

# Legal Doctrine Pre-Emptive Military Strike against the Existence of Principles of Self-Defence and Non-Intervention in International Law

Johanis Steny Franco Peilouw\*, Alma Manuputty\*\*, Muhammad Ashri\*\*, Juajir Sumardi\*\*

\* Graduate Student PhD, Study Program : Science Of Law. Hasanuddin University, Makassar, Indonesia

\*\*Faculty Of Law. Hasanuddin University, Makassar, Indonesia

**Abstract-** This study aims to discover and understand the application of the doctrine of pre-emptive military strike against the existence of the principle of self-defense and the principle of non-intervention in an attempt to establish a new international legal provisions. The method used in this study is a normative legal research methods. The results showed that application of the doctrine of pre-emptive military strike is, the development of the interpretation of Article 51 of the UN Charter and raises the pros and cons among academics and practice of the countries in the world, so it can affect the formation of a new international law. Conclusion : The doctrine of pre-emptive have strayed or not in line with the principle of self-defense in international law.

**Index Terms-** pre-emptive, self-defense, legality

## I. INTRODUCTION

International law recognizes the right of each country to act in self-defense. That an act of violence can be justified, if the action was carried out as provided for in Article 51 of the Charter of the United Nations (UN). The wording of Article 51 of the UN Charter, as follows :

Not something the provisions of this charter are detrimental to the right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council take the measures necessary to maintain international peace and security. Measures taken by Members in implementing the right of defense should be immediately reported to the Security Council and in any way can not offend the powers and responsibilities of the Security Council under the present Charter to at all times take the necessary action to maintain or restore peace as well as international security.

Understanding of Article 51 of the UN Charter, the mature countries are experiencing a shift of interpretation, which lies in the extent of self-defense action can be done. The interpretation has two different meanings, first, the phrase literally meaning that first there must be an armed attack, can only use force in the framework of self-defense. The second understanding, expressed the meaning of self-defense that wider scope, that self-defense is an inherent right under customary international law, in terms not only of armed attacks, but also concerns over the validity of anticipatory self-defense.

Judith Gardam explained that :

Article 51 retains the inherent forces of states to use in individual or collective self-defense in response to an armed

attack. Under the Charter scheme, therefore, in the case of unilateral state action, the proportionality equation Involves an assessment of the forceful actions against the legitimate goals of the use of force items, namely, self-defense (Judith Gardam., 2004) [1]

Self-defense is said to be valid if the state acts refer to the event or events in the which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means and no moment for Deliberation. (DJ Harris., 1998) [2] Where the attack by using military force in this situation should be applied proportionally to the threats he had received. This form must meet the criteria threat imminent. It means that the threat is already close at hand.

The practice of some countries have taken action anticipatory self-defense in the form of pre-emptive military strike, for purposes of self-defense before the attack. This is done as the implications of the September 11, 2001 ever experienced by the United States, as an act of terrorism act. So that countries feel the need to provide security and protection for citizens and the territorial integrity of such attacks.

The practice of anticipatory self-defense into a serious debate among academics, because this principle is contrary to the principle of self-defense enshrined in the UN Charter. Military doctrine Preemptive Strike, has been practiced by the United States, as "a policy that is part of the security strategy of the United States in an effort to safeguard its national interests" (G.John Ikenberry.,2007)[3]. The United States government in its national strategy, has explained that "action pre-emptive strike aimed at preventing the development of terrorists by way of regimes that crack down on suspected ties as the party that sponsored terrorist acts. (The National Security Strategy 2002) [4]. This doctrine has become an issue and a serious debate among statesmen, academics who are experts in the field of international law, and even become a serious problem within the United Nations itself. Of course in order to obtain the validity of its application.

## II. RESEARCH METHODS

The method used in this study is a normative legal research methods. Normative legal research methods or methods of legal research literature is the method or methods used in legal research done by examining existing library materials (Soerjono Soekanto and Sri Mamudji 2009) [5]. The first stage of normative legal research is research aimed at obtaining an

objective law (rule of law), namely by conducting research on legal issues. The second stage is a normative legal research study aimed at getting subjective law (rights and obligations) (Hardijan Rush, 2006) [6].

### III. RESULTS AND DISCUSSION

#### 1. Principles of Self-Defence (Self Defense)

The principle of self-defense is an exception to the use of violence or coercion in international law. On Article 51 of the UN Charter, used the phrase "if an armed attack Occurs ..." If interpreted literally, there must be an armed attack in advance, in order to use violence in order to self-defense.

Self-defense recognized in customary international law, where every country has a right to defend itself, but the implementation of the right of self-defense in practice is not clear. It is said that "It was only as restrictions were imposed on the employment of force by states that the need to articulate the concept of self-defense in international law Become more acute." (Rebecca MM Wallace., 1992) [7] Thus, emphasizes that the principle of self-defense in international law is still needed. Further explained, "The circumstances the which allowed the exercise of self-defense were articulated in the now famous communication of the United States Secretary of State Webster to the British Government following the Caroline incident". (Rebecca MM Wallace., 1992) [7] That is, the case has spawned caroline ship self-defense performance indicators, such as the opinions that have been expressed by Webster to the British Government in the case, namely:

*In his letter Secretary Webster emphasized that the success of the British government's defence was dependent on their action being justified on grounds of "the necessity of self-defence and preservation." It had to be demonstrated that the need for self-defence was "instant, overwhelming, leaving no choice of means, and no moment for deliberation." It was also necessary for Britain to show that the Canadian authorities had done nothing "unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."*

Webster emphasized, reasons for self-defense must be proportionate in terms of meeting the criteria must be fast, outstanding, leaving no choice of means, and no time to listen. Cases of violence perpetrated against ships caroline show that, the act of self-defense should not be unreasonable or excessive, so the action is justified and should be limited only to the needs of self-defense. Thus, "to summarise, the exercise of force in self-defense was justified under international customary law-provided that need for it was:" (Rebecca MM Wallace., 1992) [7].

1. *Instant;*
2. *Overwhelming;*
3. *Immediate;*
4. *And there was no viable alternative action which could be taken.*

Perform acts of self-defense must meet the four elements, with the intention that the act of self-defense because really been an attack or the threat of an approaching attack. Rebecca M.M. Wallace argued, "Self-defense is permissible if an armed attack

has taken place and Article 51 confines itself to self-defense only in this situation." (Rebecca MM Wallace.1992) [7]

The provisions of Article 51 of the UN Charter, allowing self-defense can be done either individually or collectively. The provision requires that every act of self-defense committed by the state (individual and collective) must be reported to the UN Security Council as the organ with the authority to restore international peace and security. Liabilities owned by parties who commit acts of self-defense is in practice difficult to do, because that usually happens is self-defense after the attack was carried out, and then reported by the parties.

Differences in understanding the meaning of self-defense, resulting in emerging doctrine that are anticipatory such, the doctrine of Bush is the doctrine of preemption, or also known as the doctrine of preemptive military strike means to carry out the first attack on other countries that seemed to be preparing an attack or was in the process of carrying out attacks.

#### 1. Application of the Doctrine of Pre-emptive Military Strike As Reason Self-Defence in International Law

Forms of individual and collective defense against the ongoing attacks, such as the fight against the occupation of Iraq to Kuwait, is regarded as a legitimate form of self-defense. But what if a country decided to attack first when he knows with certainty that the attack of other countries is imminent ? Can such preemptive military action is still considered to be an act of legitimate self-defense ? Bruno Coppieters & Nick Fotion, argued justification pre-emptive actions are as follows :

The legitimacy of a preemptive strike as a just cause is derived from the fact that a Presumed Injustice is about to occur. Needless to say, given that the actual Injustice has not taken place yet, the self-defense quality (and Thus Spake Also the just cause quality) of the preemptive strike will most likely remain somewhat suspect. Indeed, how credible is the threat, and does it really justify an anticipatory military response ? Proponents of the preemptive strike as an act of self-defense support this view in quite a straightforward manner: Why should I wait for an Injustice to be inflicted on me, when I have better chance of defending myself if I can prevent it from happening in the first place ? (Bruno Coppieters and Nick Fotion, 2008) [8] Bruno Coppieters and Nick Fotion, tried to explain about the importance of anticipatory self-defense measures, given at any time and is not yet known when the attack comes, the better strike first if there is an opportunity.

Addressed by international legal experts to be based on the case of Caroline, said that :

*International lawyers will cite the 1837 Caroline incident as the modern classic exposition of a case of what they call "anticipatory self-defense." The British had destroyed an American steamship in U.S. territorial waters, claiming that this ship had been used, and would probably be used again, to support a Canadian rebellion against their colonial rule. In the debate on this act of war, the American secretary of state Daniel Webster defined the circumstances in which anticipatory action may justifiably be taken. He stated that such an action was to be regarded as an exception to the general rule concerning self-defense and "should be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no*

*choice of means, and no moment for deliberation: Here Webster was articulating a highly restrictive rule concerning the right to use force preemptively* (Bruno Coppieters and Nick Fotion, 2008) [8].

Preemptive use of force can be considered to be justified according to Walzer, namely, "only if it constitutes a response to a sufficient threat". (Bruno Coppieters and Nick Fotion, 2008) [8] So, it should include three factors that draw the situation to show that when there is a considerable threat, to make a preemptive be justified, namely by :

1. The potential aggressor has a manifest intent to injure;
2. The potential aggressor exhibits a degree of active preparation that makes a positive intent that danger;
3. A general situation in the which waiting, or doing anything other than fighting, greatly increases the risk to the victim nation. (Michael Walzer, 2006) [9]

The situation presented by Walzer, describing the contents of the formula Caroline is no evidence in the form of threats and the threat was approaching, can not be compromised to delay the action of self-defense, because it will be bad in the future.

The debate on the issue of justification based on knowledge and timing of the threat of attack by the enemy, in the perspective of self-defense, by Akmal Hussein, argues :

*Nevertheless pre-emption as a means was believed to be supplanting the cold war concept of deterrence and containment. Remarkably though the proponents of preemption ignored the basic questions of its justification based on intelligence knowledge and timing. The decision to initiate offensive war, in the absence of any conclusive intelligence knowledge, depended on questionable assessment of threats by political leaders*"(Akmal Hussain, 2006)[10].

Pre-emptive action taken lead to debate the pros and cons, especially among countries transatlantic, by Reiner K. Huber explains :

*Nevertheless, the preventive actions taken by the United States in Afghanistan and, in particular, Iraq have led to considerable irritations in transatlantic and, one should add, inner-European relations as well. Whatever may have motivated some of Europe's leaders to denounce U.S. actions against Iraq, public response suggests that most Europeans did regard the threat not to be very grave and, therefore, preventive action simply a "war of aggression" rather than an act of anticipatory defense. In the public debate before and during the war, attempts to explain the rationale underlying the concept of preemption were mostly met by assertions about presumed American motives and inappropriate historical analogies* (Reiner K. Huber, 2004)[11].

Criticism of America was born of a false understanding of the anticipatory self-defense, resulting in open warfare, and it is this which is not desired by most European countries. Similarly the American intervention in Iraq. However, there is an opinion about the US invasion of Iraq is true, because to comply with international commitments on the peaceful coexistence. Such as the opinions expressed by Pollack that *"for invading Iraq and thus replacing Saddam regime with successor prepared to abide by its international commitments and live in peace with regional neighbours"*.

At least there are three conditions that must be met, in order to minimize the impact of the international order and the civil

society, the legitimacy of the proposed preventive measures the level of use of force in self-defense, namely : (Reiner K. Huber, 2004) [9].

- (1) Clarity of defensive purpose,
- (2) Capability to keep collateral damage at a minimum, and
- (3) Obligation to restore material damage caused by military intervention.

Commenting on the third explanation of these conditions, must meet the criteria of urgent need and proportionality. The third condition can thus unmasking of meaning between preemptive self-defense and anticipatory self-defense, because according to the understanding of Professor Sean Murphy in fact there is a difference of meaning in the use of the term self-defense extended, according to him, namely "that anticipatory self-defense is not the same as preemptive self-defense " (Charles J. Dunlap, Jr., 2013) [12] Thus, anticipatory self-defense refers to the use of armed force by the state is forced to stop the action immediately armed coercion by other state or non-state entities that operate from other countries.

While the act of preemptive self-defense is, "Preemptive self-defense is used to refer to the use of armed coercion by a state to Prevent another state (or non-state actors) from pursuing a particular course of action the which is not yet directly threatening , but which, if permitted to continue, could result at some future point in an act of armed coercion against the first state " (Charles J. Dunlap, Jr., 2013) [12] that there should be symptoms that occur prior to undertake actions self-defense. Whether it's preemptive action or action within the framework of anticipatory self-defense requires legitimacy of competent international institutions. As in the following explanation, that "preemptive action constituting self-defense so defined requires a Security Council resolution. The anticipatory self-defense doctrine can, however, justify unilateral action. Authority for anticipatory self-defense is not literally set forth in the text of the UN Charter. Indeed, because of the absence of an explicit textual endorsement of anticipatory self-defense, many experts do not accept its legitimacy" (Shirley V. Scott, Anthony John Billingsley, Christopher Michaelsen, 2010). [13]

The legality of the application of the doctrine of preemptive military strike as an act of self-defense developed from Article 51 of the UN Charter, is seen as the basis for the development of the right of self-defense by some countries as well as international law expert. Its application gave rise to a debate in the application of rights according to international practice run before the United Nations Charter and the interpretation of the contents of the charter itself. One of the basic debate is related to the temporal dimension and the legality of anticipatory action against an approaching threat.

In order to find the root problem of the debate in question, it is necessary to understand it through a historical approach on the concept of the development of customary international law in state practice of self-defense pre-Charter. and a comprehensive analysis of the process of drafting of Article 51 of the UN Charter. Forward the question is whether anticipatory action to defend ourselves is part of customary international law? and whether the action is seen as part of anticipatory self-defense when the UN Charter was adopted? Based on the research results

obtained by Kinga Tibori Szabo, in his anticipatory Action in Self-Defence, that "The concept of self-defense was traced through three succeeding normative frameworks that regulated war: the Christian natural-law, the positivist and the emerging international law frameworks. In each of Reviews These frameworks, the concept of self-defense was identified and explained on the basis of the available works and relevant state practice "(KingaTibori Szabo, 2011) [14].

So, at first the concept of self-defense developed three normative framework which regulates the war, clearly identified the basis of the results of work created and relevant state practice. That is, self-defense is seen as a right that is given by nature to the individual and the state. Thus, the "Pre-Charter concept of self-defense had always been seen as having an intrinsic anticipatory aspect. There was no strict differentiation made between 'self-defense' and 'anticipatory self-defense', Because The right as such had an anticipatory meaning. Remedial action in self-defense was allowed only if a new attack had to be warded off ". That the concept of self-defense is meant to have intrinsic anticipatory aspect.

Aspects of the essentials of anticipatory on the concept of self-defense pre-Charter are also highlighted by Bowett, that, "The right has, under traditional international law, always been" anticipatory ", that is to say its exercise was valid against imminent as well as actual attacks or Dangers "(Kinga Tibori Szabo, 2011) [14]. The same conclusion is confirmed by Waldock is, "self-defense belongs to preventive justice 'in the sense that self-defense was strictly confined' to the object of stopping or Preventing the infringement and reasonably proportionate to what is required for Achieving this object " (Tibori Kinga Szabo, 2011) [14]. That is, the proportional element is directed only limited to the object to stop or prevent a violation will occur. Waldock understand the meaning of preventive and self-defense are equally implies precautions against something that will happen later. Further KingaTibori Szabo conclude on the legality of the action of anticipatory self-defense in international law, is :

*Anticipatory action is still part of the contemporary customary understanding of self-defence. Undoubtedly, the various post-Charter developments on the subject have shaped the conditions under which anticipatory action in self-defence is legal under international law... Nonetheless, the temporal dimension of the contemporary customary right to self-defence has retained an anticipatory aspect, which—under certain conditions—may be deemed lawful under international law* (KingaTibori Szabo, 2011) [14]

The context of the debate about the legality of anticipatory action to defend ourselves, for those who reject the legality of anticipatory self-defense only approach restrict the interpretation of the agreement and contextualization. Therefore, the analysis of the concept of Article 51 of the UN Charter, certain authors maintain that self-defense before the armed attacks are prohibited. Conversely, those who support the legality of anticipatory self-defense, maintaining that the purpose of Article 51 is to preserve the common law understanding, as determined by Caroline criteria.

#### IV. CONCLUSION

The legality of the application of the doctrine of pre-emptive military strike as a reason for self-defense, that :In the condition where the action is anticipatory self-defense can be considered legitimate under international law. can be seen on the condition relating to the need and proportionality of self-defense. Needs require the requirement of an armed attack and the proximity of urgency and inevitability, while proportionality with regard to the necessary amount of force to ward off an attack. Regarding anticipatory action, the combination of elements can be incorporated into a simple formula, against the perceived threat of armed attack must be created now and the inevitable need to use proportional force to stop the attack. Thus, the validity of the application of the doctrine of pre-emptive military strike as a reason for self-defense does not meet the requirements as referred to in Article 51 of the UN Charter.

#### REFERENCES

- [1] Judith Gardam., 2004, *Necessity, Proportionality and the Use of Force by States*, Cambridge University Press, UK.
- [2] D. J. Harris.,1998, *Case and Materials on International Law*, 5th Ed, Sweet & Maxwell, London.
- [3] G. John Ikenberry., 2007, *America's Imperial Ambitions*" dalam *American Foreign Policy Theoretical Essay*, Edisi ke-4, New York: W.W. Norton dan Compagny, Inc.
- [4] *The National Security Strategy 2002*. The President of United States America, September 2002.
- [5] Soerjono Soekanto dan Sri Mamudji, 2009. *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Cetakan ke – 11. (Jakarta : PT Raja Grafindo Persada), hal. 13–14.
- [6] Hardijan Rusli, "Metode Penelitian Hukum Normatif: Bagaimana?", *Law Review Fakultas Hukum Universitas Pelita Harapan*, Volume V No. 3 Tahun 2006, hal. 50.
- [7] Rebecca M.M. Wallace., 1992, *International Law, A Student Introduction*, Second Edition., Sweet & Maxwell, London.
- [8] Bruno Coppieters and Nick Fotion, 2008, *Moral Constraints on War: Principles and Cases*, Rowman & Littlefield Publishers Group Inc., United Kingdom.
- [9] Michael Walzer, 2006, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed., New York, NY: Basic Books.
- [10] Akmal Hussain, 2006, *Some Aspects For Contemporary Inter-State Behaviour in the Context of Combating Terrorism*, *Akamdemika* 67, Januari, hlm. 25-36, [www.ukm.my/.../akademika/ACROBATAKADEMIKA67/akademika67\[02\].pdf](http://www.ukm.my/.../akademika/ACROBATAKADEMIKA67/akademika67[02].pdf), diakses pada tanggal 26 Januari 2015
- [11] Reiner K. Huber, 2004, *Anticipatory Defense: Its Fundamental Logic and Implications*, Institut für Angewandte Systemforschung und Operations Research Fakultät für Informatik Universität der Bundeswehr München, Published in: *International Seminar on Nuclear War and Planetary Emergencies 30th Session* (A Zichichi and R. Ragaini, Eds.), Singapore 2004, World Scientific Publishing Co., 498-511., <http://www.unibw.de/inf4/professuren/entpflichtete-professoren/prof-huber/dokumente/anticipdef.pdf>, diakses pada tanggal 4 Mei 2015
- [12] Charles J. Dunlap, Jr, 2013, *Anticipatory Self-Defense And The Israeli-Iranian Crisis: Some Remarks*, *ILSA Journal of International & Comparative Law*, Vol. 19: 2013, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article>, diakses pada tanggal 6 Januari 2015

AUTHORS

**First Author** – Johanis Steny Franco Peilouw: Graduate Student PhD, Study Program: Science Of Law Hasanuddin University, Makassar, Indonesia. Email : johanis\_steny@yahoo.co.id

**Second Author** – Alma Manuputty : Faculty Of Law. Hasanuddin University, Makassar, Indonesia

**Third Author** – Muhammad Ashri: Faculty Of Law. Hasanuddin University, Makassar, Indonesia

**Fourth Author** – Juajir Sumardi Faculty Of Law. Hasanuddin University, Makassar, Indonesia