# Preemptive Action, From the International Law Perspective

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## 1. The importance and the necessity of such an approach

In the legal context of the beginning of XXI Century, when the challenges that international legal order must deal with, are proliferating, forcing a profound transformation of the main actors of the international relations – the states[1] –, the importance of preserving the respect of international law is justified more than ever.

The states must enforce their commitments that they assumed through international agreements, in principal the legal value of UN Charter, so that pseudo- principles[2] from the international life claimed by great powers to have a certain legal fundament, do not succeed in affecting directly or indirectly the international legal order and all the relations established between states in conformity with their multilateral agreements signed and ratified by them[3]. On the other hand, sovereignty of a state, moreover if this is a great power, doesn't have to be submitted to different interpretations presented as derived from international documents[4] with imperative and universal value whose legal character nobody is putting in question. UN Charter, for example, as a basic legal pillar of the entire structure of international law, cannot be used in order to provide distorted interpretations or to justify interstate wars or conflicts. Any abuse in interpretation of its articles – specially of art. 51 referring to the individual right of legitimate defense, must be avoided and UN specialized organs as the International Court of Justice must interfere in this matter and provide the correct interpretation of the UN Charter articles, any time when a state, irrespective of its political or military power, intend to use or is using it in order to justify a war or a conflict with another state.

In the case of UN Charter, **the dimension of the abuse** in invoking its articles in situations that do not justify an unilateral extension of their use by a certain state, **is considerably augmented**, because this state is putting the whole international community before a fulfilled fact. Universal dimension of UN Charter and the imperative, sacred value of specific rights inscribed in it, imposes that all relativization of its principles of law must prepare the states which has violated or neglected them to face the reaction of whole international community and to engage its international responsibility.

On the other way, by using abusively the disposals from the UN Charter, **a great power** is putting the rest of the states before a dangerous precedent: if a great power is assuming the liberty of unilateral and distorted interpretation and use of UN Charter articles, then, the whole value of UN Charter will become a relativized document, even in what is concerning the sacrality of imperative law. In this situation, **the other major powers** will be forced, in order to defend their interests, to adopt the same type of distorted interpretation of UN Charter disposals, even with the price of directly augmenting the risk of international insecurity. The third direct consequence of this fact will be that the **middle and little states** will consider that no protection will be offered anymore to them by respecting the classical interpretation of UN Charter disposals and will be forced to use the same distorted manner of interpretation of the art.51/UN Charter in particular, for defending, at their turn, their national interests. That will have important negative consequences for the whole international legal order, because it is based on the classical interpretation of UN Charter: all the legal texts from this document must be interpreted in the light of maintaining peace and international security and ensuring the respect of imperative law incorporated, partially, in the UN Charter.

Another element contributing to this negative situation will be the lack of any official position of the International Court of Justice that has as mission, to be the guardant of the respect of UN Charter disposals and to eliminate the wrong or misguided interpretations made by states, in favor of the objective to keep unaltered the legal content of UN Charter. Any tolerated distort in the interpretation of the UN Charter will produce a **domino effect** for the international legal order: all the international documents based on the UN Charter and starting from its legal principles will be affected and their correct juridical interpretation will be distorted, in order to justify war and violence or satisfaction of particular political interests.

At the beginning of XXI Century, the need for order, stability and peace is more than ever, because states need to adapt their structure to deal with global challenges ; they might consider it is better to transfer certain attributes to superior levels of authority, like they do in the European Union, or they must find another way to reduce the global menaces of a world marked by rising of new actors, particularly of terrorist networks that have a negative influence for the international peace, security and the values of the interstate world.

But any type of adaptation in the structure, functions, objectives of the state, any national strategy, any action of a state **must not deviate from the genuine essence of the principles of international law** that is respect of sovereignty and of international peace and security. Some would say that there are principles applicable only in the relations between states, that only for the states, as civilized actors of the international life, can be put the question of preserving the respect of principles and juridical norms. For the relations between states and non-states actors, particularly those which provoke serious perturbations in the international relations, menacing the national being of the state itself, by massive attacks that are not respecting the classical rules of a war, these principles and norms aren't anymore applicable. Moreover, any collaboration between a state and such an actor will have as direct consequence the punishment of both the state and the terrorist network which received support from it, because **the international community**, in the age of globalization, has **two new and concrete obligations**: to eliminate the non-state actors that are provoking international insecurity and that are destroying the interstate world and its values-against this actors, the principles of international law have no relevance-, and secondly, to punish the state which is proved to be allied of this non-state actors, that means, against its own world, principles and values that it should be presumed to respect. In this context will appear the political *qualification of* "**rogue state**", that is seen by the eye of international community, as a state that participate or support the actions of the terrorist networks, endangering the international legal order and the international peace and security. This state became thus, a factor of instability and its behavior against international law must be revealed and sanctioned by international community. A rogue state must, in theory, provoke a reaction of the whole international community against it, but under the auspices of UN Charter and using only UN legal mechanisms and its disposals in a correct interpretation-avoiding abuse of collective right of the international community, in this situation, to defend itself-.

## 2. International law: a legal order based on the elimination of violence and war from international relations

War between states has been expressly prohibited by the Briand- Kellogg pact, and also by the London Convention on the definition of aggression. These two international agreements had a vital importance in declaring the war, as modality of settling the conflicts between states, as an illegal action and to prohibit its use in the interstate relations.

But, in the age of globalization, when new actors are threatening international community, its juridical norms and principles, is the international law maintaining its importance?[5] One should say that new times need new means of collective defense, that terrorist networks phenomenon of proliferation and their actions need a new typé of war, capable to eliminate the danger of affecting the existing rules of international order. Such an atypical war-because it is led by entire international community against this type of actors- need an

appropriate legal framework, and it would have a **defensive character**, because its purpose is to defend the legal order of states based on UN Charter principles, to insure the preservation of international peace and security.

But, the atypical character of this war between states and terrorist networks has also, **a preventive character**, as the radical variant of response to these attacks. Preventive character is considered an appropriate mean to led new wars, because the protection that states own to their guiding principles of law inscribed in UN Charter must be permanent and not exclusively limited to the use of classical UN mechanisms.

In confronting with the imperative need of finding the most appropriate way to respond to this threat, the international community is loosing its coherence; that is why it choose to adopt flexible means through which its legal principles must be defended either through a classical meaning of protection – only when a military attack is imminent or has been produced –, either through non- conventional means- prevention that a threat materialize into an attack.

Preventive action would then signify that states would have the right to answer through means that are not necessary proportional with the attack – means that can be more destructive than the attack of the terrorist network; that they would have this right not only in situations of concrete attacks but also, in situations of simple existence of a threat; not only against a terrorist network but also, against the supporter state.

Secondly, it means that any state is free to act in preventive defense any time where it considers that it is menaced by terrorists. For this perspective, this state will not give preeminence to international principles of law, but it will firstly and mainly **defend its territory and its population** – that means it will exert its most important and traditional function –. Preservation of legal norms will appear, in this hypothesis, **as an abstract problem**, that the state which is considering itself as victim of a non- materialized terrorist threat has not the time or the means to defend. International principles of law are becoming, in this vision, abstract goods of the **whole international community**, that need to be defended **by the whole international community**, the victim- state considering that it is not disposing of the appropriate legal and material means to do this job of universal guardant, and even that it is risking to be accused of hegemonic claims.

But **an individual action**, based on its legal right to defend individually – or together with the states whishing freely to join it, in an original form of military coalition without concrete political or juridical responsibility – an aspect that must to be analyzed by International Court of Justice, in order to assure the compatibility between the legal functioning and the limits of action of these coalitions ad-hoc and the disposals of UN Charter –, is considered by this state **as appropriate** to respond to terrorist threats, as a personal business, without engaging the international community nor the abstract dimension of defending the principles of international law broken by terrorists.

But this threat is not a concrete attack, that is why, the state will appeal to an unilateral extensive interpretation of the UN Charter in order to legitimize its military "answer". Because, in the majoritary acceptations, the preemptive action is implying a dominant component of **military means**, not economic or diplomatic sanctions taken against the terrorist or the supporter –state.

Thus, a global risk is emerging: to create an international environment based on a **new, generalized Cold War**, in which any state is attending to be the next victim of preemptive action and then, it is forced to act the first; the dilemma of security is augmenting, because other states will attend to be hit and will feel as being encouraged to strike without attend to be the object of an attack; this will lead not to a regression of the international legal and political environment but even to its **destruction, to a global state of chaos and terror**, to a lack of credibility for the international law as a subtle weapon of a disappeared, golden age based on the preeminence of law.

Preemptive action could represent the determinant factor to initiate a new age of interstate wars, a reiteration of the dark age that dominated the history with the concept of force preeminence and unlimited violence. Preemptive action is, for international community, another warning signal that the contemporary international law and the multilateral, sophisticated organizations are necessary to be maintained, in order to regulate the relations between nations, their existence being necessary, at the beginning of the third millennium, more than ever.

## 3. UN Charter: a basic legal framework of universal importance for establishing and keeping international peace and security

One of the fundamental reasons for which UN has been created by states is to maintain international peace and security, a general purpose containing several others distinct goals, such as: to take effective collective measures for the prevention and removal of threats to the peace; to take collective measures for the suppression of acts of aggression or other breaches of the peace. Another UN goal is to bring about by peaceful means, and in conformity wit the principles of justice and international law, adjustment and settlement of international disputes or situations which might lead to a breach of the peace – see art. 1, Chapter I/ UN Charter.

> All the member states must thus, be in all types of their actions – political, military, economic or diplomatic actions – compatible with these express dispositions of art. 1.

International community is right in taking collective measures in several situations mentioned expressly by the art.1/ UN Charter. The problem is to exactly define the legal nature of the preemptive action in order to know what type of legal response international community must adopt, so that the international legal principles be respected.

Is preemptive action a threat to international peace, in the sense of art. 1/ UN Charter? If so, if it is proved that this type of action **has concrete, irreversible, definitive and negative** influence over the imperative character of international principles of law, then, international community can take collective measures to prevent the preemptive action to be taken by one or another state and to prohibit this kind of action on international field. **This measure of express prohibition of the preemptive action through an international treaty or convention** signed by the states interested to preserve by legal means the present status of international order – that is not based on the use of preemptive action-, would be a postmodern type of reaction of the international community at the beginning of XXI century, as the Briand–Kellogg Pact/1928 [6] or the London Convention/1933 prohibiting the war or defining the aggression were representing at their time.

The lack of a legal response from the international community is consisting in several causes: first, international community, within the framework of UN Charter, needs to define what is a preemptive action and why it has a negative impact on the imperative law, for the international relations between states, and also, for preservation of UN purposes.

Secondly, international community must give **two types of responses**: **the creation of a legal document, incriminating the preemptive action as illegal from the perspective of international law**; **the creation of legal international mechanisms**, within UN or as an independent organization, as a functional complement of the legal convention above-mentioned on the preemptive action, that represents a concrete and legal organism competent **to identify and to combat** the preemptive actions taken by states under the aegis of international organizations or directly by a group of states gathered in some ad-hoc coalition or by an individual state.

Preemptive action can be taken by **originary subjects of international law**, as the states, or by **secondary subjects of international law**, as international organizations – in principal, by military alliances, as NATO, if the type of preemptive action that is envisaged to be taken has a determinant **military** component. If preemptive action is putting the stability of international community under question, how can be qualified then **the terrorist actions of transnational or infranational groups or networks**, that are non-state actors, whose actions are not respecting the international laws and principles and that are not pursuing a previous or a strict "ceremony" of declaring war or any official way of force deployment? Are these actions "preemptive actions", in order to protect the network against a military attack of a state, to dissuade a state reaction of self-defense, or because they are unexpected by the victim-state, they are non-conventional and their purpose is to punish the interstate world? This purpose would be a **general** one, in comparison with the case when a **state** is initiating a preemptive action, creating thus a determinate situation, not a

general one: the enemy is a determinate state, not an entire world or system. But we can notice equally in the case of an initiatory state, an ideological element: the classification of states in "civilized states" and "rogue states"; the justificatory character of the attack of the initiatory state, as defending a democratic way of living against tyranny and terrorism.

Another distinct aspect of this problem is that, because the lack of any legal regime of the preemptive action, international community do not know what measure is appropriate to be taken in order to eliminate the negative effects of this, or to discourage the initiatory state from tacking it, or what concrete mechanisms of defense should be implemented in order that states be dissuaded to adopt such an action. The **international responsibility of the initiator** of this action should be the exclusion from international community or suspension of its rights of vote in some essential organs of international organizations; the obligation to respect international principles of law, to repair the damage if it is proved one, to pay a financial compensation for the damages produced in the affected states. It is better that preemptive action should be let under the exclusive responsibility of the international community within the mechanisms offered by UN, or it is better to create a special international organism or commission with legal attributions in the field of combating the preemptive action under all its forms and by all its initiators?

## 4. Legal qualifications of the "preemptive action", in the light of existing international regulations

Preemptive action hasn't, at present, any legal specific international convention that treat about its legal regime. No international organization has not yet took the initiative to analyze form the international law perspective the preemptive action and its effects on international principles of law ; no international convention or treaty has been signed to bilateral or international level, within international organizations or outside their framework, in order that preemptive action should dispose of a determinate legal regime; at present, preemptive action is not officially prohibited, nor permitted from the perspective of international law, **by some legal instrument**.

But, if no new and special instrument on the international legal order is taking position on this problem, the **existing** international instruments can be used in order to give solutions to this problems.

So, in the perspective of the Briand- Kellogg Pact/1928, preemptive action could be qualified as war, started by a state /a group of states/ an international organization with military dimension, against another state. The elements of novelty in the case of preemptive action, are: the purpose of this action of war are not offensive, but defensive. But, in this perspective, it can be retained the idea that an **abusive defense** that is not justified by concrete and visible attack from a state, but only is based on a suspicion of attack or on the hypothesis of an imminent attack, is transforming into **an offensive type of action**, and this means starting war. Another element of novelty is that the preemptive action can be started **individually or collectively**- by a group of states gathered into ad-hoc coalition, against not only another state- the conventional aspect of the war- but against a terrorist network- the non-conventional aspect of the war. This can be interpreted as an action of some states to pressure international community to accept this precedent, as being compatible with the international law. It is an isolate action of the ad- hoc coalition or of some group of states, that is **not found on a true legal base, but is using an artificial, forced interpretation of the existing legal instruments**, in order to justify their action. Use of non- official, non- consecrated interpretation of the UN Charter – situation aggravated by the lack of a clear position of International Court of Justice, as legal defender of UN Charter and guardant of a monopoly of official interpretation of UN Charter, is generating legal abuses and violations of international law, as in the situation of preemptive action as justified by a "legitimate right of self- defense".

## 5. Analyzing the main elements of the preemptive action

Preemptive action has a strong element of intentionality; it is never started by mistake, but, on a contrary, is based on strong political determinations of the initiator state; it is often a central point of a nation-state security strategy.

Preemptive action can have **attempt,** because of a double element of its nature: the action is one projected in the future, has an element of prevention- the attack from another part is not happened yet-; in the mean time, it has a concrete element of present; the action is materially taken against another subject. A state has possibility to intend to take a preemptive action but, for various reasons, to be interrupted from taking it- inclusively by the reaction of the international community. The **attempt** to use a preemptive action against another state, must also be sanctioned by specific future means, by the international community.

The preemptive action, due to the lack of a legal statute has **a flexible content**: as involved subjects of law, it is supposing the curious position of the **initiatory state**, **that it is perceiving itself as a victim state and, in mean time, cumulating the position of an aggressor**. In the other side, the state against which is started the preemptive action, is a state that is considered the **presumptive aggressor**, but that cumulates, in the mean time, **the position of a victim state**, because it suffer concretely an armed attack from the first state. The abuse is then appearing from the existence of a individual self-perception and from a pseudo-legal qualification from the initiatory state, as victim- state. Secondly, due to the lack of a determinate legal regime for the preemptive action, the initiatory state is not seen as obliged to respect any limitations to this action: such as the principles of proportionality and necessity.

Thirdly, it can be noticed **another paradox**: **the initiatory state**, as self-perceived victim of an attack that was not been produced yet against it, **is not a concrete victim,** but an imaginary victim. It cannot prove in international justice- before the International Court of Justice, for example, or within another international organizations –, that it was a real victim, that it has suffered a real violation of its territorial integrity, of its sovereignty, of any right consecrated by UN Charter or by other international documents. In mean time, starting a preemptive action, **the initiatory state is transforming *itself into* a concrete aggressor**- because it was not been attacked –and thus, it is under the prohibition of the international existing documents that prohibits war under all forms. In this situation, it can risk to support the consequences for its attack and engage the international responsibility.

**The other state is finding itself in the inverse situation: it is a real victim**, because it suffers the real damages produced by a real attack- the preemptive character of this attack is not an argument to refuse the reality of such an attack-; **meantime, this state is perceived as an aggressor by the initiatory state** of the preemptive action, despite the fact that it has not launched a real attack against the initiatory state. So, all the content of preemptive action is based on a dislocation of political positions of the two states, on an inversion between real victim and real aggressor, aggravated because of the lack of international legal regime which should clarify the preemptive action legal nature. This key – situation is **a typical one, involving two states**; *in another* scenarios, it can involve **non-state actors**, which presence is not capable to force international community to adopt a legal international regime clarifying equally the implications and the role of these new actors in the preemptive action. On a side, international organizations, as UN, cannot interfere to prohibit or to limit the resort to such preemptive action, because it has no specific legal instrument to invoke, nor sufficient political will or institutional coherence to use in a firm way the existing legal instruments.

On the other side, terrorist networks, as non-state actors, are seen as partners of the state against which is projected a preemptive action, **state which has no possibility to defend its legal innocence before international community**[7] – innocence because the initiatory state is based on an **unilateral suspicion** that this "rogue state" has relation with terrorist networks, but has no proves; secondly, legal innocence is presumed even in international community, or, we can notice **another abusive element of the**

**preemptive action: the disappearance of innocence presumption for the " rogue state"** ; moreover, one can notice **the emergence of a strong and illegal, unilateral presumption of culpability for the state which will suffer the effects of this action.**

The whole engine of a preemptive action is not conform with international law, because it is based on a suspicion, individual or assumed by an ad- hoc coalition, and not on a real armed attack from the part of the "rogue state".

Secondly, from the perspective of UN Charter, there are no "**rogue states**", but only an international community formed by states loving peace and adhering to UN principles and documents. If "rogue states" would be admitted in the international community, then legally, this community that UN keeps homogenous and coherent in a legal ensemble of imperative law based on the respect of sovereignty, will be divided. What state has the legal capacity to proclaim another state, which is equal and sovereign as well, for the international law perspective, as being a "rogue state"? Has UN organs the capacity to make such differences between states, in order to give legal support to preemptive action? Obvious, no such competence is admitted for any state or international organization, because it would be opposed to coordinator nature of international law, that is centered on sovereignty and legal equality between all states, irrespective of their internal political organization. Declaring a " rogue state", would means to isolate this state from international community, to consider it as not belonging to UN organization, to **exclude** it from UN organization- that signifies to take a very important sanction against a state which has not attacked, only on a base of suspicion, an attitude of direct infringement of the principle of international cooperation, mutual trust and friendship between states-, to consider it as a "second hand state", that is not anymore covered by international law protection. This attitude will create a form of barbarian scission on the legal field, a hierarchy between states, with direct consequences on international law. That is why no legal fundament can be find on international law in order to justify preemptive action. No organ or state has competence to declare another state as "rogue state" and to intent against it a preemptive action: the imperative law is opposing to any such scission between states, either if it is taken unilaterally or by a coalition of states, or by any international organization.

We can notice the strong phenomenon of politization of the preemptive action, which has not been discussed by the international community from the perspective of international law, but from **realist** premises of force preemption.

International law, whose general purposes are consecrated so well by UN Charter, is destined to maintain international peace and security and to eliminate all source of violence, war and instability that could endanger the cooperation and the friendship between nations.

**Preemptive action is fighting against a whole way of living, against UN way of living, against a model of state behavior based on mutual trust and on institutionalized mechanisms of preserving and defending this interstate trust and the elimination of violence from international relations.**

## 6. The legal limits of the art.51/ UN Charter as right to collective self- defense

If an UN member state is object of an armed attack, art. 51/ UN Charter will provide the legal support for an **exceptional** use of collective self-defense, on which base the states- inclusively an ad-hoc coalition can be formed in order to exert this right. It is necessary to mention that **any exercise of a collective right of self- defense**[8] **– within or outside the UN organization, because the coalition is formed by states that are UN members-, must be compatible with UN Charter**; must contribute to the fulfillment of UN goals mentioned in art. 1; must respect all the principles of international law and the fundamental rights of the states consecrated in international documents; must respect the principles of proportionality and of necessity; must respect the monopoly of Security Council to decide on taking measures for maintaining international peace and security; must report any measures taken until the intervention in the issue of the Security Council; must not affect in any way- inclusively by initiating controversial preemptive actions – the authority and responsibility of Security Council under the UN

Charter, organ that has the right to interfere in the issue **at any time** and to take necessary actions in order to fulfill its main objectives: maintaining the international peace and security.

Even if a group of state decide to act against the state which attacked a UN member state, Security Council can intervene at any time, from the moment of creation of this coalition, before the creation of this coalition, during its activity, and after its disappearance.

The logic of art. 51 is to permit such a collective exercise of the right of self- defense as a spontaneous type of manifestation of solidarity within the UN organization, a sort of art. 5/ Treaty of Washington, which legitimates the member states to help the attacked state by insuring to it a collective type of defense. The main idea is the same, but in the case of art. 51/ UN Charter, this is an **extraordinary** way of solving the situation, **not an obligation** to act, but a subjective appreciation of the states wishing to help the affected state, **a possibility to choose this type of action**.

From the perspective of the **affected state**, this has, on the base of art. 51/ UN Charter, two options:

- to exercise its individual right to self-defense
- to form a coalition of states and to exercise a collective type of right of self- defense

But the art. 51/ UN Charter is clear: Security Council can interfere at any time and can take necessary actions in order to maintain or to restore the international peace and security- inclusively in the case when the coalition of states has taken an illegal action as preemptive action, Security Council can interfere and stop it, in order to restore international peace and security-.

Secondly, the exercise of collective right of self- defense is **limited in time**: the coalition of states can exert this type of right only until the Security Council decides to intervene and to take measures necessary to maintain international peace and security. All dispositions of art. 51 are reflecting **the preeminence of Security Council in the two options of the right of self- defense exercise by the affected state**. The idea is that any state, even an UN member affected by an armed attack must not respond to the attack or to defend itself in a way of contravening to the art. 1 and 2 / UN Charter, mainly by creating international instability and war.

**Coalition of states** pursuing the exercise of a collective self- defense right – as manifestation of the UN members solidarity, is, in conformity to art. 51/ UN Charter, **subordinated to the Security Council**, even from the moment of the creation of the coalition or of the formation of a group of states wishing to defend the attacked states.

But in both variants of exercise of the self-defense right- individually or collectively-, authority and responsibility of Security Council must be respected and the coalition or the affected state **must respect the legal limitation to the exercise of this right** imposed by art. 51/ UN Charter, **because any exercise outside the legal framework of art. 51 is an illegal exercise of the right of self- defense**. Both cases of exercise of the self- defense right are conceived as reactions to an armed attack against an UN member state. On a contrary, if it is no attack, but only a suspicion to be attacked, the right to self-defense cannot be exercised; moreover, the possibility to exercise this right outside the UN framework, in this situation, is meaning to be contrary to UN disposals- illegal exercise of self-defense right.

On the other side, if the threat is coming from the part of a non-state actor- a transnational terrorist network-, **the legal framework of art. 51 must be extended in the sense that Security Council is considering itself competent to have principal authority and responsibility to take necessary measures in order to eliminate the transnational threat;** actions should be taken, in the situation when a non- state actors is involved, only within the UN framework, that is an adaptable and flexible one, in order to insure the protection of the states in XXI Century without encroachment from the part of the states, of their legal international obligations. Security Council, on the logic of art. 51 must have, inclusively in the situation of an non- conventional attack from a non- state actor against an UN member state, the competence to adopt necessary measures to maintain international peace and security. But the initial presumption of the art. 51 must be mentioned, in order to avoid abuses: **it must exist a real attack**, even an imminent possibility of attack from a transnational network, an attack non- contested by international community, and susceptible to be produced immediately, not a suspicion of being attacked, and not a discretionary appreciation that a potential link

might exist between some state and a terrorist network which is preparing to attack.

Thirdly, it remains another important problem to be clarified: is the so- called **right of necessity** preeminent with respect to other state fundamental rights?

Can **the right of necessity** been invoked by a state attacked or suspecting that it will suffer an attack from a state or from a terrorist network, in order to justify a preemptive action?

Academics[9] are considering that the right of necessity is an expression of the political will of the most strong state, in the name of its predominate interest; the question is if it can be conceived a **fundamental right of this kind**, materialized in a concrete legal possibility for a state to cause an unjust damage to another state in order to insure its own preservation. The question is put in conventional terms- involving two **states-** and it is rising a question of hierarchy between the two state rights. It doesn't refer to the possibility that a state invoke a right of necessity **materialized in a preemptive action**, in order to cause to another state, on the base of its presumed relation with a terrorist network- in occurrence, Afghanistan/2001-2002, Iraq- 2003- an unjust damage, in order to insure its right to existence. This is because we consider that the **immediate legal roots of the self- defense right are placed in the fundamental right of existence**, and this right is considered by the doctrine of international law as **preeminent** in comparison with other fundamental rights. Thus, in this vision, the **right of necessity would be an earlier extension of the right to existence**, that justify an attack against another state, even producing an unjust damage.

For the contemporary international law, based on the UN package of consecrated fundamental rights of the UN member states, **the right of necessity is not recognized as such,** and this is why, this type of right was transferred on the political field, under the concrete and contemporary form of a preemptive action. In order to insure its existence and to preserve the national being, a great power is considered in right to cause to another state an unjust damage. This right to necessity is thus, a political expression of a relation of force, in which **the strong state is not necessary attacked**, but it is deciding to act against another state, in order to insure its preservation as state[10]. The action is causing an unjust damage to the second state, that would be necessary, in the vision of the strong state, and for this reason, acceptable for the international law- that is a dangerous interpretation.

**The similarity** with the case of preemptive action is that no attack has been produced against the state which invokes the right of self-defense[11] or the so- called right of necessity. Both cases involves a subjective, discretionary, unilateral appreciation by the state which invokes the rights above-mentioned; in both cases, these rights are favorizing the strong state and are susceptible to generate abuses with respect of the rights of the second state; both cases are creating a situation of international insecurity, they are susceptible to create endless disputes between states, opening the gate to an international state of anarchy. Both rights are invoking by the strong state as being **"absolute rights"**, and for this reasons, not respecting the similar rights of other states.

On the other hand, while the right of self-defense is consecrated as such by the art. 51/ Un Charter, the so- called right of necessity has only a **political** existence, because the necessity is an element of fact, not a distinct right; moreover, it cannot act against the idea of justice. Nevertheless, **necessity** can justify a right, in the absence of other instruments, to use the force in order to defend against an **unjust aggression**[12] – the idea of legitimate defense –, but the right of self- defense is **limited**, is not an absolute right; it is limited **by the right of existence that all other states have**. The right of necessity is not consecrated as such in the UN Charter, but has a certain contemporary application in the right of self – defense. Necessity, *if no other* legal instruments exist- in occurrence, the right of self-defense stipulated by art. 51/ UN Charter, with all legal limitations-, is projected to defend a state against an unjust aggression; when the aggression was not been produced, no such right can exists, not even on political field. For the contemporary international law, the use of force is conceived **only under the UN aegis,** only in order to maintain international peace and security, only if it is compatible with *ius cogens*; wars, from the perspective of international law, containing a conventional or non- conventional dimension, are prohibited, because the whole essence of international law is directed to the elimination of war and violence from the international life. Even if conflicts appear in international relations,

presenting a non- conventional component, as a non- state actor, a terrorist attack, the necessity that these conflicts be **solved under the aegis of UN Security Council,** using its mechanisms and respecting its principles, the need for a real reform in UN and for disposals regulating the new competences of UN organs in non-conventional wars are imposing more than ever.

## 7. Legal limits of the individual right to self-defense specified in art.51/UN Charter

Article 51/ UN Charter has a special importance from the perspective of introducing legal limits to an already taken preemptive action. Irrespective of *which is* the initiatory entity- a state, a group of states, an international organization, a non-state actor-, the legal limits stipulated in the UN Charter can be used in the case when a preemptive action has been already taken or has produced its effects. But here is appearing another legal problem: is in right a state to invoke art. 51/ UN Charter, that means the individual right of self- defense, in order to defend itself from an enemy? [13]

Art. 51/ UN Charter is offering to it this option, but with **specific legal limits**: it must be under an armed attack ; this attack must be real, must have been produced – it is not permitted to invoke this right as consequence of an attack which has not the military dimension, to an attack which has not yet been produced; moreover, it is not permitted to respond by invoking art.51/ UN Charter if it is only a suspicion of being attacked- ; the attack must occur against an UN member, **against a state**[14] – not an international organization, a non- state actor, or a state which is not member of UN organization, nor against movements of national liberation-.

This is the first package of limitative measures stipulated by art. 51/ UN Charter.

The second package is centered on the moment when the right of self-defense is exerted by the state: it is a limitation **in time** that the article is mentioning expressly: the right of self – defense, irrespective if it is exerted individually by the attacked state or by the coalition of a state- can be exerted with respect of UN Charter and especially, of *the first* package of restrictions stipulated by art. 51/ UN Charter, **until the Security Council has taken the measures necessary to maintain international peace and security**. This specific limitation of the right of self- defense, exerted individually or collectively, shows **the importance that Security Council has**, in its quality of having the monopoly within UN framework in deciding and implementing the measures for maintaining the international peace and security, as one of the principal goals of UN organization, stipulated in art. 1 of the Charter.

Another important element of discretionary appreciation, *that is not* given in the charge of the attacked state, **but of the Security Council**, is appearing: the element of **necessity**. Only the Security Council can judge if an international measure to be taken by UN organization- and not by attacked state- is necessary to preserve the stability of the present international system. But, we consider that, *a fortiori*, Security Council has, on the base of this disposal of art. 51/ Un Charter, the possibility to make its appreciations on the measure/measures taken by the attacked state or by the coalition of states in the name of self-defense right, the competence to judge if this measure is necessary or not; practically, it is a legal instrument at the disposal of Security Council to be used in order **to avoid an unilateral and abusive use of self-defense right, that is exactly the case of a preemptive action**[15]. Also, from the perspective of art. 24/ UN Charter, Security Council has the primary authority and responsibility for the maintenance of international security and peace, and not the UN members acting alone or in ad- hoc coalitions- nor within UN organization, neither outside the UN organization-.

The base which was invoked for a preemptive action was, after the events of 11 September 2001, the right of a state to self-defense. In this case, it was been operated unilaterally an extension of the article 51/ UN Charter – conceived to be applied exclusively in the relations between states-, to the case when a state is attacked by a terrorist network. The *problem is*, in this new type of non- conventional war, with an enemy without face, that is not a state, and moreover, if the network is a transnational one, delocalized, who give the competence to the attacked states to decide to attack, at his turn, in self- defense, another state; what are the criteria used to established such the target-state; are these criteria legal or only

reflects a political, temporary, and unilateral interest of a hegemony or a great power of the international system; are these *political criteria* transformed in legal ones by the will of all states or by the international community and are they opposing to the art. 51/ UN Charter? These are many issues that needs appropriate answers, inclusively through the creation of an international convention or organism competent to respond to this challenge.

When the attacked state is exerting its right of self- defense, it must also, respect the **legal principles of proportionality and of necessity**; moreover, its response against the state which has attacked, must be in conformity with the principal goals of UN organization exposed in art. 1/ UN Charter; the state invoking the right of self- defense must behave as an UN member, must accomplish its legal obligations stipulated for each UN member in the UN Charter, before, during and after the effective exercise of its right if self- defense. Concretely, it must:

- to respect the general obligation to behave as a UN member, as respecting all packages of legal obligations that it has, as UN member, as contributor to the fulfillment of UN goals
- to contribute to maintaining the international peace and security
- participating with other states to collective measures for the prevention and removal of threats to the peace
- participating with others UN members to collective measures for the suppression of acts of aggression or other breaches of the peace
- participating at *bringing about* by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace
- has the obligation to develop friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace
- participating to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion

The idea **is that unilateral actions for these goals can be discouraged** because there are involving a large, unilateral and subjective type of interpretation, that can contravene to the reality, to discourage a desire of the states to behave alone, with a risk to make abstraction of the existing rules of law and of other UN members. The disposals of art. 1/UN Charter can be interpreted, also, as **giving preeminence by the UN Charter to collective types of measures, under the aegis of UN organization, in particular, to Security Council,** in order to discourage isolated actions of a state, moreover when it suffer an armed attack.

Art. 1/ UN Charter is stipulating inclusively **collective measures for the prevention** of threats to peace, that is creating a whole legal framework for materializing this type of UN objective and dissuade the states to act individually in order to prevent threats to peace.

**Prevention**[16] **become thus, a multilateral and legal instrument**, and its goal is orientating to impeach that international system of states, international principles of law be encroached by any threats to peace, to avoid that preemptive actions should materialize as threats to this international peace. On a contrary, **preemptive action** is a **political, unilateral and illegal instrument** used by a state and justified as having as goal to prevent an attack **Prevention is a concept specified in UN Charter**, involving the community of UN members as active factors of maintaining international security and peace. In the vision of art. 5/ UN Charter, Security Council is expressly designated as the competent authority to take preventive or enforcement types of actions; another measure attached to these types of actions under the UN organization aegis is the **suspension** of the member state from the exercise of rights and privileges of membership, pronounced by General Assembly, upon the recommendation of Security Council; but is not compulsory to be taken as complement to the preventive action already taken by Security Council against this state.

The measure decided by General Assembly is not irreversible, because not the rights and privilege of UN membership are suspended, but only their exercise; secondly, the member state in cause ***must accomplish its obligations as UN***

**member**, even if a preventive action or the suspension of its rights and privileges were been taken against it. Article 5 / UN Charter is treating about the **preventive action**, a measure to be taken within the UN framework, **exclusively by the Security Council,** and as an example of **UN multilateralism**, to be exerted only in a institutionalized form and respecting the art. 2 and 5/ UN Charter. Precisely art. 2, paragr.5 prohibits to all members of the organization to give assistance to any state against which **UN** is taking preventive action.

Moreover, we can observe that preventive action is a specific measure taken only by Security Council on the base of art.5/ UN Charter, against a state- not against another actors as terrorist transnational networks-, **the appearance and the proliferation of these new types of actors imposing an extensive interpretation of the art 5, in the sense to extend the competence of Security Council to adopt preventive actions against non-state actors**, in order to avoid that some states, using this legal gap, take in their name preventive actions against transnational networks of terrorists, and indirectly to some states suspected by having relation with terrorists.

On the other hand, we must notice that UN Charter is establishing **a rule for the UN member states, that are obliged to act collectively in order to accomplish UN goals; individual action** is, on this perspective, **an exception from the rule**; in this sense, we can interpret the right of self- defense stipulated in the art. 51/ UN Charter as an exception from this rule, and the exceptions are, according a principle of law, of strict interpretation and application. Thus, treating the right of self- defense from art. 51/ UN Charter as an exorbitant right, that can occur only in some strict, limited situations, the spirit of UN Charter and its disposals are oriented **to the general obligation of the states to act as a UN members**, within the organization, and not alone, in order to avoid discretionary or abusive resort to art. 51, as in the case of preemptive action.

## 8. Preemptive action- an active violation of the UN consecrated rights of states

Fundamental rights of the states are representing for the contemporary international law an **essential component**; these rights are **intrinsic to any state; their sacred, inalienable, intangible and indivisible** juridical content is revealing the legal root of **equality** between states: all the states have the benefice of these rights, irrespective of their territorial dimension or military capacity or of other factors, and no state can renounce to these rights. The great importance of the fundamental rights for the international legal order is revealed by the **consequence** of the any type of violation of these rights, that is **putting in danger the existence of the state itself**. On the other hand, all international rules of law must be compatible with these fundamental rights, must not neglect or undermine their legal content[17]. States have the specific obligation to respect fundamental rights in the relations between them, otherwise they would engage international responsibility for any encroachment of it.

We cannot consider that a state has an absolute fundamental right while other state would dispose only by a relativized right; in both cases, it is the same right, with the same legal content; **international law cannot permit the existence of a discrimination between fundamental rights**; the discrimination exists when it is proclaimed unilaterally or by a group of states that their fundamental rights are more fundamental than the similar rights of other states. This hierarchy is a political one, established in a way contrary to the genuine spirit of the international law, whose nature is, we must reiterate, a coordinator one, based on the full legal equality between all states, and not on discriminations on juridical field.

In this context, it is essential to admit that the most important fundamental right, **the right to existence**, as a primordial right of any state, that is conditioning the existence of any other fundamental right, is recognized in international law to any state, in a same way. There is not admitted that one state or group of state could beneficiate of their right to existence in an absolute way, while other similar fundamental right to existence of other state should be relativized *de facto* or *de iure*. Moreover, a state cannot invoke its fundamental right to existence in an abusive way and for purposes other that its own and imminent survival – for example, the

goal of an aggression, or to occupy militarily a territory -. If this state/group of states are not suffering an imminent attack, in the sense of art. 51/ UN Charter, if they do not suffer any attack, but, moreover, they wish to attack preemptively, then their right to existence is unaltered, is not put in question and cannot be legally invoked.

Other fundamental right of essential importance for international law, on which base is centered the whole international law, **is the fundamental right to sovereignty and independency**[18], that a state must defend from any attempt or armed attack from other states; moreover, international law is formed of a vast normative body oriented to protect sovereignty at its full value, otherwise, its abandon would mean the domination of the strong states over the weak states and would create a situation of illegality, of tension and unstopped conflicts on international plan that would, at its turn, restart the regressive process of the international community in the ante- UN historical status.

On the base of this fundamental right, **a state cannot invoke its right to protect its sovereignty if it has not suffered a concrete armed attack or if it is not the object of an imminent attack**[19]. Preemptive action is an illegal act, from this perspective, as well, because it is contrary to the right of sovereignty and of territorial integrity of the state which will suffer the preemptive attack: this would mean **to consider an artificial extension of the right to sovereignty of the first state**, that is not recognized on international law and to consider that the similar right to sovereignty of the second state will not be so fundamental, that this right would, for various political reasons, be susceptible to suffer a violation. Or, for the international law, **any type of violation, in occurrence, provoked by a preemptive action, will be *sanctioned* by the international community on the base of existing legal international instruments and will engage the international responsibility of the states which has committed it.**

Another determinant factor of peaceful coexistence of the states, of friendship relations, of international peace and security **is the fundamental right of a state to territorial integrity and inviolability of its frontiers,** territory representing one of the essential elements for the existence of a state. In international law, the territory of any state is considered as **intangible, indivisible and inalienable**, it cannot be the object of a military occupation or of any act of force, in no context and for no reason. In this perspective, if a preemptive action is started against another state, the military occupation which would result from this action will be null and void, so as the advantages obtained through military force on the territory of this state. Initiating a preemptive action against a state, would mean **to encroach the fundamental right of existence of this state, that is the pre-condition for the existence of other fundamental rights**: this would create a **domino effect** for the whole package of fundamental rights of the state attacked through a preemptive action, and will produce, for the initiatory state, a general encroachment of its imperative and international obligations.

Cooperation between states for maintaining international peace and security is possible only if in the international relations the states would respect the **legal equality**[20] between them, as **a direct consequence of their sovereignty**. Preemptive action is affecting thus, **the base of the international law**, that is sovereign equality between states, because this type of action take as premise a political classification between "civilized states" and "rogue states", despite the fact that all states are participants to international legal order, that they all have the benefice of fundamental rights and the international obligations. For the international law, qualifications as "rogue states" are not permitted, because their content is a political one, reflecting often a temporary interest of a strong state/ a group of great powers to qualify in such a manner an sovereign state. The presence of the "rogue states" in the international law[21] would hit directly in the coordinator nature of this law, that is based on sovereign equality between all states. Preemptive action is producing thus, an unilateral political appreciation that the states would not be all equal or sovereign, that states would be "good" or "bad". The political appreciation has direct effect on the international legal order, because of the mutual influences between the two fields.

But the most important thing for a state which is acting on international filed is to exert its fundamental right **with good-faith** and to assume its international obligation with the same attitude. For the international legal order, *pacta sunt servanda* represents an unanimous

recognized principle of *ius cogens*, that limits the possibility for the state which has initiated a preemptive action, to invoke its right to self-defense or any fundamental right in order to justify its attack. *Pacta sunt servanda* obliges the initiatory state to respect the correct interpretation of the fundamental rights, to not surpass the legal content of these rights, reflected in international documents, to not try unilateral and abusive interpretation that would endanger international peace and security or other goals stipulated in the UN Charter and especially, *ius cogens*[22]. We can say that *pacta sunt servanda* has a special mission to protect the entire body of *ius cogens*, to be its guardant, to oblige the states to respect *ius cogens* **in the form of their legal consecration in the main international documents**, despite the fact that this is a principle of *ius cogens*, itself, a component of this imperative body of law.

A simple application of the *pacta sunt servanda* principle would be sufficient for imposing to any state which intent to hit another state with a preemptive action, to renounce to this action, and to return to the correct interpretation of the right of self- defense, that would guarantee, in consequence, the respect of all fundamental rights for all states.

## 9. Preemptive action and the necessity to combat international terrorism

International terrorism was been invoked by those who wished to justify the preemptive action in a manner that would be somehow compatible with international law, as a law whose essential goal is to eliminate violence in the relations between states[23].

This **global menace,** representing a real challenge for the capacity of states to respond, is materializing in various forms and modalities of operations, hitting states and civilians, contributing to an international instability and insecurity environment on national and international field. **Transnational networks** are becoming the main enemies for the states, as classical actors, which have no success in intending to eliminate this threat by appealing to conventional means. That is way, states are forced to change, inclusively the military dimension; in this context, preemptive action would appear to some states as the appropriate tool for eliminating the terrorists and for punishing the host-states.

Despite the fact that it is no universal legal definition on international terrorism, many legal instruments have tried to regulate this phenomenon and to proclaim a general obligation for the states to cooperate in order to combat it. After 11 September 2001, international terrorism has been perceived as a concrete and global threat for all international community, but, in mean time, it was a moment in which states were tempted to adopt non- conventional responses, even with the risk of relativizing the international law. Despite the fact that the tragic moment of 11 September has re-orientated the history[24] and had a powerful impact upon the relations between states, this must not put in question the international law, nor be used in order to endanger the sacrality of imperative body of international law.

If, from the perspective of international law, a state is not allowed to attack another state, nor by conventional attack, neither by preemptive action, international terrorism must be combated and eliminated, in order to permit to nations to live in an international environment of security and peace.

But, in this matter, the most important idea is that a state cannot start alone, based on unilateral appreciations on the real situation, a struggle against **international** terrorism. **All states must cooperate** [25] in order to find appropriate ways to combat this threat; because no state, either great power, superpower, either little or middle states, is not exempted from terrorist attacks.

The idea of preemptive action is that a state, on the base of an exacerbated right of self-defense can hit **another state** establishing a relation with the terrorists which have previously hit the territory of the first state, **and also, the terrorist network**. But the **transnational** character of terrorist networks can lead the state which is a victim of the terrorist attack to consider that is has a "global right to self – defense" and for thus, to pursue the terrorist network wherever is on the globe, even with the risk to encroach the sovereignty and territorial integrity of other states.

**A new threat, even global or transnational, must not provoke a type of state reaction that neglect international law**. Because, even when a state is combating international terrorism, it cannot realize this task with encroachment of international obligations assumed on international field as a part of the community of states. This is a civilized behavior for any state, to respect international law and similar rights that other states have on international legal order. Otherwise, the state which neglects international law by taking a preemptive action would be nothing else that a "rogue state", from the legal point of view.

It is essential for the respect of international law, that states use multilateral instruments[26] already existent in the international legal order, in order to deal with the transnational threat; for this, it is important that states cooperate under the aegis of UN organization, and that the legal competences of the Security Council should be enforced, as a part of a general institutional reform of UN[27] at the beginning of XXI century. Enforcing the legal competences of the Security Council and of the General Assembly in order to deal with international terrorism, is a necessity that must be accompanied by the obligation to not- contravene to *ius cogens*[28]. This would reflect the will of all states to make their contribution to the development of UN organs competences, on the base of *ius cogens*. In this perspective, preemptive action will appear as an isolate type of illegal reaction that is contrary to *ius cogens* and that is proving that, for international legal order, unilateral solutions creating abuses and direct dangers for *ius cogens* must be avoided.

As a fundamental international obligation, all states must participate **to maintain international peace and security**, and, as a **specific UN goal**, this effort must be a collective one, must be a multilateral instrument[29] suggesting a collaboration under the aegis of UN, not some isolate actions that would have negative consequences on existing body of international law. It is a question of political will but, moreover, a question of assuming the fulfillment of international obligations with good- faith – *pacta sunt servanda-*, and not to invent disproportionate, discriminatory and illegal responses to global threats, but to use correctly the existent legal instruments and to adopt appropriate institutional reforms of UN that would help to use these legal instruments in conformity with *ius cogens*.

**NOTES:**

[1] Some authors are considering that the struggle against terrorism will be for a long time the framework for recomposing the global system, in a hierarchical type of multilateralism dominated by US, or in an anarchical type of fragmentation of international relations whose main manifestation is international terrorism. See Mario Telo- "L'Europe et la gouvernance du monde après le 11 Septembre", in *Studia Diplomatica*, vol. LVII, nr. 1/2004, p. 41. However, it is accepted that the end of Cold War has brought about a multilevel of change affecting the nature of security both on international as on national fields. See Matteo Stocchetti- "Military Integration and National Sovereignty in Western Europe", *The International Spectator*, vol. XXXI, no. 3/ 1996, p. 77. No state does look to represent at the beginning of XXI century, a real threat, until 2015 and even beyond this date; the most probable risks are coming from non-state actors, of divers types, as very dangerous and proliferating entities. See also, Gerard Chaliand- "Conflicts and menaces at the beginning of Third millennium", in *Beaumarchais Center for International Research*, Arnaud Blin, Gerard Chaliand, Francois Géré coord., "Powers and Influences", trad. Narcisa Serbanescu, Ed. Corint, Bucharest, 2001, p. 26

[2] As the so- called principle of preemptive defense, that has no legal recognition in international documents, and that is violating the existing instruments of international law.

[3] UN Charter; The Paris Charter for a New Europe; The Millennium Declaration/ UNGA 2000; the Declaration on inadmissibility of intervention in the internal affairs of the states and the protection of sovereignty and independency// UNGA, 21 December 1965, Resolution 2 131/ XX; ; the Declaration regarding the enforcement of international security/ UNGA Resolution 2 734/ XXV, 16 December 1970; the Declaration regarding the strict respect of prohibition of threat with the force or of its use in the international relations/ UNGA 2 160 / XXI, 30 December 1966; The Declaration on the principles concerning friendship relations and cooperation between states / UNGA, 24 October 1970, Resolution 2 625/ XXV

[4] Sovereignty is not absolute, neither limited: it doesn't signifies absolutism but sovereign and independent exercise of power in an international determinant environment; the historical changes of this environment

doesn't affect sovereignty but is developing it; on the other side, sovereignty is not limited or relative, because it is not exerted outside the law but in conformity with legal framework ; it is not about neglecting international law but about registering within this international law. See Elena Florea- *Independency and sovereignty. Contemporary political concepts*, Ed. Politică, Bucharest, 1977, p. 48-49

[5] Some authors are considering that at the beginning of XXI Century, the Westphalian order is in a state of crisis, its principles are contested, the non- intervention in the internal affairs of other states has been abandoned in favor of a concept of humanitarian intervention at universal level and also, the indivisible character of sovereignty has been denied by globalist authors. See Henry Kissinger- "Does America need a Foreign Policy? Toward a Diplomacy for the 21st Century", trad. Andreea Nastase, Ed. Incitatus, 2002, p.11. Mary Kaldor- "New and Old Wars. Organized violence in global era", trad. Mihnea Columbeanu, Ed. Antet, s. a., s. l., p. 13. This is,certainly, a political vision trying to imposing itself over the legal international field perspective, and to relativize the main principles of law that still maintains sovereign equality between states and respect for the *ius cogens.*

[6] Grigore Geamanu- *Public International Law*, vol. I, Ed. Ştiinţifică şi Pedagogică, Bucharest, p. 223-224.

[7] That presumption is in close connection with the international obligation of all states to act with good-faith in all their legal acts on international field; moreover, states have the obligation to regulate international disputes on the base of sovereign equality of the states and in conformity with the purposes and principles of United Nations, as the UNGA Declaration of 1970 is stipulating. See Grigore Geamanu- *Public International Law*, vol. I, Ed. Didactică şi Pedagogică, Bucharest, 1981, p. 229-230. Respecting *pacta sunt servanda,* as well as the principles of cooperation in the international relations, is a legal guarantee that states must fulfill their international obligations in the spirit of UN principles and that **the bad- faith of any action** taken by a state- inclusively if it is a state presumed "to intend to attack" the initiatory state of a preemptive action, **is an element that must be proved, not presumed**. Practically, through preemptive action, it is trying to introduce in international law the presumption of bad- faith, that is directly contrary to the international principle of *pacta sunt servanda*, as *ius cogens.* Or, a principle of *ius cogens* cannot be put in question by the so- called presumption of bad- faith on which is based the preemptive action.

[8] Academics are considering that it is not a "collective right of self- defense", but a "collective defense", if two or more states organize their defense against the attack of a third state ; the action on the part of the state which is attacked, but only assists the attacked state against its aggressor, is not exactly "self- defense". See Hans Kelsen- "The Law of the United Nations. A Critical Analysis of its Fundamental Problems"; London Institute of World Affairs, London, Stevens and Sons Limited, 1951, p. 792. Collective defense can be organized before an aggression, or after the moment when a state had been attacked. In the case of preemptive action, it cannot be conceivable that a collective defense be organized before an armed attack, in order to strike a state on the base of a simple suspicion.

[9] Louis Le Fur- "La théorie du droit naturel depuis le XVII siècle et la doctrine moderne", in *Recueil des Cours*, III, 1927, tome 18, Académie de Droit International, Hachette, Paris, 1928, p. 429.

[10] Idem, p. 429-435.

[11] In the military doctrine of China, it is not need to invoke a right of self- defense that, in the future will suffer an attack- the preemptive side of the new doctrine-, but it is an offensive perspective on the nature of the strike: it is a notion of "**active defense**" that is present in the Chinese military doctrine before the moment of 11 September 2001 that has represented the moment of appearance of the preemptive action doctrine by the American superpower. China see in the local wars of Kosovo and Persian Gulf War the dimension of preemptive strike, that can be used "while the enemy is assembling its forces", an approach commented by Pentagon Report as "an effective method to offset or negate the advantages possessed by a more advanced military foe". Preemptive strike requires a mobile, flexible, smaller and technologically advanced military force, a reform of the Chinese army; in Pentagon Report it is depicted this vision of "gaining the initiative by striking first", as "winning victory with one strike, the most direct means available to Beijing to convince the enemy to desist without having to defeat his military forces, or to make political decisions in line with Chinese objectives". See Pentagon's Annual report on the Military Power of China; Report to the Congress, Pursuant to the FY2000 National Defense Authorization Act; June 23, 2000, Part II- Developments in Chinese Doctrine and Force Structure, point A- Developments in Chinese Military Doctrine, http://www.newsmax.com/articles/archives.

[12] The XXIX UNGA session has approved the definition of the armed aggression, in conventional terms – that is, in relation between two states; from this perspective, preemptive action is a new type of aggression, because the UNGA definition is depicting some elements of its nature, avant la lettre: "the use of armed force by a state against the sovereignty, territorial integrity or political independency of another state, or in any other manner incompatible with UN Charter, in the sense of present definition". See UNGA Document A/C.6/L 993, 19 November 1974. Preemptive action is thus, an act consisting in invasion or in attacking the territory of a state by the armed forces of another state; in this case, it is a classical type of aggression, but differently justified- in the

name of an exacerbated and global right of self- defense and without any previous action form the part of the second state. See Ludovic Takacs, Martian Niciu- *Public International Law*, Ed. Didactică şi Pedagogică, Bucharest, 1976, p. 50-52. Moreover, the UN Document is clearly affirming that: no reason, of any nature, political, economical, military or of other nature cannot justify an aggression".

[13] The problem is put in the National Security Strategy of the United States of America, under several forms: "our best defense is a good offense", the exercise of individual right of self- defense by "acting preemptively against terrorist organizations" – a wording directly referring to non- conventional type of war, against non- state actors. But in another part of this strategy, direct assertions referring to terrorist and also, **to states,** as targets of the preemptive action, are expressly made – for example, in Part V of the Strategy – "Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends With Weapons of Mass Destruction", In the Discourse of President Bush, West Point, NY, 1 June 2002. The inclusion of states as future targets of a preemptive action that has no real legal fundament, is contrary to *ius cogens*. http://www.whitehouse.gov/nsc/print/nssall.html

[14] The Report of the UN High –Level Panel and the Use of Force is considering that the existence of a mere threat to security is not sufficient to legitimate an armed reaction. The attack has to be imminent. On the other side, the acquisition of weapons of mass destruction by one state, while constituting a threat to security, does not give another state the right to react in self- defense. The Report rejects expressly the preemptive doctrine, specifying that the art. 51/ UN Charter must not be neither rewritten, nor re- interpreted. Other UN organs, like International Court of Justice or International Law Commission have avoided to take position on this problem involving the use of force and self- defense or on the legality of anticipatory self- defense. See Natalino Ronzitti- "The Report of the UN High- Level Panel and the Use of Force", in The International Spectator, 1/ 2003, p. 92-93.

[15] In its Resolution 1373/2001, Council of Security is reaffirming that acts of international terrorism are threats to international peace and security, reaffirming also the right of individual or collective self- defense. But it does not entrained this right to overthrown of political regime from another country, nor does it legitimate the use of force against states deemed unfriendly in order to deny them weapon systems already deployed by other sovereign states or to enforce compliance with treaty obligations. Doctrine is right in asserting that, at the moment, there is no cosmopolitan body of respectable legal opinion which could be invoked to support so broad conception of self- defense. Tactical preemption – invading a neutral country in time of war in the belief that the opponent is likely to do so at some later point – has been deemed illegal once the UN Charter was been adopted. It was unsuccessfully invoked by the Nuremberg defendants in relation to the German invasion of Norway in 1940. See Tom Farer- "The Bush Doctrine and the UN Charter Frame", *The International Spectator*, 3/2002, p. 92.

[16] Some authors are using the concept of "**preventive defense**", that is a strategy conceived to offer to United States the historical opportunity to foster peace through different methods: isolationism, after the World War I; a leading role in creating United Nations after the World War I and promoting a post-war program of reconciliation and reconstruction in both Europe and Japan; countering the spread of nuclear, chemical, biological weapons; dismantling existing nuclear arsenals; maintaining extensive contacts with the defense establishments of allies as a part of an overall policy of maintaining overseas presence in time of peace – as different strategies that cannot be confounded with the preemptive doctrine. See William J. Perry – "Defense in an Age of Hope", Foreign Affairs, Nov. December 1996, p. 64-67

[17] Nicolae Ecobescu, Victor Duculescu- *Fundamental Rights and Obligations of the States*, Ed. Politică, Bucharest, 1976, p. 7-9

[18] This principles excludes any type of discrimination and inequality- inclusively, in our times, of preemptive strikes directed to the sovereignty of another state-, in rights and in obligations, in the relations between states. See Gheorghe Moca- *State sovereignty and contemporary international law*, Ed. Ştiinţifică, Bucharest, 1970, p. 90. Preemptive action is also, contrary with the principle of non- intervention, because of its illegal and violent character directed to another state. See Grigore Geamanu- *Public International Law*, vol. I, Ed. Didactică şi Pedagogică, Bucharest, 1981, p. 211.

[19] The Report of the High – Level Panel on Threats, Challenges and Change", submitted to UN Secretary General Kofi Annan on 1 December 2004 reconfirms the traditional interpretation of the use of force and of its exceptions; the Report accredits the thesis by which self- defense can also be exercised when an attack is imminent; the concept of imminence is interpreted in the traditional sense, and not in the extended sense of the preemptive action. The report is not clarifying if the armed attack must come from a state or be carried out by a non- state actor as terrorist network; some members of EU are in favor of this second interpretation. See Natalino Ronzitti – "The Report of the UN High –Level Panel and the Use of Force", in The International Spectator, 1/ 2005, p. 92-97.

[20] If all nations and states have the supreme authority in the internal life and are independent, then, none of them can be subordinated to the other ; they are all equal entities, finding themselves in relations of coordination, not of subordination. See Elena Florea- *op. cit.*, p. 34.

[21] "Rogue states" are defined in the National Security Strategy of the United States of America/ 2002, as non respecting international law ; but this is an unilateral interpretation, reflecting a political temporary interest, because, as UN members, all states are equally, part of international community and are obliged to fulfill with their international obligations, otherwise **the UN competent organs** would take against them the sanction of expelling or suspending its rights of vote, depending of the situation. In no case the preemptive action from the part of one state would be the legal and the most appropriate measure to sanction its "rogue character".

[22] The effect of imperative law is to impeach the creation of contrary customary law with regional or bilateral character- as in the case of preemptive action. See Ion Diaconu- *Treaty of Public International Law*, vol. I, Lumina Lex, Bucharest, 2002, p. 360.

[23] At present, states have not anymore the right to take individually measures of constraint based on force in the relations between them, with the exception of their right to self- defense. Contemporary international law has replaced the law of the conqueror with the international responsibility of states for aggression. Aggressor state- that in the case of a preemptive action is an initiatory state – must suffer all legal consequences resulting from its responsibility for its acts. See Ludovic Tackacs, Martian Niciu- *Public International Law*, Ed. Didactică şi Pedagogică, Bucharest, 1976, p. 52.

[24] Constantin Gheorghe Balaban- "The Problem of the Terrorism in International Law", in *Impact strategic*, nr. 2/2004, p. 115

[25] This cooperation must imperatively be based on the international principles of peaceful settling of international disputes; states do not have to use preemptive action one against other in order to defend their existence and sovereignty, but to enforce the level of international cooperation and in deploying, within the UN framework, a collective struggle against the terrorist networks. See Grigore Geamanu *op. cit.*, vol. I, p. 225; Martian Niciu- *UN role in promoting the international law principles in relations between states*, Ed. Politică, 1973, p. 33; Ion Diaconu- *Treaty of Public International Law*, vol. I, Lumina Lex, Bucharest, 2002, p. 315-319.

[26] Multilateral intervention currently appears to be a more legitimate form of coercive diplomacy than unilateral intervention; the argument is that the support of the international community provides the intervening coalition with a mandate to defend interests which are widely shared within the community itself. See Matteo M. Stocchetti- "Military Intervention and National Sovereignty in Western Europe", in *The International Spectator*, vol. XXXI, no. 3, July- September 1996, p. 74.

[27] This question was been expressed also as a concern for US to find appropriate tools for reconciliation of the growing need for global collective action with the inadequacies of UN as principal instrument of collective action, the need to reinvent UN in a way of insuring a real multilateral governance of global affairs. See Samuel R. Berger- "A Foreign Policy for the Global Age", in *Foreign Affairs, November-* December 2000, p. 37.

[28] UN reform cannot abolish the principles of international law or modifying it, because this would put in question the theoretic bases of the UN organization and would estrange it from its initial and constituent purposes. See Victor Duculescu- *Institutions of Public Law and International Relations in Dynamic*, Lumina Lex, Bucharest, 2002, p. 436-437.

[29] Some American officials have argued that there are no multilateral institutions capable of responding to 9-11- type of crisis, US southing to combine unilateralism with multilateralism, making maximum efforts to understand others interests and involving them to maximum degree. See "United States – China Relations and Regional Security after September 11", by Yu Bin; foreword by Ralph A. Cossa and Wu Xinbo; Issues and Insights, no. 2-2002, Pacific Forum CSIS, Honolulu, Hawaii, April 2002.