The Turkish Operation in Afrin (Syria) and the Silence of the Lambs

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Operation Olive Branch

On 20th January 2018, the Turkish military started to attack the Kurdish-populated region of Afrin in Syria ("Operation Olive Branch"). With its letter to the Security Council of 22nd January 2018, Turkey justified this action as self-defence in terms of Art. 51 UN Charter. The relevant passage of the letter is: "[T]he threat of terrorism from Syria targeting our borders has not ended. The recent increase in *rocket attacks and harassment fire directed at Hatay and Kilis provinces of Turkey from the Afrin region of Syria, which is under the control of the PKK/KCK/PYD/YPG terrorist organization*, has resulted in the deaths of many civilians and soldiers and has left many more wounded." (UN Doc. S/2018/53; emphasis added). Two elements are troublesome in this official Turkish justification.

Non-state armed attacks?

First, it is controversial whether armed attacks of the YPG, a non-state actor, suffice to trigger self-defence in terms of Article 51 UN Charter and underlying customary law. The current law (both Charter-based and treaty-based) is in flux, and still seems to demand some attribution to the state from which the attacks originate. (See for a collection of diverse scholarly opinion, ranging from "restrictivists" to "expansionists": Anne Peters, Christian Marxsen (eds), "Self-Defence Against Non-State Actors: Impulses from the Max Planck Trialogues on the Law of Peace and War", *Heidelberg Journal of International Law* 77 (2017), 1-93; SSRN-version in Max Planck Research Papers 2017-17).

The ICJ case-law has not fully settled the question (see for state-centred statements: ICJ, *Oil platforms* 2003, paras. 51 and 61; ICJ *Wall opinion* 2004, para. 139). In *Congo v. Uganda* the ICJ explicitly refrained from deciding it but implied that – if at all – self-defence was available only against "large scale attacks" of a non-state armed group (ICJ *Congo v. Uganda* 2005, para. 147).

Interestingly, Turkey in its letter does not even use the term "armed attack" which is required by Article 51, but relies on the "threat of terrorism" and the *lack of control* by Syria in the Afrin region. This is reminiscent of the German explanation of its military contribution to the collective self-defence of Iraq and France in its 2015 letter to the Security Council: "ISIL has occupied a certain part of Syrian territory *over which the Government of the Syrian Arab Republic does not at this time exercise effective control*." (UN Doc. S/2015/946). It may also be recalled that Turkey, in 2015, was one of only four states which relied on the unable or unwilling-doctrine to justify strikes against IS in Syria: "It is apparent that the regime in Syria is *neither capable* of *nor willing* to prevent these threats emanating from its territory, which clearly imperil the security of Turkey and the safety of its nationals." (UN Doc. S/2015/563). To conclude, Turkey seems to imply that either non-state armed attacks by YPG would be sufficient to trigger self-defence directly, or that the lack of Syrian control, its inability to prevent rocket strikes and fire by YPG across the Turkish border, are sufficient to justify Turkey's use of force which inevitably also affects Syrian territorial integrity and sovereignty.

Threshold of gravity

Second, another condition of lawful self-defence seems not to be fulfilled. In order to qualify as an armed attack in terms of Art. 51 UN Charter, the asserted attacks would have needed to surpass a threshold of gravity in scale and effect.

In the 1986 Nicaragua judgment, the ICJ distinguished between 'the most grave forms of the use of force' and 'other less grave forms' of the use of force (ICJ, *Nicaragua* 1986, para. 191).

According to the Court, only the most grave forms constitute an armed attack apt to trigger self-defence. The famous Nicaragua gap has the legal consequence that "less grave forms" of military force – although violative of Art. 2(4) UN Charter – will not be answerable by lawful self-defence. Whether one believes that the Nicaragua gap is helpful to serve the policy objective of preventing escalation of military violence or not, the gap still seems to be good law.

The point where the threshold of an armed attack is reached cannot be measured with mathematical precision. More than 3.000 deaths as in the 9/11 attacks surely count as equivalent to an inter-state military armed attack. And maybe also more than one hundred victims as in the Paris attacks by IS in November 2015 are big enough in scale and effect. In any case, the burden of substantiation and of proof for the alleged armed attack falls on the state which claims self-defence (ICJ, *Armed Activities in the Territory of the Congo* (2005), para. 146).

According to international news reports, Turkey has not substantiated its allegation. Indeed, there was rocket fire causing some casualties from Afrin across the border, but the strikes seem to have occurred *after* the Turkish invasion. It therefore seems that (whichever position we espouse in the controversy about non-state authors), an armed attack which would be apt to trigger self-defence, has not been shown. The further requirements of necessity and proportionality also do not seem to be met, especially not in the event of an extension of the operation to further regions, as the Turkish President already announced.

Finally, no other justification of the use of force is in sight, notably no invitation by the Syrian government. To the contrary, Syria protested against the strikes (Hazem Sabbagh, Syria strongly condemns Turkish aggression on Afrin, Syrian Arab News Agency, 20 January 2018). This official statement would have to be taken at face value. Any possible secret arrangement and tacit approval by Syria could not count as valid consent under international law. To conclude – on the basis of the facts known to me – we here face a rather obvious violation of international law.

Silence

All the more troublesome is the general silence with which this unlawful act is greeted. The Kurds had, according to newspaper reports, already before the 20th January, when the Turkish offensive became imminent, asked the international community for help (Neue Zürcher Zeitung of 19 January 2018). But not even verbal support came forward. Most states reacted in a non-committal. The United States said they were "very concerned" (USA, Press statement, The Situation in Northwest Syria, Heather Nauert, Department Spokesperson, 21 January 2018).

The German foreign ministry saw the events unfold "with concern" (Press release of 21 January 2018). France, calls on the Turkish authorities to act with restraint" (Press statement, Telephone conversation between Jean-Yves Le Drianand his Turkish counterpart, Mr Mevlüt Çavuşoğlu, 21

January 2018). One state which found clear words is Egypt which considered the Turkish strikes "as a new violation of Syria's sovereignty". Neither the UN Security Council (special session of 22 January 2018), nor NATO, nor the OSCE issued an official statement.

The reasons for silence might be manifold: Geostrategic concern for shielding Turkey as the Eastern flank of NATO; reliance on Turkey in the fight against IS; the fear of losing voters with Turkish ethnic background in Western European states; economic interests in arms exportation to Turkey; or the desire to do or to continue doing basically the same as Turkey is doing right now.

Repercussions for the international legal order

But this silence will have repercussions on the international legal order. As mentioned above, neither the UN Security Council nor any other international organisation nor powerful states have clearly denounced the Operation Olive Branch as what it is: As a blatant violation of a fundamental principle of international law. In terms of fairness, this is all the more deplorable as the victims are Kurdish populations which have in the course of the last decades often been left standing in the rain during the armed conflicts of the region.

As a matter of legal policy, we need to concede that the law of self-defence should respond to novel threats and accommodate legitimate security interests of states and their populations. In technical terms, an expansive interpretation of the Article 51 UN Charter, whose wording is open, would be possible. Arguably, what matters from the perspective of the victim is the gravity of the attack and not the attacker. It therefore seems legally possible and also appropriate to modify the traditional attribution criteria (which have been developed for purposes of state responsibility) for identifying an armed attack. This is also the course which state practice seems to take. However, doing away with any link to the state from which the attack originates (in our case Syria) might go too far. First, such a legal construct can hardly well explain the inroads into the territorial sovereignty of an "innocent state". (I am not saying here that Syria *is* an innocent state).

Second, and most importantly, opening the door of Art. 51 UN Charter to "the threat of terrorism", as the Turkish letter has it, carries a huge potential for escalation of violence and for abusive invocations of self-defence. This has been highlighted as recently as 2016 (in cognisance of the Anti IS operations in Iraq and Syria) by the nonaligned states which "reject[ed] actions and measures, the use or threat of use of force in particular by armed forces, which violate the UN Charter and international law (…) under the pretext of combating terrorism" (Final Document of the 17th Summit of Heads of State and Government of the Non-Aligned Movement, 17-18 September 2016, para. 258.34).

The Turkish offensive against Afrin is an example for an aberrant invocation of the inherent right to self-defence. Not protesting against this false legal assertion might in the future fall back on the feet of those states which now fail to denounce the violation of international law and prefer to shut up. It is a silence which will facilitate them falling victim to unlawful trans-border violence at some point, too.