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Legality of Anticipatory Self-Defense in International Criminal Law: Special Case Studies in Focus

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ABSTRACT

On February 24, 2022, a significant international event transpired as Russian military forces crossed into Ukraine, initiating a full-scale conflict under the assertion of Anticipatory Self-defense. This development has sparked renewed discussions and inquiries into the legal and practical dimensions of Anticipatory Self-defense as a pretext for military actions. Notably, Anticipatory Self-defense has been invoked in the past, most notably by the Bush administration during the Iraq War and currently by the Israeli government in various contexts. In a similar vein, President Vladimir Putin employed the doctrine of Anticipatory Self-defense to legitimize and provide a legal basis for the Russian military's actions in Ukraine.

This research paper seeks to undertake a thorough and systematic exploration of the essentials and legal aspects of Anticipatory Self-defense as a concept, examining its application and relevance in contemporary international relations. The primary objective is to shed light on the justifiability and legality of utilizing Anticipatory Self-defense as a rationale for military intervention, with a specific focus on the recent events in Ukraine. Through a comprehensive analysis that combines legal, historical, and political perspectives, this research endeavor aims to provide a nuanced understanding of Anticipatory Self-defense, its utilization by different nations, and whether it can serve as a valid legal basis for military actions.



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1. Introduction

In the ever-evolving landscape of modern warfare, the dynamics of international law have undergone a profound transformation. Recent events, notably the Russian invasion of Ukraine on 24 February 2022, gained significant prominence as Russian President Putin justified the invasion by citing an imminent threat from NATO. The restriction on the use of force is given under Article 2(4) of the UN Charter and the Russian invasion is a clear violation of the Charter. This brought the idea of anticipatory self-defense into the global spotlight, sparking intense debates on its legitimacy and boundaries. As nations grapple with unprecedented threats, the established principles of self-defense, as outlined in Article 51 of the UN Charter, have come under rigorous scrutiny. During the border tensions between Britain and the United States in 1837, the devastation of the American steamboat "Caroline" by British forces highlighted critical principles (necessity, immediacy, and proportion) that continue to exist as basics of anticipatory self-defense. These principles, deeply rooted in the Caroline incident, shape contemporary discourse surrounding pre-emptive self-defense. Anticipatory self-defense, invoked by nations such as the United States during the Iraq War under Bush's perspective, asserts that nations possess the authority to protect themselves from potential threats even before an enemy launches a military assault, without waiting for an imminent peril of attack to materialize (The White House, 2022). Furthermore, Israel's use of pre-emptive strikes against Iraq, Palestine, Syria, and Iran, has ignited intense debates surrounding the legitimacy and boundaries of this concept. In the face of evolving threats and global tensions, this study delves into anticipatory self-defense's complexities, aiming to reveal its vital role in protecting nations and their citizens. By meticulously analyzing case studies, our research aims to broaden perspectives and enhance comprehension of this crucial aspect of international law.

2. Caroline Test

The Caroline case, also known as the Caroline affair, holds immense importance in international law and has greatly impacted the idea of anticipatory self-defense. This incident took place back in 1837 when there were border tensions between the United States and Canada, which was under British control. At that time, during the Canadian insurrection in 1837, rebels were getting ready in the U.S. territory to take hostile actions against the British authorities (Moore, Bassett, 1906). Specifically, during this period, the rebels engaged in looting a U.S. arsenal situated in Buffalo to acquire weapons and ammunition (Moore, Bassett, 1906). The American steamship named "Caroline" was harboured along the U.S. shore of the Niagara River. Close to its location, were rebels who were opposing the Canadian government that had set up their camp. The steamer was utilized by sympathetic Americans to transport essential provisions and weapons to support the rebel group's cause (Waxman, 2018). The steamer "Caroline" was actively providing support to the rebels in Upper Canada by reinforcing and supplying them from ports located in the United States (Jennings, 1938b). During that period, while the steamship "Caroline" rested along the American shore of the Niagara River, a group of armed individuals led by a British officer crossed the river. They went on to burn the vessel and released it to drift downstream over the waterfall (Mallison, 1991b). The severely damaged steamer was swiftly carried over Niagara Falls by powerful river currents. After the incident, various public reports emerged, but they were often exaggerated and inconsistent. It was believed that one American lost his life during the attack and the subsequent gunfire (Kosař, 2013).

The United States grew furious over this incident. When the U.S. government protested on this issue, Britain tried to justify its act by claiming self-defense as a reason for destroying the vessel. This Caroline incident sparked diplomatic tensions among the United States, Britain, and Canada. America viewed it as an unjustified attack, while Britain argued that it was necessary, as America failed to address these security concerns. But the U.S went on with its policies and the situation escalated further with the initiation of the trial of a British citizen in New York. This resulted in the worsening of relations and hinted at potential conflict between the US and Britain. Despite this, both nations pursued diplomatic solutions. Led by

Secretary of State Daniel Webster and British representative Lord Ashburton, negotiations resulted in the Webster-Ashburton Treaty. This treaty not only addressed the legal aspects of the Caroline incident but also resolved border disputes, preventing the outbreak of war and promoting the conflict-free settlement (Kosař, 2013).

The Caroline incident intensified diplomatic strains between the United States and Britain, underscoring differing views on self-defense. However, through diplomatic negotiations and the Webster-Ashburton Treaty, the parties managed to resolve their differences and prevent the imminent threat of armed conflict. The Caroline case has been referenced in numerous legal texts and judgments, and it continues to serve as a significant precedent in discussions surrounding self-defense under international law. Experts and legal scholars frequently cite this incident when examining the prerequisites and restrictions on anticipatory self-defense. Therefore, the Caroline incident stands as a conventional resource and point of reference for anticipatory self-defense in International law (Waxman, 2018).

3. The legality of Anticipatory Self-Defense under Article 51 of UN Charter

Article 51 of the UN Charter deals with the self-defense of states which states as follows;

“Nothing in the present Charter 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 the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

Overall contextual interpretation of this section reveals that Article 51 tells us about four major things;

- Self-defense is the inherent or innate right of the states
- Self-defense will be used only when armed attack occurs
- Self-defense will be used after the Security Council has taken its measures
- Actions taken in self-defense will be conveyed to the Security Council instantly

Anticipatory self-defense extracts its legality from Article 51 of the UN Charter. The word “self-defense” is used in Article 51 which is interpreted by many legal experts that anticipatory self-defense is not a right given by the UN charter. They also exclaim that the words used in Article 51 “an armed attack occurs” which means that the state can use its right of self-defense when an armed attack actually happens. It cannot be used only in anticipation which gives no right of anticipatory self-defense (Garg, 2020).

However, when we see customary International Law about self-defense it demonstrates us that the right of anticipatory self-defense is included in the right of self-defense. As Hugo Grotius wrote in his book “The Law of War and Peace” in 1625 self-defense is not used only after an attack happens but can also be used in advance. He further stated, “It is lawful to kill the one who is preparing to kill you”. Emerich De Vattel, a famous Jurist, wrote in his book “The Law of Nations” in 1758 that the safest plan is to prevent evil which means that you can use anticipatory self-defense to prevent evil and casualties (Rene, 2021).

The wider interpretation of Article 51 also shows that a state can use anticipatory self-defense because when we see the jurisprudence and purpose behind the right of self-defense it appears that it is given to save the people and big damage to that country (Shah, 2010). Therefore, if a country does not use its anticipatory self-defense and delay in self-defense makes it unable to defend its people and territory making the use of Article 51 useless (Rene, 2021). For example, if a country plans to use nuclear weapons on a state and it waits till it happens so until then big destruction and damage would have been done which

would be irrevocable and incurable. According to Lord Goldsmith, the notion of self-defense is not a static concept but it will evolve and change according to the circumstances. The notion of self-defense cannot be static because the world is evolving so modern devices including weapons, arms, tools of war, and new techniques of destruction. After seeing the reason and purpose behind the inclusion of Article 51 in the UN charter, whether the word anticipatory self-defense is not incorporated in the language of Article 51 but it never intended to restrain a state from using the right of anticipatory self-defense when the threat of attack is imminent and fatal for it that it will have no other option but to terminate that attack without using force (Bentlehem, 2012).

There is no doubt that anticipatory self-defense has some limitations and it has a very narrow scope under Article 51 of the UN charter. The main principle which is the basis of anticipatory self-defense is that threat must be imminent which was clearly described in the Caroline incident as it will be discussed in detail later. The state must use military force as its last resort and it must use force proportionately in anticipatory self-defense (Justia, 2023). Furthermore, article 51 contemplates two more conditions for using the right of self-defense, first one is that it will be used after the Security Council has taken its actions to establish peace and to avoid a war, and the second one is that after taking action in self-defense a state must report actions taken in self-defense to the Security Council (UN Charter, 1945).

It means that Article 51 of the UN Charter does not restrict states from using the right of anticipatory self-defense but its wider interpretation shows that it only gives a narrow scope to the right of anticipatory self-defense.

4. Elements of Anticipatory Self-Defense

There are three basic elements of anticipatory self-defense as they were discussed in Caroline's case;

- Immediacy
- Necessity
- Proportionality

5. Immediacy

The most important element of anticipatory self-defense is the imminence which means that there was an instant threat and there was no other means that would have been used to end the conflict. There must be a clear and present danger of attack from other states (Green, 2015). When we determine whether there was a need for anticipatory self-defense or not, imminence will be the determining legal factor in it. The problem lies here in what will be called imminent as different jurists define imminence in different ways as Lubel said imminence is the regular feature in anticipatory self-defense which will justify the act (Mottershaw, 2008). There is no definition of imminence given in International law so it will be decided each time according to the context and situation. There should be a specific and identifiable threat, this right cannot be used only based on rumors. As we know it was recognised in the post-1945 era so it all depends on each scenario (Mayne, 1999). In the case of Islamic Republic of Iran vs United States of America 2003 the burden of proof will lie on the party to prove the imminent threat that used the force (Iran vs US). It means that the right of anticipatory self-defense cannot be used arbitrarily but a state must have proof of an imminent threat.

6. Necessity

Another important element should be considered while using the right of anticipatory self-defense. Necessity means that there was no other choice left for a person or state which would have been used. The threat was so instant and overwhelming that it became necessary to act on it (Byers, 2002). For example, if other states are just preparing for war and there is no instant threat then anticipatory self-defense cannot be used. The right of anticipatory self-defense is used when conflict cannot be solved by peaceful methods then force can be used but after fulfilling all prior conditions. Further necessity means that it must be

reasonable and should not be excessive. It also depends on the nature of weapons as Israel attacked Iraq on the basis that they were preparing nuclear weapons in 1981, later on, it was declared that they were not doing anything against the directions of the UN (United Nations. Dag Hammarskjöld Library). So, it all depends on whether there is a need or not which will be decided with strict criteria.

7. Proportionality

The third most important factor that should be considered while seeing the right of anticipatory self-defense is proportionality. It means that you use such force which is proportionate to stop the threat or act of another person or state (Kosar, 2013). It must be proportional to established defensive necessity which means that excessive force must not be used. The force that is allowed in self-defense is the force that accomplishes the goal (Wilmschurst, 2006). The goal is to end the threat, not the person or state in a conventional sense. Force should always be used in a limited way, it must be used where necessary and in a proportion that prevents the attack from occurring (Upeniece, 2018). For example, if a state is planning to use nuclear weapons, it is possible to deactivate that weapon so there is no need to destroy the city or the whole country. The proportionate force in this regard will be which will end that threat. So, when a state utilize its right of anticipatory self-defense, the action or force used must be proportionate.

8. Case of Israeli Right of Pre-Emptive Strikes

Israel is the prime example of using pre-emptive strikes in Iraq, Palestine, Syria, and Iran to keep its existence. The country is continuously under threat both by physical attack but also by imminent attacks caused by destructive threats from various states (Rene, 2021). It conducted an aerial raid under Operation Opera on Iraq's nuclear facilities in 1981, considering it necessary. This was done under the name of "Begin Doctrine" which justified the preemptive nature of the strike done by the Israeli Government against the enemies to secure the defense. Starting in the 1960s after the attack on the United Arab Republic, the doctrine was also invoked in 2007 against the Syrian nuclear facilities in 2007 and Iraqi nuclear facilities in 2009. Another debate on anticipatory self-defense started which expanded the scope of anticipatory self-defense as no international law prohibited the state from maintaining the life of its citizens. However, the UN passed the Security Council Resolution 487 condemning the attack and calling it a "clear violation of the Charter of the United Nations and the norms of international conduct" (UN Resolution, 1981). Many legal jurists like Timothy L. H. McCormack argued that the precondition of anticipatory self-defense was completed during the Israeli attack on the Iraqi facilities as the UN has already confirmed the presence of nuclear facilities capable of enriching the uranium (McCormack, 1996). The main purpose of anticipatory self-defense is to tackle the upcoming attack and in the case of a nuclear attack, the destruction is too widespread and strong that it can end the capacity to retaliate. Thus, the attack even if condemned by the UN has a strong legal base. In the nuclear age, the legal utility of anticipatory self-defense has widened and can not be restricted to the classical definition (Beres, 2021).

9. Bush Doctrine and Iraq War in the Eyes of International Law

The Bush Doctrine and its subsequent implementation during the Iraq War have continued to fuel heated debate in the field of international law. The legality of anticipatory self-defense, a concept strongly advocated by the United States under the Bush administration, has been a focal point of contention, leading to in-depth analysis and discussion. Following the devastating incidents of September 11, 2001, known as 9/11, the United States crafted a strategic framework, as articulated in its National Security Strategy released in September 2002. This approach embodies the idea that a strong offense is the most effective defense, reflecting the idea that proactive measures can enhance national security (The National Security Strategy 2002, 2007). Notably, the approach emphasized America's determination to initiate preventive measures before any potential threat materialized. The declaration made a firm stance, emphasizing that if necessary, they would take independent actions to protect their people and country by preemptively countering terrorists based on the principle of self-defense (The National Security Strategy 2002, 2007).

In a span of under half a year, President George W. Bush took a step further by broadening the scope of pre-emptive measures to encompass hostile governments actively pursuing weapons of mass destruction, with Iraq being a primary focus. President Bush's stance was rooted in the belief that waiting until an impending threat becomes evident is impractical. He argued against the notion that terrorists or authoritarian regimes would give prior notice before initiating an attack, asserting that by the time such a threat fully materializes, any response would be inadequate and belated (Diehl, 2011). Bush articulated at West Point that, nations should have the authority to safeguard themselves from a range of threats even before the adversary initiates a military strike, without waiting for an immediate danger of attack to materialize. Bush contended that acting only when threats have fully materialized leads to dire consequences (President Bush Graduation Speech at West Point, 2002).

The distinction between the existing methods and the perspectives of the Bush administration revolves around the contentious question of whether using military force in self-defense should be allowed only when facing an immediate and tangible threat, adhering to the conventional notion of self-defense, or should it also encompass preemptive actions in the presence of possible but not definite danger, as advocated by the Bush Doctrine (Eenmaa, 2005). According to the Bush Doctrine, the pivotal aspect is not necessarily pinpointing the precise time and location of an impending attack. Rather, the emphasis lies on recognizing the potentiality of an attack in the future (Bukhari et al., 2020). From this perspective, if such a potential threat is discernible, the state is granted the authority, as per the Bush Doctrine, to proactively intervene and prevent the attack through preemptive measures, which could potentially include the deployment of armed forces (Eenmaa, 2005). The foundation of the Bush Doctrine's legal justification stems from the evolving nature of warfare and the limitations of the United Nations charter in dealing with these emerging threats. The U.N. Charter's clauses discussing the use of force, notably Article 51, that address the employment of force, particularly Article 51, allow for acts of self-defense but only in response to an actual attack (Diehl, 2011).

Following this perspective, the United States asserted its entitlement to engage in preemptive measures against Iraq under Saddam Hussein and other perceived adversaries (The National Security Strategy 2002, 2007). In a televised interview on February 8, 2004, George Bush openly questioned the established idea that immediacy was necessary for the preemptive use of military action. He emphasized the importance of addressing threats before they escalate, stating that it is crucial to act before they become imminent. Waiting until they reach that stage is too late (Kumar, 2014). Bush's rationale for launching the 2003 invasion of Iraq rested on the notion that America had to confront threats at their source before they unexpectedly manifested in American territories and towns. He emphasized that terrorists and states supporting terrorism don't provide warnings through formal declarations. Merely responding after their initial strike isn't self-defense, it's a path toward self-destruction. Certainly, the military intervention led by the United States in Iraq was not a reaction to a direct armed attack. Instead, it was a preemptive response to a perceived potential threat (Sapiro, 2003). In essence, the implementation of the Bush Doctrine during the Iraq War has ignited contentious debates. These debates have questioned long-standing international legal standards and emphasized how self-defense principles are adapting in the face of emerging threats (Baksh et al., 2020).

10. Russian Invasion and Anticipatory Self-Defense

24 February 2022 marked the day when Putin announced a full-scale invasion of Ukraine based on the imminent threat of invasion from NATO. A Russian representative legitimized the attack in the UN through Article 51 of "taken by Article 51 of the UN Charter in the exercise of the right of self-defense." and calling it "our actions are self-defense against the threats posed to us" (Address by the President of the Russian Federation, 2022). The use of force is prohibited by Article 2(4) of UN Charter and the

Russian invasion is a clear violation of the charter (Charter of UN, 1945). Anticipatory self-defense has a certain test that can be used to evaluate the legitimacy of the threat. Firstly, the threat should be immediate and there should be an absolute necessity. Putin alleged that NATO had planned to attack Russia but the NATO forces around the border of Russia were nominal. Also, there was no indication of building up NATO military on the borders of Russia (Schmitt, 2022). Thus, the Russian anticipation of threats from NATO forces was completely false and farfetched. Furthermore, Russia accused Ukraine of developing bioweapons funded by the US but the news both lack the credibility and immanency required to invoke anticipatory self-defense (Horton, 2022). Later, the Top Disarmament Official confirmed that the accusation of Russia regarding the biowarfare claims is baseless (UN Press, 2022). Thus, without an imminent and probable attack, the use of force on such a large scale is a prima facie violation of international law (Boyle, 2015). For anticipatory self-defense, proportionality and necessity are also considered. The Russian invasion of Ukraine on all fronts does not meet the criteria of proportionality. Also, Putin has failed to provide the ultimate necessity to do this attack (Green et al, 2022). Thus, the whole attack by Russia was based on the speculation of a non-imminent, unreal, and mild threat that did not fulfill the requirements of anticipatory self-defense (Majid, 2022).

11. Conclusion

Summing up the debate, anticipatory self-defense has undergone significant development, and use of it as a tool to legitimize illegal attacks on other countries has also increased. Therefore, the paper offers a perspective on the redefined interpretation of anticipatory self-defense. The traditional understanding of imminence, necessity, and proportionality in self-defense, as outlined in Article 51 of the UN Charter, has undergone significant reinterpretation. The Bush Doctrine, exemplified in the Iraq War, challenged established norms by advocating preemptive action against potential threats. This shift blurred the lines between imminent and potential danger, sparking intense legal debates. The Russian invasion of Ukraine further tested these boundaries. President Putin's assertion of an imminent threat from NATO lacked credibility, failing the imminence criterion. The absence of proportionality and necessity in the large-scale invasion highlighted the misuse of anticipatory self-defense. As the concept evolves, balancing a nation's security with legal principles is crucial. In navigating the complex terrain of modern warfare, it is imperative to underscore the significance of the key elements—imminence, necessity, and proportionality—within the evolving paradigm of anticipatory self-defense. These elements not only serve as the bedrock of responsible military actions but also act as the compass guiding nations toward a judicious application of this concept. As international discussions persist and legal frameworks adapt, a nuanced understanding of these elements will be pivotal in shaping the ethical and legal contours of anticipatory self-defense, ensuring its rightful place in the realm of global security strategies.

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