

COUNTER-INTERVENTION, INVITATION, BOTH, OR NEITHER ?

An Appraisal of the 2006 Ethiopian Military Intervention in Somalia

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SOMALIA: a land of clan-republics where the traveler had to secure protection from each group whose territory he has traversed.¹

(Ioan Lewis and James Mayall)

Introduction

The genesis of the 2006 military confrontation between Ethiopia and the Union of Islamic Courts traces its roots to colonial boundaries. Since independence, various Somali governments have seen the Ogaden region of Ethiopia, the north-eastern provinces of Kenya and the State of Djibouti as integral parts of what they often refer to as the 'Greater Somali Republic.'² In

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¹ Ioan Lewis and James Mayall, *Somalia*, in Mats Berdal and Spyros Economides(ed.), *United Nations Interventionism (1991-2004)*, (Cambridge University press: Cambridge, 2007), p-10.

² See Testimony by David H. Shinn, *Somalia: U.S. Govrenemnt Policy and Challenges*, Hearing before the Subcommittee on African Affairs of the Committee on Foreign Relations, United States Senate , July 11, 2006, P-3. He told the Foreign Relations Committee: "It is also clear that some leaders in the UIC, certainly including Hassan Dahir Aweys, wish to reenergize the Greater Somalia concept by incorporating into Somalia those Somali-inhabited parts of Ethiopia, Kenya, and Djibouti. Wikipedia; Mohamed Olad Hassan, 'Islamic Leader Urges 'Greater Somalia'', AP wire, reported in forbes.com, 18 November 200, in Wikipedia, *Inside Somalia and the Union of Islamic Courts*, available at:

<https://secure.wikileaks.org/wiki/Inside_Somalia_and_the_Union_of_Islamic_Courts,>

[accessed on 22 April 2009]; International Crisis Group, *Somaliland: Time For African*

particular, the claim to the Ogaden region of Ethiopia has lingered in the minds of some Somali political elites for decades and has been a source of serious and continuing anxiety to Ethiopia.³ The two countries have fought a catastrophic war in 1977 as a result of Somali invasion of the eastern part of Ethiopia owing to Somalia's claim to territories that have been parts of the Ethiopian State.

Although Somalia has not had an effective government since the overthrow of the Barre government in 1991, the hostility between the two States remained as suspicious as ever. However, the absence of government and the existence of various competing factions within Somalia itself, created a state of relative peace—one that can be best described as cold peace. This setting has descended into a complete quagmire when Islamist forces under the name of the Union of Islamic Courts, (hereinafter the UIC), stepped into Somalia's political spotlight.

In mid-2006, the UIC and Ethiopia started accusations and counter-accusations. The UIC blamed Ethiopia of interfering in Somalia's internal affairs while Ethiopia in turn accused the UIC of promoting a hidden agenda aimed at destabilizing the unity of the Ethiopian State. Ethiopia also contended that the leadership of the UIC was controlled by forces that are still actively pursuing the vision of a Greater Somalia—a vision that aspires to integrate Ethiopia's Somali-speaking Region of Ogaden into mainland Somalia and hence threatens Ethiopia's political independence and territorial integrity.⁴ The threat of "terrorism" and "violent extremism" was also another important factor which informed the context of the conflict. Indeed, the military confrontation between Ethiopia and the UIC might have been averted had it not been for the entrenched history of hostility that exacerbated the longstanding mistrust, leading to the creation of what Ethiopia deemed a state of "clear and present danger" to its sovereignty.

Ethiopia argued that its actions in Somalia were justified by the invitation of the Transitional Federal Government (TFG) and its inherent

Union Leadership, Executive Summary And Recommendations, Africa Report No. 110, 23 December 2006, p-1.

³ See Response of the Ethiopian Government to the UN Monitoring Group on Somalia, annexed to Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1676(2006), Annex X, p-63.

⁴ Dawit G, A Critical and Timely Resolution to Defend our Sovereignty, The Ethiopian Herald, Vol. LXIII, No.072, 3 December 2006, p-3; David Whitehouse, The US Proxy War in Africa: Why Did Ethiopia Invade Somalia?, available at <<http://dissidentvoice.org/Jan07/Whitehouse07.htm>>, (Last accessed 22 April, 2009), 7 January 2009; See also Testimony by David Shinn, *supra* note 2.

right to individual and collective self-defense. Due to the impossibility of providing an exhaustive account of these two continuously evolving but also shifting norms (invitation and self-defense) in the space available here and the consequent difficulty of doing justice to the different sides of the ever growing debate, self-defense is not discussed in this article. The article therefore concentrates on the examination of the legality of *invitation* and another closely related concept of intervention, *counter-intervention* (although the latter is not invoked as Ethiopia's official justification), with the view to situating Ethiopia's conduct in the norms of international law.

Drawing on contemporary norms of international law governing the use of force and military interventions, this article seeks to evaluate the legality of the 2006 Ethiopian military intervention in Somalia. Traversing through the principles of democratic legitimacy, international law principles of effective control and recognition, and other issues the article reflects on the legality of Ethiopia's intervention on behalf of Somalia's Transitional Federal Government (hereinafter the Transitional Government or the TFG). By calling attention to the instabilities of the normative foundations of invitations in international law, the article will ask whether the TFG is indeed a government proper commanding the moral and legal authority to extend invitation to foreign forces to intervene in the internal affairs of the State. Questioning the validity of Ethiopia's claim for invitation, the article further attempts to posit the unconventional state of affairs present in Somalia and explores whether there is a need for a different approach in the legal analysis of how invitation may be granted.

Working through emerging theories of international law, the article tries to extrapolate the form of governmental legitimacy that is required to invite foreign forces into the State when there are two or more competing factions. Accordingly, it asks whether the TFG's international recognition is, of itself, a sufficient parameter to entitle it to speak for the Somali State in light of international law and as such confers on it, rather than its Islamist rivals, a better right to invite foreign forces into the country.

Despite allegations by the UIC and other forces, Ethiopia consistently denied sending its troops to Somalia until it formally declared war on 24 December 2006.⁵ Nonetheless, Ethiopia admitted to sending what it called "military trainers and advisers" to help strengthen the security and defensive capabilities of the fragile Transitional Federal Government even before its

⁵ Report of the Secretary General to the Security Council on the Situation in Somalia, S/2007/115, para-5.

declaration of war.⁶ In addition to the issues raised in the preceding paragraph, this article interrogates whether the provision of “military trainers and advisers” by Ethiopia upon the invitation of the TFG constitutes a violation of Article 2(7) (the non-intervention principle) and/or 2(4) (prohibition on the use or the threat of force) of the Charter. Finally, against the backdrop of the UN Charter and general international law, the article will aspire to shed light on possible exceptions to the non-intervention principle and to determine whether Ethiopia’s conduct neatly fits into any of those exceptions.

1. Prelude: A Brief Account of the Setting

With the advent of the Islamic Courts claiming to be a unifying force and savior of the failed Somali State, the political landscape in Somalia changed significantly and abruptly. Although not an entirely new phenomenon in Somali politics, the new face of Islamic militancy exacerbated the threat to Ethiopia’s sovereignty reinvigorating Ethiopia’s sense of insecurity.⁷ Indeed, as will be discussed shortly, this militancy and the threat of terrorism associated with it constituted one of the four major factors Ethiopia raised to justify its argument for self-defense.⁸ The Ethiopian Premier associated the UIC with Eritrea and global terrorism. He said:

. . . [y]ou have the messenger voice of the government of Eritrea who has been actively involved in the fighting in Mogadishu. Theirs is not a specifically Somali agenda. And finally, you have the jihadists led by Al-Itihad-al-Islamia, which I am sure you know, is registered by the United Nations as a terrorist organization. And so, for us, the Islamic Courts Union is not a homogeneous entity. Our beef is with Al-Itihad, the internationally recognized terrorist organization. It so happens that at the moment the new leadership of the Union of the Courts is dominated by this particular group. Indeed, the chairman of the new council that they have established is a certain colonel who also happens to

⁶ See Emmanuel Fanta, *infra* note 14.

⁷ See for example, Ioan and James, *supra* note 1 at 115. To demonstrate the unfathomable nexus between religion (Islam) and militancy in the political life of Somalia, Ioan and James made reference to a Somali fundamentalist Sheikh, who was “the most brilliant poet of his age” and proclaimed a holy war against Christian occupiers. The continuity of the religious vigor of Somali politics and the changing face of “terrorism” on the international arena played its own part in taking situations out of control. Ethiopia’s experience with *Ali-Itihad* was also another reinforcing factor.

⁸ See Meles Zenawi, Prime Minister of Ethiopia, Press Conference, at

<<http://www.ethioembassy.org.uk>

/Archive/PM%20Meles%20Zenawi%20Press%20Conference%2027th%20June%202006.html>, (Last accessed 19 February 2009).

be the head of Al-Itihad. Now, the threat posed to Ethiopia by the dominance of the Islamic Courts by Al-Itihad is obvious.⁹

In the months leading up to the outbreak of a full-scale military confrontation, Ethiopia and the UIC had engaged in exchange of serious words that signaled the inevitability of an open military confrontation between the two.¹⁰ While the UIC accused Ethiopia of sending its military into Somalia to support the Transitional Government, the Ethiopian government held the UIC responsible for joining hands with Eritrea to serve as a sanctuary for Ethiopian rebel groups bent on dismantling the constitutional order in Ethiopia.¹¹ The United Nations Security Council noted the existence of interventions in the internal affairs of Somalia by several countries and urged all parties to refrain from ‘every hostile action’ which could further exacerbate the already volatile security situation in Somalia.¹² Indeed, in Resolution 1725 (adopted 18 days before the culmination of the hostility into a full-scale war), the Council expressly endorsed a proposal by IGAD (Inter-Governmental Authority for Development) to exclude neighboring States of Somalia, which have a vested interest of their own in Somalia, from the ‘Protection and Training Mission for Somalia’.¹³

Before Ethiopia officially joined the war in support of the TFG against the UIC, the spiritual leader of the Islamic Courts, Sheik Hassen Dahir Aweys, publicly stated that “Somalia is in a state of an all-out-war with the Ethiopian occupiers” and called on Somalis of all political spectrum to join the holy war (jihad) against what he described as “the Ethiopian

⁹ *Id.*

¹⁰ See Statement by Shaikh Sharif Shaikh Ahmed in a Letter Addressed to the Monitoring Group on Somalia, Annex XIV, in the Report of the Monitoring Group on Somalia (2006); *supra* note 3 at p-68.

¹¹ See Letter from the Permanent Mission of the Federal Democratic Republic of Ethiopia to the United Nations, dated 15 June 2007, accusing the UIC of infiltrating “individuals and groups” and “some parties” which it said “bent on assisting the activities of these terrorist groups”, Annex VII to the Report of the Monitoring Group on Somalia pursuant to Security Council Resolution 1724 (2006), S/2007/436, p-44-5; See also Shaikh Sharif Shaikh Ahmed, *id.*

¹² UNSC Res. 1725, 6 December, 2006, Preamble, P-2, States that “ calls upon all parties inside Somalia and all other States to refrain from action that could provoke or perpetuate violence and violations of human rights, contribute to unnecessary tension and mistrust, endanger the ceasefire and political process, or further damage the humanitarian situation.”.

¹³ UN Security Council Resolution 1725/2006, S/RES/1725(2006), Para-3.

aggression”.¹⁴ Several days after Dahir Aweys called for a holy war (Jihad) against Ethiopia, the Ethiopian Prime Minister publicly announced that “The Ethiopian government has taken self-defensive measures and started counter-attacking the aggressive extremist forces of the Islamic Courts and foreign terrorist groups,”¹⁵ thereby indicating a state of war. At this point, it became clear that Ethiopia’s intervention had moved beyond material support to the TFG and it, in fact, became a party to the ensuing hostility with the UIC.

2. The Legality of Ethiopia’s Military Intervention in Somalia

The end of the Second World War ushered in a new world order, a world order founded on the promises of peace and security to the peoples of the United Nations in accordance with the high purposes and principles set forth in Article 1 and 2 of the Charter. Under the Charter, the peoples of the United Nations have undertaken to search for a common ground of cooperation on matters of peace and security.¹⁶ Indeed, the quintessential notions of global peace and world (human) security, if not sanctity, have been accorded prominent significance and are the cornerstone of this distinctive international treaty: the UN Charter.

Central to this new international legal order is the prohibition on “the threat or use of force” proclaimed in Article 2(4) of the Charter. In the aftermath of the horrific tragedy caused by the two world wars, the victorious powers have shown a determination to “save succeeding generations from the scourge of war” and vowed to proscribe wars of conquest and expansion between States.¹⁷ To that end, they set forth their determination and commitment in Article 2(4) of the Charter in the following terms:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

Article 2(4) of the UN Charter is considered as the nucleus of international prohibition on the use of force.¹⁸ Professor O’Connell maintains that the

¹⁴ Emmanuel Fanta, Regional Coordinator for Great Lakes Conflict Early Alert Report, Analysis: Ethiopian intervention in Somalia in context, available at <<http://www.bloggernews.net/14238>>, (Last accessed 20 March 2008).

¹⁵ Report of the Secretary-General on the Situation in Somalia to the Security Council, S/2007/115, 28 February 2007, para-5.

¹⁶ UN Charter, Adopted on 26 June 1945, entered into force 24 October 1945, in accordance with Article 110, Preamble, art.1 & 2.

¹⁷ *Id* at Preamble.

¹⁸ Mary Ellen O’Connell, The Myth of Preemptive Self-Defense, The American Society of International Law Task Force (2002), p-3; Oscar Schachter, The Right of State to

prohibition set forth in Article 2(4) of the Charter recognizes only two “explicit exceptions”.¹⁹ The two notable exceptions are provisions relating to the use of force by the Security Council under the rubric of maintaining international peace and security²⁰ and the use of force in individual or collective self-defense reserved to States under Article 51 of the Charter.²¹ Furthermore, the prohibition under Article 2(4) of the Charter applies not only to the use of force *per se*, but also to the *threat of force*.²² The authority of the Security Council to use force under the rubric of maintaining international peace and security is elastic and often discretionary, and resort to use of force by individual States under Article 51 as well as customary international law is subject to rigorous and controversial requirements. Although self-defense is beyond the scope of this article, the legality of Ethiopia’s actions predating the resort to the full-scale armed confrontation with the forces of the UIC will be analyzed by reference to the general prohibition on the use of force.

The events that culminated in a full-scale war between Ethiopia and the UIC on 24 December 2006 were preceded by other actions which involved the States neighboring Somalia, mainly, Eritrea and Ethiopia.²³ These two States accused each other of meddling in the internal affairs of the Somali State in pursuit of their own national agenda.²⁴ Ethiopia accused Eritrea of trying to use Somalia to achieve its mission of destabilizing Ethiopia,²⁵ and

Use Armed Force, 82 Mich. L. Rev. 1620, 1624 (1984); Ian Brownlie, *International Law and the Use of Force by States*, (Clarendon Press: Oxford, 1963), p-112.(arguing that the customary rule on the prohibition of force is ‘restated and reinforced’ by Article 2, paragraph 4.

¹⁹ Mary Ellen O’Connell, *supra* note 18 at 3.

²⁰ Mary Ellen O’Connell, *supra* note 18; UN Charter, *supra* note 16, art.39.

²¹ Christine Gray, *International Law and the Use of Force*, (Foundations of Public International Law: Oxford University Press: Oxford, 2000), at 86, positing academic debate on the scope of the right to self-defense that “the right was fixed in customary international law in 1945 and is apparently not susceptible of restriction in the light of subsequent State practice”; Brownlie, *supra* note 18 at 269.

²² See the United Nations Charter, *supra* note 16 at art. 2(4).

²³ See Report of the Monitoring Group on Somalia Pursuant to Security Council Res. 1587(2005), S/2005/625, para-8, 25; Report of the Monitoring Group on Somalia(2006), *supra* note 3, paras-6, 7, 10, 11, 18, 19.

²⁴ See *infra*, notes 25 and 26.

²⁵ For Ethiopia’s accusation of Eritrea, see Global Policy Forum, *Blame Game Over Somali Conflict*, at

<<http://www.globalpolicy.org/security/issues/ethiopia/2007/0413blame.htm>>, April 13, 2007, (Last accessed 5 May 2009); See also Interview with the Ethiopian Prime Minister Meles Zenawi, *Ethiopian Herald*, Vol. LXIII, No. 094, 28 December 2006;

Eritrea accused Ethiopia of meddling in Somali politics to advance its own domestic agenda.²⁶ Indeed, many commentators have labeled the 2006 Ethiopia-Somalia war as a ‘proxy war’ between Ethiopia and Eritrea.²⁷

Professor Oscar Schachter posits the question of whether or not the prohibition enunciated in Article 2(4) of the Charter is limited to the use of armed force properly so called; or embraces other uses of coercive measures.²⁸ For Schachter, an even more important question is the central debate surrounding the content and substance of the phrase, “the threat or use of force against the territorial integrity or political independence” of States stipulated in Article 2(4).²⁹ For most experts on the use of force, including Schachter, the reference to ‘force’ instead of ‘war’ in this cardinal provision of the Charter underscores the fact that Article 2(4) prohibits not only the resort to armed force, but also the resort to other violent measures short of war.³⁰ In this regard, Schachter raises two central questions relevant to analyzing the legality of Ethiopia’s pre-war conduct. He first asks whether force has been used within the meaning of Article 2(4) “when a [State] provides arms to outside forces engaged in hostilities or when it trains troops of an adversary party.”³¹ He also asks whether a State can be considered to have “indirectly employed force when it allows its territory to be used by

Resolution of the House of Peoples Representatives, (8th Regular Meeting), Ethiopian Herald, Vol. LXIII, No.070, 1 December 2006, p- 1, authorizing the Ethiopian government to “take all legal and necessary steps”.

²⁶ For Eritrea’s accusation of Ethiopia, see the Report of the Monitoring Group on Somalia; *supra* note 3, Annex-VIII, Para-3.

²⁷ See the 2005 Report of the UN Monitoring Group, *supra* note 23 at para-45; Joe De Capua, Is Somalia a Proxy War between Ethiopia and Eritrea? 27 July 2007, available at < http://www.voanews.com/english/archive/2007-07/2007-07-27_voa27.cfm?CFID=180858569&CFTOKEN=25050208&jsessionid=6630a78416705b0a7ed576c30677e6925769>, (Last accessed on 23 April 2009).

²⁸ Oscar Schachter, *supra* note 18 at 1624.

²⁹ *Id.*; See also Mary Ellen O’Connell, *supra* note 18 at 4.

³⁰ Oscar Schachter, *supra* note 18 at 1625; Malcolm N. Shaw, International Law, (Cambridge University Press: 2005: 5th ed.), p-1018; Erin L. Guruli, The Terrorism Era: Should the International Community Redefine its Legal Standards on Use of Force in Self-Defense?, Willamette Journal of International Law and Dispute Resolution, 2004, p-103; Timothy Thriller, Principles of Public International Law, (Cavendish Publishing Limited: Slondon/Sydney: 1999), p-247; D. J. Harris, Cases and Materials on International Law, (Sweet and Maxwell: London: 2000: 5ed.), p-863. But see Sir Arthur Watts and Sir Robert Jennings, *infra* note 68 at 428.

³¹ *Id.*

troops fighting in another country.”³² In response to these questions, Schachter advances his view of the prohibition in the following terms:

These questions have tended to be treated under the rubric of “intervention,” a concept which has often been dealt with independently of Article 2(4) and defined as dictatorial interference by a State in the affairs of another State. However, Article 2(4) remains the most explicit Charter rule against intervention through armed force, indirect and direct, and it is pertinent to consider such action as falling within the scope of the prohibition.³³

Although Schachter recognizes the tendency of treating these situations within the purview of the doctrine of non-intervention rather than the prohibition under 2(4), he favors a broader construction of Article 2(4), bringing this conduct, i.e., training and provision of arms to an adversary and allowing one’s own territory to be used for attack against another State, within the scope of the prohibition under Article 2(4).³⁴ On the other hand, Sirs Robert Jennings and Arthur Watts consider intervention to constitute a violation of Article 2(4), when that intervention involves the use of force.³⁵ Defending his claim for a broader construction of Article 2(4), Schachter notes: “it is pertinent to consider such actions [training of the adversary’s military, provision of arms and allowing one’s own territory to be used by the adversary] as falling within the scope of the prohibition set forth under Article 2(4).”³⁶

This view is consistent with the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty which unequivocally excludes any possibility of a direct or an *indirect* intervention either in the internal or external affairs of the State.³⁷ The same view is reflected in the 1970 General Assembly

³² Oscar Schachter, *supra* note 18 at 1625.

³³ *Id.* See also Sir Robert Jennings and Sir Arthur Watts, *infra* note 68, at p-428-9, arguing that “Where intervention involves the use of armed force it is likely additionally, to violate Article 2(4) of the Charter of the United Nations, which prohibits threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the principles of the United Nations”.

³⁴ *Id.*

³⁵ See Sir Robert Jennings and Sir Arthur Watts, *infra* note 68 at 428.

³⁶ *Id.* (Emphasis mine)

³⁷ GA Res. 2131(XX), The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, 21 December 1965, (GA Res.20th Sess., Supp. 14, p-11. (Note that arts., 1, 2, 3, and 5 of this Declaration have been incorporated *verbatim* into the 1970 Declaration on Friendly Relations in the section dealing with Non-intervention).

Declaration on the Principles of International Law (hereinafter the Declaration) which explicitly reaffirmed the “duty of any State to refrain . . . from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State”.³⁸ Elaborating on the contents of Article 2(4) of the UN Charter, the Declaration reiterated “the duty of every State to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State”.³⁹ This Declaration was adopted in accordance with the Charter of the United Nations and considered not only as an “elaboration or reiteration” of the general principles enunciated in the Charter of the United Nations, but also as a document of a more profound importance reflecting the *opinion juris* of States.⁴⁰ Reaffirming the crystallization of this Declaration into a norm of customary international law, the World Court has proclaimed the following:

The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.⁴¹

In the *Military and Paramilitary Activities in and Against Nicaragua case* (hereinafter the *Nicaragua case*), the International Court of Justice was confronted with the question of the legality of intervention by a foreign State in support of non-State forces in an internal conflict. In dealing with the issue of “the sending by a State of armed bands to the territory of another State,”⁴² the Court held that such an act could be held to constitute an “armed attack” if “such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces”.⁴³ However, the Court expressly declined to hold that “assistance to rebels in the form of the provision of

³⁸ GA Res. 2625(XXV), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970), (hereinafter GA Res. 2625(XXV)), Preamble, para-9; See also

³⁹ *Id* at Principle 1(emphasis added).

⁴⁰ *Military and Paramilitary Activities in and Against Nicaragua*, (United States of America v. Nicaragua)(hereinafter *Military and Paramilitary Activities in and Against Nicaragua*), 1986 I.C.J. 14 (June 27), para-188.

⁴¹ *Id* at para-188.

⁴² *Id* at para-195.

⁴³ *Id*.

weapons or logistical or other support” constituted an “armed attack”⁴⁴ justifying resort to force. The Court, nevertheless, reaffirmed the position of the law proclaiming that “such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States”.⁴⁵ Thus, although the provision of weapons, logistics and other assistance to a rebel force may not necessarily amount to an “armed attack” against the territorial integrity and political independence of the State” triggering the application of Article 51 of the Charter, it does amount to a violation of Article 2(4) and/or 2(7) of the Charter. According to the Court’s ruling, a conduct by a nation in support of a rebel force in internal conflict, depending on its scale and effect, could amount to either a violation of 2(4) and/or 2(7), although the resort to self-defensive measures by any State requires to be preceded by a significant action amounting to an “armed attack”.⁴⁶

International law generally recognizes interventions under certain strictly regulated circumstances. Expressing his view of Article 2(4), Professor Schachter makes an explicit reference to impermissible “dictatorial interventions”⁴⁷, implying the permissibility of “non-dictatorial” or non-coercive interventions such as those undertaken through lawful invitation. For example, Watts and Jennings contend that British intervention in Jordan and American intervention in Lebanon in 1958, British interventions in Uganda, Kenya and Tanganyika in 1964, German Democratic Republic’s (GDR) intervention in Somalia in 1977, upon the invitation of the respective leaders of those States, excludes the illegality of their interventions.⁴⁸ Invitation, therefore, legitimizes an otherwise illegitimate action by other States.

Most qualified publicists in international law do not dispute the legality of non-coercive interventions such as those conducted by invitation because of the absence of apparent incompatibility with the Charter and general international law.⁴⁹ A lawful intervention by invitation does not transgress

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See *id.* at para-195 *cum* UN Charter, *supra* note 16, art. 2(4) and 2(7), except in cases where international law required provision of assistance to peoples struggling for the enjoyment of the right to self-determination.

⁴⁷ Oscar Schachter, *supra* note 18 at 1624; See also Lassa P. Oppenheim, 1 International Law, (Sir Hersch Lauterpacht ed., 8th ed. 1955), 134.

⁴⁸ Robert Jennings and Arthur Watts, *infra* note 68.

⁴⁹ Military and Paramilitary Activities in and Against Nicaragua, *supra* note 40, Para-246, holding intervention by invitation “allowable at the request of the government of a State”; Thomas C. Heller & Abraham D. Sofaer, Sovereignty: The Practitioner's Perspective, in *Problematic Sovereignty: Contested Rules and Political Possibilities*

upon the protected domains of domestic jurisdiction, political independence and sovereignty. For example, distinguishing between two conceptions of sovereignty, Stephen D. Krasner claims that “voluntary actions by rulers, or invitations, do not violate international legal sovereignty”.⁵⁰

With the mushrooming of a plethora of overarching human rights regimes and the continued recognition by the international community of people’s right to democratic governance, an era of exclusive Westphalian sovereignty has come to a close. Today, sovereignty is increasingly understood by States not only as a right/entitlement but also as a responsibility requiring a balance between internal legitimacy of regimes and their external competence to call on others, when necessary, to protect the essential interest of their State. Regarding the State of post Cold War conception of sovereignty, former Secretary General of the United Nations, Dr. Kofi Anan, said that: “State sovereignty, in its most basic sense, is being redefined States are now widely understood to be instruments at the service of their peoples, and not vice versa”.⁵¹ From this, one can safely say that in the exercise of sovereign power on behalf of the people of the State, governments can voluntarily allow others to intervene to the extent that such an intervention is in the interest of the people of the State.

On the other hand, this “redefined” conception of sovereignty also brings with it the right and responsibility of other States to intervene in another State in order to stop egregious abuse of human rights. Nowhere is this evident than in the Constitutive Act of the African Union where the responsibility of the Union to protect is coined not just in terms of the ‘responsibility’ to protect but rather in terms of the “right” of the Union to intervene. One of the founding principles of the Organization enunciated under Article 4(h) of the Constitutive Act proclaims “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity”.⁵²

(Stephen D. Krasner ed., 2001), 24, 25; Ian Brownlie, *supra* note 18 at 317; Malcolm N. Shaw, *International Law*, (Cambridge Press: 2004:5ed.) at 1042; See also L. Doswald Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BYBIL, 189; David Wippman, *infra* note 56 at 446-47; Martin Dixon and Robert MacCorquodale, *Cases and Materials on International Law*, (4th ed.: Oxford University Press: 2003, p-557.

⁵⁰ Stephen D. Krasner, *id.*, at pp-1, 11.

⁵¹ Kofi A. Annan, *Two Concepts of Sovereignty*, THE ECONOMIST, Sept. 18, 1999, at 49, 49, available at <http://www.un.org/News/press/docs/1999/19990918_kaecon.htm>, in W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 Am. J. Int'l L. 516, 517.

⁵² The Constitutive Act of the African Union, 4(p).

Although not yet a well settled rule of general international law, there is no doubt that the norm is evolving and that under the authorization of the Security Council, States can intervene to protect civilians in the context of an armed conflict. For example, Reisman argues that contemporary international law recognizes the right/responsibility of States to intervene in cases of catastrophic humanitarian crises and/or gross and massive violations of human rights.⁵³ Others tie the right of intervention to the presence of an alarming state of human rights violations culminating into genocide, ethnic cleansing, war crime and crimes against humanity.⁵⁴ These rudimentary but evolving norms have been catalogued into the 2005 World Summit Outcome Document, a non-binding consensus document by the high-level plenary meeting of the General Assembly and referred to as the “Responsibility to Protect” (R2P).⁵⁵ The principles proclaimed in paragraphs 138-139 of the 2005 World Summit Outcome document (A/RES/60/1/2005) have been subsequently reaffirmed by the Security Council Resolution 1674 (S/RES/1674/2006) on the protection of civilians in armed conflict. The consensual adoption of these principles by the General Assembly, their reaffirmation by the Security Council, their binding status under the Constitutive Act of the African Union and the emblematic character of the

⁵³ Michael Reisman, *infra* note 122 at 795.

⁵⁴ Fielding, Taking the Next Step in the Development of New Human Rights: the Emerging Right of Humanitarian Assistance to Restore Democracy, 5 Duke J. Comp. & IL(1996) 329; Chadwick, Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict (1996); Richard Falk, The Complexities of Humanitarian Intervention in Africa, A New World Order Challenge, 17 Michigan Journal of International Law,(1996), 491; See also General Assembly Resolution 60/1, 2005, World Summit Outcome Document, A/60/L.1, 24 October 2005, at Para-139 where the member States of the General Assembly proclaimed to “. . . take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity”; United Nations General Assembly, 2005 World Outcome Document, Follow up to the Outcome of the Millennium Summit, A/60/L.1, 15 September 2005, paras-138-139. This two paragraphs were re-articulated and given recognition by Security Council in resolution 1674(2006) at para4.

⁵⁵ See General Assembly Res. No.60/1(2005), World Summit Outcome Document, *supra* note at 54. See also Constitutive Act of the African Union, adopted in Lomé, Togo, 11 July 2000. The treaty provides member States of the Union the right to intervene in other States when gross violations of human rights occur. The UN General Assembly adopted Res. No. 63/308(A/RES/63/308), deciding to continue “consideration of the responsibility to protect”.

norms (war crimes, genocide, crimes against humanity, ethnic cleansing) in question and their preemptory status, is a typical demonstration of the rapid crystallization of the doctrine of the R2P into a binding norm of international law.

Wippman enumerates four situations which constitute an exception to the doctrine of non-intervention⁵⁶: intervention by invitation of a lawful internal authority⁵⁷; counter-intervention designed to offset an illegal prior intervention by another State⁵⁸; intervention in support of various substantive ends such as democracy, human rights⁵⁹, or self-determination⁶⁰; and self-defense⁶¹.

Ethiopia repeatedly argued that its intervention was justified by invitation of the internationally recognized government of Somalia and its inherent right to individual and collective self-defense under the Charter of the United Nations.⁶² With the above rules and precedents as a background, the next sections will focus only on one of the official justifications of Ethiopia, namely, invitation, and another possible basis of justification, i.e., counter-intervention, will be examined with the view to test the validity of Ethiopia's potential claims under international law.⁶³

3. Intervention by *Invitation* from Lawful Internal Authority

Lauterpacht considered external assistance to governmental authorities to suppress an internal revolt as 'perfectly legitimate' if the intervention is

⁵⁶ David Wippman, Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict, 27 Colum. Hum. Rts. L. Rev. 435, 446.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ UN Charter, *supra* note 16 at art. 51.

⁶² See also Statement by Prime Minister Meles Zenawi with *Al Jazeera* saying that "We 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."

⁶³ Since Ethiopia did not ground its intervention on its moral or legal obligations to promote substantive ends such as the promotion of human rights, self-determination and democracy, or any humanitarian motives, those exceptions are not discussed here. Counter-Intervention, however, is discussed not because Ethiopia has anchored the legality of its intervention on its right to counter-intervention, but rather because, in the view of the author, it is a ground that seems to offer a response to Ethiopia's possible lawful response to the level of threat that clouded Ethiopia's political and territorial interest at the time.

requested by the government.⁶⁴ Although intervention by the invitation of rebel forces has been consistently treated as a violation of post-Charter rules of international law, intervention by the invitation of the legitimate State governments has never been questioned in principle. Indeed, some writers go to the extent of asserting that the ability to invite foreign forces is an expression of the sovereign authority of the inviting State.⁶⁵ However, as Brownlie notes, the controversy over the legality of intervention crops up when “the legal status of the government which is alleged to have given consent is a matter of doubt”.⁶⁶ Summarizing the factors that create doubts about the legality of particular interventions by invitation, Beck notes:

The reasons given for such doubts are variously stated to be the inability of a shaky regime to represent the State as its government, a conflict with the principle of self determination or a violation of the duty of non-intervention in the internal affairs of another State. . . . It is submitted that there is, at the least, a very serious doubt whether a State may validly aid another government to suppress a rebellion, particularly if the rebellion is widespread and seriously aimed at the overthrow of the incumbent regime.⁶⁷

Jennings and Watts articulated what they consider to be the essential elements necessary for a lawful intervention by invitation.⁶⁸ They emphasized the ability of the inviting party to meet the triple tests of legitimacy, effectiveness and recognition.⁶⁹ An act of intervention by invitation, Jennings and Watts contend, will be lawful only if the party extending the invitation effectively controls the territory of the inviting State and is a legitimate representative of the people within the inviting State.⁷⁰ Viewed from this perspective, the debate as to whether the TFG could invite the Ethiopian forces turns on the

⁶⁴ Lauterpacht, Recognition, in Malcolm N. Shaw, *supra* note 49 at p-1042.

⁶⁵ See Thomas C. Heller & Abraham D. Sofaer, *supra* note 49.

⁶⁶ Ian Brownlie, International Law and the Use of Force by States 317 (1963), in Christopher J. Le Mon, Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested, 35 N.Y.U. J. Int'l L. & Pol. 741, 743.

⁶⁷ L. Doswald Beck, *supra* note 49.

⁶⁸ Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law, (9th ed.), (Longman: 1992), at 150, 435-438. L. Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', 56BYIL, 1985, p-189 in Malcolm N. Shaw, *supra* note 49 at 1042.

⁶⁹ Robert Jennings and Arthur Watts, *id* at 435-438.

⁷⁰ Jennings and Watts, *supra* note 68 at 437, arguing that “when there exists a civil war and control of a State is divided between warring factions, any form of interference or assistance (except probably of a humanitarian character) to any party amounts to intervention contrary to international law.”; Christopher J. Le Mon, *supra* note 66 at 744-746; David Wippman, Treaty-Based Intervention: Who Can Say No?, 62 U. Chi. L. Rev. 607, 624-625; But see David Wippman, *supra* note 56 at 439-40.

ability of the TFG's legal authority and constitutional legitimacy to call upon external forces to come into the State to do things which, under normal circumstances, are exclusively reserved to the "government of Somalia."

However, the question is far from being that simple. International law does not provide for the parameters that help determine a 'legitimate government' or a government with the 'legal authority' capable (legally and factually) of speaking on behalf of the State when there is no one party that is decisively in control and has visibly greater legitimacy than other warring factions. Although contemporary international law provides some indications, it does not offer a settled and clear-cut solution for the problems relating to determination of various conceptions of legitimacy, i.e., legitimacy of origin vis-à-vis legitimacy of exercise and internal legitimacy vis-à-vis external legitimacy.⁷¹

For example, the United States intervention in Grenada involved a debate about the legitimacy of alleged invitation of the United States' military by the Governor General of Grenada.⁷² The debate following the Grenada episode turned not only on the existence of any such invitation, but also on the legal capacity of the Governor General to extend an invitation on behalf of the Island.⁷³ Justifying United States' intervention in Panama, the U.S. State Department invoked the right to assist the "lawful and democratically elected government in Panama".⁷⁴ However, the "lawful and democratically elected government" referred to above, had been prevented from taking office by General Noriega, *de facto* "chief executive officer", and the point of contention was therefore whether an elected head of State that was prevented from taking the oath of office could have the legal authority to invite external forces into the country.⁷⁵ Responding to this contention, Shaw held the view that the notion of a legitimate and democratic government that has not yet taken office inviting an external armed force "runs counter to the test of acceptance in international law of governmental authority, which is firmly based upon effective control rather than upon the nature of the regime, whether democratic, socialist or otherwise".⁷⁶

Even in situations where the government is a legitimate representative of the people, most writers argue that "the traditional rule of permitting third-

⁷¹ See generally Jean D'asprenmont, *infra* note 114.

⁷² Malcolm N. Shaw, *supra* note 49 at 1042.

⁷³ J. N. Moore, Law and the Grenada Mission, Charlottesville, in Malcolm N. Shaw, *supra* note 49 at p-1042.

⁷⁴ See Malcolm N. Shaw, *supra* note 49 at 1042.

⁷⁵ *Id* at p-1042.

⁷⁶ *Id* at p-1042.

party assistance to governments would not extend to aid where the outcome of the struggle has become uncertain or where the rebellion has become widespread and seriously aimed at overthrowing the government.”⁷⁷

In a nutshell, the above argument seems to support the view that even a legitimate government lacking effective control or on the verge of losing effective control to rebels, forfeits its legal authority to invite external forces into the country to maintain its grip on power. However, if the government’s military power to maintain its authority is not put to question, international law allows such intervention of foreign forces by invitation in domestic affairs as an exception to the non-intervention doctrine embodied in Article 2(7) of the UN Charter.⁷⁸

On a more general level, the UN Charter clearly prohibits interference in matters “which are essentially within the domestic jurisdiction of any State”.⁷⁹ At the same time, the Charter envisages the right of the people within the State to exercise their right to self-determination through election and other legitimate methods recognized under international law.⁸⁰ Furthermore, Article 1 common to the two international human rights covenants of 1966 provides for the right to self-determination of all peoples and requires State parties to refrain from any conduct that interferes with the rights of “all peoples to determine their political status and to freely pursue their economic, social and cultural development”.⁸¹

⁷⁷ See Q. Wright, ‘US Intervention in the Lebanon’, 53 AJIL, 1959, p-112, 122; Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (1993), p-23; David Wippman, *supra* note 56 at 440;

⁷⁸ See Malcolm N. Shaw, *supra* note 49 at 1043; David Wippman, *supra* note 56, 446.

⁷⁹ UN Charter, *supra* note 16 at 2(7).

⁸⁰ *Id* at 1(2). Though some might argue that self-determination is meant for colonial States, the significance of the right still looms larger in the post colonial era and extends to such issues as the right of an organized political community to change their government according to their own wishes and by resorting to any method recognized by international law.

⁸¹ See the International Covenant on Civil and Political Rights, *infra* note 144 at art.1. The International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27, art. 1; The African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I. L. M. 58 (1982), entered into force Oct. 21, 1986, art. 20; The Charter of Economic Rights and Duties of States, Adopted by General Assembly, 1974, States “no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights”.

Elaborating on the right to self-determination of all peoples enunciated in the UN Charter, the Declaration on Friendly Relations proclaimed the duty of every State “to refrain from any forcible actions which deprive peoples . . . of their right to self-determination and freedom and independence”.⁸² Indeed, the Declaration affirms the rights of peoples “to seek and receive support” in their struggle and resistance against forcible actions that encroaches upon the enjoyment of the right to self-determination.⁸³ Furthermore, the Declaration imposes a duty on States to refrain from any practice that hinders peoples’ right to self-determination.⁸⁴ For example, it explicitly prohibits States from providing military, financial and other logistic supplies for parties in an internal conflict.⁸⁵ Indeed, self-determination, as a norm of *erga omnes*⁸⁶ character not only requires them to refrain from actions that jeopardize the rights of peoples to enjoy it but also imposes a positive obligation on States to support the realization of peoples’ aspiration for self-determination.⁸⁷ In all other cases, however, international law leaves internal matters to internal forces consistently with international law while it certainly prohibits the use of any coercive force between sovereign States. In essence, this prohibition flows from the inevitable fear that these interventions by way of military and other logistic supplies could potentially “disrupt the internal play of forces, and thereby violate the political independence of the State and the right of its people to determine their own political future”.⁸⁸ It is a principle that stems from a simple premise that peoples are the makers of their own destiny and places an absolute prohibition on the right of intervention particularly when

⁸² GA Res. 2625(XXV), *supra* note 38.

⁸³ *Id* at Principle (e).

⁸⁴ *Id.*

⁸⁵ *Id* at Principle (e); David Wippman, Military Intervention, Regional Organizations, and Host-State Consent, 7 Duke J. Comp. & Int’l L. 202, 212.

⁸⁶ Barcelona Traction, Light and Power Co. Ltd, (Belgium v. Spain), 1970, ICJ 3, 32(Feb.5); Reservations to the Genocide Convention, (Advisory Opinion of 28 May 1951), p- 8; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I. C. J Reports, (2004), p-199, para-155; East Timor Case, I. C. J Reports(1995), p-102, para-29, describing the *erga omnes* character of the right to self-determination as “irreproachable”.

⁸⁷ GA Res. 2625(XXV), *supra* note 38, Principle (e); Georges Abi-Saab, *The State as a Primary Fact Compelling Acknowledgment by International Law*, in Marcelo G. Kohen (ed.), *Secession: International Law perspectives*, (Cambridge) (2006) at 470-3; Christian Tomuschat, *Secession and Self-determination* in Marcelo G. Kohen (ed.), at 23-5.

⁸⁸ *Id.*; Oscar Schachter, *supra* note 18 at 1645.

the ability of the inviting party to maintain itself without foreign assistance is in question.⁸⁹

The Transitional Government of Somalia was formed in 2004 by Somalia's clan leaders and war lords in Nairobi, Kenya, on the basis of a 4.5 matrix of power distribution among Somalia's clans.⁹⁰ Nevertheless, the UN Monitoring Group on Somalia conclusively found that the TFG would have been unable to maintain control over the Somali people and its territories if it were not for the support of the Ethiopian military forces.⁹¹ At the time the TFG was constrained to the town of Baidoa near the Ethiopian border, the UIC had been exercising wide territorial control over much of Somali territory including the capital Mogadishu—effectively compromising and weakening the moral and legal standing of the TFG—posing as an indispensable *de facto* regime in Somalia.⁹² Moreover, the UIC did not only exercise its authority by force but also seems to have enjoyed at least some degree of popular support in areas that were under its control.⁹³ In effect, two competing factions claiming to be the legitimate government of Somalia emerged. This compelled the international community to take note of the factual circumstances on the ground to decide with which of the factions it would have to deal. The question, then, will be: how can we legally determine the faction best placed to speak for the Somali State and invite foreign forces into the country? It is on this very question that the legitimacy of Ethiopia's claim of invitation turns.

Other things remaining constant, legitimacy and effective control have become the two indispensable requirements necessary for the determination

⁸⁹ David Wippman, *supra* note 56, 446.

⁹⁰ International Crisis Group Report, SOMALIA: TO MOVE BEYOND THE FAILED STATE, African Report No.47, 23 December 2008. "The 4.5 formula was first adopted by the Transitional National Government in 2000. It allocates an equal number of seats in parliament to each of the four major clan-families – the Darood, Hawiye, Dir, and Digele-Mirifle – and half that number to remaining minority groups. The proposed formula for clan representation in parliament envisions 400 seats divided evenly between the four major clan groups, and minority groups collectively receiving half as many seats as a major clan (i.e., 84 seats for each major clan, 42 seats for minorities and 22 additional seats to be allocated at the discretion of the Technical Committee)."

⁹¹ See Report of the Monitoring Group on Somalia, *supra* note 3, Summary, para-2.

⁹² Ethiopia Invades Somalia; US Assists with Attacks in Somalia against Islamist Militants and Kills One Al-Qaeda Leader, December 24, 2006-January 2007: , at <http://www.historycommons.org/entity.jsp?entity=islamic_courts_union_1>, (Last Accessed 13 May 2009).

⁹³ The BBC News, Somalia's Islamic Courts, available at <http://news.bbc.co.uk/1/hi/5051588.stm>, (Last accessed 04 November 2009).

of the faction best situated to speak on behalf of the State. While the requirement of 'effective control' seems relatively factually verifiable, the question of legitimacy of governments involves unending debate. If legitimacy and effectiveness are the two yardsticks against which we can test the validity of Ethiopia's intervention by invitation, were these conditions present? The following sections will be devoted to the assessment of the presence of these conditions.

3.1-The Requirement of Effectiveness

The concept of effective control finds expression in several areas of international law ranging from the determination of statehood and governmental authority to questions of attribution of responsibility. 'Effective control' is an imperative test in international law not only for the determination of the establishment of the State as a safe and determinate international person but also for governments to act as the international faces of their respective States. In terms of governments, the effective control test relates to the ideals of independence and sovereignty and carries with it the right of the State itself. For Oppenheim, for example, effective government relates to the question of sovereignty. In his own words:

There must be a sovereign government. Sovereignty is supreme authority, which on the international plane means — legal authority which is in law not dependent on any other earthly authority. Sovereignty in the strict and narrowest sense of the term implies, therefore, independence all rounded within and without the borders of the country.⁹⁴

In this sense, the effectiveness of the government in question highlights the political independence and sovereign authority of the State itself. However, when there are competing factions claiming to be representatives of the State, the question turns into a comparison between the competing factions and identifying one that displayed a better measure of control of the State so that it reflects the independence and sovereignty of that State.

However, in the absence of one entity capable of maintaining itself without external aid, invitation to intervene militarily cannot be lawfully granted.⁹⁵ Such intervention no doubt alters the internal structure of forces. Indeed, any military intervention that ultimately changes the interplay of forces domestically and determines the outcome of the struggle constitutes a violation of the non-intervention principle and hence an unlawful

⁹⁴ R. Jennings and A. Watts, *supra* note 68, p-122.

⁹⁵ Jennings, Watts and Oppenheim, *supra* note 68 & 69; See also *supra* notes 76, 77.

intervention.⁹⁶ Clearly, we know from the various reports to the Security Council by Somalia's Monitoring Group that neither the TFG nor the UIC could have achieved whatever level of control they achieved at the relevant time had it not been for the military and logistic support they received from external forces in violation of the binding Security Council arms embargo resolution.⁹⁷ In relevant part, the Monitoring Group noted:

[T]he principal sources for the overall military build-up involving arms, military materiel and foreign military personnel can be variously attributed to ten (10) States, as follows: Djibouti, Egypt, Eritrea, Ethiopia, Iran, Libya, Saudi Arabia, Syria, Uganda and Yemen. Of the foregoing States, seven (7) are aligned with the ICU, as follows: Djibouti, Egypt, Eritrea, Iran, Libya, Saudi Arabia, and Syria; the remaining three (3) States, Ethiopia, Uganda and Yemen, are aligned with the TFG.⁹⁸

The ability of the government to invite an external force depends on its ability to manifest the independence and sovereign authority of the State.⁹⁹ Even though international recognition is vital in constituting a government of State externally, the inviting party must have the political and territorial independence necessary to enter into international relations with other States. However, Somalia and the TFG did not seem to meet the prerequisite criteria of independence and sovereignty at the relevant time.

In the words of the Permanent Court of International Justice, independence of the government pertains to "the sole right of decision in all matters of economy, politics, financial or other"¹⁰⁰ and is the centerpiece requirement of statehood. The Court has described independence in an even stronger terms when it characterized independence as "the normal condition of States according to international law; it may also be described as sovereignty, by which it is meant that the State has over it no other authority than that of international law".¹⁰¹ In the *Island of Palmas Case*, the Arbitrator, Judge Huber, enunciated the quintessential connection between independence

⁹⁶ See Q. Wright, *supra* note 77; R. A. Falk, *supra* note 54.

⁹⁷ In its 2006 Report to the Security Council, the Monitoring Group has enlisted 10 States that in one or another way intervened in a matter that is entirely within the Somali affairs; *supra* note 3 at p-44.

⁹⁸ Report of the Monitoring Group on Somalia; *supra* note 3, at 44.

⁹⁹ J. Crawford, Too Much too Soon, available at <<http://www.heinonline.org/HOL/Page?handle=hein.journals.EuropeanJournalofInternationalLaw>>, p-2, (accessed on 3 May 2006); See also David Wippman, *supra* note 56 at 450.

¹⁰⁰ *Austro German Customs Union Case*, PCIJ, series A/B No 41, at 57-58 (1931)[however note that this decision was rendered in 1931 and does not take the Charter provisions into account].

¹⁰¹ *Ibid.*

and statehood when he pronounced that: "independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of the State".¹⁰² If non-intervention, as a matter of principle, is meant to protect the sovereign authority of the State and the democratic will of its citizens, not of the governments, and if the test of an effective government which enjoys "political independence or territorial integrity" on behalf of the State is one that embodies the characteristics set forth in the Permanent Court of International Justice's judgment in the *Austro-German Custom's Union* case or the one enunciated in the *Island of Palmas case*, the TFG is nowhere near such level of political independence.

For almost two decades, there has not been an effective and functional government that represents the Somali State internally and expresses its will externally. At the time Ethiopia sent its training and advising force, the TFG was certainly not such a force capable of maintaining itself without the Ethiopian government's active military and diplomatic assistance. According to the Monitoring Group, since both the TFG and the UIC "are overwhelmingly reliant on States for support", neither of them had the "means" to survive and act independently of the support they received from external forces¹⁰³. As a result, the TFG lacks the effective territorial control test necessary and so fundamental in the assessment of the validity of invitation under traditional international law.¹⁰⁴

However, post 1945 developments in international law, particularly the emergence of the UN Charter, the two 1966 Human Rights Covenants and regional human rights instruments have fundamentally changed older conceptions of 'governments' and unleashed new understandings of governments. Contemporary international law now requires not only

¹⁰² *Island of Palmas Case*, (Netherlands v. USA), 2RIAA, 829, 838 (1928). [This decision was taken in 1928, long before numerous applicable rules have emerged. Rules of present day international law have deviated from this strict requirement of effectivity and also required legitimacy.]

¹⁰³ *Id* at p-43.

¹⁰⁴ Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 *Am. J. Int'l L.* 503, 510 (1990) contending that the "virtually uniform practice in international relations of treating any group of nationals in effective control of their State as constituting its legitimate government"); Igor I. Lukashuk, *The United Nations and Illegitimate Regimes: When to Intervene to Protect Human Rights*, in *Law and Force in the New International Order* 143, 152 arguing that classical international law recognizes effective control of the State's territory as "the only basis for recognizing a regime"; Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 1985 *Brit. Y.B. Int'l L.* 189, 190 in David Wippman, *supra* note 56 at 440.

compliance with the factual requirements but also of the legal requirements.¹⁰⁵ It is these fundamental changes recognized by eminent international law authorities, notably J. Crawford,¹⁰⁶ Marcelo G. Kohen,¹⁰⁷ Christian Tomuschat,¹⁰⁸ Andrew Clapham,¹⁰⁹ M. N Shaw and Théodore Christakis,¹¹⁰ which strengthened the importance of the existence of a legitimate right and a due process in constituting a government that can speak for the State. Christakis, for example, wrote that the maxim *iniuria ius non oritur* defines the limits placed by the law on the principle of effectiveness.¹¹¹ As a result of these shared principles and the mushrooming of overarching international human rights regimes, legitimacy has become the centerpiece requirement of a governmental authority necessary to speak on behalf of the State. In what follows, I will examine the notion of legitimacy under international law and situate the TFG in that context.

3.2- The Requirement of Legitimacy

The debate over the notion of legitimacy springs from the nature of the idea of legitimacy itself and the multifaceted confluence of competing political interests involved in the determination of a faction/government as legitimate or otherwise. Although it is a highly regarded and most frequently referred principle of law and politics, the normative content and substance of legitimacy have remained as illusive a concept as ever.

Wippman views the notion that requires the legitimacy of government as a “legal fiction central to the conduct of international relations”.¹¹² He argued that:

The legal fiction that the government speaks for the State rests in turn on another legal fiction: that the State consists of a single, self-determining political community. As members of a single community, the citizens of the State form a government through an internal process that is unique to each State and entitled to the respect of other States. Because the government is formed by the political community of the State, it is entitled to represent the State.¹¹³

¹⁰⁵ Théodore Christakis, *The State as a Primary Fact: Some Thoughts on the Principle of Effectiveness*, in Marcelo G. Kohen, *supra* note 87 at 139.

¹⁰⁶ James Crawford, in Marcelo G. Kohen, *supra* note 87.

¹⁰⁷ Marcelo G. Kohen, *supra* note 87 at 3.

¹⁰⁸ Christian Tomuschat, in Marcelo G. Kohen *supra* note 87.

¹⁰⁹ Andrew Clapham, in Marcelo G. Kohen, *supra* note 87.

¹¹⁰ Théodore Christakis, *supra* note 105.

¹¹¹ *Id.*

¹¹² David Wippman, *supra* note 56 at 625.

¹¹³ *Id.*

Although the consent of a government that meets the test of legitimacy stipulated in Wippman's characterization may validate intervention, a complex set of issues peculiar to the Somali politics, i.e., the absence of one decisive faction with stronger claim to effectiveness and legitimacy and Somalia's place in international legal and political order over the last two decades, renders this assessment unusually difficult. Wippman's analysis may not have envisaged a "failed-State" situation like Somalia and hence might not be held to be reflective of the real internal dynamics of the failed Somali State. Regardless, no matter how exceptional Somalia's situation may be, there is nothing that justifies a departure from internationally recognized rules in the analysis of the legality of intervention and invitation.

In the aftermath of the cold-war ideological confrontation between the East and West, democracy has become the "touchstone of legitimacy"¹¹⁴, and become "a prominent yardstick with which to assess the legitimacy of governments".¹¹⁵ Even before the burgeoning of the global human rights regimes, Roth notes, "almost all States—whether liberal democracies, one-party revolutionary States, military dictatorships, or traditionalist regimes—subscribed to the notion that 'the will of the people' constitutes the ultimate source of governmental legitimacy".¹¹⁶ Speaking to the Ghanaian Parliament in his first trip to Sub-Saharan Africa as President of the United States, Barack Obama, set the tone for the quintessential notion of legitimacy when he said: "But history offers a clear verdict: Governments that respect the will of their own people, that govern by consent and not coercion, are more prosperous, they are more stable, and more successful than governments that do not".¹¹⁷ But, the question is, how should we articulate legitimacy in a failed State context where constituting governments by a secret ballot is simply not an option? In whose eyes should a government be legitimate: its own people or other members of the international community? Should we emphasize on the legitimacy of origin or legitimacy of exercise? These are the issues that raised stern debate among writers and they will be discussed below in the light of Somalia's particular situation.

¹¹⁴ Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT'L L. 596, 599(1999) in Jean D'aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. Int'l L. & Pol. 877, 887.

¹¹⁵ Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 494 (2001) in Jean D'aspremont, *supra* note 114.

¹¹⁶ B. R. Roth, *Governmental Illegitimacy in International Law* (2000), in Jean D'aspremont, *supra* note 114 at 884.

¹¹⁷ Remarks by the President of the United States of America, Barack Obama, Accra International Conference Center, Accra, Ghana, July 2009.

In his landmark article titled: *Legitimacy of Governments in the Age of Democracy*, D'aspremont calls for the deconstruction of what he calls a 'monolithic' conception of legitimacy which saw the whole idea of legitimacy as nothing more than legitimacy of origin.¹¹⁸ Recognizing the emphasis of international scholarship on the legitimacy of origin, which holds the view that "a government is legitimate if it rests on the 'will of the people' expressed through a free and fair electoral process", D'aspremont calls for a holistic approach at legitimacy requiring not only legitimacy of origin but also legitimacy of exercise, which holds that "a government is legitimate if it exercises its power in a manner consistent with basic political freedoms and the rule of law".¹¹⁹ In the context under consideration, since none of the two competing factions have emerged from a ballot box, these two aspects of legitimacy may not be as helpful.

On the other hand, Professor Thomas Frank's groundbreaking work, *The Right to Democratic Governance*, transformed the notion of legitimacy from a purely domestic agenda into an international agenda, unleashing a new theory of democratic entitlement in international law.¹²⁰ The democratic entitlement theory advanced the view that legitimacy of government should be determined not solely on the basis of internal criteria but also 'universal criterion of democracy'.¹²¹ Reisman, another pioneer proponent of the democratic entitlement school, for example, asserted people's entitlement to an international right to "popular government".¹²² The advent of the international human rights enterprise buttressed the view that the question of legitimacy of governments is not purely a matter left to the internal process of States, but rather a matter for international concern.¹²³ Anchoring their arguments in the emerging "right to democratic governance" deriving from "the right to political participation" stipulated in various international human rights instruments, the democratic entitlement school of thought contends that

¹¹⁸ Jean D'aspremont, *supra* note 114 at 880, 888.

¹¹⁹ *Id.* at 899.

¹²⁰ Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 48 (1992), 48.

¹²¹ *Id.*

¹²² Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 Fordham Int'l L. J. 794, 795.

¹²³ See the UDHR, *infra* note 145 art. 20 (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will, shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

in addition to an internal requirement, the legitimacy of government should also be determined by international standards.¹²⁴ The sustained call for the determination of government's legitimacy through an external criterion brought into the light a new brand of legitimacy referred to as 'external legitimacy'. This brand of legitimacy essentially takes into account Frank's and Riesman's legitimacy of origin rather than D'aspromont's legitimacy of exercise. Debunking the approach of the democratic entitlement school, D'aspromont rejected what he saw as a narrow conception of legitimacy when he said:

The authors of the democratic entitlement school interpret "democracy" as a narrow and process-oriented concept defined by the holding of periodic elections. The understanding of democracy as a procedural requirement is not only supported by the authors of the democratic entitlement school but has also been endorsed by many other authors. It can be traced back to Mill's, Bentham's, and, later, Schumpeter's instrumental and utilitarian understandings of democracy. . . I disagree with this procedural understanding of democracy.¹²⁵

On the other hand, the question of whether the kind of legitimacy required is internal-how a government is perceived by its own people, or external -how that government is perceived in the eyes of governments of other States, is another hotly contested issue.¹²⁶ In the words of D'aspromont, notwithstanding the geopolitical and strategic considerations which so rampantly dominated international relations, "the external legitimacy of an authority has come to depend almost entirely upon its democratic character" since the last decade of the 20th century.¹²⁷ Although external legitimacy theoretically requires the legitimacy of origin, it is ultimately decided upon entirely by the foreign government's reading of the situation: their desire to enter into or continue existing relations with the new government. This renders the relevance of internal legitimacy as a measure of governmental legitimacy—one that has the legal capacity to speak for the State in the international system—essentially negligible.¹²⁸ According to this view:

International law is only concerned with the way in which a government's legitimacy is perceived by other international authorities. In that sense, the application of international law is not directly contingent upon the perception of the people, although it cannot be excluded that the internal legitimacy of a given

¹²⁴ Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 543, 596; See also Thomas Franck, *supra* note 120 at 48.

¹²⁵ Jean D'aspromont, *supra* note 114 at 891.

¹²⁶ *Id* at 882.

¹²⁷ *Id* at 887.

¹²⁸ *Id*.

authority affects the way other actors assess the external legitimacy of that authority.¹²⁹

The TFG is not a product of a ballot. It was born out of years of negotiations between the various factional warlords of Somalia through the Nairobi processes.¹³⁰ Since legitimacy of origin emphasizes on “the will of the people . . . expressed in periodic and genuine elections . . . held by secret vote or by equivalent free voting procedures”, the Nairobi and later the Djibouti processes¹³¹ are incomparable to the requirements of legitimacy of origin. Thus, the TFG does not meet the test of legitimacy of origin.

Is it internally legitimate, i.e., is it perceived by the Somali people as their legitimate representative on the international plane even if it was not elected by them? Although internal legitimacy, as legitimacy of origin, requires the free and expressed will of the people through periodic election as a prerequisite, Somalia’s unique situation might compel one to consider subsequent approval or support for that government by the people. Even when one considers the subsequent practices of the Somali public, although this could be contested as an unwarranted assertion, there is no evidence to suggest that the TFG masters more public support than its rivals and therefore more legitimate in front of the Somalis than the UIC.

¹²⁹ See Stefan Talmon, Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law, in Jean D’aspremont, *supra* note 114 at 883.

¹³⁰ The Nairobi Process refers to the conference between Somalia’s clan based warlords that negotiated the formation of the Transitional Federal Government of Somalia between October and November of 2004 in Nairobi, Kenya. This conference was concluded with the election of 275 members of the Somali parliament, the adoption of the Transitional Federal Charter and the election of the now replaced President Abdullahi Yusuf, for details on this, visit http://en.wikipedia.org/wiki/History_of_the_Transitional_Federal_Government_of_the_Republic_of_Somalia; (Last accessed 4 November 2009).

¹³¹ The Djibouti process, although not a re-negotiation of the terms of the Transitional Federal Charter, was an all inclusive effort at reconciliation mediated by the UN with support of major international players. The election of Sheikh Sharif Sheikh Ahmed, former member of the UIC, as Somalia’s President is an emblematic evidence of the inclusive character of this process. However, no matter how inclusive and who led the mediation process, the Djibouti process is incomparable with a free and fair election in which the wish of citizens is democratically manifested. Without reducing the importance of such steps at forming a condition necessary for such an election, the process itself, does not amount to election in the traditional sense. For more on this, visit <http://www.apsta-africa.org/news/article290109.php>, (Last accessed 04 November 2009).

Is it externally legitimate, i.e., perceived by governments of other States as legitimate? In contemporary international law, external legitimacy is anchored in and derives from legitimacy of origin. Individual governments usually declared their intention by bestowing recognition upon the faction they individually deem legitimate and hence a legitimate government of that State. However, the peculiarity of the situation in Somalia does not afford possibilities for elections. This unique situation dictated by almost two decades of Somalia's violent political past coupled with the discretionary character of the international law rules relating to recognition of governments, could lead one to the conclusion that the TFG has an external legitimacy. Indeed, the international community, both collectively and individually, recognized the TFG and its Transitional Charter as the only viable means towards the reconstruction of the Somali State. By May of 2006, the TFG was allowed to take Somalia's seat in all the major international organizations such as the United Nations, the African Union, IGAD, the Arab League and several other international organizations and accepted to membership of the Inter-Parliamentary Union.¹³² According to International Crisis Group report, the unprecedented level of international recognition and support extended to the TFG implicitly suggests its relative ability to be seen as Somalia's international face.¹³³

Given the geopolitical and strategic significance of Somalia and the extremist elements within the UIC, the community of nations has no option but to recognize the TFG. As recognition is granted, at least pursuant to the contention of the democratic entitlement school, in consequence of acknowledgment of the legitimacy of a government¹³⁴, the overwhelming recognition bestowed upon the TFG could be seen as an affirmation of the external legitimacy of the Transitional Federal Government of Somalia. Therefore, according to this view, as a legitimate government recognized by an overwhelming majority of the States of the world, the TFG could be seen to have the capacity to speak for the Somali State and hence lawfully extend invitation to the Ethiopian government. However, even if one accepts this narrow but practical conception of legitimacy, it only answers part of the larger question.

Indeed, Ethiopia links the validity of its invitation not so much to the notion of constitutional legitimacy and territorial effectiveness of the TFG,

¹³² *Id.*

¹³³ International crisis Group, Somaliland: Time for African Union Leadership, Africa Report N°110, 23 May 2006, p-3.

¹³⁴ Jean D'aspromont, *supra* note 114 at 901.

rather on the unprecedented global recognition bestowed on the TFG.¹³⁵ Indeed, the requirement of recognition of government is as important an issue in international law as the requirements of effective control and legitimacy.¹³⁶ However, if one views international recognition as constituting international legitimacy, one cannot avoid asking what counts in international law, international or internal legitimacy, in constituting governments for a country.

Somalia has been and is a member State of the United Nations and its Statehood has never been contested.¹³⁷ Although recognition of change of government is considered essential in determining future relationships with that State, such recognition would not affect the international legal personality of the State itself which is “perpetual and unaffected by the change of its agents”.¹³⁸ Consequently, the absence of a meaningful government in Somalia does not affect Somalia’s international personality. However, since the question at issue is the legitimacy of the government of Somalia, rather than the statehood of Somalia *as such*, the question then turns on whether international recognition constitutes conclusive evidence of a legitimate government as it constitutes conclusive evidence of statehood.¹³⁹ For TFG and its allies, legitimacy is national through the Kenyan and Djibouti Processes and international through recognition by the UN, AU and

¹³⁵ See the Response of the Ethiopian Government to the Monitoring Group on Somalia, *supra* note 11; Somalia has been a member State of the United Nations and its Statehood has not been challenged at any time after 1991. However, it was a State without any government, effective or otherwise, for almost 18 years. The Security Council has taken the opportunity to recognize the federal government and the Federal Charter in resolution 1725/2006 as the only route to peace and stability declaring “Reiterating its commitment to a comprehensive and lasting settlement of the situation in Somalia through the Transitional Federal Charter, and stressing the importance of broad-based and representative institutions and of an inclusive political process, as envisaged in the Transitional Federal Charter”.

¹³⁶ Gerhard von Glahn, *Law Among Nations*, 62 (4th ed.) (1981), Affirming that: “unless a group of people possessing territory and governmental institutions also possess independence- i.e., the ability to regulate its internal affairs without outside interference or control-that group cannot claim to be a State. This necessary ingredient, independence, must be as absolute as the modern legal order of the world permits it to be”.

¹³⁷ Awol K. Allo, *Fundamental Principles of Recognition in International Law and the Question of Palestine: A Critical Appraisal of the Factual Situations and the UN Resolutions*, LL. B thesis, (Unpublished Paper, Addis Ababa University, Faculty of Law), p-29.

¹³⁸ D. P. O'Connell, *International Law*, V. I, (2nd ed), (Steven & Sons), (London: 1970), p-145 in Awol K. Allo, *id.*

¹³⁹ See I. Brownlie, *supra* note 18, p-100.

other major international organizations.¹⁴⁰ As a result, this view holds that the TFG is a legitimate government and, therefore, capable of extending lawful invitation to Ethiopia. Those opposed to the TFG, including the UIC, contend that external forces have no basis whatsoever to constitute a government for Somalia and the Somali people alone can constitute a government for the State of Somalia.¹⁴¹

Le Mon has made a survey of interventions justified on claims of invitations since the second half of the 20th century. Having analyzed existing debates in each case, he concludes that “a determination of the legality of an intervention by invitation centers on the external legitimacy of the inviting government regarding the exercise of the sovereign rights of the State”.¹⁴² Le Mon anchors his conclusion not necessarily on a settled rule of international law but rather on the dictate of pragmatism. To that end, he observed that:

Though international legal relations exist between States, not governments, questions emerge when multiple competing factions claim to be the legitimate government of a recognized State. Whenever such a situation presents itself, other States must determine which faction is deemed to legally represent the State. Such decisions will be more predictable and sound if they are made in line with a legal doctrine regarding governmental recognition.¹⁴³

On the contrary, others argue that the notion of government is essentially intertwined, both legally and conceptually, with the free and expressed not even implied, consent of the people of the State and as such, the argument goes, recognition by other States cannot constitute a government for the State or determine a faction best suited to represent the State. According to this view, therefore, recognition doesn't seem to weigh too heavily as to be the determining factor around which the legitimacy of a government turns.¹⁴⁴

Furthermore, in the words of the Universal Declaration of Human Rights and the ICCPR, “the will of the people” alone constitutes the basis “of authority of the government” and it shall be expressed in periodic and

¹⁴⁰ Jama Ali Ahmed, Somali Minister for Foreign Affairs, with Riz Khan, *Al Jazeera*, available at <http://www.youtube.com/watch?v=Ur7k9_nwbzQ>, (Last accessed 23 July 2009)

¹⁴¹ Opposition Leader in Somalia speaking to Al Jazeera, available at <http://www.youtube.com/watch?v=Ur7k9_nwbzQ>, (Last accessed 23 July 2009).

¹⁴² Christopher J. Le Mon, *supra* note 66 at 742.

¹⁴³ *Id* at 744-745.

¹⁴⁴ See The International Covenant on Civil and Political Rights, (Adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS, 171, (hereinafter ICCPR), art. 25; See James C. N. Paul and Christopher Clapham, *Ethiopian Constitutional Development*, (Faculty of Law: Haile Sellassie I University), 1967, pp-38-9

genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".¹⁴⁵ For the same reason, the unprecedented level of recognition bestowed upon the TFG, does not, of it self, confer a better right on it nor does it entitle it to invite a foreign force into the country. This means that, viewed from the point of view of international human rights instruments, the argument that international recognition and the Kenyan and Djibouti processes respectively confer international and national legitimacy on the TFG contradicts the principles of legitimate government. However, in exceptionally fragile security environment in which adherence to the standards of international human rights regimes is virtually impossible, i.e., holding election, external legitimacy, i.e., recognition, alongside the 'effective control' test, remains to be the only sensible determinant of the faction best placed to speak for the State. However, even if the TFG is said to be a legitimate representative of the Somali State (external legitimacy), its lack of effective control at the relevant time, strips it of its authority to invite foreign forces for the sole purpose of using them for an activity that is usually undertaken by the government of the State.

There are several cases of intervention of one State in the internal affairs of other States and justified under the rubric of invitation from lawful internal authorities. Although some of these are lawful interventions through invitations,¹⁴⁶ some have failed to meet the requirements of the law and hence declared illegal by the international community. For example, the United States has defended its intervention in Dominican Republic in 1965, Grenada in 1983 and Panama in 1989, among other things, on the basis of invitation by

¹⁴⁵ See Universal Declaration of Human Rights, G.A. Res. 217A, at 75, U.N. GAOR, 3d. Sess., 183 plen. Mtg., U.N. Doc A/810 (Dec. 10, 1948). See also, G.A. Res. 49/190, U.N. Doc. A/RES/49/190 (Dec. 23, 1994); G.A. Res. 48/131, U.N. Doc. A/RES/48/131 (Dec. 20, 1993); G.A. Res. 47/138, U.N. Doc. A/ RES/47/138 (Dec. 18, 1992); G.A. Res. 52/129, U.N. Doc. A/RES/52/129 (Dec. 12, 1997); G.A. Res. 56/159, U.N. Doc. A/RES/56/159 (Dec. 19, 2001). G.A. Res. 46/137, U.N. Doc. A/RES/46/137 (Dec. 17, 1991); G.A. Res. 43/157, U.N. Doc. A/RES/43/157 (Dec. 8, 1988); G.A. Res. 45/150, U.N. Doc. A/RES/45/150 (Dec. 18, 1990).

¹⁴⁶ The intervention of United Kingdom at the request of the legitimate leader of the State of Jordan in 1958, Muscat and Oman in 1957, Uganda, Kenya and Tanganyika in 1964, and Zambia in 1965. France has intervened militarily in Chad at least on three occasions over the course of five years, in Zaire in 1978 at the request of the leaders of the State and no unlawful intervention has been found. India intervened in 1987 in Sri Lanka to help restore order the country with at the invitation of the Sri Lankan government.

“lawful authorities” of these States.¹⁴⁷ The Soviet Union invaded Hungary in 1956, Czechoslovakia in 1968 and Afghanistan in 1979 and argued that its military intervention was justified by the invitation of the respective governments of the three States.¹⁴⁸ Despite the contention of the USA and the Soviet Union to have been invited by what they considered to be legitimate authorities of these States, the debate has centered, not so much on the validity of the invitations, but rather, on the existence of any such invitations.¹⁴⁹

With the notion of State sovereignty come government’s responsibility towards its own people and the community of nations. In order to protect an essential interest of the State and its people, States are at liberty to extend invitation to other States. However, that invitation must be lawful, legitimate and consistent with the wishes and aspirations of the peoples concerned. Viewed in that light, the interventions by the USSR and the USA have not met the minimum threshold and said to have constituted a violation of the Charter and the doctrine of non-intervention.¹⁵⁰ Indeed, let alone a government as fragile as the TFG, in the words of David Wippman, even a “purely internal challenge to the government’s authority, if it is of sufficient magnitude, theoretically strips the government of its right to receive outside

¹⁴⁷ David Wippman, *supra* note 70 at 621. See M. N. Shaw, *supra* note 49 at 1033 where he argues that the protection of its nationals abroad was also another reason used for the intervention; Center for Constitutional Rights, White Papers, 100 Days to Restore the Constitution, Amend the War Powers Resolution, available at, <http://www.asitrid-online.it/~Riforma-/Documenti/CCR_100-days_WarPowers.pdf>, (Last accessed 22 July 2009), p-9.

¹⁴⁸ UN SCOR, 746th mtg 4, UN Doc S/PV.746 (1956) (Hungary); UN SCOR, 23d yr, 1441st mtg 1, UN Doc S/PV.1441 (1968) (Czechoslovakia); UN SCOR, 35th yr, 2185th mtg 2, UN Doc S/PV.2185 (1980) (Afghanistan) in David Wippman, Treaty-Based Intervention: Who Can Say No? 62 U. Chi. L. Rev. 607, 620.

¹⁴⁹ Id. See also GA Res. 1004, 1005 and 1006(ES-II)(1956); Report of the UN Special Committee on the Problem of Hungary (1957, UN Doc. A/3592 in Robert Jennings and Arthur Watts, foot note 14, p-436. On Afghanistan, see GA Res. ES-6/2, 14 January 1980. These claimed invitations were considered as either “manufactured or coerced” and as such widely criticized. “Invitation of the United States by the Lebanese government, the invitation of the USSR by the dubious government of Afghanistan, Libya and French Intervention in Chad are among examples of intervention justified on the basis of one or another form of invitation”. See Dixon and Robert MacCorquodale, *supra* note 49 at 558, referring to those claims as a case of ‘fabricated invitations’.

¹⁵⁰ David Wippman, *supra* note 56 at 450, arguing that “most States were openly critical of US military interventions . . . though there was some level of recognition that the United States’ intervention in each case was, arguably designed, at least in part, to establish a democratic government.”

assistance, on the ground that internal forces alone should decide the outcome of the conflict".¹⁵¹

Similarly, the TFG lacks the prerequisite elements of a legitimate and independent government in control of the territory of Somalia. As a result, it lacked the right to invite an outside force. Had it not been for Ethiopia, the TFG could not have maintained itself and survived the ever growing administrative control and offensive capabilities of the UIC.¹⁵² In other words, if the TFG was not capable of maintaining itself without Ethiopia's support, an external force, the intervention makes Ethiopia the ultimate decider on a matter that should have been decided upon only by the internal support competing factions mobilize.¹⁵³

4. Counter-Intervention: Offsetting A Prior Illegal Intervention

Percy Winfield once said that "the non-intervention rules appears to be a patent consequence of independence with a host of disorderly exceptions fastened on to it".¹⁵⁴ Although one can identify a host of arguable exceptions to the duty of non-intervention, counter interventions intended to offset a prior illegal intervention is one of the most recognized of the exceptions. Having ruled out the permissibility of intervention in the strongest terms, Jennings and Watts noted that "if there is outside interference in favor of one party to the struggle, other States may assist the other party".¹⁵⁵ Analogizing this notion with collective self-defense, the International Court of Justice has affirmed the right of a third State to intervene in the affairs of another if another State has already interfered in the internal affairs of that State.¹⁵⁶ Therefore, there is a broad consensus that an act of counter-intervention that is proportional to the circumstances occasioning the intervention and intended to protect the independence of the State from an illegal intervention is allowable in international law.¹⁵⁷

¹⁵² See Jeffrey Gettleman, In the Third Day of Fighting in Somalia, Worries of a Sharp Escalation By Ethiopian Forces, December 23, 2006, available at <<http://www.nytimes.com/2006/12/23/world/africa/23somalia.html>>, (accessed on 20 March 2009).

¹⁵³ David Wippman, *supra* note 56 at 450.

¹⁵⁴ Vaughan Lowe, International Law, Clarendon Law Series, Oxford University Series, 2007, at p-109

¹⁵⁵ Jennings and Watts, *supra* note 68 at 438.

¹⁵⁶ Timothy Thriller, *supra* note 30, p-253.

¹⁵⁷ Malcolm N. Shaw, *supra* note 49 at p-1041. Oscar Schachter, *supra* note 18 at 1642; See J. N. Moore, Law and the Indo-China War, in Malcolm N. Shaw, p-1041. The

Concurring with the holding of the ICJ in the Nicaragua case, Schachter is of the opinion that such form of counter-intervention is tantamount to a “collective-self-defense” since it aims at defending the State against foreign intervention.¹⁵⁸ However, Schachter’s approach to counter-intervention carries in mind an operating meaning, i.e., that there is a lawful internal authority in conflict with other internal forces and either the government or the other forces have received unlawful external assistance that justified counter-intervention by other States to defend the independence of the State. Schachter argued that “counter intervention may be justified as a defense of the independence of the State against foreign intervention”.¹⁵⁹ So for him, whether the assistance is provided to the government or other internal forces, as long as that assistance is illegal, counter-intervention is justified.¹⁶⁰ On the basis of these international norms of customary character, Ethiopia could obtain the legal right to intervene in Somalia with the view to balance a prior illegal intervention by other States.

Wippman approaches the issue from a different perspective and observed that:

A purely internal challenge to the government’s authority, if it is of sufficient magnitude, theoretically strips the government of its right to receive outside

USSR and Cuba defended their interventions in Angola during the country’s civil war “by reference to the prior South African intervention”. The United States justified its intervention in South Vietnam with reference to the intervention of North Vietnamese forces in the Southerners conflict.

¹⁵⁸ *Id.*

¹⁵⁹ David Shinn, Former US Ambassador to Ethiopia, The Ethiopia-Somali Conflict, December 28, 2006, available at <http://nazret.com/blog/index.php?title=the_ethiopia_somalia_conflict&more=1&c=1&tb=1&pb=1>, accessed, 21 February, 2008.

¹⁶⁰ Note the discussion in part II on the question of who can invite external forces into the State and when the government or the rebels can legally receive assistance from foreign forces. Jennings and Watts, however, held that “when there exist a civil war and control of a State is divided between warring factions, any form of interference or assistance (except probably of a humanitarian character) to any party amounts to intervention contrary to international law. In such a case the authority of any party to the conflict to be the government entitled to speak (and to seek assistance) on behalf of the State will be doubtful; and assistance to any party will prejudice the right of the State to decide for itself its form of government and political system”. Timothy Thriller added “States may now only intervene to assist a foreign government experiencing low level civil strife and only in such situations where the consent of the foreign government is freely given. Subject to the rules relating to self-determination, States may never give assistance to rebels, since to do so would contravene the prohibition on interference in the domestic affairs of another State”.

assistance, on the ground that internal forces alone should decide the outcome of the conflict. But if the challenge to the government's authority rests in part on external aid to the rebels, then application of the rule of non-intervention may not result in an outcome based on the support each party is able to muster internally. Instead, outside forces may determine the winner.¹⁶¹

On the basis of the above rules and authoritative opinions, if the TFG is effectively challenged by the UIC and their challenging ability has rested on the assistance external forces such as Eritrea accorded them, Ethiopia could have a legal basis to counter-intervention to prevent outside forces from deciding the outcome of the conflict in Somalia and hence prevent encroachment upon the national aspiration of the Somali people and the independence of their State. Among other things, the military and other logistics provided to the UIC by six reported Middle Eastern countries and Eritrea played a significant role in enhancing the military and political capital of the UIC.¹⁶² When, as in the case under discussion, an illegal aid from external force tilts the playing field against one of the internal belligerents (government or another internal force), the notion that only "internal forces alone should decide the outcome of the conflict"¹⁶³ will no longer operate. As Ethiopia's military aid to the TFG has been widely reported, the UN Monitoring Group on Somalia has documented the military and other material support given to the UIC by Egypt, Syria, Yemen, Djibouti, Saudi Arabia, Iran and Eritrea.¹⁶⁴ Indeed, it is clear from the reports of the Monitoring Group that in numerical terms, a greater number of States has been alleged to have provided some form of support to the UIC than the number of States that supported the TFG.

If the intervention of these external forces has already skewed the political and military landscape against one of the belligerent forces, in this case the TFG, a further invocation of the doctrine of non-intervention will not serve the initial purpose for which the non-intervention principle was

¹⁶¹ David Wippman, *supra* note 56 at 450.

¹⁶² See Report of the Monitoring Group on Somalia (2006), *supra* note 3, p-44. noting that "the principal sources for the overall military build-up involving arms, military materiel and foreign military personnel can be variously attributed to ten (10) States, as follows: Djibouti, Egypt, Eritrea, Ethiopia, Iran, Libya, Saudi Arabia, Syria, Uganda and Yemen. Of the foregoing States, seven (7) are aligned with the UIC, as follows: Djibouti, Egypt, Eritrea, Iran, Libya, Saudi Arabia, and Syria; the remaining three (3) States, Ethiopia, Uganda and Yemen, are aligned with the TFG".

¹⁶³ David Wippman, *supra* note 56 at 450.

¹⁶⁴ See Report of the Monitoring Group on Somalia (2006), *supra* note 3 at p-44; See also generally Reports of the 2005, 2006 and 2007 issued by the Monitoring Group on Somalia, *supra* note 3 and 23.

designed —protecting the independence of the Somali State and leaving the fate and destiny of the Somali people to themselves. This is precisely because intervention has already occurred and the sovereignty and independence of that State has already been compromised. If the intervention of the above mentioned countries have already provided a significant military boost to the forces of the UIC, then the intervention of Ethiopia on behalf of the TFG cannot be said to have violated the purposes behind the non-intervention principle. It rather defends the principle by counter-balancing illegal prior interventions amounting to a violation of the political independence and territorial integrity of the State referred to in the Charter of the United Nations. The purpose of the doctrine, among other things, is to enable the people of the State decide their own national fate on the basis of the support internal forces galvanize internally without the intervention of external forces.¹⁶⁵ Counter-intervention in this context has the purpose of restoring the independence of the State altered by the prior intervention, thus, the people of that State could decide for themselves without the foreign intervention. In the context of Somalia, a lawful counter-intervention has the effect of enabling the Somali people to become the makers of their own destiny by creating a government of their own choice.

However, the whole argument about counter-intervention rests on the question of whether there is an illegal intervention that should be counter-balanced. The only nonpartisan evidence the author could find on the issue is the Report by the Monitoring Group on Somalia annually submitted to the Security Council. As early as 2003, this Group has reported on the rising shipment of arms to Somalia by the neighboring States in contravention of the binding Security Council arms embargo resolution.¹⁶⁶ Although the Group noted in its 2005 Report that the magnitude of the shipment has taken an alarming turn after the establishment of the TFG, the Report does not address the issue of who first engaged in the provision of such a support.¹⁶⁷

Consistent with the decision of the ICJ in the *Nicaragua Case*, although support through funding and the sending of arms certainly constitutes an act of intervention contrary to Article 2(7) of the Charter, it is not sufficient to justify counter-intervention disproportionate to the circumstances which in the first place necessitated the intervention. For example, the sending of “trainers and military advisors” cannot be seen to be proportionate to the shipment of arms and financial support. However, when States begun “training and arming” a faction within one State, this could be seen as an

¹⁶⁵ See David Wippman, *supra* note 56 at 450.

¹⁶⁶ See Report of the Monitoring Group on Somalia (2005); *supra* note 23 at p-17.

¹⁶⁷ *Id.*

intervention and the threat of the use of force. The existence of such an intervention and threat of the use of force justifies a proportionate counter-intervention by a third State with the view to redressing the harm done to the Victim State injured by the act of a prior intervention. Therefore, the relevant question in determining the legality of counter-intervention turns on the question of who took the first initiative in sending troops and military trainers to Somalia to support either side. If Ethiopia was not the first to do this, then its counter-intervention measure is legally justified. Put simply, in order for Ethiopia's intervention to be sustainable at law as counter-intervention, Ethiopia's action to counterbalance a prior illegal intervention must have followed, not preceded the intervention by other States.

Finally, international law requires counter-intervention, like all other forms of counter-measures, to be proportionate to the measures that originally necessitated them.¹⁶⁸ Assuming that Ethiopia's provision of "military advisers and trainers" to the TFG followed, not preceded, intervention by other States on behalf of the UIC, and also assuming that Ethiopia has not sent a fighting force to Somalia before the declaration of the war, Ethiopia's conduct of sending military trainers and advisers seems to be proportionate to a similar action by Eritrea and the other nations. Thus, Ethiopia's counter-intervention preceding the declaration of a conventional military engagement on 24 December 2006, subject to the above conditions, could be considered as lawful under international law.

Conclusions

The question on the legality of Ethiopia's military intervention in Somalia presents into light the complex predicaments resulting from the realities of a 'failed State' and the current threat of "violent extremism". Ethiopia claims that the invitation by the legitimate and recognized Somali government and Ethiopia's lawful right to collective and individual self-defense justified its military intervention. Examining the validity of these claims involve the consideration and appreciation of highly contested facts and unverifiable allegations.

Contemporary international law permits intervention in matters that are within the exclusive jurisdiction of other States with the consent, *volenti non fit injuria*, of that State. Although invitation to intervene in the internal affairs of States by the legitimate governments of that State is seen as an expression of the sovereign authority of that State, the nature of the inviting government,

¹⁶⁸ See Thomas M. Franck, On Proportionality of Counter-Measures in International Law, 102 AJIL, 715, 720-1.

the precarious and limited nature of its authority, its lack of both internal and/or external legitimacy, are among the factors that render the legality of interventions uncertain. Though any form of interference in the internal or external affairs of any State is contrary to the stipulation of the Charter and customary norms of international law, the existence of consent precludes the wrongfulness of the act. However, the debate on the question of invitation turns, not so much on the existence of such invitations, but rather, on the legal validity of the invitations.

In order for a government to extend an invitation to another State on matters of internal affairs, international law requires that government to be a legitimate representative of the State, in effective control of the people and territory of the State and capable of speaking on behalf of that State (recognition). Even if there is no one party that is unequivocally better placed to speak and decide on behalf of that State, a party in a relatively better position can represent the State in question. In the context of Somalia, none of the two factions satisfy the triple requirements of legitimacy, effectiveness and recognition. None of these parties claimed legitimacy over the other as none of them was product of a freely and fairly contested election. Whereas the UIC was in a better position as far as control of the larger proportion of the Somali territory is concerned, the TFG commanded substantial level of recognition among the international community. From the point of view of international law, one needs to be invited by an entity that meets not only the test of international recognition but also the tests of legitimacy (whether internal or external) and of effectiveness. Although the TFG had sufficient level of international recognition, it lacked the legal authority to speak for the Somali State. Even if it was a government that met the test of both legitimacy and recognition, the lack of effective control of the Somali territory strips it of the right to request assistance and denies third States the right to intervention. However, this does not exclude the right of such a government to request assistance to quell a low level strife within the State. The TFG does not meet this requirement and its invitation could not be lawful. When one of the parties is not in a clearly better position to act on behalf of the State, intervention by invitation is illegal since external forces will have the opportunity to decide the outcome of a purely internal struggle.

Although the invitation argument lacks the essential requirements of the law, Ethiopia seems to have a valid right to counter-intervention in response to prior illegal interventions by Eritrea and other States with the view to defend the political independence of Somalia. The principle of counter-intervention assumes the existence of a prior illegal intervention in violation of the political independence and territorial integrity of States protected under the UN Charter. If an illegal intervention in the internal affairs of the State

had already occurred in violation of international law, others States will earn the right to intervene to counter-balance that illegal intervention. So the latter intervention is interference in the affairs of the State for the sole purpose of defending and restoring the independence and sovereignty of the State offended by a prior illegal intervention. On the same vein, the intervention of several States in the internal affairs of Somalia accords Ethiopia the right to intervene to offset an illegal intervention that is already underway.

Counter-intervention subject to conditions might justify Ethiopia's action. Yet, it is also noteworthy to take account of the silence of the Security Council, the General Assembly or the African Union in the face of a mounting conflict between the two States that was grave enough as to trigger the jurisdiction of these institutions. Ethiopia's action was not officially condemned by these organs. This could be attributed to the realization by the international community of the unfathomable truth relating to the breeding of militancy in Somalia and the consequent threat posed against Ethiopia, and such questions are beyond the scope of this article and therefore have not been discussed.

Aside from the issue of self-defense which is not addressed in this article, Ethiopia's conduct predating the full-scale military confrontation with the UIC can be seen from two angles, i.e., invitation and counter-intervention. Since the TFG lacks the legal authority to invite, Ethiopia's claim for invitation does not seem to be consistent with norms of international law governing intervention. The description of Somalia quoted at the beginning of this article as a "*land of clan republics*" does not offer the right to intervention by micro-invitations by the various clans for the purpose of international law. However, assuming that the intervention in Somalia of Eritrea and other states preceded Ethiopia's sending of 'military trainers and advisors', Ethiopia has the legal right to counter-intervention to defend the political independence and territorial integrity of the Somali State and of its people. This might sound 'altruistic' unless we realize the deeper motive of such counter-intervention that seems to trace its roots to various problems that can emerge in failed states and transcend boundaries. _____ ■
