Interventionism and Human Rights in Somalia

In this collection, academic experts as well as human rights practitioners grapple with the meaning and human rights consequences of the renewed war in Somalia following the joint military action by the Ethiopian and the Somali Transitional Federal Government forces in December 2006. These experts reflect on the legality of the Ethiopian military action, its implications for regional peace and security, the significance of the of US-led "War on Terrorism", the plight of civilians caught in the crossfire, the fate of refugees, and the future of citizenship in the Eastern Africa region and the Horn, among other issues.

The essays seek to answer some of the following key questions: Is the future of regional security going to be one underwritten by militarily powerful states in Africa? Is Ethiopia going to play the role of military hegemon in East Africa and the Horn? What is Kenya's place and role in this new arrangement? What are the implications of this military adventurism for human rights in Somalia and in the region as a whole? To what extent has the US 'war on terrorism' precipitated the Ethiopian military action in Somalia? How has focus on terrorism framed the discussions, the reporting and treatment of the victims of the fighting between the Ethiopian military, the Transitional Federal Government and the Union of Islamic Courts? Is the refugee protection regime now a casualty of state terrorism concerns? What is the extent of such a concern? How should a policy response sensitive to the rights of refugees look like?

In their conclusions the contributors to these essays do not offer packaged solutions to these problems. Rather, what they present to the reader is a problematisation of the Somalia crisis in its various dimensions and an invitation to engage in further critical analysis and research. This slim collection will appeal to all those with an interest in Somalia, the Eastern Africa region and the Horn, and human rights in general.

Interventionism and Human Rights in Somalia
Report of an Exploratory Forum on the Somalia Crisis

KENYA HUMAN
RIGHTS INSTITUTE

Cover: Participants at the Exploratory Forum on the Somalia Crisis, January 2007. INSET: Aftermath of an aerial attack by the Ethiopian Military on a UIC convoy. (Courtesy: *Nation* Newspapers)

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About the Kenya Human Rights Institute (KHRI)

The KHRI is a think tank for the generation and dissemination of high quality research in the area of human rights as well as a centre for education and training in human rights. It is founded on the understanding that progress in the human rights arena is closely linked to the continuous interrogation of practice and its linkage to underlying theories, concepts and their interpretations from an interdisciplinary perspective.

As a centre for critical reflection and research on human rights, the KHRI promotes the creative adaptation of human rights concepts, ideas and methodologies to the local realities in Kenya and the region. The KHRI carries out its broad mandate by performing scholarly research on the knowledge and experience accumulated from the struggles and initiatives of civil society organizations and individuals organized in a variety of forms in Kenya and the region.

Vision
A Centre of excellence in theory and practice of human rights in Africa.

Mission
To generate human rights knowledge and technical capacities critical for the evolution of a society that promotes and protects all human rights.

Value Statement
The KHRI is an independent centre of excellence guided and inspired by the commitment to support pro-people's struggles at local, regional and global levels and anchored on the principles of integrity, democracy, objectivity, equity and social justice.

Strategic Objectives
- To build the KHRI's capacity to become a centre of excellence
- To strengthen the capacity of key human rights actors to engage with the human rights discourse
- To promote dialogue between scholars and practitioners on pertinent human rights issues
- To inform and influence human rights trends and engagements at local, regional and global levels

Acknowledgements

Abbreviations and Acronyms

AU	African Union
BIA	Bilateral Immunity Agreement (United States)
BBC	British Broadcasting Corporation
COMESA	Common Market for East and Southern Africa
DRC	Democratic Republic of Congo
EAC	East African Community
ECOWAS	Economic Community of West African States
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IGAD	Inter-Governmental Authority for Development
KHRI	Kenya Human Rights Institute
LRA	Lord's Resistance Army
NATO	North Atlantic Treaty Organization
OAU	Organization of African Unity
OLF	Oromo Liberation Front
SPLA	Sudanese People's Liberation Army
TFG	Transitional Federal Government (Somalia)
UIC	Union of Islamic Courts
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

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Political Developments in Somalia (1991 — 2007)

1991 Mohamed Siad Barre's government collapses and a civil war begins in Somalia. Somaliland declares unilateral independence.

1992 US Marines enter Somali territorial waters in advance of a UN peacekeeping force sent in to stabilize Somalia.

1993 US Army Rangers are killed when Somali militias shoot down two US helicopters in Mogadishu. Fighting begins and hundreds of Somalis are killed.

1995 UN peacekeepers leave Somalia having failed to restore peace, law and order.

1998 Puntland region declares its autonomy.

2004 *October:* President Abdullahi Yusuf elected to lead Somalia's TFG following the inauguration of a transitional Somali parliament in Kenya. This is the 14th attempt to restore central government in Somalia.

2006 *July:* UIC Militia defeat clan warlords and take control of Mogadishu and other parts of southern Somalia.

2006 *September:* TFG and the UIC begin peace talks in Sudan while President Yusuf survives Somalia's first known suicide bombing near the parliament in Baidoa.

2006 *October:* UN reports that since the start of 2006 some 35,000 Somalis have fled to Kenya fearing a new war. Ethiopian Prime Minister Meles Zenawi announces that Ethiopia is "technically" at war with the UIC because it had declared jihad on Ethiopia.

2006 *December:* UN Security Council authorizes African peacekeepers to support the TFG but UIC announces that it will view the entry of a foreign military force into Somalia as an invasion. Soon after, Ethiopia invades Somalia and combines forces with the TFG to drive the UIC out of Mogadishu.

2007 *January:* UIC abandon their last stronghold, Kismayo and President Abdullahi Yusuf enters Mogadishu for the first time since taking office in 2004. Shortly after, the United States carries out air strikes in southern Somalia claiming that it targets were Al-Qaeda terrorists. The TFG defends the US attack.

2007 *February:* UN Security Council authorizes a six-month AU peacekeeping mission for Somalia.

2007 *March:* AU peacekeepers arrive at Mogadishu amid intense fighting.

2007 *April:* UN says that over 320,000 Somalis have fled the fighting in Mogadishu since February.

Map of Somalia

Introduction

In mid-December 2006, a combined force of Ethiopian and Somali Transitional Federal Government (TFG) troops launched an attack on the bases of the (Union of Islamic Courts (UIC) in Mogadishu and the South-central regions of Somalia. Days later, it emerged that the United States military had supported the Ethiopian and TFG forces by launching aerial attacks on targets within Somalia. On December 27, the UIC announced that it was dissolving itself and handing over power to Somali clan leaders.

While the Ethiopian troops and the TFG forces easily captured the capital Mogadishu, they found themselves facing a full-blown insurgency early in 2007. In March an advance contingent of Ugandan troops was deployed to Somalia as part of the AU peacekeeping mission in Somalia. The African Union (AU) troops would take over from the Ethiopian military and assist the TFG in the stabilisation of the country. However, fighting intensified, leading to the death of hundreds of Somalis in scenes reminiscent of the civil war in the early 1990s. By April 2007, the United Nations (UN) estimated that hundreds of thousands of Somalis had fled from Mogadishu to escape the heavy fighting between the Ethiopian and TFG forces on one side, and insurgent groups believed to be allied to the deposed UIC on the other.

Whatever the outcome of the violence between the warring groups, the December 2006 military action in Somalia raises important questions that touch on international law, regional security and human rights. At a broader level, Ethiopia's military intervention in Somalia feeds into the larger debates on the uses of military force since the last decade of the 20th century. To justify its military action in Somalia, Ethiopia reached to the well worn argument of "self-defence". The extent to which this defence can stand scrutiny remains debatable. Nevertheless, what is not contested is that Ethiopia's military action against the UIC raises important legal, political and moral questions that have a bearing on human rights. To be sure, Ethiopia has been the staunchest supporter of the Somali TFG, which

remained marooned in the small town of Baidoa as the UIC consolidated its control over most of South-central Somalia. This support, coupled with Ethiopia's testy relationship with the Islamic Courts authorities, provided extra incentives for a military confrontation.

The legal basis for Ethiopia's military action is important, not merely for academic reasons but because such use of force in a region as volatile as the Horn of Africa opens the doors for the possible expansion of violence. Other related questions also need to be explored: Is the future of regional security going to be one underwritten by militarily powerful states in Africa? Nigeria has already demonstrated its willingness to use force in West Africa and South Africa intervened in Lesotho in the 1990s. Is Ethiopia going to play the role of military hegemon in East Africa and the Horn? What is Kenya's place and role in this new arrangement? What are the implications of this military adventurism for human rights in Somalia and in the region as a whole?

For some time there were reports that Somalia was a state of interest to the United States and other countries over the possibility that it could turn into a haven for Al Qaeda terrorists. There were reports that some former members of the Al Itihaad group—accused by the United States and Ethiopia of being linked to Al Qaeda—had found their way into the central leadership of the UIC, raising the stakes for possible US military action in Somalia. Following the US military attacks on Somalia at the beginning of 2007, Somalia joined Iraq and Afghanistan as the other theatre of the US War on Terrorism. The US action however has not been restricted to overt military action.

The heightened US foreign policy focus on the region has taken the form of technical and financial support to allied governments as part of the broader covert war on terrorism. The model for this US action has close parallels to its Cold War policy in the Global South. This has raised fears over the fate of human rights in the region. Within Kenya and the rest of Somalia's neighbours, there has been concern that the United States has been applying pressure on governments to curtail the rights of individuals suspected of having links with groups such as Al Qaeda. Human rights groups have recorded that Kenya, Ethiopia and the Somali TFG have closely cooperated with the United States in the kidnapping of

suspected terrorists, their secret detention, transfer to the US detention centre in Guantanamo Bay, disappearance and torture in violation of international human rights norms.

There is need for penetrating critiques of the human rights implications of the War on Terrorism for the region. To what extent have the imperatives of this "war" precipitated the military intervention in Somalia? How has the focus on terrorism framed the discussions, the reporting and treatment of the victims of the ongoing war between the Ethiopian military and the UIC?

There were reports of Somali citizens fleeing the fighting being turned back by the Kenyan authorities at the Kenya-Somalia border on suspicion that they could be affiliated with the UIC. This raises important questions on the right balance between protection of refugees and legitimate state security concerns. Is the refugee protection regime now a casualty of state terrorism concerns? What is the extent of such a concern? How should a policy response sensitive to the rights of refugees look like?

In addition, the Somali crisis raises important questions about the role of regional organizations and institutions such as the AU and Inter-Governmental Authority for Development (IGAD), both in terms of maintaining and restoring peace, and also with respect to the protection of individuals. The extent to which they have shaped events in the current Somali crisis calls for adequate examination and analysis.

These issues were the focus of a one-day conference organized by the KHRI in January 2007. The presenters were asked to prepare exploratory observations on the unfolding crisis in Somalia. This report is a compilation of those presentations as well as the discussions by those in attendance. The presentations in this collection are therefore not fully-developed academic analyses of the subject but rather broad reflections by individuals with an intimate knowledge of the issues. They are meant to provoke further discussion and suggest new questions on the various dimensions of the Somali conflict that require deeper examination.

These reflections are also a preface to the research, lectures and publications planned under the KHRI's project on Somalia. In keeping with the KHRI's commitment to linking the work of practitioners to

that of the academics, this collection incorporates presentations by both scholars and practitioners with an interest in Somalia.

Several important questions emerged from the conference. First is the question of the legality of the military action by Ethiopia and the United States in Somalia. Beyond the realm of legality, the military action and the ensuing asymmetrical war involving the Ethiopian and the TFG forces on one hand and an unspecified number of armed groups with alliances across borders on the other, ushers an era of uncertainty with regard to regional peace and security. This is the focus of the first chapter.

Chapter two explores the human rights and humanitarian law concerns precipitated by the war in Somalia. It brings together reflections by a Somali civil society expert, a Kenyan Muslim leader intimately involved in human rights issues of Somali citizens and a legal expert on international human rights law. The chapter calls to question the conduct of the hostilities by the various parties and explores the possibilities of holding those responsible accountable under international law.

Chapter three tackles the questions of the US War on Terrorism in relation to the Somalia conflict, the implications for refugee protection and the options available to regional states in resolving their persistent security dilemmas.

Mutuma Ruteere
Dean, KHRI

Chapter One

Military Intervention and the Human Rights Architecture of East Africa and the Horn

Presenter Kithure Kindiki
Discussant Francis Situma

The Context. In December 2006, Ethiopian Prime Minister Meles Zenawi sent his military forces into Somalia. In the span of a few weeks, the Ethiopian military, jointly with the Somali TFG forces, routed from Mogadishu and most of the country, the UIC which had established some fairly stable authority in much of South-Central Somalia since June 2006. Immediately after Ethiopia's invasion, US warplanes launched attacks from the southern frontiers of Somalia, ostensibly targeting suspected Al Qaeda terrorists. Neither one of these actions was endorsed by the UN Security Council nor the Peace and Security Council of the AU, the important international institutions that may have provided the legal and normative basis for the use of force in international relations. Consequently, the Ethiopian military action re-ignited the debates in international and regional policy and academic circles over the legality and legitimacy of military interventions. The session on "Military Intervention and the Human Rights Architecture of East Africa and the Horn" sought to address the critical questions around the issue.

International Law and the Problem of Military Intervention Somalia. At the heart of the debate on whether Ethiopian and the US military actions were justified or not is the viewpoint that the use of force in certain circumstances is justifiable even if not expressly endorsed by the UN Security Council. To be sure, there are two competing paradigms in the world which cannot be ignored in international law and international relations. These paradigms pit two sets of values against one another. On the one hand, are the classical values of international law and

international relations – non-intervention in the internal affairs of states and the prohibition of the use of armed force – which are found in Article 2(7) and Article 2(4) of UN Charter in that order. In Africa, these principles are reflected in regional treaties such as the AU Constitutive Act and in sub-regional treaties of the East African Community (EAC) and the IGAD.

On the other hand, certain human rights and humanitarian imperatives may compel states to use all reasonable means, including armed force, in disregard of the sovereignty of other states. In fact, there are principles contained in international human rights, refugee and humanitarian legal instruments which may provide justification for armed intervention in the internal affairs of states.

In seeking to establish the legality and legitimacy of the recent military incursions into Somali territory the international community should ask: Does Ethiopia and the US military intervention in Somalia conform to the acceptable, permissible grounds for the use of military force in foreign countries? If not, were the actions of these states justified on any other grounds?

In attempting to explore these questions it should be clear from the outset that international law permits only two circumstances in which a state, or a group of states, may use military force against another state, or group of states. The following conditions apply:

- The UN Security Council has authorized such action by invoking Chapter 7 of the UN Charter;
- Individual self-defence – where it is certain that a state will be attacked by another, Article 51 of the UN Charter permits that state to use force in self-defence. It also allows for collective self-defence.

There are other circumstances where the use of force in international law remains the subject of ongoing controversy in the absence of an explicit legal principle in their support:

- Regional and sub-regional organizations have used force in places like Sierra Leone and Liberia (Economic Community of West African States – ECOWAS) and in Kosovo (North Atlantic Treaty Organization – NATO). Some commentators believe these cases

signal the evolution of a new norm of the use of force in international law. Nevertheless, the evidence of such remains sparse;

• The use of force by a state to protect its nationals who find themselves in life-threatening situations in foreign lands;

• Anticipatory self-defence - a controversial argument that a state may use force to defend itself before it is attacked by another state, provided it claims that it is in possession of evidence that an attack against it is imminent.

The final ground upon which military intervention has been justified rests on the controversial principle of humanitarian intervention, which does not have a strong basis in international law. Some scholars of international law and international relations believe that humanitarian intervention is rooted in customary international law, which has evolved over time on account of the practices of states. To others humanitarian intervention ought to be permissible even where the UN Security Council has not endorsed military action. Indeed, a state may intervene in another one to save people from imminent destruction at the hands of their own government or non-state groups known to be perpetrating grave human rights violations.

Still, humanitarian intervention remains highly controversial and is viewed even by its proponents as a measure of last resort where all other possible avenues, including pleas to the UN Security Council and regional collective security organizations, have been unsuccessful. This viewpoint holds that humanitarian intervention may only be applicable in extreme circumstances of human rights violations which amount to gross, systematic and widespread violations. These include the gravest atrocities that fall within the classes of genocide, war crimes and crimes against humanity.

Turning back to the question posed earlier: Is it possible to conclude that the military attacks carried out by Ethiopia and the United States fell within these acceptable and permissible grounds for the use of force in international relations? Certainly not for it would be fairly difficult to justify the actions of either one of the two countries beside any one of the foregoing conditions. Then again, it may be possible to argue that the US military intervention, in particular, was justifiable on the grounds

of anticipatory self-defence. However, the United States would have to show that the suspected Al Qaeda terrorist forces it attacked actually posed a genuine threat to its national security.

Policy Objections to Military Intervention. Seen from a policy perspective, irrespective of the provisions of the UN Charter there are three policy objections to military intervention which are critically important. Firstly, some international policy-makers caution that if the decision to carry out inter-state military intervention is left to individual states, they may carry out military interventions to settle political scores under the guise of giving effect to the UN Charter's provisions or even humanitarian intervention. Secondly, some international policy makers reason that the use of force to address human rights and humanitarian crises is a contradiction in terms: Is it reasonable that a state should be permitted to use force in another and in turn completely devastate, ruin or end people's lives in order to protect lives? Thirdly, there is a set of international policy makers who remain greatly concerned that the use of force in other states results more in short-term complications and less in any tangible, long-term benefits for stability and progress.

Looking at the human rights situation which currently prevails in East Africa and the Horn, there are two critical questions that must be considered: What are the possibilities for the potential of the repetition of the illegal military intervention of the kind carried out by Ethiopia and the United States in Somalia? Is the region likely to experience similar forms of military adventurism in the future? Besides Somalia, Rwanda and Burundi, most regional states have nurtured governing norms that have enabled them to achieve reasonable levels of political stability. Nonetheless, there are challenges in the way of norm enforcement in the region generally. For example, grave crimes such as the ongoing Sudanese government policy of genocide in Darfur continue to occur despite the fact that most African states have constitutionally protected bills of individual rights that exist to limit state power.

It should be recalled that Rwanda and Burundi, which have now joined the EAC, have experienced grave human rights violations that have so destabilised them to the extent that it is possible, even probable that they may experience breakdowns in state authority in ways similar

to Somalia. True, the potential for such human rights and humanitarian crises may call for the use of armed force but the option must be evaluated carefully.

Regulating Military Intervention in the Region: The Role of the AU. One may ask: How do the states of East Africa and the Horn intend to resolve human rights and humanitarian crises when and where they arise in the region? To begin with, the UN has become increasingly disinterested in African conflicts, and therefore, it is unlikely that there will be any serious, active UN presence in Somalia or any other state in the region whose citizens may be victims of gross, systematic and widespread human rights violations. This leaves the AU as the only other serious opportunity regional leaders have to stabilize Somalia and other regional sites of conflict. Even then, the AU has a severe image problem. It is perceived to be a replica of its predecessor, the Organization of African Union (OAU), where African heads of states and governments promoted the rhetoric of Pan-African unity even as they committed horrific crimes against their own people. For example, at the height of arbitrary rule and terror in Uganda in the 1970s, the country's murderous dictator, President Idi Amin, also chaired the OAU. Today, the rulers of some of the harshest regimes in the world still wield great influence in decision-making bodies within the refashioned AU.

In spite of its image crisis, however, the AU possesses a high level of functional relevance in the stabilisation of African conflict situations. Certainly, at the norm-setting level the Constitutive Act of the AU is a cutting-edge document which envisions a powerful role for the organization in promoting and safeguarding peace, security and human rights. In fact, the AU treaty has far-reaching provisions such as Article 4(h) which permits the Peace and Security Council to use armed force where there is sufficient evidence to demonstrate that genocide, war crimes or crimes against humanity are taking place. Regrettably, the AU is however deeply afflicted by institutional, capacity and political deficiencies which would prevent it from undertaking effective military action. In any case, it is the AU's responsibility to develop legitimate criteria and political means to govern the use of force for humanitarian intervention. This may

be the only way to deter any potentially genocidal state from recreating the inexpressible cruelty of the Interahamwe in Rwanda in 1994.

At a minimum, this criteria should be consistent with international law, and no other situation, besides grave and systematic human rights violations, should attract military intervention. The criteria must also recognize the framework and primacy of both the UN Security Council and the AU Peace and Security Council. Moreover, the use of force should only be considered after it has been demonstrated that every other measure, including conflict prevention and resolution through diplomacy, for instance, has failed. Unless and until these measures have been exhausted, there should be no allowance for states to carry out military interventions in other states.

Where conditions allow for military intervention, the criteria should be unambiguous on the actual means of the use of force. For one, the use of force must be proportional to the reality of the threat, and there ought to be minimal loss of life incurred. States which may find it necessary to intervene militarily in the affairs of other states in the region must themselves adhere to international law. For instance, if they harbour known war criminals, they should be willing to subject them to the jurisdiction of international tribunals. Finally there must be an "end point" or maximum period of time after which a state that has carried out military intervention in another would have to exit to enable the international community to support post-conflict reconstruction, peace-keeping or transitional justice programs.

Discussant's Remarks Francis Situma

Observers commenting on the use of military force by Ethiopia and the United States in Somalia should not only concern themselves solely with the questions of legality and legitimacy of military intervention. At the bottom line, the violence has resulted in the killing and devastation of many people and lives in Somalia. Therefore, the questions of fundamental importance ought to be: Can Ethiopia and the United States show cause why they should not be held accountable under international law for perpetrating extra-territorial violence? Is it not the case that both countries are signatories to the International Covenant on Civil and

Political Rights (ICCPR) and other relevant international human rights instruments which obligate them to protect the rights of all people to life and the integrity and security of person irrespective of territoriality? The presenter omitted mention of the applicability of international humanitarian law in such conflicts and the human rights impact of the use of force by states across borders.

Besides the legality or legitimacy of military intervention, the international community should consider seriously the extent to which Ethiopia and the US observed the fundamental human rights of Somali people in the process of carrying out these military operations. Undoubtedly, there have been reports of arbitrary killings having occurred; killings of a nature that is outlawed in international human rights and humanitarian law. Why then does the international community not act to hold these states accountable for these arbitrary killings? Certainly, there are grounds upon which this may be done: International humanitarian law, which seeks to protect civilians and other categories of vulnerable people, applies in both international and non-international armed conflicts. The Geneva Conventions require that state parties undertake to respect the laws of war in all circumstances. Consequently, any state violating international humanitarian law should expect that it can be held responsible for its crimes.

Further, it is worrying that the AU has not formally protested against the unwarranted military adventurism of Ethiopia and the United States in Somalia. As matters stand, African states and the international community are acting as if Somalia is not an independent state entitled to the enjoyment of sovereignty and territorial integrity. It is as if Somalia is a "no man's land". While it is arguable that the TFG welcomed Ethiopian and US intervention, a deeper analysis of the reasons why the TFG did not protest may very well reveal that it had little choice in the matter.

By referring to Somalia as a failed state, the presenter implicitly lends credence to dangerous viewpoints which suggest that Somalia ought to be open ground for military intervention and other invasive actions that may ultimately undermine its statehood. Even though Somalia may not have a stable government, it has citizens who are in effect its "owners", and therefore, their wishes must be respected. There should be no doubt

that Somalia is still a member of the UN and to that extent, Article 2 of the UN Charter protects its territorial integrity and restricts intervention in its internal affairs.

Revisiting the 1993 US-led Operation Restore Hope, observers should inquire critically into why this failed military intervention happened in the first place even though it was endorsed by the UN Security Council. Is it possible that the United States was angling to project its power to the Horn with the intention of establishing a more permanent military presence in the region? Ethiopia's recent military operations ought to be examined through the same lens. Might Ethiopia harbour ambitions of achieving regional military hegemony? Are its recent actions an element of this broader strategy? These questions become all the more relevant particularly because it is difficult to demonstrate objectively that the situation in Somalia was an imminent threat to international peace prior to the Ethiopian and US incursions.

But at a more fundamental level, if the situation in Somalia was really a threat to international peace who ought to have decided how and when to intervene? Would a regional organization have been the right body to act after objectively assessing the need for military intervention? Or should the decision have been left to the UN Security Council? That the AU and the UN Security Council have been silent as international law and the sovereignty of Somalia are violated sets a dangerous precedent for military intervention in Africa and the world-at-large. But the AU's silence may speak of other challenges. Besides its inertia, the AU seems to suffer from the Big Brother syndrome. In this condition, dominant member states tend to advance their own narrow interests even when determining the need to invoke the AU Constitutive Act. Evidently, this situation cannot promote stability in Africa.

Responses from Plenary

Sammy Musyoki (Researcher, Institute of Development Studies, University of Sussex): It is misleading for the presenter to claim that the people of Somalia did not protest the action of Ethiopia and the United States. They did.

Noor Musa (Trocaire): It has been widely reported that the UIC claimed

part of Ethiopia's territory and signalled that it would invade Ethiopia to restore Somalia's territory. Is it not reasonable to argue that Ethiopia intervened militarily in Somalia to forestall this from occurring?

Abdi Nassir Athuman (Somalia Peace and Human Rights Network): Was Kenya's January 2007 denial of entry and asylum to fleeing Somali refugees a violation of international law?

Housanna Hassan (Analyst, International Republican Institute): Why should the UIC be flushed out yet it was credited for stabilizing most of Somalia? Why is the international human rights movement slow to support the northern regions of Somalia which are fairly peaceful?

Responses by Kithure Kindiki:

- It is plausible that Ethiopia's intervention in Somalia was in anticipatory self-defence. However, the issue of concern is whether it can be said that Ethiopia determined its course of action on the basis of objective criteria. Moreover, the use of force by a collectivity of states may be more objective since unilateral action is more often than not conceived subjectively. The key issue here should be the nature and dynamics of collective, institutional interventions.

- Since Ethiopia has tended to construe its intervention in Somalia as humanitarian intervention, it becomes necessary to think critically about whether or not it is acceptable or even possible for a brutally repressive state such as Ethiopia to claim that it intervened in Somalia to stop human rights violations.

- But it may also be argued that Ethiopia's intervention was legitimate on account of the claim that the TFG invited it into its territory. Ethiopia's use of force in such circumstances is reminiscent of Democratic Republic of Congo (DRC) President Laurent Kabila's 1998 invitation to neighbouring states to support his war against rebels.

- From a legal perspective, Kenya's refusal to admit Somalis who were ostensibly fleeing persecution in Somalia is in fact a violation of international refugee law. Also, it may be the result of the absence of a clear Kenyan foreign policy.

- Nonetheless, the national security interests of states in relation to admitting and granting asylum to refugees must be addressed, and to be sure, the spread of illegal weapons and gun crime in Kenya are partly attributable to the presence of refugees.

Responses by Francis Situma:

- Kenya first closed its borders to Somali refugees in 1998. Then as is the case now, it reasoned that the flow of refugees would pose a threat to the country's primary national security interests. For those who have not yet crossed into Kenyan territory, the Kenyan government reserves the right to keep them out. However, it cannot reasonably repatriate people who are already in its territory and have applied for asylum and protection.
- The protests against Ethiopia's intervention in Somalia were by people and not the country's government. In international law and international relations a country's government, whether transitional or not, is the mouthpiece of the state. Since the TFG did not raise a formal protest through the institutional channels for international relations, it would be misleading to assert that Somalia protested against Ethiopia's actions.
- It matters not that the UIC brought stability to the situation in Somalia. International law does not recognize the UIC, and it may be argued that the UIC sought to balkanize Somalia's territory for no other reason but to capture power.

The Dynamics of the Conflict in Somalia and Prospects for Peace

Presenter David Kikaya
Discussant Tajudeen Abdul-Raheem

The Context. Somalia has not known peace for the last two decades, and today, Somalia has been reduced to a strife-torn and impoverished African nation. Since the fall of the government of Siad Barre in 1991, Somalia has not had an official government that exercises authority over the entire nation. In the same year, Northern Somalia declared its independence from the country and christened itself Somaliland. While it is a relatively peaceful place, Somaliland is not recognized as a country by the international community. In 1998, Puntland declared itself an autonomous region within a future federal Somali republic.

On the whole, it cannot be disputed that acts of attempted secession have the potential to disrupt peace in the Eastern and Horn of Africa region. As if this is not enough, the advent of global terrorism has spelt further doom for Somalia. After Afghanistan and Iraq, Somalia has been frequently mentioned as another potential hotbed of terrorism, and its dubious characterization as a failed state compounds this situation. However, Somalia has surprisingly retained some semblance of oneness on the international front through the formation of the TFG, which is formally recognized by the international community.

The Character of the UIC. Following the defeat of the Alliance against Terrorism by the UIC in Mogadishu, the international community and the media expressed several concerns. To what extent is the UIC unified? What was the composition of the UIC? How did the UIC connect with other Islamic movements in Somalia? Did the UIC transcend clan-based rivalries? The UIC was composed of different movements or groups which did not necessarily share one ideology or political agenda. While the different elements in the UIC were interested in promoting Sharia as the dominant mode of justice, the modalities of doing this were contested with some advocating moderate measures and others extreme forms of

punishment. Moreover, there was suspicion that some elements within the UIC were allied with Al Qaeda. The TFG might attempt dialogue with moderates in the UIC but it must understand that there are radical elements who reject the TFG altogether.

The Problem of Arms Proliferation in the Eastern and Horn of Africa Region. In the past three years, the United States has continued to sell arms to several states in the region and sales by authorized private companies such as Select Armor have soared. Uganda's purchase of weapons from these companies may be significant in light of a recent article in *Africa Confidential* which revealed that the Kampala-based subsidiary of Select Armor has been selling arms to the TFG. According to the report, Select Armor pledged to provide end-user certificates as part of their service, which if true, may violate the current UN arms embargo on Somalia.

Restoring Peace in Somalia. The "containment" of the UIC has created a window of opportunity for the international community to bring peace and stability to Somalia. It is also encouraging that the AU has approved a Peace-Keeping Force of nearly 8,000 African troops to restore law and order in Somalia (though they must be deployed within the shortest time possible). Similarly, Ethiopia has done a commendable job of restoring peace and order into Somalia. However, accusations that Ethiopia moved in Somalia to dismantle the bases of the remnants of the Oromo rebellion in the Southern Ethiopia, undermines its credibility as a neutral actor. Ethiopia should therefore be honourably relieved of this burden to pave way for a neutral force.

A concerted and selfless effort needs to be made to bring moderates in the UIC into the governance of the country. This will draw them out of isolation and safeguard the process of national healing and reconciliation. The UN, in collaboration with the AU and IGAD, should closely monitor arms sales to the region by unscrupulous merchants. Such arms are known to end up in the hands of rebels and it follows that we should not mistake, 'African Solutions for African Problems' to be synonymous with non-internationalization of solutions to African problems. After all, most African problems are externally instigated. Another critical point is that there are no options about ignoring the problem of refugees who are generated from the conflict in Somalia, and it is imperative that refugee

camps must not be used by warring parties to recover, regroup or re-launch conflicts with their enemies across borders.

The perennial question posed in the Horn concerns the prospects of maintaining security and stability without sacrificing the jealously guarded sovereignty of states and the protection of people from human rights violations by their own governments or marauding rebels. Will Somali factional leaders finally come together to craft a viable system of administration that meets the needs of Somalia's stateless inhabitants? Will Somalia be partitioned following the model of Somaliland? Apart from the spasmodic and ambiguous initiatives of some rich merchants and religious figures, there is little evidence of any wide-based will to restore peace in Somalia. To some foreign pundits, part of the problem is that conflict and war are normal conditions in Somalia's experience down the ages. In turn, this kind of situation breeds a high tolerance for disorder and violence, especially amongst the recent invaders of Mogadishu. But it should be recalled that peace cannot come at all if people are not powerfully motivated to search for it.

Discussant's Remarks Tajudeen Abdul-Raheem

Reflecting on the previous presentations which dwelt on the legal dimensions of military intervention, there is a need to emphasise the distinction between what is legal and what is legitimate action in international relations. It is entirely possible to cause a change in the political character of an issue and thereby affect the legal perspective from which it may be examined. This is precisely why the United States can continue to violate the human rights of terrorism suspects at Guantanamo Bay with impunity, and at the same time, issue reports on the state of human rights in each country without worrying about the contradiction. With this in mind, it is critical that the Somalia crisis is understood fundamentally as a political affair.

If Somalis and the international community successfully resolved the Somalia crisis, there can be hope that the challenges of Pan-Africanism can be addressed. Without a doubt, the disintegration of Somalia into five fairly autonomous regions resonates strongly with the histories of the rest of the artificial states which make up the "geographic" continent

of Africa. These states are the products of the continent's colonial legacy, having been created without any due regard to the cultures, traditions and relationships that form the basis of African life and society. Accordingly, there is nothing like a "Somali problem". Africans do not question their "Africanness" and it is only when they discuss state boundaries that they seem to act indifferently towards each other. Seen from this perspective, the problem of conflict in Africa stems from the creation of artificial states that were built not to represent people; states which remain anti-people.

Therefore, if the ideology of Pan-Africanism were adopted as a basic conceptual framework, one would find that Kenya cannot be neutral in the matter of the Somalia crisis. Firstly, Kenya shares a border with Somalia. Secondly, there is a significant Somali population in Kenya. But unfortunately for Kenyan Somalis, they are treated as though they were colonial subjects. The facts on human development in North-eastern Kenya, home to the majority of Kenyan Somalis, are particularly discouraging. Recent Kenyan government statistics disappointingly revealed that of thousands of people who were recruited to undergo teachers' training, less than twenty came from North-eastern Kenya. Put differently, Somalia and Somalis are not only a foreign policy issue in Kenya: They have become integral internal issues which call for urgent attention and action.

Similarly, the United States cannot afford to be neutral about Somalia because of the fact that its forces were badly humiliated by those of General Mohamed Aideed in 1993. It is no secret that the United States does not accept defeat with humility, and even where it has been clearly vanquished it has returned to Hollywood and restaged the particular war to ensure its victory. Today, Ethiopia is acting as a Trojan horse for the United States. But one may want to ask if Ethiopia has any legitimate interests that rationalize its intervention in Somalia? Of course, and like Kenya, it too cannot afford to remain neutral because it has "Somalia within" – in an unsettled region, Ogaden, which was one of the sites of contestation between Somalia and Ethiopia during the Cold War.

In terms of the new US doctrine of preemptive military action, it can be extremely dangerous for a state to act militarily on the basis of unsubstantiated fears that it will be attacked by another. If any significant

number of states in the world proceeded in this way, what really would be the implications? Ethiopia certainly considers its intervention in Somalia to conform to the doctrine of preemptive military intervention, a construct of the US-inspired War on Terrorism. But did the UIC pose a threat to Ethiopia that was significant enough for the latter to invade Somalia? If this issue is examined from a point of sincerity, it becomes obvious that the UIC was a collectivity of separate groups that cohered for the purpose of bringing law and order where warlords had failed. But what did the warlords do when it became clear that the UIC had the support of the Somali people? They merged into an alliance with the stated intention of fighting Islamic terrorism, in this case, the UIC. From that point onwards, it was fairly easy to get the moral and material support of the United States to "root out the fundamentalists and terrorists".

There should be no concern about a country being governed by Islamic values, especially where 90 percent of its people are Muslims. If one seeks to challenge this point, one should first consider why the United States has not advocated for regime change in the Gulf States. After all, these are essentially fundamentalist states based mainly on Islamic religion. The answer to this question lies in the fact that these rich oil-producing states supply a crucial commodity to the United States and have become important US allies in the Middle East. The soft hands with which the United States treats them is all the more apparent once the nationalities of the 9/11 terrorists is recalled. All 19 mass murderers were from either Saudi Arabia or Egypt; countries known to be the principal Middle Eastern allies of the United States. Interestingly, in states such as Iraq or even Iran where Islamic fundamentalism or terrorism did not exist, it seems that the unwarranted intervention of the United States in their internal affairs has energized these nuisances.

The international community must also begin to address what compels people to define themselves more in the terms of their religious identities and less on other grounds. In that regard, Ethiopian Prime Minister, Meles Zenawi, should acknowledge that his government is responsible for the marginalisation and repression of some 40 percent of the country's population who are Muslims living in the Oromia region of the country. With all due regard, before it intervenes to root out so-called

fundamentalist forces in Somalia, the Ethiopian government must first address the problems of widespread abject poverty, extreme hunger and the human misery which deeply afflict the Ethiopian masses. It will also do well to realize that as long as there is oppression, the human spirit will not cease in its determination to fight against it. With or without US support, the Ethiopian government will, in due course, come to understand that no state has the capacity to subjugate the people of Somalia, or even those of Ethiopia, for an indefinite period of time.

There is truth in the claim that a state can collapse or fail but a people or a nation cannot be said to have failed because of the decline or absence of formal state authority. Anyone who has interacted extensively with Somalis should be familiar with their spirit for enterprise. One needs only to go to Accra, London or Toronto to witness the vitality of the "little Mogadishus" where Somalis are well respected for their ability to set up and operate profitable economic ventures. Consequently, states cannot exist simply as recognized legal entities. It matters not that the people of Somaliland have declared their independence but are not recognized as a formal state. In fact, it may be argued that the absence of this formal recognition, or the status of statehood, frees the people of Somaliland from the debilitating constraints placed upon the world's poor people by predatory international institutions such as the IMF. Partly for this reason, Africans must cease to view the world through a statist lens. Instead, they must realize that the most effective, lasting way of resolving conflicts such as the Somalia crisis, lies in the regional integration of peoples and not states.

Some final thoughts on the Somali peace-making process: While the IGAD peace initiative was a broad, all-inclusive and consultative process, its major failing was that it rewarded Somali warlords and militias. This is precisely the tragedy of peace-making processes in Africa where cruel, unforgiving rebels, such as Charles Taylor of Liberia or the late Jonas Savimbi of Angola, are invited to participate at negotiating tables with sometimes generous offers for a stake in the leadership of the very states they have terrorized or dismantled. Clearly, the Somali warlords were unable to appreciate the integral role of politics in statecraft, and when they returned to Mogadishu from the IGAD peace-making conference

in Djibouti, they predictably tried to dominate the state through violent means.This particular situation greatly undermined the IGAD process.

Response from Plenary

Question: It is argued in some quarters that the international community can bring peace and stability in Somalia. But is it not the same international community that is responsible for the radicalisation of people in ways that encourage violence and terror?

Responses by Tajudeen Abdul-Raheem

- Since 9/11 Muslims suffer all kinds of humiliation and harassment when passing through immigration checkpoints at international airports. One's status does not matter, as long as one is a Muslim, one faces an "equal opportunity for harassment". In this condition, people's religion is inadvertently politicized.
- This explains the increasing Islamisation of Muslim youths around the world. Muslim women are now more likely to voluntarily wear the *hijab.* An attitude of resistance emerges, which can be summed thus, "I will assert my Muslim identity, and if you don't like it, that's your problem".
- Other people are so deeply affected by this kind of discrimination and there is reason to try to understand why they choose to resist it by violent means. Should they take up arms but are ultimately disarmed, they are likely to seek them again where the environment of discrimination, marginalisation and humiliation still prevails.

Chapter Two

Human Rights and Humanitarian Law Concerns in the War in Somalia

Presenter Abdi Mohamed Baffo
Discussant Betty Kaari Murungi

Brief historical background. Following the 1977 Somalia-Ethiopia war, 17 Somali military officers returning from combat staged an abortive coup d'etat which ended in their execution by the government of Siad Barre. The leader of this mutinous group managed his escape to Ethiopia where he formed the first armed anti-Barre opposition group. By 1990, Ethiopia hosted and supported three major armed opposition groups which were challenging Barre's authoritarian rule. A year later, the regime succumbed to the violence of its opponents and state authority collapsed in Somalia. Between 1991 and 2004, there were a total of 14 reconciliation conferences held between the warring parties that were jostling for control of the Somali state. The 2002 IGAD-brokered conference in Djibouti gave new impetus to reconciliation talks culminating in the formation of the TFG in 2004. In 2006 however, a new political force, the UIC, emerged and its influence and authority spread through South-central Somalia.

Humanitarian crisis and concerns. Despite some movement towards peace and stability, the period 2004 — 2006 continued to be characterized by serious human rights violations. In that period, civil society organizations such as Oxfam Novib documented the patterns and trends of human rights violations by official and non-state actors. In fact, there were many instances of extra judicial executions; torture and other forms of cruel and degrading treatment of people; rape and violence against women; abductions; the loss of property and the severe disruption of people's lives and livelihoods. Human rights violations intensified further as the UIC forcibly sought to supplant the TFG by establishing its own authority

over increasingly larger areas of the southern and central regions of the country.

This particular conflict created massive displacements with some 40,000 Somalis fleeing to Kenya before the closure of the Kenya-Somalia border in late 2006. To worsen the situation, these people were transferred to already overcrowded refugee camps in Northern Kenya, their misery compounded by heavy flooding and a looming outbreak of the deadly Rift Valley Fever. The persistence of drought and the prevalence of malaria in Northern Kenya may also lead to starvation and death among them.

In stark contravention of international refugee law, Kenya prevented 10,000 Somalis from seeking protection and assistance within its territory. In its own defence, the Kenyan government stated that to admit these people into Kenya would be to place national security at risk. It is especially disturbing that this vulnerable group of people has had to return and resettle in areas where their lives are unquestionably at risk. Indeed, in recent weeks Ethiopian and US military forces have killed and injured many Somalis through shelling and aerial bombardment yet it is unconscionable that people in this condition of powerlessness have had no assistance extended to them by a capable state such as Kenya.

It must be appreciated that the ongoing conflict is not about Somalis killing each other. It is much more complex, and this complexity must be highlighted. Both Ethiopia and the United States have intervened militarily in Somalia. The matter now transcends the boundaries of Somalia, and the security of people thousands of miles away may stand at risk before this new, complex situation. It follows that the notion of sovereignty is consigned to the past when external actors override the territory of a nation.

Conclusions and Recommendations. During the six-month reign of the UIC, Somalis in Mogadishu enjoyed a new sense of security that was superior to the situation in crime-ridden Nairobi. This important achievement was the result of careful consideration by the UIC of the aspirations of the Somali people. But as soon as they were driven out, chaos revisited Mogadishu in spite of the presence of some 6,000 troops in the city. It must be stressed that security and the rule of law cannot be imposed by force alone. To achieve these conditions, reconciliation,

which is the basis of stability, is a necessary prerequisite. By themselves, peacekeeping operations are futile where reconciliation has not taken place.

Still, critical questions remain unanswered: Are Ethiopian military forces in Somalia at the invitation of the TFG or not? Is there any known resolution of the TFG authorizing Ethiopia to send forces into Somalia? Three days after the invasion by the Ethiopian troops, the Speaker of the Somali Parliament claimed in a BBC interview that he did not think that the TFG had invited any foreign forces into Somalia. In any case, what is happening at this time in Somalia is unacceptable, except perhaps for those who support the presence of Ethiopian forces in the country. The majority of Somalis are angry and do not support these forces. If they were brought in to buttress the TFG, it is time now for this government to build its own credible forces. On its part, Ethiopia must realize that the region and the international community expect it to recognize the legitimacy of the TFG and the sovereignty of Somalia.

Finally, in the spirit of the principles of human rights and altruism, the Somali civil society is focused on promoting peace and reconciliation in order to calm the warring parties in a way that stabilizes the situation in the country. The Kenyan civil society is an important partner in this kind of advocacy because it is the largest and most vibrant of its kind in the entire region. So far, it has failed largely in providing structured leadership on regional issues such as the conflict in Somalia.

Nonetheless, through this important Kenya Human Rights Institute (KHRI) forum there seems now to be a new and critical avenue from which to begin to examine the problems of the security of people in Somalia and Kenya. The Somali civil society stands in solidarity with the KHRI and its efforts to promote human rights, peace and security in the region. Also, the Somali civil society is intent on working alongside any groupings that understand the urgency for the complete cessation of Ethiopian and US military operations in Somalia.

Discussant's Remarks Betty Kaari Murungi

The foregoing presentation usefully situates the political complexities of the crisis in Somalia, and their impact on regional stability. It correctly indicts human rights organizations, especially those in Kenya, for their failure to provide leadership, support and solidarity for the Somali situation. Kenyan civil society organizations must act quickly to develop viable partnerships with all well-intentioned, interested parties in Somalia and across the region to support efforts that are underway to address the Somali crisis.

The fact that 66 Kenyan Somalis are in unlawful police custody and there is no real interest on the part of Kenyan legal aid organizations to pressurize the Kenyan government to release them, confirms the lethargy of Kenyans in relation to the Somali situation.[1] This indifference may be symptomatic of what Amartya Sen explains as the tendency of societies to "miniaturize their identities". In so doing, people pigeonhole themselves into the narrow strictures of "my ethnicity, my religion, my country…", and therefore, whatever troubles other human beings in Somalia, or elsewhere, becomes relatively unimportant.

In reference to human rights and international humanitarian law, it seems certain provisions have been violated in the course of the invasion of Somalia by Ethiopia and the United States. Nevertheless, it must be understood that Ethiopia and the United States cannot actually be taken before the International Criminal Court (ICC) because neither one of them is a party to the ICC statute. In fact, Kenya is the only regional state with a major stake in the Somali crises that has ratified the ICC statute, which means that ICC jurisdiction may be triggered if any international crimes are committed on Kenyan territory. As matters stand, the ICC does not have jurisdiction over the nationals of either the United States or Ethiopia or Somalia. Eritrea, which is also fighting a proxy war with Ethiopia in Somalia, has signed, but not ratified, the ICC treaty. Therefore, ICC jurisdiction would not be triggered within Eritrean territory. Overall, the ICC should not be expected to address crimes against humanity or war crimes being committed in Somalia.

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[1] See *A Kenyan Somali's Reflections* (page 29).

Moreover, it is critical to appreciate the nature of crimes against humanity before seeking to determine the institutions of international justice that should address the grave atrocities being committed in South-central Somalia. To prove that a crime against humanity has been committed, it must be shown that there exists a systematic policy, usually an official policy, mandating government agents to commit certain acts that result in widespread abuses of human rights. If rape is to amount to a crime against humanity, it must be demonstrated that the acts of rape that have occurred were systematic, widespread and a part of a policy of a government or an official of a government. Where it can be established that the TFG associated with the Ethiopian government to develop and carry out such policies, it may then be proven that crimes against humanity have actually been committed. It is certainly easier to show that Ethiopia and the United States have committed war crimes in Somalia because, as far as war crimes are concerned, one only needs to demonstrate that a single act or violation occurred.

The other major problem facing the region, and indeed the world, is the fact that the United States continues to lean heavily on countries that have ratified the ICC statute to sign Bilateral Immunity Agreements – BIAs (actually we called them the Bilateral Impunity Agreements). Through these agreements, the United States seeks to exempt all its nationals, civilian and military officials, former and current, from investigation or prosecution by the ICC. According to the US Department of State, 102 countries had signed BIAs with the United States by the end of 2006. This state of affairs should make apparent the impunity with which the United States continues to act in matters of international justice.

Today, an international war is actually taking place in Somalia with several governments, including the TFG, Ethiopia, the United States and Eritrea (by proxy), taking part. Also, the world must not forget that on November 26, 2006, the United States unsuccessfully tried to bring a resolution in the UN Security Council that sought the approval of a UN occupation force to take over control of Somalia. Without a doubt, there was great opposition towards the idea but this situation did little to prevent the United States and Ethiopia from invading Somalia anyway.

In relation to this irresponsible military intervention, there is another

humanitarian law concern that deserves mention. This is the concept of the "belligerent occupier" which is being increasingly used after the invasion of Iraq by the United States and its allies. A state is considered to be controlled by a belligerent occupier when its territory is placed under the authority of a hostile army. This kind of occupation extends only to the territory where such authority has been established and can be exercised. Accordingly, President Abdullahi Yusuf of Somalia cannot pretend that the Somali army is in control of Somali territory, and therefore, it must be assumed that the Ethiopian and the United States army (by proxy) have become belligerent occupiers of Somali territory.

While customary international law envisions situations where a state may be occupied in this way, the belligerent occupier has certain inescapable responsibilities as there are important rights of the occupied state which must be protected. These are laid out under international treaties and international law and extend to protecting the human rights of people in the occupied country. In turn, Ethiopia and the United States do not have a license to kill, maim or destroy property in Somalia and then simply leave and carry on like they have no responsibility to its society. They do in fact have certain responsibilities; the same ones which the United States is carrying out in Iraq by way of rebuilding bridges and roads which it destroyed in the initial stages of the Iraq invasion. The international community is obligated to demand that Ethiopia lives up to its responsibilities in same way.

Response from Plenary

George Wachira (NDI Africa): Looking at the recent history of Somalia, there have been three important missed opportunities that had the potential to stabilize the country. Firstly, the international community failed to come out vigorously in support of the TFG when it was formed. Secondly, the international community failed to meaningfully engage the UIC when it took control of Mogadishu. Thirdly, the Kenyan government refused to consider hosting the UIC when they were ousted from Mogadishu. In the past, Kenya has hosted the Sudanese People's Liberation Army (SPLA) and the Lord's Resistance Army (LRA). Why not host the UIC in order to

nurture new opportunities to engage them in future? So far there has been much discussion about the problems of Somalia but little about the way forward. How may Somalia's problems be addressed in a constructive way? What are the scenarios for Somalia?

Responses from Ahmed Mohamed Baffo

- In relation to the question of Kenya offering safe passage to UIC: When the warlords were driven out of Mogadishu they had options over where to go – Kenya or Ethiopia. But the UIC did not have these options. It was believed that the UIC would fight back, and had it done so, the result would have been the complete destruction of Mogadishu and the creation of many refugees. This situation was averted because of the wise decision of the UIC to leave Mogadishu.

- It is amazing that while Somalis were overjoyed with the UIC because for the first time there was a stronger sense of security, law and order, Kenya, the United States and some Western states did not feel secure. Unfortunately, for Somalia, what matters are the security policies of other states and peoples and not the general needs of Somalis.

- Most Somalis are angry about the presence of Ethiopian troops in their country. Therefore, all interested parties of good faith need to try to resolve this serious issue. The TFG has failed to legitimate itself in the eyes of the Somali people, and instead, it relies on the backing of the international community. If it is to become legitimate, the TFG has to reconcile with other forces in the country and also with itself.

- When the Ethiopians came, they stated that they would withdraw in two weeks. However, they have only withdrawn 200 troops out of the 30,000 that are currently in Somalia. Somalia also needs to build its own security. The UIC was able to secure Mogadishu, a dangerous city, in a month's time. Ethiopia will not achieve much because its presence is unwanted by the people of Somalia. Worse still, AU forces are likely to fail if they are not seen to be working alongside a legitimate Somali military authority.

A Kenyan Somali's Reflection

Presenter Abdullahi Abdi

Background. As a Kenyan Somali I believe that my feelings encompass those of most Somali people around the globe. I come from Mandera district where Kenya, Ethiopia and Somalia conjoin. During the Ethiopia–Somalia war of 1977, Mandera was targeted for bombing and Kenyan Somalis were killed on some occasions. Similarly, when Ethiopian military forces cracked down on the Oromo Liberation Front (OLF), some Kenyan Somalis living in Mandera were killed when the forces of the latter were pursued to their hideouts in Northern Kenya. Again, when state authority collapsed in Somalia, and the lives of thousands upon thousands of Somalis stood at risk, a massive influx of refugees moved into Mandera district in the period 1991—92.

The Impact of American Military Intervention in Somalia. It cannot be doubted that 16 years ago Somalia was a much more peaceful place before the coming of the United States in 1993. The United States thoughtlessly attempted to depose Somali leader, General Mohamed Aideed, at a time when Somalis stood by him, not because of his popularity, but on account of the deep resentment the Somali people shared against the hegemonic tendencies of the United States. What is confounding is that the Western media made no reports about the thousands of Somalis who lost their lives defending Aideed. Even though the US military eventually beat an ignominious retreat, Somalia has never been the same since this particular military adventure occurred. From the US perspective, Somalia is an extremely hostile nation because it deeply humiliated and embarrassed US forces. Owing to its arrogance, the United States seems intent on orchestrating all kinds of treacherous schemes, such as the military intervention of December 2006—January 2007, to ensure that Somalia remains ungovernable.

Understanding the Weakness of the TFG. The Kenyan government has so far spent a lot of its tax-payers money in efforts to find ways of stabilizing the war-ridden Somali nation. But it should be obvious to any observer that the resources available to the Kenyan government are

insufficient to ensure the imposition of the rule of law and a dependable level of security in Somalia. Therefore, two years and three months after its installation, the TFG has declined because entities such as the IGAD, AU, UN, United States and European Union (EU), which formally recognize the TFG, have been unwilling to underwrite its integrity and sustainability.

The simple question that observers ought to be asking about this contradiction is: "Why?" Could it be that these entities which publicly recognize the TFG are unwilling to underwrite it because it is viewed as an illegitimate authority by the people of Somalia? This is doubtful because the IGAD, AU, EU, UN and the United States among other countries, recognized the TFG during its formation in Nairobi. It mattered not that it was composed of warlords and there was little evidence that it was the product of a democratic process, which may have given it some sense of public legitimacy. Besides, soon after its formation the TFG left Nairobi for Mogadishu without any proper institutional structures which one would think are essential for the stability of a nascent government borne of a conflict situation. Today, we all know that if it were not for the Ethiopian government there would be no TFG. Undeniably, the government of President Abdullahi Yusuf was protected by the Ethiopians for it was clear from the onset that there were high chances it would be easily overthrown since it is understood to be an illegitimate government installed by foreign powers.

A Perspective on the Rise of the UIC. Due to the nature of my work, I have travelled repeatedly to Somalia in recent years. For me, the final months of 2006 was a period in which I witnessed a semblance of peace in Mogadishu for the first time, "surprisingly" under the leadership of the UIC. Indeed, when various Somali warlords chose to side with the United States on the questionable pretext of fighting terrorism, many innocent Somali people were arrested and handed over to the United States on grounds of involvement in terrorism. What were the Somali people to do? Did they not have the duty to rise and protect their country men and women from being handed over to a hostile United States? I was in Mogadishu at the time, and the Somali people rose against the warlords and not the UIC. In fact, the UIC came to power through a people's

revolution. There was no army affiliated to the UIC. Rather, what has been described as a militia was just a handful of youngsters who were given arms to restore security in Mogadishu.

Within a period of six months the UIC's influence resonated within Somalia, and predictably, the alarmists started doing the rounds. Despite encouraging signs of the restoration of security, law and order under UIC rule, the international community did not care to try to understand the objectives of this new authority. Instead, the international community acted quickly to invalidate its legitimacy. As Kenyan Somalis and Muslims in this country, some of us correctly predicted that such a course of action would only serve to catalyse a new conflict in Somalia. We attempted to pressurize the Kenyan government to see the urgency of our point of view but our efforts were in vain. Initially, the Kenyan government had chosen to meet with the UIC but it seems it rescinded this decision because of the UIC's "Islamist" orientation. What is more, there is evidence that some officials of the Kenyan government publicly uttered statements that in their nature were hostile to Muslim people and the Islamic faith.

The Kenyan Government and Discrimination against Muslims. One must wonder why the Kenyan government closed its borders to persons fleeing from fear of persecution in Somalia when in the past it has welcomed refugees from other neighbouring countries. We all recall the different "revolutions" in Uganda steered variously by Idi Amin, Milton Obote and Tito Okello. In all three cases, thousands of Ugandans, fearing for their lives, fled into Kenya where they were received by the Kenyan government. The case of displaced persons fleeing from civil war in Southern Sudan is also instructive; the Kenyan government did not close its borders at any time. Yet there is still another example. When I was in Moyale in 1991, the government of Haile Mariam Mengistu collapsed and 11,000 Ethiopian troops fled into Kenya with their arms, including armoured personnel trucks. According to police information which I received at that particular time, they carried into Kenya 27,000 AK 47 assault rifles but the Kenyan government saw no need to close its border with Ethiopia.

Interestingly, in January 2007 Kenya shamelessly turned away 400 refugees from Somalia in blatant disregard of the non-refoulement

principle of the 1951 Convention on Refugees. Why did Kenya flout a convention to which it is a party? Is it because these people are Somalis who identify with the Islamic faith? With this kind of a situation how can I be proud to be a Kenyan, let alone be proud of the Kenyan government?

Other actions of the Kenyan government are plainly illegal, even immoral. Recently, the Kenyan government repatriated 34 refugees, the majority of them being Muslim from Eritrea and the Oromia region of Ethiopia. These people were escaping from those countries for fear of persecution only to be handed over to Ethiopian government agents in Mogadishu. In the event that these people loose their lives at the hands of the Ethiopian government, can we say that the Kenyan government can absolve itself from responsibility for their deaths?

As I speak to you, I have informed the chair of this forum that I have a crucial meeting scheduled from 2.00 p.m. where we will consider the best way to secure the release of 66 Kenyan Somalis who have been illegally detained, incommunicado, in police cells in Kikuyu, Loresho and the Internal Container Depot. During the last 21 days, these innocent people have been denied access to lawyers and their relatives. While Muslim leaders and human rights activists have tried to secure their release, these attempts have been frustrated by the needlessly bureaucratic ways of the Anti-Terrorist Police Unit and the Regular Police. Actually, for the last three days we have sought to file writs of *habeas corpus* for these people to be arraigned in court but our attempts have been futile.

In Conclusion. Humaneness and morality must be restored in contemporary international relations. There should be no double standards in the rhetoric or the application of the principles of human rights globally. For example, we all know that Hamas is described as a terrorist organisation simply because it has been so branded by the United States. But it is also a fact that Hamas was elected by the Palestinian people in a credible democratic process. Still, the major Western powers, led by the United States, refuse to acknowledge this reality or to recognise the Hamas-led government in Palestine. Surprisingly, the government of Ethiopian Prime Minister Meles Zenawi, who irregularly staked his claim to power, is recognised as a legitimate authority by the very same Western powers.

As we sit here and discuss the ongoing conflict in Somalia, many Muslims in this country are experiencing different kinds of violations of their basic human rights: While anti-terrorism legislation has not been enacted in Kenya, it is clear that the government is operating as if the pending draft legislation is already in force. Is it possible that the present Kenyan government has enthusiastically jumped onto the bandwagon of states which are supposedly fighting terrorism because it fears losing US support come the Kenyan General Elections in December 2007? Is this really a reasonable basis for the Kenyan government to violate the human rights of its citizens? Might this situation explain why Muslims continue to experience constant and vicious forms of harassment at the hands of the Kenyan government?

Chapter Three

The "War on Terrorism", Somalia and the Emerging Concerns on Human Rights

Presenter Makumi Mwagiru
Discussant Macharia Munene

The Context. Launched soon after the September 11, 2001 terrorist attacks in New York and Washington, the US War on Terrorism is far from a conventional war. At both conceptual and policy levels, the War on Terrorism has generated intense controversy. In particular, the legal context in which the war is being conducted remains largely disputed. The UN Charter and the Geneva Conventions of 1949 within which any war ought to be framed and prosecuted appear to have been breached. Since December 2006, Somalia is the new focus in this exceptional global war, and it is plausible that after Iraq and Afghanistan, it may become the next theatre of long-term, US-led anti-terror military operations. But much like Afghanistan, Somalia could turn out to be a treacherous adventure for the US military, since it is a country already at war with itself.

The Conflict in Somalia. For the last 14 years, the international community has pursued numerous, but largely fruitless, initiatives intended to resolve the internal turmoil that defines Somali society since the collapse of state authority in 1991. Kenya mediated a series of negotiations between Somalia's warring parties at Eldoret, Mbagathi and Nairobi including the latest peace process which established the TFG in 2004. As the international community seeks to stabilize Somalia, what was initially an internal conflict is becoming increasingly internationalized. Consequently, it is entirely possible that the fragile Somali state and the corresponding social disorder, may tempt aggressive states such as the

United States to use Somalia as an experimental area for the evaluation of anti-terror policies, military operations and technology.

Also, it cannot be ruled out that in the post-9/11 world order, the United States is intent on demonstrating to its enemies and allies alike that it is capable of fighting wars in different theatres around the globe. Moreover, Somalia has the discernible potential to act as an incubator for the radicalisation of ideas and people in ways that may be supportive of terrorism. This particular factor opens the doors for more foreign military adventures, and subsequently, greater destabilisation. At this point in time, the instability in Somalia is perhaps the greatest threat to peace and security in the Eastern and Horn of Africa region.

The War on Terrorism and its Implications on Human Rights. Thus far, some motivations, influences and forces that drive the US intrusion in Somalia's internal affairs as well as its derogation from the provisions of the laws of war have been laid out. But the most striking fact about the War on Terrorism is the assumption by its defenders that it is a war whose circumstances permit deep and wide restrictions on human rights and liberties. In the case of Somalia, the ongoing internal conflicts have themselves resulted in serious and widespread human rights violations over the years. The extent to which the United States and Ethiopia's recent military forays into Somalia have affected the rights of the Somali people also remains unclear. What is more, the United States has generally shown its contempt and aversion to the possibility of being held accountable for serious and grave rights violations by rejecting the ICC.

The torture and denial of due process guarantees to terrorism suspects held at Guantanamo Bay perhaps best exemplify the US presumption that the imperatives of its War on Terrorism outweigh the need to protect human rights at all times. In these circumstances the international community ought to ask is: Should the planners and executors of the War on Terrorism be allowed to subvert the framework of international human rights law in the course of their campaign? To be sure, since the war started there has been a difficult relationship between it and its defenders on the one hand, and the international human rights movement on the other.

Beyond the specific case of Somalia, questions should be raised

about the extent to which human rights may be restricted during a war or other kinds of security emergencies. In the terms of their discourse, certain rights are inviolate before, during and after conflicts. However, the War on Terrorism seems to ignore this basic logic about the place of rights in conflict situations. Without respect for rights, states would lack an important platform from which to conduct the diplomacy of peace mainly because rights serve as a uniting basis in conflict management.

In any event, since the United States has launched an evidently illegal war its political and military leaders are likely to reject international humanitarian and human rights law in order to protect decision makers from culpability for rights violations. It is paradoxical however that those who are against the application of international humanitarian and human rights law have often deployed the same legal regimes to gain the political initiative during the war. For instance, the existence of international humanitarian and human rights law is quickly emphasized when combatants of the United States come under violent attacks. Conversely, the leadership of the TFG seems generally unconcerned about the existence of evidence that the United States and Ethiopia have committed rights violations, and possibly war crimes, in Somalia during the period December 2006 — January 2007.

Reaffirming Human Rights in the Context of the War on Terrorism. Somali leaders should have no illusions about the real possibility that they may have to face the full wrath of international justice, much like former President Charles Taylor of Liberia learned. While it is difficult to determine the direction of the political changes which may occur in the future in Somalia, there is a possibility that internal political forces may very well congeal into a campaign for retribution against the present ruling elite. The hanging of former Iraqi President Saddam Hussein is illustrative: At a national level, the Iraqi government instituted a tribunal to try the Iraqi dictator for committing crimes against humanity primarily because hauling former heads of states to international criminal tribunals tends to be difficult. Whatever the case may be with the US War on Terrorism, one thing should be certain: Human rights law, standards and norms continue to be in force even in times of war. This means it is a war is best fought under the framework of international humanitarian and

human rights law. Not by way of policies and actions that go against these legal and moral regimes.

Discussant's Remarks Macharia Munene

The War on Terrorism may only be rationalized from a political, not legal, perspective. Overall, the presentation highlights the two ongoing conflicts in Somalia. Firstly, there is the internal conflict which has an element of civil war, and it may be said that the entity called Somalia is at war with itself. Secondly, there are the ongoing foreign military incursions into Somalia which are examined through the conceptual dimension of the War on Terrorism and its relationship to international human rights law. The first point raises the critical question about whether or not Somalia can stand on its own as a viable entity or polity in the international community while it is simultaneously engaged in a protracted conflict with itself. This leads observers to inquire if at all Somalia can be at peace with itself in the absence of more radical measures including the deliberate partitioning of the country into smaller autonomous regions.

The presenter is correct in theorizing that Somalia is a "welcome mess" which offers the right "laboratory conditions" for the United States to evaluate the military instruments of its war on terror. On the basis of this point, it may also be deduced that there are external forces – the United States and Al Qaeda – which are misusing Somali territory as a new battleground for their ongoing conflicts. It is pitiful that under these circumstances the Somali people have been turned into the victims of a conflict which is not of their own making, a conflict they may not even understand. Observers should also be concerned about the other states which may be affected by the US military intervention in Somalia. For example, it is of interest to learn about the extent to which Kenya may have already been affected by the projection of the war on terror onto Somali territory.

At a theoretical level, the presenter seems to be at "war" with the concept of the war on terror itself, a war which rightly violates the norms of fundamental human rights and what may be understood as decent conduct in international relations. The trouble which the presenter has with this particular concept leads to another remarkable observation that

may be captured thus: To what extent does the War on Terrorism actually "terrorize" the regimes of international law? Is it not the case that the War on Terrorism has enabled the stronger states to invent new conceptual or ideological bases to undermine international law with impunity? When these kinds of changes affect the principles of the enforcement of international law it should not be doubted that the practice of obeying international law is itself turned into a crime.

As a consequence, policy makers from the stronger states effectively escape the reach of international law even though they have been instrumental in its creation. Since it is the stronger states which make the law for the weaker ones to obey, when the law becomes a nuisance to the former they simply amend or ignore it, thereby creating a new norm which the latter are now expected to observe. Still, there continues to be powerful resistance from all corners of the globe to the idea that stronger states can violate laws which the rest believe are fair and just, and in so doing, enjoy impunity for their actions.

In terms of the notion of peace, there seems to be a problem with the use of the broader concept of the term international peace. Which states often talk about "a breach of international peace"? Is it not the stronger states? But how often do these states apply the discourses of peace in more generic terms which emphasize questions of structural justice, fairness and so on? In other words, there is an observable tension between the competing elements of the discourses of peace which ought to be emphasized equally in international relations. Obviously, the planners and executors of the War on Terrorism have tended to stress questions revolving around "breaches of peace" at the expense of a more generic construction of the idea of peace. It is precisely this situation that misleads supporters of the war on terror into accepting that human rights may be violated for the sake of peace.

In summary, it can be said that the War on Terrorism amounts to an international illegality because it is conducted in a way that seriously violates international human rights law and international law generally. The presenter has essentially implied this fact in his discussion.

Responses from Plenary

James Nduko (Somalia Human Rights Program, Oxfam-Novib): It is known that the justification for the US invasion of Iraq was for the purposes of ensuring its control of Iraqi oil production. In the case of Afghanistan, the imperative was to build an oil pipeline through that country to the Caspian Sea in order to exploit high value off-shore oil reserves. It is no secret that there is a system of "booking" in international business practice with respect to oil concessions and it is reasonable to assume that this is happening in relation to oil prospects in Somalia. Some regions in the territory of Somalia have been "booked" by countries including the United Kingdom, Canada, China and Italy. For this reason, it is crucially important to evaluate the role of international capital in the destabilisation of countries with oil development potential. Therefore, is it possible to assume that the recent military intrusions in Somalia conform to this logic?

Eusebio Wanyama (Lecturer, Human Rights, Catholic University of East Africa): Firstly, is it correct to assume that the recent military intervention in Somalia is another case of the misuse of war as an instrument of foreign policy and the unconcealed indifference to multilateral bodies? Secondly, is it correct to assume that what Somalia requires is peace-building? If so, would this not entail post-conflict reconstruction and violence prevention? Should this not be the key focus in Somalia?

Henry Maina: What is the place of the UN, AU and IGAD in addressing situations of conflict similar to the one prevailing in Somalia? Should states really adhere to the terms provided by these institutions? What role if any should Europe have in addressing situations of conflict that have been created by the exigencies of the War on Terrorism?

Benson Ngugi (International Commission of Jurists, Kenya Section): Is the spectre of global terrorism such a threat that its eradication justifies the use of force and the derogation from human rights standards by states? On the matter of the treatment of suspected terrorists, does Kenya have any room to manoeuvre in order to ensure that the United States, in particular, would observe the rights of Kenyan nationals who may be accused of involvement in terrorism? Also, is it

correct to posit that with the decline of the ideology of communism, Western powers have launched a global war against Islam; a revision of the war against communism?

Responses from Makumi Mwagiru

- Terrorism ought not to be the nearly indomitable threat it has been dramatized to be. Nonetheless, it is critically important to appreciate that the United States has been pursuing a policy of regime change across the world for the past eight years, and the War on Terrorism is in fact an element of this broader policy.

- Even then, the War on Terrorism is premised on the argument that armed force will be, can be and is being projected onto areas which may not be amenable to "change" through negotiation or broadly, diplomacy. In reality, states will use whichever instruments exist at their disposal to pursue their national interests.

- There is no doubt at all that states must abide by international humanitarian and human rights law in relation to their treatment of terrorist suspects. It is conceivable that Kenya may have handled terrorist suspects as despicably as the United States is doing had the Kenyan government passed and implemented US-inspired anti-terrorism legislation.

- Although Europe appears to be a united political entity, the major European powers continue to act in ways that accentuate state autonomy. For instance, owing to the nature of their domestic politics neither France nor Germany support the War on Terrorism but the poorer European states to the east have embraced it because of their reliance on financial aid provided by the United States. However, it must be underscored that Africa should not expect to rely on Europe or any other region to address the problems that occur in its own back yard.

- International institutions such as the UN, AU and IGAD do have a major role to play in defusing conflicts and preventing military adventurism. While multilateral institutions have come under sustained attack in recent years, the international community must continue to believe and rely on them. As a matter of fact, the United

States, its arrogance notwithstanding, has on occasion yielded to the UN in recent years. This in itself is a demonstration that the regulatory role of these institutions of international relations is respected by states, at least to some degree.

- The West is not the only cultural or political block on the globe pursuing an agenda to change the world order. In fact, the world is changing so rapidly and constantly. In this particular era, there are many kinds of social, cultural and political backlashes which are challenging the established order of ideation in all spheres of human life including the conduct of international relations.

The Challenges of Refugee Protection in an Era of "War on Terrorism"

Presenter Judy Wakahiu
Discussant Ekuru Aukot

What is Protection? When we talk of protection we mean legal protection. The concept must be associated with entitlements under the law and, for effective redress of grievances, mechanisms to vindicate claims in respect of those entitlements. Therefore, an inquiry into whether a population has 'protection' is an examination of the fashion in which the pertinent authorities comply with the entitlements of the individual under international law and the manner in which these legal principles are implemented and respected.

To understand the challenges of refugee protection in the context of terrorism it is important to revisit the definition of a refugee. A refugee is a person who is outside of his or her country of nationality (or place of habitual residence for stateless persons), who has a well founded fear of persecution on account of his or her race, religion, nationality or membership of a particular social group (or political opinion). It is worth noting that all those persons who flee across a border from generalised threats posed by war or civil disturbances are outside the scope of international refugee law. Such persons are considered not to have sufficient individualized fear of persecution. However, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa has subscribed to a broadened refugee definition, which includes war and civil disorder. Somali refugees fall within this broader definition of a refugee.

The concept of persecution is an important one in any definition of refugees. Persecution is ordinarily considered to come from government sources. But for the purposes of refugee protection, forces that a government either cannot or will not control can become "agents" of persecution. For instance, an insurgent movement such as the UIC would fall within this category. Therefore, the assertion by Kenya's Minister of

Foreign Affairs that the Somali government is not fighting its own people is faulty. Upon flight, a refugee becomes subject to the jurisdiction of the authorities in a country of reception. Treatment must correspond with the obligation to respect fundamental human rights, including the right not to be returned to a territory where the individual may face persecution i.e. non-refoulement. This prohibition includes non-rejection at the border or shore of the country of reception.

Refugees and Regional Instability and Security. The war in Somalia and the anti-terror campaign in the Eastern and Horn of Africa region are unfolding against the background of heightened state insensitivity to the plight of refugees. To begin with, the international refugee protection regime has changed drastically from tolerance in the 1970—80s, to hostility in the 1990s, and now refugees are seen as a force of national and regional insecurity and instability. On January 4, 2007, Kenya denied entry to asylum seekers from Somalia in the interests of preventing the entry of ousted UIC militia which the government has linked to terrorism. It is possible that the Kenyan government may have been reading from the script that was set by the US Homeland Security Department, which declared in August 2005 that it would enforce stricter security measures along US borders; extensive background checks of migrants; new full-proof visa security systems and the sharing of intelligence information with international allies to deter the entry of migrants and by extension, terrorists into US territory.

So far, Kenya is one among many states which have put in place laws, policy measures and a range of programs aimed at raising the barriers to entry for migrants into their territories, tightening border controls and generally discouraging asylum entries. While it may be argued that these measures prevail mainly in the industrialized countries, the backlash has affected policies and practices on refugee protection across the globe, seriously undermining the quality of refugee protection.

Regionalizing Refugee Protection. There have been efforts to "regionalize" refugee protection, the argument being that refugees should be protected within the regions they are generated from instead of having them cross oceans and seas into Western states. For example, in 2004 the UK proposed an "external processing" policy and "protection in

the region" by which the UK government would process all asylum claims outside the UK and require asylum seekers to seek protection solutions within their regions of origin before arriving in the UK. This would result in the creation or expansion of refugee camps in Eastern Europe, Africa, Turkey and the Middle East (See *State Watch Bulletin 2004*). This position was condemned by human rights groups, and it was shelved.

Nonetheless, it has since been modified and adopted by the EU in the harmonization of its asylum policies. Through bilateral and multilateral arrangements, EU states have pressurized their African counterparts to strengthen protection in the region of origin of refugees in addition to deterring irregular migration. The same agenda has also been packaged as development assistance for the local integration of refugees where states in the North would provide development assistance to refugee hosting states in the South in order to ensure that refugees are retained within that region. Notably, in 2005 during the UNHCR EXCOM consultations, African countries rejected this particular proposal, arguing that it contravened the spirit of burden or responsibility sharing.

Visa Policies and Carrier Sanctions. In 2001, the majority of EU countries adopted a visa policy (Common Consular Instructions) that "white" or "black" listed countries with respect to visa entry requirements. Those on the 'white' list were 44 countries from Europe, Australasia, Japan, Israel, North America and some South American countries. The rest of the world, mainly Africa, South America, Asia, Middle Eastern, and some Eastern European states fall in the 'black' list, which means that nationals from these regions are subject to particularly stringent visa requirements for entry into the EU. Similarly, US immigration policy provides that the issuance of a visa does not guarantee a right to enter US territory but simply secures the right to present oneself at the border. In sum, these stringent visa requirements act as barriers to entry and typically apply to people from the Global South. Indeed, in asserting their sovereign right to control entry into their territory, Western states have contributed to watering down the norms of refugee protection, and as a consequence, the right to seek asylum is less secure today.

Interception and Return. The United States, Australia, and Italy, to name but a few countries, have been known to intercept refugees and

migrants, commonly referred to as the 'boat people', at sea in order to prevent their arrival on land. In the case of Australia, there is a mandatory detention policy requiring the custodial holding of migrants without documentation until they are assessed. If their claims are denied, they are returned to their countries or regions of origin. EU asylum policies also allow for denial of the right to enter, and asylum seekers may be intercepted at borders (including at airports), subjected to an accelerated refugee status determination process and returned or expelled. Where the asylum seeker has gone through a 'safe third country' or where they could have sought protection in the region of origin, they may be returned or denied entry.

The 1951 UN Convention on Refugees under Siege. The War on Terrorism, coupled with stricter immigration laws and practices of states that prevent entry or hasten the return of refugees to their countries or regions of origin, bring into question the relevance of the 1951 Convention to contemporary refugee situations. Generally, states have tended to be unwilling to prioritize refugee protection and refugees are frequently classified with other irregular migrants. For instance, in September 2006 Swiss voters ratified new asylum and immigration laws which make it more difficult for refugees to receive assistance. This development has effectively blocked non-European, unskilled workers from entering Switzerland. In fact, asylum seekers, like other migrants, are required by Swiss authorities to produce valid identity papers within 48 hours of entering Switzerland. This contravenes the provisions of the 1951 Convention which prohibits states from penalizing asylum seekers for arriving without proper documentation.

Refugee Protection in Kenya. The ongoing war in Somalia has definitely impacted on refugee protection in Kenya**.** The first reaction of the Kenyan government was to close its borders with Somalia and to return over 400 asylum seekers in early 2007. This directly violated international law related to refugees, specifically, Article 33 non-refoulement provisions of the UN convention and Article 2 (3) of the 1969 OAU convention. While the Kenyan government pursues an encampment policy for refugee protection in Kenya, there is a large population of Somalis living in Nairobi and other urban areas. But with heightened concerns about

terrorism, there is a possibility that the Kenyan government will employ this particular policy in a stricter way to confine refugees, and especially Somalis, to the camps, thereby severely restricting their freedom of movement and other human rights such as the rights to work, education and travel outside the country of asylum among others. It must be acknowledged that the encampment policy violates the fundamental right to freedom of movement which is essential for the enjoyment of other human rights. Also, it cannot be doubted that camps constitute a unique setting for the arbitrary exercise of power.

It is evident that public sentiment and government policy and action in many countries are tending towards stricter immigration laws, border controls, and ultimately, the diminishing of refugee protection. In Kenya, a January 2007 opinion poll revealed that over 94 percent of Kenyans are in favour of the Kenyan government acting to return Somali refugees to Somalia. A similar number also felt that Kenya has hosted Somali refugees for too long. It is unlikely that Kenyan immigration laws and border controls will be relaxed. Rather, they are likely to become more stringent. At another level, these findings may be indicative of a general rise in xenophobia amongst Kenyans in relation to Somali people. Certainly, xenophobia is a phenomenon that often leads to discrimination and segregation of its targets from the "mainstream". In turn, this situation may lead to demands for the return of Somali refugees to their country of origin, a development which would amount to the violation of Article 33 of the UN Convention on Refugees.

The decline in refugee protection in Kenya may also be related to the Kenya government's distrust and resistance to what it views as the adherence among sections of refugees to radical Islamic ideology. After the terrorist attacks of September 11, 2001 in the United States, the Kenyan government's response to Somali refugees seems to have been heavily influenced by negative perceptions and fears arising from the situation described above. Even though the settling of Somali refugees alongside Kenyan Somalis has facilitated their integration into Kenyan urban society, refugees continue to endure discriminatory treatment in Kenya. The profiling of Somali refugees for "security reasons" continues to be a common practice in Kenya and beyond. For example, in 2006 the Kenyan

government conducted an aliens' registration process in the Eastleigh, Kariokor and Pumwani areas of Nairobi with the aim of profiling Somali refugees and other aliens of Somali decent. Though the registration process profiled other aliens and refugees, the site of the registration centres clearly pointed at one particular target – Somalis.

Refugees as a Diplomatic Burden. Kenya and other countries in the region have often viewed refugees as a diplomatic burden, a political irritant and an embarrassment to the country which considers itself as neutral in the ongoing Somali conflict. These attitudes are not new to the region in any way. Refugees in Northern Ugandan have been used as pawns in the ongoing conflict between the Ugandan government and the armed rebel movement, the LRA. Moreover, the presence of refugees who have been members of the ruling elite in their own home countries continues to be a challenge to the governments' of the states which are hosting them. Often perceived as threats to incumbent administrations back home, this particular category of refugees stands at risk from the threats of assassination, abduction and forced disappearance that may be perpetrated by agents of their own government.

The United Nations High Commission for Refugees (UNHCR) is always on the look out for such refugees and their refugee status determination process is usually accelerated and they may be eventually resettled in "safe" third countries (in most cases the United States, Canada or Australia). Regrettably, for this particular category of refugees, and especially those of Somali decent, resettlement in the so-called safe third countries will surely become difficult owing to the radical changes to immigration policy that have been effected in those countries. The stakes have been raised and the goal posts keep on shifting.

The Future of Refugee Protection in the Eastern and Horn of Africa Region. Some scholars have argued that the general mood within the region has been one of restricting rather than expanding refugee rights**.** States in the region continue looking at the issue of refugee protection through the lenses of security and defence policy, and to be sure, this approach restricts the space for refugee protection. Attempts to harmonize refugee policies and practices within the EAC have so far failed. On the other hand, IGAD has registered better progress by crafting its refugee

policy from a largely humanitarian perspective which is non-threatening to member states. But since IGAD considers the issue of refugees to be a humanitarian concern, its focus has been exclusively on assistance to the general exclusion of the questions of refugee rights and protection. This omission fails to address issues related to responsibility and the standards of protection for refugees. It is therefore difficult if not impossible for refugees in general to receive adequate protection in a region where refugee policy has been intricately bound with security concerns; in a region where the War on Terrorism thrusts state security to the fore while simultaneously accentuating prejudices against Islam and Muslims, and by extension, trampling upon the rights of refugees of Somali origin.

Stricter immigration controls aimed at deterring the arrival of asylum seekers from the Global South have placed greater pressure on the asylum regime in the South where host countries take in large refugee populations for long periods of time because they share borders with "refugee-producing" states. In the meantime, financial support from donor countries is inadequate and dwindling in many refugee situations. The shared responsibility of refugee protection is skewed, with host states taking the lion's share of the burden. The governments of host states such as Kenya argue that while developed countries are mounting higher barriers to entry for refugees seeking asylum in the North, states of the South are expected to embrace open-door asylum policies with little regard to their national security interests. If this equation is not reversed in light of the ongoing anti-terror war in Somalia and elsewhere, it should be expected that violation of the dignity and rights of refugees will continue to occur globally and in the region.

The End of Non-Refoulement? Over the years, the principle of non-refoulement has been held sacrosanct in matters of refugee protection, yet the imperatives of the War on Terrorism seem to undermine this important principle that drives the idea of refugee protection. Today, refugees are no longer guaranteed protection just because they have arrived at the border of a country, and because of this situation, it can no longer be said that the right to seek asylum is guaranteed. While it is reasonable to design strict immigration controls in order to stem the tide of the threat of global terrorism, the international community cannot

shun its responsibility to ensure that states design anti-terrorism policies which are consistent with human rights generally and refugee rights and protection in particular. If this responsibility is not met, the international refugee protection regime may stand at the risk of eventual collapse.

As matters stand now, the charity of host countries in the South is buckling under the weight of protracted refugee situations and the swelling numbers of refugees produced from conflicts that do not seem to have any end in sight. As a result, more and more host countries, overwhelmed by the pressures of addressing often massive influxes of refugees, are calling for the creation of 'safe zones' within countries afflicted by violence as a way of protecting "refugees" within their own home countries. If these calls go unheard, the distinction between refugees and internally-displaced persons will be blurred and eventually the right to seek asylum, as enshrined in the UDHR, may very well be completely eroded.

Discussant's Remarks Ekuru Aukot

The question of refugee protection is not only a legal affair. If the notion of protection is to make sense, it should be underpinned by the principles of humanitarianism. These principles fundamentally seek to create suitable conditions for people, refugees included, to lead normal lives wherever they may find themselves. Clearly, the encampment policy, which is the bedrock of Kenya's refugee protection system, is not based on the ideas of humanitarianism; and it may be likened to "state-perpetrated terrorism". Thousands of refugees who are encamped at the Kakuma and Dadaab refugee camps daily endure all manner of violations of their basic human rights, especially because they are forced to live in disagreeable, deeply degrading conditions. It would not be far-fetched to interpret this deplorable situation as a form of state-perpetrated terrorism against powerless people.

Generally, the Kenyan government's policy responses to the humanitarian crises generated by conflicts in the Eastern and Horn of Africa region have been reactive, not proactive. Discussion about comprehensive refugee protection legislation started only after an influx of refugees from Somalia overwhelmed Kenyan authorities after

the collapse of state authority in Somalia in 1991. But these discussions ceased soon after the government created a refugee camp for the Somalis in Thika. Similarly, when humanitarian crises broke out in Rwanda and Southern Sudan in 1994 and 1997 respectively, Kenyan authorities once again considered ways of developing this legislation. However, a bill was not drafted.

In the absence of this kind of legislation the Kenyan government enjoyed great leeway to pursue the least costly policy option of encampment, which results in the restriction of the rights and freedoms of refugees. In this condition, there is little if any consideration about the fact that refugees are an especially vulnerable group in dire need of protection. Therefore, what sense has it made for the Kenyan government to ratify regional and international human rights conventions that address the plight of refugees? If the idea of human rights is to continue as a basis for refugee protection, why does the international community not see the need to reconstruct the definition of a refugee in such a way that would integrate the questions of socio-economic and cultural rights? Is it not possible to rethink the problem of refugees as originating partly from the denial of group rights in the first place? And is it not logical to remedy this situation by promoting agitation for an inter-related right – the right to self-determination? These ideas should not be taken to be radical. After all, these are our human rights.

Clearly, the contemporary definition of a refugee has been overtaken by events. This is particularly discernible when contemporary global processes and the phenomenon of rapid globalisation itself are considered. If globalisation is taken as a process which integrates the peoples of the world, there ought to be no reason why an individual cannot move freely from a dangerous conflict zone, such as Somalia, to a safer country, say Kenya or Tanzania. It is paradoxical that regional leaders envision economic integration and political federation through the EAC and Common Market for East and Southern Africa (COMESA), yet a significant number of people constantly move around the region as refugees. Is there really any sense in these economic blocs or the premature ideas of political federation in the region?

A related question that the people of this region should consider is the

extent to which the treatment of refugees in this region of Africa ought to be dictated by jurisprudence from other parts of the world. Is it not more useful to manage refugees from an "African" jurisprudential perspective that is sensitive to the African context? What might this perspective be? Conversely, is it reasonable to argue that the African-inspired OAU Convention on Refugees is considered as an international treaty? If indeed it is recognized internationally, why is it that the states, which are a party to this convention, only accept refugees originating from the African continent? Why should it be difficult to recognize a regional treaty as an international instrument? If the world is to expand the avenues for people to safeguard their rights and human dignity, dialogue must be initiated at the international level to ensure that African-inspired conventions are accepted internationally. It is also necessary to link these questions to the need for Africans to rethink the place of traditional African conflict resolution mechanisms in their societies. Perhaps this is what is required for the stabilisation of Somalia.

Turning to the problem of global terror, there is little clarity about whether or not regional states really understand what the US conception of terrorism is all about. It appears that the region is afflicted largely by the phobia of terrorism because there is no serious evidence of terrorist activities being planned (or taking place). It is amazing that the United States has associated the UIC with terrorism even though it has no credible evidence to back its claims. How does one detect a terrorist in a conflict zone such as Somalia? Is there a known mechanism to do this sort of thing? On the balance of probabilities, this cannot be done, and therefore, the region cannot afford to blindly follow the lead of the United States in formulating its anti-terrorism policies. Rather, this particular policy making process ought to be conditioned by the socio-political and economic realities within regional states if at all they are to be compliant with human rights principles.

In conclusion, the region is suffering from political and intellectual mediocrity in relation to its efforts to understand and address the problem of terrorism. Firstly, why is it that there is no serious debate in the region about the United States and the question of Guantanamo Bay? Just how many people are being held there ostensibly for involvement

in global terrorism? What exactly is happening to these people? What is their fate?

Secondly, if Kenya is to accept all refugees from Somalia, it follows that the Kenyan government must attend to the question of the rights of Kenyan Somalis living in Northern Kenya. Since independence the people of Northern Kenya have been, for the most part, abandoned by successive Kenyan governments. Therefore, if the Kenyan government routinely denies basic rights and freedoms to sections of its citizenry, should the same entitlements be guaranteed to asylum seekers?

Finally, section 3(2) of the newly enacted Refugee Protection Act entertains the notion of a *prima facie* refugee but even so, the Kenyan government recently turned away hundreds of Somalis who were fleeing their country for fear of losing their lives. As Kenyans, can we say that we have faith in our own laws? Is there not a serious dissonance between our laws and our practices?

Responses from Plenary

Question 1: Are there circumstances that allow the Kenyan government to claim it reserves the right to deny refugees entry into Kenya in much the same way as some European countries have done?

Question 2: Why is it that the Kenyan government has had to face such sharp criticism for its refusal to accept refugees into its territory? Is it not possible that Kenyans were actually supportive of the plight of Somali refugees, and may not have had any problem giving them a temporary home in Kenya?

Responses from Ekuru Aukot

- The Kenyan government is a member of the international community which means that it has specific legal obligations under international law. It does not really have a right to deny asylum to those who seek it, and it has a responsibility to provide assistance to refugees. Of course, certain national security exigencies may compel the Kenyan government to reject refugees.

- People must enjoy a sense of belonging or citizenship, whatever circumstance they find themselves in. Taking in refugees and

allowing them freedom of movement and the opportunity to engage in viable economic enterprise is an important way of responding to the social reality of the loss of citizenship status and hope that many refugees know all too well.

- The policies and practices of refugee protection that are carried out in the West singularly affect the people of the Global South. Western states are increasingly heightening the barriers of entry for refugees of African origin into their countries, and financial support for refugee management and protection from these countries in continually dwindling. Countries like Kenya, which face obvious budgetary and resource constraints, are easily tempted to contravene the international refugee law regime in response to decreasing levels of donor support for humanitarian crises.

- It is unlikely that a majority of Kenyans would be supportive of the plight of Somali refugees. Over time Kenyans have developed a xenophobic outlook towards Somalis and Kenyan Somalis. Low-income earning Kenyans generally believe that the Somali have "crowded" the narrow economic space that is available. In contrast, Kenyans and their government seem to be more sensitive to the plight of refugees from Southern Sudan.

Citizenship, Human Rights and Security Dilemmas for Kenya and the Region

Presenter Musambayi Katumanga

Background. This presentation reflects on the question of citizenship and security in Kenya in relation to Somalia. It also examines what opportunities the crisis in Somalia offers to Kenya in terms of the reconstruction of the state in the Eastern Africa region and the Horn of Africa.

Citizenship and the Exclusion of Kenyan Somalis. Citizenship, defined from a liberal perspective, denotes membership within a community with common interest or rights, which are accessed within political, economic realms on an equal kind of basis. The society is then able to produce common perspectives and often a common sense of justice for all members of that particular community.

In the interest of Kenya and especially on the question of Somalia, the experience of the community will define the type of citizenship preferred. Unfortunately for the Somali, the first aspect that defines their reality is the colonial partition within the region. Subsequently, there seems to be a multiplier effect that is compounded by what is happening in Somalia. Instead of having a one-nation state, Somalia is increasingly becoming a collectivity of part-nation states-Puntland, Somaliland. As these small groups squeeze up their boundaries, more conflicts may emerge as some groups seek to engender the causes of irredentism and therefore conflicts in the region.

On the other hand, that colonial dynamic failed to respond to the socioeconomic logic of reproduction of the Somali nationality. Given the weather patterns of the region and the necessity for these groups to move as pastoralists, the questions of access to land and pasture are important. So a phenomenon emerges within the region which may be termed as frontier citizenship. This is the notion in Eastern Africa or the Horn of a citizen who has no specific borders. He/she may not be confined to one border as he/she is accustomed to moving from one end to the other. The

value of this is that it offers various opportunities to him/her if he/she can identify and exploit them. Where there is a failure to exploit these, a number of dilemmas are generated.

In the case of Kenya, especially with the fear of marginalisation by a government dominated by a Christian kind of logic, there appears to be an attempt by the Somali nationality to exit out of the state. The response, of course is military. There are also two types of Somalis beginning to emerge. At one level, there is the group which collaborated with the British under colonialism who settled as second-class citizens in various parts of the country in areas commonly referred to in major towns as *Kambi Somali.* Then there are others who have been rendered internally displaced or stateless individuals.

The Impact of Exclusion. The first response of the second-class Kenyan-Somali citizens is to concentrate on economic reproduction. So, they take up economic activities- including running hotels and *miraa* (Khat) selling. In response to the politics of irredentism, states may opt to cede space to Somalis. The logic is that, "if we cannot control the Somalis, then we will make life so uncomfortable for them, to the extent which they cannot threaten our centre". Therefore, they are marginalised economically, and in case they were to attack, a lot of space has already been ceded to them and it will take a while for them to organize and advance to a point where they would pose a clear and imminent threat to Kenya's strategic towns. This has far-reaching consequences in the sense that the region is left completely underdeveloped in terms of infrastructure and in economy. At the same time, this results in the inability of the state to sufficiently exploit the resource-rich Northern Kenya, which remains highly underdeveloped, and that is the dilemma in terms of opportunities available there.

The inability to maximize on the resources in that area generates human insecurities that the state begins to experience. There is always the logic individuals residing near borders depend on more than one state. To the extent that they cut across the borders, that marginalisation, presupposes that at one level, there is a potential of infiltration to the detriment of the state. The extent that there is poor infrastructure in Somali-occupied regions, the result is problems such as small pox and the Rift Valley

Fever. "By not responding to your neighbour's problems, you end up in the same fate as your neighbour."

In the case of the Kenyan government, the assumption was that internal instability in Somalia enhances Kenya's security. The truth is that increased instability in Somalia not only exposes conflicts within Kenya, but also constitutes Kenya as a test-space in engaging and fighting Somali conflicts. The conflicts begin to spread from one space and become regionalized in another much more viable space. In the 1980s especially as the Somali state began to collapse, several regional problems began to emerge. The Kenyan economy began to expand indirectly into Somalia while the political space of the Somali state expanded indirectly into the Kenyan state. In turn, Somalis who were politically excluded from the state, increasingly penetrated the state by grabbing the economic spaces. Somalis in the collapsed Somali state maximize on the capital from that country and export it and buy "space". So the first reconstruction within the state is the ability to capture the economic space. A Somali-Somali who has the economic capacity will be able to produce and export his/her war capital to Somalia. This is why warlords have investments in Kenya and are able to bankroll the war in Somalia.

Insecurity and Exclusion. So, the logic of sustainability of the conflict becomes very important, and opens the way for the third level of this argument, which is the discourse of insecurity. This is at two levels. One is in terms of Al Qaeda on one side and the United States on the other. Looking at international terrorism, there are actors on both sides of the divide that use the discourse of terrorism for their own ends. Al Qaeda will claim it has actors in Somalia, whether true or not, while the United States will claim there are Al Qaeda actors in Somali, whether true, or not. But the bottom line is the Somalis in the area become the victims in that process.

With respect to Kenya, the fact that the state has not penetrated the Somali citizen both in the abstract and in the reality of his/her own existence, means that perhaps 70 percent of Somalis are neutral and even indifferent to the war. There may be about 20 percent who for all practical purposes are sensitive to what is going on in terms of their lot as

an identity or as a group. At the extreme, there may be another 10 percent that may have the potential to be sympathizers Al Qaeda.

In the case of Kenya, Ethiopia and Somalia, there are conflicts affecting the Oromos on one side and the Somalis on the other within this triangular setting. In the case of Ethiopia, there are serious attempts towards secession and there is the threat of a combination of OLF violence and potential instability and conflict in Ogaden. In Kenya, the option to enter into Somalia is constrained by the fact that the state is weak not only militarily but also in itself as evidenced by ethnic polarisations, underdevelopment and the politics of marginalisation.

These vulnerabilities multiply those types of threats at three levels. Firstly, the idea of the state itself is weakened. Secondly, is the emergence of concerns about how human resources in the region are applied. Finally, there are the weaknesses of state institutions. Insecurity is not merely defined in military perspectives. There is also the human security element, which is exemplified by diseases such as the Rift Valley Fever that has been sweeping through the North-eastern region.

The Benefits of Integrating the Somali nation into the Kenyan state. The Somali phenomenon provides Kenya with a lot of options. These however also demand a lot of investment. First investment in terms of political will or short-term opportunities at the regional level. This presentation essentially proposes a rethinking of the ideas of state formation to facilitate processes of inclusive, universal citizenship. One way of doing this is to seriously think about a Marshall Plan for the entire North-eastern, Coastal and North-western parts of Kenya in terms of infrastructural development and maximizing on the potential of the military to serve in the reconstruction programme.

The second aspect of it is the possibility of creating an economic corridor on the Kenyan side of Somalia. This would promote the ingenuity of the Somali people. The Somali people have turned economics upside down. Somalia is the only place where the neo-liberals and even the communists who used to talk about the disappearance of the state have gotten it wrong. It is the only place where individual actors print and circulate money yet economic activities are still taking place. The type of citizenship that will be recognized in this area should it be rejuvenated

economically is "frontier citizenship". This would have a beneficial effect on the psychology of the Somali.

These are some possibilities for stabilizing the area. In the long term, there should be an assessment of the possibility of creating the regionalized triangle that allows movement between Ethiopia, Kenya and Somalia, especially in terms of business. This will in turn diminish the capacity of external actors seeking to interfere in the region by increasing the capacity of the region itself to engage these external actors.

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