

Is Pre-emptive war ever justified?

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CHARLOTTE BRANDON, JUN 8 2011

Pre-emptive war is universally recognized as an anticipatory use of force. Walzer acknowledges that pre-emptive force is when both individuals and states defend themselves against violence that is imminent but not actual; they can fire the first shots if they know themselves about to be attacked. (2006: 74). "...there must be shown a necessity of self-defence...instant, overwhelming, leaving no choice of means, and no moment for deliberation." (Berkely 1968). This would permit the state to do little more other than to respond to an attack once the targeted state had seen it coming but before it had felt its impact. Pre-emption then, is like a reflex action "a throwing up of ones arms at the very last minute". (Walzer, 2006: 75). Despite the definition for the terms of a pre-emptive war, whether or not it is justified has become a complex and contradicting subject for states. There is the issue of morality, abiding by international law and comprehending the definition of "imminent threat". The main problems here are that states can misjudge "threat". What really constitutes an imminent threat? It is this confusion and blurred definition which leads to states acting out of aggression and uncertainty rather than a solid justified move which can constitute a pre-emptive war. This links in with just and unjust wars which are explained by Walzer. Pre-emptive force can be headlined under legitimate and illegitimate force. Using liberal and realist theorists together with cases whereby states have used "pre-emptive" force to legitimize their actions, one can come to the judgement of whether pre-emptive war can ever be justified. In my opinion, pre-emptive force can certainly be justified supporting internal states duty of "responsibility to protect". However, because states have abused this use of force against another due to an unclear overview in International Law and the general dislike of war and its implications – "you don't prevent anything by war....only peace" (US President Truman 1950), justification can appear to be highly controversial and disliked. As Waltz commented, pre-emptive war is either about "strategic or morals... one or the other".

To begin with, the justification of something is usually correlated with legality. Surely, if something is lawful then it is moral and justified. This, of course, reaches contradictory conclusions. However, in the case of pre-emptive use of force, to understand it's legality under International Law and supported by the UN Charter, we can establish a better understanding of its justification. However, it must be noted that International Law on pre-emptive force is very limited and difficult to comprehend thus, it is my belief that it due to this blurred explanation has led to states abusing the right of pre-emptive force. The complications arise at Article 51 in International law which states the right to self-defence. It is controversial whether this is a narrow right, available only in response to an armed attack or whether it allows force in protection of nationals abroad or in response to terrorist attacks. The UN Charter prohibits the use of force by states in Article 2(4), but this has not prevented over 100 major conflicts since 1945. States tend to use international law to explain and justify their behaviour (Evans, 2006: 589). It declares that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the UN". But, the main exception is self defence (Evans:2006, 598). But, this does not identify what exactly constitutes as self defence. When is self defence appropriate? How can one differentiate self defence from hegemonic desires?

This links in with threat and the use of force. The International Court of Justice was faced with questions to the meaning of "threat of force" but limited itself to the conclusion that a threat of force is unlawful where the actual use of the force threatened would itself be unlawful; the Court refused to find that the mere possession of nuclear weapons was an unlawful threat of force. This does, however, provide some empirical evidence that the mere possession of nuclear weapons for example, as threatening as they appear, cannot be an actual imminent threat, so in the case of Iran for example, unless there is evidence for the use of "potential nuclear weapons" to be used against another

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state, the possession of them is not enough for another state to legally strike against them. But, importantly, it does recognize that “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 UN...” (UN Charter Article 51). This can be interpreted as an exhaustive statement of the right to self-defence or whether there is a wider customary law right of self-defence going beyond the right to respond to an armed attack. Some argue that an “inherent right” in Article 51 preserves a customary law right of self defence other than against an armed attack thus supporting pre-emptive force. (Bowett, 1958; Arend and Beck, 1993). Bowett argues for a right of anticipatory self defence. Evans argues that it all depends on how one interprets the charter on self defence and pre-emptive force. The main problem for this wide interpretation held by the UN charter is that it does not clearly define when self defence is necessary thus the justification and legality of states actions is indistinct. This is demonstrated by the fact that in the Nicaragua case, no provision on self-defence could be included in the UN GA and the ICJ and the case was left unresolved. The problem with the irresolution of such cases means that other states have no model on what is just and what is unjust, legal and illegal. However, other examples demonstrate a much more knowledgeable approach in understanding the justifications of pre-emptive war.

Daniel Webster for example, shows an effective way of analysing the implications for a legal and just pre-emptive strike to take place. After the Caroline case 1842, he proposed that states can resort to self defence only if it is a necessity “...instant, overwhelming, leaving no choice of means, and no moment for deliberation” (Berkely, 1968). If this is the case, if pre-emptive strike is the last option, if there is no way to compromise, then surely this is the only means for peace thus reflecting that in such circumstances, the targeted state is justified in its actions. But it is essential to note that this paradigm is still restrictive insofar as what one perceives the necessary needs to use force before the aggressor, another state may perceive this differently. So, to an extent, the necessity of the use of force depends on individual states and this is clearly very problematic. This is reflected by Hobbes’ views who stated that “war is justified by fear alone and not by anything other states actually do or any signs that they give of their malign intentions”. This therefore suggests that prudent rulers assume malign intentions. Interestingly, this can be linked to the modern day circumstances between Iran and the USA which will be explained further. But together with the international law outline, understanding the imminent threat helps to comprehend whether or not pre-emptive force is justly done. Imminent threat means “to hold out or offer (some injury) by way of a threat, to declare one’s intention of inflicting injury”. (Oxford Dictionary). Walzer makes the key point that “political ranting” is not a threat; injury must be “offered” in some material sense. Military preparation or possession of nuclear weapons for example does not count as a threat unless it violates some formally or tactically agreed-upon limit. This therefore demonstrates that despite the appearance of a threatening state, the threat has to be directly inflicted upon another and the clear intention to harm another state thus demonstrates the justifiable move of pre-emptive force.

Past examples of “pre-emptive” force provide solid examples of what is generally lawful and just and what was condemned. Indeed, such examples can be compared with the current USA and Iran situation and whether this is a case for pre-emption or not. The threat has to be imminent. Israel and the six day war June 5th 1967 is a chief example of pre-emptive force which was, according to the UN Charter, justified. Why? Because the threats were incontestably imminent. Egypt and other Arab states began moving troops to the Israeli borders, occupying the Sinai Peninsula, the west bank and Gaza strip. This was a clear strategy to surround Israel and consequently was a clear threat to the freedom of Israel. Israel claimed its attack was defensive in nature and necessary to forestall an Arab invasion. (Ackerman, 2003: 5). This reflects Walzer’s case for a just pre-emptive war on the grounds of these three pillars. First, a manifest intent to injure, second, a degree of active preparation that makes that intent a positive danger, and third, a general situation in which waiting or doing anything other than fighting greatly magnifies the risk. (2006, 88). Israel really was in danger and it was Nasser’s intention to put it in danger. Therefore, Israel’s first strike approach is a clear case of legitimate anticipation. This means that we are acknowledging that there are certain threats with which no nation can be expected to live by and through this understanding, we can comprehend the notion of aggression, which means separating pre-emptive force on justifiable terms and a state just acting out of aggression and hegemonic intentions, thus the amount of threat demonstrates that pre-emptive force is perfectly justifiable. As Walzer famously quoted, “a state under threat is like an individual hunted by an enemy who has announced his intention of killing or injuring him. Surely such a person may surprise his hunter, if he is able to do so” (2006, 85).

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This links in with the states responsibility to protect. State sovereignty should not be seen as a shield. If another state has shown intentions to act aggressively and invade another state, then it is the states duty to protect. Looking back on Israel's case in 1967, the whole country was in jeopardy. Despite an attack yet to occur, the anticipation of it led to a lack of structure and organization within the internal structure of Israel. If there is chaos in the state because of the potential outside threats, then this could result in whole social communities and economies deteriorating thus affecting other states and becoming a global problem. This would then suggest that it is the states duty to maintain peace among other states as well as itself, thus a pre-emptive move to prevent such atrocities happening would be responsible and just. Israel was justified because the external threats had severe consequences on the internal structure of Israel economically and socially and so if any state was in this situation, it is the states duty to protect themselves and others, supporting my belief that when the threat has the potential to cause intense problems before the attack has initially started, a pre-emptive strike is justified. Further to this, the human development report 1994 required: Economic security, food security, health security, Environmental security, personal security (protecting people from physical violence, whether from the state or external states), and political security. As demonstrated with the Israeli case, if these are being threatened then it is again, the states responsibility to protect themselves from further disaster. In my view, in terms of whether or not to use pre-emptive force, there are perhaps no good choices, but it is better to make the least bad choice, for the greater good.

As much as pre-emptive war can be justified and seen as the responsible choice to make, as highlighted above, it does however, comprise of one particular severe problem. There is always the desirability to take action. If we judge pre-emptive on Waltz' belief that states need to act out if they are threatened; "may not the "good" by doing nothing, make the triumph of "evil" possible?" (2001, 108). But, this is assuming that the "aggressor" is in fact in the wrong. This can be linked to Jeremy Bentham's supportive view on pre-emptive war suggesting that it is necessary in order for states to "right" a "wrong". This is where the complications arise. Who is in the right and who is wrong? Modern day wars, due to a more globalized world have resulted in a war between the western states and non-western states. Globalization has led to an interconnected world and institutions such as the UN, NATO and the EU means that states within these are essentially allies. They all have international relations with one another importing and external goods, and work together diplomatically. Non-western states however are seen as outsiders. The problem here is that it is human nature that when we are not familiar with one thing we fear it. It has become a notion of "us" and "them" thus because western states do not have very good relations with non-western states, we become unsure of their intentions. In other words, pre-emptive war could be misjudged greatly if we do not understand the "others" intentions.

A prime example of this is America and Iran. America has been threatening to use pre-emptive force against Iran because it assumes that Iran intends to use its possession of nuclear weapons against it. Presently, there is mass media attention to the potential threat in Iran. For example there is the organization "United Against Nuclear Iran" and scholars such as John Shalikashvili expressed in 2008 that the "West must be ready to resort to a pre-emptive nuclear attack to try to halt the imminent spread of nuclear weapons" (global research, 2008). However, despite these implications, Nuclear Intelligence Estimate on Iran in 2007 expressed that it was not a threat; "We judge with high confidence that Iran will not be technically capable of producing and reprocessing enough plutonium for a weapon before about 2015" (NIE, 2007). Furthermore, Iran has made no direct threats to the US about its intentions to attack it. Importantly, the USA, Israel, Britain, France and Russia all have possession of nuclear weapons but they are not seen as threats. A pre-emptive war can easily be mis-used and become a war against the non-western states. As Chomsky voiced, "Western powers can still resort to violence against the weak and defenceless, but not against each other" (2005: 71). Therefore, pre-emptive use of force needs to be critiqued and monitored in order for there not to be the dilemma of west versus non-western states. As explained before, a threat has to be direct and imminent in order for pre-emptive force to be justified. To assume a potential threat will result in miscalculations and discrimination against the other such as in the case of Iraq. This expresses the point that such an assumption would clearly be unjustified and unlawful because unlike Israel's situation in 1964, Iran has not proceeded to threaten the USA or its allies. Importantly, it is because of the UN Charter and Webster's definition of imminent threat, together with previous historical examples of legally justified pre-emptive force that means we have a much better understanding of states' intentions thus institutions such as the UN can condemn a states for its move or support it if such a case of pre-emptive war is needed.

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To conclude, despite the fact that pre-emptive war can involve states misusing it, due to international law, UN Charter together with theoretical approaches such as Waltz and Webster, together with justified examples such as Israel and unjustified such as in the case of Iraq and America and Iran, all of these have provided the knowledge of what circumstances can class as just for states to use pre-emptive force against the aggressor. If there is imminent threat against another state – actual intent to attack which results in problems within the targeted state, then it is technically lawful under the UN Charter thus it is justified. If the threat is imminent then one can be certain of an attack thus misjudging their intent would be slim if analysed correctly. Therefore my view supports Hugo Grotius' belief of "it be lawful to kill him who is preparing to kill!".

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