

International Law and the Recourse to Force: A Shift in Paradigms

ANTHONY CLARK AREND AND ROBERT J. BECK

The point is that international law is not higher law or better law; it is *existing* law. It is not a law that eschews force; such a view is alien to the very idea of law. Often as not it is the law of the victor; but it is law withal and does evolve.¹

Daniel Patrick Moynihan

Introduction

When the framers of the United Nations Charter met in San Francisco, they hoped to establish a new world order—one in which the recourse to force would be severely restricted. To this end, they formulated the United Nations Charter paradigm for the *jus ad bellum*. Three components set the parameters of this paradigm: 1) a legal obligation; 2) institutions to enforce the obligation; and 3) a value hierarchy that formed the philosophical basis of this obligation.

The first of these components, the legal obligation, was embodied in Article 2(4) of the Charter. States were to refrain from any threat or use of force against the political or territorial status quo or in any other way against the principles of the United Nations. The only exceptions to this general prohibition were 1) force used in self-defense as defined in Article 51, and 2) force authorized by the Security Council in accordance with the provisions of Chapter VII.

The second component, the international institutions, were established under Chapter VII of the Charter. Under these provisions, the Security

Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force*, London: Routledge, 1993, pp. 177–202. Reprinted with permission of Routledge and the authors.

Council is empowered to investigate international conflicts and determine if there is a threat to the peace, a breach of the peace, or an act of aggression. If the Council so determines, it is further authorized to take collective action against the recalcitrant state.

The third element of the Charter paradigm is the underlying value hierarchy. When the Charter was drafted, even though the framers proclaimed many goals for the new international organization, its preeminent goal was the maintenance of international peace and security. This goal of peace was to take priority over other goals of justice. Justice was to be sought, but not at the expense of peace. Given the experience of the first two world wars, the framers believed that more damage was done to the international system by taking up arms to fight for justice than by living with a particular injustice.

The preceding analysis reveals, however, that since the Second World War, a number of significant developments have challenged the validity of this Charter paradigm. These include such problems as the failure of international institutions and the emergence of new values concerning the recourse to force. Although most international legal scholars would contend that these post-war developments represent serious threats to the Charter paradigm, few would claim that they are indicative of a paradigmatic shift. We reject this contention. Our conclusion is that in the world since 1945, a new legal paradigm has indeed emerged: a 'post-Charter self-help' paradigm. This paradigm, we argue, is at present the best framework for understanding the contemporary law relating to the recourse to force. But even as this second paradigm may currently describe existing law, recent events in the Middle East, Eastern Europe, Central America, Africa, and elsewhere suggest that a third paradigm may be emerging, a 'prodemocratic' paradigm.

This chapter will attempt to provide an analytical framework for understanding these conclusions. In order to do so, the first section will outline the contours of the post-Charter self-help paradigm. The second section will explore the possible emergence of a new, pro-democratic paradigm. Finally, the third section will examine the future direction of the *ius ad bellum* and make recommendations for its development.

The Post-Charter Self-Help Paradigm

Not long after the Charter was adopted, changes in the international system began to challenge the efficacy of this framework for the recourse to force, leading ultimately to the emergence of a new paradigm. In order to understand the nature of this paradigm, let us examine three elements: 1) the failure of Charter institutions; 2) the emergence of a new value hierarchy; and, 3) the changed legal obligation.

The Failure of Charter Institutions

Since 1945 several major problems have developed with the system for the collective use of force established by the Charter. These include the veto, the inability to establish formal mechanisms for collective action, and the general rejection of limited collective security. Even though world leaders and scholars made efforts to respond to these problems, these efforts showed little promise. Using the General Assembly as a substitute for the Security Council only really worked in the case of Korea. And in that case, the Security Council has already authorized the initial action. In subsequent uses of force, the Assembly has not been able to respond effectively to challenge an act of aggression. Similarly, the use of regional arrangements has not proved very successful. Such arrangements have responded only selectively to uses of force by states and have frequently been perceived as little more than a fig leaf for great power actions. Finally, peacekeeping, which developed in the wake of the failure of limited collective security, cannot be considered as a substitute. Peacekeeping explicitly recognizes that collective action to fight aggression is unlikely. It comes into play only after the hostilities have ceased and the parties consent to international supervision. Peacekeeping is thus not a legitimate alternative to the Chapter VII approach to collective enforcement.

In short, in the post-Charter period, international institutions have failed to deter or combat aggression. The international community has faltered in its efforts to address this profound problem.

A New Value Hierarchy

As observed previously, the Charter paradigm for the recourse to force was predicated upon the assumption that 'peace' was more important than justice. In the post-1945 world, however, states have repudiated this hierarchy of values. In many diverse sectors of the international system, claims have been made that force against the existing political and territorial order may, at times, be justified. These claims seem to have manifested themselves in three different ways: 1) claims to use force to promote self-determination; 2) claims to resort to 'just' reprisals; and, 3) claims to use force to correct past 'injustices.'

These claims suggest that the members of the international system have rejected the philosophical underpinnings of the Charter paradigm. Rather than believing that more injury to world order occurs when force is used to pursue just goals, states have come to believe that, at certain times, it is better to break the peace in the name of justice, than to live with the injustice. At times, justice must take precedence over peace.

A Changed Legal Obligation

The Death of Article 2(4)

The failure of Charter institutions to enforce norms relating to the recourse to force and the changing value hierarchy have obliged many scholars to rethink the status of the contemporary *jus ad bellum*. In short, scholars have been compelled to ask whether Article 2(4) is still good international law. We have argued that a putative norm is a rule of international law only if it is authoritative and controlling. As a consequence, for Article 2(4)'s proscription to be regarded as genuine law, its authority and control must be clearly demonstrated.

A review of scholarship and practice suggests three fundamental approaches to this question. The first has been labelled the 'legalist' approach; the second the 'core interpretist' approach; and the third the 'rejectionist' approach.² This section will examine each of these three approaches in turn and conclude that the 'rejectionist' approach reflects most accurately the reality of the international system.

The Legalist Approach. A significant number of international publicists might be considered 'legalists.'³ These legal scholars, while recognizing that problems exist, adhere to the basic belief that the principle enunciated in Article 2(4) is still good law. To make this argument, they stress several points. First, they argue that the norm remains authoritative since no state has explicitly suggested that Article 2(4) is not good law. As Professor Louis Henkin has explained '[n]o government, no responsible official of government, has been prepared to pronounce it dead.'⁴ Thus, because states have not explicitly repudiated Article 2(4), its authority continues.

Second, legalists argue that despite the problems of Article 2(4), the norm remains controlling of state behavior. Here, they contend that despite violations of the norm, it has *for the most part* exerted a restraining influence on state behavior. In the words of Professor Henkin, 'the norm against the unilateral national use of force has survived. Indeed, despite common misimpressions to the contrary, the norm has been largely observed'.⁵ One aspect of this legalist argument seems to be that while it is easy to count the times that a particular norm is violated, it is quite difficult to identify the times when a norm exerted a controlling influence, when states refrained from forcible action because of Article 2(4)'s proscription. Another aspect of this argument is that since most states are not, in fact, using force in violation of the Charter, the norm is generally controlling of behavior.

Finally, the legalists argue that Article 2(4) must be understood as a *treaty* obligation for those states that have ratified the United Nations Charter and not just as an obligation under customary international law. Hence,

the procedure for a normative change is much more specific and defined. Professor Edward Gordon has argued that

[t]he rule embodied in Article 2(4) is not just a freestanding rule of customary law; it is also a formal treaty obligation. States may withdraw their consent to be bound by treaty obligations, but may not simply walk away from them.⁶

Explains Gordon, '[t]he existence of an operational code [read 'state practice'] different from the formal commitment may be cause for withdrawing state consent, but it does not supplant the process for withdrawing consent called for by the treaty or by treaty law generally.'⁷ Although recognizing that treaties may be 'replaced' if they are 'not followed,' Gordon contends that 'an observer's inference that they are lagging behind actual practice is too subjective and fragile a criterion to replace the formal evidence of withdrawal of state consent as an indicator of the continuing force of treaty obligations.'⁸ In other words, states must formally terminate a treaty for it to cease to binding; mere non-compliance is insufficient.

While there is a certain logic in these arguments advanced by the legalists, there are also problems. First, although it may be true that no state has explicitly declared that Article 2(4) is not good law, this fact alone does not mean that the norm is necessarily authoritative. For obvious political reasons, states have not overtly argued that the Charter norms are invalid. States have on numerous occasions claimed the right to use force in circumstances that are, nevertheless, clearly antithetical to the principle enshrined in Article 2(4). Given these claims, it seems incorrect to contend that states still hold 2(4) in very high esteem. Admittedly, the provision may still command some perceptions of legitimacy, but they seem to be far below those required for a healthy rule of law.

Second, the arguments advanced by the legalists for the controlling nature of Article 2(4) also seem to be inconsistent with realities of the international system. Certainly not every state violates Article 2(4), and certainly it is difficult to judge when a particular state's behavior was influenced by the existence of 2(4). Nevertheless, the norm has been violated frequently and with impunity in some of the most important cases of state interaction. Even though legal scholars may disagree as to the precise list of such violations of Article 2(4), there is broad agreement that numerous violations have taken place. . . .

Even Professor Henkin, in arguing that Article 2(4) is still valid, was forced to deal with a number of these instances. He explains:

the norm against unilateral force has been largely observed. With the exception of Korea (in some respects an 'internal war'), the brief, recurrent Arab-Israeli hostilities in 1956, 1967, and 1973, the flurry between

1) No state has repudiated it
2) still a restraining influence

3) it is a treaty

India and Pakistan over Kashmir in September 1965, the invasion of Czechoslovakia by Soviet troops in 1968, [and in the footnote he says: 'One might add, unhappily, Ethiopia-Somalia and Vietnam-Cambodia-China in 1978-79'], nations have not engaged in 'war,' in full and sustained hostilities or state-to-state aggression even in circumstances in which in the past the use of force might have been expected.'⁹

These 'exceptions,' and others that have taken place since the time Henkin's book was written, are profound exceptions, not simply minor incidents. These uses of force would seem rather clearly to indicate that when a state judges other foreign policy goals to be at stake, it will generally *not* allow itself to be circumscribed by the prohibition of Article 2(4).

Finally, the legalists' use of the treaty-nature of Article 2(4) is problematic. Even though Article 2(4) is a treaty provision, the same test for determining the validity of customary international law can also be employed. If a treaty provision is greatly lacking in authority and control, it seems quite logical to argue that the provision is no longer authentic 'international law.' In the decentralized system that exists today, international law is constituted through state practice. In 1945, fifty-one states chose to enunciate a particular rule relating to the use of force by ratifying the United Nations Charter. Since then, these states and over one hundred additional ones have, through their actions, chosen to change this rule. Even though there have been no formal acts that have attempted to change the written words of Article 2(4), the behavior of these states has been sufficient to effect a change.

The 'Core Interpretist' Approach. Another approach to understanding the status of Article 2(4) has been called the 'core interpretist' approach. The 'core interpretists' argue that although the narrow, legalistic interpretation of Article 2(4) no longer represents existing law, a 'core' meaning of the Article that is still authoritative and controlling can nevertheless be identified.¹⁰ Naturally, these scholars differ as to what represents this 'core' meaning. Some suggest that the 'core' is very large. They contend that the basic prohibition contained in Article 2(4) is still valid, except as modified by authoritative interpretations confirmed in state practice. Thus, every unilateral use of force is prohibited unless it can be demonstrated that the accepted interpretation of the Charter allows for an exception. These 'core interpretists' argue that permissible exceptions would include such uses of force as anticipatory self-defense, intervention to protect nationals, and humanitarian intervention.

Other 'core interpretist' scholars take a slightly different approach. They contend that the 'core' of Article 2(4) is much smaller. For example, Professor Alberto Coll suggests that

insofar as there is a remnant of a legal, as opposed to a moral obligation left in article 2(4), it is a good faith commitment to abstain from clear aggression that involves a disproportionate use of force and violates other principles of the Charter.¹¹

According to Coll,

[c]lear aggression and the content of article 2(4) and article 51 would, in turn, be defined by reference to established traditions of normative reasoning, such as prudence and just war doctrine, in an open interpretative process similar, in fact, to that already underlying state decisionmaking on the use of force in many situations.¹²

He explains that '[u]nder this interpretative process, *clear aggression* would encompass different typologies of coercive acts which various traditions of ethical reasoning, throughout different periods of history, have condemned in the strongest terms as unlawful and morally reprehensible.'¹³ Thus using Coll's approach, 'clear aggression' could include the use of force to gain territory, to achieve political domination, and to perpetrate genocide. The activities of Nazi Germany and Imperial Japan that inaugurated the Second World War would be the most obvious examples of such 'clear aggression.'

But whatever the precise nature of the 'core' that the various scholars identify, the important aspect of this approach is that it continues to affirm Article 2(4) as the existing *jus ad bellum*. All the writers of this school would contend that *some* version of Article 2(4) represents the law, and would reject arguments that 2(4) is now dead. One reason for this desire to hold on to even a shred of Article 2(4) is a belief that rejecting the norm entirely might be premature because states do refrain from certain uses of force. Consequently, such rejection could actually contribute to the dissolution of whatever restraining influence 2(4) still exerts. Another reason seems to be the symbolic nature of 2(4). For many 'core interpretists,' Article 2(4) represents a goal, an aspiration of the post-Second World War era. To claim that it is no longer law, would be to claim that prohibiting the unilateral resort to force was no longer a noble goal worth pursuing.

But despite these laudable aspirations, there is one major problem. Holding on to Article 2(4) may actually be doing more harm than good to the international legal system. Given the severely weakened authority of 2(4) and its manifest lack of control, to use Article 2(4) in any way to describe the law relating to the recourse to force may simply be perpetrating a legal fiction that interferes with an accurate assessment of state practice. It may indeed be true that some 'core' of the Article 2(4) prohibition may remain, such as a prohibition on the use of force for territorial aggrandizement. But the problem is that Article 2(4) was designed to be much

→ core meaning of one article still exists

→ excepts do exist in use of force
eg:

more than simply a prohibition on the use of force for that narrow purpose. One of the radical aspects of 2(4) was that it went beyond the Kellogg-Briand Pact, which prohibited recourse to 'war,' by prohibiting all uses of force that were against the territorial integrity or political independence of a state or otherwise inconsistent with the purposes of the United Nations. Moreover, it even prohibited *threats* of force. In other words, the Article 2(4) prohibition was much broader than simply the 'core.' If only this small sub-set of Article 2(4) still remains, it does not seem appropriate to describe the law by reference to the full set.

The 'Rejectionist' Approach. The third possible approach to the status of Article 2(4) has been called the 'rejectionist' approach. To take this approach would be to argue that Article 2(4) does not in any meaningful way constitute existing law. The contention would be that because authoritative state practice is so far removed from any reasonable interpretation of the meaning of Article 2(4), it is no longer reasonable to consider the provision 'good law.'

The classical elaboration of the rejectionist approach can be found in Professor Franck's 1970 article on the death of Article 2(4).¹⁴ At the time, Professor Franck argued that '[t]he prohibition against the use of force in relations between states has been eroded beyond recognition.¹⁵ This erosion, according to Franck, was due to three main factors: 'the rise of wars of "national liberation", 'the rising threat of wars of total destruction,' and 'the increasing authoritarianism of regional systems dominated by a super-Power.'¹⁶ But, he explained, '[t]hese three factors may . . . be traced back to a single circumstance: the lack of congruence between the international legal norm of Article 2(4) and the perceived national interests of states, especially the super-Powers.¹⁷ In short, as states have come to value goals other than those expressed in Article 2(4), the authority and control of the norm have essentially disappeared. As Professor Franck put it in 1970: '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 embodying the precepts of Article 2(4) that, as with Ozymandias, only the words remain.'¹⁸

Twenty years later, in his *The Power of Legitimacy Among Nations*, Franck reaffirmed his 'rejectionist' understanding of Article 2(4). Acknowledging the egregious lack of control of putative rules dealing with the use of force, he commented:

the extensive body of international 'law,' oft restated in solemn texts, which forbids direct or indirect intervention by one state in the domestic affairs of another, precludes the aggressive use of force by one state against another, and requires adherence to human rights standards simply, if sadly, is not predictive of the ways of the world.¹⁹

/Later, Franck compared Article 2(4) and the one-time US Government mandated 55-mile per hour national speed limit. Observing that while both rules possess 'textual clarity,' they, nevertheless, 'do not describe or predict with accuracy the actual behavior of the real world.'²⁰ He explained that

their determinacy is undermined by a popular perception that they can't mean what they so plainly say. The irrationality of the rules—their incoherence: a failure to be instrumental in relation to the purposes for which they were devised—causes us to believe, and act on the belief, that they have become indeterminate. The rules, therefore, have lost some of their compliance pull.²¹

Apart from Professor Franck, no other major international legal scholar has *explicitly* taken this approach. Yet despite this lack of support, the 'rejectionist' approach seems to offer the most accurate description of the contemporary *ius ad bellum*. The legalist approach seems too removed from the realities of the international system and the core interpretist approach seems to do little more than perpetuate a legal fiction. Based on what states have been saying and what they have been doing, there simply does not seem to be a *legal* prohibition on the use of force against the political independence and territorial integrity of states as provided in even a modified version of Article 2(4). The rule creating process, authoritative state practice, has rejected that norm.

The Post-Charter Obligation

If Article 2(4) is in fact dead, a larger question remains: what norms have developed in the post-Charter era to replace it? In other words, what rules of behavior have states constituted that *are* regarded as authoritative and are, in practice, controlling? Based on state behavior, several conclusions can be drawn about legal principles that seem to have emerged to fill the gap caused by the death of Article 2(4). The following section will set out these conclusions. We will employ here a 'positivist' approach to international law. That is, we assume that unless a restrictive norm of law can be established prohibiting a particular use of force, states are permitted to engage in that use of force. In short, for any use of force to be prohibited, an authoritative and controlling *proscription* must exist.

Our proposal does not purport to offer the only acceptable formulation of the law; rather, it seeks merely to present one possible description of the post-Charter *ius ad bellum*. In order to do so, we will first discuss those circumstances under which recourse to force seems to be lawful. Then, we will examine those circumstances under which recourse to force appears to be unlawful.

Lawful uses of force

1. *Self-defense (including anticipatory self-defense and reprisals).* The first circumstance in which the unilateral use of force would seem to be lawful in a post-Article 2(4) legal system would be self-defense. This is not particularly controversial. Individual and collective self-defense has always been explicitly permitted under Article 51 of the Charter. The major change would be the addition of anticipatory self-defense and reprisals.

Before the Charter was adopted, states had the right under customary international law to use force in self-defense even before an armed attack occurred if it could be demonstrated that such an attack were imminent and that no other recourse was available. With the demise of Article 2(4), it is reasonable to assume that this preexisting right would be rehabilitated. There seems to be no consensus on a rule prohibiting force undertaken for that purpose.

In addition to anticipatory self-defense, it would also seem that reprisals would be permissible. States have also been suing a broadened definition of self-defense to justify reprisals. There seems to be a belief on the part of states conducting such actions that they are proper to punish and deter certain prior illegal acts of the target state, even though such initial acts do not rise to the level of an armed attack. While not all states have endorsed the use of force for these purposes, there appears to be no clear agreement on an authoritative norm prohibiting reprisals.

2. *Promotion of self-determination.* In light of the growing preference for 'just' uses of force, the use of force to promote self-determination would also seem to be lawful. But since different states have defined self-determination in different ways, it would be impossible to restrict this right to the promotion of a particular 'type' of self-determination. It would, in other words, be difficult to claim that using force to promote 'pro-democratic' self-determination would be permissible, but using force to promote 'pro-socialist' self-determination would be impermissible. Consequently, there would seem to be a right for states to use force to promote self-determination *however* they define it. This would mean that such action as the Soviet 'liberation' of Czechoslovakia and the American 'liberation' of Panama would be lawful. It would also mean that it would be permissible to provide assistance to either side in a civil conflict, with the determination being made by the intervening party as to which side was acting in the true interests of self-determination.

This use of force to promote self-determination is obviously much more controversial than self-defense. It actually constitutes a clear use of force against the political independence and territorial integrity of a state. Nevertheless, as demonstrated earlier, states have come to regard a just pursuit of

self-determination as a proper use of force, at least when it is their definition of self-determination. Once again, there seems to be no restrictive rule prohibiting such use of force.

3. *Correction of past injustices.* Finally, it would seem to be lawful to employ force to correct injustices that had been inflicted on a particular state at a particular time in the past. This means that if one state had previously seized the territory of another state, had endangered the nationals of that state, or had violated some other major norm of international law, the aggrieved state could use force to rectify the situation. This new rule would legalize such actions as the Argentine invasion of the Falklands and, if they had been done today, the British, French, and Israeli invasion of Egypt in 1956, and the Arab invasion in 1973.

This use of force to correct past injustices also clearly involves action against the political and territorial status quo. States seem to feel, however, that the status quo is often unjust, and that in the absence of other effective means to correct the situation, they have the right to take the matter into their own hands.

Unlawful Uses of Force: Territorial Annexation

If states have come to acknowledge that force may properly be used to promote self-determination and to correct past injustices, very little would seem to be prohibited. In fact, in a world without Article 2(4), the only thing that does seem to be proscribed is the use of force for pure territorial aggrandizement. States still appear to believe that it is illegitimate to use force solely for the purpose of gaining territory.

Perhaps the most dramatic example of this belief can be seen in the response of the international community to the August 1990 Iraqi invasion of Kuwait. When Iraq invaded and annexed Kuwait, it justified its actions on the basis of Arab unity. Claiming that colonial borders had been unjustly drawn, the Iraqi Revolutionary Command Council proclaimed that it had 'decided to return the part and branch, Kuwait, to the whole and origin, Iraq, in a comprehensive, eternal and inseparable merger unity.' Yet despite this apparent claim of correcting a past injustice, the international community squarely condemned the invasion and annexation. On August 2, the United Nations Security Council adopted Resolution 660 condemning the invasion by a vote of 14-0, with Yemen not voting. Four days later the Council acting under Chapter VII of the Charter, imposed economic sanctions on Iraq by a vote of 13-0, with Cuba and Yemen abstaining. Shortly thereafter, following Iraq's claim of annexation, the Council unanimously adopted Resolution 662. This Resolution reiterated the Council's demand 'that Iraq withdraw immediately and unconditionally all its forces' from

Kuwait, and decided 'that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void' and demanded 'that Iraq rescind its actions purporting to annex Kuwait.' On November 30, after much negotiation, the Council adopted Resolution 678 authorizing states to use force in Iraq did not comply with the demanded withdrawal.

The Security Council's actions in this case are quite telling. Even though Iraq's actions were veiled in claims of 'justice,' the Council did not hesitate in condemning the invasion and purported annexation. The justification undoubtedly was too much of a transparent 'pretext' for a simple effort at territorial aggrandizement, reminiscent of justifications used at the beginning of the Second World War. The reaction would indicate a strong perception on the part of the overwhelming majority of states that uses of force for pure territorial aggrandizement are impermissible. Moreover, the fact that such uses of force have been quite rare in the post-War era, indicate that this norm does have a high degree of control.

But what all this suggests is that the legal structure that has emerged from the ashes of Article 2(4) may simply be a modified regime of 'self-help.' Under such a regime, states can lawfully use force to promote self-determination as they define it and to correct what they perceive to be injustices. For these purposes they possess a *competence de guerre*, akin to that possessed by states before the adoption of the League of Nations Covenant. Under this paradigm, however, one use of force is prohibited—force for territorial annexation. Of course even here, state could claim that they were acting for other 'just' reasons when their actual goal was pure territorial acquisition.

An Assessment of the Post-Charter Obligation

If the international legal system has moved toward a modified regime of self-help in the post-Charter period, is this evolution good? Does this type of legal arrangement further the general goals of international law? Assuming that one of the main purposes of international law is to promote stability and regularity in the relations among states, the answer would quite clearly be *no*. Self-determination and justice are extremely subjective terms. They can mean virtually anything a particular state chooses them to mean, and they can be used to justify virtually any use of force. In the world of 'just' causes, one person's liberator is another person's oppressor, and one person's freedom fighter is another person's terrorist.

The problem, however, is that while self-determination can mean almost anything, Article 2(4) has already been stripped of any real meaning. In light of state practice, to contend that it is still good law is to make it mean virtually anything. Recognizing that Article 2(4) is dead may not be

very satisfying, but it may be accurate. The normative framework suggested above certainly does not represent the most desirable legal regime, but it may reflect the *existing* legal regime.

The Post-Cold War Era: A New Paradigm?

Critics of the preceding analysis of the post-Charter self-help paradigm might contend that the discussion has assumed the existence of a particular type of international system. The paradigm, it could be argued, seems to assume the continuance of the Cold War and its attendant evils—lack of superpower cooperation, widespread superpower intervention, and the like. Now that the tumultuous year of 1989 has brought an end to the Cold War, the paradigm no longer depicts reality. With the collapse of the Soviet Union, increased cooperation among the permanent members of the Security Council, the rising capital of the United Nations, and the great movements toward democracy, a *laissez-faire* approach to the use of force no longer seems accepted. Instead, it could be argued, a new 'pro-democratic' paradigm is coming to describe the law relating to the recourse to force.

This section will examine the arguments supporting the existence of this would-be paradigm. It will do so by exploring the possible emergence of a new value hierarchy and a 'new' legal obligation. . . .

The Emergence of a New Value Hierarchy?

In the Post-Charter Self-Help paradigm, justice is valued above peace. States are claiming the right to use force to promote certain 'just' goals. The major difficulty with this formulation is that different groups of states have offered differing and often contradictory definitions of what a 'just' goal is. With the ending of the Cold War, however, it could be contended that an international consensus is emerging around certain acceptable 'just' goals. Specifically, it could be argued that in light of recent developments, there is a consensus that it is proper to use force to promote democratic self-determination in the western sense of the term.

This argument could be made in two steps. First, with the decline of the ideological confrontation between the East and the West, there is growing international agreement on what constitutes an 'illegitimate' regime. Such a regime would be one that engages in gross violations of human rights as enumerated in the Covenant on Civil and Political Rights or one which has come to power in total disregard of constitutional processes. Hence, the pre-1989 regimes in Panama, East Germany, Bulgaria, Czechoslovakia, and Romania, to name a few, could be regarded as illegitimate. In support of the notion that agreement on the illegitimacy of certain

regimes transcends the East-West divide, proponents of this contention would cite Gorbachev's attitude regarding the Eastern European regimes. They would argue that in his calls for change in Eastern Europe and his tacit acceptance of such change, he reflected a new thinking on the part of the Soviet Union's leadership that those regimes were, in fact, illegitimate. Second, because there could be near universal agreement that a particular government is illegitimate, it could be contended that there is an emerging belief that it is becoming permissible to use force against such regimes to promote the self-determination of the peoples.

Although this argument is only in the initial stages of development, one American scholar, Thomas Franck, has attempted to suggest its contours. Professor Franck argued that states 'are gradually coming to agree on a *right* to democratic governance, or freedom from totalitarianism.'²² He explained that

[w]hatever decent instincts came to cluster around the magnet of 'self-determination,' creating a widely-accepted exception to article 2(4), must now carry forward, in the post-colonial era, to imbue a new internationally-recognized human right to political freedom.²³

And, according to Franck, '[k]in to such a right would be another: a right of the democratic members of the international community to aid, directly or indirectly, those fighting for their democratic entitlement.'²⁴ These 'democratic entitlements,' explained Franck, 'are already spelled out in international instruments, in particular the Covenant on Civil and Political Rights, which may now be regarded as customary international law.'²⁵ But Franck believes that

[w]hen the most basic of these rights have been found to have been violated—and *only* then—an enunciated international consensus might now be ready to form around the proposition that the use of some levels of force by states could be justified to secure democratic entitlements for peoples unable to secure them for themselves.²⁶

In short, justice would still be valued over peace, but the definition of justice would not be as subjective as in the self-help paradigm.

The Emergence of a 'New' Legal Obligation?

Based on these institutional and attitudinal changes, it could be argued that a 'new' legal obligation regarding the recourse to force is in the process of emerging. Following Franck, it could be contended that the international community is coming to accept one just cause for the recourse to force

aside from self-defense—intervention to remove an 'illegitimate' regime. With the decline of competing ideologies, there is developing a consensus around what constitutes such an illegitimate regime and a growing acceptance of the permissibility to use force, if necessary, to remove such a regime. If this is indeed becoming the case, then the paradigm depicting the *jus ad bellum* may be shifting away from the post-Charter self-help paradigm to a new pro-democratic paradigm. Under such a paradigm, force would be permissible in two circumstances: to engage in individual and collective self-defense and to promote 'pro-democratic' self-determination.

While such a paradigmatic shift may occur at some point in the future, at present, it seems exceptionally premature to assert its imminent arrival. This is true for a number of reasons. First, despite the dramatic developments in Eastern Europe and the former Soviet Union, there still seems to be no real international consensus as to what constitutes an 'illegitimate' regime. While it is true that an apparent agreement developed regarding the illegitimacy of certain Eastern European governments, there seems to be no such consensus with respect to the rest of the world. If fidelity to the International Covenant on Civil and Political Rights is used as a determinant of legitimacy, a substantial number of countries fall short. Even following the remarkable developments of 1989, the human rights organization Freedom House lists fifty-nine states as 'not free.'²⁷ These states comprise over two billion people and come from nearly every area of the world. Clearly, if over one-third of the states in the international system maintain regimes in which significant political rights and civil liberties, as defined in the West, are denied, it is impossible to argue that there is some consensus on democratic legitimacy.

Second, even assuming there were some emerging agreement on legitimacy, there is clearly no consensus developing on the efficacy of the use of force to remove such a regime. A case in point would be the invasion of Panama by the United States. Even though one argument raised by the United States centered around the illegitimacy of the Noriega regime, there was near universal condemnation for the American action. While certain states believed that the government of Manuel Noriega was indeed illegitimate, there seemed to be a general rejection of US contentions that this illegitimacy gave rise to a unilateral right to invade the country. If this was the case with respect to Panama, it is difficult to envision many other cases in which there could be agreement on the permissibility of force to remove an anti-democratic regime.

In short, despite the dramatic changes that have taken place in international politics over the last several years, there does not yet seem to be the international consensus necessary to support the existence of a pro-democratic paradigm. States have not yet come to accept a *jus ad bellum*

that permits intervention for only one particular type of self-determination aimed at removing illegitimate, anti-democratic regimes.

The Future of the *Jus Ad Bellum*

Three Possible Scenarios

In light of the preceding analysis, it is contended that there has been a definite paradigm shift in the post-Charter period. The Charter prohibition on the recourse to force as established in Article 2(4) is simply no longer authoritative and controlling. States have chosen to reject this strict proscription in favor of a more permissive norm that prohibits force only in cases of action aimed at territorial aggrandizement and allows forcible efforts to promote self-determination as it is variously defined, to carry out a just reprisal, and to correct a past injustice. Despite the changes that have taken place in the international system, states have not yet reached a consensus on a more restrictive norm limiting permissible intervention to cases involving 'pro-democratic' self-determination. In other words, the post-Charter self-help paradigm, for good or ill, still describes the existing law relating to the initiation of force.

Given this conclusion, where is the law going? Is the international system evolving toward a pro-democratic paradigm or not? While it is impossible to answer this question with any certainty, three scenarios seem plausible.

First, it is conceivable that there will be no significant change in the post-charter self-help paradigm. States may continue to claim the right to use force to correct injustices and promote self-determination as they determine.

While there may be increased great power cooperation, this does not necessarily indicate that all states will refrain from acting to promote self-determination. It should be noted, for example, that even while the Soviet Union was allowing the East European states to go their own way, the United States was acting forcefully in Panama. Moreover, the changed nature of Europe may have little to do with the actions of states in other parts of the world. Islamic states, African states, and others may continue to be motivated by diverse definitions of self-determination and justice and may, when appropriate, use force to realize these claims.

A second possible scenario involves the ultimate acceptance of the pro-democratic paradigm. Even though the international system has not yet come to accept a definition of a legitimate regime, it is possible that the international community is evolving toward such definition. Before 1945, human rights was not even a legitimate topic of conversation in international discourse; now, even though definitions of human rights vary

greatly, the notion that individuals have certain rights in the international system is generally accepted. It is possible that over time more refinements will be made in this area of the law and the provisions of instruments such as the Covenant on Civil and Political Rights will begin to be reflected in practice. This may then give rise to an accepted notion of legitimacy and a concomitant right to intervene to promote such legitimacy.

Finally, there is even a possibility that Article 2(4) could be rehabilitated. The recent actions by the United Nations in the Gulf may indicate a willingness to return to a more restrictive approach to force. Even though the Iraqi invasion is an easy case because it involved obvious aggression for territorial aggrandizement, it is possible that the effect of the UN response will be a reinvigoration of the norm. With the world apparently rallying around the Charter in this case, the effect may be to encourage states to be more supportive of Charter norms in the future. Having committed themselves as a matter of principle in this case, states may be more inclined to defend the honor of Article 2(4) in the future. If this were to occur, it could lead to a new consensus on the unilateral use of force. Article 2(4) could actually become reflective of authoritative state practice.

A Recommended Jus Ad Bellum

Whether these or other plausible scenarios will come about is likely to remain unclear for some time. What is clear, however, is that the current post-Charter self-help regime leaves much to be desired. A system that provides very little in normative restraints on the recourse to force, that allows states to use force to promote self-determination and justice as they may choose to define them, is destructive of world order. For policy makers, a course of action that would promote the return to something more closely resembling Article 2(4) would seem to make sense.

Given the recent developments in the United Nations system, the greater potential for great power cooperation, and the commitment of the international community in the Iraqi conflict, the possibility of reestablishing the Charter framework for the recourse to force seems greater than at any other time since 1945. In consequence, we would recommend the following framework for the law relating to the recourse to force. This proposal, we believe, would move the international system closer to a more stable and predictable normative structure. First, we will set out our suggestions for lawful uses of force. Next, we will examine what we believe should be regarded as unlawful uses of force. Finally, we discuss four advantages of our proposal: its clarity of language; its treatment of the changed nature of international conflict; its recognition of the need for limited self-help; and its capacity to enhance international order.

Lawful Uses of Force

Self-defense

As under the Charter paradigm, self-defense would be a permissible ground for states to take recourse to force. Our proposal sets out three explicit circumstances under which a state may lawfully use force to defend itself: armed attack; imminent attack; and indirect aggression.

1. *Armed attack.* First, states would be allowed to use force in response to an overt armed attack. This would simply reaffirm the language of Article 51. When one state engaged in a clear, obvious armed attack against another, the victim state would have the right to respond with force. The only restriction on this right of the aggrieved state would be the traditional requirements of necessity and proportionality.

2. *Imminent attack.* Second, states would be allowed to use force to respond to an 'imminent' armed attack. It seems only logical to assert that states need not be required to wait until the bombs drop or the troops cross their borders before they can take defensive action. Given the technology of modern weaponry, the right of *effective* self-defense could become meaningless if a state were required to weather a first hit before it could respond. In accepting anticipatory self-defense as a permissible ground for the use of force, we posit that the burden of proof should fall upon the state exercising this right. The state must demonstrate that an armed attack is truly 'imminent' and that its preemptive action is necessary.

3. *Indirect aggression.* The International Court of Justice held in the *Nicaragua* case that indirect aggression could rise to the level of an 'armed attack,' engendering a right of self-defense under Article 51. One of the main difficulties with the Court's decision was that it set the threshold of armed attack unduly high.

We accept the notion that indirect aggression can, in some cases, be tantamount to an armed attack. We would, however, propose a lower threshold than that suggested by the International Court of Justice. In our view, indirect aggression (subject to certain qualifications) can be regarded as an armed attack in three instances: covert actions, interventions in civil/mixed conflicts, and certain terrorist actions.

Covert action. While every covert action not undertaken in self-defense is delictual, not every one constitutes an 'armed attack.' It is impossible to determine with absolute precision when a covert action rises to the level of an armed attack. We nevertheless believe that a reasonable assessment of a covert action's character can be made on the basis of three interrelated

factors: the nature of the activities; the severity of the effect of the activities; and the temporal duration of the activities.

Nature of activities. We believe that a host of covert activities could rise to the level of an armed attack. These would include such state actions as assassination, destruction of buildings, attacks against military and civilian targets, sabotage, and other acts of violence. The critical common denominator in all these would be their fundamentally *violent* nature. Covert actions such as bribery of public officials and financial support for political movements would be excluded from this category. Although these non-violent actions would be illegal violations of the sovereignty of the target state, we do not consider them to be equivalent to an armed attack. In short, the necessary precondition for an armed attack is *violence*.

Severity of effect. The effect of the violent covert activities in question should be comparable in severity to the effect of an overt armed attack. This level of severity would obviously vary with the nature of the action. Sabotaging a single small building that contained a limited amount of military equipment would not rise to the level of an armed attack. Assassinating a state's president, destroying a major military compound with explosives, or poisoning a water filtration plant would.

Temporal duration. A third factor to be weighed is the temporal duration of covert activities. A one-time covert act producing an effect of great severity might by itself be sufficient to constitute an armed attack. Activities producing effects of lesser severity, however, might only constitute an armed attack if they were part of an ongoing pattern of behavior. If the head of state were assassinated, that one act per se could be equated to an armed attack. The isolated destruction of a single small building might not be sufficient to be considered an armed attack; nevertheless, the destruction of a number of such structures over a period of time could be sufficient.

Support of rebels. At what point does outside state support of a rebel movement rise to the level of an armed attack? This question proved to be one of the most contentious ones debated during the Central American conflict of the 1980s. In order to answer this inherently difficult question, three inter-related factors must be weighed: the nature of outside support; the severity of the effects of outside support; and the attributability of the effects to the intervening state.

Nature of support. As noted above, the International Court of Justice in *Nicaragua* set the 'armed attack' threshold at a very high level. Specifically, it held that only the introduction of 'armed bands' or 'mercenaries' into a target state would rise to the level of armed attack. We disagree. We contend that a whole *range of actions* could cross the armed attack threshold: a state's provision to rebels of significant financial support; a state's provision of weapons and other equipment, intelligence, command and control

support, and training; and, of course, a state's introduction of armed bands and mercenaries.

Severity of effect. In determining whether a state's actions constitute an armed attack, the *intention* of the intervening state is not dispositive. Nor, moreover, is the *amount of aid* provided by the intervening state to the rebels. The key element in determining whether a state's support of rebels engenders the right of self-defense is the *effect on the target state* of the outside support. The degree of outside support for rebels must be sufficient to produce 'substantial effects' within the target state. Any 'effects' akin to those caused by a conventional attack by regular armed forces should be regarded as 'substantial' ones. As with covert actions, a temporal factor should affect the determination of what constitutes substantiality. 'Substantial effects' could be the result of a single prominent action or of a series of lesser actions undertaken over a period of time.

Attributability of effects to the intervening state. Unlike effects produced by covert action, effects produced by a state's support of rebels are not directly caused by the intervening state. The intervening state merely provides various forms of assistance to the rebels; the rebels, in turn, undertake actions producing effects within their state. Accordingly, for an 'armed attack' to be attributable to the intervening state, the effects within the target state must be demonstrated to be *directly linked* to the intervenor's assistance. For example, if it were proven that an intervening state provided munitions and logistical support to rebel forces, and that those forces employed that assistance in raids against government targets tantamount to an overt armed attack, then the intervening state should be considered to have effectively committed an 'armed attack.' Under such circumstances, the victim state could use force in self-defense against the intervening state.

Terrorist action. As with covert action, every terrorist act is delictual, though not every terrorist act constitutes an 'armed attack.' It is impossible to determine precisely when a terrorist act rises to the level of an armed attack. We nevertheless believe that a host of terrorist acts can do so. Depending on the attendant circumstances, these might include such actions as assassination, destruction of buildings, attacks against military and civilian targets, and sabotage.

A terrorist act is distinguished by at least three specific qualities:

- a. actual or threatened *violence*;
- b. a '*political*' objective; and
- c. an *intended audience*.

Random acts of violence performed without deliberate political objectives should not be considered 'terrorism,' even if they do inspire 'terror.' Neither

should non-violent acts, done for political purposes and directed at a specific target group. Nor, properly speaking, should politically-motivated acts of violence, when undertaken without any particular audience in mind. Accordingly, an 'act of terrorism' should be considered '*the threat or use of violence with the intent of causing fear in a target group, in order to achieve political objectives.*'

In order to justify a forcible state response, the effect of the terrorist act or acts in question must be comparable to the effect of an overt armed attack. This 'armed attack threshold' varies with three interrelated factors: the *locus* of the terrorist act; the *temporal duration* of the terrorist act; and the *severity of injury* the act inflicts upon the state.

Locus. The locus of a terrorist act may be either within a responding state's territory or outside it. Though scholars have generally not isolated this factor, we believe that it is a critical variable for determining the 'armed attack threshold.' Because it violates a state's 'territorial integrity,' a terrorist act occurring within a state's borders constitutes an inherently greater injury to that state's sovereignty than does an identical act abroad.

Temporal duration. A second factor to be weighed is the temporal duration of terrorist acts. A terrorist act can be a single, isolated occurrence or part of an on-going pattern of behavior. The latter variety of act, irrespective of its locus or severity, is more likely to rise to the level of an 'armed attack' because it causes a continuing injury to the state.

Severity of injury to the state. The 'severity' of injury to the state caused by a terrorist act can range across a broad spectrum of acts, although where precisely an act should be placed on this spectrum is debatable. At one end of the spectrum are acts causing injuries of minor severity to the state. We believe that these acts would include ones such as the temporary detention of a private citizen, the destruction of a private citizen's property, or the destruction of a limited amount of government property. Even the killing of a single national could be considered an act inflicting an injury of minor severity upon the state. To contend this is not to diminish the tragic results of such an act; rather, it is to underscore that the severity of the act should ultimately be evaluated in terms of its effect upon the state *per se*.

At the other end of the spectrum are acts causing injury of major severity to the state. We believe that these acts would consist of ones which strike at the core of a state's sovereignty. These would include the assassination of a government official, the destruction of a major government installation, or the killing of a large group of nationals *qua* nationals. While we believe that the killing of one national, or perhaps a small number of them, should not be regarded as inflicting severe injury to the state, we nonetheless contend that the killing of a large group of nationals should be so regarded. When a large number of nationals are attacked solely on the

basis of their nationality, such an attack on what can reasonably be considered an embodiment of the state's sovereignty would seem to cause the state an injury of major severity.

In assessing whether the 'armed attack threshold' has been reached, the locus of the act, its temporal duration, and the severity of injury it inflicts upon the state must be considered simultaneously. As each of these three factors varies, so, too, will the assessment of whether an 'armed attack' has occurred. For example, an attack of a given severity occurring abroad might not be tantamount to an 'armed attack,' while one of equal severity occurring within a state's territory might be. Because an act within a state's borders self-evidently violates that state's 'territorial integrity,' it is reasonable to posit a lower standard for 'severity' for terrorist acts occurring there than for acts occurring outside a state's territory. Similarly, a single act producing an injury of great severity to the state might by itself be sufficient to constitute an armed attack, whereas activities producing injuries of lesser severity might only constitute an armed attack only if they were part of an ongoing pattern of behavior. In addition to the question of which terrorist acts engender a right of forcible response is the question of what entities constitute permissible *targets for a self-defense response*. There are two such possible targets: the terrorist actor itself; or a state related in some way to the terrorist actor.

We submit that a self-defense response should be permitted against a terrorist actor under three circumstances. First, force may be employed by a victim state if the terrorist actor is located in that state's jurisdiction or in an area beyond the jurisdiction of any state: for example, the high seas or the airspace over the high seas. Second, a state may take forcible action against a terrorist actor located in another state's jurisdiction if that 'host state' is unable or unwilling to take steps to suppress that actor. Lacking evidence of 'host state' support or sponsorship of the terrorist actor, a victim state may not use force against host state targets *per se*. Rather, its action must be limited to the terrorist actor alone. Third, a victim state may employ force against a terrorist actor located in a state which is supporting or sponsoring the activities of the terrorist actor.

Depending on the circumstances, a self-defense response should also be permitted against a state involved with a terrorist actor. Here, we propose an 'attributability' requirement similar to that which we advanced for state support of rebels. A state may support or sponsor terrorist actors. In either of these cases, the effects produced by a state's action are not *directly* caused by the state. Instead, the state merely provides various forms of assistance to the terrorist actors; the terrorists, in turn, undertake actions producing effects on the victim state. Accordingly, for an 'armed attack' to be attributable to the sponsoring or supporting state, the effects on the victim state must be demonstrated to be *directly linked* to the state's assistance.

For example, if it were proven that a state provided munitions and logistical support to terrorist actors, and that those terrorists employed that assistance in an action reaching the 'armed attack threshold,' then the sponsoring or supporting state should be considered itself to have effectively committed an 'armed attack.' Under such circumstances, the victim state could use force in self-defense against the terrorist-linked state.

Intervention to protect nationals

Provided that four criteria are satisfied, a state should be permitted to intervene to protect its nationals. First, the nationals of the intervening state must be in imminent danger of loss of life or limb. Second, the target state must be unwilling or unable to protect the nationals of the intervening state. Third, the purpose of the intervention must be limited to the removal of the threatened nationals. The intervention must not be used as a pretext for any other activities in the territory of the target state. Fourth, the force used in the intervention must be proportionate to the mission of removing the nationals. No force may be used beyond that which is required to accomplish that limited task.

Force authorized by the Security Council

Finally, as in the Charter paradigm, force authorized by the Security Council would be permissible.

Unlawful Uses of Force

Aside from the uses of force detailed above, all other uses of force by a state would be prohibited. This would include the use of force to gain territory, to correct past injustices, and to promote self-determination. As noted above, there is virtually universal agreement that the use of force for territorial aggrandizement is currently illegal. To permit such a use of force would be to destroy all vestiges of international order. In addition, even though the post-Charter self-help paradigm seems to allow the use of force to correct injustices and to promote self-determination, we believe that the terms 'injustice' and 'self-determination' are excessively subjective. Were states allowed to use force to promote their own brands of justice and self-determination, nearly any use of force could be legitimized.

Advantages of Our Proposed Jus Ad Bellum

Our proposed *jus ad bellum* may not constitute the 'ideal' regime. Nevertheless, it represents a significant improvement over both the Charter paradigm and the existing post-Charter self-help paradigm. The advantages of

our proposal can be evaluated in the light of four criteria: its clarity of language; the degree to which it addresses the nature of international conflict; the degree to which it recognizes the need for limited self-help; and its capacity to enhance international order.

First, our suggested *jus ad bellum* eliminates some of the interpretation problems of the Charter framework. In particular, the proposal attempts to deal with the meaning of Article 51 and the nature of an 'armed attack.' It allows for an explicit recognition of several categories of action that may give rise to the right of self-defense including imminent attack and indirect aggression. Our approach includes a number of subjective elements; nevertheless, we believe that it contains fewer than other approaches.

Second, our proposal addresses the changed nature of international conflict. It responds to both civil and mixed conflicts and to the problem of state-sponsored terrorism. As noted throughout our work, these types of conflict have been prominent features of the post-Second World War system. Any legal framework must specifically address these varieties of conflict if it is to be effective.

Third, our framework recognizes the need for self-help for the protection of nationals. It acknowledges that states are frequently unable to receive the cooperation of the target state when their nationals are in danger and that sometimes they may be required to engage in unilateral action to extricate their citizens. Our proposal would legitimize such action, subject to the criteria set out above.

Fourth, our proposal recognizes the critical importance of a restrictive *jus ad bellum* for international order. As we have consistently emphasized, the post-Charter self-help paradigm is destructive. It is far too subjective and allows states excessive justifications for the resort to force. If international law is to promote international stability, the normative framework for the recourse to force must be as limited and objective as possible. In our proposal, we consider all uses of force to correct past injustices and to promote self-determination to be impermissible. Although any given use of force for these purposes could indeed be just, it seems impossible to devise any realistic criteria that would be both reasonably objective and acceptable to all states. Accordingly, we support a strict prohibition on the unilateral recourse to force for these purposes.

If a particular incident were to arise in which states claimed that force should be used either to correct an injustice or to promote self-determination, we believe that the Security Council would be the most appropriate body to consider the issue. If the Council determined then that the matter were so grave that it constituted a threat to the peace, the Council could authorize forcible measures. Such a multilateral approach would, in our view, be far more preferable to the unilateralism of the post-Charter self-help paradigm. It would not eliminate the subjective aspects of defining

justice or self-determination. However, before any forcible action could be undertaken, it would require Security Council endorsement.

Notes

1. D. Moynihan, *On the Law of Nations*. 19 (1990).
2. Arend, 'International Law and the Recourse to Force: A Shift in Paradigms,' *Stan J. Int'l L.* 27: 1 (1990).
3. Although it is nearly impossible to categorize scholars as *absolutely* falling into a particular school, some individuals seem to be more clearly 'legalists.' Such scholars would include: Michael Akehurst, Ian Brownlie, and Louis Henkin. See, M. Akehurst, *A Modern Introduction to International Law*: 256-261 (6th ed. 1987); I. Brownlie, *International Law and the Use of Force by States* (1963); L. Henkin, *How Nations Behave*: 135-164 (2nd ed. 1979).
4. Henkin, 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated,' *Am. J. Int'l L.* 65: 544, 547 (1971).
5. L. Henkin, *How Nations Behave*: 146 (2nd ed. 1979).
6. Gordon, 'Article 2(4) in Historical Context,' *Yale J. Int'l L.* 10: 271, 275 (1985).
7. *Ibid.*
8. *Ibid.*
9. L. Henkin, *op. cit.*: 146.
10. This seems to be the approach taken by the majority of international legal scholars. Such scholars would include Derek Bowett, Myres McDougal, John Norton Moore, W. Michael Reisman. See, D. Bowett, *Self-Defence in International Law* (1958); M. McDougal and F. Feliciano, *Law and Minimum World Public Order* (1961); Moore, 'The Secret War in Central America and the Future of World Order,' *Am. J. Int'l L.* 80: 43, 80-92 (1986); Reisman, 'Coercion and Self-Determination: construing Charter Article 2(4),' *Am. J. Int'l L.* 78: 642 (1984).
11. Coll, 'The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from Some of its Best Friends,' *27 Harv. J. Int'l L.* 27: 509, 613 (1986).
12. *Ibid.*: 620.
13. *Ibid.*
14. Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States,' *Am. J. Int'l L.* 64.
15. *Ibid.*: 835.
16. *Ibid.*
17. *Ibid.*
18. *Ibid.*: 809.
19. T. Franck, *The Power of Legitimacy Among Nations*: 32 (1990) (footnotes omitted).
20. *Ibid.*: 78.
21. *Ibid.*
22. Franck, 'Secret Warfare: Policy Options for a Modern Legal and Institutional Context,' Paper presented to the Conference on Policy Alternatives to Deal with Secret Warfare: International Law, US Institute of Peace, March 16-17, 1990: at 17.
23. *Ibid.*: 17-18.