The rules relating to the prohibition on the use of force, including its exceptions, are at the core of the international legal order that emerged after the greatest human-made disaster of all times: the Second World War. In that legal order, peace is perceived as the main value to be protected and the prohibition on the use of force embodied in article 2, paragraph 4 of the UN Charter knows just one exception: self-defence as depicted in article 51 of the same Charter. Recourse to force in international relations is meant to be the prerogative of the Security Council. In 1945, the motto was 'peace through collective security'.

What happened in this field between 1945 and 1989 is well known. It is also known that hopes for a new peaceful international order after the collapse of communism were soon disappointed. The resort to force in international relations is even more prevalent today than it was just one decade ago. It is for this reason legitimate to inquire whether international law has undergone changes in this important sphere. Since the USA has become the only superpower, since its military supremacy is overwhelming, since ultimately the USA has been one of the States that has resorted to force the most in the last decade, one is also justified in focusing on both its practice and the legal arguments it invokes.

The purpose of this chapter is to analyse the impact of the American interpretation of, and practice relating to, the rules governing the use of force in international relations since the end of the Cold War. In order to do so, this chapter will identify the different legal categories in which the use of force by the USA could be encapsulated. It will be focused, however, on self-defence, since that has been the main argument advanced by different American Administrations in order to justify their resort to force, notably in situations generally not seen to be covered by self-defence. Special emphasis will be put on the terrorist attacks of 11 September 2001 and the reaction thereto. For it is not only the question whether
terrorist attacks open the way to self-defence, but also whether there exists an armed conflict between the State and the terrorist organisations, within the meaning of international law, with all the implications both in the area of the \textit{ius ad bellum} and the \textit{ius in bello}.

Although President Bush Senior heralded the arrival of a new international order as a consequence of the international community's reaction to Iraq's attempted annexation of Kuwait,\textsuperscript{1} analysis will begin here with Operation 'Just Cause' in Panama in December 1989, rather than with Operation 'Desert Storm' which took place one year later. The US invasion of Panama was indeed the first American military operation after the fall of the Berlin wall - it took place less than two months after that event.

The new international realities led Presidents Bush and Clinton, as well as top officials such as General Powell, to elaborate new military doctrines relative to the use of force. They will be analysed in their relationship to international law.

In order to ascertain whether there has been a change in the rules concerning the use of force, or at least a change in the interpretation of the existing rules, it will be necessary to consider not only the American arguments and practice, but also –and mainly- the attitude of the international community to them.

I. American Doctrines of the Use of Force

Each American Administration elaborates what is called its 'Military Doctrine'. In the last two decades, the Reagan, Bush Sr., Powell and Clinton doctrines were advanced. If one regards these different doctrines from a legal perspective, one may note on the one hand, that contrary to the Reagan doctrine on 'collective self-defence', the others do not deal with international law at all. The former was an attempt to enlarge the legal notion of self-defence, in order to embrace the covert military activities of the United States in support of anti-Communist rebels. On the other hand, the Bush, Powell and Clinton

\begin{footnote}{Curiously enough, it was on 11 September 1989, in his speech at a join session of Congress, exactly twelve years before the terrorist attacks against the United States (\textit{Public Papers of the Presidents of the United States: George Bush}, 1990 (Washington DC, USGPO, 1991) II, 1218, at 1219.}
doctrines were comprehensive explanations of overall US policy regarding the use of force, irrespective of the matter of legality. However, this does not preclude consideration of these doctrines from a legal perspective.

The Reagan Doctrine on ‘collective self-defence’ fell rapidly into disrepute with the arrival in office of Mikhail Gorbachev in the Soviet Union. Its main foundation was precisely to fight communist expansionism. In terms of content, the Reagan doctrine espoused the legitimacy of American military support for insurgencies against governments dependent on the Soviet Union. It received a blatant rejection by the ICJ in the Nicaragua case and was then abandoned.

In his remarks at the US Military Academy of West Point on January 5, 1993, first President Bush depicted the main features of his military doctrine, elaborated during the experiences of Panama, Iraq and Somalia:

‘At times, real leadership requires a willingness to use military force. And force can be a useful backdrop to diplomacy, a complement to it, or, if need be, a temporary alternative (…) Military force is never a tool to be used lightly or universally. In some circumstances it may be essential, in others counter-productive (…) We cannot always decide in advance which interests will require our using military force to protect them. The relative importance of an interest is not a guide: military force may not be the best way of safeguarding some vital interest, while using force might be the best way to protect an interest that qualifies as important but less vital (…) Using military force makes sense as a policy where the stakes warrant, where and when force can be effective, where no other policies are likely to prove effective, where its application can be limited in scope and time, and where the potential benefits justify the potential costs and sacrifice. Once we are satisfied that force makes sense, we must act with the maximum possible support. The United States can and should lead, but we will want to act in concert, where possible involving the United Nations or other multinational grouping (…) A desire for international support must not become a prerequisite for acting, though. Sometimes a great power has to act alone’.4

Colin Powell’s doctrine on the use of force is merely a development of the Bush doctrine or rather its adjustment on matters of when, where and how to intervene. The former Chairman of the Joint Chiefs of Staff and now Secretary of State formulated the following points: do not embark on high risk operations

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that have a less than an overwhelming chance of success; do not start something without a clear idea of how to end it, do not use force incrementally or gradually.\footnote{Remarks at the National Press Club, September 28, 1993}

In turn, according to some military experts,\footnote{Charles A. Stevenson, 'The Evolving Clinton Doctrine on the Use of Force', 22 Armed Forces and Society 511 (1996), at 514-516.} the Clinton doctrine was essentially inspired and influenced by the Powell doctrine. President Clinton described three different categories of national interests with different guidelines for the use of force: 1) Vital interests, such as defence of US territory, citizens, allies and economic well-being, that call for doing whatever it takes to defend them, including the unilateral and decisive use of military power; 2) important, but non-vital interests, that call for limited and conditional use of military force, depending on conditions including likely success, costs and risks commensurate with the interests at stake, and the failure of other means used to achieve the objectives; 3) humanitarian interests, for which the US Government tends to rule out combat power and limits use of military forces to situations in which they can provide unique capabilities or respond to urgent, otherwise unattainable needs of those in distress. In these cases, the risks to US troops are supposed to be minimal.\footnote{William J. Clinton, A National Security Strategy and Enlargement (Washington DC, The White House, 1995), 12-13, quoted in Charles A. Stevenson, supra (footnote 8), 518-519. The report went on to consider several critical questions to be raised prior to the commitment of military forces: ‘Have we considered non-military means that offer a reasonable chance of success? Is there a clearly defined, achievable mission? What is the environment of risk we are entering? What is needed to achieve our goals? What are the potential costs –both human and financial- of the engagement? Do we have reasonable assurance of support from the American people and their elected representatives? Do we have timelines and milestones that will reveal the extent of success or failure, and, in either case, do we have an exit strategy? (ibid.).}

After the terrorist attacks of 11 September 2001, the George W. Bush Administration is reviewing some of the aspects of the previous military doctrines, such as those which emphasise that no American lives are to be lost in conflict (one could term it a ‘zero dead’ doctrine); or standing policies which limit military involvement in time. These changes, however, do not modify the essence of the military conceptions developed by previous governments. It only takes into account that, in the present circumstances, the price the American people is ready to pay for military action is higher than before.
Since these doctrines do not contradict one another, they can for our purposes, be analysed together. While military humanitarian intervention is particular to the Clinton doctrine, all three doctrines share the following characteristics:

1) The use of force is considered an instrument of foreign policy;
2) Enforcing respect of international law in cases of grave violations is not \textit{per se} a reason to use force,
3) The use of force by the US is not necessarily conditioned by the respect of international law,
4) The exhaustion of non-military means before resorting to force, although desirable, is not a pre-condition,
5) Interest and success are both the main considerations when resorting to force,
6) Unilateral use of force (that is to say, without UN endorsement or support from other countries) is not precluded.

Set out in this way, little –if any- impact can be derived from these doctrines which would shed light on the formulation or interpretation of the rules of international law relative to the use of force. These policy statements are nevertheless primordial in order to understand the instances in which the US uses force and how the American Government tries to explain them from a legal point of view. They primarily show that law comes after the fact rather than as a ground for the decision to resort to force.

II. 	extbf{Is There a New American Interpretation and Practice Concerning the Use of Force ?}

There has always been a tension between the US position on the use of force and the postulates of articles 2§4 and 51 of the Charter. No one denies that, with the collapse of the Soviet Union, United States involvement in the recourse to the use of force is decisive in the international relations of today. This reflects the fact that: 1) the American Government possesses more freedom to use force than before, 2) the American Government is able to impose its military supremacy with greater ease than
before, 3) the American Government can influence collective decisions to use force with greater ease than before. These are of course political considerations. The question here is whether post-Cold War American practice is from a legal perspective new, or simply tantamount to ‘new wine in old bottles’. In order to answer this question, it is necessary to compare old and new legal justifications advanced by the United States. In this respect, five major categories of recourse to the use of force since the end of the Cold War can be identified: self-defence, armed reprisals, military intervention by invitation, Security Council authorisations of use of force and armed humanitarian intervention.

Among these five categories, probably only the fourth deserves the right to be called a novelty, properly so-called. As to the other four, they are merely reformulations, using new arguments, of categories already used in the past.

1. Self-defence

Over the last 12 years, the United States has qualified numerous controversial situations as an ‘armed attack’, leading to its invocation of its purported right of self-defence, be it individual or collective.

   A. Individual Self-defence

The invasion of Panama of December 1989 was justified on the basis of General Noriega’s threats and attacks upon Americans in Panama, creating ‘an imminent danger’ to the 35,000 American citizens living there. American objectives were described as follows: 1) to protect American lives, 2) to assist the lawful and democratically elected government in Panama in fulfilling its international obligations, 3) to seize and arrest General Noriega, an indicted drug trafficker and 4) to defend the integrity of United States’ rights under the Panama Canal treaties.\(^8\) It was added as supporting the argument of self-defence that ‘the illegitimate Panamanian National Assembly declared that the Republic of Panama was in a ’state of war’ with the United States’, that an American serviceman was killed, another wounded, a

\(^8\) See ‘Contemporary Practice of the United States’, 84 AJIL 545 (1990).
third arrested and brutally beaten and his wife threatened with sexual abuse, and finally that Noriega’s alleged drug trafficking activities constituted acts of aggression. 9

The UN General Assembly condemned the American invasion and demanded a withdrawal of American forces. 10 The SC failed to adopt a resolution to the same effect because of the American, British and French veto. 11 The OAS General Assembly voted 20 to 1 to condemn the invasion. 12

On 26 June, 1993, the US launched an aerial attack against Iraqi Intelligence Headquarters, in response to an alleged failed plot to assassinate former President Bush during his visit of Kuwait more than two months earlier. The legal justification was self-defence, since, according to Ambassador Albright, ‘every member [of the SC] would regard an assassination attempt against its former Head of State as an attack against itself, and would react’. 13 Some members of the SC endorsed the American qualification (the UK, Russia, Hungary, Japan) or showed ‘understanding’ (France) for the American action, whereas the Non-Aligned Movement and China insisted on the obligation to use force only in conformity with the Charter of the United Nations.

Self-defence was invoked again on August 20, 1998, to justify missile attacks launched against Osama bin Laden’s training camps in Afghanistan and against a Sudanese pharmaceutical plant. These actions were in response to the bombings of the US embassies in Nairobi and Dar Es Salaam of August 7, 1998. 14 They were not even placed on the agenda of the SC. Again, some States showed approval or ‘understanding’ for the attacks (the UK, Germany, Japan, Spain, France) whereas others protested, including the League of Arab States, China and Russia.

It would not be too difficult to show that all these arguments fall far short of the conditions required for self-defence in conformity with article 51 of the Charter. 15 To say the least, it is only with great difficulty that these situations could fulfil the requirements set out by the ICJ in the Nicaragua case as regards

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9 Ibid. See also the statement by Ambassador Pickering before the Security Council on December 20, 1989.
11 December 28, 1989
12 Resolution adopted on December 22, 1989
15 For these conditions, see Georges Abi-Saab, ‘Cours général de droit international public’, 207 RCADI 1987, 368-379.
self-defence. Our task, however, is to assess their impact on the application or interpretation of article 51 rather than to scrutinise the legality of these actions. In order to reach a conclusion, it is necessary to examine the attitude of the rest of the international community.\textsuperscript{16}

When the cases depicted above are compared with those situations in which the US invoked self-defence when resorting to force during the Cold War, it appears that no major differences emerge, either in theory or in practice. The invasion of Grenada in 1983 and the bombing of Libya in 1986 were also justified under the ground of self-defence.

**B. The terrorist acts of 11 September 2001: a turning point?**

Almost immediately after the acts of terrorism of 11 September 2001, the American administration began to speak of 'war'. The magnitude of the action, the number of victims, the way in which it was carried out and its deep impact on world public opinion could lead to the conclusion that this horrendous act should not simply be categorised as another 'terrorist attack'. President George W. Bush considered that these attacks 'were more than acts of terror. There were acts of war'.\textsuperscript{17} In turn, Secretary of State Colin Powell ratified this vision, by explaining that 'the American people had a clear understanding that this is a war. That's the way they see it. You can't see it any other way, whether legally that is correct or not (...) and we've got to respond as if it is a war'.\textsuperscript{18} American legal and political strategy has been to put in the same category 'those nations, organizations or persons [who] planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons'.\textsuperscript{19}

There is an absolute coherence between the US interpretation of these acts and its previous practice. As we have seen above, there is nothing new in the US considering terrorist action as armed attacks

\textsuperscript{16} See below, III.
\textsuperscript{17} Remarks by the President in Photo Opportunity with the National Security Team, September 12, 2001, in: http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html
and therefore opening the way for self-defence. Indeed, what has changed, is the magnitude of the riposte and the attitude of other States vis-à-vis this American perception, as we will see below.

This qualification raises the question of the applicability of the rules of International Law related to the use of force. In other words, whether this terrorist action can be considered as acts of use of force in international relations, i.e. 'armed attacks' in the sense of article 51 of the UN Charter, or acts of aggression. Many scenarios can be envisaged. If one State is directly or indirectly implicated in these acts, the answer is easy to find: they would indisputably be acts of aggression. In turn, this point raises another question: whether the fact of solely harbouring terrorists in its territory makes a State responsible for indirect aggression.

Clearly enough, the Definition of Aggression embodied in Resolution 3314(XXIX) does not cover harbouring terrorists. In the same vein is the analysis of the International Court of Justice in the Nicaragua Case. The Court, however, did not address this particular issue in depth. During the Cold War era, States belonging to different systems furnished arms and financial or logistic support to rebels using in some cases terrorist methods. Paradoxically enough, the CIA armed, trained and supported Osama bin Laden's group in its fight against the pro-Soviet regime of Afghanistan.

There is a need to go further in the analysis than the ICJ did. A distinction can be certainly made as to the degree of assistance furnished by a State to terrorist organisations. One cannot exclude, for instance, that some form of logistic support is to be included in one of the forms of aggression depicted

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20 Just as an example, to quote what the American representative declared in the Security Council after the Israeli bombing of the PLO headquarters in Tunis in 1985: '(...) we recognize and strongly support the principle that a State subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks. This is an aspect of the inherent right of self-defence recognized in the United Nations Charter. We support this principle regardless of attacker, and regardless of victim. It is the collective responsibility of sovereign States to see that terrorism enjoys no sanctuary, no safe haven, and that those who practise it have no immunity from the responses their acts warrant' (intervention of Mr. Walters, S/PV.2615, 4 October 1985, at 112).

21 Article 3 (g) refers to sending of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State, or to the 'substantial involvement' of a State in these acts.

by Resolution 3314 (XXIX), to the extent that it constitutes a ‘substantial involvement’. Thus, logistic assistance in order to accomplish or facilitate terrorist acts can constitute a form of participation therein. Accordingly, there is a legal analysis the American Government could have followed. Washington could have demonstrated that the Taliban regime, which effectively controlled the major part of Afghanistan and was able to engage the international responsibility of this country, did more than simply harbour Ossama bin Laden’s network. The close and evident links existing between bin Laden and the Taliban were such, that it must surely not be difficult to establish that the former had become a de facto organ of the State.  

Still another possibility would have been to engage the responsibility of Afghanistan by considering that the Taliban regime failed to prevent further acts of terrorism by the Al-Qaeda network, being aware of its activities, especially after the bombing of the American embassies in Nairobi and Dar-Es-Salaam. Instead of following this course of action, the American Government decided for political reasons, to focus its rhetoric upon a ‘war against terrorism and those harbouring terrorists’. The question remains whether non-State actors, such as terrorist organisations, can be responsible for armed attacks in the sense of the ius ad bellum. Nearly fifteen years ago, Oscar Schachter gave the following example, referring to terrorist actions as possible ‘armed attacks’:

> ‘Article 51 does not qualify ‘armed attack’. On its face, it may apply to attacks from any source and therefore allow a State to respond with force to attacks by non-State bands wherever they may be. However, this conclusion seems too simplistic in a world in which territorial sovereignty of States is a dominant principle. Consider whether terrorist attacks by the West German ‘Red Army Front’ against American installations or nationals in Italy would allow the United States or Italy to attack the ‘Front’ in Germany, and seize or kill its suspected terrorists without the explicit consent of the Federal Republic of Germany. To say that ‘armed attack’ in Article 51 applies to any attack, regardless of the source, does not meet this issue’.

Of course, one could argue that after 11 September 2001, we are facing a new kind of violence. Hence, the existing rules should be adapted, or at least read, in a way that takes into account this new reality.

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23 Cf. this situation with that, although not identical, of the Ayatollah Khomeini in the Hostages case (I.C.J. Reports 1980 3 at 29-30, para. 59, and 33-35, paras. 71-75). Formally, the Ayatollah Khomeini was not an organ of the State, but the religious leader of the country. As such, the Court considered him, without further elaboration, as an organ of the Iranian State.


The point is that neither the arguments advanced nor the ways proposed to fight terrorism in the field of use of force are a novelty. One can take as an example the idea of considering the harbouring of terrorists as a justification to use force in self-defence. Israel invoked this argument in 1982 with regard to Lebanon and in 1985 with regard to Tunisia. In both cases, the Security Council did not follow this view, and also explicitly condemned the use of force by Israel in the latter.\footnote{See Resolutions 501 (1982) and 573 (1985). The former adopted on 25 February 1982 by 13 votes to none, with 2 abstentions (Poland and USSR), the latter on 4 October 1985 by 14-0 with the abstention of the United States.} In the 90s, Turkey also followed this line of reasoning in order to use force in Northern Iraq against the Kurds.

To enlarge the concept of aggression so as to include harbouring terrorists is confusing different international wrongful acts, and opening the door to more unilateral use of force, with its after-effects of escalation. For as reprehensible and unlawful as this act is, it cannot be likened to aggression, which constitutes the most grave and qualified use of force in international relations. It would be the equivalent, in the field of Criminal Law, of placing in the same situation, a killer and the person who gives him/her shelter. Harbouring terrorist groups acting abroad clearly constitutes a threat to international peace and security. This characterisation paves the way for forcible action as decided upon by the Security Council under Chapter VII of the Charter. Moreover, it cannot be said that, after the defeat of the Taliban, the Afghan government continued to provide shelter to terrorists. On the contrary, the new Afghan authorities kept up their struggle against the Taliban and Al-Qaeda. Any military action in Afghan territory would have to count on the request or the authorisation of the Afghan government, if no military action was decided by the Security Council. Since the American Government considered from the very beginning – even before knowing who was responsible for the attacks- that these acts were ‘acts of war’, the main point remains whether non-States actors such as terrorist organisations, and their members individually, can be held responsible for violations of the obligation not to resort to force, in particular of an act of aggression.

The first question that emerges is why non-State terrorist acts ought to be considered as a particular case of armed attack or even aggression. Is it their violence, their targets, their aims, the number of...
casualties or the level of destruction that provides the clue? Putting aside some semantic distinctions, violence can be the common element shared by terrorist acts and traditionally military actions engaged by one State against another. Is it still valid to consider that if the same action is committed by a State, then the characterisation of such an act as aggression offers no doubt, whereas if it committed by terrorists this characterisation does not stand?

Operation ‘Enduring Freedom’ (this name was finally preferred over the original ‘Infinite Justice’) was performed under the banner of self-defence. This term of art is employed in different ways in law, either domestic or international. In the former, it is a cause of justification in criminal law for individuals having resort to violence. In the latter, it is used essentially as an exception to the prohibition of the use of force by a State (or, as preferred by the ILC and the majority of authors, a ‘circumstance precluding wrongfulness’). There are however other circumstances in which self-defence is used in relation to some situations international agents must face. As an example, one can mention the reference made by agreements or resolutions relative to peacekeeping forces, in which it is established that these forces or their personnel will not use force except in self-defence.

There is no need to use the category of ‘self-defence’ when dealing with the repression of terrorism. Take the cases in different countries in which State agents (police or armed forces) killed terrorists having hijacked aircrafts, because this was the only way to obtain the release of their hostages. These acts were not qualified as acts of self-defence in the sense of ius ad bellum, irrespective of whether terrorists came from abroad or not. They can be justified on the basis of municipal law without any need for a reference to self-defence, as it is understood in ius ad bellum. There simply are cases of legitimate use of violence by the entity having the monopoly over it within its territory: the State.

Interesting enough, both the United Kingdom and France accompanied their ratification of Additional Protocol I to the Geneva Conventions of 12 August 1949 by an interpretative declaration of article 1,
paragraph 4 and Article 96, paragraph 3, according to which ‘(...) the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation’.29

Another flagrant contradiction is to consider that there is a war against terrorism on the one hand, and not to consider the prisoners taken as prisoners of war, as is the American government's attitude.

Even assuming that terrorist action could be considered an 'armed attack' in the sense of article 51 of the Charter, the situation emerging from the 11 September 2001 terrorist acts does not fall within the ambit of self-defence. The main idea of self-defence, which was summarised by the celebrated Webster formula, implies that the attack is underway and that the aim is to repel it. Once the attack is over, the use of force can be invoked on the basis of other reasons and the legal justifications must be different. It is not a matter of time, as some authors believe, pretending that action of self-defence can occur many months later, as was the case of the action against Iraq after its invasion of Kuwait more than six months earlier.30 Putting aside the fact that Chapter VII of the Charter rather than self-defence legally covered the 'Gulf War', this idea fails to distinguish between instant and continuing situations. Iraqi aggression was still ongoing in January 1991, since the territory of Kuwait was under military occupation. The terrorist acts of 11 September 2001 are finished. It would be forcing the legal reasoning too much to pretend that they are part of a war terrorists declare and therefore that we are facing an ongoing armed conflict. Furthermore, the goals advanced in order to justify the use of force, i.e. to prevent further terrorist attacks, to destroy the Al-Qaeda network, to bring its member to trial, fall outside the purpose of self-defence. I am not saying that force may not be necessary to achieve these objectives, or that these objectives are not justified. What I am saying is that another legal justification is required, rather than self-defence.

defence. Self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council’.

Still, can SC Resolutions 1368 and 1373 (2001) be considered as a recognition that the USA is in a situation of self-defence? This was the perception prevailing in the political spheres. However, the fact of ‘recognising the inherent right of individual or collective right to self-defence in accordance with the Charter’ neither adds nor detracts anything. The only coherent interpretation of this sentence, which is compatible with the Charter, is that it simply means that if one or more States are involved in the terrorist attacks and persist in this action, the victim State can act in self-defence. Of course, this is not the American government’s interpretation. This vague reference in the preamble of the resolution is a compromise between different interpretations. The American one, although endorsed by NATO, the EU, the States parties to the Rio Treaty and many others, is but one interpretation, and one which does not enjoy universal acceptance, as we will see below.

C. Collective Self-defence

The US also persists in its broad interpretation of collective self-defence, even after the SC has taken actions to address threats to the peace, breaches of the peace or acts of aggression. This was the case during the crisis provoked by the Iraqi invasion of Kuwait, in which the American government considered, before the adoption of the Resolution 678 (1990), that it was free to use force by virtue of collective self-defence emanating from the original Iraqi attack, even in the absence of a SC authorisation. The careful wording of the relevant SC resolutions shows that other members of this organ did not share the American view, especially since the Kuwait crisis can be considered as being the first case in which the SC played its role by taking measures to maintain and restore international peace and security.31

30 This is the view developed by Yoram Dinstein, War, Aggression and Self-Defence, 3rd ed. (Cambridge, University Press, 2001), at 212-213.
31 Resolutions were worded in such a way as to include both a reference to self-defense in their preamble and action under Chapter VII in the operative part.
D. The US practice on self-defence: an appraisal

The American interpretation of self-defence during the decade following the end of the Cold War rested on the same foundations as before. It has simply been broadened in order to include within the concept of ‘armed attacks’ against the United States, cases of drug trafficking and plots to assassinate former heads of State.

It emerges as a consequence of what we are analysing that under the heading of self-defence, one is not justified in pursuing extraterritorial repression of terrorist groups. For what is mainly at stake with the argument of self-defence is whether the victim State could claim to forcibly act against these terrorist groups, no matter where they are and irrespective of any consent from the State the territory of which becomes the battlefield. It would then be a ‘new war without borders’. Incidentally, another point on the agenda would be whether individuals responsible for these terrorist attacks could be accused of, and therefore prosecuted and judge for, the crime of aggression as foreseen in the Statute of Rome of the International Criminal Court. Like many other acts not involving State use of force, terrorism constitutes a threat to international peace and security. As such, it might be that the response of the international community –through the system of collective security set up by the UN Charter- involves the use of force. From the individual perspective, acts such as the terrorist attack against the World Trade Center can be considered as crimes against humanity, without any need to consider them as part of an armed conflict.

However, it is important to emphasise the conditions for self-defence which the US has invoked as being fulfilled in the cases which have arisen since the end of the Cold War. With the exception of Operation ‘Just Cause’ in Panama, in all the other cases the requirement of proportionality was raised. Other conditions asserted were necessity, previous warnings or attempts to achieve the goals by using
diplomatic efforts and the objective of preventing repetition. Thus, this practice confirms that necessity and proportionality are requirements that need to be met in order to invoke self-defence. The other conditions referred to can be subsumed by the requirements of necessity and proportionality. Indeed, to invoke on the one hand previous attempts to solve the problem through diplomatic means is tantamount to recognising that force is considered as an option of last resort, the peaceful means having been unsuccessfully exhausted. On the other hand, the need to prevent further attacks raises the question of whether proportionality must be measured in relation to the gravity of the attack and to the goal of stopping and repelling the aggressor or, on the contrary, whether it can go so far as to include the notion of prevention. As is well known, the notion of preventive self-defence is controversial and in any case contrary to the wording of article 51 of the Charter. There is no consensus in international society acknowledging such an extension of self-defence.33

2. Military Intervention by Invitation34

In the context of this category one can discern an evolution in the practice of the United States over the last decade. This change began with the aerial action against rebel forces in the Philippines in December 1989, at the request of the legitimate government of Corazon Aquino.35 It was followed by the deployment of the US Army in Saudi Arabia following the annexation of Kuwait by Iraq. Both cases were clear and real invitations emanating from the governments of the countries concerned, in contrast with American, Soviet or French practice during the Cold War.

Latin America has been the preferred theatre of operations for American interventions, in most of the cases without any kind of ‘invitation’ at all. The case of Haiti reflects a new approach in this field. Instead

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32 The question, however, is not at issue, since the Statute remains to be completed in order to allow the Court to judge these crimes (See art. 5 of the Statute). Moreover, the Statute shall enter into force after the deposit of the 60th instrument of ratification, acceptance, approval or accession.

33 The ICJ carefully avoided pronouncing itself upon this sensitive topic. See: ICJ Rep. 1986, 103, para. 194

34 On this point, see generally Georg Nolte, Eingreifen auf Einladung. Zur völkerrechtlichen Zulässigkeit des Einsatzes fremder Truppen im internen Konflikt auf Einladung der Regierung (Berlin: Springer, 1999)

35 We put aside one of the arguments developed by the American Government justifying the Panama invasion: the ‘consultation’ with the elected President Endara. Indeed, the American Government did not pretend that its action was motivated by an ‘invitation’ issued by him.
of unilateral action, either covered by regional endorsement without SC authorisation as required by article 53 (as was the case with respect to the Dominican Republic in 1965) or without such regional endorsement (Guatemala in 1954), the procedure followed was in full conformity with the UN and OAS Charters. First economic sanctions were adopted, followed by a US led peace-keeping operation, decided by UNSC Resolution 940 (1994).

Today, there is some criticism of American military involvement in the ‘Plan Colombia’, conceived to combat the drug industry and trade, put an end to the civil war and develop Colombian economy and democracy. From a legal perspective, nothing need be said about this American participation, as it is a response to a request of the Colombian government. The criticisms raised are instead a function of political considerations: the Plan which proposes principally a military strategy to tackle illicit drug cultivation and trafficking through substantial military assistance to the Colombian armed forces and police, escalates the existing armed conflict and human rights crisis.36

After the defeat of the Taliban forces, the US continued to conduct its military activities in Afghanistan, with at least the toleration of the new regime at the very beginning. One could speculate whether Operation ‘Enduring Freedom’ has a legal justification in the consent of the government of the State concerned.37 Yet one cannot call the operation an ‘armed intervention by invitation’, since there was no request from the Afghan government at all. Moreover, the very existence of that government is greatly tributary, although not exclusively, to the American military action against the Taliban forces. From a political perspective, nobody will regret the fall of the odious regime led by Mullah Omar. From a legal perspective, it is difficult to accept that a military intervention could be legally acceptable on the ground

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36 It must be noticed, however, that the Colombian army personnel trained by US special forces have been implicated by action or omission in serious human rights violations, including the massacre of civilians; and military equipment provided by the US to the Colombian armed forces has reportedly been used in the commission of human rights violations against civilians. Cf. Amnesty International’s Position on Plan Colombia, June 2000. Available in: http://www.amnesty-usa.org/news/2000/colombia07072000.html

37 See article 20 of the ILC draft articles on State responsibility, which considers consent as one of the circumstances precluding wrongfulness. Paragraph 6 of the ILC commentary on article 26 of the same draft articles states: ‘in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose’. Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) in: Report of the
that the new government that results from it endorsed it. This was the excuse used by the Soviet Union to legally justify its invasions of Hungary, Czechoslovakia and Afghanistan in the past. Certainly, the circumstances are different, since the new Afghan Government is a result of an arrangement between the representatives of almost all the components of Afghan society and under a UN procedure. At any rate, the American Administration did not modify its original plea of self-defence, by pretending to act upon the justification of consent given by Afghanistan. Finally, the new Afghan government even requested the end of the bombings, without being heard by the USA.

To sum up, and putting aside the theoretical case of Afghanistan, it can be said that since the end of the Cold War there has been no change in international law regarding intervention by invitation, but there has been a change in the American attitude in favour of increased compliance with these rules.

3. Security Council Practice under Chapter VII

The major changes since the fall of the Berlin Wall in the field of use of force relate to SC practice. At the very beginning of this practice, the capacity of the SC to confer upon States general authorisations to use force has been the object of huge doctrinal controversies. The starting point was the SC resolutions relative to the Kuwait crisis.

A. Authorisations to Use 'all Necessary Means'

Resolution 665 (1990) was the first Resolution to authorise member States to use such measures 'as may be necessary under the authority of the of the Security Council' to halt maritime shipping so as to ensure compliance with the economic embargo previously imposed by the Council. The second instance, contained in Resolution 678 (1990), authorised States collaborating with Kuwait 'to use all necessary means' to uphold and implement the SC resolutions mandating Iraq's withdrawal and the restoration of the legitimate Kuwaiti government.
This kind of action is not exactly what chapter VII of the Charter envisaged. What took place was not a mandatory action, but rather an authorisation. This means that the decision to resort to force belongs to the Member States. Military forces were not put at the disposal of the SC. Instead they acted on their own. Neither command nor control of the operation was vested on the United Nations. The Military Staff Committee did not act as envisaged by the Charter. The Secretary General played no role, to the point that he said that this was not a 'United Nations war'.\(^{38}\) For all these reasons, some scholars advocated that the SC acted \textit{ultra vires}.\(^ {39}\) However, it is beyond any doubt that all the permanent members, and indeed the remainder of the States themselves, considered that it was within the SC's power to act in such a way. Moreover, there was an antecedent to Resolutions 665 and 678 (1990): by its Resolution 221 (1966), the SC authorised the UK to use force in order to render effective the embargo against Southern Rhodesia.\(^ {40}\) Subsequent practice also confirmed the interpretation of the Charter according to which the SC is empowered to follow such a course of action. Resolution 794 (1992) on Somalia followed exactly the same procedure. Later on, a similar practice was adopted with respect to Bosnia and Herzegovina.\(^ {41}\) Nonetheless, an important distinction arises when one compares Resolution 678 (1990), with the other resolutions referred to above. The former simply authorised the use of 'all necessary means', without mentioning any authority or control vested in the SC with respect to such actions. The contrary is true for the latter resolutions.


\(^{40}\) Resolution 83 (1950), adopted during the Korean war, simply recommended 'the Members of the United Nations to furnish such assistance to the Republic of Korea as may be necessary to repeal the armed attack and to restore international peace and security in the area'. Moreover, this recommendation was not the product of a convergence of views amongst the members of the Security Council: the USSR was absent in the voting, two other States did not participate (Egypt, India) and another one voted against (Yugoslavia). Thus, it can with difficulty be considered as a precedent.

It was stated during the military intervention in Afghanistan that Resolution 1373 (2001) provided a mandate to use force and, moreover, one of an unlimited character. The argument is based on the fact that in the said resolution the Security Council decided, among a number of provisions concerning the freezing of terrorist assets, that all States ‘shall take the necessary steps to prevent the commission of terrorist acts’. It must be noticed that Resolution 1373 (2001), adopted under Chapter VII, did not provide a general authorisation to resort to force in order to achieve its goals, as was the case in previous practice. In its ordinary meaning, the decision that States ‘shall take the necessary steps to prevent the commission of terrorist acts’ implies that they have to take action within their borders in the field of security in order to impede such acts. The context, that is to say, the other measures addressed to the States by the same resolution, also shows that this is the only legally valid interpretation of that paragraph. The fact that the States have not interpreted it in a way authorising the use of force, confirms this interpretation. In particular, the US did not invoke it to justify its use of force.

The practice of SC authorisations to Member States to use force is today too well established to be contested. However, the question remains open whether such authorisations must be subordinated to the authority or control of the SC. If one follows the rationale of Chapter VII, the answer should be positive.

This practice of general authorisations suits the United States well. It allows it a high degree of flexibility, it imposes no strict control of the operations by the UN and ensures American leadership, since US forces are the most significant in these types of interventions.

**B. Indefinite, Implied and ex post facto Purported SC Authorisations**

In addition to the practice just described, three other arguments have been advanced in order to justify the use of force by States under an hypothetical SC umbrella. The US and the UK have argued that the authorisation given by Resolution 678 (1990) applies to the further requirements made by the SC with respect to Iraq. This is the ground invoked to justify 'Desert Fox', 'Northern Watch' and 'Southern Watch'?

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Operations, implementing the 'no fly zones' in the North and the South of Iraq.\textsuperscript{43} Such an extensive interpretation of Resolution 678—which one may term an 'indefinite authorisation'—is in contradiction with Resolution 687(1991), that declared a cease-fire after Iraqi acceptance of the said resolution, which put an end to the use of force authorised by Resolution 678 and established a new 'regime' for Iraq's post-war situation, one which still endures.

The other two arguments have been argued with respect to more recent experiences, and notably with regard to the Kosovo crisis. According to these views, the SC can implicitly or retroactively authorise the use of force by a State or a group of States.

The theory of an implied SC authorisation to resort to force was 'implicitly' advanced by NATO States, when at the beginning of the Operation 'Allied Force' they tried to justify the bombings on the basis of the Security Council's qualification of the situation as a 'threat to the peace' and on the basis of the fact that Yugoslavia did not comply with previous SC resolutions. This position is incompatible not only with the wording of the Charter, but also with the object and purpose of the collective security system that the Charter enshrines. It is evident that it is for the SC to decide whether previous measures adopted by it 'have proven to be inadequate' and that further forcible action is necessary (art. 42 of the Charter).\textsuperscript{44}

Moreover, in the case of Kosovo, the SC reserved for itself the possibility of adopting other measures.\textsuperscript{45}

More recently, it has been advanced that, since the SC did not adopt the draft resolution presented by Russia, India and Ukraine, this organ had implicitly recognised the legality of the NATO bombings. Again, this interpretation not only flies in the face of the wording and spirit of the Charter, but is also in contradiction with previous practice, when the SC did not condemn Soviet or American interventions in


\textsuperscript{44} For a convincing and in depth analysis of this question, see: Olivier Corten and François Dubuisson, 'L'hypothèse d'une règle émergente fondant une intervention militaire sur une autorisation implicite du Conseil de sécurité', 104 Revu de droit international public (2000), 873-910.

\textsuperscript{45} Resolution 1160 (1998): The SC '[e]mphasizes that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures'; Resolution 1199 (1998): The SC '[d]ecides, should the concrete measures demanded (...) not taken, to consider further action and additional measures to maintain or restore peace and stability in the region'.

Czechoslovakia, Afghanistan, Nicaragua or Panama, among others. Simply put, the SC neither condemned nor authorised the NATO bombings.

The *ex post facto* authorisation doctrine has not been officially advanced by the United States or any other government. For the moment, it is merely a doctrinal posture. Logically, *post facto* SC authorisation is not possible. The powers conferred on the SC by the Charter imply that the prerogative to use force is linked with the existence of an ongoing situation which threatens the peace, is a breach of the peace or an act of aggression. The decision to take ‘action by air, sea or land forces’ has as its purpose to ‘maintain or restore international peace and security’, as article 42 of the Charter clearly provides. Moreover, the legality of a particular recourse to the use of force must be determined at the moment it occurs. The SC neither performs judicial functions – although it can ascertain legal qualifications of some acts when fulfilling its functions - nor possesses capabilities to preclude the wrongfulness of a previous State action. Its political power to decide to use force is not tantamount to a power to decide retroactively whether force was rightly or wrongly used. The theory of *ex post facto* authorisation thus contradicts the rationale of the collective security system.

In any case, neither of the three theories of indefinite, implied or *ex post facto* authorisation has met with the support of the international community. The first of the theories has been defended only by the US and the UK and faces a vigorous rejection from the other permanent members of the SC, the Non-Aligned Movement and many other States. The weakness of the second theory is acknowledged even by the legal advisers of the interested governments themselves, as will be seen below. As such, it does not warrant much consideration from a legal perspective. As to the third theory, a more detailed analysis with regard to Kosovo can be found elsewhere and thus it will not be further elaborated upon here.

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Another position, quite astonishing from a legal perspective, is the one adopted by the European Council in its extraordinary meeting of 21 September 2001, with regard to the then possible future US military reaction to the terrorist attacks. Is the European Council, in stating that ‘on the basis of Security Council Resolution 1368, a riposte by the US is legitimate’, giving to this resolution an interpretation that would authorise or acknowledge the right of the US to resort to force? If the answer is yes, as it seems to be, different problems arise. Does the Resolution acknowledge that the US is in a situation of self-defence? Does it authorise the use of force from the characterisation of the terrorist attacks as threats to the international peace and security? Does this ‘license’ stem from both references to self-defence and the threat to peace and security? None of these possibilities bears legal analysis. The resolution does not recognise that the United States is in a situation of self-defence: it merely recognises the inherent right of self-defence in general, furthermore ‘in accordance with the Charter’. As for the mere acknowledgement that there is a threat to international peace and security and its implied authorisation to use force in order to stop this threat, we have already explained that it is up to the Security Council to adopt the decision it considers appropriate as to the best way to face this threat.

The EU statement could also suppose that, in these kind of circumstances, some form of intervention of the Security Council would be required, something that the US Government would not appreciate. Moreover, a careful consideration of the wording of the Declaration leaves open the possibility of considering that the European Union did not make a legal statement, but merely a political one: the European Council considered that an American riposte is ‘legitimate’, something quite different from ‘legal’. For it is obvious that the European Council extraordinary summit wanted to send two messages at the same time: support of an American forcible action on the one hand, and the pretence that this action is not unilateral, but having a legal and collective basis. The shadow of the unilateral NATO

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military action in Kosovo in 1999 still weighs heavily on most of the European capitals. Hence their effort to show that this time things are different, because there would be a SC endorsement.

4. Humanitarian Intervention

Much has been said about the existence of a right of humanitarian intervention to deter genocide or other grave and massive violations of human rights. It is not the place here to embark on a detailed discussion of this important issue. One may note however, that the deep discrepancies among the members of the international society about the existence of such a right are enough to demonstrate its non-existence in international law. Apart from the negative attitude of two of the five permanent members of the SC, its rejection by Third World countries should be also pointed out. The Ministerial Declaration produced by the Meeting of Foreign Ministers of the Group of 77 held in New York on September 24, 1999, in which 132 States were represented, states that ‘[t]hey rejected the so-called right of humanitarian intervention, which has no basis in the UN Charter or in international law’.50

Similarly, the 4th Report of the Foreign Affairs Committee of the House of Commons published on May 23, 2000, while recognising the morality of the NATO action, affirmed its dubious legality. It stated: ‘Our conclusion is that Operation Allied Force was contrary to the specific terms of what might be termed the basic law of the international community—the UN Charter, although this might have been avoided if the Allies had attempted to use the Uniting for Peace procedures. (...) We conclude that, at the very least, the doctrine of humanitarian intervention has a tenuous basis in current international customary law, and that this renders NATO action legally questionable.’51

Putting aside all legal considerations and focusing on ethical considerations, it must be said that the supporters of humanitarian intervention are vested with the onus probandi in order to demonstrate that force is the best available tool to safeguard human rights in situations like Kosovo. The results of the

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NATO experience cannot be seen as encouraging. \(^5\) Assume there was a circumstance in which force would be the best candidate to stop such violations and that any action from the SC is to be discarded because of an actual or potential veto. One can query whether the best way to deal with that resort to force would not be the recognition by the State or States involved that they are violating the obligation prohibiting the use of force, but that there nonetheless exist strong moral or political justifications. These justifications could act as a mitigating circumstance, not to preclude wrongfulness, but with regard to the consequences arising from that act with regard to State responsibility.

5. Armed Reprisals

Curiously enough, some of the forcible actions committed by the United States which it justifies under the notion of self-defence, would be better candidates for forcible counter-measures. \(^5\) The reason why the American government has not resorted to such an argument is simple: today it is common knowledge that forcible counter-measures are prohibited. \(^5\)

Quite surprisingly, during the NATO bombings of Yugoslavia, some distinguished scholars began to speak about ‘forcible humanitarian counter-measures’. \(^5\) The rationale of both counter-measures and humanitarian action militates against such theory. By definition, the purpose of humanitarian action is the protection of human beings, victims of violations of their basic rights. It must then be a necessity to intervene in order to stop such violations. On the contrary, counter-measures are not subordinated to the idea of necessity. In many cases, their goal could be, not to stop an ongoing wrongful act, but to

\(^5\) See Kohen (supra, footnote 47), 137-140.

\(^5\) See W. M. Reisman, ‘Self-Defence or Reprisals? The Raid on Baghdad: some Reflections on Its Lawfulness and Implications’, 5 European Journal of International Law 120 (1994), at 125. As a matter of course, he considers that there is a trend towards the acceptance of forceful counter-measures.

\(^5\) See the Friendly Relations Declaration of 1970 embodied in GA Resolution 2625(XXV), the Nicaragua Judgment of June 27, 1986 (ICJ Reports 1986, 127, para. 249), the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (ICJ Reports 1996, 246, para. 46) and article 50§1 a) of the ILC draft articles on State responsibility (loc. cit., footnote 38). Moreover, in a study prepared by Julia W.Willis, Deputy Assistant Legal Adviser for European Affairs at the Department of State, about the US position and practice in regard to acts of reprisals, the conclusion was that ‘the United States has taken the categorical position that reprisals involving the use of force are illegal under international law’. ‘Contemporary Practice of the United States’, 73 AJIL (1979), 491.

obtain reparation once the wrongful act is terminated. To speak about 'forcible humanitarian counter-
measures' would mean that States could use force in such situations, even if force is not (or is no
longer) able to put an end to the violations of human rights. The practical dangers of this theory and the
rather punitive character of these 'forcible humanitarian counter-measures' need not to be stressed.

III. Attitude of the International Community

The first striking fact concerning the attitude of the international community towards American use of
force is that nearly no attempts have been made in the Security Council or before the General Assembly
to condemn it in circumstances in which the violation of article 2, paragraph 4 was blatant, or at least
appeared prima facie to be so. This attitude is in stark contrast with the earlier, but identical experiences
before 1990, such as Grenada, Libya or Panama. In these cases, the SC was prevented from adopting
a resolution because of the right of veto, but the General Assembly clearly condemned the American
use of force and its consequences. This change of attitude cannot lead to the conclusion that the
international community has endorsed the American position. The main reason is not the fact that any
attempt before the SC is doomed to failure because of the right of veto, although this should not be
absolutely dismissed. The point is that during the Cold War there were also many occasions in which
force was used by many States (all the permanent members of the SC, but also many others States)
without any condemnation by the UN. This fact did not lead States –or authors- to believe in a change
of attitude with the regard to the prohibition of the use of force.

At first sight, a supportive attitude of the international community to the US understanding of the use of
force against terrorism could be discerned.

Humani
tarian Countermeasures and Opinio Necessitatis', 10 EJIL 791 (1999). See also his International Law (Oxford
University Press 2001), at 298.
56 See respectively GA Resolutions 38/7 of November 2, 1983, 41/38 of November 20, 1986 and 44/240 of December 29,
1989.
57 These examples can be found in A. Mark Weisburd, Use of Force. The Practice of States Since World War II
(Pennsylvania State University Press, 1997), where a short analysis of all cases of use of force since 1945 is presented.
The question arises then as whether it is true that the international community has recognised the legality of the US-British armed action in Afghanistan. At first sight, this seems to be indeed the case. However, close scrutiny of the attitude of States is necessary. Indeed, with the exception of Iran, Iraq, Vietnam, Cuba, North Korea and of course the Taliban regime of Afghanistan, no States condemned this use of force as being contrary to the obligations emanating from the Charter and general international law.

However, a general overview is an insufficient basis for reaching a conclusion so serious and important as affirming that the rules relating to the prohibition of the use of force have changed. If a glance at States’ and international organisations’ statements certainly reveals political support for the American action, from a legal point of view it reveals instead, considerable ambiguity.

A perusal of the statements made by States and international organisations shows different views. The day following the terrorist attack, the Belgian Foreign Affairs Minister declared that there was no ‘war’.58 Only the Secretary-General of NATO, Lord Robertson, spoke of ‘aggression’.59 On the contrary, UN60 and OAS resolutions61, as well as the first Declarations of the European Union62 and the North Atlantic Council,63 the statements of the Euro-Atlantic Partnership Council64 and the NATO-Russia Permanent Joint Council,65 referred only to ‘terrorist attacks’, ‘barbaric acts’ or ‘acts of violence’.

The first alignment to the US perception was made by the Statement of the North Atlantic Council of 12 September 2001, in which ‘The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty’, applying consequently collective self-defence.66 Later on, the European Union went even further, as we saw above. States parties to the Rio Treaty (the Inter-American Treaty of Reciprocal
Assistance of 1947) followed closely on American heels, in what constitutes the clearest support for the American legal justification.\footnote{The Committee designated by the 24th Meeting of Consultation of Ministers of Foreign Affairs adopted a resolution entitled ‘Support for the Measures of Individual and Collective Self-defense established in Resolution RC.24/RE.1/01’, in which it ‘resolves: 1. That the measures being applied by the United States of American and other states in the exercise of their inherent right of individual and collective self-defense have the full support of the states parties to the Rio Treaty’. OEA/Ser.F/I.24, CS/TIAR/RES.1/01. No similar text expressing this unequivocal support was adopted at the universal sphere.} Thus, it is a remarkable new fact that NATO, the EU and Rio Treaty States came round to the American perception of self-defence against terrorism.

While condemnation of the terrorist attacks was nearly unanimous, NATO, the EU and Latin American attitudes were not followed in all the other regions of the world. South Africa merely recognised ‘the right of the US government to track down the culprits and bring them to justice’,\footnote{Declaration of Foreign Minister Gurirab, 14 September 2001 (www.grnnet.gov.na).} and Namibia called for restraint.\footnote{Statement at the General Assembly, 1st October 2001 (www.un.org/News).} Even States supporting the US, were cautions as to the actions justified by the fight against terrorism. Costa Rican Ambassador Bernd Niehaus stressed that ‘the war against terrorism does not justify the use of totalitarian methods’.\footnote{Immediately after the 11 September attacks on the United States, the Security Council expressed its determination to combat by all means threats to international peace and security caused by terrorist acts. The Council also reaffirmed the inherent right of individual or collective self-defence in accordance with the Charter of the United Nations. \textit{The States concerned have set their current military action in Afghanistan in that context}. New York, 8 October 2001, On the situation in Afghanistan, http://www.un.org/News/ossg/latestsm.htm (emphasis added)}

Contrary to what was presented by the media as an endorsement of the Anglo-American use of force, Secretary-General Kofi Annan confined himself to issuing a reminder on what the position of those States was, in an excellent example of the use of cautious diplomatic terms.\footnote{Press Release PR/CP (2001)124.} Similarly, Security Council members preferred moderate terms rather than clear support to the legal justification. The permanent representatives of the USA and the UK informed the Security Council that the military action was taken in self-defence and directed at terrorists and those who harboured them, that every effort was being made to avoid civilian casualties and that the action was in no way a strike against the people of Afghanistan, Islam or the Muslim world. According to the statement of the
President of the Security Council, ‘[t]he members of the Council were appreciative of the presentation made by the United States and the United Kingdom’.72

It is difficult to interpret these vague formulas as indicating acquiescence to the legal justification invoked by the States resorting to force in that situation. In order to prove acquiescence, there must be a ‘consistent and undeviating attitude’ a ‘clear’, ‘definite’ and ‘unequivocal’ course of action, showing ‘clearly and consistently evinced acceptance’, to use the wording of the ICJ in different occasions.73

One could expect to obtain clear-cut statements in order to show that a rule in general, and specially one of the importance of that related to the use of force in particular, has changed. Instead, what we had were, with the important exceptions mentioned above, in reality vague statements from a legal perspective. What they really transpire are the will not to bother the US in this difficult situation, on the one side, and the embarrassment in finding a legal support for its action, on the other side. They show the dilemma of supporting the US while showing that ‘this time’ action counts with legal background.

Traditionally, the UK and Israel share the same legal approach as the United States on the use of force. However, the three States do not have exactly the same perception of the matter. Surely, it is Israel that adopts the broadest interpretation of the legal uses of force in international law. The radical innovation in this field is that, with the Kosovo crisis, and furthermore after the terrorist attacks of 11 September 2001, some American allies generally reluctant to adopt large interpretations of legal uses of force (e.g., France), ended up bowing to the American stance.

We are not discussing here whether force had to be used against those responsible for the terrorist attacks of 11 September. By raising the question of the legal procedures necessary to follow in order to resort to force in such circumstance, the main thing at issue here is nothing less than the whole perspective of international law. Can such a fundamental norm as the prohibition of the use of force be

72 Press Statement on Terrorist Threats by Security Council President, AFG/152, SC/7167, 8 October 2001
modified by this kind of practice? Are we ‘only’ witnessing not a modification of an existing rule, but just its 'new' interpretation?

Would international practice be less exigent when dealing with *interpretation* rather than *creation*, *modification* or *termination* of rules? One could be tempted to state quite the opposite: if States are 'just' interpreting existing rules, they are recognising that they remain to be bound to them. Then, the procedure depicted by articles 31 and 32 of the Vienna Convention on the Law of Treaties, which has come to universal acceptance at this stage, must be followed in order to determine its significance and scope. Is it nevertheless and 'authentic' interpretation? In order to affirm so, it should be demonstrated that a large and representative majority of States agreed with the British and American interpretation. The deliberate ambiguity of most of the statements – and particularly the most important ones, coming from the Security Council - proves instead that the international community is far for having accepted a sort of 'evolving' interpretation of the rules prohibiting the use of force.

Moreover, in order to invoke an evolving interpretation or a change in the rules, it would be necessary to show the same reaction in other similar situations. For the time being, if one compares the attitudes with regard to the reaction in other cases of terrorism, this is not the case. Only the American Government supported the Israeli view according to which it can enter the Palestinian Authority areas and use force. Nor did the Indian Government invoke such a right to pursue terrorists in Pakistan, responsible of the bombing of the Parliament in New Delhi. If the will of the international community is to review the existing rule regarding use of force against terrorist attacks, then one can expect the same attitude in same situations. If it is not the case, then one has to conclude that we are witnessing here is not a change in the rule or in its interpretation, but rather a political attitude of the majority of States supporting in one case the political aims of one State, and not in other cases.

The reasons for States not to condemn actual or potential American illegal uses of force are multiple and are not necessarily founded on legal considerations.
Even in cases where there is a lack of condemnation by the whole international community (with the understandable exception of the State victim of the use of force itself), it could be difficult to assert that this situation is tantamount to a change in existing rules or a change in their interpretation. States can decide not to pursue a subject responsible for breaches of international law: this fact does not mean, however, that they believe that the wrongdoer behaved in a correct manner. Even less, that its illegal conduct led to a change in the existing rules. Moreover, in the situation emerging after 11 September 2001, the American pressure put on other States to be supportive was such that it would be hard to understand their statements, or lack thereof, as meaning acquiescence to the US interpretation of law. In a situation like that, it was particularly troublesome for States to openly defy the American forcible unilateral reaction.

Concluding Remarks

If there is one point on which all scholars will probably agree, irrespective of their attitude towards the legality or not of the American use of force in different parts of the world, this point is that the collective security system enshrined by the UN Charter stands in a deep crisis.

The last decade of the 20th century begun by an extraordinarily large SC authorisation to resort to force and ended up with a massive unilateral use of force without any SC authorisation at all. In both cases, the principal actors were exactly the same. The first decade of the new millennium begins also with a large military operation to respond to the most horrific terrorist attack, outside the framework of the collective security system set up by the Charter. And again, the main actors remain the same.

We are facing here what Antonio Remiro Brotons called ‘coup de communauté internationale’ at the occasion of the NATO bombing on Yugoslavia during the crisis of Kosovo.74 Again, the United States, together with a group of other States, resorts to force outside the system of collective security enshrined in the Charter. Indeed, a comparison can be made between the present situation of crisis of the core of the international legal order born in 1945 and the situation of ‘coup d’Etat’ within domestic societies. The
latter points out a way to access to power through unconstitutional means. The ‘coup de communaté internationale’ shows the single superpower forcibly acting as a gendarme in the international relations, without consideration for the powers vested upon the Security Council in accordance with the UN Charter.

One can wonder why the US, in an unique opportunity to obtain nearly a blank cheque from the Security Council, decided to act alone. The answer must be simple: the American Government wishes to have is hands absolutely free in the field of use of force, without any authorisation, limit, control or -even less-management by the Security Council.

From the legal point of view, the most important development in the field of the use of force since the end of the Cold War is undoubtedly the implementation of a new collective security regime under Chapter VII of the Charter, based on the authorisation to member States to use force in order to impose the goals established by the SC. When it wished to do so, the American Government succeeded in imposing this practice, which faces no objection today, provided –of course- that the SC is able to adopt a resolution based on Chapter VII stipulating in a clear way this course of action.

Broader interpretations of article 51 of the Charter have been advanced. To enlarge the scope of self-defence is tantamount to curtail –in a parallel portion- both the scope of article 2, para.4 of the Charter and the powers of the Security Council. The American interpretation of self-defence leads ultimately to the consecration of supremacy of power over law. It implies a sort of flashback to the state of nature, in the Hobessian sense.\(^{75}\) One should recall what the Nuremberg International Military Tribunal stated half a century ago: 'whether action taken under the claim of self-defence was in fact aggressive or defensive

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\(^{74}\) Un Nuevo Orden contra el Derecho Internacional: el caso de Kosovo’ 4 Revista Jurídica de la Universidad Autónoma de Madrid 89 (2001), at 92.

must ultimately be subject to investigation and adjudication if international law is ever to be enforced'.

A perusal of the practice shows that these interpretations defy the ordinary meaning of the related norms and are contrary to their object and purpose; they have failed to be generally accepted and remain unilateral, in spite of some ad hoc circumstantial and 'interested' instances.

Article 2, paragraph 4 of the Charter has been presumably 'killed' many times since 1945. Despite all its violations, it is nevertheless alive. One reason for this was advanced by the ICJ in its celebrated paragraph 186 of its judgment of July, 1986. Another, probably stronger reason, is the fact that the prohibition on the use of force embodied in the Charter is still considered by the international community as the highest conquest of mankind in the field of international law after the catastrophe of 1939-1945. The ideas of Enlightenment which advocate the substitution of force with reason have not been supplanted, despite post-modernist attempts.

To produce a change in the content of peremptory norms of international law is not an easy task. In order for such a change, one needs more than a simple lack of blame with regard to some violations of the relevant rule. As stated by article 53 of Vienna Convention on the law of treaties 'A peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. At this stage, it is difficult to deny the ius cogens character of the rule embodied in article 2, paragraph 4 of the Charter, with its exception recognised in article 51 of the same legal instrument. Taken into account the serious differences of opinion in the international community, it is difficult to assume that a new peremptory rule recognising armed humanitarian intervention, forcible counter-measures, an enlargement of the notion

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78 If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule (ICJ Reports 1986, 98).
79 As example: Edward N. Luttwak, 'Give War a Chance', 78 Foreign Affairs 36 (1999).
80 Emphasis added.
of self-defence or any new exception to the general prohibition of the threat or the use of force in international relations has emerged.

With the exception of the use of force by its closest allies, the United States has always been reluctant to accept the use of force by other States, and that not only vis-à-vis the Soviet Union, its adversary during the Cold War. One must recall US Ambassador Stevenson's warning after the failure of the SC to condemn India for its taking over the Portuguese enclaves in December 1961, due to the Soviet veto: this dangerous attitude amounted to sanctioning the use of force whenever it suited the purposes of the user. Two decades later, facing Argentina's resort to force to recover the Falklands/Malvinas in April 1982, US Ambassador Lichenstein stated in the SC that 'the use of force to solve problems is deeply regrettable'. One could be tempted to consider that the United States advises the rest of the world: 'do what I say, but not what I do'.

There is no doubt as to the American military position: the United States is the most powerful State of the world. Its supremacy is overwhelming. But military power is one thing, its legal use is another. Rousseau stated more than two centuries ago: "The strongest is never strong enough to be always the master, unless he transforms strength into right, and obedience into duty". It remains to be demonstrated that American supremacy has already been transformed into law.

With the nearly unanimous position taken by States after the terrorist attacks of 11 September, 2001, the United States had a unique opportunity to revert to the rule of law at the international level. The conditions were largely favourable for the adoption of a bundle of collective measures, including some forcible action undertaken at least with Security Council approval. The American government made

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81 With in turn probably the main and remarkably exception of the use of force by the United Kingdom and France during the Suez crisis in 1956.
82 ‘We have witnessed tonight an effort to rewrite the Charter, to sanction the use of force in international relations when it suits one's own purposes’. UNSC Official Records, S/PV.987, December 18, 1961, 27.
83 UN Doc. S/PV.2350 at 31.
84 Explaining that force does not create rights, he went on deconstructing the idea of the ‘right of the strongest’: ‘Suppose for a moment that this so-called ‘right’ exists. I maintain that the sole result is a mass of inexplicable nonsense. For, if force creates right, the effect changes with the cause: every force that is greater than the first succeeds to its right. As soon as it is possible to disobey with impunity, disobedience is legitimate; and, the strongest being always in the right, the only thing that matters is to act so as become the strongest. But what kind of right is that which perishes when force fails? If we must obey
considerable steps forward towards multilateralism in different fields of the international co-operation against terrorism, with one, but none the less remarkable exception: the field of use of force. It preferred not to alter its doctrine of self-defence, in order to keep its liberty to unilaterally use force whenever it considers it necessary.

James Rubin, close adviser of former Secretary of State Madeleine Albright, has revealed that before the NATO bombing of Yugoslavia during the Kosovo crisis in 1999, there had been a series of strained telephone calls between Secretary of State Madeleine Albright and Foreign Secretary Robin Cook, in which he cited problems 'with our lawyers' over using force in the absence of UN endorsement. The American Secretary of State adopted a pure Brechtian\textsuperscript{85} approach to deal with such 'problems': 'Get new lawyers,' she suggested.\textsuperscript{86} Surely, it is easier to change lawyers than the law which States have such difficulty in forging to govern their relations.

There is no need not to respect international law in order to effectively struggle against terrorism. International Law already provides the necessary legal tools for fighting this scourge, or to improve these tools, as exemplified by the adoption of Resolution 1373 (2001). On the contrary, the rule of law, as one of the most important values of civilisation, must not only be defended against terrorism, but also applied and preserved in the struggle against it.\textsuperscript{87} It would be enough to compare the results of legal or illegal methods used against terrorism in domestic societies for concluding that there is no alternative if we want to preserve human values and rights.

The analysis of the recent practice and the alignment of the NATO, EU and Rio Treaty countries behind the US' broad conception of self-defence show that the rhetoric searching for legal justifications of what

\begin{substitute}{\textsuperscript{85}} In his poem 'Die Lösung', Bertolt Brecht related: 'Nach dem Aufstand des 17. Juni ließ der Sekretär des Schriftstellerverbands in der Stalinallee Flugblätter verteilen, auf denen zu lesen war, daß das Volk das Vertrauen der Regierung verscherzt habe und es nur durch doppelte Arbeit zurückerobern könne. Wäre es da nicht doch einfacher, die Regierung löste das Volk auf und wählte ein anderes?' \textit{Die Gedichte} (Frakfurt-am-Main, Suhrkamp, 2000), 296.
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\begin{substitute}{\textsuperscript{87}} As Secretary-General Kofi Annan reaffirmed in his address to the General Assembly: '(…) the attack of 11 September was an attack on the rule of law –that is, on the very principle that enables nations and individuals to live together in peace, by following agreed rules and settling their disputes through agreed procedures. So let us respond by reaffirming the rule of law, on the international as well as the national levels' (UN, Press Release, SG/SM/7965, 24 September 2001, 2).
\end{substitute}
clearly is a departure from international law cannot avoid contradiction. It also opens the way for unforeseeable uses of force in a great number of actual or potential situations in the future. It amounts to the negation of article 2§4 of the Charter and the collective security system.

The time has come to think about the results and consequences of the culture of force prevailing in the international relations after the end of the Cold War. Many cases of the last decade shows that force does not solve problems and generally exacerbates them. Moreover, as Juan B. Alberdi, a prominent Argentine jurist of the 19th Century, wrote after the devastating experience of the War of Paraguay in 1870: ‘war is a way of administering justice in which each party is at the same time the victim, the prosecutor, the witness, the judge and the criminal’.\textsuperscript{88}

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\textsuperscript{88} Juan B. Alberdi, \textit{El crimen de la guerra} (Buenos Aires, H. Concejo Deliberante, 1934), 50.