

Legality of a Use of Force and the Practice of States. What can be expected in the next two decades?

I. ACKNOWLEDGEMENTS

I would like to express my sincerest gratitude to Professor August Reinisch for his invitation to address such a distinguished audience in the prestigious University of Vienna Law School. I feel truly honoured to have been provided with the opportunity to maintain a dialogue and exchange ideas with such expert audience.

During a round table held here last year, I had the opportunity to mention to Professor August Reinisch my idea of presenting my preliminary findings on a methodology aiming at understanding how States attribute legality to a given use of force to an expert audience. Such presentation and exchange of ideas, by focusing on the application of such methodology to current incidents, would enable me to assert its validity, identify its limitations, constraints, shortcomings and inconsistencies, and further review and refine it accordingly.

I'm also in debt to Peter Bachmayer, Christina Binder, Brigitte Weidinger and Scarlett Ortner, who very kindly assisted me to make this event possible. I want also to express my gratitude to Niels van Tol, Librarian at the Peace Palace Library in The Hague, who helped me without dismay find books and copy articles on this subject, as well as to Evangelia Linaki, for developing the slides for this presentation and editing the final version of this text.

The views expressed herein are strictly personal and should not be considered as reflecting an official view of

any institution to which I may be affiliated with. Cases are analyzed just for academic purposes and, thus, such analysis should not be interpreted as an intention to promote any particular idea, opinion or judgment on political or other issues of any country, entity or group of individuals.

As you constitute an expert audience on this subject and our time is quite limited, I will not describe or explain the content of legal or political categories, except when it may be absolutely needed. I will also not refer to the controversies that are well known in the works and teachings of qualified publicists, to which I will refer as “doctrine” throughout the presentation. As much as possible, I will use the terms in the most acceptable or widespread interpretation.

2. OUTLINE

- **Regularities** (*that can be extracted from the analysis of the practice of States on how they attribute legality to a use of force*)
- **Paradigms** (*historical evolution of attribution of legality*)
- **2015** (*current situation*)
- **Next 20 years** (*what we can expect*)
- **Drivers for change** (*that can affect the future paradigm*)

3. REGULARITIES

In a book published in Spanish in 2011, whose title may be translated as “*Threats, Responses and Political Regime. Between Self-Defense and Preventive Intervention*”¹, I tried to explore, among others, four main issues that constitute the first part of this presentation:

- What is the process by which States make their attribution of legality to a use of force?

¹ Alberto E. Dojas, *Amenazas, Respuestas y Régimen Político*, Eudeba (2011).

- Are there some regularities or patterns that can be observed in the practice of States?
- If yes, what could be the methodology to predict how States will attribute legality to a use of force?
- What elements are taken into by States when they classify a use of force as legal or illegal?

The response to these questions can be found at the crossroads of different disciplines (eg. International Law; International Relations; Political Science; Diplomatic Studies; Sociology; Philosophy).

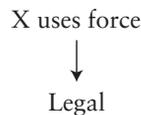
What is “practice of States” in this context?

Within the given context, “practice” not only refers to the technical expression in International Law, according to which State practice is an element used to prove the existence of customary law², but also to a behavioural approach on how and why States affirm that a use of force is legal or illegal, which, in turn, affects their behaviour in the international arena and in international organizations.

4. A GROWING COMPLEXITY OF ACTORS AND CIRCUMSTANCES

The analysis of the legality of a use of force has undergone a process of increasing complexity.

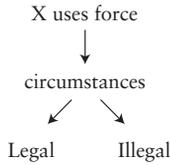
At the beginning of human society, although some moral and religious norms were established, there were no legal restrictions to the use of force between societies:



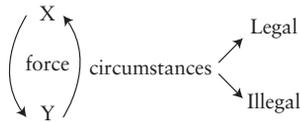
The first models that tried to establish whether a use of force was legal or illegal were constructed from the assumption that a use of force ought to be defined in similar

² See Statute of the International Court of Justice, Article 38.

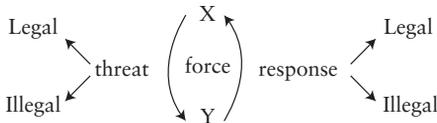
terms as an offence under criminal law, and then attributed to a State. Thereafter, considering the circumstances of the case, the State's international responsibility could be established, enabling, thus, to qualify the use of force as legal or illegal.



A further development occurred when the analysis started taking into account both actors in a given use of force: the one that used force and the other that suffered the attack. At a certain point, the actions and motivations of both parts were considered as circumstances affecting the legality of a use of force.



The model was refined again when the analysis of the circumstances lead to consider that, in fact, it was required to look at the legality of both the threat of one actor and the response of the other.



5. USUAL LEGAL CATEGORIES OF THREATS AND RESPONSES

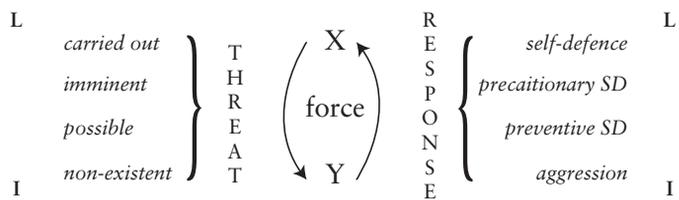
Looking at the scheme below we can understand that the legal categories that have been used historically to attribute legality or illegality to a use of force are based on

the opposition between self-defence and aggression, that is to say, to the threat and the response. As self-defence is an expression of an inherent right to survival, the analysis is directed at the legality of the first use of force (the threat), which may trigger a subsequent reaction (the response).

The United Nations (UN) Charter provisions on the use of force were drafted having in mind the experience of the League of Nations, the Briand-Kellogg Pact and the lack of observance of the basic assumption that threats and uses of force were prohibited. Most importantly, they were intended to reassure the main objective of avoiding military confrontation between the great powers that emerged after World War II. Usual categories of use of force remained the basis on which the whole system of international security was built in San Francisco.

It was the maximum agreement that could be reached at that time. Unfortunately, some very important aspects were kept within the margins of a certain ambiguity:

- a) The undefined terms of “armed attack” and “threat” that are crucial for the interpretation of the scope and limits of the legal regime on the use of force.
- b) The two conflicting ideas contained in Article 51 of the UN Charter:
 - On the one hand, that self-defence was only authorized [*if an armed attack occurs*].
 - On the other, that [*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence*].



- These two competing elements paved the way for the “strict” and “broad” interpretations of self-defense.
- c) The lack of provisions on the so-called “precautionary self-defense”³, and the legality of a response to a threat that may be carried out in the very near future, whose legality is based on the broad interpretation of Article 51 of the UN Charter.

Usual categories of threats and responses					
Nature	Variations	Threat	Response		Current legality
		Requirements	Nature	Requirements	
Carried out	armed attack	a) illegal armed attack (Art. 51); b) other acts contained in the Definition of Aggression (Res. 3314); c) other acts accepted by the practice of States d) seriousness of damage caused	Self-defence	a) necessity b) proportionality	legal
Imminent	classic-period formula	a) inevitable damage b) aggressive intention c) gravity d) damage to the invoking State	Precautionary self-defence	a) necessity b) proportionality	generally illegal
	Webster formula	a) overwhelming b) no time for deliberation c) no chance to choose means of response			legal
	doctrine of interception	attack started, not yet completed			legal
	doctrine of anticipation	a) attack in the process of being launched b) attack inevitable			disputed
	doctrine of a sequence of events	a) attacks which are part of a series of attacks repeated over time b) imminent attacks already announced			disputed
Possible	prevention	a) armed conflict inevitable b) the threat will be greater in the future	Preventive self-defence	proportionality	generally illegal
Non-existent	peaceful conduct	No threat of future attack exists	Aggression	armed attack	illegal

Thus, although there was no doubt that when an armed attack had already been carried out it was legal to respond in self-defense if conditions like necessity and proportionality were met, the different alternatives of precautionary self-defense could not reach a similar widespread acceptance.

- d) The case of a preventive use of force intended to better respond to an armed conflict considered inevitable –although used quite often– was not considered.
- e) On the other extreme of self-defense, aggression was clearly regarded as illegal, but the definition of its exact scope took quite some time to reach an extended agreement. The practice of States also broadened further the range of armed threats:

³ This term is used to avoid the ambiguity of the expression “pre-emptive self-defense”.

Aggression (Resolution 3314)

- Invasion, attack, military occupation or annexation by armed forces.
- Bombardment or use of weapons.
- Blockade of ports or coasts.
- Attack on land, sea or air forces and fleets.
- Use of armed forces within the territory of another State.
- To allow its territory to be used by another State for perpetrating an act of aggression.
- The sending of armed bands, groups, irregulars or mercenaries, or its substantial involvement therein.

Other acts regarded as armed attack as per practice

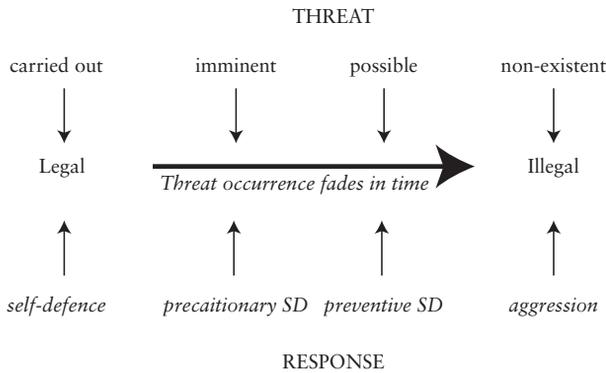
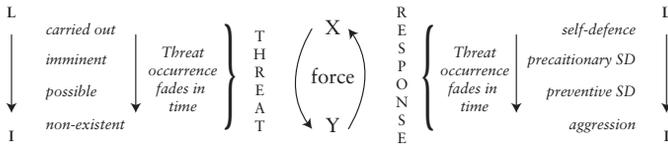
- Attempt of an attack against a Head of State.
- Attack against vessels and aircraft.
- Attack against diplomatic premises.
- Attack against nationals abroad.
- Attacks committed by armed irregular groups and terrorists.

6. TIMING OF OCCURRENCE OF THE THREAT
AND THE RESPONSE - LEGALITY AS A FUNCTION
OF TIME

The rationale behind Article 51 of the UN Charter is that time plays an important role in the legality of a use of force: as the occurrence of the threat fades over time, so does the legality of both the threat and the response. In other words, when the response is carried out *vis-à-vis* the occurrence of the threat affects the legality of the response. There is a correspondence between the legality of threats and responses as a function of the time of its occurrence.

Self-defense is legal when the threat is carried out. The legality of precautionary self-defense in its different variants (the classical model, the Webster formula and the doctrines of interception, anticipation and sequence of

events) is disputed as both the threat and the response are postponed to the future. Preventive interventions have been generally considered illegal. Aggression has always been considered illegal.



7. A PANOPLY OF RESPONSES IS AVAILABLE

Responses to a threat:

- a) May not involve the use of force, as *international cooperation* and *soft intervention*.
- b) May be based on the consequences of a threat of using force in the future, like *containment*, *deterrence* and an *ultimatum*.
- c) May cover the effective use of force, as in *self-defence* both in its strict sense or *precautionary* variables, *armed reprisals*, actions authorized by the *UN Security Council (UNSC) under Chapter VII* or based on a UNSC resolution but *not expressly authorized by it*, and *armed interventions*, including those of a *humanitarian* purpose and *preventive* nature.

All these uses of force constitute a panoply of options for using force and other means to obtain a desired objective. They may be combined and used one at a time or in parallel. It is often the case that a response is declared to be used to achieve an objective but is intended, in reality, to reach another. For example, armed interventions against terrorist bases may be intended to neutralize their activities and provoke a regime change at the same time.

<i>The panoply of responses to a threat</i>			
<i>Response</i>	<i>Definition</i>	<i>Requirements</i>	<i>Legality</i>
<i>International Cooperation</i>	<i>Fulfilment by the States of their international obligations, including the enforcement of their internal legislation and coercive mechanisms, to put an end to any undesired threat which might originate in their territories against a third State.</i>	<i>a) good faith</i>	<i>legal</i>
<i>Soft Intervention</i>	<i>Adopting strategies that do not involve the use of armed force, but are designed to produce, with time, a favourable political change in an authoritarian, hostile or failed regime, as well as in the civil society of those countries.</i>	<i>a) no use of force involved b) medium or long term results c) designed to produce a political change</i>	<i>legal</i>
<i>Deterrence</i>	<i>Threat of massive military reprisal, which seeks to prevent a hostile or enemy State from starting, or re-starting, an armed attack.</i>	<i>a) intention to use force b) military capability to inflict large-scale damage, greater than the benefits which the other party might gain</i>	<i>legal</i>
<i>Containment</i>	<i>Policy designed to avoid the expansion of a hostile State</i>	<i>a) sufficient military and political means</i>	<i>legal</i>
<i>Self-defence</i>	<i>Right to respond using armed force to an illegal use of force of which the State has been a victim</i>	<i>a) armed attack (Art. 51), and/or b) other acts contained in the "Definition of Aggression" (Res. 3314), and/or c) other acts accepted by the practice of States d) gravity of damage suffered e) necessity for, and proportionality of, the response to the damage suffered.</i>	<i>legal</i>
<i>Precautionary self-defence</i>	<i>Right to respond using armed force to an imminent illegal use of force which has not yet been carried out</i>	<i>a) threat of becoming the victim of an imminent illegal attack b) attack is inevitable c) gravity of damage which may be suffered d) necessity for, and proportionality of, the response to the damage which may be suffered</i>	<i>disputed</i>
<i>Authorised by Chapter VII</i>	<i>Use of force by a State or group of States with the authorisation of the Security Council</i>	<i>a) UNSC Resolution establishing that a threat to international peace and security exists b) Security Council authorisation to use force (Chap. VII)</i>	<i>legal</i>

The panoply of responses to a threat

<i>Ultimatum</i>	<i>Last opportunity to resolve a dispute or to comply with a Security Council resolution, before the matter is resolved by force</i>	<i>a) A warning to desist from an illegal action or omission within a set compulsory time limit b) peremptory time limit</i>	<i>legal</i>
<i>Armed Retaliation</i>	<i>Self-aid measures designed to safeguard the security or interests of a State through the imposition of a punishment, to obtain compensation for the damage caused, and to persuade the other party to abide by law in the future</i>	<i>a) victim of a previous illegal act b) the State suffering the reprisal must be responsible for the previous illegal act c) unsuccessful attempt to obtain compensation d) necessity for, and proportionality of, the response in relation to the objective</i>	<i>disputed</i>
<i>Unilateral action under Chapter VII</i>	<i>Use of force by a State or group of States without the authorisation of the Security Council, but where the latter has determined that a threat to international peace and security exists, and has instructed the State responsible, without success, to desist from the illegal action or omission</i>	<i>a) the UNSC has established that a threat to international peace and security exists b) the Council has given notice to desist from the illegal action or omission c) lack of consensus in the Council to authorise the use of force</i>	<i>generally illegal</i>
<i>Armed Intervention</i>	<i>Use of armed force by one State against another to force it to carry out, or refrain from carrying out, particular actions</i>	<i>a) the UNSC has not established that a threat to international peace and security exists b) no Security Council authorisation to use "all means necessary"</i>	<i>generally illegal</i>
<i>Humanitarian Intervention</i>	<i>Use of force by a State or group of States against another with a view to putting an end to serious violations of human rights.</i>	<i>a) serious violations of human rights b) peaceful means exhausted c) no consent by the State committing the violations d) no Security Council authorisation</i>	<i>generally illegal</i>
<i>Preventive Intervention</i>	<i>Response using armed force to a threat of an inevitable illegal use of force which, if not neutralised in time, will become a greater threat in the future</i>	<i>a) illegal threat eventually inevitable b) gravity c) the threat will be greater in the future</i>	<i>illegal</i>

8. POLITICAL REGIMES

As the UN Charter was the result of negotiations between two opposing political systems, one of which was of a totalitarian nature, democracy could not be recognized as an inherent right of individuals and societies. Article 2(7) of the UN Charter is said to have enshrined the so-called “westphalian paradigm”, prohibiting any intervention in the political regime of a State.

However, the debate about political regimes was present at the very beginning of the negotiation of the UN Charter: some States, like Argentina, were initially vetoed but finally admitted; others, like Spain, had to wait until 1950 to be accepted as full members. In the course of the history of the UN, many political regimes were sanctioned

in one way or the other, like Maoism in China, Somozism in Nicaragua, Castrism in Cuba, racist regimes in Zimbabwe and South Africa, the Taliban regime in Afghanistan and the Assad regime in Syria. In addition, the protection of a political regime triggered many military interventions during the Cold War, like in Hungary (1956), the Dominican Republic (1965), Czechoslovakia (1968), Nicaragua (1982), Afghanistan (1979) or Grenada (1983).

The concept of a hostile regime as an essential part of a threat brought, as a natural consequence, the idea that the threat does not stem from the mere existence of arms (an idea to which Kant was very much attached to), but from the intentions of the political regime (a concept that was present in most of the doctrines of International Law during the classical period). For example, according to this theory, British or French nuclear weapons are not perceived as a threat by the US, because those countries have no intention to use them against the US. The same argument, but reversed, has been at the centre of the pressure against Iran to negotiate a nuclear agreement, while Pakistan and India were accepted quite peacefully some time ago as nuclear powers⁴. Another argument of this doctrine is that democracies go to war as much as authoritarian regimes, but almost never go to war against each other. The promotion of democracy appears as a condition for establishing peace worldwide.

The hostility of a regime is not only an essential part of the exercise of demonstrating the aggressive facets of threats and carried-out attacks, but also in the construction of an enemy. In the years following the Cold War, many expressions of a political nature have been used to this end, like 'rogue' and 'outlaw' States, 'States of concern' or 'a member of the axis of evil'. Hostile regimes may also provoke, with their actions, crimes against humanity or massive violations of human rights. In many cases, these regimes were attributed a certain intrinsic

⁴ It is not the aim of this presentation to focus on all the political considerations pertaining to these cases, rather to give an example on how political regimes are considered as an element of the threat.

irrationality in their decision-making process that made their actions unpredictable and, thus, not subject to deterrence and containment, which led to the use of force being justified as a response.

Hostility may also come from authoritarian and totalitarian regimes, in which a minority (a social group or an association of individuals) through undemocratic procedures seize the power of a State for its personal interest. In some cases, this interest may have a religious, ethnic, cultural or political motivation. In others, the group just isolates the country within the context of its international relations, in which case the State is usually referred to as a “pariah” State.

Authoritarian regimes, although they do not follow hostile policies, may also be seen as a threat as they may provoke, through their actions and propaganda, adverse sentiments in their population against certain countries and values, favoring extremism and terrorism. The authoritarian nature of the regime may be used also as an argument to delimit a threat or a response.

A new political category that has appeared in recent times is that of “failed States”, to describe those that are incapable, for domestic reasons, to adequately control what is happening within their territories, paving the way for the establishment of hostile groups that may attack or threaten other States, or commit crimes against humanity and massive violations of human rights. This category is usually used to justify armed interventions within the territory of States, to attack terrorists and other armed groups, as failed States are incapable of preventing these crimes from being committed by groups operating within their territory.

In view of the above considerations, the nature of political regimes has been introduced in the evaluation of the nature and circumstances of threats and responses. Some States even maintain lists of hostile regimes, often on the grounds that such regimes protect or support terrorist groups.

The presence of non-State actors, such as terrorists, in the territory of a State with hostile objectives against other States is also related to the political regime of the

State in question. The most common threats that have been identified in this regard are the following:

- Groups established undercover or secretly within a cooperative State.
- Groups established in failed States that cannot avoid their presence and actions.
- Groups established with the consent or support of a hostile regime.
- Groups that act under the direction and control of a hostile regime.
- Groups that try to obtain Weapons of Mass Destruction (WMD) through illicit trade using illegal networks or other hostile regimes.

Some threats coming from political regimes may fall within the definition of aggression, enabling the use of force in self-defense as a legal response. However, other armed responses are in clear contradiction to the westphalian paradigm of the UN Charter and remain highly disputed if the response is not authorized by the UNSC. The most usual responses are:

- Interventions against terrorist bases in hostile regimes and failed States.
- Interventions against hostile regimes to neutralize their action.
- Interventions against hostile regimes to avoid their consolidation in power.
- Interventions against hostile regimes to provoke a regime change.
- Interventions in authoritarian regimes to install a democratic government.
- Interventions in authoritarian regimes to restore a democratic government.
- Interventions in failed States to provoke a regime change.

Usual threats from political regimes

Regime	<i>Armed Attack</i>	<i>Imminent Attack</i>	<i>Possible Attack</i>	<i>Attack against Nationals abroad</i>	<i>Attack against the Political System</i>	<i>Crimes against Humanity</i>	<i>Violation of Essential Rights</i>	<i>Consents or Supports Terrorist Bases</i>	<i>Illegal acquisition of WMD</i>
<i>Hostile Regimes</i>	YES	YES	YES	YES	YES	YES	YES	YES	YES
<i>Failed States</i>	-	-	-	(cannot prevent)	-	(cannot prevent)	(cannot prevent)	(cannot prevent)	-
<i>Authoritarian Regimes</i>	-	-	YES	YES	YES	YES	YES	YES	YES

9. NEW THREATS AND RESPONSES

The end of the Cold War created the conditions for the emergence of some trends that triggered a political and legal debate about a new set of legal categories for these “new” threats and responses:

- a) An increasing recognition of the rights of individuals and societies (eg. democracy and open societies; human rights and civil society; reactions to crimes against humanity like ethnic, cultural cleansing) that forced States to act in their protection.
- b) Proliferation of access to WMD and their related technologies.
- c) Illicit networks at a global scale, trafficking with illegal trade, including WMD and their related technologies.
- d) Armed groups both at the national and international level committing terrorist acts.

These threats were tied, in many cases, to political regimes that were either not able to counter their occurrence, or would create the conditions for their emergence, support and even direct such threats.

The responses to these new threats not only triggered the development of new means to respond to them, but also provoked the adaptation and transformation of existing institutions. For example:

- a) More active role of the UNSC in authorizing the use of force to restore and even to install democracy in failed States.
- b) New doctrines, such as Humanitarian Intervention and Responsibility to Protect.

- c) Establishment of the International Criminal Court.
- d) “Legislative” role of the UNSC, forcing the adoption of internal legislation and enforcement institutions to prevent and combat illicit networks related to WMD proliferation and terrorism.
- e) UNSC authorization to States for more intrusive ways to control and enforce UNSC resolutions on areas beyond their jurisdiction in situations where almost no force is used, along the lines of the PSI directives.
- f) Increasing preventive interventions against the acquisition and illicit trade of WMD and their technologies and terrorist groups within a State.
- g) Consent to the use of force by foreign powers against armed groups and terrorists controlling territory in one or more States.

10. THE CIRCUMSTANCES OF THE CASE - INVESTIGATION OF FACTS AND OBJECTIVE ASSESSMENT

In a very broad sense, the term “circumstances” refer to all the requisites, constraints, conditions and facts that should be considered for the attribution of legality to a use of force.

There is general agreement that a use of force should comply with the requisites of necessity, proportionality and immediacy. The rules of International Humanitarian Law should also be respected during hostilities, as well as the reporting clause contained in Article 51 of the UN Charter.

Usually, States that use force invoke their own sources of information as an objective description of facts and the hostile intentions of the other part. However, the evaluation of the fulfilment of these requirements in a given use of force demands a careful and unbiased analysis. The practice of States shows this process can be hotly disputed.

A way out from conflicting views on the evaluation of circumstances is the appointment of an investigation

body to conduct an impartial assessment of facts. This can be done through different means, like the investigative mechanisms established by the UN Secretary-General, the request of investigation by a UN Agency or regional organization, the appointment of a team of impartial experts, and, eventually, the referral of the case to the International Court of Justice (ICJ) or any other international judicial body.

When analyzing the synergies of the threat-response process, establishing the lawfulness of the conduct is not only characterized by certain complexity, but is also usually shrouded in similar amount of uncertainty or controversy. When X's army occupies Y's territory and Y repels the invasion once X's forces have crossed its border, International Law establishes the illegality of X's conduct and the legality of Y's conduct, even when a variety of circumstances might affect that classification. But as we move away from those cases that are clearly identifiable, in a situation when Y claims that X is preparing, or intends to invade or attack Y at some point, there is greater controversy on the applicable rules or their interpretation, especially when one considers the immense destructive power of the first use of modern weapons.

One State may attribute to another the intention of threatening it, allowing it to justify the response as self-defense, by virtue of its inherent right to decide whether a threat exists. The hostility of a political regime is often seen as proof of the existence of a threat. Establishing the facts, when dealing with intentions, is particularly difficult, because International Law has at present no specific rules for attributing responsibility in cases where actors perceive mere intentions as threats. Each State retains the right to respond to a threat to ensure that its interests are safeguarded, and no legal system can oblige it to commit suicide by observing the law.

Assessment of the threat depends on the information available at the point when self-defense must be exercised. If the right to self-defense is not questioned when the reaction is launched, the legality of exercising will be established.

The critical date is the moment when the self-defense is exercised, although subsequent pieces of evidence may strengthen or weaken the legality and legitimacy of the action. In the case of Iraq's possession of weapons of mass destruction during the 2003 crisis, the legality of the action was determined by the veracity and accuracy of the information available up to the point when the intervention was launched, which was questioned by some members of the UNSC. Consequently, the legitimacy was affected because, as was subsequently proven, no such weapons existed. Israel's destruction of the Osirak nuclear reactor, seen as a preventive intervention, gained greater legitimacy when Baghdad's secret nuclear plans were discovered after the Gulf War.

II. LEGALITY: DIFFERENT SHADES OF GREY

When analyzing the attribution of legality to a use of force as per the practice of States, it is observed that, in many cases, the process of deciding the legality or illegality of a use of force is usually not based on clear consensus. There is much room for disagreement, not only because of the ambiguity in the interpretations of the applicable law, but also because of the manipulation of political and legal arguments by States and the existence of interests which, in any given situation, condition the actors' positions.

This process is complex, far from being objective, dispassionate or purely 'rational'⁵. A number of historical, institutional, cultural, ideological, religious and psychological factors also exert considerable influence on the evaluation of the threat and how reasonable, or proportionate, the response is.

To reflect as closely as possible the reality of the ways in which the community of States attributes legality to an event involving force, three other categories need to be added to those of 'legal' and 'illegal', because a use of

⁵ This term is used here in a general sense, as an analysis that establishes, with relative certainty or approximation, the costs to benefits ratio of a given decision.

force is often considered to be legal or illegal only by a majority of States, and, in some cases, opinions as to such legality are clearly split among various groups. With all this in mind, the following five categories of legality can be identified:

The practice of States: categories of the attribution of legality to a use of force

Legal:	<i>Consensus that a rule authorises the use of force</i>
Generally legal:	<i>General agreement that a rule authorises the use of force in certain circumstances</i>
Disputed:	<i>General disagreement as to whether a rule authorises the use of force</i>
Generally illegal:	<i>General agreement that a rule prohibits the use of force in certain circumstances</i>
Illegal:	<i>Consensus that a rule prohibits the use of force</i>

12. CASE ANALYSIS

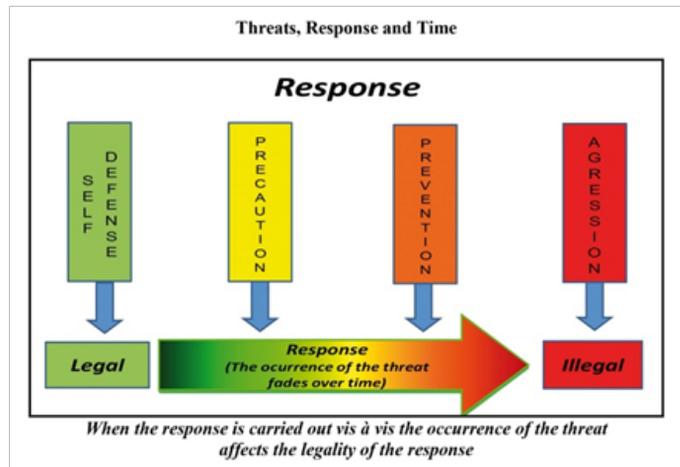
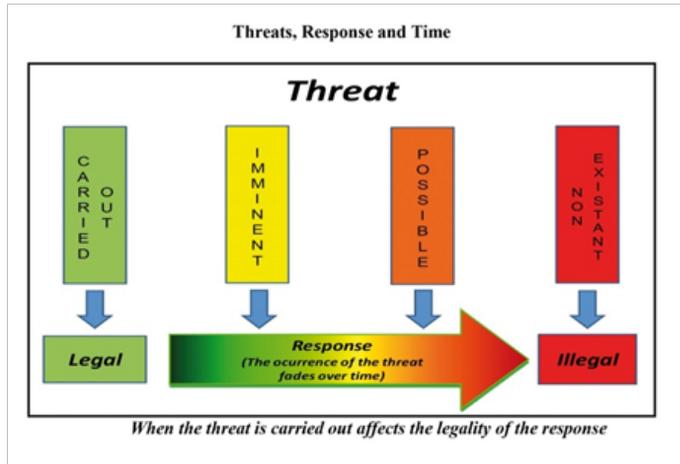
The attribution of legality has evolved from the classical period of International Law up to modern times. We have segmented time in periods between critical events in the evolution of International Law. This comparative approach with ease our dialogue about their probable evolution in the coming two decades.

When considering the **legality of the usual categories of threats and responses**⁶, it is observed that the current attribution of legality follows a pattern, according to which the more remote the occurrence of the threat, the more the illegality increases. It is also noted that imminent formulas and doctrines are listed in the chronological order of their formulation, which explains that the classic-period formula, elaborated when the caveats of the UN Charter were not present, appears first in the section, while, according to its nature, should come at the end of that section if only considered by its requirements, which are less stringent than the UN Charter.

As in a mirror, the legality of both the threat and the response is a function of the time of occurrence of the

⁶ See Chart on page 5.

threat, as it is visible in the below Charts on Threats, Responses and Time.



In order to see how this proposed methodology works in practice, twelve very well-known cases from various periods after the adoption of the UN Charter, where threats and responses were of a different nature, have been selected and reflected in a Chart⁷. One should bear

⁷ This Chart concerning the attribution of legality to a use of force in selected cases can be downloaded at www.aedojas.com. ar. In this presentation, due to lack of time and space, a short overview and general reflections are provided upon the selected

in mind that the information presented therein is given from the point of view of the responding State, that is, how the State that is conducting the response explains the nature of the threat and the response.

The first thing that can be seen is that the alleged nature of the threat follows the usual categories that have been considered. Responses are usually defined by the user also in terms of the usual categories, but in fact they may not correspond exactly to the different alternatives chosen to respond from the available panoply.

When the armed attack was clearly carried out by the armed forces of a State (that corresponds to the strict interpretation of Article 51 of the UN Charter), self-defense was alleged as the response and there was no controversy about its legality. This can be seen in Iraq (Kuwait) (1990). However, when the alleged carried-out armed attack consisted of an attack against nationals abroad (that we have seen as “other acts in the practice of States constituting an “armed attack”), the armed intervention used as response was considered generally illegal. This was the case in Entebbe (1976). The legality of the response to carried-out attacks was also considered generally illegal when coming from armed groups not forming part of the armed forces of the State (Litani Operation (1978); Nicaragua (Sandinism) (1982); Israel in Gaza (2008)) or when it constituted crimes against humanity against its own population when the response constituted humanitarian intervention, as was the case in Kosovo (1999). The response to a terrorist attack already carried out and addressed by a UNSC resolution, although some States expressed doubts about its legality, was generally considered legal, as was the case in Afghanistan (2001).

When the threat was related to an imminent or possible attack, the different variants under this category were used to explain the necessity to respond. In some cases, the threats were clearly expressed as coming from the political regime (eg. Hungary (1956), Afghanistan (USSR) (1979), Nicaragua (Sandinism) (1982) and Iraq (2003)), and when there was a concurrence to consider them as

twelve cases. However, in the coming months, a detailed analysis of 53 cases will become available at www.aedojas.com.ar.

generally illegal, the opposition to that attribution came from the superpower itself and its allies. In others, like in the Six Days War (1967), the proximity of anticipation to a carried-out attack was generally considered as legal. When the use of force was an armed intervention against groups posing an imminent threat of repeated attacks (doctrine of “the sequence of events”), the response was considered almost illegal, (eg. Israel in Gaza (2008)).

When the occurrence of the threat was even more remote and fell under the category of preventive intervention, like in the cases of Iraq (Osirak) (1981) and Nicaragua (Sandinistas) (1982) which was related to US interests in the region, it was clearly considered as illegal. In the case of the armed intervention against Iraq (2003), where other elements were also present (eg. regime change, illegal possession of WMD, a unilateral enforcement of a UNSC resolution) the response was, nevertheless, considered as generally illegal.

It is visible from the Chart⁸ that there is always an aspect of the response that is directed to counter the threat coming from the political regime. The most usual responses are shown there.

An objective investigation of facts was only proposed in four of the twelve cases, following a normal ratio in cases of use of force. In Hungary (1956), UN General Assembly (UNGA) resolution 1132 created, in 1957, a Commission to report on the armed intervention of the USSR; the case of Nicaragua (Sandinistas) (1982) was referred to the ICJ, but the US refused its jurisdiction; in Kosovo (1999), a Verification Mission was established under the auspices of the Organization for Security and Cooperation in Europe (OSCE); in Iraq (2003), the UNSC established UN Special Commission (UNSCOM), that condemned Iraq’s lack of cooperation.

Next to this section of the Chart, some additional features can be found, such as the multilateral response to the use of force, the voting at the UNSC and UNGA and, if the case involved the Americas, how voting resulted at

⁸ This Chart concerning the attribution of legality to a use of force in selected cases can be downloaded at www.aedojas.com.ar.

the OAS. On the basis of the voting results, the last column states the legality attributed to the use of force.

Sources to determine an attribution of legality to a use of force

The sources to make this determination are, on the one hand, decisions taken within the UNSC and, eventually other bodies of the UN, like the UNGA. In certain cases, other international organizations may adopt decisions related to the legality of a use of force, particularly those that have a regional nature and, due to such character, may play a role in certain cases, as was the case of the OAS during the Soviet Missiles in Cuba (1962). Other international organizations may discuss the legality of a use of force under certain circumstances (eg. NATO during the Kosovo (1991) crisis).

In addition to those organizations where the legality of a decision to use force is submitted to a formal decision, other instruments play a valuable auxiliary role in this determination. Such instruments are, for example:

- Discussions on the subject within international organizations. In this respect, the transcripts of interventions during UNSC meetings (S/PV documents) are of particular importance. Official documents submitted for the consideration of such Organizations, such as Notes from Governments, are also important.
- Public statements by Heads of State and Government, Ambassadors and other authorized Members of Cabinets, particularly Ministers of Foreign Affairs and Defense.
- Other public statements by officials, like the Legal Advisers of the Ministry of Foreign Affairs.
- Debates and Decisions of National Parliaments and Hearings at Congress Commissions, such as those of the Ministries of Foreign Affairs and Defense.
- Official documents intended to announce policies and strategies related to the use of force, like De-

fense White Papers, International Security Strategies and other similar documents.

- As a subsidiary source, the analysis of expert publicists.

13. PARADIGMS

The information contained in the table of cases can allow us to construct paradigms of legality, sorting it according to different variables. If we look at the **Chart Evolution of the legality of armed responses by type of threat**, it is evident that:

- A response to an armed attack in the strict sense of Article 51 of the UN Charter has always been considered legal;
- A response to an imminent attack, while considered legal because there were almost no legal restrictions to the use of force during the Classic Period, had some limitations in certain treaties in force during the inter-war period between the two World Wars, and was disputed after the adoption of the UN Charter, depending on the strict or broad interpretation of Article 51. After the 9/11 attack, its legality started to broaden and, apparently, will continue to be in the next 20 years, as shown, for example, in counter terrorism armed interventions.
- Responses to eventual or possible attacks that correspond to the doctrine of preventive intervention, enjoyed the same lack of restrictions during the Classic Period, but were considered generally illegal during the inter-war period between the two World Wars, according to the provisions of the League of Nations, the Briand-Kellogg Pact and other treaties. After the 9/11 attack, some preventive interventions began to be considered generally legal, but their illegality may be restored in the future or, at least, considered generally illegal.
- The response to attacks to nationals abroad was disputed after World War I (WWI) and the entry into force of the UN Charter, but it became more

difficult to be accepted under the logic of spheres of influence of the Cold War. At the end of it, the original, yet disputed, attribution was restored, but after 9/11 and the emergence of terrorism, it has become broadly accepted. Some restrictions, however, may appear in the near future, as a multipolar world may not accept its legality so easily.

- The attacks against the political order or regime of a State, while quite natural during the classic period when kingdoms usually fought each other to seize control of power, like in royal succession wars, were restricted between both World Wars, and considered mainly illegal after the westphalian paradigm was established by the UN Charter. After the 9/11 attack, armed responses to attacks against the political system (particularly those conducted by terrorist groups) started to be considered legal, in some cases under the umbrella of a UNSC resolution. With certain limitations according to the circumstances of the case, they may continue to be considered generally legal in the years to come.
- The use of force against crimes against humanity committed by States was considered legal during the Classic period, but such attribution suffered partially because of the League of Nations procedures for solving disputes and other treaties limiting the use of force. It was, however, considered illegal after the UN Charter entered into force and throughout the Cold War for the reasons already mentioned earlier. The right to intervene to help populations in despair started to be voiced after the end of the Cold War, allowing more intrusive measures within States; however, the paradigmatic Kosovo (1999) case, was considered generally illegal. The situation changed dramatically after 9/11, when there is an increasing appearance of doctrines, like the Responsibility to Protect that consider humanitarian interventions legal. They may continue to be considered generally legal in the years to come.

- The response to a violation of human and other essential rights followed a similar pattern, although some restrictions were voiced during the Classic Period of International Law, when individual and collective rights were not so clearly recognized. While such responses were considered illegal under the westphalian paradigm of the UN Charter, they started to be slowly recognized after the end of the Cold War, and even more after 9/11, and may continue to be in the future.
- The use of force against threats coming from hostile regimes and failed States, although not suffering from any restrictions during the Classic Period, was affected by the existing restrictions of the inter-war period between the two World Wars. Under the UN Charter, such use was considered illegal, except when the threat would take the form of an armed attack by regular armed forces. The situation remained the same during the Cold War and its aftermath with few exceptions, but it changed dramatically after 9/11, when regimes started to be perceived as the main problem in the fight against terrorist and other armed groups. Some restrictions to these armed interventions may appear in the future, as no complete agreement may occur in a multipolar world system.
- International criminal networks follow the same pattern, except that they were considered illegal also during the Cold War and Post-Cold War periods, when the armed intrusion within a State was still considered as being against the westphalian paradigm of the UN Charter and almost impossible with the world divided in two opposing blocks.
- The same approach was valid with respect to international terrorist groups, although some interventions were considered legal during the Cold War and the period thereafter.
- Finally, the threat from WMD, while non-existent during the Classic Period, became a source of concern after the industrial revolution, when the Geneva Protocols and other similar instruments were

adopted. However, the legality of the response to this threat became disputed after the adoption of the UN Charter and during the dynamics of the Cold War. Although such threats were considered generally illegal after the Cold War, there was a drastic change and started being considered as legal after 9/11, when the fear appeared that they may fall in the hands of terrorist groups and hostile regimes. Therefore, responses to threats from such groups and regimes started to be considered as legal. With some limitations, they may continue to be generally legal for the same reasons.

Evolution of the paradigm of the legality of armed responses by type of threat

Paradigm	Sovereignty					Human Rights			Global Threats		
	Armed Attack	Imminent Attack	Possible Attack	Attack against Nationals abroad	Attack against the Political System	Crimes against Humanity	Violation of Essential Rights	Hostile or Failed Regime	Criminal International Networks	International Terrorism	WMD
Classic Period	L	L	L	L	L	L	GL	L	L	L	x
Between Wars	L	GL	GI	D	D	GL	GL	GI	GI	GI	GL
1945	L	D	I	D	GI	I	I	I	I	I	D
Cold War	L	D	I	GI	GI	I	GI	GI	I	GI	D
Post Cold War	L	D	I	D	GI	GI	GI	GI	I	GI	GI
Preventive Intervention	L	GL	GL	L	L	GL	GL	L	L	L	L
Future	L	GL	I	GL	GL	GL	GL	GL	GL	GL	GL

- L: Legal. Consensus that a rule authorises the use of force
- GL: Generally legal. General agreement that a rule authorises the use of force in certain circumstances
- D: Disputed. General disagreement as to whether a rule authorises the use of force
- GI: Generally illegal. General agreement that a rule prohibits the use of force in certain circumstances
- I: Illegal. Consensus that a rule prohibits the use of force

Evolution of the paradigm of the legality of armed responses to threats

Paradigm	Deterrence Containment	Self-defense	Precautionary self-defense	Armed retaliation	Chapter VII authorized	Chapter VII unilateral	Armed intervention	Humanitarian intervention	Preventive intervention
Classic Period	L	L	L	L	x	x	L	L	L
Between Wars	L	L	GL	D	x	x	GI	GL	D
1945	L	L	D	I	L	I	D	I	I
Cold War	L	L	D	D	L	I	D	D	I
Post Cold War	L	L	D	D	L	GI	GI	GI	I
Preventive Intervention	L	L	GL	L	L	L	GL	GL	GL
Future	L	L	GL	GI	L	D	D	GL	I

- L: Legal. Consensus that a rule authorises the use of force
- GL: Generally legal. General agreement that a rule authorises the use of force in certain circumstances
- D: Disputed. General disagreement as to whether a rule authorises the use of force
- GI: Generally illegal. General agreement that a rule prohibits the use of force in certain circumstances
- I: Illegal. Consensus that a rule prohibits the use of force

14. WHAT ARE THE DRIVERS FOR A CHANGE IN THE FUTURE LEGALITY OF A USE OF FORCE?

The exact evolution of events and circumstances in the next 20 years, during which reasonable predictions can be made, constitutes a quite complex and risky exercise, as unexpected situations may arise that can radically transform the international environment. But, while accepting these caveats, we should try to understand what can be expected in terms of attribution of legality within this time frame. As we have seen, since WWI some adaptations and changes have occurred every 20 years, but paradigms have not been drastically affected. In fact, what can be perceived is a continuous process of adaptation to new circumstances and realities.

Having these assumptions as a starting point, we may look for the drivers for change or, in other way, for those realities and circumstances that may affect how States will attribute legality to a use of force in the next 20 years. These drivers for change, drawn from legal and political readings, can be the following:

1. The impact of technological change on warfare and intervention in the territory of other countries:

- What was considered the “territory” of a State, with a cubic spatial approach, is not valid anymore, as territory has evolved to a multidimensional area of interest and projection of power that goes well beyond the spatial limits of the State established, for example, in the Convention of the Law of the Sea.
- What are still called by some authors “unmanned” technologies, that in fact are “manned” but in a different way, like drones and robots.
- The development of cyberwar capabilities that may have a paralyzing effect on the opponent.
- Other innovations in arms systems and technologies that may produce a collapse of great magnitude within States.

2. *Multipolar international system:*

- If the world is going towards a multicentered or multipolar world system, experience has shown that such system tends to be more unstable than hegemonies, and may increase the level of confrontation and use of threat as an instrument of foreign policy. Deterrence and containment, rather than negotiation, may become more prominent as the internal logic of the system. Focal armed interventions may also be added as a valid instrument to achieve critical national or regional objectives.
- What level of hostility can we, then, expect from political regimes?
- Will the fight over territory and areas of influence continue along the period, as we have seen in Ukraine, Crimea, the Middle East and the South Sea of China?

3. *Cultural and religious dividing lines:*

- After the Cold War, there was a quite brief period of global optimism in the hope of building up a global society based on common values. However, it soon appeared that national, cultural, ethnic and religious dividing lines, once under the control of authoritarian and totalitarian regimes, started to emerge with the collapse of these regimes, with the danger of genocide and crimes against humanity being perpetrated.
- The broadened scope of human rights also went under an increasing attack in certain areas. In some cases, they are just considered an expression of Western values, not applicable worldwide.
- Are these trends going to divide the world along these lines, or are we moving, towards a global society with shared values? What are, then, going to be the responses to threats and attacks relating to situations involving the respect or violation of human rights?

4. *Subsistence of authoritarian regimes:*

- The same approach is valid with respect to democracy and open societies: while democracy was considered to be of paramount importance and proof of progress of Humanity, it is now subject to criticism in different areas as reflecting Western values and interests.
- If democracies are the only regimes that tend to solve their differences peacefully through negotiation instead of using force, what would the impact of the subsistence of authoritarian and totalitarian regimes be?

5. *Global economy without global values – An increasing number of failed States and non-State actors?*

- Is the combination of the two previous trends (cultural and religious dividing lines and authoritarian / totalitarian regimes) compatible with a unified global economy regulated mainly by market forces, or may we assist to situations where force is used to attain economic objectives, like, for example, control of scarce natural resources?
- Another combination of circumstances may bring instability to the global system: the action of non-State actors, particularly illegal groups with strong armed capabilities to control parts of the territory of failed States, fighting for control over strategic resources and earning substantial amounts of money from illicit trade. At a certain point of development, they can control extensive areas where they impose their own laws, and provoke the final collapse of the national State.
- The transformation of terrorist groups into a military force that control quite extended areas of territory, in some cases present on the territory of multiple States.
- Will armed intervention continue to be an option as we can actually see it in the UK, France, Iran

and Russia interventions in Syria, or Saudi Arabia in Yemen?

6. *WMD and technologies related thereto:*

- The proliferation of WMD and the illegal acquisition of related technologies may remain an important element of controversy that may encourage containment, deterrence and armed interventions.
- In some cases, terrorist groups and illicit networks may resort to the use of chemical weapons, as has already been the case in Syria and Iraq.

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