COMMENTS

THE WAR POWERS RESOLUTION OF 1973: NATIONAL LEGISLATION AS INTERNATIONAL LAW

"Fear of war" has become an increasingly prominent factor affecting the behavior of nations. Rapid technological advances in weaponry during the twentieth century[1] have magnified the consequences of the use of armed force.[2] War has become so potentially destructive that customary international law has changed radically as nations have sought to avoid catastrophe.[3] The carnage of World War I precipitated the first steps toward what has become a continuing theme in customary international law: the reduction of armed conflict.[4]

Widely recognized pronouncements of customary international law restricting the use of force have been made on several occasions during this century. The Covenant of the League of Nations,[5] the Kellogg-Briand Pact[6] and the Charter of the United Nations[7] are

1. *See* Firmage, *The "War of National Liberation" and the Third World*, in LAW AND CIVIL WAR IN THE MODERN WORLD 304-05 (J.N. Moore ed. 1974).

2. *Id.* The author points to the increasing rate of the "tempo of technology." Since World War II, the technology of weaponry has undergone a complete change every four to five years. This technological advance has now reached the point where nations are "afraid" to use the nuclear weapons at their disposal. The presence of these weapons has made an impact on political, economic and military institutions.

3. I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 66-67 (1963); J.L. BRIERLY, THE LAW OF NATIONS 397 (H. Waldock 6th ed. 1963). The catalyst for this change was the creation of the League of Nations in 1919. When the League Covenant first appeared, its strictures on the resort to war were the exception rather than the rule. Following its introduction, however, State practice began to change. Pacific settlement of disputes was a concept introduced in the League Covenant which found its way into bilateral treaties, regional security pacts and multilateral conventions. The Permanent Court of International Justice began operation in 1921 as a forum for pacific settlement. By 1945 it was possible to argue that the nations which began making aggressive war in 1939 had acted in contravention of international law.

4. BRIERLY, *supra* note 3, at 410.

5. Treaty of Peace Between the Allied and Associated Powers and Germany, Versailles, June 28, 1919, 225 Parry's T.S. 189 [hereinafter cited as Versailles Treaty]. The League Covenant was a part of this peace treaty.

6. General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, T.S. No. 796, 94 L.N.T.S. 57 [hereinafter cited as Kellog-Briand Pact].

7. U.N. CHARTER art. 2, para. 4.

prominent examples.[8] Although documents such as these are considered definitive statements of customary rules,[9] they are not the sole source of such law.[10] Evidence of a customary rule is also found in State actions taken pursuant to the law's terms,[11] which in turn contribute significantly to both the content and the validity of the customary rule.[12]

In 1973, the United States Congress passed the War Powers Resolution,[13] which enables Congress to limit the use of force by the United States government[14] by requiring the President to obtain congressional approval before introducing troops into hostile situations abroad for more than sixty days.[15] As such, the War Powers Resolution reduces the probability of the United States involving itself in armed conflict. The viability of the War Powers Resolution, however, has recently been challenged.[16] Reservations expressed concerning its constitutionality[17] have compounded previously existing problems of enforcement.[18] While the viability of the War Powers Resolution as legislation may be questionable, its provisions call for government action which would effectively conform United States practice to the current customary rule restricting the use of armed force.[19] Therefore, any analysis of the viability and future of the War Powers Resolution must take into account its relevance as both evidence of, and a contribution to customary international law.

This Comment examines the value of the War Powers Resolution to customary international law concerning armed conflict. First,

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8. BROWNLIE, *supra* note 3, at ch. VII.

9. *See id.* at 112, 120.

10. *See infra* text accompanying notes 16 and 17.

11. *Id.*

12. *See generally* L. GOODRICH, THE UNITED NATIONS (1959). The United States has played a major role in the development of customary international law to reduce armed conflict. For example, the League of Nations was the brainchild of President Woodrow Wilson. Also, the United States hosted the United Nations Conference on International Organization and presently serves as the home of the United Nations Organization. A substantial portion of the UN budget comes from United States coffers. Of the many functions carried out by the United Nations, peacekeeping has been considered a matter of first importance.

13. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541 — 1548 (1976)) [hereinafter cited as War Powers Resolution].

14. *See infra* text accompanying notes 88-95.

15. *See infra* text accompanying note 115.

16. *See infra* text accompanying notes 120-61.

17. *Id.*

18. *Id.*

19. A clear statement of this customary rule is found in Article 2, paragraph 4 of the United Nations Charter. This is the centerpiece of contemporary international law concerned with reducing armed conflict. BRIERLY, *supra* note 3, at 414.

the elements and evidence of customary international law will be briefly examined. By following the application of customary norms to armed conflict, the development of the rule which restricts resort to armed force will be shown. Next, the War Powers Resolution will be examined, and a survey of its provisions and legislative history will be used to exhibit its purposes and effects. A look at the recent challenges to the validity of the War Powers Resolution will complete a scenario of the legislation's current status. Finally, it will be argued that the War Powers Resolution is a State action influenced by customary international law which holds the potential for contributing to that law.

I. THE CUSTOMARY LAW OF ARMED CONFLICT

Custom is a long-standing source of international law.[20] Although it is old enough to be considered the original source of law in general,[21] customary principles are still relied upon today as a major source of growth and redefinition in international law.[22] During the twentieth century,[23] a change in customary international law regarding armed conflict has been illustrated by States' actions and the development of international legal instruments.

A. Elements of Custom

In the legal sense, "custom" means more than the habit of following a particular practice.[24] Custom in international law is comprised of two basic elements:[25] (1) a general practice followed by States and (2) *opinio juris*, the acceptance by States of that practice as law.[26] The first element is established through State actions.[27] The second element is established when States feel obligated to take those actions.[28] The process of establishing these elements involves a

20. 1 L. OPPENHEIM, INTERNATIONAL LAW 24 (Lauterpacht 7th ed. 1948).

21. *Id.* at 25.

22. H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 31 (1972).

23. BRIERLY, *supra* note 3 at 397.

24. *Id.* at 59.

25. *See generally* Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974). There is disagreement among legal scholars as to the precise elements of custom; however, these two basic elements are generally accepted as mandatory.

26. THIRLWAY, *supra* note 22, at 46 (*quoting* G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 32 (1967)).

27. I. BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 6 (1979).

28. OPPENHEIM, *supra* note 20, at 25; BRIERLY, *supra* note 3, at 61.

number of factors.[29]

When considering whether a certain kind of action is "a general practice followed by States," several guidelines are used. Initially, the action is examined in light of the duration, consistency, and pervasiveness which it entails.[30] No set formula is currently used to determine exactly how many States must follow a course of action, or exactly how long that course of action must be followed before it is deemed a "general practice."[31] A course of action that is widely followed may become a general practice in a relatively short time.[32] On the other hand, action taken by only a few States may take centuries to be so deemed.[33]

The element of obligation is also difficult to formulate since it involves a "feeling."[34] The feeling which must be present is that if a practice is not followed, there will (or at least should be) some sort of sanction imposed.[35] Although the feeling of impending sanction may seem to be an amorphous concept, it is the obligation to follow a practice, as opposed to a motive such as comity or morality, which establishes the second element of custom.[36]

When both of these elements are found in connection with a particular State action, it becomes part of customary international

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29. AKEHURST, *supra* note 25; BRIERLY, *supra* note 3, at 59-62; BROWNLIE, *supra* note 27, at 6.

30. *See* BROWNLIE, *supra* note 27, at 6.

31. *Id.*

32. *See* W. BISHOP, INTERNATIONAL LAW 637, 645 (3d ed. 1962); OPPENHEIM, *supra* note 20, at 631-635. In 1945 President Harry S. Truman delivered Presidential Proclamations 2667 and 2668, which contained a new United States policy regarding natural resources of the continental shelf. The United States claimed jurisdiction over all resources in the seabed and subsoil of the continental shelf contiguous to United States coastline, and limited jurisdiction over coastal fisheries. This idea was new to international law. Much of the area affected by these proclamations was considered to be the high seas, where the United States previously had no jurisdiction. However, the concept was so widely adopted by coastal nations that by 1958 it was considered to be a rule of customary international law and included in the Convention on the Continental Shelf adopted by the UN Conference on the Law of the Sea.

33. *See* The Paquete Habana, The Lola, 175 U.S. 677 (1900). In this case the United States Supreme Court was presented with the question of the status of coastal fishing vessels during wartime. Two Cuban fishing boats had been captured as prizes of war by the United States Navy during the Spanish-American War. The owner sued to recover them. The Court looked to "ancient usage among civilized nations, beginning centuries before and gradually ripening into a rule of international law." The rule which had developed among seafaring States was that coastal fishing boats were exempt from capture as prizes of war. The Court decreed that the boats be returned to their owner.

34. OPPENHEIM, *supra* note 20, at 25; BRIERLY, *supra* note 3, at 61.

35. BRIERLY, *supra* note 3, at 59.

36. BROWNLIE, *supra* note 27, at 8.

law.[37] State actions which satisfy the two elements of custom are sometimes called "evidence" of custom.[38] However, not every action taken by a State or one of its agents is intended to have the gravity of a customary rule.[39] The particular actor[40] and the surrounding circumstances are also crucial considerations.[41] State actions which are considered important evidence of customary international law include diplomatic correspondence, recitals in treaties and legislative enactments.[42] During the twentieth century, State actions of this nature have evidenced a marked change in international law concerning armed force[43] as States have developed new standards for "acceptable" use of force which contrast sharply with centuries of previous practice.[44]

B. Early Application to Armed Conflict

Until this century a State's resort to arms was an accepted method of implementing its foreign policy.[45] Ancient societies, even those considered highly "civilized" such as the Greek city-states, fought wars for reasons which today might seem trivial.[46] As the study of international law first developed,[47] efforts were made to distinguish between "just" and "unjust" wars,[48] although this classifica-

37. OPPENHEIM, *supra* note 20, at 25-26; BRIERLY, *supra* note 3, at 59-60; BROWNLIE, *supra* note 27, at 6.

38. BROWNLIE, *supra* note 27, at 5; BRIERLY, *supra* note 3, at 59-60.

39. BRIERLY, *supra* note 3, at 60; *see* THIRLWAY, *supra* note 22, at 31.

40. BRIERLY, *supra* note 3, at 60. Low-ranking officials entrusted only with the chores of daily operation are unlikely to be instrumental in establishing customary rules.

41. *Id.* Important actors, such as the Secretary of State, are not expected to weigh every word spoken in casual conversation. However, what they say in a meeting with foreign diplomats would constitute an official State action. A communique issued from such a meeting would consitute evidence of customary international law.

42. *See* BROWNLIE, *supra* note 27, at 5; BRIERLY, *supra* note 3, at 61. Other sources include: policy statements, press releases, opinions of official legal advisors, official manuals on legal questions, orders to armed forces, international and national judicial decisions, a pattern of treaties in the same form and the practice of international organs.

43. BRIERLY, *supra* note 3, at 397-98.

44. *See supra* note 3.

45. BROWNLIE, *supra* note 3, at 3.

46. *Id.*

47. *See generally* BROWNLIE, *supra* note 3, at 6-18. This development was taking place during the thirteenth and fourteenth centuries. Many of the ideas used came from earlier works of theologians.

48. *Id.* at 3-50. Many of the "classic" writers on international law devoted works to this effort. Men like Grotius and Vattel set out fairly well-defined criteria for a "just war." Retribution for a perceived wrong or pursuit of new territory were seen as perfectly valid reasons for calling out the army against another State.

tion did little to inhibit armed conflict.[49] The first major steps toward reducing armed conflict did not come until the advent of the First World War.[50]

The Treaty of Versailles,[51] the peace treaty which officially ended World War I,[52] contained the Covenant of the League of Nations.[53] The Covenant called for arms redution[54] and arbitration of disputes in lieu of resort to aggression.[55] Resort to arms was prohibited if not kept within defined limits.[56] These provisions exhibited a complete change in attitude toward armed conflict.[57]

This prohibition was carried further by the Pact of Paris (Kellogg-Briand Pact).[58] The Kellogg-Briand Pact condemned recourse to war[59] and called for peaceful settlement of all disputes.[60] Together, the Covenant and the Kellogg-Briand Pact served as a point of departure from States' prior willingness to engage in the use of

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49. BRIERLY, *supra* note 3, at 398; BROWNLIE, *supra* note 3, at 3-18.

50. BRIERLY, *supra* note 3, at 397.

51. Versailles Treaty, *supra* note 5.

52. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 95 n.87 (1966). Germany was actually granted an armistice on November 11, 1918. The Versailles Treaty was not signed until 1919.

53. Versailles Treaty, *supra* note 5, Part I: LEAGUE OF NATIONS COVENANT.

54. *Id.* art. 80 provides:

> 1. The Members of the League recognize that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations.
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> 2. The Council, taking account of the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several Governments.
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> 3. Such plans shall be subject to reconsideration and revision at least every ten years.
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> 4. After these plans shall have been adopted by the several Governments, the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council.
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> 5. The Members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objections. The Council shall advise how the evil effects attendant upons such manufacture can be prevented, due regard being had to necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.
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> 6. The Members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval and air programmes and the condition of such of their industries as are adaptable to war-like purposes.

55. *Id.*; art 12.

56. BRIERLY, *supra* note 3, at 408.

57. *Id.*; BROWNLIE, *supra* note 3, at 66-67.

58. Kellogg-Briand Pact, *supra* note 6.

59. *Id.* art. I. "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."

60. *Id.* art. II. "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

armed force.[61] These two widely-subscribed[62] treaties recorded this attitude change in customary international law, setting new standards for State conduct regarding the use of force.[63] As the Twentieth Century progressed, these standards were further developed.

C. *The United Nations Charter*

By 1945 the standards of the Covenant and the Kellogg-Briand Pact had developed into a customary rule through the practice of nations.[64] In that year the United Nations Conference on International Organization adopted the Charter of the United Nations.[65] The Charter's preamble states that the determination of the "Peoples of the United Nations . . . [is] to save succeeding generations from the scourge of war."[66] Article 2, paragraph 4 of the Charter has been called "the cornerstone of the Charter system,"[67] and states: "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 manner inconsistent with the Purposes of the United Nations."[68]

The Charter further developed standards restricting the resort to armed force in two ways. First, the language of Article 2(4) went beyond the terms of the Covenant and the Kellogg-Briand Pact to restrict the *threat or use* of force.[69] The change first recorded after World War I was thus refined and restated in its contemporary form.[70] Second, the purpose underlying the Charter[71] and its subse-

61. BRIERLY, *supra* note 3, at 410.

62. A. TOYNBEE, MAJOR PEACE TREATIES OF MODERN HISTORY 1286, 2393, 2396 (1967). The Covenant had thirty-two original signatories. The Kellogg-Briand Pact had fifteen original signatories and forty-three accessions.

63. BRIERLY, *supra* note 3, at 410.

64. *Id.* at 112.

65. U.S. DEPT. OF STATE, THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: SELECTED DOCUMENTS iii (1946) [hereinafter cited as SELECTED DOCUMENTS].

66. U.N. CHARTER preamble.

67. BRIERLY, *supra* note 3, at 414.

68. U.N. CHARTER art. 2, para. 4.

69. L. GOODRICH & E. HAMBRO, CHARTER OF THE UNITED NATIONS 104 (1949).

70. BROWNLIE, *supra* note 3, at 112, 120.

71. *See* GOODRICH & HAMBRO, *supra* note 69, at 93-121. The purposes and principles of the UN Charter are stated in chapter 1, which contains articles 1 and 2. Article 1 lists the Charter's purposes, the first of which is to "maintain international peace and security." Article 2 states the principles to be followed by UN Members in pursuit of the purposes set out in article 1. U.N. CHARTER arts. 1 & 2. Thus, one of the basic tenets of the UN is the preservation of international peace and security via restraints on unilateral uses of force. *See also* GOODRICH, *supra* note 12.

quent effect on State practice crystalized the statement made in Article 2(4) into a rule of customary international law.[72]

Application of the elements of customary international law to Article 2(4) illustrates the rapid incorporation into international law of the rule stated therein. The first element of customary international law, as previously set out, is "a general practice followed by States."[73] Wide-spread adherence to the restriction on the threat or use of force was evidenced soon after the signing of the Charter. By 1960, thirty-nine multilateral treaties had been enacted expressing the intention of signatory States to restrict their use of force.[74] Thirty-five of those treaties referred expressly to the strictures found in Article 2(4).[75] During that same brief period, seventy-four diplomatic communications reaffirmed the new principle, with express references to Article 2(4) in fifteen instances.[76] Seven nations enacted constitutions which contained provisions forbidding resort to aggressive war.[77] One national constitution went so far as to renounce war as an instrument of national policy.[78] Legislative enactments during this period included designation of certain acts as "crimes against peace."[79] Yet perhaps the most significant and widespread State practice reaffirming the rule stated by Article 2(4) has been signing the UN Charter.[80]

The second element, *opinio juris*, is perhaps harder to illustrate. The "feeling" among States that sanctions should be imposed is difficult to show unless an event regarded as a violation of the customary rule occurs. One such event was the invasion of Afghanistan by the Soviet Union in 1979.[81] The United States immediately condemned this action as a violation of Article 2(4).[82] The Carter Administra-

72. BROWNLIE, *supra* note 3, at 12. The fact that the vast majority of States are signatories of the UN Charter illustrates the wide acceptance of the basic principles which it contains.

73. *See supra* text accompanying note 26.

74. BROWNLIE, *supra* note 3, at 127-29.

75. *Id.*

76. *Id.*

77. BROWNLIE, *supra* note 3, at 187 n.5. These were the constitutions of Cuba, France, the Federal Repubic of Germany, the German Democratic Republic, the Republic of Korea, Nicaragagua and Venezuela.

78. *Id.* This was the constitution of Burma.

79. *See, e.g., id.* at 188 n.1. These statutes used the Charter of the Nuremberg Tribunal as their model. The notion of a "crime against the peace" was unknown before the advent of the League of Nations and the United Nations.

80. *See* U.S. DEP'T OF STATE, TREATIES IN FORCE (1983).

81. *Transcript of President's Speech on Soviet Military Intervention*, N.Y. Times, Jan. 5, 1980, at A6, col. 1 [hereinafter cited as *Transcript of President's Speech*].

82. *Id.* President Carter termed the Soviet action "a callous violation of international law

tion invoked sanctions against the Soviet Union, including a grain embargo and curtailment of Soviet fishing privileges in United States waters.[83] President Carter also advocated a boycott of the 1980 Summer Olympics to be held in Moscow.[84] Sixty nations eventually boycotted the Moscow Olympics,[85] ten more than the original membership of the United Nations.[86]

Manifestations of *opinio juris* in reaction to incidences such as the invasion of Afghanistan, and the "general practice" of States have illustrated that both of the elements of customary international law are found in the rule of Article 2(4). State actions conforming to that rule provide evidence of its scope and continued viability, thereby becoming part of customary international law.[87]

II. THE WAR POWERS RESOLUTION OF 1973

In the United States, the power to conduct warfare is constitutionally divided between the President and Congress. Congress has the power to declare war, provide armed forces and finance military operations.[88] The President has power as commander-in-chief of United States armed forces.[89] As the Vietnam War progressed, concern grew that war-making powers were gravitating toward the President, leaving Congress with a diminishing influence on the use of the armed forces.[90] In an effort to reassert its war-making authority,[91]

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and the United Nations Charter." *See also* Nanda, *U.S. Action in Grenada Raises Questions of International Law*, Den. Post, Oct. 31, 1983, § 3, at 3, col. 1.

83. *Transcript of President's Speech*, *supra* note 81. The UN Charter provides for the imposition of economic sanctions such as these in Article 41. Under the Charter, however, such actions are intended to be taken under the direction of the Security Council. U.N. CHARTER art. 41. Nonetheless, the sanctions invoked against the Soviet Union were intended as "punishment" for violation of customary international law.

84. *Transcript of President's Speech*, *supra* note 81; *see also* N.Y. Times, Mar. 21, 1980, at A3, col. 3. Chancellor Helmut Schmit of West Germany declared that his nation would also join the boycott if the Soviets did not withdraw. Chancellor Schmit, like President Carter, indicated that the Soviets were running afoul of international law.

85. Amdur, *Boycott Impact to be Felt Today*, N.Y. Times, Jul. 20, 1980, § 5, at 1, col. 4. Some of the nations which did attend, such as Great Britain, did not send a team, but instead sent a single representative. These representatives carried the Olympic flag in the opening parade instead of their national flags, as a sign of protest.

86. *See* SELECTED DOCUMENTS, *supra* note 65, at iii.

87. THIRLWAY, *supra* note 22, at 46.

88. U.S. CONST. art. I, § 8.

89. *Id.* art. II, § 2.

90. HOUSE COMM. ON FOREIGN AFFAIRS, WAR POWERS RESOLUTION OF 1973, H.R. REP. NO. 287, 93d Cong., 1st Sess. *reprinted in* 1973, U.S. CODE CONG. & AD. NEWS 2346 at 2349 [hereinafter cited as COMM. REP.]; S. REP. NO. 220, 93d Cong., 1st Sess. 1 (1973) [hereinafter cited as S. REP.].

91. S. REP., *supra* note 90, at 1-2.

Congress promulgated the War Powers Resolution on November 7, 1973[92] This legislation was intended to reduce the chances of an over-zealous President involving the United States in an unwanted war.[93] The War Powers Resolution was to insure that the "collective judgment" of Congress and the President would be used in exercising war-making powers,[94] thereby fulfilling the intent of the framers of the Constitution that war should be more difficult to start than to stop.[95]

A. The Provisions of the Resolution

The War Powers Resolution is composed of ten sections.[96] The operative portions are sections Three, Four and Five.[97] These sections contain the directives that both Congress and the President must follow to carry out the intent of the legislation.[98] Section Three, entitled "Consultation,"[99] states:

> The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.[100]

A specific definition of *consultation* was intended for this section.[101] "[C]onsultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of the action contemplated."[102] In addition, the President himself is expected to participate, and to disclose all relevant information to Congress.[103]

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92. War Powers Resolution, *supra* note 13.

93. COMM. REP., *supra* note 90, at 2346.

94. *Id.*

95. *Id.* at 10. Ending a war would be accomplished via a treaty negotiated by the President and ratified by the Senate. On the other hand, declaration of war would require the consent of both houses of Congress and the signature of the President.

96. War Powers Resolution, *supra* note 13, at 655-59.

97. *Id.* Other sections deal with such matters as Purpose and Policy (sec.2), Interpretation of Joint Resolution (sec.8) and Effective Date (sec.10).

98. COMM. REP., *supra* note 90, at 2351-55.

99. War Powers Resolution, *supra* note 13, at 555.

100. *Id.*

101. COMM. REP., *supra* note 90, at 2346.

102. *Id.*

103. *Id.*

Section Four is entitled "Reporting,"[104] and requires the President to report to Congress when American troops are committed to combat, or to situations likely to result in combat.[105] The report is to be delivered to Congress within forty-eight hours after troops are dispatched.[106] Specific information, namely (1) the reasons behind the use of American troops, (2) the authority under which those troops were utilized and (3) the expected size of the operation must be contained in the report.[107] After delivering the report the President must continue to report periodically to Congress as long as such an operation is in progress.[108] Section Four has two major purposes. First, it requires the President to consider the legal and constitutional aspects of deploying American troops absent a declaration of war.[109] Second, it attempts to ensure that Congress will be provided with information to use when considering possible action in response to the use of armed forces by the President.[110]

Section Five is entitled "Congressional Action."[111] This section

104. War Powers Resolution, *supra* note 13, at 555-56.

Sec. 4. (a) in the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President Pro Tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

105. *Id.*

106. *Id.* at 556.

107. *Id.*

108. *Id.*

109. COMM. REP., *supra* note 90, at 2346.

110. *Id.* at 2353.

111. War Powers Resolution, *supra* note 13, at 556-57.

contains four directives.[112] First, it sets out a specific procedure which Congress must follow when a report required by section Four is submitted.[113] Second, it provides a procedure which Congress must follow if it is not in session when such a report is submitted.[114] Third, section Five denies the President the authority to commit American troops for more than sixty days without obtaining the approval of Congress.[115] Fourth, Congress is authorized to use a concurrent resolution[116] to order the President to withdraw any troops from hostilities abroad at any time during or after the sixty-day period.[117]

The authors of the War Powers Resolution believed that its provisions would help solve problems which had developed concerning the power to wage war. It was hoped that the original constitutional balance of war-making powers between Congress and the President

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Sec. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Represenatives and to the President Pro Tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

112. COMM. REP., *supra* note 90 at 2355.

113. *Id.*

114. *Id.*

115. *Id.* Actually, congressional *inaction* could result in a pull out after sixty days (sec. 5(b)).

116. *See* COMM. REP., *supra* note 90, at 2357-58. This is an example of a "legislative veto" provision. A concurrent resolution differs from a joint resolution in that the former does not require action by the President. In this way, Congress can legislate "around" the President, and "veto" previous presidential actions. Some legislative vetos require that only one house take action.

117. COMM. REP., *supra* note 90, at 2353.

would be restored.[118] Instead, the War Powers Resolution appears to have spawned new complications.[119] The result has been that its very validity has been challenged.

B. Challenges to the Validity of the War Powers Resolution

1. *The Question of Constitutionality.* One challenge to the War Powers Resolution is that it may be at least partially unconstitutional.[120] One line of argument proceeds from the premise that the Resolution attempts to define the division of war-making powers between Congress and the President.[121] According to the 1926 Supreme Court decision in *Myers v. United States*, the constitutional separation of powers cannot be altered by one branch of government.[122] Accordingly, the War Powers Resolution may be an invalid attempt by Congress to alter the separation of powers.[123]

A more specific challenge arises from the recent Supreme Court decision in *Immigration and Naturalization Service v. Chadha*.[124] In *Chadha*, a challenge was raised to the constitutionality of a section of the Immigration and Nationality Act[125] that allowed either house of Congress to utilize a legislative veto to nullify actions taken by the United States Attorney General pursuant to the Act.[126] Legislative

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118. *See supra* notes 88-94 and accompanying text.

119. *At Issue: The War Powers Resolution*, 70 A.B.A. J. 10 (1984)[hereinafter cited as A.B.A. J.]. The deployment of Marines in Lebanon and the invasion of Grenada have raised the issue of the viability of the War Powers Resolution once again. This article presents arguments advanced both for and against the Resolution. Professor John Norton Moore of the University of Virginia argues that the War Powers Resolution is of doubtful constitutionality. Frederick S. Tipton, Chief Counsel to the Senate Foreign Relations Committee, argues that it is constitutional and enforceable.

120. *Id.*

121. *Id.* at 12.

122. Myers v. United States, 272 U.S. 52, 128 (1926).

123. *But see* S. REP., *supra* note 90, at 1. The view of the authors of the War Powers Resolution was that it fulfilled the intention of separation of powers rather than altering it.

124. I.N.S. v. Chadha, 103 S. Ct. 2764 (1983).

125. 8 U.S.C. § 1254(c)(2) (1976).

> (2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

126. *See generally* Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982). Considerations of efficiency and continuity have dictated that Congress delegate some of its powers to the executive branch. The result has been

vetoes had often been used by Congress to regulate legislative power delegated to the executive branch. The United States Supreme Court held that the legislative veto, as used in the Immigration and Nationality Act, was unconstitutional[127] because it violated the doctrine of separation of powers.[128] An appendix[129] to the *Chadha* opinion listed fifty-six statutes which contained legislative veto provisions, including the War Powers Resolution.[130] However, the ultimate effect which the *Chadha* decision will have upon the War Powers Resolution remains unclear.[131] Although broad language was used to strike down the legislative veto, the ruling in *Chadha* was addressed specifically to the Immigration and Nationality Act.[132] While it has been argued that the legislative veto found in section Five of the War Powers Resolution is now invalid,[133] the ruling in *Chadha* has not actually been applied to that provision.[134] Neither the general constitutional challenge to the War Powers Resolution nor the specific challenge to its legislative veto provision has been resolved.[135] Consequently, the constitutionality of this legislation remains in limbo.

2. *The Question of Politics.* In addition to constitutional attacks which have cast a pall over the future of the War Powers Resolution, there have also been problems in enforcing its terms. In practice, the War Powers Resolution has met with resistance from the White House.[136] Disputes between the President and Congress have flared each time a situation has arisen where the War Powers

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the creation of such agencies as the Interstate Commerce Commission, the Environmental Protection Agency and the Immigration and Naturalization Service. Congress has used the legislative veto as a "leash" on agencies exercising delegated congressional powers. In this way Congress avoided the complete abandonment of these delegated powers to the President. The President appoints the officials who head various agencies, thereby influencing their functions.

127. *See* I.N.S. v. Chadha 103 S. Ct. at 2786-88.

128. *Id.*; *see* U.S. CONST. art. I.

129. I.N.S. v. Chadha, 103 S. Ct. at 2811

130. *Id.*

131. A.B.A. J., *supra* note 119, at 10.

132. I.N.S. v. Chadha, 103 S. Ct. at 2786-88.

133. A.B.A. J., *supra* note 119, at 10.

134. *Id.*

135. *Id.*

136. *See* Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 AM. J. INT'L L. 605, 614-22 (1977). This article examines five examples of past situations where the War Powers Resolution was applicable. It was used in varying degrees and with various accompanying reasons for the President's actions. The author concludes that any effort made by the President to comply with the Resolution was carefully characterized as an exercise of the Commander-in-Chief's power. There was to be no appearance of compliance with any legal obligation.

Resolution was applicable.[137] A recent and pointed example is the involvement of United States Marines in Lebanon.

On August 20, 1982, President Reagan dispatched 800 Marines to Lebanon to participate in a multi-national force assembled to keep order during the evacuation of Palestinian guerillas from Beirut.[138] Although the Marines left Lebanon after the Palestinian withdrawl, they soon returned at the request of the Lebanese Government.[139] The Marines were posted in the area around the Beirut airport to help the Lebanese Government maintain "sovereignty" over that city.[140] On August 29, 1983, the Marine positions came under attack and two soldiers were killed.[141] Many members of Congress felt that this event triggered the reporting provision of the War Powers Resolution,[142] since in their view the Marines in Beirut had become involved in combat.[143]

President Reagan, while stating that he was keeping Congress informed of the situation, avoided compliance with any portion of the War Powers Resolution which would impose a time limit on the Marines' presence in Beirut.[144] Reagan Administration officials stated repeatedly that United States Marines in Beirut were *not* involved in combat.[145] On this basis it was agrued that the War Powers Resolution did not apply to the American presence in Lebanon.[146]

The opposing positions on the Lebanon operation[147] softened

137. *Id.*

138. N.Y. Times, Sept. 20, 1983, § 1, at 13, col. 5.

139. *Id.*

140. *Id.*

141. *Id.*

142. *See* Roberts, *Senate Democrats Set to Force Issue Over War Powers*, N.Y. Times, Sept. 16, 1983, at A1, col. 6; Weisman, *White House Warns a War Powers Fight Hurts U.S. Interests*, N.Y. Times, Sept. 7, 1983, at A1, col. 6.

143. Roberts, *President Pressed to Seek Approval for Marines' Role in Lebanon*, N.Y. Times, Sept. 15, 1983, at A1, col. 6.

144. Gwertzman, *Officials Call Attacks a Surprise; U.S. Role in Lebanon Questioned*, N.Y. Times, Aug. 31, 1983, at A1, col. 5.

145. Gwertzman, *Marines Are Neither Combatants Nor Targets in Beirut, U.S. Insists*, N.Y. Times, Sept. 1, 1983, at A1, col. 5.

146. *Id.*

147. *See* Halloran, *U.S. Weighing Policy Options in Beirut Clash*, N.Y. Times, Sept. 8, 1983, at A1, col. 5. At this point, the Administration was hoping for a joint resolution from Congress which would support its plans in Lebanon. At the same time, there was a move in Congress to cut funds for the Lebanon operation until President Reagan invoked the War Powers Resolution. In the end, the Administration proved more successful in attaining its goals.

gradually as the situation there became more hostile.[148] Although many in Congress felt that invocation of the War Powers Resolution was mandatory,[149] the leaders of Congress pursued negotiations with the President.[150] These negotiations eventually resulted in a "compromise resolution"[151] which applied a limited version of the War Powers Resolution to American actions in Lebanon.[152]

The compromise resolution differed from the original War Powers Resolution in several key aspects.[153] First, the reporting section of the compromise resolution included only one of three original requirements: the periodic report requirement of section 4(c) of the War Powers Resolution.[154] Second, the compromise resolution lacked any provision which would allow Congress to force withdrawal of the Marines by concurrent resolution.[155] Third, the President was authorized by the compromise resolution to keep United States forces in Lebanon for up to eighteen months.[156] In contrast, application of the War Powers resolution would have allowed for only sixty *days* of troop involvement without special approval of Congress.[157] Finally, the compromise resolution contained a section endorsing President Reagan's actions in Lebanon.[158] No such endorsement provision was included in the War Powers Resolution.[159]

The diluted terms used in the compromise resolution are illustrative of the situation confronting the original War Powers Resolution. The legislation's terms are being eroded by persistent reservations about their constitutionality[160] and hesitancy about their application.[161] The general question of the viability of the War Pow-

148. *See* Smith, *Reagan Upgrading Lebanon Presence*, N.Y. Times, Sept. 13, 1983, at A1, col. 5.

149. *See* N.Y. Times, *supra* note 138.

150. *See* Roberts, *supra* note 143. House Speaker O'Neill took the lead in placating House Democrats and encouraging a compromise resolution to "invoke" the War Powers Resolution.

151. Roberts, *Congressional Chiefs Back Compromise on War Powers; Reagan is Expected to Sign*, N.Y. Times, Sept. 21, 1983, at A1, col. 6.

152. *See* Appendix.

153. *Compare* Appendix *with* notes 104-11.

154. *See* Appendix, § 4.

155. *Id.*

156. *See* Appendix, § 6.

157. *See supra* note 111.

158. *See* Appendix, § 5.

159. War Powers Resolution, *supra* note 13.

160. Erlich, *The Legal Process in Foreign Affairs: Military Intervention—a Testing Case*, 27 STAN. L. REV. 637, 648 (1975). President Richard Nixon declared both sections 5(b) and 5(c) to be "clearly unconstitutional" in his message to Congress when he vetoed the War Powers Resolution. Since that time, the constitutional attack has continued, as was seen above.

161. *See* Franck, *supra* note 136; A.B.A. J., *supra* note 119.

ers Resolution's has therefore become a matter of which specific provisions remain workable in spite of these challenges.

C. *Current Prospects for the Resolution*

The language of the War Powers Resolution currently remains in the statute books unchanged[162] from the version originally promulgated by Congress in 1973.[163] Any challenge to its viability, however, could have three possible consequences. First, and most drastic, would be a declaration by the United States Supreme Court that the War Powers Resolution is unconstitutional in its entirety.[164] If the argument that this legislation is an attempt by Congress to alter the separation of powers[165] were to be succesfully advanced, the precedent established in *Meyers v. United States* would dictate that the War Powers Resolution be struck down.[166]

The second possibility is that only the legislative veto provision in section Five of the War Powers Resolution will be declared unconstitutional.[167] The legislative veto is the strongest directive for congressional action found in section Five,[168] as it allows Congress to order the President to withdraw troops from hostile situations abroad.[169] If the veto is challenged in court, the *Chadha*[170] ruling will provide precedent for striking the veto provision from section Five.[171]

The final possibility is that the War Powers Resolution will be nullified through neglect.[172] Since its inception the War Powers Resolution has been studiously avoided by American presidents.[173] Moreover, Congress has avoided invoking and thereby testing the Resolution. In the case of the Marine presence in Beirut, Congress

162. 50 U.S.C. §§ 1541-48 (1976).

163. War Powers Resolution, *supra* note 13.

164. *See supra* text accompanying notes 121-23.

165. *See* Myers v. United States, 272 U.S. at 52.

166. *Id.*

167. *See supra* text accompanying notes 124-35.

168. *See* COMM. REP., *supra* note 90, at 2355.

169. *See supra* note 111.

170. *See* I.N.S. v. Chadha, 103 S. Ct. at 2764.

171. 50 U.S.C. § 1548 (1976). This section is a severability provision. By its terms, any portion of the Resolution found unconstitutional can be stricken without affecting the rest of the bill. For a discussion of severability and legislative veto provisions, see Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984); Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 HARV. J. ON LEGIS. 1 (1984); Comment, *Severing the Legislative Veto Provision: The Aftermath of Chadha*, 21 Cal. W. L. Rev. 174 (1984).

172. *See supra* text accompanying notes 136-61.

173. *See* Franck, *supra* note 136.

was persuaded to enact special legislation rather than utilize the War Powers Resolution itself.[174] If the terms of the Resolution are never put to use, Congress and the President will render it void, just as if the Supreme Court had struck it down.

The United States Government appears to be poised to eviscerate the War Powers Resolution. Supreme Court action or general government inaction could completely nullify the legislation. Striking out the legislative veto provision would be less devastating, but would still deny Congress its strongest lever. Even if Congress were willing to implement the War Powers Resolution, without a strong provision for direct action legislators would be stymied if the President chose to ignore the Resolution's terms. Although these conflicts present many significant domestic issues, they are broader and more long-ranging than they may seem. The effects of the challenges to the War Powers Resolution extend beyond the realm of national legislation to international law as well.

III. THE WAR POWERS RESOLUTION AS INTERNATIONAL LAW

The War Powers Resolution was intended to reduce the chances of an over-zealous President unilaterally involving the United States in an unwanted war.[175] Instead it seems to have become the battleground for a power struggle between Congress and the President.[176] Even in the face of such an apparent failure of purpose, the War Powers Resolution still has a positive function. It is—in its purpose if not in its application—a State action reinforcing the customary rule embodied in Article 2(4) of the UN Charter.[177] As such, the War Powers Resolution is a contribution to customary international law.

A. Parallel Purposes

Article 2(4) of the United Nations Charter was drafted as a measure restricting the use of armed force by UN members.[178] The War Powers Resolution was drafted as a measure restricting the use of armed force by the United States Government.[179] The specific meth-

174. *See supra* text accompanying notes 147-52.

175. *See supra* text accompanying notes 88-95.

176. Roberts, *supra* note 143, § 1, at 6, col. 3.

177. *See supra* text accompanying notes 37-38.

178. *See supra* text accompanying notes 64-68; *see also supra* note 71.

179. *See* COMM. REP., *supra* note 90; S. REP., *supra* note 90, at 10; Erlich, *supra* note 160, at 647.

ods employed by these two provisions are different, but their purposes are the same.

The Charter is a broadly-worded document intended to lay the foundation for an international organization.[180] Article 2 sets out the principles by which that organization will operate.[181] As one of these principles, paragraph 4 of Article 2 is declaratory. Members of the UN *shall refrain* from using armed force.[182] As previously discussed, this is the contemporary statement of a rule of customary international law.[183] The mechanics for following this principle rule are left to other provisions and other documents.[184]

The War Powers Resolution is not a broadly-worded document. It contains a specific set of directives for the conduct of various branches of the United States Government.[185] The consulting[186] and reporting[187] requirements provide that both political leaders and legal experts must be consulted before any decision to dispatch United States forces to hostile situations abroad may be reached.[188] These provisions are designed to help avoid irrational or emotionally-charged decisions to use armed force.[189] The provisions for congressional action provide a direct method for removing United States forces from actual or potential combat situations.[190] Taken together, these directives provide the mechanics for achieving the ultimate purpose of the War Powers Resolution: avoiding the unnecessary use of force.[191]

The comparison of Article 2(4) and the War Powers Resolution illustrates the parallel intent of the two instruments. However, it may seem to be a fairly empty exercise. The drafters of the War Powers Resolution probably did not have Article 2(4) in mind as their primary model. The Resolution does not direct the United States government to refrain from the threat or use of force in any

180. *See* GOODRICH & HAMBRO, *supra* note 69, at 3-20.

181. U.N. CHARTER art. 2. "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles." *Id.*

182. U.N. CHARTER art. 2, para. 4; *see also supra* note 71.

183. *See supra* text accompanying notes 73-87.

184. In all, the UN Charter contains 111 articles, which set up machinery to implement its purposes and principles, as well as declaring the intention of Member States to follow its directives.

185. WAR POWERS RESOLUTION, *supra* note 13.

186. *See supra* text accompanying notes 99-100.

187. *See supra* note 104.

188. Erlich, *supra* note 160; *see also supra* text accompanying notes 101-10.

189. *See* S. REP., *supra* note 90, at 1-2.

190. COMM. REP, *supra* note 90, at 2353.

191. *See supra* text accompanying notes 88-95.

manner inconsistent with the purposes of the United Nations.[192] Instead, the President is directed to report to Congress when force is used abroad, and certain powers are reserved by Congress regarding such uses of force.[193] The War Powers Resolution thus appears to be much more of a power-sharing arrangement between two branches of the United States Government than an action reinforcing customary international law.

It is precisely the parallel intent of Article 2(4) and the War Powers Resolution, however, that reinforces and contributes to customary international law, independent of any specific language which the legislation might contain.[194] The essential building blocks of customary international law are norms of State conduct, built upon past actions and influencing future actions.[195] It is an interplay which has involved United States government institutions since their inception.[196]

1. *The Influence of Customary International Law on United States Practice.* In 1820 the United States Supreme Court decided *United States v. Smith.*[197] In *Smith*, the constitutionality of a criminal statute was challenged on the ground that it was vague in its definition of the offense. The statute imposed capital punishment for

192. Indeed, most references to the use of force in preparatory documents on the War Powers Resolution are concerned with who may exercise war powers. Much attention appears to have been focused on which branch of government was granted superior war-making authority by the Constitution. Thoughts of *curbing* the use of force were expressed largely in connection with the Vietnam War, and even then the motivation was often the avoidance of another such "loss" in the future. *See War Powers: Hearings Before the Subcomm. on National Security and Scientific Developments of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. (1973); COMM. REP., *supra* note 90; S. REP., *supra* note 90.

193. *See* War Powers Resolution, *supra* note 13.

194. *See, e.g.*, BROWNLIE, *supra* note 3, at 112-20. When Professor Brownlie traces the customary international law concerning the use of force, he focuses on the *principle* which is the essence of the rule. He follows that principle through its various manifestations in State practice. Custom by its very nature is not often reduced to a certain set of words. Rather, it is a way of doing things. In tracing the rule stated in Article 2(4), Professor Brownlie looks at a variety of State actions, some of which refer expressly to Article 2(4) and some of which do not. Their common purpose is what places them in the line of development of a customary rule: their effect on State actions rather than their use of language is what contributes to customary international law.

195. *See* THIRLWAY, *supra* note 22, at 30-37.

196. *See* U.S. CONST. art. VI, § 2. The framers of the Constitution placed treaties in the Supremacy Clause along with the Constitution itself and laws of the United States. Declaring treaties to be part of the "supreme law of the land" shows a recognition of the interrelation of international law with domestic United States law.

197. United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820).

"the crime of piracy as defined by the law of nations."[198] It was argued that this language gave insufficient notice of the elements of piracy to potential defendants. The Court disagreed. The content of customary international law was held to be sufficiently definite for its incorporation into the statute to withstand the consitutional challenge.[199] The *Smith* case shows the influence of customary international law on the domestic law of the United States at an early stage in our history. Congress incorporated a customary rule into a criminal statute. The Supreme Court consulted customary international law in its deliberations and found the evidence provided there to be dispositive of an issue raised under the Constitution.

In *Smith*, the Supreme Court sought to impliment the intent of Congress in enacting the piracy statute. Since the customary definition of piracy was expressly referred to in the statute, the language used made it fairly obvious that the intent of Congress was parallel to that of the States whose practice had established the customary international law of piracy.[200] More recently, United States courts have been faced with questions of customary international law which have not involved such clear-cut statutory language. The intent of Congress has required definition by the court involved, in conjunction with a comparison of that intent with emerging rules of customary international law. These processes were carried out in the cases of *Filartiga v. Peña-Irala*[201] and *Rodriguez-Fernandez v. Wilkinson*.[202] The earlier, and perhaps more famous of the two is the *Filartiga* case.

Filartiga involved interpretation of the Alien Tort Statute,[203] which gives federal district courts original jurisdiction over any civil action brought by an alien for a tort committed in violation of the

198. An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, ch. 77, § 5, 2 Stat. 510 (1819).

199. United States v. Smith, 18 U.S. (5 Wheat) at 160-61. The challenged statute remains in effect, essentially unchanged. 18 U.S.C. § 651 (1976).

200. In seeking to punish the crime of piracy, Congress relied on a definition of the offense which had developed into a rule of customary international law by years of State practice. For a discussion of the use of customary international law in United States legal institutions, see Schneebaum, *The Enforceability of Customary Norms of Public International Law*, 8 BROOKLYN J. INT'L L. 292 (1982).

201. Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

202. Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub nom.* 654 F.2d 1382 (10th Cir. 1981). Following the same basic reasoning as Filartiga, this case found an enforceable international human right to be free from arbitrary imprisonment. To avoid repetition, only the Filartiga case will be discussed *infra*.

203. 28 U.S.C.A. § 1350 (1976).

law of nations.[204] In *Filartiga*, the phrase "law of nations" was used differently than it was in the statute involved in *Smith*. Instead of confining the incorporation of international law to one offense, Congress simply used the term "tort." It was left to the courts to determine what constituted a tort under the law of nations. Courts were thus expected to match the intent of Congress with the existing state of international law at the time a particular suit was brought.[205] In *Filartiga*, the Court was asked to hold that physical torture by government officials was a violation of the law of nations, and as such was conduct intended by Congress to fall under the Alien Tort Statute.[206] After examining relevant actions taken by States collectively and individually, the Court found that official torture was indeed a violation of the law of nations.[207] Although the customary rule prohibiting such torture had not evolved until after the enactment of the Alien Tort Statute, the intent exhibited by Congress through the statute was shown to comprehend the subsequent, parallel international legal principle.[208]

The *Smith* and *Filartiga* cases illustrate the influence that customary international law has had on the law of the United States through express incorporation by Congress and through court interpretation.[209] The relationship has not been one-sided. While the above examples have discussed the influence of international law upon the United States, United States practice has also had its effects upon customary international law. In a least one instance, this effect has been dramatic.

2. *The Influence of United States Practice on Customary International Law.* One of the most striking instances of the influence of United States practice on customary international law began in 1945 when President Truman signed Presidential Proclamations 2667[210]

204. *Id.* "The district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or treaty of the United States."

205. *See* Filartiga v. Peña-Irala, 630 F.2d at 880. The first analysis undertaken by the court was an examination of the law of nations.

206. *Id.* at 880-81.

207. *Id.* at 881-85.

208. *Id.* at 884.

209. The statute in the Smith case made express reference to the "law of nations," while in Filartiga the court interpreted a statute to include a rule of customary international law not in existence when the statute was enacted. While examples such as these may not occur daily, they do occur with sufficient frequency that the West Publishing Co. includes international law in its "key number" system of case digests.

210. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945).

and 2668.[211] These proclamations established limited United States jurisdiction over certain areas of the high seas,[212] that part of the ocean over which no State exercises sovereignty.[213] In Proclamation 2667, the United States claimed jurisdiction and control over all mineral resources in the continental shelf contiguous to its coast.[214] Proclamation 2668 established "conservation zones" in areas of the high seas contiguous to United States territorial waters which, with the advancement of technology, had been developed as fisheries.[215] The idea of a State claiming any degree of control over the high seas was new to international law.[216] Nevertheless, so many States followed the lead of the United States by enacting various similar provisions that by 1958 limited jurisdiction over continental shelf minerals and coastal fisheries was established as a rule of customary international law.[217] The actions taken by other States varied from the United States model,[218] and the exact limits of this limited jurisdiction are still changing.[219] The international legal principle upon which these actions were and are still based, however, proceeds directly from the United States action in 1945.[220] While the *Smith* and *Filartiga* cases incorporated congressional intent and international customary principles, the Presidential Proclamations signed by President Truman *established* principles which were incorporated in various forms by other States until they became customary international law.

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211. Proclamation No. 2668, 10 Fed. Reg. 12,304 (1945).

212. A fairly concise description of this concept is found in the Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82. The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a State. The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. *Id.* arts. 1 & 2.

213. In recognition of the long-standing legal character of the high seas, both proclamations stated that they were not intended to infringe on the freedom of the high seas, save in the limited ways described therein. Proclamation No. 2667, *supra* note 210; Proclamation No. 2668, *supra* note 211.

214. Proclamation No. 2667, *supra* note 210. The main purpose here was to obtain access to the oil reserves known to exist beneath the continental shelf. The proclamation emphasized the character of the continental shelf as "contiguous" to U.S. coasts and "appertaining" to the United States.

215. Proclamation No. 2668, *supra* note 211. Here, the concern was that if left unregulated the fisheries would be quickly depleted through over-fishing.

216. *See* BISHOP, *supra* note 32, at 640-44.

217. *Id.* at 645.

218. *See* 1 U.N. DEP'T OF ECON. AND SOC. AFF., LEGISLATIVE AND ADMINISTRATIVE SERIES 3-47 (1951) [hereinafter cited as LEGISLATIVE SERIES].

219. *See, e.g.*, Draft Convention on the Law of the Sea, United Nations Third Conference on the Law of the Sea, U.N. Doc. A/Conf. 62/wp. 10/Rev. 3 (1980).

220. LEGISLATIVE SERIES, *supra* note 218, at 3-47.

B. So Who Cares?

The few examples given above illustrate the "ebb and flow" of customary international law within United States law, and conversely, of United States law within international law. The question which remains is why this ongoing process should have any bearing on the War Powers Resolution, a controversial piece of legislation touted by few, despised by many and ignored by most.

1. *The Influence of Customary International Law on the War Powers Resolution.* The wording of Article 2(4) set down a rule that is now firmly established in the international community. Unbridled resort to force is illegal; it is against the law of nations. The United States has invoked this rule and has imposed sanctions pursuant to its terms.[221] The principle embodied in Article 2(4) was also at least partly responsible for the drafting of the War Powers Resolution, as members of Congress feared the unbridled use of force by the Executive.[222]

By their very nature the provisions of the War Powers Resolution regulate and thereby limit the use of force by the United States. The President must consult with Congress whenever possible before forces are deployed. Even if consultation is not possible and troops are dispatched, the President must still report to Congress on their activity, and include in his report the legal basis for that use of force.[223] If Congress should disagree with the President's decision to use force, the War Powers Resolution provides a method for the recall of deployed forces.[224] These three major requirements of the War Powers Resolution show a clear intent by Congress to place restraints on the use of force by the Executive, and thus by the United States as a whole.[225] Although customary international law was not cited as a prime motivation for the drafting of the War Powers Resolution,[226] the influence of custom was present. The customary rule restricting the use of force developed for very good reasons, as the vast majority of States have recognized the adverse effects of war upon all factions involved.[227] The text of the War Powers Resolution

221. Nanda, *supra* note 82; *see also Transcript of President's Speech*, *supra* note 81.
222. *See supra* text accompanying notes 88-95.
223. *See supra* note 104; *see also* Erlich, *supra* note 160, at 647-48
224. *See supra* note 111.
225. *See* S. REP., *supra* note 90, at 8-11.
226. *See supra* note 192 and accompanying text.
227. *See supra* text accompanying note 80.

and its legislative history reflect this realization.[228] However, perhaps the most important aspect of the connection between the War Powers Resolution and international law is the possible influence of the former upon the latter.

2. *The Influence of the War Powers Resolution on Customary International Law.* The United States, like every nation, influences customary international law through its actions.[229] The "super power" status of the United States places it in an especially influential position.[230] President Truman's proclamations provide a graphic example of U.S. influence functioning as a catalyst for change. In the past, the United States has used its influence to nurture the development of the United Nations.[231] The organization itself was created at the United Nations Conference on International Organization held in San Francisco.[232] The permanent home of the majority of UN entitites is in New York City, with the United States contributing a substantial portion of the operating budget.[233] Through its continuing support, the United States helps further both the work of the various UN organs and the principles under which the UN operates, including Article 2(4).

United States support for Article 2(4) has been evidenced on a number of occasions, including invocation of the rule against Soviet military actions in Czechoslovakia, Poland and Afghanistan.[234] However, it has also been argued that the strong influence of the United States has worked to undermine Article 2(4) through regional security arrangements such as NATO.[235] This argument postulates that the opposing political systems represented by organizations like NATO and the Warsaw Pact make them potential instruments for carrying out the threat or use of force instead of means of defense against aggression.[236]

Presidential proclamations, diplomatic efforts, regional security arrangements and financial support of international organizations have all had their effects upon customary international law and upon

228. *See* COMM. REP., *supra* note 90.
229. *See supra* text accompanying notes 37-44.
230. *See, e.g.,* Franck, *supra* note 136, at 832-35.
231. GOODRICH, *supra* note 12, at 12-27.
232. SELECTED DOCUMENTS, *supra* note 65, at iii.
233. GOODRICH, *supra* note 12.
234. Nanda, *supra* note 82.
235. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970).
236. *Id.* at 832.

Article 2(4) in particular. All are United States actions which have been influenced by customary international law and have in turn had a reciprocal international influence. It has been shown that United States legislation is influenced by customary international law.[237] It seems logical that the War Powers Resolution, as legislation by a very influential State, would have a reciprocal impact on customary international law by providing further evidence of the content and validity of the rule found in Article 2(4).

The War Powers Resolution imposes what are in effect strictures on the use of force by the United States. These strictures place it in alignment with the rule of customary international law found in Article 2(4). The pieces appear to be in place for a strengthening of this rule via United States practice in conformity with its terms.[238] However, the Resolution currently provides only a nominal showing of conformity; its potential impact on international law is being stymied by pendent constitutional and political problems.[239] The situation is worthy of concern since the customary rule found in Article 2(4) has indeed been undermined as global political relationships have fluctuated. There is merit in the argument that factors such as regional security organizations and increased nuclear capability are hampering compliance with Article 2(4).[240] Even positive supporters of the UN Charter admit that Article 2(4) has encountered problems.[241] A strong showing of support by the United States would be very helpful, and may in fact be necessary in order to avoid further erosion of a rule of customary international law which evolved as a result of the hard lessons learned in modern warfare.

While it is true that the War Powers Resolution does not provide all of the answers, it could nevertheless proffer a great service in

237. *See supra* text accompanying notes 197-202.

238. The argument that the influence of "super powers" like the United States is undermining Article 2(4) also has a converse. The War Powers Resolution, by conforming the practice of an influential State to the strictures of Article 2(4), would presumably influence other States to follow suit. *Compare* Franck, *supra* note 235, *with* Zabloki, *War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A.L. REV. 579 (1984).

239. *See supra* text accompanying notes 120-74.

240. A pointed example is the way in which the United States became involved in the Vietnam War. The United Sates was a member of SEATO, the Southeast Asia Treaty Organization, a regional security organization established pursuant to Article 52 of the UN Charter. By special protocol, the members of SEATO agreed to extend the collective self-defense provisions of the Southeast Asia Treaty to designated territory *not governed by any of the Member States*. One such area was Vietnam. KEESING PUBLICATIONS, TREATIES AND ALLIANCES OF THE WORLD 187-90 (1968).

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

the international community. Article 2(4) represents the attempt to structure a long-term solution to the problems associated with the use of force by utilizing the rule of law. By helping to ensure the continuation of that effort, the United States could secure long-term benefits for itself and the community in which it operates. Unfortunately, the focus of many of those who will determine the fate of the War Powers Resolution is short-term and political. The most imminent of the threats to the Resolution previously discussed appears to be that of neglect.[242] The political climate in Washington D.C. has made it an unpopular piece of legislation. Even so, the very fact that the War Powers Resolution is legislation — a "rule of law" — has had an effect on United States practice. Although religiously avoided through the first years of its existence, the War Powers Resolution came into play at least marginally during the most recent United States troop deployment in Lebanon.[243] According to one of the Resolution's authors, even though the version of the War Powers Resolution enacted concerning Lebanon was criticized as a "blank check" to the President, the process did have viable functions. The "Lebanon War Powers Resolution": (1) limited the function, number and length of stay for all troops, (2) affirmed the right of Congress to change its judgments at a later date and (3) required further congressional approval for any expansion of the American presence in Lebanon.[244] In these functions was found a step forward, from absolute avoidance to grudging acceptance of the War Powers Resolution.[245] Similarly, although little formal action under the War Powers Resolution was taken regarding the invasion of Grenada in 1983,[246] the threat of congressional action did have its effects. The Reagan Administration elected to remove the vast majority of United States combat troops from Grenada before the sixty-day time limit would have expired.[247]

The analysis of the War Powers Resolution's effect on customary international law thus returns to the notion of parallelism. The impact of the Resolution on United States practice reflects the logic behind utilizing the rule of law in the international community. Even though it has yet to be formally invoked, the mere presence of the War Powers Resolution has arguably served a mitigating func-

242. *See supra* text accompanying notes 172-74.
243. Zabloki, *supra* note 238, at 579, 594.
244. *Id.* at 595.
245. *Id.*
246. *Id.* at 596.
247. *Id.* at 597.

tion in the use of force by the United States simply because it is the law of the land. The dynamics of practice are very different on the international scale, but the basic parallel between the War Powers Resolution and Article 2(4) can be drawn in this respect as well as in their root purposes. Article 2(4) also represents law: customary international law. Its impact on the international community derives from that very fact. Moreover, the increasingly dire consequences of war which precipitated the formulation of the rule provide a very practical motivation for acknowledging its terms.[248] Drawing a parallel on this level, the possibility for United States influence on customary international law thus becomes two-fold. Not only does the War Powers Resolution represent further State practice contributing to the continued validity of customary international law, it also shows that the rule of law can indeed impact the use of force by States. As a guide for future action by the United States, the War Powers Resolution could conceivably do more to preserve and develop the customary rule of Article 2(4) than a diplomatic communication, treaty, constitution or money donation.[250]

Present military capabilities make the "fear of war" factor a very real consideration in the daily operations of the international community. General consensus exists in favor of taking steps to reduce the threat of war. The question of what those steps should be, however, gives rise to heated debate. The rule of law is one avenue being explored in the search for international peace and stability. Problems encountered by advocates of the League of Nations and the Kellogg-Briand Pact have given rise to criticism that it is naive to seek peace by "legislating" against war. Considering the gravity of the issues involved, such criticism appears facile and short-sighted. If answers are to be found for the escalating problems of warfare, every alternative must be actively pursued. The customary rule restricting the use of force has persisted, indicating a viable belief that the rule of law is an alternative worthy of pursuit. The War Powers Resolution represents the potential for a valuable contribution to customary international law, and any consideration of its viability must take this factor into account. Failure to do so would be a disservice to the international community.

248. *See supra* text accompanying notes 45-72.
249. *See supra* text accompanying notes 25-42.
250. *See supra* note 238.

IV. CONCLUSION

The consequences of waging war have become more dire as technology has advanced. In recognition of this fact, State practice has changed, giving rise to a new rule of customary international law restricting the use of force. In 1945 this rule was refined and set out as Article 2(4) of the UN Charter. Since then, State practice has continued to affirm and develop this customary rule. In 1973 the United States Congress passed the War Powers Resolution. Although not an overt statement of customary international law, the Resolution's terms were designed to curb the use of force by the United States. In that way, the War Powers Resolution had the potential for becoming a valuable contribution to customary international law. However, political and constitutional worries have hampered the effectiveness of the War Powers Resolution. These problems could actually *undermine* Article 2(4)'s customary rule, which depends upon the continued practice of States for its viability. Working to solve the problems of the War Powers Resolution will have a beneficial effect on customary international law by demonstrating the continued adherence of a powerful and influential State to the terms of Article 2(4).

Thomas Langdon Bell

APPENDIX

Reprinted from N.Y. Times, Sept. 21, 1983, § 1 at 16, col. 1.

Providing statutory authorization under the War Powers Resolution for continued United States participation in the multinational peacekeeping force in Lebanon in order to obtain withdrawal of all foreign forces from Lebanon.

Resolved by the Senate and House of Representative of the United States of America in Congress assembled.

SHORT TITLE

Section 1. This joint resolution may be cited as the "Multinational Force in Lebanon Resolution."

FINDINGS AND PURPOSE

Section 2. (a) The Congress finds that—

[1]

The removal of all foreign forces from Lebanon is an essential United States foreign policy objective in the Middle East;

[2]

In order to restore full control by the Government of Lebanon over its own territory, the United States is currently participating in the multinational peacekeeping force (hereafter in this resolution referred to as the "Multinational Force in Lebanon Resolution") which was established in accordance with the exchange of letters between the governments of the United States and Lebanon dated Sept. 25, 1982;

[3]

The Multinational Force in Lebanon better enables the Government of Lebanon to establish its unity, independence and territorial integrity;

[4]

Progress toward national political reconciliation in Lebanon is necessary; and

[5]

United States Armed Forces participating in the Multinational Force in Lebanon are now in hostilities requiring authorization of their continued presence under the War Powers Resolution.

(b) The Congress determines that the requirements of section 4(a)(1) of the War Powers Resolution became operative on Aug. 29, 1983. Consistent with section 5(b) of the War Powers Resolution, the purpose of this resolution is to authorize the continued participation of United States Armed Forces in the Multinational Force in Lebanon.

(c) The Congress intends this joint resolution to constitute the necessary specific statutory authorization under the War Powers Resolution for continued participation by United States Armed Forces in the Multinational Force in Lebanon.

AUTHORIZATION FOR CONTINUED PARTICIPATION OF UNITED STATES ARMED FORCES IN THE MULTINATIONAL FORCE IN LEBANON

Section 3. The President is authorized, for purposes of section 5(b) of the War Powers Resolution, to continue participation by United States Armed Forces in the Multinational Force in Lebanon, subject to the provisions of section 6 of this joint resolution. Such participation shall be limited to performance of the functions, and shall be subject to the limitations, specified in the agreement establishing the Multinational Force in Lebanon as set forth in the exchange of letters between the governments of the United States and Lebanon dates Sept. 25, 1982, except that this shall not preclude such protective measures as may be necessary to insure the safety of the Multinational Force in Lebanon.

REPORTS TO THE CONGRESS

Section 4. As required by section 4(c) of the War Powers Resolution, the President shall report periodically to the Congress with respect to the situation in Lebanon, but in no event shall he report less often than once every six months. In addition to providing the information required by that section on the status, scope and duration of hostilities involving United States Armed Forces, such reports shall describe in detail—

[1]

The activities being performed by the Multinational Force in Lebanon;

[2]

The present composition of the Multinational Force in Lebanon, including a description of the responsibilities and deployment of the armed forces of each participating country;

[3]

The results of efforts to reduce and eventually eliminate the Multinational Force in Lebanon;

[4]

How continued United States participation in the Multinational Force in Lebanon is advancing United States foreign policy interests in the Middle East; and

[5]

What progress has occurred toward national political reconciliation among all Lebanese groups.

STATEMENTS OF POLICY

Section 5. (a) The Congress declares that the participation of the armed forces of other countries in the Multinational Force in Lebanon is essential to maintain the international character of the peacekeeping function in Lebanon.

(b) The Congress believes that it should continue to be the policy of the United States to promote continuing discussions with Israel, Syria and Lebanon with the objective of bringing about the withdrawal of all foreign troops from Lebanon and establishing an environment which will permit the Lebanese armed forces to carry out their responsibilities in the Beruit area.

(c) It is the sense of the Congress that, not later than one year after the date of enactment of this resolution and at least once a year thereafter, the United States should discuss with the other members of the Security Council of the United Nations peacekeeping force to assume the responsibilities of the multinational Force in Lebanon. An analysis of the implications of the response to such discussions for the continuation of the Multinational Force in Lebanon shall be

included in the reports required under paragraph (3) section 4 of this resolution.

DURATION OF AUTHORIZATION FOR UNITED STATES PARTICIPATION IN THE MULTINATIONAL FORCE IN LEBANON

Section 6. The participation of United States Armed Forces in the Multinational Force in Lebanon shall be authorized for purposes of the War Powers Resolultion until the end of the 18-month period beginning on the date of enactment of this resolution unless the Congress extends such authorization shall terminate sooner upon the occurrence of any one of the following:

[1]

The withdrawal of all foreign forces from Lebanon, unless the President determines and certifies to the Congress that continued United States Armed Forces participation in the Multinational Force in Lebanon is required after such withdrawal in order to accomplish the purposes specified in the Sept. 25, 1982, exchange of letters providing for the establishment of the Multinational Force in Lebanon; or

[2]

The assumption by the United Nations or the government of Lebanon of the responsibilities of the Multinational Force in Lebanon; or

[3]

The implementation of other effective security arrangements in the area.

INTERPRETATION OF THIS RESOLUTION

Section 7. (a) Nothing in this joint resolution shall preclude the President from withdrawing United States Armed Forces participation in the Multinational Force in Lebanon if circumstances warrant, and nothing in this joint resolution shall preclude the Congress by joint resolution from directing such a withdrawal.

(b) Nothing in this joint resolution modifies, limits or supersedes any provision of the War Powers Resolution or the requirement of section 4(a) of the Lebanon Emergency Assistance Act of

1983, relating to Congressional authorization for any substantial expansion in the number or role of United States Armed Forces in Lebanon.