

## **DECLARATION**

**I, KIMANI EMILY WAMBUI, declare that this dissertation is my own original work and that it has not been submitted for examination for the award of a degree at any other university.**

**SIGNED: .....**

**.....**

**KIMANI EMILY WAMBUI**

**DATE**

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

**SIGNED: .....**

**.....**

**PROF. FDP SITUMA**

**DATE**

## **ACKNOWLEDGEMENTS**

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Over and above all, to God be the glory for bringing me this far.

## **DEDICATION**

To my loving family for all their immense support and prayers.

## **LIST OF CONVENTIONS/TREATIES**

1919 Covenant of the League of Nations; 112 B.F.S.P. 1.

1928 General Treaty for Renunciation of War; 94 L.N.T.S 57.

1955 USA/Iran Treaty of Amity; 284 U.N.T.S. 93.

1945 United Nations Charter; 59 Stat. 1031; T.S. No. 993, Bevans 1153.

## LIST OF CASES

*About Rogo Mohamed & another vs. Republic, Criminal Case No.793 of 2010, Nairobi, [2011] eKLR.*

*Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (2005) I.C.J. Rep. p. 168.*

*Case Concerning Iranian Oil Platforms (Islamic Republic of Iran v. United States of America) (2003), ICJ Rep., p.161.*

*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), (1986), ICJ Rep. p.14.*

*Elgiva Bwire Oliacha vs. Republic, High Court Criminal Appeal No. 289 of 2011, Nairobi.*

*Island of Palmas Arbitration 2 R.I.A.A. 829, (1928).*

*Republic vs. Elgiva Bwire Oliacha, Criminal Case No.1445 of 2011, Nairobi.*

*The Caroline Case 29 B.F.S.P. 1137-1138; 30 B.F.S.P. 195-196.*

*The Falklands Conflict, (1982 U.N.Y.B. 1320).*

*Washington Jakoyo Midiwo vs. Minister, the Ministry of Internal Security & 2 others, Nairobi, (Unreported) [2013] eKLR.*

## **LIST OF ABBREVIATIONS**

ADF.....	Allied Democratic Forces
AU.....	African Union
AMISOM.....	African Union Mission in Somalia
GSU.....	General Service Union
KDF.....	Kenya Defence Forces
UN.....	United Nations
UNC.....	United Nations Charter
USA.....	United States of America
UK.....	United Kingdom
TFG.....	Transitional Federal Government
ICJ.....	International Court of Justice
PCIJ.....	Permanent Court of International Justice

## TABLE OF CONTENTS

<b>CHAPTER ONE .....</b>	<b>1</b>
<b>INTRODUCTION.....</b>	<b>1</b>
1.1 Background .....	1
1.2 Events Leading To ‘ <i>Operation Linda Nchi</i> ’ .....	4
1.3 Statement of the Problem.....	6
1.4 Hypothesis.....	6
1.5 Research Questions .....	6
1.6 Theoretical/Conceptual Framework.....	7
1.7 Literature Review.....	8
1.8 Research Methodology .....	15
1.9 Chapter Breakdown .....	16
<b>CHAPTER TWO .....</b>	<b>19</b>
<b>THE RIGHT TO SELF-DEFENCE UNDER INTERNATIONAL LAW .....</b>	<b>19</b>
2.1 Introduction.....	19
2.2 Self-defence under Customary International Law .....	19
2.2.1 Nature and Scope of Self-defence under Customary Law .....	21
2.2.2 Principles of the Right to Self-Defence .....	23
2.3 Self-Defence under Treaty/Conventional Law .....	26
2.3.1 United Nations Charter Prohibition on the Use of Force by States .....	26
2.3.2 Territorial Integrity of States under International Law .....	28
2.3.3 Interface Between Article 2(4) and Article 51 of the United Nations Charter.....	30
2.3.4 What Amounts to an Armed Attack and where it Should Emanate From .....	31
2.4 Conclusion .....	36
<b>CHAPTER THREE .....</b>	<b>38</b>
<b>THE ROLE OF THE SECURITY COUNCIL &amp; THE INTERNATIONAL COURT OF JUSTICE ON USE OF FORCE IN SELF-DEFENCE .....</b>	<b>38</b>
3.1 Introduction.....	38
3.2 The Role of the Security Council.....	38
3.2.1 Security Council’s Role under Article 51 .....	40
3.2.2 Efforts by the Council in addressing previous similar instances on self-defence .....	44
3.2.3 Security Council Authorization in Use of Force.....	44

3.2.4 Did Kenya report to the Security Council upon commencing ‘ <i>Operation Linda Nchi</i> ’?	45
3.3 The International Court of Justice	46
3.3.1 Introduction	46
3.3.2 Functions of the International Court of Justice	47
3.3.3 Role of the International Court of Justice in Interpreting the Nature and Scope of Self-Defence	48
3.4 Conclusion	57
<b>CHAPTER FOUR</b>	<b>59</b>
<b>‘OPERATION LINDA NCHI’ IN INTERNATIONAL LAW</b>	<b>59</b>
4.1 Introduction	59
4.2 Attacks by Al Shabaab on Kenyan territory	59
4.2.1 Events post Operation Linda Nchi	61
4.3 International Law Implications of ‘ <i>Operation Linda Nchi</i> ’	63
4.3.1 ‘ <i>Operation Linda Nchi</i> ’ and Article 51 United Nations Charter	63
4.3.2 How was Kenya handling Al Shabaab before ‘ <i>Operation Linda Nchi</i> ’?	68
4.3.3 Other International Law Implications of ‘ <i>Operation Linda Nchi</i> ’	69
4.4 Conclusion	70
<b>CHAPTER FIVE</b>	<b>73</b>
<b>CONCLUSION AND RECOMMENDATIONS</b>	<b>73</b>
5.1 Research Findings & Conclusion	73
5.2 Recommendations	77
<b>BIBLIOGRAPHY</b>	<b>79</b>



## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background

The United Nations Charter, which came into force on 24<sup>th</sup> October, 1945, had one main underlying objective, which was to maintain or restore international peace and security. The diverse principles and Articles in the United Nations Charter (UNC) espouse various means on how to achieve the United Nations Charter objectives. States are required, *inter alia*, to resolve international disputes through peaceful means.<sup>1</sup>

Further, states are prohibited, in their relations, from the threat or use of force against the territorial integrity or political integrity of any state.<sup>2</sup> The United Nations Charter, however, provides for two exceptions to this provision by recognizing the inherent right of a state, either individually or collectively, to self-defence in the event of an armed attack, before the Security Council takes intervention measures.<sup>3</sup> The second exception lies under Article 42 of the United Nations Charter where the Security Council is allowed to use force where necessary in achieving the United Nations Charter objective of maintaining international peace and security. Under Article 51 of the Charter, self-defence exists as a justification for use of force by states and a temporary right, only available until the Security Council steps in. Prior to the United Nations Charter, states waged war freely without any justification and self-defence was only invoked for political reasons.<sup>4</sup>

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<sup>1</sup>Article 2(3) UNC; 59 Stat. 1031; T.S. No. 993, Bevens 1153.

<sup>2</sup>Article 2(4) UNC; 59 Stat. 1031; T.S. No. 993, Bevens 1153.

<sup>3</sup>Article 51 UNC; 59 Stat. 1031; T.S. No. 993, Bevens 1153.

<sup>4</sup>A. Randelzhofer, 'Article 51', in Bruno Simma et al. (eds), *The Charter of the United Nations; A Commentary* (Oxford University Press, Oxford, 2002), p.789.

Notably, Article 51 has been a centre of controversy for many scholars, with the key debates revolving primarily around the definition of what amounts to an ‘armed attack’ and whether attacks by non-state actors, such as terrorists, are covered by this Article. Ian Brownlie evaluates Article 51 and the United Nations Charter to conclude that it elicits some issues of interpretation as to the concept of territorial integrity / or political independence of any state, and also as to the issue of what amounts to an ‘armed attack’.<sup>5</sup>

According to Brownlie, the term ‘armed attack’ suggests trespass.<sup>6</sup> He, however, qualifies this averment by elaborating that it is unclear as to whether the term includes subversion other than by forces of the state. He infers that sporadic operations by armed bands would appear to fall outside the scope of an ‘armed attack’, but a general campaign by powerful bands of irregulars where complicity with the government or state from which they operate can be established, would constitute an ‘armed attack’.<sup>7</sup>

Christine Gray seems to be in concurrence with Brownlie’s position.<sup>8</sup> She asserts that there are deep divisions between states and writers in regard to whether the right to self-defence is wide or narrow, which division was further fanned by the terror attacks on the World Trade Centre and The Pentagon in the United States of America (USA) on 11<sup>th</sup> September, 2001 (September 11 attacks).<sup>9</sup>

It appears that the right to self-defence has always elicited grey areas. Despite the controversies, states have continually invoked the right, even in instances of attacks by non-state actors, such as

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<sup>5</sup>Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup>edn, (Oxford University Press, Oxford, 2008), pp.732-733.

<sup>6</sup> Ibid., p. 732.

<sup>7</sup> Ibid., p. 733.

<sup>8</sup> Christine Gray, ‘Self Defence’, in Malcolm D. Evans (ed), *International Law*, 3<sup>rd</sup>edn, (Oxford University Press, Oxford, 2010), pp. 615-647.

<sup>9</sup> Ibid., p. 625.

mercenaries and terrorists acting on their own accord without state involvement. A real example is the September 11 attacks where the United States of America (USA) invoked the right to self-defence in pursuing the Al Qaeda group of terrorists in Afghanistan, though in this case there was state involvement.<sup>10</sup>

The International Court of Justice, which is the principal judicial organ of the United Nations,<sup>11</sup> has made various determinations and advisory opinions in regard to Article 51 of the United Nations Charter. In the *Case of Military and Paramilitary Activities in and Against Nicaragua (Nicaragua case)*,<sup>12</sup> the Court, in determining the issue of military and paramilitary activities in and against Nicaragua implied that self-defence can only be in respect to state to state conflict. The *Caroline* case articulated circumstances which allowed exercise of self-defence.<sup>13</sup>

According to the UN Security Council, which is the body tasked with taking security measures in instances of interstate conflict, terrorism is the new threat to world peace.<sup>14</sup> Kenya has not been spared of terrorist attacks. It is on the backdrop of increased terrorist activities and cross border kidnappings by suspected members of the Al Shabaab terror gang from Somalia on Kenyan territory, that the country announced its pursuit of the Al Shabaab members into Somalia by invoking the provisions of Article 51 of the United Nations Charter, through a military operation dubbed '*Operation Linda Nchi*' (operation defend the country). Justification for the use of force and affront to the Somalia territorial sovereignty was hinged on the inherent right to self-

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<sup>10</sup>Christine Gray, 'Self Defence', in Malcolm D. Evans (ed), *International Law* 3<sup>rd</sup>edn, (Oxford University Press, Oxford, 2010), p. 629.

<sup>11</sup>Rebecca M.M. Wallace, *International Law*, 4<sup>th</sup> edn, (London Sweet & Maxwell, London, 2002), p. 292.

<sup>12</sup> (1986), I.C.J Rep., p.14 <[www.icj-cij.org](http://www.icj-cij.org)> (last accessed on 14 December 2012).

<sup>13</sup>Rebecca M.M. Wallace, *International Law*, 4<sup>th</sup> edn, (London Sweet & Maxwell, London, 2002), p. 257.

<sup>14</sup> Report of the Secretary General of the United Nations 'Towards Development, Security And Human Rights For All', <[www.un.org/largerfreedom/](http://www.un.org/largerfreedom/)> (U.N. Doc A/59/2005 ) para 84 (last accessed on 12 December 2012).

defence.<sup>15</sup> The decision was locally and internationally applauded.<sup>16</sup> Shortly after the launch of the operation, Somalia alluded to consenting to Kenya's military incursion which raises various international law implications as will be discussed later in this paper. The Kenya Defence Forces (KDF) are now part of the United Nations backed African Union Mission in Somalia (AMISOM).

## **1.2 Events Leading To '*Operation Linda Nchi*'**

As stated previously, the issue of terrorism on the international platform has been posited as one of the present day challenges to the UN regime, alongside the issue of weapons of mass destruction.<sup>17</sup> The term 'terrorism' in itself has not been elaborately defined though various attempts have been made towards a definition. Koffi Annan, in stressing the need for a definition of the term, asserted that, in addition to actions already proscribed by existing conventions, any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from doing any act.<sup>18</sup>

Kenya has been a victim of terror attacks on her territory. The most notable of the attacks was the bombing of the U.S. Embassy in Nairobi, which was a twin attack that also took place in the U.S. Embassy in neighbouring Dar es Salaam in Tanzania, by the Al Qaeda terror group, with a total of two hundred and twenty five (225) people dying and over four thousand (4,000) left injured.<sup>19</sup> In the recent past, the country has continued to experience sporadic terrorist attacks

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<sup>15</sup>Government Declares War on Al Shabaab, < [www.citizentv.co.ke](http://www.citizentv.co.ke)> (last accessed on 16 December 2012).

<sup>16</sup> Cyrus Ombati *Calls To Support 'Operation Linda Nchi'* <[www.standardmedia.co.ke](http://www.standardmedia.co.ke)> as updated on 16 November 2011 (last accessed on 16 December 2012).

<sup>17</sup>Report of the Secretary General of the United Nations 'Towards Development, Security and Human Rights for All', <[www.un.org/largerfreedom/](http://www.un.org/largerfreedom/)> (U.N. Doc A/59/2005) para. 84 (last accessed on 12 December 2012).

<sup>18</sup>Ibid., para. 91.

<sup>19</sup><[www.crisisgroup.org](http://www.crisisgroup.org)> (last accessed on 10 December 2012).

within her territory from the Al Shabaab terror group. Bogita Ongeru describes the Al Shabaab group as an affiliate of the Al Qaeda and an amorphous militia that commits atrocities in their own country, unleashes terror on its own people and seeks to export the same to neighbouring countries.<sup>20</sup>

In the year 2009, suspected Al Shabaab members attacked Dadajabula Police Post in Northern Kenya.<sup>21</sup> In the following year, there was an attack, suspected to be by the same group, on the General Service Unit (GSU) Camp in Liboi and various landmines and military attacks on Kenya's border with Somalia.<sup>22</sup> Suspected Al Shabaab members have also carried out a series of kidnappings of foreign nationals on Kenyan territory. For instance, on September 11<sup>th</sup> 2011, a British tourist was killed and his wife kidnapped from a Kiunga resort in Lamu. A few weeks later, another French national was kidnapped at Manda Island. On October 11<sup>th</sup> 2011, two Spanish aid workers with *Medecins Sans Frontiers* were kidnapped from the Daadab Refugee Camp, allegedly by the Al Shabaab.<sup>23</sup> These are some of the incidents culminating in the Kenyan military incursion in Somalia.

It is against this background that the Kenyan Defence Forces (KDF) lodged a military operation, dubbed '*Operation Linda Nchi*' ('operation defend the country'), invoking the right to self-defence as per the UNC in a bid to protect Kenya's territorial integrity.<sup>24</sup> This pronouncement was made vide a joint press conference held in Nairobi on 15<sup>th</sup> October, 2011 by the then

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<sup>20</sup> 'Al Shabaab: The Spectre of Terror at Our Doorstep' <[www.nation.co.ke](http://www.nation.co.ke)> (last accessed on 12 December 2012).

<sup>21</sup> Mwenda Njoka 'War with Al Shabaab and Kenya's Jumbled Nationalism' <[www.the-star.co.ke](http://www.the-star.co.ke)> posted on 22 October 2011 (last accessed on 12 December 2012).

<sup>22</sup> Fred Mutinda and AFP, 'Al Shabaab Attacks Kenya Territory', <[www.nation.co.ke](http://www.nation.co.ke)> posted on 31 March 2010 (last accessed on 12 December 2012).

<sup>23</sup> Video uploaded on 15 October 2011 at <[www.citizentv.co.ke](http://www.citizentv.co.ke)> (last accessed on 11 December 2012).

<sup>24</sup> Government Declares War on Al Shabaab, <[www.citizentv.co.ke](http://www.citizentv.co.ke)> (last accessed on 16 December 2012).

Minister for Internal Security, the late George Saitoti, and his Defence Ministry counterpart, Yusuf Haji.<sup>25</sup>

Kenya is certainly not the first country to invoke the right to self-defence in tackling terrorism since states, such as Israel and the USA, have previously made similar steps, and more particularly in their response to the threats by groups, such as Al Qaeda.

This study discusses whether the alleged attacks and kidnappings on Kenyan territory by the Al Shabaab fall under the Article 51 on self-defence, which right has constantly been invoked by states. This will ultimately lead to a conclusion on the legality of Kenya's military action in Somalia and its implications under international law principles and practice.

### **1.3 Statement of the Problem**

In light of Kenya's military action, the issue is whether '*Operation Linda Nchi*' can be justified on the basis of the right to self-defence as claimed by the then Minister for Internal Security, the late George Saitoti, and his Defence Ministry counterpart, Yusuf Haji.

### **1.4 Hypothesis**

This study is premised on the basic presumption that '*Operation Linda Nchi*' was not an exercise of the right to self-defence under Article 51 of the United Nations Charter.

### **1.5 Research Questions**

This study, which evaluates the international law implications of '*Operation Linda Nchi*', seeks to answer the following questions:-

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<sup>25</sup> Ibid.

- i. Did the alleged terror attacks and kidnappings of foreigners by the Al Shabaab on Kenya's territory constitute an 'armed attack' as per Article 51 of the United Nations Charter?
- ii. Did Kenya immediately report to the Security Council upon commencing '*Operation Linda Nchi*'?

## 1.6 Theoretical/Conceptual Framework

This study is premised on the natural and positive law theories. Under the natural law theory, there is belief in a 'higher law', which is the basis upon which other laws are deemed just or unjust. The theory also propagates the universal nature of law which forms the basis for international law, which forms the bedrock of this study, and applies to all states equally.

Under the positive law theory, law is viewed as a command and as originating from a sovereign as posited by the theory's main protagonists, Jeremy Bentham and John Austin. Another key modern positivism proponent is H.L.A Hart.<sup>26</sup> The school generally views law 'as is' as opposed to law 'as ought to be', which was one of the main tenets of the natural law theory. Jeremy Bentham opined that unwritten law, such as common law, is vague and uncertain.<sup>27</sup> To John Austin, there has to be a sovereign from whom the commands emanate, that is, an identifiable political superior.<sup>28</sup>

M.D.A Freeman notes that the modern notion of sovereignty stems from the classical positivist theory hereby discussed.<sup>29</sup> The United Nations Charter legal regime, in pursuing its main

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<sup>26</sup> Brian Bix, *Jurisprudence and Legal Theory*, 4<sup>th</sup>edn, (London Sweet & Maxwell, London, 2006), p. 39.

<sup>27</sup> Raymond Wacks, *Philosophy of Law; A Very Short Introduction*, (Oxford University Press, Oxford, 2006), p. 19.

<sup>28</sup> *Ibid.*, p. 24.

<sup>29</sup> M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 8<sup>th</sup>edn, (Sweet & Maxwell, 2008), pp. 247-248.

objective of ensuring maintenance of international peace and security, acts as a tool of social control in that states are limited in use of force. States are also required to respect each other's territorial integrity. It is on this background that this theory is relevant for this study which seeks to evaluate whether Kenya's military action conforms to the conventional international law, as stipulated under the UNC, as well as customary international law.

## 1.7 Literature Review

Ian Brownlie evaluates the right to self-defence by states to elucidate the issues of interpretation of the Article, especially in regards to non-state actors, such as terrorists.<sup>30</sup> He asserts that there lacks a category of the law on terrorism and that such issues need to be gauged against applicable sectors of public international law. He, however, does not seem to be specific as to what the specific sectors of international law are. His work will generally inform this study in terms of the general principles of international law, such as that on use of force by states, state sovereignty and the United Nations (U.N.) as a system of public order and, more specifically, in regard to the right to self-defence, which will be put into perspective in this study.

Christine Gray gives an in-depth evaluation of Article 51 United Nations Charter to elicit the debate on the scope of the right to self-defence and whether the article is exhaustive.<sup>31</sup> To Gray, armed attacks are not limited to interstate conflicts, but also attacks by armed bands, irregulars and mercenaries.<sup>32</sup> To Gray, the terror attacks on the World Trade Centre (WTC) and The Pentagon, in the USA, on 11<sup>th</sup> September, 2001, expanded the notion of an 'armed attack' to encompass situations even where a state is not involved and a terrorist group is acting independently. She further assesses whether the right to self defence can be invoked in scenarios

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<sup>30</sup>Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup>edn, (Oxford University Press, Oxford, 2008), p. 746.

<sup>31</sup>Christine Gray, *International Law & the Use of Force*, 2<sup>nd</sup>edn, (Oxford University Press, Oxford, 2004), p. 112.

<sup>32</sup>*Ibid.*, p. 113.



where an ‘armed attack’ has already occurred.<sup>33</sup> She appreciates the controversial nature of the legality of pre-emptive self-defence which was left unresolved in the *Nicaragua Case*<sup>34</sup> and in the Case Concerning Armed Activities on the Territory of the Congo (*DRC vs. Uganda*).<sup>35</sup> She analyzes the impact of the September, 2001 attacks, whereby the USA invoked the right to self-defence in attacking Afghanistan. The Security Council, in this instance, recognized the right under Resolution 1368 on threats to international peace and security caused by terrorist acts,<sup>36</sup> and this, to Gray, amounted to instant customary law and acted as an authoritative re-interpretation of the United Nations Charter. This Resolution was a condemnation of terrorist acts at the international front which terrorist acts were termed as threats to international peace and security. Gray’s work will help evaluate whether alleged terror attacks by the Al Shabaab on Kenyan territory constituted an ‘armed attack’, one of the tenets of the right to self-defence that Kenya invoked when commencing ‘*Operation Linda Nchi*’. Her work will also help in evaluation of the role of the Security Council under Article 51 of the Charter.

A. Randelzhofer gives an in-depth analysis of Article 51 of the United Nations Charter on self-defence.<sup>37</sup> He evaluates the nature and scope of the right to self-defence under the Charter and customary law. He argues that under customary law, the nature and scope of self-defence are unclear and have the capacity to be extended to entail unilateral use of force by states, which was abolished by the United Nations Charter. He analyses the notion of an armed attack under Article 51 *vis-a-vis* the General Assembly’s definition of aggression and the provisions of Article 2(4) on the use of force by states to help shed light on the notion which stands undefined. His work

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<sup>33</sup>Christine Gray, ‘Self Defence’, in Malcolm D. Evans (ed), *International Law* 3<sup>rd</sup> edn, (Oxford University Press, Oxford, 2010), p. 628.

<sup>34</sup> (1986) I.C.J Rep., p.14.

<sup>35</sup> (2005) I.C.J. Rep., p. 168.

<sup>36</sup>Adopted by the Security Council at its 4370<sup>th</sup> meeting, on 12 September 2001, S/RES/1368 (2001).

<sup>37</sup>A. Randelzhofer, ‘Article 51’, in Bruno Simma et al. (eds), *The Charter of the United Nations; A Commentary* (Oxford University Press, Oxford, 2002), pp.789-806.

will help in the evaluation of the international legal implications of Kenyan military action in Somalia, which was premised on the right to self-defence.

Kevin C. Kenny explores the right to self-defence.<sup>38</sup> This entails an evaluation of the elements of self-defence, may it be individual or collective. He highlights the principles of self defence under customary law to include necessity, proportionality and the principle of immediacy, whereby the defensive acts prompting self-defence must be immediate, subsequent to the armed attack. He is critical of the role of the Security Council under Article 51, whereby he posits that the Security Council has generally failed in performing its functions under the United Nations Charter. His work lays a good foundation on the right to self-defence, especially on the role of the Security Council and whether its failure, can be alluded to in '*Operation Linda Nchi*', and this will be key in analyzing the international law implications of Kenyan military action in Somalia on the basis of Article 51 of the United Nations Charter.

Robert Jennings and Arthur Watts also explore the right to self-defence in general, as well as the concept of state sovereignty, which is supposed to be respected by all states under international law.<sup>39</sup> Their work also highlights several instances where states have invoked the right to self-defence, such as the *Nicaragua Case*, where they allude that on many occasions, the right to self-defence is asserted when a state uses armed force that violates another state's rights. They also note that in practice, it's upon a state to discern at first instance whether a case necessitating self-defence has arisen. Further, they opine that the legality of action taken in self-defence must ultimately be determined by a judicial authority or an independent political body, such as the Security Council. Their work will inform this paper on the concept of state sovereignty, and the

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<sup>38</sup>Kevin C. Kenny, 'Self Defence' in Rüdiger Wolfrum & Christiane Philipp (ed.), *United Nations: Law, Policies and Practice* Vol. 2. (Martinus Nijhoff Publishers, Dordrecht/London/Boston, 1995), pp. 1162-1170.

<sup>39</sup>Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9<sup>th</sup> edn, (Longman, London and New York, 1996), pp. 416-450.

various instances of states invoking self-defence, which will help in assessing the legality of Kenya's military action under international law.

David I. Fisher and Ore Bring evaluate the right to self-defence by states through an exploration of the UN response to the September, 11 attacks.<sup>40</sup> They note that after the September, 2001 attacks, the UN Security Council unanimously adopted two resolutions, namely Resolution 1368, calling on states to combat acts of terrorism and holding actors to accountability and Resolution 1373 on threats to international peace and security caused by terrorist acts, which provided for state members to enact domestic laws to counter terrorism, as well as refrain from instigating and acquiescing terrorist acts.<sup>41</sup> They conclude that the concept of self-defence against large scale international terrorism thus seems to be taking form and gaining acceptance in state positions. They, however, state that this does not amount to a positive development in international law and do not perceive its inclusion in the UN Charter or any other treaty. Their work will help gauge whether the alleged terror attacks by Al Shabaab warranted the invocation of the right to self-defence.

Antonio Cassese examines the right to self-defence in detail.<sup>42</sup> He sets out a threshold for an action in the context of self-defence as to entail the state victim using necessary and proportionate force and that the attacks should target 'legitimate military targets' in line with international humanitarian law. Cassese also asserts that the victim state to the 'armed attack' should not occupy the territory of the aggressor, unless the occupation is aimed at preventing further aggression. He also avers that the self-defence must be terminated as soon as the Security

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<sup>40</sup>David I. Fisher and Ore Bring, 'A Right To Self Defence Against International Terrorism?', in Diana Amneus and Katinka Svanberg (eds), *Peace And Security Current Challenges In International Law* (Student Litteratur, Sweden, 2004), pp. 177-191.

<sup>41</sup>Resolution 1373 was adopted by the Security Council at its 4385<sup>th</sup> meeting, on 28th September, 2001, S/RES/1373 (2001).

<sup>42</sup>Antonio Cassese, *International Law*, 2<sup>nd</sup>edn, (Oxford University Press, Oxford, 2005), pp. 354-355.

Council steps in and as soon as the victim state's purpose of repelling the attack is achieved. This will be very useful in informing the evaluation as to the legality under international law of Kenya's military action in Somalia and also in terms of the role of the Security Council under Article 51 of the UNC on the right to self-defence. Additionally, his work will help evaluate actions taken by the Security Council in instances where states have previously invoked the right to self-defence.

Elizabeth Wilmshurst avers that in invoking self-defence, non-state actors, such as terrorists, are espoused under Article 51 of the UNC.<sup>43</sup> This invocation, however, is in response to large scale terrorist attacks, such as the September 2001 attacks.<sup>44</sup> She analyzes various landmark cases by the ICJ and instances where states have invoked the right in light of attacks by non-state actors. She argues that the right of states to defend themselves against attacks is not generally questioned, but what is normally questioned is the action taken against the state from which the attacks emanate. Further, she alludes that in a case where a state is unable to control a terrorist group in its territory, the victim state would resort to acting in self-defence against such a group, though the terrorist acts must have been on a large scale, and such actions in self-defence must be necessary and proportionate. This paper will be useful in helping analyze the right to self-defence in response to attacks by non-state actors, such as the Al Shabaab, in the assessment of the legality of *'Operation Linda Nchi'*.

Flavio Paioletti has assessed this century's challenges to Article 51.<sup>45</sup> He analyzes the use of force by states and highlights the controversies surrounding the Article, such as the divide

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<sup>43</sup>'Principles of International Law on the Use of Force by States in Self Defence', CathamHouse, <[www.cathamhouse.org/publication/papers/view/108106](http://www.cathamhouse.org/publication/papers/view/108106)> October 2005, (last accessed on 11 January 2013).

<sup>44</sup>Ibid.

<sup>45</sup> 'The 21<sup>st</sup> Century Challenges To Article 51' <[www.e-ir.info](http://www.e-ir.info)> posted on 30<sup>th</sup> June 2011 (last accessed on 11 December 2012).

depicting the UNC regime as having failed to regulate the use of force by states due to instances where states have breached the prohibition on use of force as well as the narrow and wide interpretation of the right to self-defence. He defines the wide interpretation of self-defence by averring that Article 51 is a preservation of an earlier customary law right that allows for protection of nationals abroad and also anticipatory self-defence. He defines the narrow interpretation of the right to self-defence as being strictly applied in the context of Article 51, i.e., only when an ‘armed attack’ occurs. He further alludes that with the main objective of the United Nations Charter being promotion and restoration of peace, one cannot impute failure on the Charter regime since, even in cases where states have used force, they acknowledge the binding nature of the United Nations Charter principles and instead explain their actions under the guise of interpretation of the said rules on use of force. This paper will seek to address which of the two interpretations, the wide or the narrow, Kenya applied in launching ‘*Operation Linda Nchi*’ in evaluating the legality of the mission in the context of international law.

Christian J. Tams conducts a historical journey (1989-2009) to conclude that terrorism has led to a readjustment of the United Nations Charter regime, to allow use of force in response to terrorism under more lenient conditions.<sup>46</sup> Tams further argues that, initially, the interpretation of the UNC on use of force against terrorism was narrow, as was evidenced in the *Nicaragua Case* which found that the right to self-defence could be invoked in response to attacks by non-state actors, such as rebels, but only if they were effectively being controlled by a state. He also argues that expanding the interpretation of the legal provisions on use of force over his period of analysis has increased the risk of abuse by states of the rules. Tam’s historical analysis will help

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<sup>46</sup>‘The Use of Force against Terrorists’, 20 (2) The European Law Journal Of International Law, 359 (2009), <[www.ejil.oxfordjournals.org](http://www.ejil.oxfordjournals.org)> (last accessed on 9 December 2012).

enlighten this study on Kenyan military action in Somalia as to whether Kenya was in breach of international law prohibition on use of force by states.

D. W. Greig explores key debates under Article 51 to highlight that such debates have been centered around the context of an ‘armed attack’, the principles of necessity and proportionality in regard to the right to self-defence, among other areas.<sup>47</sup> He, however, focuses on the relationship between self-defence as a right on the part of states, and powers of the Security Council under Article 51. He further examines the reporting requirement to the Security Council under Article 51, by a state subject of an ‘armed attack’, as to whether this requirement is mandatory for the right of self-defence to suffice or merely directly as not to defeat such a right. He also examines how the ICJ has dealt with the reporting requirement by analyzing the *Nicaragua Case*. He concludes that past failure by the Security Council in performing its functions under the United Nations Charter, has made it impractical to implement some aspects of Article 51, such as the reporting requirement, because such reporting efforts to the Council will not be effectively dealt with. He sums up his discussion on the reporting requirement as being not mandatory, but directory, and avers that even the ICJ has offered little guidance on the issue in the *Nicaragua Case*. Additionally, he asserts that with the Security Council having failed to meet its obligations under the United Nations Charter, it is upon states to determine the legality of their actions in exercise of the right of self defence. With this paper being grounded on the provisions of Article 51, Greig’s work will be useful in informing the reporting requirement and will seek to establish that the reporting requirement which Kenya failed to comply with is mandatory.

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<sup>47</sup> ‘Self Defence and the Security Council: What Does Article 51 Require?’, 40 International and Comparative Law Quarterly, 366 (1991), pp. 367-402.

Christopher Greenwood analyzes the concept of war in modern international law prior to and after the adoption of the United Nations Charter.<sup>48</sup> He states that prior to the United Nations Charter, war was considered as a legal concept and not just a state of affairs, with several consequences under international law such as to affect interstate parties. He holds that after adoption of the United Nations Charter in 1945, the state of war as a legal condition has somewhat diminished, though he highlights several instances when a state of war could be inferred from interstate conflicts, such as the Falklands conflict where the United Kingdom (U.K.) government made statements to infer a state of war. He also evaluates the concept of war as against use of force and the provisions of Article 51 of the United Nations Charter, to conclude that the concept of war is incompatible with the principles enunciated under the Charter regime and has lost legal significance in modern international law. In as much as he argues that war has lost significance, the concept is still alive especially in the context of unlawful self-defence in the form of reprisals or acts of aggression as will be seen in this paper. His work will help inform this study on the concept of war *vis-a-vis* the Charter regime which forms the basis of this study.

## **1.8 Research Methodology**

This study was predominantly premised on the review and critical analysis of literature and state practice to help analyze the legality of Kenyan military action. Both primary sources, such as the UNC and case law, such as the *Nicaragua* and *DRC versus Uganda* cases, as well as secondary sources, that is, books and articles on self-defence and international law in general were exploited.

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<sup>48</sup> 'The Concept of War in Modern International Law?', 36 International and Comparative Law Quarterly, 283 (1987), pp. 283-305.

A library search was conducted at the University of Nairobi School of Law on the diverse international law literature as well as international reports and case law. Internet resources were also embraced to supplement the library resources, especially on the Kenyan context as not much is published as yet on the Kenyan military incursion in Somalia.

## **1.9 Chapter Breakdown**

This study is comprised of five chapters structured as hereunder:-

### **Chapter One: Introduction**

- The background;
- Statement of the problem;
- Hypothesis;
- Research questions;
- A theoretical/conceptual framework;
- Literature review;
- Research methodology.

### **Chapter Two: The Right of Self Defence in International Law**

1. Self defence under Customary International Law.
  - Scope of self defence under customary international law; a wide or narrow right?
  - Principles of self defence; proportionality& necessity.
2. Self defence under treaty/Conventional International Law.
  - UNC prohibition on use of force by states and the exceptions;
  - Territorial integrity of states under international law;



- Self defence under Article 51 of the UNC; What amounts to an ‘armed attack’ under Article 51 UNC and where does it emanate from?

### **Chapter Three: Role of the Security Council & the ICJ on Self Defence**

#### **1. The Security Council**

- The role, as per the UNC, of the Security Council.
- Efforts and resolutions by the Council in addressing previous similar instances of states invoking use of force in self defence such as Kenya’s ‘*Operation Linda Nchi*’.
- In the context of Kenya’s military incursion, the chapter evaluates whether Kenya engaged the Security Council in terms of reporting and the response of the Council.

#### **2. The International Court of Justice**

- Role of the ICJ in interpreting the nature and scope of the right to self-defence

### **Chapter Four: ‘*Operation Linda Nchi*’ in International Law**

- Did the various attacks and kidnappings by alleged Al Shabaab members amount to an ‘armed attack’;
- Did Kenya report to the Security Council as required under Article 51;
- How Kenya dealt with alleged Al Shabaab terrorists in instances prior to ‘*Operation Linda Nchi*’.

## **Chapter Five: Conclusion and Recommendations**

This chapter gives a conclusion of the salient findings of the study in the light of the statement of the problem, the hypothesis and the research questions. Recommendations are made on the basis of these findings.

## CHAPTER TWO

### THE RIGHT TO SELF-DEFENCE UNDER INTERNATIONAL LAW

#### 2.1 Introduction

This chapter analyzes the right to self-defence under customary international law as well as under treaty law, so as to help gauge the legality of ‘*Operation Linda Nchi*’ which was premised on the right to self-defence.

#### 2.2 Self-defence under Customary International Law

Self-defence, which formed the basis of Kenya’s military action in Somalia, is argued to be well established, both under customary international law as well as under treaty law. The right can be exercised individually by a state or collectively by states.

The right to self-defence existed even prior to its provision under Article 51 of the United Nations Charter.<sup>1</sup> Self-defence, under customary law, was regarded simply as a counter-war to an illegal war under the *jus ad bellum* doctrine.<sup>2</sup> According to Randelzhofer, the development of the right to self-defence has to be viewed ‘against the background of the general development of international law towards the prohibition of war and, eventually, the use of force.’<sup>3</sup>

Prior to 1945, war was a legal condition that was widely accepted and no legal justification was required.<sup>4</sup> Just war was regarded as a legitimate use of force in that it would avenge for injuries

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<sup>1</sup> Leo Van Den Hole, ‘Anticipatory Self-Defence’, 19 (1) *American University Law Review*, 69 (2003), p. 75, <[www.auilr.org/pdf/19-1-4.pdf](http://www.auilr.org/pdf/19-1-4.pdf)> (last accessed on 9 July 2013).

<sup>2</sup> *Ibid.*, p. 72.

<sup>3</sup> A. Randelzhofer, ‘Article 51’, in Bruno Simma et al. (eds), *The Charter of the United Nations; A Commentary* (Oxford University Press, Oxford, 2002), p. 789.

<sup>4</sup> Christopher Greenwood, ‘The Concept of War in Modern International Law’, 36 *International and Comparative Law Quarterly*, 283 (1987).

sustained and was founded on theological doctrine.<sup>5</sup> It is to be noted further that the use of force in times of peace was restricted under international law, but self-defence remained a legal justification to use of force and hostilities in times of peace.<sup>6</sup> This position was later to change with the breakdown of the church's authority, which was followed by emergence of sovereign nation state.<sup>7</sup>

The permissive nature of the right to war in certain circumstances was reflected in the Covenant of the League of Nations,<sup>8</sup> as well as in the General Treaty for Renunciation of War, also known as the Kellogg-Briand Pact of 1928.<sup>9</sup> In the Covenant of the League of Nations, war was not abolished; the Covenant only placed limitations on use of force. Such limitations under the Covenant entailed a requirement by Member States 'to respect and preserve as against external aggression the territorial integrity and political independence of all Members of the League.'<sup>10</sup>

The Kellogg-Briand Pact<sup>11</sup> which was legally binding (and still in force to date), was adopted in 1928 and it provided for condemnation on recourse to war in international controversies. It also obligated states to resolve to peaceful means of dispute or conflict resolution. In as much as war during this phase required no legal justification, it was deemed as a last resort in dispute resolution.<sup>12</sup>

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<sup>5</sup> Rebecca M.M. Wallace, *International Law*, 4<sup>th</sup> edn, (London Sweet & Maxwell, London, 2002), p. 253.

<sup>6</sup> A. Randelzhofer, 'Article 51', in Bruno Simma et al. (eds), *The Charter of the United Nations; A Commentary* (Oxford University Press, Oxford, 2002), p. 789.

<sup>7</sup> Rebecca M.M. Wallace, *International Law*, 4<sup>th</sup> edn, (London Sweet & Maxwell, London, 2002), p. 253.

<sup>8</sup> 112 B.F.S.P. 1.

<sup>9</sup> U.K.T.S. 29 (1929) Cmd. 3410; 94 L.N.T.S 57; 22 A.J.I.L Supp. 171; see also Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup> edn, (Oxford University Press, Oxford, 2008), p. 729.

<sup>10</sup> Article 10 of the Covenant of the League of Nations, 112 B.F.S.P. 1.

<sup>11</sup> U.K.T.S. 29 (1929) Cmd. 3410; 94 L.N.T.S 57; 22 A.J.I.L Supp. 171.

<sup>12</sup> Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup> edn, (Oxford University Press, Oxford, 2008), p. 729.

Brownlie argues that the Kellogg-Briand Pact laid the basis for customary law between 1928 and 1945, and was also applied in the Nuremburg trials after the First World War.<sup>13</sup> Additionally, the Kellogg-Briand Pact was reflective of the right to self-defence through the reservations contained therein on the right to self-defence, both individual and collective.<sup>14</sup> However, in as much as the Pact was very instrumental in shaping state practice, such state practice was not consistent.<sup>15</sup>

Existence of the right to self-defence in customary international law is also evident in the wording of Article 51 of the United Nations Charter. The Article makes reference to an already existing 'inherent' right to self-defence, which connotes its pre-existence.

It is not in doubt that the right to self-defence under customary international law does and did exist even prior to the United Nations Charter regime as evidenced by state practice and in its inclusion in various instruments. The right, therefore, exists in customary law alongside its provision in treaty law.

### **2.2.1 Nature and Scope of Self-defence under Customary Law**

There has been a lot of discussion around the nature and scope of the right to self-defence, whether under customary international law or treaty law. The right to self-defence under customary international law was availed as of right, and no legal justification was required for a state to wage war. In other words, under customary international law, no state was obliged to remain passive when another state took action inimical to its legally protected interests.<sup>16</sup> This

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<sup>13</sup> Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup> edn, (Oxford University Press, Oxford, 2008), p. 730.

<sup>14</sup> Ibid., p. 731.

<sup>15</sup> Ibid.

<sup>16</sup> Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9<sup>th</sup> edn, (Longman, London and New York, 1996), p. 417.

postulates the wide scope of the right to self-defence under customary international law prior to adoption of the United Nations Charter.

The scope of the right to self-defence has elicited a lot of controversy. There are authors who support the wide scope on the basis of the right to self-defence being 'inherent', to allow exercise of the right beyond an armed attack, but also in instances of anticipatory self-defence, or even in protection by a state of its nationals abroad.<sup>17</sup> There is, however, an opposing side that argues that expanding the scope of the right to self-defence beyond occurrence of an 'armed attack' will create room for abuse by states who are under a duty to settle disputes through pacific means.

Given the lack of parameters and also the ambiguity of what amounts to reasonable force in self-defence, the right to self-defence under customary international law at present can be deemed wide on the face of it, as was the case in the pre-United Nations Charter period. However, with the adoption of the United Nations Charter, the right to self-defence prevails both under customary law and under treaty law. The two sources, therefore, complement each other such that presently, such customary right to self-defence can only be invoked by a victim state after an 'armed attack'. This is on the basis that having Article 51 which is restricted to response to an 'armed attack' and a wide right to self-defence under customary law would defeat the objective of the United Nations Charter.

In practice, though, the content and scope of the customary right to self-defence still remain unclear, in some instances even extending to self-help, which creates a threat to international peace and security.<sup>18</sup>

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<sup>17</sup> Malcolm D. Evans (ed), *International Law*, 3<sup>rd</sup> edn, (Oxford University Press, Oxford, 2010), p. 624.

<sup>18</sup> A. Randelzhofer, 'Article 51', in Bruno Simma et al. (eds), *The Charter of the United Nations; A Commentary* (Oxford University Press, Oxford, 2002), p. 793.

### 2.2.2 Principles of the Right to Self-Defence

Despite the discordance on the scope of the right to self-defence, there is a common understanding that the right must be necessary and proportionate, under customary international law.<sup>19</sup> These principles of the right to self-defence were established in the *Caroline Case*,<sup>20</sup> through the correspondence of the American Secretary of State, Daniel Webster who stated that for self defence, there had to be ‘necessity of self defence, instant, overwhelming, leaving no choice of means and no moment of deliberation.’<sup>21</sup> In this case, the vessel *Caroline*, operated from the United States of America territory, supplying rebel insurrectionary in Canada. America was offering assistance to Canadian rebels, which entailed attacks on British boats passing by Navy Island. The American citizens assisting the rebels had invaded and taken possession of the Navy Island, which was part of British possessions. The British, in a bid to curtail reinforcement of the Canadian rebels, attacked the *Caroline* by setting her on fire and setting her adrift to the Niagara Falls. Subsequently, two United States of America citizens aboard the vessel lost their lives, others fled and some were taken as prisoners by their British captors. Thereafter, a Briton named Macleod was charged with murder and arson.

This incident led to various correspondence between the United States of America and the British governments in a bid to seek redress over the incident and to have Mcleod released. Mcleod was finally acquitted in October, 1841, having served almost twelve months of

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<sup>19</sup> Malcolm D. Evans (ed), *International Law*, 3<sup>rd</sup> edn, (Oxford University Press, Oxford, 2010), p. 625.

<sup>20</sup> 29 B.F.S.P. 1137-1138; 30 B.F.S.P. 195-196.

<sup>21</sup> Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9<sup>th</sup> edn, ( Longman, London and New York, 1996), p. 423.

incarceration, on the basis of the principle that an individual acting under legitimate authority is not personally responsible for executing such orders of government.<sup>22</sup>

In one of the said correspondence, the United States of America., in their protest letter by Daniel Webster over the incident, required the British government to show ‘necessity of self defence, instant, overwhelming, leaving no choice of means and no moment of deliberation.’

It can be derived from this principle of necessity that a state acting in self-defence is compelled to do so due to lack of a practicable alternative to counter force. Jennings, in his evaluation of the *Caroline Case*, notes that it was probable that in the case, the terms ‘self-defence’ and ‘self preservation’ were applied as synonyms.<sup>23</sup> Further, he argues that the case made some attempt in defining the limits of self-defence, and that self-defence was changed from a political excuse to a legal doctrine. Such limits are explicit in the correspondence by Webster. Brownlie, however, argues that Webster’s communication made no difference of the legal doctrine, but was an attempt in describing limits in relation to the particular incident.<sup>24</sup> Whether the *Caroline Case* made no difference or not to self-defence as a legal doctrine, the case was instrumental in explicitly laying down the principles of the right to self-defence, i.e., necessity and proportionality.

Proportionality, as a principle of the right to self-defence, requires that counterforce measures taken in self-defence must be commensurate to the attack being responded to, since retaliation and punitive actions are unlawful under international law.<sup>25</sup>

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<sup>22</sup> R.Y. Jennings, ‘The Caroline and McLeod Cases’, 32 *The American Journal of International Law*, 95 (1936).

<sup>23</sup> *Ibid.*, p. 91.

<sup>24</sup> Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup>edn, (Oxford University Press, Oxford, 2008), p. 734.

<sup>25</sup> Kevin C. Kenny, ‘Self Defence’ in Rüdiger Wolfrum & Christiane Philipp (ed.), *United Nations: Law, Policies and Practice* (Vol. 2, Martinus Nijhoff Publishers, Dordrecht/London/Boston, 1995), p. 1168.



Wilmshurst argues that the force applied in self-defence, when viewed as a whole, must not be excessive in averting or ending the attack.<sup>26</sup> She adds that the consequences of the measures taken in self defence must not be excessive when gauged against the harm expected from the attack.<sup>27</sup> However, this element of proportionality is vague in that there is no standard measure of proportionality, and it is incumbent upon states to determine or prove adherence to the same.

It suffices to note that necessity and proportionality of the right to self-defence under international law are not in dispute and are complimentary in nature. The principles of necessity and proportionality as prerequisites in the right to self-defence, act as limitations aimed at curtailing escalation of a conflict at the international level. Through such limitations, excessive use of force, which would amount to an unlawful reprisal, is regulated.

These elements have been applied and reaffirmed in various cases by the International Court of Justice. For instance in the Case Concerning Oil Platforms (*Iranian Oil Platforms Case*),<sup>28</sup> the International Court of Justice in questioning why the USA had targeted the Iranian oil platforms after attacks on their merchant ships, propounded that self-defence must not be retaliatory or punitive, but aimed at halting or repelling an attack. It stated that ‘the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any “measures of discretion”’.<sup>29</sup> Other notable

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<sup>26</sup> ‘Principles of International Law on the Use of Force by States in Self Defence’, ChathamHouse, <[www.chathamhouse.org/publication/papers/view/108106](http://www.chathamhouse.org/publication/papers/view/108106)> October 2005, p. 10, (last accessed on 13 July, 2013).

<sup>27</sup> Ibid.

<sup>28</sup> (2003) I.C.J Rep., p. 161, para. 74.

<sup>29</sup> Christine Gray, *International Law & the Use of Force*, 2nd edn, (Oxford University Press, Oxford, 2004), p. 121.

cases where the International Court of Justice applied these principles was in the *Nicaragua*<sup>30</sup> and *DRC vs Uganda*,<sup>31</sup> cases that are discussed in detail in the next chapter.

## **2.3 Self-Defence under Treaty/Conventional Law**

Under treaty law, the right to self-defence is expressly provided for under Article 51 of the United Nations Charter. Under this Article, the right exists as one of the few exceptions to use of force by states under the United Nations Charter regime. Notably, self-defence under Article 51 is a temporary right available to states subject of an ‘armed attack’ until the Security Council takes relevant measures.

### **2.3.1 United Nations Charter Prohibition on the Use of Force by States**

The United Nations Charter came into being after World War II in 1945, with the objective of maintaining or restoring international peace and security. One of the ways in which this objective was to be realized was through prohibition on use of force under Article 2(4) which reads, ‘*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*’ (emphasis mine).

Article 2(4), therefore, expressly prohibits the use of force by states. There are, however, exceptions to the prohibition on use of force as espoused under the Article. Force can be applied by the Security Council in enforcement actions under Chapter VII of the United Nations Charter,

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<sup>30</sup> (1986) I.C.J Rep., p.14.

<sup>31</sup> (2005) I.C.J. Rep., p. 168.

and use of force by states is also allowed under Article 51, in exercise of the right to self-defence by states victim to an ‘armed attack’.

Article 2(4) of the United Nations Charter was reaffirmed in the Preamble to the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>32</sup> The said preamble provides for states to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

This Article prohibits use of ‘armed force’. The question that comes begging, then, is whether other forms of force are also envisioned, given that force can also be economic or political.<sup>33</sup> Cassese, in his analysis of the drafting history of the Article, highlights an attempt by Brazil to prohibit the threat or use of economic measures in any manner inconsistent with the purposes of the United Nations, which was rejected.<sup>34</sup> Wallace concludes that the 1970 Declaration on Principles of International Law was also inconclusive on this question which, to her, is a reflection of the divergent views between the developed and developing states, with the latter vouching for inclusion of economic and political force as a prohibition in addition to armed force.<sup>35</sup>

She goes further to note that the International Court of Justice in the *Nicaragua Case* also failed to recognize economic sanctions by the United States of America against Nicaragua as a breach

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<sup>32</sup> G.A. Res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970).

<sup>33</sup> Rebecca M.M. Wallace, *International Law*, 4<sup>th</sup>edn, (London Sweet & Maxwell, London, 2002), p. 254.

<sup>34</sup> Antonio Cassese, *International Law*, 2<sup>nd</sup>edn, (Oxford University Press, Oxford, 2005), p. 56.

<sup>35</sup> Rebecca M.M. Wallace, *International Law*, 4<sup>th</sup>edn, (London Sweet & Maxwell, London, 2002), p. 256.

of customary international law principle of non-intervention. Of note about Article 2(4) is that the Article does not distinguish between war and use of force.

Despite Article 2(4) being addressed to United Nations members, it is now regarded as a principle of customary international law with *jus cogen* character, and therefore applicable to all members of the international community as was reaffirmed in The Declaration on Non-Use of Force also reiterated this position under Article 2,<sup>36</sup> as well as in the *Nicaragua Case*.<sup>37</sup> It is important to note that all ‘armed attacks’ involve use of force, but not all force amounts to an ‘armed attack’. Article 2(4) of the United Nations Charter is also a wide concept in that it covers not just use of force but also threats.

### **2.3.2 Territorial Integrity of States under International Law**

At the international level, states are the primary subjects of international law. Being such subjects, states are endowed with rights and duties. Brownlie sums up this position that states possess rights and duties recognized internationally, by flagging that such sovereignty refers not just to legal personality, but independence, which comes with rights that are indefeasible.<sup>38</sup>

Cassese, in his discussion on sovereign equality of states, buttresses the rights and duties of states by averring that the same is founded on customary international law as confirmed under the United Nations Charter, and such sovereignty entails authority by a state over all individuals on its territory, power to exercise public functions, and pass binding legislation, among other rights and duties.<sup>39</sup>

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<sup>36</sup> Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, A/RES/42/22, 42<sup>nd</sup> Sess. (1988) 287.

<sup>37</sup> (1986), I.C.J Rep., p.14, para. 190.

<sup>38</sup> Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup>edn, (Oxford University Press, Oxford, 2008), p. 107.

<sup>39</sup> Antonio Cassese, *International Law*, 2<sup>nd</sup>edn (Oxford University Press, Oxford, 2005), p. 48.

It is important to note that a state's territory includes land, internal waters, territorial sea as well as the airspace above them. The relevance of state territory lies in the fact that it is the space within which the state exercises its supreme authority.<sup>40</sup> However, there exists limitations to this state sovereignty, e.g., in regard to enjoyment of certain privileges and immunities by diplomatic envoys.<sup>41</sup>

The exclusive dominion of a state within its territory is key in the international order as espoused in unequivocal terms in various legal instruments, such as under Article 2(4) of the United Nations Charter. The Covenant for the League of Nations<sup>42</sup> also captured territorial integrity by requiring Member States to respect and preserve the same against external aggression.<sup>43</sup> Article 3 of the Montevideo Convention also reemphasizes the concept of territorial sovereignty.

Case law has also reaffirmed the importance of territorial sovereignty of states. In the *Island of Palmas Case*,<sup>44</sup> it was held that:-

‘Territorial sovereignty...involves the exclusive right to display the activities of a state. This right has a corollary, a duty: the obligation to protect within the territory the rights of other states, in particular the right to integrity and inviolability in peace and in war, together with the rights which each state may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the state cannot fulfill this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding activities of other states, for it serves to divide between the nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian...’.

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<sup>40</sup> Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9<sup>th</sup> edn. ( Longman, London and New York, 1996), p. 564.

<sup>41</sup> Ibid.

<sup>42</sup> 112 B.F.S.P. 1.

<sup>43</sup> Ibid., Article 10.

<sup>44</sup> 2 R.I.A.A. 829, Huber J. at 839 (1928).

The right to territorial integrity is, hence, jealously guarded by international law. In essence, territorial integrity is a core concept, given that states as subjects of international law are equal. This equality of states and their status as subjects of international law with rights and duties, obligates them to respect each other's territorial integrity by refraining them from use of armed force or otherwise. According to Bowett, territorial integrity where violated, is what triggers the right to self-defence.<sup>45</sup>

### **2.3.3 Interface Between Article 2(4) and Article 51 of the United Nations Charter**

As noted earlier, Article 51 of the UN Charter is an exception to the proscription on threat or use of force by states under Article 2(4). However, not every use of force contrary to Article 2(4) may provoke armed self-defence.<sup>46</sup> Additionally, Article 2(4) applies to interstate threat or use of force against the territorial integrity or political independence of a state. The right to self-defence, on the other hand, arises when a state falls victim to an 'armed attack' by another state's regular forces or non-state actors, with that other state's complicity. When the two articles are taken together, the issue that arises is whether 'use of force' coincides with an 'armed attack'. Randelzhofer argues that between 'threat or use of force' and an 'armed attack', the latter is much narrower.<sup>47</sup> This essentially means that Article 2(4) and Article 51 do not entirely correspond in scope.

Another issue that arises is whether the right to self-defence could still be existent without its provision under Article 51. From the wording of Article 51, use of the word 'inherent' is a preservation of a pre-existing right to self-defence. The wording of Article 51 expresses self –

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<sup>45</sup> D.W. Bowett, *'Self-Defence in International Law'*, (The Lawbook Exchange Limited, Clark, New Jersey, 2009), p. 29.

<sup>46</sup> A. Randelzhofer, 'Article 51', in Bruno Simma et al. (eds), *The Charter of the United Nations; A Commentary* (Oxford University Press, Oxford, 2002), p. 791.

<sup>47</sup> Ibid.

defence as a 'right' rather than an obligation. Besides, the right to self-defence existed even prior to the adoption of the UN Charter. Further, the ICJ in the *Nicaragua Case* emphasized that the right to self-defence existed both under customary and treaty law.<sup>48</sup> Hence, the right to self-defence would still exist even without its provision under the UN Charter, with Article 51 being only a codification of pre-existing rules of customary international law on the right of self-preservation, self-defence, for states.

### **2.3.4 What Amounts to an Armed Attack and where it Should Emanate From**

One of the requirements for a state to invoke the right to self-defence under Article 51 is that the state has been or is a victim of an 'armed attack'. There has been a lot of controversy as to what amounts to an 'armed attack'. The United Nations Charter does not define what amounts to an 'armed attack' nor its scope. The United Nations Charter makes further reference to 'attack' or 'aggression' under Articles 39 and 53, but, even then, does not offer a corresponding definition.<sup>49</sup>

Gray, in propounding the disagreement on the law of self-defence, argues that the difference over scope curtailed any substantive provision being included in General Assembly Resolutions seeking to codify the law on force. Further, that this was also reflected in the 1970 Declaration on Friendly Relations,<sup>50</sup> as well as the 1974 Definition of Aggression.<sup>51</sup> In the Declaration on Non-Use of Force, no provision was made, but a reiteration of the right of individual or collective self defence.<sup>52</sup>

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<sup>48</sup> (1986) I.C.J Rep., p.14, para. 176.

<sup>49</sup> A. Randelzhofer, 'Article 51', in Bruno Simma et al. (eds), *The Charter of the United Nations; A Commentary* (Oxford University Press, Oxford, 2002), p. 793.

<sup>50</sup> Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, A/RES/42/22, 42<sup>nd</sup> Sess. (1988) 287.

<sup>51</sup> Annex, U.N. Doc. A/RES/3314 (December 14, 1974).

<sup>52</sup> Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, A/RES/42/22, 42<sup>nd</sup> Sess. (1988) 287.

Due to the lack of a definition for ‘armed attack’, the closest definition to it is that of the term ‘aggression’. The term ‘aggression’ is defined in the United Nations General Assembly Resolution 3314 (XXIX)<sup>53</sup> as entailing use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the United Nations Charter.<sup>54</sup> The Resolution goes further to list examples of acts of aggression under Article 3, to include bombardment by armed forces of a state against the territory of another, invasion or attack by armed forces of a state, among others. Given the lack of definition for an ‘armed attack’, Randelzhofer argues that this elicits a conclusion that the definition of an ‘armed attack’ was not intended.<sup>55</sup> He further alludes that as between ‘aggression’ and an ‘armed attack’, the latter is deemed the narrower of the two terms.

The International Court of Justice has also avoided defining an ‘armed attack’. However, in the *Nicaragua Case*, the court posited that an ‘armed attack’ is a condition *sin qua non* for the right to self-defence, whether individual or collective to suffice.<sup>56</sup> The *Nicaragua Case*, in its detailed evaluation of an ‘armed attack’, relied on the definition of aggression.<sup>57</sup>

Ideally, an ‘armed attack’ is not disputed when the regular forces of a state launch an attack on another state within the latter’s territory. Instances of ‘armed attack’ are, however, shrouded in controversy when non-state actors or irregular forces come into play. The definition of aggression suggests that even irregular forces with substantive state support to attack another state in the latter’s territory amounts to an act of aggression and, hence, an ‘armed attack’.

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<sup>53</sup> Annex, U.N. Doc. A/RES/3314 (December 14, 1974).

<sup>54</sup> Article 1, para. (g).

<sup>55</sup> A. Randelzhofer, ‘Article 51’, in Bruno Simma et al. (eds), *The Charter of the United Nations; A Commentary* (Oxford University Press, 2002), p. 795.

<sup>56</sup> Malcolm D. Evans (ed), *International Law 3<sup>rd</sup> edn*, (Oxford University Press, Oxford, 2010), p. 793.

<sup>57</sup> (1986) I.C.J Rep., p.14, para. 195.



However, the International Court of Justice, in the *Nicaragua Case*,<sup>58</sup> rejected assistance to rebels in the form of provision of weapons or logistical or other support as amounting to an ‘armed attack’, but illegal intervention.<sup>59</sup> There were, however, dissenting opinions on this holding of the majority by Judges Schwebel (USA) and Jennings (UK) who, while relying on the definition of aggression, alluded that assistance in form of weapons or logistical support entail ‘substantial involvement’ by a state to amount to an ‘armed attack.’ Gray, critiquing these dissenting opinions, argues that the two judges were only making policy arguments as to what the law ought to be without adducing any evidence that provision of assistance in the form of weapons and logistical support in isolation constituted an ‘armed attack’.<sup>60</sup>

In the *Nicaragua Case*,<sup>61</sup> court clarified that actions by irregular forces could amount to an ‘armed attack ’under customary international law, as long as the gravity of such actions were commensurate to what would amount to an ‘armed attack’, if the same actions were being executed by regular forces of a state.<sup>62</sup>

A look at state practice reveals that states have invoked the right to self-defence when attacked by irregular forces. Such claims have been rejected in some instances especially where the victim states of the attacks have been in illegal occupation of the territory they are purporting to defend.<sup>63</sup> An example of such rejection was in Israel’s occupation of the West Bank and Gaza, the Golan Heights and parts of south Lebanon, which was termed illegal, culminating in the failure of Israel’s claim of lawful use of force in self-defence against cross-border attacks by

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<sup>58</sup>(1986) I.C.J Rep., p.14.

<sup>59</sup> Ibid.

<sup>60</sup> Christine Gray, *International Law & the Use of Force*, 2<sup>nd</sup>edn, (Oxford University Press, Oxford 2004), p. 110.

<sup>61</sup> (1986) I.C.J Rep., p.14.

<sup>62</sup> Christine Gray, *International Law & the Use of Force*, 2<sup>nd</sup>edn, (Oxford University Press, Oxford 2004), p. 113.

<sup>63</sup> Ibid.

irregulars.<sup>64</sup> Here, Israel's lengthy occupation in those regions was deemed pre-emptive and found to amount to unlawful reprisals, rather than self-defence.

In the *Nicaragua Case*,<sup>65</sup> the court found as follows:-

Particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX),<sup>66</sup> may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.

This essentially supports the argument that an armed attack can emanate from irregular forces as long as there is substantial state involvement. However, in this case, claim of state support through weaponry and logistical support was found not to be substantial to warrant invocation of the right to self-defence.

In the *DRC vs Uganda Case*, the International Court of Justice reaffirmed the position in the *Nicaragua Case* on the right to self-defence by re-emphasizing that the right can only be invoked after an 'armed attack'.<sup>67</sup> Further that reporting under Article 51 United Nations Charter is mandatory.<sup>68</sup> The International Court of Justice here just as was the case in the *Nicaragua*

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<sup>64</sup> Ibid.

<sup>65</sup> (1986) I.C.J. Rep., p.14, para. 195.

<sup>66</sup> Annex, U.N. Doc. A/RES/3314 (December 14, 1974).

<sup>67</sup> (2005) I.C.J. Rep., p. 168, para. 145.

<sup>68</sup> Ibid., para. 146.

expressly avoided addressing controversies surrounding the right to self-defence. The case will be discussed in detail in the next chapter.

#### **2.3.4.1 Can a Series of Attacks Amount to an ‘Armed Attack’ when Viewed Cumulatively?**

The International Court of Justice in the *Iranian Oil Platforms Case*,<sup>69</sup> evaluated whether separate armed attacks can amount to an ‘armed attack’. This case emanated from the 1980-88 conflict between Iran and Iraq, which conflict spread beyond the land to the Persian Gulf, affecting commerce and navigation activities in the region. In 1984, Iraq commenced the ‘Tanker War’ which entailed attacks on Iranian tankers carrying oil in the Persian Gulf, with Iran making retaliatory attacks to vessels trading with Iraq. Kuwait, for security of its merchant vessels in the Persian Gulf, sought re-flagging of some of its vessels by United States of America, the United Kingdom and the Soviet Union. The United States of America agreed to this proposal by providing naval escorts to all United States of America flagged ships from July, 1987. Some ships, however, suffered attacks or struck mines in the Gulf. Of significance in this matter were two attacks. On 16<sup>th</sup> October 1987, a Kuwaiti tanker, *Sea Isle City*, that was re-flagged by United States of America, was hit by a missile and, three days later, the USA attacked, in response, Iranian offshore oil installations on the basis of self-defence. The other attack was on 14<sup>th</sup> April, 1988, after a United States of America warship, *Samuel B Roberts*, struck a mine in international waters in the Gulf, and four days later, United States of America attacked and destroyed Iranian oil platforms.<sup>70</sup> Iran referred the matter to the International Court of Justice on the basis that United States of America had violated Article X of the 1955 Treaty of Amity<sup>71</sup> guaranteeing

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<sup>69</sup> (2003) I.C.J Rep., p. 161.

<sup>70</sup> (2003) I.C.J Rep., p. 161, para. 25.

<sup>71</sup> 284 U.N.T.S. 93 (1955).

freedom of commerce and navigation between two states. The United States of America counterclaimed on the basis of attacks of United States of America vessels with mines and missiles by Iran. United States of America relied on a series of attacks on its vessels. The International Court of Justice, in evaluating whether actions of Iran constituted an ‘armed attack’, found that, first, the burden of proving that was upon United States of America, and United States of America had not shown the series of attacks as amounting to an armed attack. The court further stated that even taken cumulatively, the attacks did not constitute an ‘armed attack’ on United States of America as per the *Nicaragua* test of constituting ‘most grave form of the use of force’.<sup>72</sup>

Additionally, the International Court of Justice in this case found that harm by a mine or a missile amounts to an armed attack on a third state in a conflict between two states, if such an attack was aimed at a third state.<sup>73</sup>

## **2.4 Conclusion**

The right to self-defence, whether individual or collective, is to be found both under customary and treaty law as manifested in state practice, and in various instruments, such as the Kellogg-Briand Pact as well as under the United Nations Charter. The International Court of Justice has reaffirmed this position in various cases, such as the *Nicaragua*. The two sources of the right complement each other so that the customary law right, which was wide prior to adoption of the United Nations Charter, is now limited to occurrence of an ‘armed attack’ in line with Article 51 of the United Nations Charter, a finding that was also reaffirmed in the *Nicaragua Case*. The right to self-defence, being an exception to the prohibition of use of force under the United

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<sup>72</sup> (2003) I.C.J. Rep., p. 161, para. 62-4.

<sup>73</sup> Christine Gray, *International Law & the Use of Force*, 2<sup>nd</sup> edn, (Oxford University Press, Oxford, 2004), p. 119.

Nations Charter, is aimed at protecting a state's territorial integrity. A state's territorial integrity cannot be violated where consent of military intervention by another state has been granted by the host state.

Article 51 makes it clear that actions in self-defence can only be instigated once an 'armed attack' occurs, hence defeating any claims of anticipatory self-defence which, if allowed, would be open to abuse by states. Despite the existence of the right to self-defence, both under treaty and customary international law, some ambiguities surround the right. The ambiguities lie in the definition and scope of an 'armed attack'. The International Court of Justice has, however, made reference to the definition of aggression in attempting to derive meaning to the terms. From the definition of aggression, acts of kidnapping, such as those that were allegedly carried out by the Al Shabaab on Kenyan territory, are not listed as acts of aggression and would, therefore, not amount to an 'armed attack'.

However, it is not in dispute that the principles of the right, namely, necessity and proportionality, have to be established for a state to successfully invoke the right. These principles, in addition to the requirement for reporting such actions immediately to the Security Council, also act as the limitations to the right. In regard to whether separate attacks can be taken cumulatively to amount to an 'armed attack', the same cannot stand given that self-defence is a temporary right which, once invoked, has to be immediately reported to the Security Council.

As to where an 'armed attack' should emanate from, this can be from a state's regular forces or even irregular forces, as long as state complicity can be established in the latter, which support has to be substantive. Claims of self-defence in response to attacks by non state actors with no state support would not be sustainable.

## **CHAPTER THREE**

### **THE ROLE OF THE SECURITY COUNCIL & THE INTERNATIONAL COURT OF JUSTICE ON USE OF FORCE IN SELF-DEFENCE**

#### **3.1 Introduction**

The use of force under the United Nations Charter regime is proscribed under Article 2(4), and states are required to use pacific means of dispute resolution. For this core objective of international peace to be achieved, the United Nations Charter <sup>1</sup> provides for various organs to help in its realization. This chapter evaluates the role of the Security Council and International Court of Justice *vis a vis* use of force generally and in self-defence. These two organs play a pivotal role in regard to use of force, with the primary responsibility of maintenance of international peace and security vesting in the Security Council, and the International Court of Justice being the principal judicial organ of the United Nations, vested with the role of interpreting international law in regard to disputes referred to it by consenting states.

#### **3.2 The Role of the Security Council**

The Security Council is listed as one of the United Nation's principal organs under Article 7. It is composed of fifteen (15) members, five (5) of whom are permanent and the remaining ten (10) being non-permanent, elected to the Security Council by the General Assembly for a two year term. Each member has one representative. Article 24 of the United Nations Charter sets out the functions and powers of the Security Council, with the primary responsibility of the Security Council being maintenance of international peace and security on behalf of member states. The prohibition on use of force by states is directed to interstate conflicts. In regard to civil wars,

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<sup>1</sup> 59 Stat. 1031, T.S. No. 993, Bevans 1153.

rules against forcible intervention have been developed by the United Nations General Assembly in an attempt to codify United Nations Charter provisions on use of force.<sup>2</sup> In instances of civil strife, therefore, states can only invoke the right to intervene and not the right to self-defence.

In line with its functions, the Security Council is empowered to investigate any dispute or situation that may lead to international friction or dispute. The Security Council also has the role of determining the existence of any threat to peace, breach of peace or act of aggression, or decide what form of measures, armed or unarmed, should be taken in maintenance of international peace and security as per Articles 41 and 42 of the United Nations Charter.<sup>3</sup>

Chapter VII of the United Nations Charter gives the Security Council very wide powers, not limited to domestic jurisdiction of states. Use of force by states in as much as it is proscribed, is allowed by the United Nations Charter in self-defence under Article 51. Force can also be authorized by the Security Council in peacekeeping missions. Peacekeeping is not expressly provided for under the United Nations Charter, but has developed from state practice during the Cold War. The same was as a result of Security Council inability to take action in response to breaches to peace. The United Nations General Assembly vide the Uniting for Peace Resolution,<sup>4</sup> allowed itself to call emergency meetings and make recommendations to states on use of force when the Security Council was inhibited in taking relevant action due to lack of unanimity of the permanent members.<sup>5</sup> From this, it can be derived that in as much as the Security Council is the primary security organ, even the General Assembly has played some part in authorization of use of force under the United Nations Charter. The primary role is further supported by the

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<sup>2</sup> Christine Gray, 'Self Defence', in Malcolm D. Evans (ed), *International Law*, 3<sup>rd</sup>edn, (Oxford University Press, Oxford, 2010), p. 633.

<sup>3</sup> Article 39, 59 Stat. 1031, T.S. No. 993, Bevans 1153.

<sup>4</sup> GA Res. 377 (V), (3 Nov 1950).

<sup>5</sup> Christine Gray, 'Self Defence', in Malcolm D. Evans (ed), *International Law*, 3<sup>rd</sup>edn, (Oxford University Press, Oxford, 2010), p. 638.

determination of the International Court of Justice in matters such as the *Nicaragua* where the court held that disputes involving use of force were not exclusively entrusted to the Security Council.<sup>6</sup>

The Security Council normally authorizes use of force by states through passing resolutions. In as much as use of force has to be authorized by Security Council, state practice reveals that states have used force without such prior authorization under Chapter VII, United Nations Charter. An example was use of force by the United States of America and the United Kingdom against Iraq after the cease fire. The use of force here was later legitimized under Resolution 678<sup>7</sup> on the basis that Iraq's violations after the ceasefire regime justified the use of force by the United States and the United Kingdom under Chapter VII in 1993 and 1998.<sup>8</sup>

### **3.2.1 Security Council's Role under Article 51**

It is within the context of the role of the Security Council under Chapter VII of the United Nations Charter, that the right to self-defence under Article 51 suffices. Under Article 51, the right to self-defence is exercisable by a state "until the Security Council has taken measures necessary to maintain international peace and security." In regard to the right to self-defence under the United Nations Charter, the Security Council has a central role in that states are mandated to report their use of force to the Security Council immediately. This is in view of the temporary nature of the right to self-defence which is available to states only until the Security

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<sup>6</sup> Christopher Greenwood, 'The International Court of Justice and the Use of Force' in Vaughan Lowe & Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice*, (Cambridge University Press, Cambridge, 1996), p. 373.

<sup>7</sup> UN SCOR, 2963<sup>rd</sup> Mtg., UN Doc. S/RES/0678 (1990).

<sup>8</sup> Christine Gray, 'Self Defence', in Malcolm D. Evans (ed), *International Law*, 3<sup>rd</sup> edn, (Oxford University Press, Oxford, 2010), p. 638.



Council steps in and takes the necessary measures, in realization of the objective of the maintenance of international peace and security.

The reporting by states to the Security Council usually takes the form of a letter addressed to the Security Council president setting out in brief the circumstances giving rise to the right to self-defence.<sup>9</sup> Further, such a letter should be sent promptly at the commencement of the military action in self-defence.<sup>10</sup> Additionally, Wood notes that it does not appear in practice for states to send follow-up letters so as to keep the Security Council informed about the specific measures being taken, though to him this would be inferred from Article 51 so as to enable the Security Council exercise its oversight role. There is, indeed, no need for a state to keep sending follow-up letters in that the right to self-defence is temporary in nature, with the Security Council being mandated to take relevant measures leading to termination of the right to self-defence.

There has been debate among scholars as to whether the reporting requirement to the Security Council under Article 51 is mandatory. Gray argues that it may not be mandatory to report actions taken in self-defence to the Security Council, as failure to report does not negate the action being self-defence. However, she avers that failure in reporting by a state is evidence that such action taken in self-defence was not, in fact, in self-defence. She, however, observes that states have taken caution by reporting to the Security Council, especially after the *Nicaragua Case*<sup>11</sup> where the International Court of Justice held that failure by United States of America to report its use of force to the Security Council was a reflection that it was not sure that it was acting in self-defence. This position was re-affirmed in the *DRC vs*

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<sup>9</sup> Michael Wood, 'The Security Council & the Use of Force', Hersch Lauterpacht Memorial Lectures, held at the Lauterpacht Centre For international Law, University of Cambridge, as delivered on 9 November, 2006, p. 11.

<sup>10</sup> Ibid., p. 12.

<sup>11</sup> (1986) I.C.J Rep., p.14.

*Uganda Case* where Uganda was found not to have reported its actions in self-defence in Democratic Republic of the Congo to the Security Council.<sup>12</sup> These two cases will be discussed in detail later in this chapter.

Greig also evaluates whether failure by a state to immediately report actions taken in self-defence invalidates such action, or if, indeed, the reporting requirement under Article 51 is directory in nature, to the effect that non-compliance thereof does not serve to invalidate the right to self-defence.<sup>13</sup> Further, Greig argues that the reporting requirement is directory, not mandatory with the reason being pegged on the *Nicaragua Case*, where the International Court of Justice declared that reporting was not applicable under customary international law, but under the United Nations Charter regime. That stemming from this position of the International Court of Justice, there would be inconsistency if the reporting requirement would be mandatory under the United Nations Charter and not under customary international law. Additionally, Greig is of the opinion that the reporting requirement is directory as derived from the reluctance of states to report, and that the Security Council's shortcomings have rendered certain aspects of Article 51 on the right to self-defence almost inapplicable.<sup>14</sup> The mandatory nature of the reporting requirement is clear from the wording of Article 51, where it reads 'measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council', and also from the *Nicaragua* and *DRC vs Uganda* cases where International Court of Justice reaffirmed the mandatory nature of the right. However, Randelzhofer alludes that the Security Council has for long failed to effectively performing its intended function, self-defence

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<sup>12</sup> (2005) I.C.J. Rep., p. 168., para 147.

<sup>13</sup> D.W. Greig, 'Self Defence and the Security Council: What Does Article 51 Require?', 40 International and Comparative Law Quarterly, 381(1991).

<sup>14</sup> *Ibid.*, pp. 385, 388.

by states has hence become the regular course of action and the restriction envisaged under the reporting duty has to a large extent in the past lost significance.<sup>15</sup>

Another area that has elicited debate is whether the right to self-defence terminates the moment the Security Council takes any measure. Cassese argues that self-defence does not cease when the Security Council simply makes a pronouncement on the matter but until the Security Council takes 'effective action rendering armed force unnecessary and inappropriate.'<sup>16</sup> Gray posits that it appears to be generally accepted that action by Security Council, such as passing of a resolution, is not enough or even economic measures if the aggressor is still in occupation of territory seized illegally.<sup>17</sup> The United Kingdom relied on this argument in the *Falklands Conflict*,<sup>18</sup> when it invoked the right to use force in self-defence until Argentina was driven out.<sup>19</sup> Additionally, in practice, the Security Council has affirmed the continuation of the right to self-defence even after taking steps, such as in the September, 2001 attacks on the United States, where the Security Council expressly referred to the continuing right to self-defence under Resolutions 1368<sup>20</sup> and 1373.<sup>21</sup> This argument holds true in that a pronouncement does not translate to any effective measures on the ground to stem the conflict, hence the need for substantive measures to contain the situation giving rise to self-defence.

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<sup>15</sup> A. Randelzhofer, 'Article 51', in Bruno Simma et al. (eds), *The Charter of the United Nations; A Commentary* (Oxford University Press, Oxford, 2002), p.804.

<sup>16</sup> Antonio Cassese, *International Law*, 2<sup>nd</sup> edn (Oxford University Press, Oxford, 2005), p.355

<sup>17</sup> Christine Gray, 'Self Defence', in Malcolm D. Evans (ed), *International Law*, 3<sup>rd</sup> edn, (Oxford University Press, Oxford, 2010), p. 633.

<sup>18</sup> 1982 U.N.Y.B. 1320.

<sup>19</sup> Ibid.

<sup>20</sup> UN SCOR, 4370<sup>th</sup> Mtg., UN Doc. S/RES/1368 (2001).

<sup>21</sup> UN SCOR, 4385<sup>th</sup> Mtg., UN Doc. S/RES/1373 (2001).

### **3.2.2 Efforts by the Council in addressing previous similar instances on self-defence**

The Security Council has been faced with various situations where states have used force in self-defence. The Security Council can authorize use of force by individual states or groups of states as delegated enforcement action under the United Nations Charter.<sup>22</sup> Brownlie cites this as a source of controversy. He gives the example of Resolution 678,<sup>23</sup> whereby the Security Council authorized the use of force against Iraq by a group of states aiding Kuwait and acting by way of collective self-defence as per Article 51 United Nations Charter.<sup>24</sup> Here, Iraq had failed to abide by an earlier decision of the Security Council to move out of Kuwait, and Resolution 678 was adopted authorizing all ‘necessary means’ to eject Iraq from Kuwait so as to restore international peace and security in the area. Brownlie further argues that such authorization, in some instances, serves political objectives, rather than genuine peacekeeping or enforcement action.<sup>25</sup>

### **3.2.3 Security Council Authorization in Use of Force**

There are instances where the Security Council has forthright passed resolutions in support of use of force, such as in Resolutions 1368<sup>26</sup> and 1373.<sup>27</sup> These two resolutions were passed after the September 11, 2001 attacks by Al Qaeda group of terrorists in New York and Pennsylvania. In Resolution 1368, the Security Council recognized the inherent right to self-defence, both individual and collective, in its condemnation of the attacks, which the Council classified as threats to international peace and security. In Resolution 1373, the Security Council reaffirmed its position in Resolution 1368 by recognizing the right to self-defence and called upon states to

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<sup>22</sup> Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup>edn, (Oxford University Press, Oxford, 2008), p. 741

<sup>23</sup> UN SCOR, 2963<sup>rd</sup> Mtg., UN Doc. S/RES/0678 (1990).

<sup>24</sup> Ibid.

<sup>25</sup> Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup>edn, (Oxford University Press, Oxford, 2008), p. 742

<sup>26</sup> UN SCOR, 4370<sup>th</sup> Mtg., UN Doc. S/RES/1368 (2001).

<sup>27</sup> UN SCOR, 4385<sup>th</sup> Mtg., UN Doc. S/RES/1373 (2001).

refrain from supporting, actively or passively, terrorist acts through inhibiting funding towards terrorist activities.

Under Resolution 1234, the Security Council in addressing the situation in Democratic Republic of the Congo where the Uganda and Rwanda forces were fighting the Democratic Republic of the Congo government, reaffirmed the right to self-defence and also the obligation upon states to refrain from use of force against the territorial integrity or political independence of any state. The Security Council further called upon states to bring to an end the situation by calling for an immediate cease fire and disarmament of the non-state actors involved.<sup>28</sup>

It is to be noted that the Security Council, in its pronouncement on state conduct in disputes, has been reluctant to determine acts of aggression, but rather ‘breaches of peace’, such as in the 1980-88 Iran/Iraq conflict. The Security Council has identified ‘threats to peace’ from internal conflicts, such as in Democratic Republic of Congo and Somalia.<sup>29</sup>

### **3.2.4 Did Kenya report to the Security Council upon commencing ‘*Operation Linda Nchi*’?**

As noted above, a state, upon commencing action in self-defence under Article 51, sends a letter to the Security Council President in fulfillment of the reporting requirement under the Article. In the Kenyan case, the same was not done. A few weeks after the Kenyan military incursion, the Kenyan and Somali governments held talks and the Somali government, confirmed that they had consented to Kenya launching their incursion, culminating to a joint communiqué.<sup>30</sup> After this incident, the Kenyan United Nations Ambassador, Macharia Kamau, wrote to the Security

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<sup>28</sup> UN SCOR, 3993<sup>rd</sup> Mtg. S/RES/1234 (1999).

<sup>29</sup> Christine Gray, ‘Self Defence’, in Malcolm D. Evans (ed), *International Law*, 3<sup>rd</sup>edn, (Oxford University Press, Oxford, 2010), p. 634.

<sup>30</sup> <[somaliamediamonitoring.org/28-oct-2011-morning-headlines/](http://somaliamediamonitoring.org/28-oct-2011-morning-headlines/)> (last accessed on 31 July 2013).

Council that Kenyan action in Somalia was being carried out with Somali's consent.<sup>31</sup> Whether or not this occurred, Kenya, at commencement of the military operation, had not reported to the Security Council, hence contravening a mandatory requirement for invocation of the right.

### **3.3 The International Court of Justice**

#### **3.3.1 Introduction**

The International Court of Justice is one of the principal organs of the United Nations regime and, more precisely, its principal judicial organ. The court came into existence in February, 1946 as a successor to the Permanent Court of International Justice (PCIJ), the latter of which was established under Article 14 of the Covenant of the League of Nations.<sup>32</sup> The Permanent Court of International Justice commenced its functions in 1922. However, after the Second World War with the adoption of the United Nations Charter, it was proposed that a new court be established due to the difficulty of amending the Statute forming the Permanent Court of International Justice, so as to include the United States and the Soviet Union who were non-members of the Permanent Court of International Justice.<sup>33</sup> In terms of comparison, the Permanent Court of International Justice and the International Court of Justice are similar in terms of substance of their respective Statutes, and there was also transfer of jurisdiction from the Permanent Court of International Justice to the International Court of Justice.

The need to set up a permanent court can be traced to the creation of the Permanent Court of Arbitration in 1899, which provided for arbitrators for states to choose from in case of disputes.

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<sup>31</sup> <[somaliamediamonitoring.org/28-oct-2011-morning-headlines/](http://somaliamediamonitoring.org/28-oct-2011-morning-headlines/)> (last accessed on 31 July 2013).

<sup>32</sup> 112 B.F.S.P. 1.

<sup>33</sup> Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup>edn, (Oxford University Press, Oxford, 2008), p. 708.

It has a small secretariat and states meet the arbitration costs.<sup>34</sup> This Court of Arbitration was to be emulated by the Permanent Court of International Justice that was formed under the Covenant for the League of Nations.

The International Court of Justice is often referred to in non-technical contexts as the ‘world court’. Thirlway however cautions that such a term could be misleading as it infers a superior body with worldwide jurisdiction, which is not the case.<sup>35</sup> He defines the International Court of Justice as a ‘standing mechanism available for peaceful settlement of disputes between states, to the extent that they wish to make use of it.’

### **3.3.2 Functions of the International Court of Justice**

The International Court of Justice is provided for under Chapter XIV of the United Nations Charter. All United Nations members are, *ipso facto*, parties to the Statute of the International Court of Justice, though the Court is also open to non-member states, on conditions to be determined by the United Nations General Assembly on recommendation of the Security Council.<sup>36</sup>

The International Court of Justice consists of fifteen (15) judges elected by the General Assembly and Security Council for a nine (9) year term. No two judges can be of the same nationality.<sup>37</sup> Unlike in the Permanent Court of Arbitration, where states in dispute settle costs directly, the United Nations bears the expenses of matters before the International Court of

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<sup>34</sup> Hugh Thirlway, ‘The International Court of Justice’, in Malcolm D. Evans (ed), *International Law* 3<sup>rd</sup> edn, (Oxford University Press, Oxford, 2010), p. 587.

<sup>35</sup> *Ibid.*, p. 588.

<sup>36</sup> Article 93 UNC, 59 Stat. 1031, T.S. No. 993, Bevans 1153.

<sup>37</sup> Article 3, Statute of the International Court of Justice.

Justice, save in the case of non-United Nations members where the International Court of Justice may fix a contribution towards the court's expenses.<sup>38</sup>

In terms of jurisdiction, the International Court of Justice can determine any matter referred to it by parties as well as all matters specially provided for under the United Nations Charter or in treaties and conventions in force.<sup>39</sup> The Court has jurisdiction in contentious matters, but on the basis of party consent. The International Court of Justice, therefore, only hears and decides cases on merit premised on the will of states, as reflected under Article 36 of its Statute, which is essentially a corollary of the sovereign equality of states.<sup>40</sup>

The International Court of Justice also gives advisory opinions on any legal questions to any authorized body under the United Nations Charter as per Article 65 (1) of its Statute. Such bodies authorized under the United Nations Charter to seek advisory opinions from the International Court of Justice are the General Assembly and Security Council.<sup>41</sup> However, other specialized agencies under the United Nations regime may be authorized by the United Nations General Assembly to seek such advisory opinions on legal questions arising within the scope of their activities.<sup>42</sup>

### **3.3.3 Role of the International Court of Justice in Interpreting the Nature and Scope of Self-Defence**

The law on the use of force is the cornerstone of post World War II legal order and is to be traced in two main sources, namely, the United Nations Charter and customary international law.

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<sup>38</sup> Article 35 Statute of the International Court of Justice.

<sup>39</sup> Article 36 Statute of the International Court of Justice.

<sup>40</sup> Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup> edn, (Oxford University Press, Oxford, 2008), p. 710.

<sup>41</sup> Article 96 UNC, 59 Stat. 1031, T.S. No. 993, Bevans 1153.

<sup>42</sup> *Ibid.*, Article 96 (b).



The proscription on use of force is provided for under Article 2(4) United Nations Charter which has exceptions under Article 51 on the right to self-defence and also under Chapter VII where the Security Council is allowed to use force in enforcement action. Additionally, force is also used in peacekeeping missions, though more often than not it is invoked under Article 51 in the context of self-defence.

However, despite the provisions on regulation of use of force, there are instances that give rise to problems of interpretation and application, requiring the International Court of Justice to intervene upon request by aggrieved states.

In that regard, the International Court of Justice has contributed to the development of jurisprudence on the law on the use of force and more specifically use of force in self-defence in various cases. Generally on use of force, the International Court of Justice may be requested to give a ruling on an issue of use of force incidental to another claim in state responsibility or determine substantively issues of use of force by states.<sup>43</sup> The latter has elicited an argument among jurists, that issues involving use of force are inherently non-justiciable especially in light of a continuing armed conflict.<sup>44</sup> The Court has however countered this argument as espoused in various determinations such as in the *Nicaragua Case*. Here, the United States of America argued that it was beyond judicial function for the Court to deal with a continuing armed conflict, as determination of the facts and implementation of the judgment would pose

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<sup>43</sup> Christopher Greenwood, 'The International Court of Justice and the Use of Force' in Vaughan Lowe & Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice*, (Cambridge University Press, Cambridge, 1996), p. 374.

<sup>44</sup> Ibid.

insuperable problems.<sup>45</sup> Further, the USA argued that issues raised by Nicaragua were a preserve for the Security Council and not the Court.<sup>46</sup> The Court rejected these arguments on the basis that use of force was an international law issue capable of determination by a judicial organ as was established in the Nuremburg trial.<sup>47</sup> Additionally, that there is no doctrine of separation of powers that bars the Court from hearing the case that was at the same time before the Security Council, and that the Security Council and the Court had separate but complimentary functions.<sup>48</sup> This supports the position noted earlier in this chapter that the Security Council has a primary but not exclusive role on the use of force by states.

It was not until the mid 1980s, in the *Nicaragua Case*, that the Court had the first major opportunity to pronounce on the law relating to the use of force. Since *Nicaragua*, the Court has been asked to decide cases involving the use of force in at least two advisory opinions and over twenty six (26) contentious cases. Not all of these cases have been decided on the merits, and it was not in all cases that the Court pronounced on the law relating to the use of force. Gray in her evaluation of cases on use of force after the *Nicaragua Case*, concludes that it is clear that the Court is divided as to how far its role as the ‘principle judicial organ of the UN’ should lead it to take an active role in disputes on the use of force, especially in the context of provisional measures.<sup>49</sup> She further notes that there is no absolute opposition by states to the Court’s

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<sup>45</sup> Christopher Greenwood, ‘The International Court of Justice and the Use of Force’ in Vaughan Lowe & Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice*, (Cambridge University Press, Cambridge, 1996), p. 375.

<sup>46</sup> Christine Gray, ‘The Use and Abuse of the ICJ: Cases Concerning the Use of Force after Nicaragua’, 14 *European Journal of International Law*, 867(2003), p. 870.

<sup>47</sup> Christopher Greenwood, ‘The International Court of Justice and the Use of Force’ in Vaughan Lowe & Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice*, (Cambridge University Press, Cambridge, 1996), p. 375.

<sup>48</sup> Christine Gray, ‘The Use and Abuse of the ICJ: Cases Concerning the Use of Force after Nicaragua’, 14 *European Journal of International Law*, 867(2003), p. 871.

<sup>49</sup> *Ibid.*, p. 905.

involvement on use of force.<sup>50</sup> This position explains the many matters referred to the Court touching on the use of force by states.

### **3.3.3.1 The Nicaragua Case**

On 9<sup>th</sup> April, 1984, the Ambassador of the Republic of Nicaragua to Netherlands filed an application instituting proceedings against United States of America in respect of dispute concerning responsibility for the military and paramilitary activities in and against Nicaragua.<sup>51</sup>

In this case, the right-wing Somoza Government in Nicaragua was overthrown through a revolution by the left-wing Sandinista Government. In 1981, President Reagan, terminated economic aid to Nicaragua on the basis that it had aided guerillas fighting the El Salvador Government which enjoyed good relations with the United States of America, by allowing Union of Soviet Socialist Republic arms to pass through its ports and territory en route to El Salvador. Upon taking the matter to the International Court of Justice, Nicaragua claimed that the United States of America had also acted against Nicaragua in ways that were in violation of customary international law. Among the issues raised by Nicaragua were that the United States of America had used direct armed force against it by laying mines in the Nicaraguan internal and territorial waters damaging Nicaraguan and foreign merchant ships, Nicaraguan ports, oil installations and naval base. Additionally, that United States of America had offered assistance to the *contras*, Nicaraguan guerillas fighting to overthrow the Sandinista Government.<sup>52</sup> The United States of America, in countering these allegations, alleged that Nicaragua had also assisted armed groups and that United States of America was acting in collective self defence on behalf of El Salvador.

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<sup>50</sup> Ibid., p. 877.

<sup>51</sup> (1986) I.C.J Rep., p.14.

<sup>52</sup> DJ Harris, '*Cases & Materials on International Law*', 6<sup>th</sup> edn, (Sweet & Maxwell Limited, 2004), p. 893.

The International Court of Justice in its final judgement of the matter raised various issues surrounding the use of force in self-defence. Firstly, the Court acknowledged the existence of law on force both under customary international law as well as under United Nations Charter. The International Court of Justice also confirmed Article 2(4) United Nations Charter as a rule of customary international law applicable to all states. Another notable finding of the International Court of Justice in this case was that an 'armed attack' need not be limited to grave attacks by regular forces action on an international border, but also the 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein."<sup>53</sup> Further, the court emphasized that such an attack by armed bands on the territory of another state, because of its scale and effects, would constitute an 'armed attack' and not a mere frontier incident had it been carried out by the regular forces. On the reporting requirement, the International Court of Justice held that the same does not suffice under customary international law, but under Article 51, absence of a report reflects lack of a conviction by the state in question that it was indeed acting in self-defence.<sup>54</sup> It is not in doubt that these findings of the International Court of Justice did, indeed, gave some interpretation on the legality of use of force in self-defence. However, the court failed to give interpretation of an 'armed attack', but instead relied on the definition of aggression.

Further, how do we distinguish between uses of force that amount to an 'armed attack' and those that do not? The Court held that the distinction is one relating to the gravity of the use of force or its scale and effects. What is not clear is how we distinguish between grave uses of force from

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<sup>53</sup> (1986) I.C.J Rep., p.14, para. 191.

<sup>54</sup> Ibid., para. 200.

less grave ones. In the *Iranian Oil Platforms case*, where the United States of America had targeted Iranian oil platforms after attacks on their merchant ships, the Court did not rule out that the mining of a single military vessel, though not leading to loss of life, could be regarded as sufficiently grave.<sup>55</sup> What is also not clear is whether repeated uses of force which do not individually amount to an armed attack could, collectively, be so regarded.

The International Court of Justice also acknowledged that armed attacks can also be carried out by armed bands with state complicity, and not necessarily regular forces. What was ambiguous was what amount of support was sufficient by a state aggressor to prompt the victim state to legally use force in self-defence, given that provision of weapons or logistical support was ruled out by the Court.

### **3.3.3.2 DRC vs Uganda Case**

On 23 June 1999, the Democratic Republic of the Congo (“the DRC”) filed an application instituting proceedings against the Republic of Uganda (“Uganda”) in regard of a dispute concerning acts of armed aggression perpetrated by Uganda on the territory of the Democratic Republic of the Congo, in flagrant violation of the United Nations Charter and of the Charter of the Organization of African Unity.<sup>56</sup> This was in the context of the civil war in Congo that took place between 1998-2003. Uganda’s troops had been involved during the whole duration under different circumstances. Initially, they were there on consent of the Democratic Republic of the Congo government under the Lusaka agreement, but the two later fell out. The Uganda forces were then required to leave, but refused to do so, prompting Democratic Republic of the Congo

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<sup>55</sup> (2003) I.C.J Rep., p. 161, para. 74.

<sup>56</sup> < <http://www.icj-cij.org/docket/index.php?sum=643&code=co&p1=3&p2=3&case=116&k=51&p3=5> > ( last accessed on 2 August, 2013).

to file the application with the International Court of Justice where Congo alleged that Uganda had violated the international law principles on non-use of force and non-intervention. Uganda also filed a counter claim alleging the maltreatment of Ugandan diplomats at Ndjili International Airport on 20 August 1998 by Democratic Republic of the Congo and further justified its military action in DRC as based on self-defence for the period 11 September 1998 to 10 July 1999.<sup>57</sup>

The International Court of Justice in its judgement of 19 December 2005, held that Uganda was in violation of the principles of non-use of force in international relations and of non-intervention, that it violated its obligations under international human rights law and international humanitarian law. The Court additionally found that the Democratic Republic of the Congo had, in turn, violated obligations owed to Uganda under the Vienna Convention on Diplomatic Relations of 1961 for its failure to offer effective protection to the Uganda Embassy, diplomats and property.<sup>58</sup> Uganda's claim of acting in self-defence also failed.

Just to narrow down to the Court's finding on the unlawful use of force by Uganda, the court stated 'that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the Democratic Republic of the Congo, violated the principle of non-use of force in international relations and the principle of non-intervention.'<sup>59</sup>

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<sup>57</sup> (2005) I.C.J. Rep., p. 168, para. 43.

<sup>58</sup> Ibid., para. 331.

<sup>59</sup> Ibid.

The right to self-defence under Article 51 has a reporting requirement, where a state invoking the right has to immediately report to the Security Council. In this case, this position was reaffirmed in that the International Court of Justice observed that in the period that Uganda was claiming to have been acting in self-defence, it failed to report the same to the Security Council.<sup>60</sup>

In regard to Uganda having been a victim of an ‘armed attack’, so as to invoke the right to self-defence under Article 51, the court found:-

It is further to be noted that, while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3(g) of General Assembly Resolution 3314(XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present.<sup>61</sup>

The International Court of Justice here reaffirmed the court’s position in the *Nicaragua case*, which relied on the definition of aggression in giving meaning to the concept of an ‘armed attack’ and also held that an armed attack could emanate from irregulars with state complicity, which in this case was not established. Just like in the *Nicaragua case*, the International Court of Justice here failed to define an ‘armed attack’, but noted that there was an element of cumulative attacks, though the same could not be attributed to Democratic Republic of the Congo.

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<sup>60</sup> Ibid., para. 145.

<sup>61</sup> (2005) I.C.J. Rep., p. 168, paras. 146-147.

The Court, in this case, had an opportunity to define unequivocally the ambiguities surrounding Article 51 on the right to self-defence, especially in regard to large scale attacks by irregular bands with no state complicity. The Court stated:-

Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces. Equally, since the pre-conditions for the exercise of self-defence do not exist in the circumstances of the present case, the Court has no need to enquire whether such an entitlement to self defence was in fact exercised in circumstances of necessity and in a manner that was proportionate. The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of trans-border attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end. ...<sup>62</sup>

The International Court of Justice here literally evaded interpretation of a grave issue, which should not be the case, being the principal judicial organ of the United Nations, and also bearing in mind that the parties had expressly sought its interpretation on the issue. This leaves states at a loss and increases the risk of abuse, by states, of the right to self-defence. However, as from the excerpt, the court propounded the principles of necessity and proportionality in a claim in self-defence.

The right to self-defence in response to large scale attacks by irregulars with no state complicity should be permissible. This is due to improved warfare and bearing in mind the current rise in terrorism by very well organized groups, such as the Al Qaida, who have a lot of resources at their disposal. Such groups appear to be more advanced than some developing states, hence posing immense threat to their political independence and territorial integrity.

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<sup>62</sup> Ibid., para. 147.



These are some of the cases in which the International Court of Justice has been engaged on the legality of force in self-defence. As noted, the Court has left many ambiguities surrounding Article 51 unresolved, more specifically the definition of an armed attack, as well as whether it can emanate from irregular bands with no state complicity.

### **3.4 Conclusion**

The Security Council and International Court of Justice roles in use of force cannot be ignored. The two organs play a key role in the realization of the main objective of the United Nations regime.

The Security Council is vested with wide powers in regard security issues as enshrined under the United Nations Charter. The Council is also empowered to use force or delegate such use of force in enforcement action under that chapter. In light of the Security Council role under Article 51 on use of force in self-defence, states are mandatorily required to report to the Council at the commencement of such actions vide a letter addressed to the Security Council president. The Security Council, upon receipt of such a communication, is required to take over the matter and, hence, the temporary nature of the right to self-defence. In practice, the Security Council has not been very categorical in unequivocally condemning unlawful use of force in self-defence, thereby leaving the right to be abused by states. The biggest obstacle to the Security Council's function is lack of a standing army and it has to rely on states to offer military personnel for any enforcement action under Chapter VII United Nations Charter. This slows down intervention, furthering escalation of international disputes.

The International Court of Justice, on the other hand, has played a significant role in interpretation of the law in force generally, and also specific to the controversial Article 51. From the two cases discussed above, the International Court of Justice has left some ambiguities unresolved, such as the definition of an ‘armed attack’. In the *DRC vs Uganda* case for instance, the Court literally avoided addressing controversies surrounding the right to self-defence and heavily borrowed from the *Nicaragua case*. The International Court of Justice should have seized the opportunity to offer clarity to issues such as the definition of an armed attack for jurisprudence purposes. Irrespective of its failures, the International Court of Justice offered clarity on the source of an armed attack in the *Nicaragua case* to include irregulars with state complicity, as long as such an attack would be deemed an ‘armed attack’ if committed by regular forces and not a mere ‘frontier incident’. The International Court of Justice in the *Nicaragua Case* also clarified that the right to self-defence exists both in treaty and under customary international law.

On the reporting requirement, the International Court of Justice held that the same was mandatory under Article 51, as failure to report would be reflective that a state was in doubt that it was indeed acting in self-defence.

The two organs, namely, the Security Council and the International Court of Justice, cannot therefore be overlooked in regard to the law on use of force by states, especially in the spheres of self-defence, and their respective roles should be complimentary in nature, for the realization of the United Nations Charter objective.

## CHAPTER FOUR

### ***‘OPERATION LINDA NCHI’ IN INTERNATIONAL LAW***

#### **4.1 Introduction**

Kenya has been a victim of terror attacks on her territory. The most notable of the attacks was the bombing of the United States Embassy in Nairobi in August, 1998, which was a twin attack that also took place in the United States Embassy in neighbouring Dar es Salaam in Tanzania, by the Al Qaeda terror group, with a total of two hundred and twenty five (225) people dying and over four thousand (4,000) left injured.<sup>1</sup> In the recent past, the country has continued to experience sporadic terrorist attacks within her territory, allegedly by the Al Shabaab terror group.

#### **4.2 Attacks by Al Shabaab on Kenyan territory**

The term ‘Al Shabaab’ means ‘the youth’ in Arabic.<sup>2</sup> It is a radical youth wing of Somalia’s now defunct Union of Islamic Courts that came up during the fight in 2006, against the Ethiopian troops that were assisting Somalia’s interim government. Bogita Ongeru describes the Al Shabaab group as an affiliate of the Al Qaeda and an amorphous militia that commits atrocities in their own country, unleashes terror on its own people and seeks to export the same to neighbouring countries.<sup>3</sup>

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<sup>1</sup> <[www.crisisgroup.org](http://www.crisisgroup.org)> (last accessed on 20 July 2013).

<sup>2</sup> <https://www.facebook.com/notes/kenya-at-war-operation-linda-nchi/qa-who-are-somalias-al-shabab/233449360047578> (last accessed on 4 August 2013).

<sup>3</sup> ‘Al Shabaab: The Spectre of Terror at Our Doorstep’ <[www.nation.co.ke](http://www.nation.co.ke)> (last accessed on 12 December 2012).

In the year 2009, suspected Al Shabaab members attacked Dadajabula Police Post in Northern Kenya.<sup>4</sup> In the following year, there was an attack, suspected to be by the same group, on the General Service Unit (GSU) Camp in Liboi, and various landmines and military attacks on Kenya's border with Somalia.<sup>5</sup> Suspected Al Shabaab members have also carried out a series of kidnappings of foreign nationals on Kenyan territory. For instance, on September 11, 2011, a British tourist was killed and his wife kidnapped from a Kiunga resort in Lamu. A few weeks later, a French national was kidnapped at Manda Island; she was later confirmed dead by the French government. On October 11, 2011, two Spanish aid workers with *Medecins Sans Frontiers* were kidnapped from the Daadab Refugee Camp, allegedly by the Al Shabaab.<sup>6</sup> These are some of the incidents culminating in the Kenyan military incursion in Somalia.

The Al Shabaab are not only linked to terrorist attacks in Kenya, but also in other states in the region. The group is also alleged to have executed the double suicide bombing in Uganda's capital, Kampala, which left seventy six (76) people dead.<sup>7</sup> This attack was carried out when people were watching the world cup final in the year 2010, allegedly due to Uganda's support with troops under the African Union (AU) in Somalia. The group also fights the transitional government in its country which it considers as a western outfit.

The highlighted incidents on Kenyan territory prompted Kenya to launch '*Operation Linda Nchi*' into Somalia. The launch was made vide a joint press conference held in Nairobi on 15<sup>th</sup> October, 2011 by the then Minister for Internal Security, George Saitoti, and his Defence

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<sup>4</sup>Mwenda Njoka 'War with Al Shabaab and Kenya's Jumbled Nationalism' <[www.the-star.co.ke](http://www.the-star.co.ke)> posted on 22 October 2011 (last accessed on 12 December 2012).

<sup>5</sup> Fred Mutinda and AFP, 'Al Shabaab Attacks Kenya Territory', <[www.nation.co.ke](http://www.nation.co.ke)> posted on 31 March 2010 (last accessed on 12 July 2013).

<sup>6</sup> Video uploaded on 15 October 2011 at <[www.citizen.tv.co.ke](http://www.citizen.tv.co.ke)> (last accessed on 11 July, 2013).

<sup>7</sup> <<https://www.facebook.com/notes/kenya-at-war-operation-linda-nchi/qa-who-are-somalias-al-shabab/233449360047578>> (last accessed on 4 August 2013).

Ministry counterpart, Yusuf Haji.<sup>8</sup> The military incursion was premised on Article 51 of the UNC, on the right to self-defence, with Kenya claiming it was protecting its territorial integrity. This decision was applauded by many, such as, the Tanzanian President, Jakaya Kikwete, on his courtesy call to the then Kenyan President Mwai Kibaki. He lauded Kenya's action, which he alluded would protect the country's economic and security interests.<sup>9</sup>

The military incursion was lodged both internally and into Somalia. The attacks were on land, air and sea. Even as Kenya pursued the Al Shabaab into Somalia, attacks by the group did not cease. For instance, on 28<sup>th</sup> November, 2011, suspected Al Shabaab terrorists attacked a police post at Arabiya, a trading centre 37 miles from Mandera, seizing weapons and burning a mobile transmission mast.<sup>10</sup> On 24<sup>th</sup> October, 2011, two people were killed in a Nairobi downtown bar along Mfangano Lane with over twenty (20) injured in the attack.<sup>11</sup>

The increased attacks intensified security operations and all buildings were required to inspect persons.

#### **4.2.1 Events post Operation Linda Nchi**

The military incursion into Somalia, despite the applause, gave rise to salient legal issues both domestically and under international law.

Domestically, constitutional issues were raised and the government was put to task by Parliament to explain whether Kenya was at war and why the military exercise was not first approved by Parliament, as per Article 240(8)(a)(i) and (ii) of the Constitution which requires parliamentary

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<sup>8</sup> Ibid.

<sup>9</sup> <<https://www.facebook.com/notes/kenya-at-war-operation-linda-nchi/ga-who-are-somalias-al-shabab/233449360047578>> (last accessed on 4 August 2013).

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

approval for any regional or international deployment. The Kenya Defence Force deployment was even challenged in the High Court of Kenya at Nairobi, in *Washington Jakoyo Midiwo vs Minister, The Ministry of Internal Security & 2 others*.<sup>12</sup> In this public interest petition, the petitioner was contesting, *inter alia*, the deployment of Kenya Defence Force without parliamentary approval and the use of military forces in civil unrest, by arguing that they were not trained to handle such situations and their involvement would, therefore, escalate, not de-escalate, the situation. The Court, in dismissing this petition, held that in as much as the High Court has jurisdiction over constitutional interpretation matters, such jurisdiction is exercised in the context of a real dispute *vis a vis* the key competences of different state organs. In determination of this case, the issue was held to be within the mandate of the National Assembly to address, with the petitioner then having been a member of parliament. Further, the Court held that interference by the Court in that mandate of the National Assembly would be a contravention of the principle of separation of powers.

Later, however, the lack of parliamentary approval appears to have been regularized with the cabinet backing the operation on 18<sup>th</sup> October, 2013.<sup>13</sup> Subsequently, Parliament also gave its approval for the Kenyan force to join the African Union Mission in Somalia (AMISOM) upon approval of the motion by then Defence Minister.<sup>14</sup>

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<sup>12</sup> [2013] eKLR, <[http://kenyalaw.org/CaseSearch/view\\_preview1.php?link=10935382293050538254467](http://kenyalaw.org/CaseSearch/view_preview1.php?link=10935382293050538254467)> (last accessed on 2 August, 2013).

<sup>13</sup> 'Cabinet backs offensive against Al Shabaab', Daily Nation Tuesday, 18 October 2011 <<http://www.nation.co.ke/News/politics/-/1064/1257548/-/8bl5pb/-/index.html?relative=true>> (last accessed on 4 August 2013).

<sup>14</sup> Kenya Governance Report, by African Centre for Open Governance, 2011 p. 28.

On 18<sup>th</sup> October, 2011, the Kenyan government representatives, together with their counterparts from the Transitional Government of Somalia, met in Mogadishu and signed a Joint Communiqué in which it was stated that the military incursion into Somalia was commenced with the consent of the Transitional Federal Government (TFG).<sup>15</sup> A week after the launching of ‘*Operation Linda Nchi*’, the then Somali President, Sheikh Sharif Ahmed, expressed his government’s opposition to the Kenyan military operation on their territory.<sup>16</sup> This cast doubt on the allegation by the Kenyan government that they had the consent of the Somali government. A few days later, the Somali Prime Minister, Dr. Abdiweli Mohammed Ali, sought to clarify the position of the Transitional Federal Government by reaffirming the Joint Communiqué signed in Mogadishu between the two governments and the fact that the two states had a common strategy against the Al Shabaab.<sup>17</sup>

#### **4.3 International Law Implications of ‘*Operation Linda Nchi*’**

It can be noted that various legal issues emanate from the launch of ‘*Operation Linda Nchi*’. With the domestic legal issues having been highlighted, the discussion now shifts to the international law sphere. The military incursion had, initially, been based on the right to self-defence under Article 51 United Nations Charter.

##### **4.3.1 ‘*Operation Linda Nchi*’ and Article 51 United Nations Charter**

As discussed in the preceding chapters, the right to self-defence under Article 51 has various elements that will now be discussed *vis a vis* the Kenyan military incursion.

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<sup>15</sup> <<https://www.facebook.com/notes/kenya-at-war-operation-linda-nchi/qa-who-are-somalias-al-shabab/233449360047578>> (last accessed on 4 August 2013).

<sup>16</sup> Ibid.

<sup>17</sup> <[somaliamediamonitoring.org/28-oct-2011-morning-headlines/](http://somaliamediamonitoring.org/28-oct-2011-morning-headlines/)> (last accessed on 31 July 2013).

Under Article 51, the right to self-defence arises when the state is victim to an ‘armed attack’. The question that arises and that this study seeks to answer is whether the various kidnappings of foreign nationals on Kenyan territory constituted an ‘armed attack’ under Article 51. This question brings to the fore the definition of an ‘armed attack’, which is one of the main controversies surrounding the Article. The United Nations Charter does not define the terms. Further, the International Court of Justice has not, up to date interpreted fully the meaning of an ‘armed attack’. The Court in the *Nicaragua case*<sup>18</sup> relied on the definition of aggression to give an example of an armed attack, but no definition was accorded. In the *DRC vs Uganda case*,<sup>19</sup> the court literally avoided defining the parameters of Article 51 and heavily relied on the *Nicaragua case* which had failed to define the terms. In both cases, the Court guided itself with the definition of aggression.

The term ‘aggression’ is defined in the Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX)<sup>20</sup> as entailing use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the United Nations Charter.<sup>21</sup> The Resolution, further, lists examples of acts of aggression under Article 3 to include bombardment by armed forces of a state against the territory of another, invasion or attack by armed forces of a state, among others. Under the said Article 3, kidnappings are not listed as examples of acts of aggression. It can, therefore, be concluded that kidnappings do not amount to an ‘armed attack’.

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<sup>18</sup> (1986) I.C.J Rep., p.14.

<sup>19</sup> (2005) I.C.J. Rep., p.168.

<sup>20</sup> Annex, U.N. Doc. A/RES/3314 (December 14, 1974).

<sup>21</sup> Article 1.



Throughout the text of the definition of aggression, it talks of acts of states against other states' territorial integrity. This takes us to the next question as to the source of an 'armed attack'. This was discussed in detail under Chapter Two and it was established as another source of controversy. However, the International Court of Justice in the *Nicaragua Case* expanded the source of an 'armed attack' as not being limited to an attack by regular forces of a state, but also that actions by irregular forces could amount to an 'armed attack' under customary international law, as long as the gravity of such actions were commensurate to what would amount to an 'armed attack', if the same actions were being done by regular forces.<sup>22</sup> Such attacks by irregulars must have been commenced with state complicity as articulated under Article 3(g) of the definition of aggression.<sup>23</sup>

As pointed out above, the Al Shabaab are a radical group of Islamists who are upto date fighting an insurgency against their Transitional Federal Government.<sup>24</sup> The aspect of state complicity from the Transitional Federal Government, therefore, fails and, as was reaffirmed by the Somali prime minster when reaffirming his government's position on the military incursion, the two governments had a common strategy against the Al Shabaab.<sup>25</sup> This defeats any state support and the Al Shabaab were, therefore, acting on their own accord.

Other principles or limitations to the right to self-defence, whether under treat or customary international law, are necessity and proportionality. It has been discussed that the kidnappings of four foreign nationals from Kenya was what primarily prompted the military action in Somalia. 'Operation Linda Nchi' was commenced on land, air and water, with thousands of troops

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<sup>22</sup> Christine Gray, *International Law & the Use of Force*, (2<sup>nd</sup> edn, Oxford University Press, Oxford, 2004), p. 113.

<sup>23</sup> Annex, U.N. Doc. A/RES/3314 (December 14, 1974).

<sup>24</sup> Kenya Governance Report, by African Centre For Open Governance, 2011, p. 27

<sup>25</sup> <[somaliamediamonitoring.org/28-oct-2011-morning-headlines/](http://somaliamediamonitoring.org/28-oct-2011-morning-headlines/)> (last accessed on 31 July 2013).

deployed for the operation, against the background of four kidnappings and a few spontaneous attacks. Were such counterforce measures commensurate to the four kidnappings and few attacks? The military operation was way too intensive to be proportional to the spontaneous attacks by Al Shabaab.

The other principle of necessity requires that a state acting in self-defence must have been compelled to do so due to lack of a practicable alternative to counter force. In light of the communication by Daniel Webster in the *Caroline Case*, did Kenya portray ‘necessity of self defence, instant, overwhelming, leaving no choice of means and no moment of deliberation’?<sup>26</sup> Not at all. The kidnappings of the British tourist from Lamu, and even that of the two Spanish nationals from Daadab, were a security lapse issues. If the Kenya government would have tight security or surveillance along its territorial waters and borders, such incidents would not occur. The French tourist, for instance, was kidnapped from her beach house in Lamu, yet the country has a navy which should be carrying out surveillance to prevent such criminal acts on Kenyan territory. ‘*Operation Linda Nchi*’ was in no means proved as necessary; what is necessary is the need to tighten security along the porous borders to curtail infiltration of criminals, such as the Al Shabaab. These principles of necessity and proportionality were further elaborated in the *Iranian Oil Platforms Case*.<sup>27</sup>

Another key requirement on the right to self-defence under Article 51 is the mandatory reporting to the Security Council, in light of the temporary nature of the right, until the Security Council takes relevant measures. As has been established, both in the reading of Article 51 and also as

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<sup>26</sup> Sir Robert Jennings and Sir Arthur Watts, *Oppenheim’s International Law*, 9<sup>th</sup> edn, ( Longman, London and New York, 1996), p. 423.

<sup>27</sup> (2003) I.C.J Rep., p. 161.

reaffirmed by the International Court of Justice in the *Nicaragua* and *DRC vs Uganda* cases, if a state fails to report, the same is reflective of the state being in doubt as to whether it was actually acting in self-defence. In the Kenyan case, no report was made to the Security Council, another contravention on Kenya's part of the requirement of the very right the country was relying upon. Kenya's military operation was also open ended, with no duration stipulated at commencement, which again watered down the temporal nature of the right under Article 51.

'*Operation Linda Nchi*' also brought about the issue as to whether minor attacks, taken cumulatively, would constitute an 'armed attack', which issue is closely linked to the ambiguity surrounding when an 'armed attack' commences, to prompt a state to take action in self-defence. Kenya's action was prompted by various spontaneous attacks involving kidnappings and other attacks to Kenyans such as the attack on the army camp in Liboi. The International Court of Justice, in the *Iranian Oil Platforms* case, rejected a claim of cumulative attacks on United States flagged ships.<sup>28</sup> The ambiguity of whether attacks can be construed cumulatively still stands. However, the spontaneous attacks by Al Shabaab were on a very small scale such that even when viewed cumulatively they would not amount to an 'armed attack', to justify Kenya's invocation of the right to self-defence.

Could the '*Operation Linda Nchi*' have been launched under anticipatory self-defence? This is another source of controversy, with some states and writers supporting a wide right under customary international law, and another group supporting a narrow right restricted to response to an 'armed attack' under the United Nations Charter. The Kenyan military action was based on Article 51, which is restricted to response to an 'armed attack', hence no inkling to the wide right encompassing anticipatory self-defence which, if allowed, would be open to state abuse.

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<sup>28</sup> Ibid., para. 62-4.

#### 4.3.2 How was Kenya handling Al Shabaab before ‘Operation Linda Nchi’?

Various spontaneous attacks as imputed upon the Al Shabaab had been reported prior to ‘Operation Linda Nchi’. Before the military incursion into Somalia and even after, several arrests of alleged Al Shabaab members were made and charges preferred. For instance, in *Aboud Rogo Mohamed & Anor vs Republic*,<sup>29</sup> the accused was charged with the offence of engaging in an organized criminal activity, contrary to section 3(3), as read with section 4(1), of the Prevention of Organised Crimes Act, 2010.<sup>30</sup> The particulars being that the applicants were found engaging in an organized criminal activity by being members of Al Shabaab, an outlawed organized criminal group as per Kenya Gazette Notice Vol. CX-11- No. 113 of 3<sup>rd</sup> November 2010. Both applicants were arrested on 21<sup>st</sup> December, 2010. Thereafter, they were charged with the offence on 22<sup>nd</sup> December, 2010. However, one of the accused Aboud Rogo was shot dead under mysterious circumstances in Bamburi, Mombasa on 27<sup>th</sup> August, 2012, prior to conclusion of the case.<sup>31</sup>

In another case, of *Republic vs Elgiva Bwire Oliacha*, the accused who is also known as Mohammed Seif was arrested and charged for possessing a cache of weapons in Kayole, Nairobi.<sup>32</sup> He pleaded guilty to being an Al Shabaab member and being involved in a grenade attack at the OTC bus stop in Nairobi, which led to the death of two (2) people and injury of several others. He was, subsequently, convicted and sentenced to life imprisonment, but appealed

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<sup>29</sup> Criminal Case No.793 of 2010, [2011] eKLR.

<[http://kenyalaw.org/CaseSearch/view\\_preview1.php?link=36073522080423529046897](http://kenyalaw.org/CaseSearch/view_preview1.php?link=36073522080423529046897)> (last accessed on 31 July 2013).

<sup>30</sup> Act No. 6 of 2010.

<sup>31</sup> Video posted by k24tv on 27 August 2012, [www.youtube.com/watch?v=grKZwSbA16U](http://www.youtube.com/watch?v=grKZwSbA16U); (last accessed on 15 August 2013).

<sup>32</sup> Criminal Case No.1445 of 2011., See also <http://www.capitalfm.co.ke/news/2011/10/grenade-man-pleads-guilty-admits-role-in-attacks/>> (last accessed on 5 August 2013).

the sentence which is still pending determination.<sup>33</sup> These are just a few examples, proof that the Al Shabaab activities are criminal in nature and did not in any way warrant the military incursion into Somalia as they can be prosecuted locally.

#### **4.3.3 Other International Law Implications of ‘Operation Linda Nchi’**

Shortly after the launch of ‘Operation Linda Nchi’, a joint communiqué was signed between Kenya and Somalia’s Transitional Federal Government. The Communiqué stipulated Somali’s consent to the military incursion in Somalia. Later, the Kenyan forces joined the African Union Mission in Somalia (AMISOM). These events marked the end of ‘Operation Linda Nchi’ that had been premised on Article 51 of the United Nations Charter.

Under international law, armed intervention with the consent of a territorial state is permitted, as traditionally from state practice, there were no limits to the freedom of states and all rules on force could be derogated from.<sup>34</sup> Further, states have allowed other states to use force in any form on their territory.<sup>35</sup> The United Nations Charter does not provide for consent as an exception to the prohibition on use of force under Article 2(4), but some states consider traditional law as fully valid to, consequently, argue that consent legitimizes the use of force, hence precluding the prohibition on use of force under Article 2(4).<sup>36</sup> This position by Cassese is in concurrence with the views of Shaw, who notes that aid to recognized governmental authority is legitimate.<sup>37</sup> Cassese, however, argues that such state consent should be freely given and not

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<sup>33</sup> Elgiva Bwire Oliacha vs Republic, High Court Criminal Appeal No. 289 of 2011 (Nairobi) (Unreported).

<sup>34</sup> Antonio Cassese, *International Law*, 2<sup>nd</sup> edn, (Oxford University Press, Oxford, 2005), p. 369.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Malcom N. Shaw, *International Law*, 6<sup>th</sup> edn, (Cambridge University Press, Cambridge, 2008), p. 1152.

marred with coercion or duress, must be given by lawful government, should not be a blanket authorization for future use and should also be *ad hoc* not contrary to the rules of *jus cogens*.<sup>38</sup>

In practice, it is difficult to derive circumstances under which consent is given. For instance, in the Kenyan scenario, the military action was premised initially on the right to self-defence. Shortly thereafter, a joint Communiqué was signed between Somalia and Kenya clarifying that the military incursion was commenced with Somalia's consent. These mixed positions raise questions on how the consent was derived. The consent which, as noted, is allowed under international law, legitimized the military intervention by Kenya in Somalia. Assistance to rebels against a government is, however, against the principle of non-intervention as established in the *Nicaragua* and *DRC vs Uganda* cases.<sup>39</sup>

With the consent of Transitional Federal Government having been granted, the next issue that arises is whether Kenya was, prior to joining African Union Mission in Somalia (AMISOM), was taking part in an internal armed conflict as part of Transitional Federal Government against the Al Shabaab insurgents. This is however beyond the scope of this study.

Another possible international law question in the context of '*Operation Linda Nchi*' is whether the conflict with the Al Shabaab was internationalized by the allegation that Al Shabaab are an affiliate of the Al Qaeda terror group which is an international network.

#### **4.4 Conclusion**

From the foregoing discussion, so many legal implications arose, both domestically and internationally, in the different phases of Kenya's military intervention in Somalia.

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<sup>38</sup> Antonio Cassese, *International Law*, 2<sup>nd</sup> edn, (Oxford University Press, Oxford, 2005), pp. 370-371.

<sup>39</sup> Malcom N. Shaw, *International Law*, 6<sup>th</sup> edn, (Cambridge University Press, Cambridge, 2008), p. 1153.

The chapter has analyzed events prior to, during, and after '*Operation Linda Nchi*' and the implications thereof, both domestically and internationally. Locally, the military action received mixed reactions, with some in support and others questioning the compliance with constitutional procedures on deployment of defence forces, regionally and internationally, which had been overlooked by the government. The constitutional misnomer was later rectified when the Parliament approved Kenya Defence Forces joining African Union Mission in Somalia (AMISOM).

Internationally, it has been discussed at length the events surrounding '*Operation Linda Nchi*' which was premised on Article 51 of the United Nations Charter. These events were further gauged against the requirements for the right to self-defence to suffice. It is a requirement that a state invoking the right must have been victim of an 'armed attack'. It was concluded that the spontaneous attacks and kidnappings did not amount to an 'armed attack', even when taken cumulatively. The same were concluded to be criminal acts subject to prosecution by local Courts.

Kenya's counterforce measures to the attacks and kidnappings by Al Shabaab, which were lodged on land, air and water, were found to be unnecessary as the issues could be prosecuted by local Courts. Further, the military incursion was unproportional in that the counterforce was not commensurate to the Al Shabaab attacks and kidnappings. It has also been established that the attacks were as a result of security breaches on the Kenyan side, leading to porous borders allowing infiltration of the Al Shabaab.

In regard to the mandatory reporting requirement, Kenya is not known to have reported its actions to the Security Council for the later to take relevant measures, which was a further breach to Article 51. Kenya was pursuing non-state actors with no state complicity.

Events after the military incursion into Somalia raised other international law implications. Somalia is found to have given consent which legitimized the initially unlawful use of force by Kenya under international law. Various questions arise as to whether, the allegation that Al Shabaab are linked to Al Qaeda, an international terror network, internationalized the conflict but this can be subject of future research.

All in all, '*Operation Linda Nchi*' did not meet any of the requirements of Article 51 and was, therefore, not within the purview of the right to self-defence under the United Nations Charter.



## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Research Findings & Conclusion

This study was sought to address the legality, under international law, of '*Operation Linda Nchi*' which was premised on Article 51 of the United Nations Charter. The study presupposed that '*Operation Linda Nchi*' was not premised on the right to self-defence. To establish or refute this assumption, the study sought to answer whether the attacks and kidnappings by the Al Shabaab in Kenya amounted to an 'armed attack' under Article 51 and also whether Kenya reported its actions to the Security Council as required under the said Article.

This study finds that the law on self-defence exists both under customary international law as well as under treaty, under Article 51 of United Nations Charter. The right exists under Article 51 as an exception to the prohibition on the use of force, which is proscribed under Article 2(4) of the United Nations Charter.

The right to self-defence under Article 51 is shrouded in controversy as to what entails an 'armed attack', where it should emanate from, who should be the actors, and whether the right can be exercised pre-emptively. Nonetheless, there are requirements and limitations pertaining to invocation of the right by a state.

Under customary international law, war was a legal doctrine that required no legal justification. Self-defence was, therefore, enshrined in the broad concept of war. The Kellogg-Briand Pact<sup>1</sup> also expressly provided for the right to self-defence. With the adoption of the United Nations Charter, war was expressly prohibited under Article 2(4). Self-defence is, however, one of the

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<sup>1</sup> U.K.T.S. 29 (1929) Cmd. 3410; 94 L.N.T.S 57.

exceptions to this proscription of the use of force. Article 51 of the Charter describes it as an ‘inherent’ right. This position was reiterated by the International Court of Justice in the *Nicaragua Case*.<sup>2</sup> In terms of scope of the right to self-defence, it was noted that there are two opposing positions, one supporting a wide right, not limited to the occurrence of an ‘armed attack’ in order to encompass anticipatory self-defence, and protection of foreign nationals abroad, among other aspects. The other opposing side supports a restrictive, right limited to response to an ‘armed attack’. The right to self-defence under customary law could have been wide, but with adoption of the UNC, Article 51 offered clarity by limiting the right to an ‘armed attack’. Further, that allowing a wide right, alongside a restrictive right under Article 51, would defeat the purpose of the UNC objective of maintaining international peace and security. A wide right would also offer room for abuse by states.

In terms of limitations, both under customary international law and under the UNC, the principles of necessity and proportionality must be manifest for a state to invoke the right. This position has been well settled by state practice as was evidenced in the *Caroline case*, and also by the International Court of Justice in various matters such as the *Iranian Oil Platforms case*,<sup>3</sup> *Nicaragua*<sup>4</sup> and *DRC vs Uganda cases*.<sup>5</sup> These two principles are complimentary in nature and require that self-defence counter-force must be commensurate to the force being reacted to, as reprisals are prohibited and, also, that the state acting in self-defence must be compelled to do so due to lack of a practicable alternative. To justifiably invoke the right under Article 51 of the Charter, the state must be reacting to an ‘armed attack’. Although the Court did not definitively

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<sup>2</sup> (1986) I.C.J Rep., p.14.

<sup>3</sup> (2003) I.C.J Rep., p. 161.

<sup>4</sup> (1986) I.C.J Rep., p.14.

<sup>5</sup> (2005) I.C.J. Rep., p. 168.

interpret an 'armed attack' in cases that have been before it, such as the *Nicaragua* and *DRC vs Uganda Cases*, the Court has given examples derived from the definition of aggression.

This lack of a definition has contributed to a lot of ambiguity on the right. The Court, however, in its interpretation included attacks by non-state actors as amounting to an 'armed attack' if the same would amount to be so if committed by regular forces on another state's territory with the sending state's complicity. Such assistance to the armed bands must be substantive. In the *Nicaragua case*, logistical support was deemed not to be substantive assistance. Reporting to the Security Council is a mandatory, and not directory, requirement under Article 51 which position was propagated by ICJ in the *Nicaragua*<sup>6</sup> and *DRC vs Uganda cases*.<sup>7</sup>

An in-depth analysis of two of the principal organs of the United Nations and their role in use of force in self-defence by states, that is, the Security Council and the International Court of Justice was carried out. In regard to the Security Council, it enjoys wide powers in regard to maintenance of international peace and security through regulation of use of force under Chapter VII. The Security Council can also use force in enforcement action and can also authorize states to use force. In light of the right to self-defence, states are required to report use of force immediately to the Security Council, so that it can take relevant measures to contain the situation. This is on the basis of the temporary nature of the right to self-defence under the United Nations Charter.

In regard to the role of the International Court of Justice, it has contributed to the development of the law on use of force generally and also specifically to the right to self-defence through interpretation of various international law provisions in disputes brought before it by the consent

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<sup>6</sup> (1986) I.C.J Rep., p.14.

<sup>7</sup> (2005) I.C.J. Rep., p. 168.

of states. The International Court of Justice, in the *Nicaragua case*,<sup>8</sup> clarified that ‘armed attacks’ can also emanate from non-state actors, such as armed bands with state complicity. However, in as much as the Court has made considerable contribution in settlement of state disputes, it has failed severally to interpret some key controversies on the right to self-defence under Article 51. An example is the definition on an ‘armed attack’. This failure has contributed to continued ambiguity on the concept.

In gauging ‘*Operation Linda Nchi*’ against the requirements of the right to self-defence, it was first established that the various spontaneous attacks and kidnappings of foreign nationals, whether taken individually or cumulatively do not constitute an ‘armed attack’, one of the key tenets prompting invocation of the right to self-defence under the United Nations Charter. The attacks were established to be criminal acts that could and have been prosecuted in the Kenyan courts. It was further noted that security lapse was a key contributing factor to the acts of the Al Shabaab on Kenyan territory, more so because of the porous Kenyan borders allowing infiltration of Al Shabaab elements.

On the reporting requirement, it was established that Kenya did not make any report to the Security Council. The pursuance of Al Shabaab into Somalia, through counter-force by air, land and sea, was also found as unnecessary and not proportional to the attacks and kidnappings by the Al Shabaab. This analogy led to the conclusion that ‘*Operation Linda Nchi*’ did not meet the requirements set out under Article 51 of the Charter, and, therefore, did not fall within the purview of the right to self-defence.

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<sup>8</sup> (1986) I.C.J Rep., p.14.

The question that arises then is what '*Operation Linda Nchi*' amounted to if it was not in self-defence. Due to the fact that the Al Shabaab are not a state, the use of force by Kenya cannot be termed as an act of aggression. It was further established that shortly after the launch of '*Operation Linda Nchi*', a Joint Communiqué was signed between Kenya and the transitional government of Somalia, which clarified that the military incursion was commenced with Somalia's consent. This legitimized the military action, giving rise to difficulty in categorizing Kenya's military action under international law.

Domestically, '*Operation Linda Nchi*' raised constitutional concerns in that it was commenced without parliamentary approval, as required under Article 240(8),(a)(i) and (ii) of the Constitution, 2010. The only approval that was granted by the Parliament was when the Kenya Defence Forces joined the African Union Mission in Somalia (AMISOM). The military action was, therefore, unconstitutional at the onset.

It suffices to conclude that '*Operation Linda Nchi*' not only raised international law concerns by falling outside the scope of Article 51, but also constitutional issues domestically, the latter of which fall beyond the scope of this study.

## **5.2 Recommendations**

This study has concluded that '*Operation Linda Nchi*' was not an exercise in self-defence.

Should Kenya be faced with a similar scenario as the circumstances prompting the need for '*Operation Linda Nchi*', this study proposes the following:-

- i. At the international front, Kenya is a state with duties and responsibilities and more so a United Nations member. This calls for respect of the law, procedures and institutions as

provided under the United Nations Charter. Any future claims of self-defence should be reported to the Security Council immediately.

- ii. Government should avoid misinformed pronouncements that elicit international law concerns, such as '*Operation Linda Nchi*' being premised on the right to self-defence, which was not the case. Facts and law should be established first by the relevant government organs.
- iii. Security should be tightened at the porous Kenyan borders to prevent infiltration of criminals, such as the Al Shabaab, from any neighbouring state.
- iv. Future research is also proposed so as to establish the categorization of '*Operation Linda Nchi*', which aspect was beyond the scope of this study.

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