



**UNIVERSITY OF NAIROBI**

**COLLEGE OF HUMANITIES AND SOCIAL SCIENCES**

**SCHOOL OF LAW**

**GPR 699: RESEARCH PAPER**

**Accountability in the exercise of Self-Defence under International law: A Case Study of  
*Operation Linda Nchi***

**CHANGALWA B. KEITH**

**REG NO.: G62/7838/2017**

**Submitted in partial fulfillment of the requirements for the award of Master of Laws  
(LL.M) Degree of the University of Nairobi.**

**2019**

**DECLARATION**

This thesis is my original work and has not been submitted to any institution for the award of a degree or otherwise.

**CHANGALWA B. KEITH**

**REG NO. G62/7838/2017**

**Signature .....****Date .....**

**APPROVAL**

This thesis has been submitted to the University of Nairobi, School of Law for examination with my approval as the supervisor.

**Supervisor(s): DR. KEN OBURA/DR. KEN MUTUMA**

**Signature .....**      **Date .....**

## **DEDICATION**

To all innocent souls whose lives have been cut short, maimed or altered permanently by the terror attacks on Kenyan soil and counter-terrorism military operations ongoing in Somalia; the law may fall short but the Almighty God shall ultimately, recompense you.

## **ACKNOWLEDGMENT**

To the Almighty Lord, all this work and thus far, is a testament of your ever sufficient grace, infinite favor and abundant blessings in my academic journey, career and life as a whole. Imela Papa. Ever!

My supervisor, Dr. Obura your kind tutelage and supervision from inception and throughout the research journey has been invaluable in not only honing my research skills but also enriched my knowledge in this area of study. I will forever be grateful.

Special appreciation to my lovely Chi, dear mum and close family members for your prayers and support during the long, lone and late hours spent to complete this journey successfully.

## ABSTRACT

The distinction between '*jus ad bellum*' (law of war) and '*jus in bello*' (law in war) is fundamental to the discourse on use of force. The law envisages autonomy between the question of legitimacy of resorting to armed force and the actual conduct of hostilities. *Jus ad bellum* prohibits recourse to force save for two instances: self-defence or through the UN Security Council's enforcement authority. On the contrary, *jus in bello* presupposes the necessity of armed force provided it does not occasion unnecessary human suffering.

However, in the theatre of conflict, recourse to force particularly in contemporary times pose several challenges. This is because of the increased prevalence of non-international armed conflict situations that extend to other territories and two, in light of emerging global security issues such as terrorism and the divergent state practice on this subject. In modern times, the nature and dynamics of warfare is ever in a state of flux. Modern warfare involves an intricate combination of actors- state and non-state and occurs in a globalized context that has witnessed advancements in technology and weaponry.

Contemporary armed conflicts are more often characterized by foreign intervention, either unilaterally or by several states as a multinational force. The intervening force(s) may use force against the aggressor(s) and in some instances, may offer assistance to the territorial state in restoring order. The conflict situation in Somalia is a classic example that brings to the fore a discussion on the use of force in present time.

This study examines the recourse to force in self-defence by the Kenyan state unilaterally and collectively under the African Union Mission in Somalia (AMISOM). The focus is on the extent of compliance with underlying principles and attendant obligations on use of force.

First, the study finds that *Operation Linda Nchi* depicts elements of both *jus ad bellum* and *jus in bello* regimes. Equally, the study finds that the UN Security Council vide Resolution No. 1744 of 2007 authorized the deployment of the AMISOM force in Somalia to not only undertake counter-terrorism military operations but also help the Somalia government restore law and order. Thus, AMISOM has a multi-dimensional approach comprising of military, police and civilian components.

Second, the study finds that recourse to force in self-defence is subject to legal safeguards entrenched under both treaty and customary international law. Self-defence does not also exempt a state from complying with the fundamental principles of the law of armed conflict and non-derogable principles of international human rights law.

Third, the paper finds that there exist numerous instances of breach of the law by actors involved in the armed conflict situation in Somalia. Thus, the paper recommends the invocation of the investigation procedure as a preliminary measure to determine the extent of responsibility of each party and subsequently, appropriate action.

## **DEFINITION OF KEY TERMS**

**Asymmetric warfare** refers to a situation where parties in an armed conflict do not have equal military capacities in terms of weaponry, methods or tactics. For instance, state troops and non-state actors such as armed rebel groups.

**Civilian objects** refer to civilian facilities, premises or properties that the law protects from attacks or targeting by warring parties in an armed conflict.

**Counter-terrorism military offensives** refer to the ongoing multilateral operations in Somalia against the Al Shabaab terror group and its affiliates.

***Jus ad bellum*** refers to the legal regime that regulates the legality of use of force i.e. the law of war.

***Jus in bello* or law of armed conflict** refers to the legal regime that regulates the conduct of parties taking part in an armed conflict.

***Operation Linda Nchi*** refers to the cross-border military operation in Somalia launched by the Kenyan state in October 2011.

**Self-defence** refers to a State's right under international law to use force to protect its territory against armed attacks as stipulated under Article 51 of the UN Charter and customary international law.

**Troop-contributing countries (TCCs)** refers to African states that deployed their armed forces in Somalia as part of the joint African-force.

## **ACRONYMS**

AMISOM- African Mission in Somalia

API & II- Additional Protocol I and II of 1977

AU- African Union

CIVIC- Campaign for Innocent Victims in Conflict

CRT- Critical Legal Theory

DPA- Djibouti Peace Agreement of 2008

FGS- Federal Government of Somalia

IAC- International Armed Conflict

ICC- International Criminal Court

ICJ- International Court of Justice

ICRC- International Committee of the Red Cross

ICTY- International Criminal Tribunal for Yugoslavia

ICU- Islamic Courts Union

IGAD- Inter-Governmental Authority on Development

IHL- International Humanitarian Law

IHRL- International Human Rights Law

ILC- International Law Commission

IO- International Organization

KDF- Kenya Defence Force

KNCHR- Kenya National Commission on Human Rights

NIAC- Non- International Armed Conflict



SNA- Somalia National Army

SRC- Supreme Revolutionary Council

TCCs- Troop-Contributing Countries

TFG- Transition Federal Government

TNC- Transitional National Council

UN Charter – United Nations Charter of 1945

UN- United Nations

UNGA- United Nations General Assembly

UNITAF- Unified Task Force

UNOSOM I- United Nations Mission in Somalia of 1992

UNOSOM II- United Nations Mission in Somalia of 1993

UNSC- United Nations Security Council

UNSOM- United Nations Assistance Mission in Somalia

USC- United Somali Congress

## Table of Contents

DECLARATION.....	ii
APPROVAL .....	ii
DEDICATION.....	iii
ACKNOWLEDGMENT .....	iv
ABSTRACT.....	v
DEFINITION OF KEY TERMS.....	vii
ACRONYMS.....	viii
CHAPTER 1.0: GENERAL INTRODUCTION.....	1
1.1 Background of the Study.....	1
1.1.1 The Al Shabaab terror group .....	5
1.2 Statement of the Problem.....	6
1.3 Research Objectives.....	9
1.4 Research Questions.....	9
1.5 Hypothesis.....	10
1.6 Justification of the Study.....	10
1.7 Limitations.....	11
1.8 Literature Review .....	12
1.9 Theoretical Framework.....	22
1.9.1 Critical legal theory .....	22
1.9.2 Normative Positivism.....	24
1.10 Research Methodology .....	25
1.11 Chapter Breakdown.....	<u>26</u> <del>25</del>
CHAPTER 2.0: EFFECT OF FOREIGN INTERVENTION IN THE SOMALIA CONFLICT.....	27
2.1 Introduction.....	27
2.2 Typology of Armed Conflict .....	<u>28</u> <del>27</del>
2.2.1 International Armed Conflict (IAC) .....	<u>28</u> <del>27</del>
2.2.2 Non-International Armed Conflict (NIAC) .....	<u>30</u> <del>29</del>
2.2.3 Internationalized Internal Armed Conflict .....	31
2.2.4 Internalized International Armed Conflict .....	35
2.3 Foreign Intervention in Somalia.....	36
2.3.1 African Union (AU) Intervention: AMISOM troops .....	36

2.3.2 Kenya’s Intervention: Operation Linda Nchi .....	37
2.5 Conclusion .....	40
<b>CHAPTER 3.0: KENYA’S RESPONSIBILITY IN THE SOMALIA CONFLICT .....</b>	<b>41</b>
3.1 Introduction.....	41
3.2 State responsibility in an armed conflict.....	42
3.2.0 Scope of Application of IHL.....	42
3.2.1 The Subject matter.....	42
3.2.2 The Geographical Scope.....	43
3.2.3 The Parties.....	45
3.3 Fundamental principles under IHL .....	<u>4647</u>
3.3.1 Principle of attribution .....	<u>4647</u>
3.3.2 Principle of distinction.....	51
3.3.3 Principle of proportionality.....	52
3.3.4 Principle of humanity .....	<u>5253</u>
3.4 KDF’s conduct in Somalia.....	<u>5354</u>
3.4.1 Force establishment & strategy .....	<u>5455</u>
3.4.2 KDF’s excesses: Instances of alleged breaches of IHL .....	<u>5657</u>
3.5 AMISOM’s conduct in Somalia.....	59
3.5.1 AMISOM’s alleged breach of IHL .....	60
3.6 Conclusion .....	63
<b>CHAPTER 4: CONCLUSION AND RECOMMENDATIONS .....</b>	<b><u>6465</u></b>
4.1 Introduction.....	<u>6465</u>
4.2 Conclusion .....	65
4.3 Recommendation(s) .....	<u>7273</u>
Bibliography .....	76

## CHAPTER 1.0: GENERAL INTRODUCTION

### 1.1 Background of the Study

Somalia has been characterized by a history of lawlessness and instability since colonial times. In 1969, the Supreme Revolutionary Council (SRC) led by General Said Barre staged a military coup that overthrew the independence regime.<sup>1</sup> Said Barre's regime was characterized by dictatorship as manifested by the crackdown on the critics of his regime.<sup>2</sup> This triggered intense rivalry and open warfare along clan factions.<sup>3</sup>

Subsequently, the conflict culminated in the violent ouster of President Said Barre's regime in 1991 by the United Somalia Congress (USC) forces under warlord Ali Mahdi.<sup>4</sup> Intense fighting ensued between clan lords with each seeking to gain power and control over Somalia. The protracted violence witnessed instigated a period that the citizenry refer to as '*burbur*', which means a catastrophe.<sup>5</sup>

The ouster of Said Barre's regime effectively led to the disintegration of Somalia's state system.<sup>6</sup> Ruth Gordon argues that the prolonged and bloody civil war waged against Barre's regime acted as the immediate precursor of the disintegration in Somalia and eventually degenerated into a civil war between clan-based rebel groups.<sup>7</sup> On her part, Sharmon Thomas observes that the fragmentation of the Somalia state ruined its infrastructure and claimed

---

<sup>1</sup> Joint Special Operations University (JSOU) Report, *Counterinsurgency in Somalia: Lessons learned from the African Union Mission in Somalia, 2007-2013* (September 2014) 5.

<<https://jsou.socom.mil>> Accessed on 19<sup>th</sup> February 2019.

<sup>2</sup> Campaign for Innocent Victims in Conflict (CIVIC) report 'Civilian Harm in Somalia: Creating an Appropriate Response' (2011) 9-10. Accessed at [www.civicworldwide.org/somalia\\_report\\_2011](http://www.civicworldwide.org/somalia_report_2011)

<sup>3</sup> JSOU report, *Counterinsurgency in Somalia* (n.1), 5.

<sup>4</sup> Supra note 2, 10.

<sup>5</sup> Supra note 1, 5.

<sup>6</sup> Sharmon Thomas, 'Somalia: Challenges and Opportunities in Peace Building' (2016) 5 Accessed at <<http://www.cfpar.org>>

<sup>7</sup> Ruth Gordon, 'Growing Constitutions' (1999) *Journal of Constitutional Law* Vol.1:3, 534

thousands of lives. For quite a long time, the country has been fragmented and divided into fiefdoms that are under the control of clan-based factions led by warlords.<sup>8</sup>

Hence, Sharmon Thomas argues that this state of affairs has caused the country to be recognized as a 'failed state' at the international level.<sup>9</sup> David Harris shares a similar view noting that for quite a long time, Somalia has lacked a state authority that has effective control despite the numerous attempts to restore order.<sup>10</sup>

In 1992, the United Nations (UN) banned the supply of arms to Somalia in a bid to address the proliferation of arms as they were considered a key contributor to the conflict in Somalia.<sup>11</sup> It further negotiated a truce between the clan-factions and deployed troops as the United Nations Operations in Somalia (UNOSOM I).<sup>12</sup> The mission's objective was two-fold: one, to oversee the implementation of the peace pact between the factions and two, provide security and protection to the UN personnel in the course of humanitarian aid programmes to mitigate the effects of the severe famine in Somalia at that particular time.<sup>13</sup>

However, the UN troops faced stiff resistance especially from the Mohamed Aideed-led USC faction hence there was need to deploy more troops to ensure the humanitarian relief programmes run uninterrupted. Thus, the United Nations Security Council (UNSC) authorized deployment of more troops under aegis of Unified Task Force (UNITAF) with the underlying

---

<sup>8</sup> Supra note 6, 8.

<sup>9</sup> *ibid*, 5

<sup>10</sup> David Harris, *Cases and Materials on International Law* (7<sup>th</sup> edn Sweet & Maxwell 2010) 93-94

<sup>11</sup> UN Security Council Resolution, S/RES 733 (1992) 'Imposition of Arms Embargo' adopted on 23 January 1992. Accessed at <https://www.un.org/securitycouncil/>

<sup>12</sup> African Union Mission in Somalia (AMISOM) website <<http://amisom-au.org/>> Accessed on 13 March 2019.

<sup>13</sup> United Nations Security Council (UNSC) website <<https://www.un.org/securitycouncil/>>

objective being the provision of a safe environment for the continued implementation of humanitarian operations.<sup>14</sup>

Notably, in March 1993, the warring factions signed another peace agreement in which they agreed and committed to the establishment of a Transitional National Council (TNC). The UNITAF troops undertook ‘*Operation Restore Hope*’, which managed to restore order besides alleviating the existing famine in the country.<sup>15</sup> Having achieved its mission, the UNITAF troops withdrew from Somalia in May 1993 and were replaced by the United Nations Operation in Somalia (UNOSOM II).<sup>16</sup>

Despite adoption of a peace agreement in 1993, attacks on the UN troops continued, particularly by militia affiliated to warlord Mohamed Aideed.<sup>17</sup> In October 1993, the UN troops staged an unsuccessful raid at Aideed’s base in Mogadishu resulting in the brutal killing of more than 1,000 Somalis and 19 American troops.<sup>18</sup> This culminated in the withdrawal of the USA troops in 1994 and subsequently, the UN force pulled out in 1995 despite having not managed to restore order in Somalia.<sup>19</sup> This effectively left Somalia in the hands of warlords, which aggravated the conflict situation further. In the wake of the withdrawal of the international force in 1995, the Somalia conflict spiraled into lawlessness and widespread atrocities.<sup>20</sup>

Nonetheless, it is worth noting that there have been other international efforts and approaches aimed at pacifying the Somalia situation and establishing order in Somalia.<sup>21</sup> For instance,

---

<sup>14</sup> UN Security Council Resolution 794 of 1992. Accessed at <https://www.un.org/securitycouncil/>

<sup>15</sup> AMISOM website (n.12)

<sup>16</sup> *ibid*

<sup>17</sup> Kenneth Allard, *Somalia Operations: Lessons learned* (CCRP, 2002) 16

<sup>18</sup> *Supra* note 2, 11.

<sup>19</sup> Kenneth Allard (n.17), 17

<sup>20</sup> *Supra* note 2, 11

<sup>21</sup> *Supra* note 6, 9 where the author notes that during the period 1991 to 1997, there have been a total of twelve Conferences on political reconciliation but all have not yet restored lasting peace in Somalia.

numerous peace initiatives and conferences have been convened in a bid to address the Somalia situation.<sup>22</sup> Notably, some of these initiatives have culminated in the adoption of different peace agreements containing a raft of provisions including the establishment of interim governments as a way of restoring the state system in Somalia.<sup>23</sup> However, to date none of the interim regimes has managed to restore order in Somalia since they lacked general acceptance from the warring factions.<sup>24</sup>

One of the notable initiatives took place in 2001. The Intergovernmental Authority on Development (IGAD) convened a peacemaking talks in which Kenya participated as a key mediator.<sup>25</sup> In 2004, after several unsuccessful attempts, Somalia warlords and political leaders adopted the Transitional Federal Charter that called for the creation of an interim government..<sup>26</sup> It was projected that through the Transitional Federal Government (TFG), Somalia shall re-establish administrative order and foster peace and unity.<sup>27</sup>

However, faction leaders and armed warlords coalescing under the Islamic Courts Union (ICU) banner questioned legitimacy of the interim government.<sup>28</sup> They considered the TFG as an affront on Somalia's political and territorial integrity since it was a product of an external

---

<sup>22</sup> Cecilia Hull Wilkand, 'The Role of the African Union Mission in Somalia (AMISOM): Peacekeeping Success Or Peacekeeping in Regress?' (2013) 12.

<sup>23</sup>Supra note 22, 12.

<sup>24</sup>ibid

<sup>25</sup> AMISOM website (n.12).

<sup>26</sup>David Harris (n.10), 94

<sup>27</sup> Preamble, Transitional Federal Charter for the Somali Republic.

<sup>28</sup> CIVIC report (n.2), 11-12 where the report notes that the withdrawal of the international force from Somalia in 1995 left a vacuum that led to the emergence of the ICU. Clan elders established the ICU as an alternative societal structure of power. The ICU, which was founded largely on the sharia law, further established sharia courts as a way of controlling the gangs, and militia, which was slowly becoming a threat to its own people.

process.<sup>29</sup> In local parlance, the TFG was referred to in derogatory terms as ‘*daba dhilif*’, which loosely refers to a “government set up for a foreign purpose” or a “satellite government.”<sup>30</sup>

The security situation in Somalia remained precarious. In the absence of an effective state authority, Somalia became a haven for terrorist elements. For instance, some of the ICU leaders were accused of closely associating with international terror groups such as Al-Qaida.<sup>31</sup> The Ethiopian military sent troops in Somalia to battle with the ICU force in a bid to help the TFG’s administration establish presence and control in Somalia.<sup>32</sup> In light of these developments, the ICU disintegrated into several factions with a notable one being the Al Shabaab militia.<sup>33</sup>

### **1.1.1 The Al Shabaab terror group**

The Al-Shabaab terror group emerged as a militant movement of the former Islamic Court Union (ICU).<sup>34</sup> It became prominent especially after the ouster of the ICU forces in December 2006.<sup>35</sup> In the course of time, the group has evolved rapidly from an obscure militia group into an autonomous force with transnational links with international terror groups such as the Al-Qaida.<sup>36</sup>

Arguably, Ethiopia’s violent occupation of Mogadishu in support of the TFG sparked intense public anger due to widespread human rights abuses allegedly committed by the Ethiopian

---

<sup>29</sup> Supra note 6, 9.

<sup>30</sup> Supra note 1, 9.

<sup>31</sup> CIVIC Report (n.2), 13-14

<sup>32</sup> *ibid*, 14

<sup>33</sup> AMISOM website (n.12)

<sup>34</sup> Supra note 1, 22.

<sup>35</sup> *ibid*, 22-23.

<sup>36</sup> Supra note 1, 25 where it is noted that ‘...the Al Shabaab militia established transnational links with Al-Qaeda who took advantage of the rhetoric and propaganda to offer financial, tactical support and supply of illegal arms.’



National Defence Forces (ENDF) troops.<sup>37</sup> It also lend credence to a narrative of external interference in the internal affairs of Somalia.<sup>38</sup> In this regard, Al Shabaab gained strong public support since locals viewed it as the only actor capable of revenging against Ethiopia's actions.<sup>39</sup> Consequently, Al-Shabaab militants commenced insurgency attacks against the ENDF and AMISOM troops under the pretext of fighting against foreign interference.<sup>40</sup>

In the course of time, Al Shabaab acquired sophisticated weaponry and shifted from staging attacks within Somalia to cross-border attacks thereby adopting a transnational character.<sup>41</sup> In light of these transnational attacks coupled with its affiliations with international terror groups such as Al-Qaida, Al Shabaab is now proscribed as an international terrorist group.<sup>42</sup> In 2012, the group formally announced its links with the Al-Qaida terror group.<sup>43</sup>

## **1.2 Statement of the Problem**

As one of the immediate neighbors of Somalia, Kenya has experienced the adverse effect of the conflict situation in Somalia that has lasted for over decades.<sup>44</sup> In October 2011, Kenya deployed the Kenya Defence Forces (KDF) in Somalia to undertake a military offensive dubbed '*Operation Linda Nchi*' ostensibly for purposes of establishing a security buffer zone along the

---

<sup>37</sup> CIVIC report (n.2), 14

<sup>38</sup> Supra note 1,23.

<sup>39</sup> *ibid*, 23

<sup>40</sup> JSOU Report, *Counter-insurgency in Somalia* (n.1), 23

<sup>41</sup>*ibid*, where the author points out that Al Shabaab's major act of transnational terrorism involved the July 2010 bombing in Kampala Uganda where 74 lives were lost.

<sup>42</sup>*ibid*, 24; See also CIVIC report (n.2), 14.

<sup>43</sup> UN Monitoring Group on Eritrea and Somalia report of 2012 para. 32 submitted to the UN Security Council vide S/2012/544. Accessed at <https://www.un.org/securitycouncil/>

<sup>44</sup> Kenya National Commission on Human Rights (KNCHR) Report, *The Error of Fighting Terror with Terror* (2015) 3 Available at <[www.knchr.org](http://www.knchr.org)>

Kenya-Somalia border and two, protecting her territorial integrity from the terror threat posed by the Al-Shabaab terror group.<sup>45</sup>

Although the military operation is now in its 8<sup>th</sup> year, the KDF troops have not fully complied with the fundamental principles and underlying obligations on use of force. This is evidenced by the numerous documented reports of acts of commission and omission that; one, constitute a breach of IHL and two, have also violated the core principles of human rights law. For example, the UN Monitoring Group on Eritrea and Somalia reports of increased resort to unauthorized air strikes in Somalia which have occasioned massive civilian casualties, loss of livelihoods and displaced thousands of Somalia citizenry.<sup>46</sup>In 2016, out of 105 cases of civilian deaths reported, 29 casualties were attributed to air strikes by KDF troops.<sup>47</sup>

The KDF troops have also been accused of staging indiscriminate attacks characterized by disproportionate force ostensibly targeted at Al Shabaab terror cells.<sup>48</sup> In the process, properties such as residential houses, schools, water points and other social amenities which qualify as civilian facilities under the law of war have been destroyed.<sup>49</sup> These actions negate the principle

---

<sup>45</sup> The Government of Kenya's Communiqué of 17 October 2011 addressed to the UN Security Council vide (S/2011/646) para.5. Accessed at <https://www.un.org/securitycouncil/>

<sup>46</sup> UN Monitoring Group on Eritrea and Somalia Report of 2016 submitted to the UN Security Council on 31 October 2016 vide S/2016/919 para. 104. Accessed at <https://www.un.org/securitycouncil/>

See also; the UN Monitoring Group on Eritrea and Somalia Report of 2013, para.94. Accessed at <https://www.un.org/securitycouncil/>

<sup>47</sup> UN Secretary General Report on Somalia of 2016 submitted to the UN Security Council vide S/2016/430 paras. 50-51 Accessed at <https://undocs.org/S/2016/430>

<sup>48</sup>ibid, para. 51

<sup>49</sup> ibid

of distinction under the law of war that mandatorily obliges military troops to differentiate civilians and civilian properties from military targets.<sup>50</sup>

In addition, KDF troops have been accused of not fully abiding by the requirement of military necessity that stipulates that troops must be guided strictly by military objectives as opposed to other interests.<sup>51</sup> For instance, KDF troops undertook ‘*Operation Sledgehammer*’ in 2012 that led to the successful capture of Kismayu port from Al-Shabaab’s reign since it was considered a key source of revenue for financing the activities of the terror group.<sup>52</sup> However, despite the capture, reports indicate that charcoal smuggling through the Kismayu port is still vibrant.<sup>53</sup> The UN Monitoring Group report of 2013 reveals that KDF and its local affiliated forces continued with the illegal charcoal trade through the Kismayu port despite the fact that the UN ban on charcoal trade is still in force.<sup>54</sup>

That notwithstanding, KDF’s operations have been shrouded in secrecy. This coupled with lack of cooperation with UN Monitoring bodies has greatly hampered efforts to assess the impact on civilians and adoption of necessary mitigating measures.<sup>55</sup> Equally, in relation to AMISOM operations, there is limited information on the extent to which the joint-African force has achieved its mandate.<sup>56</sup>

---

<sup>50</sup> Additional Protocol I of 1977, Article 48

<sup>51</sup> *ibid*, Article 52 (2)

<sup>52</sup> The UN Monitoring Group on Eritrea and Somalia Report of 2013 submitted to the UN Security Council vide S/2013/413, para. 91. Accessed at <https://www.un.org/securitycouncil/>

<sup>53</sup> *ibid*, para 91.

<sup>54</sup> *ibid*, paras.148-149. See also the UN Security Council Resolutions No. 751 of 1992 & No. 1907 of 2009 that inter alia imposed a ban on charcoal trade for it was considered a major source of revenue of financing illegal activities in Somalia. Accessed at <https://www.un.org/securitycouncil/>

<sup>55</sup> UN Monitoring Group on Eritrea and Somalia report of 2012 (n.43), para. 96

<sup>56</sup> *ibid*

### **1.3 Research Objectives**

This study seeks to discuss legal mechanisms of securing accountability in the exercise of force in self-defence under international law.

Specifically, the study shall seek to:

1. Discuss the scope of application and the emerging contemporary issues on recourse to force in self-defence under international law.
2. Examine the effect of Kenya and AMISOM's intervention on the conflict situation in Somalia.
3. Examine Kenya's responsibility for the acts of its troops in Somalia. The paper shall also examine the extent of responsibility of the African Union (AU) for the acts of AMISOM troops since KDF integrated into the African force in 2012.
4. Recommend the appropriate legal mechanism of securing accountability for the acts of commission and omission by KDF and AMISOM that breach international obligations.

### **1.4 Research Questions**

1. What is the threshold and legal safeguards on recourse to force in self-defence under both treaty and customary international law?
2. What is the effect of foreign intervention in an armed conflict occurring on a territory of another state?

3. What obligations accrue to the intervening state or international organization, in the context of a multinational force?
4. In case of breach of these obligations, what legal mechanism can be invoked to hold the perpetrators to account?

### **1.5 Hypothesis**

Despite the fact that Kenya deployed troops in Somalia in 2011 for a cross-border military operation under the premises of Article 51 of the UN Charter, she has not complied fully with the fundamental principles, rules and attendant obligations on recourse to force.

### **1.6 Justification of the Study**

The legal provisions under international law on recourse to force are quite elaborate. The law provides for instances where recourse to force is allowed, the threshold and mechanisms to regulate recourse to force by a state against an aggressor. Two, the law further regulates the actual use of force to ensure it does not occasion needless suffering, to both civilians and troops.

Pursuant to the law, the general rule is that threat or actual use of force by a state is prima facie prohibited.<sup>57</sup> However, the right to self-defence is an exception to this rule. Article 51 of the UN Charter provides for ‘...an inherent right of a state to defend itself either unilaterally or collectively, in the event of an armed attack.’ However, the law obliges states to submit a report to the UN Security Council detailing the action taken in the course of self-defence. Additionally, in the course of the ensuing hostilities, the law provides for fundamental principles and rules that regulate the conduct of warring parties.

---

<sup>57</sup> Article 2(4) of the UN Charter stipulates thus ‘...all UN member States in their international relations refrain from threat or use of force against the territorial integrity ...of any state or any manner ...inconsistent with the purposes of the UN...’

Thus, this research study seeks to critically analyze the level of compliance by Kenyan and AMISOM troops<sup>58</sup> in the course of the counter-terrorism armed operations in Somalia. In particular, the study shall highlight acts of commission and omission by KDF and AMISOM troops that are not in consonance with one, the core tenets of the law of war and two, underlying obligations under international law. The paper then proposes a possible legal mechanism of pursuing accountability against the state officials responsible for the breaches.

It is projected that upon conclusion, this research paper will contribute to the discourse on the need to enhance accountability of Kenyan and AMISOM troops in the ongoing counter-terrorism operations in Somalia. The paper adopts a two-fold approach in that; it recommends that the UN pursues remedial action for purposes of securing justice for victims of the numerous breaches reported. Two, given that the military operations are still ongoing in Somalia, it recommends mitigating measures that may be put in place by troop-contributing countries to prevent a recurrence of such breaches in the course of armed conflict.

### **1.7 Limitations**

The paper shall focus on the post-2011 period, the very first time in Kenya's history that the right to self-defence has been invoked and KDF involved in a cross-border military armed operation. Given the discreet nature of military operations coupled with the fact that *Operation Linda Nchi* is still ongoing in Somalia, there exist limited information on KDF operational strategies, the actual execution of operations and the impact on troops themselves and quite importantly, on civilians and civilian properties. In this regard, the author shall undertake a desktop research and critically analyze the available literature under this study area.

---

<sup>58</sup> Kenya signed a MOU with the AU in 2012 consenting to the integration of its troops with the AMISOM force.

## 1.8 Literature Review

The concept of use of force has generated extensive discourse since time immemorial. Martin Dixon argues that the concept traces its roots in the doctrine of ‘just war’, which sought to limit recourse to war only for ‘just causes.’<sup>59</sup> War was considered ‘legitimate’ in instances where an aggressor state had without reasonable cause attacked another state and refused to make amends or compensate the injured state.<sup>60</sup> Hugo Grotius observes that not all wars were condemned, rather the law of nations permitted states to ‘...repel violence and injury in order to [...] protect its citizens.’<sup>61</sup> He points out that some of the causes that were considered just included defense of citizens or recovery of property seized wrongfully.<sup>62</sup>

Essentially, war was considered as a means of correcting an injustice. States focused primarily on the grounds or reasons to use force to avenge the wrongs committed. Hence as Vaughan Lowe notes, the just war doctrine attributed ‘...all fault to the state which committed the original wrong [...] and it mattered not the violence used to make amends.’<sup>63</sup>

The advent of the concept of nation-state particularly in the 18<sup>th</sup> Century led to the redefining of the just war doctrine due to the territorial conquests that occurred at that time.<sup>64</sup> Consequently, resort to war under international law became a matter of a state’s discretion as it was considered

---

<sup>59</sup> Martin Dixon, *Textbook on International Law*, (7<sup>th</sup> edn, OUP 2013) 322

<sup>60</sup> Malcolm N. Shaw, *International Law*, (7<sup>th</sup> edn, Cambridge University Press 2014) 812

<sup>61</sup> Hugo Grotius, *On the Law of War and Peace* (2001) 23

<sup>62</sup> *ibid*, 60

<sup>63</sup> Vaughan Lowe, *International Law* (OUP, 2011), 264

<sup>64</sup> Martin Dixon (n.59), 322

an attribute of sovereignty and a prerogative of in the sovereign authority.<sup>65</sup> War was lawful provided it had been sanctioned by the regime in power. As Malcolm Shaw observes, each state was ‘...convinced in the justice of its own cause...’<sup>66</sup> States could invoke other extra-legal considerations to wage war since there were absolutely no restraints on use of force.<sup>67</sup> This led to unprecedented human suffering as witnessed during World War I.<sup>68</sup>

In the course of time, there was need to address this state of affairs and enhance the regulation of ‘resort to war’. The signing of the Covenant of the League of Nations in 1919 marked a major development in this regard. Martin Dixon observes that in line with the underlying objective of resolving international disputes amicably, the Covenant sought to impose procedural safeguards on the resort to war.<sup>69</sup> In 1928, the General Treaty for the Renunciation of War also called the *Paris Pact* was adopted to supplement the Covenant.<sup>70</sup> The Paris Pact signified a major shift since it renounced war as the only way of settling disputes between states.<sup>71</sup> Essentially, it was now accepted that war could be outlawed.<sup>72</sup>

The prohibition of threat or actual recourse to force gained credence when it was entrenched in the United Nations Charter of 1945. The UN Charter also establishes the UN Security Council and tasks it with the responsibility of upholding security and international peace. Essentially, Article 2 (4) is one of the main provisions of the UN Charter.<sup>73</sup> Vaughan Lowe argues that the

---

<sup>65</sup>Ian Brownlie, *Principles of Public International Law* (7<sup>th</sup> edn OUP 2008) 729

<sup>66</sup>Malcolm N. Shaw (n.60) 812

<sup>67</sup>Rebecca MM Wallace et al, *International Law* (7<sup>th</sup> edn, Sweet & Maxwell 2013) 294

<sup>68</sup> *ibid*

<sup>69</sup> Martin Dixon (n.59), 323

<sup>70</sup> *ibid*

<sup>71</sup>For instance, Article 1 of the Kellogg-Briand pact is instructive in that it embodies the commitment of states to resort to force as a way of settling disputes. See also Prof. Ian Brownlie (n.65) 730 notes that this treaty had an (almost) universal acceptance as 63 states ratified it with an exception of 4 states only.

<sup>72</sup>Vaughan Lowe (n.63), 270 where the author notes that the Paris Pact signaled an intention to change strategy from war to settling disputes through diplomacy among other less violent means.

<sup>73</sup> Ian Brownlie (n.65), 732



significance of Article 2 (4) is two-fold: One, it seeks to lay down the fundamental rule under international law that disputes should not be settled through violence rather, peacefully and two, the obligation of each state to desist from threat or actual force against another sovereign state.<sup>74</sup> The law requires states to always endeavor to resolve conflicts amicably. Rather than resort to war, the emphasis is on the collective security and peace at the international level.<sup>75</sup> Hence, the prohibition on resort to force forms a cardinal principle under international law that has universal application and is binding in nature.<sup>76</sup>

Though, Article 2 (4) is not an absolute provision. James Crawford observes that due to the outlawing of warfare under the Paris Pact and the UN Charter, the concept of self-defence gained prominence.<sup>77</sup> Self-defence is a legal basis for a state to invoke and exercise force to protect its territorial sovereignty and integrity against external threats. The law envisages that either a state or non-state actor may instigate an armed attack and hence, it is settled law and contemporary international practice that recourse to force in self-defence applies against an aggressor state or non-state groups provided their hostile acts qualify as an armed attack.<sup>78</sup>

The interpretation of the right to self-defence, the legal parameters and state practice has generated extensive debate over time. The debate revolves around whether to interpret Article 51 restrictively or liberally in a way that gives a broad meaning to its text. Equally controversial is whether international law permits recourse to force in self-defence particularly in view of the prevalent global threat of terrorism in the contemporary time.<sup>79</sup> Does self-defence constitute a

---

<sup>74</sup> Vaughan Lowe (n.63), 102-103

<sup>75</sup> Martin Dixon (n.59) 342

<sup>76</sup> *ibid*, 321

<sup>77</sup> James Crawford, *Brownlie's Principles of Public International Law* (8<sup>th</sup> edn OUP 2012) 747.

<sup>78</sup> Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm D. Evans, *International Law* (4<sup>th</sup> edn 2014) 629

<sup>79</sup> *ibid*, 627 where the author argues that '...the controversy on the confines and scope of self-defence has intensified especially in light of the 9<sup>th</sup> September 2001 terror attacks in USA.'

‘just cause’ in combating terrorism? Another pertinent issue relates to striking a balance between the fight against terrorism and compliance with underlying obligations that accrue under the law, for instance international humanitarian and human rights legal regimes.

The law stipulates that an armed attack forms a basis of invoking the right to self-defence.<sup>80</sup> Though, it does not expressly define what amounts to an armed attack to warrant a state to invoke force in self-defence. Malcom N. Shaw points out the conflicting views on the interpretation of the pre-condition of an armed attack and the inherent nature of the right to self-defence.<sup>81</sup> M.N. Shaw notes thus ‘...whereas Article 51 requires that self-defence can only be invoked if an armed attack occurs, on the other hand, it recognizes and preserves this right, as inherently an entitlement of states.’<sup>82</sup>

Similarly, with regard to the fight against terrorism, James Crawford notes that the different approaches employed by states in responding to terror attacks further compounds this debate.<sup>83</sup> State practice point to divergent schools of thought on whether to adopt a restrictive or permissive approach on use of force on this subject of terrorism.<sup>84</sup> As Christian Tams observes, initially the international community adopted a contextual approach that viewed terrorism as a subject of national criminal law depending on facts of each case.<sup>85</sup> In this sense, resort to self-defence was strictly construed and specifically invoked for purposes of repelling armed attacks as opposed to being left to states discretion.<sup>86</sup>

---

<sup>80</sup> Article 51 of the UN Charter stipulates thus... ‘if an armed attack occurs...’

<sup>81</sup> Malcom Shaw, *International Law*, (2<sup>nd</sup> edn, Cambridge University Press 1986) 571

<sup>82</sup> *ibid*, 571

<sup>83</sup> James Crawford (n.77), 749.

<sup>84</sup> Christian J. Tams, ‘The Use of Force against Terrorists’ (2009), Vol. 20 No. 2, 362. Accessed at <http://www.ejil.org/pdfs/20/2/1793.pdf>

<sup>85</sup> *ibid*, 363

<sup>86</sup> *ibid*, 367-370

However in light of the ever-present and growing threat of terrorism, ‘war on terror’ has increasingly gained traction as a ‘legitimate cause’ that may necessitate unilateral or multilateral intervention of states including through forcible means.<sup>87</sup> States have employed different approaches against terrorism including on the spot reprisals, cross-border operations particularly for protection of their nationals on foreign soil or long-term campaigns such as the purported ‘war on terror.’<sup>88</sup> One particular example is the *Operation Enduring Freedom* which was launched by the USA as a matter of self-defence in light of the September 2001 terror attacks in the USA.<sup>89</sup> Particularly, the UN Security Council in its condemnation of the 9/11 terror attacks, considered terrorism ‘...a serious threat to security and international peace and reaffirmed the right of a state to defend itself, either unilaterally or collectively against such attacks.’<sup>90</sup>

The underlying question though remains whether all acts of terror amount to armed attacks as to warrant invoking force in self-defence. Given the conflicting state practice and approaches on terrorism, there is a real likelihood of unjustifiable use of force to advance other interests under the pretext of fighting terrorism.<sup>91</sup> In light of the lacuna in treaty law, recourse to customary international law is necessary. For example in the *Nicaragua case*, the ICJ underscored the need to differentiate between the most-serious forms of force and the less serious ones.<sup>92</sup> From the court’s decision, ‘...only the most-grave forms of force constitute an armed attack.’ Legitimate self-defence can only arise if this threshold is satisfied.

---

<sup>87</sup>ibid, 374

<sup>88</sup>Christine Tams (n.84), 382

<sup>89</sup> Christine Gray (n.78), 631 notes that ‘...the launch of the *Operation Enduring Freedom* has greatly influenced the legal regime of self-defence since it has no definite duration.’

<sup>90</sup> UN Security Council Resolution No. 1368 of 2001, para.1 Accessed at <https://www.un.org/securitycouncil/>

<sup>91</sup> Christine Tams (n.84), 367

<sup>92</sup> Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v USA) (1991) para. 191. Accessed at <https://www.icj-cij.org/>

Another issue of contention relates to ‘...whether to construe the right to self-defence broadly to include anticipatory self-defence.’<sup>93</sup> Note the proviso under Article 51 of the UN Charter which indicates that self-defence arises ‘if an armed attack occurs.’ With respect to the fight against terrorism, does this mean that a state should merely be reactive to terror attacks or it is permitted to take pre-emptive measures to protect itself against a looming terror attack? Existing literature manifests divergent views with respect to the legitimacy of anticipatory self-defence under international law.

On one hand, some proponents hold the view that anticipatory self-defence is *prima facie* incompatible with Article 51 of the UN Charter insofar as the phrase ‘if an armed attack occurs’ is concerned.<sup>94</sup> This is premised on state practice, which as Prof. Ian Brownlie observes, points to a restrictive approach on anticipatory self-defence particularly in the post-1945 era. Prof. Ian Brownlie argues that contrary to the pre-Charter position where states misconstrued self-defence to be synonymous with self-preservation which denoted that states could invoke preventive action or measures, the post-1945 era signifies a shift since most states now consider ‘...anticipatory self-defence as being inconsistent with the UN Charter.’<sup>95</sup> On his part, James Crawford holds a similar view noting that, anticipatory self-defence contradicts the objects and purposes of the Charter particularly on restricting states from unilaterally resorting to use of force.<sup>96</sup>

On the contrary, another school of thought points out the doctrine of pre-emption that permits a state to defend itself from impending armed attacks.<sup>97</sup> Derek W. Bowett argues that in practice,

---

<sup>93</sup> Ian Brownlie (n.65), 733

<sup>94</sup> Ian Brownlie (n.65), 733

<sup>95</sup> *ibid*, 734

<sup>96</sup> James Crawford (n.77), 750.

<sup>97</sup> Vaughan Lowe (n.63), 276.

‘...(some) states do not regard an armed attack as a pre-condition for self-defence.’<sup>98</sup> Bowett reasons that in light of the acquisition of sophisticated weaponry, restricting a state from taking pre-emptive measures may greatly impede its capacity to defend itself once an armed attack arises.<sup>99</sup> Arguably, anticipatory self-defence is justifiable in the following circumstances: One, there exists an imminent threat. Two, the state should be the target of the attack. Three, such a state has exhausted other alternative means of resolving the dispute amicably and lastly, measures invoked must commensurate with the threat or force used.<sup>100</sup>

Nonetheless, the proponents of anticipatory self-defence call for caution noting that in light of dynamic changes in contemporary warfare, some states may abuse this doctrine as an excuse to attack perceived enemy states for other interests other than self-defence.<sup>101</sup> For instance, Malcolm N. Shaw notes that anticipatory self-defence requires a delicate balance given that premature use of force may presumably, amount to an act of aggression.<sup>102</sup> He notes that counter-measures against terrorism ought to satisfy the threshold of proportionality and necessity.<sup>103</sup>

In 2011, Kenya invoked Article 51 of the UN Charter as the legal basis of launching the cross-border operation codenamed ‘*Operation Linda Nchi*’ in Somalia. The incursion was premised on inter alia, the government’s intention to ‘...take pre-emptive action against the growing security threat posed by the Al-Shabaab group to protect and preserve the territorial integrity of the

---

<sup>98</sup> Derek Bowett, *Self-Defence in International Law* (Manchester University Press 1958), 191

<sup>99</sup> *ibid*, 191

<sup>100</sup> Rebecca MM Wallace et al. (n.67), 301-302.

<sup>101</sup> Ian Brownlie (n.65), 734 argues that ‘...the so-called Bush doctrine that posits states’ [...] right to resort to force as a pre-emptive measure against potential enemies is unjustifiable ... particularly on the account that the doctrine holds that there need not be proof of an imminent attack.’

<sup>102</sup> Malcolm N. Shaw (n.60), 825

<sup>103</sup> Malcom N. Shaw (n.81, 2<sup>nd</sup> edn), 575

country.’<sup>104</sup> Kenya construed the right to self-defence to mean ‘...the right to pursue the terrorist elements that had transgressed into her territory from Somalia.’<sup>105</sup>

The cross-border military offensive invoked as a pre-emptive measure brings to the fore the discussion on anticipatory self-defence. Through a communique’ to the UN Security Council, Kenya pointed out that it had suffered a dozen of terror attacks by the Al Shabaab terror group over a period of 3 years.<sup>106</sup> Two fundamental questions arise in this sense: One, can sporadic terror attacks be cumulatively considered to amount to an armed attack and two, can it satisfy the gravity threshold so as to trigger recourse to force in line with Article 51 of the UN Charter?

The ICJ has pronounced itself on this question of aggregation of attacks. For example in the *Oil Platforms Case*, the court noted that ‘...the underlying question is whether a singular attack or a combination of a series of attacks [...] amounted to an ‘armed attack’ as to justify resort to self-defence.’<sup>107</sup> Notably, the court held that ‘...the attacks even if considered cumulatively, did not amount to an armed attack as they did not satisfy the ‘most-grave’ threshold laid down in the *Nicaragua case*.’<sup>108</sup> In view of ICJ’s decision in the *Oil Platforms case*, aggregation of several attacks is subject to satisfying the ‘most-grave’ threshold for it to give rise to legitimate use of force. It is therefore arguable whether or not, the Al-Shabaab attacks on Kenyan territory in the pre-2011 period satisfied this threshold to necessitate or justify the option of force under self-defence.

Another issue of debate concerns the duration of force in self-defence. At what point should it cease? Granted, under Article 51, one of the prerequisites of invoking the right to self-defence is

---

<sup>104</sup> The Government of Kenya’s Communique (n.45), para. 2

<sup>105</sup> *ibid*, para.2

<sup>106</sup> The Government of Kenya’s Communique (n.45), 1.

<sup>107</sup> Case concerning the *Oil Platforms (Iran v USA)* (2003) para 64. Accessed at <https://www.icj-cij.org>

<sup>108</sup> *ibid*

‘...the existence of an armed attack...’ This presumes that use of force terminates upon cessation of hostilities.<sup>109</sup> David Harris argues that the right to self-defence is temporary in nature.<sup>110</sup> He rationalizes that Article 51 provides that ‘...self-defence is only available to a state until the UN Security Council takes relevant action to restore security and international peace...’<sup>111</sup> To determine the adequacy of the UN Security Council’s action is a question of fact that ought to be construed objectively.<sup>112</sup> This may include authorizing a state to unilaterally or collectively with other states to use force depending on the situation at hand.<sup>113</sup>

However, a difficulty arises in light of the nature of terrorist attacks that often manifest through a series of sporadic attacks. In the event a state opts to use force for purposes of defending itself against terror attacks, for how long should such an action last? State practice point to conflicting approaches with some states adopting time-specific measures such as on-the spot reprisals or cross-border operations for purposes of protecting nationals on foreign soil.<sup>114</sup> Conversely, other states, for instance USA have resorted to force under the pretext of ‘war on terror’ for an ‘indefinite period.’<sup>115</sup>

With respect to the KDF’s incursion, the continued existence of Kenya’s troops in Somalia raises questions as to whether Kenya should withdraw her troops from Somalia.<sup>116</sup> Arguably, the invasion now in its 8 year, has since mutated to foreign occupation due to the lack of specificity

---

<sup>109</sup> ICRC Report, *International Humanitarian Law: A Comprehensive Introduction* (2016) 58

<sup>110</sup> David Harris (n.10), 749

<sup>111</sup> *ibid*

<sup>112</sup> Derrick Bowett (n.98), 196

<sup>113</sup> *ibid*

<sup>114</sup> Christine Tams (n.84), 382, see also Christine Gray (n.78), 631

<sup>115</sup> *ibid* 382

<sup>116</sup> David M. Anderson and Jacob McKnight, ‘Kenya at War: Al Shabaab and its Enemies in the Eastern Region’ (OUP 2014) 5

on the timelines on how long it will subsist.<sup>117</sup> The (then) Chief of Defence Forces (CDF), General Karangi is quoted stating thus:

‘...this campaign is not time bound [...] when the Kenya government and the people of this country feel that they are safe enough from the Al-Shabaab menace, we shall pull back. Key success factors or indicators will be in the form of a highly degraded Al-Shabaab capacity...’<sup>118</sup>

Nevertheless, does indefinite recourse to force conform to the law, particularly in the strict sense of the twin-fold requirements of proportionality and necessity of self-defence? Christine Gray opines that indefinite force under the pretext of the fight against terrorism is unjustifiable.<sup>119</sup> For instance, Christine Gray notes that the longer the operation takes, the more destruction it occasions hence it may be deemed disproportionate to the initial attack.<sup>120</sup> Similarly, in light of the relentless terror attacks on Kenyan soil particularly in the post-2011 period, it is debatable whether *Operation Linda Nchi* offensive has achieved its underlying objective of protecting the territorial integrity of Kenya.<sup>121</sup> Arguably, it is ineffective and unnecessary to the extent that it has not prevented a recurrence of terror attacks in Kenya.<sup>122</sup> Note that the element of necessity

---

<sup>117</sup>ibid, 5

<sup>118</sup>Supra note 116, 6.

<sup>119</sup> Christine Gray (n.78), 632

<sup>120</sup> ibid, 632

<sup>121</sup> See for instance, KNCHR’s report, (n.44) 3 where some of the major terror attacks documented include following: ‘...the September 2013 Westgate mall attack in Nairobi County in which 67 people were killed, the June 2014 attack in Mpeketoni, Lamu County which led to 68 deaths. Others include the November 2014 bus attack in Mandera County that claimed 28 lives, the December 2014 quarry attack in Mandera County in which the Al Shabaab militants killed 36 quarry workers, the April 2015 attack on Garissa University College, Garissa County in which 148 students were killed. Similarly, in January 2019 attack on DusitD2 hotel in Nairobi where 21 lives were lost...’

<sup>122</sup> Christine Gray (n.78), 632, points out in reference to the operation enduring freedom launched by the USA that the fact that a military operation has failed to deter more attacks denotes that it is unnecessary and hence, fallen short of the necessity requirement.



presupposes that force is only justifiable for purposes of preventing an immediate and overwhelming threat.<sup>123</sup>

In view of the foregoing discussion, it is manifest that though the concept of self-defence is grounded in both treaty and customary international law, it continues to generate debate to date. Different scholars hold divergent views and interpretations on the exercise of force in the confines of self-defence. Recourse to force in contemporary time is equally controversial particularly in light of global security issues such as terrorism and the divergent state practice thereof. It is on this standpoint that this research study seeks to examine use of force with respect to the ongoing counter-terrorism operations in Somalia. The study shall make reference to case law and customary international law to highlight the fundamental obligations that accrue to a state that resorts to force in self-defence and the legal redress mechanism in case of breach of these obligations.

## **1.9 Theoretical Framework**

This study shall adopt the critical legal theory (CLT) and further, refer to normative positivism as propounded by H.L.A Hart.

### **1.9.1 Critical legal theory**

The underlying argument of the critical legal theory is that the law is indeterminate, irrational and incoherent. According to the proponents, there is no universal or rational understanding of the law since the law mirrors power relations in political or economic sense.<sup>124</sup> Law is a

---

<sup>123</sup> Martin Dixon (n.59), 328.

<sup>124</sup> Roberto M. Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (2015) 25

discipline that is intrinsically linked to power.<sup>125</sup> The exercise of state power influences legal aspects such as law making, adjudication of cases and enforcement among others.<sup>126</sup>

The law is inherently biased towards advancing the interests of those in power.<sup>127</sup> The proponents view the law as tool or as a mask used by the powerful or the privileged in society to dominate and legitimize injustices in society under the guise of rule of law.<sup>128</sup> Due to this, the theory rejects the idea that law comprises a set of coherent rules or concepts that apply equally or achieve uniform and definite outcomes.<sup>129</sup>

The theory posits that law is neither neutral nor objective.<sup>130</sup> This is because law is a product of a political process. For instance, Roberto Unger argues that law making occurs in a political context and more often leads to indeterminate implications.<sup>131</sup> Thus, he notes that there is a variance between law making and law application.<sup>132</sup> Application of the law is informed by extra-legal considerations.<sup>133</sup> Courts do not determine cases basing on the law strictly. Rather, they also take into account political considerations since the exercise of state power has a great influence on the judiciary.<sup>134</sup>

This theory is significant to this study in that it calls for a legal consciousness that transcends the study of law at face value. The context in which law is made, interpreted and applied is critical. This study shall critically examine recourse to force in self-defence with a view of establishing

---

<sup>125</sup> *ibid*

<sup>126</sup> Michael Freeman, *Lloyds Introduction to Jurisprudence* (9<sup>th</sup> edn Sweet & Maxwell, 2014) 1023

<sup>127</sup> Brian Bix, *Jurisprudence Theory and Context* (6<sup>th</sup> edn Sweet & Maxwell 2012) 237-238

<sup>128</sup> *ibid* 236

<sup>129</sup> *ibid*, 237-238

<sup>130</sup> Brian Bix (n.127), 238

<sup>131</sup> Roberto Unger (n.124), 80

<sup>132</sup> *ibid*

<sup>133</sup> Brian Bix (n.127), 238

<sup>134</sup> Michael Freeman (n.126), 1023-1024

whether, there is harmony between the law in text and in practice. The main reference point shall be the state practice and responses particularly with regard to the fight against terrorism.

As H.L.A Hart notes, though international law is elaborate on paper, it is often encumbered by the geopolitics and ideological differences between powerful states at the global stage.<sup>135</sup> Henry J. Steiner et.al. hold a similar view noting that ‘international law is (largely) dependent on the will of states...’<sup>136</sup> Thus, the application of legal provisions on use of force raise extra-legal considerations given the conflicting interpretations and approaches by states. Christine Gray observes that the law on recourse to force is a very controversial topic due to a combination of ‘...political, moral and legal arguments.’<sup>137</sup>

### **1.9.2 Normative Positivism**

The paper shall also refer to normative positivism as propounded by Herbert L.A Hart.<sup>138</sup> In discussing the subject of law and its applicability in society, Hart notes that ‘...the law is a system or a union of primary rules and secondary rules.’ Whereas primary rules or what he calls basic rules impose duties or restrain human beings from certain actions, the secondary rules provide for the actions the law permits.<sup>139</sup>

H.L.A. Hart points out that primary rules are not sufficient on their own since they are either uncertain, static or inefficient. As such, secondary rules supplement the basic rules to overcome these deficiencies.<sup>140</sup> Hence, he argues that a proper appreciation of the law has to take into

---

<sup>135</sup> Herbert L.A Hart, *Concept of Law* (2<sup>nd</sup> edn Clarendon Press 1994), 81

<sup>136</sup> Henry J. Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law, Politics and Morals* (3<sup>rd</sup> edn Oxford University Press 2007) 80

<sup>137</sup> Christine Gray (n.78), 618

<sup>138</sup> H.L.A Hart (n.135), 233

<sup>139</sup> *ibid* 81

<sup>140</sup> *ibid*, 94

account the interplay between primary and secondary rules.<sup>141</sup> Hart points out that secondary rules for instance, the rule of adjudication identifies the adjudicative persons or bodies and confers in them the power to make rules and the procedure to be followed thereof.<sup>142</sup> According to Hart, the inconsistencies in primary rules are cured by reference to secondary rules, hence the law is self-sufficient.

This theory is useful to this study in that in determining state responsibility under international law, there exist both primary rules and secondary rules. These rules provide for ‘...the instances and threshold of apportioning responsibility in case of breach of an international obligation.’<sup>143</sup> For instance, the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) of 2001 developed by the International Law Commission (ILC).<sup>144</sup> It suffices to note that the emphasis of the ILC Articles is on circumstances under which a state may be considered liable for acts or omissions and the legal consequences as opposed to defining the content of international obligations.<sup>145</sup> The content is derived from treaty law, which constitute the primary rules.<sup>146</sup>

## **1.10 Research Methodology**

In this paper, the author shall undertake desktop research in collecting data relevant to this area of study. The author shall rely on both primary and secondary sources. Primary sources shall comprise treaty law, customary international law and case law from judicial and quasi-judicial international organs. Key secondary sources shall include books, scholarly writings,

---

<sup>141</sup> *ibid*, 82

<sup>142</sup> *ibid*, 97

<sup>143</sup> David Harris (n.10), 421

<sup>144</sup> ILC Draft Articles adopted in 2001 and submitted to the UN General Assembly (UNGA) vide A/56/10.

<sup>145</sup> Commentaries on the Draft Articles on Responsibility of States for internationally wrongful acts of 2001, 31

<sup>146</sup> *ibid*

commentaries, articles, journals, documented reports by national and international institutions. The author shall adopt a doctrinal method of research to review and critically analyze the literature under this study area.

### **1.11 Chapter Breakdown**

This study shall be structured as follows:

The study under Chapter One shall undertake contextual analysis of the conflict situation in Somalia and the rationale that informed Kenya's cross-border operation in Somalia. In undertaking the literature review, the Chapter shall seek to highlight different scholarly perspectives on recourse to force in self-defence and the emerging issues such as terrorism with respect to the armed operations in Somalia.

In Chapter Two, the study shall centre the discussion on classification of armed conflict and effect of foreign intervention on the conflict in Somalia. The study shall seek to; One, establish the effect of Kenya's intervention and the Africa Union (AU) through AMISOM troops on the conflict in Somalia and two, determine the relevant law that applies to the conduct of the counter-terrorism operations in Somalia.

Chapter Three shall focus on the concept of state responsibility with respect to Kenya's involvement in the conflict situation in Somalia. Essentially, the study shall discuss the extent of application of the law and obligations that accrue to a state that deploys its troops in an armed operation on foreign territory. Particular focus will be on the conduct of Kenyan and AMISOM troops during the counter-terrorism operations in Somalia with a view of determining the level of compliance with the underlying legal principles on use of force.

Under Chapter Four on conclusion and recommendations, the study shall examine legal mechanism(s) that may be invoked to address breach of the fundamental principles and attendant obligations on use of force. Particularly, the study shall recommend the most appropriate mechanism of pursuing accountability against the Kenyan state and AMISOM force, for the acts of commission and omission of its troops that breach the law.

## **CHAPTER 2.0: EFFECT OF FOREIGN INTERVENTION IN THE SOMALIA CONFLICT**

### **2.1 Introduction**

Somalia's history has been characterized by decades of a conflict situation that has claimed millions of lives, displaced thousands and occasioned wanton destruction of property.<sup>147</sup> This Chapter shall discuss the subject of an armed conflict and analyze the different typologies of armed conflict, the threshold and the applicable law in each instance. This is essential in light of emerging issues such as terrorism and challenges experienced in the application of the law on modern armed conflicts. The Chapter shall then analyze the effect of Kenya's intervention and by extension, the Africa Union (AU) through AMISOM troops on the conflict in Somalia. This is essential in determining the applicable law on the ongoing counter-terrorism operations in Somalia.

---

<sup>147</sup> JSOU Report, *Counter-insurgency in Somalia* (n.1), 1.

## 2.2 Typology of Armed Conflict

### 2.2.1 International Armed Conflict (IAC)

For quite a long time, the law of war focused primarily on conflicts between states since states were considered as sovereign entities whose internal affairs were a subject of national law.<sup>148</sup> In addition, there was also a perception that ‘...recognizing non-state armed rebel groups engaged in an internal conflict may amount to legitimizing their cause and as such, undermine state sovereignty.’<sup>149</sup> Hence, other than inter-state conflicts, all other conflicts were considered as ‘internal conflicts’ that were left to domestic law.<sup>150</sup> Essentially, this formed the basis of the dualistic distinction of armed conflicts either as ‘international’ or as ‘non-international’ armed conflicts under the IHL regime.

The key sources of the law of war include treaty law, customary international law, case law and general principles of international law. Under treaty law, the four Geneva Conventions of 1949 entrench the dichotomy by recognizing ‘international armed conflicts’ (IACs) and ‘non-international armed conflicts’ (NIACs) as the only forms of armed conflict in IHL. Pursuant to Common Article 2 of the Geneva Conventions, international armed conflicts denote ‘...a declared war or any other armed conflict between two or more states...’ The defining element is the existence of an armed conflict between two or more states as affirmed in the *Tadic’s case*.<sup>151</sup>

Though in text, the phrase ‘armed conflict’ has not been clearly spelt out. This has generated extensive debate on the extent of applying the law of war.<sup>152</sup> There exist varied interpretations on what constitutes the term ‘armed conflict’ and equally important, the threshold thereof. For

---

<sup>148</sup> David Turns, ‘The Law of Armed Conflict’ in Malcom D. Evans, *International Law* (2014), 826.

<sup>149</sup> *Supra* note 109, 53-54.

<sup>150</sup> *ibid*, 53

<sup>151</sup> *Prosecutor v Dusko Tadic’s ICTY Appeal Chamber’s decision* (1999) para.84. Accessed at <http://www.icty.org>

<sup>152</sup> David Turns (n.148), 825

instance, some proponents argue that ‘an armed conflict arises in instances where two or more states resort to force to resolve their differences, however minor the differences may be.’<sup>153</sup> According to Henry J. Steiner et al., an IAC arises in two instances: where there is ‘...war between two or more states and through foreign military occupation.’<sup>154</sup> Accordingly, the determining factor is not the nature or intensity of the differences or disagreements between states, rather the deployment of troops for purposes of combat.

However, critics argue that such a threshold is too low and is not consistent with state practice.<sup>155</sup> For an ‘armed conflict’ to occur, there are certain aspects to consider. For instance, ‘...the existence of a conflict situation between two or more states that involves recourse to armed force, the nature and intensity of the conflict situation.’<sup>156</sup> Besides the recourse to force by states’ troops, intensity is a key determinant if a conflict qualifies as an international armed conflict or not.<sup>157</sup>

The factual circumstances are also key in determining whether an IAC exists or not.<sup>158</sup> This is because a state need not issue a formal declaration of war for an IAC to arise.<sup>159</sup> Similarly, it constitutes an IAC where a state invades and occupies another state’s territory fully or partially, even if the other state does not fight back.<sup>160</sup> The rationale being that the belligerent intention of the invading state will be implied from the circumstances at hand.

---

<sup>153</sup> ICRC Report, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2015) 1433. Accessed at <https://www.icrc.org/>; see also David Turns (n.167) 825

<sup>154</sup> Henry J. Steiner (n.136), 395

<sup>155</sup> David Turns (n.148), 826

<sup>156</sup> Sylvain Vite, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 75. Available at <https://www.icrc.org/> Accessed on 11 March 2019.

<sup>157</sup> *ibid*, 75.

<sup>158</sup> *Supra* note 109, 57

<sup>159</sup> *ibid*

<sup>160</sup> Geneva Conventions of 1949, Common Article 2.



### 2.2.2 Non-International Armed Conflict (NIAC)

Non-international armed conflict (NIAC) refers to ‘...an armed conflict that is not of an international character and occurs within the territory of a single state.’<sup>161</sup> Another distinguishing aspect relates to the nature of actors or parties involved. For instance, whereas IACs entail state-state conflicts, in NIACs the conflict situation may involve state troops fighting against an armed rebel group or armed and organized dissident groups against each other.<sup>162</sup>

In the context of NIACs, the ICTY stated thus ‘...an armed conflict exists if there is protracted armed violence between state organs and organized armed groups or between the rebel groups themselves within a single state.’<sup>163</sup> The ICTY’s decision is instructive in that it established a conjunctive two-fold test on NIACs that is, ‘...the intensity of the hostilities and the organization of parties to a conflict.’<sup>164</sup>

The intensity element envisages ‘protracted armed’ violence and not merely, erratic incidences. Whereas the level of organization presupposes the capacity to plan and undertake coordinated paramilitary operations.<sup>165</sup> The organization element is also key in determining whether the armed group can fully observe the core tenets and rules of IHL since legal regime on NIACs applies equally and binds all actors.<sup>166</sup> This criteria is key since the law excludes inter alia, internal skirmishes and disturbances such as riots, demonstrations and violent strikes from the confines of NIACs.<sup>167</sup>

---

<sup>161</sup> *ibid*, Common Article 3

<sup>162</sup> Additional Protocol II of 1977, Article 1

<sup>163</sup> Prosecutor v Dusko Tadic’s ICTY Trial Chamber decision (1997), para.561. Accessed at <http://www.icty.org/>

<sup>164</sup> *ibid*, para.562

<sup>165</sup> *Supra* note 109, 69-70

<sup>166</sup> *ibid*, 70

<sup>167</sup> Additional Protocol II of 1977, Article 1 (2)

### **2.2.2.1 The Critique**

The continued conventional dichotomy between IACs and NIACs is debatable especially with respect to the prevalence of armed conflict situations that do not fall in either of the 2 categories in the contemporary world. The distinction places too much focus on IACs at the expense of other types of armed conflicts that equally occasion human suffering since in the modern day conflict, a vast majority of victims are civilians.<sup>168</sup>

The ICRC notes that this distinction at its inception was largely informed by ‘...political considerations of states rather than, military necessity or humanitarian considerations.’<sup>169</sup> In addition, ‘...the adequacy of the law of war to respond to emerging security concerns in the modern day, for instance the global terror threat is also debatable.’<sup>170</sup>

Consequently, the emerging international practice points to ‘...a diminishing differentiation between the law applicable to IACs and NIACs.’<sup>171</sup> Malcom Shaw attributes this paradigm shift to two major factors: the increasing prevalence of internal conflicts and two, the magnitude and impact thereof.<sup>172</sup> In this sense, there is need to look beyond the conventional dual classification of armed conflict.

### **2.2.3 Internationalized Internal Armed Conflict**

Modern warfare is dynamic and keeps on transforming with each passing day. In view of the nature and complexity of war in present time coupled with the emerging security challenges such as terrorism, the IHL regime has transformed in a number of ways. One of the notable ways is

---

<sup>168</sup> Supra note 153, 1430.

<sup>169</sup> Supra note 109, 53

<sup>170</sup> *ibid* 46

<sup>171</sup> Malcolm N. Shaw (n.60), 865.

<sup>172</sup> *ibid*, 865.

through the emergence of the concept of ‘internationalized’ armed conflicts.<sup>173</sup> Internationalization denotes ‘...as a special type of armed conflict that arises especially if a foreign state or a group of states intervene in an ongoing NIAC and as such, become party to the conflict.’<sup>174</sup> It may also involve the deployment of multinational troops in a pre-existing internal conflict.<sup>175</sup>

Note that a NIAC transforms into an ‘internationalized’ conflict provided ‘...the state that intervenes offers support to the armed rebel group(s) that is participating in an ongoing internal conflict as opposed to the host state.’<sup>176</sup> In the event the intervening state supports the territorial state to fight off the rebel group, a NIAC retains its original character as an internal conflict as it involves 2 states fighting against the rebel group.<sup>177</sup> Thus, it is possible for a NIAC to exist simultaneously or alongside an ongoing IAC in what is commonly referred to as ‘mixed conflicts’ or ‘double classification.’<sup>178</sup>

As a matter of practice, many internal conflicts occur or extend to the jurisdiction of two or other states.<sup>179</sup> In some texts, such conflicts have been referred to ‘...as ‘transnational’, ‘delocalized’ or cross-border conflicts especially where government forces involved pursue an armed dissident group or groups hiding in the jurisdiction of a neighboring State.’<sup>180</sup> With respect to the fight against terrorism, which is often characterized by a series of terror attacks, the fundamental issue is whether the attacks may be cumulatively taken as ‘...a global cross-border armed conflict to

---

<sup>173</sup> Supra note 109, 73

<sup>174</sup> *ibid*, 73

<sup>175</sup> *ibid*

<sup>176</sup> Supra note 109, 74

<sup>177</sup> *ibid*, 74

<sup>178</sup> *ibid*

<sup>179</sup> Sylvain Vite (n.156), 85.

<sup>180</sup> *ibid*, 88-89.

which IHL would apply.’<sup>181</sup> Sylvain Vite holds the view that the fight against terrorism may manifest in two ways: as an international armed conflict where it results in armed hostilities between two states or on the other hand, as an ‘internationalized’ internal conflict if it involves a state or states fighting a rebel group.<sup>182</sup>

However, not all acts of terror are a concern of IHL.<sup>183</sup> Rather, IHL only applies ‘...on terror attacks that occur in the confines of an armed conflict be it international or non-international.<sup>184</sup> [...] since IHL seeks to limit unnecessary human suffering.<sup>185</sup> Equally, Malcom Shaw notes that counter-measures against terrorism ought to satisfy the threshold of proportionality and necessity.<sup>186</sup>

### **2.2.3.1 The Test**

This section seeks to demonstrate at what point can an internal armed conflict be said to have changed into an international one? In *Dusko Tadic’s case*, the ICTY Appeal Chamber observed thus ‘...an internal armed conflict may turn international fully or partially that is, it occurs simultaneously alongside an internal armed conflict in two instances. One, where a State deploys its forces in an internal conflict or two, where a rebel dissident group participates the ongoing internal conflict fighting on behalf of another State.’<sup>187</sup>

However, for the second requirement to be satisfied, the ICTY affirmed thus:

---

<sup>181</sup> *ibid*, 92

<sup>182</sup> Sylvain Vite (n.156), 93 points out that ‘...the USA’s attack of Afghanistan in October 2001 definitely amounted to an international armed conflict. However, upon the establishment of a transition government in Afghanistan in 2002, the conflict morphed into a classic internationalized non-international armed conflict, since the new regime with the support of the international coalition was tasked with dealing with organized non-government troops from the Taliban...’

<sup>183</sup> *Supra* note 153, 1446

<sup>184</sup> *ibid*, 1446

<sup>185</sup> *ibid*

<sup>186</sup> Malcom Shaw (n.81 2<sup>nd</sup> edn), 575

<sup>187</sup> *Tadics case* (n.151), para. 84.

‘...in order for ‘irregulars’ to qualify as lawful combatants, [...] international rules and state practice require control over them by a party to an international armed conflict and, ... a relationship of dependence and allegiance of these irregulars vis-à-vis that party...’<sup>188</sup>

As such, the ICTY laid down the overall control test that presupposes a general hold over the operations of the rebel group. Notably, the ICTY defined overall control to mean ‘...a state’s action of equipping, financing, coordinating or aiding the planning of an armed group’s operations in another state.’<sup>189</sup>

On the other hand, the ICJ in the *Nicaragua case* introduced the effective control test that requires a higher degree of control beyond mere general control. The actions of an armed rebel group may be apportioned to a state that intervenes in an internal armed conflict only if there is adequate proof that such a state has effective authority over the group.<sup>190</sup> It has to be established that the state ‘...directly took part in the commission of acts of the rebel group, for instance through issuance of specific instructions or directing the operations of the group.’<sup>191</sup> Hence, under this test, change of a NIAC to an IAC extends beyond a state offering financial support or being involved in the training, arming or planning of operations of a rebel group.

---

<sup>188</sup> *ibid*, para. 94.

<sup>189</sup> *Tadics case* (n.151), para. 131

<sup>190</sup> *Nicaragua case* (n.92) para.115 where the ICJ ‘...adopted the effective control test that requires a higher degree of control. For instance, a party need not only be in effective control of a military or paramilitary group, but also exercises control with respect to the specific operation in the course of which breaches may have been committed. The Court stated that in order to establish that the United States was responsible for “acts contrary to human rights and humanitarian law” allegedly perpetrated by the Nicaraguan *contras*, it was necessary to prove that the United States had specifically “directed or enforced” the perpetration of those acts.’

<sup>191</sup> *ibid*, para. 115

In addition, a NIAC adopts an international character in instances where a state permits or consents to volunteers for instance, mercenaries to get involved in a NIAC in another state. However, the law envisages substantial involvement by the sending state which, the ICTY affirmed thus ‘...it is important to demonstrate that sending state gave specific instructions or authorized the commission of acts that would otherwise amount to a breach of IHL.’<sup>192</sup> A generic authority over the individual is insufficient to attribute responsibility to the State.<sup>193</sup>

#### **2.2.4 Internalized International Armed Conflict**

An internalized international armed conflict as the term suggests, refers to process of transformation of an international armed conflict into an internal armed conflict. This situation arises ‘...where there is an existing IAC between two States, for instance through foreign occupation where one state invades and effectively takes over the territory of another state.’<sup>194</sup> A State’s involvement in the conflict may be directly through its forces or through a rebel group as a proxy.<sup>195</sup> In the event, such a state loses effective control or withdraws from the conflict and leaves the proxy to continue fighting against the territorial state, the character of the conflict changes to an internal one.<sup>196</sup> The distinguishing feature is the withdrawal of a foreign actor from an ongoing IAC or loss of effective authority over the occupied territory. The withdrawal may be due to military defeat<sup>197</sup> or where the foreign state(s) has achieved its military objectives.<sup>198</sup>

---

<sup>192</sup> Tadic case (n.163), para. 118

<sup>193</sup> *ibid*, para 118.

<sup>194</sup> *Supra* note 109, 62.

<sup>195</sup> ICRC Report, *Scope of Application of International Humanitarian Law* (2012) 50-51 Accessed at <https://www.icrc.org/en/>

<sup>196</sup>*ibid*, 51

<sup>197</sup> See the CIVIC report of 2011 (n.2) which documents the withdrawal of the USA and UNOSOM forces from Somalia in 1995 in the wake of the *Black hawk* incident. See also; Horace Campbell, ‘the Military Defeat of South Africans in Angola’ (2013), where he notes the exit of the South African Defence Forces (SADF) from Angola after suffering defeat by combined Angola and Cuban forces during the Operation Modular Hooper in 1987.

<sup>198</sup>*Supra* note 195, 51.

## **2.3 Foreign Intervention in Somalia**

### **2.3.1 African Union (AU) Intervention: AMISOM troops**

The African Union Mission in Somalia (AMISOM) is ‘...a regional mission that was established in January 2007 by the AU’s Peace and Security Council in liaison with the United Nations.’<sup>199</sup>

The UN Security Council authorized AU member states to send a joint force in Somalia pursuant to the AU’s request.<sup>200</sup> The initial mission of AMISOM was to help the TFG in a bid to stabilize Somalia and foster political dialogue, reconciliation and post-conflict restoration of Somalia as a long-term measure. AMISOM’s deployment came in the wake of the exit of the Ethiopian forces to ensure there was no vacuum that could be exploited by the militants.<sup>201</sup>

Notably, AMISOM has a multi-dimensional approach comprising of military, police and civilian components.<sup>202</sup> Besides the military operation, AMISOM is also mandated to foster a secure environment that will enable the smooth running of humanitarian support programmes in Somalia. Currently, ‘...the military component is the largest as it comprises of about 22,000 troops drawn from Uganda, Burundi, Djibouti, Sierra Leone, Kenya and Ethiopia [...] deployed in six sectors covering south and central Somalia.’<sup>203</sup>

---

<sup>199</sup> AMISOM website (n.12). Accessed 12 March 2019

<sup>200</sup> UN Security Council Resolution No. 1744 of 2007. See also AMISOM website (n.12)

<sup>201</sup> *ibid*

<sup>202</sup> AMISOM website (n.12)

<sup>203</sup> AMISOM website (n.12) which details the deployment of AMISOM in 6 different sectors as follows: ‘...Ugandan troops are deployed in Sector 1 that comprises the regions of Banadir, and Lower Shabelle. Kenyan forces are responsible for Sector 2 comprising Lower and Middle Jubba. Sector 3 comprising Bay and Bakool as well as Gedo (Sub Sector 3) comes under Ethiopian command. Djiboutian forces are in charge of Sector 4, which covers Hiiraan and Galgaduud while Burundian forces are in charge of Sector 5, which covers the Middle Shabelle region.’

The intervention of AMISOM troops in Somalia was premised on a number of reasons. One, there were security concerns that the decade-long conflict situation in Somalia could escalate as evidenced by the 1998 transnational terror attacks in Kenya and Tanzania.<sup>204</sup> The concern was that Somalia had become a safe haven for terror operatives to conduct their terrorist activities hence, the need to address the emerging terror threat. Two, there were concerns that the proliferation of illegal arms and prevalence of piracy attacks emanating from Somalia would adversely affect the economy of the Eastern Africa region.<sup>205</sup>

It suffices to point out that the UN Security Council exempted AMISOM from the 1992 arms embargo<sup>206</sup> and effectively authorized the supply of weapons for purposes of achieving its multifold mandate.<sup>207</sup> Though as a measure of accountability, the troop-contributing countries (TCCs) were required to give prior notification to the UN Sanctions Committee established to oversee and monitor enforcement of the arms embargo.<sup>208</sup> In line with its multi-fold mandate, AMISOM troops have undertaken several military offensives principally to degrade the military capacity of the Al Shabaab militia.<sup>209</sup> This effectively makes AMISOM a relevant party to the armed conflict in Somalia.

### **2.3.2 Kenya's Intervention: Operation Linda Nchi**

In October 2011, Kenya invoked Article 51 of the UN Charter as the legal basis of launching the cross-border incursion code-named '*Operation Linda Nchi*' in Somalia. The import of the military operation is two-fold: One, it is the first-time ever since independence that Kenya has deployed her troops to engage in active military combat and two, it also signified a major shift in

---

<sup>204</sup> JSOU Report, *Counter-insurgency in Somalia* (n.1), 39.

<sup>205</sup> Supra note 1, 39.

<sup>206</sup> UN Security Council Resolution No. 733 of 1992 vide S/RES 733 (1992) Accessed at <https://www.un.org/securitycouncil/>

<sup>207</sup> UN Security Council Resolution of 2007 (n.222), para 6.

<sup>208</sup> JSOU Report, *Counter-insurgency in Somalia* (n.1), 57.

<sup>209</sup> *ibid*, 57-59



strategy as Kenya ceased playing a neutral role to direct combat in the decades-long conflict situation in Somalia.<sup>210</sup> Principally, one of the underlying objectives of the incursion was to pursue the Al Shabaab militants and secure the Kenya-Somalia border in a bid to forestall terror attacks and safeguard Kenya's territorial sovereignty.<sup>211</sup> The prevalence of cases of kidnappings and murder targeting locals and foreigners along the Kenya-Somalia coastline provided the immediate trigger of the deployment of KDF in Somalia in October 2011.<sup>212</sup>

Nonetheless, prior to the 2011-incursion, Kenya had a long-term ambition of intervening in the conflict situation in Somalia. For instance, Bruton and Williams point out that the severe famine that occurred in Somalia at that particular time led to a mass influx of refugees into Kenya that in turn aggravated the chronic refugee crisis.<sup>213</sup> This coupled with the Al-Shabaab attacks along the coastline was considered a growing security concern hence the need to address it.<sup>214</sup>

Prior to the incursion, Kenya wrote to the UN Security Council informing it of '...her decision to take pre-emptive action to defend her territory and two, to secure peace in the face of the escalating Al-Shabaab threat in the Eastern Africa region.'<sup>215</sup> In the communique, the government indicated that it had liaised and sought the permission of the interim government (TFG) of Somalia prior to invoking this decision.<sup>216</sup> In line with Article 51 of the UN Charter, Kenya further pledged '...to report to the Security Council all measures taken in the confines of the right of self-defence.'<sup>217</sup>

---

<sup>210</sup> *ibid*, 61 the authors note that upon the entry of Kenya, Sierra Leone and Nigeria troops, the strategic end game of AMISOM was redefined to be the significant depletion of the of Al Shabaab militia.

<sup>211</sup> The Government of Kenya's Communique of 2011 (n.45), 1

<sup>212</sup> *ibid*

<sup>213</sup> JSOU Report, *Counter-insurgency in Somalia* (n.1), 61.

<sup>214</sup> Government of Kenya's Communique to the UN Security Council of 2011 (n.45), 1

<sup>215</sup> *ibid*, 1

<sup>216</sup> *ibid*

<sup>217</sup> *ibid*.

From 2011 to June 2012, KDF operated as a stand-alone force besides the AMISOM troops. In this regard, the UN Monitoring Group on Eritrea and Somalia declared Kenya's operations as a violation of the 1992 UN ban on arms in Somalia since only troop-contributing countries had the authority to offer both military and technical assistance including the supply of arms.<sup>218</sup> Due to this, Kenya agreed to integrate its troops into AMISOM force in December 2011.<sup>219</sup> However, the integration did not take effect immediately until June 2012 when Kenya and the AU acceded to a Memorandum of Understanding (MOU).<sup>220</sup>

To date, KDF operations have been characterized by both ground and air offensives in its fight against the Al Shabaab.<sup>221</sup> Inasmuch as the KDF troops have staged successful attacks against the militia such as *Operation Sledge Hammer* that led to the capture of Kismayu port from Al Shabaab stranglehold, KDF has also suffered losses especially in terms of human capital.<sup>222</sup> Though the AMISOM force comprising of Kenyan troops has gained significant ground against the Al-Shabaab terror group, the security situation in Somalia remains volatile.<sup>223</sup> The UN Security Council Counter-Terrorism Committee notes thus, '...the terror threat far from being contained, has diversified and is increasingly evolving.'<sup>224</sup> Despite AMISOM's intervention, Al Shabaab still has presence and control particularly in southern and central Somalia.<sup>225</sup>

---

<sup>218</sup>UN Monitoring Group on Eritrea & Somalia Report of 2008, para. 74

<sup>219</sup> JSOU Report, *Counter-insurgency in Somalia* (n.1), 62.

<sup>220</sup> Anderson & Mc Knight (n.116), 6

<sup>221</sup> *ibid*, 7.

<sup>222</sup> *ibid*

<sup>223</sup> UN Secretary General Report on Somalia submitted to the UN Security Council in December 2018, paras.10-11. Accessed via <https://undocs.org/S/2018/1149>

<sup>224</sup>UN Security Council Counter-Terrorism Committee survey report of 2016, para. 11 submitted to the UN Security Council vide (S/2016/49)

<sup>225</sup> *ibid*, paras.12

## 2.5 Conclusion

From the foregoing discussion, it is evident that foreign intervention is a constant feature in contemporary armed conflicts. The intervention may be directly through the deployment of a single state's troops or jointly through multinational forces drawn from different states. Given that such foreign intervention varies from one situation to another, the pertinent question centers on the extent of involvement of foreign forces in the hostilities.<sup>226</sup>

With regard to the Somalia conflict, it is evident that there has been foreign intervention over time at different levels. One, Kenya's incursion into Somalia to undertake *Operation Linda Nchi* pursuant to an official decision through a Government communique to the UN Security Council. Notably, the inability of the TFG to deal decisively with the Al-Shabaab group and restore order in Somalia formed the underlying basis of Kenya's decision to invade Somalia.<sup>227</sup>

Two, in the context of multinational forces, the AU deployed the AMISOM in Somalia with one of the principal objectives being the significant depletion of the Al Shabaab militant group. It is notable that of 3 clusters of AMISOM, namely '...military, police and civilian components,' the military cluster is the biggest covering six sectors in Somalia.

The counter-terrorism military operations also signaled a change of tact from the initial deployment of AMISOM troops strictly, as a peacekeeping force in 2007 to active combat in the conflict situation in Somalia. Both KDF and AMISOM force have applied armed force and hence, are subject to the legal regime of armed conflict.

---

<sup>226</sup> Supra note 153, 1441

<sup>227</sup> JSOU Report, *Counter-insurgency in Somalia* (n.1), 65.

## CHAPTER 3.0: KENYA'S RESPONSIBILITY IN THE SOMALIA CONFLICT

### 3.1 Introduction

The concept of state responsibility is significant in that it gives effect to international law.<sup>228</sup> In line with Article 1 of ILC Articles, responsibility of a state is premised on the presupposition that '...every international wrongful act of a state constitutes a breach of international responsibility.' Every breach attracts legal consequences. That is, a state that does not honour its obligations must be held to account.<sup>229</sup>

In the confines of an armed conflict, Common Article 1 of the 1949 Geneva Conventions obliges warring parties primarily to uphold the underlying rules and principles outlined under the law.<sup>230</sup> A state should ensure its officials and organs observe the law fully since state responsibility arises even where its officials or organs act ultra vires.<sup>231</sup> Besides warring parties, IHL obliges other states to take appropriate steps either unilaterally or collectively in instances involving serious breach of the law.<sup>232</sup> The rationale being that the core tenets of the law of war are entrenched in customary international law and hence, bind all states.<sup>233</sup>

In this sense, this Chapter analyzes the scope of application and fundamental tenets of IHL that inform responsibility of a state in an armed conflict situation. With regard to a foreign states' intervention in a NIAC as is the case with Kenya's incursion into Somalia, the study highlights the applicable rules and threshold thereof. The Chapter shall thus discuss in detail, the conduct of Kenyan troops in Somalia with a view of establishing whether it is consistent with the applicable

---

<sup>228</sup>For instance, Vaughan Lowe (n.63), 122 notes that the international legal system draws its basic coherence from the concept of state responsibility.

<sup>229</sup>ILC Articles, Article 28.

<sup>230</sup> See also Article 1 of the Additional Protocol I of 1977.

<sup>231</sup> ILC Articles, Article 7

<sup>232</sup> Article 89 of Additional Protocol I of 1977

<sup>233</sup>Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons (1996), para.79. Available at <https://www.icj-cij.org/>

provisions and rules of the law of war. This discussion will focus on the conduct of Kenyan troops both as a stand-alone force and upon integration into the AMISOM force in 2012. Possible consequences that may accrue in the event of breach of the applicable law shall inform the conclusion section.

### **3.2 State responsibility in an armed conflict**

IHL distinguishes between civilians and troops, military targets from premises owned by civilians, the rights and privileges of combatants and quite importantly, the fundamental rights of civilians that ought to be observed no matter the type of conflict.<sup>234</sup> States have the onus of ensuring their troops deployed in an armed operation observe and comply with the law fully.

#### **3.2.0 Scope of Application of IHL**

This section seeks to discuss the extent of application of the law of war since different rules and threshold apply to an armed conflict depending on its nature.

#### **3.2.1 The Subject matter**

The subject matter is key in determining what qualifies as an armed attack and the relevant legal regime. Given the classical categorization of conflict either as IACs or NIACs, the relevant provisions under the Geneva Conventions inform the subject matter. For instance, for IACs, Common Article 2(1) is instructive since ‘...it applies to all cases of declared war or of any other armed conflict which may arise between two or more member states...’ Similarly, the law stipulates that ‘...the Conventions apply to all instances of occupation of the territory of another state irrespective of whether or not, the territorial state defends itself by resort to force...’

---

<sup>234</sup>Supra note 109, 17

In contrast, Common Article 3 relates to ‘...hostilities that are non-international in character and which occur on a territory of a member state.’ The scope of the law of war requires satisfying the twin-fold criteria of ‘...the degree of violence and the level of organization of the parties.’<sup>235</sup> The law excludes other internal skirmishes and disturbances such as riots, demonstrations, violent strikes among others.<sup>236</sup>

In the context of the emerging concept of ‘internationalization’ of internal conflicts which essentially refers to instances where a NIAC adopts an international character, the key question that arises is on the rules that apply in such an instance. This new phenomenon is a subject of discussion as to whether the law of IAC applies wholly or partially in such an instance. For instance, the ICRC rejects the notion that ‘internationalized’ conflicts denote a ‘3<sup>rd</sup> type of armed conflict.’ Rather, the ICRC proposes the adoption of a mixed approach that looks at ‘internationalized’ armed conflicts as a special manifestation of either IAC or NIAC depending on the situation at hand.<sup>237</sup> Hence, the legal regime of IAC or NIAC applies in a dynamic manner basing on the factual situation at hand. The rationale being that since an internationalized armed conflict can exist simultaneously alongside an ongoing NIAC, it is prudent to take into account the circumstances of each situation.<sup>238</sup>

### **3.2.2 The Geographical Scope**

Another key issue of concern relates to the *rationae loci* that is, the territorial scope of applying IHL given the prevalence of foreign intervention in transnational or cross-border armed conflicts and the global fight against terrorism. Does IHL apply strictly on the territory where an armed

---

<sup>235</sup> Tadic case (n.163), para. 562.

<sup>236</sup> Additional Protocol II of 1977, Article 1 (2)

<sup>237</sup> Supra note 109, 74.

<sup>238</sup> See for example, in the Nicaragua case (n.92) where the ICJ ‘...differentiated the conflict between: one, the Nicaraguan government and the armed rebel group and two, between Nicaraguan and the USA.’

conflict occurs or can it be extended beyond to territories of other states? In conventional armed conflicts, territory is a constitutive factor of determining the extent of application of IHL. For instance, in IACs, the law applies ‘...on the territories of the states involved whereas in NIACs, on the territory of a state where the conflict occurs.’<sup>239</sup>

However, in view of the complexity of contemporary armed conflicts coupled with technological sophistication of weapons and means of war such as cyber-attacks, should the law of armed conflict extend beyond territory? State practice point to lack of consensus on the extra-territorial application of IHL in modern times.<sup>240</sup> Whereas some states insist on the territorial application of IHL, other states call for ‘...extra-territorial application of IHL on the basis that the extent of involvement of a foreign state in a NIAC is the determining factor as opposed to the territorial element.’<sup>241</sup>

In this regard, the ICRC notes in its 2016 report that IHL may be applied on any act of hostility taken by another state provided it is linked to an armed conflict irrespective of the territory it occurs.<sup>242</sup> Such a state is viewed to be participating in an ongoing conflict. This position equally applies to hostile acts of rebel groups, which may spill over or extend to territories of other states. The ICRC observes that emphasis should be on the factual situation, nature and quality of parties involved in the hostilities and not, on territory.<sup>243</sup> The law further extends the scope of application to all armed attacks irrespective of the territory where they occur.<sup>244</sup>

That notwithstanding, the extra-territorial application of IHL requires caution. There is a real likelihood of (some) states unilaterally resorting to force that may occasion extensive collateral

---

<sup>239</sup> Geneva Conventions of 1949, Common Articles 2 and 3 respectively.

<sup>240</sup> Supra note 153, 1441

<sup>241</sup> *ibid*

<sup>242</sup> Supra 109, 59

<sup>243</sup> *ibid*, 72

<sup>244</sup> Additional Protocol I of 1977, Article 49

damage on the civilian population.<sup>245</sup> In what has been described as a notion of ‘global battlefield,’ unlimited application of IHL may lead to catastrophic consequences.<sup>246</sup> The territorial sovereignty of neutral states not involved in the hostilities ought to be respected to minimize unnecessary suffering.

### **3.2.3 The Parties**

On the *rationae personae*, the general rule is that IHL binds all warring parties notwithstanding the type of conflict. In IACs for instance, states involved in hostilities form the relevant parties. On the other hand, in NIACs organized armed groups fighting against state troops or amongst themselves constitute relevant parties who are subject to the legal regime of NIACs provided the threshold of intensity and organizational element is satisfied.<sup>247</sup> Pursuant to the principle of equality, once hostilities commence, IHL applies equally on all parties irrespective of the underlying causes of the conflict.<sup>248</sup>

However, in view of the dynamic nature of contemporary conflict characterized by different actors and interests, pertinent questions arise. For instance, who constitutes a party in an ‘internationalized’ armed conflict and to what extent does the law of war apply? One of the central features in ‘internationalized’ armed conflicts is that of foreign intervention in an internal conflict. This may be through deployment of a foreign state’s troops unilaterally or jointly under a multinational force. Thus, the general rule is that such a state and an international organization that authorizes deployment of the multinational force are subject to the law of war.

---

<sup>245</sup> Supra note 195, 14 the ICRC notes thus ‘...there is need for a careful analysis of the legality of resorting to armed action by one state on another’s territory so as to avoid a possibility of recognizing the notion of a “global battlefield” that might lead to collateral suffering by civilians.’

<sup>246</sup> Supra note 153, 1442-1443

<sup>247</sup> Tadić case (n.163), para. 561

<sup>248</sup> Additional Protocol I of 1977, Preamble, para. 5



Though, the nature of support and involvement is key in determining whether or not to invoke the law of war and the scope of application thereof.<sup>249</sup> That is, multinational forces deployed for peacekeeping purposes are not party to a conflict as the law prohibits them from taking any enforcement action.<sup>250</sup> They may only resort to force to defend themselves when attacked. Conversely, where they engage directly in the ongoing hostilities by offering military support to either of the warring entities, a multinational force shall be considered as a warring party and hence, under the IHL regime.<sup>251</sup> That notwithstanding, the factual situation is imperative in deciding whether to apply the IHL legal regime on multinational forces since every situation varies from one another.<sup>252</sup>

It is worth noting that multinational forces comprise of troops from different states operating under the auspice of an international organization. In this sense, who is bound by the law between the international organization and the troop-contributing country? The ICRC observes that determining a relevant party rests on the level of authority and control that the international organization exercises on the troops.<sup>253</sup> This paper shall discuss this subject under the principle of attribution.

### **3.3 Fundamental principles under IHL**

#### **3.3.1 Principle of attribution**

Under international law, state responsibility only suffices on the condition that acts of commission or omission can be apportioned to a state.<sup>254</sup> In default of which, individual criminal

---

<sup>249</sup> Supra note 153, 1450-1451

<sup>250</sup> Malcom Shaw (n.81), 566

<sup>251</sup> Supra note 153, 1451

<sup>252</sup> *ibid*, 1451-1452

<sup>253</sup> *ibid*, 1453-1454

<sup>254</sup> ILC Articles, Article 2

responsibility may be invoked.<sup>255</sup> In armed situations, the law further envisages command responsibility particularly if the superior has effective authority and control over the military personnel under his/her reign.<sup>256</sup> Hence, the principle of attribution is key in distinguishing attribution between the state or its officials in their personal capacity.

The law considers ‘...the conduct of a state organ as an act of the respective state under international law...’ even if such a body falls under the national government or a devolved unit.<sup>257</sup> Martin Dixon observes that this is an integral provision of international law as it seeks to ensure a state does not invoke national law to absolve itself from international obligations.<sup>258</sup> The law attributes the acts of an official or a state organ to the national state even where s/he disregards instructions or exceeds authority provided it is in the course of duty.<sup>259</sup> Hence, a state is considered liable for all actions of its troops in a conflict situation.<sup>260</sup>

Similarly, with respect to multi-national troops, acts of an official or body of an international organization are apportioned to that organization under the law, irrespective of the stature of the organ or position of the official.<sup>261</sup> This also extends to ultra vires acts committed by the multinational troops.

---

<sup>255</sup> For examples, the Rome Statute ‘...establishes the International Criminal Court (ICC) and vests it with jurisdiction over individual persons accused of committing international crimes which include war crimes, crimes against humanity, genocide and crimes of aggression.’ Notably, the Rome statute ‘...defines war crimes to include grave breaches of the Geneva Conventions of 12 August 1949 such as willful killing, torture or inhuman treatment, willfully causing great suffering among others.’

<sup>256</sup> Rome Statute, Article 28 which apports criminal responsibility on the military commanders for the acts and omissions of troops under his/her command that constitute international crimes. It is instructive that the military commander ought to take reasonable measures to forestall such acts or in the alternative, invite competent authorities to investigate and take appropriate action against troops found culpable.

<sup>257</sup> ILC Articles, Article 4

<sup>258</sup> Martin Dixon (n.59), 258.

<sup>259</sup> ILC Articles, Article 4.

<sup>260</sup> Commentary on Articles on the Responsibility of States for Internationally Wrongful Acts (2001) 46.

<sup>261</sup> ILC Articles on the Responsibility of International Organizations of 2011, Article 6. Accessed at <https://www.legal-tools.org/>

In order to invoke state responsibility, the ILC Articles stipulates a conjunctive criterion in what has been described as the duality test.<sup>262</sup> One, the conduct in question should be apportioned to a state and two; it ought to amount to a breach of a state's international obligation.<sup>263</sup> This is premised on the understanding that states can only act or discharge their functions through state officials or organs as the case may be.<sup>264</sup>

A state is also liable for actor omissions of a private entity particularly where it authorizes it to exercise or perform public functions.<sup>265</sup> This presupposes prior authorization or specific instructions by the state to permit the private entity to undertake a particular public function.<sup>266</sup> Delegation of duty to a private entity does not exclude a state from liability.<sup>267</sup> For instance in an armed military operation, the ICJ affirmed in the *Nicaragua case* that a state which sends mercenaries or armed militia to attack another state on its behalf cannot absolve itself from responsibility.<sup>268</sup> Instructively, the law stipulates thus:

The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is acting on the instructions of or under the direction or control of that State in carrying out the conduct.<sup>269</sup>

That notwithstanding, the extent of control a state has over a private entity or individual is fundamental in determining if the actions can be apportioned to a state. This also applies in instances involving multinational troops deployed under the aegis of an international

---

<sup>262</sup> Martin Dixon (n.59), 255

<sup>263</sup> ILC Draft Articles, Article 2.

<sup>264</sup> Commentaries Commentary on Articles on the Responsibility of States for Internationally Wrongful Acts (2001) 35.

<sup>265</sup> ILC Draft Articles, Article 5.

<sup>266</sup> James Crawford (n.77), 544

<sup>267</sup> ILC Articles, Article 5

<sup>268</sup> Nicaragua case (n.92), para. 195.

<sup>269</sup> ILC Articles, Article 8

organization. Attribution rests on the nature and extent of control that the international organization exercises over the troops. Notably, the law envisages the effective control test.<sup>270</sup>

In this context, two tests have been developed: the effective control test and overall control test. One, in *Nicaragua* case,<sup>271</sup> the underlying issue was ‘...whether the conduct of the *contras*, a rebel group in Nicaragua was attributable to the United States of America so as to hold the USA responsible for breaches of international humanitarian law committed by the rebel group...’<sup>272</sup> The ICJ adopted ‘...the effective control test that requires a higher degree of control [...] noting that, though USA’s actions constituted a breach of principle of non-interference in another sovereign state, its role in inter alia; financing, supplying arms and planning the operations of the rebel group was not sufficient to apportion the group’s actions to USA.’<sup>273</sup> The ICJ reasoned that the rebel group was capable of committing such acts without the control or direction of USA.

Similarly, in the *Bosnia v Serbia* case, the ICJ reiterated ‘...the effective control test in determining the Serbia’s responsibility for crimes of genocide committed by its troops in Bosnia.’<sup>274</sup> The court stated that ‘...effective control requires sufficient proof that the state specifically instructed or directed the execution of acts that constituted crimes of genocide as opposed to general authority to its organs.’<sup>275</sup> As such, the alleged violations were not attributable to Serbia.<sup>276</sup>

---

<sup>270</sup> Article 7 of the ILC Articles on the Responsibility of International Organizations

<sup>271</sup> The Nicaraguan government sued the US for staging armed attacks against the Nicaragua state. It argued that these acts amounted to a violation of [...] prohibition of use of force.

<sup>272</sup> Commentaries Commentary on Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) 47.

<sup>273</sup> *Nicaragua* case (n.92), para 115.

<sup>274</sup> Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia v. Serbia*) (2005) Accessed at <https://www.icj-cij.org>

<sup>275</sup> *ibid*, para 400.

<sup>276</sup> *ibid*, para 413.

On the other hand, the ICTY in the *Tadics case* stated that ‘...for one to apportion the acts of an armed rebel group to a particular state, it is necessary to prove that state exercises overall control over the group [...] This presupposes a state offering financial support or planning and coordinating the armed operations of the group.’<sup>277</sup> The ICTY digressed from the high threshold set in the *Nicaragua case* noting that factual situation is key in determining the extent of control of each case.<sup>278</sup> Under the overall control test, attribution is not dependent on a state issuing specific instructions for the execution of acts that breach the law of conflict.<sup>279</sup> Rather, the threshold may be satisfied upon establishing that a state took part in the planning or offering operational support to an armed rebel group.<sup>280</sup>

Pursuant to the ILC Articles, it is noted that the 3 phrases namely; instructions, direction and control should be construed disjunctively and as such, it is sufficient to establish any one of them.<sup>281</sup> It is also essential to consider the facts of each case.<sup>282</sup>

The effective control test is also necessary in apportioning responsibility of a multinational force to the international organization that authorizes its deployment. An organization for instance, the United Nations (UN) or African Union (AU) is liable for the acts of troops of troop-contributing states provided ‘...it exercises effective control over the operations of the troops.’<sup>283</sup> Additionally, the international organization is also liable for the acts of multinational troops that otherwise contravene international obligations particularly on account of authorization.<sup>284</sup> The rationale being that were it not for the authorization, such acts would not occur in the first place.

---

<sup>277</sup>Tadics case (n.163), para 131.

<sup>278</sup> *ibid*, para 117.

<sup>279</sup>*ibid*, para.131

<sup>280</sup> *ibid*

<sup>281</sup> Commentary on Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) 48.

<sup>282</sup> *ibid*, para 5

<sup>283</sup> ILC Draft Articles on the Responsibility of International Organizations, Article 7.

<sup>284</sup>*ibid*, Article 17

However, where the troop-contributing country (TCC) retains command of actual operations of its troops, responsibility accrues to the respective state as per the dictates of ILC Article 4. The ICRC observes in most instances, the TCC delegates to the international organization the operational control only as opposed to full command over its troops<sup>285</sup>

### **3.3.2 Principle of distinction**

Another core tenet of the law of war is that of distinction. Additional Protocol I under Article 48 lays down the fundamental rule on distinction by obliging warring parties to differentiate between civilians and troops engaged in combat and two, civilian premises and military targets at all material times. As such, their operations should strictly be against military targets only.<sup>286</sup> Article 51 (6) of Additional Protocol I expressly ‘...forbids revenge attacks against civilian population.’ David Turns notes in this regard that this tenet is at the core of contemporary law of war as it focuses on protection of civilians and their properties from adverse effects of the armed conflict.<sup>287</sup>

Notably, the law defines combatants as members of armed troops engaged in armed conflict whereas civilians comprise of all other persons that are not involved in active combat.<sup>288</sup> The law prohibits parties from targeting civilians or civilian premises unless the civilians engage or participate directly in the conflict.<sup>289</sup> In this case, they lose their status as civilians as the law requires that persons not taking part in active combat must remain neutral.

---

<sup>285</sup> Supra note 153, 1453-1454

<sup>286</sup> Article 52 (2) of Additional Protocol I of 1977 defines ‘...military objectives to include the capture, defeat or neutralization of an enemy through military action.’

<sup>287</sup> David Turns (n.148), 836.

<sup>288</sup> Additional Protocol I of 1977, Article 43 as read together with Article 50 (1)

<sup>289</sup> *ibid*, Article 51 (3)

The law regards civilians as protected persons.<sup>290</sup> Others include the sick, hostages, medical and humanitarian staff among others. In the same measure, civilian objects include facilities such as hospitals, medical units and other social amenities. Quite importantly, in instances where the status or identity of a person is not certain, the law requires that such a person be considered as a civilian in the first instance prior to confirming his status.<sup>291</sup>

### **3.3.3 Principle of proportionality**

Under this principle, the law regulates the scale of force in an armed operation. The law prohibits parties from staging attacks that may occasion incidental civilian fatalities and casualties.<sup>292</sup> This also includes damage to civilian premises. Prior to targeting a military object, parties are obliged to exercise precaution so as not to harm civilians or civilian objects. Such precaution include verifying military targets beforehand, selection of weapons and scale of force to apply in a bid to minimize the impact on civilians and civilian objects.<sup>293</sup> Where a target falls outside the operation's objective, parties are obliged to suspend an attack.<sup>294</sup>

### **3.3.4 Principle of humanity**

The law forbids use of arms and tactics that may result in unnecessary or aggravated human suffering.<sup>295</sup> This also extends to weapons that may occasion serious and long-term adverse effects on the environs.<sup>296</sup> Equally, the law fetters the right of warring parties from applying excessive force on the enemy over and above the military objectives.<sup>297</sup> As Malcolm Shaw notes, the principle of humanity constitutes one of the underlying tenets of the law of conflict since it

---

<sup>290</sup> Fourth Geneva Convention, Article 4

<sup>291</sup> *ibid*, Article 50 (1).

<sup>292</sup> Additional Protocol I, Article 51 as read together with Article 57.

<sup>293</sup> *ibid*, Article 57 (2) (a)

<sup>294</sup> *ibid*, Article 57 (2) (b)

<sup>295</sup> *ibid*, Article 35

<sup>296</sup> Additional Protocol I of 1977, Article 55

<sup>297</sup> Frits Kalshoven & Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4<sup>th</sup> edn Cambridge University Press 2011) 92

requires that warring parties treat each other humanely.<sup>298</sup> The law permits armed force strictly ‘...in pursuing legitimate objectives as a matter of military necessity.’<sup>299</sup>

Similarly, the law forbids random attacks. It defines such attacks as ‘...general attacks .... not directed at any specific military target such as bombardment that does not distinguish combatants from civilians or civilian premises.’<sup>300</sup> The aim is to prevent or ensure human suffering is at its bare minimum.<sup>301</sup>

Quite importantly, the foregoing principles are entrenched in customary international law. The ICJ in the *Advisory Opinion on legality of the threat or use of Nuclear Weapons* emphasized that ‘...these fundamental rules constitute non-derogable principles of customary international law that must be observed by all states at all times.’<sup>302</sup> The rationale being that the principles are essential to the respect and observance of fundamental human rights.<sup>303</sup> As Frits Kalshoven et al. note, the ultimate aim of the law is the preservation of humanity even during wartime.<sup>304</sup>

### **3.4 KDF’s conduct in Somalia**

Prior to the incursion, Kenya notified the UN Security Council that it had sought the permission of the interim government of Somalia.<sup>305</sup> Though, questions have been raised as to whether the Somalia government actually consented to the incursion. For instance, the (then) Somalia

---

<sup>298</sup> Malcolm N. Shaw (n.60) 849

<sup>299</sup> Frits Kalshoven et al (n.297), 2

<sup>300</sup> Additional Protocol I, Article 51

<sup>301</sup> Fourth Geneva Convention of 1949, Article 27

<sup>302</sup> Supra note 233, para.79.

<sup>303</sup> Supra note 233, para.79.

<sup>304</sup> Frits Kalshoven et al (n.297), 280

<sup>305</sup> Government of Kenya’s Communiqué (n.45) of 2011, 1



president, Sheikh Sharif Ahmed is reported to have refuted Kenya's claim of informing him of the impending invasion.<sup>306</sup>

Under the ILC Articles, the law provides that a state may permit another state to undertake particular act on its territory. In such a scenario, the law precludes the second state from responsibility provided it acts within the confines of the consent granted.<sup>307</sup> It is imperative to note that the law envisages valid and genuine consent, given freely without any coercion or undue influence.<sup>308</sup> In this sense, it is arguable whether Kenya's invasion satisfies the threshold of valid consent given the contestation by the President of Somalia.

### **3.4.1 Force establishment & strategy**

The operation initially comprised of about 4000 troops in two battalions.<sup>309</sup> However, the current figure stands at 3664 KDF personnel given the entry of Sierra Leone force that was deployed to augment the KDF troops in Sector 2.<sup>310</sup> At the onset, one of the key strategies of the operation was to seize the Kismayo port since it was considered '...a key source of revenue for the militants.'<sup>311</sup> The capture of the port intended to incapacitate the Al-Shabaab terror group financially. In this regard, the KDF staged the *Operation Sledge Hammer*, which led to the successful capture of the port from Al Shabaab's stranglehold.<sup>312</sup>

---

<sup>306</sup> JSOU Report, *Counter-insurgency in Somalia* (n.1), 62.

<sup>307</sup> ILC Draft Articles, Article 20

<sup>308</sup> Commentary on Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) 73.

Accessed at <http://legal.un.org/>

<sup>309</sup> Anderson and McKnight (n.116), 7

<sup>310</sup> AMISOM website (n.12).

<sup>311</sup> Anderson and McKnight (n.116), 8

<sup>312</sup> *ibid* 8

Another strategy entailed the Kenyan troops working together with the Somali national force and surrogate forces comprising of the Azania rebel group and Ras Kamboni forces.<sup>313</sup> Through this strategy, KDF sought to be conversant with the local knowledge for ease of communication and as such, endear itself to the local population.<sup>314</sup> It suffices to note that prior to the incursion, Kenya had also through the *Jubbaland Initiative* attempted to fight the Al-Shabaab indirectly by offering financial support and supplying arms to local clan militias to fight the militants, particularly in Juba region.<sup>315</sup> However, this initiative raised questions as to whether it was in tandem with AMISOM's mandate in Somalia. For instance, the Somalia government accused Kenya of meddling in internal political processes in Juba region. Due to this, the FGS called for the removal of the Kenyan troops in AMISOM's Sector 2.<sup>316</sup>

In terms of the actual operations, the offensive now in its 8<sup>th</sup> year, has been characterized by ground, naval and air in areas under Kenya's command.<sup>317</sup> The attacks have targeted the training camps, cells and supply bases in a bid to dislodge and dismantle the militant's networks. Inasmuch as the KDF troops have staged successful attacks against the militia such as *Operation Sledge Hammer* that led to the capture of the Kismayu port from Al Shabaab stranglehold, KDF has also suffered significant losses especially in terms of human capital. For instance, the El Adde attack on the KDF camp in January 2016 resulted in significant casualties.<sup>318</sup> Nonetheless,

---

<sup>313</sup> *ibid*, 4-5

<sup>314</sup> *ibid*

<sup>315</sup> *ibid*, 5

<sup>316</sup> *ibid*, 69.

<sup>317</sup> Anderson and McKnight (n.116), 7

<sup>318</sup> The UN Monitoring Group on Eritrea and Somalia report of 2016 (n.46) submitted to the UN Security Council on 31<sup>st</sup> October 2016 vide S/2016/919. Notably at paras. 16-17, the UN Monitoring Group states that '...while the Kenyan government has not yet released official casualty figures, the Al Shabaab militants killed close to 150 Kenyan soldiers.' Accessed at <https://www.un.org/securitycouncil/>

the Kenyan government has not made public the precise extent and account of the El Adde bloodbath to date.<sup>319</sup>

Incidentally, the El Adde attack which became the third AMISOM forward operating base to be overrun by the militants has been attributed to lack of proper coordination between the AMISOM troops.<sup>320</sup> It is also imperative to point out that besides the El Adde attack, there is little information on the total number of casualties and costs of the operation so far.<sup>321</sup>

### **3.4.2 KDF's excesses: Instances of alleged breaches of IHL**

Kenyan troops have been accused of several acts of commission and omission that otherwise constitute a violation of IHL.

First, there has been speculation that KDF captured Kismayo port due to other interests as opposed to security reasons or military necessity. The basis being that despite the capture of the port, reports indicate that charcoal smuggling is still vibrant.<sup>322</sup> The UN Monitoring Group on Eritrea and Somalia indicates that KDF troops have engaged in exporting charcoal through Kismayo port even though the UN ban on charcoal trade is still in force.<sup>323</sup> As a ripple effect, the

---

<sup>319</sup> *ibid*, para 16

<sup>320</sup> UN Monitoring Group's Report of 2013 (n.52), para. 19. The other two '...were the Burundian base in Leego which was overrun on June 26<sup>th</sup> 2015 and the Ugandan base in Janaale, overrun on September 1<sup>st</sup>, 2015.'

<sup>321</sup> Anderson and McKnight (n.116), 7-8

<sup>322</sup> The UN Monitoring Group on Eritrea and Somalia Report of 2013 (n.52), para.91

<sup>323</sup> *ibid*, para.148

Al-Shabaab militants have exploited this opportunity to regroup and engage in the trade to finance their illegal activities.<sup>324</sup>

Second, besides charcoal smuggling, reports indicate that the Kenyan troops have also taken part in illegal importation of sugar.<sup>325</sup> This act in itself goes contrary to the requirement that parties in an armed conflict be guided strictly by legitimate military objectives as opposed to other interests.

Third, the Kenyan troops have staged indiscriminate attacks characterized by unauthorized air strikes<sup>326</sup> and disproportionate force ostensibly targeted at Al Shabaab terror cells. This has led to massive civilian casualties and displacement of hundreds. For instance, KDF's air strikes accounted for 29 deaths out of 105 incidences of civilian casualties reported in 2016.<sup>327</sup> The air strikes particularly in the Gedo region also destroyed houses and water wells, which qualify as civilian premises under the law of war.<sup>328</sup> In some instances, the Kenyan government has pledged to undertake official inquiries into the alleged violations. However, in most instances, the government has outrightly denied involvement despite the numerous accusations against its troops.<sup>329</sup> The UN Monitoring Group points out the lack of transparency in KDF's operations that has hampered efforts to assess the impact on civilians and put in place the necessary mitigating measures.<sup>330</sup>

---

<sup>324</sup> *ibid*

<sup>325</sup> Anderson and McKnight (n.116), 11.

<sup>326</sup> The UN Monitoring Group on Somalia notes in its 2013 Report (n.52), para.94 that '...on 7 July 2012, one month after integrating with AMISOM, KDF resumed unauthorized air strikes in Somalia...ostensibly to sustain the pressure against the Al-Shabaab militants.'

<sup>327</sup> UN Secretary General Report on Somalia of 2016 (n.47), paras. 50-51

<sup>328</sup> UN Secretary General Report on Somalia of 2016 (n.47), para 51.

<sup>329</sup> *ibid*

<sup>330</sup> UN Monitoring Group on Eritrea and Somalia report of 2012 (n.43), para. 96

Fourth, despite having agreed to join AMISOM in 2012, KDF has not fully embraced the integration. For instance, the UN Monitoring Group reports of instances where KDF personnel have not donned the necessary AMISOM insignia as a way of demonstrating its full integration into the African force.<sup>331</sup> The Monitoring Group notes thus, ‘...KDF’s operational presence in AMISOM was merely theoretical and not practical...’<sup>332</sup>

In the same regard, the UN Secretary General’s report of 2016 distinguishes the KDF from AMISOM, which denotes that KDF forces are still operating bilaterally despite the integration.<sup>333</sup> Some TCCs have been accused of continued exercise of command over their troops as opposed to leaving the command authority to the AMISOM force commander.<sup>334</sup> This has greatly affected the seamless coordination and liaison in the undertaking the counter-insurgency operation.<sup>335</sup>

Questions have also been raised on the neutrality of Kenya’s involvement in the Somalia conflict. This is particularly in the context of the Djibouti Peace Agreement of 2008 in which the AU requested the UN to deploy a multinational force comprised of ‘...countries friendly to Somalia but excluding neighboring countries...’<sup>336</sup> By deploying her troops in Somalia, Kenya disregarded this agreement. Despite the subsequent integration of KDF under the AMISOM force, there still exist a narrative of Kenya being seen as a partisan actor and meddling in the affairs of Somalia under the pretext of the fight against terrorism.<sup>337</sup>

---

<sup>331</sup> UN Monitoring Group Report on Eritrea & Somalia of 2013 (n.52), paras. 90-91.

<sup>332</sup> *ibid*, 90

<sup>333</sup> UN Secretary General Report on Somalia of 2016 (n.47), para. 50

<sup>334</sup> *ibid*

<sup>335</sup> UN Monitoring Group Report on Eritrea & Somalia of 2013 (n.52), para.91.

<sup>336</sup> Djibouti Peace Agreement of 2008, para 7.

<sup>337</sup> Anderson and McKnight (n.116), 5

### 3.5 AMISOM's conduct in Somalia

Pursuant to the strategic concept of operations, the AMISOM force is currently divided into 4 sectors.<sup>338</sup> Its mandate includes ‘...taking all appropriate measures in coordination with the Somalia force to significantly deplete the threats posed by armed groups in Somalia including the Al Shabaab militia in order to establish a secure environment necessary for an effective and legitimate governance in Somalia.’<sup>339</sup> In the discharge of this mandate, AMISOM is obliged to: ‘... comply fully with the applicable provisions of international humanitarian law, international human rights law and also, respect Somalia’s territorial sovereignty.’<sup>340</sup> In particular, the joint agreement signed between African Union and the interim government of Somalia in 2007 stipulates thus:

‘...the AU shall ensure [...] AMISOM conducts its operation with full respect to the principles and rules of International Conventions applicable to the conduct of military personnel...’<sup>341</sup>

Thus far, AMISOM has conducted a number of operations such as *Operation Panua Eneo* and *Operation Free Shabelle*, which succeeded in capturing the Afgoye corridor where the Al Shabaab militants exercised considerable influence.<sup>342</sup> Equally, the African force has also suffered devastating attacks from Al-Shabaab occasioning fatalities and casualties. Neither the

---

<sup>338</sup> UN Security Council Resolution No. 2036 of 2012 para.1 (S/RES/2036 (2012)). Available at <https://www.un.org/securitycouncil/>

It is noted that: ‘...Sector 1 covers Mogadishu which is under Ugandan and Burundi troops. Sector 2 in southwest Somalia covering key towns such as Afmadow, Jilib, Buale, and Kismayo was put under the command of about 4,200 Kenyan troops. On the other hand, Sector 3 and 4 were put under the command of Ugandan, Burundian, Djibouti and Ethiopian forces respectively.’

<sup>339</sup> *ibid*, para.1

<sup>340</sup> *ibid*

<sup>341</sup> Status of Mission Agreement (SOMA), Article VI, Para. 9. Accessed at <http://amisom-au.org>

<sup>342</sup> JSOU Report, *Counter-insurgency in Somalia* (n.1), 59 & 65.

AU nor any of the troop-contributing countries (TCCs) has made public the precise number of loss of human capital.<sup>343</sup>

### **3.5.1 AMISOM's alleged breach of IHL**

In the course of the counter-insurgency operations, reports indicate that AMISOM has employed unnecessary force by using tanks and heavy artillery indiscriminately against civilians. This has occasioned loss of innocent lives, maiming and mass displacement of Somali people.<sup>344</sup> In his 2016 report, the UN Secretary General points out thus:

‘...the number of human rights violations increased [...] primarily owing to state security operations and continued Al-Shabaab activity. Reported civilian casualties totaled 623, comprising 260 deaths and 363 injuries. Security operations generated 242 civilian casualties, of which 55 deaths and 120 injuries were attributed to the Somali security forces and 37 deaths and 12 injuries to AMISOM...’<sup>345</sup>

Similarly, in the 2016 report on Somalia, the UN Secretary General documents a total of 105 cases of civilian casualties.<sup>346</sup> Of this number, Somali security forces accounted for 28 deaths, the AMISOM force 3 deaths and the rest to the KDF troops. Claims of gender-based violence and sexual exploitation have also sufficed against AMISOM troops.<sup>347</sup>

The Monitoring Group further reports of increased resort to air strikes against civilian areas ‘...especially in Gedo, Hiran, Lower Shabelle, Middle Juba and Lower Juba.’ This has resulted

---

<sup>343</sup> *ibid*, 59

<sup>344</sup> *ibid*, 12-13

<sup>345</sup> UN Secretary General Report on Somalia submitted to the UN Security Council on 9<sup>th</sup> January 2017 vide S/2017/21, para.42

<sup>346</sup> UN Secretary General Report on Somalia of 2016 (n.47), para. 50

<sup>347</sup> The UN Monitoring Group Report of 2013 (n.52), para. 141.

in ‘...numerous incidences of civilian casualties,<sup>348</sup> destruction of sources of livelihood and displacement of thousands of people.’<sup>349</sup> The Monitoring Group points out that the AMISOM force has carried out indiscriminate attacks characterized by disproportionate force against actual or perceived threats by the Al-Shabaab group.<sup>350</sup> This often manifests itself through use of indiscriminate fire as a response to Al Shabaab’s attacks on its personnel or camps.

As a result, the (then) President of TFG, Sheikh Sharif Ahmed protested to the UN Secretary General against AMISOM’s use of excessive force and targeting civilian areas and facilities that had resulted in deliberate loss of civilian lives.<sup>351</sup> To this end, he called for urgent UN intervention to investigate these acts of violations and hold the perpetrators to account.<sup>352</sup> The UN Secretary General notes in this regard that ‘...the UN Mission in Somalia has continued to engage AMISOM with a view of undertaking investigations into the reported violations of human rights and humanitarian law.’<sup>353</sup>

Nonetheless, an underlying question is whether these efforts have been meaningful insofar as addressing the reported violations. There exist scanty information on the outcome of the investigations and the action taken thereof.<sup>354</sup> In instances where the AMISOM command has admitted responsibility for attacks against civilians, such admission has been limited to very few instances to the exclusion of other numerous incidences.<sup>355</sup> It suffices to note in this regard that

---

<sup>348</sup> *ibid*, para.129 where it is noted ‘...in 2012, the World Health Organization (WHO) registered 6,680 civilian casualties in four hospitals in Mogadishu. The victims sustained the injuries in the course of fighting between the Al-Shabaab and pro-Government forces.’

<sup>349</sup> The UN Monitoring Group’s Report of 2016 (n.46), para. 104.

<sup>350</sup> *ibid*, para. 105.

<sup>351</sup> JSOU Report, *Counter-insurgency in Somalia* (n.1), 12.

<sup>352</sup> *ibid*, 12.

<sup>353</sup> UN Secretary General’s Report of 2017 (n.345), para 42.

<sup>354</sup> *ibid*

<sup>355</sup> Human Rights Watch Report, *You Don’t Know Who to Blame: War Crimes in Somalia* (2011) 17. Accessed at <https://www.hrw.org/>

The HR Group reports thus:



the UN Security Council has called upon the AU ‘...to submit a report on the implementation of AMISOM’s mandate on inter alia... the conduct, discipline [...] and measures taken to protect civilians...’<sup>356</sup>

Notably, all warring parties participating in the Somalia conflict have not fully complied with the fundamental provisions of IHL. Beside the AMISOM force for instance, the SNA, their affiliated local militia and Al-Shabaab militants<sup>357</sup> have also been accused of targeting civilians and civilian premises.<sup>358</sup> For instance, the UN Secretary General indicates ‘...of over 300 civilian casualties recorded in 2018, the Al Shabaab terror group accounted for over 76%.’<sup>359</sup> It suffices to note that in some of its military operations, AMISOM troops have collaborated with pro-government militias.<sup>360</sup>

Incidentally, the pro-government militias collaborating with AMISOM have allegedly committed several violations against civilians including unlawful arrests, detentions, extortion and looting in civilian areas.<sup>361</sup> Granted, there is no formal agreement for such an arrangement, but given the dictates of the principle of attribution, AMISOM is obliged to ensure all its affiliates fully adhere to the law.<sup>362</sup> All parties in the Somalia conflict including the AMISOM force have engaged in rent seeking and profiteering through the elongation of the conflict. As Bruton & Williams et al. observe, ‘...the continued conflict situation has been exploited by all actors for their own selfish

- 
- a. In January 2011, AMISOM troops allegedly opened fire on a group of civilians. In this regard, three AMISOM soldiers from the Ugandan contingent were found guilty and sent back home to serve a two-year jail term.
  - b. In February 5 2011, the AMISOM force commander Maj. Gen. Nathan Mugisha wrote a letter to the Human Rights Watch Group in which he acknowledged two incidents involving AMISOM personnel firing erroneously at civilians.

<sup>356</sup>UN Security Council Resolution No. 2472 of 2019, para 32. Accessed on <http://amisom-au.org>

<sup>357</sup> CIVIC report (n.2) 2 that reveals thus ‘...Al-Shabaab militants have used civilians as “human shields” and use of IEDs and suicide bombings indiscriminately that occasion civilian casualties.’

<sup>358</sup> The UN Monitoring Group Report of 2016 (n.46), paras 16-17

<sup>359</sup> UN Secretary General Report of 2019, paras. 46-48

<sup>360</sup> The UN Monitoring Group Report of 2013 (n.52), paras.131-132.

<sup>361</sup> *ibid* para 131.

<sup>362</sup> *ibid*, para. 132.

interests including financial gains at the expense of Somalia's citizens who continue to shoulder the impact of perpetual instability and conflict situation in Somalia decades on.'<sup>363</sup>

### **3.6 Conclusion**

From the foregoing discussion, it is a cardinal responsibility of warring parties in an armed operation to respect the underlying provisions of the law of war. A state should ensure its troops adhere to the law since responsibility attaches to an intervening state even where its troops act beyond instructions or exceeds authority.<sup>364</sup> At all material times, a warring party should pursue legitimate military objectives that informed its participation or involvement in an armed conflict situation. Non-compliance with the law may occasion punitive measures.<sup>365</sup>

With regard to multinational forces, the AU Peace and Security Council initially deployed the AMISOM force in Somalia in January 2007 for a peacekeeping mission temporarily. Subsequently, the UN Security Council vide Resolution No. 2036 of 2012 authorized the deployment of AMISOM in Somalia principally '...to deal with the terror threat posed by the Al Shabaab group.'<sup>366</sup> In terms of operations, the AMISOM troops have been clustered under 6 sectors and each sector placed under the respective troop-contributing states. For an international organization, the general rule is that responsibility for the misconduct of troops operating as multinational force is dependent on the level of control a troop-contributing country or international organization exercises over the troops. The law envisages effective control, which may be established from the factual situation.

---

<sup>363</sup> JSOU Report, *Counter-insurgency in Somalia* (n.1), 56

<sup>364</sup> ILC Draft Articles, Article 7.

<sup>365</sup> For instance, Article 91 of Additional Protocol I of 1977 provides that '...a party to an armed conflict that violates the provisions of Geneva Conventions or Protocol is liable to pay compensation. Hence, all acts undertaken by the armed forces in the course of the conflict are attributable to a state.'

<sup>366</sup> AMISOM website (n.12)

It is also manifest that fundamental tenets of the law of war are universally recognized and entrenched in customary international law.<sup>367</sup> They are not limited to codified treaty law. For instance, the principle of humanity, which has a two-fold perspective in that, it focuses on the protection of both the combatants and civilians. In each instance, the principle of humanity forbids haphazard attacks and force that would otherwise occasion needless human suffering.

## **CHAPTER 4: CONCLUSION AND RECOMMENDATIONS**

### **4.1 Introduction**

Under this Chapter, the study summarizes the findings and examines available legal redress mechanisms that may be invoked in case of breach of the underlying rules and obligations that accrue in the course of exercising armed force. Specifically, the paper shall explore an effective legal avenue of pursuing accountability against the Kenyan state and AMISOM force, for the acts of commission and omission of their troops in the course of counter-terrorism operations in Somalia.

---

<sup>367</sup>Supra note 233, para 79.

## 4.2 Conclusion

In light of the discussion in the preceding chapters, it is evident that the right of a state to self-defence is inherent and is entrenched in both treaty and customary international law. However, it is not absolute. Rather, it is subject to legal safeguards that are also premised on treaty and customary international law.<sup>368</sup> Customary international law is particularly significant given that where there exist lacunae in treaty law, generally accepted state practice and rules suffice as a recourse.

As an intrinsic legal measure, Article 51 of the UN Charter is couched in mandatory terms. It obliges a state ‘...to report immediately to the UN Security Council on the measures it takes in the course of using force in self-defence.’ Additionally, the Charter reserves in the Security Council, the power to take appropriate action including imposing sanctions on non-complying member states.<sup>369</sup>

On the institutional framework, the law establishes the International Court of Justice (ICJ) as the main judicial organ of the UN.<sup>370</sup> The law vests in the court, jurisdiction to hear matters touching on interpretation of treaty law, any issue of concern under international law and quite notably, cases that involve breach of international obligations.<sup>371</sup> To date, the ICJ has pronounced itself on several of cases and issued several advisory opinions on different issues of concern under international law.

One specific area of concern is on recourse to force in self-defence. In light of the lack of definition of armed attack in text, the ICJ has laid down the threshold that ought to be satisfied to

---

<sup>368</sup>Supra note 233, para.40.

<sup>369</sup> The UN Charter, Articles 42 and 43

<sup>370</sup>Article 92 of the UN Charter as read together with Article 1 of the Statute of the ICJ.

<sup>371</sup>Statute of the ICJ, Article 36 (2)

necessitate recourse to self-defence. Notably, from ICJ's decision in the *Nicaragua case*, '...only the most serious forms of force...' amount to an armed attack and as such, warrant invocation of self-defence.<sup>372</sup> This position has further been buttressed by international quasi-judicial organs such as the ICTY which in the *Tadic's case*, affirmed the intensity of an attack as one of the key elements in determining what constitutes a non-international armed conflict (NIAC).<sup>373</sup> Recourse to force must also fulfil the customary international law threshold of necessity and proportionality criteria.<sup>374</sup> Establishing necessity is a question of a strict and objective test and not, left at a state's discretion.<sup>375</sup>

Despite the foregoing, self-defence continues to generate controversy. For example, on the aspect of anticipatory use of force and duration particularly in respect of the 'war' against terrorism. State practice point to a lack of consensus on whether to interpret self-defence restrictively or broadly to include anticipatory self-defence.<sup>376</sup> Some states, for instance, the USA have construed self-defence in its broadest sense to include taking pre-emptive and deterrence action against perceived enemies deemed to harbor or shield terrorists, particularly in the post-9/11 period.<sup>377</sup>

Equally, in its joint communique to the UN Security Council, Kenya stated its intention to inter alia, take pre-emptive measures including '...the pursuit of any armed elements...' to defend its territorial sovereignty and integrity.<sup>378</sup> This raises a possibility that force may be applied beforehand regardless of '...whether an armed attack has occurred or not.'<sup>379</sup> The pre-emptive

---

<sup>372</sup> Nicaragua case (n.92), para 191.

<sup>373</sup> Tadic's case (n.163), para.562

<sup>374</sup> See for instance, Nicaragua case (n.92), para 194 and the Oil Platforms case (n.107), para.43

<sup>375</sup> Oil Platforms case (n.107), para.73.

<sup>376</sup> Christine Gray (n.78), 632

<sup>377</sup> *ibid*

<sup>378</sup> Government of Kenya's communique to the UN Security Council of 2011 (n.45), para. 2

<sup>379</sup> Christine Gray (n.78) 633-634

approach has been rejected by other states as it is deemed to be contrary not only to the text of Article 51 of the UN Charter but also, the gravity threshold entrenched in the *Nicaragua case*.<sup>380</sup>

On the aspect of duration, the question is whether use of force can be subsist in perpetuity given the sporadic nature of terror attacks. For instance, the KDF command is on record stating that the *Operation Linda Nchi* offensive is not time-bound.<sup>381</sup> This has raised concerns that the offensive has metamorphosed into foreign occupation that has shifted from the underlying objective of safeguarding the territorial integrity of Kenya.<sup>382</sup> Similarly, it is debatable whether KDF has achieved its underlying objective in Somalia 8 years on, particularly in light of the unrelenting terror attacks in Kenya in the post-2011 period. Arguably, use of force that does not deter future or recurrence of attacks may be deemed unnecessary, as it would have fallen short of the necessity element of self-defence.<sup>383</sup>

That notwithstanding, recourse to force in self-defence is subject to legal provisions on state responsibility under international law. The right to self-defence is not abstract nor exercised in a vacuum. Rather, states must remain cognizance of the underlying obligations under international law.<sup>384</sup> Though the general rule is that self-defence may preclude responsibility, it does not exempt states from liability particularly in relation to international humanitarian law and non-derogable human rights.<sup>385</sup> The ICJ while addressing the question of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory between Israel and Palestine*, affirmed that a state should not plead self-defence particularly where its conduct breaches its

---

<sup>380</sup> *ibid*

<sup>381</sup> Anderson & Mc Knight (116), 6

<sup>382</sup> *ibid*

<sup>383</sup> Christine Gray (n.78), 632

<sup>384</sup> Commentary on Articles on the Responsibility of States for Internationally wrongful acts (2001) 33.

<sup>385</sup> *ibid*, 74

obligations under the law.<sup>386</sup> The ICJ held thus ‘...Israel’s action was not in consonance with international humanitarian and human rights law and hence, ordered the immediate cessation of the action and reparation for the violations occasioned thereof.’<sup>387</sup>

The ICJ has further emphasized the binding nature of fundamental principles and rules of IHL.<sup>388</sup> For example, distinction between combatants and non-combatants is one of the outstanding tenets of IHL. Warring parties are mandatorily obliged to differentiate civilians and civilian premises from attacks in the course of hostilities. The aim is to minimize unnecessary human suffering and adverse effects on civilian objects.

Where a state derogates or breaches these fundamental principles, legal consequences ensue.<sup>389</sup> This position is founded under both treaty law and customary international law. Some of the envisaged legal redress measures include cessation of the wrongful act, commitment to non-repetition and reparation *inter alia*.<sup>390</sup> As pronounced in the *Nicaragua case*, the offending state is obliged to cease immediately from continued breach of the law.<sup>391</sup> These legal measures may be imposed either on violations arising out of state-state relations or state and individuals.<sup>392</sup> Additionally, the court may grant provisional or interim measures depending on the urgency of the issue at hand pending the full hearing of the case.<sup>393</sup>

---

<sup>386</sup>Supra note 274, paras. 138-142.

<sup>387</sup> *ibid*, paras. 151-152

<sup>388</sup>Supra note 233, para. 79.

<sup>389</sup> ILC Articles, Article 28

<sup>390</sup>Article 30 as read together with Article 31 of ILC Articles.

<sup>391</sup> *Nicaragua case* (n.92) para. 286.

<sup>392</sup> *Commentary on Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), 87.

<sup>393</sup> Article 41 requires service of a notice of the provisional measures on the parties and the UN Security Council for enforcement purposes.

Besides the ICJ, there exist other legal mechanisms of pursuing redress for breach of IHL. These include domestic courts, the International Criminal Court (ICC)<sup>394</sup> or measures such as investigations, fact-finding or the enquiry procedure.<sup>395</sup> The law obliges state parties to search and commence legal proceedings against persons involved in the commission of grave breaches within domestic courts or surrender them for trial in another state party.<sup>396</sup> This is premised on the rationale that jurisdiction over (natural) persons accused of committing serious international crimes is a preserve of their respective national courts or the International Criminal Court (ICC).<sup>397</sup> The law limits ICJ's jurisdiction to states only.<sup>398</sup>

Similarly, the law permits warring parties to take appropriate measures such as conducting investigations or fact-finding into instances of breach of IHL with a view of redressing them.<sup>399</sup> Notably, investigations are undertaken as a preliminary measure that ought to inform further action such as suppression,<sup>400</sup> cessation of breach or commencement of trial as the case may be.<sup>401</sup>

---

<sup>394</sup> Article 1 of the Rome Statute ‘...establishes the International Criminal Court (ICC) and vests it with jurisdiction over persons alleged to have committed serious crimes of international concern.’

<sup>395</sup> Article 52 of the First Geneva Convention, Article 53 of the Second Geneva Convention, Article 132 of the Third Geneva Convention and Article 149 of the Fourth Geneva Convention are instructive in that they form the legal basis of the enquiry procedure.

<sup>396</sup> First Geneva Convention, Article 49

<sup>397</sup> Rome Statute, Article 25 ‘...vests in the ICC jurisdiction over natural persons only on the rationale that individuals commit serious international crimes and not abstract entities.’

<sup>398</sup> Statute of the ICJ, Article 34.

<sup>399</sup> Commentary of 2016 on the First Geneva Convention on the Amelioration of the condition of the wounded and the sick in Armed Forces in the field of 1949, para. 3029. It is noted that investigations should be undertaken as a preliminary step in fulfilling the obligation to prosecute or hand over persons accused of committing grave breaches of IHL. Available at <https://ihl-databases.icrc.org/> Accessed 14 March 2019.

<sup>400</sup> Article 49 of the First Geneva Convention ‘...obliges states to take appropriate action to suppress other less grave breaches that breach IHL provisions.’

<sup>401</sup> Commentary of 2016 on the First Geneva Convention (n.420), para. 3029.



Although the UN in authorizing the deployment of AMISOM, emphasized the import ‘...of full compliance with the applicable provisions of international humanitarian and human rights law...’ in the course of its mandate in Somalia, the practice portrays a departure from this commitment. As documented in several UN reports,<sup>402</sup> both KDF and AMISOM forces have allegedly committed acts that constitute a violation of the law of war. Of particular concern, allegations of staging indiscriminate attacks and employing disproportionate force that have occasioned significant civilian casualties, destruction of civilian premises<sup>403</sup> and displacement of thousands of Somali people have been rife. This has manifested itself through air strikes, ground and naval operations. This is in addition to allegations of gender-based violence and sexual exploitation against AMISOM troops.<sup>404</sup>

These acts are a manifest breach of the law of armed conflict. For example, willful targeting of civilians and civilian objects through aerial bombardment or ground operations amount to a serious breach of the law of armed conflict.<sup>405</sup> Equally, the law prohibits widespread attacks that occasion unnecessary civilian suffering through murder, torture, serious bodily injuries or other inhumane acts since they constitute crimes against humanity.<sup>406</sup>

---

<sup>402</sup> For instance, the UN Monitoring Group Report of 2013 (n.52), the UN Monitoring Group Report of 2016 (n.46), and the UN Secretary General’s Report of 2017 (n.345)

<sup>403</sup> The UN Monitoring Group Report of 2013 (n.52), para. 134

<sup>404</sup> *ibid*, para. 141.

<sup>405</sup> Article 50 of the First Geneva Convention of 1949 defines grave breaches of the law of armed conflict to include ‘...the willful killing, willfully occasioning great suffering...and wanton destruction of property that is not justifiable by military necessity.’ See also Article 8 of the Rome Statute.

<sup>406</sup> Rome Statute, Article 7

In addition, both the KDF and AMISOM forces have been accused of pursuing other interests other than the underlying military objectives that informed the deployment in Somalia.<sup>407</sup> Case in point, the KDF's involvement in illegal charcoal trade despite the UN ban being in force. This in itself disregards the rules of the law of war, which requires parties to strictly, be guided by the military objectives in the course of the operations. Besides the KDF and AMISOM troops, other actors involved in the conflict situation in Somalia have also breached IHL. For instance, the Somalia National Army (SNA), their affiliated local militia and Al-Shabaab militants have been accused of targeting civilians and civilian objects.<sup>408</sup>

Nevertheless, one of the main challenges that has hindered attribution of such breaches to the warring parties relates to the lack of proper monitoring and documentation. Given the security risks involved coupled with the discreet nature of military operations, efforts by UN Monitoring and other independent bodies to keep track and document operations that result in civilian deaths or unnecessary suffering have been greatly impeded.<sup>409</sup>

There is also lack of cooperation in implementing various recommendations by the UN monitoring bodies that seeks to ensure full adherence to the law of war.<sup>410</sup> For example, that the UN Monitoring Group on Somalia notes that AMISOM has failed to establish effective systems to investigate allegations leveled against its troops in a transparent and timely manner.<sup>411</sup> Inasmuch as investigations have been instituted in some instances, there is scanty information on

---

<sup>407</sup> The UN Monitoring Group Report of 2013 (n.52), para.151

<sup>408</sup> The UN Monitoring Group Report of 2016 (n.46), paras 16-17

<sup>409</sup> CIVIC report (n.2), 18

<sup>410</sup> The UN Monitoring Group Report of 2013 (n.52), para 167.

<sup>411</sup> *ibid*, para 141.

the outcome and remedial action taken thereof.<sup>412</sup> This in essence, has greatly impeded efforts to hold the perpetrators to account for the breaches.

Similarly, on the reporting requirements as per Article 51 of the UN Charter, there is scanty information on whether Kenya has submitted any report to the Council as earlier pledged in its communique to the UN Security Council prior to the incursion. Under Resolution No. 2036 of 2012, the Security Council obliged all troop-contributing countries to submit reports on the compliance with ban on charcoal trade within 120 days of the Resolution. From the discussion on this subject, it is quite evident that charcoal trade through the Kismayo port is still vibrant and of which, the Kenyan troops have been accused of engaging in and profiteering among other actors.

### **4.3 Recommendation(s)**

The law provides for an enquiry procedure into instances of alleged breach of any provision of IHL. The enquiry procedure is entrenched in different provisions in the Four Geneva Conventions.<sup>413</sup> The enquiry procedure is key in establishing with certainty whether or not, a

---

<sup>412</sup> The UN Secretary General's report of 2017 (n.345) para. 42 where the Secretary General notes that '...the UN Mission in Somalia has continued to engage the AMISOM with a view of undertaking investigations into the reported violations of the law.'

<sup>413</sup> Article 52 of the First Geneva Convention, Article 53 of the Second Geneva Convention, Article 132 of the Third Geneva Convention and Article 149 of the Fourth Geneva Convention are instructive in that they form the legal basis of the enquiry procedure.

party has honored its obligations under IHL. It entails verification of facts to confirm the breaches of IHL at any point of an ongoing conflict. In the event there is sufficient evidence to prove the violation, the responsible party is obliged to cease the wrongful act(s) immediately.<sup>414</sup>

One of the major challenges of the enquiry procedure is that it is largely dependent on a request by a party in an ongoing conflict. The law excludes other state parties from instituting the enquiry procedure irrespective of how grave the breach may be.<sup>415</sup> As such, this has greatly curtailed its effectiveness as a mechanism of addressing breaches of the law of war.<sup>416</sup> Equally, resort to the fact-finding procedure is dependent on state consent.<sup>417</sup> Thus, it is ineffective and unpopular on that account.<sup>418</sup>

As a measure of recourse, international practice point to resort to formal investigations at the instance of the UN through the Security Council or respective bodies at the regional level.<sup>419</sup> Notably, the investigation procedure may be initiated either during an ongoing conflict or upon termination of a conflict.<sup>420</sup> This mechanism has gained traction as manifested by the establishment of several international organs such as international criminal tribunals<sup>421</sup> and the International Criminal Court (ICC) specifically with inter alia, jurisdiction over war crimes. As such, proponents call for the establishment of ‘...a Commission of Inquiry for purposes of investigating allegations of serious international crimes witnessed in the course of the ongoing

---

<sup>414</sup> Commentary of 2016 on the First Geneva Convention of 1949 (n.420), para. 3027.

<sup>415</sup> *ibid*, para. 3044.

<sup>416</sup> *ibid*, para. 3045.

<sup>417</sup> See Article 90, Additional Protocol I of 1977

<sup>418</sup> *Supra* note 414, para 3060.

<sup>419</sup> *Ibid*, para. 3062, where it is noted that within the UN system, investigation procedures have been established mainly by the Security Council and the Human Rights Council. At the regional level, fact-finding procedures concerning the conduct of parties to armed conflicts have been initiated by various organizations such as the AU, the EU and the Organization of American States among others.

<sup>420</sup> *ibid*, para. 3062

<sup>421</sup> Commentary of 2016 on the First Geneva Convention of 1949 (n.414), para 3064 mentions international criminal tribunals such as the ICTY, the ICTR and the hybrid special court for Sierra Leone.

operations and recommending appropriate action to enhance accountability.<sup>422</sup> This is premised on the manifest unwillingness or inaction by the AMISOM command to address the allegations raised against its troops.<sup>423</sup>

This paper takes cognizance of the challenges faced by international and regional monitoring bodies in undertaking proper oversight and monitoring the operations in Somalia. This includes the apparent lack of full cooperation, particularly by KDF and AMISOM forces on implementing the recommendations contained in various UN reports.<sup>424</sup> In light of the foregoing discussion coupled with these challenges, this paper recommends that the UN commences investigations into the conduct of all actors involved in the armed operations in Somalia.

The rationale for invoking the investigation procedure is two-fold: One, it is projected that this approach will assist in determining with sufficient proof, the responsible party or parties and the extent to which parties should be held answerable for the numerous violations of the law of war witnessed in the course of terrorism and counter-terrorism operations in Somalia.

Two, upon documenting the findings, the UN will be in a position to recommend the appropriate action and the legal mechanism to seek redress thereof. Depending on the evidence gathered, possible remedial action may include the following; cessation of the wrongful acts, commitment to non-repetition or institution of criminal proceedings against culpable persons in either

---

<sup>422</sup> Human Rights Watch Report of 2011 (n.355), 5.

<sup>423</sup> *ibid*, 17.

<sup>424</sup> For instance, non-compliance with the human rights due diligence policy and failure to implement the CCTARC system fully.

domestic courts or the ICC in the event serious international crimes or crimes against humanity are established.<sup>425</sup>

This paper further takes cognizance of the fact that the insurgency and counter-insurgency operations are still ongoing and as such, there is a high possibility of continued breach of the law. Hence to prevent aggravation, this paper proposes that the UN Security Council by powers vested vide Article 51 of the UN Charter should demand from the Kenyan state and AMISOM force for a compliance report. The report should detail the actions taken either unilaterally or collectively for purposes of determining compliance with legal provisions on recourse to force. In default of which, the Security Council may invoke the appropriate action under Article 42 of the UN Charter to compel full adherence to the law.

As observed in the *Tadics Appeal case*, state responsibility is not abstract nor theoretical. Rather it is premised on:

‘[...] a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting functions to its officials or organs must answer for their actions, even when they act contrary to the instructions.’<sup>426</sup>

---

<sup>425</sup> Frits Kalshoven et al. (n.297), 225 on the Darfur situation in Sudan where the UN Security Council established an international commission of inquiry and referred the situation to the ICC basing on evidence gathered that pointed to the occurrence of crimes against humanity and war crimes

<sup>426</sup> *Tadics case* (n.151), para. 121.

## Bibliography

### A. Books

1. Allard K, *Somalia Operations: Lessons learned* (CCRP, 2002)
2. Bix B, *Jurisprudence Theory and Context* (6<sup>th</sup> edn Sweet & Maxwell 2012)
3. Bowett D.W, *Self-Defence in International Law* (Manchester University Press 1958)
4. Brownlie I, *Principles of Public International Law* (7<sup>th</sup> edn OUP 2008)
5. Crawford J, *Brownlie's Principles of Public International Law* (8<sup>th</sup> edn OUP 2012)
6. Dixon M, *Textbook on International Law*, (7<sup>th</sup> edn OUP 2013)
7. Freeman M, *Lloyd's Introduction to Jurisprudence* (9<sup>th</sup> edn Sweet & Maxwell 2014)
8. Harris D, *Cases and Materials on International Law* (7<sup>th</sup> edn Sweet & Maxwell 2010)
9. Hart H.L.A, *Concept of Law* (2<sup>nd</sup> edn Clarendon Press 1994)
10. Kalshoven F. & Zegveld L, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4<sup>th</sup> edn Cambridge University Press 2011)
11. Lowe V, *International Law* (OUP 2011)
12. Shaw M, *International Law* (7<sup>th</sup> edn Cambridge University Press 2014)
13. Shaw M, *International Law* (2<sup>nd</sup> edn Cambridge University Press 1986)
14. Steiner H.J., Alston P. & Goodman R., *International Human Rights in Context: Law, Politics and Morals* (3<sup>rd</sup> edn Oxford University Press 2007)
15. Unger M. R, *The Critical Legal Studies Movement: Another Time, A Greater Task* (2015)
16. Wallace M R et al., *International Law*, (7<sup>th</sup> edn Sweet & Maxwell 2013)

### B. Articles

1. Anderson D M et al, 'Kenya at War: Al Shabaab and its Enemies in the Eastern Region' (OUP 2014)
2. Crawford J. (eds), 'The Character and Forms of International Responsibility' in Malcom D. Evans, *International Law* (OUP 2014)
3. Gray C, 'The Use of Force and the International Legal Order' in Malcolm D. Evans, *International Law* (4<sup>th</sup> edn 2014)
4. Thomas S, 'Somalia: Challenges and Opportunities in Peace Building' (2016)
5. Turns D, 'The Law of Armed Conflict' in Malcom D. Evans, *International Law* (4<sup>th</sup> edn 2014)

6. Vite S, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009)
7. Wilkand C H, 'The Role of the African Union Mission in Somalia (AMISOM): Peacekeeping Success Or Peacekeeping in Regress?'(2013)

### **C. Case law**

1. Advisory Opinion on Legality of the threat or use of Nuclear Weapons (1996). Available at <https://www.icj-cij.org>
2. Case concerning Oil Platforms (Iran v USA) (2003) Available at <https://www.icj-cij.org>
3. Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia case) (2007). Available at <https://www.icj-cij.org>
4. Case concerning the legal consequences of the construction of a wall in the Occupied Palestinian Territory (2004). Available at <https://www.icj-cij.org>
5. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (1986). Available at <https://www.icj-cij.org>
6. Prosecutor v Dusko Tadić case(1997) Available at <http://www.icty.org>

### **D. International law instruments**

1. Additional Protocols I & II of 1977
2. Geneva Conventions of 1949
3. ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001). Accessed at <http://legal.un.org/ilc/>
4. ILC Draft Articles on the Responsibility of International Organizations (2011).
5. The Rome Statute
6. Statute of the ICJ
7. The UN Charter of 1945

### **E. Reports**

1. Campaign for Innocent Victims in Conflict (CIVIC) report, *Civilian harm in Somalia: Creating an Appropriate Response* (2011) <https://civiliansinconflict.org/>



2. Human Rights Watch Report, *You Don't Know Who To Blame: War Crimes in Somalia* (2011) <https://www.hrw.org/>
3. ICRC Report, *International Humanitarian Law: A Comprehensive Introduction* (2016). Accessed at <https://icrc.org/>
4. ICRC Report, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2015) Accessed at <https://www.icrc.org/>
5. Joint Special Operations University (JSOU), *Report on Counterinsurgency in Somalia: Lessons learned from the African Union Mission in Somalia, 2007-2013* (September 2014) <<https://jsou.socom.mil>>
6. Kenya National Commission on Human Rights (KNCHR) Report, *The Error of Fighting Terror with Terror* (2016). <[www.knchr.org](http://www.knchr.org)>
7. The UN Secretary General's Report on Somalia (2017) submitted to the UN Security Council vide S/2017/21. Available at <https://www.un.org/securitycouncil/>
8. UN Monitoring Group on Eritrea & Somalia report (2008) submitted to the UN Security Council vide S/2008/769. Available at <https://www.un.org/securitycouncil/>
9. UN Monitoring Group on Eritrea & Somalia report (2012) submitted to the UN Security Council vide S/2012/544. Available at <https://www.un.org/securitycouncil/>
10. UN Monitoring Group on Eritrea and Somalia report (2015) submitted to the UN Security Council vide S/2015/801. Available at <https://www.un.org/securitycouncil/>
11. UN Monitoring Group on Eritrea and Somalia report (2016) submitted to the UN Security Council vide S/2016/919. Available at <https://www.un.org/securitycouncil/>
12. UN Secretary General Report on Somalia (2018) submitted to the UN Security Council in December 2018. Available at <https://undocs.org/S/2018/1149>
13. UN Secretary General Report on Somalia (2019) submitted to the UN Security Council Available at <https://www.un.org/securitycouncil/>