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LEGAL PROCESSES OF CHANGE: ARTICLE 2(4) AND THE VIENNA CONVENTION ON THE LAW OF TREATIES

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INTRODUCTION

In 1945, in the wake of two World Wars in the space of thirty years, the United Nations was founded to "save succeeding generations from the scourge of war"[1] by maintaining international peace and security.[2] The key to achieving this goal was and is regulating the use of force by states. At the heart of this regulation is the prohibition on the use of force in international relations contained in Article 2(4) of the United Nations Charter. However, the Charter contains more than a legal prohibition, and the Security Council was created to act as an executive body which would oversee enforcement of the United Nations' principles using its considerable Chapter VII powers. [3] Accordingly, the Council was given "primary responsibility for the maintenance of international peace and security."[4]

The legal regime devised in 1945 presupposed considerable co-operation between the permanent members in the execution of the Security Council's role, but the Cold War soon divided East and West and eliminated any hope of co-operation.[5] The permanent member veto became a weapon that both sides used to paralyze the Council. Over the next fifty years many acts occurred which were apparent violations of the textual interpretation of Article 2(4).[6] Yet, until recently the Security Council had seemed incapable of effectively using its enforcement powers against a violator.[7] This failure has led some prominent writers to argue that the recurrent violations have weakened or eliminated the prohibition on the use of force contained in Article 2(4).[8]

This paper does not directly address the status of Article 2(4). Rather, it attempts to show how state practice over the last fifty years could have changed the legal

1 U.N.Charter Preamble.
2 *Ibid.* art. 1(1).
3 See N.D. White, *Keeping the Peace* (Manchester: Manchester University Press, 2nd ed. 1997) pp.3-5; T.M. Franck, "Who Killed Article 2(4)", (1970) 64 *A.J.I.L.* p.809 at p.810.
4 U.N.Charter art. 24(1).
5 See White, *supra* n.3, at pp.4-5; Franck, *supra* n.3, at p.810.
6 See A.C. Arend, "International Law and the Recourse to Force: A Shift in Paradigms", (1990) 27 *Stan.J. Int'l L.* p.1 at 10-18; Franck, *supra* n.3, at pp.810-11.
7 See Arend, *supra* n.6, at p.7.
8 See infra pp. 83-84

content of the prohibition on the use of force. The first part contains a discussion of the textual interpretation of Article 2(4) as well as an overview of the argument that state practice has eliminated the prohibition on the use of force. The second part examines how state practice could have modified Article 2(4) and argues that there has generally not been the requisite *opinio juris* to create a new customary norm, or intentionally abandon the norm in Article 2(4). It concludes that most apparent violations are best seen as "interpretive acts". The third part argues that interpretive acts in the form of state practice are subject to requirements of agreement and good faith, and proposes a definition of good faith agreement. Interpretive acts which do not demonstrate good faith agreement cannot modify the legal content of Article 2(4). The fourth part will apply the definition of good faith agreement to a few examples of state practice to determine whether that practice was an authoritative interpretation of the Charter. The final part will draw some conclusions about the relationship between custom formation and treaty interpretation, the relationship between interpretive acts and the proposed definition of good faith agreement, and offer some tentative suggestions on the current status of Article 2(4).

ARTICLE 2(4)

The Covenant of the League of Nations

The prohibition on force in Article 2(4) is best appreciated by comparison to its predecessors.[9] In addition, the historical background may well be a supplementary means of interpretation of the Charter.[10] One of the first notable attempts to regulate the use of force amongst the international community was the Covenant of the League of Nations, which was signed after World War I.[11] Members promised to "'respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League".[12] However, this provision was qualified in so many ways that the prohibition on force ended up being a procedural rather than a substantive prohibition.[13]

The procedural loopholes in the Covenant's regulation of the use of force were extensive. Members were obliged to submit their disputes to arbitration, judicial settlement or the League Council.[14] If the dispute was submitted to arbitration or

[9] See E. Gordon, "Article 2(4) in Historical Context", (1985) 10 *Yale J. Int'l L.* p.271 (discussing the evolution of the prohibition on the use of force in international relations).

[10] See I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 2nd ed. 1984) 141(discussing Article 32 of the Vienna Convention). For further discussion of the Vienna Convention, see infra pp. 96-99.

[11] League of Nations Covenant (1919) [Hereinafter Covenant].

[12] *Ibid.* art. 10.

[13] See A.C. Arend & R.J. Beck, International Law and the Use of Force (London: Routledge, 1993) pp.19-22; Yoram Dinstein, War, Aggression and Self-Defence (Cambridge: Grotius, 2nd ed. 1994) 77-80; H. McCoubrey & N. D. White, *International Law and Armed Conflict* (Aldershot: Dartmouth, 1992) pp.20-21.

[14] Covenant art. 12(1).

judicial settlement and a decision was not reached within a reasonable time, then the parties were free to go to war.[15] If the dispute was submitted to the Council and the Council's decision was not unanimous (excluding the disputants), then the parties were again free to go to war.[16] Even when a decision was reached by the arbitrators, the adjudicators, or the Council, if one party did not comply with the decision then the other party was free to take any action.[17] Also, the Council was precluded from making any recommendation about a dispute which arose out of a matter which was entirely within the "domestic jurisdiction" of a party,[18] which again left the parties free to use self-help.

On top of the procedural loopholes written into the Covenant, the limited extent of the Covenant's application created two more flaws. First, the provisions of the Covenant only applied where the parties to a dispute were both members of the League. Members were free to go to war with non-members.[19] Secondly, the prohibitions in the Covenant applied only to "war." Uses of force short of war were not regulated by the Covenant.[20]

The Kellogg-Briand Pact

Both states and theorists were aware of the deficiencies of the Covenant and perceived the need for tighter regulation of the use of force. Consequently, in 1928 the Kellogg-Briand Pact was signed.[21] In Article I of the Pact, the Parties renounced war as an instrument of national policy:

> "The High Contracting Parties solemnly declare... that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."

In Article II, the parties agreed to settle all disputes by pacific means:

> "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

The result was a comprehensive prohibition on aggressive war between parties to the Pact.

[15] See *ibid.* art. 12(2); Dinstein, *supra* n.13, at p.79.
[16] See Covenant art. 15(7).
[17] *Ibid.* art. 13(4).
[18] *Ibid.* art. 15(8).
[19] See Dinstein, *supra* n.13, at p.80. But see Covenant art. 17.
[20] See Arend & Beck, *supra* n.13, at p.22.
[21] The formal name of the Pact is the General Treaty for Renunciation of War as an Instrument of National Policy (1928), 94 L.N.T.S. 57 (1929).

Despite eliminating the procedural loopholes of the Covenant, some uses of force remained legal. Wars of self-defence were still legal, even though there was no definition of self-defence.[22] In addition, the Pact was limited in its extent in a similar way to the Covenant. The terms of the Pact limited its application to the relations between contracting parties,[23] and the Pact prohibited "war" and left uses of force short of war unregulated.[24]

A Textual Interpretation of Article 2(4)

The prohibition on the use of force contained in the United Nations Charter was not created in a vacuum but rather evolved over time.[25] The Covenant of the League of Nations was a response to the legal regime which was believed to have resulted in the First World War. The Kellogg-Briand Pact was a response to the inadequacies of the Covenant, and the Charter is a response to the perceived need for stronger international regulation of the use of force following the Second World War.[26] Understanding how Article 2(4) evolved is immensely helpful in understanding why it is drafted as it is.

Before turning to Article 2(4), it is necessary to briefly consider the Vienna Convention on the Law of Treaties.[27] The Vienna Convention does not directly apply to the United Nations Charter because the Charter was concluded before the Convention entered into force.[28] However, many of the Convention's provisions codify customary international law, and it is generally accepted that the principle provision on treaty interpretation, Article 31, states the customary rule.[29] As a starting point then, a treaty should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[30]

It is now time to examine the text of Article 2(4), which states that:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[22] See Arend & Beck, *supra* n.13, at pp.22-23; Dinstein, *supra* n.13, at p.83.
[23] See Dinstein, *supra* n.13, at p.83.
[24] See Arend & Beck, *supra* n.13, at p.23; Dinstein, *supra* n.13, at p.83; McCoubrey & White, *supra* n.13, at p.22.
[25] See Gordon, *supra* n.9, at pp.273-75 (tracing the evolution of the prohibition since WWI).
[26] See Dinstein, *supra* n.13, at pp.83-84. See also U.N.Charter Preamble.
[27] Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 331 (1980) [Hereinafter Vienna Convention]. The Vienna Convention will be discussed in greater detail infra pp. 96-99.
[28] See Vienna Convention art. 4.
[29] See *infra* p. 96.
[30] Vienna Convention art. 31.

The language of Article 2(4), when given its "ordinary meaning" within the overall scheme of the Charter,[31] has four principle effects:

1. It prohibits "Members" from using or threatening force against "any state". Consequently the ban on force is not limited to situations where all the disputants are members of the United Nations.[32] This cures one of the flaws in the Kellogg-Briand Pact.

2. The prohibition applies to the "international relations" of members. This means that the prohibition does not limit purely intra-state uses of force.[33] This interpretation is bolstered by Article 2(7) of the Charter which prohibits the UN from intervening in the "domestic jurisdiction of any state".

3. Article 2(4) avoids the term "war" which caused so much criticism of the Covenant of the League of Nations and the Kellogg-Briand Pact.[34] Instead, Article 2(4) prohibits "the threat or use of force". "War" was problematic because it suggested a certain level of hostilities and implied that more limited uses of force were not covered by the earlier prohibitions.[35] "[U]se of force" was adopted in place of "war" so that all military operations would violate the ban. The phrase "threat or use of force" extends the ban even further by prohibiting all threats of military force as well as all military actions.[36] This cures a second fundamental flaw of the Kellogg-Briand Pact.

4. The prohibition is not weakened by the phrase "against the territorial integrity or political independence of any state" because of the final phrase: "or in any other manner inconsistent with the Purposes of the United Nations".[37] If Article 2(4) did not include the final phrase, it would be open to the interpretation that there existed uses of force which did not effect the territorial integrity or political independence of the state against which they were directed. These uses of force might then exist outside the ban in Article 2(4).[38]

In fact, such an argument was advanced by the government of the United Kingdom shortly after the birth of the UN. In October of 1946, two British warships struck mines while passing through the Corfu Channel, in an area which was within Albanian territorial waters.[39] In November 1946, the British navy returned and mounted a minesweeping operation in the Corfu Channel, thus entering Albanian territorial waters with warships and conducting an essentially military operation.[40] In defence

[31] See Sinclair, *supra* n.10, at p.121 (noting that "there is no such thing as an abstract ordinary meaning of a phrase, divorced from the place which that phrase occupies in the text").

[32] See Dinstein, *supra* n.13, at p.92.

[33] See *ibid.* at p.84.

[34] See Arend, *supra* n.6, at pp.3-4.

[35] See Dinstein, *supra* n.13, at p.84; O. Schachter, 'The Right of States to Use Armed Force', (1984) 82 *Mich. L. Rev.* p.1620, at p.1624.

[36] See Arend, *supra* n.6, at pp.26-27; Schachter, *supra* n.35, at p.1625.

[37] See Dinstein, *supra* n.13, at pp.84-86; McCoubrey & White, *supra* n.13, at pp.25-26.

[38] See Dinstein, *supra* n.13, at p.85.

[39] See Corfu Channel (U.K. v. Alb.), 1949 I.C.J. *Rep.* 1949, pp.12-13.

[40] See *ibid.* at p.33.

of the minesweeping, the United Kingdom argued that a limited right of self-help continued to exist under the Charter where the use of force "threatened neither the territorial integrity nor the political independence' of the target state.[41] The final phrase of Article 2(4) negates arguments of this type by requiring that any threat or use of force be consistent with the "Purposes of the United Nations".[42]

The Purposes of the United Nations Charter

Article 31 of the Vienna Convention on the Law of Treaties indicates that the "object and purpose" of a treaty should be considered in the interpretation of a treaty provision, but Article 2(4) makes reference to the purposes of the Charter an explicit and primary part of interpreting the prohibition on the use of force. Ian Sinclair has argued that the "object and purpose" approach to treaty interpretation will often be a "secondary or ancillary process." But Sinclair acknowledges that this hierarchy can be "short-circuited" where the object and purpose of a treaty "exercise[s] a determining influence".[43] The last phrase of Article 2(4) is a concrete example of a situation where the "object and purpose" of a treaty provision exerts a determining influence. When deciding whether a threat or use of force violates Article 2(4), one must always consider whether it is "inconsistent with the Purposes of the United Nations".

The purposes of the UN are laid out in Article 1 of the Charter. All of the purposes are important, but Article 1(1) contains the primary purpose of the Charter,[44] and the one most applicable to uses of force. Article 1(1) directs the UN:

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

Article 1(1) makes it clear that the purpose of the UN is to maintain international peace and security. Measures to prevent and remove threats to the peace or breaches of the peace are envisioned, but should be collective (i.e., United Nations) measures.

[41] Statement by Sir Eric Beckett of the U.K. (U.K. v. Alb.), 1950 I.C.J. Pleadings (3 Corfu Channel) p.296. In the resulting case, the ICJ concluded that the minesweeping was illegal, though there is no specific reference to the last phrase of Article 2(4). Corfu Channel (U.K. v. Alb.), 1949 I.C.J. Rep. p.4, at p.35. The adverse ruling necessarily rejects the British contention that the use of force was legal because it effected neither the territorial integrity nor the political independence of Albania, but it is unfortunate that the decision does not explicitly turn on the last phrase of Article 2(4).

[42] Cf. Schachter, *supra* n.35, at p.1626.

[43] Sinclair, *supra* n.10, at p.130.

[44] See Dinstein, *supra* n.13, at p.85.

It is not intended that states be able to act unilaterally against threats to or breaches of the peace. This conclusion is strengthened by Article 2(3) of the Charter, which directs members to "settle their international disputes by peaceful means". Clearly the unilateral use of force by a state would contradict the obligation to settle disputes by peaceful means.

Adjustment or settlement of international disputes is to be sought in conformity with the principles of justice and international law, but only through "peaceful means". If there is a conflict between peace and justice, Article 1(1) indicates that peace is paramount.[45] For instance, Article 1(2) makes the development of "equal rights and self-determination" a purpose of the United Nations, but this would still be subject to Article 1(1). Justice, in the form of equal rights or self-determination, could not be sought by an individual state at the expense of peace.[46] In essence, the Charter advocates the improvement of the *status quo* through peaceful means, but condemns the unilateral use of force to modify the *status quo*.

Article 2(4): A Comprehensive Ban on the Threat or Use of Force

The result of a textual interpretation of Article 2(4) is a comprehensive ban: any threat or use of interstate armed force is prohibited whether the target is a UN member or not.[47] Article 2(4) creates a general prohibition that avoids the flaws which weakened the Covenant of the League of Nations and the Kellogg-Briand Pact. In fact, if it were not for the explicit exceptions to the general ban, all interstate uses of force would be illegal.[48] For this reason the general ban has two specific exceptions. These exceptions are for self-defence (Article 51) and for UN-authorized collective security (Article 42).[49]

When discussing self-defence and collective security, it is important to remember the relationship between Article 2(4) and Articles 51 and 42. Article 2(4) creates a general ban, and Article 51 and 42 are specific exceptions to that ban. As such, they are subordinate to Article 2(4), and cannot be interpreted without reference to Article 2(4). The emphasis in Article 2(4) on the purposes of the UN applies equally to the interpretation of Articles 51 and 42. When examining the extent of these two provisions, particularly Article 51, one must keep in mind the last phrase of Article 2(4).

[45] See Arend & Beck, *supra* n.13, at p.40; Arend, *supra* n.6, at pp.5-6.

[46] See Arend, *supra* n.6, at pp.5-6.

[47] See Dinstein, *supra* n.13, at p.86; McCoubrey & White, *supra* n.13, at p.24.

[48] See Dinstein, *supra* n.13, at pp.87-88.

[49] There is also an essentially defunct exception for action taken against the enemy states of WWII. See U.N.Charter arts. 53, 107. The provision in Article 53 which allows the Security Council to delegate enforcement powers to a regional organization is not an additional exception, but rather a method by which the Security Council can implement its power under Article 42.

Subsequent State Practice

On paper at least, Article 2(4) creates a comprehensive and relatively simple legal norm. However, it did not take long for commentators to note that states did not act in accordance with the prohibition on the threat or use of force. As early as 1946, in minesweeping the Corfu Channel, the United Kingdom violated the textual interpretation of Article 2(4).[50] The British argument that the minesweeping operation was legal because it did not violate the territorial integrity or political independence of Albania ignored the last phrase of Article 2(4). And this was just the beginning, far greater violations were to follow.

Over the next fifty years, North Korea invaded South Korea, India invaded Goa, Indonesia invaded East Timor, the Soviet Union invaded Hungary, Czechoslovakia, and Afghanistan, while the United States invaded the Dominican Republic, Grenada, and Panama. And these are just some of the most egregious violations of Article 2(4). In 1970, Thomas Franck pointed out that there had been more than one hundred outbreaks of interstate hostility since the signing of the United Nations Charter.[51] He also noted that there had been only one occasion when the UN had been able to mount a collective enforcement operation, and only then because the Soviet Union was absent from the Security Council.[52] Franck's conclusion was that state practice between 1945 and 1970 had "so severely shattered" Article 2(4) that "only the words remain[ed]".[53] Franck attributed the death of Article 2(4) to a number of factors, including: the use of the veto to frustrate the Security Council's enforcement machinery,[54] the changing nature of warfare which made it increasingly difficult to determine when an "armed attack" had occurred,[55] and the rise of superpower dominated regional organizations acting outside of the Security Council's control.[56]

In 1990, Anthony Clark Arend took up where Franck had left off. Arend canvasses state practice up to 1990 and also concludes that there have been massive and recurrent violations of the textual interpretation of Article 2(4) which have practically eliminated the legal prohibition on the threat or use of force between states.[57] Arend argues that the legal norm as of 1990 was one of "self-help" where states were largely free to use force to achieve self-defence, self-determination, or justice (all of which have very broad, subjective legal definitions according to Arend).[58] The only interstate use of force that Arend believes is still illegal is the use of force solely for territorial aggrandizement.[59] Like Franck, Arend attributes the death of Article 2(4) in

[50] See *supra* text accompanying n.s 39-42.
[51] Franck, *supra* n.3, at pp.810-11.
[52] *Ibid.*
[53] *Ibid.* at p.809.
[54] *Ibid.* at pp.810-11.
[55] *Ibid.* at pp.812-20.
[56] *Ibid.* at pp.822-35.
[57] Arend, *supra* n.6, at pp.27-28.
[58] *Ibid.* at pp.28-32.
[59] *Ibid.* at pp.32-36.

part to the failure of the collective security machinery set out in the Charter.[60] Arend also blames the erosion of Article 2(4) on state self-interest, which places more importance on a subjective concept of "justice" than on "peace", thus reversing the hierarchy set out in Article 1(1) of the Charter.[61]

Franck and Arend take the most extreme view of the status of Article 2(4), what Arend has termed the "rejectionist" approach. Not all commentators accept that Article 2(4) is dead.[62] In fact, the majority probably fall somewhere between a "legalist" position[63] (one which follows an essentially textual interpretation of the Charter's prohibition on the use of force) and a "rejectionist" position.[64] It is not the purpose of this section to present a comprehensive discussion of the positions taken by various commentators. Rather, the intent here is to highlight that a majority of writers accept that Article 2(4) has been changed by state practice, [65] even if they disagree about how much it has changed. This should raise an immediate question. If the legal content of Article 2(4) has been changed or eliminated, what was the legal process by which that change took place.'

THE PROCESS OF CHANGE

Few would disagree that at the moment when the United Nations Charter came into force it was the law between those states that were party to it and on those issues which it covered. This means that in the beginning, the textual interpretation of Article 2(4) was the law governing the threat or use of force in international relations.[66] If the law governing the use of force is now different, as the majority of writers suggest, we must explain that change.

The Charter was the product of a process of international law (treaty formation). For the legal norms in the Charter to have changed, we must identify a legal process by which that change occurred.[67] It is not sufficient, as Franck has done, to catalogue

[60] *Ibid.* at pp.6-10.

[61] *Ibid.* at pp.10-18.

[62] See *ibid.* at pp.18-28 (giving an overview of the positions taken by commentators). See, e.g., W.M. Reisman, 'Coercion and Self-Determination: Construing Article 2(4)', (1984) 78 *A.J.I.L.* p.642, at p.643(arguing that Article 2(4) must be broadly reinterpreted to allow international uses of force which "enhance opportunities for ongoing self-determination").

[63] See e.g., O. Schachter, "The Lawful Resort to Unilateral Use of Force", (1985) 10 Yale J. Int'l L. p.291(adopting an essentially 'legalist' position).

[64] See e.g., E.V. Rostow, "The Legality of the International Use of Force by and from States", (1985) 10 *Yale J. Int'l L.* p.286, at p.286 (arguing that "a rule of law . . . cannot be characterized as a norm if respect and enforcement are the exceptions rather than the rule").

[65] See Arend, *supra* n.6, at pp.25-27.

[66] At least, this was true with respect to the parties to the Charter. Since the Charter is now essentially universal, the question of whether non-parties would be bound by the anterior law or a parallel customary law is moot.

[67] See Gordon, *supra* n.9, at p.272 n.2 ("Discrepant behavior is not necessarily probative of a deliberate intent to change an existing rule. The emergence of a new rule or the fall from authority of an existing one must rest on a legal justification.")

a series of apparent violations of the textual interpretation of Article 2(4) and conclude that therefore Article 2(4) no longer has legal validity. [68] Franck's argument goes to the effectiveness of the prohibition on force, not directly to the legal status of Article 2(4). If some new legal norm now exists, that norm must have been created through a legal process, and to demonstrate that the legal validity of Article 2(4) has changed, one must show a legal process by which that change occurred.

Hierarchy of the Sources of International Law

The Statute of the International Court of Justice sets out the sources of international law:

> "The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations."[69]

Thus the three sources of international law are treaties, custom, and general principles of law.[70] Treaties are listed before custom, but it has been suggested that this is largely a matter of judicial convenience.[71] After all, judges are much more likely to

[68] See Franck, *supra* n.3, at p.809 ("The practice of these states has so severely shattered the mutual confidence which would have been the sine qua non of an operative rule of law . . . [that] only the words remain."). Arend achieves a similar result by concluding that international law must have "authority and control" to be law, *supra* n.6, at pp.18-19. See also Rostow, *supra* n.64 (arguing that a norm must be enforced to be a law). Arend and Franck's arguments both look most like arguments in favor of desuetude, though it is never specifically mentioned. Desuetude will be addressed later. See infra pp. 97-99.

[69] Statute of the International Court of Justice art. 38(1).

[70] "General principles" were probably included in the Statute as a source of law to prevent a non liquet in the absence of an apposite custom or treaty. See S. Rosenne, *The Law and Practice of the International Court*, 1920-1996," Vol. III.376, (The Hague: Martinus Nijhoff, 3rd ed. 1997) pp.1601-2. While the position of "general principles" in Article 38 indicates that they are not formally inferior to customs or treaties, when present, customs and treaties will usually prevail over general principles because *lex specialis derogat generali*. *Ibid.* at pp.1605-1606. Since in issues related to Article 2(4) there is a treaty provision clearly on point and no shortage of apparent violations which may or may not be evidence of a conflicting custom, "general principles of law" are of little utility. Consequently, general principles will receive no further attention.

[71] See Sinclair, *supra* n.10, at 2; Michael Akehurst, "The Hierarchy of the Sources of International Law", (1974-5) 47 *B.Y.B.I.L.* p.273, at p.274; K. Wolfke, "Treaties and Custom: Aspects of Interrelation" in J. Klabbers & R. Lefeber (eds)., *Essays on the Law of Treaties* (The Hague: Martinus Nijhoff Publishers, 1998) p.31 at p.37.

apply treaties first because a state's ratification or accession to a treaty is generally ascertainable. Determining the existence and extent of a custom, on the other hand, is often an extremely complex task.[72] Today, there is general agreement that there is no hierarchy between treaties and custom.[73] Therefore, at a general level, a treaty may either be supplanted by a new custom, or changed by a recognized treaty process.[74] Part II.B. will consider the former possibility: that Article 2(4) has been modified by a new custom. Part II.C. will examine the latter possibility: that treaty processes might have changed the meaning of Article 2(4).

Modification of Article 2(4) by a Subsequent Custom

This section examines the possible replacement of Article 2(4) by a subsequent custom. A clear distinction must first be made between the modification of Article 2(4) by a custom which has arisen since 1945 and the continued existence of a pre-Charter custom which co-exists with Article 2(4). Some authors base a contemporary customary right of intervention on 19th century customs which have supposedly survived the introduction of the Charter.[75] This is contrary to a textual interpretation of Article 2(4). The prohibition on the use of force in Article 2(4) is a comprehensive ban on the use of force with narrow, limited exceptions. The language used by the provision covers essentially all international military actions of whatever severity.[76] When the Charter came into being in 1945, Article 2(4) extinguished or limited all

[72] See M. Villiger, *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (Dordrecht: Martinus Nijhoff Publishers, 2nd ed. 1997), p.60 para.89.

[73] See Villiger, *supra* n.72, at pp.57-59, paras.84-86; Akehurst, *supra* n.71, at p.275; Wolfke, *supra* n.71, at p.36.

[74] While there is no general problem with a custom supplanting a prior treaty, there may be specific problems when this is attempted with Article 2(4) of the Charter. First, there is Article 103 of the Charter, which states that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." It may prohibit the modification of Charter commitments. See B. Simma (ed)., *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 1994) pp.1117-25. Cf. Vienna Convention art. 30(1). Second, Article 2(4) may be *jus cogens*. If this were true, then the Vienna Convention suggests that Article 2(4) could not be superseded by a custom unless that custom were also *jus cogens*. See Vienna Convention art. 53. See also Akehurst, *supra* n.71, at pp.281-85. Both of the above arguments are fraught with difficulties. For example, it is not at all clear that the Vienna Convention's treatment of *jus cogens* would apply to the UN Charter. See infra text accompanying n.147. This paper resolves the interaction of customs and treaties without resort to either Article 103 or the possible jus cogens nature of Article 2(4).

[75] See Rostow, *supra* n.64, at p.289 (appearing to rely on the 19th century exchange of diplomatic n.s referred to as the Caroline case to define self-defence).

[76] See *supra* pp. 78-81.

[77] See Gordon, *supra* n.9, at pp.277-78 (suggesting that the holding of the Caroline case has been modified to the extent that it allowed anticipatory self-defence in contradiction of the requirement of an armed attack in Article 51 of the Charter).

contradictory customs.[77] Mark Villiger has argued that conventions do not automatically extinguish contradictory customs covering the same subject matter.[78] However his argument centers around the fact that non-parties will continue to be bound by the custom, and even parties to a convention might have to apply the custom in their relations with non-parties. In the case of the Charter at least, these arguments are inapplicable. First, Article 2(4) requires that members apply it in their relations with non-members. Second, the UN achieved nearly universal membership so quickly, that a contradictory pre-existing custom could not have survived. If customs currently exist which have modified the legal content of Article 2(4), they came into being after 1945, though they might mirror pre-Charter customs.

It is also important to make a distinction between customs which might raise the threshold for the use of force in international relations, and customs which would lower the threshold for the use of force. It would not be inconsistent with a textual interpretation of Article 2(4) for a custom to arise which would further limit the right of states to use force in international relations. In fact, the International Court of Justice appeared to find just such a custom in various pronouncements of the General Assembly.[79] However, any attempt to lower the threshold in Article 2(4) through the creation of a new custom must be examined and explained.

Elements of Custom

The requirements of custom stem from the description of "international custom" used in Article 38(1) of the Statute of the International Court of Justice,[80] which describes custom as a "general practice accepted as law".[81] The description has two components, and custom consequently consists of a general state practice, plus a belief that the practice is a legal right or is compelled by law (often referred to as *opinio juris*).[82] The definitions of the two components are inexact. Compare, for example, the idea of "constant and uniform" practice required by the ICJ in 1950[83] to

[77] See Gordon, *supra* n.9, at pp.277-78 (suggesting that the holding of the Caroline case has been modified to the extent that it allowed anticipatory self-defence in contradiction of the requirement of an armed attack in Article 51 of the Charter).

[78] Villiger, *supra* n.72, at pp.160-161, paras.243-245.

[79] See Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. *Rep.* 14, pp.99-102.

[80] See Asylum (Colom. v. Peru), 1950 I.C.J. *Rep.* p.266, at pp.276-77.

[81] Statute of the International Court of Justice art. 38(1).

[82] See Asylum (Colom. v. Peru), 1950 I.C.J. *Rep.* p.266, at p.276; North Sea Continental Shelf (F.R.G. v. Den.and F.R.G. v. Neth.), 1969 I.C.J. *Rep.* p.3, at p. 4 ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it"); Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. *Rep.* 14, 97.

[83] See Asylum (Colom. v. Peru), 1950 I.C.J. *Rep.* p.266, at p.276.

[84] See North Sea Continental Shelf (F.R.G. v. Den.and F.R.G. v. Neth.), 1969 I.C.J. *Rep.* p.3, at p.42.

the idea of instant custom suggested in 1969[84] or the loose approach the ICJ took to contradictory practice in 1986.[85] These cases all suggest different approaches to how uniform, constant, and long a practice needs to have been followed before it becomes a custom. However, there is broad agreement that custom formation requires two things:

1. A general practice among states, plus
2. A belief that the practice constitutes law (*opinio juris*).[86]

Commentators have little difficulty finding a long history of uses of force which violate Article 2(4).[87] Some authors have used these incidents as evidence of practices in violation of Article 2(4), though there might be doubt about the constancy or uniformity of the practices. However, assuming, *arguendo*, that a practice meets the first requirement, that practice by itself is insufficient to create a custom which would modify or supplant Article 2(4). The second necessary element of a new custom is *opinio juris*.

Opinio Juris in Violations of Article 2(4)

To best determine whether the requisite *opinio juris* exists, it would be necessary to conduct a review of all the apparent violations of the textual interpretation of Article 2(4) since 1945. However, the shear number of violations puts such an undertaking beyond the scope of this paper. Instead, a sampling of the *opinio juris* offered by states engaging in some of the most blatant violations will be examined.

Opinio juris is a state's belief that the action it is engaging in is either a legal right or required by international law.[88] While *opinio juris* is a subjective belief, it is only legally relevant to the extent that other states can perceive it and act on it, which means that the more obvious the *opinio juris*, the more likely it is to contribute to a new custom. The best way to determine a state's *opinio juris* is from its own pronouncements, particularly when a state provides a legal rationale for its actions.[89] This is an important point. *Opinio juris* is a legal belief, and while virtually any public explanation a state offers can be evidence of it, not all explanations are equally probative. The most persuasive evidence of a state's belief that its action is either a

[85] See Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. *Rep.* p.14, at p. 98 ("The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule.").

[86] See generally Villiger, *supra* n.72, at pp.29-55, paras.34-78 (giving an overview of modern custom formation).

[87] See *supra* pp. 82-83.

[88] See Villiger, *supra* n.72, at pp.47-48, paras.65-66.

[89] See *ibid.* at pp.50-51, para.71.

legal right or required by international law results from a state's explanation in a situation in which there is the possibility of legal liability. States may make multiple statements on the same issue, many of them in political contexts, some of which may be mutually inconsistent. The possibility of legal liability produces the best evidence of a state's legal beliefs.[90] One of the only forums which has the realistic possibility of imposing legal liability for violations of the prohibition on the use of force in international relations is the Security Council. Consequently a state's explanation before the Security Council is persuasive evidence of *opinio juris* in violations of Article 2(4).[91]

Some critics may argue, upon reading the following examples, that the rationales that states put forward are not honest, and that therefore they cannot be used as evidence of what states actually believed. It is certainly possible to imply *opinio juris* from the actions of states if an explicit rationale is not expounded.[92] However, it would be wrong to try and second guess a state's express rationale. States are aware of the legal implications of taking a particular position. If they choose to be disingenuous in explaining their beliefs, it is a conscious decision, the consequences of which a state must be presumed to have intended. In addition, later states cannot be presumed to take into account the "true" motivations for the actions of earlier states. When later states rely on an earlier statement of *opinio juris* in the ongoing process of custom formation, it becomes irrelevant to the outcome that the earlier state may not have believed its own words.[93] In consequence, where a state expressly presents a legal rationale for an apparent violation of Article 2(4), it would be incorrect to imply an *opinio juris* from the action which conflicts with the legal rationale provided by the state.

Czechoslovakia (1968)

On the evening of August 20, 1968, troops from five Warsaw Pact nations crossed into and took control of Czechoslovakia.[94] In defending this apparent violation of Article 2(4) before the Security Council, the Soviet representative presented a letter from the Soviet government, in which it was claimed that troops had entered Czechoslovakia "pursuant to a request by the Government of that State".[95] Such an

[90] The difference between the value of statements made in political contexts and statements made in legal contexts is one of degree not kind.

[91] Cf. *supra* n.72. at pp.51-52, para.72 (noting the salutary effect of the UN process on inquiries into *opinio juris*). Internally, a state may provide a legal rationale to another branch of the government, or to the people. The examples involving the United States use this evidence of *opinio juris*. Where a state's legal system requires internal legal accountability, internal evidence of opinio juris is probative.

[92] See *ibid.* at pp.50-51, para.71. Also see the quote from the North Sea Continental Shelf Cases, *supra* n.82.

[93] See Villiger, *supra* n.72, at p.22, para.23.

[94] See U.N.SCOR, 23rd Sess., 1441st mtg. at p.13, para.137. For further information on the invasion of Czechoslovakia, see J.N. Moore & R.F. turner, *International Law and the Brezhnev Doctrine* (Lanham: University Press of America, 1987) 94-102.

[95] See U.N.SCOR, 23rd Sess., 1441st mtg. at p.1, para.3.

invitation would have removed the situation from the Article 2(4) paradigm. If the movement of troops across a border is at the request of the government of the recipient state, then the action would not violate the territorial integrity or political independence of the state, and would be compatible with the purposes of the Charter, and therefore outside the prohibition in Article 2(4).[96] However, the Soviet version of events was undercut by the Czechoslovakian representative who presented communications from his government indicating that the Czechoslovakian government had not requested or consented to the invasion,[97] and actively opposed the "illegal occupation of Czechoslovakia".[98] The US representative was quick to proclaim that "[w]e all know [the Soviet] claim is a fraud, an inept and obvious fraud".[99] In the absence of a valid invitation, the Warsaw Pact invasion of Czechoslovakia was a clear violation of the text of Article 2(4).

The important point is what the Soviets claimed as their legal position. The Soviet Union offered a legal rationale (Czechoslovakian consent) which was consistent with international law. The Soviet representative went on to argue that "[t]he decision of the socialist countries on rendering assistance to the Czechoslovak people is entirely in accordance with the right of states to individual and collective self-defence, [and] with the right provided for in . . . the Charter of the United Nations."[100] The Soviet argument was based on a characterization of the situation that seems contrary to the great weight of the evidence. But the Soviet Union's legal rationale was uncontroversial and, as the Soviet representative was careful to point out, in accordance with a textual interpretation of the UN Charter. The Warsaw Pact invasion turned on a mischaracterization of the facts, not a radical new legal theory that could supplant Article 2(4).

The Soviet representative did remark that "[t]he events in Czechoslovakia concern the Czechoslovak people and the States of the socialist sphere of collaboration . . . and them alone".[101] Taken out of context, this might lend itself to the interpretation that the Soviets believed that their "socialist" right of intervention superseded the legal norms established in the Charter.[102] But in light of the number of times that the Warsaw Pact action was claimed to be in accordance with the Charter,[103] the statement can best be seen as a reference to the Soviet argument that because Czechoslovakia had requested assistance, the situation was a Czechoslovakian internal matter beyond the scope of the Security Council as a result of Article 2(7) of the Charter,[104] and only

[96] Presence by invitation is generally considered legal under international law. See M.N.Shaw, *International Law* (Cambridge: Grotius Publications, 3rd ed. 1991) 722-3.

[97] See U.N.SCOR, 23rd Sess., 1441st mtg. at p.13, para.137.

[98] *Ibid.* at p.13, para.138.

[99] *Ibid.* at p.2, para.11.

[100] *Ibid.* at p.8, para.90.

[101] *Ibid.* at p.10, para.102.

[102] This interpretation would construe the language as a reference to the Brezhnev Doctrine. Under that doctrine, socialist states supposedly had a right of intervention to prevent other socialist states from lapsing from socialism. See generally, Moore & Turner, *supra* n.94. Such a right would be incompatible with a textual interpretation of Article 2(4).

[103] See U.N.SCOR, 23rd Sess., 1441st mtg. at p.1, p.8, p.20, paras.3, 90, 93, 105.

[104] See *ibid.* at p.26, para.237

of concern to Czechoslovakia and the socialist states "invited" into Czechoslovakia. Whatever value the Brezhnev Doctrine may have had as political rhetoric, it was not relied on as a legal defence following the invasion of Czechoslovakia.[105] The Soviet Union opted for the much more conventional defence of invitation. On the whole, the Warsaw Pact invasion of Czechoslovakia was a blatant violation of Article 2(4), but it did not have the *opinio juris* necessary to contribute to a new customary rule on the use of force.

Grenada (1983)

Turning to a different incident, the United States of America, acting in conjunction with troops from other countries, landed upon and occupied the Caribbean island of Grenada in late October of 1983.[106] There was certainly no armed attack by Grenada against the United States, and there was no Security Council mandate for occupying Grenada, so the action appeared to be a violation of Article 2(4). In defence of the invasion, the US claimed three legal justifications: invitation by the Governor-General of Grenada, a determination to use force by the Organization of Eastern Caribbean States (the OECS), and the protection of US nationals on the island.[107] All three justifications have been rejected by legal scholars. The Governor-General did not occupy a constitutional position which would have allowed him to speak for the government of Grenada, and did not have the power to authorize the invasion.[108] The treaty of the OECS allowed for collective self-defence against outside threats, not collective security against member states.[109] Even if the OECS treaty had provided for collective security, that provision would have been superseded by the collective security requirements of the Charter (i.e., Security Council approval) by virtue of Article 103 of the Charter. Finally, while the protection of nationals in danger in a foreign country may fall within the self-defence exception of Article 51 of the Charter,[110] the US went far beyond an operation to protect nationals.[111]

Again, the importance of this example lies in the *opinio juris* of the violator. The US offered three legal justifications, all of which were invalid. Consequently the

[105] Soviet officials and commentators did advocate the Brezhnev Doctrine as a justification for the invasion in political arenas. See Moore & Turner, *supra* n.94, at pp.94-102. But on the one occasion the Soviet Union was before a body which was entitled to a legal explanation, it is significant that the Soviet Union relied on invitation. See *supra* text accompanying n.s 89-91.

[106] See C.C. Joyner, "The United States Action in Grenada: Reflections on the Lawfulness of Invasion", (184) 78 *A.J.I.L.* p.131, at pp.131-32.

[107] See M.N. Leich, "Contemporary Practice of the United States Relating to International Law", (1984) 78 *A.J.I.L.* p.200, at pp.230-204 (reprinting the argument of the Deputy Secretary of State before the House Committee on Foreign Affairs on 2 November 1983).

[108] See Joyner, *supra* n.106, at pp.137-39.

[109] See F.A. Boyle et al., "International Lawlessness in Grenada", (1984)78 *A.J.I.L.* p.172, at p.173; Joyner, *supra* n.106, at pp.135-37.

[110] This paper takes no view as to the legality of this position upon a textual reading of Article 51.

[111] See Boyle et al., *supra* n.109, at p.172; Joyner, *supra* n.106, at pp.134-35.

invasion was a violation of Article 2(4). However, none of the legal defences extended by the US were incompatible with the Charter. All three justifications were misapplied, perhaps disingenuously, but they do not amount to a stated belief that the US had an extra-Charter legal right to intervene to oppose Marxism-Leninism or install a Western-style democracy.[112] In fact, the US executive branch's defence of the action before Congress concludes with: "We have not made, and do not seek to make, any broad new precedent for international action; we think the justification for our actions is narrow, and well within accepted concepts of international law."[113] The executive branch was wrong, but it did not have the *opinio juris* necessary to have created a new custom.

Panama (1989)

On December 20, 1989, the United States invaded Panama, overwhelming Panamanian resistance and capturing the Panamanian head of state, Manuel Noriega.[114] As part of justifying the invasion as self-defence, President George Bush gave two reasons: the declaration by the Panamanian legislature that a state of war existed between the two countries, and the death of a US soldier at the hands of the Panamanian defence forces.[115] Neither of these justifications accords with Article 2(4). A mere declaration of war, without an armed attack, is not sufficient to allow a military response.[116] Similarly, the death of a single soldier does not justify the invasion and overthrowing of the Panamanian government.[117] It is hard to avoid the conclusion that the US invasion of Panama was in violation of Article 2(4).[118]

Again, the importance lies in how the US treated its violation. Despite a persuasive argument that the US justifications were insufficient to invoke self-defence, President Bush's letter to Congress describing the operation states that "[t]he deployment of U.S. Forces is an exercise of the right of self-defence recognized in Article 51 of the United Nations [C]harter".[119] This language is very important, because it vitiates the use of the Panamanian invasion to support a new custom of any sort. Rather than stating that the invasion was a right derived from a new custom that had supplanted Article 2(4), the US attempted to justify the invasion as a lawful act under the Charter. By arguing, however incorrectly, that the invasion was justifiable self-defence in accordance with Article 51 of the Charter, the US robbed the invasion of the *opinio juris* necessary for it to constitute the basis for a new custom.

[112] See O. Schachter, "The Legality of Pro-Democratic Invasion", (1984) 78 *A.J.I.L.* p.645, at p.648.

[113] See Leich, *supra* n.107, at p.204.

[114] See Louis Henkin, "The Invasion of Panama Under International Law: A Gross Violation", (1991) 29 *Colum. J. Transnat'l L.* p.293, at p.293 (describing the facts of the invasion).

[115] See H.R. Doc. No. 127, 101st Congress, 2nd Sess. (1990).

[116] See Henkin, *supra* n.114, at pp.305-306.

[117] See *ibid.* at p.297.

[118] See *ibid.* at p.295, pp.312-313.

[119] H.R. Doc. No. 127, 101st Congress, 2nd Sess. (1990).

Kuwait (1990)

In the early hours of 2 August 1990, Iraqi troops crossed the border and occupied Kuwait.[120] The Iraqi representative explained the position of his government as follows:

> "First, the events taking place in Kuwait are internal matters which have no relation to Iraq.
>
> Secondly, the Free Provisional Government of Kuwait requested my Government to assist it to establish security and order so that the Kuwaitis would not have to suffer. . . .
>
> Fourthly, it is the Kuwaitis themselves who in the final analysis will determine their future. The Iraqi forces will withdraw as soon as order has been restored. This was the request made by the Free Provisional Government of Kuwait. . .
>
> Fifthly, there are reports that the previous Kuwaiti Government has been overthrown and there is now a new Government."[121]

This justification, though not as clear as the Soviet justification in the Czechoslovakian invasion,[122] is nevertheless an argument about invitation. The Iraqi government argued that there had been a change of government in Kuwait, and that the newly constituted government had requested Iraqi assistance in maintaining peace and security in Kuwait. In another similarity to the invasion of Czechoslovakia, the Kuwaiti representative was on hand to undercut the Iraqi version of events.[123] Consequently, Iraq's statement of the facts was rejected by the Security Council in its adoption of Security Council Resolution 660 (1990). As in Czechoslovakia, the mischaracterization of the facts combined with a reliance on an uncontroversial legal defence, robbed the violation of the *opinio juris* that would have been necessary for it to have created new customary law.

A Complete Lack of Opinio Juris

The four examples described above have common threads. All four were blatant violations of a textual interpretation of Article 2(4). Yet, in none of the examples did the guilty state claim to be acting on a legal theory that existed outside of the Charter. All of the defences advanced were uncontroversial ones. Consequently, even though the defences were misapplied, none of the states presented arguments which indicated

[120] See U.N.Doc. S/PV.2932 [A Provisional Verbatim Record of the Two Thousand Nine Hundred and Thirty-Second Meeting of the Security Council] at p.6.

[121] *Ibid.* at p.11.

[122] See *supra* pp. 88-90.

[123] The Kuwaiti representative's statement is in U.N.Doc. S/PV.2932 at pp.3-10.

a belief in a legal right that conflicted with a textual interpretation of Article 2(4). In the above examples, there is a lack of *opinio juris* from which a new customary law on the use of force might spring.[124]

Mark Villiger argues that *opinio juris* and explicit intent are not identical and that *opinio juris* in a new custom might form without all the parties to a treaty expressing an intent to depart from that provision.[125] He is concerned that a unanimous express intent requirement might keep a new *opinio juris* from forming because of the passive conduct of states.[126] This is a valid argument. If a number of states advanced a legal rationale at odds with Article 2(4), and over the requisite number of incidents and period of time, the other states of the world passively accepted that rationale, then it might have *opinio juris* despite the fact that not every state had explicitly rejected Article 2(4). But this is not the situation that has occurred. Where the state committing the violation explicitly claims to be acting in accordance with Article 2(4), then no *opinio juris* for a contradictory new custom can form.

This has been commented on before. In the *Nicaragua* Case, the ICJ noted with respect to the prohibition on the use of force in international relations that, "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law", but concluded that, "in fact States have not justified their conduct by reference to a new right of intervention or a new exception to the principle".[127] Louis Henkin, in his famous response to Thomas Franck's article[128] on the death of Article 2(4), noticed a similar pattern:

> "No government, no responsible official of government, has been prepared or has wished to pronounce it dead. Article 2(4) was written by practical men who knew all about national interest. They believed the norms they legislated to be in their nations' interest, and nothing that has happened in the past twenty-five years suggests that it is not."[129]

It is not possible here to examine all apparent violations of Article 2(4) in order to determine how often this lack of *opinio juris* arises in violations of the textual interpretation of Article 2(4), but it is the author's belief that a great many, if not the majority, of violations are justified using uncontroversial legal defences. But there are cases where an argument might be advanced for *opinio juris* in a right that contradicts Article 2(4).

[124] See Akehurst, *supra* n.71, at p.276 ("[S]ubsequent custom can terminate a treaty only when there is clear evidence that that is what the parties intend."); Cf. Villiger, *supra* n.72, at p.216, para.340.

[125] Villiger, *supra* n.72, at p.216, para.341.

[126] *Ibid.* at p.216, para.342.

[127] Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. *Rep.* p.14, p.109, para.207.

[128] Franck's article is cited above at n.3.

[129] L. Henkin, "The Reports of the Death of Article 2(4) Are Greatly Exaggerated", (1971) 65 *A.J.I.L.* p.544, at p.547. See also Schachter, *supra* n.112, at p.648.

East Timor (1975)

Despite Louis Henkin's assertions to the contrary, some states have appeared to equivocate about the validity of the Article 2(4) paradigm. In the early hours of 7 December 1975, Indonesian military forces invaded and overran the Portuguese colony of East Timor.[130] Portugal was certain that the act was a "blatant, undeniable violation of the Charter of the United Nations, in particular Article 2, paragraphs 3 and 4".[131] Indonesia, on the other hand, accused Portugal of creating a refugee problem, of failing to stop the persecution of pro-Indonesians, and of armed incursions into Indonesia.[132] It characterized its act as a "respon[se] to the request of the majority of the people of East Timor, which can certainly not be termed an act of aggression".[133] Indonesia went on to "reject any notion of aggression being attached to the action of its people to assist the majority of the people of East Timor . . . against a minority which wishes to impose its will by force of arms and deny the people the exercise of its inalienable right to self-determination".[134] No explicit legal argument is made about Article 2(4). In fact, Indonesia studiously avoids defending its actions in terms of Article 2(4). However, its statement can be interpreted as an implicit rejection of the Article 2(4) paradigm. Indonesia's argument appears to base a right to intervene in East Timor on a right of the inhabitants to achieve self-determination. This is at odds with Article 2(4), because it contradicts the hierarchy set up in Article 1(1).[135] Indonesia's argument suggests that justice, in the form of self-determination for the Timorese, should prevail over the Charter's emphasis on peaceful settlement of disputes, and the prohibition on the use of force in international relations. This is an implicit argument, but at the least leaves open the question of whether Indonesia was basing its right of intervention in the Charter, or on the dictates of "justice".

Goa (1961)

A more explicit argument arose in an earlier incident. Fourteen years earlier, Portugal had been the victim of another apparent violation of the text of Article 2(4). In December of 1961, Indian forces had crossed into and seized the colony of Goa from Portugal.[136] India's use of force was not Article 51 self-defence or Security Council authorized collective security, so appeared to be a violation of the Charter. In response, India attacked the rights of Portugal in Goa, claiming that they resulted from "naked, unabashed, application of force, chicanery and trickery inflicted on the people of India 450 years ago".[137] India went on to argue that since the acquisition of Goa had

[130] See U.N.SCOR, 30th Sess., 1864th mtg. at p.7, para.45.
[131] *Ibid.* at p.7, para.48.
[132] See *ibid.* at pp.11-12 para.82.
[133] *Ibid* at p.13, para.93.
[134] *Ibid.* at p.13, para.94.
[135] See *supra* text accompanying n.s 44-45.
[136] See U.N.SCOR, 16th Sess., 987th mtg. at p.6 para.23.
[137] *Ibid.* at p.8 para.37.

been illegal, and remained illegal, Portugal had no rights to Goa that could be violated.[138]

However, the most incendiary passage in the Indian statement is the following:

> "It must be realized that this is a colonial question. It is a question of getting rid of the last vestiges of colonialism in India. That is a matter of faith with us. Whatever anyone else may think, Charter or no Charter, Council or no Council, that is our basic faith which we cannot afford to give up at any cost."[139]

This is very close to an argument that India's right to invade Goa is an inherent right stemming from the nature of colonialism, and is a superior right to any contained in the Charter. This is a better example of an argument about justice superseding peace, in contravention of Article 1(1) of the Charter, than appears in the East Timor incident. The statement seems to convey the *opinio juris* necessary to create a customary right of intervention in direct contradiction of the Article 2(4) paradigm.

Because of the harsh criticism that India received for its radical position,[140] the Indian representative hastily qualified his earlier statement. At the next meeting of the Security Council, the Indian representative announced that:

> "We are criticized here by various delegations which say, 'Why have you used force" The Charter absolutely prohibits force'; but the Charter does not completely eschew force, in the sense that force can be used for self-defence, for the protection of the people of a country - and the people of Goa are as much Indians as the people of any other part of India."[141]

This is essentially an argument that fits within the same model as the US invasion of Panama. India claims to be operating in conformity with the Charter, but relies on a definition of self-defence that is at odds with the text of the Charter. By claiming that the people of Goa are really Indians as a matter of law, India invokes the right of self-defence to protect them from the Portuguese. While India's use of self-defence is incompatible with the Charter's text, India's stated belief that its act is in fact compatible robs it of the *opinio juris* necessary to create a new custom. Clearly, India's first argument is different from its second argument. The first argument comes much closer to exhibiting the requisite *opinio juris*. But India was forced to moderate that argument at the very next meeting. The result is ambiguous. It also indicates the pressure a state might have to endure for publicly rejecting the Charter, and is further evidence that the majority of violations of Article 2(4) are justified using uncontroversial legal defences and consequently lack the *opinio juris* to create a new contradictory custom.

[138] See *ibid.* at p.9 para.39, pp.10-11 para.46.

[139] *Ibid.* at p.9 para.40.

[140] See, for example, the statement of the US representative in response to the Indian statement, beginning at U.N.SCOR, 16th Sess., 987tg mtg. at p.15 para.65.

[141] U.N.SCOR, 16th Sess., 988th mtg. at p.16 para.77.

Change Through Treaty Processes

Applicability of the Vienna Convention on the Law of Treaties

Where *opinio juris* is lacking, a new custom could not have formed. But it is still possible that state practice which could not contribute to custom formation might affect the content of Article 2(4) through a treaty process. This brings us to the Vienna Convention on the Law of Treaties, a treaty which regulates the establishment and functioning of other treaties. Despite the doubts about the wisdom of having a treaty on the law of treaties,[142] the Vienna Convention was signed in 1969 and entered into force in 1980. Since the Charter was concluded thirty-five years before the entry into force of the Vienna Convention, the Convention does not apply, as a treaty, to the Charter.[143] However, Article 4 of the Vienna Convention leaves open the possibility that some provisions of the Convention may apply "independently" of whether a given treaty is subject to the Convention. This is a reference to the possibility that some provisions of the Vienna Convention may represent customary international law.[144] To the extent that provisions of the Convention represent customary international law, those provisions would apply to all treaties, including the United Nations Charter.

Today, many provisions of the Vienna Convention can be said to represent international custom.[145] Most importantly, the rules on the interpretation of treaties, Articles 31-33, are generally accepted as codifying customary rules.[146] On the other hand, Article 53, concerning the status of *jus cogens*, is the most controversial provision of the Vienna Convention, and the one least likely to state a customary norm.[147] The result is that Articles 31-33 do apply to the interpretation of the United Nations Charter, while Article 53 most likely does not apply to the Charter.

Dismissing the Obvious

The Vienna Convention on the Law of Treaties gives a concrete form to those processes of change having to do with treaties. By codifying custom, the Convention takes an ephemeral principle and gives it a specific form.[148] While still open to interpretation, the words of the Vienna Convention are much more concrete than the customs they codified. Perusing the Convention suggests a number of processes by

[142] See Sinclair, *supra* n.10, at pp.3-5.
[143] See Vienna Convention art. 4.
[144] See Sinclair, *supra* n.10, at pp.7-8.
[145] See *ibid.* at pp.10-21.
[146] See Simma, *supra* n.74, at p.30; Sinclair, *supra* n.10, at p.19 ("[T]here is now strong judicial support for the view that the rules of treaty interpretation incorporated in the Convention are declaratory of customary law.").
[147] See Sinclair, *supra* n.10, at pp.17-18.
[148] Cf. North Sea Continental Shelf (F.R.G. v. Den.and F.R.G. v. Neth.), 1969 I.C.J. *Rep.* p.3, at p.41.

which the content of Article 2(4) might have been modified. However, the majority of these can be dismissed out of hand:

1. Article 2(4) has not been superseded by a newer treaty covering the same subject matter.[149] In fact, the interaction of Article 103 of the Charter and Article 30(1) of the Vienna Convention may prevent the dilution of Charter obligations by subsequent treaties.
2. Article 40 of the Convention is superseded by Articles 108 and 109 of the Charter. There has been no formal amendment of Article 2(4) of the Charter.
3. Article 103 of the Charter prohibits modification of the Charter terms between two or more of the parties to the Charter as suggested by Article 41 of the Convention.
4. No member of the UN could avoid Article 2(4) through arguments about internal law, restrictions on authority to express consent, error, fraud, or corruption of a representative as set forth in Articles 46-50 of the Convention. Continued membership in the UN since 1945 acts as acquiescence in the validity of the treaty, thereby barring the above arguments.[150]
5. There has never been a formal decision to suspend the operation of Article 2(4) in accordance with Article 57 of the Convention.

There are other possibilities suggested by the Vienna Convention, but only two need to be addressed in detail. The validity of Article 2(4) may have been diminished by desuetude. That possibility will be discussed next. It is also possible that subsequent state practice under Article 2(4) might have "interpreted" the meaning of the prohibition on the threat or use of force.[151] The possibility of interpretation through state practice will be addressed below.

Desuetude

A number of writers have implicitly or expressly identified desuetude as a process by which Article 2(4) has been diluted. Traditionally, desuetude was a process that allowed for the deconstruction of customary rules.[152] Custom requires a general practice that has some measure of uniformity and consistency. If there are sufficient violations of the rule, then there will not be uniformity and consistency, and the custom may cease to exist.[153] Arend, Franck and Rostow, amongst others, appear to

[149] See Vienna Convention art.30 (allowing for supercession by newer treaties covering the same subject matter).
[150] See *ibid.* art. 45(b).
[151] See *ibid.* art: 31(3)(b).
[152] See Villiger, *supra* n.72, at p.55, para.79.
[153] See *ibid.* at p.55, para.79.

believe that desuetude is also a treaty process.[154] They argue that there have been sufficient violations of Article 2(4) to conclude that it no longer has legal force. There are significant problems with this argument. Article 42(2) of the Vienna Convention states that termination of a treaty can only result from the provisions of that treaty or from the default provisions in the Convention. The Charter certainly does not provide for termination as a result of desuetude, and the closest thing to desuetude in the Vienna Convention is Article 54(b). Article 54(b) allows for the termination of a treaty "[a]t any time by consent of all parties after consultation with the other contracting states". This seems to require a formal act following formal consultations. It also requires the consent of all the parties. In addition, Article 44 of the Vienna Convention holds that termination may only be invoked with respect to the whole treaty, except in some inapplicable situations. This would mean that termination could not apply only to Article 2(4) but would terminate the whole Charter. This has certainly not happened.

On the other hand, the Convention does not apply, as a treaty, to the Charter. Only those provisions which are also customary would be applicable, and there is some doubt about whether the provisions on termination represent customary international law.[155] In addition, the ILC has suggested that desuetude is included in the Vienna Convention through Article 54(b) since the necessary consent to terminate the treaty can be implied from the conduct of the parties.[156] This is at odds with an "ordinary meaning" interpretation of Article 54(b) which appears to require formal consultation and consent.

There are clearly problems with accepting desuetude as a treaty process by which Article 2(4) might have been changed, but assuming, *arguendo*, that desuetude is possible does not mean that it has occurred. Desuetude is the abandonment of a treaty or a treaty provision, but more than just violations, or even a pattern of violations, would be needed to abandon a treaty. Treaties are the result of the express consent of all the parties to be bound by the treaty. A single party does not have the power to terminate a treaty for other states unless this is specifically provided for. It is not surprising that Article 54(b) of the Vienna Convention requires the consent of all the parties to a treaty in order to terminate that treaty. At the least, desuetude would seem to require an express or implicit intent to abandon a treaty coupled with the express or implied consent of the other parties.[157] The discussion of *opinio juris* suggests that most violations of a textual interpretation are accompanied by legal rationales which would negate any claim of an express or implied intent to abandon.[158] Further, the majority of these legal rationales are rejected by the states of the world, negating any claim of implied consent.[159] In short, even if one accepts that desuetude does exist as a treaty process, there it is little evidence that it has occurred to Article

[154] See *supra* n.68.
[155] See Sinclair, *supra* n.10, at pp.14-15.
[156] See *ibid.* at pp.163-64.
[157] See *ibid.* at p.164. See also *supra* n.67.
[158] See *supra* pp. 85-95.
[159] See *infra*.

2(4), since states regularly concede the validity of Article 2(4) even while violating a textual interpretation of it.

A Classification Scheme for Uses of Force

The violations discussed above suggest that international uses of force can be broken down into categories. Such a classification scheme would look like this:

I. Uses of force outside of the scope of Article 2(4). Example: The continued presence of US troops in South Korea by invitation

II. Uses of force consistent with the text of Article 2(4). Example: Kuwait's use of force against the invading Iraqi troops

III. Uses of force inconsistent with the text of Article 2(4):

- A. Mischaracterizations of the fact situation in order to use uncontroversial defences. Example: the Soviet Union's claim of invitation in Czechoslovakia.
- B. Uncontroversial defences applied to inapplicable fact patterns. Example: the US claim of self-defence in Panama.
- C. Legal defences based on legal rights incompatible with the text of Article 2(4). Example: India's first statement in the Security Council on Goa.
- D. Apparent violations unaccompanied by legal rationales.

I and II above would not change Article 2(4). Only III is inconsistent with the text of Article 2(4) and might lead to a change. Yet within III, only III(C) and III(D) have the necessary intent to create contradictory custom or could imply an intent to abandon Article 2(4). And as India's moderation of its first argument before the Security Council indicates, these situations may be a small percentage of the actual violations of Article 2(4). The largest number of uses of force inconsistent with the text of Article 2(4) probably occur under III(A) and III(B). Yet these do not have the *opinio juris* to create new customs or the intent to abandon Article 2(4), because the states that employ them purport to be acting in accordance with Article 2(4). This leaves the problem of how to treat categories III(A) and III(B).

The International Court of Justice, when confronted with an analogous problem, argued essentially that categories III(A) and III(B) should be ignored:

> "If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."[160]

[160] Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. *Rep.* p.14, p.99 at para.186.

Because of the procedural setting of the *Nicaragua* Case, the ICJ was construing what it found to be a custom which paralleled Article 2(4), not Article 2(4) itself. But if this logic were applied directly to Article 2(4) it would mean disregarding violations falling into III(A) and III(B).

There is a problem with accepting the ICJ's logic. It is insufficient to say that the uncontroversial legal argument presented does not fit the factual model for that legal defence, and therefore cannot change the textual interpretation of Article 2(4). Part of the problem is the positivist nature of international law. States make international law, whether it be by treaty or by custom, not the ICJ. It also seems at odds with the intent with which the states in the examples treated their own legal arguments. Take for example India's second statement before the Security Council.[161] India argued that its invasion of Goa was self-defence because Goans were really Indians, and therefore the Portuguese occupation of Goa was essentially an armed attack against India. This does not accord with the text of the Charter, but in a way, India is making a claim about how it believes self-defence should be defined. India's action in Goa can be seen as an "offer" to rewrite the text of the Charter to take into account the immorality of colonialism. Because it is an offer to redefine the Charter, not to do away with the Charter, it is not an argument that gives rise to a new contradictory custom. However, under a legal regime created by states, India's offer should not just be ignored.

And in fact, there is a way to take into account such offers to modify the meaning of the text of treaties. Article 31 of the Vienna Convention on the Law of Treaties (1969) states that treaties are to be interpreted in accordance with the ordinary meaning of their words in light of their objects and purposes, and in accordance with their context.[162] The Vienna Convention goes on to state that "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be taken into account along with the context of the treaty.[163] This allows what might be termed "interpretive acts" to modify the interpretation of the "ordinary meaning" of the treaty terms. Thus India's interpretive act under Article 31(3)(b) in Goa might have modified the meaning of self-defence to allow the use of force against lingering colonialism.

INTERPRETIVE ACTS

At first glance, the conclusion that violations of Article 2(4) often cannot contribute to a new custom but sometimes can "interpret" the Charter may appear to be a change in name, without legal effect. This would be true if the requirements for custom formation and the requirements for treaty interpretation through subsequent practice were the same. If the criteria for the two processes are different, then acts

[161] See *supra* text accompanying n.141.
[162] Vienna Convention art. 31(1).
[163] *Ibid.* art. 31(3)(b).

which might contribute to custom formation, might not be capable of treaty interpretation, and vice versa. Thus, the important question becomes, what is the test of successful treaty interpretation through subsequent practice?' A close reading of Article 31 of the Vienna Convention suggests that "interpretive acts" are subject to a test of "good faith agreement". It is a single test, but springs from two different sources, the requirement of agreement and the requirement of good faith. These two sources will be examined independently, followed by a proposed definition of "good faith agreement".

Agreement

Article 31 of the Vienna Convention on the Law of Treaties states that:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose...
>
> 3. There shall be taken into account, together with the context: ...
>
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

The requirement of agreement is explicitly set out in the text of Article 31(3)(b). Interpretive acts must establish the agreement of the parties.[164] This stems from the contractual nature of treaties. They are formed out of the express consent of all the parties. In order for their meaning to be changed through interpretation, the acts which are alleged to have interpreted the treaty must be such as to show the agreement of the parties to the interpretation.

Good Faith

"Good faith" is mentioned as essentially the first guide to treaty interpretation in Article 31(1) of the Vienna Convention. Since "interpretive acts" are to be considered

[164] See Waldock Report VI, Observations and proposals of the Special Rapporteur, par. 18 reprinted in R.G. Wetzel (ed)., *The Vienna Convention on the Law of Treaties: Travaux Preparatoires* (Frankfurt: Alfred Metzner Verlag, 1978) 247 ("Clearly, to amount to an 'authentic interpretation', the practice must be such as to indicate that the interpretation has received the tacit assent of the parties generally."); ILC Commentary to Article 27 of the 1966 ILC Draft of the Vienna Convention, par. 15, Report of the Commission to the General Assembly, U.N.Doc. A/6309/Rev.1 reprinted in 1966 Y.B. Int'l L. Comm. p.169, at p.222 ("The value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms."). Cf., Sinclair, *supra* n.10, at p.137 ("The value and significance of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent.").

with the "context" of a treaty, they are also subject to "good faith,"[165] which has been recognized by the ILC as "the fundamental principle of the law of treaties".[166] The ILC went on to argue that "a means should be found in the ultimate text of any convention on the law of treaties . . . to emphasize the fundamental nature of the obligation to perform treaties in good faith".[167] Accordingly, Article 26 of the Vienna Convention (subtitled Pacta Sunt Servanda) states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".

Good faith also appears in Article 2(2) of the Charter of the United Nations:

> "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

It would be more surprising to see a treaty which did not contain a good faith provision, because the requirement of good faith is not a treaty principle in the usual voluntarist sense (i.e., it is not a provision which drafting states are free to include or not include).[168] It is a fundamental consequence of the contractual nature of agreements between states. The process of working out rules to govern the behavior of states only has value if states are bound to apply those rules.[169] A document which states are not bound in good faith to implement is not a treaty, and looks more like a "gentleman's agreement",[170] or something even less. It is worth pointing out that in some circumstances, states may even be bound in good faith to implement unilateral declarations.[171]

As a study of the doctrine of *pacta sunt servanda* demonstrates, good faith in the execution of agreements has been recognized since the dawn of recorded

[165] See Sinclair, *supra* n.10, at p.120.

[166] ILC Commentary to draft Article 23 of the 1966 ILC draft of the Vienna Convention on the Law of Treaties, Report of the Commission to the General Assembly, *supra* n.164.

[167] *Ibid.*

[168] See Sinclair, *supra* n.10, at pp.2-3. See also J.L. Brierly, *The Law of Nations* (Oxford: Oxford University Press, 3rd ed. 1942) 39-46 (addressing the source of obligation in international law).

[169] H. Wehberg has stated that 'the principle of sanctity of contracts is an essential condition of any social community.' Hans Wehberg, 'Pacta Sunt Servanda', (1959) 53 *A.J.I.L.* p.775, at p.786.

[170] See M. Bothe, "Legal and Non-Legal Norms A Meaningful Distinction in International Relations", (1980)11 *Neth. Y.B. Int'l L.* p.65, pp.70-75 (providing a brief history of gentlemen's agreements); M. Nash, "Contemporary Practice of the United States Relating to International Law", (1994) 88 *A.J.I.L.* p.515, at p.515 (providing a brief history of gentlemen's agreements); O. Schachter, "The Twilight Existence of Nonbinding International Agreements", (1977) 71 *A.J.I.L.* p.296, p.299 (describing gentlemen's agreements as precise and definite agreements which are not legally binding but which presume compliance).

[171] See Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. *Rep.* p.253, pp.267-68 (setting out the elements of a binding unilateral declaration). The Court explicitly bases the duty to implement unilateral declarations on the dictates of good faith. *Ibid.* at 268 ("Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."). See also Shaw, *supra* n.96, at p.98 (containing citations to additional material on unilateral declarations).

history.[172] Numerous ancient cultures recognized it. It existed in Roman law, Christianity and Islam. It was widely accepted in the Middle Ages. Despite its occasional detractors, it was accepted by such 16th and 17th century thinkers as Vitoria, Suarez and Grotius.[173] The most serious attacks on good faith came from Hobbes and Spinoza, who argued that the state was justified in doing anything in order to protect its interests, including breaking its own agreements. This conclusion was disputed vigorously by Vattel in the 18th century, who pointed out that rather than being detrimental to security, the sanctity of contracts made possible both security and commerce.[174] Today, there are few who would dispute the norm of *pacta sunt servanda*.[175] This is true, not because of the doctrine's long and illustrious history, nor because it appears in both the United Nations Charter and the Vienna Convention on the Law of Treaties, but because "if a contract, validly concluded, were not binding, then international law would be deprived of a decisive foundation and a society of states would not longer be possible."[176]

If the whole edifice of modern treaty law is based on the duty of states to fulfill their treaty obligations in good faith, then it is clear that treaty interpretation must also be subject to a duty of good faith. Indeed, the ILC has concluded that the duty to interpret treaties in good faith "flows directly from the rule pacta sunt servanda".[177] Consequently, it appears prominently in Article 31(1) of the Vienna Convention.

A Test of "Good Faith Agreement"

No Distinction Between Interpretation and Modification

Interpretive acts must demonstrate agreement and good faith, which leads to the question, what is good faith agreement?' One possibility is that even if states can show agreement to interpret a provision by the parties, that provision still cannot be interpreted if its terms are unambiguous. This position was advanced by the Thai delegation to the 1966 draft of the Vienna Convention, which objected that subsequent practice could not "be used to frustrate the natural meaning of the words or to extend the scope of the original terms."[178] Elisabeth Zoller claims to find a similar meaning of good faith agreement in a 1950 advisory opinion of the ICJ.[179] She argues, based on the decision in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*,[180] that there is a distinction between interpretation and modification of a

[172] See Wehberg, *supra* n.169,at p.786 (describing the history of pacta sunt servanda). See also P.K. Menon, *The Law of Treaties Between States and International Organizations* (Lewiston: Edwin Mellen Press, 1992) (tracing the history of pacta sunt servanda) pp. 55-61.

[173] See Menon, *supra* n.172, at p.56; Wehberg, *supra* n.169, at p.778.

[174] See Wehberg, *supra* n.169, at p.779.

[175] See Menon, *supra* n.172, at p.55.

[176] Wehberg, *supra* n.169, at p.782.

[177] ILC Commentary on draft Article 27 of the 1966 draft of the Vienna Convention on the Law of Treaties, Reports of the Commission to the General Assembly, *supra* n.164.

[178] Waldock Report VI, Comment of the Thai delegation, *supra* n.164.

[179] Elisabeth Zoller, "The 'Corporate Will' of the United Nations and the Rights of the Minority", (1987) 81 *A.J.I.L.* p.610, at p.616.

[180] 1950 I.C.J. *Rep.* 221.

treaty. States are allowed by their subsequent practice under Article 31(3)(b) of the Vienna Convention to interpret a provision by practice that establishes agreement, but modification is not allowed, notwithstanding the acceptance of the practice by the parties.[181] Presumably she means that provisions which are ambiguous are open to interpretation, but that to change a clear provision would be modification rather than interpretation. The ICJ decision on which this is based does indeed seem to draw a distinction between interpretation and modification (revision). The Court, in refusing to provide relief, stated that it is "the duty of the Court to interpret Treaties, not to revise them".[182] Using this definition of good faith agreement, states could not advance practice which sought to interpret "black" to mean "white" or "three" to mean "four". If states did advance these sorts of interpretive acts, they could not change the meaning of the treaty provision even if the parties to a treaty were to agree that it did. In order to modify unambiguous provisions, states would have to follow the treaty's formal amendment procedure.

This argument is belied by another ICJ decision.[183] In 1971, the ICJ faced the problem of interpretive acts under the Charter. The Court rejected an argument that Security Council Resolution 284 (1970) was invalid because two of the permanent members had abstained from voting rather than casting concurring votes. Article 27(3) of the United Nations Charter requires that "[d]ecisions of the Security Council on all other matters[184] shall be made by an affirmative vote of nine members including the concurring votes of the permanent members". It was argued that an abstention was not a concurring vote, and that consequently Resolution 284 had not been validly passed.[185] However, since 1946 a practice has been adopted in the Security Council that an abstention by a permanent member is treated as a "concurring" vote under Article 27(3).[186] The ICJ concluded that decisions of the permanent members "extending over a long period . . . have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions".[187] The Court concluded that this practice had been "generally accepted" by UN members, and constituted a "general practice" of the UN.[188]

[181] See Zoller, *supra* n.179, at p.616.

[182] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, 1950 I.C.J. *Rep.* p.221, at p.229.

[183] Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. *Rep.* p.6.

[184] "Other matters" are those that are substantive. Procedural matters are governed by Article 27(2) of the Charter.

[185] See Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. *Rep.* p.6, at p.22 para.21.

[186] See C.A. Stavropoulos, "The Practice of Voluntary Abstentions by Permanent Members of the Security Council Under Article 27, Paragraph 3, of the Charter of the United Nations", (1967) 61 A.J.I.L. p.737.

[187] Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. *Rep.* p.22 at para.22 (Jan.26).

[188] *Ibid.*

The ICJ made no mention of a distinction between interpretation and modification, in a case which would have seemed a perfect example of Zoller's rule if it existed. There is not much ambiguity in "concurrence". And there is a distinct difference between "concurrence" and "abstention". That the Court allowed "concurrence" to become "abstention" implies that a distinction between interpretation and modification cannot be maintained. Interpretive acts can make what might be termed "modifications". Indeed, as Stavropoulos noted, the outcome of concluding that all Security Council resolutions passed with an abstention are invalid would be far-reaching and absurd.[189]

The Reaction of Other Parties to an Interpretive Act

There is a better way to derive a concrete test from the duty of good faith agreement. It would be inordinately hard to articulate an objective definition of "good faith" which private observers of international law could conveniently apply to the myriad disparate acts which occur under the many treaties currently in force. Yet it is not imperative that private observers have an objective definition of good faith. Good faith is a duty which states owe to each other, for without good faith treaty obligations would be worthless. Since states are owed the duty, and presumably understand what is good faith in international relations, it is best left to states to identify acts in bad faith by other states.

States are presumptively harmed by all acts in bad faith, which decrease the overall value of treaty commitments, giving them an incentive to object to acts which they perceive to be in bad faith. A state's decision about the character of an interpretive act is likely to revolve around a cost/benefit analysis. Since any violation of the text of a treaty dilutes the overall value of treaty commitments by making treaties less certain methods of regulating the behavior of states, this will probably be weighed against what the state perceives to be the value of the interpretation that is being proposed by the act of another state. Where the value of the proposed interpretation exceeds the cost of decreasing the value of treaty commitments, the state will perceive the act as in good faith. Where the value of the proposed interpretation is less than the cost of decreasing the value of treaty commitments the state will probably perceive the act as in bad faith. Each state will make its own calculation about the utility of an interpretive act, and an objection is *prima facie* evidence that the state considers the proposal to be in bad faith.

This is not to say that for various reasons, individual states will always object to acts which states in general perceive as in bad faith. Individual states may remain silent where the act was committed by a close ally, or where the state is contemplating a similar bad faith act.[190] Yet on the whole, the average response of states will most likely reflect the general perception of whether an act is in good faith or bad faith. And where states do not object, as in the interpretation of Article 27(3), then the

[189] See Stavropoulos, *supra* n.186, at pp.744-45.

practice is in good faith.[191] Thus the private observer does not need an objective definition of good faith, but merely has to monitor the reaction of other states. Where a practice is advanced to which a significant number or even a majority of states which are party to the treaty object, that act cannot lead to an interpretation of the treaty, no matter how many times it is performed by individual states. A practice may therefore have uniformity and consistency of a sort, yet still be in bad faith.[192] Such a practice could not interpret a treaty provision.

In some ways, this definition of good faith is the opposite of *opinio juris*. Rather than looking at the belief of the acting state, we look at the reaction of other states. Where *opinio juris* is inward-looking, good faith is outward-looking. Were we to try and determine good faith from the attitude of the acting state, we would invariably be unable to trust our conclusions. The state which is acting in a way which is contrary to a binding treaty provision in the hope of changing it, or of just getting away with the violation, always has an incentive to assert that its act is in good faith. Only by looking at the collective response of the other parties can we determine whether the body of parties to the treaty think the interpretation is in their best interests. Since good faith agreement is defined in a different way from *opinio juris*, not all acts which would meet the criteria of custom would meet the criteria for an interpretive act. And the fact that states have often framed the legal rationales for apparent violations of Article 2(4) in ways which negate their use as the basis for *opinio juris* may have a real outcome on the current status of Article 2(4).

The ICJ: A Problem for the Proposed Definition

Three ICJ decisions are relevant to any discussion of treaty interpretation through subsequent practice. The *Peace Treaties* Case has already been discussed, and the distinction between interpretations and modifications rejected.[193] That rejection was based on the Court's treatment of Article 27(3) in the *Namibia* Case. It will shortly be argued that the outcome of the *Namibia* Case was correct, but that the test apparently used by the Court was incorrect.[194] Since the rejection of the *Peace Treaties* Case is based on the outcome of the *Namibia* Case rather than the Court's test in that case,

[190] For example, the only two non-participants to vote against G.A. Res. 38/7 (1983) (condemning the US-led invasion of Grenada) were El Salvador and Israel, both client states of the US at the time. See infra n.215.

[191] If enough states endorse an act, that act is *per se* in good faith, even if it is based on an inaccurate assessment of the utility of the interpretation (i.e., in the long run the act will actually harm the states accepting it by lowering the overall value of treaty commitments by more than the gain from the interpretation). Good faith is a duty owed to states and applied by states, it is not up to private observers to question the law made by states because it is not in their best interests. Observers are entitled to point out the miscalculation, hoping to change the behavior of states.

[192] See *infra* text accompanying n.s 200-203.

[193] See *supra* pp. 103-105.

[194] See *infra* text accompanying n.s 203-204.

the rejection of the *Peace Treaties* Case remains valid despite the argument that the method by which the Court arrived at the outcome in the *Namibia* Case was flawed. There is no basis for a distinction between permissible interpretations and impermissible modifications by subsequent practice. As the practice of the members of the Security Council with respect to Article 27(3) shows, interpretations can change the apparently unambiguous meaning of words.

The second relevant case is the *Corfu Channel* Case. The *Corfu Channel* Case was referred to the ICJ by a Special Agreement between the United Kingdom and Albania.[195] Albania later contested the Court's right to fix compensation, arguing that the Special Agreement had not given the ICJ jurisdiction to fix compensation.[196] The ICJ examined the subsequent practice of the parties (in this case the nature of the pleadings and argument before the Court) to determine whether the parties had intended that the ICJ fix compensation. Albania had contested the claims of damage and had tried to reserve the right to address the amount of compensation if their motion to dismiss the case was not granted.[197] The ICJ concluded that "[t]he subsequent attitude of the Parties shows it has not been their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation".[198] The ICJ does not explain the basis for its decision or offer any test by which to measure the interpretive acts of the parties.

Since the Special Agreement was a bilateral agreement, it was intuitively obvious that Albania, in responding to the facts of the United Kingdom's compensation claim rather than immediately contesting jurisdiction for such a claim, had authoritatively interpreted the treaty. Bilateral treaties are relatively simple, there are only two parties, and an interpretive act by one which is not immediately objected to by the other is presumably a good faith interpretation. The Court reached this rather obvious result without examining the nature of interpretive acts. So while the outcome in the *Corfu Channel* Case was correct, the case itself is not a source of understanding of interpretive acts. The simplicity of the case allowed a decision without a comprehensive explanation.

The third relevant case is the *Namibia* Case.[199] In upholding the Security Council's interpretation of Article 27(3) of the Charter, the ICJ seemed to focus on the consistency and uniformity of the interpretive acts.[200] While this led to the correct outcome in that case, it will not lead to the correct outcome in all cases. Where the act is in good faith, practice will be consistent and uniform. Likewise, if the act is in bad faith, practice may well also be consistent and uniform. When an interpretive act is undertaken in bad faith, the overall decrease in the value of treaty commitments is shared by all states. The decrease is apportioned out amongst all the parties to the

[195] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. Rep. p.4, at p.24.
[196] See *ibid.* at p.23.
[197] See *ibid.* at p.25.
[198] *Ibid.*
[199] Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. *Rep.* p.6.
[200] See *supra* text accompanying n.187.

treaty, possibly amongst all parties to all treaties. The actual decrease felt by the individual violator may well be smaller than the short term benefit to be gained from violating the provision. As long as to other states the benefit to be gained from the violator's intended interpretation is less than the cost of the decrease in the value of treaty commitments, they will perceive the attempted interpretation as in bad faith. The important thing is that while the other states perceive the act as in bad faith, it will still be in the interest of the violating state.[201] Consequently the violator may pursue action which is on the whole detrimental, and which other states oppose. [202] Yet, a state that had opposed the action when undertaken by another might well undertake the same action when put in the previous violator's position. States will have a somewhat hypocritical incentive to act in bad faith while condemning the bad faith actions of other states. This seeming paradox is demonstrated by the positions of the superpowers during the Cold War. When the Soviet Union attempted to bend the Charter rules, the United States opposed it. When the United States attempted to bend the Charter rules, the Soviet Union opposed it. The weighing of costs and benefits caused each state to pursue their own bad faith actions, while opposing the bad faith actions of others. This led to a certain uniformity and consistency of action. A test of uniformity and consistency is not an appropriate test for interpretive acts. Interpretive acts are subject to a test of "good faith agreement" which can only be measured in the reaction of states. Any test that takes into account the attitude of the violator will be a poor way to discriminate between good faith and bad faith.[203]

The explanation for the *Namibia* Case may well lie in the intuitiveness of the outcome, and a failure to closely examine the underpinnings of practice *qua* custom as opposed to practice *qua* treaty interpretation. One can see a similarity between the consistency and uniformity test in the *Namibia* Case and the requirements of custom formation. The ICJ's language in the *Namibia* Case is reminiscent of Article 38(1) of the Statute of the ICJ, describing customary international law. Thus the ICJ referred to the interpretation as a "general practice" of the UN that was "generally accepted" by the members.[204] No doubt the answer was obvious, there had been twenty years of absolutely consistent practice and no opposition. Perhaps the Court seized on the first test which seemed to explain what they intuitively knew to be the correct answer. The Court seemed to apply the test of practice in custom formation without considering that interpretive practice springs from a different source of law and might well be subject to a different test. If that is true, then an opportunity to

[201] Much of the cost/benefit analysis at p 105 is based loosely and by analogy on Garrett Hardin's article entitled "The Tragedy of the Commons", (1968) 162 *Science* p.1243. Writing about population growth, Hardin eloquently demonstrated how systems sometimes operate to foster activity which is profitable to the individual, but detrimental to the whole.

[202] With reference to the use of force in international relations, this presumes the failure of the UN's collective security machinery. If that machinery were operating as intended, then the states of the world, acting together, could impose a high enough cost on violators to deter violations in situations where no individual states would have sufficient incentive to intervene against the violating state.

[203] See *supra* text following n.192.

[204] See *supra* n.188.

revisit the issue in a more difficult case might lead to a different outcome. The ICJ could face a case where it is clear that the validity of the interpretation is the lack of objection, not the uniformity and consistency of the interpretive act.

GOOD FAITH AGREEMENT

It is time to take another look at the classification scheme that was proposed earlier.[205] It is now possible to incorporate the effects of the various categories of action into the overall classification scheme. The result would look like this:

I. Uses of force outside of the scope of Article 2(4). Result: This would depend on whether the use of force was governed by custom or treaty, and the nature of the justification offered. The general rules for custom formation and treaty interpretation would apply.

II. Uses of force consistent with the text of Article 2(4). Result: No effect on the interpretation of the text.

III. Uses of force inconsistent with the text of Article 2(4).

A. Mischaracterizations of the fact situation in order to use uncontroversial defences.

Result: This will be treated as an attempt at treaty interpretation through subsequent practice, and will be subject to the test of good faith agreement. As a practical matter, it seems likely that the resort to factual misrepresentations will be the result of a self-serving act, and that states will reject such offers of interpretation.

B. Uncontroversial defences applied to inapplicable fact patterns. Result: This will also be treated as an interpretive act. If the other parties do not object, then over time the interpretive act may become an authoritative interpretation of the treaty. This would mean that the presence of the previously inapplicable fact pattern is now a valid reason to invoke the legal defence. Objection by a significant number of states prevents the interpretive act from changing the meaning of the treaty terms, no matter how often it is committed.

C. Legal defences based on legal rights incompatible with the text of Article 2(4).

Result: These acts may lead to a new custom supplanting the treaty provision on a specific point. Whether this has occurred would depend on the practice meeting the requirements of custom formation. The practice would have to be "general" and have *opinio juris*. If there were a pattern of violations based on express legal rationales incompatible with Article 2(4), but the rationales for the various violations were mutually incompatible, then there might be an abandonment of Article 2(4) without the creation of a new custom to fill the

[205] See *supra* p 99.

void. This would be desuetude. If a pattern of acts is insufficient for custom formation or desuetude, it has no effect.

D. Apparent violations unaccompanied by legal rationales Result: No legal rationales accompany these actions, so the intent of the actions has to be implied from the act. Since the actions are incompatible with Article 2(4), the implied intent will probably also be incompatible with Article 2(4). The implied intent may support *opinio juris* in an emerging custom (provided that the pattern of violations is sufficiently uniform and consistent), be used as evidence of desuetude (if the pattern of violations is sufficient to indicate abandonment but not consistent enough to indicate a new custom), or may have no effect (if the totality of violations does not amount to a new custom or desuetude).

What is clearly called for is an examination of the current status of Article 2(4) as a result of the introduction of categories III(A) and III(B). Unfortunately a thorough examination of all the apparent violations of the textual interpretation of Article 2(4) in order to place those acts into the classification scheme and determine their result is beyond the scope of this paper. Instead, this paper will look at the outcomes of some of the situations discussed earlier.

Czechoslovakia (1968)

The Soviet Union relied on an invitation defence in its invasion of Czechoslovakia. The basis of this defence was refuted by the Czechoslovakian government. Consequently, the invasion of Czechoslovakia was a violation of Article 2(4). It was lacking in the *opinio juris* necessary to have constituted part of a customary modification of the Charter,[206] and can only be considered an attempt at treaty interpretation through subsequent practice. As such, in order to have interpreted the meaning of Article 2(4), there would have to have been good faith agreement amongst the other parties to the Charter. The General Assembly never managed to pass a resolution on the incident,[207] but seventy-six speakers condemned the invasion.[208] In addition, a draft resolution condemning the invasion was brought before the Security Council. It was vetoed by the Soviet Union, but received 10 votes in favor.[209] Over the coming weeks, an additional ten states addressed letters to the President of the Security Council protesting the invasion.[210] The result is not

[206] See *supra* pp. 88-90.

[207] The lack of General Assembly action on the issue might be attributable to the Czechoslovak request that the issue be removed from the Security Council agenda following hasty negotiations between Soviet and Czechoslovakian representatives. *Yearbook of the United Nations* 1968 at 303 (New York: United Nations Office of Public Information).

[208] "Summary of Developments During the Twenty-Third Session of the U.N.General Assembly", (1969) 63 *A.J.I.L.* p.569, pp.569-70.

[209] See *Yearbook of the United Nations* 1968 at pp.300-302.

[210] See *ibid.* at p.303.

as clear as it would have been if there had been a General Assembly resolution condemning the invasion, but a significant number of states did object. This prevented the formation of good faith agreement.

Grenada (1983)

As has been suggested earlier, the invasion of Grenada by the United States was a violation of the textual interpretation of Article 2(4),[211] but the US action did not have the requisite *opinio juris* to constitute an attempt at the formation of a new custom. In short, the invasion of Grenada was an "offer" to interpret the Charter through subsequent practice (a category III(B) interpretive act). Consequently, the U.S. invasion may have established interpretations to: broaden the definition of who may invite the presence of foreign forces, change the balance of power in Article 53 of the Charter in favor of regional security organizations, and broaden the definition of self-defence to allow the overthrow of foreign governments where necessary to protect the lives of nationals. These would have been far-reaching changes to the textual interpretation of Article 2(4), but would not have been barred simply for that reason.[212] If the other members of the UN had treated the proposed interpretation as in good faith, then the meaning of Article 2(4) would have been changed.[213] But the vast majority of the members of the UN rejected the interpretive act. In General Assembly Resolution 38/7 (1983), the General Assembly condemned the "armed intervention" in Grenada as a "flagrant violation of international law", and called for an "immediate withdrawal of the foreign troops".[214] The resolution was passed by a vote of 108 to 9. The only states apart from the ones which actually had troops in Grenada to vote against the resolution were El Salvador and Israel,[215] both US client states. The import is clear. The states of the world considered the invasion to be in bad faith. Consequently it could not have any interpretive effect, despite the fact that the US was able to block any concrete action against itself because of its permanent membership on the Security Council. The legal effect of the invasion of Grenada was a nullity. It could not form custom because it did not have the requisite *opinio juris*, and it could not interpret Article 2(4) because it was in bad faith.

[211] See *supra* p. 90.

[212] See *supra*.

[213] Actually, a single act probably does not constitute an authoritative interpretation, but since the invasion of Grenada is being examined out of context with the other acts which might collectively indicate the proposed interpretations, it will be presumed that a single act would interpret the Charter. The ability of a single act to interpret a treaty is related to the number of parties, and the number of objections. The more parties and the more objections (though still, of course, less than a significant number), the more acts it takes to demonstrate agreement. In this respect, the Charter is difficult to interpret because of its essentially universal membership.

[214] G.A. Res. 38/7, U.N.GAOR (1983).

[215] See Joyner, *supra* n.106, at p.139 n.52.

Panama (1989)

Similarly to Grenada, the invasion of Panama was a violation of the textual interpretation of Article 2(4).[216] Since it lacked the *opinio juris* to have contributed to a new custom, if it had any effect on the prohibition on the use of force in international relations, it would have to have been as an interpretive act. But in General Assembly Resolution 44/240 (1989), the General Assembly condemned the "invasion of Panama" as a "flagrant violation of international law" and demanded the immediate withdrawal of US troops from Panama.[217] Resolution 44/240 was adopted by a vote of seventy-five in favor, twenty opposed, with forty states abstaining.[218] Clearly there was no good faith agreement to this possible interpretation of Article 2(4). No law was formed as a result of the invasion of Panama, either in the form of a treaty interpretation or as a new custom.

Generalizing from the Situations Covered

Examining three situations does not prove that the majority of interpretive acts under Article 2(4) have been rejected. But it was not meant to, rather the situations were presented as a complement to the cost/benefit analysis already conducted. Assuming that, viewed objectively, the prohibition on the use of force in Article 2(4) is better for the average state than a looser norm which allows self-defined "just" acts, what predictions would one make?' One could predict that individual (mostly militarily powerful) states in specific situations would calculate a short-term advantage to a looser prohibition, even though on the whole the stricter prohibition remains best for the majority. Consequently, violations would occur if there was no effective enforcement machinery for the prohibition. However, one would also predict that states would oppose the violations, since from their perspective there is no short-term advantage and only the long-term cost. This is exactly what appears to have happened, and the violations in Grenada, Panama and Czechoslovakia illustrate this phenomenon.

The simple fact of violation does not mean that the legal norm has changed. Indeed, since interpretive acts are subject to a test of good faith agreement, one might predict that a large number of violations would be rejected as interpretations of the language of Article 2(4). Again, this appears to be what has happened. It is the author's belief that a majority of violations of the text of Article 2(4) will be accompanied by legal justifications which limit their potential effect to that of an interpretive act. It is the author's further belief that a majority of these will fail as interpretations of Article 2(4).

[216] See *supra* p. 91.

[217] G.A. Res. 44/240 U.N.GAOR (1989).

[218] See K. Matsuura *et al.*, (eds)., *Annual Review of United Nations Affairs 1989*, vol. 1, (Dobbs Ferry: Oceana Publications, 1990) 45.

CONCLUSIONS

The Need for an Explanation

This paper is founded on the premise that at the moment the United Nations Charter came into force, it was binding on the parties. This means that at some point, Article 2(4) was the prohibition on the use of force in international relations. In order to argue that the prohibition has changed, one must begin with the textual interpretation of Article 2(4), and demonstrate a legal process for any asserted change. Many writers have touted the death of Article 2(4), but few have articulated a convincing process by which this could have happened. The legal processes by which Article 2(4) could realistically have been changed are limited. They boil down to two real possibilities: an abrogation of Article 2(4) (either through desuetude[219] or the formation of a new contradictory custom), or the interpretation of the existing language.

Both are possibilities, but the intent of states in the majority of incidents reviewed is at odds with abrogation. This is not to say that it could not have happened. India's first statement before the Security Council on the Goa incident certainly flirts with an intentional abandonment of the Charter, while the basis of Indonesia's intervention in East Timor is studiously vague. The fact of a violation might lead to the inference that the intent was to abrogate Article 2(4) if no other justification was given, but in the majority of the cases examined here (and the author thinks it likely that this would hold true over the majority of violations), states presented a specific legal rationale which conformed with the Charter. India's flirtation with abandonment was short-lived, providing an example of the pressure that can be brought to bear on a state willing to reject the Charter. Given the careful statements of intent that have accompanied most violations of the prohibition on the use of force, both desuetude and the formation of a contradictory custom seem unlikely.

While the intent of states seems to negate an argument about abrogation, there is still the possibility of an interpretation of the meaning of Article 2(4) through subsequent practice. This process is recognized both in the Vienna Convention on the Law of Treaties and in the decisions of the ICJ. Indeed, the legal rationales that accompany violations often seem to act as "offers" to interpret the meaning of a component of Article 2(4). The use of self-defence advocated by the United States after the invasion of Panama is a good example of this phenomenon. "Self-defence" as used by the United States in Panama has little to do with a textual interpretation of self-defence. Thus the invasion, and the legal justification offered can be seen together as an offer to interpret the meaning of Article 2(4).

Good Faith Agreement

The frequency with which such interpretive acts are offered leads inevitably to the

[219] The author is not convinced that desuetude is a valid process of treaty change, but this paper assumes for the sake of argument that it is a valid treaty process. See *supra* pp. 97-99.

question of how to tell which acts have actually interpreted the Charter. The test of good faith agreement advocated here stems from the wording of Article 31(3)(b) of the Vienna Convention and the principle of pacta sunt servanda. In order to authoritatively interpret the meaning of a treaty provision, an act cannot be objected to by a significant number of the parties to the treaty. The cost/benefit analysis implies that the majority of self-serving interpretive acts will be rejected. Some interpretations will be accepted, but this will occur when the vast majority of states perceive the interpretation to be in their best interest. The interpretation of "concurrence" in Article 27(3) of the Charter is a perfect example. The ability of a permanent member to show disapproval through abstaining without having to veto a resolution gave the Security Council greater flexibility and was accepted as a good faith interpretation by members of the United Nations. If history is any guide, most violations of Article 2(4) will be self-serving, and will be rejected.[220]

The Current Status of Article 2(4)

To refer back to Anthony Clark Arend's nomenclature,[221] this paper can probably be classified as a defence of the "legalist" position. But this defence does not stem from a blind attachment to the text of Article 2(4). The text is the starting point of any discussion, but the Charter is flexible and has been changed by the actions of states, and Article 27(3) is a prominent example of this process. But not all practice automatically changes the legal norms established by the Charter. Indeed it has been one of the central arguments of this paper that most subsequent practice has failed to change the interpretation of Article 2(4). This raises the question: In which areas is there evidence of a deviation from the textual interpretation of Article 2(4)?' The analysis of others suggests that the textual meaning of Article 2(4) may have been changed through good faith interpretive acts in the following circumstances:

1. A textual reading of Article 2(4) makes it clear that threats of force are every bit as prohibited as actual uses of force. Yet it appears that threats of force are rarely objected to, and may have been accepted by a majority of the states in the world as being legitimate in some instances.[222]
2. Armed reprisals will usually be illegal under a textual interpretation of Article 2(4) because they will rarely be in direct response to an armed attack, and therefore will not meet the requirements of Article 51. Yet it appears that at

[220] In fact, history may not be a guide. With the end of superpower rivalry, the post-Cold War period appears to be one of greater co-operation and UN activism in the field of collective security. The result may be a world in which there are fewer self-serving uses of force, and growing agreement to interpret Article 2(4) through subsequent practice to permit, for example, humanitarian intervention or even democratic intervention.

[221] See *supra* text accompanying n.s 62-64.

[222] See, e.g., R. Sadurska, "Threats of Force", (1988) 82 *A.J.I.L.* p.239; Schachter, *supra* n.35, at p.1625.

least one reprisal has not generated objections from a significant number of states.[223] The lack of objection to the 1993 US airstrike on Iraq combined with the US reliance on Article 51 appears to indicate a good faith interpretive act which has the possibility of broadening the definition of self-defence to include some armed reprisals. While a single interpretive act is unlikely to modify a universal treaty,[224] it does suggest some uncertainty about the existence of a right of armed reprisal within the definition of self-defence. Clearly, more scholarship would be required to review the 1993 airstrike in the context of other instances of armed reprisal to determine whether Article 51 now contains a limited right of reprisal.[225]

These two issues are offered only as tentative suggestions, and there may well be other areas that have undergone change.[226] There is a distinct possibility that the prohibition on the use of force in international relations is no longer quite the textual interpretation of Article 2(4). The author is not automatically opposed to arguments that the meaning of Article 2(4) has changed, but is opposed to arguments that do not clearly present a legal process for that change.

Legal Norms vs. Reality: A Fatal Disjunction?

Many of the "rejectionists" have based their arguments on the gap between the text of Article 2(4) and the reality of conflict in the post-Charter years. They point to the hundreds of violations and question whether any law that is so rarely and sporadically enforced could continue to be a legal norm.[227] Such authors often point to the failure of the collective security machinery in the Charter as further evidence of the obsolescence of Article 2(4). Arend goes so far as to argue that "recognizing the death of article 2(4) may help demonstrate how far states have strayed from the Charter paradigm and encourage efforts to return to it".[228]

This paper has argued that while violations have been widespread and enforcement sporadic, most states have rejected the attempts of others to change the prohibition on the use of force. The problem with Article 2(4) is the failure of the collective security provisions to provide a counter-balance to the individual state's incentive to violate in specific instances. It is not a failure of the Article 2(4) paradigm, which most states recognize and apply as law except when they themselves are the ones

[223] See G. Stuart and N. Baker, "Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51", (1994) 24 *Ga. J. Int'l & Comp. L.* p.99.

[224] See *supra* n.213.

[225] Derek Bowett's article on armed reprisals is an excellent beginning but does not consider "interpretive acts" and is now somewhat dated. See D. Bowett, "Reprisals Involving Recourse to Armed Force", (1972) 66 *A.J.I.L.* p.1.

[226] There may also be areas which are currently undergoing change. See *supra* n.220.

[227] See *supra*.

[228] Arend, *supra* n.6, at p.37.

doing the violating. It would be a cruel irony if we were to overhaul the Charter in order to make the collective security apparatus more effective,[229] only to find that there remains no law to enforce. We must campaign for the strengthening of the collective security provisions of the United Nations, but to reject the legal norm because of a lack of enforcement is not only contrary to the expressed intent of the states of the world, but akin to throwing out the baby with the bath water.

[229] This might be done by eliminating the permanent member veto and implementing Article 43.