

THE RIGHT TO SELF-DEFENCE IN INTERNATIONAL LAW AS A JUSTIFICATION FOR CROSSING BORDERS: THE TURKEY-PKK CASE WITHIN THE BORDERS OF IRAQ

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International law grants states an inherent right to self-defence. States can exercise this right whenever they face armed attack. However, any country wishing to exercise its right to self-defence must fully consider all the restrictions on this right. The right to self-defence can permit the use of force within the borders of the victim state or on the territory of another state from where the attack is carried out. Accordingly, states may respond to any attack by the armed forces of another state or irregular armed groups that use the territory of other states for their attacks. Turkey is a country with a huge population of Kurdish inhabitants. The Kurds possess distinct origins, history, language, culture and a historical link to their land. Thus, they qualify as a people. For much of their history they have peacefully sought to assert their rights; however, Turkey denied those rights to the extent that the formation of the PKK in 1978 became a move of last resort. When the PKK started demanding Kurdish right to self-determination, Turkey launched military operations against it in self-defence. During the 1980s and 1990s, the PKK established camps in Iraq. On several occasions it withdrew its forces there as part of peace negotiations with the Turkish government. Turkey crossed the Iraqi borders and attacked the camps as part of a state policy to fight the PKK outside its borders. The PKK subsequently handed over the camps to other groups, which never posed any military threat to Turkey, but Turkish forces continued to cross the border into Iraq. This article examines the right of Turkey to use force within the borders of Iraq under the justification of self-defence.

Keywords: international law; self-defence; Turkey; Kurdish people; PKK; Iraq.

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1. Introduction

The right to self-defence is an exception from the prohibition on the threat or use of force as mentioned among the purposes and principles of the United Nations. The issue is not whether the right to self-defence exists, but when exactly states are entitled to this right. Does it apply before or after an armed attack? What constitutes an armed attack? While it is clear that the right can be exercised on the territory of the victim state, is it possible to use force in self-defence on the territory of another state from where the armed attack is carried out? What if the perpetrator of the armed attack is a non-state actor and uses the territory of another state to launch its attack?

The right to self-defence enables states to use force lawfully to protect their sovereignty, political independence and security without any international responsibility. However, exercising this right is limited to one specific circumstance – an armed attack. Moreover, states must demonstrate that force was used necessarily, proportionally and immediately, as well as informing the UN Security Council.

The Turkish-Kurdish issue can be traced back many centuries. Its roots lie in the invasion of Kurdish land and subsequent ethnic oppression. Following the establishment of the new Turkish republic in 1923, the Kurds became a minority in Turkey. Yet, they have historical connection to the land, their own history, a distinct language and culture, and a national will with the political institutions to express it. Hence, they satisfy the conditions of being a people under international law. When the Kurds tried non-violent means to achieve their right to self-determination, Turkey used military force to deny that right. Therefore, in 1978, the PKK was founded as the sole means to demands their rights. Turkey, though, regards the PKK as

a terrorist organization and fought the group in self-defence. In response, the PKK established some camps in Iraq during the 1980s and 1990s as a strategic base for the rights of the Kurds in other countries and a safe retreat for its forces during peace negotiations with Turkey; it never used them to launch its military attacks against Turkey. Nonetheless, in its fight against the PKK, Turkey crossed Iraq's borders and attacked the camps. The PKK has now handed the camps to the party for a Free Life in Kurdistan (PJAK) and The Kurdistan Democratic Solution Party (PCDK). Although these groups pose no threat of armed attack on Turkey, Ankara still attacks the camps and alleges that they are PKK bases.

Though there are numerous books and articles on the right to self-defence, there is still a lack of literature about the legal dimension of Turkey-PKK case. Examining this case helps to resolve the issue and restore peace and security to the region.

This article examines some important questions regarding the right to self-defence. What is the right to self-defence? When can that right be exercised? What are the necessary conditions to exercise the right? Against whom can the right be exercised? Is the Turkey-PKK case related to the right to self-determination or the right to self-defence? Is Turkey's crossing of Iraq's border justified by the right to self-defence under international law?

The article first discusses the theory of the right to self-defence and second, considering that theory, analyzes the Turkey-PKK case, particularly Turkey's self-defence justification for crossing Iraqi borders.

2. Historical Background

The right to self-defence is believed to refer to the concept of defensive use of force which originated from the law of nations. The defensive use of force was a sovereign right of a state and thus the origin of self-defence was state sovereignty.¹ Based on the view of some other scholars, the right to self-defence has its origin in the concept of "just war" which was present in ancient Greece and Rome. A just war would wage against a state if the state breached its obligations and refused to repair the damage.²

But the modern origin of the right dates back to the Caroline incident between the British and United States governments in 1837.³ In the first half of the 19th century, while Canada was under British rule, a rebellion rose up against British colonialism. Though the U.S. was officially neutral, many people along the Canadian border

¹ Murray Colin Alder, *The Origin in International Law of the Inherent Right of Self-Defence and Anticipatory Self-Defence*, 2 *The Western Australian Jurist* 115 (2011).

² Kinga Tibori Szabó, *Anticipatory Action in Self-Defence: Essence and Limits under International Law* 32–33 (Hague: T.M.C. Asser Press, 2011).

³ Anthony Clark Arend, *International Law and the preemptive Use of Military Force*, 26(2) *The Washington Quarterly* 90 (2003).

sympathized with the insurrection.⁴ On the night of December 29, 1837, the *Caroline*, an American ship that was allegedly bringing assistance to the rebels, moored on the American bank of the Niagara River. British troops crossed the river and attacked the ship. They killed some Americans and burned the ship. The *Caroline* incident caused tensions in relations between London and Washington. The U.S. claimed that British troops crossed its borders and violated its sovereignty but the British justified the attack as self-defence. Though Britain apologized for the act after several diplomatic exchanges, the case of the *Caroline* established the modern practice of the right to self-defence in international law.⁵

During negotiations on adopting the United Nations (UN) Charter⁶ at the San Francisco Conference in 1945, the right to self-defence was placed in Article 51 and became a part of international conventional law. Moreover, following the adoption of the Charter, the right to self-defence became a subject of scholarly writings and legal literature.⁷ In addition to that, the International Court of Justice (ICJ) clarified the right and its scope of its applicability to states in a number of cases, such as *Military and Paramilitary Activities in and against Nicaragua* (1986),⁸ the *Legality of the Threat or Use of Nuclear Weapons* (1996)⁹ and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004).¹⁰

3. The Right to Self-Defence in International Law

As we mentioned, the *Caroline* incident established the modern practice of using force in self-defence in international law. The customary understanding of self-defence is not only exercising a state's right in response to a military attack, but also to counter an imminent threat of armed attack. This type of self-defence is named anticipatory self-defence or pre-emptive self-defence.¹¹

The scope of applicability of the right to self-defence in customary international law can be found in a letter which was written on April 24, 1841, by the U.S. Secretary

⁴ *British-American Diplomacy: The Caroline Case*, Yale Law School Lillian Goldman Law Library (May 2, 2016), available at: http://avalon.law.yale.edu/19th_century/br-1842d.asp#web1.

⁵ Arend 2003, 90–91.

⁶ Charter of the United Nations (adopted June 26, 1945 and entered into force October 24, 1945).

⁷ Jan Kittrich, *The Right of Individual Self-Defence in Public International Law* 195 (Berlin: Logos Verlag Berlin GmbH, 2008).

⁸ Case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), ICJ Judgment, June 27, 1986.

⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, ICJ reports (1996).

¹⁰ *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, July 9, 2004, ICJ reports (2004).

¹¹ Niaz A. Shah, *Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law's Response to Terrorism*, 12(1) *Journal of Conflict & Security Law* 111 (2007).

of State Daniel Webster to special British representative Lord Ashburton. Webster stated that “[i]t will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”¹²

That quote illustrates two conditions for exercising the right – necessity and immediacy. However, the paragraph does not mention a third condition that states must meet – proportionality.¹³ In other words, in order for a state to be entitled to the right of self-defence under customary international law, it must show the necessity of using force, the use of force must occur as soon as the threat arises and any force must be used in a proportionate manner.

The conventional concept of right to self-defence is linguistically understood to be narrower than the customary concept. The relevant article leaves space for scholarly interpretation. In order to explain the conventional context of the right, we should first mention Article 51 of the UN Charter which states:

“[n]othing 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.”

Scholars have been divided into two groups over the interpretation of this article. One group of scholars interprets it restrictively and limits the scope of the applicability of the right to use force against actual military attack. According to their view, a state may exercise the right to self-defence only in response to an armed attack which is actually underway. The attack therefore must be an actual attack and the victim must be an actual victim, otherwise the use of force would be illegitimate.¹⁴ The second group thinks that the article can be interpreted more widely. Their logic holds that states may exercise the right not only to combat an actual military attack but also in response to an imminent armed threat to their sovereignty, political independence and security. The group argues that the right to self-defence was a pre-existing customary right before being placed in the UN

¹² Leo Van Den Hole, *Anticipatory Self-Defence under International Law*, 19(1) *American University International Law Review* 96 (2003).

¹³ Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* 10 (London: Chatham House, 2005).

¹⁴ Shah 2007, 97.

Charter. The UN Charter merely codified it without seeking to exhaust it.¹⁵ This scholarly view seems more logical because customs are one of the main sources of international law, so the right of pre-emptive self-defence exists even if the UN Charter does not mention it.

4. Limitations on the Right to Self-Defence

One of the UN's purposes is maintaining international peace and security by taking collective measures.

“[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;”¹⁶

The UN Charter also requires states to use peaceful means in settling their international disputes.

“[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”¹⁷

The Charter generally bans the use of force by states through another principle which is the non-use of force principle in article (2/4), which states the following:

“[a]ll 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.”

However, the Charter recognizes the right of states to use force in self-defence in Article 51, as an exception to the previous articles. Even so, there are some other limitations on the applicability of Article 51. The limitations are first: the use of force

¹⁵ Shah 2007, at 98–99.

¹⁶ UN Charter, *supra* note 6, Art. 1(1).

¹⁷ *Id.* Art. 2(3).

must be in response to an armed attack.¹⁸ Second: the state must show the necessity, proportionality and immediacy.¹⁹ Third: the use of force must be reported to the Security Council by states, and as soon as the Security Council takes measures with regard the issue, states must cease using force.²⁰

4.1. Armed Attack

As discussed above, international law prohibits the threat or use of force by states. However, it recognizes the right of states to defend themselves against any armed attack on their sovereignty and security. The use of force in self-defence does not constitute an armed attack but amounts to a legitimate use of force under international law.

The main precondition for exercising the right to self-defence is facing an armed attack. However, neither the UN Charter, nor any international document, has defined what is meant by armed attack. Scholars have defined it. Armed attack is generally the 'physical occurrence of the attack' through one state crossing the borders of another. In addition, some scholars believe that the term of armed attack encompasses an imminent threat, which accordingly implies that states may use force in anticipation of occurrence of an armed attack.²¹

An armed attack alone is not enough to justify using force in self-defence. The attack must be of particular scale and effect. In other words, the attack must meet a threshold of intensity of violence.²²

We should note that non-military actions or threats such as economic and social aggression, do not give states the right to use force in self-defence. The response to such attacks must be of a non-military nature, even if the attacks are very serious and damaging.²³

4.2. Necessity, Proportionality and Immediacy

Necessity, proportionality and immediacy are also conditions that a state must meet before and during the exercise of its right to self-defence, otherwise, the use of

¹⁸ Christopher Greenwood, *Self-Defence*, Max Planck Encyclopedia of Public International Law (2011) (May 3, 2016), available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?prd=EPIL>.

¹⁹ Angus Martyn, *The Right of Self-Defence under International Law: The Response to the Terrorist Attacks of 11 September*, Parliament of Australia (2002) (May 3, 2016), available at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0102/02CIB08.

²⁰ Greenwood, *supra* note 18.

²¹ Shah 2007, 101.

²² Case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *supra* note 8, para. 195.

²³ Greenwood, *supra* note 18.

force would be unlawful. Necessity means that the state must have no other effective response available except resorting to the use of force.²⁴ Proportionality means that the force must not exceed the amount of the attack and be limited to the elimination of the threat.²⁵ Immediacy means that any response to an attack must be instant. However, this condition is less rigid because a response to armed attack can be delayed if there is a need to gather evidence or collect intelligence, or any other logical reason.²⁶

4.3. The Intervention of the Security Council

While Article 51 recognizes the right of states to self-defence, it imposes two requirements upon states exercising that right. The first requirement is that “[m]easures 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.” The failure of states to satisfy this requirement makes the claim of self-defence “less plausible” and is considered a violation of the UN Charter. However, it does not make the use of force unlawful.²⁷ The second requirement is that states can take actions only “[u]ntil the Security Council has taken measures necessary to maintain international peace and security”. This requirement is regarded a temporal limitation upon the exercise of the right to self-defence.²⁸

We should note that measures taken by the Security Council are neither aimed at limiting the right to self-defence nor fighting on behalf of states acting in self-defence. They are merely intended to impose a ceasefire upon all sides of the conflict by adopting a binding decision under Chapter VII of the UN Charter and settling the dispute by peaceful means.²⁹

5. Self-Defence against Non-State Actors

The traditional understanding of the term of armed attack is the use of force by a state against another state.³⁰ But the contemporary concept also covers the attacks of the non-state actors. The UN Charter, in Article 51, does not make any mention of the source of the armed attack. As it states:

²⁴ Van Den Hole 2003, 99.

²⁵ Shah 2007, 123.

²⁶ Martyn, *supra* note 19.

²⁷ Greenwood, *supra* note 18.

²⁸ Van Den Hole 2003, 98.

²⁹ Greenwood, *supra* note 18.

³⁰ Shah 2007, 104.

“[n]othing 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.”

But the ICJ, in its judgment in the Nicaragua Case explained that an armed attack can be carried out by either regular armed forces or by irregular armed groups. As it held:

“[a]n armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘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’ (inter alia) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein.’”³¹

The UN Security Council dealt with the September 11, 2001, attacks on America as armed attacks and confirmed the right to self-defence against terrorist groups in the resolutions 1368 (September 12, 2001) and resolution 1373 (September 28, 2001).

Attacks by non-state actors must fulfill just one requirement: the attacks must be of a particular scale and effect in terms of casualties and damages.³²

6. Border Crossing in Justification of Self-Defence

The right to self-defence can be exercised within the borders of the victim state as well as on the territory from where the attack is launched.³³ If the attack was directed by a state military force against another state, the victim state can respond as it deems necessary, even if that leads to crossing the borders of another state.³⁴

If the attack was carried out by a non-state actor against another state through the territory and military support of another state, the state from where the attack was launched is internationally responsible for a wrongful act under the law of state responsibility³⁵ and the victim state can use force against both the host state and the

³¹ Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), *supra* note 8, para. 195.

³² Shah 2007, 105.

³³ Louise Arimatsu, *The Law of State Responsibility in Relation to Border Crossings: An Ignored Legal Paradigm*, 89 *International Law Studies* (U.S. Naval War College) 35–37 (2013).

³⁴ Dimitrios Delibasis, *The Right to National Self-Defence: In Information Warfare Operations* 197–198 (Edmunds: Arena Books, 2007).

³⁵ Responsibility of States for Internationally Wrongful Acts, General Assembly Resolution 56/83 (2001), Art. 8.

non-state actor.³⁶ If a non-state actor conducted an armed attack against another state through the territory of another state but without military support, the state from which the attack has directed must take all necessary steps to ensure that its territory is not used by a non-state group for military purposes, and the victim state must obtain the consent of the host state before using force against the group.³⁷

Besides the general conditions of exercising the right to self-defence, there are some other conditions for using force outside the territory of the attacked state. First; the attack must be large in scale and effect. Second; in case when the attack is carried out by a non-state actor, there must be clear evidence that the state from where the attack is directed is unwilling or unable to curb the group. Third; the use of force must be either to prevent or stop the attack.³⁸

7. Turkey and PKK Case

The Turkish-Kurdish issue is historically related to the land and origins of the Kurds. However, the development of international legal norms, principles and rights has brought a legal dimension to the case.

Kurdistan is the historical homeland of the Kurds, on which they have settled since the dawn of history.³⁹ The traditional territory of Kurdistan comprises 450,000 square kilometers⁴⁰ which extends across southern Turkey, northwestern Iran, northern Iraq and northeastern Syria.⁴¹ The name of Kurdistan has origins in a Sumerian word, "*kurti*," which meant "mountain tribe or mountain people."⁴² After the Arabs invaded a considerable part of Kurdistan in the middle ages, they referred to the area as *beled ekrad* (the land of the Kurds).⁴³ In the twelfth century, a *Seljuk* sultan used the word Kurdistan for the first time. This word also means the land of the Kurds.⁴⁴ Following the appearance of the Ottoman Empire and Safavid Empire, territories were formally

³⁶ David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24(1) *The European Journal of International Law* 247 (2013).

³⁷ Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defence Against an Imminent or Actual Armed Attack by Non-State Actors*, 106 *The American Journal of International Law* 7 (2012).

³⁸ Wilmshurst 2005, 11.

³⁹ Jawad Mella, *Kurdistan and the Kurds: A Divided Homeland and a Nation without State* 21 (London: Western Kurdistan Association Publications, 2005).

⁴⁰ Abdullah Ocalan, *War and Peace in Kurdistan Perspectives for a Political Solution of the Kurdish Question* 10 (2nd ed., Cologne: International Initiative, 2009).

⁴¹ Noory Fakhry, *Right to Self-Determination of Kurds and Its Relation with Right to Self-Defence*, Master thesis (Lund University, 2012), at 8.

⁴² Ocalan 2009, 9.

⁴³ *Id.*

⁴⁴ Ofra Bengio, *The Kurds of Iraq: Building a State within a State* 2 (Boulder, CO: Lynne Rienner Publishers, 2012).

mapped. After the Battle of *Chaldiran* in 1514 between the Ottomans and Safavids, most of the Kurds found themselves in the Ottoman Empire.⁴⁵ The empires later formalized the division in a treaty which was known as the treaty of *Zuhab* in 1639.⁴⁶ Following the collapse of the Ottoman Empire in 1923, the Ottoman part of Kurdistan was divided between Turkey, Iraq and Syria.⁴⁷

There are, however, different opinions with regard to the origins of the Kurds;⁴⁸ their origins are distinct from the Turks, Arabs and Persians.⁴⁹ The Kurds consider themselves to be the decedents of the Meds.⁵⁰ The language of the Kurds is Kurdish which belongs to the “Indo-European group of languages”⁵¹ and is distinct from Turkish, Arabic and Persian.⁵² Though there is no an accurate data regarding the Kurdish demographic, the Kurds are regarded as the largest ethnic minority in the world.⁵³ In 2010, the global Kurdish population was estimated to be 37.1 million in the world. The largest Kurdish population lives in Turkey and is estimated to be 17.94 million (about 23% of Turkey’s population of 78 million). The rest live in Iran, Iraq, Syria and the diaspora.⁵⁴

During the First World War, the 12th point of Woodrow Wilson’s 14 points⁵⁵ granted the minorities of the Ottoman Empire the right of “autonomous development.” In 1920, the Ottoman Empire signed the treaty of Sevres⁵⁶, which included the right of local autonomy for Kurdish areas in Article 62 and even raised the possibility of independence in Article 64. After establishing the new Turkish republic in 1923, Turkey signed another treaty, the treaty of Lausanne.⁵⁷ The Lausanne treaty revoked the

⁴⁵ Ocalan 2009, 14.

⁴⁶ Mohammed M.A. Ahmed, *Iraqi Kurds and Nation-Building* 1 (New York: Palgrave Macmillan, 2012).

⁴⁷ Fakhry 2012, 10.

⁴⁸ *Id.* at 8.

⁴⁹ Hardi Cojer, *Denial of Rights and Self-Determination: The Case of the Kurds of Iraq*, Master thesis (National Library of Canada, 1996), at 25.

⁵⁰ John Limbert, *The Origins and Appearance of the Kurds in Pre-Islamic Iran*, 1(2) *Iranian Studies* 45 (1968).

⁵¹ Mella 2005, 41.

⁵² Rebaz Khdir, *Self-Determination in International Law: The Case of the Kurds in the Middle East*, Master thesis (National Taras Shevchenko University of Kiev Institute of International relations, 2014), at 64.

⁵³ Fakhry 2012, 8.

⁵⁴ Siddiq Skender, *A Brief History of Kurds and Kurdistan* 4 (Virginia: Fairfax, 2011).

⁵⁵ The points were a set of principles submitted by the U.S. president Woodrow Wilson, on January 8, 1918, to end the First World War and restore peace to the World.

⁵⁶ The Peace Treaty of Sèvres was signed between the Ottoman Empire and the Victorious Allied Powers on August 10, 1920 in Sèvres, France. The treaty obliged Turkey to accept many conditions of the Allied regarding various issues including minority protection.

⁵⁷ The treaty of Lausanne was signed between the Allied Powers and the New Turkish Republic in 1923 in Lausanne, Switzerland because the new Turkish state rejected the previous treaty of Sèvres. In the Lausanne Treaty, the Allied recognized the borders of the New Turkish Republic and Turkey gave up its territorial claim over the previous lands of the Ottoman Empire.

previous treaty of Sevres and, moreover, denied the existence of the Kurds in Turkey.⁵⁸ Therefore, the Kurds started turning to rebellion to achieve their ethnic rights. The first Kurdish rebellion, the Sheikh Said revolt, occurred in 1925, the second rebellion was the Ararat revolt in 1930 and the third Kurdish rebellion was the Dêrsim revolt between 1936–1938. Turkey crushed all these rebellions and insisted on denying the existence of Kurdish ethnicity.⁵⁹ From 1925 to 1938, 250,000 Kurds were reportedly killed and about 1.5 million others were displaced by the Turkish army.⁶⁰

After crushing all the Kurdish revolts, Turkey practiced an oppressive assimilation policy. The government punished anyone who claimed ethnic, linguistic and cultural differences as a cause for separatism.⁶¹ The words “Kurd” and “Kurdistan” were banned.⁶² The Kurds were considered to be mountain Turks and the Kurdish language was regarded as a dialect of Turkish.⁶³

The PKK first began in 1973 with a group of activists known as “*Apoists*.” Between 1975 and 1976 the group’s idea of was influential in Kurdish society, particularly younger generations. The PKK was officially formed under the leadership of Abdullah Ocalan and adopted the name of *Partiya Karkaren Kurdistan* (Kurdistan Workers Party) on November 27, 1978.⁶⁴ The goal of the group was initially to unite all parts of Kurdistan and establish an independent state for the Kurds of the Middle East. However, it later changed its demand to democratic confederalism within the borders of Turkey.⁶⁵ The PKK started a violent struggle against Turkey in 1984, which is still ongoing.⁶⁶ Turkey’s oppressive policies and denial of Kurdish rights encouraged many Kurds to join the PKK and regard the organization as a legitimate force. Turkey, by contrast, started to treat the group as terrorist campaign. It declared a state of emergency in Kurdish populated cities and granted full authority to its military.⁶⁷

⁵⁸ Fakhry 2012, 10.

⁵⁹ Kristiina Koivunen, *The Invisible War in North of Kurdistan*, Doctoral dissertation (University of Helsinki, 2002), at 95–100.

⁶⁰ *Turkey/Kurds (1922 – present)*, University of Central Arkansas: Political Sciences (May 7, 2016), available at <http://uca.edu/politicalscience/dadm-project/middle-eastnorth-africapersian-gulf-region/turkeykurds-1922-present/>.

⁶¹ Fakhry 2012, 39–40.

⁶² Amir Hassanpour, *Kurdish Language Policy in Turkey*, Kurdish Academy of Language (May 7, 2016), available at <http://www.kurdishacademy.org/?q=node/129>.

⁶³ Fakhry 2012, 40.

⁶⁴ Adem Uzun, “*Living Freedom*”: *The Evolution of the Kurdish Conflict in Turkey and the Efforts to Resolve It* 13 (Berlin: Berghof Foundation, 2014).

⁶⁵ Abdullah Ocalan, *Democratic Confederalism* 34 (London: Transmedia Publishing Ltd., 2011).

⁶⁶ Idris U. Eyryce, *Roots and Causes That Created the PKK Terrorist Organization*, Academic thesis (Naval Postgraduate School, 2013), at 15.

⁶⁷ Uzun 2014, 14.

If the Turkish-Kurdish issue started out as a nationalistic case, it is now a legal issue which related to minority rights. Therefore, the Kurds now demand their rights in light of international instruments that guarantee those rights. Under international law, “all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁶⁸ The only condition that the Kurds need to fulfill under international law is to qualify as a people. Since the Kurds have a historical link to the land where they live now,⁶⁹ a distinct origin and a shared language, history and culture, the will to be a people and the institutions to express that will, they fulfill the conditions of being a people.⁷⁰ Thus, they are entitled to the right of self-determination. Turkey, by contrast, always claims that there is no Kurdish issue; there is just the issue of terrorism in Turkey.⁷¹ However, beyond very limited rights of broadcasting, private Kurdish language courses and registering Kurdish children with Kurdish names, it does not recognise Kurdish ethnic minority group rights.⁷²

8. The Use of Force by Turkey and Crossing Iraqi Borders in Justification of Self-Defence

During the Iran-Iraq war from 1980 to 1988, Iraq lost control over the northern part of its country.⁷³ In 1991, Iraq launched intensive military operations in the north to regain control of the region, but this resulted in a huge number of people becoming refugees in Turkey and Iran borders.⁷⁴ In the same year, and in response

⁶⁸ International Covenant on Civil and Political rights (adopted December 16, 1966, entered into force March 23, 1976), 999 UNTS 171, Art. 1(1); International Covenant on Economic, Social and Cultural Rights (adopted December 16, 1966, entered into force January 3, 1976), 993 UNTS 3, Art. 1(1); UN Declaration on the Rights of Indigenous Peoples, General Assembly Resolution, A/RES/61/295, September 15, 2007, Art. 3.

⁶⁹ The German scholar Kay Heilbronner believes that if the minority lives on a land and there is a historical link between the minority and the land, the minority is regarded people. The human rights expert Cristesco argues that “the presence of a historic relationship with the land is a prerequisite for a people.”

⁷⁰ United Nations Educational Scientific and Cultural Organization, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples*, UNISCO Paris November 27–30, 1989: *Final Report and Recommendations*, SHS-89/CONF.602/7, February 22, 1990, at 7–8.

⁷¹ *There's no Kurdish Issue in Turkey, Just Terrorism: Ardoğan*, Daily News, January 6, 2016 (May 10, 2016), available at: <http://www.hurriyetdailynews.com/theres-no-kurdish-issue-in-turkey-just-terrorism-erdogan.aspx?pageID=238&nID=93511&NewsCatID=338>.

⁷² Jaffer Sheyholislami, *Language Varieties of the Kurds in The Kurds: History – Religion – Language – Politics* 44 (Alexander Schahbasi, Thomas Schrott, eds., Vienna: Austrian Federal Ministry of the Interior, 2015).

⁷³ Funda Keskin, *Turkey's Trans-Border Operations in Northern Iraq: Before and after the Invasion of Iraq*, 8 *Research Journal of International Studies* 60 (2008).

⁷⁴ *Id.* at 61.

to the atrocities committed by Saddam's Regime in the region, the UN Security Council adopted Resolution No. 688 and condemned the civilian oppression by the Iraqi government.⁷⁵ The resolution established a no-fly zone and restricted the sovereignty of Iraq over its northern region.⁷⁶ After the north Iraqi Kurdish areas achieved the right to autonomy in 1991, Iraqi troops totally retreated from the north and the Iraqi Kurdish *peshmarga* forces replaced them. During those periods the PKK established some military camps along the borders between northeastern of Iraq and southeastern of Turkey.⁷⁷ During the 1990s, the PKK declared several unilateral ceasefires in the hope of initiating a peace process and withdrew its forces from Turkey to those camps⁷⁸ in a gesture of good faith towards Turkey. But Turkey took political and military advantage of the PKK ceasefires and sought to expel the PKK from its territory and fight it outside its borders. Therefore, Turkey started to find political and legal justifications to cross the borders of Iraq.⁷⁹

Turkey carried out its first military operation in 1983 based on the right of hot pursuit.⁸⁰ In 1984, it signed a protocol of security with Iraq that allowed the countries to encroach up to five kilometers into each other's territories. Based on that protocol, Turkey waged intensive operations in 1986 and 1987 in Iraq. The protocol ended in 1989 and was not renewed.⁸¹ Since the 1990s, Turkey has been crossing Iraqi borders on the basis of the right to self-defence as provided in international law.⁸²

As discussed above, the Turkey-PKK issue is basically an internal case. The source of the threat to Turkey's territorial integrity, political independence and security is its own undemocratic constitution and laws, not an armed attack of another country or an armed group from the territory of another country. Even if Turkey is entitled to the right of self-defence against the PKK within its borders, what about the rights of Kurdish people? The right to self-defence does not justify Turkey's policy of denying the Kurds, nor does it prevail over the right to self-determination. The reason for that is international law does not support human rights violations under any circumstances.

The PKK might have existed in Iraq and had camps along the Iraq-Iran borders but it was within a specific timeframe or as a precondition of the Turkish governments

⁷⁵ See the UN Security Council Resolution No. 688 (May 11, 2016), available at: <http://www.casi.org.uk/info/undocs/scres/1991/688e.pdf>.

⁷⁶ *Id.*

⁷⁷ Keskin 2008, 60–62.

⁷⁸ *Chronology of the Important Events in the World/PKK Chronology (1976–2006)*, Turkish Weekly, May 27, 2007 (May 12, 2016), available at: <http://www.turkishweekly.net/2007/05/27/article/chronology-of-the-important-events-in-the-world-pkk-chronology-1976-2006/>.

⁷⁹ Keskin 2008, 62.

⁸⁰ *Id.* at 64.

⁸¹ *Id.* at 63.

⁸² *Id.* at 67.

to start a resolution process.⁸³ Moreover, the organizational system of the group is no longer based on its classical understanding of the political campaign and rights of the Kurds. The group has changed its strategy from establishing a united state to local democratic self-governance for the Kurds in the Middle East.⁸⁴ There are some other political and military groups that are close to the PKK historically, ideologically and even in military uniform, but Turkey is not the object of their struggle and thus they don't offer any threat or aggression to Turkey. These groups are *Partiya Jiyana Azada Kurdistanê* (PJAK) (the Party for a Free Life in Kurdistan), which is a political and armed group that strives for the rights and freedoms of Kurds in Iran⁸⁵ and *Partî Çareserî Dîmukratî Kurdistan* (PÇDK, The Kurdistan Democratic Solution Party) which is a legal and civil party in Iraq.⁸⁶ The case is almost the same as the Syrian Kurdish party *Partiya Yekîtiya Demokrat* (PYD) (Democratic Union Party) and its military wing, the People's Protection Units (YPG).⁸⁷ Although the party is in the U.S led Coalition in fighting against the Islamic State in Iraq and Syria,⁸⁸ Turkey still considers it a terrorist group due to its close affiliation to the PKK.⁸⁹ The PYD, contrary to all other sides in the conflict, has established a democratic autonomous structure within the hard times of war and intends to have a strong relationship with Turkey as a neighbour⁹⁰ but Turkey always bombards the YPG bases under the justification of state security⁹¹ and insists that it will never allow the creation of a self-ruling Kurdish state on its

⁸³ International Crisis Group, *Turkey and the PKK: Saving the Peace Process*, Europe Report No. 234 (Brussels, 2014), at 5.

⁸⁴ Ocalan 2011, 26–31.

⁸⁵ Thomas Renard, *PJAK in Northern Iraq: Tangled Interests and Proxy Wars*, 6(10) *Terrorism Monitor* (2008), also available at: <http://www.thomasrenard.eu/uploads/6/3/5/8/6358199/jamestown7.pdf>.

⁸⁶ Arkan Ali, *Some Political Parties in Iraqi Kurdistan Still Await Licenses*, Rudaw, May 29, 2013 (May 14, 2016), available at: <http://rudaw.net/english/kurdistan/290520132>.

⁸⁷ *Different Views on PYD Won't Harm US-Turkey Relations, Says Turkish PM*, Rudaw, March 30, 2016 (May 20, 2016), available at: http://rudaw.net/mobile/english/middleeast/turkey/300320162?ctl00_phMainContainer_phMain_ControlComments1_gvCommentsChangePage=2_50.

⁸⁸ Cale Salih, *Turkey, the Kurds, and the Fight against Islamic State*, European Council on Foreign Relations (September 2015), at p. 1 (Nov. 10, 2016), available at <http://www.ecfr.eu/page/-/Turkey-theKurds-IslamicState.pdf>.

⁸⁹ Oral Calislar, *Why does Turkey Say PYD is More Dangerous than IS*, Al Monitor, July 22, 2015 (May 21, 2016), available at: <http://www.al-monitor.com/pulse/security/2015/06/turkey-syria-pyd-more-dangerous-isis.html>.

⁹⁰ Verda Özer, *A Conversation with Salih Muslim*, Daily News, December 13, 2014 (May 21, 2016), available at: <http://www.hurriyetdailynews.com/a-conversation-with-salih-muslim.aspx?PageID=238&NID=75570&NewsCatID=466>.

⁹¹ *Turkish PM Confirms Shelling of Kurdish Forces in Syria*, The Guardian, February 13, 2016 (May 21, 2016), available at: <https://www.theguardian.com/world/2016/feb/13/turkey-shells-kurdish-forces-in-syria-in-retaliation-for-attack-on-border-posts>; *Turkish Strikes on Syrian Kurdish Areas Leave 40 Civilians Dead: Monitor*, EKurd Daily, August 28, 2016 (September 20, 2016), available at: <http://ekurd.net/turkish-strikes-syrian-kurdish-2016-08-28>.

borders.⁹² While the PKK attacks Turkey inside Turkey, these groups pose no threat of armed attack to the country and thus there is no necessity precondition for Turkey to attack them. Since there is no necessity to prevent or stop any armed attack, there can be no proportionality either.

The PKK is neither a *de facto* Iraqi organ, nor has it been harboured, tolerated or supported by the Iraqi government. Thus, Iraq is not responsible for the PKK attacks.⁹³ Therefore, Turkey must, at least, ask Iraqi consent before bombarding the PJAK and PCDKs' positions.⁹⁴ Moreover, Turkey has targeted Iraqi civilians and civilian objects. It has caused the destruction of many houses and displacement of thousands of people in the north of Iraq. It has attacked the environmental and economic infrastructure of the Kurdistan region of Iraq.⁹⁵

It is no more logical to discuss the Turkey-PKK case within the frame of state sovereignty, territorial integrity, or political unity and security, since the rights of minorities, especially ethnic minority, are now guaranteed under international law.⁹⁶ If international law allows states to preserve their territorial integrity, it also requires them to respect and promote minority group rights.⁹⁷ If international law condemns the PKK for its violence, it also condemns Turkey for violating minority rights. If self-defence is Turkey's right, self-determination, at least in an internal context, is the right of the Kurds. The solution of the Turkey-PKK issue does not lie in crossing Iraq's borders; it lies in returning to peaceful negotiations to bring the Turkish constitution into compliance with international laws governing minority rights and disarm the PKK. Since Turkey is not faced with any PKK armed attack from Iraq and the attack is directed from the inside, there is no necessity for Turkey to conduct military operations in Iraq. Therefore, Turkey is not entitled to use force within the borders

⁹² Wyre Davies, *Crisis in Syria Emboldens Country's Kurds*, BBC News, July 28, 2012 (September 23, 2016), available at: <http://www.bbc.com/news/world-middle-east-19021766>.

⁹³ Responsibility of States for Internationally Wrongful Acts, *supra* note 35, Art. 8.

⁹⁴ Mariam Karouny, *Iraq Protests Turkish Incursion into Northern Iraq*, Reuters, February 22, 2008 (Sept. 23, 2016), available at: <http://www.reuters.com/article/us-iraq-turkey-idUSL2281538020080222>; *Iraqi Kurds Condemn Turkey Incursion, Call for Troops Withdrawal*, Xinhua, February 23, 2008 (Sept. 24, 2016), available at: http://news.xinhuanet.com/english/2008-02/23/content_7655337.htm; *Iraq Condemns Turkey for Bombing in an Iraqi Northern Village*, South Front, February 5, 2016 (Sept. 24, 2016), available at <https://southfront.org/iraq-condemns-turkey-for-bombing-in-an-iraqi-of-northern-village/>.

⁹⁵ *Iran/Turkey: Recent Attacks on Civilians in Iraqi Kurdistan*, Human Rights Watch, December 20, 2011 (Sept. 24, 2016), available at: <https://www.hrw.org/news/2011/12/20/iran/turkey-recent-attacks-civilians-iraqi-kurdistan>.

⁹⁶ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, General Assembly Resolution, A/RES/47/135, December 18, 1992.

⁹⁷ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution, A/RES/25/2625, October 24, 1970, para. 7 of the principle of equal rights and self-determination of peoples.

of Iraq under the justification of self-defence under Article 51. Moreover, it has a legal obligation under article (2/4) to refrain from the threat or use of force against Iraq.

9. Conclusion

The right to self-defence has long roots in international law. It can be traced back to the ancient concepts of the defensive use of force and “just wars” of ancient Greece and Rome; the modern basis of the right stems from the Caroline case between the British and U.S. governments in 1837. During negotiations on the adoption of the UN Charter, the right to self-defence was placed in Article 51. The customary understanding of the right includes the use of force both in anticipation of and response to an actual armed attack. The conventional concept of this right leaves space for interpretation. While some scholars confine the exercise of the right only to a response to an actual armed attack, others broaden the scope of the right to entail preemptive self-defence as well. That second view seems to be more logical due to custom, which is another reliable source of international law that the UN Charter has, in this instance, merely codified without exhausting. The right to self-defence is regarded an inherent right to which every state is entitled. The right, however, encompasses the use of force against any armed attack against the sovereignty and security of a state; it is to be exercised within the boundaries of agreed conditions as such necessity, proportionality, immediacy and reporting any measures taken to the Security Council.

The Turkey-Kurdish issue originally stemmed from the invasion of the historical homeland of the Kurds and the denial of their distinct ethnicity. However, it later became a legal issue related to minority rights. The Kurds have a historical link to where they live, a shared history and distinct language and culture within Turkey. Thus, they qualify as a people. Despite making many peaceful attempts to achieve their rights, Turkey left no alternative other than the formation of the PKK in 1978. As soon as the PKK started to demand self-determination, Turkey labelled it a terrorist group and invoked the right to self-defence. During the 1980s and 1990s, the PKK established some camps in Iraq as a strategic step towards resolving the Kurdish issue in the other Middle Eastern countries. It also used the camps as a safe retreat for its forces during peace negotiations with Turkey, as a condition of Turkish governments. But Turkey sought to attack the PKK outside of its borders and attacked the camps under the justification of self-defence even though the PKK attacks Turkey only from within its borders. Some PKK-affiliated groups exist in the northern region of Iraq, but they strive for the Kurds in other countries and they pose no threat of armed attack to Turkey. Thus, there is no necessity for Turkey to cross Iraq's borders and attack them. Since Turkey's circumstances do not meet the precondition of necessity in its military operations, there can be no proportionality either. Therefore, Turkey is not entitled to cross Iraq's borders using Article 51 as a justification. Moreover, it is bound by article (2/4) to refrain from any threat or use of force against Iraq.

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