

QUO VADIT JUS AD BELLUM?:
A LEGAL ANALYSIS OF TURKEY'S MILITARY
OPERATIONS AGAINST THE PKK IN NORTHERN IRAQ

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[In October 2007, a series of cross-border attacks by Kurdistan Workers' Party fighters operating from inside northern Iraq led Turkish authorities to launch (unauthorised) military operations in Iraqi territory. The present article analyses to what extent this intervention — largely ignored by the scholarly community — can be reconciled with the international law on the use of force (the jus ad bellum). Taking account of the reactions of the international community, it also examines the possible impact of the incident on the customary boundaries of self-defence. In this context, it is argued that the intervention adds to the growing evidence in state practice supporting a more flexible construction of self-defence against attacks by non-state actors. On the other hand, the lack of explicit legal justification on behalf of Turkey and the generally muted reactions of third states make it difficult to identify relevant opinio juris. The implication is that the incident ultimately does little in terms of reducing the existing legal uncertainty regarding the ratione personae aspect of the 'armed attack' requirement of art 51 of the Charter of the United Nations.]

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I INTRODUCTION

On 7 October 2007, a group of Kurdistan Workers' Party ('PKK') militants ambushed a Turkish commando in Turkey's south-eastern Sirnak province, killing 13 soldiers and wounding three.¹ The incident took place against a general background of increased Kurdish separatist violence and triggered a

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¹ 'Authorisation of Incursions into Iraq' (2007) 53 *Keesing's Record of World Events* 48 219, 48 219–20.

wave of public outrage across the country. When, four days later, another cross-border attack resulted in the killing of 12 soldiers and the capture of eight others, the Turkish Government gave the green light for military operations inside Iraqi territory. Initially, actions were confined to aerial bombardments and artillery raids against PKK positions, as well as relatively small-scale operations by Turkish commandos.² Fearing that a Turkish ground operation would jeopardise the stability of one of the rare peaceful parts of Iraq, the United States, together with the Iraqi government and other members of the international community, urged Turkey to pursue a diplomatic solution. Nonetheless, on 21 February 2008, Turkey launched its biggest offensive in a decade on PKK bases inside Iraq, deploying several thousand troops, supported by aircraft and artillery.³ While the operation was denounced by the Iraqi Government and the Kurdistan Regional Government ('KRG'), the international community generally adopted a passive, condoning posture. By the end of February, most Turkish troops were again withdrawn, albeit that air strikes have continued in subsequent months.⁴

The present article offers a case study of Turkey's military intervention in northern Iraq in 2007–08 — a conflict largely ignored by the scholarly community — from the perspective of the international law on the use of force (the *jus ad bellum*). On the one hand, it tests the Turkish operation against the existing rules on the inter-state recourse to force, inter alia by scrutinising the necessity and proportionality thereof. At the same time, taking account of the reactions of third states, it examines the possible impact of the incident on the customary boundaries of the right of self-defence. Indeed, as the International Court of Justice recognised in the *Nicaragua* case,⁵ the rules on the use of force are not static rules: '[r]eliance by a State on a novel right or an unprecedented exception ... might, if shared in principle by other States, tend towards a modification of customary international law'.⁶ *In casu*, the *de lege ferenda* aspect is particularly relevant in relation to the 'armed attack' requirement of art 51 of the *Charter of the United Nations*, or, more precisely, in relation to the ongoing controversy regarding the exercise of self-defence against attacks by non-state actors.

Part II of this article briefly describes the run-up to the intervention in northern Iraq in 2007–08 and the reaction of the international community. Part III deals with the legality of the operations under international law and their possible impact on the customary rules on the use of force. Part IV concludes with some final observations.

² 'Offensive against PKK Positions in Northern Iraq' (2007) 53 *Keesing's Record of World Events* 48 316, 48 316; 'Further Action against Separatists' (2008) 54 *Keesing's Record of World Events* 48 374, 48 374.

³ 'Ground Offensive against Separatists' (2008) 54 *Keesing's Record of World Events* 48 427, 48 427.

⁴ 'Turkish Troops Pull Out of Iraq', *BBC News* (UK) 29 February 2008 <<http://news.bbc.co.uk/2/hi/europe/7270566.stm>> at 23 September 2008; 'Turkey "Kills 150 Kurdish Rebels"' *BBC News* (UK) 3 May 2008 <http://news.bbc.co.uk/2/hi/middle_east/7382150.stm> at 23 September 2008.

⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 109 ('*Nicaragua*').

⁶ *Nicaragua* [1986] ICJ Rep 14, 109.

II A RECONSTRUCTION OF THE 2007–08 INTERVENTION

A *The Run-Up to the Intervention*

The latest stage in the recurring conflict between the Turkish military and the PKK⁷ can be traced back to a series of events post-1999.⁸ After more than 15 years of armed conflict in the predominantly Kurdish regions in south-eastern Turkey, with an estimated death toll of some 37 000 people, the Turkish military had come close to defeating the PKK in the late 1990s.⁹ The separatist group, once numbering between 10 000 and 20 000 fighters, had been reduced to a containable nuisance.¹⁰ The carefully orchestrated capture of the PKK's founder and unquestioned leader, Abdullah Öcalan, in 1999, seemingly delivered the coup de grâce.¹¹ Continuing to head the organisation from his jail on the isle of Imrali, Öcalan set about a radical transformation of the PKK. He declared a unilateral ceasefire and ordered the remaining 3000 to 3500 fighters to retreat and regroup in northern Iraq. As for the PKK's political agenda, Öcalan gave up the ambition of an independent Kurdistan, instead declaring that the PKK would strive for equal rights for Kurdish citizens and the release of imprisoned PKK members.

The resulting calm did not last long. The limited accommodation of Kurdish demands and the lack of prospect of political participation led Kurdish activists to reconsider their options. In 2004, the unilateral ceasefire was ended. By that time, Turkish Kurds had also gained courage from the developments within Iraq, where their Iraqi brethren had acquired regional autonomy under the auspices of the KRG.¹² This evolution flared up the ambitions of the Turkish Kurds by providing them with a suitable model of autonomy. It also made it easier for the PKK to use the mountainous border region in northern Iraq as a logistical base from which to mount cross-border raids into Turkey.

⁷ Given the regional context and the complexity of Turkish domestic politics, a brief synopsis of the Kurdish question is virtually impossible. In essence, the struggle of the Turkish Kurds finds its origin in the dismemberment of the multi-ethnic Ottoman Empire after World War I and the subsequent attempts to destroy Kurdish identity and to assimilate the Turkish Kurds into a mono-ethnic secular state, despite the prospect of autonomy incorporated in the 1920 *Treaty of Sèvres (The Treaty of Peace Between the Allied and Associated Powers and Turkey)*, opened for signature 10 August 1920, 113 BFSP 652, which never entered into force). Under the reign of Kemal Atatürk, the policy of 'Turkisation' consisted of three main elements: restriction of Kurdish cultural rights, repression of uprisings, and forced relocation of Kurdish communities to the cities in the west. The PKK was founded in 1978 under the leadership of Abdullah Öcalan and began its armed activities in 1984. See generally below n 8.

⁸ See generally Henri J Barkey, 'Turkey and the PKK: A Pyrrhic Victory?' in Robert J Art and Louise Richardson (eds), *Democracy and Counterterrorism: Lessons from the Past* (2007) 343; Henri J Barkey and Graham E Fuller, *Turkey's Kurdish Question* (1998); Aliza Marcus, *Blood and Belief: The PKK and the Kurdish Fight for Independence* (2007).

⁹ See Barkey, above n 8, 344; 'PKK "Starts Turkey Withdrawal"', *BBC News* (UK) 25 August 1999 <<http://news.bbc.co.uk/1/hi/world/europe/429898.stm>> at 23 September 2008.

¹⁰ Barkey, above n 8, 361; Marcus, above n 8.

¹¹ Öcalan's arrest completed a chain of events, triggered by Turkish threats of a military strike against Syria if the latter country continued to provide shelter to the PKK leader: see Barkey, above n 8, 352.

¹² See, F Stephen Larrabee, *Turkey As a US Security Partner* (2008) 7.

After 2004, separatist violence intensified rapidly, claiming over 1500 lives in a period of a few years.¹³ As a result, Turkish authorities grew increasingly frustrated at the lack of action undertaken by Iraqi and US forces against PKK fighters on Iraqi soil. Even though the two main Iraqi Kurdish factions, the Patriotic Union of Kurdistan ('PUK') and the Kurdistan Democratic Party ('KDP'), had assisted Turkey in combating the PKK in the mid-1990s, and even though both groups had promised to eliminate all PKK bases in the areas under their control in the 1999 *Washington Accord*,¹⁴ neither took credible steps to dismantle PKK activities after the 2003 US intervention. The Iraqi Kurds' relationship with the PKK remained one of uneasy coexistence. On the one hand, Iraqi Kurds were keen on retaining their preferential position in the Iraqi constellation and on maintaining positive trade relations with Turkey.¹⁵ On the other hand, they remained broadly sympathetic to the struggle of the Turkish Kurds and arguably regarded the PKK as a bargaining chip to pressure Turkey over the disputed status of the oil-rich region of Kirkuk.¹⁶ The US was reluctant to push the Iraqi Kurds too hard because it needed their support for the Iraqi coalition.¹⁷ While the US — like the European Union — qualified (and qualifies) the PKK as a terrorist organisation,¹⁸ it also chose not to take direct military action itself, because it needed all available forces to stabilise the other provinces of Iraq.

In 2007 — a tumultuous year characterised by open conflict between Turkey's 'Kemalist' elites in the military and state bureaucracies, and the

¹³ International Institute for Strategic Studies, 'Turkey: New Uncertainties' (2007) 107 *Strategic Survey* 178, 180.

¹⁴ See, eg, 'Fighting Between Iraqi and Turkish Kurds' (1992) 38 *Keesing's Record of World Events* 39 163, 39 163; Christine Gray and Simon Olleson, 'The Limits of the Law on the Use of Force: Turkey, Iraq and the Kurds' (2001) 12 *Finnish Yearbook of International Law* 355, 372–6. The PUK and KDP have long been the two main political factions of the Iraqi Kurds. The 1999 *Washington Accord* ended a period of intra-communal fighting between them. The fact that the Iraqi *peşmergas* (Kurdish guerrillas) temporarily supported Turkish efforts to combat the PKK in the mid-1990s is explained by two factors: Iraqi Kurds needed Turkey to continue its support of the no-fly zone, which protected Iraqi Kurds from repression by the Hussein regime (Turkey permitted US and UK forces to use the Incirlik airbase to enforce the no-fly zone), and they became increasingly dependent on trade relations with Turkey (especially since Saddam Hussein had imposed an economic blockade on them). On the fickle relationship between the PKK and the KDP and PUK, see Chris Kutschera, 'Mad Dreams of Independence: The Kurds of Turkey and the PKK' (1994) 189 *Middle East Report* 12, 14.

¹⁵ International Crisis Group, *Iraq: Allaying Turkey's Fears over Kurdish Ambitions* (ICG Middle East Report No 35, 26 January 2005) 9 <<http://www.crisisgroup.org/home/index.cfm?l=1&id=3241>> at 23 September 2008.

¹⁶ See *ibid*; 'ICG Expert: Kirkuk Deal Could Serve Both Turks, Kurds', *Today's Zaman* (Turkey) 26 May 2008 <<http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=142923>> at 23 September 2008.

¹⁷ In the face of persistent political tension and sectarian violence between Iraq's Sunni and Shiite factions, the Kurdish parties have positioned themselves as 'kingmakers' in Baghdad: see, eg, Joost R Hiltermann, 'To Protect or to Project? Iraqi Kurds and Their Future' (2008) 247 *Middle East Report* <<http://www.merip.org/mer/mer247/hiltermann.html>> at 23 September 2008.

¹⁸ See Office of the Coordinator for Counterterrorism, US Department of State, *Foreign Terrorist Organizations* (2008) <<http://www.state.gov/s/ct/rls/fs/08/103392.htm>> at 23 September 2008; Council of the EU, *Council Common Position 2008/586/CFSP of 15 July 2008 Updating Common Position 2001/931/CFSP on the Application of Specific Measures to Combat Terrorism and Repealing Common Position 2007/871/CFSP* [2008] OJ L 188/71.

pro-Islamic Justice and Development Party ('AKP') government¹⁹ — the rising anger about PKK attacks had a rallying effect on Turkish authorities and public opinion alike. When, despite the conclusion of a new security agreement with Iraq in September,²⁰ attacks continued, Turkey eventually ran out of patience. On 7 October 2007, 13 Turkish soldiers were killed in an ambush, days after PKK gunmen had shot dead 13 village guards on a bus. A wave of public outrage swept across Turkey, with 'tens of thousands of demonstrators taking to the streets' and calling for action.²¹ In response, and despite calls for restraint by the US and Iraq, Prime Minister Erdogan went to the Grand National Assembly to request authorisation to undertake military incursions into northern Iraq, a request which was overwhelmingly approved.²² Some 100 000 Turkish ground troops massed on the border. When, on 21 October, another cross-border attack against a military outpost resulted in the killing of 12 soldiers and the capture of eight others, the Turkish Government gave the green light for an aerial bombardment of Kurdish rebel positions just inside northern Iraq.²³ In the following days aerial bombardments were combined with artillery attacks as well as a small-scale hot pursuit operation by Turkish commandos to retrieve the captured soldiers. In a final effort to stave off further military operations, the KRG called on the PKK to end its attacks and the Iraqi Prime Minister ordered the closure of all PKK offices in Iraq.²⁴ On 25 October, a high-level Iraqi delegation arrived in Ankara, but their assurances were dismissed as unconvincing.²⁵ On 4 November, the PKK released the eight captured soldiers.²⁶ The following day, US President Bush received Prime Minister Erdogan at the White House. At the end of the meeting, President Bush emphasised that the PKK was a 'terrorist organization' and a 'common enemy' and offered to share US intelligence with Turkey and to increase political and military cooperation.²⁷ In the meantime Turkish operations continued, albeit on a relatively small scale.

On 16 December 2007, Turkey launched 'its largest assault in recent years', when over 50 Turkish fighter jets hit PKK positions, some 95 kilometres into Iraqi territory.²⁸ Similar raids continued throughout December and January.²⁹ A new phase began when, on 21 February 2008, the Turkish military launched 'Operation Sun', sending several thousand ground troops into northern Iraq,

¹⁹ See, eg, Thomas Bénalo, 'Turquie: l'ivresse des métamorphoses' [2007] *Politique étrangère* 839; Gülçin Lelandais, 'L'énigme de l'AKP: regards sur la crise politique en Turquie' [2007] *Politique étrangère* 547, 559–60.

²⁰ 'Vote of Confidence in AKP' (2007) 53 *Keesing's Record of World Events* 48 150, 48 151. On 28 September 2007, the two countries concluded a security arrangement to deal with the security in the border region. A Turkish request to allow 'pursuit' operations in Iraqi territory was denied by Iraq.

²¹ 'Authorisation of Incursions into Iraq', above n 1, 48 219–20.

²² *Ibid.* The motion was approved by 507 votes to 19.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ 'US Pledge of Support against Kurdish Rebels' (2007) 53 *Keesing's Record of World Events* 48 265, 48 265–6. The eight soldiers were eventually charged with 'disobeying orders' by surrendering.

²⁷ *Ibid.*

²⁸ 'Offensive against PKK Positions in Northern Iraq', above n 2, 48 316.

²⁹ *Ibid.*; 'Further Action against Separatists', above n 2, 48 374.

supported by aircraft and artillery.³⁰ On 29 February, the Turkish General Staff announced that the ground offensive was completed and that troops had returned from Iraq after achieving their objectives.³¹ The Turkish military claimed that at least 240 PKK militants were killed during the week-long offensive (as well as 27 members of the Turkish security forces) and that ‘almost 800 shelters, weapons stores and other PKK positions were destroyed’.³² The PKK, however, strongly disputed these figures, and in turn claimed victory after the withdrawal of Turkish ground troops. Independent verification of the death toll has remained impossible.³³ Following the conclusion of the February ground offensive, the Turkish military shifted its focus again to ground operations in Turkey’s own south-eastern provinces.³⁴ Nonetheless, in subsequent months, air raids were still being launched occasionally against PKK forces within northern Iraq.³⁵

B *The Reaction of the International Community*

In the run-up to the Turkish intervention, as the threat of military action became more tangible, the international community initially responded in a two-fold manner. On the one hand, states expressed sympathy with Turkey’s position and strongly condemned the PKK attacks of 7 and 21 October 2007. On

³⁰ ‘Ground Offensive against Separatists’, above n 3, 48 427. See also ‘Iraq Warns Turkey over Incursion’, *BBC News* (UK) 23 February 2008 <<http://news.bbc.co.uk/1/hi/world/europe/7260478.stm>> at 23 September 2008: ‘Reports on the size of the assault force have varied from 3000 to 10 000 soldiers’.

³¹ ‘Ground Offensive against Separatists’, above n 3, 48 427.

³² Sarah Rainsford, ‘Iraq Troop Withdrawal Baffles Turks’, *BBC News* (UK) 29 February 2008 <<http://news.bbc.co.uk/2/hi/europe/7272108.stm>> at 23 September 2008; Sabrina Tavernise and Richard A Opiel Jr, ‘Turkey Announces Withdrawal from Northern Iraq’, *International Herald Tribune* (France) 29 February 2008 <<http://www.iht.com/articles/2008/02/29/europe/turkey.php>> at 23 September 2008.

³³ ‘Turkey Urges PKK to End Struggle’, *BBC News* (UK) 1 March 2008 <<http://news.bbc.co.uk/2/hi/europe/7272184.stm>> at 23 September 2008.

³⁴ ‘Turkey “Kills 11 Kurdish Rebels”’, *BBC News* (UK) 10 April 2008 <<http://news.bbc.co.uk/2/hi/europe/7340762.stm>> at 23 September 2008; ‘Turkey “Kills 16 Kurdish Rebels”’, *BBC News* (UK) 2 April 2008 <<http://news.bbc.co.uk/2/hi/europe/7326139.stm>> at 23 September 2008.

³⁵ ‘Turkey Hits Rebel Targets in Iraq’, *BBC News* (UK) 29 March 2008 <<http://news.bbc.co.uk/2/hi/europe/7320508.stm>> at 23 September 2008; ‘Turkey Launches Raids on N Iraq’, *BBC News* (UK) 26 April 2008 <<http://news.bbc.co.uk/2/hi/europe/7368541.stm>> at 23 September 2008; ‘Turkey “Kills 150 Kurdish Rebels”’, *BBC News* (UK) 3 May 2008 <http://news.bbc.co.uk/2/hi/middle_east/7382150.stm> at 23 September 2008; ‘Military: Turkish Jets Have Struck Kurdish Rebel Target in Northern Iraq’, *International Herald Tribune* (France) 8 June 2008 <<http://www.iht.com/articles/ap/2008/06/08/europe/EU-GEN-Turkey-Iraq-Kurds.php>> at 23 September 2008; ‘Turkish Jets Target PKK in Iraq’, *BBC News* (UK) 24 July 2008 <<http://news.bbc.co.uk/2/hi/europe/7523020.stm>> at 23 September 2008; ‘Turkish Jets “Attack PKK Hideout”’, *BBC News* (UK) 29 July 2008 <http://news.bbc.co.uk/2/hi/middle_east/7531282.stm> at 23 September 2008; ‘Turkish Warplanes “Bomb PKK Base”’, *BBC News* (UK) 17 August 2008 <http://news.bbc.co.uk/2/hi/middle_east/7566322.stm> at 23 September 2008. In June 2008, Turkey and Iran, moreover, began to cooperate in fighting the PKK and the Party for a Free Life in Kurdistan (‘PJAK’), the group’s Iranian off-shoot, by means of intelligence sharing and the launching of coordinated strikes against rebel strongholds: see Suzan Fraser, ‘Turkey, Iran Launch Coordinated Attacks on Kurds’, *Associated Press*, 5 June 2008, available from <<http://www.ap.org>> at 23 September 2008. In October 2008, the Turkish Parliament extended the army’s mandate to carry out cross-border raids against Kurdish rebels in northern Iraq by one year: ‘Turkey Extends Iraq Raid Window’, *BBC News* (UK) 8 October 2008 <<http://news.bbc.co.uk/2/hi/europe/7659194.stm>> at 23 September 2008.

the other hand, they urged Turkey to pursue a solution through diplomatic means by engaging in a dialogue with the competent federal and regional Iraqi authorities. Thus, a statement by the EU Presidency of 22 October 2007 reiterated the EU's 'total condemnation of the terrorist violence perpetrated by the PKK in Turkish territory, in particular the attacks carried out over this last weekend'.³⁶ At the same time the statement emphasised the importance of 'the strengthening of the dialogue and cooperation between the Governments of Turkey and Iraq to address this problem'³⁷ and called on 'the Iraqi Government and the Kurdish Regional Government to ensure the respect for the Turkish border and guarantee that the Iraqi territory is not used for violent actions against Turkey'.³⁸ Similar declarations were made by the US, the United Kingdom, France and other countries.³⁹ These reactions were by and large inspired by fears that a Turkish intervention in northern Iraq would end the stability in the only non-violent part of Iraq by drawing Iraqi Kurdish fighters into the conflict.⁴⁰ This would not only jeopardise peace-building efforts in Iraq, but could also deteriorate regional security in the longer run. Despite these fears, states generally took a muted stance when Turkey eventually went ahead with the military option. A distinction can be made between the various protagonists.

The US never explicitly endorsed the intervention, yet it certainly never condemned it. It consistently labelled the PKK a 'common enemy' and promised to step up efforts to combat the terrorist group, urging the Iraqi authorities to do the same.⁴¹ More concretely, the US actually aided Turkey by supplying actionable military intelligence about PKK whereabouts and by clearing northern Iraqi airspace to enable Turkish strikes.⁴² Arrangements hereto were apparently

³⁶ Presidency of the EU, 'EU Presidency Statement on the Terrorist Attacks of the PKK in Turkey over the Weekend' (Press Release, 22 October 2007) <http://www.eu2007.pt/UE/vEN/Noticias_Documentos/Declaracoes_PESC/20071022PESCPKK.htm> at 23 September 2008 ('Statement on the Terrorist Attacks of the PKK').

³⁷ Ibid.

³⁸ Ibid.

³⁹ See, eg, Sean McCormack, US Department of State Spokesman, 'PKK Attack against Turkey' (Press Release, 21 October 2007) <<http://www.state.gov/r/pa/prs/ps/2007/oct/93757.htm>> at 23 September 2008; Bernard Kouchner, Press Correspondent for the Minister of Foreign Affairs, France, 'Tensions entre la Turquie et l'Iraq' (Press Release, 21 October 2007) <<https://pastel.diplomatie.gouv.fr/editorial/actual/ael2/bulletin.asp?liste=20071022.html#Chapitre5>> at 23 September 2008; David Miliband, Foreign Secretary of the UK, 'Miliband Condemns Attacks on Turkey-Iraq Border' (Press Release, 23 October 2007) <http://www.fco.gov.uk/resources/en/press-release/2007/10/fco_hpnpr_211007_turkeyiraq> at 23 September 2008. See also Condoleezza Rice, US Secretary of State, and David Miliband, UK Secretary of State for Foreign and Commonwealth Affairs, 'US-UK Joint Statement on PKK Terrorist Attack against Turkey: Calls on Iraqi, Kurdish Regional Governments to Take Steps to Halt PKK from Iraqi Territory' (Joint Press Release, 22 October 2007) <<http://www.america.gov/st/texttrans-english/2007/October/20071023140621eafas0.725033.html>> at 23 September 2008.

⁴⁰ See, eg, Michael Evans, 'Analysis: Invasion Would Be a Disaster', *Times Online* (UK) 21 October 2007 <<http://www.timesonline.co.uk/tol/news/world/iraq/article2707317.ece>> at 23 September 2008; Edward P Joseph and Michael E O'Hanlon, 'Resolving the Kurdish Dilemma', *The Wall Street Journal* (New York, US) 2 November 2007, A12.

⁴¹ 'US Labels Kurdish Group as Terrorist', *CNN* (US) 11 January 2008 <<http://edition.cnn.com/2008/POLITICS/01/11/us.turkey/index.html>> at 23 September 2008; 'US Pledge of Support against Kurdish Rebels', above n 26, 48 265.

⁴² See, eg, 'Offensive against PKK Positions in Northern Iraq', above n 2, 48 316.

made during subsequent meetings in November 2007.⁴³ Thus, on 2 November, US Secretary of State Rice visited Ankara.⁴⁴ On 5 November, Prime Minister Erdogan met President Bush at the White House.⁴⁵ On 20 November, further meetings were held between US Generals Petraeus and Cartwright, and General Saygun of the Turkish General Staff. During his first official visit to the US, on 8 January, President Gül thanked the US for its support of the Turkish campaign.⁴⁶

When on 26 February, Turkey launched its large-scale ground campaign, advance warning was given to both Iraq and the US.⁴⁷ On 28 February 2008, however, President Bush told a news conference that the Turks needed to ‘move quickly, achieve their objective and get out’.⁴⁸ The same day, US Defence Secretary Gates declared that Turkey’s incursion ‘should be as short and precisely targeted as possible’.⁴⁹ As mentioned earlier, Turkish ground troops were withdrawn the next day. This striking conjunction of circumstances obviously fuelled speculations that the withdrawal was a concession to American demands. Turkish authorities unsurprisingly denied rumours of foreign pressure and insisted that the operation was terminated because it had achieved its objectives.⁵⁰

Overall, the US attitude must be evaluated against three factors: the background of the deteriorating ‘strategic partnership’ with Turkey;⁵¹ Turkey’s strategic importance for the US presence in Iraq — consider for example the fact that 70 per cent of American logistics in Iraq went through Turkey;⁵² and the

⁴³ See ‘US Pledge of Support against Kurdish Rebels’, above n 26, 48 265. During these meetings, Turkey made clear that the time for action had come, but stressed that it preferred to consult with Washington before launching operations: Nico Hines, ‘Rice Promises US Intervention against PKK’, *Times Online* (UK) 2 November 2007 <<http://www.timesonline.co.uk/tol/news/world/europe/article2794678.ece>> at 23 September 2008; ‘Europe Again Warns against Turkish Intervention in Iraq’, *Deutsche Welle* (Germany) 22 October 2007 <<http://www.dw-world.de/dw/article/0,2144,2834888,00.html>> at 23 September 2008.

⁴⁴ Hines, above n 43.

⁴⁵ During the question and answer session with the press following the meeting, President Bush was asked what the US reaction would be to a Turkish operation into northern Iraq. President Bush answered evasively, stating that ‘it’s fine to speculate about what ... may or may not happen’, and declaring that the US would help ‘to make sure that there is good enough intelligence so that we can help deal with a common problem’: White House, ‘President Bush and Prime Minister Tayyip Erdogan Discuss Global War on Terror’ (Press Release, 5 November 2007) <<http://www.whitehouse.gov/news/releases/2007/11/20071105-3.html>> at 23 September 2008.

⁴⁶ See ‘Further Action against Separatists’, above n 2, 48 374.

⁴⁷ See ‘Ground Offensive against Separatists’, above n 3, 48 427.

⁴⁸ ‘Turkey Must End Iraq Raid — Bush’, *BBC News* (UK) 28 February 2008 <<http://news.bbc.co.uk/2/hi/europe/7268345.stm>> at 23 September 2008: ‘Bush dismissed suggestions that Turkey should be threatened with the removal of American intelligence co-operation’. See also Mark Parris, ‘US–Turkish Relations: How Firm a Foundation?’ (Speech delivered at the Economics Club, Memphis, US, 8 May 2008).

⁴⁹ ‘Turkey Must End Iraq Raid — Bush’, above n 48. Both Turkish Prime Minister Erdogan and Defence Secretary Gonul insisted that operations would continue ‘as long as necessary’: ‘Ground Offensive against Separatists’, above n 3, 48 427.

⁵⁰ ‘Ground Offensive against Separatists’, above n 3, 48 427.

⁵¹ See, eg, Mark R Parris, *Last Chance for US–Turkish Relations?* (2008) Brookings Institution <http://www.brookings.edu/opinions/2007/1031_turkey_parris.aspx> at 23 September 2008. Apart from the lack of action undertaken by US forces within Iraq against the PKK, Turks were furious about the attempt to pass a resolution on the ‘Armenian genocide’ in the US House of Representatives.

⁵² See Evans, above n 40.

US' broader 'war on terror'. In light of Turkey's resoluteness, it appears that the US Administration thought it more appropriate to condone the operations, and even offer some support, while insisting that they should be limited in time and scope. In other words, instead of risking a direct collusion with its ally, the US opted for playing a mitigating role vis-à-vis Turkey. This appears to have generated the desired result both in terms of strengthening the Turkish-US relationship and increasing US approval ratings among Turkish citizens. On the other hand, Iraqi leaders were less amused with the American volte-face. On 18 December 2007, for instance, KRG President Barzani cancelled a meeting with Secretary of State Rice in protest over the US' role in the intervention.⁵³

The Iraqi authorities initially took a conciliatory attitude. After Turkey had initiated air raids in October, Iraqi President Talabani (a Kurd himself) and KRG President Barzani declared that PKK fighters had to leave the country.⁵⁴ Iraqi officials undertook a number of diplomatic démarches and initiated several measures, such as ordering the closure of all PKK offices in the country and setting up extra checkpoints outside cities.⁵⁵ At the same time, Talabani declared that Iraq would not hand over any Kurd to the Turkish authorities, and would not itself combat the PKK, while Barzani refused to recognise the PKK as a terrorist organisation.⁵⁶ Tension mounted as Turkish aerial raids continued. Thus, in response to the large-scale raids of 16 December 2007, the Iraqi Government declared that it had neither been consulted nor informed about the offensive and lodged a formal complaint with Turkey.⁵⁷ Barzani condemned the strikes as a violation of Iraqi sovereignty hindering political efforts to find a peaceful solution to the crisis.⁵⁸ Again, when Iraq was informed of the commencement of the Turkish ground offensive in February 2008, the government strongly denounced the operation as a violation of Iraqi sovereignty and demanded that Turkey immediately withdraw from the region.⁵⁹ Foreign Minister Zebari stated that even though the operation was conceived as a 'limited military incursion into a remote, isolated and uninhabited region', it could destabilise the region if it went on.⁶⁰ He therefore urged that the operation should end 'as soon as possible'.⁶¹ Barzani declared that Iraqi Kurds would not be a part of the conflict

⁵³ See 'Offensive against PKK Positions in Northern Iraq', above n 2, 48 316.

⁵⁴ 'Dozens Die in Turkey Border Clash' *BBC News* (UK) 21 October 2007 <<http://news.bbc.co.uk/2/hi/europe/7055004.stm>> at 23 September 2008.

⁵⁵ See, eg, Ministry of Foreign Affairs, Republic of Iraq, 'Foreign Minister Receives His Turkish Counterpart in Baghdad' (Press Release, 23 October 2007), available from <<http://www.mofa.gov.iq/english/news/display.aspx?NewsID=3847>> at 23 September 2008; Ministry of Foreign Affairs, Republic of Iraq, 'Steps Taken by Iraqi Government to Handle the Last Developments on the Iraqi-Turkish Borders' (Press Release, 11 November 2007) <<http://www.mofa.gov.iq/index.aspx>> at 23 September 2008; Hines, above n 43; *Report of the Secretary-General pursuant to Paragraph 6 of Resolution 1770 (2007)*, UN Doc S/2008/19 (14 January 2008) [17].

⁵⁶ Tulin Daloglu, 'Kurdish Terror and the West: A Terrorist is a Terrorist, Plain and Simple', *The Washington Times* (Washington DC, US) 30 October 2007, A17; 'Europe Again Warns against Turkish Intervention in Iraq', above n 43.

⁵⁷ See 'Offensive against PKK Positions in Northern Iraq', above n 2, 48 316.

⁵⁸ *Ibid.*

⁵⁹ See 'Ground Offensive against Separatists', above n 3, 48 427.

⁶⁰ 'Iraq Warns Turkey over Incursion', *BBC News* (UK) 23 February 2008 <<http://news.bbc.co.uk/2/hi/europe/7260478.stm>> at 23 September 2008.

⁶¹ *Ibid.*

between the Turkish military and the PKK fighters, but simultaneously warned that 'if the Turkish military targets any Kurdish civilian citizens or any civilian structures', the KRG would order a large-scale resistance.⁶² As Turkish ground troops withdrew, Zebari told reporters 'this [was] the right thing to do' and suggested that the US had played an 'instrumental' role in pressing Turkey to leave.⁶³ President Talabani welcomed the end of the offensive, stating that 'this withdrawal indicate[d] the credibility of the Turkish government's statements that the military operation [would be] limited and temporary'.⁶⁴ In all, it appears that the US attitude left Iraqi authorities little option but to endure the Turkish intervention. Even though the Iraqi Government and the KRG formally condemned the major Turkish incursions, they generally took a non-confrontational approach, avoiding being dragged into the fighting and sustaining fairly positive relations with Turkey.⁶⁵

As mentioned earlier, the EU's reaction was a mixture of sympathy and concern. After the PKK attack of 21 October, the European Commission sharply condemned the attacks and expressed understanding for Turkey's need to protect its citizens.⁶⁶ In a similar vein, an EU Presidency statement condemned the attacks. It stressed that:

The international community ... must support Turkey's efforts to protect its population and fight terrorism, while respecting the Rule of Law, preserving the international and regional peace and stability and refraining from taking any disproportionate military action.⁶⁷

When aerial raids increased in December, another statement was issued, in which the EU expressed 'concern' over the military actions undertaken on Iraqi territory.⁶⁸ The statement called on Turkey 'to exercise restraint, to respect the territorial integrity of Iraq and refrain from taking any military action that could undermine regional peace and stability'. A third Presidency statement, following the launch of 'Operation Sun', recognised 'Turkey's need to protect its population from terrorism', while again calling on Turkey 'to refrain from taking any disproportionate military action and to respect Iraq's territorial integrity'.⁶⁹ It also called on Turkey 'to limit its military activities to those which are absolutely

⁶² 'Iraq Warns Turkey over Incursion', above n 60.

⁶³ 'Turkish Troops Pull Out of Iraq', *BBC News* (UK) 29 February 2008 <<http://news.bbc.co.uk/2/hi/europe/7270566.stm>> at 23 September 2008.

⁶⁴ 'Turkey Urges PKK to End Struggle', above n 33.

⁶⁵ It is illustrative that on 7 March 2008, mere days after the conclusion of 'Operation Sun', President Talabani conducted his first visit to Turkey since his inauguration in 2005: Sabrina Tavernise, 'Iraqi President Visits Turkey', *International Herald Tribune* (France) 7 March 2008 <<http://www.iht.com/articles/2008/03/07/europe/turkey.php>> at 23 September 2008.

⁶⁶ See 'Europe Again Warns against Turkish Intervention in Iraq', above n 43.

⁶⁷ Presidency of the EU, 'Statement on the Terrorist Attacks of the PKK', above n 36.

⁶⁸ Presidency of the EU, 'EU Presidency Statement on the Military Actions Undertaken by Turkey on Iraqi Territory' (Press Release, 17 December 2007) <http://www.eu2007.pt/UE/vEN/Noticias_Documentos/Declaracoes_PESC/20071217Iraque.htm> at 23 September 2008.

⁶⁹ Presidency of the EU, 'EU Presidency Statement on the Military Action Undertaken by Turkey in Iraqi Territory' (Press Release, 25 February 2008) <http://www.eu2008.si/en/News_and_Documents/CFSP_Statements/February/0225MZZturkey.html> at 23 September 2008.

necessary for achieving its main purpose — the protection of the Turkish population from terrorism'.⁷⁰

In sum, the EU essentially urged Turkey to seek a political solution and to avoid disproportionate military action. European countries did not regard military action as the best answer to PKK violence, but carefully refrained from formally condemning Turkey's behaviour. Taking account of the EU's critical and outspoken attitude vis-à-vis Turkish domestic politics in general, and its human rights policy in particular, this fairly mild and somewhat ambivalent approach is striking. In this regard, it is interesting to note that, in the midst of 'Operation Sun', EU officials announced that the operation would not influence Turkey's accession talks.⁷¹

Other reactions from the international community were generally analogous to the EU approach. China expressed its hope that the relevant parties could 'properly resolve relevant issues through dialogue and consultation so as to maintain peace and stability in this region'.⁷² Japan called upon Iraq 'to take appropriate measures to stop the terrorist activities of PKK members hiding in northern Iraq', and urged Turkey 'to exercise utmost self-restraint'.⁷³ Russia called upon the concerned parties 'to search for political ways of resolving the existing acute problems', and warned that '[a] military escalation in conflict ... [could] only lead to an exacerbation of the situation'.⁷⁴ United Nations Secretary-General Ban Ki-moon repeatedly expressed concern about the

⁷⁰ Ibid.

⁷¹ Stefan Nicola, 'Analysis: Turkey's Risky PKK War', *United Press International* (US) 26 February 2008 <http://www.upi.com/Emerging_Threats/2008/02/26/Analysis_Turkeys_risky_PKK_war/UPI-74401204060244> at 23 September 2008.

⁷² Liu Jianchao, Foreign Ministry Spokesperson for the Embassy of the People's Republic of China in the UK, 'Foreign Ministry Spokesperson Liu Jianchao's Regular Press Conference on 23 October 2007' (Press Conference, 23 October 2007) <<http://www.chinese-embassy.org.uk/eng/zt/fyrth/t375079.htm>> at 23 September 2008.

⁷³ See, eg, 'Statement by Press Secretary/Director-General for Press and Public Relations, Ministry of Foreign Affairs, on the Recent Situation on Attacks by the Kurdistan Workers' Party (PKK)' (Press Statement, 22 October 2007) <http://www.mofa.go.jp/announce/announce/2007/10/1175847_836.html> at 23 September 2008; Tomohiko Taniguchi, Deputy Press Secretary for the Ministry of Foreign Affairs of Japan, 'Statements on the Turkish Incursion into the Republic of Iraq and the Election of the New President of the Republic of Cuba' (Press Conference, 26 February 2008) <<http://www.mofa.go.jp/announce/press/2008/2/0226.html>> at 23 September 2008.

⁷⁴ Mikhail Kamynin, Russian Ministry of Foreign Affairs Spokesman, 'Russian MFA Spokesman Mikhail Kamynin Answers a Media Question regarding Situation on Turkish-Iraqi Border' (Press Release, 22 February 2008) <http://www.un.int/russia/new/MainRoot/docs/off_news/220208/newen2.htm> at 23 September 2008; Mikhail Kamynin, Russian Ministry of Foreign Affairs Spokesman, 'MFA Spokesman Mikhail Kamynin's Response to a Media Query on Turkish Parliament's Decision on Admissibility of Cross-Border Operation in Iraq' (Press Release, 19 October 2007) <http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/944e232074b1f24ac325737900538ec0?OpenDocument> at 23 September 2008.

intervention, urging for ‘utmost restraint’ and for respect of the border between the two countries, and stressing the need to protect civilian life.⁷⁵

III THE LEGALITY OF THE INTERVENTION

A Legal Framework

When turning to the legality of the Turkish intervention, a first striking aspect is the fact that, despite the magnitude of the operations, Turkey apparently felt little need to provide a clear legal basis for its conduct. President Gül in general terms referred to his country’s ‘readiness and right’ to intervene in northern Iraq.⁷⁶ No formal justification was made public, nor was the Security Council informed. One of the more elaborate statements was delivered after the conclusion of ‘Operation Sun’, when Turkey submitted a *note verbale* to the Human Rights Council, declaring that:

The counter-terrorism operation carried out ... in northern Iraq was limited in scope, geography and duration. It targeted solely the PKK ... terrorist presence in the region. Turkish military authorities took all possible measures to ensure the security of civilians and to avoid collateral damage. As a result, there has been no civilian casualty. Turkey remains a staunch advocate of the territorial integrity and sovereignty of Iraq.⁷⁷

Similarly, third countries remained remarkably vague and refrained from explicitly pronouncing on the operation’s lawfulness. A notable exception was the Iraqi Government, which regarded the ‘unilateral Turkish military action [as] ... a violation of Iraq’s sovereignty’.⁷⁸ Nonetheless, like other countries, Iraq made no attempt to bring the issue to the attention of the UN Security Council. On the one hand, this course of events contrasts with other major interventions which have taken place in recent years — for example, the US interventions in Afghanistan (2001) and Iraq (2003), or the Israeli intervention in Lebanon (2006) — where the intervening states went to great lengths to offer a (plausible or less plausible) legal justification, and which triggered lengthy debates within the UN Security Council. On the other hand, it mirrors the evasive approach

⁷⁵ See, eg, ‘Secretary-General Concerned at Turkish Move on Attacking Kurdish Targets in Iraq’, *UN News Service*, 19 October 2007 <<http://www.un.org/apps/news/story.asp?NewsID=24355&Cr=iraq&Cr1=turkey>> at 23 September 2008; ‘Ban Ki-Moon Voices Concern Over Turkish Air Attacks Against Iraq’, *UN News Service*, 17 December 2007 <<http://www.un.org/apps/news/story.asp?NewsID=25098&Cr=iraq&Cr1=turkey>> at 23 September 2008; ‘Ban Ki-Moon Calls for “Utmost Restraint” in Turkey–Iraq Border Actions’, *UN News Service*, 22 February 2008 <<http://www.un.org/apps/news/storyAr.asp?NewsID=25722&Cr=iraq&Cr1=turkey>> at 23 September 2008.

⁷⁶ ‘Turkey “Right to Intervene” in Iraq’, *Al Jazeera* (Qatar) 3 December 2007 <<http://english.aljazeera.net/news/europe/2007/12/2008525143433545716.html>> at 23 September 2008.

⁷⁷ *Note Verbale Dated 26 March 2008 from the Permanent Mission of Turkey to the United Nations Office at Geneva Addressed to the Secretariat of the Human Rights Council*, UN Doc A/HRC/7/G/15 (28 March 2008) (‘*Note Verbale*’).

⁷⁸ See, eg, Nicola, above n 71.

adopted by Turkey in relation to its prior incursions into northern Iraq throughout the 1990s.⁷⁹

The fact that Turkey's actions largely escaped legal scrutiny, both from the international community as well as, it appears, from international lawyers, does not mean that they fall beyond the purview of international law. Like any other cross-border use of force, the Turkish intervention must be tested against the legal rules on inter-state recourse to force (the *jus ad bellum*) laid down in the *UN Charter*. In this regard, it must first be noted that the intervention did not enjoy the approval of the Iraqi authorities; Iraq formally protested against the incursions.⁸⁰ A Turkish request to permit cross-border 'hot pursuit' operations to pursue retreating PKK fighters — which had reportedly been allowed or tolerated by Saddam Hussein before the 1991 Gulf War⁸¹ — was denied in September 2007.⁸² Hence, despite Turkish assurances that it was 'committed to Iraq's integrity', the operations fell within the ambit of art 2(4) of the *UN Charter*, which contains a comprehensive prohibition on '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 United Nations'.⁸³ As is well-known, the *UN Charter* provides only two exceptions: either the use of force must be authorised by the UN Security Council under Chapter VII of the *UN Charter* (art 39 *juncto* art 42 of the *UN Charter*), or it must constitute an exercise of the inherent right of self-defence pursuant to art 51 of the *UN*

⁷⁹ For an excellent analysis of these interventions, see Gray and Olleson, above n 14, 377–87, 395–400. Gray and Olleson find that on those occasions, Turkey generally did not report its operations to the Security Council and left the legal basis for its use of force indeterminate. By contrast, when Iran engaged in cross-border operations in Iraq against Kurdish terrorist groups, it expressly relied on the right of self-defence enshrined in art 51 of the *UN Charter* and reported its actions to the Security Council. Gray and Olleson furthermore argue that the UK and the US generally expressed understanding for the Turkish actions, but likewise avoided pronouncing explicitly on its legal basis: at 391–5.

⁸⁰ See above nn 57–59.

⁸¹ Gray and Olleson, above n 14, 378.

⁸² 'Vote of Confidence in AKP', above n 20, 48 151.

⁸³ It is generally accepted in legal literature that the term 'force' refers to the use of 'physical' or 'armed' force only: see, eg, Leland M Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (1946) 70; Albrecht Randelzhofer, 'Article 2(4)' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd ed, 2002) 112, 117–121; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 248; American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States* (1990) 383. This interpretation is confirmed by the Charter *travaux préparatoires* — a Brazilian proposal to include economic aggression was rejected in San Francisco: (1945) 6 *Documents of the United Nations Conference on International Organizations*, UN Doc I/1/27, 339–40, 609.

The *travaux préparatoires* also indicate that art 2(4) was meant as an all-inclusive prohibition. The phrase 'or in any other manner' was designed to ensure that there should be no loopholes: (1945) 6 *Documents of the United Nations Conference on International Organizations*, UN Doc I/1/25, 334–5. In accordance herewith, most authors accept that the article is not limited to attacks which affect a state's territorial integrity or political constellation. See, eg, Thomas M Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002) 12; Louis Henkin, *International Law: Politics and Values* (1995) 115–16; Yoram Dinstein, *War, Aggression and Self-Defence* (4th ed, 2005) 87. See also *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4, 33–5.

Charter.⁸⁴ Since Turkey's intervention was not sanctioned by the Council, this leaves only the latter option.

B *The Turkish Intervention and the Right of Self-Defence*

1 *Procedural Obligations*

Article 51 of the *UN Charter* provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council.

Two further preconditions for the exercise of self-defence, namely the principles of necessity and proportionality, are not listed in art 51, but form part of customary international law.⁸⁵

To what extent does Turkey's intervention meet the criteria of art 51, as interpreted and supplemented by customary international law?⁸⁶ At the outset,

⁸⁴ The 'state of necessity' does not provide a separate legal basis to justify (limited) recourse to armed force. See especially Olivier Corten, 'L'état de nécessité peut-il justifier un recours à la force non constitutif d'agression?' [2004] *The Global Community Yearbook of International Law and Jurisprudence* 11. Furthermore, art 50(1)(a) of the ILC's *Draft Articles on State Responsibility*, in ILC, *Report of the International Law Commission on the Work of Its 53rd Session*, UN Doc A/56/10 (2001) ('*Draft Articles on State Responsibility*'), indicates that the recourse to force is excluded from the ambit of permissible countermeasures.

⁸⁵ See, eg, *Oil Platforms (Iran v US) (Judgment)* [2003] ICJ Rep 161, 196 ('*Oil Platforms*').

⁸⁶ There is some controversy as to the precise relationship between the *UN Charter* rules on the use of force and the parallel customary rules as a result of some fairly ambiguous dicta in the *Nicaragua* case: *Nicaragua* [1986] ICJ Rep 14, 93–6, 103, 105. *In casu*, to circumvent the US Vandenberg reservation regarding compulsory jurisdiction, the Court found that the *UN Charter* and customary rules on the use of force are not completely identical. The Court recognised that the necessity and proportionality criteria were not enshrined in art 51 but nonetheless formed part of custom. Furthermore, it stressed that a definition of 'armed attack' was not provided in the *UN Charter* and should therefore be sought in customary international law. In all, the Court's reasoning reflects a close overlapping between the two sources of law. The only actual *discrepancy* identified by the Court concerns the reporting obligation of art 51 which is a procedural obligation, linked to the monitoring of treaty commitments by an institution established by the treaty, rather than a substantive rule: at 105. As a result, the controversy regarding the treaty–custom dichotomy is mainly relevant with regard to the legality of anticipatory self-defence, which is, however, beyond the scope of our analysis. Still, the author would briefly like to stress that, contrary to what some authors contend, nothing in the *UN Charter's travaux préparatoires* suggests that the word 'inherent' was included to clarify that art 51 did not intend to restrict the broader pre-existing customary right of self-defence: see especially US Department of State, *Foreign Relations of the United States: Diplomatic Papers (1945)* (1967) vol 1, 670. For this reason, the author agrees with Ago that the idea of 'two really divergent notions of self-defence, based respectively on general international law and on the United Nations system of law', must be dismissed as wholly unconvincing: Robert Ago, 'Addendum to the Eighth Report on State Responsibility' [1980] *Yearbook of the International Law Commission*, vol II, UN Doc A/CN.4/318, 13, 63. See also Dinstein, above n 83, 96: '[i]t can be taken for granted that pre-Charter customary international law was swayed by the Charter and that, *grosso-modo*, customary and Charter *jus ad bellum* have converged'. In sum, customary practice remains crucial to interpret and supplement the *UN Charter* provisions on the use of force, yet it is post-1945 practice that must be examined, not pre-existing custom.

brief reference must be made to the more ‘procedural’ obligations incorporated in art 51. First, the so-called ‘until clause’ suspends the right of self-defence when the Security Council has taken ‘measures necessary to maintain international peace and security’. The precise scope of this obligation is, however, irrelevant for present purposes, since at no time did the Security Council adopt a resolution dealing with the PKK presence in northern Iraq or with the Turkish intervention itself.⁸⁷ Second, it must be recalled that Turkey failed to report its actions to the Security Council. Most authors agree that this in itself does not make the intervention unlawful. Indeed, in light of the ICJ’s findings in the *Nicaragua* case,⁸⁸ most scholars consider that the reporting requirement does not constitute a *sine qua non* for the application of the right to self-defence, but a separate, conventional obligation of a procedural nature, linked to the effective exercise of the Security Council’s powers.⁸⁹ Like the Court, these scholars do concede that the duty to report carries an evidential impact, in the sense that a failure to comply may indicate that a state does not consider itself to be acting in self-defence. This approach appears to be supported by state practice.⁹⁰ In sum, Turkey’s failure to report weakens its case for self-defence, but does not destroy it altogether.

2 Gravity of the Attacks

The requirement that an ‘armed attack’ has taken place, on the other hand, does constitute an integral part of the substantive right of self-defence.⁹¹ *In casu*, this raises two questions, one related to the *ratione materiae* perspective, the other to the *ratione personae* aspect. As regards the former, we need to establish whether the cross-border attacks carried out by PKK fighters were of sufficient

⁸⁷ For commentary on the precise scope of this obligation, see, eg, Malvina Halberstam, ‘The Right to Self-Defense once the Security Council Takes Action’ (1996) 17 *Michigan Journal of International Law* 229.

⁸⁸ See *Nicaragua* [1986] ICJ Rep 14, 105, 121.

⁸⁹ See, eg, Donald W Greig, ‘Self-Defence and the Security Council: What Does Article 51 Require?’ (1991) 40 *International and Comparative Law Quarterly* 366; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963) 207; Dinstein, above n 83, 217–18; Christine Gray, *International Law and the Use of Force* (2nd ed, 2004) 102.

⁹⁰ See, eg, ‘Questions relating to Asia and the Far East’ (1964) 18 *Yearbook of the United Nations* 128, 148; *Letter Dated 3 January 1980 Addressed to the President of the Security Council by the Representatives of Australia, the Bahamas, Bahrain, Bangladesh, Belgium, Canada, Chile, China, Colombia, Costa Rica, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Fiji, Germany, Federal Republic of, Greece, Haiti, Honduras, Iceland, Indonesia, Italy, Japan, Liberia, Luxembourg, Malaysia, the Netherlands, New Zealand, Norway, Oman, Pakistan, Panama, Papua New Guinea, the Philippines, Portugal, Saint Lucia, Samoa, Saudi Arabia, Senegal, Singapore, Somalia, Spain, Suriname, Sweden, Thailand, Turkey, Uganda, the United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay and Venezuela*, UN SCOR, 2187th mtg, Agenda Item 2, UN Doc S/PV.2187 (6 January 1980) [21]; ‘Questions concerning Asia’ (1980) 34 *Yearbook of the United Nations* 296, 300; UN Doc S/PV/2671 (31 March 1986) 38. States have occasionally raised the absence of a report to the Security Council to discredit self-defence claims by other states: see *Nicaragua* [1986] ICJ Rep 14, 121–2; Dinstein, above n 83, 216. On the other hand, the absence of a report has never been regarded as invalidating a self-defence claim *per se*.

⁹¹ Linos-Alexandre Sicilianos, *Les Réactions décentralisées à l’illicéité: des contre-mesures à la légitime défense* (1990) 299–300. The legality of anticipatory self-defence is not as such addressed in this article.

gravity to trigger the right of self-defence. Indeed, according to the ICJ, a distinction must be made between ‘the most grave forms of the use of force’ — that is, those constituting an ‘armed attack’ — and ‘other less grave forms’.⁹² The Court thus introduces a *de minimis* threshold and adds that a ‘mere frontier incident’ does not activate art 51 of the *UN Charter*.⁹³ The precise content of this ‘minimal gravity’ is the subject of disagreement. Some scholars and judges set the bar for self-defence very high, by claiming that only massive attacks qualify as ‘armed attacks’ in the sense of art 51.⁹⁴ Others argue that the *de minimis* threshold should not be set too high — some even suggest that any use of force may qualify as an armed attack — and that smaller attacks may also activate the right to undertake proportionate defensive action.⁹⁵ More recent case law of the ICJ, while reaffirming that a gap exists between the ‘use of force’ and an ‘armed attack’, seems to discard the view that a large-scale attack is needed.⁹⁶ Furthermore, the ICJ seems to have endorsed the view that different attacks may be ‘taken cumulatively’ to determine whether self-defence is permitted.⁹⁷ In a similar vein, recent state practice indicates that a relatively small-scale attack may sometimes trigger art 51. Thus, when in July 2006 Israel engaged in military operations against Lebanon in response to a Hezbollah attack on an Israeli border

⁹² *Nicaragua* [1986] ICJ Rep 14, 101.

⁹³ *Ibid* 103.

⁹⁴ See, eg, *Oil Platforms* [2003] ICJ Rep 161, 330–4 (Separate Opinion of Judge Simma), referring to military attacks ‘in the substantial, massive sense of amounting to “une agression armée”, to quote the French authentic text of Article 51’; Avra Constantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter* (2000) 64. Both Judge Simma and Constantinou, however, take a radically different position in relation to the permissibility of forcible action below the ‘armed attack’ threshold.

⁹⁵ See, eg, Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (2005) 133, 138–9; Josef L Kunz, ‘Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations’ (1947) 41 *American Journal of International Law* 872, 878; Higgins, *Problems and Process*, above n 83, 251; Dinstein, above n 83, 193–5.

⁹⁶ ‘The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the “inherent right of self-defence”’: *Oil Platforms* [2003] ICJ Rep 161, 195.

⁹⁷ *Ibid* 190–2; *Nicaragua* [1986] ICJ Rep 14, 118–20. The ICJ has arguably adopted a cautious (and perhaps evasive) approach in determining whether or not cross-border incursions can ‘singly or collectively’ amount to an armed attack. In the *Nicaragua* case, the Court found that there was ‘insufficient information’ to answer this question (at 119–20) and instead turned its attention to the compliance by the US with the other preconditions of self-defence. In *Armed Activities*, the Court concluded that ‘even if [the] series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC’: *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda) (Judgment)* [2005] ICJ [146] <<http://www.icj-cij.org>> at 23 September 2008 (*Armed Activities*). In the *Land and Maritime Boundary* case, the Court simply declared: ‘neither of the Parties sufficiently proves the facts which it alleges, or their imputability to the other Party’: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Judgment)* [2002] ICJ Rep 303, 322–4. The relevant dicta indicate that the Court implicitly accepts that single cross-border incursions are not necessarily excluded from the scope of art 51, and that single incursions may be ‘taken cumulatively’ to determine whether self-defence is lawful. This cautious approach starkly contrasts with the bold declaration of the Ethiopia–Eritrea Claims Commission that ‘[I]ocalized border encounters between small infantry units ... do not constitute an armed attack for purposes of the Charter’: *Jus Ad Bellum: Ethiopia’s Claims 1-8 (Partial Award)* Eritrea Ethiopia Claims Commission (19 December 2005) 4, available from <http://www.pca-cpa.org/showpage.asp?pag_id=1151> at 23 September 2008. For (well-founded) criticism of the Commission’s Partial Award, see Christine Gray, ‘The Ethiopia/Eritrea Claims Commission Oversteps its Boundaries: A Partial Award?’ (2006) 17 *European Journal of International Law* 699, 714–20.

patrol (resulting in the death of three Israeli soldiers and the capture of two others), the majority of the international community appeared to agree that Israel had been the victim of an ‘armed attack’ and could have recourse to self-defence (even if the disproportionate manner in which Israel exercised this right was widely condemned).⁹⁸

In the end, regardless of the precise gap between arts 2(4) and 51 of the *UN Charter*, the frequency of cross-border PKK attacks and the resulting death toll leave little doubt that Turkey was subject to ‘armed attacks’ in the material sense. These attacks were carried out *deliberately*, following careful preparation, and clearly fell beyond the label of ‘frontier incidents’.⁹⁹ The attack that immediately preceded the Turkish cross-border operations was carried out by an estimated 150 PKK fighters that had entered Turkey from Iraqi Kurdistan, and resulted in the killing of 12 soldiers and the capture of eight others. Taking account of the preceding attacks, it may therefore be assumed that Turkey had been subject to attacks ‘producing serious consequences, epitomised by territorial intrusions, human casualties or considerable destruction of property’,¹⁰⁰ and that, at least from a *ratione materiae* perspective, the ‘armed attack’ requirement was fulfilled.

3 *Self-Defence against Attacks by Non-State Actors: The Nicaragua Standard*

The most problematic aspect of the Turkish intervention concerns the *ratione personae* aspect of the armed attack requirement, or more precisely, the ongoing debate on the permissibility of self-defence against attacks by non-state actors. Indeed, the question arises as to what extent an attack carried out by a terrorist

⁹⁸ During the Security Council meeting of 14 July 2006, the US, Japan, the UK, Denmark, Slovakia, Greece, France and Peru all expressly referred to Israel’s right of self-defence. Only China and Qatar identified Israel’s response as ‘armed aggression’ against Lebanon: see UN SCOR, 61st sess, 5489th mtg, UN Doc S/PV.5489 (14 July 2006). During the open Security Council debate of 21 July 2006, a majority of participants again agreed as a matter of principle that Israel had the right to defend itself against the attacks by Hezbollah. This position was held by the EU, the US, Japan, Russia, Canada, Australia, Norway, Switzerland, Brazil, Argentina, Peru, Guatemala and Ghana. On the other hand, the League of Arab States condemned the Israeli ‘aggression’, as did China, Iran, Cuba, and Venezuela. Other countries, such as India and Indonesia, condemned the disproportionate character of Israel’s action, without addressing the self-defence question: see UN SCOR, 61st sess, 5493rd mtg, UN Doc S/PV.5493 (21 July 2006). Interestingly, the G8, meeting in St Petersburg, issued a declaration acknowledging Israel’s right to self-defence while calling for restraint. Even the then UN Secretary-General Kofi Annan, albeit highly critical of Israel’s excessive and disproportionate use of force, acknowledged Israel’s right to defend itself under art 51 of the *UN Charter*: see Tom Ruys, ‘Crossing the Thin Blue Line: An Inquiry into Israel’s Recourse to Self-Defence Against Hezbollah’ (2007) 43 *Stanford Journal of International Law* 265.

⁹⁹ See Gray, *International Law and the Use of Force*, above n 89, 146. According to Gray, what the Court seemed to say by referring to the ‘circumstances of these incursions or their possible motivations’, in *Nicaragua* [1986] ICJ Rep 14, 119–20, is that episodes where there is no *intent* to carry out an armed attack, including accidental incursions and incidents where officials disobey orders, would be considered as ‘frontier incidents’, rather than as ‘armed attacks’. This reasoning reflects the idea that, at least for relatively small-scale attacks, there needs to be a subjective element, namely an intent to attack or ‘*animus aggressionis*’ (not to be confused with the motivations of the attack): see, eg, *Report of the Secretary General on the Question of Defining Aggression*, 7th sess, Agenda Item 54, UN Doc A/2211 (3 October 1952) §§ 361–2. The idea of an ‘*animus aggressionis*’ arguably finds support in *Oil Platforms* [2003] ICJ Rep 161, 191–2.

¹⁰⁰ Dinstein, above n 83, 193.

organisation (*in casu* the PKK), sanctions a forceful incursion into the territory of a state whose authorities apparently did not participate in the attack (*in casu* Iraq).

At the outset, it must be noted that art 51 of the *UN Charter* itself provides no indication as to whether an ‘armed attack’ must emanate from another state or not. Admittedly, self-defence was traditionally envisaged as a mechanism to allow states to ward off attacks by other states.¹⁰¹ At the same time, it was accepted that ‘armed attacks’ included not only attacks by states, but also certain attacks carried out by non-state actors, for which a state shared a certain degree of responsibility.¹⁰² The latter type is often described as ‘indirect military aggression’, as opposed to ‘direct’ military aggression, carried out by state agents.

In an era of decolonisation — where ‘one man’s terrorist was another’s freedom fighter’ — the extent to which ‘indirect’ aggression permitted defensive action was extremely controversial. Throughout the year-long efforts to draft a *Definition of Aggression* under the auspices of the General Assembly, the scope and implications of ‘indirect aggression’ proved to be one of the main stumbling blocks between western and developing countries.¹⁰³ In the end, a compromise was adopted through the insertion of art 3(g).¹⁰⁴ According to that provision, ‘aggression’ covers, *inter alia*, ‘[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State ... or its substantial involvement therein’.¹⁰⁵

Despite the fact that, strictly speaking, the *Definition of Aggression* merely defines the concept of an ‘act of aggression’ in the sense of art 39 of the *UN Charter* and ‘does not in any way diminish or enlarge’ the scope for lawful use of force,¹⁰⁶ the ICJ in the *Nicaragua* case regarded art 3(g) as the customary standard defining the permissible scope of self-defence vis-à-vis ‘indirect armed aggression’.¹⁰⁷ Although the Court refrained from providing an elaborate interpretation of the provision, it clarified that the assistance to rebels ‘in the form of the provision of weapons or logistical or other support’ fell beyond its scope and could not amount to an ‘armed attack’.¹⁰⁸ This restrictive reading was heavily attacked by a considerable number of (mainly Anglo-Saxon) scholars,

¹⁰¹ See Tom Ruys and Sten Verhoeven, ‘Attacks by Private Actors and the Right of Self-Defence’ (2005) 10 *Journal of Conflict and Security Law* 289, 291.

¹⁰² *Ibid.*

¹⁰³ See especially the following meetings records: Special Committee on the Question of Defining Aggression, *Summary Records of the Fifty-Second to Sixty-Sixth Meetings*, 3rd sess, vol I, UN Doc A/AC.134/SR.52-66 (19 October 1970) (‘*Summary Records 52-66*’); Special Committee on the Question of Defining Aggression, *Summary Records of the Seventy-Ninth to Ninety-First Meetings*, 4th sess, UN Doc A/AC.134/SR.79-91 (7 June 1971) (‘*Summary Records 79-91*’).

¹⁰⁴ See *Summary Records 52-66*, above n 103; *Summary Records 79-91*, above n 103; Pierluigi Lamberti Zanardi, ‘Indirect Military Aggression’ in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force* (1986) 111, 115.

¹⁰⁵ *Definition of Aggression*, GA Res 3314, 29th sess, 2319th plen mtg, annex (14 December 1974) art 3(g).

¹⁰⁶ *Ibid* art 6. See also Special Committee on the Question of Defining Aggression, *Summary Records of the One Hundred and Tenth to One Hundred and Thirteenth Meetings*, 7th sess, UN Doc A/AC.134/SR.110-113 (18 July 1974) 39 (UK).

¹⁰⁷ *Nicaragua* [1986] ICJ Rep 14, 195.

¹⁰⁸ *Ibid* 104.

who regretted that the Court had in fact limited permissible self-defence against attacks by non-state actors to cases where these actors had actually been ‘sent’ by a state, thus denying any additional significance to the phrase ‘substantial involvement’ and leaving state victims of indirect armed aggression very little opportunity to protect themselves.¹⁰⁹ Nonetheless, customary practice throughout this era offered little evidence contradicting the threshold established by the Court. Some states — Israel, Portugal and South Africa — occasionally tried to justify interventions in other countries by invoking a right of self-defence against attacks by non-state actors which enjoyed active or passive state support.¹¹⁰ Their claims, however, were time and again denounced by a broad majority of the international community, and were on many occasions formally condemned by the Security Council.¹¹¹

The implication of the Court’s interpretation of art 3(g) of the *Definition of Aggression* is that self-defence against non-state attacks would by and large be confined to situations where the attacks are imputable to the ‘sending’ state. As the ILC *Draft Articles on State Responsibility*¹¹² make clear, this leaves little room for manoeuvring.¹¹³ According to art 8 of the *Draft Articles on State Responsibility*, the conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct. Two scenarios can be distinguished. The first deals with a state giving specific instructions to individuals to perform a certain conduct (*in casu* to commit cross-border attacks). The second possibility is that the state exercises ‘effective control’ over the non-state actors in general.¹¹⁴ Finally, art 11 of the *Draft Articles on State Responsibility* states that private conduct will be considered an act of a state, ‘if and to the extent that’ the state explicitly ‘acknowledges and adopts the conduct as its own’.¹¹⁵

Neither of these situations is likely to materialise very easily. While active and passive state support to terrorist organisations and other armed groups regrettably constitutes a recurring phenomenon in international relations, the link between the state and the latter actors is unlikely to be so close as to amount to control over their activities. State support most often takes the form of training,

¹⁰⁹ See *Nicaragua* [1986] ICJ Rep 14, 543 (Dissenting Opinion of Judge Jennings), 131–3 (Dissenting Opinion of Judge Schwebel); John N Moore, ‘The Secret War in Central America and the Future of World Order’ (1986) 80 *American Journal of International Law* 43; John L Hargrove, ‘The *Nicaragua* Judgement and the Future of the Law of Force and Self-Defense’ (1987) 81 *American Journal of International Law* 135, 139.

¹¹⁰ See Gray, *International Law and the Use of Force*, above n 89, 111–15.

¹¹¹ See *ibid.* Gray recognises, however, that the main reason why the aforementioned countries’ self-defence claims were rejected consisted in the fact that they were regarded as illegally occupying territory.

¹¹² Above n 84.

¹¹³ See Ruys and Verhoeven, above n 101, 300–1.

¹¹⁴ See *Nicaragua* [1986] ICJ Rep 14, 64–5; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia) (Judgment)* [2007] ICJ Rep 1, 142–5, confirming the ‘effective control’ test for purposes of establishing state responsibility, rather than the ‘overall control’ test used by the ICTY in *Prosecutor v Tadić (Appeals Chamber)* Case No IT-94-1-A (15 July 1999) (Judgment).

¹¹⁵ Above n 84. An example hereof is the endorsement by Iranian authorities of the hostage-taking at the US embassy in Tehran: *United States Diplomatic and Consular Staff in Tehran (US v Iran)* [1980] ICJ Rep 3, 35.

financial support, weapons supplies, intelligence-sharing, or the provision of a safe haven,¹¹⁶ in other words, assistance that would seem to be excluded from triggering art 51 in the ICJ's view. Furthermore, states supporting non-state armed groups are in reality unlikely to explicitly endorse their attacks. The very essence of proxy warfare by means of non-state actors consists in its covert nature.

In any case, it is clear that the PKK attacks cannot be imputed to Iraq's federal or regional authorities. Rather than endorsing the attacks, Iraq denounced them. There is no evidence of active support of the PKK, let alone of Iraqi authorities giving instructions to PKK fighters. While the KRG displayed a degree of sympathy with the PKK,¹¹⁷ it cannot be said to have had 'effective control' over its activities. True, Iraqi authorities were undoubtedly aware of the presence of PKK fighters on Iraqi territory and failed to take appropriate actions. This is illustrated by the public refusal to extradite suspects to Turkey and by the long overdue closure of PKK offices. Iraq arguably committed a breach of international law by failing to act with due diligence to prevent PKK activities on its soil.¹¹⁸ Such internationally wrongful conduct, however, does not on its own activate the right of self-defence. Judging by the *Nicaragua* standard, one would have to conclude that Turkey's intervention violated the prohibition on the use of force.

4 *Self-Defence against Attacks by Non-State Actors after September 11*

Our analysis does not end here. After the end of the Cold War, there have been a number of instances where states have undertaken cross-border military actions in response to attacks by non-state actors in situations falling below the threshold spelled out in *Nicaragua*. Intervening states have often escaped formal condemnation by the Security Council, and the reactions of third states have been mixed. As mentioned earlier, throughout the 1990s, Iran and Turkey regularly carried out cross-border interventions against Kurdish fighters operating from Iraq.¹¹⁹ In a similar vein, the US in 1998 carried out missile

¹¹⁶ See US Department of State, *Country Reports on Terrorism 2007* (2008) ch 3 <<http://www.state.gov/s/ct/rls/crt/2007/index.htm>> at 23 September 2008.

¹¹⁷ See above n 16 and accompanying text.

¹¹⁸ This obligation flows from the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN GAOR, 25th sess, 1883rd plen mtg, Annex, UN Doc A/8028 (24 October 1970) 123 ('*Declaration on Friendly Relations*'), which proclaims that 'no State shall organise, assist, foment, finance or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State', as well as from similar, more recent resolutions: see, eg, *Resolution 1189*, SC Res 1189, UN SCOR, 53rd sess, 3915th mtg, UN Doc S/RES/1189 (13 August 1998); *Resolution 1373*, SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/RES/1373 (28 September 2001). See Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German Yearbook of International Law* 9, 34–6; Ruys and Verhoeven, above n 101, 306.

¹¹⁹ See Gray and Olleson, above n 14, 377–87, 395–400; Costas Antonopoulos, 'The Turkish Military Operation in Northern Iraq of March–April 1995 and the International Law on the Use of Force' (1996) 1 *Journal of Armed Conflict Law* 33.

attacks against targets in Afghanistan and Sudan in response to the al Qaeda bombings of the US embassies in Nairobi and Dar es Salaam.¹²⁰

Especially in the wake of the September 11 attacks, the discussion concerning self-defence against attacks by non-state actors has gained momentum. Immediately after the attacks, the Security Council adopted *Resolution 1368*, which explicitly ‘recognised’ the inherent right of self-defence in its preamble.¹²¹ Both NATO and the Organization of American States (‘OAS’) invoked the right of collective self-defence.¹²² When the US actually launched Operation Enduring Freedom in October 2001, it relied on art 51 of the *UN Charter* and declared that ‘[t]he attacks of 11 September 2001 ... ha[d] been made possible by the decision of the Taliban regime to allow parts of Afghanistan that it controls to be used by [al Qaeda] as a base of operation’.¹²³ A vast majority of UN Members expressed their support for the operation.¹²⁴

In subsequent years, a number of states have issued statements attesting to a broad right of self-defence against terrorist groups carrying out cross-border attacks, and/or have engaged in military operations against non-state armed groups abroad.¹²⁵ The boldest language can be found in the controversial US *National Security Strategy* of 2002, which declares that the US ‘will make no distinction between terrorists and those who knowingly harbour or provide aid to them’.¹²⁶ The document continues by stating that the US will not hesitate ‘to act alone, if necessary, to exercise [its] right of self-defence by acting pre-emptively against such terrorists’.¹²⁷ Comparable statements have been made inter alia by Australia and Russia.¹²⁸ Following the Bali bombing in 2002, which killed over 80 Australian tourists, Prime Minister Howard announced that his country should have the right to attack terrorist groups or bases in neighbouring countries when there would be credible evidence that these groups were planning to attack

¹²⁰ ‘Legal Aspects of International Political Relations’ (1998) 52 *Yearbook of the United Nations* 1209, 1219–20.

¹²¹ SC Res 1368, UN SCOR, 56th sess, 4370th mtg, UN Doc S/RES/1368 (12 September 2001). See also *Resolution 1373*, above n 118.

¹²² Meeting of Consultation of Ministers of Foreign Affairs, *Terrorist Threat to the Americas: Resolution Adopted at the First Plenary Session*, OAS Doc OEA/Ser.F/II.24, RC.24/RES.1/01 (2001) <<http://www.oas.org/OASpage/crisis/RC.24e.htm>> at 23 September 2008; Lord George Robertson, Secretary-General of NATO, ‘Statement’ (Press Statement, 2 October 2001) <<http://www.nato.int/docu/speech/2001/s011002a.htm>> at 23 September 2008.

¹²³ *Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc S/2001/946 (7 October 2001).

¹²⁴ ‘International Peace and Security’ (2001) 55 *Yearbook of the United Nations* 45, 65–6.

¹²⁵ See Ruys and Verhoeven, above n 101, 298.

¹²⁶ White House, *The National Security Strategy of the United States of America* (White House Report, September 2002) 11 <<http://www.whitehouse.gov/nsc/nss.pdf>> at 23 September 2008. The most controversial aspect of the 2002 *National Security Strategy* concerns its attempt to broaden the contested doctrine of anticipatory self-defence to include recourse to force against ‘non-imminent’ threats of armed attack. This issue is not addressed in the present article.

¹²⁷ *Ibid* 12.

¹²⁸ Tom Allard, ‘Pre-Emptive Strikes: PM Weighs UN Rules Change’, *Sydney Morning Herald* (Sydney, Australia) 6 December 2002, 8; *Letter Dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General*, UN Doc S/2002/1012 (11 September 2002).

Australia or Australian citizens abroad.¹²⁹ The same year, President Putin stated that Russia reserved the right to defend itself against attacks by pro-Chechen rebels operating from Georgia, threatening military action if the Georgian authorities failed to prevent incursions into Russia.¹³⁰ In 2004, Rwanda invoked the failure of the Democratic Republic of Congo ('DRC') to prevent attacks by Hutu rebel groups as justification for military operations of the Rwandan army in Eastern Congo.¹³¹ Finally, in the summer of 2006, Israel engaged in a large-scale military intervention in Lebanon in response to a cross-border attack by Hezbollah.¹³²

Against this background, the Turkish intervention of 2007–08, combined with the condoning attitude of the international community, adds to the evidence in state practice of an evolution towards a more flexible of interpretation of self-defence in response to attacks by non-state actors which a state has been unwilling or unable to prevent. Thus, it is interesting to note that President Gül used language broadly similar to that of the US *National Security Strategy* and declared that Turkey would 'not tolerate those who help and harbor terrorists'.¹³³ Furthermore, while most official state reactions remained rather vague as to the legal validity of the operation — acknowledging Turkey's need to protect its citizens as well as emphasising the need to respect Iraq's territorial integrity — some states did more explicitly recognise that Turkey had the 'right to defend'

¹²⁹ See Myint Zan, 'Comment: John's Howard's "Pre-emptive Strike Thesis"' (2003) 7 *Journal of South Pacific Law* <<http://www.paclii.org/journals/fJSPL/vol07no1/3.shtml>> at 23 September 2008; Allard, above n 128.

¹³⁰ See *Annex to Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General: Statement by Russian Federation President V V Putin*, UN Doc S/2002/1012 (11 September 2002) ('Statement by Russian Federation President V V Putin'); 'Putin Warns of "Self-Defence" Strikes', *BBC News* (UK) 11 September 2002 <<http://news.bbc.co.uk/1/hi/world/europe/2252056.stm>> at 23 September 2008; 'Putin Ups Georgia Strike Warnings', *BBC News* (UK) 12 September 2002 <<http://news.bbc.co.uk/1/hi/world/europe/2253349.stm>> at 23 September 2008. See also 'Russia Targets Top Chechen Rebels', *BBC News* (UK) 8 September 2004 <<http://news.bbc.co.uk/2/hi/europe/3636818.stm>> at 23 September 2008.

¹³¹ 'DR Congo Troops "to Repel Rwanda"' *BBC News* (UK) 3 December 2004 <<http://news.bbc.co.uk/2/hi/africa/4061793.stm>> at 23 September 2008. See also *Letter Dated 30 November 2004 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council*, UN Doc S/2004/933 (30 November 2004), which refers to the lack of an effective response from the international community; *Letter Dated 6 December 2004 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council*, Annex, UN Doc S/2004/951 (6 December 2004).

¹³² See UN SCOR, 5488th mtg, UN Doc S/PV.5488 (13 July 2006) 7–8; UN SCOR, 5493rd mtg, UN Doc S/PV.5493 (21 July 2006). In its letter to the Security Council, Israel denounced the 'ineptitude and inaction' of the Lebanese Government to exercise its jurisdiction over southern Lebanon and stated that 'responsibility for [the attack] [lay] with the government of Lebanon, from whose territory these acts have been launched into Israel': *Identical Letters Dated 12 July 2006 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council*, UN Doc S/2006/515 (12 July 2006).

¹³³ See 'Europe Again Warns against Turkish Intervention in Iraq', above n 43.

itself.¹³⁴ On 3 March 2008, for example, the Dutch Foreign Minister replied as follows to a parliamentary question regarding the legality of ‘Operation Sun’:

On the basis of the information presently available, it seems justifiable that the Turkish military actions do not violate international law. This mainly concerns the question whether Turkey acted in accordance with the right of self-defence enshrined in Article 51 of the *UN Charter*. As it is established that Kurdish attacks from Iraq have taken place on Turkish territory, and since the UN Security Council has not yet taken any measures against these attacks, Turkey can invoke the right of self-defence. An important condition for this is amongst others that the measures taken correspond to the demands of necessity and proportionality.¹³⁵

How has the ICJ reacted to evolutions in state practice after September 11?¹³⁶ First, in the *Israeli Wall* advisory opinion,¹³⁷ the Court recalled that ‘[a]rticle 51 of the *Charter* ... recognises the existence of an inherent right of self-defence in the case of armed attack by one State against another State’.¹³⁸ One year later, in the *Armed Activities* case, the Court rejected Uganda’s self-defence claim on the grounds that it had not shown that the alleged attacks emanated from ‘armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of ... the definition of aggression’.¹³⁹ These dicta seem to indicate that the Court sticks to the restrictive threshold spelled out in *Nicaragua* and essentially regards imputability to the state as a precondition for self-defence (interestingly, the phrase ‘substantial involvement’ is left out). On the other hand, in *Israeli Wall*, the Court noted that the attacks to which Israel referred emanated from within Israeli (occupied) territory. For this reason, ‘Israel could not in any event invoke [Security Council *Resolution 1368* (2001) and *Resolution 1373* (2001)] in support of its claim to be exercising a right of self-defence’.¹⁴⁰ By referring to the two Resolutions that recognised the right of self-defence in the aftermath of the September 11 attacks, the Court may *a contrario* have left open the possibility of a broader right of self-defence in response to international terrorist attacks. This, however, remains a matter of

¹³⁴ See, eg, Belgium, *Questions et réponses écrites*, Chambre des représentants de Belgique, 21 February 2008, QRVA 52 010, 1357 (Dirk Van Der Maelen, Member of Parliament; Karel De Gucht, Belgian Minister for Foreign Affairs) <<http://www.dekamer.be/QRVA/pdf/52/52K0010.pdf>> at 23 September 2008, stating that ‘Belgium condemns the terrorist acts of the PKK on Turkish territory and understands Turkey’s right to defend itself’ (author’s own translation).

¹³⁵ Maxime Verhagen, Dutch Minister of Foreign Affairs, ‘Beantwoording vragen van het lid Van Bommel over een Turkse invasie in Noord-Irak’ (Ministerial Statement, 3 March 2008) <<http://www.minbuza.nl/nl/actueel/brievenparlement,2008/03/Beantwoording-vragen-van-het-lid-Van-Bommel-over-e.html>> at 23 September 2008 (author’s own translation). Consider also the following passage from Verhagen: ‘The Iraqi government has the primary duty to make sure that its territory is not used for launching terrorist attacks. As it appears that Iraq has continuously failed to effectively counter them, Turkey has the right to defend itself against these attacks by military means’ (author’s own translation).

¹³⁶ See Ruys, above n 98, 276–9.

¹³⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 (‘*Israeli Wall*’).

¹³⁸ *Ibid* 194.

¹³⁹ *Armed Activities* [2005] ICJ [146] <<http://www.icj-cij.org>> at 23 September 2008.

¹⁴⁰ *Israeli Wall* [2004] ICJ Rep 136, 139.

speculation;¹⁴¹ the precise contribution of these Resolutions is left unanswered. In all, the Court has offered little guidance as to the impact of recent state practice on the scope of self-defence. The authority of the Court's findings in *Armed Activities* and *Israeli Wall* is moreover undermined by the considerable number of dissenting and separate opinions in which individual judges have criticised the Court's restrictive stance.¹⁴²

Legal scholarship remains divided. Some authors, relying mainly on ICJ case law, uphold the view that self-defence requires that attacks can be attributed to a state.¹⁴³ This view, however, seems to ignore recent developments in state practice and the growing recognition that this threshold leaves states insufficient protection against attacks by non-state actors. Such a gap between the 'law in practice' and the 'law in the books' seems untenable. A second group of authors conversely regard Security Council *Resolutions 1368* and *1373* as a blank cheque allowing self-defence against all attacks by non-state actors.¹⁴⁴ Against this, it must be cautioned that the precedential value of the aforementioned resolutions remains at best unclear.¹⁴⁵ States resorting to self-defence against attacks by non-state actors have virtually always appealed to some sort of link with the territorial state, be it active support (for example, Afghanistan (2001)), or the inability to take action (for example, Rwanda (2004) and Lebanon (2006)).¹⁴⁶ Moreover, some recent invocations of self-defence against non-state actors received a mixed or even negative reaction at the international level. Thus, in 2004, the Security Council demanded that Rwanda withdraw without delay any forces it might have in Congolese territory, even though it stopped short of a formal condemnation.¹⁴⁷ More recently, in 2008 Colombian planes attacked a Revolutionary Armed Forces of Colombia ('FARC') guerrilla camp two

¹⁴¹ Cf Judge Kooijmans who regretted that the Court had 'by-passed this new element [ie, *Resolutions 1368* and *1373*], the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence': *ibid* 230 (Separate Opinion of Judge Kooijmans).

¹⁴² See, eg, *ibid* 229–30 (Separate Opinion of Judge Kooijmans), 242–3 (Declaration of Judge Buergenthal), 215 (Separate Opinion of Judge Higgins); *Armed Activities* [2005] ICJ [7]–[15] <<http://www.icj-cij.org>> at 23 September 2008 (Separate Opinion of Judge Simma), [19]–[31] (Separate Opinion of Judge Kooijmans), [15] (Dissenting Opinion of Judge Kateka).

¹⁴³ Scott M Malzahn, 'State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility' (2002) 26 *Hastings International and Comparative Law Review* 83; Olivier Corten, *Le droit contre la guerre* (2008) 669–704.

¹⁴⁴ See, eg, Thomas M Frank, 'Terrorism and the Right of Self-Defense' (2001) 95 *American Journal of International Law* 839; Christopher Greenwood, 'International Law and Pre-emptive Use of Force: Afghanistan, Al-Qaeda, and Iraq' (2003) 4 *San Diego International Law Journal* 7, 17.

¹⁴⁵ See, eg, Yutaka Arai-Takahashi, 'Shifting Boundaries of the Right of Self-Defence — Appraising the Impact of the September 11 Attacks on *Jus Ad Bellum*' (2002) 36 *International Lawyer* 1081, 1090; Corten, above n 143, 694–6; Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm D Evans (ed), *International Law* (2nd ed, 2006) 589, 604–5. The resolutions only 'recognised' in general terms the inherent right of self-defence in their preamble. Furthermore, several states seemed to regard the backing of the Security Council as crucial to the US claim to self-defence.

¹⁴⁶ See above nn 123, 131, 132.

¹⁴⁷ *Resolution 1565*, SC Res 1565, 59th sess, 5048th mtg, UN Doc S/RES/1565 (1 October 2004). On the other hand, the resolution did not condemn Rwanda *ad nominatim*. It moreover recognised that the presence of armed groups in the Eastern DRC constituted a source of instability, demanding that they disarm and disband immediately and urging Congo to do all possible to effectuate disarmament.

kilometres inside Ecuadorian territory, in what was justified as a ‘legitimate exercise of self-defence’.¹⁴⁸ While the US appeared to approve the operation, many Latin-American countries in fact denounced it, and the OAS formally condemned it as ‘a violation of the sovereignty and territorial integrity of Ecuador and of principles of international law’.¹⁴⁹ More generally, one may wonder whether permitting self-defence against all attacks of non-state actors, regardless of state involvement, would not entail a risk of abuse, by allowing states to claim self-defence as a pretext for intervening in the domestic affairs of another state.

In light of these considerations, the present author feels more sympathy for a middle road, based on a more flexible standard of state involvement. The key question, however, is: what threshold can be distilled from state practice? A brief comparison of the three main instances of recent practice illustrates the difficulty of this endeavour. First, as regards the US intervention in Afghanistan in 2001, it is clear that close links existed between al Qaeda and the Taliban regime: the latter not only willingly provided the terrorist organisation with a safe haven but also offered considerable logistical support.¹⁵⁰ The same cannot be said for the position of Hezbollah within the Lebanese State. Indeed, at the time of the Israeli intervention in 2006, most states agreed that the Lebanese Government was simply unable to take action against the well-trained and well-organised Hezbollah militants and infrastructure in (mainly) southern Lebanon.¹⁵¹ Finally, the Turkey–PKK conflict lies somewhere in between. While there is no credible evidence of Iraqi authorities providing active support to PKK fighters in northern Iraq, it cannot be maintained that Iraq was unable to take action against the PKK presence in its territory. It may be recalled, for instance, that the PUK and KDP in the mid-1990s did cooperate with Turkey in fighting the PKK. Moreover, the explicit refusal of Iraqi authorities in 2007 to combat PKK fighters or to extradite suspects to Turkey, illustrates that they were not unable, but rather unwilling, to chase the PKK from its safe haven.¹⁵²

¹⁴⁸ ‘Ecuador Pulls Diplomat from Bogota’, *CNN* (US) 2 March 2008 <<http://edition.cnn.com/2008/WORLD/americas/03/02/chavez.colombia/index.html>> at 23 September 2008.

¹⁴⁹ Permanent Council of the OAS, OAS Doc CP RES 930 (1632/08) (5 March 2008). See Theodore Christakis, Interest Group on Peace and Security, *The Colombia Cross-Border Raid, the Turkish Incursion in Northern Iraq and the Legality of Cross-Border Military Operations to Hunt Down Rebels* (2008) <<http://igps.wordpress.com/discussions/the-legality-of-cross-border-military-operations-to-hunt-down-rebels>> at 23 September 2008; Chris Borgen, ‘Colombia’s Incursion into Ecuador and Anticipatory Self-Defense’, *Opinio Juris* (3 March 2008) <<http://opiniojuris.org/2008/03/03/colombias-incursion-into-ecuador-and-anticipatory-self-defense>> at 23 September 2008.

¹⁵⁰ See, eg, National Commission on Terrorist Attacks upon the US, *The 9/11 Commission Report* (22 July 2004) 66–7 <<http://www.9-11commission.gov/report/911Report.pdf>> at 23 September 2008.

¹⁵¹ See Ruys, above n 98, 270, 277–8. See also UN SCOR, 61st sess, 5489th mtg, UN Doc S/PV.5489 (14 July 2006).

¹⁵² As mentioned earlier, the intervention in Afghanistan appeared to enjoy the near-unanimous support of the international community: ‘Legal Aspects of International Political Relations’, above n 120, 1219–20. As for the intervention in Lebanon, a majority of states appeared to accept Israel’s self-defence claim, but the exercise of this right was widely perceived as disproportionate: see above n 98. As for Turkey’s intervention in northern Iraq, we have seen that the international community generally adopted a condoning posture: see above Part II(B).

What lessons can be drawn from this? It appears that the only common denominator is the fact that in each case defensive action was undertaken against the territory of a state in which the non-state group had established a safe haven and from which attacks were being launched and/or prepared. Yet, taking account of comparable interventions which met with more negative reactions and of the fairly recent nature of these developments, it is arguably premature to regard this as the new threshold. Elsewhere, the present author has suggested, first, that art 3(g) of the *Definition of Aggression* ought to be interpreted more flexibly by applying a broader ‘aiding and abetting’ test; and second, that art 9 of the ILC *Draft Articles on State Responsibility* may allow for the recourse to self-defence in exceptional situations of state failure whereby a non-state armed group has in fact replaced governmental authority.¹⁵³ Others argue that the focus on state involvement in the armed attack is no longer warranted and that one should simply attempt to readjust the necessity and proportionality criteria to meet the challenges of non-state attacks.¹⁵⁴

In the end, the Turkish intervention in northern Iraq adds to the evidence in state practice supporting a more flexible construction of self-defence against attacks by non-state actors. Unfortunately, the lack of explicit legal justification and the generally muted reactions of third states make it difficult to identify the *opinio juris* implicit in the Turkish precedent and may also indicate that states feel uncomfortable about setting new precedents. Hence, the case under consideration does not reduce the existing legal uncertainty, but adds to it. Pending clarification of this aspect of customary international law — whether by the ICJ, state practice or a growing consensus in legal scholarship — it is clear that the application of the principles of necessity and proportionality is of paramount importance. This is illustrated by the fact that, both in the cases of Israel–Lebanon (2006) and Turkey–Iraq (2007–08), the attention of the international community focused by and large on these twin conditions.

5 Necessity and Proportionality

The principles of necessity and proportionality are not mentioned in art 51 of the *UN Charter*, but are firmly established as part of customary international law, as was repeatedly recognised by the ICJ.¹⁵⁵ Both standards essentially require that measures of self-defence should be geared towards the halting or repelling of

¹⁵³ See Ruys and Verhoeven, above n 101, 314–19; Ruys, above n 98, 285–90. ‘Aiding and abetting’ is a notion borrowed from international criminal law which cumulatively requires an *actus reus* and a *mens rea*. Article 9 of the ILC’s *Draft Articles on State Responsibility*, above n 84, provides that:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

¹⁵⁴ See, eg, Kimberley N Trapp, ‘Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors’ (2007) 56 *International and Comparative Law Quarterly* 141; Michael C Bonafede, ‘Here, There, and Everywhere: Assessing the Proportionality Doctrine and US Uses of Force in response to Terrorism after the September 11 Attacks’ (2002) 88 *Cornell Law Review* 155.

¹⁵⁵ See, eg, *Nicaragua* [1986] ICJ Rep 14, 103; *Oil Platforms* [2003] ICJ Rep 161, 186–7.

an armed attack and should not exceed this goal.¹⁵⁶ Otherwise, the action undertaken will involve a punitive or retaliatory character and will be qualified as an unlawful reprisal, rather than as lawful self-defence.¹⁵⁷

In concreto, a first component of the necessity criterion concerns the requirement that peaceful means of dispute resolution have reasonably been exhausted or would clearly be futile.¹⁵⁸ While the ‘last resort’ criterion is generally accorded little attention after an armed attack has actually taken place,¹⁵⁹ it could be argued that it has a more significant role to play in assessing self-defence against attacks by non-state actors. In such situations it may be expected that the victim state should first request the other state to take action against the non-state actors on its soil, before engaging in forceful action on the latter’s territory. This view seems to be supported by third states’ insistence that Turkey and Iraq should engage in a constructive dialogue and that Iraq should take appropriate measures against the PKK. In any case, Turkey seems to have complied reasonably well with this condition. It repeatedly engaged in discussions with Iraqi officials and warned of military action if no measures were taken. In light of the continuation of attacks following the security arrangement agreed on 28 September 2007¹⁶⁰ and the persistent reluctance of Iraqi authorities to take effective action, one might indeed conclude that Turkey’s intervention was a ‘last resort’.

The second component of the necessity criterion is the requirement that there should be a close proximity in time between the start of the ‘armed attack(s)’ and the response in self-defence.¹⁶¹ Again, the ‘immediacy’ requirement does not seem to pose insurmountable problems. Turkey’s initial aerial raids and commando incursions immediately followed the PKK attack of 21 October. Moreover, even if one would object that the main ground offensive only began in late February, it must be conceded that the criterion allows for a degree of flexibility¹⁶² — especially when self-defence is used in response to a continuing series of attacks, rather than against an isolated attack.¹⁶³ The victim state must be given the time to take the necessary preparations in terms of troop

¹⁵⁶ See Gray, *International Law and the Use of Force*, above n 89, 121; Antonio Cassese, ‘Article 51’ in Jean-Pierre Cot and Alain Pellet (eds), *La Charte des Nations Unies* (2nd ed, 1991) 1329, 1333.

¹⁵⁷ See, eg, *Declaration on Friendly Relations*, above n 118, 122; *Complaint by Yemen*, SC Res 188, 19th sess, 1111th meeting, UN Doc S/5650 (9 April 1964) 10, regarding the UK raid on Harib Fort in Yemen.

¹⁵⁸ See Dinstein, above n 83, 209–10; Ago, above n 86, 69; Gazzini, above n 95, 144; Judith G Gardam, *Necessity, Proportionality and the Use of Force by States* (2004) 150.

¹⁵⁹ See Ago, above n 86, 69; Michael N Schmitt, ‘Preemptive Strategies in International Law’ (2003) 24 *Michigan Journal of International Law* 513, 530–1; Oscar Schachter, ‘The Lawful Resort to Unilateral Use of Force’ (1985) 10 *Yale Journal of International Law* 291, 292.

¹⁶⁰ ‘Vote of Confidence in AKP’, above n 20, 48 151.

¹⁶¹ See Ago, above n 86, 70; Cassese, above n 156, 1334; Gardam, above n 158, 150–3.

¹⁶² See, eg, Dinstein, above n 83, 210; Gazzini, above n 95, 144; Constantinou, above n 94, 160–1; Gardam, above n 158, 150–1.

¹⁶³ See Ago, above n 86, 70.

deployment, collecting intelligence, or exhaustion of peaceful means.¹⁶⁴ In light hereof, it may reasonably be assumed that the Turkish intervention was not a punitive expedition against Iraq, but rather a genuine defensive action aimed at the prevention of future PKK attacks.

Closely related to the necessity criterion is the requirement that the exercise of self-defence be proportionate to the exigencies of the concrete case. Without entering into a detailed analysis of relevant state practice, a number of variables can be spelled out.¹⁶⁵ The most important aspect concerns the material scope and gravity of the defensive action as compared to the initial attack(s): the defending state should use no more force — in terms of relative casualties and damage caused, weapons used and number of troops deployed — than is reasonably necessary to repel the attack(s). The geographical scope of the defensive action also matters: forceful actions should be confined to the area of the attack(s) that they are designed to repel.¹⁶⁶ Following the Argentinean conquest of the Falklands in 1982, for instance, it was argued that a large-scale British operation against the Argentinean mainland would have constituted a disproportionate escalation of the situation.¹⁶⁷ Proportionality also presupposes that the duration of the defensive action does not exceed what is necessary to deal effectively with the armed attack(s).¹⁶⁸ A final factor concerns the range of targets.¹⁶⁹ The exercise of self-defence must indeed be directed against the source of the armed attack. In the context of defensive action against non-state actors, the implication is that the action should in principle be directed solely against the latter, and not against the infrastructure or the military of the state on whose territory the action takes place. Closely related to this is the requirement that defensive action does not produce disproportionate ‘collateral damage’ among the civilian population and that civilians and civilian infrastructure are not directly targeted. While this is strictly speaking an issue of international humanitarian law (which must be respected when having recourse to self-defence),¹⁷⁰ it is often raised in the wider proportionality assessment. In any case, practice illustrates that defensive actions resulting in many civilian casualties (for example, the Israeli intervention in

¹⁶⁴ UN SCOR, 48th sess, 3245th mtg, UN Doc S/PV.3245 (27 June 1993) 3, relating to, for example, the June 1993 US strikes against the Iraqi intelligence headquarters in Baghdad in response to the attempt to assassinate former President Bush foiled two months earlier. Several weeks also passed between the bombings of the US embassies in Nairobi and Dar es Salaam in 1998 and the subsequent strikes against Sudan and Afghanistan, as well as between the Argentinean invasion of the Falklands in 1982 and the British military response. In none of these cases was the time lapse considered to invalidate the self-defence claim as such. See ‘Legal Aspects of International Political Relations’, above n 120, 1218–20; ‘Trusteeship and Decolonization: Other Colonial Territories’ (1982) 36 *Yearbook of the United Nations* 1320, 1320–46.

¹⁶⁵ See Gardam, above n 158, 162–72.

¹⁶⁶ *Armed Activities* [2005] ICJ [147] <<http://www.icj-cij.org>> at 23 September 2008; Christopher Greenwood, ‘Self-Defence and the Conduct of International Armed Conflict’ in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 273, 274; Daniel P O’Connell, *The Influence of Law on Sea Power* (1975) 65.

¹⁶⁷ Higgins, above n 83, 232.

¹⁶⁸ Greenwood, ‘Self-Defence and the Conduct of International Armed Conflict’, above n 166, 275–6.

¹⁶⁹ See *ibid* 278–9; Constantinou, above n 94, 170.

¹⁷⁰ See, eg, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 245.

Lebanon) have evoked strong negative reactions from the international community.

As mentioned before, following the events of October 2007, many states urged Turkey to show restraint and to refrain from taking disproportionate military action.¹⁷¹ In particular, it was stressed that the Turkish intervention should not endanger Iraqi civilians.¹⁷² After the commencement of ‘Operation Sun’, the US and Iraq moreover emphasised that the operation ought to be of limited duration and had to be precisely targeted.¹⁷³ How did the Turkish intervention live up to these demands (and its own promises)?¹⁷⁴ In general, the balance appears positive. The operation was directed against PKK hideouts in northern Iraq and does not seem to have exceeded this objective.¹⁷⁵ It was not used as a cover for harming the infrastructure or military capacities of the Iraqi Kurds as some had feared.¹⁷⁶ The civilian population and infrastructure was kept out of harm’s way. There were no reports of attacks resulting in large numbers of civilian casualties.¹⁷⁷ Apart from Iraqi complaints that a few bridges had been destroyed,¹⁷⁸ there were no significant excesses. Of course, the magnitude of the Turkish intervention — the large-scale deployment of ground troops and the repeated use of aerial raids — exceeded the absolute gravity of attacks by PKK fighters. In this context, the condoning posture of third states supports the view that, when defensive action is undertaken against a continuous series of attacks, the proportionality assessment must not start from a purely quantitative comparison of the amount of force used in the armed attacks and in self-defence. It then includes a functional or qualitative element, in the sense that the defensive action may exceed the gravity of the initial attacks if and to the extent that this is necessary to prevent further attacks.¹⁷⁹ Interestingly, a number of states explicitly took the view that the Turkish actions were not disproportionate. On 21 February 2008, the Belgian Foreign Minister agreed that ‘[the Turkish] attack was precisely targeted and aimed only at PKK targets, without harming the population of northern Iraq or local factions’.¹⁸⁰ In a similar vein, the Dutch Foreign Minister accepted that ‘the Turkish actions appear to be restricted to specific actions against PKK targets in the border area of northern Iraq’.¹⁸¹ Even Iraqi President Talabani conceded that the withdrawal of Turkish ground troops

¹⁷¹ See, eg, Presidency of the EU, ‘Statement on the Terrorist Attacks of the PKK’, above n 36; Presidency of the EU, ‘EU Presidency Statement on the Military Action Undertaken by Turkey in Iraqi Territory’, above n 69; Taniguchi, above n 73.

¹⁷² See, eg, ‘Ban Ki-Moon Calls for “Utmost Restraint” in Turkey–Iraq Border Actions’, above n 75; ‘Iraq Warns Turkey over Incursion’, above n 60.

¹⁷³ ‘Turkey Must End Iraq Raid — Bush’, above n 48; ‘Iraq Warns Turkey over Incursion’, above n 60. See also Verhagen, above n 135.

¹⁷⁴ See *Note Verbale*, above n 77.

¹⁷⁵ *Ibid.*

¹⁷⁶ See, eg, Brookings Institution, ‘Turkey’s Kurdish Conundrum’ (Panel Discussion held in Washington DC, US, 20 March 2008) 16–17 (Aliza Marcus), available from <<http://www.brookings.edu/events/pastevents.aspx>> at 23 September 2008.

¹⁷⁷ See *Note Verbale*, above n 77.

¹⁷⁸ ‘Iraq Warns Turkey over Incursion’, above n 60.

¹⁷⁹ See Ago, above n 86; Gazzini, above n 95, 148; Gray, *International Law and the Use of Force*, above n 89, 121.

¹⁸⁰ *Questions et réponses écrites*, above n 134 (author’s own translation).

¹⁸¹ Verhagen, above n 135 (author’s own translation).

‘indicate[d] the credibility of the Turkish government’s statements that the military operation [would] be limited and temporary’.¹⁸² In the end, the Turkish intervention poses few problems in terms of proportionality. Arguably, the only notable exception concerns the duration of the operation. Indeed, while it was earlier suggested that the launching of ‘Operation Sun’ several months after the October attacks did not necessarily violate the ‘immediacy’ requirement, it could be argued that, absent new cross-border PKK attacks, the continuation of Turkish air raids after the completion of the ground operation in February 2008 exceeded the proportionate duration of permissible self-defence.¹⁸³

IV CONCLUDING REMARKS

The Turkish military intervention in northern Iraq in 2007–08 is illustrative of an increasing trend of incursions into neighbouring states’ territory aimed at the prevention of cross-border attacks by terrorist groups or other non-state actors. Manifestations of this trend have been numerous, as is illustrated by recent conflicts between Colombia and Ecuador,¹⁸⁴ Israel and Lebanon,¹⁸⁵ Russia and Georgia,¹⁸⁶ Afghanistan and Pakistan,¹⁸⁷ or the US and Pakistan.¹⁸⁸ The traditional boundaries of the right to self-defence, as interpreted by the ICJ, are ill-equipped to deal with these situations. The precise extent to which recent state practice has broadened these parameters, however, remains the subject of considerable legal uncertainty and awaits clarification by the ICJ, legal scholarship, or — preferably — states themselves. In the meantime, compliance with the necessity and proportionality criteria remains of pivotal importance. In light of the foregoing, a conclusive ruling on the legality of Turkey’s conduct is difficult to make. However, at least from the perspective of the necessity and proportionality requirements, it could be argued that — in marked contrast to the Israeli intervention in Lebanon in 2006¹⁸⁹ — Turkey exercised considerable restraint.

Whatever the outcome of the ongoing shift in customary practice, one should caution against an overly permissive right of self-defence against non-state actors. Indeed, a proliferation of interventions of this kind may result in a substantial deterioration of regional stability in many parts of the globe. Political dialogue and cooperation between neighbouring states, therefore, remains the

¹⁸² ‘Turkey Urges PKK to End Struggle’, above n 33.

¹⁸³ Cf *Nicaragua* [1986] ICJ Rep 14, 122.

¹⁸⁴ See above n 149 and accompanying text.

¹⁸⁵ See UN SCOR, 61st sess, 5489th mtg, UN Doc S/PV.5489 (14 July 2006); UN SCOR, 61st sess, 5493rd mtg, UN Doc S/PV.5493 (21 July 2006). See also above n 98.

¹⁸⁶ *Statement by Russian Federation President V V Putin*, above n 130.

¹⁸⁷ See, eg, Carlotta Gall, ‘Karzai Threatens to Send Soldiers into Pakistan’, *The New York Times* (New York, US) 16 June 2008, 6, relating to cross-border attacks on Afghan territory by Taliban fighters operating from the border region in Pakistan.

¹⁸⁸ See, eg, Eric Schmitt and Mark Mazzetti, ‘Bush Said to Give Orders Allowing Raids in Pakistan’, *The New York Times* (New York, US) 11 September 2008, 1; Jane Perlez, ‘Pakistan’s Military Chief Criticizes US over a Raid’, *The New York Times* (New York, US) 11 September 2008, 8.

¹⁸⁹ In July–August 2006, the Israeli Defence Forces destroyed some 15 000 Lebanese houses and apartments as well as 78 bridges and 630 kilometres of roads: Noor Akl, ‘Lebanon Counts the Cost of Conflict’, *CNN* (US) 12 October 2006 <<http://edition.cnn.com/2006/WORLD/meast/10/11/lebanon.pollution/index.html>> at 23 September 2008.

proper channel to address non-state cross-border attacks. More generally, as the case of the PKK illustrates, military actions against non-state groups may (in part) generate only a placebo effect. Thus, while the Turkish intervention arguably resulted in a weakening of the PKK's infrastructure and logistical base, all actors agree that the only way to effectively deal with Kurdish separatist violence in the longer run is by addressing the root causes at the Turkish domestic level.¹⁹⁰ This presupposes the adoption of far-reaching concessions regarding the Turkish Kurds' cultural rights, a greater tolerance vis-à-vis Kurdish political participation in Ankara, as well as a comprehensive effort to address the economic underdevelopment of the Kurdish regions in south-eastern Turkey. Both the EU and the US can play a positive role in urging Turkey to take appropriate measures and in fostering a political dialogue between Turkish and Iraqi authorities.

¹⁹⁰ See, eg, Brookings Institution, 'Turkey's Kurdish Conundrum', above n 176 (Hasan Cemal, O Faruk Logoglu and Aliza Marcus). See also Commission of the EC, *Turkey 2007 Progress Report* (Commission Staff Working Document, 6 November 2007) EC Doc SEC(2007)1436; Human Rights Watch, *Turkey — Events of 2007* (Human Rights Watch World Report, 31 January 2008) <<http://hrw.org/englishwr2k8/docs/2008/01/31/turkey17727.htm>> at 23 September 2008.