UDK: 341.1:355.01(73)
Received: 1st March 2007
Acepted: 15 June 2007
Original scientific paper

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THE AMERICAN PRE-EMPTIVE STRIKE DOCTRINE AND INTERNATIONAL LAW

The paper considers the extent of the American pre-emptive strike doctrine. It examines the legitimacy of a pre-emptive strike in general, the characteristics of a new American doctrine and its impact on positive international law.

Keywords*: self-defence, pre-emptive strike*

1. INTRODUCTORY REMARKS

The rule prohibiting the use of force is an imperative norm of international law. The permitted exceptions to the rule are the right of self-defence and the use of force with the approval of the UN Security Council.

Although Articles 2, 4 and 51 of the UN Charter, as well as general customary law, prohibit preventive actions in principle, a pre-emptive strike against an imminent attack may be subsequently approved by the Security Council as self-defence. This option is provided by the *Definition of Aggression* adopted within the UN framework, by UN General Assembly Resolution 3314 (XXIX) of 14 December 1974.[1] Namely, Article 2 of the *Definition* provides that the first use of armed force shall constitute *prima facie* (i.e. rebuttable) evidence of an act of aggression, although the Security Council may conclude that such a determination would not be justified in the light of other circumstances. Therefore, for instance, the Security Council may conclude that the first use of armed force was in fact prevention against the imminent aggression for the purposes of self-defence (the so-called pre-emptive strike).

However, the possibility of a pre-emptive strike is rather limited and is to be considered in the light of circumstances determined in a famous *Caroline* case in 1837. Below we consider the mentioned case and the characteristics of the new American pre-emptive strike doctrine, as well as its impact on international law.

[1] For Croatian translation see D. Lapaš, T. M. Šošić (ed.), Međunarodno javno pravo – izbor dokumenata, Zagreb 2005.

2. PRE-EMPTIVE STRIKE LEGITIMACY ACCORDING TO CUSTOMARY LAW

The pre-emptive strike legitimacy according to customary law was laid down in the *Caroline* case in 1837. The *Caroline* was an American steamboat that was transporting supplies of people and provisions from the USA to the rebels against the British rule in Canada. The British forces attacked the ship in the American territory to prevent the rebels' strike, claiming it was in self-defence. The American side asked the British to prove that the necessity of that self-defence was instant, overwhelming and leaving no choice of means, and no moment for deliberation. Moreover, the act justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it,[2] argued the American side and demanded the British proved their action was in conformity with these requirements, as well.

As put forward by Christine Gray, the *Caroline* case attained a "mythical authority",[3] because it first defined the legitimacy of the use of force in anticipation of the coming attack. It defined the imminent danger (the attack), but also the requirement that the use of force be necessary and proportional to a coming attack. In other words, it was emphasized that the use of force must not be punitive.

Any expansion of the right of self defence outside the framework of the formula provided by the *Caroline* case would be legally impermissible.

A large majority of countries have retained the narrow interpretation of self-defence. However, even prior to the terrorist attacks on the USA in 2001 some countries used to refer to the broad interpretation of the right of self defence, comprising the protection of fellow citizens in a foreign territory, the broad right of anticipatory self defence and the use of force to counter terrorist attacks. Besides the US and Israeli actions, we can also recall e.g. the South African and Portuguese actions in the 1960s and the 1970s.[4]

Although they claimed self defence, the actions of some of the afore mentioned countries would more properly be considered as reprisals. Namely, in some cases the countries would use the term self-defence to refer to their armed response to past terrorist attacks, aimed to deter future attacks.

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[2] In 1841, writing about the attack on the Caroline steamboat, American Secretary General Daniel Webster stated that it would be for the British side to show that: ″[...] necessity of self-defence ... /was/ instant, overwhelming, leaving no choice of means, and no moment for deliberation ... Even supposing the need to enter the territory of the US, Britain must show it did nothing unreasonable or excessive; since the act justified by the necessity of self defence must be limited by that necessity, and kept clearly within it …" See also A. D. Soafer, "On the Necessity of Pre-emption", *European Journal of International Law* (hereinafter: *EJIL*), *2003*, Vol. 14, p. 214 *et seq*, J. C. Yoo, "Using Force", *University of Chicago Law Review 2004*, Vol. 71, pp. 8-9, and Andrassy, *Međunarodno pravo*, Zagreb, 1990, p. 362.

[3] C. Gray, *International Law and the Use of Force*, Second edition, Oxford, New York, 2004, p. 120.

[4] For more see *ibid*, pp. 111-114 *et seq*.

3. AMERICAN DOCTRINES

During President Clinton's mandate, particularly after the American missile attacks on targets in Afghanistan and Sudan in 1998, in response to the bombing of the American embassies in Kenya and Tanzania the same year, a new doctrine emerged in American literature, frequently referred to as the *Clinton Doctrine*. Its tenets did not comply with current international law that recognizes self-defence as the sole exception to the prohibition of the unilateral use of force. As one of its principles when recalling the above-mentioned doctrines, scholars would mention e.g. any form of the use of force to protect the vital US interests.[5]

After the terrorist attacks on September 11, 2001 the USA particularly promoted a wide concept of self-defence, which implies a large range of pre-emptive actions. In that respect, it is important to mention *The National Security Strategy* of 2002,[6] drawn up in response to terrorist threats. In the introductory letter President Bush puts forward how the threats to the US security have changed dramatically. In contrast to enemies in the past, terrorists may penetrate open societies and use modern technology to bring chaos.[7] The USA, although constantly striving to enlist the support of the international community, will not hesitate to act alone if necessary, in order to exercise the right of self defence by acting pre-emptively.[8]

The *Strategy* indirectly refers to the pre-emptive self-defence requirements as established in the *Carolina* case, but at the same time also distances itself therefrom. It puts forward the following:

"Legal scholars and international jurists often conditioned the legacy of pre-emption on the existence of an imminent threat – most often a visible mobilization of armies, navies and air forces preparing an attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries […] The greater the threat, the greater the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack."[9]

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5 For more details see D. Lapaš, *Sankcija u međunarodnom pravu*, Zagreb, 2004, pp. 314-315 *et seq*.

6 See the text on www.whitehouse.gov/nsc/nss.pdf.

7 "Defending our Nation against its enemies is the first and fundamental commitment of the Federal Government. Today, that task has changed dramatically. Enemies in the past needed great armies and great industrial capabilities to endanger America. Now, shadowy networks of individuals bring great chaos and suffering to our shores for less than it costs to purchase a single tank. Terrorists are organized to penetrate open societies and to turn the power of modern technologies against us." *Ibid*.

8 "While the US will constantly strive to enlist the support of the international community, we will not hesitate to act alone if necessary, to exercise our right of self defence by acting pre-emptively […]" *Ibid*.

9 *Ibid*, Part V.

From subsequent speeches of President Bush it is also evident that he *de facto* advocates an unlimited right of anticipatory action, even for emerging threats to the USA or its allies that cannot be eliminated without the use of force.[10] It will be too late to wait for the imminent threat, since terrorists and tyrants do not kindly announce their strikes, says Bush.

In the opinion of Bush and supporters of the new American doctrine, often referred to as the *Bush Doctrine*, characteristics, destructiveness and availability of modern weapons and changes in the type of threat to the international system, from irresponsible governments to terrorists in the possession of nuclear weapons have not brought about adequate legal changes.[11] They argue that the security system established by the UN Charter has completely failed and that new solutions are to be found, including pre-emptive strikes.

With a view to the above mentioned tenets of the new American doctrine, the collective security system as established by the UN Charter, which has never been particularly successful, has admittedly been severely endangered recently.[12] It was caused by unilateral actions of the most powerful country and its allies, who bypasssed the UN to counter new threats properly detected by the *Strategy*, but without any provision of adequate response thereto.

However, it should be pointed out that unilateral actions of countries in conformity with the new American doctrine of pre-emptive strike have not managed to change current international law, because the practice has remained limited to

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[10] See for instance *State of the Union Address* of 2003, Part 8: "[…] Some have said we must not act until the threat is imminent. Since we have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words and all recriminations would come too late. Trusting in the sanity and restraint of Saddam Hussein is not a strategy, and it is not an option […]" www.cnn.com/2003/ALLPOLITICS/01/28/sotu.transcript.8/index.html.

[11] Comp. Part V of the *Strategy*, *o.c.*: "The targets of these attacks are our military forces and our civilian population […] As was demonstrated by the losses on September 11, 2001, mass civilian casualties is the specific objective of terrorist and these losses would be exponentially more severe if terrorists acquired and used weapons of mass destruction. The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security […] To forestall or prevent such hostile act by our adversaries, the United States will, if necessary, act pre-emptively. The United States will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression. Yet in an age when the enemies of civilization openly and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather […] The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends."

[12] See invaluable analyses of the collective security system by a renowned American author T. M. Franck: "Who killed Article 2(4)?:Or: Changing Norms Governing the Use of Force by States", *American Journal of International Law* (hereinafter: *AJIL*), 1970, Vol. 64, pp. 809, 836; *Recourse to Force: State Action against Threats and Armed Attacks*, Cambridge 2002; "What happens Now? The United Nations After Iraq", *AJIL 2003*, Vol. 97, pp. 607, 610.

a few countries, and *opinion juris* has not started to develop yet. A large majority of countries have retained the traditional narrow interpretation of the right of self defence.

After the intervention in Afghanistan subsequent to the terrorist attacks on the USA in September 2001, the silence of countries could rather have been interpreted as astonishment and bewilderment, than as an approval. And a majority of countries who gave their approval for the "war" against terrorism tried to avoid principal statements about international legitimacy of such an intervention.[13] After the attack on Iraq in 2003, many countries were not silent any longer, but openly condemned the attack. Even UN Secretary General Kofi Annan declared before and after the Iraqi intervention that it was not in conformity with the UN Charter.[14]

4. FINAL REMARKS

Although there are no indications about new customary law regarding legitimacy of pre-emptive strikes, advocated by the new American doctrine, the actions undertaken in conformity with this doctrine have been most detrimental to the UN, which has been completely marginalized. In fact, the UN has a sole competence to address the terrorist threat, because only an organization that includes (almost) all world countries may adequately respond to such a threat.

The prohibition on the use of force according to international law – regardless of its violations – is one of the greatest achievements of civilization. The acceptance of the new American theory of pre-emptive strikes would result in abrogation of the current prohibition on the use of force, which is impermissible. If international law is to be maintained to restrict the use of military force, the attempts of powerful countries to increase the possibilities of the use of force must remain futile. Otherwise, we would again be in the 19th century.

Sažetak

Američka doktrina preventivnoga udara i međunarodno pravo

Ovaj se članak bavi opsegom američke doktrine preventivnoga napada. Proučava zakonitost preventivnoga napada uopće, obilježja nove američke doktrine i njezin utjecaj na pozitivno međunarodno pravo.

13 See Gray, *o.c.*, pp. 175-184 *et seq*.

14 See e.g. the Secretary General's statement before the intervention at the press conference in the Hague on 10 March 2003, www.un.org/apps/news/infocusneqsiraq.asp?NewsID=421&sID=7 and after the intervention. See e.g. a BBC News interview of 16 September 2004, http://news.bbc.co.uk/1/hi/world/middle_east/3661640.stm.

Iako ne postoje naznake o novome običajnom pravu u vezi zakonitosti preventivnih napada, koje zagovara nova američka doktrina, akcije koje su poduzete u skladu s ovom doktrinom uglavnom su naštetile UN-u, koji je postao potpuno marginaliziran. U suštini, jedino UN ima nadležnost baviti se terorističkim prijetnjama, jer samo organizacija koja obuhvaća (gotovo) sve svjetske države može reagirati na takve prijetnje na odgovarajući način.

Zabrana uporabe sile prema međunarodnome pravu – bez obzira na njezine povrede – jedno je od najvećih dostignuća civilizacije. Prihvaćanje nove američke teorije preventivnih napada dovelo bi do ukidanja današnje zabrane uporabe sile, što je nedopustivo. Ako se međunarodno pravo treba održati zato da bi ograničilo uporabu vojne sile, onda nastojanja jakih država da se povećaju mogućnosti uporabe sile moraju ostati uzaludna, ili ćemo se inače ponovno naći u 19. stoljeću.

Ključne riječi: Samoobrana, preventivne akcije