SELF-DEFENCE, INTERVENTION BY INVITATION, OR PROXY WAR? THE LEGALITY OF THE 2006 ETHIOPIAN INVASION OF SOMALIA

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I. INTRODUCTION

Somalia has been reeling from a political stalemate, civil war and lack of functioning central government since the ousting of the military strongman Siyad Barre from power in 1991. The clan-based rebel groups that overthrew the military regime were unable to agree on the formation of a central authority to fill the political void. As a result, the country was plunged into a devastating political turmoil, and a subsequent internecine civil war. Consequently, warlords, faction leaders and clan elders divided the country into fiefdoms and regional administrations. There had been several transitional national administrations since 1991, but all failed to exert their control beyond some parts of the capital Mogadishu.[1] The Transitional Federal Government (TFG) that was in power at the time of the invasion in question was formed in 2004 in neighbouring Kenya. In June 2006, after nearly sixteen years of chaos and lawlessness in some parts of the country, especially the capital and other southern regions, the Union of Islamic Courts (UIC) ousted the warlords and restored relative peace and stability for six months.[2]

In late 2006, thousands of heavily armed Ethiopian troops invaded Somalia in what is described as the most 'daring if not imprudent strategic decision any African government has made on its neighbour'.[3] Subsequently, Meles Zenawi, the Ethiopian Prime Minister, explaining why his country had sent troops to Somalia stated that 'his government had taken self-defensive measures and started

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1 K. Menkhaus, 'Governance without Government in Somalia: Spoilers, State Building, and Politics of Coping', 31(3) *International Security* (2007): 74–106.

2 Abdi Ismail Samatar, 'The Miracle of Mogadishu', 33(109) *Review of African Political Economy* (2006): 581–7.

3 Napoleon A. Bamfo, 'Ethiopia's Invasion of Somalia in 2006: Motives and Lessons Learned', 4(2) *African Journal of Political Science and International Relations* (2010): 55–65, at 55.

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counter-attacking the aggressive extremist forces of the Islamic courts and foreign terrorist groups'.[4] Ethiopian troops succeeded in capturing most of south-central Somalia from the retreating UIC militia in less than two weeks. Nevertheless, according to leaked US diplomatic cables, it is suggested that the invasion was the brainchild of the United States, and that Ethiopia was used as its 'proxy'.[5] In fact, the invasion has been perceived by many as 'a new front in the Bush administration's war on terror'; furthermore, the United States has carried out airstrikes against the retreating UIC militia.[6]

After the collapse of the Somali central government in 1991, the territory of the Somali state has been without the effective control of a central government. It goes without saying that Somalia fulfilled all the criteria of statehood when it was admitted to become a member of the United Nations in 1960.[7] Form an international law perspective, after a state is recognised, the lack of an effective government, which has the monopoly control of legitimate violence, does not in any way impair the *de jure* existence of the state. In that respect, the prohibition of the use of force is appropriate in the Somali case.[8] In response to a letter sent to the Ethiopian government by the UN Monitoring Group, the Ethiopian government claimed that the military action was 'carried out at the invitation of the Transitional Federal Government'. The Ethiopian government's statement went on to say that the military action taken by the transitional government and Ethiopia was a 'legitimate exercise of the inherent right of self-defence consistent with the United Nations Charter'.[9]

In view of that, this article will focus on the two legal justifications relied upon by the Ethiopian government, namely, self-defence and intervention by invitation. The argument in the article proceeds in four parts. The first part briefly reviews the laws governing the use of force, especially the prohibition of the use of force enunciated in the UN Charter and the customary international law. The next section examines whether the Ethiopian military intervention can be justified as an individual or collective self-defence. It also investigates whether the requirements of necessity and proportionality are satisfied. The third section examines the Ethiopian government's claim that its use of force followed an invitation from the transitional government of Somalia. It discusses whether the transitional government possessed legitimacy to consent to such large-scale outside military intervention. Finally, there is an arms embargo on Somalia imposed by the

4 UN Security Council, *Report of the Secretary-General on the Situation in Somalia*, S/2007/115, 28 February 2007, para. 5.

5 'Wikileaks: US behind Ethiopia invasion in Somalia', *Sudan Tribune*, 6 December 2010, available at http://www.sudantribune.com/spip.php?article37189 (accessed 5 July 2012).

6 Barbara Slavin, 'U.S. Support Key to Ethiopia's Invasion', *US Today*, 8 January 2007; 'US Somali Air Strikes "Kill Many" ', *BBC News*, 9 January 2007.

7 UN Security Council Resolution 141 (1960) S/4374, 5 July 1960; UNGA Resolution 1479(XV), 20 September 1960.

8 For an in-depth discussion on legal implications of state failure in general and the Somali case in particular see Riikka Koskenmaki, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia', 73(1) *Nordic Journal of International Law* (2004): 1–36.

9 UN Security Council, *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1724(2006)*, S/2007/436, 18 July 2007, para. 29.

Electronic copy available at: http://ssrn.com/abstract=2236622

Security Council acting under Chapter VII. Even if we assume that the transitional government consented to the Ethiopian intervention, can such an invitation be acted upon in the face of the binding Security Council resolution?

II. GENERAL PROHIBITION OF USE OF FORCE

The laws of armed conflict comprise two separate but interlinked components, *jus ad bellum*, which governs the use of force; and *jus in bello*, which deals with the actual conduct of the war, also known as international humanitarian law.[10] This article is primarily concerned with *jus ad bellum*. The prohibition of the use of force embodied in the Charter and later re-affirmed by several General Assembly declarations constitutes the core of the international law dealing with the use of force (*jus ad bellum*). In that regard, one of the stated fundamental aims of the United Nations is 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind'.[11] By the same token, article 1 of the United Nations Charter (UN Charter) declares one of the purposes of the United Nations to be '[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.' To achieve that noble aim, article 2(4) of the UN Charter explicitly prohibits the use and threat of war, and stipulates that, '[a]ll member States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

It is imperative to note that the prohibition in article 2(4) concerns not only the use of force but also the threat of force as further explained by the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[12] Equally, article 2(3) obliges member states to settle their disputes in a peaceful manner. According to comments on the provision by one of the committees of the San Francisco conference, the aim is that 'no condition should be created by which parties endanger the peace of others'.[13] Furthermore, General Assembly Resolutions 2131 and 2625 reaffirm the prohibition of use of force and further explain the principle of non-intervention, stipulating that '[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.'[14]

10 For more details, see Carsten Stahn, '"Jus as Bellum", "Jus in Bello" … "Just Post Bellum"?-Rethinking the Conception of the Law of Armed Force', 17(5) *European Journal of International Law* (2007): 921–43.

11 UN, *Charter of the United Nations*, 26 June 1945, Preamble.

12 International Court of Justice, Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, paras 47–8.

13 Report of Rapporteur of Committee I/1 (UN.C.I.O. Doc. 944, I/1/34(1), p. 13, cited in Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, Stevens and Sons (1958), p. 368.

14 UNGA Resolution 2131(XX), *Declaration of the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, A/RES/20/2131,

Additionally, article 3(2) of the Organization of African Unity (OAU) Charter reaffirmed the principle of 'non-interference in the internal affairs of States'. Equally, article 4(f) of the Constitutive Act of the African Union (AU) stipulates that the organisation shall function consistent with the principle of 'prohibition of the use of force or threat to use force among Member States of the Union'. Furthermore, the prohibition of the use of force embodied in article 2(4) of the UN Charter is recognised as a customary international law and eventually graduated to a peremptory norm of international law (*jus cogens*).[15] In that regard, these provisions in the charter are even binding upon non-member states of the United Nations.[16] The widespread violations of the principles of the prohibition of use or threat of force enumerated in article 2(4) of the Charter prompted one commentator to declare it dead and buried;[17] however, the violations of law do not automatically lead to their demise.[18] According to Bill Bowring, although international law including the prohibition of the use of force has been 'dragged through the mire', its relevance has not been lessened.[19] It is necessary to note that the purpose of this article is not to provide an exhaustive study of the use of force, as the subject is fully addressed elsewhere.[20] There are two exceptions to that general prohibition of use and threat of force explicitly mentioned in the UN Charter, namely, self-defence in response to an 'armed attack' consistent with article 51 of the Charter, and military action authorised by the Security Council pursuant to article 42 of the Charter. In addition, there are other exceptions such as humanitarian intervention and invitation by the lawful government of a state. Nevertheless, opinion is divided on the legality of the other exceptions.[21] The following section will examine whether the Ethiopian invasion can be justified as one of these exceptions invoked by Ethiopia, namely, the inherent right to self-defence and intervention by invitation.

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21 December 1965; UNGA Resolution 2625 (XXV), *Declaration on Principles of International Law Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, A/RES/8082, 24 October 1970.

15 Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge (1997), p. 311; Bruno Simma, *The Charter of the United Nations: A Commentary*, Oxford University Press (1994), pp. 661–78; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (hereafter *Nicaragua*), Merits, Judgment, ICJ Reports 1986, p. 14, para. 190; UN, *Vienna Convention on the Law of Treaties*, done at Vienna on 23 May 1969, UN *Treaty Series*, Vol. 1155, p. 331.

16 Malcolm N. Shaw, *International Law*, Cambridge University Press (2008), p. 1123; Antonio Cassese, *International Law*, Oxford University Press (2001), p. 101.

17 T. M. Franck, 'Who Killed 2(4)? Or: Changing Norms Governing the Use of Force by States', 64(5) *American Journal of International Law* (1970): 809–37.

18 L. Henkin, 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated', 65(3) *American Journal of International Law* (1971): 544–8.

19 Bill Bowring, *The Degradation of the International Legal Order?: The Rehabilitation of Law and the Possibility of Politics*, Routledge-Cavendish (2008), pp. 59–61.

20 For a historical account of the development of the prohibition of the use of force in international law, see Ian Brownlie, *International Law and the Use of Force by States*, Oxford University Press (1963); Yoram Dinstein, *War, Aggression and Self-Defence*, Cambridge University Press (2012).

21 Christopher C. Joyner, 'Reflections on the Lawfulness of Invasion', 78(1) *American Journal of International Law* (1984): 131–44, at 133; Shaw, *supra* note 16, pp. 1155–8.

III. THE ETHIOPIAN INTERVENTION: INDIVIDUAL OR COLLECTIVE SELF-DEFENCE?

Article 51 of the Charter provides that '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member State of the United Nations.' It is pertinent to state that article 51 also stipulates that '[m]easures taken by members in the exercise of this right of self-defence shall immediately report to the Security Council.' This creates a legal obligation for any state exercising the right to self-defence, and failure to comply with it undoubtedly undermines the claim of self-defence.[22] The right to self-defence under article 51 of the Charter can be exercised in response to an 'armed attack'. Nevertheless, the drafters of the UN Charter did not attempt to explain the phrase 'armed attack', possibly because they regarded the words as 'self-evident', requiring no further explanation. In the *Nicaragua case*, the Court noted '[w]hether self-defence be individual or collective, it can only be exercised in response to an "armed attack".'[23]

The Ethiopian Prime Minister Meles Zenawi claimed:

> Ethiopian defence forces were forced to enter into war to protect the sovereignty of the nation. We are not trying to set up a government for Somalia, nor do we have an intention to meddle in Somalia's internal affairs. We have only been forced by the circumstances.[24]

On the face of it, nothing in the wording of article 51 of the United Nations Charter, which provides an inherent right to self-defence 'if an armed attack occurs', prejudices the recourse to the use of force in response to attacks by states. Furthermore, some large-scale actions by non-state actors might be recognised as an armed attack. For instance, in the *Nicaragua case*, the Court noted that an armed attack could be defined as the:

> [s]ending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed forces against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular armed forces or its substantial involvement therein.[25]

In other words, for an act to be recognised as an armed attack two conditions should be fulfilled: there must be a close link between the state and the irregular group, and the attack must be substantially akin to 'an attack by a State'.[26] There is widespread consensus that any claim of self-defence in response to terrorist

22 D. W. Bowett, *Self-defence in International Law*, Manchester University Press (1958), p. 197.
23 *Nicaragua*, *supra* note 15, p. 165, paras 187–201.
24 Jeffrey Gettleman, 'Ethiopia Hits Somali Targets, Declaring War', *New York Times*, 25 December 2005.
25 *Nicaragua*, *supra* note 15, p. 93, para. 195.
26 Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September', 51(2) *International and Comparative Law Quarterly* (2002): 401–14, at 408.

attacks must also fulfil the requirement of necessity and proportionality under international law.[27]

The right to collective self-defence is also enshrined in article 51 of the Charter. In that respect, collective self-defence permits a state to come to the rescue of another state which becomes a real victim of an armed attack. According to Schachter, '[a] counter-intervention is permissible against a prior illegal intervention provided it is not disproportionate in manner and extent.'[28] In the *Nicaragua case*, the International Court of Justice laid down two preconditions to be satisfied before states can lawfully rely on the right to collective self-defence. The first prerequisite is that the country under attack needs to declare its status as victim and subsequently officially request help from other states.[29] The second precondition is that the unlawful action targeted against the victim state should constitute an 'armed attack'.[30] It could be argued that the alleged Eritrean troops in Somalia warranted Ethiopian intervention as a counter-offensive. However, as the following paragraphs will show, there is no evidence that Eritrean troops were in Somalia at the time of the invasion.

In general, the UN reports are considered credible, but in November 2006, the UN Monitoring Group on Somalia issued a highly controversial report claiming, among others, 'three Dows transporting 2000 fully equipped combat troops from Eritrea arrived in Warsheikh [southern Somalia]'. The report further claimed that '[d]uring mid-July 2006 ICU sent an approximately 720-person strong military force to Lebanon to fight alongside Hezbollah against Israeli military.'[31] Some commentators, relying on this report that Eritrean troops were in Somalia erroneously argued: 'this situation entitles Ethiopia to take necessary and proportionate action to reverse the imminent security threat'.[32] It is very important to note, though, the credibility of that particular UN Monitoring Group report was seriously questioned, and it was universally acknowledged that the report was based on false information, probably concocted by Western intelligence agencies and fed to the members of the Monitoring Group.[33] Revealingly, when Ethiopia later captured all south-central Somalia not a single Eritrean soldier was discovered. Furthermore, and perhaps more significantly, if two thousand Eritrean troops were present in Somalia, surely Ethiopian troops would not have marched to Mogadishu without any meaningful resistance. In the final analysis, it is obvious

27 *Ibid.*, at 160–1.

28 Oscar Schachter, 'In Defence of International Rules on the Use of Force', 53(1) *University of Chicago Law Review* (1986): 113–46, at 120.

29 *Nicaragua*, *supra* note 15, paras 14, 103, 104.

30 *Ibid.*, paras 102–4, 110, 127.

31 UN Security Council, *Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1676 (2006)*, S/2006/913, 22 November 2006, paras 23, 56, 95.

32 Colin Warbrick and Zeray Yihdego, 'Ethiopia's Military Action Against the Union of Islamic Courts and Others in Somalia: Some Legal Implications', 56(3) *International and Comparative Law Quarterly* (2007): 666–78, at 675.

33 Andrew McGregor, 'Accuracy of UN Report on Somalia Doubtful', 3(45) *Jamestown Foundation* (2006); Ronald Marshal, 'Warlordism and Terrorism: How to Obscure an Already Confusing Crisis? The Case of Somalia', 83 (6) *International Affairs* (2007): 1091–106; Abdi Ismail Samatar, 'An Odious Affair: The UN in Somalia', *Aljazeera*, 3 April 2012.

that the Ethiopian military action in Somalia cannot be justified as a collective self-defence consistent with the UN Charter. Somalia was not under attack from a third country, and it did not declare itself to be a victim of an armed attack from outside forces.

The Ethiopian government implied that even without the supposed invitation, the invasion would have taken place. For instance, in an interview with UK-based Channel 4's Jon Snow, the Ethiopian prime minister stated: '[w]e were protecting our own security, and it is the right of every nation in the world to protect its security according to international law.'[34] Evidently, article 51 of the Charter stipulates that states have a right to defend themselves 'if an armed attack occurs', which means an armed attack must have occurred before the victim state can resort to the use of force. In the *Oil Platforms case*, the Court noted:

> in order to establish that it was legally justified in attacking Iranian platforms in exercise of the right of individual self-defence, the United States has to show an attack has been made upon it for which Iran was responsible; and that those attacks were of such nature as to be classified as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter and as understood in customary law on the use of force.[35]

Furthermore, the Court held that the US government 'must also show that its actions were necessary and proportional to the armed attack made on it, and the platforms were a legitimate military target open to attack in the exercise of self-defence'.[36] According to Bowett, the exercise of the right of self-defence 'presupposes the absence of any alternative means of protection for certain essential rights of the state which are engendered'.[37]

In November 2006, the Ethiopian parliament adopted a resolution authorising the government of Prime Minister Meles Zenawi 'to take all necessary steps to ward off attacks by the Islamic Council in Somalia'.[38] Since there was no armed attack against Ethiopia within the meaning of article 51 of the Charter, it seems the resolution was referring to a potential future attack. It could be argued that the UIC and Eritrean support for the Ethiopian rebel groups warranted Ethiopian intervention. In fact, the Ethiopian government claimed that its military action in Somalia was justified because there were Oromo and Ogaden rebel groups operating from Somalia.[39] The question is, even if it is true, can providing weapons and ammunition to rebel groups justify an armed invasion? According to Brownlie, '[s]poradic operations by armed bands would also seem to fall

34 'US Role in Planning Ethiopia's Invasion', *Channel 4 News*, 30 January 2007, available at http://www.youtube.com/watch?v=7VJka6q16Os (accessed 15 July 2012).

35 *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, ICJ Reports 2003, p. 161, para. 51.

36 *Ibid.*

37 Bowett, *supra* note 22, p. 269.

38 Bamfo, *supra* note 3, at 59.

39 Tom Porteous, 'Ethiopia's Dirty War', *Guardian*, 5 August 2007.

outside the concept of "armed attack".'[40] Equally, in the *Nicaragua case*, the Court noted 'in customary international law the provision of arms to the opposition in another State does not constitute an armed attack on that State'.[41] However, large-scale armed incursions by 'armed bands of irregulars' can be characterised as an 'armed attack' provided that the complicity of the government of the states can be verifiably established.[42] The alleged presence of Ethiopian rebel groups in Somalia cannot be used as a justification for the Ethiopian intervention for two main reasons. First, the lack of government in Somalia makes the requirement of the complicity of the government problematic. Second, and perhaps more significantly, there is no evidence that there have ever been 'large scale armed incursions' organised from Somalia.

A. Ethiopian military intervention: pre-emptive self-defence?

The permissibility of anticipatory self-defence is subject to widespread debate among legal scholars. A quick survey of the literature shows that scholars disagree on the permissibility of pre-emptive self-defence in international law. Some commentators argue that the purpose of article 51 of the Charter is to confine the exercise of the right to self-defence to situations where an armed attack has already occurred. According to this argument, pre-emptive action is inconsistent with the provisions of the Charter. They argue that the 'inherent right' mentioned in article 51 can only be relied upon in response to an armed attack. This group contends that any right that existed prior to the UN Charter is restricted once the right is codified in the provisions of the Charter.[43] According to Henkin, state practice seems to reveal that 'governments have been virtually unanimous in rejecting any right to use force except in response to an armed attack'.[44] According to Antonio Cassese:

> In the case of anticipatory self-defence, it is more judicious to consider such action as legally prohibited, while admittedly knowing that there may be cases where breaches of the prohibition may be justified on moral and political grounds and community would eventually condone them and mete out lenient condemnation.[45]

Conversely, other commentators argue that the right to self-defence is wider than just responding to the existence of an 'armed attack' and allows an anticipatory self-defence, arguing that the phrase 'inherent right' in article 51 of the Charter

40 Ian Brownlie, *Principles of Public International La*w, Oxford University Press (2008), p. 732.

41 *Nicaragua*, *supra* note 15, p. 166, paras 227–38.

42 Bownlie, *supra* note 40, p. 733.

43 Brownlie, *supra* note 20, pp. 251, 257–76, p. 734; Hans Kelsen, *Recent Trends in the Law of the United Nations: A Supplement to 'The Law of the United Nations'*, Stevens and Sons (1951), p. 914; Christine Gray, *International Law and the Use of Force*, Oxford University Press (2000), p. 112; Cassese, *supra* note 16, p. 311; Byers, *supra* note 26, at 163.

44 Louis Henkin, 'The Invasion of Panama Under International Law: A Gross Violation', 29 *Columbia Journal of Transnational Law* (1991): 293–317, at 306.

45 Cassese, *supra* note 16, p. 311.

points to a pre-existing customary right.[46] In view of that, Greenwood argues that state practice since the adoption of the Charter supports the notion of a limited right to anticipatory self-defence, provided an armed attack is imminent.[47] In the same vein, Schachter suggests that anticipatory self-defence may be consistent with the UN Charter if there is a real threat and verifiable hostile intent.[48]It is pertinent to note that all the adherents of the right to anticipatory self-defence continue to acknowledge that 'the right is limited by the requirements of necessity and proportionality set out in the *Caroline* case'.[49] The notion of anticipatory self-defence in customary international law has its roots in the case of *Caroline*, in which the British destroyed a ship belonging to the United States at Niagara Falls in 1837.[50] According to the principle set out in Secretary of State Webster's letter during the *Caroline case*, now accepted as customary international law, for any military action to be justified as a lawful exercise of self-defence, there must exist 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'.[51] In other words, further attacks must be imminent, and the act of self-defence must also involve nothing *unreasonable* or excessive.

The different interpretations as to the scope of the right to self-defence notwithstanding, there is widespread agreement that for any military action to be lawfully justified as self-defence, it must fulfil both the necessity and proportionality criteria. These requirements are well-established customary international law.[52] In the *Nicaragua case*, the *Nuclear Weapons* Advisory Opinion, the *Oil Platforms* and *Armed Activities on the Territory of Congo cases*, the International Court of Justice reaffirmed time and again the conditions of necessity and proportionality.[53] The resort to force in self-defence under customary international law in response to an armed attack or anticipatory threat would be lawful only when the criteria of necessity and proportionality

46 Bowett, *supra* note 22, pp. 184–93; John O'Brien, *International Law*, Cavendish (2001), pp. 682–8; Antony C. Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter*, Routledge (1993); M. Glennon, 'The Fog of Law, Self-Defence, Inheritance and Incoherence in Article 51 of the UN Charter', 25(2) *Harvard Journal of Law and Public Policy* (2002): 539–58; Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida and Iraq', 4 *San Diego International Law Journal* (2003): 7–37, at 13, 14; Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, Cambridge University Press (2002), pp. 105–7.

47 Greenwood, *ibid.*, at 13–16.

48 Schachter, *supra* note 28, at 134.

49 Antony Clark Arend, 'International Law and the Pre-emptive Use of Military Force', 26(2) *Washington Quarterly* (2003): 89–103, at 96.

50 For more information on the *Caroline* incident and its legal implications see Robert Jennings, 'The *Caroline* and McLeod Cases', 32(1) *American Journal of International Law* (1938): 82–99.

51 Shaw, *supra* note 16, at 1131.

52 Christine Gray, 'The Use of Force and the International Legal Order', in Malcolm D. Evens (ed.), *International Law*, Oxford University Press (2010), p. 626.

53 *Oil Platforms*, *supra* note 36, p. 161; *Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v Uganda*), Judgment, ICJ Reports 2005, p. 168; International Court of Justice, *supra* note 12, p. 96, paras 37–50.

are satisfied. We will now examine whether the Ethiopian military invasion complies with the necessity and proportionality requirement.

B. Necessity of the Ethiopian military intervention

In the *Nicaragua case*, the Court stated: 'whether the response to an attack is lawful depends on the observance of the criteria of the necessity and the proportionality of the measures taken in self-defence'.[54] Berhanu Kebede, Ethiopian ambassador to the UK, claimed: 'Ethiopia acted in response to a threat to its national security. The Islamic Courts Union (ICU) declared a jihad against Ethiopia and that its acolytes intended to establish a caliphate government in Addis Ababa.'[55] However, ambassador Kebede seemed to concede that the main objective of the UIC was establishing a domestic governance structure rather than international expansion, when he stated that the UIC 'preached a hard-line ideology committed to promoting extremism. Its ultimate objective was to establish a fundamentalist government in Somalia.' Even though the Ethiopian ambassador argued that his government was responding to threats from the Islamic Courts, his statement seems to suggest that they were involved in internal Somali clan conflict as the title of his article unmistakably suggests.[56]

As Brownlie observes, '[t]o assert the right of self-defence justifies action in the face of other threats to the interests of the states is to revert to the vague and obsolete right of self-preservation or the doctrine of self-help.'[57] According to Malanczuk, armed reprisals cannot be justified as self-defence; even 'if terrorists enter one state from another the first state may use force to arrest or expel the terrorists, but, having done so, it is not entitled to retaliate by attacking the other state'.[58] In a similar vein, Joyner rightly notes: 'establishment of an ideologically distasteful regime in some state does not automatically legitimize military intervention by some other state in self-defence'.[59]

It is true that some members of the UIC had made statements warning Ethiopian troops already inside Somalia to withdraw from the country or face hostilities. In fact, the spokesman for the Courts was quoted as saying, '[s]tarting today, if the Ethiopians don't leave our land within seven days, we will attack them and force them to leave our country.'[60] In that context, there was no evidence of any action by the UIC launching attacks against Ethiopia. It seems inconceivable

54 *Nicaragua*, *supra* note 15, p. 165, paras 187–201.

55 Berhanu Kebede, 'Somalia's Instability is not Ethiopia's Fault', *Observer*, 17 January 2010.

56 Berhanu Kebede, 'Somalia Asked Us to Save Them from this Brutal Sub-Clan', *Guardian*, 3 May 2007.

57 Brownlie, *supra* note 20, p. 255.

58 Malanczuk, *supra* note 15, p. 316. For a discussion on the legality of reprisals see D. W. Bowett, 'Reprisals Involving Recourse to Armed Force', 66(1) *American Journal of International Law* (1972): 1–36.

59 Joyner, *supra* note 21, at 134.

60 'Ethiopia Deadline to Quit Somalia', *BBC News*, 12 December 2006, available at http://news.bbc.co.uk/1/hi/6171847.stm (accessed 10 June 2012); see also UN Security Council, *Report of the Secretary-General on the Situation of Somalia*, S/2207/115, para. 5.

that such declarations could be interpreted as a threat of war. It is imperative to mention, however, that the Ethiopian opposition parties rejected the Ethiopian government's argument of the existence of a threat emanating from Somalia, arguing that 'if sporadic incursion warranted a declaration of war, there would be no peace in the world'.[61] Even if we assume for the sake of argument that the UIC declared war on Ethiopia, such a 'meaningless' declaration cannot be a ground for legal justification for an invasion. As Henkin correctly observes, 'States are not permitted to go to war even if the governments of both states desire it and "declare war".'[62] It is inconceivable that the ragtag militia of the Islamic Courts presented any tangible threat to the well-trained and heavily armed Ethiopian conventional army. In my judgement, David Shinn was correct when he stated: '[a]s the recent fighting showed conclusively, the Ethiopian military is far more powerful than the militias of the Islamic Courts, which never posed a serious military threat to the Ethiopian homeland, including the Somali inhabited Ogaden region.'[63]

More pertinently, a prima facie case can be made that the Ethiopian invasion was not in response to an armed attack actual or in anticipation, but a preplanned military action aimed at influencing the internal military and political situation of Somalia. It appears that almost six months before the actual invasion commenced, the Ethiopian government allegedly 'in cahoots' with the United States started planning for the invasion. In fact, in 2007, the British television station Channel 4 reported that it had obtained a leaked record of a secret meeting held in the Ethiopian capital, Addis Ababa, attended by representatives of the United States, Ethiopia and the United Nations, allegedly 'revealing America's role in the planning and execution' of Ethiopia's 2006 invasion of Somalia. According to the programme presenter, Jon Snow, in that meeting 'the blueprint for a very American supported Ethiopian invasion of Somalia was hatched'. The participants of the meeting, including a high-ranking US official, discussed several scenarios. The worst-case scenario was regarded as being a situation in which the UIC took over Somalia, in which case, as the leaked document reveals, 'the US would not allow it'. The document went on to disclose that 'in the event of an Ethiopian rapid in and out intervention, the US would rally with Ethiopia if "Jihadists" took over'. Most revealingly still, the high-ranking US official present at the meeting reportedly stated: 'it would be a mistake for the international community to condemn such an invasion'. According to the minutes of the meeting, an unnamed UN official present at the gathering predicted seemingly with precision: 'any Ethiopian action in Somalia would have Washington's blessing'.[64] Interestingly, if the leaked document is genuine, several points are clear from these discussions. First, the United States was involved in the planning of the invasion from

61 Namrud Berhane, 'Eritrea will Fight to the Last Somalia, Not the Last Eritrean – Meles', *Allafrica*, 2 December 2006, available at http://allafrica.com/stories/200612040099.html (accessed 20 February 2014).

62 Henkin, *supra* note 44, at 301.

63 David Shinn, 'Stabilizing Somalia and Ethiopia's Role: Key Points', 2 January 2007, available at http://ethio.nl/comments/ethio_somali_war4.html (accessed 28 May 2012).

64 *Oil Platforms*, *supra* note 35.

the outset. Second, the invasion was not in response to an 'imminent danger' or an invitation from the TFG but was part of the Bush Administration's 'war on terror' operation. Third, and perhaps more significantly, no Somali official was involved in these discussions, which is another rather unmistakable indication that the TFG was used as a 'Trojan horse' to justify an illegal, preplanned invasion.

Interestingly, and perhaps predictably, the Security Council did not condemn the Ethiopian invasion of Somalia. The fact that neither the UN Security Council nor the General Assembly addressed or condemned the invasion does not make it lawful 'given the variety of motives influencing States'.[65] As Schachter correctly notes, 'decisions of the UN political bodies – or failures to decide – should not be considered definitive in every case'.[66] Furthermore, the silence of the Security Council cannot be construed as a legal justification or authorisation, because this is not the first time the world body has failed to respond to violations of the Charter owing to political expediency or stalemate, as Dinstein observes in another context:

> The record of the Security Council is replete with cases in which it has been deadlocked, due to political cleavages splitting the five Permanent Members. When a breach of (or threat to) the peace directly affects one or more of the big powers, even their 'client states', the veto power can be counted on to ensure that only an anodyne resolution will be adopted.[67]

Immediately after the Ethiopian invasion of Somalia, while the Security Council was silent on the situation, the AU supported by the Arab League and the Intergovernmental Authority on Development (IGAD) 'called on Ethiopia to withdraw thousands of troops from Somalia immediately'.[68] Nevertheless, the position of the AU on the Ethiopian intervention seemed conflicting or ambiguous at best. For instance, a high-ranking AU official was quoted as saying that 'the African Union would not criticise Ethiopia' because it had given the Union 'ample warning'. The official went on to state: 'it is up to every country to judge the measure of the threat to its own sovereignty'.[69] However, countries cannot be left to legitimise their own actions, and any measure taken should be consistent with international law. To be sure, the reaction of the AU to the Ethiopian intervention in Somalia seems to be in line with the policies of its predecessor, the Organization of African Unity, when confronted with an intra-African conflict. During the Cold War, as far as African countries were concerned, the term 'intervention' seemed to be 'not appropriate to describe the violation of national borders of African States by other African states', but had bearing only on interventions from

65 Gray, *supra* note 52, p. 617.

66 Schachter, *supra* note 28, at 122.

67 Yoram Dinstein, *War, Aggression and Self-Defence*, Grotius (1988), pp. 268–9.

68 'Ethiopia Urged to Leave Somalia', *BBC News*, 27 December 2006, available at http://news.bbc.co.uk/1/hi/6212807.stm (accessed 22 February 2012).

69 'Ethiopia Action in Somalia Backed', *BBC News*, 26 December 2006, available at http://news.bbc.co.uk/1/hi/6209325.stm (accessed 20 February 2012).

'extra-African powers or from the White Minority regimes in southern Africa'.[70] For instance, in 1978, when Uganda invaded and annexed the Kagera region of Tanzania, the Secretary-General of the OAU refused to condemn Uganda on the ground that 'such an act would be beyond the scope of the Charter of the OAU'. The Secretary-General then stated that 'All we can do is to act as a kind of referee. We had to find all means to bring about peace.'[71] In a similar vein, in 1979, after Tanzania invaded Uganda and ousted Idi Amin, the OAU did not condemn the Ugandan intervention. The Tanzanian president complained about the OAU inaction and stated: 'what we did was exemplary at a time when the OAU found itself unable to condemn Amin'.[72] By the same token, during the Libyan invasion of Chad in the early 1980s, the OAU failed to adopt a common position on the intervention.[73]

C. Did the Ethiopian invasion satisfy the proportionality principle?

It is pertinent to note that regardless of the legal justification of the military action undertaken in any conflict situation, the *jus in bello* regulations will be applicable undiminished. The law of war governs the actual conduct of the war and is aimed at protecting civilians from the devastation of war. There is widespread consensus that disproportionate military actions and violations of international humanitarian law cannot be justified as self-defence in accordance with the UN Charter and customary international law.[74] In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court held 'a use of force that is proportionate under the law of self-defence, must in order to be lawful, also meet the requirements of the law applicable in armed conflict, which comprise in particular the principles and rules of humanitarian law'.[75]

The right to self-defence under article 51 of the Charter 'is subject to the conditions of necessity and proportionality'.[76] As meticulously documented by various human rights organisations, the Ethiopian invasion caused extensive suffering, bloodletting and destruction in Somalia. In fact, the Ethiopian troops and their allied militias caused the death of tens of thousands of innocent civilians and displaced hundreds of thousands more, and as a result are accused of committing war crimes and crimes against humanity, and created the worst

70 Olajide Aluko, 'African Response to External Intervention in Africa since Angola', 80(319) *African Affairs* (1981): 159–79, at 161.

71 S. K. Chatterjee, 'Some Legal Problems of Support Role in International Law: Tanzania and Uganda', 30(4) *International and Comparative Law Quarterly* (1981): 755–68, at 757.

72 *Ibid*.

73 Aluko, *supra* note 70, at 173.

74 Judith Gail Gardam, 'Proportionality and Force in International Law', 87 *American Jounral of International Law* (1993): 392; Brownlie, *supra* note 20, p. 261;see also Frits Kalshoven, 'State Responsibility for Warlike Acts of Armed Forces', 40(4) *International and Comparative Law Quarterly* (1991): 827–58, at 827.

75 International Court of Justice, *supra* note 12, p. 96, para. 42.

76 *Ibid.*, p. 96, paras 37–50.

humanitarian crisis in Africa.[77] Sadly, one year after the invasion, Ethiopian troops and other forces were still allegedly committing war crimes in Somalia. According to the Human Rights Watch report, 'the Somali Transitional Federal Government (TFG), the Ethiopian forces that intervened in Somalia to support it and insurgent forces have committed widespread and serious violations of the laws of war'. The frequent violation of international humanitarian law detailed in the report included, among others, 'indiscriminate attacks, killings, rape, use of civilians as human shields, and looting'.[78] Additionally, the UN Monitoring Group on Somalia reported that Ethiopian troops used white phosphorus bombs in residential areas in Mogadishu, killing civilians.[79]

It should be noted that '[s]elf-defence must limit itself to rejecting the armed attack; it must not go beyond this purpose'. There is a general consensus that the right of self-defence under article 51 of the Charter prohibits 'prolonged military occupation and annexation of territory'.[80] As the Court noted in the *Nicaragua case*, self-defence justifies 'measures which are proportionate to the armed attack and necessary to respond to it'.[81] Ethiopian troops captured territories hundreds of kilometres away from the Ethiopian border and stayed in some of these cities, including the capital Mogadishu, for more than two years. In that respect, it is obvious that the Ethiopian military invasion did not satisfy the proportionality criterion.[82] It could be argued that responding to the threat by non-state actors like terrorist groups may mean attacking the 'source' of the attacks even if it is hundreds of kilometres away from the border. Israel argued that its 1982 invasion of Lebanon was aimed at eradicating PLO fighters in different cities including Beirut. However, the international community overwhelmingly rejected that argument.[83]

77 'Shell-shocked: Civilians Under Siege in Mogadishu', *Human Rights Watch*, 13 August 2007, available at http://www.hrw.org/reports/2007/08/12/shell-shocked (accessed 28 May 2012); 'Somalia: Routinely Targeted: Attacks on Civilians in Somalia', *Amnesty International*, AFR 52/006/2008, 6 May 2008, available at http://www.amnesty.org/en/library/info/AFR52/006/2008 (accessed 28 May 2012); 'Somalia/Ethiopia: Deliberate Killing of Civilians Is a War Crime', Amnesty International Press Release, 25 April 2008; Chris Tomlinson, 'EU E-mail Warns of Possible War Crimes by Ethiopia, Somalia', *Washington Post*, 7 April 2007; Jeffrey Gettleman, 'Somalia Worst Humanitarian Crisis in Africa, UN Says', *New York Times*, 19 November 2007.

78 'Somalia: War Crimes Devastate Population', *Human Rights Watch*, 8 December 2008; for the complete report see ' "So Much to Fear": War Crimes and the Devastation of Somalia, *Human Rights Watch*, 8 December 2008, available at http://www.hrw.org/node/76419 (accessed 5 July 2012).

79 UN Security Council, *supra* note 9, paras 29, 33; the report also mentions that 'the use of this type of weapons was not an isolated incident'.

80 Cassese, *supra* note 16, p. 305.

81 *Nicaragua*, *supra* note 15, para. 176.

82 Jeffrey Gettleman, 'Ethiopian Jets Strafe Mogadishu Airports', *New York Times*, 26 December 2006; 'Islamists Abandon Somali Capital', *BBC News*, 28 December 2006.

83 UN Doc. S/RES 508, 509, 517 (1982); UNGA Resolution UN Doc. A/RES/ES-7/9/ 24 September 1982.

In its *Armed Activities on the Territory of Congo* judgment, the Court noted:

> Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including in particular, recourse to the Security Council.[84]

Furthermore, and more significantly, the Court remarked that it 'cannot fail to observe, however, that taking airports and towns many hundreds of kilometres from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end'.[85] As a result, the Court rejected Uganda's argument of self-defence and stated '[t]he unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.'[86]

In the same vein, the right of self-defence is also limited by time and 'contains a temporal element'. That means any action justified as self-defence must be taken close in time to the time of the armed attack or the threat thereof. Schachter observes that, 'without that limitation, self-defence would sanction armed attacks for countless prior acts of aggression and conquest'.[87] In that respect, any 'terrorist attacks' undertaken by Islamic groups supposedly associated with the Islamic Courts several years previously cannot be used as a legal justification for the invasion. Interestingly, basing their argument on the Ethiopian government's misleading statements, Warbrick and Yihdego erroneously argue that Ethiopia's military action was in self-defence partly because 'Ethiopia completed its operation in a short time and begin leaving the country in no more than a month after it had first intervened.'[88] The facts do not bear this out. In fact, Ethiopian troops finally withdrew from Somalia in January 2009, over two years after the start of their official military intervention in December 2006.[89]

IV. INTERVENTION BY INVITATION

In an interview with an Aljazeera TV reporter, the prime minister of Ethiopia claimed that his country 'did not invade Somalia. We were invited by the duly constituted government of Somalia, internationally recognized government of Somalia to assist them in averting the threat of terrorism.'[90] Generally, it can be

84 *Armed Activities on the Territory of the Congo*, *supra* note 53, p. 168, para. 148.
85 *Ibid.*, p. 168, para. 147.
86 *Ibid.*, p. 168, para. 165.
87 Schachter, *supra* note 28, at 132.
88 Warbrick and Yihdego, *supra* note 32, at 675.
89 'Somali Joy as Ethiopians Withdraw', *BBC News*, 13 January 2009, available at http://news.bbc.co.uk/1/hi/world/africa/7825626.stm (accessed 12 June 2012).
90 Andrew Simmons interview with the Ethiopian Prime Minister, Meles Zenawi, *Aljazeera English*, 22 March 2007, available at http://www.youtube.com/watch?v=vf1ATz_wwlw (accessed 5 July 2012).

argued that a state can consent to another state sending troops to its territory, which would otherwise be regarded as inconsistent with the prohibition of the use of force embodied in the UN Charter. According to Cassese, thorough study of the Charter warrants the conclusion that 'by explicit consent, a State may authorize the use of force on its territory whenever, being the object of an "armed attack", it resorts to individual self-defence, and in addition authorizes a third State to assist in collective self-defence'.[91] Similarly, in its *Armed Activities on the Territory of Congo* judgment, the Court observes that a 'State may invite another State to assist it in self-defence'.[92] There is consensus among legal scholars that 'invitation by a lawful governmental authority in a state constitutes a valid basis in international law for foreign states to intervene to provide assistance requested'.[93]

However, the legality of such intervention may be questioned when the government concerned is not considered representative of the state it purports to represent, thus creating 'a conflict with the principle of self-determination or a violation of the duty of non-intervention in the internal affairs of another state'.[94] In that context, the issue is more complicated in situations where there is no effective central government, and 'multiple factions claim to be the legitimate government of a recognized state'.[95]

The arguments in the following section will proceed in three phases. First, the legitimacy of the TFG will be examined. Second, it will be discussed whether the TFG actually invited Ethiopia or not. Finally, the discussion will move on to the validity and actionability of the supposed invitation in the face of the UN Security Council arms embargo on Somalia.

A. Legitimacy of the transitional government

As discussed in the previous section, a sovereign state can legally invite foreign forces onto its territory, but 'the question of legality of invited intervention only crops up when the legitimacy of the inviting party is drawn into question'.[96] In situations of internal strife, however, extra care must be taken to ensure that other general principles of law like self-determination and non-interference are respected.[97] According to the eminent international jurist Cassese, 'consent must be given freely; it must be real as opposed merely "apparent" '. Furthermore, the consent should be given by a legitimate government. The consent would be

91 Cassese, *supra* note 16, p. 316.

92 *Armed Activities on the Territory of the Congo*, *supra* note 53, p. 168, para. 128.

93 Kwaw Nyamekeh-Blay, 'Intervention in International Law: Grenada and Afghanistan Compared and Contrasted', 6 *Australian International Law News* (1985): 6–28, at 12; David Wippman, 'Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict', 27 *Columbia Human Rights Quarterly* (1995–6): 435–85, at 440.

94 Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', 56(1) *British Yearbook of International Law* (1985): 189–252, at 189.

95 Christopher J. Le Mon, 'Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested', 35 *Journal of International Law and Policy* (2002): 741–93, at 745.

96 *Ibid.*, at 742; Brownlie, *supra* note 20, p. 317.

97 Brownlie, *supra* note 20, pp. 317–27.

considered unlawful 'if it turns out to be a case of interference in the domestic affairs of the State on whose territory force has been used, or if force involving atrocities were consented to for the purpose of putting down a rebellion'.[98]

The fighting between the UIC and the TFG can be seen as an internal struggle between two Somali warring parties. According to international human rights law, the Somali people have a right to internal self-determination, which means having an opportunity to participate in the decisions to determine the shape of governance they want. According to Oscar Schachter, that includes 'the right to revolt or to carry on armed conflict between competing groups'. If a third state tries to interfere militarily in the internal affairs of warring groups in a civil war with the aim of siding with one group, this clearly constitutes 'a use of force against the political independence of the State engaged in a civil war'.[99] In situations of civil war, if groups fighting against the government control large swathes of the country, the notion of political independence would dictate 'neither side, government nor insurgency, should receive military aid'. Equally, if a third state military intervenes in such a situation, it is 'using military force to curtail the political independence of the State and therefore it is an action that contravenes article 2(4)'.[100]

The 1987 *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations* stresses 'the need for all States to desist any forcible action aimed at depriving peoples of their right to self-determination, freedom and independence'. The Declaration further acknowledges 'the universal significance of human rights and fundamental freedoms as essential factors for international peace and security'.[101] As the Court noted in *Armed Activities on the Territory of Congo*, 'these provisions are declaratory of customary international law'.[102] By the same token, in the *Nicaragua case*, the Court observed that the principle of non-intervention prohibits a state 'to intervene, directly or indirectly, with or without armed force, in support of internal opposition in another country'.[103] In early December 2006, the Security Council acknowledged: '[t]he Situation in Somalia has changed dramatically since the transitional federal government was formed. There are two major players in Somalia, namely the internationally recognized transitional Federal Government and the new reality presented by the Union of Islamic Courts.' As a result, the UN Security Council emphasised 'the need for continued credible dialogue between Transitional federal Institutions and Union of Islamic Courts'. Furthermore, in the same resolution, the Security Council also called upon 'all parties inside Somalia and all other States to refrain from action that could provoke or perpetuate violence and violation of human rights, contribute to

98 Cassese, *supra* note 16, pp. 316–19.

99 Oscar Schachter, 'The Right of States to Use Armed Force', 82(5/6) *Michigan Law Review* (1984): 1620–46, at 1641.

100 *Ibid.*, at 1645.

101 UNGA, *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, A/RES/42/22, 18 November 1987.

102 *Armed Activities on the Territory of the Congo*, *supra* note 53, p. 168, para. 163.

103 *Nicaragua*, *supra* note 15, p. 108, para. 206.

unnecessary tension and mistrust, endanger the ceasefire and political process, or further damage the humanitarian situation'.[104]

The debate on state recognition and its controversies is irrelevant for the purposes of this article, because the Somali state was universally recognised in 1960. However, recognition of governments is pertinent in this case, as Le Mon notes, 'questions emerge when multiple competing factions claim to be the legitimate government of a recognized state'.[105] Notwithstanding how the government in question came into existence, for the government in question to be regarded as the legitimate government of the land, it needs to have effective control over the territory of the state and to perform the functions of the state.[106] As the Permanent Court of International Justice noted, 'States can act only through their agents and representatives.'[107] Nevertheless, in a situation like Somalia where state institutions totally collapsed and the country was controlled by various administrations, warlords and clan elders, the question of representation is not straightforward. It is necessary to note that '[a]n inviting party lacking legal recognition as the legitimate government can confer no rights upon the invited state, as it lacks such rights itself.'[108] In that respect, any foreign intervention relying on the invitation of an illegitimate entity would be in clear contravention of the prohibition of the use of force in accordance with both customary international law and article 2(4) of the Charter.[109] It seems that state practice supports the notion that governments are regarded as representing the state: 'the existence of *de facto* is generally the most important criterion in dealing with a regime as representing the state'.[110] With respect to the recognition of governments, the notion of effectiveness 'either in the literal meaning or as evidenced by adequately expressed popular approval – has become the predominant standard of recognition'.[111] For a government to be considered a legal government it should 'fulfil the functions of the state'.[112] It is pertinent to point out that the TFG lacks both *de facto* control of the Somali territory as well as popular approval of the population.[113] In that regard, it cannot be considered to be the legal government representing Somalia. Nonetheless, the Ethiopian government and TFG of Somalia both argue that the UN, the AU and the Arab League recognise the TFG; therefore, it is the legitimate government of Somalia. In 1991, in the *Republic of Somalia v Woodhouse Drake Carey Suisse S.A.*, the transitional government at the time used similar arguments, emphasising that

104 United Nations Security Council Resolution 1725(2006), SC/8887, 6 December 2006.
105 Le Mon, *supra* note 95, at 735.
106 Hersch Lauterpacht, *Recognition in International Law*, Cambridge University Press (1947), p. 98.
107 *German Settlers in Poland Advisory Opinion*, PCIJ, Series B, No. 6 (1923), p. 22.
108 Le Mon, *supra* note 95, at 754.
109 *Ibid.*, at 762.
110 Doswald-Beck, *supra* note 94, at 194.
111 Lauterpacht, *supra* note 106, p. 170.
112 Le Mon, *supra* note 95, at 745.
113 International Crisis Group, *Can Somali Crisis Be Contained?*, Africa Report No. 116, 10 August 2006.

the legitimacy of the interim government emanated from the fact that it is recognised by international organisations, and the conference where it was established was attended by foreign states and international bodies. The British Court rejected that argument and held that 'if the interim government is to be treated as the Government of Somalia, it must be able to show that it is exercising administrative control over the territory of the Republic'.[114] The Court recognised that in situations like Somalia, where 'the regime exercises virtually no administrative control at all in the territory of the state, international recognition of an unconstitutional regime should not suffice and would', as the court put it, 'have to be accounted for by policy considerations rather than legal characterisation; and it is, of course, possible for states to have relations with bodies which are not states or governments of the states'.[115]

Apparently, asked about the way the British government deals with the interim government, the Foreign and Commonwealth Office wrote '[t]he United Kingdom maintains formal contact with all the factions involved, but there have been no dealings on a government to government basis.'[116] One might argue that the situation has changed in the last twenty years and that ruling is not relevant anymore. However, at the time of the Ethiopian invasion, the transitional government was confined to a small town in Somalia under the protection of Ethiopian troops. Additionally, there is ample evidence that the United Nations and other leading powers did not recognise the Transitional Government as the legitimate representative of Somalia at the time, but one of the factions in the country. In fact, in the latest communiqué issued by the international contact group on Somalia, six different Somali groups including the TFG were all recognised as representatives of Somalia.[117] Similarly, in the recently concluded London Conference on Somalia where more than forty heads of governments and international organisations including the Secretary General of the United Nations attended, seven different Somali groups were invited to the conference on an equal footing as representatives of Somalia.[118]

There is ample evidence that the US government did not recognise the TFG as the legitimate government representing Somalia at the time of the invasion. For example, in 2007, when the TFG purportedly appointed an 'ambassador' to the United States, one State Department official, talking about the new 'ambassador', stated 'what this man has been doing is bouncing around from person to person trying to find a way into this building [State Department]'.[119] Surprisingly, in

114 For the facts of the case and the decision of the court see D. J. Harris, *Cases and Materials on International Law*, Sweet and Maxwell (2004), pp. 162–7.

115 *Ibid.*, p. 166.

116 *Ibid.*, p. 164.

117 International Contact Group on Somalia, 2–3 July 2012, Rome, Final Communiqué, available at http://unpos.unmissions.org/LinkClick.aspx?fileticket=hbD0BQT4yiw%3d&tabid=9744&mid=12667&language=en-US (accessed 5 July 2012).

118 'London Conference on Somalia: Communiqué', 23 February 2012, available at http://www.fco.gov.uk/en/news/latest-news/?id=727627582&view=PressS (accessed 5 July 2012).

119 Nina Shapiro, 'Dubious Diplomacy', *Seattle Weekly*, 27 February 2007, available at http://www.seattleweekly.com/2007-02-28/news/dubious-diplomacy/ (accessed 20 December 2011).

2007, the person reportedly appointed to represent the TFG in the United States frankly admitted that the United States did not recognise the TFG as the legitimate government representing Somalia.[120] It is clear from the foregoing that the TFG does not satisfy the effectiveness criterion and lacks popular approval, and in that respect, it cannot give any lawful consent to outside military intervention. Moreover, and perhaps more significantly, in January 2013, after the end of the transitional period in Somalia, the United States publicly 'recognised the government of Somalia for the first time since 1991'.[121]

B. There is no evidence the TFG invited Ethiopian troops

All the available evidence amply reveals that the transitional government did not consent to the invasion as an institution. It is possible that an individual like the president or the prime minister surreptitiously invited them. Nevertheless, it is vital to remember that, the leaders of the TFG derive their authority from the Transitional Federal Charter. It goes without saying that any action by an individual in contravention of the charter is an unlawful action and cannot be construed as an action of the government. In that respect, article 1(1) of the Transitional Federal Charter strongly affirms that, '[a]ll the sovereign authority belongs to the people of Somalia and may be exercised directly or indirectly through their representatives, in accordance with this Charter and the laws of the country.' In the same vein, article 1(2) stipulates that '[t]he right to exercise sovereignty shall not be delegated to any individual, group or class, and no person shall arrogate to him or herself, or exercise any State authority, which does not emanate from this Charter or any laws of the Land, not inconsistent with this charter.' Furthermore, and perhaps more significantly, as article 3(1) of the Transitional Federal Charter specifies, '[t]he Transitional Federal Government of the Somali Republic shall be founded on the supremacy of the law and shall be governed in accordance with this Charter.' In that regard, any decision taken by any individual or institution in contravention of the charter is invalid.

In fact, there is no evidence that the Transitional Federal Institutions consented to Ethiopian military invasion. For instance, the TFG cabinet did not decide to invite Ethiopia to intervene militarily. Even should the cabinet reach such a decision, it would be subject to parliamentary approval in accordance with the Charter because permitting troops from another country is a bilateral agreement between two countries. In accordance with the Transitional Federal Charter, such agreements require the approval of the parliament. Pursuant to article 14, paragraph 1(c) of the Vienna Convention on the Law of Treaties, '[t]he consent

120 Lornet Turnbull, 'Seattleite May Serve as Somali Diplomat', *Seattle Times*, 4 January 2007, available at http://seattletimes.nwsource.com/html/localnews/2003508639_somaliguy04m0.html (accessed 20 December 2011). The new 'envoy' stated: 'he's been asked by the transitional government of Somalia to be its ambassador to the U.S. — *if and when* that government is recognized by the United States' (my emphasis).

121 'Somalia: U.S. Recognizes Government', *New York Times*, 18 January 2013. Not only the US but the European Union and many other states recognised the Somali government for the first time since 1991.

of a State to be bound by a treaty is expressed by ratification when the representative of the state has signed the treaty subject to ratification.' A further point of significance is that this supposed invitation is deemed in violation of an internal law of fundamental importance pursuant to article 46, paragraph 2 of the Vienna Convention. Moreover, this violation is also manifest, given the fact that the current Somali Transitional Federal Charter was drafted with the help of an Ethiopian representative.[122] In that respect, the provisions of the Charter, pertaining to the requirement of the ratification of treaties, are expected to be objectively evident to Ethiopia.

In the final analysis, experience shows that legal justifications often employed by states in support of their claims 'frequently seem to cite carefully chosen, if not fabricated, sets of facts'.[123] For instance, in order to justify the 1968 invasion of Czechoslovakia, the Soviet Union produced 'an unsigned document that implied the Czech leaders "invited" the Warsaw Pact forces to enter Czechoslovakia'. To make matters worse, the Soviet Union even attempted to form a government, which could then issue an 'invitation letter'.[124] However, when the Czech National Assembly vociferously repudiated the Soviet claim of an invitation, the Soviet Union started to invoke the right to self-defence under the UN Charter.[125] Similarly, in the Chadian civil war, both France and Libya sent intervention forces to Chad, both seemingly claiming to have acted on the invitation of the legitimate government while supporting different sides of the internal civil war. It is necessary to note, though, the Security Council did not accept these arguments and urged both sides to settle their dispute peacefully and in a manner consistent with the UN Charter.[126] Likewise, the Soviet Union justified its 1979 invasion of Afghanistan 'by referring to an invitation from a prime minister whom the Soviets themselves essentially crowned'. However, the majority of the member states of the United Nations condemned the invasion as illegal and did not accept the Soviet justification.[127] To be sure, it was not always possible for the Security Council to condemn interventions involving one of the superpowers due to the constant threat of vetoes. For instance, the UN General Assembly denounced both the Soviet invasion of Czechoslovakia in 1968 and the US intervention in Grenada in 1983 as illegal under international law. However, while the draft resolutions of the Security Council strongly condemned both interventions, the Security Council did not push through both proposed resolutions.[128]

122 Ahmed Ismail Samatar and Abdi Ismail Samatar, 'Somalia: Reconciliation: An Editorial Note', 3 *Bildhaan: An International Journal for Somali Studies* (2003): 1–15.

123 Schachter, *supra* note 28, at 118–19.

124 Richard Goodman, 'The Invasion of Czechoslovakia: 1968', *4 International Lawyer* (1969–70): 42–79, at 43.

125 Schachter, *supra* note 28, at 118.

126 UN Doc. S/15672 (1983).

127 Le Mon, *supra* note 109, at 778.

128 Kofi Oteng Kufuor, 'The Legality of the Intervention in the Liberian Civil War by the Economic Community of West African States', *5 African Journal of International and Comparative Law* (1993): 525–60, at 544.

Some commentators wrongly mention that the Transitional Federal Parliament endorsed the Ethiopian invasion. For instance, Warbrick and Yihdego state '[t]he Somali Parliament, assembled in Baidoa approved such an invitation'.[129] Contrary to their claims, the Transitional Federal Parliament did not authorise Ethiopian troops to invade Somalia unilaterally. Instead, the debate in the parliament at the time centred on whether troops from the 'frontline states' could be permitted to be part of an international peacekeeping force. In that regard, on 14 June 2006, the Transitional Parliament passed a resolution authorising:

> The deployment of an international Peace Support Mission, under the mandates and authority of the United Nations and the participation of frontline states in the training of Somali national police and army and the provision of logistic and emergency support to the international Peace Support Mission.[130]

In actuality, the parliament approved only the deployment of an International Peace and Support Mission under the auspices of the United Nations. As UN Security Resolution 1725 (2006) explicitly states, troops from 'frontline states' are prohibited from being deployed. In 2005, the United Nations reported, 'a large number of members of parliament, cabinet ministers and other leaders oppose the deployment of troops from those countries [frontline states]'. The sensitivity of the issue is demonstrated by the fact that fist fights erupted in the Somali parliament between the opponents and proponents of the inclusion of the troops of the frontline states in the peace support mission. As a result, several members of the parliament were wounded.[131] Subsequently, the IGAD–AU fact-finding mission visited Somalia in February 2005, and reported that, by and large, the Somali people were not opposed to the deployment of foreign troops, but an overwhelming majority rejected the inclusion of troops from the neighbouring countries.[132] Equally, the TFG Council of Ministers did not decide to invite unilateral Ethiopian invasion, but on 21 May 2006, the council of ministers met in Baidoa and adopted a national security and stabilisation plan. It is pertinent to note that the proposed plan provided 'for the deployment of an IGAD/AU peace support mission'.[133] The leaders of the TFG had been embroiled in such constant disagreement and infighting that it is unlikely that they agreed to invite Ethiopia to invade Somalia. In October 2005, the Secretary General of the United Nations reported: '[s]ince early August, president Yusuf, Prime Minister Ghedi,

129 Warbrick and Yihdego, *supra* note 32, at 668.

130 Transitional Federal Parliament of Somali Republic (TFP), *Decision of the TFP on Authorization of an International Support Mission*, 14 June 2006, Ref: TFP/1/196/06. A copy of this document is on file with the author.

131 UN Security Council, *Report of the Secretary-General on the Situation in Somalia*, S/2005/392, 16 June 2005, para. 10.

132 *Ibid.*, para. 19.

133 UN Security Council, *Report of the Secretary-General on the Situation in Somalia*, S/2006/418, 20 June 2006, para. 4.

the speaker and the Mogadishu-based leaders have taken unilateral actions, none of which have contributed to the resolution of the difference between them.'[134]

C. Can the TFG invitation override the UN Security Council arms embargo?

The Security Council acting under Chapter VII of the UN Charter has the prerogative to impose on states 'an explicit obligation of compliance if for example, it issues an order or command'.[135] In that respect, article 25 of the Charter sets forth: '[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.' Furthermore, and more significantly, article 103 of the Charter provides that the decision of the Security Council taken under Chapter VII takes priority over, and erodes any other obligation that may emanate from any other international agreements.[136]

The Security Council, acting under Chapter VII, decided that 'all states shall, for the purposes of establishing peace and stability in Somalia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia until the Council decides otherwise'.[137] In paragraph 6 of the same resolution, the Security Council 'call[ed] on all states, to refrain from any action which might contribute to increasing tension and to impeding or delaying a peaceful and negotiated outcome to the conflict in Somalia'.[138] In the same vein, the neighbouring states were particularly urged to desist 'from any action in contravention of the arms embargo and related measures, and should take all actions necessary to prevent such contraventions'.[139] The Security Council acting under Chapter VII reiterated 'its insistence that all Member States, *in particular those in the region*, should refrain from any action in contravention of the arms embargo and related measures, and should take all actions necessary to prevent such contraventions'.[140]

It is pertinent to note that the Security Council partially lifted the arms embargo on Somalia and authorised 'IGAD and Member States of the African Union to establish a protection and training mission in Somalia'.[141] Nevertheless, in the same resolution, the Security Council explicitly stipulated that 'those States that border Somalia would not deploy troops to Somalia'. At the same time, the partial

134 UN Security Council, *Report of the Secretary-General on the Situation in Somalia*, S/2005/642, 11 October 2005, paras 11, 84.

135 *Certain Expenses of the United Nations (Art 17, Para 2, of the Charter) Advisory Opinion*, ICJ Reports 1962, p. 163.

136 Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10(1) *European Journal of International Law* (1999): 1–22, at 5.

137 United Nations Security Council Resolution 733 (1992), para. 5.

138 *Ibid.*, para. 6.

139 United Nations Security Council Resolution 1676, S/RES/1676/2006, (10 May 2006).

140 United Nations Security Council Resolution 1725 (2006), S/RES/1725 (2006), 6 December 2006 (my emphasis).

141 *Ibid.*, para. 3.

lifting of the arms embargo applied only to IGADSOM. However, it is necessary to mention that such a mission did not materialise. Ethiopian troops seemingly intent on pre-empting such deployment unilaterally invaded Somalia in December 2006 in contravention of UN Security Council resolutions.[142] After the Ethiopian invasion, an African Union Mission in Somalia (AMISOM) was established. Interestingly, both transitional government officials and Ethiopian government officials claimed that Ethiopian troops present on Somali soil provided training to the nascent Somali army. However, the UN Security Council, perhaps cognisant of the possibility of neighbouring countries to use such an excuse, decided: 'the arms embargo prohibits the direct or indirect supply to Somalia of technical advice, financial and other assistance, and training related to military activities'.[143]

As the Secretary General of the United Nations repeatedly acknowledged in 2005, '[t]he deployment of any foreign military force in Somalia will require an exception from the arms embargo on Somalia'.[144] Merely two months before the Ethiopian invasion, perhaps sensing the intention of Ethiopia to unilaterally invade Somalia, the Secretary General of the United Nations appealed 'to all neighbouring countries to respect the United Nations embargo on Somalia', and reiterated his 'call for them to exercise maximum restraint in order not to jeopardise the ongoing peace efforts or fuel regional instability'.[145] It goes without saying that IGAD, AU and other regional organisations knew that lifting, or partially lifting the arms embargo was necessary for any deployment of troops to Somalia. In that respect, in December 2005, the final communiqué of the Sana Forum Summit, which involved the heads of states of Somalia, Yemen, Ethiopia and Sudan, requested the Security Council 'to lift arms embargo on peacekeeping troops when they deploy in Somalia'. Likewise, the Executive Council of the African Union called on the Security Council 'to provide an exception on the arms embargo on Somalia with a view of facilitating the deployment'.[146] It should be mentioned that the repeated request from organisations of which both Somalia and Ethiopia are members unequivocally demonstrates that the Ethiopian government knew that it could not deploy troops into Somalia due to the arms embargo on Somalia without the Security Council's permission. After the Ethiopian invasion, the UN Monitoring Group reported that weapons in possession of Ethiopian troops in Somalia 'were delivered or introduced into the Somali environment in violation of the arms embargo' under UN Security Council Resolutions 733 (1992) and 1425 (2002).[147] In that respect, even if we assume for the sake of argument that the TFG invited Ethiopian troops, that invitation could not be acted upon because it was in contravention of binding Security Council resolutions.

142 UN Security Council Resolution 733 (1992); UN Security Council Resolution 1725 (2006).

143 United Nations Security Council Resolution 1425 (2002), S/RES/1425, 22 July 2002, para. 2.

144 UN Security Council, *Report of the Secretary-General on the Situation in Somalia,* S/2005/89, 18 February 2005, para. 75; UN Security Council, *supra* note 131, para. 79.

145 UN Security Council, *Report of the Secretary-General on the Situation in Somalia*, S/2006/838, 23 October 2006, para. 67.

146 UN Security Council, *Report of the Secretary-General on the Situation in Somalia*, S/2006/122, 21 February 2006, para. 16.

147 UN Security Council, *supra* note 9, paras 29, 110.

V. CONCLUSION

After the collapse of the central government of Somalia in 1991, the Ethiopian government started a policy of internal interference towards Somalia. In fact, the Ethiopian Prime Minister Meles Zenawi informed the UN Secretary-General's representative: 'Ethiopia was, in an open manner, involved diplomatically, [militarily] and politically in Somalia and would continue to be involved, not least to protect its national security interest.'[148] It is pertinent to bear in mind that the current Ethiopian government publicly and frankly admits that the policies of the past Ethiopian consecutive governments had been, among others, to 'dismantle Somalia to the extent possible' and furthermore, to take 'the war to Somalia and, along the way, aggravat[e] the contradiction between the Somali clans'.[149] Even though the current Ethiopian government vociferously claims that its bellicose policy has changed, nevertheless, its actions and policies point rather to the continuation of that belligerent strategy.[150] It is not unreasonable to assume, in that connection, that its 2006 military invasion and other interventions were intended to serve that purpose of taking 'the war to Somalia', albeit currently clothed in UN Charter terminology.

In the light of the facts and arguments set out above, it can be reasonably concluded that the invasion of Ethiopia into Somalia in December 2006 could not be justified as a measure taken in self-defence in accordance with the provisions of the Charter and under customary international law. First, there was no armed attack against Ethiopia or a threat thereof emanating from groups in Somalia. Second, Ethiopia cannot rely on the right to collective self-defence because Somalia was not a victim of an armed attack from a third country and did not declare itself to be a victim of an armed attack. In fact, there is evidence that the invasion was pre-planned as part of the so-called 'war on terror'. Furthermore, Ethiopia did not report the intervention to the Security Council as stipulated under article 51 of the Charter. Moreover, the criteria of necessity and proportionality central to the right of self-defence were not satisfied. The invasion and the subsequent two-year-long occupation of parts of Somalia including the capital city Mogadishu, and the massive human rights violations it caused were not proportionate to any threat that might have been posed by the UIC.

Equally, the Ethiopian invasion could not be justified as being the result of an invitation from the legitimate government of Somalia. First, the Transitional Federal Government was one of the factions in Somalia. It was not recognised as the legitimate government of Somalia. Second, the TFG only controlled one provincial town and lacked effective control of the Somali territory. Third, there was no evidence that the TFG invited Ethiopian troops to invade Somalia unilaterally. Fourth, it is unlawful to invite foreign troops to commit war crimes

148 United Nations Security Council, *Report of the Secretary-General on the Situation in Somalia*, S/2002/709, 27 June 2002, para. 30.

149 Ministry of Foreign Affairs of Ethiopia, 'Ethiopia's Policy Towards Somalia', available at http://www.somalitalk.com/2006/un/mfa.html (accessed 6 September 2011).

150 Afyare Abdi Elmi, *Understanding the Somalia Conflagration: Identity, Political Islam and Peacebuilding*, Pluto Press (2010), pp. 90–107.

and crimes against humanity. Finally, and perhaps more pertinently, there was an arms embargo on Somalia at the time of the invasion, so all the arms and weapons brought into Somalia were in blatant contravention of Security Council Resolutions 733 (1992), 1425 (2002) and 1725 (2006). As demonstrated in the preceding pages, the Ethiopian military intervention in Somalia was inconsistent with the UN Charter and therefore constitutes a breach of obligation to refrain from the use of force.