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INTRODUCTION

Following the devastating terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, the United States launched a military campaign against the terrorist network, Al-Qaeda.[1] This campaign included attacks against the Taliban government in Afghanistan for its support and protection of Al-Qaeda leadership, which ultimately resulted in the collapse of that government.[2] U.S. military action also disrupted and dispersed the various elements of Al-Qaeda and its affiliated terrorist groups.[3]

The United States undertook that campaign with the tacit support of many countries of the world, including the United Nations, although without the formal invocation of Article 2(4) of the U. N. Charter.[4] The United States' argument for use of force rested on claims under customary international law of self-defense and under Article 51's provision for self-defense, of the U.N. Charter.

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1. Presidential News Release, The White House, President's Building Worldwide Support Against Terrorism, September 19, 2001, *at* http://www.whitehouse.gov/news/releases/2001/09/20010919-1.html (last visited May 1, 2004). *See* also Presidential News Release, The White House, President Issues Military Order, November 13, 2001, *at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html (last visited May 1, 2004)

2. *See* Secretary of State Donald Rumsfeld, Statement of the Secretary of Defense, October 7, 2001, *available at* www.defenselink.mil/news/Oct2001/b10072001_bt491-01.html (last visited May 1, 2004)(discussing the objectives and outcomes for U.S. military campaign).

3. *See* Presidential News Release, The White House, President, General Franks Discuss War Effort, December 28, 2001 *at* http://www.whitehouse.gov/news/releases/2001/12/20011228-1.html (last visited May 1, 2004).

4. *For example*, Lawyer's Committee on Nuclear Policy, The United Nations Charter and the Use of Force Against Iraq *at* http://www.lcnp.org/global/iaqstatement3.html (last visited May 1, 2004).

More recently, the United States initiated an invasion of Iraq, based in large measure upon claims that the government of Saddam Hussein possessed weapons of mass destruction (WMD).[5] That possession, in turn, posed a threat of some sort—be it imminent or be it further in the future—to the security of the Middle East region and the United States.[6] The subsequent war toppled the Bath Party regime and has lead to a U.S. occupation, pending the implementation of a new, democratic government.[7] The justification for the war against Iraq was in part based on the Bush doctrine of pre-emptive war.[8]

Prior to U.S. action, an acrimonious debate was waged within the United Nations and the Security Council.[9] The resulting split between permanent members has lead to continuing strained relations, ongoing animosity and lingering bad feelings, as well as a sense of the futility of future collective action.[10]

These events have culminated in Secretary General Kofi Annan's new appointment of a high-level panel to conduct a through review of global security threats, and the role that collective action plays in addressing these threats.[11] The panel is also charged with recommending changes necessary for that collective action, particularly with the United Nations.[12] In light of almost fifty years of history, any consideration to change existing approaches, instruments, and mechanisms of the United Nations is serious and self-evident.

Additionally, these events have led to a return to the old debate on the effectiveness of Article 2(4) of the U.N. Charter in dealing with security threats.[13] Article 2(4) reads in its entirety:

> All Members shall refrain in their international relations from the hreat or use of force against the territorial integrity or politicalindependence of any state, or in any other manner inconsistent withthe Purpose of the United Nations.[14]

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5. *See e.g., A Nation at War: Bush and Blair at Camp David, Acting Together in Noble Purpose*, N.Y TIMES, March 28, 2003, at B12.

6. U.N. Charter, Article 2(4) specifies that only "the threat or use of force" against the "maintenance of international peace and security" justifies the use of force.

7. *See* "U.S.-led occupation of Iraq, in Wikipedia: The Free Encyclopedia, *at* http://en.wikipedia.org/wiki/U.S._occupation_of_Iraq (last visited May 1, 2004.

8. *See National Security Strategy of the United States*, *at* http://www.whitehouse.gov/nsc/nss.html (last visited May 1, 2004). *Also see* National Security Advisor, Speech at the Waldorf Astoria Hotel, New York, New York (October 1, 2002), *at* http://www.whitehouse.gov/news/releases/2002/10/20021001-6.html (last visited May 1, 2004).

9. *See* N.Y. TIMES, from January 30, 2003 to March 14, 2003, for discussions of the debate on Iraq.

10. *See* Pew Research Center for the People & the Press, *Views of Changing World 2003: War with Iraq Further Divides Global Politics*, June 3, 2003, *available at* http://people-press.org/reports/display.php3?ReportID=185 (last visited May 1, 2004).

11. *See* U.N. Press Release SG/A/857, Secretary-General Names High-Level Panel to Study Global Security Threats and Recommend Necessary Changes, March 11, 2003.

12. U.N. Press Release SG/SM/9051, Newly Appointed High-Level Panel on Threats, Challenges, Change to Meet 5-7 December.

13. As discussed later by Franck, Henkin, and others throughout this article.

14. *See* U.N. Charter, *available at* http://www.un.org/aboutun/charter/.

This debate on the prohibition of the use of force by states has a long history among both practitioners and legal scholars.[15] As early as 1970, Tom Franck posed the question in his now famous article, in simple and stark terms, "Who Killed Article 2(4)?"[16] Louis Henkin's reply, published the following year, responded likewise with its title, "The Reports of the Death of Article 2(4) Are Greatly Exaggerated."[17] Since then, many have participated in ongoing and cantankerous debate, which has led to some interesting and insightful conclusions.[18]

This paper will trace the history and arguments of that debate, as well as some of the debaters' conclusions, with the intention of reaching some preliminary findings of where we are today and whether Article 2(4) is dead, alive, or somewhere in between. It will also consider the idea behind the possibility of changing the U.N. Charter, a suggestion put forth recently by scholars, and the implications for such changes in addressing the problem of using force in our contemporary world.

THE PREMATURE DEATH OF ARTICLE 2(4)

While Thomas Franck was not the first person to question the viability of the U.N. Charter's prohibition against the use of force, he can be credited with suggesting the framework of the debate by his evocatively titled article—Who Killed Article 2(4)?[19] Franck opens his article by noting that U.N. prohibition against the use of force by states was imperfect and somewhat obsolescent from the start.[20] It was predicated on the false assumption that the wartime partnership of the Big Five—the United States, the Soviet Union, the U.K., France, and China—would continue and provide the means for policing the peace under the auspices of the United Nations.[21] This presumption failed to take into account not only the tensions of a continued partnership but also failed to recognize the changing nature of warfare.[22] While the partners could, and on occasion did, address conventional military aggression,[23] it would fail in addressing non-conventional forms of military aggression.

Additionally, Franck notes that the Charter itself provided enough exceptions

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15. Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 129-31 (Martin Nijhoff Publishers, Dordrecht, The Netherlands) (1991).

16. Tom Franck, *Who Killed Article 2(4)?* 64 AM. J. INT'L L. 809 (1970).

17 Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated,* 65 AM. J. INT'L L. 821 (1971).

18. Many of these points of view and positions will be sketched out here.

19. Franck, *supra* note 16, at 809.

20. *Id.* at 810.

21. *Id.* Not foreshadowing the Cold War and the split between the Big Five.

22. *Id.* at 811-812. Changes in nature of warfare itself have been noted by a variety of authors, including Phillip Bobbitt in *The Shield of Achilles,* John Keagan in *A History of Warfare,* and David Halberstram in *War in a Time of Peace.*

23. Franck, *supra* note 16, at 812. The examples cited are Korea and the Congo.

and ambiguities to open the rule to deadly erosion.[24] Add to that, the temptations of both powerful and not-so powerful states to settle a score, end a dispute, or pursue their national interests, and it is clear that state practice has severely shattered the mutual confidence in the rule itself.[25] Without mutual confidence in the *sine qua non* of an operative rule, the rule becomes only words without meaning.[26]

Based upon that analysis of the demise of the rule, Franck poses the open-ended question of having violated it, ignored it, run roughshod over it, and explained it away can the nations of the world live without it?[27]

Franck's article is structured around five concerns.[28] First, he looks at factors undermining Article 2(4). Beyond what he sketches out by way of faulty presumptions in the introduction, he notes an invalid premise underlying collective action by the United Nations: that the Security Council would be able to discharge its responsibilities as the United Nations' principal organ for world peacekeeping.[29] Collective action by the Council—perhaps best defined as the decision that a threat of peace exists or aggression has been committed and the steps taken by the world organization to best remedy the situation—is predicated on the unanimity of the great powers.[30] Without the assent of all members, collective enforcement action is an illusion.[31]

With the sole exception of the U.N. action in defense of South Korea—based on the fortuitous absence of the Soviet Union from the Security Council—and the United Nations' limited role in the Congo, it has not been possible to invoke collective enforcement actions under Chapter VII (at least through 1970).[32] This lack of action didn't denote a peaceful world community As Franck notes, since the San Francisco conference there had been some one hundred separate outbreaks of hostilities between states.[33]

Without the U.N. action, states had fallen back on their own resources and military and regional alliances.[34] These state responses to hostilities were

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24. *Id.* This has effected a systemic transformation, discussed later by Franck.

25. *Id.* at 809. Blame should be shared here, by both the powerful and not-so-powerful states.

26. *Id.* at 809.

27. *Id.* at 810.

28. The bookends here are small-scale warfare—guerilla warfare—and global warfare—nuclear warfare—for where Article 2(4) is placed.

29. Franck, *supra* note 16, at 810. Clearly one problem here is the lack of an independent military staff and forces—or international police forces—to support Security Council's decisions to take action.

30. This really means the affirmative vote or lacking that consent, at least the benevolent abstention of each of the Big Five.

31. It is unclear as to whether or not the Charter requires assent or, if what has become the common practice, abstention, qualifies as an affirmation.

32. Franck, *supra* note 16, at 810.

33. *Id.*

34. *Id.* at 811. Despite claims of the supremacy of the U.N. Charter to other treaties, regional military alliances do not serve as subordinate systems to the U.N. organization, subject to command and control. This was seen most recently in the case of NATO intervention in the Balkans, and specifically in Kosovo. While U.N. resolution condemned the ongoing atrocities was issued prior to the commencement of military action, and later, U.N. tribunal, at the time of this writing, is trying former

facilitated by both Chapter VII being seen to rust and increasing reliance on the use of U.N. Charter Articles 51, 52, and 53.[35] The corresponding increase in the use of exceptions to collective enforcement action have overwhelmed the rule and transformed the system.[36]

Article 51 permits the use of armed force by a state responding in self-defense to an armed attack.[37] But the problem, Franck notes, is that there is no conclusive way for the international system to establish which state is the aggressor and which state is the aggrieved.[38] With no system for objective fact finding, the concept of self-defense remains a convenient shield of for self-serving and aggressive conduct.[39] In other words, as the facts about the initiation of a dispute are not satisfactorily ascertainable, the operation of Article 51 is effectively and dangerously unlimited.[40] The temptation remains what it was before Article 2(4) was conceived and implemented: to attack first and lie about it afterwards.[41]

Franck then looks to the effect of small-scale warfare on Article 2(4).[42] Small-scale warfare operates differently than conventional warfare.[43] Manifest most often in the form of guerilla warfare and tactics, this kind of warfare also generates a corresponding different kind of assistance. Armies are not dispatched across borders, rather they took the form of encouragement and assistance that the Allies provided to resistance fighters in occupied countries. Neither the form of warfare nor the assistance and support provided to it fits into conventional international legal concepts and categories.[44]

Serb leader, Slobodan Milosevic and others for war crimes it was NATO forces, not U.N. forces, that intervened.

35. Specifically, these articles address self-defense and regional arrangements, which in certain areas, like Europe; have been utilized in lieu of the U.N. and its organs.

36. Franck, *supra* note 16, at 810.

37. Article 51 reads in its entirety, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against 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-defence 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. Much has turned on how this article is interpreted and that, like Article 2(4) itself varies.

38. Franck, *supra* note 16, at 811.

39. Claims of self-defense have been made in numerous situations, where the aggressor is clearly identifiable, including North Korea invading South Korea, India into Goa, and Cambodia into Vietnam.

40. Therefore, what is and what is not self-defense isn't clear and many nations make self-defense claims that are clearly not the case.

41. Franck, *supra* note 16, at 811.

42. *Id.* at 812. Context is important here for Franck is writing at the height of the guerilla war in Vietnam.

43. Many texts note this difference in forms of warfare, but two important ones are Charles W Thayer's GUERILLA, (Harper & Row1963), which says "Guerilla warfare has been defined as "irregular war carried on by independent bands. *Id.* at xvi. .or another definition is found in Mao's observation, "The essence of guerilla warfare is thus revolutionary in character. MAO TSE-TUNG'S ON GUERILLA WARFARE, 43 (Samuel B. Griffith trans., Praeger 1961).

44. Franck, *supra* note 16, at 812. One major difficulty with international law is that is set-up to regulate conduct between state actors, not conduct involving non-state actors. Therefore, guerillas and

This encouragement by one state to a guerilla movement in another state does not rise to the level of an "armed attack, at least in the conventional sense and therefore cannot be said to have taken place.[45] In fact, the more subtle and indirect the encouragement, the more tenacious the analogy becomes to an "armed attack" and Article 51 would not apply.[46] Article 51 does not, on its face, recognize the existence of these newer modes of aggression, or attempt to deal with the new problems of characterization they create for international law

Franck traces the United Nations' then-history with small-scale warfare, from actions in Czechoslovakia and Greece in 1948 through Lebanon a decade later to Vietnam in the 1960's.[47] His consideration of U.S. conduct in Lebanon opens up two further dilemmas: 1) that of deciding the factual question of who attacked whom and 2) defining what the level of foreign intervention should suffice to permit counter-intervention by way of collective self-defense.[48]

The first dilemma was "solved" by the establishment of an international observation group, which was tasked with ensuring that no illegal infiltration or personnel or supply of arms or material across the Lebanese borders occurred.[49] Initiated by a proposal from the Swedish Government, and endorsed by the United States, the observer group was able to report back within a month of its arrival in Lebanon on who was at fault and who was not.[50]

Yet, even this solution was not definitive, given its later rejection by the United States, for other political purposes.[51] The second dilemma has been more elusive in finding a definitive solution. Since each circumstance is different and varies in both scope and scale, the appropriate level of response is also changeable.[52] Franck passes over this unresolved dilemma and moves on to another concern—the application of Article 51.[53]

The Lebanese crisis is illustrative of two problems inherent in applying Article 51.[54] The first problem is a procedural one and relates to the dilemma mentioned earlier—how is the fact of an armed attack to be established?[55] The

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terrorists present challenges to international norms.

45. *Id.*

46. Attacks by organized military forces such as tanks going across a border are clearly direct attacks under Article 51, but terrorists blowing up buildings or guerillas infiltrating to blow up bridges and power plants are not.

47. Franck, *supra* note 16, at 811-13.

48. *Id.* at 814.

49. *Id.* at 815-16. The Observation Group serves in the peace keeping role, as opposed to the peace-making role. An excellent treatment of that distinction is found in The U.N.

50. *Id.* Interestingly, this predates the advent of the "CNN effect, where the media now often serves an additional set or sets of eyes on the ground and shows the public what is happening where.

51. The role that "other" political considerations play in the Big Five decision-making is, in part, behind calls for an independent military force, under U.N. auspices. But more will be said of that later in this article.

52. Franck, *supra* note 16, at 817

53. *Id.* at 816.

54. These problems are defined as procedural ones and substantial ones.

55. This lack of procedure for establishing when an attack has occurred is one argument advanced for revisions to the Charter. This issue is developed later in this article, specifically in

Charter provides no answer, and in its absence, Article 2(4) can be virtually nullified by self-serving allegations. The second problem is substantive—how to define an "armed attack" in a way relevant to the modern conditions of indirect, unlimited warfare without broadening it to the point at which disproportionate armed force can be used under the guise of self-defense against imagined or slight provocation.[56] And it too suffers from a lack of a definitive answer in the Charter. The default position seems to be whatever levels the provider of assistance or the requester of assistance cares to provide.[57]

Franck analogizes the problems and dilemmas with what would happen if the law were to leave two drivers in a motor vehicle collision the sole responsibility for apportioning liability, helped only by the unruly crowd gathered around them at the scene of the accident.[58]

This leads Franck to identify another of what he calls the great vulnerabilities of the norm established by Articles 2(4) and 51. If grievous threats to world peace are to appear to hereafter in the guise of civil wars or wars involving portioned states with rival regimes, then Article 51 by itself is likely to be of very little use in distinguishing individual or collective self-defense from aggression.[59]

It is worth noting here that the Charter doesn't have an answer to this question, particularly in the situation where two great powers recognize different regimes in the same country and both exercise their right to come to the collective self-defense of the side each prefers. Franck does claim that ad hoc machinery has played a role here— primarily that of the observers groups, as in Lebanon and later, in Vietnam. But the problem with ad hoc machinery is that it does not allow for a universally creditable method of determining the facts behind who attacked whom.

Once again, in the absence of an objective international system of recognition of governments for determining which party to a dispute is the aggressor and which is the victim, Article 51 is a wide-open invitation to the great Powers to engage each other in limited wars fought vicariously on borrowed terrain and with other's lives.[60]

Next, Franck considers the effect of potential nuclear warfare on Article 2(4).[61] Whereas small-scale warfare has made the rules of the United Nations hard to apply, the development of nuclear technology and nuclear delivery forces has lead to far more devastating potentiality for states.[62] Taken literally, Articles 2(4)

Franck's follow-up article on Article 2(4), 2003.

56. This is a further extension and consequence of the argument about the changing nature of warfare, mentioned earlier *supra* note 22.

57. Another allusion to the role that Big Power's dominance plays in the U.N.

58. Franck's analogy seems to suggest that the lack of an independent adjudicator than damns us to an unruly, and apparently unreasonable mob. Yet, reasonable people often play rational roles in traffic accidents, including serving as witnesses in trials and even as "good Samaritans.

59. Franck, *supra* note 16, at 820.

60. *Id.* at 818.

61. *Id.* at 820.

62. Franck is echoing the analysis found in the works of many nuclear war and deterrence

and 51 together seem to require a state to await an actual nuclear strike against its territory before taking forceful counter-measures.[63] The inanity of such a course of action is clear and no state, it is safe to presume, would sit by while another prepares it doom.

Clearly, a correction for this possible absurdity is required. As Myres McDougal has noted, it would be against reason and nature, particularly in the age of jets, rockets, and nuclear weapons, to interpret Article 51 so literally as to preclude a victim from using force in self-defense until it has actually been attacked.[64]

Customary international law accords a protection under the doctrine of necessity, permitting pre-emptive strikes against an anticipated rather than an actual attack.[65] Of course, a concern is that one can over-correct, making the right measure on the scale of anticipatory action important.[66] The line between imminent attack and between any threatening activities can be a broad one. On the one end of the scale, even conventional military action does not raise to the same threat of catastrophic destruction as nuclear attacks.

Few times are states really threatened with imminent danger or attack and required to take pre-emptive action. The one notable exception being the case of Israel's invasion of the Arab states in 1967 which was undertaken in reasonable anticipation of imminent large-scale armed attack for which there was substantiated evidence.[67] Even here there seem to be circumstances that are unusual—including the relatively small size of Israel—which lead to persuasive demonstration of the case[68]

The lack of any definitive determinative correction results in an on-going problem for the rules of the United Nations. Furthermore, as recent events demonstrate, the question of when an attack is imminent continues to be problematic for states.[69]

Regional enforcement and Article 2(4) is another central concern of Franck's article.[70] Changing circumstances in international relations, including the way states perceive their self-interest, of strategy and tactics, have combined to take advantage latent ambiguities behind the U.N. rules and in turn, have enlarged the

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theorists, like Bernard Brodie's STRATEGY IN THE MISSILE AGE (1959).

63. Franck, *supra* note 16, 820-21.

64. *See* American Society of International Law, *1963 Proceedings*, 164.

65. Franck, *supra* note 16, at 821.

66. Michael Walzer notes as much in his seminal work, JUST AND UNJUST WARS 77 (1977).

67. Cited in the "Anticipations" chapter of Walzer and also cited in numerous international law texts, including Schachter's.

68. The case for smaller states is all the more compelling given that a failure to respond might lead to complete collapse and surrender before the blow could be sustained and strike back.

69. CIA Director George Tenet's recent speech, February 5, 2004 at Georgetown University, defending pre-war intelligence assessments that were the basis for the U.S. invasion of Iraq in 2003 is illustrative of this problem.

70. Franck, *supra* note 16, at 822.

exceptions to the point of virtually repealing the rule itself.[71]

Actions by regional organizations are a major part of that development.[72] Specifically, Articles 52 and 53 of the Charter have been interpreted to legitimize the use of force by regional organizations in their collective self-interest.[73] Arguably these exceptions to Article 2(4) play an important role in the growth of international violence.[74]

The regional organizations permitted by these articles have developed tight codes of loyalty and they have not hesitated to enforce them against members suspected of deviation.[75] Their enforcement actions have tended to be beyond the reach of the larger world community, particularly if they happened to occur within an organization lead by a Super-Power.[76] Intended to supplement the U.N. peacekeeping system, these regional organizations instead have become instruments of violence eroding the Article 2(4) injunction.[77]

Tracing the struggle at the San Francisco conference between supporters of regional organizations and those who stood firmly behind the United Nations as a global organization, a compromise was reached.[78] In essence, a regional organization may act by means short of force to preserve the peace without having to await an outbreak of hostility—Article 52—but it may engage in enforcement action only after obtaining a fiat from the Security Council—Article 53.[79] An individual state or group of states may use force defensively prior to Security Council approval but only to respond to an armed attack—Article 51.[80]

But the problem, Franck notes, is that since 1945, these three articles have melded to produce an increasingly asserted right of regional organizations to take the law into their own hands, to act militarily without Security Council approval even in the absence of an actual armed attack, and to exclude the United Nations from jurisdiction over disputes in which one member is being forcibly purged of ideological non-conformity by the rest of the organization (or the Superpower who leads it).[81]

Two other issues have arisen and created tension between the United Nations

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71. Franck's point is that too many exceptions break the rule completely.

72. These organizations include NATO and OAS, as well as others. See more on this issue later in the article.

73. Examples are cited later in the article.

74. As it allows exceptions to the rule against aggression and even further, against self-defense.

75. Franck, *supra* note 16, 827-829.

76. Two representative examples were the Soviet Union and the Warsaw Pact and the U. S. and NATO.

77 Franck, *supra* note 16, at 822.

78. Franck distinguishes here between regionalists—those seeking to provide more authority to regional organizations—and Universalists—those favoring more authority to the U.N.

79. *See* U.N. CHARTER, art. 53, which notes that enforcement action by a regional organization maybe engaged in only after Security Council approval. Given this Article, we can see the problems behind the Kosovo campaign by NATO in 1999, which occurred without fiat, in the eyes of the U.N. and world opinion.

80. Franck, *supra* note 16, at 824.

81. *Id.*

and regional organizations. First, in the event of a dispute between two members of the same regional organization, who should have primary jurisdiction to bring about a peaceful settlement.[82] The ambiguity of this question is found both in the language of Article 52—which provides that members of regional organizations "should make every effort to achieve peaceful settlement of local disputes through such agencies or arrangements before referring them to the Security Council"[83] and the language of Articles 34 and 35, which, in turn state, the "Security Council may investigate any dispute " and that any "Member of the United Nations may bring any dispute to the attention of the Security Council or of the General Assembly "[84] The result is really a double jurisdiction and, with it, a lack of clarity as to who has priority and preference.[85]

Second, is the problem of defining who is a regional organization?[86] The multitude of potential regional organizations is vast and defining who qualifies is not just a political question but also a legal one. For example, the Charter's provisions for regional action using pacific settlement, do not, on their face, apply to regional organizations established for collective self-defense—under Article 51—but only to those organizations under Article 52.[87] Additionally, the fact that regional organizations are accorded such extensive powers in derogation of Article 2(4) and have garnered much greater powers in practice, it is important to have a clear view of which groupings of states are entitled to regard themselves as regional organizations.[88] The OAS, NATO, EEC, COMECOM, the WARSAW Pact, as well as, the Organization of African States, the Arab League, and other third-world regional groups have all set forth arguments for their inclusion in this grouping and yet, not all have been seen fit to be included.[89]

The unsatisfactory conclusion is that regional organizations which are lead by superpowers have established regions where Article 2(4) does not apply.[90] Motivated by a duty to comply or conform, members are subject to superpower unilateral military action, whenever they claim to see a threat to their security.[91]

Finally, Franck looks at what he says is the way ahead (at least from the vantage point of 1970).[92] In essence, Franck's argument is:

> that the prohibition against the use of force in relations between states has been

82. *Id.* at 825.

83. *See* U.N. CHARTER, art. 52.

84. *See* U.N. CHARTER, art. 35.

85. Franck, *supra* note 16, at 825.

86. *Id.* at 827.

87. One measure is the degree of coverage an organization has in both military and non-military matters, like the OAS. This definition, however, can be considered too restrictive.

88. Given the NATO intervention in Kosovo, it also seems to matter in excuses for interventions; like in criminal law, some excuses—we are a regional organization and therefore can use force—are better than others in terms of punishments enforced on the perpetrator.

89. Recognition as a regional organization seems to be a function of Great Powers acknowledge as anything else.

90. Franck, *supra* note 16, at 835.

91. *Id.*

92. As we shall see later, his views change a bit by 2003.

> eroded beyond recognition, principally by three factors: 1. the rise of wars of "national liberation"· 2. the rising threat of wars of total destruction; 3. the increasing authoritarianism of regional systems dominated by a super-Power. These three factors may, however, be traced back to a single circumstance: the lack of congruence between the international legal norms of Article 2(4) and the perceived national interests of states, especially the super-Powers.[93]

The result is one of two worlds: one where peacefully, co-existing superpowers dominated regional spheres exist—a world of superpowers run ghettos, marked by limited freedoms—or another world, arising from the ruins of Article 2(4), which is alive, vibrant, and meaningful, where national interest is not defined in numbers, but rather where national interest is perceived to be congruent with a renunciation of the use of military force in inter-state relations.[94] The second world is only reached, Franck argues, if we can redefine what national interests are and return to an international legal system of norms such as those found in Article 2(4).[95]

ARTICLE 2(4): A VICTIM OF AGGRAVATED ASSAULT, NOT MURDER.

Louis Henkin notes in "The Reports of The Death of Article 2(4) Are Greatly Exaggerated, his reply to Franck's article, that the death certificate is premature and the indictment for legicide must be redrawn to the lesser charge of aggravated assault.[96] Henkin concedes the validity of all of the arguments that Franck makes: the ills of the Charter; the mistaken assumption of continued big-Power unanimity· the changing character of war; the loopholes for "self-defense" and "regional" action; the lack of impartial means to find and characterize facts; the disposition to take the law into their own hands and distort and mangle it for their own purposes.[97] But, even granting all of those claims, he argues that to concede death would mistake the lives and the ways of the laws.[98]

Henkin's principle critique of Franck's diagnosis is that it judges the vitality of the law by looking only to its failures.[99] It needs to be noted that the purpose of Article 2(4) was to establish a norm of behavior and help deter violations.[100] Further, despite common misimpressions, Article 2(4) has accomplished those goals.

Granted, deterrence is hard to prove or measure—as in individual penology—but war is less common now than before the advent of the U.N. Charter and the rules. It is less likely, less frequent, and expectations of international violence do

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93. Franck, *supra* note 16, at 835.

94. *Id.* at 837.

95. *Id.*

96. Henkin, *supra* note 17, at 544.

97. Henkin notes Franck as a pathologist for the ills of the international body politic, although like Franck he acknowledges the legitimacy of his claims.

98. Henkin, *supra* note 17, at 544

99. *Id.* at 545.

100. Part of Henkin's argument is that the Cold War was a result of the controlling norm of Article 2(4), in places like Cyprus, Kashmir, and Berlin.

not underlie every political calculation of every nation or state.[101] While indeed we have outbreaks of hostilities, not every one of them became a full-fledged war; many of the one hundred hostilities cited have not. Most have remained subject to Cold War constraints. Threats to peace have remained just that, threats, and issues only remained in regard to peaceful settlement or non-settlement.[102] Cyprus, Kashmir, and Berlin are cited as examples.[103]

While it is possible to credit the lack of traditional war to other factors, including the changing nature and character of war, to more territorial stability, and to other changes in national interests, that does not make Article 2(4) any less a norm.[104] Law often reflects dispositions to behavior as much as it shapes them.[105] If we accept Franck's claim that "new forms of attack were making obsolete all prior notions of war and peace strategy, one may conclude that development reflected and supported Article 2(4) and made it viable.[106] Alas, nothing has rendered war obsolete as indicated by conflicts between India and Pakistan, India and China, Turkey and Greece, Honduras and El Salvador, Egypt and Israel.[107] The causes of war remain but what has changed is the notion that states are free to indulge in it whenever and wherever they want. The death of that notion is accepted in the Charter.[108]

Even the supposed transforming effect of nuclear weapons is erroneous. Neither the era when the United States had a monopoly on nuclear weapons, nor the era when the Soviet Union and the United States had a duopoly, was aggression induced by either party.[109] Nor have the superpowers'' caches of nuclear weapons deterred war by lesser Powers as demonstrated by repeated conflicts in the Middle East.[110]

The fissures of the Charter are worrisome but they are not as wide in international life as they are in the academic imagination. Pre-emptive war as "anticipatory self-defense," illegitimate self-defense claims by states attacking under the guise of Article 51, and even regional loopholes are not as prevalent and widespread as suggested.[111] There is danger out there in the international arena but it is not always fatal.

The differences here are ones in degree, not in kind. Article 2(4) remains.

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101. Henkin, *supra* note 17, at 544

102. It means that the use of force is not the only action that needs to be considered here but other options too.

103. Henkin, *supra* note 17, at 544.

104. *Id.* at 545.

105. *Id.*

106. *Id.*

107 Recall this article was written in 1971; perhaps what is interesting is that many of the same states would be on any similar list in 2004.

108. Henkin, *supra* note 17, at 545.

109. *Id.* at 545.

110. *Id.* at 545-6. Part of the deterrence argument of the Cold War rested on this premise—that nuclear weapons would have chilling effect on other forms of conflict. As Henkin notes, that was not proven out.

111. *Id.* at 546.

Donning the mantle of regionalism does not dispose of it. Not even the most stringent advocates of doctrines like the Brezhnev doctrine have suggested that Articles 52 and 53 afford it any legitimacy.[112]

Franck notes that war has not been eliminated but simply channeled into more or less blatant intervention in internal wars and affairs, often by more than one Power, often by major Powers.[113] The emergent triangle of superpowers—the United States, the Soviet Union, and China, has made competition in intervention a dominant political determinate.[114] Even so, Henkin argues, if Article 2(4) has not precluded these types of interventions—and clearly it has not—it may have signaled the effective end of conventional war.[115] If it has accomplished this change in the international order, it would signify a substantial advance and a worthy one to note. It would mean that we move from terrible destructiveness in war to lesser losses in life and property as a result of interventions.[116]

Interventions are problematic in themselves. They cannot be undertaken alone, even by superpowerss.[117] And if they do intervene, they can only be successful if they do so for a limited time, for limited objectives, and only if they are willing to accept political consequences from both their allies and their enemies.[118] Even small-Power intervention is limited and hampered, as indicated by the example of Syria's support of Palestine guerillas against Jordan.[119]

Henkin concludes by noting that Franck's warning makes its point and his cry of alarm is warranted and necessary.[120] But they can be co-opted by those super-realists who claim that the U.N. Charter is as irrelevant as the Kellogg-Briand Pact. But rather than condemn Article 2(4) to its death, it is enough to encourage the changes in individual and national perceptions that Franck recommends.[121] We need to remind everyone—citizens, policy-makers, national societies, transnational and international bodies—that this law is indeed in the national interest of all nations. War, however, prefers one interest over another, depreciates the tangible costs of life, and usually prefers the immediate and short-term to the deeper and longer-term national interest.[122]

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112. *Id.*

113. Including the previously mentioned regional organizations and their ideological wars.

114. *Id.* at 547.

115. In this way then, we see a value from Article 2(4) as it stands. If it cannot preclude war per se, it can reduce the effects through pushing states to the use of lesser forms of war, like intervention.

116. Henkin, *supra* note 17, at 547.

117 The recent example of Iraq simply validates this claim about superpower limitations. Other examples that are illustrative include the U.S.S.R. in Afghanistan and the U.S. in Vietnam.

118. In fact, interventions of any kind carry this caution. Causal connections lead to effects that intervening states have to deal with their action. For example, the U.S.'s intervention in the Middle East in 1991 had effects on their later intervention in Iraq in 2003, including the debate at the U.N., the assembly of a coalition, and the post-war occupation and nation building efforts.

119. Syria could send tanks but not air support to help their allies. The Superpowers would not allow more.

120. Henkin, *supra* note 17, at 547.

121. *Id.* at 548.

122. *Id.*

IS ARTICLE 2(4) STILL WORKABLE?

Almost fifteen years after the Franck-Henkin exchange, the debate over the U.N. Charter and the use of force continued. The number of wars—significant armed conflicts—had increased to over one hundred and twenty, with one study listing 65 major conflicts between 1960 and 1982.[123] More than 25 million men and women were under arms and world military budgets approached 700 billion dollars.[124] Correspondingly Article 2(4) continued to be central to the debate—with assessments ranging from it being still-born, to being ailing, to being out of date and senile, to even once again, it being dead![125]

In a panel presentation at the American Society of International Law Proceedings of April, 1984, seven panelists and commentators addressed issues relating to Article 2(4).[126] Domingo Acevedo opened with the topic of "Collective Self-Defense and the Use of Regional or Subregional Authority as Justification for the Use of Force."[127] Drawing upon two case studies—the Malvinas-Falklands conflict and the invasion of Grenada, he notes that regional authority clearly tried to subvert prior U.N. claims.[128]

In the first case, the Security Council's passage of Resolution 502—demanding an immediate withdrawal of Argentine forces from the Malvinas-Falklands Islands—had occurred before later action by the Organization of American States (O.A.S.) requesting British Forces withdrawal.[129] There were additional problems with regional action including the fact that one of the parties was a major Western power that was not a member of the O.A.S., creating a serious obstacle to the effective use of a regional forum and that the O.A.S. machinery's usefulness is dependent upon the support of U.N. resolutions.[130]

In the second case, U.S. reliance on regional authority of the Organization of Eastern Caribbean States (O.E.C.S) treaty, Article 8(4) is questionable at best.[131] Under that article, the collective action provided for is against external aggression, which was not the case in Grenada.[132] It also required the unanimous decision of the seven state parties.[133] While stronger arguments can be made under customary international law for protection of intervening state's own nationals—in this case

123. 78 AM. SOC'Y INT'L L. PROC. 68. Reference is made to Ruth Leger Sivard's, study of World Military Expenditures, accounting for more than 10 million deaths.

124. *Id.*

125. The panel discussion referenced here offers that range of opinions.

126. Presenters are referenced below, in order of presentation.

127. 78 AM. SOC'Y INT'L L. PROC. 68.

128. Interestingly, the U.N. claims could only be enforced in these cases by regional authorities.

129. 78 AM. SOC'Y INT'L L. PROC. 71.

130. *Id.*, The tension was also evident between Britain and the U.S. and the O.A.S. in this case.

131. 78 AM. SOC'Y INT'L L. PROC. 72.

132. Protection against outsiders, as opposed against other members of the regional organization puts strain on the system as well.

133. The member States of the OECS, founded in 1981, are Antigua and Barbuda, Dominica, Grenada Montserrat, St Kitts and Nevis, Saint Lucia and St Vincent and the Grenadines. The British Virgin Islands and Anguilla are associate members.

approximately 1,000 U.S. citizens were at risk—and based on the request of the troubled state—in this case, by the Governor-General of Grenada, the argument for treaty authority fails.[134]

Acevedo concludes that one can hardly argue that Article 2(4) is unworkable, unless one is willing to concede that the use of force as an instrument of national policy is acceptable—clearly not a tenable position.[135]

Michael Reisman's contribution is titled Article 2(4): The Use of Force in Contemporary International Law."[136] In it, he traces the developments in international law that lead to Article 2(4).[137] Specifically, he argues that the rule was never meant to be an independent ethical imperative for pacifism.[138] While persuasion was certainly preferred, it was also clear that coercive force was acknowledged as a means to maintain community order. And while unilateral force was discouraged by the rule, it wasn't eliminated.[139]

What happened to the international system following the establishment of the United Nations and Article 2(4) was the equivalent of what happened to a "Wild West" town in the 19th century when a new sheriff arrived. People were encouraged to follow the laws, put up their own guns, and rely on the force of the lawman.[140] But, in much the same way as what would happen if the Sheriff turned out to be incapable of maintaining law and order, the international system saw the United Nations as being ineffective at all policing and, therefore, returned to its own self-reliance on the use of force.[141]

Self-help, particularly in the cases of self-defense and in the cases of decolonization, was not uncommon.[142] Nor was it uncommon for cases of humanitarian intervention and intervention by the military instrument for elite replacement—Uganda, the Central African Republic, and Cambodia are illustrative of the later situation.[143] Reisman also sketches out cases for use of the military instrument in spheres of influence (specifically critical defense zones or CDZ's), treaty sanctioned interventions, gathering of evidence for international proceedings, and for international judgment enforcement. All of these later cases are determined by the particular facts in the case at hand, although the last one has little scholarly support.[144]

The conclusion is that some unilateral coercions are effectively treated as

134. 78 AM. SOC'Y INT'L L. PROC. 72-3. Sir Paul Scorn, the Governor-General, at that time, he asked for help, not an invasion.

135. *Id.* at 74.

136. 78 AM. SOC'Y INT'L L. PROC. 75.

137. *Id.* With a focus on the 19th Century and onward.

138. 78 AM. SOC'Y INT'L L. PROC. 76.

139. Reisman notes that there is a full acknowledgment of the indispensability of the use of force to maintain community order.

140. 78 AM. SOC'Y INT'L L. PROC. 77

141. The domestic analogy is often seen in international legal paradigms, including that of Michael Walzer.

142. The Corfu Channel Case is a case where self-help was claimed. *See* 1949 ICJ 4.

143. 78 AM. SOC'Y INT'L L. PROC. 79-81.

144. *Id.* at 83-84.

permissible or lawful, Article 2(4) notwithstanding.[145] The challenge for international lawyers is to find the criteria for a comprehensive set of guidelines for assessing lawfulness or permissibility of coercion in these settings.[146] Reisman suggests that a key and constant factor is found in asking whether a particular use of force—whatever its justification—enhances or undermines world order.[147] If it enhances world order, the next key question is whether it enhances the right of peoples to determine their own political destinies. That is the end for Reisman, and Article 2(4) is the means.[148]

In sum, the only control on coercion, at least impermissible coercion, is the clear conception of the licit community objectives for which coercion may be used. In other words, the basic and enduring values of contemporary world order.

Edward Gordon follows with a piece called Article 2(4) and Permissive Pragmatism."[149] Permissive pragmatism is a destructive trend among Western international lawyers, where what is lawful seems to be a function of the result one favors, rather than being a matter of compatibility with the prevailing rules of law.[150] A (recent) example of this approach is cited in the Kissinger Commission's Report on Central America (1983), which appeared to reach conclusions in a legal vacuum, oblivious to the fact that existing legal rules and treaty agreements required adherence.[151] Its focus was instead on U.S. court decisions favoring a less international perspective.[152] Permissive pragmatism is overcome only by recognition of these laws, rules, and obligations by all states and keeping faith with them in inter-state relations.[153] We need to look to the core meaning of the law to understand it.

Turning to Article 2(4), Gordon notes that even though it is ambiguous in important respects, even though it has been violated with disconcerting frequency and impunity, even though events subsequent to its adoption have shown it to be less than perfectly suited to contemporary affairs, nevertheless it contains a solid, inalienable core of objective meaning independent of the judgment of national government officials and eminently worth protecting and preserving.[154] The principled conduct of foreign relations requires championing the cause of Article 2(4), rather than dwelling upon its plasticity and overreaching idealism.[155]

It also requires a willingness to argue against disingenuous claims by

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145. *Id.* The real challenge is limiting those exceptions.

146. This criteria needs to go beyond the tradition ones of necessity, proportionality and discrimination.

147 78 AM. SOC'Y INT'L L. PROC. 85.

148. *Id.* at 86.

149. *Id.* at 87-8.

150. Gordon directs his comments on permissive pragmatism by referring to U.S. Ambassador to the U.N., Jean Kirkpatrick.

151. 78 AM. SOC'Y INT'L L. PROC. 89.

152. *Id.*

153. The concept of core meaning concept comes up clear later in this article, under Arend and Beck.

154. This absolutist view sees the Article as something beyond or more than a mere treaty element.

155. 78 AM. SOC'Y INT'L L. PROC. 90.

permissive pragmatists, like those who argue that Article 2(4) is not special or significant, it is just one of many articles in the Charter and, therefore, a mere incidental means to a particular set of goals—as opposed to what it really is—an objective rule of treaty law and, by now, general international law.[156]

Jordan Paust offers a comment on Article 2(4), noting that the restriction on the use of force is really a limited one.[157] The limitation affects only the territorial integrity of a state, the political independence of a state, and any other manner inconsistent with the Charter, but that it is not an all-inclusive prohibition.[158] Self-determination actions seem to be permitted; as do actions like evacuation of nationals—the rescue mission at Entebbe— and other actions which do not violate territorial integrity nor political independence but which may otherwise meet traditional norms or principles of necessity and proportionality.[159] Finally, humanitarian intervention appears justified by these rules.[160]

Nabil Elaraby's comment focuses on the nonuse of force.[161] He argues that the prohibition of Article 2(4) is an absolute one—the use of force must not be sanctioned under any circumstances.[162] The key to doing so is found in reviving the interest and faith of the international community in the dormant potentials that would no doubt accrue by introducing improvements in the available U.N. machinery.[163] A number of suggestions are presented including the development and institutionalization of peacekeeping, reconsidering the rule of unanimity in voting by the Security Council, and possible amendment of the U.N. Charter itself.[164]

Finally Robert Rosenstock's comment was essentially a response to several of the previous speakers.[165] He highlights that changes in the U.N. machinery, if a reasonable case could be made, were worth consideration, as well as other uses of force, which are not aggression, but rather fall in the domain of Articles 2(4) and 51.[166] Finally, he considers the case of Grenada and argues that it surely doesn't become another example of the demise of Article 2(4).[167]

The panel presentation concluded with a general discussion that included many distinguished commentators addressing overall topic comments and

156. *Id.* at 92.

157. 78 AM. SOC'Y INT'L L. PROC. 92-3.

158. So anything undertaken to maintain self-determination would appear to be allowed by Paust.

159. In other words, Article 2(4) may either allow these exceptions or at least not prohibit them.

160. Paust actually claims this supports the "human right to participate in armed revolution. Others, like Boyles, Falk, Nunes, and Weston suggest otherwise.

161. 78 AM. SOC'Y INT'L L. PROC. 94.

162. Elaraby adds, "its (Article 2(4) provisions should always be observed. No exceptions.

163. 78 AM. SOC'Y INT'L L. PROC. 95.

164. *Id.* at 96.

165. 78 AM. SOC'Y INT'L L. PROC. 97.

166. Rosenstock also offers the caution about analogizing too much from history.

167. Rosenstock also considers the role of the OECS in decision-making in Grenada and offers it as at least plausibly justified invasion and peacekeeping operation, opposed to another nail being driven into the coffin of Article 2(4).

questions, as well as the pertinent issues of the panel.[168]

HAS ARTICLE 2(4) LOST ITS LEGAL FORCE?

Oscar Schachter joined the fray in 1991, with a section from his book, *International Law in Theory and Practice*, where he posed the above highlighted question.[169] Or to put it another way, are the existing rules of force so vague and uncertain to allow states to offer a plausible legal justification for any use of force it chooses to exercise?[170]

He also posed a related question – in the absence of an authoritative body to decide conflicting positions objectively, must the rules, however clear their meaning, be regarded only as paper rules in that they may be disregarded or violated to a degree that renders them no more than nominal?[171]

Schachter argues in response to the second question, in sum, that the U.N. political organs—the Security Council and the General Assembly—provide an institutional mechanism for authoritative judgments on the use of force, but it is only under some circumstances that they can obtain the requisite authority and consequential behavior to endow their decisions with effective power.[172]

He goes on in his reply to the first question to say that Article 2(4) is really an all-inclusive prohibition against force.[173] In doing so, he follows up by rejecting the call for a revision of the Charter principles based on the arguments of special circumstances (consent, territorial claims, human rights, self-determination and national liberation, overthrow of repressive regimes, protection of life, and safeguarding legal rights), changed circumstances and state practice inconsistent with the declared rules.[174]

Schachter's position, in a nutshell, is that international law does not and should not legitimize the use of force across national lines except for self-defense (including collective self-defense) and enforcement measures ordered by the Security Council.[175] Neither human rights, democracy, nor self-determination are acceptable legal grounds for waging war, nor for that matter, are traditional just war causes or righting of wrongs. This conclusion is in accord with the U.N. Charter as it was originally understood and also in keeping with the present interpretation by the great majority of states.[176]

In responding to the question of whether article 2(4) has lost its legal force, Schachter considers several arguments, including:

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168. 78 AM. SOC'Y INT'L L. PROC. 100-7

169. Schachter, *supra* note 15, at 129-34.

170. *Id.* at 130.

171. *Id.* at 130-131.

172. *Id.*

173. *Id.* Schachter notes no state has argued that Article 2(4) is no longer in force.

174. *Id.* at 131.

175. This position might be construed as an absolutist one, where regardless of what else is happening, there rule is self-defense and U.N. collective action only, in terms of the use of force.

176. Schachter, *supra* note 15, at 106-111.

1) That the prohibition on force was part of the comprehensive agreement contained in the Charter, for maintaining international peace and security States would not have agreed to give up their unilateral recourse to force if the United Nations did not have enforcement powers (and an enforcement mechanism). Inasmuch as the United Nations does not, states should be released from their renouncement.[177]

a) Original intent of the parties (states) to the Charter[178] is plausible, but it does not follow that the parties intended the obligation to be conditioned on effective collective measures. It is not recorded in Charter discussions at San Francisco. Additionally, having an enforcement mechanism does not equal having an effective mechanism.[179] Nothing in the Charter or in general international law provides any grounds for implying an independent right to use force because the Security Council has failed to adopt collective measures.

b) It is incorrect to conclude that collective security has failed when legal rights have been infringed and no remedy, short of force, is available in a particular case.[180] UN enforcement measures were intended to maintain or restore international peace or security They were not meant to ensure compliance with the law or to bring about justice. It cannot be maintained that collective security has failed because it has not provided a remedy for a legal violation.[181]

c) The Article has been violated so many times that it has been nullified.[182] Three probable legal grounds provide for this claim, including: 1) The general principal of reciprocal observance: a state should not be bound by a rule that others flout or ignore; 2) *Rebus sic stantibus*: infringements of Article 2(4) have so changed the positions of states that any party may invoke the violations as a legal reason to disregard or suspend its obligations to refrain from force; and 3) violations are evidence of state practice sufficiently widespread to be taken as evidence of a general interpretation of the Charter and customary law.[183]

While there is some truth to these claims, even these legal grounds suffer from the fact that no state—however powerful or resentful—has argued that Article 2(4) should no longer be in force. Instead, violators have relied on exceptions or justifications contained within the rule itself, or more frequently, self-defense, under Article 51.[184]

There is a reluctance of states to abandon Article 2(4), for the basic reality is that a stable society of independent nations cannot exist if each is free to destroy

177. *Id.* at 129.

178. This is an argument that parallels the strict constructionalist's interpretation of constitutions in American legal history.

179. The domestic analogy comes to mind again with the clumsy constable. You can have a law enforcement officer but that does not mean you will have an effective one.

180. Maintenance or restoration of peace or security is not the equivalent of ensuring compliance with the law or brining about justice.

181. Certainly no other are of the law takes this view as a legitimate one.

182. Schachter, *supra* note 15, at 130.

183. *Id.*

184. Even recognized in the ICJ case of Nicaragua v. United States, 1986 ICJ 14.

the independence of the others. The legal constraint on the use of force reflects this reality Neither the failures of the United Nations, nor the violations of the Charter justify a conclusion that would allow states to wage war freely Infringements by some, under principles of reciprocity or changed circumstances, have not released all from a rule so fundamental for world order.[185]

A CHANGED LEGAL OBLIGATION: A SHIFT IN PARADIGMS?

In Anthony Arend and Robert Beck's piece, "International Law and the Recourse to Force: A Shift in Paradigms, the authors argue that a number of significant developments since World War II have challenged the validity of the U.N. Charter's paradigm.[186] This paradigm, defined as the paradigm for a contemporary notion of *jus ad bellum*, was composed of three elements—a legal obligation, institutions to enforce the obligation, and a value hierarchy that formed the philosophical basis for that obligation.[187] The failure of international institutions, the emergence of new values, and a new legal obligation have presented a paradigm shift—that of a post-Charter self-help paradigm.[188]

First, in the post-Charter period, international institutions have failed to deter or combat aggression.[189] The international community has faltered in its efforts to address this profound problem. Additionally, the international community has seen a shift from a focus on peace to that of justice.[190] This includes, as legitimate, claims to use force to promote self-determination, claims to resort to "just reprisals, and claims to use force to correct past "injustices."[191]

Finally, the legal obligation is changed. Scholars have been compelled to ask whether Article 2(4) is still good international law[192] and, is it still authoritative and controlling?[193] A review of scholarship and practice suggests three fundamental approaches to this question. The first has been labeled the "legalistic approach,"[194] the second the "core interpretist" approach,[195] and the third the "rejectionist" approach.[196]

After lengthy analysis, Arend and Beck conclude that of the three approaches,

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185. *Id.* at 131.

186. Anthony Arend & Robert Beck, *International Law and the Recourse to Force: A Shift in Paradigms, in* INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS, 285-315 (2nd ed. 2003).

187. Arend and Beck flesh out these by associating these elements with 1) Article 2(4) (of the U.N. Charter), 2) Charter VII (of the U.N. Charter), and 3) the underlying value structure.

188. Arend & Beck, *supra* note 186, at 286-87.

189. These institutional problems of the veto, lack of formal mechanism for collective action, and lack of support for limited collective action.

190. The shift from peace to justice is what constitutes the shift in values here.

191. Arend and Beck note that at times, justice must take precedent over peace.

192. Putative norms, like Article 2(4), are only a rules of international law if authoritative and controlling.

193. Arend & Beck, *supra* note 186, at 288.

194. *Id.* at 288-90.

195. *Id.* at 290-92.

196. *Id.* at 292-93.

the "rejectionist" approach reflects most accurately the reality of the international system today.[197] They start, however, by considering the legalist approach, noting that while it recognizes that problems exist, adherents adhere to the basic belief that the principle enunciated by Article 2(4) is still good law.[198] Several points are stressed in their argument. First, the norm remains authoritative since no state has explicitly suggested that Article 2(4) is not good law.[199] Second, despite the problems of the article, it remains controlling in state behavior.[200] Finally, Article 2(4) must be understood as a treaty obligation for those states that have ratified the U.N. Charter, not just an obligation under customary international law.[201] Hence, the procedure for a normative charge is much more specific and defined: "states may not simply walk away from them."[202]

Clearly, there are problems with this approach. First, while it is true no state has explicitly declared Article 2(4) as not good law that fact alone does not mean the norm is authoritative. Other political reasons exist for not doing so. Yet, states ignore the rule in their own actions. While it still commands some legitimacy, it is not that required for a healthy law. Second, the argument advanced by the legalists is inconsistent with the realities of the international system. The norm has been violated frequently and with impunity in some of the most important cases of state interaction. Even legalists like Henkin and Gordon are forced to deal with a number of these incidents: Arab-Israel hostilities, India-Pakistan's clashes over the Kashmir, the Czech invasion by the Soviet Union, as well as Ethiopia-Somalia and Vietnam-Cambodia-China.[203] Finally, the legalist's use of the treaty-nature of Article 2(4) is problematic. Regardless of whether it is treaty law or customary international law, if a rule lacks authority and control, it is no longer authentic "international law." In the decentralized system that exists today, international law is constituted through state practice.[204]

The core interpretists argue that although the narrow, legalist interpretation of Article 2(4) no longer represents existing law, the "core" meaning of the Article can nevertheless be identified and it is still authoritative and controlling.[205] While the members of this school range in opinions as to what constitutes that core, they contend that the basic prohibition remains in place.[206]

Some believe that the Article 2(4) that the exceptions are only modified by authoritative interpretations confirmed in state practice, thus permitting uses of force as anticipatory self-defense, intervention to protect nationals, and

197. *Id.* at 288.

198. Professors Edward Gordon and Louis Henkin, for example, represent this position.

199. Arend and Beck note that despite this claim, Article 2(4) is not held in high regard.

200. Controlling for the most part; for example, most states are not using force as a rule.

201. The contrasting argument is that we look to practice and what we see is that it is not working as a treaty.

202. Arend & Beck, *supra* note 186, at 289.

203. The point made *supra* about increased incidents of war throughout the world.

204. *Id.* at 290.

205. Professor Alberto Coll is a representative of this camp.

206. Core interpretists allows for exceptions to the basic prohibition against the use of force.

humanitarian intervention.[207] Others take the core as being much smaller, including Alberto Coll, who suggests that "insofar as there is a remnant of a legal, as opposed to a moral, obligation left in Article 2(4), it is a good faith commitment to abstain from clear aggression that involves a disproportionate use of force and violates other principles of the Charter."[208]

For Coll, clear aggression would include the types of actions that the Germans and Japanese used to start World War II.[209]

Core interpretists argue for holding on to Article 2(4) for several reasons, including a belief that rejecting the norm entirely might be premature, given that states do refrain from certain uses of force.[210] Consequently, any rejection would actually contribute to the dissolution of whatever restraining influence that 2(4) still exerts.[211] Another reason is the symbolical nature of 2(4) and its service as an aspirational norm.[212] To do otherwise, would serve to reject this noble goal.

The problem here, critics note, is that holding on to Article 2(4) may be doing more harm than good to the international legal system.[213] Its restrictive use otherwise may serve to perpetrate a legal fiction that interferes with an accurate state practice.[214] Article 2(4) is more than a simple prohibition on the use of force for narrow purposes—it is supposed to prohibit all uses of force that were against territorial integrity or political independence of a state or otherwise inconsistent with the purposes of the United Nations.[215] In other words, the Article 2(4) prohibition was much broader than simply the "core." If only this small subset remains, than it does not seem appropriate to describe the law by reference to the full set.

Lastly, the rejectionist approach argues that Article 2(4) does not apply in any meaningful way nor constitute existing law.[216] The contention is that because authoritative state practice is so far removed from any reasonable interpretation of the meaning of Article 2(4), it is no longer reasonable to consider the provision "good law."[217] This follows Franck's position, first in his classic article (previously discussed) and later, in his *The Power of Legitimacy Among Nations*, where he reaffirmed the rejectionist understanding of Article 2(4), noting that the extensive body of international law forbidding the use of force is not predictive of

207. As long as the accepted practice can be shown or demonstrated to be an accepted interpretation of the Charter.

208. Arend & Beck, *supra* note 186, at 291.

209. For example, "clear aggression" would include the use of force to gain territory.

210. In other words, some prohibition or restraint is better than no prohibition or restraint.

211. Arend & Beck, *supra* note 186, at 291.

212. An aspirational goal is a noble goal worth pursuing.

213. The issue here centers around the idea the Article itself is larger than the core itself, including the notion of threats.

214. Arend & Beck, *supra* note 186, at 292.

215. *Id.*

216. In short, the difference here is one between what is normally meant by "theory" and "practice.

217. Franck is representative of this last school or approach.

the ways of the world.[218]

Franck analogizes Article 2(4) with the one-time U.S. Government mandated 55-mile per hour national speed limit.[219] While both rules possess "textual clarity," they, nevertheless, do not describe or predict with accuracy the actual behavior of the real world.[220]

While not having a large school of scholars in support of the position, Arend and Beck argue this position seems to offer the most accurate description of the contemporary *jus ad bellum*.[221] The legalists seem too far removed from the realities of the international system while the core interpretists seems to do little more than perpetuate a legal fiction.[222] Neither what states say nor what states do is reflected in anything other than the rejectionist approach.[223]

Arend and Beck go on to flesh out their post-Charter approach, which essentially involves modifying the current Charter to accommodate additional uses of lawful force including a broader interpretation of self-defense (including against armed attack, imminent attack, indirect aggression), covert action, support of rebels and against terrorists actions (as measured by factors such as the nature of support, the severity of the effect, and temporal duration), intervention to protect nationals, and force authorized by the Security Council.[224] All other uses of force are unlawful.[225]

There are several advantages to their proposal, Arend and Beck argue, including the elimination of some of the interpretative problems of the Charter framework, it addresses the changing nature of international conflict, the need for self-help for the protection of nationals, and the critical importance of a restrictive *jus ad bellum* for international order.[226]

RESHAPING THE UNITED NATIONS: MODIFYING THE NOTION OF THREATS TO PEACE.

Within the last year, the debate on the U.N. Charter and Article 2(4) has seen renewed rancor.[227] One suggestion by Anne-Marie Slaughter has been that following the U.S. victory in Iraq, there is an opportunity to reshape the United Nations.[228] By committing the United States to leading the world, rather than defying it, the Bush administration can make the United Nations a more effective

218. Arend & Beck, *supra* note 186, at 292.

219. *Id.* at 293.

220. *Id.*

221. *Id.*

222. Neither sees the reality of the current system.

223. Here is reality, argue Arend and Beck.

224. The argument is that while this might not reflect the most desirable regime, it does reflect the existing regime.

225. *Id.* at 302-7.

226. *Id.* at 307-8.

227. The recent dispute about the Iraqi war.

228. Anne-Marie Slaughter, WASH. POST, April 13, 2003, at B7.

protector of the international order.[229]

Slaughter accepts that the claim that the institutions of the post-World war II era are yet adapted to address the threats of the post-Cold War era.[230] The answer, however, is found in reform, not destruction of the institutions. Beyond working with the other members of the Security Council, the United States needs to redraw the lines of how the Security Council defines which threats to international security are sufficient to require the use of force.

The solution is to utilize a new approach—one which links the human rights side of the United Nations with its security side. In other words, the United Nations must formally link the kind of moral arguments presented against Saddam Hussein—arguments made outside of the Security Council—with the kind of arguments that it made for disarmament inside the Council.

What follows from Slaughter's analysis can be set forth as follows. If the Security Council were to adopt a resolution recognizing that the following set of conditions would constitute a threat to the peace sufficient to justify the use of force, including: 1) possession of weapons of mass destruction or a clear and convincing evidence of attempts to gain such weapons; 2) grave and systemic human rights abuses sufficient to demonstrate the absence of any internal constraints on government behavior; and 3) evidence of aggressive intent with regard to other nations. This cluster of actions sets a very high threshold for the use of force, but also acknowledges the reality of the world, with terrorists, WMD, and human rights violations.

The advantages of this type of resolution are that other nations would agree to it, since in the end, it makes all nations stronger and safer with the existence of robust international institutions. These institutions would have both the political will and the means to enforce their mandates. They also would serve to help the United States overcome mounting anti-Americanism in both Europe and the Middle East. Instead of seeking to restore the status quo at the United Nations, the United States should reinvent it.

As Slaughter notes, we now have the chance to reach out to other nations to strengthen and equip the United Nations to meet a new generation of global challenges. If we miss the chance, we and the world have a frightening amount to lose.[231]

ARTICLE 2(4) AFTER IRAQ.

In 2003, Tom Franck returned to the subject of the United Nations with his recent article, "What Happens Now? The United Nations After Iraq."[232] He recalls the conclusion of his original piece on Article 2(4):

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229. This rethinking will produce new rules and procedures for the United Nations.

230. Recognizing that the institutions need not be destroyed but rather simply reworked.

231. *Id.*

232. Tom Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003)

> The failure of the U.N. Charter's normative system is tantamount to the inability of any rule, such as that set out in Article 2(4), in itself to have much control over the behavior of states. National self-interest, particularly the national self-interest of the super-Powers, has usually won out over treaty obligations. This is particularly characteristic of this age of pragmatic power politics. It is as if international law, always something of a cultural myth, has been demythologized. It seems this is not an age where men act by principles simply because that is what gentlemen ought to do. But living by power alone. .is a nerve-wracking and costly business.[233]

The major difference that Franck notes between now and then is that the demise of the Cold war has left a new form of unilateralism.[234] Additionally, in 1970, unlawful recourses to force were accompanied by a fig leaf of legal justification, which at least tacitly recognized the residual force of the requirement in Charter Article 2(4).[235] Now, the leaders of America no longer bother with such legal niceties. Instead, they boldly proclaim a policy that repudiates Article 2(4). The new principle seem derived from the Athenians at Melos: "the strong do what they can and the weak suffer what they must."[236]

The history of U.N. action since 1970 is sketched out in basically three parts: 1) the remaining Cold war normative balance of power era, which ended in 1989 with the collapse of both the Berlin Wall and later, the Soviet Union; 2) the Optimistic 1990's, when the international system seemed to be moving in the direction best expressed by the "Uniting for Peace" resolution at the United Nations; and 3) the relapse of 2003, where the United States in its invasion of Iraq, caused Article 2(4) to die again, perhaps for good.[237]

Franck analyzes the question of whether the Iraq invasion violated the U.N. Charter.[238] And despite arguments for self-defense against future use of WMD and previously sanctioned action by the Security Council, with continued reliance on Resolution 678, he concludes that indeed the invasion was illegal.[239] Even the positive after-affects do not change that assessment.[240]

Another question considered is that posed by Slaughter—can the invasion of Iraq serve as an opportunity to reform the Charter and make the law more realistic.[241] Franck acknowledges that the Charter can be revised—he argues elsewhere that the Charter as a quasi-constitutional instrument is capable of evolving through the practice of its principle organs.[242] Even the Charter text is subject to reinterpretation in practice, but as he sees it, the problem is not that

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233. *Id.*

234. *Id.* The post-Cold war model has evolved to this state of unilateralism.

235. *Id.* at 608.

236. Franck suggests that this American "might is right" point of view is really neo-Melian doctrine.

237. Franck, *supra* note 232, at 607-609.

238. *Id.* at 610.

239. The more sophisticated argument of self-defense is presented by the British side.

240. Franck, *supra* note 232, at 611-614.

241. *Id.* at 615.

242. *Id.*

one.[243] The nub of matter goes beyond the criterion for the use of force.[244] Instead it goes to who gets to decide what to do regarding the use of force.[245]

In essence, the Iraqi crisis was not primarily about what to do, but rather who decides what to do.[246] This action can best be seen as a repudiation of the central decision-making premise of the Charter system than as a genuine opening to reform.[247]

After reviewing the Bush Administration's new security strategy, which he finds problematic at best, Franck closes with a consideration of what can be done?[248] In sum, he suggests that international lawyers stand up for what it is they practice and protect—the rule of law—the rule of international law.[249] Franck also notes that the realists are probably right and in the present imbalance of power, the time for any positive and meaningful action is in the future.[250] International lawyers then should zealously guard their professional integrity for a time when it can again be used in the service of the common weal.[251]

CONCLUSION.

For the past thirty odd years, the question of whether Article 2(4) remains relevant or not has been subject to ongoing debate. This debate has been engaged in by both practioners and scholars. In fact, a recent series of popular articles in the *Wall Street Journal*, titled "The U.N.. Searching for Relevance, suggest this debate is not simply confined to the halls of the United Nations and academia; but rather, it is a concern for the citizenry of the United States and the broader citizens of the world.[252]

Among the central issues that bear further discussion and resolution are three primary issues. The first issue is the structure of the institutions themselves, to include the Charter with the provision of Articles 2(4) and 51, 52, and 53, as well as the Security Council itself. As noted here, for the Charter and its Articles to have any particular meaning, it is necessary for them to be reflective of the actual practices and aspirations of states.[253]

Some modification of the criteria for the use of force to capture the realities of the post 9-11 world is needed. As Slaughter and Franck suggest, terrorists, WMD,

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243. So it is not the reinterpretation that is problematic, but how it is interpreted.

244. *Id.* at 616.

245. International lawyers are Franck's claim and solution, both here and later.

246. Franck, *supra* note 232, at 616.

247. *Id.* at 617.

248. Yet, they ought not to take an aggressive or assertive role but rather they must wait for the appropriate moment to act, Franck says.

249. Franck, *supra* note 232, at 619-20.

250. *Id.*

251. *Id.* at 620.

252. *See* WALL ST. J. series titled, *The U.N.. Searching for Relevance*, on Oct. 1, 2003; Oct. 21, 2003; Dec. 16, 2003, and Dec. 19, 2003.

253. Interestingly, President Bush's recent remarks at the National Defense University focused on the role of failed states. *See* http://www.whitehouse.gov/news/releases/2004/02/20040211-4.html.

rogue states which engage in human rights violations systematically, and failed states are the new security threats of the 21st century.[254] For the Charter and the United Nations to remain engaged and relevant, it must be able to deal with those threats and that reality. Additionally, the changing nature of warfare will continue and the Charter needs to be able to address such concerns. We are not far removed from a world where information and computer systems can engage in direct attacks, across borders, which have at least as devastating effect on items like the financial markets, the electronic grid, and communications systems.

Second, the instruments are only as effective as they relate to the decision-makers. As Gordon and Franck note, the means of determining decisions is more important than whether the actions are right or wrong.[255] Consideration has to be given to modifications of the burdensome and unanimous system of the Security Council. The continued use of the present system does not reflect the real world —changes need to be undertaken.

How decisions are made, who makes them, how quickly they are made, and who they affect, are clearly concerns that transcend national self-interest or regional concerns. Bringing together complimentary, if occasionally competing, systems is key in decision-making too.

Lastly, a renewed commitment must be made to collective security action and collective self-defense. Cases like Afghanistan and Iraq were global, not simply U.S. concerns. Likewise, we see them in cases like Liberia, where a failed state presents problems for not only the evacuation of nationals but also for regional security and stability. The United Nations has proven itself capable of handling some actions better than others and similarly, the United States and the European Union, as well as Russia and China, can manage some things better than the United Nations.[256] Collective action will meld these actions into a more effective system for dealing with the issues of the use of force in a changing world.

254. *See* Slaughter, *supra* note 228, at B7; Franck, *supra* note 232, at 615.

255. Arend & Beck, *supra* note 186, at 289; *Franck, supra* note 232, at 611.

256. In terms of quick reaction forces, the U.S., Britain, and France have a distinct advantage in their force projection capabilities—putting boots on the ground quickly. The U.N. is better at some of the administrative and coordination efforts, like herding the NGO's, and some forms of peacekeeping.