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Between traditional rules and new practices: Spanish practice with regard the use of armed forces (1990-2015)

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INTRODUCTION

The organization by the *Spanish Yearbook of International Law*, in collaboration with Jaume I University of Castellón, of the conference "Spain and the Use of Force",[1] along with the subsequent publication of the different papers to which it gave rise, is yet another example of the possibilities this yearbook enables and affords to Spanish internationalist legal doctrine as a whole. The editors of *SYbIL* should thus be applauded, first, because the conference and resulting papers make it possible to re-examine Spanish practice on the use of force in the last twenty-five years and, second, because these activities are yet another fine example of the increasingly common and fruitful trend towards collaboration between state practice on international questions (i.e. between the *Asesoría Jurídica Internacional*, or Spanish International Legal Office, hereinafter, AJI) and academia.

This paper aims to synthesize and draw general conclusions from the contributions of the various Legal Advisers who have headed the AJI from 1990 to today and who participated in the cases in which Spain has been involved, one way or another, in the use of force during this period. Several fundamental ideas can be drawn from an examination of the period as a whole. First, Spanish practice is similar to that of its neighbours. The general rule in this area has been that both the AJI and the state have, with the exception of Yugoslavia in 1999 and Iraq in 2003, consistently sought to ensure that Spanish practice conforms to international law on the subject. Second, Spanish practice, especially in the last fifteen years, has been more frequent and varied than might initially be thought. Third, this more recent practice has included new forms, modes and features that are slightly different from classical interstate behaviour. The new practices regarding the use of force have generated different kinds of tension and sometimes exceeded traditional legal categories and rules. These new modes of Spanish practice on the use of force, along with that of other countries that also engage in it, could contribute to an evolving

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[1] The conference *Spain and the Use of Force: An Analysis of Practice (1990-2015)*, jointly organized by the *Spanish Yearbook of International Law* and the Public International Law Area of Jaume I University of Castellón, was held in Castellón on 3 December 2014.

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interpretation of certain traditional rules governing the use of force that could lead, if not to a change *of* the rules themselves, at least to a change *in* the content thereof.

This paper is divided into three parts. The first summarizes and highlights the most relevant aspects of the contributions of each of the former Legal Advisers regarding the cases in which they were involved. The second offers an initial overview of Spanish practice, including the extracted general rule, the challenge that the new practices pose to traditional rules governing the use of force, and a general assessment of the implications the examined practice has had for Spanish policy and society. Finally, the third section offers a brief analysis of the role played by the AJI in relation to Spanish practice in this area in the context of its gradually expanding role. It has always sought to defend international law, even in those cases where it was ultimately violated. Furthermore, in fulfilling its functions of prevention, response and defence, the AJI has also, when it has seen fit, played the role of a check on policy. As a result of the growing number of increasingly diverse situations in which Spain could find itself involved in the use of force, its task has grown more complex. Therefore, this paper concludes with a proposal to develop *Guidelines for the Application of the Rules Governing the Use of Force* intended both to spark debate on the matter and to assist the AJI in the performance of its functions.

SPANISH LEGAL ADVISERS IN ACTION

The first conclusion that can be drawn from the contributions of the various Legal Advisers over the period is that Spanish practice on the use of force has been far more frequent and varied than one might think. The second is that the most salient characteristic has been the AJI's clear and unwavering defence of international law. This characteristic can be seen in each of the cases in which the Legal Advisers were involved or their personal positions on them.

(1) A Classic Case: UN Enforcement Action in the First Gulf War (1990-1991)

This case combined the traditional elements of an aggression (the invasion of Kuwait by the Iraqi armed forces) and the collective security system's response through the Security Council's authorization of the use of force to address it. As noted by J. A. Pastor Ridruejo, the case was so clear, the AJI's opinion was not even requested, as it was not needed.

Therefore, the use of armed force by the member states of the international coalition to expel Iraq from Kuwaiti territory was consistent with international law because it was authorized by SC Res. 678 (1990) under the euphemistic formula of using "all necessary means".

Pastor Ridruejo himself takes a positive view of the UN's institutional practice in this case, as the authorized enforcement action made it possible to punish the aggressor (Iraq), deter other states from further potential aggressions, and achieve the stated goal, namely, the recovery of the Kuwaiti territory occupied by the Iraqi army.

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Nevertheless, he echoes the drawbacks, already noted by the then Secretary-General of the United Nations, Javier Pérez de Cuéllar, intrinsic to the fact that the enforcement action was implemented in a decentralized fashion by certain UN member states with little oversight by the Security Council rather than being carried out in a centralized manner by the UN itself.

The first Gulf War would mark the emergence of a technique (authorizations of the use of force)[2] and institutional and state practice on the use of force that, whilst maintaining the centralized role of the Security Council in determining whether a situation constitutes a threat to international peace and security (Article 39 of the UN Charter) and authorizing the use of force (Article 42 of the UN Charter), enables this force itself to be implemented in a decentralized way by all or some UN member states (Article 48 of the UN Charter). Some authors have considered this practice to be equivalent to the *privatization* or, at least, *outsourcing* of the use of force by the UN.[3]

(2) A Difficult Case: Legality and Legitimacy in the Use of Force against Yugoslavia (1999)

Spain's participation, along with nine other NATO member states, in the air strikes against Yugoslavia launched on 22 March 1999 for humanitarian reasons generated important legal and ethical questions that were difficult to reconcile. The Legal Adviser at the time, Aurelio Pérez Giralda, shares the view of other legal advisers that the armed action may have constituted a continuing violation of Article 2.4 of the UN Charter, since it could not be classified as individual or collective self-defence and had not been authorized by the Security Council.

Unlike other international legal offices, the AJI did not receive any prior request for an opinion on the legality of the use of armed force in that context. The Spanish authorities, like those of the other participating NATO member states, settled the dilemma of either respecting international law (not resorting to armed force) or acting to defend the fundamental human rights of the civilian Kosovar population (legitimacy) in favour of the latter by means of an armed intervention without international legal cover. As the international commission set up to analyse the conflict later concluded, in this case, the use of force was "legitimate, but not legal".[4]

The legal problems arising from the use of force in these conditions were later brought before the ICJ as a result of the lawsuit filed by the Federal Republic of Yugoslavia against the ten NATO member states involved for having violated, amongst other things, the principle prohibiting the threat and use of force (Article 2.4 of the UN Charter). Pérez Giralda's contribution describes the AJI's sober and effective actions before the ICJ, through which it

[2] *Cf.* H. Freudenschuß, "Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council", 5 *European Journal of International Law* (1994) 492-531.

[3] J. Cardona Llorens, "La 'externalización'/'privatización' del uso de la fuerza por las Naciones Unidas", in M. Vargas Gómez-Urrutia and A. Salinas de Frías (coords.), *Soberanía del Estado y Derecho internacional. Homenaje al profesor Juan Antonio Carrillo Salcedo* (Universidad de Sevilla, Seville, 2005) 317-342.

[4] *Cf.* The Independent International Commission on Kosovo, *The Kosovo Report. Conflict. International Response. Lessons Learned* (Oxford University Press, Oxford, 2000), at 289.

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sought the inadmissibility of the application and of the request for provisional measures due to a lack of jurisdiction, as well as the dispute's removal from the Court's General List. The clinching argument was the reservation entered by Spain in its unilateral declaration of 15 October 1990, allowing it to exclude the Court's jurisdiction *ratione temporis* over disputes "in regard to which the other party or parties have accepted the compulsory jurisdiction of the Court less than twelve months prior to the filing of the application bringing the dispute before the Court". Given that Yugoslavia had submitted its own unilateral declaration on 25 April 1999 and its application on 29 April the same year, the Court, by means of its order of 2 June 1999, found the application inadmissible and rejected the request for provisional measures.[5]

The resolution of this thorny matter was yet another contribution of the AJI, characterized by an extraordinary economy of personal and material means. Professor Pastor Ridruejo's role some years earlier in the drafting of a unilateral declaration filled with fine and subtle legal engineering and Pérez Giralda's intervention before the Court helped to resolve the legal problems arising from an armed intervention that could be considered contrary to international law.

Nevertheless, the fact that such legal skill led to a positive outcome for Spain cannot mask the fundamental underlying problem in that case, which has appeared on other subsequent occasions too: the problem of the legality of humanitarian interventions or armed interventions in accordance with the responsibility to protect in cases of genocide, war crimes, crimes against humanity or ethnic cleansing in the absence of express authorization from the Security Council. In short, this example is representative of the difficult cases in which international legality and legitimacy are not easily reconciled.

(3) The Iraq War (2003): Politics versus the Law with Regard to the Use of Force

Spain's participation in the Iraq War (2002-2003) is an example of the sometimes inextricable maze in which legal advisers can find themselves and of the professional and ethical tension with which they have to live. This time, it was a difficult case not in terms of the law, but for J. A. Yáñez Barnuevo himself in his role as a professional, a lawyer and a citizen.

In this case, the government requested several written reports from the AJI on various legal aspects of a possible armed action against Iraq. In its report of 8 October 2002, the AJI concluded that, under current international law, the only two cases in which the use of armed force would have legal cover were those of self-defence and with the express authorization of the Security Council. The first possibility did not apply, as there was no prior or imminent armed attack. The second, that of the express authorization of the Security Council, was likewise inapplicable, since SC Res. 678 (1990) had not been reactivated, as the use of force had been authorized to put an end to the Iraqi invasion of Kuwait, and, further, because SC Res. 1441 (2002), which enhanced the international inspection system to verify the possible existence of weapons of mass

[5] International Court of Justice, *Legality of Use of Force (Yugoslavia v. Spain), Request for the Indication of Provisional Measures, Order of 2 June 1999*, ICJ Reports (1999).

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destruction in Iraq, did not automatically permit the use of force, even if Iraq failed to fulfil its international obligations. Therefore, the report concluded that a new resolution was needed that explicitly authorized the use of armed force. Although a draft resolution in this regard was submitted to the Security Council (sponsored by the US, the UK and Spain), that resolution was never adopted due to the veto of other permanent members.

Ultimately, politics prevailed over and against the law, and Spain supported the 20 March 2003 invasion of Iraq. The rest need hardly be recalled: Saddam Hussein was ousted from power, the Iraqi army and government were dissolved, and the Coalition Provisional Authority was created to temporarily govern the state until power could be transferred to the legitimate Iraqi authorities. The armed intervention marked not the end of a problem, but rather the start of many more, which reach all the way up to the present day and have had a profound impact on both the international order and international law.[6]

It was thus a case of the use of force in which the government chose not to heed the AJI's recommendation. This practice, contrary to both that recommendation and international law, had an enormous institutional cost for the AJI (including, amongst other things, the resignation of its head, Yáñez Barnuevo, himself) and an equally huge political cost for the government itself.

(4) The Responsibility to Protect in Action: Libya (2011)

The primary concern of Spanish practice with regard to the use of force during the 2004-2011 period, according to Concepción Escobar, Legal Adviser at the time, was respect for international law on the subject. The practice itself can be broken down into two main categories: participation in international missions —primarily peacekeeping operations— and the armed intervention in Libya.

The participation of Spain's armed forces in international peacekeeping missions was subject to international law, especially to the relevant Security Council resolutions in each case, and to Spanish law (Organic Law 5/2005, of 17 November 2005, on National Defence). In this regard, the Escobar notes that the main concerns were: the submission of the Spanish troops to international law; the performance of the functions assigned to them abroad in accordance with Spain's international obligations; and the existence of authorization from the Security Council for any operation that might involve the use of force. To this end, under Article 19 of the Spanish Law on National Defence, these missions had to meet three conditions: have the consent of the state in whose territory they were to be conducted or have been authorized by the Security Council or agreed in the context of organizations of which Spain is a member (especially NATO and the EU); be undertaken for humanitarian or peacekeeping purposes; and not contradict or violate any principle of international law that is binding on Spain.

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[6] *Cf.* C. García and A. J. Rodrigo (eds.), *El imperio inviable. El orden internacional tras el conflicto de Irak* (Tecnos, Madrid, 2004); and *Los límites del proyecto imperial. Estados Unidos y el orden internacional en el siglo XXI* (La Catarata, Madrid, 2008).

However, the most prominent case involving the use of force was the armed intervention in Libya to protect the civilian population. It is doubly relevant here due to its theoretical and practical implications. On the one hand, it was the first instance of practical application of what has, since 2011, been called the *responsibility to protect*[7] by means of the use of armed force as a last resort and for the limited purpose of protecting civilians from grave human rights violations by the very authorities of the state of which they are nationals. It was a practice authorized by SC Res. 1973 (2011). Therefore, in principle, it does not pose any particular problems in terms of international law. On the other hand, the practical application of the notion of the responsibility to protect underscored certain problems that have not helped to strengthen its legitimacy or effectiveness, namely, the use of force for purposes other than those that justify it (i.e. the protection of the civilian population), as was the case with the political regime change in Libya.[8]

In any case, as Escobar argues, practice on the use of force in this period evinced particular concern for respect of both international and Spanish law.

(5) The Challenge Posed by the Responsibility to Protect, International Terrorism and Non-state Actors to Traditional Legal Categories in Spanish Practice from 2012 to 2015

Spain's practice in this period, like that of its neighbouring countries, highlights the tension to which the old international legal rules on the use of force are subjected by the requirement to respond to new needs arising from new types of armed conflicts, new threats and ways of using force, and the increasing number of actors involved. As Martín y Pérez de Nanclares declares, "we are currently at a turning point, which will require better adaptation of international structures and their institutions, as well as greater flexibility in the legal treatment of new phenomena, such as international terrorism or organized crime, that might imperil inalienable values of democratic societies".[9]

As the former Legal Adviser notes, Spain's participation in international missions within the framework of PKOs, EU operations or NATO operations has not posed any particular legal problems in terms of their legal basis or substantive content. Nor were such issues raised in the cases of the adoption of measures to provide assistance within the context of collective self-defence in Mali (there existed an express request for assistance by the legitimate authorities of that country and, moreover, legal cover for military operations under SC Res. 2085 (2012)) and in Iraq to regain control over the part of its territory held by ISIL. In this case, attention should be called to the Spanish practice, which the former Legal Adviser argues is consistent with

[7] ICISS, *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty*. Available at: http://www.iciss.ca/spanish-report.pdf.

[8] *Cf.* C. Gutiérrez Espada, "Sobre el 'núcleo duro' de la Resolución 1973 (2011) del Consejo de Seguridad y acerca de su aplicación práctica", 27 *Anuario Español de Derecho Internacional* (2011) 57-75.

[9] J. Martín y Pérez de Nanclares, "La sociedad internacional en la era de la mundialización: hacia un nuevo e inadecuado concepto de la legítima defensa", in J. M. Martínez de Pisón Cavero and M. Urrea Corres (eds.), *Seguridad internacional y guerra preventiva – Análisis sobre los nuevos discursos sobre la guerra* (Perla ediciones, Logroño, 2008) 229-246, at 245.

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international law, of treating the ISIL attacks as "an armed attack" that would enable Iraq to resort to the use of force in individual self-defence, as construed in Article 51 of the UN Charter, whilst also allowing other states, including Spain following the Paris Conference of 15 September 2014, to do so in collective self-defence.

On the other hand, the response to the 13 November 2015 attacks in Paris, committed by members of ISIL, in the context of the possibilities provided for under the mutual defence clauses within the framework of the EU, is limited to assistance in the territory of the member state that was the victim of the attacks. In this case, Martín y Pérez de Nanclares's position is of great interest, insofar as he considers that such attacks can be considered "an armed attack" in the sense of Article 51 of the UN Carter and that ISIL could be equated to "the traditional perpetrator of the acts for which Article 51 of the Charter may be invoked, even though it is not, strictly speaking, a state".

For this Legal Adviser, major legal questions exist regarding the possibility of recourse to the use of force in Syria, whether against the Syrian government (in accordance with the responsibility to protect) or against ISIL (in self-defence).

In any case, his conclusion with regard to this period is clear: all Spanish actions were carried out in accordance with international law.

AN INITIAL ASSESSMENT: A PRACTICE SIMILAR TO THAT OF SPAIN'S NEIGHBOURING STATES

An initial assessment of Spanish practice over this period suggests that, generally speaking and save for a few exceptions, it was similar to that of Spain's neighbouring states. It was a practice that has had to cope with new situations and needs, even when the legal rules governing the use of force remained unchanged. Additionally, this practice has been of great importance for Spanish policy, government and society.

(1) A General Rule with Some Exceptions

The general rule that can be induced from the analysis of Spanish practice on the use of force over the period is that it was similar to that of Spain's neighbours, that is, to that of European member states of the EU and NATO.[10] Thus, as a general rule, armed force has been used in accordance with international law, either because it had been authorized by the Security Council (in Iraq in the Gulf War, in Libya, or in the context of international peacekeeping missions) or because the state in which it would be carried out had requested or agreed to it as part of an act of collective self-defence (in Mali and Iraq against ISIL).

[10] See, i.e., the British practice in every number of the *British Yearbook of International Law*, section "United Kingdom Materials on International Law" (Use of Force). The same case for the french practice at *Annuaire Française de Droit International*, section "Pratique française du droit international".

The exceptions, which differed from each other, were the cases of Yugoslavia and the invasion of Iraq. In the first case, the use of force was undertaken in the context of NATO and without the express authorization of the Security Council with the aim of protecting the fundamental rights of the Kosovar people. It was an illegal intervention, although it is argued that it should not be taken as a precedent,[11] that cannot be legally justified,[12] even as a case of armed countermeasures, adopted under strict conditions, in response to a prior violation of *jus cogens* norms.[13] Perhaps the only mitigating factor was the cause, in other words, the legitimacy of the reasons that lay at its origin and the exhaustion of institutional means in the Security Council with the Russian veto of an authorizing resolution.

The second case, the invasion of Iraq without the express prior authorization of the Security Council, a move backed primarily by Spain, the US and the UK, clearly deviated not only from international law, but also from the political and legal practice of most European states.[14]

Two important consequences can be inferred from the confirmation of this general rule. First, except for the specific precedent of the invasion of Iraq, the parameters of Spanish practice are similar to those of the practice of other European states whose values, political views and economic and geopolitical interests Spain shares. In this sense, it is not an anomaly at all, but rather fits comfortably with the conduct of the country's allies in general. Second, the homogeneity of Spanish practice and that of Spain's neighbouring states could be of great value in the process of reinterpreting the content of certain rules concerning the use of force that is currently taking place in the international community. In this regard, it could help them to evolve in order to respond to the new demands posed both by the use of force by non-state actors (NSAs) and issues of human security.

(2) Old Rules and New Practices Regarding the Use of Force

Spanish practice from this period, insofar as Spain is a medium power and NATO and EU member state, clearly reflects the current tension between the traditional rules on the use of force and the new practices in this area of both states and NSAs. These new practices are the result of

[11] B. Simma, "NATO, the UN and the Use of Force: Legal Aspects", 10 *EJIL* (1999) 1-22.

[12] P. Andrés Saénz de Santa María, "Kosovo: todo por el Derecho internacional pero sin el Derecho internacional", 28 *Meridiano CERI* (1999) 4-8; O. Casanovas, "Bajo el síndrome de Kosovo", 236-237 *Revista de Occidente* (January 2001) 120-127; C. Gutiérrez Espada, "Uso de la fuerza, intervención humanitaria y libre determinación (la 'Guerra de Kosovo')", 16 *Anuario de Derecho Internacional* (2000) 93-132; and S. Ripol, "En Consejo de Seguridad y la defensa de los derechos humanos. Reflexiones a partir del conflicto de Kosovo", 51 *Revista Española de Derecho Internacional* (1999) 59-87.

[13] A. Cassese, "*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", 10 *EJIL* (1999) 23-30.

[14] P. Andrés Saénz de Santa María, "El Consejo de Seguridad en la guerra de Irak: ¿ONG privilegiada, convalidador complaciente u órgano principal?", 55(1) *Revista Española de Derecho Internacional* (2003) 205-222; O. Casanovas, "El principio de prohibición del uso de la fuerza tras el conflicto de Irak de 2003", in C. García and A. J. Rodrigo (eds.), *supra* n. 6, 125-140; and C. Gutiérrez Espada, "La *contaminación* de Naciones Unidas o las resoluciones 1483 y 1511 (2003) del Consejo de Seguridad", 19 *Anuario de Derecho Internacional* (2003) 71-88. For a different position, see R. Bermejo García, "El debate sobre la legalidad internacional tras la crisis de Irak y las Naciones Unidas", 19 *Anuario Español de Derecho Internacional* (2003) 41-69.

the emergence of new types of armed conflict (hybrid wars)[15] and of the intervention, in addition to states, of new types of organizations in them, which raises important questions, such as who can use force in international relations, and against whom; new modes of the use of force (destruction of cultural heritage, terrorist attacks against civilians, sexual slavery, etc.); new types of threats; and new means of combat.[16]

The examination of Spanish practice shows how it has changed over time, from classical cases of the use of force between states as a result of an aggression or territorial invasion (the 1991 Gulf War) to cases that are more complex, whether due to the actors involved, including, amongst others, armed groups of NSAs (Afghanistan, Syria, and Iraq today), or reasons related to the origin of the intervention, as in the case of the 1999 humanitarian intervention in Yugoslavia or what was already being referred to as the responsibility to protect in Libya in 2011.

In any case, in recent years, Spanish practice in this area, like the institutional practice of the UN or that of its neighbouring states, bears testimony to the fact that new practices regarding the use of force call for alternative responses to traditional rules on the subject. On the one hand, the emerging principle of the *responsibility to protect* a civilian population from serious violations of its fundamental rights by the state authorities themselves or by non-state groups operating with or without the connivance thereof poses difficult dilemmas when, *ultima ratio*, armed intervention is required but has not been authorized by the Security Council. First, as witnessed by the use of armed force against Yugoslavia due to its conduct towards the civilian Kosovar population, even when there are sound reasons to defend the legitimacy of a unilateral armed intervention, it will nevertheless be, or, at least, today remains, contrary to international law and, therefore, illegal. Second, in such cases in which the use of force is the last resort for the protection of civilians, Spanish doctrine has raised the possibility of contributing to an "indirect armed humanitarian intervention" in fulfilment of the responsibility to protect by providing support to non-state armed groups (NSAGs) that are fighting against the state or against other NSAs responsible for such violations. The key question lies in the scope of the aid to be provided. If it were to consist of the transfer of weapons, international rules on indirect aggression and the ICJ's interpretation thereof would prohibit such aid. However, an analysis of state and international practice in this area seems to suggest acceptance of the legality of "transfers of non-lethal equipment (helmets, uniforms, boots, flak jackets, etc.) intended to strengthen the defensive capabilities of non-state armed groups involved in the fight against government forces accused of serious violations of the principle of protection of the civilian population".[17] This practice could

[15] *Cf.* E. López-Jacoiste, "Las guerras híbridas y a la luz del Derecho internacional", *Documento de trabajo del Instituto Español de Estudios Estratégicos*, 03/2015, 1-25; also, J. Baqués Quesad, "Las guerras híbridas: un balance provisional", *Documento de trabajo del Instituto Español de Estudios Estratégicos*, 01/2015, 1-20.

[16] *Cf.* C. García and A. J. Rodrigo (eds.), *La seguridad comprometida. Nuevos desafíos, amenazas y conflictos armados* (Tecnos, Madrid, 2008).

[17] A. Sánchez Legido, "¿Podemos armar a los rebeldes? La legalidad internacional del envío de armas a grupos armados no estatales a la luz de los conflictos libio y sirio", 25 *Revista Electrónica de Estudios Internacionales* (2015) 40.

have international legal cover insofar as it constitutes lawful countermeasures as a response to a serious violation of rules protecting the fundamental rights of the civilian population and on the grounds that it does not compromise the principle of the prohibition on the use of force.[18] The provision of non-lethal equipment to NSAGs in order to protect the civilian population from government forces could be considered a countermeasure in the general public interest and, therefore, as a lawful measure in the sense provided for under Article 54 of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts.

On the other hand, the phenomenon of international terrorism,[19] by creating a sort of global market of foreign terrorist combatants willing to be called up and to treat the entire international community as a potential terrorist target, openly challenges traditional legal categories such as self-defence, the notion of an armed attack, the rule of attribution of responsibility, etc.[20]

Finally, the emergence of hybrid wars and, especially, of NSAs that use force makes it necessary to rethink and reinterpret certain traditional legal categories, such as indirect aggression, indirect humanitarian intervention[21] or the very rule of self-defence taken to the interstate level.

Now that Spain's conduct in the last decade with regard to the use of force has been shown to be consistent with international law, the most pressing matter in terms of the future of international law is to determine the extent to which these practical norms could constitute the substantive element for the creation of new customary rules on the subject or, where applicable, for a change not *of* the rules themselves, but rather *in* the content thereof. In other words, it is necessary to exam the potential impact of the new Spanish practices with regard to the use of force on international law.

The starting point is the observation that Spain has never invoked, in any of the cases in which it has been involved, new rules to expand or justify new uses of armed force beyond what is allowed under traditional rules. Therefore, there is no claim of new, more permissive rules regarding the use of force. However, in the author's view, there are two aspects of Spanish practice, which, as noted several times, is similar to that of Spain's neighbours, that might contribute to an evolving interpretation of the rule on self-defence and, therefore, to a change in the content thereof: the expansion of the notion of armed attack to include certain acts of terrorism and the possibility of extending its scope of application *ratione persone* to include not only states, but also NSAs.

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[18] C. Gutiérrez Espada, *El uso de la fuerza y el Derecho internacional después de la descolonización* (Universidad de Valladolid, Valladolid, 1988), 44-45.

[19] The characteristics of the new international terrorism are discussed in P. Pareja, "El nuevo terrorismo internacional: Características, factores explicativos y exigencias", in C. García and A. J. Rodrigo (eds.), *supra* n. 16, 57-69.

[20] On its impact on traditional legal categories, see: A. Cassese, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law" 12(5) *EJIL* (2001) 993-1001; T. Franck, "Terrorism and the Right to Self-Defence", 95 *AJIL* (2001) 839-843, at 840-841; M. Byers, "Terrorism, the Use of Force and International Law after 11 September", 51 *ICLQ* (2002) 401-414, especially, 406-410; and "Not yet havoc: Geopolitical change and international rules on military force", 31 *Review of International Studies* (2005) 51-70, especially, 55-59; and C. Tams, "The Use of Force against Terrorists", 20(2) *EJIL* (2009) 359-397.

[21] A. Sánchez Legido, *supra* n. 17, 17-41.

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Institutional and state practice and *opinio juris* regarding the consideration of certain acts of terrorism as armed attacks are increasingly well-established. Proof of this can be found in the large number of Security Council resolutions in this regard, from SC Res. 1368 (2001) and SC Res. 1373 (2001) to the most recent ones. It is likewise the practice of both the US and most European countries. In the case of Spain, the practice is similar; as noted by Martín y Pérez de Nanclares, the ISIL attacks can be considered an "armed attack" that would enable Iraq to use force in individual self-defence as construed under Article 51 of the UN Charter, whilst also enabling other states, including Spain following the Paris Conference of 15 September 2014, to do so in collective self-defence.[22]

The second aspect, the prospect of an evolving interpretation of the rule of self-defence so as to make it applicable not only between states but also against NSAs is subject to more debate. The starting point is the traditional interpretation of the rule contained in Article 51 of the UN Charter expressed by the ICJ in various cases, including some recent ones.[23] However, the new threats and forms of armed attack and the use of force by NSAs has led some states (the US, the UK, France, the Netherlands), ICJ judges[24] and authors[25] to employ diverse arguments to advocate the possibility of resorting to self-defence against armed attacks by NSAs in accordance with the same requirements applied to interstate self-defence. One of the arguments used for the evolving interpretation of the rule is based on a legal fiction: "equat[ing] Daesh (with its aspiration to become ISIS or the Islamic State, its defined population, and its *de facto* control of a defined territory) to the traditional perpetrator of the acts for which Article 51 of the Charter may be invoked, even though it is not, strictly speaking, a state".[26] Another argument in this regard is based on a different interpretation of Article 51, which does not expressly require the perpetrator of the armed attack that serves as the grounds for self-defence to be a state. Therefore, since NSAs can also perpetrate "armed attacks", if they meet the minimum conditions required to this end, some states, judges and authors believe that there are important substantive and legal reasons to allow states to use armed force against them in self-defence.

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[22] *Cf.* the contribution by J. Martín y Pérez de Nanclares to the conference.

[23] *Cf.* International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paragraph 139 (ICJ Reports 2004). In its Judgment of 19 December 2005 in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (ICJ Reports 2005), the Court refrained from pronouncing itself on this possibility and on the conditions under which international law provides for a right of self-defence against attacks by irregular forces, as it was not necessary to decide the case at hand (paragraph 147).

[24] *Cf.* the separate opinions of the judges R. Higgins (paragraph 33) and Kooijmans (paragraph 35) in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*. See also the separate opinions of Judge Kooijmans (paragraph 26-32) and Judge Simma (paragraph 4-15) in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement of 19 December 2005* (ICJ Reports 2005).

[25] K. M. Meessen ("Unilateral Recourse to Military Force Against Terrorist Attacks", 28 *Yale Journal of International Law* (2003) 341-354) considers that it would be an "an emerging rule of customary law" that would permit unilateral recourse to the use of force in self-defence directly against terrorist groups. This rule would be of subsidiary in nature (available only when multilateral action proved unviable), its basis would be states' right to survival, and its exercise in practice would be limited by the principles of necessity and proportionality.

[26] J. Martín y Pérez de Nanclares in his contribution to this conference.

In short, Spain's new practices with regard to determining what constitutes an "armed attack" and self-defence, similar to those of its neighbours, could contribute to an evolving interpretation of the legal rules on the subject, which is now in the process of producing a change *in the content* of those rules.

(3) Pragmatic Implications for Spanish Policy and Society

Some of the lessons that Spanish practice has offered over these years include, first, proof that possible recourse to the use of force in international relations is not a merely theoretical question, nor is it something alien to Spain practiced solely by countries that Spaniards view from a distance. The interdependence in every regard between members of the international community, the emergence of new types of threats and challenges, and Spain's involvement, together with allied neighbours (EU and NATO members), in the maintenance of international peace and security have caused Spanish citizens to perceive the problems of human security, serious violations of the fundamental rights of civilian populations, and international terrorism as issues affecting us all. The socialization of the consequences of these threats and problems has also encouraged this perception, whether due to the participation in such situations of various state bodies (the army, the police, etc.) or civil society itself, or to having become potential or, unfortunately, in some cases real victims thereof.

A second lesson that can be drawn from Spanish practice with regard to the use of force is the growing importance attached to the question of international legality. On the one hand, participation in or support for the use of force without international legal cover currently has a huge political cost for the government and even for the state itself. On the other hand, consistency with international law is today essential to ensuring the legitimacy of the practice.

The case of the 2003 invasion of Iraq is the clearest example of the political cost it can entail for the government and the rejection provoked in Spanish civil society. The then government's enthusiastic support for the invasion of Iraq despite the lack of prior express authorization by the Security Council was one of the primary causes of its defeat in the next general election. As a result, the new government's fulfilment of its promise to quickly withdraw the Spanish troops deployed in Iraq generated new problems with the participating states in terms of international prestige and reliability. Moreover, the intervention led to massive demonstrations in the main Spanish cities, which showcased the extent of Spanish society's repudiation of such practices.

Spanish practice also shows the growing concern of both the government and the public that the country's conduct in an area as important and sensitive as the use of force conform to international law. The experiences in Yugoslavia and Iraq show that international legality is now essential for any practice involving the use of force to be considered legitimate. Not only is this

requirement perceived by politicians and the public, it has been explicitly incorporated into the Spanish legal system by means of Law 5/2005 on National Defence.[27]

THE SPANISH INTERNATIONAL LEGAL OFFICE AND THE USE OF FORCE

The analysis of the AJI's role in Spanish practice with regard to the use of force must begin with a preliminary observation: the functions of an international legal adviser are gradually expanding. Although a general review of these functions falls beyond the scope of this paper – and has in any case already been done and done well[28] – it is worth noting that, in the case of the AJI, Martín y Pérez de Nanclares distinguishes between traditional legal functions and other more recent ones. The first traditional legal function is *to prevent*, achieved by means of preventive action taken before the actual international events occur. An adviser's initiative and sense of timing are essential to this function. The second traditional function is *to respond* to formal questions by means of written reports or briefings. Finally, the third traditional function is *to defend* the Spanish state before international courts, in particular, before the ICJ and the ITLOS.[29] In addition to these functions, Martín y Pérez de Nanclares highlights two tasks that have taken on increasing importance: first, the diplomatic function in the context of state representatives participating at international conferences, delegations to negotiate international treaties, or working groups; second, to support legislative efforts, providing the "necessary legal support in the drafting of general legal norms rooted in or with implications for international law".[30]

The AJI manages to perform this growing number of functions with an extraordinary economy of personal and material means compared to Spain's neighbours. The AJI is currently made up of six members (a full professor, an associate professor and four diplomats), including the Legal Adviser.[31] This stands in contrast to the gradual expansion of its designated functions, the ever larger substantive scope of international law, the increasing need for international legal advice, and Spanish civil society's already well-established concern for respect for international law. These limitations have largely been compensated for, as witnessed by the office's intervention before the ICJ in the case concerning *Legality of Use of Force*, by the enthusiasm, skill and capacity for work of its members.

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[27] BOE, 18 November 2005, No. 276.

[28] The authoritative volume on these functions is H. C. L. Merillat (ed.), *Legal Advisers and Foreign Affairs* (Oceana Publications, New York, 1964). See also the systematic work of R. St. J. MacDonald, "The Role of the Legal Adviser of Ministries of Foreign Affairs", 156 *Collected Courses of the Hague Academy of International Law* (1977) 381-482. In the Spanish doctrine, see S. Martínez Caro, "La función asesora jurídico-diplomática", 21 *Revista Española de Derecho Internacional* (1968) 499-513; and A. Pérez Giralda, "La Asesoría Jurídica Internacional de gobiernos desde la función pública", in C. Jiménez Piernas (ed.), *Iniciación a la pràctica en Derecho Internacional y Derecho comunitario europeo* (Marcial Pons, Madrid, 2003) 507-533.

[29] J. Martín y Pérez de Nanclares, "La labor de asesoramiento jurídico internacional al Gobierno: el papel de la AJI", in the book he edited *España y la práctica del Derecho Internacional. LXXV Aniversario de la Asesoría Jurídica Internacional del MAEC* (Escuela Diplomática, Madrid, 2014), 11-52, especially 18-25.

[30] *Ibid.*, pp. 25-29.

[31] *Ibid.*, pp. 34-37.

In the context of an area as important and sensitive in every respect as the use of force, Spanish practice on the matter and the personal contributions of the various Legal Advisers underscore, in the author's view, that the AJI's role falls, more than in many other cases, somewhere between law and policy. Moreover, given the increase in both the number of threats and the cases in which these questions arise, it could be helpful to develop *Guidelines for the Application of the Rules Governing the Use of Force*.

(1) Between Law and Policy

Martín y Pérez de Nanclares has noted that the purpose of the AJI is

> "to enable in legal terms the foreign policy action that the government aims to carry out. In other words, to make feasible the legally possible and to set clear limits as to what is legally unacceptable. Ultimately, its purpose is to seek the legal means to bring to fruition the government's specific aspirations in matters of foreign policy, although obviously with a clear limitation. Any advice or report must clearly and categorically establish the inviolable legal limits set by international law for the proposed action in question; the ability to say "no" in time, which no one requesting a report or legal opinion likes to hear, is the indispensable essence of any legal adviser who aspires not to lose the requisite professionalism and, ultimately, in the long term, probably also the respect and trust of the person requesting the report. Not everything can have legal cover".[32]

The various contributions of the different Legal Advisers show that the role performed by the AJI with regard to Spanish practice on the use of force has always been aligned with the defence of international law, even when this law has been violated. In a certain sense, one might say that the AJI, in fulfilling its functions of prevention, response and defence, has likewise performed, when it has seen fit, the role of a check on policy. In neither of the two cases in which there is little doubt that international law was violated (Yugoslavia and Iraq) did the government at the time receive a report from the AJI providing legal cover to the use of force. In the first case, the government failed to request any such report from the AJI at all. As a result, the AJI ultimately had to defend the state before the ICJ (which it managed to do successfully). In the second case, the AJI had actually issued conclusive reports to the effect that for the use of force in Iraq to be legal, express prior authorization in the form of a Security Council resolution was required. Such a resolution was never adopted, and the practice outside the bounds of international law led to the political and legal troubles discussed above.

(2) A Proposal for Developing Guidelines for the Application of the Rules Governing the Use of Force

The urgency of the daily needs to which the AJI's work is subject somewhat hampers its chances of fulfilling its function of prevention in an area as sensitive as that of the use of force. Therefore, it seems reasonable (and even necessary) to heed Martín y Pérez de Nanclares's proposal to "create some sort of stable mechanism for cooperation between the AJI and a certain circle of

[32] *Ibid*, p. 45.

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leading international legal experts able to collaborate with it on more long-term issues, since its everyday business does not always leave sufficient time for reflection and dedication'.[33] Regardless of the formula ultimately used, there is an underlying need to increase the link between the academic debate and practical needs with regard to the use of armed force. It is a practice that, whilst perhaps not regular, is also not rare in other countries and legal cultures, as can be seen, for better[34] or worse, in the US, the UK[35] or Germany.[36] In Spain, this connection has become increasingly intense, as witnessed by the symposia held as part of the process of drafting the Law on Treaties and Other International Agreements and the Law on Privileges and Immunities of Foreign States, International Organizations Headquartered or with Offices in Spain, and International Conferences and Meetings Held in Spain. Another example is the conference that led to the present paper.

Given the existing need, the sensitivity required to address it, and the tacit invitation to contribute to the discussion, this paper offers a proposal for the development of *Guidelines for the Application of the Rules Governing the Use of Force*. The goals are multiple. First, such guidelines could stimulate debate on the possibilities and limits of the international legal rules governing the use of force applicable to cases in which Spain might be involved. Second, they could help the AJI perform its functions of prevention and response in specific cases involving the application of these rules. Third, they could serve as a helpful frame of reference for classifying the practice according to the specific circumstances of each case. Fourth and finally, some of these guidelines could perhaps eventually be incorporated into Spanish law or included in documents such as the National Security Strategy.

Such guidelines would need to be flexible, open and dynamic. They must be flexible because their use lies not in serving as a closed catalogue of answers, but rather in their capacity to be adapted to meet the demands arising in real circumstances. They must be open because the international social reality is constantly evolving and new challenges (humanitarian, ethical, technological, political and legal) are always emerging. Finally, they must be dynamic because the legal concepts that are part of the legal principles and rules on the subject are not static. On the contrary, they are dynamic, evolving concepts whose content is adapted according to specific needs and circumstances.

In addition to referencing the general principle of the prohibition of the threat or use of force and its exceptions (self-defence and authorization by the Security Council), these guidelines could potentially address some of the following questions:

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[33] J. Martín y Pérez de Nanclares, *supra* n. 29, p. 37.

[34] H. H. Koh, "Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), Legal Adviser, US Department of State" (http://www.state.gov/s/l/releases/remarks/139119.htm).

[35] D. Bethlehem, "Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors", 106 *American Journal of International Law* (2012) 770-777.

[36] Martín y Pérez de Nanclares himself (*supra* n. 29, p. 37) cites as an example the existence in Germany of a permanent advisory board made up of six professors of international law.

1. The scope of self-defence: its exclusive application between states in keeping with the traditional interpretation of Article 51 of the UN Charter or its possible application against NSAs as well.
2. A non-exhaustive list of the criteria that would allow an act of terrorism or by an NSAG to qualify as an armed attack.
3. The time factor of the armed attack: prior armed attack, imminent threats, and dormant or potential threats.
4. The criteria for identifying an imminent threat.
5. The scope of an indirect humanitarian intervention in fulfilment of the responsibility to protect, as a last resort for the protection of civilians.
6. Military assistance and arms supply to NSAGs by request of the government of the state in whose territory they are operating.
7. Military assistance and arms supply to NSAGs without the consent of the government of the state in whose territory they are operating.
8. The transfer of non-lethal equipment (helmets, uniforms, boots, flak jackets, sandbags, etc.) to NSAGs for the purpose of protecting civilians.
9. The control test for the attribution of the acts of NSAGs to the state in whose territory they are operating.
10. The criteria for considering an aggression to be indirect.
11. The use of force in self-defence against NSAGs and against the state that supports or consents to the activities of such groups in its territory.
12. The use of force in self-defence against NSAGs carried out outside state jurisdiction.
13. The use of force against NSAGs operating from the territory of a state that lacks the ability to prevent or confront them.
14. The legal status applicable to foreign terrorist combatants.
15. Cyberwar.
16. The use of force by means of drones and autonomous weapons.
17. The issue of targeted killings.

CONCLUSIONS

Certain final conclusions can be drawn from this analysis of Spanish practice with regard to the use of force between 1990 and 2015, which has primarily been based on the contributions of the different Legal Advisers over the period.

First, Spanish practice reflects a shift in the types of situations in which Spain has resorted to the use of force, from classical international armed conflicts of an interstate nature including a territorial invasion (e.g. the first Gulf War in 1991) to the new types of conflicts (hybrid wars) and threats from NSAs that it has had to cope with in recent years.

Second, a general rule can be inferred from this practice, which, with a few exceptions, consists of respect for and defence of international law on the subject of the use of armed force. This practice is similar to those of Spain's neighbouring countries whose values, views and economic and geostrategic interests it shares.

Third, these new practices, of Spain, its neighbouring countries, and other states, could contribute to an evolving interpretation of the rule on self-defence. This evolution would be in the process of crystallizing a change *in the content* of the rule that would affect the notion of "armed attack" and the scope *ratione personae* thereof. In the first case, the notion of armed attack would also include certain terrorist acts that meet the requirements of gravity, effects, intention, etc. In the second, given that many of today's armed attacks are perpetrated by NSAs and that the wording of Article 51 does not expressly require that such attacks be caused by states, the evolving interpretation would permit an armed response in self-defence against the NSAs responsible for these attacks. The problem then becomes to determine, amongst other things, whether the rule's new content includes as a target only the NSA itself or also the state in whose territory it finds help or in which it finds only refuge, but which is unable to deal with it.

One of the lessons that can be drawn from the analysis of Spanish practice is that both Spanish policy and Spanish public opinion attach increasing importance to respect for international law. The experience of these years shows that when Spain participates in armed actions supported by international law, it increases their legitimacy and facilitates acceptance of the ensuing economic, military and human costs. Likewise, when the use of force lacks international legal cover but there are important grounds for international legitimacy (e.g. the protection of civilians in cases of serious crimes against them, as in Kosovo), although these grounds do not prevent the serious legal consequences, they do make it easier for politicians and public opinion to understand the conduct for two reasons. First, because the lack of authorization for the use of force in such cases may be due to limitations of the collective security system due to the exercise of the right of veto by one of the Security Council's permanent member states. Second, because Spanish public opinion is very receptive to the ethical grounds for assisting people in situations of humanitarian disaster. Lastly, the legal, political and public opinion problems posed in Spain were far greater in those cases in which force was used in the absence of both international legality and legitimacy (as with the invasion of Iraq).

Finally, with a view to stimulating debate on the possibilities and limits of the rules governing the use of force and to assisting the AJI in the fulfilment of its functions in this area, *Guidelines for the Application of the Rules Governing the Use of Force* should be developed.

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