must be actually happening or imminent. Thirdly, the actions in self-defence must be necessary and proportionate. We can look at these aspects of the international law of self-defence in turn.

For collective self-defence, the 'victim' state must ask for assistance – an 'assisting' state cannot exercise collective self-defence on the basis of its own assessment of the situation.²²

4.2 Armed attack and 'non-state actors'

There are some controversies about what constitutes an 'armed attack' triggering the right to respond in self-defence. As well as disagreements about the gravity necessary and whether a series of minor attacks is enough, a major issue is what degree of state involvement, if any, is necessary for something to count as an armed attack.²³

Article 51 of the UN Charter says nothing about who must be responsible for the threat, although the state-centred nature of the international legal order suggests that some kind of link is needed between a state towards which self-defence is directed (the 'territorial state') and military groups that have carried out acts of aggression against the victim state.²⁴ The legal test still applied by the International Court of Justice is that the 'armed attack' must be carried out *by or on behalf of a state*.²⁵ In the *DRC v Uganda* case,²⁶ the ICJ found that there

²² *Nicaragua* case, ICJ Reports (1986) 14, paras 195-8

²³ See Christine Gray, *International Law and the Use of Force*, 3rd edition, 2008, p129

²⁴ Giovanni Distefano, 'Use of Force', in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, 2014, ch 22, p558

²⁵ See Karl Zemanek, "[Armed Attack](#)", *Max Planck Encyclopedia of Public International Law*, last updated April 2009 (accessed 11 May 2011)

²⁶ [Armed Activities on the Territory of the Congo \(Democratic Republic of Congo v. Uganda\)](#) 2005 ICJ 301, 19 December 2005

was no satisfactory proof, direct or indirect, of DRC government involvement in cross-border attacks by a DRC-based rebel group against Uganda, so Uganda could not use force against DRC in self-defence. However, it explicitly avoided the question of whether armed attacks by non-state actors without state involvement could trigger the right of self-defence.

But there have been many calls for the 'armed attack' test to be adapted for a world where 'non-state actors' regularly launch attacks against states, often from external bases.²⁷

One argument is that there is enough of a state link if the 'host' state is 'unwilling or unable' to prevent the non-state actor's attacks.²⁸ Many states have taken action against irregular forces in neighbouring states, claiming that failure to prevent those forces' activities was enough to justify self-defence.²⁹ But international law gives little guidance about what the 'unwilling or unable' test might require. Ashley Deeks has suggested a few principles that could be ascertained from state practice:

The principles might include requirements that the acting state: (1) ask the territorial state to address the threat and provide adequate time for the latter to respond; (2) reasonably assess the territorial state's control and capacity in the region from which the threat is emanating; (3) reasonably assess the territorial state's proposed means to suppress the threat; and (4) evaluate its own prior interactions with the territorial state. However, an important exception to the requirement that the acting state request that the territorial state act arises where the acting state has strong reasons to believe that the territorial state is colluding with the non-state actor, or where asking the territorial state to take steps to suppress the threat might lead the territorial state to tip off the non-state actor before the acting state can undertake its mission.³⁰

Another argument is that acts of self-defence against non-state actors do not require the consent of the state where they take place, because they are not an attack on or against its territory.³¹ However, this view is not clearly established in international law.

4.3 Imminent

An armed attack must be already launched, or at least imminent, in order for states to resort to force in individual or collective self-defence. Action against *past* attacks risks being categorised as reprisal, which is

²⁷ See Ashley S. Deeks, "[Pakistan's Sovereignty and the Killing of Osama Bin Laden](#)", *ASIL Insights* Volume 15, Issue 11, 5 May 2011; Christine Gray, *International Law and the Use of Force*, 3rd edition, 2008, ch5

²⁸ See for example Ian Brownlie, "International Law and the Activities of Armed Bands", 7 *International and Comparative Law Quarterly* 712, 732 (1958); Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010); Harold Koh, US Legal Adviser, "[The Obama Administration and International Law](#): Keynote Address at the American Society of International Law 104th Annual Meeting", 25 March 2010.

²⁹ Christine Gray, *International Law and the Use of Force*, 3rd edition 2008, p132ff

³⁰ Ashley S. Deeks, '[Pakistan's Sovereignty and the Killing of Osama Bin Laden](#)', *ASIL Insights* Volume 15 Issue 11, 5 May 2011

³¹ See Jordan J Paust, '[Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan](#)', *Journal of Transnational Law & Policy*, Vol 19 No 2, 2010, p 237

unlawful in peacetime;³² action against *future* attacks might be considered pre-emptive or preventative, which again is generally considered unlawful.³³

Although Article 51 of the UN Charter refers only to force in self-defence 'if an armed attack occurs', state practice at least since the *Caroline* affair in 1837 suggests that under customary international law, a state threatened with an *imminent* armed attack may also be entitled to take appropriate measures to repel such a threat.

Traditionally, the need for action must be 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation'.³⁴ In other words, action in self-defence by another state may not be taken save for the most compelling emergency.³⁵ However, the need for the threat to be happening or imminent could also cover situations where there are 'active preparations at an advanced stage, if there is the requisite intent and capability', or where an attack has been completed but another is anticipated:

... the criterion of imminence requires that it is believed 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: it must be necessary to act before it is too late.³⁶

A more extended concept of imminence was first set out by the US, and taken up by former Foreign Office legal adviser Sir Daniel Bethlehem QC who set it out as one of his proposed principles on the use of force in self-defence against non-state actors:

Whether an armed attack may be regarded 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-defence 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-

³² See [International Court of Justice advisory opinion, *Threat or Use of Nuclear Weapons*](#) [1996] ICJ Rep 244, para 46: 'The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed inter alia by the principle of proportionality.'

³³ [Letter from UK Permanent Representative to the United Nations S/2015/688](#), 7 September 2015

³⁴ Letter from US State Department to UK Prime Minister Fox, 24 April 1841 (reproduced in Hunter Miller, '[British-American Diplomacy: The Caroline Case](#)', Yale University Avalon Project, 2008

³⁵ Elizabeth Wilmshurst, [Principles of International Law on the Use of Force by States In Self-Defence](#), Chatham House Working Paper, October 2005, p13

³⁶ Elizabeth Wilmshurst, [Principles of International Law on the Use of Force by States In Self-Defence](#), Chatham House Working Paper, October 2005, p13

defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.³⁷

Sir Daniel nevertheless accepted that 'There is little scholarly consensus on what is properly meant by "imminence" in the context of contemporary threats'.³⁸

There is widespread agreement that the right to use force in self-defence does not extend to non-imminent threats.³⁹ Elizabeth Wilmshurst of Chatham House (also a former Foreign Office legal adviser) has suggested that 'a forceful action to disrupt a terrorist act being prepared in another state might, depending upon the circumstances, be legitimate; force to attack a person who may in the future contemplate such activity is not'.⁴⁰ The US has nevertheless invoked a right to preventative self-defence against attacks that have not yet materialised.⁴¹

4.4 Necessity and proportionality

Any resort to force in self-defence must also meet requirements of necessity and proportionality.⁴² Under international law, states can resort to force in self-defence only if it is both *necessary* to ensure that the armed attack (or imminent threat) is stopped,⁴³ and *proportionate* (no greater than necessary to end the attack or remove the threat).⁴⁴

The International Court of Justice (ICJ) has held that even following a significant attack, there is no right to use force in self-defence if the use of force is not necessary to prevent ongoing or future attacks (the *Nicaragua*⁴⁵ and *Nuclear Weapons*⁴⁶ decisions). There must be no practical alternative to the proposed use of force that is likely to be effective in ending or averting the attack.⁴⁷

³⁷ See Daniel Bethlehem, '[Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors](#)', *American Journal of International Law* vol 106 no 4 (October 2012), pp769-777 at 775-6

³⁸ See Daniel Bethlehem, '[Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors](#)', *American Journal of International Law* vol 106 no 4 (October 2012), pp769-777 at 773

³⁹ Christine Gray, *International Law and the Use of Force*, 3rd edition, 2008, pp212; Elizabeth Wilmshurst, [Principles of International Law on the Use of Force by States In Self-Defence](#), Chatham House Working Paper, October 2005, pp4-5 and pp8-9

⁴⁰ Elizabeth Wilmshurst, [Principles of International Law on the Use of Force by States In Self-Defence](#), Chatham House Working Paper, October 2005, p9

⁴¹ See David Yost, 'NATO and the anticipatory use of force', *International Affairs* 83: 1 (2007) 39-68; Christine Gray, *International Law and the Use of Force*, 3rd edition, 2008, pp208-217

⁴² See Rebecca Wallace and Olga Martin-Ortega, *International Law*, 6th edition, 2009, pp297-8

⁴³ See Christine Gray, *International Law and the Use of Force*, 3rd edition, 2008, pp203-7

⁴⁴ Elizabeth Wilmshurst, [Principles of International Law on the Use of Force by States In Self-Defence](#), Chatham House Working Paper, October 2005

⁴⁵ *Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v US), 1986 ICJ 14, 27 June 1986

⁴⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 226, 245 para 41, 8 July 1996

⁴⁷ Elizabeth Wilmshurst, [Principles of International Law on the Use of Force by States In Self-Defence](#), Chatham House Working Paper, October 2005, pp7-8

The proportionality test is often difficult to apply in practice, as a report on the NATO bombing of the former Yugoslavia identifies:

... the main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied ... it is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values.⁴⁸

4.5 Collective and individual self-defence in Syria and Iraq

The US and UK are among the states to have argued that they are exercising a *collective* right of self-defence on behalf of Iraq. The basis of this is that because Iraq has the right to self-defence against ISIS/Daesh in both Iraq and Syria, it has the right to ask its allies for collective self-defence in both countries. This argument requires an acceptance of both the right of individual self-defence against non-state actors in a state that is 'unwilling or unable' to prevent their attacks, and the idea that this right can be extended to 'assisting' states acting in collective self-defence.

However, as noted above, using the collective self-defence argument means that states going to the aid of another do not themselves have to show that there is an actual or imminent armed attack – it is up to the 'victim' state to do so.⁴⁹

In [June 2014](#) and [September 2014](#) the Government of Iraq wrote to the President of the UN Security Council seeking international assistance to eradicate ISIS/Daesh and restore stability to Iraq, adding that 'ISIL has established a safe haven outside Iraq's borders that is a direct threat to the security of our people and territory...The presence of this safe haven has made our borders impossible to defend and exposed our citizens to the threat of terrorist attacks.'⁵⁰

The [Government's November 2015 response](#) to the [Foreign Affairs Committee report on extending British military action to Syria](#) says that the main legal basis for UK military action in Syria would be the collective self-defence of Iraq, with the individual self-defence of the UK and collective self-defence of other states as additional legal bases.

The UK's current legal basis for military action in Iraq is also invitation and/or collective self-defence. In September 2014 the House of Commons voted in favour of the UK joining air strikes against ISIS/Daesh in Iraq (but not Syria). The motion cited Iraq's 'request for international support to defend itself against the threat ISIL poses to Iraq and its citizens' as the 'clear legal basis' for military action in Iraq.⁵¹

⁴⁸ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, paras 48-50

⁴⁹ *Nicaragua* case, ICJ Reports (1986) 14, paras 195-8

⁵⁰ [Annex to the letter dated 20 September 2014 from the Permanent Representative of Iraq to the United Nations addressed to the President of the Security Council, S/2014/691](#)

⁵¹ [HC Deb 26 September 2014 c1255 ff](#)

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During the Iraq debate, the Prime Minister said that if the UK were to act in Syria, the legal basis for that would be 'collective self-defence against ISIL which threatens Iraq'.⁵² FCO Minister Tobias Ellwood had made a similar statement earlier that month:

The US have been clear that in carrying out military actions in Syria they are acting on the basis of both collective and individual self-defence. If the UK were to undertake military strikes in Syria we would only do so on a sound legal basis and that would depend on the facts on the ground at the time, for example in line with the US led international efforts in collective self defence pursuant to the Iraqi request of 20 September.⁵³

The US has used the collective self-defence argument to justify the ongoing US air strikes in Syria:

States must be able to defend themselves ... when, as is the case here, the government of the state where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.

Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing (Islamic State) threat to Iraq.⁵⁴

In reporting the RAF's August 2015 drone attack in northern Syria that killed two British citizens, the Prime Minister used the language of international law to justify it as a necessary, proportionate act of *individual* self-defence against armed attacks on the UK:

First, I am clear that the action we took was entirely lawful. The Attorney General was consulted and was clear that there would be a clear legal basis for action in international law. We were exercising the UK's inherent right to self-defence. There was clear evidence of these individuals planning and directing armed attacks against the UK. These were part of a series of actual and foiled attempts to attack the UK and our allies, and given the prevailing circumstances in Syria, the airstrike was the only feasible means of effectively disrupting the attacks that had been planned and directed. It was therefore necessary and proportionate for the individual self-defence of the United Kingdom.⁵⁵

He added that the drone strike 'was not part of coalition military action against ISIL in Syria' – perhaps because the House of Commons motion on military action in Iraq had specifically excluded air strikes in Syria. However, that statement is perhaps difficult to reconcile with the UK's [report on the drone attack to the UN Security Council](#), dated 7 September 2015, which added that it was also part of the 'collective self-defence' of Iraq.

It is no surprise that the Government has not made public any of the evidence behind the drone attack, but this makes its actions under international law harder to assess. Another Commons Library briefing paper, [UK drone attack in Syria: legal questions](#),⁵⁶ gives more detail.

⁵² [HC Deb 26 September 2014 c1263](#)

⁵³ Iraq and Syria, PQ208633, 9 September 2014

⁵⁴ ['Exclusive: United States defends Syria airstrikes in letter to U.N. chief'](#), *Reuters*, 23 September 2014

⁵⁵ [HC Deb 7 September 2015 cc25-26](#)

⁵⁶ CBP 7332, 20 October 2015

France has made both collective and individual self-defence arguments:

France had initially been reluctant to join the US and others in attacking ISIL in Syria. However, in September 2015, the French air force launched an attack against a Syrian ISIL training camp. At the level of the Security Council, France asserted that it had taken action in accordance with Article 51 of the Charter 'in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic' (S/2015/745, 9 September 2015). It was not clear whether this referred to attacks against Iraq or France.

Outside of the Council, the French President invoked a string of past terrorist attacks against France with an apparent Islamic background, culminating in the attacks against the staff of the satirical magazine Charlie Hebdo. France argued that ISIL constituted a direct threat to French national security and that self-defence was directly available to France available in consequence. This was rather a broad claim, going beyond the position of other Western states in that there was no argument concerning indications of imminent future attacks.⁵⁷

4.6 Does Resolution 2249 affect self-defence arguments?

As noted above, UNSCR 2249 does not explicitly accept or reject any current justification for using force in Syria or Iraq, although it may be interpreted as doing so by some states.

Marc Weller argues that it could also be interpreted as making it easier for states to make an argument for individual self-defence:

In confirming that ISIL represent a permanent and active threat of further attack, the Council appears to relieve individual states from having to fulfil the criteria for self-defence when considering armed action in Syria.

It is no longer necessary to demonstrate that they are acting in response to an actual or imminent armed attack and in a situation of instant and overwhelming necessity leaving no choice of means and no moment of deliberation. The Council has considered ISIL's recent track record of attacks and concluded that it is safe to assume that there will be further such attacks, both in terms of capacity and intent.⁵⁸

But Kevin Jon Heller, Professor of Criminal Law at SOAS, University of London, disagrees:

I read Res. 2249 to be a reminder that Daesh will inevitably strike again in the future, not as a statement by the Security Council that it is actually planning imminent attacks. So although I agree that paragraph 1 likely makes it easier for States to justify acting in self-defence, I don't think it relieves them of their obligation to show that they are using force to prevent attacks that are

⁵⁷ Marc Weller, '[Permanent Imminence of Armed Attacks: Resolution 2249 \(2015\) and the Right to Self Defence Against Designated Terrorist Groups](#)', *EJILtalk! Blog*, 25 November 2015

⁵⁸ Marc Weller, '[Permanent Imminence of Armed Attacks: Resolution 2249 \(2015\) and the Right to Self Defence Against Designated Terrorist Groups](#)', *EJILtalk! Blog*, 25 November 2015

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genuinely imminent — not simply to prevent attacks planned for some unspecified time in the future.⁵⁹

⁵⁹ Comment on Marc Weller, '[Permanent Imminence of Armed Attacks: Resolution 2249 \(2015\) and the Right to Self Defence Against Designated Terrorist Groups](#)', *EJILtalk! Blog*, 25 November 2015

5. Humanitarian intervention

The UN Security Council can authorise military intervention for humanitarian purposes provided that it has determined that situation is a threat to international peace and security. But can states intervene in other states to deal with extreme human distress, without Security Council authorisation?

Some unauthorised humanitarian interventions have subsequently been commended by the Council, or at least condoned. But their legal basis remains controversial. There is an argument that Article 2(4) of the UN Charter allows force to be used as long as it is consistent with the purposes of the UN (which include the promotion of human rights and the solving of humanitarian problems – Article 1(3)). Others suggest that even if humanitarian intervention without Security Council authorisation is unlawful under international law, it can still be legitimate – for instance the NATO intervention in Kosovo in 1999.

The 'responsibility to protect', as embodied in the [2005 World Summit Outcome](#) (which is not legally binding), allows collective action against genocide, war crimes, ethnic cleansing and crimes against humanity, where the state concerned has been unable to protect its citizens. However, it states that this must be done through the Security Council, so is not in that respect a development of the law on the use of force.

The UK is keen to develop the international law on humanitarian intervention. When putting the case for military intervention in Syria in 2013, it argued that intervention without authorisation from the UN Security Council is permitted under international law if three conditions are met:

- strong evidence of extreme and large-scale humanitarian distress;
- no practicable alternative to the use of force; and
- the proposed use of force is necessary, proportionate, and the minimum necessary.⁶⁰

But there is not yet enough consistent state practice and legal opinion to establish clear rules of customary international law on the criteria for humanitarian intervention.

Marc Weller is amongst those mentioning the possibility of taking international action directly on behalf of the populations threatened by ISIS in Syria, describing this as 'the dog that has not yet barked'.⁶¹

⁶⁰ See [Conditions for using force in humanitarian intervention](#), Library Standard Note 6716, 29 August 2013

⁶¹ ['Russia Says Its Airstrikes In Syria Are Perfectly Legal. Are They?'](#), interview with Marc Weller, *The World Post*, 10 January 2015

6. Is the UK already involved in armed conflict in Syria?

There is some debate over whether the UK is currently involved in an armed conflict with ISIS/Daesh in Syria.

According to most (but not all) analyses, armed conflict involving ISIS/Daesh – which is usually considered a ‘non-state actor’ under international law – and a state or another non-state actor will be classified as a ‘non-international armed conflict’, even if it takes place on the territory of a third state. This means that only the basic laws of war (International Humanitarian Law, IHL) apply, so for instance there is no ‘enemy combatant’ category and therefore no combat immunity on either side. Where two or more states are in armed conflict with each other, the much more detailed rules of ‘international armed conflict’ apply.

When reporting the RAF’s August drone attack in Syria that killed two British men, David Cameron stated that the UK is ‘not involved in a war’ in Syria.⁶² Some legal specialists agree, and argue that IHL therefore does not apply:

If the strike were part of an existing armed conflict, international humanitarian law would apply, including rules on targeting which permit the killing of fighters in a ‘non-international’ armed conflict. But one military strike in self-defence does not give rise to the intensity of action required to meet the threshold for a non-international armed conflict. For an isolated act of self-defence, only human rights law applies.⁶³

But others argue that the UK is part of a ‘non-international armed conflict’ with ISIS/Daesh that extends to Iraq and parts of Syria:

... the UK is already in a non-international armed conflict with ISIL, as part of a collective self-defence action on behalf of the Government of Iraq. To the extent that this conflict spills over into Syrian territory and Syria has effectively lost all control over some parts of its territory governed by ISIL (and Raqqa would meet that test), it seems to me that one does not need any additional *ad bellum* justification, specific to the UK, to attack ISIL fighters in their Syrian stronghold.⁶⁴

An [October 2015 letter from the Government Legal Department](#) says that the premise (expressed in a legal letter to them) that the Syria drone attack occurred outside the context of an armed conflict is ‘fundamentally mistaken’.

⁶² [HC Deb 7 September 2015 c30](#)

⁶³ Harriet Moynihan, ‘[UK Drone Strike on ISIS Raises Legal Questions](#)’, Chatham House expert comment, 15 September 2015

⁶⁴ Nehal Bhuta, ‘[On Preventive Killing](#)’, *EJIL Talk!*, 17 September 2015

Appendix: Past UN Resolutions on using force

Previous Security Council resolutions on using force use various wordings, often 'all necessary measures' or 'all necessary means'. Most 'authorise' force but some early ones only 'recommended' or 'called upon' states to use force. A brief chronological survey follows.

Korea, [UNSCR 83 \(1950\)](#)

'Recommends' that states 'furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack' by North Korea.⁶⁵

Southern Rhodesia, [UNSCR 221 \(1966\)](#)

'Calls upon' the UK to prevent, 'by the use of force if necessary', the arrival of in Mozambique of oil destined for Southern Rhodesia. It made no reference to Chapter VII or a specific article of the UN Charter (though its first operative paragraph 'determines' that there was a threat to peace).

Iraq, [UNSCR 678 \(1990\)](#)

'Authorizes' states cooperating with the Government of Kuwait 'to use all necessary means' to uphold its resolutions on Iraq and to restore international peace and security.⁶⁶

Somalia, [UNSCR 794 \(1992\)](#)

'Authorizes' UN Member States to use 'all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia'.

Bosnia, [UNSCR 816 \(1993\)](#)

'Authorizes' UN Member States to take 'all necessary measures' to enforce the no-fly zone established by SCR 781 (1992).

Haiti, [UNSCR 940 \(1994\)](#)

'Authorizes' UN Member States to form a multinational force and 'use all necessary means' to remove the military leadership and restore the democratically-elected Jean-Bertrand Aristide.

East Timor, [UNSCR 1264 \(1999\)](#)

'Authorizes' states contributing to the multinational force in East Timor 'to take all necessary measures' in fulfilling its mandate.

Post 9/11, [UNSCR 1368 \(2001\)](#) and [1373 \(2001\)](#)

1368: 'Calls also on the international community to redouble their efforts to prevent and suppress terrorist acts', and 'expresses its

⁶⁵ S/RES/83.

⁶⁶ S/RES/678.

readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001.

1373: 'Decides' that all states shall 'take the necessary steps to prevent the commission of terrorist acts', and 'calls upon' all states to 'cooperate ... to prevent and suppress terrorist attacks and take action against perpetrators of such acts'.

Darfur, [UNSCR 1706 \(2006\)](#)

'Decides' that UN troops are 'authorised to use all necessary means' to 'prevent attacks and threats against civilians' (in the event the decision to deploy an entirely UN-authorized force of the strength envisaged was not followed up, and a staged introduction of UN troops was agreed with the Sudanese government instead).

Libya, [UNSCR 1973 \(2011\)](#)

'Authorizes UN Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements... to take all necessary measures' to protect civilians under threat of attack in the country and to enforce the no-fly zone. The measures should not amount to a 'foreign occupation force'. Also 'authorizes' states to 'use all measures' to implement the arms embargo to inspect vessels and aircraft bound to or from Libya.

'Implicit' references to Article 42

The Security Council's study of '[Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression \(Chapter VII\)](#)', part of its Repertoire of the Practice of the Security Council, includes those making implicit references to Chapter VII and Articles 39 to 51 of the Charter. For 2010-11 it says:

Several decisions that could be considered as being under Article 42 were adopted in connection with the mandate of multinational forces. In connection with Afghanistan, the Council continued to authorize the Member States participating in the International Security Assistance Force (ISAF) already deployed in the country to take "all necessary measures" to fulfil its mandate.²⁰³ In connection with Bosnia and Herzegovina, the Council also continued to authorize the Member States, at the request of either the European Union military operation or the North Atlantic Treaty Organization (NATO) to take "all necessary measures" to effect the implementation of and to ensure compliance with annexes 1-A and 2 of the Peace Agreement.²⁰⁴ In connection with Somalia, the Council also continued its authorization of the African Union in Somalia (AMISOM) to take all "necessary measures" to carry out its mandate.²⁰⁵ In connection with Côte d'Ivoire, the Council also extended, on several occasions, the authorization of the French forces to use "all necessary means" in order to support the mission deployed in Côte d'Ivoire.²⁰⁶

The Council also authorized Member States cooperating with the Transitional Federal Government to continue using "all necessary means" to repress acts of piracy and armed robbery at sea, as set out in paragraph 10 of resolution 1846 (2008) and paragraph 6 of resolution 1851 (2008), to prevent piracy off the coast of Somalia.²⁰⁷

Notes:

- 203 Resolutions 1943 (2010), paras. 1 and 2 and 2011 (2011) paras. 1 and 2.
- 204 Resolutions 1948 (2010), para. 14 and 2019 (2011) paras. 14 and 15.
- 205 Resolutions 1910 (2010), para. 1, 1964 (2010), para. 1 and 2010 (2011), para. 1.
- 206 Resolutions 1911 (2010), para. 17, 1924 (2010), para. 2, 1933 (2010), para. 24, 1962 (2010), para 17 and 2000 (2011), para 17.
- 207 Resolutions 1950 (2010), para. 7 and 2010 (2011) para. 1.

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