


# A Collective Failure to Prevent Turkey's Operation 'Peace Spring' and NATO's Silence on International Law

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Published on October 14,  
2019

Since last week Turkey has been using massive military force in Syria. Turkey has decided to call her military operation 'Peace Spring'. 'Peace Spring' seems to be even more extensive than 'Olive Branch', Turkey's preceding invasion of Syria. 'Peace Spring' has already resulted in the flight of tens of thousands of civilians. Worldwide, observers fear that 'Peace Spring' could lead to a humanitarian catastrophe in Syria, a country whose people have been suffering from unspeakable pain for many years now. There is also widespread fear that the so-called 'Islamic State' could benefit from 'Peace Spring' as the use of force is being directed against precisely those Kurdish forces that had helped keeping the 'Islamic State' at bay. It thus appears that a depressingly large number of indications suggest that the name 'Peace Spring' is a cynical euphemism for a brutal military course of action possibly ending in a bloody disaster.

In her letter to the United Nations, Turkey invokes her right of self-defence, as recognized in Article 51 of the UN Charter, 'to counter' an 'imminent terrorist threat'. The 'facts' that Turkey refers to in this letter are essentially those:

'In particular, PKK/PYD/YPG units close to Turkish borders in the north-east of Syria, continue to be a source of direct and imminent threat as they opened harassment fire on Turkish border posts, by also using snipers and advanced weaponry such as anti-tank guided missiles.'

Under international law, the right of self-defence exists if an armed attack against another State occurs. In such a case, cross-border defensive forcible action is permissible to the extent that the action is necessary and proportional to counter the attack. The existence of a right of anticipatory self-defence has long been controversial. An arguable case can be made that such a right exists if an armed attack against a State is imminent. It is also a matter of fierce debate whether a right of self-defence exists in case of a non-State armed attack and whether it may justify forcible defensive action on the territory of another State. An arguable case can be made that such a right exists where a State is either unwilling or unable to prevent a non-State group from conducting a large-scale cross-border armed attack from the territory of that State – under strict conditions of proportionality.

Even on the basis of such a broad understanding of the right of self-defence, which is being fiercely rejected by a significant number of States and by a significant number of highly respected international lawyers as being unduly permissive, it is impossible to see how Operation 'Peace Spring' could be justified under international law. The alleged 'harassment fire' by Kurdish units is being referred to in the Turkish letter in such a

vague form that it is almost impossible to be verified. Even assuming there had been cross-border Kurdish 'harassment fire' at some point or points in the past, it is not apparent how this could reach the intensity threshold for a non-State armed attack. Even less is it apparent how Turkey's massive use of force could be necessary to counter such 'harassment fire'. No surprise then that Turkey neither uses the crucial legal term 'armed attack' in her letter nor claims that she has taken action in response to an (ongoing) armed attack. Rather, Turkey essentially rests her case on the need 'to counter an imminent terrorist threat'. But her letter does not even begin to substantiate her claim that, at the material moment in time, a cross-border armed attack by Kurdish forces was imminent.

It is worth emphasizing that Syria and the international community have not been insensitive to Turkey's security concerns. This is evident from the 1998 Adana Agreement. But Turkey's reference to this agreement in her letter to the United Nations is simply misleading. Annex 4 of this agreement, whatever its correct interpretation otherwise is, confines any conceivable necessary Turkish 'security measures' to an area '5 km deep into Syrian territory'. Operation 'Peace Spring' not only goes far beyond, but seems even be driven by the aim of effectuating a population exchange.

There is the very serious possibility that Operation 'Peace Spring' could constitute a manifest violation of the prohibition of the use of force. There is reason to believe that the Turkish President, by giving and maintaining the order for 'Peace Spring', could have incurred and could continue incurring individual criminal responsibility for a crime of aggression, as defined in Article 8*bis* of the Statute of the International Criminal Court. Pursuant to Article 15*ter* of the Statute, the Court could open a preliminary investigation if the Security Council decided to refer the situation to the Court in accordance with Art. 13(b) of the Statute.

Serious questions must, however, also be asked of NATO and its Member States. Turkey is part of NATO and she has not begun Operation 'Peace Spring' out of the blue. Quite to the contrary, for several long days Turkey kept publicly announcing that her use of force would soon begin. It is commendable that many States, including NATO members, warned Turkey not to conduct the announced operation. But international law was absent from those public warnings. To the best of my knowledge, Turkey's NATO partners did not ask her to explain to the international community in a verifiable manner how the massive use of force she was announcing could be justified in view of the prohibition of the use of force under international law. Even when Operation 'Peace Spring' had begun, NATO partners left it to Syria's President to invoke international law – to the same Syrian President who has been under suspicion for years of having incurred individual criminal responsibility for the commission of crimes under international law against civilian populations in Syria. Last week, the only "Western" States that referred to international law, were Cyprus, Greece, Liechtenstein, and Switzerland. It is to be considered a collective failure to prevent that most NATO Member States refrained from publicly referring to the prohibition of the use of force before Operation 'Peace Spring' began.

Most recently, the Turkish President has shamelessly threatened the European States that he would open the gateway for refugees in their direction should those States criticize Operation 'Peace Spring' in legal terms. I do not ignore that this creates a difficult dilemma for decision-makers. But let us not forget that the introduction of the prohibition of the use of force in the UN Charter constituted a historic achievement. The International Court of Justice has rightly characterized this prohibition as a cornerstone of the current international legal order. To remain silent in a case where this prohibition appears to be challenged to its core, means risking that this cornerstone begins to falter.