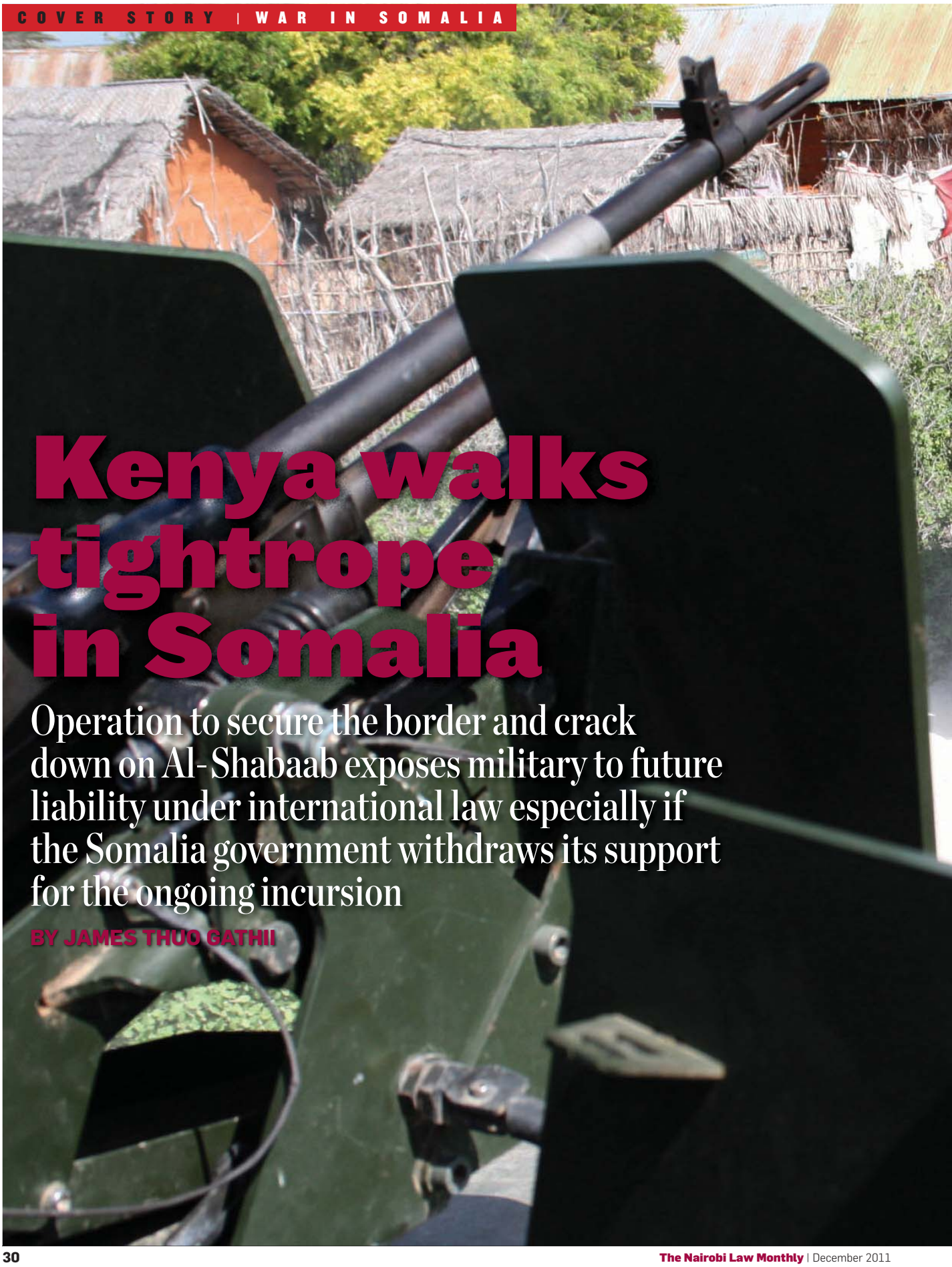

Kenya walks tightrope in Somalia

Operation to secure the border and crack down on Al-Shabaab exposes military to future liability under international law especially if the Somalia government withdraws its support for the ongoing incursion

BY JAMES THUO GATHII

Kenyan soldiers in Somalia. The incursion can only be defended on grounds that Kenya was invited by TFG.

Kenya's military offensive against Al-Shabaab — a non-State actor — raises a number of important international legal issues. All uses of force by a State are governed by rules of international law. While international law is clear on use of force against other States, there is no similar clarity when a State uses force against a non-state actor.

In the first phase of the military offensive against Al-Shabaab, Kenya argued that it was defending itself from incursions and attacks from the group into its territory. Kenya cited the third instance of kidnapping foreigners on Kenyan soil in mid-October, 2011, when two women working for Doctors Without Borders were seized by armed gunmen believed to be Al-Shabaab. The two are believed to have been taken into parts of Somalia controlled by Al-Shabaab. Tourists from the coastal town of Lamu in Kenya have also been abducted in raids and taken into the lawless Somalia region near the border with Kenya by the militia.

Under international law, Kenya's military offensive in Somalia against Al-Shabaab is better justified by the invitation of the Somali Transitional Federal Government to help stamp out the group.

I argue that the use of force in self-defence against Al-Shabaab, a non-state actor, does not have proper legal grounding under Article 51 of the Charter of the United Nations and indeed under customary international law. Nevertheless, if Kenya now has a proper legal basis in proceeding against the group, its use of force is still governed by international law. Such use of force must be necessary and proportionate. In addition, Kenya should watch the danger of occupying parts of Somalia and attracting international legal responsibility in the same way that Ugandan Defence Forces did when they occupied the eastern parts of the Democratic Republic of Congo for largely similar reasons – to ward off security threats posed by non-state actors.

Self-defence argument does not favour Kenya

The initial justification for the use of force against Al-Shabaab was in my view mistakenly predicated on Article 51 of the Charter of the United Nation, which only authorises use of force against another State where that State has initiated a cross-border attack against another.

Article 51 also authorises use of force in self-defence where the attack into a State can be attributed to the State where the attack emanates from. Clearly, since Al-Shabaab is not acting on behalf of or together with the Transitional Federal Government of Somalia, Article 51 of the UN Charter does not provide a basis for the use of force against what is essentially a non-State entity.

Right to self-defence

I make the foregoing claim notwithstanding recent UN Security Council Resolutions that have been cited as evidence of a move towards expanding the right of self-defence where attacks by irregular forces could not be attributed to a State.

Expanding the right of self-defence to include attacks by irregular forces whose conduct is not attributable to a State is inconsistent with earlier Security Council criticisms of self-defence, especially by occupying countries. Members of the Security Council disapproved Israel's claim in the 1960s and 70s that the call to arms or the implementation of force was justifiable as a response to the internal domestic instability in Lebanon, and its inability to curb and prevent terrorist attacks originating from its soil to Israel. This is consistent with the International Court of Justice's opinion in the 2005 *Congo vs. Uganda* case.

Although the court specifically declined to address the permissibility of a right to self-defence, even against large-scale at-

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tacks by irregular forces, it nevertheless found Uganda not only to have occupied parts of Congolese territory but to have used force in violation of the prohibition of the use of force contained in Article 2(4) of the charter.

Since Uganda had argued that it had suffered attacks from irregular forces which it sought to forcibly repulse, *Congo vs. Uganda* ought to be read as affirming the prohibition of the use of force in the absence of an armed attack attributable to a State.

The refusal by the court to expand the right of self-defence to include cases involving attacks by irregular forces that cannot be attributed to a State is an acknowledgment that the acceptance of an expanded right of self-defence would need more than its judicial imprimatur. Indeed, while another prior important International Court of Justice opinion, *Nicaragua vs. United States* affirmed self-defence as an inherent right, this "must" ultimately "be regarded as limited and legitimated by law."

The law on the use of force

Except in the case of self-defence or as mandated by the authority of the Security Council, Article 2(4) of the UN Charter prohibits the use of force.

Article 2(4) requires that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." The term "war" is not included within this prohibition. Rather, all uses of force whether equated to war or lesser actions are prohibited.

Under Article 51, the use of force is in self-defence triggered by the existence of an armed conflict or an armed attack attributable to a State. Lesser-isolated incidents, including minor quarrels across territorial boundaries, would not suffice as an attack or armed conflict and thus do not trigger the right of self-defence. This is another reason why I believe Article 51 of the United Nations Charter is inadequate to justify Kenya's military offensive in Somalia.

Article 51 fails to mention that an armed attack must emanate from a State; which has, in turn, led some scholars and justices of the International Court of Justice to conclude that the omission of such language means that such attacks triggering self-defence could emanate from irregular forces, even if their conduct was not attributable to a State. The argument here is that the use of force as self-defence is permissible against irregular forces acting independently and on their own accord. Those who make this argument support their view by virtue of the difference in the language used in Article 2(4) as opposed to Article 51. While Article 2(4) prohibits the use of force by one State against another, Article 51 contains no similar reference to a State in relation to the origin of an armed attack.

This reading of Article 51 is buttressed by distinguishing the Security Council's condemnation of Israel's use of force as self-defence in the 1960s and 70s, from what they consider a proper case of self-defence following attacks by irregular forces.

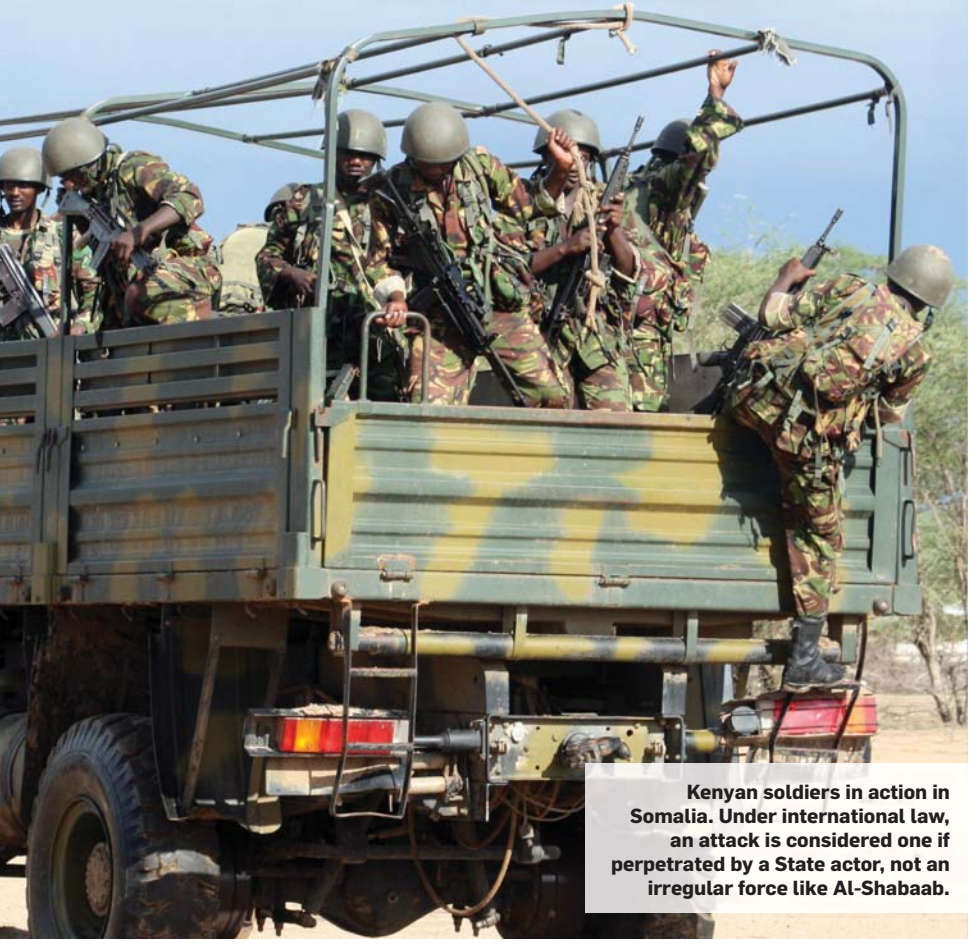
The claim here is that the condemnation of Israel is distinguishable since it was influenced by the fact that Israel was illegally occupying the West Bank, Gaza and the Golan Heights when it claimed to use force in self-defence. Similarly, Portugal's claims of self-defence in its African colonies against forces fighting for decolonisation were criticised since "Portugal was using force to maintain its illegal colonial power. The right of self-defence could not be invoked to perpetuate colonialism and to flout the right to self-determination and independence."

Based on these contentions, proponents of an expanded reading of Article 51 argue that when the armed conduct of irregular forces is of such gravity and the scale and effects equals to armed attacks that would have been undertaken by regular forces, then attribution of such conduct to a State is unnecessary to trigger the right of self-defence under Article 51.

In *Nicaragua vs. United States*, the International Court of Justice held that the exercise of the use of force permitted by the right to self-defence "is subject to the State concerned having been the victim of an armed attack."

To arrive at this conclusion, the court did not rely solely on the text of Article 51. Rather, it made reference to the Definition of Aggression as stated in Article 3(g) of General Assembly Resolution 3314 (XXIX), which the court stated is a norm of customary international law.

In defining an armed attack, the court held that, in addition to actions by regular armed forces, armed action by irregular forces, mercenaries and the like may constitute an armed attack if sent by a State or on its behalf, and if such activity "because of its scale and effects, would have been classified as an armed attack...had it been carried out by regular armed forces." Thus, according to the court, the armed conduct of irregular forces had to be attributable to a State directly or indirectly to permit the use of force in self-defence.



Kenyan soldiers in action in Somalia. Under international law, an attack is considered one if perpetrated by a State actor, not an irregular force like Al-Shabaab.

The court further opined that attribution of such conduct "to give rise to legal responsibility ... in principle [requires proof] that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."

Thus, under Nicaragua, where the gravity of the armed conduct of irregular forces can be defined as an armed attack, the right of self-defence by the victim State is permissible only upon attribution of such conduct to a State under the effective control test.

Additional examples of international judicial interpretation of Article 51 include the ICJ's statement in its Advisory Opinion on 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' that "Article 51 of the Charter recognises the existence of an inherent right of self-defence in the case of armed attack by one State against anothe."

In *Congo vs. Uganda*, the court found there was no satisfactory proof of the direct or indirect involvement of the government of the Democratic Republic of the Congo (DRC) in attacks against Uganda. Here, the court further held that "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 December 14, 1974."

These cases show that the ICJ continues to consistently require the existence of another State or at least attribution of the armed attack to such a State for the use of force as self-defence to be permissible under Article 51 of the Charter.

On the related question of the definition of an armed attack, it is notable that the Appellate Chamber of the International Criminal Tribunal of the Former Yugoslavia in the Tadic case found an "armed conflict" to exist "whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State."

It has often been noted that the use of the term "armed conflict" by the Chamber suggests a much lower threshold than armed attack. However, Tadic was not really about the permissibility of the use of force in self-defence. But if Tadic is relevant in this context, it must be noted that the Chamber qualified the term armed conflict with the verb "protracted" thus signifying the necessity of a higher intensity of armed conflict. However, the Chamber's recognition of conflicts between non-State actors for the applicability of International Humanitarian Law made no reference to the necessity of attribution of the armed conflict to a State unlike under Article 51. In addition, unlike in Nicaragua, the Chamber applied a lower threshold of control, i.e. overall control by a State "not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity."

The Chamber noted that this overall control test may be limited to the specific facts of that case relating to circumstances where "armed forces fighting against the central authorities of the same State in which they live ... may be deemed to act on behalf of another State."

Self-defence

By phrasing the underlying inquiry in such terms, the overall control test may have been the tribunal's attempt to attribute the conduct of irregulars to a State whose existence was in the process of dissolution.

In the Wall decision, Judge Higgins, in her separate opinion, with reference to the requirement that an armed attack be attributable to a State argued that: "[t]here is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State." She further explained that, to the extent that this view of Article 51 is based on the Court's decision in Nicaragua, she had reservations about the tenability of this proposition in Nicaragua.

In that same decision, Judge Buergenthal also expressed his dissatisfaction of the majority holding stating that, "the United Nations Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State, leaving aside for the moment the question whether Palestine, for purposes of this »

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case, should not be and is not in fact being assimilated by the Court to a State."

Lastly, the most recent critiques as to the necessity of attribution to a State of an armed attack by irregular forces was expressed in the Separate Opinions of the *Congo vs. Uganda* case, where the court, in failing to find a connection between the conduct of the irregular forces attacking Uganda from the Congo (the territory from which the attacks emanated) held against Uganda's argument of self-defence.

In response to this ruling, Judge Kooijmans noted that "even if one assumes (as I am inclined to do) that mere failure to control the activities of armed bands cannot in itself be attributed to the territorial State as an unlawful act, that in my view does not necessarily mean that the victim State is under such circumstances not entitled to exercise the right of self-defence under Article 51."

He continued by making reference to his dissenting position in the Wall case, and stated that "Article 51 merely 'conditions the exercise of the inherent right of self-defensc on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years.'"

In agreement with Judge Kooijmans, Judge Simma also expressed his dissent noting "that the court should have taken the opportunity presented by the present case to clarify the state of the law on a highly controversial matter which is marked by great controversy and confusion — not the least because it was the court itself that has substantially contributed to this confusion by its Nicaragua judgment of two decades ago."

Further, with reference to circumstances where a State is unable to curb the hostile conduct of irregular forces, Judge Simma, again in accord with Judge Kooijmans, concluded that "if armed attacks are carried out by irregular forces from such territory against a neighbouring

State, these activities are still armed attacks even if they cannot be attributed to the territorial State." They further argued that it "would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State and the Charter does not so require so."

Thus, it is apparent that, despite the consistent reiteration of the traditional understanding of Article 51 by the International Court of Justice, there is growing debate about the continued tenability of the requirement an armed attack being attributable to a State as a precondition for the exercise of the right to self-defence.

Following the attacks on the United States on September 11, 2001, some scholars have argued that conduct by irregular forces amounts to an armed attack irrespective of attribution to a State. Those who support this view note that UN Security Council Resolution 1368 (2001) explicitly recognised "the inherent right of individual or collective self-defence" and expressed the "readiness to take all necessary steps to respond to the terrorist attacks of September 11, 2001, and to combat all forms of terrorism," which it regards as a threat to international peace and security.

Notably, the security council also called on all States "to bring to justice the perpetrators, organisers and sponsors of those terrorist attacks" and also made provision for the accountability "of those aiding, supporting or harbouring" such perpetrators.

The preamble to the resolution expresses the council's determination to combat threats to international peace and security caused by terrorist acts and then reaffirms the inherent right of self-defence. Nowhere in this resolution is the term armed attack ever used except in the council's unequivocal condemnation of the "horrifying terrorist attacks."

There is also no mention that the attacks of September 11 were attributable

to a State. Rather, the resolution called on the international community to increase efforts in the prevention and suppression of terrorist acts and in collectively aiding to bring the perpetrators to justice.

Resolution 1373 also reaffirmed the principle that "every State has the duty to refrain from organising, instigating, assisting or participating in terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts." The resolution then follows this statement with an affirmative decision that States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens; ... and

(g)Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.

Resolution 1373 can be argued to have licensed States to use their inherent or collective right to self-defence in combating terrorism. As already noted, the separate opinions discussed above strongly suggest the UN Security Council has opened the door to permit the use of force in self-defence against irregular forces even where their conduct was not attributable to a State. For example, in the Wall case decided in 2004, three years after the adoption of the above resolutions, Judge Buergenthal notes that "in neither of these resolutions did the security council limit their application to terrorist attacks by State actors only, nor was an assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case."

International terrorism

Similarly, judge Kooijmans concluded that: Resolutions 1368 and 1373 recognise the inherent right of individual or collective self-defence without making any reference to an armed attack by a State. The security council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorises it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 without ascribing these acts of terrorism to a particular State.

This is the new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self- defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defense.

Affirmative duty of vigilance

Suffice it to say here that what is most significant about these resolutions as a question of international law is that they reinforce and increase a State's affirmative duty of vigilance.

Indeed, even the most recent statements by the General Assembly, in the United Nations Global Counter–Terrorism Strategy, are consistent with these heightened duties. In the Global Counter-Terrorism Strategy, the General Assembly required States to "refrain from organising, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that our respective territories are not used for terrorist installations or training camps, or for the preparation or organisation of terrorist acts intended to be committed against other States or their citizens."

This statement, while encompassing the obligations stated by the resolutions of the Security Council, also adds the additional prohibition against tolerating terrorist activities. In *Congo vs. Uganda*, the ICJ linked the toleration of rebels within a State's territory to a State's duty of vigilance. It noted this was a separate issue from active support of such rebels. Thus, the increased responsibilities in these Security Council resolutions impose affirmative international obligations on States irrespective of whether the conduct of irregular forces may be attributed to the State itself.

Such duties add a form of accountability and further emphasise that the Transitional Federal Government of Somalia is responsible for the acts of individuals only when it has failed to fulfill its international obligations to prevent such acts. Here, the Transitional Federal Government of Somalia has failed to maintain the required level of vigilance or 'due diligence' to prevent the injury to Kenya and this is the reason it has sought Kenya's help.

To make it clear, I have argued that Security Council Resolution 1373, and related anti-terrorism resolutions, do not permit Kenya to use force in self-defence following Al-Shabaab's border incursions into Kenya. Such an argument would license recurrent projections of military force based on Kenya's own interpretations of external threats. They would legitimise unilateral military action that would be in danger of being found to be inconsistent with Article 2(4) of the UN Charter as the International Court of Justice held Uganda had in *Congo*

vs. Uganda. In fact, that judgment explicitly rejected Uganda's auto-interpretation of Security Council resolutions as authority to legitimate its armed activities in the Congo. The court's rejection of Uganda's expanded claims of self-defence against irregular forces implicitly rejects this kind of auto-interpretations of Security Council resolutions by States, including Kenya, as authority to use force inconsistently with Article 51 of the charter.

Hence, although the Security Council has passed several resolutions authorising the use of force to pursue piracy suspects into Somalia territory, Kenya cannot use those resolutions as a justification for its use of force against Al-Shabaab. As the International Court of Justice held in *Congo vs. Uganda*, Article 51 of the United Nations Charter "does not allow the use of force [in self defence] by a State to protect perceived security interests beyond those parameters."

TFG request for help legal basis for military action

In my view, the clearest international legal basis for Kenya's military action in Somalia is by virtue of the invitation of the Transitional Federal Government of Somalia. This invitation was publicly displayed in a press conference held in Mogadishu, Somalia, following consultations between Somalia's Defense minister Hussein Arab Isse, Somalia's president Sheikh Sharif Ahmed and prime minister Abdiweli Mohammed, on the one hand, and Kenyan Defence minister Yusuf Haji and Foreign minister Moses Wetang'ula, on the other hand, on October 18, 2011. Further talks on October 31 resulted in a communiqué between the Government of Kenya and the Transitional Federal Government of Somalia. That communiqué, in my view, rhetorically provides that Kenya's military action in Somalia, dubbed 'Operation Linda Nchi', is justified under Article 51 of the UN Charter. Unlike the original arrangement of October 18, the October 31 communiqué designates Al-Shabaab as an enemy of the entire region and the world. It further goes beyond the original plan of getting rid of Al-Shabaab bases near the Kenyan border which was originally thought useful to the Transitional Government of Somalia that has no wherewithal to fight the group. It seems the Transitional Federal Government eked a concession to be the lead force in the war effort, but that seems misplaced given the near non-existence of a military in Somalia.

Kenya and the Transitional Federal Government of Somalia have also worked the diplomatic rounds and have support from the Inter-Governmental Authority on Development, the African Union and some tepid support from the United States, the European Union and the United Nations.

Intervention by invitation is only legally permissible under international law where the invitation comes from a UN recognised government. Clearly, the Transitional Federal Government of Somalia has such legitimacy to request another UN recognised government, Kenya, to intervene in Somalia to help it quell the militia. An invitation to intervene gives the intervening country consent to justify an otherwise prohibited use of force under Article 2(4) of the Charter of the United Nations. This invitation into Somalia effectively immunises Kenya from international legal responsibility far more than a justification based on self-defence. Intervention by invitation was recognised by the International Court of Justice in the *Nicaragua vs. United States* decision of 1986.

Notably, Al-Shabaab and some of its leaders have had a travel ban, assets freeze and targeted arms embargo imposed on them for obstructing the delivery of humanitarian assistance by United Nations Security as required by paragraphs 1, 3 and 7 of UN Security Council Resolution 1844 of 2008. The African Union's peace keeping force in Somalia, Amisom, whose mandate has been renewed to October 2012, does not have the mandate to undertake the forcible actions being currently undertaken by Kenya. Amison's mandate does not include the use of force, except in self-defence.

Kenya, like Uganda, has been urging the Security Council and the African Union to boost Amison's mandate and resources so that it can undertake the kind of enforcement action that the Kenyan military is currently engaged in. Where there are questions about the Transitional Federal Government of Somalia's legitimacy in the entirety of Somalia, it is clearly the recognised government – one that for purposes of international law – is without question entitled to invite Kenya to help it quell Al-Shabaab.

Kenya's intervention in Somalia even though invited and therefore consensual, must not injure the sovereignty of the TFG. Further, it must meet the customary international law requirements of necessity and proportionality. Already, several deaths on both sides have occurred. This will go to measuring the proportionality of Kenya's military action in Somalia under customary international law.

Finally, Kenya is reported to have already taken control of certain Somali towns previously controlled by Al-Shabaab. It would not be too long before the cozy relationship between Kenya and the TFG turns sour. That already happened, necessitating the October 31 communique. If relations continue to sour, the welcome Kenya has received and which legitimises its current use of force will likely be taken back.

That is what happened when the Democratic Republic of Congo disinvited Uganda and other countries to help it quell the lawlessness in eastern Congo. When Ugandan forces refused to burge, the DRC prevailed against Uganda for illegal occupation of the territory. Kenya must heed these lessons and not repeat them. To do otherwise might attract international legal responsibility in future. ■

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