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Awol K. Allo

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## Ethiopia's Armed Intervention in Somalia: The Legality of Self-Defense in Response to the Threat of Terrorism

### Keywords

Self-Defense, Terrorism, International Law: History, Military, War and Peace

**ETHIOPIA’S ARMED INTERVENTION IN SOMALIA:  
THE LEGALITY OF SELF-DEFENSE IN RESPONSE TO THE  
THREAT OF TERRORISM**

AWOL K. ALLO\*

*Whereas there are debates among some academic circles that the events of 9/11 have constituted a change in the law of self-defense, this article argues against the possibility, even of the desirability, of such an assertion. By situating the law of self-defense in the context of ‘terrorism’ and the threat thereof, this article argues that Ethiopia’s claim for a lawful exercise of its right to self-defense falls short of the requirements of the law even if Ethiopia was neither questioned nor condemned by the United Nations Security Council or the African Union.*

I. INTRODUCTION

“The Ethiopian government has taken self-defensive measures and started counterattacking the aggressive forces of the Islamic Courts and foreign terrorist groups”<sup>1</sup>—was how the Ethiopian Prime Minister declared the official start of the war between Ethiopia and the Union of Islamic Courts (hereinafter the UIC) on the night of December 24, 2006. In this sentence, the Prime Minister singled out two of the four grounds Ethiopia presented as justifying its inherent right to individual and collective self-defense—aggression and the threat of terrorism.<sup>2</sup>

Against the backdrop of evolving debates on the adequacy of the rules of international law governing the use of force and self-defense, this article seeks to enquire whether these changes represent a change in the law culminating from the necessary state practice and *opinion juris* or simply a change in the fact that does not constitute a new rule of self-defense.

Drawing on governmental statements, policy papers, official correspondences, and newspaper articles for facts and allegations, this article strives to make a

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\* LL. B (Addis Ababa University), LL. M (Notre Dame Law School, IN, USA), PhD Candidate, (Glasgow University Law School: UK); Lecturer in Law, St. Mary’s University College, Faculty of Law (Currently on Study Leave). I am extremely grateful to Professor Christian Tams who read the manuscript and provided insightful comments. All the views, errors *et al* remains that of the author’s.

1. Emmanuel Fanta, *Analysis: Ethiopian Intervention in Somalia in Context*, BLOGGER NEWS NETWORK (Jan. 30, 2007), <http://www.bloggernews.net/14238>.

2. Ethiopia argued that four factors—a ) the destabilizing mission of the Eritrean government from the north, b) the declaration of *jihad* by UIC against Ethiopia, c) the presence in Somalia of Ethiopian insurgents which seek to overthrow the government of Ethiopia by force; and d) The presence and continued influx of foreign terrorist groups with the view to advancing the extremist agenda of the UIC—created a state of “clear and present danger” triggering its lawful right to self-defense under international law. *See infra* note 142.

conceptual analysis of whether the facts on the ground met the standards of the UN Charter or customary international law when Ethiopia triggered its right to self-defense. Apart from self-defense, Ethiopia claimed that its intervention is allowed by the invitation of the “internationally recognized government of Somalia.”<sup>3</sup> This author has examined the validity of Ethiopia’s claim to lawful invitation somewhere else. This article examines the consistency of Ethiopia’s claim to the exercise of its “individual and collective self-defense” with contemporary norms of international law governing the use of force. Within that frame, the article seeks to reflect on the failed state scenario of Somalia and the silence of the international community (UN, AU, EU, individual states) in the face of Ethiopia’s intervention and what that silence says about Ethiopia’s action in particular and the evolution of the law of self-defense in general.

## II. ETHIOPIA’S MILITARY INTERVENTION IN SOMALIA: COLLECTIVE SELF-DEFENSE

The United Nations Charter outlaws all aspects of coercive use of force between sovereign nations while delineating a carefully crafted exception consistent with its prime purpose of maintaining international peace and security.<sup>4</sup> Most experts on the use of force agree on the Charter’s two known exceptions to the general prohibition set forth under Article 2(4).<sup>5</sup> While the first of these exceptions pertains to the right of “individual and collective self-defen[s]e” enunciated under Article 51 of the Charter<sup>6</sup>, the second exception relates to the use of force by the Security Council in response to a “threat to the peace, breach of the peace, or an act of aggression” under Chapter VII of the Charter.<sup>7</sup>

Ethiopia justified its military intervention in Somalia as a lawful exercise of its “inherent right of individual or collective self-defen[s]e” embodied under Article 51 of the UN Charter.<sup>8</sup> Article 51 of the Charter in part reads: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defen[s]e if an armed attack occurs against a Member of the United Nations, until

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3. See Awol Kassim Allo, *Counter-Intervention, Invitation, Both or Neither? An Appraisal of the 2006 Ethiopian Military Intervention in Somalia*, 3 MIZAN L. REV. 201, 214 (2009) (discussing the legality of Ethiopia’s claim to lawful invitation).

4. See U.N. Charter pmbl., art. 1, 2.

5. See STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 43-44 (1996); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 59-60 (2d ed. 2004); HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 30-35 (1992); MARY ELLEN O’CONNELL, THE MYTH OF PREEMPTIVE SELF-DEFENSE 3 (Am. Soc’y of Int’l Law Task Force on Terrorism 2002), available at <http://www.asil.org/taskforce/oconnell.pdf>; MALCOLM N. SHAW, INTERNATIONAL LAW 1123 (6th ed. 2008); THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9-10 (A. Cassese ed., 1986).

6. U.N. Charter art. 51.

7. U.N. Charter art. 39; see also U.N. Charter art. 2, para. 4, arts. 40 – 42, 51; IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275-78 (1963); O’CONNELL, *supra* note 5 at 3-4.

8. U.N. Charter art. 51; see also U.N. Sec. Council Comm., *Rep. of the Monitoring Group on Somalia pursuant to Sec. Council resolution 1724*, ¶ 29, U.N. Doc. S/2007/436 (June 27, 2006).

the Security Council has taken measures necessary to maintain international peace and security.”<sup>9</sup>

The reference to the term “inherent” is said to have reaffirmed the natural right of a State under customary international law to defend itself from an armed attack<sup>10</sup> through the use of force. However, although collective self-defense was not understood to be as “inherent” as a matter of international law at the time the UN Charter was adopted, the International Court of Justice (ICJ or the Court) in *Nicaragua* reaffirmed the “inherent” nature of both variants of self-defense—the right to individual and collective self-defense.<sup>11</sup> In relevant part, the Court stated, “the language of Article 51 of the United Nations Charter, the inherent right (“droit naturel”) which any State possesses in the event of an armed attack, covers both collective and individual self-defen[s]e.”<sup>12</sup>

Following the adoption of the Charter, many States resorted to international and regional security schemes under a covenant and accordingly agreed to regard an attack against one as an attack against all.<sup>13</sup> In *Nicaragua*, the ICJ set forth the cardinal rule for the exercise of the right to collective self-defense in the absence of a prior treaty agreement.<sup>14</sup> Denying the contention of the United States for the existence of a lawful ground for collective self-defense, the Court outlined the essential requirements for the exercise of lawful collective self-defense under the Charter and customary international law.<sup>15</sup> In order for collective self-defense to be valid under international law, the Court held that there should be a declaration by the victim state “which must form and declare the view that it has been so attacked,”<sup>16</sup> followed by a subsequent request by that “victim of an armed attack”<sup>17</sup> to another State for help.

According to the judgment in *Nicaragua*, the Court further emphasized the existence of the requirement of an armed attack against the victim State. These requirements are similar to those needed for individual self-defense when a third State exercises a collective right to self-defense on behalf of the victim State. The Court made the observation that:

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9. U.N. Charter art. 51.

10. Legal Consequences of the Construction of A Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I. C. J 136, 139 (July 9) [hereinafter *Palestinian Territory*].

11. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 193 (June 27) [hereinafter *Nicaragua*]; See also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 244, ¶¶ 38-39, 96-97 (July 8) [hereinafter *Nuclear Weapons*].

12. *Nicaragua*, 1986 I.C.J. at 102, ¶ 193.

13. See Treaty of Friendship, Co-operation and Mutual Assistance, art. 4, May 14, 1955, 219 U.N.T.S. 3; Charter of the Organization of the American States, art. 5(f), Apr. 30, 1948, 2 I.L.M. 235, 119 U.N.T.S. 3; Inter-American Treaty of Reciprocal Assistance and Final Act of the Inter-American Conference for the Maintenance of Continental Peace and Security, Sept. 2, 1947, Art. 3(1), 4 U.S.T. 559, 21 U.N.T.S. 77; SHAW, *supra* note 5, at 1290, 1137.

14. *Nicaragua*, 1986 I.C.J. at 103-05, ¶¶ 193-99.

15. *Id.*

16. *Id.* ¶ 195.

17. *Id.* ¶ 199.

Thus, the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim is not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today - whether customary international law or that of the United Nations system - States do not have a right of 'collective' armed response to acts which do not constitute an 'armed attack.'<sup>18</sup>

Ethiopia and Somalia were not parties to any prior bilateral or multilateral treaty arrangements that called for a collective security scheme comparable to those of NATO, the now defunct Warsaw Pact, or Inter-American Pacts governing collective self-defense arrangements examined in *Nicaragua*.<sup>19</sup> For the same reason, Ethiopia cannot justify an attack against Somalia's Transitional Federal Government (hereinafter the TFG) through a collective right to self-defense as an attack against itself to resort to the use of force against other forces within Somalia in the absence of a prior treaty arrangement. Further, even if such a treaty arrangement existed, Ethiopia could not have acted in lawful collective self-defense against the Islamic Courts in a manner consistent with the UN Charter insofar as attacks emanating from within Somalia are concerned. Such conduct would constitute an intervention into the domestic affairs of the State and does not seem to be consistent with the stipulation of the Charter.<sup>20</sup> If Somalia had been under an "armed attack" from another sovereign State, declared that it was a subject of an armed attack, and accordingly solicited Ethiopia's assistance, Ethiopia could have lawfully acted pursuant to the request, in light of the Court's guidance in *Nicaragua*.<sup>21</sup> However, although other States provided military and other assistance to the UIC,<sup>22</sup> which could have probably amounted to intervention under Article 2(7) of the Charter, such conduct cannot, of itself, justify a self-defensive response since such assistance does not constitute an "armed attack" by the other assisting States. As the ICJ reiterated in *Nicaragua*, assistance to rebel groups does not constitute an "armed attack" by the State from which the rebel

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18. *Id.* ¶ 211.

19. Evidently, Somalia and Ethiopia were in a fathom of political and military confrontation until the Siad Barre regime collapsed, let alone have a NATO or Warsaw style pact. Since 1991 leading to the recent impasse, Somalia never had any *de facto* or *de jure* regime that do the same. Robert I. Rotberg, *Failed States in a World of Terror*, 81 FOREIGN AFF. 127, 128 (2002).

20. See U.N. Charter art. 2, para. 7; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970) [hereinafter *Declaration on Principles of International Law*].

21. *Nicaragua*, 1986 I.C.J. at 203-05, ¶¶ 195-99 ("[The Court] concludes that the requirement of a request by the State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.").

22. See U.N. Sec. Council Comm., *Rep. of the Monitoring Group on Somalia established pursuant to Sec. Council resolution 751 (1992)*, ¶ 159, U.N. Doc S/2006/229 (May 4, 2006); U.N. Sec. Council Comm., *Rep. of the Monitoring Group on Somalia established pursuant to Sec. Council resolution 1587 (2005)*, ¶¶ 8, 25, U.N. Doc. S/2005/625 (Oct. 4, 2005).

groups received support or the State whose territory the rebels used, and hence, cannot justify collective self-defense under Article 51 of the Charter.<sup>23</sup>

Following the attack on 9/11, NATO did not require the involvement of a State to justify its collective-self-defense in Afghanistan. Rather it agreed that “if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty.”<sup>24</sup> The extent of the legality of NATO’s action is subject to the Washington Treaty.<sup>25</sup> Further, the right to self-defensive measures by the victim State of 9/11 was affirmed by the UN Security Council.<sup>26</sup> There are three reasons which provided the gloss of legality to NATO’s intervention in Afghanistan, all of which are not present in Ethiopia’s case. Firstly, the Washington Treaty governed the condition for NATO’s intervention while there is no such treaty between Ethiopia and Somalia. Secondly, there is a Security Council authorization in the case of the Afghan intervention while there is none in Ethiopia’s case. Finally, the attack against the Somali government comes from within Somalia itself, not “directed” from abroad as is the case with NATO’s intervention, weakening Ethiopia’s case for collective self-defense.

Writing on the controversial right to pre-emptive self-defense in the wake of 9/11, Professor Mary Ellen O’Connell makes a compelling appraisal of the ICJ decision in *Nicaragua*.<sup>27</sup> Relying on the ICJ’s pronouncement that the supply of weapons by Nicaragua to El Salvadoran rebels did not amount to an armed attack, Professor O’Connell insists on seeking the authorization of the Security Council to lawfully exercise the right to collective self-defense if pressing concerns exist which do not fit into the parameters of the law.<sup>28</sup> Although the Security Council had considered the military standoff between the various forces within and neighboring Somalia, as well as Ethiopia’s allegation of the mounting threat to its security and territorial integrity, the Council did not authorize Ethiopia to take self-defensive measures.<sup>29</sup> Indeed, in Resolution 1725 adopted eighteen days before the culmination of the hostility into a full-scale war, the Council expressly endorsed a proposal by the Inter-Governmental Authority for Development (IGAD) to exclude neighboring States of Somalia from the protection and training mission for Somalia.<sup>30</sup> In the Resolution, the Council implied the existence of States with a vested interest when it called upon “all parties inside Somalia and all other States

23. See *Nicaragua*, 1986 I.C.J. at 203, ¶ 195.

24. Press Release, NATO, Statement by the North Atlantic Council, NATO Press Release (2001) 124 (Sept. 12, 2001), available at <http://www.nato.int/docu/pt/2001/p01-124e.htm>.

25. Sean D. Murphy, *Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 48 (2002).

26. See *id.*

27. See O’CONNELL, *supra* note 5, at 6.

28. *Id.*

29. The Security Council has not made any statement that has the effect of either implicitly or explicitly authorizing Ethiopia to use force in Somalia. Rather, in Resolution 1725/2006, the Council asked neighboring States to exercise restraint. S.C. Res. 1725, ¶ 1-3, U.N. Doc. S/RES/1725 (Dec. 6, 2006).

30. *Id.* ¶ 3.

to refrain from action that could provoke or perpetuate violence and violations of human rights, contribute to unnecessary tension and mistrust, endanger the ceasefire and political process, or further damage the humanitarian situation.”<sup>31</sup> Under these circumstances, there is no doubt that Eritrea and Ethiopia are among the States that the Resolution called upon to refrain from actions that “perpetuate violence” and derail the political process in an already turbulent State.<sup>32</sup> Thus, Ethiopia’s claim to collective self-defense of Somalia under Article 51 of the Charter does not seem to be compatible with the stipulation of the Charter.

### III. ETHIOPIA’S ARMED INTERVENTION IN SOMALIA: “INDIVIDUAL SELF-DEFENSE?”

The exercise of the right to individual self-defense under Article 51 of the Charter requires the fulfillment of several rigorous but exceedingly subjective criteria. A lawful resort to armed force by individual States under Article 51 requires the fulfillment of at least the following conditions: a) there has to be a *significant* armed attack against the State acting in self-defense;<sup>33</sup> b) the self-defensive measure must be against a State and aimed at the attacking party;<sup>34</sup> c) the measure must respect the principles of necessity;<sup>35</sup> and d) the response must be equivalent to the attack—the principle of proportionality must be observed.<sup>36</sup>

As the nature of global conflicts change, new actors emerge, and new threats proliferate, these requirements have continued to generate deeper controversies between States, legal practitioners, and academics leading to a sustained call for the redefinition of the rules to meet contemporary threats.<sup>37</sup> Nevertheless, the debate over the precise contents of the vernaculars of U.N. Charter Article 51 continued between the strict constructionists on the one hand and those who envision a broader scope of interpretation and application on the other.<sup>38</sup> The most vociferous of these debates include such questions as: what constitutes an “armed attack?” When is an armed attack said to have occurred? When is an armed response necessary? What is a proportionate response to threats or attacks under the circumstances? Since Ethiopia strenuously justified its military interventions in

31. *Id.* at pmb1.

32. *Id.*

33. *Nicaragua*, 1986 I.C.J. at 203, ¶ 195 (holding that a “mere frontier incident” does not amount to an armed attack for the purpose of self-defense under Article 51).

34. *Id.*

35. See *Nuclear Weapons*, 1996 I.C.J. at 245, ¶ 41; *Nicaragua*, 1986 I.C.J. at 106-11, ¶¶ 201-212; O’CONNELL, *supra* note 5, at 7.

36. See *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, [2001] 2 Y.B. Int’l L. Comm’n 20, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (part 2), available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf); O’CONNELL, *supra* note 5, at 7; Franck, *Terrorism and the Right of Self-Defense*, *infra* note 74, at 839; Judith Gail Gardam, *Proportionality and Force in International Law*, 87AM. J. INT’L L. 391, 391 (1993).

37. U.N. SCOR, 56th Sess., 4370th mtg. at 3-4, U.N. Doc. S/PV.4370 (Sept. 12, 2001) (“The magnitude of yesterday’s acts goes beyond terrorism as we have known it so far. . . . We therefore think that new definitions, terms and strategies have to be developed for the new realities.”); Erin L. Guruli, *The Terrorism Era: Should the International Community Redefine its Legal Standards on Use of Force in Self-Defense?*, 12 WILLAMETTE J. INT’L L. & DIS. RES. 100, 123.

38. See *infra* n. 44 & 45.



Somalia on the basis of its inherent right to individual self-defense under the Charter, an examination of the requirements of lawful individual self-defense under Article 51 of the Charter will follow.

*A. The Requirement of an "Armed Attack"*

The occurrence of an "armed attack" against the victim State in violation of the principles enunciated under Article 2(4) of the Charter constitutes the primary trigger for self-defense.<sup>39</sup> However, there are extensive debates as to the precise requirements of Article 51 with respect to the occurrence of an "armed attack." The question is not so much whether an armed attack has occurred, it is rather: when is an armed attack said to have occurred? For most strict constructionists, the cumulative reading of Article 2(4) and Article 51 constituted a rule that defined the scope and limits of the principle.<sup>40</sup> For them, self-defense is a response to an armed attack triggered only "if an armed attack occurs against a Member of the United Nations" and in no other circumstance.<sup>41</sup> In that sense, the question is the first, whether an armed attack has occurred. The literal reading of the semantics used in Article 51, "if an armed attack occurs," reinforces this view and seems to clearly require an actual "armed attack" against States.<sup>42</sup>

Other authorities consider the above construction as excessively restrictive and legalistic to the extreme and point to the opening sentence of Article 51 to defend their vision of a broader scope of the right to self-defense. They argue that the phrase "[n]othing in the present Charter shall impair the inherent right of . . . self-defen[s]e," recognizes the existence of a customary right to self-defense unencumbered by the narrower scope of the Charter which strictly requires the occurrence of an armed attack.<sup>43</sup> It is also submitted that the *travaux préparatoires* of the Charter supports the view that the "use of arms in legitimate self-defen[s]e remains admitted and unimpaired."<sup>44</sup> Summarizing the views of "some States" and "most academics," Malcolm N. Shaw portrays "Article 51 as merely elaborating one kind of self-defense in the context of the primary responsibility of the Security Council" within the framework of the Charter.<sup>45</sup>

39. O'CONNELL, *supra* note 5, at 5.

40. SHAW, *supra* note 5, at 1132.

41. U.N. Charter art. 2; see EDUARDO JIMÉNEZ DE ARÉCHAGA, *INTERNATIONAL LAW IN THE PAST THIRD OF A CENTURY* 87-98 (Recueil des Cours vol. I, 1978); BROWNLIE, *supra* note 7, at 112-13, 264; SHAW, *supra* note 5 at 1132-33.

42. *Palestinian Territory*, 2004 I.C.J at 194, ¶ 127; *Nicaragua*, 1986 I.C.J. at 203, ¶¶ 194-195; see also T. D. Gill, *Litigation Strategy in the Nicaraguan Case at the International Court*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 197, 223 (Yoram Dinstein, ed. 1989).

43. See D. W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 185-86 (1958); J.L. BRIERLY, *THE LAW OF NATIONS* 417-18 (6th ed. 1963); D.P. O'CONNELL, *INTERNATIONAL LAW* 317 (1965); JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 43, 95-96 (1958); H. WALDOCK, *GENERAL COURSE ON PUBLIC INTERNATIONAL LAW* 6, 231-37 (1962).

44. See SHAW, *supra* note 5 at 1132 n.68 (quoting U.N. Conference of International Organization).

45. *Id.* at 1026.

Even more authoritative and reconciliatory of the above debate is the reaffirmation of the latter view by the ICJ in *Nicaragua*. In its extensive examination of the issue, the Court proclaimed the existence of a conventional and customary right to self-defense.<sup>46</sup> In dismissing the contention of the United States that Article 51 of the Charter “subsumes and supervenes” the scope of the right under customary international law, the Court construed the silence of Article 51 on certain essential rules of self-defense, well-established in customary international law, as evidencing the inadequacy of Article 51 to independently regulate the exercise of the right.<sup>47</sup> In affirming the existence of a customary rule of self-defense alongside the Charter rule, the Court declared:

It cannot therefore be held that Article 51 is a provision which ‘subsumes and supervenes’ customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law thus do not overlap exactly, and the rules do not have the same content.<sup>48</sup>

In *Nicaragua*, although the Court found a customary right of self-defense governing situations slightly separate from the Charter, it did not go into detail on how and when States could resort to self-defense in cases of an “imminent threat of armed attack” short of actual armed attack.<sup>49</sup> It did, however, hold that the right to self-defense under Article 51 requires the occurrence of an armed attack when it held that “[i]n the case of individual self-defen[s]e, the exercise of this right is subject to the State concerned having been the victim of an armed attack.”<sup>50</sup> Nevertheless, the Court clearly implied the availability of the right to self-defense in response to an imminent threat of an armed attack.<sup>51</sup> Therefore, while Article 51 of the Charter allows self-defense only in response to an armed attack, the inherent right of States to resort to force against an “imminent threat of attack” under customary law remained unencumbered by the Charter.

The Ethiopian government and opposition forces within Ethiopia are in agreement that there has been an attack against Ethiopia by Ethiopian rebel forces

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46. *Nicaragua*, 1986 I.C.J. at 94, ¶ 176.

47. *Id.* (“[T]he Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the “armed attack” which, if found to exist, authorizes the exercise of the “inherent right” of self-defense, is not provided in the Charter, and is not part of treaty law.”).

48. *Id.*

49. *Id.* at 103, ¶ 194.

50. *Id.* at 103, ¶ 195; *See also id.* at 27-28, ¶ 35 (“[W]hat is in issue is the purported exercise by the United States of a right of collective self-defen[s]e in response to an armed attack on another State. The possible lawfulness of a response to the imminent threat of an armed attack which has not yet taken place has not been raised.”).

51. *See id.*; *See also* Armed Activities on the Territory of the Congo (Dom. Rep. Congo v. Uganda) 2005 I.C.J. 168, ¶ 144 (Dec. 19) [hereinafter *Territory of the Congo*].

operating from the territories under the control of the UIC.<sup>52</sup> However, the mere existence of an attack does not necessarily constitute an “armed attack” triggering Ethiopia’s right of self-defense under Article 51 of the Charter. Further, Somalia’s failed State scenario makes it almost impossible to develop a proper allocation of responsibility for allowing territories under its control to be used by insurgents or for failing to control<sup>53</sup> the attacks emanating from within its territory. Theoretically, as a *de facto* regime, the UIC has the duty to refrain from acts contrary to the stipulation of Article 2(4) of the UN Charter.<sup>54</sup> But accountability for breach of international law by *de facto* regimes remained an elusive normative conception not yet crystallized into general international law. In the absence of a responsible government in effective control of the territory of the state, one can question the extent to which the State that continued to suffer cross-border skirmishes should exercise restraint. Nevertheless, the attack against Ethiopia by Ethiopian rebel forces from the areas under the control of the UIC does not justify Ethiopia’s unilateral military operation in Somalia. Ethiopia’s intervention is unjustified and inconsistent with the requirements of Article 51, not only because the attack has come from Ethiopian insurgents operating from within Somalia, but also because its actions contradicted Security Council resolution.

#### *B. The Requirement of a “State Actor”*

The second major requirement relates to the existence of a nexus between the armed attack and a State in order for an act to constitute an armed attack under Article 51 of the Charter.<sup>55</sup> Although there is nothing in the Charter or the language of Article 51 requiring a nexus between the “armed attack” and a State, traditional international law has tied the notion of armed attack in Article 51 to States.<sup>56</sup> This is partly because the prohibition set forth in Article 2(4) is stipulated as the duty of “all Members” to refrain in their international relations from actions which potentially trigger the application of Article 51.<sup>57</sup> The argument goes, if the prohibition is addressed to States, the right granted to the State as an exception to Article 2(4) must also be exercised against recalcitrant States that contradicted the prohibition under Article 2(4).<sup>58</sup>

52. See Fanta, *supra* note 1.

53. See *Declaration on Principles of International Law*, *supra* note 20, at art. 3(g) (“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 the acts listed above, or its substantial involvement therein.”); G.A. Res. 3314, Annex Art. 3(g), U.N. Doc. A/RES/3314 (Nov. 29, 1974); See also O’CONNELL, *supra* note 5, at 7 (discussing that legal responsibility follows if a state controlled or supported the attackers).

54. See Carsten Stahn, *Terrorist Acts as “Armed Attacks”: The Right to Self-Defense, Article 51 (1/212) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 42 (2003).

55. See *Nicaragua*, 1986 I.C.J. at 103-104, ¶ 195; Murphy, *supra* note 25, at 44.

56. See GRAY, *supra* note 5, at 6, 130 (arguing that, although the International Court of Justice required a nexus between the armed attack and the State in *Nicaragua*, most States did not claim a legal right to the use of force based on the narrow question of whether an attack constituted an armed attack).

57. U.N. Charter art. 2(4) (prohibiting “the threat or use of force against the territorial integrity or political independence of any state”).

58. See O’CONNELL, *supra* note 5, at 4-5.

However, modern international life and the growing power of non-state-actors seem to have rendered the requirement of a nexus between a State and a non-state actor simply unrealistic. 9/11 sent a powerful message to the world that organized non-state actors/terrorists could fly commercial airplanes into skyscrapers to rein shock and panic in one of the most powerful nations on earth without employing conventional firearms.<sup>59</sup> Following that incident, the international community came to recognize that a private act could constitute an “armed attack” within the provision of Article 51 regardless of a nexus between a State and a need for attribution.<sup>60</sup> Observing this tide of progression, Carsten commented, “the recognition that acts of private actors may give rise to an armed attack is anything but revolutionary.”<sup>61</sup> Thus, 9/11 set a profound change in that tradition and brought independent acts of private actors/terrorists within the ambit of an armed attack provided that such an attack is of significant *scale* and *effect*.<sup>62</sup> In the aftermath of the attack, the Security Council, in resolution 1368(2001) and, 1373(2001) stated the United States’ inherent right of self-defense in accordance with the Charter by declaring the attack of 9/11 as “terrorist attacks” and “threat[s] to international peace and security.”<sup>63</sup> Also, NATO and the Organization of the American States declared the attack as an “armed attack” and vowed to exercise their right to collective self-defense.<sup>64</sup> NATO, for example, did not require evidence to the effect that the attack of 9/11 be attributed to the Taliban regime or Afghanistan, rather it asked whether the “attack was directed from abroad against the United States” and could therefore “be regarded as an action covered by Article 5 of the Washington Treaty.”<sup>65</sup>

However, many academics disagree that the events of 9/11 represented a “rigorous change in the law” or that the decision of NATO, the Security Council, or the Organization of the American States on the particular facts of the events of 9/11 constituted a general and uniform state practice that constitutes a rule of customary international law that applies beyond that specific fact.<sup>66</sup> They rather see the change, for several reasons, as a “change in fact” which shifts back as the euphoria for security subsides.<sup>67</sup> Those who refute the argument that 9/11 constituted a “rigorous change in law”, point to the uniquely dangerous and alarming dimension of the 9/11 attack which gave it the political legitimacy and momentum necessary to galvanize enormous support to broaden the scope of the rule.<sup>68</sup> In refuting the argument that State practice and world opinion after 9/11 constituted a change in the scope of Article 51, they point to the existence of a

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59. See Murphy, *supra* note 25, at 41.

60. See GRAY, *supra* note 5, at 159.

61. Stahn, *supra* note 55, at 42.

62. See *id.* at 45.

63. S.C. Res. 1373, para. 2-4, U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1368, para. 2-3, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

64. See O’CONNELL, *supra* note 5, at 10.

65. NATO Press Release, *supra* note 24.

66. Stahn, *supra* note 55, at 35-36.

67. *Id.* at 36.

68. *Id.* at 35-36.

State actor, Afghanistan, to whom the acts of the perpetrators of the 9/11 attack is legally attributable.<sup>69</sup> Although the changing realities of global politics and power relationships required serious reconsiderations of several rules of international law relating to use of force and the conduct of hostilities,<sup>70</sup> selective revisions prompted by a single catastrophic event, such as 9/11, carries its own dire ramifications.<sup>71</sup> Some academics see the events of 9/11 as mere 'conventional crimes' rather than an "armed attack."<sup>72</sup> Summarizing his concern about the ongoing debate, Carsten Stahn noted:

It may be of greater consequence to admit openly that the requirement of attributability does not play a role in the definition of armed attack. Such a step would certainly mark a qualitative change in the application of Article 51 because it breaks with the conception of Article 51 as a state-centered norm.<sup>73</sup>

Nonetheless, there are strong arguments, today, that reject the legal requirement of a state-actor to qualify an act as an armed attack, without however, ignoring the relevance of such a nexus in identifying the State towards which the self-defensive measure will be directed.<sup>74</sup>

*Nicaragua* brought to light a slightly different dimension of what constituted an "armed attack" under Article 51 in the 80s. The Court required the existence of a legal attribution of sort, meeting the test of effective control, not even an overall control, between the acts of a non-state actor and a State to qualify an act as an "armed attack."<sup>75</sup> Opposing the restrictive approach of the Court to the question of what constituted an "armed attack," Judge Jennings argued in dissent that "it seems dangerous to define unnecessarily strictly the conditions for lawful self-defen[s]e, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent."<sup>76</sup> Despite the two Security Council Resolutions issued in the wake of 9/11 and the almost unanimous support given to United State's military intervention in Afghanistan, the ICJ seems to have stood by its *Nicaragua* test in at least two post 9/11 cases.<sup>77</sup>

In its advisory opinion in the *Palestinian Territories*, the Court rejected the Israeli claim to self-defense on the reasoning that self-defense under Article 51 is

69. Guruli, *supra* note 37, at 109.

70. *See id.* at 115.

71. *See Stahn, supra* note 55, at 41; Geir Ulfstein, *Terrorism and the Use of Force*, 34 SECURITY DIALOGUE 153, 153-54 (2003).

72. *See* Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 573-74 (2002); Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993, 995-98 (2001); Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001).

73. Stahn, *supra* note 55, at 42.

74. *See* Guruli, *supra* note 37, at 108-109.

75. *See Nicaragua*, 1986 I.C.J. at 65-65, ¶ 115.

76. *Id.* at 543-44.

77. *See Territory of the Congo*, 2005 I.C.J. 168; *Palestinian Territory*, 2004 I.C.J. 136.

not available to Israel against non-state actors operating on the territories under the control of Israel.<sup>78</sup> In *Territory of the Congo*, the Court required the responsibility of the Congo for the multifarious offensive actions of Ugandan rebels from the Congolese territories in order to find Uganda's right to self-defense legitimate.<sup>79</sup>

In *Territory of the Congo*, repeating the precedent it set in *Nicaragua*,<sup>80</sup> the ICJ refuted Uganda's claim to self-defense proclaiming that:

It is further to be noted that, while Uganda claimed to have acted in self-defen[s]e, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3[ ](g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defen[s]e by Uganda against the DRC were not present.<sup>81</sup>

Starkly putting the question is Professor Thomas Franck, who criticizes the majority's view of a narrower construction of Article 51. He asks: "was the state from which insurgents were operating legally responsible (in the sense of Charter Article 51) for their activities in El Salvador and Uganda?"<sup>82</sup> Franck continues, "[p]ut that way, and answered by the Court in the negative," i.e., no sufficient evidence found for attribution, "the question precluded invocation of the right of self-defense" by the United States and Uganda.<sup>83</sup> Moreover, the State that is subject to an armed attack is precluded from resorting to force under the Charter even if the acts of the insurgents, evaluated on their own, amount to an armed attack justifying self-defense under Article 51.<sup>84</sup> This holds true unless the acts of the insurgents operating in the territories of States constitute the act of those States under the law of State responsibility.<sup>85</sup> Professor Frank further observes "the judges [the majority] could have replaced the question of attribution with a finding

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78. *Palestinian Territory*, 2004 I.C.J. at 194, ¶ 139.

79. *See Territory of the Congo*, 2005 I.C.J. at 222, ¶ 146.

80. *See Nicaragua*, 1986 I.C.J. 14

81. *Territory of the Congo*, 2005 I.C.J. at 222-23, ¶ 146-47.

82. Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 722 (2008).

83. *Id.*

84. *See id.*

85. *See id.* at 736-37; *see Territory of the Congo*, 2005 I.C.J. at 222, ¶ 146; *Nicaragua*, 1986 I.C.J. at 65, ¶ 116.

of liability of states for injurious effects emanating from their territory and affecting the rights of neighboring states.”<sup>86</sup>

It seems that whatever change existed in the context of non-state actors/terrorist acts of such an alarming magnitude, the change does not of itself allow States to independently declare such acts as an “armed attack” and entitle themselves to an armed response.<sup>87</sup> The Security Council in accordance with the Charter authorized the attack against Afghanistan in the aftermath of 9/11.<sup>88</sup> In order for terrorist acts of a “significant scale,”<sup>89</sup> designed and launched by an independent private actor to be considered as an “armed attack” there should be Security Council authorization allowing the victim State to exercise its right to self-defense.<sup>90</sup> In addition, the resort to force must anticipate a proper identification of the responsible State.<sup>91</sup>

That being said, it is important to situate the UIC and Ethiopia’s alleged threat and mounting fear of attack into perspective in the light of these new developments. According to the Ethiopian and the United States governments, some elements within the Court’s Union are terrorists or at least affiliated with terrorist organizations.<sup>92</sup> To substantiate their allegations, they pointed to the then head of the Court’s Union, Sheikh Hassen Dahir Awyes, who according to the Ethiopian government, was the leader of *Ali-Itihad-al-Islamia*.<sup>93</sup> Nevertheless, neither Ethiopia nor the United States declared the UIC *in toto* as a terrorist organization. For the same reason, former members of the Court’s Union are now leading the TFG.<sup>94</sup>

Be that as it may, whatever change occurred in the law governing the use of force, it did not affect the scope of Article 51. The US military response to the attacks of 9/11 followed the second exception to Article 2(4) of the Charter, namely, Security Council determination of the attack as a breach of international peace and security and its subsequent authorization of the victim State to self-

86. Franck, *supra* note 83, at 722.

87. See O’CONNELL, *supra* note 5, at 7.

88. See S.C. Res. 1373, *supra* note 64.

89. *Nicaragua*, 1986 I.C.J. at 104, ¶ 195.

90. See, e.g., O’CONNELL, *supra* note 5, at 5.

91. *Id.* at 7.

92. See David H. Shinn, *United States – Somali Relations: Local National and International Dimensions*, EAST AFRICA FORUM, Apr. 26, 2010, <http://eastafricaforum.net/2010/4/28/united-states-somali-relations-local-national-and-international-dimensions/>; *Quick Guide: Somalia’s Islamists*, BBC NEWS, Dec. 28, 2006, <http://news.bbc.co.uk/2/hi/africa/6043764.stm>. On December 16, 2008, the Assistant Secretary of State was quoted as saying: “The Council of Islamic Courts is now controlled by al-Qaeda cell individuals, East Africa al-Qaeda cell individuals. The top layer of the [sic] court are extremists. They are terrorists. . . . They are killing nuns, they have killed children and they are calling for a jihad (holy war).” Sue Fleming, *U.S. says al Qaeda radicals lead Somali Islamists*, REUTERS, Dec. 14, 2006, <http://www.alertnet.org/thenews/newsdesk/N14424846.htm> (internal quotation marks omitted).

93. See *Profile: Somalia’s Islamic Courts*, BBC NEWS, June 6, 2006, <http://news.bbc.co.uk/2/hi/5051588.stm>.

94. *U.S. Should Accept Islamist Authority, Report Says*, INTER PRESS SERVICE, Mar. 12, 2010, available at WL 3/12/10 allAfrica.com 12:34:08.

defensive measures. However, NATO's and OAS's characterization of the events of 9/11 as an 'armed attack', supports the view that 9/11 brought about a change in the scope and substance of Article 51 of the Charter. However, this one time practice does not constitute a new rule of customary international law that modifies the substance of Article 51. Furthermore, nothing in treaty law or state practice suggests the characterization of a non-state actor as a terrorist or otherwise modifies the rule under Article 51 of the Charter. A terrorist attack by itself against a State, if it is not of a significant scale and not attributable to State, does not qualify as an "armed attack."<sup>95</sup> On the contrary, there is no reason why an attack by a non-terrorist non-state actors, if it is of a significant *scale* and *effect* and attributable to the State, should not be considered an "armed attack." The rationale that informed NATO and OAS member States' consideration of 9/11 as an armed attack seems to relate, among other things, to the gravity of the attack: where the attack originated from, "the source of the attack (i.e. the actor), the weapons/method of force used, the gravity of the attack, the location of the attack, and the national and international reaction" to the attack.<sup>96</sup> On the same reasoning, one could argue, if an attack from the UIC against the Ethiopian State is significant enough in terms of its *scale* and *effect* or in the light of the developments discussed above, there is no reason why it should not be considered an armed attack within the meaning of Article 51.

However, one might challenge the above contentions by pointing to Article 2(4) of the Charter which prevents the use of force by a State against another State to reinforce the argument that the exception under Article 51 is a right to self-defense in response to an attack occurred in violation of Article 2(4).<sup>97</sup> Thus, since Article 51 is an exception to Article 2(4), which prohibits use of force by States, the response under Article 51 must be to an "armed attack" by a State.<sup>98</sup> However, the factual situations portrayed by the UIC as an entity that was in control of most parts of Somalia as of December 2006, makes it more than just a non-state actor and certainly entitles it to a *de facto* regime status.<sup>99</sup> If the recent change in contemporary international law recognizes the rights of States to self-defense against terrorist acts of grave magnitude,<sup>100</sup> the right of States to defend themselves from a *de facto* regime conforms even better to the *raison d'être* that represented whatever shift in the law.

On a more conceptual level, the characterization of the UIC, at the relevant time, as a *de facto* regime rather than a mere terrorist group<sup>101</sup> strengthens the argument of those who supported a broader construction of Article 51 to

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95. See Guruli, *supra* note 37, at 110-14.

96. *Id.* at 110.

97. See *id.* at 103.

98. *Id.*

99. See U.N. Office for the Coordination of Humanitarian Affairs, *Somalia: UIC Disarms Militia, Tightens Control Over Kismayo*, IRINNEWS.ORG, Sept. 28, 2006, <http://www.globalsecurity.org/military/library/news/2006/09/mil-060928-irin01.htm>.

100. See Guruli, *supra* note 37, at 108-09.

101. See *Finding an End to the Somali Crisis*, U.N. INTEGRATED REG'L INFO. NETWORKS, Aug. 18, 2006, available at Westlaw, 8/18/06 allAfrica.com 16:58:48.



accommodate not only acts of State but also of non-state actors.<sup>102</sup> Furthermore, it was even contended that *de facto* regimes are bound by the provisions of Article 2(4) of the Charter regardless of individual or collective international recognition.<sup>103</sup> Even if Ethiopia and other members of the international community recognize the TFG, by virtue of actual territorial control, the UIC is bound by the prohibitions set forth in Article 2(4).<sup>104</sup> It follows that conduct by a non-state actor, such as the UIC, if it is contrary to the stipulation of Article 2(4) and of significant scale, can qualify as an “armed attack” and trigger Ethiopia’s right of self-defense.<sup>105</sup> Therefore, the non-state-actor nature of the UIC does not deny Ethiopia the right to resort to self-defensive measures if other conditions of the law are fulfilled.

### *C. How Significant Must the Attack Be? The ‘Scale’ and ‘Effect’ Test*

The third major requirement of Article 51 relates to the gravity of the armed attack.<sup>106</sup> Generally, in order for self-defense to be lawful, a *significant* armed attack must have “already occurred”<sup>107</sup> “against the territorial integrity and political independence of States.”<sup>108</sup> The application of Article 51 will be triggered only when an armed attack of a significant *scale* and *effect* has already occurred against a State.<sup>109</sup> Hence, the Ethiopian State must demonstrate that not only an attack has already occurred “against its territorial integrity and political independence,” but an attack of a significant *scale* and *effect*, have already occurred against its “territorial integrity or political independence.”<sup>110</sup>

The language of Article 51 is silent on the requirement of gravity of the attack.<sup>111</sup> In considering the question of the “sending by a State of armed bands,” the ICJ introduced a *scale* and *effect* based test when it held that the prohibition of

102. See Guruli, *supra* note 37, at 107-08 (discussing the two different theories regarding what constitutes an “armed attack”).

103. See Stahn, *supra* note 55, at 42.

104. Jackson Mbuvi, *Only a Spirit of Give and Take will Work*, ALLAFRICA.COM, Nov. 16, 2006, available at Westlaw, 11/16/06 allAfrica.com 01:34:41.

105. See Guruli, *supra* note 37, at 108 (drawing similarity between the United States right of self-defense used against the 9/11 attacks, which qualify as an “armed attack” of a significant scale against the United States, and Ethiopia’s possible right of self defense against the UIC).

106. See O’CONNELL, *supra* note 5, at 5-6.

107. *Id.* at 5.

108. *Id.* at 4.

109. See *Nicaragua*, 1986 I.C.J. at 103-04, ¶¶ 194-95.

110. U.N. Charter art. 2, ¶ 4; *Nicaragua*, 1986 I.C.J. at 103, ¶ 195 (establishing the law regarding when an attack qualifies as an “armed attack” because of the scale and effect of the attack). The fact intensive/specific nature of this requirement is apparent. It requires a higher threshold of evidence usually unavailable for academic research. In addition to the gravity of the attack Ethiopia claimed to have suffered before the days and months leading to the December 24, 2006, the very existence of any such attack against the “territorial integrity and political independence” of Ethiopia, cannot be empirically verified. Since the evidence necessary for the analysis of Ethiopia’s conduit is far from being sufficient, the following discussion relies on governmental statements, official correspondences between governments and international organizations to examine the legality of resort to force.

111. See U.N. Charter art. 51.

armed attacks may apply to “the sending by a State of armed bands on to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack [rather than a mere frontier accident] had it been carried out by regular armed forces.”<sup>112</sup> Although the Court did not set an objective threshold that must be reached in order for the use of an armed band to rise to an armed attack, it nevertheless unequivocally stipulated that it should occur on a “significant scale.”<sup>113</sup>

There are voices within the Ethiopian political spectrum and within the international community unconvinced about the occurrence of such an attack, and even if such an attack did occur, they question the significance of its *scale* and *effect* as to trigger Ethiopia’s self-defensive response.<sup>114</sup> Some opposition members of the Ethiopian Parliament echoed concern and skepticism about the gravity of the danger posed against Ethiopia and the overall intent of the government.<sup>115</sup> This sentiment was echoed in a vigorous debate that took place in the parliament.<sup>116</sup> Responding to a question from opposition MPs on whether Ethiopia is engaging in preemptive self-defense, the Ethiopian Prime Minister stated unambiguously that the Country had already come under attack from the UIC,<sup>117</sup> without elaborating in detail the gravity, place and time of that attack.<sup>118</sup> Prime Minister Meles Zenawi refrained from making a public statement about the details of the attack owing to national security concerns and asked the Speaker of the House to adjourn for a new session to allow time for deliberation on the evidence with the opposition.<sup>119</sup> In the next session of parliament devoted to the consideration of this resolution, major

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112. *Nicaragua*, 1986 I.C.J. at 103-04, ¶ 195 (emphasis added).

113. *Id.*; W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 26, 39 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (quoting *Nicaragua*).

114. See Abeje Tesfaye, *The Responsibility to Protect Somalia*, ETHIOPIAN REPORTER, Aug. 12, 2006, available at Westlaw, 8/12/06 allAfrica.com 07:04:01.

115. Bruck Shewareged, *Politics – On the Brink of War – Government Seeks Parliamentary Backing*, ETHIOPIAN REPORTER, Nov. 29, 2006, available at Westlaw, 11/29/06 allAfrica.com 17:56:19.

116. See *id.* (explaining the differing views of members of the parliament regarding the adjournment motion).

117. *Id.*

118. See *id.* When the PM presented a four-point resolution to the parliament seeking authorization to take any means necessary to curb possible attack from forces in Somalia, opposition political parties pressed the PM to provide genuine evidence that Ethiopia is indeed attacked by the UIC. In a televised parliamentary debate, the PM expressed his willingness to share ‘sensitive’ national security evidence with political parties in private so that the house unanimously pass the resolution backing the government. However, most opposition parties remained opposed to the resolution after deliberating with the government on the evidence. When the resolution was re-tabled before parliament for voting, most opposition parties either voted against or abstained. The PM commented that the difference between the government and the opposition lies at the heart of the third point in the resolution, which accuses Ethiopian insurgencies based in Eritrea and Somalia collusion with foreign forces to attack Ethiopia. The resolution was passed by a vote of 311 to 99 with 11 abstentions. See *Parliament Endorses Resolution to Reverse Somali Islamists Aggression*, Press Section, MINISTRY OF FOREIGN AFFAIRS ETHIOPIA, Dec. 1, 2006, [http://mfa.gov.et/Press\\_Section/publication.php?Main\\_Page\\_Number=3221](http://mfa.gov.et/Press_Section/publication.php?Main_Page_Number=3221).

119. Shewareged, *supra* note 116.

opposition parties either abstained or voted against the resolution that authorized the government to take “all necessary and legal steps” to repel the danger.<sup>120</sup> Defending UEDF’s (Union of Ethiopian Democratic Forces) position on the resolution, Professor Beyene Petros, then an MP, expressed his doubts in the following terms:

If sporadic incursion warranted a declaration of war, there would be no peace any[ ]where. Here, we are only being told of sporadic incursions and there is nothing to show us . . . an act of invasion. Therefore we do not believe the threat is being appropriately defined [nor] that it justifies such resolution.<sup>121</sup>

UEDF’s leader, Beyene Petros, agrees with the government: Ethiopia might have been attacked by Ethiopian rebel forces operating from within an area under the control of the UIC.<sup>122</sup> However, his party has opposed the characterization of such attacks from insurgent groups as “invasion” by the UIC and has refused to support the resolution that authorized the government to declare war on insurgent groups.<sup>123</sup>

For the purpose of self-defense under Article 51, Ethiopia must have suffered an armed attack of a significant magnitude in terms of its *scale* and *effect* for its self-defensive measure to be lawful under the law.<sup>124</sup> From the conditions required by the law and analyzed above, Ethiopia’s self-defensive measure does not seem to comply with requirement of an armed attack of a significant *scale* and *effect*, a requirement at the very core of the Charter regime on self-defense.<sup>125</sup> However, if it is established that Ethiopia has been under repeated attacks that are not in and of themselves individually significant enough to trigger its self-defensive measure, one might argue that an “accumulation of events” doctrine allows the government to accumulate the small scale attacks as constituting one serious and significant attack.<sup>126</sup> However, this doctrine is not well received in international law and does not seem consistent with the position of the Charter.<sup>127</sup>

Ethiopia also defended its action before and after the war on the basis of the existence of what it called a “clear and present danger.”<sup>128</sup> Indeed, Ethiopia tended to favor this line of argument more than the argument that “the right of self-defen[s]e arises only if an armed attack . . . occurs.”<sup>129</sup> As discussed above in

120. See Dagnachew Teklu, *MPs Vote to Fend Off Islamist “Jihad War”*, DAILY MONITOR, Dec. 5, 2006, available at Westlaw, 12/5/06 allAfrica.com 01:46:39.

121. Namrud Berhane, *Eritrea will Fight to the Last Somali, not the Last Eritrean – Meles*, ETHIOPIAN REPORTER, Dec. 4, 2006, available at Westlaw, 12/4/06 allAfrica.com 15:37:31.

122. See Yelibenwork Ayele, *Ethiopia: UEDF Defends its Position*, ETHIOPIAN REPORTER, Dec. 9, 2006, <http://allafrica.com/stories/200612110387.html>.

123. See Berhane, *supra* note 122.

124. See *Nicaragua*, 1986 I.C.J. at 103-04, ¶¶ 194-95.

125. See Tesfaye, *supra* note 115.

126. Howard A. Wachtel, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy*, 55 DUKE L.J. 677, 693 (2005).

127. *Id.* at 693-94.

128. Shewareged, *supra* note 116; Teklu, *supra* note 121.

129. GRAY, *supra* note 5, at 98. During the discussion in the parliament, the Ethiopian government

detail, threats, whether imminent or otherwise, do not entitle one to resort to armed response under the Charter.<sup>130</sup> Since the Charter rules on self-defense have a separate existence than the rules of self-defense in customary international law, the next sections will examine the validity of Ethiopia's right to self-defense under customary international law.

#### IV. ETHIOPIA'S USE OF FORCE UNDER CUSTOMARY INTERNATIONAL LAW

Some scholars have argued that customary international law allows the right to a defensive measure in anticipation of an attack even if an armed attack did not occur.<sup>131</sup> Professor Bowett for example contends that Article 2(4) of the Charter did not impair State's customary right to self-defense and did not confine it to a response to armed attack.<sup>132</sup> In a similar fashion, Sir Humphrey Waldock observed that "where there is convincing evidence not merely of threats and potential danger but of *an attack being actually mounted*, then an armed attack may be said to have begun to occur, though it has not passed the frontier."<sup>133</sup>

The exchange between the United States and United Kingdom following the *Caroline* incident is considered an authoritative statement, reflective of customary international law on the use of force.<sup>134</sup> In this correspondence, the then Secretary of State, James Webster, articulated the notion that self-defense must be limited to situations in which "the necessity of that self-defen[s]e is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."<sup>135</sup> Professor O'Connell contends that the formula in *Caroline* is consistent with "the letter and spirit of the Charter."<sup>136</sup> Schachter also observes that the delegates to the Security Council discussed the rule in *Caroline* following the *Osirak* incident.<sup>137</sup>

In that exchange, Mr. Webster neatly articulated the rule that "the act, justified by the necessity of self-defens[e], must be limited by that necessity, and kept clearly within it."<sup>138</sup> It is from these statements that the touchstone principles of necessity and proportionality evolved.

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has persistently referred to the vernacular of a "clear and present danger" produced by combination of four points presented to the Parliament as constituting the basis for such a danger. *See* Shewareged, *supra* note 117; Teklu, *supra* note 122 (internal quotation marks omitted).

130. *See* O'CONNELL, *supra* note 5, at 8, 13.

131. *Id.* at 9.

132. BROWNLIE, *supra* note 7, at 269.

133. O'CONNELL, *supra* note 5, at 8-9.

134. Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984); *see also* O'CONNELL, *supra* note 5, at 9 (concluding that the *Caroline* doctrine is consistent with the Charter and the Charter by now is considered crystallization of customary international law); *but see* GRAY, *supra* note 5, at 98 (portraying the two differing positions argued with respect to Article 51 through a paradigm called "the Academic Debate"; while some argue that the inherent right of the State to self-defense allows anticipatory self-defense, others argue that the right is limited to cases when an armed attack already occurred).

135. *Id.* at 1635.

136. O'CONNELL, *supra* note 5, at 9.

137. Schachter, *supra* note 135, at 1635.

138. JOHN F. MURPHY, *THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE: A LEGAL AND POLITICAL ANALYSIS* 17 (1983).

*A. Armed Response Should Be Necessary: The Requirement of Necessity*

According to *Caroline*, the necessity that provokes self-defense should be one that is “instant, overwhelming, and leaving no choice of means, and no moment of deliberation.”<sup>139</sup> What is instant and overwhelming depends on a number of factual circumstances ruling at the relevant time and space and there is no empirical formula that helps make an objective determination of what fits into this parameter. Indeed, given the danger posed against States by acts of “terrorism,” the eminence and proximity of the danger should be assessed in relative terms. For example, a State equipped with some of the most sophisticated and advanced military technology should not be held to the same standard of necessity as poor countries that do not possess the necessary intelligence and technical knowledge to appreciate the eminence and gravity of the threat and the means with which to respond to it.

The Ethiopian Premier told Parliament that the Islamists in Somalia have presented a “clear and present danger” against the country’s peace and security.<sup>140</sup> According to the resolution passed by the Ethiopian Parliament, a combination of four major factors triggered Ethiopia’s right to lawful self-defense: a) The presence of Eritrean troops in Somalia with the sole purpose of destabilizing the peace and stability of the Ethiopian State; b) the repeated declaration by UIC of a holy war—*jihad*—against Ethiopia and the flow of arms and financial support to the group from several Middle Eastern countries; c) the operation of armed Ethiopian opposition groups from within the areas under the control of the UIC with the view to overthrowing the legally constituted government of Ethiopia; and d) the presence of foreign militant fighters alongside the UIC which constituted a situation of “clear and present danger” against the territorial integrity and political independence of the Ethiopian State.<sup>141</sup> In particular, the emergence of the UIC as a real political force while Ethiopia was militarily confronting secessionist

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139. CHARLES CHENEY HYDE, *INTERNATIONAL LAW* 239 (1945), *reprinted in* MARY ELLEN O’CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS* 122 (2005); *See also* Gabčíkovo-Nagymaros Project, (Hung./Slovk.), Judgment, 1997 I.C.J. 7, at 40–41, ¶¶ 51–52 (Sept. 25); Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. 432 (Dec. 4).

140. *See*, Jonathan Clayton, *Ethiopia Confronts Somali Warlords*, SUNDAY TIMES, Nov. 24, 2006, <http://www.timesonline.co.uk/tol/news/world/article648189.ece> (internal quotation marks omitted).

141. *See* Press Conference, Prime Minister of Ethiopia Meles Zenawi (June 26, 2007), <http://www.ethioembassy.org.uk/Archive/PM%20Meles%20Zenawi%20Press%20Conference%2027th%20June%202006.html>, (Last accessed 19 February 2009) (“[Y]ou have the messenger voice of the government of Eritrea who has been actively involved in the fighting in Mogadishu. Theirs is not a specifically Somali agenda. And finally, you have the jihadists led by Al-Ithad Islami, which I am sure you know, is registered by the United Nations as a terrorist organization. And so, for us, the Islamic Courts Union is not a homogeneous entity. Our beef is with Al-Ithad, the internationally recognized terrorist organization. It so happens that at the moment the new leadership of the Union of the Courts is dominated by this particular group. Indeed, the chairman of the new council that they have established is a certain colonel who also happens to be the head of Al-Ithad. Now, the threat posed to Ethiopia by the dominance of the Islamic Courts by Al-Ithad is obvious.”); *See also* Clayton, *supra* note 141; *Ethiopian Parliament Authorizes Action Against Somali Islamists*, TURKISHPRESS.COM (Nov. 30, 2006), <http://www.turkishpress.com/news.asp?id=153555>.

movements in the Ogaden region of Ethiopia, heightened Ethiopia's threat and strengthened its contention on the inevitability of an attack.<sup>142</sup>

An even more threatening situation was the allegation that the officials of the UIC divulged their intention of reuniting all Somali speaking regions around Somalia, signaling the beginning of its vision to integrate the Somali people of Ethiopia into mainland Somalia contrary to principles of international law.<sup>143</sup> As one analyst familiar with the geopolitical dynamics of the region commented, "some leaders in the [UIC], certainly including Hassan Dahir Aweys, wish to reenergize the Greater Somalia concept by incorporating into Somalia those Somali-inhabited parts of Ethiopia, Kenya, and Djibouti."<sup>144</sup> The Ethiopian Parliament Resolution authorizing the government to take all legal and necessary measures against invasion by the UIC contended that "the [UIC] ha[s] an expansionist intent to annex the Somali-speaking parts of Ethiopia, Kenya and Djibouti."<sup>145</sup>

Despite these allegations and bold assertions by the UIC, some analysts dismissed UIC's propaganda as empty rhetoric and held that the UIC was not a viable threat to Ethiopia's territorial integrity and political independence at the time of intervention.<sup>146</sup> In the words of former US Ambassador to Ethiopia, Professor David Shinn:

The Ethiopian military is far more powerful than the militias of the Islamic Courts, which cannot at this writing, pose a serious military threat to the Ethiopian homeland, including the Somali-inhabited Ogaden region. The Ethiopian military has the capacity to defeat handily the Islamic Court militias inside Somalia in conventional engagements.<sup>147</sup>

In both the *Nicaragua* and *Congo* cases, the ICJ has failed to provide guidance as to what constitutes an "imminent threat of armed attack" and expressly stated that:

[R]eliance is placed by the Parties only on the right of self-defense in the case of an armed attack which has already occurred, and the issue of the lawfulness of a response to the imminent threat of armed attack has

142. See Clayton, *supra* note 141.

143. See *Somalia: U.S. Government Policy and Challenges: Hearing Before the Subcomm. on African Affairs of the Comm. on Foreign Relations*, 109th Cong. (2006) [hereinafter *Hearing*] (statement of Hon. David H. Shinn, Adjunct Professor, Elliott School of Int'l Affairs, George Washington University), available at <http://bulk.resource.org/gpo.gov/hearings/109s/34879.txt>.

144. See *id.*

145. Zeray W. Yindego, *Ethiopia's military action against the Union of Islamic Courts and others in Somalia: some legal implications*, INT'L & COMP. L.Q., 2007, at 2.

146. See David Shinn, *The Ethiopia-Somalia Conflict*, NASRET.COM, ¶3 (Dec. 27 2006), [http://www.nazret.com/php/uploadnews/search.php?misc=search&subaction=showfull&id=1167422763&archive=&cnshow=news&ucat=&start\\_from=&](http://www.nazret.com/php/uploadnews/search.php?misc=search&subaction=showfull&id=1167422763&archive=&cnshow=news&ucat=&start_from=&).

147. *Id.*

not been raised. Accordingly, the Court expresses no view on that issue.<sup>148</sup>

Ethiopia holds that Eritrea's multifaceted actions in Somalia are aimed at its territorial integrity and political independence.<sup>149</sup> It maintained that Eritrea trains, arms, and hosts Ethiopian opposition armed groups, such as the Ogaden National Liberation Front (ONLF) and the Oromo Liberation Front (OLF), with the manifest desire to destabilize the stability of the Ethiopian state.<sup>150</sup> To that effect, it was indirectly using, at the relevant time, the UIC controlled territories of Somalia as a launching pad and alludes to the United Nations Report to corroborate its allegations.<sup>151</sup> More specifically, the Ethiopian government contended that Eritrea was preparing for another round of armed confrontation as the UIC, foreign jihadists, and other forces displayed their unflinching desire to attack Ethiopia.<sup>152</sup> Ethiopia contends the existence of ever mounting threat by pointing to the repeated declaration of *jihad* by the UIC and the increasing offensive capability of this force with the material and military support from such countries as Iran, Egypt, Saudi-Arabia and others.<sup>153</sup>

Indeed, the various threats facing Ethiopia at the time bring to mind the surmounting risks that lie ahead. However, even though the cumulative effect of these four factors could amount to a serious threat to Ethiopia's sovereignty,<sup>154</sup> it is doubtful that the UIC and the foreign insurgent forces, at the time, presented a danger so grave and imminent as to amount to a situation that is "instant, overwhelming" and one that denied Ethiopia the choice of means and a moment for deliberation. The relative advantage the Ethiopian army has over the UIC is one such factor distancing the realization of any such eminence.<sup>155</sup> For the Ethiopian government, however, given the political and legal circumstances ruling at the time, failure to act would have simply mounted the risk. A delay would have only postponed the threat, not averted it. This is precisely so because of the role-played and the pressure exerted by Eritrea and the United States on their respective

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148. *Nicaragua*, 1986 I.C.J. at 103, ¶ 195; see also *Territory of the Congo*, 2005 I.C.J. at 222, ¶ 143 (quoting *Nicaragua*).

149. See *Blame Game Over Somalia Conflict*, GLOBAL POLICY FORUM, Apr. 24, 2007, <http://www.globalpolicy.org/security/issues/ethiopia/2007/0413blame.htm> ("Ethiopia's Minister of State for Foreign Affairs Tekeda Alemu charged that "Eritrea is not simply supporting terrorism, it is actively involved in terrorism in Ethiopia and our sub-region."").

150. See U.N. Sec. Council Comm., *Rep. of the Monitoring Group on Somalia pursuant to Sec. Council resolution 1676*, ¶¶ 22-23, 26-27, 30, U.N. Doc. S/2006/913 (Oct. 16, 2006) [hereinafter U.N. Sec. Council Comm. *Rep. pursuant to resolution 1676*]; see also *Blame Game Over Somalia Conflict*, *supra* note 150.

151. See U.N. Sec. Council Comm., *Rep. pursuant to resolution 1676*, *supra* note 151, at ¶¶ 22-23, 28, 218. In its 2006 Report to the Security Council, the Monitoring Group announced the participation of forces of Eritrea, OLF, ONLF and the UIC in the war leading to UIC's occupation of Kismaayo. The MGO also reported the shipment of arms to ONLF, OLF and the UIC from Eritrea. *Id.*

152. *Id.* ¶ 222.

153. *Id.* ¶ 213.

154. *Id.* at 6.

155. See *Id.* ¶ 222.

proxies to act and not delay.<sup>156</sup> However, these political considerations, which instigated and created a trump-mood over the legal requirements, do not seem to create a state of necessity that is of itself “instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>157</sup>

In *Territory of the Congo*, the ICJ did not find Uganda’s action necessary, even if Uganda was threatened by a non-state actor operating on the territory of the Congo.<sup>158</sup> The Court and the applicant States have recognized the existence of an armed attack against Uganda which the Court referred to as “series of deplorable attacks.”<sup>159</sup> The fact that the rebel groups threatening Uganda’s security received support from the Sudan and launched an attack from the DRC did not change the conclusion of the Court. The Court did not find the threat grave enough as to justify the resort to armed force against the territories of the Congo.<sup>160</sup> In this judgment, the Court dismissed Uganda’s claim to the exercise of its right to self-defense on both counts of necessity and proportionality.<sup>161</sup> Uganda told the Court that it carried out a military operation on the Congolese soil with the sole purpose of diffusing “the offensive capabilities” of FUNA,<sup>162</sup> an insurgent organization allegedly bent on destabilizing Uganda using the DRC as a launching pad.<sup>163</sup> Rejecting Uganda’s argument for the existence of a necessary condition that justified a resort to force, the Court held that “the evidence did not support the Ugandan claim to have been attacked or threatened on such a scale as to give rise to a right to resort to military force in self-defense on the territory of the Congo.”<sup>164</sup>

In her analysis of the state of the law relating to the use of force post 9/11, Professor O’Connell concludes that in the face of an obvious intention, on the part of the enemy to continue to pose a threat, armed self-defense is legitimate.<sup>165</sup> The repeated declaration of a holy war might demonstrate an irrevocable intention of the UIC to attack Ethiopia whenever it acquires the necessary military capability to do so.<sup>166</sup> However, the level of threat that the UIC posed against the Ethiopian State is not as grave and imminent as to justify self-defense. The ICJ is clear in holding that the “series of deplorable attacks” against Uganda do not justify Uganda’s self-defensive measures against the insurgencies in the Congo.<sup>167</sup>

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156. See Clayton, *supra* note 141.

157. HYDE, *supra* note 140, at 122.

158. *Territory of the Congo*, 2005 I.C.J. at 223, ¶ 147.

159. *Id.* ¶ 146.

160. *Id.*

161. *Id.* ¶ 147.

162. *Id.* ¶ 45.

163. *Id.* ¶ 120.

164. *Id.* ¶ 147.

165. O’CONNELL, *supra* note 5, at 10. Relying on resolution 1368/2001 and 1373/2001 of the Security Council and the position of NATO member States, Professor O’Connell argues that whenever there is a clear and convincing evidence that the enemy the intention or motive to continue to threaten a State, then the State is within its rights to defend itself by use of armed force. *Id.* at 9.

166. See U.N. Sec. Council Comm., *Rep. pursuant to resolution 1676*, *supra* note 151, ¶ 204.

167. *Territory of the Congo*, 2005 I.C.J. at 222-23, ¶¶ 146-147.



The other requirement relates to the existence of another alternative—a “choice of means”—other than the use of an armed force that could have prevented the necessity of self-defense.<sup>168</sup> One of the most resonating contentions advanced by Ethiopia holds that the forces under the umbrella of the UIC and the Eritrean government were working on the basis of a common design and motive to achieve a common purpose—destabilizing and endangering the territorial integrity and political independence of Ethiopia.<sup>169</sup> However, the UIC was not a proper government and can hardly be dealt with by diplomatic or legal means. Ethiopia claimed that it exhausted all diplomatic means available to avoid the confrontation but to no avail.<sup>170</sup> Although the *de facto* character of the UIC and the impossibility of pursuing a legal course against this force are true enough, the absence of this condition alone does not constitute a condition of necessity justifying Ethiopia's resort to force. Indeed, the Ethiopian government had serious security concerns at the time.<sup>171</sup> However, necessity as a justification requires an exceptionally higher threshold of mounting peril that is instant, overwhelming and should be one that does not leave any moment for deliberation. Ethiopia was certainly not under that kind of situation at the time it went to war.

Ethiopia's contention that the UIC is acting as a proxy for Eritrea and that it is providing a safe haven to the Ethiopian rebel forces operating within Eritrea and Somalia is supported by the findings of the UN Monitoring Group.<sup>172</sup> Accordingly, the official view holds that the only feasible recourse available is to take a self-defensive measure against the forces that host and infiltrate what Ethiopia deems as anti-peace elements into its territory and the stationing of foreign jihadists on its border.<sup>173</sup> In the words of Ethiopia's Ambassador to the UK, Mr. Birhanu Kebede, “the extremist forces have been training anti-Ethiopian elements and infiltrating them to Ethiopia as well as repeatedly attacking Ethiopia.”<sup>174</sup> Ethiopia's Premier, Meles Zenawi, emphasized the link between the attack against Ethiopia and the UIC when he accused the UIC of infiltrating anti-Ethiopian rebel forces “sheltered in areas under its control.”<sup>175</sup> Outlining the effort of the Ethiopian government to avoid military confrontation, the Prime Minister said:

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168. O'CONNELL, *supra* note 5, at 9.

169. See *Blame Game Over Somalia Conflict*, *supra* note 150.

170. See, e.g., Aregu Balleh, *Ethiopia Will Continue to Seek Peaceful Options to Deal With UIC - State Minister*, ETHIOPIAN HERALD, Dec. 3, 2006, available at Westlaw 12/3/06 allAfrica.com 19:32:12.

171. See *Ethiopia Has Genuine Security Concerns - U.S.*, ETHIOPIAN HERALD, Dec. 29, 2006, available at Westlaw 12/29/06 allAfrica.com 18:09:04.

172. See U.N. Sec. Council Comm., *Rep. pursuant to resolution 1676*, *supra* note 151, ¶28.

173. See TFG Troops seize OLF Fighters, ETHIOPIAN HERALD, Dec. 23 2009 (on file with author) (noting that the State media said: “Repeated attacks are being launched against Ethiopia by OLF, the Ogaden Liberation Front (ONLF) and the fundamentalist forces under the Union of Islamic Courts-forces that constitute the front of destruction created by Shaiebia.”).

174. *Ethiopian military operation do not target people of Somalia*, KILIL 5 ONLINE, Dec. 25, 2006 (2010-09-28 04:16 +0000), [http://www.kilil5.com/news/5385\\_ethiopian-military-operation-do-&print](http://www.kilil5.com/news/5385_ethiopian-military-operation-do-&print).

175. *Meles says Ethiopia forced into war: PM Meles*, KILIL 5 ONLINE, Dec. 26, 2006, [http://www.kilil5.com/news/5353\\_meles-says-ethiopia-forced-into-](http://www.kilil5.com/news/5353_meles-says-ethiopia-forced-into-) (last visited Oct. 9, 2010).

[T]he group was told to withdraw the anti-Ethiopian forces it gathered from the areas it controls, to stop sheltering these forces and infiltrating them into Ethiopia, to lift the war it declared against Ethiopia and address our differences through negotiation.<sup>176</sup>

Therefore, to the extent that these forces are in the areas within the effective control of the UIC and the UIC is not willing to see to the problem, Somalia is in breach of its international obligation.<sup>177</sup> But Somalia is a failed state in which no responsible government exists.<sup>178</sup> This unique paradigm of a failed state situation coupled with the threat of extremist militancy revamps Ethiopia's position. Although some may hold that the four factors do not to meet the requirements of the law that seeks to allow force only as a measure of a last resort, the absence of an internationally responsible actor within Somalia could be seen as an additional factor that dispenses with the excessively restrictive regime of necessity.<sup>179</sup> Therefore, the failed state situation in Somalia and the cumulative effect of the four factors that Ethiopia presented as creating what it called a situation of "clear and present danger", could be seen to have created a state of necessity that allows a temporary right to use a proportionate force to remove the threat not an all out invasion.<sup>180</sup>

#### *B. Armed Response Must be Proportional: The Proportionality<sup>181</sup> Test*

Thomas M. Franck marvelously captures the hub of the doctrine of proportionality in the following terms:

The doctrine held that (1) any State resorting to war should calibrate its response in proportion to the demonstrable wrong perpetrated against it, and that (2) the means deployed as a countermeasure against a perpetrator be proportionate to the minimum force necessary to achieve redress. The doctrine was designed to ensure that States would not resort to unprincipled and unnecessarily brutal violence under cover of redressing an alleged wrong.<sup>182</sup>

176. ETHIOPIAN HERALD, Dec. 26, 2009, at Vol. LXIII, No. 091, p. 9 (on file with author).

177. Since the situation in Somalia is unusual and one marred by militancy and extremism on the one hand and a failed-state-situation on the other, one might argue that the classical rule of international law which required States to refrain from these acts may not fit neatly into the Somali paradigm. In those cases, States might be justified in taking a proportionate response to an armed attack which already occurred or already begun to occur. Nonetheless, the threshold of threat in this case is much lower than required by the law. What exacerbated the situation more than the actual threat are the hostilities of the parties towards one another and the existence of special interest by powerful nations such as the United States.

178. See *Quick Guide: Somalia's Islamists*, BBC NEWS (last updated at 08:37 GMT, Thursday, 28 December 2006), <http://news.bbc.co.uk/2/hi/africa/6043764.stm>.

179. Franck, *On Proportionality of Countermeasures in International Law*, *supra* note 83, at 763.

180. See Clayton, *supra* note 141 (internal quotation marks omitted).

181. Franck, *On Proportionality of Countermeasures in International Law*, *supra* note 84, at 715 ("Put formulaically, most proportionality discourse occurs when A has done (or threatens to do) *X* to *B*, and *B* responds by doing *Y* to *A*. The issue then crystallizes as an inquest into whether counter-measure *Y* is "equivalent" (i.e., proportionate) to *X*.").

182. *Id.* at 719.

Proportionality is a principle of law inextricably tied to the principle of necessity and requires the acts of self-defense to be proportionate to “the necessity provoking them.”<sup>183</sup> The application of this abstract but insurmountably vital principle to situations of military conflict has never been an easy task. Proportionality, as a principle that governs both the resort to force and the means and methods relating to the conduct of hostilities, remains one of the most controversial principles that involves, to borrow from Thomas Franck, “an awkward balancing of apples and oranges.”<sup>184</sup> However, the paramount need “to prevent war but, failing that, to humanize the conflict as much as possible” makes proportionality one of the most celebrated principles, even an important conception of law, constantly invoked in international law.<sup>185</sup>

In *Nicaragua*, the ICJ declared the conduct of the United States as disproportionate noting that:

[The] United States' mining of Nicaraguan ports and attacks on the ports, oil installations, etc., do not satisfy the criterion of proportionality. 'Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid.'<sup>186</sup>

In the *Territory of the Congo*, the Court did not find a right of self-defensive measures by Uganda.<sup>187</sup> However, the Court proceeded to examine the proportionality of the self-defense measures. On proportionality, the Court pronounced that “the taking of airports and towns many hundreds of kilometers from Uganda's borders would not seem proportionate . . . nor [be] necessary.”<sup>188</sup>

The principle calls for a right and sensible balance between the threat faced and the response aimed at removing that threat.<sup>189</sup> As various fact situations are peculiar and present unique realities, the universe of proportionality remains amenable to ambiguity. However, it must not succumb to unprincipled individual evaluations justifying the use of brute force to aggravate the calamities of resort to force and the ensuing war. What provoked Ethiopia's resort to force was not a particular attack against its territory or a single threat against its national security. As discussed in previous sections, the Ethiopian government identified a wide range of potential threats including, but not limited to, the declaration of the holy war against it and the Ethiopian rebels operating from within Somalia which, according to the Ethiopian government, are working with common design and

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183. Schachter, *supra* note 135, at 1637.

184. Franck, *On Proportionality of Countermeasures in International Law*, *supra* note 83, at 716.

185. *Id.* at 723.

186. *Nicaragua*, 1986 I.C.J. at 367, ¶ 211.

187. *Territory of The Congo*, 2005 I.C.J. at 223, ¶ 147.

188. *Id.*

189. See David DeCosse, *Lost in the 'Logic of War'*, SANTA CLARA UNIVERSITY MARKULA CENTER FOR APPLIED ETHICS, <http://www.scu.edu/ethics/publications/ethicalperspectives/logic.html> (last visited Sept. 26, 2010).

purpose with the UIC and the Eritrean government.<sup>190</sup> Even if one finds Ethiopia to be in a state of necessity, Ethiopia's occupation of cities and airports far away from its borders cannot be a proportionate measure limited at removing the threat that created the necessity of self-defense.

Ethiopia is certainly under a more threatening situation that justifies the resort to force compared to Uganda. Uganda could have probably averted the danger posed to its territorial integrity and political independence by working with the DRC, or failing that, bringing the issue to the Security Council to seek authorization in exercising its right to self-defense. Also, Uganda could have brought the DRC before the ICJ alleging its failure to prevent the rebels from using its territory for illegal activities aimed at endangering its sovereignty. Ethiopia, on the other hand, did not have any such choice as the UIC is not a recognized international actor despite its *de facto* control of a large portion of the Somali territory and could not have been stopped through such means.<sup>191</sup>

On proportionality, like Uganda, Ethiopia has occupied cities and an airport far away from its borders.<sup>192</sup> After removing the UIC from Mogadishu and other major towns of Somalia, Ethiopia made its withdrawal contingent upon the deployment of an African Union peacekeeping force.<sup>193</sup> According to Ethiopia, it remained in Somalia to assist the internationally recognized transitional government without an international mandate, and to also ensure that the terrorists will not return to the position that they were held before they were driven from the capital.<sup>194</sup> The elimination of the threat against its stability requires the restoration of peace and an effective government in Somalia. If Somalia remains an insecure region, it could continue to pose a threat to the peace and security of Ethiopia and the region.

Writing on the proportionality of self-defensive measures, Oscar Schachter reached the conclusion that a State that suffered a frontier attack does not "bomb cities or launch an invasion."<sup>195</sup> Ethiopia, even if it was under an actual armed attack at the relevant time, cannot proceed to the hinterlands of Somalia and remain there for a period of two years in the exercise of self-defensive measures aimed at removing the danger that created a state of necessity. As stipulated in *Caroline*, the necessity of self-defense must be limited to removing the danger that created the condition of necessity.<sup>196</sup> If Ethiopia's defense has rested on its inherent

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190. See TURKISHPRESS.COM *supra* note 142.

191. See *Somalia - Amnesty International Report 2007*, AMNESTY INTERNATIONAL, <http://www.amnesty.org/en/region/somalia/report-2007> (last visited Oct. 8, 2010).

192. See U.N. Security Council, *Report of the Secretary-General on the Situation in Somalia*, ¶¶ 2-5, U.N. Doc. S/2007/115 (Feb. 28, 2007).

193. See *Ethiopia 'Bogged Down' in Somalia*, BBC, GLOBAL POLICY FORUM, Nov. 27, 2007, <http://www.globalpolicy.org/component/content/article/199/40868.html>; Jason McLure & Hamsa Omar, *Ethiopia Agrees to Withdraw Troops from Somalia*, BLOOMBERG, Oct. 27, 2008, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ao7G53sBBsXY&refer=home>.

194. See *Ethiopia PM, US Intelligence Committee Discuss Terrorism, Somalia*, SUDAN TRIBUNE, Feb. 22, 2007, <http://www.sudantribune.com/spip.php?article20382>.

195. Schachter, *supra* note 135, at 1637.

196. See *British-American Diplomacy: The Caroline Case*, Enclosure 1-Extract from Note of April

right to self-defense and lawful self-defense is accompanied by adherence to the principles of necessity and proportionality, even if we assume that Ethiopia has faced an imminent peril to its "essential interests" and hence under a necessary situation that justifies the use of force, Ethiopia's response goes way beyond what is necessary to avert the danger and is disproportionate to the threat posed against its territorial integrity and political independence.

What is interesting, also striking as odd, is the silence of the Security Council, the General Assembly of the UN, and the African Union in the face of what seems to be a disproportionate use of force against the territorial integrity and political independence of Somalia. These organs have envisioned the TFG and the TFG Charter as the only path to the restoration of peace and stability in Somalia.<sup>197</sup> At the same time, the TFG supported the Ethiopian intervention,<sup>198</sup> which could not have existed had it not been for the protection extended to it from Ethiopia. Politically speaking, Ethiopia's measure to intervene and remain in Somalia seems to have accorded with the interests of these international and regional organizations.<sup>199</sup> However, these organs have not expressly authorized Ethiopia to act as it did and nor did they condemn its action.<sup>200</sup> In fact, speaking in retrospect, the Ethiopian Prime Minister said "the United Nations Security Council did not put into question the measure we took in self-defense. Similarly various [g]overnments in different parts of the world have supported our right to self-defense and have refrained from putting out any kinds of declarations which might have put into question our inherent right of self-defense."<sup>201</sup> Does the concurrence of will between Ethiopia and these organizations, the positing of the issue as essentially part of the global war on terror by both Ethiopia and the United States, and the attendant silence of the Security Council remove the de-legitimizing aspects of Ethiopia's military action? Is international law moving to the recognition that the gravity of the danger and potential threat posed by acts of terrorism, the most acclaimed problem of the first decade of the 21st century, is subject to a lighter standard of necessity and proportionality? These are among the problems international law must confront head-on in the times to come.

Whatever political significance one might ascribe to Ethiopia's decision to push into the heartlands of Somalia and remain there for two years,<sup>202</sup> its action does not appear to be legally proportionate to the needs that triggered the self-defensive measure. Ethiopia might contend that it has done so to offer the Somali people the chance to reconcile, solve their differences and form a government.

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24, 1981, YALE LAW SCHOOL AVALON PROJECT, [http://avalon.law.yale.edu/19th\\_century/br1842d.asp#web2](http://avalon.law.yale.edu/19th_century/br1842d.asp#web2) (last visited Sept. 27, 2010).

197. See AMNESTY INTERNATIONAL, *supra* note 192.

198. See Fanta, *supra* note 1.

199. See AMNESTY INTERNATIONAL, *supra* note 192.

200. See *id.*

201. Prime Minister Meles Zenawi, Ministry of Foreign Affairs of Ethiopia, Speech to the Parliament (Jan. 2, 2006) available at [http://www.mfa.gov.et/Press\\_Section/publication.php?Main\\_Page\\_Number=3311](http://www.mfa.gov.et/Press_Section/publication.php?Main_Page_Number=3311).

202. See Sophia Tesfamariam, *Somalia: Two Years After the US-Backed Invasion and Occupation*, AM. CHRONICLE, Dec. 4, 2008, <http://www.americanchronicle.com/articles/view/83924>.

Indeed, one could argue that Ethiopia created an ample opportunity for the Somalis and the international community to work towards the creation of an effective and inclusive Somali government. As complex as Somalia's political problems may be, an international coalition could have provided a better political and/or military solution to Somalia's decades of lawlessness. Even in this light, the best designation that could probably describe Ethiopia's action might be that used in justifying the illegal bombardment of Kosovo by NATO—may be illegal but justified.

#### V. CONCLUSION

The legality of Ethiopia's military intervention in Somalia presents a complex maze of dilemmas dictated by the realities of a failed state scenario and a modern threat of terrorism. Ethiopia claims that the invitation by the legitimate and recognized government of Somalia and its lawful right to collective and individual self-defense justified its military intervention.<sup>203</sup> Examining the validity of these claims involves an appreciation of highly contested facts and unverifiable allegations.

Ethiopia argued that its actions are consistent with the letter and the spirit of Article 2(4) since it amounted to a lawful exercise of the right to individual and collective self-defense under Article 51 of the Charter.<sup>204</sup> Although Ethiopia did not insist on the existence of a significant armed attack, without ruling out the fact that an armed attack existed, it claimed that a combinations of four factors have created a condition of "clear and present danger" against its territorial integrity and political independence: a) the presence of Eritrean troops, a country with an entirely non-Somali agenda in Somalia; b) the consolidation of power in the hands of radical Islamic militants part of whom Ethiopia considers as "terrorists" with the manifest intention of annexing Somali speaking region of Ethiopia; c) UIC's declaration of a holy war against Ethiopia; and d) the presence of armed Ethiopian and other foreign forces working with common design and purpose with the UIC.<sup>205</sup> Along with the declaration of the Holy war, Ethiopia sees individuals within the UIC leadership as a greater threat than the UIC itself.<sup>206</sup> Explaining this distinction, the Ethiopian government pinpoints to Sheik Hassen Dahir Aweys, once head of the *Al-Itihad*, an organization on the United States' list of terrorist organizations and the man that Ethiopia holds responsible for terrorist acts in its territories.<sup>207</sup>

It contends that the cumulative effect of all these factors put Ethiopia in a state of necessity that justified self-defense in anticipation of an eminent and overwhelming attack. Though the standard of what is instant and overwhelming is

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203. See Prime Minister Meles Zenawi, *supra* note 202.

204. See William A M Henderson, *The Use Of Force In Somalia And Issues Relating To The Legality Of Ethiopian And United States Intervention*, OPTICON, Spring 2008, at 1, 2, 4, available at [http://www.ucl.ac.uk/opticon1826/archive/issue4/Art\\_Laws\\_Henderson\\_SomaliaIntervention\\_Pub.pdf](http://www.ucl.ac.uk/opticon1826/archive/issue4/Art_Laws_Henderson_SomaliaIntervention_Pub.pdf).

205. See sources cited *supra* note 143.

206. See Joseph Winter, *Profile: Somalia's Islamist leader*, BBC NEWS (Friday, 30 June 2006, 07:39 GMT) <http://news.bbc.co.uk/2/hi/5120242.stm>.

207. *Id.*

very subjective, the cumulative effect of these threats coupled with the failed State dynamic in Somalia, could be seen to create a state of necessity grave and eminent enough as to trigger the right to self-defense. However, Ethiopia's armed penetration deep into the heartlands of Somalia and its occupation of Mogadishu and other cities, was not in any way proportional to the danger posed against the Ethiopian state and goes beyond removing the threats that created the necessity of self-defense. Therefore, on the issue of proportionality, Ethiopia's action goes beyond what is strictly required under the circumstances to avert the danger posed against it and hence contravenes one of the conditions for lawful self-defense under international law.

However, one should also appreciate the nature of the danger Ethiopia faced: a complex mix of threat posed by Eritrea and UIC, and its own political interests to wipeout armed opposition groups that operate from within Somalia.<sup>208</sup> Ethiopia being an important ally of the Bush administration on the global war on terror,<sup>209</sup> there is also a global political dimension to the conflict which may explain why most states have failed to question the legality of the war or require a debate in the Security Council or elsewhere. Ethiopian government officials have echoed the notion that Ethiopia's security and respect for its territorial integrity and long term political independence anticipates the stability of Somalia.<sup>210</sup> They argued that unless Somalia becomes a stable, democratic and responsible partner in the international system, it will remain a breeding land for "terrorism" and will continue to pose a threat not only to Ethiopia and the region but also to the international community.<sup>211</sup> One could probably attribute the silence of the Security Council, the General Assembly, and the African Union to the recognition of this claim or the meeting of minds on this point.

In conclusion, Ethiopia's claim to self-defensive measures does not seem to be in line with the requirements of the UN Charter because it fails to meet the requirement of an occurrence of an attack of a significant *scale* and *effect* before recourse to the self-defensive measure. Under customary international law, although Ethiopia could be seen to be under an imminent threat of attack triggering the right of recourse to a proportionate response, it certainly went beyond what is necessary to remove the threat and used a disproportionate force.

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208. See Prime Minister Meles Zenawi, *supra* note 202.

209. Shashank Bengali, *Rice's Visit to Ethiopia Puts Focus on Ally Accused of Human Rights Abuses*, MCLATCHY NEWSPAPERS (December 04, 2007 08:11:05 PM), <http://www.mcclatchydc.com/2007/12/04/22561/rices-visit-to-ethiopia-puts-focus.html>.

210. See Prime Minister Meles Zenawi, *supra* note 202.

211. See sources cited *supra* note 143.

