Turkey’s Trans-Border Operations in Northern Iraq: Before and after the Invasion of Iraq

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Abstract
Northern Iraq provides an area of retreat for the PKK. Turkey carried out trans-border operations into northern Iraq between 1988-1999. Although Iraq applied to the Security Council, this issue never made its way to a Council meeting. Turkey mostly relied on the Resolution 688 and right of self-defence as the legal basis. Since 2003, it is Iraq’s responsibility to stop PKK activities. When it is asked from the US and Iraqi government, both states claim that they are unable to do it due to insecure conditions in Iraq. Turkey persuaded the US for a limited ground operation in 2007, but Turkey would not repeat it without the US’ consent.

The argument of self-defence is still the legal basis defended by the Turkish officials although it is debatable whether the right of self-defence include such action in contemporary international law.

Keywords: Northern Iraq, Turkey, trans-border operations, self-defence, US-Turkish relations

1. Introduction
Turkey’s trans-border operations in northern Iraq must be evaluated within the framework of the rules concerning the use of force by states and intervention.

The United Nations (UN) Charter declared its main purposes in Article 1, and in Article 2, we find the basic principles that light the way for the world organization. Article 2/4 sets out the principle of non-use of force clearly in that:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Paragraph 7 of the same article introduces the principle of non-intervention which complements the principle of non-use of force. According to the paragraph 7, “Nothing contained in the Present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

The General Assembly’s Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty adopted in 1965 provides that “No States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.” Also according to the Article 2 of this resolution, “No state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed
towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.” The only exception to the rule of the prohibition of the use of force is the right of self defence defined at Article 51.

These provisions indicate a fundamental change relating to the rules of international law on the use of force by states. War has been a way of asserting a state’s legal rights and for pursuing national interests for centuries (Cassese, 1988). Even though there were restrictions which were brought in by the customary international law, the Covenant of the League of Nations and the Kellogg-Briand Pact, none of these had put a comprehensive ban on the use of force by states. This is exactly what was done by the Charter of the UN.

Nevertheless, the reality soon proved to be fundamentally different to that anticipated by the founders of the UN. The system of collective security which was supposed to maintain international peace and security never worked as it was expected. In particular, the Security Council has not been effective in enforcing the principles of the Charter outlawing the use of force (Holsti, 1998). We have seen numerous armed conflicts fought between and within states since 1945, the number given for the 1945-1995 era is 164 (De Lupis, 1987).

However no state has radically questioned the Charter system on the use of force. On the contrary, states have formally upheld it. Some states interpret its provisions in a way which widens an individual states’ right to resort to force, but they still believe that the UN Charter provisions is the law. Almost all explanations put forward by the states that have resorted to force are based on the differing interpretations of Articles 2/4 and 51.

If a state suffers from illegal actions originating from another country, it is claimed that this state can resort to force with the aim of preventing or stopping these actions. This right is connected to the states’ duty of preventing hostile activities against another state in their own territory. States are under an obligation of preventing these activities even if they are individual ones (Ozdag, Aydinli, 2003). Here, we have to ask one crucial question: What is going to happen if that state does not have the control of a particular region? It was known that many members of the PKK (Partiya Karkeren Kurdistan in Kurdish, Kürdistan İşçi Partisi) were and still are able to find shelter in northern Iraq. The border between Turkey and Iraq is a very difficult one to hold because of its mountainous terrain and harsh climate conditions. The men of the PKK stay in Iraq during the winter and make preparations for the mild months of spring. It is very easy to infiltrate into Turkey from Iraq and to return to Iraq after completing their planned operations.

Turkey claims that, if Iraq is not able to take necessary measures to stop these incursions then she has the legal right to enter the Iraqi territories in accordance with the right of self-defence. Nevertheless, this stance cannot be easily defended when one examine the current norms on the individual use of force by states and self-defence.

2. The PKK, its Activities and Turkish Responses
2.1. The PKK and its Activities

It is not intended here to explain the history of the PKK, its activities inside Turkey and its evolution as a terrorist organization, but it is intended to describe it briefly, explain how the situation in Iraq and northern Iraq affected operations carried out by Turkey and Turkish responses to the changing conditions in northern Iraq.

The PKK was founded by Abdullah Öcalan in 1974 as a Marxist-Leninist separatist organization and formally named the Kurdistan Workers’ Party in 1978. The group, composed primarily Kurds from Turkey, started its campaign of armed violence in 1984. The PKK’s goal has been to establish an independent Kurdish state comprising the southeast region of Turkey, northern Iraq, and parts of Iran and Syria. Baghdad’s loss of control over northern Iraq due to the Iran-Iraq war (1980-88) provided an area of retreat for the PKK.
During this period, the PKK was able to work in harmony with the Kurdish Democratic Party (KDP). Although Turkey sought to sign a treaty with Baghdad granting Turkey the right to enter ten kilometers into Iraqi territory and to perform operations there, many in Turkey failed to grasp the importance of these rear bases in the years 1983-88.

Consequently, Ankara did not make adequate use of its right to cross-border operations. In 1988, the Iraqi army began pushing north to reestablish its control over the Iraqi territory along the Turkish-Iraqi border, forcing tens of thousands of refugees, including many Iraqi-Kurdish militants, to flee from the area. Baghdad sought permission from Turkey to pursue these militants onto Turkish territory, but Ankara refused permission and did not renew the hot pursuit agreement (which will be examined below) with Baghdad. As Ozdag and Aydinli stated, this was the end of the cooperation on this issue between the two countries.

The General Staff of the Turkish Army adopted a new strategy in 1991 in the struggle against the PKK. Firstly they announced that the armed forces would be taking a more decisive stand in the fighting, using its numerical superiority to reestablish control in the region. To this end some army units were reorganized and trained for the fight against counterinsurgency. Secondly, Turkey resumed cross-border operations into northern Iraq. A five-kilometer wide security zone was set up along the Turkish-Iraqi border which was to be patrolled jointly by Barzani’s KDP and Talabani’s Patriotic Union of Kurdistan (PUK) forces, both of whom wanted to reduce the PKK’s political influence. The largest cross-border operation into northern Iraq on October 12, 1992 came after a major attack by 500 PKK militants on guardhouses in the Şemdinli-Derecik region. The last big attack of the PKK which was launched from northern Iraq was on December 29, 1998 to which Turkey responded by sending a brigade-sized force into northern Iraq (http://www.mfa.gov.tr).

Turkish authorities captured Abdullah Ocalan in Kenya in early 1999, and the Turkish State Security Court subsequently sentenced him to death. In August 1999, Ocalan announced a "peace initiative," ordering PKK members to refrain from violence and requesting a dialogue with Ankara on Kurdish issues. At a PKK Congress in January 2000, members supported Ocalan’s initiative and claimed that the group would now use only political means to achieve its public goal of improved rights for Kurds in Turkey.

In April 2002 at its 8th Party Congress, the PKK changed its name to the Kurdistan Freedom and Democracy Congress (KADEK) and proclaimed a commitment to non-violent activities in support of Kurdish rights. In late 2003, the group sought to engineer another political face-lift, renaming itself Kongra-Gel (KGK) and promoting its "peaceful" intentions while continuing to conduct attacks in "self-defense" and to refuse disarmament. After five years, the group’s hard-line militant wing, the People’s Defense Force (HPG), renounced its self-imposed ceasefire on June 1, 2004. Over the course of the ceasefire, the group had divided into two factions - politically-minded reformists, and hardliners who advocated a return to violence. The hardliners took control of the group in February 2004.

The Democratic Society Party (Demokratik Toplum Partisi-DTP) which is the party representing Kurdish interests was able to enter into the Turkish Parliament with what is considered the low number of only 16 members at the 2007 general elections. When the results of the elections were analysed, it showed that the ruling party in Turkey, the Justice and Development Party (JDP), was able to receive almost half of the votes cast in the predominantly Kurdish regions. It is thought that this result is one of the elements which brought about the subsequent rise in the PKK activities against military targets in the southeastern region of Turkey.

The PKK has been a proscribed terrorist organisation since 1993 in Great Britain and France. The European Union put the PKK, along with its other names of KADEK and Kongra-Gel onto the “List of Terrorist Organizations” in 2004. The PKK is also recognized as a terrorist organization by the United States (http://www.state.gov).
2.2. How Turkey Responded?

The first operation carried out in northern Iraq by the Turkish Army dates back to 1983, and since then Turkey has received Iraq’s permission for further operations in 1986 and 1987. Other earlier operations were explained by the Turkish officials as applications of the right of hot pursuit.

Since the 1990 Gulf War the nature of the Turkish operations has changed. Immediately after the war and following the decision not to topple Saddam Hussein’s regime, huge numbers of Kurdish refugees flowed to the Turkish and Iranian borders. This led to UN Security Council Resolution 688 in April 1991. The Security Council condemned the oppression of the Iraqi civilians, especially in Kurdish populated areas, which it said threatened international peace and security in the region. It demanded that Iraq end the oppression and insisted that international humanitarian organizations be granted immediate access to those in need in the country. Finally, it appealed to all member states and humanitarian organizations to contribute to relief efforts. However, the Council did not state anywhere that it was acting pursuant to Chapter 7 of the Charter, a formulation often used by the Council often when coercive measures are being authorized.

Iraqi sovereignty over northern Iraq was restricted by Resolution 688 of the Security Council. In the framework of Operation Provide Comfort, a no-fly zone north of 36th parallel was enforced upon Iraq, and as a consequence the Iraqi state’s control over northern Iraq has completely disappeared. Since the legal sovereign of the region had no control over the region, Turkey felt that a third party should be able to stop terrorist actions originating in northern Iraq. On the basis of Resolution 688 this should have been the responsibility of the states who declared the no-fly zone, but since they were not able to do so, Turkish officials claimed that Turkey was within her rights in carrying out these trans-border operations in the framework of the right of self-defence.

The first extensive trans-border operation which was not based on the right of hot pursuit was started on March 1, 1992. It was an air operation against the PKK camp at Hakurk in northern Iraq. The Iraqi government protested this operation, but Turkish officials refused to accept their protest. The reason for Turkey’s refusal was the demonstrable lack of control of the Iraqi government in the region. It was emphasized that Turkey respected Iraq’s territorial integrity and that the sole purpose of the operation was destroying the PKK camps established in northern Iraq which were beyond the control of Iraqi government (Hurriyet, 13 March 1992). Hence, Turkey explained these operations had been carried out within the framework of the right of self-defence.

After the Gulf War, the fate of the Kurdish areas of northern Iraq escalated into a major regional and international problem, and was a source of particular concern to Turkey. It is known that after 1991 Turkey maintained a small but unknown number of troops in northern Iraq. Although it was thought that their numbers were not too many, exact number is unknown (Hurriyet, 21 March 2003). Turkey maintained three elements of military force in northern Iraq: The first, comprising troops stationed in the Iraqi part of the border zone between Turkey and Iraq (2000-2500 troops); liaison offices stationed in Erbil, Zaho, Dohuk, Suleimaniye and Koysancak; and thirdly a peace monitoring force established after the 1996 crisis between two Kurdish groups according to the Ankara Process (Erkmen, 2003).

Turkish trans-border operations which had started as air bombardments in 1983 had become more extensive with every new operation. Turkey made three extensive operations in 1992, 1995 and 1997 in northern Iraq. These operations were considered by some Arabic states to be “operations aimed at invading Mosul and Kirkuk”, but these contentions are refuted by Turkey at every occasion (Ozcan, 2001). There are some important points which were emphasized by the Turkish officials during these operations: Firstly, no civilian would be harmed. Secondly, Turkey would not be a party to the conflict between the Iraqi Kurdish leaders Jalal Talabani and Masood Barzani, and thirdly, Turkey would respect the territorial integrity of Iraq. The only goal of the operations was to destroy PKK camps which were established in northern Iraq since the Iraqi government was not able to do so, therefore the reactions of the other states would be illuminating.
Almost all reactions were concentrated on the duration of the operations and the situation in which civilians are. US President Clinton supported the 1995 operation with the condition of civilians should not be harmed. Russia asked Turkey to finish her operation and leave Iraqi territory as soon as possible. Great Britain gave voice to the same concerns with the US, that Turkey should be faithful to her declared goals. Operation should be finished as soon as possible, its area should be kept limited and civilians should not be harmed (Hurriyet, 22 March 1995).

2.3. The Legal Basis of the Turkish Operations

It is possible to establish several explanations and justifications claimed by Turkish officials. The following is a brief evaluation of these justifications in the light of the rules concerning use of force by a state.

2.3.1. Agreements between Turkey and Iraq

An agreement by which Turkey and Iraq would give permission for each other to intervene in the other’s territory could have provided the necessary legal basis for these operations.

There are three agreements which are relevant, the first of which dates back to 1926. This treaty mapped the Iraqi-Turkish border as agreed between Turkey, Iraq and Great Britain. Article 12 of this treaty states that Parties will not allow any organized activity in their own territory against the other Party. Article 10 determines a frontier region of 75 km. on both sides of the border and Article 9 states that persons who commit a murder or crime in that area and escaped to the other state’s territory must be caught and extradited by the latter. The second agreement is the Treaty of Friendship and Good Neighborship dated 1946 (UNTS, 1949). The sixth protocol of this treaty is the Protocol of Border which replaced the relevant articles of the 1926 Treaty. Article 1 once again determines the border region as 75 km. deep. According to the Article 11, Parties are under an obligation to take any necessary measures to prevent any activity being carried out in this border region which is against other Party’s security and territorial integrity.

Although these treaties determine an obligation of not to permit any organization or activity directed against each other, they do not recognize any right of intervention in the other Party’s territory without prior permission. State Parties have to prevent any hostile activity against each other from being organized in their own territory against each other, they have to catch any guilty parties who have escaped to that border region and extradite them, however they cannot resort to force in the other Party’s territory even if the other Party does not fulfil her treaty obligations.

The Protocol of Security signed in 1984 has brought a change and enabled each party to enter other’s territory for 5 km. without prior consent, and until 1989 this protocol served as the basis for the Turkish operations. Prevented from imposing its authority on northern Iraq, Iraq had to accept Turkish operations entering its territory (Nachmani: 2003). Nevertheless, Turkey did not extend the duration of this Protocol after the Iraqi government used chemicals against civilian Iraqi Kurds in March 1988. When Turkey offered to renew this protocol in 1990, it was the Iraqi government who refused the offer this time.

2.3.2. The Right of Hot Pursuit

The right of hot pursuit is an established right in the law of the sea. Article 111 of the United Nations Convention on the Law of the Sea (UNCLOS) states: “The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continues outside the territorial sea or the contiguous zone if the pursuit has not been interrupted.”

However, this right ceases as soon as the ship pursued enters the territorial sea of its own or a third state. The pursuit should have been started by the state officials just after the crime is committed.
and this right may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked as being on government service.

It is generally accepted that this right can be carried out on land either with some conditions. Nicholas Poulantzas describes the right of hot pursuit as the right of a state to continue the pursuit of wrongdoers outside a) its territorial waters, b) the air space above its territory and territorial waters, and c) its land frontiers- or outside areas over which the state has jurisdiction- upon the high seas or into the air space over the high seas, or into a no man’s land, or if an agreement exists thereon, into the territory of another state. Pursuit must be started immediately after the violation in these areas and it has to be stopped as soon as the delinquent ship entered another state’s territorial waters. Since there is not an international area which is open to all states on land, pursuit continues on another state’s territory (Poulantzas: 1969). In that case, clear consent of this state is necessary.

The first Turkish trans-border operation was carried out in May 1983. Other operations followed it in 1986, 1987 and 1991. All of these operations were explained as applications of the right of hot pursuit, and were commenced after actions which had been carried out by the PKK on the Turkish territory. For example, the 1986 operation was started following a PKK action in which nine Turkish soldiers were killed and seven of them were kidnapped. Murat Sungar, Spokesman of the Ministry of Foreign Affairs, said that a treaty giving permission to use the right of hot pursuit is not necessary according to international law. If a terrorist action which has started in one state’s territory continues in another state’s land, the former state can follow the terrorists with the condition of never losing sight of them (Hurriyet, 9 August 1991).

Still, any violation of the territorial integrity of a state by another state’s agents, even if it was breached in pursuit of offenders, constitutes a breach in international law. Even in cases of extreme necessity and self-defence states do not recognize such a right to neighboring countries without a treaty including an express provision to the contrary. The Security Protocol of 1984 recognized this right for both Turkey and Iraq. Both parties had the right of pursuing offenders in the other’s country to a maximum depth of 5 km. The right of hot pursuit cannot provide a legal basis for the operations carried out after 1991 (i.e. after Iraqi government lost her control over the region due to the no-fly zone established north of the 36th parallel and protection against the Iraqi government being provided for Iraqi Kurds by the forces of Operation Provide Comfort-2 against Iraqi government) nevertheless. After 1992, Turkey’s operations start and end with the aim of destroying the PKK camps established in northern Iraq without any particular preceding PKK activity on the Turkish territory.

2.3.3. Necessity

Necessity has constituted a valid defence in customary international law before the drawing up of the United Nations Charter. A state of necessity that could serve as a good defence would have been present where the protection of a certain value could not be effected except by the wilful breach of the prohibition of force, and where the worth of infringed value was generally taken to rank much lower than that of the value sought to be protected (Asrat, 1991). It is considered as a justification within the concepts of self-preservation or self-help.

Self-preservation is a very loosely defined term even in the traditional international law which permits resorting to use of force by states with some restrictions. This concept provides a large manoeuvring area for the willing states. If the vital interests of a state are under threat, then this state can resort to force to protect those interests. All states are under the obligation of respecting sovereignty and independence of other states. Nevertheless, under some exceptional conditions, a state can intervene in another state’s territory and self-preservation is one of those exceptional conditions (Oppenheim’s, 1955).

Would it be possible to explain Turkey’s operations in the general framework of the concepts of self-preservation or self-help? There is little doubt that the Charter has prohibited self-help (or self-preservation for that matter) as a form of force legally available to a state (Higgins, 1963). On the other
hand, Article 2/4 proved to be not without ambiguities and not invulnerable to claims that intervention by force is permitted for certain purposes (Henkin: 1991).

In the absence of an authoritative interpretation, Article 2/4 as well as other articles of the Charter has been interpreted mainly by the states and scholars, and as a result, it is obvious that the most restrictive interpretations are favoured by the states (Henkin, 1991). In that case, Article 2/4 does not leave room for a justification based on the general concepts of self-help or self-protection. Even though states still resort to force on some occasions, none of them claim a right to use force on the basis of self-preservation. On the contrary, they take great pains to show that their action is in conformity with the provisions of the UN Charter. This attitude shows that, despite the world organization’s incompetences in maintaining international peace and security, states behave with the belief that the principle of non-use of force is still valid and that this principle does not support a justification based on the general concepts of self-preservation or self-help.

Some writers have argued that when no other means to preserve the vital interests of a state are available, self-preservation can be claimed (Levi, 1991). Necessity as a specific category would have provided a valid basis under these conditions. International law has long recognized necessity as a valid defence for the non-observance of obligations with the condition that legal requirements governing its presence and conduct are met (Asrat: 1991). Yet, its legal status is not clear under the relevant provisions of the UN Charter. An excusable breach of the prohibition of the use of force should be aimed at protecting the values protected by the prohibition itself. In other words, a state which uses force against the protected values of another state to avert an impending loss, destruction or grave injury to its own legitimate values threatened by causes originating in the other state, which the latter neither learns nor is capable of managing with timely effectiveness, would be acting under a state of necessity (Asrat, 1991).

As we come to our case, the Turkish-Iraqi border does not provide a maintainable border line. The area is mountainous and has a very harsh climate. There are PKK camps established in the region, a fact which is recognized by the Iraqi officials as well as local Kurdish authorities. It is Iraqi government’s responsibility as a state not to allow these camps which were established by a separatist armed organisation and to stop this organisation’s activities from being conducted in her own territory. Nevertheless, the Iraqi government was not able to do this due to the reasons which are beyond her control thus Turkey may act under a state of necessity. The International Law Commission (ILC) states that there are states who accept necessity as a valid legal basis for use of force, but it does not recognize this claim as a rule (Yearbook of the ILC, 1980).

2.3.4. Resolution 688 of the Security Council

The most popular opinion on the legality of these operations within the academic circles of Turkey is the one which considers the Resolution 688 of the Security Council to be the basis of those operations (Baseren, 1995). Turkey has asked the Security Council to convene and take over the refugee problem on 2 April 1991. On April 10, the Turkish foreign minister said that Turkey supported the proposal to establish temporary settlements in Iraqi territory in a bid to urgently and securely supply the needs of these refugees. Within a period of seven to ten days 500,000 Iraqi Kurds had crossed over into Turkey.

The Security Council resolution stated that the results of the Iraq’s repression of her own people created situations which threatened international peace and security in the region, has caused a massive flow of refugees towards and across international frontiers, demanded an end to the repression and an opening of a political dialogue. Paragraph 7 of this resolution says that the Security Council “appeals to all Member States and to all humanitarian organisations to contribute to these humanitarian relief efforts.” Also the resolution demanded “that Iraq cooperate with the Secretary-General to these ends.”

As we see above, Resolution 688 does not say anything about an armed intervention. The only goal declared by it was in providing humanitarian aid to Iraqi Kurds, and the Council debate indicated no intention that the resolution authorized any member state unilaterally to move forces into Northern
Iraq (Scheffer, 1991). However this resolution was interpreted in such a manner that a de facto safe haven was created north of the 36th parallel.

The question as to whether Resolution 688 permitted such an action had been extensively discussed. Operation Provide Comfort was considered as an example of the so-called ‘right of humanitarian intervention’. President Bush explained it as an operation based on the Resolution 688. On the other hand, Secretary-General Perez de Cuellar stated that any plan aimed at launching foreign military force in northern Iraq required Iraq’s permission and that any police force supported by the UN requires a Security Council resolution (Keesing’s, 1991). The Secretary-General was right on this issue. Resolution 688 does not invoke Chapter VII of the Charter (Österdahl, 1997). By adopting Resolution 688, the Security Council decided that Iraq’s repression of its civilian population was not a matter essentially within its domestic jurisdiction. But it does not follow that the resolution therefore authorized the use of armed force to prevent that repression by setting up enclaves in northern Iraq (Murphy, 1999).

A new question resulted from the restriction imposed upon Iraq over the region: That of who is going to keep the order there? The Iraqi government cannot, because she does not have control over the area any longer. The answer found to this question is found within the resolution which restricted Iraq’s sovereignty, namely Resolution 688 of the Security Council. The Security Council’s resolutions are carried out by the member states of the UN. Thereafter order in the region should be kept by the member states of the UN. Operation Provide Comfort-2 functioned as a part of this duty. US aircraft still patrol the no-fly zone declared in the region. On the other hand, these measures proved insufficient to prevent the PKK activities being planned and organized at the camps in northern Iraq and then being carried out in Turkey. During the 1995 operation, Turkey saw quite clearly that the PKK was comfortably established in northern Iraq. There were 20 PKK camps north of the 36th parallel (Oran, 1998). This situation made Operation Provide Comfort absolutely unsuitable, even dangerous for Turkey in that Operation Provide Comfort was unable or unwilling to stop PKK activities which are still going on in this area. In this case, Turkey can and must carry out trans-border operations in northern Iraq to protect her own security and to keep order in the region. Nevertheless, Turkey has never claimed officially that her operations are based on the Resolution 688.

2.3.5. Self-Defence

According to Article 51 of the UN Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

If we share Derek Bowett’s view (Bowett, 1958), even the wording of this article is enough to show that Turkish operations cannot possibly be explained within the right of self-defence. It does not matter how you interpret the concept, Turkey has never reported these operations to the Security Council. Bowett thinks that this article “imports a legal obligation” of reporting it to the Security Council. In the Nicaragua case, the International Court of Justice concluded that non-reporting does not affect the validity of action taken in self-defence under customary international law. However, the Court did not give an answer to the question of what its decision would be if the Charter were applicable (Greig, 1991).

On the other hand, it would be extreme to conclude that a legitimate act of self-defence could become totally illegitimate in case of its not being reported to the Security Council, as the duty to report is owed to the international community, not to the alleged aggressor. Hence, the latter is not in a position to invoke any supposed “invalidity” of the action of self-defence arising from a failure to
report to the Security Council. Nevertheless, neither the legitimate sovereign of northern Iraq nor the state that carried out trans-border operations applied to the Security Council claiming she was a victim of an aggression. Turkish officials made statements claiming Turkey uses force in self-defence, but these statements were aimed at internal public opinion rather than being legal explanations.

Here we face the problem of the scope of the right of self-defence. Article 51’s wording states clearly that only in case of an armed attack can a state legitimately resort to force. But what is an armed attack? We find a definition of it nowhere in the Charter. Only the General Assembly provides us a resolution in which it defines the concept. According to the resolution 3314 dated 14 December 1974, PKK actions which were organized and initiated from northern Iraq would constitute an armed attack. Article 3(g) of the resolution states that “the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein” may constitute an armed attack.

Nevertheless, it is obvious that it was not the Iraqi government who sent the PKK men to commit certain actions in Turkey, as the Iraqi government was not in any position to prevent them. Furthermore, activities which were carried out in Turkey by the PKK can hardly be defined as the acts of war or aggression. Neither they were so grave as to amount to being acts listed in Article 3 before the paragraph (g). These activities were mainly applications of guerilla tactics, i.e. raiding small villages, bombing railway stations or public places, etc. The US interpreted the concept of armed attack to include certain terrorist activities to explain her bombing of the targets in Libyan territory in 1985. Nevertheless, the bombing of Libya was widely condemned and the claimed US justification was widely rejected (Henkin, 1991).

Lastly, the Turkish operations in Iraq do not fulfil one of the conditions of the right of self-defence as developed in customary international law, which justifies self-defence only when the necessity of action is instant, overwhelming, and leaving no choice of means, and no time for deliberation. Obviously, this is not the case for many of the Turkish operations. After 1992, many Turkish operations have started in the spring, after the harsh winters which are common in the region have ended and before the PKK groups take the opportunity to infiltrate Turkish territory. If we are to call these operations self-defence, then we also have to call them actions of anticipatory self-defence.

But is the anticipatory self-defence permissible under Article 51? The wording of the Article 51 could be taken to mean that under the Charter states have recourse to force in self-defence only after an actual armed attack has occurred. This interpretation means that the purpose of the Article 51 was restricting the pre-existing right of self-defence which was valid under customary international law. On the other hand, the word “inherent” could be interpreted to mean quite the opposite and then wider right of self-defence existing before the Charter would be upheld. Most scholars fall into one of these two schools of thought.

There is no recorded decision of any international judicial body on this question. Nevertheless, many states support the proposition that in certain circumstances it may be lawful to use force in advance of an actual armed attack (Arend and Beck, 1993). In 1967, when Israel carried out an preemptive strike in the face of an imminent armed attack by Egypt, she was not condemned by the world community. In contrast, the Israeli bombing of the Iraqi nuclear reactor in 1981 was considered in breach of the Charter. Because there was no evidence showing that the Iraqi nuclear reactor would be used for warlike purposes in the future and that the International Atomic Energy Authority (IAEA) had been keeping the reactor under close scrutiny.

As a result, we may possibly draw the conclusion that under Article 51 anticipatory self-defence is allowed on the strict conditions that:

(a) solid and consistent evidence exists that another country is about to engage on a large-scale armed attack jeopardizing the very life of the target state, and

(b) no peaceful means of preventing such attack are available either because they would certainly prove useless, or lack of time, or they have been exhausted (Brownlie, 1986).
The decision of the ICJ in the *Corfu Channel Case* shows that anticipation would constitute a valid basis for otherwise illegal actions. The ICJ did not find the British demonstration of force violative of Albanian sovereignty, since it was aimed at discouraging any repetition of the firing on British ships passing through the Corfu Channel which had happened on 15 May 1946. Then, the demonstration of force was justified because it constituted a valid act of anticipatory self-defence. Nevertheless, forcible acts that are not justified by illegally threatened imminent and grave peril will not be covered by anticipatory self-defence (Asrat, 1991).

3. (In)activity of the Security Council

In 1995, both the Turkish and Iraqi states were very active at the UN because of the extensive Turkish operations in northern Iraq. Iraq applied the Security Council on 28 March this year for first time. On April 7, 1995, Iraq once again applied to the Council claiming that Turkey had violated its sovereignty, territorial integrity and airspace and committed an act of aggression. In this letter, it is claimed that Turkish attacks against Iraq were increasing in that Turkish aircrafts had made 107 sorties into Iraq between 20th and 31st of March. According to Iraq, the situation in the region was a result of the US interventionist policy and if Iraq was able to implement its national sovereignty in the region no Kurdish armed terrorist group would be able to settle there.

In May 1995, Iraq once again applied to the Security Council claiming its northwestern part was invaded by Turkish forces which constituted a violation of the Iraq’s territorial integrity (UNSC Doc.: S/1995/272, S/1995/540). Turkey replied to this letter on July 24, 1995 and reminded Iraq that it has not been able to exercise its authority over the northern part of its country since 1991. Consequently, Turkey cannot ask Iraq to fulfil its obligation, under international law, to prevent the use of its territory for the staging of terrorist acts against Turkey. Under these circumstances, Turkey’s resorting to legitimate measures which are essential to its own security cannot be regarded as a violation of Iraq’s sovereignty. Also Turkey emphasized that these operations were of limited time and scope and that the world public was informed about it (UNSC Doc.: S/1995/605).

The next year (1996) Iraq applied to the Security Council several times complaining about Turkey’s ground and air raids and incursions (UNSC Doc.: S/1996/401, S/1996/762, S/1996/860, S/1996/926, S/1996/951, S/1996/1018). Nevertheless these letters have never been able to be included on the agenda of the Security Council. They were however circulated as the documents of the Security Council, but they were never acted upon, nor were any resolution taken concerning them.

Turkey replied to the first of these letters on 2 July 1996 and reiterated its arguments concerning Iraq. It was emphasized that the Turkish measures only target the elements and resources of the PKK, and the utmost care has always been taken not to harm the civilian population. Also in this letter Turkey referred to Syria for the first time and argued that it is commonly known that Syria provides shelter and support to the PKK and so is acting in contravention of the General Assembly resolutions 49/60 and 50/186 (UNSC Doc. S/1996/479).

All the letters sent by Iraq to the Security Council in 1996 display some common characteristics. Most notable of these is the argument that the situation in northern Iraq is as a result of the US policies and that Turkey is contributing to it via Operation Provide Comfort. According to Iraq, the Turkish safe havens and buffer zones in northern Iraq constitute an occupation in that the US supports Turkey (UNSC Doc.: S/1996/626, S/1996/762, S/1996/812, S/1996/951, S/1996/1018, S/1996/1041).

Turkey replied several times stating that it never intends to violate Iraq’s territorial integrity. According to Turkey, the singular aim of the temporary danger zone declared along the strip of land parallel to the border is to deter any infiltration by terrorist elements into Turkey from Iraq and thus it cannot be a violation of the territorial integrity of Iraq, because Turkey has neither any claim of sovereignty over this area, nor is there any question of military occupation (UNSC Doc. S/1996/836, A/51/468).
In a letter dated 23 October 1996, Turkey explains its policy vis a vis Iraq since 1991 which is based upon five fundamental elements. These are:

(a) the preservation of territorial integrity, sovereignty, independence and political unity of Iraq,
(b) Iraq’s full compliance with the relevant Security Council resolutions and reintegration with the international community,
(c) the right of the entire people of Iraq to freely determine their future, meeting, in a satisfactory way,
(d) reducing the negative economic and security implications for Turkey of the situation that has emerged in Iraq in the aftermath of the Gulf War (UNSC Doc.: S/1996/872, A/51/550).


For the first time in a letter dated 26 May Iraq criticized the Security Council for its inaction. Iraq argued that the Council’s failure to show any interest in this incident leads them to think that the Council’s only concern is the implementation of its own decisions and it is not interested in Iraqi concerns about sovereignty and its legitimate authority.

Iraq addressed the Security Council once again on 16 June and argued that it is surprising that the Security Council which is the primary responsible body for maintaining international peace and security and bears special responsibility concerning Iraq, remains silent on this issue and seems unable to take any action to deter Turkey. Iraq also defined this attitude as an example of double-standards.

On the other hand, Turkey stated that in order to avoid any misunderstanding it has always informed Iraq through diplomatic and its forces have already begun withdrawing from Iraq. In this letter Turkey reiterates and explains its goals as safeguarding its legitimate security interests and protecting its people against terrorism (UNSC Doc.: S/1997/552).


The Security Council’s not including this issue on its could be seen to be partly due to lack of sympathy for the Saddam Hussein regime and it was certain that the US and Britain would prevent the passing of any possible Council resolution unfavorable for Turkey in this regard.

4. After the Invasion of Iraq

The invasion of Iraq in 2003 changed the basic characteristics of northern Iraq such that this area is no longer beyond the control of the Iraqi government. The 2003 invasion of Iraq, named "Operation Iraqi Freedom" by the US administration, began on March 20. The US and the United Kingdom cooperated with Kurdish forces in the north. The Iraqi military was defeated, and Baghdad fell on April 9, 2003. On May 1, 2003, President Bush declared the end of major combat operations, terminating the Baath Party's rule and removing Iraqi President Saddam Hussein from office. A military occupation was established and run by the Coalition Provisional Authority (CPA), which later appointed and granted limited powers to an Iraq Interim Governing Council. In mid-2004, the direct rule of the CPA was ended and a new sovereign and independent Interim Government of Iraq assumed the full responsibility and authority of the state. On June 28, 2004, the occupation was ended by the CPA,
which transferred limited power to a new Iraqi government led by Prime Minister Iyad Allawi. The United Nations Security Council Resolution 1546 in 2004 recognized the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq. The Iraqi Interim Government was replaced as a result of the elections which took place in January 2005. A further milestone was the creation of a democratically-elected administration on April 6, 2005 which included Prime Minister Ibrahim al-Jaafari and President Jalal Talabani who had been elected in January 2005.

The main Kurdish parties cooperated with the US-led coalition during the invasion which led to Saddam Hussein's overthrow, and Kurdish politicians are represented on the Iraqi governing council. The Kurdistan Regional Government has a constitutionally recognised authority over the provinces of Erbil, Dohuk, and Suleimaniya, as well as de facto authority over parts of the provinces of Diyala and Kirkuk.

Negotiations between UN and Turkish officials continued up to the start of war on 19 March regarding the conditions under which Turkey would participate in the forthcoming war and the US stressed the financial benefits it was willing to bestow on Ankara. Nevertheless, even if it seemed that the new Justice and Development Party (JDP) government would be willing to cooperate with the US, Turkish public opinion opposed to the policy of participating in the war (Olson, 2005). The Turkish Parliament failed to pass a resolution granting the US ground forces access to Iraq from Turkey, which demonstrates a strong opposition in Turkey to any participation in the war. This was especially true in that many in Turkey thought that the consequences of the war would lead to the formation of an independent Kurdish state (Olson, 2005; Park, 2003).

As the US forces took the control in Iraq, Washington warned Ankara to desist from taking any unilateral military action. Turkey has repeatedly called on the US to close bases in northern Iraq belonging to the PKK and prevent attacks made by the PKK stationed there. The US has long refused to take any such action, claiming that it does not have the spare military capacity to do so (Gorvett: 2006). The US officials repeated that in the event that Turkey plans a trans-border operation, she should first discuss this with the Iraqi government. General Richard Myers answered a question regarding the possibility of such an operation: “I think the difference now is that Turkey deals with a sovereign Iraqi government. It would require a lot of negotiations between Turkey and Iraq” (Hurriyet: 14 July 2005). It is obvious that neither the Iraqi government nor Kurdish leaders would accept any extension of former agreements made between Turkey and Saddam Hussein’s Iraq giving permission to enter each other’s territory (Hurriyet: 27 July 2006).

The possibility of an operation in northern Iraq by Turkish forces arised on the Turkish agenda from time to time, however, it became more frequent in 2007. At the end of July 2006, Turkish newspapers speculated about three possibilities:

(a) a limited air operation against the PKK camps established in mountain Qandil and northern Iraq,
(b) an air-supported operation of the special forces to hit certain points in northern Iraq, and
(c) a full-scale land operation involving 50,000 troops (Hurriyet: 19 July 2006).

Nevertheless, they also reported that the White House and Pentagon consider such a unilateral military operation “would not be a rational move” and would cause a crisis between Turkey and the US (Hurriyet: 31 July 2006).

Developments about the possibility of a trans-border operation were still in progression in October 2007. On October 17, the Turkish Parliament passed legislation which empowers the government to decide whether to carry out a trans-border operation (http://www.meclishaber.gov.tr; http://articles.latimes.com). This legislation came into force after the death of 13 soldiers in one week due to PKK attacks. While there were an operation continuing in Turkish territory to catch PKK men (http://news.bbc.co.uk), the most important difficulty before the extending it to the northern Iraq was the US opposition (http://news.bbc.co.uk).
Turkey insisted that PKK militants enter from northern Iraq into Turkey and return there after the attacks. Both the US and the Iraqi governments accept that the PKK has shelter in northern Iraq (http://news.bbc.co.uk). Although the Iraqi government showed itself willing to cooperate with Turkey to remove the PKK from northern Iraq, to Turkish ears this claim did not sound genuine. Even if it was genuine, Turkey did not think that the Iraqi government was capable of removing the PKK, since the local government of Barzani ignores any dictate from the central Iraqi government on this issue. Consequently, Turkish public opinion felt that both Iraq and the US were only trying to fend off Turkey without any real intention to take the necessary steps to root out the PKK from northern Iraq.

This outlook has changed dramatically after the Prime Minister Erdoğan’s official visit to the US (http://www.guardian.co.uk). Prime Minister Erdoğan and President Bush met on November 5, 2007. According to the newspapers, President Bush offered to share intelligence and give real-time information to Turkey about terrorists who are approaching the Turkish border. In that case, Turkish troops stationed in northern Iraq would have hit them without a trans-border operation. Erdoğan’s words summarize the Turkish position on it once again. According to him, the right to take trans-border operations against a terrorist organization was a right recognized in international law and Turkey was ready to take these legitimate steps together with the US (Hurriyet: 5 October 2007).

On November 9, Chief of Staff of the Turkish Army made a statement and declared that the army is ready and waiting for the government’s order for the operation. The most important part of his words was concerning the US’ offer about sharing real-time intelligence (http://www.washingtonpost.com). He said that “If there is not going to be any operation, what is the intelligence for?” (Hurriyet: 9 November 2007). Indeed, Turkish forces started an operation on 16 November inside of Turkey but close to the border with Iraq. On November 30, Prime Minister Erdogan informed the press that authorization for the trans-border operation was given to the Army two days ago. On the next day, website of the General Staff made a statement consisting of three points: First, they affirmed that the Army was authorized on 28 November by the government. Secondly, first operation was fulfilled on December 1. Thirdly, neither civilian people living in northern Iraq nor local groups as long as they do not show any hostility were the target of the operation but the terrorist organization of PKK Kongra Gel (http://www.tsk.mil.tr).

First air bombardment was carried out on October 22 (http://www.guardian.co.uk) and in the first two months after the official beginning of the air raids no ground operation has been started. Only warplanes have crossed the border and bombed several PKK posts. On February 22, 2008, the ground operation involving 10,000 troops started (http://edition.cnn.com). This move was called as a “continuation of the air operations” (http://www.tsk.mil.tr) and lasted 8 days (http://www.msnbc.msn.com). After that, although air operations continue, no new ground operation carried out by Turkey.

The difference between this operation and the operations carried out by Turkey between 1991-2003 was the consent of the Iraqi government. It is why neither Turkey nor the US offered any legal basis for the operation possibly. Iraqi government was informed about the basics of the operation beforehand, but not about the exact date of it. Iraqi Kurds and a small number of American troops have left the operation area before it was started. Another aspect of the agreement between the Turkish and Iraqi officials was that the return of the Turkish troops as soon as Turkey reached the operation’s goals. Besides, Turkish officials were to affirm Iraq’s territorial integrity openly before the public (http://hurarsiv.hurriyet.com.tr).

While the operations was still continuing, the duration of it caused a serious tension in Turkish-US relations. Secretary of State Robert Gates stated that the operation must be finished in two weeks maximum (http://edition.cnn.com). If not, he said that the US would stop sharing real-time intelligence with Turkey (http://hurarsiv.hurriyet.com.tr). Two days after this statement, ground operation was finished by the Turkish General Staff. According to the Chief of Staff, this decision was not related to the Secretary Gates’ statement in no way (http://hurarsiv.hurriyet.com.tr). Nevertheless, the fact that no new operation was carried out after February 2008 and PKK still has posts in northern Iraq makes this
statement not too convincing (http://www.time.com). It seems that although Turkey was able to persuade the US for that operation, trans-border operations would not become routine as it was between 1991-2003.

5. Conclusion
There is no legal instrument which recognizes Turkey’s right of intervention in northern Iraq, although the situation in that area was and is unique. Its legal sovereign was deprived off the right to establish Iraqi control over the region, and there was no other mechanism created to replace the Iraqi government’s control. There were two local Kurdish authorities, who, instead of cooperating were fighting between themselves, and being a purely air operation, Operation Provide Comfort had no troops to keep order on the ground. After 2003 Iraq claimed full sovereignty in the region, but it is still unable to establish its authority there, since the local government led by Masood Barzani holds the authority in northern Iraq and Barzani behaves as if it is already an independent Kurdish state.

This situation has left Turkey in a dilemma. The Charter of the UN puts a ban on the use of force against another state. Northern Iraq belongs to Iraq and it is Iraq’s sovereign right to give or not to give permission to Turkey to mount any cross border operations, and over the history of these operations there have been many which were sanctioned by the Iraqi government. The legal government of a state may give permission of intervening in her own territory to another state, and Turkey had such permission from Iraq in the 1984-1989 period.

However, when the Iraqi government lost control over the region, they could no longer fulfil the obligation of preventing any hostile activity against another state on its own territory. If Iraq does not authorize these operations, Turkey faces the dilemma of protecting her own security by force on the one hand and of being condemned for violating Iraq’s territorial sovereignty on the other. Iraq is unable to fulfill the obligation of preventing hostile activities carried on in her own territory and yet she does not permit Turkey to do it. If Turkey complies with her decision and stops the operations, the result would be not only the most insecure conditions for the civilian people who live in the villages in the border area but also a continuous flow of PKK into Turkey.

With the establishment of the new government in Iraq the situation even got worse for Turkey. The PKK activities still constitute a threat against Turkish security interests, and even though Turkey asked the US and Iraqi government to stop the PKK, both states claimed that they are unable to do it due to insecure conditions in Iraq. This claim is not convincing, because the northern part of Iraq is an autonomous Kurdish area and the most secure region in Iraq. It is felt in Turkey that if Iraq and the US have the desire to stop these terrorist activities they should be able to, and to be successful.

In April 2006, Iran launched an attack on Iran’s own Kurdish separatists and also on the PKK; infiltrating troops and heavy equipment into northern Iraq to attack bases there which was followed by a sudden surge of articles in the Turkish press contrasting Iran’s attitude with that of the US. However, Turkey did not follow suit with its own incursion. Such an action would be a major step for Turkey to take, particularly as it is seeking to join the EU. In 2007, Turkey was able to persuade the US and Iraqi government for a limited ground operation, but it would not be expected to repeat any time in the near future. Yet still Turkey remains facing the problems of how to establish a satisfactory relationship with either an increasingly independent Kurdish autonomous area or an independent Kurdish state (Gorvett, 2006).
References


Documents


Websites