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PEACETIME FOREIGN DATA MANIPULATION AS ONE ASPECT OF OFFENSIVE INFORMATION WARFARE: Questions of Legality under the United Nations Charter Article 2(4)

by

James N. Bond
CDR, JAGC, USN

As an Advanced Research Project

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The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

Signature: James N Bond
JAMES N. BOND

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Paper directed by
John B. Hattendorf, D.Phil.
Director, Advanced Research Department

A. R. THOMAS
CAPT, JAGC, USN
Faculty Advisor

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EXECUTIVE SUMMARY

This paper examines the issue of whether the action in peacetime by one state of manipulating the data of a foreign state can equate to being the use of force in violation of U.N. Charter Article 2(4). The paper first reviews the different methods that are used to interpret treaties such as the Charter. It then reviews the Charter system in context of both how it was envisioned by the drafters and how it has evolved in practice.

The paper then examines whether Article 2(4) is still a valid norm in international law. In spite of its numerous violations and that it has evolved from its originally intended meaning, Article 2(4) nonetheless remains a valid norm for the conduct of interstate relations.

Applying these legal concepts, the paper concludes that the manipulation of a foreign state's data may, in certain circumstances, be the use of force against that foreign state in contravention of Article 2(4). These circumstances would likely be limited to acts resulting in physical destruction, death or serious injury as if they were done by kinetic attack (destruction of an aircraft or missiles) or a strategic military asset were rendered useless (blinding of spy satellites). The right to respond in self-defense under Article 51 would apply in these cases if there were a continuing threat to defend against.

However, most uses of data manipulation do not envision such results. Data manipulation resulting in the "crashing" of or interference with systems such as air traffic control, banking and finance, telephones and other communications are more

properly viewed as an unlawful intervention in the internal domestic affairs of another sovereign state. More problematic, but still likely to be considered as intervention rather than a use of force, are such things as disrupting military logistics and personnel systems. As an unlawful act not amounting to the use of force, the victim state would be allowed to respond with proportional counter-measures or reprisals which also do not involve the use of force, with one such response being a "tit-for-tat" type of data manipulation.

PEACETIME FOREIGN DATA MANIPULATION AS ONE ASPECT OF OFFENSIVE INFORMATION WARFARE:

Questions of Legality under the United Nations Charter Article 2(4)

> We live in an age that is driven by information. Technological breakthroughs...are changing the face of war and how we prepare for war.
> William Perry, Secretary of Defense

I. Introduction

In recent years there has been "much ado" about the "revolution in military affairs," about how technology will transform warfare, and how it will alter national strategies, including strategic military thought and resultant operations and tactics. Specific to the information warfare aspect of this revolution in military affairs, some argue that the ability to maintain information dominance over the adversary will have dramatic, far-reaching effects on the battlefield, while others argue that the military application of this new information "third wave"[1] is much ado about nothing. It is the "emperor's new clothes." That argument contends advances in technology have always altered military strategy and operations, that information has always been vital, and that we are, at most, perhaps in a normal evolution, but not in a revolution.

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[1] **Alvin Toffler and Heidi Toffler, War and Anti-War: Survival at the Dawn of the 21st Century (1993). The Tofflers argue that human society has gone through three waves with each wave based on the means in which wealth was created. The first wave was the agrarian, the second the industrial and now we are in the third which is the information wave.**

Certainly technological changes have always occurred throughout history and have been incorporated into military affairs as well as civilian pursuits. The advent of gunpowder, communication by telegraph, mobility by railroad, weapons delivery by tanks, submarines or airplanes, or today's computers and satellites to collect, analyze and disseminate information, have all had a profound impact on the battlefield, the military balance of power and thus also political relations between the nation states of the world. The use of information has been considered of the utmost importance to the military, from the strategic to the tactical level, since the earliest of written thought on the subject.[2] Regardless of whether one considers today's information age an evolution or revolution, it presents challenges heretofore never resolved. "The features and likely consequences of strategic information warfare point to a basic conclusion: Key national military strategy assumptions are obsolescent and inadequate for confronting the threat posed by strategic IW."[3] These new national security strategy challenges[4]

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[2] The earliest, most widely known being Sun Tzu, The Art of War (Samuel B. Griffith trans.,1971). Sun Tzu is well known for his emphasis on knowing one's self and the enemy as well as the use of deception.

[3] Roger C. Molander et.al., *Strategic Information Warfare: A New Face of War* at xvii (1996). This work is the RAND National Defense Research Institute's report on the strategic information warfare exercise "The Day After."

[4] *Id.* at 15-33. The RAND exercises "highlighted seven defining features of strategic information warfare that distinguish it from other forms of conflict and pose new challenges for the U.S. government, American society, and U.S. allies." Declaring all seven are highly effective and warranting

include subsidiary, such as legal, issues of which one is the subject of this paper.

A concerted effort has been made, especially since the last half of the nineteenth century, to formulate in written treaties the standards for the conduct of international relations, including that of armed conflict.[5] To a large extent this recording of the law was a codification of the practices of states over a period of time. As these practices became more and more accepted, it became possible to obtain agreement by the international community to more precisely record the customary international law practice into written treaties. Technological advances incorporated into military weapons and tactics have often created controversy in this procedure. Submarine warfare and air warfare are but two of the more well known examples. The Soviet launching of Sputnik, while not so controversial, is a peacetime example of technology leaping ahead of the legal system. An understanding of the methods of formulating

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special attention, they are categorized as: low entry cost, blurred traditional boundaries, perception management, strategic intelligence, tactical warning and attack assessment, building and sustaining coalitions, and vulnerability of the U.S. homeland.

[5] The use of the term "war" is no longer useful, at least in the sense of discussing the acts of states under international law. Similarly useless in today's international relations is the concept of declaring war as it is no longer relevant in international law. The concept of the "law of war" is today referred to as the "law of armed conflict." The term "humanitarian law" is also sometimes used interchangeably, albeit incorrectly, as it refers to only that portion of the law of armed conflict governing the use of armed force and the treatment of individuals in the course of the armed conflict.

international law reveals that these technological leaps ahead of the international legal system are naturally going to occur.

The development of the technology must precede its incorporation into any device. When fielded and used, that device may have an impact on international relations. That impact, normally, precedes its use or acceptance by a significant number of states over time, which is by definition required for the development of customary international law. As such, the application of innovative technologies will often exceed the current international legal regime. Stated another way, technology changes tomorrow while the law regulates according to the past. Information warfare today presents us, partially, with a repeat of the problem of technological advances producing capabilities that exceed the legal paradigm. An emphasis on the "partially" must be made as not all aspects of information warfare are either new or innovative, let alone technology driven.

The term "information warfare" is in a great many respects a useless term that sows more confusion than clarification. There has been much debate about even using that term as well as the debate over the exact definition of the term. A Presidential Decision Directive addressing information warfare has been in staffing for a long time with no near term issuance apparent. Absent federal government-wide guidance, but with the need to nonetheless move forward, the Department of Defense has issued several iterations of guidance in the information warfare sphere.

The latest definition of information warfare is, "Actions taken to achieve information superiority in support of national military strategy by affecting adversary information and information systems while leveraging and defending our information and information systems. (Command and control warfare is a subset of information warfare)."[6]

One noted thinker and author in this field stated that, "The concept of information warfare has as much analytic coherence as the concept, for instance, of an information worker."[7] Libicki goes on to argue that information warfare as a separate technique of waging war does not exist, but rather consists of several distinct forms. He also argues that information, in and of itself, is not a medium of warfare, with narrow exceptions such as electronic jamming. The Air Force in its white paper on this

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[6] Draft Department of Defense Directive No. S-3600.1, SUBJECT: Information Warfare(U), at paragraph C.3.(U) Information Warfare. Paragraph C. also defines further some of the terms used in the definition of information warfare:
1.(U) Information. Any communication or representation of knowledge such as facts, data, or opinions in any medium or form.
2.(U) Information system. The organized collection, processing, transmission, and dissemination of information, in accordance with defined procedures, whether automated or manual. In information warfare, this includes the entire infrastructure, organization, and components that collect, process, store, transmit, display, and disseminate information.
4.(U) Information superiority. That degree of dominance in the information domain which permits the conduct of operations without effective opposition.
5.(U) Leveraging. The effective use of information, information systems, and technology to increase the means and synergy in accomplishing information warfare strategy.

[7] Martin C. Libicki, *"What Is Information Warfare?,"* The Center for Advanced Command Concepts and Technology, Institute for National Strategic Studies, National Defense University, Aug. 1995.

subject[8] takes a different approach, arguing that information is a separate realm for warfare just as air, land, sea and space are realms. It also argues that information is a potent weapon and a lucrative target.

There can be no doubt that the concept of information warfare as generally discussed is tremendously broad and encompasses a great many unrelated tasks,[9] except for the fact they all utilize information (but then, what does not?). In nearly everyone's proffered definition of information warfare, it is so broad that it encompasses both a great many actions that militaries have been engaged in for centuries (such as espionage and deception) to emerging capabilities from recent technology, to futuristic possibilities. The definitions also tend to include actions that are clearly not normally thought of as warfare (though during an international armed conflict a great variety of actions can be included in the category of "in support of the war effort").

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[8] United States Air Force, *Cornerstones of Information Warfare* (1995).

[9] Libicki separates information warfare, which he calls conflicts that involve the protection, manipulation, degradation, and denial of information, into seven forms, i) command and control warfare, which strikes against the enemy's head and neck; ii) intelligence based warfare, which consists of design, protection, and denial of systems that seek sufficient knowledge to dominate the battlespace; iii) electronic warfare, radio-electronic or cryptographic techniques; iv) psychological warfare, in which information is used to change the minds of friends, neutrals and foes; v) "hacker warfare," in which computer systems are attacked; vi) economic information warfare, blocking information or channeling it to pursue economic dominance; and vii) cyberwarfare, an assorted number of futuristic scenarios. He also queries whether all of these are truly warfare. Libicki, *supra* note 7.

These overly broad definitions have lead some to believe information warfare is nothing new, just packaged differently to help in the competition for defense industry dollars, while others believe it will replace the more traditional forms of warfare.[10]

Certainly part of information warfare is "old hat," though perhaps made more capable by new technologies. The Coalition Forces' "left hook" during the Gulf War is an excellent example of information warfare at work that was, in many respects, business as usual.[11] The deception of using the Marines to make the Iraqi's concentrate their efforts towards the Kuwait coast, while at the same time preventing the Iraqi's from sensing the Coalition build-up of forces in the West, presents no legal challenges as to the lawfulness of the activities, even for those actions that were done before hostilities commenced.

Likewise, less challenging are questions like, in a peacetime environment, can state A hack its way into the dictator of state B's bank and electronically transfer funds from his account in

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[10] **The atomic bomb was another example of a technological achievement that some believed would eliminate the need for large conventional armed forces. The advent of the Korean War not only quickly dispelled that notion but also showed how limited was the use of those weapons in certain circumstances.**

[11] *See* **Convention (No. IV) Respecting the Laws and Customs of War on Land with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, art. 23.(f) of the regulations. Chivalry is one of the three principles of the law of armed conflict. Under that principle, perfidy prohibits the misuse of a protective symbol. For instance it would be impermissible to use an aeromedical evacuation aircraft, properly marked as such, as a platform from which to conduct information warfare. Otherwise, ruses and deceptions are lawful tactics of armed conflict.**

order to cripple his ability to finance his repressive regime's military build-up? Can state A's agents walk into the same bank with traditional weapons and steal the money to deny the financial resource to the dictator of state B? Obviously not (at least not lawfully), so then why would stealing the money by the means of electrons instead of guns make a difference?

On the other end of the legal continuum, there are issues of lawfulness that do challenge the international and domestic systems in place. Information warfare has commonly been divided into two areas, offensive (or information attack) and defensive (information protect). The "operators" are learning that from their perspective such a division is somewhat a false one. It is difficult to improve one's defensive capability without also studying and trying to improve the offensive capabilities one is trying to protect against. Likewise, it is not a profound statement to say that one must know what the defensive capabilities of the adversary are in order to know if your offensive capabilities are effective. From the operators point of view, analysis of offensive and defensive must go hand in hand in order to maximize effectiveness. The same is not true for a legal analysis. Legal issues can very logically remain separated into offensive and defensive issues because there are different laws governing each. A somewhat over broad statement, but generally, defensive issues are regulated by domestic law where offensive issues are regulated more by international law.

II. Scope

The flurry of activity in recent years on information warfare has raised no shortage of legal issues. It would be presumptuous to say that all of the answers have been found in certain areas, but some progress has been made. There has been notable progress in resolving defensive information warfare issues, such as privacy rights, searches and seizures and criminalizing computer attacks. The Justice Department, amongst others, continues to study these and other related legal areas to continuously improve prosecution efforts and make recommendations to Congress for improvements in statutes.

On the offensive side of the equation, there has been some analysis and progress made in the study of information warfare during an international armed conflict. There are certainly issues to be explored further,[12] but the long established norms

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[12] One such issue to be wrestled with is measuring collateral damage. For example, the military of state Z plans to hack into the information system that controls the electrical system of state Y in order to knock out the power system. The purpose of this attack being to deprive state Y's national command authorities of the capability to exercise effective command over its armed forces. The reasonably foreseeable collateral damage resulting from the power shutdown is assessed as being that all of the hospitals will lose power, directly causing the deaths of thousands of patients, and that the sewer and fresh water systems will quit functioning, resulting in widespread disease and deaths in the civilian population. Was the attack proportional? Would fewer non-combatants be killed by all of the traditional bombing raids that it would take to achieve the same level of degradation of the enemy's command and control function? (I note that while this issue is posed in the information warfare sphere, it is not limited to it.) Impacting on the proportionality and necessity issue is how to do a battle damage assessment (BDA). If we were to take out the power system

of necessity, proportionality and perfidy are still applicable and have been shown to be capable of being applied to technology that allows a state to conduct armed conflicts with electrons in place of traditional armed forces or weapons.

The aspect of information warfare that has had very little examination is the use of offensive information warfare in peacetime[13] (other than during international armed conflict[14]). This is a particularly interesting omission as it is becoming evident that the most effective use of information warfare comes

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by information warfare means, but yet could not positively verify it, do we meet the necessity and proportionality tests if we attack the target again with conventional weapons, thereby causing, at least potentially, additional collateral damage?

[13] The use of the phrase "offensive information warfare" by itself, let alone with the added descriptive of "in peacetime" can raise great sensitivities. "Warfare in peacetime" is of course a contradiction. The implications of "offensive" are ones some officials would rather not advertise. However, these are the phrases currently in use in the literature, such as those cited herein, *supra,* notes 3, 6, 7 and 8. Aside from the fact that better terms could be used, it is rather unrealistic and naive to believe that there are not others developing offensive information warfare capabilities.

[14] International armed conflict is defined in Common Article 2 to the four Geneva Conventions, one of the four being the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T 3114, 75 U.N.T.S. 31; and further defined in, for those states a party to the two Additional Protocols to the Geneva Conventions, Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art 1. para. 3.-4., U.N. Doc. A/32/144. Annex I (1977), 16 I.L.M. 1391 (1977); and Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, art 1., U.N. Doc. A/32/144. Annex II (1977), 16 I.L.M. 1442 (1977)

before hostilities start.[15] The greatest efficiency and leverage that may be obtained is the accomplishment of a political objective without having to resort to the use of armed force or, failing that, in preparing the battlefield. In such a situation, the traditional law of armed conflict does not apply. The restrictions and obligations of the United Nations Charter system and customary international law are the guiding principles.

This paper will examine one narrowly focused issue of offensive information warfare in peacetime.[16] Can the manipulation by one state of a foreign state's data ever become the use of force against that foreign state in contravention of

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[15] The USACOM information warfare wargame, Evident Surprise 96, found this to be so. The "Day After" Rand exercise/study also provides insight on maximizing the effect of "strategic information warfare."

[16] Beyond the scope of this paper is what will warfare in the future be? McDougal and Feliciano state "some degree of coercion is almost continuously observable in the ordinary process of state interaction for values." They further cite Aron, On War 8 (1959), "Relations between sovereign states may be more or less bellicose; they are never *essentially* or *ultimately* peaceful." Myres S. McDougal and Florentino P. Feliciano, The International Law of War 123 (1994). There are those that postulate that warfare will no longer be fought by armed forces over territorial borders, but rather will be over economic markets and political spheres of influence (taking warfare out of the traditional military realm using military weapons and replacing it with financial resources, access to markets, controlling information and diplomatic moves). Today, and for quite a long time now, it has clearly only been possible to have "peace" in regards to the military portion of national security. Even peace in that sphere is debatable if one argues that deterrence is a more heightened state of military affairs than true peace. Certainly in the economic and political portion, the lowest level of effort can be best characterized as periods of competition vice peace. If in the future these areas become true warfare, then much more than just the subject of this paper will need rethinking.

the U.N. Charter, and if so, when? Manipulation of data encompasses destroying it, denying its use, corrupting (altering) it, or exploiting it (that aspect of manipulation that equates to espionage by electronic means is still espionage and should be treated as such). This paper is concerned with what is commonly referred to as hacker warfare or computer warfare, specifically the nonconsensual accessing of another's information based system with one's own, but done on a state-to-state basis.[17] A related issue that is one aspect of data manipulation is what RAND refers to as perception management. These are acts of propaganda, which by virtue of today's technology and information systems, can be much more powerful and effective than ever before. The use of information, or disinformation, in cyberspace and public broadcasting systems to sway public opinion is an issue that must be addressed, but is beyond the scope here.

If one state hacked into a foreign state's information system, copied the data and backed out without otherwise disturbing the data, that is clearly not in and of itself a use of force. Espionage has a long, nearly time honored, history and, while it is an infringement of the victim state's sovereignty,[18] it is not

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[17] **For purposes of this paper I will be referring only to state actors, whether done by regular employees of a state's government or by someone acting on a state's behalf as an agent. Acts done by private individuals and organizations not attributable to the state are treated here as crimes.** *But see infra* **note 20.**

[18] **During both international armed conflicts and at other times espionage is not a crime under international law.** *See* **Hague IV,** *supra* **note 11, at arts. 24 and 29-31 of the regulations for rules regulating the punishment of spies during an armed**

a use of force within the meaning of Article 2(4). A quite different situation is if a foreign state were to hack into the U.S. system that controls our intelligence satellites and, in essence, turned them off, denying their use to the U.S. Is that a use of force? Who determines whether it is a use of force? Is it the following scenario a use of force: one state hacks into another's information system that controls their strategic missiles, then alters the data therein to command the missile, when it receives a launch order, to instead self-destruct? Clearly the U.S. would react strongly to anyone shutting down our intelligence satellites or manipulating the control of strategic missiles. It also seems self-evident that any of the other states who possess satellites and missiles would do the same. What is more problematic are the infinite number of actions that a state can undertake that fall between these two levels of action on opposite ends of the spectrum.

The analysis in this paper disregards two very important factual issues. One is what is actually technologically possible at this point in time. The exact capabilities and the technology to effectuate them are usually classified, most often at the highest levels. This legal analysis is not dependent upon the specific technological method used. More important here is who is doing what to whom under which conditions (during international armed conflict or not) as opposed to how - the

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conflict. Such matters are strictly within the competency of the municipal laws of the victim state during peacetime.

exact computer/computer related technology being employed. The second is that a state whose data is being manipulated will discover the manipulation and be able to ascertain who is doing it. Factually speaking, this may not be the case. Although technology today favors information protect over information attack,[19] that does not eliminate the possibility of a successful information attack, including one done surreptitiously.[20]

One final introductory note is that regardless of whether an act perpetrated by one state against another rises to the level of being a use of force, the doctrine of state responsibility may still apply. In general, the doctrine is not fully developed, but to the extent that it is, one state is liable to another for reparations if it commits an act or an omission that is contrary to its obligations under international law. "Every breach of international law creates a duty to pay reparations for any loss or damaged caused."[21] Unsettled areas include whether acts of the legislative and judicial branches of government are included as well as the executive, and to what extent vicarious liability

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[19] **At least when the protect technology is used and absent an insider attack.**

[20] **This situation is part of one of the seven features RAND identified, *supra* note 4, that of blurred traditional boundaries. Information warfare blurs the distinction between domestic law enforcement and national security and intelligence activities. It also blurs the distinction between levels of anti-state activity, opening the door, for states sophisticated enough to exploit the opportunity, to conduct "strategic criminal operations" by individuals or transnational criminal organizations.**

[21] **Chorzow Factory (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17.**

applies for such things as acts of private citizens and unauthorized actions of state officials. As this paper focuses on intentional acts of one state directed against another, the doctrine, even in its somewhat unsettled state, would apply. The issue here is not whether the perpetrating state can legally "get away with it" (because if they can be identified, they can be held accountable to the limits of the international legal system), but rather what type of recourse is available to a state who is the victim of having its data manipulated. If the act rises to the level of a use of force under the U.N. Charter, then more avenues of recourse are available than if the act is not a use of force.

III. United Nations Charter System

A. The Charter in Context

In order to both interpret the Charter and give construction[22] to its terms, putting the Charter into context is important. There seems to be little argument that the delegates at the conference in San Francisco wrote the Charter with the concept in mind that, even though the war was not yet over in Europe or Asia, the destruction wrought by World War II, especially occurring so soon after World War I, was so horrendous that it must not be repeated.[23] This lead to the philosophy of peace over justice,[24] no matter how unjust a state was to its own people. This philosophy is made explicitly clear in the very first words of the Charter. "The purposes of the United Nations are to maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of threats to the peace..."[25] There was an amendment proposed to this section of the Charter to add the word "justice"

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[22] Interpretation being the process of discovering and ascertaining the meaning of the written words while construction is the process, absent a clear express or implied intention, of giving effect to the ascertained meaning as applied to the facts at hand.

[23] U.N. Charter pmbl., "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."

[24] Anthony C. Arend & Robert J. Beck, International Law and the Use of Force 34 (1993).

[25] U.N. Charter art. 1, para. 1.

to the first phrase, but the amendment was not adopted. Had that amendment been accepted, the very first words of Article 1 would have described the purposes as "to maintain international peace and security, in conformity with the principles of justice and international law."[26]

As finally adopted, the article only lists peace and security, but then goes on to say how peace and security may be maintained, to include the notion that it is to be done in conformity with the principles of justice and international law.[27] The clear primacy in the words is for peace before solving injustices or other disputes.[28] Nothing was to be allowed to disturb the

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[26] Doc. 938, I/4, 6 U.N.C.I.O. Docs. 10 (1945). *See* Doc. 1006, I/6, 6 U.N.C.I.O. Docs. 22-34 (1945) for a full discussion on this amendment. The amendment was defeated on a 21 for and 21 against vote. There was clear acknowledgement of justice as a norm of fundamental importance and there was an expression of concern that peace at all costs would equate to appeasement, but in the end those concerns and the other arguments were not enough to sway a two-thirds majority to vote for the amendment. This compilation of documents, Documents of the United Nations Conference on International Organization, was not officially published by the United Nations. It was published, in cooperation with the Library of Congress, by the United Nations Information Organizations which is a group comprised of many of the U.N. members. The compilation is authoritative in the sense that it consists of official documents of the 25 April-26 June 1945 San Francisco Conference which culminated in the signing of the U.N. Charter.

[27] The Charter's preamble also states the same concept.

[28] Leland M. Goodrich et al., Charter of the United Nations Commentary and Documents, at 27 (1969), refers to peace and security as the "first principle" of the U.N. The major powers at San Francisco refused to accept an amendment to the Dumbarton Oaks proposal for collective action to be taken in conformity with international law and justice because they did not want to bind the Security Council any more than absolutely necessary. Additionally, the objective of collective measures was peace and security, not settlement of disputes. This distinction then

territorial integrity of a sovereign state. Any use of force to correct injustices, past or present, or to free colonial peoples, or for any other purpose for that matter, with four exceptions,[29] were prohibited and labeled as aggression. Both the preamble and Article 1 make it clear that the United Nations is concerned with settling of international disputes (so that the temptation to resort to force is not acted upon) and with issues such as equal rights and self-determination of peoples,[30] solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to

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allowed the major powers to accept an amendment that settlement of disputes should be done "in conformity with international law and justice." The smaller states insisted on this amendment to prevent the major powers from dealing away their interests to save the peace as was done by the appeasement of Hitler at Munich in 1938, as well as the appeasement done in Ethiopia and Albania. *Id.* 27-28 and 42; Doc. 1006, I/6, 6 U.N.C.I.O. Docs. 13 (1945); 6 U.N.C.I.O. Docs. 453 (1945); and Doc. 739, I/1/A/19(a), 6 U.N.C.I.O. Docs. 720 (1945). For another excellent treatise on its history, *see* Ruth B. Russell, A History of the United Nations Charter (Brookings Institution, 1958).

[29] *See infra* note 38 and accompanying text for the four exceptions under the Charter allowing the use of force.

[30] U.N. Charter pmbl. and art. 1, para. 2. However, as referred to in Article 1(2), General Assembly Resolutions 1514 (XV), the Colonial Declaration of 1960 and the Declaration Concerning Friendly Relations, *see infra* note 118, and as demonstrated in state practice, there is a generally accepted right of self-determination of peoples. The use of force to accomplish self-determination is a contentious issue but is argued by some as another lawful use of force. Humanitarian intervention is another contentiously lawful use of force not expressly called for in the Charter. These last two examples in particular prioritize justice over peace.

race, sex, language or religion.[31] The Charter then sets up organs to deal with these, what I will refer to as secondary issues, the only primary issue being peace.

Like any legal system that attempts to uphold certain norms, to be effective there must be in place an enforcement mechanism. Using the failures of the League of Nations[32] and the unachieved aspirations of the Kellogg-Briand Pact[33] as learning tools, the creators of the Charter established an enforcement mechanism in the form of the Security Council. The primacy of peace over justice is further emphasized by the fact the Security Council is empowered to settle disputes,[34] not to deal with all the issues presented under the purposes and principles of the Charter.

The theory of the Charter is a rather idealistic collective security concept, though expressly slanted to be managed and policed by the World War II victors. As such it is not a true collective security scheme in that certain members (the five major World War II victors who are the permanent members of the

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[31] U.N. Charter pmbl. and art. 1., para. 3.

[32] *See* Goodrich, *supra* note 28, at 290.

[33] Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, L.N.T.S. 57.

[34] U.N. Charter art. 24, discussing the functions and powers of the Security Council, in part states "its Members confer on the Security Council primary responsibility for the maintenance of international peace and security..." *Contra* art. 10, which describes the functions and powers of the General Assembly as "discuss any question or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter..."

Security Council) were empowered to opt out of the system with the power of the veto in the Security Council.[35] The veto also enabled them to prevent sanctions against their allies or proxies. As is well known, with the Korean War exception,[36] this prevented the Security Council from effectively acting as hoped throughout the duration of the Cold War. This conflict does highlight a tension that has been present "throughout the history of thought" and is still with us today. That tension being the

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[35] The word "veto" is never used in the Charter. Article 27, para 3., provides, in relevant part that, "Decisions of the Security Council on all other matters [meaning matters other than procedural ones] shall be made by an affirmative vote of [nine] members including the concurring votes of the permanent members." The Charter was amended in 1965 to expand the Security Council from 11 to 15 members and to change the number of affirmative votes required to adopt a resolution from seven to nine. The use of the word "veto" was of some debate at the San Francisco Conference. It was suggested at a meeting of Committee III "that the Committee was making a mistake by falling into the habit of using the word 'veto' which was an ugly one which aroused antagonism." Doc. 459, III/1/22, 11 U.N.C.I.O. Docs. 335 (1945). But at a meeting of Commission III the Australian delegate offered, "Some objection was taken to using the name 'veto,' but the name is quite an accurate description of the right itself." Doc. 1149, III/11, 11 U.N.C.I.O. Docs. 122 (1945).

[36] Even in the case of the Korean War the Security Council did not function quite as designed. A close reading of Security Council Resolutions 82-84 reveals that North Korea was never labelled as the aggressor and mandatory sanctions were never imposed. Instead, the Security Council recommended member states assist South Korea in its self-defense and termed North Korea's invasion of South Korea a breach of the peace. *See* Goodrich *supra* note 28, at 345; and Luard, A History of the United Nations, Vol. I (1982). At first blush this could be attributed to the fact that South Korea was not a member of the U.N., but in practice the Security Council has been reluctant to label states as aggressors. The Security Council did declare Iraq as the aggressor for its invasion of Kuwait in its Resolution 660. Along with the marked increase in U.N. peacekeeping operations since the end of the Cold War, to what extent the Security Council will be able to fulfil its assigned role in the future remains an open question.

"complex relationship between idealism and realism, between the way things ought to be and the way things are, and the debate as to whether legal philosophy should incorporate ethical standards or confine itself to an analysis of the law as it stands."[37] The Charter is idealistic, but must be applied realistically if it is to have usefulness.

Of the four exceptions to the Charter where the use of force is authorized, only two are still applicable today.[38] They are self-defense under Article 51 and as authorized by the Security Council under Chapter VII of the Charter (Articles 39 and 42 in particular). Of these two, only self-defense is relevant to this paper. One of the difficulties in ascertaining a meaning for the terms at issue here is should the meaning be that as originally intended by the drafters? Did the drafters intend a restrictive or expansive interpretation of these terms? Or is that merely the starting point for a determination of their interpretation, or more importantly, construction, today? Along this line, is the Charter a "living document" as is commonly referred to by the U.S. courts in interpreting the U.S. Constitution, or is it a document that should be read in a very textual sense based on the intended meaning of the words of 1945?

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[37] **Malcolm N. Shaw, International Law 45 and, for a more complete discussion, 702 (3d ed. 1991).**

[38] **The other two are Article 106 which discusses collective use of force before the Security Council is functional and Articles 53 and 107 which discuss use of force against the enemy states of World War II.**

B. Interpretation of the Charter

This issue was discussed at the San Francisco Conference with little in the way of guidance being established. It was concluded that there should not be included in the Charter a provision either authorizing or approving a method of interpretation. Rather, it was left to each organ of the U.N. to interpret for itself those parts of the Charter that are applicable to the functions it performs. The International Court of Justice (ICJ), as the judicial organ of the U.N., would be the only source for the interpretation of the Statute of the ICJ. It could also render advisory opinions as requested by the General Assembly or Security Council on interpretation questions those bodies might forward to it. Additionally, either of the latter two could establish an ad hoc committee of jurists to examine the issue and report its views, or either organ could call for a joint conference. It was then decided that no set method of interpretation would be established in the Charter, leaving flexibility to deal with each issue in all of its nuances as seen best at the time the issue arises. It was lastly noted that in cases where it was desired to establish a truly authoritative interpretation for future precedent that an amendment to the Charter might be necessary.[39]

Both the Charter and the *travaux preparatoires* leave the body

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[39] Doc. 887, IV/2/39, 13 U.N.C.I.O. Docs. 668 (1945); Goodrich, supra note 28, at 14.

to be used and the approach to be taken (who and how) to interpret the Charter a nearly totally open question. The method or philosophy of interpreting the Charter becomes crucial for the subject question here as it may effect the substance of the answer. Using domestic canons of statutory construction or domestic contract law interpretation methods can be helpful, but they also may be misleading if not tempered for the international vice domestic situation. Internationally there is no universal method of interpreting domestic statutes or contracts, and the rules in international law may be different than those in domestic law. Present in bilateral treaties as well, but especially so in multilateral treaties, is the occurrence of the intentional ambiguity as the method to close out negotiations if agreement on more specific terms does not appear possible. There may also be the difficulty of differences in language, particularly if the treaty is equally authentic in multiple languages. This situation is true of the Charter, "of which the Chinese, French, Russian, English, and Spanish texts are equally authentic."[40]

1. Treaty on Treaties

Interpretation of treaties became an issue of such universal concern that some basic guidance on interpretation was included

[40] **U.N. Charter art. 111.**

in the Vienna Convention on Treaties.[41] While the Vienna Convention specifically provides that it shall not be applied to treaties that were previously in force,[42] it seems quite unlikely that pertinent provisions will not be used, at least as persuasive authority if not in fact binding authority. Specifically in the case of any treaty which is the constituent instrument of an international organization, the Vienna Convention declares itself to be applicable.[43] In the case of the U.N. Charter, the Vienna Convention should be particularly applicable since it was sponsored by the U.N. and it was a U.N. organization, the International Law Commission, that prepared the draft that served as the basis for the treaty.

The International Law Commission in its draft and the Convention in final form provide only a few general principles of interpretation that were well accepted from past practice. There was an avoidance of drafting a thorough set of rules in order to not create impediments to interpretation. Instead, a few aids in trying to ascertain correct interpretations were provided. As such, they amount to general, open-ended questions that guide

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[41] **Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force on Jan. 27, 1980). Although the U.S. is not a party to this treaty, the U.S. does agree with most of its provisions.**

[42] *Id.* **at art. 4. "Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."**

[43] *Id.* **at art. 5.**

one's search for the meaning of the phrase or word. Unfortunately, these aids can also be contradictory.

The Vienna Convention only has two articles of note here that deal with the interpretation question. The first is titled "general rules of interpretation."[44] It provides that treaties are to be interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." For purposes of interpretation, the context includes the text, including preamble and annexes, and any agreement made in connection with the conclusion of the treaty either done between all the parties or made between some of the parties and agreed to by the rest of the parties as relating to the treaty.[45] There are no such additional agreements of benefit to our discussion concerning the U.N. Charter. The next provision of the Vienna Convention is more helpful here in that it provides, "There shall be taken into account, together with the context: ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[46]

The second article of interest, titled "supplementary means of interpretation," discusses when, and to what type, may recourse be had to these means of interpretation. Supplemental means includes the treaty's preparatory work (*travaux preparatoires*)

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[44] *Id.* **at art 31.(1).**

[45] *Id.* **at art. 31.(2).**

[46] *Id.* **at art. 31.(3)(b).**

and the circumstances surrounding the conclusion of a treaty. They may be resorted to when needed to confirm the meaning or to determine the meaning when the above described procedures from Article 31 leave the meaning of a provision ambiguous or obscure or would lead to a result that is manifestly absurd or unreasonable.[47] The Yalta discussions and the Dumbarton Oaks Proposals do provide some background, but they are very general in nature, providing few details. The Charter's *travaux preparatoires*, contained in the U.N.C.I.O.,[48] are helpful in revealing the thoughts and intents of individuals or groups of delegates.

At the Vienna Conference the U.S. proposed that these two articles be combined in order to eliminate the hierarchy they created as written. The intent of the U.S. was to make resort to supplementary means not on "an only if needed basis," but on an equal basis for determining the interpretation. The U.S. proposal received little support and the hierarchy remains. The International Law Commission in its commentary did state that the two articles should operate in conjunction, but their words still leave supplemental means as secondary means. Their rationale is that preparatory work may shed some light on the expression in the text, but everything expressed in those works certainly does

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[47] *Id.* **at art. 32.**

[48] *See supra* **note 26.**

not reflect a consensus of the parties.[49] Likewise, the use of state practice as an aid to interpretation is limited to only those practices that reveal an agreement of the parties.[50]

A rule that did not find its way into the Vienna Convention is one dealing with the type of provision in question. A formerly common principle was that provisions implying a limitation on state sovereignty should receive a restrictive interpretation, though this principle does not override the textual approach. This principle is not as widely accepted today,[51] probably reflecting the general trend in states allowing more infringement on their sovereignty by virtue of the increasing number and diversity of subject matter of treaties they are entering into. Concerning the use of force under the Charter, this principle could be argued to have significance since Article 2(4) limits a

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[49] Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties,* 64 Am. J. Int'l L. 495 (1970). Delegates at the convention in Vienna expressed concern that giving too much weight to the preparatory work provide maneuvering room for a state that found a treaty provision "inconvenient" to allege a different interpretation "because there was generally something in the preparatory work that could be found to support almost any intention." Other arguments included that too much emphasis on the preparatory works favors wealthier states who had the capability of maintaining thorough archives and having more representatives if the work was broken down into different committees that met at the same time. There was also concern that states there were not part of the negotiating process to a treaty may hesitate to accede if they were to be bound by the negotiating history in which they would not have their own opinions included nor necessarily even be fully aware of its complete extent. *Id.* at 520.

[50] *See also* Ian Brownlie, Principles of Public International Law 626-29 (1990).

[51] *Id.* at 631.

state's right to use of force. But, this right was previously limited in the Covenant of the League of Nations, the Kellogg-Briand Pact and, even from the textual approach, it is clear that this act of a sovereign (the right to resort to force) was specifically intended to be limited by Article 2(4).

There are three generally recognized approaches to interpretation when the meaning of a treaty provision is ambiguous or unclear. They can be referred to as the objective or textual approach, the subjective approach and the contextual approach.

2. Textual Approach

The textual or objective approach, as implied, emphasizes the analysis of the words to derive the intent of the parties. The textual approach relies upon positive law. Positivists maintain international law consists of, and only of, those treaties and customary practices to which states have consented to be bound. One of the difficulties with the strict textual approach to treaties is, what if a careful analysis of the text does not answer the question? In determining if an act is a use of force, the word force can mean several things. No matter how much one looks at the definition of "force" in a dictionary, this phrase can still be read many ways, even knowing the intent of the drafters. If one uses the textual approach plus a restrictive reading, which is common for this approach, then the

interpretation may leave much of the conduct intended to be regulated outside the scope of the treaty being interpreted. As is true here with the phrase "use of force," often the textual approach results in more than one possible interpretation, with the choice then being made as much for policy reasons as for being able to ascertain the intended meaning.

One aid to interpretation that is applicable to the textual approach is to look to applications of the treaty at a time near its entry into force. The theory is that the treaty at that time would be applied in a manner as intended by the drafters. As the application of the treaty becomes further removed in time from its entry into force, there is less credibility to the notion that the application was necessarily as the drafters intended.

3. Subjective Approach

The subjective approach uses the intent of the parties as an independent basis to help determine the meaning of unclear words or phrases. This approach is the most prevalent. One of the difficulties with the subjective intent of the drafters approach is that even recourse to supplementary materials may not lead one to be able to ascertain an interpretation. One such situation when this could be true is if the treaty is being applied to a fact situation that was not contemplated by the drafters (though this is a problem for any approach to interpretation, not just the subjective approach).

The principle of effectiveness, *ut res magis valeat quam pereat* (that the thing may rather have effect than be destroyed), is useful in the subjective approach. As implied in the name, this principle of interpretation holds that a treaty provision should be interpreted in a way that will render it the most effective and useful. Shaw argues that "any true interpretation of a treaty in international law will have to take into account all aspects of the agreement, from the words employed to the intention of the parties and the aims of the particular document. It is not possible to exclude completely any one of these components."[52]

He states this approach is particularly relevant to treaties that operate as the constitution of an international organization. In those cases a more flexible approach is justified in order to accomplish the stated aims of the organization.[53] If this type of approach is not used, the result may be that the act in question is simply not addressed because it was not clearly envisioned at the time of the drafting of the provision. In the case of the U.N. Charter, whose purpose is to maintain international peace and security, the textualist approach may determine that the issue falls outside the scope of the Charter provision in question, such as Article 2(4)'s use of force prohibition. This situation may easily create the seeds for more violence, which is the exact opposite of the Charter's

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[52] **Shaw, *supra* note 37, at 584.**

[53] ***Id.* at 586.**

goal. The subjective approach will attempt to apply the drafter's intent to the situation regardless of whether the exact fact situation was, or even could have been, envisioned by the drafters.

4. Contextual Approach

The contextual approach takes a much wider view of the situation in order to arrive at an interpretation. This approach places an emphasis on the objects and purposes of the treaty, not only at the time of the drafting of the treaty but also at the time of interpretation. It takes into account the practices of states, the changes in circumstances in the world surrounding the subject of the treaty, and examines policy issues as well. What policies drove the norm that was adopted? Are these policies still valid? Does the norm created actually fulfil its policy goal? If yes, in all or just certain situations? Particularly for aspirational norms or those norms with much ambiguity, the text itself is usually of little assistance in ascertaining what specifically is being prescribed by the treaty provision being interpreted. In such cases the practice of states may do more to reveal the "intent," at least in fact if not in original design, of the treaty provision.

The contextualist looks to the "operational code" to determine the appropriate meaning. "By operational code is meant a set of norms that operate in a certain sector and that actors deem to be

authoritative even though the norms may be inconsistent with formal legal codes. The operational code is normative but inferred from past practice and projections of future trends, rather than from documents alone."[54] A realistic assessment of how the relevant state actors will apply the provision to be interpreted is as important, perhaps more important, in interpreting a provision as the words themselves. This approach has been called by others a "politically oriented jurisprudence" approach. Under this approach, among other results, the U.N. Charter is treated as a living document in the same sense that many argue is the U.S. Constitution.[55]

Without embracing all facets of this approach, which had not yet been postulated as such,[56] President Franklin Roosevelt as one of the principle architects of the U.N., if not the principle one, envisioned an interpretive approach that included treating the Charter as a living document. His thoughts in this regard made their way into the *travaux preparatoires* in a 1944 statement by Mexico which was submitted to the convention in San Francisco:

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[54] W. Michael Reisman, *War Powers: The Operational Code of Competence,* 83 Am. J. Int'l L. 777 (1989).

[55] The U.S. Supreme Court decision in Roe v. Wade, 410 U.S. 113 (1973), demonstrates the contextualist approach in its holding that a right to privacy exists under the Constitution.

[56] This approach was first introduced by Myres McDougal and Harold Lasswell at Yale Law School. It has been adopted by many others since then, some also from Yale such as W. Michael Reisman, and is sometimes referred to as the New Haven School approach. The basic framework for this type of inquiry is set forth in the first of the New Haven studies of international law and minimum public order, Myres S. McDougal and Associates, Studies in World Public Order (1960).

> The Mexican proposals are inspired by the same ideas which President Roosevelt expressed in his speech of the 12th instant, to the effect that "Like the Constitution of the United States itself, the Charter of the United Nations must not be static and inflexible, but must be adaptable to the changing conditions of progress - social, economic, and political - all over the world."[57]

Determining the operational code is a very complex and difficult process whose full explanation exceeds the scope of this paper.[58] All methods of interpretation will agree that Article 2(4) cannot be interpreted in a vacuum. It was clearly intended to prohibit unilateral use of force (except for a short duration of self-defense until the Security Council was able to intervene) in favor of collective use of force. The need for some use of force was clearly contemplated, it was just that the Security Council would decide on the legitimate and illegitimate uses.

With the Cold War stalemate preventing the Security Council from so acting, the contextualists will argue that the individual states or regional organizations must, out of necessity, make these same decisions. The record of the San Francisco Conference reflects that the workings of the Security Council were envisioned to include world politics as well as justice in its

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[57] **Opinion of the Department of Foreign Relations Concerning the Dumbarton Oaks Proposals of Oct. 31, 1944, Doc. 2, G/7(c), 3 U.N.C.I.O. Docs. 74 (1945).**

[58] **Professor Reisman has proposed techniques for doing so in international incidents studies and application of the communications model. On incident studies, *see* International Incidents: The Law that Counts in World Politics (W. Michael Reisman & Andrew R. Willard eds. 1988), and for the communications model, International Law-making: A Process of Communication, Proc. Am. Soc'y Int'l L. 101 (1981).**

deliberations. The framers just concluded that it would be counter-productive to include specific guidance to the Council in the Charter. As events are unforeseeable, wide discretion was given the Council on the assumption that the deliberative process and collective wisdom of the members would produce the "right" results. Therefore, there is little written guidance for the individual states to borrow from in making their decisions. The contextualist fills this void with the operational code.

A brief example of the operational code at work will help in its understanding.[59] In a comment on Israel's air strike on the Iraqi nuclear plant outside Baghdad on the morning of 19 June 1981 Professor D'Amato applies the contextual approach to Article 2(4) to determine if Israel's action was a violation of that norm.[60] He uses McDougal and Feliciano's three relevant factors - extension or conservation of values, degree of

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[59] For a good example of the contextual approach as it applies to art. 2(4), and a counter argument against that approach, *see* W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 Am. J. Int'l L. 642 (1984); and Oscar Schacter, *The Legality of Pro-Democratic Invasion*, 78 Am. J. Int'l L. 645 (1984). *Also see* Ferencz's letter to AJIL in response to these two articles at 79 Am. J. Int'l L. 114 and 720 (1985). Reisman argues a textual reading of 2(4) could lead to increased violence and hinder fulfillment of the objects and purposes of the Charter regarding "true" self-determination and economic and social advancement of all peoples. He argues that the "critical question in a decentralized [international law] system is not whether coercion has been applied, but whether it has been applied in support of or against community order and basic policies, and whether it was applied in ways whose net consequences include increased congruence with community goals and minimum order." Reisman, *supra*, at 645.

[60] Anthony D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 Am. J. Int'l L. 584 (1983).

consequentiality, and exclusivity or inclusivity. Did Israel intend to conserve or extend its own values? Related, was Israel's purpose to destroy or conserve Iraq's values and the international community's?

Israel was clearly conserving its own values in trying to protect itself from the nuclear threat of an unfriendly regime who, in Israel's view, might actually use the capability or attempt to coerce Israel with the threat of using it. Israel was at the same time (but with no reason to believe they were acting for this reason) conserving the international community's as well. It was clearly taking away a value of Iraq's, but one, if factually the facility was indeed to be used to produce weapons grade material, in which the world had agreed Iraq was not lawfully entitled to possess (proliferation of nuclear weapons). An example of an extension of values would have been if Israel was trying to acquire Iraqi territory or overthrow the government.

The degree of the consequentiality of the values asserted by Israel in this case are extremely high - survival of the nation and eliminating for itself (and the world) a nuclear threat. Had Israel attacked a tank or aircraft production facility, the degree of consequentiality would have been much lower and therefore, all else being equal, much less justified.

Exclusivity and inclusivity refer to at whose interests is the state acting. Israel was unquestionably acting in its own interest with little regard for anyone else. It was therefore

acting exclusively. However, that alone will not render the use of force as illegitimate. In this case the prime motivation was exclusive, but the effect was also inclusive. The rest of the world benefited from the removal of this threat to world peace as well as did Israel. D'Amato concludes that Israel's use of force in this case was not contrary to the Charter because it was a value conservation, with those values having a very high degree of consequentiality and the effect was inclusive of the world community's needs.

Also included in the contextual approach, but covered above, is the past state practice and the probable future trend. In this case what is relevant is the extent, if any, that the self-help doctrine has become an accepted state practice during the stalemate in the Security Council. The contextualists argue that self-help is permitted and the practice will continue.

Information warfare is an example where the contextual or policy oriented approach can impute the purposes of the Charter into the poverty (void) of positive law. If there is found to be an ambiguity in the international law norm on the use of force, or the absence of such a norm, then the contextualist approach can use the operational code to determine, from past practice and perceived future trends of the relevant state actors, what the "appropriate" norm should be for the situation at hand. Especially if this process is left to the legal advisors, this approach truly does equate to the attorneys legislating instead of explaining the application of existing law, as Walzer

complains.

On the other hand, if done appropriately, this approach can be a useful device for the lawyer to use in providing legal counsel to the policy-maker in situations where the law is not clear. The distinction between the contextualist approach and my position here is that in the New Haven-politically oriented approach, it portends to proclaim what the law is. I would use it as a tool for a better understanding. The lawyer-interpreter would inform the policy-maker of the current understanding of the law including all of its imperfections and ambiguities that the text, custom and subjective approach cannot resolve. Then the operational code can be used by the attorney to perform an analysis, resulting in the legal advisor presenting to the policy-maker the law as it currently exists, how it is deficient, the operational code analysis and its results. This four step process can be of great help to the policy-maker who must make a decision regardless of the "completeness" of the law.

Even though there are a great many more treaties in existence today than ever before, the state of international law is such that inter-state relations are still relatively unregulated compared to most intra-state subjects. International law has long had devices to assist it in coping with this fact. One is the general principle, born from the equal sovereignty of states, which is "that which is not prohibited is permitted."[61] Thus, if

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[61] The SS Lotus, 1927 P.C.I.J. (ser. A) No. 10. This case is also oft cited for the principle that a state cannot unilaterally withdraw from a provision of international law, such

nothing prohibits a state from using force as it is contemplating, it may do so. There is no requirement that something expressly allow it as long as there is nothing that forbids it.

In international law, where there are far fewer laws, customary international law partially fills the void. As customary international law is created by the practice of states, this leads us back to the contextual approach. The policy-maker who must act will hopefully do so rationally. If international law in both treaty and custom does not provide the norm, then the contextual approach can supply a rationally derived, suggested norm to advocate. In this way the U.S. (or whoever), can conduct state practice in areas where the law is lacking in a way that is in furtherance of world order, is consistent with what other states are likely to at least tolerate if not outright accept, and thus either define by practice the meaning of a term or start the evolution of customary international law in this specific field. As the advocates of this approach suggest, one of the critical questions is what will other states accept as legitimate, even if the law does not expressly allow it?

The policy-maker should receive input from many perspectives, the lawyer's only being one. It is important to understand that the ultimate use of the contextual approach as suggested here

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as Article 2(4). Only the whole "group," in the case of 2(4), the entire world community, can change such a rule. Different is bilateral treaties where one side is usually allowed to withdraw, often as specified in the treaty itself.

varies from that of its proponents. There should be "truth in advertising" in what the lawyer proclaims to be interpretations of the law as opposed to advocating policy in the advice they provide to policy-makers.[62]

C. Evolution of the Charter by State Practice

Indisputably, the over 50 years of state practice of the member states operating under the Charter has not been strictly in accordance with the meaning as intended by the drafters, no matter how expansively one wants to interpret the meaning of the words of 1945. One such example is the evolution of the meaning of the words in Article 27.[63] The article requires the "affirmative vote" of nine Security Council members including the "concurring votes" of the permanent members. Concurring vote would clearly imply, if not expressly state, some type of action indicating an agreement with the resolution. Taken in context of the rest of the sentence, a concurring vote would seem to mean,

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[62] **A fourth, somewhat radical concept is the teleological approach. Here the court determines what the objectives and purposes of the treaty are and then imports the necessary meaning to give effect to those purposes. This approach differs from the contextualist who looks to the policies of the relevant actors to see what they would desire to achieve, and then give an interpretation to that affect. Especially true in these two approaches, but susceptible anytime the interpreter starts moving away from the explicit words of the drafters, resulting implementation could occur in a manner not contemplated by the parties. The teleological approach has no significant following and will not be discussed further here.**

[63] *See supra* **note 35.**

as the Soviet Union argued, each permanent member must actually cast a positive vote in favor of the resolution in question before it could be adopted, otherwise the unanimity requirement is not met.[64] Yet the practice has been to allow permanent members to do one of four courses of action on each resolution, three of which allows the resolution to be adopted (if no other permanent member vetoes it and it has enough affirmative votes). A permanent member, in addition to casting either a negative or an affirmative vote, can either not appear and thus not vote,[65] or it can appear and abstain. Neither of these last two options

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[64] Neither the records of the discussions at Yalta, Dumbarton Oaks, the San Francisco Conference nor the rules adopted by the Security Council are helpful in answering this question. They all speak of the need for unanimity of the Great Powers without specifying whether unanimity is achieved solely by five positive votes or by all positive votes by those that choose to vote, concurrence being expressed by the realization that if one of the five really wanted to prevent adoption of the resolution, they could easily do so by casting a negative vote. *See* Proposals for the Establishment of a General International Organization [Dumbarton Oaks Proposals], Oct. 7, 1944, Dep't St. Bull., XI, p. 368; Doc. 1, G/1, 3 U.N.C.I.O. Docs. 1 (1945); Statement by the Delegations of the Four Sponsoring Governments on the Voting Procedure in the Security Council, Doc. 852, III/1/37 (1), 11 U.N.C.I.O. Docs. 710 (1945); and Provisional Rules of Procedure of the Security Council, Jan. 17, 1946, U.N. Doc. S/96.

[65] One of the most notorious instances of this situation, though the first occurred four years earlier, was Security Council Resolutions 82-84 in 1950 authorizing member states to use armed force to assist South Korea in repelling the attack by North Korea. These three resolutions received affirmative votes from only four of the five permanent members. The Soviet Union did not vote on these three resolutions as it was boycotting the sessions in protest of the Nationalists being seated, instead of the Communists, in the Chinese seat. After U.N.S.C.Res. 84 was adopted, the Soviet representative resumed attendance at Security Council meetings vetoing further resolutions on the Korean conflict. *See* Luard, *supra* note 36, at 229-74; Shaw, *supra* note 37, at chp. 18; and Goodrich, *supra* note 28 at 229-31.

are expressly allowed, or disallowed, under the Charter. Most members took the position that a permanent member gave up their special voting right by being absent or abstaining.

The question then arose of what if more than one member abstained? What if all of the permanent members abstained? The pragmatic approach to answering this interpretation question is that it was quite possible, and in practice occurred frequently enough, that a permanent member did not wish to affirmatively vote for a resolution for some political reason, but did not want to block the resolution either. One of the members specifically declared this thought to be their intent at a meeting of the Security Council in August of 1947, whereupon the President of the Council, deciding enough precedent had been set, declared, "it is now jurisprudence in the Security Council-and the interpretation accepted for a long time-that an abstention is not considered a veto, and the concurrent votes of the permanent members means the votes of the permanent members who participate in the voting. Those who abstain intentionally are not considered to have cast a veto."[66]

In addition to the Security Council voting issue, other instances of practices deviating from the words and intent of the Charter include the entire collective security system in

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[66] **Official Records of the Security Council, 2nd Year, No.68, pp. 1700, 1703, 1711-12. This discussion arose as the Security Council was debating the Indonesian question on August 1, 1947. On one vote three permanent members abstained and on a second vote two members abstained. On both occasions the proposed action was adopted as there were in total a sufficient number of affirmative votes with no veto cast.**

practice. The drafters of the Charter envisioned, and the language expresses, the concept that the Security Council would have available to it its own military force,[67] that the Security Council would have a sufficiently united sense of purpose to accomplish its primary functions of both determining when a threat to or breach of the peace has occurred,[68] and that it would actually be able to respond to those situations under Article 41, measures not involving the use of armed force, or Article 42, measures using armed forces.

These variances in practice from a plain reading of the Charter has lead some international law publicists to question the continued viability and legal standing of the Article 2(4) norm prohibiting the use of force specifically and the whole Charter system of international peace and security in general.[69]

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[67] U.N. Charter art. 43. "All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security."

[68] U.N. Charter art. 39. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide, what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

[69] Admittedly most, but not all, of these works precede the end of the Cold War. For a sample of the works questioning the vitality of art. 2(4), see Thomas M. Franck, *Who Killed Article 2(4)?*, 64 Am. J. Int'l L. 809 (1970). However, the U.N.'s survival and seeming revival after the end of the Cold War only strengthens the argument for the continued viability of the Charter. *See* Arend, *supra* note 24, for a discussion of the U.N.'s, in general, and art. 2(4), in particular, vitality in the

The argument is that the Cold War superpower struggles, especially the use of the veto in the Security Council, have so undermined the entire Charter system that it is no longer viable. This position is somewhat of a coherent argument, but it overlooks one of the underlying understandings of the founding of the U.N. From the beginning seeds of the United Nations at the Yalta conference between Roosevelt, Churchill and Stalin, through the Dumbarton Oaks Proposals, which also included China, and the long contentious debates at San Francisco, it was clear the five major powers (with perhaps the Soviet Union being the most insistent due to its distrust of this new international organization) would not deviate from the position of "no veto-no charter." The major powers argued this position was consistent with political realities, that it was necessary for the creation of the organization, and that the organization would break down in the case of enforcement action being taken against one of the permanent members of the Security Council.[70]

All five powers made individual statements along similar lines of thought, but the statements of the U.K. and U.S. representatives highlight the germane point. The U.K. representative stated that,

> Peace must rest on the unanimity of the Great Powers for without it whatever was built would be built on shifting sands. ... Without that unanimity, all countries large and

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post Cold War world.

[70] **Doc. 417, III/I/19, 11 U.N.C.I.O. Docs. 306 (1945).** *See also* **Goodrich, supra note 28, at 349.**

> small, would fall victims to the establishment of gigantic rival blocs which might clash in some future Armageddon. Co-operation among the Great Powers was the only escape from this peril; nothing else was of comparable importance.[71]

The U.S. representative stated that "the Great Powers could preserve the peace of the world if united," and warned that "they could not do so if dissension were sowed among them."[72]

That the Security Council would be unable to maintain the peace and security without unanimity was well understood.[73] In this sense, the Security Council operated during the Cold War as anticipated, if not as hoped, since it was anticipated there would be no action without unanimity.[74] From the viewpoint of succeeding in maintaining peace and security it was of course somewhat unsuccessful in a great many cases. Nonetheless, those arguing the lack of success of the Charter system are really arguing its imperfections vice its demise.[75] It has always been U.S. policy to fully support the Charter system, even during the times of the greatest demonstration of discontent with the United States by members at the United Nations. All the remainder of

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[71] **Doc. 936, III/1/45, 11 U.N.C.I.O. Docs. 475 (1945).**

[72] **Doc. 956, III/1/47, 11 U.N.C.I.O. Docs. 493 (1945).**

[73] **See Anjali V. Patil, The UN Veto in World Affairs 1946-1990 (1992), especially Chapter II, for a more complete discussion.**

[74] **Goodrich,** *supra* **note 28, at 291.**

[75] *See* **Franck,** *supra* **note 69; and Louis Henkin,** *The Reports of the Death of Article 2(4) Are Greatly Exaggerated,* **65 Am. J. Int'l L. 544 (1971), for arguments on both sides of this issue. Although these articles were written when the Charter had half of its present day life, the arguments presented still reflect the current rationales.**

the member states also continue to actively participate,[76] and they continue to be quick to justify their actions as lawful under the Charter (whether or not one contends those justifications to be a stretch). These actions demonstrate the viability of the Charter and the fact that in practice, the Charter has not lost touch with reality, but rather has moved along with it. "A normative treaty the content of which is too far in advance of development in international relations is stillborn, just as a treaty that ceases to be exactly observed in the practice of governments is no longer valid in its formal expression."[77]

Some deviation from a norm does not negate the nature of the norm as legally binding. On the other hand, consistent conduct that is contrary to the norm would tend to demonstrate that states do not feel obligated to comply. Article 2(4) is perhaps the most commonly discussed example of these concepts in international law. There has certainly been violations of the norm against the use of force, but the publicists generally agree the norm is still in effect because,

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[76] **Although Indonesia did withdraw from active participation in the U.N. in 1964, this withdrawal was short-lived with their return the following year.**

[77] **Charles De Visscher, Theory and Reality in Public International Law 133 (Percy E. Corbett trans., 1957). Corbett rephrased the same thought as, "Law cannot be built upon a heedless sacrifice of reality." *Id.* at viii. The head of the French delegation at the San Francisco Conference stated it as "nothing could be more deadly than to build in uncertainty a castle of texts which did not correspond to reality." Doc. 55, P/13, 1 U.N.C.I.O. Docs. 437 (1945).**

> most states comply with it most of the time, that states attempt to justify and explain their conduct in terns consistent with the rule and with generally acknowledged exceptions to it (such as self-defense), that states condemn the behavior of violators of the rule in legal terms, and that the international community makes efforts to impose sanctions on violators even those sanctions are not always effective."[78]

These differences of original intent of the drafters and the Charter in practice go to the core purpose of the U.N. If the formal expression of core provisions can be modified by state practice, either as states individually or by actions as members of the Security Council or General Assembly, then clearly so too can other terms or phrases of the Charter be modified by the practice of the member states over the fifty years since the Charter's entry into force. The principle of *rebus sic stantibus* (at this point of affairs or in these circumstances), that the there has been such a fundamental change in circumstances (the lack of effectiveness of the Security Council and the subsequent lack of application of the Charter as envisioned) that the Charter no longer applies, cannot be applied here. While this is a fundamental principle of international law[79] dealing with

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[78] **Lori F. Damrosch,** *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs,* **83 Am. J. Int'l L. 1, at 2-3,** *citing* **Louis Henkin, How Nations Behave: Law and Foreign Policy 138-39, 146-53 (2d ed. 1979); Oscar Schacter,** *In Defense of International Rules on the Use of Force,* **53 U. Chi. L. Rev. 113, 128-31 (1986); and Oscar Schacter,** *The Right of States to Use Armed Force,* **82 Mich. L. Rev. 1620, 1623-24 (1984).**

[79] **In Fisheries Jurisdiction (U.K. v. Ice.), 1973, I.C.J. 3 at 20-I, the International Court accepted the fundamental change of circumstances principle as expressed in art. 62 of the Vienna Convention as customary international law. As such this principle applies to all states and all treaties, not just those**

treaties, and is embodied in the Vienna Convention,[80] it is very problematic to determine when the circumstances become so different that the treaty should be invalidated, and to date, no state has formally stated the Charter is invalid for this reason. "Life seldom stands still and new situations arise all the time. If changes in circumstances were normally considered sufficient to release a nation from its obligations, there are few treaties that could stand the test of time."[81] Conversely, the Charter was very much intended to stand the test of time.

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states a party to the convention and not just those treaties entering into force after the parties become bound by the Vienna Convention.

[80] **Vienna Convention, *supra* note 41, at art. 62.**

[81] **Lionel L. Summers, The International Law of Peace 140 (1972).**

IV. The Meaning of "Use of Force"

A. Some Parameters

How one interprets "use of force" will vary depending upon the approach taken. A strict textual approach, while not the prevailing view, is still important to understand as some adhere to it and both the subjective and contextual approaches use it as a starting point, as required by the Vienna Convention. I will posit here that this approach is likely to leave more questions unanswered than answered. The subjective, as the prevailing, and the contextual approach will be used to determine if more definitive understandings are possible.

In determining what constitutes "use of force" under Article 2(4), several other articles contain phrases that bear a relationship to this issue. These include "armed attack" under Article 51, "armed force" in the preamble and under Articles 41 and 46, and "threat to the peace," "breach of the peace," and "act of aggression" under Articles 1 and 39. Also helpful, but certainly not dispositive, is an examination of the work in the General Assembly in connection with its many resolutions on subjects relating to the use of force in interstate relations. I will dispense with the issue of the extent to which General Assembly resolutions are binding international law by simply stating the issue is not of significant importance here.[82] Of

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[82] **This issue has been of great fascination to the international law community. There has been an incredible volume of work done on this topic, but the simple, pragmatic answer is**

more importance are the discussions and thoughts behind the resolutions, plus the degree of consensus obtained on each. I will also refer to International Court of Justice (ICJ) opinions as they have had to deal with numerous interpretation questions. ICJ opinions do not constitute legal precedent as do court opinions in common-law jurisdictions,[83] but they nonetheless possess at least persuasive authority.

Article 2(4)[84] of the U.N. Charter forms a key part of the foundation for international order in the world today.[85] It encompasses the notions of not using or even threatening to use

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those resolutions are referred to by states when helpful and omitted in a state's argument when not helpful. While some jurists contend they are binding, there is no universal agreement to that effect and the better view is to the contrary. Regardless, many of those resolutions contain or codify what has become customary or general principles of international law which by themselves are binding.

[83] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 1976 Y.B.U.N. 1052. Article 59 states, "The decision of the Court has no binding force except between the parties and in respect of that particular case." Under a different procedure, U.N. Charter, art. 96(1), the Security Council or the General Assembly may ask the court for advisory opinions on issues to include Charter interpretation. These opinions are only advisory, particularly so for interpretations of the Charter on issues solely under the purview of another organ of the U.N., such as Security Council determinations of threats to the peace, breaches of the peace or acts of aggression.

[84] "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."

[85] Various authors have referred to 2(4) as the "cornerstone of peace in the Charter" (Waldock), the "heart of the United Nations Charter" (Henkin), and "the basic rule of today's public international law" (Jimenez de Arechaga).

force in international relations. It also encompasses the concept of the legal equality of sovereign states, specifically including a state's territorial integrity and political independence. The use of the phrase "in their international relations" was included to distinguish between the use of force permitted to a sovereign to maintain internal peace and security. The words, "Against the territorial integrity or political independence of any state" were added at San Francisco but are not escape clauses, as indicated by the phrase that follows, "or in any other manner inconsistent with the Purposes of the United Nations."[86] Of course this last phrase is as limited or expansive as one reads the Purposes of the Charter. Both the Security Council and the General Assembly have made it clear that a state cannot do by indirect means that which it is prohibited from doing directly.[87]

The key to determining the effect of Article 2(4) is the exact meaning of "use of force." It was never defined at San

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[86] Ian Brownlie, International Law and the Use of Force by States, at 267 (1963). Here Brownlie convincingly sets forth the reasons, from both the *travaux preparatoires* and from rules of interpretation of treaties why these phrases at the end of Art. 2(4) must be read as being restrictive on the use of force vice being escape clauses or loopholes. An escape clause is one that allows a party to escape the obligation of the provision at issue. *Also see* Goodrich, *supra* note 28, at 103, 104-5.

[87] Goodrich, *supra* note 28, at 50; Shaw, *supra* note 37, at 686. This issue was addressed in the context of assisting or encouraging armed resistance in another state. Specifically, a state may not invade another state in order to oust the leadership and install another. Nor may it achieve the same result by organizing, instigating, assisting or participating in either terrorist acts or in the formation of armed bands for incursion into another state.

Francisco nor has the General Assembly or International Court of Justice given it a definitive meaning, although there has been extensive debate on the subject in those forums and by publicists. In the Security Council this issue would seemingly be ripe for discussion, depending upon the exact fact situation at hand, every time the Council is called upon to determine whether there exists a threat to or breach of the peace or an act of aggression. But, as described in section III.B. below, the criteria for Security Council determinations is not use of force. Additionally, as these decisions are handled on a case-by-case basis and involve as much, if not more, political as legal considerations, it is not surprising that the Council has not attempted a more specific definition of the term "use of force."

I suffer from no delusions about giving this phrase precise meaning either. It is an impossible task. It will always be, at a minimum, "fuzzy around the edges." The intent here is to clarify its meaning to the extent possible and outline approaches that may be taken in using this term as it applies to the subject of data manipulation of a foreign state's data.

B. "Use of Force" at San Francisco

The term "use of force" was one of the many that was thoroughly discussed at San Francisco but never defined in more precise terms. Others, of relevance here, include "threats to

the peace," "breach of the peace," and "act of aggression."[88] In discussing aggression, but equally true for attempting to define use of force, Professor Stone writes of the futility of thinking an exacting definition of such a concept can be written. Even if specific criteria were agreed upon in the definition, there will still be "additional elements of uncertainty of interpretation of the criteria themselves" and the "verbal formulation...still has to be interpreted and applied by the very organs whose unreliability is the reason for the formulation" of the more specific definition.[89]

If the precision of the meaning of a specific word was fleeting at San Francisco, one would have thought that the precision of the choice of words would not have been. In somewhat typical fashion, the Charter uses broad aspirational language in its preamble and in describing its Purposes in Article 1. Article 2 contains the principles the members and the organization itself are to follow "in pursuit of the Purposes." An Article 1 Purpose is "the prevention and removal of threats to the peace and for the suppression of acts of aggression or other breaches of the peace." But the principle to be followed in its pursuit is "refrain[ing]" from the "threat or use of force."

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[88] After rejecting Bolivian and Philippine proposals to insert into the text a definition of aggression, it was decided to leave to the Security Council complete discretion to determine what constitutes a threat to or breach of the peace, or an act of aggression. Doc. 943, III/5, 11 U.N.C.I.O. Docs. 17 (1945); 12 U.N.C.I.O. Docs. 505 (1945).

[89] Julius Stone, Aggression and World Order 24-25 (1958).

The discordance is clear, unless one concludes that the "use of force" is defined as anything that threatens the peace or is a breach of the peace or an act of aggression. Neither the record at San Francisco nor practice under the Charter supports such a position. While arguably a breach of the peace and an act of aggression are forms of use of force, certainly everything that threatens the peace is not.

The discordance continues when one examines the enforcement mechanism. In discharging its duties "the Security Council shall act in accordance with the Purposes and Principles,"[90] thus it is following both guidelines even though a member state is only given one as the norm (principle) to follow. Under Chapter VI, Pacific Settlements of Disputes, "any dispute the continuance of which is likely to endanger the maintenance of international peace and security"[91] may come under the cognizance of the Security Council, at its discretion, though the parties are to first try to resolve it through their own peaceful means. This is yet an even broader mandate for Council action, but is a logical one in light of the object of resolving disputes before they become armed conflicts.

Chapter VII discusses action with respect to threats to the peace, breaches of the peace, and acts of aggression. Article 39 therein provides that the Security Council "shall determine the existence" of one of these acts and then make recommendations or

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[90] **U.N. Charter, art. 24(2).**

[91] **U.N. Charter, art. 33.**

decide what measures need be taken. The Security Council never decides if Article 2(4) has ben violated, only if the conditions of Article 39 have been met. Lastly, the discordance continues in Article 51 which provides that a state's "inherent right" of self-defense is unimpaired against an "armed attack." Article 1 and Chapter VII refer to threats to the peace, breach of the peace and acts of aggression. Chapter VI refers to disputes endangering the international peace and security. Article 2(4), as the only article to do so and the only article that imposes a norm on the freedom of a state to act,[92] refers to threat or use of force. Article 51, again the only one to do so, refers to armed attack. A key question is how do they all fit together since there are so many different terms used?

One could, with some justification based on the record of the San Francisco Conference, argue that breaches of the peace and acts of aggression under Article 39 are the same as use of force under 2(4) and armed attacks under 51. The result being a state has the right to respond in self-defense to breaches of the peace and acts of aggression. However, threats to the peace, because they are "only" still threats, should be taken to the Security Council for resolution before they become actual breaches. Chapter VI would work in the same manner except it authorizes Security Council involvement even earlier in the dispute where it

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[92] **The other principles, particularly art. 2(3) peaceful resolution of disputes and art. 2(7) non-intervention, touch on use of force indirectly but, unfortunately, do not connect in any precision any better than does art. 2(4) to the determinations of the Security Council under art. 39.**

has only arisen to the level of endangering the maintenance of international peace and security as opposed to threatening it. Presumably at least one of the thoughts behind Chapter VI is that the sooner a credible third party can mediate a dispute, the less likely it will turn violent. Unfortunately, this enumeration is not completely consistent with the actual words of the Charter (there is no requirement to accept mediation or any other form of dispute resolution under Chapter VI) and is most certainly not in keeping with practice. All of the pieces just do not fit together so neatly.

The original Dumbarton Oaks proposal for what was to become Article 2(4) was "All members of the Organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization." The Peruvian delegate described this version as "perfect."[93] His position was that the article should not contain any exceptions to the use of force but that "force ought to be used only in accord with the purposes of the Organization."[94] The amendment to include the phrase "against the territorial integrity or political independence of any state" caused great debate. Some feared these words would be used as escape clauses with states claiming that as long as their use of

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[93] Doc. 1123, I/8, 6 U.N.C.I.O. Docs. 68 (1945).

[94] *Id.* He did not say so, but it would appear he meant that the use of force could only be used under one of the four specific reasons listed in the Charter, see *supra* note 38, not that force was to be allowed for accomplishments of the purposes of the organization.

force was not against the territorial integrity or political independence of another state, then their use of force would be lawful.

To some it now appeared there were at least three arguments for the lawful unilateral use of force in addition to self-defense. Those being use consistent with (or in order to accomplish) the objects and purposes of the Charter, use that does not adversely effect the territorial integrity of another state (no border change resulted), and use that does not adversely effect the political independence of another state (no change in government or a government's policies resulted). During the course of discussions the U.S. 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; the phrase 'or in any other manner' was designed to insure that there should be no loopholes."[95]

Consistent with the U.S. statement, the committee working on the draft of Article 2 at the Conference stated for the record:

> that the unilateral use of force or similar coercive measures is not authorized or admitted. The use of arms in legitimate self-defense remains admitted and unimpaired. The use of force, therefore, remains legitimate only to back up the decisions of the Organization at the start of a controversy or during its solution in the way that the Organization itself ordains."[96]

Article 2(4) was then adopted with the understanding that use of force was legitimate in only the two above mentioned reasons -

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[95] Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 335 (1945).

[96] Doc. 885, I/1/34, 6 U.N.C.I.O. Docs. 400 (1945).

Article 51 self-defense and pursuant to Security Council authorization.[97]

A statement of the Delegate of the United Kingdom is exemplary of the many concerning the meaning of the word "force." There were numerous proposed amendments to what became Article 2(4).[98] All were defeated except for the one just described above. One of the defeated amendments, made by Brazil, was to extend the prohibition against the use of force to include economic or political coercion.[99] After these issues were settled, the U.K. representative stated, while discussing aggression:

> Apart, however, from the difficulty in defining aggression and therefore of knowing what the nations were pledged to resist, the use as a standard of an inexplicit word, such as "aggression," instead of something explicit such as "force" would give an opportunity to a state to engage in an act of aggression while calling it by another name.[100]

It is also noteworthy that the Charter's preamble states "that armed force shall not be used, save in the common interest." Characterizing the word "force" as an explicit term at that time was not questionable. It had become clear that it meant military

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[97] **Derek W. Bowett, Self-Defense in International Law 150-52 (1958), *also citing* Pompe, Wehberg, and Lauterpacht in Oppenheim (7th ed.), that the intent of the parties, ie., whether they intended to violate the territorial integrity or political independence, was irrelevant to the framers of the Charter as these phrases were not escape clauses but rather were adopted at the insistence of many smaller states to give more effect to the general prohibition against the use of force in interstate relations.**

[98] ***See* 6 U.N.C.I.O. Docs. 557 (1945) for a complete listing of the proposed amendments to Article 2(4).**

[99] **6 U.N.C.I.O. Docs. 334, 609 (1945).**

[100] **Doc. 866, I/1/30(a), 6 U.N.C.I.O. Docs. 356 (1945).**

or armed force.[101] In 1945 that meant traditional weapons employed in traditional ways (but not necessarily only by regular armed forces - guerrillas, members of resistance groups, personnel employed by other agencies of the government besides the defense entity and so forth were included).

C. What "Use of Force" Is Not

1. Violations of International Law

In clarifying "use of force" it is helpful to illuminate what it is clearly not. One concept that must be distinguished is violations of international obligations or, rephrased, not every unlawful act under international law targeted towards another state is the use of force. This is true regardless of the source of the norm.[102]

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[101] Shaw, *supra* note 37, at 686, states "The reference to 'force' rather than war is beneficial and thus covers situations in which violence is employed which fall short of the technical requirements of the state of war."

[102] The International Telecommunications Convention (Nairobi Convention), 1982; Agreement Relating to the International Communications Satellite Organization (INTELSAT), Aug. 20, 1971, 23 U.S.T. 3813; Convention on the International Maritime Satellite Organization, Sept. 3, 1976, 31 U.S.T. 1; United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, U.N. Sales No. E.83V.5 (1983), *reprinted in* 21 I.L.M. 126 (1982); and the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (The Outer Space Treaty), Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205, are treaties often referred to when discussing information warfare. Typically, data manipulation could well come under their auspices as most forms of data manipulation are likely to use signals sent by one or more satellites under the jurisdiction of one or more of these treaties. In answering the question of whether a

2. Economic and Political Coercion

The issue of whether use of force may be accomplished by means of economic or political acts was seemingly a closed issue after the San Francisco Conference, but has on several occasions been reopened, and is likely to be renewed again if certain of the possibilities of information warfare become reality. The rigorous economic embargo the U.S. has enforced against Cuba since the early 1960's, even with the publicly acknowledged aim of changing the form of the Cuban government, has not been considered to be a use of force. Likewise, the Arab embargo of Israel has not been considered to be a use of force either. The 1973 Arab oil embargo reopened this question without definitive

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particular act of data manipulation is lawful under international law, all of these treaties would have to be consulted. In answering whether data manipulation equates to the use of force, these treaties are not helpful. Even assuming, arguendo, that the specific act of data manipulation being examined is inconsistent with the obligations of these treaties, then the act necessarily is only unlawful. Whether that act is a use of force is a wholly distinct issue. The act could be unlawful but still not be the use of force or, conceivably, if perhaps less likely, it could be the use of force but done in such a way as to not violate any of these treaties. Other treaties may also similarly impact on the general lawfulness question but not the use of force question. The Incidents at Sea Agreement between the U.S. and the U.S.S.R. prohibits simulated attacks on each other's ships. Many of our arms control agreements prohibit interference with certain data flows, particularly by national technical means (spy satellites). In the case of these agreements, there is a possibility that at least some forms of information warfare, if not specifically data manipulation, could be construed by the other state as being the use of force. In such a case the act would be the use of force, or not, because of the nature of the act, not because it is a violation of the agreement. However, the fact that the act was a violation of an agreement might be used as one of the indicators and warnings of a hostile act.

resolution, but with added perspective.[103] The sanctions against South Africa stirred the debate as to their legality under international law, but they were not equated to a use of force.[104]

These examples pose the questions of, is the use of coercion an unlawful use of force under Article 2(4) and, related but distinct, must there be an armed attack before there is a use of force within the meaning of Article 2(4)? The use of the word "coercion" provides no assistance in trying to define the norm of the prohibition of the use of force. Coercion happens in every day life between "non-friends" (whether outright enemies or the relation is in a lesser state of discord) as well as between friends and allies. The normal course of diplomacy has, probably since the first ever contact between two different governments, always included elements of coercion. Even military coercion may

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[103] *See* **Jordan J. Paust & Albert P. Blaustein,** *The Arab Oil Weapon-A Threat to International Peace,* **68 Am. J. Int'l L. 410 (1974) and Ibrahim F. I. Shihata,** *Destination Embargo of Arab Oil: Its Legality under International Law,* **68 Am. J. Int'l L. 591 (1974) for opposite sides of the argument. Interestingly this situation reversed the roles of the U.S. and the Arab states. In this situation the Arab states were the more powerful and the U.S. was in the role of a weaker state. As such, the weaker state continues to argue economic coercion should be the use of force and the powerful states argue it is not the use of force.** *See also* **Derek W. Bowett,** *Economic Coercion and Reprisals by States,* **13 Va. J. Int'l L. 1 (1972); Coercion and the New International Economic Order (Richard B. Lillich ed., 1976); 12 Texas Int'l L.J. 1 (1977) which presents the papers from a symposium on the subject; and Tom L. Farer,** *Political and Economic Coercion in Contemporary International Law,* **79 Am. J. Int'l L. 405 (1985).**

[104] *See Agora: Is the ASIL Policy on Divestment in Violation of International Law? Further Observations,* **82 Am. J. Int'l L. 311 (1988), and citations therein, for both sides of this question.**

not be a use of force. Examples of the later include conspicuously changing the level of alert, conducting joint maneuvers or war games, sending a wing of fighter or attack aircraft to shore up a country, sending a carrier battle group offshore or focusing intelligence collection assets on a country.

The argument over whether economic or political coercion is a use of force for Article 2(4) purposes is seemingly renewed at every opportunity, whether in conjunction with General Assembly resolutions or in connection with treaty negotiations. Such persistence is not surprising since the concept had considerable support in San Francisco, carrying a majority in committee but not the two-thirds required for adoption. At the Vienna Convention, a continuation of the "acrimonious dispute" took the form of a proposed amendment to the text to include within the meaning of the term "force" any economic and political pressure. The amendment was "vociferously supported and vehemently attacked."[105] The U.S. took its standard position, "It has been erroneously urged from some quarters that adverse propaganda or economic measures against a State constitute a threat or use of force in violation of Charter principles."[106] The amendment was finally withdrawn on the *quid pro quo* of a draft declaration also being forwarded to the General Assembly as an annex that condemns the threat or use of pressure in any form by a state to coerce

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[105] **Kearney,** ***supra*** **note 49, at 533-34.**

[106] ***Id.*** **at p. 500.**

another state into concluding a treaty.[107] Not all harmful data manipulation will be coercion. Some forms of it could be, but determining whether the particular act of data manipulation is coercion is simply not a helpful step in the analysis of whether or not it is a use of force.

3. Armed Attack Distinguished

In the traditional use of force sense, the *Corfu Channel Case*[108] is an excellent example of the difference between a use of force and an armed attack. The British, after one of their warship's struck a naval mine in the territorial sea of Albania, entered Albanian waters again and swept the mines. The ICJ held that the British violated international law with its intrusion into Albanian waters for this purpose, but this act by the British military did not constitute an armed attack. In another case the Court also held not to be an armed attack the provision of arms to the leftist rebels in El Salvador by Nicaragua.[109] In the same case the Court said it had insufficient evidence to determine whether certain cross-border incursions by Nicaraguan military forces into the territory of Honduras and Costa Rica constituted armed attacks. The Court did say that there is a

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[107] *Id.* at 535.

[108] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4.

[109] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

difference between armed attacks and frontier incidents because the former has "scale and effects."[110]

From these cases it is clear that, while these acts are indeed a violation of the other state's sovereignty and an unlawful act under the Charter, not every nonconsensual crossing of a border by military forces will be an armed attack. Nor must there be a border crossing for there to be an armed attack. In the *Hostages Case*[111] the Court indicated that the actions of Iran in holding hostage the American personnel from the embassy was an armed attack even though not perpetrated, at least originally and for public consumption, by the government of Iran.

The overall wording of the Charter, the discussions at San Francisco, and ICJ decisions all lead to the inescapable conclusion that all armed attacks are a use of force, but the reverse is not correct. All uses of force in violation of 2(4) are not armed attacks allowing a state to respond with force

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[110] *Id.* at 103.

[111] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3., *reprinted in* 74 Am. J. Int'l L. 746 (1980), 19 I.L.M. 553 (1980). The ICJ specifically stated the legality of the failed U.S. rescue attempt (use of force in defense of nationals abroad) was not before the court. *Id.* at para. 94. The ICJ did not specifically proclaim the hostage taking as an armed attack within the meaning of Article 51 but twice in its judgment it referred to the embassy takeover as an "armed attack." *Id.* at paras. 57 and 91. It would seem unlikely that the Court would not realize the significance of the phrase armed attack, intending only to use it in a descriptive sense, but such is theoretically possible. In other places the Court used "attack," *Id.* at paras. 17, 24 and 25, and "assault," *Id.* at para. 18. At another point the Court took note of the U.S. reference to the situation as an armed attack, *Id.* at para. 32.

under the guise of Article 51.

In *Corfu Channel*, the Court stated the acts of the U.K. were not only a violation of international law but also a use of force. In response to Britain's claim that the intervention to secure evidence for use in the judicial proceedings before the ICJ was permissible, the Court stated,

> The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form here, for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself."[112]

This difference between use of force and armed attack is another of those disconnects in the wording of the Charter, complicated by the different possible interpretations of Article 51 itself.[113] The words "inherent right" and "if an armed attack occurs" provide room for contradictory interpretations. The important point here is there is no direct correlation between what is a use of force under Article 2(4) and armed attack under Article 51. They are two different events that may or may not

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[112] Corfu Channel, *supra* note 108, at 34-35.

[113] The scope of self-defense is another subject that has been the subject of intense debate and far exceeds the scope of this paper. It is only mentioned here as to its interplay with art. 2(4).

overlap.[114] The ICJ stated what is now the generally accepted interpretation of Article 51 which is that Article 51 was intended to preserve the already existing right of self-defense.[115]

There is an alternative, minority viewpoint of this situation. This viewpoint is that only armed attacks generate the right to respond in self-defense under Article 51, but a state is not powerless to respond to other forms of intervention from another state. Rather, the minority view is that the appropriate response in these situations is with counter measures, but, due to the prohibition against reprisals using force and the fact that it not self-defense, these counter measures cannot include the use of force beyond the territorial boundary of the state employing the counter measure. The distinction being those that advocate this limited view of self-defense restrict when the use of force may be employed outside a state's own borders to prevent intervention within those borders.[116]

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[114] Brownlie, *supra* note 86, at 365; Bowett, *supra* note 97, at 187.

[115] Nicaragua, *supra* note 109, at 94. *See also* the quotation accompanying text, *supra* note 92, "self-defense remains admitted and unimpaired." As an example of the debate as to the extent to which self-defense exists, *see* Brownlie, *supra*, note 86, at 274, where he discusses that the right of self-defense must be measured as that which existed in customary international law as of the time of the drafting of the Charter in 1945, which is a narrower self-defense right than that in existence prior to the 1919 Covenant of the League of Nations.

[116] *See* Henkin, *supra* note 78, at 141. Henkin argues that the position that there exists an inherent right of self-defense apart from the "if an armed attack occurs" qualification of art. 51 is "unfounded, its reasoning is fallacious, its doctrine

D. Declaration Concerning Friendly Relations[117]

The declaration enunciates seven principles that, as worded, are so broad that in their generality, and so closely mirror Articles 1 and 2 of the Charter, that they are not contentious. Under each principle are further explanations which are also somewhat broad (at least broad enough to garner the consensus needed for adoption by the special committee). The result is little more than a restatement of principles and concepts already fairly well understood. For example, under the first principle (which is a paraphrasing of article 2(4)) the sixth paragraph is, "States have a duty to refrain from acts of reprisals involving the use of force." This declaration is a restatement of the

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pernicious."

[117] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, U.N. GAOR, 25th Sess., U.N. Doc. A/RES/2625 (1970), *reprinted in* 65 Am. J. Int'l L. 243 (1971). This declaration was finally adopted on Oct. 24, 1970, seven years after the General Assembly first called for a special committee to draft this document in 1963. Similar to the other resolutions which were adopted in this time frame, it was difficult to get agreement on anything more than general statements as these negotiations were occurring with the backdrop of various armed conflicts, particularly in Vietnam and the Middle East, and the height of the differences between the Western nations, the socialist countries and the non-aligned movement. This declaration was negotiated through its seven years on the basis of consensus.

proclamation in Security Council Resolution 188,[118] which is also a concept from the Kellogg-Briand Pact,[119] was stated by the ICJ in the *Corfu Channel Case*[120] and has been reaffirmed by the U.S.[121] The committee included this provision because they regarded, and apparently wanted to emphasize, the concluding phrase of Article 2(4) as a limitation on state action, not as an escape clause.[122] The discussions behind the adoption of the last phrase of the ninth paragraph[123] under the use of force principle reveal that it was specifically targeted to preempt the argument that the inherent right of self-defense applies anytime there is a use of force in violation of Article 2(4).[124]

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[118] U.N. Doc. S/5650 (1964). The resolution "Condemns reprisals as incompatible with the purposes and principles of the United Nations."

[119] *Supra* note 33, at art. II. "The High Contracting Parties agree that the settlement or solution of disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

[120] *See supra* note 112 and accompanying text.

[121] The U.S. voted for the resolution, remains a party to the Kellogg-Briand Pact, and publicly reaffirms its position such as in a letter from Acting Secretary of State Kenneth Rush to Professor Eugene Rostow, Dept. of State File No. P74 0071-1935, *reprinted in* 68 Am. J. Int'l L. 736 (1974).

[122] As discussed *supra,* notes 86, 95-97 and accompanying text.

[123] "...when the acts referred to in the present paragraph involve a threat or use of force."

[124] Robert Rosenstock, *The Declaration of Principles of International Law concerning Friendly Relations: A Survey,* 65 Am. J. Int'l L. 713, at 720 (1971). Mr. Rosenstock was the Adviser, Legal Affairs, U.S. Mission to the U.N. *See* discussion *supra* section IV.C.3.

As one would expect; there was considerable debate in the committee during the discussions on this principle as to what the term "force" meant in Article 2(4). The more limited view advocated the term meant armed or physical force. This position was advocated mainly by the Western and several Latin American states based on the drafting history and textual analysis of the Charter. The other view was that force meant all forms of pressure including economic and political when they threaten the territorial integrity or political independence of a state. This position, advanced on the theory of fulfilling the purpose of the article, was advocated mainly by the African, Asian, some Latin American and the Eastern bloc states.

Their argument contended that the Charter should be interpreted as the U.S. Constitution is (though they used a John Marshall instead of President Roosevelt quotation) and that it was wrong to remain bound by the 1940's thinking expressed in the *travaux preparatoires*.[125] A reading of the Declaration reveals this disagreement was never settled, though the concerns raised about economic and political coercion were ameliorated in the third principle of the declaration on non-intervention.[126] The

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[125] *Id.* at 724-25.

[126] **The third principle on non-intervention, while clearly based on Article 2(7) which states the U.N. is not authorized to intervene in the domestic affairs of its members, highlights the difficulty in giving these resolutions binding legal effect. If one were to closely follow the wording of the text on the third principle, a state would nearly have to refrain from diplomacy. The wording is so broad and inclusive that even a truly friendly attempt to help another state could be read to be contrary to this portion of the Declaration.**

final result was the same as in San Francisco. The attempt to amend the text to specifically include as a use of force either political or economic coercion was explicitly not adopted.

The common sense approach to this issue supports such a conclusion. Besides the great difficulty in distinguishing between lawful diplomatic acts and impermissible acts of political coercion, there would be equal difficulty in distinguishing between lawful foreign aid and impermissible economic coercion. There were statements by at least one delegate that equated foreign aid to an entitlement. It was argued that once a state gave foreign aid to another state, that aid could not be withdrawn in protest of a certain action because to do so would be economic coercion and the use of force in violation of 2(4). The operative effect would likely have done more harm than good to third world countries needing aid because the incentive to give aid would have deteriorated if such a norm were adopted. It is also difficult to believe that the socialist countries supporting such a measure in Vienna would really have continued to provide aid to states whose government later became anti-communist. It is also difficult to believe many legislatures in Western states would have agreed to the appropriations either in cases where the governments turned anti-western.

E. Definition of Aggression

This is another subject that in and of itself has been extensively debated[127] for longer than there have been treaties trying to limit force as a permissible state instrument.[128] I shall give this subject a very brief treatment here because a paper on the use of force is seemingly incomplete without it. However, upon closer examination, whether an act of a state is aggression or not is somewhat irrelevant in today's international legal system under the Charter. This position was expressed by Mr. Rosenstock in his statement to the Special Committee on the Question of Defining Aggression upon that committee's adoption, by consensus, of its text to be sent to the General Assembly.

> We should, of course, not allow our success to lead us to place too great an emphasis on what we have accomplished. Even a legally perfect definition of aggression could do more harm than good if it were given too great an emphasis. ...It would, however, be to misconstrue the function of chapter VII of the Charter if the Council were led by this text to delay urgent action under chapter VII in order to first settle whether an act of aggression had taken place when a finding of a "threat to the peace" or a "breach of the peace" would more expeditiously and productively activate the collective security mechanism of the Charter.[129]

As Mr. Rosenstock's statement indicates, aggression has become to

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[127] **Too numerous to list, all of the classic treatises on laws of war discuss this subject. For a particularly comprehensive coverage of twentieth century efforts, culminating with the adoption of the General Assembly resolution, to define aggression, see the two volume set, Benjamin B. Ferencz, Defining International Aggression: The Search for World Peace (1975).**

[128] **Since at least 400 years before Christ, by Mo Ti, a Chinese philosopher, there have been calls to prohibit wars and outlaw aggression.** *Id.* **at 4.**

[129] **Dep't St. Bull., 1974, at 498,** *reprinted in* **68 Am. J. Int'l L. 734 (1974).**

be accepted as a more severe form of the breach of the peace,[130] but such a distinction is one, at least legally if not politically, without a difference as all forms of breaches of the peace incur the same sanctioning process under the Charter. The degree of the severity of the breach of the peace is undoubtedly one of the many factors effecting the political will to respond, but attaching the label of aggression versus that of breach of the peace is more the end result of the political feelings of the Security Council rather than a precursor to action.[131]

For purposes here concerning data manipulation, the Resolution on the Definition of Aggression is also of little help because it defines aggression as the use of armed force and provides examples that are all traditional military conquests with traditional weapons.[132] Earlier attempts at the definition of

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[130] Resolution on the Definition of Aggression, G.A. Res 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975), *reprinted in* 13 I.L.M. 710 (1974). The preamble to the annex of the resolution states that "aggression is the most serious and dangerous form of the illegal use of force."

[131] *See also* Shabtai Rosenne, *in International Law and the Use of Force,* 62 U.S. Naval War College Int'l Law Studies 1, 6 (Richard B. Lillich & John Norton Moore eds., 1980). In addition to the lack of a differentiation of legal affect, the author argues that labeling a state as the aggressor could make it more difficult to reach a settlement to end the dispute. The Security Council's function is not to settle disputes, it is to restore and maintain peace, but the pragmatic realization is the best way to restore and maintain peace is to settle disputes, whether directly by the Council or, more likely, through other third parties.

[132] The resolution specifically states in its preamble to the annex that a determination of an act as aggression must necessarily be considered in light of all of the circumstances of each particular case and that the examples cited are clearly not exhaustive.

aggression, such as at San Francisco, are also not enlightening in regards to data manipulation as they too focus on traditional military conquests.[133]

F. Use of Force in Practice under the Charter

There is a very long (most would agree too long) history of the unilateral use of force during the 50 years the Charter has been in force. The literature ascribes this use of force to a few general categories of reasons, prominent being the combination of two competing superpowers with such conflicting systems and the rapid decolonizing of the "third world" almost exclusively before those societies were self-sufficient and capable of a peaceful transition. This phenomenon produced an exceptionally ripe battleground on which the Soviet Union and its satellites dueled with the Western powers, led by the United States, over spheres of influence of these emerging states and their governments. One of the results of this Cold War was the great outcry from the emerging Third World nations for the legitimacy of the use of force for self-determination and the concomitant prohibition of supplying foreign aid to those resisting the right of self-determination. One of the ironies of this situation being that the prohibition of the supply of foreign aid was usually called for by a party that had gained control of its state, or was still trying to, by the use of force

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[133] Doc. 442, III/3/20, 12 U.N.C.I.O. Docs. 341 (1945).

with weapons or other support supplied, directly or indirectly, by some foreign entity.

Out of this violent semi-chaos of world order emerged more arguments for the legitimacy of the unilateral use of force. Broadly grouped these include, in addition to the right of self-determination and assistance to those trying to achieve it, the enlargement of the concept of self-defense such as with claims of anticipatory self-defense and rescue of nationals in foreign territory, responding to terrorism, humanitarian intervention, and, more recently, installing democracies.[134]

Unfortunately close study of these instances of use of force provides very limited assistance here. These case studies are excellent for the question of when may force be applied, but offer little guidance as to what, if anything, constitutes force beyond the traditional concept of physical, armed force. They do, however, shed some light on the issue of the continued viability (or not) of Article 2(4) as the controlling norm for the use of force.

This is the specific subject which Arend and Beck treat in detail in their recent work.[135] They offer three approaches to

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[134] **The literature on the subject of these two paragraphs is voluminous. For some of the more well known treatises** *see* **Shaw,** *supra* **note 37; Bowett,** *supra*, **note 97; Brownlie,** *supra* **notes 50 and 86; J. L. Brierly, The Law of Nations (6th ed., Sir Humphrey Waldock ed., 1963); Yoram Dinstein, War, Aggression and Self-Defence (1994); Myres S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order (1961); Arend,** *supra* **note 24; Henkin,** *supra* **note 78.**

[135] *Supra* **note 24.**

this issue as suggested by a review of the publicists and state practice. They are the legalist, core interpretist and rejectionist. In brief, the legalist approach recognizes the problems, but argues that Article 2(4) is still good law. Supporters of this position argue that states have not explicitly repudiated the article and, especially since it is part of a universal treaty, such an act is necessary to have the norm displaced. They also argue that, for the most part, it has exerted a restraining influence, which raises the old issue of proving a negative. How many times did states not resort to force because of the existence of Article 2(4)?

The core interpretists argue that the legalists strict textualist reading of 2(4) no longer represents existing law, but that a core meaning to Article 2(4) remains in identifiable fashion and is authoritative and controlling. The supporters of this position differ, rather extensively, as to what is this core meaning that can be identified. They encompass both the subjective and contextualist approaches. The rejectionist approach simply rejects the continued viability of 2(4) as establishing the norm because authoritative state practice is so far removed from any reasonable interpretation of it.[136]

Professor Franck, as the only major international legal

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[136] **Arend, *supra* note 24, at 179-185 for their presentation of these approaches.**

scholar to expressly adopt the rejectionist approach,[137] compares Article 2(4) to the federally imposed 55-mile per hour speed limit in the U.S.[138] This excellent comparison demonstrates the difficulty with accepting the rejectionist approach over the core interpretist. While the speed limit was clearly not obeyed (nor even enforced in some jurisdictions) it was the law and had some influence, including those that strictly complied with it. The question is one of degrees. Norms do evolve by state practice, that is customary international law. Thus, to what degree must the exception to a universal norm be evident in state practice before that norm no longer exists, vice the norm having evolved with state practice?

Fortunately I am not obliged to answer that question here in the legal-philosophical vein, but can take the pragmatic out. No state and exceptionally few jurists argue the extinction of Article 2(4). The vast majority of both do argue that 2(4) has evolved through state practice, though the exact parameters of that evolution are highly contentious. As such, the realistic view is that 2(4) is still the norm, though realistically to what extent it is actually controlling is clearly debatable. As the degree to which states may use force, and defend that use in the court of the world, will continue to center on Articles 2(4) and

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[137] **Arend, *supra* note 24, at 185. Arend and Beck also support the rejectionist approach. They list three others as having come close. *Id.***

[138] **Arend, *supra* note 24, at 184, *citing* Thomas M. Franck, The Power of Legitimacy Among Nations 32 (1990).**

51, so too does this paper.

G. Some More Thoughts of the Publicists on Article 2(4)

The publicists, or jurists,[139] present as divergent views as the textual, subjective and contextual approaches to interpreting a treaty would be expected to produce. In what Professor Stone calls the "extreme" view (what I would call an expansive textualist view) of Article 2(4), is the position that any use of force, without Security Council approval, across a territorial border, not in self-defense against an armed attack, violates 2(4).[140] Stone states that this interpretation does have some support in the *travaux preparatoires*, but that it ignores the phrase about territorial integrity and political independence.[141] As I have already discussed, use of those terms as escape clauses is sorely misplaced based upon the entire reading of the *travaux preparatoires*[142] and questions of doubt should have been eliminated by the Court's decision in the *Corfu Channel Case*.[143]

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[139] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 1976 Y.B.U.N. 1052. Article 38 provides that the ICJ may consider "teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." The Statute of the International Court of Justice was also negotiated at San Francisco and signed at the same time as the Charter.

[140] Stone, *supra* note 89, at 95.

[141] *Id.* at 97-100.

[142] *See supra*, notes 86, 95-97 and accompanying text.

[143] *See supra* note 108 and accompanying text.

The real problem with this view of 2(4) is that it does not comport with what was intended to be "force." The words "any force" are too broad to be a true reading of 2(4), though without using the *travaux preparatoires*, this view simply amounts to applying the plain meaning of the word, in all of its forms, straight out of the dictionary.

Similar to this position, Hans Kelson asserts that use of force includes both the use of arms and a violation of international law which involves an exercise of power in the territorial domain but no use of arms.[144] Brownlie's analysis of Kelson's position is that, while the *travaux preparatoires* do not indicate that force under 2(4) means only armed force, they also do not support Kelson's very broad view of force either. Brownlie states that force does include more than armed force, but not such things as economic measures of a coercive nature.[145] One can cite many examples of "force" or "coercion" or "pressure" that one state may apply against another that is not a physical force. It is these things that Kelson has included but the defeat of the Brazilian amendment to 2(4) would seem to have definitively ruled out. On the other hand, physical force may be applied by more than regular military units, whether its the Chinese Army that the Peoples Republic of China insisted on calling "volunteers" in North Korea, or police units, hired mercenaries or whatever. It is clear that a state is responsible

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[144] **Brownlie, *supra* note 86, at 361-62.**

[145] *Id.*

for anyone acting on its behalf, whether under their control or more loosely such as at their direction or simply at their request.

1. What is a weapon?

Another aspect of defining force is not the who, but the means of applying force. By eliminating economic and political coercion, it is clear that physical, not mental, types of force were contemplated. Other than those who try to argue economic and political acts are included, the jurists seem unanimous about the need for physical force or violence - death or destruction. Physical force raises the issue of what is a weapon? A survey of the writers has found little written on this specific question.

Due to the lack of definitions provided by jurists, I will begin with the "plain meaning" of the word as suggested by the Vienna Convention. The dictionary definition[146] is "an instrument of offensive or defensive combat used in destroying, defeating or physically injuring an enemy." Brownlie, taking a similar approach, addresses the concept of weapon in one paragraph. First, he implies force means weapons. Then he asks if "weapons which do not involve any explosive effect with shock waves and heat involve the use of force." He uses as an example chemical and biological weapons. His conclusion is that, while they are called weapons and employed by military forces, more convincing

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[146] **Merriam-Webster's Third New International Dictionary of the English Language, Unabridged (1986).**

is the fact that they are employed for the destruction of life and property[147] and therefore are weapons.

The last example he uses is the expulsion of a population over a border, the unleashing of a huge quantity of water down a valley, or the spreading of a fire across the border. Brownlie concludes only by answering that the victim state has the right to respond, include crossing into the other state's territory as necessary, without saying whether these acts are force within the meaning of 2(4).[148]

2. What may be defended?

Similar to the above what is a weapon question, this has had little discussion in the literature. It is fair to say both questions received little treatment because the answers were mostly self-evident, though that is no longer true in the case of information warfare. As Article 2(4) emphasizes, clearly a state's territorial integrity and political independence may be defended. The ICJ in the *Corfu Channel Case* made it clear that military forces outside the home state, such as naval vessels and aircraft in transit, could be defended. While still of some debate, protection of nationals abroad[149] is gaining more and more acceptance as a legitimate use of force under self-defense.

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[147] **Brownlie, *supra* note 86, at 361-62.**

[148] ***Id.* at 363 and 376.**

[149] ***See* Arend, *supra* note 24, chp. 7.**

That, however, generally exhausts the list of what most jurists say may be defended with force. The next most discussed item is a state's economic well being. Bowett devotes a chapter to this topic[150] but concludes "that the right of self-defence has...little relevance to the problem of safeguarding the state's economic rights."[151] Although this was a 1958 writing, it would still appear to be the rule. Today there are many more international law norms on world trade and economics, due to such organizations as the World Trade Organization and the International Monetary Fund. Regional groups such as the European Union, which had as part of its roots an effort by France and England to make it economically untenable for Germany to start another war against them, also contribute to increasing international norm setting in the economic sphere. However, international organizations along with reciprocity, retorsion, and, perhaps, non-forcible reprisals have been the methods used to date to protect economic interests, not force.

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[150] **Bowett,** ***supra*** **note 97, at 106.**

[151] ***Id.*** **at 113.**

V. Application of Legal Concepts to Data Manipulation

A. Can Data Manipulation be Employed as a Weapon?

Certainly the delegates at San Francisco had no doubt about the continuing nature of the technological evolution of warfare. In the committee reports concerning the discussions on the merits of including within the Charter a definition of aggression, the following two passages are noteworthy. Recording the comments of "a representative of the United States," the record reads,

> It seemed undesirable to include too narrow a concept of aggression in the Charter. He pointed out that in the future there would be many kinds of aggression and these would be covered in the Charter by the words "threat to the peace." There would be ways in which aggressors could penetrate into a state and subvert it internally without bringing about an obvious "threat to the peace."[152]

This quotation could have been straight out of a presentation today warning about the dangers of information warfare. It is important to note that the U.S. representative presented this issue as a threat to the peace question rather than as the use of force.[153]

In accordance with Article 39, the Security Council is responsible for responding to threats to the peace, which are a lesser level of action on the part of the perpetrating state than is the use of force. As envisioned in 1945, threats were not an

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[152] **Doc. 810, I/1/30, 6 U.N.C.I.O. Docs. 344 (1945).**

[153] **From my reading through the record of the San Francisco Conference, there was virtually no discussion of the concept of use of force, but a great deal about aggression, including these two quotations.**

act that gave the target state the right to respond with the use of force in self-defense. The concept was that as long as the dispute was still at the threat stage, a state could make preparations but not take forceful action. The Security Council would instead intervene to attempt to maintain the peace.[154]

The second quotation of note is that it "became clear to a majority of the committee that a preliminary definition of aggression went beyond the possibilities of this Conference and the Purpose of the Charter. The progress of the technique of modern warfare renders very difficult the definition of all cases of aggression."[155]

Again, the words fit data manipulation perfectly. One of those changes in warfare that was unforeseeable in 1945 that has now come into being is information warfare, including data manipulation. It is well established that as technology changes so do weapons, but not all technological advancements become weaponry. Does data manipulation equate to the use of a weapon and then also the use of force? Another technological advance that could not be foreseen in 1945 was the extent to which spy satellites would intrude upon other sovereign states. Yet today

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[154] **This situation raises the issue of anticipatory self-defense. Depending upon your interpretation of Article 51, anticipatory self-defense is either part of the pre-Charter inherent right of self-defense that was specifically preserved by Article 51, or it is a nonetheless lawful part of self-defense that has evolved by state practice in response to the Security Council's inability to act during the Cold War, or, as a great many states claim, there is no such right.**

[155] **Doc. 943, III/5, 11 U.N.C.I.O. Docs. 17 (1945).**

there is no doubt that those satellites are not weapons and their use is neither the use of force nor aggression. Quite the opposite, to a great extent they are one of the guarantors of peace as an integral part of arms control verifications. Their use is also a confidence building measure to the extent that they help allay the fears of undetected major military movements and make other certain events transparent.

If spy satellites, which gave the U.S. a dramatic information edge over the Iraqis in the Gulf War, are not weapons (and certainly all pieces of military property are not weapons), then what about other pieces of equipment which do nothing but process data? If we use the criteria already enumerated above as the basis for determining what is a weapon (directly capable of producing death or physical destruction of property), then most, if not nearly all, instances of data manipulation would not equate to employing a weapon and would not be the use of force.

1. Missile Explosion Example

I can think of few examples otherwise, but two are illustrative. One was the question posed at the beginning of this article. If one state were to manipulate the data of another so as to cause a ballistic missile to explode, the requisite physical destruction has occurred. An interesting question is what was the weapon? The information that was sent? (Does information "exist" as a physical object?) The electrons

themselves? The computer that was used to manipulate the data? Is the computer the gun and electrons the bullets? The next time the U.S. is engaged in an armed conflict, is every desktop and laptop computer in America a weapon (though not necessarily a military weapon)? Even without answering these questions, it would still seem to be fairly noncontroversial that the use of force was employed against the state who had its missile exploded by reason of the kinetic result.

2. Aircraft Destruction Example

Another example of data manipulation that equates to the use of force is manipulating the data in the information system that controls a military aircraft in such a way as to cause it to crash (one of many ways of doing this could be to reprogram the auto-pilot to fly the airplane into the side of a mountain or to otherwise have the plane not do as the pilot commands). Again, there is the resultant death and physical destruction. Regardless of the means, the aircraft was targeted and destroyed. That it was done by data manipulation instead of anti-aircraft fire or planting a bomb aboard does not mean that force was not used.

Military personnel and equipment, certainly equipment such as missiles and aircraft, fall within those things that a state has the right to defend, with force if necessary. In both of these examples, one issue to keep in mind is that if the first

indication of the data manipulation attack is the missile exploding or the plane crashing, then there is nothing left to defend against, unless there is a follow-on attack. Such a fact can neither be taken for granted in order to permit the use of force in self-defense nor would the prudent commander necessarily discount the possibility of continuing attacks. This fact highlights the need to develop indicators and warnings so that we may know if there is an information attack occurring before the attack has succeeded.

3. Criteria Measuring Data Manipulation as a Use of Force

It should be pointed out that the criteria being used here to determine if a weapon is being employed is a kinetic result as opposed to a kinetic means. Traditional weapons have both, a bullet, bomb or whatever, that is a physical object which moves until it strikes something, resulting in a violent kinetic reaction. Even the pungi sticks that were used in Vietnam, though they did not move, involved a physical object entering the human body and causing a violent result. The biological warfare employed by coating the ends with bacteria could cause death or serious illness. In data manipulation, there is no such physical means employed, only, potentially, a physical, kinetic result.

Nuclear fission, directed energy (lasers), and now data manipulation, are all new means of warfare since the delegates met in San Francisco. Whether these instruments are weapons is

not an exceedingly relevant question to determining whether there has been a use of force.[156] A useful analogy is that of murder weapons in criminal law. Almost every existing object has been used at one time or another to inflict death, or at least bodily harm. What makes them a weapon and the use of force is how they were employed by whom against what and why (most importantly the why, or intent behind the act). Firing a ballistic missile is not the use of force if it is fired on a state's own test range. Assuming, arguendo, that two different sovereigns were involved, China's recent missile firings around Taiwan were an attempt at coercion, and they were certainly the use of weapons, but they were not employed in such as way as to be the use of force in violation of Article 2(4).

In the case of the destroying of the aircraft, it was done both intentionally and by one state against another, then it is an attack and the use of force regardless of whether it was destroyed by data manipulation or a SAM missile. Both elements are essential. The U.S. has to look no further than the tragic USS VINCENNES/Iranian airbus incident to understand that intent (mens rea) does make a difference. The other element is who committed the act. This factor determines whether it is a criminal act or the use of force in violation of Article 2(4), the latter of which may or may not trigger the right to respond

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[156] **Whether the instrument is a weapon is quite relevant as both international and domestic legal requirements mandate that all weapons undergo a legal review for their compatibility with the law of armed conflict.**

in self-defense. As mentioned in the introduction, determining if there was an attack and if so, who did it can be very problematic.

Even establishing that the analysis is result driven and using the seemingly straight forward criteria of directly causing death or physical destruction leaves interpretation questions. It is easy to determine that force has been employed when missiles explode and airplanes crash, but these kind of results could be minor problems compared to the potential havoc that can result from data manipulation. Yet, while death is still easy to ascertain, is the same criteria for physical destruction, that is a violent act, still a valid measure? What is property and what is destroying it? Is data property and by manipulating it, are we engaging in a destructive act?

The logical answer must be yes. In the agrarian age, crops as well as enemy forces were important targets. In the industrial age, while crops and food remained important, the target priorities for the most part shifted to industrial output - guns, transportation, communications equipment, planes, ships and so forth - as well as the enemy force. In the case of information all of the above continues to apply. Everything that was important before still is, but a key target is also going to be information (data). Data becomes not only property, but vital property. Destruction of industrial objects was done because they were vital instruments in the state's strength and therefore of great value. The same is still true in the information age.

Information is a vital instrument of a state's strength and therefore of great value. Its manipulation must be considered the destruction of property, albeit possibly lacking any violence in the process of destruction.

Previous discussion has demonstrated how economic and political coercion has consistently and explicitly been rejected as falling within the meaning of the use of force. At San Francisco it was also explicitly accepted that technological changes would continue to alter the means and methods of weapons and their employment, and that those changes must be accommodated. Nuclear energy and directed energy are two technologies that were unknown to the San Francisco delegates that have become capable as being used as force. Technological advances has now added data manipulation to that list. In the case of the aircraft destruction or the missile explosion, the shift in the means and methods simply reflect the changes in technology as anticipated by the drafters of the Charter.

4. Blinding of Satellites Example

Another, more problematic scenario is if one state were to affect another's satellites by data manipulation so as to make them "blind." This blinding would include either disabling the satellite so that it could no longer collect data or no longer transmit the data back to earth (or perhaps transmit the data back, but not to a place where the signals could be received by

the entity that launched the satellite). It is clear that the U.S. would treat such a situation as a grave threat to its national security,[157] but is it a use of force? There is no physical destruction, violence or death, at least not directly, as a result of this act. The satellites have not been destroyed, that is "blown to bits," but rather the U.S. has been denied their use. Additionally, if the U.S. discovered that the satellites were being manipulated by the information systems located in a certain building in the territory of the perpetrating state, could the U.S. target this building with a conventional air strike?[158] Whether the U.S. was the victim of force in this case could vary with ones interpretation of the Charter.

a. Textualist View

This approach would not view these incidents as the use of

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[157] Even the manipulating of one satellite would be treated with the gravest of concern, but probably would not in and of itself be cause for a forceful response. Losing the use of one satellite would not likely pose a serious threat to the U.S. with its redundant capabilities.

[158] Another factual distinction with data manipulation is what will the retaliatory act in self-defense accomplish? If a state was firing missiles at the U.S. and the U.S. attacked those missile sites, then the attacks (at least from there) would stop. But will destroying the building where the satellites are being controlled result in the U.S. regaining control of them? The answer depends upon the exact technology in use, but a great possibility is no. The result of the air strike could be that the only system that would restore the satellites has just been destroyed.

force against the U.S. An Article 33 dispute, the continuance of which is likely to endanger the maintenance of international peace and security, has clearly arisen. This situation would also seem to fit squarely within the comments from the San Francisco Conference,[159] leaving most textualists to agree that there has also been an Article 39 threat to the peace as well. While Article 39 gives the Security Council more leverage, either enables them to act. The textualist would direct the U.S. to the Security Council in this case as a classic example of how the U.N. was designed to work. At this point there have been no lives lost, presumably no property irreparably damaged and there is no need for immediate unilateral action when immediate collective action by the Security Council will achieve the same objective in the preferred collective vice unilateral fashion.[160]

b. Subjective View[161]

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[159] *Supra*, notes 153, 156 and accompanying text.

[160] It is a very debatable statement that there is no overriding need for unilateral action in self-defense. Advances in technology were assumed to naturally continue by the delegates at San Francisco, but one of the results of that advance is not entirely consistent with delaying unilateral response until the Security Council acts, even assuming it were inclined to do so. The speed and destructive power which modern technology provides could easily mean that any delay to allow the Security Council to meet will only post-bellum issues to solve.

[161] There is a broad range of possible applications of the interpretations by the subjective approach. Offered here is a fairly "mainstream" subjective view.

Without having actual knowledge of the motivation of the state in blinding the U.S. satellites, one is forced by the situation to treat the intent as proven by the acts, in this case as hostile, leading one to further conclude there has been a use of force. There has indeed been no violent physical damage done as I have described the scenario, but there is no way for the U.S. to know what events may be transpiring that are now no longer transparent to it. One of the more obvious conclusions to be drawn is that someone did not want the U.S. to see something. As such, that something must be treated as a threat, and could very well already be another use of force somewhere that will eventually become known.

The focus to determine if there has been a use of force is not only determined by the means used, but is also results oriented. The pertinent question becomes, is the result of the data manipulation on the "owners" effective use of the object the same as if it had, instead, been a kinetic attack? The crux is, has the United States' ability to use the satellites remained unimpaired? If not, and it is the result of a deliberate act of another state with the intent to deny us their use, then there has been a use of force by that other state against the United States.

Whether there is still a satellite in some form or fashion in orbit is just not the right issue. In the past, whether force was used or an armed attack occurred was measured by the physical state of being of objects (troops across borders, one kinetic

energy weapon causing kinetic results against some physical object, and so forth). The true measure though was not based on the state of existence of the object, but rather the object's intrinsic value to the state that owned it, including of course the territory of the state and all those objects that were created by the financial resources of the state and its citizens. In today's information age, we must think of more than just the physical sense but also to their value in any sense. If a state has been denied the value of the object, it has been denied the object whether by electrons, theft, or kinetic energy.

In this case example, the U.S. has at least a plausible basis to argue its security has not only been threatened but substantially degraded by the use of force against its satellites, and the degree of severity of the degradation equates to an armed attack, justifying the right to respond with force in self-defense.

This fact scenario also raises another of the increasingly apparent results of today's technological world. That is the interdependence not only of civilian and military systems within a state, but between states. For reasons of both arms control and confidence building measures aspects, loss of the use of the satellites will require an increased alert posture by U.S. forces, but also most likely all of NATO's and many others, such as Russia's and China's, simply because the U.S. alert posture increased. Certainly the Security Council will have the right to be seized of the matter but that would not prevent the U.S. from

acting before the Security Council was able to implement effective measures.

c. Contextualist View

There is no doubt that the contextualist would view this situation as a use of force and an armed attack enabling the U.S. to response in self-defense. Remembering, in a nutshell, the contextualist looks to past practice of states and probable future trends plus the three factors of exclusivity/inclusivity, consequentiality, and value conservation/extension criteria. Past practice and, at least as yet, future probable trend is to allow self-help in lieu of the Security Council's inaction. For the other three criteria, this case would result in an analysis very similar to the one in the Israeli bombing of the Iraqi nuclear reactor. The degree of consequentiality of these acts is potentially very high, the U.S. is not engaging in value extension but rather is simply trying to conserve those it has which are non-controversial in this case (basic survival and self-defense), and while the act is somewhat for its own exclusive benefit, stabilizing the situation works to the betterment of the world community at large.

B. Data Manipulation: Intervention versus Use of Force

Article 2(7) of the Charter only prohibits the United Nations

as an organization from intervening in "matters which are essentially within the domestic jurisdiction of any state." It does not contain a prohibition that applies to each member individually. Article 2(3) does require all members to settle disputes by peaceful means and to not endanger international peace and security. Embodied in all aspects of the Charter is the principle stated specifically in Article 2(1) that the states are all equal sovereigns. The Declaration on Friendly Relations also requires non-intervention in each others internal affairs. It is also clear from state practice that non-intervention has become an accepted norm. The difficulty has been in defining what constitutes interference, but a specific definition is not required for the discussion here.

The far more insidious use of data manipulation than the examples given above involve such things as interfering with communications systems (telephone switches and nodes, control of satellites), banking records (Federal Reserve), financial transactions (Wall Street), lines of communication (control of airways, railroad switches, sea port control), broadcasting propaganda (seizing control of radio, television and direct broadcast channels or in addition to them) which are not likely (depending upon the specific facts of each case) to be acts that are use of force under Article 2(4), but they would seemingly be violations of the prohibition against non-intervention.

Another of the inter-related issues that arise in these scenarios is the interdependence of the world's systems. If

someone were to shutdown the U.S. air traffic control system, the ripple effect on other states airlines and the entire world wide timetable of flights could be severely disrupted. Such an intervention into the "domestic" affair of the U.S. has far more than domestic U.S. implications. Even more dramatically, interference with the world's money supply by fraudulent electronic money transfers, the disruption of the Federal Reserve, or crashing Wall Street would result in potentially enormous world wide consequences.[162]

In these cases the question moves away from the issue of use of force in violation of 2(4) and becomes what may a state do without violating the prohibition against non-intervention. Are any of these acts of the type that allow a state to defend itself with force, or stated differently, what may a state defend with force? Is the reply limited to counter-measures, retorsion and reprisals not involving the use of force, with compensation under the doctrine of state responsibility?

In answer to the question, can data manipulation be the use of force, the answer is an unequivocal yes. However, the type of

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[162] **The U.S., as the state most dependent of any on the integrity of its own national information infrastructure, would probably be wise to not set precedents establishing the practice of data manipulation. A system similar to Presidential findings under 50 U.S.C. 413 for covert activities would seem to be a wise requirement before U.S. agencies were allowed to manipulate the data of another state. This suggestion is based strictly on policy, not legalities. The U.S. could easily do more damage to itself than to anyone else if its actions are not carefully thought through to the end of their logical consequences and ramifications. Perhaps the variant of the common principle of reciprocity, mutually assured destruction, will apply to more than the nuclear weapons aspect of national security.**

data manipulation envisioned by most proponents does not appear to be considered a use of force. Another study that is in great need is answering the questions from the above paragraph. Those issues may well, for the U.S., be more of a Central Intelligence Agency and Department of Justice issue than Department of Defense. From the national perspective, they do need to be answered, but the issue needs to be framed under the principle of non-intervention and remedies of self-help, not violations of Article 2(4).

Department of Defense activities somewhat naturally ask the question as a use of force issue. But, like everyone else, DOD will have to recognize the blurring of traditional boundaries that information warfare creates. Our self-imposed administrative boundaries, such as between the Departments of Justice, Defense, Commerce and State, and with the intelligence agencies, must be revisited if the U.S. is to ever have a hope of effectively and efficiently using data manipulation to its advantage - both protecting against it and using it against others. This paper makes no attempt to suggest an answer to that issue, only to recognize its existence and impact on what departments and agencies focus their resources.

From the Department of Defense perspective, a great deal of the potential data manipulation capability is most likely to be a violation of the norm against the intervention in the affairs of another sovereign state instead of a violation of the norm of the use of force. Internally to America, anytime except during an

international armed conflict (and perhaps during a military operation other than war such as peacekeeping) this use of data manipulation may not be within DOD's charter.

VI. Conclusions

Like all aspects of civilization, international law evolves through phases. It is difficult to name any aspect of society, legal or otherwise, that is the same in its specifics as it was over a half century ago when the drafters of the U.N. Charter met in San Francisco. Certain norms that were taken for granted at that time have passed on, others that were then new ideas have now become taken for granted. Others, aspirational or forward leaning, are still just that. The norm against the use of force is one of those that is arguably *jus cogens*,[163] yet still has significant non-adherence and lacks specificity in its definition. I suspect that, like murder in domestic law, the use of force in violation of society's prohibition will continue for the foreseeable future. That does not, however, mean that the norm does not exist or that states do not strive to adhere to it, even if those same states do on occasion fall short.

As in any legal system a complex balancing of interests must take place. In the international system the major interests to be balanced are the legitimate requirements of a state's security and, ever more so, its prosperity, and the equally legitimate requirements of a civilized world in public order. These interests have not changed since long before the United Nations. They are also extremely difficult to set forth in written form in

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[163] **A peremptory norm of general international law from which cannot escape. The two most often cited examples of norms that are *jus cogens* are art. 2(4) and the norm against genocide.**

specific detail. If the world community is not able to adapt its view of international law at the same pace that society changes, such as in its technology, then a more specific written definition of a prohibition of the use of force will save the norm prohibiting it, no matter how intellectually brilliant and far-sighted such a definition may be.

Most states of the world are economically, politically and militarily weak. They have always been and undoubtedly always will be. The quest of world order is not to make all states equally powerful, but to allow all individuals the ability to live in peace with equal dignity and standard of life. How this ultimately impacts upon the Westphalian state system is a chapter in history yet to be written. But today, as at San Francisco, and again at the Vienna Convention on Treaties, and again during the drafting of the Declaration on Friendly Relations, if a vote were taken, by state on an equal basis, the vast majority would vote for the broadest possible interpretation of the prohibition in international relations against the use of force. Anything that can be done under the information warfare sphere would be no exception. Such an interpretation would blur to the point of non-distinction the norms prohibiting use of force and non-intervention.

Information warfare has the potential to be a replay of the Arab oil embargo. As in 1973, the U.S. is a superpower (though today without peer) that can quickly find itself in the position of being the a weaker state. If oil supply was a critical

vulnerability of the United States in 1973, the national information infrastructure (NII) is no less of one today and arguably it is much greater. Greater because any actor, state or private, can attack the NII. In 1973 only the oil producing states had the capability to be an influential actor. Also greater in the sense that more damage to the nation's infrastructure could result from information attacks than by a cut-off of oil.

As discussed above, it is possible that data manipulation could conceivably be a use of force. However, such an occurrence is unlikely, or most certainly not the normal goal of data manipulation in situations before the commencement of hostilities (after which the lawfulness of the use of force is moot). In the few, if indeed ever, case of data manipulation resulting in a violent act of physical destruction or death such as would occur with a kinetic energy attack or with a biological or chemical weapon attack,[164] then data manipulation could be a use of force in contravention of Article 2(4).

It is also possible to argue, with the right set of facts, that data manipulation of the national security system (ie., a military target) would be a use of force under Article 2(4). This situation would probably be a question of relative importance to the state's security. In the case of a state such

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[164] **If an electrical impulse device were used to destroy or degrade sufficiently an aircraft's information system (such as navigation or flight controls) which caused the aircraft to crash, then such an act would be the use of force.**

as the United States or Russia, denying either the use of their own spy satellites or interfering with their strategic missiles could constitute a use of force, if not an armed attack. Targeting something less than a strategic target might not be a use of force. Misdirecting one trainload of military supplies around the United States due to data manipulation, even more so if done during peacetime, is not likely to be considered a use of force against the United States. Important to note is that what is strategic in one case and with one state might be entirely different with others.

The right of remedy is far from automatic. Not every use of force permits a use of force in response. Reprisals encompassing the use of force are clearly prohibited. The principles of necessity (if the use of force is already over with, there is no right to strike anything in self-defense) and proportionality (the force used against you may be so small that there is no need to respond with force) that apply in using force for self-defense as they do in international armed conflict, may not allow a forceful response or significantly limit its scope.

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