

# BOFAXE

## IN DUBIO CONTRA BELLUM (PART 2)

### Why the Prohibition to Use Force will survive Turkey's Operation Peace Spring

— In the first part of this BOFAX, we provided some general thoughts on how international custom can change through violations of rules and reactions of the international community. In this second part, we address states' reactions to Turkey's military operations in Syria and reflect on what they entail for the status and content of the prohibition on the use of force.

In the case of "Operation Peace Spring" the reactions [were](#) diverse. The Turkic Council [welcomed](#) Turkey's operation. However, most other states took an opposing stand. Liechtenstein [condemned](#) operation "Peace Spring" in clear legal terms, labelling it an aggression. The Cypriot Minister of Foreign Affairs [called](#) the operation a "gross violation of international law and of the United Nations Charter". The largest number of those states that reacted chose not to use clear and explicit legal terminology for their condemnation. The German Foreign Minister [condemned](#) the operation "in the strongest possible terms" and held that Germany saw no basis in international law for the operation to be "legitimate". The Australian Prime Minister ["condemn\[ed\] Turkey for its invasion"](#), as did [Belgium](#) and others. The Ukrainian Ministry of Foreign Affairs expected Turkey to "adopt the decisions that will contribute to resolving the security and humanitarian problems [within the international legal framework](#)." Other states employed an even more careful language, expressing worries and concerns to urge Turkey to find a non-military solution (see for example [China](#), [Latvia](#) and [Ireland](#)).

What is the legal significance of the reactions with regard to the prohibition on the use of force and the exception of the right to self-defence? It is clear for those statements that expressly condemn Turkey's intervention as *violation*. Unequivocal condemnations not expressly based on legal considerations however are more difficult to assess. They require interpretation ([comments to Draft Conclusion 10](#)). We argue that in order to do so in a manner adequate to the events and the law governing these events, one should take into account the nature and the value of the prohibition to use force and the right to self-defence.

As far as the right to self-defence is concerned, it is an exception to the prohibition on the use of force. Exceptions to any prohibition must be construed restrictively. This interpretive rule of caution is found in early ([PCIJ, Nationality Decrees Issued in Tunis and Morocco](#), at 25), as well as more recent ([ECtHR, Litwa v. Poland](#), at para. 59) international jurisprudence. The ratio is that the norm's validity claim must not be mitigated by an (overly broad understanding of an) exception. In consequence, we argue that reactions of the international community to an obviously unjustified invocation of an exception must be understood in a way that does justice to the norm's validity claim. Unless the reactions are expressly commending the use of force, they should be understood as seeking to prevent an expansion of the exception. The more important the respective norm is, the less it matters *how* members of the international community condemn its violation in terms of legal precision. If there is condemnation, this condemnation must – for the sake of preserving the norm – be understood to qualify the respective action as illegal.

Moreover, the need to apply such an interpretive "rule of doubt" to reactions to unjustified uses of force also flows from the rule's *ius cogens* character. Article 53 of the Vienna Convention on the Law of Treaties defines a peremptory norm as a norm from which the international community of states as a whole considers no derogation possible. Put positively, *ius cogens* norms express an exceptionally high validity claim. Thus, when states criticise a violation of *ius cogens* without expressly calling it a violation of law, we argue that such criticism should still be interpreted in a way that upholds the norm.

In the current situation, it is clear that political considerations led those states who did not expressly invoke the prohibition to use force to do so. After all, Turkey is a member of NATO and [threatened](#) to "open the doors" and send the Syrian refugees into the European Union. Still, one should be careful to assume that even these states do not want to hold on to a strict prohibition on the use of force. In fact, when seen in the light of the importance of the prohibition, their criticism constitutes a compromise between their *opinio juris* and political necessities that prohibit them from expressing it in the desired unambiguous way.

To be clear: We do not claim to take violations of international law lightly – especially when the violated norms are of crucial importance to international peace. Violations of international law must always be condemned in the clearest way possible. However, if States phrase disapproval more carefully for reasons of (perceived) political necessities, this does not necessarily signify the beginning of the end of a prohibition or even just a new understanding of the rule in question. More awareness in that respect can contribute to upholding the rule in the face of violations, safeguarding its validity and in the process sharpening its contours.

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