History of the Committee

The Special Political and Decolonization Committee (SpecPol) is the fourth of the six standing committees of the United Nations General Assembly (GA). The General Assembly is composed by 191 member-states and it may recommend courses of action to UN´s Specialized agencies, to the Security Council, to international organizations, to NGO's and to governments of member States.

Following the principle of equality, each member of the GA has one vote and each vote has the same value. All decisions taken by the GA have no binding power. Inside the General Assembly, SpecPol has a broad and essential role: to deal with international politics. This committee concerns itself mainly with political destabilization within or between member states and especially with non-self-governing territories. It also handles some unusual issues such as the effects of atomic radiation and the peaceful uses of outer space.

Despite this important task, the Special Political and Decolonization Committee just recently came into existence. At the advent of the United Nations, in 1946, the General Assembly composition was: First Committee (Political and Security), Second Committee (Economical and Financial), Third Committee (Social and Cultural), Fourth Committee (Trusteeship), Fifth Committee (Administrative and Budgetary) and Sixth Committee (Legal). The matters with which SpecPol concerns itself today were handled at that time by the First and Fourth Committees.

Due to the continuity of armed conflicts in the Middle East and East Asia, the scope of the First Committee jurisdiction had grown, overloading its agenda. Because of the great amount of conflicts, it was almost impossible to deal with Political and Security problems at the same time. This jurisdiction increase demanded the creation of a new organ. Thus, in 1947, the GA established an "ad hoc" organ called Special Political Committee, whose function was advising the First Committee on political issues.

The first task of this new body was to monitor the creation of the Muslim and Jewish states in Palestine. In the Arab-Israeli conflict, SpecPol (the organ, not yet the committee) played a unique role in controlling the cease-fire and in establishing the State of Israel. The UN saw Palestine as the last challenge of decolonization, and except for the fact that it was unable to deter war, the ad hoc organ was recognized as having achieved moderate success in a task previously considered to be impossible.

Therefore, due to the effectiveness of the Special Political Committee in dealing with the Palestinian conflict, the General Assembly decided not only to keep it but also charged it with other decolonization problems. SpecPol then started to assume the responsibilities of the Fourth Committee (Trusteeship), which had been phased out as one of the standing six (reflecting the fact that most UN trusteeships had become independent and decolonization was no longer a major concern of the international community). In 1965, the Special Political Committee embraced the Trusteeship (Fourth Committee), though it continued as an ad hoc organ and maintained the function of advising the First Committee on political issues.

However, it was only in 1978 that the SpecPol became a permanent committee in the GA, assuming the place left by the Trusteeship Committee 13 years earlier. At that moment, the First Committee suffered a change in its functions, becoming responsible just for international security and disarmament matters. In this way, the SpecPol was left responsible for matters of day-by-day international politics, promoting regimes favorable to the integration of regions in the post-cold war world. Afterwards, in 1993, the First and Fourth Committees were respectively renamed "Disarmament and International Security Committee" and "Special Political and Decolonization Committee", better reflecting their role in the UN system.

For some scholars, the most important role of the SpecPol is to be the entrance door for the Security Council. Due to its character of substantive – or even theoretical – discussions and of dealing with international political issues (most of them somehow related with security), it is often seen as the place where all countries can discuss and advance substantively on general concepts of action before the Security Council undertakes decisions of executive character. It is important to

notice that, according to the "Uniting for Peace" resolution of 1950, the GA would be able to act directly whenever peace was threatened and the Security Council, inactive. To fulfill its role, it is also possible for the SpecPol to urge the Security Council and member-states to take actions that may lead to a certain path suggested by the discussions of the committee. In such a way, even without binding power, the SpecPol counts on reliable mechanisms to implement its decisions and advance towards solutions for its agenda issues.

Nowadays, we still find some difficulties to limit the SpecPol jurisdiction. As its mandate is to deal with international politics, it has often to handle with security, economic and legal repercussions of the political arena; in short, it could be said that the SpecPol deals with those issues that do not fit in the other committees' jurisdictions. On the UN agenda for the last year (2002) the Fourth Committee – which was chaired by Mr. Graham Maitland, from South Africa – addressed issues such as : economic and other activities which affect the interests of the peoples of the non-self-governing territories; the question of the Falkland Islands; the effects of atomic radiation; and investigation of the Israeli practices affecting the human rights of the Palestinian people and other Arabs of the occupied territories.

This year, in the 6th AMUN Conference, the question of preemptive actions and international drug trafficking networks will be addressed by the members of the Fourth Committee. The expectations are great and we hope that all representatives know how to work with what SpecPol can best offer to the United Nations system: a multilateral forum where all countries can hear and be heard by the international community when trying to solve some of the international political problems faced today.

Topic Area A
International law and the use of force: the case of preemptive actions

Introduction

In the last centuries, the international environment has positively changed. One of the main contributions to this process is the development of international law, which has evolved significantly towards the establishment of a more predictable reality. The advances regarding the *jus ad bellum*, however, deserve special attention, as the recourse to the use of force, a common practice in the past that deeply affected the predictability in the international context, has been regulated by treaties and customary international law.

Despite the improvements in this area, some controversial situations arise from time to time, with state practice sometimes seeming to go against the existing law. That is the reason why AMUN, more specifically the SpecPol Committee, invites all delegates to think about this issue and, after this, propose measures to reduce uncertainty and controversies present in this debate.

History of the Problem

Prior to the analysis of the use of force nowadays, more specifically the resort to preemptive actions, it is important to take a close look at how this issue evolved throughout the centuries, always going along with the development of the international society.

The concept of *jus ad bellum*[1] is, jointly with that of *jus in bello*,[2] part of the so-called "laws of war". However, because of the difference extant between them (while the former refers to rules governing the resort to armed conflicts, the latter deals with rules governing the conduct of armed conflicts), it is reasonable to treat them separately. In our case, our focus is on the *jus ad bellum*.

Despite the fact that the concept of *jus ad bellum* was only coined at the time of the League of Nations and was rarely used in doctrine or practice until after the Second World War, in the late 1940s to be precise, its idea is ancient, being possible to be associated with the lawful and unlawful wars concepts of the III-IV centuries.

In this way, the History of the Problem, which will show the changes in the *jus ad bellum* concept in the past, will be divided in three parts, covering the up to the First World War, the inter-war and the post-Second World War periods. After this brief overview, it is expected that the delegates have a better idea of the question as a whole and, from this, be able to deepen their researches on specific aspects of the theme.

The period up to the First World War

The Western European attitudes towards the legality of war were, for many centuries, dominated by the teachings of the Roman Catholic Church. St Augustine (AD 354-430), one of the first theologians to write on the subject, said:

> Just wars are usually defined as those that avenge injuries, when the nation or the city against which warlike action is to be directed has neglected either to punish wrong committees by its citizens or to restore what has been unjustly taken by it. Further, the kind of war in undoubtedly just which God Himself ordains.

Based on these ideas and also on Thomas Aquinas' works, which continued to be accepted for over 1,000 years, war was regarded as a means to obtain reparation for a prior illegal act committed by the other side, and also, in some wars against unbelievers and heretics, as being commanded by God. Religious justifications also came to be employed in the doctrine of intervention (closely related to the unlimited right to use force existent in the epoch).

It was only in the late sixteenth century that the distinction between just and unjust war started to ruin, as theologians were concerned with the state of man's conscience, and admitted that each side of a dispute would be blameless if it genuinely believed that it was in the right. Furthermore, at this time the extension of the category of *bellum justum* (just wars)[3] became dangerous, what encouraged changes in this theme.

Hugo Grotius,[4] already in the seventeenth century, made, together with other writers (Victoria, Gentili, Suarez), some attempts to reestablish traditional doctrines, apart from supernatural concerns. Grotius took a natural law approach to the recourse of war that dissociated it from the transcendent one. Interestingly enough, Grotius allowed for anticipatory self-defense as a means to respond to "an injury not yet inflicted, which menaces either person or property". However, he added, the "danger must be immediate and imminent in point of time". In the subsequent formulations of the *jus ad bellum*, one significant aspect is that religion was playing a decreasing role in the basis of the theory.

---

[1] Law on the use of force.

[2] Law in war.

[3] See WALZER, M. *Just and Unjust Wars*. New York: Basic Books, 1977.

[4] GROTIUS, Hugo. *The Three Books on the Law of War and Peace* [*De Jure Belli ac Pacis Libri Tres*] (Kelsey, Francis W. et collab. tr.), Buffalo, New York, William S. Hein & Co. 1995 [Oxford: Clarendon Press, 1925] original Latin edition 1646.

What was seen in the eighteenth and nineteenth centuries was the almost complete abandonment of the distinction between legal and illegal wars. The emergence of the doctrine of sovereignty (Bodin, Hobbes), the fundamental ordering system of the state system, guaranteed a significant amount of autonomy for the rulers (the principle of non-intervention formulated earlier by Wolff and Vattel). Based on it, legal scholars formulated the doctrine of positivism[5]. In this way, no restrictions affected the sovereign right states had to go to war. In this context, the employment of the doctrine of vital interests,[6] for example, surged as a source for political justifications and excuses, to be use for propaganda purposes; legal criterion of the legality of war was forgotten.

From this point of view, a central feature of that period's international law, and why not to say European, was the absence of any restriction on the right of states to use force and to go to war, which was considered to be an inherent attribute of the sovereignty and the equality of states.[7]

Still in the nineteenth century, a new independent reason for intervention based on "humanity" emerged related to the ideas of political liberalism and the concept of fundamental human rights, and was increasingly invoked by state practice – often, however, as a disguise for intervention made for political, economic or other reasons. In spite of it, this practice revealed a new tendency in the official grounds advanced by states to justify intervention in that period, but not a new rule of customary international law.

In 1899, Czar Nicholas II of Russia and Queen Wilhelmina of the Netherlands invited delegations from all over the world to assemble in The Hague for what became known as the First International Peace Conference. In 1999, that seminal event will be commemorated in both The Hague and St. Petersburg.

The First Hague Peace Conference is generally regarded as the cradle of multilateral diplomacy, a tradition to which the United Nations is the present-day heir. It was the first instance of open-ended multilateral diplomacy. It was also the first multilateral diplomatic effort to develop and codify certain rules of general international law.

The Conference resulted in the well-known 1899 Hague Conventions and Declarations on the armaments question, humanitarian law and the law of war, and the peaceful settlement of disputes. In 1907 the Second International Peace Conference was held which, in its final document, called for a Third International Peace Conference, to be held in 1915, with a view to finalizing the development and codification of international law on these themes. This third Conference never took place due to the outbreak of the First World War.

Not intended to re-arrange a post-war balance of power, the First Hague Conference institutionalized the peaceful settlement of disputes by establishing the Permanent Court of Arbitration. Moreover, it set limits to the actions of the parties at war by imposing on them certain duties, down to the level of the individual. In other words, the First International Peace Conference was the first genuine attempt by the international community "to save succeeding generations from the scourge of war".

---

[5] The positivism asserted that states could be bound by no higher law, resulting that the only law was that created by consent through treaties, customs, and general principles.

[6] According to this doctrine, each state remained the sole judge of its vital interests.

[7] One important feature present along the history is the existence of alliances among countries envisaging collective security systems. The maintenance of the balance of power can be considered the prevailing political principle in the European countries foreign policy after the Peace of Westphalia (1648). Friederich Gentz, the collaborator of Metternich, was later (1806) to define the European balance of power accurately as "an organization of separately existing states of which no single one has the ability to impair the independence or the basic rights of the others without meeting with effective resistance and thus having to risk danger for himself" (VEROSTA, S. "History of the Law of Nations", 1648 t0 1815, *EPIL*, vol.7, 1984, at 751 apud Malanczuk, P. *Akehurst's modern introduction to international law*. 7. ed. New York: Routledge, 1997, p. 11).

First World War: the watershed

In 1914, the liabilities of a system of self-help became obvious when the First World War began. The unprecedented suffering of the war, which killed twice as many people than had been killed in all the wars combined from 1790-1913, caused a revolutionary change in attitudes towards it. In the Paris Peace conference[8], held in the Palace of Versailles in the spring of 1919, one of the foremost concerns of the delegates was to ensure that such a war would never occur again. The creation of the League of Nations was one step towards this end.

The prime purpose of the League was the promotion of international cooperation and the achievement of peace and security by acceptance, on the part of the parties, in principle, of "obligations not to resort to war". The League established a procedure[9] which imposed significant restrictions compared with the pre-League regime, although substantial rights to take resource to force were left open.[10]

During the 1920s, various efforts were made to clarify and refine the j*us ad bellum*, in order to regulate the right of states to go to war. Among them we can mention the 1923 Draft Treaty on Mutual Assistance and the 1924 Protocol for the Pacific Settlement of International Disputes, the so-called Geneva Protocol. However, the most famous of these treaties is the Kellogg-Briand Pact,[11] which can be considered a turning point in the development away from the freedom to wage war and towards a universal and general prohibition of war.

The Treaty Providing for the Renunciation of War as an Instrument of National Policy, often referred to as the Pact of Paris or the Kellogg-Briand Pact was signed on August 27, 1928 and entered into force on July 24, 1929. This treaty, to which almost all states in the world became parties, provided:

> The High Contracting Parties solemnly declare (…) that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
>
> The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Hence, unlike the League Covenant, the Kellogg-Briand Pact outlawed the resort to war entirely, although it was generally recognized by the parties to the Pact that, in the case of self-defense, the resort to war would be permissible despite not being expressly mentioned. It also seems safe to assume that war would be permissible when it was authorized by the League Council, in accordance with the provisions of the Covenant. In this case, use of war would constitute "an instrument of international policy".[12] The Kellogg-Briand Pact is quite significant in the development

---

[8] See MAYER, Arno J. *Politics and Diplomacy of Peace Making, 19918-1919*. New York: Alfred Knopf, 1967; CZERNIN, Ferdinand. *Versailles 1919: the Forces, Events and Personalities that Shaped the Treaty*. New york: Capricorn Books, 1964; HALÉVY, Élie. *The World Crisis of 1914-1918*. London: Oxford Press, 1930.

[9] See Annex 1: Scheme with League of Nations restrictions on recourse to war

[10] It is important to notice that the League j*us ad bellum* restrictions dealt exclusively with the recourse to "war". In consequence, even under the League Covenant, the regime that existed during the positivist period would continue to regulate the uses of force short of war which are quick actions that do not involve major commitment of forces. They take place in the absence of a declaration of war and are thus regulated by the international law pf peace. Typical uses of force include reprisals, and self-defense actions. See Annex 2 and 3 for a discussion on the notion of force and on special problems related to it, respectively.

[11] See BROWNLIE, I. *International Law and the Use of Force by States*. Oxford: Claredon Press, 1963. pp. 74-5.

[12] DINSTEIN, Y. *War, Aggression and Self-Defence*. Cambridge: Cambridge University Press, 2001. p. 82.

of the law relating to the recourse to force, as it drew a legal distinction between aggression on one hand, and self-defense and force authorized by a universal international organization on the other. Its main merit, however, results from the fact that, differently from previous attempts, it entered into force and was widely regarded by states as authoritative.

The eruption of the Second World War showed that the Kellogg-Briand Pact, despite its contributions, was not sufficient to restrain the aggressive powers. However, this pact should not be ignored by this fact, as it played an important role in the interwar development of the *jus ad bellum*. This can be justified by the legal obligation emanated from it and, most important, by the idea of prohibition of aggressive war that was planted in the minds of modern world leaders.

Development after Second World War

The international legal system had failed to prevent the outbreak of the Second World War, to constrain the aggression by Hitler and to stop the unspeakable atrocities committed by the Nazi Germany throughout Europe. It also did not prevent, to take another point of view, the calculated Allied destruction by saturation bombing of German and Japanese cities, causing immense casualties among civilian population. Not to forget is the use of the two atomic bombs against Hiroshima and Nagasaki in August 1945, before the United Nations Charter, signed on 26 June 1945, entered into force, on 24 October 1945.

The creation of the United Nations in 1945 was an immediate result of "the scourge of war, which twice in our lifetime has brought untold sorrow to mankind"[13]. However, the decision to establish a new global organization of states to preserve peace after the war had already been prepared by the Atlantic Charter of 1941, in which Roosevelt and Churchill declared their hope "after the final destruction of Nazi tyranny (…) to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries" and also "to bring about the fullest collaboration between all nations in the economic field with the object of securing for all, improved labor standards, economic advancements and social security".

The United Nations Charter, sponsored by the United States, Britain, the Soviet Union and China, and originally signed by fifty-one states, was designed to introduce law and order and an effective collective security system into international relations.

The main innovation was the attempt to introduce a comprehensive ban on the use of force in Article 2(4) of the Charter. It 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.

This article constitutes today the basis of any discussion on the problem of the use of force. This rule is of universal validity: even the few states that are not members of the United Nations are bound by it because it is also a rule of customary international law. For this reason, it has been labeled as "the corner stone of peace in the Charter."[14]

Undoubtedly, the wording of Article 2(4) constitutes a considerable improvement when compared with the first article of the Kellogg-Briand Pact. The use of force in general is prohibited, rather than only war. Furthermore, the prohibition extends to the mere threat of force, not being

[13] United Nations Charter. Preamble, para. 1.

[14] WALDOCK, C.H.M. "The regulation of the Use of Force by Individual States in International Law", *Rec. des Cours* 81 (1952-II), pp. 451-517 at 492.

confined to the actual use of force. Finally, the prohibition is, at least in theory, safeguarded by a system of collective sanctions against any offender (Articles 39-51).

Nevertheless, the Charter recognizes four clear exceptions for the prohibition of the use of force. From these, two exceptions (the use of force against former enemy states, and the collective use of force before the Security Council is functional) are not very significant in the contemporary world. In spite of their appearance in the Charter, it is not probable that they will be raised. In this way, these exceptions could be considered dead letter, while the other two mentioned below can reasonably be assumed to be the only *applicable* explicit exceptions to Article 2(4).

The third exception, and the first of the *applicable* ones, is based on Chapter VII of the Charter, which deals with Action with Respect to Threats of the Peace, Breaches of the Peace, and Acts of Aggression (Articles 39-51). According to Articles 24 and 12 of the Charter, the Security Council is the primary responsible for the maintenance of international peace and security. Related to this role, there is the Article 39, the first of Chapter VII, which reads:

> The Security Council shall determine the existence of any threat to the peace, breach to the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security.

It describes how the United Nations Security Council should proceed towards the defense of its objectives, the preservation of peace, the overriding goal of the United Nations. While the League of Nations had possessed no institutional machinery and executive power to enforce the Covenant and decisions of the League, the UN Charter established a collective security system in Chapter VII, giving the Security Council the authority to determine whether there is a threat to or a breach of international peace and security and to adopt binding economic and military measures against an aggressor state.

It is important to remember that, despite the fact that only fifteen countries take part in the Security Council every year, including among them the five permanent members, this organ represents all UN members. In this way, according to Article 25 of the Charter, these members are bound to accept and carry out the decisions taken by the Council in accordance with the Charter.

Still about the collective security mechanisms, it should be mentioned that in the post-Charter world, a number of problems have severely challenged the effectiveness of the Charter framework. The UN collective system did not work, due to the antagonism that developed between the former allies after the war, and during the Cold War, in the following four decades, the United Nations failed to achieve its prime objective. Examples of the non-functioning of the UN collective security mechanisms are the military “quarantine” imposed by the United States upon Cuba in 1962, which used the regional system of the Organization of American States for legitimization, and the Vietnam War, which never led to any decisions by the Security Council.

Giving continuity to the exceptions on the use of force mentioned by the Charter, the other *applicable* one is the inherent right of individual and collective self-defense, established by Article 51 of the Charter and also recognized as a customary norm of international public law. However, due to its central role in our debate, it will be extensively discussed in the following section.

Statement of the Problem

Preemptive actions are, undoubtedly, controversial issues. There are many uncertain points involved in this debate, many of which originated from the content and scope of the Article 51 of the Charter, that is to say, the article which recognizes the inherent right of self-defense, which nowadays is invoked with regard to almost every use of military force. Furthermore, the relations between the Charter provisions themselves and the customary international law, not to mention the

wide range of not clearly defined concepts, raises many doubts about the theme. In this way, the self-defense issue deserves to be carefully discussed and, in this process, some of the problems related to it, which will directly affect our debate on anticipatory actions, will be shown.

The Development of the Right of Self-Defense

The development and importance of the right of self-defense is closely related to the background of the general development of international law towards the prohibition of war and of the use of force. Up to the beginning of the 20th century, as the international law permitted states to wage war freely, no justification was needed and the right of self-defense was of modest significance, been invoked only with political purposes. Despite this, out of a state of war, when the use of force was in fact restricted by the international law, the right of self-defense played a certain role as a legal justification with regard to hostilities. However, the content and scope of this right were relatively unclear and extended well in the sphere of self-help.

In the beginning of the 20th century, with the development of international law restrictions to resort of war (Kellogg-Briand Pact), and later to the use of force (following the Second World War), the right of self-defense gained in significance, as it was the only in the exercise of this right that a war could still be lawful. For this reason, as was previously mentioned, in almost every use of force the right of individual or collective self-defense is invoked by the states.

The Charter contains only two *applicable* exceptions of the use of force: the Security Council enforcement actions pursuant Chapter VII, and the right of self-defense, individually or collectively, laid down by Article 51. Considering that during the Cold War the collective security system was of little practical significance, the international legal practice has continued to be determined by the unilateral use of force by states. In this case, being the right of self-defense the only exception to the prohibition of force of practical significance, the Article 51 of the Charter has become the pivotal point upon which disputes concerning the lawfulness of the use of force in inter-state relations usually concentrate.

Article 51: Content and Scope

It is in the Article 51 that the right of self-defense, one of the exceptions of the prohibition of the threat or use of force, is recognized by the Charter. This article, which is the legal basis for alliances such as NATO[15] and the Warsaw Pact (dissolved after the break-up of the USSR), and also treaties like Inter-American Treaty of Reciprocal Aid[16], provides:

> *Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.*

At a glance, the article seems to be clear. However, if we look it more carefully, many questions can be raised.

[15] North Atlantic Treaty Organization.
[16] Also known as “TIAR” or “Rio Treaty”.

First of all, it is important to mention that many authors consider that the Articles 2(4) and 51 do not entirely coincide in content. This view is based on the fact that while the former says that "All members shall refrain in their international relations from the *threat or use of force*", in the latter it can be read: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an *armed attack* occurs." In this way, if the two concepts are not considered as being exactly the same, there is a gap between them. As a result, if an *armed attack* is recognized as being much narrower than the *threat or use of* force, not every unlawful use of force would allow a state to invoke the right of self-defense.

Another important aspect is that, according to the way Article 51 is read, the term "inherent" gets a different meaning. In the restrictive view, it simply means that this right is also vested in states other than UN members, and that UN members may give assistance to a non-member falling victim of an armed attack. Another approach regards the customary right to self-defense as not being affected by Article 51, but rather as having only received a particular emphasis, in a declaratory manner, for the case of an armed attack. This approach serves to justify the traditional forms of self-defense, even of self-help, in particular cases. As the content and scope of the customary right of self-defense are unclear and extend far into the sphere of self-help, its continuing existence would, in a considerable extent, reintroduce the unilateral use of force by states, the substantial abolition of which is intended by the UN Charter.

In the *Nicaragua* judgment[17], the ICJ has pronounced about the right of self-defense. In the occasion, referring to the use in Article 51 of the term "inherent right" ("droit naturel") and the mention of this right in the Friendly Relations Declaration[18], it has acknowledged the existence under customary law of a right to self-defense, comprising individual as well as collective self-defense. Albeit without giving any reasons at all, the Court takes the content and the scope of this customary right to correspond almost completely to the right of self-defense under Article 51 of the Charter[19], what means that the existence of an armed attack is a *condition sine qua non* for the exercise of the right of individual or collective self-defense. As to that, the Court held as follows:

> *In the case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defense of course does not remove the need for this.*[20]

> *The Court has recalled above (paragraphs 193 to 195) that for one State to use force against another, on the ground that that State has committed a wrongful act against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act of which it has not itself been the victim in not admitted when this wrongful act is not an armed attack. In the view of the Court, under international law in force today – whether customary international law or that of the United Nations system – States do not have a right of "collective" armed response to acts which do not constitute an "armed attack".*[21]

However, there is no far-reaching agreement between Article 51 and the customary right of self-defense. At the time when the UN Charter entered into force the traditional right of self-defense covered many areas of self-help, not being restricted only to the case of an armed attack. As a customary law, the right could only have been replaced or amended if, as from a certain moment in time, its voidness or modified existence had been commonly assumed, so that a new rule of law

---

[17] Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v*. United States of America), Merits, Judgment, ICJ Reports (1986) p.14 *et seq*.

[18] General Assembly Res. 2625 (XXV) of October 24, 1970.

[19] From the Court's observations, it clearly follows that not every use of force is at once to be considered an armed attack.

[20] ICJ Reports (1986), *supra,* fn. 17, p. 103, para. 195.

[21] ICJ Reports (1986), *supra,* fn. 17, p.110, para. 211.

could emerge, based upon the uniform practice of states. Nevertheless, such a development cannot be claimed to have occurred with regard to the right of self-defense, as, although the founding members of the UN had at first waived the broad concept of self-defense by adopting Article 51, subsequent state practice did not confirm that position in such a way as to amount to a uniform pattern of behavior. Since the creation of the UN, in 1945, various states, occasionally with the approval of the others, have invoked a wide concept of self-defense under customary law allegedly not restricted by Article 51, and have carried out actions involving the use of force which were not directed against armed attacks.[22]

The state practice, owing to its inconsistency, was not capable of restricting the scope of Article 51 itself; nonetheless, it has so far prevented the narrow reading of the right of self-defense laid down in Article 51 from becoming established in customary international law. Yet the continuing existence of the wide customary law is of practical impact merely for the few non-members of the UN. As regards UN Members, it stands that Article 51, including its restriction to the armed attack, supersedes and replaces the traditional right to self-defense.[23]

At this time, it is interesting to make a few comments on the right of collective self-defense allowed by Article 51 of the Charter. First, according to the prevailing view, the collective right of self-defense is not considered, as the wording might suggest, restricted to a common, coordinated exercise of the right to individual self-defense by a number of states[24]: neither the history nor the state practice corresponds to this restrictive view. Furthermore, this view would endanger weaker states, as it diminishes the effectiveness of the prohibition of the use of force, since the UN system of collective sanctions is not that effective. Therefore, it is almost generally accepted that the right of collective self-defense authorizes a non-attacked state to lend its assistance to the attacked state.

Some treaties, such as the North Atlantic Treaty of April 4, 1949, and the Rio Treaty of September 2, 1947, are based on this right and establish that each party undertakes to defend every other party against an attack, and this undertaking is not limited to circumstances where an attack on one party threatens the rights or interests of another party. However, it is not necessary the existence of a treaty of assistance for the exercise of this right: it is sufficient, but also necessary, that the support be given with the consent of the attacked state, consent that does not, as the ICJ states for the right of self-defense under customary law,[25] need to be declared in the form of an explicit "request".[26]

Finally, before we address anticipatory self-defense, a discussion about the immediacy and proportionality of the right of self-defense deserves our attention. Most important, force used in self-defense must be necessary, immediate and proportional to the seriousness of the armed attack: it is a matter of common sense, to avoid that minor incidents could be made pretext for starting an all-out war. According to the principle of immediacy, an act of self-defense must be taken immediately subsequent to the armed attack, in order to prevent abuse and military aggression under pretext of self-defense long after hostilities have ceased.

The traditional requirements of proportionality and necessity are the most important limitations on the right of self-defense. With regard to customary international law, in the *Nicaragua* case, the ICJ stated that "there is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in

---

[22] See the remarks by the USSR representative in the SC on the Soviet invasion of Afghanistan (UN Doc. S/PV.2190, p. 12, para.111): "Article 51 of the Charter does not create the right of States to individual or collective self-defense. It merely confirms that right and particularly stresses that this is an inalienable right of states, and that the Charter in no way whatsoever impairs it."

[23] Article 51 is also seen as a *lex specialis* prevailing over the controversial customary law by GENONI, M. *Die Notwehr im Völkerrecht*. 1987. p. 157.

[24] However, this is the position of BOWETT, I. *Self-Defense in International Law*. New York: Fredrick A. Praeger, 1958. p. 216.

[25] ICJ Reports (1986), *supra* note 17, p. 105, para. 199.

[26] Assume that an aggressor state succeeds in occupying another state within a few hours, taking all members of the parliament and of the government prisoner. In such a case at least, an explicit request for collective self-defense cannot be required.

international law". The applicability dual condition to the Article 51 of the Charter was confirmed, "whatever the means of force employed", in its advisory opinion in the *Legality of Nuclear Weapons Case.*

The permissible use of force under Article 51 is restricted to the necessary minimum required to repulse an attack because retaliation and punitive measures are forbidden. It is not quite clear, however, whether proportionality must be measured with a view to the end, with regard to the means employed, or with respect to both. But, in essence, proportionality seems to refer to what is proportionate to repel the attack without requiring symmetry between the mode of the initial attack and the mode of response. Furthermore, other limits to self-defense are set by the laws of war.[27]

It should also not be forgotten that the measures taken in the exercise of the right of self-defense must be reported to the Security Council, and they must be discontinued as soon as the Council has taken the measures necessary to maintain international peace.

There are more interesting points related to the right of self-defense, such as the armed protection of nationals abroad, the menace of nuclear weapons, and claims of territory, but due to the existent limitations these points will need to wait for another opportunity to be addressed. At this time, let our attentions be directed to the case of preventive self-defense.

Preemptive Actions: Different Approaches

There is no consensus in international legal doctrine over the point in time from which measures of self-defense against an armed attack may be taken. Although the UN Charter explicitly recognizes the right of individual and collective self-defense under Article 51, its language calls into question whether this right can be exercised before an actual armed attack occurs.

The words "if an armed attack occurs", interpreted literally, imply that the armed attack must have already occurred before force can be used in self-defense; there is no right of anticipatory self-defense against an imminent danger of attack. An anticipatory right of self-defense would be contrary to the wording of Article 51, as well as to its object and purpose, which is to cut to a minimum the unilateral use of force in international relations. This is the restrictionist's view supported by, among others, Brownlie,[28] Dinstein,[29] Henkin[30] and Jessup.[31]

However, a different approach exists. By concentrating in the word "inherent", used to describe self-defense, some authors[32] suggest that it would be inconsistent for a provision

---

[27] See GREEN, L.C. *The contemporary law of armed conflicts*. Manchester: Manchester University Press, 1993; MALANCZUK, 1997. ch. 20.

[28] BROWNLIE, 1963. pp. 275-278, 278 ("it can only be concluded that the view that Article 51 does not permit anticipatory action is correct and that arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence"). Brownlie does argue, however, that there are certain "difficult though somewhat academic cases in which preventive action of small scale might be justified." Ibid.: 278.

[29] DINSTEIN, 2001. p.173 ("Recourse to self-defense under Article 51 is not vindicated by any violation of international law short of an armed attack.")

[30] HENKIN, L. *How Nations Behave*. New York: Columbia University Press, 1979. pp. 140-144. Henkin argues forcefully against any reading of Article 51 that permits anticipatory self-defense. He does, however, suggest that anticipatory self-defense might be permissible in one, narrow circumstance: "if there were clear evidence of an attack so imminent that there was no time for political action to prevent it, the only meaningful defense for the potential victim might indeed be the pre-emptive attack and – it may be argued – the scheme of Article 2(4) together with Article 51 was not intended to bar such attack. But this argument would claim a small and special exception for the special case of surprise nuclear attack; today, and one hopes for a time longer, it is meaningful and relevant principally only as between the Soviet Union and the United States and, fortunately, only for a most unlikely eventuality. But such a reading of the Charter, it should be clear, would not permit (and encourage) anticipatory self-defense in other, more likely situations between nations generally." Ibid.: 143-144.

[31] JESSUP, P. *A Modern Law of Nations*. New York: Macmillan Co., 1948. ("Under the Charter, alarming military preparations by a neighboring country would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.")

[32] BOWETT, I. *Self-Defense in International Law*. New York: Fredrick A. Praeger, 1958. pp. 184-193. ("It is not believed, therefore, that Article 51 restricts the traditional right of self-defense so as to exclude action taken against an imminent

simultaneously to restrict a pre-existing customary right and to recognize that right as inherent. In this way, they claim that Article 51 does not limit the circumstances in which self-defense may be exercised; they deny that the word "if", as used in Article 51, means "if and only if". The scholars that fall into this school of thought are called counter-restrictionists.

Those who interpret the Article 51 as confirming the pre-existing right of self-defense consider anticipatory measures of self-defense to be admissible under the conditions set up by Daniel Webster in the *Caroline* case. So it is important to have a close look, not only at this case, but also at others in which a claim of anticipatory self-defense was made or could reasonably have been made.

State Practice Regarding Anticipatory Self-Defense

The best way to analyze the preventive self-defense is to study the state practice regarding this issue. Observing how the states act and their justifications is the path to reach some important conclusions on the subject.

The Caroline Case, 1837

This famous case is regarded as the classic illustration of the right of preventive self-defense. During the rebellion in Canada in 1837, preparations for subversive actions against the British authorities were made in United States territory. Although measures against the organization of armed forces were taken by the United States government, they were not enough. Due to the non-existence of time to halt the activities of the steamer *Caroline*, which reinforced and supplied the rebels in Canada from ports in the United States, a British force from Canada crossed the border to the United States, seized the *Caroline* in the State of New York, set her on fire and cast the vessel adrift so that it fell to its destruction over Niagara Falls. Two American citizens were killed during the attack on the steamer, leading American authorities to arrest one of the British subjects involved in the action and charge him with murder and arson.

Great Britain's protests arised and were followed by a correspondence, in which the conditions under which self-defense could be invoked to invade foreign territory were formulated by Daniel Webster in a manner that became to be treated as classic. He says that "the necessity of that self-defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation", and that the action taken must not be "unreasonable or excessive", and it must be "limited by that necessity and kept clearly within it".[33]

Drawing upon this case (even though it deals with self-defense as a use of force short of war, the criteria it established came to be applied to the claim of self-defense generally, and to anticipatory self-defense in particular), there seems to be a general agreement among international legal scholars that the pre-Charter customary international law recognized a right of anticipatory self-defense provided the conditions of necessity and proportionality were met. In this way, first a state would need to demonstrate that such forceful action was *necessary* to defend itself against an impending attack. It would, in other words, be required to demonstrate that an attack was truly imminent and there were essentially no other reasonably peaceful means available to prevent such attack. Second, the forceful response of the would-be victim would have to be *proportionate* to the threat. While neither of these criteria can be defined with complete precision, they nevertheless provide some basic parameters on the exercise of anticipatory self-defense.

---

danger but before "an armed attack occurs".). See also STONE, J. *Aggression and world order*. Berkeley: University of California Press, 1958.

[33] WEBSTER, Daniel. *British and Foreign State Papers 1841-1842*. Vol. 30, 1858, 193.

The Cuban Missiles Crisis, 1962

On October 16, 1962, the United States President John F. Kennedy received the information that the Soviets were assembling delivery systems for intermediate range ballistic missiles in Cuba. In response to what to what was considered "a deliberately provocative and unjustified change in the status quo",[34] Kennedy ordered the establishment of a naval blockade, which he termed a "quarantine", to prevent the transport of missiles and related material to Cuba. Kennedy, in his speech to the American people, claimed that he was acting "in defense of our own security and the entire Western Hemisphere". However, the blockade of Cuba was also defined by Ambassador Stevenson as "anticipatory" self-defense,[35] while the State Department Legal Adviser considered it as an action short of actual enforcement.[36]

A blockade, whether a quarantine or not, constitutes, under generally accepted norms of international law, a violation of Article 2(4). At the time of the crisis, the official legal justification presented by the Legal Adviser to the Department of State Abram Chayes[37] and his Deputy Leonard Meeker[38] focused on the authorization by the Organization of the American States as a legitimizing factor. The United States did not invoke the right of anticipatory self-defense to justify the "quarantine", as they realized that that attitude would have created a precedent that the Soviet Union could have used against US missiles sites in Europe. Nevertheless, the question of anticipatory self-defense was raised and widely discussed in the Security Council.

In the Security Council debates, support for the American actions seemed generally to fall along Cold War lines. [39] However, no specific rejection of the concept of anticipatory self-defense was made in the course of debate. In fact, there seemed to be an underlying acceptance by most members of the Council that in certain circumstances the preemptive use of force could be justified, as much of the discussion centered on the question of whether the missiles were offensive or defensive. In this way, if the missiles were offensive, there might have been some justification for preemptive action.[40]

In sum, although the discussions did not reflect a clear-cut endorsement of anticipatory self-defense, they certainly do not indicate its rejection. Instead of this, that lack of a specific condemnation of the doctrine, especially by states that opposed American actions, indicates that there may have been, at some level, an acceptance of the notion.

Middle East War, 1967

The Israeli action in June of 1967 is another use of force frequently associated with the concept of anticipatory self-defense. On June 5, Israeli forces launched attacks against the United Arab Republic and quickly defeated the combined Arab forces. Even though no attack was launched against Israel, it felt that its action was a lawful exercise of its right of self-defense, because the series of actions by Arab states indicated that military measures against Israel were imminent.

---

[34] For more, see KENNEDY, R. *Thirteen Days: A Memoir of the Cuban Missile Crisis*. Various editions.

[35] UN Security Council, 17th Year, Official Records, 1025th meeting 4 (1962)

[36] 1963 Proceedings, American Society of International Law 10 at 12

[37] CHAYES. "The Legal Case for US Action on Cuba", *Department of State.* Bull 46:763 (1962).

[38] MEEKER. "Defensive Quarantine and the Law", *American Journal of International Law*. 57: 515 (1963).

[39] The representatives of Chile, China (Nationalist China), France, Ireland, the United Kingdom, and Venezuela supported the lawfulness of the quarantine, while representatives from Ghana, Romania, the Soviet Union, and the United Arab Republic opposed the action.

[40] Even Cuba and the Soviet Union (at least initially) contended that the missiles were defensive, seemingly giving credence to the argument that if they had been offensive, there might have been some justification for preemptive action.

Many representatives, such as the Syrian, the Moroccan and the Soviet delegates, focused their attentions on the question of the first use of force, which was considered decisive. Countries more sympathetic toward Israel (the United States and Britain) tended to refrain from any discussion of the permissibility of anticipatory self-defense, leaving only the delegation of Israel examining the legal concept.

Due to the existent environment, it is difficult to glean any consensus on the legitimacy and efficacy of preemptive self-defense. States that were politically opposed to Israel tended to dismiss off-hand Israel's argument and avoided any lengthy discussion of the concept of anticipatory self-defense per se, seeming to assume that the first use of force, irrespective of the justification, was illegal. A clear consensus opposed to anticipatory self-defense, however, is difficult to be found as a result of the political posturing involved.

The Israeli Bombing of the Osarik Reactor, 1981

Fear of creating a dangerous precedent is probably the reason why states seldom invoke anticipatory self-defense in practice. However, one clear example of a state invoking it occurred in June 1981, when Israeli Air Forced bombed a nuclear reactor in Iraq, near Baghdad. Israel claimed that the reactor was going to be used to make atomic bombs for use against it, and that Israel was therefore entitled to destroy the reactor as an act of anticipatory self-defense.

The Security Council unanimously condemned Israel's action.[41] Despite this fact, in the lengthy deliberations that followed the attack, both the restrictionist and the counter-restrictionist were present.

Typically, the countries that supported the counter-restrictionist approach stated that the use of force in a preemptive fashion could be permissible provided that it could be demonstrated that there was an imminent threat and that other means of addressing this threat had been exhausted. In the Israeli attack against the Iraqi nuclear reactor, however, these criteria were not met, according to them.

The United States and the United Kingdom, for example, said that anticipatory self-defense was not justified on the facts, *inter alia*, because there was no evidence that the reactor was going to be used for making atomic bombs; they did not deal with the question whether Israel would have been entitled to use force in anticipatory self-defense if the reactor had constituted a real threat to Israel.

A large number of states, from all parts of the world, said that anticipatory self-defense was always contrary to international law. Some of them, for instance, stated that a preemptive strike was "contrary to the spirit of the Charter and to the purposes and principles of the Organization".[42]

Concluding Remarks on Preemptive Actions

State practice on the matter of preemptive actions is rather inconclusive. The case studies presented show us that after the creation of the United Nations there is a division within the international legal community regarding anticipatory self-defense.

Even though there is no established consensus in support of the permissibility of anticipatory self-defense, certainly there is not a consensus opposed to it. In this way, it seems to be impossible to prove the existence of an authoritative and controlling norm prohibiting the use of force for preemptive self-defense.

---

[41] UN Security Council Res. 487, of June 19, 1981.

[42] Statement of Mr. Sinclair, from Guyana, *UM Doc. No. S/PV. 2282: 42.*

To confine self-defense to cases where an armed attack has actually occurred would have the merit of precision, as the occurrence of an armed attack is a question of fact which is usually capable of objective verification. On the other hand, the question of whether an attack is imminent is inevitably a question of opinion and degree, and any rule founded on such a criterion is bound to be subjective and capable of abuse.

However, from the practical point of view, the exclusion of a right of anticipatory self-defense deprives the "innocent" state of the military advantage of striking the first blow. But the trouble about the anticipatory self-defense is that a state can seldom be absolutely certain about the other side's intentions; in moments of crisis, there is seldom time to check information suggesting that an attack is imminent.

The question is on the floor, and now it depends on the commitment of the international community to define how the preemptive actions issue will be considered by the International Law and the UN Charter.

Past UN Actions

Many things need to be done in order to clarify the question of the preemptive action. As could be seen along this study guide, there are many controversies around the theme. However, some important steps already taken should not be forgotten.

With the development of the j*us ad bellum* in the centuries, especially in the 20th, many attempts were made to restrict the recourse to force in the international relations. Some of them had more success than others, but all of them had their importance. The modern rules regarding the use of force, in this way, can be considered as the result of all the contributions made by the occurred efforts.

Despite this fact, after the creation of the UN system, some obstacles emerged in this field. Most of them resulted from uncertainties present in the UN Charter. A good example is the relation between Article 2, paragraph 4, which says that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations", and the Article 51, which recognizes the "inherent right of individual or collective self-defense if an armed attack occurs". In this way, imprecise interpretations and definitions of some articles and concepts bring controversies to the international context.

Taking it into account, the United Nations approved some resolutions in a tentative to reduce the existing doubts.

One of the most important advances is the General Assembly Resolution 2625 (XXV), of October 24, 1970. The so-called "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations" aims at interpreting the fundamental principles of the Charter. When interpreting the principle that states shall refrain in their international relations from the threat or use of force, for example, the Declaration supports the idea that this force refers solely to military one. However, other types of intervention are also addressed in other parts. As a result, it can be noticed that the scope of Article 2(4) is restricted to armed force.

Another significant action related with the debate is the General Assembly Resolution 3314 (XXIX), dated of December 14, 1974. In it, a definition of aggression was reached by the states. Although this definition apparently resembles the wording of Article 2(4), it must be emphasized that it does contain an interpretation of the notion of "act of aggression" as used in Article 39.

A third document related to the question of the use of force is the "Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations", adopted by the General Assembly on November 18, 1987. However, this

resolution[43] hardly clarifies the open questions surrounding Article 2(4) any further, and thus will not substantially enhance its effectiveness.

The works of the ICJ are also relevant in the issue. Maybe the most important judgment would be the *Nicaragua* case. In it, the Court based its rulings exclusively on rules of war prevention under customary international law. However, although not concerning Articles 2(4) and 51 directly, the Court interpreted those provisions as being closely related to the Charter provisions and eventually found a far-reaching coincidence between the conventional norms and the corresponding rules of customary law. In the case, despite the fact that the ICJ did not explicitly addressed the question of anticipatory self-defense, Judge Schwebel, in his dissident in the *Nicaragua* case, expressed support for the view that under Article 51 self-defense was not limited to a situation "if, and only if" an armed attack occurs.

Finally, it should be remembered the discussions that occurred in the United Nations not only when the right of anticipatory self-defense was invoked, as in the Israeli attack to the Iraqi nuclear reactor, but also in other situations where, even though not being clearly invoked, it emerged and some speeches on it and on related issues were made.

Bloc Positions

As delegates have notice by now, the question of anticipatory self-defense is surrounded by doubts and uncertainties. Most of the time, the countries' position regarding the theme is more related with political concerns than with legal ones. In this way, it is not easy to join the countries in fixed groups.

On one hand, there are those countries and scholars that are totally against the right of anticipatory self-defense, alleging that it does not fit with the purposes and principles of the United Nations. Furthermore, they defend that the Charter is clear when it says that that right of self-defense, either individual or collective, is restricted to the cases when an armed attack occurs. For them, the existence of this right would usurp the powers of the Security Council as set forth in Article 39 and curtail the Council's authority. In this way, the right of adopting preemptive actions would, according to their point of view, attempt on the international peace and security, endangering all countries.

On the other hand, there is the group of those who consider the right of preventive self-defense admissible, since the conditions set up by Webster in the *Caroline* case are met, i.e. "when the necessity of that self-defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation". However, the acceptance of this line of though raises some problems, as the criteria to define if the previously mentioned conditions were met is mainly subjective, that is to say, it varies from country to country, what certainly results in passionate endless debates.

In this way, the main difficulty is not the legitimacy of the right of anticipatory self-defense itself, but its appliance to specific cases. A good example is some of the debates that occurred during the Cold War period, when countries positions depended on the ideological side they were and not on the juridical aspect of the question. More recently, as Cold War came to its end, the states support to this kind of action depends on the political laces they have with the actors involved in the question.

A point that deserves special attention regards the U.S. position on the issue. According to its National Security Strategy,

> *the United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the*

[43] General Assembly Res. 42/22, of November 18, 1987.

> *risk of inaction— and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.*[44]

This document raised once again the question of anticipatory self-defense, setting this issue on the agenda. Many states and politicians expressed their opinions regarding the topic; an interesting debate about the legality of this recourse also occurred among scholars. As a result, it is time to try to reach a common ground on the theme, or at least advance the debate on it.

When defining their positions, the countries should be aware of their implications and consequences. Probably that is the main reason why the right of anticipatory self-defense is seldom invoked in practice: the creation of such a precedent frightens. In this way, a careful approach should be adopted by the representatives to deal with such a complex issue. As we all know, high politics is always a hot topic.

Moreover, when choosing a path to follow, it should not be forgotten that the principles and the internal and foreign policy agenda of the states are of great relevance. Depending on the country's reality, a specific behavior is expected.

Proposed Solutions

The biggest defect in the modern rules against the use of force is that they are often imprecise. Practice has corroborated it, doing little to reduce this imprecision. Many states act to keep their options opened, not adopting clear attitudes towards the problem of interpretation. In this way, although they retain the possibility of using force in certain circumstances, they know that other states, following the same interpretation as they have, would also be allowed to use force, even against them.

Taking it into account, two main ways could be glimpsed.

The first is to clarify the issue, better defining if and when anticipatory self-defense could be legally employed. In theory it is the role of the United Nations, of the International Law and also of other International Organizations: to strength and clarify the rules. If it happens, it could be expected a more predictable, and stable, environment. However, it is far from being an easy task to reach broadly accepted rules regarding this issue. A widely variety of questions would need to be addressed, such as what is an aggression, when the right of self-defense can be invoked, what is considered force, what happens when a use of force short of war happens, among other related issues. Despite the difficulties, if it succeeds, it would represent a great advance in the International Law.

The second option would be not to change the current legal status of the theme, leaving room for the countries' interpretation. This path, although perfectly possible, would leave the question of legitimacy and legality of preventive actions unchanged, representing, maybe, that the creation of a cooperative clearly regulated international community is far from been reached.

Another point to be addressed refers to the collective security mechanisms. As exists a close relation between the invocation of the right of self-defense, including in it the anticipatory option, and the efficiency of mechanisms of collective security, some positive developments in the latter would certainly represent important changes on the former, contributing for the establishment of a more pacific international order. Since its creation, the UN collective security system has faced many obstacles which have contributed to unilateral measures by states, such as the recourse to anticipatory self-defense in controversial ways.

[44] The National Security Strategy of the United States of America, September 2002. ch. V

Questions a Resolution Must Answer

After long negotiations, it is expected that the delegates reach a common ground, at least in some aspects. And here comes the importance of a resolution: it is the appropriate instrument to legitimize the agreements reached through deep and productive discussions. A good resolution, in this way, should reflect the committee's debates and opinions.

In this topic area, some important points must be addressed.

It is expected that the delegates advance on the question of the right of anticipatory self-defense, trying to define if this right exists and, if so, in which circumstances the right of anticipatory self-defense, whether individual or collective, could be invoked. As could be noticed by now, this issue is quite unclear, what have resulted in controversial actions by states.

For succeeding in this task, it is essential to clarify some concepts present in the UN Charter, most specifically in Articles 2(4) and 51, such as "threat or use of force against territorial integrity or political independence of any state",[45] and "armed attack".[46] The existence of not clearly defined concepts is one of the main roots of the problems around this question.

Allied to it, it is also fundamental to discuss the relation between them and if, in fact, exists a gap between the two articles.[47] The definitions alone will not suffice to solve the existing doubts.

The relation extant between the UN Charter and the Customary International Law is as relevant in this debate as the other points. Apparently, what can be seen is the existence of different approaches according to the origin of the law. As a result, controversies frequently emerge. In this way, some considerations on this relationship could be fruitful and bring positive results.

[45] *United Nations Charter*. Article 2, para. 4.
[46] *United Nations Charter*. Article 51
[47] See *Statement of the Problem; Article 51: Content and Scope* above