

# Turkey's Hidden Wars

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## INTRODUCTION

The attempted coup in July 2016<sup>1</sup> may have caught political commentators both within and outside of Turkey somewhat off guard, but the military coups, state violence and the bedding down of emergency legislation are, historically, rather banal features of Turkey's political-legal landscape. Although there have been significant changes to the secular complexion of state authority since the elections which brought the *Adalet ve Kalkınma Partisi* (AK Party)<sup>2</sup> to power in 2002, the draconian mechanisms used to (re)establish state security are hardly new. What is new, perhaps, is the extent to which the current Turkish government has declared war both within and beyond its borders. Within Turkey, commentators have suggested that although the slow footed (and ineptly planned) coup in 2016 may have been executed by the country's military, there had been a "slow motion coup" by the ruling AK Party and President Recep Tayyip Erdoğan eroding Turkey's democracy well before the events in July.<sup>3</sup> Whatever the merits of this argument, following the failed coup, a series of draconian measures were instituted. On the 20th of July 2016, a state of emergency was declared. A purge of state institutions and a series of show trials quickly followed, further consolidating President Recep Tayyip Erdoğan's authoritarian grip on power.<sup>4</sup> While directed mainly at those associated with the Gülen movement,<sup>5</sup> in reality, this was a war on dissent and an

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1. The military coup was an attempt to oust the president, Recep Tayyip Erdoğan, who was accused of undermining the country's secular traditions.

2. In English, the Justice and Development Party.

3. See Andrew Finkel, *Turkey was already undergoing a slow-motion coup – by Erdoğan, not the army*, THE GUARDIAN (July 16, 2016), <https://www.theguardian.com/commentisfree/2016/jul/16/turkey-coup-army-erdogan> [<https://perma.cc/8RRJ-4PD9>]. See also Tilda Grabow, *The 'Pelican Brief,' the 'Coup,' and the Matter of Parliamentary Immunity: The End of the End of Turkish Democracy*, JADALIYYA (July 25, 2016), <http://www.jadaliyya.com/pages/index/24821/the-'pelican-brief'-the-'coup'-and-the-matter-of-p> [<https://perma.cc/8J69-9J4N>].

4. Kareem Shaheen & Owen Bowcott, *Turkey MPs approve state of emergency bill allowing rule by decree*, THE GUARDIAN (July 21, 2016), <https://www.theguardian.com/world/2016/jul/21/turkey-parliament-expected-to-pass-erdogan-emergency-measures> [<https://perma.cc/WB93-XA8F>].

5. *Id.* Led by the exiled Muslim cleric Fethullah Gülen, who currently resides in Pennsylvania (USA), the movement describes itself as one that promotes interfaith education and democracy. The movement had once had very close ties to the AK Party but since 2013, when Erdoğan accused Gülen of being behind a corruption investigation into key figures in the government, the relationship has

attempt to use the coup as a vehicle to further insure that challenges to State authority are dealt with swiftly.

One challenge that continues to weigh heavily on the current regime and has, historically, resisted resolve is the protracted conflict in the Southeast Kurdish region of Turkey.<sup>6</sup> The AK Party's initial approach to this long-standing dispute between the Kurds and the Turkish state was to bring the Kurdish question in from the political cold. To do so, the AK Party took the Kurdish question out of a security framework and reframed it as a political problem that had to be solved by political rather than military means.<sup>7</sup> In 2015, the AK Party returned to a military strategy and embarked on a war against the Kurds both within and outside its territorial boundaries.<sup>8</sup> Despite this shift in policy and the brutal State campaign against the Kurds that followed, the April 2017 referendum that ensured that Erdoğan's power was constitutionally embedded,<sup>9</sup> was largely supported by the Kurds.<sup>10</sup> This was, perhaps, underpinned by the belief that, absent domestic political challenge, the AK Party would revive the peace process. Whether the AK Party will, once again, place the Kurdish issue within a political framework remains to be seen. At the moment, however, while the international community's gaze remains focused on Erdoğan's domestic political power plays, Turkey's war on the Kurds remains largely hidden.

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soured. More recently, Erdoğan accused Gülen of orchestrating the failed coup attempt. See Mustafa Akyol, *What you should know about Turkey's AKP-Gülen conflict*, AL-MONITOR (Jan. 3, 2014), <https://www.al-monitor.com/pulse/originals/2014/01/akp-gulen-conflict-guide.html> [https://perma.cc/D6AM-D365].

6. For a comprehensive historical analysis of Kurdish nationalism in Turkey, see P.J. WHITE, *PRIMITIVE REBELS OR REVOLUTIONARY MODERNIZERS?: THE KURDISH NATIONAL MOVEMENT IN TURKEY* (2000); and more contemporaneously, HAMID AKIN UNVER, *TURKEY'S KURDISH QUESTION: DISCOURSE & POLITICS SINCE 1990* (2015).

7. See, e.g., Ragan Updegraff, *Turkey Under the AKP: The Kurdish Question*, 23 J. OF DEMOCRACY 119, 119–128 (2012).

8. Umit Cizre, *Rise and fall of the dream called HDP*, OPENDEMOCRACY (Feb. 24, 2016), <https://www.opendemocracy.net/westminster/umit-cizre/rise-and-fall-of-dream-called-hdp> [https://perma.cc/UJE3-Y6HM].

9. The referendum approved 18 measures, which repealed or revised 76 articles of the 1982 Convention. There are three measures, in particular, which have significant impact on Executive branch authority. The first measure subsumes the duties of the prime minister under the office of the president, abolishing the prime ministry thereby, transforming the parliamentary system into a presidential one. Further changes included the abolishment of the requirements for the President to be neutral—above politics and representing the whole nation (*article 7, amending article 101*) and lastly the President can now issue decrees on political, social, and economic issues that carry the force of law (*article 8, amending article 104*). EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), *Amending The Constitution*, Law No. 6771 (2017). For further information on this, see *Turkey: President Bids for One-Man Rule*, HUM. RTS. WATCH (Jan. 18, 2017), <https://www.hrw.org/news/2017/01/18/turkey-president-bids-one-man-rule> [https://perma.cc/AB7F-SCNT].

10. See Ari Khalidi, *Erdogan commends 'Kurdish support' in Turkey referendum*, KURDISTAN 241 (Apr. 7, 2017), <http://www.kurdistan24.net/en/news/655a50ee-588b-4566-aada-856dfc85fbd1/Erdogan-commends-Kurdish-support-in-Turkey-referendum> [https://perma.cc/C3SY-4GWA].

The Turkish case is, I argue, a meta-conflict;<sup>11</sup> it contains several armed conflicts that are taking place both within and outside of Turkey's borders, as well as a number of legal contestations. While this current military campaign against the Kurds revisits some old legal and political terrain,<sup>12</sup> its transnational interventions open up new legal questions and debates. These legal questions and debates apply to Turkey's internal and transnational wars; they extend well beyond its borders. What is the appropriate legal framework and language to apply to situations of internal/transnational armed conflicts? Does it have force? If lacking in enforcement capability, what other mechanisms can and should be engaged? As the majority of armed conflicts, globally, are internal (and, often, associated with trans-border wars), these debates are increasingly preoccupying academic and other legal circles.<sup>13</sup>

Against this backdrop, this article will examine the legal as well as political contestations that frame Turkey's war on the Kurds. Section One will examine how Turkey's domestic and regional pressures have impacted the Kurdish peace process. Section Two will look at some of the legal developments (and accompanying debates) that emerge when determining the appropriate international legal frameworks that apply to internal as well as transnational armed conflicts. As Section Three then details, although the majority of conflicts are internal, the attendant legal discourse is littered with many unresolved debates—when a situation is considered a non-international armed conflict (NIAC); under what conditions do NIACs transition to something else (such as international armed conflicts (IAC) or state of emergency); what are the limitations on state and non-state actors in NIACs; and how does the principle of *lex specialis*<sup>14</sup> apply in NIACs, to name a few.

Section Four then turns to the applicability of international human rights law in situations of armed conflict and prolonged emergencies, as exist in Turkey today. This section will specifically focus on the more recent interventions of the European Court of Human Rights (ECHR). As Turkey is engaged in protracted military campaigns, internally in the Southeast and transnationally across its borders in Syria and Iraq, this section will map out these legal debates in the context of Turkey's war on the Kurds. The article concludes by asking whether, in light of the politicization of law, these legal debates really matter.

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11. A meta-conflict is both a conflict (in this case an armed conflict) and a conflict about the nature of the conflict and, it follows, the appropriate way to address its resolution.

12. The State's approach to conflict "resolution" in the region, historically, has been to adopt emergency legislation and military intervention. The AK Party has returned to this "toolkit" in their current policy approach to the Kurdish question. See Cengiz Gunes, *Explaining the PKK's Mobilization of the Kurds in Turkey: Hegemony, Myth and Violence*, 12 *ETHNOPOLITICS* 247, 247–267 (2013).

13. See Kendra Dupuy et al., *Trends in Armed Conflict, 1946-2016*, CONFLICT TRENDS – PEACE RESEARCH INSTITUTE OSLO (2017).

14. This term derives from the legal maxim "lex specialis derogat legi generali" or "law governing a specific subject matter."

## 1. SHIFTING POLITICAL LANDSCAPES

Despite the significant political progress, in 2015 the AK Party began to disengage from the Kurdish peace process. This shift has been linked both to the domestic political landscape, which the AK Party has occupied since 2002, and to the events taking place in northern Syria and Iraq.<sup>15</sup> Internally, the peace process has relied heavily on the strength of the leadership on both Turkish and Kurdish sides. On the Turkish side, the pivotal role of Recep Tayyip Erdoğan was evident from the outset of the process and despite the relatively slow pace of progress and democratic reforms “Erdoğan retain[ed] some credibility among Turkey’s Kurds because. . . he has done more for them than any previous Turkish leader and is clearly effective when he is convinced of a policy.”<sup>16</sup> Crucially, however, Erdoğan had also retained political capital among his core AK Party constituency since the peace negotiations became public knowledge. The AK Party won 44% of the national vote in the local elections of March 2014, translating into 41 metropolitan municipalities and signifying a “firm endorsement of the Prime Minister’s leadership.”<sup>17</sup> The results were all the more significant given that “[m]ajor events in 2013 such as the peace process, Gezi protests, and December 17th corruption probe, increased the political tension and turned the atmosphere of the local elections into a general election.”<sup>18</sup> Despite setbacks in 2009 and 2012 when thousands of activists were detained and charged<sup>19</sup> under the Anti-Terror Law of 1991<sup>20</sup> during the so-called

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15. Turkey borders both Iraq, where a US (and coalition forces) intervention in 2003 led to an intrastate conflict and fragmentation of the State, and Syria, where a civil war has been taking place since 2011. Each of these states have a significant Kurdish minority that has, as a result of these intrastate conflicts, made some political and military moves towards independence. For more discussion on this, see Matthew Weiss, *From constructive engagement to renewed estrangement? Securitization and Turkey’s deteriorating relations with its Kurdish minority*, 17 *TURKISH STUDIES* 567, 567–598 (2016).

16. Int’l Crisis Group, *Turkey: The PKK and a Kurdish Settlement*, Europe Report N°219, 32 (Sept. 11, 2012).

17. Sinan Ülgen, *What next after Turkey’s Local Elections?*, STRATEGIC EUROPE (Apr. 4, 2014), <http://carnegieeurope.eu/strategieurope/?fa=55242> [https://perma.cc/U43A-92WA].

18. Hatem Ete et al., *Turkey’s 2014 Local Elections*, 4 *FOUNDATION FOR POL., ECON. AND SOC. RES. (SETA)* 1, 20 (2014). In 2013, the AK Party opened dialogue with the Kurds. In May 2013, a few hundred demonstrators occupied Istanbul’s Gezi Park to prevent its loss through a proposed urban development plan. The government response was brutal, sending in police that used tear gas to disperse the protestors and burn down their tents. The imagery of the police using these measures against peaceful protestors sparked an even larger protest that enveloped a wider set of grievances, directed at the ruling AK Party government. This was followed, later in the year, by criminal investigation into a “gas for gold” scheme with Iran, which led to the arrest of 52 people on the 17th of December, all of whom were connected in various ways with the ruling AK Party. Against this backdrop, the local elections in March 2014 were seen to either validate or reject the AK Party’s direction. For details on events and rights violations during Gezi, see Amnesty Int’l, *Gezi Park Protests: Brutal Denial of the Right to Peaceful Assembly in Turkey*, AI Index EUR 44/022/2013 (Oct. 2, 2013). For analysis on Gezi’s impact on the AK Party, see Funda Gençoğlu Onbaşı, *Gezi Park protests in Turkey: from ‘enough is enough’ to counter-hegemony?*, 17 *TURKISH STUDIES* 272, 272–294 (2016).

19. Some of those arrested, including academics, public intellectuals, lawyers, journalists and human rights activists, are still in detention or facing trials. For additional information on these cases,

“anti-KCK” operations (the Kurdistan Communities Union),<sup>21</sup> Erdoğan’s convincing victory in the presidential election of August 2014 gave him a strong mandate to continue with the process. On the Kurdish side, in March 2013, Abdullah Öcalan, the leader of the Partiya Karkerên Kurdistanê (or PKK),<sup>22</sup> called for the “guns to go silent” and “ideas and politics to speak.”<sup>23</sup> This *Newroz* declaration facilitated a ceasefire days later and the withdrawal of PKK operatives from Turkish soil (although the extent to which this actually happened is contested).<sup>24</sup>

While domestic politics were favorable, the AK Party used the opportunity to press ahead with the Kurdish peace negotiations. However, following the results of the June 7th parliamentary election in 2015, when the AK Party lost its absolute majority and the HDP (*Halkların Demokratik Kongresi* or the People’s Democratic Congress) won 80 seats, the political capital of AK Party’s engagement in the peace process began to dissolve.<sup>25</sup> Having challenged the hegemony of Turkey’s political structure and given a voice to a constituency previously confined to the political side-lines, the AK Party had, even if unwittingly, opened the political space for others to do the same. The AK Party’s static view of democracy as something only determined by the ballot box was proven unsustainable in this “new” Turkey. Reframing the Kurdish question in political rather than security terms allowed the HDP to enter into the public square—a space that had been opened up under the AK Party. With the door partly cracked open, the HDP was able to be, albeit fleetingly, a part of Turkey’s political mainstream and provide a viable political alternative to Turkey’s other marginal-

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see Amnesty Int’l, *Turkey’s Anti-Terrorism Law Tramples Human Rights* (2014), <https://www.amnestyusa.org/turkeys-anti-terrorism-law-tramples-on-human-rights/> [https://perma.cc/73WW-JQQ3].

20. Law on Fight Against Terrorism of Turkey. Act Nr. 3713. (1991, as amended: 1995, 1999, 2003, 2006, 2010, 2013). In 2015 there were also revised national security provisions adopted. See Polis Vazife ve Salâhiyet Kanunu et al., *Law on Amending the Police Powers and Duties Law, the Law on the Gendarmerie’s Organization, Duties and Authorities, and Some (Other) Laws*, Law No. 6638, <https://www.tbmm.gov.tr/kanunlar/k6638.html> [https://perma.cc/9NDU-HXY8]; *Explained: Turkey’s Controversial Security Bill*, HÜRRIYET DAILY NEWS (Feb. 21, 2015), <http://www.hurriyetdailynews.com/explained-turkeys-controversial-security-bill.aspx?pageID=238&nID=78658&NewsCatID=339> [https://perma.cc/CQG9-JJYV].

21. The government argued that the KCK was the “civilian face” and “urban wing” of the PKK. See Ziad Abu-Rish, *Turkish Politics, Kurdish Rights, and the KCK Operations: An Interview with Asli Bali*, JADALIYYA (Nov. 3, 2011), <http://www.jadaliyya.com/pages/index/3047/turkish-politics-kurdish-rights-and-the-kck-operat> [https://perma.cc/KNQ8-SFNC].

22. The PKK is an organized armed group based in Turkey. When it began its armed struggle in 1984, its stated objective was an independent Kurdish state. While an independent Kurdish state remains in some of the narrative, the voices have now shifted to demands for equal rights and Kurdish autonomy in Turkey. See Gunes, *supra* note 12, at 255.

23. Yilmaz Ensaroğlu, *Turkey’s Kurdish Question and the Peace Process: Ideology, Interest, and the Regional Dynamics*, 15 *INSIGHT TURKEY* 7, 12–13 (2013).

24. Constanze Letsch, *Kurds dare to hope as PKK fighters’ ceasefire with Turkey takes hold*, THE GUARDIAN (May 7, 2013), <https://www.theguardian.com/world/2013/may/07/kurds-pkk-turkey-peace-talks> [https://perma.cc/S27K-R32C].

25. Int’l Crisis Group, *A Sisyphian Task? Resuming Turkey-PKK Peace Talks*, Europe Briefing N°77 (Dec. 17, 2015).

ized voices. Members of the LGBTQ community and those whose political leanings were not reflected by the previous “leftist” offerings provided the HDP the support that was necessary to pass the 10% threshold and, critically, positioned the party to become a viable threat to the AK Party’s monopoly on power.<sup>26</sup> Quite aside from the challenge posed by the entry of the HDP in mainstream politics in Turkey, the AK Party itself was engaged in internal power plays. In an effort to consolidate power around the Presidency, the party (but likely under the direction of Erdoğan) stripped the Prime Minister of his powers to choose local and provincial branch leaders.<sup>27</sup>

This domestic political struggle played out at the same time that Turkey embarked upon a very risky (and seemingly failed) strategy to deal with what it saw as its Kurdish problem along its border with Syria and Iraq. Turkey’s cross border interventions in Iraq and Syria complicated an already crowded theatre with the US and Russia among the many repertory companies engaged in meta-conflicts. Depending on the narrator, these conflicts are wars against the Islamic State (IS), or against Kurds, or both.<sup>28</sup> Turkey views the People’s Protection Units (YPG)<sup>29</sup> inside Syria as an extension of the PKK.<sup>30</sup> Kurds have accused Turkey of using the US-led coalition against the so-called Islamic State (IS) as a cover to attack the Kurdish PKK in both Turkey and Iraq, and the YPG in northern Syria.<sup>31</sup> Kurds have also

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26. *LGBT associations announce support for HDP candidate Demirtaş*, HURRIYET DAILY NEWS (Aug. 8, 2014), <http://www.hurriyetdailynews.com/lgbt-associations-announce-support-for-hdp-candidate-demirtas-.aspx?pageID=238&nid=70163> [https://perma.cc/8P8B-36YB].

27. Such a rift was publically displayed in the publication of the “pelican dossier.” The material was originally leaked to the press from Twitter user “Pelican” (dossier “Pelican”). The dossier, which was highly critical of then Prime Minister Ahmet Davutoğlu, outlined the differences between the Prime Minister and the President, and provided the name of those who were allied to the Prime Minister who were likely to be removed from office. The dossier seemed to confirm speculation that Erdoğan was attempting to exert control over the party by weakening the powers of the Prime Minister and eliminating those who were favourable to the Prime Minister from positions of power. Mustafa Akyol, *How mysterious new Turkish blog exposed Erdogan-Davutoglu rift*, AL-MONITOR (May 3, 2016), <https://www.al-monitor.com/pulse/originals/2016/05/turkey-rift-between-erdogan-davutoglu.html> [https://perma.cc/AFR9-PQ2]. Against this backdrop, the decision of Prime Minister Davutoğlu to resign in May 2016 came as little surprise. Constanze Letsch, *Turkish PM Davutoğlu resigns as President Erdoğan tightens grip*, THE GUARDIAN (May 5, 2016), <http://www.theguardian.com/world/2016/may/05/ahmet-davutoglu-future-turkish-prime-minister-balance> [https://perma.cc/FJ8V-DJXJ].

28. Int’l Crisis Group, *Steps Toward Stabilising Syria’s Northern Border*, Middle East Briefing N°49 (Apr. 8, 2016).

29. The YPG is an organized armed group of Kurdish fighters within Syria (predominantly Northern Syria). They have been “allied” with the US and European states in the fight against IS forces in Syria.

30. Martin Chulov, *Kurds see chance to advance their cause in ruins of Islamic State*, THE OBSERVER (June 24, 2017), <https://www.theguardian.com/world/2017/jun/24/kurds-see-historic-chance-advance-cause-ruins-islamic-state> [https://perma.cc/25FU-R9J2].

31. BBC Monitoring, *Turkey v Syria’s Kurds v Islamic State*, BBC NEWS (Aug. 23 2016), <http://www.bbc.com/news/world-middle-east-33690060> [https://perma.cc/PFP8-C2X2].

argued that Turkey's military intervention against the Kurds has helped the IS to attack Kurdish-held frontline areas in Syria and in Iraq.<sup>32</sup>

Although the YPG has been viewed by the US as an important ally in the fight against the IS, the failure of the IS to effectively defeat Kurdish armed groups in both Syria and Iraq underpinned Turkey's military incursions into Kurdish held areas.<sup>33</sup> The more Kurds control border areas in the region, the more realistic the threat that the aspirations of Syrian and Iraqi Kurds to establish an autonomous democratic confederation, a goal shared by the PKK, will be realized. Indeed, Syrian Kurds have made some progress in controlling border regions.<sup>34</sup> The YPG control and have declared the region known as Rojava as autonomous, and a Syrian Kurdish-led alliance that includes Arabs from the Syrian Democratic Forces has been successful in securing advancing strategic areas from various armed Islamist groups despite Turkey's ongoing bombardments.<sup>35</sup>

These shifting internal and regional dynamics informed the Turkish government's return back to the security strategy with the Kurds it had previously abandoned, but it was the events of July 2015 during which 33 pro-Kurdish activists were killed in a bombing in Suruç,<sup>36</sup> followed by the murder of two policemen by PKK in Ceylanpınar, Şanlıurfa,<sup>37</sup> that provided the trigger. In response, on the 25th of July, the Turkish air force repeatedly bombed PKK camps in northern Iraq and later in Turkey.<sup>38</sup> The authorities conducted mass arrests of Kurdish activists and pro-Kurdish militants, intellectuals and journalists. The PKK countered with a series of deadly attacks on Turkish police and army convoys. This was followed in August by a series of total curfews in 62 urban centers in the Southeast

32. *Id.* The IS has increased its attacks against Iraqi Kurdish forces in the Makhmur area near the city of Mosul.

33. *Id.*

34. See Chulov, *supra* note 30.

35. David Graeber, *Why is the World Ignoring the Revolutionary Kurds in Syria?*, THE GUARDIAN (Oct. 8, 2014), at <http://www.theguardian.com/commentisfree/2014/oct/08/why-world-ignoring-revolutionary-kurds-syria-isis> [<https://perma.cc/L7VC-BJBK>]. For specifics on the rebel group alliances see, e.g., Suleiman Al-Khalidi & Tom Perry, *New Syrian rebel alliance formed, says weapons on the way*, REUTERS (Oct. 12, 2015), <https://www.reuters.com/article/us-mideast-crisis-syria-kurds/new-syrian-rebel-alliance-formed-says-weapons-on-the-way-idUSKCN0S60BD20151012> [<https://perma.cc/93JM-46TT>]; Tom Perry et al., *Assad sets sights on Kurdish areas, risking new Syria conflict*, REUTERS (Oct. 31, 2017), <https://www.reuters.com/article/us-mideast-crisis-syria-kurds-analysis/assad-sets-sights-on-kurdish-areas-risking-new-syria-conflict-idUSKBN1D02CN> [<https://perma.cc/9A4X-8S8Z>].

36. Berkay Mandıracı, *Turkey's PKK Conflict: The Death Toll*, INT'L CRISIS GROUP (July 20, 2016), <http://blog.crisisgroup.org/europe-central-asia/2016/07/20/turkey-s-pkk-conflict-the-rising-toll/> [<https://perma.cc/J5GT-KL5Z>].

37. Andrew Marszal & Raziye Akkoc, *Kurdish militants claim 'revenge' killing of two Turkish policemen*, THE TELEGRAPH (July 22, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/turkey/11755018/Two-Turkish-police-officers-killed-close-to-Syria-border.html> [<https://perma.cc/6D67-TWKS>].

38. Constanze Letsch, *Turkish jets hit Kurdish militants in Iraq and Isis targets in Syria*, THE OBSERVER (July 25, 2015), <https://www.theguardian.com/world/2015/jul/25/turkish-jets-hit-kurdish-militants-in-iraq-as-well-as-isis-targets-in-syria> [<https://perma.cc/7KJD-G7F7>].

region.<sup>39</sup> A bombing in Ankara in early October 2015 killed 103 activists, including members of the HDP, NGOs and trade unions.<sup>40</sup> A climate of fear followed that benefitted the AK Party in the November 2015 elections, where the AK Party regained its absolute majority.<sup>41</sup> The failed coup in July 2016 opened a space for Erdoğan to further institute draconian measures that included the detention in November 2016 of the co-leaders of the HDP, Selahattin Demirtaş and Figen Yüksekdağ, along with 10 other HDP MPs ostensibly over their refusal to give testimony on “crimes” linked to “terrorist propaganda.”<sup>42</sup> In removing all traces of the Kurdish peace process from Turkey’s mainstream political agenda (and landscape), the cold peace shifted back to a long war.

In resituating the Kurdish issue back into a military framework, Turkey avoided using the language of armed conflict and, instead, applied a state of emergency law enforcement paradigm. This technique is not unique. A state’s reluctance to label situations of internal unrest as an “armed conflict” is often a decision underpinned by political, rather than legal, considerations.<sup>43</sup> In Turkey, this has resulted in an internal armed conflict that has been situated in a law enforcement paradigm. Turkey’s complex legal and political landscapes illustrate both the necessity and limitation of international law. On the one hand, Turkey’s war on the Kurds, both within and outside its borders has produced a fraught human rights landscape.<sup>44</sup>

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39. Since Aug. 10th, 58 curfews have been declared in the South East region. See Int’l Crisis Group, *supra* note 25.

40. See Int’l Crisis Group, *supra* note 25, at 8. See also *At least 95 killed in twin blast in Turkey’s Ankara ahead of peace rally*, HURRIYET DAILY NEWS (Oct. 10 2015), <http://www.hurriyetdailynews.com/at-least-95-killed-in-twin-blast-in-turkeys-ankara-ahead-of-peace-rally-89674> [<https://perma.cc/YX68-QUHQ>].

41. HDP was able to maintain above the 10% threshold. See, e.g., Ümit Cizre, *Leadership Gone Awry: Recep Tayyip Erdoğan and Two Turkish Elections*, MIDDLE EAST REPORT 276 (Fall 2015), <http://www.merip.org/mer/mer276/leadership-gone-awry> [<https://perma.cc/8LJL-4KF2>].

42. Kareem Shaheen, *Turkey Arrests Pro-Kurdish Party Leaders Amid Claims of Internet Shutdown*, THE GUARDIAN, (Nov. 4, 2016), <https://www.theguardian.com/world/2016/nov/04/turkey-arrests-pro-kurdish-party-leaders-mps> [<https://perma.cc/8R9U-C4BF>].

43. William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. OF INT’L L. 741, 756 (2005).

44. While the current crackdown on dissent has led to reports of human rights violations by Turkish state authorities throughout Turkey, these are particularly acute in the Southeast region. See Amnesty Int’l, *The State of the World’s Human Rights*, AI POL 10/4800/2017 (Feb. 22, 2017). Although it is difficult to confirm the number of civilian casualties (as Turkish security forces have obstructed the transmission of information and denied both domestic and international agencies access to cities in the Southeast region), reports by UN and numerous NGOs document widespread violations of the right to life. The UN has expressed concern over reports that Turkish security forces are using snipers and military vehicles such as tanks to shoot unarmed civilians, including women and children. See U.N. Human Rights Office of the High Commissioner, *Need for transparency, investigations, in light of “alarming” reports of major violations in south-east Turkey – Zeid* (May 10, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19937&LangID=E> [<https://perma.cc/445Q-74R8>]. Human Rights Watch has also documented reports that “security forces repeatedly opened fire on anyone on the streets or who left their homes, failing to distinguish between people who were armed and those who weren’t and making no assessment of the threat an individual posed or the necessity of using lethal force.” *Turkey: Mounting Security Operation Deaths*, HUM. RTS. WATCH (Dec. 22, 2015), <https://www.hrw.org/news/2015/12/22/turkey-mounting-security-operation-deaths> [<https://perma.cc/>]



Victims of state violence press up against international enforcing mechanisms demanding redress,<sup>45</sup> which, in turn, ignites debate as to the language and force of law. What is the appropriate legal framework and language to employ? Does it have force? And if it lacks enforcing capability, what other mechanisms can and should be engaged? These legal questions collide with existing political contestations giving ever more weight to Martti Koskenniemi's argument that determining an answer to these questions may well be a matter of "what or whose view of international law is meant."<sup>46</sup>

## 2. THE POLITICS OF WAR

### 2.1. Conflict or Complementarity?

Despite the fact that the overwhelming number of conflicts, globally, are internal,<sup>47</sup> the debate within academic and other legal circles as to which legal framework applies (and when) in internal conflicts remains unsettled. Although both human rights law (HRL) and international humanitarian law (IHL) do overlap in that they both seek to minimize harm to persons engaged in armed conflict and HRL does recognize, through its derogation regime, that states may face emergencies or situations of armed conflict, there are important differences to note. Unlike HRL, which assumes an unequal power relationship between the state and those governed, IHL is based upon the notion of "equal sovereigns."<sup>48</sup> Whereas HRL enumerates individual rights,<sup>49</sup> IHL "despite the existence of numerous individual rights" is "a corpus of law whose primary interest is to offer protection."<sup>50</sup>

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JE9C-V8UM]. These figures shed some light on how pervasive the extrajudicial killing of civilians is in southeast Turkey. In a 2016 briefing on the human cost of the turmoil between the PKK and Turkish government, International Crisis Group reported that at least 250 civilians had been killed since hostilities reignited in July of 2015. See Int'l Crisis Group, *The Human Cost of the PKK Conflict in Turkey: The Case of Sur*, Europe Briefing N°80 (Mar. 17, 2016). Although Turkey has claimed it applies a "zero tolerance towards torture" policy, see opening statement by Ambassador H.E. Mehmet Ferden Çarıkçı, Permanent Representative of Turkey to the United Nations Office in Geneva for the Fifty-Seventh Session of the Committee Against Torture, April 2016, the UN Committee Against Torture stated in its concluding observations on the fourth periodic report of Turkey that there were "numerous credible reports of law enforcement officials engaging in torture and ill-treatment of detainees." U.N. Committee Against Torture, *Concluding Observations on the Fourth Periodic Report of Turkey* (May 10, 2016).

45. See, e.g., Dilek Kurban & Haldun Güllalp, *A Complicated Affair: Turkey's Kurds and the European Court of Human Rights*, in *THE EUROPEAN COURT OF HUMAN RIGHTS: IMPLEMENTING STRASBOURG'S JUDGMENTS ON DOMESTIC POLICY 166-187* (Dia Anagnostou ed., 2013).

46. Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 *CAMBRIDGE REV. INT'L AFFAIRS* 197, 199 (2004)

47. See Dupuy et al., *supra* note 13.

48. ILIAS BANTEKAS & LUTZ OETTE, *INT'L HUMAN RIGHTS LAW AND PRACTICE* 574 (2013)

49. *Id.* at 73.

50. See BANTEKAS, *supra* note 48. HRL both protects and promotes human rights and is applied between States and individuals that fall within the jurisdiction of the state, and with one exception (aliens) applies regardless of the status of the individual. IHL categorizes individuals and provides them varying levels of protection based on their status (combatants, POW, civilians, civilians engaged in

It follows that while HRL addresses its obligations to states, “IHL obligations are incumbent on all parties to an armed conflict.”<sup>51</sup> And finally, under HRL there are a variety of treaty based monitoring mechanisms but for IHL, accountability mechanisms must be found in the International Criminal Court (ICC), ad hoc tribunals or domestic courts.<sup>52</sup>

A dominant view among legal academics is that IHL is the *lex specialis* in cases where “a rule of IHL is in direct conflict with a rule of human rights law.”<sup>53</sup> However, while some legal commentators stress the *lex specialis* of IHL in NIACs, others argue that *lex specialis* has often been interpreted, wrongly, “as implying that when international humanitarian law applies in a given situation, it takes priority over international human rights law.”<sup>54</sup> This has been the approach, as William Abresch notes, “[s]ince the International Court of Justice held that humanitarian law is *lex specialis* to human rights law in 1996—if not since the Tehran Conference of 1968—it has been widely accepted that ‘human rights in armed conflict’ refers to humanitarian law.”<sup>55</sup> More recent commentary suggests that *lex specialis* is a term, “most commonly associated with the maxim *lex specialis derogat generali*, an interpretive rule that stipulates that where two laws apply to the same situation or where there is a conflict of laws, the more specific, or less sweeping, provision should be chosen.”<sup>56</sup> Sassoli and Olson rightly conclude that adopting the use of *lex specialis* in situations of internal armed conflicts is “not entirely satisfactory”<sup>57</sup> and argue that resolving the debate as to what applies in situations of an internal armed conflict may well be to accept a solution where it is not a case of either human rights or humanitarian law but rather to “harmonize appropriately both approaches.”<sup>58</sup>

While the legal debates on the question of *lex specialis* in situations of internal armed conflict remain unsettled, in practice for victims of armed conflict, “both branches [IHL and HRL] mostly lead to the same results.”<sup>59</sup>

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hostilities, and those injured and/or who have laid down their arms). To the extent that individual rights appear under IHL, they are found in Article 3 of the Geneva Conventions, *see* Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135., an article that is common to each of the four Conventions and, additionally, in Article 75 of Additional Protocol II, *see* International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

51. *See* BANTEKAS, *supra* note 48.

52. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 1–25 (2004).

53. *See* BANTEKAS, *supra* note 48, at 658.

54. SHANE DARCY, COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW 178 (2007).

55. *See* Abresch, *supra* note 43, at 741.

56. DARCY, *supra* note 54, at 178.

57. Marco Sassoli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non International Armed Conflicts*, 90 INT’L REV. OF THE RED CROSS 599, 626–627 (Sept. 2008).

58. *Id.* at 626

59. *Id.* at 600.

Where differences do exist, it is in three main areas. The first of which is in the circumstances where a member of an armed group is lawfully killed. Under IHL, a member of an armed group can be killed if s/he does not surrender and is not a *hors de combat*, whereas under human rights law, the killing of an individual is lawful only in exceptional circumstances and where an arrest is not possible.<sup>60</sup> The second is in the form of detention and status given when a member of an armed group is captured. Under IHL when a member of an armed group is captured or detained, s/he can be held until the end of the conflict without any individual process of judicial review whereas under HRL, the individual has a right to have his or her detention judicially reviewed.<sup>61</sup> Finally, there is also a distinction in who can be held accountable for violations that happen in an armed conflict. While under human rights law, states are the ones that are held to account for human rights violations, for violations that happen during a situation of a non-international armed conflict, both state *and* non-state actors are held to account and “incur international criminal liability as opposed to liability under domestic law alone.”<sup>62</sup>

### 3. INTERNATIONAL HUMANITARIAN LAW (IHL)

The primary sources of IHL are found in The Hague Convention (IV) of 1907 on the Laws and Customs of War on Land and the four Geneva Conventions of 1949 for the Protection of Victims of War, which reflect customary international law (and as such, the applicable customary provisions of humanitarian law will be examined).<sup>63</sup> International humanitarian law distinguishes two types of armed conflicts, namely international armed conflicts (IAC) and non-international armed conflicts (NIAC)<sup>64</sup> and, within each, sub-categories or hybrids have emerged. As the next sections will detail, just when and how an armed conflict evolves from a NIAC to an IAC and, conversely, from an IAC to a NIAC are not settled legal questions.<sup>65</sup>

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60. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 50.

61. See International Committee of the Red Cross, *Internment in Armed Conflict: Basic Rules and Challenges*, ICRC Opinion Paper, 3–4, (Nov. 2014).

62. See BANTEKAS, *supra* note 48, at 572.

63. Convention Respecting the Laws and Customs of War on Land, with annexed regulations, Oct. 18, 1907, 36 Stat. 2277, 205 Parry's T.S. 277 cited in ADAM ROBERTS & R. GUELF, *DOCUMENTS ON THE LAWS OF WAR* 43-59, (1989).

64. International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, IRRC No. 900, 1427, 1433-1434 (Dec. 2015).

65. Where consensus has emerged, however, it suggests that for both IACs and NIACs, where the *lex specialis derogat generali* affirms IHL, the customary rules of IHL apply. The Hague Convention has been generally accepted among most states as declaratory of customary international law and is, therefore, binding as such. The International Committee of the Red Cross also holds that rules contained in the four Geneva Conventions are customary. Additionally, the ICRC and a number of legal scholars view many of the provisions, principles, and rules contained in Additional Protocol I to the Geneva Conventions, notably Articles 51 (prohibition of indiscriminate attacks) and 57 (principle of propor-

### 3.1. *International Armed Conflicts (IAC)*

Common Article 2 of the 1949 Geneva Conventions provides the generally accepted criteria for what comprises the existence of an IAC:

The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.<sup>66</sup>

Accordingly, for a situation to be designated as an IAC, the conflict must involve two or more states as parties on opposing sides with hostilities between the armed forces of the belligerents. The wording of the article does not express that there be a minimum level of violence for the hostilities between states to be considered an armed conflict. It is clear from a number of sources that the term international “armed conflict” is a broad concept and includes any armed confrontation between states, regardless of the scale and duration.<sup>67</sup> This reading has been referred to in the International Criminal Tribunal for the Former Yugoslavia’s (ICTY) *Tadić* decision as the so-called “first shot” theory, in which any use of force (or even the mere detention of foreign military personnel) is sufficient to constitute an IAC. In this

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tionality), and the provisions contained in Additional Protocol II as customary law. As the ICRC has noted:

[. . .] a large number of customary rules of international humanitarian law are applicable to both international and non-international armed conflicts. As a result, for the application of these rules, the qualification of the conflict as international or non-international is not relevant. These rules apply in any armed conflict. See <https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm> [<https://perma.cc/DPK4-QH8W>].

A detailed look at the customary rules which govern the conduct of hostilities are contained in Volumes I and II of a 2005 ICRC Study. Both Volume I (rules) and II (practice) are available online at: <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [<https://perma.cc/BD7P-GQN5>] and <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-ii-icrc-eng.pdf> [<https://perma.cc/7LV9-VFRY>] respectively. For a summary of the 5000-page report, see Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. OF THE RED CROSS 175 (Mar. 2005). The Rome Statute of the International Criminal Court (ICC) codifies many rules and principles of IHL as customary criminal law. Under Article 8 of the Rome Statute of the International Criminal Court, “grave breaches” as delineated in Article 147 of the Fourth Geneva Convention constitute *war crimes* and are part of customary international law. “Crimes against humanity” outlined under Article 7 also reflect customary international law.

66. Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 75 U.N.T.S. 287.

67. Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> [<https://perma.cc/GJ6U-ZSBA>]. See generally International Committee of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, ICRC Opinion Paper (Mar. 2008); Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 IRRC 69, 69-94 (2009). <http://www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf> [<https://perma.cc/9U2X-9LUB>].

view, no reciprocity is required—violence by one side against the other is sufficient. While this interpretation is found in Pictet's Commentary<sup>68</sup> and is supported by many commentators,<sup>69</sup> there are other (albeit minority) views that argue that minor border clashes or other small incidents should not be classified as IACs, because these commentators assert, the notion of armed conflict requires a higher level of intensity.<sup>70</sup> The 2017 War Report of the Geneva Academy of International Humanitarian Law and Human Rights, for example, adopts the International Court of Justice's (ICJ) position that small-scale "frontier incidents" (for example, where a soldier fires across an international border) do not constitute an IAC.<sup>71</sup>

As the dynamics of a conflict can shift, a conflict that is designated as an IAC may become "internalized" and shift to a non-international armed conflict (NIAC) in situations where the State undergoes a regime change and the new government consents to foreign intervention.<sup>72</sup> The rules which accompany such shifts, however, are not straightforward as there may not be a recognition of the new government among all states. In such cases, the general rule that would then be applied to determine status is the principle of effectiveness.<sup>73</sup> If, when evaluating the situation on the ground, it is clear that the new government exerts "effective control," then the situation would become a NIAC provided the government is using force against a non-state organized armed group.<sup>74</sup>

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68. The four volumes of Commentaries were written primarily by Jean Pictet, with the participation of Frédéric Sordet, Claude Pilloud, Jean-Pierre Schoenholzer, René-Jean Wilhelm and Oscar Uhler and published between 1952 and 1959. The Commentaries have served as the primary resource guide for the interpretation of the Geneva Conventions. The International Committee of the Red Cross, together with a team of experts, has begun a project to update the Commentaries. In 2016, the ICRC published an update to the Commentary on the First Geneva Convention that can be accessed here: Intentional Committee of the Red Cross, *Commentary on the First Geneva Convention* (2016), <https://ihl-databases.icrc.org/ihl/full/GCi-commentary> [<https://perma.cc/Q3JS-T52W>]. For reference specifically to scale and duration see Commentary on the Fourth Geneva Convention, 20-21 (J.S. Pictet ed., Int'l Committee of the Red Cross, 1958).

69. See The Geneva Conventions of 12 Aug. 1949 Commentary III Geneva Convention Relative to the Treatment of Prisoners of War, 23 (J.S. Pictet ed., Int'l Committee of the Red Cross, 1960); Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); and the more recent commentary of the ICRC see Int'l Committee of the Red Cross, *Commentary on the First Geneva Convention* ¶218 (2016) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518> [<https://perma.cc/PGL6-4ANX>].

70. See C. Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 48 (D. Fleck ed., 2nd ed. 2008); A. Paulus & M. Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization*, 91 IRRC, 95, 101 (2009).

71. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶195 (June 27) <http://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf> [<https://perma.cc/YB22-ZY74>]. See also C. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 177-83 (3d ed. 2008).

72. International Committee of the Red Cross, *supra* note 64, at 1438.

73. *Id.*

74. See Françoise Hampson, *Afghanistan 2001–2010*, in INT'L LAW AND THE CLASSIFICATION OF CONFLICTS 254 (Elizabeth Wilmschurst ed., 2012). This is an area that is not settled and in other

### 3.2. *Non-International Armed Conflicts (NIAC)*

The designation of non-international armed conflict (NIAC) is applied to armed conflicts between governmental forces and nongovernmental organized armed groups, or between such groups only.<sup>75</sup> International convention and customary IHL are clear; IHL applies to “each party” to a NIAC and that “each party to the conflict must respect and ensure respect for international humanitarian law.”<sup>76</sup> This includes Common Article 3 to the 1949 Geneva Conventions by virtue of their universal application under customary international law and, in certain circumstances, the 1977 Additional Protocol II (APII). Common Article 3 refers to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>77</sup> APII may only apply in certain circumstances because of the distinction under IHL treaty law between non-international armed conflicts within the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in Article 1 of APII. The definition provided under Article 1 of Additional Protocol II is much more restrictive and applies to armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>78</sup> This definition restricts the application in two main ways—it adds a requirement of territorial control and expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organized armed groups and not to armed conflicts occurring only between non-State armed groups. It is important to note the Additional Protocol II “develops and supplements” common Article 3 “without modifying its existing conditions of application,”<sup>79</sup> which means that the more restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of NIACs in general.

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writings, additional criteria have been added. For example, Marco Milanovic proposes that the reclassification of the conflict would occur only when:

1. The old regime has lost control over most of the country, and the likelihood of its regaining such control in the short to medium term is small or zero (negative element);
2. The new regime has established control over a significant part of the country and is legitimized in an inclusive process that makes it broadly representative of the people (positive element); and
3. The new regime achieves broad international recognition (external element). Milanovic notes that these criteria must be met in full, not part, for such a shift to occur.

75. International Committee of the Red Cross, *supra* note 64, at 1434.

76. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 495 (2005) (applying in both international armed conflicts and NIACs).

77. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 50.

78. Protocol II, *supra* note 50, at art. 1, ¶1.

79. *Id.* at art. 8.

There are two basic requirements for internal unrest to reach the threshold of a non-international armed conflict.<sup>80</sup> First, there must be protracted<sup>81</sup> armed conflict that has reached a minimum level of intensity that cannot be controlled within a law enforcement paradigm.<sup>82</sup> Indicative factors for assessment as to whether a minimum threshold of intensity has been met include:

the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and calibre of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.<sup>83</sup>

Second, the conflict must entail violence conducted by government armed forces and at least one non-governmental group that is considered a “party to the conflict” (meaning that it possesses “organized” armed forces).<sup>84</sup> The ICTY has found armed groups to be organized if they possess, among other capabilities: a command structure and disciplinary rules and mechanisms within the group; a headquarters; the exercise of control over certain territory; the ability of the group to gain access to and use a variety of weapons; and the control of a significant logistical capacity that gives them the capability to conduct regular military operations.<sup>85</sup> When such groups engage in regular and intense armed confrontations with govern-

80. While these two basic requirements are generally agreed, there is a third category that is worth noting. In order to distinguish between acts of violence that constitute a NIAC and acts of violence that are terrorism, a third category has emerged to argue that alongside the first two conditions, violence must take place between government armed forces and an organized armed group or between such groups. In short, there must be combat. See SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 233 (2012).

81. Although the term protracted connotes duration, in the Tadić decision of the International Criminal Tribunal for the Former Yugoslavia (as well as other cases) the Court confirmed that the specific meaning it gave to “protracted” when qualifying armed violence was an insistence on the intensity of conflict. Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶562 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); see also Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84, Decision on Motion for Judgment of Acquittal, ¶40 et seq (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008); Prosecutor v. Slobodan Milošević, Case No. IT-02-54, Decision on Motion for Judgment of Acquittal, ¶17 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004).

82. See Vitě, *supra* note 67, at 76.

83. See Prosecutor v. Fatmir Limaj, Case No. IT-03-66, Judgment, ¶90 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); Prosecutor v. Ramush Haradinaj et al., Case No. IT-04-84, Judgment, ¶60 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

84. See Daniel Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 RCADI 125, 147 (1979). For a detailed analysis of this criteria, see Prosecutor v. Fatmir Limaj, Case No. IT-03-66, Judgment, ¶¶94-134. (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

85. For an elaboration of the required degree of organization, see e.g., Prosecutor v. Bošković and Tarčulovski, Case No. IT-04-82, Judgment, ¶¶194-205. (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008).

mental armed forces or other organized armed groups, they are considered “party” to a NIAC.

William Abresch has noted that a decision to categorize an internal disturbance as an “armed conflict”<sup>86</sup> which engages international humanitarian law is largely political rather than legal.<sup>87</sup> States have traditionally resisted labelling internal unrest an “armed conflict” because to “apply humanitarian law is to tacitly concede that there is another ‘party’ wielding power in the putatively sovereign state.”<sup>88</sup> By labelling a situation as “armed conflict” the state is recognizing that the situation has gone beyond that which can be controlled by a law enforcement paradigm; quite simply, the state is conceding it has lost control.<sup>89</sup> States also resist armed conflict classification because of concerns that its ability to effectively combat internal unrest will be weakened if the rules of armed conflict are applied. As Fleck has argued, there is an “uneasiness about the laws’ implications for the status of parties to the conflict, and, in particular, on state’s concerns about restrictions on their ability to sanction individuals under domestic law for their belligerent acts.”<sup>90</sup> Although the 1949 Geneva Conventions contain only one provision on non-international armed conflicts, Article 3 (common to all four conventions),<sup>91</sup> customary IHL, and, in particular, the rules on the conduct of hostilities, do give armed groups the “right” to target military objectives<sup>92</sup> which is, in part, why states are reluctant to recognize a situation of armed conflict.

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86. The Rome Statute sets out that the law applying to non-international armed conflict: [ . . . ] does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. *Rome Statute of the International Criminal Court* (U.N. Doc. A/CONF.183/9) (“Rome Statute”), art. 8(f).

87. See Abresch, *supra* note 43, at 756.

88. *Id.*

89. Even in those cases where states concede the threshold of armed conflict has been reached, states’ public law injunctions often collapse the justification of war for actions taken during war. To the extent that international law engages the question of “why,” it is limited to situations of international armed conflict and centers on whether or not a state’s decision to use force (*jus ad bellum*) complies with the requirements under the UN Charter. Once a conflict is engaged, however, the law in war (or *jus in bello*) applies to the warring parties irrespective of the reasons for the conflict and whether or not the cause upheld by either party is just. This leads to a paradox of sorts, where, on the one hand, examining a state’s political landscape is critical to understanding why it has adopted or discarded its international legal obligations (and key to conflict resolution) while on the other, once a conflict is engaged, the “why” a state initiates an armed conflict is irrelevant.

90. See Michael Bothe, *The Law of Non-International Armed Conflict*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 590 (D. Fleck ed., 2d ed. 2008).

91. Additional Protocol II of the Geneva Convention, which was adopted in 1977, provides more detail on the rights and responsibilities of states in non-international armed conflicts. See Protocol II, *supra* note 50, at art. 1, ¶1.

92. Henckaerts, *supra* note 65.



### 3.3. “Internationalized” NIAC

An IAC can exist in cases of an internal armed conflict between a state and an organized armed group where the actions of the organized armed group are attributed to another state. Such a situation was addressed by the Tadić Appeals Chamber Judgment.<sup>93</sup> In its assessment, the ICTY concluded that Bosnian Serb units were sufficiently directed by the Federal Republic of Yugoslavia such that an IAC existed. In reaching this conclusion, the tribunal opined:<sup>94</sup>

[C]ontrol by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organizing, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group.<sup>95</sup>

This judgment established the “overall control” principle which has since been adopted by a number of courts and tribunals for the purpose of classification.<sup>96</sup> The ICTY in Tadić argued that State practice suggests that the threshold for establishing “overall control” is quite high and the evidence to support this must be sufficiently strong.<sup>97</sup> It should be noted, however, that the International Court of Justice (ICJ) declined to employ the “overall control” test in the Genocide case, arguing instead that the test should be whether a party to a conflict has established effective control.<sup>98</sup>

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93. Prosecutor v. Tadić, Case No. IT-94-1, Appeals Chamber Judgment, ¶¶131–140, 145 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999).

94. *Id.* at ¶131, 145, 162.

95. *Id.* at ¶137.

96. See Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 (4) EUR. J. INT’L L., 649 (2007). See also Vité, *supra* note 67, at 71 and fn. 4 for a list of Court/Tribunal decisions that adopted the overall control principle.

97. Tadić, Appeals Chamber Judgment, ¶¶131–136

98. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶402–07 (Feb. 26). The effective control test was used by the ICJ in the case *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. Rep. 14, at ¶105–15 (June 27).

### 3.4. “Transnational” armed conflicts<sup>99</sup>

In cases where an organized non-state armed group is engaged in protracted armed conflict with a state and is operating from across an international border, the dominant position has been that this is a NIAC with the associated rights and obligations.<sup>100</sup> That said, in situations of “transnational” armed conflicts questions arise as to when (or if) a situation of a NIAC evolves to an IAC.

Where a state is party to a non-international armed conflict but is conducting military operations in a second state on whose territory the non-state armed group is present, legal opinions differ as to the consequence of these actions. One view suggests that if the attacks by the state are targeting only the non-state group and its military infrastructure in the second state, the conflict remains a NIAC.<sup>101</sup> If, however, the attacks are against the infrastructure of the second state on whose territory the non-state armed group resides, then the conflict evolves into an international armed conflict. Additionally, a significant element of the determination as to whether or not a conflict evolves from a NIAC to an IAC is based on whether the second state has consented to the military intervention or, at the very least, acquiesced to it.<sup>102</sup> If such consent or acquiescence is established, then the conflict remains non-international. If, however, the second state opposes (or has condemned) the military actions of the first state, then the conflict becomes both an IAC between the two states and, additionally, a NIAC between the first state and the non-state armed group.<sup>103</sup>

### 3.5. *Turkey's Wars*

What emerges from this brief review of IHL and its application to IACs and NIACs is that these multiple and complex legal questions are contested and messy—reflecting, in part, the politics of the conflicts they endeavor to

99. For a useful overview of these issues, see Vité, *supra* note 67.

100. See International Committee of the Red Cross, *supra* note 64.

101. *Id.* at n.13.

102. According to the 2016 ICRC Commentary on Article 2 of the Geneva Conventions of 1949: “The presence or absence of consent is essential for delineating the applicable legal framework between the two States as it affects the determination of the international or non-international character of the armed conflict involving those States. Should the third State’s intervention be carried out without the consent of the territorial State, it would amount to an international armed conflict between the intervening State and the territorial State.” Commentary of 2016 on Article 2 of the Geneva Conventions of 1949, INT’L COMMITTEE OF THE RED CROSS (2016), at ¶260. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518> [https://perma.cc/RLK8-TTTS]. See also Dapo Akande, *When Does the Use of Force Against a Non-State Armed Group Trigger an International Armed Conflict and Why does this Matter?*, EJIL TALK, (Oct. 18, 2016), <http://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/comment-page-1> [https://perma.cc/ELR5-KXL6].

103. *Id.* It should be noted that although there is some consensus among scholars that the acquiescence to intervention suggests that the conflict is a NIAC, there is not consent on whether the mere condemnation by the second state is enough to shift it to an IAC with a NIAC component.

address. In mapping these legal questions onto the Turkish case, the interplay and contestation between political and legal terrains is clear. Turkey continues to frame its military intervention against the Kurds as a security-oriented “counter terrorism” measure. Its refusal to acknowledge that an “armed conflict” exists within its territory is a political calculation, reflecting a tendency by states to “articulat[e] political preferences into legal claims that cannot be detached from the conditions of political contestation in which they are made.”<sup>104</sup>

The political underpinnings for Turkey’s decision to reject the notion that it is facing a NIAC are clear: if Turkey concedes that an organized Kurdish armed group is operating within its territory, it is also conceding that there is another “‘party’ wielding power in the putatively sovereign state.”<sup>105</sup> That said, “the number, duration and intensity of individual confrontations”<sup>106</sup> between organized Kurdish armed groups and Turkish forces tell a very different story, namely that the indicative requirements set out in *Limaj et al.*<sup>107</sup> for a NIAC have been met.<sup>108</sup> This has led to a paradox of sorts whereby the State adopts a law enforcement paradigm, that, at least ostensibly, places a more onerous burden to conduct its military operations within an HRL framework but the legal requirements set out in *Limaj* situates the conduct of hostilities—on both sides—in an IHL framework.

When turning to Turkey’s cross border military interventions, it is clear that the decision by the Turkish state to engage in hostilities in Syria and Iraq is inextricably tied to the situation in the Southeast region of Turkey. The PKK has conducted cross border operations and has shadow organizations operating in both countries (and may share similar secessionist goals).<sup>109</sup> That said, what is less clear, is whether Turkey’s military interventions targeting the People’s Protection Units (YPG) and PKK inside Syria/Iraq are a NIAC or whether these conflicts also form part of an IAC. For the situation to be classified as a NIAC, the attacks by Turkey must be limited to attacks on the YPG, PKK or their respective military infrastructure. If, however, the attacks by Turkey are broadened and are directed at

104. See Koskenniemi, *supra* note 46, at 198.

105. See Abresch, *supra* note 43. While Abresch was applying this to the Russian situation in Chechnya, it is equally relevant here as both Russia and Turkey have resisted the classification of their respective conflicts as NIACs.

106. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, ¶49 (Int’l Crim. Trib. For the Former Yugoslavia July 20, 2007).

107. Prosecutor v. Fatmir Limaj, Case No. IT-03-66, Judgment, ¶¶94-134. (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005)

108. It follows, then, that the customary rules of international humanitarian law and Common Article 3 as a matter of treaty law are applicable to state and non-state actors that are party to the conflict. That said, the Turkish State continues to locate its war on the Kurds in an emergency framework and this leads to a paradox of sorts in that the State is invoking a law enforcement framework that should, in principle, provide a higher level of protection while legal commentators frame their discussion on Turkey using the laws of armed conflict.

109. See Mehmet Orhan, *Transborder violence: the PKK in Turkey, Syria and Iraq*, 7 DYNAMICS OF ASYMMETRIC CONFLICT 30 (2014).

the infrastructure of a second state (in this case, Syria or Iraq) on whose territory the non-state armed group resides, or if Turkey occupies part of the territory of either state, or if Syria or Iraq objects to or condemns military actions taken by Turkey, this *could* result in the conflict becoming both an IAC between the two states (Turkey and Syria and/or Turkey and Iraq) and, additionally, a NIAC between Turkey and the organized armed group.

At the time of this writing, incursions by Turkish forces to attack PKK bases in Northern Iraq form part of the NIAC between Turkey and the PKK.<sup>110</sup> Additionally, as Turkey has engaged in military operations within Iraqi territory without the consent of the Iraqi government, there is also an IAC between Turkey and Iraq.<sup>111</sup> With regard to Syria, there are two factors to suggest that the Turkish intervention in Syria has transitioned to an IAC. First, the “consent” required from Syria to allow the cross border operations by Turkey is unclear, and second, since September 2016, Turkey has occupied part of the territory of Syria (the area between Jarablus and Aziz) after this territory was seized from the Islamic State (IS) group.<sup>112</sup> These factors, taken together with the presence of several NIACs between IS, Kurdish militia, and other rebel groups suggest that Turkish intervention in Syria is one of an IAC. If, going forward, there is a regime change in Syria (or, indeed, Iraq) and the new regime exerts effective control over that territory and consents to Turkish intervention, then the conflict transitions to an internalized IAC.

To the extent that Kurdish organized armed groups operate outside of the influence, support or direction of another state, the transnational conflicts between Turkey and organized armed groups (OAGs) in Syria and Iraq remain a NIAC. If, however, going forward it can be determined that a state has provided organization, coordination, and planning as well as training, equipping and financing to the YPG or PKK, then the situation transitions to an “internationalized” NIAC.

While the need for IHL to evolve and meet the challenges of these “new” wars has meant that it has “fully entered the public domain” and stepped outside the “expert circles” that have historically been its caretaker, it has also made it more vulnerable to “politicized interpretations and implementation”<sup>113</sup> of its rules. This trend has also underpinned the increasing role taken by international human rights mechanisms in situations of IACs. As the next section will detail, while human rights law is not entirely displaced and can, in certain circumstances, be directly applied in

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110. For more discussion on this, see *Turkey: Involvement in Armed Conflicts*, RULAC Geneva Academy (2018), <http://www.rulac.org/browse/countries/turkey#collapse1accord> [<https://perma.cc/A367-67JT>].

111. *Id.*

112. *Id.*

113. *International humanitarian law and the challenges of contemporary armed conflicts*, 89 INT’L REV. OF THE RED CROSS 719, 720 (2007).

situations of armed conflict, there are difficulties that do arise, leaving the question; what is the *lex specialis* where these two bodies of law contrast?

#### 4. HUMAN RIGHTS LAW

While the applicability of human rights law in armed conflict remains contested terrain among legal commentators and practitioners, there is consensus that human rights law is not entirely displaced during armed conflicts and can also, in some cases, be directly applied to situations of armed conflict.<sup>114</sup> This view has been affirmed by human rights treaty bodies,<sup>115</sup> as well as the International Court of Justice in the 1996 Nuclear Weapons and the 2004 Wall opinions<sup>116</sup> and the 2005 case on Armed Activities (Congo v. Uganda).<sup>117</sup> That said, for those who recognize that human rights has some role to play during times of war or other states of emergency, they argue that this is not “the end of the story” and have shifted the focus of the debate from “the question of if human rights law applies during armed conflict to that of how it applies, and to the practical problems encountered in its application.”<sup>118</sup>

##### 4.1. *The Human Rights Committee (HRC)*

The Human Rights Committee (HRC), the monitoring body of the International Convention on Civil and Political Rights (ICCPR), has indicated that international and non-international armed conflict, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident may constitute a state of emergency<sup>119</sup> under Article 4 of the ICCPR.<sup>120</sup> As an international or non-international armed conflict

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114. HENRY STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT: LAW, POLITICS, MORALS* 395–401 (3d ed. 2008).

115. *See, e.g.*, Human Rights Committee, General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶11 (May 26, 2004).

116. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶24 (July 8); *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. Rep 136, ¶106 (July 9).

117. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2004 I.C.J. Rep. 116, ¶215–21 (Dec. 19).

118. Noam Lubell, *Challenges in applying human rights law to armed conflict*, 87 INT'L REV. OF THE RED CROSS 737, 738 (2005). Among the concerns Lubell notes are: “extra-territorial applicability of human rights law; the mandate and expertise of human rights bodies; terminological and conceptual differences between the bodies of law; particular difficulties raised in non-international armed conflicts; and the question of economic, social and cultural rights during armed conflict.” *Id.* at 737.

119. *See* Human Rights Committee, General Comment No. 29 [72] Derogations from provisions of the Covenant during a state of emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, ¶3–5 (Aug. 31, 2001) [hereinafter General Comment 29].

120. Derogations are addressed in Article 4 of the ICCPR. Article 4 provides:

1. In a time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly

could constitute a public emergency under Article 4, the HRC has accepted that there can be an overlap between human rights law and international humanitarian law. In its General Comment 29<sup>121</sup> on Article 4, the HRC considers this relationship as follows:

During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4.<sup>122</sup>

While the HRC has engaged with situations of NIAC, both in its individual communications and in the context of state reporting,<sup>123</sup> the Committee has not yet used the language of humanitarian law when arriving at its findings. In cases relating to NIACs or serious internal disturbances (in-

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required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State party to the present Covenant availing itself of the right of derogation shall immediately inform the other States parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

*See* G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (ICCPR), 174 (Mar. 23, 1976).

121. The Human Rights Committee (HRC) has adopted two General Comments on states of emergency. The first of which was General Comment 5, Article 4: Derogations, UN Doc. A/36/40 (July 31, 1981), which was then replaced by General Comment 29 in 2001.

122. *See* General Comment 29 at ¶3.

123. Compliance with the ICCPR is evaluated through two monitoring mechanisms—through a system of state periodic reporting whereby states provide written submissions on their implementation of the ICCPR rights, including the effect on them of emergency powers. These reports are reviewed by the ICCPR's treaty body mechanism, the Human Rights Committee. During this process. The Committee engages with the state party through oral proceedings and it concludes by adopting formal Concluding Observations. *See e.g.* INEKE BOEREFIJN, THE REPORTING PROCEDURE UNDER THE COVENANT ON CIVIL AND POLITICAL RIGHTS 316–19 (1999); THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY 163–4 (Anne F. Bayefsky ed., 2000).

cluding those involving the use of military force), the HRC has stressed the need for proper precautions to be taken for limitation of the use of force to the degree strictly necessary. The HRC has also emphasized the need for investigations to be undertaken in the case of suspicious deaths, including in armed conflict situations, in order to ensure that a loss of life is not “arbitrary.”<sup>124</sup> As noted earlier, when it comes to the relationship between IHL and HRL, it is around the admissible killings and internment of fighters that the relationship between two branches of law lacks clarity.

There are two oft-cited examples where the HRC dealt with right to life cases in situations that, arguably, met the threshold of a NIAC. The 1982 *Guerrero v. Colombia*<sup>125</sup> case arose in the context of the so-called “dirty war” conducted by Colombia against the rebel M-19 Movement. In communication received by a complainant to the HRC (Guerrero’s husband), it was alleged that during a raid, the police arbitrarily killed Guerrero and seven other persons and that the Colombian authorities had failed to undertake a thorough investigation into the killing.<sup>126</sup> In this case, the HRC did not take IHL into account, but rather asserted the application of human rights law and found that Colombia had arbitrarily deprived those killed in the raid of their right to life under article 6 of the ICCPR.<sup>127</sup> They argued that no proof had been proffered that the victims were members of a guerrilla organization and there had been no attempt to apprehend the victims.<sup>128</sup> Similarly, in the 2003 Country Report on Israel, the HRC’s review of Israel’s policy of targeted killings in the occupied territories did appear to take the armed conflict situation into account insofar as it seemed to accept, at least to some extent, Israel’s framing of the issue in IHL terms.<sup>129</sup> In its submission, Israel argued that its targeted killings had respected the “rule of proportionality” and had only targeted persons “directly involved in hostile acts.”<sup>130</sup> Despite this, the HRC did not apply IHL rules on the conduct of hostilities because it noted that the State had an obligation, where possible, to ensure that, before using “deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted.”<sup>131</sup>

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124. See Human Rights Committee, General Comment No. 6, Article 6: Right to Life, U.N. Doc. HRI/GEN/1/Rev.6 (Apr. 30, 1982).

125. Human Rights Committee, *Pedro Pablo Camargo v. Colombia*, Communication No. 45/1979, U.N. Doc. CCPR/C/OP/1, ¶11.2 (1985).

126. *Id.* at ¶11.3–11.4.

127. *Id.* at ¶13.3.

128. *Id.* at ¶13.2.

129. Human Rights Committee, Concluding Observations of the Human Rights Committee: Israel, U.N. Doc. CCPR/CO/78/ISR, ¶15 (Aug. 21, 2003).

130. Human Rights Committee, Consideration of the Reports Submitted by State Parties under Article 40 of the Covenant: Second Periodic Report of Israel, U.N. Doc. CCPR/C/SR.2118, ¶40 (July 25, 2003).

131. See Human Rights Committee, *supra* note 129.

With regard to detention, the Human Rights Committee's General Comment 35 on Article 9 of the ICCPR<sup>132</sup> notes that, "[A]rticle 9 applies also in situations of armed conflict to which the rules of international humanitarian law are applicable"<sup>133</sup> and concludes that "[t]he fundamental guarantee against arbitrary detention is non-derogable."<sup>134</sup> Although the Comment is specifically referring to IACs, and not NIACs, it requires that for States to derogate from their Article 9 obligations in accordance with Article 4 in an IAC, "substantive and procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention."<sup>135</sup>

#### 4.2. *The European Court of Human Rights (ECtHR)*

At the regional level, the European Court of Human Rights (ECtHR) has, on a number of occasions, applied the European Convention of Human Rights (ECHR)<sup>136</sup> in the context of armed conflicts but, until quite recently, has refrained from providing direct interpretation of specific IHL treaties. Under human rights law, the requirement for a state to take measures to minimize harm to civilians is similar to the requirement under IHL for states to take precautions during attacks.<sup>137</sup> Unlike IHL, however, the HRL requirement to minimize the loss of life is addressed to state actors and not rebel forces.<sup>138</sup>

In claims arising out of the armed conflict in Chechnya, for example, the ECtHR applied human rights law to the conduct of hostilities in Russia's internal armed conflict with Chechen rebels. In the 2005 case of *Isayeva, Yusupova and Bazayeva v Russia*,<sup>139</sup> a civilian convoy was hit by a missile, killing civilians including children.<sup>140</sup> Russia claimed that its forces were in

132. Human Rights Committee, General Comment No.35, Article 9: Liberty and Security of Person, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

133. *Id.* at ¶64.

134. *Id.* at ¶66.

135. *Id.*

136. See *Loizidou v. Turkey*, App. No. 5318/89, 23 EUR. CT. H.R. 513 (1997); *McCann and Others v. the UK*, App. No. 18984/91, 21 EUR. CT. H.R. 97 (1995); *Kurt v. Turkey*, 1998 EUR. CT. H.R. 44; *Bankovic and Others v. 17 NATO countries*, App. No. 52207/99, EUR. CT. H.R. (2001); *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, 40 EUR. CT. H.R. 46 (2004); *Isayeva, Yusupova and Bazayeva v. Russia*, App. Nos. 57947–49/00, EUR. CRT, H.R. (2005) [hereinafter *Isayeva I*]; *Markovic and Others v. Italy*, App. No. 398/03, 44 EUR. CT. H.R. 52 (2006); *Al-Skeini and Others v. the UK*, App. No. 55721/07, EUR. CT. H.R. (2007); *Al-Jedda v. the UK*, App. No. 27021/08, EUR. CT. H.R. (2008); *Korbely v. Hungary*, App. No. 9174/02, EUR. CT. H.R. (2008); *Kononov v. Latvia*, App. No.36376/04, 52 EUR. CT. H.R. 21 (2010); *Medvedyev and Others v. France*, App. No. 3394/03, 51 EUR. CT. H.R. 39 (2010); *Al-Saadoon and Mufdhi v. the UK*, App. No. 61498/08, 49 EUR. CT. H.R. SE11 (2010); *Hassan v. the UK*, App. No. 29750/09, EUR. CT. H.R. (2014); and *Jaloud v. the Netherlands*, App. No. 47708/08, 60 EUR. CT. H.R. 29 (2014).

137. See *Abresch*, *supra* note 43, at 761.

138. *Id.* at 756.

139. See *Isayeva I*. See also *Isayeva v Russia*, App. No. 57950/00, 41 EUR. CT. H.R. 38 (2005) [hereinafter *Isayeva II*].

140. *Isayeva I* at ¶11.



pursuit of Chechen rebels at the time.<sup>141</sup> The ECtHR accepted that, given the insurgency, the use of lethal force was justified but argued that such force had to be limited to legitimate targets and that there needed to be sufficient means taken to minimise harm to civilians.<sup>142</sup> In applying Article 2, which safeguards the right to life, to a NIAC, the ECtHR recognized the rationale (and need for) IHL rules, but also addressed the question as to whether an individual's life had been lawfully deprived through a HRL/ECHR framework.<sup>143</sup> In doing so, the ECtHR ruled, in this case and in others, that if it is possible to detain rebel forces without the use of lethal force, then using lethal force and/or indiscriminate weapons would violate the right to life under the Convention.<sup>144</sup>

The ECtHR did not, in these earlier judgments, attempt to clarify the relationship between the ECHR and IHL. This reluctance may, at least in part, have been rooted in political considerations, as explicit application of IHL to certain confrontations could exacerbate these situations.<sup>145</sup> Where the ECtHR did apply human rights law in cases of armed conflict, it only indirectly referenced IHL. More recently, however, the ECtHR's approach to the relationship between IHL and ECHR has evolved. In the case of *Korbely v. Hungary*,<sup>146</sup> for example, the ECtHR engaged common Article 3 of the Geneva Convention in its reasoning and in *Al-Jedda v. the UK*<sup>147</sup> and *Hassan v. the UK*,<sup>148</sup> which involve British military operations in Iraq, the ECtHR directly discussed the interplay between the ECHR and IHL.

In the *Al-Jedda* case, the applicant alleged that his internment by UK forces in Iraq was in breach of Article 5(1) (lawfulness of detention) of the ECHR.<sup>149</sup> This case marked the first time the ECtHR interpreted specific provisions of the Geneva Conventions. The ECtHR specifically asked whether the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War,<sup>150</sup> provided a "legal basis for the applicant's detention which could operate to disapply the requirements of Article 5 § 1."<sup>151</sup> The British government had argued that under the Laws of Occupation, the

141. *Id.* at ¶¶25-27.

142. *Id.* at ¶171.

143. *Id.* at ¶168.

144. *Id.* at ¶174-200. See also *Hamiyet Kaplan and Others v. Turkey*, EUR. CT. H.R. ¶¶51-5 (2015); *Isayeva v. Russia*, EUR. CT. H.R. 38 ¶191 (2005); *Akhmadov and Others v. Russia*, EUR. CT. H.R. ¶99 (2008); *Esmukhambetov and Others v. Russia*, EUR. CT. H.R. ¶146 (2011); *Benzer and Others v. Turkey*, EUR. CT. H.R. ¶184 (2014).

145. Some have argued that direct application of IHL in certain situations may be harmful. See MAGDALENA FOROWICZ, *THE RECEPTION OF INTERNATIONAL LAW IN THE EUROPEAN COURT OF HUMAN RIGHTS* 348 (2010).

146. *Korbely v. Hungary*, 2008-IV EUR. CT. H.R. 299.

147. *Al-Jedda v. The United Kingdom*, 2011-IV EUR. CT. H.R. 305, 342-8 ¶¶42-50.

148. *Hassan v. United Kingdom*, 2014-VI EUR. CT. H.R. 1.

149. European Convention on Human Rights art. 5, Jun. 1, 2010, EUR. CT. H.R. Art. 5, §1 reads: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty . . ."

150. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, United Nations.

151. *Al-Jedda v. The United Kingdom*, 2011-IV EUR. CT. H.R. at 376 ¶107.

Occupying power had “specific authorities, responsibilities and obligations” which included the obligation “to use internment where necessary to protect the inhabitants of the occupied territory against acts of violence.”<sup>152</sup> The ECtHR disagreed and argued that the Fourth Geneva Convention does not impose “an obligation on an Occupying Power to use indefinite internment without trial” and that Article 43 of The Hague Regulations was to be interpreted as an obligation of the Occupying Power to use internment but as a “measure of last resort.”<sup>153</sup>

In *Hassan v. the UK*, the ECtHR again questioned the extent to which an individual can be deprived of liberty during active hostilities. Specifically, the ECtHR sought to determine whether the applicant’s internment could be considered consistent with Article 5 of the ECHR despite the absence of any derogation by the UK.<sup>154</sup> This case was significant for a number of reasons. It confirmed that *Al-Jedda* was not an anomaly and that the ECtHR was willing to directly apply IHL. Second, it was the first time a member state directly requested that the ECtHR “disapply its obligations under Article 5 or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law.”<sup>155</sup> Finally, unlike in *Al-Jedda*, where the ECtHR ruled that the State remains bound to honour its obligations under ECHR as ordinarily interpreted when jurisdiction exists and no lawful derogation has been made,<sup>156</sup> here the ECtHR adopted an alternative approach to obligations. In reading into the ECHR an extra permissible ground for detention alongside those enumerated in Article 5, §1, subparagraphs (a) to (f), the Court relied on Article 31 of the Vienna Convention of the Law of Treaties,<sup>157</sup> which introduces the concept of dynamic treaty interpretation.<sup>158</sup> The Court determined that the state practice in this context was not to derogate from obligations under Article 5 ECHR when interning individuals pursuant to the Third and Fourth Geneva Conventions. The Court then argued that, as States do not consider Article 5 ECHR to prohibit lawful internment during armed conflict (even though such internment does not feature on the list of grounds of permissible detention) the Convention should be interpreted as such, making any derogation redundant.<sup>159</sup>

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152. *Id.*

153. *Id.*

154. *Hassan v. United Kingdom*, 2014-IV EUR. CT. H.R.

155. *Id.* at 59 ¶99.

156. *See Al-Jedda v. The United Kingdom*, 2011-IV EUR. CT. H.R. at 373 ¶99.

157. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 18232.

158. The need to interpret a treaty in the light of the normative environment of the present day. Applied here, the Court accepted that in interpreting treaty norms, in casu those of ECHR, account should be taken of subsequent state practice as well as any other relevant rule of international law applicable to the case at hand, such as IHL.

159. The ECtHR stated:

“...by reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as

While the shifts evident in both *Al-Jedda* and *Hassan* have been welcomed by some,<sup>160</sup> the direct application of IHL by the ECtHR has also been heavily criticized on two points—for endeavouring to stray outside of its human rights law domain as well as for how it applies the rules once it does.<sup>161</sup> Whatever the merits of these critiques, “humanitarian law’s limited substantive scope<sup>162</sup> and poor record of achieving compliance in internal armed conflicts,”<sup>163</sup> will almost certainly ensure that the human rights machinery will continue to be pressed to intervene in situations of armed conflict given these IHL shortcomings.

#### 4.2.1. *The ECHR and Turkey*

While Turkey’s war on the Kurds, both within and outside its borders, constitutes a NIAC, the Turkish government refers to its operations in Southeast Turkey as domestic counter-terrorism,<sup>164</sup> and has thus relied on the right of derogation under Article 15<sup>165</sup> of the ECHR on a number of occasions.<sup>166</sup> Between 1959 and 2016, Turkey was the respondent state in 3270 European Court judgments and in 2,889 of these cases, the ECtHR found at least one violation.<sup>167</sup> Turkey’s fraught political landscape, featur-

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possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions.” *Hassan v. United Kingdom*, 2014-IV EUR. Ct. H.R. at ¶104.

160. See Lawrence Hill-Cawthorne, *The Grand Chamber Judgment in Hassan v. UK*, TALK! BLOG OF THE EUROPEAN JOURNAL OF INT’L LAW (Sept. 16, 2014).

161. See Jelena Pejic, *The European Court of Human Rights’ Al Jeddah judgment: the oversight of international humanitarian law*, 93 INT’L REV. OF THE RED CROSS 837, 851 (2011); RICHARD EKINS, JONATHAN MORGAN & TOM TUGENDHAT, *CLEARING THE FOG OF LAW: SAVING OUR ARMED FORCES FROM DEFEAT BY JUDICIAL DIKTAT* (2015); Frederic Bernard, *Deprivation of liberty in armed conflicts: the Strasbourg Court’s attempt at reconciling human rights law and international humanitarian law in Hassan v. UK*, STRASBOURG OBSERVERS (Oct. 2, 2014).

162. As the protection of international humanitarian law is largely based on distinctions—in particular between civilians and combatants, something that is unknown in human rights law.

163. See Abresch, *supra* note 43, at 741.

164. *PKK getting more foreign aid than ever: Deputy PM*, HURRIYET DAILY NEWS (Apr. 6, 2016), <http://www.hurriyetdailynews.com/pkk-getting-more-foreign-aid-than-ever-deputy-pm-97412> [https://perma.cc/C8BA-JP3Z]. Turkey has been subject to extraordinary rule, in some form (extraordinary administration, Martial Law or a state of emergency) since 1940. Despite periodic respite, these (ostensibly) temporary emergency measures have become embedded in Turkey’s domestic legal landscape.

165. A state will often place internal armed conflicts outside of the IHL framework and within a state security paradigm. A state of emergency is declared, which ostensibly engages the international derogation regime, but in their endeavor to bring their actions both inside but also outside legal supervision, states use the language of counter terrorism. Within the human rights law regime, when faced with an emergency that “threatens the life of a nation” states are allowed to derogate from some (although not all) of their treaty obligations. Article 4 of the International Covenant on Civil and Political Rights (ICCPR), Article 15 of the European Convention on Human Rights (ECHR) and Article 27 of the American Convention on Human Rights (ACHR) codify the notion of derogation in the context of human rights law.

166. For a detailed list see Press Release, EUR. Ct. H.R., *Derogation in Time of Emergency* (Nov. 2017).

167. ECHR case law involving the Kurds have addressed a number of issues, including: violations of the right to fair trial, deprivation of liberty without due process, violations of freedoms of expression and association, torture, and right to life. In its judgments, the ECtHR has ruled that Turkey has

ing numerous (and rolling) military coups, explains in part this exceptionally high volume of ECtHR cases.<sup>168</sup> However, a majority of these cases were raised in Strasbourg by Kurdish groups as “[l]ocal courts in the region were unwilling to exercise jurisdiction over allegations of human rights abuses committed by security forces during the fighting with the PKK.”<sup>169</sup> With domestic remedies “de facto unavailable, Kurdish groups took direct recourse to Strasbourg,”<sup>170</sup> and, in turn, “the ECtHR effectively became an appeals court for human rights victims in Turkey.”<sup>171</sup>

Although the ECtHR referred explicitly to the existence of “violents conflits armés” (violent armed clashes)<sup>172</sup> in cases that involved the PKK, including in situations where the PKK had used armed force, the ECtHR systematically applied the law enforcement paradigm. In *Ergi v. Turkey*,<sup>173</sup> for example, a case that concerned the accidental killing of an uninvolved woman in a military operation, the ECtHR confirmed the findings of the European Commission of Human Rights, agreeing that the planning of the operation had not been careful enough to prevent casualties among the civilian population and to avoid an extension of the conflict. In its judgment the ECtHR argued that the State had failed “to take all feasible precaution in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding or, at least, minimising incidental loss of civilian life”.<sup>174</sup> The ECtHR invoked the wording of international humanitarian law by referring, for example, to “civilian life”<sup>175</sup> and “incidental loss”<sup>176</sup> but, nevertheless, assessed the State’s obligation within a human rights framework instead as a positive obligation pursuant to Article 2 of the 1949 Geneva Conventions.

Were the same case to be looked at through an IHL lens, the outcome could well have been different. In contrast to HRL, under IHL it is unclear

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violated Articles 2, 3, 5, 6, 8, 10, 11 of the ECHR and Article 1 of Protocol 1. *See Violation by Article and by States (1959-2016)*, EUR. CT. H.R. The only other State where due to a lack of access to justice, the European Court of Human Rights has seen a large amount of applications from victims in this region is in Chechnya. *See Chechnya: European Court Last Hope for Victims*, HUM. RTS. WATCH (June 8, 2008), <https://www.hrw.org/news/2008/06/08/chechnya-european-court-last-hope-victims> [https://perma.cc/P3LZ-SWXM].

168. Turkey has appeared before the European Court more than any other member state. From 1959–2016, there have been 3,270 judgements in cases involving Turkey (second to Turkey in Court appearances is the Russian Federation that has appeared in 1,948 cases). *See Violation by Article and by States*, *supra* note 167.

169. Kurban & Güllalp, *supra* note 45, at 167.

170. *Id.*

171. Dilek Kurban, *Europe as an Agent of Change: The Role of the European Court of Human Rights and the EU in Turkey’s Kurdish Policies*, STIFTUNG WISSENSCHAFT UND POLITIK RESEARCH PAPER 16 (OCT. 2014).

172. *See, e.g., Ergi v. Turkey*, EUR. CT. H.R. ¶85 (1998); *Kaya v. Turkey*, EUR. CT. H.R. ¶91 (1998); *Güleç v. Turkey*, EUR. CT. H.R. ¶81 (1998); *Ahmet Özkan and Others v. Turkey*, EUR. CT. H.R. ¶319 (2004).

173. *See Ergi v. Turkey*, EUR. CT. H.R. ¶85 (1998).

174. *Id.* at ¶79.

175. *Id.*

176. *Id.*

as to whether the principle of proportionality (which is part of the ECtHR's approach to establishing whether a State has exceeded their margin of appreciation) encompasses precautions to avoid incidental civilian casualties when establishing military advantage, or whether the ECtHR simply introduced this as an independent requirement. In *Gül v Turkey*,<sup>177</sup> the ECtHR held that there was a "grossly disproportionate" use of force by Turkish officials against a member of the PKK who was attacked while at home because the PKK did not attack him. In *Ozkan and others*, another Turkish case involving the death of a child, detention and the burning of houses that took place during military operations in south-east Turkey, the ECtHR clearly relied on principles associated with humanitarian law.<sup>178</sup> The ECtHR held that the right to life requirements under Article 2 of the Geneva Conventions would be violated in security operations involving the use of force if the state agents omitted "to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising incidental loss of civilian life."<sup>179</sup> This clearly corresponds to the wording of Article 57 (2)(a)(ii) of Protocol I.<sup>180</sup> However, when the ECtHR turned to the State's responsibilities under Article 8 (right to respect for private and family life) in relation to the destruction by fire of villagers' homes, it found that irrespective of whether the houses were set on fire deliberately, or had caught fire as a result of the security forces' intensive firing on the village, the houses were "destroyed by fire resulting from acts of the security forces" and therefore, held the state liable under Article 8.<sup>181</sup> As Lubell rightly notes, this assessment "may have been different when viewed through an IHL lens,"<sup>182</sup> where questions of proportionality would have been weighed against military necessity.

Unpacking the ECtHR's approach to these Kurdish cases is instructive in three key respects. Firstly, given the ECtHR has been unable to adequately address the sheer volume of cases that come before it,<sup>183</sup> there is a limit to which invoking the ECtHR in situations where there are large-scale human rights violations will successfully address the critical issues that arise in situations of internal armed conflicts, in Turkey or elsewhere. Secondly, the ECtHR is powerless to regulate the conduct of Turkish military operations and can only provide for the reparation of violations of individual human

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177. *Gül v. Turkey*, EUR. CT. H.R. ¶82 (2000).

178. See *Ahmet Özkan and Others v. Turkey*, EUR. CT. H.R. ¶319 (2004).

179. *Id.* at ¶297.

180. This is applicable in international armed conflict but also considered customary law for non-international armed conflict.

181. See *Ahmet Özkan and Others v. Turkey*, EUR. CT. H.R. ¶¶405–6 (2004).

182. See Lubell, *supra* note 118, at 743.

183. See Guido Raimondi, *Foreword* to COUNCIL OF EUROPE, ANNUAL REPORT: EUROPEAN COURT OF HUMAN RIGHTS (2016).

rights.<sup>184</sup> Finally, in either ignoring IHL or applying IHL principles to interpret specific situations (without referring to them by name) these cases clearly map out the potential risks and clashes between the two bodies of law.

## 5. CONCLUSION

While the military assault continues in Southeast Turkey,<sup>185</sup> law has indeed become the surface over which Erdoğan's wars are being waged. The push and pull between political and legal narratives cascades into a performance of sorts where law's gatekeepers struggle to sever and states endeavour to fuse the "nexus between violence and law."<sup>186</sup> While this article has examined these legal and political contestations against the backdrop of Turkey's war on the Kurds, the Turkish case is, of course, not unique. The proliferation of armed conflicts globally presses up against international humanitarian law and human rights law frameworks. As these mechanisms endeavour to respond by finding new and better ways to fill legal gaps, States, in turn, craft zones of exception, "a no-man's land between public law and political fact."<sup>187</sup> Just how justified the despair of law's force to regulate armed conflict or how possible it will be to hold Turkey to account in international legal arenas remains to be seen. What is clear, however, is that the *auctoritas* (authority) and the *potestas* (power)<sup>188</sup> are bound as one in the charismatic authority of Recep Tayyip Erdoğan, who has made the state of exception the rule in Turkey, transforming the juridico-political system into "a killing machine."<sup>189</sup>

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184. Aisling Reidy, Françoise Hampson & Kevin Boyle, *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey*, 15 NETH. Q. OF HUM. RIGHTS 161 (1997).

185. See *Turkey: Crackdown on Kurdish Opposition*, HUM. RTS. WATCH (Mar. 8, 2008), <https://www.hrw.org/news/2017/03/20/turkey-crackdown-kurdish-opposition> [https://perma.cc/V2MW-X3E9].

186. GIORGO AGAMBEN, *STATE OF EXCEPTION* 88 (Kevin Attell trans., 2005) (2004).

187. *Id.* at 1.

188. See *id.* Agamben engages these two concepts to draw parallels to contemporary times. Agamben defines *auctoritas* as, "the power to suspend or reactivate the law, but is not formally in force as law" and locates this in the figure of authority. *Auctoritas* is an attribute not of law, but of life itself and is originally derived from the people of the republic, later from the person of the emperor. *Id.* at 79. *Auctoritas* exists in a binary relationship "at once of exclusion and supplementation" to *potestas*, which is defined as the magistrate's power to execute the law. *Id.*

189. *Id.* at 86.