

FORCE AND THE CHARTER IN THE SEVENTIES*

Julius Stone

Force and the Charter is a very complex problem. It imports not merely the place of force in the relations of States within the Charter of the United Nations, but also the residual rules of international law, which themselves are very much older—several centuries older at least—than the United Nations. These are the residual rules of international law, customary international law, as we call it, concerning the use of force, insofar as the Charter has not abrogated those rules.¹

I

The general view often put forward by some of my colleagues is that after the United Nations Charter came into effect all use of force between States became unlawful, except in two situations. The first situation involves a Member State of the United Nations as the victim of an armed attack by another State.² This depends on Article 51 of the Charter. The other situation is that in which collective force is used by States under the United Nations Charter. This authority is granted to the Security Council under Chapter 7 of the Charter³ (the so-called Peace Enforcement Chapter). It has also been argued that similar authority lies in the General Assembly.

That then, is one level of consideration, the level of vulgar understanding, of the position after 1945. Whether or not you take that position (but the more startling if you do take that position) you have to proceed to the level of historical experience. On this second level, when you look over the history of the use of force in the relations of States since 1945 there have been more than one hundred overt exercises of force by one or more States against other States since the Charter came into force. You would never guess in how many of those cases the provisions of the Charter against the unlawful use of force by States had been invoked, let alone effectively invoked. About the only case, and this is arguable on technical grounds that we cannot go into

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1. See R. SWIFT, *INTERNATIONAL LAW, CURRENT AND CLASSIC* 478 (1969).

2. U.N. CHARTER art. 51.

3. U.N. CHARTER arts. 41, 42, 45, 48 & 49.

tonight, is the case of Korea. So, you have the stark contrast between the vulgar understanding that a new era, in which all threat or use of force between States is virtually outlawed as an instrument of policy, on the one hand, and on the other, the actualities that the threat or use of force continues to be a main instrument of policy between States.

Of course, you can go into all sorts of elaborate explanations from political, social, psychological, diplomatic and technological points of view as to why this is. If you take the vulgar point of view, that the Charter does outlaw the use of force, except for those two rather very narrow situations,⁴ you can speculate about all sorts of reasons why the Charter has, as it were in this respect, failed. You will then ask, in the words of my colleague at Columbia, Tom Franck, in his nicely (but very misleadingly) titled article, "Who Killed Article 2(4)?"⁵

If there is any article that is the key article in the matters that I am going to discuss tonight it is Article 2(4), because it reads:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁶

Tom Franck, proceeding (I suspect) from what I have called the vulgar view that force, except in those two narrow situations mentioned above, is outlawed under the Charter, and facing the undoubted and continued proliferation of the use of force after the Charter, concludes that somebody, as it were, must have knifed Article 2(4) in the back.

Now, of course, circumstances may be put forward as explaining why Article 2(4) failed, without actually assuming that somebody knifed Article 2(4) in the back. You are familiar, no doubt, with a number of these. For example, more than half of the members of the United Nations at the present time (including all the Soviet bloc States, all the Communist States, if I may so characterize them, as well as practically all the African and Asian States) have espoused the doctrine and built it into the rhetoric, if not fully into the practice, of the United Nations, that certain kinds of use of force are not use of force at all. They are "wars of liberation."⁷ To put it another way, they have espoused the doctrine that war is a permissible use of force, not only under general international law but under the Charter, when it is directed to what

4. See notes 2 & 3 *supra* and accompanying text.

5. Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809 (1970).

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

7. See Emerson, *The New Higher Law of Anti-Colonialism*, in *THE RELEVANCE OF INTERNATIONAL LAW* 159 (K.W. Deutsch & S. Hoffmann eds. 1968). This essay discusses the concept of the war of liberation as a just war and as such places it outside the principles of peaceful co-existence, thereby allowing it to supersede sweeping condemnations of war.

these States regard as a vindication of the principle of self-determination. This proceeds on the very nice theory that any State that is in the position of sovereign over a non-metropolitan territory (such as, to take an extreme case, Portugal's dominion over its colonies in Africa) is to be deemed (as we lawyers would say, is constructively by a fiction deemed to be) in a constant state of aggression against the people of that territory, preventing them from enjoying their self-determination. It is therefore open to any other State, as well as to the oppressed "People," to use force against Portugal for repelling this continuing aggression.

Although we may have a great moral empathy with this point of view, it is obvious that in a world in which claims of territory, even after decolonization, are still fairly widespread, (and we have the Indo-Pakistan affair in recent years, and a little further back from that we had the Indian relation to the Portuguese enclaves in India, and there are half a dozen other recent examples) the indulgence by a majority of members of the United Nations in the fiction that, when you use force against a State on the ground that that State is frustrating the desire for independence of some people, this is not force, is obviously something that bites deep into vulgar notions that threat or use of force is unlawful.

Again, of course, and even more important than that, one can really perhaps think that later developments, as distinct from later political attitudes, have somehow undermined the supposed prohibition on the use of force under Article 2(4). This produces a fact so plain that even most sky-blue idealists are ready to acknowledge it, although they tend to put it behind them when there is any close debate about the meaning of the text. That fact is, that a State threatened by nuclear attack will not regard itself as barred by Article 2(4) from using threats or force against another nuclear power from whom a nuclear attack is impending. The idea that Article 2(4) forbids any forceful action by such a threatened State until the nuclear attack is actually sustained is so preposterous that nobody has ever seriously suggested that a prospective victim is legally obligated to accept it. This factor, the nature of nuclear weapons, fully emerged only after the drafting of the Charter, so that one can say that it overtook the Charter, and was a factor contributing to the "death" of Article 2(4).

I would doubt, however, whether it is the main factor. The main factors are rather limits on the prohibition of threat or use of force built into the Charter itself, by way of escapes from the assumed prohibition of force. One limit, of course, is the whole structural arrangement within the United Nations Charter itself. The powers of the Security Council, especially under Chapter 7 on peace enforcement (which you remember is predicated in Article 39 on the occurrence of any threat to the peace,

breach of the peace or act of aggression)⁸ are on their face utterly plenary, probably more plenary even than those of the President of the United States and the Congress, after the present rivalries between these two authorities as to the war and peace power have been settled. These plenary powers of the Security Council over any situation in which there is a threat to the peace, breach of the peace, or act of aggression, nevertheless, have a "teeny-weeny" limit built into them. By a "teeny-weeny" limit I refer to the kind of defect disclosed by an old-fashioned marriage broker in a modern society where such brokers still operate.

The father of the prospective bridegroom would listen very patiently as the marriage broker listed all the beauties, virtues and talents of the charming bride-to-be. The matchmaker would go on for quite a long time and with conventional politeness the father, at the end, would say how humble he, as head of his family, felt in the face of such a lineage, one of such beauties, talents and graces. He would then say that he had listened with the greatest interest to the list of these and was there anything else, perhaps even by way of qualification, that the matchmaker might like to mention? The matchmaker would demur vigorously, but the father would press the request several times. Finally, but even then still reluctantly, the matchmaker would say that there was just one "teeny-weeny" thing, of no great importance. One "teeny-weeny" thing; the father would snatch eagerly at the point: Well what is that? Finally, the matchmaker would say "the bride is a teeny-weeny little bit pregnant!"

Chapter 7 of the Charter is, in a similar sense, a "teeny-weeny" bit pregnant. Unlike many pregnancies, this was one that was deliberately produced by the draftsmen of the Charter. This is exemplified by the operative powers of the Security Council, especially its operative powers under Chapter 7, which are conditioned on the non-exercise by any of the five permanent members (the so-called Great Powers) of the power to veto.⁹ So it was that many of the hundred cases where force has been used since 1945 without even a show of challenging its illegality, could occur because a veto was certain to be cast, either because one or another Great Power was involved, or the State which was involved was, as it were, under the patronage or protection of a satellite of such a veto-bearing Great Power. The Soviet Union has well over a hundred vetoes to its credit; France and Great Britain many fewer. The United States never vetoed until recent years, for the very good reason that you only need an umbrella when it rains, and until recently the United States could usually marshal enough protective votes without it. It has been

8. U.N. CHARTER art. 39.

9. U.N. CHARTER art. 27, para. 3.

with the great influx of new members, most of whom have tended to line up on many issues with the Soviet bloc, that the United States has found the use of the veto inescapable.

I am saying that the fact that there is this "teeny-weeny" built-in limitation on the plenary powers of the Security Council is a reason why the vulgar account of the stringent outlawing of force by the Charter has proved to be so illusory. There are other such escape factors built into the Charter, which I will not try to exhaust,¹⁰ under which war-like alliances like NATO and the Warsaw Pact have become powerful realities outside of but consistent with the Charter. These are alliances which in theory the talks on Mutual Reduction of Armaments in Europe may conceivably cut down, or even disband. But personally, I doubt whether these factors in the failure of the vulgar view to explain the realities will soon disappear. The effect of the dominating role of these alliances has been that in some situations, in which conceivably the legal prohibitions of force in the Charter might have been expected to operate (for instance, the crises over West Berlin), struggles were relegated to the play of politics beyond the United Nations.

II

What I am putting, and what brings me to the third level of consideration is this: What is implied in the title of Professor Franck's article¹¹ is that Article 2(4) of the Charter, if properly interpreted by lawyer-like lawyers, would have rendered unlawful all or very many of the hundred or so resorts to force since 1945, but for the fact that someone or other prevented Article 2(4) from operating. Who was this? Who killed Article 2(4)?

On the third level of consideration that I am now approaching, the question is whether the implication is correctly drawn. The question is whether, looking at the Charter, careful lawyers could read it as prohibiting the use of force to the sweeping extent that the vulgar view suggests. I must now therefore, spend a little time on this question of interpretation of the Charter.

I have said that the central, but not only, provision of the Charter

10. See J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 243-85 (rev. ed. 1959), for a detailed discussion of clauses of escape under the provisions of the U.N. Charter. Particular reference is made to the following: (a) The "Inherent Right" of individual or collective self-defense against armed attack reserved under Article 51; (b) The liberty of action of members of the United Nations against former enemy States under Article 53, para. 1 and Article 107; (c) The liberty of members to enter into regional arrangements under Articles 52-54; (d) The exclusion from United Nations jurisdiction of matters essentially within the domestic jurisdiction of any State expressly under Article 2, para. 7 and by implication under various articles of Chapters VI and VII.

11. See Franck, *supra* note 5.

on which this vulgar view of the scope of the outlawing of force under the Charter, is Article 2(4). It will perhaps bear quotation again at this point:

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.¹²

The vulgar view¹³ has the effect of reading this paragraph as if it ended with a full stop after the word "force." It would then read: "All members shall refrain in their international relations from the threat or use of force." Full stop. But, of course, it needs saying *ad nauseum*, the paragraph does not end there, and there is no full stop. There is not, indeed, even a comma after the word "force." That means that you have to read the paragraph as it is, not as prohibiting force *simpliciter*, but only force "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." To avoid error you have to learn to say (and think) all of that in one breath, as it were.

By this I do not mean that the full text does not, even after that, require analysis. When I originally offered my main dissenting opinion, back in the early fifties,¹⁴ my friend, Louis Sohn, came back very vigorously and full of life, and said: "What you say about Article 2(4) may be right, but even then you still have to reckon with the words—'any other manner inconsistent with the purposes of the United Nations.'" This (he said) refers us back to Article 1 of the Charter which opens "The Purposes of the United Nations are . . ." ¹⁵ If you read Article 1 carefully, you will see that Article 1(1) includes among these purposes to "maintain international peace and security, and to that end:"¹⁶ and then a series of things. This series of things includes:

to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace and to bring about by peaceful means and in conformity¹⁷

That is where he would stop in Article 1; and on this basis he and others would argue that the effect is to cancel out the qualifications on the

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

13. See notes 2 & 3 *supra* and accompanying text.

14. See J. STONE, *QUEST FOR SURVIVAL: THE ROLE OF LAW AND FOREIGN POLICY* 40-56 (1961). In particular reference to the author's view as to Article 2, para. 4 of the U.N. Charter prohibiting the use of all force and his criticism of that view as being a dubious and oversimplistic interpretation, see *id.* at 45-51.

15. U.N. CHARTER art. 1.

16. *Id.*, para. 1.

17. *Id.*

prohibition on the threat or use of force in Article 2(4) which I have stressed. Since Article 1(1) talks about collective measures for the prevention and removal of threats to the peace, it must be authorizing collective measures of force for the suppression of individual measures.

Let me interpose here that on one point there is no conflict of views; namely that where collective force is used in accordance with the Charter, whether Article 1(1) or Chapter 7, such force is obviously lawful under the Charter. No disagreement with that. This probably may also have to be said about collective force authorized by the General Assembly, as well as the Security Council, though there are certainly important differences between these two. What is controversial is not the positive legitimation of collective force, but the wholesale prohibition of individual force by the supposed implied cancellation, by Article 1(1), of the qualifications of the prohibition of force in Article 2(4). How do you infer from the fact that the purposes of the United Nations include the taking of effective collective measures against individual acts of force, that all acts of force, except in response to armed attack, are forbidden by the Charter? Professor Sohn's argument does infer this from Article 1(1), so far as I follow it, by way of negative inference. Since Article 1(1) does not qualify what threats to the peace can be suppressed by collective measures, therefore (he seems to be saying) all threats to the peace, and not merely the threats or uses of force "*against the political independence and territorial integrity of members, . . .*" prohibited by Article 2(4), become somehow forbidden under Article 1(1).

My main answer, however, to this kind of close analysis is that even here, too, the vulgar view of Article 1(1) does not read it in context. If you read just a little further on in the same paragraph of Article 1, and recall that Article 1(1) is only relevant to Article 2(4) because Article 2(4) forbids the threat or use of force *inter alia* "against the territorial integrity . . . or in any other manner inconsistent with the Purposes of the United Nations," the main issue emerges. This main issue is whether a particular use of force (not collective, and not in response to armed attack) must necessarily be inconsistent with the purposes of the United Nations. That is what is involved in the interpretation of Article 2(4), in which Article 1(1) is incorporated by reference.

When you read a little further in Article 1(1) you find that the purposes of the United Nations are not only to take effective collective measures, etc., but also to "bring about . . . in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to breach of the peace."¹⁸

A number of scholars have asked, not particularly in relation to this

18. *Id.*

controversy, what you are to do when it is impossible to perform all the things that Article 1(1) requires to be done. What, for example, if a wrongdoer is so outrageous and so intransigent, that you cannot bring about settlement of the dispute in accordance with justice and international law, except by resort to threat or use of force? I suppose that the Sohn type of view¹⁹ might say that you have to presume everything for the best and that since we must exclude the use of force, we have to read Article 1(1) as incorporated in Article 2(4) to mean that a State must settle its grievance with the wrongdoer by peaceful means or simply reconcile itself to suffering the wrong.

When a dispute thus arises from some grave wrong, as with India's 1971 dispute (for example) in relation to Pakistan in respect of the driving into her territory of 10 million persons, raising grave danger of cholera and other dangers of natural health, as well as the impossible economic burdens of sustaining them, then this kind of Sohn view would say that it is just too bad for India. If Pakistan would not take remedial measures after peaceful demands from India, well, India would just have to put up with the situation.

Of course, the position that India took was not that, and the question that I am raising is whether the position that India took is one that is excluded by the Charter. I am saying, coming back to Article 2(4) in relation to Article 1(1), which it incorporates, that it is neither prudent nor lawyer-like to exclude the problem which arises when the things which the Charter tells you must all be done, simply cannot all be done. There is here no way of fulfilling all the Charter's purposes. The Charter, at such a point, can not dictate what you are to do.

What I have called tonight the vulgar view, I have elsewhere called the idealist-restrictionist view. It is idealist insofar as it partakes of the kind of moralist idealism that Professor Barkun has well delineated recently.²⁰ It is restrictionist insofar as it is attempting to cut down to the minimum the legal liberty of states to go to war. The choice made by the idealist-restrictionist pays little attention to the context of Article 2(4) within Article 2 itself. Thus, the third paragraph of Article 2, immediately preceding Article 2(4), provides very simply that:

All members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice, are not endangered.²¹

Now, on its face this looks like an absolute precept, more so by far than Article 2(4). It could be read to mean that any kind of settlement involv-

19. See p. 6 *supra*.

20. See M. Barkun, *International Norms as Fact and Ideals* [1972 Proceedings of the ASIL] 66 AGIL 39-46 (Sept. 1972).

21. U.N. CHARTER art. 2, para. 3.

ing other than peaceful means is excluded. Thus Article 2(3) could then be said to prohibit flatly and absolutely any individual resort whatever to threat or use of force by States. But if that were the correct meaning, then what could Article 2(4), immediately following, mean? If you have a complete prohibition in Article 2(3), why is it necessary to go on in the next paragraph to repeat the prohibition? Furthermore, what sense does it make to have an absolute unlimited prohibition in Article 2(3), and then a very much qualified prohibition in Article 2(4)?

There are, of course, many other elements in the interpretation problems that we could play about with; but I think that this is enough to give you a sense of its drama and complexity, and to warn you against anybody who says he has the only correct answer, and that it is fairly simple and straightforward.

III

My purpose tonight has not been to convert you from the vulgar idealist-restrictionist interpretation to my own, so-called realist-traditionalist one. It is rather to point out to you that what these provisions mean in relation to what range of force is prohibited is not at all simple and straightforward. There are at least these two possible broad interpretations. I have already spent much time on the idealist-restrictionist view. What I am now calling the opposed realist-traditionalist view is implicit in the criticism that I have made of the idealist-restrictionists. This is that you have to finally dismiss as impossible the interpretation of Article 2(3) which would in absolute terms ban all use of force by individual states save by way of self-defense under Article 51. Also, when you come to Article 2(4), you have to give meaning, because the draftsmen and the codifiers put it in, to the word "against" and to all the words that follow the word "against." You cannot simply ignore these words, for they are all adjectival to "threat or use of force" which is prohibited. It is only the kind of force so described that is prohibited.

Take the little word "against," for example, in relation to the Middle-East problem. One of the arguments against Israel's continued administration of the territory she occupied after her successful self-defense in 1967 is that on the face of it (Arab spokesmen say) she is occupying territory which was formerly held by Jordan on the west bank of the River Jordan, and that this violates Article 2(4), because clearly she entered by force. Her control is the fruit of force, and the maxim *ex injuria non oritur* deprives her of any rights. Israeli spokesmen say, in reply, that while her entry was by force, it was not by force violating Article 2(4). It was not force *against the territorial integrity* of Jordan or any other State. It was force *against an impending attack* on Israel by armies of 180,000 men, highly equipped with armor and air-

craft surrounding Israel's narrow territory. It was force against immediate threat of invasion and destruction of Israel.

The word "against" there, as you see, is crucial. It is being strictly attended to and given the meaning of threat or use of force *intended and resorted to in order to* overrun or acquire territory. With this meaning of the word "against," Article 2(4) would not say anything about territory which a State comes to control in the course of defending itself against invasion of its own territory. Moreover, under ordinary, sensible meanings of self-defense, a State would seem to be entitled to continue self-defense until it has forced the invader back to a line at which he can be held against any renewal of the invasion. You see how interesting and tantalizing even that single word "against" can be, even without going into other questions about the meaning of "political independence" and "territorial integrity" and "Purposes of the United Nations." For a threat or use of force by States to be unlawful because forbidden by the Charter, you have to show that it is forbidden by the Charter. Where it is not so forbidden, any liberty of action available under traditional international law continues to prevail.

If we think of the position of war under international law before 1914, the range of State liberty to resort to it was well-nigh unlimited, giving States endless room to maneuver. Apart from one narrow doctrine, the Drago doctrine²² concerning contract debts, it was a matter within the discretion of each State whether it conducted its relations with other states on the basis of the law of peace or on the basis of the law of war. In the wave of Woodrow Wilson and Lord Cecil's drive for the League of Nations, the League Covenant²³ was widely hailed as outlawing war. But when the Covenant was examined, whether by lawyers, political scientists, or practising diplomats, it became obvious that it did not outlaw war, but merely established certain procedural principles and certain time limits which a State had to respect before it resorted to war. What the Covenant did was mark out a small restricted

22. Dr. Drago, Argentine Minister of Foreign Affairs, in an instruction of December 9, 1902, to the Argentine Minister in Washington, speaking "with reference to the forcible collection of the public debt suggested by the events that have taken place" between Venezuela and Great Britain and Germany, enunciated and advocated the adoption of what has become known as the "Drago Doctrine," which he expressed in the following words:

[T]he public debt can not occasion armed intervention nor even the actual occupation of the territory of American nations by a European power.

W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 671 (2d ed. 1962). See also Drago, *State Loans in Their Relation to International Policy*, 1 AM. J. INT'L L. 695 (1907).

23. LEAGUE OF NATIONS COVENANT, arts. 1-26 and annexes. This entered into force Jan. 10, 1920, and is reproduced, with amendments in force as of June 26, 1945, in L. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 653 (3d rev. ed. 1969).

segment of prohibition, which remained surrounded by the residual areas of State freedom of action. There were, between the 1914 and 1939 wars, various attempts to "close the gaps" in the Covenant, as the phrase went. That is to say, to cover this whole residual area in which it was still lawful to go to war with a blanket prohibition. The Kellogg-Briand pact of 1928²⁴ was the best-known example, ostensibly outlawing war "as an instrument of national policy." But the Signatories to it, including the United States, finally reserved to themselves not only the right of self-defense, but in terms much broader than the self-defense against armed attack of the Charter. Each Signatory also reserved to itself the determination of whether its self-defense was involved in any particular case. It was these reservations which led the learned Indian Judge Lal, on the Tokyo International Military Tribunal, to deliver a 500 page dissenting judgment. He argued that the majority judges' assumption that the Kellogg-Briand Pact imposed a wide legal prohibition on the resort to war was unwarranted. As a matter of law, he said, the prohibition did not amount to a binding obligation for the reason that an obligation as to which the obligee is free to determine whether it arises or not, is not a binding legal obligation.

This is where we were at the end of World War II in relation to this particular matter. Then, of course, we took the great step at San Francisco of further delimiting the liberty to resort to force by States. (The change from the concept of "war" to that of "force" is not part of our business tonight.) The new provisions of the Charter were those we have been analyzing, as well as Chapter 7 which deals with the powers of the Security Council in case there is a threat to the peace or a breach of the peace or act of aggression. The effect of these further limitations is to mark out a further segment of the traditional area of freedom of action, in which restrictions are imposed. The debate between the idealist-restrictionist and my own idealist-traditionalist position, in these terms, is as follows. In the idealist-restrictionist view you still have the self-defense exception, and you still have the collective force exception. But so far as individual State use of force is concerned there is said to be now a blanket prohibition with only a narrow self-defense-against-armed-attack exception. But in my own realist-traditionalist analysis, it is not only this narrow self-defense which remains licit, but any force which does not violate the prohibition in Article 2(4), bearing in mind that that paragraph does not have a full stop after the word "force," and thus bars only that force which is directed *against* the territorial integ-

24. Kellogg-Briand Pact for the Renunciation of War of 1928, Aug. 7, 1928, 46 Stat. 2343, (1929), T.S. 796 (effective July 24, 1929). Treaty between the United States and other world powers providing for the renunciation of war as an instrument of national policy.

rity or political independence etc. So that whatever the new area of prohibition is, it certainly does not cover the whole of the area of State freedom of action under traditional international law.

That area of the traditional freedom *not* covered by this or any other restriction is what I now call the residual area of discretion of States to use force. The survival of such an area seems to me clear, not only from the difficulties I have exposed in interpreting the Charter so as to support the idealist-restrictionist view, but is also supported by evidence from the drafting documents, the *travaux préparatoires* of the San Francisco Conference,²⁵ where for instance, the French and other delegations used, not the narrow term "defense against armed attack" now embodied in Article 51 of the Charter, but phrases like "legitimate self-defense." Only those ignorant of legal and diplomatic history could fail to know that "legitimate self-defense" gives a far wider license than the notion of "self-defense against armed attack," permitting defense of rights of a certain gravity, as well as sheer physical survival. It covered, for example, matters like sending in forces to protect the lives of nationals who were unlawfully threatened, of which the rescue operation in the Congo was a modern case. What I am saying, is that, in addition to the express overriding license of Article 51 for self-defense against armed attack, there survive areas of licensed use of force not caught by any blanket prohibition of threats or use of force. In these areas use of force remains licit simply because there is no international instrument that forbids it.

The fact that Article 51 of the Charter makes an express reservation for self-defense is not inconsistent with this. Article 51 opens:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs²⁶

Idealist-restrictionists would argue that if the Charter left some wider license for legitimate self-defense licit, it would not have been necessary to insert the narrower license of Article 51. This argument is not as strong as it seems. There is a very good reason for this apparent overlapping. The residual area of liberty under customary international law, surviving because it is not prohibited by the Charter, is one reason. This area would be cancelled out at any point where the Charter is authoritatively interpreted or amended so as to cover a part of it. In other words *this* area of license is quite literally subject to the provisions of the Charter, including Article 2(4). On the other hand, the license for self-defense against armed attack under Article 51 is not subject to, but on

25. The United Nations Conference on International Organization (UNCIO) met at San Francisco, April 25 to June 26, 1945. For further information concerning participants and organization, see LEAGUE OF NATIONS COVENANT, arts. 4-8.

26. U.N. CHARTER art. 51.

the contrary, *overrides by express words any other provision in the Charter*. "Nothing in the present Charter shall impair the inherent right of self-defense against armed attack . . ." This overriding preeminence of the liberty of self-defense against armed attack was probably as basic a political condition of acceptance of the Charter by the Soviet Union and the United States, as was the Great Power veto. Article 51 was designed to quiet any refined anxieties, such as in the United States Senate, about what implications for the scope of each Member's physical self-defense may be drawn from this or that provision of the Charter. For by the express words of Article 51 no other provision in the Charter can negate the legal position that if there is armed attack, then the self-defense right operates.

IV

The kind of skeptical view that I have put to you in necessarily abbreviated form has, I think, become very controversial in the literature since I first offered it in 1954. One of my ablest colleagues, Professor Robert Tucker of Johns Hopkins, has done me the exciting kindness, in his edition of Kelsen's *International Law*, of making a rather systematic analysis and criticism of my positions from the point of view of "progressive" policies.²⁷ He makes a number of policy criticisms of my position which I want to mention and (where I can) briefly answer.

Robert Tucker's first criticism is that it is very dangerous to admit that there is any residual area of liberty to resort to force under international law. Before 1914, he points out, the whole range of liberty of States to use force was very vague, general and undefined. Living now under the United Nations, we ought to get rid of that vagueness. For instance (he points out) the United States quarantine was imposed on Cuba in respect of placement of missiles on Cuban territory, which on the face of it was perfectly legal for the Cuban government to do or permit on its own territory. He suggests (and he is probably right) that my positions would regard as lawful the United States' forceful reaction to the Cuban government's apparently lawful action, indicating the abuses arising from vagueness of the license.

Now, I completely admit that prior to 1914 the liberty to go to war was very wide and vague. I would indeed say that it was a virtually unlimited liberty. Yet I also have to answer that we really do not get rid of the vagueness by putting our heads down and insisting obstinately on an idealist-restrictionist interpretation. It is probably true that all American international lawyers who joined in the debate about the lawfulness of the Cuban quarantine, argued from within the idealist-

27. H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 67, 68, 85, 102, 428, 453 (2d ed. R. Tucker 1962).

restrictionist view. The fact that they were "progressive" in this sense did not prevent vehement disagreement among them. Some said that the quarantine was lawful under Article 2(4) because it was a response to a threat of force issued by Cuba and the Soviet Union, in the form of placement of missiles pointed at United States territory. Others, of course, and more vocally, rejected this. For them the missiles were perfectly lawfully placed on the Cuban territory, and the quarantine imposed by President Kennedy was a threat or use of force which violated Article 2(4).²⁸ So my reply here is that even on idealist-restrictionist assumptions about the Charter, the problems of vagueness and its abuse in particular cases will remain.

The second policy objection that Tucker makes is that on my view of the range of licit force, international law would not be law at all. After all, he urges, if there is any feature that must distinguish a legal order from other orders, it is that a legal order must draw a line between the legal use of force by Members and the use of force by Members that is unlawful. Any body of rules that does not do this is not law. These are admirable sentiments; but they are very unhistorical ones. So far is it from being the case that international law as law must necessarily draw a clear line between lawful and unlawful use of force, that before 1914 there was not even an attempt to draw a line, let alone a line actually drawn. Despite all this, few authorities, except the Englishman John Austin,²⁹ questioned that international law existed as a body of norms which could be called "law." If Professor Tucker were right on this, then we would have to say that international law did not exist as law at all before 1914.

Moreover, it simply is not true that the idealist-restrictionist view draws the line between lawful and unlawful war and my view does not. We are both drawing lines. Their line is there, and my line is here, for what they are both worth.

The third policy objection made against my position is that I am performing a sleight of hand trick, at any rate, in my argument of policy that the Charter could not have imposed on members the obligation to submit without any limit to the grossest violations of their legal rights, as long as those violations did not include an armed attack by the culprit. Tucker charges me with saying that this should be rejected as an absurdly unacceptable result at this stage of world affairs, when the collective provisions for righting of wrongs mentioned in the Charter obviously are not working.

This objection accuses me of a kind of conjuring trick. It points out

28. See text accompanying note 6 *supra*.

29. See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (H.L.A. Hart, ed. 1954).

that the words of the Charter were fixed back in 1945, and that the scope of any license to use force by individual States must either have existed in and since 1945, or it cannot be admitted now. My argument (according to Tucker) is that because collective measures for peaceful adjustment of disputes under the United Nations have not worked, and because the Security Council and General Assembly have proved ineffective as means of settling disputes, we should now change the interpretation of the Charter as regards the scope of permissible violence by individual States, so that the liberty of each State to use force for its own protection can compensate for the collective inadequacies.

If my position were what this objection imputes to me, it would be a very powerful objection, but it is not. My position is very different. It is that at the time of drafting and adoption in 1945, it was clear from the *travaux préparatoires*, and from the whole range of diplomatic attitudes, that there were grave uncertainties whether either the machinery for peace enforcement or the machinery for peaceful adjustment of disputes under the new United Nations Charter would work. In view of this, and since we must credit negotiators for all States with matters of common knowledge, we must credit all concerned in 1945 with awareness of uncertainties of the future life of States under the Charter. Equivocation was to be expected, therefore, from the beginning. It is indeed, a fact of international life, as I wrote back in 1954, that the United Nations Charter is a two-faced instrument. One face looks backwards in time and leaves play for the old system of balance of power and alliances, self-defense, and self-redress when wrongs are inflicted. Another face looks forward to a moral-idealistic vision of what an organization of States would be. Textual straddling goes back to 1945. It is not an *ex post facto* alteration by me or anyone else. All that I am saying is that in interpreting the Charter, we are entitled to take into account, where the text does raise different possibilities of interpretation, that as a matter of policy Members would be unlikely, either in 1945 or 1974, to leave themselves exposed and helpless in the face of an indefinite series of grave wrongs by a blanket prohibition of forceful reaction. We are entitled to remember that this is something which those draftsmen and ratifiers of the Charter had in mind, and which may explain much equivocation of language.

Another reproach made to me in terms of "progressive" policy, is that I have been too hard on the idealist-restrictionist view, since Article 2(4) need not be interpreted to prohibit all use of coercion, but only the use of forceful or violent coercion. I have failed, says Robert Tucker, to recognize that even if all forceful coercion by States is made unlawful, States which have suffered wrongs may still have lawful means of pressure and coercion, for instance economic sanctions against those who violate their rights. Aid and credit can be denied, trade limited or boy-

cotted, and the like. Once I recognized the role of non-forceful coercion, thinks Robert Tucker, I would not be so worried about States being left helplessly exposed to an indefinite series of wrongs. For what it is worth, I grant this point. But the relief from wrong it gives is not great. It is often dubious these days whether creditors have more power over debtors than *vice versa*. Great Powers often compete with each other to *give aid*. When the United States withdrew the support for the Aswan Dam Project, it merely made room for massive Soviet economic entry to the Middle East. Since this led also to massive Soviet *military* involvement, it is even questionable that economic sanctions would represent "progress" in the sense of his criticism.

Time prevents me from considering two or three other criticisms of this sort, and I move to the important final one. In this Professor Tucker is asking me to reconsider the position, even supposing I am right, and that the Charter does not mean what the idealist-restrictionists say it means about the outlawing of force, is it not still my duty, as one devoted to the ideals of international peace, and the progress of the international community, to put my weight behind the movement to banish the hateful practice of war from the world? In other words, ought I not to desist from expressing my skepticism about the actual scope of the Charter's prohibitions, keep quiet and stop rocking the "progressive" boat? In putting this final point one has to be careful to say, as the criticism does, that this duty arises in the circumstances in which the campaign for the banning of war from human affairs has to be waged. And this very caveat is the point of my reply, and leads probably to the most important single thing that I want to say tonight.

I think the circumstances of our period not only now, but in the whole generation that has passed since 1945, have been such that to pretend that the prohibition on the use of force under the Charter is as wide as the moralist-idealist-restrictionists say it is, and therefore to invite cross-accusations of aggression, whenever force has to be arrested, probably hinders rather than promotes peace and progress in the international community. Remember that we are in an age where there is no organ, not even the Security Council, usually able or willing to make a determination of this matter. (The Great Power veto makes sure of this.) We are in an age when nationalism is not retreating, as the founding fathers of the Charter perhaps thought, but when we face an enormously intense and widespread insurgence of nationalism, and unprecedented manipulation of this insurgence by outside powers, whether in Africa or Asia, the Middle East or the Mediterranean.

In these and other circumstances of our age, I tend to think that for us to pretend that the prohibitions of the use of force by the Charter are clearer, stricter, and more definite than they are, really does not help towards the banishment of force from the relations of States. What this

pretense does, for the most part, is to put additional weapons of political warfare and harassment into the hands of each disputant State. Instead of their arguing about the merits, rights and wrongs of some economic or territorial or demographic or strategic difference between them, they argue about which of them is the naughty aggressor, which is the violator of the Charter, without any real chance, as a practical matter, of bringing this question to a clear determination.

The self-gratification of being able to sleep peacefully at night is important. It may well give me, and you, greater peace of mind to join wholeheartedly in a movement for world government. It will probably help us to sleep better at night. Yet let us be under no illusion, until we have examined the matter with our minds as well as our hearts, that it can bring world government any nearer.

Some years ago, I told an American audience my favorite story of the young lady of Melbourne. Perhaps it is time to tell it again. Melbourne, as you know, is the main rival city to Sydney, and rather more staid and prudish than Sydney (for Sydney has certain American tendencies). Now this young lady came of a rather proud, patrician Melbourne family, and she lived in a stately home on the banks of the Yarra River, at one of the rare points where the Yarra is still beautiful. She was sleeping peacefully, as any young lady of good breeding should be at 3 in the morning, in her bedroom, which gave out onto a beautiful lawn. Then, suddenly, the French windows from the lawn were thrown open, and a stranger with fiery eyes strode to her bedside, and with one sweeping gesture, he threw aside her bedclothes, lifted her like a feather in his arms, and strode out again through the French windows and onto the lawn. Of course, this poor young lady was absolutely terrified and utterly unable to make any sound. So she settled, as best she could, into the situation, and nestled down in his arms, right till he got to the green sward on the bank of the Yarra River, where the grass sloped gently down to the water. There he bent and laid her down on the grass. And just at this moment she recovered her breath, enough to speak and say: "W-What are you going to do now?" And he looked down at her with his fiery eyes and he said: "Well, lady, it's your dream!"