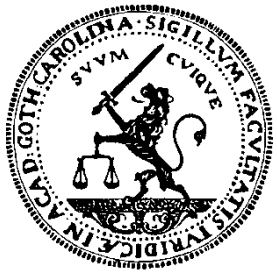

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"Operation Peace Spring": How lawful?

Understanding Turkey's Military Operation Through Restrictive and Expansive Interpretations of Article 51

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Contents

Summary

Turkey’s recent military operation in northern Syria, *Operation Peace Spring*, has fuelled an ongoing debate with regards to the content of Article 51 of the UN Charter and the right to self-defence. Adding yet another case to the list of states expanding the Interpretation of Article 51. This thesis aims to examine if the arguments put forth by Turkey, in their letter to the Security Council, meet the criteria of self-defence under Article 51.

In the quest to fulfil the aim, Martti Koskenniemi's structural understanding of international law is applied. As a consequence, a *discourse methodological approach* is used and performed in three iterative steps. Step one examines Turkey's letter to the Security Council. Step two identifies the legal discussions surrounding the four self-defence arguments put forward in Turkey's letter. Even though the interpretations of the content of Article 51 vary, from 'legal formalism' to 'legal realism', for the sake of clarity, the present study has chosen to group these different positions vis-à-vis Article 51 into two broad categories; namely, *expansive* and *restrictive* approaches. Step three applies the legal positions identified in step two to Turkey’s self-defence arguments, identified in step one.

The study concludes that the answer to the question, whether Turkey's arguments can be considered satisfying the criteria for self-defence under Article 51, is far from straightforward and depends on what approach one subscribes to. A restrictive interpretation of Article 51 leads to deeming the operation as unlawful. However, based on an expansive interpretation, it is possible to argue for the opposite. The present study demonstrates that this contradictory answer is mainly due to the complicated and often tensioned relations between international relations and international law.

Sammanfattning

Turkiets senaste militära operation i norra Syrien, *Operation Peace Spring,* har gett upphov till en pågående debatt om innehållet i FN-stadgans artikel 51 och rätten till självförsvar. Med denna militära operation kan ännu ett fall läggas till på listan över stater som utvidgar tolkningen av artikel 51. Denna uppsats syftar till att undersöka om de argument Turkiet framfört i sitt brev till säkerhetsrådet uppfyller kriterierna för självförsvar enligt artikel 51.

I strävan efter att uppnå uppsatsen syfte tillämpas Martti Koskenniemis strukturella förståelse av den internationella rätten. Som en konsekvens används en diskursanalytisk metodologi som implementeras i tre iterativa steg. Steg ett granskar Turkiets brev till säkerhetsrådet. Steg två identifierar de juridiska diskussionerna kring de fyra argumenten för självförsvar som framförts i Turkiets brev. Tolkningsmöjligheten av innehållet i artikel 51 är många, allt från ”juridisk formalism” till ”juridisk realism”, för tydlighetens skull har den nuvarande uppsatsen valt att gruppera de olika ståndpunkterna gentemot artikel 51 i två breda kategorier; nämligen expansiv och restriktivt synsätt. Steg tre tillämpar de rättsliga ståndpunkterna som identifieras i steg två på Turkiets fyra självförsvarsargument, identifierat i steg ett.

Svaret på frågan huruvida Turkiets argument kan anses uppfylla kriterierna för självförsvar enligt artikel 51, är långt ifrån enkel och beror på vilken ståndpunkt man tar. En restriktiv tolkning av artikel 51 leder till att operationen kan anses vara olaglig. Baserat på en expansiv tolkning är det dock möjligt att argumentera för det motsatta. Uppsatsen visar att detta motstridiga svar främst beror på den komplicerade och ofta spända relationen mellan internationella relationer och internationell rätt.

Abbreviations

EU	European Union
ICJ	International Court of Justice
ISIS	Islamic State of Iraq and Syria
PKK	Kurdistan Workers' Party
UN	United Nations
US	United States
YPG	People's Protection Units

1 Introduction

On the 9 of October 2019, the Turkish government sent a letter to the Security Council explaining the legal justification of a military incursion into northern Syria. In the letter, Turkey argued for the right to use self-defence, following Article 51 of the UN Charter, giving a state the inherent right to use force in response to an armed attack. It is well known that self-defence is one of the few exceptions to the prohibition against the use of force under Article 2(4) of the UN Charter and customary international law. In the letter, Turkey argued that the military operation, named *Operation Peace Spring*, was essential for national security and the safety of the country.[1] A safety concern which derives from an ongoing tension between the Turkish state and the Kurdish armed groups in northern Syria.

1.1 Background

Operation peace spring has its roots in a 35-year old and, still ongoing armed conflict between Turkey and Kurdistan Workers' Party (PKK), a Kurdish separatist movement. The friction derives from the fact that parts of the Kurdish community have demanded separation from Turkey to create a state of their own.[2] PKK is not only established within Turkey but also in Syria and has extensive support among Kurds living in the northern parts of Syria. PKK is classified as a terrorist organisation, by Turkey as well as by the EU[3] and the United States.[4]

Until autumn 2019, the Syrian Kurdish militia (YPG) controlled the northern parts of Syria, an area which the Assad regime could not uphold control over, in the outbreak of the Syrian Civil war, in 2011. The priority

[1] UN Doc. S/2019/804, 9 October 2019.
[2] Romano and Gurses (2014) p. 5.
[3] Council Decision. 2005/848/EC, 29 November 2005.
[4] U.S Embassy & Consulates in Turkey, 1 March 2019, *State Department Maintains Foreign Terrorist Organization (FTO) Designation of the Kurdistan Worker's Party (PKK).*

for the Assad Regime laid on controlling the opposition in the larger cities as well as fighting ISIS, and not the growing Kurdish state-like structure in the north.[5] Turkey has since long argued that YPG is an affiliate to the PKK.[6] Indeed, YPG's connection with PKK is not hidden, even the United States, which allied with YPG against ISIS in Syria, has on several occasions stated that YPG should "rebrand", due to this connection.[7]

According to Michael A. Reynolds, there has over the last years been a growing fear in Turkey that the PKK/YPG would use the northern parts of Syria as a base from which it could wage an armed attack against Turkey. This concern was also echoed by the US Secretary of State, who expressed that "the Turks had a legitimate security concern".[8] Thus, when the United States, on the 6 of October 2019 decided to withdraw their troops from the border area, *Operation Peace Spring* was initiated by Turkey on the 9 of October 2019.[9] The Turkish government had two goals with the operation, firstly to change the status quo in the area where YPG exerted control and secondly to create a safe zone to resettle Syrian refugees living in Turkey.[10]

In a report dated 24 October 2019, the Security Council stated that during two weeks almost 180 000 people were displaced, due to the Turkish military operation.[11] In a press briefing, the spokesperson for the UN High Commissioner for Human Rights stated that causalities from both sides were reported, still trying to verify the exact numbers.[12] Due to unreliable

[5] L. Phillips (2018) p. 152.
[6] Republic of Turkey Ministry of Foreign Affairs, *PKK, undated*.
[7] Landay and Stewert, 22 July 2017, *US. General told Syria's YPG: 'You have got to change your brand'*. Reuters.
[8] Rogin, 9 October 2019, *Turkey had 'legitimate security concern' in attacking Syrian Kurds, Pompeo says,* PBS.
[9] Guardian staff and agencies, 13 October 2019, *Trump orders troops out of northern Syria as Turkish assault continues*. The Guardian.
[10] Gall, 1 November 2019, *Turkey wants Refugees to move to a 'Safe Zone'. It's a Tough Sell*. New York Times.
[11] UN Doc. S/PV.8645, 24 October 2019, p. 2.
[12] UN Office of the High Commissioner for Human Right, 15 October 2019, *Press briefing note on Syria*.

sources, it has been challenging to verify the armed attacks which Turkey claims YPG has initiated.

Reactions to the operation has predominantly been adverse across the world. [13] However, only a few countries have denounced the operation as 'illegal' under international law. Instead, the mission has been condemned in general terms, by mentioning the risk of destabilising the region and possibly causing the revival of ISIS.[14] The European Union did, however, criticize the operation from an *Ius in Bellum* perspective.[15]

1.2 Article 51 Then and Now

At the time of its ratification, the UN Charter's purpose was "to save succeeding generations from the scourge of war".[16] Article 51 was intended as an exception to the prohibition of the use of force found in Article 2(4). At the time of ratification, the individual or collective self-defence exception mainly concerned armed attack against one state by another.[17] However, especially after the 9/11 attacks, the range of applicable arguments used when referring to Article 51 considerably expanded to also cover attacks by non-state actors, especially in the form of 'war on terror', as well as self-defence used for anticipatory means.[18] This expansion resulted in ambiguity with regards to the situations covered by the article. Thus, leading to a discussion concerning the interpretation of Article 51.[19] Indeed, as argued by many, Article 51 is vaguely formulated, to the extent that it is possible to find supporting arguments for both restrictive and expansive interpretations.[20]

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[13] Chachko and Deeks, Lawfare, 10 October 2019, '*Who IS on Board with "Unwilling or Unable"'*.
[14] Maclean, Lawrence and Agnus, 9 October 2019, *Factbox: Reaction to Turkey's military advance into Syria*. Reuters.
[15] Council of the European Union, 14 October 2019, *North East Syria: Council adopts conclusions*.
[16] Charter of the United Nations, preamble.
[17] Chinkin and Kaldor (2017) p. 167.
[18] *Ibid.* p. 173.
[19] *Ibid*. p. 167.
[20] *For example*, the United States military operation in Syria (2014) and Russia's military operation in Georgia, against attacks by Chechen rebels (2002).

Turkey is not the first state that has employed Article 51 to justify the use of force against a non-state actor. One reason for its popularity is that the article allows for self-judging and argumentation.[21] *Operation peace spring* has added yet another case to the list of states pushing the limits of Article 51. However, there is not yet any academic legal research assessing the arguments used by Turkey to defend the legality of the operation, from a self-defence perspective.

1.3 Aim and Limitation

Through an expansive respectively restrictive perspective on the interpretation of Article 51 of the UN Charter, this thesis aims to analyse whether Turkey's recent military operation in Syria can be deemed lawful within the scope of the Article.

The specific research question that will be studied is:
Do the arguments put forth by Turkey in their letter to the Security Council satisfy the legal criteria for the exercise of the right of self-defence under Article 51?

To contextualise Turkey's arguments, the present thesis highlights different interpretations of Article 51 hence does not seek to discuss the aptness of these interpretations.

1.4 Outline

Chapter two presents the chosen theoretical approach and methodology in this study. Chapter three begins by putting Article 51 in a context. Secondly, Turkey's arguments in her letter to the Security Council are extracted. Thirdly, the legal discussions surrounding the four arguments brought forward in Turkey's letter are examined. In chapter four, the legal merit of

[21] O'Connell (2019) p. 154.

Turkey's arguments to defend self-defence thesis is discussed from both restrictive and expansive approaches to Article 51.

2 Theory, Method and Material

2.1 Theoretical Approach

This thesis employs Koskenniemi's structural understanding of international law as analytical perspective. Koskenniemi's theory is based on the idea that international law should be seen as language constituting of both law and politics. Accordingly, language can never be used to find a solution but explains the solution. International law itself cannot determine a legal problem. Instead, it is used as an argumentative tool by lawyers and states.[22] This approach implies that just as international law is technical and formal, it is simultaneously politically open-ended.[23] This open-endedness causes the international legal system to be "in constant movement from emphasizing concreteness to normativity, without being able to establish itself permanently in either position."[24]

Despite his critical approach, however, Koskenniemi does not refute it. He sees International law as both *politics* and *law*, two sides of the same coin.[25] There is a pattern followed by international institutions and professionals; a consensus of what the standard answer is, limiting the possibility of a completely different outcome.[26] This approach implies that international law is at risk of serving those who are powerful enough to control and use "language" well.

In this thesis, Koskenniemi's theoretical approach is used in two ways. First, it has framed the approach taken to international law and consequently, the research aim. Secondly, it has put different legal positions on the interpretation of Article 51 in the limelight.

[22] Koskenniemi (2005) p. 589.
[23] *Ibid.* p. 563.
[24] *Ibid.* p. 65.
[25] *Ibid.* p. 536.
[26] *Ibid.* p. 607.

2.2 Methodology

Martti Koskenniemi expresses in *Letter to the Editors of the Symposium* that choosing a methodology implies that there are an objective and comprehensive standpoint. According to Koskenniemi, however, there is no such thing as objectivity.[27]

With Koskenniemie's thoughts in mind, this thesis is inspired by a *discourse methodological approach* focusing on language and diversity of interpretations. While the legal dogmatic method reconstructs a legal rule aiming to find its essence,[28] Alternatively, more to the point aims to find *the solution* to a legal problem by applying relevant legal rules.[29] A discursive approach focuses on differences and dissonances in the legal interpretation and does not aim to find "one true answer".[30]

Based on Koskenniemi's approach to international law, the inquiry has been performed in three iterative steps:

1. The first step examined Turkey's letter to the Security Council, extracting the main arguments for self-defence from the circumstances that Turkey put forth.

2. The second step identified the legal positions surrounding the arguments extracted in step one. Thereafter, inspired by Koskenniemi's pluralistic interpretation of international law, these legal discussions were categorized. It is recognized that the spectrum of legal positions is fluid and cannot straightforwardly be categorised into two distinctive groups. However, for the sake of the analysis, this enquiry employed two schools of thought with regards to self-defence, namely an *expansive* and *restrictive* approach. The

[27] Koskenniemi (1999) p. 352.
[28] Korling and Zamboni (2013) p. 356.
[29] *Ibid*. p. 21.
[30] *Ibid.* p 356.

former has a textual argument, emphasizing the Charter's objective "to strengthen universal peace" by limiting the circumstances in which states may use force. The latter claims that use of force might be permitted in situations other than an armed attack on the territory of a state in a strict sense.

3. In the third step, Turkey's arguments are assessed from both an expansive and restrictive perspective, whether they satisfy the criteria for lawful use of force under Article 51. Finally, the obtained result is analysed by applying Koskenniemi's structural understanding of international law.

2.3 Material

As stated in Article 38 of the ICJ Statute, international legal sources are divided into two groups, primary and secondary legal sources. The material used in this thesis consists of both sources. Article 51 of the UN Charter, which is in the centre of this thesis is a primary source. Used secondary sources includes judgments issued by the ICJ, resolutions passed by the Security Council, statements sent in by states to the UN as well as writings of international legal scholars including books and articles, clarifying the substance of the law.[31]

Because of the vast amount of material found on the subject, identifying the 'right' doctrine for the aim of this thesis has been essential. The choice of doctrine aims to reflect different positions with regards to how Article 51 could be interpreted rather than being exhaustive. As a foundation, works from well-respected international lawyers, such as Ian Brownlie and Christine Gray have been used.

[31] Henriksen (2017) p. 38.

3 Legal Context Surrounding Turkey's Arguments

Chapter three is divided into three sections. The first section puts Article 51 in context by presenting its historical as well as more recent developments. The second section goes through the four arguments presented in Turkey's letter to the Security Council. The third section examines the legal discussions surrounding the four arguments brought forward by Turkey.

3.1 Putting Article 51 Into Context

To understand the self-defence exception found in Article 51, one must first examine Article 2(4) of the UN Charter, which prohibits uses of force. Two exceptions to this prohibition can be found in the Charter; Article 51 and decisions taken by the UN Security Council to ensure international peace under Article 42. Article 2(4) was developed as a response to the Second World War,[32] and is, according to the ICJ "a cornerstone of the international legal order".[33] Also, it is a *Jus Cogens* norm, an international rule which cannot be set aside because of its fundamental importance.[34]

When the UN Charter came into force in 1945, it disposed of the universal right to go to war. States thereinafter needed a justification to defend acts of aggression. Thus, Article 51 and the right to act in self-defence became significant.[35] In seeking to justify their actions, States have tried to develop new exceptions to the use of force or have expanded the notion of self-defence to include their recourse to force.[36] Hence, controversy and disagreement over the scope of the right of self-defence is evident, due to the vagueness of the wording, but also to the changing structure and balance

[32] Gray (2018) p. 38.
[33] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Judgment, paras. 148.
[34] Simma et al. (2012) p. 203.
[35] Dinstein (2012) p. 176.
[36] Allain (2004) p. 251.

of power in international relations in the post-Cold War era.[37] Another factor is the absence of an authoritative mediator with power to assert if a use of force falls within the scope of Article 51.[38]

Legally speaking, the efforts to expand self-defence is noteworthy, because the prohibition of the use of force is a Jus Cogens norm. One should, therefore, expect that the efforts concerning Article 51 should be in favour of narrowing and not expanding.[39] Notwithstanding, states have managed to expand the article over the years, not by reformulating the article itself, but through the interpretation of customary law. According to the proponents of the expansive school, Article 51 refers to a pre-existing "inherent right of self-defence",[40] thus an apparent reference to customary international law.[41] Therefore, Article 51 must cannot be read alone, but together with customary law.

3.2 Turkey's Arguments in Their Letter to the Security Council

Turkey's justification for self-defence in the letter to the Security Council rests on four arguments*; Armed Attack, Anticipatory Self-defence, Self-defence Against Non-State Actors* and finally *Proportionality and Necessity*. The main futures of the letter can be summarised as follows:

1. Turkey does not explicitly use the wording 'armed attack' in the letter. However, Turkey does stress that the YPG/PKK have been "using snipers and advanced weaponry" to attack the Turkish border posts. Moreover, Turkey points out that ammunition and other deadly weapons are being smuggled into Turkey by the YPG to be used by PKK in attacks against the Turkish government. Attacks

[37] Allain (2004) p. 239. See also Chinkin and Kaldor (2017) p. 130.
[38] Chinkin and Kaldor (2017) p. 130.
[39] O'Connell (2019) p. 155.
[40] See, for example, Van den hole (2003) p. 78.
[41] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (hereafter Nicaragua case), ICJ Judgment, paras. 176.

which, according to Turkey, killed both Syrian and Turkish citizens close to the border.

2. Turkey repeatedly claims that YPG/PKK *has been,* and also *continues* to be a source of direct and imminent threat. Seemingly not only referring to an imminent threat at that exact moment but also a source of concern for future attacks. This phrasing can either be interpreted as an anticipatory self-defence argument or possibility a pre-emptive self-defence argument.

3. The letter also asserts that the military operation primarily targets the YDP/PKK forces in Syria, whom Turkey views as a terror organisation, therefore, according to Turkey, the operation is conducted against a non-state actor, based on 'War on Terror' doctrine.

4. In the letter, Turkey also mentions that the countries security concern, on several occasions, has been 'brought up' on different international platforms. However, no serious effort towards resolving the situation has been given. Further details with regards to the exact measures taken are not presented in the letter. Turkey's phrasing can be interpreted as a 'necessity' argument. Leaving, Turkey with no other choice but take military action. Turkey also mentions that the operation will be 'proportionate', "as previous counter-terrorism operations also have been".[42]

[42] UN Doc. S/2019/804, 9 October 2019.

3.3 Exploring the Legal Discussions Surrounding Turkey's Arguments

3.3.1 Armed Attack

If an *armed attack* occurs, the right to self-defence is triggered. The standard illustration of this when one states enters into the territory of another state for invasion.[43] However, there are several controversies as to what constitutes an armed attack, especially with regards to the degree of graveness that is required to categorise an attack as armed.

Restrictive Interpretation of Armed Attack by ICJ

The ICJ has explored the aggression required to be counted as an armed attack in the *Nicaragua* case. In this case, the US claimed the existence of the right to collective self-defence together with Costa Rica, El Salvador and Honduras in response to armed attacks from Nicaragua. However, ICJ did not accept the US argument concluding that there was no armed attack attributable to Nicaragua had occurred.[44] The Court further held that even though Nicaragua's conduct, assisting rebels with weapons and logistical support, could be conceived as use of force under Article 2(4), this did not amount to an armed attack. The Court famously stated that "it is necessary to distinguish the gravest forms of the use of force (those constituting an armed attack) from other less grave forms."[45] According to the ICJ, this is to be done by measuring the "scale and effects" of the armed attack.[46] When discussing the threshold of the *armed attack* in the *Nicaragua* case, the ICJ made an interesting distinction between mere *frontier incidents* and *armed attacks*, arguing that merely entering into the territory of another state with an armed force, does not necessarily constitute an armed attack. The ICJ thus adopted a restrictive approach towards the interpretation of Article 51.[47] Thus, fixating the threshold of the required force needed to meet the "armed

[43] Ruys (2010) p. 58.
[44] Nicaragua case, ICJ Judgment, paras. 238.
[45] Nicaragua case, ICJ Judgment, paras. 191.
[46] Nicaragua case, ICJ Judgment, paras. 195.
[47] Higgins (1994) p. 251.

attack" qualification is next to futile. There is also no direct requirement for any weapons to be involved.[48] Customary practice indicates that even small-scale attacks can qualify as armed attacks. As long as "they result in, or are capable of resulting in the destruction of property or loss of lives".[49]

Expansive Interpretation of Armed Attack Through the Accumulation of Events Theory

Following the 9/11 attacks, we have witnessed an increasing tendency to lower the armed-attack threshold and widening the contexts for self-defence recourse.[50] The rationale behind this change is that attacks by non-state actors are usually smaller but often unpredictable and frequent; they cause harm, but usually do not meet the requirement for the restrictive armed attack threshold. The Accumulation of Events Theory has, therefore, become an increasingly popular doctrine amongst scholars when discussing whether self-defence could be invoked against numerous low-scale uses of force.[51]

According to Ruys, the doctrine has already been used by several States, as in the examples of the US airstrikes in Iraq against Iraqi Intelligence Headquarters in 1993 and the Israeli Intervention in Lebanon 2006.[52] Similarly, Israel invoked Article 51 when conducted several attacks in Gaza as a response to rocket attacks, launched from Gaza into Israel. The argument put forth by Israel was that the rockets launched from Gaza should be seen as a whole and therefore assessed as "cumulative attacks" and not as separate attacks.[53] The ICJ has also supported the use of this theory in the *Armed Activities* case, stating that "a series of deplorable attacks could be regarded as cumulative in character".[54]

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[48] Grimal (2013) p. 96.
[49] Ruys (2010) p. 155.
[50] J. Tams (2009) p. 359.
[51] Ruys, Corten and Hofer (2018) p. 514.
[52] *Ibid*. p. 685.
[53] UN Doc. S/2008/816, 27 December 2008.
[54] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Judgment, paras. 146.

3.3.2 Anticipatory and Pre-emptive Self-defence

A strictly literal interpretation of the phrase "if an armed attack occurs" in Article 51 implies that an attack must have transpired, for a state to have the right to invoke self-defence. However, many legal scholars find that a more expansive interpretation of Article 51 is permitted. However, opinion amongst scholars varies with regards to how expansive the interpretation can be. The permissibility of the use of force in the case of anticipatory self-defence and pre-emptive self-defence is a matter of how expansive interpretation one adopts. 'Anticipatory' self-defence is a narrower doctrine that authorises armed responses to attacks that are on the brink of being launched. 'Pre-emptive self-defence' on the other hand is an expansive doctrine that authorises uses of force in order to arrest an armed attack that is not yet operational and hence is not yet *directly* threatening.[55]

Expansive Interpretation: Anticipatory Self-defence Against an Imminent Threat

There seems to be a consensus concerning the fact that states may be allowed to use anticipatory self-defence in cases where a threat is *imminent*. As Yoram Dinstein argues in his book *War, Aggression and Self-defence* state, the term imminent means that it is no longer just a threat but an apparent armed attack.[56]

In the authoritative case *The Caroline,* the ICJ stated, that the threat must be "instant, overwhelming and leaving no other choice of means and no moment of deliberation".[57] In other words, in customary law with the backing of the Caroline case, it has been permitted for a state to use anticipatory self-defence if there is an immediate and overwhelming threat. The Secretary-General asserted this position in the report of *the High-level Panel on Threats, Challenges and Change*. In this report, it was stated that

[55] O'Connell (2002) p. 1–22.
[56] Dinstein (2005) p. 182.
[57] Jennings (1938) p. 86.

the self-defence right against imminent threats "is long established in international law".[58]

More Expansive Interpretation: Pre-emptive Self-defence

Pre-emptive self-defence is used as an argument when states wish to abolish future attacks.[59] Article 51 states that self-defence is used "if an armed attack occurs", the term *occurs* referring to an armed attack that has come to pass and not a future attack. Because of this, states rarely use pre-emptive self-defence as an argument but instead contend the presence of an armed attack.[60] The hesitation shown by states to invoke pre-emptive self-defence, confirms the uncertain position the concept holds amongst states and legal scholars. That said, Israel has, on several occasions, mentioned the right to invoke pre-emptive self-defence. For example, in *Operation Opera* which involved an Israeli airstrike which led to the destruction of an Iraqi nuclear reactor. Israel feared the Nuclear plant was used to make nuclear weapons.[61] Likewise, in September 2002, the United States came out with a new National Security Strategy. The document included the controversial *Bush Doctrine* which stated that the United States would henceforth "act against threats before fully formed".[62] Thus, declaring the right to use pre-emptive self-defence. The doctrine was, however, not acknowledged by the UN bodies, who asserted that Article 51 still was adequate to "address the full range of threats to international peace and security."[63]

Not long after the United States published their 2006 National Security Strategy, which once again mentioned the right to pre-emptive self-defence.[64] Israel bombed a nuclear plant in Syria in 2007. According to Israel, they had destroyed the nuclear plant to prevent future attacks aimed

[58] UN Doc. A/59/565, 2 December 2004, paras. 188.
[59] Henriksen (2017) p. 269.
[60] Gray (2018) p. 174.
[61] Ruys, Corten and Hofner (2018) p. 329.
[62] The White House, 20 September 2002, *The National Security Strategy of the United States of America*.
[63] UN Doc. A/RES/60/1, 16 September 2005, paras. 79.
[64] The White House, 16 March 2006, *The National Security Strategy of the United States of America 2006*.

towards Israel. Noteworthy is that evidence taken from the area showed high levels of uranium, enough to make a deathly weapon.[65] As a consequence of this evidence, the case invoked almost no denunciation from other states.[66]

3.3.3 Self-defence Against Non-state Actors

Formally, arguing for the presence of the right to self-defence against non-state actors could be considered as provocative. However, after the 9/11 attacks positions altered towards a more accepting approach, increasing the uncertainty with regards to the content of current law.[67]

Restrictive Interpretation of Self-defence Against Non-State Actors

Article 51 of the UN Charter does not explicitly state that an armed attack must originate from a state actor. However, those arguing against an expansion of the interpretation of the article often affirm that the exception must be read in the light of the Charter, which only governs relations between states.[68] It appears that the ICJ has taken a more restrictive approach to the matter.[69] Although not directly condemning actions taken against non-state actors, they implied in the *Wall case* that the right to self-defence arises when an armed attack is connected to a foreign state.[70] Notwithstanding, the courts' reluctance to take a stand in the matter has been heavily criticised.[71]

Expansive Interpretation of Self-defence Against Non-State Actors

[65] International Atomic Energy Agency, GOV/2010/11, 18 February 2010, paras. 2.
[66] Ruys, Corten and Hofner (2018) p. 329.
[67] Henriksen (2019) p. 268.
[68] Chinkin and Kaldor (2017) p. 158.
[69] See, the case of Armed Activities on the Territory of the Congo.
[70] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion, paras. 139.
[71] Armed Activities on the Territory of the Congo, Separate Opinions of Judges Kooijmans, paras. 25, and Simma, paras. 8.

Just days after the 9/11 attacks the Security Council Resolutions 1368 (2001)[72] and 1373 (2001)[73] where unanimously taken.[74] A commonly held view is that resolution 1368 is an acceptance that the terror attacks of 9/11 brought forth the right of self-defence against non-state actors, thus legitimising *Operation Enduring Freedom*.[75] Resolution 1373 was however adopted as a general response to the growing threat of terrorism.[76] The phrasing used in Resolution 1373 "all necessary steps" is not the same as "all necessary means", which is commonly used when the Security Council authorises the use of force under Chapter VII.[77] It remains thus unclear if the Security Council recognised a general right of self-defence against non-state actors, or not. In the battle against ISIS in Syria (2014) however, a broad interpretation of *Operation Enduring Freedom* and the resolutions can be seen taken by Western states, justifying their war against ISIS.[78]

The vagueness of the current situation has led to the development of several new legal theories, to decrease the gap between the UN Charter and the expanded notion of self-defence. One of them is The *Unwilling or Unable* doctrine. This doctrine enables a state to enter into another state, provided that the state is unwilling or unable to deter the threat emanating from its territory.[79] The doctrine stems from the due diligence principle, which was discussed in the *Corfu Channel* case, affirming that, a state has a responsibility to "not allow knowingly its territory to be used for acts contrary to the right of other states".[80]

In the battle against ISIS in Syria (2014) the United States, openly conveyed in their letter to the Security Council that the military operation was lawful because the Syrian government had displayed an unwillingness and inability

[72] UN Doc. S/RES/1368, 12 September 2001.
[73] UN Doc. S/RES/1373, 28 September 2001.
[74] Henriksen (2019) p. 200.
[75] Trapp (2007) p. 151.
[76] Ahrnens (2007) p. 120.
[77] See, UN Doc. S/RES/661, 6 August 1990.
[78] Gray (2018) p. 237.
[79] Lehto (2018) p. 2.
[80] The Corfu Channel Case, ICJ Judgment, paras. 18-24.

to act and hinder the threat that ISIS generated.[81] As displayed in a report by Elena Chachko and Ashley Deeks, several other countries have also actively used the unable or unwilling doctrine to justify acts against non-state actors, for instance, Germany, Russia, Israel and Holland.[82] Thus, as Hakimi explains, many states have, in some way sanctioned operations against non-state actors over the years.[83]

3.3.4 Necessity and Proportionality

The legality of force used in self-defence depends, *inter alia*, on *necessity* and *proportionality*.[84] The two requirements can be derived from the Caroline case, from 1837. The incident concerned a dispute between Great Britain and the US. With regards to a wreckage of an American vessel, the Caroline, on American territory. The Caroline was assisting independence rebels in Canada, planning an attack from the US. Britain claimed the right to use self-defence.[85] As a result of the wreckage, Daniel Webster, the US Secretary of State at the time formulated the *Webster formula*. The formula stated how self-defence should be used; "nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[86] However, necessity and proportionality are both vague concepts which can be used to build either a more expansive or restrictive argument.

Necessity

Traditionally necessity is interpreted as a condition where there is no alternative solution to the armed attack, but to act in self-defence. States are therefore first expected to resort to non-violent measures and only if these measures are unsuccessful is it acceptable to use force against another

[81] UN Doc. S/2014/695, 23 September 2014.
[82] Chachko and Deeks, Lawfare, 10 October 2019, '*Who IS on Board with "Unwilling or Unable"'.*
[83] Hakimi (2015) p. 31.
[84] Kretzmer (2013) p. 235–282.
[85] Gray (2018) p. 157.
[86] Brownlie (1963) p. 43.

state.[87] It is common for states to invoke the right to self-defence after an armed attack has occurred. Usually, states argue that self-defence is justifiable to prevent future attacks. The United States, for example, justified the "war against terrorism" and the use of self-defence to "prevent and deter" future attacks.[88] The requirement of necessity differs depending on if there is an imminent threat, or more controversially if there is a remote threat.[89]

Proportionality

Proportionality has long been regarded as one of the elements for determining whether resorting to war is justified. Nevertheless, there is no explicit requirement of proportionality in Article 51. The UN has, however, stated that proportionality is an essential part of the article.[90] The proportionality requirement compares the unlawful armed attack with the counter-force used by the responding state. Factors to take into consideration when the proportionality requirement is tested is, for instance, causalities and overall damages.[91] However, symmetry between the initial attack and the response is not called upon. The proportionality-requirement is instead aimed at pinpointing the proportionate level of force required to repel the attack.[92]

[87] Corten (2010) p. 485.
[88] UN Doc. S/2001/946, 7 October 2001.
[89] Henderson (2018) p. 232.
[90] Schachter (1986) p. 120.
[91] Dinstein (2005) p. 237.
[92] Malanczuk (1997) p. 317.

4 Analysis of Turkey's Arguments

As seen, under international law, the right of self-defence exists if an armed attack against another state occurs. In such a case, cross-border defensive action is permissible to the extent that the action is necessary and proportionate. However, invoking Article 51 necessities the existence of certain conditions. Nevertheless, as seen in the previous chapter, there are different legal positions with regards to how to interpret these conditions where some entertain a more restrictive approach and others a more expansive. The following sections will apply these different legal positions on the arguments put forward by Turkey.

4.1 Armed Attack?

In the letter to the Security Council, Turkey claimed to be the victim of several attacks executed by the YPG/PKK. The attacks, cross border harassment in the form of armed fires and smuggling of deadly weapons by the YPG to the PKK. Weapons which, according to Turkey, later was used against the state. On several occasions, Turkey also affirms the necessity of the operation for the country's security, referring to the emerging Kurdish state-like entity forming on the Syrian side of the Turkish-Syrian border. An entity which, Turkey considers an offshoot of PKK, an armed Kurdish separatist group based in Turkey, which carried attacks on the Turkish military and occasionally on civilians over the years.
The question is then, whether these alleged attacks by YPG reach the sufficient level of gravity to constitute an armed attack, thus triggering the applicability of Article 51.

The vague nature of the armed attack, which Turkey implies has occurred, makes it difficult to determine its severity. Moreover, the claim is troublesome to verify, making it hard for Turkey to fulfil its burden of proof. However, assuming the attack is possible to confirm, it seems that

Turkey, refers not specifically to one armed attack but several reoccurring smaller attacks. If these attacks are seen separately, thus taking a restrictive approach in line with the argumentation of ICJ, the use of force will not reach the threshold required to meet the armed attack qualification. Thus, making *Operation Peace Spring* illegal under international law.

However, through an expansive interpretation of Article 51, the armed attack requirement could be regarded as met. This is achieved by putting forward the 'accumulation of events theory' which lowers the armed attack threshold, in the absence of a specific detectable assault, making it possible for Turkey to gather multiple attacks to meet the threshold. As stated in Chapter 3, the theory has been used on several occasions as a response to terror attacks. However, the general acceptance of such a doctrine could result in an open-ended licence to use force, going against the purpose of the UN-Charter, to keep peace and order.

4.2 Anticipatory and Pre-emptive Self-defence?

In the letter to the Security Council, Turkey begins by asserting that Turkey's national security *has been* under direct threat. The letter then advances by proclaiming that the state also *continue*s to be under imminent threat. Provided that the armed attack requirement is met, the first argument is well within the scope of Article 51, which initially is intended to apply on attacks which have transpired. However, the second argument is tougher to interpret since the terms *continued,* and *imminent threat* simultaneously are used in the same sentence. While *imminent threat* refers to the generally accepted right to use anticipatory self-defence, *continued,* instead seems to suggest the use of self-defence as means of repelling future attacks, which can be interpreted as a pre-emptive self-defence argument. Amongst legal scholars, such an extensive interpretation of Article 51 is contested. However, there seems to be a growing acceptance for the use of anticipatory self-defence when it is evident that the threat is imminent.

As Turkey is using the terms *continued* and *imminent threat* simultaneously in a sentence, it is difficult to interpret if Operation Enduring Freedom has emerged as a result of specific armed attacks, which falls within the scope of Article 51, or if the operation intended to weaken the YPG/PKK against future attacks. The last-mentioned situation resembles a pre-emptive self-defence argument, which calls for an expansive interpretation of the self-defence article, to be legal.

4.3 Non-state Actors?

Operation Peace Spring was conducted against a non-state entity, the YPG, whom Turkey views as a terror organisation due to its close organisational and operational connections to the PKK. Once again, international law harbours the possibility to argue both for the illegality and the legality of the operation based on legal entity that allegedly carry armed attacks.

If following a restrictive approach, Operation Peace Spring would not be legal under international law. However, with regards to whether it in some cases may be justifiable to use defensive action against a non-state actor arguable case can be made. Indeed, there is a growing acceptance among scholars that an armed attack by a non-state group alone can justify the exercise of right to self-defence, especially when such groups are active within a failed state.[93] This could be supported by using the Unwilling or Unable doctrine, referring to the Assad regime's lack and inability to gain effective control over the northern parts of Syria.

In conclusion, it is difficult to see how accepting the Unwilling or Unable doctrine would correspond with territorial sovereignty and the prohibition of the use of force. There is a growing consensus that the right to self-defence against non-state actors is permissible in cases where the non-state actor exercises territorial sovereignty. This was seen in, for instance, the 2014-armed conflict in Syria against ISIS, and can thus possibly also be applied to

[93] Dinstein (2012), p.225

the YPG militias in the Kurdish autonomous region. As discussed below, in such a case, cross-border defensive forcible action is permissible to the extent that the action is necessary and proportional to counter the attack.

4.4 Necessary and Proportionate?

Finally, the room for argumentation is noteworthy when discussing the parameters; necessary and proportionate. Turkey's arguments concerning how these two parameters are met during the operation are somewhat vague and need further elaboration.

Concerning the question of necessity, Turkey asserts that the security concern has been brought up, on several occasions before the state responded against the YPG/PKK. This could possibly fulfil, the requirement to first resort to non-violent measures. However, in the letter, further details with regards to the exact measures taken are not presented.

With regards to the proportionality requirement, within two weeks, the operation displaced 180 000 people, with casualties from both sides. Considering that the armed attacks are limited to harassment fires, as Turkey states in their letter, responding with such a substantial use of force cannot be regarded as proportionate. However, it could be argued, such as the US Secretary of State also expressed, see chapter 1.1, that there is a substantial risk that PKK and YPG could work together, against Turkey in order to achieve autonomy. If this threat should be imminent, it could justify the degree of force used by Turkey. By not giving more detailed information in their letter, Turkey fails, however, to show that such an imminent threat exists.

4.5 Conclusion

In the quest to fulfil the aim of this thesis, one is met with the same complexity Martti Koskenniemi acknowledges in his discursive approach to international law. International law is indeterminate and contradictory to its

nature. It would therefore be naïve to assume that the question of whether Turkey's military operation in Syria is acceptable under international law, can be answered with a simple yes or no.

It is, however, possible to conclude that the answer to whether Turkey's arguments can be considered satisfying the conditions for self-defence, depends on whether one adopts a restrictive or expansive interpretation to Article 51. With a restrictive interpretation, the operation falls outside the scope of self-defence, making it unlawful under international law. Using an expansive interpretation, it is possible to argue for the lawfulness of the operation, at least to some extent. However, even if an expansive approach is taken, the weakest and most farfetched argument that Turkey puts forward is the necessity and proportionality assessment.

The explanation to the lack of a clear answer to the research question can be found in Koskenniemi's structural understanding of international law. If international law is seen as a language, an argumentative tool, then it is not international law itself that can resolve a legal problem. Does this not defy the *raison d'être* of international law? This may partially be true if law is understood as a practice producing solutions. However, as Koskenniemi holds, international law should not solely be seen as a language of law, but also for politics. It is created by states, for states; thus, room is made for political choices and interests.

As seen, a gap has developed concerning the scope of Article 51, with the "expansionist" at one side and "restrictionists" at the other. However, legal norms are supposed to provide a generally accepted argumentative pattern. This pattern referring to a consensus of what the standard legal answer should be, limits the possibility of different outcomes in each case. In practice, this means that a State takes their political stance and form it to fit this legal pattern. In the case of Operation Peace Spring, Turkey followed its political agenda choosing an expansive interpretation of Article 51. At the same time, Turkey can be seen following the legal pattern, by arguing

within the legal framework of Article 51 and by using the four legal parameters found in their letter to the Security Council.

As a result of states political agenda and interests, the argumentative limit has been tested and stretched for decades with regards to Article 51. Also in the case of *Operation Peace Spring*, plausible arguments for the use of force have been put forward. Like waves crashing against crumbling cliffs, each new extensive argument put forward by a state has eroded the prohibition of the use of force in Article 51 one stone at a time. Accordingly, it is not difficult to understand why Turkey would feel encouraged to use the self-defence exception, following the steps of hegemonic states such as the United States, by exploiting a loophole which already exists.

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