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## THE UNITED NATIONS CHARTER AND THE LEGAL REGULATION OF THE USE OF FORCE: SOME PROBLEMS OF CURRENT INTERPRETATION

*This paper analyses some of the ambiguities of the legal regulation of the UN Charter concerning the use of force, which have received particular attention during the last decade. Firstly, the new problems arising from the interpretation and application of the right of self-defence. In particular, the admissibility of self-defence against potential threats or in response to major terrorist attacks. Secondly, the debate about the emergency of a collective responsibility to protect the civil population against genocide, war crimes, ethnic cleansing and crimes against humanity and its potential consecration as a rule of law.*

*Prohibition of the use of force, self-defence, and responsibility to protect*

## THE UNITED NATIONS CHARTER AND THE LEGAL REGULATION OF THE USE OF FORCE: SOME PROBLEMS OF CURRENT INTERPRETATION

### 1. Introduction

The United Nations Charter, adopted at the 1945 San Francisco Conference, created an international organisation and established a set of principles that reflected the aspiration to usher in a new era, characterised by the prohibition of the use of force and by articulating measures against those infringing those principles. The efficacy of the Charter in this field could be held back by the ambiguities of its provisions, resulting in disagreements about the scope and interpretation of the Charter since the very moment of its adoption. According to Article 2.4 States “shall refrain in their international relations from the threat or use of force in their international relations”. The Charter solely contemplates two exceptions to this principle: self-defence in the case of an armed attack and armed actions authorised by the Security Council, in accordance with Chapters VII and VIII. These are the core provisions of the regulations set out by the Charter concerning the use of force. Despite frequent breaches, this rule constitutes a fundamental principle of contemporary International Law universally accepted. As the International Court of Justice has stressed, when States have recourse to armed force they do not question the validity of the principle, but rather they seek to legitimate their actions by invoking the provisions of the Charter.<sup>1</sup>

The international context generated by the end of the Cold War added new challenges for the regulation of the Charter to those traditional interpretation problems. Since the UN began, its main political institutions have acted flexibly when it has come to interpreting its provisions and adapting them to changing situations<sup>2</sup>, and this has continued being their course of action in some spheres. One of the most evident consequences of the end of bipolarity was the common resorting to the collective

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1 In this respect, the judgement of the International Court of Justice in the Case relating to military and paramilitary activities in and against Nicaragua (background), states: “if a State acts in a way that is incompatible with a recognised rule, but it seeks to defend its conduct by invoking exceptions or justifications included in the same rule, regardless of whether its conduct is justifiable or not for such reasons, the significance of its approach goes towards confirming the rule rather than weakening it” (ICJ Reports 1986, p. 98, para. 186.)

2 FRANCK, Thomas. *Recourse to force: state action against threats and armed attacks*, Cambridge: Cambridge University Press, 2003, p. 7.

security system, opening up a phase of greater activity in which the Security Council has made a broader interpretation of the notion of “threat to peace”.<sup>3</sup> Differences between the permanent members, nonetheless, reappeared on the occasion of serious crises such as Srebrenica, Kosovo and Rwanda, which became symbols of the failure of the Organisation. Partly as a response to these failures, the way was opened up to the principle of the “responsibility to protect” in the early years of the XXI century. The principle was invoked by the Security Council to authorise armed intervention in Libya in 2011, highly criticised by some and praised by others. The Council’s different reaction to the conflict in Syria, a reflection of its internal divisions, has again underlined the limitations stemming from the right of veto. Another subject of disagreement is the right of self-defence. The legal régime of the Charter has allowed divergent interpretations since the outset. The attacks of September 11, 2001, and the so-called “global war on terror”, added new problems as regards their scope and relation to other dimensions of the prohibition of the use of force, still fuelling a heated debate.

This paper will focus on the current debate about the abovementioned problems of interpretation. On the one hand, it will analyze the progressive emergence of the “responsibility to protect” as a principle, and the role reserved to the Security Council. In this regard, most of the Council’s activity in the 90’s seems to have led to a greater expectation in international society about it acting as the instance for deciding to use force, in accordance with the spirit of the Charter. On the other hand, it will study the problems of interpretation of the right of-defence aroused by the 9-11 attacks and the subsequent military response.

## 2. The Adequacy Of The Provisions Of The Charter To Confront The “New Threats”

At the time of drawing up the Charter, the concept of security and of collective security had an essentially military scope. The preamble to the Charter, nonetheless, did anticipate the idea of indivisibility of security, development and human freedom. The later consolidation of the notion of human security raised the challenge of reaching consensus on a broader concept of collective security to include all of its elements. There is broad consensus on some issues, for example, a general understanding that the current threats do not respect national borders, they are interrelated and need to be tackled at the global, regional and national levels. As regards the meaning of threat to international security, the Report of the High-level Panel on Threats, Challenges

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3 Conforti, Benedetto. “Le pouvoir discrétionnaire du Conseil de Sécurité en matière de constatation d’une menace contre la paix d’une rupture de la paix ou d’un acte d’agression”, in *Le développement du rôle du Conseil de Sécurité*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993, pp. 51-60.

and Change, entitled “A more secure world: our shared responsibility”, describes it as “Any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security”.<sup>4</sup>

Disagreements persist about the nature of these new threats and about the justification of the use of force for dealing with these. Amongst the new threats, the report mentions poverty, the action of terrorist networks that take shelter in failed States or those whose government protects them; civil disturbances, the proliferation of weapons of mass destruction and organised cross-border criminality.<sup>5</sup> The standing controversy is whether the Charter provisions offer a legal basis to tackle threats to international peace and security that were not considered as such at the time when it was drafted.

Different panels of experts have been set up since the year 2000, so as to examine the activities and the responsibilities of the UN in the field of peace and international relations in depth. Amongst these, it is worth highlighting the High-level Panel on Threats, Challenges and Change created in 2003, which prepared a report entitled “A more secure world: our shared responsibility”. This advocates a broader concept of collective security that makes it possible to respond to the threats –old and new- and that similarly takes account of the interest of all States concerning security matters. Both this Report, as well as those of groups of independent experts and those of the General Secretary, express concern that inaction and ineffectiveness of the Organisation might lead States to justify the use of force beyond the UN Charter provisions.<sup>6</sup>

The ordinary period of sessions of the General Assembly was opened on September 14, 2005, on the occasion of the UN’s sixtieth anniversary, with a top level plenary meeting, in which about 170 Heads of State and of Government took part, at the venue of the United Nations in New York. This meeting concluded on September 16 with the adoption, by acclamation, of a resolution entitled “World Summit Outcome Document 2005”.<sup>7</sup> One essential element for the preparation of the Summit

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4 United Nations A/59/565, December 2, 2004, p. 12.

5 *Ibíd.* Similar considerations are made in the Secretary General’s report, *A broader concept of liberty: development, security and human rights for all* /59/2005, of March 21, 2005.

6 LÓPEZ-JACOÍSTE DÍAZ, Eugenia. “Repensando el sistema de seguridad colectiva: el Consejo de Seguridad y las nuevas amenazas a la paz y seguridad internacionales” [Re-thinking the system of collective security: the Council of Security and the new threats to international peace and security], en C. Ramón Chornet, *La acción colectiva del uso de la fuerza. Nuevos escenarios, nuevos principios de actuación en el orden internacional* [Collective action of the use of force. New scenarios, new principles of action in international order], Valencia, Tirant lo Blanch, 2012, pp. 57-139.

7 Document A/RES/60/1, October 24, 2005. The holding of the Global Summit aroused considerable expectation. Several special meetings were held during those three days. Taking the starting point to be the Secretary General’s report that is mentioned, intense negotiations were carried on at the General Assembly which, on the day before the start of the 60th period of sessions, adopted a consensus about the resolution project that became the Final Declaration of the Summit.

was the Secretary General's Report "A broader concept of liberty: development and human rights for all"<sup>8</sup>. The 2005 World Summit Outcome Document confirmed the conclusions that the Secretary General and the Groups of experts had reached. Under the title "Peace and Collective Security", it re-asserted "that the pertinent provisions of the Charter are sufficient for dealing with the entire range of threats to international peace and security" and also the "authority of the Security Council to impose coercive measures, with the aim of maintaining and re-establishing international peace and security" (2005 World Summit Outcome Document 2005, Para. 79). In this way, it re-affirmed the consensus of the States as regards the full validity of the system of the Charter, although it did not make a pronouncement about specific problems of interpretation or about the validity of the invoking of new principles based upon an emerging practice.

In the international sphere, the course of action of the States could initiate a movement towards modifying the right if a majority of States that are sufficiently representative agree on the course of action initiated<sup>9</sup>. In this process it may be hard to assess whether an action constitutes a violation of the right in force, or on the other hand, it is the manifestation of a new norm. International practice of recent years offers examples of situations of this type, such as the claim to self-defence to include preventive actions against latent threats, the possible authorisation of the preventive use of force by the Security Council within the framework of Chapter VII or the legitimacy of the use of force in compliance with "the responsibility to protect".

### 3. The Right of Self-Defence Reformulated

The right of-defence is recognised in both customary international law and the Charter. According to article 51: "Nothing in this Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security". The Charter describes it as an "inherent" right and the International Court of Justice recognized this formulation as referring to the customary nature of the right of self-defence, meaning that its content is that are attributed to it by general international law. The Charter sets out two additional obligations for the Member States of the UN. Firstly, that of immediately informing the Security Council about the measures taken. Unlike the use of force within the context of Chapter VIII, resorting to force in self-defence does not require prior authorisation from the Security Council or any other UN body. States are entitled to resort to self-defence insofar as they meet the requirements that justify this. Secondly,

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<sup>8</sup> Doc. A/59/2005, of March 21, 2005.

<sup>9</sup> In this respect, see the pronouncement of the International Court of Justice in the Case relating to the military and paramilitary activities in and against Nicaragua, para. 207.

there is that of accepting the primary responsibility of the Council, which preserves its authority to adopt the measures, at any time that it considers necessary. This latter aspect raises the issue of the possible effects of the adoption of coercive measures by the Council with regard to the right of-defence.<sup>10</sup> It can be observed from article 51 in fine that the Security Council can reject the right of-defence and bring it to an end, if it deems it necessary. However, it is necessary for the intention of the Council to be clear: adopting coercive measures does not by itself replace the right of-defence; actions from the two categories can be carried on simultaneously.<sup>11</sup>

As regards the requirements for exercising the right of-defence, as the High-level Panel stressed, article 51 of the United Nations Charter is restrictive when speaking about the possibility of imposing limits on the exercising of self-defence: “Nothing in this Charter shall impair the inherent right of self-defence.” The Charter does not specify the conditions of exercising self-defence, but necessity and proportionality are requirements that are traditionally laid down by customary law. A broad sector of the doctrine refers to the immediacy of the response as a requirement for the exercising of self-defence, but neither practical state nor international case law have considered this to be a requirement.<sup>12</sup> The top-level Group Report asserts that, in accordance

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<sup>10</sup> SCHEFFER, David J. “Use of Force after the Cold War: Panama, Iraq and the New World Order”, en L. Henkin (et al.) *Right v. Might: International Law and the Use of Force*, New York, Council on Foreign Relations, 1991, p. 127.

<sup>11</sup> In this respect, SCHACHTER, Oscar, *International Law in Theory and Practice*, Dordrecht/Boston/London: Martinus Nijhoff Pub., 1991, p. 403. For example, in the Gulf War of 1991, the authorisation of the use of force by the Security Council was concomitant to the claim for a right of individual and collective self-defence. In fact, there were not just coercive measures in resolution 661 (1990), of August 6, the preamble also states “the inherent right to collective self-defence in response to Iraq’s attack on Kuwait”. Indeed the states that sent troops to the Gulf before Resolution 678 invoked collective self-defence under article 51 as their base.

<sup>12</sup> Immediacy may be the result of a particular way of reading the formula used by the United States Secretary of State, Daniel Webster, in 1837, in the Caroline case. This was an event that raised the possibility of allowing for self-defence in advance: in that case, the immediacy concerns the proximity of the attack, and not the response. In this sense, it has been emphasised that interpreting immediacy in this way is a requirement for the exercising of self-defence in advance (Cf. VAN DEN HOLE, Leo. “Anticipatory Self-Defence under International Law”, *American University International Law Review*, vol. 19, 2003, pp. 69-106, 104). The British forces in Canada had sunk the ship *Caroline*, used by the rebels to transport munitions and personnel to Canada, whilst it was in an American port, despite there being no proof of support from the American authorities. Years later, one of the British officials responsible for the sinking was arrested when he was in United States territory. The British government protested about his arrest arguing that although the ship was in United States territory, Great Britain had exercised its right of-defence. The British government’s legal adviser had said: “the conduct of the British authorities was justifiable because it was absolutely necessary as a precautionary measure for the future and not as a way of committing reprisals for the past”. In a letter of April 28, 1841, Secretary of State Webster stated that, in order for the attack to be lawful, the British government would had to have demonstrated a “need for immediate, prevailing self-defence, which would leave no option in terms of the choice of the means, nor time to deliberate”. The formula used by Webster was and continues being invoked as a suitable expression of customary law on matters of self-defence, for example by the Nuremberg and Tokyo Courts.

with the firmly consolidated International Law principle “the threatened State can resort to military action provided that the threat is imminent, there is no other way of preventing it and the action is proportional”.<sup>13</sup> In this way it re-asserts the traditional requirements of necessity and proportionality and adds that the concept of an “armed attack” also includes the threat of an imminent attack.<sup>14</sup> The Secretary General also reached the conclusion that imminent threats are contained in Article 51.<sup>15</sup> Faced with a restrictive conception of self-defence, which starts from an objective requirement (the existence of a consummated armed attack), anticipatory self-defence implies accepting a condition of subjective appreciation (the imminent threat of the attack) with the risks inherent to this process.<sup>16</sup>

The doctrine has expressed a division about the issue of whether imminent threats are included or not in the concept of an armed attack for the purposes of self-defence. There are authors and international practice that have assumed –from the time that the Charter came into effect- that the self-defence concept can cover a response to an imminent threat of an armed attack, depending on the circumstances<sup>17</sup>. One of the arguments set out to support this thesis states that the rights existing in general International Law before the Charter should be presumed to be in force, unless the charter expressly states to the contrary: insofar as the International general law that was recognised before 1945 grants a right to anticipatory self-defence, and it should be considered that this persists.<sup>18</sup> In addition, the right of-defence faced with an imminent attack has been justified in the necessity to adapt it to new circumstances, such as the

13 A more secure world, para. 188

14 La Resolución 3314(XXIX), on the adoption of aggression, can also be interpreted in this way. It can be observed from this resolution that the first use of force is not necessarily an act of aggression, and the Security Council is responsible for deciding about it in light of other pertinent circumstances.

15 A broader concept of liberty, para. 124.

16 This is the interpretation offered by REISMANN, Michael. “Assesing Claims to Revise the Law of War”, *American Journal of International Law*, 2003, p. 84.

17 REMIRO BROTONS, A. [et. al.]. *Derecho Internacional. Curso General* [International Law. General Course], Valencia, Tirant Lo Blanch, 2010, p. 674; BERMEJO GARCIA, Romualdo. *El marco jurídico internacional en materia de uso de la fuerza: ambigüedades y límites* [The international legal framework on the use of force: ambiguities and limits], Madrid, Civitas, 1993, p. 293; GREENWOOD, Christopher. “International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq”, *4 San Diego International Law Journal*, 2003, p. 15; WALDOCK, C. Humphrey. *The Regulation of the Use of Force by Individual States in International Law*, *Recueil des Cours II*, pp. 451, 496-97. There are cases in which the evidence of imminence seem to be abundant (Israel in the Six-day War) or in which military action in self-defence is done with a certain degree of containment in mind (the Cuban blockade in the missile crisis). But the clear examples of the exception. In fact, even these two cases are questioned by some authors as valid examples.

18 BERMEJO GARCIA, Romualdo, *El marco jurídico internacional...* [The international legal framework...], op. cit., p. 228; DINSTEIN, Yoram. *War, Aggression and Self-Defence*, Cambridge, Cambridge University Press: 2001, p. 167; VAN DEN HOLE, Leo. “Anticipatory Self-Defence Under International Law”, op. cit., p. 73.

proliferation and the increase in the destructive capacity of weapons, which would cast doubt on the efficacy of a restrictive conception. For another doctrinal area, the text of article 51 of the Charter and of international practice only legitimise the exercising of the right of-defence against a consummated armed attack.<sup>19</sup> The international Court of Justice assumed an even more restrictive concept, limiting the right of-defence to a response to a consummated armed attack of significant dimension and rejecting the lawful nature of exercising it as compared to “lesser uses” of force.<sup>20</sup>

Although the top level reports and the Secretary General’s report support the notion of self-defence when faced with an imminent attack, they do not set out criteria for settling disputes when there the appreciation of the “imminence”. The debate on this topic is even further complicated by the absence of standard terminology. While the notion of self-defence in the Reports mentioned covers both a consummated attack and an imminent threat, numerous authors make use of the term “preventive self-defence” for the case of threats that are imminent but also potential. In an effort to achieve conceptual clarification, the possibility has been suggested of reserving the term of “anticipatory” self-defence to situations of imminent threats and that of preventive self-defence for the actions in situations o potential threats.<sup>21</sup>

### 3.1. The September 11 attacks and broaneded meaning of the traditional concept of self-defence

In response to the terrorist attacks of September 11, 2001, the Security Council unanimously adopted resolution 1368 (2001), of September 12, in which it recognises the inherent right to individual self-defence<sup>22</sup> and it condemns the attacks.

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19 BROWNIE, Ian. *International Law and the Use of Force by States*. Oxford: Oxford University Press, 1963, p. 257; GUTIÉRREZ ESPADA, Cesáreo. “The ‘use of force’ in the High-level Panel Reports (2004), of the Secretary General (2005) and afterwards, in the final document of the Summit of Heads of State and of Government”, XXI Anuario de Derecho Internacional [International Law Yearbook], 2005, p. 38; GLENNON, Michael, J. “The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter”, 25 *Harvard Journal on Law and Public Policy*, 2002, pp. 539, 547; GRAY, Christine. *International Law and the Use of Force*, Cambridge: Cambridge University Press, 2008, p. 160; JESSUP, Philip C. *A Modern. Law of Nations* 1948, p. 166.

20 Cases on the military and para-military activities in and against Nicaragua (1986), paragraphs 191-195 and 210-211; Case of the oil platforms (2003) paragraph 51; and in that of armed activities in the Democratic Republic of Congo (2005), paragraphs 127, 161-164.

21 In ths respect, CASANOVAS Y LA ROSA, Oriol in DIEZ DE VELASCO, Manuel. *Instituciones de Derecho Internacional Público* [International Public Law Institions], Madrid, Tecnos, 15th ed., p. 1006.

22 With this assertion, states M Reisman, the Security Council clears up any doubts about its position as regards a posible military intervention by the United States (REISMAN, W. Michael. “International Legal Dynamics and the Design of Feasible Missions: The Case of Afghanistan” *The*



The reaction of an extensive number of states and of international organisations allows it to be concluded that the characterisation of the action of the coalition led by the under states as a form of self-defence was the subject of generalised acceptance in international practice.<sup>23</sup> Some authors, however, questioned where this was a case of self-defence. The problematic elements were assessing the terrorist attacks as “armed attacks” and the act of attributing these to one State, if we start from the premise that an armed attack has to come from a State. As far as the concept of an armed attack is concerned, the recognition of the right of-defence in resolution 1368 (2001) would be equivalent to an implied acceptance that attacks undertaken by non-state perpetrators from outside a State could constitute an “armed attack”, in the sense of article 51 of the Charter. This interpretation is not shared by one part of the doctrine, for which the struggle against terrorism should be seen in terms of police, judicial and criminal actions, and particular to the domestic legal codes.<sup>24</sup> For another doctrinal sector, the exceptional magnitude of the attacks as well as the fact that one of them was against a military target, the Pentagon, would justify assessing it as an “armed attack” in the sense of article 51 of the Charter.<sup>25</sup>

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War in Afghanistan: A Legal Analysis, International Law Studies, Volume 85, Naval War College, 2009, p. 63). At the same time, T. M. Franck, qualifies, the resolution recognises a right to respond in self-defence but it does not authorise –and it cannot legally authorise– the exercising of this given that it is an inherent right of the “victim” (FRANCK, T. M. “Terrorism and the Right of Self-Defense”, American Journal of International Law, vol. 95, 2001, p. 840)

23 This is observed from the text of resolutions 1368 and 1373 of the Security Council, from the stance taken by NATO (NATO, Declaration of the North Atlantic Council, September 12, 2001) and by the Organisation of American States (Organisation of American States, Resolution: Terrorist threat in the Americas, of September 21, 2001 OEA/Ser.F/II.24, RC.24/RES.1/01). The North Atlantic Council resolved that if it were ascertained that the attack had been targeted against the United States from aboard, this would be considered to be an action covered by article 5 and that, hence, collective action could be taken in self-defence. A few weeks after the attacks, on October 2, the Secretary General of NATO stated that such circumstances had arisen and that article 5 was applicable. In the same respect, the report on A more secure world: our shared responsibility, he assesses the response to the September 11 attacks as a “military campaign of self-defence against the Taliban regime, head by the United States” (Cf. Doc. A/59/565, of December 2, 2004, p. 20, para. 14).

24 See, GUTIÉRREZ ESPADA, Cesáreo. “¿No cesaréis de citarnos leyes viendo que ceñimos espada? [Would they not stop quoting laws seeing that we carry swords?] (About 9-11)”, Anuario de Derecho Internacional [International Law Yearbook, 2001, pp. 25-38; CORTEN, O. / DUBUISSON, F. “Opération ‘liberté inmuable’: une extension abusive du concept de légitime défense”, Revue générale de droit international public, 2002, pp. 51-78; REMIRO BROTONS, Antonio. “Terrorismo, mantenimiento de la paz y nuevo orden”, [Terrorism, keeping the peace and the new order] *ibid*, pp. 125-171, RAMÓN CHORNET, Consuelo. “La lucha contra el terrorismo internacional después del 11 de septiembre 2001”, [The fight against international terrorism after September 11, 2001] *ibid*, pp. 273-287.

25 EISEMANN, P.M., “Attaques du 11 septembre et exercice d’un droit naturel de légitime défense”, Bannelier, K. et al. (eds.), *Le droit international face au terrorisme*, pp. 239-248; BERMEJO GARCÍA, Romualdo. “El Derecho Internacional frente al terrorismo: ¿Nuevas perspectivas tras los atentados del 11 de septiembre?” [New perspectives following the September 11 attacks?], Anuario de Derecho Internacional [International Law Yearbook], 2001, pp. 5-24; HINOJOSA MARTÍNEZ, Luis. “Irak y

As far as the perpetrator of the attack is concerned, article 51 identifies the holder of the self-defence to be the State that has suffered an armed attack, but it does not set conditions about the source of the attack. To the extent that self-defence is an exception to the principle of the prohibition against the use of force by the states in its international relations, it would seem to be assumed that the attack must have come from another State. Then again, article 51 of the UN Charter does not require that the armed attack should come from a State; article 5 of the North Atlantic Treaty does not establish this requirement either. The fact that an armed action is carried out in a State, Afghanistan, to which terrorist attacks had not been attributed represented an additional obstacles, given that the attacks as such could not be attributed to the Taliban regime. The Taliban government was not directly involved in organising it or carrying it out, did not possess the degree of control necessary in order for the attacks carried out by Al Qaeda to possibly be attributed to it, according to the rules that govern the international State responsibility. According to Professor J. Delbrück, the international Treaties against terrorism, the resolutions of the Security Council and of the General Assembly concerning those States that support, provide shelter or permit the presence of territories in their territories violate the fundamental obligation to suppress and eliminate international terrorism, and the specific demands made by the Security Council to the Taliban regime, requesting the handover of Bin Laden, would make it possible to consider that the Taliban government had been sufficiently involved as to support the consequences of exercising the right of-defence.<sup>26</sup> In any case, the Taliban government, the de facto government of Afghanistan, did not want to dis-associate itself from the terrorist group that it provided shelter and protection to, which meant that any military action that was taken against Al Qaeda that would lead to a confrontation with Afghanistan in practice.

### 3.2. The UN Charter in light of the right to preventive self-defence in the case of potential threats

The debate about the suitability of the Charter to respond to threats that are not foreseen at the time they are adopted has also been advanced for the purpose of dealing with latent or potential threats. The issue took on special significance following the

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Afganistán: una comparación ante el Derecho Internacional”[“Iraq and Afghanistan: a comparison in International Law”]. Elcano Royal Institute, ARI no 10/2008, 14.I.2008, p. 3.

26 DELBRÜCK, Jost. “The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on the International Legal Implications of the ‘War on Terrorism’”, German Yearbook of International Law, 2001, p. 15. In the same regard, ZEMANEK, Karl. “Self-Defence against Terrorism; Reflexions on an Unprecedented Situation”, in MARIÑO MENÉNDEZ, F. El Derecho internacional en los albores del siglo XXI. Homenaje al Profesor Juan Manuel Castro-Rial Canosa [International law at the dawn of the XXI century. Homage to Professor Juan Manuel Castro-Rial], Madrid, Trotta, 2002, pp. 702-705.

Adoption of the National Security Strategy of the United States of America, of September 17, 2002, by virtue of which “the capacities and targets of today’s adversaries” would have the effect of legitimating military action against potentially devastating threats “although uncertainty exists as to the time and the place of the enemy’s attacks.”<sup>27</sup> An attempt has been made to justify the enlarging of the concept of self-defence, so as to extend it to the preventive use of force, aimed at eliminating a latent threat, by adducing that the danger that is present is so high that we cannot wait for the threat to materialise because the harm would be inevitable. The American Security Strategy sought to emphasise its defensive essence by re-affirming that the exercising of this was subordinate to the principle of necessity and that the use of preventive force could not be a pretext for aggression.

The Report from the High-level Panel of Experts echoed the severity that could be entailed with latent threats, which are not imminent or likely to happen soon but they are real. It categorically discarded the argument that self-defence could be invoked against these. When the threat or the danger is not imminent they should be referred to the Security Council for consideration, leaving the collective security system to act.<sup>28</sup> The reasons are clear, given the proliferation of potential threats:

“The risk for world order and for the non-intervention norm that it continues being based upon is simply too big to accept the legitimacy of unilateral preventive action, in contrast to that which is collectively approved. Letting one act is like letting all of them act.”<sup>29</sup>

Some of the arguments put forward by the current American administration to justify the lawfulness of the deadly selective attacks seem to assume a return to the discourse on preventive self-defence, albeit under another name. The speech of the Attorney General, Eric Holder, of March 5, 2012, invoked the right of self-defence “against an Al Qaeda leader or an associated force that constitutes an imminent threat of violent attack”. By specifying the criteria that are used to weigh up whether an individual poses an imminent threat he is asserting that because of the particular characteristics of Al Qaeda and its modus operandi, “the Constitution does not require the President to delay action until it reaches the final stage of its plan, that he should determine the place and type of attack with clarity”<sup>30</sup> A threat described in this way

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27 National Security Strategy of the United States of America, 2002: title V: The new National Security Strategy, published in March 2006, reiterated these particular principles.

28 A more secure world, para. 193.

29 A more secure world, para. 191. The Secretary General’s Report spoke in the same terms (cf. A broader concept of liberty, para. 125).

30 Attorney General Eric Holder’s Speech on Targeted Killing at the Northwestern University School of Law, March 5, 2012. A classified Memorandum from the Department of Justice, leaked by NBC News, on February 5, 2013, sets out the same idea and it states that “it is not necessary for the United States to have clear proof that a specific attack is going to take place against people or interests of the United States in the immediate future .... with respect to the Al Qaeda leaders

is not necessarily imminent<sup>31</sup>, and it demonstrates the questionably legal grounds in which the expansion of selective delay attacks is based.<sup>32</sup>

#### 4. New Threats And New Needs Concerning Collective Security: The Validity Of Chapter VII Of The Charter

The UN Charter states that the Organisation will take “effective collective measures for the prevention and removal of threats to the peace, and for the suppressions of acts of aggression or other breaches of the peace” with the aim of keeping international peace and security. This goal appears as announced as the first purpose of the Organisation (Art. 1.1).

The legal framework for the adoption of coercive actions is fundamentally set out in Chapter VII, which the charter has conferred the primary responsibility on for keeping international peace and security (article 24.1) and the possibility of adopting decisions that are binding on the member states (article 25). The Security Council decide when and how to apply the Charter’s mechanism. To do this, firstly, it has to determine that a situation constitute a threat to peace, a breach of the peace or an act of aggression (art. 39). If it considers it pertinent it can adopt provisional measures to stop the situation worsening (article 40). Finally, the Council has to decide which measures are necessary to maintain or re-establish international peace and security, which may be of a non-military nature (article 41) or that could involve the use of force (article 42).

##### 4.1 Action against latent threats

In making its statements against legitimate preventive defence, the High-level Panel had affirmed that latent threats had to be submitted to the Security Council for consideration:

“The text of Chapter VII is sufficiently extensive in itself and it has been interpreted

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who are constantly planning attacks. The United States will foreseeably have a limited window of opportunity to defend Americans in a way that have some chance of success and that sufficiently reduces the likelihood of harm to civilians”. (Department of Justice White Paper, Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al Qaida or an Associated Force, pp. 6 and 7).

31 HAAS, Richard. “The President Has Too Much Latitude to Order Drone Strikes”, Wall Street Journal, February 18, 2013.

32 BROOKS, Rosa. “Mission Creep in the War on Terror”, Foreign Policy, March 14, 2013.

with enough latitude so that the Security Council can approve all types of coercive action, including the military action, against a State when it considers this necessary to keep or re-establish international peace and security”. This occurs whenever the threat may take place, if it is right at that time, in the imminent future or in a more distant future at such a time, which involves the particular State or non-state agents that it protects or provides support to acting in such a way, or that comes in the form of an act or omission, that represents a real or potential threat of violence or simply a challenge to the Council’s authority”<sup>33</sup>.

The Report stresses that the reasons that lead it to reject the legitimacy of the preventive use of military force in the case of self-defence, by virtue of article 51, “are not applicable to the collective action authorised by virtue of Chapter VII”. The Secretary General also refers to latent threats to the competence of the Security Council, which has full authority, “to make use of military force, even in a preventive manner, so as to keep international peace and security”<sup>34</sup>.

This last observation is associated with other considerations about the 2003 Iraq war. The Report seems to place conditions in making an over-simplistic analysis of the right of-defence. The United States based its argument for the lawfulness of its action on The legality of American and British intervention in Iraq was not covered by an express authorisation from the Security Council and neither was it in line with the Security Council resolution 1441(2002), which had been unanimously adopted, even though it had invoked a right of preventive self-defence against international terrorism. Other states, on the other hand, argued that resolution 1441 did not authorise the use of force in itself, which had required the adopting of another additional resolution.<sup>35</sup> This would be a demonstration of what WECKEL calls the culture of the ‘grey area’ within the sphere of the prohibition against the use of force, basing himself on amigós language, creating a legal form of uncertainty that makes it possible to give consideration to opposing arguments.<sup>36</sup>

#### 4.2. Chapter VII of the Charter and the responsibility to protect

The possibility of intervening an end to mass atrocities committed against the

33 A more secure world, para. 193.

34 A broader concept of liberty, para. 125.

35 For a setting out in summary form of the doctrinal analyses of the purposes of the 2003 Iraq war see IOVANE, Massimo/ DE VITTOR, Francesca. “La doctrine européenne et l’intervention en Iraq”, *Annuaire français de droit international*, 2003, pp. 17-31.

36 Cfr. WECKEL, Ph.: “Interdiction de l’emploi de la force: de quelques aspects de méthode”, en *Les métamorphoses de la sécurité collective. Droit, pratique et enjeux stratégiques*, SFDI, Paris, Pedone, 2005, pp. 189-190.

population within a State has divided the members of the international community, amongst whom they defend a “right of humanitarian intervention” and those who adduce that neither are the States entitled to unilateral action, nor can the Security Council authorise coercive measures, by virtue of Chapter VII, against sovereign States because of what happens within its borders.

In the Millennium Report, of the year 2000, the Secretary General set out the debate in the following terms:

*“... if humanitarian intervention is, in reality, an unacceptable attack on sovereignty, how should we respond to situations like Rwanda and Srebrenica, and the serious and systematic violations of the human rights that transgress all of the principles of our common humanity?”*

The report of the International Commission on Intervention and State Sovereignty (ICISS), entitled the responsibility to protect, published in December 2001, sought to provide an answer to this question. The Report underlines the argument that each State has the principal responsibility for protecting its population and the international community has subsidiary responsibility, when it is clear that a certain State “does not wish to or cannot comply with its responsibility to protect or the material author of the crimes or atrocities, or when the actions that take place in said State entail a direct threat to other people that live outside it”.<sup>37</sup> In this latter case, according to the Report, the responsibility to protect of the international community would have the priority over the principle of non-intervention.<sup>38</sup> The Report cautiously stated that international practice seemed to point towards the appearance of a norm in this respect, which is still in the process of coming together.<sup>39</sup>

Four years later on, the High-level Panel followed the line traced out by the Commission, underlining the change that the international community had been going through in its way of understanding sovereignty and the acceptance of a collective responsibility to protect. The exercising of this form of responsibility could lead to the adoption of coercive actions of a different nature, including military action even though this may be a last resort.

As for the authority legitimated to adopt such measures, the Commission had

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<sup>37</sup> The ICISS expressly states that this responsibility is due to three reasons: “firstly, it means that the state authorities are responsible for protecting the life and safety of its citizens and promoting their well-being; secondly, it suggests that national police authorities are responsible to citizens at the internal level and the international community through the United Nations, and thirdly, they have to settle accounts for their acts or omissions. This concept of sovereignty supported by the growing influence of human rights standards and by the increased presence of the concept of human security in international discourse”. Cfr. The responsibility to protect, para. 2.15, p. 14.

<sup>38</sup> The responsibility to protect, para. 2.28 y 2.29, pp. 17-18.

<sup>39</sup> The responsibility to protect, para. 2.24, pp. 16-17.

indicated that it should be the Security Council as the body primarily responsible for keeping the international peace and security. In this same regard, pronouncements were made by the High-level Panel <sup>40</sup> and the Secretary General.<sup>41</sup>

The 2005 Summit Declaration provided support for this idea, although it is evasive by characterising it as a principle or norm, terms used by the reports mentioned above. The Declaration formulates the notion in the following terms:

“138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. (...)

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations, as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, ethnic cleansing and crimes against humanity.”<sup>42</sup>

It only admits the possibility of intervening militarily as a last resort and with the Security Council's authorisation by virtue of Chapter VII of the Charter. Announcing the concept in this way, there are still some issues less to resolve. In particular, if an action by a State or a group of States would be lawful in the event of the Council becoming stagnated by the veto of a permanent member. For a large part of this doctrine, these armed interventions for humanitarian purposes, if they are indeed carried out without the Security Council's authorisation, they represent a transgression of international legal order, as it assaults the sovereignty of the States and the rule that guarantees the inviolability of their territories. It has also demonstrated prevention in a situation of the possibility that covers interest and goals that are not strictly humanitarian.

Without wanting to reproduce the long debate about humanitarian intervention in these pages, it is worth going back to some of the elements that are relevant in analysing the scope of the responsibility to protect. The international community has reacted in different ways in diverse cases of intervention, despite the presence of humanitarian factors in all of them. India's interventions in East Pakistan (Bangladesh) in 1971, that of Tanzania in Uganda with the aim of overthrowing Idi Amin, in 1979, that of Vietnam

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40 Cfr. *A more secure world*, para. 203: ““We approve the norm that is being imposed in the sense of there being a collective international responsibility to protect, which the Security Council can exercise by authorising military intervention as the last resort in the case of genocide and other large scale massacres, of ethnic cleansing or serious violations of international humanitarian law that a sovereign government has not been able or not wanted to prevent.”

41 *A broader concept of liberty*, para. 135.

42 2005 World Summit Outcome Document, A/RES/60/1.

in Cambodia, bringing an end to the Pol Pot regime and the atrocities committed by the Cambodian authorities or the French intervention to overthrow Bokassa in the Central African Republic, constitute examples of such forms of intervention. The actions of India, Tanzania and France were not condemned by the Security Council or by the General Assembly. Vietnam's intervention, however, was condemned by the Security Council: although it did bring an end to the genocide perpetrated by the Khmer Rouge in Cambodia, more weight was given to the history of the Vietnam regime on human rights and the line of geo-strategically fracture between the powers that backed Cambodia or Vietnam.<sup>43</sup> Echoing this action by the Council, Schachter concludes that when a State or a group of states uses force without the authorisation of the Security Council, to bring an end to atrocities being committed against the population, if there is a clear need for intervention and an obvious humanitarian intent, is likely that its action will not be condemned.<sup>44</sup>

On more recent dates, other interventions also stirred up controversy such as those of France, the United Kingdom and the United States in Iraq in 1991, declaring an exclusion zone for the Iraqi armed forces to the north of parallel 36, dispensing humanitarian aid and deploying troops on the ground with the aim of protecting the Kurdish population and assist with the arrival of humanitarian care: those of the ECOWAS (Economic Community of West African States) in Liberia (1989) and in Sierra Leone (1997) and that of NATO in Kosovo, in 1999. In judging each case of the use of force, the Security Council seems to have opted to weigh up considerations of legality and legitimacy. In some cases, mention was made of a posteriori ratification or approval of the unauthorised uses of force by the Security Council. While we should make note of the fact that the Security Council debates conclude without the condemning of a certain piece of action is not necessarily equivalent to a posteriori legitimisation of said action: when the use of force is carried out by one or various members of the Council, or by an allied country, the veto mechanism makes condemning the action unthinkable. We could speak about a posteriori ratification in the case of the military interventions of ECOWAS in Liberia and Sierra Leone, where the Security Council expressly praised the organisation for its efforts in order to re-establish peace and security (Resolution 788, of November 19, 1992, in the case of Liberia; Resolution of 1260, of August 20, 1999, proposed by Sierra Leone). However, although it has been affirmed that resolution 1244 (1999), of June 10, represented a form of backdated authorisation of the use of force by NATO in Kosovo in 1999, said resolution does not contain clauses that praised the Alliance's intervention. The Security Council, however, adapted itself to the situation that had been created and it acted in a pragmatic way, backing the agreement between the parties on the principles for the political solution of the Kosovo crisis, and assuming the primary solution that was its responsibility in keeping international peace and security. The Report of the Independent Commission on Kosovo concluded that NATO's action was not

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43 GRAY, Christine. *International Law...* op. cit, p. 33.

44 SCHACHTER, Oscar. *International Law in Theory and Practice*, op. cit, p. 126.



legal but it was legitimate, because this became necessary after having used up the diplomatic route and there was a serious risk of a humanitarian disaster.<sup>45</sup>

Several authors have expressed their difficulty in reaching a conclusion about the lawfulness in cases of this nature. On the one hand, they state that the legality of an intervention not involving the Security Council is admitted but this would cast doubt on the validity of the legal regulation of the Charter.<sup>46</sup> Then again, it is added that each case of humanitarian intervention must be assessed in light of the specific circumstances, which not just include considerations concerning the need to protect the human rights of the populations in danger, but also to what extent the parties have tried to act in the manner most in accordance with the law.<sup>47</sup>

Notwithstanding, the consensus reached at the 2005 Summit, some states have declared their suspicion about the possibility of the responsibility to protect is used as an instrument of continuity of interventionist policies<sup>48</sup> and in light of their possible selective application.<sup>49</sup> The debates at the Security Council about the protection of civilians in armed conflicts are a reflection of the divisions generated around the concept.<sup>50</sup> The work of the Secretary General dealing with the responsibility to protect has taken the form of a multitude of reports that have focused every time on a different element of the concept.<sup>51</sup> The reports set out the different aspects of

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45 Independent International Commission on Kosovo: *The Kosovo Report*, available at <http://www.reliefweb.int/library/documents/thekosovoreport.htm>. The report proposed an interpretation of the humanitarian intervention doctrine that is halfway between a review of international law in force and a proposal for international moral consensus. This would involve overcoming the rigidity of the legality, incorporating criteria of legitimacy. In this sense, the Report asked for a review of the applicable law so as to make it more consistent with the international consensus.

46 CASSESE, Antonio. "Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community", *European Journal of International Law*, vol. 10 (1999), pp. 23-30.

47 SIMMA, Bruno. "NATO, the UN and the Use of Force: Legal Aspects", *ibid*, p. 1-22; GUTIÉRREZ ESPADA, Cesáreo. "Uso de la fuerza, intervención humanitaria y libre determinación (La 'Guerra de Kosovo')" [Use of force, humanitarian intervention and free determination (The Kosovo War)], *Anuario de Derecho Internacional (International Law Yearbook)*, 2000, pp. 93-132; Franck, Thomas. "In extremis: are there legal principles applicable to the illegal use of force?" en L.C. Vohrah (ed.) *Man's Inhumanity to Man*, Kluwer Law 2003, pp. 935-952.

48 FOCARELLI, "La dottrina della 'responsabilità di proteggere' e l'intervento umanitario", *Rivista di Diritto Internazionale*, 2008/2, pp. 317-346.

49 In this respect, Mexico (UN Doc. S/PV.5703, o, 28), China (UN Doc. S/PV.5703, p. 17), Qatar (UN Doc. S/PV.5703, p. 11) and Colombia (UN Doc. S/PV.5703, p. 39).

50 Security Council SC/10442, 6650th meeting, November 9, 2011 (available at [responsibilitytoprotect.org](http://responsibilitytoprotect.org)).

51 The first report (*Making the responsibility to protect effective*, Doc. A/63/677, January 12, 2009), focused on the three pillars of the concept and on the function that the international community performs for applying this. The second report analysed the responsibility to protect from the perspective of an early warning and the evaluation of this (A/65/877-S/2011/393). Lastly, the fourth report (*The*

the responsibility to protect and contribute useful information about the positions of the states, although they fail to make decisive contributions as regards practically detailing the party involved and the obstacles that have to be overcome so these can be effectively exercised. This is in spite of the fact that the last two were prepared after the Libya crisis.<sup>52</sup> In his speech to the General Assembly on September 25, 2012, the Secretary General again set out the need to “endow the responsibility to protect with a specific meaning.”<sup>53</sup>

Although the “responsibility to protect” was incorporated into some Security Council resolutions<sup>54</sup>, this did not especially have consequences in practice until the military intervention in Libya of March 2011.<sup>55</sup> In resolution 1973 (2011), March 17, 2011, the Security Council, after reiterating the responsibility of the Libyan authorities to protect their own population and condemning the serious and systematic violation of the human rights that was taking place, looked at Chapter VII of the United Nations Charter and it authorised the Member States so that, acting nationally or through regional organisations or agreements, they could adopt all of the measures necessary so as to protect its civilians and the areas populated by civilians under threats of attack, although excluding the deployment of troops on the ground.<sup>56</sup> The focus

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responsibility to protect: timely and decisive response, A/66/874-S/2012/578, of July 25, 2012), is focused on the different dimensions of the third pillar of the concept, dealing with the responsibility of the Member States to adopt collective measures, both peaceful and coercive, always in accordance with the Charter and, as the case may be, through the Security Council, when prevention fails and it is clear that the national authorities are not protecting their populations from genocide, war crimes, ethnic cleansing or crimes against humanity (Making the responsibility to protect effective, Doc. A/63/677, para. 11).

52 Tracking the evolution of the concept is illustrative; in this respect see CERVELL HORTAL, María José. *Naciones Unidas, Derecho internacional y Darfur* [United Nations, International Law and Darfur], Granada: Ed. Comares, 2010, pp. 52-76.

53 Following the presentation of the first of the Secretary General’s reports, the General Assembly began an informal dialogue with annual meetings based upon preliminary reports from the Secretary. The last one was on the dialogue about the “Secretary General’s Report on the responsibility to protect: timely and decisive response”, held on September 5, 2012.

54 The first one to incorporate this was resolution 1674 (2006), in which the Council “Reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity” (paragraph 4). Later on, the Council mentioned this in dealing with the protection of civilians in armed conflicts, for example, in the Preamble of the resolution 1894 (2009), of November 11.

55 HERRERO DE LA FUENTE, Alberto, *La crisis de Libia* [The Libya crisis] (2011) and *la responsabilidad de proteger* [the responsibility to protect], Inaugural Lecture of the academic year 2011-2012, University of Valladolid, 2011, pp. 9-16.

56 It has been stated that “in this way the intention was to calm the concerns and the bad memories of the Kosovo action (1999) and Iraq (2003), which were illegal and aggressive interventions with land occupation”. See MANGAS MARTÍN, Araceli. “La autorización del uso de la fuerza armada en Libia” [The authorisation of the use of armed force in Libya], *Elcano Royal Institute Analysis*, 57/2011.

of the responsibility for military intervention lay with the United States, France and Great Britain, in an operation that would ultimately be conducted under NATO direction.<sup>57</sup> Putting this operation into practice for the first time has not been exempt from controversy, owing to the mode it was carried out and owing to its end result.<sup>58</sup>

Some heralded armed intervention with the Security Council's backing as a triumph of the doctrine of the "responsibility to protect".<sup>59</sup> Others pointed to a possible exceeding of the limits of the mandate of the resolution in conducting the operation, which was stated in the numerous declarations of the political leaders of the countries involved, according to whom one of the goals of the intervention had become a change in the Libyan regime. Resolution 1973 does not contain any mention about Gaddafi's future, nor did it set the goal of overthrowing the current regime in Libya.<sup>60</sup> The international coalition however, went on to decide that the only acceptable final scenario to guarantee the protection of the civilians was for Gaddafi to leave power.<sup>61</sup> Numerous analysts declared their objection on considering another aspect of the intervention: its poorly defined strategy. Using regime change, as the goal had not been accompanied by an assessment of the potential implications that overthrowing President Gaddafi could have on a state like Libya, characterised by its low level of institutionalisation.<sup>62</sup> Finally, when it was then possible to consider that the Gaddafi regime had been defeated, the Security Council would "welcome

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57 On March 27, the Alliacne assumed the responsibility to implement all of the aspects of the Security Council resolution 1973 and, on March 31, it officially took over command of the operation.

58 BERMEJO GARCÍA, Romualdo. "La protección de la población civil en Libia como coartada para derrocar un gobierno: un mal inicio para la responsabilidad de proteger" ["The protection of the civilian population in Libya as an excuse for overthrowing a government: a poor start for the responsibility to protect"], XXVII Anuario de Derecho Internacional [International Law Yearbook], 2011, pp. 9-55.

59 Gareth EVANS, one of the parents of the concept, argued that this was not a question of a bombardment by democracy or to obtain Gaddafi's head, but rather that "legally, morally, politically and militarily, it only has one justification, to protect the country's population" (BAJORIA, Jayshree. "Lybia and the responsibility to protect", Council on Foreign Relations, March 24, 2011, available at <http://www.cfr.org/libya/libya-responsibility-protect/p24480>)

60 In accordance with the United Nations mandate, on repeated occasions NATO asserted that the sole purpose of the international bombings was to protect the population and that when the violence ended, these would come to an end. Initially, Obama also declared that the objective of the United States and of the international intervention was to avoid a massacre by Gaddafi's troops against the dissidents, and he declared that overthrowing the dictator by force was not amongst the coalition's plans because that would entail weakening and dividing the allies, repeating the errors committed in Iraq (cf. European Mediterranean Institute. Cronología de las revueltas en el mundo árabe 2010-2011. Libia [Timeline of the uprisings in the Arab world 2010-2011 (<http://www.iemed.org/dossiers/tunisia/cronologies/Julio22/Libia22julio.pdf>)).

61 B. Obama, D. Cameron and N. Sarkozy. "Libya's Pathway to Peace". The New York Times. April 14, 2011.

62 HAAS, Richard N. "Why Europe No Longer Matters", Council on Foreign Relations, Op-Ed, June 17, 2011, p. 1 (available at <http://www.cfr.org/europerussia/why-europe-no-longer-matters/25308>).

the improvement of the situation of that country”, encouraging the setting up of an inclusive and representative transnational government.<sup>63</sup>

Thus we see evidence of one of the risks inherent in the use of force in exercising the responsibility to protect: that the action ends up becoming an intervention in a civil war for the benefit of the faction opposing the regime which is surely usually the weakest side.<sup>64</sup> In the debate about the responsibility to protect, held at the General Assembly in September 2012, some states declared their concerns about the way in which the responsibility to protect in Libya had been invoked, pointing out that this was one of the reasons that had led to the impasse over Syria.<sup>65</sup> Drawing up the balance sheet for applying the concept to the General Assembly, in September 2012, the Secretary General stressed that the responsibility to protect had attained a particular leading role during the previous year and a half, noting that it had been applied in Libya, Yemen and Syria by means of resolutions of the Security Council and the General Assembly. Following on from the work of the High Commissioner for human rights and his two Special Advisors, the responsibility to protect was also invoked in the Ivory Coast, Guinea, Kyrgyzstan, South Sudan, Sudan and the Democratic Republic of the Congo, amongst others. In the opinion of the Secretary General, the cases of the Ivory Coast and of Libya represented a degree of success of the responsibility to protect, although the resulting situation has still been problematic. Syria, on the other hand, exemplified a new failure. The range of examples and the reference to the work of bodies other than the Security Council show the intention to emphasise the wide sweep of courses of action that are possible in order to exercise the responsibility to protect. This means that only the final part of one of the ends of the doctrine would entail the authorisation of the use of force by the Security Council. Mentioning the example of Syria, however, shows that that one is the most sensitive element, where the failure of the responsibility to protect results in serious human costs.<sup>66</sup>

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63 Security Council Resolution 2009 (2011), of September 16. For an analysis of the Security Council's action, see BLANC ALTEMIR, Antonio. *La Unión Europea y el Mediterráneo. De los primeros Acuerdos a la Primavera Árabe* [The European Union and the Mediterranean. From the first Agreement to the Arab Spring], Madrid: Tecnos, 2012, p. 228-229.

64 WALZER, Michael. “On Humanitarianism: is helping others charity, or duty, or both?”, *Foreign Affairs* nº 90, 2011, pp. 69-80. As this author highlights, all humanitarian action is a political project whose success means that it is necessary to have sufficient information, commitment to justice and preparation to carry out a prudent weighing up of the damage inherent to all military interventions and the good it is intended to achieve.

65 UN Press Release, General Assembly, GA/11270, Department of Public Information, United Nations, New York, September 5, 2012. The Secretary General has, in this regard, stated that the fears about the inappropriate use of the concept would not have inhibited the international community from dealing with serious cases of violence or inciting violence. Although the cases of inhibition on the part of the international community are less due to scruples regarding the interventionism in small states than the Security Council being blocked by any of its permanent members.

66 UN Press Release, Secretary General, SG/SM/14490-GA/11271, Department of Public Information, United Nations, New York, September 5, 2012.

## 5. CONCLUSIONS

In the same way as in other sectors of International Law, the regulation of the use of force covers areas in which it is especially complex to determine what forms part of the rule in force and what still represents an aspiration. During the course of this paper, we have attempted to demonstrate the ambiguity of the legal regulation of the Charter and some of the essential problems raised by its interpretation and application nowadays.

During the last decade different problems of interpreting the right of-defence have come to the fore, particularly the dispute between the supporters (in a minority) and detractors of a right to preventive self-defence to latent threats. There is also the possibility of invoking self-defence so as to cover the military response to the terrorist attacks of September 11, and the acceptable extent of this interpretation. The preparatory Reports of the Millennium Summit held in 2005 coincide in stating that the Charter provides coverage to the use of force in self-defence when faced with a consummated armed attack, or faced with an imminent threat of this. Conversely, the argument of invoking self-defence in order to justify unilateral actions against derived latent threats, fundamentally from international terrorism, would not gain support from the Charter. Only the Security Council, acting within the context of Chapter VII, could authorise the preventive use of force to preserve international peace and security when faced with serious but latent threats.

Another issue that takes centre place in the agenda of several of the main bodies of the UN was the emergence of a collective responsibility to protect the civilian population against war crimes, ethnic cleansing and crimes against humanity. While some reports from independent experts assessed this as an emerging principle, the General Assembly lowered expectations in the 2005 Summit Outcome Document. Later reports from the Secretary General, as well as the dialogue held by the General Assembly about the responsibility to protect, have contributed towards explaining the content of this significant element, although the problems concerning its legal nature and effective application still need to be further set out in detail. This is one situation that reveals the division that the concept has aroused, especially in its coercive dimension. The responsibility to protect covers a wide range of instruments, from preventive measures of varied nature to other collective ones of a non-military character. Only in extremely serious situations and when the necessary requirements are met, can it be necessary to intervene in a military sense. This solution is always exceptional and it must be in line with the terms laid down by the Charter, and so it is subject to prior Security Council authorisation.

Both cases, exercising the responsibility to protect and reacting to latent threats, involve the Security Council acting according the provisions of the Charter. The system therefore revolves around the Council assuming this responsibility. Experience shows that if the Security Council does not act, it is hard to stop States particularly interested or affected by the situation from intervening unilaterally.

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