

10 THE LEGAL ASPECTS OF TURKEY'S WAR AGAINST THE PKK

A Case for Self-Defence within the Context of International Law

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10.1 INTRODUCTION

For four decades, from the 1980s the southeast region of the Republic of Turkey was ravaged by a guerrilla war that pitted the Kurdish insurgent movement, the Partiya Kar-karen Kurdistan (PKK) or Kurdistan Workers' Party, against Turkey. In other words, the conflict between Turkey and the PKK as a Kurdish insurgent movement is a four-decade-long guerrilla war over suppression of Kurdish cultural and political rights by the Turkish government.

The PKK is an armed group that is involved in an ongoing independence struggle in south-east Turkey and its leaders portray the group as a Kurdish liberation movement that struggles for fundamental human rights for the Kurdish population in Turkey. Nevertheless, it is on the list of terrorist groups of the Turkish government and many other States and organizations because of its resort to violent acts. However, controversies are continuing in the international community, and especially between legal scholars, on the nature of this group and the legal position of its ongoing conflict with Turkish Armed Forces.

After the Turkish general election of June 2015, a peace and reconciliation process between the PKK and Turkey broke down and tensions exploded, with a heavily armed reaction by the Turkish troops. This has influenced the position in international law. One of the contentious issues recently argued among scholars is the status of the armed actions between the Turkish Armed Forces and the PKK. Regardless of the original basis of the PKK conflict, one of the most controversial issues in international law is how Turkey justifies self-defence against the PKK.

In the international policy against unlawful acts by armed non-State actors, self-defence against attacks by these groups has been admitted in principle under narrow conditions.¹ For an attack to qualify as an armed attack in the sense of Article 51 of the UN

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1 Christian J. Tams "The Use of Force against Terrorists" (2009) 20(2) Eur J Int'l L 359 at 368.

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Charter, a direct attack by an armed non-State actor has to be attributed to another State under rather stringent rules on attribution.² In this respect, since the 1990s Turkey has repeatedly invoked a right to use force against PKK bases in northern Iraq. Moreover, its use of force against the PKK under the right to self-defence has not been condemned by the international community. By contrast, many nations have underlined the necessity of a targeted response to terrorist attacks.³

In July 2015, the United States (US) Department of State announced that the US recognized Turkey's right to self-defence against the outlawed PKK.⁴ According to spokesman John Kirby, "[by attacking] the outlawed [PKK], Turkey has continued to come under attack by [PKK militias], and we recognize their right to defend themselves against those attacks."⁵ Relevantly, Turkish President Recep Tayyip Erdogan, in a reaction to an attack in the centre of Ankara which killed at least 28 people and left another 61 injured on 17 February 2016, stated that "Our State will never give up its right to self-defence against all kinds of terror threats."⁶ More importantly, holding an independence referendum in Kurdistan region of Iraq in September 2017 increased Turkey's concerns about the possibility of inspiring Kurdish uprisings in Turkey, because an independent Kurdistan region might shelter the PKK militants. Based on this, Turkey targeted the PKK camps in KRG territory more severely than ever as a reflection of its right to self-defence. In this sense, Turkey's justification for using the right to self-defence against the PKK as an armed non-State actor based on Kurdish ethnic motivations fighting for different political purposes, including protection of their race, language, religion and customs etc., requires evaluation under the applicable rules of international law.

The main objective of this study is to answer the question of whether Turkey's attitude in its fight against the PKK is a fight against terrorism or self-defence against an armed non-State actor, as Turkish authorities have recently progressively emphasized. Based upon these, the scope of the PKK, the law applicable to armed conflict between the PKK and the Turkish Armed Forces and other controversial questions will be discussed. In order to be able to examine the content of Turkey's fights against the PKK, the concepts of self-defence and war against terrorism are needed to be assessed at first sight.

2 Tams, above n 1.

3 See Christian J. Tams and James G. Devaney "Applying Necessity and Proportionality to Anti-Terrorist Self-Defence" (2012) 45(1) *Israel L Rev* 91 at 91-106.

4 "US Recognizes Turkey's Right to Self-Defense against Outlawed PKK" (2015) Daily News <www.hurriyetdailynews.com/us-recognizes-turkeys-right-to-self-defense-against-outlawed-pkk.aspx?pageID=517&nID=86028&NewsCatID=359>.

5 "US Recognizes Turkey's Right to Self-Defense against Outlawed PKK", above n 4.

6 Presidency of the Republic of Turkey "Statement on the Terrorist Attack in the Kizilay Neighborhood of Ankara" (2016) <www.tccb.gov.tr/en/speeches-statements/558/40135/statement-on-the-terrorist-attack-in-the-kizilay-neighborhood-of-ankara.html>.

10.2 ASSESSMENT OF SELF-DEFENCE AND WAR AGAINST TERRORISM

Recent years have seen the emergence of some groups of armed non-State actors that inflict violence and harm against States for religious, political and other reasons. Generally, States that are exposed to the unlawful acts of these groups call them terrorist organizations. There is no technical meaning and universally agreed definition of terrorism. However, it's undeniable that terrorism involves illegal and unlawful activities by non-State actors in response to particular state policies. As the ICRC has pointed out, there is a significant difference between armed attacks and terrorism. In a sense, an armed conflict is a situation in which certain acts of violence are considered lawful and others are unlawful, while any act of violence designated as 'terrorist' is always unlawful. In fact, the final objective of an armed conflict is to prevail over the enemy's armed forces. Therefore, the parties to an armed conflict are permitted, or at least are not prohibited from, attacking each other's military objectives or individuals not entitled to protection against direct attacks.⁷ In any case, there are some instances in which the parties to an armed conflict commit acts of violence apart from the acts that are permitted by the law of armed conflict. However, this does not mean that none of the parties to an armed conflict commit acts of violence during the conflict unintentionally or as a result of neglect. Distinguishing between them is never simple. Therefore, it can be said that the ICRC's distinction is not adequate to separate armed conflicts from terrorism.

The law of armed conflict only applies in situations of armed conflict. It does not, therefore, regulate unlawful acts committed in peacetime. It applies to terrorist activities and to counter-terrorism initiatives in the context of an internal or international armed conflict. This body of law is not "potentially relevant to the consideration of terrorist actions. In many cases, unlawful acts including terrorist acts committed by armed non-State actors would indeed be violations of the law of armed conflict if they were conducted in the course of an international or even internal armed conflict."⁸ It will also apply whether or not the original use of force was lawful. Terrorism, in the context of armed conflict, may also incur individual criminal responsibility under international criminal law.⁹ However, the main problem here is the designation of these groups.

In fact, an armed non-State actor may or may not be considered a terrorist group.¹⁰ According to the National Intelligence Council of the US, non-State groups are "non-

7 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (32nd International Conference of the Red Cross and the Red Crescent, Geneva, 2015) at 7 <<https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf>>.

8 Adam Roberts "Counter-terrorism, Armed Force and the Laws of War" (2002) 44(1) *Survival: Global Politics and Strategy* 7 at 8.

9 United Nations, *Frequently Asked Questions on International Law Aspects of Countering Terrorism* (U.N. Office on Drugs and Crime, Vienna, 2009) at 64.

10 Margaret Buse "Non-State Actors and Their Significance" (2001) 5(3) *Journal of Conventional Weapons Destruction* 1 at 1.

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sovereign entities that exercise significant economic, political, or social power and influence at a national and international level.” This definition also includes terrorist groups,¹¹ which can be defined as organizations that commit violent acts and seemingly have no purpose other than to inflict terror among the civilian population.¹²

Since the Cold War, the question of the use of force against unlawful acts has recently developed into the issue of the use of force against armed non-State actors. This arose out of the awareness that a terrorist threat typically comes from groups of private individuals that can hardly be referred to as a State, i.e. groups that, while operating in the territory of a State, are not under the control of that State’s government.¹³ The emergence of these groups has raised many questions about the applicability of the law of armed conflict to regulate these conflicts. Similarly, the fight against terrorist actions after the 11 September 2001 attacks gave importance to these kinds of armed conflicts, and the question of whether they are covered by the law on armed conflict. In this regard, the US attack on Afghanistan in October 2001 was one of the foremost instances. However, there are very significant differences between these events and States’ normal acts of war. Terrorist groups often create their own special sub-groups and use hit-and-run attacks. In fact, terrorist groups are often organized into cells in a loose hierarchical structure.¹⁴ Generally, they separate themselves from society and make secret and detailed plans, followed by sudden attacks. Therefore, it is impossible to determine their location and when they will conduct armed attacks. According to Silja Vöneky, the law of armed conflict is not applicable to terrorist actions because it is not clear what terrorists will do, what their plans are or when they will attack. Therefore, preventing their actions is not easy in practice.¹⁵ However, many different opinions have been put forward in this context. Some other experts, including Kenneth Roth, believe that the fight against terrorist actions should be conducted in the framework of the rules on law enforcement. Roth points out that, in the case of politically motivated conflicts, whether they are wars or not is difficult to identify. Therefore, terrorism is generally understood to fall under law-enforcement rules, whereas armed rebellions, once they are sufficiently organized and violent, are usually seen as ‘war.’ However, the problem with this guideline is that it was written to address political conflicts rather than global terrorism.¹⁶

11 Teresa La Porte “The Legitimacy and Effectiveness of Non-State Actors and the Public Diplomacy Concept” (2012) 1 at 4 <<http://files.isanet.org/ConferenceArchive/58816b94a39845d9a5b618ae52e7c80c.pdf>>.

12 Buse, n 10 above, at 2.

13 Raffaella Nigro “International Terrorism and the Use of Force against Non-State Actors” (2009) 150 Pol’y Brief 1 at 1 <www.ispionline.it/sites/default/files/pubblicazioni/pb_150_2009_0.pdf>.

14 James J. F. Forest, *Teaching Terror: Strategic and Tactical Learning in the Terrorist World* (Rowman & Littlefield Publishers, Lanham, 2006) at 116.

15 For more information, see Silja Vöneky “The Fight against Terrorism and the Rules of International Law of Warfare”, in Christian Walter, Silja Vöneky, Volker Röben and Frank Schorkopf (eds.) *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Springer, Berlin/Heidelberg, 2003) (2003) at 925-950.

16 Kenneth Roth “The Law of War in the War on Terror: Washington’s Abuse of “Enemy Combatants”” (2004), 83 Foreign Aff. 2 at 3.

In any case, international law has separated armed non-State actors from terrorist groups. In other words, it is highly unlikely for armed non-State actors to be labelled terrorist organizations in the context of international law. In such a case, “the designation of [an armed non-State actor] party to an [armed conflict] as ‘terrorist’ means that it is likely to be included in lists of proscribed terrorist organizations maintained by the UN, regional organizations and States.”¹⁷

As a result of all these considerations, self-defence against the PKK has begun to be discussed among legal scholars as a controversial issue which needs to be evaluated in detail. In order to comprehend the Turkish justification for self-defence against the PKK, we need to evaluate the rationality of the right to self-defence in international law.

Legally, the use of force is prohibited in international law, with the exception of the right to individual or collective self-defence under Article 51 of the United Nations (UN) Charter and the UN Security Council enforcement measures under Article 39 of the Charter (the law on the use of force or *jus ad bellum*). As a regime of rules against using force, the law on the use of force is dealing with conflict management, and how States initiate armed conflict or under which conditions the use of force is legally and morally justified (the legality of forcible conduct).¹⁸

The right to use force finds its origins in the 1919 Covenant of the League of Nations, the 1928 Kellogg-Briand Pact and the UN Charter.¹⁹ The primary legal source of the right to use force derives from Article 51 of the UN Charter as an exception to the prohibition on the use of force regulated under Article 2(4), which reads “All members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the UN.” Refraining from threatening or using force has also been confirmed in various international documents, such as the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations,²⁰ the 1974 Definition of Aggression,²¹ the Helsinki Final

17 ICRC, n 7 above, at 20.

18 William J. Johnson (ed.), *Law of Armed Conflict Deskbook: 2012* (Create Space Independent Publishing Platform, Virginia, 2012) at 10.

19 Judith Gardam “Proportionality and Force in International Law” (1993) 87(3) *Am. J. Int'l L* 391 at 391.

20 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UN GA Res 25/2625, 25th sess, 1883rd plen mtg, Supp. No. 28, UN Doc A/RES/25/2625 (24 October 1970) <www.un-documents.net/a25r2625.htm>.

21 *1974 Definition of Aggression*, UN GA Res 3314, Doc Res. 3314, 29th sess, 2319th plen mtg, Supp. No. 31, UN Doc GA/Res/3314 (14 December 1974) <[www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314\(XXIX\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/3314(XXIX))>.

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Act of 1975,²² and the 1987 Declaration on Enhancing the Effectiveness of the Principle of Refraining from the Use of Force.²³

The prohibition under Article 2(4) of the UN Charter on using unilateral force is a principal that is necessary for the maintenance of international peace and security. However, according to Article 51 of the UN Charter, the “inherent” or “natural” right of States to use military force in self-defence is regarded as an exception to the provision of Article 2(4) if “an armed attack occurs” against them. Moreover, the UN Charter foresees certain circumstances in which the use of military force is permissible. According to its Article 51, the use of force is permissible in individual or collective self-defence if an armed attack occurs against a member of the UN and when the UN Security Council has directed or authorized the use of force to maintain or restore international peace and security.

Article 51 of the UN Charter reads as follows:

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

In the sense of Article 51, alongside a State victim of an armed attack which has the right to use force in self-defence, other States may join in using force to defend the victim State, pending action by the UN Security Council. In fact, the right to individual or collective self-defence includes the right to use force against an aggressor in order to effectively terminate an armed attack or even to prevent or deter its recurrence.²⁴

In order to achieve more clarity on the right of States to use military force in self-defence, it is necessary to look at the emergence of this right. In fact, the right of States to use military force in self-defence was established in the *Caroline* case.²⁵ As a result of this case, the use of force is permitted when the conditions of customary international law regarding “necessity” and “proportionality” are met. These conditions constitute the main

22 *The Helsinki Final Act of 1975, Final Act of the 1st CSCE Summit of Heads of State or Government* (1 August 1975) <www.osce.org/helsinki-final-act?download=true>.

23 *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, UN GA Res 42/22, 42nd sess, 73rd plen mtg, Supp. No. 49, UN Doc A/RES/42/22 (18 November 1987) <www.un.org/documents/ga/res/42/a42r022.htm>.

24 Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edition, Columbia University Press, New York, 1979) at 141.

25 For more information, see James Dever and John P. Dever “Making Waves: Refitting the Caroline Doctrine for the Twenty-First Century” (2013) 31 *Quinnipiac L Rev* 165 at 165-193.

components of the right to use military force in self-defence. The ICJ confirmed this in its judgement of 27 June 1986 in a case *Concerning the Military and Paramilitary Activities in Nicaragua* and in a 1996 Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons. According to the ICJ, “there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.”²⁶ The court stated that “the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.”²⁷ However, “this dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.”²⁸

Surely, self-defence is not a punitive reaction, but preventive in nature, aiming to prevent further aggressive action and saving the victim State's national interests, security, and territorial integrity. Accordingly, measures taken in the context of self-defence should be compatible with the fundamental rules of the law of armed conflict, especially the conditions of necessity, proportionality and a distinction between civilians and combatants. Therefore, any action without verification of the seriousness of threats and legitimate military targets for which an attack has already been planned will be illegitimate. Hence, many previous armed attacks against terrorist groups and their supporters have been criticized because these actions did not meet the conditions of necessity and proportionality.²⁹ Some examples are the attack on a partially completed nuclear reactor in Iraq with F-16s by Israel in 1981, the bombing of a Palestine Liberation Organization (PLO) target located in Tunisia by Israel in October 1985, and the bombing of Libyan targets by the US in April 1985 following the terrorist bombing of a Berlin nightclub after determining that Libya had sponsored the terrorists. These were not defensive acts. They were retaliatory in nature to the point where their main goals were punitive.³⁰ However, the party that uses military force in self-defence must prove that both of the conditions of necessity and proportionality have been adhered to. At this point, it should be noted that there is a generally accepted consensus that customary rules of the law of armed conflict (for example, the conditions of necessity, proportionality, humanity and distinction between civilians and combatants) should generally apply independently of the cause of armed conflicts, such as self-defence against armed non-State actors or a fight against terrorist organizations.³¹

26 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* [1986] ICJ Rep 176 <www.icj-cij.org/docket/files/70/6503.pdf>; *Legality of the Threat or Use of Nuclear Weapons*, at 41.

27 *Military and Paramilitary Activities in and against Nicaragua*, n 26 above, at 41.

28 *Military and Paramilitary Activities in and against Nicaragua*, n 26 above, at 41.

29 For more information, see Leah M. Campbell “Defending against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan” (1999-2000) 74 Tul L Rev 1067 at 1067-1096.

30 Campbell, n 29 above, at 1079-1080.

31 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (ICRC Press, Geneva, 2011) at 18; See also, ICRC, *International Humanitarian Law: Answers to Your Questions* (ICRC Press, Geneva, 2002) at 4.

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Based upon these, the preliminary questions in the case of Turkey-PKK confrontation as the focal point of this study is how does Turkey justify self-defence against the PKK and whether its military actions in self-defence are compatible with the basic rules of IHL. Unquestioningly, the answer to these questions obviously depends on the scope and nature of the PKK. In this way, determination of the scope of the PKK requires first making a distinction between terrorism and armed conflicts.

10.3 TURKEY'S JUSTIFICATION FOR SELF-DEFENCE AGAINST THE PKK

10.3.1 *The Scope of the PKK*

The PKK, or Kurdistan Workers' Party, as a Kurdish insurgent movement emerged inside Turkey's borders in 1974 and began its armed struggle against the Turkish regime for self-determination for the Kurdish population in Turkey. These armed battles between the PKK and Turkish Armed Forces have claimed the lives of thousands of civilians and led to enormous economic losses for the country. In fact, "the activities of the PKK, an outlawed Kurdish organization which came to prominence in the early 1970s, generated significant destabilization in south-east [Turkey]."³²

Nonetheless, in March 2013 the Turkish government and the PKK agreed to a cease-fire in order to find a resolution to the decades-old Kurdish issue in Turkey. However, after the Turkish general election of June 2015, the peace process broke down and tensions escalated into armed conflict between Turkish security forces and the PKK in south-east Turkey. Thus, the PKK question has presented a continual and existential threat to the territorial integrity and political independence of Turkey. In this context, it should be noted that

"the right of States to defend themselves against ongoing attacks [by armed non-State actors or terrorist organizations] is not generally questioned. What is questioned is the right to take action against the State that is the presumed source of such attacks, since it must be conceded that an attack against an armed non-State actor within a State will inevitably constitute the use of force on the territorial State."³³

In spite of all the events that have taken place so far, according to Turkey, the EU, NATO and the US State Department, the PKK is a terrorist group. However, it is not on the UN

³² Kerim Yildiz, *The Kurds in Turkey EU Accession and Human Rights* (Pluto Press, London, 2005) at 104.

³³ Elizabeth Wilmschurst, *Principles of International Law on the Use of Force by States in Self-Defence* (Chatham House Press, London, 2005) at 12.

list of terrorist groups, which is so far limited to Islamic State³⁴ and Al-Qaeda,³⁵ whose activities have directly resulted in the death of Turkish citizens including women and children, many of whom were ethnic Kurds. Since Canada, some European countries such as Britain and the US are members of NATO and Turkey as the PKK's target is also in NATO, they list the PKK as a terrorist group. However, neither Britain nor the US lists the far more extreme Afghan Taliban as a terrorist organisation because it is not inside the territory of a NATO member State.³⁶

The heads of the PKK, however, portray themselves as Kurdish freedom fighters who struggle for the fundamental human rights of the Kurdish population in Turkey, especially their right to self-determination. The PKK emerged as an illegal organization by declaring a national liberation struggle for the Kurdish 'nation' within the official borders of Turkey. Its programme is a 'Kurdishized' copy of those traditional communist parties that undertake the 'national' liberation of a nation as an 'initial stage' of the ultimate socialist revolution.³⁷ The PKK changed its name to the Congress for Freedom and Democracy in Kurdistan (KADEK) in April 2002. In this way, in 2002 this new organization was founded which replaced the political role of the PKK and rejected the use of violent activities and a hierarchical system of organization. KADEK announced its dissolution in October 2003 and re-formed as Kongra Gel. However, after the US Government declared KADEK and Kongra-Gel were terrorist organizations, the Kurdish movement started to prefer the name PKK in its diplomatic relations with various governments. The PKK's armed wing, known as the Peoples' Defence Forces (HPG), has remained active ever since.³⁸

As stated above, the PKK's heads believe that the PKK is an armed non-State actor with a basic structure of command. It should be remembered that armed non-State actors operate outside State control and use force to achieve their political or allegedly political objectives.³⁹ Armed non-State actors can have dozens or hundreds of members and more importantly they hold territory and can confront armed forces. Comparatively, although terrorist organizations may also have dozens or hundreds of members, they do not hold

34 *Threats to International Peace and Security Caused by Terrorist Acts*, UN SC Res 2253, 7587th mtg, UN Doc S/RES/2253 (17 December 2015) <[www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2253\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2253(2015))>.

35 See for example, *Threats to International Peace and Security Caused by Terrorist Acts*, UN SC Res 2199, 7379th mtg, UN Doc S/RES/2199 (12 February 2015) <[www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2199%20\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2199%20(2015))>.

36 Clive Williams "When Are Terrorists Not Terrorists? When, as with the PKK, National Self-Interest Gets in the Way" (2016) *The Canberra Times* <www.canberratimes.com.au/national/public-service/when-are-terrorists-not-terrorists-when-as-with-the-pkk-national-selfinterest-gets-in-the-way-20160126-gme6ga.-html#ixzz3zXM3sqCN>.

37 Ali K. Özcan, *Turkey's Kurds: A Theoretical Analysis of the PKK and Abdullah Öcalan* (Routledge Publishing, London, 2006) at 17.

38 Volkan Gülsen, "Europeanization and Transformation of the Kurdish Movement" (2013) UACES 43rd Annual Conference Paper 1 at 9 <<http://uaces.org/documents/papers/1301/gulsen.pdf>>.

39 David Petrasek, *Ends and Means: Human Rights Approaches to Armed Groups* (International Council on Human Rights Policy, Geneva, 2000) at 5.

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any territory and cannot confront armed forces.⁴⁰ In the case of Turkey, the existing situation is that the Qandil Mountains, which run along the Iraqi side of the border in the north with Iran, are under the PKK's effective control. In fact, despite what a large number of scholars suppose, Qandil is a region inside the borders of Iraq and serves as the headquarters for the PKK in northern Iraq. Although Turkey has demanded that the Iraqi government stop cross-border attacks by the PKK, the Iraqi government has no presence within a hundred miles of Qandil, which is in territory nominally controlled by Iraq's Kurdistan Regional Government (KRG).⁴¹ In addition, the PKK militias confront armed forces. Although the PKK militias operate unlawful acts against Turkish troops and occasionally against civilians besides their military confrontations with armed forces in southeast Turkey, the PKK can be qualified as an armed non-State actor which also commits violent actions inside Turkey.

10.3.2 Characterizing the PKK's Actions as 'Armed Attacks'

The rise of armed non-State actors in different regions of the world has led to the fragmentation of States as these actors take control of territory and populations. The use of force, including terrorist tactics, by such groups in order to achieve their political objectives has made their situation influential and has led to them having greater expectations of the international community. Therefore, a prerequisite for identifying the status of the PKK-Turkey conflict is analysing it as an armed conflict in the context of international law considerations.

As a matter of international law, a victim of an armed attack can only exercise its right to self-defence under the conditions foreseen by Article 51 of the UN Charter. Substantially, from the wording of Article 51 of the UN Charter "... if an armed attack occurs against a Member of the United Nations ..." it seems clear that only "States" are designated as the targets of armed attack, and the Charter remains silent on the issue of the "origin of the armed attack." However, the International Court of Justice (ICJ) removed the doubt over this issue in the *Wall* case, where it provided that "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State." Therefore, there is in practice no space for an interpretation accepting that armed non-State actors can be the perpetrators of an act permitting the exercise of the right to self-defence. Accordingly, the ICJ's jurisprudence is based on rejection of self-defence against armed non-State actors.

40 Audrey K. Cronin, "ISIS Is Not a Terrorist Group: Why Counterterrorism Won't Stop the Latest Jihadist Threat" (2015) *Foreign Affairs* <<https://www.foreignaffairs.com/articles/middle-east/isis-not-terrorist-group>>.

41 Peter Galbraith "The Kurdish Border Poses an Explosive Threat" (2007) *Newsweek* <www.newsweek.com/peter-galbraith-kurdish-border-poses-explosive-threat-100181>.

Nevertheless, as a result of increasing violent actions by armed non-State actors, we can see the development of a State practice of exercising the right of self-defence against armed non-State actors. In this regard, “many States now hold the view, and have acted on the basis that the inherent right of self-defence extends to the use of force against [armed] non-State actors, and includes the right to use force in response to both an actual and an imminent armed attack by that non-State actor.”⁴² Currently, States are confronted by many instances of attacks by armed non-State actors which use other States’ territories to carry out attacks. In such conditions, the use of military force in self-defence against these groups by extending Article 51 of the UN Charter to armed non-State actors has become a matter of controversy. To be clear, using self-defence measures against armed non-State actors has changed the international community’s understanding of self-defence in international law. As Anne Peters states, “the silence of the vast majority of States is in normative terms problematic because it risks being interpreted as implied acquiescence to an extensive interpretation of Article 51 of the UN Charter.”⁴³ Moreover, as Judge Simma pointed out with regard to interpretation of Article 51 in his separate opinion to the judgment in the *Congo* case, “... a restrictive reading of Article 51 might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying opinio juris, it ought urgently to be reconsidered, also by the Court.”⁴⁴

Based on the above, the Turkish authorities now characterize the PKK’s actions as “armed attacks” by broadly interpreting Article 51 of the UN Charter, since Article 51 highlights a right to self-defence in response to an armed attack. The main point here is an evaluation of the cross-border PKK attacks under Article 3(g) (“gravity of the attacks”) of the Definition of Aggression Annexed to General Assembly Resolution 3314 (XXIX),⁴⁵ which has been qualified as a reflection of customary international law in the ICJ’s *Nicaragua* case.⁴⁶ In this context, the PKK’s cross-border operations from bases in Iraq would not constitute an armed attack, and in order for Turkey to exercise the right of self-defence, the PKK’s operations must be classified as armed attacks rather than as mere

42 Jeremy Wright “The Modern Law of Self-Defence” (2017) EJIL: Talk <<https://www.ejiltalk.org/the-modern-law-of-self-defence/>>.

43 Anne Peters “German Parliament Decides to Send Troops to Combat ISIS - Based on Collective Self-Defence “in Conjunction with” SC Res. 2249” (2015) EJIL: Talk <<https://www.ejiltalk.org/german-parlament-decides-to-send-troops-to-combat-isis-%E2%88%92-based-on-collective-self-defense-in-conjunction-with-sc-res-2249/>>.

44 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*(Judgement) [2005] ICJ Rep, *Separate Opinion of Judge Simma*, at 11 <www.icj-cij.org/docket/files/116/10467.pdf>. See also the separate opinions of Judges Buergenthal, Higgins, and Kooijmans to the Israeli Wall Advisory Opinion <www.icj-cij.org/en/case/131/advisory-opinions>.

45 *Definition of Aggression*, n 21 above.

46 *Military and Paramilitary Activities in and against Nicaragua*, n 26 above, at 195.

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frontier incidents scale (the amount of force used and the duration of attack or its locale) and effects (the damage or casualties caused) of these operations.⁴⁷

In this respect, the attacks of 11 September 2001 demonstrated that operations with a smaller scale than the PKK's operations qualified as armed attacks. Additionally, after Hizbullah's killing of eight soldiers of Israel's Defence Forces and kidnapping two on the border with Lebanon in an attack on 12 July 2006, Israel's right to self-defence was recognized by a large number of States in the UN Security Council meeting on 21 July 2006.⁴⁸

In the case of the PKK, it is clear that the scale of the PKK's operations organized from northern Iraq is bigger than Hizbullah's operations carried out against Israel. According to the latest reports, since the 7 June 2015 general elections in Turkey there have been 281 attacks with heavy weapons, including five kidnappings and 17 extortions, by the PKK militias.⁴⁹

The PKK's cross-border armed operations and their extensions to the largest cities have resulted in hundreds of civilian and military deaths. According to a March 1993 report by Helsinki Watch, the PKK continues to wage guerrilla warfare in southeast Turkey, frequently in violation of the law on armed conflict.⁵⁰ As the latest figures from the International Crisis Group confirmed in its last updated open-source on 02 May 2017, at least 921 State Security Force Members and 393 civilians have been killed in clashes between security forces and the PKK since 20 July 2015. A large proportion of the casualties were soldiers, police officers and village guards, including ethnic Kurdish paramilitaries who were armed and paid by the Turkish government.⁵¹ During this period, 393 civilians were also killed as non-combatants. All of them were killed in urban clashes in the southeast or in PKK-affiliated bomb attacks in metropolitan centres.⁵²

Considering the events mentioned above, evaluation of the PKK's operations "as a whole" demonstrates that all of these operations were carried out by "irregular military forces" located in northern Iraq and the "scale and effects" of their actions were grave enough to constitute "armed attacks." According to Turkey, "the [KRG] in Iraq [supports] the PKK and turns a blind eye to its cross-border incursions into Turkey."⁵³ As

47 *Military and Paramilitary Activities in and against Nicaragua*, n 26 above, at 195.

48 *The Situation in the Middle East, Including the Palestinian Question*, UN SC Doc S/PV.5493 (Resumption 1), 5493rd mtg (21 July 2006) at [3] <[www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.5493\(Resumption1\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.5493(Resumption1))>.

49 Zia Weise and Chris Stevenson "Turkish Airstrikes against PKK in Iraq throw Two-Year Ceasefire with Kurds into Jeopardy" (2015) Independent <www.independent.co.uk/news-19-6/turkish-airstrikes-against-pkk-in-iraq-throw-two-year-ceasefire-with-kurds-into-jeopardy-10416213.html>.

50 Lois Whitman and Helsinki Watch, *The Kurds of Turkey: Killings, Disappearances and Torture* (Human Rights Watch, New York, 1993) at 11-12 <<https://www.hrw.org/sites/default/files/reports/TURKEY933.PDF>>.

51 International Crisis Group "Turkey's PKK Conflict: The Rising Toll" (2017) <www.crisisgroup.be/interactives/turkey/>.

52 International Crisis Group, n 51 above.

53 Christine Gray, *International Law and the Use of Force* (Oxford University Press, Oxford, 2004) at 143.

the UN Security Council pointed out in its Resolution 1373, adopted shortly after the 11 September 2001 attacks, all States shall prevent armed non-State actors or terrorist organizations from carrying out armed attacks using their respective territories for those purposes against other States or their citizens.⁵⁴ In this context, the PKK's attacks are imputable to the KRG due to Iraq's turning a blind eye to the PKK's cross-border attacks against Turkey using the KRG's territories and therefore, justify Turkey's self-defence actions in Iraq's territories under Article 51 of the UN Charter. In a letter to the UN General Assembly and Security Council, Turkey stated that "if respect for Iraq's territorial integrity is an obligation for Turkey as well as other members of the international community, Iraq is no less obliged to prevent the use of its territory for the staging of terrorist acts against Turkey." Indeed, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the UN (General Assembly resolution 2625 (XXV) of 24 October 1970) stipulates that every State has the duty to refrain from, *inter alia*, acquiescing in organized activities within its territory directed towards the commission of terrorist acts in another State. Because of this very principle, it becomes inevitable for a country to resort to necessary and appropriate force to protect itself from attacks from a neighbouring country if the neighbouring State is unwilling or unable to prevent the use of its territory for such attacks.⁵⁵ Therefore, Turkey as the victim State has used Article 51 of the UN Charter by notifying the UN Security Council of its right to the use of force in self-defence within the territorial State's territories.

The PKK's attacks that preceded the Turkish cross-border operations were carried out by PKK fighters who entered Turkey from Iraqi Kurdistan. Taking account of the preceding and continuing attacks, it may, therefore, be assumed that Turkey is subject to attacks which have serious consequences: human casualties or considerable destruction of property.⁵⁶ From this point of view, it can be concluded that the "armed attack" requirement is fulfilled.⁵⁷ Therefore, as Ban Ki-moon, former Secretary-General of the UN, pointed out, armed actions taken by Turkey against the PKK were done in accordance with the UN Charter, as a way of exercising self-defence.⁵⁸ In other words, Turkey can

54 *Threats to International Peace and Security Caused by Terrorist Acts* [2001] UN Sec Res 1373, 4385th mtg, UN Doc S/RES/1373 (28 September 2001) at [2(d)] <[www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20\(2001\).pdf](http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20(2001).pdf)>.

55 UN Doc. S/1996/479. Identical Letters from the Charge d'Affaires A.I. of the Permanent Mission of Turkey to the United Nations Addressed to the Secretary-General and the President of the Security Council. 2 July 1996, <http://repository.un.org/bitstream/handle/11176/41261/S_1996_479-EN.pdf?sequence=3&isAllowed=y>.

56 Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, Cambridge, 2005) at 208.

57 Tom Ruys "Quo Vadit Jus Ad Bellum?: A Legal Analysis of Turkey's Military Operations Against the PKK in Northern Iraq" (2008) 9(2) *Melb J Int'l L* 334 at 350.

58 United Nations Secretary-General, "Secretary-General's press encounter following Security Council Meeting and Consultations on Syria, Accompanied by Special Envoy for Syria, Staffan de Mistura" (29 July 2015) <<https://www.un.org/sg/en/content/sg/press-encounter/2015-07-29/secretary-generals-press-encounter-following-security-council>>.

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invoke the right to self-defence against the armed attacks of the PKK, which is active inside and outside its territory.

In the process of justifying use of force in self-defence against the PKK, the references made in the international law of armed conflict should be mentioned. Considering the provision of Rule 2 of the ICRC Customary International Humanitarian Law Study and regardless of the status of the parties, unlawful acts by armed non-State actors are subject to the law of armed conflict. According to Rule 2, “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”⁵⁹ Substantially, armed non-State actors as “the militarily weaker ‘outlaw’ do not respect the law, but rather see the resort to violations such as terrorist attacks or acts of perfidy as their only chance of avoiding total defeat.”⁶⁰ Many armed groups “consider that their only chance to overcome militarily and technologically incomparably stronger governmental forces is to attack ‘soft targets,’ namely civilians and the morale of the civilian population.”⁶¹ In this context, the PKK is an armed non-State actor but it employs terrorist tactics to demonstrate its opposition to a discriminatory political order existing in Turkey since the 1980s.⁶² Additionally, Geneva Call, which works with the PKK as an armed non-State actor in Turkey, has engaged with the PKK on humanitarian norms in general since 2008.⁶³ However, a controversial issue here is that the political developments after the 11 September 2001 attacks have drawn attention to the importance of the law of armed conflict in the fight against armed non-State actors.⁶⁴ The law covering armed conflicts foresees some of the constraints in counter-terrorism measures and operations. Even if armed non-State actors are regarded as “offensive civilians” or “unlawful combatants,”⁶⁵ responses to terrorist attacks have been limited by customary rules of the law of armed conflict. For example, massive counter-attacks against a location with a high civilian density are not compatible with the principle of distinction between civilians and combatants. In fact, indiscriminate killing of civilians in order to fight armed non-State actors in a region is unacceptable. Such a collective punishment will cause civilian casualties and suffering⁶⁶ and possibly lead to a

59 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge University Press, Geneva and Cambridge, 2005) at 8.

60 Marco Sassòli and Yuval Shany “Should the Obligations of States and Armed Groups under International Humanitarian Law Really Be Equal?” (2011) 93(882) *Int’l Rev Red Cross* 425 at 428.

61 Sassòli and Shany, n 60 above.

62 For more information, see Gerald L. Neuman “Humanitarian Law and Counterterrorist Force” (2003) 14 *Eur J Int’l L* (2003) at 289.

63 Geneva Call “Deed of Commitment under Geneva Call for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination” (2016) <http://genevacall.org/wp-content/uploads/dlm_uploads/2013/10/205-01Mar-pkk-turkey-gender.pdf>.

64 Program on Humanitarian Policy and Conflict Research, *Empowered Groups, Tested Laws, and Policy Options: The Challenges of Transnational and Non-State Armed Groups* (Graduate Institute of International Studies, Geneva, 2007) at 27.

65 Vönkey, above n 15, at 27.

66 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, Cambridge, 2005) at 56.

humanitarian crisis. In this respect, Rule 1 of the ICRC Customary International Humanitarian Law Study and also Article 24(1) of the Draft Protocol Additional to the Geneva Conventions of August 12 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts confirm that “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”⁶⁷ However, implementation of the law of armed conflict by States during counter-terrorism operations against armed non-State actors is challenging. Generally, the forces fighting against unlawful acts by such actors violate the legal prohibitions during their military operations. Brutal State responses have actually led to an increase in the number of terrorist attacks by armed groups. The Turkish armed forces are no exception in this respect.

After the 11 September 2001 attacks, States’ use of excessive force in the fight against terrorist attacks by armed non-State actors has not been compatible with the basic rules of law of armed conflict. Upholding the law of armed conflict and human rights during counter-terrorism operations is the key to the elimination of terrorist activities by non-State actors. Even though States that have espoused “violence” as an efficacious and prior method to fight against terrorist actions have failed, they are applying this method insistently. Nonetheless, it can be perceived that many States have changed their methods in the fight against terrorist actions by adopting fighting methods based on fundamental rules of human rights and the rule of law. In this respect, in 2002 the UN General Assembly approved an expanded programme of activities for The Terrorism Prevention Branch of the UN Office on Drugs and Crime (UNODC), focusing on the provision of technical assistance to countries, upon request, in legal and related aspects of counter-terrorism, especially for ratifying and implementing the universal legal instruments against terrorist actions, and for strengthening the capacity of the national criminal justice system to apply the provisions of these instruments in compliance with the principle of “rule of law.”⁶⁸

According to the Annex which was attached to UN General Assembly Resolution 49/60 (1994)⁶⁹ at the request of Turkey, terrorism is identified as a factor endangering friendly relations and territorial integrity.⁷⁰ In this respect, Turkey’s insistence on the maintenance of territorial integrity relates to its interest in labelling PKK fighters as terrorists and refusing to allow them recognition of their legitimate struggle under international law.⁷¹ There is a cross-border non-international armed conflict between Turkey and the PKK, which organizes cross-border operations from Iraq’s territory against Tur-

67 Henckaerts and Doswald-Beck, n 58 above, at 3; See also Marco Sassòli “Legitimate Targets of Attacks under International Humanitarian Law” (2003) HPCR Pol’y Brief 1 at 1-10.

68 United Nations, n 25 above, at 24.

69 *Measures to Eliminate International Terrorism*, UN GA Res 49/60, 88th plen mtg, UN Doc A/RES/49/60 (17 December 1996) at [1] <www.un.org/documents/ga/res/51/a51r210.htm>.

70 Ilias Bantekas and Susan Nash, *International Criminal Law* (Cavendish Publishing, London, 2003) at 42.

71 Bantekas and Nash, n 70 above, at 42.

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key. The use of force in self-defence against the PKK as an armed non-State actor based in Iraq requires the consent of Iraq as the territorial State. Otherwise, a lack of consent from the territorial State would trigger the application of the law of international armed conflicts because of an extraterritorial use of force on Iraq's territory, even though the armed force is directed against the PKK as an armed non-State actor based in Iraq. In other words, this would no longer be governed under the law of non-international armed conflicts.⁷²

Nevertheless, Iraq's turning a blind eye to the using its territory by the PKK for its cross-border attacks against Turkey constitutes a justification for Turkey's use of force against the PKK in northern Iraq and targeting the PKK camps in Iraq on the basis of right of hot pursuit which is established under customary law and also by the 1958 Geneva Convention on the High Seas and the 1982 UN Convention on the Law of the Sea.⁷³

10.4 CONCLUSION

The present study has demonstrated the PKK's status as an armed non-State actor and Turkey's justifications for use of force in self-defence against this group. One of the basic arguments of the study is that armed non-State actors such as organizations that intend to achieve both national and international development objectives sometimes use force against central governments because of failures of diplomacy. In response, the use of force in self-defence against armed non-State actors is only admissible under certain circumstances, according to Article 51 of the UN Charter. A more important issue here is that Article 51 of the UN Charter "is not confined to self-defence in response to attacks by States."⁷⁴ As a rule, according to Article 50 "States" are the only targets of armed attack. However, since the origin of such an armed attack is not specified by Article 51, many States that are in practice confronted with armed attacks by armed non-State actors believe that the perpetrator of the armed attack need not necessarily be identified as a State and therefore an armed attack can be carried out by armed non-State actors.⁷⁵ Therefore, they can exercise the right of self-defence against non-State armed actors as a legally justified practice when they use other States' territories as bases for their armed attacks under the "host State supports" or "where the host State is not able to confront effectively" rules. It should be remembered that any action taken in self-defence against such groups must be reported to the UN Security Council.

72 Rebecka Buchanan "Law Applicable to Cross-Border Conflicts with Organised Armed Groups" (2015) Human Security Center <www.hscentre.org/global-governance/law-applicable-cross-border-conflicts-organised-armed-groups/>.

73 Bantekas and Nash, above n 70, at 104.

74 Whitman and Helsinki Watch, n 50 above, at 13.

75 Wilmshurst, n 33 above, at 204.

Nevertheless, the use of force should be proportionate and necessary to deter the specific threat at hand. That is, the main objective of the armed non-State actors should be protection of and a struggle for fundamental human rights and prevention of their violations, not committing unlawful acts against a civilian population. More importantly, irrespective of who is right and who is wrong in decisions by States or armed non-State actors to fight against each other, both sides are responsible for respecting the fundamental rules of the law of armed conflict. In the Kurdish ethnic-based conflicts initiated by PKK militias in the south-east borders of Turkey, there has been no substantial respect for the law of armed conflict because of the PKK's increased terrorist tactics. The PKK's indiscriminate shooting and intentional targeting of non-combatants and civilian State employees, who are persons protected by the law of armed conflict, are definitely violations of the law of armed conflict. On the other hand, the reactions of States (Turkey, in this case) to armed attacks, including unlawful acts of an armed non-State actor in self-defence, should be compatible with the fundamental principles of the law of armed conflict, including the principles of distinction and proportionality. In this sense, Turkey's reactions, such as the killing of peaceful demonstrators,⁷⁶ to violent actions by the PKK indicate incompatibility with the law of armed conflict. For example, based on the last report of the UN Human Rights Watch, 21 civilians were killed in contradiction to the principle of distinction between civilians and combatants during application of a blanket curfew in south-eastern Turkish towns in 2015.⁷⁷

All State actions in response to armed attacks by other States or armed non-State actors should be compatible with the main conditions of the law of armed conflict. Non-combatants, which generally includes the civilian population, can be endangered both by armed non-State actors' acts of violence and by States' counter-terrorist acts. In fact, the scope of the law of armed conflict is very broad and its customary rules, such as the distinction between combatants and civilians, necessity, and proportionality, have been adjusted to the substantiveness of armed conflicts between States and armed non-State actors. However, States typically have the obligation and right to defend their citizens against any acts of violence carried out by armed groups or another aggressor State. This may include the arrest and detention of persons suspected of terrorist crimes.

All in all, the PKK and Turkey need to be given incentives to pursue reconciliation negotiations while respecting the law of armed conflict. In short, commitment to the law of armed conflict can most possibly decrease or eliminate the number of casualties, diminish aggression between Turkey and the PKK, and make diplomatic resolution possible for both sides.

⁷⁶ Whitman and Helsinki Watch, n 33 above, at 13.

⁷⁷ Human Rights Watch "Turkey: Events of 2015" (2015) <<https://www.hrw.org/world-report/2016/country-chapters/turkey>>.

