

The Right to Use Anticipatory Self Defense Against Terror: The Tomb of Suleyman Shah and Turkey's Challenges

By Major Halil Murat Berberer*

I. Introduction

I can't breathe. My lungs hurt. My skin has become rough and just being outside hurts. I follow news of death from home . . . There was a funeral for someone who was wounded when he reached the Turkish border and who died as soon as he crossed over, as if it were fated for him to die on foreign soil, but that foreign soil cradled his torments and his deaths while his own country made him homeless and cast him out.¹

Samar Yazbek, after witnessing many of the disastrous events that have taken place in Syria, wrote a memoir of her experiences from the Syrian civil war.² This war began almost six months from the day that a man burned himself in Tunisia, in silent protest to the abuses of his government.³ This single act of desperation would trigger the protests known as the Arab Spring.⁴ Tunisia, Egypt, Bahrain, Libya and Syria are among the countries most affected by the Arab Spring.⁵ Unfortunately, for the Syrians, the spring would never come, only a harsh never-ending winter full of suffering and death.

Conflict in Syria triggered by the Arab Spring is now a widespread and brutal civil war resulting in death and displacement of Syrian people.⁶ Due to the Syrian civil war, from 2011 to the present, there are 6.4 million people internally displaced, 191,369 people killed, and 4.7 million people in dire need of humanitarian assistance in hard to access areas.⁷ However, this is not just Syria's problem. The intensity of the conflict threatens regional stability and, most notably, threatens the national security of Turkey.⁸

One key issue that is unique to Turkey and the situation in Syria is the Tomb of Suleyman Shah (the Tomb). The Tomb is a Turkish exclave⁹ that until recently was located in Karakozak Village in Muncic, Syria, 37 km away from the borders of Turkey and Syria.¹⁰ Despite its location inside Syria, the Tomb, a historical heritage and a symbol of national pride, retaining immense emotional value for Turkish people, is considered part of the sovereign territory of Turkey.¹¹

* Judge Advocate, Turkish General Staff. Presently assigned as Chief of International Law Affairs Department, Ankara, Turkey. LL.M., 2007, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; B.A., 1997, Turkish Military Academy; J.D., 2002, Eskisehir Anadolu University, Turkey; LL.M., 2002, Institution of Informatics, Ankara Middle East Technical University; LL.M., 2007, Institution of Social Sciences, Cag University, Mersin. Previous assignments include Infantry Officer, Siirt, Turkey, 1998-2000; Project Officer, Main Headquarters of Turkish Land Forces, 2002-2004, Military Judge, 6th Major Command, Adana, Turkey, 2005-2011, Military Prosecutor, Turkish General Staff, Ankara, Turkey 2011-2012. This article was submitted in partial completion of the Master of Laws requirements of the 63d Judge Advocate Officer Graduate Course.

¹ SAMAR YAZBEK, A WOMAN IN THE CROSSFIRE: DIARIES OF THE SYRIAN REVOLUTION 145 (2012).

² *Id.*

³ Thilo Maruhn, *Sailing Close to the Wind: Human Rights Council Fact-Finding in Situation of Armed Conflict—The Case of Syria*, 43 CAL. W. INT'L L. J. 402-03 (2012).

⁴ Annyssa Bellal & Louise Doswald Beck, *Evaluating the Use of Force During the Arab Spring*, 14 Y.B. OF INT'L HUMANITARIAN L. 3 (2011).

⁵ *Id.*

⁶ See UN Office for the Coordination of Humanitarian Affairs, *Syria Crisis*, <http://syria.unocha.org> (last visited Mar. 2, 2014).

⁷ See *id.* See also U.N. S.C. Rep. of the Security Council, Implementation of Security Council Resolution 2139 (2014 and 2165) (2014), U.N. Doc. S/2014/756 (2014), available at http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_756.pdf [hereinafter Security Council Report].

⁸ See MIT Ctr. for Int'l Studies, *Debating U.S. Interests in Syria's Civil War*, MIT CENTER FOR INTERNATIONAL STUDIES, (Sept. 16, 2013), http://web.mit.edu/cis/editorspick_audit_091613_syria.html (stating that use of chemical weapons, international terrorism, spill-over effect of civil war, mass atrocities and humanitarian disasters, refugee outflows, the movement of fighters across borders, the flow of weapons across borders can be counted as examples of security threats for the neighboring countries and the rest of the world).

⁹ The special status of the Tomb of Suleyman Shah was determined by Franco-Turkish Agreement. See Fr.-Turk., Oct. 20, 1921, available at <http://www.turkishweekly.net/columnist/3528/october-1921-1968-2011-the-new-ankara-agreement-and-its-context.html> [hereinafter Fr.-Turk. Agreement].

¹⁰ See Press Release, Republic of Turkey, Ministry of Foreign Affairs, Regarding the Temporary Relocation of the Tomb of Suleyman Sah and Memorial Outpost (Feb. 22, 2015), available at http://www.mfa.gov.tr/no_-70_-22-february-2015_-press-release-regarding-the-temporary-relocation-of-the-tomb-of-s%C3%BCleyman-%C5%9Fah-and-memorial-outpost.en.mfa [hereinafter Press Release Regarding the Relocation].

¹¹ Fr.-Turk. Agreement, *supra* note 9, art. 9. Article 9 of The French-Turkish Agreement signed on 20 October 1921 in Ankara states that the Tomb of Suleyman Shah, the grandfather of the Sultan Osman, founder of the Ottoman dynasty, situated at Jaber-Kalesi shall remain the

Soon after the outbreak of violence in Syria, Turkey publically announced that it considered an attack or even the threat of attack on the Tomb to be a threat to its national security, and Turkey further declared it would defend the Tomb with all necessary force.¹² On February 21, 2015, Turkey took action as it warned it would do, and conducted an operation into Syria in order to protect the Tomb and its military personnel.¹³

Turkish Armed Forces entered Syria and conducted an operation called “Sah Firat” to evacuate and relocate the Tomb.¹⁴ Sah Firat, which involved armored vehicles, weaponry and troops, lasted less than twenty-four hours.¹⁵ The initial effort involved exfiltrating the garrison troops guarding the original site and destroying the infrastructure of the site to prevent the militants from using the exclave.¹⁶ The mission was completed on February 22, 2015, after the Tomb and the Memorial Outpost¹⁷ were relocated to a new site within Syria, in the north of Syrian Eşmesi village.¹⁸

The Syrian government issued its objection almost immediately, publically asserting that Turkey conducted this operation without Syrian consent.¹⁹ Specifically, the

property of Turkey, who may appoint guardians for it and may hoist Turkish flag there. *See id.* *See also Why is Suleyman Shah's Tomb So Important?*, BBC (Feb. 22, 2015), available at <http://www.bbc.com/news/world-middle-east-31574209>.

¹² *See Turkey Ready to Respond Any Attack to Suleyman Shah Tomb in Syria*, HURRIYET DAILY NEWS (Mar. 14, 2014), available at <http://www.hurriyetdailynews.com/turkey-ready-to-respond-any-attack-to-suleyman-shah-tomb-in-syria-fm-davutoglu-says.aspx?pageID=449&nID=63573&NewsCatID=352> (explaining that according to the statement made by the Foreign Minister of Turkey, any attack against the Tomb either from “the regime, from radical groups of from anybody” would be subjected to retaliation from Turkey, which would take all measures for the protection of that land.); *see Turkey Vows to Respond to Any attack on Suleyman Shah Tomb*, HURRIYET DAILY NEWS (Mar. 23, 2014), available at <http://www.hurriyetdailynews.com/turkey-vows-to-respond-to-any-attack-on-suleyman-shah-tomb.aspx?pageID=238&nID=63967&NewsCatID=359>.

¹³ *See Press Release Regarding the Relocation*, *supra* note 10 (emphasizing that “the ongoing conflict and state of chaos in Syria posed serious risks to safety and security of the Tomb”).

¹⁴ *Id.*

¹⁵ *Turkish Military Enters Syria to Evacuate Soldiers and Move Tomb's Remains, Reports Say*, N.Y. TIMES (Feb. 21, 2015), http://www.nytimes.com/2015/02/22/world/europe/turkish-military-enters-syria-to-evacuate-soldiers-guarding-tomb-reports-say.html?_r=0.

¹⁶ *Id.*

¹⁷ Designated name of the post for the guards which is a part of the Tomb.

¹⁸ Press Release Regarding the Relocation, *supra* note 10.

¹⁹ *Turkish Military Enters Syria to Evacuate Soldiers, Relocate Tomb*, REUTERS (Sept. 22, 2015), <http://www.reuters.com/article/2015/02/22/>

Syrian government described Turkey’s operation, Sah Firat, as an act of flagrant aggression, adding that Ankara would be responsible for the consequences of the operation.²⁰ The Turkish government countered, asserting its right to anticipatory self-defense and stating that it would act again, to include crossing back into Syria if necessary, to defend its national interests and security.²¹

This article provides support to the position that Turkey has the right under international law of anticipatory self-defense against the emerging threats out of Syria. Considering the threats and the special status of the Tomb, it is specifically argued that Turkey’s decision to cross into Syria, to evacuate its military personnel guarding the Tomb, and to relocate the Tomb was legally sound and consistent with the international legal principal of anticipatory self-defense.

This article is divided into four parts, including part I, the Introduction, and part IV, the Conclusion. Part II provides the background of the civil war in Syria and the incidents of armed conflict that have occurred between Turkey and Syria. Part II also discusses the Turkish Parliamentary Resolution²² in response to the threats arising from Syria under international law and the Turkish Constitution. Additionally, part II covers the threat of terrorism emanating from the Syrian Civil War and, specifically, the threat to the Tomb. Part III justifies, based on the situation in Syria, Turkey’s right to exercise anticipatory self-defense in order to protect its national security to include the Tomb. It is this article’s position that Turkey’s right to anticipatory self-defense is consistent with the United Nations (UN) Charter in general and the customary right of self-defense.

II. Factual Situation in Syria

Long before the current conflict, Turkey and Syria conducted diplomatic relations that included agreements

us-syria-crisis-turkey-idUSKBN0LQ03U20150222 [hereinafter Syrian Objection].

²⁰ *Id.*

²¹ *Turkish PM: No Change in Syria Policy After Shah Firat Operation*, TURKEY AGENDA (Feb. 24, 2015), <http://www.turkeyagenda.com/turkish-pm-no-change-in-syria-policy-after-shah-firat-operation-2034.html> [hereinafter Turkish Prime Minister’s Statement] (declaring that Turkey had the right of ensuring the safety of its soldiers along with protecting the Tomb under international law, adding that Turkey will never hesitate to take any unilateral step when it comes to its national security).

²² Republic of Turkey, Resolution No. 1071 (Oct. 2, 2014), http://www.tbmm.gov.tr/tbmn_kararlari/karar1071.html (last visited Mar. 10, 2015) [hereinafter Resolution].

on security cooperation.²³ These relations were memorialized in the signing of the Adana Agreement on October 20, 1998 and in the Joint Political Declaration on establishing the High Level Strategic Cooperation Council in September 2009.²⁴ The agreement and declaration represented significant inroads in Turkish-Syrian foreign relations.²⁵ The Turkish-Syrian relationship flourished in all aspects until, as described further below, the uprisings started in Syria after the impact of the Arab Spring.²⁶

A. Breakdown of Turkish - Syrian Diplomacy

After the beginning of the Arab Spring in 2010, the turmoil of the uprising took little time to reach to the Syrian Arab Republic.²⁷ The unrest in Syria began as civil discord on March 15, 2011, triggered by the arrest of at least 15 children for painting anti-government graffiti on the walls of a school in the southern city of Daraa.²⁸ Initially, the Syrian people protested peacefully against the regime,²⁹ but unfortunately the Syrian regime reacted disproportionately by using military force to stop the protests.³⁰

²³ Republic of Turkey, Ministry of Foreign Affairs, *Relations Between Turkey-Syria*, MFA.GOV.TR, <http://www.mfa.gov.tr/relations-between-turkey%E2%80%93syria.en.mfa> (last visited Mar. 15, 2015) [hereinafter Relations].

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Marc Lynch, Deen Freelon & Sean Aday, *Syria in the Arab Spring: The Integration of Syria's Conflict with the Arab Uprisings, 2011-2013*, [I-7] RES. & POL. 3 (2014).

²⁸ *Daraa: The Spark That Lit the Syrian Flame*, CNN (Mar. 1, 2012, 9:32 AM), <http://www.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/>.

²⁹ *Syria Revolution: A Revolt Brews Against Bashar Al-Assad's Regime*, WASH. POST (Mar. 15, 2011, 11:35 AM), http://www.washingtonpost.com/blogs/worldviews/post/syria-revolution-revolt-against-bashar-al-assads-regime/2011/03/15/ABrwNEX_blog.html.

³⁰ See Marauhn, *supra* note 3, at 404. Explaining that,

The Syrian government, in light of anti-government protests continuing into April 2011, opted for a military response to the political opposition. On April 25, 2011, the Syrian military launched a large operation at Dara'a, ostensibly to target terrorists but in fact trying to end pro-democracy protests. Rather than calming down the situation in Dara'a, these military activities triggered farther anti-government demonstrations all over Syria.

The Syrian regime violently repressed the peaceful protests and between March and the end of November in 2011, killed more than 4,000 of its people.³¹ Facing a brutal regime that was unresponsive to democratic requests, the uprising gradually transformed into an armed insurgency.³² Since then, the escalation in violence has keeps rising in parallel with the regime's excessive use of force.³³

The Turkish government objected to the regime's use of military force against civilians, and declared that President Bashar al-Assad must step down as president.³⁴ This marked the official breakdown in Turkish-Syrian diplomacy, and to date Turkey remains adamant that the Syrian administration must reform and attend to the democratic needs of the Syrian people.³⁵

B. The Civil War in Syria

Initially, the international community considered Syria's violent reaction to the protestors as constituting human rights violations and repression.³⁶ However it is now clear that the situation is, at the very least, a non-international armed conflict, as officially classified by the International Committee of the Red Cross (ICRC) in July 2012, marking the start of the civil war in Syria.³⁷

The Syrian civil war has led to the effective fragmentation of Syria into three identifiable enclaves. Of these,

Id.

³¹ Bellal & Beck, *supra* note 4, at 7.

³² Jonathan Spyer, *Fragmented Syria: The Balance of Forces as of Late 2013*, 17 MIDDLE E. REV. OF INT'L AFF. 9 (2013).

³³ See *Syria's Barrel Bombs: An Eyewitness Account*, AL-MONITOR (June 19, 2014), <http://www.al-monitor.com/pulse/originals/2014/06/syria-aleppo-barrel-bomb-eyewitness-account.html> (stating that for the past six months the explosive barrel campaign against Aleppo has been going on killing dozens of people. According to the statistics from the Aleppo Martyrs site document, "the deaths of 1,606 people, among them 411 children, who died since the beginning of the campaign. Only 23 of them were opposition fighters").

³⁴ Marauhn, *supra* note 3, at 411.

³⁵ See Relations, *supra* note 23.

³⁶ Tom Ruys, *The Syrian Civil War and the Achilles' Heel of the Law of Non-International Armed Conflict*, 50 STAN. J. INT'L L. 253 (2014).

³⁷ *Id.* See also *Why and How IHL Applies in Syria*, ICRC INTERCROSS BLOG (July 27, 2012), <http://intercrossblog.icrc.org/blog/why-and-how-ihl-applies-syria>; *IHL and Humanitarian Principles Are Non-Negotiable-Syria Is No Exception*, ICRC (Feb. 15, 2014), <https://www.icrc.org/eng/resources/documents/article/editorial/2014-02-15-syria-maurer-humanitarian-principles.htm>.

two--the regime area and the Kurdish area--are tightly ruled by a central authority. The third, the rebel-held zone, has no central authority but is a kind of conglomerate of various Sunni Islamist forces ruling over different areas. None of these enclaves are strong enough to over-run any of the others. None of them are sufficiently weak as to be in danger of overthrow by any of the others.³⁸

As of August 2014, the Islamic State in Iraq and al-Sham (ISIS)³⁹, Free Syrian Army (FSA), Al Nusra, the Kurdish People's Protection Units (YPG), and a few other armed groups shared control of the rebel held zone.⁴⁰ However, irrespective of their territorial control, it is believed that there are more than 1,500 organized opposition groups with widely differing political affiliations in Syria.⁴¹

Unfortunately, the conflict and violence is still widespread and continues across the entire country.⁴² Civilians are stuck in the fire of a fight between the regime and various armed factions and groups.⁴³ The humanitarian situation has turned out to be a disaster, and it continues to worsen.⁴⁴ The death rate continues to rise every day.⁴⁵ Torture is widespread, and people are also

dying from hunger and infectious diseases.⁴⁶ In addition to losing control of the territory, Assad's regime is not providing basic governance required to maintain the health and welfare of the public.⁴⁷ Because the situation of this situation it appears that Syria, destroyed by civil war, reflects the main characteristics of a weak or a failed state.

C. Syria: A Failed State and the Impact of Spillover From the Syrian Civil War on Turkey

A failed state, as is the case with Syria, creates the perfect operational environment for terrorist organizations to coalesce.⁴⁸ In addition to the implications of becoming a safe haven for terrorist organizations, Turkey is effectively unable to negotiate with a legitimate authority in power in Syria in order to ensure its national security or to handle the humanitarian crisis that has culminated at its border, since there is no legitimate authority in power in Syria.

Turkey shares its longest international border with Syria.⁴⁹ Accordingly, Turkey is greatly affected from the spillover of the Syrian civil war.⁵⁰ There have been numerous incidents of violence from the parties to the non-international armed conflict in Syria that have resulted directly and indirectly in the deaths of Turkish civilians and military personnel.⁵¹ These incidents include the shooting down of a Turkish military aircraft by Syria's regime,⁵² bomb explosions in the cities Reyhanli and Akcakale, and cross border artillery and rocket fire.⁵³ Furthermore, the humanitarian crisis along the border caused by the influx of Syrian refugees fleeing

³⁸ Spyer, *supra* note 32, at 16.

³⁹ Also known as the Islamic State of Iraq and the Levant (ISIL), the Islamic State (IS) or DAESH which is the Arabic acronym.

⁴⁰ *Syria Civil War Map: August 2014 (#13)*, POLITICAL GEOGRAPHY NOW (Aug. 18, 2014), <http://www.polgeonow.com/2014/08/syria-civil-war-map-august-2014-13.html>.

⁴¹ CHRISTOPHER M. BLANCHARD, CARLA E. HUMUD & MARY BETH D. NIKITIN, CONG. RESEARCH SERV. RL33487, ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE (2014), available at <http://fas.org/sgp/crs/mideast/RL33487.pdf> (last visited Mar. 6, 2015).

⁴² See Security Council Report, *supra* note 7 (explaining that conflict and high levels of violence continued throughout the Syrian Arab Republic, including the use of explosive weapons in populated areas, indiscriminate aerial bombings by government forces and indiscriminate shelling and attacks by armed opposition).

⁴³ *Id.*

⁴⁴ Muriel Asseburg, German Inst. for Int'l & Sec. Affairs, *Syria's Civil War: Geopolitical Implications and Scenarios* (2013), IEMED MEDITERRANEAN Y.B. 18 (2013), available at <http://www.swp-berlin.org/fileadmin/contents/products/fachpublikationen/AsseburgSyriaMediterraneanYearbook2013.pdf>.

⁴⁵ Ban Ki-moon, *Crisis in Syria: Civil War, Global Threat*, HUFFINGTON POST (Aug. 25, 2014, 5:59 AM), http://www.huffingtonpost.com/ban-kimoon/crisis-in-syria-civil-war_b_5529973.html.

⁴⁶ *Id.*

⁴⁷ Security Council Report, *supra* note 7.

⁴⁸ Edward Newman, *Failed States and International Order: Constructing a Post-Westphalian World*, 30 CONTEMP. SECURITY POL'Y 431 (2009).

⁴⁹ Turkey, NATIONS ENCYCLOPEDIA, <http://www.nationsencyclopedia.com/geography/Slovenia-to-Zimbabwe-Cumulative-Index/Turkey.html> (last visited Mar. 15, 2015).

⁵⁰ See WILLIAM YOUNG ET AL., SPILLOVER FROM THE CONFLICT IN SYRIA: AN ASSESSMENT OF THE FACTORS THAT AID AND IMPEDE THE SPREAD OF VIOLENCE 15-23 (RAND 2014), available at http://www.rand.org/content/dam/rand/pubs/research_reports/RR600/RR609/RAND_RR609.pdf (explaining details about Spillover of the Syrian Conflict into Turkey).

⁵¹ *Id.*

⁵² Syria 'Shoots Down Turkish Fighter Jet', TELEGRAPH.CO.UK (June 22, 2012, 4:16 PM), <http://www.telegraph.co.uk/news/worldnews/middle-east/syria/9349777/Syria-shoots-down-Turkish-fighter-jet.html>.

⁵³ See YOUNG ET AL., *supra* note 50, at 15-23.

from the violence is further complicating Turkey's ability to ensure its national security.⁵⁴

The current situation in Syria carries enormous risk for the security of Turkey. The violence of the civil war and the humanitarian crisis have destabilized the region, creating vast ungoverned regions which give rise to terrorist groups who act without respect for international law or the fear of reprisal.⁵⁵

D. Turkey's Response to the Civil War in Syria

During the Syrian crisis, Turkey has followed an active humanitarian policy and applied an open-door policy, taking the leading role in assisting and hosting Syrian refugees.⁵⁶ In April 2011, the first Syrian refugees entered into Turkey, while the Turkish Government was trying to convince the Syrian Government to take humanitarian precautions against protestors.⁵⁷ However, it did not work, and the relations between the two countries deteriorated.⁵⁸ Eventually, the high tension between the countries led to incidents, although short in duration, of armed conflict, forcing Turkey to defend itself.

As mentioned previously, on June 22, 2012, an unarmed RF-4 Turkish aircraft, while on a test and training mission in international airspace 13 miles off the coast of Latakia, was shot down by Syria.⁵⁹ Immediately after, the Ministry of Foreign Affairs declared that:

The shooting of the aircraft without any warning is by no means acceptable and that the responsibility of this attack falls completely on the Syrian side. This aggressive act, which runs against all the principles of good faith and good neighborliness, is a flagrant and grave violation of international law and that the Government of Turkey reserves all

⁵⁴ KEMAL KIRIŞCI, SYRIAN REFUGEES AND TURKEY'S CHALLENGES: GOING BEYOND HOSPITALITY 30 - 36 (Brookings Inst. 2014), available at <http://www.brookings.edu/~media/research/files/reports/2014/05/12%20turkey%20syrian%20refugees%20kirisci/syrian%20refugees%20and%20turkeys%20challenges%20may%2014%202014.pdf>.

⁵⁵ Security Council Report, *supra* note 7.

⁵⁶ Ethan Corbin, *International Response to the Syrian Refugee Crisis, in THE SYRIAN REFUGEE CRISIS AND LESSONS LEARNED FROM THE IRAQI EXPERIENCE* 13 (2013), available at <http://www.bu.edu/iis/files/2013/05/Syrian-Refugee-Report-v-5.1.pdf>.

⁵⁷ See Relations, *supra* note 23.

⁵⁸ Marauhn, *supra* note 3, at 411. See also Relations, *supra* note 23.

⁵⁹ Syria 'Shoots Down Turkish Fighter Jet', *supra* note 52.

its rights emanating from international law to take counter measures and steps with regard to its pilots and aircraft that are still missing in action, at a time and basis of its own choosing.⁶⁰

The event triggered a change in Turkey's rules of engagement.⁶¹ Turkey declared publically that it would consider every military element approaching its border from Syria as a security threat and would therefore treat such elements as military targets.⁶²

On February 11, 2013, in the southern province of Hatay at the Cilvegözü border gate, a car bomb terror attack killed 14 people.⁶³ No one claimed responsibility for the attack; however, the Interior Minister of Turkey stated that they had solid information about the link with Syria.⁶⁴ Again on May 11, 2013, two car bombs exploded in the town of Reyhanlı, in Turkey.⁶⁵ At least 50 people were killed and many others were injured.⁶⁶ It was the worst terrorist attack Turkey had ever seen.⁶⁷ Turkish officials stated that the Reyhanlı attack was carried out with support from the Syrian regime.⁶⁸

On September 16, 2013, Turkish warplanes shot down a Syrian Mi-17 helicopter crossing into Turkish airspace in accordance with the new scope of the rules of

⁶⁰ See Press Release, Republic of Turkey, Ministry of Foreign Affairs, Regarding the Steps Taken by the Ministry of Foreign Affairs of the Republic of Turkey in Respect of the Shooting Down of a Turkish Military Aircraft Off the Coast of Syria (June 24, 2012), available at http://www.mfa.gov.tr/no_-173_-24-june-2012_-press-release-regarding-the-steps-taken-by-the-ministry-of-foreign-affairs-of-the-republic-of-turkey-in-respect-of-the-shooting-down-of-a-turkish-military-aircraft-off-the-coast-of-syria.en.mfa.

⁶¹ See *Turkey PM Erdogan Issues Syria Border Warning*, BBC (June 26, 2012), available at <http://www.bbc.com/news/world-middle-east-18584872>.

⁶² *Id.*

⁶³ See *Turkey Blames Syria for Border Gate Attack*, HURRIYET DAILY NEWS (Mar. 11, 2013), available at <http://www.hurriyetdailynews.com/turkey-blames-syria-for-border-gate-attack.aspx?pageID=238&nid=42749>.

⁶⁴ *Id.*

⁶⁵ See *Syria Absolutely Behind Reyhanli Attack, Says Turkish Ministry*, HURRIYET DAILY NEWS (Apr. 7, 2014), available at <http://www.hurriyetdailynews.com/syria-absolutely-behind-reyhanli-attack-says-turkish-ministry.aspx?pageID=238&nid=64634&NewsCatID=509>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

engagement.⁶⁹ Again on March 23, 2014, Turkish fighter jets shot down one of the two Syrian warplanes, one of which did not stop flying into Turkey's airspace for a distance of 1.5km despite several warnings.⁷⁰

E. Threat of Terrorism and the Tomb of Suleyman Shah

The failed or weakened Syria has created a lack of authority and massive advantage for the terrorist organizations to foster and move freely.⁷¹

The supposed relationship between weak or failed states and terrorism rests upon a number of assumptions: Terrorist groups will make a decision about operating in an environment of weak or failed states; in a vacuum of public authority – with no functioning or effective institutions of police enforcement or justice – terrorist groups can actively recruit, train and plan attacks which target either local or foreign interests; and terrorist groups can operate in such states – free from detection, interference, or interdiction – more effectively than in functioning states.⁷²

The rise of ISIS is the latest and the most important example of how terrorist organizations can take the advantage of a vacuum of power within a state.⁷³ The latest news from the region paints the reality of how ISIS actively recruits, trains, plans, and executes attacks with near impunity from the ungoverned spaces of Syria.⁷⁴

Flourishing terrorism in Syria carries numerous risks and threats for any state in the world for a number of

reasons.⁷⁵ However, Turkey's situation is unique due to geopolitical reasons and is arguably more at risk than the rest of the international community; this is due partly to its proximity as a neighbor state. But unlike any other neighbor, Turkey must also protect its national treasure, the Tomb of Suleyman Shah, an exclave inside the territory of Syria. This clearly presents a unique and complex problem faced by no other country.

The Tomb, although recently moved because of Turkish intervention, is closer to the Turkish border, but still physically located inside Syrian territory.⁷⁶ Despite the fact that the new location of the Tomb may provide a more secure place, due to the symbolic objective of terrorism and the nature of the Tomb, it remains a ripe target for any terrorist organization operating in Syria, especially ISIS.⁷⁷

F. Turkish Parliamentary Resolution as a (Domestic or Constitutional) Legal Basis for Deploying Armed Forces Abroad

The legal grounds for a potential use of force are provided in Turkey's latest Resolution approved by the Turkish National Assembly on October 2, 2014.⁷⁸ Deploying the Turkish Armed Forces abroad as well as accepting foreign armed forces in Turkey requires the Turkish National Assembly's approval according to the Article 92 of the Turkish Constitution.⁷⁹ In accordance with Article 92, the Turkish Parliament approved a highly important resolution, which gives the authority to the government to deploy Turkish armed forces to eliminate the threats emanating from Syria and Iraq.⁸⁰

As stated in the previous parts of the article, the spillover effect of the Syrian civil war has resulted in

⁶⁹ See *Turkish Warplanes Shoot Down Syrian Helicopter*, REUTERS (Sep. 16, 2013), available at <http://www.reuters.com/article/2013/09/16/us-syria-crisis-turkey-idUSBRE98F0K920130916>.

⁷⁰ See *Turkey Downs Syria Military Jet In Airspace Violation*, BBC (Mar. 23, 2014), available at <http://www.bbc.com/news/world-middle-east-26706417>.

⁷¹ Spyer, *supra* note 32, at 9.

⁷² Newman, *supra* note 48, at 431.

⁷³ Ruys, *supra* note 36, at 253.

⁷⁴ See S.C. Res. 2178, U.N. SCOR, S/RES/2178 (Sept. 24, 2014), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20%282014%29 (giving facts about the threat posed by ISIS and other international terrorist organizations).

⁷⁵ *Id.* (Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security).

⁷⁶ Press Release Regarding the Relocation, *supra* note 10.

⁷⁷ Can Kasapoglu & F. Doruk Engin, *Defending the Tomb of Suleyman Shah: Turkey's Options and Challenges*, 8 EDAM Discussion Article Series 3 (2014).

⁷⁸ Resolution, *supra* note 22.

⁷⁹ See TURKISH CONST. art. 92. The power to authorize the declaration of a state of war in cases deemed legitimate by international law and except where required by international treaties to which Turkey is a party or by the rules of international courtesy to send the Turkish Armed Forces to foreign countries and to allow foreign armed forces to be stationed in Turkey, is vested in the Grand National Assembly of Turkey.

⁸⁰ See Resolution, *supra* note 22.

deaths of Turkish citizens and caused serious security problems. The threats emanating from Syria may be divided into two classes. The first threat is derived from the acts of the Syrian regime against Turkey.⁸¹ The second is derived from the terrorist organizations that have flourished in the ungoverned spaces within Syria.⁸² Obviously, geopolitical issues make Turkey highly susceptible to those threats.⁸³

The language of the resolution explicitly states that Turkey may use force to eliminate any kind of threat emanating from Syria. This right to use force in self-defense extends to either acts from the Syrian regime, or acts from the terrorist organizations that endanger Turkish national security. The importance of the resolution for purposes of this article is that it explicitly addresses and emphasizes Turkey's domestic authority and sovereign right over the Tomb. It further highlights Turkey's right and willingness under domestic law to protect the Tomb, as it did on February 21, 2015, when its military crossed into Syria and evacuated the Tomb's guards and relocated the Tomb. This leads into the next part of this article, which is a discussion about Turkey's rights under international law to respond with military force in order to protect the Tomb.

III. Turkey's Right to Anticipatory Self-Defense under International Law

As stated above, Turkey satisfied its legal burden under domestic law to responding in self-defense. However, Turkey must also satisfy certain requirements under international law before it can respond anticipatorily to a threat from non-state actors located outside its own territory.⁸⁴ In other words, it is a challenge for a nation state such as Turkey to determine under international law when the right to use force against "non-State entities, such as terrorists [that] carry out attacks on [it], but operate from or take sanctuary in another State ('the sanctuary State')."⁸⁵

⁸¹ See *Syrian Regime Biggest Threat to Turkey's Stability*, WORLD BULLETIN (Sept. 20, 2014), <http://www.worldbulletin.net/news/144783/syrian-regime-biggest-threat-to-turkeys-stability>.

⁸² See generally S.C. Res. 2178, *supra* note 74.

⁸³ See generally YOUNG ET AL., *supra* note 50.

⁸⁴ Brent Michael, *Responding to Attacks By Non-State Actors: The Attribution Requirement of Self-Defence*, 16 AUSTRALIAN INT'L L. J. 133 (2009).

⁸⁵ *Id.*

As mentioned previously, the threat from non-state actors operating in Syria was especially acute with regard to the Tomb prior to its most recent relocation.⁸⁶ Despite the difficulties typically associated with identifying when a nation-state has the right to use anticipatory self-defense, Turkey clearly had the right to use force against the imminent attacks of ISIS inside the territory of Syria in order to protect the Tomb.⁸⁷ In this respect, and contrary to the Syrian government's view, which called the operation Sah Firat an act of flagrant aggression,⁸⁸ Turkey's right to utilize anticipatory self-defense was lawful, pursuant to both the UN Charter and customary international law.

A. UN Charter System in General and Turkey's Right to Use Military Force

Two fundamental principles under the UN Charter appear to "collide" with Turkey's right to use force against the non-state threat from within Syria, they are: "territorial sovereignty and the prohibition on the use of force prescribed in article 2(4) of the UN Charter."⁸⁹ Specifically, Article 2(4) of the UN Charter prohibits the use of force by stating that "all member states shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations."⁹⁰ However, there are two recognized exceptions.⁹¹ One exception is provided pursuant to Article 51 of the UN Charter.⁹² The other exception to these fundamental principles that bar use of military force

⁸⁶ See Kasapoglu & Engin, *supra* note 77, at 1 (explaining that the Tomb is considered one of the most sensitive places to the threat of terror); see *The ISIS Threat to Turkey*, FOREIGN MILITARY STUDIES OFFICE, http://fmso.leavenworth.army.mil/OEWatch/201405/Turkey_03.html (last visited Mar. 10, 2015) (reporting that on a Youtube video, the ISIS declaring that Turkish soldiers leave the Tomb in three days, otherwise, the Tomb will be destroyed).

⁸⁷ See *300 days at the Tomb of Suleiman Shah*, AL-MONITOR, (Mar. 6, 2015), <http://www.al-monitor.com/pulse/originals/2015/03/turkey-syria-suleiman-shah.html> (explaining that the coalition air attacks had impeded ISIS but could not eliminate its threat and stating how ISIS threat and harassment increased at the Tomb). See also Turkish Prime Minister's Statement, *supra* note 20 (stating that "Sah Firat was conducted due to the rising security concerns over escalating clashes between groups that are fighting inside the country, mainly threats from the Islamic State of Iraq and the Levant").

⁸⁸ See Syrian Objection, *supra* note 19.

⁸⁹ Michael, *supra* note 84, at 133.

⁹⁰ UN Charter art. 2, para. 4.

⁹¹ Natalia Ochoa-Ruiz & Esther Salamanca-Aguado, *Exploring the Limits of International Law Relating to the Use of Force in Self-Defence*, 16 THE EUR. J. OF INT'L L. 499, 500 (2005).

⁹² *Id.*

is Turkey's right to self-defense under international law.⁹³ This article will explore the scope of these exceptions as it applies to Turkey's case below.

B. Debates over the Scope of a Nation State's Right to Self-Defense

It is generally accepted that "while Article 2(4) outlaws the use of force, Article 51⁹⁴ preserves the inherent right of individual or collective self-defence"⁹⁵ However, scholars and the international legal community debate the breadth and scope of Article 2(4).⁹⁶ There are mainly two groups of international law experts who have opposing views regarding the scope of self-defense.⁹⁷ One view is narrowly tailored and posits that "the meaning of Article 51 is clear; the right of self-defense arises only if an armed attack occurs."⁹⁸ On the opposing side, the broader view is twofold and posits that the customary international right to self-defense survives concurrently with Article 51 and that customary international law recognizes the right to anticipatory self-defense.⁹⁹

The language of Article 2(4) "may appear straightforward at first glance, but nearly every term of

significance" is part of this debate.¹⁰⁰ In addition to this, undefined key concepts such as "armed attack" and "inherent right" have created some ambiguity.¹⁰¹ This ambiguity, over the years, is the crux of the argument regarding the scope of the right to self-defense.¹⁰² Therefore, it is important to further analyze the development of the right to anticipatory self-defense under customary international law to better understand the significance of this debate and how it applies to Turkey's situation.

C. Anticipatory Self-Defense and Customary International Law

Turkey, like all nation states, has the inherent (i.e., customary) right to act in self-defense, including the right to anticipatory self-defense.¹⁰³ Prior to Article 51, anticipatory self-defense historically existed in customary international law.¹⁰⁴ Most notably, the concept emerged as customary after a series of incursions in 1837, now referred to as the Caroline case.¹⁰⁵

According to the principles established by the Caroline case, a state invoking self-defense must:

"[S]how a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that...[it] did nothing

⁹³ *Id.*

⁹⁴ Article 51 reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

UN Charter art. 51.

⁹⁵ Kalliopi Chainoglou, *Reconceptualising Self-Defence in International Law*, 18 KING'S L. J. 63 (2007).

⁹⁶ See YORAM DINSTEIN, *WAR AGGRESSION AND SELF-DEFENCE* 87-94 (2011).

⁹⁷ CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 98 (2004).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Benjamin Zweifach, *Plugging the Gap: A Reconsideration of the U.N. Charter's Approach to Low-Gravity Warfare*, 8 INTERCULTURAL HUM. RTS. L. REV. 385-86 (2012).

¹⁰¹ Eric A. Heinze, *Nonstate Actors in the International Legal Order: The Israeli-Hezbollah Conflict and the Law of Self-Defense*, 15 GLOBAL GOVERNANCE 87 (2008).

¹⁰² Gray, *supra* note 97, at 98.

¹⁰³ Leo Van Den Hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 105 (2003).

¹⁰⁴ MURRAY COLLIN ALDER, *THE INHERENT RIGHT OF SELF-DEFENCE IN INTERNATIONAL LAW* 68 (2012).

¹⁰⁵ *British-American Diplomacy The Caroline Case*, THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Mar. 10, 2015). This famous incident took place

At midnight about 70 or 80 armed linen boarded the steamer and attacked the persons on board with muskets, swords, and cutlasses. The 'passengers and crew' of whom there were in all 33, merely endeavored to escape. After this attack the assailing force set the steamer on fire, cut her loose, and set her adrift over the Niagara Falls. Only 21 of the persons on board had since been found, and one of these, Amos Durfee, was killed on the dock by a musket ball. Several others were wounded.

unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it.”¹⁰⁶

From the Caroline case, four cumulative conditions which govern the existence of the right of a State to use force in the territory of another State in self-defense developed, which are:

“(1) The existence of a grave and pressing danger against the security of a State or its citizens necessitating such action; (2) The absence of means of protection other than the measures taken or to be taken; (3) the illegal nature of this danger; and (4) Proportionality.”¹⁰⁷

It is rather clear that Turkey faces a “grave and pressing danger” from a threat that operates without respect for international laws and customs. It is also clear that these non-state actors who present this “grave and pressing danger” do not respond to anything short of military force. However, the most significant thing about this case is not the conditions-based elements needed to trigger Turkey’s inherent right to self-defense under customary international law. What is most significant, with respect to Turkey’s current situation, is that the Caroline case represents the principle that a state may exercise its inherent right to self-defense against non-state actors, even if it requires breaching another state’s sovereignty.¹⁰⁸

D. Reconciling the UN Charter and Customary International Law Regarding Turkey’s Right of Anticipatory Self-Defense

As mentioned above, the international community debates the breadth and scope of this right as it exists under Article 51 of the UN Charter. However, it is this article’s position that the UN Charter does not displace or

limit Turkey’s right of self-defense that exists in customary international law. This right includes the right to use force in anticipation of an imminent armed attack.¹⁰⁹ Furthermore, it is the position of this article that taking a narrow view of the right of anticipatory self-defense is dangerous because of the threats posed today by regional instability and terrorist organizations. More importantly, the narrow view inaccurately portrays the context of and role that customary international law played during the drafting of Article 51 of the UN Charter.¹¹⁰

In support of this article’s position, it is necessary to clarify the intentions of the drafters of Article 51 with respect to the concept of anticipatory self-defense. This requires understanding the influence the customs of the time had on the drafting of the UN Charter.¹¹¹ When Article 51 was drafted, customary international law was an important field of law, used to inform the drafters and to interpret codified international law.¹¹² In fact, most eminent scholars agree that the customary rule has survived and continues to be supported through history by state practice and legal opinions from tribunals responsible for interpreting international law.¹¹³

For instance, the International Court of Justice, in its decision on the case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),¹¹⁴ confirmed that the right to self-defense in response to an imminent threat of an armed attack is available.¹¹⁵ In addition to the Caroline case,

¹⁰⁶ Francis Grimal & Graham Melling, *British Action in Libya in 2011: The Lawful Protection of National Abroad?*, 23 DENNING L. J. 171 (2011). See Letter from Daniel Webster, to Henry S Fox (Apr. 24, 1841), 29 BRITISH & FOREIGN STATE ARTICLES (1841–42), at 1129–39 (1857). For more detailed discussion, see J A Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense* 14 CARDOZO J. INT’L & COMP. L. 429 (2006).

¹⁰⁷ Bin Cheng, *Pre-emptive or Similar Type of Self-defense in the Territory of Foreign States*, 12 CHINESE J. OF INT’L L. 4-5 (2013).

¹⁰⁸ Brian Finucane, *Fictitious States, Effective Control, and the Use of Force Against Non-State Actors*, 30:1 BERKELEY J. INT’L L. 66, 83 (2012).

¹⁰⁹ Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack By Nonstate Actors*, 106 AM. J. OF INT’L L. 769, 771 (2012).

¹¹⁰ James Mulcahy & Charles O Mahony, *Anticipatory Self Defense: A Discussion of International Law*, 2 HANSE L. REV. 233-35 (2006).

¹¹¹ KINGA TIBORI SZABÓ, *ANTICIPATORY ACTION IN SELF-DEFENCE ESSENCE AND LIMITS UNDER INTERNATIONAL LAW* 282 (2011).

¹¹² Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 A.F. L. REV 89 (2004).

¹¹³ Mulcahy & Mahony, *supra* note 110, at 243.

¹¹⁴ See *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.), Judgment, (June 27, 1986), available at <http://www.icj-cij.org/docket/files/70/6503.pdf> (explaining that Nicaragua requested the Court to adjudge and declare on the basis that the United States was responsible for illegal military and paramilitary activities in and against Nicaragua, and “training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua,” the United States breached its obligation under customary international law not to intervene in the affairs of another State).

¹¹⁵ AWOL K. ALLO, *ETHIOPIA’S ARMED INTERVENTION IN SOMALIA* 146 (2010). See *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.), Judgment, (June 27, 1986).

there are examples of state practice where nations exercised their customary right of self-defense prior to the enactment of the UN Charter.¹¹⁶ Some of these examples include China's use of defensive military force to assert its economic rights against imminent threat of The Union of Soviet Socialist Republics in 1929; Albania's use of defensive force against Italy's preparation of using armed force to make Albania protectorate in 1939; and Czechoslovakia's use of force against Hungary due to the border dispute in 1939.¹¹⁷

E. Principles that Turkey Must Apply in Exercising its Right to Self-Defense

In a case where a victim nation state, such as Turkey, plans to exercise its right to self-defense under customary international law, three principles must be met. The victim nation state must establish that self-defense is necessary; that its reaction in self-defense is proportional; and that the need to act in self-defense is immediate.¹¹⁸ These principles are also the preconditions for anticipatory self-defense.¹¹⁹

Although necessity and proportionality are not openly expressed in the UN Charter, there is a general acceptance in academics that they are essential characteristics of self-defense.¹²⁰ In addition to this, a consensus exists as to the requirements of necessity and proportionality as elements to a response,¹²¹ and in parallel that "justifications for anticipatory self-defense must still comply with necessity and proportionality requirements."¹²² Necessity and proportionality are discussed below in detail concerning Turkey's right to exercise anticipatory self-defense against the threat from ISIS within Syria.

1. Necessity

¹¹⁶ ALDER, *supra* note 104, at 65-66.

¹¹⁷ *Id.* See also Finucane, *supra* note 108, at 35 (giving examples for the state practice of exercising the inherent right of self-defense such as the US intervention in Spanish Florida, British intervention in New York State, and Russian intervention prior to the enactment of the UN Charter).

¹¹⁸ ALDER, *supra* note 104, at 93.

¹¹⁹ Hole, *supra* note 103, at 105.

¹²⁰ GRAY, *supra* note 97, at 121.

¹²¹ Kastenber, *supra* note 112, at 110.

¹²² *Id.* at 111.

So, how can Turkey determine if it is necessary to act in self-defense? In other words, how can Turkey determine "what is instant and overwhelming" if there is "no empirical formula that helps make an objective determination of what fits into this parameter" to determine imminence?¹²³ Clearly, a State considering use of self-defense must meet the burden of the objective and reasonable observer standard.¹²⁴ Thus, in order to resort to force, it must be objectively clear that a danger of an imminent attack exists.¹²⁵ Unfortunately, there is no formula for measuring the signs of the imminent nature of the threat.¹²⁶ Furthermore, the responsibility rests with the State taking action in self-defense to apply this standard and establish the legality of their action.¹²⁷

Although an empirical formula does not exist, a state in Turkey's situation can look to a number of factors that support the principal of necessity for acting in self-defense. First, relevant to the scope of a state's right of self-defense is the very threat of an imminent or actual armed attack by a non-state actor.¹²⁸ Related to this factor in making a necessity determination is consideration of the host state's ability and willingness to take an action against non-state actors exhibiting threats from within its territory.¹²⁹ Of course, as in Syria's case, a host state's ability to put an end to any threat emanating from non-state actors relies on its ability to effectively control its own territory.¹³⁰

¹²³ Allo, *supra* note 115, at 157.

¹²⁴ Christoph Muller, *The Right of Self-Defense in the Global Fight Against Terrorism*, 81 U.S. NAVAL WAR C. INT'L L. STUD. 355 (2006).

¹²⁵ Hole, *supra* note 103, at 99.

¹²⁶ Allo, *supra* note 115, at 157.

¹²⁷ David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24 E.J.I.L. 271 (2013).

¹²⁸ Bethlehem, *supra* note 109, at 775.

¹²⁹ Finucane, *supra* note 108, at 86.

¹³⁰ *Id.* See *supra* note 84, at 153.

In October 2008, similar defensive attacks were carried out by US forces in Syria against terrorist groups acting against US forces in Iraq. Four helicopters carrying US troops flew four miles into Syrian territory and killed a leader of a network that channels foreign fighters from Syria into Iraq. The leader, Abu Ghadiya, was the founder of the al-Qaeda insurgent group in Iraq, and Abu Musab al-Zarqawi had named him the organization's commander for Syrian logistics. The raid was justified on similar grounds to 'unwillingness or inability': if the host country fails to deal with the irregular groups, then action is justified in self-defense. In discussing the legal basis of cross-border operations. Administration officials pointed to a speech given by President

On the other hand, if a host nation is able and willing to take action against a terrorist threat from within its territory, then the ability a victim nation to establish the necessity to respond with force would be diminished in scope and geographically limited.¹³¹ “Necessity establishes not only when a defending state may resort to force against a non-state actor, but also where the defending state may act.”¹³² There are various arguments related to geographic scope of the use of force, however the persuasive one is that the defending state may use force in the territory of a host state from where a non-state actor poses a threat, however force must be limited to the customary norms of necessity and proportionality.¹³³ For instance, killing of Al Qa’ida fighters inside the territory of host states such as Pakistan, Yemen, Somalia, would be lawful because the authorities have failed to catch them.¹³⁴ However, killing Al Qa’ida fighters in the United Kingdom by the United States using targeted killing tools would be unlawful, since the United Kingdom is willing and capable of taking effective measures against them.¹³⁵

Ethiopia’s military intervention in Somalia on December 24, 2006 is an example of a state resorting to use of force in self-defense against non-state actors in another state.¹³⁶ For the case of Ethiopia’s military intervention in Somalia, Ethiopia claimed that the combination of enemy troops, foreign fighters, unrest at the border, and declarations of a jihad made it necessary to use of force and presented a “clear and present danger” against its territorial integrity and political independence.¹³⁷

Bush to the UN General Assembly a month prior to the Syria raid, in which the President stated, ‘[Sovereign States] have an obligation to prevent [their] territory from being used as a sanctuary for terrorism.’

Id.

¹³¹ Finucane, *supra* note 108, at 87.

¹³² *Id.* at 88.

¹³³ Heinze, *supra* note 101, at 94-95.

¹³⁴ Finucane, *supra* note 108, at 88.

¹³⁵ *Id.* at 88-89.

¹³⁶ Mark Kielsgard, *National Self-Defense in the Age of Terrorism: Immediacy and State Attribution*, in ANICETO MASFERRER (ED), POST 9/11 AND THE STATE OF PERMANENT LEGAL EMERGENCY: SECURITY AND HUMAN RIGHTS IN COUNTERING TERRORISM 326, 327 (Springer Press, 2012).

¹³⁷ Allo, *supra* note 115, at 139, 157 (explaining that leading up to Ethiopia’s decision to intervene, destabilization due to the build up of various armed groups such as Union of Islamic Courts (UIC) and foreign terrorist groups threatened the security of Ethiopia, to include the

As with the Caroline case and Ethiopia’s situation with Somalia, Turkey faces a situation of “necessity that provokes self-defense” and is of a nature that is “instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”¹³⁸ As many of the actions from these non-state actors have proven, Turkey is unable to settle this matter through diplomacy or through the “exhaustion of peaceful means,” normally a requirement before acting in self-defense.¹³⁹ In other words, “self-defense is permissible. . .when peaceful means of redress have reasonably been exhausted, or when diplomatic enterprises would clearly be futile.”¹⁴⁰

Furthermore, the principle of necessity in this case, until recently, was not just limited to Turkey’s sovereign borders. Considering the situation in Syria,¹⁴¹ ISIS as a

presence of Eritrean troops. Ethiopia’s parliament passed a resolution authorizing use of force in self-defense.

According to the resolution passed by the Ethiopian Parliament, a combination of four major factors triggered Ethiopia’s right to lawful self-defense: a) The presence of Eritrean troops in Somalia with the sole purpose of destabilizing the peace and stability of the Ethiopian State; b) the repeated declaration by UIC of a holy war—*jihad*—against Ethiopia and the flow of arms and financial support to the group from several Middle Eastern countries; c) the operation of armed Ethiopian opposition groups from within the areas under the control of the UIC with the view to overthrowing the legally constituted government of Ethiopia; and d) the presence of foreign militant fighters alongside the UIC which constituted a situation of “clear and present danger” against the territorial integrity and political independence of the Ethiopian State).

¹³⁸ Allo, *supra* note 115, at 157. See CHARLES CHENEY HYDE, INTERNATIONAL LAW 239 (1945), reprinted in MARY ELLENO’CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS 122 (2005); Gabcikovo-Nagymaros Project, (Hung./Slovk.), Judgment, 1997 I.C.J. 7, at 40–41, 51–52 (Sept. 25); Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. 432 (Dec. 4).

¹³⁹ ANDREAS LAURSEN, CHANGING INTERNATIONAL LAW TO MEET NEW CHALLENGES: INTERPRETATION, MODIFICATION AND THE USE OF FORCE 152 (2006).

¹⁴⁰ TOM RUYS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 95 (2010).

¹⁴¹ Chainoglou, *supra* note 95, at 63.

Within this context and given the increasing link between international terrorism, illegal arms trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, if a state is unable or unwilling to comply with its international obligations under any of the mandatory provisions of Resolutions 1373 or 1540, it may endanger by its own (in)actions its sovereign status.

non-state actor posed a threat against the Tomb. The Islamic State in Iraq and al-Sham cannot be negotiated with, and it is apparent that the Syrian government could not take effective measures in its territory to abate terrorism and protect the regions surrounding the Tomb. Therefore, due to the threat posed to the Tomb, Turkey's actions clearly meet the objective observer standard for establishing the necessity to act in self-defense within Syria to protect the Tomb.

2. Proportionality

It is important to understand that Turkey's burden to legally execute its right to anticipatory self-defense requires more than establishing that action is necessary. Turkey is also obligated to act proportionately when acting in self-defense against any threat it faces, whether it be from another nation state or a non-state actor.¹⁴² Deriving from historical Caroline case and inextricably tied to the principle of necessity,¹⁴³ proportionality is an international requirement of an act of self-defense.¹⁴⁴ However, all though it is inextricably tied to necessity, the proportionality requirement stands alone as a context based standard for which there is no formulaic template for the application to the situations.¹⁴⁵ Because of its abstract nature, the application of this proportionality principle is not easy.¹⁴⁶

For Turkey, some would argue that this is the more challenging of the two principles because the threat faced is asymmetric and from a non-state terrorist organization that does not follow customary international norms.¹⁴⁷ This is especially true, because as the respected expert and scholar Thomas Franck points out, the doctrine of proportionality requires a State to "calibrate its response" by using the "minimum force necessary to achieve redress," a concept more easily applied to control the military responses of two State actors that otherwise

See also E. Benvenisti, *The US and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies*, 15 E.J.I.L. 677, 692 (2000).

¹⁴² Hole, *supra* note 103, at 103; Bethlehem, *supra* note 109, at 772.

¹⁴³ Allo, *supra* note 115, at 163.

¹⁴⁴ Michael N. Schmitt, *The Legality of Operation Iraqi Freedom under International Law*, 81 U.S. NAVAL WAR C. INT'L L. STUD. 374 (2006).

¹⁴⁵ RUY, *supra* note 140, at 121.

¹⁴⁶ Allo, *supra* note 115, at 163.

¹⁴⁷ Kretzmer, *supra* note 127, at 271; JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 180 (2004).

adhere to the Law of Armed Conflict.¹⁴⁸ Although the term "minimum" is constraining in nature, its application must be "sensibl[y] balance[d] between the threat faced and the response aimed at removing that threat."¹⁴⁹ In other words, it is the very complexity of the threat and the level of risk Turkey currently faces, far graver than that any other nation state faces, which actually warrants extending Turkey the broadest application of its legal right to act in self-defense.

Turkey clearly could have responded with military force to any attack from terrorists against the Tomb. In that instance, Turkey's actions should not go beyond that which is necessary to achieve the goal of protecting its military personnel and the Tomb. But the threat Turkey faced prior to moving the Tomb, and the ongoing threat it currently faces is more complicated than simply responding after an armed attack. The risk to Turkey's national security with relation to both the Tomb and the security of its borders certainly justifies an anticipatory military response now or in the near future against the asymmetric threat from within Syria. The author of this article is confident the international community's "second opinion" on Turkey's election to respond with anticipatory self-defense will be that it was "well-founded."¹⁵⁰

E. Beyond Turkey and the ISIS Threat - Combating Global Terrorism and Application of the Broader View

It is important to acknowledge that the peaceful nations of the world currently face emerging and evolving threats from regional and global terrorist organizations. These threats exist in the physical and virtual world, and these organizations do not align themselves with geopolitical entities and laws that govern nation state behavior. What is more, "[g]lobalization and advances in technology are facilitating the capacities of terrorists to travel, move money and cause damage with modern weapons."¹⁵¹ The 9/11 attacks on the United States proved that global terrorism is at such a scale states must look to expand their rights to anticipatory self-defense or face massive destruction.¹⁵²

¹⁴⁸ Allo, *supra* note 115, at 162. See also Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 719 (2008).

¹⁴⁹ Allo, *supra* note 115, at 163. See David DeCosse, *Lost in the 'Logic of War'*, SANTA CLARA UNIV. MARKULA CENTER FOR APPLIED ETHICS (2009) (on file with author).

¹⁵⁰ *Id.*

¹⁵¹ Mulcahy & Mahony, *supra* note 110, at 237.

¹⁵² See *September 11th Fast Facts*, CNN (Sept. 8, 2014, 12:54 PM), <http://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/>

Considering the level of operational capacity of terrorist organizations, non-state actors and their acts against states, the international community at large must give serious consideration to interpreting and applying codified and customary international law in ways that allow nation states to effectively combat terrorist organizations. A narrow, state-centric approach to the law of self-defense does not meet the new challenges and threats posed by terrorist organizations, nor does it provide the required balance to satisfy security concerns as non-state actors continually come onto the stage with brutal tactics and devastating capabilities.¹⁵³

To achieve this, the application of international law may have to evolve to meet new challenges and provide a legal approach for states in terms of stopping those violent activities of terrorism. The solution is bigger than just a military solution. However, states must be permitted to utilize its military as part of the solution. Consequently, with the rise of various threats such as nuclear proliferation and global terrorism, an expansive interpretation of Article 51 must be applied, so that nation states like Turkey may act in self-defense against these organizations that do not respect international or domestic law.¹⁵⁴

IV. Conclusion

The Syrian crisis has created various threats and geopolitical implications for the globe. However, for Turkey in particular, the threat it faces from the number of non-state actors acting from within Syria is more complex than just a border security issue. Specifically, the threat against the Tomb of Suleyman Shah is unique to Turkey. Carrying part of Turkey's national heritage, the Tomb is a piece of sovereign Turkish property within Syria. Turkey's decision to defend it with military force as if it was defending something from within its own borders was legally sound. It is wholly unreasonable to expect Turkey to watch from afar as terrorist organizations within Syria get stronger and openly threaten the Tomb. Much like protecting an embassy, or a country's military or nationals abroad trigger the right of self-defense of a state, Turkey's actions are clearly legal even though it responded to non-state actors within the sovereign territory of a foreign state.¹⁵⁵ Much like the

Caroline case, Turkey did not need to wait for Syria's consent.¹⁵⁶

However, despite the position this article has taken regarding Turkey's actions to protect the Tomb along with its current posture towards the failed state of Syria, it is time for the international community to formally agree that international law must evolve to the times. Those that remain skeptical must realize that international law must adjust to current challenges, and must be interpreted and applied in order to respond the threats of global terrorism. This proposal, that international law adapt and evolve with current times, is not contrary to customary international law and UN Charter.¹⁵⁷ The very nature of custom and, at the time, formation of the UN Charter represent the fact that international law is adaptable to the times.¹⁵⁸ Is the UN Charter not a formal agreement codifying the views of the international community to address to threat to global security at that time? In fact, a close study of how the international community has responded to terrorism should serve as a harbinger that we are in midst of another evolution in international law.¹⁵⁹

Nevertheless, a conclusive remark does not prove the legality of the concept, since the matter does not seem to be resolved among scholars still polarized about the idea. It is time for the United Nations to step in and issue a binding decision specifically addressing the right of anticipatory self-defense against non-state actors.¹⁶⁰

(explaining that a total of 2,977 people were killed in the worst terrorist attack in U.S. history).

¹⁵³ Finucane, *supra* note 108, at 82-83.

¹⁵⁴ Heinze, *supra* note 101, at 87.

¹⁵⁵ Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19.2 J. OF TRANSNAT'L L. & POL'Y 238-39 (2010).

¹⁵⁶ *Id.* at 244.

¹⁵⁷ LAURSEN, *supra* note 139, at 300.

¹⁵⁸ Hole, *supra* note 103, at 75-84.

¹⁵⁹ *Id.* at 298.

¹⁶⁰ *Id.* at 238-39.