

**An Analysis of the Legitimacy of Self Defence against Non-State Actors in International  
Law**

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By  
Ngolo Emily Sharon Wakesho  
077751

Prepared under the supervision of  
Ms Linet Njeri

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## Declaration

I, NGOLO EMILY SHARON WAKESHO, 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 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:.....

Linet Njeri

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## ABSTRACT

*In recent years, there has been a proliferation of non-state actors that have proven to be a credible threat to the survival of states and mankind. These non-state actors are strong not only in number and ammunition but also economically. In the event a sovereign state is attacked or threatened to be attacked, it is within its rights to defend itself and its people. Historically, the right of self-defence in international law could only be invoked as between states. The question as to whether the inherent right of self-defence arises in the case where the attacker is not a state under international law, has been seen to creep into numerous legal discussions recently, as a result of the emergence of these dangerous non-state actors all over the world, and subsequently, retaliatory actions by states in the façade of self-defence. This paper intends to analyse the provisions of international law to determine what the future holds, if at all the international community is to curb the threat posed by these non-state actors while still upholding the spirit and purpose of the United Nations Charter, by preventing the unilateral recourse to use of force by states. The paper finds that, self-defence against non-state actors should be permitted for states but with various limits in the law. The right should have stringent limits.*

## LIST OF ABBREVIATIONS

1. AMISOM - African Union Mission to Somalia
2. AU – African Union
3. ICU – Islamic Courts Union
4. NSA – Non-State Actor
5. UN – United Nations
6. UNGA – United Nations General Assembly
7. UNSC – United Nations Security Council
8. TFG – Transitional Federal Government

## LIST OF CASES

1. *Military and Paramilitary activities in and against Nicaragua, (Nicaragua v United States)*, Merits, Judgement, ICJ Reports, 1986.
2. *Case Concerning Armed Activities on the Territory of The Congo (Democratic Republic of the Congo V. Uganda)* ICJ Reports, 2005.
3. *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory (Palestine v Israel)*, Advisory Opinion, 2004.
4. *Factory at Chorzów, Jurisdiction*, PCIJ Judgment No. 8, 1927.
5. *Corfu Channel, Merits*, Judgment, I.C.J. Reports 1949.
6. *Reparation for Injuries Suffered in the Service of the UN, Advisory Opinion*, ICJ Reports 1949.
7. *Case Concerning Armed Activities on the Territory of The Congo (Democratic Republic of the Congo V. Uganda)* ICJ Reports, 2005.
8. *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory (Palestine v Israel)*, Advisory Opinion, 2004.
9. *Factory at Chorzów, Jurisdiction*, PCIJ Judgment No. 8, 1927.
10. *Corfu Channel, Merits*, Judgment, I.C.J. Reports 1949.
11. *Reparation for Injuries Suffered in the Service of the UN, Advisory Opinion*, ICJ Reports 1949.

## CHAPTER 1

### RESEARCH PROPOSAL

#### INTRODUCTION AND BACKGROUND

The general obligation not to use force in international law is *jus cogens* in character.<sup>1</sup> Article 2(4) of the UN Charter prohibits the threat or use of force among member states.<sup>2</sup> There however exists Charter exceptions to the general rule found in Article 51.<sup>3</sup> The interpretation of the UN Charter as regards the Charter exception is however not clear and is a point of contention in the international community. Some scholars take the *restrictive view*, while others take the *permissive view* of the issue.<sup>4</sup>

There has been a recent proliferation of non-state actors launching attacks against the territories of sovereign states. These NSAs in the world today are strong in ammunition, in number and economically, just like states and therefore have the power to launch attacks that may very well be described as threatening to mankind. States, having been governed by the legal parameters of international law as regards the use of force are considerably different from NSAs such as terrorists<sup>5</sup>, and expecting states to deal with the latter, in the event they attack or show probability of attacking, the same way as the former is unrealistic.<sup>6</sup> It is further known that no government can be held responsible for the conduct of rebellious groups, committed in violation of its authority<sup>7</sup>, where it is itself not guilty of breach of good faith or of negligence in suppressing insurrection, when the structures and organizations of the movement are and remain independent of the state.<sup>8</sup> Self-defence against NSAs

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<sup>1</sup> *Military and Paramilitary activities in and against Nicaragua, (Nicaragua v United States)*, Merits, Judgement, ICJ Reports, 1986, 14.

<sup>2</sup> Article 2(4), Charter of the UN, 1945.

<sup>3</sup> Nothing in the Charter shall impair the inherent right of individual or collective self-defence if armed attack occurs against a member of the UN'.

<sup>4</sup> The *restrictive view*, is that the UN Charter gives a total ban on the use of force, and when self-defence is permitted, it is only within the limits of article 51. The second view, is the *permissive* one, where proponents of this school of thought expand the limits of use of force, having the opinion that there are many more circumstances where force may be used other than just when a state has suffered an actual attack from another.

<sup>5</sup> In the world of today, NSAs are clandestine, astute and sharp witted. The credibility of any law is its ability to evolve and deal with the current issues that face the international community.

<sup>6</sup> Dupuy, P-M, and Kerbrat Y, *Droit International Public*, 10th Ed, Paris: Dalloz, 2010.

<sup>7</sup> Brownlie I, *International Law and the Use of Force by States*, Oxford University Press, 1963.

<sup>8</sup> Brownlie I, *International Law and the Use of Force by States*, 1963.

emanating from the territory of a sovereign state is a tough legal question and in analysing its legitimacy, a number of issues need to be determined.<sup>9</sup>

Kenya launched an offensive operation<sup>10</sup> against Al Shabaab on October 2015, dubbed Operation Linda Nchi.<sup>11</sup> There was a joint communique sent to the UNSC, by Kenya and the Transitional Government of Somalia detailing the reasons and justifications for the invasion.<sup>12</sup> The reasons the communique presented was among others that there have been unprecedented escalation of threats to the country's national security, through the violent incessant infringement of Kenya's territory and Kenya therefore, had to invoke its responsibility to protect itself from these threats.<sup>13</sup>

This research, will set out to analyse the legal parameters surrounding state's rights of self-defence against a threat by a NSA, specifically whether, it is legal to invade the sovereignty of other states, where the actions of a NSA cannot really be attributed to it. Where then, is the line drawn between legal pre-emption and unlawful aggression? An in depth analysis of Kenya's incursion into Somalia in 2011 will be conducted against the backdrop of these. With deference to the history and importance of UN Charter in this body of law, an attempt is made to show that the interpretation of the law ought to be laid out in clarity, to avoid the threat of the proliferation of unilateral use of unlawful force.

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<sup>9</sup> Where the state was complicit or actively supporting NSAs, or where it failed to exercise due diligence to prevent the NSA, or where they may have exercised due diligence but it was nonetheless unable or is unwilling to prevent the attack or further attacks.

<sup>10</sup> The Kenyan government has characterized the invasion as one of self-defence, invoking Article 51 of the UN Charter.

<sup>11</sup> <<http://www.criticalthreats.org/somalia/operation-linda-nchi>> on 29th January 2016.

<sup>12</sup> UNSC, S/2011/646 (2011), Republic of Kenya, Letter dated 17 October 2011 from the permanent representative of Kenya to the UN addressed to the president of the UNSC, 1.

<sup>13</sup> UNSC, S/2011/646 (2011), 2.

## STATEMENT OF THE PROBLEM

The Charter exception in Article 51 of the UN Charter presumes, but does not adequately state whether the right to self-defence only arises when a state suffers attack from another state.<sup>14</sup> The realities of the world order that attacks emanate from NSAs such as terrorist organizations, pose considerable difficulty in the law. The fact that some states have justified their retaliatory attacks<sup>15</sup>, using the loopholes Article 51 of the charter, necessitates a review of the interpretation of the law, in order to prevent the very real threat of unilateral force being used in the world over in the name of self-defence.

## JUSTIFICATION OF STUDY

The proliferation of sharp, strong-in-number and support, dangerous armed groups from states in conflict which cannot adequately stop these armed groups, justifies a review of the interpretation of the law. There is needed consensus, if at all there is to be a balance between the protections of future generations from the scourge of war, *Vis-à-vis* the immediate destruction of these armed groups.<sup>16</sup> The law needs to be progressive and tailor made to the realities of the new world order, and this research intends in the end, to provide an adequate solution and recommendation to the problem.

## STATEMENT OF OBJECTIVES

### General Objective

The general objective of this research is to sufficiently discuss the legitimacy in the law of use of force in self-defence against NSAs.

### Specific Objectives

1. To tailor the discussion to analysing the issue of self-defence, in response to armed attack from NSAs and what legal implications that has on states.

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<sup>14</sup> Franck T, *Recourse to Force: State Action against Threats and Armed Attacks*. Cambridge, UK: Cambridge University Press, 2002.

<sup>15</sup> These states are such as the United States against Afghanistan, Israel against Hezbollah, Colombia against the FARC and Turkey against the PKK.

<sup>16</sup> Franck T, *Recourse to Force: State Action against Threats and Armed Attacks*, 2002.

2. To analyse the legal parameters that surround state responsibility for NSAs in a bid to determine the legality of a state invading the sovereignty of another while claiming self-defence.
3. To carry out a study of the Kenyan invasion of Somalia in attack against the Al-Shabaab as well as brief discussions of other cases of the same as well in the world in a bid to determine the legitimacy of self-defence of this manner.

## RESEARCH QUESTIONS

1. Is it legally justifiable, for a state to claim self-defence against NSAs in the territory of another sovereign state?
2. What are the legal parameters surrounding the attribution of state responsibility for NSAs within a state's territory?

## HYPOTHESIS

Self-defence by a state against attacks by NSAs emanating from the territory of sovereign states is permitted in International Law. The right of self-defence as stipulated by Article 51 envisages not only self-defence against states but also against NSAs as well as against not only the use of force, but also the threat of use of force.

## METHODOLOGY

The methodology adopted in this paper will be desktop research through the use of library sources, internet sources, international law instruments, international resolutions, books, journal articles, judicial and arbitral jurisprudence and analysis of scholarly writings on the circumstances states may claim resort to use self-defence and the legality of this. A study of the Kenyan invasion in Somalia in 2011 will be carried out as well, through desk research.

## THEORETICAL FRAMEWORK

This research paper will primarily take the legal realist theory of law while also minimally focusing on the positivist theory of law in some aspects.

The legal realist approach, posited by *Oliver Wendell Holmes*<sup>17</sup> says that the law ultimately, is not an abstract of rules but derives force from the prevailing social interests. Justice Holmes posited that the life of the law was not logic, but rather, experience.<sup>18</sup> This theory states that most times, judges, influenced by other societal influences, make the law what it is and that the driving force of law comes from actual practice and not from abstract rules.<sup>19</sup> Because of this, the legal realist school also posits that law ought to be guided by considerations of the effects it has on social welfare of the people it guides.

This research will use the legal realist theory to argue that international law should be tailored to the ultimate good of society, considering the emerging threats by NSAs. The law should work progressively, and judges of the international courts as well as the international institutions such as the Security Council should influence the interpretation of the law in a way that ensures the societal welfare of states is catered for.

The study will demonstrate the real time situations in the world, and the realist approach to the law will help give a deeper understanding of the function of the law in this case, taking cognizance of the realities that the world faces. This paper largely recommends tailoring the law to be progressive and address the realities that face states today, as the legal realist approach proposes, in that the law should be tied to the real world outcomes.<sup>20</sup>

This paper also takes the positivist approach as posited by *Hans Kelsen*, in the *pure theory of law*<sup>21</sup>, describing the law as binding norms, by examining the UN Charter, case law as well as legal writings to determine the exact legal parameters of the law of the use of force. The positivist approach will enable a conclusive look into the proper procedure and limits in the resort to force by states which will aid in the analysis of the issue.

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<sup>17</sup> Holmes, Oliver Wendell, Jr, *The Common Law*. Holmes, Little, Brown, 1963.

<sup>18</sup> Holmes, Oliver Wendell, Jr, *The Common Law*, 1963.

<sup>19</sup> <[https://www.law.cornell.edu/wex/legal\\_realism](https://www.law.cornell.edu/wex/legal_realism)> on 20th February 2016.

<sup>20</sup> <[https://www.law.cornell.edu/wex/legal\\_realism](https://www.law.cornell.edu/wex/legal_realism)> on 20th February 2016.

<sup>21</sup> Kelsen H, '*The Pure theory of law*', Berkeley University of California Press, 2<sup>nd</sup> ed, 2002.

## LITERATURE REVIEW

There exists a wealth of scholarship on the issue of use of force in international law. There is no dispute that use of force is strictly forbidden in the international community as is stipulated by the UN Charter. Notable however, is that there exists a very wide variety of interpretation of the law as regards the restrictive and expansive views of the law on the use of force and its exceptions thereof. The main international instrument on the use of force is the UN Charter. The ICJ decisions as well as General Assembly and Security Council resolutions form a broad part of the literature on the issue.

### On Use of Force and Self-Defence

**Charter of the UN.**<sup>22</sup> The UN Charter under Article 2(4) prohibits the resort to force, with only two exceptions: The UNSC authorization of force and the right of self-defence is found in Article 51. Article 51 refers to an “inherent” right of self-defence but also notes that self-defence arises only if an armed attack occurs.

The **World Summit Outcome**<sup>23</sup> which reviewed the UN Charter and the operation of the organization, agreed to reconfirm the Charter rules as written. On self-defence, the document states in paragraph 78, “We reiterate the importance of addressing international challenges and problems by strictly abiding by the Charter and the principles of international law.”

**Ian Brownlie** in his book, ‘*International Law and the Use of Force by States*’,<sup>24</sup> strongly rejects the expansive approach to use of force. The book explains use of force, the limits of the use of force in the charter as well as in customary international law.

**Christine Gray** in ‘*International law and the use of force*’<sup>25</sup> relies on actual evidence of state practice and *opinio juris* to show that the trials that states have to have a relaxed interpretation of the Charter have failed. Gray finds significant evidence that most governments favour strict interpretation of the UN Charter rules on the use of force.

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<sup>22</sup> Charter of the UN, 1945.

<sup>23</sup> UN Doc. A/60/L.1. (2005) UN GAOR, World Summit Outcome.

<sup>24</sup> Brownlie, I, *International Law and the Use of Force by States*, 1963.

<sup>25</sup> Gray, C, *International Law and the Use of Force*, 3d ed, Oxford, Oxford University Press, 2008.

**Christine Gray** <sup>26</sup>discusses the rise in use of force cases, including cases concerning the right of self-defence, before the ICJ. She contends that the decisions indicate ICJ deference to the Security Council, which is still in support of the restrictive view.

**Arend, Antony Clark and Robert Beck** in their paper '*International law and the use of force*' write on the permissive and expansive view of the law. They contend that state practice shows clearly the uncertainties of the limits of jus ad bellum. They aver that there is no clear prohibition on self-defence to counter terrorist attacks.

**Franck Thomas** in the '*Recourse to Force: State Action against threats and armed attacks*'<sup>27</sup>, argues that custom has evolved and that there tends to be an acceptance of the legality of many actions in international law in the name of self-defence and sometimes humanitarian intervention. He supports the expansive view.

**Dupuy Pierre and Yann Kerbat**<sup>28</sup>review the UN Charter rules and apply them to the contemporary problems of terrorism and non-state-actor uses of force. As a solution, emphasis is put on the collective decision making as with the UNSC rather than individual resort to use of force.

**Greenwood C** in '*International Law and the Pre-emptive use of force: Afghanistan, Al Qaeda and Iraq*'<sup>29</sup> suggests that in the legal framework on the use of force, there are certain instances where self defence against threats by terrorists is justified, provided the set conditions are justified. The paper focuses on the threat from international terrorism in the situation in Iraq.

## On State Responsibility

The **International Law Commission's Articles on Responsibility of states for internationally wrongful acts**,<sup>30</sup> consolidates the law on state responsibility. These rules form the accepted international law standards.

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<sup>26</sup> Gray C, 'The Use and Abuse of the ICJ: Cases concerning the Use of Force after Nicaragua', *European Journal of International Law*, 867–905, 2003.

<sup>27</sup> Franck T, *Recourse to Force: State Action against Threats and Armed Attacks*. Cambridge, Cambridge University Press, 2002.

<sup>28</sup> Dupuy, P-M, and Kerbrat Y, *Droit International Public*, 2010.

<sup>29</sup> Greenwood C, 'International law and the pre-emptive use of force: Afghanistan, Al Qaeda and Iraq' *San Diego International Journal*, 7, 2003.

<sup>30</sup> UN Doc. A/56/10, International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts. Report of the ILC on the Work of Its 53rd Session, 2001.

**Ian Brownlie's** book, *'International Law and the Use of Force by States'*<sup>31</sup>, is the most authoritative book on state responsibility. The book properly analyses the law on state responsibility, analysing instances that responsibility can be attributed to a state.

**Tom Ruys and Sten Verhoeven's** *Attacks by Private Actors and the Right of Self-Defence*,<sup>32</sup> succinctly takes into account the rules on state responsibility, and in analysing them comes up with the position that looking at state responsibility in the extreme fashion is not desirable, and that ultimately it is the substantial involvement test that should be taken when considering whether any action may be attributed to the state.

## LIMITATIONS OF STUDY

In regards to the study on Operation Linda Nchi, the paper is limited to desktop research, as it is not possible to carry out field research and interview the key stakeholders, such as government officials, and officials in the Kenyan Army.

Documents that led up to the decision of Kenya's invasion in Somalia are part of confidential government information. This is a limitation because of the fact that the research cannot gain these documents to establish the exact factual circumstances that led to the invasion.

## CHAPTER BREAKDOWN

Chapter 1:

Introduction and Background of the study.

Chapter 2:

Operation Linda Nchi – Kenya.

Chapter 3:

General Law on the Use of Force and Self Defence.

Chapter 4:

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<sup>31</sup> Brownlie, I, *International Law and the Use of Force by States*, 1963.

<sup>32</sup> Ruys T and Verhoeven S, *Attacks By Private Actors and the Right of Self-Defence*, *Oxford Journal of Conflict and Security Law*, Volume 10, Issue 3, 2005.

State Responsibility and Attribution.

Chapter 5:

Conclusions and Recommendations.

## CHAPTER 2

### OPERATION LINDA NCHI – KENYA’S INCURSION INTO SOMALIA 2011.

#### INTRODUCTION

Self defence against NSAs poses a great challenge to states in the world today. This chapter will focus on the background of the Kenyan incursion in Somalia in 2011, the Al Shabaab, the reasons and justifications by the Kenyan state, whether the Somali state is responsible for the attacks by the Al Shabaab and the legal procedure in general followed by Kenya. The paper shall outline this real life case to prove further the hypothesis that in the current world order, there exists an issue in international law, in terms of the legal parameters in the use of force, self-defence and state responsibility as regards terrorist attacks by NSAs emanating from the territory of a state.

#### AL SHABAAB

Al Shabaab, is an Islamic militant group,–with roots in Somalia. Al Shabaab, also known as *Harakat al-Shabaab al-Mujahideen* means ‘youth movement’ or ‘movement of striving youth’. The militant group, is said to have been formed in 2004, as the militant wing of the Islamic Courts Union (ICU), which was the larger network of Islamic militant tribes that controlled Southern and Central Somalia.<sup>33</sup>

The ICU was a group of Sharia courts that had united in Somalia for the purposes of forming a rival administration to the TFG (TFG) of Somalia.<sup>34</sup> The ICU for a very long time, up until 2006 had controlled most of Southern Somalia, and only the Northern regions were not under their control.<sup>35</sup> After a few battles in 2006 in some major towns in Somalia, the ICU lost much of their territory, and moved towards the town of Kismayo, but later abandoned it, early 2007.

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<sup>33</sup> <[https://www.nctc.gov/site/groups/al\\_shabaab.html](https://www.nctc.gov/site/groups/al_shabaab.html)> on 3<sup>rd</sup> December 2016.

<sup>34</sup> <<http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/61>> on 10th December 2016.

<sup>35</sup> <<http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/61>> on 10th December 2016.

Al Shabaab waged an insurgency against Somalia's transitional government, in 2007, and since then the fighting between Al Shabaab and the Somali government has erupted.<sup>36</sup> Since then, the group has described itself as waging war against Somali's TFG and the AU Mission to Somalia (AMISOM) that was formed by the African Union's Peace and Security Council, and approved by the UNSC in 2007.<sup>37</sup> In the year 2012, Al Shabaab claimed allegiance to Al Qaeda.

AMISOM is a peacekeeping mission operated by the AU which was created to replace the IGAD Peace Support Mission to Somalia, which was proposed for peacekeeping in Somalia during the last phases of the civil war.<sup>38</sup> AMISOM was authorised by the Security Council in the year 2007, with a limited mandate of six months which was later renewed. The main aim of AMISOM was to support national reconciliation, and to take all measures as it deemed fit for the maintenance of peace and security through ensuring the Al Shabaab is curbed through offensive operations against the group.<sup>39</sup> This clearly shows why the Al Shabaab has continued and will continue to fight the mission.

## THE AL SHABAAB AND KENYA

Reference is had to Al Shabaab in this context as an example of States' struggles against NSAs *acting* from the territory of another State but not under its direct control. Al Shabaab is a military group with its roots in Somalia and as will be shown in this part, Kenya launched an offensive against the militant group in 2011. There are many factors in international law that come about, in particular as regards the legitimacy of the fight against this militant group that resides in the territory of Somalia.

In 2011, Kenya launched an offensive against the militant group Al Shabaab in Somalia, dubbed 'Operation Linda Nchi'. Operation Linda Nchi, which means 'Operation Protect the Nation' will be a big part of the discussions in this paper. The context which Kenya launched the offensive against Somalia was the attacks that were carried out in Kenya, which were believed to be by the Al Shabaab.<sup>40</sup> There was a chain of kidnappings that triggered this. A British man and his wife were kidnapped from a resort in Lamu and killed, a French woman was kidnapped from her home in October, and in another incident, two Spanish aid workers

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<sup>36</sup> <<http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/61>> on 10<sup>th</sup> December 2016.

<sup>37</sup> <<http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/61>> Accessed 10<sup>th</sup> December 2016.

<sup>38</sup> <<http://amisom-au.org/amisom-mandate/>> on 2<sup>nd</sup> January 2017.

<sup>39</sup> <<http://amisom-au.org/amisom-mandate/>> on 2<sup>nd</sup> January 2017.

<sup>40</sup> See more at <<http://www.criticalthreats.org/somalia/operation-linda-nchi>> on 20<sup>th</sup> June 2016.

were kidnapped from Daadab Refugee camp.<sup>41</sup> The terrorist group claimed responsibility for these attacks.<sup>42</sup>

The kidnappings, formed the basis of Kenya's invasion in Somalia, on the grounds of self-defence.<sup>43</sup> The full text on the grounds of Kenya's incursion is found in the joint letter to the UNSC by Kenya and Somalia dated October 17<sup>th</sup><sup>44</sup>, in which among other issues, the Kenyan government cited the attacks on Kenyans and foreigners by the Al Shabaab as a threat to the security of the nation and a reason for remedial and pre-emptive action to be taken to preserve the integrity of Kenya, and secure peace and security.<sup>45</sup> In this, Kenya invoked Article 51 of the UN Charter, which as mentioned in Chapter 1, enforces the inherent right of individual and collective self-defence if an armed attack occurs against a member of the UN, until the Security Council has taken the measures necessary to maintain peace.<sup>46</sup> This however notably violated the UNSC Arms Embargo that was imposed on Somalia in 1992.<sup>47</sup> This arms embargo stated that there was a general and complete embargo on all delivery of weapons and military equipment to Somalia as well as called on all states to refrain from all action which might contribute to increasing tension in Somalia.<sup>48</sup> Kenya, in choosing to invade Somalia in pursuit of Al Shabaab, was violating the requirement that all countries should have refrained from all actions that could contribute to increasing tensions in Somalia.

## REASONS FOR KENYAN INCURSION IN SOMALIA

The reasons for the invasion are found in the joint letter by Somalia and Kenya to the UNSC. Kenya, was in direct consultations with the TFG of Somalia and noted the violent and incessant infringement of Kenya's territorial integrity by the Al Shabaab and agreed that a pre-emptive invasion to secure the security and peace of both countries was necessary. The two countries agreed that they would continue working together in a common political and security strategy to stabilize Somalia and get rid of the threats of the Al Shabaab militants,

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<sup>41</sup> < <http://www.criticalthreats.org/somalia/operation-linda-nchi> > on 20th June 2016.

<sup>42</sup> < <http://www.criticalthreats.org/somalia/operation-linda-nchi> > on 20th June 2016.

<sup>43</sup> Kenya: Operation Linda Nchi - Kenya's Endless War, Daily Nation, 16<sup>th</sup> October 2015. <<http://allafrica.com/stories/201510170130.html>> on 22nd June 2016.

<sup>44</sup> Article 51, *Charter of the UN*, 1945.

<sup>45</sup> UNSC, S/2011/646 (2011), 2.

<sup>46</sup> Article 51, *Charter of the UN*, 1945.

<sup>47</sup> UNSC/RES/733 (1992) Implementing an Arms Embargo on Somalia.

<sup>48</sup> UNSC/RES/733 (1992).

as they were a common enemy to both countries.<sup>49</sup> They also committed to undertaking coordinated attacks in pursuit of the Al Shabaab elements. This, as we see here, brings out the issue of the use of force against NSAs and self-defence.

This, was against the backdrop of the collapse of the Somali state in 1991, which was noted to have since then escalated the crisis situation and turned into a myriad of threats to not only Somalia, but also other neighbouring states such as Kenya. The letter also stated that despite efforts by Somalia through the AU and IGAD, to call upon the International community to intervene in the situations, these calls have been consistently ignored or met with inadequate unsustainable support.

They also noted that after the TFG of Somalia defeated the Al Shabaab, the security situation improved but that the group had since regrouped and consequently posed a significant threat to peace and security in the region and beyond. The Al Shabaab have since then infiltrated Kenya, and committed crimes including kidnappings of foreign and local civilians, destruction of property and the disruptions of humanitarian efforts for the refugees in Daadab.<sup>50</sup>

These activities, taken as a whole according to the letter, posed serious threats to public safety and security within Kenya. Against the backdrop of all these, the letter noted that Kenya and Somalia were justified and warranted to carry out military efforts to forestall the actions of Al Shabaab to terrorise civilians.<sup>51</sup>

## LEGAL PROCEDURE USED BY KENYA

Article 51 of the UN Charter states that;

‘...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.’

Kenya, as a member of the UN is expected, in the exercise of its inherent right of self-defence, to report all measures of self-defence to the Security Council. Kenya, after invoking

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<sup>49</sup> UNSC, S/2011/646 (2011).

<sup>50</sup> UNSC, S/2011/646 (2011).

<sup>51</sup> UNSC, S/2011/646 (2011).

article 51 as the basis of its invasion in Somalia, did this through the joint communique with Somalia.

It should be noted however that Kenya, did not gain the Security Council's approval for the invasion. Security Council has not addressed the issue to this date.<sup>52</sup> The question then begs as to what exactly is the legal status of the invasion, without the United Nation's approval/disapproval. It has been stated that silence means acquiescence in the forum of the UNSC.<sup>53</sup> It is acknowledged that a state, under customary international law can only have the right to use force on foreign soil without the UNSC approval when all peaceful means to the conflict have been exhausted, when the threat is so imminent, leaving absolutely no alternative than to resort to force to defend themselves from an attack.<sup>54</sup> It should also be noted, that once the Security Council steps in to maintain international peace and security, the state is to cease using force.<sup>55</sup> The expectation here is that when such a situation occurs, the UNSC will take action in the fastest way possible according to its mandate in international law.<sup>56</sup> What is the legal status of such an operation when the Security Council has not taken the measures necessary to restore peace and security?

Kenya, argued that the invasion was lawful as it was in accordance with Article 51 of the charter, and that it had the full support of the Somali government.<sup>57</sup> The Minister for Defence of Kenya at the time stated that the invasion was in the best interests of Kenya and that the country was doing all in its power within legal means to safeguard the security of its boundaries.<sup>58</sup> It should be noted however that the joint communique referred to in the preceding paragraphs, did not explicitly authorise Kenyan military operations on Somalia, but impliedly did so by introducing the aspect of 'cooperation' of both governments in

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<sup>52</sup> The UNSC has notably not passed a resolution for Kenya's case.

<sup>53</sup> See, Starski P, Silence within the Process of Normative Change and Evolution of the Prohibition on the Use of Force – Normative Volatility and Legislative Responsibility, *Max Planck Institute for Comparative Public Law and International Law*, 2016. See also, Murungu C, *Prosecuting International Crimes in Africa*, Pretoria University Law Press, 158.

<sup>54</sup> US Secretary of State Daniel Webster in the landmark case on the customary international law on the right of self-defence, articulated that in his opinion in that the "necessity of self-defence" is contingent on circumstances that are "instant, over-whelming, leaving no choice of means, and no moment for deliberation," and the act must be justified by the necessity of self-defence.

<sup>55</sup> Article 51, UN Charter.

<sup>56</sup> Gray C, *International Law and the Use of Force*, 248.

<sup>57</sup> UNSC/RES/1853 (2008) Report of the Monitoring Group on Somalia, 55.

<sup>58</sup> Kersten M, Chasing al – Shabaab: Is Kenya Right to intervene in Somalia? October 31<sup>st</sup> 2011 <<http://justiceinconflict.org/2011/10/31/chasing-al-shabaab-is-kenya-right-to-intervene-in-somalia/>> on 10<sup>th</sup> August 2016.

undertaking the security and military operations. In addition, a study of the arms embargo imposed on Somalia by the UNSC brings into question the legality of the position that Kenya took as regards this issue. In this tangent then, has Kenya illegally invaded the state of Somalia, by her justifications being without adequate legal merit?

## INTERNATIONAL COMMUNITY RESPONSE

The International Community has been seen to implicitly forming significant opinion juris that shows that such invasions such as the one Kenya carried out are in some way legitimate.<sup>59</sup> Kenya has received widespread support for the invasion, by the United States that have been key in providing support through drones and other military tactics, to help in the fight against the Al Shabaab. In addition, states such as France and Israel have given significant support to the Kenyan Military. The AU as a whole has also supported Kenya's military operations.<sup>60</sup> The AU can also be said to be implicitly giving a favourable response to Kenya's operations through the creation of AMISOM, which would eventually absorb the activities that Kenya was carrying out. The UNGA has also proven its support implicitly through the support of the AMISOM. It has, among other things passed resolutions whose subject is the funding of AMISOM activities.<sup>61</sup> This, interestingly followed a resolution by the Security Council stating its intention to establish a peace keeping union in Somalia as a follow-on force to the activities of AMISOM.<sup>62</sup> These all show the express as well as implicit approval of the missions in Somalia, including Kenya's.

This support has been more so, in the subsequent armed attacks by the Al Shabaab that Kenya has been a victim of, such as the Westgate Shopping Mall attack in 2013, and the Garissa University College attack in 2015, just to mention a few of the numerous attacks that Al Shabaab has claimed responsibility for.<sup>63</sup> It can be thus said, that this support is slowly seen to be building custom in International law that a state can act in self-defence within the meaning of article 51, against a NSA emanating from the territory of another state.<sup>64</sup>

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<sup>59</sup> Kersten M, Chasing al – Shabaab: Is Kenya Right to intervene in Somalia?

<sup>60</sup> Kersten M, Chasing al – Shabaab: Is Kenya Right to intervene in Somalia?

<sup>61</sup> UNGA, *Resolution adopted by the General Assembly [on the report of the Fifth Committee (Financing of support to the AUMission in Somalia)]*, Res 64/287, 2010.

<sup>62</sup> UNSC, Res 1863/2009, Expression of Intention to establish Peace Keeping Mission in Somalia, 2009.

<sup>63</sup> Kersten M, Chasing al – Shabaab: Is Kenya Right to intervene in Somalia?

<sup>64</sup> Birkett D, The Legality of the 2011 Kenyan Invasion of Somalia and its Implications for the Jus Ad Bellum, *Journal for Conflict and Security Law*, 2013.

This can be likened to the Ethiopian invasion in Somalia in 2006, against the ICU in Somalia, in which the Ethiopian state invoked article 51. Here, the AU was in support of the action, and only one state at the time in Security Council challenged Ethiopia's assertion of the right.<sup>65</sup> There are many other cases in which the International Community has had to deal with this issue. These will be dealt with in detail in the next chapter.

In conclusion, it is clear that the invasion into Somalia by Kenya has many legal implications. This paper however posits that the Security Council's silence on the matter or lack of explicit statement, coupled with the subsequent resolutions in favour of the missions in Somalia, could be said to be an implicit acquiescence of the right of self-defence against NSAs (In this case Al Shabaab) who emanate from a territory that is not responsible for their actions.

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<sup>65</sup> Allo A, Ethiopia's Armed Intervention in Somalia: The Legality of Self-Defense in Response to the Threat of Terrorism, *Denver Journal of International Law and Policy*, 2011, 39.

## CHAPTER 3

# INTERNATIONAL LAW ON THE USE OF FORCE AND SELF-DEFENCE VIS-À-VIS NON-STATE ACTORS

## INTRODUCTION

Many can concede that the notions of warfare in pre-1945 and those of today are strikingly different.<sup>66</sup> The current world order poses greater dangers in terms of the proliferations of new methods of warfare such as the presence of weapons of mass destruction as well as new actors in armed conflicts. It is the assertion of this paper that the drafters of the UN Charter, provided for the legal limits of the use of force, only bearing the ‘state’ as is defined in the Montevideo convention<sup>67</sup> in mind. We now however live in a nuclear era and NSAs have emerged in the plane of armed conflict, and granted, most of these pose a significant to the survival of states today, as post-1945 practice has shown. The purpose of this chapter is to carry out a study of the law of the use of force and self-defence in a bid to analyse on a backdrop of the law, whether states are justified in claiming self defence against NSAs in the territory of another sovereign state. In doing so, the chapter will begin on a discussion of the history and the current law on the use of force and then the exceptions thereof, specifically that of self-defence.

## USE OF FORCE IN INTERNATIONAL LAW

### HISTORY

Historically, wars were classified as just or unjust. There was a religious aspect to war, and many times, priests were the people to declare whether war was just or not.<sup>68</sup> With the rise of sovereign states, the prerogative of war was with states themselves. Under the concept of ‘just war’ as defined by Hugo Grotius, there needed to be a wrong done to the state or a right illegally denied. War was illegal unless justified by a ‘just cause’.<sup>69</sup> This proved problematic as many states unilaterally waged war against each other as they believed they had ‘just cause’ to do so, but this was not objective. In 1648, the peace of Westphalia<sup>70</sup> made states

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<sup>66</sup> Andreias V, Anticipatory self-defence in international law: legal or just a construct for using force?

<sup>67</sup> Article 1, Montevideo convention, 1933.

<sup>68</sup> Aquinas T, *Summa Theologiae, Secunda Secundae, Quaestio 40, 1.*

<sup>69</sup> Shaw M, *International Law*, 6th edition, Cambridge University Press, 2008, 1097.

<sup>70</sup> Dinstein Y, *War, Aggression and Self-Defence*, 4th ed., Cambridge University Press, 2005, 63.

equal and this was in tandem with the concept of 'sovereign right to wage war'. This meant that every sovereign was right to wage war for any reason they deemed fit.<sup>71</sup>

After the occurrence of the First World War, there was a clear need for a system which would solve disputes without resorting to war. The birth of the League of Nations in 1919, was a step towards this direction. The members agreed that they were to strive for international peace. First, there was the presence of a Council of the League, which all members would submit to in case any dispute arose. If they did not agree with the decision, they would not go to war until after three months and this was to be a cooling off period. The League of Nations regulated and restricted war in these ways but did not prohibit it.<sup>72</sup> It failed because states could still resort to war, at the end of its guidelines. The Kellogg-Briand Pact<sup>73</sup> in 1928, between some states in the world was another law that attempted to ensure international peace. In this pact, the states agreed that they would only solve disputes through peaceful means and condemned war.

## THE UN CHARTER AND THE USE OF FORCE

The UN Charter was adopted in the year 1945 after the Second World War. The purpose of the UN Charter is alluded to in the preamble of the Charter, and this is to save succeeding generations from the scourge of war<sup>74</sup> through uniting to maintain peace and security.

The preamble to this effect also states that all the member states shall ensure that armed force shall not be used, save in common interest.<sup>75</sup> In relation to this, one of the purposes of the UN Charter as states by Article 1 (1) is;

‘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

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<sup>71</sup> Shaw M, *International Law*, 1121.

<sup>72</sup> Article 10 -16, *The League of Nations Covenant*, 1919.

<sup>73</sup> Article 1, 2, *The Kellogg-Briand Pact*, 1928.

<sup>74</sup> Preamble, *UN Charter*, 1945.

<sup>75</sup> Preamble, *UN Charter*.

or settlement of international disputes or situations which might lead to a breach of the peace;<sup>76</sup>

Article 2 of the Charter then states that in pursuit of the above purposes and others, all members and others shall;

2(3) - 'Settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.'<sup>77</sup>

2(4) - '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 UN.'<sup>78</sup>

From the above, it can be seen that the adoption of UN Charter was a step towards the right direction in terms of maintaining international peace and security in the world. Article 2(4) bans the use of force in relations in the international community and has gained the status of *jus cogens* in international law today. Being a *jus cogens* provision, means that it is a peremptory norm. Under the Vienna Convention, a peremptory norm is one which is universally accepted and recognised and to which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character.<sup>79</sup> It is therefore recognised universally that the threat or use of force is prohibited. The Charter however contains exceptions to this general rule, which shall be discussed below.

The Charter gives the UNSC the explicit powers to deal with matters to do with actions with respect to the threat of peace, breaches of peace and acts of aggression under Chapter VII.<sup>80</sup> This power, is under Article 39 in which the UNSC is given the powers to determine the existence of any threat to peace and decide which measures to take in order to maintain peace and security.<sup>81</sup> This is one of the Charter exceptions to the general rule.

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<sup>76</sup> Article 1(1), *UN Charter*.

<sup>77</sup> Article 2(3), *UN Charter*.

<sup>78</sup> Article 2(4), *UN Charter*.

<sup>79</sup> Article 53, *Vienna Convention on the Law of Treaties*, 1963

<sup>80</sup> Chapter 7, *UN Charter*.

<sup>81</sup> Article 39, *UN Charter*.

The other and most relevant Charter exception to the general rule is that which is contained in Article 51 of the Charter. This provision forms the basis of the discussion on self-defence. Article 51 states that;<sup>82</sup>

‘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 UN, until the Security Council has taken measures necessary to maintain international peace and security.

Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.’

## SELF DEFENCE IN INTERNATIONAL LAW

Self Defence in international law today has its basis in Article 51 of the Charter as shown above. As will however be shown, Self-defence not only has its basis in the Charter, but also in Customary International law as well. The two are said to work side by side, and this part shall carry out a discussion of both instances, to ultimately answer the question of whether this right exists against NSAs operating in the territory of a sovereign state.

## SELF DEFENCE UNDER ARTICLE 51

Article 31(1) of the 1969 Vienna Convention on the Law of 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 and in the light of its object and purpose.’<sup>83</sup>

It is therefore important in analysing the right of self-defence under Article 51 of the Charter to look at the right in totality in the context of Article 2(4). It would therefore not be far-fetched to argue that since this is the case, under the reading of the Vienna Convention,

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<sup>82</sup> Article 51, *UN Charter*.

<sup>83</sup> Article 31(1), *UN Charter*.

Article 51 is a permitted derogation from the jus cogens norm, which then gives it the same rank in the hierarchy of norms.<sup>84</sup> Under Article 51, states have an ‘*inherent*’ right to defend themselves against an armed attack. This article also contains procedural obligations, namely that once the Security Council has taken adequate measures to maintain peace and security, the state taking action in self-defence shall cease all its actions.<sup>85</sup> The other is that any action taken in self-defence must be reported to the UNSC immediately.

As regards the discussion of this paper, i.e. self-defence against NSAs, it should be noted that there are three points of contention that this emerging issue raises. First is as regards the authorship of the armed attack, and second, as regards the use of the word ‘armed attack’. Thirdly, this paper identifies as an issue the right of self-defence against the threat of the use of force’.

As regards the first issue, this is a problem because the drafters of the Charter omitted to specifically state the author of the armed attack and only stated that that the right of self-defence existed when an ‘armed attack occurs’. It is believed by many writers and teachers of International law that in 1945, the drafters meant that the authors of the armed attacks were only states, because granted, at the time, no other actors had the economic and physical power to launch armed attacks. Assuming the omission was intentional so as to cater for changing times and situations, this paper posits that considering the proliferation of armed attacks by NSAs in the world now, the lack of clarity as regards the authorship of the attacks in the charter, causes significant loopholes in practice and needs to be looked into.

The second issue is considerably in the view of this paper harder to deal with, as some may argue that it is explicitly in the Charter that self-defence only exists when an armed attack has already occurred. The Charter has not explicitly defined an armed attack. The UNGA has come up with the definition of aggression, which partly, some have resorted to use as the definition of an armed attack. The ICJ has however attempted to come up with decisions as regards this, but impliedly adopted the definition of aggression as the definition of an armed attack.

As regards the third issue, it is averred by this paper, that because Article 2(4) mentions that the prohibition exists on not only the use but also the ‘threat’ of use of force<sup>86</sup>, then the right

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<sup>84</sup> Christenson G, The World Court and Jus Cogens, *American Journal of International Law*, Vol. 81, No. 1, 1987, 93.

<sup>85</sup> Article 51, *UN Charter*.

<sup>86</sup> Article 2(4), *UN Charter*.

of self-defence should exist when a state is defending itself from not only attacks that have already occurred, but also those that have been ‘threatened’ but not exactly materialised.

## AUTHORSHIP OF ARMED ATTACK

The ICJ has made pronouncements on the issue of authorship of attacks in many of its judgements including the Nicaragua case<sup>87</sup>, the Armed Activities<sup>88</sup> case as well as the Wall advisory<sup>89</sup> case. The ability of a state to defend itself against attacks from a NSA based in the territory of state, who may not have been involved in those attacks themselves, is quite understandably controversial, unsettled and vague.<sup>90</sup> The paper however intends to show that the approach the ICJ has taken in the Nicaragua case and more such as the Wall Advisory opinion and Armed Activities case (Congo v Uganda), while well informed cannot<sup>91</sup> be said to be adequately reflect the state of affairs in the current world order.<sup>92</sup> It is important to note that the ICJ decision in Nicaragua stated that notwithstanding its main decision, the reliance of a state on such an exception would if shared in principle by other states tend towards a modification of customary international law.<sup>93</sup>

In reference to the UN Charter, Article 51 does not explicitly state the author of the armed attacks. This brings difficulty in the interpretation of the law, as in the world today, there has been a proliferation of armed dangerous NSAs. The law, especially as regards an issue as important as this, needs to be clear and not vague or leave the issue to interpretation by states. NSAs may threaten the very existence of states and on a different tangent, states may unilaterally abuse their right to self-defence under the Charter.<sup>94</sup>

State practice after 1945 has been said to suggest that armed attacks from NSAs can be regarded as armed attacks within the meaning of article 51. The examples explored in this part shall be in brief; the United States’ attacks against Afghanistan, the Israeli attacks

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<sup>87</sup> *Military and Paramilitary Activities in and against Nicaragua*, ICJ, para 207.

<sup>88</sup> *Case Concerning Armed Activities on the Territory of The Congo (Democratic Republic Of The Congo V. Uganda) 2005*, ICJ Rep para 164.

<sup>89</sup> *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory (Palestine v Israel)*, Advisory Opinion, 2004 ICJ Para 136.

<sup>90</sup> Bowett D, *Self-Defence in International Law*, 1958, 26.

<sup>91</sup> See Judge Schwebel's dissenting opinion in the Nicaragua case.

<sup>92</sup> See Judge Schwebel's dissenting opinion in the Nicaragua case.

<sup>93</sup> *Military and Paramilitary Activities in and against Nicaragua*, ICJ, para 207.

<sup>94</sup> Steenberghie R, *Self –Defence in Response to Attacks by NSAs in the Light of Recent State Practice: A Step Forward*, *Leiden Journal of International Law*, 2010, 184.

against Hezbollah, Turkey's operations against PKK and Colombia's operations against FARC.<sup>95</sup>

It is important to note that the ICJ as mentioned above, has made judgements against this. In the Wall Advisory opinion, the court rejected Israel's argument that the wall built in Palestinian territory was a legitimate practice of self-defence.<sup>96</sup> In the Armed Activities case, the court held that Uganda had no right to self-defence against a rebel group that emanated from the DRC.<sup>97</sup> A number of judges have rejected this view however, the most notable being Judge Simma in the Armed Activities case who noted that the court could not continue carrying on the restrictive interpretation of Article 51 taking into account state practice and the development of the issue in the Security Council.<sup>98</sup> An example of the pronouncement of the Security Council on this issue is the resolutions it granted in favour of the United States after the September 11<sup>th</sup> attacks, recognising that the USA had been a victim of an armed attack and had the right to respond, even though the attacks were not authored by a state, which is the ICJ's interpretation of Article 51.<sup>99</sup>

## Operation Enduring Freedom - Us against Al Qaeda in Afghanistan

The terrorists group Al Qaeda committed the September 2001 attacks against the United States. It was said that the Taliban group in Afghanistan harboured and actively supported Al Qaeda. The US after the attacks informed the UNSC that it was carrying out attacks<sup>100</sup> against Al Qaeda training camps and Taliban military camps in Afghanistan referring to their right of self-defence against 'armed' attacks within the meaning of Article 51.<sup>101</sup> Although

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<sup>95</sup> Davies M, 'The use of force in self-defence against NSAs: an assessment of the legal regime in light of action taken against Islamic State in Iraq and Syria' Master Thesis, University of Amsterdam, Amsterdam, Netherlands, 2015, 15.

<sup>96</sup> *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory* ICJ, Para 136.

<sup>97</sup> *Armed Activities on the Territory of The Congo*, ICJ Rep para 164.

<sup>98</sup> UNSC recognized State's inherent individual and collective right of self-defence in accordance with the Charter. See Resolutions 1368 and 1373.

<sup>99</sup> UNSC recognized State's inherent individual and collective right of self-defence in accordance with the Charter. See Resolutions 1368 and 1373.

<sup>100</sup> 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-defence, 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'

<sup>101</sup> Bethlehem D, Self-Defence Against an Imminent or Actual Armed Attack by Non State Actors, *American Journal of International Law*, 2012, 106.

the UN did not specifically mandate the actions of the US,<sup>102</sup> a number of states worldwide and other international organisations viewed the actions of the US to be a legitimate form of self-defence.<sup>103</sup> In addition to this, Resolutions 1368 and 1373 reaffirmed the right of US' individual and collective self-defence.<sup>104</sup> NATO and The European Union also supported the actions of the United States.<sup>105</sup> The operation enduring freedom is therefore a very important example of state practice showing that self-defence allows for attacks by NSAs that need not be attributed to the state itself to qualify as armed attacks within the meaning of article 51.<sup>106</sup> Attribution and state responsibility still however remains an important component of this discussion and of this example too, as the Taliban was said to be 'harbouring and 'actively supporting' the terrorist group, and this will be discussed in the next chapter.

### Operation Sun - Turkey against PKK in Iraq (Kurdistan Workers' Party)

In the year 2007, militants from the PKK attacked and killed Turkish troops in a number of cross border attacks. The militants were based in Northern Iraq. Following this, a number of airstrikes were launched against their hideouts in Iraqi territory. Turkey was seen not to be in conformity with requirements of the Charter, as they did not report their actions to the UNSC, even though in a number of instances,<sup>107</sup> Turkey claimed that their actions were in self-defence.<sup>108</sup> It should be noted that most states refrained however from commenting on the legality of Turkey's actions, but the one's that did, did not deny that the attacks against Turkey warranted self-defence.<sup>109</sup> Some countries like the US and others provided intelligence and other forms of military help to Turkey, but never unequivocally approved or condemned Turkey's actions.<sup>110</sup> The EU seemed to be in support of Turkey's actions as

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<sup>102</sup> Kofi Annan, UN Secretary General at the time, while not endorsing the strikes, acknowledged that states had a right to individual self-defence.

<sup>103</sup> See, S/RES/1368 (2001) & S/RES/1373 (2001) and North Atlantic Treaty Organization (NATO), 2001, 51.

<sup>104</sup> See, S/RES/1368 (2001) & S/RES/1373 Preamble, Para 2 (f)(g), Para 3 (2001).

<sup>105</sup> The EU declared its wholehearted support for the action in self-defence in conformity with the UN Charter and UNSC Resolution 1368.

<sup>106</sup> House of Commons Library, *The Legal Basis for the Invasion of Afghanistan*, 2010, 6.

<sup>107</sup> Ruys T, Quo Vadit Jus Ad Bellum?: A Legal Analysis of Turkey's Military Operation against the PKK in Northern Iraq, *Melbourne Journal of International Law*, 2008, 23.

<sup>108</sup> Ruys T, Quo Vadit Jus Ad Bellum? A Legal Analysis of Turkey's Military Operation against the PKK in Northern Iraq, 23.

<sup>109</sup> Steenberghie R, Self –Defence in Response to Attacks by NSAs in the Light of Recent State Practice: A Step Forward?

<sup>110</sup> Presidency of the EU, *EU Presidency Statement on the Terrorist Attacks of the P.K.K in Turkey over the Weekend'* (Press Release, 22 October 2007).

they stated that they were in support of Turkey's efforts to protect its population and fight terrorism, but stated that they should refrain from taking any illegal or disproportionate military action.<sup>111</sup> State reactions in Turkey's case have been vague but however still show that self-defence could and has been taken in response to armed attacks by NSAs.<sup>112</sup>

### Operation Change Direction – Israeli against Hezbollah in Lebanon

In the year 2006, Israel launched an operation against the militant group Hezbollah, in Lebanese territory because they were based in Lebanon. This was in response to attacks on Israel and a cross border attack which killed Israeli troops while others were captured.<sup>113</sup> Israel claimed the right to self-defence under Article 51 of the Charter, and said they would take appropriate actions to end the survival of the terrorist group.<sup>114</sup> There was wide acceptance by states worldwide that the attacks by Hezbollah were armed attacks and many were supportive of Israel's right to act in self-defence. Argentina, the United Kingdom, Denmark and France among other asserted their support for Israel during a UNSC meeting.<sup>115</sup> In the resolution 1701, the Security Council referred to the Hezbollah attacks and never explicitly rejected the self-defence right of Israel. This operation was however also characterised by a lot of criticism in regard to the disproportionate use of force that Israel used, rather than the actual substantive right of self-defence that Israel had. That, was not in contention.<sup>116</sup> It is however important to note that in this case, Hezbollah was not exactly separate from the state of Lebanon as it is said to have a political wing which is part of the government of Lebanon.

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<sup>111</sup> Bethlehem D, Principles Relevant to the Scope of a State's Right Of Self-Defense Against An Imminent Or Actual Armed Attack By Non State Actors, 106.

<sup>112</sup> Ruys T, Quo Vadit Jus Ad Bellum? A Legal Analysis of Turkey's Military Operation against the PKK in Northern Iraq.

<sup>113</sup> Bethlehem D, Principles Relevant to the Scope of a State's Right Of Self-Defense Against An Imminent Or Actual Armed Attack By Non State Actors, 109.

<sup>114</sup> UN Doc. S/2006/515 62, Letter from the Permanent Representative of Israel, 9.

<sup>115</sup> See as an example, UN Doc. S/2006/515 62, Letter from the Permanent Representative of Israel, 9.

<sup>116</sup> See UN Doc. S/PV.5489, 11, 12, 13.

## OTHER INSTANCES OF STATE PRACTICE

Australia, after an attack in Bali which involved some of its citizens, stated that they should have the right to attack under anticipatory self defence against terrorists in neighbouring countries.<sup>117</sup>

Rwanda also invoked self-defence and gave as a justification the inability of the DRC in preventing Hutu rebels in 2004, and attacked the rebels in the DRC territory.<sup>118</sup>

## MEANING OF ARMED ATTACK

A study of Article 51 once again brings considerable difficulty when looking at what exactly the meaning of the term ‘armed attack’ is. The question that lingers the most amongst others, is that of the threshold of attacks which would mean ‘armed attack’ within the meaning of Article 51.<sup>119</sup> There has been a debate as to whether smaller successive attacks could be said to be combined to prove the existence of a high threshold of attacks which could be sufficient to warrant to self-defence as was the case in the Al Shabaab attacks against Kenya before the incursion<sup>120</sup>

In the Nicaragua case, the ICJ declared that the definition of an armed attack was not provided in the UN Charter,<sup>121</sup> but attempted to state that armed attack was a subcategory of the definition of aggression as was given in Resolution 3314 of the UNGA.<sup>122</sup> This paper however avers that there is still no consensus as regards what acts constitute an armed attack and the elements thereof, as the definition of aggression is too wide and consists of other kinds of attack and not only armed attack.

## SELF-DEFENCE AGAINST A ‘THREAT’ OF FORCE

Article 51 should be read against a backdrop of Article 2(4). Article 2(4) bans not only the use of force, but also the threat of it. The premise of this part is that as Article 51 is the exception afforded to the rule in Article 2(4), it would not be far-fetched to say that states

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<sup>117</sup> Shaw M, *International Law*, 1146-1150.

<sup>118</sup> Shaw M, *International Law*, 1146-1150.

<sup>119</sup> Bethlehem D, Principles Relevant to the Scope of a State’s Right of Self-Defense against an Imminent or Actual Armed Attack by Non State Actors, 106.

<sup>120</sup> Dinstein Y, War Aggression and Self-Defence, 176.

<sup>121</sup> *Military and Paramilitary Activities in and against Nicaragua*, ICJ, para 176.

<sup>122</sup> UNGA, *Definition of Aggression*, Res 3314, 1974.

should have the right to defend themselves against threats of force against them and not just actual use of force. The right of self-defence as stipulated in Article 51 however only arises when an ‘armed attack’ has occurred. The legal issue in contention in issue here is whether states can claim self-defence against a *threat* of use force by a NSA emanating from the territory of a state and the imminence thereof of an attack. Here, is the threat of use of force so instant and overwhelming such that it leaves no moment for deliberation and no other choice for the victim state but to resort to self-defence?

In the view of the ICJ, the act of self-defence is only regarded as lawful if there is an actual armed attack; that states do not have the a right of collective or individual self-defence in response to attacks which do not constitute an armed attack.<sup>123</sup> It has been stated that it would be a;

‘travesty of the purposes of the Charter (the preservation of international peace and security) to compel a defending state to allow its assailant to deliver the first, and perhaps fatal blow; that to read Article 51 restrictively is to protect the aggressor’s right to the first strike.’<sup>124</sup>

This is followed by the assertion that it is absurd for a state to have to wait for an armed attack to occur before taking any action to protect itself.<sup>125</sup> In tandem with the realist approach to the law, this part will discuss the law as regards this issue against a backdrop of state practice after 1945, to get a better interpretation of Article 51 as read with Article 2(4).

The Government of United Kingdom according to debates in the House of Lords have reiterated that the right of self-defence has been taken to include the instance where an armed attack is *imminent*.<sup>126</sup> Here it should be noted that imminent as used is different from a more remote threat. It was on this basis for instance, that the UK participated in operation enduring freedom against Taliban and Al Qaeda in Afghanistan.<sup>127</sup> This is in agreement with the argument that depending on the circumstances, self-defence can be used against those who

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<sup>123</sup> Bethlehem D, Principles Relevant to the Scope of a State’s Right Of Self-Defense Against An Imminent Or Actual Armed Attack By Non State Actors, 106.

<sup>124</sup> Waldock H, The Counter proliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction, *Denver Journal of International Law and Policy*, 1999, 483- 513.

<sup>125</sup> Dinstein Y, War Aggression and Self-Defence, 172.

<sup>126</sup> Dinstein Y, War Aggression and Self-Defence, 173.

<sup>127</sup> Hamoud M, The Use of Force Against Iraq: Occupation and Security Council Resolution 1483, *Cornell International Law Journal*, 2004, 436.

harbour and plan and perpetrate attacks if the use of force in self-defence is necessary to avert the planned attacks. Kenya, in its invasion in Somalia claimed they were going to launch strikes to protect the state from the growing threat Al Shabaab posed in the country.

It has been said that *in response to terrorist groups*, States should be able to use force where there is credible evidence of attacks, even where there is no precise evidence of the exact nature of the attack. There exist conditions in customary international law; namely that the use of armed force should be last resort, that it should be absolutely necessary to thwart the attack, that the attack must be imminent and that the force used must be proportionate to the threat that is faced.<sup>128</sup> An important aspect is that of imminence. The position of Customary International Law on this matter is that the attack must be instant, overwhelming, leaving no choice or means for deliberation.<sup>129</sup>

It is important in determining the extent of legality of this premise, that state practice as regards the issue is looked at. In this part, the following shall be studied in brief; Cuban Missile Crisis, the Six Day War, and the Osirak reactor case in Iraq.

### Cuban Missile Crisis

In the year 1962, the Soviet Union was delivering armament to Cuba which according to US intelligence, could deploy nuclear missiles. The US considered a strike against Cuban territory to eliminate the missile systems as well as a naval blockade to stop further shipments to Cuba.<sup>130</sup> Although the US did not claim Article 51 but Article 52 on the regional arrangements for maintaining international peace, this was all done to thwart the threat of nuclear weapon shipments to Cuba, and the US in these operations gained the regional support of the Organisation of American States.

### Six Day War – Israel

In the year 1967, Israel launched pre-emptive attacks against Egypt, Syria and Jordan. The troops of these countries were said to be acting in hostility towards Israel. The three countries had then formed an alliance. Egypt, evicted the UN peace keeping corps from the Gaza strip

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<sup>128</sup> These are the principles that were developed by the Caroline case.

<sup>129</sup> This is as in the Customary International law case of the Caroline.

<sup>130</sup> Cassese A, *International Law*, Oxford University Press, 2<sup>nd</sup> ed, 2005, 311.

and issued threatening statements together with other Arab states who all proclaimed their intentions of Israel's destruction.<sup>131</sup> Egypt also imposed a naval blockade to cut off Israel's access to the Red Sea. Israel then decided that with the aggressive actions, it would launch airstrikes on the three countries' airfields, thereby neutralising all their air capabilities which ultimately aided in Israel's success of the war in a matter of six days.<sup>132</sup> Israel's first argument was of Anticipatory self-defence but this failed largely due to the fact that Israel did not adhere to the requirements of anticipatory self-defence as stipulated in Customary International law when they continued attacking after the victory after the Arab states.<sup>133</sup> These were those of imminence, necessity and proportionality. Specifically, it was argued that Israel's actions were not in any way proportional to the threat said to be faced. Israel then argued that the naval blockade by Egypt was an act of war and proof of hostile intentions. Still, even though many states sided with Israel, they did not approve of the anticipatory self-defence argument.<sup>134</sup>

### Osirak Reactor Case

In the year 1981, Iraq was building a nuclear reactor with the French which was code-named *Osirak*. Iraq continuously denied the existence of the nuclear reactor, while still declaring its intention for acquiring nuclear weapons and using them against Israel, together with the hostile attitude it had towards the country.<sup>135</sup> The reactor was said to be only for scientific research, but Iraq was purchasing higher quantities of Uranium than would be needed for scientific research and therefore Israel suspected the legitimacy of the reason. These reasons prompted Israel to launch an airstrike to destroy the reactor. Israel invoked anticipatory self-defence and argued that the threat of use of nuclear weapons entitled it to act pre-emptively. Israel in part in its argument stated that technological advances warranted a broadening of the scope of self-defence as is in the Charter, to include situations in which a state acted pre-emptively to thwart an attack. This is evidently self-defence against a 'threat' of use of force.

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<sup>131</sup> Duhem N, *The Legitimacy Of Anticipatory Self-Defence In Combating Transnational Terrorism*, University of Amsterdam, Amsterdam, Netherlands, 2013.

<sup>132</sup> Duhem N, *The Legitimacy Of Anticipatory Self-Defence In Combating Transnational Terrorism*, 2013.

<sup>133</sup> Shaw M, *International Law*, 1156.

<sup>134</sup> Duhem N, *The Legitimacy Of Anticipatory Self-Defence In Combating Transnational Terrorism*, 2013.

<sup>135</sup> Cassese A, *International Law*, 311.

## CUSTOMARY INTERNATIONAL LAW RIGHT OF SELF-DEFENCE

### The Caroline Case<sup>136</sup>

The Caroline case is often cited as the basis of the right of self-defence under customary international law. The Caroline incident occurred in the year 1837 and for this reason is rejected by many writers as basis for any display of state practice in regard to use of self-defence as it is pre-1945, but has considerably generated a number of important rules to the CIL right of anticipatory self-defence and is therefore useful in this paper following the realist school of thought as many states have claimed this right.

The Caroline was a steamer flying the US Flag which was being used to ferry reinforcements and supplies to the Canadian insurgents against British. After several incidents of the insurgents firing on the British troops, the British decided to cut off their supply line (The Caroline). They boarded the Caroline, burned it and sent it over the Niagara Falls.<sup>137</sup> US secretary of state in a letter to Lord Ashburton of Britain, stated the following which later came to be the basis of some of the principles of anticipatory self-defence; imminence, necessity and proportionality.<sup>138</sup>

*"It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. ...even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."*<sup>139</sup>

It is suggested that the Caroline incident as well as State practice developing 150 years later has sufficiently developed a customary right to self-defence. That, the use of armed force and the violation of the territory of a state is justified as self-defence under the law where an armed attack is launched or threatened against a state which then warrants an urgent necessity of defensive action against that attack or threatened attack which is limited to the prevention of the attack, and there is no practicable alternative to that action in self-defence or the state which has the legal powers to stop the attack cannot or is unwilling.<sup>140</sup>

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<sup>136</sup> <[http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp)> on 13th October 2016.

<sup>137</sup> Dinstein Y, War Aggression and Self-Defence, 213.

<sup>138</sup> Cassese A, *International Law*, 304.

<sup>139</sup> See, <[http://avalon.law.yale.edu/19th\\_century/br-1842d.asp](http://avalon.law.yale.edu/19th_century/br-1842d.asp)> on 13th October 2016.

<sup>140</sup> *Oppenheim's International Law*, Oxford University Press, 1992, 9th ed, vol 1, 422.

Anticipatory self-defence has been defined as the ability of a state to take measures aimed at countering the foreseen consequences of actions in violation of its territory.<sup>141</sup> A state takes anticipatory self-defence against another state in anticipation of an attack by that state before that state can commence the attack. Anticipatory self-defence must be immediate and necessary. It is considered that in the event the UN Charter actions are delayed or inadequate as has been seen in many instances, it would be a failure of Article 1 the Charter to compel a state to allow its attacker to deliver the first blow which could turn out to be fatal.<sup>142</sup>

## Principles of Anticipatory Self defence

The three principles of Webster's formula are necessity, immediacy and proportionality and these serve to limit the right of self-defence under CIL.

1. The threat must be imminent. Imminent here means that the threat must be instant, overwhelming, leaving no choice or means of deliberation.
2. The action in self-defence must be necessary to protect against the threat.
3. The action must be proportionate to the threat, meaning that it cannot be unreasonable or excessive. There should be a symmetry between the action and its purposes or the desired result.<sup>143</sup>
4. The action must also be taken as a last resort after all peaceful means have been attempted.<sup>144</sup>

In conclusion, this paper is of the position that, as regards to authorship of an armed attack, self-defence should include situations where the author of the armed attacks are NSAs. As regards the meaning of armed attacks, the paper posits that there has been no consensus as to what exactly constitutes armed attacks. In tandem with the realist view however, the position should be that the armed attacks should be weighted according to the level of damage and should include small successive attacks that eventually lead up to a large scale attack. As regards whether self-defence should be used not only against an actual armed attack, but also to thwart the threat of imminent use of force by the NSAs.

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<sup>141</sup> Duhem N, *The Legitimacy Of Anticipatory Self-Defence In Combating Transnational Terrorism*, 2013.

<sup>142</sup> Duhem N, *The Legitimacy of Anticipatory Self-Defence In Combating Transnational Terrorism*, 2013.

<sup>143</sup> Franck T, *Recourse to Force: State Action Against Threats and Armed Attacks*, 101-102.

<sup>144</sup> Arend A.C, *International Law and the Pre-emptive Use of Military Force*, 2003.

## CHAPTER 4

### STATE RESPONSIBILITY AND ATTRIBUTION

#### INTRODUCTION

It is conceded that the use of force by a state in the territory of another states not only goes against the principles enshrined in the UN Charter, but also those of territorial sovereignty and non-intervention as well. Self-defence is however the most important exception to this. The inherent right of a state to act in self-defence against another state is upheld in international law. As this paper deals with the specific issue of NSAs however, difficulty arises as to whether a state would be justified in carrying out actions in self-defence against NSAs in the territory of a sovereign state.<sup>145</sup>

The law on state responsibility plays a huge role in determining whether the conduct against a certain state is legal, as it is known that states cannot take measures on the territory of another state against its will. In examining Kenya's incursion into Somalia on the grounds of self-defence, this chapter will delve into the law on state responsibility and determine the grounds under which international law allows states to use force against NSAs emanating from the territory of another state, in this case Somalia. This chapter analyses whether on the basis of the law of state responsibility, whether or not the Republic of Somalia is responsible for the actions of Al Shabaab and therefore susceptible to actions in self-defence from Kenya.

#### THE LAWS ON STATE RESPONSIBILITY

The substance of the laws on state responsibility are codified by the International Law Commission's Draft Articles on Responsibility for Internationally Wrongful Acts (ARSIWA). The law on state responsibility is secondary in nature and consists largely state attributability which determines whether certain conduct was embarked on by the state in question. States are held responsible under these laws for acts and omissions and their legal consequences thereof.<sup>146</sup> The Permanent Court of International Justice applied the principle set out in article 1 in a number of cases such as the *Phosphates Morocco case*;<sup>147</sup> that when

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<sup>145</sup> Duhem N, *The Legitimacy of Anticipatory Self-Defence in Combating Transnational Terrorism*, 2013.

<sup>146</sup> ILC, *Draft Articles on Responsibility for Internationally Wrongful Acts*, para 1.

<sup>147</sup> *Phosphates in Morocco*, Judgment, 1938, P.C.I.J., Series A/B, No. 74, 10, 28.

a state commits an internationally wrongful act against another, responsibility arises as between those two states.<sup>148</sup> Other cases in which this was set are the *Chorzow Factory Case*, *Corfu Channel* case, the *Military and Paramilitary Activities in Nicaragua* case and the *Reparation of Injuries* cases.<sup>149</sup>

The general rule is that there are two requirements, that first there has to be a wrongful act and that the act must be attributable to the state. Under these articles, there consists circumstances that preclude wrongfulness of certain acts by states.<sup>150</sup> These will assist in determining whether the state of Somalia is responsible for the acts of NSAs (The Al Shabaab) *Vis-à-vis* Kenya's actions in self defence against Al Shabaab in Somalia.<sup>151</sup>

As concerns NSAs, the principles of state responsibility serve to establish a link between their actions and those of the state itself. The law on state responsibility is very restrictive in the attribution of conduct to a state. It follows, that only acts of official state organs, in their official capacity can be attributable to the state. Any acts of other actors which do not officially in their capacity act on behalf of a state cannot be attributable to a state.<sup>152</sup> As regards the Al Shabaab, this author concedes that Articles 1 and 2 of the ARSIWA do not impute responsibility on the part of Somalia.

The issue of NSAs can be addressed by the exceptions given in the ARSIWA; those that impute responsibility of the state in situations of NSAs. These are such as; that of circumstances where the NSAs are acting in the *instruction and direction* of the state, and where the *state acknowledges the actions of the NSA as its own*.<sup>153</sup>

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<sup>148</sup> Article 1(2), *Draft Articles on Responsibility for Internationally Wrongful Acts*, 2001.

<sup>149</sup> See, See also *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, 21; *Corfu Channel, Merits*, Judgment, I.C.J. Reports 1949, 4, 23; *Military and Paramilitary Activities in and against Nicaragua*, 14, 142, para. 283, and 149, para. 292; *Reparation for Injuries Suffered in the Service of the UN*, Advisory Opinion, I.C.J. Reports 1949, 174, 184.

<sup>150</sup> Article 1 and 2 *Draft Articles on Responsibility for Internationally Wrongful Acts*, 2001.

<sup>151</sup> Allo A.K, Ethiopia's armed intervention in Somalia: The Legality of Self-Defence in Response to the Threat of Terrorism, 147.

<sup>152</sup> Article 4 and 7, *Draft Articles on Responsibility for Internationally Wrongful Acts*, 2001.

<sup>153</sup> Ruys and Verhoeven S, Attacks By Private Actors and the Right of Self-Defence, 293.

## EXCEPTIONS TO THE GENERAL RULE

### Article 8, ARSIWA

The first exception to the general rule is found in Article 8 of the ARSIWA, which states in part;

*“The conduct of a person or group of person 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.”<sup>154</sup>*

Under this provision, conduct can be attributed to a certain state where the NSAs are acting on the specific instructions and/or in the scenario where the state has direction or control over the NSAs.

The first instance is conceivably easy to articulate and is widely accepted as it is not dependent on any further requirements. When a certain state gives specific instructions to a NSA to act in a certain way, the actions of those NSAs are automatically and evidently attributable to the state that instructed them.<sup>155</sup> In analysing this provision, it is clear that there is no evidence to the effect that the Republic of Somalia gave Al Shabaab instructions of any kind, therefore this provision cannot be used to impute any form of state responsibility for the actions of Al Shabaab against Kenya.

The second instance is whereby the state has direction or control over the NSAs. It follows therefore that if this is the case, the state will be responsible for the actions of the NSAs whilst under its own direction or control.<sup>156</sup> This scenario is however difficult to apply, and there have been numerous commentaries as to what exactly the drafters of Article 8 meant by ‘direction or control’. There have been two main tests in the history of International law that have been used in attempts to explain the meaning of the words in the provision. The author however posits that the law ought to be clearer in this, as there is still a lot left to the imagination of legal scholars worldwide, which ultimately leads to various conundrums in practice.

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<sup>154</sup> Article 8, *Draft Articles on Responsibility for Internationally Wrongful Acts*, 2001.

<sup>155</sup> Ruys and Verhoeven S, *Attacks By Private Actors and the Right of Self-Defence*, 293.

<sup>156</sup> Condorelli L, *the Imputability to States of Acts of International Terrorism*, 18, *Israeli Yearbook on Human Rights*, 1989, 240.

The first of these tests, and that which the author intends to use for purposes of analysis of the questions of this paper is the ‘Effective Control’ test. This test was brought forward by the ICJ in a myriad of cases, starting with the Nicaragua judgement, where it was stated that *‘armed attack could be attributed to a state directly through 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’*.<sup>157</sup> The essence of the effective control test is that basically a state can be held responsible for acts of NSAs when these said actions were an integral part of the operations that were directed or controlled by the state. This, as read, sets a very high threshold which can only be said to be achieved if the level of control or direction is at a very high level.<sup>158</sup> Following this, any conduct of the NSAs that is only incidentally or not so near in association with conduct that is directed or controlled by the state, precludes any state responsibility.<sup>159</sup> The essence of effective control is that the *state involved must be involved in the planning of attacks, choosing of targets as well as provide operational support and specific directives and instructions*. It is said that provision of logistical support or other material training does not meet the threshold for ‘effective control’.<sup>160</sup>

The other of these tests is the ‘Overall Control’ test, which is the more flexible of the two tests and which shall not be used for the purposes of this paper as a result of some of its shortcomings, one of which is that the competency of the ICTY was to establish individual criminal responsibility and not state responsibility. The overall control test was applied first by the ICTY, in the Tadic trial,<sup>161</sup> to determine whether the acts performed by organised groups were attributable to the state. In this way, the ICTY could determine whether the conflict was international or non-international in nature, making up important rules in international humanitarian law. In this test, a state was responsible for the acts of certain NSAs when it had ‘overall control’ of these actors beyond mere financing, training or

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<sup>157</sup> See the following; *Nicaragua v. United States of America*, para 11; *Wall Advisory Opinion*, para 139; *Territory of Congo*, para 146; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgement)* [2007] ICJ Rep 43, paras 384, 391, 400 and 401.

<sup>158</sup> Commentaries to the *Draft Articles on Responsibility for Internationally Wrongful Acts*, 2001, 104, para 2.

<sup>159</sup> Commentaries to the *Draft Articles on Responsibility for Internationally Wrongful Acts*, 2001, 104, para 2.

<sup>160</sup> *Military and Paramilitary Activities in and against Nicaragua*, para 112.

<sup>161</sup> *Prosecutor v Tadic*, para 137.

equipping.<sup>162</sup> The ICJ, in the Genocide cases stated that the overall control test could not be used as it stretched too far out the link that the state must have had with the NSAs.<sup>163</sup>

Using as has been stated above, the effective control test as regards Article 8, this paper posits that Article 8 cannot be invoked to impute responsibility on the part of the Republic of Somalia. There is again, no evidence at all to the effect that the Republic of Somalia has effective control over the actions of Al Shabaab to effectively warrant actions in self-defence by Kenya.

## Article 11, ARSIWA

The second exception is found in Article 11, which reads in part;

*“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.”*<sup>164</sup>

This article as it reads means that conduct of NSAs can be attributed to the state if the state acknowledges and adopts the specific conduct as one of its own; of the state.<sup>165</sup> This is presumably a very high threshold that is rarely invoked. It was invoked in the ICJ case of *United States v Iran* (Diplomatic and Consular Staff in Tehran) in 1980.<sup>166</sup> The essence of this article is that both requirements have to be fulfilled, the state has to not only explicitly acknowledge but also adopt the conduct of the NSA as its own.<sup>167</sup> It has been said that factual acknowledgement or approval or endorsement of the actions cannot suffice to fulfil the criteria needed. In the *United States v Iran* case, it was at the onset decided that the mere approval of the actions of the hostage takers was insufficient, but that what made the actions of the hostage takers become that of Iran was the policy of not taking adequate steps to end the hostage situation to political reasons and the fact that many Iranian authorities complied with this and used it as its own policy.<sup>168</sup>

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<sup>162</sup> *Prosecutor v Tadic*, para 137.

<sup>163</sup> *Genocide Case*, para 406. See also Article 11, *Draft Articles on Responsibility for Internationally Wrongful Acts*, 2001.

<sup>164</sup> Article 11, *Draft Articles on Responsibility for Internationally Wrongful Acts*, 2001.

<sup>165</sup> Crawford and Olleson S, *The Nature and Forms of International Responsibility in International Law*, Oxford University Press, 2006, 457.

<sup>166</sup> *United States Diplomatic and Consular Staff in Teheran* (United States v Iran) (Judgment), 1980, ICJ Rep 3, para 74.

<sup>167</sup> Ruys and Verhoeven S, *Attacks By Private Actors and the Right of Self-Defence*, 301.

<sup>168</sup> *United States v Iran*, ICJ Rep 3, para 74.

In carrying out an analysis of Article 11, it can be seen that this provision again fails to impute responsibility on the Republic of Somalia as there is no evidence to the effect that Somalia acknowledged and adopted the actions of Al Shabaab against Kenya as its own.

In the regime of the law on state responsibility, this paper conceives that the tests provided for in the exceptions as regards private actors are extremely high, and even though with good reason, can sometimes rid a state of the opportunity to invoke self-defence against NSAs, when there is clear evidence of actions that warrant self-defence. In this particular case, the author argues that the only way in which Kenya may successfully invoke state responsibility for purposes of self-defence, is through a negative connotation that a state may not interfere with the territorial integrity of a sovereign state unless with the explicit consent of a state. There has been evidence provided in the chapters before this one that Somalia consented to Kenya's operations in self-defence. This is shown in the Joint Communiqué presented to the UNSC detailing the specifics of the incursion.

Notwithstanding this, the author however, as mentioned before does not agree with the notion that self-defence can only be used against actions of NSAs which meet the thresholds of Articles 8 or 11. In line with the realist approach of this paper, and with the increasing proliferation of attacks by NSAs, following such a restrictive approach would be detrimental to the rights of a state such as Kenya to protect its territorial integrity. For this reason, this chapter in the next part, discusses whether there are other avenues other than those given explicitly in the law on state responsibility that may warrant self-defence. This, is done with adequate cognizance of the need to balance the avenues in which states may successfully invoke and carry out force in the name of self-defence on the one hand and on the other hand, the need to enforce a state's right to protect itself from the ever rising threat of NSAs.

## COMPLEMENTARY TO STATE RESPONSIBILITY?

### AGGRESSION

*'Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the UN, as set out in this Definition'*<sup>169</sup>

The ICJ, in its Nicaragua decision, stated that self-defence was not only limited to those situations where a state can be held responsible for an armed attack but also where the court could establish a state link by relying on the definition of Aggression as given by the UNGA. Article 3 of the list annexed to the definition of aggression by UNGA listed several acts which qualified as aggression. Article 3(g) which is highly cited stated that (as reiterated by the ICJ in the Nicaragua case), '...the sending by or on behalf of a state or armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein...'

The questions here is first whether the Aggression as defined is the same as an armed attack and whether 'substantial involvement' by a state in the acts listed amounts to a suitable state link to the conduct committed so as to then essentially impute state responsibility.

As to the first question it should be noted that, the term aggression is a wider term than armed attacks and includes economic and ideological aggression as well.<sup>170</sup> Self-defence under the UN Charter is only limited to armed attacks, and one might see the reason of this, that the drafters set to only restrict self-defence to armed attack to avoid the unilateral proliferations of acts of war by countries. Only the gravest forms of aggression (armed aggression) constitute an armed attack.

As for the second question, it should be noted that the ICJ in its Nicaragua judgement imputed that an armed attack could also consist the sending by or behalf of a state of armed groups, bands, irregulars or mercenaries in the sense of Article 3(g) of the UNGA definition of aggression, including substantial involvement provided the scale and effects of the attack would exceed a mere frontier incident.<sup>171</sup> By applying Article 3(g) of the definition, to the exercise of the right of self- defence, it means that the right was not only limited to the

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<sup>169</sup> UNGA, Res 3314, 1974.

<sup>170</sup> Feder M, Reading the UN Charter Connotatively: Toward a New Definition of Armed Attack, 19 *New York University Journal of International Law*, 1987, 430.

<sup>171</sup> *Military and Paramilitary Activities in and against Nicaragua*, 3.

situations where conditions of Article 8 or 11 are fulfilled, but also in situations where there is merely substantial involvement of a state in the conduct of NSAs.

## THE NOTION OF A FAILED STATE?

Another notion that has grappled the issue of attacks by NSAs is the exercise of the rights of self defence against a state that has failed or is unwilling to prevent an attack by private individuals. The principle followed under this rule is the due diligence rule, which forms part of International law.

Under the due diligence rule, a state is under a duty to protect rather than a duty to abstain, and failure to do so will entail the commission of an internationally wrongful act. States have a duty to protect other states from attacks conducted by private individuals or NSAs emanating from their territory by among other things combating the hostile use of force of NSAs against foreign states.<sup>172</sup> This duty was drawing from the Declaration of Friendly Relations which essentially proclaims that no state shall organise, assist, foment, finance or tolerate subversive terrorist or armed activities.<sup>173</sup>

The threshold of this duty is that it must be carried out by states due diligently and not that it must be absolute.<sup>174</sup> The question begs then, can this be a reason for a state to impute state responsibility and carry out actions in self-defence when another fails to carry out this duty diligently? The due diligence rule however does not apply to cases where a state provides support material, logistical or other form as save for extreme cases, such conduct will never amount to attributability of the conduct of private actors to a state.<sup>175</sup> In the *Nicaragua case*, the United States' active involvement in the Contras was condemned as against the principle of non-intervention; that is, a duty to abstain and not to protect other states.<sup>176</sup> It follows therefore that support of this kind is a breach of the duty to abstain and does not impute a breach of the due diligence rule as regards actions by NSAs in this case. The tolerating of

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<sup>172</sup> Lillich R and Paxman J.M, State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities, 27 *AUL Rev*, 1977, 261.

<sup>173</sup> GA Res. 2625 (XXV). See also, S.C. Res. 1189, U.N. SCOR, 53rd Sess., 3915th mtg., U.N. Doc. S/RES/1189, 1998.

<sup>174</sup> Mazzeschi P, The Due Diligence Rule and the Nature of the International Responsibility of States, 35, *German Yearbook of International Law*, 1992, 34-36.

<sup>175</sup> Lillich R and Paxman J.M, State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities, 261.

<sup>176</sup> Mazzeschi P, The Due Diligence Rule and the Nature of the International Responsibility of States, 34-36.

presence of armed actors can be an example of how a state has not acted due diligently, but cannot warrant actions in self defence against a state.

As regards the notion of a failed state, it should be noted that the precursor to a state abiding by the due diligence rule is that it should have a functioning governmental apparatus capable and willing to combat the actions of the NSAs. If the governmental apparatus has failed, other issues creep up. As we have seen and as is the subject of this paper, there is a proliferation of dangerous armed non-state groups that emanate from the territories of sovereign states which have most of the time been subject to civil and political strife. The NSAs seek refuge there and for political and other reasons find a prying ground to expand and carry out armed attacks on that state and others. That is indeed, the storyline of an armed group like Al Shabaab. The actions of such groups can only be considered actions of the state if those individuals are exercising some form of governmental authority.<sup>177</sup> Here, there is presupposed to be either a partial or total collapse of the sovereign government.

It is the position of this paper however that international law would be crude in allowing for the use of self-defence against states which are inherently because of certain circumstances incapable of preventing attack. International law should not voluntarily injure a state that is in a fragile state because of its structural inability to prevent attacks. With the consent of the 'fragile state' however, states can work with it to make sure there is a coordination of efforts to fight the armed NSAs.

Taking into account these other sources of state responsibility complementary to the actual substantive law on state responsibility, the author maintains the position that none of these can be effectively used to impute state responsibility on Somalia for the actions of Al Shabaab. The only recourse Kenya could have, is to claim self-defence and a justification based on Somalia's actual consent and willingness to the actions by Kenya. The author however sees a lacuna in the law in that the law on state responsibility is very much restricted, to the point of rendering a state's right to act in self-defence null and void. This paper posits that a more flexible approach than those given in Articles 8 and 11 be followed.<sup>178</sup>

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<sup>177</sup> Article 9, *Draft Articles on Responsibility for Internationally Wrongful Acts*, 2001.

<sup>178</sup> Condorelli L, *The Imputability to States of Acts of International Terrorism*, 240.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

This research paper set out to study the legitimacy of self-defence against NSAs in International law today. The hypotheses of this study was that self-defence against attacks by NSAs that emanate from the territory of a sovereign state, is permitted under international law.

The paper set out on a premise of the realist school of thought, and in this is, the author is of the position that international laws should be tailor made to meet the realities that the world faces; that international law should be a living, breathing branch of law that should not be stagnant but adapt to the numerous changes that globalisation and the natural growth of the world has brought about. The author set out to write this paper on the premise that, international law could not be effective if it remains archaic and does not meet the needs of the changing community of states and the world at large.

On a backdrop of the recent proliferation of dangerous and conceivably powerful NSAs in the plane of armed conflict in many parts of the world, the study set out to analyse what exactly the legal parameters surrounding states' right of self-defence in relation to NSAs is, and in what circumstances this would be permitted. The study noted that many countries as mentioned in the paper, claimed their right to defend themselves against attacks by NSAs who attacked them, but that still, this was an issue in contention in international law. Taking into cognizance the fact that the UN Charter was put in place to ensure among other things but most importantly that peace and unity prevailed in the world, the study was necessary to carry out because of the fact that many states continually waged acts of war and used force against NSAs in other sovereign states.

The study was carried out to show that there needed to be clarity in the law, in order to ensure that the very real threat of NSAs was dealt with, while still preserving the purposes of the UN Charter in Article 1(1). The author concedes that states should not be left to unilaterally wage war in the name of self-defence from NSAs when the law is not entirely clear as this brings a travesty to the purpose of the UN Charter. The author also concedes however, that the issue of armed NSAs needs to be dealt with, as in the world today, they pose a threat to the survival of mankind.

It is in this tangent then, that the paper sought to gain the answers to the following questions.

*Whether it is legally justifiable, for a state to claim self-defence against NSAs in the territory of another sovereign state?*

*What are the legal parameters surrounding the attribution of state responsibility on a sovereign state in whose territory the NSAs emanate from?*

The paper set out to gain answers to these questions through carrying out a discussion on a practical case, that of the *Operation Linda Nchi*, which was the 2011 Kenyan incursion into Somalia in self-defence against the terrorist group Al Shabaab. This practical example was used in the study in analysing the various issues in law that were discussed. The paper discussed the general law on the use of force and the self-defence exception in the UN Charter and in customary international law and thereafter, the law on state responsibility as regards the issue of NSAs.

### Authorship of Armed Attacks

This research paper has shown that the UN Charter does not explicitly state the authorship of armed attacks when it mentions self-defence. The paper is of the position that, the authorship of armed attacks in relation to self-defence should include NSAs as well as states. Failure to do so, would be against the realist school of thought, and would open up states to a myriad of attacks by NSAs that they cannot ultimately defend themselves from. The authorship of armed attack should include NSAs because in the world today, NSAs continue to threaten the sovereignty of peoples and their states should be able to protect their sovereignty.

### Threat of Armed Attack

This paper has also shown that self-defence, should not only be permitted in the case of an actual materialised armed attack, but also against the threat of armed attack. This, the paper holds, is the correct position of the law, but should contain limits. The threat of the armed attack must be imminent, instant, overwhelming, and absolutely necessary to thwart the threat and must leave no choice or moment for deliberation. In these cases then, self-defence should be permitted. It would be a complete absurdity to expect that states should sit and wait for attacks that they view as imminent to materialise. The use of force as well as the

threat of use of force is prohibited in the UN Charter. Further, the self-defence exception in Article 51 should also then be as relates to force and threat of force.

### State Responsibility for Non-State Actors

This study has also set out clearly that self-defence against NSAs should be permitted in cases where the armed actions of the NSAs against a particular state, are either directly controlled or instructed by the particular sovereign state in which they emanate from. Self-defence should also be permitted in instances where a particular state has acknowledged and adopted the actions of the NSAs as its own. This is in tandem with the international law on the responsibility of states. It is the position of this paper that, without determining clearly and evidently the state link to the actions of the NSAs, it is illegal to use force against the territory of another sovereign state. Furthermore, this paper is of the position that claiming state responsibility and owing to the failure of a state or its apparatus in thwarting a threat because it is a failed state, and thereby using force against it, is not in good faith and should not be entertained as an argument for the using of force against it. Once a state has declared its consent however to the actions in self-defence of another state against these NSAs as was the case in the *Operation Linda Nchi* that the state should be permitted to carry out these actions.

### Conclusion

This paper, ultimately is of the position that the law need not be written a fresh, but only clarified as regards these issues. Self-defence against NSAs, should be permitted in international law, but in a very strict manner. There should be limits, as discussed in the previous paragraphs that ultimately ensure that it is not easy for a state to launch attacks against another state, while claiming self-defence. States should not unilaterally use force against distant threats. This, makes sure that the world does not return to its previous state, where for instance states could wage war because they had a 'just cause' to do so. This paper realises that the UN Charter provisions on the use of force are extremely important, in order to preserve the peace and unity in the world. Self-defence against the attacks and the threat of attacks by dangerous armed NSAs should be permitted in very stringent ways. The law should be adequately clarified to ensure that there are set limits on this.

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