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The Pursuit of Self-Determination by Iraqi Kurds and Regional Security Implications: An International Law Perspective

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Table of Contents

Introduction	4
Chapter One: The Right to Self-determination	5
Definition of self-determination	8
Who has the right to self-determination?	11
The statute of the right to self-determination in the UN charter	13
The legal possibility of self-determination for the Kurds	16
Is it self-determination or secession?	18
The dream of the Kurdish nation the Right to Internal and external sovereignty	20
Chapter Two: The state in international law	22
The concept of the state in the international law	23
National Unity and Territorial Integrity	25
Chapter Three: collective security	26
The concept of collective security and self-defense	26
Non-state armed groups	31
Turkish Military Operations in Northern of Iraq	36
Turkish and Iranian reaction toward independence	46
Conclusion	47
Bibliography	50

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Abstract

In September 2017, a dispute emerged over the Kurdistan Region of Iraq's desire to hold a referendum on its independence from Iraq. The Kurds believed they had the right to self-determination under international law. The central government and the Iraqi Supreme Court asserted that there was no constitutional basis for a referendum. Furthermore, Kurdish independence in Iraq poses a possible threat to neighbour states who have Kurdish minorities.

The right to self-determination in a post-colonial context is a very ambiguous concept and it is unclear whether modern law authorizes external self-determination in the form of unilateral secession from the mother state. The secession theory has emerged when people under special circumstances believe their right has been denied and there are no other means for remedy but secession. The purpose of this dissertation is to examine whether the Kurds in Iraq have the right to self-determination, and if the law of self-determination allows secession as a remedy for people. The other part of the dissertation discusses the effect of Iraqi Kurdish self-determination on collective security in the region and the possible hostilities in light of the current Turkish military operations in Iraq and Syria.

Introduction

A referendum took place in September 2017 in northern Iraq led by the Kurdish leader Masoud Barzani, calling for Kurdish independence from Iraq. Yet it was clearly rejected by the Iraqi government and neighboring

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states where Kurdish minorities exist. This caused hostilities in the region and provoked military escalation by Turkey and Iran.

This dissertation will discuss two fields of international law, the right to self-determination and collective security, taking the Kurds in northern Iraq as a case study to explain the right to self-determination, its effectiveness on the collective security in the region and its impact on international law.

The first chapter will cover the right to self-determination and the legality of the claims made by Iraqi Kurds in international law for their right to self-determination based on the criteria usually applied by international law and the UN charter. The second chapter discusses the concept of the state and sovereignty in international law, which reflects the understanding of international law to the concepts of state, national unity, and territorial integrity and whether it is imposed on the status of Iraqi Kurds.

The third chapter analyzes the implications of self-determination for Kurds in Iraq on the collective security in the region, taking the fact of the current Turkish military operation in Syria and Iraq against Kurdish armed groups, using the concept of self-defense in pursuance of Article 51 of the UN Charter. I discuss the case of Iraqi Kurds within the scope of the definition of people and territorial integrity, using previous cases in international law and the in the international courts.

Chapter One: The Right to Self-determination

The right to self-determination remains a complicated concept partly because it is ambiguous in two areas in international law. Firstly, it does not classify if the claim is for self-determination only for colonial territories. Secondly, it does not define clearly who the eligible people are who require self-determination. These two fields of international law remain under discussion. This chapter will examine the legality of self-determination for Kurds in Iraq in accordance with the legal interpretation of self-determination in international law and domestic law to understand the reasons that make a group of people seek independence.

Kurdistan for Kurds is a geographical expression encompassing an area

which stretches from south-east Turkey across the northern most areas of Iraq into Iran's mid-western region.¹ But the Kurds have a dream to have a nation that includes areas stretching from the Taurus Mountains in the west to the Iranian plateau in the east, and from Mount Ararat in the north to the plains of Mesopotamia in the south, some also include parts of Armenia and Azerbaijan around 500,000 sq KM; as large as France.² The northern areas of Iraq where the majority of the Kurds settled, is called the Kurdistan Region of Iraq KR-I, which includes Erbil, Dohuk, and Sulaymaniyah on the border with Iran and Turkey.

The destiny of the Kurdish in northern Iraq has changed after the Gulf War 1990-91 which raised the Turkish government sensitivity towards Kurdish aspirations for self-determination.³ In 1991, the government led by Saddam Hussain suppressed and attacked Kurdish and Shi'a rebels and fleeing civilians.⁴ Around half-million Kurdish fled in 1991 to the Turkish border after the failure of the Kurdish revolution against the Saddam regime.⁵ The UN Security Council expressed its grave concern about the repression against Kurds and Shi'a in Iraq.⁶

The crisis brought international attention to protect Kurds, thus the US led coalition created a protection zone, "no-fly zone" and forced the Iraqi military to withdraw from the north.⁷ This intervention was to meet the imminent humanitarian needs.⁸ Self-governing powers were given to the two political parties which dominated the Kurdish political landscape, Kurdish Democratic Party (KDP) and Patriotic Union of Kurdistan (PUK)⁹.

1. Martin Short and Anthony McDermott, *The Kurds*, Report No 23, fourth revised edition, 1981. PP 4-5.

2. Short M, and McDermott A, (N 1) P 5.

3. Bill Park, *Turkey's Policy Towards Northern Iraq: problems and perspectives*, May 2005, Routledge, P 20

4. Human Rights Watch, *Back Ground on Human Rights Conditions, 1984-1992*, August 1993, Vol.5, Issue 5 <https://www.hrw.org/reports/1993/iraq/> accessed on 19th July 2018.

5. Park B (N 3) P 20

6. UNSC Resolutions 688 (5 April 1991) UN DOCs 2982nd meeting, P 31.

7. Danesh Sarooshi, *The United Nation and development of the collective security*, 2nd edition 2003, Oxford University press, Clarendon press. Oxford 1999. P 227

8. *Ibid*, P 227

9. Park B (N 3) P 20

In 2002 the Kurdish parties drafted a constitution considering KR-I as a federation and for self-governing to extend to include the oil-rich Kirkuk area.¹⁰ Kurds used the opportunity of the US led coalition presence to secure an autonomy settlement with Baghdad.¹¹ After the Iraq invasion and intervention of US led military in 2003, Kurds made tangible advances politically. In the first election, the Kurds were keen voters, the KDP and PUK recorded the second largest vote of 25.7% which secured the Kurds 75 seats in the 275-member Iraqi national assembly.¹² In 2006 the PUK and KPD unified their administration within the autonomous region of Kurdistan for the first time after the civil war in KR-I.¹³ On 25 Sep 2017, a referendum took place in KR-I led by the Kurdish leader Masoud Barzani for the right to self-determination and independence from Iraq.¹⁴

This chapter of the dissertation will discuss the concept of self-determination and the applicability to implement the criteria of self-determination to the Kurdish case in northern Iraq. I will present the legality of the Kurdish dream to have a nation, this concept will be presented in pursuant to the explanation of Article 1(2) of self-determination and Article on the territorial integrity in the UN Charter 2(1)¹⁵.

10. Ibid, P 22

11. David Keen, *The Kurds In Iraq: How Safe Is There Haven Now?* Jan 1993, Save Children, P 20

12. Park B (N 3), P 7

13. Mohammed M. A (N 14) P 12.

14. Galip Dalay, *Foreign Affairs, After the Kurdish Independence Referendum, How to Prevent a Crisis in Iraq?* 2 October 2017 < <https://www.foreignaffairs.com/articles/middle-east/2017-10-02/after-kurdish-independence-referendum> > accessed on 23 July 2018.

15. United Nation Charter, signed on 26 June 1945, came to force on 24 October 1945, Article (2) and article 2(1), UNTS.

Definition of self-determination

The self-determination legally formulated in the UN Charter is applied to all people suffering under colonial domination.¹⁶ The concept of self-determination was used to end colonialism. However, it was used for the post-colonial state to fight human rights abuses by some states who justified their abuse due to self-defense.¹⁷ Hence, the concept of self-determination in that regard was crystallized by the international human rights bodies and applied to all people.

The concept of self-determination contradicted within the UN Charter because, Article 1 (2) of the UN charter enhanced friendly relations based on the respect of the principle of the equal rights and self-determination as a tool to keep universal peace.¹⁸ On the other hand, Article 2 (1) emphasizes clearly on the equality of sovereignty of all state members¹⁹. While, Article 76 presented self-determination into phases, either through development leading to self-determination (autonomy) or development towards full political independence.²⁰ The UN Charter touched on the concept of self-determination more broadly, which widened the interpretation of the right to self-determination.

Furthermore, Article 2(1,4) of the UN Charter emphasizes the sovereignty, territorial integrity, and political independence as a core principle upon which equality among all members rests.²¹ The apparent contradiction between the concept of sovereignty, territorial integrity, political independence and self-determination in the UN charter has resulted in conflicting interpretations to the rights of peoples to self-determination.²²

16. Ove Bring, Kurdistan and the Principle of Self-Determination, 35 German Y.B. Int'l L. 157 (1992), P 158

17. E. Chadwick, Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict, 1st edition 1996, P3

18. UN Charter (N 27) Art 1 Para 2

19. Ibid Art 2 Para 1

20. Bring O, (N 28) P 164

21. UN Charter (N 27) Art 2 para (2&4)

22. U.N Charter preamble, Articles 2(1)(4)(7), 4, 9,93 and 110

The international community admits people's rights to self-determination under the state domestic procedures, political process or democratic presentation within the framework of the state.²³ Because Article 2(7) of the UN charter prevents any intervention in the internal matters that fall under the domestic jurisdiction of any state.²⁴

Modern international law considers self-determination in the framework of political representation and standards of rights for minorities. Historically, Woodrow Wilson reflected the Western European understanding for self-determination that those within a certain state should have the right to choose their own government – “self-government”.²⁵ A population has the right to choose their own form of government.²⁶ Such form should be under a democratic government.²⁷ Wilson connected the right of self-determination with a democratic government which represents all people rights, justifying the behavior of belligerents as a war between democracy and autocracy.²⁸ This explanation was included in the UN Charter Article 55 proves that in order to achieve equal rights and self-determination the United Nation shall promote high standards of living and with equal access to social services and developed social, economic systems along with respect for human rights and other fundamental rights.²⁹

The Western states have interpreted self-determination in the context of popular sovereignty and representative government.³⁰ This more or less reflects the same concept of democratic government that a representative government effectively represents all people's rights without any discrimination within its territory. In that regard, the Iraqi constitution

23. E. Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*, 1st edition 1996, P3

24. UN Charter (N 27) Art 2 para (2&4)

25. Thomas D. Musgrave, *Self-Determination and National Minorities*, 2nd edition 2000, Oxford University press, P 22

26. *Ibid*, P 22

27. *Ibid*, P 22

28. *Ibid* P 22

29. UN Charter (N 27), Art 55.

30. D. Musgrave T, (N37) P 96

defines Iraq as a democratic and federal state in Article 1.³¹ And recognizes the autonomous region of Kurdistan as being self-governing.³²

However, Iraqi Kurds arguing that they are entitled to independence is based on three points that the Iraqi constitutional process could not solve. Firstly: failure of the constitutional mechanism to solve the boundary among regions of Iraq which includes the rich reserves of oil around Kirkuk.³³ Second, was the fiscal relationship and revenue sharing. Thirdly, the security within the state, since Iraq is facing terrorist attacks.³⁴ Using the security situation as a reason to argue that central government could not provide protection to the Kurds does not meet the fact that Article 121 (5) of the Iraqi constitution entitled the KR-I region, the responsibility of administration requirements which include the internal security forces in the region.³⁵

Using the security situation, in general, is a weak argument to justify self-determination in international law. Particularly, as Iraq is going through a transitional period from autocracy to democracy and in need of support from the international community. Hence, it is not an ideal option for any ethnic group to separate due to the security situation deteriorating. Moreover, the self-governing status established in 1992 by the international community led indirectly to a civil war breaking out between the two dominant Kurdish parties and isolated the Kurds ethnically.

31. Wipo.int, Iraq constitution 2005, Article 1 http://www.wipo.int/wipolex/en/text.jsp?file_id=230000 , accessed on 11 March 2018

32. BBC News, Iraqi Kurdistan Profile, 31 Oct 2017 < <http://www.bbc.co.uk/news/world-middle-east-28147263>> accessed on 12 Mar 2018.

33. Thomas D. Grant: Kurdistan After the Referendum of September 25, 2017: Statehood, Recognition and International Law. 46Ga. J. Int'l & comp. L. 369, 1 August 2018), p 396-397

34. Ibid p 396-398

35. Iraqi constitution of 2005, Art 121 Para 1 https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en accessed on 27 September 2018.

Who has the right to self-determination?

Ethnic groups frequently ask for the right to self-determination, on the basis that they are a distinct community of people.³⁶ The Kurds are arguing that self-determination is confirmed and recognized by international law and the UN. The concept was developed after WWI to give the right for the group of people under Ottoman Empire control to choose their future.³⁷ Furthermore, it was a legal framework after WWII for decolonization, and around 120 states were born into the world.³⁸ The right to self-determination was entitled to the people in the post-war period by the international instruments and resolutions³⁹. but, the term of people has never interpreted or defined in a comprehensive manner. It is a gap in the international law because the international community have never agreed on a definition. Rupert Emerson said that, “the term of people had never attained any general accept meaning which can be applied to the diverse world of political and social reality” .⁴⁰

Another interpretation to the term ‘people’ is within the framework of decolonization, referring to people who are entitled to self-determination is the population of a non-self-governing territory.⁴¹ Hence, the concept of self-determination applied to land under occupation or under the possession of a colonial authority. Based on the last definition, Iraq is an independent state and a member of the United Nations.⁴² A much broader definition for ‘people’ is that it is not limited to colonial territories only, but it goes beyond that to imply and include the presence of a representative government where people have rights to choose their own government and their views are reflected without discrimination.⁴³

36. D. Musgrave T, (N37), P 102

37. Amir Taheri, Gatestone Institute International Policy Council, Kurdish Referendum: What is The Lowdown, 1/10/2017 <https://www.gatestoneinstitute.org/11090/kurdish-referendum-secession> accessed on 25th July 2018.

38. Ibid

39. D. Musgrave T, (N37), P 148

40. D. Musgrave T, (N37) P 148

41. Ibid P 149

42. Amir Taheri, (N 50).

43. D. Musgrave T, (N37) P 151

This concept was asserted in the provision of the 2625 (XXV) resolution paragraphs (1,7).⁴⁴ At this point, the understanding of ‘the people’ based on the above, is that of the people within an existing territorial boundary in a sovereign and independent state.

Brownlie defined people in terms of ethnic criteria that “the principle of self-determination is a right of a community which has a distinct character and to have this character reflected in the institution of government under which it lives”.⁴⁵ A distinct character depends on several criteria such as race, nationality, language, culture, religion and group psychology predominate.⁴⁶ In similar scope, experts within UNESCO were able to define people in international law who are entitled to self-determination and classify them with specific categories named.⁴⁷

1. Group of people who enjoy the same historical tradition.
2. Same racial or ethnic identity.
3. Share the same culture.
4. Enjoy the same language.
5. Religious or ideological affinity.
6. Territorial connection.
7. Mutual economic life.
8. The group of people must be an acceptable number. There is no need to be very large as there are Microstates.

The group should have means to express themselves and make the request for their identity.⁴⁸

44. UNGA Resolution 2625 (XXV) (24 October 1970) 25th session reported from the sixth committee, UN DOCs (A/8082), A/Res/25/2625, Para 1,7

45. Brownlie I, ‘The Rights of Peoples in Modern International Law.’ (1985) 9(2) Bull Austl Soc Leg Phil 108

46. Ibid, P108

47. Daniel Moeckil, Sangeeta Shah and Sandesh SivaKumaran, international human rights law, second edition, oxford university press, 2014, Page 337.

48. Moeckil D, Shah S, and SivaKumaran S, (N 60) 337.

Both definitions have a broad range of explanations and could be applied to a broad range of ethnic groups that might create instability around the world. In addition, it is impossible to rely on as there would be few groups in the world who have been universally accepted as peoples using the above criteria.⁴⁹

Furthermore, the Kurds were granted self-government in 1992 because they are a discriminated group. But in August 1996 Masoud Brazani asked for Saddam Hussain's support to defeat the Patriotic Union of Kurdistan (PUK) in the Sulaymaniyah districts.⁵⁰ In September 1996 the Kurdish Democratic Party KDP took control of northern Erbil and Sulaymaniyah, the KDP-led parliament announced in the Parliament building in Erbil.⁵¹ In October the PUK re-captured Sulaymaniyah.⁵² In January 1997 the PUK announced a new government in Sulaymaniyah while the KDP was claiming jurisdiction over the whole of Kurdish-controlled north.⁵³ As a result of these events the Kurds at that time could not prove that one ethnic group could create a stable state even if they were recognized as being a people. On the other hand, they are well represented in the current government based on Brownlie definition.

The statute of the right to self-determination in the UN charter

Article 1(2) of the UN charter addressed the question of self-determination.⁵⁴ The members of the UN should implement the UN Security Council resolutions based on Article 25 of the Charter.⁵⁵ That may indicate that

49. Ibid P 337.

50. BBC News, Iraqi Kurdistan Profile- Timeline, 31 Oct 2017 < <https://www.bbc.co.uk/news/world-middle-east-15467672>> accessed on 27 July 2018.

51. BBC News, Timeline: Iraqi Kurd, 19 April 2011 < http://news.bbc.co.uk/1/hi/world/middle_east/country_profiles/2893067.stm> accessed on 27 July 2018

52. Patrick Cockburn, Independent, PUK <https://www.independent.co.uk/news/world/puk-turns-the-tables-on-allies-of-saddam-1358374.html> accessed on 27 July 2018.

53. BBC News, Timeline: Iraqi Kurd, 19 April 2011 < http://news.bbc.co.uk/1/hi/world/middle_east/country_profiles/2893067.stm> accessed on 27 July 2018

54. UN Charter (N 27), Article 1(2).

55. Ibid, Article 25.

the UN General Assembly resolutions are not binding.⁵⁶ However, it is an essential instrument in international law to reflect the international community's interpretation and will. Resolution 1514 determined to take immediate action towards self-determination.⁵⁷ However, it considered the states then still under colonial control.

The main reason for the resolution 1514 is to grant independence to countries and people under colonial rule. It is not granting independence for entities who are part of an independent country because it has insisted on the right of people (states) to exercise of their sovereignty and the integrity of their national territory.⁵⁸ It has also affirmed the fundamental rights of the dignity and worth of the human person and the equal rights of men and woman to promote social progress and better standards of life in larger freedom.⁵⁹ Furthermore, the resolution emphasises friendly relations based on respect and equal rights to self-determination of all people and respect for human rights and fundamental freedoms without distinction.⁶⁰

The UN charter focuses a lot on the national unity and territorial integrity. The colonial declaration of 1960 itself also emphasizes in Article 6 on the national unity and territorial integrity. "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".⁶¹

That is the viewed from the Arbitration Commission of the European Conference on Yugoslavia in Opinion No. 1 that the state was defined as a community because it has a territory, a population subject to an organized political authority and enjoys sovereignty.⁶² In addition to the

56. Vaughan Lowe, *International Law*, 1st edition 2007, Oxford University press, P 91

57. Knop K, (N67) P 327

58. UNGA resolution 1514, XV (14 Dec 1960) UN Docs, adopted on 947 plenary meeting

59. Ibid

60. UNGA resolution 1514 (N 72)

61. The United Nation and Decolonization, the Declaration on the Grating of Independence to Colonial Countries and People, UNGA Res 1514 (XV), on its 947-plenary meeting of 14 December 1960, UN Doc A/RES/1514(XV) OXIO 5, Art 6

62. Malcolm N. Shaw, *international law*, eighth edition, Cambridge university press, 2017, PP 157-158

constitutional and the internal political system.⁶³ Moreover, the state may be recognized even if it is in a conflict with another state if it is able to determine its frontiers and control that territory which was the case in the Algeria Conference in November 1988 when they declared in the case of Palestinian state that the Palestinian organization was unable to control any part of the territory and claim it.⁶⁴

Furthermore, the International Court decision is another legal instrument to explain the UN Charter to follow up on the development of self-determination. In the case of Western Sahara, the ICJ referred to Article 1 and 55 of the UN Charter asserting that this provision related to the non-self-governing territories in a way to end the colonial system.⁶⁵ The ICJ decision considered the right to self-determination a principle only for a colonial-type territory.⁶⁶

In summary, section XI of the UN Charter deals with the non-self-governing territories for “people who have not yet attained a full measure of self-government”.^{67,68} Moreover, Chapter XII deals with territories under a trusteeship system.⁶⁹ There is no clear statement or provision that deals with independence for a group of people within their independent territory. The declaration on friendly relations also prevents any intervention in the territorial integrity of a member state.⁷⁰ Therefore, the right to self-determination for people in accordance with the General Assembly resolution 1514 is the right to the people of the territory to freely choose their own government.⁷¹

63. Ibid, PP 157-158

64. N. Shaw M, (N 76) PP 157-158

65. The case of Western Sahara, advisory Opinion, [1975] ICJ Rep 12, P 23 Para 45. < <https://www.icj-cij.org/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>>

66. Crawford J, *The Right to Self-determination in International Law: its Development and Future*, in Edited by Philip Alston, *People's rights*, 1st edition, 2001, Oxford University press, P 32-33

67. UN Charter (N 27), Chapter XI.

68. Knop K, (N67) P 52

69. UN Charter (N 27) Chapter XI.

70. UNGA Resolution 2625 (24 October 1970), UN DOCs (A/8082), A/R.es/25/2625.

71. Knop K, (N67) P 66.

The legal possibility of self-determination for the Kurds

The Security Council affirmed in its resolution 1546 the fully sovereign and independent interim government of Iraq, emphasizing its independence, sovereignty, unity and territorial integrity of the country⁷². In addition, they reaffirmed that Iraq is moving towards federal, democratic, pluralist and unified status with full respect for political and human rights⁷³. However, KR-I proceeded toward a referendum looking for independence as a minority group. This was considered illegal by the Iraqi supreme court as having no constitutional reference and indeed violating its provisions.⁷⁴ Clearly, UNAMI represented the view of the UN towards the referendum and requested that KR-I respect the constitution along with acknowledging and respecting the federal court's decision.⁷⁵

Similarly, Spain is a quasi-federal polity and the constitution enacted that the territory of Spain is divided to 17 self-governing units in 1979.⁷⁶ Catalonia attained self-governing status by passing a Statute of Autonomy in 2006 after which demands for further autonomy to decide Catalonia's future increased.⁷⁷ This led the Spanish constitutional court to insist and emphasize that Spain is the only nation from a legal perspective and the existing constitution acknowledges only one Spanish nation.⁷⁸

In a similar case to Kurdistan, Catalonia kept raising the debate of independence and requesting separation from Spain to accommodate

72. UNSC Resolution 1546 (8 June 2008) 4987 meeting SC Doc S/RES/1546 (2004).

73. Ibid

74. Reliefweb, statement on the Federal Supreme Court Decision Concerning Kurdistan Referendum, (EN/AR/KU), 12 Nov 2017 < <https://reliefweb.int/report/iraq/statement-federal-supreme-court-decision-concerning-kurdistan-referendum-enarku> > accessed on 9th august 2018.

75. Ibid

76. Victoria Ferrers Comella, The Spanish Constitutional Court confronts Catalonia's "right to decide" (comment on the judgment 42/2014), (constitutional law), 2016, E.C.L. P 571

77. Ferrers Comella V, (N 90) P 573

78. Ferrers Comella V, (N 90) P 575

the national Catalan identity.⁷⁹This debate has led to a discussion on the national level for the various solutions to satisfy the Catalan aspirations, one of the suggested solutions is a federation that would stratify the Catalan demands for self-government and reform the Spanish constitution.⁸⁰

A federation is an ideal solution replacing independence which was presented in the Iraqi constitution to satisfy Kurdish and minorities rights and keeping friendly relations between the central government and KR-I. Moreover, it reflects Articles 1 (2,3) 55 (c) of the UN charter connecting the right of self-determination to human rights.⁸¹This reflects the relation between the friendly relationship between the state that is based on equality and human rights.⁸² The concept of self-determination in modern international law is the emphasis on respect of the human rights for all minorities without discrimination to achieve international peace. It is no longer discussing self-determination under the same terms when countries were under colonial rule.⁸³ This is clear in the emphasize of the UN Charter on people's rights to choose their political, economic and social system based on their desire within the border of the state and not encouraging the creation of a new state.

The international human rights bodies provide that the international community supports more internal self-determination for minorities. In order to guarantee their rights to decide their future within the boundaries of the state.⁸⁴ This should be through the participation in the political system, freedom of expression and democratic election.⁸⁵ Article 25 of the ICCPR focused on the right to participate in the public affairs.⁸⁶ Self-determination at this point is the right to political, social, economic

79. David Moya, Spain: elections in Catalonia 2015 and the debate on independence, constitutional law, P.L 162, Jan 2016, E.C.L., P 163

80. Ibid P 163

81. UN Charter (N 27) Art 55

82. Ibid Art 1 (2,3) and 55 (c).

83. Crawford J (N80) P 16

84. Crawford J (N80) P 25

85. Crawford J (N80) P 25

86. International Covenant on Civil and Political Rights ICCPR, adopted by the GA resolution 2200A (XXI) of 16 Dec 1966, entry to force on 23 March 1976. Art 25

and cultural rights.⁸⁷ Even though Article 1 does not articulate who ‘the people’ are who have the right to self-determination.⁸⁸ However, Article 3 mentions the state under colonial rule.⁸⁹

GA resolution 2200A (XXI) which adopted the ICCPR view and reaffirmed the inherent and equal rights of all UN members in accordance with Universal Declaration of Human Rights that free human beings should enjoy civil and political freedom and economic, social and cultural rights⁹⁰. In that sense, the Iraqi constitution recognizes the region of Kurdistan along with the existing authorities as a federal region in Article 117⁹¹. Furthermore, Article 121 (1) gives the right to Kurdistan to exercise executive, legislative and judicial powers inside the region⁹². On the domestic level, the Iraqi constitution admitted the authority of the KR-I. Therefore, the central government complies with its obligation toward Kurdish rights. However, the Kurds argue that since the Iraqi constitution permits the jurisdiction of the KR-I then there is no legal basis to prevent the referendum and declare independence. This argument has no legal basis in international law because the only cases that were permitted by international law were remedial secessions when there was no way that the central government permitted rights to minorities.

Is it self-determination or secession?

Self-determination debates between 1950-1980 emphasized decolonization, but after 1980 it took three directions, firstly, it was used to justify intervention in another state for protection. Secondly, recall a secession from a state, and thirdly, establish a special arrangement within a state like autonomy or internal self-determination⁹³. While self-

87. Crawford J (N80) P 27

88. ICCPR (N100) Art 1

89. Crawford J (N80) P 27

90. UNGA Resolution 2200A (16 Dec 1966) UN DOCs A/RES/21/2200.

91. Iraqi Constitution of 2005, Art 117 https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en

92. Ibid Art 121 Para 1

93. Crawford J (N80) PP 39-40.

determination is a tool to reflect minorities' rights in the governmental institutions which may be regional autonomy like Kurdistan, "secession is a new non-colonial category of external self-determination"⁹⁴. This applies when the government does not recognize people's rights along with the continuous oppression and discrimination.

Secession would take a long time after negotiations had led nowhere and would require the consent of the mother state. South Sudan's secession was ratified by Khartoum after 20 years of war and six years of negotiations⁹⁵. The consent of the mother state was an essential condition to approving the secession by the international community and in international law. However, Kosovo separated without consent but the situation of the state until now was complicated and not many states recognized Kosovo, only states who might benefit from such a secession and it is still not recognized by the UN. The Kurds cannot rely on the case of Kosovo.

First, the Kurdish people were represented in the federal state institutions in addition to the veto in accordance to Iraqi constitution which entitled them to reject any decision⁹⁶. Second, there is international protection formulated by the existence of international humanitarian NGOs working along with UN operations in northern Iraq. The secession of Kosovo from Serbia and the independence of Bangladesh from Pakistan are important examples for remedial secession⁹⁷ in international law while the Kurds do not have similar grounds for secession.

External self-determination through secession, the separation from the mother state to a smaller territorial base inhabited by the self-determination seeking people, is not welcomed by international law⁹⁸. In other words, no people or other minority groups can claim an international right to

94. Knop K, (N67) P 80.

95. Amir Taheri, (N 50).

96. Iraqi Constitution, 2005, 142

97. CEU, Ieva Vezbergaitė, Remedial secession and exercise of the right to self-determination of peoples, 2011, P75

98. Milena Sterio, Opinion Juris, Do Kurds Have the Right to Self-Determination and/or Secession? 29 Sep 2018 <http://opiniojuris.org/2017/09/28/kurds-right-self-determination-and-or-secession/> accessed on 31 July 2018

secede⁹⁹. Legally, secession is not an accepted formula in international law and politics, and the Kurds do not have international political support for secession.

The dream of the Kurdish nation and the right to internal and external sovereignty

The Kurds are the second largest ethnic group who are stateless in the world.¹⁰⁰ The dream for a nation for Iraqi Kurds started to grow after experiencing discrimination in Iraq, Syria, Iran and Turkey.¹⁰¹ The toppling of Saddam Hussain in 2003 offered the Kurds greater rights, as well as legal and political representation. However, the September referendum was not the first one. In 2005 there was a referendum on the question of independence, but the difference was, that the first was initiated by civil-society-led forces, whereas the second was conducted by the Kurdish government and had been ratified by the region's parliament which stated their intention in favour of independence from Iraq.¹⁰²

A nation can have a different expression and explanation. Thus, it might refer to territory, language, culture, religion, and shared history.¹⁰³ There are three essential categories for nationhood. Spatial which is the territory; social that is related to understanding and sharing history, myths, culture and traditions and finally, political which is related to state or government.¹⁰⁴ The concept of nation has two meanings. First, the behavior of the nation members when it is related to their national identity which is clear in the common origin, ethnicity, and culture.¹⁰⁵ Second, when a nationally aware group in the population is trying to achieve self-determination.¹⁰⁶ The nation consists of an ethnic or cultural group, whereas the state is

99. Sterio M, (N 112)

100. Mahir A. Aziz. Kurds of Iraq, IB Tauris & Co Ltd, 30 Jan 2011, P4

101. Ibid P4

102. Dalay G, (N24)

103. A. Aziz M. (N114) P21

104. Ibid P21

105. A. Aziz M. (N114) P21

106. Ibid P21

a political entity with a varying degree of sovereignty¹⁰⁷. While states are mainly nations there are nations which are not states, suffering from a deficit in full sovereignty¹⁰⁸. These are communities that consider themselves nations but are not recognized by others¹⁰⁹. In a way similar to the Kurds in Iraq. Even though they are part of Iraq after 2003, they have still considered themselves as a nation and have continued calling for independence. The Kurds lost the national conscience of being part of the Iraqi political and social community.¹¹⁰ On the political side, Kurds have political representation. In 2003 the Kurds integrated into a newly formed federal, parliamentary, representative, democratic republic¹¹¹. The Kurdish people had legal representation within the Iraqi government.

For Kurds are a group of people who have a “common political goal, a will to live together and clear ethnic or culture ties” .¹¹² They have agreed on being part of the federal structures of Iraq when they voted with a majority on the Iraqi constitution and they include the veto for the Kurds to reject the constitution or any decision with the vote of the three Kurdish provinces” .¹¹³

Self-determination for Kurds in Iraq is interpreted as having autonomy within the mother state and representation in the state institutions¹¹⁴. They were able to achieve that through a federal system. An exceptional case of unilateral secession is Kosovo which is still not recognized by the UN, but Russia used the case of Kosovo to annex Crimea.¹¹⁵ However, in the case of Kosovo, the ICJ advisory opinion considered Kosovo not represented by the Serbian government and it is not recognized by international law, though it was tolerated by the international community, hence, the

107. Ibid PP 22-23

108. Ibid P 23

109. Ibid P 23

110. Ibid P 23

111. IRFAD, Iraq Government < <http://www.irfad.org/iraq-government/>> accessed on 24th of July

112. E. Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*, 1st edition 1996, PP 4-5

113. Ibid PP 4-5

114. Sterio M, (N 112)

115. Sterio M, (N 112)

secession was not prohibited by international law.¹¹⁶

The declaration on the friendly relations between states insisted on the respect of territorial integrity and sovereignty which can be contrary to the concept of self-determination.¹¹⁷ Therefore, the declaration targeting states that had been under colonial control did not always include all peoples who identified with a particular linguistic or national community. The federal system emerged as an alternative solution for degrees of self-determination which applied more to states previously under colonial control.

This partially meets the demands of the Kurds as a minority for self-government in the form of territorial autonomy.¹¹⁸ This has created regional political units controlled by the Kurds, protected and secured by constitutional provision.¹¹⁹ Therefore, the Kurds were assured to have their rights to a proportion of state revenues, (17 percent of the federal budget) which increased exponentially from 2005 to 2013.¹²⁰ 95 percent of the budget is from the central government, three-quarters of which is allocated to public sector salaries, the majority of the KR-I social welfare services that are functioning in the region are dependent upon Baghdad-based funding.¹²¹

Chapter Two: The state in international law

The first chapter discussed in detail the concept and the criteria of self-determination based on facts and interpretations of international law and human rights conventions. The Kurds have the right to be represented within a democratic government. This was assured in the Iraqi constitution and various legislation. Furthermore, this chapter will discuss the concept of state and sovereignty in regard to the legality of Kurdish aspirations to create a separate state.

116. Sterio M, (N 112)

117. Hilly Moodrick–Even Khen, Intlawgrls, Between Kurdistan and Catalonia: On the Right to Self-Determination of Peoples, 3 November 2017 < <https://ilg2.org/2017/11/03/between-kurdistan-and-catalonia-on-the-right-to-self-determination-of-peoples/>> accessed on 1 August 2018.

118. Ibid

119. Moodrick–Even Khen H, Intlawgrls (N149)

120. Denise Natali, The Kurdistan Region of Iraq: Stabilizer of Spoiler? 14 Geo.J.Int'l Aff. 17 (2013), P 73.

121. Ibid 76.

The concept of the state in international law

The concept of the state is the main subject in international law that considers sovereignty¹²². It is related to the territory controlled along with a range of activities controlled by government and its agencies within its borders that are not regulated by another state¹²³. The State has become the dominant part of the political form because it is the only uninterrupted authority over its population, territory, government and is able to enter relations with other states.¹²⁴

There are four essential criteria that have to exist to create a state. These are population, territory, government and the ability to enter into international relations¹²⁵. The existence of the territorial boundary gives legality to claims of sovereignty and not the existence of distinct people.¹²⁶ This is asserted in Article 2(1) of the UN Charter that for all member states sovereignty is equal based on the organizational principles of territoriality¹²⁷. A state without a territory will not be able to fulfil the international law requirements for recognition of statehood. In the cases where a state has a problem with the boundaries that will not be an obstacle to formal recognition such as the boundaries dispute between Belgium and the Netherlands.¹²⁸ For some the boundaries dispute can be very complicated like in the case of Israel.¹²⁹ Furthermore, statehood can be accepted if it has an effective government that guarantees to uphold the law and maintain order.¹³⁰ Finally, there will be a need to enter into international relations as an independent state.¹³¹

122. Jan Klabbbers, *International Law*, 4th edition, 2014, Cambridge University Press, P 69

123. Lowe V, (N 70) P 138

124. Klabbbers J, (157) P 69–70

125. *Ibid* P 70

126. Jackson R, (N 161) P 1404

127. UN Charter (N 27) Art 2(1).

128. Klabbbers J, (157), P 70

129. Klabbbers J, (157), P 70

130. Klabbbers J, (157) P 71

131. Klabbbers J, (157) P 72

There are differences between independence and sovereignty in international law.¹³² Sovereignty focuses on the principle of non-intervention in the affairs of the state, prohibition of the use of force and coercion, insisting on the principles of equality of sovereignty, immunity and also the formal independence of decision-making of the state and freedom to practice that independence.¹³³ Hence, there are two faces for the full recognition of sovereignty. Firstly, external sovereignty that is concerned with the relation of a state with other states based on its internal regulation, based on its independence and equality with other states. Secondly, the internal sovereignty that relates to the control of the state over its territory. The Kurds have achieved a degree of success in achieving internal sovereignty and partial external sovereignty.

Even with the emphasis of international law on states sovereignty, self-determination in a sovereign state has an important feature. Internal self-determination for all the people in a state have their rights in a democratic government without discrimination where all ethnic groups are represented.¹³⁴ The UN charter enhance respect for human rights which are connected with self-determination, however, the challenge is that any action might be considered as an intervention in the domestic affairs of a sovereign state¹³⁵.

On the other hand, the Constitutional rights of people should be based in the constitution of the state as part of the right to self-determination.¹³⁶ These rights are emphasized in the International Human Rights bodies. The Universal Declaration on Human Rights included in Article 3 and 12 the rights of people to be protected and no one shall be subjected to arbitrary interference as part of the rights to life and liberty.¹³⁷ Human rights are part

132. Lowe V, (N 70) P 138-139

133. Lowe V, (N 70) P 138-139

134. Antonio Cassese, *Self-Determination of peoples a Legal Reappraisal*, 2nd edition 1996, Cambridge University press, P 102

135. *Ibid* P 102

136. Universal Declaration of Human rights, UNGA Res 217 A(III) (10 Dec 1948) (UDHR) Art 8

137. *Ibid* Art 3 & 12

of international law and the state is the main actor and the only official actor who has the legislative force in the international law based on the concept of the sovereignty. Therefore, states who stand up for International Human Rights Law have limited their own power as a right for people to self-determination and they are responsible to protect it.

National Unity and Territorial Integrity

Territorial integrity and self-determination are seemingly in contrast to each other.¹³⁸The general assembly resolutions 1514 and 2625 that discussed national unity considered any action that might affect the national unity as a breach of the UN Charter and the International Covenant on Civil and Political rights and the Covenant on Economic, Social and Cultural rights.¹³⁹ Territorial integrity is an essential point in statehood, in which a state has control over its territory as an essential condition to international peace and security.¹⁴⁰Article 2(4) of the UN Charter is the well-established instrument for the territorial integrity in international law.¹⁴¹

In addition to the UN charter, Article 8 of the Montevideo convention on the rights and duties of states stressed that no state has the right to intervene in the internal and external affairs of another state¹⁴². In the case of the Kurdistan secession it is more or less an internal matter and the UN will refrain from intervening in order to keep international peace and security. Moreover, any action from the Kurds effecting the territorial integrity of Iraq is viewed as a breach of the UN Charter. This is especially the case if there are no humanitarian abuses that authorize the UN to intervene. In such a situation secession remains under domestic jurisdiction in accordance to Article 2(7) of the UN charter¹⁴³.

138. E-international relation studies, Michele Capeleto, Self-determination Entail an automatic Right to secession, 2 May 2014 < <http://www.e-ir.info/2014/05/02/extending-european-union-membership-to-the-eastern-neighbourhood/>> accessed on 12 Mar 2018.

139. *Lowe V*, (N 70) P 133

140. *D. Musgrave T*, (N37) P 180.

141. UN Charter (N 27) 1945 Art 2(4).

142. Montevideo Convention on the Rights and Duties of States, adopted on 26 December 1933, came to force on 26 December 1934 Art 8

143. UN Charter (N 27) 1945 Art 2(7).

Chapter Three: Collective Security

This chapter will explore the legality of Turkey's right to self-defense against the Kurdish aspiration of independence in Iraq. I take into account the current and previous Turkish military intervention in Iraq and Syria. In addition to Turkey, Iran was also involved in the fight against Kurdish expansion and in supporting the government of Assad. This in particular raised U.S fears of an alliance between the two countries to face the Kurdish aspiration for unity and thus expand to their lands to where Kurdish majorities and minorities existed. This chapter will discuss also the effect of the Kurdish military group using force to achieve independence on the collective security in the region.

The concept of collective security and self-defense

The referendum in KR-I alarmed Turkey, who feared the expansion of Kurdish aspirations towards the Kurdish areas in Turkey. Turkey has already taken several actions to stop the Kurdish expansion to Turkey which will affect the collective security in the region. Furthermore, it raises the possibilities of hostilities in Turkey, Iran, Syria and Azerbaijan where Kurdish minorities exist.

After the fall of Saddam Hussain in 2003, the Kurdish Peshmerga helped the US army to liberate Kirkuk, Nineveh, Salahadin and Diyala from the Iraqi army in northern Iraq and was fighting a Sunni Arab insurgency in the central region.¹⁴⁴ Turkey has intervened several times in Iraq to limit Kurdish expansion by conducting air-strikes and sending troops to northern Iraq to defeat the PKK.¹⁴⁵ This organisation has been operating from the mountainous of northern Iraq. Early in 2018 Turkey started an operation in Iraq and Syria fighting the Kurdish militia, who are in turn supported by the US in their fight against ISIS.¹⁴⁶ Furthermore, Iraq considered

144. Mohammed M. A (N 14), P119

145. PKK is the military edge of the Turkey Kurdish who are functioning Northern Iraq and relying of using force to get independency.

146. The Telegraph, Turkey Begins Operation in Iraq's Sinjar, Erdogan Says, 25th March 2018 <<https://www.telegraph.co.uk/news/2018/03/25/turkey-begins-operation-iraqs-sinjar-erdogan-says/>> accessed on 6th July 2018.

the Turkish intervention as a breach of Iraqi territorial integrity calling on Turkey to withdraw their troops.¹⁴⁷

Turkey has submitted a note to the Security Council justifying the military operation as a right to self-defence under Article 51 of the UN Charter, and the Security Council resolutions of the responsibilities of the attributed state to fight terrorist¹⁴⁸. Affirming that PKK Syrian affiliated PYD/YPG are listed as terrorist groups because their attack crossed the border into Turkey.¹⁴⁹ Turkey is pursuing the methods of self-defence to attack the PKK in northern Iraq and Syria due to its belief, that it is a modern threat extending into its territory. Hence, it has to be prepared to take pre-emptive action before incursion takes place. This is similar, to the action against Al Qaida and ISIS which have been threatening international peace and security.

The collective security system of the UN charter stands on two elements. Firstly, the prohibition against inter-state threats or use of force under Article 2(4).¹⁵⁰ Secondly the primary responsibility of the Security Council to maintain international peace and security. Article 39 and 42 of the Charter discuss the collective procedure for reacting to aggression that endanger international peace and security.¹⁵¹ The UN defines collective security as an element consisting of three distinct sets of policies, the regulation of armaments, the peaceful settlement of disputes and collective action.¹⁵² Hence, collective security can be defined as a system in which each state in the system accepts that the security of the one is the concern of all, each state agrees to join in a collective response to aggression to defend peace and security.

147. Saeed Bagheri, EJIL: Talk, Turkish Military Intervention in Mosul: A legal and Political Perspective, 27 Jan 2017 < <https://www.ejiltalk.org/turkish-military-intervention-in-mosul-a-legal-and-political-perspective/> > accessed on 7 Sep 2018.

148. UNSC (22 Jan 2018) Identical letters dated 20 Jan from Charge Daffairs a.i. of the Permanent Mission of Turkey to the United Nations, addressed to the Secretary-General and the president of the security council, S/2018/53, PP 1-2

149. Ibid P 2

150. UN Charter (N 27) Art 2(4)

151, Ibid, Art 39 and 42

152. Andrew Martin, Collective security, a Progress Report, UNESCO, P 38

In some cases, the Security Council will not be able to maintain international peace and security.¹⁵³ Therefore, a mechanism was considered to protect states.¹⁵⁴ After the Cold War until the Gulf War efforts were made to make collective security more sufficient under the Security Council, but the situation in Iraq after 2003 and the terrorist attack against the UK in 2001 raised Article 51 of the UN charter to the right to self-defence individually or collectively through regional arrangements.¹⁵⁵ ¹⁵⁶ Even though, the use of force is prohibited under Article 2(4) of the UN Charter,¹⁵⁷ the Security Council can authorize the use of force individually under Article 51 of the UN Charter,¹⁵⁸ to respond to any threats to international peace and security or towards any acts of aggression.¹⁵⁹ The Security Council takes time to respond to a crisis, and it cannot be supposed that the state has no rights to defend itself.¹⁶⁰

The UK's legal understanding of Article 51 of the UN Charter is that it does not require a state passively to await an attack but includes the 'inherent right' – as it is described in Article 51 – to use force in self-defence against an 'imminent' armed attack, referring back to customary international law,¹⁶¹ to the inherent right of individual and collective self-defence.¹⁶² The UK was part of the US-led coalition operation against Al Qaida / Taliban in Afghanistan in 2001 and currently is operating in Iraq

153. Ademola Abass, *Regional Organization and the development of Collective Security, Beyond Chapter VIII of the UN Charter*, 1st edition 2004, Hart Publishing Oxford and Portland, Oregon, P 106

154. Ademola Abass, *Regional Organization and the development of Collective Security, Beyond Chapter VIII of the UN Charter*, 1st edition 2004, Hart Publishing Oxford and Portland, Oregon, P 106

155. Abass A, (N 222) P 106

156. UN Charter (N 27) Art 51

157. UN Charter (N 27) 2(4)

158. Ibid Art 51

159. Ibid Art 51

160. Lowe V, (N 70) P 275

161. GOV.UK Attorney General's speech at the international institute for Strategic studies, 11 Jan 2017 < <https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies>> accessed on 3rd of June 2018.

162. Ibid

and Syria on the basis of self-defence.¹⁶³

In the 1837 Carolina case it was indicated that a group of rebels against British rule hired a steamboat for use in a raid against Canada.¹⁶⁴ This boat was burned and sent to the Niagara Falls by the British military, with one American killed.¹⁶⁵ Alexander McLeod, one of the militiamen was arrested and charged in the US.¹⁶⁶ Britain objected asserting that this act is justified in international law as self-defence.¹⁶⁷ This case ended by a treaty signed by the US secretary of state Daniel Webster and Britain's Foreign Secretary Lord Ashburton. It concluded that, Britain's action would be justified if Britain could show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation.¹⁶⁸ Both the United States and Britain accepted the definition of self-defence.¹⁶⁹

The Carolina formula is criticised for two reasons. Firstly, the lack of any alternative option to the use of force, and second, that the force used for self-defence was not excessive,¹⁷⁰ which is hard for a state to accept within the threats from terrorist attacks because a state has to wait until an attack actually happened then can respond and there is no right of anticipatory self-defence.¹⁷¹ So, if a group of people are planning to conduct an attack in Europe in which other European countries will be affected, but one will be affected more than others; and also if those groups are carrying out this attack in a country which cannot track or detain them, can no other state act in collective self-defence?¹⁷²

163.GOV.UK Attorney General's speech at the international institute for Strategic studies (N 230)

164. Lowe V, (N 70) P 275

165. Ibid P 275

166. Lowe V, (N 70) P275

167. Ibid P275

168. Lowe V, (N 70) P275-276

169. Ibid P275-276

170. Ibid P276

171. Ibid P276

172. Lowe V, (N 70) P277

The U.S. has adopted a different path to respond to such a threat. The National Security Strategy states that America will act against such emerging threats before they are fully formed.¹⁷³ Defeating threats before they reach its border. While the US seeks to enhance the international community to respond collectively it will not hesitate to act alone if necessary to exercise the right to self-defence pre-emptively against terrorists.¹⁷⁴ Additionally, NATO itself recognized the attack of September 11th as an attack against NATO under its Article V of self-defence which was used for the first time.¹⁷⁵ Moreover, Australia invoked the ANZUS treaty to declare that the September 11th attack was an attack against Australia itself.¹⁷⁶

The Attorney General for the UK asserted that the use of force permitted in international customary law under the UN charter, in anticipation of Chapter VII authorized by the Security Council and individual or collective self-defence under Article 51 of the UN charter.¹⁷⁷ Additionally, the UK recognized humanitarian intervention as a potential legal basis for the use of force in certain circumstances.¹⁷⁸ Hence, the concern is that the right to self-defence might be used as an excuse to the use of force.¹⁷⁹

Another aspect of the Carolina case is that anticipatory self-defence under Customary International Law, is where a state uses force to stop an attack that has not actually commenced, but reasonably is believed to be imminent, because no state is expected to await an initial attack which might break the states will and capacity for further resistance and thus jeopardize its

173. The National security Strategy of the United States of America, 17 Sep 2002, the white house Washington < <https://www.state.gov/documents/organization/63562.pdf>> accessed on 31st of May 2018.

174. Ibid P 6

175. Ibid P 25

176. The National security Strategy of the United States of America (N 242) P 26

177. GOV.UK, Attorney general Office and the Rt Hon Jeremy Wright QCMP, speech Attorney General's speech at the International institute for strategic Studies, the Modern Law of Self-defense, 11 Jan 2017, P 6< https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminence_Speech_.pdf> accessed on 31 May 2018.

178. Ibid.

179. *Lowe V*, (N 70) P 277

existence.¹⁸⁰ During the Carolina incident Canada and part of the United Kingdom faced an armed insurrection mounted from US territory by non-state actors. The UK responded by attacking the insurgent supply ship.¹⁸¹ The Bush doctrine went beyond that in his statement saying; “we will make no distinction between terrorists who committed these acts and those who harbour them”¹⁸² and war is not only against Al Qaeda but against all terrorist groups in the world to be stopped and defeated.¹⁸³

President Bush’s speech in the Congress confirmed that any state that continues to harbour, or support terrorists will be regarded by the U.S as a hostile regime.¹⁸⁴ In that regard, Turkey is arguing the same concept of anticipatory self-defence in defeating the Kurdish threat on its borders with Iraq and Syria, by acting to end the Kurdish armed group who targeted military and civilian objectives inside Turkey. Implementing the US and the UK understanding to self-defence by Turkey and Iran will create more hostilities that will endanger the region. The UN described the recent Turkish operation in Syria as self-defense in accordance with Article 51 of the UN Charter.¹⁸⁵

Non-state armed groups

In regard to self-defense, the UN Charter prohibits the use of force in Article 2(4).¹⁸⁶ However, a state is able to use force when it is related to some categories for non-state armed groups, like terrorists and armed opposition groups. Article 3 common to the Geneva Convention applies to organized armed groups in their capacity as parties to non-international armed conflict.¹⁸⁷ The UNSC resolutions 1368 (2001) and 1373(2001)

180. Michael P. Scharf, School of Law, case western reserve University, How the war against ISIS changed International Law P 24

181. Ibid P 24

182. Ibid P 29

183. Ibid P 29

184. Michael P. Scharf (N 249) P 30

185. Majeed Gly, Rudaw, UN describes Turkish airstrikes against PKK as self-defense, 8th Jan 2018 < <http://www.rudaw.net/english/middleeast/turkey/01082015>> accessed on 9th July 2018

186. UN Charter (N27) Art 2(4)

187. Vladyslav Lonovoy, The Uses of Force by Non-State Actors and the Limits of Attribution of Conduct, I May 2017, Eur J Int Law, (2017) 28 (2): 563. P 564

conclude that the prohibition of force extended to include non-state armed group with the possibility to self-defence against large scale operations by such groups that amount to armed attack.¹⁸⁸ However, if a state uses the method of self-defence in targeting non-state armed groups in a third party that is a violation of Sovereignty and territorial integrity.¹⁸⁹

Even though there is no consensus on the definition of terrorist, the act of terrorism was defined by the special tribunal for Lebanon. In this case the Appeals Chamber declared that customary international law considers that terrorism consists of the following acts – i) preparation of a criminal act such as murder, kidnapping, hostage-taking, arson and so on) ii) the intent to spread fear among the population which would generally entail the creation of public danger or directly or indirectly coerce a national or international authority or take some action or to refrain from taking it and iii) when the act involves at transnational element.¹⁹⁰

The ICRC defined armed groups as membership in “irregular forces such as militia, volunteer corps or resistance movement belonging to a party to the conflict, generally not regulated by domestic law and can only be reliably determined on the basis of functional criteria, such as those applying to an organized armed group in a non-international armed conflict”.¹⁹¹ The basic concept of an organized armed group is; “non-state party to an armed conflict including both dissident armed forces and an organized armed group”.¹⁹² The membership of organized armed groups is usually more difficult than dissident armed group.¹⁹³

The memberships depend on the continuous function assumed by an

188. Ibid P 568

189. Ibid P 571

190. P. Scharf M, (249) P 38

191. Nils Melzer, Interpretive Guidance on the Notion of Direct Participation In Hostilities Under International Humanitarian Law, May 2009, ICRC, P 25 < <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> accessed on 24th of June 2018

192. Ibid

193. Nils Melzer, Interpretive Guidance on the Notion of Direct Participation In Hostilities Under International Humanitarian Law, May 2009, ICRC, P 33 < <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> accessed on 24th of June 2018

individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-state party to the conflict.¹⁹⁴ Individuals who are continuously involved in the preparation, execution or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function¹⁹⁵.

In 2001 the U.S. was entitled to shoot down the aircraft flying over the world trade centre to stop the suicidal terrorist attack that was controlled and planned by Al Qaida, functioning from Afghanistan.¹⁹⁶ However, that right will not justify an attack on the state of Afghanistan itself, because international law does not permit revenge or punishment or deter future attacks.¹⁹⁷ On the other hand, the Afghani government was unable or unwilling to prevent Al Qaida activities from Afghanistan, which justified the US right to self-defence to attack Al Qaida and its facilities in Afghanistan in order to prevent future attacks¹⁹⁸. On the other side the concept of proportionality should be considered the right of self-defence,

President Reagan's speech on the airstrike on Libya indicated the same concept, that the U. S. force targeted the headquarters of terrorist facilities and military assets that supported Muammar Qaddafi's subversive activities.¹⁹⁹ Because the government in Libya was held to be accountable for the terrorist attacks against American citizens when abroad, the US would respond as soon as it determined the responsibility²⁰⁰. On the 25 March 1986, orders were sent from Tripoli to the Libyan People's Bureau in East Berlin to conduct a terrorist attack against Americans, to cause maximum

194. Ibid P 33 8

195. Ibid, P 34

196. Lowe V, (N 70) P 278

197. Ibid P 278

198. Ibid P 278

199. The New York Times, Transcript of Addressed by Reagan on Libya, 1986 < <https://www.nytimes.com/1986/04/15/world/transcript-of-address-by-reagan-on-libya.html> > accessed on 2nd June 2018.

200. Ibid

and indiscriminate casualties. Libya's agents then planted the bomb".²⁰¹ The US took a pre-emptive action against Qaddafi's terrorist installations which aimed to diminish Qaddafi's capacity to export terror and provide him with incentives and reasons to alter his criminal behaviour.²⁰² The response of the US was under the right of self-defence based on the UN charter Art 51.²⁰³ Even though there was insufficient evidence that the attack was conducted by Libyan officials or directed by Qaddafi, the US took a pre-emptive action, that there is no distinction between terrorist and those who knowingly harbour or provide aid to them²⁰⁴, because the US priority is to destroy terrorist organizations globally and attack their leadership.²⁰⁵

The UK Attorney General set out the legal consideration before an action is to be taken under self-defence against an imminent attack, considering that modern threats of attacks might be direct, and international law has to keep up with the changing times.²⁰⁶ The UK will use lethal force against terrorists. However, it should be the last resort to defend the country from an attack, when there is no other option to detain, disrupt or otherwise prevent those plotting acts of terror, for example law enforcement measures.²⁰⁷ Additionally, using force in certain circumstances is seen as justifiable, to prevent attacks before they occur.²⁰⁸ In 2013 Sir Daniel Bethlehem set out a series of factors to be considered when assessing threats which includes:"

- the nature and immediacy of the threat;
- the probability of an attack

201. Ibid

202. The New York Times, Transcript of Addressed by Reagan on Libya (268)

203. UN Charter (N 27) Art 51

204. The National Security Strategy of the United State of America, Sep 2002, P 5 <https://www.state.gov/documents/organization/63562.pdf> accessed on 24th of June 2018

205. Ibid P 5

206. GOV.UK, press release, legal basis for striking terror targets set out, 11th Jan 2017 < <https://www.gov.uk/government/news/legal-basis-for-striking-terror-targets-set-out> > accessed on 2nd June 2018.

207. GOV.UK, press release, legal basis for striking terror targets set out (N 275)

208. Ibid

- whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury.
- loss or damage likely to result therefrom in the absence of mitigating action
- the likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause less serious collateral injury, loss or damage”.²⁰⁹

The military action extended against combat terrorists in a country unwilling or unable to control them is based on the level of support provided by the harbouring state, consistent with the Hague Convention (V).²¹⁰ However, taking proportionality into account, if it is a state that only allows terrorists to operate from its territory, providing no meaningful support, hence military action is permissible when necessary to deal with the terrorist threat itself, neither the military of the harbouring State nor its infrastructure is a permissible target.²¹¹ In such a case, there is a distinction between using force in a state and using force against the state itself.²¹² A swift, precision strike against terrorists or their training facilities in the territorial state (a so-called “in and out operation”) is considered a limited interference with the territorial integrity or political independence of the territorial.²¹³

209. Ibid

210. *Lowe V*, (N 70), P 126

211. Ibid P 126

212. Ibid P 136

213. P. Scharf M, (N 249) P 31

Turkish Military Operations in Northern of Iraq

Turkey is claiming the concept of self-defense against the PKK in KR-I which is operating from Iraqi territory. This attracted different views on the legality of the use of force especially by Turkey and the US.²¹⁴ The PKK has Marxist roots and is Kurdish from Turkey.²¹⁵ It was formed in the late 1970s and launched an armed struggle against the Turkish government in 1984 calling for an independent Kurdish state within Turkey.²¹⁶

Legally the PKK was recognized by the EU²¹⁷ and the US as a terrorist organization. The Bureau of Counterterrorism in the State Department considered this organization a terrorist organization based on the designated targets, actual terrorist attacks that the group has carried out and their engagement in the planning and the preparation of violent actions²¹⁸. So, it is unlawful to provide materials or support to these organisations under the jurisdiction of the US which is defined in 18 U.S.C. § 2339A(b)(1) as “ any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who maybe or include oneself), and transportation, except medicine or religious materials.”²¹⁹

214. Lonovoy V, (256) P 572

215. BBC News, who are Kurdistan Workers Party (PKK) Rebels? 4 Nov 2016 <https://www.bbc.co.uk/news/world-europe-20971100> accessed on 25th June 2018.

216. BBC News, who are Kurdistan Workers Party (PKK) Rebels? 4 Nov 2016 <https://www.bbc.co.uk/news/world-europe-20971100> accessed on 25th June 2018.

217. Mujge Kucukkeles, The Conversation, Why the PK has become overstretched in its quest for self-rule in Syria, 8 March 2018 < <http://theconversation.com/why-the-pkk-has-become-overstretched-in-its-quest-for-self-rule-in-syria-90355>> accessed on 9th July 2018.

218. US Department of state, forging Terrorist Organization < <https://www.state.gov/j/ct/rls/other/des/123085.htm>> accessed on 29th of June

219. US Department of state, forging Terrorist Organization < <https://www.state.gov/j/ct/rls/other/des/123085.htm>> accessed on 29th of June

Turkey conducted the largest military operations to defeat the PKK in the 1990s, 2008 and 2018 which is ongoing. In 1990 over 40.000 people died in the conflict between the PKK and the Turkish government.²²⁰ Many villages have been destroyed in south east and east Turkey where the majority of Kurds live.²²¹ Hundreds of thousands of Kurds fled to cities in other parts of the country.²²² The Turkish air force regularly carried out raids against PKK bases in northern Iraq.²²³

The U.S. promised Ankara in 2002 that it would not allow Iraqi's Kurds to declare independence during the war.²²⁴ In 2007 the US provided Turkey with timely military intelligence about the PKK movements in KR-I, where Turkey hit the targets in an effective air raid and killed around 150 Kurdish rebels based on information from unmanned U.S. drones.²²⁵ Around 400 families were affected during 2007, therefore, a UN military advisor visited Rawanduz districts on 28 Dec 2007 to evaluate the damages and displacement resulting from Turkey's airstrikes. The UN delegation met with number of displaced Kurdish families and promised them compensations.²²⁶

Turkey believes that it has a right to intervene in Iraq more than the U.S. who came from eight thousand miles to occupy a country. Turkey used the political and security vacuum in Iraq during the civil war for its own interest.²²⁷ In response, the PKK launched massive attacks against Turkish troops inside Turkey on 3/10/2008 a few miles from Iraqi borders, killing 15 and many were wounded, and they abducted two soldiers.²²⁸ Turkey carried out more raids against possible PKK targets on Qandil Mountain

220. BBC News, who are Kurdistan Workers Party (PKK) Rebels? 4 Nov 2016 <https://www.bbc.co.uk/news/world-europe-20971100> accessed on 25th June 2018.

221. Ibid

222. Ibid

223. Ibid

224. Mohammed M. A (N 14), P 120

225. Ibid P 157

226. Ibid P 160

227. Mohammed M. A (N 14) P 160

228. Ibid P 160

which led to anti-government demonstrations in Turkey demanding the government to take decisive measures to end PKK presence in KR-I.²²⁹

Furthermore, Turkey asserted that the KR-I administration did not cooperate with Turkey by describing the PKK as a terrorist group which meant they were harboring them.²³⁰ On the other hand, Turkey and KR officials conducted a meeting on 14th October 2008 where Turkish politicians requested KR-I to fight the PKK by cutting their communications lines, hospitals and airports service additionally, arresting and delivering their leaders to Ankara.²³¹ At this point KR-I confirmed to the Turkish delegation, that it had no means to dislodge the PKK from their high rugged Qandil Mountain with difficult terrain and suggested to Ankara to have a dialogue with the PKK to solve the conflict, since they had not been able to defeat the PKK since 1984.²³² The Iraqi central government has neither the desire nor resources to shift the focus from the security situation in the country to help Ankara in its fight against the PKK.²³³

In 2011 the Iraqi government plan in the region changed after the Syrian uprising, where Iraq and Iran supported the Assad government while Turkey and the Gulf countries supported opposition forces.²³⁴ Hence, Turkey armed Iraqi Turkman in order to fight Iraqi Kurdish national ambitions, in particular the disputed areas like Kirkuk which were rich in Oil.²³⁵ Turkey encouraged Turkmen to ally with Arabs to block the implementation of Article 140 of the Iraqi constitution that address remedies within the disputed areas.²³⁶ In 2015 the PKK was widely targeted by Turkish security operations, especially after the attempted coup in

229. Mohammed M. A (N 14) P 160

230. Ibid P 163

231. Mohammed M. A (N 14) P 160

232. Ibid P 163

233. Ibid P 163

234. Mohammed M. A (N 14) P 165

235. Ibid P 166

236. Ibid P 166

July 2016 against President Recep Tayyip Erdogan by mutinous Turkish officers.²³⁷ The PKK's ambitions in Turkey are to live on their land on the border with Turkey freely.²³⁸ Therefore, the PKK military leader Cemil Bayik, confirmed that the PKK fighting will continue until the innate right of the Kurdish people is accepted.²³⁹

KR-I tried to reduce the tension with Turkey so, they put more restrictions on the movement of goods into and out Sinjar northern of Iraq to control the PKK activities who had based armed forces in the area which were mostly made up of Yazidi fighters.²⁴⁰ The Turkish Kurdish armed group PKK started to mobilize Iraqi Yazidis Kurds in northern Iraq to join them.²⁴¹ Using fighting ISIS as a main ideology to recruit Yazidis after the Yazidi genocide in 2014.²⁴² KR-I put more barriers to the Yazidis recovery by preventing people in Sinjar from access to services, specially, the KR-I already prevented them from returning to their homes in Sinjar.²⁴³

As a result, the PKK attacked Turkish troops within KR-I for the first time in years which affirmed Ankara's concern of the PKK's growing role in Syria and Sinjar in Iraq, therefore, Turkey had expended 20-25 KM into KR-I in Dohok and Erbil provinces which will create a buffer zone to prevent the PKK from crossing the borders.²⁴⁴ By late April 2018, Turkish troops reaches Sidakan district 90 KM inside Iraqi territory and from KR-I capital Erbil, captured 30 villages previously controlled by PKK and established positions on top of 8 mountains.²⁴⁵

237. BBC News, who are Kurdistan Workers Party (PKK) Rebels? (N289)

238. Ibid

239. Ibid

240. Human Rights Watch, Iraqi: KRG Restrictions Harm Yezidi Recovery, 4th Dec 2016 <<https://www.hrw.org/news/2016/12/04/iraq-kr-g-restrictions-harm-yezidi-recovery>> accessed on 2nd July 2018

241. Human Rights Watch, Iraqi: KRG Restrictions Harm Yezidi Recovery (N 312)

242. Ibid

243. Ibid

244. Paul Iddon, Middle East Eye, How Far Will Turkey's Anti-PPK operation in Northern Iraq go, 11 May 2018 <http://www.middleeasteye.net/news/turkey-pkk-iraq-operation-1642512166> accessed on 3rd July 2018.

245. Iddon P, (N 316)

The International Court of Justice defined armed attack in the case of Nicaragua as “the gravest forms of the use of force constitute an armed attack.²⁴⁶ Such an armed attack” triggers the right of self-defence, and the assault must reach a certain scale of violence, when that attack threshold is reached either by a particular serious terrorist attack or by a series of attacks actions in self-defence are legal.²⁴⁷

The ICJ stated in the case of Nicaragua and Congo that the use of force against a terrorist organization whose conduct is not imputable to a territorial state would itself constitute a lawful armed attack.²⁴⁸ The jurisprudence of the ICJ require the control of the territorial state on the non-state armed group who are functioning in its territory, in the case of Nicaragua v. the U.S, the US has no effective control of the rebels²⁴⁹and Nicaragua has to control rebels within its territorial borders. In the case of Iraq, the central government is not hosting the PKK, the central government has no resource or will to control them which make the Turkish intervention unlawful.

In another case on the 23 June 1999 the Democratic Republic of the Congo filed an application instituting proceeding against Uganda for acts of armed aggression perpetrated in flagrant violation of the United Nations Charter and of the Charter of the OAU.²⁵⁰ The Democratic Republic of the Congo contended that such armed aggression had involved violation of the sovereignty and territorial integrity of the DRC.²⁵¹ The DRC sought to secure the cessation of the acts of aggression directed against it which constituted a serious threat to peace and security in central Africa in general and in the Great Lakes region in particular.²⁵² The Republic of Uganda, by engaging in military and paramilitary activities against the DRC, by

246. P. Scharf M, (249) P 22

247. P. Scharf M, (N 249) P 22

248. P. Scharf M, (N 249, P 23

249. Ibid P 23

250. United Nation, Report of the International Court of Justice, 1 Aug 2004–1 July 2005, General Assembly Official Records, 60th session, supplement No.4 (a/60/4) P 29 Para 147<<https://www.icj-cij.org/files/annual-reports/2004-2005-en.pdf>> accessed on 3rd June 2018

251. Ibid P 29 Para 148

252. Ibid P 29 Para 148

occupying parts of its territory and actively extending military, logistic, economic and financial support to irregular forces operating there, and having operated there, violated the following principles of conventional and customary law.²⁵³:

- To refrain of using force in international relations, including the prohibition of aggression.
- The obligation to settle international disputes by peaceful means to ensure international peace and security.
- To respect the sovereignty of the state and the principle of non-interference in matters within the domestic jurisdiction of States, including refraining from extending any assistance to the parties to a civil war operating on the territory of another State”.²⁵⁴

Uganda intervened based on its belief that the DRC provided military and political support to the anti-Ugandan rebels.²⁵⁵The ICJ found that Uganda did not produced sufficient evidence to show that the DRC had provided political and military support to anti-Ugandan rebel groups operating in its territory, or even to prove that the DRC had breached its duty by tolerating anti-Ugandan rebels on its territory.²⁵⁶ Therefore, the court rejected the claim of Uganda.²⁵⁷

The ICJ found that Uganda had violated the sovereignty and also the territorial integrity of the DRC and Uganda’s actions equally constituted an interference in the internal affairs of the DRC and in the civil war

253. United Nation, Report of the International Court of Justice (N 323) PP 31–32 Para 159

254. United Nation, Report of the International Court of Justice (N 323) PP 31–32 Para 159

255. International Court of Justice reports of Judgment, advisory opinion and orders. Case concerning Armed Activities on the theory of the Congo, Democratic Republic of Congo V. Uganda, judgments of 19 Dec 2005, P 103 Para 298, judgment I.C.J Reports 2005, P. 168 < <https://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>> accessed on 27 September 2018

256. International Court of Justice, Armed Activities on the territory of the Congo DRC V. Uganda, on 23 June 1999< <https://www.icj-cij.org/en/case/116>> accessed on 3rd June 2018.

257. Ibid

raging there²⁵⁸. The unlawful military intervention by Uganda was of such magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter²⁵⁹.

The recent intervention of Turkey in Iraq and the previous military intervention based on the ICJ opinion is a breach to the territorial integrity of Iraq. This is because Iraq is not supporting or harbouring the PKK. On the other hand, the PKK is attacking the Turkish army and civilian areas, which permits Turkish forces to attack them inside Iraq in accordance to self-defence under Article 51 of the UN Charter.

Individual terrorist attacks, and the ongoing attacks by the PKK reached the level of an armed attack and hence, the principle of self-defence based on Article 51 of the UN charter that refers to the inherent right to self-defence.²⁶⁰ which is also mentioned in the UN security Council resolutions 1368 (2001) and 1373 (2001).²⁶¹ The self-defence clause is used not only based on current and existing armed attack, but also where an armed attack is imminent.²⁶² So, if Turkey is facing imminent armed attack from the PKK it is entitled to use necessary and proportionate force to repel that attack in exercise of the inherent right of individual self-defence.

258. International Court of Justice, Summary of the Judgment of 19 Dec 2005, *Armed activities on the Territory of the Congo (Democratic Republic of the Congo V. Uganda)*, summary 2005/3, P 9, P63 Para 165 < <https://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf> > accessed on 9th June 2018.

259. International Court of Justice, Summary of the Judgment (N 331)

260. UN Charter (N 27) art 51

261. Intelligence and Security Committee of Parliament, *UK lethal Drone Strikes in Syria*, 26th Apr 2017, P27. https://b1cba9b3-a-5e6631fd-s-sites.googlegroups.com/a/independent.gov.uk/isc/files/20170426_UK_Lethal_Drone_Strikes_in_Syria_Report.pdf?attachauth=ANoY7cqobnLssGmgaRozhsDwV034t5Uiyk6y5bdj0vuHfa23iiu1k9IA19UNVzEct2vZZVUbquDNk_4jarMKd1of4pZ0ohD1c7YV-oUSnH91_4fKjsyUHKyg1AwvBMTRgPi5Xj6UNLbFrd9QIfHsu v6kVkbucfumbkcl66WA_84iUE2iqn92oVLM9gWOua8pTibPp1IR53jxcbOMQObs9RHzWK7Ss4svGPf2g79nXTQG95PnWhJLDg%3D%3D&attredirects=2 accessed on 8th June 2018.

262. *Ibid*

However, that is still a breach of Iraqi sovereignty because Iraq has not given consent to intervene and not supporting PKK. Additionally, the Turkish military operation in Syria which is a very complex area, in international law amounts to a breach of the sovereignty of Syrian and endangers the peace and security in the region which creates more hostilities. One may argue if the Iraqi and Syrian government are unwilling or unable to respond to the PKK activities on their territories, that would give Turkey a reason to take a step forward toward self-defence especially as the KR-I has self-governing status in Iraq and it is the biggest supporter to all Kurdish armed groups in the region not only PKK.

There is also another principle that should be considered by the Turkey which is the Jus in bello that attacks should be limited to military objectives where civilians' targets should not be the object of the attack.²⁶³ Second, proportionality which is to prohibit attacks that maybe expected to incur incidental loss of civilian life, injury, or damage to civilian objects.²⁶⁴ Since, the PKK is considered a terrorist group therefore, the high-level members are lawfully targeted because they are not part of the state military.²⁶⁵ Furthermore, the law of war would treat Al Qaeda members presumptively as civilians who are immune from targeting unless they either directly participate in hostilities or take on a continuous combat function with the group.²⁶⁶

This explanation was used by the Russia to kill Chechen rebel warlord Omar Ibn Al Khattab.²⁶⁷ The ICRC classified targeting and killings of terrorist groups should be consistent with International Humanitarian Law, individuals who continuous function involves the preparation, execution, or commence of act or operations amounting to direct participation in hostilities assume a continuous combat function.²⁶⁸ The same logic should

263. P. Scharf M, (249) PP- 35-36

264. Ibid PP- 35-36

265. Ibid P 36

266. Ibid P 36

267. P. Scharf M, (249) P 36

268. P. Scharf M, (249) P 36

be followed by the Turkish in 2007 when they targeted Civilians in Iraq.

Moreover, there are two cases within the ICJ related to the state responsibilities when non-state acts can be attributed to the state, if the acts can be considered by the state itself²⁶⁹. First, The Nicaragua case where the action of Nicaragua in supporting rebels in El Salvador was measured as an armed attack and whether it justified the military action by the United states in collective defence with El Salvador²⁷⁰. Nicaragua provided weapons and logistical support to rebels seeking to overthrow the government of El Salvador²⁷¹. Hence, the US considered that action a threat²⁷². The ICJ rejected the US argument and did not consider sending armed bands into territory of another state would be sufficient to be an armed attack concluding that the use of military force was not justified.²⁷³ On the other hand, the ICJ did not consider the Nicaraguan Contras attributed to the US even though the Contras were the proxy army of the US and could not existed without the US financial and logistical support²⁷⁴.

Going further, the ICJ considered the US participation even if it was preponderant or decisive in financing, organizing, training, supplying and equipping of the Contras, the selection of its military and paramilitary and the planning for the whole of its operation target has been done by the Contras and there was not enough evidence to be sufficient for armed attack or to be attributed to the US.²⁷⁵ Because the acts committed by the Contras itself and sufficient evidence to prove that the US had directed or enforced

269. Greg Travalio, John Altenburg, *Terrorism, State Responsibility, and the Use of Military Force*, Vol. 4: No. 1, Article 9, 4/01/2003, P 102.

270. *Ibid* P 103

271. International Court of Justice, Reports of Judgment advisory Opinion and Orders, case Concerning Military and Paramilitary activities in and Against Nicaragua, Nicaragua V. United states of America, 27 June 1986, Judgment I.C.J. reports 1986, P.14., P 11 Para 19 < <https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>> accessed on 27 September 2018

272. *Ibid* P.14., P 17 Para 35

273. Travalio G and Altenburg J, (N 342) P 103

274. *Ibid* P 103

275. International court of Justice, Reports of Judgment (N344) PP 54-55, Para 115

the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant state, additionally, nothing was proven that the US had an effective control on the military or paramilitary operations in the course of which the alleged violations were committed²⁷⁶.

If a state does nothing to prevent terrorists from operating from its territory and does not provide any meaningful support the respondent is allowed to extend its jurisdiction to stop those terrorists even though there is no involvement with the military of the harbouring state and its infrastructure which is consistent with the Hague Convention (V).²⁷⁷ The terrorist facilities and supplies that are located in the state are a permissible target and military force may be employed even if it means breaching the territorial integrity of the hosted state²⁷⁸.

Baghdad condemned all the Turkish operations on Iraqi soil while the Turkish foreign minister claimed that Baghdad had approved a plan for joint operation against PKK²⁷⁹. On March 11, 2018 Turkish airstrikes destroyed around 18 targets linked to the PKK in northern Iraq.²⁸⁰ The Iraqi foreign minister condemned the deadly Turkish airstrikes and alleged that it killed civilians and that Baghdad rejected Ankara's support to deal with the PKK.²⁸¹

Furthermore, on the 25th March Erdogan announced Turkish operation against PKK in Sinjar. However, some report says that the PKK had withdrawn from Sinjar, meanwhile Erdogan's statement enhanced the

276. International court of Justice, Reports of Judgment (N344) PP 54-55, Para 115

277. Hague Convention (v) respecting the rights and duties of neutral powers and persons in case of war land, U.S.T.S. 540,2 A.J.I.L. supp. 117, signed at the Hauge, 18 October 1907, entered into force Jan 26, 1910, Chapter 1, art 1&2.

278. Travalio G and Altenburg J, (N 342) P 112

279. Romany shaker, foundation for defense of Democracies, Erdogan threatens to Expand War Against U.S. Partners in Syria, 3rd Apr 2018 <http://www.defenddemocracy.org/media-hit/romany-shaker-erdogan-threatens-to-expand-war-against-us-partners-in-syria/> accessed on 3rd July

280. Romany shaker, foundation for defense of Democracies, Erdogan threatens to Expand War Against U.S. Partners in Syria, 3rd Apr 2018 <http://www.defenddemocracy.org/media-hit/romany-shaker-erdogan-threatens-to-expand-war-against-us-partners-in-syria/> accessed on 3rd July

281. Romany shaker (N 357)

Iraqi prime minister to order the military to take over the country's border country to avoid the Turkish incursion.²⁸² However, Erdogan warned Baghdad that he would not wait for permission to extend his operation in northern Iraq to stop the PKK threat.²⁸³

Turkish and Iranian reaction toward independence

High level meetings reflect the cooperation between Turkey and Iran in responding to the Kurdish referendum and the growth of Kurdish armed groups in northern Iraq and Syria.²⁸⁴ Joint actions have been taken by the two countries involving operational training, defense research and plans to exchange intelligence and cadets and to dispatch a naval team and drill observers.²⁸⁵ Turkey and Iran face threats from the Kurdish referendum in Iraq because both have sizable Kurdish minorities.²⁸⁶

Furthermore, Iran also fought Kurdish insurgents last year, because the Iraq-based Democratic Party of Iranian Kurdistan (PDKI) declared a renewal of its armed actions which has led to clashes with Iranian security forces and Iran is afraid that the U.S, Israel and Saudi Arabia may extend military support to the PDKI which add more parties to the Kurdish struggle and open new fields of armed conflict.²⁸⁷ In 2011 Iran had a ceasefire with a separate Kurdish insurgent group the Party for a Free Life in Kurdistan (PJAK) an affiliate of the PKK.

However, there were some clashes between the Iranian security forces and the PKK militia near the Iranian-Turkish border.²⁸⁸ Therefore, Erdogan has declared that Iran and Turkey may launch a joint operation against the PKK.²⁸⁹

282. Ibid

283. Ibid

284. Merve Tahiroglu, Foundation for Defense of Democracies, Iran and Turkey Agree on Opposing Kurdish Independence, But Not Much More, 25th August 2017 < <http://www.defenddemocracy.org/media-hit/merve-tahiroglu-iran-and-turkey-agree-on-opposing-kurdish-independence-but-not-much-more/>> accessed on 6th July 2018

285. TahirogluM, (N 399)

286. Ibid

287. Ibid

288. Ibid

289. Ibid

Especially, Iran has confirmed many times and has also expressed a clear reaction towards the Kurdistan referendum even if it was based on a Baghdad, it had closed borders and airspace with Kurdistan stating that it respects Iraqi territorial integrity and the democratic process.²⁹⁰

Conclusion

Self-determination in modern international law involves democracy as a universal value and the right of people to determine their political, economic, social and cultural system which is reflected in the participation of people in all of these aspects.²⁹¹ That respects sovereignty, territorial integrity and political independence.²⁹² Hence, this condition is applied in the case of Iraqi Kurds. In 1991 the international community took the collective responsibility to protect the Kurds. In the event of genocide and other larger scale killing, ethnic cleansing or serious violations of international humanitarian law where the sovereign government has an incapability or seems unwilling to prevent serious incidents directed against a community.²⁹³

The international community had to take a collective action to protect the community and endorsed the use of force.²⁹⁴ ICISS enhanced the state responsibility toward human rights obligations and any agent of the state is accountable to crimes he is responsible internationally under international law.²⁹⁵ Woodrow Wilson and Franklin Roosevelt made this value central to their war effort, the UN enshrined the principle of equal rights and self-

290. Benthon McKernan, Independent, Kurdish referendum: Isan closes Border with Iraqi Kurdistan Over Independence Vote Fears, 25th Sep 2017 <https://www.independent.co.uk/news/world/middle-east/kurdish-referendum-iran-close-iraq-border-kurdistan-independence-vote-polls-ballot-a7965481.html> , accessed on 3rd July 2018.

291. UNGA Res 60/12005 (16 September 2005) 60th session, UN DOCs A/Res/60/1 P30 Para 135

292. Ibid, P1 Para 5

293. UN GA resolution, adopted in its 59 session, on 5th Dec 2004, UNGA, A/59/565, P 57 Para 203

294. UN GA resolution, adopted in its 59 session, on 5th Dec 2004, UNGA, A/59/565, P 57, Para 207

295. Gareth Evans, Mohammed Sohnoun and others, Reports of the International commission on Intervention and Sate Sovereignty, the responsibility to Protect, December 2001, P 13, Para 2015.

determination of people in its Charter.²⁹⁶

Sovereignty is a protected status by international law. A state is able to give sovereignty to other regional institutions like the European Union.²⁹⁷ Similarly, the Iraqi constitution permitted the KR-I authority to exercise rights with respect to territorial integrity. The state is the only authority who can permit other entities to practice self-governance. The declaration of the independence in South Sudan was admitted by the UN and around 80 states recognized South Sudan and the first of these states was Sudan itself, but the independence was based on the consent of the mother state itself.²⁹⁸ Moreover, the recognition of the state might involve the political interest. The USA found itself on the side of Iran opposing Kurdish independence, which is contradictory from the US reaction toward supporting the independence of South Sudan, Kosovo and East Timor.²⁹⁹

A state is entitled to the right of self-defense to respond to threats and to target only non-state armed groups, to stop them from conducting more attacks. Recently Iran had targeted a Kurdish village within the border of Iraq claiming that there were Kurdish Iranian militia there. Iran at the beginning had military and paramilitary corporation with Turkey to protect the border. But in September 2018 Iran also targeted objectives inside the territory of Iraq, who is condemning any intervention from other states without its permission.

Hence, the military intervention is expanding. Furthermore, Turkey failed to prove that Iraq is responsible or supporting the PKK, hence based on the ICJ opinion extending military operation to the Iraqi territory is a

296. Seth J. Frantzman, the Juersalem Post, Why the US Choose to Oppose the Kurdish Independence Referendum, 19th Sep 2017 <https://www.jpost.com/International/Why-the-US-chose-to-oppose-the-Kurdish-independence-referendum-505498> accessed on 7th June 2018.

297. James Crawford, Martti Koskenniemi, International Law, 3rd edition 2013, University Printing house, P132

298. Jan Klabbbers, International Law, 4th edition, 2014, Cambridge University Press, P 75

299. Seth J. Frantzman, the Juersalem Post, Why the US Choose to Oppose the Kurdish Independence Referendum, 19th Sep 2017 <https://www.jpost.com/International/Why-the-US-chose-to-oppose-the-Kurdish-independence-referendum-505498> accessed on 7th June 2018.

breach to the territorial integrity. However, Turkey is responding based on self-defense under Article 51 of the UN Charter which creates a very complex area in international law concerning peace and security in the region and reducing trust in international law.

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