

UNIVERSITY OF NAIROBI



INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

The Law of Armed Conflict and Counter-Terrorism: A Case Study of the Kenya Defence Forces (KDF)

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R47/13061/2018

Submitted in partial fulfillment of the requirements for the award of Post Graduate Diploma in Strategic Studies of the University of Nairobi

NOVEMBER 2019

DECLARATION

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

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APPROVAL

This project has been submitted to the University of Nairobi, Institute of Diplomacy and International Studies for examination with my approval as the supervisor.

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DEDICATION

To my wife Esther Wanjiru and sons Larry Kimiti and Lenny Saiyalel for their encouragement, support and prayers during the entire academic journey so far.

ACKNOWLEDGEMENT

I wish first and foremost to thank the Most High and Mighty God for giving me good health and strength throughout the study period. I am greatly indebted to my supervisor, Dr. Kenneth Mutuma (PhD) for his unreserved guidance, advice and support since the beginning of the study. I also appreciate all my colleagues in the G2 Course 34 2018/19 for their encouragement during the study period.

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ACRONYMS AND ABBREVIATIONS

AMISOM	African Union Mission in Somalia
CDF	Chief of Defence Forces
IAC	International Armed Conflict
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ISIS	Islamic State of Iraq and the Levant
KDF	Kenya Defence Forces
LOAC	Law of Armed Conflict
MPs	Members of Parliament
NIAC	Non-International Armed Conflict
NSA	Non-State Actor (s)
TFG	Transitional Federal Government
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNC	United Nations Charter
UNSC	United Nations Security Council
USA	United States of America
WWI	World War I
WWII	World War II

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CHAPTER ONE: PRELIMINARIES AND BACKGROUND INFORMATION

1.1 Background of the Study

With an increase in terrorism activities in the world, most of the affected states are left confused on how to deal with it.¹ The current state of laws seems inadequate in the counterterrorism measures since terrorism, as the study will demonstrate, is not an armed conflict.² International Community's failure to agree and provide a meaning to terrorism, thus counterterrorism, poses challenge and a dilemma as to how to deal with it.³ It is these challenges that form the background of this study. Several scholars and commentators have argued that invoking UNC Article 51 is enough to counter terrorism. Others argue that this is subject to abuse since the discretion of determining when time is ripe to attack a group or another state as a way of fighting terrorism is too widely left to individual states. As things are, it seems that each state develops and applies its own rules for counterterrorism since there are no globally acceptable, ratified and or developed counterterrorism laws to regulate the affairs.

Whereas the confusion in counterterrorism remains, terrorism thrives and unless the world community moves swiftly in sealing the existing legal loopholes, counterterrorism is far from bearing noticeable fruits. To some quotas, LOAC applies to counterterrorism and terrorists are mere criminals/ armed groups fighting the governments.⁴ This study contends that this is not the position. Terrorism is a post LOAC phenomenon which by all facets cannot be effectively handled

¹ Paul R. "Confusion on Counterterrorism" (2014) accessed at <https://www.brookings.edu/opinions/confusion-on-counterterrorism/> (accessed on April 12, 2019).

² Supra

³ United Nations Office on Drugs and Crime "Counter-Terrorism: Education for Justice University Module Series" United Nations, Vienna, (2018) accessed at https://www.unodc.org/documents/e4j/18-04932_CT_Mod_01_ebook_FINAL.pdf (accessed April 9, 2019)

⁴ Supra

by the LOAC. The legal challenge faced can best be addressed by interrogating LOAC in the wake of terrorism. This is what will be looked at in this study.

It intends to look thoroughly through the challenges faced in counterterrorism more so how to apply international treaties, conventions and other laws; including the domestic laws. A study of KDF will be evaluated on how it has dealt with the menace of terrorism both within and outside Kenyan borders. The issue of definition of armed conflict, terrorism and counterterrorism will be looked at as this is where the real hurdle is.

1.2 Problem Statement

The overall response to terrorism is arguably inadequate. If anything, there seems to be lack of international political will to tackle the terrorism menace or that it presents a difficult legal hurdle, both under the individual domestic laws and the International Law.⁵ Additionally, the international community seems to be lethargic in legislating against terrorism. Consequently, legislation on counterterrorism remains sparse despite realization that terrorism represents a new threat to world peace. The LOAC was precipitated by WWI and WWII and thus largely concerned with interstate armed conflicts.

9/11 attacks in the USA brought into limelight terrorism. Realizing LOAC was inadequate for USA to attack Afghanistan and the Taliban, President George W Bush, had to find an alternative legal justification which he could not find in the existing legal framework. This led to the invention of 'global war on terror' but which still generally lacks legal backup, definition and *modus operandi*. This call however enabled the USA to invoke the military in the fight against 'terrorism', according to rules set by the USA, fighting a war defined by USA and according to

⁵ The IHL

fairly non-existent international law to regulate it. This is the situation up to now, the worldwide. The sad reality of this new type of war is its rapid spread, while counterterrorism measures and legislation on the same remain very stagnant. This renders the counterterrorism methods lag and inefficient and be applied in confused murky waters of different domestic legislations as each state may decide.

KDF faced similar legal challenges presented by this counterterrorism legal infrastructure when it crossed border into Somalia and subsequently joined the AMISOM to fight against terrorism. Just like the USA, Kenya had to face terrorism regardless of non-existence of a clear legal justification, armed with military weaponry and UNC Article 51. Notably, Article 51 of UNC is not clear on the threshold to be attained before it can be invoked. Consequently, it has been left to individual states to decide if there is a need to go after a group operating from another sovereign state as was the case of pursuit of Al-Shabaab in Somalia by KDF. Key questions remain whether this was justified and whether the threshold was met.

In the book “Defending humanity” by *Fletcher, George P*⁶, the authors note that in analyzing the basis of armed attacks on self-defense the legal resting place is self-defense principles found in a particular country’s domestic criminal systems, “*droit naturel de legitime defense*” (legitimate defense). That is, legitimate self-defense rule is to be applied in order to find out if there is a justification by the states to use force in further application of Article 51 of the UNC. This study thus broadly aims at examining the existing legal framework and more specifically LOAC and its application to counterterrorism operations.

⁶ Fletcher, George P., and Jens David Ohlin. “Defending humanity: When force is justified and why.” Oxford and New York: Oxford University Press. (2008.)

1.3 Objectives of the Study

- i. To examine the rise in terrorism as a new threat to international peace and security.
- ii. To examine the legal framework governing counterterrorism operations.
- iii. To analyze application of LOAC in counterterrorism efforts by KDF in Somalia.
- iv. To give relevant recommendations on the legal shortfalls in countering terrorism.

1.4 Significance of the Study

This research is both educative and informative. Educative in the sense that it can be used for academic purposes in the schools and in the military. It is informative in the sense that it will disseminate important information on the key areas that the existing regime needs improvement on and where the world is in terms of tackling the terrorism menace. The weaknesses of this law and how it is applied for military tactics the process used by states to make decisions will be analyzed. As this study focuses on the KDF and the challenges Kenya has faced in the war against terrorism with the neighboring Somalia-linked militia (Al-Shabaab), it will look into the applicability of the law and generally the relevance of LOAC in counterterrorism. The recommendations will be relevant in informing militaries and governments on how to anchor counterterrorism operations on law and most importantly deterring such future criminal acts.

1.5 Justification and Relevance of the Study

Terrorism though relatively a new wave of global security concern, is undoubtedly on the increase. This is a worrying trend. The implication is that terrorists are right among us. They are almost in all states of the world and are still spreading their tentacles through recruitment. This is in spite of numerous infancy measures put in place through national legislations and international instruments

and establishment of counterterrorism institutions and despite use of armed forces and other security agents to combat terrorism. Although Kenya used its military power to intervene in Somalia where terrorists have set their operational bases with an aim to neutralize them, there is little to show of it other than a reduction of attacks in the Kenyan territory.

The study will focus on investigating why there is little progress in counterterrorism, not only in Kenya but all over in the world. It focuses on KDF and will help inform and educate on the strengths and weaknesses of the existing law on counterterrorism and LOAC and where to make improvements. This will help invigorate counterterrorism operations.

It is also meant to criticize previous studies on this topic on areas that might have been overlooked. It will analyze the factors that make it conducive for the failure of law and for the thriving of terrorism in the world. As the study will demonstrate, more can be done, or different counterterrorism approaches can be applied. The study will also show how the definitions and categorization of terrorism thus counterterrorism methods have been a hindrance in counterterrorism.

1.6 Literature Review

A Chinese Writer called Sun Tzu who wrote in 500 BC, argued that wars must be within the confines of absolute inevitability of the use of the armed forces. Those to be spared include persons captured during war, persons wounded in the battlefield, those who may have fallen sick during combats and also the innocent civilians. Argument by Sun later was echoed by Dunant, who founded the Red Cross. Consequently, where military action is unnecessary, it should not be invoked and the civilians, the non-combatants, the wounded and the ones who have surrendered

should be protected. Unfortunately, the terrorists have no regard to such provisions. They have no humanitarian mind at all and are not bound by such law. They attack and kill civilians with the force of confronting the military. A paradox however exists in that whenever the military is deployed, it has, and must follow LOAC.

In India, similar rules as those proposed by Dunant and Sun Tzu exist. An example is *Code of Manu* which was inscribed in 200 BC. It outlines the rules that regulate behavior during attacks. This Code was the first to declare a prohibition in using weapons which were either barbed or poisoned. It also proposed that care be afforded to wounded soldiers and that combatants who surrendered should be spared. This was one of the earliest developments of the LOAC.

It should be noted that up to 20th century, there virtually existed no international law principle that could limit the right of a sovereign state going to war since war was an essential ingredient that a State could exercise for political reasons. During those times, some wars were considered as just and others were considered unjust wars. This doctrine was formulated by St. Augustine. It was largely based on Christian beliefs. At the time, this doctrine of just and unjust war was very flexible, as to enable a sovereign state at its own discretion to define its war as just. Impliedly, therefore, the opposing State would be regarded as engaging in an unjust war. This means the soldiers of the state deemed to be fighting just war could mistreat and disregard LOAC as much as they wanted against the state deemed to be fighting unjust war. Most likely, parties taking part in a war could justify a just war, thus on their part they could not be interested in protecting those who were not able to defend themselves either because of wounds or for being captured.⁷

⁷Peter John Rowe “Law of war” found at <https://www.britannica.com/topic/law-of-war> (accessed January 19, 2019)

Dale Stephens and Michael W Lewis note an increase in the realization that LOAC IS pricey. Observing LOAC as it currently exists may be seen to go against achieving humanitarian goals. LOAC has ambiguities that are far reaching as opposed to the certainty it gives the world in combating war. These have been magnified by the failure of the international community to come up with true and final legal definitions. The current definitions create challenges in classifying terrorism within armed conflict and the effectiveness of LOAC in dealing with terrorism.

A more distinctive philosophical foundation for the modern LOAC is by Rousseau when he tried differentiating states from men in the famous theory of ‘social contract’. He Recognized that in 18th Century that war was an integral part in the politics of a state as opposed to individual retaliation between people. Rousseau was of the view of war not being defined by relationship between men rather between states whereby subjects of those states become adversaries by accident. This opinion was a demonstration of post-Westphalian fulfilment and emphasis on states and common humanity of participants in war.

This is a continued touch stone validating current LOAC found in ‘*Martens Clause*’ as it first appeared in 1899 Hague Convention No. II, at its preamble. It was later incorporated in Common Articles, thus, though a party has denounced the Hague Convention it, “*Shall in no way impair the obligations which the Parties to a conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usage established among civilized peoples, from the laws of humanity and the dictates of public conscience...until a more complete code of the law of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as the result from the usages*

established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”⁸

A positive stride toward development in LOAC was made around 300 BC, with the coming into the arena of “Stoicism,” a Greek philosophical school.⁹ It was concerned with understanding, sympathy and respect each other during war.¹⁰ Problem with stoicism however is that it was not clear with what this sympathy is and what the understanding it referred to. The other problem is that in 300BC, little, if anything was known about terrorism, thus it could probably not have informed the current counterterrorism measures. But the philosophy behind *stoicism* was key in preserving the human dignity as far as development of the IHL is concerned.

The big question in the minds of many civilians affected by terrorism is how to apply Human Rights to the active participants in the terrorist acts. To this end, it is suggested by Dieter Fleck that where violent disturbances are not covered by IHL, automatically IHRL comes into play. Thus, according to him, applying human rights obligations totally would pose problems of making a determination as to if there is a continuing armed conflict or not.

This was same position taken by authors like Oppenheim who suggested that a legitimate warfare must be fought between sovereign states. This means therefore that LOAC should not apply to NSAs. Even then, it can be concluded that such NSAs are engaged in an illegitimate warfare, thus if terrorists are to be included in this category of NSAs they cannot escape LOAC. They are illegal combatants who should be responsible and accountable for their atrocities according to International Law in place.

⁸ “The LOAC: Basic Knowledge”, ICRC (1997)

⁹ Ibid. P. 24

¹⁰ http://cdn.peaceopstraining.org/course_promos/international_humanitarian_law/international_humanitarian_law_english.pdf (accessed January 26, 2019)

Author Donahue authored a publication called *Civil Liberties, Terrorism and Liberal Democracy: Lessons from the United Kingdom*, in which he observes a behavior by the armed forces supporting emergency legislation being extended in counterterrorism since they want to retain the said emergency legislation for their own convenience even where there no longer exists terrorism. A US Congressman called Pence similarly opined counterterrorism methods being advocated for addresses unlawful actions since law is concerned with conviction or trust for the law enforcement agencies.

The law that exists on the subject does not seem tackle terrorism adequately, as this research will show. However, there are attempts made. An example is Article 2 (4) of the UNC which according to Lowe¹¹ imposes a positive obligation on states to always endeavor to settle disputes amicably¹² rather than resorting to war. Similarly, and as correctly observed by Martin Dixon, the ban against force is an International Law cardinal principle with universal application and is binding in nature.¹³ Article 2 (4) is not an absolute provision since UNC does not impose a total ban on war. An exemption exists in provisions of the notion of self-protection under UNC Article 51.

This concept gained prominence with the outlawing of warfare by the UNC and Paris Convention.¹⁴ The rationale for self-defense is need for a legal basis that a state can lawfully invoke use of force for protection of its boundaries against external threats. Law envisages a state or NSA may instigate an armed attack and hence it is settled law and contemporary international

¹¹Vaughan Lowe, *International Law* (OUP, 2011) 270 where the author notes that the Paris Pact signaled an intention to change strategy from war to settling disputes through diplomacy among other less violent means.

¹² James Crawford (n.86), 748

¹³ Article 52 (2) of Additional Protocol I of 1977 defines military objectives to include the capture, defeat or neutralization of an enemy through military action.

¹⁴ James Crawford, *Brownlie's Principles of Public International Law* (8th edn OUP 2012) 747.

practice that self-defense and use of force applies against an aggressor provided that their hostile acts can acts of violence.¹⁵

Self-defense right is a debate that is continuing as to whether Article 51 of the UNC should be interpreted restrictively or liberally in a way that gives a broad meaning to its text. Derek W. Bowett argues that the content and interpretation of self-defense as a right is not limited by UNC Article 51¹⁶ thus holding the view that Article 51 be read to safeguard a sovereign state's right to its own defence and protection.

Similarly, does the law allow for self-defense, and by use of force in such an instance especially as global terrorism becomes more prevalent?¹⁷ How do we combat terrorism and obey IHL? UNC Article 51 envisages a violent attack as a justification for invoking self-defense as of right.¹⁸ The shortcoming of this is that the UNC has not defined what an armed attack is to justify resort to force by a state in the context of self-defense arguably in self defence. Case law has pointed to a clearer definition, trying to put a settlement on what the level of provocation should be attained before this right can be invoked.¹⁹

War on terror cab be said to be increasingly requiring unilateral or multilateral intervention of states by employing different approaches including cross-border operations particularly for protection of nationals on foreign soil or long-term campaigns such as the so-called

¹⁵Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm D. Evans *International Law* (4th edn 2014), 619.

¹⁶ Derek W. Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 187

¹⁷ *ibid*, 627 where the author argues that the controversy on the confines and scope of self-defence has intensified especially in light of the 9/11 terrorist attacks in USA.

¹⁸ Article 51 of the UN Charter stipulates thus....'if an armed attack occurs...'

¹⁹ *Ibid*, 15

counterterrorism.²⁰ UNSC in its Resolution in 2001 condemned the 9/11 terror attacks in the USA²¹ recognizing that terrorism exists and it's seriousness as international peace and security threat. It reaffirmed state's right to self-defend itself, either unilaterally and collectively against such attacks.²²

That notwithstanding, the underlying question still remains whether all terror attacks amount to armed attacks as to trigger or justify the legitimate self-defense. Given conflicting states' practice and approaches on terrorism, there is a likelihood of unjustifiable use of force to advance other interests under the pretext of fighting terrorism.²³ To determine 'an armed attack' in light of lacuna in treaty law, it is essential to refer to customary international law. Notably in ICJ in *Nicaragua case*, the underscored need to distinguish gravious form of force from other less serious forms.²⁴ From the court's decision, an armed attack can only be made up of the most gravious of attacks. Legitimate self-defense can only arise if this threshold is satisfied. James Crawford further traces the inherence nature to self-defense on customary law practice which existed prior to its codification under the UNC.²⁵

Another issue of contention relates to whether to construe the right broadly to include anticipated self-defense.²⁶ Note proviso under Article 51 of the UNC is to the effect that self-defense can only be invoked in case of an occurrence of armed attack. With respect to fight against terrorism, does

²⁰ JSOU Report, Counter-insurgency in Somalia (n.1), 12.

²¹ Christine Gray (n.80), 631 notes that the launch of the *Operation Enduring Freedom* otherwise referred to global 'war on terror' has greatly influenced the legal regime of self-defence since it has no definite duration.

²² UN Security Council Resolution No. 1368 of 2001, para.1 (S/RES/1368 (2001). Accessed at <https://www.un.org/securitycouncil/>

²³ Christine Tams (n.95) 367

²⁴ Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v USA) (1991) para. 191. Accessed at <https://www.icj-cij.org/>

²⁵ James Crawford, *Brownlie's Principles of Public International Law* (8th edn OUP 2012) 747.

²⁶ Ian Brownlie, *Principles of Public International Law* (7th edn OUP 2008) 729

this mean that a state should merely be reactive to terror attacks or it is permitted to take pre-emptive measures to defend itself against an impending terror attack? KDF in Somalia was reactive to some terror activities within Kenyan soil and at the same time preventing imminent terror attacks (anticipatory self-defense) against the homeland.

As it stands, no agreement on the legal aspect of anticipatory self-defense under International Law and especially UNC Article 51 which is conditional upon occurrence of armed attack. Prof. Ian Brownlie observes, is premised on a restrictive approach on anticipatory self-defense especially in the post WWII. James Crawford holds a similar view noting that, anticipatory self-defense is inconsistent with Article 51 as it contradicts objectives and purposes of UNC particularly on restricting states from unilaterally deciding to use of force.²⁷

Pre-emption that permits self defence from impending attacks is proposed by Derek W. Bowett²⁸ who argues that requiring self-defense in case of armed attack is inconsistent with state practice and practical aspects of state's self-defense principle. Reasonably though, anticipatory self-defense is justifiable in the circumstances where there exists an imminent threat. Also, the subject state must have exhausted all other alternative peaceful means of resolving the dispute (if there is any) at hand and lastly, measures being used must be commensurate with the threat or force used.²⁹

Similarly, ICJ in the *Nicaragua case*,³⁰ the pointed out that the self-defense can only be valid when observing criteria for necessity and proportionality. In *Oil Platforms case*,³¹ the same Court emphasized on measures taken in course of self-defense that they must be of necessity and directly

²⁷ Ibid, 77

²⁸ Derek W. Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 187

²⁹ Rebecca MM Wallace et al, *International Law* (7th edn, Sweet & Maxwell 2013) 294

³⁰ *Nicaragua v USA* (1991) para. 191. Found at <https://www.icj-cij.org/> (Accessed 12th April, 2019)

³¹ *Iran v USA* (2003). Found at <https://www.icj-cij.org> (accessed 4th March, 2019)

proportional to the armed attacks. It was pointed out that establishing necessity is a question of a strict and objective test and not left to a state's discretion. It seems this is the justification relied upon by Kenya in 2011 when she invoked UNC Article 51 being the legal backup of launching the cross-border operation codenamed '*Operation Linda Nchi*' in Somalia. According to the Kenyan Government, the incursion was premised on the government's intention to take pre-emptive action against the growing security concerns threat postured by the Al-Shabaab terrorist group in protecting and preserving her territorial boundary.³² Kenya construed this right of self-defense to mean right of pursuing terrorist elements that had transgressed into her territory from Somalia.

On the issue of aggression, the intensity and frequency of the attacks, the ICJ in the *Oil Platforms Case* underscored the underlying question as '*...whether a singular attack or a combination of ... attacks...amounted to an 'armed attack' as to justify resort to self-defense.*'³³ Notably, the court held that the attacks even if considered cumulatively, did not amount to an armed attack as they fell short of the 'most-grave' threshold laid down in the *Nicaragua case*. It is therefore arguable whether or not, terrorist attacks by Al-Shabaab on Kenyan territory pre-2011 satisfied this threshold to necessitate use of force in the confines of defending herself.

David Harris³⁴ argues that self-defense as a right usually is by its nature temporary. His views are Article 51 is not available to a state as a self-defence '*...until the UNSC takes appropriate actions to restore international peace and security...*'. Has Kenya obtained her objectives or not? The continued presence of KDF alongside AMISOM in Somalia signifies that Kenya still considers Al-Shabaab as a potential and active threat. Indeed, the former president of Kenya, Mwai Kibaki and

³² The Government of Kenya's Communiqué of 17 October 2011 addressed to the UN Security Council vide (S/2011/646) para.5. Accessed at <https://www.un.org/securitycouncil/>

³³ The Oil platforms case

³⁴David Harris, "Cases and Materials on International Law" (7th edn Sweet & Maxwell 2010) 93-94

his successor Uhuru Kenyatta have continuously stressed that KDF will only leave Somalia when Kenya feels safe both from within and outside her territory. General Karangi, the (then) CDF, is quoted stating thus:

*‘...this campaign is not time bound [...] when the Kenya government and the people of this country feel that they are safe enough from the Al-Shabaab menace, we shall pull back. Key success factors or indicators will be in the form of a highly degraded Al-Shabaab capacity....’*³⁵

In other forums, legislation against terrorism has been viewed by some as a common stand by Britain that that whatever form of violence will never be tolerated. British Members of Parliament during the times of “*Troubles*”³⁶ for example usually offered their support for implementation of a law suspending the basic human rights as a way of demonstrating that Britain was in total rejection of terrorism and in fact she was courageous enough to resist it altogether.³⁷ Impliedly, a repeal of counterterrorism law could be interpreted that Britain sympathized with terrorism; or any opposition to such legislation must not have been soft on terrorism. This hard line is what Jack Straw took urging the Parliament that where terrorism is involved, violation of human rights is justifiable.³⁸

Just war theory justification has been criticized majorly by the pacifism perspective. Pacifism takes a view that violence as a means of war is essentially never justified or acceptable as moral, even in

³⁵ Sharmon Thomas, ‘Somalia: Challenges and Opportunities in Peace Building’ (2016) 5 Found at <http://www.cfpar.org> (Accessed on 4th April, 2019)

³⁶ Ibid. 33

³⁷ Ibid. 100

³⁸ United Nations Secretary-General “Secretary-General’s speech at SOAS, University of London, on “Counter-terrorism and human rights: winning the fight while upholding our values” [as delivered]” *New York* (2017) found at <https://www.un.org/sg/en/content/sg/statement/2017-11-16/secretary-general%E2%80%99s-speech-soas-university-london-%E2%80%9Ccounter-terrorism> (accessed February 8, 2019)

cases of severe humanitarian crisis. The pacifist approach is against violence since it is a morally illegitimate way of providing security to citizens or better still to a means of moral security for providence of human rights, international peace and justice.

Thus, in the Kenyan intervention in Somalia, pacifists would deem the armed intervention as both unethical and immoral. It continues that the value of non-violence and peace is higher than any other so, in lieu of force, under the pacifist model States are encouraged to use non-violent measures to address conflict and crises. Pacifists assume that the highest priorities are life and peace. However, non-violence practices like sanctions, diplomatic engagements etc would be inappropriate for NSAs like the terrorists, clans, pirates or rogue states that are not legitimate and are destructive to global security and/or its people. Besides that, when such actors are using violence as their means, it becomes extremely difficult to preserve the notion of non-violence, as states need to defend themselves against the actors. NSAs like terrorists do not oblige to negotiations or other non-violent methods.

As far as NIAC is concerned, Professor Schmitt discusses the law touching on the opposing rebels during a NIAC. He noted scarcity of treaty law touching on NIAC. A question of threshold presents itself in determination of if the persons engaged in attacks are actual members of the opposite forces or if they are just criminals or criminal gangs who are using the instability to advance their criminal activities. The latter, the criminal gangs who take advantage of instability, cannot be regarded as parties to the conflict until they take sides or collaborate with the rebel forces. This then means that according to the Professor, domestic and human rights law purely governs the operations targeting such groups or individuals. The caution he proposed was states must be wary of such criminals turning to oppose or compete with the state in controlling the state,

upon which instance the state must respond forcefully or in a militarily. For the former, an easy way distinguishing is the rebel armed forces, who are at all times targetable by militarily.

1.7 Theoretical Framework

The study will by large consider and be guided by the following theories: First is the self-defense targeting theory. It is provided for in the UNC Article 51. It theorizes any form of armed force can only be regulated by *jus ad bellum*, which is simply a state's right to war. It involves consulting so as to make a determination on if it is justifiable to enter into war or not. In other words, is it a 'just war'? Thus, the self-defense principles propagated by *jus ad bellum* seek to achieve objectives of self-defense. This in turn obviates the need to assess if IHL principles apply to these kinds of operations or not.

As long as the targeted forces are in the confines of principles of *ad bellum*, that is those of necessity and proportionality, then launching attacks on them is legal.³⁹ This theory is in one way or the other responsible to the confusion surrounding legal characterization of transnational terrorism. Can armed conflict thrive in the confines of the definition according to international law when states use armed force to counterterrorism in various areas? Thus, according to this theory, the entry of the KDF to Somalia in the hunt for the Al-Shabaab militants was informed by the bid to self-protect. Internationally, this is not regarded as IAC since Kenya is not warring Somalia rather just an organized criminal gang residing in Somalia, or rather with a base in Somalia, a group which has been disowned by Somalia. Besides Kenya, this theory was invoked by the two

³⁹WatkinK. & Norris J. Non-International Armed Conflict in the Twenty First Century ed. 88 Rhode Island: Naval War College, 2012 found at <https://www.peacepalacelibrary.nl/ebooks/files/356612716.pdf> (accessed January 19, 2019)

former presidents of USA, George W. Bush and Barrack Obama when fighting against Al-Qaeda and Taliban terrorist groups in Iraq and Afghanistan respectively.

The second theory is *Sovereign Agency Theory*. According to this theory, the current confused conflict classification formulae for applying LOAC is no longer useful. This is because regulating state military has for long been viewed along the principle military is sovereign agent of a state thus given privileges and duties on that justification. These privileges and duties are the basis of modern LOAC.

In 20th Century LOAC was divided with total LOAC being applicable only to conflicting sovereigns while just a number of provisions of LOAC could apply to other conflicts that were not between sovereign states. The separation resulted to a blur line whereby states are able to customize LOAC for their agents, thus choose which parts of LOAC are applicable and which ones are not.

This theory goes on to suggest that how LOAC is being applied should not in any way be manipulable. The application should not be based on confused classification paradigm, instead on the original sovereign's grant of agency. Whenever a state decides to go the military way it should be prepared for the application of full LOAC regardless of the classification of the conflict taking place.⁴⁰

Then there is the *Just War Theory* which founded on the Christian perspective by St. Augustine who viewed war on morality based Christian perspective. This theory received comments from St.

⁴⁰Eric T.J “Applying a Sovereign Agency Theory of the Law of Armed Conflict” *Chicago Journal of International Law* (Vol. 12 No. 2 (2012) Accessed at <https://chicagounbound.uchicago.edu/cjil/vol12/iss2/14/> (accessed on 18.01.2019)

Thomas Aquinas in the 13th century. Aquinas presented the traditional just war theory as has been discussed by the modern-day scholars. His discussion is focused on justification of war and the kind of activities in war that are permissible for a Christian while engaged in war. Aquinas' argument has lately become the basis for universalizing war beyond Christendom.

Since the terrorist attacks in the US on 9th September, 2001, attention has been focused by academicians with conferences at the international level, national and military levels being held purposely to develop and consolidate the just war theory which has become an interesting topic for discussion in political science, international relations, ethics, philosophy and military history courses. Proceedings of these conferences are often issued so as to offer readers with a taste of what topics bring up.

In the political circles, for justification of war to be a superficial acknowledgement of justification is required. As seen above, soldiers are taught on just war in the military conventions and academies. Generals on the ground teach their troops to adhere to the rules of just war. Despite these efforts, genocidal war crimes continue to happen. The world has experienced genocidal campaigns being waged and soldiers committing atrocities. Those actions are illegal and war crimes regardless of how much they may be sanctified and how intense and deadly the battle may seem to be.

1.8 Hypothesis

The study will test two hypotheses:

H₀₁: LOAC has no limitations based on the experiences of the KDF in fighting terrorism.

H₀₂: LOAC has no effect on efficacy of counter-terrorism operations by KDF in Kenya and Somalia.

1.9 Methodology of the Study

The research has adopted a qualitative approach. It has used descriptive research design which has allowed the researcher to make collection of vast volume of information on the study phenomenon to enable testing of hypothesis.⁴¹ This enabled study of the behavioral trends in the changing arena of armed conflicts informed by entrant of new wave of warfare, labelled the ‘war against terrorism’. The researcher therefore collected data from different sources to have an in-depth understanding of the problem.

Data was collected through document review of relevant literature complemented by internet sources. The research looked at what different scholars have written about the legal framework applicable to counterterrorism operations. Case law, international legal instruments, armed forces and states’ experiences were considered in the course of the study. Statistical data was also evaluated to support arguments in the study.

1.10 Chapter Breakdown

Chapter one of the study is centered on introducing and giving a brief background of research. It has given statement of the problem, its objectives, significance and justification of the research. This chapter has further interrogated the legal basis of armed conflict through a literature review, provided the theoretical framework, stated the hypothesis and finally gave the methodology used in the study. Chapter two will look in depth at the definitions of both terrorism and armed conflict,

⁴¹ Kothari, C. R. “Research methodology”. *New Delhi: New Age International Ltd.* (2004).

history of terrorism and counterterrorism, applicability of LOAC to counterterrorism and civilians, combatants and non-combatants. Chapter three will consider the case study of KDF in Somalia. The question of whether it was legal for Kenya to enter Somalia in pursuit of the Al-Shabaab militants will be examined in this chapter. The ability of Somalia to give consent being a failed state will also be discussed. Chapter four will give conclusions and the recommendations from the study.

1.11 Conclusion

The chapter has analyzed the perspective upon which the study is based, and how it has been carried out. To start with, the chapter has summarized the background of the entire study, thus it was informed by the prevailing and ever-growing threat of terrorism globally. It has looked at the objectives to be achieved by the study upon completion, its relevance as well as the significance. The research has been informed by the literature that exists on the topic, the various theories and the researcher's subjective analysis of the same. The next chapter looks into more detail the findings from the above analyses, looking into the legal framework that is applicable to counterterrorism, if there is any and what the shortcomings are.

CHAPTER TWO: COUNTERTERRORISM AND THE LEGAL FRAMEWORK

2.1 Introduction

The chapter looks in detail the legal framework that guides the counterterrorism methods. It will also examine the current legal framework to counter terrorism. What is important for the chapter is the point at which the LOAC merges with terrorism and where both diverge. The chapter will seek to place terrorism within armed conflict and examine whether LOAC is a good tool in counterterrorism.

2.2 Definition of Terrorism

The immediate challenge after September 11 terrorist attacks in the USA, was lack of clearly defined terrorist activities. The UK's representative to the UN at the time had this to say, '*What looks, smells, and kills like terrorism is terrorism*' while attempting to define terrorism. Several other attempts on the definition have been made globally.

As noted by Hoeven Juliana⁴² after September 11th period, counterterrorism actions are overly undefined. Since no clear counterterrorism rules exist, states take advantage of the situation to justify infringements in the name of domestic security. Today, what we have is a loosely defined terrorism as, '*acts that either cause death or injury to persons, or damage to property, combined with a specific intent to intimidate a population, compel a government or international*

⁴² Supra

*organization, seriously destabilize or destroy the fundamental structures of a country or international organization.*⁴³

Significant effort to define terrorism was also made in August 2004 by the UN through Resolution 1566, thus; *“criminal acts, including [those] against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provide a state of terror in the general public or in a group of person or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute...terrorism are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature ...”*⁴⁴

Problem with defining terrorism however, lies in the ‘exceptions’ proposed by some of the instruments.⁴⁵ Exceptions as to who can and who cannot engage in terrorism; exceptions on what constitutes terrorism and what does not constitute acts of terrorism. These exceptions range from actions against members of the army and their objects, prohibited actions and excluding actions by military. Even for the ones that include exception clauses, it is not yet agreed on if the exclusion of actions by ‘armed forces’ only refers to state actors/ armed forces or if they include NSAs. Some instruments exclude a state’s army when on official duties. This implies that armed state actors cannot be terrorists while on the other hand ANSAs can be.

⁴³ EU Council Framework Decision 2002/475/JHA found at <https://www.econstor.eu/bitstream/10419/144726/1/848321065.pdf> (accessed on 21.01.2019)

⁴⁴ Juliana V.H “Counter-Terrorism Measures And International Humanitarian Law: A Case Study Of The “Troubles” In Northern Ireland” *Penn Law: Legal Scholarship Repository* (2016) found at <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.co.ke/&httpsredir=1&article=1922&context=jil> (accessed 23.01.2019)

⁴⁵ Mackintosh K. and Duplat P. Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action (2013)

It is disagreements over such exceptions that have caused negotiations on a comprehensive terrorism convention difficult leading to a deadlock for over two decades.⁴⁶ The Danish Judiciary has weighed in and tried to define armed forces. In a Supreme Court's ruling, 'armed forces' refers only to the army. Thus, the two emergent schools of thought in the definition of terrorism are first which covers only non-combatant and secondly which covers combatants and noncombatants.

This raises a dilemma whether counterterrorism is regulated by the LOAC, otherwise which other international obligations were states required to adhere to in the fight against terrorism? It is for this reason that Amnesty International has warned widely defined terrorism can rise issues with concerned parties' human rights. Similarly, the European Court of Justice lamented failure by UNSC set up a body exclusively to hear complaints and accusations on the legality of various actions by concerned persons suspected to be terrorists. The real threshold has also not been clearly set by the international body, leave alone the definition.

2.3 Definition of Armed Conflict

Just like undefined terrorism, armed conflict has no clear definition. The international community through the applicable IHL and IHRL recognizes, instead, what is known as IAC and NIAC.⁴⁷ This means armed conflict it must fall within these two categories. The relevance of this is that different approaches in terms of laws and physical confrontation will be employed including aspects of LOAC and domestic criminal and human rights laws.

⁴⁶ Supra

⁴⁷ Albert Camus "Non-international Armed Conflict (NIAC)" found at <https://guide-humanitarian-law.org/content/article/3/non-international-armed-conflict-niac/> (accessed January 29, 2019)

Armed conflict has been defined, though not universally accepted, as of prolonged forceful violence between military and ANSAs within that state; or between such ANSAs in a state.⁴⁸ To be of a ‘protracted’ nature, the armed violence must present a measurable intensity and duration. It must meet some criteria and threshold which is provided in case law. In the *Radovan case*, at paragraph 441, it was held, “*For Article 3 to apply, two preliminary requirements need to be fulfilled, namely there must be an armed conflict and the crime must be closely related to that armed conflict (“nexus requirement”).* In relation to the requirement that there exist an armed conflict, the Appeals Chamber in the *Tadić case* articulated the test as follows: “*[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized groups or between such groups within a State”. To determine the existence of an armed conflict, both the intensity of the conflict and the organization of the parties to the conflict must be considered on a case-by-case basis. It is immaterial whether the armed conflict was international in nature or not.*”⁴⁹

This definition was informed by the fact that the Common Article III and Protocol II Article 4 (2) (d) are not so clear on the definitions although they appear to be explicit in terms of what IHL entails in as far as NIAC is concerned.

IAC occurs between opposing states. A key question however arises of who forms the state in this context. The description of NIAC as an armed confrontation between army and rebels or between rebels themselves does not fully clear the blurred distinction neither does it help position ‘war on terror’.

⁴⁸ As defined by the International Criminal Tribunal for Yugoslavia In the *Tadic* Interlocutory Appeal on Jurisdiction, (a 1995 judgment)

⁴⁹Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016 – Volume I of IV (TC), 24 March 2016. Found at <https://www.casematrixnetwork.org/cmn-knowledge-hub/elements-digest/art8/c/common-elements/3/> (accessed 23rd May, 2019).

To assist determine the existence of armed conflicts, the ICRC looks into legal standing of hostile and aggressive parties viz a viz how military has responded.⁵⁰ Armed conflict has further to be differentiated from other forms of confrontations and violence like in riots.⁵¹ This is because for it to be termed a confrontational armed conflict the threshold discussed has to be crossed. This to some extent means that there may be a military occupation or military intervention. However minimal this is, chances are that it could be termed an armed conflict.⁵²

2.4 Pre- LOAC History and Development

There was war and there were conflicts.⁵³ People were killing and injuring each other for power, property, control of territory and general causes of conflicts including religion supremacy. The laws of war or rather the conditions were those set by the fighters in the battlefield. Whatever limitations which they could have imposed could not be said to be based on any laid down rule rather for the convenience of the fighters.⁵⁴

There later came in the need to offer some protection to combatants, civilians, the sick, children, wounded and the medical personnel who have no direct connection/ involvement to the hostilities. International cooperation was required in this. Henri Dunant was key in finalization of the first Convention in Geneva in 1864 whose objective was to protect the wounded and the sickly. Soon thereafter, in 1868 the Declaration of St. Petersburg was enacted which banned explosives and

⁵⁰ These may include armed self-liberation struggles. This is applicable to the states that are a party to Additional Protocol I of the Geneva Convention 1949

⁵¹ Article 2(2) of the Additional Protocol II.

⁵²In the case of *The Prosecutor vs. Dusko Tadić a/k/a 'Dule' (1995)*, as determined in the *International Criminal Tribunal for the Former Yugoslavia*, even minor instances of armed violence, such as an individual border incident or capture of a single prisoner, may suffice to cross the threshold for IHL to apply (para. 70).

⁵³ Ibid P. 31

⁵⁴Ibid P. 24

missiles weighing not less than 400 grams in. Two treaties were enacted in 1899 in Hague; one concerning expansion of bullets.

The Second Hague Conference was held in 1907. A major stride was made producing a total of thirteen different treaties. In 1925, the Geneva Gas Protocol was signed which eliminated using suffocating and poisonous gas during war. Two other Geneva Conventions were passed dealing with the wounded and those captured during war. Following WWII, another important conference in Geneva gave birth to the now famous four Geneva Conventions of 1949 which were ideally concerned with the wounded and sick on land, the sick and shipwrecked at sea, with prisoners of war and with civilians. Several other treaties followed including the 1977 UN Convention on Military or hostile use of environmental modification techniques and the 1977 two Additional Protocols to the Geneva Conventions of 1949, extending the terms of the conventions to wars of national liberation and civil wars.

These developments were as a result of evolving war and great need to protect the non-combatants and those unable to proceed with active combat due to wounds or other forms of incapacitations. But where is the place of terrorists in this whole arrangement? Are they capable of these protections? Legal protections to terrorists have proved a difficult thing to achieve due to their tactics of targeting anybody from civilians to military and the 'non-believers' without distinction.

2.5 LOAC Currently

LOAC is the law that is aimed at protecting and regularizing actions by members of army, active members in an armed conflict who must obey it whatever their rank, position and group, at a

personal level.⁵⁵ Breach of this law becomes a personal responsibility⁵⁶, unless there is evidence to show that the contravention was the responsibility of a State in which case it can be punished by way of sanctions or fines.⁵⁷ Invoking of superior orders by the individuals is no defence to violation of the LOAC. Trial for crimes committed by individuals and states during the armed conflicts can take place in the domestic or international courts. Serious violation of the LOAC is considered a war crime. In addition to domestic and international courts, war crimes can be prosecuted in ad hoc Tribunals like ICC or the Tribunal which investigated law breakages in the Rwanda and Former Yugoslavia and among other Tribunals.

LOAC was born in the battlefield⁵⁸, drafted in simple language for faster and ease of interpretation by its users, especially the fighters, who are not lawyers. Its language is straight forward. It has evolved in terms of military experience as customs and traditions. Thus, it is meant to be applied during violent confrontations. LOAC is part of International Law, and has been accepted by majority of UN member states as binding on themselves especially during the times of armed conflicts.⁵⁹ It is also applicable to countering hostilities within a state.⁶⁰

The first law on the armed conflicts was enacted in 1864.⁶¹ Currently, there are around fifty (50) international legal instruments on war laws. There are also international customary practices that have since been accepted as part of the international laws used in armed conflicts. LOAC is aimed

⁵⁵ Speaking Notes “Laws of Armed Conflict (LOAC) Basic” FOI 267/16/17 Item 1 found at http://www.defence.gov.au/FOI/Docs/Disclosures/267_1617_Documents.pdf (accessed May 22, 2019)

⁵⁶ According to Common Article III of the Geneva Conventions.

⁵⁷ Supra

⁵⁸ Supra

⁵⁹ Lesson Notes prepared by ICRC on “the Law of Armed Conflict; Basic Knowledge.” found at https://www.icrc.org/en/doc/assets/files/other/law1_final.pdf (accessed 23rd May, 2019.)

⁶⁰ An example is the 1949 Geneva Conventions which have been accepted by virtually every member of the United Nations.

⁶¹ The first Geneva Convention. It has been revised several times-1906, 1929 and lastly in 1949. This Convention was mainly concerned with protection of victims of the armed conflicts.

at reducing suffering, loss and damage to property and lives that happen during war. It obligates persons and involved states and the army to abide by the laws of war. Its spirit however is not to hinder in any way efficacy of the military during such conflicts.

Two types of armed conflicts recognized by existing treaty regimes attract different obligations from different actions.⁶² Should it be determined to be an war, automatically the IHL comes in, more so if it is an IAC.⁶³ If it is not an armed conflict or if it is a NIAC the warring pacts or individuals will be under individual country's Criminal Justice Law and its Human Rights Law. ICRC, as an humanitarian body internationally has a duty to determine existence of war or not.⁶⁴ IHL is applicable beyond geographical confines of conflicting states in such a way as would otherwise warrant global targeting of individuals or groups believed to be NIACs.⁶⁵

2.6 IAC and War

IAC has to be distinguished from 'war'. War has to be sanctioned by the UN through the UNSC⁶⁶ and comes with stringent measures, conditions and threshold to be crossed. Today, many States are reluctant in declaring war against another due to the strict legal requirements by the UN. This threshold to be crossed, as hinted earlier, is that first it must be a full war between two or more states or state actors. Secondly is that the involved states must acknowledge that there is war between them, and in fact the states must be in support of their own state actors. The UN must

⁶² Especially the Geneva Conventions of 1949, the UN Charter and the IHL.

⁶³ Antoine A. "International Humanitarian Law and the Law of Armed Conflict" *Peace Operations Training Institute* (2012) accessed at http://cdn.peaceopstraining.org/course_promos/international_humanitarian_law/international_humanitarian_law_english.pdf (accessed January 26, 2019)

⁶⁴ ICRC Opinion Paper "How is the Term "Armed Conflict" Defined in International Humanitarian Law" (March, 2008)

⁶⁵ Michael N. Schmitt "Charting the Legal Geography of Non-International Armed Conflict" *International Law studies Journal* Vol. 90 (2014) pg. 5

⁶⁶ According to the UN website <https://www.un.org/en/sections/what-we-do/maintain-international-peace-and-security/> (accessed 24th May, 2019)

recognize that there is such a war and sanction it, meaning any atrocities committed by the combatants, or the involved states will be visited upon them individually.

War must be fought within the confines of UNC, the IHL and the IHRL since a breach of any of them will be a war crime or a crime against humanity or a breach of International Law. This has serious consequences for the individuals or states found culpable under the International Law. Thus, since WWII, this has rarely happened. However, there can be armed conflict which was devised by the IHL as a replacement to war in the post WWII. It is however yet to be declared if counterterrorism is a war, or a form of war, or a means of countering an armed group or simply a phenomenon with no legal definition.

2.7 History of Terrorism and Counterterrorism

The war on terrorism, like illegally trading in illicit drugs, illegally dealing in arms, infringing on intellectual property, trafficking people, and fake money; pits states fighting against determined but people without no particular allegiance to any state and law, yet they have enough resources to continue with the war with global empowerment. Unless states use and update their strategies they will never win war on counterterrorism, since terrorism is shaping the world in a similar way as interstate confrontations once did.⁶⁷

Little had been known or thought of or even planned about terrorism globally until 11 September 2001 terrorist attacks in the USA. This single event completely changed the landscape in the relative peace that was being enjoyed post WW II. Perhaps this was the biggest attack of the time to awaken the world to the reality of terrorism. The chronology of the attack involving four

⁶⁷Ibid P. 29

coordinated terrorist attacks was quite chilling. Before then, there were other ‘small scale’ attacks in different parts of the world. Examples are when World Trade Center was bombed in 1993, Military Complex Base belonging to USA was attacked in 1996 in Saudi Arabia, similarly Embassies belonging to USA and Israel were bombed in Kenya and Tanzania in 1998 and lastly in 2000 when USS was bombed among many other incidences.

Following the 11th September, 2001 attacks in USA were others like December 2001 when Al Qaeda associate Richard Colvin Reid attempted to light a shoe bomb on a Trans-Atlantic Flight coming from Paris to Miami; an explosion at a Synagogue in Djerba in April 2002; a French oil tanker exploded off the Yemeni Coast in October 2002; several bombs at an Indonesian Resort Island of Bali; and lastly two attacks on Israeli and US targets in Kenya in November 2002. That was just a start of many more terrorist attacks in the world more than two decades since the first major terrorist attack took place. The phenomenon has mutated, changed and advanced with technology while the world community has remained stagnant in terms of developing the counterterrorism laws, leave alone the actual definition of the term terrorism. It is this lagging behind that has caused the fight against terrorism to be a hard and complicated endeavor.

From the definition of terrorism above and due to lack of consensus on the issue, individual states have been given the freedom to define and apply their own interpretation of the term terrorism. Internationally, ‘self-defense’ seems to be at the center of counterterrorism measures. Who is self-defending? Obviously not individual persons but states. As stated above, attacks in USA on 11th September, 2001 signaled need for serious counterterrorism measures in the world. In fact, it is one of the biggest persuading incidents. Soon after that incident, the UN established a UN Resolution requiring all member states to use every possible method to counter terrorism. The self-defense

mechanism being employed was open to grand IHRL and the IHL abuses. States could label any group a terrorist and use whatever means they deemed fit to. It had to be reviewed.

This was an abrupt change in law; therefore, many questions would soon arise. New international strategies have shift attention to counterterrorism activities and how legal they are. UNSC adopted a Resolution in 2004, requiring obedience to international law by the states in counterterrorism. This statement was meant to offer a clarification and guidance on how to deal with terrorism. Thus, the counterterrorism mechanisms being employed and the methods must be legal in accordance to international law standards.

2.8 Applicability of LOAC to Counterterrorism

The arguments in this regard differ. To some commentators, terrorism is a form of armed conflict governable by LOAC while to others it is not. This classification is important as the former advocate that provisions of LOAC should apply generally in counterterrorism. The converse argument is that IHRL applies where terrorism is not viewed as armed conflict. International Law further protect and recognize introduction of emergency legislation as a right. This is another way through which confusion was brought to counterterrorism methods. When states start using emergency legislation to counterterrorism, it becomes exceedingly difficult to force states to rescind and comply with LOAC. The following sections of the study show what hinders applicability of LOAC to counterterrorism operations. The first one is the inability to distinguish terrorists from civilians, combatants and non-combatants.

2.9 Civilians, Combatants and Non-Combatants

The IHL demands that combatants should behave and dress not like civilians but as combatants for ease of distinguishing them. Reason is that IHL demands that civilians be protected from any form of harm during combat. And for doing this, the International Law has a reward, if captured, they will be held as prisoners of war, not as criminals. They may not be prosecuted if they were indeed lawful combatants in line with International Law. But what terrorists do is to conceal themselves among the civilians, launching attacks not as fighters, or lawful combatants, but as ‘civilians.’ This very aspect of terrorism has made it impossible to put down a concrete definition that would then open a wide door for conventions and treaties on counterterrorism. In line with this, LOAC seeks to protect human rights as far as is permissible and practical, to protect the civilians, the wounded, children, non-combatants, medical personnel, religious gatherings etc. LOAC mandates the persons actively involved in the combat (lawful combatants) to strictly stick to the law. 1949 Geneva Conventions of 1949 together with Additional Protocols with the Additional Protocols separate legal combatants from non-combatants. According to 1949 Geneva Conventions, Common Article 3, as long as a civilian is not a party to hostilities, they are entitled to protection. Those taking part in hostilities in law are regarded as combatants. What is being involved in hostilities in the modern-day counterterrorism? By virtue of an Executive Determination, US Policy is to the effect that Taliban and Al Qaeda are unlawful combatants.

This creates ambiguity under LOAC. The reason is that the enemy advances an uneven combat on members of the international community using terrorism as a delivery tool. Has integrity of the law itself been eroded? Perhaps the answer is in the affirmative since it is now being realized that LOAC as it appears is ancestral thus unable to keep up to speed with newly emerging forms of

warfare. LOAC, being a positivist heritage, was traditionally framed to offer protection to army under the concept of fairness.

Current incarnation in *jus in bello* gives permission to the army to target of the international terrorists. Reevaluation of the legality of the methods for engaging NSAs/ in a newly looked at framework would be of advantage in protection of the ‘true civilians’ especially for parties to Rome Statute and which are contemplating using their own domestic criminal justice system due to violation of this principle of distinguishing between participants in armed conflict and the true civilians.

Another problem with the counterterrorism laws and methods/strategy is that as some commentators have argued, the terrorist activities are committed by “civilians”, who are terrorists. These are the people the International Law is meant to protect as civilians. Terrorists attackers are normally disguised as civilians. It a tactic whose requirement is a clear distinction between combatants and civilians. Conversely it demands combatants to respect that distinction by imposing several requirements and prohibitions. The same law does not allow any intentional target to civilians; thus, it requires carefulness on combatants to circumvent unpresented suffering and harm on civilians during combats. This is besides, requiring combatants to adequately distinguish themselves from civilians so as to help from harming the civilians. In order to enjoy these protections, civilians are strictly forbidden from taking part in hostilities and combat.

Army must attack civilians if civilians attack them. Terrorists including Al-Shabaab, Al-Qaeda, Taliban and ISIS among others, violate the laws of war,⁶⁸ the LOAC by unlawfully taking part in

⁶⁸ Stephane O. “Global counter-terrorism must not overlook the rules of war” *ICRC* (2017) <https://medium.com/law-and-policy/global-counter-terrorism-must-not-overlook-the-rules-of-war-8e4906f720cd> (accessed January 31, 2019)

hostilities disguised as civilians. The terrorists are not being controlled by any state thus forcing them to obey the law would be an exercise in futility. Their *modus operandi* is by intentionally and deliberately blurring the distinguishing lines between civilians and combatants, thus making it difficult to distinguish terrorists from civilians. This makes it difficult to apply the LOAC strictly. Consequently, this implies that in such a scenario, LOAC in its strict sense will not apply to counterterrorism.

Regrettably, terrorists attack civilians aiming at causing massive civilian casualties. Thus, this alone qualifies terrorists as illegal belligerents by virtue of their actions. They cannot be prisoner of war at whatever stage. No protection can be guaranteed by the 1949 Geneva Conventions as they clearly don't meet four conditions set for lawful combatants by the 1874 Conference in Brussels.

Distinction between lawful combatants and civilians has been provided by war customs through four provisions. The first is that lawful combatants have a leader who is responsible for subordinates' actions. Secondly is they put some fixed peculiar symbol or mark or badge recognizable from far. Thirdly they don't conceal arms; and lastly they obey LOAC. The conditions as outlined above help in ensuring the substantive customary rules of war are respected during combat and that civilians are distinguishable from combatants. According to Customary Law only lawful combatants are supposed to involve themselves in military combats.

Customary Law of war immunizes combatants who are legal only from legal actions that would customarily be termed as criminal acts under international or local law. The rationale is that the lawful combatants are engaged in a conflict in order to win over the enemy/the other group or to subdue the enemy. They are thus protected and can be captured as prisoners of war LOAC. Thus,

if defeated, instead of being prosecuted under the common domestic criminal laws, they can be held as prisoners of war and thus afforded legal protection under the LOAC.

Under the LOAC, unlawful combatants have no right to launch attacks thus they are not immune from being prosecuted for their unlawful acts. They are neither protected under LOAC; to be captured as prisoners of war. They are supposed to be militarily targeted and attacked. This is applicable to terrorism.

UN has not, through any of the laws, recognized any of the known terrorist group engaged in any of the current armed conflict in the world as a lawful combatant. None of those groups obeys LOAC either through customs or otherwise. Terrorists are therefore regarded as militias who fight in disobedience of LOAC and are accordingly viewed as unlawful combatants.

2.10 The IHL, the IHRL and the UNC

2.10.1 IHL

IHL is the internationally established rules, which are envisioned in solving benevolent predicament coming up right from armed conflicts.⁶⁹ IHL protects lives of persons and their property during war by putting a limit on the conflicting states' choice of how to approach the war.

LOAC is same IHL, in whatever other term it may be used.⁷⁰

⁶⁹ Stéphane O. "Out of balance: Global counter-terrorism & the laws of war" *Humanitarian Law and Policy* (2017) <https://blogs.icrc.org/law-and-policy/2017/09/15/out-of-balance-global-counter-terrorism-the-laws-of-war/> (accessed February 1, 2019)

⁷⁰ http://cdn.peaceopstraining.org/course_promos/international_humanitarian_law/international_humanitarian_law_english.pdf (accessed January 26, 2019). The definition is originally from Definition elaborated by the International Committee of the Red Cross and generally accepted. Source: Commentary on the Additional Protocols of 8 June 1977, ICRC, Geneva, 1987, p. XXVII.

Between 16th and 18th centuries a humanitarian was developed in Europe whereby fighters would often meet pre-hostilities to make a decision on what rules to guide them during war. For example, they would agree on observing a truce, how and who to take care of the wounded, or who was responsible for releasing the captured when war ends. It is acts and behaviors which acted as catalysts for development of IHL and Geneva Conventions.

IHL can be associated with Battle of Solferino. One witness of that carnage, Dunant, was appalled by the suffering of the injured persons abandoned to die in the battlefields. Dunant was helped by the local inhabitants in collecting and caring for the wounded. When he went back to Geneva, he published a book in 1862⁷¹ where he portrayed cruelty of war on the injured people. These formed basis of IHL as it is known today.

2.10.2 International Human Rights Law

IHRL cuts across all the other legal frameworks. It is the guiding law in all forms of violence, government interventions and generally conflicts. This is even in cases where the IHL does not apply. Notably, the most appropriate law to have dealt with terrorism or rather the best counterterrorism law would have been based on the IHL since it is the law of ‘war’. However, war on terror is yet to be globally accepted that it is indeed a war.

The Human Rights Law comprises of several treaties under the United Nations. The first and the most important is the UDHR which was adopted in 1948 immediately after WWII and sought to ensure that all the member states have the utmost respect of human rights as outlined by the Declaration. Its adoption was due to the cruel jaws of armed conflicts to the human existence and

⁷¹‘A Memory of Solferino ‘

rights. The UDHR provides checks and accountability demands in these circumstances which includes terrorism.⁷²

2.10.3 United Nations and the United Nations Charter versus Terrorism

*“Terrorism remains a persistent and evolving global menace. It undermines international peace and security, destroys societies and destabilizes entire regions. It is an affront to the common values encapsulated in the United Nations Charter and the Universal Declaration of Human Rights. No country is immune to this threat...”*⁷³ This statement is a manifestation of how incapable the UDHR and the UNC have been found in dealing with the terror threat.

Indeed, the UN Secretary General call for the first ever UN Conference on Counterterrorism on 28-29 June 2018 in New York themed, *“Strengthening international cooperation to combat the evolving threat of terrorism”* came a little too late as terrorism had existed longer before this. This leads to the question whether the international community, through the UN is really proactive in dealing with the terror menace.

The most notable Article in the UNC that is arguably the most invoked in the fight terrorism is Article 51. The wording of Article 51 is thus, *“Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the*

⁷²Eric Posner “The case against human rights” *The Guardian* (2014) found at <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> (accessed February 7, 2019)

⁷³ Words by Mr. Vladimir Voronkov, Under-Secretary-General of the United Nations Office of Counter-Terrorism on the “Report of the United Nations High-Level Conference on Counter-Terrorism” found at the <https://www.un.org/sc/ctc/news/keyword/charter/> (last accessed on 26/1/2019)

authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

An issue of this Article is where the UN's consent through the UNSC is required, only a notification of intention to invoke the Article. The UNSC may choose to act on the communication or not. There is no obligation placed upon it by the Article. The other issue with the Article is that there are no set criteria for the states to follow for invocation of self-defense as a right. This is solely left on the states affected by the violence to decide. This being a principal Charter on matters of world peace and security, such failures are glaring and dangerous. Further, the UN has not considered aligning the Charter to the modern-day warfare, especially terrorism. The Article 51 is arguably not an authoritative legal framework to guard the world against terrorism. Of importance to note about the Charter is that it has reduced, almost eliminating war in its strict sense. Nations nowadays rarely attack each other in the name of war. What is short of the Charter is its inability to distinguish armed conflict from terrorism, thus it treats terrorism as an armed conflict. In fact, to some quotas, terrorism is a NIAC.⁷⁴

The UNC contextualizes the UN's obligation in fostering friendliness amongst countries aligned on principles of equality of rights to all humans and peoples' freedom.⁷⁵ This was position as well as driving force towards coming up with the Charter. Terrorism that has occurred post-1945 when the UNC came into force have no affiliation to self-determination debates. Terrorism has been

⁷⁴ Whittaker, David J “Terrorism Reader” *Paperback* (2001).

⁷⁵ United Nations Office on Drugs and Crime “Introduction to International Terrorism” *United Nations Vienna* (2018).

identified to be caused by many internal and external factors.⁷⁶ This confusion has led to the international community identifying terrorist groups according to what goals motivate them or ideologies rather than according to their illicit activities, like it happens through UN. This clearly shows how the counterterrorism field is undefined, unregulated and how legally loose it is. What Whittaker⁷⁷ suggests is that UNC was enacted when terrorism had not been ‘invented’. In fact, the first legal framework on terrorism were developed between 1960s and 1990s, long after the passage of the UNC, and addressed specific types of terrorist offences.⁷⁸ This explains why the Charter may not be an effective tool in counterterrorism.

2.11 Conclusion

UNC was enacted, informed by the urge to have a long-lasting world peace after the catastrophic devastation of the two world wars (WWI and WWII) and other armed conflicts experienced before 1945. The letter and spirit and of the UNC and indeed any other post 1945 Conventions is geared towards the regulation of wars and armed conflicts; especially the protection of civilians, non-combatants and those not directly involved in the conflicts. Terrorism was born long after 1945, and given much world attention after 11th September, 2001 USA terrorist attacks.

Faced with a real threat, the UN, the international community and the Nations were confused on how to deal with the emerging new type of ‘war’. It was undefined, unincorporated in the general definition of Armed Conflict. It has been unclassified, uncategorized and it caught the world unawares. The chapter has analyzed the existing legal framework and the serious need to counter the menace. Since the affected states/ nations need to be at peace with each other and to protect

⁷⁶ Whittaker, David J “Terrorism Reader” *Paperback* (2001).

⁷⁷ *Supra*.

⁷⁸ *Supra*.

their subjects, with or without a legal framework to guide their operations, they resort to their primary call, labeling the terrorists as criminals and dealing with them as such. This has some serious shortcomings as has been seen in the study and more-so as demonstrated by Whittaker.⁷⁹

It is clear from the study and the experience that the LOAC, the IHRL and the UNC have all failed to offer a conclusive, globally recognized counterterrorism legal framework, guidelines, rules and methods. As such, the counterterrorism methods are as defined by each of the affected states. The definitions are customized to suit each country. This is dangerous, as the exercise is subject to abuse, manipulation and may fail to meet the target. This will best be demonstrated by the experience of Kenya (KDF) in the fight against Al-Shabaab both in and out of its borders. The next chapter analyses this in detail.

⁷⁹ Supra.

CHAPTER THREE: CASE STUDY OF KENYA DEFENCE FORCES (KDF)

3.1 Introduction

In October 2011, KDF crossed the border into Somalia to combat a terrorist group residing in Somalia, Alshabaab. The exercise was codenamed “*Operation Linda Nchi*” meaning ‘Protect the Country.’ It’s main aim creating an imaginary barrier of 100km in length along the Kenyan border with Somalia and eliminate Al-Shabaab militants, who had been increasingly terrorizing Kenyans. The following month, November, Kenyans, at 82% supported Government’s decision to the threat posed by Al-Shabaab head on.⁸⁰ While it is acknowledged that this was a hard decision made by Kenya in sending its troops to Somalia, to some it was unnecessary, while to others it was excessive use of force.⁸¹

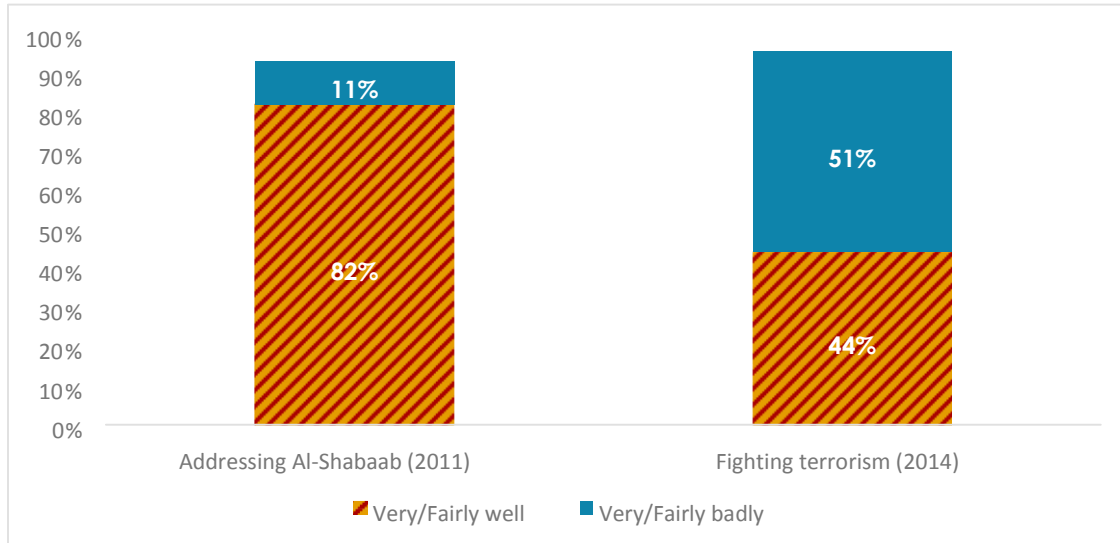
The following graphic representation shows the public perception of counterterrorism operations by the KDF in Somalia in 2011 and in 2014⁸². It shows a sharp decline in the positivity of the intervention.

⁸⁰ See illustration from “Afrobarometer” Dispatch No. 37 by Stephen Buchanan-Clarke and Rorisang Lekalake http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno37.pdf (last accessed on 28/01/2019)

⁸¹ Miyandazi, Luckystar “Kenya’s military intervention in Somalia: An intricate process.” Policy & Practice Brief. Issue 19 (2012).

⁸² Stephen B.C and Rorisang L. “Is Kenya’s anti-terrorist crackdown exacerbating drivers of violent extremism?” *the Injustice for Justice and Reconciliation and Afro Barometer* Dispatch No. 37 (2 July 2015) found at http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno37.pdf (accessed on 28/01/2019)

Figure 1: Evaluations of Government Performance in Fighting Terrorism



3.2 Kenya's Justification

Before this offensive, Kenya had experienced a number of terrorist attacks, sea piracy cases by the Al-Shabaab, abductions and killings. This was proving troublesome for Kenya. It adversely affected sectors like tourism, which is a key pillar in the Kenya's economy. In the intervention, Kenya demonstrated that a state's interests would always be pursued first before any other international relations. It is however critical to examine what convinced Kenya that it would not be acting against the law in the counterterrorism measures it employed. The threshold for such acts has not been defined, with some commentators like Miyandazi⁸³ suggesting that kidnappings and killings had not crossed the essential threshold for such incursion thus Kenya might have used a

⁸³ Supra

lame excuse to explore hidden national interests.⁸⁴ This as has been previously discussed in the study is the main shortfall for UNC which is meant to give such a go-ahead in an invasion.

Looking at the Just War Theory, it has its main tenets as *jus ad bellum*, *jus in bello* and *jus post bellum*. *Jus ad bellum* means that an aggrieved state/nation has just cause and reason to override the sovereignty of another state and intervene. *Jus in bello* means that the war must be fought ethically and morally. *Jus post bellum* on the other hand looks at the aftermath of intervention and how the intervening state helps reorganize the intervened state. This is the larger picture in the counterterrorism measures whereby if terrorism is organized in a ‘failed state’ like Somalia, the intervening state as part of the counterterrorism strategies should help in the reorganization of the ‘failed state.’ This could be the reason why President Uhuru of Kenya and even the former president Kibaki declared that the KDF will leave Somalia when the enemy is defeated and would help Somalia set up a stable government.

While pacifists may argue that the Kenyan intervention was immoral, it would be unrealistic and ineffective for Kenya to not use force as a means to intervene in Somalia due to the nature of the threats at hand and the nature of the actors involved. Taking the amoral realism school of thought which proposes that intervening by use of force can be justified, it should come with limitations. The amoral realism is of the view that “morality does not constrain war” as the proponents of the pacifism school of thought proposes. It also suggests that, “...morality is silent in wartime, denying that moral limits exist on the conduct of war.” This thus presents a sharp contrast with the *jus in bello* aspect of just war theory which proposes that there are constraints and regulations regarding wartime behavior and morality regarding such behavior.

⁸⁴ Supra

In applying the legalist perspective to the humanitarian intervention of Kenya, it is unclear and somewhat uncertain if legalists likely would approve the intervention as being morally acceptable. While it is clear that acts of aggression have been taken against Kenya on several occasions through terrorist attacks and piracy incidents among others, it is not clear whether such attacks should be attributed to the Somalia state itself or to actors (terrorists or pirates) who are not necessarily state-sponsored but are NSAs. Ultimately, the legalist paradigm emphasizes the concept and notion of the state.

In the case of Kenya, legalists could argue that because of the aggression by terrorists who were housed in Somalia or somewhat facilitated by the collapse of Somalia, it is therefore Somalia which is ultimately responsible and therefore deserving of intervention militarily. Conversely, as aforementioned, legalists could argue that the state and main government, which in this case would be the Somalia's TFG, cannot be held accountable for individual actors and is therefore undeserving of armed interference.

3.3 History of Skirmishes in Somalia

The second limb of the intervention involves the relationship between Kenya and Somalia. There is some history which might have had a bearing on the intervention. Kenya has had a history of strained relations with Somalia. At Kenya's independence Kenya's Somalis were permitted to be part of Somalia by excising the former North Eastern Province into Somalia. Tension between the

two states escalated so much so that Somali secessionism movement ensued between 1963 and 1967.⁸⁵

When the conflict was concluded the Kenyan government promised to develop northern Kenya and to help in re-settling people who were affected by the clashes. This was not honored by the Kenyan Government. Its presence was also not legitimately felt there such that the area was left unmanned, being open to attacks from Somalia. Thereafter, from 1980s, Somalia entered into a crisis thus cross-border attacks in North Eastern Province of Kenya became progressively advanced. Later on, a rebellion erupted following the formation of Somali National Movement intent on overthrowing the Said Barre's regime. This violence intensified between 1980s and 1990s. Barre was ultimately overthrown and exiled. Rival clashes begun on the control of the declared Republic of Somaliland. This is what has caused a lack of an effective government to date.⁸⁶

In 2004, the TFG in Somalia was formed which represented the fourteenth attempt in creating a functional Somalia Government. The hopes given by TFG to the international community and Kenya included that Somalia would be stable, which has not happened to date.

3.4 Attacks in Kenya

During the period when TFG was ineffective, Kenya has consistently been experiencing an increase of criminal activities within and outside its borders, some of which involve kidnappings. Kenya believed that this was the work of Al-Shabaab terrorist group. This led to Kenya being more and more concerned about its territorial security.

⁸⁵ Ndichu, Justin M. "Plugging a Leak": A Preliminary Step in Establishing a Nuanced Approach to Govern Intervention in the New Age." *Cornell International Law Journal* Vol. 49 (2016) PP201-225.

⁸⁶ *supra*

Then came in Operation Linda Nchi. It was necessitated by the reasons analyzed previously in this research. Immediately after launching Operation Linda Nchi, Kenya wrote to the UNSC justifying its military intrusion into Somalia.⁸⁷ Kenya justified her decision on the sharp increase in security risk caused by ever escalating attacks across her border with Somalia, claiming that this was an ongoing problem for a long time now emanating from the lack of a stable government in Somalia for over two decades. The last straw was when foreign nationals were kidnapped in Kenyan territory.

3.5 LOAC in Relation to KDF and Terrorism

Looking at the Geneva Conventions *viz a viz* KDF, it is clear that LOAC is not the guiding law. In fact, the Kenyan military is guided by the local domestic legislation and its traditional mandate to protect the country from external attacks, whatever the form such aggressions take.⁸⁸ What Kenya did was to write a simple letter, explaining its justification of entering Somalia ‘to flush out Al-Shabaab.’ Other than this normal traditional obligation to inform the UNSC of the decision, it is clear KDF went there in the best interests of the country. LOAC was out of the transaction.

Perhaps, as is normal in operations by the military, like in the case of KDF, the *jus in bello* component of IHL will be obeyed. This is normal since the military is a disciplined force and thus must endeavor to protect the civilians, must wear military attire and carry arms openly. The obligation to act within *jus in bello* provisions however doesn’t naturally extend to the terrorists. As seen earlier, terrorists conceal themselves among civilians, most times attacking the very

⁸⁷ Supra.

⁸⁸ Supra.

civilians they conceal themselves in and there is no known way of identifying them until they strike.

Kenya has experienced what the study wants to demonstrate as a problem with counterterrorism vis-a-vis the LOAC. The targets of terrorists remain unpredictable. They attack the security forces and the civilians alike. They also kill their own members whom they suspect of spying against them. They do not follow provisions of law but rather set their own laws and enforce them. LOAC also comes short of its effectiveness in the need by the military to defend its country against a 'faceless' group of armed people. Some attacks are cross border, like is the case with Kenya (KDF) and Somalia (where Al-Shabaab has set base and is operating from). A lacuna in law exists here in regard to judicial jurisdiction in case terrorists are captured. Are they to be presented to the International Courts like ICC or should they be prosecuted in Somalia or in Kenya?

Any of those questions can be effectively answered by looking at the enabling legislation. Currently there is none and if any, no world body is willing to take the direction of prosecution. Indeed, it seems that the world is convinced that the way to win the war on terrorism is not by legal means but by force. Perhaps this is the main reason why it is difficult to legislate on the same. It could also explain why counterterrorism measures have largely been left to individual states who feel that they are either directly affected or are desirous of helping in counterterrorism although they may not be directly affected.

From the world response, it seems that any country can enter any other country in pursuit of terrorists. In Somalia, there are several countries engaged under the umbrella of AMISOM. AMISOM's aim isn't necessarily to fight terrorism but to help restore order in the war-torn

Somalia. It comes as collateral that to restore this order, the biggest hurdle is terrorism which must be fought not exactly as terrorists but as an armed group bent on destabilizing Somalia.

Meanwhile, KDF is not seeing just order but a defeat of Al-Shabaab in the best interests of Kenya. In fact, KDF entered Somalia very late when the attacks escalated indicating that Kenya was provoked into action and not necessarily motivated by peace in Somalia. Actually, if Somalia continued fighting internally with the 'criminal' elements residing in Somalia, without attacks and kidnappings across the border, Kenya would probably have never sent its troops to Somalia. Practically, Kenya had its own motivation and thus guided by its laws. It just invoked a basic provision of the UNC that it had to act to self-defend itself. This action itself sheds doubt on the theory that Somalia gave its consent for Kenya to intervene militarily. Indeed, if there was such request sought by Somalia it would have been upon Somalia to inform the UN that it had invited and allowed KDF into its territory in pursuit of Al-Shabaab.

On the flip side, Somalia did not resist or object to Kenya's intervention. This would have been by way of Somalia writing to Kenya demanding withdrawal of its forces. It would have subsequently written to UN complaining about the decision by KDF to enter Somalia. Somalia has not done this. This makes it difficult to classify the intervention according to the International Law. With such difficulty in clearly classifying counterterrorism operations and the inadequacy of the international law in relation to terrorism, individual states have no other choice but to label terrorists as criminal gangs. This then means that the states can apply their own domestic criminal laws or anti-terrorism laws to combat terrorism. This phenomenon effectively transforms terrorism into an ordinary crime which during armed conflict is not governed by *jus in bello* but by the local laws that punish criminalism including IHL.

Before launching *Operation Linda Nchi*, various interventions by Kenya to maintain security of her inhabitants had failed to stop Al-Shabaab terrorist group from carrying attacks on Kenyan soil. Kenya was forced to invoke Article 51 right to her self defence so as to completely subdue the Al-Shabaab insurgents. As this research has shown, there is agreement on the legality of the actions by Kenya because some security analysts argue that there was justification under the traditional self-defense principles since it can be invoked where armed non-state actors resort to engaging in terrorist or even criminal activities. Other scholars are of the opinion that accepting the self defence by Kenya, or even the self defence principle altogether is dangerous as it lowers threshold way below limits that can be allowed under the circumstances. They see that whatever justified Kenyan incursion into Somalia was too low for that a magnitude military entry into Somalia.

To date, even as offensive continues in Somalia by KDF and the AMISOM, the UN has not offered legal direction on whether the Kenyan intervention was legal. The incorporation by the UNSC of the Kenyan troops into the AMISOM was seen as a boost to the overall regional support for Kenya in countering terrorism in Somalia and the region. USA supported the Kenyan intervention in Somalia when it used a drone to attack Al-Shabaab bases in Somalia in September 2014. The legality of this drone attack hasn't gained much international discussion and criticism.

3.6 Consent and Somalia as a Failed State

Looking at how divided the discussion surrounding the principle of self defence is, and its overall legality, it is unfortunate that the issue has been thoroughly addressed by the international community, especially on Kenya's intervention in Somalia. Perhaps one of the reasons for this is the assumption that TFG in Somalia consented to the military intervention by Kenya. If consent is given it is regarded as enough justification for intervention by another state. in such a case consent

is viewed as an international bilateral agreement that is binding to the two or more states involved.⁸⁹ By their nature, bilateral agreements between two or more countries is purely an affair of parties to those bilateral agreements. They have no obligation to explain them to anybody neither can community poke their noses into what the agreements entailed. Questions surrounding this issue lie on the existence of a state.⁹⁰ Some commentators are of the opinion that a failed state like Somalia (then) is incapable of giving such consent for military intervention. Unstable state without a government that is incapable of meeting its fundamental obligations and providing the most basic services to its citizens.

A failed state is a golden palace for terrorists, the main reason why Al-Shabaab is thriving in Somalia. Terrorists thrive in failed states since they have an easy way of assessing money for running their activities, recruitment of new members to join their troops. Another reason why failed state is a golden palace for terrorists is that terrorists can hide within the failed state since even though failed, is still a sovereign state and they are aware that other nations will may not interfere.⁹¹

Most of the analysts view TFG as not to have acted freely in allowing Kenya into Somalia to intervene on terrorism. This is because TFG once operated from Kenya, it was elected and formed in Kenya and that TFG sought to fulfil some objectives of Kenyan Government. Thus, TFG may have been influenced by Kenyan government.

⁸⁹Mitt R. "Counterterrorism as Armed Conflict" *University of Oxford* found at <http://counterterrorismethics.com/counterterrorism-as-armed-conflict/> (accessed January 30, 2019).

⁹⁰ Supra.

⁹¹ Supra.

3.7 UNC in Relation to Terrorism: Kenya's Justification

In light of the relentless terror attacks on Kenyan soil, it is debatable whether or not the *Operation Linda Nchi* offensive has achieved its underlying objective of protecting the territorial integrity of Kenya. Arguably, it is ineffective and unnecessary to the extent that it has not prevented a recurrence of terror attacks in Kenya.⁹² This is despite the element of necessity which presupposes that force is only justifiable for purposes of preventing an immediate and overwhelming threat.⁹³

Turning attention to the UNC and the domestic laws to find out what justified why Kenya intervened in Somalia, to be noted are principles of sovereignty of states and not being intervened. Thus, countries are not required to interfere with internal affairs of sovereign state. according to UNC, states should refrain from interfering in "*matters which are essentially within the domestic jurisdiction*" of other states.⁹⁴ This principle however, does not shield states and individuals against human rights abuses whether or not they involve foreigners. This in essence limits the non-intervention principle.

International law, specifically Article 2(4) of UNC prohibits the use of force by states in the following terms: "*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.*"

⁹² Christine Gray (n.80), 632, points out in reference to the operation enduring freedom launched by the USA that the fact that a military operation has failed to deter more attacks denotes that it is unnecessary and hence, fallen short of the necessity requirement.

⁹³ Martin Dixon, *Textbook on International Law*, (7th ed, OUP 2013) 322

⁹⁴ Article 2(7) of the UN Charter which in full reads: "*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.*"

There however exist two established exceptions to this rule as follows; the right of self-protection and implementation action according to authorization by UNSC. Up to this point, some commentators could argue that Kenya overstepped its mandate since it interfered with the internal affairs of another state without a prior sanction either from the UN or from Somalia. However, in its defence and in justification of its actions, Kenya said that it was justified under Article 51 of the UNC.

These were legit questions since Kenya went into Somalia to fight the Al-Shabaab. Kenya however wrote a letter to the UNSC giving the required information and in compliance of the simple procedure required by Article 51 of the UNC. The UNSC remained silent even after this letter, other than a statement commending Kenya on its role and decision to stabilize Somalia by Secretary General to UN, Ban Ki-moon.

The applicability of LOAC and indeed other legal provisions in counterterrorism thus remains wanting. No specific instruments exist in the International Law that are capable of being invoked by the state. Counterterrorism operations consequently remain discretionary at individual state level. Take an example of USA attacks in Somalia. USA has not been attacked by Al-Shabaab, neither is it operating under AMISOM but continues attacking Al-Shabaab bases in Somalia. If Kenya was justified by Article 51, what legal justification does the USA have for attacks on terrorists harbored in Somalia? This further depicts the insufficiency of LOAC in governing counterterrorism operations.

3.8 Conclusion

Kenya claims to have been justified while entering Somalia in pursuit of the Al-Shabaab. This was a culmination of many terror and terror related attacks on Kenyan soils by people who used to escape towards Somalia. Public perception was good when Kenya entered Somalia, but kept on dwindling as time went by. Perhaps this was informed by the fact that despite entering Somali, terrorist attacks continued to happen, and in a more brutal way. It has been argued that the few attacks on the Kenyan soil by Al-Shabaab probably did not warrant such a wide scale reaction by the KDF.

The letter that Kenya did to the UNSC was not responded. This was due to the fact that the UN recognizes existence of terrorism and inexistence of an adequate legal framework to guide the cause that a nation would want to take to fight the terrorism. However to date, almost a decade since KDF entered Somalia terrorism continues to thrives. As the study turns to conclude on its findings and give recommendations in the next chapter, it is worth noting that terrorism is a world threat and unless proper legal mechanisms are put in place, the world will never be at peace.

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

The study has made reference to various theories, literature and the International Law in trying to find if indeed there is a link between LOAC and counterterrorism methods currently in use. KDF has been used as a case study to bring the study closer home and find out what legal justification did Kenya have in intervening in Somalia to flush out the Al-Shabaab.

It has been depicted that LOAC was largely informed by the events following the WWI and WWII including majority of the Conventions, Treaties and Charters. The four Geneva Conventions of 1949, the UNC of 1945, the UDHR of 1948 and several others came into force after 1945. This depicts the view that the world had of another type of an armed conflict where there were lawful combatants on the one side and the civilians on the other hand. LOAC was thus invented for protection of these two groups. The obligation was on the lawful combatants to follow the law. The non-combatants on the other hand would be afforded protections for not being part of hostilities. LOAC brought about reduction in armed conflict of an international nature and reduced suffering to the civilians.

Unfortunately, there was born a new form of a security threat to the world peace, terrorism. Terrorism is fought in defiance against the LOAC and even the domestic laws. Terrorists attack civilians with the same force as the military. Terrorists are NSAs, perpetrating international attacks and their actions cannot be blamed on any particular state.⁹⁵ The Geneva Conventions do not apply

⁹⁵Measures to eliminate international terrorism: ICRC statement to the United Nations, 2016 found at <https://www.icrc.org/en/document/measures-eliminate-international-terrorism-icrc-statement-united-nations-2016> (accessed January 31, 2019)

to the terrorists, since they are NSAs or even state agents. Terrorists are not party to any International Law.

In intervening in Somalia, Kenya could not have sought consent from Somalia partly due to non-existence of a “government” to give consent and the feeling that the attacks were of an international nature that were a threat to its own security, thus, with or without consent it had to act fast. However, Kenya felt an obligation under international law to inform the UNSC as is required by the Charter. Kenya invaded Somalia militarily to fight an armed NSA residing in Somalia, a sovereign. International legal justification for this action by Kenya remains debatable. Somalia and the UNSC did not object to the actions by Kenya, not as a sign it was justifiable but because Kenya’s right to self-protect its borders was paramount.

Lack of international recognition of existence of terrorism, which is beyond LOAC, has made the counterterrorism methods inefficient and largely ineffective. LOAC is not the guiding law in the current confrontations between KDF and Al-Shabaab in Somalia. Kenya’s goal is dismantling the terrorists for stability to be restored back in Somalia and for Kenya to remain safe.

Terrorism cannot be said to be part of IAC. There are no states involved. Terrorism cannot be classified as NIAC as well completely removing terrorism from the realm of LOAC. Domestic law of Kenya is obviously inapplicable in Somalia, neither is Somalia’s domestic law applicable to Kenya’s intervention. Even if it did, Somalia has impliedly consented to Kenya’s intervention.

The silence by the UNSC when Kenya intervened in Somalia means that the international community will be reluctant in intervening on an individual state’s actions in counterterrorism perhaps because of existing legal uncertainties. The requirement by Article 51 of the Charter to be

informed of the intervention is considered enough. The attitude being ‘the rest of the counterterrorism methods will be devised and applied by the affected state.’ Consequently, LOAC and counterterrorism seem independent of each other.

4.2 Recommendations

From the conclusions above these recommendations arise: First, that there is need to be certain about the type of insurgents we are dealing with. That is to say, a clearly and globally accepted definition of the term terrorism is needed. It will inform who the terrorists are. Lack of a clear definition has continually presented difficulties on how to approach the issue of counterterrorism including USA after the attacks in 2001 and the KDF entry into Somalia. This definition should be included into a universally accepted International Conventions, Treaties, Declarations or any other International Law Instrument.

Secondly, the same instrument should be able to outline in clear and certain terms what constitutes terrorism and what does not. On the same breadth, it should clearly tell who is capable of committing acts of terrorism and who is not. Although this is the main hinderance to devising a globally accepted definition of terrorism, it is high time the international community fast tracked the process and negotiations on the same.

Thirdly, terrorism should be classified into either international or non-international, just like LOAC had distinguished the IACs from NIACs. This will in turn inform how to deal with terrorism, what legal provisions apply, who should be involved in the fight and the set criteria to be applied.

Fourthly, at what point is international intervention required? This is still open since currently there is no requirement that international involvement should be invoked in counterterrorism or not. This should be clearly spelt and it goes hand in hand with the classification anticipated in recommendation three in the above paragraph. The law should state who can intervene and under what circumstances and who cannot and why.

Fifth, there need to be clearly set out rules, regulations, laws and methods to be used in the counterterrorism. This will emanate from the definition of terrorism and the threshold to be met before such methods can be used.

Sixth, terrorism thrives in the failed states. Therefore, there is need to legislate on the capabilities of a failed state in relation to foreign intervention in counterterrorism. A counterterrorism law should be in place to specifically guide individual states that may be willing to intervene in situations of terrorism.

Seven, since there is currently no set and clearly defined threshold to be met before some acts can be declared to be acts of terrorism, there is need to have such a threshold clearly set out. The UNC has not set out any criteria, neither has any international law instruments, but some case law⁹⁶ has tried to clear the mess although this has had no much impact. A clear legislation is needed on this.

Eight, UNSC need to be given more powers by the UNC in terms of Article 51. Upon notification of the intention to invoke the right to self-protection/ defence, what should the UNSC do? This is a vague discretion left upon the provoked state by the UNC.

⁹⁶ Supra.

Nine, from the study terrorism cannot be classified under LOAC. Consequently, an instrument separating LOAC from being applied to terrorism should be in place with rules that apply to terrorism set out. This will be a positive step towards curbing terrorism.

Ten, internationally recognizable and agreed upon terrorism-related offences should be put in place including jurisdictions where such offences and crimes are to be prosecuted. Also, to be included in this is how the punishment should be meted out upon the terrorists.

Eleven, the rules should be able to state who confirms and declares the existence of terrorism. For armed conflicts, especially those of international nature the ICRC is responsible. Since the study has shown that terrorism is not a NIAC or IAC, thus out of the mandate for the ICRC, to whom does terrorism fall?

Bibliography

A. Books

1. Adam Roberts “Counter-Terrorism, Armed Force and the Laws of War” *The International Institute for Strategic Studies, London*, (2002).
2. Antoine A. “International Humanitarian Law and the Law of Armed Conflict” *Peace Operations Training Institute* (2012).
3. Bouvier, Antoine A. “International Humanitarian Law and the LOAC.” *Peace Operations Training Institute* (2012).
4. Brigitte L. N. “Terrorism and Counterterrorism” *Routledge* (2016).
5. Christine Gray, ‘The Use of Force and the International Legal Order’ in Malcolm D. Evans *International Law* (4th ed 2014), 619.
6. David Harris, “Cases and Materials on International Law” (7th edn Sweet & Maxwell 2010) 93-94.
7. Derek W. Bowett, *Self-Defence in International Law* (Manchester University Press 1958) 187.
8. Fletcher, George P., and Jens David Ohlin. “Defending humanity: When force is justified
9. Garraway, C. *Armed conflict and terrorist organizations*, Cambridge: Cambridge University Press, 2013.
10. Ian Brownlie, *Principles of Public International Law* (7th edn OUP 2008) 729.
11. James Crawford, *Brownlie’s Principles of Public International Law* (8th edn OUP 2012) 747.
12. Jim Powell “Marcus Tullius Cicero, Who Gave Natural Law to the Modern World” *Foundation for Economic Education* (1997).
13. Martin Dixon, *Textbook on International Law*, (7th edn, OUP 2013) 322.
14. Nacos L.B. *Terrorism and Counterterrorism*: Routledge, 2016 (PP 248 & 255).
15. Rebecca MM Wallace et al, *International Law* (7th edn, Sweet & Maxwell 2013) 294.
16. Sharmon Thomas, ‘Somalia: Challenges and Opportunities in Peace Building’ (2016) 5.
17. Subrahmanian V.S. “Handbook of Computational Approaches to Counterterrorism” *Springer Science & Business Media*, 2012 (PP 364-366).

18. Van den Herik L. & Schrijver N. *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, Cambridge: Cambridge University Press, 2013.
19. Vaughan Lowe, *International Law* (OUP, 2011) 270.
20. Watkin K. & Norris J. *Non-International Armed Conflict in the Twenty First Century* ed. 88 Rhode Island: Naval War College, 2012.
21. Whittaker J.D. *Counter-Terrorism and Human Rights* Routledge, 2014 (PP 11-17).

B. Journals

1. Christian J. Tams, 'The Use of Force against Terrorists' (2009), Vol. 20 No. 2, 362.
2. Dale S. and Lewis Michael W. "The LOAC-A Contemporary Critique." *Melbourne Journal of International Law* Vol 6(2005).
3. Dapo A. "When Does the Use of Force Against a Non-State Armed Group trigger an International Armed Conflict and Why does this Matter?" *Blog of the European Journal of International Law* (2016).
4. Eric T.J "Applying a Sovereign Agency Theory of the Law of Armed Conflict" *Chicago Journal of International Law* (Vol. 12 No. 2 (2012).
5. Marko M. "What Exactly Internationalizes an Internal Armed Conflict?" *Blog of the European Journal of International Law* (2010).
6. Michael N. Schmitt "Charting the Legal Geography of Non-International Armed Conflict" *International Law studies Journal* Vol. 90 (2014) pg. 5.
7. Ndichu, Justin M. "Plugging a Leak": A Preliminary Step in Establishing a Nuanced Approach to Govern Intervention in the New Age." *Cornell International Law Journal* Vol. 49 (2016) PP201-225.
8. The International Institute for Strategic Studies "Counter-Terrorism, Armed Force and The Laws of War" quarterly journal of IISS, London vol. 44, no. 1, pp. 7-32 (2002).

C. Articles

1. A Memory of Solferino', ICRC, Geneva 1986, p. 41.
2. Albert Camus "Non-international Armed Conflict (NIAC)."

3. Albert Camus, "Terrorism: Definition."
4. Buchanan, Stephen C. and Lekalake, Rorisang "Is Kenya's anti-terrorist crackdown exacerbating drivers of violent extremism." *Afro Barometer Dispatch No. 37* (2015).
5. CICR "Terrorism, Counter-Terrorism and International Humanitarian Law." *Proceedings of the Bruges Colloquium* (2016).
6. Daniel T. "The "failed State" and international law" *International Review of the Red Cross, No. 836* (1999).
7. Dixie Hughes "Terrorism and UK Law – Modern Terrorism Series Part 1" *UKDJ* (2015).
8. E4J University Module Series "Counter-Terrorism Categorization of an armed conflict" *UNODC* (July 2018).
9. Eric Posner "The case against human rights" *The Guardian* (2014).
10. EU Council Framework Decision 2002/475/JHA.
11. Global Terrorism Index, 2017: "Measuring and Understanding the Impact of terrorism".
12. ICRC "The LOAC: Basic Knowledge." *International Committee of the Red Cross Unit for Relations with Armed and Security Forces* (2002).
13. James R "State Responsibility" *Max Planck Encyclopedia of Public International Law [MPEPIL]* (September 2006).
14. Measures to eliminate international terrorism: ICRC statement to the United Nations" (2016).
15. Mitt R. "Counterterrorism as Armed Conflict" *University of Oxford* .
16. Miyandazi, Luckystar "Kenya's military intervention in Somalia: An intricate process." *Policy & Practice Brief, Issue 19* (2012).
17. Office of the United Nations High Commissioner for Human Rights "Human Rights, Terrorism and Counter-terrorism" Factsheet No. 32.
18. Peter John Rowe "Law of war".
19. Roser, Mohamed Nagdy and Hannah Ritchie "Terrorism" *Our World in Data* (2018).
20. Stephane O. "Global counter-terrorism must not overlook the rules of war" *ICRC* (2017).
21. Stéphane O. "Out of balance: Global counter-terrorism & the laws of war" *Humanitarian Law and Policy* (2017).
22. Terrorism and Human Rights" by the *Council of Europe* (2018).
23. The LOAC: Basic Knowledge", ICRC (1997).

24. UNODC “Categorization of an armed conflict.”
25. Yoo, John C. and Ho, James C. “International Law and the War on Terrorism.” *YooNyu Combatants.Doc* (2003).

D. Case Law

1. *Iran v USA* (2003).
2. *Nicaragua v USA* (1991).
3. Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016 – Volume I of IV (TC), 24 March 2016.
4. *The Prosecutor vs. Dusko Tadić a/k/a 'Dule'* (1995).

E. International Law Instruments

1. Additional Protocol I of 1977.
2. Additional Protocol II.
3. The Geneva Conventions.
4. The IHL.
5. The UN Charter, 1945.
6. UDHR.
7. UN Security Council Resolution No. 1368 of 2001, para.1 (S/RES/1368 (2001)).

F. Reports

1. JSOU Report, “Counter-insurgency in Somalia.”
2. Vladimir Voronkov, Under-Secretary-General of the United Nations Office of Counter-Terrorism on the “Report of the United Nations High-Level Conference on Counter-Terrorism.”
3. International Review of the Red Cross “International humanitarian law and the challenges of contemporary armed conflicts” *Reports and Documents* (2007) pp719-757.
4. Munive, Jairo and Somer, Jonathan (2015). *Counter-terrorism and the protection of civilians: Armed non-state actors*, DIIS Report, No. 2015:14.

5. United Nations (2018). *Report of the United Nations High-Level Conference on Counterterrorism*.
6. E4J University Module Series “Counter-Terrorism Categorization of an armed conflict” *UNODC* (July, 2018).
7. Stephen B.C. and Rorisang L. “Is Kenya’s anti-terrorist crackdown exacerbating drivers of violent extremism?” *The Injustice for Justice and Reconciliation and Afro Barometer* Dispatch No. 37 (2 July 2015).

G. Speeches, Studies, Opinion Papers, Notes and Communications

1. “Afrobarometer” Dispatch No. 37 by Stephen Buchanan-Clarke and Rorisang Lekalake.
2. Commentary on the Additional Protocols of 8 June 1977, ICRC, Geneva, 1987, p. XXVII.
3. Hoeven Juliana V. “Counter-Terrorism Measures and International Humanitarian Law: A Case Study of the “Troubles” In Northern Ireland.” *The “Troubles” in Northern Ireland* (2016) pp1093-1151.
4. ICRC (2008). *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* International Committee of the Red Cross (ICRC) Opinion Paper.
5. ICRC Opinion Paper “How is the Term "Armed Conflict" Defined in International Humanitarian Law” (March, 2008).
6. Juliana V.H “Counter-Terrorism Measures And International Humanitarian Law: A Case Study Of The “Troubles” In Northern Ireland” *Penn Law: Legal Scholarship Repository* (2016).
7. Lesson Notes prepared by ICRC on “the Law of Armed Conflict; Basic Knowledge.”
8. Mackintosh K. and Duplat P. Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action (2013).
9. Mackintosh K. and Duplat P. *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* (2013).
10. Speaking Notes “Laws of Armed Conflict (LOAC) Basic” FOI 267/16/17 Item 1.
11. The Government of Kenya’s Communiqué of 17 October 2011 addressed to the UN Security Council vide (S/2011/646).

12. United Nations Secretary-General “Secretary-General’s speech at SOAS, University of London, on “Counter-terrorism and human rights: winning the fight while upholding our values” [as delivered]” *New York* (2017).

H. Webpages

1. http://cdn.peaceopstraining.org/course_promos/international_humanitarian_law/international_humanitarian_law_english.pdf (accessed January 22, 2019).
2. <http://counterterrorismethics.com/counterterrorism-as-armed-conflict/> (accessed January 30, 2019).
3. <http://essays.ssrc.org/10yearsafter911/counter-terrorism-armed-force-and-the-laws-of-war/> (accessed January 31, 2019).
4. <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093> (accessed January 25, 2019).
5. <http://visionofhumanity.org/app/uploads/2017/11/Global-Terrorism-Index-2017.pdf> (accessed January 27, 2019).
6. <http://www.cfpar.org> (Accessed on 4th April, 2019).
7. http://www.defence.gov.au/FOI/Docs/Disclosures/267_1617_Documents.pdf (accessed May 22, 2019).
8. <http://www.ejil.org/pdfs/20/2/1793.pdf> (accessed May 21, 2019).
9. <https://blogs.icrc.org/law-and-policy/2017/09/15/out-of-balance-global-counter-terrorism-the-laws-of-war/> (accessed February 1, 2019).
10. https://books.google.com/books?id=F2cPpfcpor8C&printsec=frontcover&dq=books+on+counterterrorism+free+download&hl=en&sa=X&ved=0ahUKEwjG79_moZjhAhWiuFkKHAmhDOQQ6AEIKDAA#v=onepage&q&f=false (last accessed April 4, 2019).
11. https://books.google.com/books?id=GI_7CwAAQBAJ&printsec=frontcover&dq=books+on+counterterrorism+free+download&hl=en&sa=X&ved=0ahUKEwjG79_moZjhAhWiuFkKHamhDOQQ6AEIPTAE#v=onepage&q&f=false (accessed on 02/04/2019).
12. <https://chicagounbound.uchicago.edu/cjil/vol12/iss2/14/> (accessed January 17, 2019).
13. https://en.wikipedia.org/wiki/International_law (accessed January 27, 2019).

14. <https://fee.org/articles/marcus-tullius-cicero-who-gave-natural-law-to-the-modern-world/> (accessed January 26, 2019).
15. <https://guide-humanitarian-law.org/content/article/3/non-international-armed-conflict-niac/> (accessed January 29, 2019).
16. <https://medium.com/law-and-policy/global-counter-terrorism-must-not-overlook-the-rules-of-war-8e4906f720cd> (accessed January 31, 2019).
17. <https://ourworldindata.org/terrorism> (accessed February 3, 2019).
18. <https://politics.stackexchange.com/questions/31734/non-subjective-definition-of-terrorist-or-widely-used-equivalent-term> (accessed January 24, 2019).
19. <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.co.ke/&httpsredir=1&article=1922&context=jil> (Accessed April 16, 2019).
20. <https://ukdefencejournal.org.uk/terrorism-and-uk-law-modern-terrorism-series-part-1/> (accessed January 26, 2019).
21. <https://www.britannica.com/topic/law-of-war> (accessed January 19, 2019).
22. <https://www.casematrixnetwork.org/cmn-knowledge-hub/elements-digest/art8/c/common-elements/3/> (accessed 23rd May, 2019).
23. <https://www.coe.int/en/web/portal/terrorism-and-human-rights> (accessed February 6, 2019).
24. <https://www.econstor.eu/bitstream/10419/144726/1/848321065.pdf> (accessed January 21, 2019).
25. <https://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/> (accessed January 28, 2019).
26. <https://www.forbes.com/sites/dominicdudley/2018/12/05/deadliest-terrorist-groups-in-the-world/#11bfa8702b3e> (accessed 24th May, 2019).
27. https://www.icrc.org/en/doc/assets/files/other/law1_final.pdf (accessed 23rd May, 2019).
28. <https://www.icrc.org/en/doc/resources/documents/article/other/57jq6u.htm> (accessed January 23, 2019).
29. <https://www.peacepalacelibrary.nl/ebooks/files/356612716.pdf> (accessed January 19, 2019).

30. <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> (accessed February 7, 2019).
31. <https://www.un.org/counterterrorism/ctif/en/border-management-and-law-enforcement-relating-counter-terrorism> (accessed February 4, 2019).
32. <https://www.un.org/counterterrorism/ctif/en/un-global-counter-terrorism-strategy> (accessed February 5, 2019).
33. https://www.un.org/counterterrorism/ctif/sites/www.un.org.counterterrorism.ctif/files/Report_UNHLC_FINAL_WEB.pdf (accessed January 20, 2019).
34. <https://www.un.org/en/sections/what-we-do/maintain-international-peace-and-security/> (accessed 24th May, 2019).
35. <https://www.un.org/sc/ctc/news/keyword/charter/> (accessed January 26, 2019).
36. <https://www.un.org/securitycouncil/> (Accessed April 13, 2019).
37. <https://www.un.org/securitycouncil/> (Accessed February 5, 2019).
38. <https://www.un.org/sg/en/content/sg/speeches/2017-11-16/speech-soas-university-london-counter-terrorism> (accessed January 23, 2019)
39. <https://www.un.org/sg/en/content/sg/statement/2017-11-16/secretary-general%E2%80%99s-speech-soas-university-london-%E2%80%9Ccounter-terrorism> (accessed February 8, 2019).
40. <https://www.un.org/sg/en/content/sg/statement/2017-11-16/secretary-general%E2%80%99s-speech-soas-university-london-%E2%80%9Ccounter-terrorism> (accessed February 8, 2019).
41. <https://www.unodc.org/e4j/en/terrorism/module-6/key-issues/categorization-of-armed-conflict.html> (accessed February 9, 2019).