

BOFAXE

COLLECTIVE SELF-DEFENCE OR JUST ANOTHER INTERVENTION? (Part 2)

Some Thoughts On Turkey Allegedly Sending Syrian Mercenaries to Nagorno-Karabakh

Does Turkey meet the criteria set out in *Nicaragua*?

When determining the existence of an armed attack against Azerbaijan, the first problem arising is one of evidence. While there is evidence that both States launched attacks against one another, both Armenia and Azerbaijan blame the other party for initiating the conflict. As argued on this blog before (see [here](#)), none of the incidents in late September were able to meet the high threshold of an armed attack, although by now, the ICJ's "scale and effect" threshold (see [here](#) at 195) might arguably have been met. Alternatively, one could argue that, by occupying the Nagorno-Karabakh region and by continuously violating Azerbaijan's territorial integrity, Armenia is still conducting an armed attack today. Indeed, the military occupation of another State's territory is considered an act of aggression under customary international law, reflected in [General Assembly Resolution 3314 \(XXIX\)](#). Additionally, the Security Council issued four resolutions (see [here](#), [here](#), [here](#) and [here](#)) reaffirming the territorial integrity of Azerbaijan and demanding the immediate withdrawal of Armenia from all occupied areas of Azerbaijan. Hence, an armed attack is arguably (still) present.

Additionally, for the existence of a right to collective self-defence, a declaration and request by Azerbaijan, asking Turkey for aid in exercising the right to self-defence, is also required. As the ICJ emphasized in *Nicaragua*, "there is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation." Azerbaijan, in multiple letters addressed to the UN Secretary-General, declared it was under an armed attack by Armenia and invoked self-defence (see [here](#) and [here](#)). Moreover, Azerbaijan called on the United Nations and its Member States "to take decisive steps to force the aggressor Armenia to comply with international law and bring it to account" (see [here](#)). Regarding the relations between Azerbaijan and Turkey, a 2010 Agreement on Strategic Partnership and Mutual Support (see [here](#)) governs the defence cooperation between the two States. It includes that the countries will help each other if either one invokes its right of self-defence under Article 51 UN Charter. This cooperation agreement in addition to Azerbaijan's declarations and calls for "decisive steps" strongly indicate that both the declaration and request criteria have indeed been fulfilled.

Consequently, the existence of Turkey's right to collective self-defence in the present conflict is not *prima facie* unrealistic. However, this does not mean that Turkey's actions constitute a lawful exercise of collective self-defence, especially considering that Article 51 UN Charter sets out additional criteria to this end. Indicatively, Turkey has disregarded the obligation to immediately report to the Security Council (see [here](#) at 145). Furthermore, Turkey has openly declared that the newest cease-fire was merely a "temporary solution" and that it would continue to support Azerbaijan on the battlefield. By violating the cease-fire and not striving for a permanent and peaceful solution, Turkey exceeded the limits of necessity and proportionality.

The role of the Security Council and the OSCE Minsk Group

Under Article 51 UN Charter self-defence is allowed until the Security Council takes "measures necessary to maintain international peace and security". It is questionable whether the Security Council resolutions and the referral of the conflict to the OSCE Minsk Group qualify as measures triggering this "until clause". While the resolutions are binding under Article 25 UN-Charter (see [here](#) at 113), they are not enforceable, as no reference to Chapter VII was made therein. The Security Council opted for a referral of the conflict to the OSCE Minsk Group, instead. The OSCE is a regional organization that operates without a binding treaty. Hence, it has no competence to impose sanctions. The efforts put forth by the Minsk Group, including the temporary cease-fire, have shown not to be effective. The crucial question is whether the "until clause" is triggered once the Security Council takes any action (regardless of its nature or success) or once it takes effective action under Chapter VII. The text of Article 51 is open to both interpretations. Considering the drafting history and the inherent character of the right to self-defence, a narrow interpretation is more convincing (cf. [here](#) with further references). Following the narrow interpretation, the referral of the conflict to the OSCE was not convincing and that further measures by the Security Council would have been necessary.

Concerning the legality of mercenaries

Most of all, a worrying question that remains is the implication of Turkey (allegedly) sending foreign mercenaries to Azerbaijan. According to Armenia, this constitutes a violation of "numerous international legal norms, which are binding, including for Azerbaijan and Turkey" (see [here](#)). Indeed, under the [International Convention Against the Recruitment, Use, Financing and Training of Mercenaries](#), to which Azerbaijan is a State party (see [here](#)), using mercenaries in a conflict is prohibited. Turkey, on the other hand, is not bound by the said Convention. Under International Humanitarian Law, mercenaries do not enjoy the status of combatant or prisoner of war (see [here](#)) and using them is not prohibited. Hence, there is no indication that the use of mercenaries *per se* constitutes a violation of international law for Turkey.