Turkey's extraterritorial use of force against armed non-state actors

Article

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IN SEARCH OF THE AD BELLUM CRITERIA IN TURKEY'S EXTRATERRITORIAL SELF-DEFENCE

Abstract

The use of force in foreign territories has been contained in the Constitution of the Republic of Turkey, with the authorisation of the Grand National Assembly of Turkey in 'cases deemed legitimate by international law' and where required by international treaties to which Turkey is a party. Yet Turkey's extraterritorial self-defence operations lead to the most important question of identifying the circumstances under which the Turkish authorities have justified military intervention in foreign territories.

This article aims to assess whether Turkey's use of force and alleged extraterritorial self-defence contravenes international law. In order to address how Turkey interprets the right to use armed force and the right of self-defence, and to bring clarity to Turkey's approach to jus ad bellum, this article explores Turkey's practice based on the assessment of the Turkish military intervention in Syria both in line with bilateral treaties to which Turkey is a party, and the use of force in self-defence. The aim is to determine whether Turkey's justifications are compatible with international law on the use of force.

Keywords: self-defence – military intervention – armed non-state actors – Turkey – Syria

1. INTRODUCTION

The use of armed force is generally prohibited under 2(4) of the UN Charter, which proclaims:

> *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 [UN].*

The only legitimate reactions to an armed attack are self-defence and action sanctioned by the UN Security Council. Having said this, this article lays out an example of a set of regulations that legitimise the use of force and deployment of armed forces. Turkey has often been the victim of terrorist attacks launched by the Kurdistan Workers' Party (PKK), which has been categorised by Turkey and many other states and international organisations, including the US and EU, as a terrorist group.[1] Turkey has

[1] See International Crisis Group (ICG), 'Turkey's PKK Conflict Kills almost 3,000 in Two Years' (20 July 2017), https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/turkeys-pkk-conflict-kills-almost-3000-two-years; Council of the European Union, 'EU Terrorist List' (23 November 2021), https://www.consilium.europa.eu/en/policies/fight-against-terrorism/terrorist-list/; US Department of State, 'Foreign Terrorist Organisations' (10 August 1997), https://www.state.gov/foreign-terrorist-organizations/. For a detailed assessment, see Mitchel P. Roth and Murat Sever (2007), 'The Kurdish Workers Party (PKK) as Criminal Syndicate: Funding Terrorism through Organised Crime: A Case Study', *Studies in Conflict & Terrorism* 30(10), at 901-920; Murat Haner, Michael L. Benson, and Francis T. Cullen (2019), 'Code of the Terrorists: The PKK and the Social Construction of Violence', *Critical Criminology* 27, at 393–419.

sometimes responded to the PKK's attacks, coming both from south-eastern Turkey and the Qandil mountains in northern Iraq, since the 1980s. However, Turkey's military operations have been controversial regarding their classification as self-defence under the UN Charter and the law on the use of force or *jus ad bellum*.[2]

Jus ad bellum is a set of criteria under which states construct the right to use armed force and is key to understanding the circumstances in which rights and obligations of states are acquired in the law governing the use of force.[3] This is, of course, distinct from *jus in bello*, which is known as a set of criteria or rules that ought to be followed during the conflict.[4] Having said this, this article will shed light on the conditions that are required for states to exercise the right to use armed force in foreign territories.[5]

Having discussed Turkey's practice, this article explores the current debates in recent literature to shed light on the legality of the Turkish military intervention in northern Syria. That being said, military intervention in Syria is the primary focus of this article as it has generated much debate on whether the precepts of *jus ad bellum* have been satisfied. It thus raises a more fundamental critique of states' own assessment of a particular situation as armed aggression. In so doing, the article challenges Turkey's basic assumptions of the right to use force and military intervention in northern Syria justified by a necessity of self-defence.

This article builds on critical questions of *jus ad bellum* as to whether the right to use armed force has been interpreted and applied adequately by the Turkish authorities and in compliance with the international law on the use of force. While the discussion reflects Turkey's approach to *jus ad bellum*, the article also answers the more challenging legal question of whether military intervention and the use of force against Kurdish and the so-called Islamic State fighters in Syria are compatible with the *ad bellum* criteria. And if the legality exists, an objective question is that of the implications of Turkey's military presence in Syria in the aftermath of the fall of Islamic State. Having delineated the scope of self-defence in international law, the article examines the various aspects of Turkey's approaches to *jus ad bellum* to shed light on the *ad bellum* criteria that allow the use of armed force that does not impinge on the territorial integrity of a state. This article aims to argue that Turkey's extraterritorial self-defence

[2] See generally, Tom Ruys (2008), 'Quo Vadit Jus Ad Bellum?: A Legal Analysis of Turkey's Military Operations Against the PKK in Northern Iraq', *Melbourne Journal of International Law* 9(2), at 334–364; Kimberley N. Trapp, 'The Turkish Intervention Against the PKK in Northern Iraq—2007–08', in: Tom Ruys, Olivier Corten and Alexandra Hofer (eds.), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press, 2018), at 689-701.

[3] See generally, Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 2012); Ian Brownlie, *International Law, and the Use of Force by States* (Oxford University Press, 1963); Christine D. Gray, *International Law, and the Use of Force* (Oxford University Press, 2004); Michael N. Schmitt (2003), 'International Law and the Use of Force: The Jus Ad Bellum', *The Quarterly Journal* 2(3), at 89-97.

[4] For further discussion, see Keiichiro Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (Hart Publishing, 2011), at 7-11; Carsten Stahn (2007), ''Jus ad bellum', 'just in bello' . . . 'jus post bellum'? – Rethinking the Conception of the Law of Armed Force', *European Journal of International Law* 17(5), at 927-929; Robert Kolb (1997) 'Origin of the twin terms jus ad bellum/jus in bello', *International Review of the Red Cross* 37(320), at 553-562; Christopher Greenwood (1983), 'The relationship between jus ad bellum and jus in bello', *Review of International Studies* 9(4), at 230-232.

[5] The right to use armed force is recognised both under customary international law and the UN Charter. It is also widely accepted that this right has its root in customary international law, and it has been subsequently codified by the UN Charter. Relatedly, it is also worth noting that the right of self-defence contained in Article 51 of the UN Charter has attained the status of jus cogens in international law and corresponds entirely with the inherent right of self-defence as to be found in customary international law. Tom Ryus has argued, for example, that both the prohibition on the use of force contained in Article 2(4), and the right of self-defence contained in Article 51 of the UN Charter, are *jus cogens* norms, which are closely associated with the application of a particular set of norms in customary international law. Tom Rays, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press, 2010), at 540-541. See also Ulf Linder Falk (2011), 'The Creation of Jus Cogens – Making Sense of Article 53 of the Vienna Convention', *Heidelberg Journal of International Law* 71, at 360.

operations cannot be inferred from a reading of Article 51 of the UN Charter. While the article addresses the question of Turkey's compliance with international law on the use of force, it lies primarily in the analysis of Turkey's agreements with Syria as a basis for recourse to armed force.

The analysis proceeds as follows. Part 2 draws on preliminary considerations for the main analysis, where it considers the general prohibition on the use of force and the exceptions to this prohibition as the core components of *jus ad bellum*. Part 3 explores the Turkish military intervention in northern Syria asserted in line with the bilateral security treaties signed between Turkey and Syria as primary justifications for using armed force in foreign territories. Part 4 looks at how Turkey relies on the applicability of *jus ad bellum* and self-defence in using armed force against armed non-state actors and the measures taken by Turkey due to the unwillingness or inability of the Syrian government. This part of the research then examines self-defence against imminent attacks and the armed attack threshold for using force in self-defence, according to which Turkey has relied on the *ad bellum* criteria by considering certain actions as armed attacks.

2. PRELIMINARY CONSIDERATIONS

Jus ad bellum is the only branch of international law that governs the conditions under which states may resort to the use of armed force in general. *Jus ad bellum* is governed by conventional (including Articles 2(4), 39–42, and 51 of the UN Charter) and customary international law.[6] To begin, the general prohibition on the use of force is regulated by Article 2(4) of the UN Charter, and the exceptions to this prohibition (use of force in self-defence and use of force with UN Security Council authorisation)[7] set out in Chapter VII of the UN Charter are the core components of *jus ad bellum*. The prohibition on the use of force is not only recognised as a customary norm,[8] but is generally considered a peremptory norm of general international law (*jus cogens*)[9] from which no derogation is permitted, either by consent or by treaty.[10] To curtail the freedom of states to use force to settle international disputes, the use of force

[6] See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ Judgment (27 June 1986), para. 193. For further discussion, see Marco Roscini (2015), 'On the 'Inherent' Character of the Right of States to Self-defence', *Cambridge Journal of International and Comparative Law* 4(3), at 634-660; Natalino Ronzitti (2006), 'The Expanding Law of Self-Defence', *Journal of Conflict & Security Law* 11(3), at 343-359.

[7] Debates are still on going by some authors who argue that international law recognises unilateral humanitarian intervention and/ or military assistance on request under certain circumstances. For the validity of these claims and/ or arguments, see Tom Ruys, 'International Law of the Use of Force', in: Jan Wouters, Philip De Man and Nele Verlinden (eds), *Armed Conflicts and the Law* (Intersentia, 2016), at 114-133; Erika de Wet (2017), 'Reinterpreting Exceptions to the Use of Force in the Interest of Security: Forcible Intervention by Invitation and the Demise of the Negative Equality Principle', *AJIL Bound* 111, at 307-311; Michael Wood (2013), 'International Law and the Use of Force: What Happens in Practice?', *Indian Journal of International Law* 53, at 360-365; Laura Visser (2020), 'Intervention by Invitation and Collective Self-Defence: Two Sides of the Same Coin?', *Journal on the Use of Force and International Law* 7(2), at 292-316.

[8] See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Judgment (19 December 2005), para. 161; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986), above no 6, para. 190. For further discussion, see James A. Green (2011), 'Questioning the Peremptory Status of the Prohibition on the Use of Force', *Michigan Journal of International Law* 32(2), at 215-257; Gordon A. Christenson (1987), 'The World Court and Jus Cogens', *American Journal of International Law* 81(1), at 93-101; Carin Kahgan (1997), 'Jus Cogens and the Inherent Right to Self Defense', *ILSA Journal of International & Comparative Law* 3(3), at 767-827.

[9] Andre de Hoogh, 'Jus Cogens and the Use of Armed Force', in: Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015), at 1161-1186; Carin Kahgan (1997), 'Jus Cogens and the Inherent Right to Self-Defence', *ILSA Journal of International & Comparative Law* 3(3), at 767-827.

[10] For a discussion, see Kamrul Hossain (2005), 'The Concept of Jus Cogens and the Obligation Under the U.N. Charter', *Santa Clara Journal of International Law* 3 (1), at 72-98. See also UNGA, Peremptory norms of general international law (jus cogens), UN Doc. A/CN.4/L.967 (11 May 2022), https://documents-dds-ny.un.org/doc/UNDOC/LTD/G22/339/00/PDF/G2233900.pdf?OpenElement.

in international law has been prohibited by the UN Charter. Following the UN Charter, to maintain international peace and security, all members of the UN shall settle their international disputes peacefully.

Even though the use of force is widely prohibited under international law, it may be justified under some exceptional conditions. Article 51 of the UN Charter states:

> *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 [UN] 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 to maintain or restore international peace and security.*

Article 51 is clear enough to allow a state's exercise of the right of self-defence only if it has been the victim of an 'armed attack'. As the International Court of Justice (ICJ) has pointed out in the *Oil Platforms* case, the defending state 'must ... show that its actions were necessary and proportional to the armed attack made on it and that the platforms were a legitimate military target open to attack in the exercise of self-defence.'[11] Some scholars and states have argued that self-defence is also the case when an 'imminent threat' of attack clearly exists.[12] Self-defence in that sense would be 'anticipatory',[13] which is the use of armed force by a state to repel an attacker before an actual armed attack has taken place, before the army of the enemy has crossed its border, and before the bombs of the enemy fall upon its territory.[14] Although Article 2(4) of the UN Charter does restrict the use of armed force to resolve international disputes, it nevertheless recognises the 'inherent right' of states to act in self-defence in Article 51. When it comes to anticipatory self-defence, its proponents argue that anticipatory self-defence is consistent with Article 51 of the UN Charter if the evidence of a threat is compelling and the necessity to act is overwhelming, particularly when combatting armed non-state actors.[15] This would,

[11] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, ICJ Judgment (6 November 2003), para. 51. See also Dapo Akande and Thomas Liefländer (2013), 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense', *American Journal of International Law* 107(3), at 563-570; David Kretzmer (2013), 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum', *European Journal of International Law* 24(1), at 235–282.

[12] See for instance, Anthony Clark Arend (2003), 'International Law and the Preemptive Use of Military Force', *The Washington Quarterly* 26(2), at 89–103; Michael Wood, 'The Caroline Incident-1837', in: Tom Ruys, Olivier Corten, and Alexandra Hofer (eds.), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press, 2018), at 5-16.

[13] For a discussion, see Amos N. Guiora (2008), 'Anticipatory Self-Defence and International Law—A Re-Evaluation', *Journal of Conflict & Security Law* 13(1), at 3-24.

[14] Michael F. Lohr (1985), 'Legal Analysis of US Military Responses to State-Sponsored International Terrorism', *Naval Law Review* 34, at 16. See also Jan Wouters and Tom Ruys (2006), 'The Legality of Anticipatory Military Action after 9/11: the Slippery Slope of SelfDefense', *The Foreign and Security Policy of the European Union* 59(1), at 45-67; Amos N. Guiora (2008), above no 13.

[15] Jutta Brunnée and Stephen J. Toope (2017), 'Self-Defence Against Non-State Actors: Are Powerful States Willing but Unable to Change International Law?', *International and Comparative Law Quarterly* 67(2), at 264; Tarcicio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press, 2005), at 149-153; Michael F. Lohr (1985), above no 14, at 16. For further discussion, see W. Michael Reisman and Andrea Armstrong (2006), 'The Past and Future of the Claim of Preemptive Self-Defense', *American Journal of International Law* 100(3), at 525-550; Anthony Clark Arend (2003), above no 12, at 89-102.

particularly, be the case for the Turkish military intervention against Islamic State in Syria,[16] which is discussed in Part 4.[17]

While this article is concerned with Turkey's recourse to armed force under international law, it is also worth noting that the Turkish Constitution constitutes legal authority for the Turkish government to make the *ad bellum* decisions in conformity with the applicable rules of international law. The reference to *jus ad bellum* in the Constitution of the Republic of Turkey (1982) is the first paragraph of Article 92, which states:

> *The power to authorise the declaration of a state of war in cases deemed legitimate by international law and except where required by international treaties to which Turkey is a party … to send the Turkish Armed Forces to foreign countries and to allow foreign armed forces to be stationed in Turkey, is vested in the Grand National Assembly of Turkey*.[18]

Although the phrase 'cases deemed legitimate by international law' refers to international law as the primary legal authority that legitimises the deployment of armed forces, attention should be paid to the phrase 'except where required by international treaties to which Turkey is a party'. The Grand National Assembly of Turkey, according to this provision, authorises the declaration of a state of war where required by international treaties to which Turkey is a party and therefore can send the Turkish Armed Forces to foreign territories. There can be no doubt that the phrase 'except where required by international treaties to which Turkey is a party' is an exception to the Grand National Assembly's authority and, thus, the right to use armed force would be implemented under the international treaties that regulate resorting to the use of armed force in foreign territories. The primary instances that might fall into this category are self-defence under Article 51 of the UN Charter and sending the Turkish Armed Forces to foreign territories under Article 5 of the North Atlantic Treaty Organisation (NATO),[19] to which Turkey is a party. In the same vein, Turkey has resorted to the use of armed force in foreign territories based on bilateral treaties. Having said this, it would be logical to explore how Turkey has applied this in practice. For the sake of clarity, the most convenient way to explore Turkey's practice relating to the use of force in line with bilateral treaties is to examine its justifications for using force in Syrian territory.

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[16] For a discussion, see George Brandis QC (Attorney-General of Australia), 'The Right of Self-Defence Against Imminent Armed Attack in International Law', *EJIL: Talk!* (25 May 2017), https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/.

[17] Turkey has recognised a right of self-defence against imminent attacks. See Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/563 (24 July 2015).

[18] It is worth being explicit that the term 'legitimate' in Article 92 is intended to order all governmental bodies to respect the obligations arising out of international law in times of war and crisis. The accompanying commentary of Gündüz indicates that Article 92 limits the power of the legislature to declare war to the situation in which it is legitimate under international law to do so. The term 'international law' as used in Article 92, comprises both conventional and customary international law and restricts the power of the legislature to declare war to the situation in which it is legitimate under international law to do so. In other words, the Constitution orders the authorities, wherever required, to comply with international law. On this understanding, the phrase 'cases deemed legitimate by international law' obviously refers to the 'legal' conditions under which the use of force is permitted by conventional and customary international law. Aslan Gündüz (1991), 'Eroding Concept of National Sovereignty: The Turkish Example', *Marmara Journal of European Studies* 1(1&2), at 140-141. See also Sevin Toluner, *Milletlerarası Hukuk ile İç Hukuk Arasındaki İlişkiler* (İstanbul Üniversitesi, 1972), at 680.

[19] See John M. Vander Lippe (2000), 'Forgotten Brigade of the Forgotten War: Turkey's Participation in the Korean War', *Middle Eastern Studies* 36(1), at 92-102. For further discussion on the use of force and self-defence requirements under Article 5 of the NATO agreement, see Broderick C. Grady (2002), 'Article 5 of the North Atlantic Treaty: Past, Present, and Uncertain Future', *Georgia Journal of International and Comparative Law* 31(1), at 167-198; Bruno Simma (1999), 'NATO, the UN and the Use of Force: Legal Aspects', *European Journal of International Law* 10(1), at 1-22; Bruno Tertrais (2016), 'Article 5 of the Washington Treaty: Its Origins, Meaning and Future', *Research Paper* 130 *(NATO Defense College),* at 1-8.

3. USE OF FORCE ASSERTED IN LINE WITH BILATERAL TREATIES

Overshadowing the earlier discussion concerning the Turkish authorities' interpretation and implementation of the phrase 'cases deemed legitimate by international law' contained in Article 92 of the Turkish Constitution is based on their own assessment of the situation. This is particularly the case where the Grand National Assembly of Turkey approved military operations in Syria as subject to the bilateral treaties to which Turkey is a party.[20]

In this part, I will address Turkey's treaty-based justifications for military intervention in Syria which directly focuses on the source and validity of the territorial state's consent to intervention and the use of armed force. In particular, I consider the justifications for military intervention and the use of force against Islamic State and Kurdish fighters based in Syria. To this end, military intervention in Syria justified under *Adana Security Agreement* is examined as the subject of treaty-based intervention.

3.1. BACKGROUND LEADING UP TO BILATERAL TREATIES

Turkey shares its longest common border (911 km) with Syria in the south-eastern part of the country. The border between Turkey and Syria has historically been contentious and a major cause of tension between the two countries. The joining of the Turkish and Arabic-speaking province of Hatay with Turkey in 1939; Turkey's damming of the Euphrates River as part of the Southeast Anatolia Project which has long been criticised for its negative effects on the natural environment, cultural heritage, and the local population since the 1970s;[21] and the Syrian government's support of the PKK and its leader, Abdullah Öcalan in 1980, have been major reasons for the triggered tensions between the two countries over the years. However, following the *Adana Security Agreement*,[22] which was signed by Turkey and Syria on 20 October 1998, and which obliged the Syrian government to expel Abdullah Öcalan (the PKK's founding member), Turkey and Syria have turned over a new leaf in their relations. To eliminate the existing tensions between the two countries and to stabilise the border region, the agreement entailed the following commitments:

> *As of now, Öcalan was not in Syria and he definitely will not be allowed to enter Syria; the PKK elements abroad will not be permitted to enter Syria; as of now, the PKK camps are not*

[20] See Richard Spencer and Barney Henderson, 'Turkey Approves Military Operations in Syria', *The Telegraph* (4 October 2012), https://www.telegraph.co.uk/news/worldnews/middleeast/syria/9586845/Turkey-approves-military-operations-in-Syria.html; Daniel Dombey and Erika Solomon, 'Turkish Parliament Authorises Force against ISIS in Syria and Iraq', *Financial Times* (2 October 2014), https://www.ft.com/content/c39027be-4a31-11e4-bc07-00144feab7de; Eric Schmitt, Maggie Haberman and Edward Wong, 'President Endorses Turkish Military Operation in Syria, Shifting U.S. Policy', *New York Times* (7 October 2019), https://www.nytimes.com/2019/10/07/us/politics/trump-turkey-syria.html.

[21] Presumably, SAP has been utilised to fight the PKK through using the Euphrates and Tigris as a bargaining chip to force both Syria and Iraq to cut their support to the PKK. See Arda Bilgen (2020), 'Turkey's Southeastern Anatolia Project (GAP): A Qualitative Review of the Literature', *British Journal of Middle Eastern Studies* 47(4), at 666; Gilberto Conde (2016), 'Water and Counter-Hegemony: Kurdish Struggle in the Tigris and Euphrates in Turkey', *Revista de Paz y Conflictos* 9(2), at 43–58; Joost Jongerden (2010), 'Dams and Politics in Turkey: Utilising Water, Developing Conflict', *Middle East Policy* 17(1), at 137–43.

[22] The Adana Security Agreement signed by Turkey and Syria in Adana (1998), *Voltaire Network* (20 October 1998), https://www.voltairenet.org/article208057.html.

operational and definitely will not be allowed to become active; and many PKK members have been arrested and have been taken to court.[23]

In 1998, when Turkish and Syrian authorities discussed defusing the border tensions between the two countries, they made a joint commitment to co-operate in combatting terrorism. According to the *Adana Security Agreement*, and based on the principle of reciprocity, Syria would not permit any activity which emanates from its territory aimed at jeopardising the security and stability of Turkey. It would not allow the supply of weapons, logistical material, financial support, or propaganda activities of the PKK on its territory. Syria recognised that the PKK was a terrorist organisation and had, alongside other terrorist organisations, prohibited all activities of the PKK and its affiliated organisations on its territory. It would not allow the PKK to establish camps and other facilities for training and shelter or commercial activities on its territory. Nor would it allow the PKK to use its territory for transit to third countries, and it would take all necessary measures to prevent the leader of the PKK terrorist organisation from entering Syrian territory and would instruct its authorities at border points to that effect.[24]

Turkey and Syria agreed upon a counter-terrorism strategy through which both sides needed to combat terrorism. Given that the main objective of the *Adana Security Agreement* is to fight the PKK and its extensions in the Syrian territory, both sides agreed to establish certain mechanisms for the effective and transparent implementation of the measures mentioned above.[25] The emergence of Islamic State in Syria, however, has shown that the Syrian government has not been effective in applying the major terms and conditions of the agreement. For this reason, Turkey and Syria reopened discussions of the *Adana Security Agreement* and created a revised document called the *Joint Cooperation Agreement*[26] in 2010. This agreement also includes security cooperation activities within the borders of both parties. In this context, each party will take effective security measures against terrorist acts, terrorist organisations and members of terrorist organisations in its territory.[27]

3.2. Bilateral Treaties as Primary Justifications for Use of Force against Armed Non-state Actors

Far more recently, following the tensions that arose in northern Syria in 2015, Vladimir Putin, the president of the Russian Federation, stated that the *Adana Security Agreement* dealt with the fight against terrorism and it was the base that closed many issues in terms of ensuring Turkey's security on its southern borders. Mevlut Çavuşoğlu, Turkey's Minister of Foreign Affairs, interpreted this statement as a green light to move its forces into Syria, mentioning that 'we think [Putin] referred to the [*Adana Security Agreement*] implying that Turkey can intervene in [Syria].'[28] Ultimately, Turkey extended the

[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] Türkiye Cumhuriyeti ile Suriye Arap Cumhuriyeti Hükümeti Arasında Terör ve Terör Örgütlerine Karşı Ortak İşbirliği Anlaşması (unofficial title in English: Joint Cooperation Agreement on Counterterrorism between the Republic of Turkey and the Syria Arab Republic), Republic of Turkey Prime Ministry (21 December 2010), https://www.resmigazete.gov.tr/eskiler/2011/07/20110705M1-12-1.pdf.
[27] *Ibid.*, Article 4.
[28] See 'Proposed Russian Control of Syria Border Unlikely to Appeal to Turkey', *The New Arab* (25 January 2019), https://english.alaraby.co.uk/english/indepth/2019/1/25/adana-not-an-option-for-turkey-in-northern-syria-1; 'Russia Positive on Turkey's Plans to Secure Its Borders: FM Çavuşoğlu', *Daily News* (24 January 2019), https://www.hurriyetdailynews.com/russia-positive-on-turkeys-plans-to-secure-its-borders-fm-cavusoglu-140741; Nalan

scope of both the original *Adana Security Agreement* and the *Joint Cooperation Agreement* to Islamic State's terrorist actions. Again, in its letter dated 9 October 2019 to the UN Security Council, Turkey notified the Council that:

> *Besides, the Adana agreement signed on 20 October 1998 by the Republic of Turkey and the Syrian Arab Republic constitutes a contractual basis for my country to fight all kinds of terrorism emanating from Syrian territory in its hideouts and in an effective and timely manner.*[29]

However, Article 4 of the *Joint Cooperation Agreement* is insufficient to justify the use of force in Syrian territory without the consent of the Syrian government. In other words, it does not authorise military intervention. More precisely, the amended document only provides for 'joint cooperation' in the fight against terrorist organisations, including the PKK and its extensions, as well as any other violent groups active in Syria and Turkey.[30] Both the *Adana Security Agreement* and the *Joint Cooperation Agreement* provide that the contracting parties will never allow any terrorist or other violent group to use their territory to violate their national security and stability. Importantly, the *Joint Cooperation Agreement* stipulates that both Syria and Turkey have committed to pursuing all terrorist groups in perpetuity, and to take all necessary joint measures, to a certain degree, by identifying their resources and locations.[31] In essence, it appears that consent to take all necessary measures[32] to pursue terrorist groups is an independent justification for Turkey to use force against armed non-state actors but nothing in the *Adana Security Agreement* or the *Joint Cooperation Agreement* addresses military intervention, territorial secession, a safety-zone, a unilateral invasion or occupation of the other contracting party's territory.

Moreover, even under the given bilateral treaties, Turkey's reliance on the use of force against an imminent threat of the PKK/PYD/YPG units close to Turkish borders in the northeast of Syria lies far ahead of the purpose of Article 51 of the UN Charter. That being said, the Turkish military intervention in northern Syria does not serve the purpose of either the *Adana Security Agreement* and the *Joint Cooperation Agreement* or Article 51 of the UN Charter. It is difficult, therefore, to rely on the *Joint Cooperation Agreement* or the *Adana Security Agreement* granting permission for military intervention as a necessary measure in fighting against terrorist groups. It does not even seem to have been the intention of the contracting parties at the time of the negotiations. It is, therefore, possible to argue that although there are prominent examples of treaties that have authorised external military interventions

Koçak, 'Russia Open to Turkish Ops in Syria under Adana Agreement', *Daily News* (18 February 2019), http://www.hurriyetdailynews.com/russia-open-to-turkish-ops-in-syria-under-adana-agreement-141306.

[29] Letter dated 9 October 2019 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, UN Doc. S/2019/804 (9 October 2019).

[30] Türkiye Cumhuriyeti ile Suriye Arap Cumhuriyeti Hükümeti Arasında Terör ve Terör Örgütlerine Karşı Ortak İşbirliği Anlaşması (2010), above no 26, Article 2.

[31] *Ibid*., Article 7.

[32] See *Case Concerning Armed Activities on the Territory of the Congo* (2005), above no 8, para. 106.

accompanied by *ad hoc* consent at the time,[33] treaty-based interventions might potentially be abused and used for serious violations by powerful states.[34]

What is clear in the Syrian case is that the agreements in question do not authorise the use of force on the territory of the contracting parties, and it appears clear, therefore, that intervention in Syria is an approach that stems from the broad interpretation of the key provisions of the *Adana Security Agreement* and the *Joint Cooperation Agreement*, according to which the contracting parties have agreed to take 'necessary measures' for certain purposes.[35] As a matter of principle, only the clear consent of a state to a particular act of armed force, if freely and properly given, can legitimise military intervention which otherwise would have been unlawful.[36]

Returning to treaty-based military interventions, state practice indicates that although the use of force based on a bilateral treaty is one of the primary circumstances that may justify forcible military intervention,[37] the intervening state is prohibited from taking any action in violation of the traditional rules of international law that have been developed for the purpose of territorial protection.[38] Put differently, even consent does not preclude the wrongfulness of any act of a state which is not in conformity with an obligation arising under a *jus cogens* norm of general international law. As discussed earlier, the general prohibition on the use of force contained in Article 2(4) of the UN Charter is generally considered a *jus cogens* norm of general international law from which no derogation is permitted, either by consent or by treaty. Although *jus cogens* norms do not render invalid bilateral defence treaties, the prospective unauthorized military intervention in foreign territories is a decisive issue that would bring the international responsibility of the intervening state for violating the applicable rules of international law. Ultimately, any broad interpretation of bilateral treaties would invite stronger states to intervene by treaty in the affairs of the relatively weaker states, a practice which would be incompatible with the principles of the UN Charter.[39]

The violations committed by Kurdish fighters in the parts of northern Syria recaptured from Islamic State have been the motivating factor to open the door for Turkey to bring the bilateral counter-terrorism agreements forward. As Amnesty International reported in February 2015, the YPG began demolishing villages and displacing villagers after taking control of Rojava, the de facto autonomous region in northern Syria, which had been under the control of Islamic State. Most residents affected by the YPG's

[33] For example, see Convention for the Construction of a Ship Canal (Hay-Bunau-Varilla Treaty) (Panama, 18 November 1903), at https://avalon.law.yale.edu/20th_century/pan001.asp#art7; The 1921 Treaty of Friendship between Persia and the Russian Socialist Federal Soviet Republic (Moscow, 26 February 1921), League of Nations Treaty Series, No. 268 (1922), at 401-413; Treaty between the US and Cuba Embodying the Provisions Defining the Future Relations of the US with Cuba Contained in the Act of Congress (Platt Amendment) (Habana, 22 May 1903), in Lester H. Woolsey (1934), 'The New Cuban Treaty' *American Journal of International Law* 28(3), at 530-534. For an extensive discussion of each treaty, see Robert Jennings and Arthur Watts, *Oppenheim's International Law - Volume 1: Peace* (Longman, 1996), at 446. Charles D. Ameringer (1966), 'Philippe Bunau-Varilla: New Light on the Panama Canal Treaty', *The Hispanic American Historical Review* 46(1), at 28-52; W. Michael Reisman (1980), 'Termination of the USSR's Treaty Right of Intervention in Iran', *American Journal of International Law* 74(1), at 146-147; Rafael A. Lecuona (1997), 'International Law, Cuba, and the United States of America', *International Journal on World Peace* 14(1), at 39.

[34] See generally, David Wippman (1995), 'Treaty-Based Intervention: Who Can Say No?', *The University of Chicago Law Review* 62(2), at 685; David Wippman, 'Prodemocratic Intervention by Invitation', in: Gregory H. Fox and Brad R. Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000), at 312-313.

[35] The Adana Security Agreement (1998), above no 22, Annex 4.

[36] For an extended discussion, see Ingrid Detter De Lupis, *The Law of War* (Cambridge University Press, 2000), at 88; Ulf Linderfalk (2017), 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?', *European Journal of International Law* 18(5), at 860.

[37] Robert Jennings and Arthur Watts (1996), above no 33. See also Ashley S. Deeks (2013), 'Consent to the Use of Force and International Law Supremacy', *Harvard International Law Journal* 54(1), at 18-20.

[38] See generally, Christian Marxsen (2015), 'Territorial Integrity in International Law - Its Concept and Implications for Crimea', *Heidelberg Journal of International Law* 75, at 7-26.

[39] See W. Michael Reisman (1980), above no 33, at 153.

unlawful practices were Arabs and Turkmen; however, in some cases (including in the mixed town of Suluk), Kurdish residents were also barred by the Kurdish fighters from returning to their homes.[40]

As reported by the Syrian Network for Human Rights, the Syrian Democratic Forces (hereafter, SDF), led by the YPG, carried out arbitrary arrests and enforced disappearances in areas under their control, targeting political activists and media journalists opposing their policies, as well as carrying out arrests with the aim of forced conscription. They also detained civilians, including women and children. As a means to advance in northern Syria, Kurdish fighters detained at least 2,705 individuals, largely of Arab and Turkmen descent, at the Turkish-Syrian border between March 2011 and March 2019. They justified their actions as being for the civilians' own protection.[41]

In such circumstances, it appears that the terrorist threat embodied by the Kurdish military advance in northern Syria compelled Turkey to resort to armed force, including cross-border operations, to suppress the threat, particularly in the aftermath of the activities of Islamic State. In the broad meaning of the phrase, one might argue that the fight against Islamic State's terrorist actions seems less of a rational explanation for Turkey's presence in Syria. What is clear, however, is that the measures Turkey has taken in Syrian territory stem from the Turkish authorities' interpretation of necessary counter-terrorism measures as a framework to safeguard their national security and stability. In practice, it seems that Syria's failure to comply with its obligation to counter-terrorism has allowed Turkey to use force against the above-mentioned groups in northern Syria as a last resort by utilising a broad reading of the *Adana Security Agreement* and the *Joint Cooperation Agreement* based on their own assessment of the situation. Again, however, it does not justify military intervention in Syrian territory.

It is remarkable that the primary objective of the *Adana Security Agreement* was to repel the advances of terrorist groups in the Turkish-Syrian border area. Considering Turkish troops have already repelled the YPG and Islamic State fighters by seizing control of approximately 30–35 km of Syrian territory, their continued presence in Syria as an extension of treaty-based intervention is contrary to the primary objective and purpose of both the *Adana Security Agreement* and the *Joint Cooperation Agreement.* Both agreements provide that Turkey has the right to repel terrorists and other violent groups from its borders so they can no longer threaten its national security. Removing Kurdish fighters from approximately 35 km of Syrian territory adjacent to its borders indicates that Turkey has gone far beyond the purpose of the *Adana Security Agreement*, which in Annexe 4,[42] confines any conceivable necessary Turkish security measures to an area 5 km deep into Syrian territory, stating 'the Syrian side understands that its failure to take the necessary measures and security duties, stated in this

[40] Amnesty International, 'Syria: US Ally's Razing of Villages Amounts to War Crimes' (13 October 2015), https://www.amnesty.org/en/latest/news/2015/10/syria-us-allys-razing-of-villages-amounts-to-war-crimes/; Amnesty International, 'We Had Nowhere Else to Go: Forced Displacement and Demolitions in Northern Syria' (12 October 2015), https://www.amnestyusa.org/reports/we-had-nowhere-else-to-go-forced-displacement-and-demolitions-in-northern-syria/.

[41] UNGA, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic submitted to the Human Rights Council, UN Doc. A/hrc/28/69 (5 February 2015), at 41-42; The Syrian Network for Human Rights, 'Eight Years Since the Start of the Popular Uprising in Syria, Terrible Violations Continue: From Minority Ruel, Repression and Dictatorship Towards Pluralism', *Human Rights and Democracy* (11 March 2019), at 6, http://sn4hr.org/wp-content/pdf/english/The_eighth_year_of_the_start_of_the_popular_movement_in_Syria_and_the_terrible_violations_continue_en.pdf; Human Rights Watch, 'Under Kurdish Rule: Abuses in PYD-run Enclaves of Syria' (19 June 2014), https://www.hrw.org/node/256559/printable/print.

[42] See Claus Kreß, 'A Collective Failure to Prevent Turkey's Operation 'Peace Spring' and NATO's Silence on International Law', *EJIL: Talk!* (14 October 2019), https://www.ejiltalk.org/a-collective-failure-to-prevent-turkeys-operation-peace-spring-and-natos-silence-on-international-law/.

agreement, gives Turkey the right to take all necessary security measures within 5 km deep into Syrian territory.'[43]

Ultimately, a continued military presence on Syrian territory would be considered a violation of Syria's territorial integrity as it is now ignoring the legitimacy and authority of the Syrian government in its territory. As a result, the latest action elicited a harsh response from the Syrian government, which sent identical letters dated 31 October 2019 to both the UN Secretary-General and the President of the UN Security Council.[44] The letters stated that Turkey had occupied several Syrian villages, and its military aggression against the Syrian people continued unabated.[45] Having reaffirmed its territory's inviolability, sovereignty, and integrity, Syria reiterated the government's unwavering determination to continue the war against terrorism and to liberate any territory, particularly in northern Syria, that terrorist groups continue to control.

One reasonable reading of this statement is that there is a lack of consensus and disagreement over the legal obligations of both contracting parties under the *Adana Security Agreement*, seemingly on the basis that they do reject each other's approach to the issue of combating terrorism under the *Adana Security Agreement* and this has obviously led to inconsistent outcomes. A normative argument in such a situation is that any necessary actions taken by Turkey or Syria concerning any threats to the peace or acts of aggression would therefore meet the *ad bellum* criteria under the UN Charter. This simply stems from Article 103 of the UN Charter, which provides that in the event of a conflict between the obligations of the member states under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.

What is much clearer, however, is that neither the *Adana Security Agreement* nor the *Joint Cooperation Agreement* allows unilateral measures against armed non-state actors in the territory of the contracting party. It is important to note that the treaties signed in both 1998 and 2011 require a 'joint operation' in case of a terrorist attack by any violent armed group. This is perhaps why Turkey has then relied on the use of force in self-defence asserted in line with the unwilling or unable theory, alleging that Syria has not fulfilled the conditions of the *Adana Security Agreement* nor the *Joint Cooperation Agreement*, so the state of necessity has emerged, and Turkey has the right to take necessary measures unilaterally.

4. USE OF FORCE IN SELF-DEFENCE ASSERTED IN LINE WITH THE UNWILLING OR UNABLE THEORY

Terrorism is a phenomenon that has often brought the Turkish government's concerns about its national security to the fore. Tensions between Turkey and armed non-state actors based in neighbouring countries raise the question of whether Turkey has acted in compliance with the *ad bellum* criteria by using force in foreign territories. Far more recently, in its statements, Turkey has relied on the

[43] The Adana Security Agreement (1998), above no 33. See also Claus Kreß (2019), above no 42.
[44] Identical Letters dated 31 October 2019 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2019/856 (31 October 2019).
[45] *Ibid.*

unwillingness and inability of the Syrian government to prevent non-state actors' threats emanating from its territory as a justification for military intervention in northern Syria. This part, initially, seeks to highlight whether the *jus ad bellum* paradigm supports the legality and effectiveness of the Turkish military intervention in Syrian territory due to the unwillingness or inability of the Syrian government. It then aims to answer whether and to what extent Turkey's justifications are sufficient to meet aggression or armed attack criteria which can give Turkey a valid *ad bellum* basis to use force against imminent attacks.

4.1. Measures Were Taken Due to the Unwillingness or Inability of the Territorial State

Turkey's geopolitical position has made it more vulnerable to the significant cross-border security threats emanating from terrorist groups and other violent armed non-state actors, including the PKK, the Kurdish People's Protection Units or *Yekîneyên Parastina Gel* (hereafter, YPG), the Democratic Union Party or *Partiya Yekîtiya Demokrat* (hereafter, PYD), the Kurdish Democratic Confederalist political party established in 2003, and Islamic State based in Syria. Following the emergence of Islamic State, Turkey has suffered terrorist attacks not only in the Turkish-Syrian border area but also in major cities, including Ankara and Istanbul. The targets of these attacks have almost always been the Turkish state, civilians, or demonstrations.[46]

Islamic State has repeatedly targeted Turkey. Regardless of the justifications for military intervention in foreign territories, the anxiety of the Turkish authorities regarding Islamic State's frequent attacks is understandable, and it is a vital issue for Turkey. As a result, although Turkey was part of the US-led coalition fighting Islamic State, the Turkish Armed Forces also unilaterally intervened in Syria to attempt to halt Islamic State's terrorist operations.

On 24 July 2015, Turkey sent the following letter to the President of the UN Security Council justifying its use of armed force against Islamic State in Syria:

> *With the emergence of [Islamic State], the threats from Syria gained new dimensions. Syria has become a haven for [Islamic State]. This area is used by Islamic State for training, planning, financing, and carrying out attacks across borders. Also, Security Council Resolutions 2170 (2014) and 2178 (2014) have underscored the threat posed by Islamic State and the resolve of the international community to combat Islamic State. The terrorist attack that took the lives of 32 Turkish citizens in Suruç on 20 July 2015 reaffirms that Turkey is under a clear and imminent threat of continuing attack from Islamic State. Most recently, on 23 July 2015, Islamic State attacked the border military post in Elbeyli and killed a Turkish soldier. It is apparent that the regime in Syria is neither capable of nor willing to prevent these threats emanating from its territory, which clearly imperil the security of Turkey and the safety of its nationals.*

[46] The conflict in Syria and the threat of Islamic State emanating from northern Syria have also been the major causes of displacement of the highest number of people and refugees in the world today. According to the UN Refugee Agency, in September 2018, 5.64 million Syrian refugees were registered in neighbouring countries. Turkey currently hosts over 3.6 million registered Syrian refugees. See Refugees and Asylum Seekers in Turkey: 2019 Planning Summary (2019). See UNHCR, 'Refugees and Asylum Seekers in Turkey: 2019 Planning Summary' (15 February 2019), http://reporting.unhcr.org/sites/default/files/pdfsummaries/GA2019-Turkey-eng.pdf.

> *Individual and collective self-defence is our inherent right under international law, as reflected in Article 51 of the UN Charter. On this basis, Turkey has initiated necessary and proportionate military actions against Islamic State in Syria, including in coordination with individual members of the Global Coalition, to counter the terrorist threat and to safeguard its territory and citizens.*[47]

In its most basic form, the unwilling or unable theory is a situation in which 'a state (the "victim state") suffers an armed attack from [an armed non-state actor] operating outside its territory and concludes that it is necessary to use force in self-defence to respond to the continuing threat that the group poses… If the territorial state is willing and able, the victim state may not use force in the territorial state, and the territorial state is expected to take the appropriate steps against the [armed non-state actor]. If the territorial state is unwilling or unable to take those steps, however, it is lawful for the victim state to use that level of force that is necessary (and proportional) to suppress the threat that the [armed non-state actor] poses.'[48] As mentioned above, Turkey's initial attacks against Islamic State in January 2014 and its joining of the US-led coalition's armed operations under the unwilling or unable theory intensified the terrorist operations against them. This is a framework for extraterritorial self-defence, according to which using extraterritorial force against armed non-state actors depends on a determination that the relevant armed non-state actors perpetrated an armed attack against the victim state or other states, and the host state is 'unable or unwilling' to suppress the threat.[49] Having relied on this theory, Turkey intervened in northern Syria to use force against Islamic State in self-defence against the threats it posed since the Syrian regime was unwilling or unable to halt the threats emanating from its territory.[50]

As their primary justification, the Turkish authorities declared that Syria, as the host state, had been unwilling or unable to control its territories, which were under the effective control of Islamic State and were being used as a base for its terrorist operations.[51] Therefore, to protect itself against these threats, the Turkish Armed Forces entered Syria to use force in self-defence.[52] Turkey deployed its armed forces in Syrian territory with neither the consent of the Syrian government nor UN Security Council authorisation.[53] Nevertheless, the use of force based on the Syrian government's supposed

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[47] Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, above no 17.

[48] Ashley S. Deeks (2012), '"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense', *Virginia Journal of International Law* 52(3), at 487. For further discussion, see Craig Martin (2019), 'Challenging and Refining the "Unwilling or Unable" Doctrine', Vanderbilt Journal of Transnational Law 52(2), at 387-461; Olivier Corten (2016), 'The 'Unwilling or Unable' Test: Has it Been, and Could it be, Accepted?', *Leiden Journal of International Law* 29(3), at 777-799; Paulina Starski (2015), 'Right to Self-Defense, Attribution and the Non-State Actor - Birth of the "Unable or Unwilling" Standard?', *Heidelberg Journal of International Law* 75, at 460-461.

[49] Yoram Dinstein (2012), above no 3, at 195. See also Ashley S. Deeks (2012), above no 48.

[50] Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, above no 17.

[51] It is important to note that Islamic State's armed attacks are not attributed to Syria as the Syrian government did not have 'effective control' over Islamic State and it has never authorised the group's activities. Therefore, the territorial state (Syria) cannot be held responsible for any violation of international law and for the threats and terrorist acts of armed non-state actors who are not supported or tolerated by the territorial state. See *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986), above no 6, para. 195; *Prosecutor v Dusko Tadic (Appeals Chamber Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY)* (18 July 1999), paras. 115-162. For further discussion, see Paulina Starski (2015), above no 48, at 494; André Nollkaemper, 'Attribution of Forcible Acts to States: Connections Between the Law on the Use of Force and the Law of State Responsibility', in: Niels M. Blokker and Nico Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality, a Need for Change?* (Martinus Nijhoff, 2005), at 141.

[52] Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, above no 17.

[53] Turkey has been taking a similar position by using force against the terrorists operating in northern Iraq between 1993-2003. Although Iraq protested what it considered as an act of aggression but did not deny the right of Turkey to take coercive measures to the extent that this was strictly necessary to neutralise terrorist groups. While the legality of Turkish intervention in Northen Iraq is at the very least doubtful, the attitude of both governments clearly militates in favour of the admissibility

unwillingness or inability to act for itself is still unacceptable. As Gill and Tibori-Szabó have argued, although the lack of feasible alternatives to self-defence in the form of law enforcement or cooperation with the territorial state may stem from the refusal of the territorial state to exercise its obligation to halt the threat of armed non-state actors, this refusal does not itself give rise to the right of self-defence.[54] The targeted state may take action in self-defence only if it is clear that the territorial state will not do so, and there are no other feasible alternatives to thwart the attack. However, no self-reliant unable or unwilling test replaces or supplants the principle of necessity, which remains the bedrock requirement for the exercise of self-defence.[55] While the necessity of self-defence arises from the combination of an ongoing or impending armed attack and the lack of feasible alternatives, no necessity of self-defence will arise if the territorial state undertakes effective measures to neutralize the threat of an armed attack by an armed non-state actor presents on its territory.[56] Viewed from this perspective, it would be unfair to say that Syria has not fought against Islamic State or other terrorist groups within its territory, given that it has launched many operations against Islamic State and other terrorist targets, both unilaterally and with the comprehensive support of its regional and strategic allies, including Iran and Russia.

No one is allowed to use armed force against any armed group in foreign territories without the host state's consent or UN Security Council authorisation. While the inability or unwillingness of a state to prevent armed non-state actors from operating on its territory may be a factor in assessing the need to act in self-defence,[57] the issue remains controversial and continues to give rise to disagreements. It is worth noting here that the ICJ has left this issue open in its decision in the *Case Concerning Armed Activities on the Territory of the Congo,* where it has stated that 'the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.'[58] In effect, however, the Court has adopted a restrictive approach[59] as it was apparently unwilling to accept that the operation of a terrorist group from the territory of the target state *per se* justifies the use of force in that state by a state allegedly acting in self-defence.[60]

Viewed from this perspective, the legality of the Turkish military presence in Syria and its approach to extraterritorial self-defence against armed non-state actors present on foreign territories is contentious simply because it has moved beyond the contemporary *ad bellum* considerations. This is particularly obvious in the context of the indiscriminate attacks by the Turkish-backed armed forces of the Free Syrian Army and of Turkey's reliance on self-defence against attacks stemming from particular parts of Syrian territory invaded by the Turkish Armed Forces. In such a situation, self-defence would remain unlawful if the defence is invoked by the defending state against non-state actor attacks stemming from the territory that the defending state occupies.[61]

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of the use of force on necessity grounds. Tracisio Gazzini (2008), 'A Response to Amos Guiora: Pre-Emptive Self-Defence Against Non-State Actors?', *Journal of Conflict & Security Law* 13(1), at 27-28. See also Elizabeth Wilmshurst (2008), 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', *International and Comparative Law Quarterly* 55(4), at 970.

[54] Terry D. Gill and Kinga Tibori-Szabó (2019), 'Twelve Key Questions on Self-Defense against Non-State Actors', *International Law Studies* 95, at 449.

[55] *Ibid.*, at 500.

[56] *Ibid.*

[57] *Ibid.*

[58] *Case Concerning Armed Activities on the Territory of the Congo* (2005), above no 8, para. 147.

[59] For a discussion, see Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge University Press, 2017), at 158-161.

[60] *Case Concerning Armed Activities on the Territory of the Congo* (2005), above no 8, para. 299.

[61] For a discussion, see Vaios Koutroulis (2011), 'Of Occupation, Jus ad Bellum and Jus in Bello: A Reply to Solon Solomon's "The Great Oxymoron: Jus in Bello Violations as Legitimate Non-Forcible Measures of Self-Defense: The Post-Disengagement Israeli Measures towards Gaza as a Case Study"', *Chinese Journal of International Law* 10(4), at 897–914.

Again, while some states (e.g., Turkey, Iran, the US, and the UK) have explicitly or implicitly accepted the principle that defensive measures are permissible when the neighbouring state is unwilling or unable to prevent cross-border attacks,[62] using force in foreign territories based on the unwilling or unable theory remains highly controversial, especially because it has not gained recognition as a customary rule, nor can it be found under conventional international law or acknowledged in the reasoning of an international tribunal. This is particularly evident from the ICJ's Nicaragua case, where it explains that the Court has not recognised the legal effectiveness of the unwilling or unable theory and has pointed out that 'there is no rule in customary international law permitting another state to exercise the right of self-defence based on its own assessment of the situation.'[63]

Moreover, an armed attack is still the primary requirement for using force in self-defence, and military actions in self-defence against the armed non-state actors who have perpetrated an attack should be compatible with the general rules of *jus ad bellum*, including necessity and proportionality.[64] As a matter of *jus ad bellum*, however, the question remains whether armed non-state actors can be the authors behind an armed attack or not. What is rather clear is the fact that the unwilling or unable theory is viewed as a consideration that has no basis in customary international law.[65] By conferring every state with the power to unilaterally implement its conception of the necessities of the war against terror, the unwilling and unable theory bypasses, if not simply ignores, this core provision, along with the entire collective security system established by the UN Charter. This is precisely why most states have not accepted the unwilling or unable theory,[66] either in the Syrian case or more generally.[67]

An important issue to be highlighted further in this section is that the UN Security Council is the only UN body with the authorisation to determine the existence of any threat to the victim state, and it should make an appropriate decision regarding the unwillingness or inability of the territorial state. While the Council should determine the existence of any threat to the victim state and make an appropriate decision regarding the issue, the unwillingness or inability of the Syrian government to suppress the threat posed by Islamic State has been a controversial matter for the international community. It is, therefore, worth making explicit here that it would be unfair to say that Syria has not fought against Islamic State or other terrorist groups within its territory, given that it has launched many operations against Islamic State and other terrorist targets, both unilaterally and with the comprehensive support of its regional and strategic allies, including Iran and Russia.

What is clear, however, is that Turkey initially resorted to military action against Islamic State in Syria based on the unwilling or unable theory. In the letter to the UN Security Council, Turkey referred to its inherent right to individual and collective self-defence against Islamic State due to the Syrian government's unwillingness or inability to combat Islamic State, which posed a serious threat to Turkey's national security. In the meantime, however, it appears clear that Turkey also used the Islamic State crisis as an opportunity to expand its operations against the PKK, YPG, and PYD. That said, the victories of these groups in the region could enhance the consolidation of Kurdish territories that may

[62] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Oxford University Press, 2010), at 433.
[63] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986), above no 6, para. 195. See also Olivier Corten (2016), above no 48, at 783.
[64] For an extended discussion, see Roberto Ago (1980), 'Addendum - Eighth Report on State Responsibility', *Yearbook of the International Law Commission* II(1), paras 13 and 69.
[65] Olivier Corten (2016), above no 48, at 783.
[66] Yoram Dinstein (2012), above no 3, at 195.
[67] Olivier Corten (2016), above no 48, at 798.

lead to the creation of a Kurdish corridor.[68] This is probably the most likely hypothesis as to why Turkey intervened in Syria: it is concerned that the area of northern Syria controlled by the YPG could become part of a potential Kurdish state. However, as Detter has argued, this can be categorised as a 'patronising intervention'[69] by Turkey, which refers to the actions in northern Syria as being legitimised for its national security reasons, which, at least in international law, confers no legitimising effect at all, although, in political terms, it may explain the reason for its actions.[70]

The axis around which the Turkish military intervention in Syria revolves, therefore, is directly related to terrorist attacks as Turkey's major domestic issue. The growing threat of Islamic State and the Kurdish militants provided a foundation for Turkey to use force against both. Following the outbreak of the non-international armed conflict in Syria in 2011, Turkey endeavoured to protect its border from illegal migration. However, the invasion and occupation of northern Syria by Islamic State and YPG militants compelled it to take drastic measures to protect its border with Syria. As a security-enhancing measure, Turkey started constructing a wall along its entire 911 km long south-eastern border with Syria, and it deployed its troops and equipment near the border in 2015. Nonetheless, this strategy did not completely succeed as a protective measure. The Istanbul nightclub massacre[71] and the Russian ambassador's assassination in Ankara[72] were the most notable pieces of evidence that indicated the wall policy and the deployment of Turkish troops to the border *per se* were unable to protect Turkey from the cross-border threats of Islamic State and the YPG. All of that said, the threats of Islamic State and the YPG led to the Turkish military crossing the border to counteract the threats posed by Islamic State and prevent the PKK and its extensions in Syria from establishing themselves west of the Euphrates along Turkey's borders.[73]

In the wake of the threats mentioned above, Turkey launched three major operations in northern Syria. The Turkish Armed Forces carried out the first operation, Operation Euphrates Shield, in August 2016 in the triangle between Azaz, Jarablus, and al-Bab in northern Syria.[74] The second operation, Operation Olive Branch, was launched in January 2018 in northern Syria to protect Turkey's national security.[75]

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[68] Simonas Dapkus (2016), 'Turkey's Security Dilemma on the Border with Syria: Situation Assessment and Perspectives of the Intervention', *Lithuanian Foreign Policy Review* 33(1), at 53.

[69] The most striking case of patronising intervention was the action of the US to mine the ports of Nicaragua and to take other para-military action against that state in the 1980s. See Ingrid Detter De Lupis (2000), above no 36, at 97.

[70] Ingrid Detter De Lupis (2000), above no 36, at 96-97. See also Paul S. Reichler and David Wippman (1986), 'United States Armed Intervention in Nicaragua: A Rejoinder', *Yale Journal of International Law* 11(2), at 462-473; Roger Peace (2010), 'Winning Hearts and Minds: The Debate Over U.S. Intervention in Nicaragua in the 1980s', *Peace and Change: A Journal of Peace Research* 35(1), at 1-38.

[71] See Nodirbek Soliev (2017), 'The Terrorist Threat in Turkey: A Dangerous New Phase', *Counter Terrorist Trends and Analyses* 9(4), at 24-29; Kareem Shaheen, 'Turkey Nightclub Shooting: Istanbul on Alert after Aunman Kills Dozens', *The Guardian* (1 January 2017), https://www.theguardian.com/world/2016/dec/31/turkey-armed-attacker-opens-fire-in-istanbul-nightclub-reports.

[72] See Pavel K. Baev and Kemal Kirişci, *An Ambiguous Partnership: The Serpentine Trajectory of Turkish-Russian Relations in the Era of Erdoğan and Putin* (Brookings, 2017), at 10; Shaun Walker, 'Russian Ambassador to Turkey Shot Dead by Police Officer in Ankara Gallery', *The Guardian* (20 December 2016), https://www.theguardian.com/world/2016/dec/19/russian-ambassador-to-turkey-wounded-in-ankara-shooting-attack.

[73] For more details, see Patrick M. Butchard (2019), 'Digest of State Practice: 1 July – 31 December 2018', *Journal on the Use of Force and International Law* 6(1), at 131-143.

[74] Jeff Jager (2016), 'Turkey's Operation Euphrates Shield: An Exemplar of Joint Combined Arms Maneuver', *Small Wars Journal*, https://smallwarsjournal.com/jrnl/art/turkey%E2%80%99s-operation-euphrates-shield-an-exemplar-of-joint-combined-arms-maneuver; Orwa Ajjoub and Matt H.C.K Williams, 'Crushing Rojava: Turkey's War in Syria', *The Conflict Archives* (23 October 2019), http://theconflictarchives.com/news/2019/10/23/crushing-rojava-turkeys-war-in-syria.

[75] Anne Peters, 'The Turkish Operation in Afrin (Syria) and the Silence of the Lambs', *EJIL: Talk!* (30 January 2018), https://www.ejiltalk.org/the-turkish-operation-in-afrin-syria-and-the-silence-of-the-lambs/; Stefano Marinelli, 'The Use of Force of Turkey in Rojava after the Capture of Afrin: Consequences for International Law and for the Syrian Conflict', *International Law Blog: Fresh Perspectives on International Law* (26 March 2018), https://internationallaw.blog/2018/03/26/the-use-of-force-of-turkey-in-rojava-after-the-capture-of-afrin-consequences-for-international-law-and-for-the-syrian-conflict/; Orwa Ajjoub and Matt H.C.K Williams, 'Crushing Rojava: Turkey's War in

The final operation, Operation Peace Spring, began on 9 October 2019 to eradicate the terrorist threat.[76] The Turkish authorities justified the operations as self-defence measures against Islamic State[77] and the Kurdish militants in Syria, which would ensure Turkey's continued existence and security by clearing terrorists from the region.[78]

In its last statement, Turkey stated that the ultimate goal of Operation Peace Spring, which was launched 'in the face of multi-dimensional terror threats emanating from Syria against our national security, [was] to ensure the security of our borders, to neutralise terrorists in the region and to save the Syrian people from the oppression of terrorists… The operation [was] being conducted on the basis of international law, in accordance with our right of self-defence under Article 51 of the UN Charter and resolutions of the UN Security Council on the fight against terrorism.'[79] This last point inevitably raises the key conceptual question of whether aggression or an armed attack was valid as the main *ad bellum* criterion which allowed Turkey to use force in self-defence.

4.2. Self-Defence Against Imminent Armed Attacks

There are particularly distinct reasons that have compelled Turkey to use force against the Kurdish fighters in northern Syria, especially under Operation Peace Spring. According to the decision (2018/3775 E., 2018/5600 K),[80] made by the Sixteenth Criminal Division of the Court of Cassation (Supreme Court of Appeals of Turkey), Islamic State and the PKK/YPG/PYD have organised numerous terrorist attacks against Turkey.[81] The major ones are listed below.

> *a) Terrorist attacks launched by Islamic State:* Bomb attack in Sultanahmet (6 January 2015); bomb attack on the People's Democratic Party (Halkların Demokratik Partisi (HDP)) in Adana and Mersin (18 May 2015); the Suruç attack (20 July 2015); the Ankara explosion (10 October 2015); the Taksim attack (19 March 2016); the Gaziantep Şehitkâmil attack (1 May 2016); the Atatürk Airport attack (28 June 2016); the attack on a wedding in Gaziantep Şahinbey District (20 August 2016), and the Ortakoy Reina armed attack (1 January 2016).[82]

Syria', *The Conflict Archives* (23 October 2019), http://theconflictarchives.com/news/2019/10/23/crushing-rojava-turkeys-war-in-syria.

[76] Bethan McKernan, 'Turkey Launches Military Operation in Northern Syria', *The Guardian* (9 October 2019), https://www.theguardian.com/world/2019/oct/09/turkey-launches-military-operation-in-northern-syria-erdogan. For a discussion, see Vito Todeschini, 'Turkey's Operation "Peace Spring" and International Law', *Opinio Juris* (21 October 2019), http://opiniojuris.org/2019/10/21/turkeys-operation-peace-spring-and-international-law/.

[77] Anne Peters (2018), above no 75.

[78] Identical Letters dated 20 January 2018 from the Chargé 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, UN Doc. S/2018/53 (22 January 2018). For further discussion, see Anne Peters (2018), above no 75.

[79] Press Release Regarding Certain Comments in the International Community on Operation Peace Spring, No: 297, Republic of Turkey Ministry of Foreign Affairs (11 October 2019), http://www.mfa.gov.tr/no_297_-baris-pinari-harekati-ni-hedef-alan-yorumlar-hk.en.mfa. See also Ahmet S. Yayla and Colin P. Clarke, 'Turkey's Double ISIS Standard', *Foreign Policy* (12 April 2018) https://foreignpolicy.com/2018/04/12/turkeys-double-isis-standard/; Vito Todeschini (2019), above no 76.

[80] Türkiye Cumhuriyeti, Yargitay 16. Ceza Dairesi, Esas No: 2018/3775, Karar No: 2018/5600 (31 December 2018), at 10, https://karararama.yargitay.gov.tr/YargitayBilgiBankasiIstemciWeb/.

[81] See generally, Saeed Bagheri, *International Law and the War with Islamic State: Challenges for Jus ad Bellum and Jus in Bello* (Hart Publishing, 2021), at 63-65.

[82] Türkiye Cumhuriyeti, Yargitay 16. Ceza Dairesi (2018), above no 80. See also Sarah Almukhtar et al., 'Wave of Terror Attacks in Turkey Continue at a Steady Pace', *New York Times* (5 January 2017), https://www.nytimes.com/interactive/2016/06/28/world/middleeast/turkey-terror-attacks-bombings.html.

b) Terrorist attacks launched by the PKK/YPG/PYD: the Sabiha Gökçen Airport attack (23 December 2015); the Ankara Military Service vehicle attack (18 February 2016); the Ankara Kizilay attack (13 March 2016); the Beşiktaş attack (10 December 2016), and the Kayseri attack (17 December 2016).[83]

More specifically, the Court of Cassation has considered Islamic State and the Kurdish groups active in both Turkey and Syria to be equal in terms of their political ideologies and their threat to Turkey's national security and stability. Having compared the facts of the two sets of cases, the Court emphasised that the PKK, PYD, YPG, and Kurdistan Freedom Hawks or Teyrebazen Azadiya Kurdistan (hereafter, TAK) are the same for Turkey since they pursue the common goal of creating a self-governing Kurdish state through organising terrorist attacks against Turkey in the northwest of the country. The same ideology regarding Islamic State and al-Qaeda could be determined as being the same as that of the PKK, YPG, PYD and TAK. In that sense, the above-mentioned terrorist attacks are all claimed to be cumulative attacks against Turkey. In its letter dated 9 October 2019 to the UN Security Council, Turkey notified the Council that:

> *The PKK/PYD/YPG units [as well as Islamic State] close to Turkish borders in the north-east of Syria, continue to be a source of direct and imminent threat as they opened harassment fire on Turkish border posts, by also using snipers and advanced weaponry such as anti-tank guided missiles.*[84]

Having released this statement, the justifications propounded by Turkey bring two crucial arguments to the forefront regarding the legality of the intervention in northern Syria. Initially, it appears that the most controversial point in the letter is the imminent threat allegation, which scholars have often criticised as an invalid argument for justifying the use of force in self-defence. This issue has also divided the UN member states. They have explicitly disagreed about whether they have the right to use anticipatory armed force to defend themselves against imminent threats and whether they have the right to use it preventively to defend themselves against latent or non-imminent threats.[85]

Note in that regard that Turkey has expressed its concerns, saying that the weapons given by the US to the YPG to use against Islamic State in Syria are ultimately finding their way to the PKK for use against Turkey[86] due to the weakness of Islamic State in Syrian territory.[87] However, even if the authorising

[83] Türkiye Cumhuriyeti, Yargitay 16. Ceza Dairesi (2018), above no 80.

[84] Letter dated 9 October 2019 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council, above no 29. For further discussion, see Dennis Schmidt, 'Turkey's Syria Invasion: German Research Report Says Illegal on All Counts', *Just Security* (15 November 2019), https://www.justsecurity.org/67219/turkeys-syria-invasion-german-research-report-says-illegal-on-all-counts/; Vito Todeschini (2019), above no 76; Saeed Bagheri (2021), above no 81, at 23.

[85] See UNGA, 'In Larger Freedom: Towards Development, Security and Human Rights for All', Report of the Secretary-General, UN Doc. A/59/2005 (21 March 2005), paras. 122-126.

[86] Ahmet Topal, 'YPG Terrorists Sell US Weapons for Profit', *Daily Sabah* (12 June 2018), https://www.dailysabah.com/war-on-terror/2018/07/13/ypg-terrorists-sell-us-weapons-for-profit; Tuvan Gumrukcu, 'Turkey Says U.S. Support for Syrian Kurdish YPG a "Big Mistake"', *Reuters* (18 November 2018), https://www.reuters.com/article/us-mideast-crisis-syria-turkey-usa-idUSKCN1NN09I; Kareem Shaheen, 'US Decision to Arm Kurds in Syria Poses Threat to Turkey, Says Ankara', *The Guardian* (10 May 2017), https://www.theguardian.com/world/2017/may/10/ankara-calls-us-arming-of-kurds-fighting-isis-in-syria-a-threat-to-turkey.

[87] As reported by the Office of the UN High Commissioner for Human Rights (OHCHR), the aforementioned groups have been accused of the extrajudicial execution of multiple civilians, intimidation, ill-treatment, killing, kidnapping, looting and seizure of property, and the operations have displaced thousands of civilians. Following their disproportionately violent operations in northern Syria, the UN Office for the Coordination of Humanitarian Affairs (OCHA) expressed deep concern regarding the human suffering in northern Syria and urged all parties to exercise restraint and to act in line with their obligations under the UN Charter advocating the protection of civilians and civilian infrastructure. See Rupert Colville, 'Press Briefing Note on Syria', *OHCHR* (11 October 2019), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25129&LangID=E. See also UNSC, Turkey's

factors mentioned above robustly justify Turkey's position in using force against the YPG and Islamic State as a last resort, its military response needs to have complied with the basic requirements of self-defence, including necessity and proportionality, contained in Article 51 of the UN Charter as the core principles of international law regulating *jus ad bellum*. As the ICJ reaffirmed in the *Nicaragua* case, the lawfulness of any response to an attack depends on the observance of these criteria.[88] Otherwise, any form of military operation in self-defence that does not respect the mentioned conditions might be regarded as a violation of Article 2(4) of the UN Charter.

By itself, an imminent attack is one where the attacker has committed a particularly aggressive course of action that they will not desist from unless there was some kind of intervention in the causal chain, such as using force in self-defence.[89] For this reason, the UN Secretary-General's report based on the High-Level Panel Report on Threats, Challenges, and Change offers an objective and verifiable basis for the use of force against imminent threats when it states that:

> *The language of [Article 51] is restrictive… However, a threatened state, according to long-established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate*.[90]

However, this is still problematic, and the major challenge is what kind of threat might be considered equivalent to an imminent attack[91] and what criteria indicate imminence?[92] There remains a contradiction since the wording of Article 51 is ambiguous, and it is not clear to what extent it prohibits the adverse effects of the use of force in self-defence against armed non-state actors based in another state's territory. Article 51 remains open to reckless and broad interpretations, which might be inconsistent with the primary objective of the right of self-defence – ensuring the national security, territorial integrity, and political independence of states against aggressions and armed attacks. However, it seems unlikely that the broad interpretation of Article 51 can change the ordinary meaning of using armed force in self-defence. As Haque has rightly pointed out, the vast majority of parties to

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Military Operation Has Displaced Thousands of Civilians, Worsened Syria's Dire Humanitarian Crisis, Top Official Warns Security Council, 8645th Meeting (PM), UN Doc. SC/13994 (24 October 2019), https://www.un.org/press/en/2019/sc13994.doc.htm; Martin Chulov, 'Syria: Videos of Turkey-Backed Militias Show Potential War Crimes', *The Guardian* (26 October 2019), https://www.theguardian.com/world/2019/oct/26/syria-turkey-arab-videos-torture-kurdish-bodies-militia; OCHA, 'Humanitarian Chief Concludes Visit to Ankara and Turkey/Syria Border' (11 October 2019), https://www.unocha.org/story/humanitarian-chief-concludes-visit-ankara-and-turkeysyria-border. See also UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/44/61 (2 July 2020), at 109-111.

[88] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986), above no 6, para. 194. See also Saeed Bagheri (2021), above no 81, at 65.

[89] See Marko Milanovic, 'The Soleimani Strike and Self-Defence Against an Imminent Armed Attack', *EJIL: Talk!* (7 January 2020); https://www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack/; George H. Brandis QC, 'The Right of Self-Defence Against Imminent Armed Attack in International Law', *EJIL: Talk!* (25 May 2017), https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/.

[90] UNGA, A More Secure World: Our Shared Responsibility - Report of the High-Level Panel on Threats, Challenges and Change: Note by the Secretary-General. Follow-up to the Outcome of the Millennium Summit, UN Doc. A/59/565 (2 December 2004), at 188, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/602/31/PDF/N0460231.pdf?OpenElement.

[91] For an extended discussion of this issue, see Chris O'Meara (2022), 'Reconceptualising the Right of Self-Defence against 'Imminent' Armed Attacks, *Journal on the Use of Force and International Law*, at 10-26; George Brandis (2017), 'The Right of Self-Defense against Imminent Armed Attack in International Law', *Australian Yearbook of International Law* 35, at 55-66; Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, AI-Qaida, and Iraq', *San Diego International Law Journal* 4, at 10; Derek W. Bowett, *Self-Defence in International Law* (Praeger, 1958), at 187-192.

[92] For further discussion, see David Kretzmer (2013), 'The Inherent Right to Self- Defence and Proportionality in Jus Ad Bellum', *European Journal of International Law* 24(1), at 235-282; Daniel Bethlehem (2012), 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors', *American Journal of International Law* 106(4), at 770-777; Dapo Akande and Thomas Liefländer (2013), above no 11, at 563-570.

the UN Charter have said and done nothing to establish an agreement with broad interpretations of Article 51 to justify the use of armed force against the threat of armed non-state actors in foreign territories.[93] This, in itself, reduces the weight of subsequent state practice as a supplementary means of interpreting the UN Charter.[94]

Precisely, the use of force is legally permitted only where there is aggression or an armed attack against the state. This *ad bellum* criterion needs to be met as the central pillar of the right to self-defence under the UN Charter. According to the ICJ, only the gravest forms of the use of force constitute an armed attack, which can trigger self-defence.[95] That said, less grave forms of an armed force or a series of low-scale attacks will not be answerable by lawful self-defence even though they violate Article 2(4) of the UN Charter.[96] A complex problem, however, remains due to the lack of a clear definition of 'armed attack'. The issue should be rather whether the attack produced serious consequences, epitomised by territorial intrusions, human casualties, or considerable destruction of property.[97] This is, perhaps, a threshold for using force in self-defence, according to which Turkey has relied on the *ad bellum* criteria by explicitly considering certain actions as armed attacks. This is, of course, an elementary point but not a matter that is of central importance in this case. Turkey already believes that an armed attack has occurred or is imminent. More importantly, the armed force may be used in self-defence only when it is necessary to end or avert an armed attack. In doing so, therefore, all peaceful means of ending or averting the attack must have been exhausted or be unavailable. On this basis, Turkey might rely on the right to use armed force on Syrian territory if the attacks have crossed the threshold and peaceful means of ending or averting the attack have been exhausted.[98] Turkey has justified its military operations in Syrian territory in its letter to the UN Security Council by referring to Resolutions 2170 (2014) and 2178 (2014) where it has characterised Islamic State's cross-border terrorist actions as armed attacks, reaffirming that Turkey is under a clear and imminent threat of continued attack.[99] This is, however, a matter of controversy simply because Islamic State's sporadic attacks have not substantiated Turkey's claim of an armed attack, and it is difficult to equate them to the gravest uses of force.[100]

What is true, however, is that Turkey has directly operated and justified its military operations under the *ad bellum* rules due to the lack of certain definitions of armed attack under *jus ad bellum*. This has allowed Turkey to benefit from the ambiguity of the definition of both an armed attack and an imminent attack as it relates to anticipatory self-defence in response to an imminent armed attack as a controversial form of pre-attack self-defence.[101] While, on the one hand, the ICJ has left open the issue

[93] See Adil Ahmad Haque, '"Clearly of Latin American Origin": Armed Attack by Non-State Actors and the UN Charter', *Just Security* (5 November 2019), https://www.justsecurity.org/66956/clearly-of-latin-american-origin-armed-attack-by-non-state-actors-and-the-un-charter/. For further discussion, see Duncan B. Hollis (2005), 'Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law', *Berkeley Journal of International Law* 23(1), at 137-174; Monica Hakimi (2015), 'Defensive Force Against Non-State Actors: The State of Play', *International Law Studies* 91, at 1-31; Olivia Flasch (2016), 'The Legality of the Air Strikes against ISIL in Syria: New Insights on the Extraterritorial Use of Force against Non-State Actors', *Journal on the Use of Force and International Law* 3(1), at 37-69.

[94] Adil Ahmad Haque (2019), above no 93.

[95] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986), above no 6, para. 191; *Case Concerning Armed Activities on the Territory of the Congo* (2005), above no 8, para. 147. See also Anne Peters (2018), above no 75; Stefano Marinelli (2018), above no 75.

[96] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986), above no 6, para. 191.

[97] See Yoram Dienstein (2012), above no 3, at 208.

[98] See, e.g., *Case Concerning Oil Platforms* (2003), above no 11, para. 64; *Case Concerning Armed Activities on the Territory of the Congo* (2005), above no 8, para. 146.

[99] See Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council, above no 17.

[100] See *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986), above no 6, para. 191.

[101] See generally, Leo Van Den Hole (2003), 'Anticipatory Self-Defence Under International Law', *American University International Law Review* 19(1), at 69-106; Ashley S. Deeks, 'Taming the Doctrine of Pre-Emption', in Mark Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2016), at 661-678.

of the lawfulness of self-defence against the threat of an imminent armed attack,[102] it has been the consistent position of the UNGA and some member states that imminent threats are fully covered by Article 51 of the UN Charter, which safeguards the inherent right of sovereign states to defend themselves against the attack.[103] Lawyers have long recognised that this covers imminent attacks and attacks that have already happened.[104] This has also been the position of the UK, US, and many other states over the years that self-defence against an imminent armed attack is lawful under international law,[105] which is also supported by some scholars.[106]

For the sake of this manuscript, however, this writer is of the view that existing international law does not offer strong guidelines on the use of force in anticipatory self-defence against the threat of an imminent armed attack by armed non-state actors, as discussed earlier. It certainly cannot be disputed that the current manifestations of the use of force by armed non-state actors with or without the support of a state call for a liberal construction of the requirement of armed attack in Article 51 of the UN Charter, where states facing existential threats from such elements are to be in the position to defend themselves. It is impossible, however, to turn a blind eye to the dangers of allowing a state, from its unilateral assessment and determination of 'imminent threat', to breach the territorial integrity of another state in the guise of acting in self-defence. This is the position of the ICJ in the *DRC v. Uganda* case, under which the Court has rejected an expansion of the right of self-defence to include a right to anticipatory self-defence against the threat of an armed attack by armed non-state actors.[107] Having said this, Turkey has moved beyond the purpose of Article 51 of the UN Charter simply because nothing in Article 51 addresses military intervention, a unilateral invasion, or occupation of a foreign territory as measures against threats of armed non-state actors.

5. CONCLUSION

To address the Turkish practice in the implementation of the law on the use of force, this article explored the current debates on *jus ad bellum* to bring clarity to the lawfulness of Turkey's extraterritorial self-defence operations. First, it was discussed that the Turkish military intervention in Syria is an extension of its constitutional approach to *jus ad bellum*, where it has relied on both self-defence and treaty-based justifications for military intervention in foreign territories. In other words, we have seen that Turkey has relied on two basic scenarios in justifying the use of armed force in Syrian territory. The first was

[102] See *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (1986), above no 6, paras. 35 and 194; *Case Concerning Oil Platforms* (2003), above no 11, paras 61-64 and 72; and *Case Concerning Armed Activities on the Territory of the Congo* (2005), above no 8, para. 143.

[103] On this issue, for the views of scholars who concur with the ICJ's position, see Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963), at 231–280; Olivier Corten, *The Law Against War* (Hart Publishing, 2010), at 198-248; Oscar Schachter (1984), 'The Right of States to Use Armed Force', *Michigan Law Review* 82(5), at 1620-1646; Noam Lubell, Extraterritorial Use of Force Against Non-State Actors (Oxford University Press, 2010), at 67-80; James A. Green (2015), 'The Ratione Temporis Elements of Self-Defence', *Journal on the Use of Force and International Law* 2(1), at 106.

[104] See UNGA, 'In Larger Freedom: Towards Development, Security and Human Rights for All', Report of the Secretary-General, UN Doc. A/59/2005 (21 March 2005), para. 124, https://www.refworld.org/docid/4a54bbfa0.html.

[105] Daniel Bethlehem (2012), above no 92, at 771.

[106] See Michael N. Schmitt (2003), 'Bellum Americanum Revisited: U.S. Security Strategy and the Jus ad Bellum', *Military Law Review* 176, at 378; Mark L. Rockefeller (2004), 'The Imminent Threat Requirement for the Use of Preemptive Militar Military Force: Is It Time for a Non-Temporal Standard', *Denver Journal of International Law & Policy* 33(1), at 133; Christopher Greenwood (2003), 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', *San Diego International Law Journal* 4(1), at 12-13.

[107] *Case Concerning Armed Activities on the Territory of the Congo* (2005), above no 8, para. 143. For a discussion, see Stephanie A. Barbour and Zoe A. Salzman (2008), '"The Tangled Web": The Right of Selfdefense Against Non-State Actors in the Armed Activities Case', *New York University Journal of International Law and Politics* 40(3), at 81-83.

the use of force in line with bilateral treaties signed between Turkey and Syria. It was, however, explained that none of the given treaties allows unilateral measures against armed non-state actors in the territory of the contracting party. The key point in that regard was that both the *Adana Security Agreement* and the *Joint Cooperation Agreement* require only a 'joint operation' in case of a terrorist attack by any violent armed group. This was precisely the reason why Turkey has then relied on the use of force in self-defence under Article 51 of the UN Charter and asserted in line with the unwilling or unable theory as the second scenario, alleging that Syria has not fulfilled the conditions of the given treaties. Therefore, the state of necessity has emerged, and Turkey has the right to take necessary measures against armed non-state actors present on Syrian territory.

However, as explained earlier, this writer is of the view that Turkey has moved beyond the purpose of both the bilateral treaties and Article 51 of the UN Charter simply because nothing in either the given treaties or Article 51 of the UN Charter addresses military intervention, a unilateral invasion, or occupation of Syrian territory as measures against imminent threats of armed non-state actors. Concerning Article 92 of the Turkish Constitution, which considers the use of force in cases deemed legitimate by international law, Turkey must exercise that right responsibly in compliance with its general obligations under conventional and customary international law. Recall that in this context, states may use armed force only in response to an armed attack and that there is no evidence in existing international law to support anticipatory self-defence against the threat of an imminent armed attack by armed non-state actors in foreign territories. Indeed, the broad interpretation of Article 51 cannot change the ordinary meaning of using armed force in self-defence.

It was also discussed that Turkey's approach to extraterritorial self-defence against armed non-state actors present in foreign territories is problematic simply because the Turkish Armed Forces have moved beyond the *ad bellum* criteria as they have resorted to indiscriminate force against attacks stemming from particular parts of Syrian territory invaded by the Turkish Armed Forces.

Finally, this article has sought to show that Turkey's military presence in northern Syria based on the *Adana Security Agreement* has lost legitimacy as the primary objective of the agreement is to repel the advances of terrorist groups across Turkish borders. Since Turkey has already repelled the Kurdish and Islamic State fighters by seizing control of a buffer zone some 30 to 35 km deep, the continued presence on Syrian territory is contrary to the main purposes of the Adana Security and the *Joint Cooperation Agreement*. A continued military presence on Syrian territory would, therefore, be considered a violation of Syria's territorial integrity, usurping the authority of the Syrian government within its borders. In other words, military presence on a territory not fully sanctioned by valid agreement is a criterion that can help identify military occupation.[108]

In sum, given that the exclusive purpose of self-defence actions is to halt and repel an armed attack, seizing control of part of Syria and the consequent displacement of local civilians may be an example of excessive force[109] used by Turkey.

[108] See Adam Roberts (1984), 'What Is Military Occupation', *British Yearbook of International Law* 55(1), at 249-305; Eyal Benvenisti, *The International Law of Occupation* (Oxford University Press, 2012); David J. Scheffer (2003), 'Beyond Occupation Law', *American Journal of International Law* 97(4), at 842-860.

[109] James A. Green and Christopher P.M. Waters (2015), 'Military Targeting in the Context of Self-Defence Actions', *Nordic Journal of International Law* 84(1), at 11. For an extended analysis, see James A. Green, *The International Court of Justice, and Self-Defence in International Law* (Hart Publishing, 2009), at 66-96.