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## Pre-emptive war under international law

The trend of modern geopolitical changes suggests the emergence of several new poles of global leadership and a number of new global problems. In the first case, the unipolarity of the world order established after the end of the Cold War presupposed the existence of one centre of gravity for geopolitical influence. But recently, issues of confrontation between Russia, the United States, and People's Republic of China have become more and more frequent, and these are not only multi-vectored but also have a different nature in bilateral relations. Above all, the global challenges of our time include the problem of international terrorism and the growth of fundamentalism. Both are manifestations of extremely radical political views of various groups, especially religious ones, and they testify to the growing social inequality and socio-cultural deformation in the world community. Such challenges predetermine the foreign policy of many states which seek to secure their own existence and guarantee the achievement of strategic development goals. In this aspect, the emphasis in the sphere of national security is shifted from a defense system formation to the creation of a system of preventive-pre-emptive mechanisms to avert national and international security risks. The quintessence of such a geopolitical trend was the emergence of an entire direction called pre-emptive war. While this concept was initially developed in the US as part of counter-terrorism activities it was later used by other countries as a system of measures to ensure national security providing for pre-emptive strikes against the enemy.

The modern study of the pre-emptive war doctrine as a new model of building a national security system was mainly developed in the works of researchers such as J. Barnes, W. Galston, C. Gray, A. Gurner, A. Daoudi, R. Delahunty, A. Clarke,

M. Lawrence, J. Mitchell, K. Müller, L.A. Skotnikov, P. Stoel, A.I. Utkin, E. Franklin, J. Yu and others.

In essence, the doctrine of pre-emptive war — or as it is called the “Bush Doctrine” — is the logical continuation of the “Clinton Intervention Doctrine”<sup>1</sup>. The main point of the latter was that the United States reserves the right to enter into conflict on the side of any party thereto, according to their own national security interests. In particular, we acknowledge that the term “intervention” is viewed as a factor in deterring negative risks of any conflict development for US national security; thus replacing the concept of “damage to any of the parties to the conflict”.<sup>2</sup>

The main provisions of the Bush Doctrine, which proclaimed the need for “a new way” to ensure US security, were set out in 2002 in documents such as the State of the Nation Report and National Security Strategy, and these were announced in the US President’s speech to the UN. George W. Bush declared “the ability of the United States to accumulate so much power which makes a hostile armament race senseless” (while promising international terrorists to expect “American justice”).<sup>3</sup> The central element of Washington’s new foreign policy concept is pre-emptive/anticipatory/proactive attack<sup>4</sup> which has always been considered a last, extreme resort. The Bush Doctrine, based on the principle of unilateral actions, justifies the US right to expedite the attack. Moreover, it was stated that the United States was ready to apply such measures to any state considered potentially dangerous.<sup>5</sup>

In this context, the questions raised by A. Clark appear perfectly logical: is this approach to pre-empt problems not contrary to existing international law and how does anticipation of danger through a direct military attack correlate with international law?<sup>6</sup> The answers to these questions depend on how the outlines of international law are understood in the modern world community. In accordance with the paradigm of the UN Charter for the use of force, unilateral pre-emptive attack without direct threat is illegal. But if the structure of the UN Charter no longer corresponds to the risks imposed by global problems, the Charter

<sup>1</sup> T. Smith, “In defense of intervention”, *Foreign Affairs* 73, 1994, pp. 34–46.

<sup>2</sup> R. D. Randall, “Preventive war and the epistemological dimension of the morality of war”, *Journal of Military Ethics* 5, 2010, no 1, pp. 32–54.

<sup>3</sup> M. Pietkiewicz, K. Domagała, “National security strategy as seen in the example of the United States of America”. In: *The Safety of the Individual and of the Group in Private and Public Law — a Collection of Studies*, eds. K. Flaga-Gieruszyńska, E. Cała-Wacinkiewicz, D. Wacinkiewicz, Gorzów Wielkopolski, 2015, pp. 189–206.

<sup>4</sup> A. M. Dershowitz, *Preemption: A Knife that Cuts both Ways*, New York 2006, p. 67.

<sup>5</sup> А. И. Уткин, *Доктрина Буша: концепция, разделившая Америку*, “Россия в глобальной политике” 2005, no 4, [http://www.perspektivy.info/rus/ekob/doktrina\\_busha\\_koncepcija\\_razdelivshaja\\_ameriku\\_2007-01-01.htm](http://www.perspektivy.info/rus/ekob/doktrina_busha_koncepcija_razdelivshaja_ameriku_2007-01-01.htm) (access: 31.03.2017).

<sup>6</sup> R. Goodman, “Humanitarian intervention and pretexts for war”, *The American Journal of International Law* 100, 2006, no 107, pp. 108–141.

itself does not accurately reflect existing needs for international legal regulation. In this context, the Bush Doctrine is, in fact, in the legal field of international regulation of issues of waging war and protection of national interests.<sup>7</sup>

However, for this purpose it is necessary to determine the essence, nature, and content of the Bush Doctrine; or the pre-emptive war doctrine.

E. Franklin gives the following definition of a pre-emptive attack: “a pre-emptive attack is a tactical activity designed for obtaining strategic effect”. Pre-emptive attacks are separate operations executed by one state against another without declaring war. From the point of view of ethics and morality, pre-emptive attacks are a way to seize the initiative with respect to a threat to the national interests of the state against which such a pre-emptive attack is being prepared. Pre-emptive attack is not, and cannot be described as, a hidden attack.<sup>8</sup>

Referring to and comparing the logic which led to the adoption and approval in the practice of international relations of the so-called nuclear deterrent policy with President Bush’s policy and arguments for pre-emptive war, R. Lawrence concluded that the latter should not be used to justify the war in Iraq. On the other hand, the new preventive policy of President George W. Bush’s Executive Office — the doctrine of pre-emptive war — is an appropriate response to the new challenge of terrorism directed against terrorists and not against states. While good reasons for the war in Iraq may exist in themselves; for example the ability to influence global oil prices and helping Shiites and Kurds gain independence from the Sunnis — the war against Iraq as an end in itself cannot be considered within the framework of pre-emptive war.<sup>9</sup>

In other words, the pre-emptive war doctrine is not directed against Iraq or any other state hostile to the United States. But it is this doctrine that was developed and coincided temporally with the application of new technologies and mechanisms for delivering a strike against the United States’ national security system. Here, we refer to the use of international terrorism as an instrument of indirect impact on the United States.

According to A. Dowdy, the war in Iraq has been a controversial and illogical element of US foreign policy and a source of political and ethical debate both within the state and abroad. Solving the dilemma of fairness or unfairness of US actions in Iraq should be based primarily on the fact that they are not war. This is the US response to the terrorist threat, as well as the possibility of escalation of the political conflict in the Middle East which could lead to a new phase of aggression against the United States. This forced George Bush to propose a new

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<sup>7</sup> A. Clark, “International law and the preemptive use of military force”, *The Washington Quarterly* 2003, no 3, pp. 89–97.

<sup>8</sup> E. Franklin, “Preemption and just war: Considering the case of Iraq”, <http://www.comw.org/qdr/fulltext/04wester.pdf> (access: 31.03.2017).

<sup>9</sup> R. M. Lawrence, “The preventive/preemptive war doctrine cannot justify the Iraq war”, *Denver Journal of International Law and Policy* 33, 2004, no 1, pp. 16–29.

national security doctrine — the pre-emptive war doctrine.<sup>10</sup> In this case, it is necessary to refer to the UN Charter, namely, to the possibility and the means for the state to protect its own national security.

Formally, according to the UN Charter, the use of force is prohibited unless it has been authorized by the UN Security Council or carried out as self-defense. Interpretation of the content of Article 2 (4) and Article 51 of the UN Charter allows the conclusion that the following instruments may be used to ensure pre-emptive self-defense: the salvation of citizens and humanitarian intervention. These measures will be considered legitimate from the point of view of international law. In other words, any action beyond the understanding of humanitarian intervention or unauthorized by the UN Security Council is an act of aggression.<sup>11</sup>

In fact, one can disagree with such a thesis, because there is direct reference in the UN Charter to the right of nations to self-defense and defense of their national interests. Although there was not open aggression by another state against the United States, there was, however, a terrorist act. The Bush Doctrine allows a response to such an act if there is evidence that instability in one state or another threatens intensification of terrorist groups and terrorist activities from its territory.

It should also be noted that the pre-emptive war doctrine differs significantly from the preventive war doctrine, which, in accordance with international law, is an act of aggression and is prohibited by international law;<sup>12</sup> moreover, it is regarded as a direct violation of international law and provides for the possibility of coercing such a state into peace. Thus, the concept of pre-emptive war is related to the law of war as a right to protect the state. If an attack is unavoidable, there is a clear danger and a nation or state has the right to defend itself. An example is the situation at the border of Israel on the Sinai Peninsula when there was a clear threat from Egypt. At that time Israel started the war, and the war of 1967 can be characterized as the first pre-emptive war. In contrast, a preventive war begins long before an immediate threat or humanitarian crisis when the balance of power is the main factor in a preventive attack. As noted above, pre-emptive war occurs when there is direct evidence of an alleged threat; when the powers initiating the war retain their tactical superiority on the border of the attacked state or when the military doctrine of one state clearly predetermines the possibility of an attack on another state.<sup>13</sup>

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<sup>10</sup> A. R. Dawoody, "Examining the preemptive war on Iraq: An ethical response to issues of war and nonviolence", *Public Integrity* 2006, no 7, pp. 64–82.

<sup>11</sup> M. S. Stein, "Unauthorized humanitarian intervention", *Social Philosophy & Policy Foundation* 21, 2004, no 1, pp. 14–38.

<sup>12</sup> A. C. Arend, "International law and the preemptive use of military force", *The Washington Quarterly* 26, 2003, no 2, p. 97.

<sup>13</sup> Л. А. Скотников, "Право на самооборону и новые императивы безопасности", *Международная Жизнь* 2004, No 9, pp. 3–15.

With regard to pre-emptive war and its difference from other manifest forms of military aggression, pre-emption from the standpoint of international law constitutes self-defense, where — as the act of aggression in the form of preventive war is a violation of the UN Charter, as mentioned above.

However, a review of Article 51 of the UN Charter clearly shows that it does not in any way affect the inherent right to individual or collective self-defense if there is an armed attack against the Member of the Organization, until the Security Council takes the measures necessary to maintain international peace and security. The measures taken by the Members of the United Nations in the exercise of this right to self-defense must be immediately reported to the Security Council and should in no way affect the powers and responsibilities of the Security Council, in accordance with the existing Charter, with regard to taking at any time such actions deemed necessary for maintenance or restoration of international peace and security.

In this context, the position of A. Gürener is indicative. When analyzing the UN Charter, this researcher concluded that in order to limit the use of force in international relations, the UN must clearly identify the permissibility of its use. In accordance with the UN Charter, there are only two exceptions to the ban on the use of force: coercive measures to maintain international peace and security carried out in accordance with Chapter VII of the Charter and the inherent right to individual and collective self-defense provided by Article 51 of the Charter. In accordance with Article 51, the initiating condition for the exercise of self-defense is an armed attack. Legal self-defense requires actual armed attack; an open act of aggression, but the very existence of such a threat is not an acceptable and sufficient condition for the use of self-defense. At the same time, the researcher notes that such a position is outdated, since the prevention of aggression is not only self-defense but also a means of maintaining peace and, in particular, international law itself. According to this point of view, the old ideas of self-defense have lost their relevance, as also has Article 51 of the UN Charter. A new vision of the problem of international relations makes it possible to treat the text of Article 51 in a way that does not exclude the possibility of pre-emptive actions.<sup>14</sup>

It must be remembered that the state which intends to make pre-emptive war must notify the UN Security Council of their intent. But the question of a methodological nature arises in how to determine whether such an attack or similar activities undertaken by the state constitutes pre-emptive war. Analysis of the “Bush Doctrine” enables identification of the following criteria for characterizing and identifying such measures:

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<sup>14</sup> A. Gürener, “The doctrine of pre-emption and the war in Iraq under international law”, *Perceptions* 2004, no 4, pp. 33–42.

- legitimization of a pre-emptive war by the political leaders of the state;<sup>15</sup>
- open statement — national leaders or heads of international organizations should announce the intention of a pre-emptive war and provide the conditions to prevent or stop it when they reach their stated goal of ensuring state security;<sup>16</sup>
- intention or an open threat to the national security of the state which decided to start a pre-emptive war;
- proportionality — restraint and accuracy in the use of force sufficient to prevent a threat;
- exhaustive use of other means in international politics to resolve the situation which did not result in localization of the threat;<sup>17</sup>
- reasonable expectations of success, determined by clear understanding by national leaders of the attainability of the pre-emptive war objectives which coincide with the adequacy of measures to ensure national security;<sup>18</sup>
- in addition, it is extremely important to understand the essential difference between the terms “pre-emptive war”, “preventive war” and “anticipatory war” (Table 1).

Table 1. Comparison of the concepts of “pre-emptive war”, “preventive war” and “anticipatory war”

| Criteria                          | Content of the Concept        |  |   |
|-----------------------------------|-------------------------------|--|---|
|                                   | <i>Pre-emptive war</i>        | <i>Anticipatory war</i>  | <i>Preventive war</i>                                     |
| Moment of delivery                | when there is a real threat   |  | when there is a potential threat                          |
| Objective of war                  | to prevent an attack          | to anticipate an attack  | stopping of the preparation for a possible attack         |
| Consequences of war               | gaining tactical superiority  |  | gaining strategic superiority                             |
| Nature of war                     | direct attack of enemy forces | war aimed at breaking the integrity of the enemy's army support infrastructure |   |
| Position of the political leaders | warns the world community     | declares intention and warns the world community                               | obtaining sanction or approval of the UN Security Council |

Source: elaboration on basis of literature.

<sup>15</sup> G. Reichberg, “Preemptive war: What would Aquinas say”, *Commonweal* 2004, no 30, pp.10–14.

<sup>16</sup> J. W. Smith, “Augustine and the limits of preemptive and preventive war”, *Journal of Religious Ethics* 2007, no 3, pp.140–164.

<sup>17</sup> A. Fiala, “Citizenship and preemptive war: The lesson from Iraq”, *Human Rights Review* 2006, no 7:4, pp. 19–39.

<sup>18</sup> E. Franklin, op. cit.

Thus, “anticipatory war” is intermediate between pre-emptive and preventive wars and this characterizes it as a way of solving the problem of ensuring national security by direct attack on the enemy’s armies support system, and only if necessary in case of direct attack by enemy forces. Materially, anticipatory war gives tactical superiority with minimal loss of personnel and minimum human toll.

As K. Gray points out, a pre-emptive war occurs only when the enemy’s attack is already at the implementation stage or is, at least, inevitable. The researcher relates this term to the strategy of US behavior in a possible attack by the USSR during the Cold War period. Thus, a pre-emptive war would be an attack involving some combination of launch on warning (LOW), and preventive-launch under attack (LUA).<sup>19</sup>

At the same time, K. Müller asserts that a preventive war consists of such state actions when there is really only such an alternative as the possibility of obtaining the first strike or delivering a first strike. The most restrictive sense of a preventive war is to exclude the possibility of a potential future attack by delivering such an adequate military strike that will derange the other state’s mechanism of preparing for an attack against the state which employed a pre-emptive war.<sup>20</sup>

W. Galston adheres to a different point of view, openly criticizing the Bush Doctrine and emphasizing that a pre-emptive war is a direct act of aggression. In particular, this analyst draws attention to the fact that Bush’s Doctrine is a response to the intensification of anti-American sentiment in Iraq and Afghanistan, and the only real objective is “a regime change”, requiring 150,000 to 200,000 US soldiers and allied forces. But the ground operation cannot be considered a pre-emptive war. The objective of the Bush Executive Office concerning regime change is the equivalent of unconditional surrender of independent states, and this will have consequences similar to the post-war period. The US takes full responsibility for the territorial integrity of Iraq to ensure the security and basic needs of its people, as well as to restructure its governance and political culture systems. And this is a consequence of direct military aggression.<sup>21</sup>

A similar point of view is shared by J. Barnes and R. Stoel who argue that the Bush Doctrine is a fiction in itself which allows the waging of wars of aggression and evading international law by spreading US influence over new regions and new countries. Thus, the US justifies aggression, masking it with preventive pre-emptive war. In this case, the US is not bound to justify and prove its own actions because its national security doctrine does not imply this; and a hypothetical

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<sup>19</sup> C. Gray, *The Implications of Preemptive and Preventive War Doctrines: A Reconsideration*, Carlisle 2007, p. 70.

<sup>20</sup> K. Mueller et al., *Striking First: Preemptive and Preventive Attack in U.S. National Security Policy*, Santa Monica 2007, p. 17.

<sup>21</sup> W. A. Galston, “The perils of preemptive war”, *Philosophy & Public Policy Quarterly* 22, 2002, no 4, pp. 120–132.



threat is simply sufficient.<sup>22</sup> At the same time, it is important for the United States to solve a further problem: the issue of the Federal Government's and the President's role in employing such a tool of national security as a pre-emptive war. The ambiguous question is the President's ability to unilaterally decide on pre-emptive war or the Congress must declare such a war. In accordance with the law and the US Constitution, the President has the right to decide on the need to repel a "sudden attack". In this context, J. Mitchell notes that Congress should have the power and political mechanisms to influence dispatch of American soldiers and use of American weapons abroad. However, all responsibility for deciding whether to wage a pre-emptive war should only be vested in the President of the United States.<sup>23</sup>

In addition, there is also need for a more precise definition of the self-defense criterion which should be taken into account when studying the admissibility of a unilateral pre-emptive war, and the first priority is to adhere to the principles of necessity and proportionality. The UN International Court of Justice referred to these, in particular, in such cases as "Nicaragua v. United States of America" (1986) and "Islamic Republic of Iran v. United States of America" (2003). In the case of "Nicaragua", the Court established the threshold for the intensity of the use of military force at the level of a "simple border incident", excess of which comes under an 'armed attack' within the meaning of UN Charter Article 51. Importantly, the Court twice noted in the same order that the disputing parties "did not raise the question of the legality of the response to the imminent threat of an armed attack. Accordingly, the Court does not express any views on this matter". It is likely that the International Court of Justice could utilize its own legal tools to proffer modern criteria in connection with the legality of unilateral military force preemption and it is not necessary to wait until an interstate dispute arises for the Court to state its legal position. Moreover, it also has an advisory opinion on the issue of law outside the framework of a dispute at its disposal.<sup>24</sup>

The main goal of the international legal introduction of a pre-emptive war, according to R. J. Delahunty, should be the maintenance of international peace and stability as a means of promoting global welfare. According to this approach, the international legal system should be designed to ensure international 'public goods'. These public goods include ensuring security and protection of civilians from internal and external threats, reducing violations of human rights such as genocide and ethnic cleansing and promoting non-proliferation of weapons of mass destruction. Unlike the UN Charter system, which is intended to reduce the

<sup>22</sup> J. Barnes, R. J. Stoll, *Preemptive and Preventive War: A Preliminary Taxonomy*, Houston 2007, p. 19.

<sup>23</sup> J. B. Mitchell, "«Preemptive war»: is it constitutional?", *Santa Clara law Review* 2004, no 44, pp. 495–507.

<sup>24</sup> Б. Тузмухамедов, "Упреждение силой: «Каролина» и современность", *Россия в глобальной политике*. no 2, 2006, [http://www.globalaffairs.ru/number/n\\_6563](http://www.globalaffairs.ru/number/n_6563) (access: 31.03.2017).



use of force by states to almost zero, the restructured international legal regime of a pre-emptive war based on global welfare will seek to engage and encourage states to ensure the optimal level of force, thereby allowing armed interventions in appropriate cases in order to prevent harm.<sup>25</sup>

Thus, in modern conditions, there is need for legal regulation of pre-emptive war as an objectively existing phenomenon. Otherwise, pre-emptive war will continue to start outside the legal field, as, for example in the case of US military aggression against Iraq. The beginning of a pre-emptive war, as well as the beginning of humanitarian intervention, is preceded by an information war which sometimes requires greater expense than the military operation itself. Modern information technology offers wide opportunity for disinformation, production of edited photo and video facts, provocations and the formation of prejudiced public opinion. There is therefore objective need for the formation of an independent international body for round-the-clock satellite monitoring of the territory of potential military conflicts. Modern technology, subject to personnel impartiality, enables objective assessment of the international situation in virtually every square meter of the territory of any country in the world.<sup>26</sup>

Summarizing the analysis of the essence and international legal support of such a phenomenon as pre-emptive war, a number of conclusions should be drawn.

Firstly, the theoretico-methodological justification of a pre-emptive war meets the most acute needs of the development of modern geopolitical processes. The development of nations and the state should be aimed at the ongoing process of building welfare, but such development may be interrupted by an act of aggression of another state or another international threat; in particular terrorism. In this sense, the role of the national security system is not to protect, but to pre-empt such an act of aggression. Pre-emptive war is therefore the optimal and most effective mechanism for ensuring national state security.

Secondly, we consider it erroneous to interpret pre-emptive war as a means of external expansion exclusively by the US and justified in the Bush Doctrine. In fact, the concept of pre-emptive war became widespread in the middle of the 20<sup>th</sup> century. Attention here is particularly drawn to the pre-emptive war of Israel against Egypt for the latter's actions in the Sinai Peninsula which directly threatened Israel's security.

Finally, urgent measures are paramount to implement pre-emptive war doctrine in international law and introduce relevant norms in international legal acts. Most important of all is the search for possible mechanisms to obtain appropriate clarification of the nature and structure of pre-emptive war measures from the International

<sup>25</sup> R. J. Delahunty, J. Yoo, "«The Bush doctrine»: Can preventive war be justified?", *Harvard Journal of Law & Public Policy* 2005, no 32, pp. 844–872.

<sup>26</sup> А. А. Ганзенко, "Концепция превентивной войны в современном международном праве", *Вісник Запорізького національного університету: Збірник наукових праць. Юридичні науки* 2012, no 1, pp. 11–15.

Court of Justice, the UN Security Council or other UN entities with a view to developing precise and unified knowledge and understanding of a pre-emptive war.

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## PRE-EMPTIVE WAR UNDER INTERNATIONAL LAW

### Summary

The thesis is devoted to problems associated with the international legal regulation of pre-emptive war. It is quite obvious that this phenomenon has a logical context revealed in national security policies individual states pursue for themselves. In this regard, analysis was made of the prerequisites for the emergence of a new doctrine of pre-emptive war, and here analysis of the "Bush Doctrine" made it possible to reveal the characteristics of pre-emptive war. In addition, the article pays precise attention to the problem of correlation between the characteristics of pre-emptive war and preventive war. It has been separately established that the current stage of international legalization of pre-emptive war requires significant improvement in mechanisms preventing this phenomenon and the development of a system of sanctions. Important conclusions are drawn regarding the prospects for international consolidation and implementation of the pre-emptive war doctrine in the systems of international law.

**Keywords:** pre-emptive war, Bush doctrine, act of aggression, war, international law, UN Charter, preventive war.

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