

Katarzyna Furmanek<sup>1</sup>

### **“Concepts of Preemption, Imminent Threat and Security in the post-9/11 world”**

Security is not an isolated good, but a component of a complex transaction. It costs – in terms of time, money, flexibility, privacy, freedoms and involves other security trade-offs we intentionally or unknowingly make every day. In the wake of 9/11, the security environment is characterized by dramatic change and instability and calls for reinvention of our ideas about security. The situation of uncertainty and global insecurity was even intensified with the unprecedented terrorist attack on America on September 11th, 2001. At the same time, security analysis is becoming much more complex and requires more conceptually sophisticated analytical tools, especially in setting clear criteria for security problems’ definition. The debate over the redefinition of the concept of security and threat perception after the end of the Cold War underwent a decisive shift after the dramatic events of 9/11. As the new threats unfolded, world’s only superpower proclaimed unilateral, preemptive action one of the key elements of its new security strategy. Proclamation of the US National Security Strategy of 2002 triggered an ongoing debate over the legality and moral justification of the policy of preemption based on so-called “imminent threat”.

Understanding the notion of “security” is largely based on the identification of threats. For the past centuries, major security concerns stemmed from the recognition of state-based threats, predominately military in nature, grounded in the realist school. One of the key themes to emerge in the post-cold war era security debate, has been the need to go beyond traditional thinking of security towards broader and more comprehensive approach and focus on non-traditional security challenges. Transnational threats and threats represented by non-state actors of international relations became a key security concern.

---

<sup>1</sup> Mgr Katarzyna Furmanek is a PhD Candidate at the Institute of American Studies and Polish Diaspora of the Jagiellonian University. Her main area of research includes transatlantic security relations in the post-cold war period with special interest in the post-9/11 security policy. In 2004 she graduated from International Relations and American Studies, Jagiellonian University. In 2005 she was awarded with the Sasakawa Young Leaders Fellowship at the School of International & Public Affairs, Columbia University in the New York City, United States.

The increasing prevalence of transnational threats has made it apparent that security concerns transcend national sovereignty and affect communities and individuals across state borders. As a result, scholars have been debating the continued relevance of the state-centric political-military focus of security studies and proposing alternative approaches that widen the types of issues perceived as security threats in nonmilitary dimension. At the core of the new security agenda are the following questions: security for whom, from what, and by what means and instruments? How do we determine the nature of threats and how do we address them?

Substantially, long before the “short XX Century”<sup>2</sup> security was defined in primarily state-centered, military terms. In the absence of international security organization, states were compelled to guarantee their own security with military means. Traditionally, the concept of the balance of power was seen as key mechanism for providing security, while security was perceived as “an absence of threat” or the capability to deter threat with the use of military power. Security was located at the intersection of threats and capabilities.<sup>3</sup> When threats exceed capabilities, states become potential victims, when capabilities exceed threats, a classic security dilemma comes into play<sup>4</sup>.

The objective understanding of security, close to the rationalist paradigm, proposed by Arnold Wolfers (1962) provides more comprehensive definition of security, which: “(...) *in an objective sense, measures the absence of threats to acquired values, in a subjective sense, the absence of fear that such values will be attacked* It must be reminded however, that it is neither politically or analytically helpful to define security

<sup>2</sup> E. Hobsbawm, *Age of Extremes: The Short Twentieth Century 1914-1991*, Michael Joseph, London 1994.

<sup>3</sup> See more [in:] M. Clarke, *New Perspectives in Security*, Brassey's for the Centre for Defense Studies, London 1995; Lynn-Jones S. and S. Miller (ed.), *Global Dangers: Changing Dimensions of International Security*, MIT Press, London 1995, E. A. Kolodziej, *Security and International Relations*, Cambridge University Press, London 2005.

<sup>4</sup> Security dilemma occurs when state trying to increase their security, unintentionally decreases the security of other states. States vis-à-vis states interpret their actions as threatening and perceive their “subjective” security endangered. As a result they arm themselves, which shifts the balance of power and consequently weakens neighboring states. Therefore, in order to restore power equilibrium, neighbor states increase their military capabilities and escalate the conflict leading even to the open warfare. That vicious circle of unintended provocation raises major security concerns, even though none of the states actually desire the conflict. The security dilemma as one of the possible causes of war is later discussed.

[in:] H.Gartner, A. Hyde-Price, E. Reiter (ed.), *Europe's Security Challenges*, Lynne Rienner, London 2001, p.2; R.Jervis, *Was the Cold War a Security Dilemma?*, *Journal of Cold War Studies*, Vol. 3, No.1, Winter 2001, pp. 36-60; Ch. L. Glaser, *The Security Dilemma Revisited*, *World Politics - Volume 50*, Number 1, October 1997, pp. 171-201.

entirely in objectivist-rationalist terms. Taken to extremes, such an approach leads to the situation in which concepts such as security are fetched from outside politics and are supposed to have universal validity. In fact, constructivists stressed the subjective or inter-subjective aspects of security as more important.<sup>5</sup> Essentially, there's no such a thing as a "perfect" objective security – states determine their level of security in relation to other states, so it's subjective by definition. Security decisions are often predestined with subjective perceptions, identities and values and cannot be derived from structures alone. There is always a complex interplay between subjective and objective elements of security.<sup>6</sup>

One of the key themes to emerge from the post-cold war debate on the nature of security has been the need to go beyond the traditional thinking of security.<sup>7</sup> Realist approach to security became inadequate to deal with the new security agenda. The traditional understanding of security was "excessively narrow" and "excessively military" as Richard Ullman suggested in 1983.<sup>8</sup> Similar arguments were made by Barry Buzan, who insisted on broadening the security concept by including economic and social factors.<sup>9</sup> Fundamental geopolitical changes that started in Europe in 1989 unfolded several new challenges that weren't primarily concerned with territorial defense. Issues such as post-communist nationalism, conflicts based on ethnical and religious animosities, ethnic cleansing, the emergence of "rogue" and "failed" states, mass migrations, the environmental degradation and finally, threat of terrorism, became more important for security and conflict prevention<sup>10</sup>. Since 1990 we observed three simultaneous trends in the process of reconceptualisation of security: widening of the

<sup>5</sup> See more [in:] E. Adler, *Seizing the Middle Ground: Constructivism in World Politics*, European Journal of International Relations 3, no. 3, September 1997, pp.319-64; J. T. Checkel, *International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide*, European Journal of International Relations 3, no. 4, December 1997, pp. 473-95.

<sup>6</sup> M. Ayoob, *Defining Security: A Subaltern Realist Perspective*, pp. 121-146. [in:] K. Krause, and M. C. William (ed.), *Critical Security Studies*, University of Minnesota Press, , Mineapolis 1997.

<sup>7</sup> B. Buzan, O. Wæver, J. de Wilde, *Security. A New Framework For Analysis*, Boulder & London: Lynne Rienner 1998, pp. 29-31. See more [in:] B. Buzan, C. Jones & R. Little, *The Logic of Anarchy: Neorealism to Structural Realism*, New York: Columbia University Press 1993; P. J. Katzenstein (ed.), *The Culture of National Security*, New York: Columbia University Press 1996; M. Finnemore, *National Interests in International Society*, New York: Cornell University Press, 1996.

<sup>8</sup> R. Ullman, *Redefining Security*, International Security, Vol. 8, No. 1, 1983, pp. 129-53.

<sup>9</sup> B. Buzan, *People, States & Fear: The National Security Problem in International Relations*, Longman, London 1991.

<sup>10</sup> J. N. Rosenau, *New Dimensions of Security: The Interaction of Globalization and Localizing Dynamics*, Security Dialogue 25, no.3, September 1994, pp. 255-281.

security concept from military to political, economical, societal and environmental dimensions; deepening of the referent object of security from national state to human/societal level and sectoralisation/fragmentation of security (human security, energy security, food security etc.). The second tenet of the post-cold war security debate concerns the nature of the threat<sup>11</sup>, supposedly, the defining feature of the security problem.

The question of threat perception has enormous implications for contemporary international affairs. The answer to this deceptively simple question can differ widely depending on one's beliefs, values and residence. Nevertheless, often underestimated, societal constituent of threat identification and perception became a central premise of contemporary transatlantic relations. Those cross-border or transnational threats, as some prefer "threats without enemies"<sup>12</sup> constitute one of the most challenging security concerns - environmental threats. They are increasingly global in nature and cannot be addressed with traditional, military instruments - as Gwyn Prins puts it: "*You can't shoot an ozone hole*".<sup>13</sup> Environmental degradation is likely to result in interstate conflict over nonrenewable resources scarcities, cause mass migrations of refugees and ethno-national violence and increase economic deprivation<sup>14</sup>.

The terrorist attacks of September 11<sup>th</sup>, 2001 in New York and Washington became a turning point in American perception of security. In 1962, President John F. Kennedy stated, "*We no longer live in a world where only the actual firing of weapons represents a sufficient challenge to a nation's security to constitute maximum peril.*"<sup>15</sup> In 2002, President George W. Bush echoed and extended Kennedy's concerns arguing in the National Security Strategy of the United States of America (NSS) that "*We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.*"

---

<sup>11</sup> There is also an important distinction to be made between "threat" and "risks" – while a "threat" is a potential way an attacker can attack a system, while "risks" involves both likelihood of the threat and the seriousness (scale) of the attack [in:] B. Schneier, *Beyond Fear: Thinking Sensibly about Security in an Uncertain World*, Copernicus Books, New York 2003, pp.17-21.

<sup>12</sup> G. Prins and R. Stamp, *Top Guns and Toxic Whales: The Environment and Global Security*, Earthscan, London 1991.

<sup>13</sup> A. Hyde-Price, *Beware the Jabberwock!: Security Studies in the Twenty-First Century* [in:] H. Gartner, A. Hyde-Price, A. Reiter, *Europe's Security...* p.32-36.

<sup>14</sup> T. Homer-Dixon, *On the Threshold: Environmental Changes as Causes of Acute Conflict*, *International Security* 16, no.2, Fall 1991, pp.76-116.

<sup>15</sup> L. Chang and P. Kornbluh (eds.), *The Cuban Missile Crisis, 1962: A National Security Archive Documents Reader*, New York: The New Press, 1998, p.161.

The main principle of the NSS 2002, reaffirmed in 2006 strategy, is the policy of preemption, elevated in importance and visibility on unprecedented level in the U.S. foreign policy.

Preemption, defined as the anticipatory use of force in the face of an imminent attack, has long been present in world politics and as such is not a Bush' invention. However, the administration has broadened the meaning to encompass preventive war as well, in which force may be used even without evidence of an imminent attack to ensure that a serious threat to the United States does not gather or grow over time, which clearly contradicts the rule of international law. Considerable controversy over the policy of preemption is partially related to the timing of its publishing - few days before planned attack on Iraq, which became – and also to the confusion over the definitions of the word „preemption”, as distinguished from „prevention”.

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.<sup>16</sup> 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 attack/war is launched on the basis of indisputable evidence that an enemy attack is *imminent*. Distinctively, preventive attack/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.<sup>17</sup> The concept of imminence is therefore crucial to the understanding the distinction between preemption from prevention.<sup>18</sup>

---

<sup>16</sup> Other definitions of preemptive/preemptive war/attack can be found in A. F. Lykke, (ed.) *Military Strategy: Theory and Application*, Carlisle Barracks, PA: U.S. Army War College, 1993, p.386.

<sup>17</sup> See also: J.J.Wirtz, J.A. Russell, *U.S. Policy on Prevention war and Preemption*, “The Nonproliferation Review”, Spring 2003, pp. 112-123.

<sup>18</sup> M. E. O’Hanlon, S. E. Rice, and J. B. Steinberg, *The New National Security Strategy and Preemption*, The Brookings Institution Policy Brief #113, Dec. 2002; A. D. Sofaer, *On the Necessity of Pre-emption*,

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.*”<sup>19</sup> 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.*”<sup>20</sup> Stephen Cimbala argues that a “*preventive war is one undertaken by a state in anticipation of an enemy intent to attack at some future date or in response to an expected power transition in the international system which the state considers unacceptable and is willing to go to war to prevent.*” Preemption, on the other hand, “*is a decision to strike first in the belief that an enemy has already decided to attack and is now attempting to implement that decision.*”<sup>21</sup>

Still, there is a great confusion over the terminology in the academic debate. For instance, Nye claims that “*preemptive strike occurs when war is imminent*”,<sup>22</sup> while Mary Ellen O’Connor uses “preemptive” to mean the lack of imminence. She also appears to use „anticipatory” to mean force against an imminent threat.<sup>23</sup> Yoram Dinstein, in contrast, uses all three terms (preemptive, preventive, anticipatory) interchangeably as examples of impermissible use of force, but adopts the term “interceptive” to describe force that is legitimate.<sup>24</sup> For Christine Gray, „anticipatory“ is but another name for „preemptive.”<sup>25</sup> Mary Ellen O’Connell prefers the term „incipience“ as a substitute for arguments over pre-emption and prevention; Dinstein uses this

---

„European Journal of International Law”, vol. 14, no. 2, 2003, p.220; L. Freedman, *Prevention, Not Preemption*, „The Washington Quarterly”, Spring 2003, p. 113; R. F. Grimmert, *U.S. Use of Preemptive Military Force*, CRS Report for Congress 9/18/2002; L. Feinstein and A-M. Slaughter, *A Duty to Prevent*, Foreign Affairs, Jan./Feb. 2004, pp.136-150.

<sup>19</sup> Department of Defense, DOD Dictionary of Military available at <http://www.dtic.mil/doctrine/jel/doddict/data/p/index.html>. It is interesting to note that the Department of Defense does not define what constitutes “incontrovertible evidence” or what qualifies as “imminent.”

<sup>20</sup> Ibidem

<sup>21</sup> Stephen J. Cimbala, *Military Persuasion: Deterrence and Provocation in Crisis and War*, University Park, PA: Pennsylvania State University Press, 1994, p. 77.

<sup>22</sup> J. S. Nye, *Understanding international conflicts: An introduction to theory and history*, New York: Longman 2003, p.157.

<sup>23</sup> M.E. O’Connor, *The Myth of Preemptive Self-Defense*, „The American Society of International Law,” Task Force on Terrorism, August 2002, p. 2.

<sup>24</sup> Y. Dinstein, *War, Aggression and Self-Defence*, Cambridge: Cambridge University Press, 2005, p.168.

<sup>25</sup> C.Gray, *International Law and the Use of Force*, Oxford University Press, 2004, p. 111.

„incipience” terminology as synonymous with „interceptive” i.e. as permitting self-defense against what is usually called an imminent threat.

According to Dan Reiter, a war is preemptive if it breaks out primarily because the attacker feels that it will itself be the target of a military attack in the short term. To Reiter, the essence of preemption, is that it is motivated by fear, not by greed. This definition is limited to perceptions of short-term threats to national security: in contrast, the term preventive war is used for a war that begins when a state attacks because it feels that in the longer term (usually in the next few years) it will be attacked or will suffer relatively increasing strategic inferiority.<sup>26</sup> To Reiter, the time element is a crucial distinction. Robert Harkavy offers a similar definition of preemption and prevention, stating that preemption is usually linked to an immediate crisis situation in which there is an apparent advantage to striking first. Preventive war, on the other hand, involves longer-term premeditated behaviour on the part of one antagonist, often where striking the first blow may not be perceived as crucial.<sup>27</sup>

Most of the above mentioned definitions concentrate on the proximity of the threat – is the threat imminent or more distant, but inevitable? Some of the definitions concentrate on different criteria and focus on the rationale for preemption and prevention. Attention is placed on the interactions between how and why threats might develop in the future and the actions states take to counter these threats. John Lewis Gaddis suggests that preemption implies military action undertaken to forestall an imminent attack from a hostile state, while prevention implies starting a war to keep such a state from building the capacity to attack.<sup>28</sup> Richard Haass likewise argues that preventive uses of force are those that seek either to stop another state or party from developing a military capability before it becomes threatening or to destroy it thereafter. On the other hand, preemptive

---

<sup>26</sup> D. Reiter, *Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen*, International Security, vol. 20, no. 2, Autumn 1995, p.6.

<sup>27</sup> R. E. Harkavy, *Preemption and Two-Front Conventional Warfare: A Comparison of 1967 Israeli Strategy with the Pre-World War One German Schlieffen Plan*, Jerusalem Papers on Peace Problems no. 23, Jerusalem: Leonard Davis Institute for International Relations, 1977, p.7.

<sup>28</sup> J.L. Gaddis, *Surprise, Security and the American Experience*, Harvard: Harvard University Press 2004, p.86.

uses of force Haas defines as based on intelligence warning indicating imminent military action by an adversary.<sup>29</sup>

Other scholars focus on the shifting balance of power between the actor and adversarial/rival state. Alfred Vagts, for example, argues that wars are called preventive “when they are undertaken in order to keep an enemy, who is preparing or suspected of preparing an attack, from striking the first blow at a later date, which threatens to be more unfavorable to one’s own side.”<sup>30</sup> For Bernard Brodie, preventive war refers to “the undertaking to destroy now an already strong rival power one fears may grow faster than one’s own.”<sup>31</sup> Douglas Lemke focuses on the rationale for undertaking preventive military action and defines “the preventive motive” as “present when one state is declining in power relative to another.”<sup>32</sup>

Under both contemporary practice and tradition, what is ruled out is the use of purported self-defense as a justification for the use of force against a mere potential threat, where there is as yet no attack or even imminent attack. In contrast, preemptive self-defense against an imminent or actual attack appears permissible, whereas preventive self-defense – where there is not even an imminent threat – is impermissible.<sup>33</sup> Anticipatory military activities are defined as military actions taken in response to either an imminent threat or to counter a more distant threat within the context of an international crisis. In this respect, the term “anticipatory military activities” includes the traditional concepts of both preemption and prevention.

As Reiter notes, “Preemption is not a theory of war, but rather a path to or scenario for war predicted by some theories”<sup>34</sup>, it is instructive to briefly discuss some of the theories about the causes of war.<sup>35</sup> One of the leading elements of the international

---

<sup>29</sup> R. N. Haass, *Intervention: The Use of American Military Force in the Post-Cold War World*, Washington, DC: Carnegie Endowment for International Peace, 1994, pp. 51-52.

<sup>30</sup> A. Vagts, *Defense and Diplomacy: The Soldier and the Conduct of Foreign Relations*, New York: King's Crown Press, 1956, p. 263.

<sup>31</sup> B. Brodie, *War and Politics*, New York: The Macmillan Company, 1973, p. 25.

<sup>32</sup> D. Lemke, *Investigating the Preventive Motive for War*, *International Interactions* vol. 29, no. 4003, p. 278.

<sup>33</sup> See e.g. M. Walzer, *Just and Unjust wars: A Moral Argument with Historical Illustrations*, United States: Basic Books Inc., 2006, p. 74-75; D. Rodin, *War and Self-Defense*, Oxford: Oxford University Press, 2002, p. 113.

<sup>34</sup> D. Reiter, *Exploding the Powder Keg Myth...*, p. 6.

<sup>35</sup> See more [in:] G. Blainey, *The Causes of War*, New York: The Free Press, 1973; S. Brown, *The Causes and Prevention of War*, New York: St. Martin's Press, 1987; D. C. Copeland, *The Origins of Major War*,

relations literature on the causes of war is – mentioned before - the “security dilemma”. The concept is the heart of structural realist theory: in a “self-help system” one cannot simultaneously improve one’s own security without reducing that of others, because the extent of one’s security is always the extent of the insecurity of one’s opponent.<sup>36</sup> This dilemma characterizes the tension between deterrence and reassurance: If an actor seeks to enhance the credibility of his deterrent threat, he will generally improve his military capabilities and engage in actions that, by definition, would greatly reduce the security of his opponent, which in turn destroys the reassurance measures and frightens the opponent into actions designed to counteract his deteriorating security position.<sup>37</sup> While security dilemma largely increases the possibility of conflict between two adversaries, there are other concepts which refer to measures taken to depress the likelihood of war, such as the deterrence theory.<sup>38</sup>

Reduced to its core, deterrence means “*discouraging the enemy from taking military action by posing for him a prospect of cost and risk outweighing his prospective gain.*”<sup>39</sup> Brodie argues that “*The threat of war, open or implied, has always been an instrument of diplomacy by which one state deterred another from doing something of a military or political nature which the former did not wish the latter to do.*”<sup>40</sup> For Jervis, “*One actor deters another by convincing him that the expected value of a certain action is outweighed by the expected punishment.*”<sup>41</sup> In other words, deterrence involves set of strategies which aim to forestall possible aggression by making the costs of attack

---

Ithaca: Cornell University Press, 2000; M. W. Doyle, *Ways of War and Peace*, New York: W.W. Norton & Company, 1997; R. Gilpin, *War and Change in World Politics*, New York: Cambridge University Press, 1983; M. Howard, *The Causes of Wars and Other Essays*, Cambridge, MA: Harvard University Press, 1983; S. Van Evera, *Causes of War: Power and the Roots of Conflict*, Ithaca, NY: Cornell University Press, 1999.

<sup>36</sup> C. Glaser, *Structural Realism in a more Complex World*, Review of International Studies, No.29, BISA 2003, pp. 403-414; K. Waltz, *Structural Realism After the Cold War*, International Security, Vol. 25, No. 2, 2000, pp.5-41.

<sup>37</sup> J. Mitzen, *Ontological Security in World Politics: State Identity and Security Dilemma*, European Journal of International Relations, 2006, p.3. See also: J. H. Herz, *Idealist Internationalism and the Security Dilemma*, World Politics 2, no. 2, January 1950, pp. 156-158; A. Butfofy, *Offence-Defence Theory and the Security Dilemma: The Problem with Marginalizing the Context*, Contemporary Security Policy 18, no. 3, December 1997, p. 45-47.

<sup>38</sup> There are also other elements of the security dilemma which can contribute to the outbreak of war, including arms races, spiral models, the offence—defense balance model etc.

<sup>39</sup> G. H. Snyder, *Deterrence and Defense: Toward a Theory of National Security*, Princeton, NJ: Princeton University Press, 1961, p. 4.

<sup>40</sup> B. Brodie, *The Anatomy of Deterrence*, World Politics 11, no. 2, January 1959, p. 174.

<sup>41</sup> R. Jervis, *Deterrence and Perception*, International Security 7, no. 3, Winter 1982-1983, p. 4.

unbearable. The basic logic behind deterrence theory is therefore to counter the instability created by the security dilemma by instead creating a situation that hypothetically dissuades states from attacking.<sup>42</sup>

Another important concept underlying “causes of war” is the notion of perception and misperception. The identification and perception of threat involves a wide variety of behaviors. While liberal theorists and realists agree that threat perception is a cornerstone of international relations, there is widespread disagreement on the factors that contribute to the emergence of threats. In particular, the field is deeply divided between those that believe *material* factors such as the balance of military power determine the perception of threat and those that believe *ideational* factors such as shared democratic values determine the perception of threat<sup>43</sup>. Stephen Walt argued that threat perception was a function of four factors: aggregate power, offensive capability, geographic proximity and extended the traditional balance of power theory by the ideational component of “aggressive intentions”<sup>44</sup>. While the first three are objective, the fourth factor is clearly subjective and hardly assessable.

Michael Howard rightly points out that “*the causes of war remain rooted (...) in perceptions by statesmen of the growth of hostile power and the fears for the restriction, if not the extinction, of their own.*”<sup>45</sup> It is therefore essential that the actors involved have an accurate view based on the reliable intelligence and understanding of the situation at hand. Particularly with respect to anticipatory military activities, where the action is taken before an armed attack, the element of misperception, and its consequences, is absolutely crucial. Jervis presents two different types of misperceptions, one that concerns an erroneous view of what elements should be targeted by any deterrent threat and the

---

<sup>42</sup> Jervis points out one of the important caveats of deterrence theory: deterrence is only effective if the other states believe that the “defender” will actually carry out the threatened action, and if the “defender” threatens something that the potential attacker actually values. If, on the other hand, the adversary does not believe that the defender will act, the deterrent threat is not “credible” and will, therefore, do nothing to reduce the likelihood of conflict. In fact, such situations may even make conflict between the two more likely, since the adversary may believe that there will be no, or little, cost associated with attacking—i.e., the attacker does not believe that the defender will actually take any action in response, or that the action taken will be mild. Additionally, if the defender targets something that is not valued by the potential attacker, there will not be any incentive not to attack. See more [in:] R. Jervis, *Deterrence...*, p. 13.

<sup>43</sup> D.L. Rousseau, *Identifying Threats and Threatening Identities: The Social Construction of Realism and Liberalism*, Stanford University Press 2006, pp. 2-28.

<sup>44</sup> S.M. Walt, *The Origins of Alliances*. Ithaca, NY: Cornell University Press 1987, pp.-12-28.

<sup>45</sup> M. Howard, *The Causes of Wars...*, p. 18.

second which is build around the inaccurate view of the credibility of the deterrent threat. If the target state does not believe that the deterred will actually carry out the threatened action, it will not be deterred.<sup>46</sup> Other kinds of misperceptions can originate from erroneous assumptions about the capabilities and intentions of the adversary, as state's military posture and capabilities are not equivalent to its aggressive intentions. In fact, Jervis asserts that statesmen often create a situation that is ripe for misperception, since they often assume that the opposite agents see the world as they see it, they fail to accurately determine whether this is actually true and have much more confidence in their beliefs about the other's perceptions than the evidence warrants.<sup>47</sup>

Most of the factors that contribute to the likelihood of war discussed above have a common underlying function – uncertainty. It is applicable to both the capabilities and the intentions of the adversary, and it tends to increase, at least hypothetically, the probability of a state using anticipatory military activities to deal with threats posed by an adversary. From the theoretical perspective, there are certain structural or strategic elements that make states more or less likely to use anticipatory military activities, such as the strategic advantage of “striking first” and the “surprise” factor, but it must be stressed that states generally restrain from using preemptive and preventive military action.<sup>48</sup>

It appears that there are at least three types of limitations which keep the states from using anticipatory military actions: domestic and political restraints, the rule of international law and institutions such as United Nations with the general ban on the use of force and other legal ramifications enshrined in the UN Charter, and finally, moral objections and normative constraints embodied in the just war tradition.

Political costs of using preemption, in both domestic and international realm, are one of the key factors that influence state's decision about preemptive military

---

<sup>46</sup> R. Jervis, *Deterrence and Perception*, p. 5-8.

<sup>47</sup> Ibidem, p. 5.

<sup>48</sup> According to Van Evera, there are four elements that determine the size of the first-strike advantage: “1. The feasibility of gaining surprise”; “2. The effect of a surprise strike on the force ratio between the two sides”; “3. The offense-defense balance”; and “4. The size of the political penalty on first-strike.” Van Evera also points out on so called “first-strike penalty” where the political costs of preemptive actions are discussed [in:] S. Van Evera, *Causes of War...*, p. 70. More elements of motivation and factors that enable states to use anticipatory military actions is discussed [in:] R. T. Bzostek, *Why not Preempt? An Analysis of the Impact of Legal and Normative Constraints on the Use of Anticipatory Military Activities*, August 2005, pp.60-66.

engagement. Van Evera argues even that the political penalty of using preemptive action can “ (...) outweigh even a large military first-strike advantage, converting a military success into a general political-military failure.”<sup>49</sup> Public support for prospected action also plays an important role and has an impact on political decision-making process. Political regime of the state can also influence the likelihood of using anticipatory military activity. Those arguments are also presented by Randall Schweller, who discusses the variety of different factors that preclude democracies from using preemptive force, public opinion being one of them: “*public opinion inhibits democratic state actors from initiating wars expected to be of great risk and cost*”.<sup>50</sup>

States may also be constrained against using anticipatory military activities because of the precedent that such actions would create for other states. Historically, while using anticipatory military action as a general tool of foreign policy, the United States has argued against a right of preemptive self-defense as a matter of policy and prudence.<sup>51</sup> Acting in its own best interest, the United States has been careful to make only those legal arguments relative to the use of force that it could accept in the hands of other states. International law may restrain the United States from time-to-time, but the benefit of restraining others as well, has been – so far - worth the cost. The United States can hardly wish to see an anarchic regime in which every state is entitled to initiate the

---

<sup>49</sup> Van Evera, *Causes of War...*, p.70.

<sup>50</sup> R. L. Schweller, *Domestic Structure and Preventive War: Are Democracies More Pacific?*, *World Politics* 44, no. 2, January 1992, p. 242. See also: J. S. Levy and J. R. Gochal, *Democracy and Preventive War: Israel and the 1956 Sinai Campaign*, *Security Studies* 11, no. 2, Winter 2001/2.

<sup>51</sup> Notably, the policy of preemption emphasized by the Bush administration, has its deep roots in the American history with some vivid examples of using prevention as a tool for expansion in the XIX century. In the time of international crisis, after gen. Jackson invaded Spanish Florida in 1818, Secretary of State John Quincy Adams told the Spanish ambassador that Spain’s failure to preserve order along the borders justified preventive American action. In 1904 President Theodore Roosevelt announced that the United States would intervene in the Western Hemisphere to uphold civilization. He believed the Europeans would deploy their navies to the hemisphere, seize national customs houses, and thus endanger U.S. security. Decades later, Franklin Roosevelt renounced his cousin’s advocacy of the Monroe Doctrine and declared a “Good Neighbor Policy”. However he did not rule out the preventive use of force. After war erupted in Europe, he deemed it essential to supply the European democracies with munitions and food (*Lend-Lease Act*). In September 1941 when Nazi submarines attacked the U.S. destroyer Greer, Roosevelt misrepresented the circumstances surrounding the incident and declared, that it was the time for prevention of attack. He then warned that German and Italian vessels cruising in the North Atlantic would do so “at their own peril.” Roosevelt justified the U.S. policy by analogy: “*when you see a rattlesnake poised to strike, you do not wait until he has struck before you crush him.*” More [in:] M. J. Arinello, *National Security Strategy of Preemption*, USAWC Strategy Research Project, March 2005, pp.4-6 and A. C. Arend, *International Law and the Preemptive Use of Military Force*, “The Washington Quarterly”, April 2003; pp. 89-93.

use of force against its adversaries in preemptive self-defense, despite the fact of setting such a precedence with its previous actions.<sup>52</sup>

International institutions can also reduce conflict in a number of ways, mainly through creating the framework for multilateral cooperation and peaceful settlement of disputes. As Martin and Keohane argues, institutions can “*mitigate fears of cheating and so allow cooperation to emerge and (...) facilitate cooperation by helping to settle distributional conflicts and by assuring states that gains are evenly divided over time, for example by disclosing information about the military expenditures and capacities of alliance members.*”<sup>53</sup>

There is a considerable debate among scholars concerning the concept of self-defense and its legal standing. Both customary law and modern international law generally seek to outlaw the use of force, permitting self-defense under specific conditions. However, what constitutes legitimate self-defense remain highly controversial topic. With respect to the legality of the use of force in international law, scholars often refer to its early beginnings, namely, to the father of international law - Hugo Grotius. Grotius in his laws of nature, did advocate broad standards for the legitimate use of force, including in „the defense of chastity”, however the argument stating that he advocated unlimited anticipatory action would be a serious exaggeration.<sup>54</sup> In his „*De Jure Belli Ac Pacis Libri Tres*” he writes that “*the danger (...) must be immediate and*

---

<sup>52</sup> The US legal position on the use of force has been somewhat ambiguous when considering the case of humanitarian intervention. The Clinton administration issued no legal justification for using force in Kosovo, but it also did not argue for changing the law or institutions of the Charter. Rather, State Department officials made clear as soon as hostilities ended that the United States did not support a general right of humanitarian intervention. Regarding the official US position on humanitarian intervention see also, in M-E. O’Connell, *Authority to Intervene*, International Legal Challenges for the Twenty First Century, Proceedings of a Joint Meeting of the Australia and New Zealand Society of International Law and the American Society of International Law 303 (June 26-29, 2000); see also C. Gray, *From Unity to Polarization: International Law and the Use of Force Against Iraq*, „European Journal of International Law”, no.13, 2002, pp. 1-15; F. Harhoff, *Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?*, “Nordic Journal of International Law”, vol.70, no.1-2, 2001, pp. 65-119; J.Kurth, *Humanitarian Intervention After Iraq: Legal Ideals vs. Military Realities*, Foreign Policy Institute, “Orbis”, Winter 2005, pp.86-101.

<sup>53</sup> R. O. Keohane and L. L. Martin, *The Promise of Institutional Theory*, International Security 20, no. 1, Summer 1995, pp. 45-46; R. O. Keohane, *International Institutions: Can Interdependence Work?*, Foreign Policy No. 110, Spring 1998, p. 86.

<sup>54</sup> David M. Ackerman wrote in a Congressional Report *on International Law and the Preemptive Use of Force against Iraq*, that “*Hugo Grotius stated in seventeenth century that it be lawful to kill him who is preparing to kill*”. D. A. Ackerman, *International Law and the Preemptive Use of Force Against Iraq*, Congressional Research Service, March 17<sup>th</sup>, 2003, p. 2.

*imminent in point of time (...) but those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived and deceive others*”<sup>55</sup>. The key factor is thus the concept of imminence, which can be found in the cornerstone of XIX century customary law - the *Caroline Case* of 1837.<sup>56</sup>

The *Caroline* was a ship in United States waters suspected by the British authorities in Canada of being used to support Canadian rebels. The British attacked and destroyed the vessel despite its location. In response, the United States Secretary of State, Daniel Webster wrote, “*there must be shown ‘a necessity of self-defense . . . instant, overwhelming, leaving no choice for means and no moment for deliberation’*”<sup>57</sup>. It has been used to establish the principle of anticipatory self-defense as a part of customary law and from this case the three criteria for preemption immediacy, proportionality, and necessity are derived.<sup>58</sup>

The Webster’s imminency requirement also imposes that the attack be ongoing, or at least so imminent that the victim-State has to react almost reflexively to counter it. This requirement has generated enormous debate about precisely when it is that an attack becomes imminent enough to merit preemptive action in self-defense.<sup>59</sup>

Some scholars use the *Caroline* incident as providing customary legal basis for preemptive action. For instance William Taft argues, that US NSS „ (...) *relies on the*

<sup>55</sup> H. Grotius, *Trzy księgi o prawie wojny i pokoju*, Warszawa 1957, p. 175.

<sup>56</sup> *Carolina case* refers to a series of events beginning in 1837 that strained relations between the United States and Canada (and thus Britain). A band of Canadian rebels, led by William Lyon Mackenzie, seeking a more democratic Canada, had been forced to flee to the United States after leading the failed Upper Canada Rebellion. They took refuge on Navy Island on the Canadian side of the Niagara River and declared themselves the Republic of Canada. American sympathizers supplied them with money, provisions, and arms via the steamboat SS *Caroline*. On December 29 1837, Canadian loyalist Colonel Sir Allan MacNab and Captain Andrew Drew of the Royal Navy commanding a party of militia, crossed the international boundary and seized the *Caroline*, towed her into the current, set her afire, and cast her adrift over Niagara Falls. President Martin Van Buren protested strongly to London, but was ignored. On May 29, 1838, American forces retaliated by burning a British steamer SS *Sir Robert Peel* while it was in US waters. The tensions were ultimately settled by the Webster-Ashburton Treaty of 1842 with an expression of regret on the part of Britain that there had not been an immediate explanation and apology for the occurrence. [in:] L.P. Rouillard, *The Caroline Case: Anticipatory Self-Defence in Contemporary International Law*, Miskolc Journal of International Law, vol. 1., no. 2, 2004, pp. 104-120.

<sup>57</sup> State Secretary Webster, *British and Foreign State Papers*, vol. 29, 1840-1841, p.1129, 1138 [in:] A.S.Gorener, *The Doctrine of Pre-Emption and the War in Iraq Under International Law*, Perceptions: Journal of International Affairs, vol.9, no.2, p.35

<sup>58</sup> More [in:] R. Y. Jennings, *The Caroline and McLeod Cases*, *The American Journal of International Law* 32, no. 1, January 1938.

<sup>59</sup> For instance, according to Dinstein, an offended nation need not wait for the actual attack to take place to respond “with the perception of urgency” to the threat. See: Y. Dinstein, *War, Aggression...*, p.219

same framework applied to the British in Caroline... The United States reserves the right to use force preemptively in self-defense when faced with an imminent threat”.<sup>60</sup> In fact, US NSS acknowledges the *Carolina* formula stating that: “Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat — most often a visible mobilization of armies, navies and air forces preparing an attack... “. But the text continues: “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”.<sup>61</sup>

Nevertheless, the ambiguity of the *Carolina* case also raises many questions upon what constitutes the “imminent threat”, how the “necessity” is to be defined, what is meant by “instant” and how long “moment for deliberation” lasts, and most importantly, who is legitimate to determine those elements?<sup>62</sup>

The Webster’s criteria of immediacy tend to be expanded over the ages, and so Michael N. Schmitt introduced the concept of “window of opportunity”, as applied to terrorist attacks. According to Schmitt, the only window of opportunity that exists to prevent a terrorist attack may be “long before a planned attack.”<sup>63</sup> In other words, the specific circumstances of a terrorist attack may not allow interception of the action when it is imminent. In contrast, Michael O’Hanlon, Susan E. Rice, and James B. Steinberg assert that terrorists groups’ past practices and explicit statements provide “an adequate substitute for the traditional doctrine’s requirement for imminent threat.”<sup>64</sup>

Traditional interpretation of the international law allows the anticipatory use of force under strict circumstances. Under the Covenant of the League of Nations the use of force was regulated by procedures elaborated in Article 12, which states that: „*The*

---

<sup>60</sup> W. H. Taft IV, *The Legal Basis for Preemption*, 18 November 2002. Available online at: Council on Foreign Relations: <http://www.cfr.org/publication.php?id=5250>.

<sup>61</sup> United States National Security Strategy 2002, p. 15

<sup>62</sup> T. Taylor, *The End of Imminence?*, *The Washington Quarterly*, 27, no.4, Autumn 2004, p. 61.

<sup>63</sup> M. N. Schmitt, *Preemptive Strategies in International Law*, *Michigan Journal of International Law*, winter, no. 24, 2003, p. 534. See also: *Counter-Terrorism and the Use of Force in International Law*, European Center for Security Studies, The Marshall Center Papers No. 5. Available online at: [http://www.au.af.mil/au/awc/awcgate/marshall/mc-paper\\_5-en.pdf](http://www.au.af.mil/au/awc/awcgate/marshall/mc-paper_5-en.pdf)

<sup>64</sup> M. O’Hanlon, S. E. Rice, J. B. Steinberg, *The New National Security Strategy...*, p.5.

*Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration of judicial settlement or to enquiry by the Council and they will agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council”.*<sup>65</sup> Article 15 however, provides legal conditions of the use of force: *„If the Council fails to reach a report which is unanimously agreed to by members thereof, other than Representatives of one or more of the parties of the dispute, the Members of the League reserve themselves the right to take such an action as they shall consider necessary for the maintenance of right and justice.”*<sup>66</sup>

Under universally accepted provisions of law enshrined in the UN Charter<sup>67</sup>, there is a general ban on the use of force explicitly stated in the Article 2(4): *”All members shall refrain from the threat or use of force against the territorial integrity or political independence of any state or in any manner inconsistent with the Purposes of the United Nations.”*<sup>68</sup> There are only two exceptions to this general rule: one is the enforcement action to maintain international peace and security, carried under Chapter VII of the Charter, the other is the inherent right of individual and collective self-defence, laid down in Article 51 of the Charter: *„Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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-defence 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 deemed necessary in order to maintain or restore international peace and security”.*<sup>69</sup> The self-defence exception has been the most often invoked justification for the use of force without Security Council

---

<sup>65</sup> *The Covenant of the League of Nations*, 1922, available at: <http://www.yale.edu/lawweb/avalon/leagcov.htm>

<sup>66</sup> Ibidem. After the demise of the League of the Nations, an additional attempt was made to limit the use of force in the 1928 Kellogg-Briand Pact which banned the use of war as a political instrument.

<sup>67</sup> Since all sovereign states are members of the UN, UN Charter appears applicable as a universal international law. See more [in:] M. N. Schmitt, *International Law and the Use of Force: Attacking Iraq*, RUSI Journal 148, no. 1, February 2003, p. 521.

<sup>68</sup> *UN Charter*, art 2(4). Available online at: <http://www.un.org/aboutun/charter/>

<sup>69</sup> *UN Charter*, Ch.VII, art. 42, 51. Available online at: <http://www.un.org/aboutun/charter/>

authorisation, yet it is also the most problematic. At face value, the Charter explicitly outlaws the use of force, except in specific, clearly defined circumstances. The debate arouses in respect to the vague and ambiguous language of the Charter open to numerous interpretations, specifically in regard to the „inherent right” clause. Does it include the right to preemptive action? Does it mean that the customary law of self-defense somehow survived the introduction of the Charter?

There are two schools of interpretation of Article 51. „Restrictionists” claim that art 51 explicitly limits the rule of self-defense to those actions that occur after an armed attack has actually taken place, therefore any form of preemption is unlawful. Under Article 51, the triggering condition for the exercise of self-defence is the occurrence of *an armed attack*; an open-ended, distant, potential threat does not suffice. Albrecht Randelzhofer argues that „*the prevailing view refers, above all, to the purpose of the Un Charter, i.e., to restrict as far as possible the use of force by the individual State and considers Article 51 to exclude any self-defense, other than in response to an armed attack.*”<sup>70</sup> Joseph Kunz also argues along these lines, claiming that a mere „threat of aggression” would not be sufficient to justify the unilateral use of force.<sup>71</sup>

On the other hand, „counter-restrictionists” believe that Article 51 was never intended to restrict the right of preemptive self-defense, but it maintains the preexisting rule of customary law allowing the anticipatory self-defense. Proponents of a broader right of anticipatory self-defense generally base their arguments on the word “inherent” in Article 51. Their argument is based on the notion that the right of self-defense are unchangeable by the Article 51 of the Charter, which by pledging not to “impair the inherent right of self-defense,” left unchanged the law of customary self-defense predating the introduction of the UN Charter. Although some principles of international law could be considered unchangeable, so-called *jus cogens* principles, there are no indicators pointing that a right of anticipatory self-defense is a *jus cogens* principle. Indeed, the International Court of Justice has identified the Charter prohibition on the use of force, Article 2(4) as *jus cogens*, not self-defense. Moreover, limits imposed on self-

<sup>70</sup> A. Randelzhofer, “Article 51” [in:] *The Charter of the United Nations: A Commentary*, B. Simma (eds.), vol.1, Oxford: Oxford University Press, 2002, p. 792.

<sup>71</sup> J. L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations Charter: A Search for Original Intent*, *The American Journal of International Law* 41, no. 4, October 1947, p. 878.

defense in Article 51, would in fact be meaningless if a wider customary law of self-defense survived there restrictions.<sup>72</sup>

The issue of when an armed attack “begins” for purposes of the right of self-defense is also open to discussion. Counter-restrictionist interpret Article 51 to permit anticipatory self-defence when a threat is so grave, so direct and so definite that the victim does not have to wait until the attack has actually started in order to act in self-defence.<sup>73</sup> Timothy McCormack argues that Article 51 allows the states to “*have the freedom to defend themselves against the threat of an attack that the Security Council will do nothing to stop.*”<sup>74</sup> Schmitt goes further claiming that “*it would be absurd to suggest that international law requires a State to ‘take the first hit’ when it could effectively defend itself by acting preemptively.*”<sup>75</sup>

In fact, the framers of the Charter did indeed consider the situation of a ‘threat’ - Article 39 states that: “*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security*”<sup>76</sup>. Therefore, the power to authorize the use of force in the case of a mere threat lies with the Security Council alone. In other words, the Charter clearly states, that only an actual armed attack triggers the right of self-defense and according to the Article 31 of the *Vienna Convention on the Law of Treaties*, the interpretation of the Charter must start with the “ordinary meaning to be given to the terms of the treaty” – namely „an attack” is *a conditio sine qua non*.<sup>77</sup>

---

<sup>72</sup> C. Gray, *International Law...*, p. 87.

<sup>73</sup> Professor Anthony D’Amato, for example, used such an interpretation to justify Israel’s 1981 strike against the Iraqi nuclear reactor at Osirik. Israel wished to prevent Iraq from developing nuclear weapons. The strike aimed at long-term Israeli security. In D’Amato’s view, the Israeli attack did not compromise the territorial integrity or political independence of Iraq, nor was it inconsistent with the purposes of the UN. By this narrow view of sovereignty, D’Amato concludes that the strike did not violate the prohibition in Article 2(4). International reaction to the Israeli strike, however, was uniformly negative. The Security Council passed a unanimous resolution condemning it as a violation of the Charter (S.C. Res. 487, June 19, 1981.) [in:] M-E. O’Connell, *The Myth of Preemptive...*, p. 4; see also: A. D’Amato, *Israel’s Air Strike Upon the Iraqi Nuclear Reactor*, “*American Journal of International Law*”, vol.77, 1983, p.584.

<sup>74</sup> T. L. H. McCormack, *Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor*, New York: St. Martin’s Press, 1996, p. 209-211.

<sup>75</sup> M. Schmitt, *International Law and the Use of Force...*, p. 535.

<sup>76</sup> *UN Charter*, Art. 39.

<sup>77</sup> Definition of „an armed attack” according to the Webster’s Encyclopedic Dictionary: ‘*an offensive military operation with the aim of overcoming the enemy ...*’, or: ‘*an offensive move in a performance or contest*’, and: ‘*Attack ... applies to the beginning of hostilities*’.

UN XXIX GA Resolution 3314 (1974) also clarified the definition of "aggression" including: *the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation or annexation; bombardment or use of any weapons by a State against the territory of another State; the blockade of ports or coasts of a State by the armed forces of another State; an attack by the armed forces of a State on the land, sea or air forces of another State; use of armed forces of a State which are within the territory of another State with the agreement of the receiving State in contravention of the agreement; action of a State allowing its territory to be used by (an)other State for perpetrating an act of aggression against a third state; and „the sending by or on behalf of a State of armed bands which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.*"<sup>78</sup>

This definition is supported by the ICJ *Nicaragua* judgement, in which ICJ accepted the GA Resolution 3314 as being an expression of customary law and took it as a point of departure for the legal assessment in that particular case.<sup>79</sup> The Security Council and governments have also clarified some issues since September 11th as a way of adopting new threats and technologies.<sup>80</sup> Still, there is no self-appointed right to attack another state because of fear that the state is making plans or developing weapons usable in a hypothetical campaign.<sup>81</sup>

The rule prohibiting the use of force applies to situations involving states; it is not, as a matter of principle, concerned with actors which are not subjects of international law. However, in situations whereby a state is actually involved, to a sufficient degree, in non-

---

<sup>78</sup> UN XXIX GA Resolution 3314. Available online at: <http://domino.un.org/UNISPAL.NSF/a06f2943c226015c85256c40005d359c/023b908017cfb94385256ef4006ebb2a!OpenDocument>

<sup>79</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua vs. United States of America*, Order of 10 May 1984. Available online from: <http://library.lawschool.cornell.edu/cijwww/icjwww/idecisions/isummaries/inussummary840510.htm>

<sup>80</sup> The Security Council referred in two resolutions to the right to resort to self-defense in the face of the September 11 attacks (UN S.C. Res. 1368 (2001); UN S.C. Res. 1373 (2001)).

<sup>81</sup> See also: J. Kammerhofer, *Uncertainties of the Law on Self-Defence in the United Nations Charter*, Netherlands Yearbook of International Law, Cambridge University Press, vol. 35, 2004, pp. 143-204; R.Vark, *The Use of Force in the Modern World: Recent Developments and Legal Regulation of the Use of Force*, Baltic Defense Review, vol.2, no.10, 2003, pp. 27-44; J.N. Maogoto, *War on the Enemy: Self-Defense and State-Sponsored Terrorism*, Melbourne Journal of International Law, vol. 4, 2002, pp.1-33; J.Wouters, T.Ruys, *The Legality of Anticipatory Military Action after 9/11: The Slippery Slope of Self-Defense*, Institute for International Law, Lueven University, Paper no.91, Feb 2006, pp. 3-25.

state violence, it is indeed accepted that this involvement is equivalent to an armed attack and may thus entail the same consequences as an armed attack, namely it can trigger the right of self-defence. Situations where armed force is used by non-state groups from a territory which is not effectively controlled by the (or a) government of the state in question (failed state). The question arises whether this could be considered a situation equivalent to an armed attack by that state. In the case of a failed state, there is no government to be „involved”. Based on the assumption that there is a legal duty of every state to prevent transborder activities of terrorism originating from its territory, omission could be considered equivalent to „involvement”. It's a preferable thesis to that of a failed state not being protected by the principle of the prohibition of the use of force. The issue remains in somewhat, unguarded waters of international law.<sup>82</sup>

There are certain criteria for permissible, legal preemptive self-defense with the absolutely crucial being: necessity and proportionality. In order to act in anticipatory self-defence, a country would have to show that the necessity to exercise force was immediate (another state was about to engage in an armed attack) and there were no other available means to address the threat. The state is also required to act in a proportionate manner.<sup>83</sup>

There appears to be a consensus among legal scholars that an attack must be underway to trigger unilateral right of self-defense - any earlier response requires the approval of the Security Council. Additionally the concept of imminence is generally accepted as an indication for the use of anticipatory action. However, the criteria that should be met before the use of anticipatory force remain controversial topic. For instance Richard Maxon, presents several criteria that should be met before anticipatory self-defense can be legally carried out and when the threat of an attack is both imminent and immediate. Maxon poses four guideline questions: Are there objective indicators that an attack is imminent? Does the past conduct of hostile declarations of the alleged aggressor reasonably lead to a conclusion that an attack is probable? What is the nature of the weapons available to the alleged aggressor nation, and does it have the ability to use them effectively? and finally, is the use of force the last resort after exhausting all

---

<sup>82</sup> R.Vark, *State Responsibility for Private Armed Groups in the Context of Terrorism*, *Juridica International*, no.1, 2006, pp. 184-193 [after:] M-E.O'Connell, *The Myth of Preemptive...*, p.12

<sup>83</sup> A. C. Arend, *International Law...*, p.90.

practicable, peaceful means?<sup>84</sup> Some scholars suggest that the imminence changes over time so does the nature of threat, and that the failure of the Security Council to effectively deal with those threats virtually negated the prohibitions imposed by the Charter.<sup>85</sup> Nevertheless, it seems that the framers of the Charter intended the Security Council to decide what qualifies as imminent, despite the fact that UN did not live up to expectations.

One of the main arguments in favor of a revision of restrictive interpretation of international law is that the traditional understanding of the threat and idea of imminence existent in the time of *Carolina* case – is no longer applicable. With the advancement of new technologies, especially the weapons of mass destruction and new threats, such as international terrorism, states cannot remain idle when threats grow over time. Greenwood points out two major factors, distinctive *signum temporis*, which he identifies as „the gravity of the threat“: „*Where the threat is an attack by weapons of mass destruction, the risk imposed upon a State by waiting until that attack actually takes place compounded by the impossibility for that State to afford its population any effective protection once the attack has been launched, mean that such an attack can reasonably be treated as imminent in circumstances where an attack by conventional means would not be so regarded.*” He further states the second factor – “the method of delivery of the threat”: “*It is far more difficult to determine the time scale within which a threat of attack by terrorist means would materialize.*”<sup>86</sup>

The case for a change of this restrictive concept of pre-emptive self-defence is made by the US National Security Strategy of 2002: “*Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture. The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’ choice of weapons, do not*

---

<sup>84</sup> R. G. Maxon, *Nature's Eldest Law: A Survey of a Nation's Right to Act in Self Defense*, Parameters, Autumn 1995, pp. 55-68. Available at: <http://carlisle-www.army.mil/usawc/parameters/1995/maxon.htm>.

<sup>85</sup> C. Greenwood, *International Law and the Pre-Emptive Use of Force, Afghanistan, Al-Qaida, and Iraq*, San Diego International Law Journal no. 4, 2003; T. M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force By States*, American Journal of International Law 64, no. 4, October 1970, pp. 809-37; M. J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, Harvard Journal of Law & Public Policy 25, no. 2, Spring 2002, pp. 539-58; T. Graham, Jr., *Is International Law Relevant to Arms Control? National Self-Defense, International Law, and Weapons of Mass Destruction*, Chicago Journal of International Law 4, Spring 2003, pp. 1-17;

<sup>86</sup> C. Greenwood, *International Law...*, p. 16.

*permit that option. We cannot let our enemies strike first*".<sup>87</sup> With those words, however, NSS makes the case for preventive action while using term „preemption“. NSS appears to redefine „imminent threat“ as „clear danger, that is not necessarily present“.<sup>88</sup>

An essential argument for maintaining the restrictive interpretation is the problem of vagueness and the possibility of abuse. The National Security Strategy seems to recognize this dilemma, the risk of abuse in particular: “... *nor should nations use pre-emption as a pretext for aggression.*” This sentence is followed, however, by a somewhat enigmatic postulate: “*Yet in an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.*” Does this sequence imply a differentiation between (other) „nations” and the United States?

While discussing the possible limitation on the use of force and its impact on state’s behaviour one should also examine the normative aspect of the matter. According to the just war tradition, there are three sets of principles, which determine when state sare permitted to go to war – *ius ad bellum*, what states are permitted to do in war – *ius in bello* and the *ius post bellum* principles which concern the justice of peace agreements and the termination phase of war. The just war theory consists of six pillars: Just Cause – which demands that the war to be initiated only to repel an attack or in self-defence of another nation that has been attacked; Right Intention – ensures that wars are not fought for questionable reasons, but only to drive out the attacking nation and establish a fair peace - wars fought to satisfy hatreds, or punish others do not satisfy this principle, nor do wars fought for economic or ideological reasons; Legitimate Authority - to declare war; Proportionality - the probable good that the war will achieve must be worth the cost of fighting the war; Last Resort - all peaceful means of conflict resolution has to be exhausted before going into war; and finally - Reasonable Hope of Succes which it demands realistic estimates of the chances of winning the war.<sup>89</sup>

---

<sup>87</sup> NSS 2002, p.15

<sup>88</sup> F. E. Wester, *Preemption and Just War: Considering the Case of Iraq*, Parameters, winter, vol. 34, 2004, p.20, 36.

<sup>89</sup> See more [in:] F. E. Wester, *Preemption and Just War...*, pp. 20-39; I. L. Jr. Claude, *Just Wars: Doctrines and Institutions*, Political Science Quarterly 95, no. 1, Spring 1980, pp. 83-96; L. H. Miller, *The Contemporary Significance of the Doctrine of Just War*, World Politics 16, no. 2, January 1964; J. Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, Princeton, NJ: Princeton University Press, 1981; P. Christopher, *The Ethics of War & Peace: An Introduction to Legal and*

Some scholars argue that the use of force in an anticipatory manner can be congruent with the requirements of the just war tradition. For instance Neta Crawford insists that: “*in cases of a credible threat of imminent attack, [one may] act preemptively to prevent such a threat from being realized. On the other hand, preventive war, waged to defeat a potential adversary before its military power can grow to rival your own, is not just.*”<sup>90</sup> Michael Walzer also argues that anticipatory military activities are permitted when there is “sufficient threat,” which he describes as consisting of three things: “*a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk.*”<sup>91</sup> The notion of an imminent threat remains a central requirement for any “just” use of force. Generally, it can be argued that both - international law and the just war tradition limit the legitimate/just use of force to situations where an armed attack has already occurred. The imminence requirement once again proves to be the most salient in terms of distinguishing legitimate from illegitimate anticipatory military activities.

Certain parts of the Bush Doctrine made explicit reference to both the legal standing of use of anticipatory action and the just war tradition: “*The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.*”<sup>92</sup> There is much debate within the scholarly literature as to whether the Bush Doctrine lies outside the boundaries of international law and the just war tradition, pushes the accepted margins of permissibility with respect to international law and the just war tradition, or is consistent with the requirements of international law and the just war tradition. By large, the divide amongst scholars is roughly parallel to the divide in regard to the interpretation of the legal standing of self-defense in the UN Charter.

---

*Moral Issues*, Upper Saddle River, NJ: Prentice Hall, 1999; J. Turner Johnson, *Just War, As It Was and Is, First Things* 149, January 2005, pp.14-24; R. L. Holmes, *Can War Be Morally Justified? The Just War Theory*, [in:] *Just War Theory*, ed. J. Bethke Elshtain, New York: New York University Press, 1992.

<sup>90</sup> N. C. Crawford, *Just War Theory and the U.S. Counter-terror War*, *Perspectives on Politics* 1, no. 1, March 2003, p. 7.

<sup>91</sup> M. Walzer, *Just and Unjust wars...*, p. 80.

<sup>92</sup> *President Bush Outlines Iraqi Threat*, Remarks by the President on Iraq, October 7 2002, Office of the Press Secretary, November 7, 2002.

Various arguments have been made to the effect that the Bush doctrine is consistent with the law of the UN Charter and with international law more generally or, at the very least, that the UN Charter should be read in such a manner to permit the doctrine.<sup>93</sup> In fact, much of the criticism of the Bush Doctrine have focused not on the preemption per se, but rather on its implementation in Iraq, where the threat was not universally viewed as „imminent”. It is therefore instructive to ask whether at the doctrinal level, NSS is consistent with the requirements of international law and the just war tradition. And if not, will this constrain the United States from further implementation of the doctrine or will it try to „bend the rules” to fit the policy to particular case? William H. Taft IV, the Legal Adviser to the Department of State, argues in support of the legality and justifiability of preemption outlined in the NSS: *“After the exhaustion of peaceful remedies and a careful, deliberate consideration of the consequences, in the face of overwhelming evidence of an imminent threat, a nation may take preemptive action to defend its nationals from unimaginable harm.”*<sup>94</sup>

The key element is thus to provide „overwhelming evidence” in order to prove „the imminence” of the threat. Greenwood also places emphasis on the validity of the threat: *„Nevertheless, the requirement that an attack be imminent cannot be ignored or rendered meaningless. Even when taking into account [these] issues...the right of self-defense will justify action only where there is sufficient evidence that the threat of attack exists. That will require evidence not only of the possession of weapons but also of an intention to use them.”*<sup>95</sup> „Overwhelming evidence” is what was apparently flawed in the case of Iraq. In justification of the Iraq war President Bush claimed that: *“Saddam is a threat. And we’re not going to wait until he does attack”*<sup>96</sup> and in his further statements he continues: *“Saddam Hussein and his weapons of mass destruction are a direct threat to this country (...) September the 11th should say to the American people that we’re now a battlefield, that weapons of mass destruction in the hands of a terrorist organization*

---

<sup>93</sup> E. Zoller, *The Law Applicable to the Pre-emption Doctrine*, American Sociology International Review, no.98, 2004, p. 333; A. D. Sofaer, *On the Necessity of Pre-emption*, European Journal of International Law, no. 14, 2004, p. 209.

<sup>94</sup> W. H. Taft IV, *The Legal Basis for Preemption*, 18 November 2002. Available online at: Council on Foreign Relations: <http://www.cfr.org/publication.php?id=5250>.

<sup>95</sup> C. Greenwood, *International Law...*, p. 16.

<sup>96</sup> George W. Bush News Conference of March 6, 2003. Available online from: <http://www.whitehouse.gov/news/releases/2003/03/20030306-8.html>

could be deployed here at home.”<sup>97</sup> It appeared later, however, that the potential threat posed by Iraq was not as great as originally thought. The intelligence picture, not only provided by US sources but that of other allied nations, that established a good deal of the impetus for the war was based upon what now appears to have been flawed, inaccurate or in error.<sup>98</sup> In 2004, Greg Thielmann, former head of the Office of Strategic Proliferation and Military Affairs in the State Dep’s Office of Intelligence and Research announced that: „. *The US intelligence community’s inability to produce accurate information on enemy threats renders such a doctrine feckless and reckless.*“<sup>99</sup>

The Bush Doctrine identifies at least three types of „new threat“ that could be addressed with preemptive force: terrorism, WMD and „rogue states“, each presenting its own challenge, especially in regard to pinning down an authoritative definition. Alex Schmidt enumerated 109 definitions of terrorism in literature, only in the 1939-1981 period of time.<sup>100</sup> What needs to be stressed in the first place is that terrorism is a method, a tactic, not an enemy and not an objective. Declaring war on a tactic makes therefore little sense. Walzer says that terrorism’s purpose is “*to destroy the morale of a nation or a class, to undercut its solidarity; its method is the random murder of innocent people*”<sup>101</sup> and most of the definitions follow similar pattern. Notably, there are three schools of thought on the meaning of America’s declared war on terrorism: war against terrorists—those who employ terrorism, war against the states that enable terrorists, and war against those terrorists who pose a direct threat to the United States.<sup>102</sup>

---

<sup>97</sup> Ibid.

<sup>98</sup> *Comprehensive Report of the Special Adviser to the DCI on Iraq’s WMD*, Washington, DC, US Gov Printing Office, September 30, 2004. Available online from: [https://www.cia.gov/cia/reports/iraq\\_wmd\\_2004/note.html](https://www.cia.gov/cia/reports/iraq_wmd_2004/note.html)

<sup>99</sup> A White House-commissioned report of March 2005 on WMD intelligence was extremely critical of American intelligence on Iraqi WMD prior to the 2003 attack (*Commission on the Intelligence Capabilities of the United States Regarding the Weapons of Mass Destruction Report to the President*, March 31, 2005. Available online from: <http://www.wmd.gov/report/>). It must be stated in defense of the intelligence community, however, that events such as the disappearance of over 380 tons of high explosives during the later half of October 2004, shows that chemical or biological weapons could have been hidden. This failure of the intelligence of both the United States and her allies had critical impact. See more [in:] G.Thielmann, *Preventive Military Intervention: The Role of Intelligence*, Ridgway Center Policy Brief 04-1, October 2004. Available online at: <http://se1.isn.ch:80/serviceengine/FileContent?serviceID=PublishingHouse&fileid=C0019EE1-79C6-43B7-BE97-E8E80BDA99F4&lng=en>

<sup>100</sup> A. P. Schmidt, *Political Terrorism: A Research Guide*, New Brunswick, N.J.: Transaction 1984.

<sup>101</sup> M. Walzer, *Just and Unjust Wars...*, p. 197.

<sup>102</sup> D. R. Worley, *Waging Ancient War: Limits on Preemptive Force*, RAND Analysis, February 2003, p. 2-3.

The problem of terrorism has been addressed by the Security Council, which adopted several resolutions condemning terrorism as a threat to international peace.<sup>103</sup> Generally, according to UN resolutions Security Council expressed its readiness to take all necessary steps to respond to the terrorist attacks and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations. By extrapolation, one could assume, that in the light of undisputable evidence of an imminent terrorist attack, there could be support for preemptive action taken to forestall the attack. By the same token, taking into account the SC's inability to act unanimously, can state act unilaterally? This logic stands behind the Bush Doctrine elaborated in the NSS: *„As a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed. (...) History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action”* and further it states: *„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.”*<sup>104</sup>

Undoubtedly, the use of preemptive force against terrorists raises several questions: Is there a specific threshold of intensity to qualify a terrorist attack as an armed attack? Does the coordinated use of force to hijack and use large airliners loaded with fuel to attack the World Trade Center and the Pentagon classify as an armed attack against the United States and if it does – does it also trigger the right of self-defense under article 51 to prevent future attacks?<sup>105</sup>

There is also a question of proportionality of the supposed preemptive attack – what kind of response can be proportionate to the potential threat? During a March 6, 2003 news conference, President Bush went on in justifying the attack on Iraq: *“if the*

---

<sup>103</sup> SC Resolutions 1267 (1999) of 15 October 1999 and 1373 (2001) of 28 September 2001 as well as its other resolutions concerning threats to international peace and security caused by terrorism. Available at: <http://www.un.org/News/Press/docs/2004/sc8214.doc.htm>

<sup>104</sup> NSS 2002, p.15.

<sup>105</sup> Almost immediately following September 11, the U.S. and several European states apprehended individuals who indicated that more attacks were planned. Subsequent to the launch of Enduring Freedom, U.S. troops have found documentary evidence in Afghanistan confirming that more attacks in the series were indeed being planned. *Recovered al-Qaeda Documents Reveal Plans for Other Terror Attacks: Official*, AGENCE FR.-PRESSE, Feb. 1, 2002, WL 2/1/02 AGFRP.

*world fails to confront the threat posed by the Iraqi regime...free nations would assume immense and unacceptable risks. The attacks of September 11, 2001 showed what enemies of America did with four airplanes. We will not wait to see what terrorist states could do with weapons of mass destruction.*"<sup>106</sup> Bush insists that the United States is "*in a conflict between good and evil (...). By confronting evil and lawless regimes, we do not create a problem, we reveal a problem. And we will lead the world in opposing it.*"<sup>107</sup> Aside from occupying the moral high ground, which exempts America from self-criticism, such sentiments imply that as there can be no acceptable compromise with the forces of evil, and following the logic - there can be no reasonable restraint on the forces of good - ergo – any response to prevent future seems permissible.

Unlike terrorism, there is an elaborate legal framework established to deal with the proliferation of weapons of mass destructions, however, with several weaknesses considering compliance of “rogue-states”.<sup>108</sup> The question of the threat of using WMD is the most problematic and remains undetermined, although it has been addressed by the International Criminal Court which held that: “*in view of the current state of international law (...) the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake.*”<sup>109</sup>

---

<sup>106</sup> George W. Bush, National Press Conference, The White House, March 6, 2003. Available at: <http://www.whitehouse.gov/news/releases/2003/03/20030306-8.html>

<sup>107</sup> George W. Bush, *Graduation Speech at West Point Academy*, New York, 1 June 2002. Adopted further as an introduction to the U.S. N.S.S. 2002. Tekst online: <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html>

<sup>108</sup> M. E. Newcomb, *Non-Proliferation, Self-Defense, and the Korean Crisis*, *Vanderbilt Journal of Transnational Law* 27, October 1994, pp. 608-09; E. Arnett, *Reassurance versus Deterrence: Iranian Confidence-Building Opportunities*, *Disarmament Diplomacy*, no. 27, June 1998; C. Rak, *The Role of Preventive Strikes in Counterproliferation Strategy: Two Case Studies*, *Strategic Insights*, vol. 2, no.10, October 2003, available at: <http://www.ccc.nps.navy.mil/si/oct03/wmd.asp>.

<sup>109</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *International Court of Justice*, 266, July 8, 1996. See also: R. S. Clark, *The laws of armed conflict and the use or threat of use of nuclear weapons*, *Criminal Law Forum*, vol.7, no.2, 1996, pp.265-298; M. J. Aznar-Gomez, *The 1996 Nuclear Weapons Advisory Opinion and Non Liqueur in International Law*, *The International and Comparative Law Quarterly*, vol. 48, no. 1, 1999, pp. 3-19; V. Chetail, *The contribution of the International Court of Justice to international humanitarian law*, *IRRC*, vol. 85, no. 850, 2003, pp. 235-269; J. Granoff, *Nuclear Weapons, Ethics, Morals, and Law*, *Brigham Young University Law Review*, October 2000, pp.1413-1442; N. Tannenwald, *Stigmatizing the Bomb: Origins of the Nuclear Taboo*, *International Security*, vol. 29, Spring 2005, pp. 45-46; G. Perkovich, *Bush's Nuclear Revolution: A Regime Change in Nonproliferation*, *Foreign Affairs*, vol. 82, March/April 2003, pp. 2-8.

There is a general agreement that states and leaders that refuse to accept and abide by some of the most important legal norms and practices of the international system could be considered “rogue-states”. The rogue state’s relationship to the terrorist can range from direct support, to harboring, to merely turning a blind eye. States that harbor terrorists constitute an entirely different enemy than the terrorists themselves. A war against those rogue states that harbor or enable terrorist threats is properly conducted with the traditional methods of relations between states—deterrence, coercion, and compellence.<sup>110</sup> Nonetheless, the clear definition of which states can be qualified as rogue, on what basis and by whom remains disputable. This element has important consequences vis-à-vis the use of anticipatory military activity in that it becomes difficult to prove that there is an imminent threat from a “rogue state” if it is not clear that the state in question is “rogue” or if it really poses a threat to any other state.

Anticipatory military activities occupy a gray area within international law, the just war tradition, and the international security literature. In each of these realms, questions about the legality, legitimacy, justifiability or utility of these activities are usually answered in an equivocal manner. For example, in the international law and just war literatures, there is consensus that these actions are permitted in certain instances; or in other words, the answer is “yes, but...” In this respect, the Bush Doctrine, and its concrete application in Iraq and possibly elsewhere, could play a dangerous role in setting precedence by the solidification of the new legal and normative “rules of the game.” Although anticipatory military activities have always been a part of the array of policy options available, they have not been employed very frequently due to the legal and normative constraints against their use. It remains to be seen if these elements will have a constraining effect on the Bush Administration in its future implementations of the Bush Doctrine.

Overall, it can be stated that the preemptive doctrine invites international chaos – virtually any nation could invoke invented threats to justify aggressive wars, based on a perceived threat. Preemptive self-defense not only undermines the restraint on when states may use force, it also undermines the restraints on how states may use force, since there can be no restraints in the assessment of the proportionality against a possible

---

<sup>110</sup> D. R. Worley, *Waging Ancient War...*, p. 7-8.

attack. Therefore, it can be argued, that the strategy of preemption is not only costly, dangerous and ineffective but also counterproductive.<sup>111</sup>At the same time, it will be interesting to observe if and how the international law and the just war tradition change and adapt with respect to the new challenges presented by today's world.

---

<sup>111</sup> M-E. O'Connell, *The Myth of Preemptive...*, p. 15.