

1 Birth and infancy of a Charter rule: the open framework

My dear Briand, I have been reading this wonderful book ... *Vom Kriege* [by] Karl von Clausewitz ... I came upon an extraordinary chapter ... entitled 'War as an Instrument of Policy.' Why has not the time come for the civilized governments of the world formally to renounce war as an instrument of policy?

Nicholas Murray Butler to Aristide Briand (June 1926),
describing the origins of the Kellogg-Briand Pact¹

Article 2(4)'s blind spot

After sixty years of United Nations (UN) activity, there seems little of a peg on which to hang yet another investigation into the regime of force. The UN Charter law regulating the initiation of interstate military action has been examined innumerable times. Its main pillars, article 2(4), article 51 and chapter VII, are well known. The outlawing of force as the first pillar is one of the key dictates of international law:

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.²

Surprisingly, however, even the most comprehensive discussions of the force regime have turned a blind eye to one of its components: the

¹ Nicholas Murray Butler, *Across the Busy Years: Recollections and Reflections* vol. II, 202–3 (1940) (footnotes omitted).

² Article 2(4) *Charter of the United Nations and the Statute of the International Court of Justice*, 39 Am. JIL Supp. 190–229 (1945) (26 Jun. 1945).

prohibition of *military threats*.³ Article 2(4) expressly forbids ‘the threat or use of force’. Yet what is to be understood by the first part of that phrase, and how the UN and individual states have treated it, has until now remained entirely unexplored.⁴ To chart this hitherto blank territory on the map of international practice, and to discover what it means for the international law discipline, is the subject of this study.

Properly speaking it is a rediscovery of previously charted territory. In June 1945 the UN Charter signatories agreed to the wording of article 2(4) as it was prepared by the US State Department prior to the Dumbarton Oaks conversations. By informal consensus of the drafters, as will become clear, the objective was to recast the language of the League of Nations Covenant, whose ban of ‘war’ by then carried the stigma of failure; it had failed to contain international violence between 1919 and 1945. The new wording in the UN Charter was created to overcome the deficiency that governments could deny the existence of a state of war by simply omitting to attribute that word to their military actions. The terms ‘threat’ and ‘force’ were designed to describe a single wrong and put an end to self-declaratory formalism.

Curiously, the idiomatic unity of ‘threat or use of force’ quickly dissolved. The two terms all too soon met entirely different fates. Since 1945, it was ‘force’ that was most evidently spotlighted, debated, politicised, reinterpreted, tested against practice and sometimes dismissed altogether. The ‘threat’ of force neither shared any of that celebrity nor did it undergo similar attempts to adapt it to changed circumstances. There have been no claims that threats ought to be lawful for humanitarian, ideological or overriding security concerns. Nor, for example, have proposals emerged to link them with the right to self-defence. Paradoxically, old and new resolutions of the UN and nearly all

³ For the purposes of this study, I treat ‘military threat’ and ‘threat of force’ as synonyms. I take article 2(4) United Nations Charter (UNC) as being limited to military force and threats to impose economic or political sanctions as being beyond its scope. See Leland M. Goodrich, Edvard Hambro and Anne Patricia Simmons, *Charter of the United Nations: Commentary and Documents* 49 (3rd edn, 1969); Albrecht Randelzhofer, ‘Art. 2(4)’, in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* vol. I, 112–36 (2nd edn, 2002), at Mn. 15–19; Rolf M. Derpa, *Das Gewaltverbot der Satzung der Vereinten Nationen und die Anwendung Nichtmilitärischer Gewalt* (1969).

⁴ The notable exceptions are J. Craig Barker, *International Law and International Relations* 122–36 (2000); Nigel D. White and Robert Cryer, ‘Unilateral Enforcement of Resolution 687: A Threat Too Far?’, 29 Cal. WILJ 243–83 (1999); Romana Sadurska, ‘Threats of Force’, 82 Am. JIL 239–68 (1988); Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict* 55–62 (1992); Ian Brownlie, *International Law and the Use of Force by States* 88–9, 364–5 (1963).

important security agreements of the post-war period still echo the ‘threat or use of force’ formula, but none has ever attempted to lay the groundwork for elaboration on the threat issue.⁵ Not only has there been a lack of discussion that might lead to reinterpretation, but also of simple primary understanding. The no-threat rule is established on paper – there is no shortage of treaty evidence for this – yet in the complex back and forth of scholarly enquiry and evolutionary identification of the law, article 2(4) ‘part two’ has been completely left out of the loop.

The completeness of this omission is surprising and its consequences are obscure. Omission means, for one thing, that at present there can be little agreement on the content of the law. What makes a threat of force unlawful? When is its use justified? Under what circumstances is a treaty invalid according to article 52 of the Vienna Convention of the Law of Treaties?⁶ Without records of the case law of courts, the practice of UN organs, state behaviour and scholarly opinion, the existing literature, like a hall of mirrors, reflects seemingly empty space. As a result, short of embarking on an in-depth study of the subject, the legal advisor who is asked to comment on the lawfulness of suspicious action is left with nothing to hold on to other than the text of the UN Charter itself. That text is highly indeterminate. One can derive little certainty from the word ‘threat’ alone or the context of its placement. Numerous interpretations are plausible. Even if one could trump all others, few

⁵ Brownlie, *Use of Force by States*, at pp. 120–9. See the General Assembly resolutions A/RES/380 *Peace Through Deeds* (17 Nov. 1950); A/RES/2131(XX) *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty* (21 Dec. 1965); A/RES/2625 (XXV) *Declaration on the Principles of International Law concerning Friendly Relations and Co-operation Among States In Accordance With the Charter of the United Nations* (24 Oct. 1970); A/RES/42/22 *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations* (18 Nov. 1987). For important multilateral treaties see article 1 *American Treaty on Pacific Settlement (Pact of Bogotá)*, 30 UNTS 55 (30 Apr. 1948); article 19 *Charter of the Organization of American States*, 119 UNTS 3 (30 Apr. 1948); article 1 *Inter-American Treaty of Reciprocal Assistance (Rio Treaty)*, 21 UNTS 324 (9 Feb. 1947); article 1 *The North Atlantic Treaty*, 34 UNTS 243 (4 Apr. 1949); article 1 *Southeast Asia Collective Defence Treaty (Manila Pact)*, 209 UNTS 28 (8 Sep. 1954); article 1 *Treaty of Friendship, Co-operation and Mutual Assistance (Warsaw Pact)*, 219 UNTS 3 (1 May 1955); articles 52 and 53 *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (23 May 1969); articles 19(2)(a), 39(1)(b) and 301 *United Nations Convention of the Law of the Sea*, 1833 UNTS 3 (10 Dec. 1982); article 4(f) *Constitutive Act of the African Union*, 479 UNTS 39 (11 Jul. 2002).

⁶ Article 52 *Vienna Convention on the Law of Treaties (VCLT)* reads: ‘A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.’ For a discussion see below, chapter 9, at pp. 285–9.

decisions on the UN Charter, as the long history of the use of force debate exemplifies, have been arrived at purely by reliance on a text-based analysis. The Charter is a treaty and its text the primary source of law, but there is much more to it than that: today the law is extracted by consulting a complex interplay of documented history, which includes the UN Security Council, the General Assembly, the International Court of Justice, UN member practice and the academic literature.⁷ None of these can be left out of a proper investigation if the goal is to instil such accuracy into article 2(4) that is capable of guiding interstate conduct. It is this same accuracy that the legal advisor will need to respond firmly to a government's enquiries.

Omission also has consequences on a deeper, systemic level. If the law is unknown and if no trip-wires of unlawfulness have been defined, there can be no convincing condemnation of wrongful behaviour. At the same time, public international law is highly dependent on diplomatic protest for the very sake of identifying the law. It is said that when states acquiesce to violations, the pertinent rule itself will undergo erosion.⁸ Resorting to the aging Lotus principle, states accord to themselves the freedom to act when they ought not. The systemic result is that omission is self-confirming. It feeds presumptions of indeterminacy, which in turn affect the patterns of behaviour on which lawyers depend to extract the law.⁹

Arguably, neglect in the literature would not be of any real consequence if the no-threat principle were inherently indeterminate, to the effect that any research on the content of the law beyond the Charter text would be bound to fail. The notion of threat is difficult to grasp. Nonetheless, I argue that this is a groundless assumption. Indeterminacy stems less from an inbuilt fuzziness of the Charter language (or ordinary language) than from the absence of solid enquiry. 'Force' too, is hard to define, yet there has been no shortage of scholarly and governmental attempts to root out uncertainties.¹⁰ As in any system of law, rules simply need to be spelt out for specific cases, the accumulation of authoritative cases sharpening the meaning of the original norm. It follows that indeterminacy can be at least partially overcome by the introduction of evidence. The 'case history' on interstate threats,

⁷ Michael Byers, book review, 'Recourse to Force: State Action Against Threats and Armed Attacks', 97 Am. JIL 721-5 (2003).

⁸ Knut Ipsen, *Völkerrecht* §15 Mn. 112 (5th edn, 2004).

⁹ Thomas M. Franck, *The Power of Legitimacy Among Nations* 50-66 (1990).

¹⁰ Especially A/RES/3314 (XXIX) *Definition of Aggression* (14 Dec. 1974).

as we will see in detail, is rich enough to eliminate some of the ambiguities in which article 2(4) is presently shrouded. To recover this hidden treasure is desirable not only from an academic viewpoint, but also for the very sake of rendering the UN Charter rules and principles operational and able to discharge their proper function.

If states evidently thought it wise to have the rule against threats instituted in 1945, why has it been so manifestly omitted? A confluence of factors suggest themselves. To begin with, the advent of the Cold War shortly after the signing of the UN Charter sent strong signals to state leaders from both ideological camps that they could not afford to tempt each other with weakness. From Washington's perspective (the perspective of the major sponsor of the UN Charter), there could not be another Munich failure. The lesson of Hitler's coerced surrender of the Czechoslovakian Sudeten territory in 1938 was that appeasement and the 'peace in our time' formula did not work.¹¹ Unopposed aggression would simply breed further aggression. Wrongdoers had to be opposed from the very beginning with the language of action and the word of force.¹² States could not rely on the UN Security Council, which was caught in paralysis, for their own safety. If force turned out to be a sporadic necessity, even more did the deterrent threat establish itself as a continuous shield against expansionist plans of adversaries. For this reason, while the first use of force remained politically sensitive on a case-by-case basis, the threat of swift military action became an integral part of US grand strategy.¹³ The overriding objective of winning the Cold War could only mean that the Charter's shining commitment to renouncing international violence, which relied on replacing confrontation with cooperation, would fall prey to the dictate of *Realpolitik*. Among the first victims in the Charter's retreat to pragmatism ranked its signatories' promise to forgo the threat of force.

This retreat was pushed further with the advance of military technology.¹⁴ With the development of the atomic bomb and its

¹¹ G. F. Hudson, 'Threats of Force in International Relations', in Martin Wight (ed.), *Diplomatic Investigations: Essays in the Theory of International Politics* 201–5 (1966).

¹² Robert J. Beck, 'Munich's Lessons Reconsidered', 14 *Int. Sec.* 161–91 (1989).

¹³ David Mayers, 'Containment and the Primacy of Diplomacy: George Kennan's Views, 1947–1948', 11 *Int. Sec.* 124–62 (1986).

¹⁴ Thomas M. Franck, 'Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States', 64 *Am. JIL* 809–37 (1970), at 820–2; and the follow-up article, Thomas M. Franck, 'What Happens Now? The United Nations After Iraq', 97 *Am. JIL* 607–20 (2003).

proliferation into the hands of the Soviet Union, Britain, China and France, the reliance on threats turned from a strategy of preference into one of survival. Between the USA and the Soviet Union, deterrence and the maintenance of military balance grew into the best remedy to avoid all-out war.¹⁵ Force would now be promised in the hope that the promise would never have to be fulfilled.¹⁶ While the case for deterrence was strongest for nuclear weapons, it was never confined to them. The delivery of advanced conventional arms, too, could increase the military prowess of countries without nuclear weapons to the sudden disadvantage of adversaries, making the threat of force a more pervasive foreign policy tool than before. This was in itself not a new situation. The American Civil War (1861–5) was the first conflict in which the devastating effects of mass production and mechanised weaponry, enabled through the industrial revolution, were experienced. What distinguished the second half of the twentieth century from previous periods was the multiplication of destructive power well beyond earlier capacities. In the face of military build-ups, states would find themselves ever more compelled to rely on the politics of confrontation and their own acquisition of cutting-edge arms to safeguard their national security. The logic of the Latin adage *si vis pacem para bellum* (if you wish for peace, prepare for war)¹⁷ and the resulting arms race reverberated with particular strength in the technology-empowered post-World War II order. Examples abound to this day, as in the current conflicts between the two Koreas, Turkey and Greece, India and Pakistan, and mainland China and Taiwan, where both sides seek to gain security by expanding their ability to impose unacceptable costs on the other. The embittered ideological divisions in the world, together with the multiplication of destructive power, pushed the call to forsake all forms of military threats into the realm of the merely desirable.

After 1989, the influence of the Cold War rationale lessened while the gulf between the technology haves and have-nots widened. In the First Gulf War, the casualty ratio between US and Iraqi soldiers amounted to an unprecedented 1:1,000.¹⁸ In the following years, primarily the USA began to argue that the credible threat of force

¹⁵ Richard Ned Lebow and Janice Gross Stein, 'Deterrence and the Cold War', 110 PSQ 157–81 (1995).

¹⁶ Thomas C. Schelling, *Arms and Influence* 18–26 (1966).

¹⁷ Attributed to Flavius Vegetius Renatus, *Epitoma Rei Militari* book 3, prologue (2004) [390], in the form '*Qui desiderat pacem, praeparet bellum*'.

¹⁸ William J. Perry, 'Desert Storm and Deterrence', 70 F. Aff. 66–82 (1991), at 67.

was a necessary ingredient of diplomacy in dealing with notorious norm-breakers.¹⁹ Bosnia, Kosovo, Macedonia, Somalia, Haiti, North Korea, Taiwan, East Timor, Iran and Iraq loomed large as cases where coercive diplomacy could make a difference.²⁰ Although seriously flawed, the humanitarian dimension of efforts such as in the former Yugoslavia had the effect of making it difficult to defend a completely pacifist stance. Moreover, the threat of force had qualities that no military battle could deliver. Applied successfully, it could persuade wrongdoers to comply without a single death occurring. If it failed, it demonstrated that diplomatic means had been exhausted to no avail and that force was truly the last resort. While the dictate of 1945 had been ‘peace over justice’ under all circumstances, the notion of ‘justice over peace’ had now clearly gained momentum and weakened claims that the eventual use of force was unlawful.²¹ The crucial difference from the threat of force debate is that it was never started.

Traced attempts to regulate threats before 1919

Two related strands of thought may be said to run through historic attempts to regulate the recourse to force. On the one hand, there has been the social attempt to create a communal system that would diminish incentives to go to war. States could be persuaded not to wage war once doing so offered no advantages. On the other hand, there has been the legal attempt to establish the wrongfulness of coercive military action. States could be persuaded directly through the weight of moral judgment. A decisive turning point arrived when the two strands of thought came together: first, with the advent of the League of Nations, and later and more thoroughly, with the UN. An international system that offered an effective remedy for an injured state could also legitimately demand that recourse to forcible self-help be banned as a matter of law.²² For much of its history, however, the international system offered no such remedies, and legal concepts to regulate threats of force were embryonic at best.

¹⁹ For a proponent of the continued utility of threats see James A. Nathan, *Soldiers, Statecraft, and History: Coercive Diplomacy and the International Order* 167–71 (2002).

²⁰ Barry M. Blechman and Tamara Cofman Wittes, ‘Defining Moment: The Threat of Force in American Foreign Policy Since 1989’, in Paul C. Stern (ed.), *International Conflict Resolution After the Cold War* 90–122 (2000).

²¹ Susan J. Atwood, ‘From Just War to Just Intervention’, 19 *New Eng. J. Pub. Pol.* 55–75 (2003–4).

²² Thomas M. Franck, *Fairness in International Law and Institutions* 253 (1995).

In the middle ages, ideas for regulating force between nations have run side by side with larger plans for a comprehensive system of peaceful coexistence. Such plans regularly provided for the establishment of a confederation of sovereign states, whose task was to persuade nations to settle their disputes without resort to violence.²³ But ultimately, such ideas were predominantly visionary. They were not held to be a dictate of the law. Natural law theorists such as Alberico Gentili, Hugo Grotius, Thomas Hobbes and Samuel Pufendorf did not think of war as illegitimate in itself.²⁴ Disagreement concentrated on rightful reasons to wage one, and within that context, threats were only of ancillary concern in the question of whether the fear of a neighbouring nation could justify a pre-emptive war.²⁵ Kant later proposed that standing armies be abolished because ‘they incessantly menace other states by their readiness to appear at all times prepared for war’.²⁶ This was well conceived, but again visionary and not an official statement of policy of any government.

While the early writers of international law had still lived in an age when threats were not particularly useful for foreign endeavours, the situation had changed dramatically by the nineteenth century with the advance of technology and the industrial revolution. The invention of the steamboat, the railway and the telegraph not only led to the shrinking of the world and the first wave of globalisation but also to the ability to extend increased military power over greater distances.²⁷ European states regularly threatened and used force to advance their imperial goals in Asia, South America and Africa. British ‘gunboat diplomacy’, made famous in the first Opium War of 1840–2 against China, was acknowledged practice. The USA, too, asserted with the Monroe doctrine the right to exercise hegemonic influence over the Americas. In Asia, the ‘black ships’ of Commodore Matthew C. Perry forced Japan to sign the treaty of Kanagawa in a successful mission to gain trade concessions in 1854. Coercion was a foreign policy tool of great convenience, while the ordering idea of balance of power was

²³ Sylvester John Hemleben, *Plans for World Peace through Six Centuries* (1943).

²⁴ Grotius himself championed the right to self-preservation and the right to punishment for violations of the law of nature: see Hugo Grotius, *The Law of War and Peace* book I, chap. 2, paras. 1–6 (1925) [1625]; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* 86, 102, 108 (1999).

²⁵ Tuck, *The Rights of War and Peace*, at pp. 18–31, 52, 130, 161, 167, 183 and 227.

²⁶ Immanuel Kant, *Zum Ewigen Frieden: Ein Philosophischer Entwurf* preliminary article 3 (1984) [1795].

²⁷ William R. Keylor, *The Twentieth-Century World: An International History* 27–8 (4th edn, 2001).

preoccupying the minds of continental statesmen as a means of maintaining systemic order.²⁸ Intervention in the affairs of smaller nations was widely accepted practice among large Western powers, while headlong confrontation between equals risking pan-European war – the fruit of the balance of power concept – was not.²⁹ If Western leaders worried about the threat of war, it was because they worried about its potential to bring about war among themselves. After the defeat of Napoleon Bonaparte, the informal Concert of Europe attempted to settle contentious issues that threatened the stability between the great sovereign powers (Great Britain, Prussia, Austria, Russia and France) by a division into territorial blocks, a system of alliances and periodic international conferences. Above all, it was designed to counter another French-incited battle over the mastery of Europe. Since revision of the status quo was dangerous to the established order, it was opposed. States accorded to themselves the occasional right to reinstate the balance by force and showed no signs of surrendering portions of their sovereignty that would reduce their capacity to do so.³⁰

Nineteenth-century international law did not object to this basic scheme. Scholars were now much more confident in their reliance on positive, consent-indicating acts of states to shape legal obligations, and under these terms, threats as part of war (or as the trumpets heralding its commencement) were permitted.³¹ Nations retained the right to wage war on a scale, at a time and for a reason of their own choosing.³² When Lassa Oppenheim, a strong adherent to positivist thinking about international law, summarised the *lex lata*, he reasoned along the categorical lines of Vattelien sovereignty: ‘States are Sovereign, and as consequently no central authority can exist above them able to enforce compliance with its demands, war cannot, under the existing conditions and circumstances of the Family of Nations, always be avoided ... International Law ... at present cannot and does not object to States

²⁸ Alan J. P. Taylor, *The Struggle for Mastery in Europe* xix–xx (2nd edn, 1974); Alfred Vagts and Detlev Vagts, ‘The Balance of Power in International Law: A History of an Idea’, 73 *Am. JIL* 555–80 (1979), at 564–76.

²⁹ Thomas G. Otte, ‘Of Congress and Gunboats: Military Intervention in the Nineteenth Century’, in Andrew M. Dorman and Thomas G. Otte (eds.), *Military Intervention: From Gunboat Diplomacy to Humanitarian Intervention* 19–52 (1995).

³⁰ Brownlie, *Use of Force by States*, at pp. 46–9.

³¹ Maurice Bourquin, ‘Le Problème de la Sécurité Internationale’, 49 *Rec des Cours*, vol. III, 473–542 (1934), at 477.

³² Robert Kolb, *Ius Contra Bellum: Le Droit International Relatif au Maintien de la Paix* Mn. 27–40 (2003).

which are in conflict waging war upon each other instead of peaceably settling their differences.’³³ Paradoxically, however, and also as a derivative from the concept of sovereignty, international law did forbid intervention in the affairs of other sovereign states under the law of peace. In the absence of war, the threat of force was seen as a form of intervention which had to obey the rules governing armed reprisals.³⁴ Under these rules, a government’s armed reprisal was lawful if used as a proportional response to prior injury by another state. Hence it was formally possible that a state issuing a military threat violated international law. But obviously, this fell far short of establishing a solid prohibition, and its modest ethos was very little in evidence in practice. Not only were prior injury and proportionality rather woolly restraints; at heart stood an axiomatic contradiction: governments remained free to remove these restraints by simply declaring, instantly and at the stroke of a pen, a state of war and with it the breakdown of the law of peace. The residual freedom to go to war had such sanction under the law that the delicate fences built around the use of ‘armed reprisals’ were too easily shattered.³⁵

Towards the turn of the century the European mindset gradually began to change. Governments increasingly became democratically accountable. Wars took a heavier toll on the general population and a nation’s economic resources. Information was spread widely through newspapers.³⁶ The principle of non-intervention was beginning to be taken more seriously, particularly outside Europe.³⁷ The first international attempt to regulate the threat of military force came from the American continent. In 1890, in the midst of the European ‘scramble for Africa’, Argentina and Brazil, at an inter-American conference, found wide approval for their proposal which condemned territorial conquest and that submitted that ‘all cessations of territory made subsequent to

³³ Lassa Oppenheim, *International Law: A Treatise* vol. II, 52–3 (1906). On the ‘Vattelian’ basis see Emer de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle, Appliquée à la Conduite et aux Affaires des Nations et des Souverains* book I, chapter 2 (1958) [1758].

³⁴ In the nineteenth century the principle of non-intervention was predominantly understood to interdict armed force as a compulsive means, including the threat of force. See Axel Gerlach, *Begriff und Methoden der Intervention im Völkerrecht* 24–8 (1967). But the law was anything but settled on the matter, see Brownlie, *Use of Force by States*, at pp. 44–5; P.H. Winfield, ‘The History of Intervention in International Law’, 3 *Brit. YBIL* 130–49 (1922–3).

³⁵ Kolb, *Ius Contra Bellum*, at Mn. 39. ³⁶ Brownlie, *Use of Force by States*, at p. 26.

³⁷ Gerlach, *Intervention im Völkerrecht*, at pp. 18–19.