

# Legality of the Turkish military operations in Syria

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## 1. Introduction

Since its outbreak in 2011, Syria's civil war has provided a prominent reminder of the shortcomings of the global and regional systems of international security, and of the disrespect for international law and the volatility of international alliances. It exemplifies the complexity of global and regional tensions, manifested by the large number of engaged organised armed groups,<sup>1</sup> the accumulation of which

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<sup>1</sup> There are reportedly around 1,500 armed groups/militias active in the Syrian civil war, but only some of them can be regarded as sufficiently organized armed groups. For a brief characterization of all main contenders, see T.D. Gill, *Classifying the Conflict in Syria*, International Law Studies 2016, vol. 92, p. 353–362. The list of main parties to the conflict is available at <https://guides.library.illinois.edu/Syria/Combatants>, and provides the following picture:

1. Pro-Assad Forces (the forces of Bashar al-Assad's Government, Hezbollah, Shia Militias);
2. Islamist Opposition (ISIS, also known as ISIL, IS, the Islamic State, and Daesh; Hay'at Tahrir al Sham, formerly known as Jabhat al-Nusra and Jabhat Fateh al-Sham; Ahrar al-Sham; Jaysh al-Islam);
3. Non-Islamist Opposition (Free Syrian Army (FSA), The Southern Front, Syrian Democratic Forces (SDF));

has contributed to the greatest refugee crisis of the twenty-first century.<sup>2</sup> The war has torn the country apart. Initially a peaceful protest, it turned into an ‘all against all’ armed conflict. As a result, nearly 400,000 people have been killed in armed conflict. The war, which has lasted over ten years, resulted in such destruction and poverty that it has forced almost 6 million Syrians to flee and seek refuge in neighbouring countries, not to mention over 6 million internally-displaced persons in Syria itself.<sup>3</sup>

Given the fact that Syria’s civil war is a multidimensional phenomenon, the authors decided to focus on a specific and defined angle, this is the responsibility of Turkey under public international law resulting from the Turkish interventions in Syria. This choice was driven by the fact that Turkey is one of the regional military powers, a State Party to the European Convention on Human Rights (ECHR), a NATO Member State, and a major geopolitical player in the Syrian civil war. Due to its international obligations Turkey is required to follow certain more advanced standards of human rights protection as well as respect the rule of law. This is even more critical because the civil war in Syria, as well as the Turkish interventions, are marked by an unprecedented use of proxy rebel forces (and what’s more, recruited and trained by a quasi-governmental military company SADAT);<sup>4</sup> all of which are being accused of alleged serious human rights violations. It needs to be emphasized that never before has a State Party to the ECHR and NATO utilised proxies on such a large scale to conduct armed hostilities in another State.<sup>5</sup> This

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4. Kurdish Forces (Democratic Union Party (PYD), The People’s Protection Units (YPG), the Kurdistan Workers’ Party (PKK)); and

5. States involved in the conflict (France, Germany, Iran, Israel, Jordan, Russia, Saudi Arabia, Syria, Turkey, the United Kingdom, and the United States).

<sup>2</sup> HRC, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (IICI) (21 January 2021) UN Doc A/HRC/46/54; UNHCR Operational Portal, Statistics on Total Registered Syrian Refugees, [https://data2.unhcr.org/en/situations/syria#\\_ga=2.256178626.811965682.1589397130-1944816245.1589397130](https://data2.unhcr.org/en/situations/syria#_ga=2.256178626.811965682.1589397130-1944816245.1589397130) [accessed 21 January 2021].

<sup>3</sup> G. Sturge, M. Harding, P. Loft, *The Syrian civil war: Timeline and statistics*, House of Commons Library, <https://commonslibrary.parliament.uk/research-briefings/cbp-9381/> [accessed 2 December 2021].

<sup>4</sup> H. Yanarock, J. Spyer, *Turkish Militias and Proxies*, The Jerusalem Institute of Strategic Studies, <https://jiss.org.il/en/yanarocak-spyer-turkish-militias-and-proxies/> [accessed 27 January 2021].

<sup>5</sup> Since the use of armed proxies is not a new phenomenon as such (see Y. Bar-Siman-Tov, *The Strategy of War by Proxy*, Cooperation and Conflict 1988, vol. 19, no 4, p. 263, and was already considered by the ICJ (*Nicaragua v US* (Judgment) [1986] ICJ Rep 14) it has, nevertheless, regained a lot of attention with the intensification of the employment of private military contractors and support for local partners in twenty-first century by states such as France, Iran, the Russian Federation, UAE, UK and US. More: ABA Center for Human

*modus operandi* makes it necessary to consider Turkey's responsibility for actions of two kinds: actions of State organs; and actions of proxies. Due to the limited space of this article only the former will be analysed, although the latter will be referred to where appropriate.

The article begins with a concise factual overview of the Turkish military interventions against Kurdish militia during the civil war in Syria – namely Operation Euphrates Shield, Operation Olive Branch and Operation Peace Spring, which are collectively referred to hereinafter as the Turkish Operations – together with fights in the Idlib province. This overview serves as a basis for the analysis of the applicable international law and qualification of the Turkish Operations in light of *ius ad bellum* and *ius in bello*.

## 2. The Turkish Operations

Owing to its proximity to Syria and its political, economic, and cultural interests, Turkey has been one of the key actors involved in the civil war in Syria.<sup>6</sup> Ankara has used the Syrian conflict domestically as a pretext to suppress the rights of the Kurds living in Turkey as well as to limit their parliamentary representation. Successive military operations in Syria have helped Erdoğan to connect with increasingly nationalistic constituencies.<sup>7</sup> Following the failed coup in July 2016, the Turkish government's Syria policy has played a major role in rebuilding the credibility of the Turkish Armed Forces. Finally, Ankara's involvement in Syria also has given Turkey leverage over the European Union in terms of managing refugee flows.<sup>8</sup>

In four consecutive years, Turkey launched and conducted in Syria three military operations (framed as 'counter-terrorism operations') targeting Kurdish fighters.

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Rights & Rule of Law Initiative, *The Legal Framework Regulating Proxy Warfare* 2019, [www.americanbar.org/content/dam/aba/administrative/human\\_rights/chr-proxy-warfare-report-2019.pdf](http://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf) [accessed 10 November 2021]; C. Randaux, D. Sterman, *Twenty First Century Proxy Warfare, Confronting Strategic Innovation in a Multipolar War Since the 2011 NATO intervention*, International Security, <https://www.newamerica.org/international-security/reports/twenty-first-century-proxy-warfare-confronting-strategic-innovation-multipolar-world/> [accessed 10 October 2021].

<sup>6</sup> E. Gürçan, *Political geography of Turkey's intervention in Syria: underlying causes and consequences*, Journal of Aggression, Conflict and Peace Research 2017, vol. 11, p. 1.

<sup>7</sup> F. Siccardi, *How Syria Changed Turkey's Foreign Policy*, Carnegie Europe, 14 September 2021.

<sup>8</sup> Ibid.

## 2.1. Proxy war

Before presenting the factual background, a brief reference should be made to the use of proxies in the Turkish Operations. While the term “a proxy” describes the relation with another subject in a functional manner,<sup>9</sup> the term “armed non-state actor (ANSA)”<sup>10</sup> focuses on the opposition to a State (governmental) authority. While concepts of proxy warfare or ANSA are not defined under international law, they are highly discussed in doctrine, and provide for intrinsic trait of all modern armed conflicts.<sup>11</sup> The motivations for governments to resort in different ways to ANSA are manifold, and among them can certainly be mentioned the desire to avoid international responsibility for violence and repression.<sup>12</sup> For obvious reasons, the state-ANSA or sponsor-proxy relationship is very often kept secret and the lack of access to reliable information poses a practical challenge to justice and accountability for possible violations.<sup>13</sup> Nevertheless, the rules on the attribution of conduct to a State, provided for, in particular, in International Law Commission Articles and tests established by the jurisprudence of the International Court of Justice (ICJ),<sup>14</sup> are applicable and should not be ignored.<sup>15</sup>

The Turkey-backed rebel forces (hereinafter referred to as part TBRF) – include *inter alia*, the Turkish Free Syrian Army (TFSA, also known as the Syrian National

<sup>9</sup> From a security studies perspective, ANSA fall in four categories; proxy, auxiliary, surrogate and affiliated forces. V. Rauta, *Towards a typology of non-state actors in 'hybrid warfare': proxy, auxiliary, surrogate and affiliated forces*, Cambridge Review of International Affairs 2020, vol. 33, no. 6, p. 868.

<sup>10</sup> It includes *inter alia* armed groups, private military companies, mercenaries, rebel groups and non-internationally recognized governments. A. Bellal, *What Are Armed Non-State Actors? A Legal and Semantic Approach*, in: E. Heffes, D. Marcos, M. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice*, Berlin 2020, p. 23.

<sup>11</sup> S. Farrior, *State Responsibility for Human Rights Abuses by Non-State Actors*, Proceedings of the ASIL Annual Meeting 1998, vol. 92, p. 299–303, doi:10.1017/S0272503700058067.

<sup>12</sup> S. Carey, M. Colaresi, N. Mitchell, *Governments, informal links to militias, and accountability*, Journal of Conflict Resolution 2015 vol. 59, no. 5, p. 850–876.

<sup>13</sup> “Secrecy, plausible deniability, and ambiguity in the rules of engagement and command structure are characteristic features critical to the success of proxy strategies, making narrative control over the quality of command and control a central tactical concern.” C. Randaux, D. Sterman, *op. cit.*

<sup>14</sup> *Nicaragua v US*, *op. cit.*; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgement) [1996] ICJ Rep 595.

<sup>15</sup> United Nations, International Law Commission, Report on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), <http://www.un.org/law/ilc/> [accessed 21 January 2021].

Army)<sup>16</sup> and National Liberation front (NLF).<sup>17</sup> The biggest challenge in analysing the Turkish Armed Forces (TAF)-TBRF connection results from the mere objective of proxy warfare.<sup>18</sup> The opaque command-and-control contours, assigned roles and missions, as well as the weak level of organisation of TBRF forces (lack of a fixed structure under a single command) do not facilitate the understanding of the modalities of cooperation between TBRF and TAF.<sup>19</sup> However, the totality of the circumstances of this co-operation indicates that at least some of the TBRF (especially the SNA<sup>20</sup>) could and should be treated as proxies, and their conduct could be attributed to Turkey. What is more, Turkey could be held responsible for failing to intervene in cases when TAF effectively controlled the areas where TBRF were committing atrocities and where TAF was aware of such incidents.<sup>21</sup>

Having said that, in order to classify legal consequences of a given armed action, every attribution exercise would have to be carried out on a case by case and ANSA by ANSA basis.

## 2.2. Operation Euphrates Shield (August 2016–March 2017)

Operation Euphrates Shield was officially aimed at self-defence and limited to the elimination of ISIS's presence from the border with Turkey.<sup>22</sup> However, it is been argued that the implicit aim of this operation was to take over the sphere of influence over the Syrian territory between Kurdish-controlled cantons (Kobane, Jazira and Afrin) and in this way prevent them from exercising authority on a continuous stretch of territory.<sup>23</sup> Also, the Syrian government concluded that the real aim of

<sup>16</sup> Al-Jaysh al-Watani. More: H. Yanarock, J. Spyer, *op. cit.*, p. 4.

<sup>17</sup> Al-Jabhat al-Wataniya il-Tahrir, officially formed in 2018, composed of Ahrar al-Sham and Faylaq al-Sham, and then in 2019 incorporated under the structures of SNA.

<sup>18</sup> C. Randaux, D. Sterman, *op. cit.*, p. 18–28. See E. Yüksel, *Strategies of Turkish proxy warfare in northern Syria*, CRU Report 2019, p. 16-17.

<sup>19</sup> E. Yüksel, *op. cit.*; Ch. Lister, *The Free Syrian Army: A decentralized insurgent brand*, The Brookings Project on US Relations with the Islamic World Analysis Paper 2016, no. 26; *Hay'at Tahrir al-Sham, TNT Terrorism Backgrounder*, The Center for Strategic and International Studies, 2018.

<sup>20</sup> HRC, Report of the IICI (28 January 2020) UN Doc A/HRC/43/57, para 47.

<sup>21</sup> HRC, Reports of the IICI (31 January 2019) UN Doc A/HRC/40/70, para 71; (15 August 2019) UN Doc A/HRC/42/51, para 64; (11 February 2016) UN Doc A/HRC/31/68, para 67-69; (14 August 2020) UN Doc A/HRC/45/31, para 54, 67.

<sup>22</sup> M. Gürcan, *Assessing the Post-July 15 Turkish Military*, Washington Institute For Near East Policy Policy Note, 2019, p. 59.

<sup>23</sup> Al-Jazeera, *Turkey deploys more tanks in Syria, warns Kurdish YPG*, 25 August 2016, <https://www.aljazeera.com/news/2016/8/25/turkey-deploys-more-tanks-in-syria-warns-kurdish-ypg>, [accessed 11 October 2021].

the Turkish intervention was to establish its own sphere of influence on Syrian territory, using its own terrorist organizations, in violation of Syrian sovereignty and territorial integrity.<sup>24</sup>

The main ground operation (liberation of Jarabulus, Al-Rai and Al-Bab from ISIS) was conducted by Turkish Special Forces and TAF, joined by TBRF.

Turkish forces declared a win after 216 days,<sup>25</sup> as they managed to force the ISIS troops to retreat and to take over the control of the designated territories. According to the Washington Institute for Near East Policy, the operation resulted in the following casualties: 71 killed and 220 wounded Turkish soldiers, 614 killed TBRF fighters, 3,000 killed ISIS militants, and 500 killed YPG fighters.<sup>26</sup>

### 2.3. Operation Olive Branch (January–April 2018)

On 20 January 2018, Turkey launched Operation Olive Branch, which was officially presented as a response to continuous attacks carried out by terrorist groups from Syrian territory. It should be noted that the Turkish government considers the Kurdish militia (PKK/KCK/PYD/YPG), together with ISIS movements, to be terrorist organisations.<sup>27</sup>

The operation was aimed at the seizure of the Afrin region and cities controlled by the YPG. In a note addressed to the United Nations Security Council (UNSC), the Turkish government explained the reasoning behind yet another intervention in Syria by claiming that “the threat of terrorism from Syria targeting our borders has not ended. The recent increase in rocket attacks and harassment fire directed at the Hatay and Kilis provinces of Turkey from the Afrin region of Syria, which is under the control of the PKK/KCK/PYD/YPG terrorist organisation, has resulted in the deaths of many civilians and soldiers and has left many more wounded.”<sup>28</sup>

<sup>24</sup> Al-Ahed News, *Turkish Tanks Roll into Jarabulus, Syria Denounces Flagrant Violation of Sovereignty*, <https://www.english.alahednews.com.lb/essaydetails.php?eid=34583&cid=386> [accessed 11 October 2021].

<sup>25</sup> Daily News, *Turkey can start new operations if necessary as Euphrates Shield ends*, 29 March 2017, <https://www.hurriyetdailynews.com/turkey-can-start-new-operation-if-necessary-as-euphrates-shield-ends-pm-111401> [accessed 11 October 2021].

<sup>26</sup> See M. Gürcan, *Political geography...*, *op. cit.*, p. 9.

<sup>27</sup> Official Website of the Presidency of the Republic of Turkey, *With Operation Peace Spring, Turkey has taken down the theatre of blackmails and schemes and has revealed the truth*, 24 October 2019, <https://tccb.gov.tr/en/news/542/112274/-with-operation-peace-spring-turkey-has-taken-down-the-theatre-of-blackmails-and-schemes-and-has-revealed-the-truth-> [accessed 11 October 2021].

<sup>28</sup> UNSC, 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, 22 January 2018, UN Doc S/2018/53.

Inasmuch as the mountainous terrain of Afrin was a major obstacle to the Turkish land incursion, the aerial operation became crucial. Since the Russian military contingent controlled de facto Syria's north-western airspace, TAF obtained the Kremlin's approval for the strikes from manned aircrafts and UAVs.<sup>29</sup> At the same time, Syrian government strongly condemned Turkish intervention and denied receiving any notification or giving consent.<sup>30</sup> After three months of a combined aerial and ground offensive, the hilly region and the city of Afrin were taken over by TAF and TBRF (the recently consolidated SNA) in March.<sup>31</sup>

According to the Syrian Observatory for Human Rights (SOHR),<sup>32</sup> the operation resulted in the following casualties: 96 Turkish soldiers killed, 616 TBRF fighters killed, 1,586 YPG fighters killed, 91 Syrian soldiers killed, and 389–500 civilian deaths. Several international non-governmental groups raised concerns as to the indiscriminate nature of the attacks carried out by the Turkish forces.<sup>33</sup>

## 2.4. Operation Peace Spring (October–November 2019)

Operation Peace Spring was launched by Turkey on 9 October 2019. Officially, it had two objectives: to establish a 30-kilometer-long so-called 'safe zone' where 3.6 million Syrian refugees could be resettled from Turkey, and to push the YPG out of the area, to the east of the Euphrates.<sup>34</sup>

The safe zones were supposed to be created jointly by Turkey and the United States, but since the US forces<sup>35</sup> were withdrawn from the area controlled by

<sup>29</sup> K. Earle, *Operation Olive Branch: A Misstep in Russia's Syria Strategy?*, Georgetown Security Studies Review, <https://georgetownsecuritystudiesreview.org/2018/02/17/operation-olive-branch-a-misstep-in-russias-syria-strategy/> [accessed 11 October 2021].

<sup>30</sup> SANA, *Syria strongly condemns Turkish aggression on Afrin*, <https://sana.sy/en/?p=124986> [accessed 11 October 2021].

<sup>31</sup> HRC, Report of the IICI (9 August 2018) UN Doc A/HRC/39/65, para 14.

<sup>32</sup> Given the practical difficulties with the reliability of the daily numbers of deaths from all sides in the civil war in Syria, and notwithstanding the fact that this information office is called 'pro-opposition' or anti-Assad, the authors decided to provide data per SOHR [when available], as their reports are frequently quoted by major news outlets.

<sup>33</sup> *Syria war: Turkey 'indiscriminately shelling civilians in Afrin*, BBC, 28 February 2018; A. Baghdassarian S. Zadah, *Voices from Afrin: First-hand Accounts of Turkish Crimes Against the Kurds and Policy Proposals From Those Affected*, Yale Journal of International Affairs 2021, vol. 16, p. 119–135.

<sup>34</sup> UNGA Official Records, September 2019, UN Doc A/74/PV.3, 20-1.

<sup>35</sup> Ca 1000 soldiers, while hundreds of US special operation forces still remain in Syria. M. Prothero, *The 1,000 elite US troops in Syria are making a chaotic and demoralizing retreat after Trump cancelled their mission*, Business Insider, 15 October 2019, <https://www.businessinsider.com/1000-us-troops-chaotic-demoralizing-retreat-syria-2019-10?IR=T> [accessed 11 October 2021].

Kurds,<sup>36</sup> Turkey carried out the air and land offensive alone. Unlike the two previous operations, Peace Spring was a rapid, well-prepared and full-fledged military operation. The TAF's attacks were suspended during several ceasefires brokered by the United States<sup>37</sup> and Russia.<sup>38</sup> According to the Turkey-Russia agreement Kurdish forces, i.e. the YPG and SDF, had to pull back from the major towns next to the Turkish border (the safe zone in question), after which joint Russian-Turkish forces would patrol the area.<sup>39</sup> As a result, the safe zones were established (although smaller than planned), the YPG forces were withdrawn beyond the Euphrates, and part of the formerly Kurdish-controlled area (Kobani and Manbij) came under the control of the Syrian government.<sup>40</sup>

Although the Turkish government called Operation Peace Spring a diplomatic and military victory,<sup>41</sup> there were also numerous allegations that the TAF and TBRF (SNA) were committing human rights violations and war crimes,<sup>42</sup> i.e. that they were targeting civilians, using prohibited means of warfare like white phosphorus

<sup>36</sup> U. Uras, *Turkey's Operation Peace Spring in northern Syria: One month on*, Al-Jazeera, 8 November 2019, <https://www.aljazeera.com/news/2019/11/8/turkeys-operation-peace-spring-in-northern-syria-one-month-on> [accessed 11 October 2021].

<sup>37</sup> As agreed on 17 October 2019. "Turkey has agreed to pause its offensive for 120 hours to allow the United States to facilitate the withdrawal of YPG forces from the Turkish-controlled safe zone. Turkey has agreed to a permanent ceasefire upon completion of the YPG withdrawal." *The United States and Turkey Agree to Ceasefire in Northeast Syria*, The White House, 17 October 2019.

<sup>38</sup> As agreed on 22nd October 2019. "[S]tarting 12.00 noon of October 23, 2019, Russian military police and Syrian border guards will enter the Syrian side of the Turkish-Syrian border, outside the area of Operation Peace Spring, to facilitate the removal of YPG elements and their weapons to the depth of 30 km (19 miles) from the Turkish-Syrian border, which should be finalized in 150 hours. At that moment, joint Russian-Turkish patrols will start in the west and the east of the area of Operation Peace Spring with a depth of 10 km (six miles), except Qamishli city." The full text of the joint Turkey–Russia statement: [www.aljazeera.com/news/2019/10/full-text-turkey-russia-agreement-northeast-syria-191022180033274.html](http://www.aljazeera.com/news/2019/10/full-text-turkey-russia-agreement-northeast-syria-191022180033274.html); B. McKernan, J. Borger, *Turkey and Russia agree on deal over buffer zone in northern Syria*, Guardian, 22nd October 2019, <https://www.theguardian.com/world/2019/oct/22/turkey-and-russia-agree-deal-over-buffer-zone-in-northern-syria> [accessed 11 October 2021].

<sup>39</sup> U. Uras, *op. cit.*, p. 26.

<sup>40</sup> J. Stocker, *Syrian government forces set to enter Kobani and Manbij in SDF deal*, Defense Post, 13 October 2019.

<sup>41</sup> Presidential Spokesperson Kalin: *Operation Peace Spring has thwarted aims to establish a terror state in the north of Syria*, Official Website of the Presidency of the Republic of Turkey, 4 November 2019.

<sup>42</sup> HRC, A/HRC/43/57, *op. cit.*, para 45–59.



and napalm,<sup>43</sup> as well as conducting ethnic cleansing operations.<sup>44</sup> As with the previous two operations, Syrian government protested and considered these actions a violation of its sovereignty and UN resolutions.<sup>45</sup>

According to SOHR, the operation sustained the following losses: 11 Turkish soldiers killed, 355 TBRF fighters killed, 445 SDF fighters killed, 29 Syrian soldiers killed, and 147 civilian deaths.

## 2.5. Turkish Engagement in Idlib (October 2017–May 2020)

The Astana peace talks of 2017 resulted in a three-way agreement between Turkey, Russia and Iran.<sup>46</sup> The plan was to create a number of so-called ‘de-escalations zones’ aimed at calming the situation and bringing an end to the fighting in many contentious areas in Syria.<sup>47</sup> One of these zones covered parts of the Idlib province. Consequently, in October 2017, TAF established twelve observation posts which served Turkey to monitor the truce between the warring parties in the Idlib province.<sup>48</sup>

Over the course of time and alongside the Turkish Operations, the situation in Idlib continued to further deteriorate, which led to heavy clashes between all warring parties, including those of both a State and non-state character, that is: TBRF, HTS, and Russian and Syrian armed forces. As a result, Turkey’s military

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<sup>43</sup> B. Trew, *Turkey faces scrutiny over alleged use of white phosphorus on children in northern Syria*, Independent, 18 October 2019, <https://www.independent.co.uk/news/world/middle-east/syria-turkey-ceasefire-war-crimes-middle-east-a9161586.html> [accessed 15 September 2021].

<sup>44</sup> It is being argued that the resettlement aims at changing the ethnic structure of the northern Syria and at pushing Kurds further South. E. Schmitt, *US Envoy in Syria Says Not Enough Was Done to Avert Turkish Attack*, New York Times, 7 November 2019.

<sup>45</sup> *Syrian gov’t slams new Turkish operation in Syria*, Alamsdar News, 9 October 2019, <https://www.almasdarnews.com/article/syrian-govt-slams-new-turkish-operation-in-syria> [accessed 11 October 2021].

<sup>46</sup> *Turkey finished setting up observation posts in Idlib*, Hurriyet Daily News, 16 May 2018, <https://www.hurriyetdailynews.com/turkey-finishes-setting-up-observation-posts-in-idlib-131919> [accessed 11 October 2021].

<sup>47</sup> *Syrian war: All you need to know about the Astana talks*, Al-Jazeera, 30 October 2017, <https://www.aljazeera.com/news/2017/10/30/syrian-war-all-you-need-to-know-about-the-astana-talks> [accessed 11 October 2021].

<sup>48</sup> *Turkey finished setting up observation posts in Idlib*, UNGA Official Records, *op. cit.*

presence increased to 56 military posts as of May 2020,<sup>49</sup> while the number of TAF troops reached the level of approximately 20,000 soldiers.<sup>50</sup>

The currently-existing situation is far from being clear-cut. There have been confirmed skirmishes between TAF and Syrian armed forces, which evolved into a fully kinetic military operation at the beginning of 2020.<sup>51</sup> The most notable attack took place on 27 February 2020, when at least 33 Turkish soldiers were killed and more than 30 wounded.<sup>52</sup> The *modus operandi* of the airstrike prompted its attribution to Russian Air Forces.<sup>53</sup> The TAF's retaliation was swift – it started on the same day and was called Operation Spring Shield.<sup>54</sup> In order to avoid escalation with Russian armed forces and not to hamper diplomatic relations between Turkey and Russia, the TAF attacked Syrian armed forces and their proxies. According to Turkish sources, over 300 Syrian soldiers were killed and 200 tanks and military vehicles destroyed.<sup>55</sup> This clearly indicates that the 'de-escalation' zone in the Idlib province has not met its basic assumptions.

### 3. International law regimes applicable to the Turkish Operations

Due to the limited volume of this article, the authors will only discuss the regimes of *ius ad bellum* and *ius in bello*. At the same time it is worth noting that other applicable legal regimes, such as State responsibility,<sup>56</sup> international criminal law,<sup>57</sup>

<sup>49</sup> Asharq Alawsat, *Turkey Increases Military Observation Posts to 56 in Idlib*, 7 April 2020, <https://english.aawsat.com/home/article/2220736/turkey-increases-military-observation-posts-56-idlib> [accessed 11 October 2021].

<sup>50</sup> J. Cafarella et al., *Turkey Commits to Idlib*, Institute for the Study of War Report, 2020, <https://www.understandingwar.org/backgroundunder/turkey-commits-idlib>, p. 3 [accessed 11 October 2021].

<sup>51</sup> HRC, Report of the IICI (3 September 2020) UN Doc A/HRC/44/61.

<sup>52</sup> C. Gal, *Airstrike Hits Turkish Forces in Syria, Raising Fears of Escalation*, New York Times, 27 February 2020.

<sup>53</sup> J. Cafarella et al., *op. cit.*, p. 5.

<sup>54</sup> HRC, UN Doc A/HRC/44/61, *op. cit.*, para 14.

<sup>55</sup> J. Cafarella et al., *op. cit.*, p. 5.

<sup>56</sup> Articles on State Responsibility, UNGA Res 56/83, 28 January 2002, UN Doc A/RES/56/83.

<sup>57</sup> Turkey is not a State Party to the Rome Statute, however the ICC's jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression allows the UNSC to refer a situation for investigation by the ICC prosecutor in accordance with Art. 13(b) of the Rome Statute. Such a referral of course would require that the permanent members of the UNSC do not veto this decision, which, given the constellation of Turkey's allies, is considered to be very unlikely (cf UNGA and UNSC, Letter dated 14 January 2013 from the Chargé d'affaires a.i. of the Permanent Mission of Switzerland to the United

and international human rights law<sup>58</sup> also deserve attention and should be studied in future contributions.

### 3.1. The Use of Force

Before addressing the grounds used by Turkey to justify its intervention in Syria, some fundamental principles of the law on the use of force should be highlighted. Article 2(4) of the UN Charter declares that all States 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.<sup>59</sup> Importantly, the text of Article 2(4) of the UN Charter does not specify that it applies outside of the context of inter-state relations. Notably, Article 2(4) does not expressly prohibit the extraterritorial use of force against non-state actors.<sup>60</sup> On the other hand, any use of force against non-state actors is likely to interfere with the territorial integrity of the affected State, even if such use of force is directly and solely aimed against the non-state actor.<sup>61</sup> Thus the principle prohibiting the use of force contains two exceptions – the inherent right of individual or collective self-defence and the exercise of UNSC powers under Chapter VII of the UN Charter, including the authorization of military action.<sup>62</sup> Apart from cases where the UNSC authorizes the use of force, a State can only act unilaterally in self-defence under Article 51 of the UN Charter and customary international law if the use of force by a non-state actor is attributed

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Nations addressed to the Secretary-General, 16 January 2013, UN Doc A/67/694-S/2013/19 and Russia, China block Security Council referral of Syria to International Criminal Court, UN News, 22 May 2014. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 38544. For the establishment of the International, Impartial and Independent Mechanism charged with the investigation and prosecution of persons responsible for the most serious crimes under international law committed in Syria since March 2011 see UNGA Res 71/248, 11 January 2017, UN Doc A/RES/71/248.

<sup>58</sup> The list of universal human rights treaties ratified by Turkey can be accessed at <https://indicators.ohchr.org/> [accessed 11 October 2021].

<sup>59</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV), 24 October 1970, UN Doc A/RES/2625 (XXV).

<sup>60</sup> V. Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, *The European Journal of International Law* 2017, vol. 28, no. 2, p. 567.

<sup>61</sup> *Ibid.*

<sup>62</sup> N. Blokker, *Is the authorization authorized? Powers and practice of the UN Security Council to authorize the use of force by coalitions of the able and willing*, *The European Journal of International Law* 2000, vol. 11, p. 541.

to another State and constitutes an armed attack.<sup>63</sup> In order for self-defence to be lawful, the use of force in response to an armed attack must be both necessary and proportionate. It remains controversial whether this right applies against an armed attack by a non-state actor and/or whether self-defence can be pre-emptive.<sup>64</sup> Another aspect is the legality of a military intervention based on an invitation and the consent of the government.<sup>65</sup> Most scholars consider it a recognised form of the use of force in international relations.<sup>66</sup> The expression of consent as the legal basis for the intervention in Syria can only be analysed in the Russian and Iranian contexts. Syria has never approved the Turkish Operations, on the contrary, it has protested against them on several occasions.<sup>67</sup>

### 3.1.1. Turkey's reasoning

In general, Turkey maintains that its interventions in Syria are conducted within the framework of its right of self-defence<sup>68</sup> under Article 51 of the UN Charter<sup>69</sup> and the authorization of the UNSC to suppress terrorist acts committed by organisations that constitute a threat to international peace and security.<sup>70</sup> Article 51 provides that the right to self-defence can be exercised after the occurrence of an armed attack and notification of undertaken measures to the UNSC.<sup>71</sup> Therefore, in order

<sup>63</sup> V. Lanovoy, *op. cit.*, p. 49.

<sup>64</sup> K. Trapp, *Can Non-State Actors Mount an Armed Attack?*, in: M. Weller (ed), *The Oxford Handbook of the Use of Force in International Law*, Oxford 2015, p. 679; T. Ruys, *Armed Attack' and Article 51 of the UN Charter*, Cambridge 2010, p. 368; E. Wet, *The invocation of the right to self-defence in response to armed attacks conducted by armed groups: Implications for attribution*, *Leiden Journal of International Law* 2019, vol. 32 (1), p. 91–110.

<sup>65</sup> *Nicaragua v US*, *op. cit.*, para 246; K. Bannelier-Christakis, *Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent*, *Leiden Journal of International Law* 2016, vol. 29(3), p. 743.

<sup>66</sup> L. Visser, *Intervention by invitation and collective self-defence: two sides of the same coin?*, *Journal on the Use of Force and International Law* 2020, vol. 7(2), p. 293.

<sup>67</sup> Express consent as the legal basis for intervention in Syria can be analysed only in the context of Russia and Iran, since Syria never expressed any consent with regard to Turkey. To the contrary, Syria protested against Operation Euphrates Shield see Al-Ahed News, *op. cit.*; see Alamsdar News, *op. cit.*

<sup>68</sup> Nevertheless the Special Rapporteur on extrajudicial, summary or arbitrary executions rightly points out that invoking the former can be extremely debatable. HRC, *Use of armed drones for targeted killings*, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 15 August 2020, UN Doc A/HRC/44/38.

<sup>69</sup> UNSC, *Identical letters...*, *op. cit.*, p. 20.

<sup>70</sup> *Ibid.*

<sup>71</sup> For a more detailed discussion and rich exemplification of state practice in this matter see A. Kleczkowska, *Użycie siły zbrojnej między państwami* [Use of armed force between states], Warszawa 2018, p. 355–360; as eg. the Islamic Republic of Iran informed UNSC about

to successfully plead self-defence, it is essential to transparently present the existence of all legal and factual premises, in particular the existence of an armed attack conducted by the Kurdish forces against Turkey.

Yet the 2016 Operation Euphrates Shield was presented by Turkish officials as a response to the unanimously-adopted UNSC resolution no 2249 (2015), which called upon States to take all lawful measures (like military cross-border operations) to combat terrorist groups in Syria and Iraq.<sup>72</sup> Additionally, Turkey has argued that this operation was an act of self-defence, in response to ISIS's shelling of Turkish border towns and suicide bombings and attacks targeting Turkish nationals.<sup>73</sup> Later, Operation Olive Branch was announced by the Turkish government as "being conducted under the framework of Turkey's rights based on international law, UN Security Council's decisions especially no. 1624 (2005), 2170 (2014) and 2178 (2014) and as per the self-defence right under 51<sup>st</sup> item of UN charter, while being respectful to Syria's territorial integrity."<sup>74</sup> Likewise, Operation Spring Break was justified by the Turkish government as "in line with the right of self-defence as outlined in Article 51 of the Charter of the United Nations, to counter the imminent terrorist threat, to ensure Turkey's border security, to neutralise terrorists starting from along the border regions adjacent to Turkish territory and to liberate Syrians from the tyranny of PKK's Syrian branch, PKK/PYD/YPG, as well as Deash."<sup>75</sup>

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unlawful act by US military forces against the territorial integrity of Iran and targeting intruding aircraft. UNSC, Letter dated 20 June 2019 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, 20 June 2019, UN Doc S/2019/512.

<sup>72</sup> UNSC, Res 2249, 20 November 2015, UN Doc S/RES/2249; *Relations between Turkey–Syria*, Ministry of Foreign Affairs of the Republic of Turkey, [www.mfa.gov.tr/relations-between-turkey%E2%80%93syria.en.mfa](http://www.mfa.gov.tr/relations-between-turkey%E2%80%93syria.en.mfa) [accessed 11 October 2021].

<sup>73</sup> K. Shaheen, *Turkey sends tanks into Syria in operation aimed at Isis and Kurds*, *Guardian*, 24 August 2016, <https://www.theguardian.com/world/2016/aug/24/turkey-launches-major-operation-against-isis-in-key-border-town> [accessed 11 October 2021].

<sup>74</sup> A. Akan, *Turkish army announces "Operation Olive Branch" in Afrin*, AA, 20 January 2018; UNSC, Res 1624, 14 September 2005, UN Doc S/RES/1624 – condemning international terrorism; UNSC, Res 2170, 15 August 2014, UN Doc S/RES/2170 – imposing sanctions against individuals associated with Al-Qaida, Islamic State in Iraq and the Levant (ISIL) and Al Nusrah Front (ANF); UNSC, Res 2178, 24 September 2014, UN Doc S/RES/2178 – deciding that ... Member States shall prevent and suppress recruiting, organizing, transporting or equipping ... foreign terrorist fighters recruited by or joining ISIL, ANF and all groups, undertakings and entities associated with Al-Qaida.

<sup>75</sup> UNSC, Letter dated 9 October 2019 from the Permanent Representative of Turkey to the United Nations, addressed to the President of the Security Council, 9 October 2019, UN Doc S/2019/804.

### 3.1.2. Legality of the Turkish Operations under the law concerning the use of force

It should be underlined that so long as during all three operations the TAF and TBRF were following UNSC measures and were targeting members of UN-designated terrorist groups such as Al-Qaida, Islamic State in Iraq and the Levant and Al-Nusrah Front, the legality of such interventions should not be challenged under Chapter VII (which was largely the case of Operation Euphrates Shield). Nevertheless, in those situations where other groups were targeted (namely Kurdish forces during the Operations Olive Branch and Peace Spring), the invocation of the UNSC resolutions as a legal basis cannot be considered as valid. Therefore, in order to determine the legality of the latter operations, the premises of the right of self-defence need to be examined.

First of all, in its Letter to the Secretary-General and the President of the Security Council of 20 January 2018 regarding Operation Olive Branch, Turkey invoked ‘rocket attacks and harassment fire’ directed at its provinces from Syria’s territory<sup>76</sup> as the acts triggering the right of self-defence. Turkey did not use the notion of an ‘armed attack’ in its statement, instead appealing to the ‘threat of terrorism’ and the ‘lack of control by Syria in the Afrin region’. Had it asserted that there was an ‘armed attack’, this could have been instructive in terms of considering whether such attacks were to be considered as ‘the most grave forms of the use of force’ or ‘other less grave forms’ of the use of force. Thus it remains unclear whether the attacks invoked by Turkey surpassed the threshold of gravity in scale and effect, as defined by the ICJ in *Military and Paramilitary Activities in and against Nicaragua*.<sup>77</sup> Turkey’s reasoning fails because self-defence is available only against ‘large scale attacks’ of a non-state armed group.<sup>78</sup> Turkey similarly failed to specify when exactly the attacks took place, while Peters has suggested that strikes from the Afrin region happened after the Turkish intervention.<sup>79</sup> Therefore, the occurrence of the armed attacks should have been directly stipulated or/and substantiated by Turkey, as the State claiming the right of self-defence. The same reservation applies to the Operation Peace Spring, which has been severely criticised

<sup>76</sup> UNSC, Identical letters..., *op. cit.*, p. 20.

<sup>77</sup> *Nicaragua v US*, *op. cit.*, para 191.

<sup>78</sup> *Armed Activities on the Territory of the Congo (Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, 222 paras 146–147. For state-centred statements see *Oil Platforms (Iran v US)* (Judgment) [2003] ICJ Rep 161, 186–187, 190–191 paras 51, 61; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, p. 194, para 139.

<sup>79</sup> A. Peters, *The Turkish Operation in Afrin (Syria) and the Silence of the Lambs*, EJIL Talk, 30 January 2018.

by the international community.<sup>80</sup> In that Operation the right of self-defence was notified and claimed as the legal basis for the intervention in the same obscure and inoperative manner as in the letter on Operation Olive Branch.<sup>81</sup> Turkey's statement again fell short of the notion of an 'armed attack', nor did it provide detailed information which would allow for verification of its occurrence.<sup>82</sup> However, as pointed out by Murphy, there is a common understanding shared by States in the aftermath of the WTC 9/11 attacks that an armed attack occurs when the affected State immediately perceives an incident of a certain scale as akin to that of a military attack and qualifies it as an armed attack.<sup>83</sup> Therefore, in both cases the cornerstone of the right of self-defence, i.e. the occurrence of an armed attack of certain gravity (greater than using snipers and anti-tank guided missiles or the smuggling of weapons<sup>84</sup>) was not sufficiently demonstrated or recognized, which in consequence significantly weakens the alleged lawfulness of the Turkish Operations.

Turkey could refer to the less strict approach, known under customary law as 'permissible anticipatory self-defence' when the threat of an armed attack is real and imminent.<sup>85</sup> However no proof of such attacks or real and imminent threats of attack has been presented. It would be a stronger case had Turkey informed the UNSC about possible armed attacks, with the UNSC representative having had full access to the relevant locations.

Furthermore, it is still unsettled whether the right of self-defence can be triggered by an armed attack by a non-state actor.<sup>86</sup> The Turkish military interventions

<sup>80</sup> Turkey's European allies expressed strong condemnation of the Turkish offensive, with French President Emanuel Macron calling it 'madness' and German Chancellor Angela Merkel calling it 'an invasion'. Both countries suspended arms sales to Turkey, along with other EU Member States. Euroactiv A Brzozowski, *EU condemns Turkey's military action, stops short of common arms embargo*, 14 October 2019, <https://www.euractiv.com/section/defence-and-security/news/eu-condemns-turkeys-military-action-stops-short-of-common-arms-embargo> [accessed 11 October 2021]; see U. Uras, *op. cit.*, p. 4; European Parliament Res (2019) on the Turkish military operation in northeast Syria and its consequences (2019/2886(RSP)).

<sup>81</sup> UNSC, Letter dated 9 October 2019..., *op. cit.*

<sup>82</sup> C. Kreß, *A Collective Failure to Prevent Turkey's Operation 'Peace Spring' and NATO's Silence on International Law*, EJIL Talk, 14 October 2019.

<sup>83</sup> S. Murphy, *Terrorism and the concept of armed attack in article 51 of the U.N. Charter*, Harvard Journal of International Law 2002, vol. 43(10), p. 47–48.

<sup>84</sup> UNSC, Letter dated 9 October 2019..., *op. cit.*

<sup>85</sup> N. Shah, *Self-defence in Islamic and International Law Assessing Al-Qaeda and the Invasion of Iraq*, London 2008, p. 89.

<sup>86</sup> "... as majority of the ICJ has consistently held that uses of defensive force against the state from whose territory NSAs operate, in response to an armed attack by those NSAs, would only be a legitimate exercise of rights under Article 51 of the UN Charter if the armed attack

against Kurdish forces on Syria's territory perfectly exemplify the controversy.<sup>87</sup> Of course it is true that several modern armed non-state groups (like ISIS or Kurdish forces) have developed the substantial capacity to conduct combat operations on a large scale and to effectively oppose State forces.<sup>88</sup> Therefore it is argued that to limit and preclude Turkey's right of self-defence against non-state attacks on the part of Kurdish forces would not seem reasonable.<sup>89</sup> This approach seems to be supported by the UNSC, calling upon States to take all necessary measures against non-state actors taking over the control of other States (ISIL, ANF and all other individuals, groups, undertakings, and entities associated with Al Qaeda, and other terrorist groups, as designated by the UNSC)<sup>90</sup> and thereby providing a threat to global peace and stability.<sup>91</sup> However, this approach can be seen as too permissive,<sup>92</sup> as those groups operate on Syria's territory, hence the exercise of Turkey's right of self-defence is connected with their violation of Syrian territorial integrity and sovereignty. In this respect Turkey's position, whereby it stated that the Operation was 'respectful to Syria's territorial integrity', is irrelevant since the Syrian government protested against that intervention and had every right to do so.

This understandable concern could be mitigated by the appropriate implementation of the customary law principles of necessity (meaning that there is no

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was attributable to the state in whose territory (and against which) defensive force was used." K. Trapp, *op. cit.*, p. 686; A. Peters, Ch. Marxsen, *Self-Defence Against Non-State Actors: Impulses from the Max Planck Dialogues on the Law of Peace and War*, Harvard Journal of International Law 2017, vol. 7, p. 1; see N. Shah, *op. cit.*, p. 93.

<sup>87</sup> Nevertheless, as stated above, Turkey did not use the wording of 'armed attack' in any of its correspondence to the UNSC.

<sup>88</sup> For an analysis of whether the PKK qualifies as an organized armed group under responsible command, with the operational ability, structure and capacity to carry out 'protracted violence', to respect fundamental norms of LOAC and to control territory see D.A. Nejbir, *Applying Humanitarian Law: A Review of the Legal Status of the Turkey-Kurdistan Workers' Party (pkk) Conflict*, Journal of International Humanitarian Legal Studies 2021, vol. 12(1), p. 37–70.

<sup>89</sup> Ruys provides, *inter alia*, the US interventions in Afghanistan (1998 and 2001) and Sudan (1998); the Israeli intervention in Lebanon (2006); and the Turkish intervention in Iraq (2007–8) as examples of state practice. He also mentions *opinio iuris* expressed by States such as the US, Russia, Australia, France, the Netherlands, Rwanda, Ethiopia and Iran. T. Ruys, *Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge 2010, p. 486.

<sup>90</sup> It did not name Kurdish forces.

<sup>91</sup> UNSC, Res. 2249, 20 November 2015, UN Doc. S/RES/2249.

<sup>92</sup> See the plea of international lawyers against the abusive invocation of self-defence in the context of the fight against terrorism. *A plea against the abusive invocation of self-defence as a response to terrorism*, <http://cdi.ulb.ac.be/contre-invocation-abusive-de-legitime-defense-faire-face-defi-terrorisme/> [accessed 2 October 2021].



alternative to the use of force, and peaceful means are truly inaccessible and impossible to apply); and proportionality (i.e. that the intensity of the use of force must be limited to that necessary to achieve the objective of self-defence, by limiting the scale and intensity of deployed force measures to those necessary to remove the threat). These criteria are firmly anchored in customary law, and their importance and application is not controversial in the doctrine.<sup>93</sup>

Should Syria's government be considered unable or unwilling to take effective actions against those groups, Turkish interventions could be presumed necessary.<sup>94</sup> The latter premise however must also meet the proportionality test, which concerns the *degree* of force used by TAF against Kurdish forces on the territory of Syria. In this regard the burden of proof lies with Turkey, which should have aligned the activities of its armed forces with its official statements notified to the UNSC regarding Operation Olive Branch<sup>95</sup> and Operation Peace Spring.<sup>96</sup>

To conclude, taking into account the insufficient substantiation of the occurrence of an armed attack, combined with Syria's protests, the Turkish Operations should be seen as unjustified and abusive and be qualified as grave violations of international law.<sup>97</sup> The same applies to all actions carried out by Turkey that exceed the scope of the specific authorization under Chapter VII. Turkish actions should be considered under international law not as an illegal response to an armed attack, but rather as prohibited anticipatory self-defence.<sup>98</sup>

<sup>93</sup> States have invoked them in their positions regarding situations such as the Belgian intervention in Congo, and the US intervention in Iraq or Granada. See A. Kleczkowska, *op. cit.*, p. 60–62; *Nicaragua v US*, *op. cit.*, para 176.

<sup>94</sup> J. Sendut, *The Unwilling and Unable Doctrine and Syria*, Cambridge University Law Society, [www.culs.org.uk/per-incuriam/the-unwilling-and-unable-doctrine-and-syria](http://www.culs.org.uk/per-incuriam/the-unwilling-and-unable-doctrine-and-syria) [accessed 2 October 2021]; J. Brunnée, S. Toope, *Self-Defence Against Non-State Actors: Are Powerful States Willing But Unable to Change International Law?*, *The International & Comparative Law Quarterly* 2018, vol. 67(2), p. 263.

<sup>95</sup> “[...] the operation will target only terrorists and their hideouts, shelters, emplacements, weapons, vehicles and equipment. All precautions have been taken to avoid collateral damage.” UNSC, Identical letters..., *op. cit.*

<sup>96</sup> “As has been the case in its previous counter-terrorism operations, Turkey’s response will be proportionate, measured and responsible. The operation will target only terrorists and their hideouts, shelters, emplacements, weapons, vehicles and equipment. All precautions are taken to avoid collateral damage to the civilian population. All deconfliction channels are open and functioning to ensure risk mitigation as well as to prevent any inadvertent incident and/or friendly fire vis-à-vis the elements of allied and partner countries present on the ground for the purpose of fighting against Daesh.” UNSC, Letter dated 9 October 2019..., *op. cit.*, p. 63.

<sup>97</sup> European Parliament Res, *op. cit.*, p. 68.

<sup>98</sup> N. Shah, *op. cit.*, p. 89.

### 3.1.3. Legal consequences

Turkish interventions entail State responsibility for violation of Article 2(4) of the UN Charter, which in this case amounts also to an act of aggression.<sup>99</sup>

Holding Turkey responsible for violations of *ius ad bellum* is connected with the victim State's activity – in this case Assad's Syria. Taking into consideration the current situation, as well as the shortcomings of the international regime of State responsibility (neither Turkey nor Syria have submitted a declaration under Article 36(2) of the ICJ Statute), it is very difficult to anticipate whether, and when, Turkey might bear international responsibility.

## 3.2. The Law of Armed Conflict

Regardless of the legality of Turkey's use of force *per se*, it still needs to be analysed whether the Turkish Operations were in compliance with the international law of armed conflict (LOAC).<sup>100</sup> LOAC is a regime of international law designed to determine what and who should be protected during the course of an armed operation and, as a result, to establish acceptable targets for attack.<sup>101</sup> The Hague Convention of 1907 (HC) and the four Geneva Conventions of 1949 (GC) remain the cornerstone of LOAC, and due to their universal adoption<sup>102</sup> all their provisions are considered to form customary law.<sup>103</sup> The Additional Protocols to the Geneva Conventions of 1977 strengthening the protection of victims of international (AP I) and non-international (AP II) armed conflicts are not of comparable importance. This is because of the significantly smaller number of signatories<sup>104</sup> and because of the often

<sup>99</sup> As defined in Art. 1 and 3(1) of Definition of Aggression, UNGA, Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314: "The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof"; O. Corten, *The Law Against War. The Prohibition on the Use of Force in Contemporary International Law*, Hart 2010, p. 91–92.

<sup>100</sup> For a general classification of the conflict in Syria see T.D. Gill, *op. cit.*

<sup>101</sup> P. Grzebyk, *Cele osobowe i rzeczowe w konfliktach zbrojnych w świetle prawa międzynarodowego* [*Personal and material objectives in armed conflicts under international law*], Warszawa 2018, p. 24–30.

<sup>102</sup> There are more state parties to GC (196, including Palestine, the Cook Islands and Holy See) than to the UN Charter (193).

<sup>103</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep, para 79.

<sup>104</sup> There are 174 state parties to AP I (including Russia and Syria, excluding Turkey) and 169 state parties to AP II (including Russia, excluding Syria and Turkey). Whereas only some of the provisions of AP I are regarded as customary law, the whole body of AP II is of this nature.

divergent practices of non-party states, that prevent the formation of robust and universal customary rules.<sup>105</sup> In addition to the treaty provisions, customary LOAC will apply in both types of armed conflicts<sup>106</sup> and will be especially important when determining the rules of conduct in non-international armed conflicts (NIACs).<sup>107</sup>

The constitutional element of the applicability of the LOAC is the existence of an armed conflict.<sup>108</sup> Therefore it has to be determined whether the Turkish Operations can be classified as an international armed conflict (IAC) and/or a non-international armed conflict (NIAC). Despite the increasingly frequent calls for the unification of the LOAC, distinguishing the two types of armed conflicts is still of great importance due to the differences in the applicable norms.<sup>109</sup> While the targeting rules are rather aligned, some issues of great importance are regulated differently. This includes the inapplicability of the regimes pertaining to combatants, prisoners of war, and occupation.<sup>110</sup>

### 3.3. Existence of an international armed conflict (IAC)

An IAC is defined as armed hostilities between at least two States, including all cases of partial or total occupation as well as fighting in the exercise of people's right of self-determination.<sup>111</sup> Despite the different approach of the International Criminal Tribunal for the former Yugoslavia (ICTY) on the threshold theory, stating that "[a]n armed conflict exists whenever there is a resort to *armed force*

<sup>105</sup> Iran, Israel, Pakistan, Turkey and the US are among non-party states to AP I and AP II. *North Sea Continental Shelf (Germany v Netherlands)* (Judgment) [1969] ICJ Rep 42, para 73.

<sup>106</sup> *Nicaragua v US*, *op. cit.*, para 218; *Prosecutor v Tadić* (Jurisdiction) IT-94-1 (2nd October 1995) para 98. See the Customary IHL Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> [accessed 2 October 2021] and the summary of its critics in P. Grzebyk, *Cele...*, *op. cit.*, p. 27–28.

<sup>107</sup> Since only the Common Art. 3 of the GC (CA3) and AP II (only 28 Arts.) provide for treaty provisions relating to NIACs. ICRC identified 148 customary rules applicable to NIACs. J.-M. Henckaerts, *Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict*, International Review of the Red Cross 2005, vol. 87(857), p. 198–212.

<sup>108</sup> CA3, Art. 6 IV GC, Art. 3(a) AP I.

<sup>109</sup> L. Moir, *Towards the Unification of International Humanitarian Law?*, in: R. Burchill, N. White, J. Morris (eds), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey*, Cambridge 2005, p. 108; see also P. Grzebyk, *Cele...*, *op. cit.*, p. 39–45.

<sup>110</sup> R. Kolb, R. Hyde, *Advanced Introduction to International Humanitarian Law*, London 2015, p. 36–38.

<sup>111</sup> Art. 2 CG and Art. 1 AP I. However the provision of Art. 1(4) AP I was introduced in a treaty law as an exception and therefore should be interpreted narrowly. See S. Vité, *Typology of armed conflicts in international humanitarian law: legal concepts and actual situations*, International Review of Red Cross 2009, vol. 91(873), p. 69–94.

between States”,<sup>112</sup> it is accepted that an IAC exists as soon as the first intentional shot is fired.<sup>113</sup>

It is argued that the Turkish Operations constituted an IAC only when direct hostilities between the TAF and Syrian government’s forces (or organised armed groups controlled by them) took place,<sup>114</sup> as well as during the time of military occupation of northern Syria.<sup>115</sup> Even though the resort to the use of armed force by two States is not required; i.e. that for an IAC to exist it suffices that only one State uses armed force against another State,<sup>116</sup> the relevance of the presence of organised armed groups and their role in the conflict cannot be understated. The doctrine is divided as to the classification of such a conflict,<sup>117</sup> but the authors tend toward the view that the lack of consent of Syria (the territorial State) to the Turkish (the foreign State) Operations targeting ISIS and/or Kurdish forces (organised armed groups<sup>118</sup> not backed by a territorial State) is not sufficient to provide for existence of an IAC.<sup>119</sup> The Turkish Operations were in fact directed at organised armed groups (be they ISIS or Kurdish forces) controlling parts

<sup>112</sup> *Prosecutor v Tadić*, *op. cit.*, para 70.

<sup>113</sup> *Prosecutor v Delalić* (Trial Chamber) IT-96-21-T (16 November 1998) para 208: “If there is only a single wounded person as a result of the conflict, the Convention will have been applied.” M. Sassòli, A. Bouvier, A. Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, International Committee of the Red Cross, 2006, p. 116; R. Kolb, R. Hyde, *op. cit.*, p. 98.

<sup>114</sup> However, it should be noted that the 2016 Commentary to GC, points out that “any attack directed against the territory, population, or the military or civilian infrastructure constitutes a resort to armed force against the State to which this territory, population or infrastructure belongs.” Therefore, given that members of the attacked groups belonged to the Syrian population and/or they were deployed on Syrian territory, one can argue that the Turkish intervention constituted an IAC from the first moment of attack, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#53224> [accessed 2 October 2021]

<sup>115</sup> For a more detailed discussion on the internationalisation of armed conflicts in cases of direct military interventions and pertinent arguments on the practical and theoretical difficulties of the so-called ‘global approach’, see N. Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars*, London 2017, p. 98–112.

<sup>116</sup> *Ibid.* 55–56; Common Art. 2 GC; *Prosecutor v Delalić*, *op. cit.*, para 208.

<sup>117</sup> M. Zamir, *op. cit.*, p. 85–8.

<sup>118</sup> D.A. Nejbir, *op. cit.*, p. 70.

<sup>119</sup> For a list of the decisive factors for the classification of IAC and NIAC cf T.D. Gill, *op. cit.*, p. 373. The author argues that the lack of consent is less persuasive than such factual situations like the nature of parties involved, the targets of military operations, the occupation of territory, the lack of a territorial state’s effective control over the territory, and the relationship between a state and an organized armed group.

of Syrian territory, and even if the Syrian government protested against them and presented them as a violation of its sovereignty, the factual situation did not justify the application of IAC LOAC.

Thus it is necessary to determine armed hostilities between Turkish and Syrian armed forces (which reportedly took place under the Operation Olive Branch during the Afrin siege, and surely took place during the fighting in Idlib in 2020<sup>120</sup>) in order to establish the existence of an IAC.<sup>121</sup> Until such clashes occurred, the Turkish Operations could not be classified as an IAC and should have been conducted in accordance with the legal regime governing NIACs.<sup>122</sup>

Nevertheless, it has to be stressed that the Turkish Operations led to the military occupation of northern regions of Syria, and thus, according to Article 2 GC, an IAC in place.<sup>123</sup> Territory is considered occupied when it is placed under the actual authority of a hostile army and this authority is exercised.<sup>124</sup> Therefore, the territories seized during the Turkish Operations, especially the so-called safety zones established by the Operation Peace Spring, should be classified as occupied territories for as long as Turkish authorities were in a position to assert themselves (through any effectively controlled group, such as decentralized local councils and even an unstructured military administration).<sup>125</sup> No armed resistance on the part of Syria (the occupied State) is required to trigger Turkey's obligations as an occupying power under the LOAC.<sup>126</sup>

It should be further emphasized that the Idlib offensive of the Syrian government, including fighting between TAF and Syrian armed forces, undeniably proved

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<sup>120</sup> Cafarella et al., *op. cit.*, p. 5.

<sup>121</sup> Should the overall or effective control of Turkey over the TBRF be established, the beginning of IAC could follow. See T.D. Gill, *op. cit.*, p. 367–370.

<sup>122</sup> See Section on NIAC, *infra*.

<sup>123</sup> “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” Art. 2 GC.

<sup>124</sup> Art. 42 of the Hague Regulation, Ann. to IV HC; *Congo v Uganda*, *op. cit.*, para 173; *Legal Consequences of the Construction of a Wall*, *op. cit.*, para 78.

<sup>125</sup> S. Reeves, D. Wallace, *Has Turkey Occupied Northern Syria?*, Lawfare, 22 September 2016; R. Barwari, *Turkish sub-governor found dead at office in Syria's occupied Jarabulus*, Kurdistan24.net [accessed 2 October 2021]; P. Grzebyk, *Classification of the Conflict between Ukraine and Russia in International Law (Ius ad Bellum and Ius in Bello)*, Polish Yearbook of International Law 2014, vol. XXXIV, p. 49–51.

<sup>126</sup> Syria itself described this situation as an occupation. UNSC (14 February 2018) UN Doc S/PV.8181 and UNSC (28 February 2018) UN Doc S/PV.8195.

the existence of an IAC.<sup>127</sup> What's more, the ambiguous role of the Russian ground offensive raises concerns about the increasing scale of the IAC in place.<sup>128</sup>

Insofar as concerns the temporal scope of the LOAC's application, it is necessary to determine whether the Turkish Operations should be classified as protracted armed hostilities within one IAC, or as separate consecutive armed conflicts. Notwithstanding the character of the armed conflict(s), it is understood that the LOAC "applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts until a peaceful settlement is achieved."<sup>129</sup> It should be noted however that some of a belligerent's obligations may be affected by the cessation of active hostilities.<sup>130</sup> The various temporary cease-fire deals and periods of rest between the Turkish Operations (also due to COVID-19) were not concluded by a definitive peace agreement, thus it is clear that the IAC was still ongoing.

The territorial scope of the application of the LOAC is associated with the very notion of an armed conflict, and it covers "the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."<sup>131</sup> Therefore in case of the Turkish Operations the LOAC applies in the whole territory of Turkey and Syria and to all attacks, in whatever territory they were conducted (so called 'spill-overs'),<sup>132</sup> and not just the territory where the actual combat or occupation takes place.

Since the modality of an IAC between Turkey and Syria has been demonstrated, it must be concluded that the conduct of hostilities by belligerent States is governed by the GC and relevant customary rules (inasmuch as the AP I was ratified only by Syria).<sup>133</sup>

<sup>127</sup> B. McKernan, *500,000 flee Syrian regime's deadly offensive in Idlib*, Guardian, 5 February 2020; K. Shaheen, *Turkey's Intervention in Syria Will Slow Assad, But It Won't Stop Him*, Foreign Policy, 7 February 2020; P. Mazur, M. Targ, *Geopolityczne i ekologiczne korzyści zaangażowania się Rosji w konflikt syryjski* [Geopolitical and ecological gains of Russia in Syria], Przegląd Geopolityczny [Geopolitical Review] 2018, vol. 25, p. 124–132.

<sup>128</sup> It should be noted that, in general, the air presence of a foreign state's armed forces is not regarded as a sufficient factor to internationalize a conflict, while a ground offensive is. See T.D. Gill, *op. cit.*, p. 375; M. Prothero, *Turkey and Syria are fighting in a shoe box in northern Syria, and officials fear it could ignite a bigger conflict with Russia*, Business Insider, 4 February 2020, <https://www.businessinsider.com/turkey-syria-conflict-us-troops-caught-in-middle-of-fight-2020-2?IR=T> [accessed 2 October 2021].

<sup>129</sup> *Prosecutor v Tadić*, *op. cit.*, para 70.

<sup>130</sup> The obligation to repatriate persons protected under Art. 118 III GC (prisoners of war) and Art. 132 IV GC (civilians).

<sup>131</sup> *Prosecutor v Tadić*, *op. cit.*, para 70.

<sup>132</sup> Art. 49 AP I.

<sup>133</sup> Syria ratified GC in November 1953 and AP I in November 1983, Turkey ratified GC in February 1954.

### 3.4. Existence of a non-international armed conflict

The classification of a NIAC is a more complex task due to the several definitional approaches and the required threshold standard,<sup>134</sup> thus obfuscating the applicability of the LOAC. Since a NIAC has to be distinguished from “from banditry, unorganised and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”,<sup>135</sup> the threshold of the LOAC’s applicability in a NIAC is paradoxically higher than in an IAC. According to the ICTY’s jurisdiction decision in the *Tadić* case, a NIAC exists whenever there is “protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”<sup>136</sup> Therefore, not only does the intensity threshold have to be satisfied, but the actors taking part in it must exhibit a certain degree of organisation.<sup>137</sup>

The intensity threshold (protracted armed violence) can be assessed in many ways, and the factors to be considered include, *inter alia*, the use of armed forces instead of law enforcement, types of weapons used, number of victims (level of violence), the duration and frequency (temporal scope) as well as the areas of combat (geographical scope).<sup>138</sup> The Turkish Operations did not consist of single, sporadic or isolated attacks. On the contrary, they consisted of planned military operations executed by TAF (and TBRF) with the use of heavy arms (even napalm and white phosphorus), performed on land and in the air space (bombardments), causing a significant number of casualties (loss of life, injury, destruction), as depicted in part I of this article. It is thus posited that the Turkish Operations (both individually and taken together), as well as the armed responses of Kurdish

<sup>134</sup> See the discussion on the different NIAC’s criteria under CA3, art. 1 AP II and customary law in D.A. Nejbir, *op. cit.* Since Turkey is not a party to AP II, only CA3 and customary law applicable to NIAC will be further analyzed. It shall be nevertheless noted that due to a higher threshold of AP II, the scope of the application of CA3 is wider than this of AP II.

<sup>135</sup> *Prosecutor v Tadić* (Trial Chamber) IT-94-1-AR73 (7 May 1997) para 562 or “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” as phrased by the article 1(2) AP II.

<sup>136</sup> *Prosecutor v Tadić, op. cit.*, p. 70.

<sup>137</sup> *Prosecutor v Tadić* test has been adopted by other international courts and tribunals: *Prosecutor v Delalić, op. cit.*, para 183; *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) para 619, *Prosecutor v Lubanga* (Confirmation of charges) ICC-01/04-01/06 (29 January 2007) para 233.

<sup>138</sup> P. Grzebyk, *Classification..., op. cit.*, p. 42.

forces,<sup>139</sup> were sufficiently violent and protracted to meet the requirement of the NIAC intensity threshold, especially when the aggregating approach is applied.<sup>140</sup>

While an IAC occurs between two States, a NIAC requires that an organised armed group be party to the conflict (on one or both sides). The classification of a party to a NIAC is based on objective criteria, i.e. the level of organisation,<sup>141</sup> and not on such subjective factors as its alleged terrorist/liberating/antigovernmental character.<sup>142</sup> This requirement is logically connected with the intensity threshold condition.<sup>143</sup> Therefore, an armed group should demonstrate the presence of some kind of:

- 1) command structure. Have an identifiable leader, general staff or high command, and identifiable ranks and positions; the use of spokespersons, fixed headquarters or a basic system of disciplinary rules and mechanisms; or the existence of internal regulations;
- 2) operational capacity. To be able to engage in protracted armed violence; to plan, co-ordinate and carry out military operations; to exercise some kind of territorial control or challenge the State's control; or to operate within defined zones of responsibility;
- 3) logistical capacity. The existence of supply chains to gain access to weapons and other equipment; the ability to recruit and train new members, to provide uniforms and weapons, and to organise and move a certain number of fighters;

<sup>139</sup> HRC, A/HRC/46/54, *op. cit.*, para 30; HRC, Report of the IICI (16 August 2013) UN Doc A/HRC/24/46, para 94.

<sup>140</sup> See T.D. Gill, *op. cit.*, p. 376. For the aggregating approach to the intensity threshold, shifting its focus from levels of violence to area and period of protracted violence (which can be applied to SDF and YPG under the coalition umbrella of Kurdish forces). *Prosecutor v Katanga* (Judgement) ICC-01/04-01/07 (7 March 2014) para 1217; J. Kleffner, *The Legal Fog of an Illusion: Three Reflections on "Organization: and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict*, International Law Studies 2019, vol. 95, p. 72–77; J. Nikolic, R. de Saint Maurice, T. Ferraro, *Aggregated intensity: classifying coalitions of non-State armed groups*, ICRC Blog, <https://blogs.icrc.org/law-and-policy/2020/10/07/aggregated-intensity-classifying-coalitions-non-state-armed-groups/> [accessed 2 October 2021].

<sup>141</sup> "... neither does the degree of organisation for an armed group to a conflict to which Common Article 3 applies need be at the level of organisation required for parties to Additional Protocol II armed conflicts, which must have responsible command, and exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol." *Prosecutor v Boskoski and Tarculovski* (Judgement) IT-04-82-T (10 July 2008) para 197.

<sup>142</sup> *Prosecutor v Akayesu*, *op. cit.*, para 603.

<sup>143</sup> *Prosecutor v Haradinaj, Balaj, Brahimaj* (Trial Judgment) IT-04-84-T (3 April 2008) para 60.



- 4) ability to enter into settlement agreements with a unified voice;
- 5) as well as ability to maintain and enforce internal discipline.<sup>144</sup>

The Kurdish forces organisational structure is widely recognized as sufficiently developed – the YPG at least since mid-2012 and the SDF from its formation in 2015 – to be classified as an organised armed group under the LOAC.<sup>145</sup>

To conclude this part, the complex question of the applicability of the NIAC LOAC to Kurdish forces should be addressed (to the extent limited by the volume of this article). The mere applicability of the LOAC to organised armed groups is declared in CA3 (stating that each party to the conflict shall be bound to apply, at a minimum, its provisions). Considering that States rather aim at the exclusion of provisions related to organised armed groups from treaty law (for political reasons), the list of thereof is limited.<sup>146</sup> The customary LOAC applies to Kurdish forces insofar as their status as party to a NIAC means that they are also subjects of international law (albeit limited). Even though the common understanding may be different, there are multiple incentives for organised armed groups to comply with the LOAC.<sup>147</sup> One of them is the precondition to be recognized as an armed group with command structure “capable of ensuring generally the execution of... orders, including, as far as possible, respect of the laws and customs of war.”<sup>148</sup>

Given the significant restrictions on accession to treaties by non-state actors, a commitment to Geneva Call’s Deeds provides for a substitute practice of consensual acceptance of the LOAC and human rights norms by armed non-state actors.<sup>149</sup> It should be stressed that in 2014 Kurdish forces signed Geneva Call’s

<sup>144</sup> *Prosecutor v Boskoski and Tarculovski, op. cit.*, para 198-203, *Prosecutor v Ramush Haradinaj et al.* (Judgment) IT-04-84-T (3 April 2008) para 60.

<sup>145</sup> W. van Wilgenburg, *Syrian Democratic Forces*, Syria (ECFR); T. Gal, *Legal Classification of the Conflict(s) in Syria*, in: H. Moodrick-Even Khen, N. Boms S. Ashraph (eds), *The Syrian War Between Justice and Political Reality*, Cambridge 2020, p. 51–52; EASO, *Syria Actors*, 2019, Country of Origin Information Report, p. 45–46.

<sup>146</sup> P. Grzebyk, *Classification...*, *op. cit.*, p. 49.

<sup>147</sup> Respect for the legal regime of the state of origin, the customary character of LOAC, the legitimacy of governments formed in the future, and a desire to avoid criminal responsibility. For a more detailed discussion see P. Bongard, *Engaging armed non-state actors on humanitarian norms: reflections on Geneva Call’s experience*, Humanitarian Exchange Magazine, July 2013; E. Heffes, *Compliance with IHL by Non-State Armed Groups: Some Practical Reflections at the 70th Anniversary of the 1949 Geneva Conventions*, EJIL Talk, 21 August 2019; J. Kleffner, *The applicability of international humanitarian law to organized armed groups*, International Review of the Red Cross 2011, vol. 93 (882), p. 443.

<sup>148</sup> Respect for Human Rights in Armed Conflicts, UNGA (18 September 1970) UN Doc A/8052.

<sup>149</sup> A. Bellal, E. Heffes, *Yes, I Do: Binding Armed Non-State Actors to IHL and Human Rights Norms through Their Consent*, Human Rights & International Legal Discourse 2018, vol. 12(1), p. 120.

Deed of Commitment banning anti-personnel mines;<sup>150</sup> the Deed of Commitment prohibiting sexual violence in armed conflict and gender discrimination;<sup>151</sup> and the Deed of Commitment for the protection of children from the effects of armed conflicts.<sup>152</sup> They have also introduced several laws aimed at the protection of cultural heritage in wartime,<sup>153</sup> and signed an action plan between SDF and the United Nations to end and prevent the recruitment and use of children under the age of 18.<sup>154</sup> However, the mere ability and willingness of organised armed groups like SDF or YPG to comply with the law, which has been demonstrated through the above examples, does not mean that these groups comply with all their obligations in the practice of the conflict. On the contrary, according to the findings of the IICI, Kurdish forces have violated the LOAC and the signed declarations on several occasions: they did not provide adequate conditions to the detainees<sup>155</sup> or humanitarian aid to the displaced communities;<sup>156</sup> they have forcibly conscripted men and boys for military service;<sup>157</sup> conducted indiscriminate attacks;<sup>158</sup> and tortured civilians.<sup>159</sup>

Having demonstrated that the Kurdish forces fulfil the criteria for an organised armed group as defined by treaty law, case law and doctrine, it must be assumed that the armed clashes which took place during the Turkish Operations between TAF and Kurdish forces should be classified as a NIAC.<sup>160</sup> As a matter of fact Turkey sees its operations as an extension of a NIAC with the PKK happening on its

<sup>150</sup> Geneva Call [http://theirwords.org/media/transfer/doc/2014\\_5jun\\_ypg\\_syria\\_mines-dff14ef8c9755e80c9acac47f61672bf.pdf](http://theirwords.org/media/transfer/doc/2014_5jun_ypg_syria_mines-dff14ef8c9755e80c9acac47f61672bf.pdf) [accessed 2 December 2021].

<sup>151</sup> Geneva Call [http://theirwords.org/media/transfer/doc/2014\\_5jun\\_ypg\\_syria\\_gender-4f26f63ee92ec20705c26f5e15ad6b12.pdf](http://theirwords.org/media/transfer/doc/2014_5jun_ypg_syria_gender-4f26f63ee92ec20705c26f5e15ad6b12.pdf) [accessed 2 December 2021].

<sup>152</sup> Geneva Call [http://theirwords.org/media/transfer/doc/2014\\_5july\\_ypg\\_yjp\\_syria\\_children-f4976d5452cadc27c284b56910ba01bc.pdf](http://theirwords.org/media/transfer/doc/2014_5july_ypg_yjp_syria_children-f4976d5452cadc27c284b56910ba01bc.pdf) [accessed 2 October 2021].

<sup>153</sup> *Culture Under Fire: Armed Non-State Actors and Cultural Heritage in Wartime*, Geneva Call Report, 2018, p. 44–47.

<sup>154</sup> *Syrian Democratic Forces Sign Action Plan to End and Prevent the Recruitment and Use of Children*, UN News, 1 July 2019.

<sup>155</sup> HRC, UN Doc A/HRC/43/57, *op. cit.*, para 64; HRC, UN Doc A/HRC/40/70, *op. cit.*, para 75–76.

<sup>156</sup> HRC, *Human rights abuses and international humanitarian law violations in the Syrian Arab Republic*, Conference room paper of the IICI (10 March 2017) UN Doc A/HRC/34/CRP.3, para 86–93; HRC, UN Doc A/HRC/43/57, *op. cit.*, para 61.

<sup>157</sup> HRC, UN Doc A/HRC/34/CRP.3, *op. cit.*, para 94.

<sup>158</sup> HRC, UN Doc A/HRC/43/57, *op. cit.*, para 66.

<sup>159</sup> HRC, UN Doc A/HRC/40/70, *op. cit.*, para 70, 80.

<sup>160</sup> T.D. Gill, *op. cit.*, p. 376.

own territory.<sup>161</sup> YPG is regarded as a military wing of the Democratic Union Party (PYD) – a PKK’ affiliate in Syria with the overarching political goal of introducing a democratic self-determination in Rojava.<sup>162</sup> While both organisations follow closely tied political objectives based on democratic confederalism and use similar symbols, it is not sufficiently clear whether PKK and YPG operate under the same command structure.<sup>163</sup> Therefore, until demonstrated otherwise the two NIACs (Turkey vs PKK and Turkey vs Kurdish forces in Syria) should be examined separately. In this context it should be assumed that the territorial scope of the NIAC in question includes the territory of Syria and all other territories (the spill-over effect) where the intensity threshold of hostilities is met. Since Turkey is not a signatory or party to AP II, its military activities against Kurdish forces should comply with the provisions of CA3 and the relevant customary law.

To conclude, from the *ius in bello* perspective the Syrian civil war in fact covers several IACs and NIACs that last simultaneously. This paper was focused on the Turkish interventions in Syria, and thus the armed conflicts with involvement of Turkish forces were analysed. While the use of force between Turkey and Syria constitutes an IAC, the use of armed force between Turkey and Kurdish forces consists of a NIAC. However, this does not exhaust the list of other armed conflicts that have taken place in the same operational space, although between other actors.<sup>164</sup> The co-existence of these different types of armed conflicts implies that during the Turkish Operations, Turkey should constantly have distinguished between activities targeting a territorial State (Syria) and those targeting organised armed groups (Kurdish forces), and complied with the LOAC regarding IACs and NIACs respectively. This of course can lead to important practical hardships resulting in multiple breaches of the LOAC as regards both an IAC and a NIAC (and other applicable regimes like human rights law).

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<sup>161</sup> UNSC, Letter dated 24 August 2016 from the Permanent Representative of Turkey to the United Nations, addressed to the President of the Security Council (24 August 2016) UN Doc S/2016/739. For a detailed analysis of the hostilities between the PKK and Turkey since 1984 and their classification as a NIAC see D.A. Nejbir, *op. cit.*

<sup>162</sup> EASO, *op. cit.*, p. 45.

<sup>163</sup> M. Bradley, J. Parkinson, *America’s Marxist Allies Against ISIS*, Wall Street Journal, 24 July 2015; *The US denies ties between the YPG and PKK. This is how they’re linked*, TRT World, 12 November 2018.

<sup>164</sup> T.D. Gill, *op. cit.*, p. 373–377.

## 4. Conclusions

The conflict in Syria has been going on for a decade, but news from the front line indicates that it is not yet approaching any peaceful settlement. The situation is dynamic and constantly evolving. This article is intended only to analyse a certain aspect of this conflict, namely the legality of the Turkish Operations conducted in the period of 2016–2020.

First, Turkey violated the right to the use of force insofar as it acted over and above the mandate given by the UNSC resolutions and against the will of Syria as a territorial State. This should entail the imposition of sanctions by other States and triggers Syria's right to demand the cessation of the violation and appropriate restitution.

Secondly, from the LOAC perspective the Turkish Operations should be classified simultaneously as an IAC (in the case of military action against Syrian armed forces, like in Idlib in 2020) and a NIAC (in the case of military actions against Kurdish forces). The above classifications determine the law under which the legality of actions must be assessed. Thirdly, Turkey's resorting to ANSAs as proxies, confirms the ongoing phenomenon of outsourcing war and challenges the already undermined regimes of international responsibility and accountability.

## Abstract

The aim of this article is to address the legality of armed violence between Turkish armed forces and the Syrian government and non-state actors within the Syrian territory, including the Kurdish rebel forces. The scope of the article covers the Turkish military operations conducted from 2016 to 2020.

Firstly, the authors address the issue whether Turkish operations were conducted within the scope of *jus ad bellum*. The authors' conclusions are that the Republic of Turkey has violated international law and therefore the imposition of sanctions by other States and Syria's claims for a cessation of the violation and appropriate restitution are justified.

Secondly, the Turkish operations are classified under *jus in bello* from the perspective of the law governing international and non-international armed conflicts. This makes it possible to determine which norms of the law of armed conflict and international human rights law are applicable in this context. Moreover, it establishes a framework for further examination of the nature of the alleged violations and opens a debate on possible measures of redress for victims of the breaches attributable to the Republic of Turkey.

**Key words:** conflict in Syria, law of armed conflict, Turkey, non-state actors, use of force

## Legalność tureckich operacji wojskowych w Syrii

### Streszczenie

Celem niniejszego artykułu jest omówienie legalności przemocy zbrojnej między tureckimi siłami zbrojnymi a rządem syryjskim i podmiotami niepaństwowymi na terytorium Syrii, w tym kurdyjskimi siłami rebelianckimi. Zakres artykułu obejmuje tureckie operacje wojskowe prowadzone od 2016 do 2020 r.

Po pierwsze, odnosimy się do kwestii, czy operacje tureckie były prowadzone w ramach *ius ad bellum*. Twierdzimy, że Republika Turcji naruszyła prawo międzynarodowe i dlatego nałożenie sankcji przez inne państwa oraz roszczenia Syrii o zaprzestanie naruszeń i odpowiednią restytucję są prawnie uzasadnione.

Po drugie, operacje tureckie są klasyfikowane z perspektywy prawa regulującego międzynarodowe i niemiędzynarodowe konflikty zbrojne. Identyfikujemy normy prawa konfliktów zbrojnych i międzynarodowego prawa praw człowieka mające zastosowanie w tym kontekście. Ponadto w artykule przedstawione są wyjściowe ramy do dalszego badania charakteru domniemanych naruszeń oraz możliwych środków naprawczych dla ofiar naruszeń, które można przypisać Republice Turcji.

**Słowa kluczowe:** konflikt w Syrii, międzynarodowe prawo konfliktów zbrojnych, Turcja, podmioty niepaństwowe, użycie siły

