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The Political and Legal Force of the Prohibition of Force: Assessing State Behaviour

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Nikolas Stürchler, *The Threat of Force in International Law*, New York, Cambridge University Press, 2007, ISBN 9780521873888, 358 pp., $112.00 (hb).

Joel H. Westra, *International Law and the Use of Armed Force: The UN Charter and the Major Powers*, London and New York, Routledge, 2007, ISBN 9780415770989, 224 pp., $75.00 (hb).

Recent political developments on the global scene have shed new light on established rules concerning the employment of military force while giving rise, among other things, to a reappraisal of the scope and limits of the right of self-defence. The terrorist attacks of September 2001 raised the question of whether actions by non-state actors can fall within the concept of 'armed attack'. Those attacks were defined by UN Security Council Resolution 1368, under Article 39 of Chapter VII of the UN Charter, as 'a threat to international peace and security', but the ambiguous formulation left sufficient scope for upholding the prevailing view that Article 51 may only be invoked in the case of conflict between states. According to this view, which meanwhile has been contested, any resort to self-defence for legally justifying unilateral military action against terrorist organizations operating in other countries needs to be supported by evidence or argumentation that attacks perpetrated by those organizations can be attributed to a state. In defending the military campaign conducted to oust the Taliban regime in Afghanistan, the US government could credibly argue that this regime, exercising effective control over the country, was to be held accountable since it was harbouring members of al Qaeda on its territory and was actively supporting them.

At the same time the US government submitted the position that responsible governments cannot be expected to wait passively for an attack to destroy one or more valuable targets in their country. Believing that traditional policies of containment and deterrence do not provide sufficient protection against terrorists whose hatred towards others seems to be stronger than love of their own life, proponents of the pre-emptive use of military means asserted with new vigour the right of anticipatory self-defence. It was argued that pre-emption in the face of an imminent danger

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has always been accepted as legitimate and appropriate and, consequently, may be considered part of customary law. But the proclaimed right to use force unilaterally in the absence of clear criteria to define acute threats (what is imminent and what is not?) did obscure the distinction between pre-emption and prevention, and with it the difference between lawful and unlawful military action.

Among the most important political developments of late is the transformation of warfare. Strategic thinkers have come to speak of fourth-generation warfare, pointing to the centrality of information networks in military operations. However, there is another face of modern warfare, the face of irregular wars. Unlike the conventional battles of the past, with clear front lines unfolding, this kind of warfare is conducted – to refer to Rupert Smith's much-acclaimed book *The Utility of Force* (2005) – 'among the people', involving large numbers of civilians, either actively or passively. It is also conducted, to quote General Sir Richard Dannatt (head of the British army), 'in the spotlight of the media and the shadow of international lawyers'.[1] The severe impact of irregular wars – guerrilla wars, acts of terrorism, and the Palestinian *intifada* – on the civilian population underscores the important role of international humanitarian law in protecting people. While a lot of attention has been focused on the abuses that occurred in the prisons of Abu Ghraib and Guantánamo Bay, one cannot equally turn a blind eye to the abuse of this branch of law by weaker parties seeking to redress power disparities through taking shelter among innocent people. One of the reasons why weaker parties often prevail in asymmetric showdowns is their calculated exploitation of the stronger parties' commitment, under the pressure of public opinion, to abiding by the rules of humanitarian law. It does not augur well for the further development of humanitarian law that this commitment has become a powerful weapon in the hands of violent non-state actors.

1. The threat of force

The two books under review largely pass over these new developments but it does not mean that their findings are obsolete or irrelevant. The book by Nikolas Stürchler, who is a senior research fellow at the World Trade Institute and a visiting lecturer in international and constitutional law at the University of Basel, is concerned with the threat of force. The diplomacy of violence relying on the threats of force has been, and still is, a main ingredient in the stuff of international politics. References to gunboat diplomacy and coercive diplomacy feature prominently in both classical and modern treatises. In the nuclear age, with the spectre of mutual annihilation haunting humankind, threats of force seem to have become a substitute for actual warfare, at least when relations between major powers possessing weapons of mass destruction are concerned. The UN Charter is unambiguous on the legal aspect of the subject: Article 2(4) prohibits not only the actual use of force but also threats thereof. But what specific forms of military coercion can be considered unlawful threats of force? What makes a threat of force illegal? These important questions

1 'After Smart Weapons, Smart Soldiers', *The Economist*, 25 October 2007.

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have elicited different interpretations and conflicting views, creating uncertainty about the limits to one of the important tools of statecraft. It is a disturbing thought that the legal adviser who is solicited to state his opinion on the lawfulness of actions short of war is left with barely more to hold than the text of the UN Charter itself.

Stürchler sets out on the ambitious task of clarifying the concept and establishing criteria which may serve to distinguish between legal and illegal instances of coercive state behaviour. In performing this task the author focuses in the first chapters of the book on the historical pedigree, systematic context, and relevant case law of the non-threat principle. In the chapter dealing with the theoretical implications of this principle the competing claims made by the adherents of the deterrence model and the spiral model of issuing threats are discussed. While the deterrence model holds that military threats may prevent war by convincing the adversary that going to war would be too costly or even self-destructive, the spiral model asserts that military threats and brinkmanship tend to escalate into war. Stürchler rightly points out that both models, appealing to divergent 'lessons of the past', represent contested descriptions of real-life militarized conflicts. This is an important observation because pleas for permissive interpretation of the UN Charter are likely to be based on the assumed validity of the deterrence model. In view of the ambiguous historical record, the contention that unilateral deterrence should be beyond the scope of Article 2(4) because it indirectly serves the Charter's peace objective cannot be taken for granted. It may be true that the Charter partially relies on deterrence to dissuade would-be aggressors, but – as the author argues – there is little doubt that deterrence was intended to flow out from the Security Council. Nevertheless, the Charter's recognition of the right to self-defence and to a reasonable level of armaments lends plausibility to the view that deterrence is not strictly unlawful. However, deterrence covers only one of the two forms of military coercion. The other is compellence, referring to threats of force intended to gain concessions from the other party. Since deterrence aims at making the target state refrain from something and compellence at making this state actively do something, the latter represents the more offensive form of military coercion. The mere presence of compellence in the diplomacy of violence may be taken as an indicator of unlawfulness. But here, too, hasty inferences should be met with caution. How is one to judge acts of compellence that are directed at rectifying the consequences of aggression? For example, after Iraq's invasion of Kuwait in 1990 the United States and other Western powers tried to persuade Saddam Hussein to give up the occupation of this small Arab state. They did so by issuing threats of military action well before Operation Desert Storm, with ground attacks, was launched. It is hard to believe that those threats were less lawful than a deterrence policy that might have been pursued to stop Saddam from carrying out his invasion plan.

The conclusion drawn from the first chapters is rather depressing: 'the legal regime governing threats of force still eludes rigid legal taxonomy' (p. 92). It is particularly striking in that Stürchler declares himself highly critical of the contribution of the International Court of Justice. In its six decades of history, there are only three ICJ cases relevant to the theme of the threat of force, namely the *Corfu Channel* case (1949), the *Nicaragua* ruling (1986), and the Advisory Opinion on *Nuclear Weapons*

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(1996). As is amply demonstrated in the book, none of the decisions on each of these cases substantially refer to one another. In the author's harsh judgement the world court has provided very limited and at times even contradictory evidence. The lack of clarity and consent on the legal bearing of the threat of force as found in history, doctrine, and jurisprudence leads him to turn to post-Second World War state practice to ascertain in what circumstances specific forms of military coercion are deemed permissible or not. The focus is on the legality of four different types of threat: (i) explicit threats to extract concessions; (ii) demonstrations of force; (iii) threats in self-defence, and (iv) threats in the context of protracted conflict. There is no doubt that the related chapters constitute the core and at the same time the most challenging part of the study.

The author is aware that, to borrow his own words, extracting law from state practice is an arduous task with many pitfalls (p. 125). The first requirement to be met is that of determining which state practice is legally relevant. There is the danger of systemic bias in sampling: the tendency to select only those cases that support the proposition of custom, that are abundantly documented, or that refer to physical acts rather than more tangible forms of state behaviour. The second problem to be tackled is that of establishing the relationship between state practice and treaty interpretation. A major difficulty arises from the uncertainty as to whether states abstained from the use of military threats because they really felt it was illegal to do so. To deal with this problem of causality the researcher may be forced to engage in counterfactual analysis and speculate about the likelihood of those states seeking refuge in military coercion in the absence of perceived legal obligations. The third requirement concerns finding a sound empirical base for the identification of state practice. The legal scholar may benefit in this respect from a relatively large number of empirical studies on the diplomacy of violence conducted by international relations scholars. In fact, Stürchler relied gracefully on some of them to collect his factual evidence and substantiate some of his points. Starting from four propositions he embarks on a comprehensive investigation comprising 24 historical cases that are classified in three broad categories and compared in terms of the type of threat involved, the individual and communal responses of states to it, and, as far as possible, the reasons why they responded the way they did. The sample is drawn from a wider pool of 111 legally relevant cases stretching from October 1945 to December 2003. In an annex the reader will find a survey and brief summary of each of these cases.

What has the author found and what inferences does he make? Recognizing that the relatively small number of cases that are studied in depth does not allow sweeping generalizations, Nikolas Stürchler wisely presents his findings in careful language, surrounded with many caveats. Still, the results of his study turn out to be instrumental in developing criteria for the violation of the non-threat principle. An important preliminary finding is that in threat-related cases only a handful of states tend to react by actually condemning or approving potential violations of the UN Charter. This finding is a clear illustration of the rule that strikes at the heart of the whole concept of collective security: the more responsibility is shared among nations, the more it is shirked. While breaches of Article 2(4) of the UN Charter should be taken as an offence to all nations since an *erga omnes* obligation is involved, states

are affected in different ways, tempting many of them to indulge in buck-passing behaviour. A rational calculation is at play. It is rightly submitted that the prospect of 'getting involved', particularly against powerful states, is more costly than 'staying out' (p. 257). This is one of the reasons why, in the author's opinion, the old adage that silence equals approval does not apply to obligations in multilateral settings.

One of the main findings is that state practice has converged into a single, overarching credibility test. Crucial is allegedly whether a state *credibly* communicate its readiness to employ force towards one or more other states. A threat is defined as credible when it appears rational to implement it. Only then might one expect a sufficiently serious commitment to run the risk of armed encounter. Stürchler concludes that in order for there to be a violation of Article 2(4), 'a state must *credibly communicate its readiness to use force in a particular dispute*' (p. 273, emphasis in original). This conclusion is contestable. Can one really maintain that any military threat by – let us say – a bloodthirsty dictator to destroy his neighbouring countries becomes less unlawful the more political leaders of target countries have reason to question the dictator's military capabilities to carry out the threat? It does not seem reasonable. Moreover, credibility is rather an elusive concept – what is credible to one may be incredible to another. It is hard to see here any improvement on the familiar criterion of the 'signalled intention to use force'.

Another finding which may be easier to accept is that a threat need not be explicit to constitute a violation of Article 2(4). In fact, demonstrations of force appeared to be a stronger indicator of breaches of the non-threat principle than threats being articulated aloud. Still another finding, which cannot surprise those familiar with the mechanisms of coercive diplomacy, is that the actual use of force may occasionally constitute a threat of force. At issue here is the limited employment of force and the threat to escalate to higher levels of violence. This specific application of coercive diplomacy, which was widespread during the Cold War but also frequently used afterwards, is blurring the distinction made in Article 2(4) between the threat and use of force.

Stürchler has accomplished an admirable piece of work, setting a high standard especially for those who seek to study state practice in a systematic, non-impressionistic way. He combines finesse in legal thinking with a thorough knowledge of international relations readings. While breaking new ground on an important legal subject, he never overreaches himself.

2. The actual use of force

As the title reveals, the subject matter of Joel Westra's book is not the threat of military force but the use of it. The author is an assistant professor in the department of political science at Calvin College, and he does not betray his scholarly background. While Stürchler's empirical investigations are preceded by extensive legal analysis, Westra's study is mainly focused on the examination of decisions by major powers to employ military force. He combines quantitative (statistical) analysis of 196 cases with a qualitative 'structured, focused comparison' of five selected cases which are studied more in depth. Those cases concern US military intervention in the

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Caribbean region between 1953 and 1961 (sub-cases: Guatemala, Cuba, and the Dominican Republic), Anglo-French military intervention in Egypt (1956), Soviet military intervention in Hungary (1956), and two cases of US–British military intervention in Iraq (divided between the periods 1990–8 and 1999–2003). Since the main focus of the study is – as indicated – on the 'major powers', defined as the permanent members of the UN Security Council, the non-selection of China in the qualitative case study analysis is to be taken as an important omission. Clearly the People's Republic did not refrain from the use of military force, both before it occupied China's seat on the Security Council (the border war with India in the early 1960s) and afterwards (the armed intervention in Vietnam in the late 1970s). Although a special appendix on 'Case selection and methodology' is added to the book, no reason is given for the omission of China in the case study analysis; the reason might be the lack of reliable research data. Furthermore, it is regrettable that NATO's military intervention over Kosovo in 1999, which was epoch-making in many respects, is only briefly discussed in the final chapter. The time frame of Westra's whole research – from October 1945 to October 2003 – is quite similar to Stürchler's.

Conceptualizing the UN Charter as a legal instrument designed to establish and sustain the post-Second World War international order, the author purports to determine to what extent Article 2(4) has functioned as a restraint upon the military actions of the great powers. To this end he has developed four models accounting for the weight of legal arguments underpinning state behaviour, as related to the outcome of decision-making on the application of military force. Legal arguments are supposed to send signals to other states about one's commitment to the existing international order. The first model is the familiar *realist* model, which posits that the UN Charter and other international law are expressions of state dominance, the dominance of powerful states in particular. The Charter is assumed to operate via the arguments and actions of major powers to induce coercive restraint from less powerful states. Arguments major powers level to defend their positions and actions are primarily intended to generate support from their domestic constituencies and not to persuade other states. Those arguments tend to contain both legal and non-legal claims. Another deduction is that the primary disagreements addressed in a major power's legal arguments are less likely to be over the determination of facts than over the inclusivity, priority, interpretation, or application of legal rules.

The realist model is confronted with the so-called *prudential restraint* model. The basic assumption underlying this model is the proposition that international law evokes restraint within powerful states, in that they use it to legitimate the exercise of their power. Like the realist model the prudential restraint model suggests that the arguments offered by major powers may contain both legal and non-legal claims, but it also allows for the deduction that legal claims will have priority over non-legal claims. Another difference lies in the coherence and consistency of legal arguments over time. In contrast with the realist model the prudential restraint model predicts that decision-makers within a major power will consider claims made in similar situations in the past and claims that might be made in similar situations in the future. They will formulate their arguments accordingly, or else attempt to obscure

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the contradictions between them. The author rightly links the names of classical realist writers such as Hobbes, Carr, and Morgenthau to the notion of 'prudential restraint'. Incidentally, John Mearsheimer, one of the leading representatives of the newer generation of American realists, opposed the US invasion of Iraq in 2003,[2] as Morgenthau took issue with the US decision to wage war in Vietnam. However, because the writers concerned 'fail to specify a clear mechanism by which international law actually functions', they nonetheless exemplify in the author's opinion the realist model, at least as conceived by Westra. He aims to develop such a mechanism, and, in doing so, demonstrate 'the impact of the Charter on the major powers' military actions and the arguments that they offer for those actions' (p. 8).

The third and fourth models which structure the author's investigations are respectively the *liberal* model and the *communal obligation* model. The liberal model assumes that the UN Charter and other international law operate via transnational interaction to produce domestic-level restraints on state action. Liberal theorists argue that international law becomes 'entrenched' in domestic processes and 'enmeshed' with domestic decision-making (especially in liberal democratic states).[3] By contrast, the communal obligation model is rooted in the thought that the Charter operates via social learning and argumentation within the Security Council to produce collective restraint on state action. Authors associated with this model believe that the Charter, as a product of consensus among states, provides a standard for assessing the legitimacy of state actions,[4] and that it creates pressure for major powers to demonstrate that they are responsible members of the international community by adapting their behaviour to the legitimate standards of the community.[5]

What does Westra's sophisticated and painstaking theory-testing exercise show? In hardly more than a 100 pages the author jumps to the conclusion that 'the major powers remain generally committed to the existing international order, despite moderate shifts in the balance of power that have occurred since the end of World War II' (p. 149). Aside from the point that the breakdown of the Soviet Union marked not a moderate but a radical shift in the global configuration of forces, this rather sanguine conclusion cannot go unchallenged. Surely, in conformity with the predictions of the prudential restraint model it is found that in most cases the major powers extended arguments which gave legal claims priority over non-legal claims (derived from principles of morality, justice, fairness, or efficiency). But can this outcome be taken as evidence for their commitment to the existing order and not to the pursuit of their national interest, however perceived? First of all, not only non-legal but also legal arguments may be instrumental in generating domestic support. Any US administration which is negligent in finding a legal basis for a decision to embark on military intervention will run into deep trouble in making the case for

2 J. J. Mearsheimer, *The Tragedy of Great Power Politics* (2001).

3 L. Henkin, *How Nations Behave: Law and Foreign Policy* (1979); M. S. McDougal, 'Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry', (1960) 4 *Journal of Conflict Resolution* 337; A. Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', (1997) 51 *International Organization* 513.

4 R. A. Falk. 'The Interplay of Westphalia and Charter Conceptions of International Legal Order', in R. A. Falk and C. E. Black (eds.), *The Future of the International Legal Order* (1969), 32.

5 T. M. Franck, *The Power of Legitimacy among Nations* (1990).

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war in Congress. Second, in so far as policymakers did observe prudence by delaying planned military operations, they did so on many occasions not because they were constrained by the force of international law but because time was needed to agree on a legal pretext. In those cases when a legal justification could not be found the United States, in particular, sought refuge in covert operations. One of the clear exceptions to this general pattern was the case already referred to, namely Iraq's aggression towards Kuwait, when the United States deliberately sought (and obtained in late November 1990) the authorization of the Security Council in order to undo Iraq's occupation of Kuwait by force. Does the fear of one's nation's reputation being damaged and of losing the sympathy of allies and friendly states as the result of unilateral action signify a firm commitment to the existing international order? This question is open to divergent answers.

Another reason to be less optimistic than Westra regarding the actual weight of legal arguments in major powers' decision-making is the rather marginal role conferred on legal counsellors in the foreign ministries. Chester Bowles, a US undersecretary of state in the early 1960s, was one of the few key decision-makers who took the view (with a lot of foresight!) that acting in defiance of the legal obligations under the Charter 'would deal a blow' to a system that is 'the condition not only of a lawful and orderly world, but of the mobilization of our own power' (p. 73). But when his superior, Dean Rusk, convened a series of meetings to discuss possible military actions against Cuba he invited neither the attorney general nor the State Department legal adviser. In the same vein, when almost forty years later another US secretary of state, Madeleine Albright, was confronted during the Kosovo crisis with legal objections raised by legal advisers in the UK Foreign Office, her reaction to her counterpart Robin Cook was quite revealing: 'Get new lawyers!'

Although it is less insightful and rich than Nikolas Stürchler's work, Joel Westra, too, has written a valuable book. The greatest value lies in the design of a creative and original theoretical framework for analysing the problem of great-power compliance with the ground rules of the post-1945 legal order. My main objection is that the author cannot avoid giving the impression of having his interpretations adjusted to preconceived views of the superiority of the prudential restraint model. This model can certainly claim a great deal of explanatory power but there is room for other interpretations and inferences.

3. Final remarks

Occasionally, pious calls for the integration of international law studies with international relations approaches are heard. The books that have been reviewed here testify to the scholarly cross-fertilization that can be achieved by including in the legal discourse non-legal theoretical concepts and the results of empirical research into state behaviour. The challenge ahead is to take a deeper look into the evolution of the law on the threat and use of military force in the post-9/11 constellation, particularly as far as the balance between the right of self-defence and the requirement of Security Council approval or authorization of military force is concerned. With the clear shift away at present from regular interstate wars to new patterns

of violent conflict, not only the responsibilities and duties of UN member states towards terrorist organizations but also the political and legal implications of asymmetric warfare between state and non-state actors in general need to be addressed. In getting to grips with the new *problématique*, students of international law and of international relations alike are well advised not to entrench themselves within the boundaries of their own disciplines.

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