THE LEGITIMACY OF THE UNILATERAL USE OF FORCE AGAINST NON STATE ACTORS AND THE TRANSFORMATION OF THE LAW OF SELF DEFENCE.

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Declaration

I, NICOLE CHEPTOO KOECH, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for the award of a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

MR. ALLAN MUKUKI

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DEDICATION

I dedicate this dissertation to The Almighty, my father, my sisters, my brother, my friends Gladwinne and Hope and above all my mother for their unrelenting belief and support in me. I am forever grateful.

ABSTRACT

Over the past decades the UN Charter regime has been readjusted and bent to permit forcible responses to terrorism in more lenient conditions. The right to self-defense against non-state actors has increasingly been invoked and accepted in the practice of states. Nonetheless the acknowledgement of this right has had to overcome a vital obstacle; that of justifying why the right of territorial sovereignty of a host State is not being violated by the self-defensive force in its territory. The 9/11 attack in 2001, the Garissa attack in 2015 are part of example of the growing phenomenon of terrorism in our world today. With terrorism acts causing ripples effects across the global, it is without a doubt that close to billions of citizens have lost their lives as warfare and mass weapons of distraction continues to advance and modify. As weapons advance non- state actors do as well. Not only do they grow more resilient but also in numbers. Non- State actors are shaping today's international relations yet the international Community has not acknowledged their presence conclusively. In practice aggrieved States have had to rely on state involvement/attribution or consent in order to justify their invasion in the host territory. However in one way or another the two justifications have fallen short of making a conclusive ground. Consent may never be given or sometimes the host state has no involvement. This paper seeks to demonstrate a solution already in existence in law but is evidently not yet fully been incorporated looking at Self-defense as a circumstances precluding wrongfulness.

The paper takes the position that the self-defense doctrine is transforming if not already transformed and embarks on evidencing the transformation in order to acknowledge and legitimize self-defensive force against non-state actors.

List of Abbreviations

UNC	United Nations Charter
UNSCR	United Nations Security Council Resolution
UNSC	United Nations Security Council
ASR	Articles on State Responsibility
SC	Security Council
UN	United Nations

List of Cases

Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) Merits, ICJ Reports, 1986.

Legal Consequences of the Construction of a wall in the occupied Palestinian Territory, Advisory opinion, ICJ Reports, 2004.

United Kingdom of Great Britain and Northern Ireland v Albania (Corfu Channel Case), Assessment of Compensation, ICJ Reports, 1949.

Legal Consequences of the Construction of a wall in the occupied Palestinian Territory, Advisory opinion, ICJ Reports, 2004, 136.

Armed Activities case between Uganda and Democratic Republic of Congo, Advisory Opinion, ICJ Reports, 2005, 168.

Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America), General List no. 90, ICJ Reports, 2003.

United Kingdom of Great Britain and Northern Ireland v Albania (Corfu Channel Case), Assessment of Compensation, ICJ Reports, 1949.

The Caroline v The United States of America (1813), The Supreme Court of the United States.

SERAC v Nigeria (1996) African Court of Human and People Rights.

List of Legal Instruments.

The United Nations Charter, 24 October 1945, 1 UNTS XVI.

Covenant of the League of Nations, 28 April 1919.

Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy (Kellogg Briand Pact), 28 August 1928, 94 LNTS 57.

Vienna convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

ILC, *Articles on State Responsibility*, ILC 53rd Report, 2001, UN Doc A/56/

CHAPTER ONE

INTRODUCTION

1.1.Introduction

The right to self-defence against non-state actors has increasingly been besought and acknowledged by the practice of states in the present world. Proven to be a highly prevalent and contentious issue in International Law, provisions of the United Nations Charter have not provided an irrefutable answer to the legitimate use of force against non-state actors. The said right has predominately known to be available for interstate relations thus when invoked against a non-state actor it questions its legitimacy. Self-defensive force ideally operates in a sphere where the aggrieved state ought not to infringe the right (in particular the right to territorial sovereignty)[1] of the host state. Therefore, aggrieved states have had to rely solely on the host state's consent or even the host's involvement/attribution with the non-state actors in order to justify the self-defensive force expended on the host state.

Ideally, consent, a customary law doctrine, has been the ideal method to achieve a legal justification for invasion under international law.[2] For example in Kenya's Operation Linda Nchi, Kenya acquired consent for the invasion in Somalia. Involvement of the host state with non-state actors on the other hand, is not clear from a legal standpoint on how to rationalize it to form legal justification for self-defensive force.[3] States however, have disregarded the idea of relying on the consent and involvement of the host states as they are now invoking the right to self-defence themselves as seen from state practice. Turkey in July 2015, invoked their right to self-defence against ISIL (DAESH) in the context of limited cross border operations in Syria. In 2014, Washington invoked self-defence against Khorasan, a group in Syria close to al-Qaida 'to address terrorist threats that they pose to the United States and its allies'.[4]

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[1] *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* Merits, ICJ Reports, 1986, 94.

[2] Arend A, Beck R, '*International Law and the Use of force'*, Routledge Taylor and Francis Group, New York, 2013, 4.

[3] Paddeu F, 'Use of force against non - state actors and circumstances precluding wrongfulness of self-defence' 30 *Leiden Journal of International Law* 1, 2017, 94.

[4] https://www.ejiltalk.org/permanent-imminence-of-armed-attacks-resolution-2249-2015-and-the-right-to-selfdefence-against-designated-terrorist-groups/ on 1st November 2019.

With the lack of a proper legislation in place to guide the emerging phenomenon of terrorism and counter terrorism, most actions under International Law remain unjustified. However it begs to question whether the now widely accepted use of self-defensive force against non-state actors marks a change or transformation in the doctrine of self-defence or is the exceptional right being abused.

This paper seeks to explore the doctrine of Self-defence, examining its development in international law and critiquing its elements and pre conditions with an aim of answering the question on whether self defence against non-state actors is legitimate. The paper will question and analyse state practice as the form new phenomenon in self-defence. Looking at its viability and determining whether it marks a change to the already present doctrinal law.

1.2.Background

After the devastation of the Second World War, allied states signed a treaty with the determination "to save succeeding generation from the scourge of war and "to ensure that armed force shall not be used, save in the common interest".[5] International legal systems established in 1945, came up with the principle of prohibiting threat or the use of force in International Relations. [6] This principle has been long acknowledged not only as Customary International Law but also as a rule of *Jus Cogens*.[10] Highlighted under article 2(4) of the UN charter, the said principle expels a solemn rule in which the primary subjects of International Law, States, are bound by and obligated to conform to. [7] However, as times change, International Relations does as well as states are not only regarded as the only subjects under International Relations.[8] The high minded resolve of Article 2(4) proved to preserve peace and humanity post the war period. Nevertheless, the efficacies of Article 2(4) of

[5] Preamble, *United Nations Charter*, 24 October 1945, 1 UNTS XVL.
[6] Mung'ale A, 'efficacies of article 2(4) of the UN charter in regulating the threat or use of force in international relations; a case study of Iraq-us war in 2003,' Unpublished LLM Thesis, University of Nairobi, 2005, iii.
Also *case concerning Military and Paramilitary Activities In and Against Nicaragua*, ICJ, 90.
[7] See Article 2(4), *United Nations Charter*. 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'
[8] Lanovoy V, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct',28 *The European Journal of International Law* 2, 2017, 563.

the UN Charter in regulating the threat or use of force has proven to be a major threat to the principle itself.[9]

Since the beginning, International relations as a discipline has been focused on interstate relationships while terrorism and counter terrorism of which has become a predominant issue in the present day, shapes international relations today.[10] Non state actors being the primary players of Terrorism have not yet been fully recognised in the realm of International Law.[11] Traditionally, International relations has not been accustomed to accommodate such actors. *Kenneth Waltz* posited, 'States are the units whose interactions form the structure of international political systems and they will long remain so.' He however posited that, 'the importance of non-state actors and the extent of transnational activities are obvious.'[12]

1.3.Statement of the Problem

This dissertation aims to determine the legitimacy of states exercising self defence against non-state actors. As highlighted in the Charter, states are owed the right to expend self-defensive force if they suffered an 'armed attack' and further believe that it is necessary and proportionate to exercise this right to expend the threat.[13] Nevertheless, with the lack of clear laws, no laws and rigidity of laws and international principles, self defence against non-state actors is still up for contention. Many scholars and States have perceived State practice 'an action' due to the lack of laws in place though it raises the question is State practice an actual commencement of the law of self-defence transforming or is it being misconstrued, abused for the benefit of states remediating an attack.[14]

[9] Mung'ale A 'efficacies of article 2(4) of the UN charter in regulating the threat or use of force in international relations; a case study of Iraq-us war in 2003', Unpublished LLM Thesis ,University of Nairobi, 2005, iii.
[10] Paley A, 'Non state Actors in International Politics a Theoretical Framework' Unpublished Master in Arts Thesis, Graduate Studies of Texas A& M University, 2008, 2.
[11] The term non-State actors is a superordinate concept that encompasses all those actors in international relations that are Not State[s].
[12] Paley A, 'Non state Actors in International Politics a Theoretical Framework', 2.
[13] Tams C, 'The Use of Force against Terrorists', 20 *The European Journal of International Law* 2, 2009, 370.
[14] Ouzobide A, 'Extra territorial use of force against non-state actors and the transformation of the law of self-defence', Unpublished LLD Thesis, University of Pretoria, 2017, 2.

1.4.Justification of the study

The paper is of the position that, attacks by non-state actors is evidently proving to be a grievous phenomenon in today's world and ways to deal with this matter has become not only an antagonistic issue in the international community but a greater challenge to International Law.[15] Whether states can use force against non-state actors in host countries is considerably deliberated as the International community continues to accept and yet critique unilateral use of force against non-state actors through state practice. International law as a discipline has been focused on interstate relationships and the need to achieve a legal normative framework that addresses relations between non state actors is duly required. Terrorism is becoming part of the world's grievous affair and legal justifications are needed to expend the threat that goes against the very principle that every state abides by, Peace.

No doubt has there been countless discussion on relooking non state actors and trying to combat the threat the pose. As evidenced from the United Nations Security Council Resolutions, however the paper is of the view that State practice truly can be due to the lack of laws in place but also because of the rigidity of international laws. The exceptional right was adopted when states were the prime subjects of international relations, however we cannot deny non state actors qualify as subjects today.

1.5.Hypothesis

a. The paper acknowledges that, there exists no definite and internationally accepted law that regulates unilateral use of force against non-state actors. However examining and analysing Article 51 of the UN Charter in conjunction to State practice would justify the transforming doctrine of self-defence as the paper sets to vindicate the legitimacy of self-defensive force against non-state actors.

1.6.Statement of Objectives

The paper is guided by the following objectives;

[15] Paddeu F, 'Use of force against non - state actors and circumstances precluding wrongfulness of Self Defence' 94.

a. To understand analyse, critique and explore the inherent right to self-defence in conjunction with the topic at hand, which is its application against non-state actors.
b. To demonstrate the transformation of the law of defence through state practice in exercising self-defensive force against non-state actors with an analysis of various State Practice Operations. In comparison to the abuse ideology of state practice.
c. To examine and critique viable laws that correspond and accommodate the transformation perspective of self-defence, in a bid of conceptualizing a legal framework to guide self defence against non-state actors

1.7.Research Questions

a. Is the inherent right to self-defence applicable against non-state actors?
b. Is the law of self-defence transforming through state practice?
c. What are the viable laws that accommodate the transforming if not transformed doctrine of self-defence?

1.8.Theoretical Framework

The theoretical lens that this paper gives regard to is the '*Hobbesian Theory*.' Thomas Hobbes, proponent of this theory, was the first to offer knowledge in justice and sovereignty. The theory is founded on the social contract concept whereby previously, a time Hobbes calls 'chaos', every individual in a society strove to seek peace, and all means necessary were adopted to attain it and maintain it.[16]He stipulated that the only way to preserve peace was for every individual to give up their natural right to a sovereign body to ensure that peace is accorded to all. He calls the collection of rights a social contract, which was a contract between the sovereign body (state) and the people. From this States are then obliged to ensure that the people's rights are achieved and realised.[17]

In light of the study, Security derives from the state. The state must be able to provide a sufficient level of protection of the population, from external as well as from internal threats. The means of such protection is, in the final analysis, power. The state needs coercive power-a monopoly over

[16] Hobbes.T, '*on the natural condition of mankind as concerning their felicity and Misery'* The Leviathan' , Penguin Books, Baltimore, 1986, chapter xiii.
[17] https://thegreatthinkers.org/hobbes/introduction/ on 3rd November 2019.

the means of violence-in order to protect the population.[18] Therefore aggrieved states using self-defensive force is the aggrieved state exercising the duty imposed to them by its citizens to protect them and preserve their live and but most importantly promote and uphold peace in their territorial state.

The study seeks to rely on the Hobbesian theory on justifying aggrieved states invoking their inherent right to self-defence against an armed attack. As pointed out in the theory it is the state's duty to ensure peace and security among its citizens. States expending self-defensive force against non-state actors is a means to eliminate the threat and ensure peace and tranquillity of its citizens.

The sole purpose of Kenya's operation Linda Nchi invasion in South Somalia was to capture the port of Kismayo and to crush the Alshabaab Islamic militia this was after Kenya suffered a series of attacks. The invasion was a clear reflection of the theory.

1.9.Literature Review

This section is a study and review of the current available literature on the unilateral use of force against non-state actors. The review aids in coming up with snapshot of some of the views held by prominent authors in this field. The paper shall focus on three main themes.

a. The inherent right to the use self-defence force.

Oscar Schachter postulates that the UN Charter was adopted to promote and preserve peace post war and thus states were refrained from using force and threats to solve disputes.[19] He however states that the same charter provides for an exception that force shall be used in the event there is an armed attack.

Shaw M highlights the history of self-defence by depicting its development from the 'just war doctrine' as was then to what is 'self-defence' as per the United Nations Charter. The study is determined to understand the inherency of self-defence by dating back to its commencement to what it is today.

[18] Sorensen G. 'The Hobbesian dilemma', 17 *Third World Quarterly* 5, 1996, 903.
[19] Schachter O. 'The Right of States to Use Armed Force', 82 *Michigan Law Review* 5/6, 1984, 1620.

David Kretzmer, in his article attempts to define the meaning of self-defence.[20] The author recognises the provisions of article 51 of the charter pointing out that an armed attack is key as a precondition to justify the right to use of self-defensive force. He further acknowledges to two tests that appeals to the legality of the use of force. Necessity and Proportionality. As opposed to Oscar, the author David provides an undisputed view to self-defence, as far as the aggrieved state has suffered an armed attack and is of the opinion that the self-defensive force is necessary. This appeals to the worldly view of how self-defence is exercised today with reference to the Taliban attack by the United States. This study seeks to achieve that the inherent right is accorded to all member states, David's views shall be taken into consideration,

This study shall focus on mapping a legal terrain on the inherent right of self-defence in a bid to establish and answer the question on whether self-defence that is inherent to states can be exercised against non-state actors. The seeks to understand the development of self-defence, critique the current law on self-defence and lastly look at its application against non-state actors.

b. The transformation of the law of self-defence

Alabo Obuzide focuses on the extra territorial use of force against non-state actors, his main focus is determining whether the law of self-defence is changing.[27]With his attention focused on the 9/11 attack, he posited that the response by the United States to the attack marked a change to the application of self-defence. This study shall take into consideration his remarks, guided by his assumptions the study shall take into account the causes of a change in the doctrine. The author highlights on the efficacies and the demise of article 2(4) of the UN Charter and further critiques on the compatibility of article 51 and 2(4) of the Charter. Alabo is in belief that the doctrine is self-defence is changing, and his article strives to prove the transformation.

Christian James on the other hand submits that 'over the past decades the Charter regime has been readjusted and bent to permit forcible responses to terrorism in more lenient conditions.'[21] The author submits that it's no longer disputable that the Security Council does not authorises the use of force against non-state actors. He further acknowledges that the new practise of states in

[20] Kretzmer D. 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum', 24 *The European Journal of International* Law 1,2013, 253-254.
[21] Tams C, 'The Use of Force against Terrorists', 370.

invoking self-defence themselves is an 'expansion to the doctrine of self-defence.' In support of Alabo, the author is driven to stipulate a massive change in the law of self-defence, though considers the change an expansion to the already existing law.

Mary Ellen however is of the view that for self-defensive force to be expended there are four requirements to be met in which correlate with article 51 of the UN charter.[22] Thus states invoking self-defence themselves is an abuse to the doctrine itself. Different from the views of Alabo and Christian, Mary Ellen is of the position that there are thresholds to be met to invoking the right to self-defensive force. Thus the law of self-defence is not transforming but actually being abused. This study shall give regard to the views of the authors highlighted and as well critique on the positions, in clearly analysing and concluding that the law is actually transforming or as Mary Ellen holds is being abused.

c. Analysing viable laws and principles corresponding to the transformation on the law of self-defence.

Paddeu Federica additionally recognises the inherence of self-defence accorded to states and further literates that self-defence cannot operate without precluding the wrongfulness of it thus for it work properly and for states to exercise this right accordingly, some rights of the host state have to be excluded.[23] The author earlier, acknowledges the doctrine of consent and Involvement as two main factors to consider exercising self-defence. The concepts are a prerequisite to ensure that territorial sovereignty of host states is not infringed. However the author is of the position that there is a new approach to the achieving self-defence without infringing the rights to territorial sovereignty.

A possible law that accommodates the transformation is highlighted by Peter Hipold. He acknowledges that the UNSCR 2249 has raised questions to where International law is headed but further acknowledges that the Resolution adopted has had its way not only directed to Morden international law but also in anti-terrorism law. It is without doubt that this resolution has received

[22] O'Connell M. 'Lawful Self Defense to Terrorism', 63 *Notre Dame Law School*,2002, 889-890.
[23] Paddeu. F, 'Use of force against non - state actors and circumstances precluding wrongfulness of Self Defence' 94.
[27] Ouzobide A. 'Extra territorial use of force against non-state actors and the transformation of the law of self-defence' 2.

its fair share of criticism and appraisal. Nonetheless, the resolution spear heads a new journey to achieving a normative framework that is providing solutions to debates and arguments on the contentious issue of the legitimate use of force against non-state actors.

Elena Cikrovic examines the question on whether UNSCR 2249 expands the scope of exceptions to the general prohibition of article 2(4) of the UN Charter.[24]She purports that the Resolution is consistent with provision article 1(1) of the UN charter,[25] 'the collective and effective measures'. Thus legitimizing use of force against non-state actors. . Ellen purports that the Resolution has elements and factors that complement and are in line with the provisions of the Charter. Though notably, the Resolution does not define the use of force as self-defence.

Michael Wood, stipulated that the resolution did not authorize the use of force rather the resolution calls upon states to use all necessary measures in compliance with international law.[26] Michael however acknowledges that all necessary measures could include use of force.

The paper aims to legitimize self defence against non- state actors and violation of territorial sovereignty acts as a rebuttal to the very essence but looking at it as mechanism that cannot operate without violating territorial sovereignty is a step to legitimising the use of self-defensive force against non-state. The study shall consider the critics and the appraisals of UNSCR 2249, so as to determine whether the resolution can be adopted to legislate use of force against non-state actors.

1.10. Methodology

The study shall take a qualitative approach. It will relate to the contemporary and vastly-accepted view of unilateral use of force against non-state actors being a mode of self-defence. This inquiry shall be relied on only as means of appraisal but also as a guidance in considering and coming up

[24] Cikrovic E 'Incomplete World Order: United Nations Security Council Resolution 2249 (2015) and The Use of Force in International Law', 7 *Comparative Law Review* 2, 2016, 6.

[25] Reference to Article 1(1) of the *The United Nations Charter, 'To maintain international peace and security, and to that end: to take* ***effective collective measures*** *for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;* and UNSCR no 2249 ***Calls upon Member States that have the capacity to do so to take all necessary measures****, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law.*

[26] Wood, 'The Interpretation of Security Council Resolutions, Revisited', Max Planck Yearbook of United Nations Law Online, 2017, 17-18.

with a proper legislative framework that would address the inequities and relations that exist between states and non-state actors. Kenya's operation Linda Nchi shall be used as the centre study to achieving this.

The mode of research used in this study is based on scholarly research, journals and articles done on matters of terrorism and counter terrorism. As search both primary and secondary sources shall be given regard. To be noted there isn't any legal framework that addresses the topic of discussion however relevant laws and legislations shall be regarded.

1.11. Limitations

The main challenge anticipated in this study is the lack of legislative frameworks that address the topic of discussion in International law. Considering non state actors are new subjects under international law and haven't yet been incorporated neither accommodated in International Law.

1.12. Chapter Breakdown

Chapter 1: Introduction to the study

This Chapter will set out the basic the concepts within the study. This includes the Introduction, background, the statement of the problem, the hypothesis and the statement of objectives. In addition, the chapter outlines a theoretical framework and a literature review that intends to inform the study.

Chapter 2: The Inherent right to self defence

This chapter explores the inherency of the right to self-defence. Looking into the development and history of self-defence, outlining the preconditions of self-defence and examining and analysis terms and analogies of Article 51 of the UN Charter.

Chapter 3: The Transformation in the Law of Self Defence

Chapter 3 delves into the investigation of the transformation of the Law of Self-defence. Kenya operation Linda Nchi shall be the case study and much regard shall be given to similar operations that involve the use of self-defensive force against non-state actors. The chapter examines the transformation and discuss on the contentious debate surrounding it. It further looks into State practice and examines whether it amounts to transformation or abuse to the self-defence doctrine.

Chapter 4: A Commentary on Kenya's Operation Linda Nchi

This Chapter conducts an examination on the United Nations Security Council Resolution papers 2249, 1373 and 1378 as the legislation that would legitimize the use of force against non-state actors. Overarching the chapter examines viable laws that appeal to the transforming rational of the Doctrine of self-defence. Providing a lens that accommodates the transforming doctrine.

Chapter 5: Conclusion and Recommendations.

This chapter forms the conclusion of the study and includes certain recommendations towards an effective legal framework for the unilateral use of force against non-state actors.

CHAPTER TWO

THE INHERENT RIGHT TO THE USE OF SELF-DEFENSIVE FORCE: MAPPING A LEGAL TERRAIN.

2. Introduction.

Many concede that the notion of self-defence against non-state actors is debatable.[27] Those for it claim that we presently live in a world that possess greater dangers then what was faced pre 1945.[28] With the increase and modification of warfare such as the presence of weapons of mass destruction and the rise of non-state actors, self-defence is necessary to combat presentable threats or injuries.[29] Those against it base their arguments on the fact that there is no legal basis in international law that ascertains lawful unilateral force against non-state actors.[30] Irrefutably, The United Nations Charter does not provide for the use of self-defence being exercised against non-state actors, seeing as the right is reserved for interstates.[31]

Nonetheless, the only question that stands is; is self defence against non-state actors legitimate? If not will Customary International Law prove its legality? Will the opinion of the International Court of Justice set precedence? Or will State Practice legitimise the use of defensive force against non-state actors? This Chapter shall map a legal terrain on the use of self-defensive force in International Law. An analysis shall be done on the lawful dispensation of self-defensive force, narrowing down on the preconditions that actualizes article 51 of the UN Charter and determining the place of self-defence against non-state actors in International law.

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[27] For Instance. Corten O, The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate, 16 *The European Journal Of International Law* 5, 2006, 803.
See also Tams C, The Use of Force against Terrorists, 20 *The European Journal of International Law* 2, 2009, 359.
[28] Andreias V, Anticipatory self-defense in international law: legal or just a construct for using force? 5.
[29] Shaw M, *International Law*, 6 ed, Cambridge University Press, Cambridge, 2008, 43-44. See also
[30] The term non-State actors is a superordinate concept that encompasses all those actors in international relations that are not State [s].
[31] Paddeu F, 'Use of force against non - state actors and circumstances precluding wrongfulness of self-defense' *Leiden Journal of International Law*, 30, 2017, 94.
See Also, *Legal Consequences of the Construction of a wall in the occupied Palestinian Territory*, Advisory opinion, ICJ Reports, 2004, 194. '….Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one state against another state….'

2.1. The Concept 'Self Defensive Force.'

The concept of Self-defence draws back to Ancient Greece and Ancient Rome. Self-defence was linked to the power and prerogative of States to wage wars.[32] Historically, wars were categorised as 'just' or 'unjust'.[33] Hugo Grotius defined a just war as there needed to be a wrong to be done to the state or a right illegally denied for a just war to be expended for it to amount to a 'just cause.'[34] St Thomas Aquinas, further expanded the concept, asserting that certain conditions ought to be met in order to wage a just war. Despite the wrongful act, there was also a 'need' to punish the wrongdoer.[35] With the rise of the doctrine on sovereignty in the European states, declaring war was now based on sovereignty. Christian States would now advance wars with the idea of impending a just war but also considering it their right to protect its territory. Problem came in when states unilaterally waged wars against each other. With now both sides believing they had a just cause to do so.[36]

The Peace of Westphalia in 1648, brought an end to the 'just war' conceptualization, and advocated for state equality. States were now to honour and respect the integrity and independence of each other. It was then, that states were obliged to resort to peaceful measures in settling international disputes.[37] But war was not eliminated from the international plane rather it was regulated by a set of conditions linked to the sovereignty of States. In the event the sovereignty was infringed this gave grounds for expending war. [38]

By the end of The First World War, it was clear that there was a need for an International system that would solve disputes without resorting to war.[39] In 1919, the establishment of the League of Nations, strived to achieve international peace.[40] The members adopted a means to regulate and restrict wars, however they did not prohibit war. The Covenant set up measures that would restrict

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[32] Phillipson C, *The International Law and Custom of Ancient Greece And Rome*, Macmillan and Co, London, 1911, 179.
[33] At the time, international relations and the Law was religion centric. Christianity determined what exactly a just war was.
[34] Shaw, *International Law*, 1097.
[35] Aquinas T, *Summa Theologiae*, Secunda Secundae, Quaestion 40, 1.
[36] Andreias V, *Anticipatory self-defense in international law: legal or just a construct for using force*, 5.
[37] Gross L, 'The Peace of Westphalia, 1648 -1948' 42 *American Journal of International Law* 1, 1948, 20.
[38] Andreias V, *Anticipatory self-defense in international law: legal or just a construct for using force*, 5.
[39] Andreias V, *Anticipatory self-defense in international law: legal or just a construct for using force*, 6. See also, Shaw, *International Law*, 1121.
[40] https://www.unog.ch/80256EDD006B8954/(httpAssets)/36BC4F83BD9E4443C1257AF3004FC0AE/%24file/Historical_overview_of_the_League_of_Nations.pdf, on 14th November 2019.

war to tolerable levels.[41] The 1928 Kellogg- Briand Pact,[42] attempted to make a system that regulated war. Parties to the treaty condemned recourse to war and agreed to renounce it as an instrument of national policy in their relations with one another.[43] The widespread acceptance of the treaty did give the principle of Prohibition on resorting to war its power in international law. Nevertheless, Reservations from the treaty gave the perception that the prohibition on the resorting to war does not necessarily mean that the use of force in all circumstances is illegal.[44]

The birth of the UN Charter in 1945, came as a result of the Second World War. The purpose of the Charter was;

> '*To save succeeding generation from the scourge of war and to ensure that armed force shall not be used, save in the common interest.'*[45]

Enshrined in article 2 of the Charter was a determination of states to not only maintain peace but condemn war.[46] In specific article 2(4), which is regarded as *jus cogens* instigates that states;

> *'Refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.'* [47]

Though despite the Charter appealing to its declarations stated in its preamble, the same charter provides for an exception to the prohibition of the use of force, Self-defensive force' [48] which shall be discussed throughout the paper.

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[41] Article 10-16, *Covenant of the League of Nations,* 28 April 1919.
[42] *Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy (Kellogg Briand Pact),* 28 August 1928, 94 LNTS 57.

[43] Article 1, *Kellogg Briand Pact.*
[44] Brown P. 'Undeclared Wars', 33 *The American Journal of International Law* 3, 1939, 538-539…. 'In spite of the adoption of the Kellogg it was evident in the 1930s that states often engaged in hostiles without declaring war or calling it war…'
[45] Preamble *The United Nations Charter,* 24 October 1945, 1 UNTS XVI.
[46] Article 2, *The United Nations Charter.*

[47] Article 2(4), *The United Nations Charter.*
[48] Article 51, *The United Nations Charter.*

The adoption of the treaties and covenants aforementioned were established at a time when states were the only actors in International relations and warfare was not as accelerated as it is now.[49]

By deduction, we could argue that the exception on the use of force was to be exercised only if armed force was necessary to address a threat, an 'armed attack'[50] Then again we can see that, this reserved right was for states, considering they were the only actors in international relations at the time.[51] With non – state actors being part of the today's international concern, a great gap existing in the regulation of use of force by non-state actors.[52] From the subsequent sections of this chapter, the paper shall answer the untimely question on whether the inherent right to self-defensive force exists against non-state actors in the territory of a sovereign state.

2.2. Self Defence in International Law.

The traditional meaning of the inherent right Self-defence draws it authority from the *Caroline Case.*[53] In 1837 British subjects seized and destroyed a vessel in an American port. This had taken place because the *Caroline* (the vessel) had been supplying groups of American Nationals, who had been conducting raids into the Canadian Territory. The case highlighted the essentials of self-defence which are recognised under Customary International Law.[54] First, there had to exist a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. Secondly, that the action taken in pursuance of it must not be unreasonable or excessive. [55]

Article 51 of the United Nations Charter expressly states that;

> *'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 Nation, until the*

[49] The Peace of Westphalia, The Covenant of the League of Nations, The Kellogg- Briand Pact in 1928 and The United Nations Charter were established in an era where weapons of war are not as advanced as they are now.
See also Thomas F, 'Who killed Article 2(4) or the Changing norms governing the use of Force by States.' 64 *The American Journal of International Law* 5, 1970, 809 – 812. And Tams C, The Use of Force against Terrorists, 361.
[50] Article 51, *The United Nations Charter.*
[51] Lanovoy V, 'The Use of Force by Non state Actors and the Limits of Attribution of Conduct, 28 *The European Journal Of International Law* 2, 2017, 563.
[52] Lanovoy V, 'The Use of Force by Non state Actors and the Limits of Attribution of Conduct, 563-564.
[53] *The Caroline v The United States of America* (1813), The Supreme Court of the United States.
[54] Jennings R, 'The Caroline and McLeod Cases', 32 *The American Journal of International Law* 1, 1938, 82.
[55] *The Caroline v The United States of America* (1813), The Supreme Court of the United States.
Also, Shaw, *International Law,* 1131.

security council has taken the 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.'[56]

Many scholars of the law have pointed out that the opening phrase of article 51, insinuates that there existed an inherent right in Customary International Law,[57] over and above the specifics pointed out in the preceding article, in this case presence of an armed attack.[58] The ICJ in the Nicaragua Case, highlighted that the right to self-defence existed as an inherent right not only in the charter but also in Customary International Law.[59]

2.3.Analysis of Article 51.

Article 31 (1) of the 1969 Vienna Convention on the Law of the Treaties states that,

'A treaty shall be interpreted in good faith In accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose.'[60]

In analysing the right to self-defence highlighted under article 51, one would look at the right in conjunction with article 2(4) of the Charter. In reference to the provision of the Vienna Convention

[56] Article 51, *The United Nations Charter*.
[57] Jennings R and Watts A. *Oppenheim's International* Law, 9ed, Oxford University Press, Oxford, 1992, 442. '*It is suggested that the Caroline Case as well as State practice developing years later has developed the customary right to self-defence. Whereby, the use of force and the infringement of territorial sovereignty is justified as self-defence under law where an armed attack is targeted or threat is targeted against an aggressor state which then permits an urgent necessity of defensive action against that attack or threat. The defensive action is however limited to the prevention of that attack and there was no alternative to that action in self-defence or the state which has the legal powers to stop the attack cannot or is unwilling.*'
[58] Shaw, *International Law*, 1132.
[59] *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* Merits, ICJ Reports, 1986, 94.
[60] Article 31(1), *Vienna convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

we can infer that Article 51 is a permitted derogation from the *Jus Cogens* norm, which then gives it the same rank in the hierarchy of norms.[61]

Article 51 licenses at least one kind of resort to force by an individual member state that being the use of armed force to repel an armed attack. Any other use of armed force must either be authorized by the Security Council or so minor it falls under a *de minimis* exception.[62] Most scholars and the International Court of Justice appear to agree that indeed self-defence is permitted in the event there has been an 'armed attack.'

International Literature describes a couple of stringent preconditions necessary for the right to be expended lawfully. Some notions are strict to the right being only expendable if a state was exercising against another state, locking out states exercising it against non-state actors. Others emphasis that there needs to be attribution or consent for the right to be exercised, which shall be discussed in the preceding chapters.[63] Nonetheless, it all narrows down to five stringent preconditions.[64] First, the force used is to be exclusively directed to repel an armed attack of the aggressor state.[65] Secondly, relying on the *Caroline case 1842,* the necessity for a forcible reaction had to be 'instant, overwhelming, leaving no choice of means and no moment for deliberation.'[66] Thirdly, the force ought to be proportionate to the purpose of driving back aggression.[67] Fourthly, the use of force has to be terminated immediately if the Security Council has taken necessary measures or the aggression has come to an end. [68] Lastly, states expending the right have to comply and preserve fundamental principles of humanitarian law for example territorial Sovereignty.[69]

[61] Christenson G, 'The World Court and Jus Cogens' 81 *American Journal of International Law*, 1, 1987, 93.
[62] O'Connell M, 'Lawful Self Defence to Terrorism', 63, *University of Pittsburgh Law Review,* 4, 2001, 890.
[63] Paddeu F, 'Use of force against non - state actors and circumstances precluding wrongfulness of self-defense' 94.
[64] Cassese A, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' 12 *European Journal of International Law* 5, 2001, 995.
[65] O'Connell M, 'Lawful Self Defence to Terrorism', 889 - 890.
[66] *The Caroline v The United States of America* (1842), The Supreme Court of the United States.
[67] Kretzmer D. 'The Inherent Right to Self Defence and Proportionality in Jus Ad Bellum', 24 *The European Journal of International Law* 1, 2013, 253-254.
[68] Article 51, *The United Nations Charter*.
[69] Cassese A, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International', 995.
Also, *United Kingdom of Great Britain and Northern Ireland v Albania (Corfu Channel Case),* Assessment of Compensation, ICJ Reports, 1949, 35.

For purposes of this chapter, this study will draw your attention to one main ground deduced from the preconditions listed above. Prescribed by article 51 of the UN Charter there ought to be an 'armed attack' in order to expend the right.

a. 'Armed attack'

The International Court of Justice (ICJ) in its 2004 Advisory Opinion on the case *Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory,* highlighted that article 51 applied in the case of an armed attack by one state against another state.[70] Therefore, article 51 did not excuse Israel's security barrier on the Palestinian territory because Israel did not claim that it had been victimized by another state. Similarly, in the 2005 *Armed Activities case between Uganda and Democratic Republic of Congo,* the ICJ held that there was no satisfactory proof of the involvement of these attacks whether directly or indirectly by the government of DRC.[71] Essentially, the attack was non attributable to DRC and therefore there was no legal grounds for Uganda to expend their right to self-defensive force.

The most restrictive position in literature and precedence permits the use of defensive force between states if the attack is attributable to the state, thus force against non-state actors is deemed unlawful.[72] In order to be able to resort to self-defensive force, a state had to be able to demonstrate that it had been the victim of an armed attack and it bears the burden of proof. [73] The ICJ in its jurisprudence has made it clear that state involvement is required in order for a group to be considered to have launched an 'armed attack'.[74]

Article 51 does not exactly provide a meaning of what exactly is an armed attack. The question that remains is that of the inception of attacks which would mean an armed attack' within the meaning of article 51.

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[70] *Legal Consequences of the Construction of a wall in the occupied Palestinian Territory,* Advisory opinion, ICJ Reports, 2004, 136.
[71] *Armed Activities case between Uganda and Democratic Republic of Congo,* Advisory Opinion, ICJ Reports, 2005, 168.
[72] Hakimi M, 'Defensive Force against Non- State Actors: The State of Play,' 91 *International Studies,* 2015, 4.
[73] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America),* General List no. 90, ICJ Reports, 2003, 189 – 190.
[74] Randelzhofer A, Dörr O,' Purpose and Principles, Article 2(4)'in Simma B, Khan D, (3ed), *The Charter of the United Nations: A Commentary,* 3ed, Oxford Scholarly Authorities on International Law, London, 2012, 200, 213.

In the case of *Nicaragua v United States of America*, the ICJ, relying on article 2 of the United Nations General Assembly's definition of aggression, regarded an 'armed attack' as when regular armed forces cross an international border or when a state sends "armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another state of such gravity as to amount to" an actual armed attack by the regular forces.[75] By deduction the court found that the assisting of rebels in the form of provision of weapons did not constitute an armed attack, but rather an act of the unlawful use of force and threat.[76] On major down fall of the court's decision is categorising and limiting the definition of armed attack because what happens then to victim states that have suffered an armed attack by non-state actors? Judge Jennings in her dissenting opinion in Nicaragua highlighted that;

> 'It seems dangerous to define unnecessarily strictly the conditions of lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap is absent.'[77]

This paper seeks to address two issues of contention that arise from the ambiguity of what amounts to an armed attack. First the authorship of an armed attack. Secondly, the use of the term 'armed attack.'

With reference to the first issue we could argue that the omission of an author from article 51 was intentional could be to accommodate the change in times or international relations advancing considering the charter was ratified in 1945. However, with the escalation in the advancement of weapons and massive rise of non-state actors, we could assume that at the time the charter was adopted states were and were seen to be the only actors in international law. Nonetheless, the lack of clarity and identification of who an author is has created massive ambiguities to the present Charter.

For the second issue, the term 'armed attack' has been in contention with the present rise of non-state actors. Article 51 does not explicitly describe what it entails. However, the ICJ[78] and UNGA[79] have tried to define what amounts to it. It is however undisputable that the definitions made but

[75] UNGA, *Definition of Aggression,* UN/A/Res3314 (XXI), 14 December 1974.
[76] Gray C, *International Law and the Use of Force* 4ed, Oxford University Press, Oxford, 2018, 108.
[77] *Nicaragua v United States of America,* ICJ, 76.
[78] *Nicaragua v United States of America,* ICJ, 195.
[79] UNGA, *Definition of Aggression,* UN/A/Res3314 (XXI), 14 December 1974.

both the ICJ and UNGA are not overarching neither fully inclusive seeing as it looks out a number of instances that could entail an armed attack.

b. 'Armed attack' against non – state actors.

If we rely on the ICJ's decision in Nicaragua, on what constitutes an armed attack, then we can concluded by stating an armed attack is not only an action by armed forced across an international border, but also in addition it's the sending out by or on behalf of a state of armed bands or groups with the aim of carrying out acts of armed force of such gravity that would amount to an actual armed attack conducted by regular armed forces. In this case, our focus then shifts to a consideration that state involvement is necessary in order to render a legitimate action in self-defence.[80] Despite the attempt of courts to define what exactly amounts to an armed attack, present attacks have proved to show the difficulty in defining and limiting what amounts to an armed attack.

For example, if an armed attack is upon an embassy abroad, would it amount to an armed attack?[81] In 7 August 1998 the US Embassies in Kenya and Tanzania were bombed, causing loss of lives and damage of property. On 28 of August, the US launched a series of missile attacks in Afghanistan and Sudan targeting the operations associated with Osama Bin Laden who was deemed to be responsible for the attacks. The US exercising their article 51 right claimed that the missile strikes, 'were a necessary and proportionate response to the imminent threat of further terrorist attacks against US personnel and facilities.'[82]

The US missile strikes seems to adjust the concept of self-defence and negate the definition set by the International Court of Justice when defining an armed attack.

It is clear that the right to self-defence applies to armed attacks by states or there is a degree of involvement or attribution by the host state, question is what happens when the armed attack is not from a state neither is there state involvement?

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[80] Gray, *International Law and the Use of Force*, 108.
[81] Shaw, *International Law*, 1134.
[82] Murphy S, Contemporary Practice of the United States Relating to International Law, 93 *The American Journal of International Law* 1, 1999, 161.

This paper avers that there still exists a great loophole on the definition of 'armed attack'. There is no defined term neither a consensus on what the term should mean. With the much ambiguities in place, over the past decades the charter regime has been adjusted and bent to permit forcible responses to terrorism in more lenient conditions.[83] It is no longer undisputed that states have been invoking self-defence force against non-state actors, an action still not recognised by law a practice that deemed legal yet again illegal. The only question is, 'Is this an abuse to the already existing Doctrine of self-defence or a cry for change, considering what was in pre 1945 is not what is now?'

2.4.Conclusion

The stringent preconditions of self-defence have proven not only to be limiting but also detrimental to states exercising the right freely against non-state actors. By deduction, 'Armed attacks ought to have an involvement with the host state.' This perception however has not stopped states from exercising the right against non-state actors as seen from the US missile attacks on Afghanistan and Sudan or Kenya's Defence Force in Somalia.

Problem is are states willing to agree that the concept of self-defence pre 1945 is different from it now. In addressing this untimely question the subsequent chapters of this paper shall address the transformation of the law of self-defence and narrow into state practice as a reason to relook the Doctrine of Self Defence.

[83] Tams C. 'The Use of Force against Terrorism', 370.

CHAPTER THREE

TRANFORMATION ON THE LAW OF SELF DEFENCE

3. Introduction

Christian James Tams a professor in International Law stated that, 'over the past decades the UN Charter regime has been readjusted and bent to permit forcible responses to terrorism in more lenient conditions.'[84] Highlighted in his article 'The Use of Force against Non-State actors', the author argues that he restrictive approach to self-defensive force decades ago has now come under strain.[85]

The international community in the last decades has continued to recognise the right of states to use self-defensive force against non-state actors. A new practice most would consider as an expansion to the doctrine of self-defence, considering self-defence was a right reserved for interstates.[86] But also could be a justifiable ground to extinguish and quash threats and remediate armed attacks suffered by states due to attacks by non-state actors.[87] However, indisputably the said practice marks a complete shift to the set Doctrine of self-defence and limitations such as territorial sovereignty.

This chapter unfolds palpable circumstances on a dire need to relook at the doctrine of self-defence. The chapter shall point out different missions and operations of States exercising the right of self-defence against non-state actors and examine whether this 'state practice' instigates a transformation in the law of self-defence or is it an abuse to the already existing law.

3.1. Kenya's 'Operation Linda Nchi' Mission (Kenya and Al Shabaab)

In October 2011, Kenya's Defence Armed Force invaded the southern part of Somalia with the sole purpose of capturing the port city of Kismayo and to crush the Al Shabaab Islamist militia.

[84] Tams C, The Use of Force against Terrorists, 20 *The European Journal of International Law* 2, 2009, 370.
[85] Tams C, The Use of Force against Terrorists, 373.
[86] *Legal Consequences of the Construction of a wall in the occupied Palestinian Territory,* Advisory opinion, ICJ Reports, 2004, 194. '….Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one state against another state….
[87] Tams C, The Use of Force against Terrorists, 359.

The 'Operation Linda Nchi' was an armed invasion triggered by a series of attacks that occurred in Kenya. [88]

a. Al Shabaab

Al shaabab is an Islamic militia group based in Somalia. Also known as *Harakat al shaabab al Mujahideen*, [89] it is believed to have been formed in 2004, however statistics show activities of the group pre dating to the 1990s.[90] The militant branch served as the military wing for the Islamic Courts Union (ICU) in Somalia. The ICU had been established to rival the administration of the Transitional Federal Government of Somalia. In 2006, AL Shabaab broke out seeking to establish a new Somalian state that rules in accordance to the strict interpretation of Sharia Law.[91] Although based in Somalia, the group has managed to cause series of attacks not only in Somalia but in neighbouring countries such as Kenya.[92]

In 2007, AL Shabaab waged a mutiny against the Somali Transitional Federal Government (TFG) and have been at war since.[93] The International Community's hand has not been short in condemning the war. The UN Security Council has authorised AMISOM, a replacement of the peace keeping mission IGAD Peace Support Mission to Somalia that was tasked to maintain peace and security during the last phases of civil war in the 1990s.[94]Nonetheless, AL Shabaab have made it their duty to retaliate, declaring war to now both Somalia TFG and AMISOM.[95]

b. Kenya and Somalia

Kenya's invasion in Somalia was as a result of a series of kidnappings and killings in the Kenyan jurisdiction.[96] In September 2015, a British woman was kidnapped and husband shot dead in a beach resort in Lamu.[97] In October 2015, a French woman was kidnapped from her home.[98] Later,

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[88] Anderson D. 'McKnight J. Kenya At War: AL Shabaab and Its Enemies in Eastern Africa', 114 *African Affairs* 454, 2014, 1.
[89] https://www.dni.gov/nctc/groups/al_shabaab.html on 26th November 2019.
[90] https://cisac.fsi.stanford.edu/mappingmilitants/profiles/al-shabaab#text_block_13374 on 26th November 2019.
[91] https://cisac.fsi.stanford.edu/mappingmilitants/profiles/al-shabaab#text_block_13374 on 26th November 2019.
[92] https://cisac.fsi.stanford.edu/mappingmilitants/profiles/al-shabaab#text_block_13374 on 26th November 2019.
[93] https://cisac.fsi.stanford.edu/mappingmilitants/profiles/al-shabaab on 26th November 2019.
[94] http://amisom-au.org/amisom-background/ on 26th November 2019.
[95] Anderson D. 'McKnight J. Kenya at War: AL Shabaab and Its Enemies in Eastern Africa' 2.
[96] Birkett D. 'The Legality of the 2011 Kenya Invasion of Somalia and its Implications for the *Jus Ad Bellum*' 18 *Journal of Conflict and Security Law* 3, 2013, 427.
[97] https://www.theguardian.com/world/2011/sep/11/kenya-shooting-kidnap-british-couple on 26th November 2019.
[98] https://www.theguardian.com/world/2011/oct/19/french-woman-kidnapped-somalia-dies on 26th November 2019.

two Spanish aid workers were kidnapped from the Dadaab Refugee camp.[99] The legal justification for reasons for the invasion are highlighted under a Joint letter to the United Nations Security Council by Kenya and Somalia. The letter highlighted the full grounds of Kenya wanting to expend self-defensive force in the Somalian territory by pointing out the series of attacks and threats that have occurred and gave reasons for the necessity for a remedial and pre emptive action to preserve peace and security.[100]

Kenya invoked its Article 51 right, after a conclusive direct consultation with the Somali government.[101] TFG had noted the threat and attacks on the Kenyan jurisdiction and consented to the pre- emptive invasion. TFG of Somalia and Kenya agreed to work together to stabilize Somalia and do away with AL Shaabab.

c. Loopholes on 'Operation Linda Nchi'

Despite the operation legally having the justification for the use of force. Kenya exercising its inherent right to self-defence, was however a violation to the United Nations Security Council Arms Embargo that was imposed in Somalia in 1992. [102] The UNSC Arms Embargo points out that there is a general and complete embargo on the delivery of weapons and military equipment in Somalia, in addition a call on all States to refrain from any action that may increase the tension in Somalia.[103] Kenya's invasion was a direct violation to this.

Kenya's Operation Linda Nchi is part of example of States in the present decade trying to combat non state actors in host Jurisdictions especially where there is no direct attribution of the host state with the non-state actor. Kenya' invasion could be argued as lawful following the pre-set conditions of self-defence as highlighted in the previous chapter, together with the fact that they

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[99] https://www.theguardian.com/world/2011/oct/13/aid-workers-kidnapped-kenyan-camp on 27th November 2019.
[100] *Letter dated 17 October 2011 from the Permanent Representative of Kenya to the United Nations addressed to the President of the Security Council*, 18 October 2001, UN Doc S/2011/646 '***Kenya has been facing serious challenges emanating from the collapse of the State of Somalia over the past two decades. The situation has worsened of late, following the unprecedented escalation of threats to the country's national security. Kenya has suffered dozens of incursions that were repulsed by its military and police forces. Scores of Kenyans have lost their lives over the past 36 months in border towns and communities owing to terrorist actions and incursions from Al-Shabaab militants'***
[101] *Letter dated 17 October 2011 from the Permanent Representative of Kenya to the United Nations addressed to the President of the Security Council*, (***Kenya, in direct consultations and liaison with the Transitional Federal Government in Mogadishu, has, after the latest direct attacks on Kenyan territory and the accompanying loss of life and kidnappings of Kenyans and foreign nationals by the Al-Shabaab terrorists, decided to undertake remedial and pre-emptive action***)
[102] UNSC/RES/733 (1992) Implementing an Arms Embargo on Somalia.
[103] UNSC/RES/733 (1992)

gained consent from the host State. The Minister of Defence in Kenya at the time as well argued that the invasion was in the best interest of Kenya and that the country was doing all in its power within the legal realm to preserve security within its borders.[104] Should we then still conclude that the operation was legal? Notably, under Customary International Law, a state can have the right to use force without the approval of the Security Council if all alternative means necessary have been exhausted and the impending threat is imminent and the Security Council has been notified of the attack.[105] The rational is that the Security Council is to expend measures in the fastest way possible liaising with its mandate in International Law.[106] Nonetheless, we are still left to question the legality of an operation that was in direct violation of Somalia Arms Embargo Law. Should the self-defence be permitted even if certain laws are violated?

3.2. State Practice

The International Court of Justice has made profound decisions in regards to article 51 of the UN Charter. Especially with realising the term 'armed attack' and the authorship of armed attack as highlighted in the *Nicaragua case*,[107] the *Armed Activities Case*[108] and the *Wall case*.[109] By deduction the Courts decisions have purported that, for the right of self-defence to apply against an armed attacks by non-state actors, there has to be a degree of involvement or attribution by the host state, thus an interstate affair.[110] It should be noted that Article 51 does not demand or even such a limitation. There is no reason to limit a states right to protect itself against an attack emanating from another state. The right to self-defence is a right to use force to avert an attack.[111] The source of an attack whether a state or a non-state actor should be irrelevant to the existence of

[104] Kersten M, Chasing al – Shabaab: Is Kenya Right to intervene in Somalia? October 31st 2011 http://justiceinconflict.org/2011/10/31/chasing-al-shabaab-is-kenya-right-to-intervene-in-somalia/ on 26th November 2019.
[105] Article 51, *The United Nations Charter*, 24 October 1945, 1 UNTS XVI.
[106] Gray C, *International Law and the Use of Force* 4ed, Oxford University Press, Oxford, 2018, 248.
[107] *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* Merits, ICJ Reports, 1986, 207.
[108] *Armed Activities case between Uganda and Democratic Republic of Congo,* Advisory Opinion, ICJ Reports, 2005, 164.
[109] *Legal Consequences of the Construction of a wall in the occupied Palestinian Territory,* ICJ, 136.
[110] *Legal Consequences of the Construction of a wall in the occupied Palestinian Territory,* ICJ, 139.
[111] Article 51, *The United Nations Charter.*

the right. This rationale is supported by reference to the *Caroline Case;*[112] the criteria in the case was enunciated in the context of a marauding armed band, not orthodox state to state conflict.

State practice is the 'practice of the Security Council giving no support to the restriction of self-defence to action against armed attacks imputable to a state.'[113] The attack against Al Qaeda in Afghanistan was an action of self-defence of anticipated imminent terrorist attacks from Al Qaeda and not from the Taliban.[114] There was an urgent necessity to attack the Taliban as a pre emptive measure against Al Qaeda.

The right of states to protect itself from ongoing and even past attacks from non-state actors is not necessarily in contention, rather what's in question is the right to institute an armed attack against a state that is presumed to be host of these attacks considering it is the use of force on the territory of a state and the state could possibly have no responsibility or involvement in the attacks.

Self-defensive force ideally operates in a sphere where the aggrieved state ought not to infringe the right to territorial sovereignty.[115] One would argue that the reason for limiting self-defensive force to its lawful exercise between interstates, is as a mean to preserve territorial sovereignty. A principle that literature, legislation and even states seek to uphold. In the *Corfu Channel* case of 1949, the ICJ stated that, between independent states, respect for territorial sovereignty is an essential foundation of international relations.[116] Customary International Law on the other hand holds the same notion, professing that states ought not to intervene with the affairs of another state, including the 'use of armed force.' The United Nations General Assembly on the other hand sought to come up with resolutions that seek to uphold the principle, stipulating that no state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state.[117]

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[112] *The Caroline v The United States of America* (1813), The Supreme Court of the United States.
[113] https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilpforce.doc on 28th November 2019.
[114]Williams R. 'Dangerous Precedent: America's Illegal War in Afghanistan', 33 *University Pennsylvania International Law Journal* 563, 2011, 567.
[115] *Nicaragua v United States of America,* ICJ, 94.
[116]*United Kingdom of Great Britain and Northern Ireland v Albania (Corfu Channel Case),* Assessment of Compensation, ICJ Reports, 1949, 35.
[117] UNGA, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty,* UN A/RES/2131(XX), 21 December 1965.

In spite of literature and the law preserving the doctrine of Sovereignty, scholars have argued that self-defence cannot function without the need to exclude the wrongfulness of the infringement of territorial sovereignty of a host state. Problem is International legislation on self-defence does not realise this, considering there are preconditions to be met.

In the subsequent sections of the chapter it explores different operations in brief conducted by states against non-state actors. Highlighting there defences and justifications for carrying out an invasion against territorial sovereign states as an attempt to look into the transformation or abuse of self-defence.

a. Operation Enduring Freedom (The United States and AL Qaeda)

The U.S led military action in Afghanistan was a response to attacks suffered on the US soil in September 11th. Operation Enduring Freedom (OEF) was an airstrike operation targeting the authors of the 9/11 attack, Al Qaeda and the Taliban that were based in Afghanistan.[118] The US in a letter informed the United Nations Security Council of the attacks after they had already conducted the attacks in Afghanistan and referred to the attack as them exercising their right of self-defence as highlighted in article 51.[119] Despite the UN not officially authorizing the attacks made by the United States, the global acceptance of States and worldwide international organisation gave the US' OEF a legitimate perspective to Self Defence.[120] The OEF is an example of what the international community perceives as state practice. Nonetheless we do pose the question on whether this is a transformation or an abuse to self-defence.

There are three exceptions to the *Jus cogens* principle on the prohibition on the use of force. First if it for self-defence. Secondly, if a United Nations Resolution authorizes the use of force and lastly the doctrine of consent permits the use of force. In OEF, the United States claimed that their actions were an act of self-defence, to which by deduction and to the public could be considering the 9/11

[118] Williams R. 'Dangerous Precedent: America's Illegal War in Afghanistan', 565.

[119] United States' Letter to the UN October 2001 stated the following; '…the attacks on 11 September 2001 and the on-going threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation... In response to these attacks, and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against AL Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan….'

[120] UNSC S/RES/1368 (2001), UNSC S/RES/1373 (UNSC Resolutions 1368 and 1373 later reaffirmed the inherent of the US exercising the right of self-defensive force in Afghanistan.)
See also UNSC S/RES/1368 (European Union gave full support to the Operation)

attack was very present and in many terms would constitute an armed attack. Nonetheless was it legitimate? Further, the United Nations Security Council Resolutions 1373 and 1378 reaffirmed the attack but did not authorize the attack at the time which question its legitimacy of the operation.

States global acceptance to State Practice would instigate a dire need to relook the doctrine of self-defence but we cannot deny the great loopholes and shortfalls of states disregarding certain procedures or principles attached to the doctrine of self-defence. Is then self-defence transforming or being abused to fit state interests?

b. 'Change Direction' Israeli Operations in Lebanon

In 2006, the Israel Defence Force (IDF) launched an armed attack in the Territorial grounds of Lebanon to target a militant group known as Hezbollah.[121] The non-actor militant was based in Lebanon what was a cease fire of three days was a remediate of Israel exercising their Article 51 right to the use of self-defensive force.[122] Similar to the United States' position, Israel maintained that there actions was for from engaging in illegal acts of extra judicial killings as alleged rather it was a mere exercise of a legitimate right to self-defence guaranteed by International Law.[123] Commentators mainly of the Israeli extraction have argued that 'even as Israel is negotiating with the owners of the land it illegally occupies, it is entitles an occupying power to use force in self-defence.[124] In addition states supported the operation done by Israel. The UK, France Argentina are among the states that gave their full support to the operation in a UNSC meeting.[125]

Nonetheless, Operation Change direction did face countless critics, with the extra judicial killings and the proportionality of the force used challenged a pre-condition of self-defence, proportionality. [126]

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[121] Schmitt M. ''Change Direction' 2006: Israeli Operations in Lebanon and the International Law of Self – Defense.' 29 *Michigan Journal of International Law* 2, 2008, 127.
[122] Permanent Representative of Israel to the United Nations, Identical Letters Dated 12 July 2006from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/60/937, S/2006/515 (July 12, 2006) [hereinafter July 12, 2006 Letters]
[123] Naftali O. Michaeli K, 'Illegal Occupation: Framing the Occupied Palestinian Territory', 23 *Berkeley Journal International Law* 3, 2005, 240- 241.
[124] Steven D. 'Israel's Policy of Targeted Killing' 17 *Ethics and International Affairs* 1, 2003, 113.
See also the law of oocupation https://www.icrc.org/en/doc/resources/documents/misc/634kfc.htm on 5th December 2019.
[125] UN Doc. S/2006/515 62, Letter from the Permanent Representative of Israel, 9.
[126] Schachter O. 'The Lawful Resort to Unilateral Use of Force', 10 *Yale Journal of International Law* 2, 1985, 292.

c. Other operations.

The growing state practice that supports the exercise of self defence against non-state actors has not only become prevalent but quite evident. Despite the aforementioned operations there are other operations instituted by states combating armed attacks by non-state actors. For example Rwanda's actions in the territory of the Democratic Republic of Congo remediating the attacks of former Armed Forces of Rwanda/ Interahamwe forces. [127] Or Senegal, Thailand and Tajikistan using self-defence in response to armed attacks by non-state actors.[128]

3.3. Transformation or an Abuse to Self-Defensive Force.

The *jus ad bellum*[129] has been described as a static security scheme from 1945 to the extent that the UN Charter accommodates self- defence, Security Council authorization and consent as exceptions to the general prohibition of the use force.[130] The international security system has been structured in a such a way that no exceptions to the general prohibition is permitted, whether for the purposes of rescuing a State's national abroad, or rescuing aliens from widespread human right abuse or even a state pre- emptively acting against a grave but unforeseen threat.[131]

Nonetheless, we are looking at a decade where non state armed attacks is challenging international security structures, mass weapons of distractions and even the rapid accelerations and growth of non-state actor groups have posed a contemporary challenge to the practical application of *jus ad bellum.* The author of the Protean jus ad bellum, highlighted 'that observers of the largely those grounded on realism theories of international relations simply conclude that the *jus ad bellum* is a utopian notion that has no real relevance for contemporary inter- state behaviour'[132]

Yet we cannot deny the view that a cry for a transformation could better yet be an opportunity for states to abuse elements to the doctrine of self-defence. For example, The United States withdrew from Afghanistan after the death of Osama Bin Laden, leader of Al Qaeda. The United States did

[127] UN Doc. S/2004/951, 6 December 2004 (Rwanda).
[128] Lanovoy V. 'The Use of Force by Non State Actors and the Limits of Attribution of Conduct', 28 *The European Journal of International Law* 2, 2017, 571.
[129] '*Jus ad bellumI* refers to the conditions under which states may resort to war or to the use of armed force in general. The prohibition against the use of force amongst States and the exceptions to it, set out in the United Nations Charter of 1945, are the core ingredients of *jus ad bellum.*' https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0 on 28th November 2019.
[130] Murphy S, 'Protean jus ad bellum', 27 *Berkeley Journal of International law* 1, 2009, 22 – 24.
[131] Murphy S, 'Protean jus ad bellum', 22.
[132] Murphy S, 'Protean jus ad bellum', 22.

claim that their remediate attack was them exercising their right to self-defence, however the war that was, was against the Taliban in Afghanistan against Al Qaeda. Does that still amount to self-defence?[133] In addition, Israel considered an occupying power, they have the responsibility under International Law to protect the lives of the people that reside in the territory that it occupies[134]yet despite engaging in illegal extrajudicial killings, Israel still claimed that the attack was an act of self-defence as highlighted under article 51 of the UN Charter. Israel's attack on the Hezbollah was not only regarded as disproportionate by its opponents by the United Nations Secretary General Kofi Annan.[135] Or Kenya going ahead with its invasion despite the violation of the Arms Embargo rule in Somalia. It still raises the question are countries ready to transform the rigid interpretation of *jus ad bellum.*

3.4. Conclusion

The purpose of this chapter, was to draw out the new practice that states have adopted in exercising self-defensive force against non-state actors as highlighted by the operations aforementioned. By highlighting the operations above we see a dire need to adopt a law or expand the international laws or principles to accommodate 'State practice.' It is undisputed that with the rise of mass destruction weapons and non-state actors, transforming or adapting the laws on the use of force and self-defence seems viable, however we cannot deny the consequential results that seems to pose a greater threat. For example, elements such as proportionality has been disregarded and acts of remediation are been covered by 'Self Defence'. We could look at it as an abuse but could it be a consequence of the rigidity and lack of laws.

The paper posits that there is a transformation on the doctrine of self-defence. The abuse of it arises due to lack of legislation to support the transforming and consequentially transformed doctrine. The next chapter seeks to first show Self-defence as circumstance precluding wrongfulness and further show the response of the International Community in regard to the transformation of self-defence as a step to giving awareness to the impending predicament.

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[133] Williams R. 'Dangerous Precedent: America's Illegal War in Afghanistan', 567.
[134] Naftali B, Michaeli K. 'We must not take a scarecrow of the law: A legal analysis of the Israeli Policy of targeted killings' 36 *Cornell International Law Journal* 2003, 259-262.
[135] UNSC S/REP/8063 (2004) Security Council urged to condemn extrajudicial executions following Israel's assassination of Hamas Leader.

CHAPTER FOUR

A 'TRANSFOMERD' DOCTRINE OF SELF DEFENCE: ANALYSIS OF VIABLE LAWS AND PRINCIPLES IMPENDING ITS TRANSFORMATION

4. Introduction

Robert Ago, the International Law Commission's special Rapporteur, defined the notion 'self-defence in terms of a legal *faculte* of a state to use force in response to an act of another state.' (Meaning self-defence is available for interstates). He further expressed that 'self-defence as a specific factual circumstance precludes the wrongfulness of the use of force which constitutes an individual or a collective measure of resistance against state aggression.'[136] By deduction we could then state that self-defence precludes the wrongfulness of certain breaches in International Law such as territorial sovereignty. The paper explores the right of states to exercise self defence against non-state actors. However, one major contentious issues is that when an aggrieved state invades the host states territory it does violate their sovereignty. Ideally, consent,[137] or host involvement [138] has had to be a ground to achieve a legal justification for the invasion. But what if the host state does not consent neither has an involvement with the non-state actors. Can self-defence still be invoked?

This Chapter explores viable laws and reasons that accommodates the transforming doctrine of self-defence. As discussed throughout the paper, the paper tries to adopt a new lens in viewing the doctrine of self-defence. The chapter shall revisit some of the operations mentioned in the previous chapter and denounce abuse and show transformation. The Chapter, will first come up with grounds to eliminate the wrongfulness of self defence against non-state actors, further explore on grounds that would denounce the abuse perception that most States perceive as 'transformation.'

[136] Farhang C, 'Self Defense as a circumstances Precluding the Wrongfulness of the Use of Force,'11 *Utrecht Law Review* 2, 2015, 1.
[137] Arend a, Beck R, *'International Law and the Use of Force,'* Routledge Taylor and Francis Group, New York, 2013, 4.
[138] Paddeu F, 'Use of Force against non-state actors and circumstances precluding the wrongfulness of self-defense', 30 *Leiden Journal of International Law,* 2017. 94

4.1. Doctrine of consent: 'Intervention by invitation'

The Consent of host states in which non state actors occupy has ideally been advanced and justified for most state invasions. For example, the United States relied on consent when carrying out drone strikes in Somalia, Pakistan and Yemen in a bid to target the non-state actors occupying the host state.[139] However notably, the doctrine of consent is not codified in Law let alone International Law. A broad outline of the elements of consent as *Lex generalis* has been highlighted in Article 20 of the Draft Article of State Responsibility and the commentary accompanied by it from the Intentional Law Commission.[140] We could consider this provision as the *Lex specialis* of consent.[141]

Consent is a manifestation of the 'sovereign equality' of states a principle enshrined in the UN Charter.[142] In conjunction, consent is a product of an international system attempting to preserve the autonomy of states as evidenced in article 2(4) of the UN Charter. The provision specifically, emphasizes on the autonomy of states' internal practices, enabling the discussion of consent in regards to sovereignty. [143] Ideally, states have the authority to govern all the activity occurring within its borders and by conclusion then have the capacity to invite a state to use force within its jurisdiction. Consequently, this then validates the use of force and it does not infringe territorial sovereignty. This was incorporated in The International Law Association's Use of Force Committee in its draft report on aggression and the use of force. The commission distinguished consent from 'the excused violations' of sovereignty as 'consent involves no violation of state sovereignty *ab initio.*'[144]

As mentioned, the US drone strikes is part of example of the doctrine of consent in play. Operation Linda Nchi is another, where Somalia agreeing to work together with Kenya to eliminate the threat

[139] Byrne M. 'Consent and the use of force: an examination of 'intervention by invitation' as a basis for US drone strikes in Pakistan, Somalia and Yemen', 3 *Journal on the Use of Force and International Law* 1, 2016, 97.
[140] Article 20, ILC, *Articles on State Responsibility*, ILC 53rd Report, 2001, UN Doc A/56/10.
[141] Byrne M. 'Consent and the use of force: an examination of 'intervention by invitation' as a basis for US drone strikes in Pakistan, Somalia and Yemen', 98.
[142] Article 2(7), *The United Nations Charter*, 24 October 1945, 1 UNTS XVI.
[143] Byrne M. 'Consent and the use of force: an examination of 'intervention by invitation' as a basis for US drone strikes in Pakistan, Somalia and Yemen', 99.
[144] See the International Law Association Committee on the Use of Force, Report on Aggression and the Use of Force of 2014.

of Al shabaab in Somalia.[145] It would be easy to conclude that consent then can be used to legitimately justify the use of force against non-state actors? However there is a loophole.

A possible issue with regard to consent and the use of force is. The use of force is a peremptory norm. If we look at Article 26 of the Draft Articles,[146] it insinuates that the use of force would remain unlawful as consent cannot preclude the wrongfulness of any act of a state which is not in conformity with an obligation arising under a peremptory norm of international law.[147] Scholars have argued questioning the peremptory nature of the prohibition of the use of force. If indeed Article 2(4) was a *jus cogens* then we would not have the exception of self-defence.[148] We then are back questioning the legal justification of consent in self-defence. Can consent be fully relied on, can it be adopted as a legal normative framework that would accommodate the transforming self-defence doctrine.

The International Law Commission in their commentary stated that for consent to be valid consent requires that it,

> *..Must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error fraud, corruption or coercion.*[149]

At the minimum, consent ought to reflect the true, voluntary and clear intention of a state. The fact that we looking at force that invades the territory of another state it suggests that there ought to be a high threshold of consent.

The legal argument of consent has been used by all 11 States intervening in Iraq, by Egypt targeting the ISIL in Libya and by Iran and Russia invading Syria.[150] However, international legal erudition

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[145] *Letter dated 17 October 2011 from the Permanent Representative of Kenya to the United Nations addressed to the President of the Security Council,* (***Kenya, in direct consultations and liaison with the Transitional Federal Government in Mogadishu, has, after the latest direct attacks on Kenyan territory and the accompanying loss of life and kidnappings of Kenyans and foreign nationals by the Al-Shabaab terrorists, decided to undertake remedial and pre-emptive action***)

[146] Article 26, ILC, *Articles on State Responsibility*, ILC 53rd Report, 2001, UN Doc A/56/10.

[147] Emphasis on Article 2(4) and Article 51, *United Nation Charter.*

[148] Linderfalk U, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think about the Consequences? ' 18 *European Journal of International Law* 2007, 853, 860. Also, Green J, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' 32 *Michigan Journal of International Law* , 2011, 215

[149] Commentary, ILC, *Articles on State Responsibility*

[150] Christakis K. 'Military Interventions against ISIL in Iraq, Syria and Libya, and the Legal Basis of Consent', 29 *Leiden Journal of International Law* 1, 2016, 743.

is profoundly divided on the legality of intervention by invitation in a case of civil war in this case an attack targeting non state actors. Therefore can we still pinpoint consent as a lucid ground and principle that would justify the transformation of self-defence against non-state actors?

4.2. Attribution/ State Involvement.

State involvement or attribution has been one of the predominate grounds that most states would rely on in justifying their invocation in host states. Nonetheless, the grounds of attribution as codified by the International Commission in Articles on State Responsibility for Internationally Wrongful Acts have failed to capture different magnitudes on the use of force by non-state actors. Thus a great gap still exists in the regulation on the use of force by non-state actors and the consequences, if any, for the states that facilitate it.[151] There still is a difficulty in acknowledging the right of self-defence against non-state actors and ideally explaining why the host territory sovereignty should can be violated when an aggrieved State is acting in self-defence. Tom Ruys and Sten Verhooeven, portrays the dilemma as,

> *…On the one hand it cannot be accepted that states must simply undergo private attacks without having the right to defend themselves by using force against the home bases of these ground and their accomplices…On the other hand, state sovereignty is and remains one of the basic pillars of international law and order and should not lightly be violated…'*[152]

Legal justification are necessary to tolerate the violation of host states' rights even if its remediating an attack suffered.

a. Legislation.

Article 8 of the Articles on State Responsibility for Internationally Wrongful Acts states that;

[151] Lanovoy V. 'The Use of Force by Non State Actors and the Limits of Attribution of Conduct', 28 *The European Journal of International Law* 2, 2017, 563.
[152] Ruys T. Verhoeven S, 'Attacks by Private Actors and the Right of Self-Defense', (2005)10 *Journal of Conflict & Security Law* 289, 2005, 310.

> *'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.'*

As aforementioned, States shall be considered attributable to the acts of non-state actors if the state instructs them to do so. In addition not only will the state be attributable but responsible for the internationally wrongful action whether the instruction was by action or omission.[153] Secondly, the provision states that a State shall be considered attributable if it gives the direction or has control of the group, in this case the non-state actors. The case *Nicaragua v USA* adopted the same principle, stating that an 'armed attack shall be attribute to a state directly committing the armed attack or indirectly, by the sending of or on behalf of a state armed bands, groups or mercenaries when the state has effective control of it.'[154]

Article 11 of the same legislation stipulates that;

> *Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.*[155]

Adopted in the case *United States v Iran,*[156] the provision instigates that for a state to be attributable the conduct ought to be acknowledged by the state and the State adopting the conduct as its own.[157]

The ideology of consent and attribution may sound or could form part of a legislative framework to accommodate the transforming self-defence doctrine. Nonetheless, the two International Law principles fall short of fully accommodating the growing phenomenon of what is non state actors. Some of the questions still up for discussion is what happens to a Host state if they did not give consent, or the state was not attributable to the conduct of the non-states actors that occupy their territory? Notably no Host state is ready to have their sovereignty violated. Which takes us back

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[153] Article 2, ILC, *Articles on State Responsibility*
[154] *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* Merits, ICJ Reports, 1986, 384.
[155] Article 11, ILC, *Articles on State Responsibility*
[156] *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Order, ICJ Reports, 1981,74.
[157] Crawford and Olsson S, The Nature and Forms of International Responsibility in International Law, Oxford University Press, 2006, 457

to one function of self-defence that many States are yet to consider. Self-defence as a circumstance precluding the wrongfulness.

4.3. Self Defence as a circumstances precluding the wrongfulness.

Kimberly Trapp in her article 'The Use of Force against Terrorists' purported that Self-defence cannot function without the need to exclude the wrongfulness of the infringement of rights (in this case territorial sovereignty and right to non-interference) of the host state by the lawful measures of self-defence.[158] Self Defence must in some way excuse the violation of these rights of the host state if it is to be an effective mechanism. It is undisputed that article 2(4) does prohibit the use of force against the territorial integrity or political independence of any state. Thus using self-defensive force against a non-state actor that resides in a host territory would amount to an infringement of that host State's territorial Sovereignty even if the force expended targeted the non-state actor. Nonetheless, if article 51 is to be regarded as functional, as a true exception in International law, then it has to excuse the violation of host territorial sovereignty.[159]

a. Article 21 of the ILC's Articles on State Responsibility.

Article 21 of the Articles on State Responsibility states that;

> *'The wrongfulness of an act of a **State** is precluded if the acts constitutes a **lawful** measure of self-defence taken in conformity with the Charter of the United Nations.' [160]*

As pointed out in the International Law Commission commentary, Article 21 is ideally aimed at precluding the wrongfulness of the potential breach of other obligations by conduct lawfully taken in self-defence. It should therefore be noted that the provision does not necessarily concern itself with the effects of self-defence. Self-defence is an exceptional right and when rightfully invoked it would not constitute a breach of the obligation on the prohibition of force under article 2(4) of the UN Charter.[161]

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[158] Trapp K. 'The Use of Force against Terrorist: A Reply to Christian J. Tams' 20 *The European Journal of International Law* 4, 2010, 1053.
[159] Trapp K. 'The Use of Force against Terrorist: A Reply to Christian J.' 1049 -1050.
[160] ILC, *Articles on State Responsibility*, ILC 53rd Report, 2001, UN Doc A/56/10.
[161] ILC, *Articles on State Responsibility commentary* to Article 21.

The Commission highlights to functions of Self-defence in international law. First, as a primary rule self-defence is an exception to article 2(4) of the UN Charter. Secondly, as a secondary rule, self-defence is a justification for the breach of other legal commitments caused by the lawful defensive force. The first function has been addressed by the previous chapters, for purposes of this chapter, the paper shall delve into the second function.

i. Secondary Rule of Self Defence.

The primary and secondary rule primarily gives a theoretical explanation for the recurring phenomenon of self-defence in practice.[162] Ideally, it is widely known that self-defensive force does not include a violation of territorial sovereignty neither a breach of non-intervention when invoked. Moreover, it is also evident in decisions met by the International Court of Justice, that in the event the use of force falls short of upholding the requirements of self-defence, not only will that be a breach to the principle on prohibition of force but also a breach to territorial sovereignty and non-intervention. The assumption is that if self-defence is exercised in line with the set requirements then there is no way that there could be a breach of the principles, prohibition of force, territorial sovereignty or non-intervention. Nevertheless, if Self-defence is an exception to the prohibition on the use of force, how then can we explain the breach of the other principles?

The purpose of this section is to explore the functionality of self-defence in International Law in conjunction with the transforming doctrine of self-defence. As pointed out in the previous chapter, the law is changing but also abuse seems to be an argument that most scholars perceive other than transformation. For example, infringement of territorial sovereignty or other obligations such as in the Nicaragua case. Nonetheless this section proves to show as a secondary rule self-defence seeks to preclude the wrongfulness of other potential breaches that arise during the lawful dispensation of self-defence. From the previous chapters, self defence against non-state actors has proven to be a highly contentious issue, considering the lack of an irrefutable answer in regards to its legitimacy. However the paper has pointed out that nowhere has it been stated that self defence against non-state actors is illegitimate. If self-defence is dispensed lawfully as per the requirements set out from the *Caroline case* and ICJ Jurisprudence then who's to stop states from exercising the right, having considered that it precludes the wrongfulness of self-defence.

[162] Paddeu F. 'Self Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of the Articles on State Responsibility', 85 *British Yearbook of International Law* 1, 2015, 92.

4.4. State Responsibility; A commentary on the Hobbesian Theory.

As an International Principle a state has the duty to protect its citizens.[163] Thomas Hobbes proponent of the Social Contract Theory states that the only to preserve peace was for every individual to give up their natural rights to a sovereign body to ensure that peace is accorded to all therefore giving States the obligation and duty to protect its citizens. The Hobbesian Theory can be a justification of States using use force against non-state actors. It could suffice as the reason the US invaded the Taliban, the reason Kenya invaded Somalia and could be a possible justification of the UNSC adopting of resolution 2249.[164]

a. United Nations Security Council Resolution 2249.

The UNSCR 2249 adopted in November 2015,[165] was intended to open a new chapter in the fight against terrorism but also prompt a step of the international community accepting a need for a change on the rigid laws of *jus ad bellum*. The Resolution did receive its fair share of criticism, as it was perceived that the provision was a violation to the UN Charter, however, the said resolution has gained its status in Customary International Law, due to its wide acceptance.[166] It was regarded that Resolution 2249, was 'an equally unprecedented measure by the Security Council'.[167] The resolution was made in a manner that accepts, legitimizes measures in other words use of force against self-defence.[168] The way the resolution was structured one would perceive that the Security Council supports use of force against non-state actors. Nonetheless, the unanimity of how the resolution was adopted would infer the legitimacy of force against non-state actors in this case ISIS.[169]

In the operative clause paragraph 5 of the resolution the Council;

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[163] *SERAC v Nigeria* (1996) African Court of Human and People Rights,
[164] Hipold P. 'The fight against terrorism and SC Resolution 2249 (2015); towards a more Hobbesian or more Kantian International Society?' 55 *Indian Journal of International Law* 4, 2015, 535.
Also, UNSC S/RES/2249 (2015) Threats to International Peace and Security caused by terrorist Acts
[165] UNSC S/RES/2249 (2015)
[166] Hipold P. 'The fight against terrorism and SC Resolution 2249 (2015); towards a more Hobbesian or more Kantian International Society? 540.
[167] https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/ on 9th December 2019.
[168] https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/ on 9th December 2019.
[169] https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/ on 9th December 2019.

> *'Calls upon* Member States that have the capacity to do so to take all necessary measures, in compliance with International Law, in particular with the United Nations Charter... to redouble and coordinate their efforts to prevent and suppress terrorist acts……'[170]

The provision goes on and lists some of the present non state actors. Nonetheless what is in contention is the effect, the force of this operative clause. Chapter VII of the Charter states that the Security Council' power to maintain peace. It gives the SC authority to determine the existence of any threat to the peace, breach of the peace, or act of aggression and take military or non-military action to restore international peace and security.[171] If relying on this provision, then wouldn't UNSCR 2249, suffice. In spite so, the resolution did however not make reference to Chapter VII, to which many have questioned its legality.[172] However as sited by the ICJ in *Namibia Advisory Opinion*, a resolution that does not infer or make reference to Chapter VII does not mean that the resolution is not binding or does not have legal effect. As long as the resolution infers that the council must decide or authorize is enough to give the operative clauses legal effect.[173]

In another argument, the wording *calls upon* and 'take all measures necessary' has not escaped the legal lens. The word '*calls upon'* would show the SC lack of authorization of states using force but 'take all measures necessary' tells it all.[174] In addition, it refers to all measures taken should be in accordance to international laws, particularly the UN Charter. Meaning that states would not be taking up actions that are not in compliance with the United Nations Charter, specifically the laws of *jus ad bellum.* Should we not then conclude that unilateral force against non-state actors in indeed legitimate?

b. Other United Nations Security Council Resolutions

United Nations Security Council Resolution 1373 and 1378 of 2001,[175] are part of example of the Security Council not only not authorizing but addressing the right of states in using force against

[170] UNSC S/RES/2249 (2015), 5.
[171] Chapter VII, *The United Nations Charter*
[172] https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/ on 9th December 2019.
[173] *Advisory Opinion on the Legal Consequences for Stats of the Continued Presence of South Africa in Namibia*, ICJ, 1971, 19 – 41.
[174] https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/ on 9th December 2019.

[175] UNSC S/RES/1373 (2001) Creation of counter Terrorism committee
UNSC S/RES/1378 (2001) On the Situation in Afghanistan

non-state actors. The Resolution was adopted in 2001, after the 9/11 attacks, in which it reaffirmed the inherent right of individual and collective self-defence.[176] The resolution did not in fact authorize the United States and other states in participatory of the attacks in Afghanistan, however the attacks gained a 'Security Council legitimacy stamp on them.'

We could deduce that relying on Chapter VII, the Security Council has made sure that actions of non-state actors have been addressed, an actual practical example of the Hobbesian theory in play. Nonetheless, as per the resolutions sited and other such as UNSCR 2213 and 2214 all are a bid to legitimise and combat non state actor actions. Notably, the resolutions doe give reference to international law and specific the UN Charter, in that as States do take ' all necessary measures' or 'all measures' they take up an action that has been authorised and in line with the relevant laws.

4.5. Conclusion

This chapter sought to show a transformed perception of the rigid law of *jus ad bellum*, by first showing self-defence as a circumstance precluding the wrongfulness. The chapter highlighted consent and state involvement as a route of states expending their right. However, looking at self-defence from the lens of article 21 of the ARSW, then self defence against non-state actors not only is a right with reference to Article 51 but a legitimate action that denounces the abuse that most would perceive. UNSC Resolution 2249 of 2015, is a step towards a transformed doctrine of self-defence with much precedence set by the prior Resolution 1373 and 1378 of 2001. We can then look at self defence against non-state actors not only legitimate but an action in line with International *jus cogens* principles.

The final chapter proposes laws and legislation that could form a new law, guideline or normative framework to which states can adopt in a bid to combat actions by non-state actors.

[176] UNSC S/RES/1373 (2001)
UNSC S/RES/1378 (2001)

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

The research paper was set to conduct a study on the unilateral use of force against non-state actors. A topic of discussion that has flooded the International Community since its introduction and consequently the recognition of non-state actors in International relations. The paper delves into the Doctrine of self-defence as the focus study, examining the laws that correspond to it and analysing the proposed transforming if not already transformed doctrine of self-defence.

The paper sets out by exploring the laws on the use of force and self-defence. The laws on *jus ad bellum.* International Law prohibits the use of force as per Article 2(4) of the UN Charter and the same law provides an exception to the already *jus cogens* principle, Self-defence as highlighted in Article 51 of the same Charter.[177] In a bid to analyse the laws of self-defence, the paper embarked on a premise of the Hobbesian Theory, giving reason to why a state would use force in a bid to remediate an attack or prempt an attack. The theory stipulates that states have a duty owed to its citizens. A state remediating an attack would only be that state acting in the best interest of its citizens. Nonetheless, the paper recognises that as a state invokes its self-defensive right, there is the need to ensure that it is done in line with principles of International law, which consequentially imposes a corresponding duty to a state.

A great gap exists in the regulation of use of force by non-state actors but above all, a vast controversy on whether the provisions of Article 51 or better yet Customary International Law is applicable to States invoking self-defense against non-state actors. As highlighted throughout the paper, the said exception has been predominantly acknowledged as an interstate right, thus questioning the legitimacy of States claiming to have exercised their self-defensive right against a non-state actor occupying a host state.

To answer the topic of discussion, the paper set to examine and map a legal terrain of self defence in International Law. As depicted by the paper, The right to self-defense is in itself is inherent, however, it is limited to the conditions of necessity, proportionality and immediacy as deduced

[177] Article 2(4) and Article 51, *United Nations Charter.*

from the *Caroline case* which gives authority to Self Defence in international law. The paper was guided by the following questions;

1. Whether the inherent right to self-defence is applicable against non-state actors?
2. Whether the new practice, 'State practice', to which states have had to invoke their self-defensive right in a bid to combat non state actors is indeed legitimate? And whether the law of self-defence is indeed changing.

An analysis of the history of self-defence was necessary to understand where the exception to the peremptory norm, prohibition of force originated from. The development of self-defence from the 18th century that was the 'just wars doctrine' to the adoption of it in the United Nations Charter not only proved that peace and tranquillity was the agenda but also preservation of territorial sovereignty was key point of achievement, a principle which has been discussed extensively throughout the paper.

In exploring the laws of self-defence, the paper found that there was a need to understand that, First self-defence was an already exception to the laws on prohibition of force so as to acquit arguments by Host states claiming that the remediate attacks are not accorded by law.

Secondly, understand what amounts to the lawful dispensation of self-defence. As discussed in the paper there are set stringent preconditions to be followed to legitimize the invocation self-defence. An armed attack as highlighted in Article 51 ought to be present. From case law, an aggrieved state could only invoke self-defence if it was necessary, and if the force used shall be proportionate and there was an urgency. Further the paper embarked on analysis of Article 51, examining the terms 'armed attack' and 'authorship of armed attacks'. The two terms have had its fair share debate as depicted in the paper where case law has attempted to define it. The paper acknowledges that first the UN Charter does not define the two neither are there laws or statutes, that define it. However notably it the terms neither express that an armed attack and authors of an armed attack associated with non-state actors would prevent a State from invoking their self-defensive right. In spite so, the paper however suggests that a clear definition of the two would not only promote clarity but also should include attacks by non-state actors.

Thirdly, is examining whether the inherent right to self-defence which was conducted lawfully, applies to non-state actors. The debate here has been contentious considering host states have

argued that their territorial sovereignty has been infringed. In that regard, states have had to rely on state involvement with the non-state actors or even consent from the host state in order to lawfully invoke the right.

After having mapping a legal terrain the paper embarked on analysing and examining the new phenomenon State practice. With Operation Linda Nchi being the main study, the paper finds a new trend of the practicability of self-defence many call 'State Practice'. In a bid to critique and analyse the new phenomenon there was a need to unfold some of the operations that invoked 'State Practice.' The paper finds that state practice arose due to the rigidity of the laws of *jus ad bellum,* furthermore the said practice arose because there was no law to guide states and yet aggrieved states had to act in self-defence after having suffered an armed attack. Invoking their right to self-defence seemed not only viable but it was an inherent right only difference was that the self-defensive force was targeted to the non-state actors. The paper acknowledges that the legitimacy of State practice has been contentious. Some with the view that it is an abuse to the doctrine as violation of territorial sovereignty of the Host state is at issue while others presume it's a commencement to the transformation of the doctrine. The paper holds that self-defence is not being abused rather the law is transforming.

The paper prompts there is a dire need to relook self-defence from a different lens. To look at Self-defence as a circumstance precluding wrongfulness. States have had to rely on consent or even state involvement for the right against non-state actors to seem legitimate and to avoid infringement of territorial integrity. However, viewing self-defence as a circumstance precluding wrongfulness not only allows for it to be effective but also it denounces all collateral (potential breaches) when invoked. Drawing back to the Hobbesian theory, states should be allowed the right to protect its citizens it is their duty, despite the circumstance. The paper is of the view that if this lens is adopted then we can justify UNSCR 2249, 1373 and 1378. Most importantly the said resolution can be adopted as a framework for the conceptualizing of a normative law.

Below are 2 recommendations that the paper proposes in answering the legitimacy of self-defence against non-state actors.

a. The need to regard Self-defence as a circumstance precluding wrongfulness even when invoked against non-state actors.

We can argue that the prevalent debates on the use of force against non-state actors could be due to the lack of a proper legislation in place to guide the emerging phenomenon of terrorism and counterterrorism, thus many would consider that actions against non-state actors remain unjustified. As discussed in the paper, The UN Charter does not explicitly state that use of force against non-state actors is illegitimate neither does it authorize it. Predominately, what is up for debate is the sovereignty that most Host states would claim violated and state practice being an abuse to self-defence. Lastly, State practice having no legal justification.

Drawing back to Article 21 of the ARS, Self-defence in essence excuses the violation of territorial sovereignty or even right to non-interference. Article 21 acts as an echo to the already existing secondary function of self-defence. Most actions by non-state actors have no attribution to the Host state or consent may sometimes not be gotten especially where the host state has no defined nor a recognized government. The paper is of the position that, if self-defence is invoked lawfully, then violation of territorial sovereignty or other collateral breaches is excused. If we adopt this lens then we can then conclude that self-defence against non-state actors can gain its legitimacy if invoked lawfully.

The incidental function, in other words secondary function of self-defence, has not been fully articulated by most states as its view has not gained its popularity by States. Host having had their sovereignty infringed would want the invoking state to be answerable. It is for this reason that rarely would it be articulated in state pleadings. Nonetheless, the secondary function of self-defence is necessary to be adopted as it is an international legal order.

The paper suggests that adopting a legal framework on the use of self-defensive force against non-state actors could be the answer to the lack of clarity but acknowledging Article 21 poses a greater and ideal lens in viewing the legitimacy of use of force against non-state actors.

b. The need to acknowledge the transforming if not transformed Doctrine of Self-Defence and conceptualised legal normative framework.

In contention is whether State practice is indeed an abuse or transformation. We could look at Operation Linda Nchi as an abuse or Operation Change Direction' Israeli Operations in Lebanon as a model example of what abusing the doctrine of self-defence is, however, as the paper finds

the debate could be a cry, a retaliation to the lack of laws, lack of clarity and rigidity of *jus ad bellum.* Nonetheless, the paper has shown that abuse does not necessarily explain 'State Practice' rather transforming would be an ideal justification. For example, in Operation Linda Nchi, Kenya invoked their right to self-defence in line with the pre-conditions of self-defence, Kenya went further to even acquiring consent from Somalia and further informed the United Nations Security Council. Only difference of the operation and the model invocation of self-defence is, Kenya was targeting a non-state group. If a right is invoked in line with the said precepts of international law does it still amount to an abuse? As aforementioned in the paper the abuse rationale is a consequence to the lack of set laws.

The law of self-defence has transformed and it is evidenced from the adoption of United Nations Security Council Resolution 2249, 1373 and 1378. The resolutions mentioned have received its fair share of criticism, nonetheless it is a step to achieving a new framework that would legislate the use of force against non-state actors. The analogy ' all necessary measures' and 'all measures' not only gives states the liberty to impend and combat a threat or an armed attack but the following words ' in line with International law and principles' in the resolutions keeps the acts of States using 'measures' within the scope of principles and guidelines of international law. That means self-defence shall be invoked if there is an armed attack, it is necessary and proportionate and immediate. Adopting Resolution 2249, 1373 and 1378 would be a conceptualization of a normative framework for the Use of force against non-state actors.

The paper highlights that, it would seem viable that the doctrine of self-defence under Article 51 be rewritten so as to accommodate all the transformation and developments of warfare. But the world is transforming and not only will non state actors group enlarge but mass weapons of destruction advance. This paper recommends that a separate law be adopted to address the emerging issue of non-state actors in the international community. The framework should include a definition or an armed attack, who can be the author of an armed attack. Furthermore, adopt Self-defence as a circumstance precluding wrongfulness and lastly adopt United Nations Security Council Resolution 2249, where states have been given the liberty to use 'all means necessary' to combat non state actors. The wording of the Resolution was careful not to authorise use of force, however it does give states different avenues in combating non state actors, whether through use of force or not.

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