The Crime of Aggression and Pre-Emptory Self-Defence

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On July 17, 2018, the Assembly of States Parties to the International Criminal Court activated the International Criminal Court ("**ICC**")'s jurisdiction over the crime of aggression. As of January 2021, forty-one states have ratified the amendment to the *Rome Statute of the International Criminal Court* ("***Rome Statute***") giving the ICC jurisdiction over those states for the crime of aggression. Although the ICC has not yet charged anyone with aggression, the ICC will eventually have a case concerning aggression before it. When that day comes, the defendant may argue their actions constituted self-defence rather than aggression. In this case, the ICC will need to determine whether pre-emptory self-defence is a valid legal defence to aggression and, if so, how far that defence extends.

The prohibition on aggression is now well established in international law. After the Second World War, the Nuremberg and Tokyo Tribunals convicted several individuals for crimes against peace, which the Nuremberg Tribunal described as "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." The newly-founded United Nations ("**UN**") also took steps to further recognize the prohibition on aggression under

international law. The UN's founding document, the *Charter of the United Nations* ("***UN Charter***") contains a provision prohibiting aggression in Article 2(4), which reads:
"*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 United Nations*."

However, the right of self-defence is also well established in international law. *UN Charter* Article 51 caveats the prohibition on the use of force found in UN Charter Article 2(4) by providing:

"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…"

Consequently, a state that has suffered an "armed attack" may lawfully use force in self-defence until the United Nations Security Council ("**UNSC**") intervenes (Crawford, Brownlie's Principles of Public International Law, 9th Edition, 2019, pp. 720-23).

Furthermore, states possess the "inherent" right of individual and collective self-defence under customary international law ("**CIL**"). The International Court of Justice ("**ICJ**") confirmed this fact in *Military and Paramilitary Activities in and Against Nicaragua ("**Military and Paramilitary Activities**") at paragraph 176* when it recognized the "inherent right to self-defence" as CIL. Additionally, many states asserted the right to self-defence in collective self-defence treaties created during the Cold War. These treaties represent the *opinio juris* and state practice required for recognition as CIL.

Controversially, certain states have, at varying times, also asserted that the inherent right of self-defence includes a right to pre-emptory self-defence. Before the First World War, many states asserted a right to use war for defensive purposes. This right to use war for defensive purposes was not only confined to circumstances where a state or one of its allied states had suffered an attack on its territory. The right to use war for defensive purposes also included circumstances where an "unjust threat of imminent armed force" was directed at a state's territory or one of its allied states' territories (Adler, The Inherent Right of Self-Defence in International Law, 2013, p. 22).

Britain and the US indirectly recognized this "right to use war when faced with an unjust threat of imminent armed force" in the aftermath of the *Caroline* affair. In 1837, British armed forces destroyed a private American vessel named the *Caroline*, which the British believed the individuals on board were using to assist an armed rebellion in British North America (now Canada) (Crawford, 2019, p. 724). In protesting Britain's actions, US Secretary of State Daniel Webster wrote to British diplomat Alexander Baring, 1st Baron Ashburton to demand Britain justify its sinking of the *Caroline* by demonstrating a "…necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation" and by demonstrating that the actions taken in self-defence were not "unreasonable or excessive" (Webster & United States Department of State, The Diplomatic and Official Papers of Daniel Webster, While Secretary of State, 1848, p.110; Crawford, 2019, p. 724). In

his response, Lord Ashburton did not dispute Secretary Webster's statement of principle (Crawford, 2019, p. 724). Consequently, Lord Ashburton's concurrence with Secretary Webster demonstrated *opinio juris* for Secretary Webster's legal test (the "***Caroline* test**") that a state may use force in pre-emptory self-defence if it has a "necessity of self-defense" that is "instant, overwhelming, leaving no choice of means, and no moment for deliberation" (Adler, 2013, pp. 44-3).

However, the *UN Charter* changed how states conceptualized the right of self-defence. *UN Charter*. Articles 2(4) and 51 limited the right of self-defence to circumstances where "an armed attack occurs." Accordingly, any state that asserts a legal use of force in self-defence now must demonstrate the presence of an armed attack. Still, the overlap and ambiguity between aggression, self-defence, and pre-emptory self-defence continues to create friction and uncertainty about these three legal concepts. Does the inherent right of self-defence include a right of pre-emptive self-defence? What is the precise moment when a state may exercise its right of self-defence? When does self-defence become aggression?

A good way to illustrate these issues is by employing the facts of the attack on Pearl Harbor to generate an oft used hypothetical example (Brownlie, International Law and the Use of Force by States, 1963, p. 368; Crawford, 2019, p. 560). On December 7, 1941, Japan launched a surprise attack on the United States' Pearl Harbor naval base in Hawaii. The Japanese military planned the attack in Tokyo throughout 1941. On November 26, 1941, six Japanese aircraft carriers departed from the Kuril Islands and began their voyage to a position northwest of Hawaii, where they arrived in early December 1941. Then, in the early morning of December 7, 1941, the aircraft carriers launched their aircraft, which flew to Pearl Harbor and physically attacked the naval base. The US was unaware that the Japanese attack was inbound. However, if the US were aware of the incoming Japanese attack, at what point along the operation's timeline could the US have lawfully used force in self-defence under international law's current framework?

Unfortunately, official decisions related to aggression and pre-emptory self-defence are scarce and offer little assistance in answering this question. Since 1945, the UNSC has only denounced two instances of the use of force as "aggression" (Currie & Rikhof, International & Transnational Criminal Law, 3rd Edition, 2020, p. 189): South Africa's invasion of Angola in 1976 and Iraq's invasion of Kuwait in 1990. Additionally, the ICC has never heard a case where an individual was charged with aggression. Moreover, the 2005 *Case Concerning Armed Activities on the Territory of the Congo ("**Armed Activities**")* is the only case where the ICJ may have alluded to pre-emptory self-defence (Crawford, 2019, pp. 724-5). In that case, the ICJ said, at paragraph 148:

"*Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council*."

James Crawford suggests the ICJ may have intended to imply that Article 51 excludes pre-emptory self-defence as a legitimate use of force when it said that use of force is justified "only within the strict confines" laid down by Article 51 (Crawford, 2019, pp. 724-5). However, the ICJ's statement in *Armed Activities* is far from unambiguous and demonstrates that the ICJ was reluctant to rigorously delimit the boundaries of legal self-defence at that time. Furthermore, in *Military and Paramilitary Activities*, the ICJ recognized it had the opportunity to comment on "the lawfulness of a response to the imminent threat of an armed attack," but it declined to do so (Henderson, The Persistent Advocate and the Use of Force: The Impact of the United States upon the *Jus ad Bellum* in the Post-Cold War Era, 2010, p. 174). Instead, the ICJ stated unambiguously, at paragraph 194, "the Court expresses no view on that issue." Therefore, the ICJ still has not rendered a comprehensive opinion on the legality of pre-emptory self-defence (Clapham & Gaeta, eds, The Oxford Handbook of International Law in Armed Conflict, 2014, p. 563; Henderson, 2010, pp. 174-5).

Consequently, academics passionately debate the legality and extent of the right of pre-emptory self-defence in the absence of official opinions or guidelines from international organizations like the ICJ and the UN. The academics engaged in this debate are generally divided into two groups: "expansionists" and "restrictionists" (Henderson, 2010, p. 173).

The expansionists generally believe states have a right of pre-emptory self-defence under CIL and that this right is not precluded by the *UN Charter* (Henderson, 2010, p. 173). The expansionists generally cite to the Caroline test to argue the right of pre-emptory self-defence became CIL in the 19th Century (Crawford, 2019, p. 724). Expansionists also argue that *UN Charter* Article 51's reference to the "inherent" right of self-defence was intended to include this pre-existing right of pre-emptory self-defence (Crawford, 2019, p. 723; Henderson, 2010, p. 173). Furthermore, some expansionists assert that the occurrence of an "armed attack" is only one of several circumstances in which a state may act in self-defence (Henderson, 2010, p. 173).

Conversely, the restrictionists generally believe the right of pre-emptory self-defence is not CIL and that *UN Charter* Article 51 restricts the right of self-defence to circumstances where an armed attack has already occurred or is presently occurring (Henderson, 2010, p. 173). Restrictionists generally cite directly to *UN Charter* Article 51 – which only permits states to use force in self-defence "if an armed attack occurs" – to support their position (Crawford, 2019, p. 723). Additionally, restrictionists argue the word "inherent" in UN Charter Article 51 simply refers to states' obvious right to engage in self-defence if attacked (Henderson, 2010, p. 173). Moreover, restrictionists employ the principle of *lex posterior derogat priori* ("a later law repeals an earlier law") to assert that the restrictive interpretation of UN Charter Article 51 takes precedence over any right of pre-emptory self-defence that may have existed in CIL before the *UN Charter* entered into force (Henderson, 2010, p. 173). Crawford, for example, believes: "Reference to the period 1838–42 as the critical date for the customary law said to lie behind the UN Charter is anachronistic" (Crawford, 2019, p. 724). Furthermore, some restrictionists believe the limits *UN Charter* Article 51 imposes on self-defence would become meaningless if the UN Charter permitted pre-emptory self-defence (Henderson, 2010, p. 173). Some restrictionists also

argue that a legal right of pre-emptory self-defence would undermine the *UN Charter*'s object and purpose to restrict states' capacity to use force unilaterally (Crawford, 2019, pp. 723-5; Clapham & Gaeta, 2014, p. 548; Henderson, 2010, p. 173; Weller, ed, The Oxford Handbook of the Use of Force in International Law, 2015, p. 664).

Although public international law tolerated the expansionist-restrictionist debate for decades, international criminal law can no longer evade the debate now that the ICC's jurisdiction over the crime of aggression has entered into force. *Rome Statute* Article *8bis* defines the "crime of aggression" as "the planning, preparation, initiation or execution, by a person… of an act of aggression." *Rome Statute* Article *8bis* also defines an "act of aggression" as "the use of armed force by a State… [in any] manner inconsistent with the Charter of the United Nations." Consequently, a case involving the crime of aggression could conceivably force the ICC to determine whether pre-emptory self-defence is contrary to the *UN Charter*.

Imagine if the ICC were required to hear a case where an individual is charged with the crime of aggression following events similar to the Six Day War in 1967. Shortly before the Six Day War, Egypt closed the Straits of Tiran to Israeli shipping despite Israel's claims that closing the Straits would constitute an act of war, verbally threatened to destroy Israel's sovereignty and territorial integrity, and mobilized its armed forces along its border with Israel (Quigley, The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War, 2012, pp. 15-26). In response, Israel launched an armed attack against Egyptian military positions in the Sinai Peninsula (Quigley, 2012, pp. 109-10). Disregarding any potential jurisdictional, admissibility, or temporal issues, if the ICC were to prosecute for aggression an individual who was in a position similar to that of an Israeli leader during the Six Day War, the accused's defence would likely resemble the arguments Israeli Minister of Foreign Affairs Abba Eban delivered to the UNGA in June 1967 quoted at Quigley, 2012, pp. 108-9:

"*…the choice was to live or perish, to defend the national existence or to forfeit it for all time… I invite every state here represented to ask itself how it would have acted in the following conditions: a group of neighbouring States encircle you with infantry and armoured divisions; issue detailed orders to their commanders on how to bomb your airfields and capture your territory; [and] announce their intention to wage a war of annihilation against you… How would you react? What would you do?*"

Considering the hypothetical above is based on a historical fact pattern, the possibility that a similar case could come before the ICC is not a farfetched one. Eventually, the ICC will have a case concerning aggression before it. That case may involve a defendant who argues their actions were not aggression, but some form of pre-emptory self defence. In that situation, the ICC will need to decide whether to accept or reject the defendant's argument as a valid legal defence, thereby determining pre-emptory self-defence's legality under international law.

Fortunately, scholarly opinions offer some guidance on how the ICC may approach an aggression case involving pre-emptory self-defence as a legal defence. Scholars like Distefano in Clapham & Gaeta. 2014, pp. 560 do not consider pre-emptory self-defence as a binary concept. Rather, these

scholars conceptualize pre-emptory self-defence as an umbrella term that includes four different types of self-defence other than conventional self-defence: interceptive self-defence; anticipatory self-defence; pre-emptive self-defence; and preventive self-defence (Clapham & Gaeta, 2014, pp. 560-3; Weller, 2015, pp. 662-9).

Conventional self-defence is the type of self-defence explicitly contemplated by the *UN Charter* (Crawford, 2019, p. 721; Adler, 2013, p. 125). Conventional self-defence provides that states may lawfully use force in self-defence to respond to an armed attack against it that has occurred or is presently occurring (Henderson, 2010, p. 173). In the Pearl Harbor hypothetical, the US counter-attacking Japanese aircraft already bombing Pearl Harbor would be considered conventional self-defence. An historical example of conventional self-defence is the Persian Gulf War. On August 2, 1990, Iraq unilaterally invaded Kuwait. The UNSC passed a resolution under *UN Charter* Chapter VII authorizing states to use force to repel the Iraqi invasion. However, Kuwait had the legal right to exercise use of force in self-defence individually and collectively the moment Iraq invaded.

The ICC should accept conventional self-defence as a legal defence to aggression because conventional self-defence is a valid use of force under international law. Expansionists and restrictionists both recognize that conventional self-defence is the quintessential form of self-defence contemplated when states drafted the *UN Charter* (Henderson, 2010, p. 173). Accordingly, if a defendant charged with aggression proves their state did not strike first and merely responded to an armed attack from another state, the ICC should accept the defendant's legal defence and find the defendant not guilty of aggression.

Interceptive self-defence occurs when a state uses force to obstruct an armed attack that has already launched, but has not yet physically arrived at its target (Clapham & Gaeta, 2014, p. 560). The attacking state must have "irremediably and irreversibly triggered" the armed attack for the defending state's use of force to qualify as interceptive self-defence (Clapham & Gaeta, 2014, p. 560). Yoram Dinstein describes interceptive self-defence as "nipping an attack in the bud" (Dinstein, War, Aggression and Self-Defence, 4th Edition, 2005, p. 91; Clapham & Gaeta, 2014, p. 560). In the Pearl Harbor hypothetical, the US using force to attack airborne Japanese bombers approaching Pearl Harbor from outside US territorial waters would be considered interceptive self-defence (Clapham & Gaeta, 2014, p. 560). Another example is Israel shooting-down Iraqi Scud missiles during the Persian Gulf War (Clapham & Gaeta, 2014, p. 560).

The ICC should accept interceptive self-defence as a legal defence to aggression because interceptive self-defence is a valid use of force under CIL. Expansionists accept interceptive self-defence as CIL because it satisfies the *Caroline* test. Many restrictivists also accept the right of interceptive self-defence as CIL. These restrictivists maintain their position that *UN Charter* Article 51 restricts the right of self-defence to armed attacks that have occurred or are presently occurring. However, these restrictivists also interpret "armed attack" flexibly enough to include attacks that are "irremediably and irreversibly" launched but have not yet arrived at their targets (Henderson, 2010, p. 174). Certain restrictivist scholars, like the late Sir Ian Brownlie, concede that, in some circumstances,

states may respond with force to intercept apparently offensive operations that have not yet resulted in a physical attack (Weller, 2015, pp. 664-5; Brownlie, 1963, p. 368). Although not all restrictivists agree with this position, Thomas M. Franck asserts that to hold otherwise would result in an absurd interpretation of *UN Charter* Article 51 where self-preservation in the face of an "irredeemably and irreversible" armed attack is only available to non-UN member states (Franck, Recourse to Force: State Action against Threats and Armed Attacks, 2002, p. 98; Henderson, 2010, p. 174). Accordingly, if a defendant charged with aggression proves they used force to intercept an "irremediably and irreversibly triggered" armed attack, the ICC should accept the defendant's legal defence and find the defendant not guilty of aggression.

Anticipatory self-defence occurs when a state uses force to halt an imminent armed attack (Weller, 2015, p. 662). Although the potential victim state has not yet suffered a completed armed attack, it perceives the attack as temporally imminent (Weller, 2015, p. 662). Anticipatory self-defence is different from interceptive self-defence in that the attacking state has not yet "irremediably and irreversibly triggered" its armed attack. Rather, the attacking state's armed attack is "on the brink of launch" (Clapham & Gaeta, 2014, p. 561). In the Pearl Harbor hypothetical, the US using force to attack the Japanese aircraft carriers positioned northwest of Hawaii as the aircraft carriers are preparing their bombers to attack would be considered anticipatory self-defence. An historical example of anticipatory self-defence is the Arab-Israeli War. In 1948, Israel faced an imminent threat of armed force by neighbouring Arab states almost immediately following its declaration of statehood (Adler, 2013, pp. 126-7). Consequently, Israel used force against the Arab states' mobilizing military forces before it was physically attacked. However, the UNSC imposed no sanction on Israel for this use of force (Adler, 2013, pp. 126-7).

The ICC should accept anticipatory self-defence as a legal defence to aggression because anticipatory self-defence is a valid use of force under CIL. Expansionists accept anticipatory self-defence as CIL because it conforms with the *Caroline* test's immediacy and necessity requirements (Webster & United States Department of State, The Diplomatic and Official Papers of Daniel Webster, While Secretary of State, 1848, p.110). Restrictivists are understandably more suspicious about anticipatory self-defence's legitimacy. However, some restrictivists extend their interpretations of "armed attack" enough to also accept anticipatory self-defence as CIL. For example, Dinstein has long asserted that *UN Charter* Article 51 does not permit action taken in self-defence before an "armed attack" and that use of force to pre-empt a merely "foreseeable" or "conceivable" armed attack is unlawful (Henderson, 2010, p. 174). However, Dinstein also accepts that self-defence in the face of an "imminent" armed attack is lawful under *UN Charter* Article 51 (Henderson, 2010, p. 174). Moreover, the UNGA's 2004 "Report of the High-Level Panel on Threats, Challenges and Change" recognized that "…a threatened State, according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate" (Weller, 2015, pp. 665-6). Although not all restrictivists agree with this position, sufficient *opinio juris* and state practice exists to recognize anticipatory self-defence as CIL (Clapham & Gaeta, 2014, p. 561). Thus, if a defendant charged with aggression proves they used force to halt

an “imminent” armed attack “on the brink of launch,” the ICC should accept the defendant’s legal defence and find the defendant not guilty of aggression.

Pre-emptive self-defence occurs when a state uses force to halt a particular tangible course of action that the state perceives will shortly evolve into an armed attack against it (Weller, 2015, p. 662; Clapham & Gaeta, 2014, p. 561). Pre-emptive self-defence is different from anticipatory self-defence in that the armed attack against the potential victim state is not necessarily imminent. However, to qualify as pre-emptive self-defence, the potential victim state requires good reason to believe that the attack is likely, is near at hand, and, if it takes place, will result in significant harm for its use of force (Weller, 2015, pp. 662-3). In the Pearl Harbor hypothetical, the US using force to attack the Japanese aircraft carriers while they are travelling toward their attack position northwest of Hawaii would be considered pre-emptive self-defence. An historical example of pre-emptive self-defence is the United States’ assertion that it had the right to strike Soviet missile sites in Cuba during the Cuban Missile Crisis in 1962 (Adler, 2013, pp. 127-9). A state preparing missiles for launch against another state generates the imminence required for anticipatory self-defence (Weller, 2015, p. 662). However, no evidence suggests the Soviets actually intended to use the missiles to launch a surprise attack on the US during the Cuban Missile Crisis (Adler, 2013, pp. 133-4). Moreover, the US did not believe the USSR had the right to strike American missile sites in Turkey even though those missiles were active and could strike the USSR from across the Black Sea (Adler, 2013, pp. 133-4). Thus, an American attack on the Soviet missile sites in Cuba would have constituted pre-emptive self-defence. Similarly, Israel’s first strike on Egypt during the Six Day War was an act of pre-emptive self-defence. Although Egypt closed the Straits of Tiran, verbally threatened Israel, and mobilized its forces along the Egyptian-Israeli border, Israel had no concrete proof that Egypt was actually preparing to launch a surprise attack on Israel (Quigley, 2012, pp. 83-113). Furthermore, US intelligence considered an Egyptian surprise attack on Israel unlikely despite Egypt’s actions (Quigley, 2012, pp. 83-113). Therefore, the Israeli strikes on Egyptian military positions in the Sinai Peninsula constituted pre-emptive self-defence.

The ICC should not accept pre-emptive self-defence as a legal defence to aggression because pre-emptive self-defence is a not a valid use of force under CIL. Many expansionists accept pre-emptive self-defence’s legitimacy arguing the requirements that states must have good reason to believe that the attack is likely, is near at hand, and will result in significant harm if it takes place satisfy a modern interpretation of the *Caroline* test (Weller, 2015, pp. 666-7; Henderson, 2010, p. 173). However, restrictivists reject pre-emptory self-defence because a likely attack is too remote to qualify as an ongoing armed attack under *UN Charter* Article 51 (Henderson, 2010, p. 173). Moreover, Crawford notes that state practice since 1945 has generally opposed pre-emptive self-defence (Crawford, 2019, p. 724). This divergence in *opinio juris* and lack of state practice indicate that the right of pre-emptive self-defence is not established as CIL (Clapham & Gaeta, 2014, p. 561). Accordingly, the ICC should reject pre-emptive self-defence as a legal defence to aggression.

Finally, preventive self-defence occurs when a state uses force to halt a serious future threat of an armed attack, without clarity about when or where that attack may emerge (Weller, 2015, p. 663). Preventive self-defence also occurs when a state – lacking credible evidence that the other state has the capacity and intent to attack – uses force to respond to another state's threatening behaviour (Weller, 2015, p. 663). Preventive self-defence is different from pre-emptive self-defence in that the threat is more remote in time and usually rests on vague (and likely subjective) indicators of fear (Clapham & Gaeta, 2014, p. 563). In the Pearl Harbor hypothetical, the US using force to attack Japan while the Japanese military was still formulating plans to attack Pearl Harbor would be considered pre-emptive self-defence. An historical example of preventive self-defence is the United States' national security strategy developed after the September 11, 2001 terrorist attacks (also known as the "**Bush Doctrine**") (Crawford, 2019, p. 725). The Bush Doctrine's assertion that the US had the right to strike enemies in other states "even if uncertainty remains as to the time and place of the enemy's attack" was too vague and subjective to qualify as pre-emptive self-defence. The Doctrine also suggested that the US had the right to use force even without credible evidence that its targets had the capacity and intent to attack the US or its allies. Furthermore, the US arguably abused the Bush Doctrine to justify its invasion of Iraq in 2003 (Adler, 2013, pp. 167-9).

The ICC should not accept preventive self-defence as a legal defence to aggression because preventive self-defence is not a valid use of force under CIL. Restrictivists flatly reject the doctrine of preventive self-defence and assert it lacks any legal basis (Crawford, 2019, p. 725). Even expansionists have difficulty establishing the doctrine of preventive self-defence's legitimacy because preventive self-defence does not satisfy the *Caroline* test (Clapham & Gaeta, 2014, p. 561). Furthermore, Antonio Cassese notes that conspiracy or planning a war have not become part of CIL, so using force to respond to these acts is not supported by international law (Currie & Rikhof, 2020, p. 187). Although one could cite to the UN Charter's reference to the "threat" of use of force to justify preventive self-defence, Crawford responds to this argument convincingly at page 720:

"The threat of force remains a part of everyday life on the international plane, and state practice has demonstrated a certain tolerance of it, one reason being that some obvious threats—such as the development and stockpiling of weapons—are concomitant to the right of self-defence under Article 51 of the Charter."

Moreover, defendants have tried – and failed – to use preventive self-defence as a legal defence before. German leaders on trial at Nuremberg attempted to use preventive self-defence as a legal defence by arguing that Germany was compelled to invade Norway to prevent Britain from invading Norway (Clapham & Gaeta, 2014, pp. 561-2). Not only did the Nuremberg Tribunal reject this defence, it categorized Germany's use of force in Norway as "aggressive war" (Clapham & Gaeta, 2014, pp. 561-2). Accordingly, the ICC should reject preventive self-defence as a legal defence to the crime of aggression and should even consider convicting an accused who establishes that they used force preventively.

The ICC will eventually hear a case involving an individual accused of committing the crime of aggression. When this case materializes, the ICC could be called upon to resolve the friction and uncertainties between the longstanding legal concepts of aggression, self-defence, and pre-emptory self-defence and to decide whether and to what extent states possess a right of pre-emptory self-defence. If this situation occurs, the ICC should adopt the framework proposed by Distefano (Clapham & Gaeta, 2014, pp. 560-3) and rely on agreements between the expansionists and the restrictionists to determine when pre-emptory self-defence is permissible as a legal defence to the crime of aggression. Accordingly, the ICC should only accept conventional self-defence, interceptive self-defence, and anticipatory self-defence as valid legal defences to aggression. This legal standard would finally clarify the legal rights and restrictions related to aggression and pre-emptory self-defence both for states and for individuals charged with the crime of aggression in the future.

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