PRE-EMPTIVE MILITARY ACTION: A VALID OPTION UNDER INTERNATIONAL LAW OR A THREAT TO INTERNATIONAL PEACE?

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First, it is one of those topics that necessitate starting with clarification of terminology used. Especially as the title doesn't speak, for example, of pre-emptive self-defence but pre-emptive military action, which may include, beside self-defence, actions with humanitarian aims, i.e. so-called humanitarian intervention not to stop but to prevent an imminent genocide. If we speak of pre-emptive use of military force authorised by the UN Security Council, I wouldn't find many problems with that (overstepping the mandate may be an issue). Much more complicated is the question of humanitarian intervention of a pre-emptive nature not authorised by the Security Council. However, I will leave most of that aside. Though interesting and important in themselves, these topics are not, as I understand, at the centre of our panel's discussion.

Then, there is a predicament with the term *pre-emptive*. Is it analogous with the term *anticipatory* in the sense international lawyers traditionally associate with the *Caroline case* and customary international law with their requirements of immediacy, necessity and proportionality in the exercise of the right to self-defence? *The Caroline case* has established, as we all know, that the use of force in self-defence is permitted when the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation".[2]

Or are we talking about something else, e.g., about pre-emption in the sense of *the Bush doctrine* that is often dubbed as preventive self-defence. Are we talking about self-defence only? There may also be pre-emptive military actions in the form of collective security in cases of threats to international peace and security in order to prevent such threats materializing into breaches of the peace.

In my presentation, I will concentrate on issues of pre-emption that may, or depending on circumstances may not, come within the remit of self-defence.

The Israeli first use of force in the Six-Day War in 1967 seems to be an example of an anticipatory use of force in self-defence in terms of the *Caroline case*, customary international law and, I would argue, also of Article 51 of the UN Charter since the Charter has to be interpreted in the context of existing customary international law. The withdrawal of the UN peacekeepers at the request of President

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[2] 'The Caroline', J, Moore, 2 *Digest of International Law*, p. 412 . See also, R.Y. Jennings, 'The Caroline and McLeod Cases'. 32 *American Journal of International Law* (1938).

Gamal Abdel Nasser, mobilisation and movements of Egyptian forces, and last but not least, the closure of the Straits of Tiran to Israeli navigation, seemed to indicate, with a high degree of probability, that an attack on Israel would have been imminent. Israel, in the UN, referred to the closure of the Straits of Tiran, as an act of war, and therefore didn't raise the defence of anticipatory self-defence. However, I think that if Israel was relying only on this fact alone, its response may have breached the requirement of proportionality. The Israeli response, surely, was much more massive than, say, an on-the-spot reaction in the Straits or something like that. Therefore I would think of the Six-Day War as a war of anticipatory self-defence.

The developments related to the "war on terror" have given support to two hitherto somewhat controversial interpretations of self-defence: it is now more widely accepted that there is room for anticipatory self-defence as well as for what Oscar Schachter, Yoram Dinstein and some others have called *defensive reprisals*. Or rather, in responses to terrorist attacks these two wider interpretations of use of force go hand in hand. Effective responses to typical terrorist pin-prick attacks have to be either carried out *ex post facto* or in anticipation of a new probable attack from the same source. Here, responses can be characterised both as defensive reprisals or acts of anticipatory self-defence.

Now we come to the issue of pre-emption in the meaning of prevention. Michale Reisman in 2003 defined preventive self-defence as "a claim of authority to use, unilaterally and without international authorization, high levels of violence in order to arrest a development that *is not yet operational* and hence is *not yet directly threatening*, but which, if permitted to mature, could be neutralized only at a high, possibly *unacceptable, cost*. It is not hard to imagine circumstances in which PSD might appear justified. Yet if universalized, the claim, by increasing the expectation and likelihood of violence, could undermine minimum order".[3] I think it is well put.

Another international lawyer, Michael Bothe believes that to adapt the right to self-defence to these new perceived threats is unacceptable and would lead to vagueness and increase the risk of abuse. He argues:

[I]f we want to maintain international law as a restraint on the use of military force, we should very carefully watch any attempt on the part of opinion leaders to argue that military force is anything other than an evil that has to be avoided. The lessons of history are telling. If we revert to such broad concepts, such as the just war concept, to justify military force we are stepping on a slippery slope, one which would make us slide back into the nineteenth century when war was not illegal.[4] I believe this to be a dominant position among European international legal scholarship.

In my use of force classes in London I usually compared the two uses of military force that both involved Israel: the June 1967 Six-Day War that many international lawyers, including myself, have considered to be within the frame of legitimate self-

[3] M. Reisman, Self Defense in an Age of Terrorism, ASIL Proceedings, 2003.
[4] M. Bothe, Terrorism and the legality of pre-emptive force, (2003) EJIL 227.

defence and the 7 June 1981 attack on the Osirak nuclear centre in Iraq that in the eyes of most international lawyers, as well as of the UN Security Council, has been a case of breach of international law.

The concept of self-defence is inherently linked to the concept of an armed attack. The mere possession or attempts of acquisition of nuclear weapons cannot be equated with an armed attack notwithstanding how wide an interpretation we give to the concept of "armed attack". Proliferation of WMD and self-defence are phenomena from different legal domains or branches of international law. Proliferation of nuclear weapons may be considered as a threat to international peace and security. When we talk about possible use of force against nuclear proliferation we are not in the domain of self-defence; we are in the domain of arms control or in the domain of threats to international, including regional, peace and security.

Preventive attacks, even if in breach of international law, can be explained or justified by extralegal arguments. As Dean Acheson, a distinguished American diplomat and lawyer, put it when speaking of the Cuban missile crisis: "The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power – power that comes close to sources of sovereignty".[5] I believe that many politicians today think along these lines since there has been surprisingly little said about legal implications of preventive unilateral use of force.

Can it be claimed that a unilateral use of force to preempt a state from acquiring nuclear capability, although illegal is nevertheless legitimate, using the terminology of the Report by the Commission headed by Judge Goldstone? What would that mean? It could possibly mean at least three things. First, that a case under consideration is so unique, so exceptional that existing norms, which formally should cover also that case, in their application to that case have consequences clearly contradicting the object and purpose of that norm (e.g., the application of norms of state succession to the Soviet nuclear arsenal that would have been contrary to the object and purpose of the NPT). Secondly, legitimate although illegal could also mean that existing norms have become outdated because of the radical change of circumstances and in such a case law may change through it breaches (we will have a case of *ex factis jus oritur* instead of *ex injuria jus non oritur* that is not so exceptional in international law). Finally, and bringing all that together, there should be a wide acceptance of legitimacy of such acts, especially among the actors whose opinion matters.

In my opinion, it would be difficult to give unequivocal "yes" answers to any of these propositions. Let us take a concrete situation. The Iranian threat may be, or may be perceived as, unique to Israel but globally it is not much different from other similar situations and therefore it would be difficult to argue that the general limits to the use of force in this case don't apply. This means that if Israel, or Washington for that matter, were to preventively attack Iranian nuclear facilities, such a case will serve as a precedent for further loosening the prohibition to use force. Equally, I don't

[5] *Proceedings of the American Society of International Law*, 1963, p. 14.

think that the international law prohibition of use of force has become outdated; the law of self-defence doesn't require states to behave like sitting ducks waiting for an attack to materialise in order to respond. In 1967 Israel responded within the confines of international law. Finally, I doubt whether world public opinion, the majority of governments and peoples in the region would consider such a use of force legitimate.

Now about possible political implications of preemptive (preventive) use of force in the Middle East. Nobody can be sure what these implications will be. It is not even certain whether an attack on nuclear facilities of Iran will stop, delay, accelerate or restart Iranian military nuclear programmes. In Iran there are not so much mad mullahs (or irrational Shiite clerics, as they are sometimes called) but, for example, quite liberal Iranian students who are in favour of Iran's nuclear weapons. I emphasise, weapons, not nuclear programmes within the NPT or the IAEA mandates. I know less what the Mullahs think (unfortunately, I am not alone here), but I know more about students and their views. Some 5-6 years ago I had in my masters programme at King's College, London a group of Iranian students, who were all in favour of Iran becoming nuclear. Reasons for that you may guess: there was certainly more than one. Not only will Iran quit the NPT, if attacked, but the regime and the people may become more united than they are now. Reading comments by some American politicians as well as reading various analyses of negotiations with Iran, I have a feeling that sometimes it is not only Iranian nuclear ambitions that are at issue, but also a regime change in Iran. The aim of diplomacy should be the change of behaviour not of the regime. Attacking Iran may well strengthen the regime.

Then, what effect will such an attack have in the Middle East? Some regimes, e.g., the Saudi monarchy may welcome an attack against Iran seeing it as "cutting off the head of the snake" (a Saudi euphemism for attacking Iran). But the reaction of the "Arab street" may be rather different and taking into account the current situation in the Arab world, one may be pretty sure that anti-Israeli, anti-American and generally anti-Western sentiments in the Muslim world will become considerably stronger.

Use of force to prevent a state becoming nuclear is an exercise in the balance of power, self-preservation or self-help. As Thucidides wrote about the *casus belli* of the Pelopponesian war, "The growth of the power of Athens, and the alarm, which this inspired in Lacedaemon, made war inevitable". So, Sparta attacked in order to prevent Athens from becoming too powerful.

Then there are, besides *jus ad bellum* issues, also *jus in bello* problems, if facilities containing dangerous forces are attacked. Hans Blix and some others have referred to Article 56 of AP I of 1977 to the Geneva Conventions of 1949 (Article 55 may come into play too) that prohibits attacks against facilities containing dangerous forces, like nuclear power stations. Effects of attacks against some of them may amount to use of nuclear weapons. Though Israel, Iran and the United States are not party to the Protocol, political fallout from such an attack will depend on the nuclear fallout.

To conclude: pre-emptive use of military force is beyond the parameters of self-defence. Is it a threat to international peace? What would be its consequences? To that I would respond that this is one of those situations where we have both known unknowns as well as unknown unknowns, which Secretary Rumsfeld spoke of. We know, or as lawyers say, should have known, that we cannot know whether such a use of force brings about desired aims or not and one can be sure that there will be consequences of which we know yet nothing.

In summer 2002 in Newport (RI) at a conference I attended at the US Naval War College, Adam Roberts, then Professor of International Relations at Oxford, now the President of the British Academy, warned against possible war against Iraq saying something like: listen also to your friends who disagree with you; they wish you well. Today I may say too: listen to friends of Israel who may disagree with views some of you may hold, because they wish you well.