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**ASSESSMENT OF KENYA'S MILITARY INTERVENTION IN SOMALIA
AGAINST AL SHABAAB IN LIGHT OF JUST WAR THEORY**

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the Award of Master of Arts Degree in Diplomacy**

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DECLARATION

I, Eric Wamanji Ndung'u give the declaration that this research project is my original work and has not been presented for a degree in any other University.

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Declaration by the Supervisor

This project has been submitted for examination with my approval as the University supervisors.

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Date:

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Here is to thank all the people who contributed to this work. To mention a few: Dr. Martin Ouma, for your patience, guidance and keen eye; George Maangi for invaluable insights and the authors that I have generously cited. Thank you all.

DEDICATION

To my mum, Harriet Wanjiru, the greatest of them all.

ABSTRACT

The study was designed to assess Kenya's military intervention in Somalia against Al Shabaab using the Just War Theory. Key objectives were: To assess the extent to which Kenya was justified to intervene in Somalia using *jus ad bellum* framework; to assess Kenya's compliance to the right conduct of war during the intervention in Somalia using *jus in bello* approach and to assess the *jus post bellum* strategies after the end of the intervention in Somalia. The researcher reviewed diverse literature on the Just War Theory, the history of conflict in Somalia and on Al-Shabaab. The researcher used qualitative research design and employed the use of in-depth interviews with high-profile respondents with the knowledge of international relations, international security and international law. The researcher found out that the intervention in Somalia did not meet the basic thresholds as deemed fit by the Just War Theory under the framework of *jus in bello*. KDF did not get the requisite approvals from parliament plus the provocations from Al-Shabaab were not too serious to warrant a military intervention. Further, during war, KDF, in some instances failed to comply with the right conduct of war especially on the principle of discrimination. Several civilians were either killed or maimed because of this behaviour. On the *jus post bellum*, Kenya did not have any blue print for a post-conflict Somalia. This reality, in totality makes the Kenya's intervention unjust. The researcher recommends that the future interventions should be within the acceptable just war tradition. Importantly, exit strategies are critical as are post-conflict blue prints. Kenya and other actors in Somalia now should be strongly thinking of a post-conflict strategy for Somalia to bring lasting peace. The researcher recommends further areas of research for instance further exploration on how KDF treated the prisoners of war.

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ABBREVIATION

AMISOM	African Mission in Somalia
AU	African Union
CPA	Comprehensive Peace Agreement
CSIS	Center for Strategic and International Studies
ICC	International Criminal Court
ICJ	International Court of Justice
ICTFY	International Criminal Tribunal for the Former Yugoslavia
IGAD	Intergovernmental Authority for Development
IHL	International Humanitarian Law
IJA	Interim Juba Administration
IUC	Islamic Union Courts
KDF	Kenya Defence Forces
OLN	Operation Linda Nchi
R2P	Responsibility to Protect
TFG	Transitional Federal Government
UK	United Kingdom
UN	United Nations
UNITR	United Nations International Tribunal for Rwanda
UNSC	United Nations Security Council
USA	United States of America
WB	World Bank
WMD	Weapons of Mass Destruction
WWI	World War I
WWII	World War II

CHAPTER ONE

1.0 INTRODUCTION

This section gives background information on war, the conflict in Somalia, Kenya's involvement in Somalia under *Operation Linda Nchi* and its justification. It also includes statement of the problem, justification of the study, literature review, theoretical framework using the Just War theory and the research methodology to be employed in the study.

1.1 Background to the Study

Historically, the very nature of humankind has been that of conflict and war. Indeed, war is as old as the time when human beings first organized themselves into groups.¹ Recorded history is proof that conflict has dogged and shaped human societies. Louise Wilmot posited that war remains an apparently ineradicable part of human experience². That is why realists such as Thomas Hobbes who wrote about the state of nature³, Nicollo Machiavelli⁴ who came up with a strategy of governance, and Sun Tzu who developed strategy of war⁵, all viewed war as intrinsic to mankind and that the international system is anarchic. This means that horrific brutality, cruelty, and suffering are the hallmarks of war. Consequently, societies and states have developed rules of engaging in war. At first such rules were mainly customary and philosophical but with time, thinkers, diplomats and teachers of law, having appreciated that war, too,

¹ Art C. R., and Jervis R., "Central issues in contemporary world politics," in *International Politics*, 4th Ed. Harper Collins College Publishers (1996). Pg. 397.

² Willmot L., 'Introduction' in *On War* by Carl von Clausewitz, Wordsworth Edition Limited (1997) pg. XXI

³Hobbes, T. (1588-1679), English Philosopher who wrote about the state of nature in the *Leviathan*.

⁴ Nicollo Machiavelli (1469-1527) wrote the *The Prince* and *Discourses* that provided strategy of governance, diplomacy and conquests.

⁵ Tsu, Sun. *The art of war*. Translated by Lionel, G. Abingdon, Oxon: Routledge, 2013.

requires regulation, set to codify the rules: justification of getting into war, behavior during war and post-war justice – hence the Just War Theory.⁶

Indeed, just wars are widely deemed those with intentions to amend heinous injury or put a stop to persistent evils of human rights violations or indignation⁷. The modern world's first international rules of war were established through the Geneva Conventions⁸ and International Peace Conferences⁹ held at The Hague in the Netherlands in the years 1899 and 1907. This codification is founded on the main principle that, where possible, war should be shunned. The same humanitarian principle seeks to reduce suffering during war and bring to account parties to war, in the event of transgressions against international norms and laws during conflict. War crimes are prohibited and punished under international law.

History chronicles the warfare of empires and principalities. One of the bloodiest wars is the 30-year war¹⁰ that ended with the 1648 Peace of Westphalia. This treaty created the modern state sovereignty doctrine, as we know it. Then there were the Napoleonic wars (1803-1815) Dungan Revolt (1862 – 1877) American Civil War (1861-1865) or the Gallic Wars (58-50 BC) all of which posted thousands if not millions of casualties. In the last century, the world degenerated in two gigantic wars: WWI and WWII from

⁶Just War Theory.com. <http://www.justwartheory.com/>

⁷Hugo, Grotius, *De jure belli ac pacis*. In: Bederman DJ. Reception of the classical tradition in international law: Grotius' de jure belli ac pacis. *Emory International Law Review* 1996:10:31-2.

⁸ International Committee of the Red Cross. "Geneva Conventions and Commentaries." <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>

⁹ International Committee of the Red Cross. "Treaties, State Parties and Commentaries." <https://ihl-databases.icrc.org/ihl/INTRO/195>

¹⁰Tertrais, Bruno. "The Demise of Ares: The End of War as We Know It?" *The Washington Quarterly* 35:3 (2012): 7-22, 2012.

which, arose pacifist global organizations -the League of Nations¹¹ and the United Nations¹² (UN) respectively.

As a pacifist institution, the 1945 UN Charter in Chapter VII appropriately proscribes aggressions against states. However, the same charter, in Article 51 sanctions warfare if it is for self-defense. This charter also creates the UN Security Council (UNSC), which has the duty to keep global peace and security. To this end, it boasts supremacy to permit a state to wage a war against an aggressor state.

The comity of nations has also been keen to punish crimes committed during war. When the Second World War (WWII) ended, the Nuremberg Trials were set up to prosecute the Nazis who had committed atrocities against humanity. Tribunals to seek justice for war crimes have also been initiated such as the UNITR and the UNCTFY. The latest global effort to bring justice to such crimes is the Rome Statute of the International Criminal Court (ICC). This institution pursues justice for crimes against humanity such as genocide and mass displacement of population. In addition, the UN in 2005, at the World Summit, member states unanimously adopted the Responsibility to Protect (R2P) policy that sought to prevent genocide, war crimes, and crimes against humanity.¹³

The doctrine founded on the principle that involvement to protect people, which can include the intervention of the military whenever necessary is allowed in the event that

¹¹ Trachtenberg, Michelle. "Reparation at The Paris Peace Conference." *The Journal of Modern History*. 51.1 (1979): 24-55.

¹³Genocide Prevention and the Responsibility to Protect. Retrieved from www.un.org

civilians are in danger. This also includes when a state is not in a position or even does not show the will to protect its population from such a danger or threat. In recent years, the UNSC has largely acted on this principle as has been evident in Somalia because the insecurity in the country poses a serious threat to international peace and security as provided in Chapter VII of the Charter of UN.¹⁴

Indeed, even amid laws and customs deterring war, still there are valid justifications for a state or states to go to war. Lately, the threat of terror has become a global concern leading to the rise of *war on terror*. Indeed, this concept gained currency after the 9/11 attacks on Twin Towers in the USA. In 2001, US President, mounted a global war to fight terrorism, which he said that a time had come for the world to unite to face a new form of battle, which he called the first and hopefully the only one in this century. According to the State Department, this would be a war against terrorism, its exporters and desiring to export terror, and against governments or institutions that support or harbour them.¹⁵

Consequently, the US waged war on Taliban in Afghanistan, which was then sheltering the notorious Al-Qaeda network and its financier and head, Osama Bin Laden¹⁶ who bear the responsibility for the terror acts. The US pursued Bin Laden inside Pakistan and neutered him at Abbottabad, Pakistan. The US has since mounted numerous strikes, mostly in the Middle East, Somalia, Sudan and Pakistan in pursuit of Islamic extremists

¹⁴International Development Research Centre. "Report on the International Commission on Intervention and State Sovereignty." *The Responsibility to Protect*. December 2001

¹⁵ State Department. "The global war on terrorism: the first 100 days." <https://2001-2009.state.gov/s/ct/rls/wh/6947.htm>

who execute various terrorist acts. The US justification is that terrorists not only threaten the national interests of the US but are also a threat to global peace.

In Africa, war on terror has been intense since August 7, 1998 when terrorists attacked the US embassies in Kenya and Tanzania. In Nigeria, the terror group Boko Haram has been waging war including abductions and massacres. Most notable is the abduction of 276 girls from Government Girls School in Chibok, Northern Nigeria. The girls who became the embodiment of the Boko Haram's anarchy, attracted international attention and condemnation drawing attention to the ever-increasing terror danger. To date, the Nigerian army is still battling the militants and close to two million people have been displaced by the terrorists who consider everything Western as forbidden.¹⁷

For a long time, Kenya has been pre-occupied with tackling terrorism within its borders. Indeed, the country has suffered a series of devastating terror attacks since the 1998 August bombing which the Al-Qaeda claimed responsibility. On October 16, 2011 Kenya engaged in its first cross-border offensive with an objective of vanquishing an adversary who wreaked horror and death inside Kenya's territory¹⁸. On that day, the Kenya Defence Forces (KDF) under the auspices of Operation Linda Nchi (OLN) entered Somalia in pursuit of the Al-Shabaab terror group that had staged a series of kidnappings and bombings inside Kenya, which threatened national security and violated Kenya's territorial integrity. Al-Shabaab operates in Somalia, which is a dysfunctional state since 1991 after the tumble of Siad Barre. However, the UNSC

¹⁷Who are Nigeria's Boko Haram Islamist group? *BBC*. November 24, 2016. <http://www.bbc.com/news/world-africa-13809501>.

¹⁸ Pius, T. Migue. "Operation Linda Nchi." Nairobi: Ministry of Defence, 2014.

Resolution 1725 of December 6, 2006, prohibited bordering states from sending soldiers to Somalia.

1.2 Statement of the Research Problem

Military operations across the world leave a trail of destruction, pain and anguish. Since Kenya's intervention in Somalia, KDF, Al-Shabaab and civilians have experienced numerous casualties and losses. Domestically, Kenya continues to bear the brunt of the war as Al Shabaab stages a series of retaliatory attacks – Al-Shabaab has attacked civilian populations in Kenya and KDF bases inside Somalia. Equally, the war, five years on, is still unyielding. Neither does Kenya seem to have an exit strategy nor are there signs demonstrating a vanquished Al-Shabaab. Yet, Kenya has invested heavily directly and indirectly in this war. Exit strategies and neutering enemies are critical tenets of the theory of Just War. Therefore, Kenya's operations in Somalia beget the question whether the exercise was worth it.

In addition, information in the public domain about KDF's conduct during the operation is also scanty. For instance, very little is known of casualties on both sides - including collateral damages on civilians, and the types of weapons used. Such obfuscation is a case for concern because the post-war justice (*Jus post bello*) is dependent on such information. Scholars of Foreign Policy and of war have also been denied the opportunity to offer informed conclusions about the *Operation Linda Nchi*. It is worthy therefore to explore the extent to which Kenya was justified to intervene Somalia (*jus ad bellum*), KDF's behaviour during OLN and post-war strategies. So far, there is scanty information in relation to the Just War Theory vis a vis *Operation Linda Nchi*,

and whether the requisite philosophical frameworks were complied with. The purpose of this study is therefore to assess *Operation Linda Nchi* in light of Just War Theories.

1.3 Objectives of the research

1.3.1 Primary Objective

The general objective is to assess Operation Linda Nchi in light of the Just War Theory.

1.3.2 Specific objectives

1. To assess the extent to which Kenya was justified to mount Operation Linda Nchi using *jus ad bellum* framework.
2. To assess Kenya's compliance to the right conduct of war during Operation Linda Nchi using *jus in bello* framework.
3. To assess the *jus post bellum* strategies after the Operation Linda Nchi.

1.4 Research Questions

1. Did Kenya meet the threshold of going to war under *jus ad bellum* principles?
2. Did Kenya Comply with the right conduct during war under *jus in bello* principles?
3. What are the possible *jus post bellum* scenarios after Operation Linda Nchi?

1.5 Justification of the Study

1.5.1 Policy justification

Since OLN is the first offensive Kenya has ever engaged in, breaking from the policy of non-interference, insights from this study will contribute to the review of existing policies or formulation of new ones on decisions to wage war, alliances to form before and during the war and the right conduct during the war. It is envisioned that new knowledge, on lessons learnt, best practices and the recommendations arising from this

study could be helpful to policy makers in governments and non-governmental organizations to refine existing ones on Somalia and Kenya's neighbours going forward.

1.5.2 Academic Justification

The OLN will continue to draw diverse interest from scholars of international relations. Therefore, information generated will contribute to the pool of knowledge that will be useful to future researchers in the same field. Recommendations for further studies will open new vistas for those who will be interested in the OLN as areas of research.

1.5.3 To the General Public

Since the country has invested heavily in the war through public resources, and since the OLN has had impact on the nation psychologically, socially and emotionally, it will be imperative to establish the morality or lack of it regarding the exercise for the public appreciation of what transpired, what worked, what failed and what lessons the country learnt.

1.6 Limitation of the Study

War zones are dangerous. Therefore, ordinarily, researchers on topics related to war, conduct and laws that govern them, heavily rely on reported and documented data. This research was constrained by the fact that the researcher was not on the battleground as the war unfolded hence lacks in experiential authority on the war. The researcher was also unable to travel to Somalia and establish the extent of complicity to or deviation from international laws of war. However, to mitigate on these challenges, the researcher engaged soldiers who participated in the OLN. The researcher also interviewed the

OLN war immigrants, as well as agencies and International NGOs that have been involved in this operation. Scholars and experts on war and conflict will also be consulted to generate intelligent conclusions.

1.7 Literature Review

1.7.1 Introduction

Considerable literature has been accumulated on the subject of war. This section seeks to review literatures on war and provisions for just war. It will review literature on the justification of going to war, including critical analysis of sources of conflict, the emerging concept of war on terror and the moral frameworks that govern warfare. The section will also consult publications, charters and philosophical arguments of the compliance with rules of war and possible post war justices. This review will be approached in the prism of Kenya's intervention in Somalia in pursuit of the Al Shabaab, Kenya's conduct during the intervention and the post war implications for Somalia and Kenya.

1.7.2 Justification of going to war

The world over, states have gone to war for various reasons. Some were justified, some not. Rational actors, ideally, go to war when negotiations for peaceful solution on object of conflict collapse. When such war decisions are made, the actors anticipate that gains of the war will outweigh the input. Gains in this case could be restoration of loot, peace, resources, power, glory, territory, or an end to suffering caused by an aggressor. Alternatively, it could be for punishing an aggressor.

States have waged wars against states and against insurgents. The US for instance waged war against Vietnam in a bid to neuter the rise of communism. It also waged war in Iraq ostensibly in pursuit of Weapons of Mass Destruction. The Iraq war has drawn interest of scholars because it is recent and was embroiled in controversy of legitimacy. However, the joint Resolution to Authorize the Use of US Armed Forces against Iraq which, which Congress endorsed, noted that “war turned out to be a major international issue of concern with critics arguing that it did not pass the threshold of *jus ad bellum*. For instance, Richard Falk noted that, America used humanitarian benefits to justify the war because the security premise was not watertight.¹⁹ Indeed, that is why when no WMD were found, the war was discredited...”²⁰ The Gulf War for instance has remained a major cause of disagreement as to whether it was justified or not. Then, lately, the US waged one of the biggest wars of the millennium when it attacked the Taliban in Afghanistan in the war against terror.

The UN, which was founded on the premise of peace, largely dissuades aggressive behaviour by states against others. However, the UN Charter provides two exceptions for waging a war: for self-defense as captured in Article 51; and in the principle of collective security which allows preventive forces by nations for peace as postulated in Article 39.

Nevertheless, beyond being an ethical issue, *jus ad bellum* is also a legal issue. International law such as the Geneva Conventions too has codified these circumstances of going to war.

¹⁹ Falk, R. “Future implications of the Iraq conflict: What future for the UN Charter System of war Prevention?” *American Journal of International Law*, 590, 597, July 2003.

²⁰ Patrick, D. P., “Just war theory and the 2003 decision to invade Iraq.” United States Army War College, 2013.

War on terror is now a global endeavor that is asymmetrical in nature. It gained impetus from September 11, 2001 when the al-Qaeda terror network bombed the Twin Towers in New York City. The terror strike marked a turning point on how the World would react to terror and its agents going forward. The then President Bush declared a war on terror. He described any military action as a campaign against terror. He argued that it was other mechanisms such as diplomacy, economic sanctions, intelligence system had already been invoked in 38 states.²¹

The US marshaled support from allies and waged war on the Taliban government in Afghanistan. Indeed, whilst states have the absolute responsibilities in their internal affairs, an external intervention is also appropriate as informed by the international community's doctrine of R2P. Policies effected in documents for example, the 2002 US National Security Strategy²² prescribe conditions that legitimize intervention to pursue of WMD or to root out terrorists. Therefore, Carter²³ and colleagues argue that failure of states to control terror or heinous activities within their borders withdraws their sovereignty and therefore affords concerned nations the reason to action act for self-defence. This form of intervention is pegged on the emerging doctrine of Contingent Sovereignty.

Philip Zelikow in 1998 co-authored a report on the doctrine of contingent sovereignty and observed that internationally accepted norms should adapt to this doctrine so that

²¹ Bush G. W., *George W. Bush address to the nation*, October 7, 2001 <http://www.press.uchicago.edu/Misc/Chicago/481921texts.html>

²² The National Security Strategy of the United States of America, September 2002. <https://www.state.gov/documents/organization/63562.pdf> on May 9, 2017 at 2213 hrs

²³ Ashton, B. et al., "Catastrophic Terrorism: Elements of a National Policy." With John, M. Deutch and Philip, Zelikow. "Preventive Defense Project publications." vol. 1, no. 6, Center for International Security and Cooperation (CISAC), Stanford University, October 1998.

such states are responsible for reassuring others that they are not a threat to them in any way including developing weapons of mass destruction or harbouring criminals. In the event that this guarantee is not given, then the concerned states can defend itself.²⁴

Hass notes that support for terrorism is not just as active assistance; it includes failure by a state to take steps to curb terrorist activities within its territory. That is, a state is expected to effectively control its politics and have monopoly on all issues within its territory, failure to which its sovereignty may be deemed contingent.²⁵

Controversy and confusion surrounded diplomatic engagement between Kenyan officials and their Somalia counterpart in relation to Kenya's intervention. Soon after Kenya's entry to Somalia, the two countries entered into a pact to support the operation to flush out Al Shabaab. On October 18, 2011, Kenyan delegation was hosted by the President of Somalia Sharif Sheikh Ahmed in Mogadishu to work out modalities on security partnership that would defeat Al-Shabaab. The agreement was signed between Kenya's Defence Minister Mohamed Yusuf Haji and his Somalia counterpart Hussein Arab Isse. However, soon afterwards, the Somalia President disowned the agreement.²⁶²⁷In June 2012, OLN ended. KDF was incorporated into AMISOM.²⁸

²⁴Ashton B. Carter, John M. Deutch, and Philip D. Zelikow. "Catastrophic Terrorism: Elements of a National Policy." Cambridge MA: Visions of Governance for the Twenty-First Century, 1998, www.ksg.harvard.edu/visions/publication/terrorism.htm.

²⁵Richard, N. Hass. "Sovereignty: Existing Rights, Evolving Responsibilities." Remarks to the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, January 14, 2003. www.state.gov/s/p/rem/2003/16648.htm.

²⁶Australia Broadcasting Corporation, "Somalia president speaks out against invasion" October 25, 2011

²⁷CNN Wire Staff. "Somali president speaks out against Kenya's incursion." *CNN*, October 25, 2011 retrieved from <http://edition.cnn.com/2011/10/25/world/africa/somalia-kenya/>

²⁸Pius, T. Migue. "Operation Linda Nchi." Nairobi: Ministry of Defence, 2014.

As argued before, the compliance of right conduct of war is complete not just on philosophical terms but also in legal terms. The Geneva conventions provide a strong framework under international law. For instance, article 5 (2) of Geneva III provides crisp guidance on how to treat prisoners of war including provision of full protection to the point when a competent tribunal will determine their fate and status.²⁹

The doctrine of just cause is critical as a mechanism of forestalling the abuse of the war process. This means that once the just cause element has been achieved, the war should end, if not, continuation of such a war now lacks justification and thereby impermissible.³⁰ Importantly, in a democracy like Kenya, citizens have the right to make judgements about going to war.³¹

1.7.3 Compliance to the right conduct of war

Though warfare by nature is a destructive enterprise, belligerents are required to act within certain moral frameworks known as *jus in bello*. This doctrine, ideally, is anchored on humanitarian and human rights principles engineered to reduce suffering during war such as extreme inhuman treatment of populations and or prisoners of war. This means that acts of war should not cause unintended, unjustified or gruesome suffering. In fact, Article 22 of the Hague Conventions guided that belligerents are limited in extend of which they can injure the enemy. The right conduct of war thus means that belligerents will desist from using prohibited weapons like those of mass destruction, use of hollow point bullets, or poisonous gases. They also prohibit war

²⁹ International Committee of the Red Cross. "Treaties, States Parties and Commentaries." <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vw>

³⁰ Jeff, McMahan. *Just cause for war*. Retrieved from http://www.philosophy.rutgers.edu/joomlatools-files/docman-files/Just_Cause_for_War.

³¹ Andrew, Fiala. "Practical Pacifism, jus in bello and citizen responsibility: The case of Iraq. Ethical Perspectives." *Journal of the European Ethics Network*. 13, 4 (2006): 673-697

excesses like destroying towns, villages, and historical and cultural sites. The US forces were also accused of humiliating Islamic prisoners at Abu Ghraib during the Iraq War. But the Vietnamese combatants too flouted international law by not identifying themselves and by hiding in the civilian population.

Though conventions exist to prohibit use of chemical weapons, Syria has used chlorine and sarin gases against its citizens in violation of the law.³²

When the U.S fought the Vietnam War, there were complaints about improper conduct. For instance, in March 16, 1968 US troops slaughtered over 300 unarmed civilians in My Lai village. Yet, the Theory of War proscribes such collateral damages.

On compliance to the war conduct, apart from philosophical underpinnings, the just war theory contents that compliance with international law is critical.³³ These laws are largely codified under the International Humanitarian Laws (IHL).³⁴ The laws widely guide show to treat and care for war prisoners, wounded soldiers and wounded non-combatants during conflict. For instance, biological and chemical weapons are prohibited in the Geneva Protocol.

1.7.4 Justice after war (*jus post bellum*)

Ethics and justice of war does not end when the last shot has been fired. In any case, that is when sobriety that makes sense of the entire war enterprise – justification of going to war and belligerents' conduct during war, are put to perspective and

³² Human Rights Watch. "Syria: Coordinated chemical attacks on Aleppo." February 13, 2017. <https://www.hrw.org/news/2017/02/13/syria-coordinated-chemical-attacks-aleppo>

³³Jeniffer, L., "Was the Afghan conflict a just war?" *BMJ*. 324, no. 7333. February 9, 2002. Accessed November 28, 2017. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1122274/>

³⁴ Red Cross. "Summary of the Geneva Conventions of 1949 and their additional protocols. International Humanitarian Law." April 2011

subsequent actions follow accordingly. Thus, justice after war is easily the collection of laws, norms, and doctrines applicable during the transition from armed conflict to peace.

This concept was first championed by Brian Orend and seeks to justly and competently conclude conflict. One example is the Sudan in the implementation of CPA since 2005.³⁵ In the example of Kosovo, United Nations Resolution No. 1244 of 1999 urged the EU and other international bodies to design an elaborate a strategy that would boost the economy, and offer stabilization in the region after the Kosovo conflict.³⁶

In this reconstruction endeavor, CSIS vouches for local participation. It notes that native participants should have the principal duty to play dominant roles throughout the rebuilding process, given that their own future that is under threat.³⁷ Indeed, it has developed a framework revolving around four focus areas: social and economic well-being, security, justice, social, reconciliation, and governance and participation.

Transition from conflict to peace, is still a nascent area that is developing. It is for this reality that experts of just war theories have critically explored the *jus post bellum* framework as critical component to complete the Just War Theory. In essence, *just post bellum* deals with justice after war or management and restoration of peace after war.³⁸

³⁵ African Union Peace and Security. <http://www.peaceau.org/en/page/70-post-conflict-reconstruction>

³⁶UN Security Council Resolution 1244 (1999), <http://www.unmikonline.org/misc/N9917289.pdf>

³⁷ CSIS. "Post Conflict Reconstruction task framework report." retrieved from <https://www.csis.org/analysis/post-conflict-reconstruction-task-framework-report>

³⁸Nollkaemper, A., and Schrijver, N., Forward to *Jus post bellum*. Carsten, Stahn & Jann, K. Kelffner (Eds.) T.M.C. The Hague: Asser Press, 2008.

For instance, prisoners of wars cease to be aggressors once captured and as such, when the war ends, the just manner of handling such cases is to repatriate them. It is expected of the antagonist to reciprocate unless otherwise the prisoners of war violated international human rights laws and committed war crimes that then calls for their post war trials.

Jus post bellum is also interested in reconstruction after war affording for post-conflict recovery. A classical case of such a recovery is the Marshall Plan- a \$13 million American effort to rebuild Europe after the war. This effort, front by the U.S.A succeeded in stabilizing Europe and rehabilitating German and Japan and thrust them on the path to socio-economic and socio-political prosperity. In Africa, the African Union too has developed a policy on rebuilding after a conflict called the Post Conflict Reconstruction and Development (PCRD), which is a crucial area of AU support for reconstruction efforts.

Jus post bellum spells out the terms to be met so as to conclude a conflict; provides conditions for the end of war; guides on construction of peace treaties; cessation of hostilities as peace negotiations for peace are ongoing whereby warring parties try to act for terms that favors them and to control for unfriendly peaceful resolutions.

Just settlement for a just war, therefore, demands that certain conditions and thresholds must be complied with. They include: that unjust benefits from belligerence must be removed; assailants must be punished in twofold i.e. a) Reparation for damages during war b) Legal action for those involved in war.

Drafting of a new constitution is also a fundamental facet of *jus post bellum* – political environment has to be redesigned to avoid slipping back to conflict. Thus all the measures of constitution making – including consultation, public participation in debating the issues and a referendum, have to be factored. This way, nations are able to merge and convey a common future and by providing an internationally acceptable standard on governance and the rule of law that all and sundry will be comfortable in. Such countries like Liberia, South Sudan, Haiti and even Kosovo adopted new constitutions after conflict.

The Nuremberg trials (1945-46) are some of the famous post war justice. The series of 13 trials were designed to bring to justice the Nazi criminals after World War II. Our latest post-conflict institution is the International Criminal Court (ICC) where war criminals are brought to justice. So far, Charles Taylor the former leader of Liberia has been jailed by The Hague based court. Then, there was the UNTR that was in Arusha to try the aggressors of Rwanda Genocide of 1994. Another example is the ICTFY to try war criminals during the Yugoslavia war.

Post-conflict reconstruction is a critical stabilizing mechanism in a bid to prepare the states for order, peace and posterity. The most famous post-conflict reconstruction is the Marshal Plan designed for Europe, which was an economic and infrastructural development, designed to bring Europe to its feet after WWII. Established institutional framework outdo external in solving such underlying problems with the duty and capability to lessen the disparities to the levels that are usually seen to be ‘fair’.

It should be appreciated that wars cause major destruction on a country's infrastructure, and has far-reaching social and psychological debilitating impact. It dismantles legitimacy on the rule of war and destroys means of economic production.

There is also a valid need to provide security for the victim against future attack. This can be done through demilitarization, setting up a peacekeeping force and/or political rehabilitation of the aggressors. In Colombia for instance, the Farc rebels are being rehabilitated into mainstream politics³⁹. There is also talk to absorb the Taliban in Afghanistan into the political system as a way of just conclusion to the war.

It is also crucial that all the terms for settlement should be made public. This is critical to allow for debate around the terms and seek for public endorsement. In the same breath, political leaders, soldiers, and civilians must be clearly distinguished and their roles clearly spelt out to avoid grey areas that may degenerate into more conflict.

Judicial justice must be established to hold to account aggressors for war crimes in a fair and just manner. The ICC for instance has been designed to deal with war crimes. There have also been a number of post-war trials such as the Nuremberg trials on the Nazis after the WWII and ICTR after the genocide in 1994. Retributive justice is critical for stability and closure. Indeed, "retribution requires the imposition of a just and appropriate punishment, and nothing more". Civilians have to be protected from disciplinary measures like comprehensive sanctions because this will subject them to further suffering and indignity.

³⁹ Julia, S. C., "Colombia's FARC will fight on as political party, rebel leader says." *Reuter* September 17, 2016 retrieved from <http://www.reuters.com/article/us-colombia-rebels-conference-idUSKCN11N0JX?il=0> retrieved on May 4, 2017

To conclude, *jus post bello* is a critical phase that calls for a firmer theoretical and philosophical framework. While indeed, war at first is justified under certain principles, the operation of the war itself does not quite follow a surgical precision. It means that in such a process, normally chaotic and emotive, divergence from moral, legal and ethical framework is real. It therefore begets a *jus post bellum* reality to address any such transgressions.

1.7.5 Al Shabaab: Rise, Doctrine and Retaliation

Al-Shabaab (Harakat al-Shabaab al-Mujahedeen) means the ‘youth’ in Arabic. It is an Islamist outfit focused on imposing strict sharia Islamic Law on Somalia. It sprouted to life in 2006 from the radical youth wing of Somalia's now-redundant UIC. But in December 2006, in the Battle of Jilib, Ethiopian and TFG forces defeated the UIC in Mogadishu⁴⁰. By August 2010, Al-Shabaab became an independent organization that controlled the majority of South and Central Somalia.

Al-Shabaab propagates the Saudi-inspired Wahhabi form of Islam; most Somalis are Sufis.⁴¹ Al Shabaab is also linked to the Al-Qaeda terror network that has been responsible for numerous terror attacks worldwide. With time, Al-Shabaab emerged as a prolific militia with fighting power geared towards establishing an Islamic State in Somalia and an Islamic Emirate in the adjacent region. It is also designed to launch a Jihad war against the West and all what it describes as “enemies of Islam.” According to Radio Aljir, Al-Shabaab want to free the region of Christianity and make it a Salafi-Islamic State, and then soldier on to Islamize the world.

⁴⁰Barnes, Cedric, and Harun Hassan. “The Rise and Fall of Mogadishu’s Islamic Courts.” Chatham House, April 2007.

⁴¹ BBC. who are Somali Al-Shabaab?

Omar Hammami (Abu Mansour al Amriki) the al-Shabaab American commander looks at the group's main goals as creation of a global caliphate. According to Chris Harnisch, Al-Shabaab has a global goal - establish an Islamic Caliphate the world over.⁴²

The military organization of the militants comprises five distinct sub-groups:

Abu Dalha Al-Sudaani: Lower and Middle Juba; Sa'ad Bin Mu'aad: Gedo; SaalahNabhaan: Bay and Bakool; Ali Bin Abu Daalib: Banaadir, Lower Shabelle, Middle Shabelle; Khaalid Bin Wliid: Hiiraan, Mudug, Galgaduud and Liwaa'ulQudus: Eastern Sanaag and Bari regions "Sharqistan"⁴³

In 2007, Al Shabaab embarked on a large scale recruiting campaign to expand the network to international milieu. It fundraised from sympathetic Somalis in diaspora and other Islamists. The militants also made money through the seaport of Kismayo until it was liberated by the KDF.

UN reported that in 2011 that Al-Shabaab revenue amounted between \$70 and 100 million. These income were collected from fees imposed on seaports and airports, members' contribution and checkpoints.⁴⁴ Such illicit financing is critical to any terror group to sustain the fighting internally and externally.

⁴² Chris, Harnisch. "The Terror Threat from Somalia." *Critical Threats*. February 12, 2010, pp. 24. http://www.criticalthreats.org/wp-content/uploads/2016/07/CTP_Terror_Threat_From_Somalia_Shabaab_Internationalization-1.pdf

⁴³ Igor, P. "Terror in East Africa: Al Shabaab." *Global Research*. June 21, 2016.

⁴⁴ UNMGSE, 2011, p. 27.

The first attack by Al-Shabaab in Kenya happened in May 2008 in which the organization's fighters attacked Liboi Police Station in Garissa County. They set free nine inmates, three of whom were suspected to have links with Al Qaeda. The Al-Shabaab aims at establishing an Islamic state with full enactment of Sharia laws and chasing non-Somalis from Somalia.

Since the start of *Operation Linda Nchi*, there have been massive casualties both in Somalia and in Kenya. Al-Shabaab has consistently indicated its motive to strike Kenya's interests as a protest of KDF's presence in Somalia. According to the BBC, Al-Shabaab says it is targeting Kenya because it has sent its troops into Somalia territory.⁴⁵ As such, the attacks are designed to cause harm and force KDF to retreat. On January 15, 2016, al Shabaab announced the killing of about 100 Kenyan soldiers in El-Ade camp⁴⁶. The explosive used, according to the KDF Chief of Staff, General Samson Mwachethe was three times powerful than that which was detonated on the US embassy in Kenya in 1998.⁴⁷ In 2013, Al-Shabaab attacked the Westgate Mall Shopping Centre in Nairobi in which 68 people were killed⁴⁸. On April 2, 2015, Al-Shabaab hit the Garissa University. It killed 142 people as it targeted the Christian population. Then, there was an attack at Mpeketoni, Lamu. Al-Shabaab claimed responsibility, though the Kenya Head of State, Uhuru Kenyatta, disputed the allegation instead attributing it to domestic politics. In 2014, al-Shabaab struck a mine in Mandera and

⁴⁵ "Why is al-Shabaab targeting Kenya?" *BBC* April 3, 2015. <http://www.bbc.com/news/world-africa-32174235> retrieved on May 2, 2017.

⁴⁶ Paul D. Williams. "The Battle of El-Adde: The Kenya Defence Forces, Al-Shabaab and Unanswered Questions." *International peace Institute*, July 2016

⁴⁷ "Kenya troops killed by 'huge bomb' in Somalia attack January." *BBC 21 2016*.

⁴⁸Howden, D. "Terror in Nairobi: the full story behind al-Shabaab's mall attack." *The Guardian*, Friday October 4, 2013

targeted Christians, killing 36⁴⁹ a move consistent to its doctrine of wiping off infidels. According to Dorothy Otieno, Kenya has had 448 cases of terrorism since the first one in 1975 and 219 of these have been perpetrated by Al-Shabaab.⁵⁰

1.7.6 Research Gap

A lot of information has been generated around OLN and the situation in Somalia in general. However, no study known to the researcher tackled the offensive from the Just War Theory. It is for this reason that existed a research gap that this study is filling.

1.8 Theoretical Framework

Introduction

The Just War Theory will guide this study. The theory is the most influential in relation to reason, morals and justice of wartime. The Just War concept traces its roots to Roman and Greek philosophy. Even Cicero guided that only legitimate wars be fought for the empire and that moderation was desirable to reduce violence. The main proponents of this theory include St. Augustine, Hugo Grotius, St. Thomas Aquinas, Francisco de Vitoria, and Immanuel Kant. This theory is critical in that it establishes criteria of engaging in war and on how belligerents ought to conduct themselves during war. The parameters in this theory are designed to minimise warfare on superfluous premises. They also discourage wartime excesses and human suffering. Indeed, disregard of these laid down laws, one will be deemed to have committed war crimes, which is punishable under international law. Just War theory, classically had two sets – justification of going

⁴⁹ Gentleman, J. 'Militants divide Kenyan miners by religion, then begin killing,' *New York Times*, December 2, 2014 retrieved from https://www.nytimes.com/2014/12/03/world/africa/mandera-kenya-quarry-shabab-killing.html?_r=0 retrieved on May 1, 2017

⁵⁰ Otieno, D. 'How KDF Somalia incursion changed Kenya.' *Daily Nation* October 16, 2015

to war and correct conduct during war. It is St. Augustine of Hippo who coined the phrase “just wars” in his treatise, *City of Man; City of God*.

But, say they, the wise man will wage Just Wars. As if he would not all the rather lament the necessity of just wars, if he remembers that he is a man; for if they were not just he would not wage them, and would therefore be delivered from all wars.⁵¹

Thus, Ramsey rightly postulates that Augustine was a pioneer of the theory maintaining for a war that is just. This thinking has consequently informed Christian thought in the Western world on matters war.⁵²

A new dimension on post war behaviour and justice is emerging in scholarly discourses called *jus post bellum*.

With time, parleys such as the Geneva and Hague Conventions have been instrumental in codifying the theory into law. The theory is now anchored on three main principles i.e. *jus ad bellum*, *jus in bello* and *jus post bellum*.

1.8.1 Justification of going to war

This doctrine establishes the normative principles to be satisfied by states before going to war. It is mainly associated with St. Augustine of Hippo. Augustine developed the principles for going to war as just cause, competent authority especially in invoking and authorising the war. Competent authority in this case is a constitutionally mandated institution like that of the Commander-in-Chief, citizen’s representative that is the parliament. Other principles are: right intention, probability of success, and that war should be waged as a last resort especially when other peaceful mechanisms like diplomacy have been tried and failed.

⁵¹ St. Augustine. *City of God*. Book XIX: Chapter 7.

⁵² Ramsey, P. “The Just War according to St. Augustine,” in *Just War Theory*, ed Jean Beth Elshtain (New York: New York University Press, 1992), 8.1

Later, almost 1,000 years after Augustine, St. Thomas of Aquinas buttressed the concept of *jus ad bellum*. Aquinas writing in *Summa Theologica* noted three key principles that should inform a state before going to war: It has to happen for a noble and authentic purpose; must be conducted by a legitimate authority and it has to focus on peace even in the midst of violence.

1.8.2 *Jus in bello*

Jus in bello refers to the rules of engagement during war. It therefore spells out the right conduct of war. Indeed, though war is a chaotic painful engagement, the international legal system has overtime established and refined rules of engagement during war. This is called *jus in bello*. The crux of this position is to ensure that all wars are fought in the most humane way possible. This will help to reduce civilian casualties, protect the dignity of civilians and ensure that prisoners of war are cared for humanely. Rules of the right conduct outlaw the use of certain artilleries and weapons of mass destruction such as poisonous gases.

Thinkers have codified key principles to consider for *jus in bello*: avoid usage of weapons prohibited under international law; never intend deaths of civilians; only target combatants; apply only proportionate power to achieve the end goal. Do not use unnecessarily too much force and treat prisoners of war humanely -they have been captured and therefore pose no threats. Such approaches as genocide or rape are prohibited; according to this doctrine, even if the enemy breaks these rules, armed forces are not permitted to break them.

1.8.3. *Jus post bellum*

Justice after war is emerging as a critical aspect of the War Theory. Indeed, there have been desires to develop principles after cessations of hostilities since those who came up with, and polished the just war theory did not accord sufficient thought to the scenario after war.⁵³ Proponents of the framework are convinced that little attention has gone to *jus post bellum* in designing rules of war in the in the last two centuries.⁵⁴

Thus the post-war mechanism seeks to achieve peaceful, just and fair settlement after combat. Though not captured fully in the original Just war theory, scholars and thinkers have been remodeling this concept.

Such scholars as Gerry Bass have been strong proponents of *jus post bellum*. To Gerry, even when a state fights to kick out a regime that is genocidal, but then leaves residues of weapons, lawlessness, grievance, such a state relinquishes its original justification of fighting.⁵⁵

Based on Gerry's submission, a war is only just when the end result is justice and peace. That is why, scholars such as Brian Orend, also a key proponent of the after war justice, developed five-point approach on the same.

Just Cause termination: at the end, reasonable vindication of rights whose violations triggered resort to war. Victims' rights must be restored through punishment, compensation and rehabilitation. Right Intention: The post-conflict phase should not be

⁵³ Williams, E. R., and Cladwel, D. "Jus Post Bellum: Just war theory and the principles of just war peace." *International Studies Perspectives*. 7 (2006): 302-320.

⁵⁴ The Jus Post Bellum Project Home Page. <http://juspostbellum.com> accessed on Sunday July 11,2017.

⁵⁵Bass, G.J., "Jus Post Bellum". *Philosophy & Public Affairs*. 32(4), (2004): 386

guided by revenge. In this phase, it is prudent to follow due process and fairness in the prosecution and punishment of the war crimes associated with jus in bello. Public declaration and legitimate authority at the end of the war, the termination must be made public via an authority as prescribed in law. Discrimination: the terms of peace and the post conflict rehabilitation and reconstruction must differentiate between: political military leaders, soldiers and civilian population. Proportionality: The terms of peace must be proportionate to rights vindication and the people of the defeated state must never forfeit their human rights.⁵⁶

1.9 Research Methodology

1.9.1 Introduction

The study employed qualitative research methods. Qualitative methods involved primary data collection (questionnaires and interviews). This method was used on officials of departments involved in defense, interior and foreign affairs and international organizations. This was purposive random sampling in which informants have specific information required for the study.

Further, the qualitative method involved an in-depth study of documents (treaties, reports and protocols), published books, papers, journals as well as the Internet and unpublished works that were used as secondary sources of data. Unpublished works such MA Theses from IDIS were also consulted. The researcher also made use of the Jomo Kenyatta Memorial Library (JKML) and other libraries during the research.

⁵⁶Brian, Orend. "Terminating Wars and Establishing Global Governance. (1999). 259

1.9.2 Research Design

The researcher employed the case study research design. The qualitative approach to research, John Creswell noted, is apt for natural settings and key for capturing opinions of respondents.⁵⁷ This involved an in-depth study of the Operation Linda Nchi offensive as waged by the KDF against the Al Shabaab. Therefore, the researcher obtained data and insights from GOK's foreign policy on Somalia, KDF strategies during OLN, and Al Shabaab's strategies and operations and eventually made conclusions anchored on the fundamentals of the Just War Theory.

1.9.3 Instruments for Data Collection

The researcher used the following instruments to collect data for this study: interviews and readings.

1.9.4 Data Collection

The study exploited both primary and secondary data. The researcher carried a series of semi-structured in-depth interviews with officials of organizations and state agencies involved in the OLN including KDF, Ministry of Defence officials, International Law and Security experts. Boyce and Neal describes in-depth interviews as qualitative research techniques involving "intense individual interviews." Such interviews normally are fit for a tiny group of respondents for purposes of exploring in depth insight and perspectives on a topic, issue, or program.⁵⁸

⁵⁷ John, W. Creswell. "Research design: Qualitative, quantitative and mixed approaches (3rd edition)." London: Sage, 2009.

⁵⁸ Caroline, Boyce, and Panella, Neale. "Conducting in-depth Interviews: A Guide for Designing and Conducting In-Depth Interviews." Pathfinder International Tool Series, 2006.

Semi-Structured interviews are desirable for high impact and deep information gathered from executives and scholars. They are also flexible to allow for clarification and for follow-up questions. Rasmussen and Erik, affirms as much and recommends interviews for this kind of qualitative study.⁵⁹ Before the data collection, the researcher trained five interviewers. The researcher and the interviewers ran a series of mock up interviews to ensure standardization and internalization of the key aspects of the questions, including developing follow-up questions. Secondary data was obtained from intensive reading conducted on relevant literature to extract required facts about OLN. These included International Law documents, International Treaties, Academic papers, Conference proceedings, expert opinions, speeches, theses and dissertations on the subject, journals and books.

1.9.5 Target Population

Target population for this study was in Nairobi. The population falls under two broad categories; specified population and unspecified. The study's population was specified given that the study theme is specific. The target group was officials of the KDF, Ministry of Defence, Ministry of Foreign Affairs, International Relations scholars and experts, and organisations associated with human rights, diplomacy and security.

1.9.6 Data Reliability and Validity

The validity of the data used in this research was upheld by obtaining it directly from relevant officials of the state agencies and organizations involved in OLN.

⁵⁹ Rasmussen, S. and Erik, S. "Essentials of social research methodology." Odense: University of Southern Denmark, 2006.

Secondary data was be extracted from internationally accredited books, journals and articles and also official government documents, treaties, protocols and reliable online sources.

1.9.7 Data Analysis

The researcher used thematic content analysis for qualitative data. Boyatzis defines Thematic Analysis as a type of qualitative analysis. This type is applicable in analyzing classifications and present themes (patterns) that relate to the data. It illustrates the data in great detail and deals with diverse subjects via interpretations.⁶⁰

This method was considered most viable considering that the objectives of the study are thematic and therefore establishing patterns in responses was deemed critical. Coding for the data was both deductive and semantic. Deductive to pick from already pre-determined themes as per the Just War Theory, semantic to provide a more nuanced perspective on the themes.

1.9.8 Ethical Considerations

The researcher maintained high level of confidentiality in relation to information gathered and the protection of interviewees. The researcher also dully acknowledged all the secondary sources of data and remained objective in the handling and analysis of obtained data.

⁶⁰ Richard, E. Boyatzis. "Transforming qualitative information: Thematic analysis and code development." London: Sage Publications, 1998.

1.10 Chapter Outline

Chapter One- This provides background information of the study, justification of the study, literature review and research methodology.

Chapter Two- Will focus on the justification of waging OLN, scholarly works on the appropriate war doctrine, findings and analysis.

Chapter Three – Focuses on the right conduct of war in light to the OLN. It also contains findings, and analysis.

Chapter Four- The chapter tackles objective number three in relation to post conflict justice. It will also have findings and analysis.

Chapter Five- Provides summary, conclusions and recommendations from the study.

CHAPTER TWO
KENYA’S JUSTIFICATION FOR GOING TO WAR WITH AL SHABAAB
USING JUS AD BELLUM FRAMEWORK

2.1 Introduction

On October 14, 2011 the KDF crossed Kenya’s international border into the sovereign territory of Republic of Somalia in pursuit of the al Shabaab terror group in a project dubbed OLN. By 2017, KDF was still in Somalia fighting though absorbed by AMISOM. Such cross-border aggression attracts the attention of the UN Charter of 1945. While the central tenet of the charter, as outlined in the preamble, is for a pacific world, it offers a window, especially in article 51, on conditions precedent for a state to go to war and that is mainly for self-defense. Beyond the UN Charter, the Just War Theory outlines conditions precedent for a just war. This chapter will therefore assess Kenya’s justification of going to war in Somalia and if the reasons mesh up with the tenets of jus in bellum.

2.2 Kenya’s justification of going to war in light of Jus ad bellum

The history of societies has been that of wars. From the Roman wars to the medieval ones like the 30-years War to the World War I and II, to as late as the war on terror waged on Iraq and Afghanistan, belligerents were guided by certain principles. These rules have now been codified as Jus ad bellum or reason why states go to war.

2.2.1 Competent Authority in authorizing for the Somalia Intervention

Responsibility of declaring war rests with a legitimate authority in tandem with a country’s constitution. While Kenya’s president, Mwai Kibaki, sanctioned the war against Al-Shabaab, the Kenya constitution vest that authority to parliament. Yet there

are no parliamentary documents to show that indeed the people's representatives actually discussed the proceedings in parliament.

Indeed, in Kenya, sovereign authority belongs to the people Chapter One 1) Constitution of Kenya 2010. This sovereign power is exercised individually or through democratically elected representative (2). A constitutionally elected government, which starts a war without the consent of its citizens, can be accused of engaging in an unjust war.⁶¹ In this case, the sovereign will of the people is represented in the national assembly. But that was not the case and experts of law validity of the war. In a personal interview with Hassan Kulundu, a lawyer in Nairobi, the OLN lacked the support of the sovereign people of Kenya.

“Kenya, in declaring OLN did not seek the clearance of parliament. The president should have convened parliament and table the bill to allow for the state to wage war against the Al-Shabaab. This ultimately rendered the war unjust.”⁶²

The Constitution of Kenya is explicit on the process declaring war. In line with article 95 (6) and 132 4(e) the president requires to get approval from parliament. Parliamentary approval is consistent with Orend's requirements that “the people must, in some public procedure, meaningfully consent the launching of a war on their behalf.”⁶³

After KDF had made the incursions, parliament was informed by the then Assistant Minister for Interior Mr. Orwa Ojode (now deceased) and received intense opposition.

⁶¹Austine, Cline. “Jus ad bellum and the pursuit of war.” March 21, 2017. <https://www.thoughtco.com/just-war-theory-p2-250987>

⁶² Hassan, Kulundu. Lawyer, Nairobi in an interview on July 25, 2017 in Nairobi.

⁶³ Orend, Brian. *War and International Justice: A Kantian Perspective*. Waterloo, Ontario: Wilfrid Laurier University Press, 2000.

There is therefore a possibility that the Kenyan Parliament would have objected the war had it been consulted earlier. These scenarios robbed the war of its legitimacy as lacking the will of the sovereign people of Kenya.

Yet, thinkers like Cicero and St. Augustine reaffirmed the primacy of a competent authority in declaring a war to be battled only by state soldiers. Indeed, a just war must be initiated by a political authority within a political system that allows distinctions of justice.⁶⁴

2.2.2 Just cause for Operation Linda Nchi

The just cause doctrine addresses the ultimate reason of waging a war. It responds to a wrong committed by a belligerent. Yet, post-World War II international law, especially article 2(4) of the Charter prohibits states from going to war.

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.⁶⁵

Still, the UNSC in Chapter VII can authorize war to keep peace and for self-defense.

Moreover, the Charter, in Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.⁶⁶

Invoking the just cause doctrine, states may go to war to defend their sovereignty and territorial integrity. By going to Somalia, Kenya argued that that her territorial integrity had been violated by the al-Shabaab. Thereby Kenya strongly cites the article 51 UN

⁶⁴First published in 1944, Ford's article has been reprinted as, John C. Ford, S.J., "The Morality of Obliteration Bombing," in Richard B. Miller, ed., *War in the Twentieth Century: Sources in Theological Ethics* (Louisville: Westminster John Knox Press, 1992), 138-177.

⁶⁵ UN Charter

⁶⁶ Ibid

as a key justification to wage war against Al-Shabaab in Somalia. But beyond the UN, thinkers of the morals of war also have provisions for fighting in self-defense. The Catholic Church for instance in the Catechism of the Catholic Church (1992) is supportive of "legitimate defense by military force"

Al-Shabaab had caused massive havoc and threatened Kenya's \$750m tourism industry. The terrorists were linked to a number of bombings in the country and in the abduction of western tourists.

The last straw was when two Spanish aid workers with *Medicines Sans Frontiers* (MSF) were kidnapped in a Daadab refugee camp near the Kenya-Somalia border on 13 October 2011.⁶⁷

However, Nelius Makena, a Nairobi-based consultant on international relations questions the wisdom of waging a war based on such scenario as "kidnapping."⁶⁸

"That was an over-reaction to wage war because of isolated cases of kidnapping. It would have been easier to treat the incidents as a criminal and not necessarily as a threat to Kenya's territorial integrity. Kenya cannot justify the war based on such a justification."

According to KDF, Kenya was responding to Al Shabaab's criminal activities that were a threat to security, countering armed attacks with force.⁶⁹ It was also a way of preserving and upholding the "sovereignty and territorial integrity" of Kenya and Somali from within and without threats.⁷⁰ These premises have strongly been disputed by experts of international law who argue that the country's territorial integrity was under no threat of an external aggression.

Operation Linda Nchi was therefore the only way to deal with the problem.⁷¹ The goal of Kenya's policy to pursue al-Shabaab in the territory of Somalia was to provide a

⁶⁷Pius, T. Migue. "Operation Linda Nchi." Ministry of Defence. Nairobi: 2014, pg. 7

⁶⁸ Nelius Makena interviewed by Frank KImani, Nairobi, August 2, 2017.

⁶⁹ *ibid*

⁷⁰ *ibid*

⁷¹ *ibid*

peaceful Jubaland that will secure Kenya's interest.⁷² Kenya therefore responded in accordance to the principle of *war on terror* that has become the preoccupation of civilized nations. On the Somalia invasion, Kenya invoked article 51⁷³ of the UN Charter, and in the spirit of preemption and prevention to forestall continued attacks.⁷⁴

Applying the doctrine of just cause –self-defense and protection of territorial integrity – is a valid argument but partially. Al-Shabaab foray to the country was not quite a declaration of war not did it threatened the territorial integrity *per se*.

At times, effort towards humanitarian intervention are also justified to fight a war. In addition, this is captured under the doctrine of Responsibility to Protect (R2P). This doctrine is in tandem with the emerging global activism thought framework of the centrality of humanitarian rights. Thus, a country can wage a war justly if it is the only way it can deal with a threat its citizens' fundamental rights.⁷⁵ It is worth noting that this doctrine though was not cited nor alluded to by Kenyan authorities, and justifiably so because at the time of the incursion there was no known humanitarian crisis in Somalia.

Yet, scholars such as Waltzer note that resistance to aggression - “violation of territorial integrity or political sovereignty of interdependent states⁷⁶” remains the basic

⁷²Bruton and Williams. “Counter-insurgency in Somalia.” pp. 55–9, 61–2; William, S. K. Reno. “Rethinking counterinsurgency in Somalia.” *CTC Sentinel* 6, 4 (2013): p. 16.

⁷³ Charter of the UN, 1945.

⁷⁴ Khalif A. “Kenyan army in for “mother of all battles.”” www.nationmedia.com

⁷⁵Mednicoff, D. M. “Human Wars? International law, Just War theory and contemporary armed humanitarian intervention.” *Law, Culture and Humanities* 2006;2: 373-398.

⁷⁶Michael, Waltzer. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. New York: Basic Books, 1977: 51-2.

justification for just war. It is these premise that Kenya invoked in her justification to fight al Shabaab in Somalia.

War can also be waged pursuant to sanctioning by the Security Council⁷⁷ after invoking Chapter VII of the UN Charter. For instance, the UNSC approved military action against Libya⁷⁸ that included a raft of operations including airstrikes and no fly zones. The UNSC also approved military action on Afghanistan after the 9/11 attacks and where NATO took the lead in flushing out the Taliban in the new campaign dubbed War on Terror. The UN, under resolution 1383 (2001) established the International Security Assistance Force (ISAF) to maintain security in Kabul. Other reasons for war could be for self-determination. In Africa, Eritrea and Ethiopia were at war between 1998 and 2000. Eritrea had invaded Ethiopia resulting to belligerence and retaliation. The war was about the territory of Badme, which, according to the UN, belongs to Eritrea. Still on the issue of territorial integrity, on August 2, 1990 Iraqi troops violated Kuwait's territory triggering the Gulf War. Indeed, this action offended international law in Article 2(4) of the U.N Charter. Yet, OLN lacked the requisite approvals from UNSC.

Kenya's action in Somalia triggered a chain of catastrophic retaliatory acts from the militias. Indeed, "Al-Shabaab has vowed retribution on Kenya for sending troops in 2011 to Somalia to fight the group..."⁷⁹ In 2013, Al Shabaab attacked the Westgate

⁷⁷Gagro, S. Fabijanić. "The Responsibility to Protect (R2P) Doctrine." *International Journal of Social Sciences* III (1) (2014):1-17.

⁷⁸Bilefsky, D., and Landler, M., *As UN backs military action against Libya the role of U.S is unclear* . (March 17, 2011). <http://www.nytimes.com/2011/03/18/world/africa/18nations.html?pagewanted=all&mcubz=1>

⁷⁹ Associated Press. *Nine Kenyans beheaded by Somali al-Shabaab terrorists* retrieved from <https://www.theguardian.com/world/2017/jul/08/nine-kenyans-beheaded-by-somali-al-shabaab-terrorists>

Mall in Nairobi resulting to 67 deaths. “At midday on 21 September, (sic 2013) Al-Shabaab militants stormed Nairobi’s premiere shopping centre throwing grenades and firing indiscriminately at shoppers. The subsequent siege lasted 80 hours and resulted in at least 67 deaths.”⁸⁰ Come March 10, 2012, a grenade blamed on Al-Shabaab killed six people in Nairobi.

In 2015, Al Shabaab attacked Garissa University College killing 42 students. On November 22, 2014, the group also attacked passengers who were from Mandera to Nairobi, killing 28. Further, Al Shabaab also attacked a quarry in Mandera and killed 36 quarry workers.

On October 14, 2011 the Kenya Defense Forces (KDF) entered the territory of the Republic of Somalia⁸¹ in a bid to neuter the Al-Shabaab terrorist outfit that had visited economic, social and even political anguish at home. Thus OLN marked a major departure on Kenya’s Foreign Policy⁸² towards Somalia, which was primarily on a policy of non-aggression.

Operation Linda Nchi (OLN) was in response to sporadic Al-Shabaab attacks on Kenya. The militants abducted two Spanish Aid Workers working for *Medicines Sans Frontiers (MSF)* at Daadab refugee camp⁸³. They also abducted a British tourist at Kiwayu Safari

⁸⁰ Daniel Howden. *Terror in Nairobi: the full story behind al-Shabaab's mall attack* retrieved from <https://www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya>

⁸¹ Julius, W. Karangi, Preface in *Operation Linda Nchi*. Nairobi: Ministry of Defence, 2014.

⁸³Xan, Rice. “Two aid workers kidnapped from Kenyan refugee camp,” *The Guardian*, October 13, 2011 retrieved from <https://www.theguardian.com/world/2011/oct/13/aid-workers-kidnapped-kenyan-camp> retrieved on May 1, 2017.

Village at the Coast⁸⁴. These abductions prompted the US and some European countries to issue travel advisories to their citizens against visiting Kenya thus negatively affected inflows of tourists.

“If you carefully consider the cost –benefit analysis of the intervention, you will realize that Kenya has been hit harder since the intervention. These reality begets the question as to whether the entire operation was worth it.”

But, the government of Kenya strongly argued that with these excursions, Al-Shabaab had threatened Kenya’s security and violated the state’s territorial integrity in itself an offending norms and laws. Indeed, one of the core legitimizing function of a state is to assure security.⁸⁵ Kenya’s Defence Minister, Yusuf Haji insisted on the country’s right to pursue enemies when attacked. According to Ali Noor, Haji explained that Kenya is trying to push al Shabaab as far away as possible.⁸⁶

Further the Kenya National Bureau of Statistics found a slump in the economy following the Kenya’s intervention in Somalia: Consequently, the tourism earning dropped by 7.3 % from Ksh 94.0 billion in 2013 to Ksh 87.1 billion in 2014. This was attributed to a decrease of 11.1 % in the number of international visitor arrivals over the same period mainly due to negative travel advisories by key source markets.”⁸⁷

Apart from markets, there has been an increase in radicalization of youth by Al-Shabaab who advanced the narrative that the intervention in Somalia was anti-Islam. Indeed, a

⁸⁴ Mathew, H., “Kenya kidnapping: British woman being held by terrorist group al-Shabaab, say Somalia.” *The Telegraph*, September 16, 2011.

<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/8767832/Kenya-kidnapping-British-woman-being-held-by-terrorist-group-al-Shabab-say-Somalia.html> retrieved on May 1, 2017.

⁸⁵ Jammie Scudder, Territorial integrity, modern states and the international system, December 2010.

⁸⁶ Ali, N. “Kenyan ramps up security at Somali border, eyes al Shabaab.” *Reuters*, October 16, 2011

⁸⁷ KNBS “Economic Survey Nairobi: Kenya National Bureau of Statistics. 2015: pg. 211

war is just if the cause being fought for can be achieved⁸⁸. But this was not a war of self-defense because Kenya was not under existential threat. For this reason, invoking Article 51 of the Charter of the UN lacks merit.

2.2.3 Right Intentions in relation to Operation Linda Nchi

States going to war must stick to the just causes that prompted an attack. Hence, as Brian Orend notes, a state can in no way use a just cause to go to war and pursue other objectives it might have such as ethnic animosity or domestic glory. Further, the Just War Theory considers it immoral to wage a war of self-gain – either for territory, natural wealth or for trade. The intention to wage war against Al Shabaab was to neuter further attacks on Kenya and to redress the injury Kenya suffered because of continuous kidnappings and to correct the suffered wrongs. Yet, while it was not explicitly declared, KDF soldiers eventually engaged in illegal trade of charcoal and sugar for self-gain. Though proceeds from such trade are not remitted to the Kenya's exchequer, it is clear that KDF violated this critical tenet of just war by engaging in activities for self-gain.

In February 2012, the export of charcoal from Somalia was banned by the UNSC aimed at starving the key sources of income for al Shabaab.⁸⁹ Yet, a UN report exposes that KDF is facilitating the sale of charcoal for al-Shabaab. In 2011, the terror group earned some \$25 million from exporting 9-11 million bags of charcoal.

⁸⁸ Regan, J. Richard. *Just War: Principles and Causes.* Washington DC: The Catholic University of America Press, 1996.

⁸⁹UN Security Council. "Security Council Resolution 2036 S/RES/2036." February 22, 2012.

The report further found out that after the Kismayo takeover by the KDF, those involved in charcoal trade comprised of three groups: al Shabaab, RasKamboni and Somali Kenyan businessmen who cooperated with the KDF. This report therefore incriminates the KDF as gaining from a banned trade, particularly during war. Kevin Kelly, quoting the UN report, notes that the proceeds from the illegal trade is divided thus: 40 per cent for Al-Shabaab, and an equal percentage for the Interim Juba Administration (IJA) while KDF pockets 20 per cent.⁹⁰

Besides charcoal, KDF was also involved in illicit sugar trade worth \$400 million⁹¹. In this ring, KDF taxed every bag of sugar and charcoal that left the port city of Kismayo. Accordingly, the taxes amount to \$50 million per year. The charcoal enterprise offends the just war theory, which prohibits war for the commercial gain of a belligerent state.

2.2.4 Probability of success during operation Linda Nchi

The probability for success is another key doctrine in *Jus ad bellum*. Fighting asymmetrical wars have proved to be tricky globally especially when it involves terror groups. The US tried to fight insurgents in Somalia to success leading to the downing of the Black Hawk. In Afghanistan, the US is still fighting the Taliban 15 years on. This means that Operation Linda Nchi was destined for the same fate. There was no chance of success fighting an ideologically driven outfit with military hardware.

“The decision to invade Somalia in pursuit of the militia (Al-Shabaab) was rushed by every account. There was no guarantee of succeeding to defeat an

⁹⁰ Kevin J. Kelly. “Al-Shabaab exporting charcoal from KDF controlled port, UN says.” *Business Daily*, October 16, 2014

Retrieved from: <http://www.businessdailyafrica.com/Al-Shabaab-exporting-charcoal-from-KDF-controlled-Kismayu/539546-2488252-104m7lnz/index.html>

⁹¹Conor, Gaffey. “Sugar Smuggling Ring in Somalia.” *Newsweek* 11.12.15. <http://www.newsweek.com/kenya-somaliakenya-sugarsomalia-sugaral-shabaabal-shababgarissa-university-596894>

outfit that is amorphous as is Al-Shabaab. KDF should have noted and seek to devise other strategies instead of the invasion.”⁹²

Waging war against amorphous groups that are founded on ideology poses a great danger. It shows that success may not be probable. This is true especially when Kenya did not have an exit strategy. It shows that the state did not know whether it was going to succeed or not. And for this matter, the way against Shabaab is ongoing ad infinitum with massive casualties both in Kenya and Somalia. It clearly shows that through the so many deaths, this was not a moral war. Dr. Nyagudi Musandu, an expert in security is convinced KDF even lacked the military sophistication to win the war:

They, (KDF) do not seem to grasp the high speed pace and precision surveillance nature of war. For example, I do not see an F-5 jet with no night operations capability, flying out of Laikipia Air Base and striking an Al-Shabaab convoy deep inside Somalia, after a tip off by Kenya Army Special Forces spotters at 1:00 am.⁹³

In Jus ad bellum, a state at war is required to design an exit strategy beforehand. However, Kenya did not have a clear exit strategy either from Somalia.⁹⁴

Yet, Kenya lacked an exit strategy according to Colonel David Obonyo, the KDF Spokesperson who revealed that it was impossible for Kenya to put a timeline on the offensive. “In Somalia, it will depend on how hard AMISOM and international partners like the European Union work to train the Somali army. It is very difficult to put a timeline on *sic* exit strategy.”⁹⁵

“The fact that there was no exit strategy is a clear indication that the intervention did not comply with the war tradition. Normally a military engagement must have a blue print for exit. But for our case it seems KDF was preparing to be an occupying force.”⁹⁶

⁹² Interview with Juma Odhiambo, Peace and Conflict Expert, in Nairobi on August 13, 2017.

⁹³ Nyagudi, Musandu, (Security Expert) interviewed in person. (Nairobi, November 19, 2017).

⁹⁴ Agencies. “No exit dates for Kenyan mission in Somalia.” *Aljazeera*, October 29, 2011.

⁹⁵ Otieno, D., “Like every nation on earth that has had to deal with terrorists, Kenya suffered from a lack of imagination.” *Daily Nation*, October 16, 2015.

⁹⁶ Oral interview, Boniface Sitati, International Law Expert, July 28, 2017.

But Kenya has also suffered immensely from retaliatory attacks by Al-Shabaab since the OLN operation began. On September 21, 2013, Al-Shabaab seized the Westgate Mall in Nairobi and killed 69 people and injured scores others; in 2014, on June 16, 2014, Al-Shabaab attacked a village in Mpeketoni and killed 48 people injuring others and displacing thousands others; Al-Shabaab also attacked Garisa University killing 42 people and forced the institution to close. The terror group also on December 2, 2014 attacked a quarry in Mandera and killed 36 people in a campaign that targeted non-Muslims. That is not enough. The Kenyan Garrisons have been a major target for Alshabaab in Somalia. Al-Shabaab hit a KDF camp in El-Wade. In January 2017, Al-Shabaab struck a Kenya military base in Kulbiyow. Nine KDF soldiers were killed⁹⁷. On January 15, 2016, Al-Shabaab sacked a KDF camp in El-Adde and killed 173 soldiers taking 13 others as prisoners of war.⁹⁸

The persistent strikes negatively affected Kenya's economic stride. Major countries like UK, US and Australia issued a series of travel advisories that further hurt the tourism industry.

“Before the travel restrictions, the Moi International Airport was busy as we used to host 35 charter flights a week. Hotels enjoyed roaring business then.”- Yatich Kangugo, Airport Manager, Moi International Airport.⁹⁹

Ironically, Kenya waged war against Al-Shabaab to protect the tourism sector and life of her citizens. It turned out that the operation was in effect counter-productive.

⁹⁷ DW. “Al-Shabaab attacks Kenya military base, dozens killed.” January 28, 2017. <http://www.dw.com/en/al-shabab-attacks-kenya-military-base-dozens-killed/a-37311441>

⁹⁸ Investigative Desk. “Kenya lost 173 soldiers in terror attack on KDF base in Somalia, survivor says.” *The Standard*, January 15, 2016. <https://www.standardmedia.co.ke/article/2000229998/kenya-lost-173-soldiers-in-terror-attack-on-kdf-base-in-somalia-survivor-says>

⁹⁹ Mathias, R. “Hoteliers ask US and Europe to lift travel advisories.” *Business Daily*, March 12, 2013. <http://www.businessdailyafrica.com/news/Hoteliers-ask-US-and-Europe-to-lift-travel-advisories/539546-1718534-format-xhtml-tqy95iz/index.html>

2.2.5 Was the Operation Linda Nchi the last resort?

War as a last resort is a key tenet of Just War Theory postulated mainly by the School of Salamanca. Ideally, before resorting to war, other peaceful mechanisms such as diplomacy are critical. But this doctrine works well in symmetrical wars that involve states not so much with militias. Kenya therefore did not exploit this route because the al Shabaab is an amorphous group Kenya's efforts in resolving the conflict diplomatically was lacking. While it was impossible for Kenya to engage the al-Shabaab in diplomatic discussion, it was not so difficult to curtail their stream of income. Economic tactics could have weakened al-Shabaab. For instance, the group is the largest exporter of charcoal to Dubai, Kenya should have sort support of the global community including Dubai to freeze this trade thus starve the al-Shabaab their source of income.

2.2.6 Self-Gain during Operation Linda Nchi

Reports incriminating KDF having engaged in illicit charcoal and sugar trade are well documented. KDF facilitated the trade by taxing charcoal that was being exported via the port of Kisimayu.

"Since the charcoal trade is al-Shabaab's primary income, it is not an exaggeration to posit that a portion of the resources used to carry out terror attacks in Nairobi and in Mombasa and other locations along the Kenyan coast is being generated with the acquiescence or even the cooperation of the KDF and Kenyan business interests,"¹⁰⁰

This ideal contradicts key doctrine of war, which prohibits combatants to enrich themselves from the war. The researcher established from different experts who held firm to the UN findings, citing it as a credible and non-partisan institution.

¹⁰⁰Issa, B. "UN report finds Kenya still funding al-Shabaab terror group through illegal sugar and charcoal trade." November 8, 2016.
<http://www.ibtimes.co.uk/un-report-finds-kenya-still-funding-al-shabaab-terror-group-through-illegal-sugar-charcoal-trade-1590462>

“The UN Monitoring Group is a credible institution. Their findings are valid. Yet the morality of gaining from the spoils of war delegitimises the entire intervention and operation. KDF have violated the morals and doctrines of war.”¹⁰¹

2.3 Chapter Summary

The moral legitimacy of engaging in the OLN are in question. Even after fighting the war, neither Somalia nor Kenya is safe. Somali is yet to establish a peaceful functional regime. Indeed the justification of waging a war against Al-Shabaab was below the acceptable threshold of *Jus ad bellum*. The incursions in Kenya by Al Shabaab were more of a criminal nature more than a threat to territorial integrity. This means that if security were beefed up, it would have been possible to deter Al Shabaab from attacking and kidnapping people from Kenya and therefore rendering OLN unnecessary. Furthermore, Kenya did not have an exit strategy, which is critical doctrine and instead chose to engage in a war that would last for eternities. Strategically and morally this open foray without exit plan is defeats the morals of war. Further Augustine postulated that war must be for a good cause and not for self-gain. Yet, the KDF have been accused of indulging in the business of charcoal and sugar which in itself is immoral as per the just war doctrine. The so-called al Shabaab attack on Kenya had not reached such an intensity as to constitute a threat on the sovereignty on Kenya and therefore the invocation of article 51 of the UN Charter was dubious. Still, it should be noted that Kenya did not receive the UN Security Council for the Somalia interventions thus offend Chapter VII of the UN Charter.

Further ICJ ruled in its judgment on *Nicaragua vs USA* case that violation of the ban of the use of force must stretch a certain level of intensity in order to concurrently

¹⁰¹ Hassan, Kulundu (Lawyer) interview in Nairobi on July 25, 2017.

constitute an armed attack.¹⁰² Indeed, according to the ICJ, smaller border attacks do not constitute an armed aggression and therefore do not warrant a military operation. Al-Shabaab incursion to Kenya did not reach such a threshold. In any case, it only involved abductions that could have been preempted had the police system been intact and active.

¹⁰² ICJ Report. "Case Concerning military and paramilitary activities in and against Nicaragua (Nicaragua vs United States of America)." June 27, 1986. <http://www.icj-cij.org/files/case-related/70/6505.pdf>

CHAPER THREE

COMPLIANCE TO THE CONDUCT OF WAR DURING OPERATION LINDA NCHI

3.1 Jus ad Bellum - Right Conduct of War

One of the biggest challenges of warfare may not be in winning but minimizing transgression against human rights, environment and cultural heritage sites, and ensuring that the war is fought in ethical and morally acceptable ways. Indeed, behavior during war must be consistent with ethical parameters associated with war traditions and laws. Kenya's intervention in Somalia is an asymmetrical engagement that involves a rag-tag militia – the Al-Shabaab. Still, rights in war principles have to be applied for purposes of moral permissibility of the war by belligerents.

3.2 Prohibited Weapons during Operation Linda Nchi

The principle underpinnings that prohibit use of certain weapons in war trace their origins to war philosophers. The principle of no means *malum in se* (meaning wrong or evil in itself) instructs fighters to avoid use of weapons or evil methods during the conflict e.g. rape of people and turning fighters against their own camps or use of artillery like nuclear and biological weapons whose effects cannot be controlled.

From the philosophical thought, the principle of prohibited weapons found themselves codified in international law through treaties and conventions. International parameters on the right conduct of war have been aptly captured in a number of declaration and conventions that strongly prohibit use of certain weapons. One of the charters is the St. Petersburg declaration renouncing the use, in time of war, of explosive projectiles under 400 grams (1868).

Additionally, IHL or law of armed conflict is a critical parameter in the course of combat. The 1949 Geneva Convention and 1907 Hague Regulations, representing customary international law, are critical guiding principles to the right conduct of war. This explains why the world was horrified when reports from Syria indicated the use of prohibited gases against civilians. "The results prove the existence of sarin," Ahmet Uzumcu said. The Khan Sheikun attack on April 4 was previously believed to have been the first use of sarin since the deadly August 2013 attack in and around Damascus, which killed hundreds of people.¹⁰³

Further, Syria for instance in 2013 deployed nerve gas attacks, killing hundreds of people. The Assad regime too holds stockpiles of chemical weapons such as chlorine, which are prohibited under international law. Additionally, the Assad regime has indiscriminately used barrel bombs that maimed and killed civilians.¹⁰⁴ The battle of Aleppo also procured a series of war crimes: Civilians have been deliberately targeted thus leading to immense loss of human life...¹⁰⁵

An assessment of OLN did not show the use of any prohibited weapons during the operation.

3.3 Principle of discrimination during Operation Linda Nchi

Jus in Bello takes note of the legitimate targets in war known as the doctrine of discrimination. This principle therefore is designed to protect the rights of the civilians

¹⁰³AFP. *Sarin used in Syria 5 days before Khan Sheikhun: OPCW*. October 4, 2017 <https://www.yahoo.com/news/sarin-used-syria-5-days-khan-sheikhun-opcw-140209310.html>

¹⁰⁴ Jim, M. "Why Syrian president Assad is considered a war criminal." <https://www.usatoday.com/story/news/world/2017/04/06/syria-president-bashar-assad-war-criminal/100116828/>

¹⁰⁵ UN News Centre. *War crimes committed by all parties in battle for Aleppo – UN-mandated inquiry on Syria*. <http://www.un.org/apps/news/story.asp?NewsID=56265#.Wh0CTCN96MA>

against possible harm during combat. However, in this principle, it will still be morally right if non-combatants suffer as collateral damage.

But KDF was accused of non-discrimination in its offensive. Interviews with refugees and eyewitnesses claim that the KDF used airstrikes against civilians.

“I hail from Gedo region. One time, we had gathered to feed and water our animals when KDF rained missiles from the air. They targeted poor unarmed pastoralists.”¹⁰⁶

However, Dr. Nyagudi, a security expert believes KDF did its best to ensure that there are as limited atrocities as it could happen in a warfare situation.

Kenya Defence Force has tried its best to conform to expected. Conducting a war without atrocities is a kin to claiming that you can develop a market without fraud.”¹⁰⁷

The proportionality condition is aptly captured in Additional Protocol I to the Geneva Conventions which prohibits such attacks “*which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.*”¹⁰⁸

Take the Iraq War for instance. Human Rights Watch established that Iraq forces violated international humanitarian law, thus causing civilian deaths. The transgressions comprised of deployment of human shields, illegal use of the Red Cross and Red Crescent emblems, anti-personnel landmines, and inability to protect civilians.

¹⁰⁶ Oral Interview with Abdi Osman in Nairobi, on August 1, 2017.

¹⁰⁷ Cleophas Kanga (International peace expert) interviewed by Grace Mburu in Nairobi on August 20, 2017.

¹⁰⁸ 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 51 (5) (b), in Documents on the Laws of War, 3d ed., ed. Adam Roberts and Richard Guelff (Oxford: Oxford University Press, 2000), p. 449

Iraq military also wore civilians' clothes subjecting the civilians at risk.¹⁰⁹ In the same breath, coalition forces also used cluster munitions that caused deaths to civilians. Indiscriminate attacks are a gross violation of the right conduct of war. According to Waltzer, for a war to be legitimate, it has to protect the rights of the population and those that have been victimized by a belligerent.

In the Kenya's scenario, Kenya Army killed and injured 11 children during an air operation. Reporting to the UNSC, Antonio Guterres noted "Child casualties attributed to Amisom primarily occurred in operations against Al-Shabaab or in indiscriminate fire responding to attacks."¹¹⁰

*"KDF did not truly abide by international laws of war. You will recall that one time, 20.10.2011, KDF's airstrikes bombarded an IDP (Internally Displaced Persons camp) near Jilib in Somalia. About 45 people were hurt. There were also some deaths. Now, International law demands that parties to conflict must protect civilians against indiscriminate killings."*¹¹¹

Indiscriminate fire that leads to casualties of civilians is immoral under the Just War Tradition. Therefore, Kenya violated this norm. This is because in the event soldiers use their weapons against non-combatants, or trail their enemy outside the permitted area, they are no longer committing legitimate acts of war but acts of murder.¹¹²

Furthermore, the first addition protocol of 1977 to the Geneva Conventions (Protocol) in this principle, parties have to distinguish between civilian and military installations. It requires that such war operations be directed only at military installation. Therefore,

¹⁰⁹ Human Rights Watch. "Off Target: the conduct of the war and civilian and civilian casualties in Iraq." December 11, 2003, Retrieved from <https://www.hrw.org/report/2003/12/11/target/conduct-war-and-civilian-casualties-iraq>

¹¹⁰ Kelly, J. K., <http://mobile.nation.co.ke/news/UN-holds-Amisom-to-account-over-child-casualties/1950946-4129426-tt2nnd/index.html>

¹¹¹ Oral Interview, Hassan Kulundu, Lawyer Nairobi, August 10, 2017.

¹¹² Internet Encyclopedia of Philosophy. "Just War Theory." <http://www.iep.utm.edu/justwar/#H3>

responsibility for the right conduct of war rests with the armed forces and not so much with the civilian government that authorized the war during the jus ad bellum stage. Indeed, the supposition of non-combatant immunity ordains that war is between fighters. This means that any civilian installations, schools, hospitals, places of worship or humanitarian activities are to be spared from attack. Any deliberate attack that contradicts this premise is immoral and offends international law of war.

It is also immoral, according to the Just War Tradition, to harm combatants who have surrendered, shipwrecked or parachuting from a wrecked aircraft. The philosophy here is that such a group is already incapable of fighting can only be taken in as a prisoner of war.

3.4 Principle of Proportionality during OLN

This principle, a moral and legal norm, defines the circumstances what kind force may be used during war, and the extent of permissible force during combat. Thus, proportionality requires that applicable force during combat should not surpass that which is enough to subdue the enemy. It desires to minimize unjustified suffering and destruction during war and to, which, according to Green, will help to contain the damage that may accrue running beyond the cessation of hostilities.¹¹³

Thus, the right conduct of war prohibits excess use of force because military means ought to be proportionate to their anticipated ends and therefore "the evil produced by the war must not be greater than the good done or the evil averted by it."¹¹⁴ Indeed, the

¹¹³ Leslie, C. Green. *The Contemporary Law of Armed Conflict*. Manchester, Canada: Manchester University Press, 1993.

¹¹⁴ James, T. Johnson. *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*. New Jersey: Princeton University Press, 1981.

School of Salamanca further advances this argument that response to war should be at par with the evil committed; it would be an unjust war should the force be excessive.

This principle calls for prudence especially when it comes to attacking a military establishment near a civilian environment. Utmost care ought to be taken according to this principle to protect civilians from injury. In 1992, the Catholic Church codified its own morals of war captured in the Catechism of the Catholic Church. It inter alia argues that arms used must not lead to effects that are worse than evil that is being dealt with.

Indeed, Luis Moreno-Ocampo, former ICC Chief Prosecutor reiterated that, “*A crime occurs if there is an intentional attack directed against civilians (what is referred to as principle of distinction). An attack launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (in this case principle of proportionality).*”¹¹⁵

This is in resonance with other laws and norms in the international regime. For instance, article 51, paragraph 5 of the First Additional Protocol to the Four Geneva Conventions of 1977 limits the military excesses during combat. It forbids “an attack that may have dire consequences on civilians i.e. injury, loss of civilian life, damage to civilian objects, or a combination thereof which would be excessive in relation to the concrete and direct military benefit anticipated.” Kenya is a signatory to this protocol hence must abide by it.

¹¹⁵Bryen, S., *The Doctrine of Proportionality*, 20.7.2014.
<https://www.gatestoneinstitute.org/4462/proportionality-doctrine>

3.5 Prisoners of war during the OLN

Every war produces its prisoners, the wounded and the sick. Prisoners of war are captured belligerents. It is an honoured tradition therefore, that by virtue of their weak, disadvantaged status, prisoners of war, the wounded and the sick be treated humanely. This tradition has even been codified in a series of international conventions. But curiously, the OLN did not seem to have produced any prisoners of war. KDF has not mentioned about this group, yet, all wars do produce prisoners.

One of them is the Geneva Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field (1864) that provides the framework on how to treat victims of war. Then there is the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War guides on how the prisoners of war are to be treated. The 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked members of the Armed Forces at sea; the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War; the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in time of War. There is also the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

The OLN did not produce any prisoners of war, which is a unique occurrence. While Kenya's combatant were captured by al-Shabaab, there are no known prisoners of war in possession of Kenya, begging the question as to what fate befell. Does it mean that even the captured prisoners were killed? In a personal interview with Juma Odhiambo, a peace and conflict expert, many questions are still glaring as to the fate of the POW.

“We have not seen any prisoner of war being held by KDF. What this means is that either there were summary execution of such persons or KDF used tactics

that were disproportionate thus eliminating all and sundry. That is a case for worry. It calls for further investigations.”¹¹⁶

However, Nyagudi had a different perspective on the scenario surrounding prisoners of war. While he is convinced that the prisoners’ rights were not violated, he still holds that the strategy used to handle the prisoners is out of the norm:

KDF hands over Al-Shabaab Prisoners immediately to the Somalia National Army, where they are usually immediate court Martials. I however feel that all Al-Shabaab captured by police and KDF within Kenya should be in the custody of the military and the corpses of dead Al Shabaab should be documented and buried within military compounds to facilitate exchange at later date.¹¹⁷

3.6 Chapter Summary

Kenya’s conduct during the war met certain criteria but failed in others of this *jus in bello* framework. While the intervention did not deploy prohibited weapons known to the researcher, it mounted indiscriminate killings of innocent non-combatants. It is also not clear why the intervention did not produce any prisoners of war. This could mean that KDF may have killed all those who were captured. Thus, a further study should be done to establish what happened to OLN prisoners of war.

¹¹⁶Juma Odhiambo, (Peace and Conflict Expert) Interviewed by Sammy Tema in Nairobi on August 13, 2017

¹¹⁷Nyagudi interview (2017)

CHAPTER FOUR

POST-CONFLICT JUSTICE AFTER OLN

4.1 Introduction

Justice after war is a concept that has gained currency in the recent past especially post WWII and the establishment of the UN. Justice after a conflict is viewed as complicated. This is because it involves military, political, economic and social dimensions for justice, social and for political and economic reconstruction. It is largely designed to forestall a relapse to anarchy. Also critical to this framework is the economic dimension. In this score, economic restoration includes delivery of aid, repairing physical infrastructure, re-establishing social services, creating conducive environment for the thrive of commerce, and implement critical reforms for economic stability and growth. Leading scholar in *jus post bellum* is Brian Orend who has developed a framework for the same. Further, reconstruction also involves provision of justice to victims and bringing to justice warlords and those who transgressed against the right conduct during war.

4.2 Jus post bellum in light of OLN

Like with every conflict, the Kenya's intervention in Somalia provided an arena to explore the post-conflict mechanisms. But John Njiru, an expert in International Relations posits that Kenya did not fashion plans to create opportunities for justice after the operation ended. Yet, the philosophical underpinnings of post-war justice are to help the country to rise up to normalcy and prevent it from sliding to anarchy or into a failed state.

“It has been a bit of a challenge because Operation Linda Nchi ended before the war could be concluded. Therefore, a post conflict justice system becomes

tricky. Still, if we had prisoners of war, probably we could see their trials in Mogadishu which is the seat of power."¹¹⁸

Today's concept of reconstruction is traceable to the rehabilitation of the South after the conquest of the Confederacy in 1863.¹¹⁹ After WWI, Austria became the first of the modern-day beneficiary of reconstruction spearheaded by the League of Nations. Reconstruction of Austria included suspending reparation payments, the commencement of economic modifications and the appointment of a High Commissioner for the country's economy.¹²⁰

After WWII, a more robust, well-coordinated and expansive reconstruction was undertaken in Europe and Japan. It involved the UN Relief and Rehabilitation Administration to Europe and China between 1943 and 1946, the loans of the International Bank of Reconstruction and Development to Europe, the Marshall Plan for Western Europe (1948-1951) and the economic assistance to Japan.

Similarly, the Marshall Plan undertaken by US targeted Western Europe, and transferred \$13.3 billion for reconstruction with the following objectives: to increase production, expand foreign trade, boosting internal monetary stability, and development of European economic cooperation targeting some 17 Western and Southern European Countries.

¹¹⁸ John, Njriu. Expert, International Relations. Interviewed by, in person, (Nairobi, 2017)

¹¹⁹ Andrew, J. Williams. "Reconstruction before the Marshall Plan." *Review of International Studies* 31.3: (2005): 541-58.

¹²⁰ Ibid

It is imperative to note that since WWII, dynamics of reconstruction have changed becoming even more complex with multiple actors. In 1995 for example, the IMF reviewed its guiding principle on emergency assistance so as to handle the desires of countries coming out of conflicts. In 1997, the World Bank set up a Post-Conflict Unit that would later be known as “Conflict Prevention and Reconstruction Unit.” It also had a Post-Conflict Fund.

For instance, reconstruction efforts in Uganda in which the World Bank was involved were broad. In the first five years after the conflict (1987-92), the WB supported in 25 operations totaling to US\$1 billion, as well as liaising with other international donors.

The UNDP founded the Bureau for Crisis Prevention and Recovery in 2001 to work and restore the quality of life of victims of natural disaster or violent conflict. Elsewhere in 2005, the UN founded a Peace-building Commission and a Peace-building Support Office and a Peace-building Fund, tasked to bring together and improving relations amongst participants in a rebuilding effort. In 2006, AU finalized the development of the Post-Conflict Reconstruction and Development (PCRD) Policy.¹²¹

African Union’s policy is anchored on six key pillars, which include: security, humanitarian/ emergency assistance, socio-economic reconstruction and development, political governance and transition, human rights, justice and reconciliation and finally women and gender.¹²²

¹²¹African Union. “Post Conflict Reconstruction.” Monday 23, 2015. Retrieved on November 24, 2017 from <http://www.peaceau.org/en/page/70-post-conflict-reconstruction>

¹²²ibid

But experts such as Kulundu and Makena have expressed reservations as to the manner in which KDF ended the war, got absorbed in AMISOM without a clear plan for post war justice. This could be attributed to the fact that the war was and is ongoing therefore challenging to deliver on some of the post war clauses.

“Even when we assess the AU blue print of jus post bellum, you will realize that the intervention did not even pretend to achieve any of the provisions. It tells you that the intervention fell short of acceptable traditions of war.”¹²³

Michael Schuck proposed three tenets to the Jus Post Bellum doctrine namely: repentance, honourable surrender and restoration.¹²⁴ This formed the earliest scholarly streamlining of the concept. In summary the tenets impose moral obligations as follows: The Principle of humility and repentance would easily facilitate post-conflict healing. Honorable surrender means a duty to safeguard rights of losers and respect for former combatants. Finally on Schuck’s framework, restoration ordains that victors are obligated to remove all instruments of war including landmines.

Lately, Brian Orend anchored on Immanuel Kant’s postulation on the morality of ending a war develops this concept. The Post-bellum doctrine is framed along the following premises: providing conditions for end of a conflict. That is, once justice has been served, extension of offensive is treated as act of hostilities. But the KDF-Alshabaab question could not meet this requirement because the war continues under AMISOM as Kulundu observed. Further, that there is a need for a roadmap towards peace treaties, which has never been thought through, explains Kimani because Al-Shabaab is a terror and criminal group. The principle also appreciates the need to design

¹²³Nelius Makena, Expert, International Relations in an interview in Nairobi on July 20. 2017

¹²⁴ Michael, J. Schuck. “When the shooting stops: Missing elements in just war theory.” *The Christian Century* 111, 26 (1994): 982-984.

guidelines for the political reconstruction of defeated states and to stem draconian and ruthless peace terms; the rights an impartial state battles for in a war provide the restrictions on what can be claimed from the conquered belligerent.

However, this framework works well when a war is fought between states. It requires modification though when it comes to amorphous outfits such as terrorists in such an asymmetrical warfare. The doctrine further explores the just settlement of war as thus: Undeserved advantages as a result of aggression must be done away with. Punishment against the aggressor is in three ways namely: compensate victim for their losses, institute war-crime trials for belligerents and ensure security for the affected against a relapse of an attack. Thus demilitarization and strengthening the political environment is key.

Further, for a successful post conflict reconstruction, settlements must be made public and actors involved have to be known as well. Furthermore, there is a need to distinguish different actors such as soldiers, leaders, and civilians. They must all be treated differently. It is also envisioned that aggressors and their leaders to face fair and public trials related to war crimes. At the same time, and civilians must be immune from any measures that may cause further pain.

The following pillars of the doctrine as developed by Orend established that Kenya did not meet any of them.

Just Cause termination: requires a convincing exoneration of rights whose violation is based on combat, the reinstatement of the objection of rights of victim through punishment, compensation and rehabilitation. Working with this principle, the OLN

ended even before any single such restoration to justice could be achieved. After the intervention, Kenya suffered a series of deadly attacks both within the country and in Somalia where Al-Shabaab attacked KDF barracks.

Right Intention: intentions such as revenge should not be the key incentive for the post-conflict phase. Thus, justice should dominate the arrest of war during war. At the end of the OLN, KDF had yet to prosecute any militant. Experts in security argue that this is a component that was overlooked mostly because KDF was quickly absorbed into AMISOM.

When OLN ended, there was no public declaration of peace by a legitimate authority as is prescribed in the doctrine. Hostilities between KDF and the militants was still high. That is why, according to Makena, KDF was silently absorbed into AMISOM.

On discrimination, where the doctrine postulates that agreements to end war and usher peace, stability and prosperity must be discerning, i.e. civilians, soldiers and political military leaders. Again, Ndung'u and Kimani, in their interviews observed that this principle could not be put into practice at the end of OLN. KDF could not proclaim victory because the enemy was yet to be vanquished.

Further, OLN failed on the principle of proportionality where aspects of peace should be at par with violable rights. Scholars such as Makena and Kulundu, in the interviews, suggested the need for a more robust way to respect rights and dignities of the masses in Somalia after the operations.

But even as the operation ended and KDF was assimilated in AMISOM, the move was not publicized as is ordained especially in the *jus post bellum* principles. The public learnt of the assimilation later in the press. According to James Kibigo, such silence offended the framework of the just war theory especially the requirement of a competent authority to make it public the end of war.

The ICC is the latest construct on the *just post bellum* in the international community. The court fits into Schuck doctrine of restoration. The ICC is designed to punish those atrocities associated with the *jus in bello*. The ICC tackles key areas outlined as: genocide, crimes against humanity, and war crimes. The statute has been effective since July 1, 2002.

Yet, while Al-Shabaab has meted inhuman atrocities within and outside of Somalia, especially in Kenya, Operation Linda Nchi did not produce the desirable justice. KDF did not make any arrests and prosecution of warlords or militants. This means that to victims of Al-Shabaab mass murder and destruction, justice has not been served.

“KDF has been accused of been accused of benefiting from the war. Taxes levied on sugar and charcoal before shipment via the Kismayu Port is a violation of the just war tradition. It seems as if KDF went to the war with the hope of material gain.”¹²⁵

Jus Post bellum also demands a national reconstruction effort after. In such a framework, it entails crating a Truth Justice and Reconciliation Commissions that will search harmony and integration going forward. But, Kenya ended the Operation Linda Nchi inconclusively and her soldiers absorbed into AMISOM. Thus, to date, there are

¹²⁵ Oral Interview with Pius Kimani, expert in International Relations and security, in Nairobi, 10.8.2017

no such efforts under the intervention strategies to create a sound Truth Justice and Reconciliation mechanism in Somalia.

Where applicable, sound democratization processes including establishment of a robust electoral commission or authority and system, establishment of an independent judicial system, or establishment of independent commissions, will be critical for post-conflict reconstruction. It also includes strong parliament and representation regime. This is to be coupled with civic education. Kimani Ndung'u, a consultant on diplomacy explained:

“When you look at KDF statements and plans, it is clear that Kenya did to have any post-conflict ideas for Somalia. There are no any plans for reconstruction or to modernize institutions for justice. This poses a great challenge to the stability of the country going forward.”¹²⁶

Further, post-conflict reconstructions will create an economic stimulus package to enable the country the loser to regain their hold. Such economic effort will entail a robust monetary system including strengthening the central bank and the securities exchange. Yet, *Operation Linda Nchi* did not have a component of reconstruction that would see an economic rise for Somalia. This means that amid the all the losses accrued from the war, the citizens of Somalia and in particular of the areas where the interventions took place, will remain disadvantaged economically for a long time. Since KDF got absorbed into AMISOM, the required pacification of Somalia and bringing to book perpetrators did not happen. Thus, there were no known terms of peace to that effect.

¹²⁶Kimani Ndung'u, Consultant on diplomacy, interview in Nairobi on 18.8.2017

4.3 Chapter Summary

Though jus post bellum is core to just war tradition, Kenya's interventions in Somalia completely missed this element. Absence of a post-war strategy is attributed to absorption of KDF to AMISOM. Therefore, the war did not end therefore complicating any possibility of a jus post bellum reality. Further, KDF did not have an exit strategy before the intervention explaining why most, if not all tenets of jus post bellum were not implemented.

Operation Linda Nchi came to an end neither with clear terms of settlement nor with victory. Even the end of the operation did not have the requisite publicity especially by an authority. Instead, the KDF was assimilated into the AMISOM and continued with the operation under a different umbrella. Most Kenyans thus are still confused about the nature of the operation that KDF is engaged in at the moment in Somalia. The confusion is a product of lack of publicity.

CHAPTER FIVE

SUMMARY, CONCLUSIONS AND CONCLUSION OF THE STUDY

5.1 Introduction

This chapter outlines the summaries of findings, conclusion and recommendations. It provides an analysis of the KDF intervention in Somalia in light of the Just War Theory. As such, the chapter distills the entire operation on three key issues – justification of going to war, conduct during war and post-war justice. Grounded on the results, the chapter spells out recommendations for policy formulation and areas for future studies.

5.2 Summary of Findings

1. In line with objective one of the study, “To assess the extent to which Kenya was justified to mount Operation Linda Nchi using *jus ad bellum* framework,” this study has found out that Kenya did not have solid justification of intervening in Somalia. The premises that informed Kenya’s justifications for Operation Linda Nchi were way below the threshold envisioned in Just War Theory especially justification for going to war. Kenya could have used other diplomatic means to address the problem.

2. On objective two “To assess Kenya’s compliance to the right conduct of war during Operation Linda Nchi using *jus in bello* framework,” the study observed that KDF generally kept fidelity to the conduct of war. Although questions still linger as to what happened to the prisoners of war. Due to challenges of getting insider information from KDF, it was difficult for the researcher to competently account for the fate of such prisoners. Still, KDF was accused of indiscriminate attacks on civilians, which offended the *jus in bello* doctrine.

3. On Objective number three To assess Kenya's *jus post bellum* strategies after Operation Linda Nchi," the study found out that there were no such strategies This means that the post war justice remained blank and thus making the intervention short of the just war tradition.

5.3 Analysis

The moral legitimacy of the Somalia intervention is in question. Even after fighting the war, neither Somalia nor Kenya is safe. Somalia is yet to establish a peaceful functional regime. This makes the campaign counterproductive. Indeed the justification of intervening against Al-Shabaab was short of the threshold of *Jus ad bellum*. Incursions against Kenya by Al-Shabaab were more of a criminal nature than a threat to territorial integrity. This means that if security were beefed up, it would have been possible to deter Al Shabaab from attacking and kidnapping people from Kenya and therefore rendering OLN unnecessary. The so-called al Shabaab attack on Kenya had not reached such an intensity as to constitute a threat on the sovereignty on Kenya and therefore the invocation of article 51 of the UN Charter was dubious. Still, Kenya did not get a UNSC authorization to intervene in Somalia hence offended Chapter VII of the UN Charter.

Indeed, ICJ ruled in its judgment on *Nicaragua vs USA* case that defilement of the decree on choosing and deploying military offensive must exceed some thresholds to warrant an armed attack. It is clear that Al-Shabaab's forays where two cases of kidnappings were reported, had not reached a critical level to warrant Kenya's intervention.

Furthermore, Kenya did not have an exit strategy, which is critical doctrine and instead chose to engage in a war that would last for eternities. Strategically and morally, this open forays without exit plan defeats the morals of war. Further Augustine postulated that war must be for a good cause and not for self-gain. Yet, KDF has been accused by credible investigators of gaining from the outlawed business of charcoal and sugar.

Kenya's conduct during the war met certain criteria but failed in others on *jus in bello* framework. While the intervention did not deploy prohibited weapons known to the researcher, it mounted indiscriminate killings of innocent non-combatants. It is also not clear why the intervention did not produce any prisoners of war, or why the prisoners of war were never made public. This could mean that KDF may have killed all those who were captured.

Operation Linda Nchi lacked a post-conflict justice mechanism. This is because the intervention came to an end before the conflict could be dealt with. Thus, Kenya could not lay critical frameworks such as justice, social and economic reconstruction and establishing national cohesion mechanisms.

Operation Linda Nchi came to an end neither with clear terms of settlement nor with victory. Even the end of the operation did not have the requisite publicity especially by an authority. Instead, the KDF was assimilated into the AMISOM and continued with the operation under a different umbrella. Most Kenyans thus are still confused about the nature of the operation that KDF is engaged in at the moment in Somalia. The confusion is a product of lack of publicity.

5.4 Recommendations

1. In line with Objective one, the researcher strongly recommends that future wars should be determined by the sovereign will of the people through parliament. Further that, before any military invasion or intervention, all diplomatic channels must be explored and exhausted.

2. Based on Objective number two, which further detailed investigation, must be carried out to establish the detailed conduct of war and especially on how the prisoners of war were treated. The researcher also recommends that action be taken against all those culpable in abetting crime by participating in illegal charcoal and sugar trade.

3. On objective number three, the researcher recommends a staggered post-conflict master plan for Somalia that can be implemented in bits even as the campaign against Al-Shabaab continues. Such models as a strong judicial system, economic empowerment, public education and d-radicalization programmes must be initiated and followed through. Further, the researcher suggests that there is a strong and valid need for a post conflict justice in Somalia. And this could start with a strong training and deploying of a professional police and armed forces. The international community should be in hand to professionalize such a force so that it can solidly contain Al-Shabaab. On economic front, the research suggests strong protection of the port city of Kismayu and the beaches of Mogadishu. A well-protected port will allow for trade and therefore employing the youth. Finally, a robust publicity campaign need to be upped using radio and other traditional media to de-radicalise the youth and to prevent others from being radicalised. Communication experts must come to play in reshaping the future of Somalia. Finally, before such an intervention, the KDF and government should

put the just war theory into test to determine the suitability and legitimacy of an intervention.

5.5 Suggested areas for further studies

This study focused on the general principles of the Just War Theory. In the course of the study, a number of pertinent thematic areas emerged that would warrant further investigation. They are listed here below:

1. Establish the fate of the Prisoners of War during OLN in light of international laws of war.
2. Assess the public perceptions in Kenya of the intervention in Somalia.
3. Explore appropriate just post bellum mechanisms that could win lasting peace in Somalia and eradicate Al-Shabaab.

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Appendix I: Introductory Letter

Dear respondent.

My name is Eric Wamanji a graduate student at the University of Nairobi pursuing a masters of Arts degree in Diplomacy. I am conducting a study titled “Assessment of Kenya’s military intervention in Somalia against Al-Shabaab in light of Just War Theory” in partial fulfilment of the award of Master Degree. The purpose of this letter is to seek your indulgence in providing time for an interview where you will share your expert insight and facts in relation to the questions. This is purely an academic endeavour and information and data received will be treated with the confidentiality it deserves. Your cooperation is highly appreciated.

Thank you in advance for your assistance.

Yours Faithfully,

Eric Wamanji

Appendix II: Interview Questions

RO. I Justification of going to war

1. To what extent was Kenya's intervention against Al-Shabaab in Somalia the last resort available?
2. What was the framework for KDF that convinced of a win after the intervention against Al-Shabaab in Somalia?
3. The Al-shabaab doctrine is ideological to a large extent, how could use of force win over such an ideological predisposition?
4. How best did Kenya employ other diplomatic and non-military mechanism such as strengthening the Amisom before going to the war?
5. Did Kenya seek the approval of parliament to go to war with the Al Shabaab? If yes, where is the evidence? If no, why not?
6. Kenya intervened in Somalia because of two kidnappings; but the Al Shabaab has hit Kenya harder ever since. How best can we then justify the intervention?
7. KDF told the press that it didn't have exit strategy from the intervention, why did we intervene without an exit strategy?
8. Did Kenya seek the UN Security Council approval for the intervention in Somalia? If yes, what evidences do we have?

RO. 2. Compliance during war

- 1) What was the nature of the weaponry used in the war against Al Shabaab?
- 2) To what extent can we account for collateral damage?
- 3) What benefits did Kenya achieve from the intervention?
- 4) Reports indicated that KDF soldiers support illegal charcoal trade through Kisimayu? How far, widespread was this situation?
- 5) Gaining from such illicit activities is a violation of the Just War Tradition. What is your comment on this matter?
- 6) To what extent can we say the force used in Somalia was proportional?

- 7) KDF dropped bombs that killed some children who obviously are not combatants. What does that tell us about their application of the principle of discrimination?
- 8) KDF air strikes targeted livestock and water wells, how widespread was this issue? Was this a deliberate punitive measure?

RO. 3. Justice after war

- 1) What were the post-war plans for Somalia – did Kenya develop a blue print for reconstruction?
- 2) What were the strategies of incorporating the local population in governance and commerce?
- 3) Were there any prisoners of war? Where are they? What conditions are they living in?
- 4) How would you want a future Somalia to look like?
- 5) What should Kenya do to bring lasting peace in Somalia as a post-conflict effort?
- 6) Do we have any prosecution to be made as a result of transgressions during war?