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The Nine Lives of Article 2(4)

David Wippman*

Article 2(4) of the UN Charter has been declared dead, not once, but many times. In effect, it has died early and often, yet each time it somehow lives on only to be declared dead yet again by a new set of self-styled pragmatists wielding old arguments spiced up with new terminology and new examples of Article 2(4)'s demise.¹ And each time a new contrarian commentator marshals the most recent evidence to present at the grave site, a chorus of the faithful tears up the death certificate and pronounces the patient alive if not well, reiterating familiar if updated arguments.

Perhaps the most famous, if not the first, obituary for Article 2(4) and the UN Charter appeared in the *American Journal of International Law* in 1970, in Thomas Franck's provocatively titled article, "Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States."² Franck's diagnosis was simple: the "high-minded resolve of Article 2(4)" had failed because the predicted cooperation of the permanent members of the Security Council never materialized, because ambiguities in the Charter language afforded ample opportunity for abuse, because the nature of warfare shifted, and above all because state practice showed more of breach than of honor.³ In an equally famous reply, Louis Henkin responded

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1. Article 2(4) reads: "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." U.N. Charter art. 2, para. 4.

2. Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 809 (1970).

3. *See id.* at 810-12.

that the glass was half full, that the Charter norms were battered but not beaten, that the focus on violations ignored the larger record of compliance, that the norm influenced state behavior for the better, and that all governments if not all commentators continued to recognize its authority.⁴

The debate has ebbed and flowed over the ensuing years. In 1986, for example, Jean Combacau declared that the international system was "back where it was before 1945: in the state of nature."⁵ More recently, NATO's 1999 aerial war against the Federal Republic of Yugoslavia over Kosovo and the 2003 U.S.-led invasion of Iraq prompted a new series of articles presenting again the case for Article 2(4)'s burial. Franck, for example, concluded that Article 2(4) "has died again, and, this time, perhaps for good."⁶

Early arguments were heavily influenced by realist notions of international law as epiphenomenal, a product of states interacting in an anarchic system in which law exerts no genuine causal influence over state behavior.⁷ The contemporary "Emperor's New Clothes perspective,"⁸ compelled by an accumulating weight of state practice contrary to the dictates of the Charter, concedes what realists long claimed, that powerful states would not allow whatever normative force the Charter carried to stand in the way of pursuing national interests by whatever means necessary.⁹ Of course, for the realists, Article 2(4) could not die because it never had any independent life in the first place. It represented only a temporary coincidence of interest among powerful states, to be used by them as convenient and to be ignored, violated or explained

4. Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 544 (1971).

5. Jean Combacau, *The Exception of Self-Defense in U.N. Practice*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9, 32 (A. Cassese ed., 1986).

6. Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 620 (2003).

7. For a concise introduction to the "realist challenge," see Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 207-09 (1993).

8. See Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AM. J. INT'L L. 621, 621 (2003) (characterizing the position of recent Charter critics who conclude that the 2003 war in Iraq "merely confirmed the long-evident exhaustion of the United Nations Charter as a source of normative guidance on the use of force").

9. See, e.g., INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (Anthony C. Arend, et al. eds., 1996).

away when inconvenient. When states refrained from using force in their international relations, they did so not because of any legal constraint or normative compulsion, but because of material constraints stemming from considerations of relative power and interest vis-à-vis other states.

The realist refrain echoes in Franck's seminal 1970 article, which assigns primary blame for Article 2(4)'s alleged demise to "a single circumstance: the lack of congruence between the international legal norm of Article 2(4) and the perceived national interest of states."¹⁰ In conventional realist fashion, Franck observes that when treaty obligations and national interest conflict, the latter wins out.¹¹ Thus, he concludes, the failure of the Charter stems from "the inability of any rule, such as that set out in Article 2(4), in itself to have much control over the behavior of states."¹² For an international lawyer, this is a hard concession.

Franck's 1970 critique of Article 2(4) finds its most notable modern analogue in Michael Glennon's thoughtful article, "How International Rules Die."¹³ In a sophisticated updating of Franck's early arguments, Glennon applies a rational choice framework that uses the frequency of a rule's violation as the metric for determining whether the rule remains in effect.¹⁴ In this and related work, Glennon concludes that Article 2(4) has fallen into desuetude as a result of too frequent violations.¹⁵ Glennon is careful to point out that desuetude does not imply that the norm has no effect on state behavior, only that the effect is not strong enough to warrant the title of international law.¹⁶ In this latter respect, Glennon's essay avoids the full reach of the realist claim that international law has no causal force, even as he argues that Article 2(4) is no longer binding.

But the upshot of Glennon's position, and of other

10. Franck, *supra* note 2, at 835.

11. *Id.* at 836.

12. *Id.*

13. Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005).

14. *Id.* at 940, 946–50. See also Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF. 16 (2003).

15. Glennon, *supra* note 13, at 958–60.

16. Glennon, *supra* note 13, at 960 ("If a rule is breached by a significant number of states a significant number of times over a significant period of time, I would not call it international law. It may still exert 'compliance pull' as a social norm. It may still be regional law—it is entirely possible that different use-of-force norms hold sway in Europe, say, than in Africa. It may be 'soft law,' whatever that is. But it is not *international* law.") (citations omitted) (emphasis in original).

contemporary critics, is much the same as the realist view that international law neither does nor should drive policy makers to avoid the use of force in pursuit of the national interest. This view has found its way into the highest echelons of the U.S. government, where many key positions are occupied by neoconservatives who favor abandoning treaty obligations inconsistent with U.S. national interests and regard Article 2(4) as a paper constraint unsuited to the contemporary strategic environment and likely, if respected, only to hinder the U.S. exercise of power.¹⁷ Unlike the pragmatic realists of earlier administrations, however, the neoconservatives in and outside the U.S. government have sought to use U.S. power to remake the world, and in particular the Middle East, with results now painfully visible in Iraq.

As Glennon points out, whether we regard Article 2(4) as law or social norm is a semantic and definitional question that cannot be resolved in the absence of empirical tools that are simply unavailable.¹⁸ But the notion that Article 2(4) died in 1970, or in 1986, or in 1999, or in 2003, or that it slowly expired over the last generation, suggests a linear view of the effect of violations. Under this view, the norm ultimately collapses under the accumulated weight of too many and too significant breaches.

This approach assumes that legal norms operate on a one-way ratchet, in which violations progressively undermine a norm with no room for recovery in between violations. In fact, Article 2(4) has displayed remarkable resilience; it not only stubbornly refuses to die, but sometimes emerges stronger than before. Indeed, it was not so long ago that even past and present mourners concluded, in the wake of the dissolution of the former Soviet Union and the subsequent new-found though temporary unanimity of the Security Council, that we were in fact living in a new world order.¹⁹ The Council's authorization of the use of force in the first Gulf War was heralded as proof that the system was finally working as intended.

Perhaps Article 2(4) emerged like Lazarus from the dead in 1990, only to be killed again by subsequent breaches in Kosovo, Iraq, and elsewhere. But it seems more likely that rumors of its

17. For a neoconservative take on international law, see generally ROBERT KAGAN, *OF PARADISE AND POWER* (2003).

18. See Glennon, *supra* note 13, at 952.

19. See Franck, *supra* note 2, at 609–10.

death have once again been exaggerated. In fact, Article 2(4) displays a surprising capacity to endure major setbacks for several reasons. First, its core—the ban against the invasion, occupation, and eventual annexation of another state—remains largely intact. However much the norm may fray through abusive invocations of self-defense, mis-readings of Security Council resolutions, or overreaching claims on behalf of regional organizations, open breaches of the norm remain rare; we are not in the pre-Charter world of German armies marching through Europe and Japanese fleets attacking Pearl Harbor. Second, international law governing force has shown a capacity for adaptation to changed circumstances. As a quasi-constitutional instrument, the Charter must flex at the joints to endure; evolving understandings of the law, to include, for example, a limited right of anticipatory self-defense, should be understood as evolution rather than revolution. And third, and perhaps most important, breaches of the norm tend to be self-limiting, as the international political system adapts or shifts in ways that render repeated breaches contrary to the interests of most states, often including those responsible for the breaches in the first place.

I. NOTHING NEW UNDER THE SUN

Challenges to the normative authority of Article 2(4) are many. In the aftermath of any given incident, whether the conflict over Kosovo or the 2003 invasion of Iraq, the temptation to declare the cause lost and remove the patient from life support is understandably powerful. But before signing a death certificate, we should consider both the baseline against which we are measuring Article 2(4)'s vital signs and the cyclical course in which those vital signs rise and fall.

The framers of the UN Charter were pragmatic men, hardened by the experience of a world war in which entire cities were obliterated by incendiary and nuclear attack. They understood that a flat ban on the coercive use of force would not succeed in eliminating all interstate violence, but undoubtedly hoped to reduce substantially, if not eliminate entirely, large-scale international armed conflicts. In this, they largely succeeded. How much of that success we should attribute to the law of the Charter and the institutional mechanism it creates to “enforce” that law, and how much to national interest and the

distribution of material resources, will forever be open to debate. But at a minimum, the Charter framework offers some normative reinforcement for decisions that might be taken for many reasons.

Of course, the Charter design has never functioned entirely as intended. The Charter's enforcement mechanisms require the support or at least acquiescence of all five permanent members, something achieved only once during the Cold War and only sporadically since. No state ever signed an Article 43 agreement placing troops at the Council's disposal. With the Security Council sidelined throughout most of its history by Cold War tensions and the veto, and more recently by disputes over Iraq and the U.S.-declared "global war on terrorism," the door has stood open for states to act in ways that contravene or at least undermine the Article 2(4) regime.

In his 1970 article, Franck identifies three principal trends that, in his view, culminated in the early death of Article 2(4): "1, the rise of wars of 'national liberation'; 2, the rising threat of wars of total destruction; 3, the increasing authoritarianism of regional systems dominated by a super-Power."²⁰ Each of these trends has been overtaken by historical developments in ways that render them no longer the threat to Article 2(4) they once were, though each has a modern analogue that continues to pose a threat to the Charter norm on the use of force.

A. CHANGES IN THE NATURE OF WAR

The Charter's drafters were in many ways generals fighting the last war; the Charter regime therefore outlawed aggression, with German armies marching through Europe the paradigm case. As Franck points out, the nature of warfare changed in the post-Charter world, with wars of national liberation and insurgencies of various stripes becoming the dominant form of armed conflict.²¹ Attempts to identify an aggressor in such conflicts, and, in particular, to identify an armed attack of the sort contemplated by Article 51, would have been difficult even with a well functioning Security Council. In the polarized climate of the Cold War, such efforts were largely fruitless. In many cases, each side in a given conflict, and its supporters, could argue with greater or lesser plausibility that the other

20. Franck, *supra* note 2, at 835.

21. *See id.* at 812-20.

side was the aggressor. External intervention in internal conflicts became the norm.

Throughout most of the Cold War, most states operated on the assumption that international law permitted military aid to an incumbent government, at least when the government could plausibly claim that such aid was needed to offset external assistance illicitly given to opposing forces.²² Conversely, most states viewed aid to rebel forces as a violation of the principle of non-intervention, even if the rebels portrayed themselves as freedom fighters opposing a dictatorial regime. Franck's point in 1970 was that whether external involvement in a given case constituted legitimate collective self-defense or aggression could not be determined "[i]n the absence of some universally credible fact-determination procedures"²³ Further, all efforts to arrive at agreed rules dealing with the newly endemic phenomenon of "indirect and vicarious aggression" proved fruitless.²⁴

Franck's point, though well-taken, may not prove as much, then or now, as the title of his article might suggest. Article 2(4) does not apply neatly to cases of intervention in internal conflicts, and there is still no generally agreed means short of a frequently deadlocked Security Council for authoritative determination of the facts. Such conflicts are still endemic: so many states intervened in the recent conflict in the Democratic Republic of the Congo, for example, that it was sometimes referred to as Africa's World War.

But internal conflicts are not as frequent as they were during the Cold War. More to the point, weakness in the reach, clarity, and impact of Article 2(4) does not translate into evidence of its demise. It simply means that the authority of the norm is variable; plainly, it is stronger in clear cases of classic inter-state aggression. When Iraqi tanks rolled into Kuwait, there was little room for argument, and the Security Council authorized the use of all necessary means to restore Kuwait's sovereignty and territorial integrity.²⁵ Even in internal conflicts, the norm still offers some guidance. The International

22. See Tom J. Farer, *A Paradigm of Legitimate Intervention*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 316, 319 (L. Fislser Damrosch ed., 1993).

23. Franck, *supra* note 2, at 817.

24. *Id.* at 819.

25. See S.C. Res. 678, para. 8, U.N. Doc. S/RES/678 (Nov. 29, 1990).

Criminal Tribunal for former Yugoslavia determined that Serbia's intervention internationalized the conflicts in Bosnia and Croatia,²⁶ and the International Court of Justice ruled that Uganda's intervention in the Democratic Republic of the Congo violated Article 2(4), despite claims of invitation and self-defense.²⁷

The real complaint amounts to this: force is still used routinely in international relations, without Security Council authorization and in situations that do not amount to genuine self-defense. While force may seldom take the form of open cross-border aggression, it nonetheless permeates the international system; therefore, claim the critics, Article 2(4) has failed. Defenders of Article 2(4) might legitimately accept the premise of this claim without accepting the conclusion. Force remains endemic, but open aggression does not, and illicit interventions remain something to disguise, deny, or excuse.

Differences over the conclusion to be drawn from evidence on which all agree stem in part from differences in methodology and perception. As Henkin observed in 1971, the problem with Franck's diagnosis is that it "judges the vitality of the law by looking only at its failures."²⁸ The same might be said of subsequent diagnoses. Glennon, in the modern version of the argument, contends that we *should* focus principally on the law's failures.²⁹ When a rule is violated, we know that the rule did not cause the behavior sought; conversely, when a rule is followed, we do not know whether the rule was the cause of compliance or incidental to it.³⁰ While Glennon's observation is accurate, his approach stacks the deck by privileging "disconfirming" evidence, and it neglects the possibility that whatever ground is lost when a breach occurs might be made up by subsequent adherence to the norm or by imposition of reputation and other costs on the violator.

A better test of whether Article 2(4) still lives is whether state decision-makers continue to accept it as a general standard of expected conduct powerful enough to constrain state behavior. In fact, argued Henkin, Article 2(4), despite periodic

26. See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶¶ 86–87 (July 15, 1999).

27. See *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, 45 I.L.M. 271, at 307–09 (Dec. 19, 2005).

28. Henkin, *supra* note 4, at 544.

29. See Glennon, *supra* note 13, at 952–53.

30. See *id.* at 939, 967.

breaches, has established itself as a norm and deterred violations: “[t]he sense that war is not done has taken hold, and nations more readily find that their interests do not in fact require the use of force after all.”³¹ Certainly, no government denies that Article 2(4) remains good law. Violations are not justified on the ground that the norm is dead; instead, states invoke self-defense or other legal justification for conduct that others might view as a breach, or deny the facts that would support a claim of breach. While Glennon and others dismiss such statements, in rational choice terms, as “cheap talk,”³² they ought at least to count as evidence of a general recognition that inter-state war either is not or should not be done, except in accordance with the Charter framework. While in a given context a variety of interests may overpower whatever constraining force the norm exerts, it does not follow that the norm is without effect.

Plainly, inter-state wars are less frequent than before 1945. Whether and to what extent that may be attributed to the Charter legal regime is unknown and unknowable. Glennon suggests that while not strong enough to be “law,” Article 2(4) may exercise some constraining force as a social norm.³³ But this enters the realm of irresolvable semantic differences; Article 2(4) of the Charter is alive, whether as law or as social norm. Open breaches still occur, but they are infrequent.

Nonetheless, changes in the nature of warfare have again posed important challenges to the legal regime of the Charter. The modern analogue to wars of national liberation may be transnational terrorism. One important consequence has been a transformation in the definition of what constitutes an armed attack, with the blurring of the boundaries between state and non-state actors. In the past, states assumed that only other states could carry out an armed attack. When Israel bombed PLO headquarters in Tunisia in 1985, it was widely condemned,³⁴ in part because PLO attacks on Israel were not deemed the equivalent of an armed attack that might justify

31. Henkin, *supra* note 4, at 544.

32. Glennon, *supra* note 13, at 977 (citing Stephen M. Walt, *Rigor or Rigor Mortis? Rational Choice and Security Studies*, INT'L SECURITY, Spring 1999, 5, at 29).

33. *Id.* at 963.

34. The United Nations Security Council condemned Israel by a vote of 14-0, with the United States abstaining. See S.C. Res. 573, para. 9, U.N. Doc. S/RES/573 (Oct. 4, 1985).

military action against a host state in self-defense.³⁵ But in 2001, when the United States claimed a right to use force against Afghanistan, the international community largely agreed that the events of September 11 amounted to an armed attack imputable to Afghanistan, even if it could not be shown that the Taliban government authorized, directed, or approved the attack. For the first time in its history, NATO invoked Article 5 of the Washington Treaty, the collective self-defense provision under which an attack against one NATO member is deemed an attack against all.³⁶ The Organization of American States (OAS) pledged to support the United States in a resolution invoking the right of self-defense.³⁷ Similarly, the Security Council in Resolution 1373 criminalized support for terrorists and implicitly recognized that a U.S. use of force against Afghanistan would constitute self-defense.³⁸ This past summer 2006, Israel invaded southern Lebanon, following repeated Hezbollah attacks in Israel. Israel did not view itself as at war with Lebanon; instead, its forces sought to displace Hezbollah fighters to make way for the Lebanese army to exert control over the border region. Yet to attack Hezbollah, in a world organized by territorial boundaries, necessarily meant that Israel had to attack Lebanon as well, just as the United States had to attack Afghanistan in order to pursue Al Qaeda. This kind of transnational conflict between states and non-state actors operating from other states places an obvious strain on the law of self-defense. The problem seems manageable when confined to cases in which a state harbors a non-state terrorist group that commits open attacks against another state. The U.S. claim that it may attack terrorists wherever and whenever it finds them poses a greater challenge, at least conceptually.³⁹

35. See S.C. Res. 573, ¶ 1, U.N. Doc. S/RES/573 (Oct. 4, 1985) (condemning Israeli reprisal against the PLO Headquarters in Tunis, Tunisia as an "act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct"); see also Gregory M. Travaglio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT'L L.J. 145, 157 (2000).

36. See Statement by the North Atlantic Council, Press Release (2001)124 (Sept. 12, 2001), www.nato.int/docu/pr/2001/p01-124e.htm.

37. Organization of American States, Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas, Sept. 21, 2001, OEA/Ser.F/II.24.

38. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

39. See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675

So far, however, that claim has been mostly rhetorical. U.S. cruise missile strikes against suspected al Qaeda members in Yemen, Pakistan, and, most recently, Somalia would plainly violate Article 2(4) if carried out without the consent of the governments of those states, but the United States seems to have obtained consent, or at least acquiescence, in each case.

One important reason Article 2(4) remains alive—if not always well—is that many of the threats to its vitality have proved to be self-limiting. The wars of national liberation that concerned Professor Thomas Franck in 1970 have largely run their course.⁴⁰ Decolonization is all but over, East Timor's independence from Indonesia one of the colonial era's last gasps. The leaders of former national liberation movements, such as the African National Congress in South Africa or the South West Africa People's Organization (SWAPO) in Namibia, now run the governments of independent states. External intervention in civil wars, particularly in failed or failing states, remains a major problem, but wars of national liberation, one important source of such conflicts, have now largely died out.

For structural reasons, the risks posed by the U.S. global war on terrorism may also prove self-limiting. The United States, whatever its rhetoric about attacking terrorists wherever it finds them, cannot afford to do so in very many places without alienating allies or states whose cooperation is vital in the war on terrorism. Mullah Muhammad Omar may be alive and well and busily reorganizing the Taliban in Pakistan, but the United States cannot afford to destabilize the government of Pervez Musharraf by pressing the issue too strongly. And with the exception of Israel and its continuing war against Hezbollah, Hamas, and related groups, other states have not chosen to emulate the United States in its willingness to employ military force across borders in the pursuit of terrorist groups.

B. THE NUCLEAR CHALLENGE AND PREVENTIVE WAR

The second trend cited by Professor Franck in 1970 sounds

(2004). See also Anthony Dworkin, *The Yemen Strike: The War on Terror Goes Global*, CRIMES OF WAR PROJECT, Nov. 14, 2002, <http://www.crimesofwar.org/onnews/news-yemen.html>.

40. See Franck, *supra* note 2, at 813–20 (detailing the applicability of Article 4(2) to the wars of national liberation in Lebanon and South Vietnam).

remarkably familiar: the increasing tendency of states to invoke preemptive self-defense in ways that, if accepted, would render Article 2(4) a dead letter.⁴¹ On its face, Article 51 requires an armed attack to occur as a prerequisite to the exercise of the right to self-defense. As Franck points out, a rule that requires a state to await a first strike is intolerable in a nuclear age, but a rule that “permits a pre-emptive strike whenever a nation regards itself as ‘intolerably threatened’ is so subjective as to be no rule at all.”⁴² But notwithstanding Franck’s concern, states generally have not claimed a right of anticipatory self-defense, much less (until recently) a right to preventive war. Claims to exercise such a right have been few and isolated, and reactions have varied, depending on the circumstances. Thus, Israel’s preemptive strike in the 1967 Six Day War received tacit acceptance from the United States and many western countries, which accepted Israel’s claim that an attack against it by Arab states was imminent. By contrast, the Security Council unanimously condemned Israel’s 1981 attack against the Iraqi nuclear reactor in Osiraq, in large part because no Iraqi attack on Israel was imminent.⁴³

These and other cases demonstrate less the failure of the Charter’s regime governing the use of force than its capacity to adapt to changing circumstances. Over time, the Charter could reasonably be read to permit anticipatory self-defense in the event of convincing evidence of an imminent attack. For the Bush administration, however, anticipatory self-defense, with its continued insistence on evidence of an imminent attack, might, in a post-9/11 world, still be too little, too late. In its 2002 National Security Strategy, the Bush administration claimed the right to engage in preventive military action:

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning. . . .

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more

41. *Id.* at 820.

42. Franck, *supra* note 2, at 821.

43. S.C. Res. 487, ¶ 1, U.N. Doc. S/RES/487 (June 19, 1981).

compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.⁴⁴

By substituting a sliding scale of risk assessment for the imminent attack requirement, the United States effectively adopted, at least in its public rhetoric, the highly subjective standard Franck described a generation ago.⁴⁵ The United States did not, however, invoke the doctrine of preemptive self-defense to justify the 2003 war in Iraq. The political rhetoric prior to the war, which centered on the need to find and destroy weapons of mass destruction Iraq turned out not to possess, suggested the war was in fact an early application of the 2002 National Security Strategy.⁴⁶ The extent to which United States decision-makers genuinely believed their own rhetoric about the "gathering danger"⁴⁷ posed by Iraq remains the subject of debate; some critics of the war suggest the real motive was a neoconservative push to transform the politics of the Middle East through regime change in Iraq.⁴⁸ Either way, the United States, in the end, avoided preemptive self-defense and relied instead on a strained reading of the relevant Security Council resolutions as its primary legal justification for war.⁴⁹

To some extent, the United States' choice of legal justification may have reflected a desire to accommodate allies such as the United Kingdom and Australia, which wanted a justification consistent with the UN Charter and palatable to audiences at home. The United States' legal rationale may also have reflected the concern, evident in the National Security Strategy itself,⁵⁰ that reliance on preemptive self-defense might

44. The National Security Strategy of the United States of America, at 15, Sept. 2002, <http://www.whitehouse.gov/nsc/nss.pdf>. The Bush administration has expanded upon this theme in subsequent speeches and writings by administration officials.

45. See Franck, *supra* note 2, at 821.

46. The National Security Strategy of the United States of America, Sept. 2002, <http://www.whitehouse.gov/nsc/nss.pdf>.

47. President George W. Bush, President's Remarks at the United Nations General Assembly (Sept. 12, 2002), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>.

48. See, e.g., Jonathan Schell, *No Doubt*, THE NATION, June 30, 2003, at 8.

49. See William H. Taft & Todd F. Buchwald, *Future Implications of the Iraq Conflict: Preemption, Iraq and International Law*, 97 AM. J. INT'L L. 557 (2003) (describing the origins of the series of Security Council Resolutions upon which the Bush Administration depended).

50. The National Security Strategy of the United States, available at

open the door for other states to invoke that doctrine to commit aggression. Whatever the reason, here, too, the threat to the Charter appears self-limiting. Given its disastrous post-war experience in Iraq, the United States' appetite for further preventive wars is likely to be modest, at best. The United States has shown little stomach for military action against Iran, despite that country's long-standing hostility to the United States and Israel and its recent progress in efforts to develop nuclear weapons. Similarly, the United States insists that diplomacy is the best means to deal with North Korea's recent nuclear test. Indeed, the United States has little choice, since military action might prompt North Korea to retaliate against South Korea with a nuclear strike against Seoul. In short, Iraq may turn out to be the high-water mark in claims of preemptive self-defense, soon to recede as a threat to the Charter in much the same way that claims of a right to preemptive self-defense declined following the Cuban missile crisis in 1962.

Of course, nuclear weapons remain a major challenge to the Charter system, even if we no longer fear a massive thermonuclear exchange. Ironically, though, the proliferation of nuclear weapons may, in the short run, render violations of the Charter less likely. At a minimum, it will insulate some states from open attack, including the two standing members of the "axis of evil." North Korea already has a potent deterrent against United States' military action, and Iran may soon have it, as well. India and Pakistan can no longer afford to engage in open conflict; like the superpowers during the Cold War, they cannot risk mutual destruction, and so conflict between them must be confined to small-scale skirmishing over Kashmir. While Iranian acquisition of a nuclear weapon would revamp the balance of power in the Middle East, Iran could not afford to use a nuclear weapon against Israel, since it might retaliate in kind. In short, in the near term, proliferation may limit the ability of force-projecting states, particularly the United States, to intervene militarily in states viewed as threats, and that, by itself, may bolster rather than weaken Article 2(4).

In the long run, of course, nuclear proliferation may prove highly destabilizing to the Charter system and the world. At present, any country that shares nuclear material or weapons with a terrorist group runs a substantial risk of detection and

retaliation. But the more countries that acquire nuclear weapons, the easier it will be for any one of them to disguise the source of nuclear material shared with a non-state group. And if regional powers such as Iran acquire nuclear weapons, other states in the region will experience strong pressures to acquire such weapons for themselves.⁵¹ Whether the Charter regime on the use of force can continue to survive in such a world is an open question, but we are not there yet.

III. REGIONAL ENFORCEMENT ACTION

In 1970, a major concern was that exceptions to Article 2(4)'s prohibition on the use of force threatened to swallow the rule. Of particular concern, noted Franck, were the expansive claims made by regional organizations to enforce the peace within their regions and discipline members "suspected of deviation."⁵² Under the express terms of the Charter, regional organizations may not carry out enforcement actions absent prior Security Council authorization, although they may use measures short of force to maintain peace within the region.⁵³ The two superpower-dominated regional blocs occasionally used force or subversion to keep members from straying and sometimes inverted the Charter scheme by taking coercive measures in response to perceived threats to regional peace, even in the absence of Security Council authorization. Thus, for example, the United States placed a naval quarantine around

51. See Noah Feldman, *Islam, Terror, and the Second Nuclear Age*, N.Y. Times Magazine, October 29, 2006, available at <http://www.nytimes.com/2006/10/29/magazine/29islam.html?ex=1319774400&en=072d0d0ae9ef345d&ei=5090&partner=rssus>.

52. Franck, *supra* note , at 822.

53. Article 53(1) reads:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

Cuba during the 1962 Cuban missile crisis and justified its action on the basis of a "recommendation" from the Organization of American States.⁵⁴

With the disintegration of the former Soviet Union, much of the impetus to employ regional organizations in ways inconsistent with the Charter disappeared. With capitalism triumphant, the blocs no longer exist as such; much of Eastern Europe has either joined NATO or is clamoring to do so. But this same tectonic shift in international politics has opened the door to two possible new forms of abuse.

The first, presenting perhaps the greatest challenge to Article 2(4)'s normative authority in recent years, came from an unlikely source: NATO.⁵⁵ NATO's 1999 intervention in Kosovo was a collective action by the world's richest and most powerful states, the states most directly associated with and interested in the maintenance of the rule of law in international affairs. The breach of the Charter was clear and apparent. NATO did not seek or receive Security Council authorization, and it was not acting in self-defense. Given NATO's membership, the intervention could not be dismissed as a simple and transient breach of international law or the aberrant action of a few states carrying little or no precedential value. Moreover, most NATO members made relatively little effort to shoehorn the intervention into the legal categories available under the UN Charter for the use of force.⁵⁶ The United States in particular did not advance a specific legal rationale for the intervention, as it usually does when it engages in significant military action. Instead, the United States articulated a series of contextualized factors that in the United States' view rendered the intervention "justified."⁵⁷

In the aftermath of the Kosovo intervention, and in connection with the drafting of a strategic statement for NATO's 50th anniversary, the United States briefly suggested that NATO as a regional organization did not need Security Council authorization to act.⁵⁸ In Senate testimony on April 21, 1999,

54. Resolution of Council of the Organization of American States, Oct. 23, 1962, 47 US Department of State Bulletin 722 (1962).

55. The discussion of Kosovo below is drawn from David Wippman, *Kosovo and the Limits of International Law*, 25 *FORDHAM INT'L L.J.* 129, 130-131 (2001).

56. See Thomas Franck, *Lessons of Kosovo*, 93 *AM. J. INT'L L.* 857, 859 (1990).

57. See, e.g., James P. Rubin, U.S. Department of State, Daily Press Briefing, Mar. 16, 1999.

58. Franklin D. Kramer, Assistant Secretary of State, Prepared Statement to

Assistant Secretary of State Franklin Kramer noted that “[w]hile collective defense continues to be the core function of the Alliance, future missions should include ‘out-of-area’ contingencies such as Bosnia and Kosovo, which threaten the overall strategic stability of Europe.”⁵⁹ He then added:

As you know, in taking any such NATO action, it is our strong belief that UN Security Council resolutions mandating or authorizing NATO efforts are not required as a matter of international law—and, as the Kosovo situation has shown, that view is widely shared in the Alliance. NATO’s actions have been and will remain consistent with the purposes and principles of the United Nations—a proposition reflected in the Washington Treaty itself. The United States will not accept any statement in the new Strategic Concept that would require a UN Security Council resolution for NATO to act.⁶⁰

NATO’s action in Kosovo and U.S. post-Kosovo rhetoric prompted considerable hand-wringing and new claims of Article 2(4)’s demise. But the consternation was surprisingly short-lived. At the conclusion of the conflict, the UN Security Council adopted a series of resolutions approving the political settlement reached between NATO and the Federal Republic of Yugoslavia, suggesting, if not approval, at least after-the-fact acquiescence in NATO’s decision to intervene.⁶¹ Moreover, NATO’s intervention did not open the floodgates to other “humanitarian interventions,” nor is NATO eager to act again without a Security Council imprimatur. The ongoing genocide in Darfur would be an obvious opportunity for states so inclined to circumvent the Security Council. But the United States, overstretched militarily in Afghanistan and Iraq, is hardly likely to lead the charge against another Arab government absent Security Council authorization and it has shown no disposition to intervene elsewhere for humanitarian reasons. Other NATO members are unlikely to conduct their own humanitarian intervention without U.S. leadership and support, and most did not endorse the U.S. suggestion that NATO generally does not need Security Council authorization for enforcement action. Instead, most NATO states prefer to regard Kosovo as an anomaly rather than a precedent.

the Committee on Foreign Relations, United States Senate: NATO’s Fiftieth Anniversary Summit (Apr. 21, 1999).

59. *Id.* at 19.

60. *Id.*

61. See Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT’L L. 824, 826-27 (1999).

The second post-Cold War shift in attitudes towards regional organizations pertains almost exclusively to Africa, where first the Economic Community of West African States (ECOWAS) and then the African Union (AU) have quietly asserted a right to carry out enforcement actions without the prior authorization of the UN Security Council. In 1990, ECOWAS used force to end the civil war raging in Liberia; it neither sought nor received prior Security Council authorization. Other States generally welcomed, or at least acquiesced in, ECOWAS' decision to use force, and in subsequent resolutions, the Council implicitly supported the intervention.⁶² ECOWAS again used force without prior Security Council authorization in 1996, this time to reinstate the ousted President of Sierra Leone.⁶³ Again, the Security Council implicitly ratified the intervention, but only after the fact.⁶⁴

In 1998, ECOWAS adopted a Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.⁶⁵ The Protocol established a nine-member Mediation and Security Council, empowered to decide by a two-thirds vote on ECOWAS responses to conflicts in member states.⁶⁶ Among other things, the Mediation and Security Council shall "decide on all matters relating to peace and security"; and shall "authorise all forms of intervention and decide particularly on the deployment of political and military missions"⁶⁷ pursuant to triggering conditions that include "serious and massive violation of human rights and the rule of law"; "an overthrow or attempted overthrow of a democratically elected government"; and "[a]ny other situation as may be

62. See Jeremy Levitt, *Humanitarian Intervention by Regional Actors in International Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L.J. 333, 347 (1998); David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 185-86 (Lori Fisler Damrosch ed., Concil on Foreign Relations Press 1993).

63. See Levitt, *supra* note 62, at 347; Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 325-31 (1998).

64. See S.C. Res. 1181, U.N. Doc. S/RES/1181 (July 13, 1998).

65. Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, Dec. 10, 1999, available at http://www.iss.co.za/afregorg/unity_to_union/pdfs/ecowas/ConflictMecha.pdf.

66. *Id.* art. 4, 8-10.

67. *Id.* art. 10.

decided by the Mediation and Security Council.”⁶⁸ Member states are to designate military units to be available to carry out missions mandated by the Mediation and Security Council.⁶⁹ In short, ECOWAS has created a miniature, sub-regional equivalent of the UN Security Council, and arrogated to itself the power to undertake enforcement actions in member states.

In July 2000, the African Union followed suit, by including in its Constitutive Act a provision asserting “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”⁷⁰ In 2002, the AU adopted a protocol establishing a Peace and Security Council empowered to take decisions on intervention by a two-thirds majority, and authorized the establishment of an African Standby Force to help carry out peace support and intervention missions.⁷¹

ECOWAS and AU claims of a right to intervene in grave circumstances have garnered surprisingly little attention, in part because most states would welcome any means to curtail Africa’s many festering conflicts and because the United Nations has repeatedly proven unwilling to tackle such conflicts itself. ECOWAS intervention in Liberia, and later Sierra Leone, followed unsuccessful efforts to persuade the Security Council to take meaningful action. So long as future actions by ECOWAS and the AU fit that pattern, they are unlikely to attract much criticism, even if they do not fit with the Charter scheme for the use of force. In any event, given political and resource constraints, neither ECOWAS nor the AU is likely to employ its claimed mandate to intervene very often. And the ECOWAS and AU models are unlikely to be replicated, or accepted, elsewhere, so their impact on the Charter as a whole will likely remain modest.

68. *Id.* art. 25.

69. *Id.* art. 28.

70. Constitutive Act of the African Union, art. 4(h), July 11, 2000, available at http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm.

71. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, art. 13, July 9, 2002, available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm.pdf>.

CONCLUSION

The end of the Cold War may have loosened generally the political constraints on the use of force. NATO's intervention in Kosovo and the U.S. invasion of Iraq in 2003 would have been unthinkable during the Cold War. Similarly, the U.S. response to the September 11 attacks could not have taken place in a Cold War environment. Such actions are possible today because the danger that competing interventions might escalate to a superpower nuclear confrontation has largely disappeared. Accordingly, NATO and the United States have space to act that did not exist before. Similar space exists for other states that might wish to use force on a limited scale, whether it takes the form of Russian military action in the "near abroad" or the multiple interventions of Uganda and Rwanda in the Democratic Republic of the Congo.

But the flip side of this easing of constraint is the decline of superpower interference in internal conflicts. During the Cold War, both superpowers felt the need to discipline members of their respective blocs. Such discipline, whether in U.S. efforts to maintain friendly governments or overthrow unfriendly ones in Latin America, or Soviet efforts under the so-called Brezhnev Doctrine to retain communist regimes in eastern Europe through force if necessary, posed an important challenge to Article 2(4) that has now largely dissipated. Moreover, competitive superpower interventions on behalf of national liberation movements and "freedom fighters" throughout the developing world, matched by opposing superpower support for friendly governments, have largely ended. The end of the Cold War also paved the way for at least occasional Security Council cooperation on peace and security issues. Thus, even though Article 2(4) faces new challenges, at least some old ones have receded.