

# Turkey's Incursion in Iraq: Why No Legal Consequences?

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## INTRODUCTION

On October 7 and 8, 2007, members of the Kurdistan Workers Party (PKK) killed 13 Turkish soldiers near Turkey's border with Iraq.<sup>1</sup> The following week, Turkey's parliament voted overwhelmingly to approve a military incursion into northern Iraq.<sup>2</sup> On December 16, more than 50 Turkish aircraft attacked Kurdish rebel camps inside Iraq.<sup>3</sup> A few hundred Turkish troops then crossed the border into Iraq.<sup>4</sup> The US government has generally supported the Turkish military against the PKK, which it calls a terrorist organisation. The Iraqi government, however, called the December incursion "interference in our territory", saying there must be a peaceful solution to the Turkey-PKK conflict.<sup>5</sup> Two months later, however, on February 21, between 3000 and 10,000 Turkish soldiers deployed in northern Iraq in Turkey's biggest offensive in over a decade.<sup>6</sup> Turkey claimed that the PKK had killed nearly 40,000 people since 1984, that 3000 rebels were based in Iraqi Kurdistan, and that it had the right under international law to strike the PKK there.<sup>7</sup> The UN urged restraint and respect for Iraq's sovereignty;<sup>8</sup> the EU called on Turkey to demonstrate restraint and "respect human rights and the rule of law"<sup>9</sup>; while the US asked Turkey to limit the offensive to "precise targeting" of Kurdish rebels.<sup>10</sup>

Turkey's actions elicited minimal criticism with respect to international law. Many international stakeholders either criticised the operation or outright condemned it but all tempered their

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<sup>1</sup> BBC News, "Turkish soldiers killed by rebels," *BBC News*, October 7, 2007.

<sup>2</sup> CNN, "U.S. urges restraint after Turkish soldiers killed in clashes with PKK," *CNN*, October 21, 2007.

<sup>3</sup> Sebnem Arsu and Stephen Farrell, "Turkey Bombs Kurds in Iraq; 2 Sides Differ on Casualties," *New York Times*, December 23, 2007.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Reuters, "Turkey launches major land offensive into Northern Iraq," *Reuters*, February 22, 2008.

<sup>7</sup> *Ibid.*

<sup>8</sup> Reuters, "U.N. urges Turkey to respect Iraq's border," *Reuters*, February 22, 2008.

<sup>9</sup> Reuters, "EU: Turkey must avoid disproportionate Iraq action," *Reuters*, February 22, 2008.

<sup>10</sup> Reuters, "U.S. urges Turkey to limit N. Iraq offensive," *Reuters*, February 22, 2008.

negative comments with the recognition that Turkey had been attacked by terrorists. The underlying reason for their equivocal language was their desire to maintain good relations with Turkey. If they had attempted to bring Turkey in front of the UN Security Council or International Court of Justice (ICJ), relations would have been severely strained. As a result, no one did.

This essay will first examine the details of Turkey's incursion into Iraq and the questions of its legality under international law. I do not draw any firm legal conclusions, as there are arguments for and against Turkey's actions. Second, it will consider the messages of international legal actors, in this case the US, the EU, Iraq and others, along with Turkey's justification for the incursion, to determine why, if Turkey did in fact violate international law, no one brought the case before the UN Security Council or the ICJ. My argument is that all actors found it more important to maintain good relations with Turkey than to uphold international law.

## THE INCURSION AND THE LEGAL USE OF FORCE

Between October 2007 and February 2008, Turkey intervened into northern Iraq several times, by air and on the ground. On the face of it, without having been invited by either the Iraqi government or the Kurdistan Regional Government (KRG) of northern Iraq, these acts were illegal. According to UN Charter Article 2(4), Turkey should not have used force against Iraq's "territorial integrity or political independence".<sup>11</sup> There is the chance that Article 2(4) is no longer valid. Legal scholars have been debating for decades whether 2(4) still applies to UN

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<sup>11</sup> Charter of the United Nations, <http://www.un.org/en/documents/charter/chapter1.shtml>.

member states. In 1970, Thomas M. Franck wrote in the *American Journal of International Law* that, due to 100-odd violations since 1945, Article 2(4) was dead.<sup>12</sup> But since that time, there have been many reiterations of the law, and it is clear that, even though it is frequently violated, it still applies.

As if the UN Charter were not enough, the prohibition on the violation of another state's territorial sovereignty has been reinforced by legal decisions and documents since then. In the *Corfu Channel* case of 1949, the ICJ said the UK had no right of intervention into another member state, even though it had been harmed. "The Court can only regard the alleged right of intervention as the manifestation of a policy of force,"<sup>13</sup> and is thus illegal. It stated further that "respect for territorial sovereignty is an essential foundation of international relations."<sup>14</sup> The 1970 Friendly Relations Declaration reaffirms Article 2(4) in the same language as the Charter uses.<sup>15</sup> The 1974 Definition of Aggression repeats and thus bolsters this pledge by describing aggression, yet again, as any "use of armed force by a State against the sovereignty, territorial integrity or political independence of another State".<sup>16</sup>

The supremacy of territorial integrity was upheld in the famous *Nicaragua* case of 1986. The ICJ ruled that the US was "in breach of its obligations under customary international law not to use

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<sup>12</sup> Thomas M. Franck, "Who Killed Article 2(4)? or Changing Norms Governing the Use of Force by States," *the American Journal of International Law*, Vol. 64, No. 4 (Oct., 1970): 809-837.

<sup>13</sup> Peter Malanczuk, "Akehurst's Modern Introduction to International Law," seventh revised edition (New York, NY: Routledge, 1997), 310.

<sup>14</sup> *Ibid.*, 310.

<sup>15</sup> United Nations General Assembly, <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement>

<sup>16</sup> United Nations General Assembly, <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement>

force against another State", "not to intervene in [Nicaragua's] affairs", and "not to violate its sovereignty".<sup>17</sup> An ICJ advisory opinion in 1996 said it considered armed reprisal during peacetime unlawful.<sup>18</sup> Turkey's incursion into Iraq was the use of force in armed reprisal and a violation of Iraq's sovereignty. The prohibition on the use of force is universal and customary law.<sup>19</sup> Therefore, Turkey's incursion into Iraq was illegal under international law.

Except that it might not have been. The first chance for legal intervention not authorised by the Security Council is in the event of state support for terrorism. Would Turkey be within its right to strike northern Iraq if the Iraqi government or KRG had provided safe haven or other assistance to the PKK?

On September 28, 2001, the Security Council decided in strong language that all states must, among other things, "[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts," and "[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens".<sup>20</sup> Since the earlier Resolutions that this one reaffirms, sponsorship of terrorism could consist of simply tolerating the presence of terrorists within one's borders.<sup>21</sup>

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<sup>17</sup> International Court of Justice, *Nicaragua v. United States of America*, June 26, 1986, <http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5>

<sup>18</sup> International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996, 246.

<sup>19</sup> Malanczuk, 309.

<sup>20</sup> United Nations Security Council, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>

<sup>21</sup> Daniel Byman, *Deadly Connections: States that Sponsor Terrorism* (New York, NY: Cambridge University Press, 2005), 222.

But does providing safe haven for terrorists legitimise reflexive invasion? Arab and Non-Aligned states consider that UN Charter Article 51 means self-defense is only permissible in interstate conflict. The interpretation by terrorist-chaser states such as the US, Israel and Turkey, on the other hand, is that guerrillas and terrorists in third party states are legitimate targets under Article 51.<sup>22</sup> Waisberg (2009) explains how difficult it is unravel the argument and charge a state with aggression for pursuing terrorists.

"On the one hand, a third party state failure to act and prevent the presence of terrorist organizations may correspond to the violation of a number of counterterrorism obligations established by Resolution 1373 (2001) and the United Nations Counter-Terrorism Strategy (2006). On the other hand, it is not clear whether a failure to comply with an obligation to prevent and combat terrorism constitutes a sufficient basis of liability for justifying the use of force against the harboring state territory, even if the target of the response taken in self-defense is the terrorist organization."<sup>23</sup>

Can a terrorist attack make Turkey's invasion of Iraq legal? It is still unclear.

After September 11, 2001, the Security Council recognised the US's right to self-defense. Waisberg also notes that this approval of force was at odds with the *Nicaragua* ruling, which stated that intervention is only possible on condition that the state sponsor of the terrorist group is actively supporting the group.<sup>24</sup> Nicaragua's actions did not constitute "an armed attack" on El Salvador, so the collective self-defense argument would not be valid. But did Turkey not suffer an armed attack? The US ousted the Taliban, the government that provided safe haven to al Qaeda. But Turkey did not oust a government; it attacked suspected terrorist bases.

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<sup>22</sup> Tatiana Waisberg, "The Colombia-Ecuador Armed Crisis of March 2008: the Practice of Targeted Killing and Incursion against Non-State Actors Harbored at Terrorist Safe Havens in a Third Party State," *Studies in Conflict & Terrorism* Vol. 32, No. 6 (2009).

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

In justifying the incursion into Iraq, Turkish officials invoked international law. President Abdullah Gul implied in October 2007 that the PKK attacks were violations of Turkey's territorial integrity and the incursion was in designed to protect it. "Those who create, feed and support terrorism" he said, perhaps a veiled reference to the KRG, "should know that no force can stand against the determination of the Republic of Turkey to protect its inseparable integrity",<sup>25</sup> implying that Turkey was the initial victim of violations of international law. He later said Turkey respected Iraq's borders, because it would be illegal not to, but that it would "not tolerate those who help and harbor terrorists",<sup>26</sup> alluding to Iraq's passive support for terrorists, which would make Turkey's threat of force either legal or, at the least, understandable. At the beginning of the major ground operation in February 2008, a military spokesperson said the Turkish army "values Iraq's territorial integrity",<sup>27</sup> possibly because he knew a violation of territorial integrity was what, if anything, Turkey could be charged for under the law; he then said the army would leave Iraq "as soon as planned goals are achieved",<sup>28</sup> as though defending against charges of disproportionality. Finally, he intimated that the incursion would be legal because it would target the terrorist safe haven and restore international peace and security.<sup>29</sup> So Turkey did make some attempt to paint its actions as legal. As Iraq may have been providing a safe haven to a known terrorist group, under Resolution 1373 Turkey may have had the right to invade.

The other exception that might apply to Article 2(4) in this case is self-defense. Article 51 of the

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<sup>25</sup> Reuters, "Kurdish Rebels Kill 13 Soldiers on Turkish Border with Iraq," *New York Times*, October 8, 2007.

<sup>26</sup> CNN, "U.S. urges restraint after Turkish soldiers killed in clashes with PKK," *CNN*, October 21, 2007.

<sup>27</sup> CNN, "Turkey launches major Iraq incursion," *CNN*, February 23, 2008.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.; His actual words were "The executed operation will prevent the region from being a permanent and safe base for the terrorists and will contribute to Iraq's stability and internal peace."

UN Charter enshrines the right of a state to defend itself against armed attack. It states that such self-defense could continue until the Security Council takes measures to restore security. In this case, the Security Council took no such measures. In a few cases in the past, the Security Council's failure to act has been construed as tacit approval to use force.<sup>30</sup>

Turkey seems to have been the victim of an armed attack. What kind of armed attack is it permissible to counter with the self-defense argument? The *Nicaragua* case introduced a threshold, so for instance a "mere frontier incident" would not count as armed attack.<sup>31</sup> (Ruys, 349.) Some scholars and judges consider that invoking self-defense under Article 51 is so perilous that only massive assaults should qualify, whereas others suggest that a high threshold is impractical and small attacks should permit self-defense.<sup>32</sup> Tom Ruys believes that the deliberate nature of the PKK attacks, the 150 PKK fighters involved, 13 Turkish soldiers dead and eight more kidnapped, constitutes more than a frontier incident, and that the "armed attack" requirement was met.<sup>33</sup>

But it is not clear if Article 51 applies only to armed attacks by other states, or if self-defense is legitimate against terrorists. The apparent permission given by Security Council Resolutions 1368 (2001) and 1373 (2001) for the US to invade Afghanistan may make it so. In addition, norms may be changing. While international law is positive and not regressive, meaning even

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<sup>30</sup> Oscar Schachter, "Self-Defense and the Rule of Law," *the American Journal of International Law* No. 83 (April 1989): 264.

<sup>31</sup> Tom Ruys, "*Quo vadit jus ad bellum?*: a legal analysis of Turkey's military operations against the PKK in northern Iraq," *Melbourne Journal of International Law* Vol. 9, No. 2 (2008): 349.

<sup>32</sup> *Ibid.*, 349.

<sup>33</sup> *Ibid.*, 350.



custom cannot make something once illegal legal, interpretation of that which can be interpreted may vary with time. The Turkish incursion into Iraq, like the Colombian incursion into Ecuador barely weeks after Turkey withdrew from Iraq, like the Israeli attack on Lebanon in 2006, is a case of state practice that promotes a more flexible understanding of the employment of self-defense against non-state actors.<sup>34</sup> That said, there was no explicit legal justification for Turkey's actions, and third states were generally mute on the subject. As such, it is "difficult to identify the *opinio juris* implicit in the Turkish precedent and may also indicate that states feel uncomfortable about setting new precedents."<sup>35</sup> So the question of self-defense against attacks by non-state actors is still not clear, and this is where we will leave it.

One final legal point, however. Article 51 also states that, when exercising self-defense, Turkey should have immediately reported its actions to the Security Council. It did not.<sup>36</sup> Why not? It is possible Turkey did not consider itself to be acting in self-defense.<sup>37</sup> However, the question may in fact be irrelevant. Determining legality and culpability is not the same as determining if the offending party will be prosecuted. And Turkey was not prosecuted.

## THE INCURSION AND INTERNATIONAL REACTION

I hold that the reason Turkey was not prosecuted was that any actor that had the authority or ability to aid in prosecuting Turkey felt that remaining on good terms with it was more important

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<sup>34</sup> Ibid., 359.

<sup>35</sup> Ibid., 359.

<sup>36</sup> Ibid., 345.

<sup>37</sup> Ibid., 348.

than charging it with aggression. In other words, good relations with Turkey are more important than the law.

For its own part, the Turkish government, as we saw above, did make some public appeals to international law. Other governments showed sympathy for Turkey in the wake of the initial attacks in October. For example, an official statement by the EU president issued a "total condemnation of the terrorist violence perpetrated by the PKK in Turkish territory".<sup>38</sup> Strong language, strong support for Turkey. Security Council Resolution 1787 (2007) was passed one and a half months later condemning all terrorism and reminding states that they must take all possible action to fight it.<sup>39</sup> Admittedly, it did not mention Turkey or Iraq by name, but it applied as much to them as anyone. As such, it may have been an implicit poke at Iraq and the KRG for not having tackled the PKK beforehand.

After Turkey's December air attacks on PKK strongholds in Iraq, it faced warnings, but not legal action. Iraq was clearly against threats to its territorial integrity, but did not threaten legal action. In September 2007, Iraq signed a security agreement with Turkey that said that, while it pledged to prevent financing and support for the PKK, it did not grant Turkey the right to enter Iraqi soil.<sup>40</sup> After the attacks on Turkey in October, the prime minister of Iraq promised to "take serious measures" against the PKK, including shutting down its offices.<sup>41</sup> If it had always been

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<sup>38</sup> President of the European Union, [http://www.eu2007.pt/UE/vEN/Noticias\\_Documentos/Declaracoes\\_PESC/20071022PESCPKK.htm](http://www.eu2007.pt/UE/vEN/Noticias_Documentos/Declaracoes_PESC/20071022PESCPKK.htm).

<sup>39</sup> Security Council of the United Nations, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/634/39/PDF/N0763439.pdf?OpenElement>.

<sup>40</sup> BBC News, "Turkey-Iraq agree security pact," *BBC News*, September 28, 2007.

<sup>41</sup> Xinhua, "Iraq promises co-op with neighbors to combat PKK threats," *Xinhua*, November 3, 2007.

capable of doing so, Iraq may share some of the blame for the attacks on Turkey under the safe haven arguments looked at above. At various times, Iraqi officials demanded Turkey respect Iraq's territorial integrity while condemning the PKK in the same breath.<sup>42</sup> Iraqi Foreign Minister Hoshiyar Zebari, a member of the Kurdish Democratic Party, spoke vaguely of the harm unilateral action by Turkey could do to Iraq-Turkey relations. At the same time, he noted that the Turkish raids had been in sparsely populated areas.<sup>43</sup> Was he really saying that the Turkish air force could enter Iraq when it liked, as long as it only bombed fields? No, he was tempering his language in order not to offend Turkey. Zebari understood that Turkey would pursue the PKK no matter what he said about it, and knew that, in the interest of their relationship, it was preferable not to criticise Turkey too stringently. For this reason, he said in the same press conference, "we fully understand the legitimate concern Turkey has over the PKK terrorist activities against them".<sup>44</sup>

As Turkey became more heavily involved in northern Iraq after Turkish ground troops invaded on February 21, calls to respect Iraq's sovereignty and the rule of law came in. But tellingly, most censure of Turkey's incursion was, like Zebari's comments, not harsh, or was equivocal. On February 22, the UK said "[w]e would urge Turkey to withdraw from Iraqi territory as early as possible and take the greatest possible care to avoid causing harm to the civilian population".<sup>45</sup> Hardly threatening language, and no appeal to international law. Russia called for "respect for the sovereignty and territorial integrity of Iraq"--note the language of the UN Charter--but said it

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<sup>42</sup> Julian Borger, "Turkey to pull out of Iraq in days as US calls for swift end to conflict," *the Guardian*, February 28, 2008.

<sup>43</sup> BBC News, "Turkey defends incursions in Iraq," *BBC News*, December 19, 2007.

<sup>44</sup> Ibid.

<sup>45</sup> Reuters, "UK urges Turkey to leave Iraq as early as possible," *Reuters*, February 22, 2008.

was equally important "not to allow the territory of any state to be used as a staging ground for terrorist activities against their neighbors."<sup>46</sup> The Russian foreign ministry was, without knowing it or not, giving Turkey an argument for the incursion's legality: Iraq may have been a safe haven for terrorists. The EU, concerned about both international law and regional stability, said "we think this action is not the best response. The territorial integrity of Iraq is for us very important." These are not the words of an organisation that is about to take Turkey to the International Criminal Court but rather, those of an organisation still considering admitting Turkey as a member.

The EU continued expressing its concern for the operation as it rolled on. "While recognizing Turkey's need to protect its population from terrorism, the Presidency calls on Turkey to refrain from taking any disproportionate military action and to respect Iraq's territorial integrity, human rights and the rule of law. It also calls on Turkey to limit its military activities to those which are absolutely necessary for achieving its main purpose - the protection of the Turkish population from terrorism."<sup>47</sup> In the same statement, it called on the governments of Iraq and Iraqi Kurdistan not to let the area become a safe haven, once again harking back to our idea that at least some measure of self-defense may be legal in this case.

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<sup>46</sup> Mark Bentley, "Turkish Army Begins Ground Assault on PKK in Iraq," *Bloomberg*, February 22, 2008.

<sup>47</sup> President of the European Union,  
[http://www.eu2008.si/en/News\\_and\\_Documents/CFSP\\_Statements/February/0225MZZturkey.html](http://www.eu2008.si/en/News_and_Documents/CFSP_Statements/February/0225MZZturkey.html).

The US never condemned the operation.<sup>48</sup> Its popularity in Turkey had collapsed with the 2003 invasion of Iraq and subsequent autonomy for Iraqi Kurdistan.<sup>49</sup> The Bush administration had largely ignored Turkey's concerns over the Kurds for four years.<sup>50</sup> Turks considered the resurgence of the PKK a consequence of the US invasion of Iraq.<sup>51</sup> While it warned Turkey against excessive military action, it assured it would take steps against the PKK.<sup>52</sup> The US government said it was "coordinating with the Turkish and Iraqi authorities in the area", sharing intelligence.<sup>53</sup> Though US officials urged restraint<sup>54</sup> and spoke of American interest in Iraq's stability,<sup>55</sup> the only words that could have had an effect were those from the White House near the closing of the operation. On February 28, both George Bush and his Defense Secretary Robert Gates urged Turkey to hurry and end its operation and leave Iraq. On the following day, it did.<sup>56</sup> In order, presumably, to save face, Turkey denied it was foreign pressure that pushed it out, and said it left Iraq because the operation had succeeded.<sup>57</sup> It felt no more reason to invoke international law or otherwise defend its actions.

Iraq's government appealed to Turkey to end the breach of its sovereignty, but did not do so in particularly harsh terms. It did not refer the case to the Security Council or the ICJ. It may have borne some measure of guilt for its toleration of PKK bases within its territory. But Turkey never

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<sup>48</sup> BBC News, "Iraq denounces Turkish offensive," *BBC News*, February 26, 2008.

<sup>49</sup> Peter W. Galbraith, *Unintended Consequences: How War in Iraq Strengthened America's Enemies* (Simon & Schuster, 2008), 87.

<sup>50</sup> *Ibid.*, 101.

<sup>51</sup> *Ibid.*, 102.

<sup>52</sup> *Ibid.*, 101.

<sup>53</sup> BBC News, "Turkey defends incursions in Iraq," *BBC News*, December 19, 2007.

<sup>54</sup> BBC News, "Iraq denounces Turkish offensive," *BBC News*, February 26, 2008.

<sup>55</sup> Al Jazeera, "Turkey continues raids into Iraq," *Al Jazeera*, December 24, 2007.

<sup>56</sup> CBS News, "Turkey Leaves Iraq After U.S. Pressure," *CBS News*, February 29, 2008.

<sup>57</sup> ABC News, "Turkey denies US pressure influenced withdrawal," *ABC News*, March 1, 2008.

directly blamed the Iraqi government and, indeed, continued to pursue security relations with it during the crisis. Both states wanted to maintain good relations, if for no other reason than security. EU spokespeople asked Turkey to respect the rule of law, but did not want to alienate a prospective member. They have pressured Turkey since then about Kurdish rights, but have not taken any legal action. The US clearly did not consider international law a priority or it would have appealed to it from the start. The Bush administration was keen to use this situation to strengthen its tattered relations with Turkey, even despite its large interest in Iraq's stability and sovereignty.

After the troops left, the criticism dried up. International peace and stability were restored. Of course, journalists, NGOs and scholars censured the Turkish military and government for the operation, but they have no power to enforce the law. Unless they can pressure governments into forcing compliance, which they did not, international law will have no effect.

## CONCLUSION

We cannot infer from one case that all *ius ad bellum* is useless; Turkey is a unique case among many. We can, however, conclude that international law is not sufficiently powerful that it can deter or punish all violations of Article 2(4). As we have seen, international law was barely even evoked as a basis for criticism of Turkey's incursion.

States would have derived little obvious benefit from charging Turkey with violating Article 2(4), and if they had done so they might not even have been successful. There was no real reason to attempt to prosecute Turkey besides generally believing in the rule of law. States seemed to have calculated that criticising Turkey for potentially violations of the law were enough, as they then spoke conciliatorily about the need for Turkey to combat terrorism. Our conclusion, therefore, must be that, as important as international law is to states, there are some things far more important in the short term.

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