The laws of war in self-defence operations under international law:

The *jus ad bellum* and *jus in bello* of the Turkish military intervention in Northern-Iraq

Research question:

Did Turkey have the right to take self-defence measures against cross-border attacks originating from Northern-Iraq and were those measures conducted legally?

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Table of Contents

Table of Contents

1. Introduction

In a speech, former UN High Commissioner for Human Rights, Louise Arbour, once said, *'The strength of our rule of law and human rights norms can only be measured by whether they can resist the temptation to surrender to fear in times of crises.*[1] [2]
Terrorism can be seen as one of the contemporary crises our world faces, since terrorism indiscriminately targets the civilian population. One can agree that the international community has to respond to these terrorist threats while still respecting the fundamental rights and freedoms guaranteed under international law. In accordance to this theorem, the international community has stated that, *'there are no grounds that could justify resorting to terrorist activities'* and condemned terrorism in *'all its forms and manifestations'*.[3] As mentioned above terrorism poses a serious threat to the fundamental rights and freedoms of people and it has become a highly debated topic in our contemporary world. However, terrorism is actually not a recent phenomenon; it has posed a threat to bodies of (international) law and the safety of civilians throughout history with records of terrorism starting in the antiquity.[4] The word terrorism is also derived from the Latin word *terrere* which means 'to make tremble'.
The *Aircraft Convention* (The Convention on Offences and Certain Other Acts Committed on Board Aircraft) is seen as the first international treaty intended to counter some aspects of terrorism and was already signed in 1963.[5] [6] Terrorism became more of an issue after the terrorist attacks on September 11, 2001. After those events terrorist threats were not seen as mainly national issues anymore, on the contrary one realized that effectively fighting terrorism required a collective international (For example the United Nations or NATO) approach. The United Nations Charter (more specifically collective measures included in article 39, 41 and 42 in Chapter VII of the Charter), international humanitarian law and human rights law have become important tools to deal with terrorism.[7] These fields of international law can be used to re-establish and secure international order and stability.
Measures, both repressive and preventive, are taken by the international community in order to combat terrorism. However, the international community also notices that some measures taken to combat terrorism are threatening individual rights and freedoms.[8] Examples of this are secret prison facilities, torturing and targeted killings based on vague evidence.[9] Therefore, while combating terrorism, a balance between the security of the state and the protection of human life and dignity should be found. If national security is prioritized over the protection of human life and dignity, the system of human rights established after World War II could fall apart.[10] An important question to answer is where the balance between national security as a pose to individual freedoms and national integrity lies.

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[1] C. Tomuschat, *Human rights. Between idealism and realism*, New York: Oxford University press 2008, p. 68.
[2] L. Arbour, 'In Our Name and On Our Behalf', *International and Comparative Law Quarterly* 2006, Vol. 55, issue 04, p. 525.
[3] General Assembly Resolution 60/1, 16 September 2005, paragraph 81.
[4] G. Chaliand & A. Blin, *The history of terrorism. From antiquity to al Qaeda*, London: University of California Press 2007 p. vii.
[5] Advisory Council on International Affairs and Advisory Committee on Public International Law, *Pre-emptive Action*, advisory report, The Hague, April 2000 p. 29-31.
[6] D. Donnell, 'International treaties against terrorism and the use of terrorism during armed conflict and by armed forces', *International Review of the Red Cross* 2006, Vol. 88, No. 864, p. 854.
[7] United Nations Office on Drugs and Crime, *Frequently Asked Questions on International Law Aspects of Countering Terrorism*, New York, 2009 p. 1 <www.unodc.org/documents/terrorism/Publications/FAQ/English.pdf>.
[8] C. Tomuschat, *Human rights. Between idealism and realism*, New York: Oxford University press 2008 p. 67.
[9] C. Tomuschat, *Human rights. Between idealism and realism*, New York: Oxford University press 2008 p. 67.
[10] C. Tomuschat, *Human rights. Between idealism and realism*, New York: Oxford University press 2008 p. 68.

The purpose of this thesis is to look at the relationship between international law and terrorism in a specific context. More specifically it will deal with the laws of war (*jus ad bellum* and *jus in bello*) applicable to military operations, focusing on the Turkish military intervention in Northern-Iraq of 2008. The state of Turkey is affected by terrorism. They have been affected by terrorism since the 1970s, long before the attacks on September 11, 2001.[11] Since that day all of a sudden a 'war' was opened against terrorism and measures that Turkey could not take for over thirty years could suddenly be taken. Therefore, some scholars in Turkey, like Professor Sadi Çaycı, believe that double standards are applied to them and that democracy and human rights are merely used as a '*legal shield*' against their fight against terrorism.[12] With regards to Turkey the focus will be on a terrorist group called PKK which is aiming for secession from Turkey that has been active since the nineteen seventies. Over the years, PKK militants have relocated their bases to the 'safer' mountainous areas in Northern-Iraq and they frequently launch attacks into Turkey from those camps.[13] As a response to these attacks Turkish military forces have conducted operations against the PKK in Northern-Iraq. This fact gives this conflict which started as a non-international armed conflict an international dimension. Therefore the main research question will be:

Did Turkey have the right to take self-defence measures against cross-border attacks originating from Northern-Iraq and were those measures conducted legally*?*

In order to answer this question the laws of war will be discussed. The laws of war consist out of two parts; these two parts are the *jus ad bellum* and the *jus in bello*. The *jus ad bellum* deals with the justification to engage in war and the *jus in bello*, also known as international humanitarian law, deals with the permissible conduct of war. With the creation of the United Nations after the Second World War all resorts to armed force was prohibited. Armed force can only be used in the exceptional situation when the United Nations gives its authorization or as self-defence. Thus, the question to answer is whether Turkey could enter Iraq according to international law. Another question that needs to be answered is whether the conduct of the intervention was legal. In order to analyse this, the rules of international humanitarian law also have to be analysed. Nowadays international humanitarian law and human rights cannot be seen as two completely separate and unrelated regimes. In the traditional sense, international human rights law and international humanitarian law are seen as two separate bodies of law. However, developments in the field of international law have brought these two regimes closer together. Even so close that at some point the late professor Colonel Draper made the following statement: '*The two bodies of law have met, are fusing together at some speed and … in a number of practical instances the regime of human rights is setting the general direction and objectives for the revision of the law of war*'.[14] The fact that these two regimes are growing together, means that the conduct of war has to be in line with both the rules of international human rights law and international humanitarian law. This means that international human right law has become a part of *jus in bello* and therefore it will also have to be analyzed in this thesis. Because international humanitarian law and international human rights law are both a part of *jus in bello* the relationship between international human rights law and international humanitarian law in situations of armed conflict will have to be

[11] See, Sadi Çaycı, 'Countering Terrorism and International Law: The Turkish Experience', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 137, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[12] See, Sadi Çaycı, 'Countering Terrorism and International Law: The Turkish Experience', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 140, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[13] See, Sadi Çaycı, 'Countering Terrorism and International Law: The Turkish Experience', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 139, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[14] G.I.A.D Draper, 'The Relationship between the Human Rights Regime and the Laws of Armed Conflict', *Israel Yearbook on Human Rights* 1971, Vol. 1, p. 191.

analysed in order to determine whether the conduct of the Turkish military intervention was legal or not.

2. Definition of terrorism

International organisations and nations have never been able to agree on a definition for terrorism. This means there is no real worldwide-accepted definition of (international) terrorism. This might be because of the well-known phrase that says that one person's terrorist is another person's freedom fighter.
The current international anti-terrorism legal framework consists of twelve treaties.[15] These treaties aim at creating laws and establish conventions that criminalize certain terrorist acts such as kidnapping, detonating bombs and hijacking airplanes. Plans to make a single comprehensive anti-terrorism treaty have been discussed within the United Nations the members however, still disagree about the scope of that treaty.[16] As mentioned above a single overlapping anti-terrorism treaty does not exist. The current system is highly fragmented and is intended to respond to specific forms and aspects of terrorism.
A definition that is used by Raphael Perl[17], senior policy analyst on terrorism with the Congressional Research Service, to define terrorism is: '*politically motivated violence perpetrated against non-combatant targets by sub national groups or clandestine agents'*. International terrorism is defined as: '*terrorism involving the citizens or property of more than one country*'.[18] The definition of a terrorist group is: '*a group which practices or which has significant subgroups which practice terrorism*'.[19] These definitions are also commonly used by the United States government and implemented into anti-terrorism law.[20] [21] One of these twelve treaties is the International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999). According to this treaty, collecting and/or providing funds with the intent of killing or injuring civilians where the purpose is to intimidate a population or coerce a government is seen as a terrorist activity.[22] The Security Council has also taken Resolutions aimed at combating terrorism. The Security Council, in Resolution 1373, recognizes terrorism in general (before this resolution it was always terrorism aimed at a state or a region) as a threat to international peace and security.[23] Another outcome of this resolution was that in accordance with Chapter VII of the United Nation Charter the measures taken under the International Convention for the Suppression of the Financing of Terrorism is binding on all member states.[24] [25]
The current and commonly used definitions of terrorism have their shortcomings because they mainly focus on politically motivated behaviour and group activities. However, religion can

[15] Advisory Council on International Affairs and Advisory Committee on Public International Law, *Pre-emptive Action*, advisory report, The Hague, April 2000 p. 29-31.
[16] Advisory Council on International Affairs and Advisory Committee on Public International Law, *Pre-emptive Action*, advisory report, The Hague, April 2000 p. 29-31.
[17] Short biography <www.icasinc.org/bios/perl_rf.html>.
[18] R. F. Perl, *International Terrorism: Threat, Policy, and Response* (Congressional Research Service Report for Congress), January 3 2007, p. 34.
[19] R. F. Perl, *International Terrorism: Threat, Policy, and Response* (Congressional Research Service Report for Congress), January 3 2007, p. 34.
[20] R. F. Perl, *International Terrorism: Threat, Policy, and Response* (Congressional Research Service Report for Congress), January 3 2007 p. 34.
[21] Section 2656f of Title 22 of the United States Code.
[22] Text and status of the United Nations Conventions on Terrorism <www.un.org/law/cod/finterr.htm>.
[23] Security Council Resolution 1373 <www.un.org/News/Press/docs/2001/sc7158.doc.htm>.
[24] UN Charter Chapter 7 <www.un.org/en/documents/charter/chapter7.shtml>.
[25] Advisory Council on International Affairs and Advisory Committee on Public International Law, *Pre-emptive Action*, advisory report, The Hague, April 2000 p. 29-31.

also be a motivating factor to enact terrorist activities. This is made visible through the activities of groups such as Al Qaeda. The current definition also does not include individuals while individuals can also conduct terrorist activities while not necessarily being part of any group. They can be ideologically connected to a group, however not organizationally.[26] The 'Oslo bomber' could be seen as a recent example of this.[27] This man was ideologically connected to the far right but did not conduct his attacks (Bombing of parliament building and mass shooting) in the name of a group.[28] Besides traditional terrorist activities such as armed assault and bombing, terrorists in the future might be able to increase the use of more advanced technology such as cyber attacks to cause damage.
Even though the traditional definition has its shortcomings, it will be used for the sake of this thesis. Thus the definition of terrorism in the thesis will be:

Politically motivated violence perpetrated against non-combatant targets by sub national groups or clandestine agents and *collecting and/or providing funds with the intent of killing or injuring civilians where the purpose is to intimidate a population or coerce a government is a terroristic activity.*[29]

According to this definition, the PKK is a terrorist group. Their political goal is to secede from Turkey and they use violence against civilians to accomplish this goal; they intimidate civilians and by using this method, they try to coerce the government to comply with their demands. They target all kinds of civilians, ranging from tourists[30], teachers[31] and even children[32].

3. Concept and sources of the laws of war

The two world wars that took place in the 20th century paved the way for the (adapted) return of the medieval just-war theory. According to the just-war theory, war should be both legally and morally justifiable. This was a real shift in thinking because war was in the 19th century seen as a tool of the state to pursue its own interest. The use of force could be justified if it served the vital interests of a state.[33] When the United Nations was established after the Second World War, it was tasked to act as '*perpetual guardian of world peace and suppressor of aggression*'.[34] The United Nations prohibited all resorts to armed force in its Charter. The use of force is only allowed in two exceptional situations. The first exception is the authorisation of the use of force by the United Nation Security Council. The second one is the use of force as self-defence. The goal of the United Nations to abolish war is a noble one

[26] R. F. Perl, *International Terrorism: Threat, Policy, and Response* (Congressional Research Service Report for Congress), January 3 2007 p. 34.
[27] A news article <www.washingtontimes.com/blog/robbins-report/2011/jul/23/oslo-terrorist-his-own-words>.
[28] A news article <www.dailymail.co.uk/news/article-2017851/Norway-attacks-gunman-Anders-Behring-Breivik-right-wing-extremist-hated-Muslims.html>.
[29] R. F. Perl, *International Terrorism: Threat, Policy, and Response* (Congressional Research Service Report for Congress), January 3 2007, p. 34.
[30] Two news articles <www.dailymail.co.uk/travel/article-1295941/Turkey-terror-warning-tourists-PKK-makes-new-threats.html><www.todayszaman.com/newsDetail_getNewsById.action;jsessionid=10CBABB59455CE5242AFBA98D30BCF74?newsId=216680>.
[31] News article <www.todayszaman.com/columnist-258500-reasons-behind-pkk-attacks-on-teachers.html>.
[32] Various news articles <www.hurriyetdailynews.com/default.aspx?pageid=438&n=2-civilians-dead-in-terrotist-attack-in-turkey-2011-09-27> <www.presstv.ir/detail/214215.html> <www.todayszaman.com/news-245593-pkk-wants-to-kill-pious-kurdish-children-erdogan-says.html>.
[33] S. C. Neff, *War and the Law of Nations. A General History*, Cambridge: Cambridge University Press 2005 p. 167-170.
[34] S. C. Neff, *War and the Law of Nations. A General History*, Cambridge: Cambridge University Press 2005 p. 280.

that is worth fighting for, however in practice this system based on just-war theories never managed to abolish war. War stopped to exist as a '*legal institution*' in the sense of the 19th century, however in the words of lawyer Stephen C. Neff,[35] '*what the world really witnessed after 1945 was less the abolition of war than its reconceptualisation. The pieces of the puzzle, so to speak, remained in existence; but they were assembled into somewhat different patterns or pictures*'.[36] War kept existing but in a different way than it did in the past. This change was realised because of two major changes. First of all the self-defence exception became the centre of international law. The changes in the concept of self-defence could probably be realized because the effectiveness of the Security Council was limited during the cold war, which resulted in a greater reliance on self-defence measures.[37] Many states would use the self-defence exception to justify their unilateral use of force. Secondly, the view on the conduct of war also changed. The focus moved from fairness and mutuality between the warring parties to alleviating the suffering caused by war.[38] The changing view of the concept of self-defence had influence one the *jus ad bellum* while the other major change addressed the *jus in bello.*

Nowadays, all the international laws on war are according to professor Dieter Fleck[39] and professor Terry D. Gill[40] included in a relatively new field of international law they call the international law of military operations.[41] They divide it into the following three branches: the *jus ad bellum*, the *jus in bello* (international humanitarian law) and the *jus post bellum*. The first branch focuses on the justification to engage in war while the second one focuses on the permissible conduct of war. The third branch focuses on the follow up phase; the transition from an armed conflict to a situation of peace. This thesis will only focus on the first two branches. Dieter Fleck and Terry D. Gill both acknowledge that it might be too early for the international law of military operations to be recognized as a core legal discipline of international law.[42] However, they note that it encompasses '*all relevant aspects of military law that affects the conduct of operations*' and that it is developed by state practice and thus in line with it.[43]

Sources of international law, thus also the sources for abovementioned branches, can be found in article 38 of Statute of the International Court of Justice. This article states[44]:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;

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[35] Information about Stephen C. Neff <www.law.ed.ac.uk/staff/stephenneff_63.aspx>.
[36] S. C. Neff, *War and the Law of Nations. A General History*, Cambridge: Cambridge University Press 2005 p 315.
[37] S. C. Neff, *War and the Law of Nations. A General History*, Cambridge: Cambridge University Press 2005 p 315.
[38] S. C. Neff, *War and the Law of Nations. A General History*, Cambridge: Cambridge University Press 2005 p 315.
[39] Professor Dieter Fleck is the former Director for International Agreements & Policy of the German Federal Ministry of Defence and Honorary President of the International Society for Military Law and the Law of War.
[40] Terry D. Gill is professor of military law at the University of Amsterdam.
[41] T. D. Gill & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p. 565.
[42] T. D. Gill & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p. 565.
[43] T. D. Gill & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p. 565.
[44] Statute of the International Court of Justice <www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II>.

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This is seen as a highly authoritative article that lists sources of international law. Treaties and international customary law are seen as the main sources of international law. Customary international law is as the name might suggest derived from customs and consists of two elements. These two elements are state practice (usus) and *opinio juris* (the conviction that the practice reflects law).[45] The other points mentioned in the article have a supportive role and are meant to supplement and help interpret the main sources.[46] This list is also known to be incomplete; decisions taken by international organizations can for example also be seen as sources of international law.[47] The main sources for the two branches relevant to this thesis (*jus ad bellum* and *jus in bello)* can be found in the United Nations Charter, international humanitarian law, human rights law and customary international law. These four sources are relevant because they cover both the *jus ad bellum* and the jus *in bello*. Rules of *jus ad bellum* can be found both in the United Nations Charter and in customary international law while rules of *jus in bello* can be found in international humanitarian law, international human rights law and customary international law.

International military operations should always have a legal basis under international law. The legal basis can be found in the United Nations Charter and customary international law. If force is used outside of this framework, the operation is *prima facie* illegal under international law. International humanitarian law, which regulates the conduct of war, applies to all fighting parties in an armed conflict. It does not matter whether the parties are engaged in a legal or illegal armed conflict. International humanitarian law is the main source when determining the legality of the conduct and actions of fighting parties in an armed conflict. Its relation with human rights is an interesting one. In this relationship, humanitarian law will act as the *lex specialis* while human rights law will act as the *lex generalis*. This relation will be explained in further detail in chapter nine.

This thesis will continue in the next chapter by giving a brief description of the situation in Turkey. After that, it will continue to discuss the *jus ad bellum* followed by the *jus in bello*.

4. The situation in Turkey

The republic of Turkey has been engaged in a so-called low intensity conflict since the beginning of the nineteen seventies. A low intensity conflict can be described as the '*selective and restrictive use of military forces in order to comply with policies and political objectives set by the body controlling the military force*'.[48] Low intensity conflicts are usually waged against non-state actors. Some examples of these non-state actor terrorists groups (not all of them are active anymore) in Turkey are the PKK, Kurdish Hezbollah (unrelated to the Lebanese group), DHKP and Asala. The motives of these groups may vary, some are

[45] A. Cassese, *International law*, New York: Oxford University Press 2001 p.157.
[46] S. C. Hicks, 'International order and Article 38(1)(c) of the Statute of the International Court of Justice', *Suffolk Transnational Law Journal* 1978, vol. 2, p.6-10.
[47] T. D. Gill & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p. 8.
[48] United States Department of the Army (5 December 1990), Field Manual 100-20: Military Operations in Low Intensity Conflict.

ideological or nationalistic and others can be religious. As different as all the various groups may be they pose a threat to the nation. If the state does not appropriately deal with these groups, the conflict could escalate beyond a low intensity conflict. This does not necessarily mean military measures because the solution could also be sought in diplomatic, political and economic spheres. In this paper the PKK (Kurdistan Workers' Party), who as its ultimate goal has secession from Turkey, will be used as the case study for the non-state actor terrorist group. This group was established in 1974 and aims to create an independent Kurdish State in a large part of Turkey. A short analysis of the ongoing conflict shows that approximately 18% of a total of 78.7855.48 people living in Turkey is Kurdish.[49] According to the PKK, the Kurdish people are occupied by four 'colonizing' states. One of these states is Turkey, which will be the focus of the thesis; the others for the sake of completeness are Iraq, Iran and Syria. The PKK aims to establish an independent country on the territories of these four states. This goal they pursue is called secessionism. The PKK have their base of operations in Northern-Iraq and they launch their attacks from this location. They created a so-called 'safe haven' in this location because a power vacuum exists in that area. The PKK is estimated to have up to 5000 militants in Northern Iraq.[50] Already 40000 people have lost their lives during this ongoing conflict.[51] The PKK is currently listed as a terrorist organization by some influential states such as the United States and by international organizations such as the NATO.[52] [53] However, despite this fact it is also known that the PKK received, or is still receiving, help from some countries. The former leader of the PKK also confirmed this during his trial.[54] Some of these supporting countries are also in the NATO.[55] Greece for example, is known to have provided weapons and material to the PKK.[56] Currently the EU also sees the PKK as a terrorist group.

Secession is not a new phenomenon within international law and can be traced back to the Westphalia Treaty of 1648. This treaty had lead to the creation of the nation state and also the start of secessionist movements.[57]

International-legal principles usually help to solve international issues, however in the case of Turkey they have not led to any kind of solution for over forty years. On the contrary, two principles are used against each other. These two conflicting principles are the right to self-determination and the principle of territorial integrity.

International subjects must comply with all principles of international law.[58] However, in practice it is safe to say that the appliance of principles is often dependant on the prevailing political climate.[59] During the cold war, the Soviet Union and the United States where not in favour of an extensive right to self-determination because they thought that this could cause a

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[49] The world fact book <www.cia.gov/library/publications/the-world-factbook/geos/tu.html>.

[50] See, Sadi Çaycı, 'Countering Terrorism and International Law: The Turkish Experience', *In Terrorism and International Law: Challenges and Responses*, 2003 p. 139, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.

[51] See, Sadi Çaycı, 'Countering Terrorism and International Law: The Turkish Experience', *In Terrorism and International Law: Challenges and Responses*, 2003 p. 138, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.

[52] Council Decision 2011/70/CFSP of 31 January 2011 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:028:0057:01:EN:HTML>.

[53] News article <english.peopledaily.com.cn/200512/20/eng20051220_229424.html>.

[54] News article <news.bbc.co.uk/2/hi/europe/358115.stm>.

[55] See, Sadi Çaycı, 'Countering Terrorism and International Law: The Turkish Experience', *In Terrorism and International Law: Challenges and Responses*, 2003 p. 138, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.

[56] M. M. Gunter, *The Kurd and the Future of Turkey*, New York: St. Martin's Press 1997 p.110.

[57] M. J. Kelly, 'Pulling At The Threads Of Westphalia: ''Involuntary Sovereignty Waiver''- Revolutionary International Legal Theory Or Return To Rule By The Great Powers?', *UCLA Journal of International Law and Foreign Affairs* 2005, Vol. 10, No. 2, p.371-347.

[58] A. Cassese, *International Law*, New York: Oxford University press 2005 p. 67.

[59] A. Abasov & H. Khachatrian, *The Karabakh conflict. Variants of settlement: concepts and reality*, Yerevan: Noyan Tapan 2006 p. 27.

disturbance in the balance of powers. During that period, the territorial integrity of states seemed to be of more importance than the principle of self-determination. However, this was not the case in all situations since the right to self-determination for the people living in colonies was generally accepted. United nations General Assembly Resolution 1514, called Declaration on the Granting of Independence to Colonial Countries Peoples, adopted in 1960 strengthened this.[60]
When the Soviet Union collapsed the political situation changed. The views on the right to self-determination started to change and one looked at it differently outside of the strict guidelines used in the cold war. With regard to this change, two American researchers, Morton H. Halperin and David J. Scheffer, can be quoted: '*it is time to pursue a creative policy which would take into account the peculiarities of each situation.*'[61] The relation between the principles of self-determination and territorial integrity might not be applied as strictly as it was before, however the scope of the principle of self-determination is still uncertain.

In this case the two principle seem to conflict with each other because the PKK wants to secede from Turkey and create a Kurdish state on a part of Turkish soil. The right to self-determination can be classified in two categories. The first category is the self-determination in the colonial context and the second category is the right to self-determination in the contemporary context.
The right to self-determination in the colonial context is generally recognized, and sources of colonial self-determination can be found in the Charter of the United Nations.[62] [63]
This is not case with the right to self-determination in the contemporary context. The right to self-determination can be divided in an external and internal dimension. Peoples under colonial domination have the right to external self-determination. This means they are allowed to establish a sovereign State. Racial groups that are denied full access to the government in a sovereign State are entitled to internal self-determination. This means the pursuit of its political, economic, social and cultural development within the framework of an existing State.[64] The right to external self-determination in the contemporary context does not create a general right to secession, self-determination as the right to (unilateral) secession is highly contested under international law.[65] Unilateral secession means that a part of a territory breaks away by creating an independent state. It does this without the prior consent of the parent state and without a constitutional provision that allows for secession.[66] Already in 1952 it was stated by 'First lady' and Human rights activist Eleanor Roosevelt[67] that: '*Just as the concept of individual human liberty carried to its logical extreme would mean anarchy, so the principle of self-determination given unrestricted application could result in chaos'.*[68]
Territorial integrity is still a very important principle to all states. Degradation of this principle could be a threat peace and stability and the Survival of the state.[69] In 1998 the

[60] GA Resolution <daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/88/IMG/NR015288.pdf?OpenElement>.
[61] A. Abasov & H. Khachatrian, *The Karabakh conflict. Variants of settlement: concepts and reality*, Yerevan: Noyan Tapan 2006 p. 28.
[62] Chapter 1, Article 1 (2) Charter of the United Nations.
[63] Chapter 9, Article 55 Charter of the United Nations.
[64] A. Cassese, *International Law*, New York: Oxford University press 2005 p. 60-64.
[65] S. van den Driest, *The right to self-determination* (Slides used on 12 October during the course International Law: Current Issues), 2010
[66] S. van den Driest, *The right to self-determination* (Slides used on 12 October during the course International Law: Current Issues), 2010
[67] Short Biography <www.udhr.org/history/Biographies/bioer.htm>.
[68] Eleanor Roosevelt, 'The Universal validity of Man's Right to Self-Determination', in 27 *US Department of State Bulletin*, 8 December 1952.
[69] A. Cassese, *International Law*, New York: Oxford University press 2005 p. 63.

Supreme Court of Canada gave its opinion about the legality of the unilateral secession of Quebec under Canadian and international law by stating that, '*A State whose government represents the whole of the people or the peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity'*.[70]

As mentioned above the PKK claims to be colonized by the Turkish state. This of course cannot be the case. If one would look at the history of the area one could see that Kurds have always lived in peace under the sovereign authority of the Ottoman Empire (present day Turkey).[71] After the end of World War I, which resulted in a loss for the Ottoman Empire, The allied powers made agreements to create an autonomous Kurdish state. Under the terms of the Treaty of Sevres at the Versailles Peace Conference, the division of Ottoman land was outlined. This treaty, however, never came into effect because the Ottoman officials never ratified the treaty. When a combination of British, French, Greek and Italian troops started to invade and occupy parts of present day Turkey, the former Ottomans started a national liberation war during 1919 and 1922 against the foreign occupation. The Allied side lost this war and this lead to the creation of a new treaty in 1923. In this treaty known as the treaty of Lausanne, the creation of an independent Turkish state where both Turks and Kurd's would live was acknowledged. Turkey has a multiethnic society, Besides Kurds others ethnicities like Lazs, Georgians, Abkhazians, Chechens, Bosnians, Albanians, Arabs and others live alongside each other. When the word Turk is used in the context of Turkey, it is usually not meant to point out a specific race but a reference to all those ethnicities that were in the liberation war.[72] [73] The Kurds in Turkey are a not region specific group but can be found all over the country. They can also be divided under different tribes like the Jirki, Alan, and Ezdinan. These tribes do not speak the same dialect and thus Turkish serves as a language of communication between the tribes indicating that there is no real unity amongst them.[74] The law treats all Turkish citizens equally and the Turkish state does not have a policy that discriminates on racial grounds, instead it represents the entire population off Turkey. The fact that Turkey had a president with a Kurdish background (Turgut Özal) from 1989 until 1993 supports this. Therefore, based on the ruling of the Supreme Court of Canada in the *Quebec* case the territorial integrity of the Turkish state should be protected.

Another important case regarding the right to self-determination is the advisory opinion of the International Court of Justice on Kosovo's declaration of independence.
This case was brought before the International court of justice by Serbia in which it wanted an opinion over whether or not Kosovo's declaration of independence was illegal.
The question was phrased like this[75]: '*is the unilateral declaration of independence by the Provisional Institutions of Self-Government in Kosovo in accordance with international law?'*
On 22 July 2010 the ICJ gave its opinion: ' *The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international*

[70] A. Cassese, *International Law*, New York: Oxford University press 2005 p. 68.
[71] S. E. Cornell, 'The land of Many Crossroads: The Kurdish Question in Turkish Politics', *Orbis* 2001, Vol. 45, No. 1, p. 33.
[72] See, Sadi Çaycı, 'Countering Terrorism and International Law: The Turkish Experience', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 138, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[73] S. E. Cornell, 'The land of Many Crossroads: The Kurdish Question in Turkish Politics', *Orbis* 2001, Vol. 45, No. 1, p. 34.
[74] See, Sadi Çaycı, 'Countering Terrorism and International Law: The Turkish Experience', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 138, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[75] Page 6 of the ICJ opinion <http://www.icj-cij.org/docket/files/141/15987.pdf>.

law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law'.[76] This advisory opinion, which is not legally binding but is regarded as an authoritative view on the matter, received many reactions. Some were content with the advisory opinion and said that the decision has important legal and political significance and sets a precedent that cannot be confined to Kosovo alone.[77] While on the other hand many other states believed this judgment was confined for Kosovo. For example, the U.S. State Department spokesman Philip Crowley stated that: *'Anyone who reads the ruling will see that this was a specific judgment based on facts unique to Kosovo, we certainly don't think it applies to other circumstances'*.[78] Besides being of non-binding character the advisory opinion on Kosovo left some important questions unanswered. In its advisory opinion, the ICJ did not answer whether or not the right to self-determination was applicable or whether or not Kosovo had the right to unilaterally secession.[79] This advisory opinion does not bring us any closer to solutions for these types of issues since it is not really clear in clarifying its conclusions or simply refraining from answering some important underlying questions. In conclusion, it is safe to say that exercising the right of self-determination by means of unilateral secession is still contested. Self-determination usually takes place within the framework of a state (internal).[80] The advisory opinion did not solve the uncertainty regarding self-determination. This means that the PKK does not have the unilateral right of secession. This is strengthened by the fact that the Turkish law treats all its citizens equally. The PKK attacks aimed against the Turkish state and people cannot be justified under international law and are illegal.

5. Cross Border Attacks and Operations

All use of force (or even threatening to use force) is prohibited under international law. Only two exceptions to this rule exist. The first one is the use of force within the United Nations collective security system; the second one is using force as self-defence.[81] The attacks the PPK launches from Northern-Iraq do not fall under any exception and they do not distinguish between the civilian population and combatants and are therefore clearly illegal. This part of the paper will focus on a series of attacks launched by the PKK in a period between 2007 and 2008 and the military response of the Turkish military. The legality of the armed response under international law will be discussed.

During the year 2007, an increase in PKK hostilities was noticeable. Events in Iraq made it easier for the PKK to use the mountainous border region in Northern-Iraq as a safe haven for staging cross-border attacks into Turkey.
On the 7th of October, this resulted in an attack where a group of PKK terrorists attacked a Turkish military unit in the southeast of Turkey. This attack resulted in wounding three and killing 13 soldiers.[82] The increase of hostilities in general and this attack specifically caused a

[76] Page 44 of the ICJ opinion <http://www.icj-cij.org/docket/files/141/15987.pdf>.
[77] Reactions <www.armeniadiaspora.com/news/article-hits/1603-karabakh-armenians-buoyed-by-kosovo-precedent.html>.
[78] Reactions <www.armeniadiaspora.com/news/article-hits/1603-karabakh-armenians-buoyed-by-kosovo-precedent.html>.
[79] Page 32 of the ICJ opinion <http://www.icj-cij.org/docket/files/141/15987.pdf>.
[80] H. Krueger,' Implications of Kosovo, Abkhazia and South Ossetia for International Law The Conduct of the Community of States in Current Secession Conflicts', *Caucasian Review of International Affairs,* vol. 3 (2) p. 121-142.
[81] T. D. Gill & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p.188.
[82] T. Ruys, *'Armed Attack' and Article 51 of the UN Charter. Evolutions in Customary Law and Practice*, Cambridge University Press, 2010 p. 457.

public outrage in Turkey.[83] A few days later after barely recovering from the shock another PKK attack originating from Northern-Iraq resulted in the capture of eight and the death of 12 soldiers. As a response, a majority in the Turkish parliament approved military operations on Iraqi soil.[84] On February 21, 2008, Turkey launched on of its biggest attack ever on PKK camps in Iraq. This military operation was code-named '*Güneş Harekatı*' ('operation sun'). In the past operations had been mainly small-scale, this one was different because it involved artillery, air units and thousands of troops. However, by the end of February most Turkish troops had already left Iraq again.[85] The Turkish government claimed that nearly 40000 people had lost their lives since the PKK took up arms and that around 3000 rebels were stationed in Northern-Iraq. It therefore claimed it had the right under international law to attack the PKK there.[86]

The reactions of the international community in the period leading to and after the military intervention were mixed. Many states expressed their sympathy with Turkey and in their wording strongly condemned the PKK attacks. However, they also stressed that Turkey should look for a peaceful solution through diplomatic means. A good example that illustrates the view of the international community can be found in a statement made by the European Union in October 2007. In this statement they condemn terrorists and terrorism and at the same time they emphasize the importance of dialogue and cooperation between Turkey and Iraq and the regional government of Northern-Iraq.[87] They also urged the government of Iraq and the regional government of Northern-Iraq to '*ensure the respect for the Turkish border and guarantee that the Iraqi territory is not used for violent actions against Turkey*'.[88] Other countries like the United States and the United Kingdom also made similar statements. Most countries were afraid that a military intervention would destabilize Northern-Iraq, which is the only relatively stable region in the country. The United States for example did not openly approve the military operations but it also did not disapprove them. It did however refer to the PKK as *'the common enemy'* and '*terrorists*'.[89] Because of the previous statement and the 'war on terror' launched and led by the United States, were they intend to pursue and eliminate terrorists world-wide, one view could be that the United States silently approved the military operation. They also provided Turkey with military intelligence on PKK locations and troop movement.[90] This can also be seen as approving the military operations.
Logically the government of Iraq called the military intervention a '*interference in our territory*'.[91] At first sight, Article 2 paragraph 4 of the United Nations Charter supports the view of the Iraqi government. This article states that, '*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of*

[83] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 335.
[84] T. Ruys, *'Armed Attack' and Article 51 of the UN Charter. Evolutions in Customary law and Practice*, Cambridge University Press, 2010 457.
[85] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 335-336.
[86] News article <www.aljazeera.com/news/europe/2007/12/200852514343354571 6.html>.
[87] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 340.
[88] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 340.
[89] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 340.
[90] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 341.
[91] News article <www.reuters.com/article/2008/02/22/us-iraq-turkey-idUSL2281538020080222>.

the United Nations'. This article however, has to be read in the light of the promise the United Nations Charter makes to provide an effective system of collective measures aimed at preserving the peace.[92] Based on the high number of conflicts in the world the United Nations is not always able to succeed with its goal. Another important fact to note is that at the end of the military operations the Iraqi government stated that *'this withdrawal indicated the credibility of the Turkish government's statements that the military operation would be limited and temporary'*[93] Iraq also did not take the Turkish decision to conduct military operations in Iraq to the United Nations Security Council. In general, the international community acknowledged that Turkey had the right to protect its citizens from terrorist attacks while on the other hand it urged Turkey to respect the rule of law and preserve international and regional stability. The international community also urged the Turkish military from refraining disproportionate and unnecessary military action. Most of the statements made by Turkey, Iraq and the rest of the international community have a political background and not a legal one. The Turkish government did not really give a public legal justification for the operation. It did however notify the Human Rights Council in a *note verbale*. In its notification, the Turkish government ensured that the military operations in Northern-Iraq where only aimed at the PKK terrorists in the region and they also affirmed that they respect the sovereignty of Iraq.[94] In the exact wording of the *note verbale* it was stated as, '*the counter-terrorism operation carried out ... in northern Iraq was limited in scope, geography and duration. It targeted solely the PKK ... terrorist presence in the region. Turkish military authorities took all possible measures to ensure the security of civilians and to avoid collateral damage. As a result, there has been no civilian casualty. Turkey remains a staunch advocate of the territorial integrity and sovereignty of Iraq*'.[95]

An important thing to notice is that the military operations indeed did not lead to any civilian casualties. The rest of the international community also did not come with legal arguments either for or against the military intervention (with the exception of Iraq of course, which was mentioned before). This is interesting because states in the recent past have always been eager to come up with a legal justification for there actions showing there military intervention was a just one. Examples of this are the wars in Afghanistan and Iraq.[96] Returning to the legal issues it was already shown that the use of force is prohibited under our contemporary international law system. This is codified in article 2 sub 4 of the United Nations Charter. This means that at first sight the military operations of Turkey where an infringement of the territorial integrity of Iraq and thus prohibited under international law. Iraq also did not approve the military operation since it formally protested against it. The rule that prohibits the use of force is also a part of customary international law. The importance of the territorial integrity can also be found in the famous *Nicaragua* case dating from 1986. In this case, the International Court of Justice decided that the United States was violating their obligation under customary international law, which prohibits them from using force, intervening in internal affairs and violating the sovereignty of other states.[97]

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[92] T. M. Franck, 'When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?', *Journal of Law & Policy* 2001, Vol. 5:51 p.51.

[93] News article <news.bbc.co.uk/2/hi/europe/7272184.stm>.

[94] Note Verbale Dated 26 March 2008 from the Permanent Mission of Turkey to the United Nations Office at Geneva Addressed to the Secretariat of the Human Rights Council, UN Doc A/HRC/7/G/15 (28 March 2008) ('Note Verbale').

[95] Note Verbale Dated 26 March 2008 from the Permanent Mission of Turkey to the United Nations Office at Geneva Addressed to the Secretariat of the Human Rights Council, UN Doc A/HRC/7/G/15 (28 March 2008) ('Note Verbale').

[96] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p.345.

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

Only two exceptions exist to bypass the prohibition on the use of force. The first exception is the authorisation of the use of force by the United Nation Security Council. The second one is the use of force as self-defence. The first one can be found in Chapter VII of the United Nations Charter, more specifically it can be found in article 39 until article 42. The second exception can be found in article 51 of the United Nations Charter. In this case however, there was no collective action therefore the only possible exception is self-defence and it should be looked for in article 51 of the United Nations Charter. In order to analyze the legality of the legal intervention in Northern-Iraq this article will be analyzed. The concept of self-defence in this thesis will be viewed from an international law perspective. Self-defence under international law gives states the right to use force against an armed attack originating from outside its borders, which is directed against its territory, citizens, vessels, aircrafts, or military units.[98] [99] The concept of self-defence denotes the lawful use of force by a state as a response to a prior illegal use of force directed against them, self-defence measures cannot be taken against the lawful use of force.[100]

6. Self-defence under article 51 United Nations Charter

Article 51 of the United Nations Charter states:

'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security'.[101]

Besides the wording of the article rules of customary international law dictate that military self-defence actions are also always bound by the criteria of proportionality and necessity, which are a part of customary international law.[102] The right of self-defence thus has a dual legal basis. If one wants to review whether the military operations between 2007 and 2008 where in compliance with international law or not one has to analyze the operations in light of article 51 of the United Nations Charter and the two additional criteria.

Based on the text of article 51 of the United Nations Charter one can conclude that the right to self-defence cannot be used when the Security Council has taken *'measures necessary to maintain international peace and security*'. States have the inherent right to take self-defence measures but only until the Security Council takes measures. The right is thus temporarily and can only exist for the time necessary until the Security Council acts. However, the Security Council with regard to the conflict in Northern-Iraq took no measures. The article also states

[98] T. D. Gill & D. Fleck, The handbook of the international law of military operations, New York: Oxford University Press 2010 p. 187.
[99] D. W. Bowett, *Self Defence in International Law*, New York: Manchester University Press 1958 p. 3-25.
[100] T. D. Gill & D. Fleck, The handbook of the international law of military operations, New York: Oxford University Press 2010 p. 187-188.
[101] United Nations Charter <www.un.org/en/documents/charter/chapter7.shtml>.
[102] Oil Platforms (Iran v US) (Judgment) [2003] ICJ Rep 161, 196 ('Oil Platforms').

that, '*Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council'*. This did not happen in this case as Turkey did not report the military actions it undertook to the Security Council. The Security Council on its turn did not assemble to discuss this situation.[103] This requirement to notify the Security Council of self-defence actions as soon as possible gives the Security Council the primacy in determining what measures have to be taken in order to restore peace and security. Therefore, this is an important requirement as the United Nations has the monopoly on the use of force. However, this duty to notify is not a requirement of prior authorization.[104] It was already mentioned that the collective system is not always successful in maintaining or restoring peace. States have the right to take self-defence measures when an armed attack has taken place and do not have to wait for the Security Council to take measures. The Security Council is in the end still the highest authority; it can support, reject or simply take note of the self-defence measures. If the Security Council takes measures aimed at resolving the conflict the right of self-defence will cease to exist. In this case however, the Security Council did not take any measures neither did it sanction Turkey. Based on the *Nicaragua* case this negligence of reporting to the Security Council alone does not make the intervention illegal.[105] Most legal scholars among whom professor Donal Greig[106] also seem to agree with this view.[107] [108] Reporting to the Security Council is generally not seen as a prerequisite for the use of the right to self-defence. In the words of lawyer Tom Ruys[109] it is '*a separate conventional obligation of a procedural nature, linked to the effective exercise of the Security Council's powers'*.[110] However, it is also generally believed that reporting to the Security Council will strengthen the position of a state when using the self-defence exception. States usually do report acts of self-defence, which may indicate state practice.[111] In the case of Turkey the non-reporting of the self-defence, exception does not strengthen the justification of the military intervention but this fact also does not make it illegal altogether.

The most essential legal requirement for taking self-defence measures is the existence of an armed attack. The important question to answer is whether the attacks conducted by the PKK in the period between 2007 and 2008 can be regarded as an armed attack. The United Nations Charter does not define the term 'armed attack'. The definition of the word should instead be sought with the International Court of Justice, customary international law and to a lesser degree in the legal literature. From these sources one can conclude that not all the fighting arising from hostilities can be seen as an armed attack. The magnitude of attacks is decisive here. This was already decided in the *Nicaragua* case. In this case, the International Court of Justice decided that *'the most grave forms of the use of force'* constitute an armed attack and *'other less grave forms of force'* do not.[112] Incidents and 'small' attacks are not enough to

[103] T. Ruys, 'Armed Attack' and Article 51 of the UN Charter. Evolutions in Customary Law and Practice, Cambridge University Press, 2010 p. 462.
[104] T. D. Gill & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p. 195.
[105] *Nicaragua* [1986] ICJ Rep 14, 105, 121.
[106] Donal W. Greig is a professor at law at Australian National University.
[107] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 348.
[108] D. W. Greig, 'Self-Defence and the Security Council: What does article 51 require?', *international and Comparative law Quarterly* 1991, 40 p. 366.
[109] Tom Ruys is a full time researcher at the institute of international law at the University of Leuven.
[110] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 348.
[111] Y. Dinstein, *War, Aggression and Self-Defence*, Cambridge: Cambridge University Press 2005 p. 216.
[112] Nicaragua [1986] ICJ Rep 14, 101.

justify self-defence under article 51 of the United Nations Charter.[113] This thesis will defend the view that this threshold should not be too high as this might prevent states from defending themselves adequately. Some scholars also uphold this view and say that the threshold should not very high and that smaller attacks can justify self-defence under article 51 United Nations Charter.[114] [115] Needless to say the self-defence measures have to be proportionate and comply with the rules of international humanitarian law. Some scholars even suggest that all use of force can be seen as an armed attack that can justify the use of self-defence. This thesis however does not support this view as these self-defence actions will cause infringements in the national integrity of nations which can potentially harm the stability of an entire region and can thus not be justified by all use of force. Relatively new case law (*Oil Platforms* [*2003*]) also seems to support the view that 'smaller' attacks can constitute an armed attack. The Court does maintain the view that not all use of force can be seen as an armed attack under article 51 United Nations Charter and preserves its minimum threshold requirement but it puts the threshold slightly lower.[116] It puts the threshold lower because it acknowledges that a sum of different attacks may be '*taken cumulatively*' to justify self-defence.[117] [118] This means that a series of small incidents could be enough to justify self-defence measures.

Which level of force exactly triggers the right to use self-defence under article 51 is not precisely defined and the opinions of scholars on this matter also differ. Whether one classifies the PKK attacks aimed against Turkey as small or large scale attacks, one cannot deny the absent of a series of attacks. In our case, the cross-border attacks can be seen as an armed attack in the sense of article 51 of the Charter. This is made clear from the frequency, but also the impact of the attacks. As was already mentioned the attacks resulted in the death of at least 25 soldiers and many wounded. This high injury and death toll on its own suggests an armed attack. The cross-border attacks were also carried out deliberately by a rather large force (estimated at least 150 terrorists) and took place after careful preparations. All this evidence shows that the cross-border attacks cannot be seen as so called 'frontier incidents' and are definitely armed attacks in the sense of article 51 United Nations Charter.[119] If this situation would have been between two states, for example between Iraq and Turkey, the question of legality would be easy to answer because the self-defence exception was originally designed as an instrument for states to defend itself against military aggression from other states.[120] Simply put if one state attacks another state the other state has the right to defend itself against the attacks. These types of attacks are also called direct military aggression.[121] The fact that the attacks in this case came from a non-state actor complicates the matter because article 51 of the Charter is not precise on whether it applies to armed attacks carried out by non-state actors like terrorists. Thus the question here is whether Turkey (state) can launch an attack into Iraqi territory (state) aimed at terrorists when it is being

[113] Nicaragua [1986] ICJ Rep 14, 103.
[114] T. Gazzini, *The Changing Rules on the Use of Force in International Law*, Manchester: Manchester University Press, 2005 p. 133.
[115] J. L. Kunz, 'Individual and Collective Self-Defence in Article 51 of the Charter of the United Nations', *American Journal of International Law* 1947, 41 *p.* 872.
[116] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 349.
[117] *Nicaragua* [1986] ICJ Rep 14, 118-20.
[118] C. J. Tams, 'The Use of Force against Terrorists', *The European Journal of International Law* 2009, Vol. 20, No. 2, p. 388.
[119] C. Gray, *International Law and the Use of Force*, New York: Oxford University Press 2004 p.102.
[120] T. Ruys & S. Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' *Journal of Conflict and Security Law* 2005, Vol. 10 p. 289-291.
[121] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 351.

attacked by those terrorists who launch their attacks from Iraqi territory (non-state actor); even though Iraq has no obvious (provable) direct connection with the attacks. As mentioned above self-defence measures were meant to be used by states against other states however one already thought of the possibility that states would exploit this limitation and support certain non-state actors. Therefore, some attacks carried out by non-state actors for which a state has a certain level of responsibility also count as an armed attack.[122] These types of attacks are sometimes called indirect military aggression.[123] In a situation of direct aggression, it is easy to determine whether there is a situation of armed attack or not. With regard to indirect aggression, disagreement exists around its scope and applicability.[124] Not all indirect aggression can trigger self-defence measures. After years of debate, the United Nations General Assembly adopted a resolution in which it defines aggression.[125] This resolution also covers indirect aggression in article 3 paragraph G. This article states the following:

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The International Court of Justice has taken the above-mentioned article as a standard when defining whether indirect aggression constitutes an armed attack and can justify self-defence measures.[126] Therefore, the Court stated that assisting rebels by providing them with weapons or providing logistical support is not sufficient enough to be seen as an armed attack.[127] Many scholars, including Judges Schwebel[128] and Sir Robbert Jennings[129] who expressed their view in their dissenting opinion in the *Nicaragua* case, found this reading of the court too narrow and restrictive and argued that this reading severely limited the options of a state to defend itself against attacks coming from non-state actors supported by states.[130] This thesis agrees that the restrictive reading of article 3 paragraph G limits the possibilities of self-defence against non-state attacks. Based on the current scope of indirect aggression self-defence measures can only be taken in two situations. In the first situation a state gives (direct) instructions to non-state actors to perform cross-border attacks while in the second situation a state exercises '*effective control*' over the non-state actors.[131] States however, do not easily meet the requirements to fulfil these two situations. Besides this they will (most likely) not openly support terrorists and will always do this secretly, which makes it difficult to prove. As was already mentioned the PKK received support from other states in the past. The reality of our world is that states always have and always will support non-state actors in accordance with their own national interests. State support usually consists of training, financial support,

[122] T. Ruys & S. Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' *Journal of Conflict and Security Law* 2005, Vol. 10 p. 289-291.
[123] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 351.
[124] P. L. Zanardi, 'Indirect Military Aggression' in Antonio Cassese (ed), *The Current Legal Regulation of the Use of Force*, Dordrecht: Martinus Nijhof Publishers 1986 p. 111-115.
[125] Definition of aggression <www.un-documents.net/a29r3314.htm>.
[126] *Nicaragua* [1986] ICJ Rep 14, 195.
[127] *Nicaragua* [1986] ICJ Rep 14, 104.
[128] See dissenting opinion Judge Schwebel paragraph 347-450 <www.icj-cij.org/docket/files/70/6523.pdf>.
[129] See dissenting opinion Sir Robbert Jennings paragraph 542-544 <www.icj-cij.org/docket/files/70/6525.pdf>.
[130] J. L. Hargrove, 'The Nicaragua Judgement and the Future of the Law of Force and Self-Defense', *American Journal of International Law* 1987 81 p. 135-139.
[131] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 352.

weapons supplies, intelligence sharing, or providing a safe haven.[132] In line with the case law of the International Court of Justice, this type of state aid is not enough to trigger self-defence measures under article 51 of the United Nations Charter. The government of Iraq and the regional government of Northern-Iraq showed some degree of sympathy towards the PKK and refused to hand over terrorists to Turkey or close PKK offices.[133] [134] This alone of course is not enough to trigger article 51 of the Charter. Even though the central government of Iraq condemned the attacks in later statements, they still failed to fulfil their obligations under international law. The government of Iraq was without any doubt aware of the PKK activities on their territory, yet they did not take sufficient measures against the PKK. Refusing to close PKK offices is just one example of their negligence (or failure) to comply with international obligations. Their obligation to act with *due diligence* to prevent PKK activities is derived from Security Council Resolution 1373[135] and General Assembly Resolution 2625[136] (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations).[137] However, no clear evidence that the government of Iraq is directly sending or has effective control over the PKK or its activities exists. Therefore based on the judgement from the *Nicaragua* case one could say that the measures Turkey took as a reaction to the PKK attacks were not in line with the rules on self-defence.

However, the events on September 11, 2001 had an undeniable impact on the world and this impact was reflected in the changing attitude of some states and scholars towards terrorists and terrorism. These attacks reopened the discussion about self-defence against non-state actors. A changing view on the international laws of war was noticeable among some states. One day after the attacks on September 11 the Security Council adopted Resolution 1368. In the Resolution, the Security Council recognized the inherent right of individual or collective self-defence in accordance with the Charter.[138] On September 28, also not long after the events of September 11, the Security Council adopted Resolution 1373. In this Resolution it stated that all states must, '*Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, and deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens*'.[139] Just tolerating terrorists on your own soil can sometimes also be seen as supporting them.[140] When the United States launched an attack against Afghanistan, it used article 51 of the United Nations Charter as the legal basis. The argumentation that they used was that the Afghan government participated in terrorist activities, actively supported and allowed terrorists to use parts of the country as their base of operations or basically they accused the Afghan government of creating save havens for the terrorists.[141] The United States received support from the majority of the United

[132] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 353.
[133] News article <www.todayszaman.com/newsDetail_getNewsById.action?load=detay&link=125206>.
[134] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 353.
[135] Security Council Resolution 1373<unispal.un.org/UNISPAL.NSF/0/392A001F254B4B9085256B4B00708233>.
[136] General Assembly Resolution 2625 <www.un.org/ga/search/view_doc.asp?symbol=A/RES/2625(XXV)>.
[137] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 353.
[138] The sentence can be found in the preamble of Security Council Resolution 1368 <daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement>.
[139] Security Council Resolution 1373 <unispal.un.org/UNISPAL.NSF/0/392A001F254B4B9085256B4B00708233>.
[140] D. Byman, *Deadly Connections. States that Sponsor Terrorism*, New York: Cambridge University Press 2005 p. 222.
[141] Letter addressed to the President of the Security council <www.hamamoto.law.kyoto-u.ac.jp/kogi/2005kiko/s-2001-946e.pdf>.

Nations member states.[142] The Security Council recognised the United States' right to self-defence. This support is actually not in line with the earlier *Nicaragua* judgement. In the years following the September 11 attacks, a number of governments made statements in which they also argued to broaden the rules around self-defence against non-state actors while some actually took self-defence issues against non-state actors.[143] [144] The United States argued the broadening of the right of self-defence in their National Security Strategy of 2002. In this document, the United States declared that it '*will make no distinction between terrorists and those who knowingly harbour or provide aid to them*'.[145] They also stated they will '*not hesitate to act alone, if necessary, to exercise our right of self-defence*'.[146] This is a highly controversial statement and not entirely in line with international law, however it might also indicate that double standards are been used since most states did not voice any objection against the United States. Other states from various regions of the world for example Russia, Rwanda and Australia also made comparable statements.[147] One of the states that actually took self-defence measures against a non-state actor was Israel, which attacked Lebanon as a reaction to Hezbollah attacks originating from Lebanon.[148] The combination of the aforementioned reactions of states and Security Council Resolution 1368 (2001) and 1373 (2001) approving the operations in Afghanistan, indicate that norms and views surrounding this topic are changing. This is also supported by the fact that Turkey in general did not receive condemning reactions from the international community; on the contrary, the international community seemed to acknowledge that the state of Turkey had the right to defend itself against terrorist attacks. This also indicates a change in norms towards a more flexible view on self-defence against non-state actors.

Currently there seems to be a discord on the matter between on the one hand state practice and on the other hand written and case law. Since international law is mainly made by states, it is unlikely that the narrow view from the *Nicaragua* case will hold since states seem to find this view very narrow and argue it hinders them in effectively defending themselves. International law is in constant development and the way one views international law in general and customary international law in particular has developed a lot since 1984, and those developments should be reflected in the law itself. Acts of states should be looked at with the changing criteria. Some scholars still support the more narrow view of the International Court of Justice.[149] However, a growing number of scholars seem to disagree with the narrow view of the Court and argue that Security Council Resolution 1368 and 1373 justify self-defence measures against cross-border attacks coming from non-state actors.[150] [151] As mentioned earlier this thesis supports a broader view regarding self-defence against non-state actors. However, it also recognises the dangers a too broad view could have. The most obvious

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[142] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 354.
[143] T. Ruys & S. Verhoeven, 'Attacks by Private Actors and the Right of Self-Defence' *Journal of Conflict and Security Law* 2005, Vol. 10 p. 289-290.
[144] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 354-355.
[145] National Security Strategy of 2012 at page 5 <www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>
[146] National Security Strategy of 2012 at page 6 <www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>
[147] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 354.
[148] E. Inbar, 'How Israel Bungled the Second Lebanon War', *The Middle East Quarterly* 2007, Vol. XIV No 3 p. 57-65.
[149] S. M. Malzahn, 'State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility', *Hastings International and Comparative Law Review* 2002, 26, p.83.
[150] T. M. Franck, 'Terrorism and the Right of Self-Defense', *American Journal of International Law* 2001, Vol. 95 No. 4 p. 839.
[151] Christopher Greenwood, 'International Law and Pre-emptive Use of Force: Afghanistan, AI-Qaeda, and Iraq' (2003) 4 *San Diego International Law Journal* 2003, Vol. 4 No. 7 p. 17.

danger is the likelihood that states would abuse a too broad view for their own national interests. Therefore, the requirements for self-defence should also not be too broad and they should always have some kind of connection with the state they conduct their operations from. In most conflicts, this connection lies in either (1) a state tolerating or even helping the terrorist group or (2) a state simply has no means to undertake action against the terrorist groups who are sometimes better organized and have more resources available then the state they reside in has. The two given examples, the American intervention in Afghanistan and the Israeli intervention in Lebanon, both stand on the opposite ends of the spectrum. In the case of the United States, the Afghan government obviously supported the terrorists within its border.[152] In the case of Israel, one can argue whether Lebanon had enough power to take effective measures against a well-organized group as the Hezbollah.[153] The case of Turkey and Northern-Iraq seems to be somewhere in-between these two scenarios. Iraq officially stated it would not undertake action against the PKK, this shows they were not willing to co-operate with Turkey or put differently comply with their obligations under international law. This can be seen as helping (or at least providing a safe heaven for) the terrorists. On the other hand however, most scholars seem to believe that there is no clear evidence that Iraq was actively supporting the PKK while acknowledging that Iraq did have the means to take action.[154] This thesis supports the view that the military intervention in Northern-Iraq is just one example in a newly developing trend. States want to be able to defend themselves against non-state actors whose influence and activities seem to be growing and reaching a level that could seriously damage a state. Therefore, this thesis supports the view that the justification for the Turkish military intervention (the *jus ad bellum* part), in the light of the recent developments, is a legal one.
States also seem to be aware of the possible abuses a broad reading of the right can bring with it. Therefore, in the Turkish-PKK conflict and in the two earlier mentioned conflicts the main concern did not seem to be the military intervention itself. Instead, the international community seemed to be more interested in the principles of necessity and proportionality.[155] These two principles can be seen as a safety net to prevent states from abusing their broadening right to self-defence. On Augustus 12, 1949 four additional protocols relating to the Protection of Victims of International Armed Conflicts were adopted to the Geneva Conventions. Since then the principle of proportionality has been a part of both customary international law and conventional obligations.[156] Thus proportionality is, be it slightly different, covered by both *jus ad bellum* and *jus in bello*. All military operations with a legal basis under the rules of *jus ad bellum* must be necessary and proportional.

In the upcoming chapters the necessity and proportionality of the Turkish intervention will be discussed in order to fully analyze whether Turkey respected their obligations under the laws of war. However, before making this analysis the branch of *jus in bello* will be analyzed. Therefore, in chapter seven the rules of international humanitarian law will be discussed. It was already mentioned that international humanitarian law and human rights cannot be seen as two separate regimes. This thesis will therefore analyze the relationship between international human rights law and international humanitarian law in situations of armed

[152] A. Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', *European Journal of International Law* 2001, Vol. 12 No 5 p. 999.
[153] E. Inbar, 'How Israel Bungled the Second Lebanon War', *The Middle East Quarterly* 2007, Vol. XIV No. 3 p. 57-65.
[154] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 358.
[155] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 359.
[156] J. G. Gardam, 'proportionality and force in international law', *The American journal of International Law* 1993, Vol. 87, No. 3, p. 391.

conflict. In chapter eight human rights law will be discussed after which, in chapter nine, the relation between the two will be discussed. In chapter ten the necessity and proportionality of the Turkish intervention will be discussed.

7. Humanitarian law

When self-defence measures are taken during an armed conflict, the rules of international humanitarian law apply to the conduct of war. Thus, for international humanitarian law to be applicable there has to be a situation of armed conflict. The concept of international humanitarian law will be explained in this chapter.

The European continent of the past used to be the stage for many wars that made numerous casualties. In an attempt to regulate war and lower the number of casualties Dutchman Hugo de Groot (Grotius) wrote his famous book, *De Jure Belli ac Pacis,* in which he laid down his views on regulating the conduct of wars. Some rules on how to conduct war did exist, however they did not have a big impact on the warring parties and never made it to positive law.[157]
Having witnessed the battle of Solferino, social activist Jean Henri Dunant, decided to take action to regulate warfare. During this battle many wounded that could have been saved died. Therefore, Jean Henri Dunant organized international conferences in 1863 and in 1864 where it was decided that there should be a neutral party (Red Cross) that could take care of the wounded.[158] [159] After these conferences, one realised the importance of codifying the laws of war in international treaties. The conferences led to the adoption of the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.[160] The creation of humanitarian law was mainly based on the mutual expectation of a minimum level of civilized behaviour between warring nations.[161] The motivation behind humanitarian law was not a struggle for rights like the struggle for human rights. Instead the motivation could be found in principles of humanity and of charity called *'inter arma caritas'* which translated means: *in war, charity*.[162]
Important steps in order to create humanitarian law where taken in the 19th century. However, big reforms could only be made after World War II when four new conventions where adopted in 1949.[163] These four conventions aimed at helping the sick and wounded on land, the sick and wounded at sea, prisoners of war and civilian victims of armed conflict. In addition to the four conventions two important protocols that can be used in the fight against terrorism where made in 1977. Protocol I regulates international armed conflict and protocol II regulates non-international armed conflict. The two protocols cover all kinds of armed conflict and are therefore applicable on terrorism. It is necessary to examine the application of international humanitarian law in order to be able to apply them on the Turkish military operation.

[157] C. Tomuschat, *Human rights. Between idealism and realism*, New York: Oxford University press 2008 p. 15 and p. 296.
[158] C. Tomuschat, *Human rights. Between idealism and realism*, New York: Oxford University press 2008 p. 15 and p. 296-297.
[159] Website Swiss human rights portal <www.humanrights.ch/en/Standards/International-Humanitarian-Law/History/index.html>.
[160] C. Tomuschat, *Human rights. Between idealism and realism*, New York: Oxford University press 2008 p. 15 and p. 296-297.
[161] C. Droege, 'The interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', *Israel Law Review* 2007, Vol. 40, No. 2, p. 313.
[162] C. Droege, 'The interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', *Israel Law Review* 2007, Vol. 40, No. 2, p. 313.
[163] A. Roberts & R. Guelff, *Documents on the laws of war*, New York: Oxford University Press 2010, p. 195 & 221 & 243 & 299.

The two sets of the laws of war, the *jus ad bellum* and the *jus in bello*, have already been discussed extensively in the thesis. The *jus ad bellum* covers the lawfulness of resorting to armed force and the *jus in bello* covers the conduct of warfare.[164] Before the adoption of the two protocols in 1977, a distinction was made in the *jus in bello*. On the one hand you had *Geneva law* and on the other hand you had *Hague law. Geneva law* dealt with the victims of war and was seen as international humanitarian law. *Hague law* regulated the conduct of the hostilities. Since the adoption of the two protocols this distinction is not made anymore. Because the two protocols cover both matters *Jus in bello* in total is now seen as international humanitarian law.[165]
International humanitarian law is applicable in armed conflicts. It is meant to regulate war and bring suffering to a minimum by trying to keep a minimum level of civility even during armed conflict. The underlying thought is to create a balance between humanity and military necessity.[166] A few basic rules of international humanitarian law are[167]:

1. *Persons outside of combat (the original term that is used is hors de combat) and those not taking part in hostilities shall be protected and treated humanely.*
2. *It is forbidden to kill or injure an enemy who surrenders or who is outside of combat.*
3. *The wounded and sick shall be cared for and protected by the party to the conflict which them in its power. The emblem of the 'Red Cross' or the 'Red Crescent', shall be required to be respected as the sign of protection.*
4. *Captured combatants and civilians must be protected against acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.*
5. *No one shall be subjected to torture, corporal punishment or cruel or degrading treatment*
6. *Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare.*
7. *Parties to the conflict shall at all times distinguish between the civilian population and combatants. Attacks shall be directed solely against military objectives.*

From the list of basic rules of international humanitarian law, we can conclude that its main goal is to protect civilians and other persons outside of combat. The treatment and wellbeing of civilians was also the main concern that the international community had when Turkey launched its self-defence operation into Northern-Iraq. Thus, when analyzing the conduct of the Turkish military operation it is important to look at the way the Turkish military treated people outside of combat and who was targeted by the military. This includes collateral damage, as the military is not allowed to use all measures at its disposal if this greatly affects civilians in the area, even if those measures are solely aimed at the terrorists. Another important issue is the number of troops and the weapons that are used during the self-defence measures.

As mentioned above international humanitarian law is applicable in both international and non-international armed conflict. Therefore, it is important to determine what an armed conflict is and whether terrorism falls under its scope or not.

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[164] C. Tomuschat, *Human rights. Between idealism and realism*, New York: Oxford University Press 2008, p. 291.
[165] T. Meron, 'The Humanization of Humanitarian Law', *American Journal of International Law* 2000, Vol. 94, No. 2, p. 239.
[166] T. D. Gilland & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p. 52.
[167] J. De Preux, *Basic rules of the Geneva conventions and their additional protocols*, Geneva: ICRC 1988 p. 1.

It is easier to determine whether international humanitarian law is applicable on international armed conflict then it would be to determine whether it is applicable on non-international armed conflicts. With regard to international armed conflict, international humanitarian law would apply to every use of cross-border armed force. The Geneva Conventions are clear on this matter by stating that the laws on international armed conflict applies to: '*all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them*'.[168] The ICRC further complements this by stating: '*any difference arising between two states and leading to the intervention of members of the armed forces is an armed conflict*'.[169] The only exception to this rule might be isolated small-scale border clashes and incidents.[170] The Turkish cross-border operation had an international character and it was conducted during armed conflict. International humanitarian law was thus applicable during the Turkish self-defence operation. For international humanitarian law to apply on a non-international armed conflict a certain threshold must be reached. For example, a long lasting armed conflict between the state and well organised armed groups or armed conflict between groups within a state. For a conflict to be seen as a non-international armed conflict, it needs to meet two requirements. The armed violence must be of (1) sufficient intensity and the groups engaged in the hostilities have to be (2) sufficiently organized.[171] A non-international conflict is more complex compared to an international armed conflict and it can be difficult to determine whether this threshold is met. The conflict with the PKK in Turkey also has a non-international dimension; however, this does not fall within the research of this thesis and will not be further discussed.

8. Human Rights

Developments in the field of international law have reduced the gap between human rights law and international humanitarian law. Human rights law is nowadays generally recognized as a part of *jus in bello* (more on this in chapter nine). Thus, the conduct of the Turkish operation can only be legal if it is in line with both the rules of international humanitarian law and human rights law. This chapter will therefore focus on the concept of human rights law. This chapter will explain what human rights are and where its sources can be found, whereas in chapter nine the actual relationship between human rights law and international humanitarian law will be analyzed.

According to professor emeritus Christian Tomuschat[172] a lawyer would describe human rights as '*part and parcel of a legal system*'.[173] Such a legal system could be described, again in the words of Christian Tomuschat, as an '*inter-subjective system designed to apply to all the members of a given human community that has a general mechanism of enforcement*'.[174] Human rights law is a part of international law that deals with the obligations of States with regard to the observance and protection of the fundamental rights that all individuals

[168] Article 2 Geneva Convention I-IV common part.
[169] J. Pictet, Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in armed Forces in the Field (Geneva: ICRC, 1952), 32.
[170] T. D. Gill & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p. 213.
[171] T. D. Gill & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p. 55.
[172] Some information about C. Tomuschat <untreaty.un.org/cod/avl/faculty/Tomuschat.html>.
[173] C. Tomuschat, *Human rights. Between idealism and realism*, New York: Oxford University press 2008 p. 1.
[174] C. Tomuschat, *Human rights. Between idealism and realism*, New York: Oxford University press 2008 p. 1.

posses.[175] This means that human rights apply to all individuals just because of the fact that they are human beings.[176] Whereas international humanitarian law categorises people that should be protected, human rights law focuses more on how states should protect those human beings by stating how they should be treated. The fact human rights apply to all individuals can also be read in the preamble of the Universal Declaration of Human Rights which states: *'Whereas recognition of the inherent dignity and of the equal and inalienable right of all members of the human family is the foundation of freedom, justice and peace in the world'*.[177] Human rights are traditionally classified into so-called generations of rights.[178] There are currently three different generations of rights. The so called: first generation of rights, the second generation of rights and the third generation of rights.[179] The first generation of rights are also called civil liberties and key features are for example the freedom of speech and the freedom of religion. The second generation of rights are called economic and social rights. The third generation of rights are the newest generation of rights and are sometimes called solidarity rights.[180] The big difference between the first two generation of rights and the third one is the fact that the third generation has no universal legal foundation in any legal instrument.[181] The first two generations can be found in many binding international agreements; the same cannot be said for the third generation since they have never made it into international treaties. This means that they are not worldwide accepted and do not form a part of the *jus in bello*.

Human rights as a part of international law can be found in treaties of international law, other international agreements, customary law including *jus cogens* norms, and soft law. The Universal Declaration of Human Rights treaty from 1948 can be seen as the first codification of human rights. The codification of the current system of human rights started after World War II in an effort to make sure that the horrors of that war would never happen again. Before this war human rights where regarded to be an internal affair regulated in constitutional law. International interference in this area was seen as interference in the reserved domain of a sovereign state. The end of the Second World War paved the way for human rights to become a part of international law. The adoption of the above-mentioned Universal Declaration of Human Rights was the first step. However, throughout history there have been cultures and nations such as the Greeks that made important contribution to the realisation of the current human rights system.[182] Like treaties, customary international law creates legally binding rules.[183] *Jus cogens* norms consist of binding rules from which no derogation is possible. *Jus cogens* norms are peremptory and thus binding on all states. This is also the main difference between customary law rules and *Jus cogens* norms. Customary international law requires the consent of a state (consent to be bound) and is open to some degree of variation between the obligations of states. *Jus cogens* norms can never be violated by any state. Self-defence operations during armed conflicts, including the self-defence operation of Turkey in Northern-Iraq, are no exception to this rule. The prohibition on torture is for example a *Jus cogens* norm as no derivation from this prohibition is allowed. The Turkish state in the past

[175] See, Dinah Pokempner, 'Terrorism and Human Rights: The Legal Framework', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 19, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[176] M. Cranston, *What are Human Rights?*, London: Bodley Head 1973 p. 36-37.
[177] General Assembly Resolution 217-A (III), 10 December 1948.
[178] K. Vasak, 'A 30-Year Struggle', *The UNESCO Courier* November 1977, p. 29.
[179] C. Tomuschat, Human rights. *Between idealism and realism*, New York: Oxford University Press 2008 p. 25-54.
[180] C. Tomuschat, Human rights. *Between idealism and realism*, New York: Oxford University Press 2008 p. 54.
[181] C. Tomuschat, Human rights. *Between idealism and realism*, New York: Oxford University Press 2008 p. 54.
[182] See, P. Hostettler, 'Human Rights And The 'War' against International Terrorism', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 31, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[183] A. Cassese, *International law*, New York: Oxford University press 2001 p.153.

has been accused of torturing PKK suspects, therefore when analyzing the conduct of the military operation attention will be given to the *Jus cogens* norms.

Besides the above-mentioned binding legal instruments sometimes referred as 'hard law', non-binding legal instruments called 'soft law' exist. Examples of 'soft law' are joint statements, declarations of policy and United Nations General Assembly resolutions. Regardless of the fact that 'soft law' has a non-binding character it has a reasonable influence one the development of international law.[184] 'Soft law' instruments usually deal with new fields of law, unregulated areas of the law or politically sensitive areas of the law. The advantage of 'soft law' is that it can create guidelines or common policies for topics that would normally stay out of the picture. Even though it will not have any binding effect, it will at least cover the topic. Human rights derived from all the above-mentioned international norms and agreements are usually found in constitutional law or other national legislation.

9. International humanitarian law and its relation with human rights law

International human rights law and international humanitarian law are in the traditional sense seen as two separate bodies of law. Initially when these two branches of law where established they had little in common apart from their underlying thought.[185] They shared the same humane ideas but their theoretical foundations and motivations differed.[186]
However, according to Dr. Cordula Droege[187]: 'dev*elopments in international and national jurisprudence and practice have led to the recognition that these two bodies of law not only share a common humanist ideal of dignity and integrity but overlap substantially in practice'.*[188] This overlap between the two bodies of law is very visible in situations of international armed conflicts. In his book called *Human Rights: Between Idealism and Realism*, Christian Tomuschat describes the relation between international human rights law and international humanitarian law. He describes it as the following: '*Since international humanitarian law aims to maintain a modicum of civilization amid the worst of all cataclysms human communities can experience, namely war, it may be classified as one of the branches of international human rights law*'.[189] This phrasing shows that human rights law and international humanitarian law are not two completely different fields of international law, instead they overlap and complement each other. Other authors also seem to support this view.[190] [191] Thus, even in times of war and armed conflict international human rights law does apply since it co-exists with international humanitarian law. International humanitarian law, the body of law that regulates war, does thus not replace human rights. However, human rights can be subjected to derogation in times of national emergency. Human rights law is the *lex generalis* and international humanitarian law serves as the *lex specialis* that is applied during times of armed conflict. In this case, *Lex generalis* means that human rights cover the

[184] C. Tomuschat, *Human rights. Between idealism and realism*, New York: Oxford University Press 2008 p. 39.
[185] C. Droege, 'The interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', *Israel Law Review* 2007, Vol. 40, No. 2, p. 312.
[186] C. Droege, 'The interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', *Israel Law Review* 2007, Vol. 40, No. 2, p. 312.
[187] Cordula Droege is a legal advisor at the legal division of the international committee of the Red Cross.
[188] C. Droege, 'The interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', *Israel Law Review* 2007, Vol. 40, No. 2, p. 310.
[189] C. Tomuschat, *Human rights. Between idealism and realism*, New York: Oxford University Press 2008 p. 292.
[190] See, Dinah Pokempner, 'Terrorism and Human Rights: The Legal Framework', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 19, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[191] T. D. Gill & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p. 51.

general matter and can be derogated during times of armed conflict. When this special situations of armed conflict occurs human rights are supplemented by the *lex specialis*, international humanitarian law that is designed for these situations. Thus, even though these two branches of international law never meant to partially cover each other in practice they do. This however is not a bad thing as we can also make up from this statement:

> '*Triggering events, opportunities and ideas are key factors in the development of international law. This fact accounts for the fragmentation of international law into a great number of issue related treaty regimes established on particular occasions, addressing specific problems created by certain events. But as everything depends on everything, these regimes overlap. Then, it turns out that the rules are not necessarily consistent with each other, but that they can also reinforce each other. Thus, the question arises whether there is conflict and tension or synergy between various regimes'*.[192]

As we already saw, the end of the Second World War brought many changes with it that contributed in the development of international law. The foundation of the current human rights system was established after the Second World War with the codification of the Universal Declaration of Human Rights treaty in 1948. The same can be said of international humanitarian law that went through a phase of big reforms in 1949 when four new Geneva conventions where adopted. This period brought human rights and humanitarian law closer to each other. All four of the Geneva conventions have a chapter with general provisions included in them. These general provisions are the same for all four of them. Especially article 3 of these general provisions proved to be important. Paragraph 1 of the article states that persons who are not actively taking part in hostilities should under all circumstances be treated '*humanely without discriminating on the bases of race, colour, religion or faith, sex, birth or wealth, or any other similar criteria*'.[193] It also contains a list of acts/proceedings that are prohibited with respect to the above-mentioned persons. One example is the prohibition of humiliating and degrading treatment. In addition to this, paragraph 2 of article 3 states that wounded and sick people should be collected and cared for.[194] This article brought humanitarian law closer to human rights law because it dealt with the question how a state should treat its own citizens, which was really the domain of every individual state to decide for itself. Besides that, provisions that prohibit discrimination of race, colour and religion can usually be found in first generation human rights that protect the citizen against the state. This is relevant because of the *Issa and others v. Turkey* case.[195] In this case, the European Court of Human Rights examines the responsibilities Turkey has under the European Convention on Human Rights during a comparable military operation conducted in 1995. The Court in this case decided that people who come within an area under the effective control of a Contracting State are considered to be within the legal space of that state.[196] The Court ruled that Turkey had effective control over the territory during the military operation of 1995. Since the two military operations are very similar (same objective, same territory, same states, same terrorist group) it is likely that it was also considered to be in effective control during the military operation of 2008. This means that the human rights applicable to Turkish nationals were also applicable to the Iraqi nationals in the area under effective control. Again as mentioned before the way the Turkish military treated civilians and others outside of combat (for example

[192] M. Bothe, 'The Historical Evolution of International humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law', in *Crisis Management And Humanitarian Protection*, 2004 p. 37.
[193] A. Roberts & R. Guelff, *Documents on the laws of war*, New York: Oxford University Press 2010, p. 198 (article 3).
[194] A. Roberts & R. Guelff, *Documents on the laws of war*, New York: Oxford University Press 2010, p. 198 (article 3).
[195] European Court of Human Rights, Issa and others v. Turkey (Application No. 31821/96), 16 November 2004.
[196] European Court of Human Rights, Issa and others v. Turkey (Application No. 31821/96), 16 November 2004, paragraph 69.

civilians and prisoners) is decisive when analyzing the legality of the conduct of the self-defence measures.

The members of the United Nations also contributed in bringing the regimes closer together by gradually accepting that human rights are applicable even during times of armed conflict.[197] The most evident statement regarding the relation between international law and humanitarian law would not be made until 1967 in the context of the Six-day war. This time it was a Security Counsel resolution where the Security Counsel stated that:

'essential and inalienable human rights should be respected even during the vicissitudes of war' and continues to say that: *'all the obligations of the Geneva Convention relative to the treatment of prisoners of war of 12 Augustus 1949 should be complied with the parties involved in the conflict'*[198]

A General Assembly resolution that was adopted a year later reaffirmed this.[199] [200] The title of the resolution, *Respect for human rights in armed conflicts,* in itself said enough. The resolution itself starts with the following sentence: *'The General Assembly, Recognizing the necessity of applying basic humanitarian principles in all armed conflicts'*[201] After the adoption of the additional protocols and some statements by the International Committee of the Red Cross, the application of human rights in armed conflicts was generally recognized in international humanitarian law.[202]

Human rights cannot easily be derogated. In this part of the thesis, the derogation of human rights will be discussed in order to further explain the relation between human rights and international humanitarian law and thus show what kind of conduct is accepted in armed conflicts. The derogation of a right can be described as: *an extraordinary restriction of the right beyond what is normally allowed by its terms.*[203] Derogations restricts the right rigorously and are regarded to be construed.[204] With regard to derogation, three types of rights will be discussed, that is: rights that cannot be derogated, the right to life and derogation from other rights.

As mentioned above some rights are regarded to be that important that derogation of those rights is not allowed. They are included in lists written down in various human rights treaties such as the International Covenant on Civil and Political Rights.[205] These lists however are not exhaustive, meaning there are other rights that cannot be derogated even though they are not included in any list. A good example of such a right is article 14 of the International Covenant on Civil and Political Rights. With regard to this article the Human Rights Committee of the United Nations stated the following in General Comment number 29: *Fundamental requirements of fair trial must be respected during a state of emergency. Only a*

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[197] C. Droege, 'The interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', *Israel Law Review* 2007, Vol. 40, No. 2, p. 314.
[198] <daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/240/89/IMG/NR024089.pdf?OpenElement>.
[199] GA Res. 2444 can be found on this website <www.un.org/Depts/dhl/resguide/r23.htm>.
[200] <daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/244/04/IMG/NR024404.pdf?OpenElement>.
[201] <daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/244/04/IMG/NR024404.pdf?OpenElement>.
[202] C. Droege, 'The interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', *Israel Law Review* 2007, Vol. 40, No. 2, p. 316.
[203] See, Dinah Pokempner, 'Terrorism and Human Rights: The Legal Framework', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 20, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[204] See, Dinah Pokempner, 'Terrorism and Human Rights: The Legal Framework', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 20, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[205] Article 4.1 International Covenant on Civil and Political Rights.

court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a state party's decision to derogate from the Covenant. [206] With regard to this example, their have been complaints in the past that PKK suspects did not receive a fair trial.[207] Therefore when looking at the conduct of the Turkish military operation attention will be given to rules that cannot be derogated under *jus in bello*.
Other examples of these rights that can not be derogated are: the prohibition to torture, the prohibition of slavery and the prohibition of Inhuman or Degrading Treatment.[208] These examples are included in the list with rights that cannot be derogated. Those prohibitions are absolute and no exceptions can be made under any condition. With regard to torturing there is a special convention established against torture.[209] Torturing and inhuman and degrading treatment are quite common in wars but under no circumstances allowed. This is another issue that will be analyzed in the Turkish self-defence operation, as there have been claims in the past that PKK suspects had been tortured.

Another very important right is the right to life. However, contrary to the above-mentioned rights the right to life can be derogated under certain strict conditions. This can be read in article 2 of the European Convention on Human Rights. Some authors consider The European Convention on Human Rights to be based on customary law.[210] Article 15 sub 2 of the European Convention on Human Rights links the human rights system to international humanitarian law. This article states: *'No derogation from Article 2, except in respect of deaths resulting from lawful acts of war (…) shall be made under this provision'.*
From these two articles, one can conclude that the right to life can be derogated under four conditions set by those two articles. These four conditions are:

- Self defence or the defence of any person against unlawful violence
- To arrest or to prevent the escape of a person lawfully detained
- When taking lawful action for the purpose of quelling a riot or insurrection
- When engaging in lawful acts of war during armed conflict

Besides these four conditions there are also two other conditions to be met. The term 'lawful' is mentioned a few times in the articles. This means that all force used by the state must be based on the law. This is called the principle of legality. Besides this principle, the use of force must be proportionate, necessary and whenever possible kept at a minimum level. When taking military measures their will most likely be casualties. However, as one can see from point four the right to life can be derogated during lawful acts of war in an armed conflict. The self-defence measures the Turkish military took was as discussed in chapters five and six legal under international law, meaning that PKK militants are legal targets. It still needs be analyzed whether the killing was proportionate and necessary.

Besides the right to life and the prohibition to torture and other inhuman treatment, other human rights can also be derogated under certain circumstances. One has to note that

[206] U.N. Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), paragraph 16, CCPR/C/21/Rev.1/Add.11, 31 August 2001.
[207] News article <www.alarabiya.net/articles/2010/07/07/113244.html>.
[208] See, Dinah Pokempner, 'Terrorism and Human Rights: The Legal Framework', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 20, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[209] The convention is available at <www.hrweb.org/legal/cat.html>.
[210] See, P. Hostettler, 'Human Rights And The 'War' against International Terrorism', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 34, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.

derogations are not allowed to conflict with international humanitarian law.[211] International humanitarian law is seen as the baseline below which derogation of rights may not go.[212] This is regarded to be so because many rights that cannot be derogated reflect core principles of international humanitarian law.

10. Necessity and proportionality

The two branches of the international laws of war, *jus ad bellum* and *jus in bello,* were already described multiple times in the thesis. In chapter five and six the thesis analyzed the *jus ad bellum* of the Turkish military intervention in Northern-Iraq. In those two chapters it was argued that the Turkish intervention was in line with the rules of *jus ad bellum*. The rules of *jus in bello* deal with the conduct of war. Only complying with one of the two branches is not sufficient. This means that a state fighting a just war can fight in an un-just manner and vice versa. The *jus in bello* can be divided in the two broad principles of discrimination and proportionality. The first principle defines the legitimate targets in war. The second principle concerns with the question how much force is accepted.

International humanitarian law (*jus in bello*) is only applicable during armed conflict. This means the Geneva Conventions only deal with acts of terrorism when they take place in situations of armed conflict. International law distinguishes between legitimate violence and violence that is not legitimate like terrorism. Two key features used to make this distinction are: '(1) *the right to use force and commit acts of violence is restricted to the armed forces of each party to an armed conflict and only members of armed forces and military objectives may be the target of acts of violence, (2) and the civilian population or civilian objects like infrastructure are not legitimate targets for military attacks*'.[213] Even though it is not explicitly mentioned, international humanitarian law prohibits terrorism in general. As illustrated in one of the previous chapters there is no justification for a so-called liberation war waged by the PKK. It was also shown that necessity and proportionality are mandatory requirements for self-defence under customary law even though they are not mentioned in article 51 of the United Nations Charter. These two principles are meant to limit the scope and magnitude of the self-defence measures. Measures taken in self-defence should only be aimed at stopping and countering the armed attack.[214]

In this part of the thesis, both requirements will be analysed in more depth. The principle of necessity is an important principle of *jus in bello* as it looks for a balance between humanity and military necessity. Necessity is in the *Lieber Code* defined as, '*Those measures which are indispensable for securing the ends of war and which are lawful according to the modern law and usage of war*'.[215] International humanitarian law dictates that '*military necessity cannot be used to justify actions prohibited by law*'.[216] In other words, necessity does not override the

[211] U.N. Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), paragraph 9, CCPR/C/21/Rev.1/Add.11, 31 August 2001.
[212] See, Dinah Pokempner, 'Terrorism and Human Rights: The Legal Framework', In *Terrorism and International Law: Challenges and Responses*, 2003 p. 21, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[213] H. P. Gasser, 'Acts of terror, "terrorism" and international humanitarian law', *International Review of the Red Cross* 2002, Vol. 84, No. 847, p. 554.
[214] C. Gray, *International Law and the Use of Force*, New York: Oxford University Press 2004 p. 121.
[215] Article 14 Lieber Code.
[216] T. D. Gill & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p. 215.

laws of war.[217] It serves as an extra level of restraint (self-control) on fighting parties because measures that are normally legal under international humanitarian law may be prohibited because they are not necessary in order to pursue legitimate military objectives.[218] The goal of the Turkish military was to stop the armed attacks launched into Turkey by the PKK. All the attacks were in line with this requirement because the Turkish military did not attack any non-PKK related targets and did not use weapons that would cause unnecessary suffering.[219] The principle of necessity is also an important part of the *jus ad bellum*. In that context the principle of necessity means that the self-defence measures should be used as so-called last resort measures. This means that all peaceful solutions must have '*reasonably been exhausted or must be clearly futile*'.[220] When planning to take action against non-state actors a state should first ask the state from which the attacks originate to take action against the non-state actor. Only if the 'host' state refuses or is simply unable to take action one can proceed with military action. This of course also limits the possibilities of abuse. It puts a level of restraint on states because '*it can prohibit states from taken action if it is not necessary for the pursuance of legitimate goals'*.[221] As was already shown a big part of the international community urged that Turkey and Iraq should engage in dialogue to solve the issues. This also indicates *opinio juris*. The principle of necessity also requires a close proximity between the start of an armed attack and the self-defence measures.[222]

This thesis holds the view that Turkey met the criteria of necessity. Turkey was frequently engaged in dialogue with Iraq and asked its government to take appropriate action against the PKK. Already in 1995 former Turkish president Süleyman Demirel stated that, '*the border between Turkey and Iraq is a problem. However, that state of affairs is not a matter that can be solved now. Turkey does not plan to use force to either solve the problem or gain territory. Nevertheless, something could have been achieved through the cooperation of the peoples of the two countries*'.[223] This statement shows that Turkey does not have the intention to solve this conflict by using force and believes that dialogue will bring the conflict closer to an end.

Another example of Turkey seeking dialogue with Iraq is the signing of a security agreement in 2007 by Turkey and Iraq.[224] In this security agreement, the Turkish and Iraqi government agreed that Iraq would take measures to prevent the armed attacks of the PKK. The government of Iraq was not really willing to cooperate as many Iraqi officials opposed the agreement and the Iraqi government denied Turkey the right to cross the border to pursue terrorists and refused to extradite PKK terrorists. Iraq failed to live up to its agreement because the cross-border attacks into the territory of Turkey kept increasing, even after the signing of the security agreement.[225] It is safe to say that all options to a peaceful solution had reasonably been depleted and the military intervention was a last resort option. There was also a close proximity between the start of the armed attack and the self-defence measures. Of course, the military intervention was not conducted the day after the attacks but this is also not

[217] T. D. Gill & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p. 215.
[218] D. Fleck, *The Handbook of International Humanitarian Law*, New York: Oxford University Press 2008 p. 38.
[219] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 362.
[220] J. G. Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge: Cambridge University Press 2004, p. 150.
[221] T. D. Gill & D. Fleck, *The handbook of the international law of military operations*, New York: Oxford University Press 2010 p. 215.
[222] J. G. Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge: Cambridge University Press 2004, p. 150.
[223] D. Pipes, 'Hot Spot: Turkey, Iraq, and Mosul', *The Middle East Quarterly* 1995, Vol. II, Nr. 3, p. 66.
[224] News Article <news.bbc.co.uk/2/hi/7017919.stm>.
[225] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 360.

necessary because states need time to make needed preparations. The close proximity requirement has some level of flexibility.[226] This requirement is even more flexible when the self-defence measures are taken as a reaction to a number of successive armed attacks.[227] This was the case with the Turkish self-defence measures as they were a reaction to multiple well-organised armed PKK attacks. As mentioned before those armed attacks were carefully planned, resulted in the death of at least 25 soldiers and it is estimated that around 4000 to 5000 PKK terrorist have taken shelter in Northern-Iraq.[228] The requirement of close proximity must be viewed in the light of these facts. The Turkish state will need time to prepare measures against a force of that size. It will for example have to mobilize the army, prepare all the soldiers and machinery and collect intelligence on the PKK. These are all time-consuming actions and therefore the Turkish state has to be given time to take all necessary preparations.

The second principle that always needs to be met in self-defence actions is the principle of proportionality. To meet with this principle the state using self-defence measures must not use more force than is reasonably necessary to repel the armed attack.[229] In order to measure this, one looks at the casualties, damage caused, weapons used and number of troops that are being deployed. The principle of proportionality also includes that self-defence actions should take place in the region the armed attack originated from. This can for example be read in the *Armed Activities* case. In this case the International Court of Justice states: '*The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of trans-border attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end*'[230]
International humanitarian law also dictates that self-defence measures must be directed at the group that caused the armed attack. Thus when the aggressor is a non-state actor the self-defence measures should be aimed at them. Therefore, the self-defence measures should not target the infrastructure or civilians or cause disproportionate 'collateral damage'.[231] The principle of proportionality also shows differences between international human rights law and international humanitarian law. Despite their similarity, the principle has a different meaning in both regimes.[232] In the words of professor Heike Krieger: '*The European Court's of Human Rights evaluation of the use of force in law enforcement operations contains different languages and different balancing techniques to humanitarian law which may be overlooked because both legal systems use terms that sound the same*'.[233] The principle of proportionality entails a state has to balance in the use of force, however the values that are balanced under both regimes are different. For example, when the police uses force against a civilian human rights law applies. The use of force against the civilian is weighed against the aim of protecting a person against unlawful violence. The use of force is only proportionate if

[226] J. G. Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge: Cambridge University Press 2004, p. 151.
[227] R. Ago, 'Addendum to the Eighth Report on State Responsibility', *yearbook of the International Law Commission* 1980, Vol. II (1) p. 70.
[228] See, Sadi Çaycı, 'Countering Terrorism and International Law: The Turkish Experience', *In Terrorism and International Law: Challenges and Responses*, 2003 p. 139, available at <www.iihl.org/iihl/Album/terrorism-law.pdf>.
[229] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 361.
[230] Armed Activities Case <www.icj-cij.org/docket/files/116/10455.pdf>
[231] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 362.
[232] H. Krieger, 'A Conflict Of Norms: The Relationship Between humanitarian Law And human Rights Law In The ICRC Customary Law Study', *Journal of Conflict & Security Law* 2006, Vol. 11, No. 2 p. 281.
[233] H. Krieger, 'A Conflict Of Norms: The Relationship Between humanitarian Law And human Rights Law In The ICRC Customary Law Study', *Journal of Conflict & Security Law* 2006, Vol. 11, No. 2 p. 281.

the smallest amount of force necessary is used. We also saw that killing a person is only allowed when strict requirements are met. This is different when international humanitarian law applies. When an enemy combatant is killed, the proportionality of the used force is measured by weighing the effect of the used force has on civilians or civilian objects. The effect it has on the targeted combatant is not weighed because the use of lethal force is allowed against enemy combatants.

Turkey seems to have acted proportionate in its self-defence measures. Like was the case with the necessity principle the international community also asked Turkey not to use disproportionate military action. This again shows *opinio juris.* The international community was concerned the civilians in Iraq would suffer under the military intervention. The Turkish government also stated the self-defence measures would solely be aimed at the PKK and they kept their word. Turkey did not intend to weaken Iraq and did not target the Iraqi government or the Iraqi citizens, it only targeted PKK camps in scarcely populated areas. It is considered to be unjust to indiscriminately target civilians during war. Non-combatants are a protected group by international humanitarian law and stand outside of the hostilities. Only combatants are legitimate targets. There were no civilian casualties and the infrastructure in Iraq was not targeted.[234] Neither was the Iraqi military targeted. This shows that the operation was purely aimed at the PKK hiding in Northern-Iraq. The operation was also only conducted in the mountainous border areas where the PKK is taking shelter and is because the measures were limited to the border areas in line with ruling of the *armed activities* case. Because the self-defence measures were only conducted in the border areas civilians did not suffer from collateral damage to life or property. No prisoners were taken therefore their treatment cannot be measured.

It is difficult to get an exact number of deployed troops because various sources contradict each other however this number is likely to be somewhere between 5000 and 10000 soldiers.[235] [236] This, given the fact that around 5000 PKK militants are located in Northern-Iraq, is not disproportionate. The scale of the Turkish self-defence operation was obviously much greater then the scale of the PKK cross-border armed attacks. It was greater in the number of troops that were deployed and heavier weaponry (artillery and fighter jets) was used. However, when self-defensive measures are taken against a constant series of attacks the evaluation of the proportionality of the self-defence measures must not merely consist of a quantitative comparison between the amount of force used by the initial attacks and in the self-defence measures.[237] Turkey was the victim of a constant series of attacks by the PKK. When this is the case the proportionality requirement also includes a qualitative (functional) element. This means that the self-defence measures can go beyond the gravity of the prior armed attacks if this is necessary in order to prevent further attacks.[238] In this case, a large force and heavy weaponry was needed in order to stop a considerable force scattered throughout rough and mountainous terrain from launching cross-border attacks. The PKK was fighting from fortified positions and was better known with the terrain. A large military force was thus needed to break the PKK cross-border attacks.

According to the Turkish military around 240 PKK militants had been killed and 24 soldiers lost their lives during the operation.[239] [240] The PKK is not exactly clear on their casualties (in

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[234] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 362.

[235] News article <uk.reuters.com/article/2008/02/22/idUKL22614485._CH_.242020080222>.

[236] Article in Turkish claiming 10000 troops <www.milliyet.com.tr/2008/02/23/guncel/agun.html>.

[237] C. Gray, *International Law and the Use of Force*, New York: Oxford University Press 2004, p. 121.

[238] C. Gray, *International Law and the Use of Force*, New York: Oxford University Press 2004, p. 121.

[239] Two articles <news.bbc.co.uk/2/hi/europe/7272108.stm><www.nytimes.com/2008/02/29/world/europe/29iht-turkey.5.10595736.html?_r=1>.

the tens) but claims to have lost a lot less.[241] There also seems to be no problem with the proportionality in the number of casualties. 240 is much more then the 25 lives lost by the initial PKK attacks, however the aim was to repel the PKK attacks and 240 out of 5000 is not enough to prevent future PKK attacks. This is proven by the fact that the PKK is still conducting attacks originating from Northern-Iraq. The PKK claim seems unlikely given the careful preparation of the Turkish military, the number of soldiers and the aerial raids. The last point that needs to be analyzed is the duration of the self-defence measures. The '*Güneş Harekatı*' (code-name of the military operation) started on February 21, 2008 and ended on February 29, 2008.[242] This means the self-defence measures only lasted 8 days. The Turkish military claimed it had completed its objective whithin that period and was already pulling its troops back. Because of the short duration of the measures it can be concluded that the operation was indeed only aimed at preventing the cross-border attacks as this limited period of time could never be enough to completely destroy the PKK entirley.

In the light of the topics discussed in this chapter the conclusion that the military operation was proportionate can be drawn. The international community, including Iraq, also agrees that the operation was proportionate.[243] The president of Iraq even stated that, '*the withdrawal of Turkish ground troops indicate the credibility of the Turkish government's statements that the military operation would be limited and temporary*'.[244]

11. Conclusion

In this thesis, the military operation launched by the Turkish military in the period between 2007 and 2008 against the PKK in Northern-Iraq was analyzed in the light of the laws of war. The question the thesis tried to answer was the following:

Did Turkey have the right under international law to take self-defence measures against cross-border attacks originating from Northern-Iraq and were those measures conducted legally?

The laws of war were dived in two parts that is, the *jus ad bellum* and the *jus in bello*. The military operation had to be in accordance with both branches to be legal under international law.

When analyzing the conflict it was noticeable that the views on self-defence measures included in article 51 of the United Nations Charter are changing. Nowadays its scope is seen as too narrow and restrictive and many scholars argue that this is severely limiting the options of a state to defend itself against attacks coming from non-state actors. Statements of various authors and countries such as the United States, Israel, Russia, Rwanda, and Australia were shown as examples to support this observation. The Turkish military intervention in Northern-Iraq is just one example of an intervention into the territory of another state with the goal of

[240] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 339.
[241] <www.globalresearch.ca/index.php?context=va&aid=8334>
[242] News article <ww.nytimes.com/2008/03/01/world/middleeast/01turkey.html>.
[243] T. Ruys, 'Quo Vadit Jus Ad Bellum?: A legal Analysis of Turkey's military operations Against the PKK in Northern Iraq', *Melbourne journal of international Law* 2008, Vol. 9 (2) p. 362.
[244] News article <news.bbc.co.uk/2/hi/europe/7272184.stm>.

preventing cross-border attacks carried out by terrorists. States are the main subjects of international law and international law is aimed at regulating the behaviour between states. Therefore, states ultimately create international law. The current scope of the right to self-defence set by the International Court of Justice in the *Nicaragua* case is not likely to hold anymore since many states and authors voice objections against the narrow reading of the Court. The thesis also supported the broadening of the right of self-defence. However, it also argued that a too broad scope with lead to abuse by state. The *Nicaragua* case dates from 1986 and is not in line with the contemporary world anymore. The world has changed; the balance of power has shifted and more then ever in history non-state actors like terrorist pose a great threat to the safety and security of states. Many great changes in the law occur after 'great' events like the Second World War. The terrorist attacks of September 11, 2001can also be seen as a 'great' event. This event has set the discussion about the scope of self-defence into motion and the discussion is certainly not settled yet. It was also observed that while the rules regarding self-defence are getting more flexible, the principles of necessity and proportionality are still important. Sates have to oblige with the rules of those two principles in order for their self-defence operation to be legal under international law.

With regard to Turkey, the thesis argued that the self-defence operation was in line with the rules of *jus ad bellum*. The military self-defence operation was compared with the self-defence operation of the United States in Afghanistan and the self-defence operation of Israel in Lebanon. In those two cases who share similarities with the Turkish case, the international community in general accepted that it was legal under article 51 of the United Nations Charter. The main concern of the Turkish self-defence operation lay with the necessity and proportionality part of the rules of war. The thesis argued that the Turkish operation was also in line with those two requirements. The military operation could be seen as a 'last resort' measure after all other options failed. The military operation also did not lead to any civilian casualties or damage to civilian property. This means the Turkish military exercised caution and restraint during the self-defence operation. The number of troops used by the Turkish military was also proportionate as was the number of casualties on both sides. The self-defence operation was also limited to a few days, which also indicated the proportionality of the self-defence measures.
War should always be a last resort option, however reality shows that it is sometimes unavoidable. If a country decides to conduct military operations, it should at least do this within the scope of the international laws of war and keep civilian casualties at a minimum. This was the case with the Turkish self-defence operation.

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