THE IMPACT OF THE US UNILATERALISM ON INTERNATIONAL LAW

-The Situation of Jus Ad Bellum After September 11-

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Abstract

Title:The Impact of the US Unilateralism on International Law -the situation of 'jus ad bellum' after September 11-

This study aims at addressing the question of what can be the long-term implications of the US unilateralism on international law especially on *jus ad bellum* with regard to the United States' hegemonic position in the system. Even though an endless debate over the legality of the US actions seems in vain, to answer this question is only possible by a detailed analysis of the US justifications in resorting to force after September 11 attacks. Considering the historical continuity of the United States' unilateralist policies in post cold war epoch, such an analysis interrogating the US arguments can reveal the comprehensive consequences of these policies on international law. To achieve this goal, this study will start with an introduction to the notion of American unilateralism by examining its instances in trade, environmental and humanitarian issues. Then, America's war on terrorism as well as the surrounding concepts such as rogue state, axis of evil and succeeding operations to Afghanistan and Iraq will be evaluated within the present legal framework. Many of the authors who have written on the legal issues arising out of the United States' operations against Afghanistan and Iraq usually concentrate on the validity of the US justifications without considering the long term implications of these justifications. However, the United States' arguments certainly deserve a closer look with regard to the fact that the United States' unilateralist stance towards international legal body and norms governing the use of force might be seen as an indicator of American efforts to expand existing limits of normative framework of law on behalf of its policy ends. As a consequence, it might be possible to understand how the US actions trigger the transformative –or devastating- changes on the existing norms of international law.

Özet

Başlık: Amerikan tek taraflılığının uluslararası hukuk üzerindeki etkisi-11 Eylül sonrası jus ad bellum'un durumu-

Bu çalışmanın amacı, egemen güç olan Amerika'nın tek taraflı eylemlerinin uluslararası hukuk özellikle de *jus ad bellum* üzerinde uzun vadedeki etkilerinin ne olacağı sorusuna cevap bulmaktır. Her ne kadar Amerika'nın başlattığı savaşların yasallığı üzerine süregelen tartışmalar, perspektiflerinin şimdiki zamanla sınırlı olması hasebiyle yararsız addedilse de, mevcut problemin cevabı yine 11 Eylül sonrası Amerikan argümanlarının detaylı bir değerlendirmesi ile ortaya çıkacaktır. Amerika Birleşik Devletlerinin soğuk savaş sonrası artan tek taraflı hareket etme eğilimini göz önünde bulundurursak; bu ölçekte bir analiz Amerika'nın hukuk üzerinden hakimiyet kurma çabasının uzun vadedeki sonuçlarını göz önüne sermek için gereklidir. Bu amaçla, çalışmada önce Amerika'nın soğuk savaşın bitişine müteakip ticari ilişkiler, çevresel konular ve insan hakları konusunda tek taraflı edimleri incelenerek kavrama giriş yapılacak; ardından 11 Eylül olayları ve sonrası Amerikan operasyonları –*Sürekli Özgürlük* ve *Irak'a Özgürlük*- kuvvet kullanımı ile ilgili hukuki çerçeve kapsamında tartışılacaktır. Amerika Birleşik Devletlerinin Afganistan ve Irak operasyonları üzerine yapılan tartışmaların çoğu Amerikan işgalinin hukuki olup olmadığı üzerinde yoğunlaşmıştır ve bu operasyonların uzun vadedeki muhtemel sonuçlarını göz ardı etmektedir. Ancak, Amerika'nın genelde uluslararası hukuk sistemine özelde ise kuvvet kullanımını düzenleyen kurallara karşı tek taraflı ve dayatmacı tutumu -bu süper gücün hukuk kurallarını kendi çıkarlarına uygun şekilde esnetme çabası göz önüne alınırsa- kesinlikle daha yakın bir incelemeyi hak etmektedir. Ancak bu şekilde Amerikan eylemlerinin hukukun mevcut kuralları üzerindeki -kimilerince tahrip edici- dönüşümü nasıl tetiklediği anlaşılabilecektir.

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PREFACE

Beside its political, economic or military connotations in the history, September 11 also has a standing point in our personal histories. It is noteworthy that most people accurately remember where they were or what they were doing when they first heard the news about the attacks. It is a milestone in our lives just like the bombing of Hiroshima and Nagasaki or the collapse of Berlin Wall was for their witnesses. When I first heard of September 11 attacks, I was about to go to another city to study international relations. In this sense, I can assert that my education started in the aftermath of the attacks and continued in the shadow of the response of the United States, because at least for international relations discipline, September 11 was a breaking point that rendered every explanation of post cold war system up to 9/11 somehow obsolescent. Every prediction about economic, political (e.g. belief of the end of history, declaration of the triumph of liberalism) or cultural (it is an interesting detail that 2001 was announced as 'dialog year' by the UN) future needed a revision.

Yet, it is well known that politics is flexible/modifiable in and by its nature. It adapts itself to every change even to the most fundamental ones and always puzzles patterns. On the other hand, it is hardly possible to assert the same thing for law. Beyond the codification of legality in written rules and consented treaties of modern times; the 'just' and 'unjust' notions find their roots in ancient ages (Vagts, 2004). Law renovates quite slowly, and so represents a relative stability, because

every concept should first pass its exam against history. September 11 events challenged international law in this respect. As the victim of attacks, the United States eagerly declared present legal system's inability against the threat of recurrence of such attacks, and insistent on its so-called solution to the global security problems, started to impose its concepts on international law. The long process of the development of customary international law was replaced by the instant evolution of new rules due to the absence of powerful opposition against vigilante acts of Hegemon (Knight, 2002). Moreover, the strategic practices of the states were equated with the consent-based treaty rules (Lowe, 2003). Consequently, the basic norms of the international law especially norms governing the use of force seem to corrode by the unilateral acts of the victim of the terrorist attacks. As a matter of fact, September 11 attacks did not just start a completely new debate on these norms, but also intensified an old debate related to the role and capability of international law in times of hegemony (Krisch, 2005, Lobel, 2000, Schmitt, 2003).[1]

To understand the phenomenon, this study will focus on the impact of American unilateralism on jus ad bellum by scrutinizing the US' justifications in its operations against Afghanistan and Iraq after September 11 attacks, also considering some concepts of the United States foreign policy which are used in labeling threats posed by terrorist networks or their supporters. But before doing so, a conceptual framework of unilateralism will be drawn by a historical review of American

[1] This debate also revealed as the confrontation of politics and law. We can assert that Realist school of IR theory is mostly inclined to look at international law through an instrumentalist optic which recognizes international law as an essential tool for great powers to attain their interests (Keohane, 1997). On the contrary, international legal scholars often argue that international law has an independent effect on state behavior (Henkin,1979). In Boutros-Gali's words (1994): "today, even the most flagrant violators of international law feel compelled to assert the compatibility of their actions with its principles." (UN Documents, SG/SM/5202). A third approach to the role of law in international relations comes from constructivist school of IR discipline. According to this school of thought, norms do not merely influence on or simply shaped by the interests and behaviors of states. Rather, they redefine these interests and reconstruct their behavior (Finnemore and Sikkink, 1996).

unilateral acts on different issues in the last few decades to see the background of the concept.

It is crucial to evaluate the American claims of change revealed by September 11 attacks within the existing legal framework considering the fact that the attacked state is also the Hegemonic power of the world which barely graced international law since the beginning of the post cold war era. In this sense, one can assert that the United States embraced that opportunity to pave the way for its hegemony on international law. Yet, I believe that the US' justifications are not totally ambiguous or illegal as they are usually presupposed by the opponents of the United States' hegemony. Instead, the United States' language and mentality in its legal arguments usually catches the void or controversial points in legal documents and uses that infirmity of the text to justify its claims. In this sense, we can talk about a law-making process in American foreign policy planning which prioritizes the strategic gains (or 'vital interests' as repeatedly announced by American politicians) and functionalizes legal norms to achieve these gains. Thus, the problem at present is not the United States' efforts to legalize its unilateral acts by contentious interpretations of law but the imposition of its unilateral actions based on strategic choices as the precedent of new norms of law (Cohen, 2003). The US unilateralism generates a dangerous situation for law and merits a closer look.

Instead of going into details of my thesis, I would like to finish this part with a few explanations about two 'noticeably' unresolved points in my study. First one is about the objectivity of the evaluation of American unilateralism and the second one is about the use of the word 'hegemon' to denote the United States.

Main dilemma of any social study is its possible subjectivity in judgments. The legal studies are not an exemption to this rule. Legality might be a Janus-faced

phenomenon and although the limits and norms of law are well-defined in written sources, the interpretation of these norms is hardly independent of the theoretical perspective of the interpreter. With regard to the US justifications, same problem occurs. Most of the arguments defending American position are based on New Haven School's approach, which emphasized state practice –especially dominant states'- as the basic source of law (Slaughter, 1999). It is understandable that the US' unilateral acts and its justifications for these acts seem legitimate and legal for one accepting this approach. Yet at the same time, if you are a positivist who claims that international law is the sum of rules which states consented to in multilateral structures such as treaties and international organizations, then you might be highly critical of American actions and deeply concerned about the future of international law when such actions generated new norms. As indicated above, any evaluation of the legality of American actions or any estimation about the impact of these actions is usually shaped/manipulated by this methodological debate (Corten, 2006). The possibility to overcome this problem is correlated with the possibility to reach an agreed approach in any social science which seems very hard at any time. So, first I had to decide my approach in studying legal concepts and arguments. I can assert that my perception is somewhere between legal positivism and CLS which seems suitable for an analytical study about unilateralism. In this sense, my approach to the legal issues throughout the study will prioritize multilateral actions in law-making process with special emphasis on the legal language used by states rather than focus on the contemporary practices of powerful states.

Second problem was related to the use of the word 'hegemony' for the US predominance. I am definitely aware of the ideological debate on the concept of hegemony. Thus, instead of questioning the different –mostly pejorative-

connotations of the term and carrying the debate to this paper, I simply chose to refer to hegemony within its subtext for legal scholars. In this conception, hegemony should not necessarily mean an exercise of mere power between the dominant and the dominated but as a "certain type of relationship between the will of the leading state and the will of those it leads" (Triepel, 1938). A similar meaning might be extracted from the Alvarez's HIL definition which will be cited in the introduction chapter. Accordingly, I employed the term not as a synonym of *empire* –despite its use by many neoconservatives and also opponents of neo-conservatism- but as a label for the only dominant power in the world that possesses the ability to inflict its own system on the international community.

In conclusion, this study aims to advance our understanding about the interaction of hegemon and international law in order to generate a set of assumptions about the future of the international legal system.

"When the United States speaks, the world listens, so it matters what language the United States uses."

Rubin, 2000[2]

"We may find out that our self-defense requires further action with respect to other organizations and other states."

Negroponte, 2001[3]

"Words can be turned against me."

Baudrillard[4]

CHAPTER 1

INTRODUCTION

With the collapse of the USSR in 1991, the superficial stability of the Cold War period ended. During that period, two superpowers had deterred each other from using conventional weapons with the threat of a nuclear catastrophe that would destroy both sides. Yet, this order of cold war period was just on the surface because even though the sword of Damocles prevented the United States and the Soviet Union from waging the Third World War, 100 million people died in hot conflicts, including civil wars, all over the world because of indirect power struggles between the two rivals.

[2] From an interview in TIME magazine.
[3] From the US letter that was sent to the UN Security Council to justify military operation against Afghanistan.
[4] From an interview in Der Spiegel, www.ubishops.ca/baudrillardstudies/spiegel.htm

However, with the end of the Cold War, suppressed ethnic tensions and regional hostilities surfaced once again in crises like the disintegration of Yugoslavia or the invasion of Kuwait. For the sole superpower –in Schmitt's words (2003) the victor of the global antithesis of the East and West in the new *nomos* of the earth - , the system is much more complicated now, with major powers resisting its hegemony, potential aggressor states seeking regional dominance and failed states trying to adapt to the market economy.[5] The triumph of liberalism could not bring on "perpetual peace" as it was expected but reintroduced a chaotic political environment with many minor and major conflicts revealed by the vacuum effect of the demise of the Communist Bloc.[6]

In this turmoil, Bush Senior's declaration of a "new world order" seemed too naïve and optimistic to cope with such threats, but after a while, it became clear that the United States had used that concept to mean a world led/ordered by its unparalleled power.[7] In accordance with this policy, the United States carried out many military actions in the name of managing global threats. The US resorted to force against Iraq (1991, 2003 and several strikes in 1993, 1996, and 1998) in Somalia (1993), in Bosnia and Haiti (1994), in Afghanistan (1998, 2001), struck targets in Sudan (1998), led a NATO bombardment on Serbia (1999), and Yemen

[5] For an analysis of the hegemonic nature of the United States see Vagts, (2003), Pfaff, (2001) and Ikenberry, (2001). For a more welcoming view towards hegemony see also Bolton (2000).
[6] According to Fukuyama (1992), the collapse of communist bloc also exposed the ultimate victory of liberalism against all competing paradigms. And the victory of liberalism would bring the end of history by stopping all major conflicts between great powers and ideological camps. Yet, many scholars from Realist school of IR theory were more pessimistic about this new era after the bipolar cold war term. For example, Mearsheimer asserted that multipolar system had caused great wars before (especially in Europe) and its return would also end the relative stability of cold war (Mearsheimer, 1990).
[7] This unilateralist tendency of the Hegemon is appraised as a natural consequence of unipolarity of post cold war political environment and appreciated as the most convenient behavior for the superpower (Kagan, 2002; Benvenisti, 2004).

(2002).[8] As a 'self-appointed leader'[9], the United States has mostly felt free to act unilaterally in these conflicts (Pellet, 2000; Habermas, 2003). Yet, the legal constraints on the use of force are still valid for the sole superpower. In pursuing its political interests, the United States, mostly depending on some universal moral notions such as "promoting freedom", "humanitarian concerns" or "supporting democracy", finds it difficult to obey the doctrine of *jus ad bellum*, which strictly defines the legal limits of the use of force without regarding the pretext of any action. Therefore, it is understandable that the United States of America started to seek a way to stretch these limits in the name of a necessary adaptation of international law to the changing threats of post Cold War environment and to impose new limits allegedly reflecting global interests –which are typically used interchangeably with the US interests (Mead, 2002).

This general effort to modify and reshape international law into a form to the advantage of the hegemon of the system is hardly a new phenomenon. In every age, each powerful state has tried to impose its will on international law to promote its own interests. As stated by Byers (2003a);

> In the sixteenth century, Spain redefined basic concepts of justice and universality so as to justify the conquest of indigenous Americans. In the eighteenth century, France developed the modern concept of borders, and that of the balance of power, to suit its continental strengths. In the nineteenth century, Britain introduced new rules on piracy, neutrality and colonialism – again, to suit its particular interests as the predominant power of the time. (p.173)

In this sense, the anticipated attitude of America against the norms of the use of force is correlated with its power as a hegemon and its inclination to use that power to dominate the international community by changing the basic norms of law

[8] The military superiority of the United States is the most unrivalled aspect of its power but besides its military interventions, the US unilateralist stance is evident in many other issues such as environment, trade etc. since the demise of the Cold War.
[9] For a detailed analysis of the self-appointed foreign policy leadership of America see, Wills, (1999).

such as equality of states or the prohibition of the use of force. Military power is insufficient to secure hegemony by itself, so the US needs a well-established body of law suitable for hegemony – hegemonic international law as named by legal scholars- to preserve (and legally exercise) its unilateralist power (Vagts, 2003; Krisch, 2005; Berman, 2006).

> Hegemonic international law jettisons or severely undervalues the formal and de facto equality of states, replacing pacts between equals grounded in reciprocity, with patron-client relationships in which clients pledge loyalty to the hegemon in exchange for security or economic sustenance. The hegemon promotes by word or deed, new rules of law, both treaty based and customary. It is generally averse to limiting its scope of action via treaty; avoids being constrained by those treaties to which it was adhered; and disregards, when inconvenient, customary international law, confident that its breach will be hailed as a new rule.(Alvarez, 2003, p.873)

The events of September 11 and the developments in its aftermath should be evaluated within this context. Understanding the actions and the underlying motivations of the superpower is only possible through a closer examination of the United States' approach to international law during this strategic time period. The US could choose to violate the law concerning the use of force as it did many times before such as in Vietnam (1961-1973), Nicaragua (1980s), and Sudan (1998). Instead, it chose to imply a demand to alter the basic conceptualization of the generally applicable rules governing the use of force.[10] So, it is important to analyze the tensions between the existing legal constraints and the Hegemon's demands for change, and to evaluate the long- term implications of those demands.

In this sense, some questions arising from the US actions are as follows;

[10] Although these rules are deemed as 'generally applicable', it is hard to believe that demanded changes on these rules would be applicable to all states. Especially concerning the rules governing the use of force, new norms resulted from unilateral American actions will only fit to hegemon's interests and capability though they would be available for all states in principle. As rightly put by Byers (2003), "the right of self defense, has …extended…but though the extended right is in principle available to all states, in practical terms it is of use only to those with the ability and will to project military force (p.179).

- In what way do we need to understand the arguments of the US such as "preemptive self defense", "implied authorization" and "harboring state" under the norms of international law?

-What were the underlying dynamics of these US arguments and actions during the operations against Afghanistan and Iraq? Did the United States try to explain these actions under the present norms of legal system or choose to stretch its limits?

-Are American modifications of the law purely a result of the threats of a changing world or are they also a part of the reconstruction of international law in a form that might be manipulated by the hegemonic power?

-In other words, are the rising security concerns in post 9/11 context sufficient to understand American pressure on international law or should we also reconsider the new world order claims of America that have arisen shortly after the demise of the cold war and prior to September 11?

-What are the adjustments/revisions demanded by the United States to adapt international law to the changing security environment?

-How can we evaluate the operations against Afghanistan and Iraq? Aside from their moral or political aspects, what is their significance in international law with regard to the changes imposed in these wars?

-What is the position of the UN in this context? How can we read the Security Council resolutions during the operations? Did the United Nations really step aside its responsibilities as criticized by some commentators? Or was it insufficiently equipped to fulfill these responsibilities?

Answering some of these questions (and hopefully shed some light on the others) is only possible with a detailed analysis of the US justifications for the use of

force after September 11 attacks, also considering the historical continuity of the United States' unilateralist tendency during the post Cold-War epoch. For the purposes of such an analysis, the debates over the rules governing the use of force might be helpful to understand the more fundamental debate over the future of international law under the influence of the United States.

Although the US actions have become the center of every legal argument since World War II, legal academic analyses with regard to the underlying motives and possible legal outcomes of the US actions are relatively scarce. More often than not, legal scholars interpret the US actions in one way or another; either they ardently believe the legality of US justifications or they firmly denounce American disrespect against international law. In each case, they largely ignore the undermining effects of these actions on the body of international law. However, it is worth considering that the United States' legal advisors work hard to justify every action of the United States on an acceptable basis in international law since one of the foundational principles of the US is the *rule of law* (Byers, 2003a). In this sense, it is not enough to talk about the US' disdain against international law. We should look beyond the mere rhetoric and objectively evaluate US actions and justifications of these actions.

I believe that we are witnessing a process of shaping international law to a move toward hegemony through a superpower's distorted legal arguments which aim to perpetuate American hegemony even after its military or economic domination/superiority fades away. In this sense, the United States' unilateralist stance towards the international legal body generally, and particularly towards the norms governing the use of force, might be seen as an indicator of the US efforts to expand the existing limits of the normative framework of law on behalf of its policy ends with the claim of an exceptional status for itself. Thus, the essential point of any

study looking beyond plain legal argumentation should be its emphasis on the underlying logic of that language and the possible consequences of this logic/language on international law.

Shortly, my study aims to address the question of what can be the long-term implications of US unilateralism on international law, especially concerning the norms governing the use of force with regard to the United States' hegemonic position in the system. While posing this question, I propose three hypotheses to understand the phenomenon;

-American unilateralism -and disdain for multilateral bodies including the UN- is not a new phenomenon that suddenly emerged after the September 11 attacks but a long-term process that can be traced back to the end of the Cold War.

-American unilateralism during the operations against Afghanistan and Iraq which was exposed, by defusing the Security Council in the former case and by bypassing it in the latter, was part of the hegemonic strategy of the United States to acquire a greater space to impose its own conceptualization of legality.

-The debate over the legality of the US operations, American arguments and usually European counterarguments, should be evaluated according to the concept of hegemonic international law. Thus, the crucial point of debates concerning international law is not the lucid motives of the operations (e.g. fundamentalist terrorism, geopolitics, oil, the Taliban or Baath regime) but their justifications which might be invoked by the Hegemon in the future if they turn into a norm with the help of the extraordinary circumstances of September 11.

As things stand, America seems to feel free to act unilaterally beyond the existing legal body that are based on certain principles such as sovereign equality or prohibition on the use of force enshrined in the Charter, whilst presenting its long-

time doctrines as new rules of international law – presumably hegemonic international law. What really matters is not where things are but in what direction they are going. Yet, to accurately assess where things are going is only possible by an accurate description of where things are.

This study tries to understand the phenomenon by emphasizing the notion of unilateralism. To demonstrate the historical continuity in American unilateral acts more accurately and to shed some light on the pattern of these kinds of acts, American unilateralism (particularly in the post-cold war term) on the issues different from the use of force will be examined in the first part of the study. I also intend to depict the far-reaching aspects of American unilateralism, which epitomized in the US actions not only related to intrinsically problematic issues on the use of force but also quite ordinary issues i.e. exportation of products, fishing in high seas, or production methods of foodstuffs.

After this preliminary review of the concept of unilateralism and its usage in different issues, the central theme of the thesis, the manifestation of American unilateralism considering the norms of jus ad bellum will be scrutinized. For this reason, the second part of the study will start with an assessment of the legality of some American idioms, directly concerned/connected to the phenomenon of use of force, such as 'rogue states', 'axis of evil' and 'war on terror' which the United States has constantly tried to impose on the legal system. The examination of these idioms will be helpful to precisely evaluate the Afghanistan and Iraq wars which exemplify the United States' unilateral military answer to threats.

These two operations, *Operation Enduring Freedom* and *Operation Iraqi Freedom*, were not separate from each other or unrelated operations. On the contrary,

the Afghanistan and Iraq operations complemented one another in reconstructing the US unilateralism on the use of force.

Therefore, the last part of the study will be assigned to investigate the legality of the US arguments about these operations. A detailed analysis of American justifications will also reveal new concepts such as *harboring states*, *hostile regimes* or *preemptive war* which the United States unilaterally tries to attach to international law. Consequently, one-sided acts of America can be interpreted within the broader context of hegemonic international law which materialized in the imposition of these new norms into the existing international legal system by the United States.

As explained earlier, the aim of this study is to attain a clearer picture of the changing international law context, especially *jus ad bellum* in the post 9/11 world with respect to the unique position of the United States in the political system of the post Cold War era. American unilateralism might be the key term to understand that position and the possible effects on international law.

CHAPTER 2

AN OVERVIEW OF THE HISTORY OF THE US UNILATERALISM

The Definition of Unilateralism

Although unilateralism is not a new phenomenon either in international law or in international relations, it is impossible to overlook the increasing attention to the issue especially after the demise of the cold war. During the cold war era, the check-balance system between the two super powers compelled both sides to act in accordance with the norms of international law (at least on the surface) considering the serious consequences they might confront otherwise.[11] After the collapse of the Soviet Union, the world has witnessed a different kind of system– a 'hybrid' of unipolar and multipolar systems- with a sole superpower with superiority in military, economic, technological and cultural aspects and a few major powers without the ability to balance that superpower's hegemony but the desire to resist its superiority (Huntington, 1999).[12] Many scholars have repeatedly pronounced that the dominance of the superpower –the USA- is emphasized by its unilateral acts, which mostly contradict the basic norms of international law. As the unrivalled superpower, the United States of America freed from the constraints of the cold war feels less obliged by international law norms and more inclined to act unilaterally presenting its own interest based policies as new rules of law (Hathaway, 2000; Lobel, 2000).

[11] Besides, both of the super powers had established their blocs with their peripheral states and to attain agreement within these blocs was only possible by a rather multilateral policy.

[12] Yet at the same time, this description of the system is not accepted by all scholars. For example according to Nye (2003), the system could not be delineated by referring to the superiority of the state in only one dimension of power. On the contrary, the system at present shows a complex three dimensional structure which he defined as a chessboard. Military power might be the most important dimension (upper layer) of the structure but without dominance in middle layer (economic power) and bottom layer (transnational relations) it could not be possible to attain unipolarity. In this sense, Nye suggested that the system might be unipolar in the upper layer, but it is multipolar in middle and bottom layers.

It would be misleading to suggest that American governments have simply chosen to violate the law by depending on the US' military might. On the contrary, the problem at present is more complicated than a simple choice between different explanations of the world with the basic terms of two dichotomous traditions of political philosophy; on the one hand, a *Hobbesian* world under the rule of power and on the other hand, a *Grotian* world under the power of the rule. Actually, the existing debate is not revealed by the explicit denial of international law by the hegemon but by the hegemon's contentious interpretations of the place of its unilateral acts in international law. In Byers' words (2003b), "International lawyers in the Department of State, together with lawyers in other parts of the US government, have excelled in shaping the law to accommodate the interests of the United States" (p. 9). In this sense, it is very important to understand the debate in terms of the perceptions of parties with regard to international law. We can identify three groups of perceptions regarding the situation of unilateralism in international law in general, and the rising unilateralist tendency in the foreign policy of the United States, in particular.

The first group can be examined under the concepts of neoconservative ideology in the United States. Although it might be a misinterpretation to confine the enthusiastic support to the unilateralism in the US' foreign policy to neoconservatives, the American neoconservatism resembles the hard core of this line of thought. Since it is hard to identify a pure neoconservative tradition in the US political life considering the changing spectrum of the ideology in the last two decades, the basic principles or themes of the ideology can be extracted by looking at the characteristics of political positions of so-called neoconservatives at present.

The central thesis of neoconservative ideology is a belief in the universality of American values. This belief manifests itself as the justification of the American unilateral acts throughout the entire world in order to promote a specific "political form of life and the culture of a particular democracy that is supposedly exemplary for all societies" (Habermas, 2003, p.707). This argument is directly connected to the roots of neoconservative thought, which is based on the reaffirmation of the thought that the nature of a state's internal structure also affects the foreign policy of that state. Therefore, the stability of the international system is directly correlated to the internal character of each and every state. In this sense, to spread American values is a necessary step to constitute liberal democratic societies which act in accordance with the basic principles of international affairs (Fukuyama, 2006). Actually, the US strategy in the Middle East that is based on regime change in rogue states in order to make them system players exemplifies this line of thought. [13] Thus, the notion of benign hegemon which aims "to deploy American power in pursuit of global ends" is mostly supported by the leading scholars of the neoconservative tradition who believe that these global ends are also vital for the United States' national interests (Krauthammer, 2003; Kristol & Kagan, 2000).

Another important theme of neoconservative thought is American exceptionalism. As the sole superpower –with its unrivalled and unprecedented superiority in many aspects- the United States has the right and duty to act alone by its independent judgment to pursue both its own interests and its global ends (Hathaway, 2003; Habermas, 2003). Thus, multilateralism has come to be identified as a means to restrain the power of the hegemon and is regarded with contempt by

[13] America's historical record on the help and support to the authoritarian regimes in the past might have falsified that argument. But according to neoconservative view "…such alliances are nonetheless justified so long as they are instrumental (meant to defeat the larger evil) and temporary (expire with the emergency)." (Krauthammer, 2002)

the neoconservatives. International law in general and international institutions in particular, are also mistrusted in neoconservative thought (Fukuyama, 2006, Krauthammer, 2003). According to the basic principles characterizing the neoconservative line in foreign policy, international law is too weak and is insufficient to enforce its will on its subjects. To replace the power politics of the realist tradition with the norms and values of international law is a utopia that will never come to exist (Micklethwait & Wooldridge, 2005). Moreover, the existing argument about the legality of unilateral acts under the tenets of international law is not just an outcome of the optimistic view of the system but is a cover for the political maneuvers of weak states (Kagan, 2002). To put it more clearly, those states, which are not strong enough to obtain their own goals, are aware of the ineffectiveness of international law to achieve security, while mentioning the normative body of law, they still try to use it as an instrument to obtain their goals. According to this view, the United States should ignore the hypocritical reaction of the international community and not 'allow itself to be tied down by international agreements that diminish its freedom of action' (Bratspies, 2003; Gerson, 2000). [14] The rising American unilateralism in the last few decades is best understood by looking at the explanations of strong neoconservatives in recent administrations. First of all, leading neoconservatives explicitly pronounce their disdain against multilateral bodies by declaring "the irrelevance of the UN" or "the misguided insistence on unanimity". Even the 2005 US National Defense Strategy associated terrorism with international law by stating that "the ability of other states to resort to international law and international organizations, and to utilize terrorism, contending that these strategies, taken together, constitute a US vulnerability" and "our strength

[14] This view reminds us the Melian dialogues of Thucydides, "The Strong do what they can, and the weak suffer what they must."

as a nation will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes and terrorism." Therefore, it might be plausible to assert that the neoconservative tradition believes that international law is a means of the weaker states to control the power of the US in the international arena and manifests the need for America to take a more unilateralist course (Ikenberry, 2002).

As a last point, the neoconservative tradition mostly pronounces the importance of moral values rather than the legal imperatives. American power should be used for moral purposes, because as the world's hyperpower[15] it is the US' responsibility to provide peace and stability in the system (Kupchan, 1998; Freedman, 2005).

The second group in the existing arguments about unilateralism, which is not as skeptical as neoconservative thought towards international law, is generally inspired by the policy-oriented school (New Haven school) of international law. According to the policy-oriented paradigm, which was established by Myres McDougal and Harold Lasswell, the basic source of international law is not the legally binding rules consented to by the states but "the process of authoritative decision insofar as it approximates a public order of human dignity" (McDougal, 1966, p.299).[16] At the most general level, this explanation means substituting the norms of international law with state practice. In this sense, recent developments in world politics –the spread of WMD throughout the actors in the system, the rise in the destruction capability of terror networks revealed by September 11 attacks, or increasing environmental problems- have compelled states to act unilaterally because

[15] The term belongs to the French foreign minister Védrine who stated his concern about the unrestrained predominance of the United States in a speech in Paris in early 1999.
[16] Its focus on human dignity might give rise to serious problems in jurisprudence considering the subjectivity of a concept such as 'human dignity' in the framework of an objective body like the body of international law (Arend, 1999).

of the inadequacy of existing norms of international law (Reisman, 2000; Falk, 2003). In spite of the pejorative connotations of unilateralism amongst international lawyers, the aims can justify the means, and the unilateral acts of states might be understandable as a process to adapt international law to the changing necessities of the present day; in Byer's words 'letting the exception prove the rule' (Byers, 2003b). This approach argues that unilateral acts cannot be evaluated by looking at their nature but at their intended results. If a unilateral act aims to promote a norm, which does not function in its existing frame, then this act can be seen as legitimate and even legal. As stated by Bodansky (2000) "Unilateralism is not necessarily destabilizing. Sometimes it can play a catalytic role, promoting the development of international (…) regimes. In such cases, another less pejorative term for unilateralism is leadership" (p.340).

The third party in the argument about the place of unilateralism in international law severely criticizes the two views mentioned above. According to many international scholars, the neoconservative legacy is mistaken in its beliefs: both about the exceptional place of the United States in international law regime; and about the role of international law in the international political arena.

First of all, the overwhelming power of the US does not make its unilateral acts virtuous in and of itself. The benevolent hegemon concept does not validate the American arguments, which presuppose a knowledge of the interests of others better than they can know them (Lobel, 2000; Benvenisti, 2004). The US unilateralism cannot be legitimized either as a natural right of the world's sole superpower or as a required and necessary contribution of the world's oldest democracy. The claim of the universality of the US values has no legal value under the principle of the equality of sovereign states, which is repeatedly underlined in the UN Charter.

The widely acknowledged problems of multilateralism –the UN failure to stop atrocities, to impose efficient sanctions on failed states or to prevent armed conflicts- might also be explained by the failure of member states to meaningfully commit to multilateral legal enterprises. In fact, the problem is not derived from the nature of multilateralism itself, but from the state arrogance against multilateral structures (Hathaway, 2000).[17]

The neoconservative argument that weak states use international law as a cover for their inability to pursue their own interests also reflects this mistaken perception of other states because of the understandable arrogance of a superpower. Thus, it is plausible to construe that such a view might misinterpret the cause-effect relationship between the insistence of states –particularly European States- on international law and their relative lack of military capacities.[18] These states' belief in international law may be the cause rather than the effect of the lack of their military power (Bratspies, 2003, p.894).

With regard to the policy-oriented approach's perception about American unilateralism, most of the legal scholars reiterate that unilateral acts violating the norms of international law cannot be defended as the only means to update the dysfunctional norms of the existing framework. "In any legal system, international or domestic, breaking the law does not make the law disappear" (Slaughter, 2003: p.202). The legal system has its own dynamics for revising the useless or disabled parts of its body. To undertake unilateral acts when a multilateral framework seems

[17] This tendency in American foreign policy is obvious. American multilateralism is always selective and conditional. *The Economist* called this political attitude parallel unilateralism which was explained as , "a willingness to go along with international accords, but only so far as they suit America, which is prepared to conduct policy outside their constraints." (*The Economist*, 2001: p. 24)
[18] According to the neoconservative tradition, military capacity is the basic and essential element of state power. In this sense, in neoconservative thought, the weakness of a state mostly implies its relative insignificant military might in comparison with US' military capacity.

inadequate seriously undermines the efficacy of international legal norms and threatens the existence of law.

To sum up, the unilateralism notion is the breaking point for the contesting approaches regarding the role and place of international law in world politics. This divergent political conceptualization of the notion also indicates the tension between existing legal constraints and demands for change.

After looking at the political debate over the unilateralism, we can look at the definition of the concept. Actually, unilateralism is mostly accepted as a routine exercise of state power, but the problem arises when the powerful states resorting to unilateral acts interpret existing norms of international law in such a way as to support their strategic goals. In order to understand the nature of the legality of unilateral acts we will examine the meaning of the concept.

Although the debate on unilateralism was intensified by the unstable political environment of the post cold war era, which became obvious in the last few decades by the unilateral use of force by states, an agreed upon legal definition of unilateralism does not exist.

Institutions of international law are attempting to reach a consensus on the definition of unilateralism. The definition of unilateralism in the third report on the unilateral acts of the states of International Law Commission is as follows: “A unilateral statement by a State by which such State intends to produce legal effects in its relations to one or more States or international organizations and which is notified or otherwise made known to the State or Organization concerned.”

From a strictly political viewpoint, unilateralism can be explained as the acts of a sovereign political actor (or group of actors) detaching itself from the rest of the cooperating community in pursuit of its own goals. The legality of such acts is not an

issue in this view, despite its negative connotations in the basic principles of international affairs.

One of the explanatory elements in schematizing that definition of unilateralism is the concept of extra-territoriality. States normally have the will and the right to enforce their legislation within their own territory. However, the problematic aspect of unilateralism arises only if the state tries to impose its will or values on another community outside its jurisdiction (Jansen, 2000; Sands, 2000).

From another point of view, one may argue that some unilateral acts of states have legal content and produce legal effects, but that does not make these acts automatically illegal. If a state tries to impose its will on other states without any legal authorization or justification of unilateral action, then it explicitly harms international law by violating its basic tenets such as the sovereign equality of states and their obligation to cooperate. It might be true to assert that unilateralism is lawful because the obligation to cooperate is conditional on state consent. However, the obligation to negotiate in international relations is binding within the Charter norms and that obligation limits the room for legality of unilateral action (Dupuy, 2000). As stated by Chazournes (2000), "In this context, it is important to distinguish unilateral action taken within the framework of a given legal structure which itself authorizes (or at least tolerates) such action, from behavior which ignores, bends or contravenes outrightly applicable rules" (p.316).

The basic problem here is the fact that a unilateral act may be legal under the formal language of law, but its contradiction with the essence of law shifts the system from *rule of law* to *rule by law*[19] in which states perceive law not as an end itself but as a convenient means to justify their political maneuvers. Besides, the

[19] This inference about the existing attitude of the United States towards international law belongs to Ayşen Candaş Bilgen.

repeated unilateral acts of dominant states on any issue may pave the way for the substitution of those acts with accepted norms of customary law, which takes the state practice as its basic source. In this sense, it is essential to look beyond mere rhetoric about unilateralism and examine state practices in different issues.

US Unilateralism in Trade Issues

The direct relationship between unilateralism and extra-territoriality, with regard to the definition of unilateralism mentioned above, compels us to examine the state jurisdiction beyond territorial limits. An obvious example of this tendency of states to apply jurisdiction beyond territorial limits is state sanctions in international trade affairs.

In recent decades, the US is the leading state accused of acting unilaterally on trade issues followed by European Union's unilateral practices on environmental issues. Patterns of unilateralism in trade policy fall into three categories, on the basis of the underlying reasons for trade sanctions (political reasons, environmental concerns) also considering sanctions' territorial link with the restricting country (within its territory, in a trade partner's territory or an unrelated third country's territory).

First, and probably the most problematic category among these practices of trade barriers, appears in using trade measures in order to impose a certain policy on another state. To express it in a different way, the legality of using trade controls for political ends is highly questionable under the basic principles of international law, which prohibits states from exercising jurisdiction outside their territories.

This dispute about using trade measures to influence policy-makers abroad can be traced back to an early example: In "The Belgian Family Allowances" (1957) case, Belgium was litigated because it had charged an extra levy on foreign goods if

the exporting country's family allowances scheme (a totally distinct subject) did not meet the standards that Belgium had put in place. This is an obvious example of extra-territorial jurisdiction of a state over another one to force it to adopt the former's values in social or political issues (Jansen, 2000). It is also emphasized that although such measures are usually defended as a means to promote some universal values in other states –even if we ignore this very controversial nature of such enforced universality- the underlying reasons for those barriers are mostly to protect domestic producers under the cover of social concerns.

Another important example of such acts (trade sanctions with political reasons) is "The Cuban Liberty and Democratic Solidarity Act" –generally known as the Helms-Burton Act- which was signed on 12 March 1996. The unilateralist and highly criticized aspect of this act was its hostile attitude towards and direct intervention in the administration of another state (Dunoff et. al., 2002). The first paragraphs of the act expressed the insistence of the US on preventing the admission of the Cuban government to international institutions –especially financial organizations- like the OAS or World Bank. The Helms-Burton Act instructed the Secretary of the Treasury to withhold payments to these institutions, even though they were obligatory payments under their charters, if any of them gave loans or help to Cuba. The Act prohibited helping third parties, which help Cuban government financially, or in other ways. Moreover, this extra-territorial legislation on third parties was not limited to aid cuts. The Helms-Burton Act also prohibited trade with third parties who traded with or invested in Cuba. These kinds of 'secondary boycotts' are definitely illegal because the boycotting state tries to coerce or convince another state to change its policy regarding another state in a completely irrelevant issue (Lowenfeld, 1996).

A similar example of economic sanctions with political goals is the Iran-Libya Sanctions Act of 1996 (ILSA) which is also known with the name of its prominent supporter, D'Amato. The basic aim of the act was to conduct a containment policy by using economic sanctions against "rogue states". The starting point of the issue was the regime change in Iran in 1979. After the collapse of the pro-American shah regime, the United States initiated a comprehensive embargo against Iran and tried to convince its allies to support it. Yet, most of the European countries were hesitant to pursue such a policy against a strategic country like Iran. Therefore, the US stayed alone in the implementation of the embargo for a long time. This partially stable situation changed in 1994 when a Republican Senator, Alphonse D'Amato, drafted an act that defended a more compelling approach to third parties which ignored the US embargo. The Clinton administration refused to sign the act - D'Amato Law- at the beginning. But the political atmosphere totally changed in July 1996, when a TWA flight crashed because of a terrorist attack and Iran was shown as the primary suspect that supported terrorist groups. Libya was included in the act by the insistence of one Senate member, Edward Kennedy who had promised his constituents whose relatives died at the Lockerbie incident.

The Iran-Libya Sanctions Act banned all trade relations between the US, Iran and Libya and also proposed a general trade restriction against third parties who traded with or invested in Iran or Libya. As was the case for Helms-Burton, the act generated a serious reaction from the international community. Especially European States refused to obey the restrictions of the United States. In practice, the act did not impose its trade restrictions on the states that traded with these countries but only on the states investing in them. Also, the act provided the presidential discretion to decide when to impose trade sanctions. As usual, the act was used for economic

purposes (utilizing democratic concerns about these countries as a pretext) to level the conditions for American firms with non-American firms that could freely trade with Iran or Libya. However, the ILSA reversed international political climate on behalf of Iran and purported states to side with Iran against unilateral actions of America (Mastanduno, 2002).

Secondly, and in a completely different vein, some trade sanctions are related to concerns about public health or environmental issues rather than political ones. These issues which raised concern may be within the jurisdiction of the state or there may be a territorial link between the state and the place of the problem/concern addressed by that state.

Most of the cases under this heading are concerned with the compliance of imported products or its production methods to GATT or WTO standards (Biermann, 2001). In this aspect of the issue, there is a serious debate over the product/process distinction within the trade sanctions.

In order to understand the implications of this distinction for unilateral acts of states in international trade, with regard to the importer state's requirements about imported products and requirements about its production process, we should examine these concepts very briefly. It will be easier to explain the phenomenon through an example. Let us suppose that country A imports goods X from country B. It is understandable and also justifiable for country A to put a restriction on goods X if they do not meet the environmental or public health standards country A sets within its territory for the goods X. This restriction is on products. Yet at the same time, if country A prohibits or restricts the import of these goods from country B by asserting that the production standards of the X producing factories in country B do not fit the

standards of country A for X producing factories, this is obviously an exercise of extra-territorial legislation where country A targets country B.

Although most American commentators argue that there is no textual or formal base for a product process distinction in GATT or WTO agreements (Howse & Regan, 2000), this distinction provides a useful threshold to limit the rising unilateralist tendency with different claims in trade policy (Jackson, 2000). An example of product process distinction can be seen in the EC Measures concerning Meat and Meat Products (Hormones) case. The Hormones Case was related with the ban of hormone-treated meat imported from the US and Canada by European countries. Beginning from 1981, the European Community has imposed a general import ban on meat-products which were treated with growth-promoting hormones because of the alleged danger of these hormones for human health. After a while, the EC broadened the limits of the import ban and put forward another restriction on meat-products from America and Canada by asserting that many slaughter houses in both countries do not meet the health standards of the EC. In response to these measures, the US introduced a list of banned products that had been imported from the European Community. In addition, it used its veto power to block the establishment of a Panel against its unilateral acts (Quick & Blüthner, 1999). When the United States and Canada applied to the Appellate Body, the case result was in favor of the US and Canada due to the absence of a scientific proof that supports the EC's claim about the harmful side effects of hormones. A year later the EC reiterated its ban against hormone-treated meats asserting that new scientific research supports its argument. On the contrary, the US tried to justify its unilateral retaliatory measures against the EC under the norms of GATT and WTO. This example is important in two aspects; first, it might be a good example of the exploitation of

health or environmental concerns as an excuse for unilateral trade restrictions and second, it shows the fragile ground of the product/process distinction with regard to the effect of the producing process on the quality of products.

As a last category of trade barriers, some trade restrictions aim at protecting the environment. However, the rising interconnection between universal environmental problems and the unilateral application of trade measures aiming to protect the environment is the cause of a serious debate within the discipline. This debate covers a number of issues: How can international bodies distinguish between real environmental motives from the protection of domestic production in trade sanctions? Is it a prerequisite to have a territorial link between the environmental resources and the state that use unilateral measures in order to protect that resource? Is universal jurisdiction to protect the environment justifiable under the obligations of multilateral treaties such as GATT or WTO rules? These questions will be examined below.

The US Unilateralism in Environmental Issues

Trade and environmental issues have been intertwined in recent years by the rising public attention to the ecological costs of commercial products. Moreover, most of the disputes arise from a unilateral imposition of the environmental values of states through international trade relations. It is hard to distinguish environmental unilateral acts from trade issues because many states employ trade measures in order to deal with their environmental concerns.

The basic source of the alleged justification of unilateral action by states is Article XX of GATT. This general exceptional clause permits WTO members all trade restrictions that are “necessary to protect human, animal or plant life or health” or “relating to the conservation of exhaustible natural resources if such measures are

made effective in conjunction with restrictions on domestic production and consumption." Both exceptions are restricted by the chapeau of Article XX, which subjects exceptions to the requirement "that such measures are not applied in a manner which would substitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[20]

Another legal document, which is usually accounted by states as a source for their unilateral acts, is principle 15 of the 1992 Rio Declaration on Environment and Development. In this principle, it is stated that;

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities, where there are threats of serious or irreversible damage; lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

With the use of the 'precautionary' concept, the Declaration enlarged the limits of the measures that shall be taken against the environmental dangers to the cases where there is doubt about the existence of a danger but no objective proof. Considering the Hormone Dispute decision of the Appellate Body, it can be suggested that the unilateral acts of states lower the threshold a step further and loosen the limits of the extraterritorial jurisdiction of states. Because of the states' unilateral actions in environmental issues are usually presented as a source of customary international law, these actions should be evaluated within the developments they triggered in international law. To put it more precisely, any unilateral measure of a powerful state to protect the environment might be deemed as part of customary international law in

[20] The exact wording of the article is as follows;
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures….
(b) necessary to protect human, animal or plant life or health;…
(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;…

the next years[21]. In this context, it is understandable that "developing countries often feel threatened by what they perceive as an emerging environmental unilateralism and even 'eco-colonialism' of industrialized countries" (Biermann, 2001; p.422).

An important example that should be mentioned is Canadian action taken against a Spanish fishing boat, called *Estai*, in March 1995. Canada seized the boat - after a four hour long chase- and took it to one of its harbors with the claim that the boat exceeded the quotas that protect Greenland Halibut and used prohibited fine fishnets in catching them. The problem was that the Estai was fishing outside the 200-mile limit in the Atlantic Ocean. In other words, it was definitely outside the jurisdiction of Canada. The conflict could not be solved within the legal institutions but through political negotiations, which resulted in economic compensations for both sides.

Although it is well-known that unilateral action in the name of environmental protection is not an exclusive province of the United States, the superpower's unilateralist measures concerning the environment should be examined more carefully with regard to the size of its ecological footprint and its domestic environment protection regime which is an early example. The United States' unilateral approaches about environmental governance can be addressed under two headings.

The first group consists of the US abstention from multilateral enterprises as a sign of its unilateralist stance. Although the decision to join collective actions -e.g. multilateral agreements- is definitely the sovereign right of any state, the US unilateralism is severely criticized by participatory states due to the paralyzing impact of the US absence on the outcome of such actions (Brunee, 2004).

[21] The decision of US Supreme Court in Paquete Habana case (1900) clearly depicted the role of dominant powers in custom formation in international law.

The second group of American unilateral acts directly aims to affect policies of other states on environmental issues without their consent. Again, the real problem in these acts is their legal implications for the development of international law. Customary international law accepts the repeated practices of 'dominant' states as a source. In this sense, the legal outcomes of this unilateralist stance might be more enduring than it seems at the present time. As is mentioned above, most obvious examples of such a tendency appeared as trade barriers on imported products like the ones in the Tuna-Dolphin case or Shrimp-Turtle case.

The Mexican Tuna case –which is also known as the Tuna-Dolphin dispute- is an extreme example of the US unilateral behavior considering the fact that the US argument is deprived of any legal basis under the rules of international regulations that America also participated in to protect the environment.

The issue was derived from the unusual migration behavior of the dolphins in the Eastern Tropical Pacific Ocean. Dolphins in this ocean often swim together with schools of tuna. Fishing vessels understand the location of the tuna when they see the dolphins on the surface. They encircle the dolphins and the tuna beneath them with large purse seine nets and catch the tuna. The dolphins are usually unable to escape these nets and are accidentally killed during the tuna catch.

Although the case was initiated in 1991, the background of the US restriction on trade in this issue started in the 1970's. Prior to this date, the US was responsible for the death of 400 000 dolphins per year while harvesting tuna. The United States prohibited this method of fishing in 1972 and then it enlarged the prohibition's scope to imported products (Dunoff et. al., 2002). By 1991, the US had banned tuna imports from Mexico because Mexico was using purse seine nets in the tuna catch, which causes a high rate of dolphin mortality. Mexico opposed the embargo and

appealed to the GATT by asserting that the embargo was a direct practice of unilateral imposition of the US standards by violating another state's domestic jurisdiction (Sands, 2000). A GATT panel upheld the Mexican position by recalling that the dolphins were not an endangered species under the CITES –Convention on International Trade in Endangered Species to which America was also a signatory state- and could not fit to the conditions of the exceptional clause in Article XX. In this sense, the US tried to impose its own standards about the environment on third parties –which had no opportunity to contribute to the elaboration of those standards- through trade measures. The American side objected to the report by asserting that the report used broad and vague language. The Mexican side also did not insist on the report. The embargo was lifted by the efforts of NGO's, but the US side has continued to use its own standards in practice.

Another example of American unilateralism in the environmental regime is the case of the Import Prohibition of Certain Shrimp and Shrimp Products, shortly the Shrimp/Turtle case, which again involved a trade measure. Since 1996, the United States has applied trade restrictions to the shrimps, which are imported from countries that do not use Turtle Excluder Devices (TEDs) in their shrimp trawler vessels. According to the US, those vessels incidentally kill sea turtles –an endangered species under the CITES- while catching shrimps. On this basis, the US prohibited the import of shrimp from Pakistan, Malaysia, Thailand and India, caught through methods not corresponding to the US standards. The case shows some similarities with the Tuna-Dolphin case. The US standards to protect sea turtles, for example TED use in vessels, were not commonly accepted or used by the international community. Yet, at the same time the states had formally agreed with the extinction risk of turtles.

The report of the Appellate Body on the issue indicates the evolution of WTO jurisprudence since the Tuna-Dolphin case. The report accepted the justifiability of the US act to protect an endangered species under Article XX of GATT. Although it made room for unilateral acts through Article XX [22], its emphasis over the territorial link condition between the protector state and protected species precluded extraterritorial jurisdiction of states. Some might question whether this case can be considered as an indicator of the long-term implications of a unilateral action of the US. However, it is stated by Biermann (2001) that "this decision of the Appellate Body might force smaller trading nations to adopt environmental standards of larger economies in order to safeguard their export markets" (p.433).

Actually, the statement above summarizes effectively the problematic aspects of unilateralism in environmental issues. As the US is the dominant actor, the US unilateralism arouses more suspicion than any other actor of the system. This suspicion increased since it abstained from the ratification of two basic environmental regulations, the Kyoto Protocol and the Biodiversity Convention. These points will be evaluated in more detail later.

The US Unilateralism in Humanitarian Issues

Even without a unilateralist approach, any attempt to establish an international framework governing human rights raises serious reaction from the states. A good starting point in the analysis of this hesitant reaction against internationalization of human rights might be the international legal system itself in order to explain the absence of regulatory and obligatory principles in humanitarian issues. Although it has been more than fifty years since the UN adopted the Universal Declaration of

[22] "It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Members may to some degree, be a common aspect of measures falling within the scope of one or another of exceptions (a) to (j) of Article XX."(Appellate Body Report, paragraph 121, 1998)

Human Rights, it is too new for the human rights doctrine to start to play an efficient and decisive role in the international political system (Özdek, 2000).

As events in recent decades unfolded, states suffice with daily basis formulas to solve humanitarian issues rather than commit to the establishment of an institutionalized body of humanitarian norms or they prefer ex post facto justifications for their actions to protect human rights –as in the case of Kosovo. Moreover, states sometimes prevent the application of human rights law by their abstention from the ratification of major human rights treaties or they paralyze these bodies with their reservations in vital parts of them (Dunoff et. al., 2002).

The basic explanation of this attitude might be the vulnerable nature of human rights concern to politicization. States might use the human rights agenda as an instrument to strengthen their position in international area or to restrict the capabilities of other states. This explanation is plausible in the light of the state-centric view which is based on the immune sovereignty of states (Dağı, 2001).

In its regular sense, international human rights law protects persons from violations of their basic rights by states.[23] Yet, there is a considerable debate over the question of whether or not the internationalization of human rights is a threat or an attack against the right of state jurisdiction over its own territory. This debate stems from the fact that international legal framework in human rights aims at imposing certain norms about humanitarian issues to the target states (Zacklin, 2003). The spectrum of that imposition might vary from economic sanctions or diplomatic pressure to the use of military force or a threat to use it.

Actually, the possibility of military operation in the name of humanitarian intervention is also a major concern area within the states with respect to the latest

[23] To the extent that globalization have led to the emergence of powerful non-state actors, it is possible to assert that non-state actors should be added to the threat category as well as states (Shelton, 2003).

efforts to justify this kind of actions as an exception to the prohibition of use of force. Although the prohibition of intervention in paragraph 7 of article 2 of the UN Charter is still valid, in the last few decades -especially after the end of the cold war- the international community has witnessed many instances in which that prohibition was breached or at least loosened by state practice. The first sign of this unilateralist tendency towards international law was the US led operation against Iraq in 1991 after the adoption of a UN ceasefire. In the "Operation Provide Comfort", the US, England and France asserted that they acted to stop the oppression against the Shiite and Kurdish population by the Baath regime. England also used this argument many times since August 1992 in its operations against Iraq (Gray, 2000). The process continued with the debatable intervention to Kosovo (Lobel, 2000, Krisch, 2000, Gowlland-Debbas, 2000). In 2001, some international organizations established ICISS (International Commission of Intervention and State Sovereignty) with the support of the Canadian government to work on some regulations about humanitarian intervention. The last instance of the concept is the second Iraq war. Although humanitarian intervention was not explicitly accentuated in the justification letters of the US and England, the brutal administration in Baghdad, the arbitrary arrests and torture in Iraq, the mass murders of the Baath regime were repeatedly emphasized in the mass media during the war. In this sense, humanitarian issues were also launched as part of the war against terrorism.

Despite the serious debate over these extreme examples of the application of international human rights, most states take the legitimacy of unilateral actions in humanitarian crises for granted and continue to use the gaps in the doctrine as an excuse for the illegality of their acts. It is possible, therefore, to assume that humanitarian issues represent an important example for understanding the long term

effects of unilateral actions on international law especially considering the morality element of these actions as a pretext.

The position of the world's sole superpower, the United States in this context is also paradoxical. The US always boasts of its long tradition of human rights promotion and its commitment to the constitutional rights of its citizens. However, the same United States has consistently refused to ratify international human rights treaties and has also resisted international scrutiny of its domestic political structure with regard to international legal norms governing human rights. Instead, America usually prefers to act unilaterally when the case is domestic implementation of international norms. Eventually, the most visible instances of American unilateralism –which is mostly embedded in American exceptionalism-, are its actions on humanitarian issues, especially its attitude towards multilateral treaties.

For example, the US had not ratified the International Covenant on Civil and Political Rights until 1992 –after 26 years, despite its leading role during the negotiation process of the Covenant. In April 1992, when it ratified the Covenant, it did so by attaching many RUD's (reservations, understandings and declarations) to its ratification as usual.

The United States' formal reservations were mostly related to the articles of the Covenant which contradicted existing US domestic law about free speech, capital punishment and torture (Article 20, Article 6 and Article 7).

The US understandings aimed to clarify the meaning of some terms in Article 2(1), Article 4(1) and Article 26 about non-discriminations in order to preclude the substitution of their definitions under the US constitution with the meanings in the Covenant.

Probably the most problematic aspect of US proposals was its declarations to corroborate that the provisions of the Covenant will have no legal effect on the US law or practice.[24]

This attitude of the US was widely criticized by many states and NGO's (Dunoff, 2002). The Human Rights Committee –the executive body of the UN in humanitarian issues- also considered the issue and in 1995 it commented on State reservations to the ICCPR. Although the Committee accepted that 127 participant states had entered 150 reservations in total to their acceptance, it criticized some RUD's of the US indicating that these reservations were incompatible with the object and purpose of the treaty (Human Rights Committee, General Comment 24).

The United States objected to this comment and reminded the Committee of treaty rules and customary international law norms that verify the permissibility of reservations of States Parties to any legal document which they ratified.

As a response to the US argument, in 1995 the Human Rights Committee issued another document that repeated its criticisms against the US reservations, noting that "taken together, they are, intended to ensure that the United States has accepted what is already the law of the United States" (Human Rights Committee, Comments on the United States of America, 1995).

As indicated by the ICJ Advisory Opinion in 1951, the direct relationship between the number of the participating states to a humanitarian law treaty and effectiveness of the treaty necessitates a flexible attitude towards state reservations. Therefore, humanitarian treaties usually do not suggest obligatory mechanisms against state reservations. This principle is the underlying reason of the lack of a

[24] The explanation of Bush administration to the declarations about the ICCPR was as follows; For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in US courts." (Senate Executive Report 102, 1992)

strong objection from the states to the United States' RUD's. It would paralyze the functionality of any treaty to exclude the superpower from its participation. Still, the United States has failed to ratify many human rights treaties including the Convention on the rights of the Child (CRC).

The CRC adopted unanimously by the UN General Assembly in 1989. Again, the US played an active role in the drafting process. However, the document is still contested in the US and the United States is the one of the two UN member States (the other one is Somalia) that did not ratify the CRC.

Actually, it is hard to understand the American reluctance against the Convention considering the fact that the CRC is the most widely accepted human rights treaty in the history with its 191 participant nations. Also, the basic principles of the convention are not debatable or complex. Instead, they are at the most elementary level with regard to the rights of the children; the right to life, the right to affect the decisions about themselves, the right not to be subject to discrimination (Moravcsik, 2002). The CRC also suggests an executive body to provide compliance; Committee on the Rights of the Child which will monitor state practices and issue reports about their compatibility with the convention.

Even so, the covenant has raised serious reaction in the United States especially within conservative groups. At the basic level, they claimed that the CRC took the responsibility of the children from their families and gave it to some international bodies and disabled the parental rights over the children. Moreover, the convention was also criticized as trying to replace the domestic laws of the US pertaining family with some Marxist-feminist agenda which harms the integrity of the family (Moravcsik, 2002). Although the values which the CRC defends are mostly universal, the debate over the US ratification has been won by its opponents.

The United States preferred to act unilaterally on the issues of children's rights instead of adhering to the multilateral bodies concerning the issue.

As it can be seen, the US has long been reluctant to subject its domestic regulations to international jurisdiction. Yet at the same time, it is very prone to impose its human rights standards on other states by using its overwhelming pre-eminence in economic, military and technological aspects. The IRFA is a good example of this tendency to act unilaterally in monitoring human rights issues.

Since 1996, the US foreign policy office has been working on a more active political initiative about the protection of religious freedom worldwide. This movement can be traced back to a cold war campaign that aimed to help Jews in the communist countries. In 1997, the Wolf-Specter Bill was proposed to the Senate. But the bill was widely criticized in two aspects: first its emphasis on the persecution of Christians abroad and second is its automatic authorization for political and economic sanctions against the countries that violate the standards of religious freedom set in the bill. A revised version of the bill –called the International Religious Freedom Act- was accepted in 1998 which gave more room for the President to suspend suggested sanctions or other measures if the national interest of the US was in danger. In this sense, one can assert that the revisions to the act strengthened its unilateral stance by exempting the US from any binding policy and also designated the US government as the only authority that arbitrarily decides when a violation of religious freedom necessitates a counter-measure to the violator country. Between 1999 and 2000, different measures were put into practice against China, Burma, Iran, Iraq and Sudan as 'countries of particular concern' under the provisions of the act (Danchin, 2002).

Moreover, the act has implicitly presupposed the superiority of some universal liberal values –under the protection of the United States- against the rest of the world that do not fit the requirement of those values which at best are defined as "countries of particular concern"; at worst accused of being "rogue states".

To sum up, humanitarian concerns are another area in which US unilateralism might be visible where a powerful state unilaterally monitors another state according to its own moral standards.

It is quite difficult to examine all instances when America preferred unilateral action. These three headlines cited above (trade, environment, human rights) are basic examples in which we can envisage the US unilateralism as a phenomenon observable in many different aspects of American foreign policy. Yet, the most important category of the US unilateralism (due to its long term effects on international law) arises from the practices related to the norms governing use of force. To have recourse to force unilaterally does not just defeat collective security, but also destroys basic roots of the legal system entrenched in an understanding of multilateralism against any threat to peace and stability. This ground-breaking nature of American unilateral use of force will be examined in the next chapter of the study.

CHAPTER 3

THE US UNILATERALISM ON THE USE OF FORCE AFTER SEPTEMBER 11

Introduction

In 1945, when representatives of 50 countries met in San Francisco to draw up the United Nations Charter, their basic concern was 'to protect next generations from the scourge of war.' Thus, the core notion of the Charter, and of entire international legal system that emerged after the II World War, is the prohibition on the use of force which was embodied in the first chapter of the Charter. Considering the fact that the main goal of the Charter is the protection of peace and stability, it is understandable that the Charter has put the threshold for use of force too high and accepted only one exception to the prohibition on unilateral use of force; the inherent right of self defense. Although the prohibition was strict, the Charter did not discount the possibility of a threat to peace. It suggested a collective security understanding which should be manipulated through the resolutions of the Security Council. Yet, all these measures did not suffice to detain states from resorting to force unilaterally. On the contrary, in our day military might has a more primary role in international relations than it had a few decades ago. It is, for this reason, important to question whether we are witnessing a fundamental change in this crucial area of international law. Given the fact that the United States is the leading military power of the world and is also the one that has frequently resorted to force both in and after the cold war era, it is legitimate to question the place of its military actions in international law. Moreover, as the sole superpower, the United States' practice and interpretation of the rules

governing prohibition on the use of force is important in any effort to estimate the future of the international legal order.

In this line of thought, the purpose of this chapter is to analyze the impact of the American interpretation of, and practice relating to, the rules governing the use of force in international relations since September 11 terrorist attacks. To scrutinize the American justifications in cases that the US unilaterally resort to force might be helpful to predict the impact of these justifications based on contentious interpretations of existing law norms. Special emphasis will be put on the concepts used by the United States during these operations due to the assumption that these concepts -rather than being seen as simple rhetorical means- might be useful to shed some light on the American formulation or interpretation of the rules of international law concerning the use of force.

Thus, the relationship between these concepts (or doctrines) and international law will be analyzed in the first section of this chapter by using the notion of "war on terror" as the reference point of inquiry. To understand the role of these concepts in the US unilateralism on the use of force is only possible by placing them in the larger picture of international legal order also considering the attitude of the global community. Declaring war against terrorism by the United States will be used as a starting point to understand the instances in which the United States uses force and how it tries to explain its actions from a legal point of view. Then, military operations within the scope of that war will be examined.

Basic Concepts of American Unilateralism on the Use of Force in Post 9/11 World

Rogue states

It is clear that no attempt to understand the newly declared "war on terror" or the US military operations that succeeded it can suffice without attempting to analyze the

context of both. In this sense, to discover the facts beyond the rhetoric, it is inevitable to examine the basic terminology of the US-led war against terrorism, which materialized in the concept of "rogue states."

In the aftermath of 11 September, a number of military operations were initiated which were justified as preventive actions against the so-called rogue states that were deemed to be responsible for the attacks or allegedly planning new ones. Yet, this kind of classification of certain states by the United States is not a new trend in American foreign policy and should be evaluated within the broader framework of post-cold war's political environment. Therefore, understanding the phenomenon necessitates first a closer look at the origins and definition of the concept, and then a detailed analysis of the possible legal implications of such stigmatization of certain states.

The roots of the concept "rogue state" can be traced back to the end of 1989, just weeks before the collapse of the Berlin Wall, when the senior US military officers realized the necessity of a new threat scenario which could replace the role once fulfilled by the cold war's Communism threat posed by the Soviet Union (Hubbell, 1998, Buzan, 2006). In a world devoid of a prime adversary –a perilous 'Other' image- , the Pentagon established this new paradigm to justify its preservation of armed forces and a military budget at its Cold War level.[25] In other words, the concept was created as a means to confine the possible military cutbacks to a minimum level (Klare, 1998, Hoyt, 2000, Ahmed, 2003). At this stage, the basic premise of the doctrine –which was called *the Base Force Concept* by then Chairman of JCS, Powell- was to put the threats posed by regional powers of the Third World

[25] The quest for a new threat is also related to the practice of domestic policy in the United States. To unite people against a common enemy is a very effective and usual way to mobilize the people with an emphasis on national identity as it was done in Kennedy's time against "a monolithic and ruthless conspiracy" or in Reagan's against an "empire of evil" (Chomsky, 2000).

against the US' interests into the place of the threat concept of the Cold War, and to arrange the US military power taking into account this new kind of threat. However, the invasion of Kuwait by Iraq changed the climate on behalf of the Pentagon and most commentators argued that the new threat was rightly estimated in the military planning of the post Cold-War environment by the Pentagon.[26]

The doctrine took its full-fledged version in 1993 when the Clinton administration declared the meaning of this new strategy as the containment of "rogue leaders set on regional domination through military aggression while simultaneously pursuing nuclear, biological and chemical weapons capabilities" (Aspin,1993).

Since then, the doctrine has become dominant in American strategic planning and is mostly accepted by scholars without a detailed analysis of the rationality or reality of the rogue state concept (Hubbell, 1998; Caprioli & Trumbore, 2005). Especially from 1993 to 1998, the rogue doctrine had merely symbolized the basic theme of the US military thinking.

In 1994, the rogue state term was used by President Clinton for the first time. In his speech to European prime ministers in Brussels, Clinton stated that "the danger is clear and present. Growing missile capabilities are bringing more of Europe into the range of rogue states such as Iran and Libya". The term found widespread support in academic literature and the media even though the Clinton administration declared the abolition of the term in 2000 and started to use the term 'states of concern' instead of rogue states due to the positive improvements in the behaviors of those states. This change of behavior in American foreign policy can be explained by

[26] An interesting point in this coincidence is the unknown fact that Bush's famous Aspen speech that condemned the rogue states and declared the United States readiness to fight against their aggressive behavior' was not an answer to the invasion of Kuwait although it was made right after the invasion. The speech was prepared weeks before the invasion of Kuwait just to announce the formal approval of the new strategy by the Bush administration.

the relative lack of support the term gained from the international community, even from the Allies of the United States (Klare, 1998).[27]

Yet, the scene has totally changed with the terrorist attacks of 2001. The Bush administration revived the rogue state term as soon as they came to power and even hardened its language after the Twin Towers attack on 11 September by declaring their readiness to act against those rogue states which constitute an "axis of evil".

In addition to this short examination of the historical background of the concept that may have cultivated its present connotation, it is crucial to discover the exact definition of the rogue state in American policy planning with regard to its daily usage by the community to understand the rogue state conceptualization in today's political climate.

First of all, it is a widespread mistake in daily political language to use the "failed state" and "rogue state" concepts interchangeably as each has different associations in the United States' foreign policy officers' minds. The failed states concept is mostly used to define the states which were unsuccessful in their efforts to adapt to market economies after the collapse of the Communist Bloc (Binnendijk, 1999; Rotberg, 2002).[28] Yet at the same time, the rogue states were and are resistant to adapt to liberal market democracies. To put it differently, failed states are a cause of concern because of their weakness which renders them vulnerable against domestic and international instabilities within the system. On the contrary, rogue states' problematic aspect is not their weakness but their relative strength to oppose an international order typically based on Western values (Bilgin & Morton, 2002). Actually, the labeling of certain states as 'rogue' or 'failed' indicates not only

[27]While the term has had widespread use in the political lexicon, only a few States have used it officially, such as the United Kingdom and Ukraine (Minnerop, 2002).

[28] These kinds of binary oppositions (failed versus successful) shows a noticeable continuity with Cold-war discourse. "The rhetoric of rogue states is indicative of how US foreign policy continues to be driven by dualistic and militaristic Cold-war thinking patterns." (Bleiker, 2003, p.721)

different political dynamics within those states but also different kinds of policies applied to them by the US. In American foreign policy the failed-rogue distinction implies two different kinds of states: "friends" and "foes" (Bilgin&Morton, 2004).

Aside from its usage in American policy planning, the exact definition of the concept of rogue state is vague and arbitrary. More often than not, the phrase is used to label states which are dictatorial in domestic politics and aggressive and threatening in their international relations. Furthermore, those states are seen as characteristically impertinent to international law and engagements and intrinsically assailant against peace and the stability of the international system. The supporters of this assumption also emphasize the impossibility of deterring these kinds of states with diplomatic measures or other non-forceful ways (Binnendijk, 1999, Rubin, 1999, Krauthammer, 2003, Segell, 2004).

However, recent research on the alleged aggressive behavior of rogue states in interstate relations hardly proves the reality of this assumption.[29] Actually, the results of empirical research shows that the rogue states' (especially five of them are most publicized: Cuba, Iran, Iraq, North Korea and Libya) involvement in interstate conflict or their tendency to initiate war or have recourse to armed force first is not very different from nonrogues (Caprioli & Trumbore, 2005).[30]

Despite the term's pejorative connotations in the political lexicon, rogue states might be equated with those in the United States' list of "supporting

[29] It is mostly accepted that liberal democracies are more peaceful in and by their nature. Yet at the same time, although 'liberal friends' may abstain from recourse to force against each other, that does not confirm the existence of a liberal peace atmosphere considering the fact that those liberal states deeply prone to making war on 'the other', non-liberal states. For the discussion about that assumption of liberal theory in international law, see Moravcsik (1997), Alvarez (2001) and Slaughter (2000).

[30] This article of Caprioli and Trumbore revealed that in a time span between 1980 and 2001, so-called rogue states' initiation of or involvement in armed conflict is not indicatively different from any other states' in the system. In this sense, they asserted that "…the results of our analysis show that rogue states have not posed a generalized threat to international security as measured by interstate conflict behavior. As its critics have long suspected, the rogue concept seems to be at best a questionable foundation to build general foreign and defense policies." (Caprioli&Trumbore, 2005, p.788)

international terrorism" which was established in 1979. The states in the list such as Libya (since 1979), Syria (1979), Cuba (1982), Iran (1984), North Korea (1988), Iraq (1990), and Sudan (1993) are mostly accused of sponsoring terrorism or being "safe havens" for terrorist organizations. Many political sanctions have been imposed against the states in the list such as exclusion from State Immunity in civil litigation, or economic sanctions like the Cuban Liberty and Democratic Solidarity Act or the Iran-Libya Sanctions Act mentioned above.[31]

Nevertheless, the current practice of the United States exposes the fact that there is a lack of correlation between the states that are labeled as rogue and certain characteristics attributed to them (Hoyt, 2000).[32] Some states that fit the definition of roguish behavior might be excluded from that label due to their relative devotion to American dominance, e.g. Israel. This fact compels many commentators to argue that the rogue state concept is not an objective analytic category, but a pretext for America to justify its unilateral actions against those states that oppose its domination (Chomsky, 2003, Litwak, 2000, Hirsch, 2002, Bleiker, 2003, also see Bilgin&Morton, 2004). This is not to say that those states labeled as rogue are not really a threat to stability or are totally peaceful, but as stated by Hubbel (1998) "it is clear(…) that their rogue status reflects not the magnitude of their crime but the extent of their dissent from US policy" (p. 10).

A closer look at the origin and meaning of the rogue state concept signifies the important role of the term in today's political life, considering the security questions that have emerged after September 11 attacks. Yet at the same time,

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[31] Another dimension of the rogue state approach is in economy with the control of exportation of dual-use items. According to Cupitt, the rogue state approach simplifies the control and also limiting the burden on exporters by only targeting control over certain states (Cupitt,1996).

[32] The content analysis made by Hoyt in the governmental documents (from 1993 to 1998, which can be counted as the golden years of the doctrine) that cited the 'rogue state' phrase reveals that "the conceptualization of rogue state in American foreign policy planning is basically related to the perceived image of these states and based on rhetoric more than reality" (Hoyt, 2000, p.310).

September 11 has also raised very important consequences for the normative body of law considering the state sovereignty and prohibition of intervention. In this sense, it is crucial to ask what the possible implications of the continuing unilateral classification of states as supporters of terrorism or generally as axis of evil might be on international law.

First of all, the threshold of the legal use of force enshrined in the Charter cannot be lowered by asserting the necessity of intervention against a state that is classified as rogue by the United States. The evaluation of the legality of military operations even if they are under the name of self-defense against a terrorist attack remains independent from such classifications of states as rogues and nonrogues. The United States' responsibility and obligation to justify its recourse to force is still valid.

Although this classification of the United States is legally invalid in international law, it should be kept in mind that this kind of labeling certain states might affect the judgments and opinions of other states in international community. The negative atmosphere about a state might affect its credibility as a member of the United Nations. For example, other members can more easily accept an American claim about the responsibility of those rogue states in some terrorist attacks despite the lack of concrete evidence. This possibility reveals that the unilateral stigmatization of some states might have long term implications on the development of customary international law in addition to the dubious position of such classifications in the current international law with regard to the violation of the sovereign equality of the alleged rogue states (Minnerop, 2002).

These problems mostly became visible after September 11 attacks. Since then, so-called rogue states have been chosen as the target of present and potential

operations and threatened by the use of force in the extent of American war on terrorism. Thus, September 11 should be analyzed within the context of that 'war' and also under the legal norms that define the characteristics of armed attack.

September 11

The significance of September 11 events is not confined to the unusual method of the attacks –to use airplanes as bombs- or its choice of targets –the financial and military centers of a superpower- or its grave humanitarian loss -2900 victims in a couple of hours- but is also related to its ground-breaking effect on the existing legal framework established by the United Nations Charter.[33] In this sense, the subsequent events such as the declaration of war on terrorism, the war on Afghanistan, and the war on Iraq should be evaluated after a detailed analysis of September 11 events.

Terrorist attacks on the World Trade Center and the Pentagon

On 11 September 2001, nineteen people, all foreign nationals of Middle Eastern origin, hijacked four US civilian airliners after takeoff and crashed them into planned targets. Two of the jets departed from Boston en route to Los Angeles. After being seized by the hijackers –five terrorists in Flight 11 and five hijackers in Flight 175- they were both directed to New York City. At 8:48 a.m., the first plane crashed into the north tower of the World Trade Center, a 110-story building which accommodated roughly 50,000 people in its offices. At 9:03 a.m., the second plane crashed into the south tower of the same building. Although the evacuations started instantly, it was not possible to help the people in the floors above the sites where the planes crashed. At 9:50 a.m., the south tower, and at 10:30 a.m., the north tower

[33] Actually some commentators appraised September 11 events as another instance of terrorism and insist on to act in that way rather than to appeal it as a completely new phenomenon (Karstedt, 2002). They also evaluate the consequential challenge about the adequacy of the normative body of the Charter as a pretext for the establishment of American hegemony on international law. However, it is not deniable that most of the concepts raised right after the attacks had already been mentioned by American jurists for a long time. For such treatment to the US response to attacks see, Chomsky (2002).

collapsed one after another. In the next days, nearly 2900 persons were confirmed to be dead in the collapse of the World Trade Center, some of them were firemen and police officers trying to vacate the site. Also 157 passengers died when the planes crashed. The collapse of the Twin Towers affected an area of 30 million square feet in Manhattan, damaged a subway station and filled the island with smoke and debris.[34]

At 9:39 a.m., another five hijackers seized a plane which had departed from Washington D.C, directed it to the Pentagon and crashed it into the south part of the complex. Fifty-nine passengers on the plane and 125 persons on the ground died during the collapse.

The last incident happened on the plane that departed from New York at 8:01 a.m. en route to San Francisco. Probably some passengers in the plane had heard some news about the previous attacks on the WTC and the Pentagon, because the passengers struggled with the hijackers and at 10:10 a.m. the plane crashed into the countryside of Pennsylvania and forty passengers, crew and hijackers died.

In the wake of the attacks, the United States issued a series of executive orders to cut the funds of Al Qaeda –allegedly responsible for the attacks, although this was never accepted by its leader, bin Laden. President Bush declared a national emergency and stated in his speeches that the United States considered these events as a military attack. He also labeled the next steps of the United States as the start of a "war on terror". Although he did not clarify the exact meaning of the term -whether it was used rhetorically or literally-, the phrase drew widespread support at the domestic and international level. In the following weeks, the military planning centers pointed to Afghanistan as the first target of the war on terrorism.

[34] A rough estimate of the damage the attacks on the World Trade Center caused; $11 billion in the loss of human productive value, $34 billion in the property loss, $14 billion in cleanup and police costs, and $21 billion from the interruption of business in the lower Manhattan districts.

The Place of September 11 in International Law

Considering the gravity of the attacks, and their exceptional nature –carried out by a terrorist group into the heart of the superpower's economy- it is predictable that the United States' response would be extensive and also comprise military action. Still, the legal consequences of September 11 events and probable American actions should be evaluated within the reaction of the global community, especially the United Nations.[35]

On 12 September, the United Nations Security Council unanimously adopted resolution 1368 in which it "unequivocally condemns in the strongest terms the horrifying terrorist attacks(…) and regards such acts, like any act of international terrorism, as a threat to international peace and security." The same day, the UN General Assembly adopted a weaker resolution with regard to the terms used in it. The General Assembly Resolution 56/1 did not accentuate the word of attack to refer to the events, but "strongly condemns the heinous acts terrorism." On September 28, the Security Council adopted another resolution basically reaffirming the previous resolution's statements. In addition, Resolution 1373 imposed a series of obligations under Chapter VII of the Charter to combat terrorism.[36]

[35] The relevance of the UN is precisely stated by Myjer and White. At the beginning of their article they denote that the attacked party cannot act unilaterally and independently to exercise its self defense right. "(…) when a state claims to have been subject to an armed attack against it, the norms and structures of international law should come into play. These do not simply exist at the substantive level (customary or treaty), where it is acknowledged that a victim state, in exercising its right of self defence, can take proportionate military measures to respond to the attack against it. They also exist at an institutional level, where the UN Security Council has primary responsibility for issues of peace and security, with the power to take non-military and military measures to deal with a threat to the peace, breach of the peace or act of aggression. In addition, a collective self-defence organization, of which the victim state is a party, is also a potential actor, given that these entities are based around the maxim of an attack against one being an attack against all." (Myjer & White, 2002, p.5)

[36] For a detailed analysis of Resolution 1373 as a part of Security Council's counterterrorism efforts, see Stromseth (2003).

Some American scholars assert that both Security Council resolutions imply that September 11 events were considered as an armed attack by the UN. The Preamble of Resolution 1368 explicitly recognized "the inherent right of individual or collective self defense in accordance with the Charter." Resolution 1373 also reaffirmed that recognition of former resolution in its preamble. In the light of the definition of self defense in article 51, it can be asserted that the UN Security Council considered September 11 atrocities as an armed attack (Greenwood, 2002, Moir, 2005).

However, this assumption is discredited by the fact that neither of the resolutions ever explicitly concluded that September 11 events were armed attacks in the term's legal meaning. Although they referred to the right of self defense, the resolutions fell short of an open declaration of armed attack. With regard to the Gulf Crisis of 1991 –the most significant and seminal incident in the practice of the right of self defense - this absence in wording becomes more significant. Immediately after the Iraqi invasion of Kuwait, the Security Council adopted a resolution that qualified the event as a "breach of international peace and security", and four days later expressly recognized Kuwait's right of self defense. It is not possible to interpret the present process as recognition of armed attack if we acknowledge that the Kuwait case set an example of armed attack that created a self defense right. The possible reasons for that ambiguity in resolutions 1368 and 1373 (arose from the lack of a plain characterization of events) might be to avoid the unwarranted political and legal consequences of such a depiction, i.e. to prevent the broadening of the armed attack definition (Myjer&White, 2002).[37]

[37] According to Cassese who drew attention to the ambiguity of and the controversy in the resolutions, another reason might be the Security Council's desire to compel the US to seek an authorization for its operations. Considering the political atmosphere in the aftermath of September 11 attacks, it was highly possible that the US could get such authorization from the Council. Yet, the United States

This debate over the characterization of September 11 events is crucial for the evaluation of the legality of the subsequent actions of the United States. Since the Charter –though it refers to armed attack in article 51- did not define the elements of an armed attack, the definition of the aggression in General Assembly's resolution 3314 is generally appealed to by scholars and jurists to understand the place of the terrorist attacks within the present legal framework. Yet at the same time, it is understandable that the magnitude of September 11 attacks makes it difficult to identify them as simply terrorist acts. If we accept that the cited Security Council resolutions do not automatically oblige us to refer to the attacks as armed attack, then we should admit that a closer examination is required to label them.

First of all, any analysis of September 11 events should recognize the fact that terrorist attacks are certainly illegal under domestic and international law. Although there have been lots of arguments about the underlying factors that trigger terrorism or socio-economic conditions that provide fertile ground for terrorist organizations, no one has ever asserted that these factors or conditions might legitimize the terrible events of September 11.

The events can be defined as criminal offence under the criminal law of the United States and the murderers should be tried before the courts in the United States. That would be the case even if the responsible persons reside outside American territory. The perpetrators of September 11 attacks are also committers of international crimes such as aircraft hijacking, aircraft sabotage and terrorist bombing (Ratner, 2002). The atrocities can also be defined as crimes against

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chose to keep the management of the crisis in its own hands and to take the appropriate measures including military options unilaterally rather than to leave space for the Security Council 'to take the necessary steps'. (Cassese, 2001, p.996)

humanity due to the high number of victims who died in a single attack.[38] According to the international legal norms regulated by anti-terrorist conventions, the offenders should be extradited or prosecuted by the state of residence even though the residence state has no extradition treaty with the attacked state. Moreover, the Security Council resolutions expressly defined the event as a 'threat to international peace and security' and declared its 'readiness to take all necessary steps' to combat with that threat. In this sense, September 11 events are considered as criminal offence and a threat to peace and security by the international community.

However, the main problem at present is to answer the question whether September 11 can be regarded as an armed attack. The importance of this question is due to the fact that the self defense rationale of the United States' subsequent acts is justifiable only if an armed attack occurred.

The concept of armed attack is mostly used for aggressions of the regular military forces of states in an apparent way such as invasion of territory or assault on citizens. Yet, the problem occurs when the attack is carried out by terrorist groups who act autonomously. The International Court of Justice, in the Nicaragua case, acknowledged the descriptive characteristics of an armed attack as "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, to the territory of another State, (…) such operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces", referring to the definition of aggression in General Assembly Resolution 3314. Although it is acceptable that the scale and effect of the events of September 11 amounted to an armed attack by a regular army,

[38] This view was also expressed by a former Minister of Justice of France, Robert Badinter, then UN Secretary-General Kofi Annan, and many respectable jurists such as Antonio Cassese, Adam Roberts and Vaughn Lowe.

the statement of the Court still pointed to the necessity of a state element in the aggressor side to consider the aggression as armed attack.

This aspect of the armed attack definition was repeatedly questioned by American legal scholars after September 11. They claimed that recent developments revealed the necessity of defining the place of non-state actors in the legal system. Moreover, the existence of an armed attack should be determined in terms of the scale or consequences of the act rather than the feature of the aggressor (Moir, 2005). Thus, September 11 events totally challenge the existing framework of international law and necessitate a new categorization of aggression (Yoo, 2003, Wedgwood, 2003).

In addition to this criticism, some commentators also refer to the Caroline incident as an example of armed attack by an autonomous group. In the Caroline incident, the threat was posed by non-state actors (Canadian rebels and their American sympathizers) who could be called terrorists today. They were not acting "by or on behalf of" America, on the contrary, America tried to prevent these helps of American sympathizers, but Webster did not question that aspect of the issue to judge the legality of the British attack. Actually, the characteristics (individual American citizens or regular American forces) of the subjects that triggered the so-called self defense right of Britain were not taken into consideration during the debate (Greenwood, 2002). The United States never argued that Britain could not use its self defense right against individual Americans in American territory due to their assistance to the insurgence in British territory, but presumed the existence of such a right of Britain against this autonomous group's armed attack. Thus, it is part of customary law that states can act against terrorist groups in third states' territory and can label their aggressions as armed attack.

There are several controversial points in the simplicity of that statement. First of all, the Caroline incident might be a significant example in defining the limits of the customary right of self defense, but the UN Charter is the basic source of law, and as more than a codification of customary international law, it may attach or detach certain parts of it (Rivkin, Casey & DeLaquil, 2005). Moreover, the Charter recognizes the inherent right of self defense, but does not make a reference to custom in the definition of aggression. The ICJ detailed the definition of armed attack in its binding decision of the Nicaragua case. As a last point, the United States itself sometimes appealed to diplomatic means to try the offenders of some terrorist acts instead of considering all these acts as armed attack.[39]

Also the United States' efforts and insistence on expanding the scope of self defense in a way that encompasses military action against a harboring state of an attacker group can be interpreted as an implicit acquiescence of the prerequisite of state involvement in the definition of armed attack (Byers, 2002). The question of state involvement in or responsibility for the attacks of a terrorist organization, and the legality of targeting Afghanistan will be elaborated below.

To sum up, the classical definition of armed attack necessitates a state element as the attacker. The aggressor should be identified as the armed forces of a state or at least should act under the control of a state. In other cases, the events should be characterized as international crimes or probably as crimes against humanity. In this line of thought, the United States might demand the extradition of the attackers, but cannot wage a war against Afghanistan when it refuses to turn them over.

[39] As an example, after the bombing of an American passenger jet in 1988, the United States demanded the extradition of the suspected persons instead of initiating a military operation.

Yet, this assessment about the nature of September 11 attacks would be irrelevant if we ignore the United States' response to these attacks. The Bush administration -starting from the first moments that the news of attacks was heard- has constantly reiterated its policy to cope with such attacks by military means under the label of 'war on terrorism'. Therefore, the next part of this section will focus on that notion to provide a competent framework to the subsequent US operations against Afghanistan and Iraq.

The War on Terrorism

The essential ring of the chain of events which connected September 11 atrocities to the US military operations started nearly a month after the attacks and continued so far is the notion of "war on terrorism". Without a deliberate analysis of that notion and its place in international law, a meaningful approach to the present picture seems impossible. In this sense, first the concept of terrorism will be evaluated under the light of its transformation through history. Then, the declared war on terror will be scrutinized by referring both to the literal and rhetorical usage of the term "war" considering its legal consequences in each case.

The basic challenge to labeling September 11 attacks does not derive from the unique nature of the events in terrorism's history, but the lack of a clear definition of terrorism itself in international law.

Even though the roots of the notion can be traced back to ancient ages[40], the first official use of the term was in France. During the French Revolution, Robespierre declared a series of measures under the title of 'terror' to repress the civil unrest. According to Robespierre, "terror is nothing other than justice, prompt,

[40] The Zealots of Judea can be assumed to be the first example that employed terrorist tactics by carrying out a campaign of assassination against the Roman occupiers and their Jew collaborators. In the Middle East, the first and possibly well-known example is the Hashishees of Sabbah. Those assassins had also used suicidal attacks against the leaders of their presupposed enemy.

severe, inflexible; it is therefore an emanation of virtue; it is not so much a special principle as it is a consequence of the general principle of democracy applied to our country's most urgent needs." After a year, he was executed and condemned of 'terrorism' by his opponents. Thus, the beginning of the term was directly related to the use of violent measures under state authority (Newman, 2004).

In the late nineteenth century, this usage of the term was forgotten for a while and the term started to refer to attacks against the state by the Nihilists in Russia and Anarchists in Europe. This is also the time when the word entered daily language because of publicized attacks. Actually, this was also the first time when the phrase "war on terror" was articulated by the Western press such as the Sunday Times to name the governments' efforts to stop the attacks of anarchists.

With the beginning of the twentieth century, the state terror conceptualization was marginalized due to the recurring incidents of anti-State terrorism. Even today, terrorism is used to describe non-state violence in political lexicon though in many cases states use terrorist means as an advantageous way to achieve their strategic goals.

Since 1930's –just after the assassination of the Yugoslavian King - international law has tried to codify legal instruments to combat with terrorism. Yet, when the international organizations tried to develop rules to combat terrorism, they confronted a fundamental problem; failure to obtain consensus. As it is always articulated, "one person's terrorist is another person's freedom fighter". Thus, the naming of any action as terrorism always arouses the opposition of some states which label such actions as liberation movements and the like (Norton, 1990). In other words, to prevent the reactions of states to one or another element of the terrorism definition, draftsmen should have intentionally refrained from identifying

the exact meaning of the term. To achieve the unanimity of the international community was somehow possible by conventions that did not cite the word terrorism.[41] In accord with this deliberate abstention/ambiguity in codification, the International Convention on the Suppression of Terrorism was adopted by the UN in 1999 without a clarified definition of terrorism in its context. Guillaume (2004) stated that behavior as "it was somewhat paradoxical that the international community was seeking to suppress terrorism but could not pinpoint its meaning" (p.114). The same tendency is visible in the UN Security Council resolutions after September 11 events. Both resolutions 1368 and 1373 strongly condemned terrorism and offered a set of mechanisms to combat terrorism but still failed to define terrorism.

A world-wide unification against terrorism is visible in the recent years with regard to the realization of the grave dangers states may confront by ignoring terrorism. The United States led that "war on terrorism" as the major target of the newly emerged fundamentalist terrorism (Quenivet, 2002). However, these efforts raised a serious danger in and by themselves. Any war without an agreed definition of the enemy might cause serious harm in international law considering the far-reaching effects of American actions. In this sense, to seek for a legally defined terrorism concept in international law seems essential.

To begin with, definitions in governmental documents might be helpful in any attempt to understand or explain the terrorism notion in political jargon. A US army manual defined terrorism as "the calculated use of violence or threat of violence to attain goals that are political, religious, or ideological in nature (…)

[41] The Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents (1979), International Convention Against the Taking of Hostages (1979) are such examples of the efforts to cope with terrorist acts without clearly naming them.

through intimidation, coercion, or installing fear." The US government also describes terrorism under the Federal Criminal Code as

> "activities that involve violent (...) or life-threatening acts (...) that are a violation of the criminal laws of the United States or of any State and... appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (...) if domestic (...) occur primarily within the territorial jurisdiction of the United States (...) if international (...) occur primarily outside the territorial jurisdiction of the United States (...)"

Another useful definition in the same line belongs to the British government: "Terrorism is the use, or threat, of action which is violent, damaging or disrupting, and is intended to influence the government or intimidate the public and is for the purpose of advancing a political, religious, or ideological cause." It is important to be aware of the fact that some of those definitions belong to the Reagan administration's first "war on terror" which is also remembered by state terrorism in the name of counterterrorism. Therefore, it is crucial to rely on legal definitions instead of rhetorical devices to cope with terrorism and abstain from legalizing prohibited measures (Zizek, 2002). Otherwise, any effort to suppress terrorism might create new stages of unlawful violence, this time under the authority of state.[42] As rightly put by Suganami (2002), "If it is terrorism that America and its allies wish to fight, they must be anti-terroristic in their own approach, and being anti-terroristic means, among other things, that they must act, and must be seen to act, within the law"(p.8).

Within the context of international law, the definition used here will be the one made in a United Nations report of 17 March 2005 entitled Larger Freedom: "any action intended to cause death or serious bodily harm to civilians or non-

[42] As suggested by Agamben (2002), "state… can always be provoked by terror to become terroristic."(p.5). This statement echoes the warning of Nietzsche (1997) "He who fights with monsters should be careful lest he thereby become a monster" (p. 107)

combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act."

In the light of this definition, terrorism has three basic components; first, there must be a violent act that aims to kill or harm people, second, a certain agenda must be expected to be achieved by this act, and last there must be a coordinated plan motivating even a single act.

Even though all agree that September 11 attacks were "heinous terrorist acts" under this classification, the consequent answer to the attacks raised serious concern and dissent among international legal scholars. The US initiated a campaign encompassing several military operations and domestic measures under the name of war on terrorism. [43] The extent of the campaign seems arbitrary and there is no time limit on the military operations. At the same time, the use of the word 'war' was usually interpreted as a rhetorical tool of the Bush administration against the possible reaction at home and most scholars optimistically accentuated their belief of that use of word 'war' by American administration as an understandable emotional reaction or a revocable error (Cassese, 2001). It is also criticized as to declare a war on a method or strategy even though by meaning the people employing that strategy seems problematic in and by itself. Actually, the United States had launched war against some abstract notions such as the war on drugs, war on poverty before. Still, Bush's employment of the Reagan administration's bad reputed war on terrorism

[43] According to Kışlalı, such language is the most encouraging attitude against a terrorist. To define terrorism as a war increases the respect of the terrorist for his case (Kışlalı, 1998). The same view is shared by Howard, too. Howard stated that to call any measure against terrorism as war will accord a dignity and status to terrorists by identifying them as warriors just as they wish (Howard, 2002).

notion increased the suspicion whether the current war was inspired by the first one.[44] The lack of a clear definition of terrorism has also strengthened this worry.

However, there are serious signs that the war notion in the current case might be part of a broader strategy of the legitimization of armed violence rather than a simple misnomer (Megret, 2003, Roth, 2002).It seems like this notion is used in its literal meaning "to conduct a police operation within a theatre of irregular warfare" (Karstedt, 2002, p.151). By doing so, the Bush administration set itself free from the peace time obligations of states and depended on the extraordinary powers of a government that recognized *jus in bello* which is actually confined to regular wars between real states not a campaign against an unlocated-undefined enemy. In fact, the United States' practices after the declaration of war are definitely in accord with this approach. The illegal killings of suspected Al Qaeda personnel by drone fire or bombing in another state's territory are always introduced as compulsory actions of warfare. The United States administration had issued an executive order for its personnel in the CIA and Special Forces to assassinate Saddam Hussein even before the second Iraq war was initiated. The suspects of Al Qaeda in and outside American territory have been arrested with the title of "unlawful combatants" which has no value in international law and have been brought to secret locations for interrogations without trial.[45] The officials declare that some of these detentions without trial might last until the end of the war on terrorism, which is unpredictable considering the arbitrariness of the term "war" here. The unlawfulness of these actions even for wartime governments is defended with the claim that the unusual nature of the

[44] It should be kept in mind that prominent figures of the current administration such like Rumsfeld, Wolfowitz and Cheney were at Office during Reagan administration, too. Besides, Rumsfeld had to respond to Senate Commission about the United States' unlawful activities in Nicaragua during Reagan's war on terror.

[45] The number of interrogations is overwhelming. According to Lustick (2006), in the four-and-a-half years since September 11 the government required 80.000 Arabs and Muslims to register, called 8.000 of them to FBI interviews and locked up 5.000 in preventive detention. Yet none of them convicted of terrorism (p.44).

enemy makes the ordinary rules of war inapplicable in this war. Some scholars argue that the validity of the laws of war is directly related to the reciprocal obedience to those rules. In the war on terrorism, it is hard to assume that Al Qaeda will respect the laws of this war, and this prospect lessens the application of the laws of war by the US side (Posner, 2005).

Aside from the apparent illegality of these acts, it is also important to question the possible outcomes of the war on terrorism. The flaw of calling a criminal act a war by attributing warrior roles to terrorists –but not 'combatant' as explained above- might create a relative legitimacy for the terrorists' acts as mentioned above. Also, due to the illegality of the US actions during the war on terrorism and the subdivisions of that war, the Afghanistan, Iraq and Somali operations caused serious reactions against America and its unilateral use of force. It is repeatedly emphasized by legal scholars that any action to suppress terrorism must rely on legality and multilateralism. Otherwise, such measures that solely depend on the military pre-eminence of the superpower might backfire and even contribute to the recruitment of new members for the terrorist group.[46] It is, for this reason, reasonable and necessary to question the US justifications for the military operations against Afghanistan and Iraq (within the scope of its war on terrorism) in order to understand the impact of the US unilateralism on jus ad bellum.

The Evaluation of the Use of Force Against Afghanistan

The War in Afghanistan

The first military operation in the name of the war on terrorism was waged against Afghanistan twenty-six days after the terrorist attacks on the World Trade Center and Pentagon. Although the Al-Qaeda connection in the incidents had been

[46] Some terrorism experts noted that after the invasion of Iraq in 2003, the recruitment to Al Qaeda showed a huge increase in numbers. Also the new members of the organization are mostly young and well-educated as opposed to the ordinary profile of such organizations' members.

pointed by the US intelligence offices since the first days of the attacks, the name of Afghanistan was accentuated for the first time after an English document about the attacks was released on 4 October. In addition to providing some details of the past speeches of Usama bin Laden in which he had made repeated calls for *jihad* against America as an indicator of the role of bin Laden in the attacks, the document also declared an Al-Qaeda relation with the Taliban regime of Afghanistan.[47] The United States publicly confirmed the reliability of the United Kingdom's document after two days.

On 20 September, Bush issued a speech to the Congress that also might be seen as an indirect message to the Taliban authorities, who were not recognized as the government of Afghanistan by the United States:

> The United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of Al-Qaida who hide in your land. Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats, and aid workers in your country. Close immediately and permanently every terrorists training camp in Afghanistan, and hand over every terrorists and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act and act immediately. They will hand over the terrorists, or they will share in their fate.

Taliban officials rejected these demands and insisted on securing bin Laden unless the United States provided satisfactory evidence of the Al-Qaeda connection

[47] The title of the document was "Responsibility for the Terrorist Atrocities in the United States, 11 September 2001." The document listed the well-known details of the Al-Qaeda and also put forward some new claims as the evidence of the guilt of Al-Qaeda in the atrocities. Yet, the evidence was not clear and its basis was concealed due to security concerns. One of the articles even noted that "…there is evidence of a very specific nature relating to the guilt of Bin Laden and his associates that is too sensitive to release." This secrecy continued in the following days too (Suganami, 2002). The US government initially promised to provide a detailed public statement of the evidence linking the attacks to Al-Qaeda but later abstained and contented with limited briefings to the NATO and the UN. Another important aspect of the issue was made public by Chomsky. He claimed that in June 2002 the then FBI director testified before the Senate and admitted that before the invasion of Afghanistan, they just *believed* the mastermind of 9/11 attacks was bin Laden who operated within Afghanistan although the financing of the attacks was traced to Germany and the United Arab Emirates (Chomsky, 2003, p.200). For an opposite view about the evidence provided by the US and the UK, see also O'Connor (2003)

in September 11 incidents. In the following days, the US-allied states declared their support to the US for a possible action and all diplomatic relations with the Taliban government were broken. When a military operation against Afghanistan became foreseeable, the Taliban officials offered to negotiate to hand over bin Laden to a third country but the Bush administration stated that there would be no negotiation and again demanded that the Taliban surrender bin Laden "dead or alive."

On 7 October 2001, the US and the UK initiated an intense air strike against Afghanistan with the claim of self defense. The name of the operation was determined as "Operation Infinite Justice" at the beginning, but considering the public reaction against negative –and retaliatory- undertone of that name, it was changed and the operation was entitled "Operation Enduring Freedom." The United States notified its justifications of the operation to the UN with a letter by Negroponte. The details of the letter and the US' self defense claim in it will be analyzed later. President Bush announced the operation in his speech to the nation:

> On my orders, the United States military has begun strikes against Al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. These carefully targeted actions are designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime.

The war was carried out in different phases. The first phase started with air strikes against the strategic centers of the Taliban infrastructure and the suspected terrorist camps of Al Qaeda, and lasted nearly a month (McInnes, 2003). The second phase started in late October and continued during November. In this phase, the US forces decided to support the Northern Alliance to seize the government and helped them to take advantage of the ground war. The third phase in December was based on severe aerial bombing of the caves in Tora Bora Mountain to seek the senior officers of Al Qaeda. After that, Hamid Karzai was called to establish an interim

government and a UN force was located in the region (O'Hanlon, 2003, Boot 2003). The US military operation lasted a few more months in a lower degree.[48]

Aside from raising concerns about the civilian casualties during air strikes and the humanitarian loss in a possible famine, the war against Afghanistan aroused less opposition within the international community, at least on the governmental plane, when compared to the opposition to the Second Iraq war.[49] Most of the states supported the US action and participated in strikes whereas some others offered intelligence. Even so, to interpret the relative lack of opposition as a sign of concrete consensus on the operation is problematic, to say the least.[50] "Either you are with us or you are with the terrorists" categorization of Bush might have compelled states to consent to war with the fear of a US response (even being the next target of the United States) to any challenge to operation decision[51] (Myjer&White, 2002, Roy, 2002, Slocombe, 2003). Also the dramatic atmosphere in the aftermath of 11 September might have comprised sympathy towards the US and softened the reactions of states. However, the legality of the operation was questioned by legal scholars –especially in Europe. These questions and the proposed answers will be revisited here.

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[48] According to O'Hanlon (2002), " by the end of January, the United States had flown about 25,000 sorties in the air campaign and dropped 18,000 bombs, including 10,000 precision munitions (…) in addition, more than 3.000 U.S. and French bombs were dropped on surviving enemy forces in March during Operation Anaconda, in which some 1500 Western forces and 2000 Afghans launched a major offensive against about 1000 enemy troops in the mountainous region of eastern Afghanistan." (p.271)

[49] Yet at the same time, the opinion of the public significantly contradicted those of their governments. A Gallup poll run in late September 2001revealed that the world public prefers diplomatic solutions rather than the ones that rely on military might.

[50] For such treatment of the state consent on Operation Enduring Freedom, see, Kirgis (2001).

[51] On 20 September, President Bush made a speech to Congress to announce the long-term plan of the US in its fight against terrorism. He stated that; "Our response involves far more than retaliation and isolated strikes. Americans should not expect one battle but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."

The legality of the war in Afghanistan

On 7 October, the United States' permanent representative to the United Nations, John D. Negroponte, circulated a letter to the Security Council to document the initiated air strike against Afghanistan. Among the several arguments that could justify its operation, America opted to depend on its inherent right of self defense to wage a war against Afghanistan (Byers, 2002). In this letter, Negroponte stated that;

> In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.
> …
> The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad. In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to *prevent and deter further attacks* on the United States. (emphasis added)

The letter, and the US justification stated in the letter, arouses different kinds of legal issues which range from the character of 11 September events to the conditions of self defense to preemptive action. Up to now, the basic definition of self defense was determined in the Charter and its practice in several cases filled in the details absent in the definition. The right of self defense occurred when a state is attacked by another. The subject, object and extent of the consequential process were somewhat clear; *the attacked state* could resort to armed action against *the aggressor state* until the *attack ended*. Even if we accept that the right of self defense is

justifiable against a terrorist act, it is still hard to answer these basic questions in the United States' exercise of self defense; against whom, by what means, until when? These and some other problems will be studied below.

Was 9/11 an armed attack?

The validity of the self defense right depends on the characterization of September 11 as an armed attack under Article 51 of the Charter and the rubric of CIL. Different arguments about the convenient title for the attacks were discussed above and will not be repeated here. Yet, it is obvious that the rest of the debate about the legality of the US' self-defense argument is tenable only if September 11 atrocities are labeled as armed attack in its legal meaning in the first place.

Was The Self Defense Right Against Afghanistan Valid?

The timing problem

One of the basic prerequisites of the right of self defense is defined as the necessity of action in customary international law. This means that the attacked state should react immediately and rely on defensive purposes rather than counteracting the previous attack. The response to aggression under the right of self defense must be directed to repelling the attack or at least to lessening its damage (Cassese, 2001, Schmalenbach, 2002). Yet, it is difficult to see this element of the legal self defense act in the United States' Operation Enduring Freedom which began 26 days after 11 September; allegedly armed attack triggered the necessity of self defense. Therefore, the US action against Afghanistan might be interpreted as a reprisal –which is strictly prohibited in the Charter- since it commenced long after the real attack ended, and cannot be justified as a necessity to stop the harm of an ongoing aggression (Dunoff et.al., 2002). As defined by Moir (2005) "in order to qualify as a lawful exercise of self defense, the use of force must be protective rather than punitive, i.e. necessary to

repel an ongoing or imminent armed attack, rather than to retaliate for a previous attack" (p. 7). In the current crisis, the harm was already done, and it is hard to defend any action after that moment as a necessary means to deter that harm. It is also significant to remember President Bush's statement about the timing of the military operation, which acknowledged that America will act at a time it decides.

These criticisms seem unconvincing to most American scholars. Their counter-argument is based on a notion that has been accepted by the United States – and also Israel- in the recent decades, "the accumulation of events theory". According to this theory, September 11 events cannot be evaluated in isolation, but within the context of previous attacks. If we assess September 11 events as the latest part of an ongoing attack of Al Qaeda which can be enumerated as first the Twin Towers attacks in 1993, then the attacks on the US embassies in Kenya and Tanzania in 1998, and the attack on the USS Cole in 2000; the timing matter in the US response gains a new dimension. The attacks on the WTC and Pentagon can be seen as another phase of a single –and ongoing- attack by Al Qaeda (Moir, 2005).

Even if the accumulation of events theory is rejected, it is still possible to claim that September 11 incident was the first of a series of attacks. In that case, the United States might argue that Al Qaeda posed an imminent threat to the United States and its nationals inside and abroad considering the severity of September 11 attacks. Thus, the US action should be seen as a necessary measure to prevent the future damage of Al Qaeda in its ongoing attack (Franck, 2001). Actually, this part of the argument is totally consistent with the latest actions of the US against terrorist attacks, e.g. the bombing of a pharmaceutical factory in Sudan in response to the attacks on its embassies. The United States –as well as the United Kingdom and Israel- has repeatedly argued that the right of self defense against terrorism cannot

exclude preemption in case of an imminent threat by terrorist networks (Greenwood, 2002).[52]

The targeting problem

Apart from the American assumption that the necessity aspect of the self defense right is justified by these arguments, it is still problematic to assert that Operation Enduring Freedom was proportionate according to the Webster's statement in the Caroline incident which limited the use of force to "nothing unreasonable or excessive." Thus, the proportionality principle is also related to the question of whether it is legal to expand the response to a terrorist action by a group –even if it caused colossal harm- to attacking another state's territory, its government installations or its infrastructure with the aim of overthrowing its de facto government and installing a new one.

Was Afghanistan a legitimate target?

September 11 attack was not launched by the Taliban, but Al-Qaeda. In this sense, the question arises whether it is lawful to take military action against a state which was not directly involved in the responded attacks but allegedly linked to the responsible terrorist organization (Byers, 2002).[53]

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[52] Actually the basis of this appeal can also be found in the Shultz doctrine. In response to the threat of future terrorist attacks, in his famous Park Avenue Synagogue speech in 1984, he declared, "our responses should go beyond passive defense to consider means of active prevention, pre-emption and retaliation. Our goal must be to prevent and deter future terrorist acts. We cannot allow ourselves to become the Hamlet of nations, worrying endlessly over whether and how to respond." Instead, Shultz argued, the United States had to strike first. "The public must understand before the fact that some will seek to cast any pre-emptive or retaliatory action by us in the worst light, and will attempt to make our military and our policy makers—rather than the terrorists—appear to be the culprits. The public must understand before the fact that occasions will come when their government must act before each and every fact is known." Yet, the reactions of the international community to the previous applications of the doctrine fall short of a meaningful pattern and it is not possible to talk of an emerging customary international law norm. It is also important to remember that the most famous claim of preemption belongs to Nazi Germany for the invasions of Czechoslovakia and Denmark in World War II.

[53] Some scholars also suspected whether a non-state actor can be subjected to military force by a state in the name of self defense. The answer of American side to that criticism was very clear, " if the Council can act against Al Qaeda, so can an attacked state (Franck, 2001).

In fact, to disregard the territorial integrity of other states with the excuse of self defense against terrorism was a usual claim of the United States nearly for two decades. The basic premise of that attitude can be traced back to George Shultz –who is also deemed as the father of the preemption doctrine (Henninger, 2006).

> The Charter's restrictions on the use or threat of force in international relations include a specific exception for the right of self-defense. It is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace; from attacking them on the soil of other nations, even for the purpose of rescuing hostages; or from using force against states that support, train, and harbor terrorists or guerrillas. (Shultz, 1986)

The doctrine has been widely used and promoted in many instances in which the US unilaterally resorted to force. For example in 1986, when a nightclub in Berlin was bombed and two American soldiers died in the attack, the United States responded with an attack against Tripoli with the claim of self defense though the claim was widely rejected by other states. Another –and a more illustrious one- is the assassination attempt against a former president of the US, George Bush Sn. which was responded to by the bombardment of Iraqi military headquarters. Even though American actions in both incidents were highly criticized, the United States kept using this argument to extend the existing limits of the right of self defense at the expense of a state's right of territorial integrity enshrined under the UN Charter.[54]

Besides, the US attacks did not simply violate the sovereign rights of Afghanistan by initiating operations on its territory without the consent of its government, but also aimed to topple that government (Greenwood, 2002, Schmalenbach, 2002). Although the Taliban was not recognized by the UN as a

[54] Another state which uses that justification repeatedly is Israel. Although most of the arguments of Israel are widely rejected by the international community, even these rejected actions might be used as precedents by American legal advisors e.g. Israel's bombardment of the Osirak reactor is criticized by the UN as unlawful but still referred to as an example of the preemption doctrine by US legal advisors. For the exact place of the Shultz Doctrine in international law see also, Gray, 2000, p. 116-120.

legitimate government, it is still necessary to provide a legal ground for the US actions against the Taliban regime because of the lack of a direct link between the Twin Towers attack and the Taliban.[55]

First of all, it is not tenable to evaluate the legality of the Operation Enduring Freedom with arguments depending on the discoveries made after the allied forces entered Afghanistan. The United States and the Allies might have found some documents revealing the organic relationship between the Al-Qaeda leader, Usama bin Laden and the Taliban's religious and military leader, Mullah Omar. Yet, such evidence did not exist on 7 October when the US initiated its operations. So, justifying Operation Enduring Freedom with the Taliban's involvement in September 11 attacks can be interpreted as politically legitimate, but not lawful at all.[56]

With regard to the Taliban's (and consequently Afghanistan's) responsibility for the actions of Al-Qaeda, which was sheltered in Afghanistan, the United States made several arguments that referred to the Taliban's past record on the violations of its obligations imposed by the Security Council resolutions against the Al Qaeda. The Taliban was not widely recognized as the government of Afghanistan when September 11 attacks occurred. Nevertheless, it controlled most of Afghanistan territory[57] -except a very limited area in the northeast of the country which was ruled

[55] According to Foley (2001), the problematic aspect in the American claim of self defense right in Afghanistan war is not the timing of action but the target's position in the timing condition of self defense right. In other words, the Operation Enduring Freedom was only lawful if the US could prove that the Taliban regime posed a direct and imminent threat to the United States. Although it is accepted that the methods of terrorism are based on stealth and surprise, it is still hard to convince anyone that the Taliban government was preparing for imminent attacks when the US attacked it. "There are no airliners flying from the Afghani airports toward American targets, which the US could legally intercept and destroy as immediate danger." (Foley, 2001, p.9)

[56] For the new emerging tendency for the ex post facto legitimization of a war see also Korhonen,, 2003.

[57] The failed state argument which is based on the assumption of terrorists located in a territory without effective governance is not applicable in this situation (Schmalenbach, 2002). According to Chan (2005) "As for the weak state, the Taliban probably imposed a stronger government than its modern predeccors, and Osama bin Laden did not come to Afghanistan because its government was too weak to prevent him from doing so, but because its government was strong enough to welcome him to stay. There was a deliberate policy-oriented invitation to Osama." (p. 6)

by the Northern Alliance- and could be treated as the *de facto* government of Afghanistan.[58] The basic underpinning of the US justification was that by allowing the Al-Qaeda to operate from its territory, in Bush's words by "harboring terrorists", the Taliban and also Afghanistan under its rule could be legitimately targeted within the right of self defense against armed attacks previously committed by this terrorist network. However, a state's responsibility for the actions of non-state actors operating from its territory is highly controversial in international law and a few points need to be made.

The international legal community has long argued about the responsibility of states in the actions operating from their territory. The most cited cases of this debate are the Nicaragua and Tadic cases. In the former case, the Nicaragua government appealed to the International Court of Justice with a demand of financial compensation from the United States for its continuing attacks by direct means such as mining harbors or indirect ones like assistance to contra guerrillas within Nicaragua. The United States claimed that its acts could be considered as the collective self defense of El Salvador and Honduras with respect to Nicaragua's assistance to FMLN -an insurgent movement in those states. With regard to Nicaragua's responsibility in the actions of FMLN and the United States' responsibility in the actions of contra guerrillas', the court advised a two folded argument; first "complete control" which means to attribute all acts of the group to the supporter state, that group must have such a dependence on the supporter that it can be equated with an organ of the state. After stating that, the court focused on a subsidiary principle with regard to the US' role in the paramilitary activities of

[58] Yet at the same time, an American argument which was based on the right of intervention through an invitation from the Northern Alliance as the legitimate government of Afghanistan was not plausible since the fact was that neither the Northern Alliance nor the Taliban were accepted as the representatives of the Afghan people by the UN. For such justifications depend on the legitimacy of the Northern Alliance see Byers, 2002.

contras. This second principle can be called "effective control" over certain acts of the group that can be attributable to the US only if that state actively controls the conduct of that act.[59] To sum up, in the Nicaragua case, ICJ stated that mere assistance provided by a state in terms of weapon provision, or logistic or other support was insufficient to label the act of an aggressor group as an armed attack from the supporter state (Milanovic, 2006).[60]

Yet, this threshold was lowered by the International Criminal Court for Former Yugoslavia, mostly known as the Tadic case, which emphasized "overall control" rather than "effective control" of the ICJ. In its decision, the court stated that

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields *overall control* over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. (emphasis added)

The last attempt to codify state responsibility in international law was concluded by the UN's International Law Commission in 2001 with the Draft Articles on Responsibility of States for Internationally Wrongful Acts. The related articles are as follows:

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[59] The Court has to determine whether the relationship of the contras to the United States Government was such that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. The Court considers that the evidence available to it is insufficient to demonstrate the total dependence of the contras on United States aid. A partial dependency, the exact extent of which the Court cannot establish, may be inferred from the fact that the leaders were selected by the United States, and from other factors such as the organization, training and equipping of the force, planning of operations, the choosing of targets and the operational support provided. There is no clear evidence that the United States actually exercised such a degree of control as to justify treating the contras as acting on its behalf.
Having reached the above conclusion, the Court takes the view that the contras remain responsible for their acts, in particular the alleged violations by them of humanitarian law. For the United States to be legally responsible, it would have to be proved that that State had effective control of the operations in the course of which the alleged violations were committed. ICJ decision in military and paramilitary activities in and against Nicaragua. para. 115

60 It is plausible to explain the US action against Afghanistan in terms of the Nicaragua judgment. In that case the ICJ rejected the US claim that the support of Nicaragua to the terrorist groups in Al Salvador provided sufficient ground for a self defense operation against Nicaragua. In other words, to attack a terrorist group's supporter state is not within the limits of the self defense right, which was the case in the US justification for its actions against Afghanistan. The decision also threw light on the defining features of an armed attack. According to the ICJ, a state element is necessary to label an act as armed attack.

> Article 8
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State carrying out the conduct.
>
> Article 9
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.
>
> Article 11
> Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

In the light of the preceding paragraphs, we can assert that in the present situation, the Taliban authority neither instructed nor controlled September 11 attacks. Moreover, they never admitted the responsibility of the attacks, and also in the following days of the attacks, the clergy declared a statement condemning the attacks. In the light of these arguments about state responsibility, it is not plausible to assert that the harboring of the Al Qaeda by Afghanistan might justify the claim of self defense right against that state.

Even if the state responsibility argument seems unacceptable and extravagant, it is still possible to claim that Afghanistan violated its legal obligations and duties by harboring the Al Qaeda in its territory (Cassese, 2001, Franck, 2001). According to the UN General Assembly Resolution 2625, namely Declaration on Friendly Relations, states should "refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts." Aside from this general obligation of states to prevent the operation of terrorist groups within their territory, the Security Council resolutions in the wake of 11 September also imposed

such duty on the Taliban regime. Resolution 1368 explicitly called states "to bring to the justice the perpetrators, organizers and sponsors of these terrorist attacks" and stressed "those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable." Resolution 1373 also decided that states should "deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens" and "ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice." The last part of the resolution might be interpreted as an imposition on the Taliban regime to extradite Usame bin Laden.

Actually, there is no general principle in international law that obliges states to extradite terrorists.[61] Yet, the Security Council has the power and authority to require member states to surrender the suspected criminals to its or a third party's jurisdiction if there is a threat to international peace and security, as was the case with the Lockerbie incident. With regard to the fact that the Security Council had previously adopted a binding decision in 1999, which required the Taliban regime to surrender bin Laden to the United States or a third party as the perpetrator of the bombing of US embassies, the Taliban regime was already at an illegal point in its resistance to extradite bin Laden. Still, to justify a military operation against a state with the excuse of that state's breach of its obligations to extradite terrorists seems illogical, to say the least.

Lastly, another American argument asserts that the position of Afghanistan can be compared to a neutral state in warfare that actively helps or passively accommodates enemy troops. In that case, a state can lawfully launch a military

[61] There are multilateral treaties that regulate the relations between states with regard to the appropriate conduct against criminals. As an example, according to the convention for the suppression of unlawful acts against the safety of civil aviation, all parties should extradite or prosecute the offenders of sabotage. Although both Afghanistan and the US are parties to the treaty, the breach of a treaty by not fulfilling its obligations cannot justify the resort to force.

operation against the host state's territory to deter the belligerent group's operations (Greenwood, 2002). Yet, the legal limit of such a military operation will be the targeting of enemy troops, leaving out the hosting state in the operation. If we apply this argument to the current crisis, it is obvious that Afghanistan's political structure -the Taliban regime- cannot be included in the extent of the military operation with respect to its inactivity against Al Qaeda.

Was the Right of Self Defense Superseded by the Security Council Resolutions?

Even if we accept the validity of the self defense rationale, some problems arise about the duration of that right. According to article 51, the right of self defense ceases when "the Security Council has taken measures necessary to maintain international peace and security." It could be argued when the Security Council adopted resolution 1368, there was an implicit reference to the self defense rationale in the text, but after the adoption of resolution 1373, which took a list of measures under Chapter VII of the Charter in response to the attack, the self defense right could not sustain its validity. In this sense, the second resolution might have ended the self defense right by taking the necessary measures.

However, the preamble of both resolutions cannot be ignored. If the right of self defense is superseded by the second resolution, then how can we explain the resolution 1373's reaffirmation of the inherent right of self defense as recognized in resolution 1368?

The right of self defense is directly related to the necessity of the victim state to repel the present danger when there is no other option available. But this right ends when the urgency to take counter measures disappears. The aim of this limitation is to stop any armed attack short of a war. If the self defense right

continues against an attack as long as the victim state feels necessary, then military dispute may turn into war. In this sense, it is logical to assert that the United States' self defense right should cease when the Security Council acts against the threat. Yet, this is not the case in resolutions 1368 and 1373. Thus, anyone who accepts that the resolutions recognized the self defense right of the United States should also admit that the right did not end with these resolutions (Byers, 2002).

Was The Operation the Only Choice?

It was estimated that such an attack against the world's sole superpower would not be responded to without military might. Actually, in the wake of September 11, the rhetoric of the American politicians exactly epitomized the atmosphere amongst the terrified people of America (Liberman, 2006). Later, the administration abandoned its emphasis on war against another civilization or religion (its crusade rhetoric) and addressed its outrage to the perpetrators of attacks. Although an attack of such scale is economically, sociologically and mostly psychologically devastating for the victim, it is still questionable that September 11 attack deserves the most violent answer (Thornberry, 2002). According to the first article of the UN Charter, all states have the duty "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." In accordance with that duty, the nonmilitary alternatives should have been evaluated more carefully before waging a war against Afghanistan. Actually, after resisting some time the US demands about the extradition of bin Laden, the Taliban regime had seen the approaching war and offered to turn bin Laden over to a third

country.[62] But the United States interpreted that effort as Taliban tactics to gain some time and repeated its demand to hand over bin Laden dead or alive (Foley, 2001). By doing so, the US blocked negotiations to get bin Laden through diplomatic means.

Even when diplomacy did not work, there were still other options to impose American demands on the Taliban. Some commentators referred to the economic sanctions against Iraq which started at the time it invaded Kuwait and lasted even after the military operation ended. Apparently, the Security Council has considered these sanctions as an appropriate measure to cope with an aggressor before having recourse to armed force (Dunoff et. al., 2002). The obligation to negotiate is determined within the UN Charter. All members of the UN should act in accordance with that obligation before resorting to force, considering the fact that the basic goal of the foundation of the United Nations is to protect the next generations from "the scourge of war".

Yet, the United States preferred to initiate a military operation against Afghanistan despite all these problematic aspects of the operation. Even though the US president and some commentators has argued that the operation Enduring Freedom was a multilateral action with regard to the states' logistic and intelligence support before and during the war, the US justifications of operation represented a typical example of American unilateralism. The United States jettisoned any chance to launch that operation under the UN authorization in order to act unrestrained by this authorization and to decide its limits unilaterally. The US exploited the catastrophic atmosphere in the wake of the11 September events to appeal and impose its controversial interpretation of self defense right during the operations. The US

[62] Some commentators noted that the demand of the Taliban was similar to the Libya's request in the Lockerbie case. But in that case, the United States accepted that request and the suspected criminals were tried before a Scottish jury in the Netherlands.

unilateralism in the use of force norms has reached a momentous point with the operation against Iraq.

The Evaluation of Use of Force Against Iraq

This part of the chapter aims to analyze the argumentation of self defense right in US justifications of operation Iraqi Freedom considering the notion's historical background and this background's role in its present connotations. To achieve this aim, first a brief review of the history of the norms of use of force will be examined. Then, the US justifications in II Iraq war will be evaluated in detail to understand the demands of change by the United States on the existing limits of the use of force, with a special emphasis on the right of self-defense. The preemption doctrine in the 2002 NSS document might be seen as the key notion in such an evaluation. The war against Iraq also renders a unique and significant case with regard to the changing attitude against the Security Council resolutions.

The Basic Norms of International Law Governing the Use of Force

For many centuries, resorting to force was taken for granted as legitimate in international relations. Most states appraised war as a lawful means of achieving national interests or responding to the illegal actions of other states. Yet, some ancient thinkers tried to formulate consistent rules about war. The first examples of this tendency were usually denoted as an ethnic characteristic which aimed to prevent wars among states of similar ethnic backgrounds. For example, Socrates did not use the word war for the armed conflicts among Greek states. According to Aristotle and Plato, it was not legal or legitimate that the Greek states fight against each other. Cicero defined some diplomatic norms that states should apply during the warfare. During the age of the Roman Empire, it was possible to talk about a 'pax romana' which meant that every state should live peacefully under the government of

the Roman Empire. As it can be seen, all these rules were very primitive efforts to define the limits of warfare.

Prior to the Middle Ages, most of the literature was concerned with the rules that govern the conduct of war –*jus in bello*- rather than the rules that govern the conditions to wage war –*jus ad bellum*-. The rules that placed some basic limits on the use of force mostly stemmed from the Roman Catholic tradition. One of the first theologians who wrote on the topic was St. Augustine. His conception of just war continued to be accepted for nearly 1000 years. In the fourteenth century, Thomas Aquinas revisited Augustine's teachings and he reformulated the just war concept in three principles: First, an authority should announce the war. Second, the war should be started against an attacker party. Third, the war should be conducted with good intention. To sum up, war is morally and legally permissible only if it is a response to a prior illegal act.[63] In the late sixteenth century, the distinction between just and unjust war started to erode. Some commentators argued that if each party in a war believed in their own rightfulness –namely the doctrine of probabilism- then both sides were just. This doctrine blurred the limits of just war and in the late eighteenth century, the concept of just war was totally abandoned. After that time, war was just evaluated with respect to the vital interests of states and there were no limits on the right of states to resort to war (Dedeoğlu, 2001).

During the nineteenth century, the balance of power barely prevented states from starting great wars. However, states were still not very concerned in putting legal limits on the use of force.

In practice, the first attempt to prohibit the use of force was the Locarno treaty signed by Germany, England, Italy, France and Belgium on 16 October 1925.

[63] At the same line of thought the war interpreted as a means to punish these acts. "It would be impossible for the world to be happy (…) if the innocent were not allowed to teach the guilty a lesson." (Vitoria,1557, section 2, ¶ 9)

Actually, the Locarno Treaty was a non-aggression protocol between the signatory states rather than a general prohibition of use of force. Yet, these efforts of seeking peace between the two wars provided the convenient grounds for the founding of the League of Nations in 1920. The Charter of the League of Nations could not provide efficient measures against the use of force. So, the states tried to fill the gaps of the Charter by accepting the Paris Pact on 27 August 1928. First, the USA, England, France, Germany, Italy, Japan, Poland, Belgium, and Czechoslovakia signed the pact (Langlois et. al., 2000). Then, in 1939, 63 states, including Turkey, signed the pact, too. In this pact –which is also known as the Briand-Kellog Treaty- the parties undertook that they would not use war to further their national interests, they would not use war to settle their disputes and they would use peaceful means to solve their disagreements. In other words, the pact meant the repudiation of force as a political means in international relations. Nevertheless, the pact accepted war as legal and legitimate in the case of the self-defense of states. Besides, there were no sanctions in the pact to ensure state obedience to its terms (Pazarcı, 2000).

The UN Charter is the first agreement that formally prohibits the use of force in international relations. The basic goal of the United Nations is the protection and maintenance of international peace and security as stated in paragraph 1 of article 1 of the Charter:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

To achieve this goal the prohibition of the use of force is also regulated in paragraph 4 of article 2: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." [64]

Although the wording of the article might be interpreted to mean that the prohibition is binding over the signatory states, the Charter makes it clear in paragraph 6 of article 2 that the organization can take preventive measures in case of an aggression or threat of aggression by non-signatory states. The wording of the text is as follows: "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." Shortly, the prohibition of the use of force is binding on all states.

However, this prohibition has some exceptions, too. The UN Charter also determines these exceptions. The first exception to the prohibition is self-defense. In law literature, self-defense is explained as the legal right to defend oneself with reasonable force.

Although it is not definite in the Treaty of the League of Nations or the Briand-Kellog pact, the right of states to self-defense that is accepted in customary international law is clearly stated by article 51 of the UN Charter:

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

[64] The word 'war' is used only once –at the preliminary part- in the Charter. Some commentators argue that this wording and the emphasis on the use of force aims to prevent states from using the different interpretations or definitions of war in order to take advantage of the gaps in the definition as they did before with the Briand-Kellog pact (Keskin, 2002, Dunof et al., 2003).

As it can be understood from the article, the most important condition of the right of self-defense is the physical occurrence of armed attack. Yet at the same time, some parts of this condition should be examined more carefully to understand the right of self-defense. First, we should look at the General Assembly Resolution 3314 for the exact definition of armed attack/aggression.

The first article of the resolution defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State." The second article of the resolution suggests two preconditions to define an act as aggression. The attacker party should be the first one that resorts to armed force, and its act should be very serious and intense.

The third article of the resolution explains the acts that are deemed to be aggression in the existence of cited preconditions:

> a-The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
>
> b-Bombardment by the armed force of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
>
> c-The blockade of the ports or coasts of a State by the armed force of another State;
>
> d-An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
>
> e-The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
>
> f-The action of a State in allowing its territory which it has placed at the disposal of another State, to be used by that other State for perpetrating and act of aggression against a third State;
>
> g-The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Different interpretations about the definition of aggression will be mentioned again while examining the anticipatory self-defense and preemptive war concepts.

The second controversial point about the right of self-defense is to be subjected to a real attack. Most commentators accept that the 'occurrence' phrase in the article must be interpreted as the existence of a real attack, and that probability of an attack does not suffice for the presupposition of the right of self-defense (Henkin, 1979, Gray, 2000, Lowe, 2003). The ongoing debate will be evaluated in the coming pages.

There are also some international law norms which govern the application of the right of self-defense. The first of these norms is the necessity and proportionality of the use of force with respect to the scope of the attack. Necessity in this context means that there should be no other option to stop the attack and proportionality means to use just enough force to stop the attack and remove its results.

Another norm about the use of force is related to the application of that right individually or collectively. The attacked state can confront this individually or it can ask for the help of other states. Yet, the intervention of a third party without a call from the victim is not legal under the rules of self-defense.

As a last point, the state that resorts to force under the concept of self-defense has the right to do it without obtaining permission from the Security Council. But after exercising the right of self-defense, the state should inform the Security Council about its measures and also obey the resolutions of the Security Council about the issue.

The second exception of the prohibition on the use of force is to resort to force under the UN resolutions to secure international peace and security. The main goal of this exception is to guarantee the prohibition of paragraph 4 of article 2 and to acknowledge the authority of the Council to decide upon the methods of enforcement in case of an aggression against the peace and security of the system. At

this point, according to the article 24 of the UN Charter, the Security Council determines the measures to be put into practice by the organization. Besides, Chapter VII of the Charter regulates the authority and actions of the Security Council. According to the article 39 of Chapter VII, in the case of an aggression, the Security Council will determine the situation, decide upon the adequate measures and act as the superior authority during the application of these measures.

Adequate measures may be in two different forms; measures not involving the use of force in accordance with article 41, and measures involving the use of force and military force in accordance with article 42. To provide an efficient mechanism to the Security Council to apply the appropriate measures, articles 43-47 regulate the maintenance of an armed force under the authority of the Council. However, this part of the Charter has never become operative mostly because of the veto of the five permanent members.

Consequently, even if the Council determines the existence of aggression or the threat of aggression, the UN organization is contented with the establishment of ad hoc peace forces or the authorization of the use of force to member states due to the lack of this special force under the authority of the Council.

In these two ways, -ad hoc forces and member state coalitions- to resort to force in the name of the UN has caused many complications within the existing framework of international law. The ambiguous wording of authorizations enables states to interpret these resolutions on behalf of their political interests. This attitude produces serious results in the exercise of self-defense. In the absence of an ending date in an authorization resolution, states may allege that the resolution justifies their self-interested acts even years later. In other words, the power of the UN is restricted to the authorization of the use of force and reduced to an inefficient position in

practice. Global security has been left in the hands of a few powerful states under the UN umbrella. The appearance of this tendency in the first and second Iraq wars is also worth considering.

Self-Defense against Iraq's WMD Stock

The legal framework of self-defense –which was cited by the US as one of the justifications of the 2003 Iraq war- was briefly explained above. Yet considering the changing conceptualization of threat, many controversial points of the existing framework of self-defense was revealed by the "Operation Iraqi Freedom." The UN Charter accepted self-defense as an exception while prohibiting the use of force in international relations. However, the definition of self-defense in theory arises some issues in practice.

- Should the act of aggression actually occur to justify the self-defense? Or can the threat of an imminent attack reveal that right?
- Who -in addition to the threatened victim- is entitled to use force for self-defense right, if this right is revealed in the case of a threat instead of a real attack?
- How can it be possible to determine which party is the aggressor and which party the defender in the existing tension? Is it plausible simply to look at the order of the use of force?

While searching for answers, the reference point will be the process which resulted in the second Iraq war. Within this context, before examining *the 2002 American National Strategy* and the 'pre-emptive' self-defense doctrine in this strategy, we should look at the anticipatory self-defense concept in customary international law.

Anticipatory Self Defense

It is controversial whether a state has the right to self-defense under the threat of an imminent attack. To answer that question correctly necessitates a careful interpretation of the definition of 'armed attack' in article 51 of the UN Charter. The first paragraph of article 31 of the Vienna Convention on the Law of Treaties may be helpful in shedding some light on the method of interpretation (Bothe, 2003). The paragraph was as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." As it seems here, to interpret the term 'attack' in article 51, first the ordinary meaning of the word should be understood. The word attack is defined as "to set upon forcefully in order to damage, injure or destroy them" or "a belligerent or antagonistic action" in dictionaries. The basic point of these definitions is their emphasis on action.

However, article 31 states that we should interpret the ordinary meaning within its context. Therefore, we can find some helpful details by looking at the whole draft. Article 51 determines the condition of self-defense as "if an armed attack occurs." It is implausible to assume that the UN Charter ignored the possibility of the threat of attack because paragraph 4 of article 2 prohibits not only the use of force but also the threat of the use of force. In article 39, the threat to the peace is defined along with the act of aggression. It is obvious that the UN Charter considers the existence of a possible threat in prohibition of use of force but restricts the exception of that prohibition in the limits of an actual attack (Pazarcı, 1999). In other words, the self-defense right arises only in an actual attack and the threat of attack falls within the authority of the Security Council.

Finally, under article 31 of the Vienna Convention, we should interpret the term attack in the light of the aim and the intention of the UN Charter. It is obvious that the aim of the UN Charter is the prohibition of the unilateral use of force. So, it is appropriate to constrain the definition of attack to real action.

Despite this interpretation, some scholars assert that if the damage of the real attack will be insufferable, it will be unjust to ask the possible victim to wait until the inevitable harm is done by the real attack. The source of this assertion is the 1841 Caroline case. In the Caroline incident, the US secretary of state Webster formulated the conditions of anticipatory self-defense in the case of an imminent threat as "instant, overwhelming, leaving no choice of means and no moment for deliberation" (Webster, 1842) This formulation of necessity and urgency principles –which was repeated in the Nuremberg case- is generally accepted in customary international law.

Yet in practice, states rarely resort to the anticipatory self-defense doctrine to justify their military actions. As an example, the USA and the UK used self-defense concept to justify their actions to secure the no-fly zones in Iraq. During the establishment of the no-fly zones in northern Iraq in 1991 and southern Iraq in 1993, many armed conflicts occurred between the coalition forces –the UK and the USA- and the Iraqi Air Forces. The US and England explained these conflicts and also their attacks on the Iraqi radars which locked on to the coalition's fighter planes as legal under the self-defense concept. In their explanations, the US and England did not try to broaden the existing limits of the concept and refused to justify their actions as anticipatory self-defense. The situation continued that way until the "Operation Desert Fox" in December 1998. After this operation, the US and England started to attack the control-command centers of Iraq in and out of the no-fly zones, along with

aggressor targets. Yet even at that moment, they argued that they did not resort to force preemptively but acted within the limits of the self-defense concept. This changing attitude about targets after 1998 intensified the existing debate about the ongoing operations of the US and the UK. Although many countries led by Russia and China condemned the operations, the US and the UK insisted on their arguments and abstained from a discussion about the definition of self-defense in existing literature.

As can be understood from this example, states usually avoid arguments that broaden the limits of self-defense while they prefer to interpret these limits on behalf of their national interests. This attitude radically changed with "Operation Iraqi freedom." After the 9/11 attacks, the preemptive war notion has come to be more widely accepted as a means to revitalize the existing scope of self-defense to cope more efficiently with the changing threats of the globalized political environment.

Preemptive self-defense

September 11 attacks put international terrorism at the top of the world agenda. Surely terrorism is not a new phenomenon in the international political system, but the developments in technology have made weapons more destructive and the rise of globalization has eroded state boundaries. Consequently, it is much easier for terrorists to harm large crowds than it was 50 years before. September 11 attacks confirmed and made clear that well-known truth to the entire world (Brunee and Toope, 2003; Beard, 2002). After the attacks on the World Trade Center towers and the Pentagon, the US declared war against terrorism and made a call to the international community to move together with America in this war. This call was positively answered by the world community and world states declared that they supported the US in its fight against terrorism. The nineteen member countries of the

NATO declared that September 11 attacks would be considered as an action against them all under Article 5 of the Washington Treaty. The United Nations Security Council declared a resolution, affirming that "acts of international terrorism constitute a threat to international peace and security" and recognized "the inherent right of individual or collective self-defense in accordance with the Charter" (Resolution 1368). In a few weeks, the US announced that it had found a link with the Al-Qaeda and Taliban administration of Afghanistan, and used resolution 1368 and resolution 1373 (which reaffirm the self-defense right mentioned in resolution 1368) to start a war against Afghanistan in 2001. This war was partly supported by the international community, and after a while, the US-led collaboration started to corrode.

Firstly, Bush's "axis of evil" definition in the wake of 11 September intensified the suspicion of the world community.[65] The common point of the states included in the axis of evil was their opposition to American policies rather than their alleged support of terrorism (Quevinet, 2002). Also, the consequential National Security Strategy widened the gap between America and the rest of the coalition. In this document, the US stated that it aimed to forestall terrorism by acting preemptively against these states harboring terrorist organizations.

However, international lawyers have criticized this strategy –generally known as the Bush Doctrine- in many respects. The doctrine intends to broaden the limits of self-defense on the basis of the controversial definition of anticipatory self-defense in customary international law.

> For centuries, international law recognizes that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and

[65] This definition echoes the Reagan administration's "empire of evil" phrase and also strenghtens the claims that the Bush administration has intensified the trends of its predeccors rather than striking out a new direction.

> international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat-most often a visible mobilization of armies, navies, and air forces preparing to attack.
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries (…) The United States has long maintained the option of preemptive action to counter a sufficient threat to our national security. The greater the threat, the greater the risk of inaction-and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and the place of the enemy's attack[66]

It is hardly possible to place this statement of Bush under any heading in international law. Some commentators argue that this kind of broadened interpretation of self-defense is based on the wording of article 51 of the UN Charter. They construe the use of the word 'inherent' in the article as a referral to the concept of self-defense in the pre-charter meaning. In other words, the UN Charter did not restrict the long-established right of states to resort to force in customary international law when they ratified the Charter and preserved that right in the same manner (Yoo, 2003). Even if we assume that this interpretation is reasonable, it is implausible to assert that states can have recourse to armed force in the form it had been accepted in the nineteenth century (Bothe, 2003).

Moreover, the Bush doctrine argues that preemptive self-defense should be used even if the place or time of a possible attack is unknown. This argument stems from the fact that terrorist organizations will probably give little thought to the costs of a "second strike" (Wedgwood, 2003). When the UN Charter was signed in 1945, the enemy concept did not include non-state actors such as the Al-Qaeda terrorist network. Such non-state actors –different from states- have no fear of retaliatory action against their territory, nation or sovereignty. In these circumstances, states have no deterrent power on terrorists to prevent a horrible attack. According to the Bush doctrine, the only solution is to "take the battle to the enemy, disrupt his plans,

[66] *The National Security Strategy of the United States of America* 15 (September 2002)

and confront the worst threats before they emerge. In the world we have entered, the only path to safety is the path of action and this Nation will act."[67]

It is possible to observe a "best defense is offence" approach –which was a game strategy of American football in the 1960's- in this statement (Köni, 2004). However, it is not possible to maintain security with preemptive strategies in a world which is totally surrounded by conflicts of different degrees –from border tensions to armed conflicts. In every conflict, each party wants to have the advantage of the "first strike". In this sense, to legalize the preemption concept means to give a loaded gun to these conflicting parties. As stated by Brunee and Toope (2003); "the world would certainly not be a safer place if international law permitted over 190 individual states to be their own judge and jury on when to use weapons to resolve disputes." (p.793) In addition, the Bush doctrine did not answer the question of what would happen if the so-called rogue states tended to use preemptive self-defense against the imminent attacks of the US considering repeated American threats of military operation to those states. Who can decide on the lawfulness of preemption if the limits of the concept are to be determined by the self-intuition of states? As an example, the preemptive self-defense concept might provide sufficient legal grounds for, say, the Arab countries to attack Israel, for China to attack Taiwan or India to attack Pakistan as an episode in an ongoing broader tension/conflict.

Another dangerous aspect of this doctrine is its ignorance about the internal dynamics of the Charter system (Stahn, 2003). It has been repeatedly accentuated that the circumstances were so fundamentally different during the time of the adoption of the UN Charter, the restriction of the use of force cannot be taken in its strict sense any more (Kirgis, 2003, Yoo, 2003). Yet, any revisions or changes in the

[67] George W. Bush, Commencement Address at the United States Military Academy in West Point 1 June 2002.

UN Charter or UN structure should be done within the context of the UN institutional body, in accordance with the traditional international law norms. With the preemptive self-defense doctrine, the US preferred to sweep away its binding responsibilities towards the UN system and weakened the collective security. This unilateralist stance was emphasized in the National Security Strategy with the statement of Bush which echoed Albright that "the United States will not hesitate to act unilaterally."[68]

The military operation against Iraq was started while the debate about the 2002 National Security Strategy and the preemptive self-defense doctrine in this strategy was still going on. Although the preemptive self-defense concept was not accentuated in the legal justifications of the invasion, the US letter mentioned "to achieve the security of itself and the international community" as one of the motives of the Iraqi operation. This argument made many commentators think that the invasion of Iraq was the first trial of the Bush doctrine (Lowe, 2003, Hathaway, 2005). In its successive statements, the US claimed that Iraq still possessed chemical and biological weapons and in the light of his past actions, Saddam Hussein showed the world that he would not hesitate to use these weapons or to transfer them to terrorist organizations.[69] During the invasion process, Bush and his legal advisors declared in many speeches that they were using their inherent right of self-defense under the article 51, against that posed threat from a Saddam-led Iraq. This rhetoric implies preemptive self-defense though it is not exactly mentioned in the 2002 National Security Strategy.

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[68] As stated in 2002 National Security Strategy: "While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against (…) terrorists to prevent them from doing harm against our people and our country."

[69] Actually, this claim is quite improbable considering the fact that Saddam Hussein did not use any WMD against coalition forces even in the I. Iraq war in 1991.

However, this doctrinization may cause some problems in practice. Firstly, the reports about the nuclear capability of Iraq presented by Powell were counterfeit and any link between Al-Qaeda and Saddam still does not exist. The community was misdirected by these made-up arguments and the emotional rhetoric of 11 September. The coalition forces and American intelligence could not find any evidence to support the alleged existence of chemical or biological weapons, arsenals, or nuclear facilities. Moreover, it is hard to understand American lack of concern with the absence of WMD arsenals if there was a real threat of the transportation of those weapons to terrorist organizations. The US did not find these alleged weapons and was content with a fruitless search in Iraq instead of tracing them. Can we think that the US did not really believe that terrorist organizations might obtain these weapons or did not care about what happened to the alleged WMD arsenal of Iraq? These inconsistencies about the operation produced a serious skepticism about the legality of the invasion under the self-defense concept. Therefore, the limited and partly emotional support –considering the atmosphere of the aftermath of the brutal attacks of 11 September- of the international community to the US war against terrorism started to erode on such grounds. The US failure to uncover the weaponry of mass destruction in Iraq despite total access to suspicious sites and the cooperation of Iraqi scientists caused an important reaction against the preemptive action to forestall terrorism.

Another controversial point about the operation is its image in the eyes of the public. The US tried to convince the community about the Iraq and Al-Qaeda link. When these efforts failed, the US declared that it aimed to force Iraq to cooperate with the UN inspectors. After a while this statement turned to enforcing Iraq to comply with its disarmament obligations, but the goal changed to that of a regime

change. This confused rhetoric resulted from the lack of a legal basis of the operation (Lowe, 2003).

The reasons for the change of regime constitute another legal problem of the operation. These reasons –the brutality of Saddam, inhumanity of the regime - were introduced as part of the war against terror. Besides the alleged connection of Saddam and terrorist organizations, the repressive regime and the painful conditions in Iraq provided a convenient structure for terrorist networks. It is clear that bad regimes are fertile grounds for terrorism. The less the means the public have in order to change bad conditions, the higher the risk is to resort to illegal formations. Yet, the international law norms such as the protection of human rights, self defense against acts of aggression or deterrence of a threat against peace cannot be combined in a super-category of 'preemption' (Brunee & Toope, 2003).

Shortly, the operation Iraqi Freedom shows many controversial points within the frame of the preventive use of force considering international law norms. None of the conditions of anticipatory self-defense stated in the Caroline incident were fulfilled.

Even if we accept that the US used its right of anticipatory self-defense, the question of its position in the situation stays unanswered. The right of self-defense belongs to the victim state. If the legality of preemptive action is taken for granted, then the right of preventive self-defense belongs to the probable victim. Considering the geographic position of Iraq, the possible victim states are Turkey, Saudi Arabia, Israel, Qatar, Georgia, Azerbaijan, Armenia and maybe some parts of Russia and some islands of Greece. But Iraq has never obtained any intercontinental missiles. It is not possible to assume that the US was a possible victim of Iraqi aggression.

Another American thesis is that the operation can be seen as part of a continuing conflict (Taft & Buchwald, 2003). It is known that the process started in 1991 but the resolution 687 ceased the armed conflict. So, America's military operation against Iraq cannot be legalized as a preventive attack of the former on the latter.

To sum up, the efforts to legalize the second Iraq war as preemptive self-defense is more than the violation of the Charter; it is the first trial of a doctrine which might have very dangerous consequences.

Legal Justifications of the Use of Force against Iraq under the Security Council Resolutions

The operation Iraqi Freedom which was initiated by the USA and England on 20 March 2003 caused serious disagreements in the international community. Along with the methods of warfare and the occupation process, the reasons justifying war raised many controversial points in law. While examining the legality of these reasons, the acts of the US and the UK after 1990 should be evaluated, too.

The United States and the United Kingdom reported the "Operation Iraqi Freedom" to the United Nations Security Council by sending letters on 20 March 2003, and they explained their legal justifications in those letters. The UK letter tried to justify the operation by the combining effect of the resolutions 678 (1990), 687 (1991) and 1441 (2002). The US letter argued that the 1991 cease-fire was suspended –because of the material breach of Iraq by its non-compliance with its disarmament obligations- and resolution 687 had lapsed. Therefore, the authorization to use force by resolution 678 had been revived. Besides, the US claimed that it acted for the security of America and the international community. It is possible to posit many controversial points in these arguments.

To begin with, only resolution 678 clearly authorized the use of force. On 2 August 1990, just after Iraq's invasion of Kuwait, the UN adopted resolution 660, condemned Iraq's acts, and demanded it to withdraw from Kuwait as soon as possible. All of the following resolutions also aimed to impose that resolution. Due to Iraq's continuing occupation of Kuwait, the Security Council adopted resolution 678. This resolution authorized member states "to cooperate with the government of Kuwait to use all necessary means to uphold and implement (…) all subsequent relevant resolutions to restore international peace and security in the area."

Yet, this resolution should be evaluated within the specific conditions of that time. In fact, after the first Iraq war, the cease-fire was established by resolution 687 and Iraq was subjected to inspections during the next 12 years.

A week after the adoption of resolution 687, the Security Council adopted resolution 688. This resolution called Iraq to stop the repression to Kurdish and other civilian populations and asked it to allow the international humanitarian organizations to watch humanitarian grievances in all parts of Iraq. The statement of "as a contribution to removing the threat to international peace and security in the region" in resolution 688 was interpreted as a new authorization by the US and England. They assumed that the combination of this statement in resolution 688 with the similar statement in resolution 678 might be sufficient to justify military operation to enforce Iraq to comply with the obligations of resolution 687 (O'Connell, 2003, p.2). With this argument, the US-led troops established a security zone in northern Iraq. The same argument was also used in "Operation Provide Comfort" in April 1991. In this operation, the USA and the UK established no-fly zones in both northern and southern Iraq. In the following years, armed force was used against Iraq several times through the excuse of patrolling no-fly zones (Taft &

Buchwald, 2003: p. 565).The US air strikes in 1993 and 1996 were criticized as illegal by the UN member states. But these criticisms could not prevent a new US-led operation in 1998 to enforce Iraq to accept the UN weapon inspectors. The US and the UK tried to pass an automatic authorization of the use of force with resolution 1154 (Lobel & Ratner, 1999, p.150). Although these efforts were fruitless, the US and the UK started a comprehensive air strike against Iraq in February 2001 to provide the security of the no-fly zones. In these strikes, American and English air forces bombed Iraqi radar stations and communication centers. These strikes were not supported by any state but Japan. China, Russia and France declared that the operation was illegal. The process was in that stage in 2002. But, just after the 9/11 attacks, Iraq was made a target again and an air strike against Baghdad started on 24 March 2003 due to the justifications cited above. The criticisms of these justifications should be evaluated in the light of the 12 years while the process lasted.

First of all, the claim that the non-compliance of Iraq with its disarmament obligations caused a material breach, terminated the cease-fire in resolution 687 and revived the authorization of 678 has raised serious complications with regard to international law norms. The basis of this argument is the fact that the UN Charter is a multilateral treaty. The breach of a Security Council resolution under Chapter VII might be interpreted as the breach of the whole Charter and treated that way by the US legal scholars (Kirgis, 2002, p.2). According to Article 60 of the Vienna Treaty – the basic source of the law of treaties- "a material breach of a multilateral treaty by one of the parties entitles a party (…) specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part."

Some American scholars comment on the concept of "specially affected" (Rubin, 2002; Kirgis 2002; Wedgewood, 2002). These scholars assert that the non-

cooperation of Iraq with its disarmament obligations was a result of its hostile intentions against the US security and that the US might be called the specially affected party as the main target of the Baath regime and terrorist networks (Yoo, 2003: p.568). Besides, the same article of the Vienna treaty also states that if that breach radically changes the position of parties, then the operation of the treaty can be suspended in whole or in part. In this sense, America invokes the right to suspend resolution 687 unilaterally. [70]

Yet at the same time, the UN Security Council resolutions are not multilateral treaties though they do show some similarities. Treaties are reached by negotiations and are only binding on the signatory parties. Yet, the Security Council resolutions have a certain binding effect on the subject state –UN member or not. Because of their obligatory quality, Security Council resolutions cannot be evaluated as multilateral treaties and the 1969 Vienna Treaty's Article 60 cannot apply to these resolutions (O'Connel, 2003: p.3).

Another American argument is based on the fact that resolution 687 was a cease-fire. Unlike peace treaties, which put a final end to warfare, resolution 687 was a cease-fire and suspended the military actions between enemy parties temporarily. Therefore, if one of the parties breached its provisions they could return to warfare (Wedgewood, 2002).

This argument might be challenged, too. Firstly, resolution 687 was not a cease-fire between Iraq and the coalition forces but between Iraq and the United Nations (Franck, 2003). Thus, the agreement would be effective "upon the official notification by Iraq to the Secretary-General and to the Security Council " not to the

[70] Actually, article 43 of the Vienna Treaty also states that the termination or suspension of a treaty cannot impair the duty of a state "to fulfill any obligation of the treaty to which it would be subjected under international law independently of the treaty."

coalition forces. In this sense, the Security Council is the only party that can decide on the invalidity of the cease-fire agreement.

Besides, after the prohibition of the use of force in the UN Charter, it is mostly accepted in international law that the authority to abrogate a cease-fire in the case of a breach of its terms does not belong to the signatory parties but to the Security Council. The Security Council also decides the appropriate measures to be taken in such cases.

Furthermore, to argue that the cease-fire was terminated because of Iraq's non-compliance with the terms of resolution 687 is also contentious. Before resolution 687, the Security Council adopted resolution 686, which provided an interim cease-fire between parties and declared that the authorization of resolution 678 would be in operation until the fulfillment of the terms of this interim cease-fire. Contrary to resolution 686, resolution 687 did not demand the compliance of Iraq with the cease-fire conditions. Instead, resolution 687 was content with Iraq's formal acceptance of these resolutions and charged the Security Council with taking the "necessary steps as may be required for the implementation of the present resolution." In other words, the cease-fire completely ended the authorization of resolution 678 and gave back the control of the issue to the Security Council.

Actually, the lack of a clear statement of the Council to abrogate the authorization of 678 does not mean that states have the right to use that authorization whenever they want. A state which is once subjected to the use of force by the Security Council resolution cannot permanently stay under the threat of intervention (Keskin, 2004). For example, it is ridiculous to assert that resolution 83 is still in operation to justify a military action against North Korea. These kinds of actions

nullify the Security Council and cause the exploitation of its authority (Falk, 2003). The basic evidence is that there is no revival in the Council's history.

Another argument about the revival of resolution 678 is based on resolution 1441 of the Security Council. At the first paragraph of the resolution, the Security Council recognized that Iraq had breached its obligations and gave Iraq a final opportunity to comply fully with its disarmament obligations. In addition, it stated that if the Security Council received a report that provided sufficient information to prove Iraq's failure to comply with its obligations, the Security Council would convene immediately to consider the situation. The council also repeated that unless Iraq complied with its obligations, "it will face serious consequences".

According to the USA, that resolution, which was passed unanimously on 8 November 2002, used a similar language with resolution 678 and proved the invalidity of resolution 687. Especially the wording of paragraph 12 which stated that the Council would convene immediately " in order to secure international peace and security" is reminiscent of resolution 678 (Taft & Buchwald, 2003).

Actually, the negotiation process of resolution 1441 is the most obvious evidence to refute this argument. The original draft of the resolution, which was proposed by the USA and England, used the phrase of "to restore international peace and security." But this phrase was replaced by "to secure international peace and security" because of the severe opposition of several states including those of Europe. Besides, during the negotiation process, states like France and Russia emphasized that resolution 1441 was not an automatic authorization to use force and that to resort to force against Iraq needed another resolution.[71] Although "the serious

[71] French ambassador Levine stated that his country was pleased to see that Resolution 1441 removed all possibilities of an automatic authorization. The president Blair publicly guaranteed his colleagues that Resolution 1441 would not use as an automatic trigger for war. The same view was visible in the US media too. The next day of the resolution, the headline in *Wall Street Journal* was "An automatic

consequences" phrase might be interpreted as a resort to force, the situation was very different from 1991.

Moreover, resolution 1441 only stated that "the Security Council will convene immediately upon receipt of a report making clear that Iraq is still not complying with its obligations", but did not make further explanation. According to the USA, the lack of further explanation means that another resolution was not necessary.

In resolution 678, which authorized the 1991 Iraq war, the Council determined that the authorization of military operation would be effective unless Iraq withdrew from Kuwait on or before 15 January. Member states were content with that resolution and one day after the deadline -16 January- coalition forces started the military operation without a new resolution. The US claimed that resolution 1441 connoted resolution 678 in its purpose and terminology and connected the authorization to Iraq's violation of its terms. Thus, resolution 1441 accepted the existence of material breach, gave Iraq a final opportunity and emphasized that Iraq would face serious consequences if it did not fulfill the terms of that final opportunity. It is important to understand that resolution 1441 made no limitation on the source of the cited report that would prove the possible violations of Iraq. Therefore, the US side assumed that this condition was fulfilled by the comprehensive report of Colin Powell that was presented to the Security Council on 5 February 2003. The authorization to use force against Iraq was put in operation without a new resolution just like in resolution 678.

However, a closer reading of resolution 1441 reveals many points that invalidate those arguments of the US. Like its precedents, resolution 1441 put the

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strike isn't endorsed" and in *New York Times* it was "UN rebuffs US on threat to Iraq if it breaks pact".

Security Council in charge of taking the necessary steps and expressed that the Council remained 'seized of the matter'. The obvious meaning of this phrase is that the Security Council is the only competent authority in the issue. Although the serious consequences -which Iraq would face if it continued its violations- might be interpreted as a military operation, this phrase should be evaluated as a warning rather than as an authorization. This meaning will be more compatible with the UN's goal to solve debates with peaceful methods. A serious act –such as to declare war to a country- should have a more reliable legal basis than some ill-defined phrases in resolution 1441 or the authorization of a war in resolution 678 in 1991 which was not ended with a clear statement.(Lowe, 2003)

Another point which we should keep in mind is the limits of the authorization to use force in resolution 678. The resolution was carefully drafted to limit the authorization to securing the independence and territorial integrity of Kuwait. At the time of this resolution, there was no demand to disarm Iraq. Moreover, none of the resolutions –either before or after resolution 678- made a reference to a regime change in Iraq. Anyway, George Bush Sn. accepted that fact in the first Iraq war and stated that the authorization of resolution 678 did not comprise any attack against Saddam or the Baath government.

Besides, the US and the UK kept trying to pass another resolution from the Security Council until 17 March. Prime Minister Blair's claim about the possibility to ignore an unreasonable veto in this process – implying the inevitable French veto- caused serious reactions from international lawyers who pointed out that England had used its veto power 32 times in the past.

In light of these arguments, it can be asserted that to interpret and broaden the UN Security Council resolutions beyond their real aims on behalf of states' political

interests defeats international law and contradicts the spirit of the UN Charter. Moreover, the real dangerous aspect of these efforts is the fact that all these justifications cited in American arguments which they tried to impose on law is the unilateral will of the United States.

CONCLUSION

This thesis examined the American unilateralism in post cold war era as a factor that affected the existing and prospective situation of international law, particularly jus ad bellum. To understand the phenomenon, American actions and statements especially those related to the use of force were analyzed with a perspective focusing on September 11 attacks as a milestone in the development of international law.

Even though it is accepted that the existence of unipolarity in international political system is not a prerequisite of unilateralism, the unilateralist tendency in the United States foreign policy became much more evident since the end of the cold war. The end of the cold war, coupled with the disintegration of the Soviet Union opened a new chapter in American foreign policy planning. The United States did not hesitate to declare its unrivalled power and change the course of its foreign policy from collective security to hegemonic stability. The basic indicator of this understanding in American foreign policy is its rising unilateralist tendency since the 1990's.

To analyze the long term impacts of these unilateral actions with regard to their legal implications, the study started with an overview of the various examples of American unilateralism in some degree connecting present cases to historical examples. This part might be also helpful to prove the fact that American unilateralism is neither a suddenly emerged phenomenon nor peculiar to a specific administration. Additionally, the notion is not confined to a certain area of American foreign policy. Unilateral policies of the United States vary in a spectrum from

ideological hostilities against some countries to basic regulations about foodstuffs. However, the examination of American unilateral policies in trade relations, environmental issues, or humanitarian problems is not enough to understand the exact impact of the US unilateralism on international law. Since the United States is the dominant power in the world, since its military might is greater than the sum of the military capabilities of seventeen states that succeed it, since the United States usually does not hesitate to act alone whilst using that military might, its military actions should be scrutinized in more detail and its justifications through these actions should be analyzed within a comprehensive perspective.

First of all, it is noticeable that many concepts used after September 11 attacks can be traced back to Reagan, Bush Sn. or even Clinton administrations. The historical background of these concepts used by the present administration after the attacks (such as axis of evil/rogue states, war on terrorism, or harboring states) revealed that they are neither spontaneous nor emotional reactions to the attacks. On the contrary, most of them are mere reformulations, employing new justifications, of the arguments already used in the past.

The same situation appears at the US military operations which have been initiated as a response to the attacks. After the terrorist attacks, the United States decided to take action against Afghanistan. To initiate such action, the US might rely on Security Council resolutions which it could easily obtain in the psychological atmosphere of the attacks or it could explain the operation as a required humanitarian intervention for Afghani people. Yet, it chose to invoke its inherent right of self defense –the most controversial issue in the UN Charter- for the operation Enduring Freedom. This choice should be comprehended within the interaction of international politics and international law. More precisely, the United States has utilized the

convenient situation in the aftermath of 11 September to invoke its prolonged claim to broaden the right of self defense in a way comprising responses against terrorist attacks. Although the previous US attempts to impose such modification failed due to a lack of international support, with operation Enduring Freedom, this expansion in the concept was confirmed by many states this time. By doing so, the United States managed to loosen the legal constraints on the use of force.

Nearly two years after the September 11 attacks, the United States launched a military operation against Iraq. Even though the US justification relied on some contentious interpretations of former Security Council resolutions –which also represented another instance of American unilateralism with regard to its arbitrary behavior against the United Nations' resolutions- the justification letter still referred to the United States' preemptive self defense right which could be implemented in the presence of an imminent threat. In this situation, the threat was posed by Iraq and its WMD stock with regard to the possibility of the passing on these weapons to terrorist organizations that proved their destructive capability in September 11 attacks. Same declaration about preemptive self defense was also underlined in the 2002 National Security Strategy which repeatedly recalled the failure of deterrence strategy in the WTC attacks. The American president declared that 'he will not wait until the threats materialize'. Yet, the preemption doctrine was another American argument which the US has tried to incorporate to the extent of right of self defense nearly for two decades. However, this effort was always blocked by the United Nations considering the dangers of such an extension in a highly militarized world. Just like the war against Afghanistan, by using the terrorist attacks as a pretext, the United States has employed a similar legal strategy to attach preemption doctrine to the legal definition of use of force.

To sum up, the United States has imposed its policies to the legal system as a necessary adaptation of international legal system which it deemed incapable of coping with newly emerged threats such as proliferation of WMD, or international terrorism even though the US had invoked these doctrines many times before while there was no threat of WMD or WMD possessor terrorists.

However, this does not mean that the United States' unilateral actions were solely dedicated to the imposition of these 'old wines in new bottles' in the aftermath of September 11. It is undeniable that the US actions have many different aspects related to both domestic and foreign policy. The inquiry of the United States' unilateral actions, its justifications for these actions or the place of these actions within the terms of legality do not suffice to completely explain their underlying motives.

At the beginning of this thesis, it was depicted that the aim of such a study is not to make a list of the United States' unilateral actions which are mostly criticized as the demonstration of the superpower's arrogance against international law. Nor it is to oversimplify the complex structure of the United States' foreign policy with an explanation confined to legal implications of this policy. In other words, to state the fact that the US unilateralism has a long-term influence on international law is not to claim that the US unilateralism entirely meant to create that influence. The foreign policy of the US is manipulated by many different agents and its direction is affected by many divergent factors. In this sense, this study did not inquire into the causal roots of American unilateralism but its consequences. By doing so, the study was limited to the examination of the impact of these unilateral actions on international law rather than analyzing the impact of international law on US actions.

American unilateralism is a multi-faceted concept which can be observed in actions or inactivity of a state. Accordingly, any attempt to understand American unilateralism should also consider the United States' treaty policy as a failure of international cooperation. Legal scholars are well aware of the fact that the abstention of the United States from any treaty weakens its efficacy, if not make it stillborn, and therefore, constitutes an important category in American unilateralism as a privilege to the sole superpower. However, this thesis mentioned very little –if any- about the recurrent themes of the United States treaty policy due to the limits of its scope.

As a last note, my thesis started with an analogy of past hegemonic powers' influence on the development of international law with American unilateralism's long-term consequences on international law. Throughout the thesis, American arguments were carefully assessed to understand possible reflections of their language on international legal structure. It is possible to claim that the United States' contemporary unilateral actions including its ongoing presence in Iraq, its continual bombings of Somali without any second-thought about the necessary authorization of the UN Security Council, or its approach towards the imprisoned Taliban soldiers in Guantanamo who are labeled as unlawful combatants (an illegal category invented by America in 1970's) have vindicated that the system is evolving to the hegemonic international law. Yet, it is still too early to assess whether the United States' unilateral interpretation of and practices related to the norms governing the use of force will end up in the legitimization of supremacy of power over law.

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