

Article 2(4) in Historical Context

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In most enlightened legal systems the unilateral resort to armed force is justified, excused, or met with sanctions of diminished severity only when it is the sole means available to resist some imminent threat of violence. Obligated to coexist, sometimes even to adopt one another's techniques and appearances, law and force nonetheless represent rival cultures. Recognition of this fact with respect to international relations helps place in proper perspective recent attempts to dislodge Article 2(4) from its intended moorings or, indeed, to eliminate altogether the obligation it embodies.

I

Until this century, the decision by states to employ armed force in their international relations enjoyed close to a full measure of legitimacy under international law. Force used in a way that clearly violated another state's established rights was treated as a subject of concern only between the state employing force and the target state. Third parties might object on the ground that specific, consequential injury to them might result from the breach of international law, but, in general, states not directly affected were deemed not to have rights in jeopardy. If they interfered, it was as mediators or by offering their good offices; in either case upon sufferance.

The Convention for the Pacific Settlement of International Disputes, concluded at the first Hague Peace Conference in 1899, critically weakened the theoretical foundations of this traditional perspective regarding the use of force. It established the principle that, in case of serious trouble or conflict, nations should have resort to the good offices or mediation of foreign states before resorting to arms. Moreover, it recommended that, as circumstances might allow, third parties on their own initiative should offer their good offices or mediation to the states in conflict. The right to do so extended throughout the hostilities, and could never be taken by the warring states as an unfriendly act. These principles established the international community's independent interest in the prevention or cessation of international armed conflict and deprived

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warfare of the legitimacy it derived from the presumed prerogatives of national sovereignty.

Despite the establishment of the international community's interest in narrowing this prerogative based on sovereignty, it must be remembered that World War I began with the denial by a major power that the Hague Convention, or any treaty, continued to be obligatory upon a party to it when that party no longer considered compliance to be in its national interest. Inevitably, such an open-ended assertion of sovereign prerogatives led to the setting aside of other rules and obligations when they were considered by other belligerent states to be incompatible with their respective interests or convenience. As a result, many of the rules of law that the world had thought were most firmly established were disregarded: e.g., rules pertaining to the conduct of warfare, the property and lives of civilian non-combatants, and the treatment of neutrals. Alleged violations of the rules during World War I caused leaders to examine the premises upon which international society had been based. One of these leaders, Elihu Root, said at the time:

[W]e may well ask ourselves whether that general acceptance which is necessary to the establishment of a rule of international law may be withdrawn by one or several nations and the rule be destroyed by that withdrawal so that the usage ceases and the whole subject to which it relates goes back to its original status as matter for new discussion as to what is just, convenient and reasonable.¹

These observations acquire renewed currency in light of arguments recently made that Article 2(4) has been deprived of its legal authority by the frequency and impunity with which its terms appear to be violated under the claims of sovereign prerogative. To the extent that Article 2(4) represents a free-standing expression of a rule of customary law, it may, of course, be overtaken by a more permissive (or any other) code of state behavior. But the evidence is not persuasive that this has happened.²

Consequently, the argument is advanced that noncompliance and de facto tolerance of noncompliance in influential official circles are sufficient at least to evince a telling gap between the formal rule and the "operational code" of state behavior. This distinction between formal

1. Root, *The Outlook for International Law*, PROC. FIFTH NAT'L CONF. AM. SOC'Y FOR JUD. SETTLEMENT OF INT'L DISPUTES 30 (1916).

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. Furthermore, there is little evidence that states are shying away from Article 2(4). States using force or appraising its use by others regularly resort to Article 2(4) to justify their decisions. The seeming frequency of discrepant behavior is evident largely because it is so much easier to itemize and recognize an overt incident of noncompliance than one that is compliant.

expressions of legal obligation—derided as myth systems—and underlying determinants of state behavior—operational codes—is said to be designed to account for and predict more accurately official behavior and reaction to it, on the one hand, and to dispel cynicism about the effectiveness of legal restraints on the use of force, on the other.³ In the present context, these objections may be incompatible with one another. Moreover, it is less than clear that subjecting the authority of formal expressions of state consent to further validation in the form of corroborative behavior would reduce the level of cynicism about the effectiveness of international legal norms. Finally, one should bear in mind that the predictive quality of legal rules serves to influence behavior, not merely to record and account for it.

Article 2(4) tries to reduce questions of national conduct to simple and definite form, so that its core meaning stands out comparatively free from deliberate attempts to manipulate its application to specific events.⁴ Problems arise because Article 2(4) is a legal rule located in the text of a multilateral treaty which requires adaptation to changing circumstances. The challenge becomes one of remaining faithful to its core meaning without thereby sacrificing the flexibility ordinarily required in interpreting constitutional norms.

Historical antecedents may offer some guidance as to the core meaning of Article 2(4). After World War I, the adoption of the Covenant of the League of Nations reestablished the international community's interest in a state's use of armed force in pursuit of its national interests. First, the Covenant declared in Article 10 that "any war or threat of war" was dangerous to the entire community. Except for the substitution of the more inclusive word "force" for "war," the language of Article 2(4) echoes this fundamental expression of community interest. Second, the Covenant also institutionalized the power of public opinion as a sanction against the unlawful use of force by obligating members of the League in Article 11 "to respect and preserve as against external aggression the territorial integrity and existing political independence" of other mem-

3. W. REISMAN, *FOLDED LIES* 16 (1979).

4. On this point as well, Root's 1915 comments are still relevant seventy years later:

Occasionally there is an act the character of which is so clear that mankind forms a judgment upon it readily and promptly, but in most cases it is easy for the wrongdoer to becloud the issue by assertion and argument and to raise a complicated and obscure controversy which confuses the judgment of the world. There is but one way to make general judgment possible in such cases. That is by bringing them to the decision of a competent court which will strip away the irrelevant, reject the false, and declare what the law requires or prohibits in the particular case.

Root, *supra* note 1, at 33.

bers. The policies underlying the Covenant initiated the process and framed the words through which Article 2(4) came to be fashioned.

It is relevant to the interpretation of Article 2(4) that this process of reestablishing the international community's interest in a state's use of armed force did not come about overnight. The process gained momentum as a result of unanimous resolutions of the League Assembly between 1924 and 1927 condemning "wars of aggression" as international crimes;⁵ the declaration of the twenty-one American republics at the Pan American Conference in 1928 considering such wars an international crime "against the human species;"⁶ and the signing later that year of the Kellogg-Briand Pact declaring "in the names of their [the signatory states'] respective peoples 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."⁷ By 1934, with sixty-three states having participated in the Pact, it was said that the Pact had "abolished the conception of war as a legitimate means of exercising pressure on another State in the pursuit of national policy"⁸

The developmental process of Article 2(4) continued following the outbreak of World War II. In 1941, the leaders of Great Britain and the United States declared in the Atlantic Charter that "they believe that all nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force."⁹ The following year, the State Department forwarded to President Roosevelt the first draft of its plan for what became the United Nations, articulating as its first purpose the prevention of "the use of force or threats of force in international relations except by authority of the international organization itself."¹⁰ Thus, even before the formal negotiations leading to the adoption of Article 2(4) in San Francisco in 1945, both the policy and the core of the language by which the community sought to deprive nations of the unlimited use of self-help were already well in place.

Article 2(4) is not merely the product of some momentary burst of enthusiasm; it is a deeply rooted rule of international law embodying a

5. See W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 1010 (3d ed. 1971).

6. *Id.*

7. General Treaty for the Renunciation of War as an Instrument of National Policy, 46 Stat. 2345-46, 94 L.N.T.S. 63 (1929).

8. See H. BRIGGS, *THE LAW OF NATIONS: CASES, DOCUMENTS, AND NOTES* 716-17 n.2 (1938).

9. 55 Stat. 1603 (1941-42).

10. Plan for the Establishment of an International Organization for the Maintenance of International Peace and Security, *reprinted in* R. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER* 991 (1958).

fundamental presumption that the use of force by states in pursuit of their national interests poses an unacceptable danger to the larger community.

II

The 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. The existence of an operational code 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. Treaties, like free standing rules of customary law, are apt to be replaced if they are immoral, unfair, or not followed. However, 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.

One may argue that existing procedures for amending multilateral treaties are too heavily biased in favor of normative stability to assure the continuing adaptability of treaty obligations to changing circumstances. Bias of this sort may well be working to the detriment of Article 2(4)'s capacity to promote the community interests for which it was designed. But surely this fact alone does not justify simply arrogating to oneself as an outside observer, much less as an interested party, the authority to treat it or other treaty obligations as having lost their obligatory character. Rather, obligation is destroyed when a system in fact vindicates so self-serving an escape from formal commitments.

Some attempts to legitimize the unilateral resort to armed force seek to leave Article 2(4) formally in place but to read into it at the same time a less restrictive meaning than the history accompanying its long period of development might suggest. For example, the suggestion has been made that Article 2(4) does not prohibit force unless the force is directed "against the territorial integrity or political independence of a state" or is "inconsistent with the purposes of the United Nations." The idea that force is permissible so long as it is not directed against the integrity of the invaded state's territorial boundaries or its independence was first advanced during oral argument, but given short shrift, in the *Corfu Channel* case.¹¹ So far as I am aware, in the four decades since the Court

11. Statement of Sir Eric Beckett (U.K. v. Alb.), 1948 I.C.J. Pleadings (3 Corfu Channel) 295-96 (Public Sitting of Nov. 11-12, 1948).

rendered its judgment in that case, a less restrictive meaning for Article 2(4) has never been endorsed by any court or official body; still, it continues to crop up from time to time. When the suggestion was made at San Francisco that the words "or in any manner inconsistent with the Purposes of the United Nations" might be read to narrow the scope of Article 2(4), despite the presumption against armed self-help with which the Charter as a whole is infused, the "United States delegate 'made it clear that the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition [against the use of force]; the phrase "or in any other manner" was designed to ensure that there should be no loopholes.'"¹²

The first suggestion from an official source that constraints against armed self-help imposed by Article 2(4) were not absolute but should be viewed against a larger background of complementary Charter norms or objectives was made following the Cuban Missile Crisis. The State Department's Deputy Legal Adviser, defending the imposition of the naval quarantine of Cuba on other grounds, added that "not all threats or uses of force are prohibited; only those which are inconsistent with the purposes of the United Nations are covered by Article 2, paragraph 4."¹³ The suggestion enlisted little support at the time, and might have been thought to have expired completely but for its revival by former Ambassador to the United Nations Kirkpatrick, who, in defending the invasion of Grenada, told the UN Security Council: "The prohibitions against the use of force are contextual, not absolute. They provide ample justification for the use of force against force in pursuit of the other values also inscribed in the Charter—freedom, democracy, peace."¹⁴

Perhaps because the open-endedness of Ambassador Kirkpatrick's interpretation called to mind past invasions of Caribbean and Central American countries which were justified in terms of the pursuit of humanitarian objectives, the restoration of local governmental functions, or the preservation of the peace and harmony of the hemisphere, her construction of Article 2(4) has not found support at the UN. Because Article 2(4) is susceptible to abuse, it is recognized by the international community that manipulations of the text in terms of scope and intent

12. Brownlie, *The Use of Force in Self-Defense*, 37 BRIT. Y.B. INT'L L. 183, 236 n.2 (1961).

13. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515, 523 (1963).

14. Remarks by Ambassador Kirkpatrick to the UN Security Council, Oct. 27, 1983, reprinted in DEP'T ST. BULL., Dec. 1983, at 74. The Office of the Legal Adviser to the Department of State does not share this view. See Letter from Davis R. Robinson dated Feb. 10, 1984, reprinted in 18 INT'L LAW. 381 (1984).

unfortunately discredit legitimate claims to use force, such as to achieve humanitarian aims.

The term *humanitarian intervention* is not found in the Charter, but abounds in discussion of incidents where military action of limited scope and duration is used to rescue persons put in peril by the actions or neglect of a local government. The term's utility for decisionmaking in international law is limited by the fact that it is employed to describe three very different situations: first, where a state uses force to protect the lives or property of its own nationals abroad when a host government is unwilling or unable to provide such protection; second, where the use of force serves to prevent a foreign government from initiating or perpetuating a massive and gross violation of the human rights of its own or a third state's nationals; third, where a state intervenes in a foreign state's civil war or so-called war of national liberation. The first of these situations may be also conceived of as involving considerations of national self-defense; the second, a transcendent norm of human rights; the third, the protection of the invaded state's political independence. The problem in each instance is not so much logic, but the frequency and ease with which the elusive standard of humanitarian motives is abused. Particularly in this hemisphere, humanitarian motives, even when genuine, appear too often to have been subordinated to the attacking state's motive of enhancing its own relative power position.

By emphasizing Article 2(4)'s general proscription of armed force in *international* relations, one can construct an interpretation of it that justifies the use of armed force against groups that are operating in a vacuum of governmental authority. However, even this interpretation suffers from the demonstrated tendency of strong states to create anarchy in weaker ones for the purposes of justifying armed attacks inside their territory.

In sorting out the justifications for the use of force, Article 51 of the Charter must be considered. Article 51 states that nothing in the Charter "shall impair the *inherent* right of individual or collective self-defense *if an armed attack occurs*" (emphasis added). The Charter does not elaborate on what "inherent right" means. In trying to discern the meaning of the inherent right to self-defense, it is once again useful to examine briefly some history. Prior to the adoption of the Charter, the right of self-defense under international law was judged by the standard advanced by Secretary Webster in the *Caroline*¹⁵ case: the necessity of force must be "instant and overwhelming, and leaving no choice of

15. 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 409 (1906).

means and no moment for deliberation.”¹⁶ This standard does not preclude the use of force in anticipation of an armed attack—for instance, where a neighboring state is engaged in alarming military preparations. In contrast, Article 51, while purporting to leave the *inherent* right unimpaired, appears to have imposed a new criterion—the prior happening of an armed attack.

The *travaux préparatoires* of the Charter are not dispositive of the question whether Article 51 was intended to narrow the existing right of self-defense. They reveal only a political accommodation for the benefit of Latin American states that sought assurance that the regional arrangements contemplated by Article 52 would not be undercut by Article 51. What can be said with certainty about Article 51 is that it has been open to abuse when interpreted without due regard to the primary position Article 2(4) plays in the Charter’s policy regarding the use of force.

Despite the primary position of Article 2(4), Professor Rostow proposes that any construction of Article 51 that denies to national leaders the absolute right to determine when considerations of national self-defense dictate the use of armed force would in effect convert the Charter into a “suicide pact.”¹⁷ The decision to use force in self-defense, he has said, “is almost always a conditioned reflex under circumstances of stress.”¹⁸ This perspective on national decisionmaking may be accurate, but history should remind us also that while the instinct for survival is aroused spontaneously when an individual’s life is threatened, it is generally transformed into a more calculated response when the collectivity’s “life” is threatened. This does not gainsay the appropriateness of leaving to each state the determination of when its integrity is threatened by an anticipated invasion. However, it does afford a suitable basis for skepticism when the alleged threat might more objectively be deemed a danger to a state’s relative power position or prestige, or when the threat is posed by an ongoing situation rather than by an instant or overwhelming crisis which admits no choice but to use armed force.

Historically, modern societies have sought to restrain individuals who choose to use armed force upon their citizenry. Historical experience counsels that in international society it is also too dangerous to permit a readily presumed right to coerce the citizenry of other countries.

16. *Id.* at 412.

17. Rostow, *Law ‘Is Not a Suicide Pact,’* N.Y. Times, Nov. 15, 1983, at A35, col. 1.

18. *Id.*