

**TERRORISM AS A THREAT TO INTERNATIONAL SECURITY, A CASE**

**FOR SELF DEFENCE: KENYA'S EXPERIENCE WITH SOMALIA**

**BY**

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**DECLARATION**

I do hereby declare that I have read and understood the regulations governing submission of a Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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## **DEDICATION**

To my parents: for believing in me and my two brothers and sisters who have always been by my side.

To the memory of those who have lost their lives from terror attacks; May their souls rest in eternal peace.

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## **LIST OF ABBREVIATIONS**

ACSRT- Africa Centre for the Study and Research on Terrorism  
AMISOM-African Mission in Somalia  
AU-African Union  
COMESA-Common Market for East and Central Africa  
CTC- The Counter Terrorism Committee  
EAC-East Africa Community  
ECOSOC-Economic and Social council  
ESC- Economic and Social Council  
ICAO- International Civil Aviation Organisation  
ICC-International Criminal Court  
IGAD-Inter-governmental Authority on Development  
IMO- International Maritime Organisation  
OAU-Organisation of African Unity  
REC- Regional Economic Communities  
RECS-Regional Economic Communities  
SCR-Security Council resolution  
SC-Security Council  
SUA- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation  
UN GA- United Nation General Assembly  
UN SC-United Nation Security Council  
UNCCPCJ- The UN Commission on Crime Prevention and Criminal Justice  
UNCLOS-United Nation Covenant on Law of the sea  
UNODC- The UN Office on Drugs and Crime  
UN-United Nations  
US-United States of America



## ABSTRACT

Chapter one deals with background, literature review and theories of self defence generally to expose gaps, distortion or different perspectives on the right of self defence vis a vis terrorism. This chapter sought to answer:

- 1) What does the literature says on the scope of the acts that constitute a threat to international peace and security?
- 2) What does the literature says about the relevant international institution that should respond to emerging threats?
- 3) Has the new threat altered the established understanding of self defence?

In the analysis I have relied on reports, scholarly journals, text books and articles in regard to terrorism and Kenya's incursion into Somalia.

Chapter two deals generally with right to self defence as provided for in the UN Charter. It looks at how right to self defence was practiced prior to and during the time of UN Charter. This chapter sought to answer the following questions:

- 1) What is the role of UN in fight against terrorism?
- 2) What are the emerging states' practices against terrorism and piracy?
- 3) How has Kenya reacted to threats posed by terrorism and piracy from Somalia?

In this analysis I have relied on various UN Resolutions in regard to terrorism and further on journals on how they have reported the trends of states practice on the use of force against terrorism.

Chapter three deals with the problems posed by terrorism in Kenya and outlines methods that Kenya has taken in response to these threats. This chapter sought to answer the following questions:

- 1) What is the current security situation in Somalia?
- 2) What is the impact of the terrorism from Somalia into Kenya?
- 3) What is the recourse taken by Kenya in the fight against terrorism?

I have relied on newspapers and various reports by UN and other institutions that have reported on the issue of Kenya and the terrorism from Al shabaab.

Chapter four ends with conclusions and recommendations. It gives insights with regard to Kenya's right to self defence in the face of terrorism from Somalia. This chapter has answered questions posed by chapter one, two and three. On giving recommendations I have borrowed heavily from Rome Statute, UN Charter, Kenya's statutory law and the global trend on the best practices in fighting terrorism as has been reported via various journals, articles, reports, amongst others. I have recommended the way forward as prosecutions, self defense or surveillance.

## CHAPTER ONE

### SELF DEFENCE VIS-A-VIS TERRORISM

#### 1.1 Introduction

The use of force in fight against terrorism remains a controversial area in international law. War, as it is known, is expensive in terms of money, casualties and deaths. The United States of America invaded Afghanistan in its fight against terrorism but this has proved very expensive. In mid October 2011, Kenya invaded Somalia in its quest to fight terrorism.

The preamble to the African Union Constitutive Act obliges the African states to promote and protect human and peoples' rights, consolidate democratic institutions and culture, to ensure good governance and the rule of law.

On the other hand, article 4 of the Act provides that the Union shall function in accordance with:<sup>1</sup>sovereign equality and interdependence among Member States of the Union; peaceful resolution of conflicts; prohibits on the use of force or threat of use force among Member States; non-interference in the internal affairs of another; the right of the Union to intervene in pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity; respect for democratic principles, human rights, the rule of law and good governance; respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.

To sum up, article 4 of the African Union Constitutive Act recognises counter-terrorism, human rights and democratic principles as core values to be promoted but it is not yet clear on how far member states should go in promoting these principles.

Article 2(4) of the UN Charter prohibits on the use of force. However, this has not prevented the occurrence of over one hundred major conflicts since World War II and the death of over twenty million people. There remains a mixture in view point in regard to the use of force some arguing that it can be used for humanitarian purpose, to fight terrorism or to promote democracy; while others are directly opposed to this as it is not provided so in the UN Charter.<sup>2</sup>

Kenya has been a constant target of terrorist attacks, together with its neighbours, Tanzania and Uganda. Kenya has been a great target since the infamous 1998 bomb blast. These terrorist acts have claimed lives, destroyed property, and have significantly killed her tourism industry.

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<sup>1</sup> Section 4; paragraphs (a), (e), (f), (g), (h), (m) & (o), respectively, of African Union Constitutive Act.

<sup>2</sup>Gay, C., "The Use of Force and the International Legal Order", in Evans, M.D., (ed.), *International Law*, Oxford University Press, New York, (3<sup>rd</sup> edn: 2010), pp 615-647, pg 615-616.

In 1998 Kenya witnessed one of its worst acts of terrorism in Nairobi's US Embassy where hundred of people were killed and more others injured.<sup>3</sup> Kenya has since remained a major target of terrorist attacks with this trend increasing at an alarming rate. In mid October 2011, tourists were abducted by suspected Al Shabaab adherents and Kenya entered into Somalia to pursue the Al Shabaab in her effort to contain this situation.<sup>4</sup>

This paper looks at the Kenya's incursion into Somalia in pursuit of Al Shabaab against the background of article 51 as read together with article 2(4) of the UN Charter which allows for the right of self defence, and at the same time, prohibits on the use of force in international relations respectively. There is an argument that the use of force, which is the right of self defence to curb terrorism, has gained a force of customary international law. There is another group that is opposed to the view and idea of the use of force in the fight against terrorism. These arguments and counter-arguments are elaborated in the ensuing part of the paper.

## 1.2 Background of the Study

The Republic of Kenya is located in the East African region in the continent of Africa. It borders Tanzania, Uganda, Ethiopia, Somalia and Southern Sudan (Formerly Sudan). It is a former colony of Britain and it attained her independence on December 12<sup>th</sup> 1963.

The Republic of Somalia, one of its neighbours, has been without a stable government since the fall of President Mohamed Said Barre. This has resulted into high number of refugees into Kenya running away from Somalia resulting to a big refugee camp in Dadaab in Kenya. Furthermore, Somalia has become a safe haven for terrorist groups such as Al Shabaab which is linked to Al Qaida.<sup>5</sup> More recently, the rise of indigenous Islamist movements in southern Somalia has rekindled fears that the anarchic territory has become a safe haven for Al Qaeda and other transnational terrorist movements.<sup>6</sup> This has become a regional threat.

In the year 1998, there was a twin bomb blast in Kenya and Tanzania which are believed to have been masterminded from Somalia by a terrorist group. Kenya has had to endure threats of terrorist attacks since 1998. This has resulted into loss of lives and property. Her tourism industry has been adversely affected impacting negatively on her economy. Further, Somalia is allegedly used as a transit point for illegal arms into Kenya further compromising her internal security.

The UN Security Council has failed to take adequate measures to solve the Somali crisis. Kenya therefore had to act to preserve its sovereignty. The Kenya's stumbling block has been its knowledge of the obligations it owes to the international community by virtue of article 2(4) of UN charter which prohibits on the use of force in international relations. However, Kenya can invoke-as it has done- article 51 of the UN

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<sup>3</sup>Laredo Morning Times, "Nairobi Bomb Truck Tabbed as U.S. Victims Come Home", *Laredo Morning Times*, USA, (Friday, August 14, 1998), available at <[airwolf.lmtonline.com/news/archives/081498/pagea11.pdf](http://airwolf.lmtonline.com/news/archives/081498/pagea11.pdf)>, accessed on 4/4/ 2012.

<sup>4</sup>Guled,A.&Hourel,K., "Kenya's Advance in Somalia Surprises US Officials", available at <[yahoo.com/Kenya\\_advance\\_somaalia\\_surprise\\_us](http://yahoo.com/Kenya_advance_somaalia_surprise_us)>, accessed on 4/4/2012.

<sup>5</sup>"United Nations Peace Operations, Year in Review", (2009), pg 37-38, available at <[www.un.org/un/peacekeeping/publications/yir/yir2009.pdf](http://www.un.org/un/peacekeeping/publications/yir/yir2009.pdf)> accessed on 4/4/ 2012.

<sup>6</sup>Norris, J. & Bruton, B., "Twenty Years of Collapse and Counting: The Cost of Failure in Somalia", A Joint Report from the Center for American Progress and One Earth Future Foundation,(September 2011), pg 1, available at <<http://www.americanprogress.org/issues/2011/09/pdf/Somalia.pdf>>, accessed on 4/4/2012.

Charter on the right of self defence. In this route, it will have to adhere to the conditions set therein. In ensuing part of the paper, it discusses on Kenya's entry into Somalia.

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

In recent years there has been an increase in the acts of terrorism and piracy off the coast of Somalia against the Republic of Kenya. This paper analyses whether the acts of terrorism and piracy from the Republic of Somalia amount to an armed attack against the Republic of Kenya as envisaged under UN Charter to validate Kenya's resort to self defence.

Secondly, it explores the standards that an act of terrorism must meet in order for it to be regarded as a threat to international peace and security as envisaged under article 39 of the Charter of the United Nations (UN), hence calling for action by the UN Security Council.

### **1.4 Literature Review**

The literature covers the response of the international community to acts of terrorism and piracy, the scope of acts that constitute a threat to international peace and security, the relevant international institution that should respond to emerging threats and whether the emerging threats have altered the traditional understanding of the right to self defence. This literature on the use of force has revolved around three issues as discussed below.

#### **1.4.1 Maintenance of world peace and security**

It has been argued that one of the ways to maintain world peace is through disarmament. In this process, it has been argued should involve, first, the demobilisation to be done universally. In this stage, it should be done proportionally and simultaneously on a step by step basis. The states will be required to declare their arsenals and afterwards inspection should follow as a form of verification. This is to be guided by a binding agreement.<sup>7</sup>

After demobilisation, states should establish a world police. In establishing the world police, they will have to ensure it is independent from any influence. It should be composed of forces from all countries of the world and be headed by a panel of civilians reflecting the face of all regions of the world. This force is to be entrusted in maintaining international peace and security.<sup>8</sup>

It has been proposed that the instrument for peaceful settlement of disputes should be pursued, if disarmament and global police force will fails to bring a lasting peace. This reinforces the idea that the peaceful settlement of dispute should be the way forward. The Security Council will be authorized to refer to the International Court of Justice, any dispute likely to endanger peace on the basis of international law.<sup>9</sup> This suggestion, on the face of it, is a good way forward although it fails to take into account the emerging threats to international peace and security such as terrorism, famine, and economic hardships.

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<sup>7</sup>Sohn, L. B., "United Nations Charter Revision and the Rule of Law: A Program for Peace", (1956) 50(6), *Northwestern University Law Review*, pp 709-725, pg 716-721.

<sup>8</sup> *ibid*, pg 721-723.

<sup>9</sup> *Supra* n. 7, pg 724.

This paper has explained that there are emerging threats to international peace, such as terrorism and piracy which needs to be given equal weight if UN is to remain relevant in maintaining international peace and security in the 21<sup>st</sup> century. Secondly, defining terrorism as a threat to international peace and security is not be enough, the UN and its SC should act to counter this, perhaps the UN SC should be praised given the number of sanctions it has issued pursuant to article 41, including authorisation of the use of all necessary means including force to deal with terrorism in some instances. Furthermore, the UN generally and SC in particular, ought to admit its shortcomings in maintaining international peace and security, specifically due to its inability to establish a standing army under article 43 of the UN Charter to be used for maintaining international peace and security.

The failure to establish a standing army should be remedied by specific authorisation of the right of self defence under article 51 of the Charter to certain acts of terrorism that qualifies as a threat to international peace and security, for example Kenya can be allowed to use its right of self defence against Al Shabaab in Somalia to counter terrorist.

Another author has justified Security Council actions in expanding the meaning of article 39 on the meaning of the word ‘a threat to peace’ to mean that it can take anticipatory measure and declare an ‘economic crisis’ to amount to a threat to international peace in a European country.<sup>10</sup> The argument in favour of this is that by practice Security Council had previously modified a ‘threat’ to peace to include economic crisis which was of high magnitude and had caused widespread riots and eventual overthrow of a government.

It argued that this kind of a threat called for proactive measures because certain economic crisis which exceeds a certain limit is likely to provoke people into acts that will eventually lead to a breach of international peace and security as per article 39 of the UN Charter.<sup>11</sup> Those opposed to this view, argues that the Security Council is not a representative of the world community, which instead; it should be the General Assembly because it represent all countries of the world. Furthermore, the right of intervention on economic grounds is not provided in the Charter, and instead, it should be ECOSOC to advise on this-one of the creation of the UN Charter- because it is composed of the experts on economy.<sup>12</sup>

This paper argues that although Security Council makes resolutions which per article 103 of the UN Charter supersede treaty law, customary international law and municipal law, it needs to be re-looked and re-organised to take into account the emerging realities of our times for it to remain relevant.

#### **1.4.2 Piracy as a form of terrorism**

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<sup>10</sup>Boon, K.E., “Coining a New Jurisdiction: The Security Council as Economic Peacekeeper”, (2008) 41(4), *Vanderbilt Journal of Transnational Law*, pp 991-1042, pg 991. The Security Council on the other hand failed to qualify the economic collapse, hyper inflation and perceived dictatorial regime in Zimbabwe as a threat to peace and security as some member of UN Security Council supposedly China could not have allowed perceived dictatorship to be equated as a threat to international peace and security as itself is a communist; to have done so would have had the effect of indirectly condemning itself and seemingly entrenching democracy as having force of international customary law; a trend that could have been dangerous to its existence.

<sup>11</sup> *ibid.*

<sup>12</sup>Boon, K.E., “Coining a New Jurisdiction: The Security Council as Economic Peacekeeper”, (2008) 41(4), *Vanderbilt Journal of Transnational Law*, pp 991-1042, pg 991-992.

The Piracy at the sea off the coast of Somalia is not generally viewed as an armed conflict and therefore only reasonable and necessary force can be used as self defense.<sup>13</sup> This Piracy is widespread, and as such it amount to a threat to international peace and security, however, this has not been acknowledged well by the Security Council and has been left to the states and organisations to deal with it. This paper has viewed this as an abdication of a prime duty by the UN Security Council under chapter VII.

It has been suggested that prosecuting suspected pirates is a major potential deterrent. Under international law any country can prosecute them if caught on the high seas; but in practice few do so unless there are national interests at stake, and many suspected pirates are released without a trial.<sup>14</sup> The problem of piracy and terrorism from Somalia remains a big issue; however, world community has been indecisive in dealing with this problem. This paper analysis this and concludes that if UN SC, cannot deliver, our fore fathers who gave birth to UN were aware and that is why even after prohibiting on the use of force in solving international dispute under article 2(4), were aware that there would come a time when UN was not to be the best avenue to solve some international disputes and so went further and provided under article 51 on right of self defence. This is probably the best instance when resort to force by Kenya against terrorists and pirates from Somalia is justified.

UN Security Council has passed resolutions to aid in fighting piracy in high seas and on territorial waters off Somalia.<sup>15</sup> This has been by authorising nations to patrol waters off Somalia, in high seas and in territory of Somalia. It is noteworthy that piracy has evolved from traditionally taking vessels and its content to taking hostages for ransom.<sup>16</sup> Therefore, piracy has resulted in human, military costs and economic costs that affect global trade in form of payment of ransom, damages to ship, cargoes delays in deliveries, increase in insurance premium, and measures that are put in place to secure ships from attacks.

Although the Security Council has linked the activities of pirates off the coast of Somalia with the notion of a threat to international peace and security, it has failed to come up with a mechanism to end it. Since Resolution 733/1992, the Security Council has routinely invoked Chapter VII as regards the situation in Somalia, and stated that such situation continues to constitute a threat to international peace and security.<sup>17</sup> The resolution captured the objective that actions against piracy off the Somali coasts be conducted within the framework of Chapter VII of the UN Charter.<sup>18</sup> However, the authorization to undertake all necessary

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<sup>13</sup>Thorp, A., "Preventing and Prosecuting Piracy at Sea: Legal Issues", International Affairs and Defense Section, Standard note 6237, (28<sup>th</sup> February 2012), pg 1-2, available at < [www.parliament.uk/briefing\\_papers/SN06237.pdf](http://www.parliament.uk/briefing_papers/SN06237.pdf)>, accessed on 11/4/2012.

<sup>14</sup> *ibid.*

<sup>15</sup>Martin, J.S., "Fighting Piracy with Private Security Measures: When Contract Law Should Tell Parties to Walk the Plank", (2009-2010)59, *American University Law Review*, pp 1363-1398, pg 1366. Available at < [www.wcl.american.edu/journal/lawrev/59/5martin.pdf](http://www.wcl.american.edu/journal/lawrev/59/5martin.pdf)> accessed on 11/4/2012.

<sup>16</sup>*ibid*, pg 1367.

<sup>17</sup>Treves, T., "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia" ,(2009) 20 (2),*The European Journal of International Law* ,pp399-414, pg 400-401. Available at <[www.ejil.org/pdfs/20/2/1800.pdf](http://www.ejil.org/pdfs/20/2/1800.pdf)>, accessed on 11.4.2012.

<sup>18</sup> *ibid*, pg 401.

measures in Somalia set out in Resolution 1851 was limited to the 12 months plus reporting requirement that was placed on it.<sup>19</sup> This means that more than resolutions are needed to fight the piracy off the coast of Somalia, and despite it being recognized as breach to international peace, little is being done by the UN to tackle this disorder.

It is argued that various acts off Somalia coast can be argued as occurring acts of Piracy, Terrorism, War, or Self defence. They say that concentrating on the acts occurring around the Horn of Africa, the arguments vary. Some says that the acts are purely acts of piracy, as there is no government sponsorship while others argues that in fact the Government of Somalia is powerless to prevent the acts as well. Some even question the existence of a government in Somalia. It is argued that the acts extend beyond piracy, and should be categorized as acts of war, or at the least, terrorism while at the same time, others argue against such a premise.<sup>20</sup>

However, it needs to be noted that abducting people and demanding for ransom to release them cannot be an act of self defence but is a breach of international peace and security. The piracy and the terrorist acts off the coast of Somalia affect Kenya in the following ways; first, this route is the one that is used to transit goods to Kenya from overseas, these may lead to increase in insurance costs for ships hence increased cost for goods when they land in Kenya. Secondly, there is a threat along Kenya's coast which deters tourists hence Kenya loose foreign earning and this is to be recovered by raising taxes on Kenyans.

When the above two facts are taken together, it means Kenyans may have to contend with economic hardships. This can provoke them into streets to riots due to cost of life and perhaps to riot against their government which can further endanger international peace and security.<sup>21</sup> The new threats posed by piracy seems to have altered the established understanding of self defence as is now being recognised as a threat to international peace and security and the appropriate responses should be applied.

There are factors that link piracy to modern-day terrorism and hence justify the argument that pirates should be fought just like terrorists. These factors are<sup>22</sup>: first, piracy, just like terrorism, embraces the use of terror by non-state actors as a means of coercion directed against states and their citizens; secondly, piracy has historically been much more than sea-robbery. In this context, piracy, whether perpetrated by private individuals or groups, is to be understood as a political tool, that by sponsoring such actions, aim to achieve a particular political goal. As such, pirate acts closely resemble terrorist acts; third, pirate motivation throughout history has close resemblance with contemporary terrorist motivation. Similar to the pirates who waged war against a world that they viewed as unjust, today terrorists aim their acts against particular

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<sup>19</sup> *Supra* n. 17, pg 405.

<sup>20</sup> Kendall, W.K. & Kendall, L.K., "The Consequences to Shipping of a Resurgence of Violence at Sea: Piracy, Terrorism, War or Self Defence?" (2010)24, *European Journal of Economics, Finance and Administrative Sciences*, pp 138-146, pg 141. Available at <[www.eurojournals.com/ejefas\\_24\\_13.pdf](http://www.eurojournals.com/ejefas_24_13.pdf)>, accessed on 11/4/2012.

<sup>21</sup> Boon, K.E., "Coining a New Jurisdiction: The Security Council as Economic Peacekeeper", (2008) 41(4), *Vanderbilt Journal of Transnational Law*, pp 991-1042, pg 992.

<sup>22</sup> Odhiambo, E.O.S., *et al* , "Prosecuting Somalia Pirates As Terrorists", (2011) 2(2), *Journal of Defence Resources management*, (Centre for Disaster Management & Humanitarian Assistance & Dept. of Criminology and Social Work, Masinde Muliro University of Science Technology, Kenya), pp 37-46, pg 38-39, available at <[journal.dresmara.ro/issues/.../04\\_odhiambo\\_onkware\\_kasill\\_ntabo.pdf](http://journal.dresmara.ro/issues/.../04_odhiambo_onkware_kasill_ntabo.pdf)>, accessed on 17/6/2012.

nations, in a war of non-state actors versus states; fourth, the legal definitions of piracy and terrorism have evolved and have come to resemble one another. Nowadays, piracy is seen less as sea robbery and more as maritime terrorism, and as reflected in modern-day treaties such as the Geneva Convention, UNCLOS, among others.

On the other hand piracy is argued as not being terrorism at all. Piracy is defined by article 15 of 1958 Geneva Convention on the High Seas and article 101 of 1982 UNCLOS. These conventions are declaratory of customary international law.<sup>23</sup> The following is a guide of the act that constitutes piracy: it is a criminal act exercised by passenger or crew of a ship against another ship/person/property on its board; that is, there is 'two vessel requirement'. The acts of piracy must be committed for a 'private end', however, criminal acts of vengeance and hate can be classified as piracy if it meets 'private end clause'. There was an omission as it has not mentioned those committed for 'political end'.<sup>24</sup>

Hijacking is not piracy because 'two vessel' requirements is lacking, further piracy is committed for 'private end' while hijacking is for 'political ends'; so too terrorism which is committed for political aims.<sup>25</sup>

The 1988 I.M.O. Convention specifically deals with maritime terrorism. Article 9 clearly states that the rule of international law pertaining to the competence of states to exercise investigating or enforcement jurisdiction on board of ships not flying their flag are not affected. The power to arrest foreign vessel in hands of terrorist is granted only if the following grounds may be invoked:<sup>26</sup> consent of flag state, properly exercised hot pursuit, presence on board the 'terrorist' vessel of hostage nationals of the flag state of the boarding vessel or may be of a 3<sup>rd</sup> state, and existence of a link between a ship manned by a terrorist organization and the flag state of the boarding vessel, that is, the fact that terrorist act has been committed in a place under the jurisdiction of this last state.

Terrorism and piracy are two different things with the consequences that rules on piracy and terrorism cannot be applied interchangeably on 'suspected acts of maritime terrorism'. This is because had the states intended so they could have seized the opportunity during drafting of UNCLOS of 1982 and 1988 Rome Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation, or still they have not seized the opportunity to do so up to date.<sup>27</sup>

This paper has viewed Al Shabaab acts of piracy as an extension of its terrorist acts, hence as terrorism. The anti-terrorist conventions can either be relied upon directly, should the piracy act fit within the precise framework of one of these acts, or simply be used as jurisdictional and procedural models for the handling of pirates, captures and trials. Piracy, this paper argues, constitutes terrorism on the high seas, and pirates should be treated as terrorists. It is likely that, at present, the activities of Somalia piracy fund Al Shabaab

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<sup>23</sup>Ronzitti, N., *Maritime Terrorism and International Law*, Martinus Nijhoff Publishers, Ad Dordrecht: Netherlands(1990), pg 1.

<sup>24</sup> *ibid.*

<sup>25</sup> *Supra* n. 23, pg 2.

<sup>26</sup> *Supra* n. 23, pg 10.

<sup>27</sup> *Supra* n. 23, pg 10.



terrorist activity. For example, pirate speed boats routinely seize weapons from victim vessels and may be involved in the resale and smuggling of such weapons to terrorist groups.<sup>28</sup>

### **1.4.3 Terror acts that amount to a threat to international peace and security**

It has been argued that while there are on the face of it morally justifiable elements of the use of force as a security response to terrorism, from the perspective of the Just War tradition the doctrine's linkage with a power-driven foreign policy strategy undermines the moral credibility of the doctrine. In a number of ways the Bush Doctrine of use of force against any act of terrorism as a response to international terrorism is, tragically, undermining the international moral and legal order, thereby undermining the very order necessary for sustainable security against terrorism.<sup>29</sup> The key question for lawyers on this issue was whether there was a causal connection between the terror attacks and the war in Iraq as there was no proof of Iraq sponsoring terrorism or being involved in one. Hence this paper analysis the concept of terrorism with the aim of contributing toward an objective approach to the acts of terrorism to avoid countries misusing the term as reason for self defence thereby violating territorial integrity of other states without due justifications. Some actions are routinely labelled "terrorist" that do not qualify as such. An example is the references to "terrorist" actions by the Lebanese group, Hezbollah, against the Israeli military in southern Lebanon, or by Palestinians against Israeli soldiers in the occupied territories, targets that hardly qualify as civilians or non-combatants. It is said that an unusually strict definition of "non-combatant," the same can be said for actions directed against the U.S. military, say, the bombing of the USS Cole in Yemen in October 2000, or the bombing of the U.S. Marine barracks in Beirut in October 1983.<sup>30</sup> When one is subjective in declaring who is a terrorist, this is dangerous to those not terrorists as they can wrongly be labelled as such and hence wrongly targeted.

In conclusion, the UN SC has been entrusted with maintenance of international security, and this includes defining what will amount to a threat to international peace and security per article 39 of UN Charter. This is a discretionary power and sometimes may be frustrated by veto powers of permanent member who sometimes veto situations that are about to be declared as a threat to international peace and security and therefore may lead to inaction as per article 27(3) of UN charter. This paper analysis such situation with aim of making a case that the only remaining cause of action to countries affected, for example Kenya and Somalia piracy and terrorism, is for Kenya to resort to self defence as provided in the Charter.

### **1.5 Justification**

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<sup>28</sup> Odhiambo, E.O.S., *et al*, "Prosecuting Somalia Pirates As Terrorists", (2011)2(2), *Journal of Defence Resources management*(Centre for Disaster Management & Humanitarian Assistance & Dept. of Criminology and Social Work, Masinde Muliro University of Science Technology, Kenya),pp 37-46, pg 41, available at <[journal.dresmara.ro/issues/.../04\\_odhiambo\\_onkware\\_kasill\\_ntabo.pdf](http://journal.dresmara.ro/issues/.../04_odhiambo_onkware_kasill_ntabo.pdf)>, accessed on 17/6/2012.

<sup>29</sup> Snauwaert, D.T., "The Bush Doctrine and Just War Theory", (2004) 6(1), *The Online Journal of Peace and Conflict Resolution*, pp121-135, pg 132. Available at <[www.trinstitute.org/ojpcr/6\\_1snau.pdf](http://www.trinstitute.org/ojpcr/6_1snau.pdf)> accessed on 11/4/2012.

<sup>30</sup>Kapitan, T., "Can Terrorism be Justified?", (April 28, 2007), pg 18, available at <[www.niu.edu/phil/-kipitan/pdf/canTerrorismbejustified.pdf](http://www.niu.edu/phil/-kipitan/pdf/canTerrorismbejustified.pdf)>, accessed on 11/4/2012.

This paper extends the frontier of knowledge in the field of piracy and terrorism by analyzing: what is meant by piracy and terrorism; the nature of piracy, terrorism and development in the Horn of Africa; piracy as a form of terrorism, and some recommendations concerning better ways of dealing with pirates as terrorists.

This paper goes into depth in analysing the occurrence of terrorism in modern times with a view to building a nexus between terrorism and contemporary threats to international peace and security under article 39 of UN Charter. Further it makes a case for UN Security Council intervention on ground that it is a threat to international peace and security.

## 1.6 Conceptual Framework

The key questions that are being answered by this part is the understanding of what amounts to an act of terrorism, and whether terrorism is a legal issue, how the meaning has shifted over time and the attendant implication this has for the doctrine of self defence under the UN Charter.

### 1.6.1 Meaning of terrorism

The United Nations has adopted about thirteen international conventions relating to acts that amount to terrorism.<sup>31</sup> These international conventions describe acts that amount to terrorism which include: hijacking, taking of hostages, aerial sabotage, terrorist bombings and attacks on diplomats and other internationally protected persons.

According to the AU Convention on the Prevention and Combating of Terrorism (Algiers Convention),<sup>32</sup> acts of terrorism includes: Acts that endanger the life and property of civilians calculated to intimidate or coerce any government, body, institution, the general public, to do or to abstain from doing any act or to disrupt any public service or create general insurrection in a State.

The Terrorism Suppression Bill (draft) of 2003 herein after referred as Bill, draft Suppression of Terrorism bill or Terrorism Bill,<sup>33</sup> at section 3 defined terrorism as the use, or threat of action where: the action used or threatened; involves serious violence against a person, and, involves serious damage to property. This

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<sup>31</sup>These Conventions include Convention on Offences Committed on Board Aircraft, 163, Convention on the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105, *entered into force* Oct. 14, 1971; Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, 974 U.N.T.S. 178, *entered into force* January 26, 1973; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents 1973; Convention against the Taking of Hostages G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), *entered into force* June 3, 1983; Convention on the Physical Protection of Nuclear Material, 1980; Convention on the Suppression of Terrorist Bombing, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), *entered into force* May 23, 2001; Convention on the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999), S. Treaty Doc. No. 106-49 (2000), 39 I.L.M. 270 (2000), *adopted* 9 Dec. 1999, *entered into force* 10 Apr. 2002; International Convention for the Suppression of Acts of Nuclear Terrorism, 2005. The full text of these conventions is available at <http://www.un.org/terrorism/instruments.html>, as on 10/6/2012.

<sup>32</sup> OAU Convention on the prevention and Combating of Terrorism, OAU Assembly 35th Ord. Sess., OAU Doc. AHG/Dec. 132 (XXXV), 14 July 1999.

<sup>33</sup>Republic of Kenya, *The Terrorism Suppression Bill (draft)*, in Kenya Gazette Supplement No. 38 (Bills No. 15), Government Printers, Nairobi, (2003).

definition was been criticised as being too imprecise, broad and vague.<sup>34</sup>This has been solved under section 2 of Prevention of Terrorism Act of 2012 as discussed in chapter three.

Since 1983, the U.S. Department of State (2000) has used Title 22 of the United States Code, Section 2656f (d), to define terrorism. In the introduction to the Department's *Patterns of Global Terrorism*, terrorism is defined as politically motivated violence perpetrated against non-combatant targets by sub national groups or clandestine agents, usually intended to influence an audience.<sup>35</sup>

This definition includes three key criteria that distinguish terrorism from other forms of violence. First, terrorism must be politically motivated. Terrorism is directed toward goals that are political; in other words, terrorist actions are intended to guide or influence governmental policy. Thus, violent acts such as robbery, homicide, and kidnapping, which are committed in the furtherance of personal or criminal goals, are not included. This criterion emphasizes that the social and psychological antecedents of personally or criminally motivated violence are different than the antecedents of terrorist violence.<sup>36</sup>In this lens Al Shabaab may not be viewed as terrorist, but in the second limb discussed below, they will qualify as terrorists.

Second, terrorist violence is directed at non-combatants. Non-combatants are people who are not members of the military services or military members who are not actively involved in military hostilities. This criterion identifies terrorism as violence directed toward civilian populations or groups who are not prepared to defend against political violence. It includes military members who are attacked during peacetime.<sup>37</sup>

The third criterion of the definition of terrorism is that sub national groups or clandestine agents commit terrorist attacks. Under this criterion, political violence by nation states is not terrorism, even when there is a probability that non-combatants will be killed.<sup>38</sup>

In addition to the political motivation of the acts, the targeting of non-combatants, and the sub national, clandestine nature of the perpetrators, two other important definition criteria have been stressed in the psychology of terrorism literature. Terrorism is intended to create an extremely fearful state of mind. Furthermore, this fearful state is not intended for the terrorist victim; rather, it is intended for an audience who may, in fact, have no relationship to the victims. Similarly it is emphasized that terrorism was intended to “create extreme fear and/or anxiety-inducing effects in a target audience larger than the immediate victims.”<sup>39</sup>

There are three perspectives that people use in determining whether or not an act is terrorism.<sup>40</sup>First, some people see terrorism as a legal issue. With this perspective, an act is considered terrorism only if it is illegal.

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<sup>34</sup>Kathurima, M., “The Role of National Human Rights Institutions and Civil Society in Preventing the Adoption of Unacceptable National Security Legislation”, Paper presented at ICJ Biennial Conference, (27th-28th August) 2994. Available at <[www.icj.org](http://www.icj.org)>accessed on 10/6/2012.

<sup>35</sup>Charles, L., “The Definition of Terrorism, Analyses of Social Issues and Public Policy”, The Society for the Psychological Study of Social Issues ( 2002), pp 9–14, pg 10, available at <[www.asap.spssi.org/pdf/asap019.pdf](http://www.asap.spssi.org/pdf/asap019.pdf)>, accessed on 17/5/2012.

<sup>36</sup> *ibid.*

<sup>37</sup> *Supra* n. 35.

<sup>38</sup> *Supra* n. 35, pg 11.

<sup>39</sup> *Supra* n. 35, pg 11.

<sup>40</sup> *Supra* n. 35,pg 11-13.

Governments are likely to use this perspective to interpret terrorism; however, the determination that an act is terrorism under this perspective depends on which government is doing the interpreting. Obviously, not all nations will have the same definition of what is legal. Two governments, therefore, may view the same incident differently.

A second perspective is moral in nature and would consider an act to be terrorism only if it had no moral justification. Some groups are willing to commit politically motivated illegal violence but do so with the belief that it is a necessary and morally justified act. As an example, the Provisional Irish Republican Army considers its violent attacks morally justified in that its goal is to eliminate British dominance in Northern Ireland, a political condition it sees as immoral on the part of Great Britain. Thus, it does not interpret what it is doing as terrorism.

Third perspective is behavioural. With this perspective, terrorism is defined purely by the behaviours involved, regardless of the laws or morality of those doing the defining. In reasoning from this perspective, different interpreters will necessarily arrive at the same conclusions as to whether or not a particular act is terrorism.

When studying the construct of terrorism from a psychological perspective, we need to use a reliable definition. It is for this reason that the behavioural perspective seems to be the best one for behavioural scientists and mental health professionals to use. This is the only one of the three that permits a reliable operational definition of terrorism regardless of who measures it.<sup>41</sup>

As a working definition, 'terrorism' shall be understood to mean an activity 'aimed to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act.'<sup>42</sup> Terrorism in this paper includes piracy. The issue with the definition of what is terrorism and a terrorist is that there are many conventions defining terrorism. This has created vagueness and ambiguity on what these terms actually encompass. The resulting effect is that UN failed in most cases to take actions in Somalia and as a result Kenya continues to suffer from terrorism and piracy from Somalia. This has left Kenya with no option but to result to self defence to fight terrorism from Somalia. This paper analyses this with aim of making a case for a single or consolidated definition on terrorism by the UN that will be binding and to supersede all other definitions, that is to spell the cause of action by UN and affected states in the face of terrorism.

### 1.6.2 Definition of Piracy

The current definitions of piracy are inadequate as a tool for policymakers and need to change.<sup>43</sup> There are two common definitions of piracy. The first, used by the IMO, derives from the U.N. Convention on the Law of the Sea (UNCLOS). The following definition of piracy is contained in article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS):

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<sup>41</sup> *Supra* n. 35, pg 13.

<sup>42</sup> Annan, K., "In Larger Freedom; Towards development, security and human rights for all", Report of the Secretary-General, UN Doc. A/59/2005, at para. 91. Accessed on 8/7/2012.

<sup>43</sup> Dillon, D., "Maritime Piracy: Defining the Problem", (2005) 25(1), *SAIS Review*, pp155-164, pg 155.

“Piracy consists of the following acts:

(a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) Any act inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).<sup>44</sup>

The UNCLOS definition restricts acts of piracy to the “high seas” and “outside the jurisdiction of any state.” Only 122 reported pirate attacks, or 27 percent of actual and attempted attacks against vessels, took place on the high seas in 2003. The rest of the attacks occurred in ports and territorial waters well inside the jurisdiction of a state.<sup>45</sup> The implication of this narrow definition is that the pirates have been taking advantage of it by attacking vessels when they are near their territorial waters, or by attacking a vessel and they hide in their territorial water, being their jurisdiction Kenya is left with dilemma of whether or not to pursue them to their territorial water and hence in most cases it is forced to give up on the pursuit.

The IMB offers another definition of piracy: An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.<sup>46</sup> The IMB’s definition is broad and includes any attack or attempted attack on a ship, whether it is anchored, berthed or at sea. The IMO has attempted to close the definition gap by using both the UNCLOS and IMB definitions. Yet even using these two definitions does not account for extortion by port officials or differentiate maritime terrorism.<sup>47</sup>

Crimes against ships should be placed into four categories:<sup>48</sup> First, corruption, that is, acts of extortion or collusion against marine vessels by government officials and/or port authorities. Secondly, sea robbery, that is, attacks that take place in port while the ship is berthed or anchored. Third, piracy, that is, actions against ships underway and outside the protection of port authorities in territorial waters, straits and the high seas. Finally, maritime terrorism, that is, crimes against ships by terrorist organizations.

Several United Nations instruments addresses the problem of piracy,<sup>49</sup> including the Convention on the High Seas,<sup>50</sup> the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

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<sup>44</sup> See <[www.icrwhale.org/eng/Definitionpiracy.pdf](http://www.icrwhale.org/eng/Definitionpiracy.pdf)>, accessed on 17/5/2012.

<sup>45</sup> Dillon, D., “Maritime Piracy: Defining the Problem”, (2005) 25(1), *SAIS Review*, pp155-164, pg 156.

<sup>46</sup> International Chamber of Commerce “Piracy and Armed Robbery against Ships”, Annual Report, International Maritime Bureau, Jan. 1–Dec. 31, 2003, pg 3.

<sup>47</sup> Dillon, D., “Maritime Piracy: Defining the Problem”, (2005) 25(1), *SAIS Review*, pp155-164, pg 156.

<sup>48</sup> *ibid*, pg 157.

<sup>49</sup> Mason, R.C., “Piracy: A Legal Definition”, Report for Congress, Congressional Research Service, (December 13, 2010), pg. 4-5, available at, <[www.fas.org/spp/crs/misc/R414555.pdf](http://www.fas.org/spp/crs/misc/R414555.pdf)> accessed on 17/5/2012.

<sup>50</sup> Convention on the High Seas, 13 U.S.T. 2312; T.I.A.S. 5200; 450 U.N.T.S. 82. Signed at Geneva, April 29, 1958. Entered into force September 30, 1962.

(SUA Convention),<sup>51</sup> and the Convention on the Law of the Sea (UNCLOS).<sup>52</sup> The Convention on the High Seas and UNCLOS both address piracy by stating that “[a]ll states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”<sup>53</sup> The SUA Convention further expands on the judicial treatment of pirates. Its main purpose is “to ensure that appropriate action is taken against persons committing unlawful acts against ships.”<sup>54</sup> Unlawful acts include, but are not limited to, the seizure of ships; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.<sup>55</sup>

The working definition of piracy in this paper is that it includes: first, corruption, that is, acts of extortion or collusion against marine vessels by government officials and/or port authorities. Secondly, sea robbery, that is, attacks that take place in port while the ship is berthed or anchored. Third it includes actions against ships underway and outside the protection of port authorities in territorial waters, straits and the high seas. Finally, maritime terrorism, that is, crimes against ships by terrorist organizations.

This paper acknowledges the existence of a common definition of piracy. However, this paper makes a case for a modified definition of the term piracy to take care of emerging trend in modern time piracy off the coast of Somalia to distinguish those acts of piracy that amount to terrorism. Here crimes against ships by terrorist organizations such as kidnappings and taking of hostage should be equated to terrorism and hence counter-terrorism regime should be invoked. The acts of terrorism from piracy to be specifically defined as a threat to international security and aggression to countries affected hence calling for Security Council action or self defence by Kenya (country affected).

### 1.6.3 Self Defence

In self-defence, it is conventional to ask whether the actor believes, and whether a reasonable person would believe, each of the following facts existed: first, an aggressor was threatening him with harm, second, that harm would be of a particular level of gravity, third, his use of force in response would prevent that harm, fourth, the level of responsive force he expects to employ would be of a similar level of gravity, fifth, if the force was not used, the threatened harm would occur immediately, and sixth, no non-violent or less forceful alternatives were available whereby the threat could be avoided.<sup>56</sup> It requires an affirmative answer to each of these questions. Yet in many cases, an actor threatened with harm will actually have no beliefs at all about most of these matters. It would be unfair to deny a full defence to all such actors. At the same time, we

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<sup>51</sup>Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, T.I.A.S. Signed at Rome, March 10, 1988. Entered into force March 1, 1992.

<sup>52</sup>United Nations Convention on the Law of the Seas (UNCLOS), 21 I.L.M. 1261. Convention adopted December 10, 1982. Entered into force November 16, 1994.

<sup>53</sup>Convention on the High Seas at Article 14; UNCLOS at Article 100.

<sup>54</sup>International Maritime Organization statement on aims for the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, available at <http://www.imo.org/>.

<sup>55</sup> *ibid.*

<sup>56</sup>Simons, K. W., “Self-Defense: Reasonable Beliefs or Reasonable Self-Control?” (2008) 11(1), *New Criminal Law Review*, pp 51-90, pg 51.

should still hold such an actor to a normative standard of justifiable behaviour. Actor is required to exercise a reasonable degree of self-control in response to a threat of force.<sup>57</sup>

The working definition for self defence is that, an aggressor is threatening the targeted victim with harm, and, that harm would be of a particular level of gravity, the targeted victim's use of force in response would prevent that harm; however, the level of responsive force he expects to employ would be of a similar level of gravity. If the force was not used, the threatened harm would occur immediately, and, no non-violent or less forceful alternatives were available whereby the threat could be avoided. This paper compares the right to self defence by individuals in domestic laws with that of state against state as provided in the Charter with the aim of making case for a common understanding of what right to self defence should encompass.

There is a restrictive school which stresses that this right should be understood narrowly with respect to article 2(4) which prohibits use of force.<sup>58</sup> It is argued that the prohibition on the use of force in article 2 (4) of the Charter is a codification of an existing customary *jus cogens* norm of international law from which no derogation is allowed. The one exception from this rule is the right of self-defence, which gives legality to the use of force by virtue of article 51 of the Charter and it is dictated by the necessity to use force as a means of self-defence. Article 51 should be read in conjunction with article 2 (4) of the Charter bearing in mind the will of the founders of the charter to prohibit the use of force in relations between states.

The prohibition of the use of force is a *jus cogens* rule and can only be modified by a subsequent norm of general international law having the same character. Here self-defence does not include anticipatory or pre-emptive attack because expanding this right to that extent constitutes a change in article 2 (4) of the Charter and is thus inadmissible because the right of self-defence does not have the same character and it is not a *jus cogens rule*, as is prohibition of use of force. The meaning of the word "armed attack" mentioned in article 51 of the UN Charter has a clear meaning which rules out anticipatory self-defence.

On the other hand it is argued that the right of self-defence is of customary character and that article 51 of the Charter just reserved that right and embodied it but did not exhaust it. Moreover, the right of self-defence is an inherent right and does not need approval from the UN Security Council, but the use of force should be authorized by UN Security Council When the use of force is used as the means of carrying out the right of self-defence, then the approval of UN Security Council is necessary which means that authorisation is given on the use of force, not on the right of self-defence.

In this context, it can safely be said that the right of self-defence has a customary character but still remains as a provisional norm embodied in article 51 of the Charter, as a provisional norm it neither covers the whole understanding of the "inherent" right of self-defence, nor exhausts it, but rather includes a mere reference to the broader customary right of self-defence.<sup>59</sup>

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<sup>57</sup>*ibid.*

<sup>58</sup>Medzmariashvili, M., "Pre-emptive Self-defence against States Harbouring Terrorists", Research Papers No. 4, Riga Graduate School of Law, Latvia:Baltic Region,( 2011), pg 9, available at <[www.rgsl.edu.lv/images/stories/.../4\\_medzmariashvili\\_final.pdf](http://www.rgsl.edu.lv/images/stories/.../4_medzmariashvili_final.pdf)>, accessed on 11/4/2012.

<sup>59</sup> *ibid.*, pg 12-14.

However, the Charter was made to remedy the customary right of self defence which had to an extent been the cause of 1<sup>st</sup> & 2<sup>nd</sup> World War; hence it must have been the intention of drafters to limit its scope for the sake of peace. This paper aims to distinguish between different types of terrorism. After this, it analysis that the repeated terrorist acts that amount to grave harm to be categorized as an armed attack under article 51 of the charter by acknowledging terrorism as a great tragedy of 21<sup>st</sup> century. After this, the paper aims to makes a case for a right to self-defence by affected countries or a collective Security Council action by use of force or otherwise to curb its continuity.

#### 1.6.4 Human Security

The concept of human security consists in the protection of the vital core of all human lives in ways that enhance human freedoms and human fulfilment. Human security can thus be said to comprise “protecting people from critical (severe) and pervasive (widespread) threats and situations, using processes that build on people’s strengths and aspirations, creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.”<sup>60</sup>

The former UN Secretary-General Kofi Annan himself specified this comprehensive nature of security, when he stressed that human security now joins the main agenda items of peace, security and development. He argued that:

“Human security in its broadest sense embraces far more than the absence of violent conflict. It encompasses human rights, good governance, and access to education and health care and ensuring that each individual has opportunities and choices to fulfil his or her potential. Every step in this direction is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear, and the freedom of future generations to inherit a healthy natural environment, these are the interrelated building blocks of human and therefore national security”.<sup>61</sup>

This means that human security is multi dimensional, and it includes political-civil and social-economic rights. This should stretch to even taking into account the needs of the future generations to ensure that their lives will not be compromised by current actions. The working definition in this paper, on human security is “protecting people from critical (severe) and pervasive (widespread) threats and situations.

This paper analysis human security in light of human rights with the aim of making a case for crimes against humanity to those involved, that is, terrorism from Somalia against Kenya, hence to be liable for prosecution

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<sup>60</sup>Owada, H., “The United Nations and The Maintenance Of International Peace and Security :The Current Debate In The Light Of Reform Proposals” , Keynote Speech at the Research Forum on International Law, European Society of International Law ; Graduate Institute of International Studies, (26 May 2005), pg 11, available at <[www.esil.sedi.eu/fichiers/eu/owada\\_051.pdf](http://www.esil.sedi.eu/fichiers/eu/owada_051.pdf)>, accessed on 17/5/2012.

<sup>61</sup> *ibid*, pg 12; Press Release SG/SM/7382 dated 8 May 2000.



at ICC (International Criminal Court), or as a war crime, hence calling for application of international humanitarian law or laws of war (Geneva IV convention).

In conclusion, the contemporary situation has redefined the established understanding of these terms, forcing innovative interpretation of the relevant international documents such as UN Charter to accommodate them. That is why it is now common for UN SC to emphasize that terrorism, piracy and human insecurity may amount to a threat to international peace and security under article 39 of the UN Charter and in other cases as amounting to an armed attack hence justifying resort to self defence under article 51 of the UN Charter.

### **1.7 Hypotheses**

- 1) The terrorist attacks directed at Kenyans inside Kenya by Somali insurgents amounts to a threat to international peace and security as envisaged under article 39 of the UN Charter and is a crime against humanity.
- 2) The piracy off the coast of Somalia against foreign ships coming into Kenyan territory has acquired an element of terrorism and therefore amounts to a threat to international peace and security as envisaged under article 39 of the UN Charter.

### **1.8 Research Objectives**

1. The paper seeks to investigate the scope and limit of right to self defence especially when facing threat of terrorism.
2. The paper seeks to investigate the effectiveness of Security Council in fight against piracy and terrorism.
3. The paper seeks to investigate whether Kenya can under UN Charter invoke its right to self defence to fight piracy and terrorism from Somalia, particularly, pre-emptive strikes.
4. The paper seeks to investigate the power and role of the Security Council in maintaining international peace and security including fighting piracy and terrorism.

### **1.9 Research Questions**

1. Does the right to self defense includes right to fight terrorism?
2. Can a country invoke its right to self defense when UN Security Council fails in its duty of maintaining international peace and security?
3. What is the scope of power and role of the Security Council in maintaining international peace and security?
4. Is piracy envisaged as a form of terrorism, and if so, does it fall within the category of threat to international peace and security?

### **1.10 Research Methodology**

In this paper, the author has relied on secondary means in conducting the research. These are; library books, internet materials, treaties and conventions and judicial decisions from International Court of Justice.

### 1.11 Chapter Breakdown

Chapter one deals with background, literature review and theories of self defence generally to expose gaps, distortion or different perspectives on the right of self defence vis a vis terrorism. This chapter sought to answer:

- 4) What does the literature says on the scope of the acts that constitute a threat to international peace and security?
- 5) What does the literature says about the relevant international institution that should respond to emerging threats?
- 6) Has the new threat altered the established understanding of self defence?

Chapter two deals generally with right to self defence as provided for in the UN Charter. It looks at how right to self defence was practiced prior to and during the time of UN Charter. This chapter sought to answer the following questions:

- 4) What is the role of UN in fight against terrorism?
- 5) What are the emerging states' practices against terrorism and piracy?
- 6) How has Kenya reacted to threats posed by terrorism and piracy from Somalia?

Chapter three deals with the problems posed by terrorism in Kenya and outlines methods that Kenya has taken in response to these threats. This chapter sought to answer the following questions:

- 4) What is the current security situation in Somalia?
- 5) What is the impact of the terrorism from Somalia into Kenya?
- 6) What is the recourse taken by Kenya in the fight against terrorism?

Chapter four ends with conclusions and recommendations. It gives insights with regard to Kenya's right to self defence in the face of terrorism from Somalia. This chapter has answered questions posed by chapter one, two and three.

## CHAPTER TWO

### USE OF FORCE TO COUNTER TERRORISM: TRENDS IN INTERNATIONAL PRACTICE

#### 2.1 Introduction

In this discussion, the paper investigated the emerging practices in line with the right to self defence. It then zeroed in on terrorism, kidnappings, and piracy, which are the core problems and threats that Kenya, and indeed, international community is facing from Somalia, this is in an effort to expose the existence of customary international law of self defence against terrorism.

The paper's argument is that: if the right of self defence was only exercisable when there was an actual armed attack; this would translate that article 51 has technically allowed terrorism to thrive by tying hands of the victim state and that the victim state is by implication defenceless as it has to await the UN Security Council's action which may be too late as the right to life and properly of its citizen will have been already jeopardised.

The paper puts the case that the purpose of article 51 is not to protect violators of human rights but to promote international peace and security and this will only be effective if and when a country can counter an imminent threat before it occurs.

#### 2.2 Terrorism and Right to Self defence

Article 2(4) UN Charter obliges UN members to refrain in their international relations from the threat or the 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. In Articles 42, 43 and Article 51, the Charter recognizes two exceptions to this prohibition: forcible enforcement measures within the framework of the organization's collective security system and the right of self-defence against armed attacks.

Christian Tams contends that faced with challenges such as terrorism and piracy; the international community has not formally amended the Charter rules but has re-appraised them through interpretation. In many respects, the interpretation has produced clear and stable results, but it has also led to processes of adaptation and adjustment in the light of new realities.<sup>62</sup> In this writing, it has been argued that the legal rules governing the use of force have been re-adjusted so as to permit forcible responses against terrorism.

##### 2.2.1 Restriction on the use of force in response to terrorism

The 1985 Israeli raid on the PLO Headquarters outside Tunis was condemned by the Security Council which declared it as an act of armed aggression in shocking violation of the Charter of the United Nations.<sup>63</sup> Similarly in 1986 United States' raid on targets in Libya was roundly rejected by the General Assembly as a violation of the Charter of the United Nations and of international law.<sup>64</sup> South Africa's incursions into

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<sup>62</sup>Tams, C.J., "The Use of Force against Terrorists", (2009) 20 (2), *The European Journal of International Law*, pp359-397, pg 360.

<sup>63</sup> SC Res. 573 (1985); SC Res. 313 (1972); SC Res. 508 and 509 (1982).

<sup>64</sup> GA Res. 41/38.

neighbouring states also met with stiffer resistance.<sup>65</sup> They applied the restrictive construction of the right of self-defence prevailing at the time to the particular problem of anti-terrorism. This restrictive construction depended on three arguments which, taken together, made self-defence effectively unavailable as a justification for forcible anti-terrorist measures.

First; self-defence against armed attacks by non-state actors was admitted in principle that is, depended on facts and the questions of attribution, and required responding states to show a substantial involvement of the territorial state in the very attacks of a terrorist organization against which the response was directed, referred to as effective control test.<sup>66</sup> As a consequence, only terrorist attacks effectively controlled by another state triggered a right of self-defence.

Secondly; The Court's *Nicaragua* judgment confirmed that self-defence should be available only in response to grave infractions of the prohibition against the use of force. This narrow interpretation could draw on the differences in wording between Article 2(4) of UN Charter on the one hand, 'any use of force', and Article 51 of UN Charter on the other, 'armed attack'.<sup>67</sup> This seemed to imply that states would have to forgo forcible responses, when faced with lesser breaches of Article 2(4) UN Charter, an apparent implication which remained controversial.

Under the traditional approach, Article 51 and customary international law entitled states to resort to force only defensively in the presence of an armed attack and to the extent necessary to repel it. It was accepted in principle that self-defence was not an open-ended but only has the aim of repelling armed attacks and provisionally guaranteeing the security of states. This reading implied requirements of necessity and proportionality limiting the scope of the right, but also meant that there had to be a temporal link between the measures of self-defence and the attack against which they were directed, referred to as the requirement of immediacy. Unless the accumulation doctrine was accepted, this meant that responses against terrorist attacks of an instant character could not easily qualify as self-defence, as coming after the event and when the harm has already been inflicted.<sup>68</sup>

Actual instances of state practice, such as the British bombing of Fort Harib in Yemen in 1964, were condemned from the 1960s.<sup>69</sup> From 1970 onwards, important documents such as the Friendly Relations Declaration<sup>70</sup> contained generalized exclusionary clauses obliging states to refrain from acts of reprisal involving the use of force.<sup>71</sup> During the 1960s and 1970s, freedom from colonial domination seemed a legitimate cause, and the fight against it arguably could be pursued by means of force.<sup>72</sup> But that argument was not applied to the fight against terrorism.

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<sup>65</sup> SC Res. 527 (1982), SC Res. 546 (1984), and SC Res. 568 (1985).

<sup>66</sup> *Tadic* judgment (Case IT-94-1, *Prosecutor v. Tadic* , 38 ILM (1999) 1518, at paras 116 – 145).

<sup>67</sup> Verdross, A. & Simma, B., *Universelles Völkerrecht: Theories and Praxis* , Duncker u Humblot, Berlin, (3rd edn:1984), at para. 472.

<sup>68</sup> Bowett, D., "Reprisals Involving Recourse to Armed Force", (1972) 66(1) *American Journal of International Law*, pp1-36, pg 3.

<sup>69</sup> SC Res. 188 (1964); and further SC Res. 111 (1956), 171 (1962), 316 (1972), 332 (1973), 573 (1985); as well as GA Res. 41/38 (1986).

<sup>70</sup> GA Res. 2625 (XXV) (principle I.6).

<sup>71</sup> GA Res. 2625 (XXV) (principle I.6).

<sup>72</sup> Gray, C, *International Law and the Use of Force*, Oxford University Press, New York, (3rd edn: 2008), pg 59.

This position is understandable as then terrorism was not a big threat, if ever it was, to states. The states were still in the process of healing from wounds from Second World War hence were determined in every way to discourage any perceived form of aggression, and here use of force to fight terrorism, would be interpreted as an aggression as they could see terrorism as a normal criminal act. This interpretation can not justify large scale and repetitive acts of terrorism from Al Shabaab to Kenya, since on the flip side, they are directing attacks on Kenya killing innocent people and destroying property. This is clearly prohibited under article 2(4) of UN Charter, so UN SC has to act, if not, Kenya is entitled to use its right of self defence to defend itself from Al Shabaab by use of force: if and when necessary, in fact, this is in line with the emerging practice.

### 2.2.2 Emerging practice

The fight against terrorism is increasingly been regarded as a legitimate cause which might warrant a military approach.<sup>73</sup> Presently, the collective security system has confronted the problem of terrorism, as a consequence, it is today a real possibility that states using force against terrorists should be in a position to do so with the blessing of the Security Council. This is as a result of the Security Council's active role in the fight against terrorism.

Under Article 42, the Security Council can authorize military measures by coalitions of the willing, and that this authorization should justify the use of force. Secondly; no one seriously questions the Security Council's right to qualify as a threat to peace situations which have nothing to do with the use of inter-State force.<sup>74</sup> As regards statements of principle, SC Resolution 1566 (2004) Condemned in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security'.<sup>75</sup> Once the Security Council has qualified an act of terrorism as a threat to international peace and security, the road towards sanctions under Articles 41 and 42 of the UN Charter is in principle open.

In the SC's Resolutions 1368 and 1373, the Council expressly noted that the attacks of 9/11 had triggered a right of self-defence but this amounted to a multilateral endorsement of a claim to use force unilaterally, rather than multilateral enforcement action in the sense of Article 42.

In 2003, Israel in response to a suicide bombing in Haifa it bombed Palestine camps north of Damascus. In the summer of 2006, following rocket attacks against it by the Lebanon-based Hezbollah, Israel responded first with bombardments and then an invasion of Lebanon.<sup>76</sup>

Turkish troops invaded northern Iraq in late February 2008. The international community's reaction was characterized by a mixture of sympathy and concern for Turkey's conduct.<sup>77</sup> Just as with respect to the July

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<sup>73</sup> Neff, S.C., *War and the Law of Nations*, Cambridge University Press, New York, (2005), pg 382– 383.

<sup>74</sup> Herik, L.V.D., "The Security Council's Targeted Sanctions Regimes: in Need of Better Protection of the Individual", (2007) 20(4), *Leiden Journal of International Law*, pp 797-807, pg 797.

<sup>75</sup> SC Res. 1456.

<sup>76</sup> Zimmermann, A., "The Second Lebanon War: Jus ad bellum, jus in bello and the Issue of Proportionality", (2007) 11, *Max Planck Yearbook of United Nations Law*, pp 99-141, pg 99.

<sup>77</sup> Ruys, T., "Quo Vadit Jus ad Bellum? A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq", (2008) 9(2), *Melbourne Journal of International Law*, pp 334-364, pg. 334- 344.

War; states stressed the need for reactions to be proportionate, and on that basis criticized the Turkish use of force. Most reactions however carefully refrained from formally condemning Turkey's behaviour.<sup>78</sup>

In 1998, in response to attacks on US embassies in Kenya and Tanzania, the United States bombarded a pharmaceutical plant in the Sudan allegedly used by terrorists and a terrorist base in Afghanistan.<sup>79</sup> To justify its conduct, the United States referred to Article 51 of the UN Charter. The international community's reaction was mixed, ranging from condemnation to open or tacit approval. Similarly the United States had fired missiles on the headquarters of the Iraqi Intelligence Service in Baghdad in 1993 in response to an alleged assassination attempt on President Bush.<sup>80</sup>

In 2007, following attacks by Chechen rebels, Russia conducted air strikes against Chechen bases in the Pankisi Gorge in Georgia, claiming that Georgia had been unable to establish a security zone in the area of the border, continues to ignore Security Council Resolution 1373 and does not put an end to the bandit sorties and attacks on adjoining areas of Russia.<sup>81</sup>

Along similar lines, Australia claimed a right to use force extraterritorially against terrorists threatening to attack Australia or its citizens following the Bali bombings of October 2002.<sup>82</sup> The 2005 African Union Non-Aggression and Common Defence Pact expressly qualify the harbouring of terrorists, as well as any provision of support for them, as an act of aggression.<sup>83</sup>

This confirms the contention that although the use of force to fight terrorists is not express in the Charter, the states nevertheless, as the threats of terrorists and terrorism have increased, they have been quick to assert their right to self defence and have used force to fight it. This indicates a growing trend toward accepting the use of force against terrorist as customary; therefore, on the same line, Kenya is justified in using force against Al Shabaab which is sponsoring terrorism against Kenya. This includes by actual entry into Somalia to pursue them and in the process eliminate them. The UN has not been left behind in fight against terrorism but has increasingly become innovative with viable means to counter terrorism.

### **2.3 The UN response to the growing threat of terrorism**

Following UN conventions and treaty on terrorism, terrorism is to be treated as criminal offences, to be dealt with by national courts of law. States should investigate such offences and either bring the perpetrators to justice or extradite suspects to another country where they will face justice. There has been an increase in instances of asserting the use of force in response to a terrorist attack originating from inside the borders of another state.

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<sup>78</sup> *ibid.*

<sup>79</sup> Lobel, J., "The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan", (1999) 24, *Yale Journal of International Law*, pp 537-557, pg 537.

<sup>80</sup> Reisman, W.M., "The Raid on Baghdad: Some Reflections on its Lawfulness and Implications", (1994)5, *Europe Journal of International Law*, pp120-133, pg. 120.

<sup>81</sup> UN Doc. S/2002/1012.

<sup>82</sup> Ruys, "Quo Vadit Jus ad Bellum? A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq", (2008) 12, *Melbourne Journal of International Law*, pp 334-368, pg. 334.

<sup>83</sup> Art. 1(c) (xi): the following shall constitute acts of aggression: ... the encouragement, support, harbouring or provision of any assistance for the commission of terrorist acts and other violent trans-national organized crimes against a Member State : available at: [www.africa-union.org/root/AU/Documents/Treaties/text/Non%20Aggression%20Common%20Defence%20Pact.pdf](http://www.africa-union.org/root/AU/Documents/Treaties/text/Non%20Aggression%20Common%20Defence%20Pact.pdf). as at 4. 12. 2012.

The UN Security Council may adopt binding measures against states or authorize the use of military force under Chapter VII of the United Nations Charter where it finds that international peace and security are threatened. In connection with acts of terrorism, the Security Council authorised sanctions against Libya, Sudan and Afghanistan.<sup>84</sup>

UN Security Council Resolution 1368 (2001) condemned the terrorist attacks on the USA as a threat to international peace and security. The resolution acknowledged the right of self-defence by recognizing the inherent right of individual and collective self-defence in accordance with the Charter. It is noteworthy here that Security Council has no role in the exercise of the right of self-defence, right of self defence applies under Article 51 until the council has taken measures necessary to maintain international peace and security.

The wording of Resolution 1368 was taken verbatim from Article 51 of the UN Charter, and the resolution made particular reference to the right of self-defence that exists under the terms of the Charter. This meant that the Security Council did not take a position on whether the Charter's conditions for the use of force in self-defence had been satisfied.<sup>85</sup>

Resolution 1368 was passed on the day following the terrorist attacks when it was not clear who was behind the attacks. It is seen that council at this time had given unlimited authority for the USA to use force against any state that had connections with terrorism in this attack in particular. It is argued that the use of force is a far-reaching intrusion into state sovereignty and thus should require clear legal authority.<sup>86</sup> The resolution seemed to represent a political acceptance of the idea that the use of force in exercise of the right of self-defence can be excused in unique cases of terrorism.

UN Security Council Resolution 1373 (2001) dealt with the financing of terrorism and placed on member-states a duty to prevent and criminalize such financing. That resolution also referred in its preamble to the right of self-defence by reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as had been reiterated in resolution 1368 (2001).

The UN General Assembly Resolution 2625 (XXV) (1970) on the 'Friendly Relations' resolution lays down that member states shall not tolerate the use of their territory for terrorist acts. UN General Assembly Resolution 49/60 (1994), on 'Measures to Eliminate International Terrorism', also contains a prohibition against allowing the preparation of terrorist acts that are to be carried out on the territory of other states.

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<sup>84</sup>UN Security Council Resolutions 748 (1992), 1054 (1996), 1267 (1999) and 1333 (2000).

<sup>85</sup>Ulfstein, G., "Terrorism and the Use of Force", In *Security Dialogue*, Sage Publications, International Peace Research Institute, Oslo: Norway, (2013)34(2), pp 153–167, pg 155.

<sup>86</sup> *ibid.*

Therefore, the UN General Assembly leans against a state sponsoring terrorist activity or terrorism in another country. This is a tacit recognition that if one state is found sponsoring terrorist acts in another state obviously consequences must follow, and in this instance, the aggrieved state may strike the offending state as a pre-emptive measure to safeguard itself from the actual harm coming from there.

### 2.3.1 Analysis of the growing trend on the use of force against terrorism

The United Nations had condemned military action after terrorist activity when the United States used force against Libya in 1986 and against Iraq in 1993 after plans were uncovered revealing it aimed to assassinate President George H. W. Bush and the Emir of Kuwait. In 1998 it hit certain targets against Afghanistan and Sudan after the US embassy bombs in Tanzania and Kenya.<sup>87</sup>

The United States used armed force against Libya in April 1986, after the bombing of a Berlin discotheque frequented by American servicemen. The attack killed three and injured 229. The Israeli invasion of Lebanon in 1982 was for a large part inspired to put an end to cross border terrorism, targeted against Israel.<sup>88</sup>

Many terrorist organizations experience defeat, but not all are bound to fail as a result of external pressure applied through the counterterrorist instruments. Russian populist revolutionary group Narodnaya Volya in the late nineteenth century, the Peruvian Shining Path and the Kurdish Workers Party in the late twentieth century have all been reduced in importance as a result of military action; too Egyptian Islamic Jihad was dealt with successfully in a military manner.<sup>89</sup> The UN has been encouraging states to ratify anti-terrorism conventions as this will go along way in fight against terrorism.

## 2.4 UN System and Fight against Terrorism

In the aftermath of the attacks on 11 September 2001 in US, both the issues of non-ratification and the lack of an overall convention on terrorism were brought to the fore by the former UN Secretary General Kofi Annan that :

“The fight against terrorism must begin with ensuring that the 12 legal instruments on international terrorism already drafted and adopted under United Nations auspices are, ratified and implemented without delay by all states. It is also important to obtain agreement on a comprehensive convention on international terrorism”.<sup>90</sup>

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<sup>87</sup>Duyvesteyn, I., “Great expectations: the use of armed force to combat terrorism”, in Taylor & Flancis(ed), *Small Wars & Insurgencies*, Utrecht University, The Netherlands (2008) 19(3), pp 328 — 351, pg 328.

<sup>88</sup> *ibid*, pg 338.

<sup>89</sup> *Supra* n. 87, pg 341-342.

<sup>90</sup>Norman, P., “The United Nations and Counter-Terrorism after September 11: Towards an Assessment of the Impact and Prospects of Counter-Terror ‘Spill-Over’ into International Criminal Justice Cooperation”, Paper to British Society of Criminology Conference 6-9th July 2004, Centre for European Studies Research, University of Portsmouth, Filename: 004, (Jan



On September 11th, 2001 only two countries had ratified all twelve of the UN conventions related to terrorism: the UK and Botswana.<sup>91</sup>

As a result, the lack of widespread ratification and effective implementation of these longstanding legal instruments featured prominently in the unprecedented UN Security Council's formal response to September 11th. The international community's poor track record in unrealized universal legal norms, poor implementation, and the subsequently patchy picture of international cooperation against international terrorism became one of the main focal points for remedial action after September 11th.<sup>92</sup>

The main institutions of the UN of concern here are the General Assembly and the Security Council. The General Assembly has mainly considered issues related to terrorism and taken legislative responsibility. This has been principally achieved by its' subsidiary Economic and Social Council (ESC) that coordinates the economic and social policy and operations of the UN under the overall authority of the General Assembly via, in the crime field, the 'functional' Commission on Crime Prevention and Criminal Justice.<sup>93</sup>

The ESC was the central decision-making and policy-formulating forums for international criminal justice issues within the UN. The relevant autonomous 'specialized agencies', of the UN system include the International Maritime Organisation (IMO) and the International Civil Aviation Organisation (ICAO), each of which have developed some of the twelve UN conventions and protocols on acts of terrorism.<sup>94</sup>

The UN Commission on Crime Prevention and Criminal Justice (UNCCPCJ) is a 'subsidiary body' with a brief to develop international policies and promote activities to combat national and transnational crime, promoting the role of criminal law, crime prevention and improving the efficiency and fairness of criminal justice administration systems.<sup>95</sup> The UN Office on Drugs and Crime (UNODC), with staff-members across the world, undertakes this work within a crime programme and the drugs programme. The crime programme includes the combating of corruption; illicit trafficking in human beings; transnational organized crime; and via the Terrorism Prevention Branch, actions to increase state capacity in countering terrorism. Since 2002 the Branch has been responsible for the Global Programme against Terrorism.<sup>96</sup>

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2005)2, pg 3, available at < [www.britisssocrim.org/volume7/004.pdf](http://www.britisssocrim.org/volume7/004.pdf)>, accessed on 24/5/2012; UN Secretary- General, November 2001.

<sup>91</sup>Ward, C., "Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council", (2003) 8(2), *Journal of Conflict and Security Law*, pp 289-305, pg 291.

<sup>92</sup>Norman, P., "The United Nations and Counter-Terrorism after September 11: Towards an Assessment of the Impact and Prospects of Counter-Terror 'Spill-Over' into International Criminal Justice Cooperation", Paper to British Society of Criminology Conference 6-9th July 2004, Centre for European Studies Research, University of Portsmouth, Filename: 004, (Jan 2005)2, pg 3, <available at [www.britisssocrim.org/volume7/004.pdf](http://www.britisssocrim.org/volume7/004.pdf)>, accessed on 24/5/2012.

<sup>93</sup>*ibid*, pg 5.

<sup>94</sup> *Supra* n. 92, pg. 5.

<sup>95</sup> *Supra* n. 92, pg 6.

<sup>96</sup> *Supra* n. 92, pg 6.

The UN Charter gives the Security Council primary responsibility for maintaining international peace and security. Through this 'UN system' its member countries have a range of 'peaceful' and 'coercive' measures that may be deployed to counter the threat and practice of terrorism. Security Council regarded the attacks of 11 September 2001 as a threat to international peace and security, but its decisions were not framed as responses to Al-Qaeda, but as a response to international terrorism.<sup>97</sup> Overall response of the international community is that while both peaceful and coercive measures are regarded as contributors to deterrence and resolution to the threat of terrorism, peaceful means must be deployed first.<sup>98</sup> The UN was awakened by September 11<sup>th</sup> terror attack on its response against terrorism.

## 2.5 UN Response to Terrorism before September 11

The Security Council acted against incidents of terrorism by imposing economic and diplomatic sanctions in states. This was seen in relation to Libya in 1993 in response to the Lockerbie bombing and Sudan in 1996 in response to the Sudanese government support for Osama Ben Laden and acts of terrorism.<sup>99</sup> By 1999, the developing threat from Al-Qaeda and its support from the Taliban regime in Afghanistan led the Security Council to issue its most stringent response in Resolution 1267 under the terms of Chapter 7 of the UN Charter, due to its failure to respond to previous SCRs.

This SCR established a sanctions regime that incorporated for the first time a Security Council "sanctions committee" to monitor state compliance via SCR 1267, para. 6. The importance of a Chapter 7 Resolution under the UN Charter, which relates to 'Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression', is that it stipulates that 'action shall be taken' specifically under art.39 of the UN Charter.<sup>100</sup> Thus, in the specific case of the Taliban continuing to allow Al-Qaeda to operate training camps in Afghanistan, the Security Council in 1999 uniquely used the full weight of the UN Charter to oblige all UN members to comply with the terms of the Resolution via SCR 1267, paras. 3 and 4. This increasingly stringent intervention of the Security Council continued to be a key feature, but critically it was only directed against individually identifiable states, in response to specific acts of terrorism.<sup>101</sup>

After the passing of SCR 1267, a different approach was taken by the Security Council in its SCR 1269. This sought to enhance the universal legal response to terrorism at the domestic and international level in calling on all countries to implement the UN instruments on terrorism whilst it encouraged speedy adoption

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<sup>97</sup> *Supra* n. 92, pg 6.-7.

<sup>98</sup> United Nations Charter, Art.33.

<sup>99</sup> Norman, P., "The United Nations and Counter-Terrorism after September 11: Towards an Assessment of the Impact and Prospects of Counter-Terror 'Spill-Over' into International Criminal Justice Cooperation", Paper to British Society of Criminology Conference 6-9th July 2004, Centre for European Studies Research, University of Portsmouth, Filename: 004, 9Jan 2005)2, pg 7, available at <[www.britisssoccrim.org/volume7/004.pdf](http://www.britisssoccrim.org/volume7/004.pdf)>, accessed on 24/5/2012

<sup>100</sup> *ibid.*

<sup>101</sup> *Supra* n. 99.

of the pending conventions.<sup>102</sup> It was seen here that in moving for the first time to a general response against terrorism in the implementation of universal legal norms no specific obligation to comply was placed on member states and no mechanism was put into place to monitor state accession or to evaluate compliance.<sup>103</sup>

Many multilateral treaties of potential global application remain unsigned by a large number of States or, though signed, unratified. The objective of creating a global framework of binding norms in the areas concerned is consequently frustrated, particularly in those cases in which the treaties are prevented from entering into force.<sup>104</sup> Therefore, UN practical capacity-building assistance and support to ease compliance with SCR 1269 was to all intents and purposes unavailable. It is said that in acting against a specific threat the political will was present in the Security Council, but in acting in general to bind member countries to a set of legal norms with universal intent the political will in still could not be obtained.<sup>105</sup>

The question here is on the recourse when the members of international community cannot agree on such issue like fighting terrorism and it continue to hurt Kenya. The answer lay in the fact that there is no where it is provide in the Charter that member cannot use right of self defence when members have failed to agree on how to solve problems endangering international peace and security, therefore right of Kenya to self defence subsist, so it is up to Kenya to decide on how to use it, but of course, without breaching the UN Charter.

### **2.5.1 Shortcomings of the UN in the fight against terrorism**

Before September 11th 2001, it is said, the UN system was able to draft a range of legal agreements that, as a whole, sought to counter designated acts of international terrorism. However, with no compulsion placed on states to ratify any convention promulgated by the UN General Assembly, and in particular its continuing disagreements on a comprehensive convention on terrorism, it was difficult to see that any effective international response was possible to systematically counter terrorism.<sup>106</sup>

There was a clear lack of political resolve in the Security Council to oblige countries to accede to a universal legal framework against acts of terrorism. Instead the Security Council had distinguished itself by issuing a range of aspirational Resolutions on the developing UN legal framework against terrorism.<sup>107</sup>

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<sup>102</sup> *Supra* n. 99, pg 7-8.

<sup>103</sup> Szasz, P.C., "The Security Council Starts Legislating", (2002) 96(4), *The American Journal of International Law*, pp 901-905, pg 902.

<sup>104</sup> United Nations Office of Legal Affairs, "Strategy for an Era of Application of International Law: Action Plan adopted by the Senior Management Group and Approved by the Secretary-General", New York: United Nations, (2000), pg 2. From <[http://untreaty.un.org/ola-internet/cover\\_sheet.htm](http://untreaty.un.org/ola-internet/cover_sheet.htm)> Retrieved on 15 June, 2012.

<sup>105</sup> Norman, P., "The United Nations and Counter-Terrorism After September 11: Towards an Assessment of the Impact and Prospects of Counter-Terror 'Spill-Over' into International Criminal Justice Cooperation", Paper to British Society of Criminology Conference 6-9th July 2004, Centre for European Studies Research, University of Portsmouth, Filename: 004, (Jan 2005)2, pg 8, available at <[www.britisssocrim.org/volume7/004.pdf](http://www.britisssocrim.org/volume7/004.pdf)>, accessed on 24/5/2012

<sup>106</sup> *ibid*, pg 9.

<sup>107</sup> *Supra* n. 105, pg 9.

This pointed to a lack of clear direction in fight against terrorism. Where the UN body lacks a clear vision to fight terrorism should not be interpreted as to deny Kenya or another country from filling this gap. The best way to fill this gap is by use of her power of self defence in article 51 of UN Charter and this will be in order as other countries did same as the history demonstrates.

### 2.5.2 Emerging UN Regime on Fight against Terrorism

Since the early 1960s, the UN General Assembly had laboured to develop a range of specialist conventions and protocols to counter acts of international terrorism, but by 2001 only two countries, Botswana and the United Kingdom, had acceded to all twelve UN conventions that collectively comprised the international community's universal legal response to international terrorism.<sup>108</sup>

Only four states, Botswana, Sri Lanka, UK and Uzbekistan had ratified the 1999 Convention relating to terrorist financing, forty-six other states had signaled intent by signing the Convention, a measure that was to become key to the Security Council's strategic response to the attacks.<sup>109</sup>

This low level of signature and ratification was graphically exposed after the attacks on September 2001 advertising the international community's failure to achieve widespread adherence to universal legal norms. Action to address this became the key plank of a strategic UN Security Council intervention.

Although the attacks on September 2001 was attributed to Al-Qaeda, the response of the Security Council became a unique breakpoint with past practice as it sought to 'legislate against terrorism' in general, and making implementation of executive action against terrorism a universal concern.<sup>110</sup> To enable this, the Security Council was additionally committing itself to a challenging strategy to increase global state capacity to act against international terrorism, as well as monitoring state compliance in the adoption of universal legal norms. This two-pronged enforcement strategy was set out on the 28 September 2001 in UN Security Council 1373.

The Resolution obliged all countries to legislate in acting against the financing of terrorism and other support to international terrorism via SCR 1373, paras. 1-2.<sup>111</sup> This included information and intelligence exchange between states, the screening of asylum seekers, the elimination of political exemption clause to the extradition of suspects, as well as addressing the links between terrorism, organised crime and American

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<sup>108</sup>Ward, C., "Building Capacity to Combat International Terrorism: The Role of the United Nation's Security Council." (2003) 8(2), *Journal of Conflict and Security Law*, pp 289-305, pg 289-305.

<sup>109</sup>Norman, P., "The United Nations and Counter-Terrorism after September 11: Towards an Assessment of the Impact and Prospects of Counter-Terror 'Spill-Over' into International Criminal Justice Cooperation", Paper to British Society of Criminology Conference 6-9th July 2004, Centre for European Studies Research, University of Portsmouth, Filename: 004, (Jan 2005)2, pg 9-10, available at [www.britisssoccrim.org/volume7/004.pdf](http://www.britisssoccrim.org/volume7/004.pdf), accessed on 24/5/2012.

<sup>110</sup>*ibid*, pg 10.

<sup>111</sup> Szasz, P.C., "The Security Council Starts Legislating", (2002) 96(4), *The American Journal of International Law*, pp 901-905, pg 902.

neo-conservative concerns with weapons of mass destruction in the hands of terrorist groups via SCR 1373, para. 4.

Within these broad-based obligations to legislate, and to undertake executive action against terrorism, a number of issues were outlined but specifically the Resolution went on to call for full international cooperation via bi-lateral and multilateral agreements, and in particular it called for ratification of the 1999 Convention on the Suppression of the Financing of Terrorism ‘as soon as possible’.<sup>112</sup>

An obligation to ‘increase cooperation’ against terrorism would be facilitated by the global ratification of all twelve UN conventions and protocols on acts of terrorism, but the latter convention on the financing of terrorism was the only one specifically mentioned in the operative text of the Resolution at para. 3(d); even though ‘the relevant international conventions relating to terrorism’ had been specifically referred to in the Resolution’s preamble.

The UN counter-terrorist enforcement strategy set out in SCR 1373 also had the key lever of a committee of the Security Council established to monitor implementation of this resolution at para. 6. In contrast to the Security Council sanctions committee established under SCR 1267 in 1999 to monitor state action against the Afghan Taliban regime, this was the first time in the field of international terrorism that general executive action and the adoption of international legal norms to fulfill the will of the Security Council was to be monitored by a Security Council committee. Szasz makes it clear that there was no indication that these obligations would lapse or that the monitoring would end until full legal and operational compliance was attained.<sup>113</sup>

The passage of SCR 1373 uniquely set an obligatory international legal regime to realise a general UN enforcement strategy against international terrorism encompassing a wide range of judicial, criminal police and immigration cooperation measures. It implicitly recognised that universal political agreement on what constituted terrorism was not present hence allowing states to variously define terrorism at the domestic level but also that the UN system needed to realistically focus on long-term state counterterrorist capacity building to attain the objectives of SCR 1373. The open-ended mandate of the Counter Terrorism Committee was an acknowledged break with the past, namely that the September of 11th attacks

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<sup>112</sup>Norman, P., “The United Nations and Counter-terrorism after September 11: Towards an Assessment of the Impact and Prospects of Counter-Terror ‘Spill-Over’ into International Criminal Justice Cooperation”, Paper to British Society of Criminology Conference 6-9th July 2004, Centre for European Studies Research, University of Portsmouth, Filename: 004, (Jan 2005)2, pg 10, available at <[www.britisocccrim.org/volume7/004.pdf](http://www.britisocccrim.org/volume7/004.pdf)>, accessed on 24/5/2012.

<sup>113</sup>Szasz, P.C., “The Security Council Starts Legislating”, (2002) 96(4), *The American Journal of International Law*, pp 901-905, pg 902.

represented, or were, a general threat to international peace and security, one that exceptionally warranted an obligatory ongoing regime of monitoring of compliance.<sup>114</sup>

The Counter Terrorism Committee (CTC) comprises all members of the Security Council with a mandate to monitor implementation of the resolution, with the assistance of appropriate expertise as per SCR 1373, para. 6. Established by the 4th October 2001 (UN Security Council 2001) the CTC was to generate a work programme to realise the Resolution's aims as per SCR 1373 para.7; by 28 October, and to receive within 90 days, reports from on 191 UN member states on their state of compliance.<sup>115</sup> It subsequently became clear that the first and subsequent 90-day periods entailed consecutive work programmes that have been reported to the Security Council ever since.<sup>116</sup>

The CTC formally interpreted the demands of UN SCR 1373 as three discrete prioritised stages; with 'Stage A' being the initial priority to ensuring that states have 'effective counter-terrorism legislation in all areas of activity related to resolution 1373'. 'Stage B' is supposed to focus on 'strengthening states or executive machinery to implement resolution 1373-related legislation', whilst the final stage would mop-up outstanding areas of the Resolution.

Subsequent related resolutions emphasised both the importance of parallel supportive actions by international, regional and sub-regional organisations for the CTC per SCR 1377, 2001; and the need for capacity building through assistance and exchange of international best practice and compliance within 'international human rights, refugee and humanitarian law' per SCR 1456, 2003.

This accompanied General Assembly approval of a further 'strengthening' of the Terrorism Prevention Branch in December 2002; in UN ODC 2003: 4; and by October 2003 over 30 states had benefited from direct UN technical assistance from this route; in UN ODC 2003: 7. The CTC was urged by the Security Council in SCR 1456 to help coordinate international and bilateral assistance to countries to fulfill the UN counter-terrorism strategy.

However, there is a disconnection between these efforts and what is happening on the ground especially if the Kenya and Al Shabaab case is to go by. This therefore means to Kenya that it cannot stand by in comfort of these efforts and expect that the terror attack will just end. The best thing for Kenya is what it has done,

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<sup>114</sup>Norman, P., "The United Nations and Counter-terrorism after September 11: Towards an Assessment of the Impact and Prospects of Counter-Terror 'Spill-Over' into International Criminal Justice Cooperation", Paper to British Society of Criminology Conference 6-9th July 2004, Centre for European Studies Research, University of Portsmouth, Filename: 004, (Jan 2005)2, pg 11, available at < [www.britisssoccrim.org/volume7/004.pdf](http://www.britisssoccrim.org/volume7/004.pdf) >, accessed on 24/5/2012.

<sup>115</sup>*ibid*, pg 11.

<sup>116</sup>*Supra* n. 114, pg 11-12.

that is, pursuing them to the end in an effort to get rid of this menace once and for all, because seemingly, the UN system has failed. The regional efforts to counter terrorism, although have done a great deal; still have not saved Kenya from the terror acts by Al Shabaab. The regional efforts are discussed in the ensuing part.

## 2.6 Regional Response to Terrorism

The UN Global Counter-Terrorism Strategy of the September 2006 called for a holistic and inclusive approach to counter terrorism. It includes not just law enforcement and other security-related preventative measures that have been the Security Council's focus since September 2001, but also gives priority attention to addressing underlying conditions conducive to the spread of terrorism, such as poverty, lack of good governance, and social and economic marginalization.<sup>117</sup> Political leaders in East Africa have acknowledged the sub-region's vulnerabilities and that capacity building across many areas is needed to address current weaknesses.<sup>118</sup>

The AU has adopted a broad-based continental normative framework to combat terrorism. This framework includes, first; the 1999 Organization of African Unity Counterterrorism Convention, which was adopted as part of the continent's reaction to the 1998 al-Qaeda attacks in Kenya and Tanzania, secondly; the AU's 2002 counterterrorism plan of action and third; the AU's 2004 Protocol to the Convention. These instruments contain important provisions on extradition, the exchange of information, capacity building, and other elements, which if implemented, have the potential to strengthen counterterrorism cooperation across the continent.

Just like the UN Strategy, these instruments stress that counterterrorism measures should not infringe on human rights or undermine the rule of law. In addition, the plan of action calls for member states to promote policies aimed at addressing many of the same conditions conducive to the spread of terrorism identified in the UN Strategy, for example, poverty and social and economic marginalization.<sup>119</sup>

### 2.6.1 Africa Centre for the Study and Research on Terrorism

The AU established the ACSRT in 2004 as its technical arm on matters related to terrorism and implementation of the AU counterterrorism program.<sup>120</sup> It charged the ACSRT with a number of important functions aimed at enhancing the counterterrorism capacities of and cooperation among its members.<sup>121</sup> It

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<sup>117</sup>Centre on Global Counter Terrorism Cooperation, "Implementing the UN Global Counter-Terrorism Strategy in East Africa (IGAD Region): Building National Capacities", Hilton Hotel, Addis Ababa, (4-5 March 2008), pg 1-2, available at <kms1.isn.ethz.ch/serviceengine/files/ISN/.../2008\_03\_addis.pdf>, accessed on 5/5/2012.

<sup>118</sup>*ibid*, pg5

<sup>119</sup> paragraph 10(e) of the 2002 Plan of Action.

<sup>120</sup>The ACSRT is a structure of the AU Commission and the Peace and Security Council.

<sup>121</sup>More specifically, the ACSRT is charged with 1) sensitizing AU members to the threat of terrorism in Africa; 2) providing capacity building assistance to enhance national and regional capabilities; 3) creating a mechanism for all member states to access

envisioned a highly integrated network of State and Regional Economic Communities (REC) focal points coordinated centrally through Algiers.

By year 2008, the ACSRT had convened four meetings of the focal points from AU members, forty-one have been designated, including four from East Africa, and the RECs in Africa that have so far been designated (six have been designated, including one from COMESA, the EAC, and IGAD).<sup>122</sup> In addition, it has organized a few training seminars at its well-equipped facility in Algiers. With its focus on training, information exchange, alerts and prevention, and its recently adopted cooperation agreement with the EU aimed at promoting the implementation of Security Council Resolution 1373 among its members,<sup>123</sup> it is well-placed to contribute to the implementation of the preventative and capacity-building elements of the UN Strategy.

IGAD began with a focus on development issues but gradually took on security functions, underscoring the reality of the intimate relationship between security and development in the Horn of Africa.<sup>124</sup> Since its inception IGAD has been extensively involved in peace efforts in Somalia and southern Sudan, which generally contributes to addressing conditions conducive to the spread of terrorism. However, it is in the areas of Pillar II and III of the UN Strategy where IGAD, through its capacity building programme against terrorism, is making its greatest contributions.<sup>125</sup>

The EAC is a regional intergovernmental organization aimed at promoting cooperation among its five member states in political, economic and social sectors.<sup>126</sup> Although the founding treaty makes no specific mention of counterterrorism as an area of cooperation among its members,<sup>127</sup> the three founding member's heads of state; of Kenya, Tanzania, and Uganda; did agree in a 1999 memorandum of understanding signed

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expert guidance; 4) building a database to facilitate the sharing of intelligence and other terrorism-related information; 5) harmonizing and standardizing domestic legal frameworks with the AU and international counterterrorism frameworks; and 6) disseminating counterterrorism research across the continent. .Modalities for the Functioning of the African Centre for the Study and Research on Terrorism (2005), available in, *African Counterterrorism Cooperation: Assessing Regional and Sub-regional Initiatives*, Andre Le Sage (ed.), (Washington, DC: National Defense University Press and Potomac Books; 2007), Appendix Four, pg 184.

<sup>122</sup>The ACSRT has also provided all focal points with the equipment needed to maintain regular contact and exchange information between the centre and member states. Mugumya, G., Director for Peace and Security, AU Commission, .Prevention of Terrorist Movement and Effective Border Security. Remarks at Fifth Special Meeting of the CTC with International, Regional and Sub-Regional Organizations, Nairobi, Kenya, ,( 29 October 2007), pg. 7, [http://www.un.org/sc/ctc/pdf/nairobi\\_africanunion.pdf](http://www.un.org/sc/ctc/pdf/nairobi_africanunion.pdf), accessed on 6.6.2012.

<sup>123</sup>Centre on Global Counter Terrorism Cooperation, "Implementing the UN Global Counter-Terrorism Strategy in East Africa (IGAD Region) :Building National Capacities", Hilton Hotel, Addis Ababa , 4-5 March 2008, pg 14-15, available at [kms1.isn.ethz.ch/serviceengine/files/ISN/.../2008\\_03\\_addis.pdf](http://kms1.isn.ethz.ch/serviceengine/files/ISN/.../2008_03_addis.pdf), accessed on 5/5/2012.

<sup>124</sup>IGAD was created in 1996 to supersede the Intergovernmental Authority on Drought and Development, which was founded in 1986.

<sup>125</sup>Centre on Global Counter Terrorism Cooperation, "Implementing the UN Global Counter-Terrorism Strategy in East Africa (IGAD Region):Building National Capacities", Hilton Hotel, Addis Ababa , 4-5 March 2008, pg 15, available at [kms1.isn.ethz.ch/serviceengine/files/ISN/.../2008\\_03\\_addis.pdf](http://kms1.isn.ethz.ch/serviceengine/files/ISN/.../2008_03_addis.pdf), accessed on 5/5/2012.

<sup>126</sup> *ibid*. The original three founding EAC member states, Kenya, Tanzania, and Uganda, were joined by Burundi and Rwanda in 2006.

<sup>127</sup>The Treaty for the Establishment of the East African Community, 30 November 1999, [http://www.issafrica.org/AF/RegOrg/unity\\_to\\_union/pdfs/eac/EACTreaty.pdf](http://www.issafrica.org/AF/RegOrg/unity_to_union/pdfs/eac/EACTreaty.pdf), accessed on 8/6/2012.



on the margins of the signing of the founding treaty to set up a mechanism to deal with terrorism in the region.<sup>128</sup> While such a regional mechanism is not yet in place, the EAC has nevertheless developed a number of counterterrorism programs under the aegis of cooperation on political matters, and legal and judicial affairs and devised an East African Community Strategy on Combating terrorism in East Africa, in which EAC states pledged to exchange information on terrorism, enhance border security, and establish a regional forensic center.<sup>129</sup>

Kenya is suffering from increased terror attacks since 1998. It is also threatened by piracy off the coast of Somalia on the ships coming to its territory. This has impacted negatively on its economy, and has adversely affected its tourism industry. Ordinarily, UN would act to stop threats to international security, breach of peace and aggression. In this connection, UN has made an attempt as shown by various UN conventions to counter terrorism. However, UN efforts in fighting terrorism is hampered by; lack of a single agreeable definition of terrorism, many overlapping conventions dealing with terrorism and general unwillingness by UN GA to come with a single convention on terrorism to supersede the existing ones.

Regionally, AU has adopted convention and protocol to counter terrorism. However, all these efforts have not saved Kenya from terrorism, mainly because they are inadequate. For this reason, if Kenya's use of force will stop terrorism from Somalia given that UN and AU have failed then it is justified the same way other countries have previously resorted to force in face of terrorism as discussed in chapter two.

## **2.7 The International Actions to Halt Piracy**

Part VII of the Law of the Sea Convention deals with issues of piracy on the high seas.<sup>130</sup> Article 100 states that repression of piracy is a collective duty for every state, even in their non-jurisdictional waters. Article 105 and 107 states that any military vessel has the right to seize a pirate ship and its property on board, arrest the crew and put them on trial under their national jurisdiction, as long as such a seizure takes place on the high seas or in any waters outside the jurisdiction of that particular state. Under this article, however, a ship may only fire at another ship in self-defense.

Under the Law of the Sea Convention, however, those same illegal acts of piracy committed inside the territorial waters of a country: do not fall under the definition of piracy, but are simply considered as:

“sea robbery under international law, and are dealt with by the laws

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<sup>128</sup>Okumu, W., “Counterterrorism Measures in the East African Community”, in Andre Le Sage (ed.), *African Counterterrorism Cooperation: Assessing Regional and Sub-regional Initiatives*, National Defense University Press and Potomac Books, Washington, DC, (2007), pg 83.

<sup>129</sup>Centre on Global Counter Terrorism Cooperation, “Implementing the UN Global Counter-Terrorism Strategy in East Africa (IGAD Region): Building National Capacities”, Hilton Hotel, Addis Ababa, ( 4-5 March 2008), pg 17, available at <kms1.isn.ethz.ch/serviceengine/files/ISN/.../2008\_03\_addis.pdf>accessed on 5/5/2012.

<sup>130</sup>Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

of that country. Domestic laws seldom permit a vessel or warship from another country to intervene. Illegal acts committed for political rather than private ends also fall outside the international law definition of piracy”.<sup>131</sup>

Therefore, when piracy occurs in the territorial waters of a particular state, pirates are subject to that state’s jurisdiction and capacity to prosecute.<sup>132</sup> The narrow scope of the Law of the Sea Convention’s piracy provisions severely limits the availability of international law to deal with piracy in places such as Somalia.

Other international instruments apply more broadly to any state that has pirates in its custody. Examples include the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention)<sup>133</sup> and the 2000 Convention against Transnational Organized Crime.<sup>134</sup> Each document “contains useful provisions relating to mutual legal assistance, assistance in prosecution and extradition, matters not addressed in the law of the sea.”<sup>135</sup>

In addition, many other international documents address piracy activities tangentially. For example, in 1992, UN Security Council Resolution 733 imposed a general and complete arms embargo on Somalia.<sup>136</sup>

On June 2, 2008, the Security Council unanimously adopted the US/France-sponsored Resolution 1816, which, in cooperation with the TFG and consistent with international law, authorized for a period of six months for every state to enter Somalia’s territorial waters for the purposes of repressing acts of piracy and armed robbery at sea by all necessary means.<sup>137</sup> Also, multinational naval coalitions have established naval and aircraft patrol initiatives to improve maritime security around the Horn of Africa.<sup>138</sup>

On December 2, 2008, the Security Council, acting under Chapter VII of the UN Charter, passed Resolution 1846 to again address the issue of piracy in Somalia’s territorial waters. The resolution extended for another twelve months Resolution 1816’s authorization of other states to enter Somalia’s territorial waters.<sup>139</sup> Resolution 1846 emphasized the need for states to prosecute pirates legally under the SUA Convention<sup>140</sup> and to work together with the International Maritime Organization (IMO) to achieve this goal.<sup>141</sup> The

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<sup>131</sup>Grierson, S. N. Z., “Modern Day Piracy and International Law, FYI on the Case”, (Dec. 2008), pg 2, available at <<http://www.simpsongrierson.co.nz/assets/publications/onthecase/ModernDayPiracyDec08.pdf>>. Accessed on 7/5/2012.

<sup>132</sup>Gettleman, J., “Somalia’s Pirates Flourish in a Lawless Nation”, *New York Times, New York*, (Oct. 31, 2008), pg 1

<sup>133</sup>Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1 (1995), 1678 U.N.T.S. 221.

<sup>134</sup>Convention Against Transnational Organized Crime, Nov. 15, 2000, S. TREATY DOC. NO. 108-16 (2004), 2225 U.N.T.S. 209.

<sup>135</sup>Workshop Commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, “Piracy Off the Somali Coast, Final Report”, Nairobi, Kenya, (Nov. 21, 2008),pg 27, available at <[http://www.imcsnet.org/imes/docs/somalia\\_piracy\\_intl\\_experts\\_report\\_consolidated.pdf](http://www.imcsnet.org/imes/docs/somalia_piracy_intl_experts_report_consolidated.pdf)> accessed on 7/5/2012.

<sup>136</sup>S.C. Res. 733, ¶ 5, U.N. Doc. S/RES/733 (Jan. 23, 1992).

<sup>137</sup>S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

<sup>138</sup>Silva, M., “Somalia: State Failure, Piracy, and the Challenge to International Law”, (2010)50 (3), *Virginia Journal Of International Law*, pp 553-571, pg 553-571.

<sup>139</sup>S.C. Res. 1846, ¶ 10, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

<sup>140</sup>*ibid.*

<sup>141</sup>S.C. Res. 1846,

Security Council reiterated its condemnation of all acts of piracy and armed robbery against vessels in Somali territorial waters and on the high seas off the coast of Somalia. It also called upon organizations to cooperate with the shipping industry and the IMO, and to operate consistently with the resolution and relevant international law by deploying naval vessels and military aircraft, and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery off the coast of Somalia.<sup>142</sup>

Similarly, Resolution 1851, adopted on December 16, 2008, invited states to make special agreements with other nations in the region to facilitate prosecution of piracy.<sup>143</sup> It also encouraged the creation of an international cooperation system and a center for the sharing of information.<sup>144</sup> It further held that for twelve months following the adoption of Resolution 1846, states and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG.<sup>145</sup> These measures, however, must be undertaken in a manner consistent with applicable international humanitarian and human rights law.<sup>146</sup>

## 2.8 Conclusion

There is no settled understanding on the use of force to fight terrorism. Initially, unilateral use of force to fight terrorism was normally criticised, but nowadays it is gaining acceptance, therefore, today it is possible for a country to use right of self defence against terrorism without much international condemnation.

Further, with the emergence of failed states, for example Somalia has complicated situation. This country is a safe haven for piracy and terrorism which affects Kenya and other countries. The international response has not been very successful to fight it. This has prompted Kenya to invoke its right of self defence and has entered into Somalia. The subsequent chapter explores the Kenya's experience with terrorism, especially from Somalia.

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<sup>142</sup> *ibid.*

<sup>143</sup> S.C. Res. 1851, ¶ 3, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

<sup>144</sup> *ibid.*

<sup>145</sup> *Supra* n 143.

<sup>146</sup> *Supra* n 143.

## CHAPTER THREE

### KENYA AND THE PROBLEM OF TERRORISM FROM SOMALIA

#### 3.1 Kenya's entry into Somalia: Reasons and Factors

Since the mid-1990s, a number of loosely affiliated extremist groups operating from Somalia have carried out or facilitated terrorist attacks in East African region.<sup>147</sup> The first was al-Ittihaad al-Islami (AIAI), a Somali Islamist and nationalist political grouping with some longstanding links to Al-Qaeda that aimed to establish an Islamic emirate in the Somali-inhabited territories of the Horn of Africa.<sup>148</sup>

In the mid-1990s, it claimed several terrorist attacks in Ethiopia. Following Ethiopian retaliatory raids on its Somali bases in early 1997, however, the AIAI's military and political command structure was dismantled, and the movement formally disbanded.<sup>149</sup> Some leaders of this terror group remained active and are believed to have played a supporting role in the 1998 bombing of the U.S. Nairobi embassy. That 7<sup>th</sup> August 1998 attack in Nairobi and Dar es Salaam against the U.S embassy, were carried out by Al-Qaeda in East Africa based in Somalia. Its Somali connections were instrumental in planning and executing the twin attacks, which together killed 225 and wounded over 4,000.

On 28<sup>th</sup> December 2002, it attacked the Paradise Hotel, a beachfront lodge in Kikambala, Kenya, owned by Israelis and frequented by Israeli tourists, killing fifteen and injuring about 80.<sup>150</sup> On the 11 July 2010 bombings in Kampala that killed 85 civilians and injured dozens more was attributed to Al-Shabaab, a successor to AIAI.<sup>151</sup>

A string of cross-border kidnapping attacks targeting Western tourists on the Kenyan coast and aid workers from the refugee camp in Dadaab provoked Kenya to enter Somalia in pursuit of Al Shabaab. Several Europeans were seized in the Lamu area in September and October 2011 and the key tourism industry was hit hard. The last straw appeared to be when two Spanish aid workers with Médecins Sans Frontières (MSF) were kidnapped in a Dadaab refugee camp, near the Kenya-Somalia border, on 13 October 2011, the third incident in less than a month.<sup>152</sup> Several days later, Kenyan troops moved into Somalia. The former President, Mwai Kibaki, informed the public that Kenya was at war only two days after the army had entered into Somalia.<sup>153</sup>

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<sup>147</sup>Crisis Group Africa Report "The Kenyan Military Intervention in Somalia", Report N°184, (15 February 2012), pg 1 available at <[www.crisisgroup.org/.../Kenya/184%20\\_Thekenyamilitaryintervention in Somalia.pdf](http://www.crisisgroup.org/.../Kenya/184%20_Thekenyamilitaryintervention%20in%20Somalia.pdf)>, accessed on 17/6/2012.

<sup>148</sup>*ibid.*

<sup>149</sup>*Supra* n. 147.

<sup>150</sup>*Supra* n. 147.

<sup>151</sup>*Supra* n. 147.

<sup>152</sup>Somalia Report, "The two aid workers were reportedly sold, in January, to pirates and moved to a hijacked ship. Update: Kidnapped MSF workers moved to MV Albedo", *Somalia Report*, (12 January 2012).

<sup>153</sup>Peter Leftie, "Kenya, Somalia seal pact to hit Al Shabaab", *Daily Nation*, Nairobi, (19 October 2011).

Kenya since the intervention was launched in October has experienced more than thirty attacks linked to Al-Shabaab.<sup>154</sup> In the first few weeks, these mainly targeted bars and night clubs, including a Nairobi nightclub bombing on 24<sup>th</sup> October 2011, and churches. With the build-up of security, the majority of subsequent attacks have been in North Eastern Province, along the Somalia border. These increasingly target military and other security forces.<sup>155</sup> On 9<sup>th</sup> January 2012, insurgents raided a police post, killing at least six and taking two hostages.

The UK foreign office said “that terrorists may be in the final stages of planning attacks” and warned British citizens in Kenya to be “extra vigilant”.<sup>156</sup> The Dadaab refugee camps had become increasingly insecure. The surge of kidnappings, grenade attacks and violence within them hampered aid efforts.<sup>157</sup>

Faced with this predicament, Kenya invaded Somalia. It based this incursion on its right of self defence. Kenya is unknown for aggression; it did this for the sake of protecting the right to life and the right to property of its citizens.

### 3.1.1 Piracy in Context

In Somalia, the failure of the state to provide good governance, security, and respect for the rule of law is the cause if it’s endemic conflict. These inabilities have fuelled piracy and provided a breeding ground for terrorist activities.<sup>158</sup>

It is a long-held principle of international law that each state has the right to conduct its domestic affairs without interference from any other state.<sup>159</sup> The 1933 Montevideo Convention on the Rights and Duties of States identifies some of the fundamental legal characteristics of a state. These legal characteristics include: a permanent population; a defined territory; and a government capable of maintaining effective control over its territory and conducting international relations with other states or gaining international recognition.<sup>160</sup> The contemporary assessment of countries such as the Somalia, this traditional definition is watered

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<sup>154</sup> *ibid.*

<sup>155</sup> The Standard Newspaper, “Al-Shabaab attacks Kenya’s security forces”, *The Standard*, Nairobi, (13 December 2011).

<sup>156</sup> Clar Ni Chonghaile, “Kenya: warning of imminent terrorist attack”, *The Guardian*, Britain, (7 January 2012).

<sup>157</sup> Crisis Group Africa, “The Kenyan Military Intervention in Somalia”, Report N°184, (15 February 2012), pg 8 available at <[www.crisisgroup.org/.../Kenya/184%20\\_Thekenyamilitaryintervention in Somalia.pdf](http://www.crisisgroup.org/.../Kenya/184%20_Thekenyamilitaryintervention%20in%20Somalia.pdf)>, accessed on 17/6/2012.

<sup>158</sup> Silva, M., “Somalia: State Failure, Piracy, and the Challenge to International Law”, (2010) 50 (3), *Virginia Journal Of International Law*, pp 553-578, pg 554.

<sup>159</sup> The sovereignty principle is entrenched in the Treaty of Westphalia (1648 Peace of Westphalia) and the legal implications of this sovereignty are marked by the 1945 United Nations Charter. See Brad R. Roth, State Sovereignty, International Legality, and Moral Disagreement (Mar. 3, 2006), pg 11, (paper presented at the 2006 University of Georgia School of Law International Law Colloquia), available at <http://www.law.uga.edu/intl/roth.pdf>. Accessed on 9/5/2012.

<sup>160</sup> Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

down.<sup>161</sup> As a result, the concept of the “failed state” has emerged in Somalia.<sup>162</sup> Somalia is regarded as a failed state.

### 3.1.2 Somalia as a failed State

From a political and legal perspective, a “failed state” can be said to possess specific geographical, political, and functional characteristics.<sup>163</sup> Geographically, failed states are essentially associated with internal and endogenous problems, despite incidental cross-border impacts. Politically, failed states face an internal collapse of law and order. Functionally, failed states lack bodies capable of representing them at the international level and lack the capacity for accepting external influence.<sup>164</sup>

Failed State is one which, though retaining legal capacity has for all practical purposes lost the ability to exercise it. There is no body which can commit the State in an effective and legally binding way, for example, by concluding an agreement.<sup>165</sup> Somalia as a failed state possesses no control over the use of force by coordinated institutions, no functional governmental authority, no security for its residents, and no control of its borders.<sup>166</sup> They are liabilities in virtually every regard; the unbridled criminality, humanitarian disasters, and domestic conflicts that afflict failed states also affect neighboring states, the surrounding region, and the world as a whole.<sup>167</sup> Failed states become breeding grounds for terrorist groups. In this context, Somalia continues to be a great threat to Kenya’s security due to activities of Al Shabaab.

### 3.2 Situation in Somalia

Somalia was founded in 1960 following the unification of the Italian and British territories.<sup>168</sup> Prior to the civil war that started in 1990, Somalia was a major exporter of agricultural produce and seafood. Somalia’s trading partners included the neighboring countries of Kenya and Ethiopia.<sup>169</sup> The civil war destroyed Somalia, deprived its people of their homes and livelihoods, and created a parallel economy driven by piracy.<sup>170</sup> After the forced departure of President Mohamed Siad Barre in 1991, the Somali state essentially ceased to exist, lacking any coordinated governmental authority.<sup>171</sup>

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<sup>161</sup>The Fund for Peace, “The Failed States Index, Foreign Policy”, (July–Aug. 2009), pg 81.

<sup>162</sup>Silva, M., “Somalia: State Failure, Piracy, and the Challenge to International Law”, (2010)50 (3) *Virginia Journal Of International Law*, pp 553-578, pg 555.

<sup>163</sup>Thürer, D., “The “Failed State” and International Law”, (1999) 81, *INT’L REV. RED CROSS*, pp733–54, pg731.

<sup>164</sup> *ibid.*

<sup>165</sup> *Supra* n 163, pg 734.

<sup>166</sup> *Supra* n 163, pg 731.

<sup>167</sup>Rotberg, R. I., “The Failure and Collapse of Nation-States: Breakdown, Prevention and Repair”, in Rotberg, R. I., (ed), *When States Fail: Causes And Consequences*, Princeton University Press, Princeton University, (2004), pp1-45, pg 5–9.

<sup>168</sup>Kaplan, S.D., *Fixing Fragile States: A New Paradigm for Development*, Greenwood Publishing Group, West Port:USA, (2008) pg 117.

<sup>169</sup>International Expert Group on Piracy off the Coast of Somalia, “Piracy Off the Somali Coast, Final Report”, Workshop Commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, Nairobi, Kenya, (Nov. 21, 2008), pg29–34, available at <[http://www.imcsnet.org/imcs/docs/somalia\\_piracy\\_intl\\_experts\\_report\\_consolidated.pdf](http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf)> accessed on 13/6/2012.

<sup>170</sup> *ibid.*, pg 29-30.

<sup>171</sup>McLure, J., “The Troubled Horn of Africa: Can the War-torn Region Be Stabilised?”, (2009)149( 3), *CQ GLOBAL RESEARCHER*, p 158, pg 163–164.

Since that time, there have been at least fifteen unsuccessful attempts to establish a government in Somalia.<sup>172</sup> Similarly, no meaningful security body has been able to replace the Somali army following its collapse in 1991. Opposition groups have undermined virtually every attempt at replacement, essentially converting soldiers into domestic mercenaries. The absence of designated policing authorities has created an ongoing security vacuum. The terrorist groups such as Al Shabaab which is linked to Al Qaeda seized this opportunity and established a formidable terrorist and piracy network in Somalia.

### 3.3 Ongoing Piracy in Somalia

Piracy has become particularly lucrative in Somalia because in terms of maritime traffic; Somalia is one of the most geographically well positioned countries in the world. Located between the Horn of Africa and the southernmost tip of the Arabian Peninsula, Somalia is situated at the crux of all major regional shipping lanes.<sup>173</sup> The strait adjacent to Somalia links the Indian Ocean, Arabian Sea, Gulf of Aden, Red Sea, and the Suez Canal. The most noticeable trend observed in the past year has been a shift in the main area of activity, from southern Somalia and the port of Mogadishu to the Gulf of Aden.<sup>174</sup>

The primary objective of Somali piracy is usually to obtain ransom for both ships and crew members. Consequently, shipping companies have already suffered losses in excess of one hundred million dollars. To date, piracy has sometimes resulted in the killing of hostages.<sup>175</sup> While the amounts of ransom demanded are increasing, the average ranges from half a million to two million dollars.<sup>176</sup> In most cases, pirates and shipping companies negotiate the ransom, which is paid in cash.<sup>177</sup> This piracy is being conducted by the terror group known as Al Shabaab. Some of the weapon it seizes from the ship end up in its terror activities.

### 3.4 Nature of Terrorism in Kenya

Direct motivations of terrorism in Kenya includes; the country's close ties with the West especially the US, its vibrant coastal beach tourism industry that is at odds with the locally dominant Islamic religion and culture and the perception that the country's predominantly Christian population is an obstacle to the Islamization of Eastern Africa.<sup>178</sup>

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<sup>172</sup> *Ibid*, pg 151-157.

<sup>173</sup> Ploch L., *et al*., "Piracy off The Horn Of Africa", Cong. Research Service, CRS Report for Congress Order Code RL 40528, USA, (Apr. 21, 2009), pg 4.

<sup>174</sup> Middleton, R., "Piracy in Somalia", (2008), pg 6, available at [http://www.chathamhouse.org.uk/files/12203\\_1008piracysomalia.pdf](http://www.chathamhouse.org.uk/files/12203_1008piracysomalia.pdf) accessed on 20/5/2012.

<sup>175</sup> *ibid*, pg 7-9.

<sup>176</sup> International Expert Group on Piracy off the Coast of Somalia, "Piracy Off the Somali Coast, Final Report", Workshop Commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, Nairobi, Kenya, (Nov. 10-21, 2008), pg 19, available at [http://www.imcsnet.org/imcs/docs/somalia\\_piracy\\_intl\\_experts\\_report\\_consolidated.pdf](http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf). Accessed on 19/5/2012.

<sup>177</sup> *ibid*.

<sup>178</sup> *Supra* n. 176, pg 11.

Factors facilitating terrorist attacks in Kenya includes;<sup>179</sup> the country's coastal geographic situation and strategic location relative to Europe, Asia, and neighboring African countries, porous borders, unstable neighboring countries, especially Somalia , relatively open and multicultural society, relatively good transport and communications infrastructure, relatively advanced regional economy, relatively large Muslim population and the political and socio-economic deprivation of the coastal population relative to the rest of the country.

One of factors that contribute to terrorism in Kenya is its close ties to Israel, a country that Muslims around the world dislike for its persecution of Palestinians. This relationship is a major irritation to foreign and native Muslims who have repeatedly but unsuccessfully been calling for the severance of the relationship.<sup>180</sup>

One indication of the strength of this relationship is Kenya's June 1976 decision to offer Israel crucial logistical support in its raid on Entebbe Airport in order to free Israeli hostages held there by Palestinian hijackers allied to the then Ugandan dictator Idi Amin.<sup>181</sup> This assistance was later avenged in the 1980 bombing of the Israeli owned Norfolk Hotel in Nairobi, killing 15 and wounding more than 80 mostly Kenyans .<sup>182</sup> Another indication is the Israel's prompt dispatch of a strong contingent of an Israeli Defence Force rescue team to Nairobi during the 1998 terrorist attacks. Given that one of the Al Qaeda's major grievances against the US is its support of Israel at the expense of Palestinians, it is not surprising that Kenya's long pro-Israel stance is viewed by the Al Qaeda as evidence of Kenya's support of the US policy in the Middle East.<sup>183</sup>

Somalia is a major source of danger to Kenya because the weapons used in the Mombasa attacks were smuggled into Kenya by sea from Somalia. Some of the same components were used in the bombs that destroyed the hotel in Kikambala [Mombasa] and the U.S. embassy in Nairobi in 1998. This means that Somalia has become an Al-Qaeda's source of weaponry, base of operation and attack, and a convenient hideout for its attackers.<sup>184</sup>

### 3.5 Effects of terrorism in Kenya

These effects includes; loss of lives, the decline of the country's tourism industry and the attendant loss of jobs and foreign exchange, growing tension between Muslims and Christians, radicalization of the country's Muslims, rising anti-western sentiments in the Muslim and general population, the passage of anti-terrorist

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<sup>179</sup> *Supra* n. 176, pg 11.

<sup>180</sup> *Supra* n 176 , pg 12.

<sup>181</sup> Kyemba, H., *A State of Blood: The Inside Story of Idi Amin*, Ace Books, New York, (1977), pg 56.

<sup>182</sup> Otiso, K. M., "Kenya in the Crosshairs of Global Terrorism: Fighting Terrorism at the Periphery", (December 2009)1 (1), *Kenya Studies Review*, pp107-132, pg 112.

<sup>183</sup> *ibid.*

<sup>184</sup> *Supra* n 182, pg ,114.



measures, threat to Kenya's human, civil and political rights besides eroding the country's sovereignty, and rising tension between Kenya and the West.<sup>185</sup>

### 3.6 Steps to control Terrorism

Kenya is relying on a combination of legislative, security, social and diplomatic measures to deal with the country's terrorist threat. These measures include anti-terrorist legislation, beefed up security patrols by the military and police, social outreach and peace talks to resolve the Somalia crises.<sup>186</sup>

#### 3.6.1 Legislative action

On 30<sup>th</sup> April 2003, Kenya published a draft Suppression of Terrorism bill to guide its future response to terrorism, the country has been using various pieces of existing laws, such as, Anti-Corruption and Economic Crimes Act, the Police Act and other elements of Kenya's criminal code to deal with its terrorism threat. The country's broad executive powers are also being extensively used for this purpose. The passage of the Anti-Corruption and Economic Crimes Act of 2003 was seen, especially, likely to help to seal a major loophole such as corruption of the police, immigration and customs agencies in the country's vulnerability to terrorism.<sup>187</sup>

Besides defining terrorism and terrorist organizations, the Bill sought, among other things; first, sought to criminalize unlawful weapons training, the leading of terrorist organizations, possession of articles of terrorism, being a member of or supporting a terrorist organization;<sup>188</sup> secondly, conferred extra powers on police and spelled out cooperative procedures to enable Kenya to work with other countries to combat terrorism; third, provided punishment for anyone convicted of terrorism and fourth, allowed for the seizure of property acquired through terrorism.<sup>189</sup>

The bill was initially unpopular because; first, it was widely believed to have been foisted on Kenya by the U.S. and British governments thereby undermining homegrown responses to terrorism;<sup>190</sup> secondly, it appeared to target certain groups of Kenyans, especially Muslims and was perceived to be divisive because it was seen to pit Christian supporters against its Muslim opponents;<sup>191</sup> third, it was seen as being draconian

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<sup>185</sup> *Supra* n 182, pg 117.

<sup>186</sup> *Supra* n 182, pg 125.

<sup>187</sup> *Supra* n 182, pg 125.

<sup>188</sup> Republic of Kenya, *The Terrorism Suppression Bill (draft)*, in Kenya Gazette Supplement No. 38 (Bills No. 15), Government Printers, Nairobi, (2003).

<sup>189</sup> Wabala, D. & Wandera, N., "Scotland Yard joins Kenya war on terror", *East African Standard*, Nairobi, (Thursday, June 27, 2003), online at < <http://www.eastandard.net/> > accessed on 6-3-2012.

<sup>190</sup> Thuku, W., *et al*, "Pressure mounts on anti-terror Bill", *Daily Nation*, Nairobi, (Friday, July 4, 2003), Online at <<http://www.nationaudio.com/>>, accessed June 3, 2012.

<sup>191</sup> Otieno, S., "No hidden agenda on terror Bill, says Government", *East African Standard*, Nairobi, (Monday, August 4, 2003), online at <http://www.eastandard.net/>, accessed Monday, June 1<sup>st</sup>, 2012.

and oppressive because it contained no remedy for those wrongly accused of terrorism ;<sup>192</sup> fourth, it was seen as being unbeneficial to Kenyans even though they were to bear its brunt not so much to protect them but to satisfy American and British concerns over their own security;<sup>193</sup> fifth, it eased the extradition of terrorist suspects to other countries without the normal safeguards;<sup>194</sup> sixth, it was undemocratic having been drafted with no due input from most Kenyans.

The allowing for the arrest and holding of terrorist suspects without allowing them to contact lawyers and relatives was seen as violation of human rights. <sup>195</sup> Additionally, the Bill had also caused out cry among some Kenyans because they viewed it as being racist because of its likely violation of the rights of non-whites while protecting those of whites.<sup>196</sup>

Although there was a complaint that the Counter Terrorism Act will be regarded as targeting a certain community, Kenya had to enact an Act of parliament to aid in fighting terrorism. This was done in year 2012 (Prevention of Terrorism Act of 2012). Muslims leaders had initially opposed the Bill on grounds that it targeted the community and infringed on certain constitutional rights. They said the draft law contravened the Constitution. Associations of Muslim Organisations in Kenya (Amok) in run up to year 2012 changed heart and supported it as meant to protect Kenyans against terror threats. The organization's chairman, Sheikh Athman Mponda, said: "We've lost many young men who have been recruited into Al-Shabaab and taken to Somalia. I know of nine young men who have been killed in Somalia."<sup>197</sup> This support by Muslim community to a large extent contributed to the enactment of the Prevention of Terrorism Act of 2012, laws of Kenya.

### 3.7 Terrorism in Somalia as a threat to international peace

Kenya defence force liberated the last strong hold of Al Shabaab on 29<sup>th</sup> September 2012.<sup>198</sup> The KDF has now been incorporated into AMISOM which means Africa Mission in Somalia. Even after the news of Kenya intervention in Somalia surfaced, the UN SC remained silent, despite the fact that it was not informed of Kenya's intention to intervene in Somalia. Utterance by the UN SG Ban Ki Moon came nearly two

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<sup>192</sup>Thuku, W., *et al*, "Pressure mounts on anti-terror Bill", *Daily Nation*, Nairobi, (July 4, 2003), Online at <http://www.nationaudio.com/>, accessed June 3, 2012.

<sup>193</sup>Otieno, S., "No hidden agenda on terror Bill, says Government", *East African Standard*, Nairobi, (Monday, August 4, 2003), online at <http://www.eastandard.net/>, accessed Monday, June 1<sup>st</sup>, 2012.

<sup>194</sup>Thuku, W., *et al*, "Pressure mounts on anti-terror Bill", *Daily Nation*, Nairobi,(July 4, 2003), Online at <http://www.nationaudio.com/>, accessed June 3, 2012.

<sup>195</sup> *ibid*.

<sup>196</sup>Walunywa, J., "Racial origins of the Terrorism Bill", *East African Standard*, Nairobi, (Friday, July 11 2003).

<sup>197</sup>Sunday Standard, "Kibaki signs historic Anti-Terrorism Bill", *Sunday Standard*, Nairobi, (14/10/2012). available at [www.standardmedia.co.ke](http://www.standardmedia.co.ke) accessed on 28/5/2013); Daily Nation, "Terrorist will Face Life in Jail Under New Law", *Daily Nation*, Nairobi,(25/6/2012) Available at [www.hiiram.com/news4/2012/jun/24684/terrorist\\_will\\_face\\_life\\_in\\_jail\\_under\\_new\\_law.aspx](http://www.hiiram.com/news4/2012/jun/24684/terrorist_will_face_life_in_jail_under_new_law.aspx) accessed on 28/5/2013.

<sup>198</sup>Gayathri, A., "AU forces capture rebel stronghold Kismayu, says Kenya", *International Business Times*, Nairobi, (28<sup>th</sup> September 2012). Available from <[www.ibtimes.com/au-forces-capture-rebel-stronghold-kismayu-sayskenya](http://www.ibtimes.com/au-forces-capture-rebel-stronghold-kismayu-sayskenya)(accessed on 4th November 2012).

months into the invasion where he commended Kenya on its roles and efforts in stabilizing Somalia.<sup>199</sup> This is partly due to the recognition that Al Shabaab continues to be a threat to international peace and security. Kenya combined the tactic of invasion into Somalia with that of enacting her new law: The Prevention of Terrorism Act of 2012. It is believed this will go along way in addressing the threat coming from terrorism.

### **3.7.1 The Prevention of Terrorism Act of 2012**

This is a Kenyan Act of parliament assented by President on 12<sup>th</sup> October 2012 and commenced on 24<sup>th</sup> October 2012. In section 2, it defines terrorist acts as an act or threat of action –

- a) which
  - I. involves the use of violence against a person;
  - II. endangers the life of a person other than the person committing the action;
  - III. creates a serious risk to the health or safety of the public;
  - IV. results to the serious damage of property;
  - V. involves the use of fire arms or explosives;
  - VI. involves the release of any dangerous, hazardous, toxic or radioactive substance or microbial or other biological agent or toxic into the environment;
  - VII. interferes with an electronic system resulting in the disruption of the provision of communication, financial, transport, or other essential services;
  - VIII. interferes or disrupts the provisions of essential or emergency services;
  - IX. prejudices national security or public safety; and
- b) which is carried out with the aim of-
  - I. intimidating or causing fear amongst members of the public;
  - II. intimidating or compelling the Government or international organisation to do or to refrain from any act; or
  - III. destabilizing the religious, political, constitutional, economic or social institutions of a country or international organisation

Part three of this Act creates offences from section 4 to 30. Then we have part 4 which provides on investigation of offences. This run from section 31 to 37. Part 5 deals with the trial of offences from section 38 to 40 which includes matters of jurisdiction and evidence.

### **3.8 Arguments and Counter-Arguments on Kenya's invasion into Somalia**

Some scholars are questioning the legality of Kenya's invasion into Somalia in pursuit of Al Shabaab. What is bothering them is whether: the Al Shabaab's terror acts in Kenya, including kidnapping, amounts to

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<sup>199</sup> Moon, B. K., "United Nations Secretary General praises Kenya's invasion of Somalia", *Pan African News Wire*, PPS.2011, (8 September 2011), available from <[panafricannews.blogspot.com/2011/12/united-nations-secretary-general](http://panafricannews.blogspot.com/2011/12/united-nations-secretary-general)> accessed 1<sup>st</sup> August 2012.

‘armed attack’ under article 51 of UN Charter, notwithstanding the fact that Somalia is a failed state.<sup>200</sup> It is argued that for the terrorist acts from Al Shabaab to qualify as an armed attack: must form part of a consistent pattern of violent terrorist actions rather than just being isolated or sporadic aggressions.<sup>201</sup>

It is argued that the followings are factors that led to ‘operation linda nchi’ in Somalia. In September of 2011, a British national was killed and a wife abducted from a luxury resort of Kiwayu on Kenyan coast, on 1<sup>st</sup> October 2011, a French national was kidnapped in Manda island of Lamu and on 13<sup>th</sup> October 2011, two aid workers were abducted in Dadaab camp. The Al Shabaab denied these acts hence raises doubt whether they were responsible.<sup>202</sup> It is argued that many countries, such as, South Africa, Rwanda, Australia, France and Israel, supported Kenya invasion into Somalia, however, some argued that this was not warranted as it did not meet the proportionality and necessity principles required for an armed attack as the kidnapping had already occurred, may be it was a reprisal.<sup>203</sup>

It is said that kidnapping does not amount to an ‘armed attack’ but as a crime hence it is argued that it did not meet the criteria of an ‘armed attack’ under article 51 of the UN Charter and further that Kenya’s action did not meet the necessity and proportionality requirements. Kenya exploited the situation because it read the mood of international community who wanted situation in Somalia normalized and used that to its advantage.<sup>204</sup> It is said that it could have been more lawful or less unlawful if it invoked the collective self defence card of helping Somalia by responding to prior interventions by other states via AMISOM in guise of fighting international terrorism.<sup>205</sup>

However, other scholars on the other hand argues that the incursion into Somalia to pursue Al Shabaab was justified under self defence on the following grounds as amounting to armed attack:<sup>206</sup>

1. it kidnapped two foreigners and killed another one in the Kenyan resorts on the east coast, abduction of two aid workers from Dadaab refugee camp and the attack against Kenyan soldiers in cross border raids raised a lot of concern hence the incursion in the mid- October, 2011.
2. There was credible intelligence that this terrorist group would continue to attack Kenya.
3. Due to sporadic nature of the attack, it appeared that the threat was escalating hence it was the decisive opportunity to take preventive measures to attack and damage such group prior to its launching another attack on Kenya.
4. It was not possible to defeat Al Shabaab in a single strike as it is dispersed across the number of cells. It could have been dangerous to attack it on a piece meal basis by series of individual strikes

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<sup>200</sup>Teodorescu, N., “Proxy Warfare in the Horn of Africa: Terror Organization Al Shabaab Prospering from the Chaos in the Failed state of Somalia”, International Conference on Economic Marketing and Management IPEDR , University of Bucharest, Romania, (2012)28, pp 215-230, pg 215.

<sup>201</sup> *ibid*, pg 217.

<sup>202</sup> *Supra* n. 200, pg 217-218.

<sup>203</sup> *Supra* n. 200, pg 218-219.

<sup>204</sup> *Supra* n. 200, pg 220.

<sup>205</sup> *Supra* n. 200, pg 220.

<sup>206</sup>Kassilly, J., *et al*, “Kenya’s Pre-Emptive and Preventive Incursion against Al-Shabaab in the Light of International Law”, (2012) 1, *Journal of Defence Resources Management*, pp 27-36,pg 27-28.

due to fear of retaliation, hence had to go there and comb the whole area to remove and eliminate this terror group.

The UN Charter has not defined the term ‘armed attack’, this has left the International Court of Justice and other UN organs to address this gap, albeit sparingly to fit into a given situation. This has handicapped UN as a whole, and concerned parties in particular when it comes to the concept of the use of force. It is to be observed, as a result, the use of force was initially condemned when it was used to deal with terrorists, however with time dynamics, it has gradually been redefined to a level that we may say that grave or repeated acts of terrorism may constitute ‘armed attack’ under article 51 of the UN Charter.

### **3.9 Conclusion**

After September eleven terrorists attacks on U.S., the UN system has renewed its energy to fight terrorism and has adopted various Security Council’s resolutions that have gone along way in fight against terrorism. In Africa, the AU has adopted some measures including a convention to fight terrorism. When we come to Kenya which has suffered multiple attacks from terrorism, it is surprising that it took up to year 2012 to adopt a domestic legislation as a base for fighting terrorism. The next chapter deals with conclusions and recommendations.

## CHAPTER FOUR

### CONCLUSIONS AND RECOMMENDATIONS

#### 4.1 Introduction

This chapter sums up the insights that have emerged from the discussion so far. Thereafter it has made recommendations. If implemented; these recommendations will go along way in eliminating instances of terror attacks. However, they should be applied with high degree of circumspection.

##### 4.1.1 Emerging insights on self defence vis-a-vis terrorism

Use of force in international law against terrorists and terrorism still remains controversial today. This is in spite of the increase in the states' practice on assertion of use of force to fight their increased threats from terrorism.

There are two schools of thought in regard to the use of force. One of the schools of thought is the one that professes that the use of force is prohibited by article 2(4) of UN Charter. A country is only allowed under article 51 to use of force in self defence only when there is an actual armed attack from another country. This therefore rules out the acts of terrorism from non state actors as one of the instance where a country should use its right of self defence.<sup>207</sup>

The other school of thought takes the view that article 51 of the UN Charter which provides for self defence needs to be understood well. They argue that this article did not create the right of self defence but only preserved the traditional/customary states' right to self defence which they profess is inherent.<sup>208</sup> They argue that this right exists until the UN has taken steps to stop the acts that continue to be a threat to another state's sovereignty or security. This school of thought goes on and argues that terrorism has redefined what was traditionally referred to as a threat to international peace, security and armed attack. They stress that terrorism has become a modern threat to international peace and security and that repeated and consistent terrorist acts would qualify as an armed attack under article 51 of the UN Charter which therefore justifies the country affected to use its right of self defence.<sup>209</sup>

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<sup>207</sup> *Tadic* judgment (Case IT-94-1, *Prosecutor v. Tadic*, 38 ILM (1999) 1518, at paras 116 – 145).

<sup>208</sup> Medzmariashvili, M., *Pre-emptive self-defence against states harbouring terrorists*, Research Papers No. 4, Riga Graduate School of Law, Latvia: Baltic Region, (2011), pg 9-11, available at <[www.rgsl.edu.lv/images/stories/.../4\\_medzmariashvili\\_final.pdf](http://www.rgsl.edu.lv/images/stories/.../4_medzmariashvili_final.pdf)>, accessed on 11/4/2012.

<sup>209</sup> Teodorescu, N., "Proxy Warfare in the Horn of Africa: Terror Organization Al Shabaab Prospering from the Chaos in the Failed state of Somalia", International Conference on Economic Marketing and Management IPEDR, University of Bucharest, Romania, (2012) 28, pg 215-217.

Terrorism remains a real threat to Kenya's security. This is mostly coming from Somali terror groups such as Al Shabaab which is linked to Al-Qaeda. As a result of these terror activities, Kenya saw the US Embassy targeted in 1998. The UN's response against terrorist activities in Kenya has been inconclusive and of no meaningful benefit to Kenya, therefore, this has informed the Kenya's decision to use its own means to deal with the threat.

The piracy off the coast of Somalia is evolving into something similar to terrorism because,<sup>210</sup> among other things, the definitions it is being given by UN conventions resembles terrorism; like terrorism it uses force to coerce and it is now being aimed to achieve a particular political goal. Further, it resembles terrorism in that it is being driven by ideological opposition to an unjust world. There is a direct, albeit disputed link to specific terrorist acts: it is alleged that piracy finances the acquisition of weapons used in terror acts in Kenya by Al Shabaab.

Human insecurity has been interpreted as integral to world peace and security.<sup>211</sup> Terrorism is a threat to human security, international peace and security as per article 39 of the UN Charter. Among the options open to a country facing terrorism is pursuing peaceful means such as negotiations with the terrorists as per article 33 of UN Charter. Negotiations, however, have failed. The only viable option that remains is the use of force and Kenya is now at this stage and is hoping to win against terrorism.

#### **4.1.2 Emerging insights on the use of Force to Counter Terrorism: Trends in International Practice**

It is now accepted that force is prohibited in international relations following article 2(4) of UN Charter. The only instance when it is allowed is during instance of self defence after armed attack and collective Security Council resolution under articles 41- 51 of the UN Charter.

In the early years of the UN Charter the use of force was not tolerated and majority of states stressed that the way to deal with terrorism was to prosecute them using the domestic criminal law.<sup>212</sup> This restrictive approach which discouraged the use of force to fight terrorism ruled up to 1980s, however, after 1980s, it is gaining currency for states to use force against terrorism.

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<sup>210</sup> Odhiambo, E.O.S., *et al* , "Prosecuting Somalia Pirates As Terrorists", (2011) 2(2), *Journal of Defence Resources management*(Centre for Disaster Management & Humanitarian Assistance & Dept. of Criminology and Social Work, Masinde Muliro University of Science Technology, Kenya),pp 37-46, pg 38-39, available at < [journal.dresmara.ro/issues/.../04\\_odhiambo\\_onkware\\_kasill\\_ntabo.pdf](http://journal.dresmara.ro/issues/.../04_odhiambo_onkware_kasill_ntabo.pdf)>, accessed on 17/6/2012.

<sup>211</sup> Owada, H., "The United Nations And The Maintenance Of International Peace And Security: The Current Debate In The Light Of Reform Proposals", Keynote Speech at the Research Forum on International Law, European Society of International Law, Graduate Institute of International Studies, (26 May 2005), pg 11, available at < [www.esil.sedi.eu/fichiers/eu/owada\\_051.pdf](http://www.esil.sedi.eu/fichiers/eu/owada_051.pdf)>, accessed on 17/5/2012.

<sup>212</sup> Tams, C. J., "The Use of Force against Terrorists", (2009) 20 (2), *The European Journal of International Law*, pp 359-397, pg 360-365.

Prior to the 1990s the states that were more vocal in asserting the use of force to fight terrorism were USA and Israel, although they were mostly severely criticised. However, as from 1990s the world is now partial to the use of force in the fight against terrorism. Among the countries that have used force in the recent past in the fight against terrorism include USA, Israel, Turkey, Russia, Australia and Kenya. In fact, Kenya was praised by UN Secretary General when it entered Somalia to fight terrorism.<sup>213</sup> The September 11/2001 terrorist attacks in USA made significant shift on the perception of the use of force to fight terrorism, as UN SC and indeed whole of UN, is seen to have sanctioned the use of force to fight terrorism.<sup>214</sup>

The UN and other regional bodies such as African Union have continuously condemned terrorism and are spearheading the fight against terrorism through resolutions and treaties. As the trend continues, the use of force to fight against terrorism is increasingly being accepted, and has now somewhat acquired the status of customary international law that a country can use its right of self defence against terrorism.

#### **4.1. 3 Emerging insights on the Problems of Terrorism in Kenya from Somalia**

Kenya has suffered numerous terrorist attacks since 1990s which are believed to have been masterminded from Somalia. However, the terrorism, kidnappings and piracy form Al Shabaab increased drastically to unbearable levels in the year 2011. This led to an all time high loss of lives, property and decline in tourism activity in Kenya. The reasons that are believed to be the motivation behind terrorist attacks in Kenya is Kenya's close ties with the west, the west that is viewed as the enemy of Muslim countries, and further desire to Islamise East Africa.<sup>215</sup>

Ordinarily, the terrorists are viewed as criminals to be dealt with using municipal criminal justice. However, when we come to the Somalia issue, things are different because Somalia is a failed state which is not able to control its own internal affairs;<sup>216</sup> however, there is certainly an improvement courtesy of AMISOM. Nonetheless, Somalia cannot, so far, be relied upon to deal with or contain Al-Shabaab. Kenya had then to act to protect itself from the threat by Al Shabaab. To do this it needed to eliminate this terror group once and for all. To do this among the options that were available was to negotiate with it peacefully to end its heinous acts, to prosecute those who are caught, or to use force by invoking its right of self defence. In this

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<sup>213</sup> Moon, B. K., "United Nations Secretary General praises Kenya's invasion of Somalia", *Pan African News Wire*, PPS.2011, (8 September 2011), available from <[panafricannews.blogspot.com/2011/12/united-nations-secretary-general](http://panafricannews.blogspot.com/2011/12/united-nations-secretary-general)> accessed 1<sup>st</sup> August 2012.

<sup>214</sup> Norman, P., "The United Nations and Counter-Terrorism After September 11: Towards an Assessment of the Impact and Prospects of Counter-Terror 'Spill-Over' into International Criminal Justice Cooperation", Paper to British Society of Criminology Conference 6-9th July 2004, Centre for European Studies Research, University of Portsmouth, Filename: 004,( Jan 2005).2, pg 1-5, available at <[www.britisssocrim.org/volume7/004.pdf](http://www.britisssocrim.org/volume7/004.pdf)>, accessed on 24/5/2012.

<sup>215</sup> Workshop Commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, "Piracy Off the Somali Coast, Final Report", Nairobi, Kenya, (Nov.21,2008)pg19,available at <[http://www.imcsnet.org/imcs/docs/somalia\\_piracy\\_intl\\_experts\\_report\\_consolidated.pdf](http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf)>

<sup>216</sup> Kassilly, J., *et al*, "Kenya's Pre-Emptive and Preventive Incursion against Al-Shabaab in the Light of International Law",(2012) 1, *Journal of Defence Resources Management*, pp 27-36, pg 27-28.



instance negotiations were not feasible since the group did not in the first place articulate their reasons for attacking Kenya. The prosecution option was not practical as the brain and financing network of the group is inside Somalia. This is the reason why Kenya resorted to the use of force in the name of self defence to fight terrorism from Somali territory. Later the Kenya Defence Force joined AMISOM forces. So far they have made good progress and the terrorist acts from Somalia have drastically reduced, while at the same time the Somalia government is becoming stable. Kenya has also enacted the Prevention of Terrorism Act of 2012 which will go along way in fighting terrorism.

## 4.2 RECOMMENDATIONS

This section addresses the shortcomings that have been identified from the threat of terrorism in Kenya. It is addressed to the Kenyan situation or any other person who may deem it necessary.

### 4.2.1 Prosecution

This can be under municipal law or international criminal law. In municipal law, this entails prosecuting them under municipal law. Terrorism involves destruction of people's property and loss of lives. Among the Kenya's law that can be applied here is the Penal Code and Prevention of Terrorism Act of 2012. The Penal Code has been in existence in Kenya since independence but the Prevention of Terrorism Act was enacted in the year 2012.

The Penal Code, which covers almost all crimes, was found to be wanting in dealing with terrorism hence the enactment of Prevention of Terrorism Act of 2012. It is hoped that this Act will go along way in preventing and deterring terrorism. It has created offences and methods of prosecuting these offences that specifically relates to terrorism.<sup>217</sup>

This Prevention of Terrorism Act will deter the potential terrorists and is less expensive compared to the use of force. However it suffers a major shortcoming since it is viewed by a section of Islamic community as targeting them; however, a good section of Muslim supports it as they expressed their support to enacting of Prevention of Terrorism Act of 2012. Another shortfall is that, it is only effective in dealing with local terrorist network in Kenya but when we come to the terrorists who are in Somalia this may be impossible since it would have to rely on Somali government either prosecuting them or repatriating them to Kenya to face prosecution for their terrorist acts committed in Kenya. Somalia government is not in shape to arrest the gang leaders of the Al Shabaab, so in this area, this local prosecution mechanism may fail.

The alternative to local/municipal prosecution is prosecution under international criminal law. This can either be at the International Criminal Court or by forming International Tribunal by UN to prosecute the perpetrators of terrorism.

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<sup>217</sup> Republic of Kenya, *The Prevention of Terrorism Act of 2012*, Government Printers, Nairobi, ss 4-30.

In the International Criminal Court at Hague<sup>218</sup>, it can be prosecuted as part of genocide, war crime or Crimes against humanity if certain acts of the terrorists will fulfil the threshold for these crimes. However, as it is today, terrorism and piracy do not fall under jurisdiction of International Criminal Court (ICC) as it is not among the crimes within its jurisdiction under Rome statute, perhaps it should be amended to include them. On the other hand, an International Tribunal can be formed to prosecute the perpetrators of Terrorist acts. This will go along way in eliminating the problem of terrorism from Somalia. However, to capture them and bring them to justice is a tall order, since even Joseph Kony, the leader of Uganda Lord resistance Army, is yet to be captured even after arrest warrant by International Criminal Court because he is hiding; so too they can hide.<sup>219</sup> If not hiding, some states may refuse to cooperate with ICC to arrest the accused; the same way they have done in the case of Sudan president Al Bashir, therefore, this argument may fail in some instances.<sup>220</sup>

It will be very hard for terrorism and piracy by Al Shabaab against Kenya to qualify as Genocide-in fact almost impossible. Genocide is provided for under article 6 of Rome statute.<sup>221</sup> This article gives acts that can be committed in furtherance of genocide.<sup>222</sup> However, for these acts to be held as amounting to genocide-must be proved beyond reasonable doubt that the act(s) in question was(were) committed with intention to destroy in whole or in part a 'national', 'ethnic', 'racial' or 'religious group' as such. This threshold must be proved beyond reasonable doubt. Failure to prove an act was being committed with the said intention(s) mean(s) it cannot be held as genocide. To this end; terrorism and piracy by Al Shabaab does not qualify as genocide.<sup>223</sup>

The Crime against Humanity is provided for by Rome statute under article 7. Threshold required is that they be committed as part of a widespread or systematic attack(s) directed against any civilian population, with knowledge of the attack. This must be proved beyond reasonable doubt. This section provides for the elements of the acts that constitute Crime against humanity.<sup>224</sup> The definition thereof has it formulated in

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<sup>218</sup>Rome Statute of International Criminal Court, articles 5-8. Done at Rome, on 17th day of July 1998 (U.N. Doc. A/CONF.183/9).

<sup>219</sup>Jeffrey, G., "In vast Jungle, US Aid in Search for Kony", *New York Times*, New York, (30/4/2012), available at <[nytimes.com/top/reference/timestopics/people/k/joseph\\_kony/index.html](http://nytimes.com/top/reference/timestopics/people/k/joseph_kony/index.html)> accessed on 30/5/2013.

<sup>220</sup>Pliopoulos, K., The African Union and the ICC, available at <<http://www.crimesofwar.org/commentary/the-african-union-and-the-icc/>> accessed on 30/5/2013.

<sup>221</sup>Rome Statute of the International Criminal Court; DONE at Rome, this 17th day of July 1998.

<sup>222</sup> Article 6(1): for the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

<sup>223</sup>Boot, M., Genocide, *Crimes against Humanity and War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, School of Human Rights Research, Intersentia(2002)12,pg 26.

<sup>224</sup> For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder;

terms of violence against person and contains reference to persecution.<sup>225</sup> Persecution is defined in article 7 of Rome Statute as ‘intentional’ and ‘severe’ deprivation of fundamental rights contrary to international law by reason of identity of group or collectivity.

Torture is one of the elements of Crime against Humanity under Rome Statute; however, it is also subject to 1984 Convention against Torture and other Inhumane or Degrading Treatments and Punishments.<sup>226</sup> Still in this head, it is not possible to group terrorism and piracy from Al Shabaab as Crime against humanity. This is because of the caveat in article 7 of Rome statute which says by reason of group identity or collectivity: because as we know of terrorism and piracy, it is indiscriminative as it targets anyone or anything but with intention to induce audience and not more. To this extent unless the Rome Statute is amended to include terrorism as an act amounting to crime against humanity, the International Criminal Court does not (have) and will remain without jurisdiction.

Finally, we have War Crimes. It is provided for under article 8(1) of Rome Statute that the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. This threshold must be proved beyond reasonable doubt. It too contains elements that are to act as a check list for a certain act to be regarded as a ‘War Crime’.<sup>227</sup> These

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(b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

<sup>225</sup> Boot, M., *Genocide, Crimes against Humanity and War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, School of Human Rights Research, Intersentia(2002)12, pg 26-27.

<sup>226</sup> *Ibid.*

<sup>227</sup> Article 8(2) For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion; (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are

crimes can either be committed in international armed conflict and/or internal armed conflict. Therefore these are crimes committed at times of war: they are Crime committed in war times by those involved in it directly or indirectly.<sup>228</sup> Article 8 para 2(b) (xvii) through (xx) is clear in that it talks of other violations of the laws and customs applicable in international armed conflict within established framework of international law. Terrorism and piracy is not a War Crime as it is not an element in article 8 of Rome statute of War Crimes therefore International Criminal Court has no Jurisdiction over it. However, if member can

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neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army; (xii) Declaring that no quarter will be given; (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war; (xvi) Pillaging a town or place, even when taken by assault; (xvii) Employing poison or poisoned weapons; (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123; (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions; (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable;

**...and in (e)** Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (v) Pillaging a town or place, even when taken by assault; (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions; (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; (ix) Killing or wounding treacherously a combatant adversary; (x) Declaring that no quarter will be given; (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

<sup>228</sup> Boot, M., *Genocide, Crimes against Humanity and War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, School of Human Rights Research, Intersentia(2002)12, pg 26-27.

find it desirable due to the growing threats of terrorism, they can amend the Rome Statute and add terrorism and acts of piracy as an element of war crimes but then they retain the threshold that exist of the nexus of the act( here terrorism) where it involves violation of law of war, that is, violations of the laws and customs applicable in international armed conflict within established framework of international law, where then it will be triable as a ‘War Crime’ at the International Criminal Court.

In respect to jurisdiction, article 11 of Rome statute provides that it has jurisdiction only in respect to crimes committed after entry into force of this statute. Under article 12(1) a state party accepts jurisdiction of the court in respect to the crimes referred in article 5. This court may exercise jurisdiction under article 12 if the crime occurs on the territory of the state party or if on board a vessel or aircraft of the state party; or if the accused is a national of the state party. In case of the Al Shabaab, they are from Somalia; ICC may have jurisdiction to the extent that the crimes are committed in Kenya, a state party, therefore whether Somalia is a member to Rome statute is irrelevant.

Under article 13 the court exercises jurisdiction if the state refers the matter to the prosecutor; the UN Security council refers to the prosecutor when it is acting under Chapter VII of UN Charter-in this instance even non state party can be referred where the court will now assume jurisdiction to prosecute a national of non party state. The UN SC can under article 13 of Rome statute refer the Al Shabaab to ICC prosecutor to carry investigation and prosecute them if the situation is determined under Chapter VII of UN Charter to be a threat to international peace and security even if the ICC has no jurisdiction under article 12. Finally, the prosecutor may initiate his/her own investigation in respect of crimes where court has jurisdiction. When the prosecutor initiates investigations *proprio motu*; then under article 15, s/he must get approval from pre-trial chamber of International Criminal court.

#### **4.2.2 Market force analysis**

This is a situational analysis which borrows from theory of demand and supply to explain the interplay of the circumstances on the ground and how they accelerate or diminish the occurrence of terrorist acts. This is by looking the causes of terrorism in Kenya from the Al Shabaab’s perspective. Here, the paper dealt with the three alleged causes of terrorism in Kenya which are in turn elaborated. These are: West-Muslim conflict of ideology, Christian-Muslim misunderstanding, and question of unchecked border.

In the question of unchecked border, this is where there is influx of refugees and illegal visitors from Somalia who sometimes sneak through illegal weapons which are then used to commit terrorism. Here the force that makes this happen is the porous borders, a weakness in Kenya that is exploited by the terrorist. The existence of polar borders may be equated to supply or the facilitation that enables terrorists to enter Kenya undetected. The exploitation of this situation is a demand by terrorists who will seize it whenever it is available then take advantage of it and commit their terrorist acts. Kenya should control the entry of the illegal arms by screening thoroughly those who are entering into Kenya and also by ensuring that Kenya’s borders are constantly surveyed to control illegal migration into Kenya.

Then we have the West-Muslim conflict of ideology. This is where the West is seen by the Muslim as promoting policies to humiliate them. To counter this, terrorists use their bad tactics of terrorism. Here Kenya is viewed as a sympathiser of the West hence it is targeted. The driving force here is to eliminate discrimination on race and religion. The supply or the cause here is the feeling of being superior to the rest and hence the demand or want is to fight humiliation; want to be treated as equals. Kenya should be neutral when it comes to West-Muslim conflict to avoid being drawn into conflict that is not benefiting from.

Finally is the Christian-Muslim tussle on which religion is superior. The demand here is to end religious prejudices and discrimination while the supply or the cause of this conflict is the side that Kenya is seen to lean on, as in, is it on Christian or Islamic side. To avoid this driving force it should champion neutrality in religion and be accommodative. On religious conflict, it should be neutral on the faith, that is, there should be no official state's religion. This will promote religious equality and tolerance and any act of terrorism that would be motivated by religious discrimination is eliminated.

#### **4.2.3 The UN System**

The UN is regulated by the UN Charter. It has prohibited the use of force in article 2(4) and instead requires state to use peaceful means to solve their disagreements or conflict. These peaceful means are: negotiations, inquiry, conciliation, mediation, arbitration and litigation.

In article 27(3), Security Council can pass a resolution by concurrence of five permanent members. However, it can be defeated if one of permanent members vetoes it. Through article 39, Security Council can declare an act as a threat to international peace and security and can place sanctions through article 39-45. This could include collective self defence by UN to fight terrorism.

Through article 51, Kenya has used its right of self defence by resorting to force against terrorism by entering Somalia to pursue the Al Shabaab. This article argues that a country reserves its right of self defence in the face of armed attack from another country. The Al Shabaab's terror attacks are contemporary forms of an armed attack as it is consistent and repetitive. This paper has taken the position that this right of self defence is inherent and also customary and not the creation of UN Charter, the UN Charter only came to regulate it bearing in mind the past experience of first and second world wars.

Terror attacks remain among the acts that are not considered as an armed attack. However, through states' trend and practice, it is gaining acceptance for countries to use force against terrorism, in fact Kenya's entry into Somalia has not received criticism but instead was approved by UN Secretary General meaning

Kenya's use of force against Al Shabaab stands no condemnation from international community. To this end, the Al Shabaab's attacks against Kenya should be interpreted as an armed attack under article 51 of UN Charter.

#### 4.2.4 Self Defence

This can be by entering Somalia, as it has done, to comb and bring into justice those responsible for terrorist activities in Kenya. This should be in accordance with article 51 of the UN Charter which provides for the right of self defence.

This right of self defence is inherent, thus it is accepted that it pre-existed the UN Charter, what the Charter did was to regulate how it is done. It is to be invoked when there is an actual armed attack and exist until the UN has acted to normalise the situation. The country that invokes article 51 is supposed to immediately inform the UN. Kenya did this.

The question has been whether terrorism from Somalia is an armed attack as envisaged under UN Charter. This paper argued that the trend in international practice is now in favour of using force to fight terrorism if the terrorism is either repeated or is seen to pose a grave harm to a country. Al Shabaab's acts of terrorism are repetitive and form a consistent pattern of attacks and continue to pose a great danger to Kenya's survival as a stable country hence the way to deal with them should be by use of force so as to weaken and eventually eliminate them. Repeated terrorist acts of grave harm from Somalia should be treated as an armed attack under article 51 of the UN Charter.

It should use pre-emptive strikes or preventive strikes.<sup>229</sup> In Pre-emptive strikes, this is when if they get evidence of planned attacks, they should use force to prevent its occurrence. In preventive strikes this is where there is no evidence to suggest there is an imminent attack but fears that because an enemy is acquiring stronger weapons, it will embolden them to attack us at a time when they are stronger. Consequently, the best thing is to strike them now rather than wait for them to acquire superior weapons to be used against us in future. This is because it will be impossible for us to contain them when they have acquired superior weapons relative to ours as then we will be defenceless.

#### 4.2.5 Four tier approach

In this approach the above four method should be resorted to either concurrently or simultaneously where possible to ensure that the terrorists have no room to continue with their heinous acts. These are market force approach, prosecution under criminal justice system, use of force and result to the UN system.

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<sup>229</sup>Kassilly, J., *et al*, "Kenya's Pre-Emptive and Preventive Incursion against Al-Shabaab in the Light of International Law", (2012) 1, *Journal of Defence Resources Management*, pp 27-36, pg 27-30.

In market approach this is where it should control the entry of the illegal arms by screening thoroughly those entering Kenya and ensuring Kenya Borders are surveyed to control illegal migration into Kenya. Secondly; it should be neutral when it come to West-Muslim conflicts to avoid been drawn into conflict that it is not benefiting from. Further, on religious conflict, it should be neutral on the faith, that is, there should be no official state's religion. This will promote religious equality and tolerance and any act of terrorism that would be motivated by religious discrimination is eliminated.

At the same time, those identified committing terrorist acts should not be forgiven but should be brought into justice by either being prosecuted in our municipal courts or resort to International Criminal Justice system by having an international tribunal to prosecute them or amend Rome Statute of the International Criminal Court to have jurisdiction to try terrorists on 'war crimes' or 'crimes against humanity'. Further, hybrid tribunal consisting of judges from Kenya and Somalia can be formed to prosecute the terrorists under the guide and support of the UN.

At the same time, the UN system should be resorted to for peaceful means of settlement of dispute; article 33 of UN Charter should be invoked. This includes: negotiations, conciliation, arbitration, inquiry, mediation and going to International Court of Justice; if the dispute resorting to terrorism is the one that can best be solved through this method. Here, the UN Secretary General should be at the forefront in pushing for this method, and it will go along way in minimising the instance of the use of force against terrorist acts to the acts that would not otherwise warrant the use of force.

In the specific identifiable acts of terrorism that are persistent or of grave harm, a country should singularly use force under the self defence to deal with the terrorists. Here, Kenya entered into Somalia to pursue Al Shabaab in line with the international trend. It should continue until the UN has acted to bring the situation in Somalia under control. At the same time it should be reporting to the UN to ensure compliance with article 51 of the UN Charter. This should be pursued concurrently with peaceful means, prosecution and relying on the UN response mechanism against terrorism.



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