

## THE USE OF FORCE IN SOMALIA AND ISSUES RELATING TO THE LEGALITY OF ETHIOPIAN AND UNITED STATES INTERVENTION

By *William A M Henderson*

For many years the Horn of Africa has had more than its fair share of troubles in comparison to many other territorial expanses. Indeed the Horn could be described as a 'hot spot' for armed conflict, caused by a variety of factors.<sup>1</sup> The Horn of Africa incorporates Ethiopia, Somalia, Djibouti and Eritrea.<sup>2</sup> The most recent high-profile troubles in the area have taken place between Ethiopia and Somalia<sup>3</sup>, or it may be more appropriate to say that the troubles have involved those countries and others.

These armed conflict-related issues are not particularly new as they have been ongoing for a long time in the area. Relations between neighbours in the Horn have often been strained and Somalia itself has suffered problems of territorial integrity with both the establishment of Puntland<sup>4</sup> and Somaliland.<sup>5</sup> These areas operate with a certain degree of autonomy or, indeed, even *de facto* independence from Somalia. What is new is the manner in which the conflict has taken on involvement of outside forces in a country that has for some time been lacking a functioning government.

Somalia itself has been particularly torn by internecine warfare. It is a country that has been split by factionalism (even setting aside Puntland and Somaliland) and has in the past been involved in full scale war with its neighbour to the west, Ethiopia, on more than one occasion. Ethiopia, in turn, was overcome by 'bloody coups, uprisings, wide-scale drought, and massive refugee problems' from 1974 until 1991, as civil war raged throughout the country.<sup>6</sup> A similar situation has existed in Somalia

since 1991, where 'turmoil, factional fighting, and anarchy' have been faced by the people of that state.<sup>7</sup>

This paper will examine some of the legal issues relating to the latest armed conflict in Somalia, analysing the roles of the domestic parties involved and their legal standing together with the roles of other parties from outside the territory who have been involved to varying degrees in the conflict. The points to be addressed will predominantly relate to the *jus ad bellum*, as well as dealing with issues of recognition and responsibility where outside state intervention is a factor in an internal armed conflict.

### Background to the recent conflict

The fighting in 2007 at one point resulted in the establishment of an internationally recognised central government in the capital of Somalia, Mogadishu, for the first time since the overthrow of the former government of Siad Barre in 1991, notwithstanding the short lived Transitional National Government of 2001-2003. These events are part of a long history of armed conflict that the people of Somalia have faced and this paper also addresses some of the issues arising from the involvement of various parties, internal and external, with the hostilities. More recent events have resulted in continued fighting and the armed conflict currently shows little sign of ending.

On 20<sup>th</sup> December 2006 opposing armed forces of the Ethiopian government and Union of Islamic Courts (UIC) engaged in heavy fighting outside Baidoa, the base for the Transitional Federal Government of Somalia (TFG). The conflict had been ongoing for years and reached the level of the UIC declaring 'holy war' against Ethiopia in the summer of 2006.<sup>8</sup> Four days after the 'Battle of Baidoa' the Ethiopian government declared that it had armed forces located within Somalia engaged in warfare against the UIC.<sup>9</sup>

<sup>1</sup> Robert F. Gorman, *Political Conflict on the Horn of Africa* (Praeger Publishers, New York, 1981) 5

<sup>2</sup> Bereket Habte Selassie, *Conflict and Intervention in the Horn of Africa* (Monthly Review Press, London, 1980) 1

<sup>3</sup> However, note also the problems between Ethiopia and Eritrea: e.g. UN SC/9169, Statement by the President of the Security Council, 13 November 2007

<sup>4</sup> BBC News, Regions and Territories: Puntland (15 January 2008) <[http://news.bbc.co.uk/1/hi/world/africa/country\\_profiles/4276288.stm](http://news.bbc.co.uk/1/hi/world/africa/country_profiles/4276288.stm)>

<sup>5</sup> BBC News, Regions and Territories: Somaliland (29 February 2008) <[http://news.bbc.co.uk/1/hi/world/africa/country\\_profiles/3794847.stm](http://news.bbc.co.uk/1/hi/world/africa/country_profiles/3794847.stm)>

<sup>6</sup> CIA – The World Factbook - Ethiopia (14 June 2007)

<<https://www.cia.gov/library/publications/the-world-factbook/geos/et.html>>

<sup>7</sup> CIA – The World Factbook - Somalia (14 June 2007)

<<https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>>

<sup>8</sup> BBC News, Somalis vow holy war on Ethiopia (9 October 2006)

<<http://news.bbc.co.uk/1/hi/world/africa/6032907.stm>>

<sup>9</sup> BBC News, Timeline: Ethiopia and Somalia (25 January 2007)

<<http://news.bbc.co.uk/1/hi/world/africa/6159735.stm>>

The TFG was established by the Transitional Federal Charter of Somalia,<sup>10</sup> which is also the basis for the Transitional Federal Parliament (together they are referred to as the Transitional Federal Institutions). The establishment of the Transitional Federal Institutions was the culmination of two years of negotiations in Kenya and resulted in the TFG being the body recognised by the United Nations as having responsibility for the State and its future development. The UN Security Council has noted that there is a need for a ‘comprehensive and lasting settlement of the situation in Somalia through the Transitional Federal Charter’, which needs to be based on ‘the importance of broad-based and representative institutions reached through an all inclusive political process, as envisaged through the Transitional Federal Charter’.<sup>11</sup> The UIC has been in conflict with the TFG for some time, and until the beginning of 2007 the UIC controlled a large area of the country (or at least a large party of the country as it could be considered without Somaliland and Puntland), including Mogadishu.

### Preliminary points regarding the Use of Force

Other than the two domestic elements in the conflict (the TFG and UIC), Ethiopia and the United States of America have also been involved in the conflict. This leaves us with the question of legality regarding the actions of those two states. Some have argued that the prohibition of force is defunct<sup>12</sup> and no longer worth the paper it is written on but the UN Charter gives us a system that is, frankly, all that we currently have to stop us from reverting to the darkness of pre-1945. The prohibition of the use of force is well documented now by many scholars so this article will not be treading over that general ground. There are, after all, acute differences in relation to the use of force by a State within its own borders and within or against foreign territory.

### Somalia: The State

Reference to Max Weber’s description of a State being ‘a human community that claims the monopoly of the legitimate use of physical force

<sup>10</sup> Institute for Security Studies – copy of Charter, adopted following Declaration on the Harmonization of Various Issues Proposed by the Somali Delegates at the Somali Consultative Meetings, 9-29 January 2004, Kenya <<http://www.iss.co.za/AF/profiles/Somalia/charterfeb04.pdf>>

<sup>11</sup> UNSC Res 1744 (2007)

<sup>12</sup> Thomas Franck “Who Killed Article 2(4)?” 64 Am. J. Int’l L. 809 (1970)

within a given territory’<sup>13</sup> can be taken in our formalistic legal circumstances to show the relationship of a State to the use of sovereign armed force within the given situation of Somalia. The important point of this is to distinguish when a sovereign power is exercising such authority and when a lesser power is acting. The traditional focus being that the sovereign power may act and request outside assistance whereas the rebel group or insurgents legally may not.<sup>14</sup>

The above-noted definition of the State is of course a sociological description but it is one that is also apt for our legal discourse and is not in conflict with the principles of Montevideo, namely that a State has a government, a people and a territory, as well as the capacity to enter into external relations<sup>15</sup> or independence. It has been noted that sometimes a State does not necessarily have the required control of its territory to hold onto Statehood<sup>16</sup> and that is most certainly the case in unique situations. What then of Somalia which was, and still is, a divided territory with a government that is not in control of large swathes of the country?

### *Jus ad bellum*

#### *Self-defence*

One possible relevant area of law here in respect to both external parties involves self-defence as defined under Article 51 of the Charter of the United Nations.<sup>17</sup> Primarily, where the TFG alone is concerned, the situation could more accurately be one of self-preservation that existed and developed in December 2006 and January 2007. The difference being that self-defence would be applicable were the TFG to have crossed over into Kenya, had the UIC been based there.<sup>18</sup> The absence of international border violation with regards to the TFG removes the issue of self-defence from consideration to an extent. We will come to see that the matter of self-

<sup>13</sup> Max Weber et al, *From Max Weber: Essays in Sociology* (Routledge, London, 1991) 78

<sup>14</sup> Malcolm Shaw, *International Law* (5<sup>th</sup> edn, CUP, Cambridge, 2003) 1043-1045

<sup>15</sup> Convention on Rights and Duties of States (26 December 1933)

<sup>16</sup> e.g. the cases of various European Governments-in-exile during the Second World War

<sup>17</sup> See Ian Brownlie, *International Law and the Use of Force by States* (OUP, Oxford, 1963) and; Christine Gray, *International Law and the Use of Force* (2<sup>nd</sup> ed., OUP, Oxford, 2004) for discussion of Article 51 issues.

<sup>18</sup> Antonio Cassese, *International Law* (OUP, Oxford, 2001) 311

defence has been invoked by those intervening from outside the territory.

It is suffice to say at the moment that a lawful case of self-defence is widely accepted to require a need for a combination of factors, including those of necessity, proportionality and immediacy.<sup>19</sup> These requirements are essential for proving the legality of a State's use of armed force against the territory of others.

### *Intervention*

It is long established that a State has the right to use force within its own borders to quell an armed insurrection<sup>20</sup>, subject to the usual requirements of the *jus in bello*. A related issue concerns instances when others become involved in a dispute beyond their territorial boundaries.

The Declaration on Friendly Relations provides that all States must not become involved in civil strife within other States<sup>21</sup>, but that does not preclude giving support to governments that have requested help. Sovereignty allows a State to request help from other States where there is a need for armed or other assistance. This right has been addressed but has been difficult to apply in the 'worst case scenario' where there are two or more parties with differing claims to be the legitimate government.<sup>22</sup> This is not an issue that this paper will deal with as the United Nations position is taken here, recognising the TFG as the Government. Neither shall the territorial dispute over Ogden or the area declared 'Somaliland' be addressed at this juncture.

However, there would be an issue to consider regarding legality of invitation if the international community instead recognised the UIC as the Government of the territory. That said there is the matter of the UIC operating as a *de facto* government for a large section of the country, including Mogadishu, for some time. However, armed intervention in a State can have legitimacy where the government invites that outside State to

participate.<sup>23</sup> These matters become very pertinent when considered in light of the legitimacy of State action and also potential alternative 'Governments' of Somalia.

### **Internal Entities**

#### *The Transitional Federal Government*

In May 2006 the United Nations Security Council stressed the 'need for the Transitional Federal Institutions to continue working towards establishing effective national governance in Somalia.'<sup>24</sup> The Security Council also recognised the position of the UIC as having a role in discussions on the future of Somalia but fundamentally the Transitional Federal Charter and Institutions were highlighted as providing the only directions under which Somalia could work.<sup>25</sup>

The intention of the international community was that the institutions established under the Transitional Federal Charter were to be as 'broad-based, representative and inclusive as possible', in order to achieve peace for the people of Somalia.<sup>26</sup> The UIC had for the past few years been the strongest military and governmental entity within the territorial boundaries of Somalia. The organisation built itself up to the position where it controlled a large area in the south of Somalia whilst the internationally recognised government controlled only an area surrounding the temporary federal base in Baidoa. Neither of these organisations was in control of the north of the country, and much of it was fractured by tribalism.

#### *The Union of Islamic Courts*

Although the UIC at one point controlled the majority of Somalia (excluding the autonomous areas), it never received the international legitimacy experienced by the TFG. However, it has been claimed that the UIC received support, through various means, from other States.<sup>27</sup>

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<sup>19</sup> Christopher Greenwood "International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida and Iraq" 4 San Diego Int'l. L.J. 13 (2003) 12

<sup>20</sup> R Jennings and A Watts (eds), *Oppenheim's International Law: Peace* (9<sup>th</sup> edn, Longman, London, 1996) 419.

<sup>21</sup> UN GA/RES/2625 (XXV) Declaration on Principles of International Relations and Co-operation among States in Accordance with the Charter of the United Nations, 24 October 1970.

<sup>22</sup> Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> edn, OUP, Oxford, 2003) 708

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<sup>23</sup> Malcolm Shaw, *International Law* (5<sup>th</sup> edn, CUP, Cambridge, 2003) 1042

<sup>24</sup> UN SC/RES/1676 (2006)

<sup>25</sup> UN S/PRST/2006/59, Security Council Presidential Statement, 22 December 2006.

<sup>26</sup> UN SCRES/1725 (2006)

<sup>27</sup> Council on Foreign Relations, Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1676, November 2006

<<http://www.cfr.org/content/publications/attachments/Somalia.doc>>

The UIC is/was effectively an affiliation of separate Sharia courts operating in the country that wanted to replace the lawlessness and tribal factionalism with Islamic Law.<sup>28</sup> It also came into conflict with the TFG as the jurisdiction of the UIC spread throughout the country and then in turn came into conflict with neighbouring Ethiopia.

## External considerations

### *Involvement of Ethiopia*

After Ethiopia became involved in the country it was stated by a representative of the Ethiopian government that the position of the State in using military force was based on the right of self-defence and the need to safeguard 'national sovereignty, peace and stability'.<sup>29</sup> This position was thereafter confirmed as also being based on that of invitation by the host, with the Ethiopian Prime Minister specifically stating that Ethiopia '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'.<sup>30</sup> The position, as confirmed by the United Nations Secretary-General, regarded the initial Ethiopian involvement as 'self-defensive measures' against the UIC and terrorists in neighbouring Somalia.<sup>31</sup>

### *The United States of America and the 'War on Terror'*

In addition to the Ethiopian involvement in Somalia, the United States of America has also intervened in the conflict, first by launching an air assault on those fighting alongside the UIC in the south of the country, and then against suspected terrorists a couple of weeks later.<sup>32</sup> The US position was that Al-Qaeda was operating from Somali territory and being supported by the UIC. It was stated that those being sheltered by the UIC were the persons responsible

for the 1998 attacks on US embassies in east Africa.<sup>33</sup>

The President of Somalia gave support to the actions of the US in bombing the south of Somalia as UIC forces moved south to the Kenyan border. The Somali President stated that 'the US had a right to bombard terrorist suspects who attacked its embassies in Kenya and Tanzania'.<sup>34</sup> The position could therefore be predicated on that of invitation by the host government. The TFG could be said to legitimise actions of the US in the country.

That said, the language of the Somali President is of interest as it is unclear if the stated right of the United States is derived from that of self-defence or from intervention at the request or consent of the Somali TFG. With regards to self-defence then, the longstanding issues of necessity and proportionality arise.<sup>35</sup> This would of course be a pertinent issue for discussion due to the length of time that has elapsed between 1998 and the US attacks on Southern Somalia in 2006 and other factors involved. No State would want to be in the position of being accused of conducting an illegal reprisal but here the conduct of outside States appears invited and therefore legal.

The US National Security Strategy is equally relevant.<sup>36</sup> The most recently stated US position is that it is essential to 'deny... terrorists control of any nation that they would use as a base and launching pad for terror'.<sup>37</sup> This is spoken about in the same manner as calls for protecting democracy and stopping 'terrorists from exploiting ungoverned areas'. Southern Somalia, and perhaps even Somalia as a whole, could fall into this definition. While the strategy may express the views of the US administration's present understanding of the law of self-defence, it is not necessarily a widely shared view. The most secure legal foundation for intervention in these circumstances rests upon invitation by the territorial State.

It would be worthwhile bearing in mind the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States* in this overall situation,

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<sup>28</sup> BBC News, Profile: Somalia's Islamic Courts  
<<http://news.bbc.co.uk/1/hi/world/africa/5051588.stm>>

<sup>29</sup> Berhanu Kebede, Amassador of Ethiopia to the United Kingdom, Letter to *The Guardian* newspaper, 9 January 2007.

<sup>30</sup> Meles Zenawi, Prime Minister of Ethiopia, television interview with Andrew Simmons, Al Jazeera, 22 March 2007

<sup>31</sup> UN S/2007/115, Security Council Report of the Secretary-General on the situation in Somalia, 28 February 2007, para. 5

<sup>32</sup> *Ibid.*, paras. 6 and 10.

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<sup>33</sup> CNN, *Pentagon official: U.S. attacks al Qaeda suspects in Somalia* (9 January 2007)  
<<http://www.cnn.com/2007/WORLD/africa/01/08/somalia.strike/>>

<sup>34</sup> BBC, *US Somali airstrikes 'kill many'* (9 January 2007)  
<<http://news.bbc.co.uk/1/hi/world/africa/6243459.stm>>

<sup>35</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgement*, ICJ Reports 1986, para. 194

<sup>36</sup> The National Security Strategy of the United States of America, 2002 and 2006 - available at:  
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<sup>37</sup> *Ibid.*, 2006 National Security Strategy of the USA, 12

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although the text does specifically refer to 'threatening the sovereign personality and the political independence of States' when it condemns intervention 'for any reason whatsoever'.<sup>38</sup> Considering the point made earlier in relation to the legitimacy of intervention when accepted and authorised by a sovereign power then this particular point would not be one of the concerns if we accept, as Ethiopia and the US do, that the lawful government of Somalia is the TFG.

## Conclusion

What can be concluded from this is that the international community, through the UN Security Council in particular, views the TFG and the Transitional Federal Institutions as being the legitimate Government of Somalia. Applying the international law on the use of armed force we have the involvement of Ethiopia and the US which is perhaps not legitimised by self-defence exceptions, but instead, by the consent of the State, through the invitation issued by the TFG. If the UN Security Council had not referred to requirements to work within the confines of the Transitional Federal Charter then the issue of civil war would have complicated matters even further regarding outside armed intervention.

Jan Egeland, the former United Nations Under-Secretary General, once spoke about Somalia, expressing a 'sense that it is a hopeless case of incomprehensible internal conflicts and there is nothing we can do.'<sup>39</sup> That comment was made before the recent conflict, and at that time, Egeland also said he hoped Somalia was 'turning a corner'. Indeed it would seem that Somalia is turning, albeit in circles.

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<sup>38</sup> UN GA/RES/2131 (XX) (1965)

<sup>39</sup> UN Office for the Coordination of Humanitarian Affairs, Interview with Jan Egeland, 9 December 2004 <<http://www.irinnews.org/report.aspx?reportid=52367>>

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