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INFO MEMO

October 16, 2002, 4:00 PM

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel *WJ Haynes*

SUBJECT: Legal Distinction Between Preemption, Preventive Self-Defense, and Anticipatory Self-Defense

- You wrote me a note asking whether there is any significant difference between these terms.
- In ordinary usage, “pre-emptive” and “preventive” convey slightly different meanings.
 - William Safire’s recent column (“Rope-A-Dope,” NYT Mag., October 13, 2002) explained that the terms connote a difference in the imminence of threat. A “pre-emptive” action responds to a more imminent threat than does “preventive” action. (~~Sec Feb 8~~)
RED TAB.
 - The DoD Dictionary of Military Terms recognizes this distinction. It defines a “preemptive attack” as one “initiated on the basis of incontrovertible evidence that an enemy attack is imminent.” It defines a “preventive war” as one “initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk.”
- International law recognizes no difference between “preemption,” “preventive self-defense,” and “anticipatory self-defense.” These terms all refer to the right to use force based on the existence of an imminent threat but prior to an armed attack.
 - “Anticipatory self-defense” is the classic term for the right under customary international law to use force in the face of an imminent threat. The 1837 “*Caroline Case*” established the right of anticipatory self-defense. (For a more detailed discussion of anticipatory self-defense and the *Caroline* case, see the Info Memo at ~~Tab A~~.)
GREEN TAB.
 - The Nuremberg Tribunal reaffirmed the *Caroline Case* in 1946, stating that “preventive action in foreign territory” is justified in the face of an imminent threat.

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- The 2002 National Security Strategy (NSS) in discussing preemption states: “For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.”
 - NSS emphasizes, however, that the concept of “imminent threat” must be adapted to “the capabilities and objectives of today’s adversaries” (*i.e.*, the threat need not be as imminent if there is an increased risk of occurrence and an increased magnitude of harm).

COORDINATION: None





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INFO MEMO

August 2, 2002, 10:30 AM

FOR: SECRETARY OF DEFENSE

FROM: William J. Haynes II, General Counsel 

SUBJECT: Anticipatory Self-Defense

- Self-defense has been a fundamental right recognized in the customs and practices of nations. These practices are sometimes called the “law of nations” or “customary international law.” The UN Charter—the most important codification of those customs and practices—did not create the right, nor does it limit it.
- The 1837 “*Caroline Case*” is generally cited as establishing the right of “anticipatory self-defense” under customary international law.
 - The steamer *Caroline* had been supplying armed insurgents against British rule in Canada with reinforcements of men and materiel from the United States. In response to the threat of more activity of this sort, a British force from Canada entered U.S. territory at night, seized the *Caroline*, set the ship on fire, and sent it over Niagara Falls, killing two U.S. citizens in the process.
 - The British claimed they were acting in self-defense. In an exchange of diplomatic notes, Secretary of State Daniel Webster called upon the British to show that the “necessity of self-defense [was] instant, overwhelming, leaving no choice of means, and no moment of deliberation”
 - Webster’s articulation of the justification needed for use of force in that circumstance supports the legitimacy of anticipatory self-defense.
 - The *Caroline* case has been distilled into two principal requirements for using force in anticipatory self-defense:
 - The use of force must be necessary because of both the imminent nature of the threat and the absence of peaceful alternatives, and,
 - The response to the threat must be proportionate.



- Recent U.S. practice can be seen to demonstrate that the custom among nations (i.e., customary international law) is in accord:
 - Cuban Missile Crisis – nuclear missile bases in Cuba labeled an “immediate threat” and imposition of a blockade a justifiable act of self-defense.
 - 1986 air strikes on Libya justified in large part as anticipatory self-defense.
 - 1989 military action in Panama – President Bush explained the action was necessary to protect American lives in imminent danger.
 - 1993 attack on Iraqi Intelligence Headquarters in response to compelling evidence Iraq had attempted to assassinate President Bush justified as self-defense.
 - 1998 cruise missile strikes in Afghanistan in response to U.S. embassy bombings in Kenya and Tanzania justified as “a necessary and proportionate response to the imminent threat of future terrorist attacks against U.S. personnel and facilities.”

- With the advent of nuclear and other sophisticated weapons and the potential for terrorists to obtain such weapons, the degree of imminence required to justify using force in anticipatory self-defense arguably should be seen differently: the threat need not be as demonstrably imminent if there is an increased risk of occurrence and an increased magnitude of harm.

- Taking those changed circumstances and the practice among nations into account, the appropriate analysis might be stated as follows:
 - Anticipatory self-defense is justified if a state:
 - Reasonably believes that it will be the subject of attack by WMD or terrorism;
 - Pursues nonmilitary remedies to no avail;
 - Waits until further delay would unreasonably increase the chances of significant harm ; and
 - Uses force proportional to the threat.

COORDINATION: None



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September 27, 2002 2:58 PM

SECDEF HAS SEEN

FEB 13 2003

TO: Torie Clarke
CC: Jim Haynes
FROM: Donald Rumsfeld *DR*
SUBJECT: Definitions



Please do me a favor and ask Tom Shanker what distinction he was referring to in terms of preemption, preventative self-defense and anticipatory self-defense.

Jim, I got asked this question. Is there some legal answer to it that I ought to be aware of?

Thanks.

DHR:dh
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Please respond by 10/11/02



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