

# The Limits on the Use of Force in International Dispute Resolution

## The Case of Somalia

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## I. INTRODUCTION

Somalia is often the first country that comes to mind when one searches for an example of a 'failed state.'<sup>1</sup> The country has known civil strife for more than 15 years.<sup>2</sup> After almost a decade of civil war, in which no functioning government existed, a peace process was initiated in early 2000.<sup>3</sup> A Transitional National Government (TNG) was established in August 2000 but the newly acquired peace in the country soon proved to be short-lived.<sup>4</sup> Another peace process followed in 2004, which finally led to the establishment of the Transitional Federal Government (TFG).<sup>5</sup> Unfortunately, this regionally initiated peace process also failed to be inclusive and responsive to the root causes of the conflict that has ravaged the country for so long and fighting between different parties continued.<sup>6</sup>

Whilst the international community was searching for ways to resolve the ongoing Somali crisis, Ethiopia took the decision to intervene in its neighbour's affairs in order to 'protect its sovereignty'<sup>7</sup> and to 'assist' the TFG.<sup>8</sup> In December 2006, openly supported by the United States of America

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<sup>1</sup> As explained by Koskenmäki, a number of definitions are used to explain the phenomenon of a failed or collapsed state. She quotes, for instance, I. W. Zartman as defining a failed state as 'a situation where the structure, authority (legitimate power), law and political order have fallen apart' and A. Eckert who explains state failure as 'the disintegration of legitimate governmental authority'. R Koskenmäki 'Legal Implications Resulting from State Failure in Light of the Case of Somalia' (2004) 73 *Nordic Journal of International Law* 1 at 2.

<sup>2</sup> See International Crisis Group 'Can the Somali Crisis Be Contained?' Africa Report N° 116, 10 August 2006 available at [http://www.crisisgroup.org/library/documents/afrika/horn\\_of\\_africa/116\\_can\\_the\\_somali\\_crisis\\_be\\_contained.pdf](http://www.crisisgroup.org/library/documents/afrika/horn_of_africa/116_can_the_somali_crisis_be_contained.pdf) (accessed 21 August 2006) 1 [hereinafter ICG Report 116]. See section III for a more detailed overview of the ongoing crisis in the country.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid

<sup>6</sup> Ibid.

<sup>7</sup> Reuters AlertNet 'Somalia Troubles: Key Facts' April 2007 available at [http://www.alertnet.org/printable.htm?URL=/db/crisisprofiles/SO\\_PEA.htm&v=at\\_a\\_glance](http://www.alertnet.org/printable.htm?URL=/db/crisisprofiles/SO_PEA.htm&v=at_a_glance) (accessed 1 April 2007) 10 [hereinafter Reuters AlertNet April].

<sup>8</sup> Ethiopian Ministry of Foreign Affairs 'TFG of Somalia expresses support for Ethiopian Parliament's Decision' 4 December 2006 available at [http://www.mfa.gov.et/Press\\_Section/publication.php?Pub\\_Page\\_Id=3233](http://www.mfa.gov.et/Press_Section/publication.php?Pub_Page_Id=3233) (accessed 15 June 2007) [hereinafter MFA Press Statement 4 December].

(US),<sup>9</sup> Ethiopia launched a military operation against the Union of Islamic Courts ('UIC' or 'Courts').<sup>10</sup> The UIC had taken over the country's capital, Mogadishu, in June 2006 and violently opposed the TFG.<sup>11</sup>

Traditional and contemporary conflict resolution emphasises diplomacy rather than military confrontation in States' international relations. Over the past sixty years since the establishment of the United Nations (UN), a comprehensive international legal framework was developed that completely prohibits the use of force<sup>12</sup> in States' international relations. The framework, also referred to as the *jus ad bellum*,<sup>13</sup> recognises two exceptions to the prohibition of the use of force, namely in self-defence or following a Security Council authorisation.<sup>14</sup> However, the recent events in Somalia simply seem to be in line with other events in the world that demonstrate that the use of force, and even more so the initiation of a large-scale military operation, is increasingly being used to deal with States' security concerns.

This trend commenced in 2001 with the US invasion of Afghanistan in October, a month after the 9/11 events.<sup>15</sup> The aim of the US invasion of Afghanistan was to remove the Taliban, the 'ruling party' in the country, which was said to support and harbour the Al-Qaeda terrorist movement that

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<sup>9</sup> See, for instance, Reuters AlertNet 'U.S. Signals Support for Ethiopia in Somalia' 27 December 2007 available at <http://www.alertnet.org/thenews/newsdesk/N27462368.htm> (accessed 13 July 2007).

<sup>10</sup> The Islamic Courts coalition is known by various names, amongst other the Coalition of Islamic Courts, Somalia Islamic Courts Council (SICC) and the Supreme Council of Islamic Courts (SCIC).

<sup>11</sup> See C Barnes and H Hassan 'The Rise and Fall of Mogadishu's Islamic Courts' Chatham House, Africa Programme (AFP BP 07/02) April 2007 available at [http://www.chathamhouse.org.uk/publications/papers/download/-/id/458/file/9776\\_bpsomalia0407.pdf](http://www.chathamhouse.org.uk/publications/papers/download/-/id/458/file/9776_bpsomalia0407.pdf) (accessed 24 June 2007). See section III for a more detailed overview of the UIC's ascendance to power.

<sup>12</sup> With 'force' this paper refers to armed or military force.

<sup>13</sup> The *jus ad bellum* is not to be confused with the *jus in bello*, or international humanitarian law, which regulates the conduct of hostilities during war. See T Hillier *Principles of Public International Law* 2ed (1999) 245 and 269.

<sup>14</sup> See Article 51 and 42 of the UN Charter. A detailed discussion on the exceptions to the prohibition of the use of force will follow in section II.

<sup>15</sup> However, arguably this trend was 'introduced' by the US (Cuba Quarantine) in 1962 and applied by Israel against Iraq in 1981. These events will be discussed in more detail in section II. B. 2.

was allegedly responsible for the terrorist attacks.<sup>16</sup> The international community, still astonished over the 9/11 attacks, accepted the invasion as an act of self-defence in accordance with Article 51 of the UN Charter.<sup>17</sup>

On the other hand, the US invasion of Iraq in 2003 has been almost conclusively analysed as illegal.<sup>18</sup> In this case, the US and its allies choose to use force instead of travelling the diplomacy path to resolve the ongoing differences between the international community and Iraq.<sup>19</sup> The use of force led to a regime change in that country and subsequent international involvement in building a new Iraqi nation.<sup>20</sup> The continued occupation of Iraq by the US and its allies was later legitimised by UN Security Council resolutions.<sup>21</sup>

Another example of use of force that has been analysed as contrary to international law<sup>22</sup> would be the Israeli military operation against Hezbollah and the subsequent occupation of Lebanon in July 2006.<sup>23</sup> Rather than negotiating with Lebanon, and thus with Hezbollah that formed part of the Lebanese government, Israel initiated a military operation aimed simply at

<sup>16</sup> See Letter of the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (S/2001/946), 7 October 2001 [hereinafter US Letter to Security Council October 2001]

<sup>17</sup> See, for instance, the analysis of M J Kelly 'Understanding September 11<sup>th</sup> – An International Legal Perspective on the War in Afghanistan' (2001-2002) 35 *Creighton Law Review* 283 at 285. It is important to note that the legality of the Afghanistan invasion has been questioned. See, for instance, J I Charney 'The Use of Force Against Terrorism and International Law' (2001) 95 *American Journal of International Law* 835.

<sup>18</sup> See, for instance, T Gazzini *The Changing Rules on the Use of Force in International Law* (2005) 78 and H Duffy *The 'War on Terror' and the Framework of International Law* (2005) 197.

<sup>19</sup> See section II.B.2.1.1 for a detailed overview of the run-up to the Iraqi invasion.

<sup>20</sup> For an overview of the developments in Iraq following the invasion see, for instance, International Crisis Group 'Where is Iraq Heading? Lessons from Basra' Middle East Report N° 67, 25 June 2007 available at

[http://www.crisisgroup.org/library/documents/middle\\_east\\_north\\_africa/iraq\\_iran\\_gulf/67\\_iraq\\_lessons\\_from\\_basra.pdf](http://www.crisisgroup.org/library/documents/middle_east_north_africa/iraq_iran_gulf/67_iraq_lessons_from_basra.pdf) (accessed 19 August 2007) [hereinafter ICG Report 67].

<sup>21</sup> See Security Council resolution 1483 (2003), 1500 (2003) and 1511 (2003).

<sup>22</sup> See, for instance, C Gray 'The Bush Doctrine Revisited: the 2006 National Security Strategy of the USA' (2006) 5 *Chinese Journal of International Law* 555 and G Ziccardi Capaldo 'Providing a Right of Self-Defence Against a Large-Scale Attack by Irregular Forces: The Israeli-Hezbollah Conflict' (2007) 48 *Harvard International Law Journal Online* 101, <http://www.harvardilj.org/online/115>.

<sup>23</sup> See section II.B.2.1.2 for a detailed overview of the Israeli military operation against Hezbollah.

severely weakening the movement.<sup>24</sup> Following more than a month of hostilities, an UN-led peacekeeping force was deployed to monitor a cessation of hostilities.<sup>25</sup>

The objective of this paper is to provide *a legal analysis of the recent events in Somalia, in particular the Ethiopian military operation against the UIC, in the general context of international dispute resolution*. In order to analyse the Ethiopian use of force, the paper will first discuss the traditional notions that govern the use of force and the rationale behind this legal regime. Thereafter, it will highlight the arguments that have been raised in the current debate surrounding the use of force, most importantly concerning anticipatory self-defence and pre-emptive self-defence. The US government and several scholars claim that a change in the traditional legal regime concerning the use of force is needed due to the emergence of 'new security threats.'<sup>26</sup>

To facilitate the analysis of the resort to the use of force by Ethiopia, section III will then briefly discuss developments in the country that caused the ongoing instability and triggered the Ethiopian military operation. Following a historical overview, this section will discuss the process that resulted in the establishment of the TFG and the 'rise' to power of the UIC. In addition, it will focus on the events leading up to the military confrontation at the end of December 2006.

Section VI will analyse the force used in Somalia by Ethiopia against the legal framework discussed in section II. Should the Ethiopian military operation against the UIC only be the most recent example of an illegal use of force, the section will briefly discuss the possibility that the Bush Doctrine,

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<sup>24</sup> Ibid.

<sup>25</sup> See Security Council Resolution 1701(2006).

<sup>26</sup> See, for instance, J C Yoo 'Force Rules: UN Reform and Intervention' (2006) 6 *Chicago Journal of International Law* 641 and A M Slaughter & W Burke-White 'An International Constitutional Moment' (2002) 43 *Harvard International Law Journal* 1.

the principle being used to 'justify' the use of force in these instances, is approaching the status of customary international law.

Finally, section V will discuss the current situation in Somalia, which has witnessed the deployment of an African Union (AU) peacekeeping mission amidst the continued presence of Ethiopian forces in the country. Thereafter, it will briefly discuss the lessons that can be drawn from the Somali experience. It will also briefly discuss the current situation in Iraq and Lebanon in the context of the argument that the use of force in order to address the international community's short-term security concerns would most likely result in reduced chances to achieve peace and stability in the country in question. Lastly, section V will share recommendations that have been made to address the various challenges identified.

## II. INTERNATIONAL DISPUTE RESOLUTION AND THE LEGAL USE OF FORCE: TRADITIONAL NOTIONS AND CURRENT DEBATES

### A. Traditional Notions: The United Nations Charter and Customary International Law

#### 1. Peaceful Settlement of Disputes

By the end of the nineteenth century, the world had witnessed enough suffering caused by States' resort to force as a tool to resolve differences between them to realise that there was a need to focus on alternative, peaceful methods to address these differences. Delegates at the Peace Conferences of 1899 and 1907 extensively discussed peaceful means to settle disputes and ways to improve 'the conditions of warfare' but they were unable to reach consensus on completely prohibiting the use of force.<sup>27</sup>

In 1928, however, sixty-three States signed the Kellogg-Briand Pact, which condemned the 'recourse to war for the solution of international controversies' and instructed States to make this 'an instrument of national policy.'<sup>28</sup> Soon after, however, World War II erupted, which served as a clear indicator that a more comprehensive framework was needed to deal with the prohibition of the use of force in international relations.

The rare moment of consensus and solidarity amongst the international community following the horrors of World War II resulted in the creation of the UN and the adoption of the Organisation's constitution, the UN Charter, which would become the basis of the legal framework governing States' international relations in the post-1945 era.<sup>29</sup> The world organisation,

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<sup>27</sup> Study Group of the David Davies Memorial Institute of International Studies *International Disputes – The Legal Aspects* (1972) vii [hereinafter 'Study Group']

<sup>28</sup> W A Schabas 'International Law and Response to Conflict' in C A Crocker, F O Hampson and P Aall (eds) *Turbulent Peace: The Challenges of Managing International Conflict* (2001) 603 at 604.

<sup>29</sup> Charter of the United Nations [hereinafter UN Charter].

in order 'to save succeeding generations from the scourge of war,'<sup>30</sup> was mandated to 'maintain international peace and security.'<sup>31</sup>

The UN manifestly acknowledged that '[d]isputes are an inevitable part of international relations, just as disputes between individuals are inevitable in domestic relations.'<sup>32</sup> Therefore, it recognised its mandate 'to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.'<sup>33</sup>

In particular, Article 2(3) of the UN Charter states that '[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.' Thus, States were given the positive obligation to resolve their differences peacefully.

Furthermore, subsequent Article 2(4) notes that '[a]ll members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.' Noteworthy is that fact that in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua case)*, the International Court of Justice (ICJ) found that Article 2(4) has attained the status of customary international law<sup>34</sup> and thus even those few States that are non-members of the UN are legally bound by the Article.<sup>35</sup> Moreover, in the same case the ICJ quotes the International Law Commission as noting that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.'<sup>36</sup>

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<sup>30</sup> Preamble of the UN Charter.

<sup>31</sup> Art. 1, UN Charter.

<sup>32</sup> J G Merrills *International Dispute Settlement* 4ed (2005) 1.

<sup>33</sup> Art. 1, UN Charter.

<sup>34</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (merits)* [1986] ICJ Rep 14 para 190 [hereinafter Nicaragua case].

<sup>35</sup> Hillier (note 13) 247.

<sup>36</sup> *Nicaragua case* (note 34) para 190.

Finally, Chapter VI of the UN Charter, which deals with the Pacific Settlement of Disputes, commences with Article 33 of which the first paragraph notes that:

'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

Thus, whilst States have a positive obligation to resolve their differences by use of peaceful means, it is left to the discretion of States to decide which method best suits their situation. In order to emphasise the large number of peaceful dispute settlement methods available to parties involved in a dispute, as well as to do justice to these numerous peaceful methods developed by the international community over the years, a brief discussion of each of the methods listed will follow below.<sup>37</sup>

## **1.1 Diplomatic Methods: Negotiation, Mediation, Enquiry and Conciliation**

### **1.1.1 Negotiation**

It is important to note that the order of the methods listed under Article 33 is not based on priority or preference for any of these methods.<sup>38</sup> However, in agreement with Merrills, this section commences with negotiation, which is the most important method to resolve disputes.<sup>39</sup> The frequent use of negotiation as a method to resolve differences between parties can be

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<sup>37</sup> It is important to note that this paper will use the terms 'conflict' and 'dispute' interchangeably. Both terms refer to 'a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another. In the broadest sense, an international dispute can be said to exist whenever such a disagreement involves governments, institutions, juristic persons (corporations) or private individuals in different parts of the world.' This definition is borrowed from Merrills (note 32) 1.

<sup>38</sup> Ibid 2.

<sup>39</sup> Ibid.

explained by the fact that it only involves the parties to a dispute.<sup>40</sup> As we shall see below, all other methods depend on third party intervention.

Put simply, negotiations consist of dialogue between two parties that disagree on a matter.<sup>41</sup> The only prerequisite for negotiations is consensus by the parties on the location where negotiations would take place as well as the subject of the talks.<sup>42</sup> Negotiations are generally conducted through 'diplomatic channels' although, depending on the nature of the disagreement and its complexity, other government departments may be involved as well.<sup>43</sup> During the negotiations the different parties present their interests, proposals and eventually their counter-proposals.<sup>44</sup> The solution lies in the ability of the parties to reach consensus on a proposal and thus their willingness to make reasonable compromises.<sup>45</sup>

Noteworthy is the fact that negotiation is also a method often employed to prevent disputes.<sup>46</sup> In this case, one party reckons that a decision or action it is planning to take may affect another party and therefore initiates dialogue, referred to as consultation, with the party concerned to discuss the matter.<sup>47</sup>

Finally, negotiations may also pave the way for other dispute resolution methods.<sup>48</sup> For instance, negotiations may take place prior to a mediation process to reach consensus on the modalities of that process.<sup>49</sup>

### 1.1.2 Mediation

Should parties to a dispute be unable to reach consensus on their own, a third party may offer or be invited to intervene.<sup>50</sup> The third party could be an

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<sup>40</sup> Study Group (note 27) 77.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid 78.

<sup>43</sup> Merrills (note 32) 8.

<sup>44</sup> Study Group (note 27) 77.

<sup>45</sup> Ibid.

<sup>46</sup> Merrills (note 32) 3.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

international organisation, a State or an individual,<sup>51</sup> as long as, in case mediation is offered, the third party is acceptable to both sides of the dispute.<sup>52</sup> Article 4 of the Hague Convention on the Pacific Settlement of Disputes of 1899 describes the role of a mediator as 'reconciling the opposing claims and appeasing the feelings of resentment that may have arisen' between the parties to a dispute.<sup>53</sup> A mediator is actively involved in the proceedings and is expected to open up channels of communication between the parties by receiving information from the parties individually and unpacking as well as passing on proposals from one party to the other.<sup>54</sup> In addition, a mediator may propose and promote new ideas for the resolution of the dispute.<sup>55</sup>

Closely linked to the concept of mediation is good offices, which is used to refer to 'action taken to bring about or initiate negotiations' by a third party, often a high-profile individual.<sup>56</sup> Good offices can be distinguished from mediation because it does not involve the third party's active participation in the negotiations.<sup>57</sup>

### 1.1.3 Enquiry

While during a mediation process the intervening third party relies on information provided by the parties themselves, enquiry entails a third party intervention to provide the disputing parties with an objective assessment of their disagreement.<sup>58</sup> Enquiry will be most effective when the issue of disagreement is 'largely one of fact, rather than law or policy' and when the

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<sup>51</sup> Ibid 29.

<sup>52</sup> Ibid 32.

<sup>53</sup> Study Group (note 27) 83.

<sup>54</sup> Merrills (note 32) 28.

<sup>55</sup> Ibid.

<sup>56</sup> Study Group (note 27) 83. An example would be former South African President Nelson Mandela in Burundi.

<sup>57</sup> Ibid.

<sup>58</sup> Merrills (note 32) 63.

disputing parties are willing to accept the possibility that 'their version of events may be shown to be wrong.'<sup>59</sup>

#### **1.1.4 Conciliation**

Finally, conciliation involves the setting up of a commission by the disputing parties that would undertake an objective assessment of the dispute.<sup>60</sup> This peaceful method differs from an enquiry because the intervening third party, the commission, also attempts to put forward proposals for the solution of the dispute.<sup>61</sup>

### **1.2 Legal Methods: Arbitration and Adjudication**

The second group of peaceful dispute settlement methods is referred to as 'legal means of settlement' and consists of the arbitration and adjudication processes.<sup>62</sup> The difference between these legal methods and the methods discussed in the previous section is that with the latter the parties remain in control of the outcome of the proceedings.<sup>63</sup> In other words, with diplomatic methods the parties to the dispute 'may accept or reject a proposed settlement as they see fit.'<sup>64</sup> When arbitration and adjudication are selected as settlement methods, however, the parties decide that they want the outcome of the process to be binding,<sup>65</sup> as will be explained below.

#### **1.2.1 Arbitration**

The International Law Commission defined arbitration as 'a procedure for the settlement of disputes between States by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.'<sup>66</sup> When the

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<sup>59</sup> Ibid.

<sup>60</sup> Ibid 64.

<sup>61</sup> Study Group (note 27) 95.

<sup>62</sup> Merrills (note 32) 91.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

<sup>66</sup> Hillier (note 13) 232.

disputing parties mutually agree that their difference should be submitted to arbitration, they negotiate the modalities of the process, which would be outlined in a *compromis*.<sup>67</sup> For instance, the parties negotiate the form of arbitration (mixed commission, sovereign arbitrator, specially qualified individual or a collegiate body),<sup>68</sup> the issue to be decided on,<sup>69</sup> the law to be applied,<sup>70</sup> as well as the procedural arrangements (location, payment and so on).<sup>71</sup>

### 1.2.2 Adjudication

Adjudication, on the other hand, does not provide the disputing parties with decision-making powers over the numerous modalities of the settlement process.<sup>72</sup> It involves submission of a disagreement to a permanent tribunal that applies rules of law to decide which party to the dispute is right or wrong and its decisions are legally binding.<sup>73</sup> The best example of such a tribunal is the ICJ, which was established in 1945 as the principal judicial organ of the UN, replacing the Permanent Court of International Justice of the League of Nations.<sup>74</sup> It is important to note that in contentious cases only States may be parties before the ICJ.<sup>75</sup>

### 1.3 The Security Council

It is important to discuss briefly the role of the Security Council in the peaceful settlement of disputes. Article 37(1) of the UN Charter states that '[s]hould parties to a dispute of the nature referred to in Article 33 fail to settle

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<sup>67</sup> Ibid 233.

<sup>68</sup> Merrills (note 32) 92-94.

<sup>69</sup> Ibid 98.

<sup>70</sup> Ibid 104.

<sup>71</sup> Ibid 99.

<sup>72</sup> Ibid 127.

<sup>73</sup> Ibid.

<sup>74</sup> Hillier (note 12) 234.

<sup>75</sup> Art. 34 of the Statute of the International Court of Justice. In accordance with Art. 96, in addition to the General Assembly and the Security Council, other organs of the United Nations and specialized agencies may, following General Assembly authorization, request advisory opinions.

it by the means indicated in that Article, they shall refer it to the Security Council.' The second paragraph of Article 37 explains that '[i]f the Security Council deems that the continuance is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.'

However, if the Security Council finds, in accordance with Article 39 of the UN Charter, that a certain dispute creates 'the existence of any threat to the peace, breach of the peace, or act of aggression' it may under Article 41

'... decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.'

It is important to note that decisions taken by the Security Council under Chapter VII of the Charter are binding on all Member States of the Organisation.<sup>76</sup>

## **2. Settlement of Disputes by Use of Force**

The preceding section discussed the numerous methods available to resolve disagreements between parties in a peaceful manner. It is important to note that the following section should be considered relevant in *exceptional* circumstances only. This would involve a conclusion by the relevant actors that the methods to resolve a dispute peacefully previously discussed are either not available, have failed to bring about a solution or are deemed ineffective.<sup>77</sup>

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<sup>76</sup> Duffy (note 18) 169.

<sup>77</sup> Ibid 145.

## 2.1 Self-Defence

The most important exception to the prohibition of the use of force rule is when force is used in self-defence, as stated in Article 51 of the UN Charter:

‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.’

It is important to emphasise that, as noted in Oppenheim’s International Law, the self-defence exception, ‘[l]ike all exceptions, ... is to be strictly applied.’<sup>78</sup> Duffy explains that the strict application of the self-defence exception is especially important since there does not exist ‘a mechanism to ascertain the validity of a state’s claim to exercise the right.’<sup>79</sup>

As the term suggests, a State’s reaction in self-defence ‘has a “defensive” character since it is directed at preventing the armed attack from proceeding, succeeding and achieving its purpose.’<sup>80</sup> Below follows a brief discussion of the various conditions that have evolved over the years under which the use of force in self-defence is legally justified.

### 2.1.1 Conditions for the Use of Force in Self-Defence

#### 2.1.1.1 Armed Attack

Article 51 indicates that a State’s right to self-defence may be exercised if that State suffers an armed attack. The wording ‘if an armed attack occurs

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<sup>78</sup> Oppenheim’s International Law quoted in Duffy (note 18) 150.

<sup>79</sup> Ibid.

<sup>80</sup> Gazzini (note 18) 129.

against a Member of the United Nations' triggers three questions. Firstly, it is important to determine what is perceived to constitute an armed attack.

#### *2.1.1.1.1 Defining an Armed Attack*

Since there is no internationally agreed definition of an armed attack,<sup>81</sup> several judgements of the ICJ have been relied upon to determine what constitutes an armed attack. Harris, for instance, refers to the *Nicaragua* case in his explanation that one must examine the 'scale and effects' of the force used since the use of force against another State does not automatically constitute an armed attack.<sup>82</sup>

Furthermore, in the same case the Court noted that 'an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces, "or its substantial involvement therein."<sup>83</sup> However, assisting rebels in another State by providing them with arms, logistical or other forms of support was not deemed to amount to an armed attack.<sup>84</sup>

The *Oil Platforms* case sheds light on the legality of self-defence against numerous armed acts that, taken individually, are not severe enough to constitute an armed attack, the so-called 'accumulation of events' theory.<sup>85</sup> By deciding that '[e]ven taken cumulatively ... these incidents do not seem to the Court to constitute an armed attack ...,' the Court confirmed that it is nevertheless possible for a series of armed acts to meet the threshold of an armed attack collectively.<sup>86</sup>

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<sup>81</sup> In agreement with Duffy (note 18) 151 and Gazzini (note 18) 119.

<sup>82</sup> D J Harris *Cases and Materials on International Law* 6ed (2004) 923.

<sup>83</sup> *Nicaragua* case (note 34) para 195.

<sup>84</sup> *Ibid.*

<sup>85</sup> Gazzini (note 18) 143.

<sup>86</sup> *Oil Platforms* case [2003] 42 *ILM* 1334 para 64.

### 2.1.1.1.2 Armed Attack by Non-State Actors

The second question that one may ask concerns the perpetrators of such an armed attack. Whilst the Article is silent on the perpetrators of an armed attack, it seems clear that self-defence may be invoked when it concerns an armed attack carried out by a State or even by non-State actors, such as the armed bands and mercenaries mentioned in the *Nicaragua Case* judgement.

However, there is an ongoing debate on whether non-state actors carrying out an attack against a State must be acting on behalf of another State in order for the victim State to obtain the right to use force in self-defence.<sup>87</sup> Those arguing that this is not necessary refer to Article 51, which does not mention State involvement as a prerequisite, and to the *Caroline* case, in which Canadian rebels seem to have acted without involvement of any State.<sup>88</sup>

However, as explained by Duffy, proponents of the requirement of State involvement explain that non-State actors responsible for an armed attack are likely to be based in the territory of another State and not in the high seas.<sup>89</sup> Therefore, self-defence measures against non-State actors carried out on another State's territory do not seem lawful if it has not been established that the non-State actors were indeed acting on behalf of that State.<sup>90</sup> Indeed, it is possible that a State may have failed or have been unable to prevent the presence of hostile non-State actors on its territory, which brings up the question of whether or not a State breached an international obligation.<sup>91</sup>

The ICJ has not been able to bring an end to the ongoing discussion by pronouncing itself clearly on the matter. For instance, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court noted that 'Article 51 of the Charter

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<sup>87</sup> Duffy (note 18) 159.

<sup>88</sup> Ibid. The *Caroline* case will be discussed in more detail in section II.B.1.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Gazzini (note 18) 130.

thus recognizes the existence of an inherent right of self-defence in the case an armed attack by one State against another State.’<sup>92</sup> This statement was later discussed in the Separate Opinion of Judge Higgins who noted that ‘[t]here is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defence is only available when an armed attack is made by one State against another State.’<sup>93</sup> The events of 9/11 have triggered a renewed debate on this issue, which will be discussed in section II.B.2.

#### 2.1.1.1.3 Temporal Aspect of an Armed Attack

Finally, another question concerns the temporal aspect of an armed attack. Based on the language of Article 51, it is clear that the right to self-defence may only be invoked when an armed attack is ongoing.<sup>94</sup> However, customary international law allows a State to defend itself against an *imminent* armed attack.<sup>95</sup> This is referred to as anticipatory self-defence<sup>96</sup> and will be discussed in more detail in Section II.B.1.

#### 2.1.1.2 Necessity, Proportionality and Immediacy

Firstly, the principle of necessity dictates that the use of force in self-defence is only legitimate if it is not possible for a State to defend itself by use of other, peaceful means.<sup>97</sup> Closely linked to necessity is the principle of proportionality, which requires that only force necessary to stop an attack may be used.<sup>98</sup> In the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, the Court confirmed that ‘[t]he submission of the exercise

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<sup>92</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Reports para 139.

<sup>93</sup> *Ibid.* Separate Opinion of Judge Higgins.

<sup>94</sup> Gazzini (note 18) 143.

<sup>95</sup> Harris (note ) 921.

<sup>96</sup> A C Arend and R J Beck *International Law & the Use of Force* (1993) 72.

<sup>97</sup> Gazzini (note 18) 146.

<sup>98</sup> Duffy (note 18) 162.

of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.<sup>99</sup>

The principle of immediacy re-emphasises the defensive objective of the use of force in self-defence.<sup>100</sup> As noted above, reaction in self-defence is aimed at preventing an armed attack from 'proceeding, succeeding and achieving its objective.' Thus, the use of force in self-defence is only legal for the duration of an armed attack.<sup>101</sup> In other words, the end of an armed attack also indicates the end of the right to use of force in self-defence.<sup>102</sup>

In addition, the principle of immediacy underlines the temporary nature of a State's right of self-defence.<sup>103</sup> As indicated in Article 51, the right to self-defence is valid only '*until* the Security Council has taken measures necessary to maintain international peace and security' [italics added].

## 2.2 Security Council Authorisation

The second exception in which the use of force can be legitimised is when such use is authorised by the Security Council under Chapter VII of the UN Charter; Article 39 allows the Security Council to determine whether any situation amounts to a 'threat to the peace, breach of the peace, or act of aggression' and subsequently to 'make recommendations, or decide what measures shall be undertaken in accordance with article 41 and 42 to maintain or restore international peace and security.'

Whilst Article 41 outlines the peaceful measures that may be taken, Article 42 notes that in case the Security Council

'consider[s] that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and

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<sup>99</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 para 41.

<sup>100</sup> Gazzini (note 18) 143.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid. Gazzini explains that a State may nevertheless defend itself against an attack that has ended but is part of 'a single aggressive plan.' This refers to the abovementioned 'accumulation of events' theory.

<sup>103</sup> Duffy (note 18) 163.

security. Such action may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations.’

As noted previously, all decisions taken by the Security Council under Chapter VII are binding on Member States of the Organisation.

### **B. Current Debates: New Rules on the Use of Force for New Security Threats?**

The morning of 11 September 2001 witnessed the hijacking of four commercial airplanes in the US.<sup>104</sup> It soon became clear that the airplanes were hijacked with the aim of using them to cause considerable human as well as material damage in various cities in the US.<sup>105</sup> By noon that day, the two buildings of the World Trade Center in Manhattan, New York State and part of the Pentagon in Langley, Virginia were in ruins as a result of crashed airplanes.<sup>106</sup> The fourth plane crashed in an open field near Pittsburgh, Pennsylvania.<sup>107</sup> Approximately 3000 people lost their lives.<sup>108</sup>

Soon thereafter, the Administration of President Bush stated that these events were organised by members of a terrorist organisation, Al-Qaeda, whose leadership was based in Afghanistan, where it received support from the Taliban, the country’s ‘ruling party.’<sup>109</sup> This formed the basis of the US decision to invade Afghanistan in October 2001 with the aim of removing the Taliban as well as destroying the various Al-Qaeda bases in the country.<sup>110</sup> The Afghanistan invasion marked the commencement of what would become known as the ‘War on Terror.’<sup>111</sup>

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<sup>104</sup> For an in-dept discussion on the events of 9/11, see The 9/11 Commission Report (2003) available at [www.9-11commission.gov/report/911Report.pdf](http://www.9-11commission.gov/report/911Report.pdf) (accessed 13 March 2007).

<sup>105</sup> Ibid.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> US Letter to Security Council October 2001 (note 16) 1.

<sup>110</sup> Ibid.

<sup>111</sup> For more information, see, for instance, S Elworthy and P Rogers ‘The ‘War on Terrorism’: 12 month audit and future strategy options’ Oxford Research Group 11 September 2002 available at [http://www.oxfordresearchgroup.org.uk/publications/briefing\\_papers/pdf/waronterrorism.pdf](http://www.oxfordresearchgroup.org.uk/publications/briefing_papers/pdf/waronterrorism.pdf) (accessed 12 July 2007).

The US justified the invasion as a measure of self-defence in accordance with Article 51 of the UN Charter; as noted by Mr. Negroponte, US Ambassador to the UN:

'In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to *prevent and deter further attacks* on the United States. These actions include measures against Al-Qaida terrorist training camps and military installations of the Taliban regime in Afghanistan ....' [italics added]<sup>112</sup>

In addition, the 9/11 attacks 'triggered' Article 5<sup>113</sup> of the North Atlantic Treaty and accordingly the US was assisted by several North Atlantic Treaty Organisation (NATO) allies<sup>114</sup> in its undertaking of a military operation in Afghanistan, which continues to date.<sup>115</sup>

The US' use of force in self-defence to the 9/11 attacks, in particular its legality, is the subject of continuous debate and will not be further examined in this article.<sup>116</sup> However, the debate<sup>117</sup> further developed after the US indicated its willingness to carry out a similar military operation in Iraq, a country that it had officially named a 'rogue state.'<sup>118</sup> Whilst the

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<sup>112</sup> Ibid.

<sup>113</sup> Article 5 of the North Atlantic Treaty notes that '[a]n armed attack against one ... of them ... shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked forthwith, individually and in concert with the other Parties, such action as ... necessary, including the use of armed force ...'

<sup>114</sup> Kelly (note 17) 286.

<sup>115</sup> See, for instance, IRINNEWS 'AFGHANISTAN: Civilian casualties reportedly peak in August' 5 September 2007 available at <http://www.irinnews.org/PrintReport.aspx?ReportId=74118> (accessed 7 September 2007).

<sup>116</sup> For a discussion on the legality of the Afghanistan invasion see, for instance, Kelly (note 17) and C Greenwood 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (2003) 4 *San Diego International Law Journal* 7.

<sup>117</sup> The debate that is currently ongoing includes the principle of the 'Responsibility to Protect.' Proponents of this principle argue that the use of force to bring about an end to a situation of severe human rights abuses may be legally justified. See the report of the International Commission on Intervention and State Sovereignty 'Responsibility to Protect' December 2001 available at <http://www.iciss.ca/report-en.asp> (accessed 15 March 2007) See also, for instance, F R Tesón *Humanitarian Intervention: An Inquiry into Law and Morality* 3ed (2005) for a detailed discussion on the matter.

<sup>118</sup> National Security Strategy of the United States of America. September 2002 available at <http://www.whitehouse.gov/nsc/nss.pdf> (accessed 12 March 2007) [hereinafter 2002

military operations in Afghanistan were a clear response, whether a legally justifiable one or not, to the 9/11 attacks, the military operations in Iraq seemed to be in response to a threat, which was not so easily identifiable. Proposing measures of self-defence against a future attack thus invokes the concepts of anticipatory self-defence or even pre-emptive self-defence, depending on the perceived imminence of the attack, as will be explained below.

### 1. Anticipatory Self-Defence: the Imminence Doctrine<sup>119</sup>

Section II.A. 2.1.1.1 briefly touched on the temporal aspect of an armed attack and mentioned that customary international law recognises a State's right to self-defence when faced with an imminent armed attack. This customary right is based on the well-known *Caroline* case in which British forces seized an American ship, the *Caroline*, in the American port of Schlosser that was allegedly on its way to provide support to Canadian rebels.<sup>120</sup> Thus, even though in this instance an armed attack had not yet occurred, there seemed to be agreement that when the 'necessity of self-defence [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation,'<sup>121</sup> a country may use force to defend itself even *prior* to an armed attack occurring.<sup>122</sup> Naturally, the self-defence measures are required to satisfy the conditions of proportionality and necessity.<sup>123</sup>

For long, it was unclear whether or not Article 51 of the UN Charter restricted the existing customary right of self-defence against an imminent armed attack.<sup>124</sup> The 'restrictionist school' argued that Article 51 is 'the only

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National Security Strategy]. The document explained that Iraq received this title since '[a]t the time of the Gulf War, [the US] acquired irrefutable proof that Iraq's designs were not limited to the chemical weapons it had used against Iran and its own people, but also extended to the acquisition of nuclear weapons and biological agents.'

<sup>119</sup> Term borrowed from Yoo (note 26) 648.

<sup>120</sup> *Caroline* case [1837] in D J Harris Cases and Materials on International Law 6ed (2004) 921.

<sup>121</sup> *Ibid.*

<sup>122</sup> Arend and Beck (note 96) 71.

<sup>123</sup> *Ibid.* 72.

<sup>124</sup> *Ibid.*

contemporary source of law on self-defence' and its wording clearly requires an armed attack 'to occur.'<sup>125</sup> On the other hand, the 'counter-restrictionist school' focused on the 'inherent' right to self-defence that Article 51 provides and argued that therefore 'the framers of the Charter did not intend to circumscribe the pre-existing customary right.'<sup>126</sup>

However, the parties to the debate that developed after the 9/11 events appear to agree that Article 51 does include the right to self-defence against an armed attack that is imminent. For instance, the former UN Secretary-General's High-level Panel on Threats, Challenges and Change notes that '... a threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.'<sup>127</sup> In his response to the High-Level Panel's report, the former UN Secretary-General stated that '[i]mmminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognised that this covers an imminent attack as well as one that has already happened.'<sup>128</sup>

## 2. Pre-emptive Self-Defence: the Bush Doctrine

In September 2002, one year after the events of 9/11, the Bush Administration presented its National Security Strategy.<sup>129</sup> The document, whose content was for the most part repeated in the country's National Security Strategy of 2006,<sup>130</sup> discussed issues related to global economic growth, development and democracy but it were the sections on defeating

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<sup>125</sup> Ibid 73.

<sup>126</sup> Ibid.

<sup>127</sup> Secretary-General's High-level Panel on Threats, Challenges and Change 'A More Secure World: Our Shared Responsibility' 2004 available at [www.un.org/secureworld/](http://www.un.org/secureworld/) (accessed 15 October 2006) 63 para 188 [hereinafter High-level Panel Report].

<sup>128</sup> K Annan 'In larger freedom: towards development, security and human rights for all' (A/59/2005) 21 March 2005 available at <http://www.un.org/largerfreedom/> (accessed 15 October 2006) 33 para 124 [hereinafter In Larger Freedom Report].

<sup>129</sup> 2002 National Security Strategy (note 118).

<sup>130</sup> National Security Strategy of the United States of America. March 2006 available at <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf> (accessed 12 March 2007).

global terrorism and preventing enemies from attacking the country that intensified the aforementioned debate.<sup>131</sup>

Firstly, in section III, entitled 'Strengthening Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against US and Our Friends,' the Bush Administration notes that '[w]hile the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting *preemptively* against such terrorists...' [italics added] since the 'best defence is a good offence.'<sup>132</sup>

Section V, 'Prevent Our Enemies from Threatening Us, Our Allies, And Our Friends with Weapons of Mass Destruction,' further elaborates on this:

'Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a possible attacker, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.'<sup>133</sup>

Thus, the Bush Administration emphasises the emergence of 'new security threats,' as briefly mentioned in the introduction to this article, caused by global terrorism and the proliferation of weapons of mass destruction. These threats were non-existent at the time the UN Charter was drafted, which aimed to deal with 'conventional threats posed by conventional actors: [S]tates.'<sup>134</sup> Accordingly, the Administration explains:

'For centuries, international law recognized that nations need not to suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat —most often a visible mobilization of armies, navies, and air forces preparing to attack. *We must adapt the concept of*

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<sup>131</sup> See also the National Military Strategy (2004) and the Department of Defense National Defense Strategy (2005).

<sup>132</sup> 2002 National Security Strategy (note 118) 6.

<sup>133</sup> Ibid 15.

<sup>134</sup> A C Arend 'International Law and the Preemptive Use of Military Force' (2003) 26:2 *The Washington Quarterly* 89 at 97.

*imminent threat to the capabilities and objectives of today's adversaries'* [italics added].<sup>135</sup>

Hence, the traditional criteria of an imminent attack, as outlined in the *Caroline* Case, the Bush Administration argues, are no longer relevant in this day and age. Instead, it explains, the nature of today's threats call for 'anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack.'<sup>136</sup> In agreement with Arend, the Bush doctrine seems to argue for a relaxation of the condition of necessity<sup>137</sup> and even of the condition of proportionality, although it is unclear to what extent exactly these conditions require revision. Certainly, the indication that 'the reasons for our actions will be clear, the force measured, and the cause just'<sup>138</sup> does not provide a tangible yardstick against which the use of force in self-defence under the Bush Doctrine can be tested.

Furthermore, it is noteworthy that these sections do not specifically mention the Security Council and the central role this organ plays in matters concerning the use of force.<sup>139</sup> In addition, the aforementioned ongoing discussion on the status of armed attacks by non-state actors acting independently from any government does not seem to be an issue in the National Security Strategy document as it does not differentiate between governments and non-state actors.<sup>140</sup>

In order to allow for a discussion in section IV on the status of the concept of pre-emptive self-defence under international law, it is important to look at the practice of States in this regard. The following section will therefore briefly discuss the use of force in two countries since the events of 9/11 as well as uses of force arguably in accordance with the principle of pre-emptive self-defence prior to 2001.

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<sup>135</sup> 2002 National Security Strategy (note 118) 15.

<sup>136</sup> Ibid.

<sup>137</sup> Arend (note 134) at 96.

<sup>138</sup> 2002 National Security Strategy (note 118) 16.

<sup>139</sup> In agreement with Gray (note 22) fn32.

<sup>140</sup> Ibid fn75.

## 2.1 State Practice Post-9/11

### 2.1.1 Iraq (2003)

Less than one month after the presentation of the US National Security Strategy of 2002, in which it labelled Iraq a 'rogue state' and accused it of acquiring nuclear and biological weapons in addition to chemical weapons,<sup>141</sup> the House of Representatives passed a resolution entitled '[t]o authorize the use of United States Armed Forces against Iraq.'<sup>142</sup> The resolution stated:

'The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to: 1) defend the national security of the United States against the continuing threat posed by Iraq; and 2) enforce all relevant United Nations Security Council resolutions regarding Iraq.'<sup>143</sup>

After its unsuccessful lobby in the Security Council to get a resolution passed that would authorise the use of force against Iraq,<sup>144</sup> the US government, with military support from the United Kingdom, Australia and Poland,<sup>145</sup> launched an armed operation against Iraq on 20 March 2003.<sup>146</sup>

That same day, a letter was sent to the President of the Security Council by the US Permanent Representative to the UN informing him of the commencement of the military operation.<sup>147</sup> It outlined the several resolutions that were passed by the Security Council on Iraq since it invaded Kuwait in 1990 and emphasised the country's non-compliance with these resolutions.<sup>148</sup> The letter further explained that 'in view of Iraq's material breaches, the basis for the cease-fire has been removed and use of force is

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<sup>141</sup> 2002 National Security Strategy (note 118) 13-14.

<sup>142</sup> House Joint Resolution 114 'To authorize the use of United States Armed Forces Against Iraq,' approved in the House of Representatives October 10, 2002 4 [hereinafter House Joint Resolution 114].

<sup>143</sup> Ibid 4.

<sup>144</sup> Gazzini (note 18) 78.

<sup>145</sup> Ibid 79.

<sup>146</sup> Letter of the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (S/2003/351), 20 March 2003 2.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

authorized under [Security Council] resolution 678 (1990).<sup>149</sup> It concluded that '[t]he actions that coalition forces are undertaking are an appropriate response. They are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area.'<sup>150</sup>

Thus, the US justified the military operation in Iraq on the basis that the use of force against the country was authorised by previous Security Council resolutions as well as on the basis of the US' right to self-defence against the Iraqi threat. The first justification has been highly debated and will not be addressed in this paper.<sup>151</sup> Rather, for the purpose of this paper, it is important to determine if the force against Iraq, whether authorised by previous Security Council resolutions or not, was used in self-defence, anticipatory self-defence or pre-emptive self-defence.

Firstly, it is clear that the military operation in Iraq was not a response to an armed attack, as was the case in Afghanistan, for instance. Moreover, the Bush Administration did not argue that the Iraqi government was in any way responsible for or involved in the 9/11 attacks.<sup>152</sup> Secondly, with regards to an imminent Iraqi threat, the aforementioned resolution passed by the House of Representatives noted concerning this:

'... Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a *surprise attack* against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself' [*italics added*].<sup>153</sup>

The wording in this paragraph clearly does not allege that the Iraqi threat is regarded imminent, as in accordance with the 'instant, overwhelming, leaving no choice of means, and no moment for deliberation' necessity for self-

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<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> For a discussion on the claimed Security Council authorisation for the use of force in Iraq, see Y Dinstein *War, Aggression and Self-Defence* 4ed (2005) 294.

<sup>152</sup> Duffy (note 18) 206.

defence in the *Caroline Case*. Interestingly, it refers to the possibility of a 'surprise attack' against the US, which, by its very nature, cannot be imminent. Thus, it is clear that the US government applied the principle of pre-emptive self-defence in defending itself against Iraq, which formed a so-called 'new threat,' namely by its support for global terrorism and possession of weapons of mass destruction.

### 2.1.2 Lebanon (2006)

In July 2006, Israel launched a large military operation in Lebanon against Hezbollah.<sup>154</sup> The Israeli Defence Force (IDF) used warplanes to bomb physical infrastructure, including the international airport in Beirut, and Hezbollah sites in southern Lebanon and set up a land, sea and air blockade.<sup>155</sup>

The Israeli military operation was triggered by an attack carried out by Hezbollah in Israeli territory against an IDF convoy that was patrolling the Israeli/Lebanese border on 12 July.<sup>156</sup> The attack resulted in the death of three Israeli soldiers and the kidnapping of two others.<sup>157</sup> The tank that was subsequently sent into Lebanon to bring back the two captured soldiers hit a landmine which resulted in the death of another three IDF soldiers.<sup>158</sup>

In its communication to the former UN Secretary-General Kofi Annan and the President of the Security Council on 12 July, Israel noted that it considered the attack by Hezbollah as a 'clear declaration of war.'<sup>159</sup> It held Lebanon responsible for the attack since it was launched from the south of

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<sup>153</sup> House Joint Resolution (note 142) 2.

<sup>154</sup> Human Rights Watch 'Lebanon: Why They Died – Civilian Casualties in Lebanon during the 2006 War' 6 September 2007 available at <http://hrw.org/reports/2007/lebanon0907/lebanon0907webwcover.pdf> (accessed 9 September 2007) 37.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council (S/2006/515) 1.

that country.<sup>160</sup> Israel also mentioned Iran and Syria, together with Hezbollah forming the 'Axis of Terror,' since these two countries 'support and embrace those who carried out this attack.'<sup>161</sup>

Israel concluded its letter to the Security Council by stating that it 'reserve[d] the right to act in accordance with Article 51 of the [UN] Charter and exercise its right of self-defence when an armed attack is launched against a Member of the United Nations.'<sup>162</sup> Thus, the military operation was initially considered to be a self-defence measure in response to the border attack by Hezbollah, which would then trigger questions with regard to the necessity and proportionality of the response and continue the discussion on the status of an armed attack by a non-state actor.

However, soon after the letter to the Security Council President, Israel made it clear that its military operation was not only a response to the Hezbollah attack aimed at bringing back the captured soldiers; as noted at the Security Council meeting that reported on an UN mission to the region:

'They [Prime Minister Ehud Olmert, Deputy Prime Minister and Foreign Affairs Minister Tzipi Livni, Vice-President Minister Peres and a number of other senior officials] made clear that Israel had decided that military operations would continue until Hizbollah was seriously weakened; this was not, as in the past, a response to a particular incident – the abduction of the two soldiers - but was definitive response to *an unacceptable strategic threat* posed by Hizbollah and a message to Iran and Syria that threats by proxies would no longer be tolerated' [italics added].<sup>163</sup>

The meeting further reported that Israel had indicated that a political solution to the conflict was possible only after it found that 'Hizbollah has been weakened sufficiently not to pose an immediate threat to the citizens of Israel.'<sup>164</sup>

Thus, whilst the Israeli military operation was definitely triggered by the Hezbollah border attack, it was particularly aimed at seriously weakening

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<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Official Record of the Security Council on the 5493<sup>rd</sup> meeting on 'the situation in the Middle East, including the Palestinian question' (S/PV.5493) 21 July 2006 5.

<sup>164</sup> Ibid.

the movement. More specifically, Israel intended to prevent any future attacks by Hezbollah, which clearly goes further than the defensive measures allowed under Article 51. In addition, the future attacks that Israel aimed to prevent cannot be claimed to be imminent as compared to the imminent attack by the Canadian rebels in the *Caroline* case. Rather, similar to the argument put forward in the case of Iraq, Hezbollah was perceived to form a threat to Israel, especially because of its (alleged and undefined) links to the 'terrorist States'<sup>165</sup> of Syria and Iran, and therefore warranted pre-emptive self-defence measures against it.<sup>166</sup>

## 2.2 State Practice Pre-9/11

It is important to note that the Bush Doctrine of pre-emptive self-defence is arguably not a principle that was created only after the 9/11 events. This section will briefly discuss two uses of force prior to 11 September 2001 whose legality have been tested in accordance with the Imminence Doctrine of anticipatory self-defence. However, the two instances were generally not found to be in response to attacks that were imminent and may now possibly be added to the list of uses of force pre-emptively.

### 2.2.1 Cuban Missile Crisis (1962)

In 1962, the US put up a naval blockade, referred to as a 'quarantine,' aimed at preventing the delivery of weapons by the Soviet Union to Cuba.<sup>167</sup> The blockade was triggered by a discovery on the part of the US that the Soviet Union had already installed a significant number of missiles that could reach the US and Latin America and therefore compromise the security of several countries.<sup>168</sup>

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<sup>165</sup> Ibid 1.

<sup>166</sup> This conclusion is shared by Gray, who argued that 'In so far, as Israel argues it is using force to address the threat of future attacks by Hizbollah, its claim to self-defence is pre-emptive. Gray (note 22) 122.

<sup>167</sup> Arend and Beck (note 96) 74-75.

<sup>168</sup> A M Weisburd *Use of Force – The Practice of States Since World War II* (1997) 215.

Since a naval blockade is considered a use of force and hence a violation of Article 2(4), the United States could only justify its action by demonstrating that it was either self-defence in accordance with Article 51 or authorised by the Security Council.<sup>169</sup> As there was no Security Council authorisation, only an authorisation by the Organisation of American States (OAS),<sup>170</sup> the quarantine could only be legal in response to the occurrence of an armed attack or an armed attack that was imminent in accordance with customary international law. Thus, the debate that followed evolved around the imminence of a Soviet attack and concluded that since the weapons were defensive it cannot be argued that the necessity of self-defence was as 'instant' as in the *Caroline* case.<sup>171</sup> Retrospectively, it can be argued that the US government put up the blockade as a pre-emptive self-defence measure against what it perceived to be a threat to the country's national security.

### 2.2.2 Iraq (1981)

In June 1981, Israel conducted an air attack on a nuclear reactor near the Iraqi capital Baghdad, aimed at completely destroying the facility, in which it succeeded.<sup>172</sup> The Security Council immediately passed a resolution that expressed its disapproval of the action.<sup>173</sup>

The Israeli Representative explained that Israel believed that the nuclear facility may be used for the production of weapons to be used against Israel rather than for scientific research as was claimed by Iraq.<sup>174</sup> Therefore, the Israeli Representative argued, the military action was in accordance with the principle of anticipatory self-defence under customary international law.<sup>175</sup>

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<sup>169</sup> Arend and Beck (note 96) 75.

<sup>170</sup> The US could not rely on this authorisation as the use of force by a regional body must be authorised by the Security Council. See UN Chapter VIII, Article 53.

<sup>171</sup> Arend and Beck (note 96) 75.

<sup>172</sup> *Ibid* 77.

<sup>173</sup> Weisburd (note 168) 288.

<sup>174</sup> *Ibid*.

<sup>175</sup> Arend and Beck (note 96) 78.

The debate that ensued focussed on whether the perceived threat posed by the nuclear facility in Iraq could be considered imminent.<sup>176</sup> Most delegates however, did not find that the criteria of the *Caroline Case* were met.<sup>177</sup> Again, it could be argued that Israel at the time applied criteria to determine the nature of the threat posed by Iraq that are more in line with the criteria used nowadays under the Bush Doctrine of pre-emptive self-defence.

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<sup>176</sup> Ibid.

<sup>177</sup> Ibid 79.

### III. BACKGROUND TO THE SITUATION IN SOMALIA

Somalia is located in the north-east of the African continent, along the Gulf of Aden and the Indian Ocean, in a region that is presently referred to as the Horn of Africa. It borders Kenya, Ethiopia and Djibouti and the Arabian Peninsula, which lies on the other side of the Gulf of Aden, has been the country's traditional trading partner and has had cultural ties with Somalia for several hundred years.<sup>178</sup>

Unlike most countries in Africa, the Somali State is based on one ethnic group.<sup>179</sup> The Somali people generally have the same religion, Islam (Sunni), and speak the same language, nowadays referred to as Somali.<sup>180</sup> Besides Somali, Arabic, Italian and English are widely spoken.<sup>181</sup> According to UN statistics of 2005 compiled by Reuters, the Somali population totals 10.7 million.<sup>182</sup>

In order to better understand the situation in Somalia today and the challenges in bringing peace and stability to the country, this section will briefly discuss the history of the country, the peace process that resulted in the establishment of the current government and the ascendance to power of the main armed opposition, the UIC.

## 1. Historical Overview

### 1.1 Colonisation (until 1960)

Colonisation of the region inhabited by the Somali people commenced in the 1880s<sup>183</sup> and divided the region into different parts, namely French Somaliland (currently known as Djibouti), British Somaliland (currently the

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<sup>178</sup> J Van Beurden 'Somalia: In State of Permanent Conflict' in M Mekenkamp, P Van Tongeren and H Van de Veen (eds) *Searching for Peace in Africa: An Overview of Conflict Prevention and Management Activities* (1999) 156 at 156.

<sup>179</sup> K Abraham *Somalia Calling: The Crisis of Statehood and the Quest for Peace* (2002) 1.

<sup>180</sup> Van Beurden (note 178) 156-157.

<sup>181</sup> BBC News 'Somalia: Country Profile' available at

[http://news.bbc.co.uk/2/hi/africa/country\\_profiles/1072592](http://news.bbc.co.uk/2/hi/africa/country_profiles/1072592) (accessed 16 July 2007) 2.

<sup>182</sup> Ibid.

<sup>183</sup> Abraham (note 179) 3.

self-declared, internationally non-recognised State of Somaliland<sup>184</sup>), Italian Somaliland (currently Somalia), which included the Ogaden region in Ethiopia, and a region in northern Kenya.<sup>185</sup> In 1941, the British occupied Italian Somaliland and returned the Ogaden region to Ethiopia in 1948.<sup>186</sup> Nevertheless, in 1950 Italy became the administering authority of Italian Somaliland under the UN trustee system.<sup>187</sup> Finally, on 1 July 1960, five days after gaining independence, British Somaliland united with Italian Somaliland and formed present-day Somalia.<sup>188</sup>

Noteworthy in this period of the country's history, as explained by Schoiswohl, is that:

Before European colonization, the Somali people were not organized in a centralised State-structure, despite a strong sense of linguistic, religious and cultural identity – rather, political life was determined by a decentralized political system comprising an elaborate succession of clans and sub-clans.<sup>189</sup>

The Somali clan system can be explained as follows: despite the aforementioned common ancestry, the Somali identity is based on kinship.<sup>190</sup> Each person belongs to one of the six clan-families, namely the *Dir*, *Isaaq*, *Darood* and *Hawiye* (collectively forming the 'Somaale' group) and the *Digil* and *Rahanwein* (the 'Sab' group<sup>191</sup>).<sup>192</sup> The 'Somaale' group makes up 80 per cent of the population<sup>193</sup> and is predominantly nomadic.<sup>194</sup> The remaining 20 per cent of the population belongs to the 'Sab' group, which is

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<sup>184</sup> The north-western region of Somaliland declared independence from Somalia in 1991, following the outbreak of the civil war. To date, the Somaliland Republic has not been officially recognised. See M Schoiswohl *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland' – The Resurrection of Somaliland Against All International 'Odds': State Collapse, Secession, Non-Recognition and Human Rights* (2004).

<sup>185</sup> Van Beurden (note 178) 157.

<sup>186</sup> Abraham (note 179) 3.

<sup>187</sup> Schoiswohl (note 184) 100.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.* 98.

<sup>190</sup> Abraham (note 179) 3.

<sup>191</sup> *Ibid.* Sab and Somaale were the two sons of a male ancestor from which the Somali people believe they descended.

<sup>192</sup> *Ibid.* 6-7.

<sup>193</sup> *Ibid.* 3.

more agricultural.<sup>195</sup> Each clan-family can be divided into clans, which are in turn divided into sub-clans.<sup>196</sup>

Colonialism, however, forced a governance system that was mainly centralised upon a people used to a political system that was largely decentralised.<sup>197</sup> Moreover, the border agreements, like in many parts of the continent, did not take into consideration the clan territories and restricted the mobility of a people that was predominantly nomadic.<sup>198</sup> Lastly, the colonisers favoured certain clans in terms of provision of water rights and land, which consequently affected the political balance between clans.<sup>199</sup> In conclusion, as noted by Bradbury, 'State development thus altered the way people participated in the local management of resources [and] altered pastoral socio-political institutions.'<sup>200</sup>

## 1.2 Independence and Democracy (1960 – 1969)

Aden Abdulla Osman became the first President of independent Somalia.<sup>201</sup> Stability in the country prevailed, despite some difficulties that were caused by the merger of the former Italian and British colonies, mainly due to a shared Somali culture and unity amongst the newly appointed politicians to realise their dream of a 'Greater Somalia,' which would include the Somali communities in the Ogaden region of Ethiopia, Djibouti (French Somaliland at the time) and northern Kenya.<sup>202</sup>

Leadership quarrels in the ruling party paved the way for a victory of Dr. Ali Shirmake in the 1967 elections.<sup>203</sup> Mohamed Ibrahim Egal, who belonged to the *Isaaq* clan in the north of the country, became Prime

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<sup>194</sup> Van Beurden (note 178) 157.

<sup>195</sup> Ibid.

<sup>196</sup> H M Adam 'Somalia: International versus Local Attempts at Peacebuilding' in T M Ali and R O Matthews (eds) *Challenges for Peacebuilding in Africa* (2004) 279.

<sup>197</sup> Schoiswohl (note 184) 99.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid. Bradbury quoted in Schoiswohl.

<sup>201</sup> Ibid 100.

<sup>202</sup> Ibid.

Minister. Elections in 1969 re-instated both Shirmake and Egal as President and Prime Minister respectively.<sup>204</sup>

However, Somalia's dependence on foreign aid due to the country's failure to build a stable economy and the waste of resources used to achieve a 'Greater Somalia' resulted in the formation of a certain elite, which was further entrenched by the Cold War.<sup>205</sup> The elite used the political process to compete for the economical and political resources of the State, without having distinct ideological programmes and thus instead depending on support from their clan members.<sup>206</sup> Amidst this tension, the feeling amongst the Somali people that the regime was not representative grew, especially as Prime Minister Egal favoured *Isaaq* clan members in the distribution of government positions.<sup>207</sup>

### 1.3 Dictatorship (1969 – 1991)

In 1969, a bloodless coup d'état by the army brought General Mohamed Siad Barre to power.<sup>208</sup> Barre headed the Supreme Revolutionary Council, created following the successful coup, which declared its aim to be to 'preserve democracy and justice' as well as to 'eliminate corruption and [clanism].'<sup>209</sup> Barre soon introduced 'Scientific Socialism' aimed at facilitating the transition from 'the pastoral society into modern Nation-State which would substitute the clan in providing leadership, security and welfare.'<sup>210</sup>

However, Barre's government soon turned to an autocratic style of governing and focussed on the establishment of a security apparatus to maintain power.<sup>211</sup> As described by Schoiswohl:

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<sup>203</sup> Ibid 101.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid 102.

<sup>211</sup> Ibid. Schoiswohl notes that, with the assistance of the Soviet Union, Barre built one of the most powerful armies in Sub-Saharan Africa.

'The [Barre] regime itself operated on the basis of nepotism and corruption, allied clans receiving preferential disbursements in development aid or political positions while those not allied depending on the informal or illegal economy, which developed parallel to the declining formal economy; the State apparatus, consolidated among Barre's immediate kin, was largely maintained by foreign aid.'<sup>212</sup>

In addition, in 1977 Barre revived the dream of a 'Greater Somalia' and commenced a war against Ethiopia over the Ogaden region, which he lost soon after.<sup>213</sup> The country then experienced one of the worst famines which contributed further to the growing opposition against the Barre regime.<sup>214</sup> As one scholar noted: 'Barre's brutal and arbitrary repression and his concentration of power in the hands of his clan elite led to the whole country rising up against him, using their own clans as organizing bases.'<sup>215</sup>

#### **1.4 Civil War and State Collapse (1991 – )**

The numerous opposition movements that emerged, most notably the United Somali Congress (USC), formed by members of the *Habr Gedir* clan of the *Hawiye* clan-family, and the Somali Patriotic Movement (SPM) formed by another clan, clashed with Barre's troops on various occasions.<sup>216</sup> Despite an effort made by Somali civil society in May 1990 to push for dialogue to end the political crisis, the USC attacked Mogadishu, which it took over in January 1991 after two months of intense fighting.<sup>217</sup> Barre escaped and went into hiding in the south of the country.<sup>218</sup>

As soon as the Barre regime was ousted, cooperation amongst opposition movements, typically, came to an end.<sup>219</sup> The inauguration as President of businessman Ali Mahdi Mohamed, who had participated in the civil society call for dialogue, and Umar Arteh Ghalib, formerly a member of

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<sup>212</sup> Ibid 104.

<sup>213</sup> Ibid 103

<sup>214</sup> Ibid.

<sup>215</sup> Adam (note 196) 256.

<sup>216</sup> Schoiswohl (note 184) 105-106.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid 106-107.

Barre's government, as Prime Minister triggered dissent amongst other movements.<sup>220</sup> Several peace conferences aimed at reconciling the various movements were organised, initially by the USC and later by the Italian and other governments.<sup>221</sup> The conferences failed however and fighting erupted,<sup>222</sup> with far-reaching consequences. As noted by Adam:

'By 1992 the effects of state collapse manifested themselves in a devastating man-made famine and a brutal multi-sided civil war which collectively claimed the lives of at least three hundred thousand men, women and children (roughly 25-30 per cent of all children under the age of five). At its peak in 1992, the magnitude of human suffering in Somalia was overwhelming: out of a total population of eight million, approximately 4.5 million Somalis required urgent external assistance. Of those, some 1.5 million people were at immediate risk of starvation, including one million children.'<sup>223</sup>

Throughout the 1990s, both local and international efforts to mediate between the Somali parties were initiated.<sup>224</sup> However, all these initiatives failed until in 2000 a peace conference resulted in a negotiation process that made way for the formation of a Transitional National Government (TNG).<sup>225</sup> However, the TNG only existed for three years during which it faced internal opposition and was unable to carry out most of its mandates.<sup>226</sup> The opposition, organised as the Somali Restoration and Reconciliation Council (SRRC), received political and military support from Ethiopia, which feared the influence in the TNG of 'Islamist groups.'<sup>227</sup>

## 2. The Transitional Federal Government

In 2004, the TNG was replaced by the Transitional Federal Government (TFG), which was the result of the 14<sup>th</sup> attempt to bring peace to the country

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<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid.

<sup>223</sup> Adam (note 184) 263.

<sup>224</sup> ICG Report 116 (note 2) 3.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid.

since 1991.<sup>228</sup> This process took place in Kenya over two years and was organised by the Inter-Governmental Authority on Development (IGAD), the regional organisation of the Horn of Africa.<sup>229</sup> Abdillahi Yusuf, a prominent figure in the SRRC, became the country's President and Ali Mohamed Gedi was appointed Prime Minister.<sup>230</sup>

However, it may be noted that the facilitation process was dominated by Ethiopia, which, unsurprisingly, 'favoured' the SRRC and consequently, the newly formed TFG did not have the support of most of the TNG supporters and 'Islamist groups.'<sup>231</sup> Nevertheless, the TFG is officially recognised by IGAD, the UN and AU.<sup>232</sup>

Soon after its establishment, the TFG suffered internal divisions.<sup>233</sup> President Yusuf and Prime Minister Gedi faced opposition from the so-called Mogadishu Group, which was represented by the Speaker of Parliament and made up of parliamentarians and cabinet members mostly from the south of the country.<sup>234</sup> The divisions were caused by the failure to reach agreement on two issues, namely the location of the provisional capital city<sup>235</sup> and the President's proposal to invite peacekeepers.<sup>236</sup>

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<sup>228</sup> Reuters AlertNet April (note 7) 8.

<sup>229</sup> Ibid. IGAD members are Somalia, Djibouti, Ethiopia, Eritrea, Sudan, Kenya and Uganda. See Agreement Establishing the Inter-Governmental Authority on Development (IGAD) (IGAD/SUM-96/AGRE-Doc) 21 March 1996 available at [http://www.igad.org/about/agreement\\_establishing\\_igad.pdf](http://www.igad.org/about/agreement_establishing_igad.pdf) (accessed 16 June 2007).

<sup>230</sup> ICG Report 116 (note 2) 3.

<sup>231</sup> Ibid.

<sup>232</sup> According to Talmon 'non-recognition' or 'recognition' of a government may mean two things. Firstly, it may be 'an indication of willingness or unwillingness on the part of the recognising government to establish or maintain official, but not necessarily intimate, relations with the government in question.' Secondly, it may be 'the manifestation of the recognizing government's opinion on the legal status of the government in question.' Most importantly, Talmon explains that '[i]t must be emphasized that recognition does not objectively establish the legal status of a government, but that it simply constitutes a subjective (relative) statement on that status.' S Talmon *Recognition of Governments in International Law – with particular reference to governments in exile* (1998) 23, 29 and 30.

<sup>233</sup> ICG Report 116 (note 2) 4.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid. The TFG was formed in exile and was under pressure to relocate to Somalia. Due to security concerns, the President proposed Jowhar or Baidoa as the provisional capital instead of Mogadishu, a proposal that met fierce opposition from the Mogadishu Group, which, naturally, wanted the government to be seated in Mogadishu right away.

<sup>236</sup> Ibid. The Somali President proposed the deployment of peacekeepers to allow the newly established government to implement their mandate amid ongoing security problems

By September 2005, almost a year after its establishment, the TFG was still not functioning properly as a result of the failure of the two sides to resolve their differences.<sup>237</sup> Eventually, the Mogadishu Group fell apart due to internal tension, leaving President Yusuf and Prime Minister Gedi and their supporters in charge of an isolated TFG.<sup>238</sup> Their failure, however, to establish government structures in Mogadishu resulted in a 'political vacuum' in the south of the country.<sup>239</sup>

### 3. The Union of Islamic Courts

The 'political vacuum' in the south of Somalia triggered the revival of the Islamic Courts 'system' by several Islamic organisations that subsequently formed a coordinating body that is referred to as the UIC.<sup>240</sup> The first Islamic courts were established in the early 1990s and continued to operate on an 'on-and-off' basis throughout the civil war.<sup>241</sup>

#### 3.1 History of the Islamic Court System in Somalia

In 1994, with the support of 'secular' political leaders, local Islamic clerics, mostly from the *Abgal* clan of the *Hawiye* clan-family, set up the first Islamic courts in North Mogadishu, which were aimed at providing an alternative method to deal with the lawlessness that had plagued the country for more than three years.<sup>242</sup> As explained by Barnes and Hassan, the establishment of the Islamic courts was motivated principally by a wish for law and order rather than a wish to apply Islamic law.<sup>243</sup> In addition, the Courts' 'Islamic agenda was not particularly 'programmatic'; they were not presided over by

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throughout the country. This proposal also met fierce opposition from the majority in the Mogadishu Group.

<sup>237</sup> Ibid 9.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Barnes and Hassan (note 11) 2.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

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<sup>237</sup> Ibid 9.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Barnes and Hassan (note 11) 2.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

expert Islamic judges, nor were they adherents to any specific school of Islamic law.<sup>244</sup>

A court, generally, had a simple structure: a *Shura*, a council of respected community leaders, a chairman, who is appointed by the *Shura*, and a militia commander, who is appointed by the chairman in consultation with the *Shura*.<sup>245</sup> The militia, recruited from the local clan, were responsible for the enforcement of the judgements.<sup>246</sup> Financial contributions from private individuals as well as taxation via militia checkpoints provided the funding for the operation of a court.<sup>247</sup>

Their success in curbing the anarchy in the capital city, the relative discipline of the Courts' militia and finally their lack of political ambition resulted in popular support for the Courts.<sup>248</sup> However, their demise followed shortly after some quarrels over leadership.<sup>249</sup> They rose briefly in 1998 following the death of General Aideed in 1996 and once again in 2000 although the establishment of the TNG reduced popular support for the Islamic Courts.<sup>250</sup>

### 3.2 The Islamic Courts in 2006

In 2003, Sheikh Sharif Sheikh Ahmed, a school teacher from the *Abgal* clan of the *Hawiye* clan-family, was frustrated by the ongoing security crisis in Mogadishu and re-opened an Islamic court in the north of the city.<sup>251</sup> Other Islamic courts were opened soon and in 2004 Sheikh Sharif Sheikh Ahmed was elected Chairman of the Union of Islamic Courts.<sup>252</sup> As in the past, the various Islamic courts had their own militia and the coordinating body

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<sup>244</sup> Ibid.

<sup>245</sup> ICG Report 116 (note 2) 9.

<sup>246</sup> Barnes and Hassan (note 11) 2.

<sup>247</sup> ICG Report 116 (note 2) 9.

<sup>248</sup> Ibid.

<sup>249</sup> Barnes and Hassan (note 11) 2.

<sup>250</sup> Ibid 3.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

established a combined militia force of some 400 members, which, dealt successfully with some of the security problems in the city.<sup>253</sup>

Amidst the 'success' of the UIC, a new alliance was formed in February 2006, namely the Alliance for Restoration of Peace and Counter-Terrorism (ARPCT).<sup>254</sup> The origins of the ARPCT can be traced back to US efforts to monitor possible terrorist activities in the country.<sup>255</sup> Since the bombings of the US embassies in Nairobi and Dar-es-Salaam in 1998 and the attacks in Mombasa in 2002, the US viewed Somalia as a possible terrorist haven.<sup>256</sup> More recently it claimed to have evidence of the presence of Al-Qaeda members in Mogadishu.<sup>257</sup> It used local actors, ranging from government structures such as the administrations in the Somaliland and Puntland<sup>258</sup> regions to non-state actors such as clans and militias, to carry out monitoring activities for it.<sup>259</sup>

It is unclear whether the local allies of the US formed the ARPCT at their own initiative or were asked to do so by the US.<sup>260</sup> Either way, the announcement in February 2006 that the Alliance was formed was taken as a declaration of war by the UIC and fighting between the two movements erupted.<sup>261</sup> Clashes continued until June 2006 when the UIC defeated the Alliance.<sup>262</sup> Subsequently, the Islamic Courts, rewarded for their success in returning some degree of stability to the capital city with increased support from the local population, most notably the business community, expanded their stronghold.<sup>263</sup> As noted by Barnes and Hassan, the UIC

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<sup>253</sup> ICG Report 116 (note 2) 10.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

<sup>258</sup> Reuters AlertNet April (note 7) 5. Unlike Somaliland, the Puntland region has not declared independence from Somalia as it wishes to remain part of that country. It is a semi-autonomous State and relatively stable.

<sup>259</sup> ICG Report 116 (note 2) 10.

<sup>260</sup> Ibid 12.

<sup>261</sup> Ibid. As explained by the ICG, the UIC considered the formation of the ARPCT to be part of the US conspiracy against their movement. In addition, clan rivalries played up as most of the leadership of the ARPCT belonged to different clans.

<sup>262</sup> Ibid.

<sup>263</sup> Barnes and Hassan (note 11) 4.

'... achieved the unthinkable, uniting Mogadishu for the first time in 16 years, and re-establishing peace and security. The Courts undertook significant and highly symbolic public actions. Road-blocks were removed and even the ubiquitous piles of rubbish that had blighted the city for a decade or more were cleared. The main Mogadishu airport and seaport were reopened and rehabilitated for the first time in a decade. Squatters were made to vacate government buildings, illegal land grabs were halted, and special courts were opened to deal with the myriad claims for the restitution of property.'<sup>264</sup>

Most notable was the apparent change in attitude of the UIC after their defeat of the Alliance. Whereas previously their 'factional politics' was based on 'clan loyalty,' they now announced their intention to bring 'an alternative means of governance to Somalia through *Sharia* law.'<sup>265</sup> In addition, besides their open criticism of the policies of the TFG, the UIC became publicly critical of issues that were previously not emphasised, such as the status of Somaliland and, most importantly, Ethiopia's foreign policy towards Somalia.<sup>266</sup> In the following months, tension heightened between the UIC, the TFG and Ethiopia, a staunch supporter of the TFG, this setting the stage for confrontation in December 2006. The events leading up to the Ethiopian military operation against the UIC will be discussed in detail in the following section.

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<sup>264</sup> Ibid.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

## IV. THE USE OF FORCE IN SOMALIA: ILLEGAL OR DEVELOPING CUSTOM?

### A. The Use of Force in Somalia

#### 1. The Ethiopian Military Operation and Preceding Events

The 'rise' of the UIC and its widespread support posed an additional 'threat' to the already fragile TFG.<sup>267</sup> Recognising a need to defuse the tension between the UIC and the TFG, the League of Arab States hosted peace talks between the parties in Khartoum, Sudan, on 22 June 2006.<sup>268</sup> The talks were deemed successful as the parties reached agreement on several issues, most importantly the recognition of the legality of the TFG and the recognition of the existence of the Union of Islamic Courts.<sup>269</sup> In addition, both parties pledged to refrain from 'any provocative or hostile acts or antagonistic propaganda' and committed to further peace talks at a later stage.<sup>270</sup>

Soon thereafter however, each party accused the other of not respecting the agreement reached in Khartoum: the UIC was accused of carrying out a military operation against an ARPCT leader in the capital city; whilst the TFG was accused of inviting Ethiopian forces into the country.<sup>271</sup> As a result, a second round of negotiations only took place in September 2006, which resulted in agreement between the parties on various issues such as security sector reform and peaceful coexistence amongst the countries of the region.<sup>272</sup> The parties furthermore agreed to hold a third round of peace talks by the end of October 2006.<sup>273</sup>

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<sup>267</sup> K Annan 'Report of the Secretary-General on the situation in Somalia' S/2006/838) 23 October 2006 1 (hereinafter SG Report October 2006).

<sup>268</sup> Ibid 2.

<sup>269</sup> Ibid.

<sup>270</sup> Ibid.

<sup>271</sup> Ibid 5.

<sup>272</sup> Ibid 3.

<sup>273</sup> Ibid.

In the meantime, however, the TFG had increasingly suffered internal divisions, which ultimately led to its dissolution.<sup>274</sup> Following a mediation intervention by Ethiopia, a new government was announced by Prime Minister Gedi in August 2006.<sup>275</sup> The new Council of Ministers was approved by the Transitional Federal Parliament by mid-September 2006.<sup>276</sup>

Furthermore, in the beginning of August 2006, in response to numerous reports on violations of the 1992 arms embargo<sup>277</sup> by Somali as well as by foreign actors and the concern that Somalia was being used to 'play out regional rivalries,' the UN Secretary-General wrote both Ethiopian Prime Minister Meles Zenawi and Eritrean President Isaias Afwerki.<sup>278</sup> In his letters he '[encouraged] both countries to work with local and international stakeholders to promote peace and reconciliation in Somalia and to exercise maximum restraint and refrain from any action that would violate the arms embargo or heighten tensions in an already volatile situation.'<sup>279</sup>

Disagreement over both parties' preconditions for the third round of peace talks resulted in the postponement of the negotiations.<sup>280</sup> Although the Speaker of the Transitional Federal Parliament had managed to convince the UIC, which had demanded the withdrawal of Ethiopian troops from Somalia as a prerequisite for their participation in the talks, to continue dialogue, the TFG criticised and declined the initiative of the Speaker because he had acted without prior consultation.<sup>281</sup> Instead, the TFG welcomed<sup>282</sup> Security Council resolution 1725 that was passed on 6 December 2006, which

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<sup>274</sup> Ibid 2-3.

<sup>275</sup> Ibid.

<sup>276</sup> Ibid.

<sup>277</sup> Security Council resolution 733 (1992) imposed a '... general and complete embargo on all deliveries of weapons and military equipment to Somalia ...' The report of the Monitoring Group on Somalia that came out in November 2006 confirmed most of the reported violations of the arms embargo involving more than ten countries. See Monitoring Group on Somalia 'Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1676' (S/2006/913) 22 November 2006 [hereinafter the 'Monitoring Group Report'].

<sup>278</sup> SG Report October 2006 (note 267) 5.

<sup>279</sup> Ibid.

<sup>280</sup> B Ki-moon 'Report of the Secretary-General on the situation in Somalia' (S/2007/115) 28 February 2007 2 [hereinafter SG Report February 2007].

<sup>281</sup> Ibid.

<sup>282</sup> Ibid.

authorised IGAD and members of the AU to deploy a protection and training mission to Somalia.<sup>283</sup> The UIC, unsurprisingly, firmly opposed the resolution, arguing that 'the deployment of foreign forces was tantamount to an invasion of Somalia by Ethiopia.'<sup>284</sup>

Subsequently, forces belonging to the UIC and the TFG were involved in a minor clash on 7 December.<sup>285</sup> In the following weeks, tension mounted and clashes intensified.<sup>286</sup> This prompted the Ethiopian government to decide that the forces that it had already on the ground in Somalia should engage the UIC alongside the TFG forces.<sup>287</sup> As reported by the UN Secretary-General, by 24 December, '[t]he [TFG] forces, supported by Ethiopian ground and air forces, engaged with the [UIC] forces on a front stretching more than 400 km, from the lower Juba valley in the south to the region of Galkayo in central Somalia.'<sup>288</sup>

## 2. Analysis

It should be noted from the outset that it is unclear when exactly Ethiopian troops first moved into Somalia. Only on 16 December 2006 did Ethiopian Prime Minister Meles Zenawi formally acknowledge the presence of Ethiopian troops in Somalia,<sup>289</sup> without indicating how long his forces had been present in the country.

Furthermore, it is unclear what exactly Ethiopia perceived to be the legal justification for the movement of its troops into Somalia and for the military operation against the UIC. Prime Minister Meles Zenawi reportedly stated officially 'that his Government had taken self-defence measures and started counter-attacking the aggressive extremist forces of the Islamic

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<sup>283</sup> Security Council resolution 1725 (2006).

<sup>284</sup> SG Report February 2007 (note 280) 2.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

<sup>287</sup> Ibid.

<sup>288</sup> Ibid.

<sup>289</sup> Ethiopian Ministry of Foreign Affairs 'Meles says UIC extremist leaders hell-bent on establishing a Taliban-like regime in Somalia' 16 December 2006 available at

Courts and foreign terrorist groups.<sup>290</sup> It is unclear if these self-defence measures were perceived to be taken in response to an actual *attack* by the Courts or merely the *threat* posed by the existence of the movement, which was fiercely opposed to Ethiopia's involvement in the political process in Somalia. In addition, official Ethiopian government sources have also referred to their 'responsibility to assist the [TFG] of Somalia.'<sup>291</sup>

The use of force by Ethiopia in Somalia triggers several questions regarding the legality of its actions, namely: whether the country acted in self-defence in accordance with Article 51; whether it assisted Somalia in accordance with the right of collective self-defence under Article 51; whether it acted in accordance with the principle of anticipatory or pre-emptive self-defence; or, finally, in accordance with the principle of intervention by invitation.

## 2.1 Self-Defence in Accordance with Article 51?

### 2.1.1 Right of Individual Self-Defence?

As discussed in section II.A.2.1.1, the first condition for the right of self-defence is the occurrence of an armed attack. In March 2007, the Ethiopian Ambassador to the United Kingdom explained his country's actions as follows:

'In Somalia, Ethiopia acted in self-defence as it had been under attack from the Union of Islamic Courts (UIC) since the summer of 2006. For more than six months, the UIC had infiltrated armed and trained militia into eastern Ethiopia where they had attacked and killed locals and destroyed development infrastructure such as schools and clinics.'<sup>292</sup>

Noteworthy is that, by knowledge of the author, this was the only statement from the Ethiopian government that claimed that Ethiopia had actually

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[http://www.mfa.gov.et/Press\\_Section/publication.php?Pub\\_Page\\_Id=3265](http://www.mfa.gov.et/Press_Section/publication.php?Pub_Page_Id=3265) (accessed 15 June 2006).

<sup>290</sup> SG Report February 2007 (note 280) 2.

<sup>291</sup> MFA Press Statement 4 December (note 8).

<sup>292</sup> New African 'Ethiopian Embassy Replies: letter from the Ethiopian Ambassador, H. E. Berhanu Kebede, in London, UK. 41<sup>st</sup> year – March 2007 – No 460. 4.

suffered an attack by the UIC. As we shall see in the next section, most government sources referred to a *threat* posed by the UIC.<sup>293</sup> Nevertheless, this paper will briefly examine the legality of the force used in self-defence under Article 51 by Ethiopia against the abovementioned UIC attack.

Whilst the Ambassador provided certain details on the attack, it is important to further specify the alleged actions of the UIC by use of sources from third parties. For instance, the Monitoring Group on Somalia (Monitoring Group) reported that '[o]n 8 July 2006 a shipment of arms [provided by Eritrea] transported by camels and donkeys, and under the escort of 70 *members* of the [UIC] along with 160 [Ogaden National Liberation Front]<sup>294</sup> fighters, entered Ethiopia through the Abudwaq district, Galgadud region, Somalia' [*italics added*].<sup>295</sup>

Thus, although we can conclude that the UIC was indeed involved in smuggling arms across the Somali-Ethiopian border, it is unclear whether it indeed sent armed and trained militia. As the report notes, the escort was provided by *members* of the UIC, which does not necessarily mean armed and trained militia. Furthermore, whilst the Monitoring Group confirms the UIC's military dominance in southern Somalia, it does not mention any military activities of the movement in eastern Ethiopia. It is important to bear in mind that there is an armed opposition movement active in the region, the ONLF, and it is unclear to what extent responsibility for the attacks and killings of locals had been investigated.

Thus, the question then is whether the smuggling of arms by the UIC into Ethiopia meets the threshold of an armed attack. As previously

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<sup>293</sup> Furthermore, it is important to note that Ethiopia never claimed that its military operation against the UIC was in response to an attack on its forces present in Somalia. As the following section will discuss, the engagement of the troops that it had deployed to Somalia with the UIC was to 'assist' the TFG when the clashes intensified.

<sup>294</sup> The Ogaden National Liberation Front has been involved in military clashes with troops of two Ethiopian governments for more than a decade. It fights for secession of the Ogaden region in eastern Ethiopia. See Human Rights Watch 'Ethiopia: Crackdown in East Punishes Civilians' 4 July 2007 available at [http://hrw.org/english/docs/2007/07/02/ethiop16327\\_txt.htm](http://hrw.org/english/docs/2007/07/02/ethiop16327_txt.htm) (accessed 20 July 2007) 2 [hereinafter HRW Report 4 July].

<sup>295</sup> Monitoring Group Report (note 277) 14.

mentioned, in the *Nicaragua* case the Court found that assisting rebels in another State by providing them with arms, logistical or other forms of support was not deemed to amount to an armed attack,<sup>296</sup> but only to a 'breach of the principle of the non-use of force and an intervention in the internal affairs of a State.'<sup>297</sup>

However, in the interest of the discussion this paper will now assume that the Ethiopian allegation is factual and the UIC was indeed responsible for infiltrating armed and trained militia. As noted, in the *Nicaragua* case the Court found that "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular forces.<sup>298</sup> This in turn raises the question whether the acts of armed force against Ethiopia were of sufficient gravity.

If the attack described by Ethiopia is compared with other attacks that have been not found of sufficient gravity by the ICJ,<sup>299</sup> it is likely that it would come to the same conclusion with regards to the UIC attack. Thus, whilst the casualties in this event are highly regrettable, it does not provide sufficient justification for Ethiopia's use of force in self-defence against the UIC in Somalia.

Thus, despite the attempt of this paper to make the abovementioned attack meet the basic requirements of the right of self-defence, it cannot be found to legally justify the use of force in self-defence against the UIC in conformity with Article 51. It is therefore irrelevant, also bearing in mind the limited space available, to analyse Ethiopia's use of force against the principles of necessity and proportionality.

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<sup>296</sup> *Nicaragua* case (note 34) para 195.

<sup>297</sup> *Ibid* para 247.

<sup>298</sup> *Ibid* para 195.

<sup>299</sup> For instance, with regards to the missile and mine incidents in the *Oil Platforms* case the ICJ found that '[e]ven taken cumulatively, ... these incidents do not seem to constitute an armed attack on the United States, of the kind that the Court, in the case concerning Military and Paramilitary Activities in and against Nicaragua, qualified as a "most grave" form of the use of force...' (note 86) para 64.

Lastly, it is important to note that this discussion deliberately ignored the ongoing debate on the requirement that non-State actors act on behalf of a State. Even if this paper were to accommodate the proponents of such a requirement and delve into the question of State involvement in the UIC attacks, as indeed, it has been reported that Eritrea has been supporting the UIC by providing them with arms,<sup>300</sup> this involvement would not have changed the outcome of the above analysis. The attack is still unlikely to meet the gravity threshold and Ethiopia therefore could not have invoked its right to self-defence against Eritrea.

### 2.1.2 Right of Collective Self-Defence?

One statement of the Ethiopian government referred its responsibility to assist the TFG.<sup>301</sup> This assistance could mean two things: firstly, to assist the TFG in dealing with the opposition from the UIC at the invitation of the TFG, which will be discussed in section 2.3; and secondly, to assist the TFG in defending itself against an attack from the UIC by invoking the right of collective self-defence under Article 51.

As explained by Dinstein, '[a]n armed attack against a State, in the meaning of Article 51, posits some element external to the victim State. Non-State actors must strike at a State from the outside.'<sup>302</sup> Therefore, the right of self-defence under Article 51 cannot be invoked 'when non-State actors attack a State from within – and no other State is involved'<sup>303</sup> – [which] is a case of either an internal armed conflict or domestic terrorism.'<sup>304</sup>

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<sup>300</sup> Monitoring Group Report (note 277) 11.

<sup>301</sup> MFA Press Statement 4 December 2006 (note 8) 1.

<sup>302</sup> Dinstein (note 151) 205.

<sup>303</sup> It is important to briefly discuss whether based on the alleged Eritrean supply of arms to the UIC by Eritrea the TFG could have invoked its right to self-defence against Eritrea. This instance is similar to the situation described in the section 2.1.1: like Ethiopia, Somalia cannot invoke the right of self-defence as the Court found in the *Nicaragua* case that the mere supply of arms does not constitute an armed attack. Therefore, the TFG would not have been legally justified in undertaking forceful self-defence measures against Eritrea and Ethiopia could therefore not have legally provided assistance to Somalia under this scenario.

<sup>304</sup> Dinstein (note 151) 204.

Indeed, the UIC, a non-State actor, carried out armed activities against the TFG from within Somalia, as part of its opposition to the current government. Furthermore, section III discussed the events in Somalia and using the definition of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Additional Protocol II),<sup>305</sup> it can be concluded that in December 2006 the situation in Somalia could indeed be classified as an internal armed conflict.

Thus, needless to say, if Article 51 cannot be invoked by the TFG in this instance, then Ethiopia's right of collective self-defence is non-existent as well. Instead, the TFG must defend itself<sup>306</sup> in accordance with Common Article 3 to the Four Geneva Conventions of 1949,<sup>307</sup> as well as provisions of Additional Protocol II that have obtained the status of customary international law as Somalia has not ratified this Protocol.<sup>308</sup>

## **2.2 Self-Defence in Accordance with the Principle of Anticipatory or Pre-emptive Self-Defence?**

As mentioned in the introduction to this section, it is unclear if Ethiopia perceived its actions in self-defence to be in response to an attack by the UIC or rather the threat that it was perceived to form. The previous section described the one instance that Ethiopia referred to an attack, which was analysed as not invoking the right of self-defence under Article 51. In

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<sup>305</sup> Protocol Additional II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Conflicts, 1125 UNTS 609. Article 1 of Protocol II states that its provisions 'shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operation and to implement this Protocol.'

<sup>306</sup> For the rights and duties of the UIC, see L Zegveld *The Accountability of Armed Opposition Groups in International Law* (2002) 4.

<sup>307</sup> See list of treaties.

<sup>308</sup> See International Committee of the Red Cross 'State parties to the various treaties, conventions and protocols' available at [http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (accessed 14 July 2007).

addition, however, it is more probable that Ethiopia perceived the deployment of troops to Somalia and the military operation against the UIC as a measure to deal with the threat that it believed the UIC posed to its security and sovereignty.

For instance, in a press statement published on the website of the Ethiopian Ministry of Foreign Affairs on 24 November 2006, Ethiopian Prime Minister Meles Zenawi reportedly said that 'Ethiopia is under *manifest and direct threat* from the Jihadists' at the helm of the Union of Islamic Courts in Somalia' [italics added].<sup>309</sup> In the same press statement, which reported on the discussion in the House of Peoples' Representatives of the request by the Prime Minister to 'resolve on the security threat posed by extremist groups operating out of Somalia,'<sup>310</sup> the Prime Minister was reported as saying that

'... repeated declarations of Jihad war against Ethiopia coupled with the [UIC's] overt plan to come out powerful to clinch hegemony of rule over all speakers of the Somali language in East Africa not only threatens the security and sovereignty of Ethiopia, but endangers also the peace of the wider Horn of Africa region.'<sup>311</sup>

Therefore, the Prime Minister indicated, 'Ethiopia has the inherent right to self-defence and will take measures proportional to the magnitude of the threat, should its efforts for peace fail.'<sup>312</sup>

### 2.2.1 Anticipatory Self-Defence?

The question that should be addressed at this point is whether the threat was perceived to be imminent, thus invoking the right to anticipatory self-defence under customary international law. By applying the criteria to determine the

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<sup>309</sup> Ethiopian Ministry of Foreign Affairs 'Prime Minister: Ethiopia will never, ever declare war against Ethiopia' 24 November 2006 available at [http://www.mfa.gov.et/Press\\_Section/publication.php?Pub\\_Page\\_Id=3205](http://www.mfa.gov.et/Press_Section/publication.php?Pub_Page_Id=3205) (accessed 15 June 2007).

<sup>310</sup> Ibid.

<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

imminence of an armed attack, namely one that necessitates self-defence as 'instant, overwhelming, leaving no choice of means, and no moment of liberation,' it is not possible to conclude that Ethiopia faced such an armed attack from the UIC.

### **2.2.2 Pre-emptive Self-Defence?**

Rather, the mere fact that Ethiopia was able to determine that the UIC posed a threat to the country on 24 November 2006, almost a month before the actual military operation, indicates the lack of imminence. Moreover, the motion that was passed in Ethiopia's House of Peoples' Representatives on 4 December 2006, allowing the government 'to take legal and appropriate measures with a view to repulsing the aggression of extremist forces operating under the [UIC],'<sup>313</sup> further demonstrated Ethiopia's intention to use force pre-emptively.

### **2.3 Assistance to the TFG: Intervention by Invitation?**

Although the previous sections established that the force used by Ethiopia in its military operation against the UIC was in accordance with the Bush Doctrine of pre-emptive self-defence, it is important to discuss the legality of the other justification that was put forward by the Ethiopian government, namely its responsibility to assist the TFG.

In a press statement released on 4 December 2006, government spokesperson Abdirahman Nur Dinari was reported as having 'said [that] the extremist group [UIC] has the aim of attacking the [TFG] of Somalia and disrupting peace and stability in Ethiopia.'<sup>314</sup> In addition, government officials reportedly 'said [that] being a member of IGAD, Ethiopia has a responsibility to assist the [TFG] of Somalia.'<sup>315</sup>

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<sup>313</sup> MFA Press Statement 4 December 2006 (note 8).

<sup>314</sup> Ibid.

<sup>315</sup> Ibid. It is important to note that the founding document of IGAD does not mention such a responsibility. See IGAD Document (note 229).

Intervention by invitation refers to a request by a State to another State to assist it in dealing with an internal rebellion.<sup>316</sup> It is not outlined in the Charter but derived from traditional prescriptions of international law.<sup>317</sup> As explained by Hillier, the right of a State to intervene in the domestic affairs of another State upon invitation has been restricted progressively, especially with the emergence of the right to self-determination.<sup>318</sup> According to Hillier, 'States may now only intervene to assist a foreign government experiencing low civil strife and only in such situation where the consent of the foreign government is freely given.'<sup>319</sup>

In the case of Somalia, even though it can be assumed that the TFG would indeed have given consent freely, the situation can definitely not be regarded as low intensity unrest. As previously discussed, the situation in Somalia at the time of the military operation can be classified as an internal armed conflict. Based on this, it can be concluded that Ethiopia cannot rely on its perceived 'responsibility to assist the TFG' to legally justify its use of force against the UIC in Somalia.

Most importantly however, resolution 1725 adopted by the Security Council on 6 December 2006, '[called] upon all parties inside Somalia and all other States to refrain from any action that could provoke or perpetuate violence ...' and acting under Chapter VII of the Charter, the Council '[affirmed] ... that the following provisions of present resolution [on the deployment of a protection and training mission in Somalia]... aim solely at supporting peace and stability in Somalia through an inclusive political process and creating the conditions for the withdrawal of all foreign forces

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<sup>316</sup> Hillier (note 13) 251.

<sup>317</sup> T J Farer 'Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife' (1969) 82 *Harvard Law Review* 511 at 511. In the *Nicaragua* case, the Court treated intervention by invitation as an exception to the Principle of Non-Intervention: 'Indeed, it would be difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already available at the request of the government of a State, were also to be allowed at the request of the opposition.' *Nicaragua* case (note 34) para 246.

<sup>318</sup> Hillier (note 13) 252.

<sup>319</sup> *Ibid* 253.

from Somalia<sup>320</sup> and [endorsed] the specification in the IGAD Deployment Plan that those States that border Somalia would not deploy troops of Somalia.<sup>321</sup>

Accordingly, even though the Security Council did not specifically address the reported presence of Ethiopian troops in the country, it made clear that the countries in the region, specifically the neighbours of Somalia, thus, including Ethiopia, should not be militarily involved in the situation in Somalia. Thus, by moving its troops into Somalia, Ethiopia was essentially in violation with resolution 1725.

## **B. The Bush Doctrine: Approaching Customary International Law?**

The analysis in part A of this section demonstrated that Ethiopia's use of force in Somalia can be added to the examples of force used in pre-emptive self-defence, which were discussed in parts II.B.2.1 and 2.2. This triggers a question with regards to the status of the Bush Doctrine of pre-emptive self-defence under international law, as, indeed, the practice of States is one element in examining whether a principle is declaratory of customary international law.<sup>322</sup> It is therefore worthwhile to discuss to what extent the Bush Doctrine of pre-emptive self-defence is approaching the status of customary international law. In order to facilitate such a discussion, this section will commence with outlining briefly what exactly determines that a rule has the status of customary international law.

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<sup>320</sup> Security Council Resolution 1725 (2006) 2.

<sup>321</sup> Ibid 3.

<sup>322</sup> Hillier (note 13) 20.

# 1. Formation of Customary International Law

## 1.1 The Material Element

As mentioned, the identification of a principle as customary international law greatly depends on the practice of States.<sup>323</sup> This is referred to as the 'material element' and includes 'any act, articulation, or other behaviour of a State which discloses the State's conscious attitude concerning a customary rule or recognition of a customary rule.'<sup>324</sup> More precisely, the International Law Commission listed the following sources as 'classical' examples of "Evidence of Customary International Law:" treaties; decisions of national and international courts; national legislation; diplomatic correspondence; opinions of national legal advisors; and practice of international organisations.<sup>325</sup>

The ICJ has stated that State practice on a particular matter must have been 'extensive.'<sup>326</sup> Thus, this implies that practice does not have to be universal but merely 'common' and 'widespread.'<sup>327</sup> In addition, Hillier explains that practice appears to require being 'representative in the sense that all the major political and socio-economic systems should be involved in the widespread practice.'<sup>328</sup> Finally, with regard to the temporal aspect of this element, there does not seem to be a fixed length of time required to establish a rule of customary international law.<sup>329</sup> The required duration of State practice depends on the nature of the rule; a completely new principle requires less lengthy practice than an already existing rule that is being challenged.<sup>330</sup>

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<sup>323</sup> Ibid.

<sup>324</sup> Ibid.

<sup>325</sup> Ibid.

<sup>326</sup> Ibid 23.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid 25.

<sup>330</sup> Ibid.

## 1.2 The Psychological Element

The second element that is required is referred to as the 'psychological element' or *opinio juris sive necessitatis* (*opinio juris*, which literary means the opinion of law or of necessity).<sup>331</sup> This concerns 'the subjective conviction held by States that the behaviour in question is compulsory and not discretionary,<sup>332</sup> 'due to a feeling of legal obligation.'<sup>333</sup>

## 1.3 Categories of Customary International Law

It is important to note that there appear to be three categories of customary rules. Firstly, there are those customary rules that have reached their status over the years, based on practice of States that was eventually regarded as best reflecting the opinion of States on the matter.<sup>334</sup> A second category of rules, as explained by Cannizzaro,

'appear to be the product of the claims of certain actors, usually the most powerful among them, implicitly or expressly put forward in order to provoke a change in the law which better accommodates their interests, and which is accepted, or acquiesced to by other actors convinced of the necessity or of the ineluctable character of such a change.'<sup>335</sup>

Lastly, the law-making process with regard to the third category of customary rules is less clear. In this case, the customary status of a rule cannot be explained by looking simply at the practice of states or their *opinio juris* on the matter.<sup>336</sup> Rather, these customary rules were established 'by way of a deductive process, looking at the [*opinio juris*] of the actors in international law, at the structure of the international system, or at a combination of principles and values in this legal order.'<sup>337</sup>

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<sup>331</sup> Ibid 26.

<sup>332</sup> Ibid 19.

<sup>333</sup> Ibid 26.

<sup>334</sup> E Cannizzaro and P Palchetti *Customary International Law on the Use of Force* (2005) 2.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid 3.

## 2. The Bush Doctrine and Customary International Law

Based on the criteria outlined in the previous section, it is possible to argue that indeed the Bush Doctrine of pre-emptive self-defence is still far from approaching the status of customary international law. Whilst it is indeed notable that in the past three years only, at least three uses of force were based on pre-emptive self-defence (Iraq, 2003; Lebanon, 2006; and Somalia, 2006), taken collectively with the less recent examples of the use of force in pre-emptive self-defence (in 1962 and 1981, amongst others), it is doubtful that it would be deemed enough to meet the aforementioned threshold of 'extensive' state practice.

With regard to the psychological element of customary international law, it is unlikely that the parties having used force pre-emptively did so because they felt 'legally obligated.' As explained by Cannizzaro, 'it is plainly not the conduct itself but what the State says about the conduct that supplies the truly relevant evidence of *opinio juris*.'<sup>338</sup> Indeed, especially in the case of Iraq, the majority of the intervening parties attempted to justify their actions by use of resolutions that were adopted in the Security Council in the 1990s and thus demonstrating the 'legal consciousness of Member States that non-defensive action could be lawfully undertaken solely when so authorised [by the Security Council].'<sup>339</sup>

Certainly, it must be noted that it is not even clear whether the United States, creator and staunch promoter of the Bush Doctrine of pre-emptive self-defence, essentially wishes this principle to achieve the status of customary international law. It only once referred to a need to change the current international legal framework in its 2002 National Security Strategy by stating that international law recognises the right to self-defence against an imminent threat and that all that is required is to 'adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.'<sup>340</sup>

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<sup>338</sup> Ibid 17.

<sup>339</sup> Gazzini (note 18) 83.

<sup>340</sup> 2002 National Security Strategy (note 118) 15.

In agreement with Gray, 'there [is] some uncertainty as to whether pre-emptive self-defence was put forward as an existing legal right or merely as a proposal as to what the law should be.'<sup>341</sup> However, it is likely that the statement by former US Secretary of State Henry Kissinger in 2002 that '[i]t is not in the American interest to establish pre-emption as a universal principle available to every nation'<sup>342</sup> is still upheld today.

In addition, a significant part of the international community mainly rejected the need for the proposed adaptation of the concept of an imminent threat. For instance, the aforementioned High-Level Panel recognises that a 'problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.'<sup>343</sup> It states, however, that 'if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to.'<sup>344</sup> This clearly rejects the argument by the Bush Administration that if necessary a State may act unilaterally.<sup>345</sup> Moreover, former UN Secretary-General Kofi Annan expressed his agreement with the Panel's statement on this issue in his own report.<sup>346</sup>

In addition, the European Union (EU), in its Security Strategy of 2003, acknowledged that threats to Europe's security are terrorism and the proliferation of weapons of mass destruction but added regional conflicts, state failure and organised crime to its list of key threats.<sup>347</sup> In stark contrast to the National Security Strategy of the US, the EU emphasises the central role of the UN by stating that:

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<sup>341</sup> Gray (note 22) 17.

<sup>342</sup> Gazzini (note 18) 201-202.

<sup>343</sup> High-Level Panel Report (note 127) 63 para 188.

<sup>344</sup> Ibid para 190.

<sup>345</sup> 2002 National Security Strategy (note 118) 6.

<sup>346</sup> In Larger Freedom Report (note 128) 33 para 125: 'Where threats are not imminent but latent, the Charter gives full authority to the Security Council to use military force, including preventively, to preserve international peace and security.'

<sup>347</sup> European Union 'A Secure Europe in a Better World: European Security Strategy' 12 December 2003 available at <http://www.consilium.europa.eu/uedocs/cmsUplaod/78367.pdf> (accessed 12 March 2007) 3-4.

'The fundamental framework for international relations is the United Nations Charter. The United Nations Security Council has the primary responsibility for the maintenance of international peace and security. Strengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively, is a European priority.'<sup>348</sup>

In conclusion, even though the preceding discussion argues that the Bush Doctrine of pre-emptive self-defence cannot be considered to be approaching customary international law, there is a need to address the division in the opinion of international community on this matter. As will be discussed in the following section, the 'War on Terror' and the ongoing debate on a need to adapt the international legal framework as it currently is to the 'new security threats' of today results in ambiguity and some States are likely to take advantage of this situation, like Israel and Ethiopia, arguably, have done.

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<sup>348</sup> Ibid 9.

## V. WAY FORWARD: LESSONS LEARNED FOR INTERNATIONAL DISPUTE RESOLUTION AND RECOMMENDATIONS

### 1. Somalia Today

#### 1.1 The Conflict Situation

After nine days of heavy fighting, the Ethiopian and TFG forces pushed most of the UIC fighters to the south of the country.<sup>349</sup> As expected, the UIC departure resulted in a 'breakdown of law and order' in the capital city, as 'freelance militia' filled the vacuum left by the ousted UIC.<sup>350</sup> As explained by a local journalist, '[e]ach clan [tried] to rearm and repossess weapons taken from them by the [UIC], in anticipation of the return of the warlords.'<sup>351</sup> By the beginning of January 2007, Ethiopian and TFG forces took control of Mogadishu<sup>352</sup> and efforts to resist the presence of Ethiopian and TFG forces in the capital city soon increased by an insurgency made up of a variety of groups, some supportive of the warlords that previously ruled Mogadishu and others supportive of the UIC.<sup>353</sup>

Towards the end of January, the AU reported that according to the TFG, approximately 3000 UIC fighters were still present in the country and left behind a 'sizable' number of weapons, mines and booby traps.<sup>354</sup> It furthermore repeated its recommendation that a peacekeeping force be deployed to Somalia, to assist the 'inadequate and ill-equipped' TFG forces

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<sup>349</sup> IRINNEWS 'SOMALIA: Mogadishu in chaos as Islamic militia leave' 28 December 2006 available at <http://www.irinnews.org/Report.aspx?ReportId=62912> (accessed 22 April 2007)

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<sup>350</sup> Ibid.

<sup>351</sup> Ibid.

<sup>352</sup> Human Rights Watch 'Somalia: Shell-Shocked: Civilians under Siege in Mogadishu' 13 August 2007 available at <http://hrw.org/reports/2007/somalia0807/somalia0807webwcover.pdf> (accessed 17 August 2007) 4 [hereinafter HRW Report 13 August].

<sup>353</sup> IRINNEWS 'SOMALIA: A tortuous road ahead in search of peace' 12 March 2007 available at <http://www.irinnews.org/REport.aspx?ReportId=70652> (accessed at 22 April 2007) 1.

<sup>354</sup> African Union 'Report of the Chairperson of the Commission on the Situation in Somalia. (PSC/PR/2(LXIX)) 19 February 2007 7.

with returning peace and stability to the south of the country.<sup>355</sup> The AU noted that 'the recent developments in Somalia represent a unique and unprecedented opportunity to re-establish the structures of governance and further peace and reconciliation in Somalia.'<sup>356</sup>

Whilst heavy fighting between Ethiopian troops and the insurgents continued, the Security Council adopted resolution 1744 on 21 February 2007, which authorised the AU to deploy a peacekeeping mission to Somalia. The resolution stated that the Security Council '... [*underlined*] that the deployment of AMISOM will help avoid a security vacuum and create the conditions for a full withdrawal and the lifting of emergency security measures currently in place.'<sup>357</sup> Soon thereafter, Uganda deployed 1,600 troops to AMISOM and Burundi, Ghana, Nigeria and Malawi pledged to contribute troops soon.<sup>358</sup>

The arrival of peacekeepers in the capital exacerbated violent opposition by the insurgents who perceived the peacekeepers to be yet another ally of the TFG.<sup>359</sup> As a result, the month of March witnessed heavy fighting but despite continuing insecurity, the Transitional Federal Parliament passed a motion on 13 March that authorised the TFG to move from its temporary seat in Baidoa to Mogadishu.<sup>360</sup>

A cease-fire agreement that was negotiated between Ethiopian troops and *Hawiye* clan elders at the beginning of April was only effective for a short while after which Ethiopian troops intensified their military campaign.<sup>361</sup> According to Human Rights Watch, in the month of April Mogadishu

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<sup>355</sup> Ibid.

<sup>356</sup> Ibid 9.

<sup>357</sup> Security Council resolution 1744 (2007) 1.

<sup>358</sup> IRINNEWS 'SOMALIA: A tortuous road ahead in search of peace' 12 March 2007 available at <http://www.irinnews.org/REport.aspx?ReportId=70652> (accessed at 22 April 2007) 1.

<sup>359</sup> Ibid 4.

<sup>360</sup> IRINNEWS 'SOMALIA: Government moves to Mogadishu' 13 March 2007 available at <http://www.irinnews.org/Report.aspx?ReportId=70664> (accessed 22 April 2007) 1.

<sup>361</sup> HRW Report 13 August 2007 (note 352) 4.

experienced the 'heaviest fighting' since the commencement of the civil war fifteen years ago.<sup>362</sup>

Since April, the TFG has focussed most of its efforts at organising a 'national reconciliation conference' aimed at bringing the warring parties to the table and discussing a way forward.<sup>363</sup> After having been postponed a number of times, the conference finally took place on 15 July and was attended by representatives from the AU, IGAD, Ethiopia, Kenya and Yemen.<sup>364</sup> However, concerns with regards to the control of the TFG over the proceedings and the absence of the UIC's political arm and certain elements of the *Hawiye* clans dominated the conference.<sup>365</sup> Sheikh Sharif Sheikh Ahmed reportedly said that '[f]or any genuine dialogue to take place inside the country there has to be immediate and unconditional withdrawal of the Ethiopian troops from Somalia.'<sup>366</sup> Indeed, it is unclear what effect the conference has had on the peace process as fighting between Ethiopian and TFG forces and insurgents continues to date.<sup>367</sup>

## 1.2 Humanitarian Consequences

By April 2007, out of a population of 9.9 million, 400.000 Somalis were internally displaced and lived in squalid conditions while another 395.00 fled to neighbouring countries.<sup>368</sup> Approximately 2 million people are in need of emergency health care, while there are only 4 doctors per 100.000 people,

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<sup>362</sup> Human Rights Watch 'Somalia: a failing counter-terrorism strategy' 14 May 2007 available at [http://hrw.org/english/docs/2007/05/14/somali6070\\_txt.htm](http://hrw.org/english/docs/2007/05/14/somali6070_txt.htm) (accessed 22 June 2007) 1 [hereinafter HRW Report 14 May].

<sup>363</sup> IRINNEWS 'SOMALIA: Conference organisers optimistic, despite adjournment' 16 July 2007 available at <http://www.irinnews.org/Report.aspx?ReportId=73255> (accessed 16 July 2007) 1 [hereinafter IRINNEWS 16 July].

<sup>364</sup> Ibid.

<sup>365</sup> IRINNEWS 'SOMALIA: Optimism over peace conference despite violence' 13 July 2007 available at <http://www.irinnews.org/Report.aspx?ReportId=73234> (accessed 15 July 2007).

<sup>366</sup> IRINNEWS 16 July (note 363) 1.

<sup>367</sup> IRINNEWS 'SOMALIA: Policemen killed as bloodshed in Mogadishu continues' 14 August 2007 available at <http://www.irinnews.org/Report.aspx?ReportId=73724> (accessed 15 August 2007) 1.

<sup>368</sup> Reuters AlertNet April (note 7) 2.

and 1.7 million require food aid.<sup>369</sup> According to the United Nations Children's Fund (UNICEF), only 13 per cent of Somali boys and 7 per cent of Somali girls are attending primary school.<sup>370</sup>

However, the lawless situation in most parts of the country has resulted in countrywide ambushes, armed checkpoints and piracy.<sup>371</sup> In addition, fighting continues between Ethiopian and TFG forces and insurgency groups, both sides accused of engaging in 'indiscriminate shelling and arbitrary arrests and detention.'<sup>372</sup> Evidently, the continued insecurity seriously hampers the delivery of the so desperately needed humanitarian assistance.<sup>373</sup>

### 1.3 Regional Developments

The military operation against the UIC by Ethiopia and the TFG has, as expected, impacted on the situation in Ethiopia, specifically in the east of the country.<sup>374</sup> Human Rights Watch reported that in June 2007 Ethiopian government forces commenced a military campaign against the Ogaden National Liberation Movement (ONLF)<sup>375</sup> 'aimed at eliminating the [movement]'.<sup>376</sup>

It has been reported that hundreds of civilians fled their villages either because they were ordered to leave their houses by the Ethiopian army or because they were caught in clashes between government forces and ONLF

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<sup>369</sup> Ibid.

<sup>370</sup> Ibid 2.

<sup>371</sup> Ibid 5. For instance, by July 2007 several ships of the United Nations World Food Programme were hijacked by armed pirates off the Somali coast.

<sup>372</sup> Office for the Coordination of Humanitarian Affairs 'Humanitarian Situation in Somalia – Monthly Analysis' July 2007 available at <http://ochaonline.un.org/somalia> (accessed 23 July 2007). For detailed information on the violations of International Humanitarian Law by the parties to the conflict see HRW Report 13 August (note 352).

<sup>373</sup> See Reuters AlertNet April (note 7) 4-5 for details on the humanitarian aid efforts in the country.

<sup>374</sup> HRW Report 4 July (294) 2.

<sup>375</sup> Ibid.

<sup>376</sup> Human Rights Watch 'Ethiopia's dirty war' 5 August 2007 available at <http://hrw.org/english/docs/2007/08/05/ethiop16594.txt.htm> (accessed 17 August 2007) 1 [hereinafter HRW Report 5 August].

fighters.<sup>377</sup> Moreover, Ethiopian forces, especially targeting civilians suspected of having family members in the ONLF, were described as 'burning homes and property, including the recent harvest and other food stocks intended for the civilian population, confiscating livestock and, in a few cases, firing upon and killing fleeing civilians.'<sup>378</sup>

Indeed, as mentioned previously, the Ogaden region in Ethiopia has strong ethnic links with southern Somalia and the UIC has been reported as supporting the ONLF by facilitating weapon deliveries to them. As pointed out by Human Rights Watch, it is highly likely that the ONLF 'may have decided to escalate its rebellion in Ogaden in response to Ethiopia's full-scale military intervention in Somalia in December [2006].'<sup>379</sup> In addition, some analysts fear that the military campaign in Somalia and the clashes between Ethiopian forces and ONLF fighters will eventually lead to renewed conflict between Ethiopia and Eritrea.<sup>380</sup>

## 2. Lessons Learned

At the end of June, the Washington Post Foreign Service reported that Ethiopian Prime Minister Meles Zenawi admitted that his government "'made a wrong political calculation" when it intervened in Somalia ....'<sup>381</sup> Certainly, the situation in Somalia and eastern Ethiopia seems to have only worsened since December 2006. As noted by Human Rights Watch 'the armed opposition to Ethiopia and the TFG gains greater support from Somali

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<sup>377</sup> HRW Report 4 July 2007 (note 294) 1.

<sup>378</sup> Ibid.

<sup>379</sup> HRW Report 5 August 2007 (note 376) 1.

<sup>380</sup> See *ibid* and International Crisis Group 'Somalia: The Tough Part is Ahead' Africa Briefing N° 45, 26 January 2007 available at [http://www.crisisgroup.org/library/documents/africa/horn\\_of\\_africa/b45\\_somalia\\_the\\_tough\\_part\\_is\\_ahead.pdf](http://www.crisisgroup.org/library/documents/africa/horn_of_africa/b45_somalia_the_tough_part_is_ahead.pdf) (accessed 30 January 2007).

<sup>381</sup> Washington Post Foreign Service, Stephanie McCrummen 'Ethiopia: Ethiopian Premier Admits Errors on Somalia' 29 June 2007 available at [http://nazret.com/blog/index.php?title=ethiopia\\_meles\\_zenawi\\_admits\\_errors\\_on\\_s&more=1&c=1&tb=1&pb=1](http://nazret.com/blog/index.php?title=ethiopia_meles_zenawi_admits_errors_on_s&more=1&c=1&tb=1&pb=1) (accessed 17 July 2007) 1.

nationalists and Islamists alike with every day the Ethiopian troops remain on Somali soil.<sup>382</sup>

It is important to note that the military operation against the UIC was considered by many Western countries as part of the ongoing 'War on Terror.' As noted by Human Rights Watch, 'Ethiopia and its Somali proxies, including a large number of warlords with notorious records of abuse from earlier conflicts, are perceived by the EU and US government as key allies in the "war on terror" and are doing the [W]est's dirty work against Somalia's Islamists.'<sup>383</sup> Ethiopia and the United States labelled the movement as 'extremist' and according to Human Rights Watch, the UIC was even referred to as a terrorist movement, which it found 'inaccurate and misleading.'<sup>384</sup>

Indeed, as previously discussed, the UIC enjoyed popular support and was, wrongly, not perceived as a party to an ongoing conflict with deep-rooted causes. The situation that the UIC found itself in by June 2006 forced it to organise itself and have a clear position on the peace process in the country. Unlike before, where numerous movements with unstable leadership and ever-changing motives ruled Mogadishu, the UIC presented the TFG a credible opponent in peace talks. Instead, the TFG supported the use of force in an attempt to completely eliminate its adversary.

In fact, it could be argued that the ongoing crisis in Somalia could have been avoided if Ethiopia and the several Western States would have learned from the lessons that the military operations in Iraq and Lebanon provided. Both military operations, as discussed previously, were undertaken as pre-emptive self-defence measures without authorisation from the Security Council. In addition, both military operations were seen as being part of the ongoing 'War on Terror.'<sup>385</sup>

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<sup>382</sup> HRW Report 14 May 2007 (note 362) 2.

<sup>383</sup> Ibid 2

<sup>384</sup> Ibid.

<sup>385</sup> Gray (note 22) 29: '[Prime Minister Blair] claims that the terrorist attacks in the USA, the UK, Spain, Indonesia, Algeria, Afghanistan and Iraq, the continuing conflict in Lebanon and Palestine "is all part of the same thing."

Lebanon, a country that has experienced civil war and whose politics are to a certain degree linked to developments in the Israel/Palestine conflict, experiences ongoing instability more than a year after Israel's offensive in the country.<sup>386</sup> In addition, Hezbollah has been said to still have military potential and is probably military stronger and more popular than before the Israeli military operation.<sup>387</sup> Gray pointed out that Israel has used force on numerous occasions and correctly noted that 'the lesson of previous conflicts is clear and that the use of force cannot be a means of settling conflicts in the region.'<sup>388</sup> In the case of Iraq, the crisis in this country is unforeseen and does not have any prospects of being resolved soon.<sup>389</sup>

Thus, Somalia, Lebanon and Iraq, and even more countries if one considers the regional effects that these conflicts have had and will continue to have, are likely to remain unstable for some time to come. Furthermore, as rightly pointed out by Human Rights Watch, the approach taken by Ethiopia 'will only strengthen the hand of the extremist minority in Somalia, handing Al-Qaida another potential theatre of militant actions, and another opportunity to present themselves internationally as defenders of Islam against western aggression.'<sup>390</sup> The same could be said to apply in Iraq and Lebanon, and even Palestine.

Therefore, it could be concluded that the greatest lesson learned from the products of the 'war on terror' thus far, is that its proposed (unilateral) military response to 'new security threats' linked to conflicts that are

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<sup>386</sup> For information on the ongoing instability in the country see, for instance, IRINNEWS 'LEBANON: Tense times as rival Islamist groups vie for control of refugee camp' 5 August 2007 available at <http://www.irinnews.org/PrintReport.aspx?ReportId=73587> (accessed 22 August 2007) and International Crisis Group 'Lebanon at a Tripwire' Middle East Briefing N° 20, 21 December 2006 available at [http://www.crisisgroup.org/library/documents/middle\\_east\\_north\\_africa/arab\\_israeli\\_conflict/lebanon/b20\\_lebanon\\_at\\_a\\_tripwire.pdf](http://www.crisisgroup.org/library/documents/middle_east_north_africa/arab_israeli_conflict/lebanon/b20_lebanon_at_a_tripwire.pdf) (accessed 13 March 2007).

<sup>387</sup> See Al Jazeera 'Hezbollah: Stronger than ever?' 11 July 2007 available at <http://english.aljazeera.net/News/asp/print.htm> (accessed 22 August 2007).

<sup>388</sup> Gray (note 22) 122.

<sup>389</sup> For more information on the ongoing conflict in Iraq see, for instance, ICG Report 67 (note 20).

<sup>390</sup> HRW Report 14 May 2007 (note 362) 2.

complex, and in the case of Somalia and Lebanon even more than a decade old, does not result in stability or the 'removal' of the anticipated threat.

Instead, it can be argued, in agreement with Gray, that the 'war on terror' has completely '[distorted] our understanding of conflicts.'<sup>391</sup>

Negotiation and all the other methods discussed in the second section of this paper are deemed unsuitable in the 'War on Terror.' As noted by the Centre for Humanitarian Dialogue:

'The War on Terror has further challenged the appropriateness of dialogue. Some governments argue that pariah groups and regimes should be isolated, not engaged. Indeed, the idea of negotiating with Al Qaeda appears ludicrous – what could possibly be agreed? But if one pursues purely military solutions in Iraq and Afghanistan, and refuses to permit channels of dialogue with Hamas in Palestine and Hezbollah in Lebanon, countries elsewhere, – Sri Lanka, Somalia, Colombia, Philippines – are given less reason to engage those who take up arms. If we wish to see the extremists choose the political path, we need to keep the political channels open.'<sup>392</sup>

### 3. Recommendations

The lessons learned discussed in the previous section indicate that there is a need to address the ongoing division in the international community with regard to the appropriate response to the emergence of 'new threats.' As mentioned previously, even though the response advocated by the United States has met significant opposition from a majority of States, it is nevertheless employed by a number of countries, like for instance Israel and Ethiopia, which contributes to further divisions in the international community and ambiguity on the current legal framework governing the use of force.

The first recommendation for a way forward would be to re-emphasise the central role of the UN Security Council in the maintenance of international peace and security. Indeed, although one could debate the degree of danger posed by the 'new threats,' it cannot be denied that

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<sup>391</sup> Gray (note 22) 122.

<sup>392</sup> Centre for Humanitarian Dialogue 'Don't cheapen talk, make dialogue work' 13 August 2007 available at <http://www.civicus.org/new/media/make-dialogue-work.doc> (accessed 15 August 2007) 2.

terrorism and the proliferation of weapons of mass destruction present the international community with a security challenge that was previously, at the time of the creation of the UN, unanticipated. However, what remains unchanged is that the international community still has an interest in dealing appropriately with these new challenges. As argued by Weiner:

'Because these contemporary security threats – unlike the rivalries of the Cold War era – do not implicate competing interests of the Permanent Members, the Security Council's security architecture is actually better suited to addressing today's threats than it was to countering the state-versus-state conflicts for which it was designed.'<sup>393</sup>

Thus, the aforementioned call for an adaptation of the international legal framework made by certain scholars and governments is redundant. Rather, the criteria based on the *Caroline* case should be maintained in the decision of States to undertake self-defence measures should a State be faced with a threat that is imminent.<sup>394</sup> For those threats that are not imminent, the Security Council should be presented with relevant evidence and decide what measures (whether involving the use of force or not) should be undertaken in response.<sup>395</sup>

This approach would respond to two challenges that have presented themselves following the response of some States to the 'new security threats.' Firstly, it 'would likely prevent the opening of the flood gates to unilateral preemptive action by other states.'<sup>396</sup> The case of Somalia, for instance, has demonstrated that any country can use the principle of preemptive self-defence not necessarily to prevent an imminent threat from materialising but rather to simply eliminate one of its opponents.

The error in judgement that Ethiopia even admitted making introduces the second challenge that can be prevented by a multilateral approach: in

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<sup>393</sup> A S Weiner 'The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?' (2006) 59 *Stanford Law Review* 415 at 416.

<sup>394</sup> In agreement with Arend (note 134), the High-level Panel Report (note 127) and In Larger Freedom Report (note 128).

<sup>395</sup> *Ibid.*

<sup>396</sup> Arend (note 134) at 102.

agreement with Weiner, 'the use of force pursuant to the Charter's collective security provisions carries with it greater legitimacy, greater prospect for success, and less danger of destabilising error or abuse than would force exercised pursuant to doctrines that expand the right of states to use force unilaterally.'<sup>397</sup>

Another issue that has come up since the events of 9/11 and the response of some States is the failure of the international community to agree on a definition of terrorism. As previously mentioned, the 'War on Terror' is fought without a clear understanding and agreement on what 'terror' or terrorism actually is. This is problematic. Although the apparent difficulty in reaching consensus is not denied, the issue of terrorism has such a great impact on foreign policies and international relations that it therefore needs to be understood similarly by the international community. This will prevent a situation whereby a government or one party to a conflict simply brands the opposition or an adversary as 'terrorist' to justify military actions against it or simply to gain support internationally.

Lastly, although seeking authorisation from the Security Council should go a long way in dealing with this, it should not be forgotten that the prohibition on the use of force was introduced following a conclusion by the international community that the use of force is simply not an effective method to deal with disputes in international relations. It subsequently designed numerous peaceful methods, discussed in section II.A.1, to resolve differences that may arise in international relations. Thus, although potential threats should be submitted for the Security Council's attention, it is desirable that States carefully consider their requests for forceful action against such a threat.

A case in point is Afghanistan. The military operation that was undertaken, arguably, in accordance with international law, has resulted in the ousting of the Taliban regime and the instalment of a 'democratic' government. However, more than five years following the military operation,

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<sup>397</sup> Weiner (note 393) at 416.

remnants of the Taliban regime continue to fight the new regime and to pose a danger to efforts towards peace and stability in the country and even the region at large.<sup>398</sup>

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<sup>398</sup> See IRINNEWS Afghanistan (note 115).

## VI CONCLUSION

Acknowledging the hard lesson learned that the use of force to resolve differences in international relations is rarely effective, the international community has designed a variety of methods that can be employed to resolve (international) disputes peacefully. The UN Charter and customary international law therefore allow States to resort to the use of force in two exceptional circumstances only, namely in self-defence and following an authorisation by the Security Council. Despite the requirement of exceptional circumstances, military force has been used by States on several occasions since the establishment of the UN and the examination by the ICJ of the legality of these uses of force has contributed to further limitations to the resort to force.

Exactly six years ago, well-planned terrorist attacks on various cities in the US shook the world and triggered a global 'War on Terror,' which is described as being both 'a battle of arms and a battle of ideas.'<sup>399</sup> Indeed, since September 2001, at least three major military operations have been carried out as part of the 'War on Terror,' namely in Afghanistan, Iraq and Lebanon. This paper has noted the arguments put forward by several scholars that in the case of Iraq and Lebanon force was not used in accordance with the UN Charter or customary international law. Rather, the use of force in these instances was perceived as legitimate since it responded to so-called 'new threats' that warrant an adjustment in contemporary international law governing the use of force. This proposed adjustment is referred to as the Bush Doctrine of pre-emptive self-defence.

Certainly, besides a battle of arms the 'War on Terror' also seems to involve a 'battle of ideas.' Not only in the ideological sense however, but also with regard to ideas on the appropriate response to the 'new security threats.' There is a battle between those who argue that the Bush Doctrine of

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<sup>399</sup> National Strategy for Combating Terrorism of the United States of America, September 2006 available at <http://www.whitehouse.gov/nsc/nsct/2006/nsct2006.pdf> (accessed 18 August 2007) 1.

pre-emptive self-defence is necessary to counter today's threats and those who argue that the current legal framework is still appropriate and does not need to be adjusted.

This paper analysed the Ethiopian military operation against the UIC in Somalia and argued that it can be added to the list of recent uses of force in pre-emptive self-defence. Similar to the US and Israel, Ethiopia perceived an adversary as a threat that needed to be confronted militarily. Similar to the US and Israel, Ethiopia did not believe that by employing any of the various peaceful dispute resolution methods at its disposal it would have achieved their objective of eliminating the threat. Lastly, similar to the US and Israel, Ethiopia is now confronted with various challenges as a result of its military operation in Somalia. The opportunity to advance peace and reconciliation in the country following the defeat of the UIC that the AU referred to seems to have not presented itself. Instead, the military confrontation in Somalia seems to have exacerbated simmering tensions in other conflict areas, such as the Ogaden region in Ethiopia.

Whilst this paper argues that the Bush Doctrine of pre-emptive self-defence is not approaching customary international law, it is clear that the ongoing division in the international community regarding the modalities of the use of force is problematic. One way forward that this paper supports is to underline on the central role of the Security Council and its ability to authorise the use of force should this be the only realistic option to prevent existing threats that are not imminent from materialising. Secondly, the ongoing debate on what exactly constitutes terrorism needs to be concluded, for it presently allows the term to be abused by governments facing opposition that may very well have legitimate grievances. Finally, the military solution that is proposed to counter today's threats needs to be reconsidered. It should take into account the fact that the use of force was prohibited following a realisation by the international community that the use of force does not advance resolution of differences between States. The outcomes of the latest attempts to deal with differences militarily clearly

indicate that, regardless of the emergence of 'new threats,' the use of force does not contribute to their resolution.

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