Introduction

'Any writer on the law of nations is, despite himself, an expression of the country to which he belongs; and every country has the ideas of its age, of its condition and of the state of its civilisation'.
Alberdi, The Crime of War

'International law on the use of force is like plasticine – it melts at the approach of a flame'.
Reflection overheard by the author in 1981 in the Diplomatic Academy of Argentina

On 11th September 2001, a large section of mankind looked on mesmerised as images, broadcast from various global news channels, showed over and over the destruction of the Twin Towers by an attack carried out by suicidal members of an international terrorist network; all over the planet, those same television viewers harboured the private suspicion that great changes on the international stage were on the way, in response to the first large-scale attack on U.S. territory since the Second World War.

Nor was global public opinion wrong, for the reaction of the American government and American society was not long in coming. Combat was launched on many fronts, the most significant and controversial of which were the military interventions in Afghanistan and Iraq. The justification for the U.S. strategy for confronting global terrorist networks and the political regimes that sheltered or supported them was what was known as the 'doctrine of preventive intervention' or the 'Bush (Jr.) doctrine'. The contents and practical application of this doctrine created the broadest and deepest political and legal controversy since the creation of the United Nations [1]. Many analysts predicted the end of the international law on the use of force which had been applicable until then, because they understood that the doctrine cast doubt upon two basic agreements made in the period following the Second World War: on the one hand, the political

[1] The other huge global controversy was the doctrine of humanitarian intervention, when NATO intervened in the Kosovo crisis.

regime would no longer be indifferent to, and unchangeable by, armed interventions from third-party countries, and, on the other, the existence of a completed, tangible and verifiable threat would no longer be a prerequisite for the use of force. Such were the pessimistic arguments that prompted us to try to clarify what this new doctrine actually consisted of, what differences existed between it and the classical formulation of prevention, and how it might affect the future interests of our country.

In the end, it was – once again – a case of reflecting on the necessity for ethical and legal norms to regulate the way in which individuals and states lived together. One essential element of any civilised human society is the existence of an obligation not to use force against the other members of the community, so that violence, restricted only by chance or convenience, is not used, but rather is subject to ethical restriction, the latter often reflected in customary or formal legal norms.

The form taken by this restriction accords with the nature of the political system. Throughout human history, the prohibition of individual violence has generally been based on an authoritarian exercise of power; one group imposes its order on the rest, who comply with the obligation while there is no possibility of revolt. The correlation of forces among the various actors determines the boundaries of the centralised use of force.[2] In a democratic system, *per contra*, restrictions on the use of force are established by means of an institutionalised system of creating rules, which reflects the consensus among the majority of citizens that private violence cannot be admitted as a means of dispute resolution[3]; the system rests not only on

[2] In imperial systems, concentration of the power of coercion tends to be more or less absolute. In feudal systems, various warlords act within their own territory, which does not exclude conflict and war among themselves. In some cases, one or more groups or organisations succeed in imposing its or their order within part of the territory of a state. Evolution of the correlation of internal forces marks the change from one system to another. Thus, for instance, the Chinese system of the 'Warring States' ended when one feudal lord (the king of Qin) defeated all the others, and set himself up as the first emperor (Qin Shi Guang Di). Shis-Tsai Chen, 'The Equality of States in Ancient China", AJIL, vol. 35, no. 4, 1941. The fall of the Roman Empire created the conditions necessary for the rise of feudalism in Europe; this process came to an end, in its turn, with the consolidation of the Nation States around the absolute power of a king or emperor. In Great Britain, royal power underwent a lengthy period of negotiations with the feudal barons, and this, via the first legislative regulation of this correlation of forces (the Carta Magna of 1215), was the origin of Western constitutionalism. Each process has its own peculiarities, and is subject, to a greater or lesser extent, to the existence of various external influences (which was particularly apparent, for example, in Italy in the 16th to 18th centuries).

[3] The restriction still exists, even though each democratic legal system establishes extenuating circumstances and those which exculpate an individual from personal responsibility in cases of self defence.

the power of each of the different social actors, but also on the personal and social conviction of how good and necessary these values are[4], i.e. on the political culture. The distinctive features are not only the monopoly on the use of force[5], but also the social acceptance of the regulation and execution of the use of force on the part of the state.

If a system is unable to safeguard the lives, property and interests of its unarmed members, then each of the latter becomes obliged to see to his own defence using his own resources. At the end of that road – the lack of a social order to regulate and limit the use of individual violence – lie anarchy and civil war, and, at international level, war between states. In both processes, the stronger and more powerful side triumphs. Consequently, the establishment of a democratic order is the most suitable instrument not only for preventing recourse to individual violence, but also for protecting the weakest and most peace-loving.

When each actor has to use his own resources to ensure survival and to protect his interests, the perception of the threat and the assessment of the appropriate response play a critical role. Here we are dealing with a complex process, which is far from being objective, dispassionate or purely 'rational'[6]. A number of historical, institutional, cultural, ideological, religious and psychological factors exert considerable influence on the evaluation of the threat and how reasonable, or proportionate, the response is.

These considerations led, as a consequence, to the opening up of three new fields of enquiry: the nature of the specific processes of state assessment of threats and the most appropriate responses thereto; the role played by the political regime in those assessments, and the manner in which, in the period after World War II, there arose the attribute of the legality of the specific practice of states. The intersection of these variables made it

[4] A political system in which periodic elections are held, but in which different actors (in particular the one for the time being in power) cannot freely enjoy the essential values that define an open society, is not a democratic regime. The Nazi party, for instance, came to power by means of elections (and intimidation), but its lack of pluralist values prevented it from being considered a democratic regime. There is no democratic regime that does not possess democratic values that are both deeply rooted in its society, and observed by those temporarily in power through recognition of the institutions they represent.

[5] State monopoly on the use of force exists both in authoritarian regimes as well as in democratic ones.

[6] 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.

possible to compare the different historical paradigms on the use of force.

Prevention is based on the perception that an armed conflict is inevitable, and that, therefore, it is better to confront the threat in advance, when one is in a better position to defeat or neutralise the enemy. The point of departure of the doctrine of preventive intervention is that it is legitimate, not to mention advisable, to attack before being attacked, or before the enemy is in a position to launch its own aggression. The application of this doctrine in the wake of the Twin Towers attacks – when the existence was being affirmed of new categories of threats which justified the preventive use of force, as was the inadequacy of the existing norms to assure the legality of the responses required to counteract those threats – led to the conclusion that there was no universal consensus, either on the applicable legal norms, or on the basic values on which the international system is founded.

In tracing the history of the doctrines on the use of force and considering their legality in the light of historical paradigms, we attempted to answer three questions:

- what is the nature of these alleged 'new' threats in the doctrine of preventive intervention?
- which rules of international law apply to these threats and to the responses thereto? and
- where appropriate, which amendments should be introduced into international law to respond adequately to these possible limitations?

The first hypothesis that we worked on was that a threat from a global terrorist network, to be successfully confronted, did not need a substantial modification to international law, with the possible exception of the concept of the imminence of the attack, and that, when reference was made to the 'inadequacies' of international law, this meant the limitations of the institutional arrangement which emerged in 1945, based on the supposed inviolability of the internal political regime, irrespective of its nature.

The second hypothesis was that the political regime was one of the keys to these institutional limitations, and that the inviolability guaranteed by the Charter – and defended by the larger part of the doctrine – had not been as well observed as was alleged; rather, it taken up a significant

part of the debate within the United Nations. Regime change by military means had been attempted repeatedly since 1945; in effect, the Cold War was a global confrontation to decide which political system was the legitimate one.

The third hypothesis was, at the same time, a provisional conclusion: that the level of development of the political culture and of the democratic values played a key role, both at global level – as an expression of the growing demand for open societies in parallel with the expansion of democratic capitalism – and at national level – offering the conditions conducive to the establishment and consolidation of the democratisation processes – and that, consequently, the pretention of the doctrine of preventive intervention to install democratic regimes through military force would not bear fruit (at least in the short term) unless mediated by a previous political culture that created the necessary social conditions. This is to say that military intervention could be successful in restoring democracy, but not in installing it. This was true both of unilateral actions and of multilateral ones that enjoyed the approval of the United Nations.

Our fourth hypothesis held that defence at all costs of the Charter's Westphalian paradigm brought with it a limitation on the establishment at global level of a peaceful society, organised by legal norms and complete respect for the basic human rights. For this reason, we had to find out what contribution society and external politics could make in support of a new international legality based on recognition of human rights and of the democratic regime as the organisational basis of the system.

It became clear during the analysis that there was a marked terminological ambiguity in international politics, which was reflected also in the legal doctrine. We attempted, therefore, to set down a definition of terms, which would determine clearly the analytical categories required for a study of the problem, by fixing the limits of legitimate defence, and of the different variables of precaution, prevention and aggression.

As will be seen, the definition of the nature of the threats, and the selection of the most appropriate responses from among the many options available, are the factors that allow a justification of the attribution of legality to the use of force. Using these categories, an attempt was made to establish an analytical model that would be useful in foreseeing the attri-

bution of legitimacy which could be expected in a given situation. Such legitimacy is more often expressed in terms of majorities than of consensus, because there exists a broad margin of dissent, caused not only by ambiguity in the interpretation of legitimate defence in its different variants, but also by the manipulation by states of political and legal arguments, and by the existence of interests which, in any given situation, condition the positions of the actors.

Chapter I presents an overview of the evolution of the ideas, norms, and institutions of the international law on the use of force, as related to threats and responses. It proceeds from the dyad 'aggression and self-preservation', considered, in the case of the former, as a manifestation of human nature, and, of the latter, as the need to protect oneself individually and socially – and the way its legal, ethical and political evaluations have varied with differing historical and cultural circumstances is demonstrated.

After WWI, a process began that sought international arrangements that would allow a classification to be made, with a certain degree of objectivity, of the illegality of aggression and the legality of a response in self-defence. The inadequacies – both legal and in the political culture – in the League of Nations system for avoiding wars of aggression led to generalised warfare. After WWII, international law placed more emphasis on the perpetration of an attack (aggression) and in the conditions for being able to advocate the legitimacy of the response, than on the mechanisms for resolving the problem of the threatened use of force, when in fact that was the real starting point of the disorder in the system. It may seem strange that this was so, because WWII was, in reality, the history of the threat of aggression by totalitarian regimes, which was not addressed in time. The new post-war order ought to have focussed on how to prevent a given threat turning into another tragic reality, a process in which it was already clear that the internal political regime had a central role to play.[7] The opposition between two conflicting political systems meant that no consensus could be built that could be reflected institutionally in

[7] The International Military Tribunal (also known as the Nuremberg Tribunal) and the International Military Tribunal for the Far East (also known as the Tokyo Tribunal) established a direct relationship between the Nazi regime and Japanese militarism and their respective wars of aggression.

the Charter regime, because the existence of a powerful, totalitarian actor had to be accepted. It was not, therefore, a case of a lack of political vision, or of a 'legislator's error', it was simply the material correlation of forces between the two political systems into which the world found itself divided in 1945.

The present international system is the heir to this San Francisco negotiation. The monopoly on violence in the hands of the Security Council is of a formal nature, because it has no means of its own of acting preventively or punitively, which it could employ independently of the will of the member states which do have such capacity. At the same time, the most powerful members reserve to themselves a right to veto even a simple declaration of the need to avoid or suppress a violation of the legal order. Nor, from the point of view of political culture, does there exist in the international community consensus either that it is essential to the system not to resort to force on an individual basis, or, among the permanent members, that it is necessary to intervene each time a threat or breach of an international obligation arises.[8] Therefore, the limitations are not only institutional, but pertain also to political culture.

The Charter authorised the Council to take action when faced with a threat to international peace and security, but the system has an intrinsic weakness when maintaining legal protection for any political regime, irrespective of its type. The latter's inviolability is still formally protected and materially preserved, even when it commits the gravest violations of human and political rights, if the great powers cannot agree to put an end to the situation.

Chapter II analyses the historical evolution of the concept of self-defence, and establishes the differences between it and the several variables of precaution – classical period doctrine, 'Webster formula', interception, anticipation and sequence of events – prevention and aggression. Analysis of a set of paradigmatic historical cases shows that the practice of states seems to demonstrate that, between the legitimacy of reacting when faced with an aggression already committed, and the illegality of attacking when faced with a possible threat whether indirect or mediate, is disputed. This

[8] As will be seen later, these are the characteristics that have led to international law being considered 'primitive'.

is not only because of the difficulty of establishing facts and intentions, but also because of the ambiguity in the use of the words 'anticipatory' and 'preventive'. Self-defence when faced with a future threat is often seen as aggression, but, since aggression and self-defence are correlates of the threat-response relationship, greater accuracy in these legal terms is proposed, with a view to clearing up the controversy on the law applicable to the new doctrine of preventive intervention.

Thereafter, the so-called 'Bush (Jr.) doctrine' is analysed, with its definition of threats and the array of responses available to confront them, in the context of the USA's strategic doctrines since WWII, in order to identify the components that are new and which others are in fact a continuation of previous strategic doctrines.[9]

Chapter III is devoted to the threat in general terms, and to placing in that context the 'new threats' that have their origin in global terrorist networks, the acquisition of weapons of mass destruction and their technologies, hostile regimes, failed states and authoritarian regimes. The possible responses to each of these threats is examined in Chapters IV and V[10], as a function of an array of responses, and a study is made of the attribution of legitimacy in each of the possible situations.

The 'Bush (Jr.) doctrine' did not display as many new elements as had been attributed to it; rather, various elements were rooted in previous US strategic doctrines. Also, it emerges from an analysis of similar post-war cases that most of the elements of the doctrine were already present during the Cold War, and that the changes in the attribution of legality to the responses in fact corresponded to the application of doctrines formulated before that US Administration came to power.

The central problem seems to be rooted more in the political regime than in the nature of the threats or the legitimacy of the responses – it is not weapons that threaten, but the nature of the regime which possesses them. Hostile regimes, whose challenge to the international system was

[9] Understood as the legal and political doctrine which arises from the documents and declarations of the main political figures of the Administration of US President George W. Bush.
[10] Because of its length, the analysis of the threat has been spread over two chapters.

deferred in 1945, have still to find the way to a legal solution. Democracies and open societies tend to develop peaceful relations among themselves. In most of the conflicts since 1945, one of the actors has been an authoritarian or totalitarian regime and/or the armed groups trying to install them by seizing power. Relations among democratic nations [11] proceed peacefully these days, regulated, at least for the most part, by legal norms.

The delegitimisation of totalitarian and authoritarian regimes is a tendency that continues to develop at international level, in parallel with the illegalisation of aberrant practices and crimes against humanity, and with the expansion of democratic capitalism, the incorporation of old, closed, autarkical societies into the global economy, and the extension of new information technologies. If this process of building a global society continues, shared values will be essential to the establishment of an international democratic order, and political culture will continue to play a very important role in the transition of closed regimes to more open societies.

However, changing the political culture is a complex process, marked by different conditioning factors, both internal and external, which directly conditions the installation of a new basis for international legality having at its heart the defence of human rights rather than the inviolability of the political regime. Nevertheless, there are grounds for thinking that there is at present a tendency towards a change of paradigm based on a new democratic legality at global level.

Lastly, an assessment is made of the use-of-force paradigm for the next 10 years, as well as a reflection on the foreign policy of our country, that it may develop an active policy on the international stage of defending the democratic system and recognising the inalienable right of the human person.

What the analysts considered 'new' in the 'Bush Jr. doctrine', from a political and strategic point of view, is in fact a new rationalisation of deep currents welling both from the Wilsonian moralism of the period after WWI, and from the realism of the strategic doctrines of the East-West

[11] As various societies in Latin America, Central Europe and Southeast Asia have managed to build democratic regimes, they have integrated into this nucleus of peaceful relations regulated by legal norms.

conflict. From a legal point of view, most of what were considered innovative elements were merely the attribution of legality to the different variables of legitimate precautionary defence. The strictly preventive elements of the doctrine were very limited, and focussed on a possible threat from a hostile or authoritarian regime. What we call the Westphalian paradigm of the inviolability of the political regime was no such thing; on the contrary, the Cold War was a gigantic confrontation, the purpose of which was to produce (and impose) a political regime for all humanity. With the defeat of one side to this conflict, the burning question now is the form to be assumed by the global expansion of capitalism.

If we aspire to a global society that is peaceful and regulated by legal norms accepted by consensus, the concept of the inviolability of the political regime must be abandoned once and for all, and an international system established the foundation of which would be respect for individual and social human rights. We find ourselves at the beginning of a period of transition from the Westphalian paradigm to the human-rights paradigm. However, the triumph of the latter is neither cast in concrete or inevitable; it depends rather on the evolution of a set of variables that are outside the field of international law and are directly related to the history, values, political culture and social capital of the various societies, amongst other crucial elements. The combination of open political regimes and respect for human rights creates better conditions for the establishment of a peaceful international community based on legal norms. As Argentina is obliged to allocate the bulk of its resources to economic and social development, our action in the international field ought to be directed at supporting democratic regimes and the complete validity of human rights. That way, the international context will most favour our own consolidation as an open, pluralist and democratic society.

The present international law possesses the legal tools that are appropriate to confront the threat of a global terrorist network. Although the application of the doctrine of sequence of events – which allows anti-terrorist intervention to be considered as precautionary rather than preventive – has been disputed in its application to specific cases, the controversy has in fact been based on the requirement to produce verifiable (i.e. sufficiently acceptable for the international community) evidence of the existence of the threat. On the other hand, the use of force against a political regime without Security Council authorisation has mainly been con-

sidered preventive and therefore illegal. A key role in all this has also been played by the submission of sufficient evidence of the preparation of an act of aggression on the part of a regime which has been classified as hostile, but, if the hostile regime has started preparations to launch an aggression, in fact the matter is no longer one of a preventive response, but of a precautionary one. Once more we find ourselves on the horns of a false dilemma created by ambiguity in the definition of terms. In this period of transition, we must foster the attribution of legality to the promotion of human rights and the democratic regime, and at the same time proscribe the unilateral use of force when the existence of a threat has not been sufficiently demonstrated.

Technological changes have been creating conditions for the emergence of a global civil society and public opinion, which has given new life to the human rights agenda and placed authoritarian and totalitarian regimes on the defensive. Nevertheless, in this period of transition in which we find ourselves, a very important role is still played by the strategic and global interests of the permanent members of the Council and of the great powers. This has not prevented the Council – when there is a consensus, as in the case of international terrorist networks – from progressing to ever more intrusive forms, through what has come to be called the attribution by the Council of 'legislative' powers. Therefore, a certain tension exists between the demands of the global civil society and public opinion on the one hand, and the resistance (by its persistence) of the Westphalian paradigm on the other. The end of this story has not yet been written.

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