DETERRENCE AND THE THREAT OF FORCE BAN: DOES THE UN CHARTER PROHIBIT SOME MILITARY EXERCISES?

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"*The pen is mightier than the sword.*"[2]

I. Introduction

With the stroke of a pen, the drafters of the United Nations (UN) Charter and creators of the United Nations attempted to ban the "threat or use of force" as a means of resolving disputes between nations.[3] In an effort to ban wars,[4] however, the drafters used language that arguably bans

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2. E.D. HIRSCH, JR. ET AL., THE DICTIONARY OF CULTURAL LITERACY 54 (1988). The authors interpret this old proverb to mean: "Human history is influenced more by the written word than by warfare." *Id*. In this article the proverb is used to highlight the fact that diplomacy and legal rules may be more effective than military force.

3. *See* discussion *infra* Part II.A. The UN CHARTER, Article 2, paragraph 4, mandates, in part, the following: "All Members shall refrain in their international relations from the threat or use of force . . . ."

4. The UN Charter was drafted during World War II and was focused on preventing "a third recurrence" of World War. EDWARD STETTINIUS, CHARTER OF THE UNITED NATIONS, REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE 9-10 (1945).

all uses of force and even all threats to use force.[5] If read and applied literally, the ban on threats of force might make a United States military exercise illegal when a purpose of the exercise is to threaten, deter, or send a warning message to another nation.[6] That message is often underscored by a demonstration of the United States' ability to mass forces and project vast amounts of lethal combat power in a short period of time whenever and wherever necessary.[7]

This article explores the meaning of Article 2(4) of the UN Charter within the context of a military exercise that is designed to influence the behavior of another nation. The article specifically focuses on the joint and combined United States military exercise known as "TEAM SPIRIT," which took place in South Korea, or the Republic of Korea (ROK), each year from 1976 to 1996.[8] The timing and scope of this exercise was often related to efforts by the United States Government to influence North Korean policymakers.[9] The article identifies the relevant UN Charter provisions and provides some factual background about why the United States conducted the TEAM SPIRIT maneuvers in South Korea. The article then discusses the methods of interpreting international documents, and applies each of the steps from the various methods of interpretation. After analyz-

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4. (continued) During the ratification of the UN Charter, Congressman Bloom, a member of the House of Representatives and a member of the United States delegation to the San Francisco Conference, included the following language in his address to his colleagues in the House: "Great nations linked together in victorious war are now joined in an unbreakable chain of unity for the preservation of the peace they have won." 91 CONG. REC. 7298 (1945).

5. *See* discussion *infra* Part II.A.

6. There are political and economic reasons for caring about whether international conduct is legal. As Professor Moore notes, "Americans rightly expect their nation to act lawfully in international affairs." JOHN MOORE, LAW AND THE GRENADA MISSION 1 (1984). He observes that perceptions of lawfulness "can assist greatly in modern politico-military actions" while perceptions of illegality "can be equally harmful." *Id*. at 3 n.3. One strong economic reason for acting lawfully is to avoid an adverse judgment and damages imposed by the International Court of Justice (ICJ). In 1986, the ICJ ruled in favor of Nicaragua in its claims against the United States, including violations of Article 2(4), but deferred ruling on Nicaragua's demand for more than $370,200,000 in damages. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 146-149 (June 27).

7. Aspects of the "U.S. approach" include deterrence by forward deployments and "the demonstrated will and ability to commit more forces in the event of a crisis." INSTITUTE FOR NATIONAL STRATEGIC STUDIES, NATIONAL DEFENSE UNIVERSITY, STRATEGIC ASSESSMENT: FLASHPOINTS AND FORCE STRUCTURE 237 (1996) [hereinafter INSTITUTE FOR NATIONAL STRATEGIC STUDIES].

8. As discussed, *infra*, the TEAM SPIRIT exercises were conducted annually from 1976 until 1996, with the exception of the years 1994 and 1995. *See infra* notes 36, 39-42.

9. *See infra* notes 39-40.

ing the relevant laws, rules, agreements, judicial opinions, practices of nations, and other considerations, the article reaches conclusions about whether U.S. military exercises designed, at least in part, to send a warning message to another nation are prohibited by Article 2(4).

II. Factual and Legal Background

To determine whether United States military activities in Korea are legal, it is necessary to identify the relevant law, the reasons the United States military is in South Korea, and what the U.S. military does there. This section addresses each of these areas in turn.

A. The Prohibition on Threats or Uses of Force

The UN Charter bans threats of force in Article 2(4): "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."[10]

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10. UN CHARTER art. 2, para 4. The "Purposes of the United Nations" are set forth in Article 1:

> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
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> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
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> 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
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> 4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Id. art. 1.

States may only resort to threats or uses of force to exercise "individual or collective self-defense"[11] pursuant to Article 51.[12] The Charter addresses other uses of force when authorized by the Security Council in Chapter VII,[13] Articles 39,[14] 41,[15] and 42;[16] and in Chapter VIII.[17] Although there

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11. Professor Kelsen refers to "collective self-defense" as "another mistake in the wording of Article 51." HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 915 (1951). He advises that the term should read "collective defense." *Id*.

12. UN CHARTER art. 51. The full text provides the following:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

13. Chapter VII of the UN Charter is entitled: "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression." *See* Michael J. Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 HARV. INT'L L.J. 621, 629 (1986).

14. UN CHARTER art. 39. If the Security Council deems it necessary, based on its findings, it "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." *Id*.

15. UN CHARTER art. 41. This article lists the following examples of "measures not involving the use of armed force": "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." *Id.*

16. UN CHARTER art. 42. Military action is designed "to maintain or restore international peace and security." *Id*. Specific types of military missions are enumerated in the article: "demonstrations, blockade, and other operations by air, sea, or land forces of the Members of the United Nations." *Id*.

17. Chapter VIII is entitled "Regional Arrangements." Professor Shachter also includes two additional authorized uses of force: (1) peacekeeping forces authorized by the Security Council or General Assembly and deployed pursuant to agreements with the sending states, and (2) joint action by the five permanent members pursuant to Article 106. Oscar Schachter, *Authorized Uses of Force by the United Nations and Regional Organizations*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 66 (Lori Fisler Damrosh & David J. Scheffer eds., 1991).

are numerous defenses to alleged violations of Article 2(4), they are beyond the scope of this article.[18]

The Charter provisions appear to be "absolutist."[19] Article 2(4) apparently bans *all* threats or uses of force, except for individual or collective "self-defense" and collective actions authorized by the Security Council. If Article 2(4) is a complete ban, the TEAM SPIRIT exercises, when coupled with an intention to send a message, were illegal.

B. The North Korean Threat

According to U.S. defense analysts, North Korea is a threat to the South because of its strong military and weak economy.[20] There is a risk "that the heavily armed North Korean Army on the verge of economic collapse might launch an invasion out of desperation."[21] Analysts agree that the relative poverty of North Korea is directly related to its efforts to maintain one of the largest militaries in the world.[22]

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18. Individual or collective self-defense pursuant to Article 51 is the most frequently asserted defense or justification for an allegedly illegal threat or use of force. Thomas M. Franck, *Who Killed Article 2(4) or Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 823 (1970). There are two reasons for this: (1) it is specifically addressed in the Charter, and (2) it "permits collective self-defense against an armed attack *unless* a Security Council resolution prohibits it." *Id.* Article 51, therefore, reverses, "in situations of self-defense, the requirement for prior Security Council approval before armed force is deployed." *Id.* Other defenses include the following: self-help or vindication of a denied right, humanitarian intervention, counter-intervention, self-determination, just reprisals, correction of past injustice, and the *de minimis* or prudent and economical exception. *See also* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984); Romana Sadurska, *Threats of Force*, 82 AM. J. INT'L L. 239 (1988); Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1, 45-47 (1990).

19. *See* Alberto R. Coll, *The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from Some of its Best Friends*, 27 HARV. INT'L L.J. 599 (1986). Professor Coll argues that goals such as prohibiting "force as an instrument of international relations" are admirable as "aspirational, guiding principles," but they are not enforceable. *Id.* at 599. An attempt to enforce "absolutist interpretations" of Article 2(4) "widen[s] the gap between law and . . . reality." *Id.* at 616.

20. INSTITUTE FOR NATIONAL STRATEGIC STUDIES, *supra* note 7, at 99-100.

21. *Id.* at 237. Added to the uncertainty and the economic problems is that North Korea has not had any visible leadership since the death of its "Great Leader," Kim Il-sung, in 1994. ROBERT STOREY & DAVID MASON, LONELY PLANET KOREA 375 (1997). "Kim Il-sung died of a heart attack on 8 July [1994] after ruling the North for 46 years." *Id.*

22. ROD PASCHALL, WITNESS TO WAR: KOREA 200 (1997). North Korea only has a population of approximately 24 million, but it has the fifth largest military in the world with 1.28 million in active service and another 4.7 million in the reserves. INSTITUTE FOR

There is also no dispute that North Korea's economy is in bad shape.[23] Their economy has been declining by approximately five per cent each year since 1992.[24] The UN World Food Program reports that North Korea cannot feed its people adequately.[25] Foreign investment has declined to almost zero.[26] North Korea's per capita income is only about $900 per year.[27] The contrast with South Korea's annual income,[28] foreign trade balance,[29] and foreign assistance[30] has created a barrier to reunification that may only be overcome by war.[31]

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22. (continued) NATIONAL STRATEGIC STUDIES, *supra* note 7, at 100. The North Korean military is more than twice as large as the military of the Republic of Korea. PASCHALL, *supra* at 200. "North Korea has poured resources into the military, heavy industry, grandiose monuments, and statues of the Great Leader–all at the expense of agriculture and consumer goods." STOREY & MASON, *supra* note 21, at 379.

23. The nation is practically at subsistence level, food shortages have forced many citizens to forage "for weeds to make soup," and energy shortages have forced the closure of more than half of all factories. STOREY & MASON, *supra* note 21, at 375, 379.

24. STOREY & MASON, *supra* note 21, at 375. The decline will continue to have devastating results because "60% of the workforce is in industry." *Id*. at 379. Only 20% or less of the workforce are employed in industry in developed western countries. *Id*.

25. INSTITUTE FOR NATIONAL STRATEGIC STUDIES, *supra* note 7, at 106. The report also warns that the nation will suffer continued widespread food shortages and malnutrition. *Id*. The food shortage is due, in part, to "catastrophic flooding in the summers of 1995 and 1996 [which] ruined grain crops and destroyed prime agricultural land. . . ." STOREY & MASON, *supra* note 21, at 379. "Grain rations are reported to have sunk to 200g per person per day (the UN-set minimum is 500g). . . ." *Id*. Information about the level of starvation came from an insider in 1997. Hwang Jang-yop, North Korea's "top ideologue," and the person in charge of international relations in the North Korean Workers Party sought asylum at the South Korean embassy while he was in Beijing. *Id*. at 378. Hwang said, "How can there be a socialist society when [North Korea's] people, workers, peasants, and intellectuals are dying of starvation." *Id*.

26. Investments and economic assistance from the Soviet Union were drastically reduced in 1990 when the Soviets established diplomatic and trade relations with South Korea. STOREY & MASON, *supra* note 21, at 374. The Republic of China has also curtailed most of its aid to the North Koreans after establishing diplomatic relations with South Korea. *Id.* "Both Russia and China now trade far more with the South than with the North." *Id.* "North Korea, as presently constituted, cannot endure indefinitely without substantial international aid." INSTITUTE FOR NATIONAL STRATEGIC STUDIES, *supra* note 7, at 97.

27. PASCHALL, *supra* note 22, at 199.

28. According to a 1997 source, the South Koreans, with U.S. assistance, "have raised their average annual income from practically nothing to $7200." *Id*. Because of its strong economy, South Korea is referred to as one of Asia's "little tigers" or "little dragons." STOREY & MASON, *supra* note 21, at 22.

29. "The North's total annual foreign trade equals less than four days worth of South Korea's trade." STOREY & MASON, *supra* note 21, at 379.

30. Congress initially appropriated $200 million for South Korean reconstruction in August 1953 and later that month announced a long range plan costing $1 billion. 15 FUNK & WAGNALL STANDARD REFERENCE ENCYCLOPEDIA 5436 (1970).

C. United States Military Activities in South Korea

Since the Korean War,[32] the United States has defended South Korea[33] with a policy of deterrence through forward deployment and power projection.[34] Pursuant to that policy, the United States maintains a large and lethal military force in South Korea.[35] As part of the "power pro-

30. (continued) Additional appropriations were made insubsequent years, including $250 million in 1961. *Id.* at 5437. In contrast, the Soviets agreed to spend 1 billion rubles to restore North Korea, and China cancelled the North Korean war debt and agreed to provide $300 million worth of aid for four years. *Id.* In addition to the aid from the United States for South Korea, the UN Korean Reconstruction Agency spent more than $143 million building 6000 homes, 110 irrigation and flood control projects, fully stocked classrooms and medical clinics, and factories. *Id.*; *see also* UN OFFICE OF PUBLIC INFORMATION, EVERYMAN'S UNITED NATIONS 105-106 (1964).

31. "The growing economic disparity between the two halves has created an increasingly insurmountable obstacle [to reunification]." PASCHALL, *supra* note 22, at 199. "Just to bring the economic level of the North to that of the South would cost southerners $40 billion per year for ten years, about one eighth of South Korea's entire annual economic output." *Id.* Other estimates place the figure at $250 billion in direct governmental aid and another $1 trillion in private investments. STOREY & MASON, *supra* note 21, at 376. North Korea is in a worse financial condition than the former East Germany ever was. *Id*. The risk of a war of reunification at this time may happen because "the regime would prefer to go down in flames rather than be peacefully taken over by the South–thus a renewed Korean War becomes a frightening if still unlikely possibility." *Id*. at 370.

32. The Korean War began on 25 June 1950, when the North Korean Army, equipped by the Soviet Union, invaded South Korea. 15 FUNK & WAGNALL, *supra* note 30, at 5438. Although no "peace treaty" has ever been signed, the war is usually considered to have ended when the North Korean and United Nations commands signed an armistice on 26 July 1953. 24 FUNK & WAGNALL, *supra* note 30, at 8799; Michael Schuman, *North Korea's 'Wartime Mobilization' Belies Hope of Thaw Before Peace Talks*, WALL ST. J., Mar. 16, 1998, at A16.

33. The United States "leads both the UN Command and the U.S.-South Korea Combined Forces Command (which handles deterrence and defense). INSTITUTE FOR NATIONAL STRATEGIC STUDIES, *supra* note 7, at 105.

34. *Id*. at 237. "[T]he U.S. approach is built upon deterrence via . . . substantial U.S. forces . . . and the demonstrated will and ability to commit more forces in the event of a crisis [to] provide powerful evidence to the potential aggressors that they would not benefit from . . . attack." *Id*.

35. The United States has 37,000 troops, with "substantial conventional combat power" stationed in the Republic of Korea. *Id*. at 105; STOREY & MASON, *supra* note 21, at 378. According to the staff judge advocate of the Army's 2d Infantry Division, which is the unit on the DMZ, the Division is "the most forward deployed combat ready division in the United States Army. With armor, mechanized infantry, and air assault battalions, the Warrior Division is, in our humble opinion, the most powerful division in the Army." Letter, Headquarters, 2d Infantry Division, Office of the Staff Judge Advocate, subject: Welcome Letter (5 Jan. 1999). In addition to the conventional power, the U.S. "nuclear umbrella" also covers South Korea. INSTITUTE FOR NATIONAL STRATEGIC STUDIES, *supra* note 7, at 105.

jection" prong of U.S. policy, the United States conducted the TEAM SPIRIT military exercises.[36] The military maneuvers demonstrated our commitment to the Mutual Defense Treaty[37] and to the prevention of a second Korean War.[38] During the 1990s, the scope and timing of the TEAM SPIRIT exercises[39] was coupled with political rhetoric[40] in an attempt to

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36. As noted above, TEAM SPIRIT exercises began in 1976. Caspar W. Weinberger, *More Appeasement–at South Korea's Expense*, FORBES, Oct. 21, 1996, at 35. They have been held every Spring from 1976 until 1996 with the exception of the years 1994 and 1995. *Id.* The exercises were not held those years as an inducement to North Korea to abandon its nuclear weapon development program. *Id*. In exchange for the cancellation of the exercises in 1994 and "after a personal visit by former President Jimmy Carter, Kim Il-sung surprised everyone with an announcement that he would freeze North Korea's nuclear program." STOREY & MASON, *supra* note 21, at 375. The exercises took place again in 1996 after North Korea failed to allow inspections of their nuclear facilities. *Id.* at 376.

37. Mutual Defense Treaty, Oct. 1, 1953, U.S.-Korea, 5 U.S.T. 2368 (entered into force on Nov. 17, 1954). The treaty grants the United States the right to maintain land, sea, and air forces in South Korea and provides that the United States will provide military assistance to South Korea if there is an "external attack" on South Korean territory. *Id*.

38. The wartime losses in lives and material resources in both North and South Korea were "incalculable." 15 FUNK & WAGNALL, *supra* note 30, at 5436. There were 1,312,836 South Korean military casualties, including more than 415,000 killed. North Korean military casualties were between one and a half and two million. In addition to the military casualties, millions of civilians throughout the Korean Peninsula were killed, wounded, or victims of malnutrition and disease. *Id*. The casualties represent a high percentage of the total population, which was estimated at 13,000,000 in the North and 30,470,000 in the South in 1968. *Id*. at 5429. The population estimates in 1997 were 24,000,000 and 48,000,000, respectively. STOREY & MASON, *supra* note 21, at 379. "Virtually every city, town, and village on the peninsula was damaged; many were almost totally destroyed." 15 FUNK & WAGNALL, *supra* note 30, at 5436. "Millions of people were left homeless, industry destroyed, and the countryside devastated." STOREY & MASON, *supra* note 21, at 16. Allied casualty figures vary depending on the source. The above referenced encyclopedia tallies 137,051 U.S. casualties, including 25,604 dead, and 16,532 other allied casualties, including 3,094 dead. 15 FUNK & WAGNALL, *supra* note 30, at 5441. The Korea guidebook states, "Of the UN troops, 37,000 had been killed (mostly Americans) and 120,000 wounded." STOREY & MASON, *supra* note 21, at 16. A third source lists substantially higher allied casualties: "The UN suffered over 500,000 casualties, including 94,000 dead, 33,629 of whom were Americans. The United States also suffered 103,284 wounded and 5,178 missing or captured." PASCHALL, *supra* note 22, at 188. "Seoul had changed hands no less than four times" during the first year of the war. STOREY & MASON, *supra* note 21, at 16. In addition, the UN air force "devastated North Korean supply bases, railroads, bridges, hydroelectric plants, and industrial centers" in a steady stream of bombing missions while the ground war was relatively static along what is now the DMZ. 15 FUNK & WAGNALL, *supra* note 30, at 5440.

39. TEAM SPIRIT '83 was one month long and involved 70,000 U.S. troops, 36 warships, and 118,000 ROK troops. Michael Wright, *Gunboat Diplomacy Updated for the 1980's: Washington Increases Use of Overseas Military Maneuvers*, N.Y. TIMES, Mar. 13, 1983, sec. 4, at 4. In 1991 the scope of the exercise was reduced in exchange for North

influence the North Korean government to abandon its nuclear weapons development program,[41] participate in reunification and peace talks,[42] and comply with international obligations.[43]

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39. (continued) Korea's promise that it would not seek nuclear weapons and would allow inspections. Fred C. Ikle, *U.S. Folly May Start Another Korean War*, WALL ST. J., Oct. 12, 1998, at A18. North Korea broke both promises. *Id.* "TEAM SPIRIT could be sized to create varying degrees of discomfort for North Korea." David A. Fulghum, *U.S. Pressures North Korea to Shed Nuclear Weapons*, AVIATION WK. & SPACE TECH., Mar. 28, 1994, at 22-23. The exercise can come in three sizes: a Command Post Exercise; a defensive exercise; or an offensive exercise with amphibious landings, armored attacks, and deep strike operations. *Id*.

40. On 12 March 1993, North Korea announced that it was withdrawing from the Nuclear Non-Proliferation Treaty (NPT) because of the TEAM SPIRIT exercises. Sue Chang, *Northern Isolationism: What's Next?* BUS. KOREA, Apr. 1993, at 23-25. Analysts say the real reason was to avoid international inspections of its nuclear facility. *Id*. President Clinton visited the DMZ on 11 July 1993 and announced that "if [North Korea] ever uses [nuclear weapons] it would be the end of their country." Gwen Ifill, *Clinton Ends Asia Trip at Korea's Demilitarized Zone*, N.Y. TIMES, July 12, 1993, at A2. "Massive military exercises" were planned for 1994 "to rattle North leader Kim Il-sung." Bill Powell, *Rattling Kim's Cage*, NEWSWEEK, Apr. 4, 1994, at 36. In 1996, the ROK urged that the exercises be started again because of North Korea's hostile actions (a submarine full of North Korean commandos beached in South Korea and killed ROK soldiers in a firefight). Weinberger, *supra* note 36, at 35.

41. After "the North's second promise to stop its nuclear weapons program," the United States called off the TEAM SPIRIT exercises in 1994. Weinberger, *supra* note 36, at 35. What makes the deterrence of North Korea's nuclear weapons development critical to U.S. policy-makers is that North Korea has a "propensity for brinkmanship" and has demonstrated its "willingness to use terror as a weapon." INSTITUTE FOR NATIONAL STRATEGIC STUDIES, *supra* note 7, at 101. Defense analysts believe that it is likely that North Korea will view weapons of mass destruction (nuclear, biological, and chemical weapons) "as their first choice rather than as weapons of last resort." *Id*. at xiii.

42. Kim Il-sung agreed to participate in peace talks in 1994 in exchange for canceling the TEAM SPIRIT exercises that year. Kim Il-sung died before the peace talks began. STOREY & MASON, *supra* note 21, at 375. Although the exercises were cancelled, the negotiations did not take place because of Kim Il-sung's death. Weinberger, *supra* note 36, at 35. TEAM SPIRIT initially had a limited scope in 1995 to encourage North Korea to resume talks with the South. *U.S. and South Korea Scale Down Maneuvers*, N.Y. TIMES, Feb. 13, 1995, at A5. The exercise was subsequently cancelled for the second year in a row. Weinberger, *supra* note 36, at 35.

43. North Korea has a history of breaking promises, obligations, and commitments. STOREY & MASON, *supra* note 21, at 379. North Korea borrowed more than $8 billion from European and Japanese bankers for "manufacturing joint ventures in the 1970s, then abruptly abrogated the contracts, kept the technology, and simply refused to repay." *Id.* "Most countries [will not] trade with [North Korea] on anything other than a cash or barter basis." *Id*.

III. Interpreting the UN Charter

There has been little attention paid to the meaning of "threats of force," separate from "uses of force," as used in the UN Charter.[44] Although "threats" may be based as expressed or implied military, economic, political, or other forms of coercion,[45] the focus of this article will be on threats to use military force.[46] "Threats" of using military force might include the following situations in a spectrum ranging from the most benign to the most aggressive:

(1) the mere fact or political reality that one nation has more military might than another nation;[47]

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44. Schachter, *supra* note 18, at 1625; Sadurska, *supra* note 18, at 239-40.

45. A frequently debated issue in international relations is the issue of economic coercion. *See, e.g.*, Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 500 (1970). Many developing nations argue that economic coercion is the kind of "threat or use of force" that they experience most often. *Id.* at 533-34. This issue is not new. Some of the delegates to the United Nations Conference on International Organization in San Francisco, California, in 1945 (the "San Francisco Conference") raised concerns about economic coercion during the drafting of the UN Charter. BENJAMIN B. FERENCZ, 1 DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE 38-39 (1975).

46. This restriction is consistent with the opinion of legal scholars who argue that "the 'force' referred to in Art. 2(4) is military force." Bert V. A. Röling, *The Ban on the Use of Force and the UN Charter*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 3-4 (A. Cassese ed., 1986).

47. Schachter, *supra* note 18, at 1625. "The preponderance of military strength in some states and their political relations with potential target states may justifiably lead to an inference of a threat of force against the political independence of the target state." *Id*. Some of the limited opposition to the ratification of the UN Charter in the Senate in 1945 revolved around the fear that it gave too much power to the "big five" (the United States, the Soviet Union, the People's Republic of China, France, and Great Britain) who would have veto powers in the Security Council. 91 CONG. REC. 6983 (1945). Senator Vandenberg responded to this issue by saying, "I hasten to assert that so far as force is concerned, the world is at the mercy of Russia, Britain, and the United States, regardless of whether we form this league or not. Those happen to be the facts of life." *Id.* at 6983-84. Although Article 2, paragraph 1, says the Charter is based on the principle of "sovereign equality," the Security Counsel veto, in Article 27, paragraph 3, was an acknowledgement of the political reality in 1945. *Id*. at 6984. Throughout history, drastic differences in size and power between two nations or individuals have provided the basis for humorous and classic stories, fairy tales, and legends, especially when the story has the unlikely conclusion that the "little guy" wins. *See, e.g.*, THE MOUSE THAT ROARED (Columbia/Tri-Star Pictures 1959) (summarized by PAULINE KAEL, 5001 NIGHTS AT THE MOVIES 392 (1982), as follows: "It's about a minuscule mythical country that declares war on the United States, expecting to be quickly defeated and thus eligible for the cash benefits of rehabilitation."); 1 *Samuel* 17

(2) having more military strength than other nations and making sure that the international community knows it;[48]
(3) having the power and making a general threat;[49]
(4) concentrating military or naval power near a foreign nation or foreign military force—the naval battle group moves in;[50]
(5) both concentrating power and warning the target state that military force will be used, if necessary, in self-defense or defense of another nation;[51]
(6) conducting large scale joint/combined military exercises with the intention of influencing the behavior of a potential adversary in the region;[52] and

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47. (continued) (David and Goliath); THE GOLDEN CHILDREN'S BIBLE 230-35 (Rev. Joseph A. Grispino et al. eds, 1993) (David and Goliath); EDITH HAMILTON, MYTHOLOGY, TIMELESS TALES OF GODS AND HEROES 159-172 (1942) (Hercules); ÆSOP'S FABLES 42-43 (George Fyler Townsend trans., Int'l Collectors Library 1968) (The Mouse and the Lion).

48. President Theodore Roosevelt, U.S. Commander in Chief from 1901-1909, "summarized his foreign policy as 'speak softly and carry a big stick.'" HIRSCH, *supra* note 2, at 279. Although he proudly characterized his approach in this "threatening" manner, history will remember him for his ability to make both peace and threats to use force. He mediated a war between Russia and Japan, when they were fighting for control of Korea, and won the Nobel Prize for peace in 1906. 15 FUNK & WAGNALL, *supra* note 30, at 5434. Historians refer to his threats, or "big stick carrying," as "gunboat diplomacy." HIRSCH, *supra* note 2, at 317. One of his most famous "threats of force" was his demonstration of naval power near Colombia to support the independence of Panama from Colombia in 1903 and his prompt efforts to create the Panama Canal thereafter. DAVID MCCULLOUGH, THE PATH BETWEEN THE SEAS, THE CREATION OF THE PANAMA CANAL 350-77 (1977).

49. An example is the U.S. policy of nuclear deterrence, known as "massive retaliation," announced by Secretary of State John Foster Dulles in 1954. *See* WILLIAM W. KAUFMAN, THE REQUIREMENTS OF DETERRENCE 3 (1954). This policy did not threaten any specific nation, but was a general threat to any and all future adversaries that the United States may resort to overwhelming nuclear destruction instead of attempting to match force with force wherever U.S. interests are threatened. *Id.*

50. Aircraft carriers, other warships, and AWACS electronic surveillance airplanes are often moved to trouble spots in a hurry. Wright, *supra* note 39, at 4. In his article, Mr. Wright implied that "gunboat diplomacy" meant worldwide participation in military training exercises with a secondary purpose of "demonstrating that Washington is both trustworthy and not to be trifled with." *Id. But see* 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 cmt. g (asserting that "gunboat diplomacy" is clearly prohibited by Article 2(4)).

51. *See* Wright, *supra* note 39, at 4 (warnings to Libya while concentrating warships and using naval aircraft to contest Libya's claims to Mediterranean Sea area as territorial waters).

52. *See* Fulghum, *supra* note 39, at 22. This is the TEAM SPIRIT situation, of course.

(7) concentrating power and issuing an ultimatum for yielding to demands.[53]

Assuming *arguendo* that all seven of the situations listed above are "threats," the next question is how to determine which of the threats, if any, are illegal under the UN Charter. Are they all banned by the Charter's prohibition against "threats of force"? Are any of them banned? At first glance, the extremes appear to be relatively easy to analyze. The benign end of the spectrum reflects a fact of life: some nations are more powerful than others.[54] The opposite extreme reflects a "blatant and direct threat of force, used to compel another state to yield territory or make substantial political concessions (not required by law)" from a weaker adversary.[55] Unfortunately, what at first appears to be an obviously illegal threat may not be a violation of the UN Charter when looked at more closely.[56] Even an apparently extreme situation involving a coercive threat to annex all or part of another nation's territory is usually accompanied by a claim that the territory rightfully belongs to the party demanding the territory.[57]

This section reviews the various methods of interpreting international agreements, and uses each step of the various methods of interpretation to analyze the TEAM SPIRIT scenario.

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53. This was Germany's approach with portions of Czechoslovakia and Poland prior WAY TO WORLD PEACE 69-79 (1983). This approach was also depicted in the comics recently. In a "Beetle Bailey" cartoon, the benefits of a successful, credible threat were depicted. In frame one Sarge shows Beetle Bailey a television with a scene of physical violence and says, "This is what I'll do to YOU if you don't get back to work!" In frame two, Beetle is digging a hole energetically and Sarge says to the reader, "See? TV violence can actually prevent REAL violence!" Mort Walker, *Beetle Bailey*, KING FEATURES SYNDICATE, INC. (Feb. 1, 1999).

54. Schachter, *supra* note 18, at 1625. *See supra* note 47. The disparity in size may lead to an inference of a threat. Schachter, *supra* note 18, at 1625.

55. Schacter, *supra* note 18, at 1625; *see* QUINCY WRIGHT, A STUDY OF WAR 1326 (1951) ("An aggressor's success in utilizing threats of violence will stimulate him to utilize the same methods again.").

56. The North Korean's 1950 invasion of South Korea was a clear case of armed international aggression to the United States, but the Soviets considered it an internal armed conflict, or civil war, which should not have been intervened in by outside states. HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 33 (1992).

57. Schachter, *supra* note 18, at 1627. Land grabbers almost always claim that the territory was historically theirs and they are only righting a wrong. *Id.* One of the more ancient claims to righting a territorial wrong arose in 1961 when India sent its troops into Goa, then administered by Portugal. India claimed that "it was merely moving its troops into a part of India that had been under illegal domination for 450 years." *Id*.

A. How to Interpret Treaties and Other International Agreements

Among the numerous authorities on the interpretation of international agreements, international legal jurists and scholars look primarily to decisions of the International Court of Justice (ICJ) and to the Vienna Convention on the Law of Treaties, or the "Treaty on Treaties."[58] In addition, international legal experts in the United States also consult the Restatement (Third) of the Foreign Relations Law of the United States and opinions from the United States Supreme Court.

1. ICJ Sources

The Statute of the International Court of Justice created the ICJ.[59] The Statute lists "the interpretation of a treaty" as the first item on the list of international disputes over which the ICJ has jurisdiction.[60] In practice, most of the judgments and advisory opinions of the Permanent Court of International Justice[61] and the ICJ have been primarily concerned with interpreting treaties.[62]

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58. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNT.S. 331, UN Doc. A/CONF. 39/27 (entered into force on January 27, 1990), *reprinted in* 8 I.L.M. 679 (1969); 63 AM. J. INT'L L. 875 (1969); BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW, SELECTED DOCUMENTS AND NEW DEVELOPMENTS 53 (1994). The United States has not ratified the convention. CARTER & TRIMBLE, *supra*, at 53. For an analysis of this treaty, *see* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281 (1988); Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).

59. The Statute of the International Court of Justice was drafted at the San Francisco Conference and was attached to the UN Charter as an annex when the Charter was signed on 26 June 1945 and favorably considered by the Senate during the advice and consent vote on 28 July 1945. 91 CONG. REC. 8189-8190 (1945).

60. Statute of the I.C.J. art. 36, para 2.a., 59 Stat. 1055, T.S. No. 993 [hereinafter Statute of the ICJ].

61. The Permanent Court of International Justice was established under the League of Nations and is the predecessor to the current ICJ. UN OFFICE OF PUBLIC INFORMATION, *supra* note 30, at 19. Almost all of the decisions of the Permanent Court of International Justice dealt with treaty interpretations. SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 26 (1958).

62. The vast majority of ICJ opinions also revolved around interpreting treaties. Nagendra Singh, *The UN and the Development of International Law*, *in* UNITED NATIONS, DIVIDED WORLD, THE UN'S ROLES IN INTERNATIONAL RELATIONS 404-11, 543-48 (app. F) (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1994); UN OFFICE OF PUBLIC INFORMATION, *supra* note 30, at 395-423.

Article 38 of the Statute lists the sources of law that the ICJ will apply in any treaty interpretation or other dispute:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations; [and]
> d. subject to the provisions of Article 59,[63] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[64]

The first item on the ICJ's list, "international conventions,"[65] includes the Treaty on Treaties, discussed below.[66] The second item, "international custom," refers to rules that are considered customary international law[67] as well as practices that are legally permitted or authorized because of a widespread acceptance in the international community.[68] The third item

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63. Article 59 of the Statute of the ICJ states, "The decision of the Court has no binding force except between the parties and in respect of that particular case." Therefore, ICJ opinions are never binding authority in any other judicial proceeding.

64. Statute of the ICJ, *supra* note 60, art. 38, para. 1.a.-d.

65. "International conventions" bind the states that sign treaties and agreements as well as states that participate in a widespread international practice with the belief, or "*opinio juris*," that the practice is an obligation of international law. Robert F. Turner, *Nuclear Weapons and the World Court: The ICJ's Advisory Opinion and Its Significance for U.S. Strategic Doctrine*, *in* 72 INT'L L. STUDIES–U.S. NAVAL WAR COLL. 315 (Michael N. Schmitt ed., 1998).

66. *See* discussion *infra* Part III.A.2.

67. Professor Turner provides a succinct description of this source of law:

> [A] consensus has emerged that certain 'peremptory norms' of international law are of such fundamental importance that they will be imposed even upon persistent objectors despite their lack of consent. Often identified by the Latin expression *jus cogens*, these principles have been so universally embraced through all major legal systems, and the consequences of their breach are viewed as so objectionable, that the collective world community basically agreed to impose them on all [s]tates. Classic examples include the prohibition embodied in Article 2(4) of the UN Charter prohibiting the aggressive use of military force.

Turner, *supra* note 65, at 315-16.

68. Deterring aggressors is arguably one such widely accepted practice, based on the experiences of failing to deter aggressors successfully in the 1930s. *See* KAUFMAN, *supra*

on the ICJ list refers to domestic or national laws.[69] The final source is the "other" or "miscellaneous" category: nonbinding or persuasive judicial opinions, treatises, and other legal publications.

2. Treaty on Treaties

The Treaty on Treaties[70] applies to "treaties between [s]tates."[71] It defines a "treaty" as "an international agreement concluded between [s]tates in written form and governed by international law. . . ."[72] This treaty is, therefore, another source of interpretation for delving into the meaning of Article 2(4) of the UN Charter.

The Treaty on Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms . . . in their context and in the light of its object and purpose."[73] This is obviously an attempt to glean the parties' intent from the document itself. In the context of the interpretation of Article 2(4), it means the entire UN Charter must be reviewed and not just the prohibition on the threat or use of force and defenses.

In analyzing the "context," the person interpreting the document should look at the main text, preamble, annexes, any agreement relating to the treaty, and any instrument made by one of the parties and accepted by the other(s) as related to the treaty.[74] In addition to the "context," interpreters may look at any subsequent agreement between the parties relating to the interpretation, any subsequent practice, and "any relevant rules of international law applicable to the relations between the parties."[75] Applying this to the Charter interpretation, an analysis of the entire Charter may

68. (continued) note 49, at 22. *See infra* Part III.B.8.

69. *See* discussion *infra* Parts III.A.4., III.B.6.

70. According to some scholars, the Treaty on Treaties is "the indispensable element in the conduct of foreign affairs." Kearney & Dalton, *supra* note 58, at 495. Even though the United States is not yet a party to the treaty, the terms of the treaty would apply to the United States because they are considered to be a restatement of customary rules, "binding [s]tates regardless of whether they are parties to the Convention." Frankowska, *supra* note 58, at 286. The United States is a signatory, but the treaty has been pending the Senate's advice and consent for ratification since 1972. *Id*.

71. CARTER & TRIMBLE, *supra* note 58, art. 1.

72. *Id*. art. 2, para. 1.a.

73. *Id*. art. 31, para. 1.

74. *Id*. art. 31, para. 2, 2(a), 2(b).

75. *Id*. art. 31, para. 3, 3(a), 3(b), 3(c).

be combined with an analysis of other international rules on use of force[76] and on the practices of nations since the creation of the United Nations.[77]

The rules relating to "supplementary means of interpretation" are in Article 32. This Article states that consideration of "preparatory work on the treaty," or *travaux préparatoires*, is only permitted if the meaning would otherwise be "ambiguous or obscure" or would lead "to a result which is manifestly absurd or unreasonable."[78] Although the international standard is tougher than the usual standard in the United States for resorting to legislative history, Article 2(4) is sufficiently ambiguous to allow consideration of all available sources of interpretation, as discussed below.[79]

3. Restatement

The *Restatement (Third) of the Foreign Relations Law of the United States*[80] provides interpretation guidance that is identical in most respects

76. *See, e.g.*, General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. 796, IV Trenwith 5130, 2 Bevans 732 (entered into force July 24, 1929) (also known as the Kellogg-Briand Pact or the Pact of Paris), *reprinted in* FERENCZ, *supra* note 45, at 190-93 [hereinafter Pact of Paris]; *see also* FERENCZ, *supra* note 45, at 24-25.

77. *See* discussion *infra* Part III.B.8.

78. CARTER & TRIMBLE, *supra* note 58, art. 32. During the drafting of this treaty, only Hungary and the United States objected to the listing of the *travaux préparatoires* as secondary means of interpretation. Kearney & Dalton, *supra* note 58, at 519. The United States is traditionally "in favor of according great weight to *travaux*." *Id.* Most nations are opposed to considering preparatory documents, except as a last resort, for the following reasons: (1) something may be found in them to support any intention; (2) states with large, well-indexed archives would benefit; and (3) states would be reluctant to enter into a treaty that they did not help negotiate. *Id.* States and international tribunals will continue to consider "preparatory work and the circumstances of the conclusion of treaties when faced with problems of treaty interpretation." *Id.*

79. The language "threats or use of force" appears in Article 52 of the Treaty on Treaties: "A treaty is void if its conclusion has been procured by the threat or use of force violating the principles of international law embodied in the Charter of the United Nations." For an interpretation of that phrase during the negotiation and drafting of the Treaty on Treaties, delegates consulted the United Nations Special Committee on Principles of International Law concerning Friendly Relations and Cooperation Among States which had been studying the phrase since 1964. Kearney & Dalton, *supra* note 58, at 534. The Special Committee noted that "there was a fundamental difference in opinion as to the meaning of the words 'threat or use of force' in [Article 2(4)] . . . . [T]hose words could be interpreted as including all forms of pressure exerted by one [s]tate on another [or] just the threat or use of armed force . . . ." *Id.* (quoting the Dutch representative).

to the Treaty on Treaties.[81] The only significant difference relates to preparatory works or legislative history. The *Restatement* does not limit consideration of the *travaux préparatoires*, but does mention the Treaty on Treaties' limits[82] and notes that "some interpreting bodies" are more willing to use the preparatory works than others.[83] The *Restatement* also advises that "[a]greements creating international organizations have a constitutional quality. . . ."[84] The emphasis in the *Restatement* on looking at the text "in the light of its object and purpose" and the "subsequent practice" of the parties is fundamental in the analysis of Article 2(4).[85]

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80. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 (1987).

81. *Restatement* § 325(1) and § 325(2) are substantially the same as the Treaty on Treaties' art. 31(1) and art. 31(3), respectively. Comment b to § 325 of the *Restatement* (defining "context") is almost identical to art. 31(2) of the Treaty on Treaties. The text of *Restatement* § 325 states the following:

> (1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.
>
> (2) Any subsequent agreement between the parties regarding the interpretation of the agreement, and subsequent practice between the parties in the application of the agreement, are to be taken into account in its interpretation.

1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325.

82. *See* discussion *supra* Part III.A.2 (the "ordinary meaning" of the text must be obscure, ambiguous, or unreasonable before one may look to "supplementary means" of interpretation).

83. "The [Treaty on Treaties'] inhospitality to *travaux* is not wholly consistent with the attitude of the [ICJ] and not at all with that of United States courts." 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325, comment e.

84. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325, comment d.; David J. Scheffer, *The Great Debate of the 1980's*, *in* RIGHT V. MIGHT, INTERNATIONAL LAW AND THE USE OF FORCE 12 (Louis Henkin ed., 1989).

85. Section 905(2) of the *Restatement* states the following: "The threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the UN Charter, as well as to Subsection 1." 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905(2). In the comments, Article 2(4) is described as a limit on the threat or use of military force, but not economic force. 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905, comment g. The *Restatement* is somewhat inconsistent in that it allows a state to resort to unspecified

4. United States Supreme Court Guidance

The United States Constitution empowers federal courts in the United States to play an active role in interpreting treaties: "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their Authority."[86] The federal courts' role is also important in litigation involving treaties because the "Constitution, and the laws of the United States . . . and all treaties . . . shall be the supreme law of the land."[87] In addition, the United States Supreme Court has established that it is the duty of the federal courts to "determine what the law is."[88]

In the countless number of federal cases that cite to one or more treaties, very specific guidance on treaty interpretation emerges. In a recent case interpreting an extradition treaty, the Supreme Court noted three sources to consider: the language of the treaty, the history of negotiation, and practice under the treaty.[89] As with the ICJ and other authorities cited above, the Supreme Court advises that "[i]n construing a treaty, as in construing a statute, we first look to its terms to determine its meaning."[90]

If treaty language is uncertain, ambiguous, or unclear, the Supreme Court advises analyzing the preparatory documents, including the negoti-

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85. (continued) counter-measures (if necessary and proportional) in response to a violation of an international obligation, but then repeats the UN Charter language (prohibiting threats or uses of force). 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905. The *Restatement* also notes that the scope of Article 2(4) has "never been authoritatively resolved," but then claims that "it is clear that it was designed . . . to outlaw 'gunboat diplomacy' even in response to violations of international law." 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905, comment g. The phrase "gunboat diplomacy" is not defined in the Restatement sections, comments, or Reporters' Notes.

86. U.S. CONST. art. III, § 2, cl. 1.

87. *Id.* art. VI, cl. 2.

88. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-77 (1803).

89. United States v. Machain, 504 U.S. 655, 662-66 (1992). The Court held that an extradition treaty with Mexico did not deprive a United States District Court of jurisdiction after U.S. Drug Enforcement Agency personnel abducted a Mexican citizen from Mexico to stand trial in a U.S. court for the kidnapping and murder of a DEA agent and his pilot. 504 U.S. at 666. The Court advised treaty interpreters to look at "the language of the treaty, in the context of its history." *Id.*

90. *Id.* at 662 (quoting Maximov v. United States, 373 U.S. 49, 54 (1963)); Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 180 (1982) ("The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'"); United States v. Stuart, 489 U.S. 353, 365 (1989).

ations, diplomatic correspondence, operation of the treaty, and evidence of the parties' construction of key terms, to determine the intention of the parties.[91] In a 1989 case, the Supreme Court highlighted one source in particular: "The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed."[92] The practice of the signatories and the signatories' original intent are especially important in the analysis of the UN Charter.

B. Applying the Sources

The remainder of this article analyzes the meaning of Article 2(4) by applying the following sources of law consistent with the above principles: text,background to text, intentions of drafters, intentions of decision-makers during ratification (Congress and President), court opinions (ICJ and domestic courts), legal scholars, and the practice of nations.[93] As discussed in this section, there are many interpretations of the Article, but only a few in the context of military maneuvers. The status of military exercises that "send a message" will emerge from this systematic analysis, even though the scope of the phrase "threat or use of force" in Article 2(4) "has been for many years the source of acrimonious debate."[94]

1. Text

Some legal scholars claim that Article 2(4) is a complete prohibition on the use of force (except where individual or collective defense under Article 51 applies).[95] The rule appears on its face, however, to be limited to threats or uses of force "against [(1)] the territorial integrity or [(2)] political independence of any state, or [(3)] in any manner inconsistent

91. *Stuart*, 489 U.S. at 366-69.

92. *Id*. at 369.

93. In this article, the single most important source, the text itself, will be considered first. *See* CARTER & TRIMBLE, *supra* note 58, art. 31, para. 1; 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325. The remaining sources fall into two general groups: historical and developing. After an analysis of the text, the historical sources are analyzed in a chronological order (background to the text, drafters' intentions, and then the ratification process). Finally, the developing sources are analyzed in the following order: court decisions, then scholarly writings, and, finally, the practices of nations.

94. CARTER & TRIMBLE, *supra* note 58, at 127.

95. JAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 113 (1963); MCCOUBREY & WHITE, *supra* note 56, at 24.

with the Purposes of the United Nations."[96] Two types of loopholes appear to exist. First, the rule appears to only prohibit large-scale uses of force (to seize and hold territory or overthrow a government, for example).[97] Second, the rule appears to allow any use of force that is "consistent" with the purposes of the UN Charter.[98]

The "territorial integrity" and "political independence" language comes from Article 10 of the Covenant of the League of Nations.[99] Professor Brownlie claims that this text does not qualify Article 2(4), but "give[s] more specific guarantees to small [s]tates."[100] The plain language of Article 2(4) does not support his position, however. The rule says that threats or uses of force are prohibited and then specifies *when* they are prohibited.[101] As drafted, the rule is like a parking sign that says "No Parking Between 7 a.m. and 5 p.m." In this example, parking *is* permitted, just not during the conditions stated. Such language specifies when something is prohibited. If the language of the text takes precedence in treaty interpretations, then the ban on the threat or use of force would be seriously limited. The text clearly states that "threats or uses of force" are only prohibited if directed at a nation's territorial integrity or political independence or if inconsistent with the United Nations' purposes.[102]

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96. UN CHARTER art. 2, para. 4.

97. *See* Röling, *supra* note 46, at 4; MCCOUBREY & WHITE, *supra* note 56, at 24-25.

98. *See supra* note 10 (Purposes of the UN Charter); *see also* Röling, *supra* note 46, at 4-5.

99. *See infra* note 115 (discussing Covenant of the League of Nations art. 10).

100. BROWNLIE, *supra* note 95, at 267.

101. Professor Röling notes that one writer (Julius Stone) argues that "as a simple matter of syntax, the structure of Article 2(4) does not produce an unqualified prohibition of the resort to force, as it would have done if the draftsmen had stopped at the words 'threat or use of force.'" Röling, *supra* note 46, at 4; Schachter, *supra* note 18, at 1625. "The last twenty-three words contain qualifications. . . . If these words are not redundant, they must qualify the all-inclusive prohibition against force. Just how far they do qualify the prohibition is difficult to determine from a textual analysis alone." Schachter, *supra* note 18, at 1625.

102. *See supra* Part II.A.; LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS 104-105 (1949). These commentators discuss the chaos that the "territorial integrity or political independence" clarification/qualification language could have on the relations of nations. They expressed a hope (in 1949) that the international community would ignore the poor syntax and give effect to the intent of the change (to protect weaker nations) and to the spirit and intent of the Charter. *Id*. Their hope has been realized so far.

As obvious as the foregoing argument appears to be, the ICJ[103] and most legal scholars look to the full text of the UN Charter,[104] historical development of the Charter, and the intentions of the drafters[105] for the meaning of Article 2(4).[106] As a minimum, however, the language is sufficiently ambiguous,[107] obscure,[108] and likely to lead to an absurd or unreasonable result to justify resort to all available sources of interpretation, including "the preparatory work of the treaty and the circumstances of its conclusion."[109]

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103. The United Kingdom unsuccessfully argued this interpretation of Article 2(4)during the Corfu Channel Case. *See* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) (Judgment on Merits). In that case, Albania asserted its sovereignty over the channel and mined it to prevent the free navigation by others. The United Kingdom claimed that the channel was an international body and entered the channel to remove the mines. In the dispute that followed, the United Kingdom argued that it "had threatened neither the 'territorial integrity' nor the 'political independence' of Albania, and hence [its conduct] was not unlawful." Röling, *supra* note 46, at 3-4. The ICJ held that the United Kingdom violated Article 2(4). ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 216-17 (1963).

104. *See* UN CHARTER art. I (Purposes); Chapter IV (The General Assembly); Chapter V (The Security Council); Chapter VI (Pacific Settlement of Disputes); and Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression).

105. The counter-argument may be summed up as follows: "[S]uch arguments would destroy, at the outset, the foundation upon which the whole post-1945 order was to be built." MCCOUBREY & WHITE, *supra* note 56, at 25.

106. BROWNLIE, *supra* note 95, at 267; Röling, *supra* note 46, at 4. During the ratification process, Senator Connolly encouraged an analysis of the Charter by considering the entire document, and not just bits and pieces. He said, "The Charter must be judged not in its dissected parts, not in its dismembered and mutilated clauses and phrases, but it must be judged as an integrated body, complete in its organs and functions." 91 CONG. REC. 6877 (1945).

107. Louis Henkin, *Use of Force: Law and U.S. Policy*, *in* RIGHT V. MIGHT, INTERNATIONAL LAW AND THE USE OF FORCE 39 (1989).

108. Professor Stone made the following comment about the clarity of Article 2(4):

> It would surely be a massive inadvertence to many sharp and complex legal controversies surrounding article 2(4) and its relation to other articles of the Charter to suggest that the exact scope of article 2(4) itself . . . is in any sense 'clear-cut.' It would indeed be sanguine to regard it as anything short of very obscure.

Julius Stone, *De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace*, 8 VA. J. INT'L L. 356, 369 (1968).

109. CARTER & TRIMBLE, *supra* note 58, art. 32; 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 comment e.

2. Background to Text

Until 1914, war was considered an inherent right of a sovereign nation.[110] "Threats of force" would have fallen into a legal category called "hostile measures short of war," which included all threats or uses of military force up to declared war.[111]

During and immediately after World War I,[112] states were more concerned about the use of force.[113] That concern was manifested in the drafting of the Covenant of the League of Nations and creation of the League of Nations.[114] The Covenant did not outlaw or prohibit the "threat or use of force," but did make aggression, threats of aggression,[115] war, or threat of war[116] a matter of concern for all members and "created a presumption against the legality of war as a means of self-help."[117]

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110. BROWNLIE, *supra* note 95, at 41.

111. *Id*.

112. From 1914-1918, there were 37 million military casualties and 13 million deaths (counting all military and civilians). STETTINIUS, *supra* note 4, at 9. A second source lists 20 million military and civilian deaths due to war, 20 million more wounded, and another 20 million dead from epidemic and famine. FERENCZ, *supra* note 53, at 41.

113. BROWNLIE, *supra* note 95, at 51.

114. The Covenant was drafted during the first four months of 1919 and was adopted on April 28, 1919. FERENCZ, *supra* note 45, at 7. "[T]he isolationist United States Senate refused to give its consent to the Treaty. The failure of the world's richest and most powerful nation to accept the Covenant or become a Member of the League was bound to destroy the possibility of the League ever becoming an effective instrumentality for world peace." *Id*. at 9-10.

115. Article 10 of the Covenant of the League of Nations uses language that later appears in Article 2(4) of the UN Charter: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled." COVENANT OF THE LEAGUE OF NATIONS art. 10, *reprinted in* FERENCZ, *supra* note 45, at 61-63.

116. Article 11 of the Covenant states, "Any war or threat of war . . . is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." COVENANT OF THE LEAGUE OF NATIONS art. 11, *reprinted in* FERENCZ, *supra* note 45, at 63-64.

117. BROWNLIE, *supra* note 95, at 56-57. War continued to be a viable alternative for states, but states had to either submit their disputes to arbitration, judicial settlement or the Council for resolution prior to resorting to war. COVENANT OF THE LEAGUE OF NATIONS arts. 12, 13, 15, *reprinted in* FERENCZ, *supra* note 45, at 64-65. Failure to follow the League procedures would be deemed to be an act of war against all of the members. COVENANT OF THE LEAGUE OF NATIONS art. 16, *reprinted in* FERENCZ, *supra* note 45, at 65-66.

The first attempt to actually prohibit or outlaw war was the Kellogg-Briand Pact or Pact of Paris,[118] which is still in force today.[119] The Pact and the UN Charter are the primary sources of the norm limiting resort to force by states.[120] Unlike the UN Charter, however, the Pact did not expressly prohibit threats to use force.[121] Before 1945, "there was no customary international prohibition on the unilateral resort to force. If the circumstances warranted it, . . . states reserved the right to resort to force."[122]

The history of the text of the UN Charter began with the Atlantic Charter, a joint statement by President Franklin D. Roosevelt and Prime Minister Winston Churchill in which they "envisioned a peace afford[ing] to all peoples security from aggression."[123] The "freedom from aggression" theme was an echo reverberating since the mid-1930s,[124] a focal point for the creation of the wartime alliance,[125] and the catalyst for the creation of an organization to maintain or restore peace.[126]

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118. *See supra* note 76. The Pact of Paris is only three short articles. Nations signing the Pact of Paris renounced recourse to war as an instrument of national policy and pledged to only use pacific means to resolve international disputes or conflicts. Pact of Paris, *supra* note 76, at art. I and II. "It was eventually ratified by almost all of the countries of the world." FERENCZ, *supra* note 45, at 25.

119. BROWNLIE, *supra* note 95, at 75.

120. *Id*. at 91.

121. *Id*. at 364. Professor Brownlie notes, however, that the Pact of Paris may address some threats of force. He wrote that "a threat to resort to war for political motives would seem to be a[n] [illegal] 'recourse to war for the solution of international controversies' and 'as an instrument of national policy.'" *Id*.

122. W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 642 (1984).

123. 24 FUNK & WAGNALL, *supra* note 30, at 8796. They issued their joint statement in August 1941. *Id*.; FERENCZ, *supra* note 45, at 371; GOODRICH & HAMBRO, *supra* note 102, at 4.

124. Aggressions during that decade included the following: Italy invaded Ethiopia (1935), Germany reoccupied the Rhineland (1936), Germany and Italy intervened in the Spanish Civil War (1936), Japan invaded China (1938), Germany annexed Austria and demanded portions of Czechoslovakia, Germany invaded Poland (1939), and the Soviet Union invaded Finland (1939). FERENCZ, *supra* note 53, at 69-79.

125. On 1 January 1942, "representatives of the twenty-six nations then warring against the Axis Powers met in Washington, D.C., and formally subscribed to the purposes and principles enunciated in the Atlantic Charter." 24 FUNK & WAGNALL, *supra* note 30, at 8796. The agreement signed at that meeting was called the "Declaration by the United Nations." *Id*.; MCCOUBREY & WHITE, *supra* note 56, at 23; GOODRICH & HAMBRO, *supra* note 102, at 4-5.

126. As is evident from reading the Congressional Record from 1945, the United States, as a nation, felt guilty and remorseful for, first, failing to join the League of Nations

An initial draft of what would evolve into the UN Charter was prepared at Dumbarton Oaks, Washington, D.C.[127] The language of what is now Article 2(4) is the same as the language from the Dumbarton Oaks proposal until the word "force."[128] During the San Francisco Conference, the following language was inserted after the word "force": "against the territorial integrity or political independence of any state." This language was added "at the insistence of the smaller states, worried that the original draft was not robust enough to protect the weaker states from armed interventions by the more powerful states."[129]

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126. (continued) and then being unable to exercise any influence over the tragic aggressions that took place in the 1930s. Senator Connally, one of the drafters of the UN Charter, and the Chairman of the Foreign Relations Committee, was one of many Senators to raise the specter of the League of Nations during the Charter ratification process:

> Strange as it may seem, in view of the practical unanimity of the people of the United States in support of the Charter, many representatives of foreign nations are still doubtful as to what the vote on the Charter will be here in the Senate. They remember 1919. They know how the League of Nations was slaughtered here on the floor. Can you not still see the blood on the floor? Can you not see upon the walls the marks of the conflict that raged here in the Chamber where the League of Nations was done to death? They fear that that same sentiment may keep the United States from ratifying this Charter.

91 CONG. REC. 7954 (1945).

127. Plans for an international organization named the "United Nations" began after a conference in Moscow and the signing of the "Moscow Declaration," on 30 October 1942 by representatives from the United States, the Soviet Union, the United Kingdom, and China. MCCOUBREY & WHITE, *supra* note 56, at 23; 24 FUNK & WAGNALL, *supra* note 30, at 8796. In the summer and autumn of 1944, the four signatories met at Dumbarton Oaks, Washington, D.C., to draft detailed proposals for the new international organization. 24 FUNK & WAGNALL, *supra* note 30, at 8796; JOHN F. MURPHY, THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE 11 (1982). The Dumbarton Oaks document formed the basis of the deliberations at the United Nations Conference in San Francisco, California, 91 CONG. REC. 7299 (1945), where the UN Charter was drafted from 26 April to 26 June 1945. STETTINIUS, *supra* note 4, at 9; 24 FUNK & WAGNALL, *supra* note 30, at 8796; 91 CONG. REC. 6701, 6874 (1945).

128. "All members . . . shall refrain . . . from the threat or use of force . . . ." UN CHARTER art. 2, para. 4; Dumbarton Oaks Proposals Chap. II, para. 4; *see* STETTINIUS, *supra* note 4, at 178, 179 (Appendix A with UN CHARTER and Dumbarton Oaks Proposals side-by-side).

129. MCCOUBREY & WHITE, *supra* note 56, at 25. According to the authors, and the "smaller states" that recommended the additional language, "the phrase was inserted to strengthen article 2(4), not to weaken it." *Id.*; GOODRICH & HAMBRO, *supra* note 102, at 103-105.

The historical context of Article 2(4) gives important clues to its meaning. First, and foremost, the key concern that motivated the founders of the United Nations was the prevention of military aggression.[130] The members of the League of Nations must have been dumbfounded when Mussolini's armies attacked Ethiopia or when Mussolini and Hitler used the killing fields of Spain to train troops and test weapons and tactics. After the Pact of Paris and the establishment of the League's conflict resolution procedures, the blatant aggressions throughout the 1930s must have shocked the U.N. architects.

When the aggressions occurred prior to World War II, it became immediately obvious that the League was powerless to stop them. The international community needed a policeman or a benevolent gang to stop the thugs. A necessary prerequisite for the next attempt at an international organization was the good faith participation of all, or at least most, of the world's most powerful nations. The League failed, not just because the United States did not join, but because the big powers that were members did not work together. Cooperation of the great powers is the key to the success of the United Nations.[131]

Based on this context, joint military exercises to deter a known aggressor, as in South Korea, would be praised by the UN Charter drafters, not condemned. If the exercise participants talk about defense, and not conquest, the show of force would be consistent with the purposes and principles of the Charter.[132] The fact that U.S. politicians make statements to encourage the potential aggressor to comply with its international obligations should not change this analysis. Aggression, and not deterrence, is the scourge to be eliminated by the world community.

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130. *See supra* notes 123-126.

131. Coll, *supra* note 19, at 608. "No legal interpretation of article 2(4) can ignore" the importance of international cooperation. *Id*. Professor Coll describes the Charter arrangement as "Hobbesian." *Id*. Professor Lebow noted that "[d]eterrence is based on a Hobbesian view of the world. . . . [A]ggression occurs when a state perceives the opportunity to get away with it." RICHARD NED LEBOW, BETWEEN PEACE AND WAR, THE NATURE OF INTERNATIONAL CRISIS 883 (1981). When the UN deterrence system fails to work, and deterrence is still deemed to be necessary for a state's survival, then states may be compelled to exercise deterrence on their own. *Id*.

132. *See supra* note 10 (Purposes of the UN Charter).

3. Intentions of the Drafters

Although reluctantly considered by the ICJ or other international tribunals,[133] the intentions of the drafters is a key method of determining the meaning of executed documents in the United States.[134] Analysis of legislative histories or preparatory work is often helpful in any treaty interpretation to determine the intentions of the parties.[135]

As noted above, the background documents and drafts of an international agreement, treaty or other document are usually referred to as *travaux préparatoires* or preparatory work. There are two ways to analyze the *travaux*: (1) by looking at summaries or commentaries prepared by participants at the time, or (2) by reviewing the draft documents and notes prepared during the actual drafting of the Charter. Although the latter method might yield more specific comments from specific individuals attending the drafting conference, the task would require the analysis of more than 3,000,000 pages of text.[136] Fortunately, there are a number of excellent summaries and commentaries about the Charter drafting process that assist in identifying the intentions of the drafters.[137]

Secretary of State Stettinius summarized the Charter and the historical context in which it was drafted in the first eleven pages of his Report

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133. *See, e.g.*, Kearney & Dalton, *supra* note 58, at 519. Professor Kelsen does not believe it is possible to glean the legislative intent or intention of the drafter from "a complex procedure in which many individuals participate, such as . . . the procedure through which a multilateral treaty is negotiated. . . ." KELSEN, *supra* note 11, at xiv.

134. *See* United States v. Alvarez-Machain, 504 U.S. 655, 666 (1992) (interpreting a treaty, look at the language of the treaty in the context of its negotiation history).

135. LAUTERPACHT, *supra* note 61, at 27.

136. Representative Charles A. Eaton of New Jersey participated in the United Nations Conference in San Francisco and summarized the voluminous record prepared in a speech to the House of Representatives on 6 July 1945:

> While the Dumbarton Oaks proposals . . . formed the basis of our deliberations, there were some 700 pages of amendments proposed, supported by 800,000 documents. There were written during the Conference 3,000,000 pages of official documentation. Four commissions and 12 technical committees working in conjunction with almost daily and nightly conferences of the heads of the five great powers, hammered out upon the anvil of free and unlimited discussion the Charter in its final form.

91 CONG. REC. 7299 (1945).

137. *See generally* STETTINIUS, *supra* note 4, at 9-19 (Mr. Stettinius was the Secretary

to the President.[138] He emphasized the enforcement mechanisms of the Charter and asserted that the "overriding purpose [of the Charter is] 'to maintain international peace and security.'"[139] In his review of Article 2(4), he said that "force [(and presumably threats of force)] may only be used [(1)] in an organized manner [, (2)] under the authority of the United Nations [, (3)] to prevent and remove threats to the peace [,] and [(4)] to suppress acts of aggression."[140] The Secretary of State emphasizes that collective force to maintain peace and security is the heart of the Charter scheme.[141] In addition to use of force as part of U.N. collective security, states may also use force to repel aggression under Article 51.[142]

If the Secretary's four-part test were applied to the TEAM SPIRIT situation, the TEAM SPIRIT scenario would most likely be acceptable. The only part of the test that is questionable is the second step: the UN authority requirement. The authority arguably exists now, based on the Security Council actions in 1950, or it could easily be obtained in view of the current collective efforts to fight aggression in Korea.

Professor Goodrich and Mr. Hambro analyzed the drafters' work and found that the ban on the threat and use of force in Article 2(4) "covers a considerably wider range of actions than the phrase "resort to war" used in the Covenant [of the League of Nations]."[143] These commentators assert that the drafters intended to limit the rule to the threat or use of "armed" or "physical" force.[144] The authors note that, "[t]he coercion or attempted

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137. (continued) of State at the time and Chairman of the United States Delegation); GOODRICH & HAMBRO,*supra* note 102, at 4-5, 103-105 (Mr. Goodrich was a Professor of Political Science at Brown University and Mr. Hambro was the Registrar of the International Court of Justice); KELSEN, *supra* note 11, at xiv, 120, 915 (Mr. Kelsen was a Professor of Political Science at the University of California-Berkeley).

138. STETTINIUS, *supra* note 4, at 9-19.

139. *Id.* at 13.

140. *Id.* at 41.

141. *Id*.

142. *Id*.

143. GOODRICH & HAMBRO, *supra* note 102, at 104.

144. *Id*. Professor Jackamo agrees:

> While some commentators have interpreted "threat or use of force" to mean both armed and non-armed force, most have refrained from extending this interpretation beyond armed interventions. Indeed, the primary purpose of the formation of the United Nations was the prevention of war, a fact which is quite evident from the legislative history captured at the Conference at San Francisco in 1945.

coercion of states by economic or psychological methods may be undesirable and contrary to certain of the declared purposes of the United Nations, but [Article 2(4)] is not directed against action of this kind."[145] This interpretation supports the TEAM SPIRIT scenario. The messages, warnings, and pressures directed toward North Korea are arguably psychological and not physical threats, at least as long as the United States makes credible assurances that its military buildup for the exercise is purely defensive in nature.

Some commentators claim that the drafters intended to create an absolute prohibition on threats or use of force with very limited exceptions.[146] Professor Henkin asserted, however, that "Article 2(4) was written by practical men who knew all about national interest."[147] They drafted "norms" to guide behavior, not to hamstring their governments from taking necessary actions for national security or other reasons.[148]

According to Professors Kearney and Dalton, "The legislative history of the San Francisco Conference is clear as to the original intent. 'All the [m]ember [s]tates had agreed to prohibit . . . physical or armed force.'"[149] Professor Kelsen concurs with the emphasis on armed force.[150] Among the rare references to Article 2(4) in his almost one-thousand-page critique of the UN Charter, he notes that the ban on the use of force (and, again, presumably the threat of force as well) refers "especially to the use of armed force."[151] He says that the right to use armed force is dependent upon the existence of a credible claim of self or collective defense.[152] He

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144. (continued) Thomas J. Jackamo, III, *From the Cold War to the New Multilateral World Order: The Evolution of Covert Operations and the Customary International Law of Non-Intervention*, 32 VA. J. INT'L L 929, 959 (1992).

145. GOODRICH & HAMBRO, *supra* note 102, at 104.

146. BROWNLIE, *supra* note 95, at 113.

147. Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 544, 547 (1971).

148. *Id*. They were also realistic men and women who knew "that an evil which killed some forty million human beings, armed and unarmed, within the period of thirty years . . . would not be eradicated by the mere act of writing a charter, however well designed." STETTINIUS, *supra* note 4, at 10.

149. Kearney & Dalton, *supra* note 58, at 534 (quoting the Chilean delegate to the San Francisco Conference).

150. KELSEN, *supra* note 11, at 915. Professor Sadurska notes, "This conclusion [that Article 2(4) only applies to the physical use of armed force], although not contradicted by the travaux préparatoires of the Charter, cannot be said to be clearly confirmed by them." Sadurska, *supra* note 17, at 242 n.12.

151. KELSEN, *supra* note 11, at 915.

152. *Id*.

compared the Charter and the Kellogg-Briand Pact and argues that the Charter is directed at the threat or use of armed forces.[153]

One of the most notable aspects of the drafting process is the unanimous vote in favor of ratification.[154] It is not clear whether the unity was because of the continuing world war, the desire to influence the subsequent ratification process by a show of solidarity, or a sincere satisfaction with the work that was accomplished. One intent was clear, however: to stop armed or military aggression and protect the weaker nations with a worldwide collective security system. Even if the intention was to ban all unauthorized threats of force, the arguably implicit threat associated with the TEAM SPIRIT exercises would not trouble the drafters in view of North Korea's military might and behavior.[155]

4. Intentions of U.S. Decision-Makers During Ratification

In this international law analysis, a review of the United States' ratification of the UN Charter is relevant to determine whether any reservations exist.[156] Definitions of "threats or uses of force" by the executive, legislative, or judicial branches of the U.S. government are also relevant if an allegation of a breach of Article 2(4) arises in a U.S. forum. Because

153. *Id*. at 120 (He found the Charter and Pact compatible, with the Charter being the more restrictive of the two).

154. 91 CONG. REC. 7298, 7950, 7954 (1945). Senator Connally's account makes the drafting convention come to life for readers more than fifty years later:

> [Y]ou would have been stirred, I am sure, had you been on the steering committee representing all 50 of the nations, when the roll was called and every nation responded 'yea.' It was a historic event, it was a stirring event, when the vote was recorded and it was announced that 50 nations had recorded their views that the Charter ought to be ratified.

91 CONG. REC. 7954.

155. *See supra* notes 22, 40, and 41 (Korea has the fifth largest military and may have nuclear weapons.).

156. A party to a treaty may accept most, but not all, of its obligations under a treaty by entering a "reservation" to the provisions that are deemed to be unacceptable. CARTER & TRIMBLE, *supra* note 58, at 139. "In U.S. practice the President would communicate any U.S. reservation when he ratifies the treaty." *Id*. at 196. Usually the President makes an initial decision about the reservations that he deems appropriate and communicates his decision to the Senate as it conducts the advice and consent process. *Id*. "In addition, especially in recent years, the Senate has initiated or required the entry of substantive reservations to treaties as part of its 'advice and consent' role." *Id*.

the U.S. Constitution makes treaty-making a joint effort,[157] it is important to analyze the President's and the Senate's intentions during the ratification process.

There is no evidence in the Congressional Record of an intent to make any reservations to the ratification of the Charter.[158] In searching for reservations, exceptions, or understandings, however, it became clear that the President and Senate intended to ratify the UN Charter as quickly as possible to set an example for other nations.[159] Politicians also wanted to demonstrate the United States' determination to make the United Nations a reality.[160] The rapid ratification process[161] was a source of great pride in this country.[162] The speedy ratification, however, meant a less than full discussion of every provision of the Charter during the ratification process.[163]

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157. The Constitution states: the President has the "power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur." U.S. CONST., art. II, § 2, cl. 2.

158. 91 CONG. REC. 5936-8190.

159. The following conclusion of Representative Bloom's speech to the House of Representatives on 6 July 1945 is typical rhetoric during the ratification process: "May the Congress of the United States lead the rest of the world in ratifying this new magna carta of peace and security for mankind." 91 CONG. REC. 7299.

160. Senator Connolly challenged the Senate to make the United States a leader: "The United States must employ its tremendous national power to lead and cooperate with other nations to curb aggression and to crush and overwhelm savage attacks upon peaceful peoples." 91 CONG. REC. 6878.

161. President Truman signed the UN Charter at the conclusion of the San Francisco Conference on 26 June 1945. 91 CONG. REC. 6701. Six days later, on 2 July 1945, President Truman submitted the Charter to the Senate, urging "prompt ratification." 91 CONG. REC. 7118-7119 (1945). Hearings began in the Senate Committee on Foreign Relations one week later on Monday, 9 July 1945. 91 CONG. REC. 7275. Less than three weeks later, on Friday, 28 July 1945, the Senate passed the resolution of ratification (to "advise and consent to the ratification" of the Charter) by a vote of 89 to 2. 91 CONG. REC. 8189-8190. President Truman ratified the Charter eleven days later on 8 August 1945. Joint Resolution Aug. 4, 1947, c. 482, 61 Stat. 756.

162. Chief Justice Vinson's dissent in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 668 (1952) provides an example of this national pride. He wrote the following: "Accepting in full measure its responsibility in the world community, the United States was instrumental in securing adoption of the UN Charter, approved by the Senate by a vote of 89 to 2."

163. This was a frequently expressed concern during the ratification process. Senator Brewster cautioned on 28 June 1945:

> I hope that while the subject is being considered there will not go out through the country today or tomorrow the word that 40, 50, 60, or 70

President Roosevelt was instrumental in the prompt ratification of the Charter by his selection of the United States delegation.[164] President Truman and the State Department furthered the success of both the drafting process[165] and the ratification process with efforts to educate the public and all decision-makers.[166] In addition, President Truman made personal appeals to Congress to ratify the Charter quickly.[167]

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163. (continued)

> Senators have already passed judgment upon the matter, and that is [sic] is a closed book. I assert that we will do little service to the dignity of this body if we thus anticipate in advance the decisions resulting from the deliberations . . . .

91 CONG. REC. at 6921. The President and Senate leaders acknowledged that the Charter was not perfect. They preferred to ratify the Charter quickly and then revise it later, rather than delay the ratification to improve it. The ghost of the failed ratification of the Covenant of the League of Nations was one reason for wanting to expedite the process. The political leadership did not seem to be too concerned about ratifying a Charter with problems, however. They expressed their belief that the Charter could be revised over time to stay abreast of changes in the world, perhaps to include changing practices of nations. *See* discussion *infra* Part III.B.8. President Truman expressed this opinion to the San Francisco Conference at the closing ceremonies: "The Charter, like our own Constitution, will be expanded and improved as time goes on. . . . Changing world conditions will require readjustments." 91 CONG. REC. 6980. Senator Connolly appealed to the Senate using similar language: "The Charter is a 'significant beginning' . . . It will grow and develop in the light of experience and according to the needs of nations under international law and justice and freedom." 91 CONG. REC. 6877.

164. In addition to the Secretary of State, Edward R. Stettinius, Jr., the United States Delegation included Senator Tom Connally, the Chairman of the Foreign Relations Committee; Senator Arthur H. Vandenberg, Representative Sol Bloom, and Representative Charles A. Eaton. STETTINIUS, *supra* note 4, at 254. Former Secretary of State Cordell Hull was also assigned to the delegation, but he did not participate due to illness. 91 CONG. REC. 6877.

165. By ensuring that the drafting process took place before the war was over, President Truman was able to count on a higher degree of unity among the fifty allied nations at the San Francisco Conference. STETTINIUS, *supra* note 4, at 9-12.

166. The Department of State distributed approximately 1,900,000 copies of the Dumbarton Oaks Proposals, had films and a radio series, accepted hundreds of speaking engagements, reviewed as many as 20,000 letters per week relating to the Dumbarton OaksProposals, and invited forty-two national organizations to serve as consultants to the U.S. Delegation. STETTINIUS, *supra* note 4, at 27.

167. In his remarks to the Senate upon formally submitting the Charter to the Senators for their advice and consent on 2 July 1945, President Truman said, "It is good of you to let me come back among you. You know, I am sure, how much that means to one who served so recently in this Chamber with you." 91 CONG. REC. 7118.

The voluminous record of the ratification proceedings does not contain a definition of "threats of force." As in the other sources considered so far in this analysis, the often colorful rhetoric during the late summer of 1945 included an emphasis on unity,[168] sovereign equality of nations,[169] fighting armed aggression,[170] and the importance of deterrence.[171]

Only a few concerns were expressed during the ratification process. One was that the process might be going too quickly.[172] Another concern was whether the United States would be surrendering any of its authority over its own military forces.[173] The latter issue, which still exists today, supports an interpretation that the legislative intent was for the United States to keep some freedom of action short of war. The issues emphasized in congressional speeches during ratification also support the TEAM SPIRIT scenario as the United States works with allies to deter aggression.

5. International Court Opinions

A majority of the cases considered by the ICJ involve interpreting treaties and other international agreements.[174] In the *Corfu Channel Case*, the first case to be considered by the ICJ,[175] the court clarified the meaning and purpose of the phrase "territorial integrity or political independence" in Article2(4), finding that the phrase emphasized particular types of aggression that are especially egregious, but did not limit the prohibition on the threat or use of force.[176]

A precedent[177] from part of an ICJ case that is "on all fours"[178] with the issue discussed in this article emerged from a case the United States

168. 91 CONG. REC. 6701, 6874, 6878, 6980.
169. *Id*. at 5939, 6980.
170. *Id*. at 5944, 6878.
171. *Id*. at 5944, 6702.
172. *Id*. at 6921.
173. *Id*. at 6875.
174. *See* discussion *supra* Part III.A.1.
175. UN OFFICE OF PUBLIC INFORMATION, *supra* note 30, at 395.
176. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) (Judgement on Merits).
177. Opinions of the ICJ have "no binding force except between the parties and in respect of that particular case." Statute of the ICJ, *supra* note 60, art. 59. The ICJ opinions are at least persuasive authority, however. *See* Statute of the ICJ, *supra* note 60, art. 38, para. 1.d. ("The Court . . .shall apply . . . judicial decisions . . . .").
178. "On all fours" means "a judicial decision exactly in point with another as to result, facts, or both. . . . The one is said to be on all fours with the other when the facts are

lost: *Nicaragua v. United States*.[179] Nicaragua alleged that the United States violated Article 2(4) by, *inter alia*, conducting military maneuvers with Honduras on Honduran territory near the Nicaraguan border.[180] According to Nicaragua, the military exercises were illegal because they "formed part of a general and sustained policy of force intended to intimidate the Government of Nicaragua into accepting the political demands of the United States Government."[181] The court noted that there was no secrecy about holding the maneuvers and considered newspaper accounts in addition to the briefs and other documents filed by Nicaragua in reaching its decision on this claim.[182]

In deciding whether the U.S. military exercises were an illegal "threat of force," [183] the court considered the ongoing "war of words" with Nicaragua.[184] The court determined[185] that it was "not satisfied that the

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178. (continued) similar and the same questions of law are involved." BLACK'S LAW DICTIONARY 1088 (6th ed. 1990).

179. In *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 146-149 (June 27), the Court found that the United States violated Article 2(4) by a number of activities. The violations of law included the following: laying mines in Nicaraguan waters; attacks on Nicaraguan ports, oil installations, and a naval base; and training, arming, and equipping the *Contras*. *Id*. at 118, 134-35, 147-49. Nicaragua sought $370,200,000 in damages. *Id*. at 20, 142-45. The court ruled that "the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua. . . ." *Id*. at 149. The court reserved ruling on the "form and amount" of Nicaragua's damages, hoping that the parties would agree on an amount. *Id*. The United States contested jurisdiction and did not take part in the proceedings. *Id*. at 17, 20, 22, 23.

180. The Court listed the various exercises as follows:

> The manoeuvres [sic] in question are stated to have been carried out in autumn 1982; February 1983 ("Ahuas Tara I"); August 1983 ("Ahuas Tara II"), during which American warships were, it is said, sent to patrol the waters off both Nicaragua's coasts; November 1984, when there were troop movements in Honduras and deployment of warships off the Atlantic coast of Nicaragua; February 1985 ("Ahuas Tara III"); March 1985 ("Universal Trek '85"); [and] June 1985, paratrooper exercises.

Id. at 53.

181. *Id*.

182. *Id*.

183. The court noted that "a 'threat of force' . . . is equally forbidden by the principle of non-use of force." *Id*. at 118.

184. *See, e.g.*, *id*. at 57-58 (U.S. Congressional Acts authorizing and appropriating funds for the *Contras*), 58-59 (*Washington Post* article on CIA covert operations in Nicaragua), 64 (*New York Times* article on *Contras* conducting assassinations and psychological warfare training), 65 (the CIA's preparation and distribution of a manual for training guerrillas in psychological operations), 69-70 (press releases from the White House and public

manoeuvers [sic] complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force."[186]

The similarities between this part of the *Nicaragua* case and the situation in Korea are striking. Although the ICJ did not elaborate on the "circumstances" in which the exercises were held, more likely than not some of the key facts included the United States' emphasis on "training" [187] and "deterrence."[188] The exercises in Korea are just as public and just as publicly committed to training.[189] Although TEAM SPIRIT took place in an environment of tough political talk and threats, the exercise, like those in Central America, was conducted primarily for training. Although the ICJ opinion is not binding precedent, the part that discusses U.S. military exercises would certainly be persuasive if U.S. military exercises in Korea were ever challenged at the ICJ.[190]

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184. (continued) statements by the President supporting the reduction of economic assistance to Nicaragua because of its "aggressive activities" in Central America).

185. The United States did not contest any of the evidence, of course, because of its decision not to participate in the proceedings. *See id*. at 17, 20, 22, 23.

186. *Id*. at 118.

187. "A primary purpose of the 60 or so maneuvers the United States conducts every year with foreign countries is training, Pentagon officials say. . . ." Wright, *supra* note 39, at 4. In view of the date of this newspaper article, the date of the case, and the references to the *New York Times* in the opinion, the judges of the ICJ may have considered, or at least read, Wright's article prior to deciding the case. This article noted that U.S. sailors, soldiers, and airman participated in a weeklong military exercise in Honduras in February 1983 ("within a dozen miles of the frontier with Nicaragua"). *Id.* It also mentioned that a three-week naval exercise was beginning in the Caribbean, involving as many as 36 warships, including three aircraft carriers, from the U.S., United Kingdom, and the Netherlands ("the most extensive [naval exercises] held in the area in years"). *Id*.

188. United States military exercises "might also seem designed to demonstrate that Washington is both trustworthy and not to be trifled with." *Id*.

189. *See id*.

190. It is unlikely that North Korea would pursue claims at the ICJ because it might risk "losing control over the resolution of [the] disputes entrusted to the Court for adjudication." Leo Gross, *Underutilization of the International Court of Justice*, 27 HARV. INT'L L.J.571, 571-572 (1986) (discussing reasons nations do not use the ICJ). Korea's violation of treaties and other international agreements, *see supra* notes 41-45, would make it unwise to place itself before the jurisdiction of the ICJ. *See, e.g.*, Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) (Judgement on Merits) (The United Kingdom sued Albania for damages, and won, after mines in a contested waterway damaged British ships and caused deaths and injuries to crewmen. Albania filed a counterclaim, and won, alleging the UK violated Article 2(4) when a British minesweeper entered sovereign Albanian territory (the disputed waterway) and cleared away the mines.).

6. Domestic Court Opinions

As noted above, interpreting treaties is an important part of federal court business in the United States.[191] Since ratification of the UN Charter, however, only eight United States Supreme Court cases and 269 other published federal court opinions mention the Charter.[192] Very few cases actually mention Article 2(4).

In 1952, the Chief Justice of the Supreme Court said, "The first purpose of the United Nations is to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression . . . ."[193] The various sources interpreting Article 2(4) therefore reveal a common theme: the United Nations was created to maintain peace by deterring aggression. This was also one of the purposes of the TEAM SPIRIT exercises.

Occasionally other federal courts have discussed Article 2(4) in very general terms. Judge Bork described Article 2(4) as the "fundamental principle of the Charter–the non-aggression principle."[194] He noted that Articles 1 and 2 of the UN Charter "contain general 'purposes and principles,' some of which state mere aspirations and none of which can sensibly be thought to have intended to be judicially enforceable at the behest of individuals."[195] His statement is consistent with a general principle of interpretation: "Articles phrased in 'broad generalities' constitute 'declarations of principles, not a code of legal rights.'"[196] Judge Bork's descrip-

191. *See supra* Part III.A.4. Although domestic court decisions are not very persuasive to international determinations of the meaning of treaty terms, they are relevant to that analysis. As discussed above, the ICJ includes the "judicial decisions . . . of the various nations" as part of its final tier of sources to consider in a treaty interpretation issue. Statute of the ICJ, *supra* note 60, art. 38, para. 1.d.; *see supra* Part III.A.1. Although not as persuasive as the writings of legal scholars and the practices of nations, *see infra* Parts III.B.7 and III.B.8, respectively, this analysis of domestic court cases is included at this point to follow the international court cases and complete the analysis of court decisions generally.

192. This conclusion is based on a search conducted through LEXIS on 20 January 1999 using the key words: "United Nations" as a phrase, within twenty-five words of the word "Charter."

193. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 668 (1952) (dissenting).

194. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 n. 16 (D.C. Cir. 1984) (concurring).

195. *Id*. at 809.

196. United States v. Noriega, 746 F. Supp. 1506, 1533 (S.D. Fla. 1990) (quoting Frolova v. USSR, 761 F. 2d 370, 374 (7th Cir, 1985)).

tion of Article 2(4) as applying to "aggression" and not other, more benign, threats, or uses of force, would also support the military maneuvers at issue in our scenario.

Federal court litigants do not win cases by alleging violations of the UN Charter.[197] If a foreign government does not complain that the United States violated Article 2(4), United States courts do not analyze that provision to determine whether it was violated.[198] Federal courts often express one of three main reasons for not interpreting Article 2(4) or other provisions of the UN Charter. First, as noted above, the clauses are general and not intended to be interpreted and enforced by the individual party plaintiffs or defendants.[199] Second, interpretations of Article 2(4) by the courts might be inconsistent with executive branch activities and would

197. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655 (1992) (federal district court had jurisdiction even though criminal defendant claims that U.S. agents violated extradition treaty with Mexico when they abducted him from Mexico and Mexico complains as well); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (plaintiff attempted to seek damages against Libya for alleged violations of UN Charter); Simmons v. United States, 406 F.2d 456 (5th Cir. 1969) (draft dodger asserts Article 2(4) as a defense to his efforts to avoid induction to fight in an "illegal" war); United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990) (Noriega asserts lack of jurisdiction based on U.S. violation of Article 2(4)); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 374 (7th 1985) (plaintiff not entitled to base suit on alleged violations of UN Charter).

198. United States v. Hensel, 699 F.2d 18, 30 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983) ("As a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved."); United States v. Noriega, 746 F. Supp. 1506, 1533 (S.D. Fla. 1990) (Noriega lacked standing to raise a treaty violation in the absence of a protest by the government of Panama); *see also* United States v. Zabauch, 837 F.2d 1249, 1261 (5th Cir. 1988) ("The rationale behind this rule is that treaties are designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress.").

199. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 n. 16 (D.C. Cir. 1984) (Bork, J., concurring). Judge Bork warned that the enforcement by individuals of alleged violations of Article 2(4) "would flood courts throughout the world with the claims of victims of alleged aggression (claims that would be extremely common) and would seriously interfere with diplomacy." *Id.* The last five words form the second basis for federal courts to avoid interpreting UN Charter provisions, as discussed in this section. One noteworthy feature of the UN Charter is the protection of individual rights in the "purposes" listed in Article 1, paragraph 3: "To achieve international cooperation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." If individuals could enforce Charter provisions in federal Court, Article 1 might have figured prominently in the efforts to end racial discrimination in the United States during the 1950s, 1960s, and 1970s. *See* JUAN WILLIAMS, EYES ON THE PRIZE 1-57 (1987) (desegregation and other civil rights litigation).

cause confusion in the international arena.[200] Third, it is not the judiciary's duty, because it would amount to conducting foreign policy.[201]

Whether federal courts are abdicating their responsibilities or appropriately exercising judicial discretion,[202] there is little guidance on the meaning of Article 2(4) in domestic court cases. The conclusory interpretations that exist, however, tend to support the legality of the military exercises. Article 2(4) appears to apply to aggression, breaches of the peace, and threats of war, not to military maneuvers designed to send a message.

7. Legal Scholars

The opinions of legal scholars extend from one end of the spectrum to the other, with countless variations in the middle.[203] The most restrictive position is that Article 2(4) can be boiled down to the following mandate: "All Members shall refrain . . . from the threat or use of force . . . ."[204]

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200. *See* Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L'L. 9, 20-23 (1970) (federal courts defer to executive branch in international law matters).

201. *See* Simmons v. United States, 406 F.2d 456, 460 (5th Cir. 1969) Simmons argued that the United States' participation in the war in Vietnam violates Article 2(4) and his induction would make him a party to war crimes. The Court affirmed his conviction on the grounds that his induction did not necessarily mean that he would be sent to Vietnam. In addressing his Article 2(4) claim, the Court said that it was inappropriate for the judiciary to conduct the foreign policy of the United States.

202. *See* Lillich, *supra* note 200, at 9. Federal courts frequently avoid analysis of international law issues by citing one of the following doctrines: political question, judicial abstention, or deference to another branch of government. *Id*. at 21-23, 41-45. According to Professor Lillich, such handling of international issues "has lessened the stature of United States domestic courts in the international community . . . ." *Id*. at 23.

203. Röling, *supra* note 46, at 3 (noting "[t]here are many differences of opinion about the content and scope of [Articles 1, 2, and 51]"); Kearny & Dalton, *supra* note 58, at 534 ("The scope of the phrase 'threat or use of force' in [Article 2(4)] . . . has been for many years the source of acrimonious dispute."); Stone, *supra* note 108, at 369 ("[F]ew authorities would say that the exact limits of the lawful threat or use of force under the Charter are free from serious controversy."). Professor Murphy notes that interpretations differ in part because (1) the first purpose in Article 1 addresses "threats to the peace" and "acts of aggression," not "threats or uses of force"; (2) that purpose also implies that "unless law and justice are served, recourse to force may be justified"; (3) the principle of self-determination in Article 1(2) arguably supports threats and uses of force for national liberation; and (4) the prohibition in Article 2(4) conflicts with the Security Council's duty to determine if a threat exists. MURPHY, *supra* note 127, at 17.

204. UN CHARTER art. 2, para. 4. As discussed, *infra*, Professor Brownlie is a proponent of this interpretation. *See* BROWNLIE, *supra* note 95, at 113.

The other extreme finds that, because there is no enforcement, there is no prohibition. Scholars who take this position argue that power politics and national self-interest rule.[205]

Professor Ian Brownlie expresses one of the most restrictive views of the meaning of Article 2(4). He believes the rule is "comprehensive in its reference to 'threat or use of force' and . . . one of the principal exceptions–the reservation of the right of individual and collective defense in Article 51–should be given a narrow interpretation."[206] Professor Levitin is very close to the Brownlie end of the spectrum. He argues that Article 2(4) is still as restrictive as its drafters intended it to be, but should be amended to allow humanitarian interventions (for example, to prevent genocide) and to "liberate" suppressed populations or support self-determination (for example, Paris in 1945, but not Hungary in 1956).[207]

Professors Arend and Franck, on the other hand, argue that Article 2(4)'s prohibition on the threat or use of force "is not authoritative and controlling and, therefore, not a principle of contemporary international law."[208] Professor Franck goes so far as to say that Article 2(4) is "dead" because of "the wide disparity between the norms it sought to establish and the practical goals the nations are pursuing in defense of their national interest."[209]

Professor Turner expresses a middle ground: Article 2(4) is a rule "prohibiting the aggressive use of military force."[210] Professor Kelsen

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205. *See* Franck, *supra* note 18, at 809.

206. BROWNLIE, *supra* note 95, at 113.

207. *See* Levitin, *supra* note 13, at 652-54. He argues that Article 2(4) should permit states to intervene to prevent extensive human rights violations and should recognize the "liberation of Paris principle: if the people throw flowers, the invasion is lawful; if they do not throw flowers, or if they throw anything else, the invasion is unlawful." *Id. See also* Reisman, *supra* note 122, at 644. Article 2(4) should be interpreted to support genuine efforts at self-determination.

208. Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT'L L. 107, 132 n.144 (1998); Arend, *supra* note 18, at 45-47; ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 191-94 (1993); Franck, *supra* note 18, at 809.

209. Franck, *supra* note 18, at 837. This view was expressed in a more colorful way by another scholar: "A curious legal gray area extended between the black letter of the Charter and the bloody reality of world politics." Reisman, *supra* note 122, at 643.

210. Turner, *supra* note 65, at 315-316. He asserts that an international consensus exists to support the rule's status as customary international law. *Id*. Other legal scholars have also described Article 2(4), as "a prohibition on the first use of military power." Röling, *supra* note 46, at 3-4.

also believes the emphasis of Article 2(4) is on armed force.[211] He argues that Article 2(4) and Article 51 (self and collective defense) are tied closely together.[212] Professor Henkin disputes those who claim Article 2(4) is "dead," although he admits that it has been undermined by ineffective, haphazard enforcement.[213] Like Professor Turner, Henkin asserts that the rule has obtained universal acceptance as a "norm," not as an absolute prohibition on all threats or uses of force.[214]

Professor Coll, like Professor Turner and many others, takes a middle ground regarding the kind of threats or use of force involved. He argues that Article 2(4) has not been completely destroyed: its "core value–the prohibition of *clear aggression*–remains authoritative."[215] He points out that the General Assembly acknowledged the political reality that the threat and use of force continue to exist as legal options when it authorized the use of force for self determination.[216] An analysis of the kind of authorized threat or use of force is also supported by Professor Reisman: "The critical question . . . is not whether coercion has been applied, but whether it has been applied in support of or against community order and basic policies . . . ."[217]

Regardless of how broadly or narrowly Article 2(4) is interpreted, legal scholars tend to agree that, in practice, a "threat of force" is rarely considered to have a separate significance beyond the use of force threatened.[218] Either the threat merges with the use of force or the threat dissipates as conditions change.[219] Even though a "threat of force" is as bad as a "use of force" under the Charter, "threats" are evaluated differently.[220]

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211. KELSEN, *supra* note 11, at 120, 915.

212. *Id*. at 915.

213. The continuing vitality of Article 2(4) is argued forcefully by Professor Henkin. Henkin, *supra* note 147, at 544.

214. "[The drafters of the UN Charter] believed the norms they legislated to be in their nations' interest, and nothing that has happened in the past twenty-five years suggest that it is not." *Id*. at 547.

215. Coll, *supra* note 19, at 608.

216. *Id*. at 612, citing United Nations, General Assembly Resolution Adopted Nov. 10, 1975, A/Res/3382 (XXX) ("the General Assembly endorsed the right of national liberation movements to use violent struggle in achieving their ends"); *see also* MCCOUBREY & WHITE, *supra* note 56, at 30 (The resolution "could be interpreted as undermining article 2(4)" and "is the modern-day equivalent of the just war doctrine.").

217. Reisman, *supra* note 122, at 645.

218. MCCOUBREY & WHITE, *supra* note 56, at 239-40.

219. Sadurska, *supra* note 18, at 239.

220. *Id*. "This practical attitude toward the threat of force stems from the preoccupation of international law with international peace and security above all." *Id*.

This creates some difficulty in identifying examples of threats that received international attention.[221] The international community rarely concerns itself with threats that are made and then dissipate or are withdrawn within a relatively short time period.[222]

Defining a "threat" is a challenge in itself. Some of the issues involved are the intentions of the parties, proving the threat, perceptions, tolerance for some threats or certain nations that make threats, and proving causation after an alleged threat.[223] Professor Brownlie offers this definition of a "threat of force": "an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government."[224] Professor Sadurska suggested a similar definition: "[An] act designed to create a psychological condition in the target of apprehension, anxiety, and eventually fear, which will erode the target's resistance to change or will pressure . . . toward preserving the status quo."[225]

Consistent with his restrictive interpretation of Article 2(4), Professor Brownlie's definition of a threat allows for an "implied promise" to use force and is, therefore, the one most likely to include the TEAM SPIRIT scenario. The Sadurska definition focuses on the intent when the "threat" is made and the intent that it have a certain effect on the recipient. The latter scholar lists the following methods, *inter alia*, of expressing a threat: "moving army units into proximity with the target audience, engaging in military maneuvers, increasing a military budget, or deploying certain weapons."[226] Whether any of these possible expressions of a threat are

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221. MCCOUBREY & WHITE, *supra* note 56, at 56. Obviously, the international community is more concerned with actual uses of armed force than with threats to use force. *Id.* One example of threats to use of force involved express and implied threats by Turkey, using naval vessels and military planes, to ensure adequate protection of Turkish Cypriots in 1963. *Id*. at 56-57. The United Nations condemned Turkey's threats as violations of Article 2(4). *Id*. at 57.

222. *Id*. at 58. Turkey's threats against Cyprus are an exception because the threats lasted from December 1963 until 1974, and Turkey threatened to invade the entire time if they deemed it necessary to protect the Turkish Cypriots. *Id.* The United Nations' condemnation took place in 1965. *Id*. When threats are made and then quickly dissipate, "generally the collective sigh of relief that actual force has not been used . . . outweighs any desire to condemn the threat." *Id*. at 58.

223. Sadurska, *supra* note 18, at 241.

224. BROWNLIE, *supra* note 95, at 364.

225. Sadurska, *supra* note 18, at 241.

226. *Id*. at 243.

even threats at all, and if so, whether any are illegal threats, would depend upon the threatener's intentions.[227]

The apparent consensus regarding the test for the legality of a threat is that a threat to use force is legal if the use of force threatened would be legal.[228] This definition could encompass the TEAM SPIRIT exercises. The maneuvers and message might be illegal if they are viewed as an "implied promise" to use military power (although not authorized to do so) to compel compliance with international obligations (for example, abandon a nuclear weapons program, talk peace or fight, pay just debts, or resolve prisoner of war issues).[229]

At least one scholar has applied the Brownlie definition in this way. "[T]he promise" of the resort to force is usually "implied by the massing of troops on the border or by other concrete military preparations or activities."[230] On the surface, this situation appears to apply to U.S. participation in TEAM SPIRIT exercises with more than 100,000 soldiers, sailors, airmen, and marines.[231] The nature, and legality, of the specific demands made before and during the exercise may be the key to whether the exercises are illegal in Professor Brownlie's opinion. Expressed intentions (for example, to conduct a training exercise) may remove U.S. operations from the "implied promise to use force" prong, although the scope of the exercise could undermine what the United States says.[232]

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227. Professor Sadurska notes an interesting distinction between a "warning" and a "threat." A warning merely cautions the target to be careful or the target state may be injured or damaged. A threat is a communication to the target that the threatener is ready, willing, and able to cause damage and injuries if the target does not comply with certain demands. *Id*. at 245 (giving credit to Paul Finn for the clarification).

228. *Id*. at 248; BROWNLIE, *supra* note 95, at 112, 364; MCCOUBREY & WHITE, *supra* note 56, at 55; Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 146-149 (June 27), at 99-105; Edward Gordon, *Article 2(4) in Historical Context*, 10 YALE J. INT'L L. 271, 274-75 (1985), Turner, *supra* note 65, at 350.

229. According to Professor Stone, "forcing" North Korea to agree to do anything may be void under Article 2(4) of the Charter or Article 52 of the Treaty on Treaties. Stone, *supra* note 108, at 369.

230. MCCOUBREY & WHITE, *supra* note 56, at 55-56. The authors describe Iraq's massing of 100,000 troops on the border with Kuwait on 31 July 1990 to send the message that "armed force would be used by Iraq if Kuwait did not concede to Iraqi demands." *Id*. at 55. They conclude that the threat was unlawful because there was no legal justification for the use of force at that time. *Id*.

231. Wright, *supra* note 39, at 4.

232. *See, e.g*, Fulghum, *supra* note 39, at 23 ("The size and scope of TEAM SPIRIT

A line of reasoning that relates to the TEAM SPIRIT exercises emerges from some of the most restrictive interpreters of Article 2(4). These legal scholars say that an acceptable self-defense argument could be made by nations with nuclear weapons that assert they will only use those weapons in response to the first use by another state.[233] Because individual self-defense and collective "self-defense" are equally protected in Article 51, the nuclear weapons defense should apply to the defense of others as well. There is no logical reason to consider nuclear weapons any differently from overwhelming conventional combat power in this analysis.[234] Accordingly, the TEAM SPIRIT joint and combined exercises would be considered legal under Article 2(4) if the United States announces that it will use that lethality against North Korea only if it attacks South Korea first.

Of course the wrinkle in the foregoing analysis is the other communications the United States has with North Korea, before and during the exercise. If the United States implies that it may use its military muscle aggressively, without the authority to do so, our conduct would be illegal. Likewise, if the United States demands that North Korea make concessions that are not related to customary international law or some treaty obligation (for example, give up territory or change leaders or type of government), the United States would be in violation also.[235] If, on the other hand, the United States merely warns of the consequences of any North Korean aggression, trains to defend itself and others, and continues to encourage North Korea to do the right thing in other areas, then its conduct would be permissible.

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232. (continued) may be adjusted depending on how much pressure the United States wants to apply to North Korea.").

233. MCCOUBREY & WHITE, *supra* note 56, at 59.

234. *Id*. at 61. Military preparations, including the invitation of allied troops to assume defensive positions, are not a "threat" if taken as defense against a threat from another. *Id.*

235. The discussion in Congress and the media about whether Saddam Hussein should remain in power is one example. Although U.S. military leaders have consistently indicated that the United States is only interested in performing those missions authorized by the United Nations, some members of Congress have expressed their desire for a change in the political leadership of Iraq.

8. Practice of Nations

According to all of the methods of interpretation discussed in this article, the practice of nations[236] is one of the most important considerations.[237] Based on the actions and inactions of the United Nations, and on U.S. foreign policy since 1945, this consideration is arguably conclusive.[238]

During this century, there have been an unbelievable number of wars and deaths from military conflicts.[239] Threats and uses of force continue in spite of the Article 2(4) ban.[240] This situation is a very real, albeit tragic, part of the "practice of nations." According to some legal scholars, an

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236. In an interpretation of the UN Charter, the analysis of the "practice of nations" begins on 24 October 1945. On that date, the last of the five permanent members of the Security Council and a majority of the other original signatories ratified the Charter. 91 CONG. REC. 10043 (1945); 24 FUNK & WAGNALL, *supra* note 30, at 8797. The Charter then took effect and the United Nations was an international organization. *Id*. October 24 is observed as United Nations Day. UN OFFICE OF PUBLIC INFORMATION, *supra* note 30, at 6. The five permanent members of the Security Council are the United States, the Soviet Union [now Russia], the United Kingdom, France, and China [now the People's Republic of China]. *Id*. at 11. The Soviet Union was the last of the five permanent members to ratify the UN Charter. 91 CONG. REC. 10043 (1945).

237. The ICJ, Treaty on Treaties, and Restatement all list "subsequent practice of the parties" second and the United States Supreme Court always has it on its short list of sources after analyzing the language itself. *See* discussion *supra* Part III.A.

238. Professor Coll notes that the success of an idealistic, or "absolutist," interpretation of Article 2(4), banning (almost) all threats or uses of force, was dependent on the United Nations' guarantee of big power cooperation and worldwide collective security. The failure of the UN to deliver on either cooperation or prompt collective security action requires nations to be able to take steps to deter aggression. Coll, *supra* note 19, at 608-10.

239. Professor Moore's research uncovered the following statistics:

> Approximately 33 million combatants have died in wars of the twentieth century. [n.4] Even more shockingly, the figures for non-combatants killed during and outside of war . . . may be as high as 169 million, or even higher. . . .[n.5] One scholar estimates that since World War II, that is during the era of the United Nations, there have been 149 wars (including civil wars) and that these wars have produced an estimated 23 million combatant and civilian casualties . . . .[n.6]

John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security and War Avoidance*, 37 VA. J. INT'L L. 811, 816 (1997) (citing RUDOLPH J. RUMMEL, THE MIRACLE THAT IS FREEDOM, THE SOLUTION TO WAR, VIOLENCE, GENOCIDE AND POVERTY 3 (1995) (n.4); RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT 4 (1994)(n.5); RUTH SIVARD, WORLD MILITARY AND SOCIAL EXPENDITURES 21 (1993)(n.6)).

240. A strong consideration that weighs against "legal absolutist interpretations of

attempt to ban all threats or uses of military force would be "naïve and indeed subversive of public order" in the face of the frequency and perceived need for such force.[241]

The UN Charter lists a number of principles in addition to the ban on the threat or use of force in Article 2(4): "self-determination, human rights, security, peace, and justice."[242] One scholar suggests that the "practice of nations" since 1945 reflects an attempt to balance and give full effect to these principles.[243] He suggests that it may be necessary to make a threat or use reasonable amounts of military force to vindicate, advance, or preserve all five of the other principles listed above.[244]

One of the most important "practices of nations" since 1945, is deterrence,[245] or credible threats to deter aggression.[246] There is general agreement as to two basic principles of deterrence: (1) it is better to take reasonable efforts to prevent aggression than sit idly by until having to react to the aggressor, and (2) the costs of deterrence are far less than the costs associated with undoing the aggression.[247] Deterrence has been a significant part of U.S. foreign policy since the end of World War II.[248]

Deterrence is a practice of individuals and nation-states used throughout history.[249] It is a method of "preventing certain types of contingencies

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240. (continued) Article 2(4) and 51 of the Charter [is] the ubiquity of force in international relations." Coll, *supra* note 19, at 611-12.

241. Coll, *supra* note 19, at 612 (quoting Reisman, *supra* note 122, at 645).

242. *Id.* at 609-10; *see* UN CHARTER, art. 1, *supra* note 10.

243. *See* Coll, *supra* note 19, at 609-10. "This is not a blank justification for preventive wars, or wars to maintain the existing balance of power, but a suggestion that in certain circumstances pre-emptive military coercion may be justified . . . ." *Id*. at 610.

244. *Id*.

245. *See* discussion *supra* Part III.B.2. Professor Coll argues that deterrence is the underlying premise for the Charter. Coll, *supra* note 19, at 608. If states cannot depend on the UN deterrence system, they may have to establish their own. *Id*.

246. Also defined as "the threat to use force in response as a way of preventing the first use of force by someone else." Paul Huth & Bruce Russett, *What Makes Deterrence Work?* 36 WORLD POL. 496, 496-497 (1984).

247. KAUFMAN, *supra* note 49, at 12-13.

248. LEBOW, *supra* note 131, at 273-74.

249. *See, e.g.*, SUN TZU, THE ART OF WAR 96 (Samuel B. Griffith trans., Oxford U. Press 1963) (between 453-221 B.C.) ("One able to prevent [the enemy] from coming does so by hurting him."). Tu Yu, a commentator of the 7th and 8th Centuries A.D., said, "If you are able to hold critical points on his strategic roads, the enemy cannot come. Therefore Master Wang said: 'When a cat is at the rat hole, ten thousand rats dare not come out; when a tiger guards the ford, ten thousand deer cannot cross.'" *Id*. *See also* CARL VON CLAUSWITZ, ON WAR 92 (Michael Howard & Peter Paret eds & trans., Princeton U. Press 1984) ("Once

from arising."[250] It serves the interests and principles established by the UN Charter because it is a way "to achieve a measure of safety without resorting to violence on a universal scale."[251]

The beginnings of World Wars I and II, the attack on Pearl Harbor, and the loss of Eastern Europe after World War II were all blamed on the lack of deterrence.[252] The Korean War is also blamed on the lack of effective deterrence.[253] Relative calm, in the sense of no "major wars," has existed since the end of World War II.[254] The lesson from history is that

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249. (continued) the expenditure of [an aggressor's] effort exceeds the value of the political object, the object must be renounced and peace must follow."). Thomas Jefferson wrote to James Monroe on 11 July 1790: "Whatever enables us to go to war, secures our peace." Turner, *supra* note 65, at 336, n.136. In a recent interview, author Tom Clancy said, "If people know you're going to do that [power projection by moving "a large quantity of military forces in one big hurry"], they're not going to bother you. A mugger does not pick an armed police officer as a target. A mugger goes after a little old lady." Fred Barnes, *Tom Clancy's Power Projections*, USA WEEKEND, Jan, 29-31, 1999, at 8.

250. KAUFMAN, *supra* note 49, at 6; Moore, *supra* note 239, at 840-41. Professor Moore is analyzing the "synergy between a regime initiating an aggressive attack (typically non-democratic) and an absence of effective system-wide deterrence." Moore, *supra* note 239, at 840. He postulates that whenever both factors exist, there is a higher probability that military aggression will take place. *Id*. Effective deterrence requires four elements: the ability to respond, the will to respond, effective communication of the ability and will to the aggressive regime, and perception by the aggressive regime of deterrence ability and will. *Id*. at 841.

251. KAUFMAN, *supra* note 49, at 1.

252. *Id*. at 22; Turner, *supra* note 65, at 336 ("[B]oth [World Wars] resulted in large part from perceptions by potential aggressors that their victims, and States which might come to their aid, lacked both the will and the ability to respond effectively to aggression."); Moore, *supra* note 239, at 844 ("[A]n absence of effective deterrence was present before every major war of this century. . . .").

253. *Id*. "[In early 1950,] the United States Department of State was sending out signals that it had little further interest in Korea . . . ." STOREY & MASON, *supra* note 21, at 372. The most obvious "signal" to North Korea was in a foreign policy speech by Secretary of State Dean Acheson in which he omitted Korea from the American defense perimeter in the Pacific. DEAN ACHESON, REMARKS BEFORE THE NATIONAL PRESS CLUB IN WASHINGTON, D.C., ON THE CRISIS IN ASIA–AN EXAMINATION OF U.S. POLICY (Jan. 12, 1950), *reprinted in* 22 DEP'T ST BULL 111, 116 (Jan. 23, 1950); WILLIAM WHITNEY STUEK, JR., THE ROAD TO CONFRONTATION, AMERICAN POLICY TOWARD CHINA AND KOREA, 1947-1950 161 (1981). According to former Soviet leader Nikita Khrushchev, North Korea would not have attacked the South in 1950 if General MacArthur and other U.S. military leaders showed a greater interest in South Korea's security after the United States withdrew military forces from South Korea in 1948. STOREY & MASON, *supra* note 21, at 372.

254. Professor Henkin credits the fact that "traditional war between nations has become less frequent and less likely" to the successful purpose of Article 2(4) "to establish a norm of behavior and to help deter violation of it." Henkin, *supra* note 147, at 544-548.

clear aggression will occur "against the territorial integrity [and] political independence"[255] of other states if the United States fails to be assertive, "militarily strong, and politically confident."[256]

In the practice of states, Article 2(4) is recognized as customary international law, but some threats to use force are essential and necessary for national security.[257] The illegality and the necessity of threats collide if a large-scale military exercise takes place as a deterrent threat and it provokes a military conflict. The "absolutists" argue that Article 2(4) was designed to prevent that from happening. The rule bans all threats, even threats based on deterrence. The ban ensures that conflict does not occur based on misunderstood signals or a cycle of threats and counter-threats.[258]

The prohibition in Article 2(4), however, is part of a worldwide collective security system that is not working well.[259] Accordingly, the "practice of states" has been to characterize the ban the way Professor Turner does, as only applying to threats of aggressive military force.[260] This approach is consistent with the Charter's background, principles, and purposes, yet allows nations to defend themselves and others.[261]

There are two final points relating to the practice of nations and the TEAM SPIRIT scenario. First, North Korea is non-democratic, a former aggressor, and a perennial breaker of international laws.[262] The international community has a greater tolerance for deterrent threats that are directed at such regimes.[263] Finally, the nuclear issue is vitally important. North Korea most likely has nuclear weapons capability now, or will have

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255. UN CHARTER art. 2, para. 4.

256. *See* Coll, *supra* note 19, at 601. American power is a fundamental prerequisite to the success of international organization and order. *Id*.

257. Turner, *supra* note 65, at 313-15.

258. *See, e.g.*, Robert Jervis, *Rational Deterrence: Theory and Evidence*, 41 WORLD POL. 183, 183-84 (1989).

259. Franck, *supra* note 18, at 837.

260. Turner, *supra* note 65, at 315-16.

261. *Id*. at 350. "Any analysis of potential defensive behavior needs to discriminate between actual use [of force] . . . and expressed or implied threats aimed at enhancing deterrence. Deterring armed international aggression, after all, is an important Charter value." *Id*. *See* Franck, *supra* note 18, at 814 ("[A]n original central purpose of the [United Nations] was collective security against aggression in order to end war.")

262. *See supra* notes 21-26, 28-32, 36, 38-43 and accompanying text. The first two descriptive phrases in this string relate to Professor Moore's deterrence paradigm. *See supra* note 250.

263. Sadurska, *supra* note 18, at 241.

it soon. With nuclear weapons, or any weapon of mass destruction, the potential target state may not wait until it is attacked before defending itself.[264] Deterrence protects an issue that is even more fundamental than any of the United Nations' purposes or principles–survival.

IV. Conclusion

The long footnotes on casualty figures were included for a reason.[265] Successful deterrence prevents war. Ineffective deterrence results in the horrors of war. Even though there can be miscalculations and misunderstandings, the fundamental goal of deterrence is the same as that of the UN Charter: "To maintain international peace and security."[266]

The most persuasive reason that there have been so few incidents involving alleged violations of the "threat of force" ban, is that when deterrent threats are successful, the world usually breathes a "collective sigh of relief" that at least one war was averted this century.[267] Threats come in many forms and are a part of life. Bullying or aggression is also a fact of life, but one that has been universally condemned. The bully's "threat," and not the "threat" of the ones defending against the bully's aggression, is the threat that Article 2(4) was originally drafted to prohibit.

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264. *International Control of Atomic Energy: Growth of a Policy*, DEP'T ST. PUB. NO. 2702 164 (1946), *quoted in* P. JESSUP, A MODERN LAW OF NATIONS 166-167 (1948), *reprinted in* WOLFGANG G. FRIEDMANN, ET. AL, CASES AND MATERIALS ON INTERNATIONAL LAW 893 (1969) (U.S. Department of State Memorandum urged that the definition of an "armed attack" take into account nuclear weapons and "include in the definition not simply the actual dropping of an atomic bomb, but also certain steps in themselves preliminary to such action."); Turner, *supra* note 65, at 320. Professor Turner summarizes this point as follows:

> [A]ny rule that would prohibit a State in lawful possession of nuclear weapons from even threatening to use them defensively to preserve the lives of tens of millions of innocent non-combatants would stand as clear evidence that the law had become part of the problem–or, in the words of Dickens: "If the law supposes that, the law is a ass, a idiot."

Id. (quoting CHARLES DICKINS, OLIVER TWIST 354 (Kathleen Tillotson ed., Oxford Univ. Press 1966)).

265. *See supra* notes 38 112, 239.

266. UN CHARTER art. 1(1) (the first purpose listed). The first seventeen words of the Charter state, "We the peoples of the United Nations determined to save succeeding generations from the scourge of war . . . ." UN CHARTER pmbl.

267. MCCOUBREY & WHITE, *supra* note 56, at 58. *See supra* note 221.

The thread that weaves all of the various sources of interpretation together is the intention to stop aggression. The drafters inadvertently made the text of Article 2(4) obscure and ambiguous by adding language to comfort smaller nations that were concerned about aggressions in the past. History has many examples of efforts to improve international law to ban *aggression*, not militaries and military exercises. The "players" in this analysis, whether they are drafters, legislators, leaders, or judges, all expressed the importance of deterring aggression to promote peace and security. The debate among the legal scholars highlights the difference between aggression and deterrence and the problems of having too much of either one. The last source applied in this analysis, the practice of nations, fully supports the need to deter aggression.

The common theme noted in a number of sources is that a nation can legally threaten to do anything that the nation can legally do.[268] As long as the United States is threatening, or warning, that it may respond with devastating force to defend itself or an ally, then the U.S. conduct would not violate Article 2(4). Deterrence, or a policy of maintaining credible threats to respond with force, is therefore legal. North Korea would not be able to interfere with the TEAM SPIRIT military exercises by alleging that they violate Article 2(4).[269] This applies, of course, to the other rogue states and potential aggressor nations all around the world that receive similar military threats from United States military, naval, and air exercises.

With respect to the specific fact situation analyzed in this article, North Korea might have more success if it were to consider the old proverb at the beginning of this article. By picking up the pen (to finally sign a peace treaty and to sign trade agreements) and laying down the sword (by reducing the vast amounts of its limited wealth spent on its military might), North Korea may be able to improve its economic situation and its chances of reuniting Korea (but peacefully). Reunification would probably end, or at least result in a drastic reduction in, the United States' presence and military exercises on the Korean Peninsula. In the final analysis, an olive branch might accomplish more than pens or swords.

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268. BROWNLIE, *supra* note 95, at 55-58.

269. *See* discussion *supra* Part III.B.5 (Nicaragua attempted to stop U.S. exercises in Central America in the 1980s).