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**SELF-DEFENSE AGAINST NON-STATE ACTORS IN  
AFGHANISTAN AND SYRIA**

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I hereby declare that I have compiled the thesis/paper independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading. The document length is 11644 words from the introduction to the end of the conclusion.

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## **Abstract**

This research analyzes the contested right of self-defense against non-state actors in the cases of U.S' intervention in Afghanistan and Turkey in Syria, as well as the significance of the justifications put forward in these cases for the evolution of customary international law. The questions of the circumstances under which actions of non-state actors can be attributable to a state in order to justify the use of force within that state's territory by the victim state, have been under debate for long. The issue of state attributability and self-defense against non-state actors assumed heightened importance in the wake of the 9/11 attacks and have again later only risen in topicality with the rise of the terrorist organization ISIS.

With the rise of conflicts involving non-state actors, and the scale of the attacks they are able to carry out, their significance has majorly risen in the contemporary international security environment. As the UN Charter based security system and international law are traditionally designed for wars among states, efforts to overcome the threats of the 'new wars' have been constrained, which has then led to a situation where armed interventions can be argued to be justified, even when they are not legitimate.

As the right to self-defense against non-state actors based on either of the justifications put forward by the U.S. and Turkey; the 'harboring' or 'unwilling or unable' doctrines, both broaden the scope of the traditional understanding of the exception to the jus cogens rule of prohibition of the use of force, the circumstances in which the justification have been put forth warrant an examination. As well as the international response to the justifications and the operations, and the significance for the evolution of customary law. The acceptance of these doctrines as part of customary law would cause a major shift from the previous stricter interpretation of the right to self-defense, with possibly unwanted results in state practice.

**Keywords:** International law, Jus ad bellum, non-state actors, Afghanistan, Syria, self-defense

## Introduction

International law on the use of force, as established by the UN Charter following the second World War, has focused on preventing a great power war among the primary actors of international relations at the time, states. In the recent decades however, the significance of non-state actors has risen in conflicts, although they have existed before, the gravity of the attacks carried out by non-state actors has risen to levels comparable to traditional national armies; attacks by ISIS and those of 9/11 have caused conflicts with non-state actors not to be regarded as just matters of states internal affairs anymore. The efforts to overcome the problems caused by these “new wars” have been constrained by the international law and UN’s collective security system, which are designed for wars among states. This situation has opened the door for unilateral interventions bypassing and undermining the UN Charter and international humanitarian law.<sup>1</sup> A question of the applicability of the right to self-defence as established in the UN Charter art. 51 and international customary law, against non-state actors, has been raised, and the debate remains inconclusive. Nevertheless, state practise has recognized this justification for the use of force and the number of different unilateral interventions has been on the rise.

The aim of this research is to, through examining the self defense against non state actors justification for the use of force in cases of U.S. in Afghanistan and Turkey in Syria, to gain understanding of the role of the mentioned justification in the changing security environment. To gain understanding of the significance of these interventions for the evolution of international customary law is crucial due to the fact that allowing state practice to limit the scope of peremptory norms such as of the prohibition on the use of force, can seriously undermine international law and the collective security efforts of the United Nations Security Council based on the UN Charter. As state practice and *opinion juris* are crucial in the evolution of customary international law, examining the state practice and the international response in the context of the self-defense against non-state actors-justification in Afghanistan and Syria, can the precedential value of the interventions for the evolution of international law and the position of the mentioned legal justification, be studied. In doing so, a research question is raised regarding self-defense against non-state actors: is it a legitimate

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<sup>1</sup> von der Schulenburg, M. (2020). Michael von der Schulenburg: The Era of Armed Non-State Actors – Void in International Law

and necessary justification for the use of force in the new security environment or rather an attempt to broaden the justifications for the use of force outside the scope of art. 51 of the UN Charter and the Security Council's authorization?

The cases of the U.S. in Afghanistan and Turkey in Syria are chosen as case studies, since the former has had a significant role in the development of international customary law on this matter, as will be demonstrated later in the thesis, and the latter, due to the fact that the chaos of the Syrian civil war has warranted a number of self-defense claims for military interventions by foreign powers, out of which Turkey, as the neighboring country, would logically seem to have a legitimate security threat claim. This research paper is conducted through qualitative analyses of primary, secondary and tertiary sources relating to the topic, as well as of the relevant international law, since the issue at hand is best described through documentary analysis and legal-historical-political analysis of previous work on the topic as well as legal analysis of the relevant law on the matter. The main research method used is document analysis, as data from primary sources is examined and interpreted to gain understanding and elicit meaning of the issue at hand.<sup>2</sup>

This thesis consists of first, preliminary analysis of the right to self defense in general and against non-state actors with the purpose of establishing the background to and the framework of the debate of the legitimacy of the justifications put forward in the cases of Afghanistan and Syria. The specific circumstances of the U.S. led intervention in Afghanistan, the question of self defense and that of the Taliban as a non state actor will then be discussed, as well as the international response to the intervention, followed by the outcome of the intervention from the point of view relevant to the research question. The third part of the research will examine Turkey's intervention into Syrian civil war, the legitimacy of the self defense against non state actors-justification in this context, international response, and the outcome of the conflict from the international law point of view. The final part of the research will focus on the issues of the broadening of the scope of right to self defense as illustrated by the cases examined. Finally, the findings of this research will be concluded in the last chapter.

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<sup>2</sup> Bowen, G. A. (2009). Document analysis as a qualitative research method. *Qualitative research journal*.

# 1. Use of force in international law

The Charter of the United Nations (UN Charter) article 2 (4) states that all member states must refrain in their foreign affairs from resorting to use of force or to the threat of it against the territorial integrity or political sovereignty of any state, or in any other manner against the purposes of the United Nations. Only two exceptions exist to the prohibition of the use of force, self-defense as prescribed in art. 51 of the UN Charter and art. 42, which permits use of force with the authorization of the UN Security Council.<sup>3</sup> The prohibition of the use of force can be understood as arising from both treaty law and customary rule.<sup>4</sup> It is predominantly uncontested that the prohibition of the use of force enjoys *jus cogens* status, therefore no deviation is permitted.<sup>5</sup> If looking at treaty-based law, art. 2 (4) is comprehensive in its language, therefore also imposing a complete prohibition.<sup>6</sup> The prohibition of the use of force also prohibits the doctrine of armed reprisal as a justification to use force to constrain a state to resume compliance with its international obligations.<sup>7</sup> Use of force is therefore, comprehensively banned in international law, with the only two mentioned exceptions.

## 1.1 Self-defense in international law

Art. 51 of the UN Charter states that “Nothing in present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...”, it also stipulates that any acts of self-defense must be reported to the Security Council. This inherent right of self-defense is part of customary international law,<sup>8</sup> and has the status of *jus cogens*.<sup>9</sup> Art. 51 binds the right to use force in self-defense to the occurrence of an “armed attack”. This means that for any claim to use

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<sup>3</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI  
Accessible: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

<sup>4</sup> Corten, O. (2021). *The law against war: the prohibition on the use of force in contemporary international law*. Bloomsbury Publishing.

<sup>5</sup> Weller, M., Solomou, A., & Rylatt, J. W. (Eds.). (2015). *The Oxford Handbook of the use of force in international law*. Oxford University Press.

<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Byers, M. (2002). Terrorism, the use of force and international law after 11 September. *International & Comparative Law Quarterly*, 51(2), 401-414.

<sup>9</sup> Kretzmer, D. (2013). The inherent right to self-defence and proportionality in *jus ad bellum*. *European Journal of International Law*, 24(1), 235-282

force in self-defense to be legitimate, there needs to be an armed attack taking place, or according to the doctrine of anticipatory self-defense, an armed attack must be imminent.<sup>10</sup> For an armed attack to be “imminent”, all actions needed to launch the attack need to have been completed, so that the attack could possibly take place without further actions besides the actual launching of the attack, and there needs to be clear evidence of this attack.<sup>11</sup> The doctrine of anticipatory self-defense against an imminent threat is widely, but not universally accepted.<sup>12</sup>

Armed attack itself is not defined in the Charter, but the International Criminal Court (ICC) has in its case law established that an armed attack as according to art. 51 giving rise to the right to use force in self-defense, cannot be a “mere frontier incident”. In its Nicaragua judgement, the Court made a distinction between “most grave forms of the use of force” constituting an armed attack as per art. 51, and “other less grave forms”.<sup>13</sup> It should be mentioned however, that the Courts demand for the force used to meet a threshold of gravity to be regarded as an armed attack has not been universally accepted.<sup>14</sup> In the Nicaragua judgement it was also established that an armed attack does not just merely include actions taken by the regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to, (inter alia) an actual armed attack conducted by regular forces, or its substantial involvement therein.”<sup>15</sup>

Art. 51 does not define the content of the right, yet still prerequisites and limitations to it can be found in customary and case law. Besides the scale of force, other additional factors need to be considered: the target of the attack; the identity of the attacker; the military nature of the attack; and the attribution of the attack to the state against which force in self-defence is to be employed. The legality of force used in self-defense also depends on the principles of necessity, proportionality, and the criteria of immediacy.<sup>16</sup> For the use of force as self-defense

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<sup>10</sup> Supra Nota 5

<sup>11</sup> Supra Nota 5

<sup>12</sup> Wilmschurst, E. (2006). The Chatham House Principles of International Law on the Use of Force in Self-Defence 1. *International & Comparative Law Quarterly*, 55(4), 963-972.

<sup>13</sup> Yusuf, J. A. A. (2012). The notion of ‘Armed Attack’ in the Nicaragua judgment and its influence on subsequent case law. *Leiden Journal of International Law*, 25(2), 461-470.

<sup>14</sup> Supra Nota 9

<sup>15</sup> Supra Nota 13

<sup>16</sup> Supra Nota 9

to suffice the criteria of necessity, it must be the last resort after all possible peaceful means have been exhausted.<sup>17</sup> The criteria of immediacy can be seen as an aspect of the principle of necessity, since it requires that there is no time to pursue non-forcible measures to stop the attack, hence the necessity of self-defense. The principle of necessity is also linked to the principle of proportionality, seeing that it restricts the use of force in self-defense to the elimination of the attack.<sup>18</sup> Defensive use of force must therefore be limited to what is necessary to stop or prevent the attack. The principle of proportionality also requires that the force used in self-defense, considering the whole defensive operation, must not be excessive in relation to the attack and the harm caused by it.<sup>19</sup> In addition to the proportionality requirement of use of force in jus ad bellum, any actions taken by the State practicing self-defense must comply with jus in bello, and therefore also the principle of proportionality of international humanitarian law (IHL).<sup>20</sup>

When a state claims self-defense in the face of an ongoing attack against it, the primary and legitimate goal of the defensive force used is the halting and repelling of the attack. In the case of self-defense when the attack is already completed before the victim state could respond to it, or in the case of an imminent armed attack, any use of defensive force will inevitably be forward-looking.<sup>21</sup> Different motives for forward-looking use of force after the initial attack has been completed can be reprisal or punishing the attacker, preventing further attacks or deterrence.<sup>22</sup> Reprisals, traditional acts of self-help of a victim state in response to a prior violation of international law by another state in order to enforce compliance, are condemned in United Nations General Assembly's Resolution 2625.<sup>23</sup> As far as acts of self-defense go, those of which motive is purely retributive are not accepted, even though retribution is likely present as a partly motivation for almost all cases of use of force as self-defense.<sup>24</sup>

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<sup>17</sup> Gardam, J. (2004). *Necessity, proportionality and the use of force by states* (Vol. 35). Cambridge University Press.

<sup>18</sup> Supra Nota 12

<sup>19</sup> Supra Nota 12

<sup>20</sup> Supra Nota 9

<sup>21</sup> Supra Nota 9

<sup>22</sup> Supra Nota 9

<sup>23</sup> Darcy, Shane, *Retaliation and Reprisal* (2012). OXFORD HANDBOOK ON THE USE OF FORCE, Marc Weller, ed., Oxford University Press, 2013

<sup>24</sup> Supra Nota 9

The language of art. 51 reserves the right to self-defense for states, the party attacking however, may in reality be a state or a non-state actor. The wording of art. 51 leaves the status of the attacker open, a fact which has opened the door for possible interpretations of a non-state actor being regarded as an attacker. Non-state actors and the right to use force as self-defense against them will be discussed next.

## **1.2. Non-state actors**

Since the end of the cold war the global security environment has changed, interstate warfare is rare and different threats to national security have emerged as more dominant. The most notable threats to state security and integrity are now increasingly non-state in nature. National armed forces are faced almost exclusively against the threat of non-state actors, operating within and beyond state borders. Additionally, almost all foreign military interventions have been in armed conflicts to which non-state actors are a party.<sup>25</sup> Traditionally when talking about non-state actors in international law, they are regarded to be armed insurgent groups or terrorists, but non-state actors can refer to any actor in international relations that are not states. This encompasses individuals as well as entities, out of which most possess some form of legal capacity in international law, as opposed to states, which possess full legal capacity.<sup>26</sup> For the purpose of this paper, international organizations, corporations, non-governmental organizations, and other non-state actors alike shall be ignored, as focus is on armed non-state actors.

Armed non-state actors have been defined as “any armed group, distinct from and not operating under the control of, the state in which it carries out military operations, and which has political, religious, and/or military objectives.”<sup>27</sup> This definition also characterizes the armed non-state actors in both Afghanistan and Syria. Armed non-state actors are generally formed around common identities, be that ideological, religious, ethnic, or social, and often weaken the government’s authority. This tendency leads to a cycle of violent non-state actors emerging out of states where the government’s authority is weak, particularly its monopoly

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<sup>25</sup> von der Schulenburg, M. (2020). Michael von der Schulenburg: The Era of Armed Non-State Actors-Risks of Global Chaos.

<sup>26</sup> Wagner, M. (2009). Non-State Actors.

<sup>27</sup> Bellal, A., Giacca, G., & Casey-Maslen, S. (2011). International law and armed non-state actors in Afghanistan. *International Review of the Red Cross*, 93(881), 47-79.

on the use of force, leading to non-state actors further undermining the already weak governments.<sup>28</sup> This tendency is also visible in both, Afghanistan, and Syria.

This change from traditional interstate wars to conflicts involving non-state actors, often capable of violence comparable to that of regular armed forces, has highlighted the state-centric approach of the contemporary law on use force, created after the second World War with the devastation of the great power wars in mind. This has led to collective security efforts` limited capacity in solving conflicts to which non-state actors are a party to, and therefore enabled unilateral interventions becoming more common.<sup>29</sup> The rise of unilateral and other armed interventions circumventing the UN Charter and international humanitarian law as it stands,<sup>30</sup> warrants an examination of first, the legality and legitimacy of self-defense against non-state actors in *lex lata* as well as *lex ferenda*, the latter specifically in contexts of Afghanistan and Syria. The standing of the self-defense against non-state actors –justification for use of force in international law as it stands, will be discussed next.

### **1.3 self-defense against non-state actors**

As discussed, the increased number of conflicts where non-state actors are involved in, has raised the issue of whether the right to self-defense is also applicable in the case of an attack by a non-state actor. Article 51 does not specify that the armed attack must be conducted by a state, it only speaks of an armed attack which must take place, for the right to use defensive force to be applicable. For an armed attack to give rise to the right of self-defense as per art. 51, it must be directed from outside the victim state`s territory. This view is reflected in the ICJ`s Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.<sup>31</sup> In this Advisory Opinion the Court held that the Israel`s claim of self-defense as the basis for the building of a separation barrier, was not legitimate, as Israel did not claim that the attacks, from which the wall was supposed to protect it from, had originated from or were attributable to another state.<sup>32</sup> It is, therefore, the extraterritorial right to self-defense against non-state actors, which is subject to debate.

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<sup>28</sup> Supra Nota 2

<sup>29</sup> Supra Nota 1

<sup>30</sup> Supra Nota 1

<sup>31</sup> Supra Nota 12

<sup>32</sup> Supra Nota 9

The Advisory Opinion on the Legal Consequences of the Construction of a Wall gave the impression that only an armed attack by another state would trigger the right to self-defense, although the Court was not unanimous. It has been argued that the Advisory Opinion does not explicitly imply that self-defense can be invoked only in cases of armed attack by another state.<sup>33</sup> In the Nicaragua case, the ICJ had previously found that the right to self-defense could be triggered by attacks by non-state actors, given that they receive state support. In this judgement the Court held that the notion of an “armed attack” by non-state actors triggering the right to self-defense, is linked to the close cooperation of the state with the non-state actor, as well as to the fact that the gravity of the attack is similar to that of an attack by regular armed forces.<sup>34</sup> In ICJ’s more recent decision in *Armed Activities in the Congo*, the question of the right to self-defense against non-state actors in contemporary international law was left open, as well as under what conditions such right might be applicable, if at all.<sup>35</sup> The Court’s unwillingness to clarify the scope of art. 51 in *Armed Activities* could be interpreted as creating an opening for parting from its previous state-centered understanding of an armed attack in the future, however, it must not be interpreted as including non-state actors into the scope of art. 51 as *lex lata*.<sup>36</sup> As will be illustrated later, this ambiguity of the United Nations System on the matter, as will be shown, have contributed to the situation where the scope of the right of self-defense are, at least attempted, to be stretched by state practice.

Arguably, the view of non-state actors as being capable of launching an armed attack as per art. 51, changed with the 9/11 attacks, and the consequent Security Council Resolutions seemingly confirming the possibility of attacks by non-state actors having the same character and a level of intensity that was traditionally available to be reached by traditional military means only.<sup>37</sup> However, the Resolutions adopted following the 9/11 attacks did not explicitly make that conclusion.<sup>38</sup> State practice has also recognized the right to self-defense against

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<sup>33</sup> Supra Nota 9

<sup>34</sup> Supra Nota 8

<sup>35</sup> Supra Nota 9

<sup>36</sup> Starski, P. (2015). Right to Self-Defence, Attribution and the Non-State Actor–Birth of the ‘Unable and Unwilling’ Standard?. *Heidelberg Journal of International Law [ZaöRV]*(2015), 455-501.

<sup>37</sup> Supra Nota 4, 24.

<sup>38</sup> Myjer, E. P., & White, N. D. (2002). The Twin Towers Attack: An Unlimited Right to Self-Defence?. *Journal of Conflict and Security Law*, 7(1), 5-17.

non-state actors.<sup>39</sup> A question whether self-defense against non-state actors is legitimate even without a link between the state from whose territory the attack was launched from and the non-state actor, still remains. It is evident that even if the defensive use of force is only targeted at the non-state actor, it compromises the territorial integrity of the state on whose territory the non-state actor operates. It has been proposed that such violation of a host states territorial integrity is justifiable with the “unwilling or unable” test; if the state “harboring” the non-state actor is unable or unwilling to prevent the attacks from being launched out of its territory, the victim state may resort to self-defense. This still controversial test would then provide for the right to self-defense even without having to establish a link between the host state and the non-state actor, other than that the harboring state is not capable or willing to take actions to prevent the attack.

This view was present in Turkey`s justifications for the use of force against non-state actors as self-defense in Syrian territory without the consent of the recognized government of the country. In the joint US and British intervention into Afghanistan, self-defense against non-state actors was given as a justification, and it was also held that the Taliban regime, as not the internationally recognized government, but the regime de facto in power in Afghanistan, was also responsible for the 9/11 attacks, given its the close relationship to Al Qaida.<sup>40</sup> These interventions in Afghanistan and Syria, will be further discussed next with the aim of understanding how their justifications of self-defense against non-state actors fits in the legal framework established here and further how they have shaped customary law on this matter, starting with the formerly mentioned.

## **2. US intervention in Afghanistan**

After the attacks on World Trade Center twin towers and Pentagon on September 9<sup>th</sup>, 2001, the U.S. launches a bombing campaign in Afghanistan with British support on October 7<sup>th</sup>. The early phase of Operation Enduring Freedom involves mainly air campaigns, and later

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<sup>39</sup> Van Steenberghe, R. (2010). Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?. *Leiden Journal of International Law*, 23(1), 183-208.

<sup>40</sup> Lehto, M. (2018). The Fight against isil in Syria. Comments on the Recent Discussion of the Right of Self-defence against Non-state Actors. *Nordic Journal of International Law*, 87(1), 1-25.

conventional ground forces as well, although most of the fighting on the ground is between Taliban and its local opponents. In the first year of the conflict the U.S-UK coalition and the local opponents of Taliban, the Northern Alliance are successful in their fight and take cities such as Kabul.<sup>41</sup>

In 2003 the U.S Secretary of Defense states that “major combat” has come to an end in Afghanistan and in 2004 a new Afghan constitution is adopted, seen as a positive sign for the country`s democratic development.<sup>42</sup> With the presidency of Obama, more troops are sent to Afghanistan and the strategy is changed to dismantling and defeating Al-Qaeda safe heavens in Pakistan, where their leader Osama bin Laden is believed to have escaped to. Bin Laden is killed in 2011 in Pakistan by US Forces, and this raises the question of should the war in Afghanistan be continued.<sup>43</sup> In 2011, ten years after the war began, Obama announces a troop withdrawal plan where troops would be withdrawn by 2014, he also announces that the U.S. has begun preliminary peace talks with the Taliban. In 2014, a timetable is announced for the withdrawal of US troops by the end of 2016.<sup>44</sup>

Trump`s presidency signals a prolonged war in Afghanistan, as he aims to prevent the emergency of a “vacuum for terrorists” in Afghanistan with military commitment. However, at the same time peace talks progress, and in 2021 President Biden announces a plan for full withdrawal by September 11<sup>th</sup>. Taliban then takes over the country facing only little resistance. In August 2021 during the chaotic withdrawal, 13 US service members are killed, with The Islamic State in Khorasan claiming responsibility. U.S. retaliated with an air strike targeting the suspected offenders, killing ten civilians, out of which seven were children.<sup>45</sup> Questions also have risen about the rapid Taliban take over following the U.S. withdrawal,<sup>46</sup> as well as questions of the more than 2,300 dead and more than 20,000 wounded US military personnel and at least half a million dead or wounded Afghans after 20 years of war,<sup>47</sup> just for Afghanistan to end up in the hands of Taliban yet again.

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<sup>41</sup> Council on Foreign Relations. *The U.S. War in Afghanistan*, Retrieved from <https://www.cfr.org/timeline/us-war-afghanistan> , 12.05.2022

<sup>42</sup> Ibid

<sup>43</sup> Supra Nota 41

<sup>44</sup> Supra Nota 41

<sup>45</sup> Eichensehr, K. E. (2022). United States Grapples with Aftermath of Withdrawal from Afghanistan. *AMERICAN JOURNAL OF INTERNATIONAL LAW*, 116(1), 190-197.

<sup>46</sup> Ibid

<sup>47</sup> Malkasian, C. (2020). How the Good War Went Bad: America's Slow-Motion Failure in Afghanistan. *Foreign Aff.*, 99, 77.

## 2.1. self-defense in Afghanistan

The attack, consisting of four hijacked planes, two hitting the World Trade Center, one Pentagon and one crashing in Pennsylvania, killing nearly 3000,<sup>48</sup> were a terrorist attack of an unprecedented scale. However, even if the attacks are regarded as having the `scale and effect` to count as an armed attack and not as ‘less grave forms of violence’ as per the Nicaragua judgement, a substantial involvement of Taliban in the attacks need to be established to justify armed countermeasures against Afghanistan.<sup>49</sup>

Following the 9/11 attacks, US issued an ultimatum; Taliban, the de facto government of Afghanistan, should hand over Al Qaeda leaders and shut down their bases in Afghanistan. As the Taliban did not comply, US and its allies went to war.<sup>50</sup> On the same day as the first bombing campaign was launched in Afghanistan, The U.S. representative to the United Nations informed the Security Council that the U.S. was invoking its right to self-defense as per art. 51, stating that: “My Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks ... and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation.” In the report, the U.S. also reserved the right to broaden the scope of their self-defense: “we may find that our self-defence requires further actions with respect to other organizations and other States.”<sup>51</sup> In the report submitted to the UNSC, the U.S.’ view of Taliban harboring and supporting Al Qaeda, creating the needed link between the state and the non-state actors for the attack to amount to an armed attack, is visible. This view of Taliban-Al Qaeda cooperation is also supported by the fact that the UNSC had previously insisted on several occasions that the Taliban must stop harboring and providing training camps for Al Qaeda, hand over Osama bin Laden, as well as to take appropriate measures to ensure the territory under its control was not to be used for preparation of terrorist attacks.<sup>52</sup>

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<sup>48</sup> Hartig, H., Doherty, C. (2021). *Two Decades Later, the Enduring Legacy of 9/11*, Accessible: <https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11/>, 12.05.2022

<sup>49</sup> Supra Nota 38

<sup>50</sup> Dinstein, Y. (2009). Terrorism and Afghanistan. *International Law Studies*, 85(1), 4.

<sup>51</sup> Smith, B., & Thorp, A. (2010). The legal basis for the invasion of Afghanistan. *House of Commons Library SN/IA/5340*, 26.

<sup>52</sup> Ibid

In the light of these facts, the question of the right to self-defense against non-state actors in the case of Afghanistan is an easier one, as there is arguably a close link between the State represented de facto at the time by Taliban, and the non-state actor. In the case where the attack is attributed to a state, the right to self-defense is not as controversial as self-defense against non-state actors acting alone without significant state involvement,<sup>53</sup> however, it is not indisputable.

The prior understanding of state responsibility for armed attacks by non-state actors as per the Nicaragua judgement required that they would have to be sent by the state or act on its behalf. Since the 9/11 attacks, the question of state responsibility seems to have shifted from a narrower standard of `sending on its behalf` to a standard which can be interpreted more broadly; `harboring` of the non-state actor.<sup>54</sup> This view is visible in the ultimatum the U.S. issued to the Taliban, which reflects an understanding of the Taliban not explicitly sending Al Qaeda on its behalf but enabling its activities on the Afghan territory.

It is notable that the U.S. could have in addition to its self-defense justification tried to justify its military actions with other legal justifications.<sup>55</sup> Other possible legal justifications could have included intervention by invitation or humanitarian intervention, the latter was cited as a justification by the UK, (U.S.'s ally in Afghanistan) in Iraq in 1991 and Kosovo in 1999.<sup>56</sup> Notable is also the reservation of the possibility to use force in self-defense against other organizations or states, besides Taliban and Al Qaeda, who U.S. blamed for the attacks. It could be argued that the U.S. took the opportunity provided by the 9/11 attacks to establish a new precedent of the previously stricter understanding of the right to self-defense against non-state actors in customary law, as now including a broader understanding of a state harboring terrorists being a legitimate target of self-defense.<sup>57</sup> This view can be supported by the fact that the U.S. did not wait for the UNSC authorization for its use of force, but instead, secured a wide international support, including the invocation of the collective defense art 5 of the NATO treaty and the equivalent article of the Inter-American Treaty of Reciprocal Assistance, without them even the being called to engage in military action.<sup>58</sup> The accepting

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<sup>53</sup> Supra Nota 9

<sup>54</sup> Supra Nota 40

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<sup>56</sup> Supra Nota 8

<sup>57</sup> Supra Nota 8

<sup>58</sup> Supra Nota 8

international response would later prove to be a significant factor in the precedential value of the U.S' response to the 9/11 attacks.

## 2.2 international response

The U.S' claim of self-defense was not condemned by the Secretary General of the UN at the time, Kofi Annan, who in his speech on October 8<sup>th</sup>, 2001, acknowledged that states have the right to self-defense.<sup>59</sup> This view of acknowledging the inherent right to self-defense, but at the same time not explicitly stating that such right is applicable in the case of Afghanistan, is also visible in the UNSC resolutions adopted as a result of the 9/11 attacks. Overall U.S's claims of self-defense met very little opposition internationally, and the launching of attacks against Taliban and Al-Qaida in Afghanistan was widely accepted.<sup>60</sup> The U.S's claim of self-defense under art 51. against Al-Qaeda and the Taliban regime harboring it was accepted by the majority of UN Members including China and Russia, with only Iran and Iraq challenging the legality of the operation.<sup>61</sup> Therefore, the possible attempt by the U.S. to shape customary law, derived from the practice and opinions of states,<sup>62</sup> seems successful as far as the acceptance of the state practice in this specific circumstance goes. The ambiguity of the consequent UNSC Resolutions would also add to the precedential value of the operation, as they could be interpreted to, at least seemingly, endorse self-defense in the case of the 9/11 attacks.

## 2.3 UNSC Resolutions

The UNSC resolutions adopted following the attacks only generally recognize the right to self-defense in the case of an armed attack, but do not explicitly determine that the attacks amounted to an armed attack.<sup>63</sup> It is a notable fact in this context, that the UNSC did adopt such resolutions confirming the occurrence of an armed attack in the case of Iraq invading

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<sup>59</sup> Rose, L. M. (2002). US Bombing of Afghanistan Not Justified As Self-Defense Under International Law. *Guild Prac.*, 59, 65.

<sup>60</sup> Scharf, M. P. (2013). *Customary international law in times of fundamental change: Recognizing Grotian moments*. Cambridge University Press.

<sup>61</sup> Ruys, T., & Verhoeven, S. (2005). Attacks by private actors and the right of self-defence. *Journal of Conflict and Security Law*, 10(3), 289-320.

<sup>62</sup> Supra Nota 8

<sup>63</sup> Supra Nota 38

Kuwait in 1990.<sup>64</sup> Resolution 1368 condemned the attacks, expressed “its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001”, and gives general authorization to bring those responsible to justice, however it does not clearly state who or how.<sup>65</sup> The Security Council also asserted its primary responsibility on matters of international peace and security.<sup>66</sup> In resolution 1373 the UNSC listed the non-violent actions that all states must take against terrorism, gave general authorizations on state actions against terrorist attacks and reaffirms the right to self-defense again and the requirement to act in accordance with the Charter.<sup>67</sup> The Resolutions 1368 and 1373, did not contain the authorization to use force, but they ‘recognized ‘and `reaffirmed` the inherent right to self-defense, and can therefore be interpreted to endorse the use of force in self-defense.<sup>68</sup> The U.S. however, did not seek the authorization of the UNSC, a fact which can be seen in the act of actually launching the defensive attacks on the same day as notifying the UNSC of the invocation of the right to self-defense. Therefore, the significance of the Resolutions could be argued to be in adding to the legitimacy of the self-defense and its international acceptance, rather than recognizing the right to self-defense against non-state actors beyond the specific situation and circumstances in which they were adopted.<sup>69</sup>

## **2.4 Restrictions to the inherent right of self-defense**

Even if the justification of self defense against non-state actors in Afghanistan was accepted by the international community and not explicitly accepted neither condemned by the UNSC, the inherent right to self defense faces restrictions in international law. The legality of self-defense in Afghanistan in *jus in bello* is beyond the scope of this thesis, but the tests of proportionality, necessity and immediacy also plays a role in *jus ad bellum*. As far as proportionality goes, it could be argued that considering the UNSC Resolutions, if understood to regard the 9/11 attacks as armed attacks and not as ‘less grave forms of violence’, as per the Nicaragua judgement, the threshold of an armed attack would be met, and self-defense would be a proportional response. The international response to the self-defense would also support this view. For self-defense to meet the criteria of necessity, it should be the last resort

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<sup>64</sup> Supra Nota 38

<sup>65</sup> Supra Nota 51

<sup>66</sup> Supra Nota 51

<sup>67</sup> Supra Nota 51

<sup>68</sup> Supra Nota 40

<sup>69</sup> Supra Nota 40

after all peaceful means have been exhausted. In this regard, it can be argued that the ultimatum the U.S. issued to Taliban to hand over Al-Qaeda, before launching the attacks in Afghanistan, could be seen as the attempt to resolve the conflict by peaceful means.

The principle of necessity, however, as far it is linked to proportionality in that it restricts the use of force to the elimination of the attack,<sup>70</sup> would not have been met in the case of use of defensive force after the first attack has been completed. The only legitimate reason for the use of force in self-defense is to end or avert the attack.<sup>71</sup> It is universally accepted that the notion of self-defense does not apply to use of force behind which the motivation is purely retributive.<sup>72</sup> Reprisals are forceful measures carried out after the act which they are responding to have been completed and they have no connection with protection from the initial attack.<sup>73</sup> Retaliation and reprisals do not fit within the scope of the self-defense justification for use of force, and would therefore need the authorization of the UNSC.<sup>74</sup> It can be questioned whether the attacks carried out by the U.S. in self-defense, almost exactly a month after the initial attacks, actually fell within the scope of ending or averting the attack. It could even be claimed that the operation in Afghanistan was a reprisal, as far as it was a forceful measure carried out after the act which they are responding to have been completed, and they have no connection with protection from the initial attack. If the operation in Afghanistan was to be regarded as a reprisal, the lack of authorization of the UNSC for the use of force would have made it illegal in international law.

## **2.5 Significance for the evolution of International law**

Legal rules are not perpetually fixed and can evolve over time. The evolution of jus as bellum is essentially a process driven by the subjects of the law, states.<sup>75</sup> Conventionally, customary international law evolves slowly over decades, but sometimes transformative world events, also called Grotian moments, have the ability to shape customary international law quite rapidly.<sup>76</sup> In the aftermath of the 9/11 attacks, it was argued that the Charter based security

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<sup>70</sup> Supra Nota 12

<sup>71</sup> Supra Nota 12

<sup>72</sup> Supra Nota 9

<sup>73</sup> Supra Nota 9

<sup>74</sup> O'Connell, M. E. (2018). The Popular but Unlawful Armed Reprisal. *Ohio NUL Rev.*, 44, 325.

<sup>75</sup> Ruys, T. (2010). *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Vol. 74). Cambridge University Press.

<sup>76</sup> Scharf, M. P., Sterio, M., & Williams, P. R. (2020). *The Syrian Conflict's Impact on International Law*. Cambridge University Press.

system was not able to deal with these new threats of the twenty first century, such as transnational terrorism.<sup>77</sup> Given this and the fact that customary law is derived from the practice and opinions of states, the post 9/11 political climate would, therefore have been favorable for any possible new formulations of the understanding of the right to self-defense in customary law.

U.S's self-defense claim included the Taliban, and therefore it was closer to the existing understanding of the right to self-defense, as the target of use of force was not solely operating within the territory of a state whose territorial integrity was about to be compromised with the self-defense, but a link was established between the two. By broadening the claim of self-defense to include the state, the U.S. had a better change in securing international support.<sup>78</sup> International support for the self-defense operation was overwhelming, despite the fact that the connection between Taliban and Al-Qaeda did not meet the Nicaragua threshold of state involvement.<sup>79</sup> With the wide international acceptance of the U.S's countermeasures to the attacks, the contested scope of right of self-defense could now be said to include defensive use of force against states which harbor or actively support non-state actors carrying out attacks from the territory of that state.<sup>80</sup> Therefore, the acceptance could have said to have loosened the threshold of state involvement needed for the exercise of legitimate self-defense, as established in ICJ case law, from substantial state involvement to the doctrine of 'harboring', or that the previous understanding of 'substantial involvement' would have come to encompass the acts of 'harboring' or 'aiding and abetting' of the non-state actor carrying out an attack.<sup>81</sup>

In the past claims of self-defense against states which lend passive support, as opposed to active support, to the non-state actor carrying out the attack had been met with condemnation in the international community,<sup>82</sup> but with the 9/11 attacks and the consequent UNSC Resolutions as well as the support for the military operation in Afghanistan the situation had

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<sup>77</sup> Supra Nota 75

<sup>78</sup> Supra Nota 8

<sup>79</sup> Ruys, T. (2009). The intangible 'armed attack': Evolutions in Customary Practice pertaining to the Right of States to Self-defence under Article 51 UN Charter.

<sup>80</sup> Supra Nota 8

<sup>81</sup> Supra Nota 79

<sup>82</sup> Cenic, S. (2007). State Responsibility and self-defence in international law post 9/11: Has the scope of Article 51 of the United Nations Charter been widened as a result of the US response to 9/11?. *Australian International Law Journal*, (14), 201-216.

changed. It is notable that it was not the first time the U.S had used the justification of a state harboring non-state actors, but it was the first time that such self-defense claim was met with wide international support.<sup>83</sup> This could be taken as telling of the desire of the U.S to broaden the scope of the right for its own security interests.

It has also been argued that the wide international acceptance of the operation in Afghanistan did not imply a change in the existing customary law but was merely the only imaginable response given the shock value of the attacks, and should therefore be regarded as acceptance of the self-defense in this specific and unique situation and not as acceptance of the loosening of the prohibition of the use of force in general.<sup>84</sup> This view would be supported by the examples of the U.S. and Israel claiming self-defense in the years soon after 2001, on the basis that a state is harboring terrorists, as these claims were met with condemnation by many states in the international community.<sup>85</sup> Nevertheless, taking in account the fact that in its letter to the UNSC the U.S. did not simply claim that the Taliban regime is harboring Al-Qaeda, but claimed to have found evidence that the former actively supported the latter (a claim which, once proven, would have brought the self-defense claim close to the higher threshold of attributability to the state), and that the language of harboring was chosen to be used instead, taken together with the possible sympathy factor of the international community, the U.S. can be argued to have seized the moment to establish its claims of self-defense in Afghanistan as acceptable and therefore having loosened the legal limitations on the use of force.<sup>86</sup>

Whether 9/11 and the operation in Afghanistan changed the existing interpretation of the state involvement threshold needed for legitimate self-defense claims, cannot be immediately seen after the fact. A change in customary law warrants an examination of state practice beyond the circumstances of the operation in Afghanistan. State practice regarding self-defense against non-state actors since the 9/11 has been inconsistent, and similar claims as that of the U.S. in Afghanistan, have been rejected.<sup>87</sup> Over a decade after the U.S. claimed self-defense in Afghanistan, similar claims of self-defense against non-state actors launching attacks from within a sovereign state, were used in the context of the Syrian civil war. This time however,

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<sup>83</sup> Supra Nota 82

<sup>84</sup> Supra Nota 79

<sup>85</sup> Supra Nota 82

<sup>86</sup> Supra Nota 82

<sup>87</sup> Supra Nota 40

the legal debate has departed from the traditional frame of state attributability with regard to the attacks carried out by non-state actors, to whether one can justify extraterritorial self-defense with the mere unwillingness or inability of the host state to prevent non-state actors carrying out attacks.

### 3. Turkey`s intervention in Syria

In the context of the chaotic Syrian civil war creating instability, a flow of refugees and a power vacuum filled with different non-state actors in northern Syria, Turkey sees it necessary to get directly involved, as it sees the situation near its border as a security dilemma.<sup>88</sup> Turkey fears that the creation of a Kurdish autonomy in Syria might ignite further separatist aspirations in its own Kurdish minority, and therefore it is in Turkey`s interest to prevent Syria from being divided among the different parties to the conflict, specifically the Kurds in Northern Syria. The non-state actors active in Northern Syria include the Syrian Democratic Forces (SDF), which consists of Syrian Kurds supported by Arab militia groups, as well as the Islamic State of Iraq and Syria (ISIS).<sup>89</sup> Turkey sees the SDF as an extension to the Kurdistan Workers Party or PKK, a Kurdish militant political organization which has been fighting a bloody fight for Kurdish autonomy in Turkey for decades, and which Turkey sees as a terrorist organization.

Turkey`s military involvement in Syria has been ongoing since 2016 and has involved three major military interventions into the territory of Syria. Operations Euphrates Shield, Olive Branch and Peace Spring were military operations Turkey launched into the territory of Syria, with the goals of securing the national border, eliminate the threat of terrorism posed by the non-state actors,<sup>90</sup> to prevent the formation of a Kurdish autonomous zone along the border and to push the Kurds south,<sup>91</sup> and finally, to establish a “safe zone” in Northern Syria, where

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<sup>88</sup> Costea, Cătălin Alin. *Euphrates Shield: An analysis of Turkey`s intervention in Syria*. International Scientific Conference Strategies XXI. The Complex and Dynamic Nature of the Security Environment – Volume 1, Romania, pp. 47-48

<sup>89</sup> Supra Nota 87

<sup>90</sup> Kokkonen, Yrjö. (2016). *Tausta: Miksi Turkin joukot tunkeutuivat Syyriaan ja mitä hyökkäyksellä tavoitellaan?* Yle Uutiset. August 30. Accessible: <https://yle.fi/uutiset/3-9130726>, 12.05.2022

<sup>91</sup> Yesiltas, Murat. (2018). *Turkey`s Strategic Reasoning behind Operation Olive Branch*. Seta Perspective. January. Accessible: [https://setav.org/en/assets/uploads/2018/01/34\\_Perspective.pdf](https://setav.org/en/assets/uploads/2018/01/34_Perspective.pdf), 12.05.2022

Turkey's Syrian refugees would be moved.<sup>92</sup> With its operations Turkey was successful in occupying Kurdish held territories and resettling some of the millions of Syrian refugees in Turkey, back to Syria.<sup>93</sup> In 2020 a cease fire was announced<sup>94</sup>, but fighting has still continued.<sup>95</sup>

### 3.1 Self-defense in Syria?

Turkey claims it is exercising its right to self-defense as according to art. 51 UN Charter, on the basis that Kurdish forces near its border use harassment fire and therefore pose a "direct and imminent threat".<sup>96</sup> However, the harassment fire Turkey is referring to is hard to verify and unlikely to reach the threshold of gravity needed to reach the status of an "armed attack" as per art. 51.<sup>97</sup> The ICJ has, as mentioned, established in its case law that "mere frontier incidents" do not amount to an armed attack justifying the use of force in self-defense. It would be hard to claim that the harassment fire Turkey claims to be a victim of would amount to the "most grave forms of the use of force", as per the Nicaragua judgement.

Additional justifications put forward by Turkey include the imminent and direct terrorist threat posed by the Kurdish fighters and the right to self defense against non-state actors, and as such they are not generally accepted in international law.<sup>98</sup> For Turkey's claims of self-defense to be legitimate, it must have been in response to an imminent armed attack by a feasible actor, and further for the operations establishing a "safe zone" to be legitimate, they must have been a necessary and proportionate measure to defend Turkey from the attack.<sup>99</sup> For the purpose of this thesis, only the legitimacy of the self-defense against non-state actors

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<sup>92</sup> Reuters Staff. (2018). *Turkey says nearly 300,000 Syrians return home after military operations*. Reuters. December 22. Accessible: <https://www.reuters.com/article/us-mideast-crisis-syria-turkey-idUSKCN1OL0BI> , 12.05.2022

<sup>93</sup> Pärssinen, Minna. Saarikoski, Jyrki. Kankkonen, Tom. (2019). *Venäjän presidentin Vladimir Putinin mukaan Turkki voi jatkaa operaatiotaan "turvallisuusvyöhykkeellä" Syyriassa – Venäjä ja Turkki suunnittelevat yhteisiä partioita*. Yle Uutiset. October 22. accessible: <https://yle.fi/uutiset/3-11031230> , 12.05.2022

<sup>94</sup> Demirtas, Serkan. (2020). *Turkey launches Operation Spring Shield*. Hurriyet Daily News. March 02. Accessible: <https://www.hurriyetaidailynews.com/opinion/serkan-demirtas/turkey-launches-operation-spring-shield-152580> , 12.05.2022

<sup>95</sup> Aslan, Dilara. (2021). *Assad regime, Russia knowingly targeted Idlib hospital, sources say*. Daily Sabah. March 23. Accessible: <https://www.dailysabah.com/politics/assad-regime-russia-knowingly-targeted-idlib-hospital-sources-say/news> , 21.05.2022

<sup>96</sup> Ghraïne, B. N. (2020). *The Syrian safe zone and international law*. *Policy Brief, Institute of International Relations Prague, Centre of international Law*.

<sup>97</sup> Ibid

<sup>98</sup> Ibid

<sup>99</sup> Hagemann, Tim. *Limitless Self Defence? Turkey's invasion of Northern Syria in light of Art. 51 UN Charter*. u:Polis. Accessible: <https://u-polis.com/?view-article=26> , 12.05.2022

claim will be further discussed, although the necessity and proportionality of the operations beyond the actual launching of the defensive attacks are also crucial factors in examining the legitimacy of the operations as a whole.

### **3.2 self-defense against non-state actors in Syria**

Turkey claims that the terrorist threat of the non-state actors in northern Syria justifies its operations as self-defense as per art. 51 and has used language which frames its operations within UNSC war on terror network,<sup>100</sup> as the Security Council has called to respond to the threat of terrorism by “all necessary measures” in its Resolutions.

Following the launch of Operation Peace Spring in October 2019, the Turkish Minister of Defense claimed the operation to have been carried out on the grounds of the right to self-defense and that: “Our aim is to put an end to the presence of terrorists in east of River Euphrates, especially Daesh, PKK/PYD/YPG, and to institute a peace corridor to provide the return of our Syrian brothers to their homelands.”<sup>101</sup> From the minister’s remarks it can be concluded that Turkey does not differentiate between the different non-state actors in Syria, but categorizes the Kurds of the PKK, PYD and YPG in the same category as Daesh (or ISIS); as terrorists who pose a threat to Turkey. The PYD, or the Democratic Union Party is a Kurdish political party in Syria, and the YPG, or the People’s Protection Units, is the military force of the SDF. Turkey sees the YPG and PYD as PKK affiliates and hence categorizes them as terrorist organizations.

This view contradicts with the fact that the PYD/YPG has been an ally of the U.S. in fighting ISIS in Syria and has even been provided with training and material support.<sup>102</sup> This fact could be seen as challenging the validity of the Turkish claims, as the Kurds have proved themselves perhaps the most effective fighters against ISIS in Syria and have attained wide international sympathy for it. If Turkey claims self-defense against non-state actors in the context of the UNSC supported response to international terrorist threats, it would be contradictory to target actors allied on the same side. Turkey has a long-standing claim of the

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<sup>100</sup> Cirkovic, E. (2016). Exceptionality and context: Turkish intervention in Syria and the war on terror.

<sup>101</sup> Hürriyet Daily News. (2019) *Operation Peace Spring` enters third day, `neutralizes` 342 terrorists*, October 11. Accessible: <https://www.hurriyetdailynews.com/operation-peace-spring-enters-third-day-neutralizes-342-terrorists-147388>, 12.05.2022

<sup>102</sup> Acun, C. & Keskin, B., *The PKK’s Branch in Northern Syria: PYD-YPG*, SETA, (2017), at 23.

PKK and its affiliates as terrorist organizations. However, the UN does not recognize the PKK as a terrorist organization, nor is it mentioned in UNSC resolution 2249, adopted as a response to terrorist attacks in 2015, which names Al-Qaeda and ISIS, and calls upon member states to take all necessary measures against terrorist organizations posing a threat to the international peace and security.<sup>103</sup> Neither YPG nor the SDF are globally recognized terrorist organizations. Therefore, Turkey's claim of justifying its operations with the primary objective of fighting the YPG and SDF,<sup>104</sup> as fighting against international terrorism within the UNSC endorsed framework, is weak. Also, members of the International Coalition fighting against ISIS, which Turkey is part of, have condemned attacks targeting the Kurdish troops.<sup>105</sup>

In its letter to the UNSC Turkey claimed that Syria is “neither capable nor willing to prevent these threats.”, when referring to the threat posed by non-state actors in Northern Syria.<sup>106</sup> With its justification put forward in the letter, Turkey joined the U.S, Canada and Australia, who in their respective letters which also cite Syrian regime's unwillingness and it being unable to prevent terrorist activities emanating from its territory, as a justification for their self-defensive measures taken in Syria.<sup>107</sup> The “unwilling and unable” test, which would justify a military intervention in the case where the state from whose territory attacks are emanating from, is not capable or willing to prevent those attacks, is yet to be accepted as a doctrine of contemporary international law.<sup>108</sup> However, it gained popularity with the Syrian civil war, as a number of states issued similarly worded justifications for their operations in Syria.

Turkey's claims of the right to self-defense on the basis of the unwilling or unable test could be argued to be based on the Adana Agreement, a 1998 agreement between Turkey and Syria,

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<sup>103</sup> United Nations Security Council. Resolution 2249 (2015) 20. November. Accessible: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/384/13/PDF/N1538413.pdf?OpenElement> , 12.05.2022

<sup>104</sup> Supra Nota 91

<sup>105</sup> Hurriyet Daily News, (2016) *France criticizes Turkish military operations in Syria*, 30. August. Accessible: <https://www.hurriyetdailynews.com/france-criticizes-turkish-military-operation-in-syria-103393> , 12.05.2022 & Knight, B. (2019) *Germany caught between Turks and Kurds in Syria*, DW News, 9. October, Accessible: <https://www.dw.com/en/germany-caught-between-turks-and-kurds-in-syria/a-50762273> , 12.05.202

<sup>106</sup> United Nations Security Council. (2015) Doc. s/2015/563), accessible: [https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_2015\\_563.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_563.pdf)

<sup>107</sup> Supra Nota 40

<sup>108</sup> Couzigou, I. (2017). The Right to Self-Defence against Non-State Actors: Criteria of the ‘Unwilling or Unable’ Test. *Heidelberg Journal of International Law*, 1.

which recognizes the right of Turkey to intervene if it deems Syria unable or unwilling to prevent the SDF from operating on its territory.<sup>109</sup> However, as the prohibition on the use of force is *jus cogens*, no derogation is permitted through the operation of, for example treaty processes, to expand the existing exceptions. *Jus Cogens* prohibitions can never be narrowed.<sup>110</sup> Also, the Syrian regime has refused to recognize the Turkish intervention as legitimate and has said it would defend its sovereign territory from the “invasion”,<sup>111</sup> therefore eliminating the possibility of an intervention by invitation.

As regarding the PYD/SDF’s status as a non-state actor, it must be observed that although the territories as de jure Syrian, SDF has in Northern Syria build a de facto quasi state, with the power over the population. De-facto regimes are obligated by the prohibition of the use force as per art.2 (4) UN Charter and must therefore be a feasible target of the exercise of self-defense.<sup>112</sup> However, even if the Kurds in Northern Syria were regarded as a feasible target, additional criteria must be met: principles of necessity and proportionality would have to be satisfied for the operations to be legitimate. Further, even if the non-state actors de facto in control of the territory where the attacks are emanating from are seen as viable target of defensive use of force, for any claim of self-defense as according to art. 51 to be legitimate, an armed attack must be in action, or imminent. As discussed above, the harassment fire which Turkey is a victim of, unlikely meets the threshold of gravity needed for an armed attack as per the ICJ case law.

### 3.3 International response

Turkey, with its self-defense claim based on the Syrian government’s unwillingness or inability to prevent non-state actors from launching attacks from within its territory, joined a group of other states, including for example, the UK, the U.S, Germany, and Canada, who also cited self-defense based on the ‘unwilling or unable’ doctrine as a justification for their military involvement in Syria.<sup>113</sup> A lack of consensus on the legality and acceptability of the

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<sup>109</sup> (1999) *Minutes of the Agreement Signed by Turkey and Syria in Adana (Unofficial Translation)* Republic of Turkey Ministry Foreign Affairs. October 20. Accessible: <http://www.mafhous.com/press/50P2.htm> , 12.05.2022

<sup>110</sup> Supra Nota 74

<sup>111</sup> Cornish, C, Pitel, L, (2019) *Syria warns it will defend territory from Turkish advance*, Financial Times, October 11. Accessible: <https://www.ft.com/content/bf2d3564-ec01-11e9-a240-3b065ef5fc55> , 12.05.2022

<sup>112</sup> Supra Nota 99

<sup>113</sup> Supra Nota 99

doctrine remains, yet it has been argued that the self-defense justifications put forward to the UNSC by multiple states with regard to their operations in Syria show the current state practice, making the unwilling or unable doctrine not necessary a rule in customary law, but a firmly established norm.<sup>114</sup> However, with regard to Turkey's justification vis-à-vis the other states self-defense justifications for their operations in Syria, one major difference can be seen: Turkey's unwillingness to distinguish between the different non-state actors in Syria. Turkey's attacks targeting the Kurdish troops have been condemned by the international community<sup>115</sup> and therefore, its operations with the main objective of fighting the Kurdish troops in Northern Syria differ from the international coalition's operations targeting ISIS, even if both have put forward the same justifications. Therefore, even if claims of the Syrian regimes unwillingness or inability to prevent ISIS from operating from within the Syrian territory would be accepted as a legitimate justification for self-defense by the international community, this acceptance would not cover Turkey's operations as such.

### **3.4 Significance for the Evolution of International law**

As Turkey was not alone in citing self-defense as the justification for a military operation into Syria, the effect of it on the evolution of international law cannot be assessed independently of the whole context of the fight against international terrorism in Syria. Although a large number of states claimed unilateral or collective self-defense in Syria on the basis of the unwilling or unable doctrine, a larger number either critiqued it, or showed restraint in making use of the concept.<sup>116</sup> New formulations of customary international law, as understood as state practice and the subjective acceptance of that practice as law, cannot be established by the practice and opinion of for example, specific and powerful states only, or by the consensus of Western states. For state practice to be sufficiently widespread and representative to be regarded as the formation of a new rule of international customary law, a high number of states, more than half, and a vast majority, have been suggested as the threshold of concurring states needed.<sup>117</sup> Although the global fight against ISIS and the chaos of the Syrian civil war undoubtedly created a situation where international attention was

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<sup>114</sup> Bagheri, S. (2021). *International law and the war with Islamic State: challenges for Jus ad Bellum and Jus in Bello*. Bloomsbury Publishing.

<sup>115</sup> Supra Nota 105

<sup>116</sup> Nowak, C. (2018). The changing law of non-intervention in civil wars—assessing the production of legality in state practice after 2011. *Journal on the Use of Force and International Law*, 5(1), 40-77.

<sup>117</sup> Ibid

warranted, the 9/11 type of international sympathy possibly opening the door for new formulations of the scope of the right to self-defense did not raise its head.

Despite the lack of widespread state practice and *opinio juris* that is required for the establishment of customary international law, there seems to be a belief that the doctrine is now established as customary law, a view visible in government statements of certain states.<sup>118</sup> With the high number of states claiming self-defense against non-state actors, namely ISIS, in Syria, without substantial state involvement as the basis for the legitimacy, and some states (the U.S, Canada and Australia) explicitly claimed self-defense based on the unwilling or unable doctrine, some changes can be seen to have occurred in the material and rhetorical practices concerning the right to self-defense.<sup>119</sup>

While a number of states claimed self-defense against non-state actors in Syria with similar justifications to Turkey's; the fight against international terrorism and the unwillingness or inability of the Syrian government to stop these terrorists from operating within its territory and launching attacks, Turkey's operations are still quite different: they were mainly targeted at the Kurdish troops of Northern Syria. This difference of the target, for other states in Syria mainly or solely ISIS, and for Turkey the Kurds, is one reason why the widening the scope of the right to self-defense from substantial state involvement to more expansive understanding of state involvement, and then to reach attacks with no state attributability carried out by non-state actors, is a potentially dangerous path. The example of Turkey shows how the language used by many in the international community, justifying extraterritorial self-defense with the necessity to fight international terrorism when the host state is paralyzed by for example, a civil war, can be used to advance one's own political agenda. The issues and the possibilities of the evolution of customary international law on the right to self-defense, as illustrated by the cases of Syria and Afghanistan, will be further discussed next.

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<sup>118</sup> Martin, C. (2019). Challenging and refining the unwilling or unable doctrine. *Vand. J. Transnat'l L.*, 52, 387.

<sup>119</sup> Brunnée, J., & Toope, S. J. (2018). Self-defence against non-state actors: are powerful states willing but unable to change international law?. *International & Comparative Law Quarterly*, 67(2), 263-286.

#### **4. Issues with the broadening the scope of the right to self defense**

The interventions into Afghanistan and Syria, although not universally accepted as having changed the understanding of the customary law on self-defense, have had an impact on the development of state practice and opinion. However, it is clear that state practice regarding the use of force in self-defense against non-state actors in cases of the host state 'harboring' or being 'unwilling or unable' to prevent it from launching attacks, has not been consistent. The international reaction to those claims of the U.S, however, shows a tendency towards authorizing the use of force in self-defense in response to attacks committed by non-state actors, even when the threshold of substantial state involvement as established by ICJ case law is not met as such. This self-defense claim may be asserted even more strongly if the evolution of customary law moves towards justifying self-defense in response to attacks carried out by non-state actors without state involvement beyond its unwillingness or incapacity of preventing them, like in the case of Syria.

As discussed earlier, the new security environment coupled with the UN Charter based collective security system unable to respond to the threats posed by non-state actors, has given rise to unilateral interventions circumventing the Charter and the UNSC. Although, new legal norms might be needed to combat the threats of the so called new wars, the situation where the existing system is inadequate in responding to them has opened the door for 'norm entrepreneurship', where certain states have tried to shape custom on the right to self-defense, for the purpose of pushing their own political agenda, be that the widening of the scope of the customary law based right to self-defense, or the legitimacy of an armed intervention for one's own political interests disguised in the language of more widely accepted 'war against international terrorism'. The lack of clarity of both harboring doctrine and the unwilling or unable test, provide room for self-serving claims.

The obvious issue with the acceptance of the 'harboring' or 'unwilling or unable' doctrines, is that they would broaden the traditional understanding of the right to self-defense exception to the jus cogens rule of prohibition of the use of force. This would undermine the Charter based security system and international law, especially the legal principles of sovereignty and

non-intervention.<sup>120</sup> Both doctrines and further issues of them being accepted universally as legal norms will be discussed next.

#### **4.1 The 'harboring' doctrine**

With the wide international acceptance of the U.S' self-defense in Afghanistan, the doctrine of harboring non-state actors, and this giving rise to the right of self-defense on the territory of that state, was generally accepted. With this acceptance, the U.S, or some other state, will be able to invoke the same justification again, even if the circumstances are less grave.<sup>121</sup> The arguable successful extension of the right to self-defense to include actions taken against states harboring non-state actors also raises issues of evidence and authority; how to decide on the sufficient evidence of state complicity, and further, would the requirement of reporting of self-defense to the UNSC be enough to prevent abuse of the doctrine, especially since a number of states most likely to be able to engage in such practice of self-defense are able to use their veto powers against resolutions against them.<sup>122</sup> Besides the mentioned issues, the acceptance of the harboring doctrine, even if it was just accepted in the specific circumstances of the 9/11 attacks and aided by the consequent exceptional international sympathy, the intervention into Afghanistan set in motion a significant loosening of the prohibition of the use of force,<sup>123</sup> and this can enable further formulations of even wider understanding of the right to use force in self-defense.

#### **4.2 The 'unwilling or unable' doctrine**

Acceptance of the use of force against the territorial integrity of a state based on its inability or unwillingness to prevent independent non-state actors from launching attacks from within the state territory, is a step even further from the traditional understanding of the scope of the right to self-defense, than that of the harboring doctrine. Where traditionally in international law, the failure to prevent the use of territory to attack another state would have given rise to state responsibility and the right to take countermeasures short of force, it would now trigger

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<sup>120</sup> Supra Nota 119

<sup>121</sup> Supra Nota 8

<sup>122</sup> Supra Nota 8

<sup>123</sup> Supra Nota 8

the right to use force in self-defense.<sup>124</sup> This obviously raises the same issues of sovereignty and non-intervention as the harboring doctrine. The unwilling or unable doctrine, if universally accepted, would lead to a situation where the ‘self-help’ of states in the form of unilateral interventions into states deemed just unable or unwilling, would undermine the UN system and the principle of non-use of force.<sup>125</sup>

Additionally, the unwilling or unable tests is problematic because it singles out states on the basis of relative capacity, even those states willing to take measures against the non-state actors operating within its territory, can be deemed unable, and therefore could be subjected to an armed intervention. It has been observed that this test has only been applied to states from the Global South and has been promoted by powerful Western States.<sup>126</sup> This can lead to a similar situation that that in Syria, where the recognized local government, entangled in brutal civil war on multiple fronts, would have to consent to an armed intervention based on the right to self-defense, or suffer from the intervention without its consent, even when the local government is fighting its own fight against the non-state actors, but deemed ‘unable’. Again, issues of evidence and authority raise their head, how to determine the inability of a state, and would this be up to the state claiming self-defense or perhaps the UNSC, in connection to the notification requirement of the right to self-defense?

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<sup>124</sup> Supra Nota 119

<sup>125</sup> Corten, O. (2016). The ‘unwilling or unable’ test: has it been, and could it be, accepted?. *Leiden Journal of International Law*, 29(3), 777-799.

<sup>126</sup> Supra Nota 119

## Conclusion

UN Charter based security system has been inadequate in responding to the ‘new threats’ of, for example, transnational terrorism, and this has led to a situation where unilateral interventions based on different and even loosened versions of the understanding of the right to self-defense, have been on the rise. The cases of Afghanistan and Syria show how justifications for the use of force in self-defense against non-state actors can depart from the previous stricter understanding of the right, and still gain wide international acceptance, or even when not, be disguised behind the language of other more easily accepted political justifications for interventions, and therefore, also claim to be legitimate despite the difference of the primary target.

Before the 9/11 attacks, and even up until the more recent attacks involving ISIS, there was considerable support for the idea that only attacks carried out by states or attributable to a state could give rise to legitimate self-defense, however, now it seems that more expansive understanding of state involvement has gained ground.<sup>127</sup> The U.S’ arguably opportunistic norm entrepreneurship in the wake of the attacks and the ‘Grotian moment’ of the international sympathy and understanding of use of force in the exceptional situation as well as the non-explicit UNSC Resolutions adopted as the response, paved the way for the broadening of the scope of self-defense from a stricter understanding of substantial state involvement to the mere harboring of non-state actors giving rise to self-defense claims. With the operation in Afghanistan the lowered threshold of state attribution giving rise to self-defense, is now widely accepted, even when the prolonged and arguably forward-looking operation raised questions of proportionality. With its justification for the intervention based on the right to self-defense, being accepted, the U.S, or another state using similar tactics, may be able to invoke the right again. The right to exercise self-defense against non-state actors in cases where the attacks cannot be attributable to the state however, remained contested.

With the chaos of the Syrian civil war and the attacks carried out by ISIS, a similar situation to that following the 9/11 attacks raised its head. States claiming self defense intervened into Syria, on the basis of the unwillingness and inability of the Syrian regime to prevent the

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<sup>127</sup> Supra Nota 119

operation of non-state actors on its territory, as well as the framework of the global fight against terrorism. Although the interventions in Syria, not least that of Turkey's, were not as widely accepted as the one in Afghanistan at the time, they still caused a shift in the material and rhetorical practices concerning the right to self-defense.<sup>128</sup> Even if the controversial unwilling or unable test is not widely accepted as a norm of customary international law, a view of the doctrine now being established as customary law is visible in government statements of certain states.<sup>129</sup> A potentially dangerous view, when considering the underlying motivations of the Turkish operations in Syria and the difference of the primary target, coupled with the justifications very similar to those of Western states', some of which are now advocating for their acceptance as customary law.

The acceptance of the broadening of the scope of the right to self-defense, would threaten to eviscerate and contradict the primary rule, the prohibition of the use of force, and therefore, would undermine the Charter based international security system and international law. Although it seems that the Charter based system is inadequate when it comes to responding to certain threats of non-state nature, the broadening of the scope of the right to include states merely on the basis of their relative incapacity, would open the door to interventions disguised in the language of more widely accepted political justifications, such as the UNSC endorsed fight against international terrorism, to advance one's own political agenda, arguably like the case of Turkey in Syria, or for opportunistic powerful states claiming legitimate self-defense on the basis of the relative (in)capacity of the state whose territorial integrity the operation would breach. Although the necessity for self-defense against non-state actors can hardly be questioned in the context of for example, the 9/11 attacks or attacks carried out by ISIS, the examples of Syria and Afghanistan illustrate a worrying development where this legal justification can be used to broaden the scope of the right of self-defense to possibly advance one's own agenda.

To escape the problem of the existing legal framework established by the UN Charter, limiting the arguably needed right of self-defense against non-state actors in the new security environment, causing illegitimate but politically justified interventions, would a more explicit approach be needed from the UN System, including the UNSC and the ICJ. Where the

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<sup>128</sup> Supra Nota 119

<sup>129</sup> Supra Nota 118

arguably vague approach of the mentioned to the self-defense justifications put forward by states taking part in military interventions has enabled a politically vague situation on the issue, have certain states been able to take part in 'norm entrepreneurship', and therefore, been able to shape the material and rhetorical practice of states, which ultimately can lead to the evolution of the customary international law.

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