

KENYA'S PRE - EMPTIVE AND PREVENTIVE INCURSION AGAINST AL - SHABAAB IN THE LIGHT OF INTERNATIONAL LAW

E.O.S. ODHIAMBO*, K . ONKWARE*, J . KASSILLY*,
L.T . MAITO*, W. A. OBOKA*, J. W. WAKHUNGU*, O. M. NTABO**

* Centre for Disaster Management & Humanitarian Assistance (CDMHA)
Masinde Muliro University of Science Technology, Kenya

** Dept. of Criminology and Social Work, Masinde Muliro University of
Science Technology, Kenya

Al-Shabaab terrorist group's series of kidnappings and cross-border incursions into Kenya threatened security and the lucrative tourism industry in East Africa's largest economy. Towards the end of 2011 events like the kidnapping of two foreigners and the killing of another in the Kenyan resorts on the east coast, the abduction of two aid workers from the Dadaab refugee camp, and the attack against Kenyan soldiers in cross-border raids raised a lot of concern for the Kenyan government. Consequently, the latter decided that the national security interest of Kenya had to be protected. As a result, the decision of the government was to go to war against Al- Shabaab. This prompted the Kenya Defence Forces' (KDF) incursion to Somalia in a pre-emptive and preventive campaign aimed at flushing out Al-Shabaab from this country. The campaign took off in mid-October 2011 and it was dubbed "Operation Linda Nchi", Swahili for "Protect the country". In this article we look at the implication of Kenya's pre-emptive and preventive incursion against Al- Shabaab from the perspective of international law.

Key words: *pre-emptive, preventive, incursion, international law.*

1. INTRODUCTION

Kenya Defence Forces' (KDF) preemptive and preventive actions are justified after the terrorist group known by the name of Al-Shabaab performed a series of kidnappings and cross-border incursions into Kenya, all of which threatened security and the lucrative tourism industry in East Africa's largest economy. [1] Towards the end of 2011 events like the kidnapping of two foreigners and the killing of another in the Kenyan resorts on the east coast, the abduction of two aid workers from the Dadaab refugee camp, and the attack against

Kenyan soldiers in cross-border raids raised a lot of concern for the Kenyan government. [2] There was credible intelligence that Al-Shabaab terrorist group would continue to attack Kenya. Therefore, the most appropriate decision on behalf of Kenya was to conduct a military operation to take preventive action to stop such further attack. [3] Because the terrorist group had previously attacked Kenya, preventive action was justified. Given the sporadic nature of terrorist attacks, it appeared that the threat was escalating. Therefore, a decisive opportunity to attack and damage such a group

prior to it launching another attack on Kenya was seized. [4]

The Kenya Defence Forces decided to use a campaign strategy because of the nature of the terrorist group it was difficult, if not impossible, to defeat a terrorist group in a single strike. But in most cases, terrorist groups do not provide the targeting structure to carry out this approach since, for example, most terrorist groups are dispersed across a number of cells with little contact between them. [5] As a result, there may not be enough information to stage a campaign. Consequently, in most situations, governments are reduced to attacking terrorist organizations on a piecemeal basis, using a series of individual strikes. [6]

2. METHODOLOGY

The Qualitative Research method was used in this study. Primary and secondary data were analyzed. One of the researchers being a soldier was able to collect primary data by interviewing and analyzing the narratives and the stories told by fellow soldiers and officers who had been involved in the incursion and those who had not. A total of 115 military officers were interviewed and their views on preemptive, preventive and international law recorded.

Secondary data on the subject drawn from books, journals, news papers, Conference proceedings, Government/corporate reports, theses and dissertations, Internet and magazines was critically analyzed. The findings and analysis are presented under the sub headings of: preemptive attack, preventive attack and international law.

2.1. PREEMPTIVE ATTACK

The Oxford Dictionary defines “preemptive” as “*obtaining or preventing something by acting in advance*”. [7] In this respect, Reisman noted that: “*The claim to preemptive self-defense is a claim to entitlement to use unilaterally, without prior international authorization, high levels of violence to arrest an incipient development that is not yet operational or directly threatening, but that, if permitted to mature, could be seen by the potential preemptor as susceptible to neutralization only at a higher and possibly unacceptable cost to itself*”. [8] A preemptive strike can be defined as use of force by a state against its adversary so as to prevent an attack or to protect its security; it would otherwise be disastrous, if it waits for its adversary to take the first step. According to its advocates, preemption is a strategy to protect a state if there is an “imminent threat” to its security. Mobilization of the adversary’s army, navy and air force has generally been defined as an imminent threat, for which, it is argued, preemptive force is permissible as an act of self defense.

2.2. PREVENTIVE ATTACK

Preventive war is defined as an attack launched on the belief that the threat of an attack, while not imminent, is inevitable, and that delaying such action would involve great risk and higher costs of war. [9] Preventive attack and preventive war designate proactive measures taken by a threatened nation to eliminate an anticipated threat. The preventive measure minimizes the threat by choosing the time, place and character

of an initial attack and thus denies the threatening agent these advantageous choices. [10] Diplomatic or other means of national power should be exhausted before taking preventative action to provide the opportunity for building domestic and international consensus for the preventive action and for legitimizing such action. Anticipatory self-defense or striking an enemy before that enemy initiates his attack, is defined in four ways. The fundamental discriminators in these definitions are the distinctions between imminent and inevitable threats. Preemptive war is launched on the basis of indisputable evidence that an enemy attack is imminent. Distinctively, preventive war is defined as an attack launched on the belief that the threat of an attack, while not imminent, is inevitable, and that delaying such action would involve great risk and higher costs of war. [11] The concept of imminence is therefore crucial to the understanding the distinction between preemption from prevention. [12]

The most often described distinction between preemptive and preventive military activities revolves around the proximity of the threat. For example, according to the United States Department of Defense, a preemptive attack is defined as *“an attack initiated on the basis of incontrovertible evidence that an enemy attack is imminent”*. [13] A preventive war, on the other hand, is *“a war initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve great risk”*. [14] A possible sum up of the differences between the two phrases is that while preventive war is undertaken when a state anticipates that its enemy

may attack sometimes in the future or wants to prevent a change in the power balance at international level it deems as unacceptable, preemption refers to the decision of a state to be the first to take action because it has the firm conviction that another state has already decided to attack and hence it is about to carry out its plans. [15]

Still, there is a great confusion over the terminology in the academic debate. For instance, Nye [16] claims that preemptive strike occurs when war is imminent. On the other hand, O'Connor [17] means lack of imminence when referring to preemptive. Moreover, the same author, when referring to *“force against an imminent threat”* prefers to use the term *“anticipatory”*. Dinstein [18] in contrast, uses the terms of preemptive, preventive, anticipatory in free variation and as examples of not allowable use of force, whereas in order to describe the use of force in a legitimate way the author uses the word *“interceptive”*. As for Gray, *“anticipatory”* means nothing but *“preemptive”*. [19]

The concept of imminence however, has been complicated by the perceived threats that exist today. The issues of terrorism are proving difficult in this respect. The imminence of a terrorist attack is extremely difficult to determine, and, in comparison to the massing of troops along a border, is near impossible to detect. [20]

2.3. PRECEDENCE OF PRE-EMPTIVE AND PREVENTIVE STRIKE

Russo-Japanese had preventive war between 1904 and 1905. Both Russia and Japan were seeking to

expand their influence in Korea. Many scholars would argue that some sort of military conflict between the two countries was inevitable. The conflict did begin and the Japanese initiated it. A comment by a Japanese minister provides a succinct explanation for why the Japanese acted: "*We do not want war, for it would cost us so much, and we have nothing to gain even if we win; but by keeping the peace too long we may even lose our national existence*". [21]

Another preventive war is the Pacific War launched by Japan's surprise attack on Pearl Harbor of United States. The Japanese relations had deteriorated steadily in the decade following Japan's seizure of Manchuria in 1931-1932. They took a sharp turn for the worse with the Japanese-German-Italian Tripartite ("Axis") Agreement (September 1940) and Japan's occupation of French Indochina (1940-1941), culminating with President Roosevelt's decision to impose an embargo on oil exports to Japan and a seizure of Japanese assets in the United States (July 1941). By December 1941, many in Tokyo and Washington believed war to be inevitable. Japan's decision to go to war was driven in large part by this belief and by fears that the United States oil embargo would impair Japan's war-making capabilities within months. [22] As a result, it was better to strike sooner than later. Like the Russo-Japanese War, the Japanese attack on Pearl Harbor reveals the difficulty of distinguishing between a preventive war and a simple war of aggression. In the case of the Pearl Harbor, for instance, war was only "inevitable" because Japan was committed to a policy of expansion

in China and Indochina unacceptable to the United States.

The preemptive war most written about was the one undertaken by Israel against Egypt and Syria June 5, 1967. The months leading to the Israel cabinet's June 3 decision to go to war were marked by escalating tension between Israel and its Arab neighbors. [23] Responding to a series of cross-border terrorist attacks, Israel forces launched a brief incursion into Jordan in November 1966. In April 1967, Syrian shelling of northern Israel led to a brief but intensive air strike in which Israel war planes defeated the Syrian military.

In May, Egyptian President Gamal Nasser demanded the removal of UN peacekeepers from most of the Sinai and closing the straits of Tiran that further raised the tension. Nasser's rhetoric grew more heated as June approached, declaring on May 28 that "*We plan to open a general assault on Israel. This will be total war. Our basic aim is the destruction of Israel*". [24] Egypt and Syria moved troops into positions in the Sinai and the Golan Heights. Jordan's King Hussein visited Cairo May 30, militarily aligning himself with Egypt and Syria a step that raised the specter of a three-front war in Israel. Yet the Israel attacks of June 5 fell short of a strict definition of preemptive war. While most Israel decision makers believed that war with Israel's Arab neighbors was inevitable, not all believed it was imminent. The decision to attack was largely driven by a belief in retrospect that an early war would catch Israel's enemies off guard and maximize Israel's opportunity to inflict a decisive defeat on increasingly hostile and united neighbors. Thus,

the Six-Day War contains elements of both preemption and prevention.

The last example we cite is when the Israel war planes bombed Iraq's Osirak nuclear facility in June 7, 1981, as a preventive attack. The Israel war planes stroke the incomplete reactor at a site north of Baghdad, fearful that the reactor might be used to create plutonium for an Iraqi nuclear weapons program. While Israel's strike against the Osirak Reactor may be a clear instance of a preventive strike, it does not represent an example of preventive war. International reaction to the Israel strike, however, was uniformly negative. The Security Council passed a unanimous resolution condemning it as a violation of the Charter (Security Council Resolution, 487 (June 19, 1981). That condemnation helped solidify the general understanding that Article 2(4) is a general prohibition on force.

3. INTERNATIONAL LAW

International law holds that the use of force between states is illegal. Article 2(4) of the UN Charter prohibits the "*threat or use of force against the territorial integrity or political independence of any State*". [25] The two exceptions to this general rule are the Security Council authorization for the use of force to keep peace as provided in Chapter VII of the Charter, and that done in self-defence. Article 51 of the United Nations (UN) Charter, says "*nothing shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain*

international peace and security. Measures taken by Members in exercise of this right of self defence shall be immediately reported to the Security Council". [26]

There should be an armed attack prior to the preemptive strike for Article 51 to be applied. However there is no unanimous interpretation of this provision. The advocates of preemption say there is no explicit mention of any prohibitions and the states have the right to act. Since there is no unanimous acceptance or rejection of whether an armed attack is a necessary pre-condition for preemption, it has generally been accepted that a preemptive strike can be launched irrespective of a prior armed attack.

3.1. THE LAW AGAINST PREEMPTIVE SELF-DEFENSE

The purposes of the United Nations (UN) are enshrined in Article 1(1) of the Charter, the primary purpose being to "*Maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace*". [27] Others reject this claim, and argue instead that the words "inherent right" in Article 51 is evidence that the Charter was intended to recognize and continue the customary right that was in place before the establishment of the United Nations. [28]

These provisions apply equally to both members and non-members of the United Nations, and prohibit all recourses to force, whether unilateral acts of aggression or multilateral efforts to protect human rights or to

conduct humanitarian intervention. [29]

There are two exceptions to the general rule against the use of force. The first of these relates to acts authorized by the United Nations Security Council. Article 42 of the Charter permits the Council (and by extension UN members) to take any such actions to maintain and restore international peace and security where non-forcible measures would, or have proven to be, inadequate. [30] Without the United Nations Security Council authorization, the use of force would be unlawful, and it is not for individual states to determine when threats to the peace have occurred. Reading the Charter as a whole, it is evident that the prohibition on force was intended by the drafters to be very broad, admitting of only explicit exceptions. This conclusion is confirmed by the drafting history of the Charter. The Security Council alone has legal authority to authorize forcible military actions. [31]

3.2. SELF-DEFENSE IN INTERNATIONAL LAW

Article 51 is not the only authority that permits the use of force in self defense. Even though the issue of when an armed attack is justified because of the right to self-defense is still under debate, the Security Council has clarified that *“an attack must be underway or must have already occurred in order to trigger the right of unilateral self-defense”* unless an earlier response has already been approved by the Security Council. Therefore, no state can take it as its own right to attack another state on reasons that the latter is hypothetically planning

or developing weapons for a likely campaign. The use of force should not involve *“anything unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it”*. [32]

The customary right to self-defense, either in anticipation or otherwise, would therefore be valid when the requirements of necessity and proportionality are fulfilled. In this respect, the International Court of Justice (ICJ) in the 1986 Nicaragua versus The United States of America case stated that *“the exercise of this right is subject to the State concerned having been the victim of an armed attack”*. [33] Article 51 itself professes that *“nothing in the present Charter shall impair the inherent right”* (United Nations Charter), the implication being that the customary rules continue *“to exist unimpaired after ratification”*. [34] The use of force outside such an instance would therefore be unlawful.

3.3. MILITARY ACTUAL COMBAT

The provisions of Article 51 of the UN Charter set out that should an armed attack occur, then a state can exert its right to self-defense. Some scholars argue that the right of pre-emptive self defense, if applied too broadly, could be used by states to *“cloak aggression in the mantle of self-defence”*. [35] This would in turn provide a dangerous precedent and could provide *“justification for Pakistan to attack India and for North Korea to attack South Korea, and so on”*. [36] According to the International Court of Justice, in Nicaragua’s case it is only actions of

great gravity could lead to an armed attack as the expression of the right to individual or collective defense. [37] Based on the UN General Assembly's Definition of Aggression [38] the Court concluded that an armed attack is justified as a result of the "right to use force to repel an attack in progress, to prevent future enemy attacks following an initial attack, or to reverse the consequences of an enemy attack, such as ending an occupation". [39] "The state acting in self-defense may seek the destruction of an attacking enemy force if that is necessary and proportional to its own defense. The right also includes taking the defense to the territory of the enemy attacker, if that is necessary and proportional". [40]

The defensive use of force can be delayed, after an unlawful armed attack, depending on the circumstances. Taking a reasonable amount of time to organize the defense is permissible. "Force can be used in self-defense only against a state legally responsible for the armed attack. It is generally not enough that the enemy attack originated from the territory of a state. Rather, legal responsibility follows if a state used its own agents to carry out the attack". [41]. When using force, the principles of necessity and proportionality must be observed. Thus, the principle of necessity limits the use of force to the accomplishment of military objectives. As for proportionality, the latter rules out that the likely civilian casualties must be weighed in the balance. In case the damages to civil property or the loss of innocent lives are greater than the benefits triggered by objective of achievement, then the attack is to be abandoned.

3.4. CONSEQUENCES ON KENYA PREEMPTIVE AND PREVENTIVE WAR AGAINST AL-SHABAAB

Whether it is a limited war or surgical strike or hot pursuit, Kenyan's response would be equally serious. If one goes by the statements of its important actors and by Al-Shabaab counter mobilization around Kismayu, and several terrorist attacks in Northern Eastern province, any further action by Kenya Defense Forces will only aggravate Kenya security situation rather than addressing it. [42]

Secondly, will preemptive strike secure Kenya's interests against Somalia? Presuming that the preemptive strike sought to destroy Somalia's Al-Shabaab, will the military campaign be able to destroy all of them? If any such strike continues, Al-Shabaab, would not hesitate to escalate its terrorist attack as it has been witnessed in Kenya since some of Al-shabaab members are Kenyan unemployed youths who are not of Somali origin and difficult to identify as Al-Shabaab sympathizers. [43] Another factor which would not help any aggressive Kenyan action is the political equation inside Somalia which is unstable, both inside and outside its parliament. [44]

4. CONCLUSIONS

In order to uphold Kenya's legitimacy, it is vitally important for this country to undertake a preemptive and preventive war against Al-Shabaab. A right of self-defense that encompasses both actions done in response to an armed attack, and actions done in anticipation of an armed attack, are provided by international law. However, the

extent of the customary rules remains somewhat controversial.

We argue that the notion of imminence should be extended to allow for pre-emptive strikes against terrorist groups. However the dangers that might arise from an alteration of the existing framework are numerous. To extend these requirements too far for example, would leave the notion of self-defense open to abuse, and could give states an opportunity to cloak aggressive military strikes under the mantle of pre-emptive self-defense.

Despite this, the notion of pre-emption is permitted in international law, and therefore, Kenya was justified legally to carry out pre-emptive and preventive war against Al-Shabaab. Kenya should seek to justify its actions in a multilateral setting such as the Security Council, ensuring that it does so with credible evidence. It will also give Kenya an option for pre-emptive and preventive war against Al-Shabaab action that conforms to international law.

After the devastating Nairobi terrorist attacks in August 7, 1998 and November 28, 2002 in Kikambala, Mombasa Kenya *“had the right to defend itself against continuing terrorist attacks mounted by the Al-Shabaab. Kenya has no right, however, to invade another state because of speculative concerns about that state’s possible future actions. The current international order does not support a special status for any member or a singular right to exempt itself from the law. To maintain a legal order that restrains other states and to uphold the rule of law, Kenya should continue its conservative commitment to limit the unilateral use of force, and reject a*

reckless doctrine of preemptive self-defense”. [45] It is its right to suggest that the confluence of international terrorism represents a unique and deadly challenge to Kenya and the international community. The legitimacy of traditional preemptive action is already widely accepted as implicit in the right to self-defense. More assertive measures of preventive action before an imminent threat arises may at times be necessary.

5. RECOMMENDATIONS

A. Kenya Defence Forces (KDF) had advantage when it launched a pre-emptive and preventive war against Al-Shabaab. It chose the timing for the incursion, and it had the initiative. However, those advantages will diminish should the war be more than a single campaign. The incursion will lose momentum over time, and Al-Shabaab may be able to rally, regroup, and counterattack in various ways similar to what happened against Ethiopian military. Kenya Defence Forces (KDF) have achieved rapid victory, it has been fairly common in history for that victory to be marred by *“the war after the war”*. Hence the need for a proper exit strategy.

B. Kenya Defence Forces’ (KDF) pre-emptive and preventive military action against Al-Shabaab should have the character of a raid, not of an invasion. Strategists should be pragmatic. The issue is not the desirability of conquest, enforced regime change, and societal remodeling, but rather their feasibility and costs. A swamp-draining motive behind the pre-emptive and preventive option is simply not sustainable. This has been confirmed by the Kenyan government admitting to the public

university striking lecturers and public hospital striking doctors that their demand for pay hike cannot be met for the time being because of the cost of war in Somalia.

C. Though judging from its past reactions which advocated for diplomacy, Kenya Defence Forces' (KDF) pre-emptive and preventive action was rare and it was a justified case. In future, Kenya Defence Forces' (KDF) cross border incursion must be the last resort, not temporally, but with respect to the evidence-based conviction that the non-military instruments of policy cannot succeed. There should be convincing intelligence facts to the

effect that the conditions to be forcibly preempted and prevented would result to catastrophic consequences. The benefits of preventive military action must be expected to be far greater than the costs. There should be international support for Kenya Defence Forces' (KDF) pre-emptive and preventive action.

D. Demobilization and reintegration of Kenyan unemployed youths who had joined the terrorist group Al-Shabaab by providing amnesty, education, vocational opportunities and employment for former combatants may prevent them from rejoining Al-Shabaab terrorist group.

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