



PREEMPTIVE WAR UNDER THE PRINCIPLES OF INTERNATIONAL LAW

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Abstract:

Different opinions exist regarding the legitimacy of preemptive war, and the controversy surrounding it persists. Preemptive war is a military escalation undertaken by a state to thwart a potential or imminent military intervention. This type of warfare raises numerous questions. In terms of legitimacy, states employing this strategy seek to justify their actions as a means of self-defense and safeguarding national peace and security. They view preemptive attacks as one of the viable options under certain circumstances. Nevertheless, preemptive wars raise significant concerns about the preservation of global peace and stability.

Keywords: Preemptive war - Military intervention - International peace and security.

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I. INTRODUCTION

The first subtitle opens with an introduction that presents the specific problem under study and describes the research strategy. The request for peace and tranquility has existed since the dawn of humanity, closely tied to the essential need for survival amidst conflicts. As the history of mankind is marked by battles, wars, and armed conflicts—regardless of their justifications or names—they represent an assault on human beings, their safety, and their spiritual values. Nonetheless, power has remained a cornerstone of international relations since ancient times. The term "preemptive war" has long entered the field of international relations, serving as a tool employed by powerful states to regulate their relations in defense of their own interests, thus sparking extensive debate regarding the nature of international relations.

Thus, the study problem can be defined as follows: to what extent can preemptive war be considered an act of aggression? To answer this question, the research is divided into two chapters

Based on these two chapters, the study will be conducted by following the analytical method and, at times, the comparative method as it serves the subject.

1. The Essence of Preemptive War

In this section, we will address the origin and definition of preemptive war by legal scholars in the first subsection and distinguish the term preemptive war from other similar terms in the second subsection

1.1. The Origin and Definition of Preemptive War

The strategy of preemptive war was uncommon in ancient times, as battles often occurred after an army was directly attacked by the enemy. With the advancement of military technology and increased international tensions, preemptive wars have become a focal point for states and military leaders.

1.1.1 The Origin of Preemptive War

The concept of preemptive war is relatively modern, yet it has ancient roots, dating back 2500 years. It was legitimized by Aristotle and King Philip II of Macedon when Greece invaded Persia to bring the East under Western rule. This indicates that thinkers who coined this new and precise term did so after witnessing events that allowed them to understand and study this theory.²

However, some believe that preemptive war emerged in modern times, particularly upon reading ³Hugo Grotius's "On the Law of War and Peace" in 1625, where he stated, "It is lawful to kill someone who is preparing to kill you,"⁴ indicating the legitimacy of preemptive war in self-defense if the attack is imminent and inevitable. The United States adopted preemptive war as a new strategy in its military policy after the events of September 11, 2001. While the right to self-defense is legally valid, there was confusion between terrorism and the right to self-defense.⁵

The 1937 Geneva Convention, in Article 1, Paragraph 2, defines acts of terrorism as criminal acts directed against a state intending to create a state of terror among specific persons, groups of people, or the general public.⁶

1.1.2 Definition of Preemptive War

Preemption involves initiating a war in anticipation of an imminent attack or as a strategy to strike first before the other party launches a suspected attack after receiving a warning of an imminent threat.⁷ Various thinkers have defined preemptive war:

- Noam Chomsky believes that preemption is relevant when a threat is imminent or on its way. In this context, preemption serves to confront an adversary preparing for an imminent attack, especially when their forces are in heightened combat readiness. Thus, the concerned state decides to surprise the adversary with an attack to neutralize or possibly destroy its military capabilities completely.⁸
- Richard Haass views preemptive war as a response to intelligence warnings about an imminent military attack from the enemy. It occurs unexpectedly amid imminent or actual attacks.⁹

It can be said that preemptive war begins with the conviction that an enemy attack is inevitable. This type of war results from potential actions against the attacking state and is referred to as a "preemptive strike," targeting enemy forces already deployed in offensive positions, ready for an actual attack.¹⁰

1.2. The Difference Between Preemptive War and Similar Terms

Many terms are often confused with preemptive war, including preventive war, legitimate defense, and asymmetric warfare.

1.2.1 The Difference Between Preemptive War and Preventive War

The Chambers Dictionary defines the term "anticipate" as follows: "To predict something and then act as though it is bound to happen".¹¹ According to Niaz A. Shah, this implies that something is certain and inevitably will occur, necessitating a response.¹² O'Connell describes preventive self-defense as a narrower principle that authorizes armed responses to imminent attacks (on the brink of being launched) or when an aggressive attack has already occurred, with the victim being aware that more attacks are planned.¹³

The concept of prevention requires careful calculations of the enemy's various movements, while early preemptive attacks could constitute aggression. As legal scholar Shaw notes, it is generally difficult to pinpoint the dividing line between these two concepts.¹⁴ Preventive war can be defined as a unilateral attack that aims to neutralize the potential future threat posed by an adversary. This means using military force against a specific country to prevent a threat it might pose in the future. The main reason for such a war is not the current threat posed by the adversary but the belief in its potential future intentions. It is a war waged to maintain the current balance of power and prevent a perceived shift from equilibrium to domination and subjugation.¹⁵

Preventive action means "countering specific acts of destruction by the adversary, in situations where waiting until the potential attack occurs is not an option,"¹⁶ essentially equating to deterrence. It also refers to "thwarting an aggressive attack or plans and preparations by the adversary, based on intuition and estimation of potential threats".¹⁷

From this, we can say that despite the similarity between the two terms, both involving the presence of an armed military attack and concerns about a potential threat based on the adversary's intentions, the difference between preventive and preemptive¹⁸ war lies in the nature of the threat and the timing of the response. Preventive war is based on suspicion of a long-term

threat, characterized by the possibility of the adversary developing military capabilities or acquiring advanced means that might be used in the future against the initiating state. The threat in preventive war is both long-term and uncertain. In contrast, preemptive war is based on the suspicion of an imminent attack by the adversary, confirmed by activities and preparations indicating the threat. Therefore, the initiation of preemptive war is urgent due to the anticipated imminent attack, leaving no room for delay. Conversely, in preventive war, there is sufficient time for consideration, planning, and careful strategizing since the expected threat remains distant.¹⁹

1-2-2 The Difference Between Preemptive War and Preventive Defense :

The concept of preventive defense has emerged from the need for states to have legal justifications enabling them to find exceptions allowing the use of force to safeguard their interests. It can be understood as an initiative by one or more states to engage in military actions when there is confirmation or indications supporting the belief that another state or states might launch a military attack. This grants them the right to use their military forces before facing a directed attack on their territory or against military forces affiliated with them outside their territory²⁰, based on the argument that today's world is filled with weapons threatening the security and existence of states. The concept of preventive defense intersects with the concept of preemptive war in that the purpose of preemptive war lies in deterring an imminent aggression with tangible evidence confirming allegations of such a threat, such as the buildup of a state's military forces on the borders of another state as a precursor to an attack. In this regard, it aligns with the concept of preventive defense, which requires the presence of a serious and imminent threat, leaving no room for doubt. However, they differ in that preventive defense is temporary, ceasing once the expected threat is repelled, whereas preemptive war is indefinite as it involves a long-term military intervention to achieve specific goals.²¹

In other words, the fundamental difference is that preventive defense does not escalate to the point of waging war; it is limited to limited strikes to repel the anticipated attack and prevent the opponent from executing its attack, whereas preemptive war lasts longer and seeks broader objectives such as the destruction of the opponent's power. Therefore, preventive defense may turn into preemptive war when a state initiates attacks under the pretext of using the right of preventive defense, then changes its objectives and prolongs its strikes to engage in preemptive war.²²

1-2-3 The Difference Between Preemptive War and Asymmetric War:

All wars are considered asymmetric because opponents are never identical, thus asymmetric warfare (also known as irregular warfare) can take multiple forms, such as:

a- On the operational level (including deception, covert operations, treachery, and terrorism...)

b- On the strategic military level (like guerrilla warfare, massive retaliation, and blitzkrieg...) ²³

c- On the strategic political level, meaning ethical or religious wars and clashes of cultures. Differences may take various forms with asymmetry evident in terms of strength, means, methods, organization, values, and time. ²⁴According to Colonel Ph. Boone of the Ministry of Defense, asymmetric war is defined as a lack of alignment between the objectives and goals and the means of the warring forces. It is also known as asymmetric or non-traditional warfare, characterized by significant and varied differences in military power, organization, and armament or by irregular armed militias adopting guerrilla warfare and insurgency as their strategies of attack. It is marked by control over the rules and conditions of confrontations in

terms of place and time. Referring to the general concept of each, we deduce the difference in that preemptive war is fought against a state preempted by another state due to its suspicion that the former will attack soon, making the confrontation relatively symmetrical because the two states may directly engage militarily after the war begins. Asymmetric warfare, on the other hand, is usually waged by a state against a non-state entity, which could be an organization, individuals, or specific groups, and the capabilities of this entity are extremely weak compared to the state possessing massive military capabilities. The asymmetry here leads the weaker party to employ alternative means capable of defeating the opponent, as seen in guerrilla warfare and insurgency²⁵

2. The principle of sovereignty and Non-recognition of Preemptive War

In this section, we will discuss the legitimacy of preemptive war and its conflict with the principle of sovereignty through the first requirement, and the position of international law on this matter in the second requirement.

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2.1- The Conflict between the Principle of Sovereignty and the Legitimacy of Preemptive War:

Preemptive war is considered one of the most controversial military strategies in modern history, as it requires states to make decisive decisions about launching a preemptive or preventive attack on a potential enemy before it can launch an attack against the state itself or its allies. While some advocate for the legitimacy of this type of war, others question whether this negative use of military force is legally and ethically justified and whether it aligns with the principles of international law, especially the principle of sovereignty. This is what we will examine in this section.

2-1-1 The Principle of Sovereignty:

The French jurist "Bodin" defined sovereignty as: "absolute authority that is constrained only by God and the law". However, all definitions indicate that sovereignty is the authority itself exercised within its geographical territory with complete freedom. It also enjoys the element of power, which is the essence of authority. Some classify sovereignty as subordinate and directly subject to the rules of international law, which is referred to as the sole criterion.²⁶ The Dutch jurist "Kloffens" defined a sovereign state as a state that is not subject to the control of another state, enjoying absolute authority over its land, sea, and air territories within the laws in force²⁷. From this, we deduce that the state diminishes its external authority due to its lack of superiority over the sovereignties of other states. Each independent state refuses to be dominated by another state and only adheres to international treaties and agreements.²⁸

As we mentioned in the first section about the definition of preemptive war and stated that it involves preempting an attack, which fundamentally contradicts the principles of international law as it constitutes a violation of the principle of sovereignty and non-intervention, recognized by the United Nations. Sovereignty serves as the sole guarantee for the principle of state independence, while prohibited intervention refers to any illegal action undertaken by a foreign state through coercion and compulsion to achieve

its own interests. Such intervention can be political or military against another state, leading to internal and international problems.²⁹

2.1.2- Legitimacy of Preemptive War:

Article 51 of the United Nations Charter confirms the natural right of states to defend themselves in the event of an armed attack. This right to self-defense continues until the Security Council takes the necessary measures to maintain peace and international security. The article includes conditions and restrictions on the exercise of legitimate defense, and if any state violates these conditions, it would be considered as engaging in an unlawful aggression. This means that the legitimacy of preemptive war is limited to the scope of self-defense and is proven by the presence of the conditions of legitimate defense. Jurisprudence and judiciary consider a state's right to self-defense as a natural right derived from its existence, and international law regulates its exercise without undermining its essence.

2-1 International Law's Stance on the Legitimacy of Preemptive War:

Preemptive war remains a subject of international debate to this day, with some considering it legitimate and others considering it illegitimate. Opinions have varied, and there has been disagreement. Some argue for the necessity of specific conditions for recognizing the legitimacy of preemptive war, including that the threat to the attacked state must be imminent and unmistakable, leaving no room for doubt. Additionally, the response must be proportional to the size of the threat for it to be deemed legitimate. Furthermore, there is a necessity to respect international law, especially humanitarian law, during preemptive war.³⁰ However, others argue that preemptive war lacks any legal basis.

2.2.1- The Difference Between Legitimate and Illegitimate War:

"Legitimate war" and "illegitimate war" are terms used to define the legality and legitimacy of the use of military force by a state or a specific party. This determination is associated with legal, ethical, and political standards related to armed conflicts. The difference between them lies in the following:

1. **Illegitimate War (War of Aggression):** The definition of aggression emerged after World War II according to Article 6 of the Nuremberg Charter, Article 5 of the Tokyo Charter, and Article 2 of Law No. 10 in the Drafting of Crimes against Peace and Crimes against Humanity. It states: "The state's use of its forces against another state for purposes other than legitimate national or collective defense or implementing a decision or recommendation issued by a competent body of the United Nations".³¹ According to Article 8 of the Rome Statute, for the purposes of this statute, the crime of aggression includes any act that grants an individual the authority to control the political or military action of the state or gives them the ability to direct such action, whether through planning, preparation, initiation, or execution of an act that constitutes a clear violation of the United Nations Charter in terms of its nature, seriousness, and scope.³²

2. **Legitimate War:** Legitimate or traditional war, according to the traditional international law definition, is a state of hostility that arises between two or more states, ending the peace between them, and involves the use of armed forces in armed struggle. In such wars, each state seeks victory over its enemies, imposing its will on them and imposing its various conditions to achieve peace.³³

The distinction lies in the state's intention to initiate the attack. If the attack is justified as self-defense, then it is considered a legitimate war. However, if it is based on false pretenses, such as launching a preemptive attack against a state under the pretext that they pose a threat, then it constitutes aggression, which is an illegitimate act. This is the consensus among the majority of legal scholars.

In this regard, the United States traditionally pursued a policy of deterrence and containment in the context of its international relations. However, it abandoned this approach and adopted a new strategy of preemptive attacks to deter any threat to its national security. It implemented a policy of preemptive strikes against any state that attempted to undermine its national security.³⁴

The United Nations Charter and international agreements have not defined the concept of preemptive war. This lack of clarity has led major powers to use military force against certain states, claiming the legitimacy of these actions as they represent legitimate defense. They rely on new concepts such as counterterrorism and others.³⁵

2-2-2 Legal Adaptation of Preemptive War:

The legal adaptation of preemptive war lies in its classification as an act of aggression, which is considered an illegal act of aggression. This is because it directly contradicts Article 4/2 of the United Nations Charter, which prohibits the use or threat of force. A state engaging in preemptive wars typically harbors a premeditated intent to attack another state, and this intent is followed by the actual use of armed force against that state. In both cases, the intent to use force and the actual use of force are fundamentally prohibited by the provisions of Article 4/2.³⁶

International law has not provided a specific definition of international crime; instead, it has deferred to jurisprudence, which has attempted to provide various definitions. Similarly, regarding its elements, international crimes have evolved over time through numerous debates and developments. Current forms of international crimes include war crimes, crimes against humanity, genocide, and crimes of aggression.

In this context, there is no consensus on what constitutes justifications in international criminal law. Opinions and doctrines have varied, and the Rome Statute adopted a different approach by embracing grounds for excluding responsibility without justifications for perpetrating such acts.

II. Conclusion:

Through our study of preemptive war under the rules of international law, the legitimacy of preemptive war remains a subject of debate. However, the United Nations Charter criminalizes the use of military force due to its aggression and harm to humanity, primarily to maintain international peace and security. We have found that there is a faction of legal scholars attempting to broaden the interpretation of exceptions mentioned in the Charter's texts to find a specific loophole for the legitimacy of preemptive war. On the other hand, there are scholars who do not recognize the legitimacy of preemptive war and consider it as aggression because it undermines international security. Through our study, we have reached several conclusions, the most important of which are:

- The use of preemptive war in the manner employed by the United States leads to general international chaos.

- The legality or illegality of preemptive war is not regulated, thus it will remain a subject of dispute.
- Legitimate defense is permissible when all its conditions are met; otherwise, it constitutes aggression.³⁷

Article 51 does not authorize preventive defense or preemptive war.

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