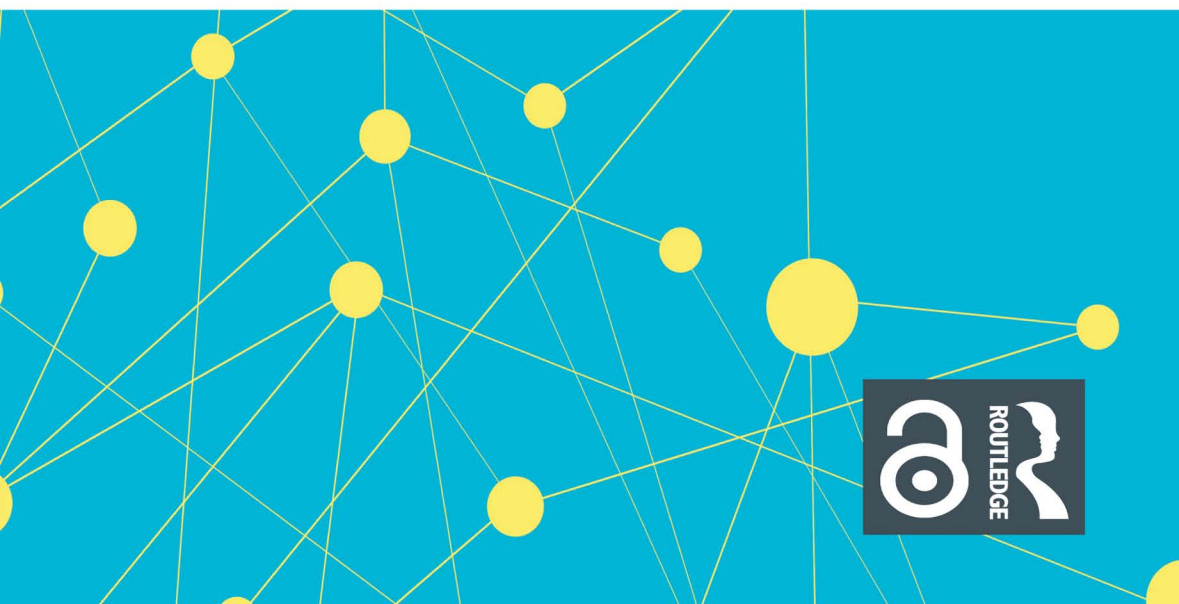
THREATS OF FORCE AND INTERNATIONAL LAW

PRACTICE, RESPONSES AND CONSEQUENCES

Agata Kleczkowska



THREATS OF FORCE AND INTERNATIONAL LAW

Threats of force are an inherent part of communication between some States. One prominent example is the 2017–2018 crisis in relations between the United States and North Korea, marked by multiple threats issued by both sides. Yet, despite the fact that States seem to use threats of force with unlimited freedom, they are prohibited by international law. This book presents threats of force from the perspective of the practice of States. Thus, the book is based on an examination of multiple cases when States reported threats of force. It describes what threats of force are, examines the status of the prohibition of threats of force as a legal norm, presents examples and describes the mechanisms that are available for States in case threats occur, as well as their legal consequences. The book will be an invaluable resource for academics and researchers in the areas of international security law, public international law, law of armed conflict and international relations.

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Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2023
by Routledge
4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
605 Third Avenue, New York, NY 10158

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

ISBN: 978-1-032-44627-1 (hbk)
ISBN: 978-1-032-45225-8 (pbk)
ISBN: 978-1-003-37602-6 (ebk)

DOI: 10.4324/9781003376026

Publication financed under the program of the Minister of Science and Higher Education under the name "DIALOG" in the years 2019–2023 as part of the project "Excellence in Legal Research. Promoting Polish Achievements in the Area of Legal Sciences Abroad" implemented under the leadership of Celina Nowak by the Institute of Law Studies of the Polish Academy of Sciences.

Contents

Abbreviations

ECOWAS	Economic Community of West African States
FRY	Federal Republic of Yugoslavia
ICJ	International Court of Justice
ILC	International Law Commission
NATO	North Atlantic Treaty Organization
OAS	Organizations of American States
OSCE	Organization of Security and Cooperation in Europe
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

Introduction

The motivation behind this book was the 2017–2018 crisis in relations between the United States and North Korea, which was marked by multiple threats issued by both sides. This began in January 2016 when North Korea announced that it had conducted a fourth nuclear weapons test and detonated a hydrogen bomb for the first time. The international community, with the United Nations Security Council (UNSC) in the lead,[1] condemned the North Korean actions and imposed sanctions on the State. That, however, did not stop North Korean leader Kim Jong Un from carrying out further tests of increasingly sophisticated weapons, which began to threaten Japan, or from producing missiles with increasing range.[2] In August 2017, it was reported that North Korea had produced a miniaturized nuclear warhead capable of being mounted on a missile. At the same time, in reaction to new United Nations (UN) sanctions, North Korea said that 'physical action will be taken mercilessly with the mobilization of all its national strength.'[3] US President Donald Trump replied to this statement by saying, 'North Korea best not make any more threats to the United States. They will be met with fire and fury like the world has never seen.'[4] That kicked off a volley of threats between the USA and the North Korea, which lasted until March-April 2018.[5]

The crisis in relations between North Korea and the USA seems like a textbook example of mutual threats of force. But is it really? Between August 2017

1 See, eg, UNSC Res 2270 (2 March 2016) UN Doc A/RES/2270.

2 'Chronology of U.S.-North Korean Nuclear and Missile Diplomacy' (*Arms Control Association*, July 2020) <www.armscontrol.org/factsheets/dprkchron> accessed 1 September 2022 (Chronology of U.S.-North Korean Nuclear and Missile Diplomacy).

3 Anna Fifield, Ellen Nakashima and Joby Warrick, 'North Korea Now Making Missile-Ready Nuclear Weapons, U.S. Analysts Say' (*The Washington Post*, 8 August 2017) <www.washingtonpost.com/world/national-security/north-korea-now-making-missile-ready-nuclear-weapons-us-analysts-say/2017/08/08/e14b882a-7b6b-11e7-9d08-b79f191668ed_story.html?utm_term=.26a064dbf86e> accessed 1 September 2022.

4 'Trump Says North Korea Will Be Met with "Fire and Fury" If It Threatens U.S.' (*Reuters*, 8 August 2017) <www.reuters.com/article/us-northkorea-missiles-usa-trump-idUSKBN1AO28O> accessed 1 September 2022.

5 Chronology of U.S.-North Korean Nuclear and Missile Diplomacy (n 2).

DOI: 10.4324/9781003376026-1

and April 2018, the UN Security Council adopted two resolutions deepening the sanctions imposed on North Korea: UNSC Resolutions 2375 and 2379.[6] Neither of them mentions the prohibition of the threat of force. Also, neither the USA nor North Korea claimed that through statements and conduct the other side had violated Article 2(4) of the UN Charter,[7] and they both remained silent on the question of international law. Why was this so?

Prohibition of threats of force was included in Art. 2(4) of the UN Charter alongside the prohibition of the use of force. It is rarely mentioned by States or international organizations; if it appears in the statements or resolutions of international organs at all, it is usually coupled with the prohibition of the use of force, forming a composite prohibition, for example, 'the prohibition of the threat or use of force.' Nor have scholars paid much attention to the prohibition of threats of force. Although a few seminal works on the topic are devoted exclusively to threats of force [Nikolas Stürchler, The Threat of Force in International Law, Cambridge 2007; Romana Sadurska, Threats of Force, American Journal of International Law vol. 82 (1988); Marco Roscini, Threats of armed force and contemporary international law, Netherlands International Law Review, 54 (2); James A. Green and Francis Grimal, The Threat of Force as an Action in Self-Defense Under International Law, Vanderbilt Journal of Transnational Law vol. 44 (2011); Nicholas Tsagourias, The prohibition of threats of force, in Nigel D. White and Christian Henderson (eds.), Research Handbook on International Conflict and Security Law, Edward Elgar Publishing 2013], it is mentioned mostly only at the margins of discussions of the prohibition of the use of force. Accordingly, what is usually examined is what a threat of force is (ie, how it can be defined); what the exceptions to the prohibition of threats of force are; whether Art. 2(4) forms one or two prohibitions; whether the prohibition of the threat of force is a customary norm; and enumerations of examples of threats of force. To sum up, investigations into the threats of force are made almost exclusively against the background of the prohibition of the use of force.

Obviously, due to the fact that the drafters of the UN Charter included both norms in one provision, it is hard not to make comparisons and differentiations between the prohibition of the threat of force and the prohibition of the use of force. Nevertheless, the primary aim of this work is to investigate the practice of States to find out what they say about threats of force; whether they invoke the concept at all and, if so, whether they apply any uniform definition in naming which act is the threat of force; how they react to threats of force; what they expect from the international community in cases where they feel victimized by threats of force; whether threats of force are followed by the use of force itself; and what the consequences are, if any, of issuing threats of

6 UNSC Res. 2375 (11 September 2017) UN Doc S/RES/2375; UNSC Res. 2379 (21 September 2017) UN Doc S/RES/2379.

7 Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 16 UNTS 1.

force. Thus, it may turn out that the USA-North Korea crisis – where the issue of threats of force was not mentioned at all – was a typical example of State practice or, alternatively, that it was a very specific situation in which political goals prevailed over international law.

This book advances the thesis that the prohibition of threats of force is a separate legal norm from the prohibition of the use of force. It is neither a peremptory nor a customary norm. Despite multiple examples of violations of the prohibition of threats of force since 1945, it remains a binding treaty norm. States do report cases of threats of force to international organs, especially to the UNSC. However, international bodies seldom react to reported threats of force other than by acknowledging the State's submission; condemnation of such threats constitutes a rarity. What's more, some international organs explicitly recognize threats of force as an effective tool of diplomacy and politics and back up the threats. Despite the substantial differences between the prohibitions of the threats of force and of the use of force, the legal consequences of violations of both bans remain largely the same. Thus, illegal threats of force may result in certain obligations imposed on States or the invalidity of further actions.

The examination of the practice of States is, throughout this entire book, subject to one specific rule – an act of a State was examined as a potential threat of force only if it was referred to as a threat of force by any State. To put it differently, there were three basic situations in which a statement or conduct was taken into account for the purposes of this research. Firstly, a State that was the author of a statement or that engaged in conduct specifically identified this statement or conduct as a threat of force; for example, before the USA intervention in Iraq in 2003, the representatives of the USA claimed that the threat of force against Iraq was indispensable to make the State comply with international law.[8] The second situation is when a State referred a threat of force to an appropriate body when a threatening statement was made or threatening conduct was initiated against it. This variant includes the largest number of examples. For instance, in a letter dated 11 December 1998, Eritrea informed the president of the UNSC about threats of force made by Ethiopia, claiming that '[the] Addis Ababa regime is once again beating the war drums and issuing threats to use force.'[9] Finally, a third State may call statements or conduct initiated by other States threats of force. For instance, after the Anglo-French ultimatum against Egypt in 1956, the USSR and Yugoslavia called it a threat of force.[10] These remarks will be analogously referred to acts made and commented on by international organizations.

8 See, eg, UNSC Provisional Records (14 February 2003) UN Doc S/PV.4707, 20–21.

9 'Letter dated 11 December 1998 from the Permanent Representative of Eritrea to the United Nations Addressed to the President of the Security Council' (11 December 1998) UN Doc S/1998/1155, 2.

10 Statements made by the USSR [UNSC Official Records (30 October 1956) UN Doc S/PV.750, paras. 47, 52] and Yugoslavia [UNSC Official Records (30 October 1956) UN Doc S/PV.749, para. 26].

This methodology is indispensable to make sure that what is taken into account is not the views in the doctrine of law but the views of States. Moreover, States use the term 'threat' in multiple variations, not all of which are connected with Art. 2(4) of the UN Charter. Thus, in order to make sure that the current research was not based on erroneous examples of State practice, it was necessary to limit its examination only to those cases when a State or international organization identified a specific act as a threat of force. The reasons behind this methodology are elaborated in Chapter 2, Section 2.3.

To make this method of investigation complete, one more comment is necessary: Inasmuch as States rarely pay attention to the strict terminology used in international treaties – adjusting their legal arguments to match their rhetoric – an examination was carried out in cases not only when a State directly referred to a 'threat of force' but also when some of its derivatives were used. These derivatives include, but are not limited to, a threat to invade;[11] threats of aggression;[12] a threat of the use of force;[13] a threat of the imposition of military strikes;[14] a threat of the use of military force;[15] a threat to resort to force;[16] a threat of intervention;[17] an aggressive threat;[18] a threat of hostile action;[19] a military threat;[20] threats to use force;[21] a threat of direct military

11 'Letter Dated 18 October 1975 from the Permanent Representative of Spain to the United Nations Addressed to the President of the Security Council' (18 October 1975) UN Doc S/11851.

12 'Letter Dated 18 February 1999 from the Chargé d'Affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the President of the Security Council' (19 February 1999) UN Doc S/1999/177.

13 'Letter Dated 17 March 1999 from the Chargé d'Affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the President of the Security Council' (17 March 1999) UN Doc S/1999/292, 3; UNGA Res. 3389 'Implementation of the Declaration on the Strengthening of International Security' (18 November 1975) UN Doc A/RES/3389.

14 'Note verbale dated 23 February 1999 from the Permanent Mission of Belarus to the United Nations addressed to the Secretary-General' (26 February 1999) UN Doc A/53/845-S/1999/208.

15 'Letter dated 23 March 1999 from the Permanent Representative of Belarus to the United Nations addressed to the Secretary-General' (23 March 1999) UN Doc A/53/870-S/1999/309.

16 'Letter dated 17 March 2006 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (22 March 2006) UN Doc A/60/730–S/2006/178, 1.

17 'The Declaration of San José, Costa Rica' in 'Letter Dated 29 August 1960 from the Secretary-General of the Organization of American States Addressed to the Secretary-General of the United Nations, Transmitting the Final Act of the Seventh Meeting of Consultation of Ministers of Foreign Affairs' (7 September 1960) UN Doc S/4480, para. 1.

18 UNSC Provisional Records (15 October 1994) UN Doc S/PV.3438, 9.

19 UNSC Provisional Records (17 October 1994) UN Doc S/PV.3439, 7.

20 Ibid; 'Letter Dated 15 September 1956 from the Representative of the Union of Soviet Socialist Republics Addressed to the Secretary-General of the United Nations' (17 September 1956) UN Doc S/3649, 7.

21 S/PV.3439 (n 19) 7.

intervention;[22] a threat of military invasion;[23] a threat of outside aggression;[24] a threatening act of aggression;[25] a threat of bombardment;[26] and a threat of rocket attacks.[27]

This book is composed of five chapters. The first chapter presents the history of the prohibition of threats of force and discusses the definitions of threats of force. The second chapter compares the prohibitions of threats of force and of the use of force and discusses exceptions to the prohibition of threats of force and the status of the prohibition of threats of force as potentially being a peremptory and customary norm. All of the arguments are supported by cases drawn from States' practices. The third chapter presents examples of threats of force in general, arranged in three groups, that is, written and oral threats of force and physical actions. Beyond these three categories, there are also instances of threats of force that may take any or all of these forms. The fourth chapter presents possible responses to threats of force, dividing them into those that take place within international organizations and those that are carried out by States on their own. Theoretical discussions are supplemented by States' practices. The aim of the fifth and final chapter is to show the consequences of threats of force. Thus, the first section presents those repercussions, taking into account whether the threats were followed by the use of force. Ultimately, the *ex injuria jus non oritur* principle, the prohibition of illegal territorial acquisitions, and the invalidity of treaties are discussed.

22 'Letter dated 12 September 1958 from the Permanent Representative of Greece to the United Nations, addressed to the Secretary-General' (12 September 1958) UN Doc A/3874/Add. 1, 4.

23 UNSC Official Records (4 January 1961) UN Doc S/PV.921, para. 67; UNSC Official Records (4 January 1961) UN Doc S/PV.922, para. 57.

24 'Letter dated 22 September 1965 from the Permanent Representative of Cyprus to the United Nations addressed to the Secretary-General' (22 September 1965) UN Doc A/5934/Add. 1, para. 14.

25 UNSC Official Records (28 June 1977) UN Doc S/PV.2015, para. 35.

26 'Letter dated 13 October 1986 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General' (13 October 1986) UN Doc S/18397.

27 UNSC Official Records (18 July 1960) S/PV.874, para. 122.

1 History and definition of the threats of force

Introduction

The aim of this chapter is to present the background of threats of force. It is divided into two sections. The opening section presents the history of the prohibition of threats of force. The second section attempts to define the characteristics that make up threats of force.

This chapter claims that the prohibition of threats of force is a relatively fresh invention, only introduced with the UN Charter in 1945, similar to the prohibition of the use of force. Threats may take various forms, including actions as well as written and oral forms. Two elements of threats of force have subjective character: the intent of the threatening State and the credibility of the threat(s). Apart from these subjective elements, the objective that the threatening State seeks to achieve is also an important feature of the threat of force. Usually, the objective of the threat of force is a certain demand. However, there is no requirement of the demand element in Article 2(4) of the UN Charter; thus, if a threatening State does not form the demand, the threat of force would still be illegal. Moreover, threats of force can be accompanied by other elements, such as a time limit to meet the demands or the so-called 'peremptory language.'

1.1 The history of the prohibition of threats of force

Before the UN Charter came into force, States treated threats of force (or rather threats of war, as the term 'force' was only officially introduced to the language of *jus ad bellum* by the UN Charter) as a regular tool of conducting policy; the right to use a threat of war was parallel to the right to wage war.[1] Demonstrations of force, ultimatums, amassing troops on another State's border, and other acts of intimidation were not uncommon.[2] For instance, in the nineteenth

1 J Craig Barker, *International Law and International Relations* (Continuum 2000) 126.

2 Nicholas Tsagourias, 'The Prohibition of Threats of Force' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar Publishing 2013) 67, 68.

DOI: 10.4324/9781003376026-2

century, European States used threats of war to dominate Asia, South America and Africa.[3] Specific examples include the 'gunboat diplomacy' operations run by European States against China after 1839,[4] which resulted in a series of treaties expanding foreign trade and allowing foreigners to exert control over China's most important political and economic institutions,[5] or the threats made by the USA that forced Japan to sign the Treaty of Kanagawa in 1854.[6]

Nonetheless, the lack of regulation and the permissibility of threats of force before 1945 do not mean that States and scholars did not recognize threats of force and distinguish them as a separate concept. For instance, Emmerich de Vattel (1714–1767) claimed that not only an injury but also a threat of injury (understood as a threat of violation of a State's right) may be a reason for a just war:

> The right of using force or making war, belongs to nations no farther than is necessary to their defence, and the support of their rights. Now any one attacking a nation, or violating its perfect rights, does it an injury . . . . Let us then say in general, that the foundation or cause of every just war is injury, either already done or threatened. The justification reasons of a war show that an injury has been received, or so far threatened as to authorize a prevention of it by arms . . . . In judging whether a war be just, we must consider whether he who undertakes it, has in fact received an injury, or whether he be really threatened.[7]

Moreover, Francis Grimal claims that the regulation of 'assistance' in some of the pre-Charter treaties should in fact be deemed as a reference to threats of force.[8] This would mean that some of them tried to limit the threats of force

3 Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007) 8.

4 Gunboat diplomacy is defined as the 'actual or threatened use of limited naval force to secure a benefit in an international dispute' by a stronger State against a weaker one [JY Wong, 'The Limits of Naval Power: British Gunboat Diplomacy in China from the Nemesis to the Amethyst, 1839–1949' (2000) 18(2) *War & Society* 93].

5 Catherine Ladds, 'China and Treaty-Port Imperialism' in John M MacKenzie (ed), *The Encyclopedia of Empire* (John Wiley & Sons, Ltd. 2016) 1, 1.

6 Commodore Matthew C. Perry brought a letter from USA President Millard Fillmore to Japan, requesting the conclusion of a trade treaty. As the Japanese had traditionally pursued the policy of isolation, initially they were reluctant to accept the American offer. However, Perry threatened that, unless the USA's requests were fulfilled, he would land with his men and stay there until the matter was settled [Arthur Walworth, *Black Ships Off Japan. The Story of Commodore Perry's Expedition* (Archon Books 1966) 117].

7 M Emmerich de Vattel, *The Law of Nations: Or Principles of the Law of Nature; Applied to the Conduct and Affairs of Nations and Sovereigns*, Book III (S. & E. Butler 1805) para. 26.

8 This author finds connotations between the 'assistance' and 'threat of force' in the International Court of Justice (ICJ) judgment in the Nicaragua case:

> [The] Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.

in relations between its parties. In this context, one may invoke, for example, Art. III of the Treaty of Westphalia of 1648, which stated the following:

> And that a reciprocal Amity between the Emperor, and the Most Christian King, the Electors, Princes and States of the Empire, may be maintain'd so much the more firm and sincere (to say nothing at present of the Article of Security, which will be mention'd hereafter) the one shall never assist the present or future Enemys of the other under any Title or Pretence whatsoever, either with Arms, Money, Soldiers, or any sort of Ammunition; nor no one, who is a Member of this Pacification, shall suffer any Enemys Troops to retire thro' or sojourn in his Country.[9]

Article XXII of the Convention of Peace, Amity, Commerce, and Navigation of 1932 between the USA and Chile states the following:

> Whenever one of the contracting parties shall be engaged in war with another State, no citizen of the other contracting party shall accept a commission or letter of marque for the purpose of assisting or co-operating hostilely with the said enemy against the said party so at war, under the pain of being treated as a pirate.[10]

One of the first attempts to limit 'threats of war' (not 'assistance to war') was the resolution adopted by the First International Conference of American States, which was held in Washington, DC, from 1889 to 1890. It called for the elimination of conquest from American law and the 'nullification of any surrender of territory made under the threat of war or the pressure of armed force.'[11] This resolution, however, never became binding.[12]

At the beginning of the new century, a reference to 'ultimatum' – a specific type of threat of the use of force[13] – was made in Article 1 of the Third Hague Convention on the Opening of Hostilities:

> The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form

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[*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14, para. 193) (*Military and Paramilitary Activities in and against Nicaragua*); Francis Grimal, Threats of Force: International Law and Strategy (Routledge 2013) 15]

9 Treaty of Westphalia (24 October 1648): 'Peace Treaty Between the Holy Roman Emperor and the King of France and their respective Allies' (2011) 50(1) *Islamic Studies* 73.

10 Convention of Peace, Amity, Commerce, and Navigation (signed 16 May 1832) <https://avalon.law.yale.edu/19th_century/chile01.asp> accessed 1 September 2022.

11 Samuel Guy Inman, *Inter-American Conferences, 1826–1954: History and Problems* (The University Press of Washington, DC, and the Community College Press 1965) 43–44.

12 Ian Brownlie, 'International Law and the Use of Force by States Revisited' (2000) 21 *Australian Year Book of International Law* 1, 3.

13 See Chapter 3, Section 3.4.

> either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.[14]

As observed by F. Grimal, in the context of this provision, a threat of force, that is, as an ultimatum, seems permissible: A State may submit its ultimatum to another State, and if the latter does not meet the requirements included in the ultimatum, hostilities may legally commence.[15]

Next, threats of force were treated more broadly in the Covenant of the League of Nations. The Covenant did not prohibit threats of war; instead, it stated what measures may be undertaken in the event such threats affect one of the League's members.[16] An example of such an approach may be Article 10 of the Covenant, which stated the following:

> The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.[17]

In the case where a threat of war occurred, States were supposed to follow the procedure vaguely regulated in Article 11(1) of the Covenant:

> Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.

Even though Art. 11(1) established 'the general principle of political and legal interest of the League in case of war or threat of war,'[18] the meeting of the Council was made dependent upon a request submitted by a member State, after which the Secretary General summoned the Council to meet.[19]

The League did undertake some efforts to specify the procedure included in Art. 11(1). On 15 March 1927, the Committee of the Council released

14 Convention (III) relative to the Opening of Hostilities. The Hague, 18 October 1907, in Dietrich Schindler and Jiří Toman (eds), *The Laws of Armed Conflicts* (Martinus Nijhoff Publishers 1988) 57–9.

15 Grimal (n 8) 19.

16 Ibid 22.

17 Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 108 LNTS 188.

18 Robert Kolb, 'Article 11' in Robert Kolb (ed), *Commentaire sur le Pact de la Société des Nations* (Bruylant 2015) 447, 451.

19 Ibid.

recommendations concerning Art. 11 of the Covenant, stating that, in the case of an imminent threat of war, 'the Council shall meet with the greatest promptitude' and further specifying that even before that meeting, 'the Acting President should send telegraphic appeals to the parties to the dispute to refrain forthwith from any hostile acts.' According to the recommendations, 'As soon as the Council meets, it will no doubt verbally urge on the representatives of the nations in dispute the great importance of avoiding a breach of the peace.'[20] Given the content of the Committee's proposals, it does not seem that they could have substantially improved the work of the League or truly appeased tensions between States.

Commitments from Articles 10 and 11 were invoked in the context of threats of war during the Greco-Bulgarian dispute. On 19 October 1925, Bulgarian and Greek frontier guards exchanged shots. The Greek commander decided that the frontier was threatened and ordered his troops to trespass into Bulgarian territory. Bulgaria did not respond militarily but instead referred the case to the Council of the League of Nations, invoking Articles 10 and 11. On 23 October, the Council requested both parties to suspend hostilities and withdraw their troops. Greece replied that the measures undertaken were in fact a legitimate defence and did not withdraw its forces. On 26 October, the Council again requested both parties to withdraw their troops, this time giving the parties 24 hours to comply. As a result, Greece eventually evacuated its troops on 28 October. During the final session of the Council on 30 October 1925, British Foreign Secretary Austen Chamberlain observed that, '[A] threat of war anywhere is a menace which comes home to us all and which affects us all,' thus treating the threat of war against one of the League's members as in fact threatening all of its members.[21]

To sum up, the Covenant of the League of Nations did not prohibit threats of war nor did it limit them; it only introduced a procedure that allowed the League of Nations to adopt a joint response when threats of war occurred.[22]

Threats of war were not prohibited by the Briand-Kellogg Pact either, the most important act from the perspective of *jus ad bellum* in the inter-war period. In fact, the Pact did not even mention threats of war. Article I of the Pact stated the following:

> The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.[23]

20 Hans Wehberg, *The Outlawry of War* (Carnegie Endowment for International Peace 1951) 137.
21 Ibid 46–9.
22 Stürchler (n 3) 12.
23 General Treaty for Renunciation of War as an Instrument of National Policy (adopted 27 August 1927, entered into force 24 July 1929) 1929 94 LNTS 57.

And according to Article II:

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

Even though preparatory works on the Pact also indicate that the States did not intend to include any reference to threats of war in the Pact, there were some interpretations of this legal instrument that attempted to include threats of force. For instance, I. Brownlie claimed that the phrases 'recourse to war' and 'an instrument of national policy' also referred to, for example, ultimatums.[24] Similar conclusions were also reached during the 38th International Law Association Conference held in Budapest between 6–10 September 1934, when the International Law Association adopted the 'Budapest Articles on Interpretation' concerning the Briand-Kellogg Pact. Article 2 thereof stated that, 'A signatory State which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact.'[25] Moreover, one of the additional resolutions adopted during the conference held that,

> Signatories of the Pact should forthwith refuse and prohibit aid to any State commencing or threatening to commence recourse to armed force, and which refuses or fails, on the demand of any signatory State to submit the matter in dispute to the Permanent Court of International Justice or to some other agreed tribunal for final determination.[26]

Despite the fact that the 'Budapest Articles on Interpretation' were much more precise than the Pact, especially as concerns threats of force, they did not reflect the positions of States at that time.[27] Ultimately, no State invoked the Briand-Kellogg Pact in the inter-war period to claim that threats of war were illegal under the Pact.[28]

However, R. Kolb claims that the lack of explicit regulation of threats of war in the Briand-Kellogg Pact was subsequently dealt with in the 1930s,

24 Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 89.

25 Manley O Hudson, 'The Budapest Resolutions of 1934 on the Briand-Kellogg Pact of Paris' (1935) 29(1) *The American Journal of International Law* 92, 93. See also Elihu Lauterpacht, *International Law Being the Collected Papers of Hersch Lauterpacht*, *Volume 5: Disputes, War and Neutrality*, Parts IX–XIV (Cambridge University Press 2004) 424, 425, 427.

26 'Considerations of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations: Selected Background Documentation' (23 March 1964) UN Doc A/C.6/L.537/Rev 1, 43.

27 Grimal (n 8) 28.

28 An attempt to overcome the shortcomings of both the Covenant of the League of Nations and the Briand-Kellogg Pact was the Geneva Protocol for the Pacific Settlement of International Disputes [Albrecht Randelzhofer and Oliver Dörr, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 200, 206].

'particularly in the context of the Stimson Doctrine.'[29] When it comes to the first part of this view, in the 1930s the States indeed adopted a series of bilateral treaties guaranteeing mutual assistance not only in cases of aggression but also in the case of a threat of aggression.[30] However, these treaties did not prohibit the threat of aggression; they only established the obligation of mutual assistance in case such threats occurred.

In terms of the second part of Kolb's view, the meaning of the Stimson doctrine with respect to the prohibition of threats of war is doubtful. The doctrine was formulated in a telegram dated 7 January 1932 written by US Secretary of State Henry L. Stimson to the US Ambassador in Japan, in reaction to the Japanese policy against China. It stated as follows:

> [I]n view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Imperial Japanese Government and the Government of the Chinese Republic that it cannot admit the legality of any situation de facto nor does it intend to recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, independence, or the territorial and administrative integrity of the Republic of China, or to the international policy relative

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Not only did this latter act mention threats of war, but one of its provisions – Article 8 – was exclusively devoted to the prohibition of threats of war:

> The signatory States undertake to abstain from any act which might constitute a threat of aggression against another State. If one of the signatory States is of opinion that another State is making preparations for war, it shall have the right to bring the matter to the notice of the Council. The Council, if it ascertains that the facts are as alleged, shall proceed as provided in paragraphs 2, 4 and 5 of Article 7.
>
> (Protocol for the Pacific Settlement of International Disputes (adopted 2 October 1924) <www.refworld.org/docid/40421a204.html> accessed 1 September 2022)

Thus, the Protocol established not only the prohibition of threats of aggression but also the procedure to follow in case such threats were issued. However, the Geneva Protocol was rejected by the United Kingdom and never came into force (Jaroslav Žourek, *L'Interdiction de l'emploi de la Force en Droit international* (AW Sijthoff 1974) 34).

29 Robert Kolb, *International Law on the Maintenance of Peace: Jus Contra Bellum* (Elgar Publishing 2019) 79.

30 See, eg, Article(s) 1 of the Pacts of Mutual Assistance signed between the USSR and France on 2 May 1935 ['France–U.S.S.R Treaty of Mutual Assistance' (1936) 30(4) *AJIL* 177]; the USSR and Czechoslovakia on 16 May 1935 (Treaty of Mutual Assistance between the Czechoslovak Republic and the Union of Soviet Socialist Republics <www.forost.ungarisches-institut.de/pdf/19350516-1.pdf> accessed 1 September 2022); Latvia and the USSR on 5 October 1939 (Pact of Mutual Assistance between the Republic of Latvia and the Union of Soviet Socialist Republics <www.forost.ungarisches-institut.de/pdf/19391005-1.pdf> accessed 1 September 2022); Estonia and the USSR on 28 September 1939 (Pact of Mutual Assistance Between the U.S.S.R. and Estonia <www.lituanus.org/1968/68_2_03Doc6.html> accessed 1 September 2022).

> to China, commonly known as the 'open door policy'; and that it does not intend to recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which Treaty both China and Japan, as well as the United States, are parties.[31]

The Stimson doctrine established the principle of non-recognition of situations, treaties or agreements achieved in violation of the Pact of Paris, that is, by means of war. Again, however, Secretary Stimson did not mention threats of war, and his statement clearly referred only to violations in areas regulated by the Briand-Kellogg Pact. The Stimson doctrine was further included in the resolution adopted by the Assembly of the League of Nations on 11 March 1932, which also did not declare that the obligation of non-recognition covered situations, treaties or agreements reached by the threat of war.[32]

Nevertheless, it should be highlighted here that once again the doctrine of international law outpaced States' efforts in terms of the development of international law. The obligation of non-recognition of territorial acquisitions gained by the threat of war was proposed in a series of projects concerning different problems of international law presented in 1925 by the American Institute of International Law in collaboration with the Pan American Union. Project no. 30, titled 'Conquest,' stated that '[i]n the future territorial acquisitions obtained by means of war or under the menace of war or in presence of an armed force, to the detriment of any American Republic, shall not be lawful.'[33] Nevertheless, as in case of the 'Budapest Articles on Interpretation,' the bold ideas of scholars in the early twentieth century clearly did not influence the conduct of States.

Finally, the International Military Tribunal in Nuremberg highlighted the role that threats of war played in the Nazis' realization of their plan. Count one of the indictment – 'The Common Plan or Conspiracy' – stated that the Nazi Party wished to accomplish its aims 'by any means deemed opportune, including unlawful means, and contemplating ultimate resort to threat of force, force, and aggressive war.'[34] It was further observed that '[t]he aims and purposes of the Nazi conspirators . . . evolved and expanded as they acquired progressively greater power and became able to make more effective application

31 'The Secretary of State to the Ambassador in Japan (Forbes), Washington, 7 January 1932 – noon' (Document 57) in *Papers Related to the Foreign Relations of the United, 1931–1941*, *Volume I: Japan* 76.

32 'Resolution adopted by the Assembly on 11 March 1932, League of Nations Correspondence and Resolutions respecting Events in Shanghai and neighbourhood' (1932) 5, Miscellaneous 13.

33 'American Institute of International Law: Texts of Projects' (1926) 20(4) *AJIL* Supplement: Collaboration of the American Institute of International Law with the Pan American Union 300, 384.

34 'Indictment' in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 1 (1946) 27, 29–30.

of threats of force and threats of aggressive war.'[35] According to F. Grimal, this reference 'is significant because it judicially recognises the prohibition of threats of force within international law and enforces the prohibition by charging the members of the Nazi Party with this crime.'[36]

The Judgment of the Nuremberg Tribunal also includes examples of how the Nazis used threats of force in practice even in the inter-war period. One of the cases of such threats was the annexation of Austria: On 12 February 1938, Austrian Chancellor Kurt von Schuschnigg, confronted with the threat of a German invasion against his State, promised amnesty to Nazis imprisoned in Austria and the appointment of Nazis to ministerial posts. The threat of invasion was repeated when K. von Schuschnigg announced a plebiscite on the question of Austrian independence in March 1938: On 11 March, Adolf Hitler sent him two ultimatums demanding the cancellation of the plebiscite and the resignation of Schuschnigg within 3 hours; otherwise Germany was prepared to start the invasion. Schuschnigg caved in under the threat. Next Austrian Chancellor Arthur Seyss-Inquart immediately invited German troops into Austria to 'preserve order.' The invasion began on the next day, and on 13 March 1938, Austria was annexed by Germany.[37]

Another famous case of threats of force made by Nazi Germany in the inter-war period concerns Czechoslovakia. On 14 March 1939, President Emil Hacha and Foreign Minister František Chvalkovský went to Berlin at Adolf Hitler's invitation. During the meeting, Hitler, Joachim von Ribbentrop, Hermann Göring and Wilhelm Keitel told Hacha 'that if he would sign an agreement consenting to the incorporation of the Czech people in the German Reich at once, Bohemia and Moravia would be saved from destruction.'[38] Moreover, H. Göring threatened to destroy Prague from the air. Faced with these threats, E. Hacha and F. Chvalkovský signed the agreement of incorporation. On 15 March 1939, German troops entered Bohemia and Moravia, and on 16 March a decree was issued incorporating Bohemia and Moravia into the Reich as a protectorate.[39] Even though both the USA and the UK

35 Ibid 30.

36 Grimal (n 8) 29.

37 Indictment (n 34) 37.

38 'Judgement' in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, vol. 1 (1946) 171, 197.

39 Ibid 197–8. In fact, Czechoslovakia was also the victim of another threat of war that led to the acquisition of part of Czechoslovakian territory: the Munich agreement included an addendum

> stipulating that Czechoslovakia would have to settle its other border disputes with Poland and Hungary. Poland took advantage of the situation by delivering an ultimatum to Prague demanding that Czechoslovakia cede to Poland the duchy of Teschen, an old bone of contention in Polish-Czechoslovak relations. Isolated and demoralized, the Czechoslovak government acquiesced.
>
> (Lonnie Johnson, Central Europe: Enemies, Neighbors, Friends (OUP 1996) 199)

declared the German actions to be illegal and void, they *de facto* recognized the German administration over Moravia and Bohemia,[40] and other States did not raise any objections.

To sum up, before 1945 there was neither a treaty nor a customary norm that prohibited threats of war.[41] Likewise, the obligation of non-recognition of illegal situations or treaties did not embrace cases arising out of threats of war. While it is worth noting that, to some extent, the problem of threats of war was noted – as in the Covenant of the League of Nations or in bilateral treaties on mutual assistance – aside from doctrinal proposals there were no attempts to establish an absolute and explicit prohibition of threats of war. As a result, the prohibition of threats of force was introduced for the very first time only in the UN Charter and has no precedent in the pre-Charter period.[42]

1.2 Definition of the threat of force

The concept of threats of force was not subject to any closer characterization, neither before 1945 nor in the UN Charter.[43] Likewise, no other legal instruments define the term.

Czechoslovak Minister Hurban informed the US Secretary of State on 1 October 1938 that his State considered the ultimatum handed by Poland as a violation of the Briand-Kellogg Pact and 'paragraph 2 of the addenda to the agreement of the Four Powers reached at Munich on September 29th' ['The Czechoslovak Minister (Hurban) to the Secretary of State' (Document 691) in *Foreign Relations of the United States: Diplomatic Papers 1938, Vol. I: General* (US Government Printing Office 1955) 710].

40 Brownlie (n 24) 415–416.

41 See also, eg, Kolb (n 29) 331; Grimal (n 8) 11.

42 Similar views were expressed by, eg, France ['Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations' (1981) UN Doc A/36/41, para. 145] and Madagascar [Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States (16 October 1964) UN Doc A/AC.119/SR.9, 17]. See also 'Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations' (1982) UN Doc A/37/41, para. 411; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 12.

43 Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2010) 93; Christian Henderson, *The Use of Force and International Law* (Cambridge University Press 2018) 26; Tsagourias (n 2) 68; James A Green and Francis Grimal, *The Threat of Force as an Action in Self-Defense Under International Law* (2011) 44 *Vanderbilt Journal of Transnational Law* 285, 289; Grimal (n 8) 136–7. It should nevertheless be mentioned that even though during work on the UN Charter the shape of the current Article 2(4) changed, it always included the prohibition of threats of force. See, eg, the proposals of amendments to the prohibition of the threat or use of force presented by different States included in documents of the United Nations Conference on International Organization (vols. I–II): 'Proposals of the Delegation of the Republic of Bolivia for the Organization of a System of Peace and Security' (5 May 1945) Doc 2 (English) G/14 (r), 6; 'Amendments Presented by the Delegation of Iran to the Dumbarton Oaks Proposals' (5 May 1945) Doc 2 (English) G/14 (m), 1; 'Amendments to the Dumbarton Oaks Proposals Submitted on Behalf of Australia' (5 May 1945) Doc 2 (English) G/14 (l), 1;

The aim of this section is to characterize threats of force by investigating three crucial elements of a threat of force: the forms that the threats of force take; the subjective element; and the objective of threats of force. It is not the aim of this section to propose another definition of threats of force beyond those that have already been created in the doctrine of law, but rather to comprehensively describe what threats of force are and how to differentiate them from non-threatening acts.

1.2.1 Forms of threats of force

The first element of threats of force to be investigated is the form of acts that may constitute threats. Two positions may be distinguished here: the prevailing view is that threats may take various forms, including actions[44] and written and oral forms.[45]

'Amendments and Observations on the Dumbarton Oaks Proposals, Submitted by the Norwegian Delegation 3 May 1945' (4 May 1945) Doc 2 (English) G/7 (n) (1), 2; 'Amendments to the Proposal for the Maintenance of Peace and Security Agreed on at the Four Powers Conference of Dumbarton Oaks Supplemented as a Result of the Conference in Yalta, Submitted by the Netherlands Delegation to the San Francisco Conference' (1 May 1945) Doc 2 (English) G/7 (j) (l), 8; 'Additional Amendments Proposed by the Delegation of the Republic of Panama Concerning the Proposals for the Maintenance of Peace and Security Agreed Upon at the Conference of Dumbarton Oaks' (5 May 1945) Doc 2 (English) G/7 (g) (2), 6; 'Brazilian Comment on Dumbarton Oaks Proposals. Memorandum of Brazilian Acting Minister for Foreign Affairs to American Charge d'Affaires, 4 November 1944' (2 May 1945) Doc 2 (English) G/7 (e), 6. See also 'The United Nations Dumbarton Oaks Proposals for a General International Organization' Doc 1 G/I, 3.

44 Nicholas Tsagourias claims that threats of force may involve not only actions but also omissions. As an example, he refers to the 1994 resolution adopted by the Turkish parliament in which it granted the government powers, including military ones, to safeguard and defend Turkish interests in the event that Greece extended its territorial waters in the Aegean Sea. Greece labelled the resolution a violation of Article 2(4) (Tsagourias (n 2) 76). Likewise, during the discussion upon the Declaration of Friendly Relations, the representative of Madagascar said that '[a]cts of omission could also constitute threats, without armed forces necessarily being involved, as for example through the complete or partial interruption of economic relations and of means of communication' [Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, Summary Record (21 March 1966) UN Doc A/AC.125/SR.19, para. 9]. While it is theoretically plausible that threats of force could also take the form of omissions, it is difficult to find any examples of when a State, by its inaction, made a threat of force. The adoption of a resolution that allows a government to defend its national interests cannot be called an omission. On the other hand, the example presented by Madagascar is based on the assumption that threats of force cover instances of the use of not only armed forces but also economic and other kinds of interference. Thus, they do not represent convincing examples of threats of force committed by omission.

45 See the statements made by the representatives of Cyprus ['Consideration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations' (22 July 1964) UN Doc S/5725, 19; UNGA Official Records (29 November 1963) UN Doc A/C.6/SR.822, para. 7]; Madagascar [Special Committee on Principles of International Law Concerning Friendly Relations And

Oral and written threats of force may be either direct or indirect.[46] As an example of a direct threat, one may quote former USA Secretary of State Colin Powell, who in the context of the USA intervention in Iraq in 2003 stated that,

> [W]e must continue to put pressure on Iraq and to put force upon Iraq to make sure that the threat of force is not removed, because resolution 1441 (2002) was all about compliance, not inspections . . . . The threat of force must remain.[47]

On the other hand, States may perceive some statements as threats of force even when they do not directly refer to the use of force. For instance, during the debate within the UNSC, Pakistan referred to the official pamphlet issued on behalf of the Government of India in January 1962 titled 'Kashmir and the United Nations,' which stated that 'India is prepared to be patient and

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Co-Operation Among States, Summary Record (3 September 1964) UN Doc A/AC.119/SR.9, 17]; and China and Russia ['Letter dated 2009/08/18 from the Permanent Representative of China and the Permanent Representative of the Russian Federation to the Conference on Disarmament addressed to the Secretary-General of the Conference transmitting answers to the Principal questions and comments on the draft "Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force against Outer Space Objects (PPWT)" introduced by the Russian Federation and China' (29 February 2008) Doc CD/1839, 2]. See also Article I (w) of the African Union Non-Aggression and Common Defence Pact (adopted 1 January 2005, entered into force 18 December 2009) <https://au.int/en/treaties/african-union-non-aggression-and-common-defence-pact> accessed 1 September 2022; 'Third report on the draft code of offences against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur' (8 April 1985) UN Doc A/CN.4/387 and Corr. 1 and Corr. 2, paras. 89–92. More examples of written and oral forms of threats of force are included in Chapter 3. Similar views are also presented in the doctrine of law: Romana Sadurska, 'Threats of Force' (1988) 82 *AJIL* 239, 242–5; Marco Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54(2) *Netherlands International Law Review* 229, 235; Barry M Blechman and Tamara Cofman Wittes, 'Defining Moment: The Threat and Use of Force in American Foreign Policy' (1999) 114(1) *Political Science Quarterly* 1, 4, ft 7; Corten (n 43) 108; Hilaire McCoubrey and Nigel D White, *International Law and Armed Conflict* (Dartmouth Publishing Company 1992) 56; Tsagourias (n 2) 76; Branislav L Slantchev, *Military Threats: The Costs of Coercion and the Price of Peace* (Cambridge University Press 2011) 3, 65; François Dubuisson and Anne Lagerwall, 'Que signifie encore l'interdiction de recourir à la menace de la force?' in Karine Bannelier and others (eds), *L'intervention en Irak et le droit international* (Pedone 2004) 85, 86.

For more examples of written and oral threats of force, as well as threats of force as actions see Chapter 3.

46 See, eg, an explicit statement made on this point by Argentina [Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States (16 October 1964) UN Doc A/AC.119/SR.3, 11]. See also Corten (n 43) 108; Brownlie (n 24) 364; PH Winfield, 'The History of Intervention in International Law' (1922–1923) 3 *British Year Book of International Law* 130, 140; Tsagourias (n 2) 77; Nigel D White and Robert Cryer, 'Unilateral Enforcement of Resolution 687: A Threat Too Far?' (1999) 29(2) *California Western International Law Journal* 274, 252; and Grimal (n 8) 6.

47 UNSC Provisional Records (14 February 2003) UN Doc S/PV.4707, 20–21.

tolerant . . . but it is obvious that there is a limit to patience and tolerance.' In reaction to these words, the representative of Pakistan asked, 'If this is not a threat of the use of armed force, what would be clearer?'[48]

The catalogue of physical actions considered by States to constitute threats of force is very broad and includes, *inter alia*, troop concentrations; military manoeuvres near another State's borders; mobilization for the purpose of exerting pressure on the other State; violation of airspace and territorial waters; and so on.[49] As in the case of verbal and oral threats, actions may also be direct or indirect threats of the use of force.[50]

Another view concerning the forms of threats of force was vocalized by, *inter alia*, the representative of the Central African Republic during the session of the UNGA Sixth Committee[51] and by International Law Commission (ILC) member Edilbert Razafindralambo.[52] According to this position, statements made by a State's representatives can only amount to a threat of force if they are backed up by physical acts. However, this standpoint remains the minority view, especially given that States report many threats of force that remain merely in the form of oral or written communications and are never followed by the actual use of force, which does not make them permissible or legal under Art. 2(4).

1.2.2 Subjective elements – intent to use force and credibility of threats

Some scholars and States claim that it is impossible, or at least difficult,[53] to create a definition of the threat of force, mainly due to the fact that the qualification of a specific act as a threat of force would have to be based on a subjective test,[54] as '[t]he concept of threat is a matter of perception.'[55] Two elements

48 UNSC Official Records (1 February 1962) UN Doc S/PV.990, para. 76. For another case of indirect threats of force, see, eg, the claim made by Guyana that Suriname resorted to threats of force (*Republic of Guyana v. Republic of Suriname, Memorial of the Republic of Guyana*, vol. I (22 February 2005) para. 10.20 <https://pcacases.com/web/sendAttach/904> accessed 1 September 2022).

49 'Report of the International Law Commission on the work of its fortieth session, 9 May–29 July 1988' UN Doc A/43/10, para. 220, A/37/41 (n 42) para. 414; UNGA Official Records (5 November 1962) UN Doc A/C.6/SR.753, para. 31; UNGA Special Committee on the Question of Defining Aggression (26 June 1969) UN Doc A/AC.134/SR.25–51, 32.

50 See, eg, Constantine Antonopoulos, 'The Unilateral Use of Force by States in International Law' (DPhil thesis, University of Nottingham 1992) 115.

51 UNGA Official Records (29 November 1965) UN Doc A/C.6/SR.884, para. 27.

52 ILC Summary record of the 2,058th meeting (8 June 1988) UN Doc A/CN.4/SR.2058, 20.

53 Statement made by ILC Member Riyadh Mahmoud Sami Al-Qaysi (ILC Summary record of the 2,135th meeting (12 July 1989) UN Doc A/CN.4/SR.2135, 293, para. 2).

54 See the statements made by ILC Members Stephan C. McCaffrey (ILC Summary record of the 1,885th meeting (21 May 1985) UN Doc A/CN.4/SR.1885, para. 49) and Calero Rodrigues (ILC Summary record of the 1,817th meeting (10 May 1984) UN Doc A/CN.4/SR.1817, para. 16).

55 'Letter dated 2008/06/20 from the Permanent Representative of Canada to the Conference on Disarmament addressed to the Secretary-General of the Conference transmitting the report

of threats of force seem to be especially related to subjectivity – the assessment of the intent of the threatening State and the credibility of the threat(s).

When it comes to the intent of the threatening State, unless the State makes it abundantly clear that the act performed is a threat of force,[56] the targeted State must deduce this intent from the threatening State's words and conduct.[57] Thus, the determination that a State is threatening to use force against another is a matter of interpretation of the allegedly threatening State's intent.

It should be highlighted here that the question of whether the intent of the threatening State may be assessed individually by an allegedly targeted State is subject to some criticism. For instance, Albrecht Randelzhofer and Oliver Dörr claim that,

> It is not sufficient that another State reacts or believes it is reacting to a presumed threat of force. Only a threat directed towards a specific reaction on the part of the target State is unlawful under the terms of Art. 2(4).[58]

Nevertheless, the determination of whether there is a threat of force will always be a matter of the allegedly targeted State's individual judgment. R. Sadurska defines the threat of force as 'an act that is designed to create a psychological condition in the target of apprehension, anxiety and eventual fear.'[59] Thus, the threat is indeed a matter of subjective judgment, and what for one State constitutes a dreadful threat of force may for another State amount only to an unfriendly act that does not require any specific reaction; a case-by-case assessment is always needed. An example of the former situation may be the complaint made by Cuba in front of the UNSC concerning threats of force against it made by the USA.[60] According to Cuba, the USA threatened it by saying that 'any threat to the Cuban Government came not from the United

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of the Conference organized by UNIDIR entitled "Security in Space: the Next Generation" held from 31 March to 1 April 2008 in Geneva' (23 June 2008) Doc CD/1844, para. 53.

56 See, eg, the statements concerning Iraq quoted in Chapter 2, Section 2.4.

57 Tsagourias (n 2) 77; Antonopoulos (n 50) 115; Matthew C Waxman, 'The Power to Threaten War' (2014) 123 *The Yale Law Journal* 1626, 1635; Union Académique Internationale, *Dictionnaire de la Terminologie du Droit International* (Sirey 1960) 387; statements made by ILC Member Julio Barboza ('Draft articles on the draft Code of Crimes against the Peace and Security of Mankind. Titles and texts adopted by the Draft Committee: articles 13, 14 and 15 – reproduced in A/CN.4/SR.2134 to SR.2136' UN Doc A/CN.4/L.433, 295–296, para. 34). Some authors claim that there is a threat of force if the threatening State makes clear its intention to use force [see, eg, Grimal (n 8) 6; Mohamed S Helal, 'The ECOWAS Intervention in The Gambia – 2016' in Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 912, 928]. However, as multiple examples discussed in this book prove, the majority of the conduct that States deem to be threats of force does not require a clear manifestation of intent.

58 Randelzhofer and Dörr (n 28) 218. See also Grimal (n 8) 52.

59 Sadurska (n 45) 241.

60 UNSC Official Records (22 November 1961) UN Doc S/PV.980, para. 20.

States, but from the Cuban people, who would not tolerate indefinitely the repression to which they were subjected,'[61] as well as '[w]hat the United States and its sister American republics opposed was interference in the affairs of the American continent by dictatorships fraudulently imposed on their people.'[62] However, the USA denied any plans to intervene in Cuba during the meeting of the UNGA Committee, as well as denying that its statements amounted to a threat of force. An example of the situation when a State denies being the target of the potential threat of force could be that during the border dispute between the People's Republic of China (PRC) and India in the Karakoram and the Himalayas in 1962, India dismissed the Chinese threats to use force against it as a bluff.[63] Ultimately, China's threats of force turned out not to be deceitful – on 20 October 1962 the PRC attacked Indian forces.[64]

Both States and the doctrine of law[65] agree that, in order to serve its function, the threat of force must be credible. As one author put it, 'A threat is credible when it appears rational to implement it, when there is a sufficiently serious commitment to run the risk of armed encounter.'[66] On the other hand, States refer to this criterion by stating that the measures undertaken must 'make a State believe' that the use of force itself will take place.[67] Thus, as in the case of the intent of the threatening State, the assessment of credibility is subject to the individual judgment of a targeted State.[68]

In practice, States attach considerable significance to the credibility of threats, because they perceive that only credible threats can be effective,

61 UNGA Official Records (5 February 1962) UN Doc A/C.1/SR.1231, para. 29.

62 Ibid para. 44.

63 Neville Maxwell, *India's China War* (Pantheon Books 1970) 236–7.

64 Slantchev (n 45) 189.

65 See, eg, Blechman and Cofman Wittes (n 45) 6; Daryl Grayson Press, *Calculating Credibility: How Leaders Assess Military Threats* (Cornell University Press 2005) 10; Corten (n 43) 109; Anne Lagerwall, 'Threats of and Actual Military Strikes Against Syria – 2013 and 2017' in Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 828, 841; Ganesh Sitaraman, 'Credibility and War Powers' (2014) 127 *Harvard Law Review* 123, 125; Alexander L George, *Forceful Persuasion: Coercive Diplomacy as an Alternative to War* (US Institute of Peace Press 1991) 4; Matthew Waxman, 'War, Threats of Force, and Law: Thoughts on North Korea' (*Lawfare Blog*, 1 February 2018) <www.lawfareblog.com/war-threats-force-and-law-thoughts-north-korea> accessed 1 September 2022; Kirsten Schmalenbach, 'Article 52' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 871, 887. See also the Independent International Fact-Finding Mission on the Conflict in Georgia, 'Report,' vol. II (September 2009) 232.

66 Stürchler (n 3) 259.

67 Yearbook of the International Law Commission 1989, Volume II, Part Two, 68, para. 3. It was also suggested that the credibility of threats must be assessed in a reasonable way; see the statement made by the representative of Paraguay ['Comments and observations received from Governments' (1 March and 19 May 1993) UN Doc A/CN.4/448 and Add.1, 92, para. 14; see also A/CN.4/L.433 (n 57) 291, para. 58].

68 Statement made by ILC Member Pemmaraju Sreenivasa Rao (Ibid 294, para. 14).

meaning that only such threats may achieve the goals for which they were made.[69] For instance, in 1998, during the debate over the situation in the Federal Republic of Yugoslavia (FRY), the USA stated, 'We must acknowledge that a credible threat of force was key to achieving the OSCE and NATO agreements[70] and remains key to ensuring their full implementation.'[71] Likewise, in the course of the debate within the UNSC on the situation in Iraq in 2003, Spain suggested that Iraq agreed to international cooperation only because of credible threats of force against it,[72] while the UK representative clearly stated that it was possible to achieve the solution to the crisis only thanks to the fact that diplomatic efforts were backed by the credible threat of force.[73] During the same debate, the representative of Bulgaria also said that 'it is the threat of the use of military force and even the very presence of a

69 See, eg, the statements made by San Marino (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Public sitting (13 November 1995) Verbatim Record 1995/31, 20); Indonesia (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict/Legality of the Threat or Use of Nuclear Weapons*, Public sitting (7 November 1995) Verbatim Record 1995/27, 44); and Nauru (*Legality of the Threat or Use of Nuclear Weapons*, Letter dated 15 June 1995 from counsel appointed by Nauru, together with the Written Statement of the Government of Nauru: Memorial of the Government of the Republic of Nauru, 2) before the ICJ. See also Sadurska (n 45) 245.

70 The USA representative spoke about the agreement signed in Belgrade on 16 October 1998 by the Minister of Foreign Affairs of the FRY and the Chairman-in-Office of the Organization of the Security and Cooperation in Europe (OSCE) in order to establish a verification mission in Kosovo ('Letter Dated 19 October 1998 from the Permanent Representative of Poland to the United Nations Addressed to the Secretary-General' (20 October 1998) UN Doc S/1998/978), including the undertaking of the FRY to comply with resolutions 1160 (1998) and 1199 (1998), and the agreement signed in Belgrade on 15 October 1998 by the Chief of General Staff of the FRY and the Supreme Allied Commander of NATO, with Europe providing for the establishment of an air verification mission over Kosovo ('Letter Dated 22 October 1998 from the Chargé d'Affaires a.i. of the Mission of the United States of America to the United Nations Addressed to the President of the Security Council' (23 October 1998) UN Doc S/1998/991), complementing the OSCE Verification Mission.

71 UNSC Provisional Records (24 October 1998) UN Doc S/PV.3937, 15. See also statements on the role of credible threats of force made by the UK (quoted in Ian Brownlie and CJ Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 49(4) *The International and Comparative Law Quarterly* 878, 896); Croatia (UNSC Provisional Records (21 April 1994) UN Doc S/PV.3367, 6); the Chairman of the Sixth Summit Conference of the Organization of the Islamic Conference (Ibid 20); Malaysia (UNSC Provisional Records (14 February 1994) UN Doc S/PV.3336 Resumption 1, 81); and Yugoslavia (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict/Legality of the Threat or Use of Nuclear Weapons*, Public sitting (12 May 1999) Verbatim Record 1999/25, 17). See also Jane Perlez, 'Allies Call Kosovo Rivals to Peace Talks in France' (*The New York Times*, 30 January 1999) <www.nytimes.com/1999/01/30/world/allies-call-kosovo-rivals-to-peace-talks-in-france.html> accessed 1 September 2022.

72 S/PV.4707 (n 47) 16.

73 Ibid 18. See also Jeffrey Goldberg, 'The Obama Doctrine: The U.S. President Talks Through His Hardest Decisions About America's Role in the World' (*The Atlantic*, April 2016) <www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/> accessed 1 September 2022.

significant number of American and British soldiers on the borders of Iraq that make resolution 1441 (2002) truly credible.'[74]

There are no strict criteria to determine whether a State has a genuine intent to threaten the use of force against another State nor to determine whether such a threat is credible.[75] As mentioned, a case-by-case analysis is always needed. So, what circumstances should be taken into account? First of all, the 'State's past record of conduct' matters.[76] During the proceedings before the ICJ in the Lockerbie case, Ian Brownlie speaking on behalf of Libya, in order to review the evidence of threats of force made by the USA and the UK against Libya, mentioned, *inter alia*, the general history of relations between the United States and Libya particularly since 1978, including hostile acts directed against Libya; the persistent presence of the Sixth Fleet in the Central Mediterranean; and the use of the Sixth Fleet and bases in the United Kingdom for the air attacks of 1986.[77]

Other factors that should be taken into account include the general relations between the two States;[78] whether threats of force go 'hand in hand with preparations for the use of force;'[79] public support for military action; third nations' support for the threats; the reputation of the State making threats of force;[80] whether the threatening State carried out its threats of force in the past;[81] whether the State possesses the military power to carry out its threats;

74 UNSC Provisional Records (7 March 2003) UN Doc S/PV.4714, 31.

75 A/CN.4/L.433 (n 57) 291, para. 58. See the statement made by Brazil (UNGA Official Records (5 November 1963) UN Doc A/C.6/SR.805, para. 10). See also *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para. 47; White and Cryer (n 46) 255. See also the *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Merits) Corfu [1949] ICJ Rep 35 and Grimal (n 8) 57.

Article 2(2) (b) of the International Convention for the Suppression of Acts of Nuclear Terrorism states that any person commits an offence within the meaning of the Convention if that person '[d]emands unlawfully and intentionally radioactive material, a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force' (International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89).

76 Statement made by the representative of the USA within the Sixth Committee (UNGA Official Records, Sixth Committee (11 November 1963) UN Doc A/C.6/SR.808, para. 27).

77 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Public sitting (28 March 1992) Verbatim Record 92/5, 15. See also the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Public sitting (26 March 1991) Verbatim Record 92/2, 41.

78 Verbatim Record 92/5 (n 77) 16. See also Antonopoulos (n 50) 120.

79 Statement by ILC Member Edilbert Razafindralambo (ILC Summary record of the 1,884th meeting (20 May 1985) UN Doc A/CN.4/SR.1884, para. 39). See also Nigel D White, 'Self-defence, Security Council Authority and Iraq' in Richard Burchill, Nigel D White and Justin Morris, *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (Cambridge University Press 2005) 235, 259.

80 Blechman and Cofman Wittes (n 45) 7–9.

81 Corten (n 43) 110.

the threatening State's interest in direct military confrontation;[82] approval of the use of force by a proper organ of State (eg, Congress in the case of the USA);[83] and the general political, geographical and historical circumstances.[84]

In the context of the credibility of threats of force, the term 'excess' appears to have special significance, as some scholars observe that there is a category of statements that – even though acute and blunt – are nevertheless not credible enough to convince that they could constitute a threat of force.[85] Such statements made by, for example, a 'weak, remote and traditionally peaceful' State can be treated as simply verbal excess.[86] Consequently, when assessing whether there is a threat of force, one has to balance two questions: on one hand, the right of a victimized State to subjectively evaluate whether a statement made by another State amounts to a threat of force and, on the other hand, whether no threat of force actually occurred, but rather merely excessively strident language was used in the communications between two States. This differentiation seems to be important, as the State that feels threatened may try to use retorsions or other measures allowed by international law,[87] which would only deepen tensions between States. If a recognition of mere excess in communication is made early enough, a State that feels threatened may be stopped before it takes further steps.

To sum up, the analysis of the subjective element will never be an easy task, as it requires a close look at the reaction of one State to the conduct of another. A State may interpret the seemingly innocent actions of another State as a threat of force if it intuitively considers them hostile. Likewise, assessment of the credibility of threats of force is also subjective. Given the practice of States so far, one may point to a number of factors that are sometimes taken into account when States evaluate which threats might be credible.

1.2.3 The objective of the threat of force

Finally, an important element of a threat of force is the objective that the threatening State seeks to achieve. Usually, the objective of the threat of force is a certain demand: the threatening State claims it will use force unless a

82 Press (n 65) 10–11, 20.

83 Lori Fisler Damrosch, 'The Constitutional Responsibility of Congress for Military Engagements' (1995) 89(1) *AJIL* 58, 70.

84 Corten (n 43) 109.

85 'Report of the International Law Commission on the work of its forty-first session, 2 May–21 July 1989' UN Doc A/44/10, 68, para. 4. See also Yearbook of the International Law Commission 1989, Volume II, Part Two, 68, para. 4; statement by the ILC Member Ahmed Mahiou [ILC Summary record of the 2,060th meeting (10 June 1988) UN Doc A/CN.4/SR.2060, 105, para. 14].

86 Corten (n 43) 110.

87 See Chapter 4, Section 2.

targeted State meets its demand(s).[88] Examples of the objectives of threats of force may be to make a State change its internal policies;[89] accept a certain solution to a dispute;[90] comply with certain rules;[91] impose, uphold or change a certain political regime;[92] or weaken the threatened State.[93] Thus, in general, the objective of a threat of force is to make the targeted State subject to the will of the threatening State, regardless of whether this amounts to specific conduct, compliance with certain rules, or establishment of a specific domestic situation. The use of force is contingent upon the threatened State's failure to subordinate to the will of the threatening State.[94]

However, as White and Cryer aptly observed, the threatening State does not have to articulate the demands upon which the use of force is conditioned; there is no such requirement in Art. 2(4).[95] While it is true that the demands of the threatening State are the focal point of most threats of force (as the following chapters will demonstrate), the threat of force would be equally illegal if the threatening State did not raise any demands. To put this in the context of a simple example, the president of a State with a huge military arsenal, which has a long history of using force against weaker States, makes a television appearance in which he addresses a small neighbouring nation by saying, 'We will attack you.' Such a statement constitutes, under given circumstances, a violation of Art. 2(4), even though it does not include any special demand or condition that could prevent the threatening State from using force. Such threats are, however, very rare, because the threat of force (and the subsequent use of force) is not a goal in its own right; instead, it is a way to achieve some further goal(s).[96] In the same vein, demands do not have to be explicitly formulated.[97]

88 Statement made by the USA (A/AC.119/SR.3 (n 46) 14); Dubuisson and Lagerwall (n 45) 86.

89 Statement made by Madagascar (A/AC.125/SR.19 (n 44) para. 9). In this context, Hungary accused Israel of using threats of force 'to blackmail its allies, to try to impose its will upon the international community and to force public opinion to accept Israel's aspirations and ambitions' (UNGA Official Records (12 November 1981) UN Doc A/36/PV.55, para. 70).

90 Statement made by France with regard to the threats of airstrikes against Syria: 'As a result of the threat of strikes, which was not a mere stratagem, we have finally moved forward. We put pressure on the regime and its allies' (UNSC Provisional Records (27 September 2013) UN Doc S/PV.7038, 7). See also the statement by Malaysia in the case of Kosovo (UNSC Provisional Records (24 March 1999) UN Doc S/PV.3988, 9–10).

91 Statement by the UK in the case of Iraq (S/PV.4714 (n 74) 27).

92 UNGA Official Records, 1st Committee (1 December 1981) UN Doc A/C.1/36/PV.47, 41; statement made by China (UNSC Provisional Records (23 May 1986) UN Doc S/PV.2685, 16). See also the statement by Ecuador (A/37/41 (n 42) para. 32).

93 See the statement made by the USSR (UNSC Official Records (26 October 1983) UN Doc S/PV.2488, para. 48).

94 Tsagourias (n 2) 76.

95 White and Cryer (n 46) 253. See also Roscini (n 45) 235; Stürchler (n 3) 37; Waxman (n 57) 1635. Cf Dubuisson and Lagerwall (n 45) 86, 88, 94.

96 See, eg, A/CN.4/L.433 (n 57) 293, para. 9; see also statements made by ILC members Jiuyong Shi (A/CN.4/SR.2058 (n 52) 7) and Paul Reuter (A/CN.4/SR.2135 (n 53) 293, para. 9); Roscini (n 45) 234.

97 Lagerwall (n 65) 841.

1.2.4 Other elements of the threat of force

Apart from the three aspects of threats of force discussed in the previous sections, both States and scholars have referred to some other elements of threats.

Firstly, threats of force may be accompanied by a sense of urgency,[98] meaning that the targeted State is not given unlimited time to meet the demands formulated by the threatening State. Certain conduct may be expected to take place immediately, and the lack of any action within a short time will result in the use of force.

Secondly, threats of force may be isolated acts, but they also may be long-lasting or refer to well-established situations or disputes.[99] For instance in 1967, Greece, in taking a stand against the Turkish intervention in Cyprus, stated before the UNSC that, 'Cyprus has been living under the threat of invasion ever since 1963. That was the date of the first offensive movement of the Turkish armed forces.'[100] Similarly, on 25 April 1989, Panama requested a UNSC meeting due to the 'grave situation' it was facing 'as a result of the flagrant intervention in its internal affairs by the United States, the policy of destabilization and coercion pursued by the United States and the permanent threat of the use of force against Panama.'[101]

Thirdly, threats of force may be authenticated by – to quote I. Brownlie's address before the ICJ on behalf of Libya in the Lockerbie case – 'peremptory language,'[102] that is, statements such as 'The British and American Governments today declare that the Government of Libya must . . . ,' 'We expect Libya to comply promptly and in full,' and so on. In general, one may conclude that States are using 'peremptory language' when their statements are full of stringent demands, leaving the threatened State little or no room for manoeuvre.

These elements are not decisive when it comes to determining the existence of threats of force. At the same time, however, they may increase the sense of 'apprehension, anxiety and eventual fear'[103] on the part of a targeted State, or they may convince the rest of the international community that it is indeed dealing with a threat of force in violation of Art. 2(4).

1.2.5 Summary

Threats of force may take the form of both physical actions and written and oral communications. When deciding whether a certain action or statement amounts to a threat of force, one needs to assess not only the intent of the

98 Blechman and Cofman Wittes (n 45) 9–10.
99 Yearbook of the International Law Commission 1989, Volume II, Part Two, 68, para. 3.
100 UNSC Official Records (20 December 1967) UN Doc S/PV.1385, para. 62.
101 'Letter dated 25 April 1989 from the Permanent Representative of Panama to The United Nations Addressed to the President of the Security Council' (25 April 1989) UN Doc S/20606.
102 Verbatim Record 92/5 (n 77) 16. I. Brownlie used this term when speaking before the ICJ on behalf of Libya in the Lockerbie case to prove that the UK and the USA made threats of force against Libya.
103 Sadurska (n 45) 241.

threatening State but also the receipt and reaction of the targeted State(s). One should also bear in mind that, in order to serve its function, a threat of force needs to be credible. Because both of these elements are very subjective, one must evaluate them on a case-by-case basis, focusing in particular on the circumstances of a given case, the history of relations between the States concerned and the history of their military interventions in general.[104] A threat of force also usually expresses the objective that the threatening State wishes to achieve, upon which the use of force against the targeted State is dependent. This, however, is not an obligatory element, nor does it have to be made explicit.

Apart from the three key elements, there are also a few additional ones that may come in useful when assessing a State's actions and statements from the perspective of threats of force. For instance, a threatening State may demand that the targeted State fulfil the objective of its threat immediately, or it will carry out its threat; the targeted State may claim that the threat of force has been ongoing for an extended time; the mere language used by the threatening State may already strongly suggest that a threat of force is at stake; and many other elements may appear as well.

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2 The status of the prohibition of the threats of force

Introduction

This chapter discusses the status of the prohibition of threats of force. It starts by determining the relationship between the two prohibitions from Art. 2(4). Next, it seeks to establish the exact wording of and exceptions to the prohibition of the threats of force. It also notes the relations between prohibition and other norms of international law, which are often invoked by States together with the ban. As States use numerous different terms, including the word 'threat,' it is also important to establish if and how, they differ from the 'threat of force' from Article 2(4). Last but not least, it is important to find out whether the prohibition of threats of force is a peremptory or customary norm of international law.

The conclusions of these chapter are of utmost importance for the further examination of the threats of force: they will assist the reader to determine the place of the prohibition in the international legal order.

2.1 The prohibition of the threats of force v. the prohibition of the use of force

Article 2(4) of the UN Charter states as follows:

> 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.

Thus, this provision formulates two prohibitions: one on the use of force and the other on the threat of force. A similar regulation is also included in numerous other treaties.[1]

1 See, eg, Article 301 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396; Article 3(2) of the Agreement governing the activities of States on the moon and other celestial bodies

DOI: 10.4324/9781003376026-3

Does the fact that these two manners of conduct are prohibited by one and the same legal norm mean that they are indivisibly coupled and should be understood as one prohibition or, rather, are they connected only by their generic proximity? States often use the wording of Article 2(4) when talking about the

(adopted 18 December 1979, entered into force 11 July 1984) 1363 UNTS 3; Article 1 of the Inter-American Treaty of Reciprocal Assistance and Final Act of the Inter-American Conference for the Maintenance of Continental Peace and Security (adopted 2 September 1947, entered into force 3 December 1948) 21 UNTS 93; Article 1 of the American Treaty on Pacific Settlement (Pact of Bogota) (adopted 30 April 1948, entered into force 6 May 1949) 30 UNTS 83; Article 1 of the North Atlantic Treaty (adopted 4 April 1949, entered into force 24 August 1949) 34 UNTS 243; Article 1 of the Treaty of Friendship, Co-operation and Mutual Assistance between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian's People's Republic, the German Democratic Republic, the Polish People's Republic, the Romanian People's Republic, the Union of Soviet Socialist Republics and the Czechoslovak Republic (adopted 14 May 1955, entered into force 6 June 1955) 219 UNTS 23; Article I of the Southeast Asia Collective Defense Treaty (Manila Pact) (adopted 8 September 1954, entered into force 19 February 1955) <https://avalon.law.yale.edu/20th_century/usmu003.asp> accessed 1 September 2022; Article II of the Charter of the Islamic Conference (adopted 25 September 1969, entered into force 4 March 1972) 914 UNTS 110; Article 1 of the Security Treaty between Australia, New Zealand and the United States of America (adopted 1 September 1951, entered into force 29 April 1952) 131 UNTS 83; Article 2 of the Charter of the Shanghai Cooperation Organization (adopted 7 July 2002, entered into force 19 September 2003) 2896 UNTS 209; Article 4 of the Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3; seventh preambular paragraph of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3; Art. 25 of the protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, in Solomon Ebobrah and Armand Tanoh (eds), *Compendium of African Sub-Regional Human Rights Documents* (Pretoria University Law Press 2010) 203; Art. 1 of the Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71; Art. 4 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (adopted 27 January 1967, entered into force 10 October 1967) 610 UNTS 205; Art. 3 of the Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America (Tlatelolco Treaty) <www.iaea.org/publications/documents/treaties/treaty-prohibition-nuclear-weapons-latin-america-tlatelolco-treaty> accessed 1 September 2022; Art. 1 of Protocol 2 to the South Pacific Nuclear Free Zone Treaty (adopted 8–11 August 1986) Doc IAEA-INFCIRC/331/Add.1; Art. 2 to the Protocol to the Treaty on Southeast Asia Nuclear Weapon-Free Zone (adopted 15 December 1995) <https://treaties.unoda.org/t/bangkok_protocol> accessed 1 September 2022; Art. 1 of Protocol I to the African Nuclear Weapon-Free Zone Treaty (Pelindaba Treaty) <www.iaea.org/publications/documents/treaties/african-nuclear-weapon-free-zone-treaty-pelindaba-treaty> accessed 1 September 2022; Art. 1 of the Protocol to the Treaty on a Nuclear Weapon-Free Zone in Central Asia (adopted 6 May 2014) <https://treaties.unoda.org/t/canwfz_protocol> accessed 1 September 2022. See also soft law documents, including the Helsinki Final Act (adopted 1 August 1975) <www.osce.org/files/f/documents/5/c/39501.pdf> accessed 1 September 2022; Charter of Paris for a New Europe (21 November 1990) <www.osce.org/files/f/documents/0/6/39516.pdf> accessed 1 September 2022; and CSCE Budapest Document 1994: Towards a Genuine Partnership in a New Era (6 December 1994) <www.osce.org/files/f/documents/5/1/39554.pdf> accessed 1 September 2022.

prohibition of the 'threat or use of force' as though there is a single prohibition. This is not a coincidence because some States, for example, Nauru and Malaysia, claim that the United Nations Charter 'treats "threat or use" as a single, indivisible concept';[2] others say that they are 'inseparably linked' in Article 2(4).[3]

Most authors, however, maintain that the prohibition of threats of force and the prohibition of the use of force are distinguishable and constitute two different concepts.[4] At the same time, although the prohibition of threats of force may be called 'the neglected younger sibling'[5] of the prohibition of the use of force, both have the same legal status on the grounds of Article 2(4). This position is

2 *Legality of the Threat or Use of Nuclear Weapons*, Note Verbale dated 19 June 1995 from the Embassy of Malaysia, together with Written Statement of the Government of Malaysia, 2; *Legality of the Threat or Use of Nuclear Weapons*, Letter dated 15 June 1995 from counsel appointed by Nauru, together with the Written Statement of the Government of Nauru: Memorial of the Government of the Republic of Nauru, 2. See also Carsten Stahn, 'Between Law-Breaking and Law-Making; Syria, Humanitarian Intervention and What the Law Ought to Be' (2014) 19(1) *Journal of Conflict and Security Law* 25, 44–5; Nigel D White and Robert Cryer, 'Unilateral Enforcement of Resolution 687: A Threat Too Far?' (1999) 29(2) *California Western International Law Journal* 243, 254. This view is also expressed by some authors. For example, J Craig Barker states that 'the concept of the "threat or use of force" has been treated as a single prohibition against the use of force in general' (J Craig Barker, *International Law and International Relations* (Continuum 2000) 127).

3 'Report of Special Committee on Enhancing Effectiveness of Principle of Non-Use of Force in International Relations' UN Doc A/33/41, para. 62. It is also easy to observe that the coupled prohibition of 'the threat or use of force' appears in most UN resolutions and statements. Very rarely do UN organs refer directly to threats of force; see, eg, the resolution on Implementation of the Declaration on the Strengthening of International Security, which reaffirmed the opposition 'to any threats of use of force, intervention, aggression, foreign occupation and measures of political and economic coercion with attempt to violate the sovereignty, territorial integrity, independence and security of States' [UNGA Resolution 3389 'Implementation of the Declaration on the Strengthening of International Security' (18 November 1975) UN Doc A/RES/3389(XXX)]. In a statement made on behalf of the UNSC, its president stated, *inter alia*, that, 'The Security Council also calls on both parties to show maximum restraint and to refrain from any threat of use of force against each other' ('Statement by the President of the Security Council' (4 October 2005) UN Doc S/PRST/2005/47).

4 Nicholas Tsagourias, 'The Prohibition of Threats of Force' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar Publishing 2013) 67, 67; Romana Sadurska, 'Threats of Force' (1988) 82 *AJIL* 239, 239; Marco Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54(2) *Netherlands International Law Review* 229, 276; 'Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations' UN Doc A/35/41, para. 178; 'Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations' UN Doc A/42/41, paras. 44–5.

It should be observed that different commentators pay attention to different levels of distinctiveness between both prohibitions. To mention just the discussion within the ILC, Amado noted the difference in the gravity of the use of force and the threat of force on the grounds of international criminal law, while Yepes observed that there is a 'difference of degree between the threat of employment of armed force and the actual employment of it' [(1951) 1 Yearbook of the International Law Commission 58, paras. 34, 40].

5 White and Cryer (n 2) 244.

supported by States,[6] scholars,[7] and ICJ decisions, as well as by regional treaties and resolutions.[8] The present author also supports this latter view.

At the same time, it is impossible not to notice that even if the prohibition of the threat of force and the prohibition of the use of force are two different legal norms, they are linked with each other. Some describe this connection by stating that both bans 'merge into each other.'[9] Others say that the use of force itself may sometimes constitute the threat;[10] that at times it may be difficult to distinguish between the threat of force and the use of force; that there is an 'absolute symmetry' between the prohibition of the use and the threat of force;[11] or that there is a low threshold between threats of force and the use

6 Statements made by Indonesia (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict/Legality of the Threat or Use of Nuclear Weapons,* Public sitting (3 November 1995) Verbatim Record 1995/25, 24); Iran (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict/Legality of the Threat or Use of Nuclear Weapons,* Public sitting (6 November 1995) Verbatim Record 1995/26, 24); San Marino (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Public sitting (13 November 1995) Verbatim Record 1995/31, 20); Mexico (*Legality of the Threat or Use of Nuclear Weapons*, Note Verbale 19 June 1995 from the Embassy of Mexico, together with Written Statement of the Government of Mexico, para. 34); Malaysia (Note Verbale dated 19 June 1995 from the Embassy of Malaysia (n 2) 8); Austria (UNGA Official Records (15 November 1972) UN Doc A/PV.2085, para. 54) and Nauru (Letter dated 15 June 1995 from counsel appointed by Nauru: Memorial (n 2) 11).

7 Christian Henderson, *The Use of Force and International Law* (Cambridge University Press 2018) 30; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2010) 113; Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *The European Journal of International Law* 1, 11; Francis Grimal, *Threats of Force: International Law and Strategy* (Routledge 2013) 163; James A Green and Francis Grimal, *The Threat of Force as an Action in Self-Defense Under International Law* (2011) 44 *Vanderbilt Journal of Transnational Law* 285, 311; Anne Lagerwall, 'Threats of and Actual Military Strikes Against Syria – 2013 and 2017' in Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 828, 842; *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Weeramantry 525; Georg Dahm and Jost Delbrück, *Völkerrecht*, Volume I/3 (De Gruyter 2002) 824; Lori Fisler Damrosch, 'The Constitutional Responsibility of Congress for Military Engagements' (1995) 89(1) *AJIL* 58, 69. Cf the 'Report of the Special Committee on the Question of Defining Aggression' (26 November 1954) UN Doc A/2806, para. 25.

8 Corten (n 7) 113; Green and Grimal (n 7) 311; Dino Kritsiotis, 'Close Encounters of a Sovereign Kind' (2009) 20(2) *The European Journal of International Law* 299, 301. See also the Dissenting Opinion of Judge Weeramantry (n 7) 526.

9 Statements made by Indonesia (Verbatim Record 1995/25 (n 6) 32); Nauru (Letter dated 15 June 1995 from counsel appointed by Nauru: Memorial (n 2) 23); and Qatar (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict/Legality of the Threat or Use of Nuclear Weapons,* Public sitting (10 November 1995) Verbatim Record 1995/29, 27).

10 Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007) 262; Independent International Fact-Finding Mission on the Conflict in Georgia (n 31) 232. According to these commentators, even a very limited use of force may amount to an infringement of Article 2(4), not under the label of the use of force but as the threat of force.

11 François Dubuisson and Anne Lagerwall, 'Que signifie encore l'interdiction de recourir à la menace de la force?' in Karine Bannelier and others (eds), *L'intervention en Irak et le droit international* (Pedone 2004) 85, 88–9.

of force.[12] While these statements could prove correct under very specific and limited circumstances, this work will note two other links between both prohibitions that always accompany them: firstly, there is the formal link, connected with the wording of the prohibition of the use of force and the formulation of Article 2(4); and secondly, there is the link of a normative character concerning the exceptions to the prohibition of threats of force.

2.1.1 '[A]gainst the territorial integrity and political independence or in any other manner inconsistent with the purposes of the United Nations'

The second part of Article 2(4) of the UN Charter – 'against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations' – was added upon the request of smaller States, who sought by these words the reinforcement of international peace and security and the guarantee of their independence.[13] Thus, in opposition to some views presented in the doctrine of law, these words were supposed to establish the absolute prohibition of the use of force and to exclude any possible pretext for the use of force outside the right to self-defence and collective action under UNSC authorization.

However, the wording 'against the territorial integrity' refers not only to the prohibition of the use of force, despite the fact that it directly follows the term 'use of force,' but also to the prohibition of threats of force.[14] Both States[15] and scholars[16] have stated several times that there is a prohibition of threats of force against 'the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United

12 Nigel D White, 'Self-defence, Security Council authority and Iraq' in Richard Burchill, Nigel D White and Justin Morris, *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey* (Cambridge University Press 2005) 235, 259.

13 The United Nations Conference on International Organization, Yearbook of the United Nations 1946–1947, 19; Albrecht Randelzhofer and Oliver Dörr, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 200, 216.

14 Such a view is also expressed by Grimal (n 7) 36.

15 Statements made by France (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict/Legality of the Threat or Use of Nuclear Weapons*, Public sitting (1 November 1995) Verbatim Record 1995/23, 65); Mexico (Note Verbale dated 19 June 1995 from the Embassy of Mexico (n 6) para. 31); Malaysia (Note Verbale dated 19 June 1995 from the Embassy of Malaysia (n 2) 17); Nauru (Letter dated 15 June 1995 from counsel appointed by Nauru: Memorial (n 2) 23); Cyprus ('Letter dated 31 July 1965 from the Permanent Representative of Cyprus Addressed to the President of the Security Council' (2 August 1965) UN Doc S/6581); and the USSR (UNGA Official Records, Sixth Committee (29 October 1963) UN Doc A/C.6/SR.802, para. 25).

16 See, eg, the dissenting opinion of Judge Weeramantry (n 7) 525. See also the Tallin Manual on International Law Applicable to Cyber Warfare prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence (General Editor: Michael N Schmitt) (Cambridge University Press 2013) 45, Rule 10.

Nations.' This means that the prohibition of threats of force, like the prohibition of the use of force, is also an absolute ban, and all threats of force, barring the two noted exceptions, are illegal.[17]

2.1.2 Exceptions to the prohibition of the threats of force

The overwhelming majority of States[18] and scholars[19] present the view that the threat of force is illegal if under the same circumstances the use of force is also illegal. Likewise, the ICJ stated in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, '[I]f it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.'[20] F. Grimal explains this symmetry by saying that '[b]ecause Article

17 However, as in the case of the prohibition of the use of force, there were also attempts to interpret the prohibition of the threats of force, such that if there were a case of threats of force that did not contravene territorial integrity, political independence or the purposes of the UN, such threats could be legal, even if they do not fall into one of the exceptions. For instance, with regard to 'defensive quarantine,' L. Henkin stated that the threat of force in that case was 'minimal and conditioned on legitimate demands.' According to him, one could argue that there was no threat of force against the political independence or territorial integrity of Cuba or Russia, nor any other State whose vessels could be affected. Moreover, the threat was also not against the purposes of the United Nations because

> its purpose was not aggressive but rather defensive, to eliminate a potential threat to peace . . . .[S]uch force was not threatened unilaterally but only pursuant to the authorization and recommendation of the OAS, a regional organization contemplated by the Charter and furthering its purposes.
>
> (Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press 1979) 299)

18 Statements made by Indonesia (Verbatim Record 1995/25 (n 6) 37); UK (*Legality of the Threat or Use of Nuclear Weapons*, Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Comments of the United Kingdom, para. 3.119); France (Verbatim Record 1995/23 (n 15) p. 65); Lesotho (*Legality of the Threat or Use of Nuclear Weapons*, Letter dated 20 June 1995 from the Permanent Representative of Lesotho to the United Nations, 2); USA (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict/Legality of the Threat or Use of Nuclear Weapons,* Public sitting (15 November 1995), Verbatim Record 1995/34, 79); Malaysia (Note Verbale dated 19 June 1995 from the Embassy of Malaysia (n 2) 8); and Nauru (Letter dated 15 June 1995 from counsel appointed by Nauru: Memorial (n 2) 2, 11).

19 See, eg, Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 364; Hilaire McCoubrey and Nigel D White, *International Law and Armed Conflict* (Dartmouth Publishing Company 1992) 57; Lagerwall (n 7) 842; Matthew A Myers, 'Deterrence and the Threat of Force Ban: Does the UN Charter Prohibit Some Military Exercises?' (1999) 162 *Military Law Review*, 132, 172. See also the Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations (1984) UN Doc A/39/41, paras. 91, 95–97; Dubuisson and Lagerwall (n 11) 89. The opposite view is presented by Sadurska (n 4) 250; Robert Kolb, *International Law on the Maintenance of Peace: Jus Contra Bellum* (Elgar Publishing 2019) 332.

20 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para. 47. See also the finding made by the ICJ in the Nicaragua case that the '"threat of

2(4) refers to both threats and use in the same breath, it is logical to assume that the same exceptions apply also to threats.'[21]

There are two exceptions to the prohibition of the use of force – the right to self-defence, as defined in Art. 51 of the UN Charter, and collective action authorized by the UNSC under Chapter VII of the UN Charter. The position presented previously means that the same exceptions apply also to the prohibition of threats of force, that is, self-defence and collective actions authorized by the UNSC are exceptions to the prohibition of threats of force.[22] To put it differently, if a State is entitled under certain circumstances to exercise the right to self-defence, it may choose not to use force in reply but to respond with the threat of the use of force in self-defence. Likewise, if the UNSC authorized States to conduct an armed intervention under Art. 42 of the UN Charter, these States may, instead of using force, threaten to carry out the intervention authorized by the UNSC. The same applies also to Art. 53(1) because, as FRY claimed in relation to threats of force made by NATO against it,

> NATO is a regional military organization and in Article 53, para 1 of the UN Charter it is expressly stated that no regional arrangements or regional agencies can utilize any enforcement action without the authorization of the Security Council. The UN Security Council has not authorized NATO to undertake enforcement measures against the FR of Yugoslavia and the NATO threat therefore represents a direct violation of the Charter of the United Nations and a threat to the sovereignty and territorial integrity of our country.[23]

However, the connection between exceptions to the threat of force and the use of force raises at least two concerns.

Firstly, as some authors have pointed out, 'it is not always possible to assess, when the threat is made, that an eventual use of force will be itself unlawful,'[24]

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force" . . . is equally forbidden by the principle of non-use of force' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep, para. 227).

21 Grimal (n 7) 38.

22 *Legality of the Threat or Use of Nuclear Weapons*, Written Comments of the Government of Egypt on other Written Statements, 16–17, para. 39; *Legality of the Threat or Use of Nuclear Weapons*, Note Verbale dated 20 June 1995 from the Embassy of New Zealand, together with Written Statement of the Government of New Zealand, 13, para. 52; Green, Grimal (n 7) 295; Myers (n 19) 136; Stürchler (n 10) 219. Cf Dissenting Opinion of Judge Weeramantry (n 7) 526.

23 'Letter dated 5 February 1999 from the Chargé d'Affaires a.i. of the Permanent Mission of the Federal Republic of Yugoslavia to the United Nations Office in Geneva addressed to the Chairman of the Commission on Human Rights' (26 February 1999) UN Doc E/CN.4/1999/119, 2.

24 Michael Wood, 'Use of Force, Prohibition of Threat' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law*, Thematic Series

for instance, when a State makes a threat of force anticipating UNSC authorization.[25] However, if such an authorization has not yet been issued, the threat of force is also illegal. The threat of force is legal when the legal grounds for the actual use of force have already materialized, not when such grounds may occur in the future. Thus, if the UNSC has not yet issued authorization for a collective armed intervention, a State is not entitled to threaten another with conducting such an intervention. Similarly, it is not permissible to issue threats of the use of force in self-defence due to the threat of an armed attack. The use of force in self-defence is legal only after an armed attack has occurred; thus, a threat of the use of force in self-defence is also legal only in its aftermath. Otherwise, if States were allowed to threaten the use of force in reply to the threat of the use of force, it could seriously undermine international peace and security.

Secondly, it should be observed that the fact that the prohibition of the use of force and the prohibition of the threat of force share exceptions means that States should attempt to save the use of force as a last resort.[26] If we interpret both bans and exceptions to them *a minori ad maius*, it would mean that if circumstances arise justifying the right to self-defence, a State should first choose to threaten the attacking State with the use of force, and if this measure turns out to be ineffective, it is then entitled to use force in self-defence.[27] Likewise, if the UNSC authorized a collective action under Art. 42, States should first attempt to threaten to carry out such an intervention, and if the threat does not produce the intended effects, only then should they turn to the use of force. This is so because the threat of force is far less destructive than the use of force; thus, if legal threats of force could possibly have the same effect as the use of force, States must try them. On the other hand, if the threats of force turn out to be ineffective and the conditions of exceptions to the prohibition of the use of force still exist, the State should be allowed to proceed with the use of force. This finding is consistent with the rule according to which the use of force should be an *ultima ratio*.

The opposite situation is not permissible, that is, when a State has already used force in self-defence or has conducted an armed intervention authorized by the UNSC, but it still continues to issue threats of force based on the

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Volume 2: The Law of Armed Conflict and the Use of Force (OUP 2017) 1300, 1301, para. 10. See also Lagerwall (n 7) 845; Kolb (n 19) 333.

25 Wood (n 24) 1301, para. 10.

26 Nevertheless, one has to agree with Oscar Schachter when he writes that '[t]here is no legal rule that a State must turn the other cheek because of its obligation under Article 2(3) to seek peaceful settlement' (Oscar Schachter, 'International Law in Theory and Practice. General Course in Public International Law' (1982) 178 *Recueil de Cours* 1, 152–153). Thus, the use of force may turn out to be the only effective alternative to repel an armed attack when there is 'no reasonable prospect of the efficacy of peaceful measures of settlement' (Ibid 154). In such a case, obviously, a State does not have to employ non-forcible measures before using force.

27 See Green and Grimal (n 7) 307.

conditions that allowed it to use force in order to 'strengthen the effect' of the use of force, deter future disputes or simply demonstrate that the intervention did not happen by chance because they is a very powerful State. None of these purposes complies with the aims of contemporary legal exceptions to the prohibitions of the threat and use of force. Thus, when a State employs the most far-reaching tool it has at its disposal – that is, the use of force – it is no longer allowed to use threats of force for the same reason and on the same grounds, because such threats would only serve to exacerbate tensions between States.

2.2 Other norms breached by the threat of force

An illegal threat of force obviously violates Art. 2(4) of the UN Charter. However, this is not the only rule that is breached by such a threat.

The most frequently mentioned norm violated by threats of force is Art. 2(3) of the UN Charter,[28] which states the following:

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

As was mentioned in the previous chapter, threats of force are often used to resolve conflicts between States or, to put it more precisely, to extort the most favourable resolution of the dispute for the State that is issuing such threats of force. Obviously, '[t]he threat of use of force because of its coercive nature does not constitute a peaceful means for the settlement of disputes between States in the sense of Article 2(3) of the U.N. Charter.'[29] Thus, for some States Art. 2(3) complements the prohibition of threats of force[30] in the sense that it requires States to abandon coercion in the process of resolving disputes and make them use peaceful means instead. The

28 See, eg, the statement made by Cambodia ('Identical letters dated 8 August 2010 from the Permanent Representative of Cambodia to the United Nations addressed to the President of the General Assembly and the President of the Security Council' (11 August 2010) UN Doc A/64/891–S/2010/426, 2).

29 Constantine Antonopoulos, 'The Unilateral Use of Force by States in International Law' (DPhil thesis, University of Nottingham 1992) 119.

30 Statements made by Malaysia (Note Verbale dated 19 June 1995 from the Embassy of Malaysia (n 2) 4) and Nauru (Letter dated 15 June 1995 from counsel appointed by Nauru: Memorial (n 2) 5). See also Stürchler (n 10) 53; Independent International Fact-Finding Mission on the Conflict in Georgia, 'Report', vol. II (September 2009) 237. See also Article 9 of the Japanese Constitution, which states that '[a]spiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes' [The Constitution of Japan (promulgated 3 November 1946, came into force 3 May 1947) <https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html> accessed 1 September 2022].

prohibition of the threat of force, together with Article 2(3) of the UN Charter, not only bans certain conduct by States but also points out the right way to resolve disputes.[31]

Other States claim that threats of force violate Art. 2(7) of the UN Charter, which establishes the following:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Even though Art. 2(7) of the UN Charter prohibits the United Nations from intervention in matters that are essentially within the domestic jurisdiction of States, it tends to be invoked as an emanation of a general principle of non-intervention.[32]

Among other UN Charter provisions, States also mention passages from the Charter's preamble,[33] Article 1[34] (particularly its first paragraph[35]), and Articles 2(1) and 2(2).[36] Scholars have also referred in general to Chapters VI and VII of the UN Charter.[37] At times, States have claimed more broadly that threats of force violate the 'purposes and principles of the UN Charter.'[38]

31 The prohibition of using threats of force as a means of settling disputes can also be deduced from the UNGA Res. 2625(XXV) 'Declaration on the Principles of International Law Governing Friendly Relations between States' (24 October 1970) UN Doc A/RES/2625: 'Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues' (see Grimal (n 7) 49).

32 Statements made by Argentina (UNSC Official Records (6 April 1948) UN Doc S/PV.278, 6), Syria (UNSC Official Records (17 March 1948) UN Doc S/PV.268, 95), and the USA (Ibid 99).

33 Note Verbale dated 19 June 1995 from the Embassy of Malaysia (n 2) 4.

34 Statement made by Chile (UNSC Official Records (31 March 1948) UN Doc S/PV.276, 268–269).

35 Statement made by Syria ('Identical letters dated 11 April 2018 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council' (12 April 2018) UN Doc S/2018/332).

36 S/6581 (n 15).

37 Tsagourias (n 4) 68; Stürchler (n 10) 53.

38 Statements made by the League of Arab States ('Letter dated 24 April 2002 from the Chargé d'Affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General' (15 August 2002) UN Doc A/56/1026-S/2002/932, 16, para. 10) and Czechoslovakia (UNGA Official Records (22 October 1957) UN Doc A/PV.708, para. 227). See also the statement made by Iran ('Letter dated 17 March 2006 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (22 March 2006) UN Doc A/60/730–S/2006/178, 3).

Apart from the UN Charter, in specific cases States have also referred to other treaties, the provisions of which are violated by the threat of force. For instance, in October 2008 Thailand claimed, in front of the President of the UNSC, that threats of force made against this State by Cambodia violated, in addition to Art. 2(4), the Treaty of Amity and Cooperation in Southeast Asia.[39] The same year, Haiti argued that the Dominican threats of force violated not only the UN Charter but also the OAS Charter and the Rio Treaty.[40] Likewise, in the award in arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, the tribunal ruled that the threats of force made by Suriname violated the United Nations Convention on the Law of the Sea.[41] Interestingly, the Solomon Islands stated that a State that threatens the use of force, violates, *inter alia*, Art. 1 Common to the Geneva Conventions of 12 August 1949, as well as Articles 1(1) and 40 of the Protocol Additional (I) to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts.[42] The same State also pointed out that threats of force violate certain principles included in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, such as the obligation of cooperation in the maintenance of international peace and security and the duty to fulfil in good faith obligations stemming from the UN Charter, rules and principles of international law, and international agreements.[43] Finally, States complaining about threats of force have also generally claimed that such threats violate 'principles of international law.'[44]

39 'Letter dated 16 October 2008 from the Permanent Representative of Thailand to the United Nations addressed to the President of the Security Council' (17 October 2008) UN Doc S/2008/657, para. 2.

40 'Cable dated 7 June 1964 Addressed to the President of the Security Council by the Secretary of State for Foreign Affairs of the Republic of Haiti' (8 June 1964) UN Doc S/5750.

In Article 1, parties to the Rio Treaty stated that they 'formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or of this Treaty' (Inter-American Treaty of Reciprocal Assistance (n 1)).

41 United Nations, 'Award in the Arbitration Regarding the Delimitation of the Maritime Boundary Between Guyana and Suriname' (2007) 30 *Reports of International Arbitral Awards* para. 488 (2).

42 *Legality of the Threat or Use of Nuclear Weapons*, Letter dated 19 June 1995 from the Permanent Representative of Solomon Islands to the United Nations, together with the Written Statement of the Government of Solomon Islands 25, paras. 3.8., 3.10.

43 Ibid 25, para. 3.8.

44 'Letter dated 1 July 1992 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General' (6 July 1992) UN Doc S/24239; statement made by the Heads of State or Government of the Movement of the Non-Aligned Countries ('Letter dated 4 March 2003 from the Chargé d'Affaires a.i. of the Permanent Mission of Malaysia to the United Nations addressed to the Secretary-General' (18 March 2003) A/57/759–S/2003/332, para. 21).

2.3 Different kinds of threats

It was mentioned in the introductory chapter that the current book focuses only on those cases when States, international organs or other relevant actors have referred to the 'threat of force' (or the variations of this term) and that the reasons behind this method would be spelled out in Chapter 2. Now is the appropriate time and place to submit such an explanation.

'Threat of force' is not the only term wherein States use the word 'threat.' In fact, 'threat' appears to be one of the most frequently used terms by States, a catch-all phrase often used when they feel endangered – or consider that the international community is endangered – by some situation, not necessarily connected with forcible measures.[45] Written and oral statements made by States, international treaties, the UN Charter and other instruments include a wide variety of different phrases that describe menaces.[46] The following list attempts to define some of the most frequently used phrases that include the word 'threat.'[47] By no means should it be treated as a complete catalogue of all phrases that contain the word 'threat'; its aim is rather to demonstrate that, owing to the popularity of this word, States do not invoke a 'threat of force' within the meaning of Article 2(4) every time they use the word 'threat.'

Firstly, States often mention that there is a 'threat to the peace.' Under Article 39 of the UN Charter, if the UNSC establishes that there is a 'threat to the peace,' it opens the way for the UNSC to apply measures from Chapter VII. 'Threat to the peace' is the broadest and the most oft-used concept from Article 39.[48] Theoretically, the UNSC may determine a threat to the peace based on any kind of conduct by States. Indeed, in practice this term covers a broad range of situations: armed conflicts; a dramatic humanitarian situation; an influx of refugees; violation of a peace agreement;[49] serious violations of

45 See also Corten (n 7) 94.

46 Jan Klabbers, 'Intervention, Armed Intervention, Armed Attack, Threat to Peace, Act of Aggression, and Threat or Use of Force: What's the Difference?' in Marc Weller, Alexia Solomou and Jake William Rylatt (eds), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 488, 491.

47 During the proceedings before the ICJ concerning the legality of the threat or use of nuclear weapons, the Solomon Islands presented its own list of threats prohibited by international law: firstly, the prohibition of threats to international peace and security, implicit in Articles 1(1) and 39 of the UN Charter; secondly, it is forbidden to threaten the use of force in violation of Article 2(4) of the UN Charter; thirdly, UN General Assembly Resolution 2625(XXV) (A/RES/2625 (n 32)) prohibits the threat or use of force (Principle 1, paras. 1, 4, 5 and 10), as well as prohibits the threat of intervention (Principle 3, para. 1) (Letter dated 19 June 1995 from the Permanent Representative of Solomon Islands (n 43) 24, para. 3.6).

48 Nico Krisch, 'Article 39' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 1272, 1278.

49 Corten (n 7) 94–95.

human rights[50] and international humanitarian law; terrorism; situations in which other 'factors subsist that may lead to the use of force';[51] illicit trafficking of weapons; proliferation of weapons of mass destruction;[52] the proliferation, excessive and destabilizing accumulation, and circulation of small arms and light weapons;[53] the introduction of a certain political regime in a State; discrimination against the economic interests of foreigners in contravention of international standards; and closure of ports to foreign vessels.[54]

To sum up, although they may partially overlap, the terms 'threat of force' and 'threat to the peace' do not designate the same situations.[55] As the representative of the Netherlands observed, threats of force cover 'a situation in which it was probable that a State would use force against the territorial integrity or political independence of another State,' whereas a threat to the peace corresponds 'to a position where it was probable that peace would be violated.'[56] To put it differently, a threat of force refers to a particular situation that occurs in relations between two States, whereas a threat to the peace covers a more 'general situation of a vague threat.'[57] Thus, not every threat of force is a threat to the peace, in the sense that the particular threat may not translate into a general threat. At the same time, not every threat to the peace is a threat of force, as the term 'threat to the peace' is much more capacious[58] and not

50 'Letter dated 10 July 1959 from the Representatives of Afghanistan, Burma, Ceylon, Ethiopia, Federation of Malaya, Ghana, Guinea, Indonesia, Iran, Iraq, Jordan, Lebanon, Liberia, Libya, Morocco, Nepal, Pakistan, Saudi Arabia, Sudan, Tunisia, United Arab Republic and Yemen Addressed to the President of the Security Council' (10 July 1959) UN Doc S/4195, 2–3.

51 James Crawford, *Brownlie's Principles of Public International Law* (8th ed, OUP 2012) 760.

52 Erika de Wet and Michael Wood, 'Peace, Threat to' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law*, Thematic Series Volume 2: The Law of Armed Conflict and the Use of Force (OUP 2017) 946, 947, para. 8; Advisory Council on International Affairs, *Advisory Report 36: Pre-Emptive Action* (July 2004) 13 <www.advisorycouncilinternationalaffairs.nl/binaries/advisorycouncilinternationalaffairs/documents/publications/2004/07/09/pre-emptive-action/Pre-Emptive_Action_AIV-Advisory-report-36_ENG_200407.pdf> accessed 1 September 2022.

53 'Statement by the President of the Security Council' (20 July 2000) UN Doc S/PRST/2000/25, 4.

54 Benedetto Conforti, 'Le pouvoir discrétionnaire du Conseil de sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression' in René Jean Dupuy (ed), Le développement du rôle du Conseil de sécurité (Martinus Nijhoff Publishers 1993) 51, 56–7; Robert Cryer, 'The Security Council and Article 39: A Threat to Coherence' (1996) 1(2) *Journal of Armed Conflict Law* 161, 172.

55 McCoubrey and White (n 19) 61; Yearbook of the International Law Commission 1989, Volume II, Part Two, 68, para. 3; Cryer (n 55) 162.

56 'Report of the Special Committee on the Question of Defining Aggression' (24 August–21 September 1953) UN Doc A/2638, para. 61.

57 Corten (n 7) 95–6, 99, 317; 'Report of the International Law Commission on the work of its forty-first session, 2 May–21 July 1989' UN Doc A/44/10, 68, para. 3. See also the examples provided by Henderson (n 7) 27–8.

58 See the statement made by the USSR (Special Committee on the Question of Defining Aggression, Sixth Session, Summary Records (29 August 1973) UN Doc A/AC.134/SR.100–109,

limited only to threats of force.[59] If the UNSC establishes that there is a threat to the peace, it triggers the Council's competences under Art. 39 of the UN Charter[60] and launches the procedures envisaged in Chapter VII of the UN Charter. On the other hand, if a State reports to the UNSC that it was subjected to a threat of force, this does not immediately prompt any action under Chapter VII. Only if the UNSC decides that this particular threat of force also amounts to a threat to the peace may it apply measures from that Chapter.

Secondly, the most widely used term that includes 'threat' is probably 'threat to international peace and security,' developed by the UNSC. While the UN Charter mentions 'threat to the peace' few times, it does not introduce the term 'threat to international peace and security.' However, this term is usually understood as amounting to a 'threat to the peace' because the UNSC uses these terms interchangeably.[61] As S. Chesterman wrote, 'The practice of the 1990s showed a shift away from any reference to the specific articles of Chapter VII and a reliance on the Chapter as a whole';[62] the frequent use of the term 'international peace and security' may be one of the manifestations of this practice. Given that, the comments rendered earlier with regard to a threat to the peace are also valid for threats to international peace and security. Thus, 'threats to international peace and security' may also include 'threats of force.'[63]

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16). See also the 'Report of the 1956 Special Committee on the Question of Defining Aggression' (8 October–9 November 1956) UN Doc A/3574, para. 53 and the statement made by ILC member Laurel B. Francis (ILC Summary record of the 2,135th meeting (12 July 1989) UN Doc A/CN.4/SR.2135, 297, para. 57).

59 Yoram Dinstein, *War, Aggression and Self-Defence* (4th ed, Cambridge University Press 2005) 284; Roscini (n 4) 231 ft omitted; Rosalyn Higgins, 'Legal Limits to the Use of Force by Sovereign States United Nations Practice' (1961) 37 *British Year Book of International Law* 269, 274; McCoubrey and White (n 19) 61–2. See statements made by the USA (UNSC Official Records (6 October 1948) S/PV.363, 4); China (A/2638 (n 57) para. 62); Yemen (UNSC Official Records (22 February 1983) UN Doc S/PV.2416, para. 77); the Ministerial Council of the Gulf Cooperation Council ('Letter dated 14 October 1994 from the Acting Permanent Representative of Saudi Arabia to the United Nations addressed to the Secretary-General' (18 October 1994) UN Doc A/49/523-S/1994/1162, 2); and Iran ('Letter dated 6 June 2008 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council' (10 June 2008) UN Doc S/2008/377, 1). See also the award in the arbitration concerning the delimitation of the maritime boundary between Guyana and Suriname (n 42) para. 484 and the preamble of UNSC Res. 581 (13 February 1986) UN Doc S/RES/581.

60 A/2806 (n 7) para. 25; Dahm and Delbrück (n 7) 824.

61 Krisch (n 49) 1294–5.

62 Simon Chesterman, 'The New Interventionism: Threats to International Peace and Security and Security Council Actions Under Chapter VII of the UN Charter' in Simon Chesterman (ed), *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP 2002) 112, 125.

63 See, eg, a statement made by Czechoslovakia with regard to threats of force made by the USSR, which at the same time amounted to threats to international peace and security (UNSC Official Records (22 March 1948) UN Doc S/PV.272, 187–188). One should also observe that threats of force may be only one of multiple acts that make up 'threats to the peace' or 'threats to international peace and security.' To give just one example, Syria claimed

Thirdly, States also mention 'threats to the territorial integrity and political independence.'[64] The meaning of this term is not clear. On one hand, some statements suggest that 'threats to the territorial integrity and political independence' of States differ from 'threats of force against the territorial integrity and political independence.' For instance, according to the USA, a refusal to withdraw troops previously present in the territory of another State with that State's consent but that has now been withdrawn 'would constitute a threat of force in violation of Article 2, paragraph 4, and a threat to the territorial integrity and independence of the State thus occupied.'[65] Consequently, it seems that the USA differentiates between these two terms. On the other hand, at times States have used 'threats of force' and 'threats to territorial integrity and political independence' as synonyms. To give an example, in a letter dated 21 March 1962 addressed to the President of the UNSC, the representative of Israel raised complaints against Syria, highlighting 'threats against its territorial integrity and political independence made by the official spokesmen of the Syrian Government, manifesting aggressive intentions against Israel in flagrant violation of the United Nations Charter.'[66] The fact that it is impossible to determine the precise meaning of this term confirms the method applied in this book, that is, examination of only those statements in which States explicitly mention 'threats of force.'

Fourthly, a 'threat' does not have to refer to a situation involving armed measures or potentially having such consequences; it may be completely unrelated to any military steps. The Final Document of the International Conference on the Relationship between Disarmament and Development states the following:

> [N]on-military threats to security have moved to the forefront of global concern. Underdevelopment and declining prospects for development, as well as mismanagement and waste of resources, constitute challenges to security. The degradation of the environment presents a threat to sustainable development. The world can hardly be regarded as secure so long as there is polarisation of wealth and poverty at the national

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that the regime in Pretoria committed mass murders, crimes against humanity and aggression against Angola, Mozambique and Botswana, that it further threatened to launch invasions against neighbouring States and that it colonized and continued to exploit Namibia. Thus, '[b]y pursuing these policies, South Africa gravely threatens international peace and security' (UNSC Official Records (26 July 1985) UN Doc S/PV.2602, paras. 50–51).

64 See, eg, statements made by the USA (UNGA Official Records, Sixth Committee (11 November 1963) UN Doc A/C.6/SR.808, para. 23) and Israel (The Yearbook of the United Nations 1955, 31–32). See also Grimal (n 7) 74, 79.

65 A/C.6/SR.808 (n 65) para. 23.

66 'Letter dated 21 March 1962 from the Permanent Representative of Israel addressed to the President of the Security Council' (21 March 1962) UN Doc S/5098, 2. In this context, see also statements made by the USSR (UNSC Official Records (18 February 1964) UN Doc S/PV.1095, paras. 9, 12).

> and international levels. Gross and systematic violations of human rights retard genuine socio-economic development and create tensions which contribute to instability. Mass poverty, illiteracy, disease, squalor and malnutrition afflicting a large proportion of the world's population often become the cause of social strain, tension and strife.[67]

Also, the president of the UNSC explicitly identified non-military threats as threats to peace and security.[68]

Finally, the numerous different notions that include the word 'threat' should be mentioned: 'attempted threat';[69] 'threat to independence, territorial integrity and sovereignty';[70] 'threat to the security';[71] 'direct threat to universal peace and security';[72] threat against 'freedom, independence and integrity';[73] 'threat to the independence, freedom and sovereignty';[74] threat to 'the security and independence';[75] and the like. On one hand, the basic rule of interpretation of legal texts would indicate that different phrases designate different notions. Thus, all of the terms mentioned in this section should have different meanings, and, for instance, a 'threat to independence, territorial integrity and sovereignty' should not be associated with a 'threat to the territorial integrity and political independence.' On the other hand, however, all of these phrases orbit around the same terms, such as security, independence and sovereignty, which substantially overlap. In addition, it has been claimed that some of them embrace threats of force.[76] The lack of clarity in States' statements concerning

67 International Conference on the Relationship between Disarmament and Development, 'Report of the International Conference on the Relationship between Disarmament and Development' (24 August–11 September 1987) UN Doc A/CONF.130/39, para. 18. See also 'Relationship between disarmament and development: Report of the Secretary-General' (14 September 1989) UN Doc A/44/449, para. 13.

68 'Note by the President of the Security Council' (31 January 1992) UN Doc S/23500, 3.

69 See the statements made by Syria ('Special Committee on principles of International Law concerning friendly relations and co-operation among states,' Summary record (18 March 1966) UN Doc A/AC.125/SR.16, para. 20) and Japan (Ibid). See also UNGA Res. 42/22 'The Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations' (18 November 1987) UN Doc A/RES/42/22, para. 7, and UNGA Res. 2131 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of Their Independence and Sovereignty' (21 December 1965) UN Doc A/RES/2131, para. 1.

70 Statement made by the USSR (S/PV.1095 (n 67) para. 12).

71 S/RES/581 (n 60) preamble.

72 UNGA Res. 2160 'Strict observance of the prohibition of the threat or use of force in international relations, and of the right of peoples to self-determination' (30 November 1966) UN Doc A/RES/2160, preamble.

73 UNGA Res. 290 (IV) 'Essentials of Peace' (1 December 1949) UN Doc A/RES/4/290, para. 2.

74 Statement made by Kuwait (UNSC Official Records (5 July 1961) UN Doc S/PV.958, para. 68).

75 Statement made by Iraq (Ibid, paras. 36, 38, 50, 52).

76 For example, the USSR also claimed that '[b]y embarking on military threats,' the United Kingdom and France 'create a situation dangerous to peace' ('Letter dated 15 September 1956

the meanings of these terms does not allow for the solution of this cognitive dilemma. Given the appropriate circumstances, some of these terms may somehow approximate, *inter alia*, a 'threat to the peace,' but it is not possible to come up with a definite answer to this problem. Thus, in order to ensure certainty that the results of the current research take into account the practice of States concerning the threat of force within the meaning of Article 2(4) of the UN Charter, this book focuses only on those examples of States' practices in which they expressly referred to 'threats of force.'

Last, but not least, one should also mention that States themselves frequently intermingle different terms that include the word 'threat' and employ them inconsistently. For instance, during the debate upon the defensive quarantine started by the USA against Cuba, the Soviet representative interchangeably called the quarantine a 'threat or use of force against the territorial integrity and political independence of Cuba,'[77] a 'threat to international peace and security'[78] and a 'threat to peace.'[79] Likewise, in a letter dated 29 September 1948, the governments of France, the UK and the USA drew the UNSC's attention to the 'unilateral imposition by the Government of the Union of Soviet Socialist Republics of restrictions on transport and communication between the Western Zones of Occupation in Germany and Berlin.'[80] The three governments enumerated that the USSR had, *inter alia*, 'threatened the Berlin population with starvation, disease, and economic ruin.'[81] According to these governments, the Soviet actions were contrary to the USSR's obligations 'under Article 2 of the Charter of the United Nations and create[d] a threat to the peace within the meaning of Chapter VII of the Charter,' as well as constituted a 'threat to international peace and security.'[82] The examples of these two communications, formulated by such different political blocs, well demonstrate that within one communication States can and do use the term 'threat' in several different meanings, mix up the terms mentioned previously and do not necessarily give these terms the same meanings that the doctrine does. Many similar cases could be described,[83] which again proves that, due to the variety of terminology and confusion of terms, the current research can produce accurate results only if it is focused on the term 'threat of force.'

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from the Representative of the Union of Soviet Socialist Republics addressed to the Secretary-General of the United Nations' (17 September 1956) UN Doc S/3649, 7).

77 UNSC Official Records (23 October 1962) UN Doc S/PV.1022, para. 158.

78 Ibid, para. 174.

79 Ibid, para. 180.

80 'Identical notifications from the Governments of the French Republic, the United States of America and the United Kingdom to the Secretary-General, dated 29 September 1948' (29 September 1948) UN Doc S/1020, 1.

81 Ibid 2.

82 Ibid 1–2.

83 See, eg, statements made by Syria (Special Committee on the Question of Defining Aggression, Summary Records (19 October 1970) UN Doc A/AC.134/SR.67–78, 57–58) and the USA (A/C.6/SR.808 (n 65) para. 23).

2.4 Is the prohibition of threats of force a peremptory norm or a customary norm?

Most States,[84] international organs[85] and scholars[86] label the prohibition of the 'threat or use of force' as having the status of customary law. While in this context most of them refer jointly to the 'threat or use of force,' some do refer specifically to the prohibition of the 'threat of force' as a customary norm.[87] However, there are commentators who go even further and claim that the prohibition of the threat or use of force, without distinguishing between these two bans,[88] constitutes a *jus cogens* norm.[89]

Contrary to these views, this book argues that the prohibition of the threat of force and the prohibition of the use of force are two separate norms of public international law, which developed at different paces and were supported by different kinds and amounts of States' practice and *opinio juris* and, thus, should be treated as two distinct norms. Moreover, the prohibition of the threat of force is neither a customary norm nor a peremptory rule of

84 Statements made by the USA (A/C.6/SR.808 (n 65) para. 20) and Nicaragua [*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Application instituting proceedings (26 November 2013) para. 22 <www.icj-cij.org/en/case/155/institution-proceedings> accessed 1 September 2022]. Some States also claimed that the prohibition of the threat of force is applicable to non-UN Members through Article 2 (6) of the UN Charter (see, eg, the statement made by Iran, Verbatim Record 1995/26 (n 6) 22).

85 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para. 87; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (n 20) para. 188; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (Preliminary Objections) [2016] ICJ Rep 3, paras. 75–78. See also the Tallin Manual (n 16) 42, 45.

86 Henderson (n 7) 17; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 18; Myers (n 19) 177. See also the Yearbook of the International Law Commission 1966, Volume II, 247, para. 8.

87 I Brownlie speaking on behalf of Libya before the ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Public sitting (28 March 1992) Verbatim Record 92/5, 17; *Legality of the Threat or Use of Nuclear Weapons*, Letter dated 20 June 1995 from the Minister of Foreign Affairs of the French Republic, together with Written Statement of the Government of the French Republic, 26, para. 15; Roscini (n 4) 252–5; Barker (n 2) 128.

88 One of the States to make such a distinction was New Zealand, which claimed that only the prohibition of the use of force is a *jus cogens* norm [*Legality of the Use by a State of Nuclear Weapons in Armed Conflict/Legality of the Threat or Use of Nuclear Weapons*, Public sitting (9 November 1995) Verbatim Record 1995/28, 42] and Roscini (n 4) 256–7.

89 Statements made by Indonesia (Verbatim Record 1995/25 (n 6) 19); Iran (*Legality of the Threat or Use of Nuclear Weapons*, Note Verbale dated 19 June 1995 from the Embassy of the Islamic Republic of Iran, together with Written Statement of the Government of the Islamic Republic of Iran, 1); Philippines (Verbatim Record 1995/28 (n 89) 60); Nauru (Letter dated 15 June 1995 from counsel appointed by Nauru: Memorial (n 2) 3–4); Ecuador (UNGA Special Committee on the Question of Defining Aggression (26 June 1969) UN Doc A/AC.134/SR.25–51, 74); and Czechoslovakia (A/C.6/SR.802 (n 15) 12). See also Stürchler (n 10) 63; Randelzhofer and Dörr (n 13) 203; White (n 12) 259; Dubuisson and Lagerwall (n 11) 84.

international law. The aim of this section will be to present the arguments in support of this thesis.

Firstly, a number of States and international organizations have engaged in illegal threats of force in the past. Most importantly, some of them directly issued such threats. The two most widely discussed cases of illegal threats of force are the NATO intervention in Kosovo and the intervention of the coalition of States in Iraq.

When it comes to the NATO intervention, in 1998 the situation in Kosovo began to raise alarms. FRY forces responded to attacks carried out by the Kosovo Liberation Army with large-scale, indiscriminate attacks and forced 200,000 civilians – Kosovan Albanians – to flee their homes. In October 1998, Slobodan Milošević, president of the FRY, agreed to withdraw its troops from Kosovo and agreed that the Organization of Security and Cooperation in Europe (OSCE) could establish a Kosovo Verification Mission. The peace did not last long, as the FRY soon renewed its forces in Kosovo. In January 1999, that prompted the so-called contact group – composed of the USA, UK, France, Germany, Italy and the Russian Federation – to convene negotiations between the representatives of Kosovo and the FRY in Rambouillet, France. The aim of the talks was to reach a comprehensive political settlement on Kosovo's autonomy within the FRY for a 3-year period.[90] At the beginning, the contact group negotiators prepared a document that included 'non-negotiable principles/basic elements,' which stated, *inter alia*, that Kosovo would have a high degree of self-governance and that there would be international involvement and full cooperation by the parties on implementation of the agreement.[91] The latter was to take place through the Implementation Mission, formed by the OSCE and the European Union.[92] Despite initial disagreements, the Kosovo delegation signed[93] the Rambouillet Accords, as the new documents became known, but the FRY refused to accede.

This case is discussed in this book because the FRY, in several statements made before international organs, claimed that NATO (or the States comprising NATO) attempted to make it sign the Rambouillet Accords under the threat of bombing.[94] Because the FRY did not succumb to the threats, NATO

90 David Wippman, 'Kosovo and the Limits of International Law' (2001) 25(1) *Fordham International Law Journal* 129, 132–3; Ruth Wedgwood, 'NATO's Campaign in Yugoslavia' (1999) 93(4) *The American Journal of International Law* 828, 829.

91 Marc Weller, 'The Rambouillet Conference on Kosovo' (1999) 75(2) *International Affairs* 211, 225–6.

92 Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords), Chapter 5, Article I(1), 50 <https://peacemaker.un.org/kosovo-rambouilletagreement99> accessed 1 September 2022.

93 Weller (n 92) 229–33.

94 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict/Legality of the Threat or Use of Nuclear Weapons*, Public sitting (12 May 1999) Verbatim Record 1999/25, 30; *Legality of Use of Force (Serbia and Montenegro v. Belgium); (Serbia and Montenegro v. Canada); (Serbia and Montenegro v. France); (Serbia and Montenegro v. Germany); (Serbia and Montenegro v. Italy);*

conducted bombings against the FRY from 24 March 1999 to 9 June 1999.[95] Ultimately, after 78 days of NATO bombing, S. Milošević agreed to sign a ceasefire agreement (less favourable than the proposal in the Rambouillet Accords), Serb forces withdrew from Kosovo and the displaced Albanian Kosovars were allowed to return to their homes.[96]

Some of the States that participated in Operation Allied Force attempted to legitimize it on the basis of international law: Belgium claimed that UNSC Resolutions 1160, 1199 and 1203 constituted an 'unchallengeable basis for the armed intervention,'[97] although in fact neither of them authorized the use of force. In addition, both Belgium and the UK claimed that the operation was a humanitarian intervention, although they justified their positions in different ways. Belgium asserted that NATO intervened to safeguard *jus cogens* norms such as the right to life and physical integrity, as well as the prohibition of torture, in order 'to prevent an impending catastrophe recognized as such by the Security Council.'[98] On the other hand, the UK stated in the UNSC that the action was legal because it was 'justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe.'[99] However, neither Belgium nor the UK explained whether it grounded its claims on the customary norm that allows states to undertake a 'humanitarian intervention,' how it was formed, etc. States like the Netherlands[100] and Canada[101] also referred to the humanitarian aspect of the NATO action, but none of them elaborated on the specific legal grounds (customary or treaty norm) that authorized the bombing. Taking everything into account, the legal positions offered by the participants of the intervention were neither consistent nor had a justification in the circumstances of the operation and the international legal framework. Thus, the use of force carried out by NATO may be recognized as illegal, and, as a consequence, the threats of force that preceded the bombings were also illegal.

(Serbia and Montenegro v. Netherlands); (Serbia and Montenegro v. Portugal); and (Serbia and Montenegro v. United Kingdom), Public sitting (21 April 2004) Verbatim Record 2004/14, 34, para. 23; 'Letter dated 24 March 1999 from the Chargé d'Affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council' (24 March 1999) UN Doc S/1999/318, 2.

95 United Nations International Criminal Tribunal for the Former Yugoslavia, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' <www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal> accessed 1 September 2022.

96 Lord Robertson of Port Ellen, 'Kosovo One Year On: Achievement and Challenge' 16–17 <www.nato.int/kosovo/repo2000/report-en.pdf> accessed 1 September 2022; Benjamin S Lambeth, *NATO's Air War for Kosovo: A Strategic and Operational Assessment* (RAND 2011) 224–7.

97 *Legality of Use of Force (Yugoslavia v. Belgium)*, Public sitting (10 May 1999) Verbatim Record 1999/15, 11.

98 Ibid 11–12.

99 UNSC Provisional Records (24 March 1999) UN Doc S/PV.3988, 12.

100 Ibid 8.

101 UNSC Provisional Records (10 June 1999) UN Doc S/PV.4011, 5–6, 13.

When it comes to specific examples of threats of force per se, the USA stated, 'We must acknowledge that a credible threat of force was key to achieving the OSCE and NATO agreements[102] and remains key to ensuring their full implementation.'[103] British Prime Minister Tony Blair said in the House of Commons on 23 March 1999 that '[l]ast October, NATO threatened to use force to secure Milosevic's agreement to a ceasefire and an end to the repression that was, at that time, in hand. That was successful – at least, for a while.'[104] The Netherlands also claimed that '[t]he threat of the use of force, embodied in this NATO decision, should be seen first of all as a political means to convince parties to withdraw their heavy weapons or place them under United Nations control.'[105] However, it was not only the NATO Member States themselves but also the officials representing NATO who openly issued threats of force towards the FRY. The first threats of force were made in October 1998:[106] During a press conference NATO Secretary-General Javier Solana stated that '[t]he Allies believe that in the particular circumstances with respect to the present crisis in Kosovo, as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force.'[107] Similarly, J. Solana said in a statement dated 23 February 1999 that

> [s]ince the beginning of the crisis, NATO has fully supported the efforts of the international community to bring peace to Kosovo and to help

102 The USA representative spoke about the agreement signed in Belgrade on 16 October 1998 by the Minister of Foreign Affairs of the FRY and the Chairman-in-Office of the OSCE to establish a verification mission in Kosovo ('Letter dated 19 October 1998 from the Permanent Representative of Poland to the United Nations addressed to the Secretary-General' (20 October 1998) UN Doc S/1998/978), including the undertaking of the FRY to comply with Resolutions 1160 (1998) and 1199 (1998) and the agreement signed in Belgrade on 15 October 1998 by the Chief of General Staff of the FRY and the Supreme Allied Commander, Europe, of NATO providing for the establishment of an air verification mission over Kosovo ('Letter Dated 22 October 1998 from the Chargé d'Affaires a.i. of the Mission of the United States of America to the United Nations Addressed to the President of the Security Council' (23 October 1998) UN Doc S/1998/991), complementing the OSCE Verification Mission.

103 UNSC Provisional Records (24 October 1998) UN Doc S/PV.3937, 15.

104 *Legality of Use of Force (Serbia and Montenegro v. Belgium); (Serbia and Montenegro v. Canada); (Serbia and Montenegro v. France); (Serbia and Montenegro v. Germany); (Serbia and Montenegro v. Italy); (Serbia and Montenegro v. Netherlands); (Serbia and Montenegro v. Portugal); (Serbia and Montenegro v. United Kingdom)*, Public sitting (23 April 2004) Verbatim Record 2004/23, 24–25, paras. 10–14.

105 UNSC Provisional Records (14 February 1994) UN Doc S/PV.3336 Resumption 1, 134.

106 Ian Brownlie and CJ Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 49(4) *The International and Comparative Law Quarterly* 878, 903. Serbia claimed that the threat of force against it was formed for the first time on 28 August 1998 when there was an internal NATO decision to use air strikes if necessary (Verbatim Record 2004/23 (n 105) 24, para. 9).

107 NATO HQ Brussels, 'Transcript of the Press Conference, by Secretary-General, Dr. Javier Solana' (13 October 1998) <www.nato.int/docu/speech/1998/s981013b.htm> accessed 1 September 2022.

> achieve a negotiated political solution. Our stance in putting the threat of force at the service of diplomacy has helped to create the conditions for the Rambouillet talks to make progress.'[108]

More such statements could be quoted; they were reported by the FRY (later Serbia and Montenegro) in the consecutive communications to the United Nations and before the ICJ in the case concerning the Legality of Use of Force.[109]

Another example concerns the use of force against Iraq in 2003. The USA and the UK had sought diplomatic and political support for the intervention in Iraq since the late 1990s. The USA wanted to topple Saddam Hussein, which it failed to achieve after the liberation of Kuwait. Iraq was accused of supporting terrorism, including Al-Qaeda (which was responsible for the 9/11 attacks), and it was alleged that the Iraqi regime had planned the assassination of George H.W. Bush in 1993.[110] Moreover, a day after the first anniversary of the 9/11 attacks, the White House released its 'Background Paper on Iraq' in which it claimed that the Saddam Hussein regime, in violation of its international obligations, had continued:

> to seek and develop chemical, biological, and nuclear weapons and prohibited long-range missiles; brutalizing the Iraqi people, including committing gross human rights violations and crimes against humanity; supporting international terrorism; refused to release or account for prisoners of war and other missing individuals from the Gulf War era; refused to return stolen Kuwaiti property; and was working to circumvent the UN's economic sanctions.[111]

Nevertheless, despite their diplomatic efforts, the USA and the UK did not manage to convince the UNSC to authorize the use of force against Iraq. On 8 November 2002 the UNSC adopted Resolution 1441, which did not include consent for the use of force.[112] States that supported the resolution

108 'Statement by the Secretary-General of NATO, Dr. Javier Solana, on the outcome of the Rambouillet talks' (23 February 1999) Press Release (99)21 <www.nato.int/docu/pr/1999/p99-021e.htm> accessed 1 September 2022. For more on that see Chapter 4, Section 4.1.1.3.

109 See, eg, 'Letter dated 1 February 1999 from the Chargé d'Affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council' (3 February 1999) UN Doc S/1999/107, 4; Verbatim Record 2004/14 (n 95) 31, para. 14; quotations provided by Simma (n 7) 9.

110 Marc Weller, 'The Iraq War – 2003' in Olivier Corten and Tom Ruys (eds), *The Use of Force in International Law: A Case-based Approach* (OUP 2018) 639, 642–3.

111 'A Decade of Deception and Defiance, White House Background Paper on Iraq' (12 September 2002) <https://2001-2009.state.gov/p/nea/rls/13456.html> accessed 1 September 2022.

112 UNSC Res. 1441 (8 November 2002) UN Doc S/RES/1441.

claimed that their decision was motivated precisely by the lack of authorization for the use of force against Iraq.[113] In February 2003, the USA and the UK again sought support for the use of force against Iraq in the UNSC, but like in previous cases they failed.[114] Despite that, on 19 March 2003, the USA, together with its allies (the UK, Australia and Poland), commenced Operation Iraqi Freedom.[115] The USA claimed that due to the 'material breach' of Iraq's obligations, Resolution 1441 renewed the authorization for the use of force from UNSC Resolution 678 of 1990.[116] This claim, however, had no grounds in international law, which rendered the intervention illegal.[117] As a consequence, any threats of force against Iraq were also illegal.[118]

Before the intervention started, the USA acknowledged that Iraq had agreed to introduce some initiatives, noting however that '[t]hese initiatives – if that is what some would choose to call them – have been taken only grudgingly; rarely unconditionally; and primarily under the threat of force.'[119] The UK, another State firmly soliciting the intervention in Iraq, said that the

> only way we are going to achieve disarmament by peace of a rogue regime that, all of us know, has been in defiance of the Council for the past 12 years – the only way that we can achieve its disarmament of weapons mass destruction, which, the Council has said, pose a threat to international peace and security – is by backing our diplomacy with the credible threat of force.[120]

Thus, in the cases of both Yugoslavia and Iraq, neither the Netherlands, nor the USA nor the UK tried to conceal that its actions amounted to threats of force, identified them differently or claimed that there were any legal grounds

113 See the statements made by France, Mexico, Russia and Syria (UNSC Provisional Records (8 November 2002) UN Doc S/PV.4644, 5–10).

114 See UNSC Provisional Records (5 February 2003) UN Doc S/PV.4701.

115 Weller (n 111) 644.

116 'Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council' (21 March 2003) UN Doc S/2003/351.

117 For a more substantive analysis of the US and UK positions, see Weller (n 111) 644–55; Alex J Bellamy, 'International Law and the War with Iraq' (2003) 4(2) *Melbourne Journal of International Law* 497, 497–519.

118 This position is also confirmed by the appeal signed by over 300 lawyers, who stated in 2003 that

> [t]he recent conducts of these two states [the USA and the UK], which are ostensibly preparing for a massive attack, more generally constitute a threat of use of force. Such a threat is equally prohibited under Article 2(4) of the Charter.
>
> ('Appel de juristes de droit international concernant le recours à la force contre l'Irak' (2003) 1 Revue belge de droit international 266, 273)

119 UNSC Provisional Records (7 March 2003) UN Doc S/PV.4714, 14.

120 Ibid 27. See also UNSC Provisional Records (14 February 2003) UN Doc S/PV.4707, 18.

for these threats of force. Rather, they all treated threats of force as an effective and unavoidable tool of political and diplomatic pressure, without any mention of international law or the prohibition of threats of force.

One could argue whether these examples are sufficiently representative to have influenced customary law. However, the threats of force mentioned earlier were supported by numerous States – from different continents, of varying military capabilities and with divergent legal systems – that had previously often expressed views conflicting with those expressed by the USA as the superpower. For example, when threats of force were made against Serbia, Croatia stated, 'What is needed in Bosnia and Herzegovina is a carefully balanced policy of a credible threat of force and straightforward support for the peace plans at present under discussion.'[121] In a similar vein, Sweden admitted that '[i]t is of special importance that the threat to use air power be seen as part of an essential political process aimed at a negotiated solution.'[122] Tunisia said,

> The ultimatum by the North Atlantic Treaty Organization (NATO) represents an important step forward, and its implementation must be monitored with great determination and seriousness. In our view, this ultimatum should apply to all the other 'safe areas,' including Bihac, Srebrenica, Gorazde, Tuzla and Zepa, as well as to Sarajevo . . . . Therefore, it would be wise to deal with every aggression in any of these areas with the same threat of the use of force by NATO.[123]

Also, Senegal stated, 'We believe that the threat of the use of force in Sarajevo should be extended to cover the entire territory, and particularly the five other "safe areas," where the civilian population continues to suffer repugnant acts of Serb terrorism.'[124] The representative of the Czech Republic said,

> The threat of air strikes cannot be seen in isolation. It is a part of a broader set of measures and does not, in and of itself, amount to a solution . . . . The threat has been issued, in particular, to prevent the strangulation of Sarajevo, which in turn will make it possible to place the city under United Nations administration.[125]

Before the 2003 intervention in Iraq, Spain stated that '[i]t is impossible not to realize that only maximum pressure and the credible threat of force make an impression on the Iraqi regime.'[126] Bulgaria claimed that 'it is the threat of

121 S/PV.3336 Resumption 1 (n 106) 86.
122 Ibid 113.
123 UNSC Provisional Records (15 February 1994) UN Doc S/PV.3336 Resumption 2, 160.
124 Ibid 172.
125 UNSC Provisional Records (14 February 1999) UN Doc S/PV.3336, 66.
126 S/PV.4714 (n 120) 24.

the use of military force and even the very presence of a significant number of American and British soldiers on the borders of Iraq that make resolution 1441 (2002) truly credible.'[127] Macedonia stated that '[p]olitical pressure and the real threat of the use of force have proven to be the right mechanisms and have yielded results in the intensity of cooperation of Saddam's regime and its respect for the decisions of the Security Council.'[128] Colombia said,

> Only the threat of the use of force and the unanimous adoption by the Security Council of resolution 1441 (2002), which gave the Government of Iraq its final opportunity to cooperate unconditionally . . . have made it possible for certain headway to be made in this cooperation.[129]

The threats of force were also supported by international organizations. Most importantly, they were endorsed by the UN, that is, the organization with one of its pillars being the prohibition of the threat of force.[130] With reference to the former Yugoslavia, the UN Secretary-General report stated,

> The initial application of the safe-area concept in Srebrenica and Zepa, based on specific negotiated agreements between the parties, was successful in lowering levels of hostilities and improving living conditions. However it did not create viable communities. Later agreements, supported by the threat of air strikes, led to the withdrawal or control of heavy weapons of both sides in and around Sarajevo and the withdrawal of Serb forces and heavy weapons from around Gorazde.[131]

With regard to the same intervention, the Chairman of the Sixth Summit Conference of the Organization of the Islamic Conference stated, '[T]he threat of credible air strikes must be extended to the whole of the territory of the Republic of Bosnia and Herzegovina and in particular to the safe areas defined in Security Council resolutions 824 (1993) and 836 (1993).'[132]

In the context of international organizations supporting threats of force, it should also be noted that after the use of chemical weapons by the Syrian

127 Ibid 31.

128 UNSC Provisional Records (12 March 2003) S/PV.4717 Resumption 1, 17.

129 Ibid 23.

130 It can be interesting to invoke here the opinion of J Craig Barker, who stated that 'the threat of force does form part of the process of UN diplomacy,' while the existence of Chapter VII of the UN Charter constitutes 'a threat of force designed to persuade states to settle their disputes by peaceful means in accordance with the UN Charter' (Barker (n 2) 124 ft 8).

131 'Report of the Secretary-General pursuant to Resolution 844 (1993)' (9 May 1994) UN Doc S/1994/555, para. 26. Nigel D White and Robert Cryer also point out that in the practice of the international organizations, including the UN, condemnations of threats of force were rare; they enumerate five such cases in total (White and Cryer (n 2) 245–246).

132 UNSC Provisional Records (21 April 1994) UN Doc S/PV.3367, 20.

regime in 2013, the EU High Representative Catherine Ashton said the following while addressing the European Parliament:

> We know that tomorrow Secretary Kerry will meet with Minister Lavrov in Geneva to try and work up exactly what this initiative might mean, to get into the detail of what would have to happen, and when and how and by whom. And we put the EU at the disposal of the work that is on-going in order to see how we can contribute . . . . Some honourable members will no doubt in the course of your deliberations argue that the threat of strikes has been the most important element in bringing to the table an initiative that can try and tackle chemical weapons. Whatever your view, the reality is that this is a moment to try and pull towards the process that is so necessary to find a political solution and we need to engage with all partners, as we are doing, to find ways to achieve that. We will continue to work to that end.[133]

She thus acknowledged that some States may consider the threat of force as the most important factor that led to the political solution in terms of the non-use of chemical weapons in Syria, and she did not condemn it.

These are just several examples out of many of statements issuing or supporting threats of force.[134] One can say with a high degree of certainty that, if a layperson read them, the last thing that would come to his or her mind is that international law prohibits threats of force. In the light of these States' statements, threats of force are neither banned nor deplorable; on the contrary, they are commendable as a proper and effective tool of statecraft. Moreover, none of the States spoke about threats of force as an ultimate resort or an exceptional measure; rather, the States simply opted to uphold them. Also, none of the States mentioned previously looked for a legal justification for the threats; they only sought to confirm that threats of force must be 'credible' to serve their purposes. Equally disturbing is the position taken by the UN Secretary-General and other officers of international organizations.

The second argument against the customary character of the prohibition of threats of force is that, even if States give a justification for threats of force,

133 'Speech by HRVP Catherine Ashton on Syria' (11 September 2013) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_688> accessed 1 September 2022.

134 See also statements made by Macedonia (UNSC Provisional Records (19 February 2003) UN Doc S/PV.4709 Resumption 1, 18); Spain (S/PV.4707 (n 121) 16); The Netherlands (UNSC Provisional Records (26 March 1999) UN Doc S/PV.3989, 4); Croatia (S/PV.3367 (n 133) 6); the UK (*Fisheries Jurisdiction (United Kingdom v. Iceland)*, Memorial on Jurisdiction submitted by the Government of the United Kingdom of Great Britain and Northern Ireland, para. 53); and the USA (S/PV.4714 (n 120) 16). At the same time, a rare example of States that called to end the threats of force during the debate concerning Iraq were the statements made by Malaysia and Lebanon (UNSC Provisional Records (17 October 2002) UN Doc S/PV.4625 Resumption 2, 6, 10).

these explanations have little or nothing to do with international law.[135] States simply deny threats of force by making use of terminological ambiguities, try to diminish the meaning of the measures undertaken or refer to the factual background of the case.[136]

An example of a case in which a State attempted to excuse itself from allegations of threats of force by using terminological ambiguities can be seen in a statement made during a discussion in the UNGA by the USSR's representative Andrei Gromyko. In support of the Syrian government, A. Gromyko stated that the USSR 'has already drawn the attention of the Government of Turkey to the danger inherent in the Syrian situation,' one that 'it may be incurring by continuing its reckless policy against Syria,' and added that potential events in the Middle East may have 'grave consequences for peace and for Turkey itself.'[137] However, the USSR emphasized, 'Some say that the statements and warnings the Soviet Union has addressed to Turkey are threats. They are not threats, but they are a warning.'[138] A similar argument was also used by the USSR during the debate in the UNSC on the 'defensive quarantine,'[139] when the representative of the USSR said that

> [t]he people of the USSR will not remain indifferent if armed intervention is undertaken against Cuba . . . I should make it clear in that

135 To do justice, there are a few examples whereby States have attempted to dismiss the accusations of threats of force by referring to international law. For instance, Belgium claimed before the ICJ that '[t]he threat of force is, *ex hypothesi*, just as illegal as the use of force. Why wait? On 30 January 1999, the NATO Council, I may remind the Court, publicly authorized its Secretary-General to launch air strikes' (Verbatim Record 1999/15 (n 98) 11). Another example may be the legal justification of 'defensive quarantine' presented by Leonard C Mekker (Leonard C Mekker, 'Defensive Quarantine and the Law' (1963) 57(3) *American Journal of International Law* 515, 523); however, this action is sometimes presented as a threat and sometimes as a use of force by the USA against Cuba. Finally, in the Lockerbie case, the UK claimed before the ICJ that it did not issue threats of force against Libya but only employed certain means such as

> joining other States in proposing to the Security Council that it adopt under Chapter VII of the United Nations Charter a resolution (subsequently adopted as resolution 748) requiring Libya to comply with paragraph 3 of Security Council resolution 731 . . . , and secondly, enforcing against Libya the economic sanctions which were then imposed by the Security Council in resolution 748, and subsequently tightened by resolution 883.
>
> (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections of the United Kingdom, para. 3.28)

136 Cf, eg, Roscini (n 4) 248.

137 A/PV.708 (n 39), paras. 116–117.

138 Ibid para. 118.

139 That term refers to the blockade announced by the USA on 22 October 1962 against the Soviet ships bringing offensive military equipment to Cuba ('President John F. Kennedy's Speech Announcing the Quarantine Against Cuba' (22 October 1962) <www.mtholyoke.edu/acad/intrel/kencuba.htm> accessed 1 September 2022).

> connexion that we are not threatening the United States with our rockets . . . and we do not intend to make any such threats. We say, 'Hands off Cuba; let it work out its own destiny; do not threaten it with your might, for others have the might to match it.' That is the line we are taking.[140]

States have also attempted to undermine the importance of measures undertaken. In 1948, the representative of the USSR asked, 'What is the origin of these fables about the threat of the USSR to use force against Czechoslovakia? They came from newspapers which have made it their speciality to spread slanderous and provocative reports about the Soviet Union.'[141] In the same vein, during oral proceedings before the ICJ, Colombia claimed that

> Nicaragua . . . misrepresents Colombian statements which are alleged to be threats to the use of force. When the Court reads them in full, it will see that they are no more than political affirmations of the commitment to protect Colombian rights in Colombian areas. If such routine political statements are henceforth to be taken as violations of the United Nations Charter, the Security Council's agenda and the Court's docket will quickly become bloated with trivialities.[142]

Also, with respect to explanations concerning alleged threats that refer to the factual background rather than legal arguments, one may again point to the statement made by Colombia, which claimed that Nicaragua

> has not and could not provide the slightest evidence of any unlawful threat of force contrary to Article 2, paragraph 4 of the Charter of the United Nations. To the contrary, Colombia has given instructions to its armed forces to avoid any risk of confrontation and the situation has remained calm.[143]

As was mentioned in one of the previous sections, threats of force are legal if the use of force in the same situation would also be legal, that is, when the conditions for legal self-defence are fulfilled or when the use of force was authorized by the UNSC. However, in none of the cases mentioned earlier did any of the States attempt to justify threats of force by saying that they fell within the right to self-defence or were authorized by the UNSC; several similar examples could be invoked. Thus, these States violated the prohibition of

140 UNSC Official Records (19 July 1960) UN Doc S/PV.876, para. 74.

141 UNSC Official Records (2 April 1948) UN Doc S/PV.281, 6.

142 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Public sitting (28 September 2015) Verbatim Record CR 2015/22, 43, para. 13.

143 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary objections of Colombia, para. 1.8.

threats of force and did not seek to prove that their actions were legal. Their explanations presented in the face of allegations of threats of force are certainly not a manifestation of respect for the prohibition of threats of force.[144]

A third argument relates to the customary nature of the prohibition of the use of force. When reading about violations of the prohibition of threats of force, one may think that it is nothing out of the ordinary when compared to breaches of the prohibition of the use of force, which have occurred multiple times since 1945. One may ask: Because a majority of States and scholars have no doubts that the latter ban has a customary status,[145] why then is there a question about the prohibition of threats of force as a customary norm?

There is, however, a significant difference in the way in which alleged violations of both prohibitions have been treated in the course of the last 78 years. When States violate the prohibition of the use of force, in an overwhelming majority of cases they present their legal positions by attempting to justify the use of force as legal, referring to the exceptions to the prohibition, specific interpretations of Article 2(4), a state of necessity, the consent of the territorial state, etc. Moreover, it has often occurred that States have presented not just one but multiple legal arguments in support of their use of force. Certainly, these arguments often amounted to an abusive interpretation of the law or were simply erroneous, but what matters here is that States demonstrated respect for the prohibition and did not question its significance. This also became one of the proofs of its transformation from a treaty to a customary norm.

On the other hand, in cases of threats of force, States very rarely try to explain their threats of force by referring to international law. Instead, they use one of the various explanations mentioned previously. One could also ask why, if the threat of force is followed by the use of force, should States justify mere threats? However, when making threats, States do not know whether the use of force will ultimately occur in the future, and if they have plans to do so, they surely must also have an explanation for the use of force. Shouldn't they use this same motivation to justify the threats of force in the first place?[146]

Finally, a point needs to be made concerning the specific language used by States. Some States and scholars openly admit that threats of force are part of the language of international politics and diplomacy. As F. Grimal put

144 Similar justifications of threats of force can be found in statements made by the USA in response to the Cuban ['Letter dated 15 July 1960 from the Permanent Representative of the United States of America addressed to the President of the Security Council' (15 July 1960) UN Doc S/4388, 7, 8] and Nicaraguan (UNSC Official Records (9 November 1984) UN Doc S/PV.2562, para. 49) allegations that threats of force were made against these States. See also the explanations presented by the UK [UNSC Official Records (17 July 1958) UN Doc S/PV.831, para. 30; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Memorial on Jurisdiction submitted by the Government of the United Kingdom of Great Britain and Northern Ireland, para. 53].

145 In this context see, eg, Roscini (n 4) 245.

146 In this context, see Lagerwall (n 7) 842–3.

it, threats of force are tolerated 'because of their intrinsic value in international relations,'[147] as they constitute 'necessary weapons in the diplomatic armory.'[148] One could even say that threats of force are a desirable tool of diplomacy because, contrary to the use of force, they help to achieve States' aims without resorting to armed violence.[149] They may thus be seen as a very useful substitute for the use of force, as they may achieve comparable results with far less pernicious efforts. As the subject of this work is international law, not politics, it is only worth mentioning here that there are a few terms that lie at the borderline of international law and politics and that prove that threats of force form part of the everyday language of States. One of them is 'gunboat diplomacy.'[150] Another one could be 'coercive diplomacy (strategy),' the definition of which is

> to create in the opponent the expectation of costs of sufficient magnitude to erode his motivation to continue what he is doing . . . . Success may depend on whether the initial coercive action or threat stands alone or is a part of a broader credible threat to escalate pressure further if necessary.[151]

Thus, despite some differences in the goal and scope of the terms, they both designate threats of force as a regular part of diplomacy and international relations.

Threats of force are part of the language of armed and powerful States, which are able to make their threats credible. A very meaningful example is the attitude of the United States. As M. Waxman wrote, during the early stages of the Cold War,

> [t]he United States was building and sustaining a massive war-fighting apparatus, but its security policy was not oriented primarily around

147 Grimal (n 7) 5.

148 Ibid. See also the statement made by ILC member Lacleta Muñoz (ILC Summary Record of the 1,965th meeting (12 June 1986) UN Doc A/CN.4/SR.1965, 144, para. 10). The Netherlands observed that some pressure in international relations, in the form of threats of force, is indispensable to keep the minimum legal order [Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Summary Records (16 October 1964) UN Doc A/AC.119/SR.7, 8–9]. Matthew A. Myers even observed that, while Art. 2(4) is recognized as a customary norm, 'some threats to use force are essential and necessary for national security' (Myers (n 19) 177).

149 Sadurska (n 4) 246; Randelzhofer and Dörr (n 13) 218; Crawford (n 52) 747; White (n 12) 259; Roscini (n 4) 248–251; Antonopoulos (n 30) 114; Ryan Goodman, 'Humanitarian Intervention and Global Legal Norms' (*Just Security Blog*, 11 October 2013) <www.justsecurity.org/1913/humanitarian-intervention-global-legal-norms/> accessed 1 September 2022.

150 See ft 4 in Chapter I.

151 Alexander L George, *Forceful Persuasion: Coercive Diplomacy as an Alternative to War* (US Institute of Peace Press 1991) 11.

> waging or winning wars but around deterring them and using the threat of war – including demonstrative military actions – to advance U.S. security interests.[152]

In speaking about contemporary times, the same author observed that 'the United States wields threats of force and war all the time. We deter. We coerce. We reassure allies – or don't.'[153] USA Secretary of Defence Caspar Weinberger and General Colin Powell did not conceal the fact that they were ready to use threats of force, although only as a last resort and if diplomacy failed.[154] In addition, one can invoke a quotation from Richard Holbrooke, who said that 'diplomacy backed by force works better than just diplomacy.'[155]

These arguments clearly demonstrate that the prohibition of threats of force, even though it is recognized as one of the pillars of the international security system,[156] has not reached the status of a customary norm,[157] and certainly not a *jus cogens* norm.[158] However, if there are many manifestations of State practice violating threats of force, does this mean that one should look for an adversarial customary norm, namely, the one that allows for threats of force?

The crystallization of a customary norm requires two elements: general practice (*usus*) and acceptance as law (*opinio juris*). As mentioned, States have not only breached the prohibition of the threats of force numerous times but in addition treated threats of force as a regular tool of policy that may be helpful in achieving certain goals. Moreover, threats have been made and/or

152 Matthew C Waxman, 'The Power to Threaten War' (2014) 123 *The Yale Law Journal* 1626, 1647.

153 Matthew Waxman, 'War, Threats of Force, and Law: Thoughts on North Korea' (*Lawfare Blog*, 1 February 2018) <www.lawfareblog.com/war-threats-force-and-law-thoughts-north-korea> accessed 1 September 2022.

154 Barry M Blechman and Tamara Cofman Wittes, 'Defining Moment: The Threat and Use of Force in American Foreign Policy' (1999) 114(1) *Political Science Quarterly* 1, 2.

155 Quotation after Harold Hongju Koh, 'Syria and the Law of Humanitarian Intervention (Part I: Political Miscues and U.S. Law)' (*Just Security Blog*, 26 September 2013) <www.justsecurity.org/1158/koh-syria/> accessed 1 September 2022. See also Harold Hongju Koh, 'Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)' (*Just Security Blog*, 4 October 2013) <www.ejiltalk.org/syria-and-the-law-of-humanitarian-intervention-part-ii-international-law-and-the-way-forward/> 1 September 2022. A similar statement was made by UN Secretary-General Kofi Annan: 'You can do a lot with diplomacy, but with diplomacy backed up by force you can get a lot more done' ('Transcript of Press Conference by Secretary-General Kofi Annan at United Nations Headquarters' (24 February 1998) UN Doc SG/SM/6470).

156 Tsagourias (n 4) 67; A/33/41 (n 3) para. 42.

157 See also James A Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 *Michigan Journal of International Law* 215, 226–7; Green and Grimal (n 7) 290, ft 17.

158 See also Wood (n 24) 1301, para 12; Green (n 158) 226–7; Roscini (n 4) 256; Green and Grimal (n 7) 291, ft 17.

endorsed by many States with different legal and political systems and varying interests. It can thus be assumed that the first element of a customary norm has been developed, namely, general practice.

Despite this, a customary norm authorizing threats of force has not been formed. The reason is that States, despite regularly violating the prohibition of threats of force in practice, have never explicitly negated the binding force of the ban. On the contrary, they declare their attachment to the prohibition.[159] Even if some others call these declarations 'lip service,'[160] they nevertheless have legal force. Thus, no *opinio juris* has emerged that would allow the claim that a new customary norm has been formed that allows for the threats of force.[161]

To sum up this section, for States threats of force are all too often an accepted tool for conducting policy. Thus, on one hand they are bound by the prohibition of the threat of force in Article 2(4) and solemnly repeat it every time international peace and security are at stake, while on the other hand they blatantly violate the prohibition any time they consider it necessary to achieve certain aims.

2.5 Conclusions

The aim of this chapter has been to present the current status of threats of force under international law. It examined the full wording of the prohibition of the threat of force ('prohibition of threats 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'), as well as confirmed that the same exceptions apply to the prohibition of the threat of force as to the prohibition of the use of force. Violation of the prohibition of the threat of force amounts not only to a breach of Art. 2(4) but also to a breach of Art. 2(3), which complements the prohibition of threats of force, and to a breach of Articles 2(7), 2(1) and 2(2) and Chapters VI and VII of the UN Charter, as well as many other norms. The next section explained that States use the word 'threat' in many different contexts, which justifies the correctness of the

159 See, eg, Letter dated 20 June 1995 from the Minister of Foreign Affairs of the French Republic (n 88) 226; statements made by Australia ('Comments and observations received from Governments' (1 March and 19 May 1993) UN Doc A/CN.4/448 and Add. 1, 64, para. 22); Algeria, Cameroon, Ghana, India, Kenya, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia ('Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States' (26 September 1967) UN Doc A/6799, 27–8); the USA (A/AC.134/SR.25–51 (n 90) 32); Cyprus (A/AC.134/SR.67–78 (n 84) 17); Ecuador ('Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations' (1982) UN Doc A/37/41, para. 32); the Federal Republic of Germany (Ibid, para. 127); and Greece (Ibid, para. 281).

160 Barker (n 2) 136.

161 Ibid 128; Grimal (n 7) 48; White and Cryer (n 2) 246.

method applied in this book. Finally, the last section of the chapter presented arguments as to why the prohibition of threats of force is neither a customary nor a peremptory norm of international law.

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3 Threats of force in practice

Introduction

The aim of this chapter is to present examples of threats of force; each example will be followed by actual cases of the employment of a threat of force.

As mentioned in Chapter 1, this work is based on the assumption that threats of force can take the form of actions, as well as have an oral or written structure. This finding will be useful in this part of the book. Firstly, the chapter presents examples of threats in each of these three categories and subsequently describes threats of force that can take either of these forms. It should nevertheless be highlighted that this arrangement has no legal implications but is only an attempt to structure and clarify the analysis.

3.1 Threats of force as actions

3.1.1 Threats of force involving the movement of armed forces

The aim of this subsection is to present the most commonly invoked examples of threats of force, that is, those that involve the movement of the armed forces of the threatening States.

3.1.1.1 Military manoeuvres

Military manoeuvres are one of the most frequently enumerated actions recognized by States as threats of force,[1] even if some authors claim that only if special circumstances accompany manoeuvres are they a threat of force.[2]

1 James A Green and Francis Grimal, The Threat of Force as an Action in Self-Defense Under International Law (2011) 44 *Vanderbilt Journal of Transnational Law* 285, 295–8; Francis Grimal, *Threats of Force: International Law and Strategy* (Routledge 2013) 43; Branislav L Slantchev, *Military Threats: The Costs of Coercion and the Price of Peace* (Cambridge University Press 2011) 66–7; François Dubuisson and Anne Lagerwall, 'Que signifie encore l'interdiction de recourir à la menace de la force?' in Karine Bannelier and others (eds), *L'intervention en Irak et le droit international* (Pedone 2004) 85, 86.

2 Nicaragua claimed that '[t]he continuous United States military and naval manoeuvres adjacent to Nicaraguan borders, officially acknowledged as a program of "perception

DOI: 10.4324/9781003376026-4

According to the USA Department of Defense's Dictionary of Military and Associated Terms, the term 'manoeuvres' has four different meanings, all of which may raise considerable concerns about security from a third State. Thus, manoeuvres may designate the following:

> 1. A movement to place ships, aircraft, or land forces in a position of advantage over the enemy. 2. A tactical exercise carried out at sea, in the air, on the ground, or on a map in imitation of war. 3. The operation of a ship, aircraft, or vehicle to cause it to perform desired movements. 4. Employment of forces in the operational area, through movement in combination with fires and information, to achieve a position of advantage with respect to the enemy.[3]

States have repeatedly declared that military manoeuvres carried out by other States amount to threats of force against them. In its application to institute proceedings against Honduras before the ICJ, Nicaragua stated that

> [t]he Honduran Government has also used the threat of force against Nicaragua not only in words but also in facts. Since 1981 they have constructed military airports, naval bases and other military infrastructure along the border with Nicaragua, and have continuously held

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management," falls within the description of threats of force' [*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Memorial of Nicaragua (30 April 1985), para. 457]. However, the ICJ found that it is 'not satisfied that the manoeuvres complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Report, para. 227). Despite that, some authors claim that the conclusion reached by the ICJ refers to the circumstances of the specific manoeuvres and does not mean that, in general, military manoeuvres on a state's border cannot amount to a threat of force (J Craig Barker, *International Law and International Relations* (Continuum 2000) 131 ft 43; Grimal (n 1) 59). More specifically, O. Corten came to the conclusion that

> to come within the ambit of the rule set out in article 2(4), military manoeuvres should be accompanied by declarations or at any rate evidence of a clear threat of invasion or military incursion, even in a context of extreme tension between the States concerned.
>
> (Olivier Corten, The Law Against War: The Prohibition on the Use of Force in Contemporary International Law (Hart Publishing 2010) 103)

It is also claimed that military manoeuvres should take place near the State's borders to be considered as a threat of force to this State (statement made by ILC member Jiuyong Shi, 'Report of the International Law Commission on the work of its fortieth session, 9 May–29 July 1988' UN Doc A/43/10, para. 220).

3 Joint Chiefs of Staff, *Department of Defense Dictionary of Military and Associated Terms, as of November 2021* 135 <https://irp.fas.org/doddir/dod/dictionary.pdf> accessed 1 September 2022.

> manoeuvres with the United States Army with the express object of intimidating Nicaragua.[4]

Nicaragua also made a similar complaint against the joint exercises of Honduran and USA forces; according to Nicaragua, it was

> confronted with the ever-present threat of invasion by the armed forces of the United States and Honduras. The continuing so-called joint military manoeuvres by the United States and Honduras not only pose an increasing danger to the peace and stability of Nicaragua but, indeed, give military manoeuvres new dimensions and added objectives. Thus, in our times military manoeuvres can no longer be considered as mere exercises in military preparedness but have, regrettably, come to represent a sophisticated form of pressure and intimidation.[5]

Another example of manoeuvres being considered threats of force was brought up by China in 1986: 'It has been noted by all that since the beginning of this year the United States Navy has conducted frequent military manoeuvres in the waters near Libya, subjecting Libya to military threat and aggravating the tension in the Mediterranean.'[6]

Next, on 25 April 1989, Panama requested a meeting of the UNSC due to the 'grave situation' Panama was facing 'as a result of the flagrant intervention in its internal affairs by the United States, the policy of destabilization and coercion pursued by the United States and the permanent threat of the use of force' against it.[7] During the UNSC meeting, Panama mentioned, *inter alia*, 'the movement of armed units of the United States army outside their defence sites,' violations of airspace and overflight of the military installations of its defence forces. Moreover, the USA has 'brought to the Republic of Panama commandos specializing in surprise attacks.' Panama noted that 'soldiers and marines have been recently sent to Panama, along with combat helicopters and an offensive military team.' Thus, '[t]roop and weapons movements have been continuous, as have military manoeuvres displaying a force in constant readiness to attack.'[8]

Among the more recent threats of force of this kind, one may make mention of the complaint from North Korea before the UNSC that the USA 'threatens the Democratic People's Republic of Korea with a nuclear pre-emptive attack and aggravates tension by reinforcing armed forces and conducting large-scale

4 *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Application instituting proceedings, paras. 20, 22; see also Memorial of Nicaragua (n 2) para. 457.

5 UNSC Official Records (3 April 1984) UN Doc S/PV.2528, para. 155.

6 UNSC Provisional Records (27 March 1986) UN Doc S/PV.2670, para. 26.

7 'Letter dated 25 April 1989 from the Permanent Representative of Panama to the United Nations addressed to the President of the Security Council' (25 April 1989) UN Doc S/20606.

8 UNSC Provisional Records (28 April 1989) UN Doc S/PV.2861, 8–15.

joint military exercises near the Korean peninsula.'[9] However, those alleged threats of force occurred in 2006 and so are not part of the crisis in USA-North Korea relations from 2017 to 2018.

Given these examples, one may conclude that targeted States treat as threats of force those manoeuvres that are carried out near their borders and/or away from the territory of the State that is checking the capabilities of its forces, during a situation of strong political tensions between these States and especially if one of the States has an overwhelming military advantage that it is flaunting during the manoeuvres.

3.1.1.2 Concentration of forces

The purpose of the concentration, or massing, of forces is to focus the combat power of a State in one place in order to successfully carry out an offensive action in the future.[10] Thus, it may be understood as a threat of force by other States, especially if it takes place near their borders.[11]

Here one may refer to the example of the 1956 intervention in Egypt. As early as mid-September 1956, Egypt complained that its act of nationalization of the Suez Canal 'was met by declarations by the Government of France and the United Kingdom conveying threats of force and by measures of mobilization and movement of armed forces.'[12] Around that time, the USSR also observed that 'a growing concentration of United Kingdom and French military and naval forces is taking place in immediate proximity to Egypt'[13] in order to impose upon Egypt the plan that provided for handing over the Suez Canal to foreign administration.[14] Thus, the USSR claimed that 'the Governments of the United Kingdom and France have no grounds whatever for resorting to a threat of force or the use of force against Egypt.'[15] Moreover, 'the United

9 UNSC Provisional Records (14 October 2006) UN Doc S/PV.5551, 8.

10 David Evans, *War: A Matter of Principles* (Macmillan Press Ltd 1997) 70, 73; Slantchev (n 1) 66–7.

11 Troop concentration was understood as such by the USSR [UNGA Official Records, Sixth Committee (5 January 1952) UN Doc A/C.1/SR.278, para. 37; A/43/10 (n 2) para. 220]; statements made by ILC members Frank XJC Njenga (ILC Summary record of the 1,885th meeting (21 May 1985) UN Doc A/CN.4/SR.1885, para. 6) and Jiuyong Shi (ILC Summary record of the 2,058th meeting (8 June 1988) UN Doc A/CN.4/SR.2058, 7); Yearbook of the International Law Commission 1989, Volume II, Part Two, 68, para. 3; Mohamed S Helal, 'The ECOWAS Intervention in The Gambia – 2016' in Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law: A Case-based Approach* (OUP 2018) 912, 928; Georg Dahm and Jost Delbrück, *Völkerrecht*, Volume I/3 (De Gruyter 2002) 824; Dubuisson and Lagerwall (n 1) 86.

12 'Letter dated 17 September 1956 from the Representative of Egypt addressed to the President of the Security Council' (17 September 1956) UN Doc S/3650, 1–2.

13 'Letter dated 15 September 1956 from the Representative of the Union of Soviet Socialist Republics addressed to the Secretary-General of the United Nations' (17 September 1956) UN Doc S/3649, 2.

14 Ibid 3.

15 Ibid 6.

States of America is not protesting against the concentration of troops and the threat of their use.'[16] In the end, other States also recognized that making 'armed forces ready for war,' mobilizing 'reserves and preparing for landings,' concentrating naval, air and land forces of France and the United Kingdom' and making 'hostile economic measures' were threats of force against Egypt.[17]

During another Middle East crisis in 1957, Syria requested that the UNGA include in its agenda an item titled 'Complaint about threats to the security of Syria and to international peace.' Syria claimed that there was

> an actual military threat to Syria, resulting from the heavy, unprecedented and unwarranted concentration of Turkish troops, up to several divisions, in close proximity to the Syrian-Turkish border. These troops are being constantly reinforced. They are now massed mainly in a small sector, and have taken a disposition which presages imminent attack.[18]

Ultimately, no intervention took place, and two weeks later the situation was resolved.[19] A year later, during the next crisis in the region, which was marked by USA intervention in Lebanon and UK intervention in Jordan with the consent of these States, the USSR observed that '[i]n view of the concentration of United States troops in south eastern Turkey there is a direct threat of invasion of the Syrian part of the United Arab Republic by United States armed forces.'[20]

In May and June 1965, Pakistan informed the UNSC that, in connection with the dispute over Rann of Kutch, India had concentrated 'virtually the entire Indian striking power on Pakistan's borders . . . in offensive formations,' which amounted to a threat of force against Pakistan.[21]

On 18 March 1979, the Secretary of State for Foreign Affairs of the Lao People's Democratic Republic informed the UN Secretary-General that China was massing several divisions of their armed forces along the Laos frontier where, according to Laos' secretary, troops were engaged in combat exercises,

16 Ibid 5.

17 Repertory of Practice of United Nations Organs, Art. 2(4), Supplement no. 2 (1955–1959), vol. I, para. 33.

18 'Letter dated 15 October 1957 from the Minister of Foreign Affairs and Chairman of the delegation of Syria, addressed to the Secretary-General' (16 October 1957) UN Doc A/3699, 1.

19 For more on the Syrian crisis of 1957, see Philip Anderson, 'Summer Madness the Crisis in Syria, August–October 1957' (1995) 22(1–2) *British Journal of Middle Eastern Studies* 21–42; Ivan Pearson, 'The Syrian Crisis of 1957, the Anglo-American 'Special Relationship, and the 1958 Landings in Jordan and Lebanon' (2007) 43(1) *Middle Eastern Studies* 47–55.

20 UNSC Official Records (17 July 1958) UN Doc S/PV.831, para. 59.

21 'Letter dated 7 May 1965 from the representative of Pakistan to the President of the Security Council' (7 May 1965) UN Doc S/6340, 107; 'Letter dated 7 June 1965 from the Permanent Representative of Pakistan addressed to the President of the Security Council' (7 June 1965) UN Doc S/6423, para. 21. See also 'Letter dated 22 June 1965 from the Permanent Representative of Pakistan addressed to the President of the Security Council' (22 June 1965) UN Doc S/6466, 1.

had infiltrated spies into Laos, collaborated with the imperialists in supporting the Laotian reactionaries, and had twice encroached into Laotian territory. Thus, according to the Lao Secretary of State, China was threatening Laos and preparing to launch an armed invasion against the State.[22]

One final example may be that of the USSR's report about the concentration of USA forces near Nicaragua:

> The people of Nicaragua are threatened by a direct invasion of American forces. The Pentagon has amassed dozens of warships off the coast of Nicaragua in the Pacific and Atlantic Oceans and has moved into neighbouring Honduras, under the guise of exercises, massive combat contingents of the American armed forces, who are giving direct support to the rebel hands.[23]

In the context under discussion, one may also invoke UNSC Resolution 949. In the preamble to the resolution, the Council noted 'past Iraqi threats and instances of actual use of force against its neighbours' and expressed its determination 'to prevent Iraq from resorting to threats and intimidation of its neighbours and the United Nations.' The resolution, *inter alia*, condemned 'recent military deployments by Iraq in the direction of the border with Kuwait' (para. 1) and demanded 'that Iraq not again utilize its military or any other forces in a hostile or provocative manner to threaten either its neighbours or United Nations operations in Iraq' (para. 3).[24] During the discussion within the UNSC preceding the adoption of the resolution, States recognized these movements of Iraqi troops as threats of aggression against Kuwait.[25]

3.1.1.3 Mobilization of forces

Finally, the issue of the mobilization of forces deserves some further examination. According to USA Department of Defense's Dictionary of Military and Associated Terms, the term 'mobilization' has two meanings:

1. The process of assembling and organizing national resources to support national objectives in time of war or other emergencies.

22 'Letter dated 27 March 1979 from the Chargé d'Affaires a.i. of the Permanent Mission of the Lao People's Democratic Republic to the United Nations addressed to the Secretary-General' (28 March 1979) UN Doc A/34/135-S/13199, 2.

23 'Letter dated 26 October 1983 from the Permanent Representative of the Union of Soviet Socialist Republics to the United Nations addressed to the Secretary-General' (27 October 1983) UN Doc A/38/535-S/16089, 2.

24 UNSC Res. 949 (15 October 1994) UN Doc S/RES/949.

25 See UNSC Provisional Records (15 October 1994) UN Doc S/PV.3438; UNSC Provisional Records (17 October 1994) UN Doc S/PV.3439. See also Chapter 5, Section 5.1.1.

2. The process by which the Armed Forces of the United States, or part of them, are brought to a state of readiness for war or other national emergency.[26]

Thus, mobilization – in the sense of preparing and organizing resources for war – may fulfil some of the elements of threats of force, especially when it occurs at the borders of the targeted State. Indeed, it is one of the most frequently enumerated examples of threats of force.[27]

For examples of the mobilization of forces that were deemed to be threats of force, see the cases that were mentioned during the discussion of the concentration of troops.

3.1.2 Possession of nuclear weapons

Some States claim that the mere possession of nuclear weapons amounts to a threat of force. Firstly, it is said that States possess, maintain, and deploy nuclear weapons to deter possible aggression from third States.[28] However, 'deterrence is meaningless without a credible willingness to use' nuclear weapons; thus, ' "deterrence" equals "threat to use".'[29] Even if the notion of 'nuclear deterrence' (as well as 'deterrence' in general) is a matter of international politics and not of international law,[30] it is hard not to see that in practice the terms 'threat' and 'deterrence' cover parallel scopes of States' actions, with their joint aim being to prompt other States to behave in a certain way. They also share some traits, because insofar as deterrence must be accompanied by 'credible

26 Department of Defense Dictionary of Military and Associated Terms (n 3) 145.

27 A/43/10 (n 2) para. 220; 'Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations' (1982) UN Doc A/37/41, para. 414; Dahm and Delbrück (n 11) 824; Matthew C Waxman, 'Regulating Resort to Force: Form and Substance of the UN Charter Regime' (2013) 24(1) *The European Journal of International Law* 151, 160; Paul Huth and Bruce Russett, 'What Makes Deterrence Work? Cases from 1900 to 1980' (1984) 36(4) *World Politics* 496, 504; statement made by ILC member Jiuyong Shi (A/CN.4/SR.2058 (n 11) 7); Slantchev (n 1) 66–7; Dubuisson and Lagerwall (n 1) 86.

28 *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Vice-President Schwebel, 314.

29 *Legality of the Threat or Use of Nuclear Weapons*, Letter dated 15 June 1995 from counsel appointed by Nauru, together with the Written Statement of the Government of Nauru: Memorial of the Government of the Republic of Nauru, 2; *Legality of the Threat or Use of Nuclear Weapons*, Note Verbale dated 19 June 1995 from the Embassy of Malaysia, together with Written Statement of the Government of Malaysia, 2; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict/Legality of the Threat or Use of Nuclear Weapons*, Public sitting (3 November 1995) Verbatim Record 1995/25, 9. See also *Lord Advocate's Reference No 1 of 2000* 2001 SCCR 296, para. 64.

30 *Legality of the Threat or Use of Nuclear Weapons*, Declaration of Judge Shi, 277; *Legality of the Threat or Use of Nuclear Weapons*, Declaration of Judge Ferrari Bravo, 284.

willingness,' the threat of force needs to be credible.[31] Consequently, if some States equate nuclear deterrence with threats of force, and deterrence involves the possession of nuclear weapons, then the mere possession thereof could be considered a 'threat of force.'

Secondly, and related to the preceding discussion, during the proceedings before the ICJ concerning the advisory opinion in the Legality of the Threat or Use of Nuclear Weapons case, San Marino pointed out that the possession of nuclear weapons, threats of their use and, finally, their use are interdependent, and one leads to another:

> [T]he threat does not work unless it is credible. First of all, a State which intends to use this threat has to possess a nuclear weapon – an incentive in itself to the production of nuclear devices by other States – then, it has to prove to be able to use this weapon in case of necessity. As a result, threatening may bring about the actual use of nuclear weapons.[32]

San Marino's position adds two important observations: that there is no threat of the use of nuclear weapons without possession thereof – which is a self-propelling reason for the production of nuclear weapons – and that a State may be so determined to prove that its threat to use nuclear weapons is credible that it will indeed use a nuclear weapon in order to back up its threat. This demonstrates that the production, possession, threat and use of nuclear weapons create a vicious circle that does not serve international peace and security, but rather accelerates the arms race.

The same idea was also expressed by India, although in a more general manner:

> The problem of the security of non-nuclear-weapon States against the use or the threat of use of nuclear weapons arises from the possession, the continued stockpiling and the further sophistication of nuclear weapons and the means of their delivery. The real hope of security for non-nuclear-weapon States lies in nuclear disarmament, when nuclear weapons shall have been completely eliminated.[33]

Finally, some States treat threats of force and use of force in the context of nuclear weapons as one indivisible concept, or at least two closely related ones. For instance, Nauru claimed that '[t]hreatening is an active and destructive

31 See also John Burroughs, *The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice* (LIT Verlag 1997) 42.

32 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict/Legality of the Threat or Use of Nuclear Weapons,* Public sitting (13 November 1995) Verbatim Record 95/31, 20.

33 UNSC Official Records (19 June 1968) UN Doc S/PV.1433, para. 104.

use of nuclear weapons.'[34] Similarly, during discussion in the UNSC, the representative of Qatar pointed out that the threat and use of force merge into each other and that, by 'the nature and effect of nuclear weapons, the open or veiled threat of the use of nuclear weapons must include the very possession of such weapons.'[35] Thus, for these States, the possession of nuclear weapons equates not only to a threat but also to the use of force, as they treat threat and use of force as one indivisible concept.

To sum up, some States perceive the possession of nuclear weapons in the context of the policy of deterrence and the concept of threats of force. According to these States, because the possession of nuclear weapons is supposed to effectively deter enemies, it has to be credible, which means that it actually plays the same role as threats of force. Nevertheless, one should highlight that the equation between the possession and threat of use of nuclear weapons finds no grounds in international law. While it is true that international law calls for disarmament by nuclear States and for the non-acquisition of nuclear weapons by non-nuclear States,[36] it does not include a general prohibition of the possession of nuclear weapons.[37] On the other hand, the threat of use of nuclear weapons, which would violate Art. 2(4) of the UN Charter and the 'requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as (. . .) specific obligations under treaties and other undertakings which expressly deal with nuclear weapons,'[38] is illegal. Thus, possession of nuclear weapons should be distinguished from the threat of force: as long as a State may possess nuclear weapons, the threat of use of nuclear weapons is illegal (or at least it would be difficult to find a case in which all of the conditions of legal threats of use of nuclear weapons set by the ICJ would be fulfilled all at once).

34 Letter dated 15 June 1995 from counsel appointed by Nauru: Memorial (n 29) 7.

35 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict/Legality of the Threat or Use of Nuclear Weapons*, Public sitting (10 November 1995) Verbatim Record 1995/29, 27.

36 See, eg, Treaty on the Non-Proliferation of Nuclear Weapons (adopted 12 June 1968, entered into force 5 March 1970) 729 UNTS 161.

37 Only some regional treaties prohibit the possession of nuclear weapons, eg, the South Pacific Nuclear Free Zone Treaty (adopted 6 August 1985, entered into force on 11 December 1986) 1445 UNTS 177. From among universal treaties, Article 1(1)(a) of the Treaty on the Prohibition of Nuclear Weapons bans, *inter alia*, the possession of 'nuclear weapons or other nuclear explosive devices'; nevertheless, it is impossible to state that such prohibition has become a customary norm [Treaty on the Prohibition of Nuclear Weapons (adopted 7 July 2017, entered into force 22 January 2021) <https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf> accessed 1 September 2022].

38 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Report 226, para. 2D of *dispositif*. Nevertheless, the ICJ also famously noted that

> in view of the current state of international law, and of the elements of fact at its disposal, *the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.*
>
> *(Ibid para. 2E)*

3.1.3 Violation of airspace and territorial waters

Violation of airspace and territorial waters by third States is also often mentioned as an instance of threats of force.[39]

In December 1963, Cyprus complained in the UNSC about the 'violation of air space, the terrorizing of the population, the low flying of planes, and the violation of the territorial waters of Cyprus' by Turkish military aircraft and warships, which constituted 'the threat of force in flagrant violation of Article 2, paragraph 4, of the Charter.'[40]

Another example may be 'military threats'[41] taking the form of a 'violation of the territory of the Islamic Republic of Iran by the United States,' reported by Iran on 31 July 1987: 'American aircrafts entered Iranian airspace without permission, and [an] American navy vessel warned an Iranian patrol aircraft which was on the Iranian territorial waters not to approach American ships.'[42]

Also, in 1986 the USSR accused the USA of fabrications that were supposed to be a pretext for the US intervention in Nicaragua and called the USA actions a violation of international law. Vladimir B. Lomeiko, spokesman for the Ministry of Foreign Affairs, said, *inter alia*, that the USA carried out a 'frenzied campaign of threats' against Nicaragua and that 'these threats were being backed up by large shows of military force, including troop deployments and violations of Nicaraguan waters and airspace.'[43]

One may also mention that in 1989 the members of the Non-Aligned Movement 'condemned the continuing threats of aggression against Cuba and the violation of its territorial waters and airspace, particularly through spy planes, as well as the financial, credit and commercial blockade.'[44]

39 See, eg, Nigel D White and Robert Cryer, 'Unilateral Enforcement of Resolution 687: A Threat Too Far?' (1999) 29(2) *California Western International Law Journal* 243, 252.

40 UNSC Official Records (27 December 1963) UN Doc S/PV.1085, para. 16; 'Letter dated 26 December 1963 from the representative of Cyprus to the President of the Security Council' (26 December 1968) UN Doc S/5488, 113. At the same time, Cyprus reported that '[t]he Prime Minister of Turkey, before the Turkish Parliament on 25 December 1963, announcing the dispatch of the aircraft and the naval units as above, threatened the use of force' (Ibid).

41 'Note Verbale dated 14 August 1987 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (14 August 1987) UN Doc S/19043, para. 2.

42 'Letter dated 31 July 1987 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (3 August 1987) UN Doc S/19016.

43 Quotation after 'Russians Accuse U.S. Of Seeking to Meddle in Nicaraguan Affairs' (*New York Times*, 16 November 1986) <www.nytimes.com/1984/11/16/world/russians-accuse-us-of-seeking-to-meddle-in-nicaraguan-affairs.html> accessed 1 September 2022.

44 'Letter dated 19 July 1989 from the Chargé d'Affaires a.i. of the Permanent Mission of Zimbabwe to the United Nations addressed to the Secretary-General' (26 July 1989) UN Doc A/44/409-S/20743, para. 227.

3.2 Oral threats of force

Any statement by a State representative, whether made before domestic organs, in public rallies or other open assemblies, on television or during press briefings, can be recognized as a threat of force under certain circumstances.

In 1968, Jordan claimed that Israeli Prime Minister Levi Eshkol had, in a speech before the Knesset, 'warned Jordan that Israel would take military action again against the East Bank of Jordan and that Jordan must face the consequences.'[45] According to Jordan, 'His speech embodied some fabricated allegations against Jordan intended to mislead world public opinion and to pave the way for a future justification of a new Israeli attack against Jordan.'[46]

Iran referred to statements made during a press conference and an interview to depict 'illegal threats of resort to force' made against it by the highest representatives of the USA government, stating that on 18 April 2006,

> in a question-and-answer session in the White House, when asked whether United States options regarding Iran 'include the possibility of a nuclear strike' and whether his Administration is planning for such a prospect, President George W. Bush refused to rule out a United States nuclear strike on Iran and instead replied, 'All options are on the table.' Moreover, on Thursday, 20 April 2006, the Secretary of State of the United States, Condoleezza Rice, speaking to the Chicago Council on Foreign Relations, and in reply to a question on Iran said 'we are prepared to use measures at our disposal – political, economic and others,' and yet again she reiterated the United States President's view that 'all options remain on the table.'[47]

On 7 August 2010, during a public meeting with the People's Alliance for Democracy, the Prime Minister of Thailand, Abhisit Vejjajiva, stated, 'About the land encroachment, we will cancel the memorandum of understanding if the problem can't be settled. We will use both diplomatic and military means.'[48] For Cambodia it was

> a clear threat to use military force to settle the problem of demarcation of the border, which has been clearly demarcated by the Convention

45 'Letter dated 27 March 1968 from the Permanent Representative of Jordan addressed to the President of the Security Council (27 March 1968) S/8505, 1.

46 Ibid. For more information about this, see the United States Central Intelligence Agency, 'Foreign Broadcast Information Service, Daily Report' (19 March 1968) FB 55/68, Israel, H3.

47 'Letter dated 27 April 2006 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (1 May 2006) UN Doc A/60/834–S/2006/273, 1–2.

48 'Identical letters dated 8 August 2010 from the Permanent Representative of Cambodia to the United Nations addressed to the President of the General Assembly and the President of the Security Council' (11 August 2010) UN Doc A/64/891–S/2010/426, 2.

> of 1904, the Treaty of 1907 between France and Siam, and the maps produced by the Franco-Siamese Commission set up by the above-mentioned Convention.[49]

Another example can be Iran drawing the UN's attention to

> remarks made by Israeli regime Prime Minister Benjamin Netanyahu on 5 November 2012 (Israeli television channel 2, programme Fact), as reflected in international media, wherein he once again threatened to use force against the Islamic Republic of Iran by reiterating his intention to conduct an attack on the Iranian nuclear sites. According to the same sources, in an aggressive posture he even suggested that for such an attack he does not need 'the support from Washington or the world.'[50]

3.3 Written threats of force

Written threats of force can take the form of governmental notes, statements quoted in press articles or made during interviews and letters transmitted to UN organs.

The Israeli newspaper *Haboker*, in its 17 February 1965 issue, in an article titled 'Eshkol says that the division of the tributaries of the River Jordan shall be met by appropriate action on the part of Israel,' published some statements made by Israeli Prime Minister L. Eshkol, such as '[t]here shall be neither leniency nor concession in regard to the diversion of the State's waters.' He also said that the 'Israel people is [sic] called upon to make the utmost effort and to mobilize their greatest potentialities for the aggrandizement of the strength of the Israel army,' because Israel's army 'must have the necessary striking power to meet the enemy . . . . As regards the diversion of the Jordan waters, we shall not stand still. We have warned the Arab neighbours in a clear and unequivocal language, and we are emphasizing this today.'[51] According to Syria, these words constituted a threat of the use of force.[52]

On 23 July 1965, the Cyprus House of Representatives decided to extend the tenure of the president and members of the House and approved an electoral law that wrote off the constitutional distinction between Greek and Turkish electors and candidates. The Turkish Cypriot members did not participate

49 Ibid.

50 'Identical letters dated 7 November 2012 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General and the President of the Security Council' (9 November 2012) UN Doc S/2012/817.

51 UNSC Official Records (25 July 1966) UN Doc S/PV.1288, para. 94 [the entire publication in Hebrew may be found here: The National Library of Israel, 'Haboker' (17 February 1965) <www.nli.org.il/en/newspapers/hbkr/1965/02/17/01/?&> accessed 1 September 2022].

52 S/PV.1288 (n 51) para. 94.

in the decision and declared that the legislation was without any legal or constitutional basis.[53] By a note dated 27 July to the Cyprus Ministry of Foreign Affairs, the Turkish government protested the actions of the Greek members of the Cyprus House of Representatives, declared them to be illegal and stated that it would not fail to take whatever action was necessary under the Treaty of Guarantee to ensure the observance of constitutional order in Cyprus.[54] For Cyprus, the words included in the Turkish note amounted to 'the threat of the use of force' made by Turkey against the territorial integrity and political independence of Cyprus by the Turkish government, 'in violation of Article 2, paragraphs 1, 2, 3 and 4 of the Charter.'[55]

During an interview with the Japanese news agency KYODO on 20 August 1980, Chinese deputy foreign minister Han Nianlong allegedly said that 'China reserves its right to attack Viet Nam again.'[56] The spokesman for the Foreign Ministry of the Socialist Republic of Vietnam called it 'China's war threat.'[57]

Iran claimed that, in an interview published by the *Yedioth Ahronoth* newspaper on 6 June 2008, the Israeli Deputy Prime Minister and Minister of Transportation, Shaul Mofaz, said that Israel 'will attack Iran . . . attacking Iran in order to stop its nuclear plans, will be unavoidable.'[58] For Iran this was deemed as a threat to resort to force.

In March 2017, the Israeli newspaper *Haaretz* published statements made by Naftali Bennett, Minister of Education of Israel, who described the strategy

53 Under the Constitution of Cyprus adopted on 16 August 1960 (see <https://biblioteka.sejm.gov.pl/konstytucje-swiata-cypr/?lang=en> accessed 1 September 2022), the Turkish community was granted the right of veto over a broad array of governance issues (Thomas M Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 80).

54 The Yearbook of the United Nations 1965, 202.

55 'Letter dated 31 July 1965 from the Permanent Representative of Cyprus addressed to the President of the Security Council' (2 August 1965) UN Doc S/6581.

56 The word 'again' refers to the armed conflict that occurred between China and Vietnam between 17 February and 15 April 1979 (for more on this, see David Ambrose, 'The Conflict Between China and Vietnam' (1979) 2 *The Australian Journal of Chinese Affairs* 111, 111–120).

57 'Letter dated 22 August 1980 from the Permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General' (25 August 1980) UN Doc A/35/408-S/14122, 1. The statement issued by the spokesman also mentioned that China continued

> to increase armed provocations, which cause tension along the Vietnamese–Chinese border, misrepresent the situation and create new obstacles with a view to deliberately suspending the third round of the Vietnamese–Chinese negotiations. At the same time it is intensifying its collusion with U.S. imperialism in pressuring Thailand into creating tension along the Kampuchean.

58 'Letter dated 6 June 2008 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council' (10 June 2008) UN Doc S/2008/377, 1.

of his government in the case of an armed conflict with Lebanon in the following way:

> The Lebanese institutions, its infrastructure, airport, power stations, traffic junctions, Lebanese Army bases – they should all be legitimate targets if a war breaks out. That's what we should already be saying to them and the world now. If Hezbollah fires missiles at the Israeli home front, this will mean sending Lebanon back to the Middle Ages . . . . Life in Lebanon today is not bad – certainly compared to what's going on in Syria. Lebanon's civilians, including the Shi'ite population, will understand that this is what lies in store for them if Hezbollah is entangling them for its own reasons, or even at the behest of Iran.[59]

According to Lebanon, words like these constituted threats in contravention of Article 2(4) of the UN Charter.[60]

3.4 Ultimatums

An ultimatum is among the most frequently listed threats of force.[61] It has even been called 'the classic example of a threat of force.'[62]

Nevertheless, it should be observed at the outset that Y. Dinstein pointed out that an ultimatum should not be confused with the threat of force.[63] This author refers to Article 1 of the Third Hague Convention on the Opening

59 Amos Harel, 'With Lebanon No Longer Hiding Hezbollah's Role, Next War Must Hit Civilians Where It Hurts, Israeli Minister Says' (*Haaretz*, 13 March 2017) <www.haaretz.com/israel-news/next-war-with-lebanon-must-hit-civilians-where-it-hurts-bennett-says-1.5447209> accessed 1 September 2022.

60 'Identical letters dated 16 March 2017 from the Permanent Representative of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council' (21 March 2017) UN Doc A/71/846–S/2017/228, 1–2. Lebanon also drew attention to 'grave threats' made by 'senior Israeli officials, such as the Minister of Intelligence, Yisrael Katz, and the Minister of Defence, Avigdor Lieberman' against Lebanon and its civilian installations.

61 See, eg, 'Question of defining aggression: Report by the Secretary-General' (3 October 1952) UN Doc A/2211, para. 367; Michael Wood, 'Use of Force, Prohibition of Threat' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law*, Thematic Series Volume 2: The Law of Armed Conflict and the Use of Force (OUP 2017) 1300, 1301, para. 8; Stefan Kadelbach, 'Ultimatum,' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Max Planck Encyclopedia of Public International Law*, Thematic Series Volume 2: The Law of Armed Conflict and the Use of Force (OUP 2017) 1238, 1238, para. 1; Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007) 258; Marco Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54(2) *Netherlands International Law Review* 229, 238–9; statement made by Haiti ['Telegram dated 5 May 1963 from the Minister of Foreign Affairs of the Republic of Haiti to the president of the Security Council' (6 May 1963) UN Doc S/5302, 1].

62 White and Cryer (n 39) 252; Robert Kolb, *International Law on the Maintenance of Peace: Jus Contra Bellum* (Elgar Publishing 2019) 332.

63 Yoram Dinstein, *War, Aggression and Self-Defence* (4th ed, Cambridge University Press 2005) 86.

of Hostilities[64] and concludes that an ultimatum is a 'warning that, unless specific conditions are fulfilled by a designated deadline, war will commence ipso facto.'[65] To put it differently, an ultimatum sets a deadline and warns 'that war . . . [will] start automatically once it lapses.'[66] On the other hand, 'a threat that, if certain demands are not complied with, hostilities will be initiated' can become an ultimatum in the light of Art. 1 of the Third Hague Convention of 1907 only if it is 'followed by a formal declaration of war.'[67]

Nowadays it very rarely occurs that States commence hostilities between themselves following a 'previous and explicit warning,' usually relying instead upon the effect of surprising the adversary with an attack. Thus, when a State issues an ultimatum, it may be recognized by the other side as a threat of force within the meaning of Art. 2(4) and not in the sense of Art. 1 of the Third Hague Convention of 1907 (as will be demonstrated by the practices of States presented later in this section), with all its consequences, that is, an addressee may consider that even if demands are not fulfilled the attack will not automatically occur. That is why ultimatums will be discussed here as an example of a threat of force.

Most of the definitions of ultimatum formed in the doctrine of law repeat the traits of threats of force already established in Chapter 1. However, they usually mention one additional, special trait that differentiates ultimatums from other types of threats of force – a time limit set for compliance with the demands of the threatening State. Thus, an ultimatum is a type of communication whereby a State threatens another State with the use of force unless the latter State complies with certain demands within a certain time limit. The message that the ultimatum conveys is that, if the targeted State fails to meet the deadline, the threat of force will be carried out,[68] meaning that force will

64 Article I was quoted in Chapter 1, Section 1.1 of this book.

65 Dinstein (n 63) 30.

66 Ibid 31.

67 Ibid 30–31. See also Lassa Oppenheim, *International Law: A Treatise*, vol. II (Longmans, Green, and Co 1906) 30–1.

68 See Alexander L George, *Forceful Persuasion: Coercive Diplomacy as an Alternative to War* (US Institute of Peace Press 1991) 7; Jean Salmon, *Dictionnaire de Droit International Public* (Bruylant 2001) 1112; Paul Gordon Lauren, 'Ultimata and Coercive Diplomacy' (1972) 16(2) *International Studies Quarterly* 131, 137; A/2211 (n 354) para. 367. However, other criteria differentiating ultimatums from other threats of force may be applied: for example, Nikolas Stürchler mentions that today an ultimatum 'means that another state is faced point-blank with a "last clear chance," the unequivocal promise that unless it complies with a specific demand, the use of force will result' [Stürchler (n 61) 259; see also Union Académique Internationale, *Dictionnaire de la Terminologie du Droit International* (Sirey 1960) 624]. To this end, one may quote the first two paragraphs of UNSC Resolution 678, which state that the Council

> 1. Demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so; 2. Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to

be used. An ultimatum may take the form of both legal and illegal threats of force. An ultimatum would be legal if, for example, after an armed attack occurred, the attacked State threatened to use force in self-defence unless the attacking State withdrew its forces from attacked State's territory within 12 hours. There are, however, many more examples of illegal ultimatums, including the ones discussed later.

The most widely discussed example of a threat of force in the form of an ultimatum was the one issued by France and the UK in 1956.[69] On 26 July 1956, Egypt proclaimed the nationalization of the Suez Canal Company. After the nationalization, France, the United States and the United Kingdom agreed that the Egyptian action threatened 'the freedom and security of the Canal as guaranteed by the Convention of 1888.' France and the UK first tried to convince President Gamal Abdel Nasser to change his decision about nationalization by sanctions and the establishment of an arbitral commission and the Suez Canal Users Association, but when these steps proved to be fruitless, a potential armed conflict began to hang in the air.[70] Israel, concerned by the military alliances created by Egypt with its Arab neighbours, used the pretext of nationalization of the Suez Canal[71] to start an armed intervention on 29 October 1956. The next day, France and the UK issued an ultimatum to the government of Egypt in which they demanded that Egypt

1. stop all warlike actions by land, sea and air;
2. withdraw all Egyptian military forces ten miles from the Suez Canal; and
3. accept the occupation of Egyptian territory by British and French forces consisting of key positions at Port Said, Ismailia and Suez.[72]

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uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area.

Because UNSC Resolution 678 was adopted under Chapter VII of the UN Charter (preamble), and because the term 'all necessary measures' was interpreted as permission to use force by Member States [Nico Krisch, 'Article 42' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 1330, 1342], the resolution may be deemed as an ultimatum (UNSC Resolution 678 (29 November 1990) UN Doc S/RES/678). It should be also noted that some authors claim that an ultimatum does not have to amount to the threat of force or be limited to the use of force in case the demands of the author of the ultimatum are not met, as it may include also the warning of 'creation, change or dissolution of a legal relationship under international law,' eg, termination of treaties or severance of diplomatic relations (Kadelbach (n 61) 1238, para. 1).

69 See statements labelling the Anglo-French ultimatum as a threat of force made against Egypt: USSR (UNSC Official Records (30 October 1956) UN Doc S/PV.750, paras. 47, 52); Yugoslavia (UNSC Official Records (30 October 1956) UN Doc S/PV.749, para. 26); Corten (n 2) 103–104; Belatchew Asrat, *Prohibition of Force Under the UN Charter: A Study of Art. 2 (4)* (Iustus Förlag 1991) 140.

70 The Yearbook of the United Nations 1956, 19–20.

71 Arthur James J Barker, *Suez: The Seven Day War* (Faber & Faber 1964) 71.

72 'Letter dated 30 October 1956 from the Representative of Egypt addressed to the President of the Security Council' (30 October 1956) UN Doc S/3712, 1.

France and the UK demanded an answer by 6:30 am Cairo time on 31 October, 'failing which the Governments of the United Kingdom and France will intervene in whatever strength they may deem necessary to secure compliance.'[73] Because President G. A. Nasser refused to comply with the ultimatum's demands, on 31 October bombing started, while on 5 November Anglo-French forces landed in Port Said.[74]

Another example of an ultimatum deemed as a threat of force may be the statement made by President Ronald Reagan on 4 April 1985: He called on the governments of Nicaragua and El Salvador 'to lay down their arms and accept the offer of church-mediated talks on internationally-supervised elections and an end to the repression now in place against the church, the press and individual rights.'[75] At the same time, he asked the Democratic Resistance to extend the ceasefire until 1 June and asked the USA Congress for the immediate release of $14 million to be used for food, clothing, medicine and other necessities for survival, instead of arms. President Reagan ended by saying, '[P]eace negotiations must not become a cover for deception and delay. If there is no agreement after 60 days of negotiations, I will lift these restrictions, unless both sides ask me not to.'[76] According to Nicaragua, this 'peace proposal' was, in reality, 'an ultimatum announcing recourse to military measures if certain demands are not accepted.'[77]

In April 1994, during the armed conflict in the Balkans, NATO allies issued an ultimatum to Bosnian Serb forces that they would launch immediate airstrikes unless the Bosnian Serb forces ended their offensive against the declared UN 'safe area' in eastern Bosnia, withdrew their troops to at least 1.9 miles from the centre of Gorazde by one minute after midnight Greenwich Mean Time and allowed humanitarian aid into Gorazde by that time.[78]

Another case of an ultimatum was the address made by President George W. Bush on 17 March 2003: 'Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict, commenced at

73 Ibid.

74 Steven Z Freiberger, *Dawn Over Suez: The Rise of American Power in the Middle East, 1953–1957* (Ivan R Dee 2007) 188.

75 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Memorial of Nicaragua (n 2) 188. President Ronald Reagan made that statement as part of his remarks on the Central American Peace Proposal supporting democratic changes in Nicaragua.

76 Ibid 189.

77 Ibid, para. 457.

78 William Drozdiak, 'NATO Gives Serbs Deadline' (*The Washington Post*, 23 April 1994) <www.washingtonpost.com/archive/politics/1994/04/23/nato-gives-serbs-deadline/b911b6c1-9b84-4f72-9f3f-042f0a6344a8/> accessed 1 September 2022. For more on the circumstances of the NATO threats against Bosnian Serbs, see A Mark Weisburd, *Use of Force: The Practice of States Since World War II* (The Pennsylvania State University Press 1997) 113–114.

a time of our choosing.'[79] Because the demand expressed by the USA president was not met, on 20 March the USA started its military intervention in Iraq.[80]

One of the most recent examples of an ultimatum was connected with the long-running dispute between Thailand and Cambodia over the Temple of Preah Vihear. In its 1962 judgment, the ICJ found that the Temple 'is situated in territory under the sovereignty of Cambodia' and that 'Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory.'[81] Despite the ICJ decision, tensions between these two States arose from time to time, including in October 2008 when Cambodia accused 500 Thai soldiers of crossing the border of Preah Vihear.[82] To this end, 'the Prime Minister of Cambodia publicly issued an ultimatum for Thailand to withdraw by 1200 hours on 14 October 2008 or Cambodia would turn the border area into a "death zone".'[83] According to Thailand,

> [s]uch public announcement of a threat to resort to the use of force by Cambodia not only negates earlier goodwill but also runs counter to the spirit of good neighbourliness and the Treaty of Amity and Cooperation in Southeast Asia, and contradicts the principle enshrined in the Article 2, paragraph 4, of the Charter of the United Nations.[84]

Ultimately, the dispute ended in border clashes that resulted in the deaths of two Cambodian soldiers.[85] The situation at the Cambodian border seems to illustrate the example of a legal threat of force – if the Thai soldiers crossed the Cambodian border first and tensions on the border were aggravated from the beginning of October 2008,[86] then under the 'accumulation of events' doctrine[87] it may be qualified as an armed attack. In that case, the ultimatum – the

79 'President Says Saddam Hussein Must Leave Iraq Within 48 Hours' (17 March 2003) <https://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030317-7.html> accessed 1 September 2022.

80 'The Iraq War 2003–2011' <www.cfr.org/timeline/iraq-war> accessed 1 September 2022.

81 *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) [1962] ICJ Report 6, 36–7.

82 Ek Madra, 'Cambodian PM Gives Thailand Border Ultimatum' (*Reuters*, 13 October 2008) <www.reuters.com/article/us-cambodia-thailand-idUSTRE49C1JZ20081013> accessed 1 September 2022.

83 'Letter dated 16 October 2008 from the Permanent Representative of Thailand to the United Nations addressed to the President of the Security Council' (17 October 2008) UN Doc S/2008/657, para. 2.

84 Ibid.

85 Seth Mydans, '2 Killed on Thai-Cambodian Border' (*The New York Times*, 15 October 2008) <www.nytimes.com/2008/10/16/world/asia/16cambo.html> accessed 1 September 2022.

86 See the description of events at UNESCO, 'Temple of Preah Vihear (Cambodia)' <https://whc.unesco.org/en/soc/755> accessed 1 September 2022.

87 Under the 'accumulation of events' doctrine, several events that individually would not be considered as an armed attack entitling a State to the right to self-defence can, taken as a

threat of force made by Cambodia in mid-October 2008 against Thailand – was legal, as Cambodia was entitled to the right to self-defence against an armed attack on the part of Thailand.

3.5 Domestic legislation of states

A threat of force can be included not only in an act directed toward an international community or to another State/other States but also in an act of internal law or a statement made before domestic organs.[88] R. Sadurska refers to internal acts that may be considered as examples of threats of force, firstly mentioning Article 36 of the Soviet Law on the State Boundary, which stated as follows:

> The border guard and Anti-Aircraft Defence Forces shall, in effectuating the protection of the USSR state boundary, use weapons and combat equipment in order to repel an armed attack or intrusion on the territory of the USSR, suppress armed provocations on the state boundary of the USSR, prevent the hijacking of Soviet aircraft without passengers on board, as well as against violators of the USSR state boundary on land, water, and in the air in response to the use of force by them or in instances when the cessation of the violation or detention of the offenders cannot be effectuated by other means. When necessary, weapons and combat equipment of other branches of the USSR Armed Forces may be used when protecting the state boundary of the USSR. The procedure for the use of weapons and combat equipment when protecting the state boundary of the USSR shall be established by the USSR Council of Ministers.[89]

Further on, Sadurska also refers the Ordinance Containing Instructions for the Armed Forces in Times of Peace and in a State of Neutrality adopted by the Swedish government on 3 March 1983, according to which

> [A] foreign submarine found submerged in internal waters shall be forced to surface and be taken to an anchorage for further action, while a foreign submarine found within 12 miles of Swedish territorial waters

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whole, reach the threshold of an armed attack, so that a victimized State can use force in self-defence (see Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 168–175).

88 See, eg, Romana Sadurska, 'Threats of Force' (1988) 82 *AJIL* 239, 243. Cf the statement made by the USA ('Special Committee on the Question of Defining Aggression,' Summary Records (30 September 1968) UN Doc A/AC.134/SR.1–24, 196). In this context, Branislav L. Slantchev claims that 'increasing the military budget or passing legislation to increase the draft or implementing economic sanctions that impair the opponent's ability to wage war' would not constitute a threat of force (Slantchev (n 1) 67).

89 'Union of Soviet Socialist Republics: Law on the State Boundary of the U.S.S.R. (entered into force, 1 March 1983)' (1983) 22(5) *International Legal Materials* 1074.

> shall be turned away from the territory. If necessary, in either situation armed force may be used without prior warning. Simultaneously, the navy's share of military spending was increased to provide for the development of improved surveillance systems and the deployment of new incident depth charges and antisubmarine torpedoes.[90]

Sadurska does not mention whether either of these acts was considered to be a threat of force by other States, nor is the present author aware of any such case.

However, there are examples of internal acts that States viewed as communicating threats of force. For instance, on 10 February 1966, Cuba complained in a letter to the UN Secretary-General that the threat of military intervention in any of the Latin American States was 'clearly expressed in the recent decision of the House of Representatives of the United States which had the impudence to declare that the Government of that country would have to intervene, whenever it considered it advisable, in any territory of this continent.'[91] Even though Cuba did not provide any more detailed information, the context of the letter suggests that it referred to the so-called Johnson doctrine[92] and Resolution 560 adopted by the USA House of Representatives,[93] which stated as follows:

> [I]t is the sense of the House of Representatives that (1) any such subversive domination or threat of it violates the principles of the Monroe Doctrine, and of collective security as set forth in the acts and resolutions heretofore adopted by the American Republics; and (2) In any such situation any one or more of the high contracting parties to the InterAmerican Treaty of Reciprocal Assistance may, in the exercise of individual or collective self-defense, which could go so far as resort to armed force, and in accordance with the declarations and principles above stated, take steps to forestall or combat intervention, domination, control, and

90 Quotation after Sadurska (n 88) 255–6 (ft omitted).

91 'Letter dated 10 February 1966 from the Charge d'Affaires a.i. of Cuba addressed to the Secretary-General' (11 February 1966) UN Doc S/7134, 2.

92 The doctrine was formulated by President LB Johnson:

> The American nations cannot, must not, and will not permit the establishment of another Communist government in the Western Hemisphere . . . . This is and this will be the common action and the common purpose of the democratic forces of the hemisphere. For the danger is also a common danger, and the principles are common principles.
>
> ('Radio and Television Report to the American People on the Situation in the Dominican Republic on 2 May 1965' in *Public Papers of the Presidents of the United States. Lyndon B. Johnson: Containing the Public Messages, Speeches, and Statements of the President 1965 (in two books)*, Book I (United States Government Printing Office 1966) 472)

93 For more on that resolution, see Heiko Meiertöns, *The Doctrines of US Security Policy: An Evaluation under International Law* (Cambridge University Press 2010) 134.

> colonization in whatever form, by the subversive forces known as international communism and its agencies in the Western Hemisphere.[94]

Even though during the discussion concerning the preceding resolution the members of the House of Representatives gave assurances that the resolution fitted into the collective security system and did not allow for the unilateral use of force, departing from the language of Joint Resolution 230,[95] some members of the House still expressed doubts about the way in which the resolution was worded and whether it would allow the USA to engage in 'clumsy-handed intervention in the affairs of other nations.'[96] Thus, Cuban concerns over the resolution were somewhat justified.

In 1980, Nicaragua complained about the threat of a military action planned against it by the United States. One of the proofs of such a situation was a statement made on 12 November 1981 before the Committee on Foreign Relations of the House of Representatives by the USA Secretary of State Alexander M. Haig, Jr., who 'refused to rule out the possibility that the United States Government might try to destabilize or overthrow the Government of National Reconstruction of Nicaragua.'[97]

Finally, the most recent example concerns the instructions given by the President of Russia, Vladimir Putin, to senior officials of law enforcement agencies connected with the situation in 'Pankisi Gorge and other areas of contiguous territory along the line of the State border between Georgia and the Russian Federation' as a 'place . . . where the situation is giving rise to particular alarm' due to the 'terrorist threat.'[98] According to Russia, if the Georgian government was unable to establish a security zone in the area of the Georgian-Russian border, Russia could act independently on the grounds of the right to self-defence. To this end, V. Putin discussed the situation on the Caucasus state border with senior officials following increased instances of armed militants entering Russia from Georgia and instructed the Federal Border Service Director, the Defence Minister and the Federal Security

94 Congressional Record – House, Volume 111, Part 18 (14–23 September 1965), 89th Congress, 1st Session, 24347.

95 Resolution 230, adopted by the Senate and the House of Representatives, stated that

> [t]he United States is determined to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending by force or the threat of force, its aggressive subversive activities to any part of the hemisphere.
>
> (Ibid 24348)

96 Ibid 24349.

97 'Letter dated 17 November 1981 from the Permanent Representative of Nicaragua to the United Nations addressed to the President of the Security Council' (18 November 1981) UN Doc S/14757, 2.

98 'Letter dated 11 September 2002 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General' (12 September 2002) UN Doc S/2002/1012, 2–4.

Service Director to report on the fulfilment of the directives on the strengthening of Russia's southern frontiers and to draft and propose measures for the additional protection of the border. The Defence Ministry was told to draft proposals together with law enforcement agencies.[99] However, according to Georgia, the measures undertaken by V. Putin were not just regular steps adopted for the protection of a state border; on the contrary,

> the assignments given out to the Russian law-enforcement agencies by President Putin on 11 September do not in any way fall under the universally accepted international norms of inter-State relations and cannot be assessed otherwise but as a threat of aggression from the Russian Federation against a neighbouring sovereign State.

Georgia also claimed that it 'considers totally unacceptable the liberal, if mildly put, interpretation of Article 51 of the United Nations Charter . . . [which] is aimed at the justification of such aggressive intentions.'[100] In the end, Russia used the argument of self-defence when it started an armed conflict with Georgia in August 2008, although the reason given was not related to the situation of the Russian-Georgian border.[101]

3.6 War propaganda

War propaganda (or 'propaganda for war') is indicated as another example of a threat of force.[102] There is no comprehensive (and no legal) definition of war

99 'President Vladimir Putin chaired a meeting with senior officials of law enforcement agencies' (11 September 2002) <http://en.kremlin.ru/events/president/news/27396> accessed 1 September 2022.

100 'Letter dated 13 September 2002 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General' (16 September 2002) UN Doc A/57/409–S/2002/1035, 2.

101 Russia claimed that it was entitled to the right to self-defence because

> [t]he scale of the attack against the servicemen of the Russian Federation deployed in the territory of Georgia on legitimate grounds, and against citizens of the Russian Federation, the number of deaths it caused as well as the statements by the political and military leadership of Georgia, which revealed the Georgian side's aggressive intentions, demonstrate that we are dealing with the illegal use of military force against the Russian Federation.
>
> ['Letter dated 11 August 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council' (11 August 2008) UN Doc S/2008/545]

102 UNGA Res 2625(XXV) 'Declaration on the Principles of International Law Governing Friendly Relations between States' (24 October 1970) UN Doc A/RES/2625; Article 20(1) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; UNGA Res. 110 (II) 'Measures to be taken against propaganda and the inciters of a new war' (3 November 1947) UN Doc A/RES/110(II), para. 1; UNGA Res. 42/22 'The Declaration on the Enhancement

propaganda. In general, it seems that it may be understood in two ways: firstly, as an incitement to war or, to put it in the language of contemporary international law, an incitement to use force and, secondly, in a broader sense, as a preparation for war and ignorance of the peaceful settlement of disputes.[103] Nevertheless, whichever of these definitions of war propaganda one adopts, they may both be understood as threats of force.

There are not many examples in States' practice of war propaganda being interpreted as threats of force. One may start with the complaint submitted by the government of Guatemala. Its representative submitted a document to the UN that included 'a series of facts amounting to open hostility and a threat of intervention in the internal affairs of the Republic of Guatemala.'[104] This document was supposed to be 'evidence in the event of an attempt, on the part of those who are pursuing these tactics, to infringe by force the territorial inviolability and the national independence of Guatemala.'[105] The first point of this 'series of facts' is stated as follows:

> Since the Guatemalan Revolution of 1944, newspaper chains in the United States, important journals in other countries and the largest North American news agencies, have carried on a systematic propaganda campaign of false and tendentious reports which, taking advantage of the international tension that has prevailed for some years, attempts to represent Guatemala as an 'outpost of Soviet communism on the American continent,' a 'tool of Moscow' and 'spearhead' of the Union of Soviet Socialist Republics against the United States of America.[106]

The next case is the Thai complaint about Vietnamese fighting near Thailand's border. The background of the complaint was the armed conflict in Vietnam

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of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations' (18 November 1987) UN Doc A/RES/42/22; Human Rights Commission, 'General Comment No. 11: Article 20 (Prohibition of propaganda for war and inciting national, racial or religious hatred)' (29 July 1983) UN Doc HRI/GEN/1/Rev.9 (Vol. I), para. 2; 'Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States' (26 September 1967) UN Doc A/6799, 28; UNGA Res. 819 (IX) 'Strengthening of peace through the removal of barriers to free exchange of information and ideas' (11 December 1954) UN Doc A/RES/819 (IX), para. 2; UNGA Res. 277 (III) 'Freedom of Information' (13 May 1949) UN Doc A/RES/277 (III). See also Anne Lagerwall and François Dubuisson, 'The Threat of the Use of Force and Ultimata' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 910, 913; Asrat (n 69) 138; Kolb (n 62) 332; Corten (n 2) 110.

103 Michael G Kearney, *The Prohibition of Propaganda for War in International Law* (OUP 2007) 5–6; Arthur Larson, 'The Present Status of Propaganda in International Law' (1966) 31 *Law and Contemporary Problems* 439, 443–4.

104 'Letter dated 15 April 1953 from the Permanent Representative of Guatémala addressed to the President of the Security Council' (15 April 1953) UN Doc S/2988, 1.

105 Ibid 2.

106 Ibid.

that broke out in 1946 between the government of the newly established Democratic Republic of Vietnam and French forces.[107] Thailand, which had adopted an anti-communist approach during the Cold War,[108] in a letter dated 29 May 1954 claimed that '[l]arge-scale fighting has repeatedly taken place in the immediate vicinity of Thai territory; there is in the view of my Government a possibility of direct incursions of foreign troops into its territory.'[109] Thailand was more specific during the debate within the UNSC, when the representative of Thailand stated that his State 'hoped that the war in Viet-Nam would continue to be confined to that country'; according to him, the situation started to worsen, as the Vietnamese forces intended to overthrow the legal governments of Cambodia and Laos. Moreover, 'the propaganda of the Viet-Minh and the foreign governments with which it is associated have made serious and false charges against Thailand.' Given all of that, there is 'the clear danger . . . of a further extension of the war. Thailand considers itself to be directly threatened by these developments.'[110]

Another case may be found in Laos-China relations. After China invaded Vietnam in 1979,[111] Laos complained that China had massed 'several divisions of their armed forces along the Lao frontier, where they frantically engaged in combat exercises.'[112] However, this was not the only reason for the close presence of Chinese troops next to the border with Laos: according to Laos,

> China is continuing to increase the number of spies in Laos for the purpose of engaging in propaganda concerning the threat of a Chinese invasion, promoting subversion and discord among the Lao minorities and between the Lao and Chinese peoples, and opposing the policies pursued by the Lao People's Democratic Republic.[113]

The hostile relations between China and Laos, however, did not result in an armed intervention by China but, on the contrary, they gradually improved, leading to a state visit to Beijing by Laos' prime minister in 1989.[114]

107 Pierre Asselin, 'The Democratic Republic of Vietnam and the 1954 Geneva Conference: A Revisionist Critique' (2011) 11(2) *Cold War History* 155, 159–161. Ultimately, the conflict was terminated several weeks after Thailand submitted its complaint – by 21 July 1954, the parties reached agreement on most important issues during the conference in Geneva.

108 Surin Maisrikrod, 'Thailand's Policy Dilemmas Towards Indochina' (1992) 14(3) *Contemporary Southeast Asia* 287, 290–3.

109 'Letter dated 29 May 1954 from the Acting Representative of Thailand to the United Nations addressed to the President of the Security Council' (29 May 1954) UN Doc S/3220, 1.

110 UNSC Official Records (3 June 1954) UN Doc S/PV.672, paras. 31–5.

111 See, eg, David C Gompert, *Hans Binnendijk, Bonny Lin, Blinders, Blunders, and Wars: What America and China Can Learn* (RAND Corporation 2014) 117–28.

112 A/34/135-S/13199 (n 22) 1.

113 Ibid 7.

114 MacAlister Brown and Joseph J Zasloff, 'Government and Politics' in Andrea Matles Savada (ed), *Laos: A Country Study* (3rd ed, US Government Printing Office 1995) 203, 249–50.

3.7 'Accumulation of events' as a threat of force

It was mentioned earlier that some States claim that not only singular events can be qualified as an armed attack, which gives rise to the right to self-defence, but so can a series of events that separately would not amount to such. This doctrine is called the 'accumulation of events.' In case of threats of force, States tend to present an analogous position: they describe a threat of force not as a singular event but as a series of occurrences that the targeted State deems as a threat of force only when taken as a whole.

For instance, in April 1978, Cyprus informed the UN about a series of three events that, according to Cyprus, amounted to 'intimidation and threats of force':[115] the Turkish constitutional advisor allegedly said that 'regrettable things may happen in the immediate future if the Turkish proposals were not accepted and the intercommunal talks were not resumed';[116] Turkish military aircraft flying at a low altitude had violated the airspace of Cyprus; and the Turkish Prime Minister, Bülent Ecevit, declared that 28,000 Turkish occupation troops would continue to remain on the territory of Cyprus.[117]

One may also mention that the coordinator of the Government Junta of National Reconstruction of Nicaragua, in a letter dated 21 September 1984 addressed to the Presidents of the member States of the Contadora Group, complained that Nicaragua was 'facing a serious increase in the threats and military aggression from the Government of the United States of America,' which resulted in 'assassinations and kidnapping of children, men and women,' 'extensive damage to the economy,' 'destruction of the country's modest resources,' the presence of USA warships close to the Nicaraguan coast, the direct participation of CIA mercenaries in attacks on the territory of Nicaragua and 'invasions from neighbouring territories of over 6,000 Somozan counter-revolutionaries inside the country.'[118] The representative of Nicaragua thus enumerated – under the label of threats of force and the use of force – widely varying forms of conduct attributed to the USA: assassinations and kidnappings, damage to the economy, the presence of US warships, the engagement of American intelligence and indirect armed intervention against Nicaragua.

The Movement of Non-Aligned Countries was also concerned about the situation in Nicaragua. Its coordinating bureau sent a communiqué to the UN Secretary-General calling out 'attempts aimed at destabilizing and

115 'Letter dated 18 April 1978 from the Permanent Representative of Cyprus to the United Nations addressed to the Secretary-General' (19 April 1978) UN Doc A/33/85-S/12655, 1. See also 'Letter dated 18 April 1978 from the Permanent Representative of Cyprus to the United Nations addressed to the Secretary-General' (18 April 1978) UN Doc A/33/84-S/12653, 2.

116 A/33/84-S/12653 (n 115) 1.

117 A/33/85-S/12655 (n 115) 1.

118 'Letter dated 21 September 1948 from the Permanent Representative of Nicaragua to the United Nations addressed to the President of the Security Council' (23 September 1984) UN Doc S/16756, 2.

toppling the Nicaraguan Government,' 'the danger of a direct intervention in Nicaragua' and 'intensified aerial and naval actions, in flagrant violation of the airspace and territorial waters of Nicaragua,' as 'hostile actions and threats' against Nicaragua.[119]

Finally, Uganda, in its counter-memorial submitted to the ICJ, described a series of actions carried out by both the DRC and Sudan that, according to Uganda, amounted to the threat of force. When it came to the threat of force on the part of the DRC, Uganda observed that 'the military threat to Uganda escalated dramatically,' further indicating that

> with FAC [Armed Forces of the DRC] support, the ADF [*Forces démocratiques alliées*] launched a major attack on Kasese, a regional center in western Uganda and the site of a strategically important airfield, on 1 August, the day before the Congolese rebellion broke out. A similar attack was made on the town of Kyarumba, near Kasese, on 6 August . . . . The DRC government sent six FAC battalions, composed of Katangese troops from southern Congo who had remained loyal to President Kabila, to the border region across from Uganda. They joined forces with the ADF and Interahamwe operating in that region and, on 7 August, near Beni, attacked the UPDF [Uganda People's Defence Force] troops that were still in Congo pursuant to the Congolese government's invitation . . . . At the same time, Ugandan military intelligence reported that the Government of Sudan had airlifted some 3,500 WNBF to Kinshasa.[120]

Thus, Uganda identified as a 'military threat' a series of cases of the use of force by the DRC, both inside and outside the territory of Uganda.

Moreover, Uganda claimed that Sudan also presented a serious military threat:

> The Sudan had been conducting armed actions against the Republic of Uganda since 1986, and had at times bombed Ugandan towns and villages across the long boundary that divides southern Sudan from northern Uganda. The Government of the DRC had now agreed to put at the disposal of the Sudan all the airfields in northern and eastern Congo, and the Sudan had agreed to use these military airfields to deliver arms, supplies and troops to support the FAC, and also to support the anti-Uganda armed groups in the Uganda-Congo border region. As a result, the Sudan had succeeded in opening a second front against Uganda. An immediate consequence of this realignment was the recrudescence of military assistance and logistical support to the anti-Uganda armed

119 'Letter dated 19 November 1984 from the Permanent Representative of India to the United Nations addressed to the Secretary-General' (20 November 1984) UN Doc A/39/673-S/16835.

120 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Counter-Memorial Submitted by The Republic of Uganda, vol I, para. 47.

> groups in the period June 1998 onward followed by their incorporation into the command structure of the official Congolese armed forces.[121]

It stems from this account that Sudan also presented a military threat to Uganda because it had at its disposal the DRC airfields and started to provide military aid to the DRC and anti-Ugandan armed groups.

3.8 Conclusions

The aim of this chapter has been to present the great variety of forms that threats of force can take – from military manoeuvres, through to the possession of nuclear weapons and domestic acts of States, and ending with war propaganda. It is important to highlight that the list of threats of force presented in this chapter is in no way exhaustive. As mentioned in Chapter 1, threats of force are to a great extent based on a subjective element, so their identification depends on many factors. Thus, virtually any State behaviour may be deemed as a threat of force. The attempt to classify threats of force by the form they took was used to arrange the numerous cases discussed in this chapter, but in no way does this have any influence on their legal assessment.

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121 Ibid para 363.

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4 Responses to threats of force

Introduction

The aim of this chapter is to discuss the responses that States undertake and/or could undertake in reaction to threats of force. To this end, the chapter is divided into two parts. The first discusses how States can use the framework of international organizations to cope with threats of force. The most important role is performed here by the UNSC; however, other UN and non-UN organs may also play a part, depending on the circumstances surrounding the threats of force. The second part of the chapter reviews measures available to the targeted State outside these international organizations, such as verbal condemnations; preparations against the threatened use of force; and signing treaties that allow for a consultative mechanism in cases of threats of force.

4.1 Responses to threats of force under the framework of international organizations

4.1.1 The United Nations

Within the UN system, States most frequently submit cases of threats of force to the UNSC or the UNGA. Because the powers of these two organs are the broadest (while at the same time being grossly underused by States), responses to threats of force by the General Assembly and the Security Council will be discussed by differentiating between the measures these bodies may undertake; what measures States wish them to employ; and what means are actually employed by these two organs.

4.1.1.1 The UN Security Council

4.1.1.1.1 WHAT THE UN SECURITY COUNCIL CAN DO

It has been previously established that threats of force may constitute a type of threat to the peace.[1] Thus, in cases of threats of force, the UNSC may assume

1 See Chapter 2, Section 2.3.

DOI: 10.4324/9781003376026-5

its functions under Chapter VII of the UN Charter. The 'gateway to Chapter VII'[2] is Art. 39 of the UN Charter, which states as follows:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Under Art. 39, the UNSC has exclusive and discretional power to decide both whether a particular situation is indeed a 'threat to the peace, breach of the peace, or act of aggression' at all[3] and to determine what constitutes a 'threat to the peace, breach of the peace, or act of aggression.'[4]

'Threat to the peace' is the broadest of the three terms mentioned in Article 39, and, as mentioned in Chapter 2,[5] in practice it covers an extensive array of situations, including threats of force. Given the goal of Chapter VII, the UNSC should not determine the existence of a threat to the peace and, consequently, should not apply measures from Chapter VII, if the situation does not concern the majority of States and their nationals or, to put it differently, if the conduct of a State cannot be considered as a credible threat to the peace or a danger to the international community as a whole.[6] It seems that at least some threats of force can fit into these criteria of a threat to the peace.

On the other hand, the term 'breach of the peace' should 'include all situations in which a "threat to the peace" is no longer merely a threat but has already materialized.'[7] To differentiate between a breach of the peace and aggression, one could say that a 'breach of the peace would denote a serious outbreak of armed hostilities, but which is not so serious as to constitute an act of aggression.'[8] Finally, 'aggression' refers to the most serious cases of the use of armed force, as defined in UNGA Resolution 3314. Given their meanings, neither 'breach of the peace' nor 'aggression' covers threats of force.

2 James Crawford, *Brownlie's Principles of Public International Law* (8th ed, OUP 2012) 759.

3 Nico Krisch, 'Article 39' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 1272, 1275.

4 Gérard Cohen-Jonathan, 'Article 39' in Jean-Pierre Cot and Alain Pellet (eds), *La Charte des Nations Unies* (Economica 1991) 645, 649; Krisch (n 3) 1274–5.

5 See Chapter 2, Section 2.3.

6 Benedetto Conforti, 'Le pouvoir discrétionnaire du Conseil de sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression' in René Jean Dupuy (ed), *Le développement du rôle du Conseil de sécurité* (Martinus Nijhoff Publishers 1993) 51, 56–7.

7 Krisch (n 3) 1293.

8 Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 144. See also Hilaire McCoubrey and Nigel D White, *International Law and Armed Conflict* (Dartmouth Publishing Company 1992) 129–30; Ruth B Russell, *A History of the United Nations Charter: The Role of the United States 1940–1945* (The Brookings Institution 1958) 670.

Taking the preceding into account, the UNSC has to first determine that a threat of force amounts to a threat to the peace in order to use its powers under Chapter VII of the UN Charter.[9] After the Council makes such a determination, it may order measures from Art. 40 to prevent the situation from being aggravated.[10] Thus, the UNSC may demand the suspension of hostilities, troop withdrawal or the conclusion of an agreement on a ceasefire; it may also call on a State(s) to agree to the presence of UN observers.[11] Importantly, measures under Art. 40 cannot be of a conclusive character, for example, the UNSC may temporarily determine a ceasefire line and demand that troops withdraw behind the line, but it cannot take a decision on the final dispute settlement.[12]

Next, under Article 41 the UNSC has competences to establish non-forcible, binding measures upon States. These measures may include 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations,' as enumerated in Art. 41 itself. However, this list is not exhaustive, as the UNSC may apply any other measures short of the use of force.[13] Article 41 is the legal basis for the establishment of sanctions by the UNSC, usually of an economic or diplomatic nature.[14] Moreover, under Art. 41 the Council may adopt measures of dispute settlement, adjudication or legislation.[15]

Finally, under Art. 42 the UNSC may decide that the measures provided for in Article 41 are inadequate, or have proved to be inadequate, and decide to undertake a collective armed action. Articles 43–47 envisage a special measure to carry out such an action – UN members should make available to the UNSC their armed forces. According to the Report of the UN Secretary-General

9 Advisory Council on International Affairs, *Advisory Report 36: Pre-Emptive Action* (July 2004) 13, 23 <www.advisorycouncilinternationalaffairs.nl/binaries/advisorycouncilinternationalaffairs/documents/publications/2004/07/09/pre-emptive-action/Pre-Emptive_Action_AIV-Advisory-report-36_ENG_200407.pdf> accessed 1 September 2022; Nico Krisch, 'Article 40' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 1297, 1299; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2010) 408.

10 Cohen-Jonathan (n 4) 646.

11 Krisch (n 9) 1300–301.

12 Ibid 1301.

13 Pierre Michel Eisemann, 'Article 41' in Jean-Pierre Cot and Alain Pellet (eds), *La Charte des Nations Unies* (Economica 1991) 691, 695.

14 Crawford (n 2) 764.

15 Nico Krisch, 'Article 41' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 1305, 1310–311, 1322. When it comes to dispute settlement and adjudication, the UNSC may decide about the settlement of compensation claims; determine the boundary between two States; adopt a peace agreement; declare certain States' actions as 'null and void' or determine that a State is liable for damages arising from the use of force. Quasi-legislation means that the UNSC may impose enduring obligations on some member States.

titled 'An Agenda for Peace,' 'The ready availability of armed forces on call could serve in itself as a means of deterring breaches of the peace since a potential aggressor would know that the Council had at its disposal a means of response.'[16] However, Article 43 (and its subsequent provisions) has never been implemented.[17]

It also needs to be highlighted that the UNSC may engage in dispute settlement under Chapter VI of the UN Charter. Using this path, it does not have to determine that a particular threat of force amounts to a threat to the peace; nevertheless, under this chapter, it may only undertake non-coercive and non-binding measures.[18] If the same measures may be undertaken under Article 40 and Chapter VI, it is up to the UNSC to decide which regulation will prove more effective.[19] According to Art. 33(2), the UNSC may call upon States to take any procedural measures that it considers appropriate to peacefully settle the dispute. These may include negotiations, mediation, reconciliation or submitting the dispute to a judicial organ. The application of Art. 33(2) means that the Council is referring the responsibility for the dispute back to the parties to the dispute, although the Council's referral may be supported by different diplomatic initiatives.[20] Article 34 has an exceptional meaning under Chapter VI, as it is an independent measure of action taken by the UNSC. It gives the UNSC the power

> to investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Thus, the UNSC may call for reports clarifying the situation, hear witnesses, dispatch missions of inquiry, and the like.[21] A determination made under Art. 34 can be a pre-condition for calling upon the parties under Art. 33(2) or for making recommendations under Art. 36 or 37(2).[22] Article 35 allows both UN members and non-member States to bring matters to the attention of the UNSC or the UNGA and obliges these organs to deal with the matter.[23] The

16 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping' (17 June 1992) UN Doc A/47/277-S/24111, para. 43.

17 Nico Krisch, 'Article 43' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 1351, 1356.

18 Christian Tomuschat, 'Article 33' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 1069, 1070.

19 Krisch (n 9) 1301.

20 Ibid 1072, 1083–84.

21 Theodor Schweisfurth, 'Article 34' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 1086, 1095.

22 Ibid 1089.

23 Theodor Schweisfurth, 'Article 35' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 1108, 1113.

UNSC may act under Article 36(1) if there is a dispute likely to endanger the maintenance of international peace and security.[24] Because while acting under Art. 36 the UNSC is exercising its primary responsibility, it acts not only upon the request of States but also *ex officio*. The UNSC may then recommend to the parties a specific procedure for settling a dispute that it considers to be most appropriate in the given situation, not only the ones mentioned in Article 33. It may also recommend 'accompanying measures so as to enhance the chance of success of the envisaged settlement procedure, such as the revocation of certain unilateral acts by one or both of the parties' or recommend that the parties refrain from any action that could aggravate the situation.[25] Recommendations made under Art. 36 are not binding, but the UNSC may assess the legality of States' actions and condemn them.[26] Under Art. 37(1), 'Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.' Then,

> [i]f the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.
>
> (Art. 37(1))

Moreover, 'Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute' (Art. 38).

To sum up, if the UNSC identifies a threat of force as a type of a threat to the peace, it may use its broad competences under Chapter VII to assist States in resolving the tension and to prevent the escalation of the situation into an actual use of force. As long as collective armed intervention under the auspices of the UNSC to stop threats of force remains unlikely, the UNSC may first and foremost use the measures included in Articles 40 and 41, for example, demand that the threatening State cease threats of force or establish economic sanctions against the threatening State.[27]

Moreover, regardless of whether the threat of force amounts to a threat to the peace, the UNSC may use the tools envisaged in Chapter VI, which, even if they are not binding, can still constitute considerable political support for the targeted State and could contribute to the settlement of a dispute. As the

24 Thomas Giegerich, 'Article 36' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 1119, 1128.

25 Ibid 1131, 1134.

26 Ibid 1135, 1143.

27 See also the statement by Iraq (UNGA Official Records, Sixth Committee (11 November 1963) UN Doc A/C.6/SR.808, para. 10).

previous chapter demonstrated, disputes concerning threats of force can have a complicated factual background; Article 34 allows the UNSC to investigate such situations to clarify all of the facts in cases where there are doubts about the authenticity of the threats.

Thus, the UNSC has at its disposal a whole range of tools, both binding and non-binding, forcible and non-forcible, to investigate and reduce threats of force between States.[28]

4.1.1.1.2 WHAT STATES WANT THE UN SECURITY COUNCIL TO DO

The UNSC is certainly the organ most often addressed in cases of threats of force. States consider that because the UNSC is burdened with the primary responsibility for maintaining international peace and security, it is also the proper organ to which to submit complaints about such threats.[29] It has even been stated that this role of the UNSC with regard to threats of force constitutes 'one of the fundamental guarantees for the proper functioning of the system of security and the pacific settlement of disputes envisaged by the Charter.'[30]

28 J Craig Barker, who differentiates between permissible and non-permissible threats of force, also sees a primary role of the UNSC in determining the permissibility of some of the threats. According to him, the UNSC could appraise the threats of force as potential threats to international peace and security at an early stage, monitor permissible threats of force and react before the situation escalates into a threat or breach of peace. In deciding whether to condemn specific threats of force, it would assess the claims of the competing parties (J Craig Barker, *International Law and International Relations* (Continuum 2000) 133).

29 See, eg, statements made by Indonesia (UNGA Official Records, First Committee (3 January 1952) UN Doc A/C.1/SR.478, para. 13), Cyprus (UNGA Official Records, Sixth Committee (29 November 1963) UN Doc A/C.6/SR.822, para. 7), Ecuador ('Special Committee on the Question of Defining Aggression, Summary Records (19 October 1970) UN Doc A/AC.134/SR.52–66, 55) and Italy (Special Committee on the Question of Defining Aggression, Summary Records (19 October 1970) UN Doc A/AC.134/SR.67–78, 55). See also the statement made by R Higgins, speaking on behalf of the UK, before the ICJ in the Lockerbie case ['If Libya really believes such threats have been made, it has only to go to the Security Council which is exactly the usual forum for addressing claims of threats contrary to Article 2(4) of the Charter'; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Public sitting (28 March 1992) Verbatim Record 92/6, 25–26]. See also statements by the ILC (Yearbook of the International Law Commission 1989, Volume II, Part Two, 68, para. 5), its members [Pemmaraju Sreenivasa Rao, 'Draft Articles on the Draft Code of Crimes Against the Peace and Security of Mankind. Titles and Texts Adopted by the Draft Committee: Articles 13, 14 and 15 – reproduced in A/CN.4/SR.2134 to SR.2136' UN Doc A/CN.4/L.433, 294, para. 14, and Juri G Barsegov, Ibid 294, para. 19] and the doctrine of law [Marco Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54(2) *Netherlands International Law Review* 229, 269, 277; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 259, 54; Philip C Jessup, *A Modern Law of Nations – An Introduction* (The Macmillan Company 1948) 166]. Cf Christine Gray, *International Law and the Use of Force* (4th ed, OUP 2018) 17.

30 Statement made by Turkey (UNSC Official Records (5 January 1961) S/PV.923, para. 64).

In cases of threats of force, States make a variety of requests in their submissions to the UNSC. These may be organized by starting with those involving the least use of the powers of the UNSC and ending with those that invoke its most far-reaching competences.

Firstly, it sometimes occurs that States simply report cases of threats of force, without asking the UNSC to employ its powers. To give an example, by a letter dated 8 September 1987, Libya informed the president of the UNSC that on 30 August 1987 it received a letter from the USA government in which 'basing its position on allegations relating to the supply of mines and weapons to the Islamic Republic of Iran, [it] threatens to resort to force and aggression against the Jamahiriya.'[31] In the same vein, States may request that their communication to the Council about the threats be circulated among the member States.[32] Secondly, at times States request the UNSC to convene a meeting in order to discuss cases of threats of force made against them.[33] Thirdly, addressing the UNSC competences, States sometimes ask the UNSC, in general terms, to carry out its responsibilities under Chapter VII of the UN Charter[34] in order to attempt to restore peace.[35] Next, States may demand that the UNSC condemn the threats of force as well as call upon the threatening

31 'Letter dated 8 September 1987 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council' (8 September 1987) UN Doc S/19113, 2.

32 For example, letters of Turkey ('Letter dated 19 September 1997 from the Permanent Representative of Turkey to the United Nations addressed to the Secretary-General' (23 September 1997) UN Doc A/52/383-S/1997/732, 2); Cyprus ('Letter dated 26 September 1997 from the Permanent Representative of Cyprus to the United Nations addressed to the Secretary-General' (29 September 1997) UN Doc A/52/397-S/1997/739, 2); Lebanon ('Letter dated 14 January 1972 from the Permanent Representative of Lebanon to the United Nations addressed to the President of the Security Council' (14 January 1972) UN Doc S/10506); Egypt ('Letter dated 30 October 1956 from the Representative of Egypt addressed to the President of the Security Council' (30 October 1956) UN Doc S/3712); and Thailand (Letter dated 16 October 2008 from the Permanent Representative of Thailand to the United Nations addressed to the President of the Security Council' (17 October 2008) UN Doc S/2008/657, para. 8).

33 Requests made by Cyprus ('Letter dated 13 March 1964 from the Permanent Representative of Cyprus addressed to the President of the Security Council' (13 March 1964) UN Doc S/5598); Iraq, Jordan, Kuwait, Morocco, Saudi Arabia and Yemen ('Letter dated 30 September 1986 from the Permanent Representatives of Iraq, Jordan, Kuwait, Morocco, Saudi Arabia and Yemen to the United Nations addressed to the President of the Security Council' (1 October 1986) UN Doc S/18372); Panama ('Letter dated 10 January 1964 from the Permanent Representative of Panama addressed to the President of the Security Council' (10 January 1964) UN Doc S/5509, 1); and Iraq ('Letter dated 2 July 1961 from the Permanent Representative of Iraq addressed to the President of the Security Council' (2 July 1961) UN Doc S/4847).

34 Statement made by New Zealand (UNSC Provisional Records (15 October 1994) UN Doc S/PV.3438, 9).

35 Statement made by Iraq (UNSC Official Records (31 May 1967) UN Doc S/PV.1345, para. 21).

State to cease the threats[36] or, more generally, to refrain from taking any steps that might further aggravate the situation.[37] Likewise, States also may request the UNSC to express support for States that have been targeted by threats of force.[38] Finally, States may ask the UNSC to protect them from threats against their independence and territorial integrity[39] and from the use of force by the threatening State.[40]

It needs to be highlighted that in all of these cases States usually do not precisely indicate what specific steps the UNSC should take to meet any of these requests. For instance, Cyprus, which deemed itself threatened with the use of force by Turkish forces, mentioned 'appropriate measures under the relevant provisions of the Charter,'[41] while Jordan, with regard to threats of force made by Israel, stated that the UNSC 'should take more effective measures to cope with the problem.'[42] The representative of Vietnam was more concrete, as he requested the adoption of a resolution by the UNSC concerning threats of force made by the USA against Nicaragua,[43] while Ghana proposed considering sanctions against South Africa.[44] None of the States referred to particular UNSC competences or UN Charter provisions or concretely specified the form of protection sought against the threats of force.

Bearing in mind the findings of the previous section, States do not make use of all of the tools they could, given the broad powers of the UNSC in cases of threats of force. Most often, they submit cases of threats to the Council and ask for a meeting or protection, as well as the adoption of a resolution or sanctions of imprecise content at best. They do not make use of the UNSC's competences to investigate the situation, indicate measures appropriate for settling the dispute or engage its powers to enforce obligations on member States. While it is true that threats of force usually form part of a bigger, long-standing dispute, in which more UNSC powers are engaged, if threats of force

36 Statement made by Iran ('Letter dated 10 November 2006 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (13 November 2006) UN Doc A/61/571–S/2006/884, 2).

37 Statement made by the USSR (UNSC Official Records (19 February 1964) UN Doc S/PV.1096, para. 54).

38 Statement made by Yemen (UNSC Official Records (3 April 1984) UN Doc S/PV.2528, paras. 127, 130).

39 Statement by the USSR (S/PV.1096 (n 37) para. 54).

40 Statements made by Cyprus (S/5598 (n 33)); Czechoslovakia (UNSC Official Records (25 February 1964) UN Doc S/PV.1097, paras. 58, 60); Pakistan (UNSC Official Records (1 February 1962) UN Doc S/PV.990, para. 77); Greece (UNSC Official Records (24/25 November 1967) UN Doc S/PV.1383, para. 67); and the FRY ('Letter dated 20 March 1999 from the Chargé d'Affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council' (20 March 1999) UN Doc S/1999/301, 3).

41 Statement made by Cyprus (S/5598 (n 33)).

42 UNSC Official Records (30 March 1968) UN Doc S/PV.1409, para. 20. See also statement made by Egypt (UNSC Provisional Records (11 April 1995) UN Doc S/PV.3514, 10).

43 UNSC Official Records (4 April 1984) UN Doc S/PV.2529, para. 24.

44 UNSC Official Records (1 February 1980) UN Doc S/PV.2195, para. 88.

are no less dangerous than the use of force itself and may lead to the aggravation of a situation, they should be properly addressed as well.

4.1.1.1.3 WHAT THE UN SECURITY COUNCIL DOES

Despite its vast competences under the UN Charter and it being the most frequent addressee of requests from targeted States, the UNSC does not usually engage actively in situations involving threats of force.

When it comes to the State requests to convene a UNSC meeting, these calls are rarely answered if threats of force are the only issue that is at stake. Even when threats of force became a matter of debate within the UNSC, it is usually one of many disputed issues among States and rarely the sole matter of discussion.

In a significant number of its resolutions, the UNSC has condemned threats to international peace and security or violations of the prohibition of the 'threat or use of force.' However, in only a few resolutions has the UNSC referred explicitly and solely to threats of force (not coupled with the use of force). In Resolution 326, the UNSC condemned 'all the acts of provocation and harassment, including economic blockade, blackmail and military threats, against Zambia by the illegal régime [Southern Rhodesia] in collusion with the racist régime of South Africa' (para. 1).[45] Likewise, in Resolution 403, the UNSC strongly condemned 'all acts of provocation and harassment, including military threats and attacks, murder, arson, kidnapping and destruction of property, committed against Botswana by the illegal regime in Southern Rhodesia' (para. 1).[46]

Threats of force may be also addressed by the president of the UNSC on behalf of the Council. For instance, in March 2005, Ethiopia had been steadily massing troops towards the southern border of the Temporary Security Zone. It described those activities as part of a reorganization of its armed forces to improve its defence capability, but Eritrea regarded them as provocative. Furthermore, during the year, three shooting incidents occurred in Sector West, allegedly between armed Ethiopians and Eritrean militia, which resulted in casualties.[47] In a statement made on behalf of the UNSC, the president declared, *inter alia*, that '[t]he Security Council also calls on both parties to

45 UNSC Res. 326 (2 February 1973) UN Doc S/RES/326. In its letter dated 24 January 1973 from the Permanent Representative of Zambia to the United Nations addressed to the President to the Security Council ((24 January 1973) UN Doc S/10865), Zambia did not specifically mention threats of force. The issue of threats of force was also not explicitly mentioned during the UNSC debate (UNSC Official Records (2 February 1973) UN Doc S/PV.1691).

46 UNSC Resolution 403 (14 January 1977) UN Doc S/RES/403. The adoption of the resolution was the result of a debate within the UNSC initiated by the letter dated 22 December 1976 from the Permanent Representative of Botswana to the United Nations addressed to the President of the Security Council ((22 December 1976) UN Doc S/12262), which, however, did not mention threats of force committed by Southern Rhodesia; the issue of threats emerged only during the UNSC debate (see UNSC Official Records (14 January 1977) UN Doc S/PV.1985, paras. 11, 19, 106, 139).

47 Yearbook of the United Nations 2005, 353, 355.

show maximum restraint and to refrain from any threat of use of force against each other.'[48]

When it comes to the UNSC powers under Chapter VII of the Charter, '[t]he Council has never to date initiated or explicitly authorised formal sanctions in response to a threat of force according to article 2(4) of the UN Charter,'[49] not to mention never reaching armed intervention based on Art. 42. Also, there is no evidence that the UNSC has ever tried to adopt measures from Chapter VI to peacefully resolve a dispute between States over threats of force.

In conclusion, mere threats of force are rarely a concern for the UNSC and, if they are, the Council usually limits itself to the circulation of States' submissions about alleged threats. Meetings and resolutions discussing specific threats of force are a rarity.

With regard to the UNSC's role concerning threats of force, one more issue needs to be discussed. Chapter 2 of this work demonstrated that States often use threats of force as a tool in negotiations and diplomacy, while at the same time ignoring the fact that threats of force are prohibited by Art. 2(4) of the UN Charter. In the past, the UNSC has been involved in situations when States made such threats of force.

The most discussed of such cases happened during the armed conflict in the Federal Republic of Yugoslavia. The factual and legal background of it has been elaborated in Chapter 2. Here it suffices to recall that the FRY claimed that NATO tried to make it accept the Rambouillet Accords under threats of force. Because the FRY persistently refused to do so, NATO carried out a bombing campaign that lasted until 9 June 1999. On the very next day, the UNSC adopted Resolution 1244 in which it not only did not raise the question of the legality of the NATO actions but implicitly confirmed the legality of the accords by making them a part of the new order introduced in Kosovo.[50] In the first paragraph of the resolution, the UNSC declared 'that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2.'[51] In the 11th paragraph of the resolution, the Council stated the following:

> [The] main responsibilities of the international civil presence will include:
>
> (a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648); . . .

48 'Statement by the President of the Security Council' (4 October 2005) UN Doc S/PRST/2005/47.

49 Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007) 268; McCoubrey and White (n 8) 62.

50 Giovanni Distefano, 'Le Conseil De Sécurité Et La Validation Des Traités Conclus Par La Menace De La Force' in Charles-Albert Morand (ed), *Crise des Balkans de 1999: les dimensions historiques, politiques et juridiques du conflit du Kosovo* (Bruylant 2000) 167, 180.

51 UNSC Resolution 1244 of 10 June 1999, S/RES/1244.

> (e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648).

Annex 1 of the resolution includes the 'Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersburg Centre on 6 May 1999.'[52] The preamble to it states the following:

> A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA.

Annex 2 of the resolution starts with the words: 'Agreement should be reached on the following principles to move towards a resolution of the Kosovo crisis.'[53] The eighth paragraph states that

> [a] political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the UCK.

Thus, regardless of the FRY's claims and the fact that both NATO and NATO member States openly admitted that threats of force were used to make the FRY comply with the Rambouillet Accords, the UNSC adopted a resolution that accepted the political process and order provided by these accords, even though one of the parties refused to sign them under the threat of force.

Another case in which States made blatant threats of force but the UNSC did not condemn such a practice concerned Iraq. In 2002 the UNSC adopted Resolution 1441, which noted the breach of international obligations by Iraq but remained silent about the threats of force.[54] As N. D. White observed,

> it can be blandly stated that all the Security Council was doing was taking advantage of this threat without endorsing it, and that the Council, if it had decided to authorize the use of force in a second resolution, would have been accepting the threat only for the purpose of enforcing its will. The failure to authorize the use of force could then be seen as a rejection of that threat that preceded it.[55]

52 Ibid.

53 Distefano (n 50) 181.

54 UNSC Res. 1441 (8 November 2002) UN Doc S/RES/1441.

55 Nigel D White, 'Self-defence, Security Council Authority and Iraq' in Richard Burchill, Nigel D White and Justin Morris, *International Conflict and Security Law: Essays in Memory of*

It is obvious that, with regard to both the FRY and Iraq situations, if the UNSC had condemned the threats of force as illegal, it would have blighted long-standing efforts to resolve these crises – efforts that were supposed to be supported by threats of force. On the other hand, the UNSC's condemnation of such threats would be a strong signal that threats of force cannot be used as a tool to enforce international obligations, including duties stemming from UNSC resolutions. As mentioned previously, the UNSC has a wide range of measures at its disposal that it could have used to resolve the conflicts and induce both the FRY and Iraq to comply with the signed agreements and UNSC resolutions. Instead, the lack of UNSC condemnation of the threats of force raised not only the question of the UNSC's position towards the role of threats but also, in the case of the FRY, whether the threatening States could in fact justify their threats (and, ultimately, the use of force) by referring to UNSC resolutions.[56] To sum up, bearing in mind that the UNSC is the principal worldwide organ responsible for the maintenance of international peace and security, there should not be the slightest doubt that it stands guard over fundamental principles such as those arising from Art. 2(4). Thus, in the case of the UNSC, a lack of condemnation of threats of force, and especially 'taking advantage' of these threats, in fact amounts to an ignominious failure to fulfil its role and has contributed to the declining importance of the prohibition of threats of force.

4.1.1.2 The UN General Assembly

4.1.1.2.1 WHAT THE UN GENERAL ASSEMBLY CAN DO

Besides the UNSC, the UNGA is also addressed by States in cases of threats of force. Although it has a considerably smaller range of functions with regard to the maintenance of international peace and security and, most importantly,

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Hilaire McCoubrey (Cambridge University Press 2005) 261. In this context, one may also refer to the example presented by François Dubuisson and Anne Lagerwall: these authors claim that the UNSC itself threatened the use of force in its Resolution 1441. In this act, the Council imposed a number of obligations on Iraq, at the same time referring to UNSC Resolution 678 and stating in the 13th paragraph that 'the Council has repeatedly warned Iraq that it will face serious consequences as a result of its continued violations of its obligations.' In this context, 'serious consequences' are assumed to amount to the threat of force (François Dubuisson and Anne Lagerwall, 'Que signifie encore l'interdiction de recourir à la menace de la force?' in Karine Bannelier and others (eds), *L'intervention en Irak et le droit international* (Pedone 2004) 85, 95–6). Thus, according to the authors, if the USA and the UK threatened the collective use of force in reference to Resolution 1441, their threats would be legal. However, in practice, they threatened with a unilateral use of force, which made their threats illegal (Ibid 96–7). Despite this view, nothing in Resolution 1441, nor in the statements of States preceding the adoption of the resolution, indicates that the resolution was supposed to express the threat of force or authorize the use of force.

56 Corten (n 9) 121–22.

cannot take binding decisions on member States, it can deal with threats of force as the most representative UN organ.

Under Art. 11(1) of the UN Charter,

> The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security . . . , and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

The following paragraph adds:

> The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.
>
> (Art. 11(2))

Given these regulations, States must decide whether they prefer to submit the issue of threats of force to the UNSC – which may undertake binding decisions and impose coercive measures, but which may also be paralyzed by the veto of one of the permanent members – or whether the UNGA would be a more appropriate addressee of the matter, as the Assembly may handle the situation more effectively, even though it may make only non-binding recommendations.[57] Moreover, under Art. 11(2), there are no limits on which questions relating to international peace and security the UNGA may discuss, as well as no limits on the substance of its recommendations, including coercive measures.[58] Thus, the UNGA may call upon the UNSC to act under Chapter VII and/or adopt sanctions under Art. 41, as well as call on States to employ sanctions.[59] Even though the UNGA cannot impose any obligations on the UNSC, it may put political pressure on the Council[60] and in this manner induce it to act. However, if the UNGA believes that binding coercive

57 See, eg, Schweisfurth (n 23) 1110–111.

58 Eckart Klein and Stefanie Schmahl, 'Article 11' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 491, 499, 501.

59 Eisemann (n 13) 703. If a State establishes sanctions on the request of the UNGA, then such act of sanctions is a unilateral act of a State and such State cannot invoke the UN Charter as grounds for the establishment of sanctions in the event they contravene its international obligations (Ibid 704).

60 Cohen-Jonathan (n 4) 650–51.

measures are necessary to deal with the dispute, it is obliged to refer the matter to the UNSC.[61]

Under Art. 11(3), even if the situation is only *likely* to endanger international peace and security – that is, it is not yet a threat to the peace or a breach of the peace – the UNGA may nevertheless call the attention of the Security Council to such a situation.[62]

Like the UNSC, the UNGA also has some powers under Chapter VI of the UN Charter. Under Articles 35(1) and 35(2), both member States and non-members may decide whether they wish to bring any dispute or any situation to the UNGA or to the UNSC.

Finally, UNGA Resolution 377 (V) 'Uniting for Peace' should be mentioned, which

> [r]esolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression, the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations.
>
> (para. 1)

To sum up, even though the UNGA is not the organ primarily responsible for the maintenance of international peace and security, it has certain tools at its disposal to address threats of force. UNGA actions can only take the form of non-binding recommendations, but these may still exert considerable pressure on both States and the UNSC. Thus, to address the UNGA in cases of threats of force may turn out to be a viable alternative compared to submission of the situation to a UNSC that is paralyzed by the veto of one of the permanent members.

61 Klein and Schmahl (n 58) 501.

62 The picture of the UNGA's competences when it comes to international peace and security is complete only with the mention of Article 12 of the UN Charter, which states as follows:

> While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

Thus, if the UNSC exercises its functions with regard to a specific case of the threat of force, unless requested the UNGA would not be allowed to make any recommendations about that situation.

4.1.1.2.2 WHAT STATES WANT THE UN GENERAL ASSEMBLY TO DO

States address some cases of threats of force to both the UNSC and the UNGA,[63] or to the UNGA and the UN Secretary-General.[64] The reason States address threats of force to the UNGA instead of (merely) to the UNSC is that they see, or foresee, inaction on the part of the UNSC paralyzed by the veto of one of the permanent members. This has been confirmed by States on multiple occasions. For instance, during the debate in the UNGA concerning the alleged threats of force made by Turkey against Syria, the representative of the USA noted that, if the matters under discussion were 'in fact an urgent threat to the peace, the place to go under the Charter is clearly the Security Council.'[65] The representative of Syria addressed this statement as follows:

> We believe that in the circumstances the General Assembly not only has the competence to consider this question and the United States representative did not contest this-but that it is also the right place to come to, instead of the Security Council, since the work of the Security Council is often hampered by various influences which come, mainly from the side of the 'cold war,' into the sacred precincts of the United Nations. It is not because this question is not urgent that it came to the General Assembly. That does not diminish its urgency, nor does it diminish its importance . . . . Acts speak louder than words. We want those acts to be known. We want this question to be aired by means of a debate and by means of the investigation referred to by my Foreign Minister a short time ago, so that the United Nations would then be in a position to decide about this matter, instead of trying to find a means of shelving it and thus help in some way to bypass the United Nations.[66]

Thus, States perceive the UNGA as a forum in which their problems can be genuinely discussed and investigated, instead of the UNSC, which is often driven by political pragmatism.

When States submit their complaints to the UNGA, they also request the circulation of their communications as a UNGA document[67] and their inclusion

63 For instance, in 2010 Cambodia informed both president of the General Assembly and the president of the Security Council about threats of force made by Thailand against it ('Identical letters dated 8 August 2010 from the Permanent Representative of Cambodia to the United Nations addressed to the President of the General Assembly and the President of the Security Council' (11 August 2010) UN Doc A/64/891–S/2010/426). See also UNSC Official Records (4 January 1961) UN Doc S/PV.921, para. 64.

64 See, eg, 'Letter dated 1 December 1979 from the Permanent Representative of Viet Nam to the United Nations addressed to the President of the General Assembly and to the Secretary-General' (7 December 1979) UN Doc A/34/800-S/13682.

65 UNGA Official Records (22 October 1957) UN Doc A/PV.708, para. 178.

66 Ibid, paras. 236, 238.

67 A/52/383-S/1997/732 (n 32) 2.

in the UNGA agenda.[68] They rarely make any specific requests towards the UNGA; one of the rare examples is a request by the Minister of Foreign Affairs and Chairman of the Delegation of Syria, made in a letter dated 15 October 1957, to establish a commission under the UNGA 'to investigate the situation on the Syrian-Turkish border and report to the Assembly.'[69]

4.1.1.2.3 WHAT THE UN GENERAL ASSEMBLY DOES

Some cases of threats of force are discussed in both the UNGA and in the UNSC;[70] others are debated only in the UNGA.[71]

Even though the UNGA has never recommended that member States adopt sanctions in cases of threats of force,[72] it nevertheless has adopted several resolutions addressing and condemning threats of force. For instance, the UNGA was determined to prevent further Israeli attacks against nuclear facilities after the attack on the 'Osirak' nuclear reactor in Iraq. In Resolution 36/27, the UNGA strongly condemned Israel for this act of aggression (para. 1), as well as condemned 'Israeli threats to repeat such attacks on nuclear installations if and when it deems it necessary' (preamble). It also issued 'a solemn warning to Israel to cease its threats and the commission of such armed attacks against nuclear facilities' (para. 2).[73] In Resolution 37/18, the UNGA stated that it was gravely concerned 'that Israel continues to maintain its threats to repeat such attacks against nuclear installations' (preamble), condemned Israel for such threats (para. 3) and demanded that Israel withdraw its threats (para. 4).[74] In Resolution 38/9, the Assembly again noted Israeli 'threat to repeat its

68 'Letter dated 15 October 1957 from the Minister of Foreign Affairs and Chairman of the delegation of Syria, addressed to the Secretary-General' (16 October 1957) UN Doc A/3699, 1.

69 Ibid 3.

70 See the 1958 discussions concerning the situations between Tunisia and France – Tunisia requested the withdrawal of all French troops from its territory, but its persistent requests were met with hostile actions on the part of France, which were recognized by States as a threat of force [see, eg, UNSC Official Records (2 June 1958) UN Doc S/PV.819, paras. 13–15, 57–60; UNGA Official Records (23 August 1961) UN Doc A/PV.1000, paras. 83, 133; UNGA Official Records (23 August 1961) UN Doc A/PV.1001, para. 62.; UNGA (24 August 1961) UN Doc A/PV.1003, paras. 66–68; UNGA Official Records (25 August 1961) UN Doc A/PV.1005, para. 174].

71 See, eg, the debate on the alleged threats of force made by Turkey against Syria (see A/PV.708 (n 65) paras. 116–18, 124, 152, 227).

72 Stürchler (n 49) 268.

73 UNGA Resolution 36/27: 'Armed Israeli aggression against the Iraqi nuclear installations and its grave consequences for the established international system concerning the peaceful uses of nuclear energy, the non-proliferation of nuclear weapons and international peace and security' (13 November 1981) UN Doc A/RES/36/27.

74 UNGA Resolution 37/18: 'Armed Israeli aggression against the Iraqi nuclear installations and its grave consequences for the established international system concerning the peaceful uses of nuclear energy, the non-proliferation of nuclear weapons and international peace and security' (16 November 1982) UN Doc A/RES/37/18.

armed attack against nuclear facilities' (para. 2). The UNGA also asserted that 'any threat to attack and destroy nuclear facilities in Iraq and in other countries constitutes a violation of the Charter of the United Nations' (para. 3). The UNGA reiterated 'its demand that Israel withdraw forthwith its threat to attack and destroy nuclear facilities in Iraq and in other countries' (para. 4).[75] Finally, in Resolution 39/14, the UNGA stated that it is '[c]onvinced that the Israeli threats to attack nuclear facilities in Iraq and in other countries will continue to endanger peace and security in the region' (preamble) and that 'any threat to attack and destroy nuclear facilities in Iraq and in other countries constitutes a violation of the Charter of the United Nations' (para. 3).[76]

Similarly, in the operative part in Resolution 36/103, annex 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States,' the UNGA stated that it was 'deeply concerned' by the 'frequent recourse to the threat or use of force' and was conscious 'of the imperative need for any threat of aggression . . . to be completely ended' (preamble).[77]

In Resolution 2383 (XXIII), the UNGA stated that it is 'deeply concerned at the serious threat constituted by South African armed forces in Southern Rhodesia to the sovereignty and territorial integrity of independent African States in the area' (preamble).[78]

To sum up, despite the limited tools the UNGA has at its disposal, it has managed to address threats more often than the UNSC, as well as to condemn them.

4.1.1.3 Other UN organs

Other UN organs are addressed much more rarely in cases of threats of force. Within the UN system, one must especially highlight the role of the UN Secretary-General, the head of the Secretariat, a post that differs significantly from the positions held by the UNSC and the UNGA with regard to the maintenance of international peace and security. During the preparatory work on the UN Charter, the role of the Secretary-General was described in the following way:

> The Secretary-General may have an important role to play as a mediator and as an informal adviser of many governments, and will undoubtedly

75 UNGA Resolution 38/9: 'Armed Israeli aggression against the Iraqi nuclear installations and its grave consequences for the established international system concerning the peaceful uses of nuclear energy, the non-proliferation of nuclear weapons and international peace and security' (10 November 1983) UN Doc A/RES/38/9.

76 UNGA Resolution 39/14: 'Armed Israeli aggression against the Iraqi nuclear installations and its grave consequences for the established international system concerning the peaceful uses of nuclear energy, the non-proliferation of nuclear weapons and international peace and security' (16 November 1984) UN Doc A/RES/39/14.

77 UNGA Resolution 36/103 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States' (9 December 1981) UN Doc A/RES/36/103.

78 UNGA Resolution 2383 (XXIII) 'Question of Southern Rhodesia' (7 November 1968) UN Doc A/RES/2383.

> be called upon from time to time, in the exercise of his administrative duties, to take decisions which may justly be called political.[79]

This role was further reinforced by the wording of Art. 99 of the Charter, which states that '[t]he Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.' Even if under Art. 99 the Secretary-General 'cannot force correct decisions, he or she may be able to make it harder to take manifestly wrong decisions, or to take no decision at all.'[80] The UN Secretary-General may establish a fact-finding mission, appoint a special representative, provide good offices, submit drafts and proposals of resolutions to the UNSC, put political pressure on the UNSC and assess actions undertaken by States from the perspective of international law (although this latter function remains controversial).[81] Thus, he has the function of an unbiased mediator whose primary task is to seek a peaceful solution to disputes and to recommend solutions to the parties, without the power to undertake any coercive measures. If such measures are needed, he may nevertheless refer the situation to the UNSC.

States eagerly use the position of the UN Secretary-General in cases of threats of force, and communications about threats of force are often addressed to the UN Secretary-General.[82] They also make requests that this organ undertake specific actions; for instance, in a letter dated 19 December 1985, Lesotho asked the UN Secretary-General if he could use his 'good offices to stop South Africa from carrying out its threatened and planned armed attack'[83] against it.

Disputes connected with threats of force may be also adjudicated before the ICJ.[84] Threats of force have indeed been the background of some complaints

79 'Report of the Preparatory Commission of the United Nations (23 December 1945)' Chapter VIII, section 2, paras. 8–17, quoted after Simon Chesterman, *Secretary or General? The UN Secretary-General in World Politics* (Cambridge University Press 2007) 244–45.

80 Simon Chesterman, 'Article 99' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd ed, OUP 2012) 2009, 2013.

81 Ibid 2012–14.

82 See, eg, 'Letter dated 24 March 1986 from the Chargé d'Affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General' (24 March 1986) UN Doc A/41/231; 'Letter dated 28 February 1986 from the Charge d'Affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (28 February 1986) UN Doc S/17871; 'Letter dated 4 April 1985 from the Chargé d'Affaires a.i. of the permanent Mission of the Libyan Arab Jamahiriya to the United Nations addressed to the Secretary-General' (4 April 1985) UN Doc A/40/224-S/17081.

83 'Letter dated 19 December 1985 from the Permanent Representative of Lesotho to the United Nations addressed to the Secretary-General' (20 December 1985) UN Doc S/17689, 1–2. See also the 'Letter dated 29 March 2001 from the Permanent Representative of Lebanon to the United Nations addressed to the Secretary-General' (29 March 2001) UN Doc A/55/864–S/2001/292, 3.

84 Under Art. 33 of the UN Charter, the UNSC may also suggest that the dispute should be resolved by the ICJ (Tomuschat (n 18) 1083–84).

submitted to the ICJ: in the case Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina wanted the ICJ to rule, *inter alia*, 'that Yugoslavia (Serbia and Montenegro), in breach of its obligations under general and customary international law, has used and is using force and the threat of force against Bosnia and Herzegovina.'[85] In the Lockerbie case, Libya requested the Court to adjudge and declare

> that the United States is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya.[86]

Likewise, in the Memorial submitted to the ICJ in the case 'Dispute Concerning Certain Activities Carried Out in the Border Area,' Costa Rica claimed that Nicaragua had expressed an intention to use force on the territory of Costa Rica, and that to this end Nicaraguan President Ortega 'threatened the use of armed forces' by stating that '[w]e are obliged to defend our territory, and the army has an obligation to protect the area.'[87]

Despite these States' submissions, the ICJ has rarely addressed threats of force. In the case 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide,' the ICJ did not refer to the question of alleged threats of force. In the Lockerbie case, by a letter dated 9 September 2003, the agents of the two parties jointly notified the Court that the parties 'agreed to discontinue the proceedings.'[88] In the 'Dispute Concerning Certain Activities Carried Out by Nicaragua in the Border Area,' the ICJ found that there was no need to decide about the possible breach of Art. 2(4) of the UN Charter due to the fact that '[t]he relevant conduct of Nicaragua has already been addressed in the context of the Court's examination of the violation of Costa Rica's territorial sovereignty.'[89] Other cases in which the ICJ

85 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Application instituting proceedings filed in the Registry of the Court, 62.

86 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Application instituting proceedings, para. IVc.

87 *Dispute Concerning Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Memorial of Costa Rica, vol. I, para. 6.52.

88 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Order of 10 September 2003.

89 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (Judgment) [2015] ICJ Report 665, para. 97.

failed to examine threats of force include the Spanish-Canadian Fisheries Jurisdiction, the Greek-Turkish dispute over the Aegean Sea, the Anglo-Icelandic Fisheries Jurisdiction and the Oil Platform Case.[90]

In this context, it should also be mentioned that some commentators do not consider the ICJ to be the proper forum to address threats of force, both because of a belief that such cases should be submitted before the UNSC[91] and because situations involving threats of force are often of a political, not legal, character.[92]

4.1.2 Organs outside the United Nations

Outside the UN system, some organizations also offer States help in cases of threats of force. For example, Article 2 of the Protocol relating to mutual assistance on defence of the Economic Community of West African States (ECOWAS) provides that 'Member States declare and accept that any armed threat or aggression directed against any Member State shall constitute a threat or aggression against the entire Community.'[93] The subsequent provision holds that 'Member States resolve to give mutual aid and assistance for defence against any armed threat or aggression' (Art. 3). Finally, Article 16 of the Protocol states:

> When an external armed threat or aggression is directed against a Member State of the Community, the Head of State of that country shall send a written request for assistance to the current Chairman of the Authority of ECOWAS, with copies to other Members. This request shall mean that the Authority is duly notified and that the AAFC are placed under a state of emergency. The Authority shall decide in accordance with the emergency procedure as stipulated in Article 6 above.

Similarly, Article I (w) of the African Union Non-Aggression and Common Defence Pact defines a 'threat of aggression' as 'any harmful conduct or statement by a State, group of States, organization of States, or non-State actor(s) which, though falling short of a declaration of war, might lead to an act of aggression as defined above.'[94] Under Art. 4 of the Pact, State parties

90 Stürchler (n 49) 65–8.

91 Verbatim Record 92/6 (n 29) 20–1.

92 During discussions on the UNGA request for an advisory opinion from the ICJ concerning 'Legality of the Threat or Use of Nuclear Weapons,' some States claimed that the question was a legal one, while others supported the view that it was a purely political issue (Martin Lailach, 'The General Assembly's Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1995) 8(2) *Leiden Journal of International Law* 401, 419).

93 Protocol relating to mutual assistance on defence (adopted 29 May 1981, entered into force 30 September 1986) (1992) 1690 UNTS 51.

94 African Union Non-Aggression and Common Defence Pact (adopted 1 January 2005, entered into force 18 December 2009) <https://au.int/en/treaties/african-union-non-aggression-and-common-defence-pact> accessed 1 September 2022.

undertook 'to provide mutual assistance towards their common defence and security vis-à-vis any aggression or threats of aggression,' as well as 'individually and collectively, to respond by all available means to aggression or threats of aggression against any Member State' ((a) and (b)).

4.1.3 Conclusions

As previously stated, some authors claim that States do not usually submit cases of threats of force before international organs, along with noting an ongoing lack of interest in threats of force in general. This section proves that States do have an interest in threats of force and demand the attention of international organizations, especially the UN, to deal with such situations.

Neither the UNSC nor any other organ has any special functions connected with the prevention of or dealing with threats of force. Despite that, under the general powers held by these organs, States have a range of options to choose from when confronted with threats of force, including both binding and non-binding measures and coercive and non-coercive measures. Nevertheless, neither States nor the international organs themselves use the full capacities of these competences: On one hand, States make very modest requests for a reaction or measures to be undertaken by international organizations, while on the other hand, organs like the UNSC do even less. While they do not ignore complaints to the UNSC, at the same time they also do not engage their full powers to respond to threats of force.

Because submitting a complaint to an international organization, especially organs like the UNSC and the UNGA, is the most effective way to draw the attention of the international community to threats of force, States do report threats of force to these forums, even if their submissions fail to result in the full might of the organ being applied.

4.2 Measures outside international organizations

In cases of threats of force, States not only have recourse to international organizations but may also undertake appropriate measures outside institutional frameworks. In general, as in the case of any breach of international law, States are entitled to use retorsions,[95] that is, legal but unfriendly measures, to reply to threats of force. These measures include, but are not limited to, complete or partial interruption of economic relations; declaring a diplomatic envoy *persona non grata*; termination or suspension of diplomatic relations; recalling ambassadors; currency restrictions; denunciation of treaties; freezing or seizing assets; and non-recognition of one government and recognition of

95 See, eg, Nigel D White and Robert Cryer, 'Unilateral Enforcement of Resolution 687: A Threat Too Far?' (1999) 29(2) *California Western International Law Journal* 274, 248.

a rival government.[96] When targeted States address those threatening them, their demands are usually quite general; for instance, Vietnam demanded that China 'stop the armed provocations, war preparations and threats of war against the Socialist Republic of Viet Nam.'[97] States highlight that threats of force should be replaced by peaceful means of resolving disputes, for example, that the situation that led to the tensions should be the subject of debate within the UN Security Council.[98] In addition, States can also address the international community, pointing out its passive attitude towards the threats of force they experienced,[99] demanding condemnation of the threats by the rest of the States[100] and employing appropriate measures in reaction to threats.[101] Indeed, it is not uncommon that groups of States openly express solidarity with a targeted State and call upon the perpetrator to stop the threats;[102] in this regard, the role of regional solidarity takes on a special emphasis.[103]

Targeted States often do not limit themselves to requests to stop the threats of force directed against them, but they also employ specific measures in reaction to the threats, to demonstrate their military strength or to prepare for the possible use of force.[104] For instance, Turkey acknowledged its military

96 'Seventh report on State responsibility, by Mr Gaetano Arangio-Ruiz, Special Rapporteur' (9, 24, 29 May 1995) UN Doc A/CN.4/469 and Add.1–2, 15, para. 59; 'Report of the International Law Commission on the work of its forty-seventh session (2 May–21 July 1995) UN Doc A/50/10, 70, para. 13; Michael Haas, *International Human Rights: A Comprehensive Introduction* (Routledge 2012) 143.

97 A/34/800-S/13682 (n 64) 4.

98 See the statements made by Cuba (UNSC Official Records (25 March 1982) UN Doc S/PV.2336, para. 12) and the UK (UNSC Official Records (19 October 1948) UN Doc S/PV.368, 48–49).

99 See the statement made by Iraq (UNSC Official Records (9 December 1971) UN Doc S/PV.1610, para. 103).

100 See the statements made by the FRY ('Letter dated 24 March 1999 from the Chargé d'Affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council' (24 March 1999) UN Doc S/1999/318, 2) and Iran ('Identical letters dated 13 April 2010 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General and the President of the Security Council' (22 April 2010) UN Doc A/64/745–S/2010/188, 2).

101 'Letter dated 28 February 1986 from the Charge d'Affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (28 February 1986) UN Doc S/17871; S/1999/318 (n 100) 2.

102 See the statements made by Mozambique (S/PV.1985 (n 46) paras. 11, 19) and by ministers of foreign affairs and heads of delegations of the Movement of Non-Aligned States ['Letter dated 23 October 1987 from the Permanent Representative of Zimbabwe to the United Nations addressed to the Secretary-General' (27 October 1987) UN Doc A/42/681, para. 118; Letter dated 19 July 1989 from the Chargé d'Affaires a.i. of the Permanent Mission of Zimbabwe to the United Nations addressed to the Secretary-General' (26 July 1989) UN Doc A/44/409-S/20743, para. 307].

103 See the statement made by Malta (UNSC Official Records (22 February 1983) UN Doc S/PV.2416, paras. 40–1, 46).

104 McCoubrey and White (n 8) 61.

presence on Cyprus in support of the Turkish Republic of Northern Cyprus and explained that 'the level and composition of these forces have to be in correlation to the military threat directed from the South against the Turkish Republic of Northern Cyprus.'[105] Similarly, Iran indicated that '[t]he "Martyrdom" manoeuvres were in response to the military threats of the United States in the region, and were carried out in support of the regime in Iraq.'[106]

In the face of threats of force issued by the DRC against Uganda, the latter State described its reaction as follows:

> In the middle of September 1998, Uganda dispatched her combat troops to the DRC in response to a grave and imminent threat from anti-Ugandan armed bands, who by that time had been formally incorporated into the Congolese army and were escalating their cross-border attacks against Uganda and, most conspicuously, the imminent threat from the armed forces of the Government of Sudan which, by virtue of a military alliance between the DRC and Sudan, had sent thousands of Sudanese troops to eastern Congo where they took up positions directly threatening Uganda.[107]

Uganda's decision was recorded in a confidential, internal document titled 'Position of the High Command on the Presence of the UPDF (Uganda People's Defence Forces) in the DRC.' The reasons for the government's decision to 'maintain forces of the UPDF in the DRC' were stated as follows: 'To be in a position to safeguard the territorial integrity of Uganda against irresponsible threats of invasion from certain forces.'[108]

In preparing for an armed attack following threats of force, a State may also import arms[109] or invite the stationing of foreign troops.[110] Among other specific measures, one that should be mentioned is the decree issued by the government of the FRY in the face of the threat of an attack by NATO, which

105 UNSC Provisional Record (14 December 1971) UN Doc S/PV.2771, 53.

106 'Note Verbale dated 14 August 1987 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General' (14 August 1987) UN Doc S/19043, para. 2.

107 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Public sitting (15 April 2005) Verbatim Record 2005/6, 11, para. 12.

108 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Public sitting (18 April 2005) Verbatim Record CR 2005/7, 14–15, para. 18; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Counter-Memorial Submitted by The Republic of Uganda, vol. I, para. 53. However, it is interesting to observe that Uganda claimed that it had the right to undertake all of these measures in self-defence (Ibid, para. 7), which in this situation amounts to anticipatory self-defence before an armed attack occurred against it (see the statement made by the DRC – *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Public sitting (11 April 2005) Verbatim Record CR 2005/2, paras. 18–19).

109 See the statement made by Cyprus (UNSC Official Records (27 February 1964) UN Doc S/PV.1098, para. 126).

110 Such was the case of South Korea (The Yearbook of the United Nations 1975, 198).

provided that media entities that transmit foreign news programmes or 'disseminate defeatism' may be closed down by the Serbian Ministry of Information; in the following days, the government indeed closed down several newspapers and radio stations under the decree.[111]

The mobilization of forces, reinforcement of arms, assistance of foreign troops and domestic legislative measures are legal. It would be absurd to require a targeted State to sit idly by and wait until the time when the threatened use of force materialized. As long as the targeted State limits preparations to its own territory and in its preparations does not cross the threshold for threats of force or use of force,[112] the means undertaken will be legal.

Finally, it should be mentioned that States establish the means of reaction to threats of force in bilateral treaties, securing the assistance of other States in cases of threats of force. For instance, Article III of the Mutual Defense Treaty Between the United States and the Republic of the Philippines states the following:

> The Parties, through their Foreign Ministers or their deputies, will consult together from time to time regarding the implementation of this Treaty and whenever in the opinion of either of them the territorial integrity, political independence or security of either of the Parties is threatened by external armed attack in the Pacific.[113]

In addition, Article II of the Mutual Defense Treaty Between the United States and the Republic of Korea assures the following:

> The Parties will consult together whenever, in the opinion of either of them, the political independence or security of either of the Parties is threatened by external armed attack. Separately and jointly, by self help and mutual aid, the Parties will maintain and develop appropriate means to deter armed attack and will take suitable measures in consultation and agreement to implement this Treaty and to further its purposes.[114]

A similar provision was included in Article 3 of the Warsaw Pact:

> Whenever any one of the Contracting Parties considers that a threat of armed attack on one or more of the States Parties to the Treaty has

111 'Situation of human rights in Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia: Note by the Secretary-General' (30 October 1998) UN Doc A/53/322/Add. 1, para. 40.

112 For the criteria of the lawful preparation to resist an armed attack, see Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 367.

113 Mutual Defense Treaty Between the United States of America and the Republic of the Philippines (adopted 30 August 1951, entered into force 27 August 1952) (1953) 177 UNTS 134.

114 Mutual Defense Treaty Between the United States and the Republic of Korea (adopted 1 October 1953, entered into force 17 November 1954) (1956) 238 UNTS 202.

> arisen, they shall consult together immediately with a view to providing for their joint defence and maintaining peace and security.[115]

In a Note Verbale of 23 February 1979, the UK assured the UN Secretary-General that, under the British-Brunei Treaty of Friendship and Co-operation of 7 January 1979, 'the United Kingdom has responsibility for Brunei's external affairs, and has a consultative commitment with Brunei in the event of external attack or threat of such attack, will come to an end,'[116] even though the treaty itself did not mention the consultation between States in case of attack or threat of attack.[117]

To summarize the measures that can be undertaken by States outside the institutional framework of international organizations, States have a few options to choose from: They may limit themselves to addressing demands to the threatening State, appealing to it to stop the threats of force, or they may request that the international community express solidarity with them and undertake appropriate measures. In addition, when confronted with threats, States may also start preparations for the possible use of force in the event of realization of the threats by reinforcing their military positions and arsenal. Finally, States may secure itself in advance against future threats of force by concluding treaties that provide for a system of consultations with other treaty parties in the event threats of force are directed against it.

4.3 Conclusions

When reacting to threats of force, States can decide whether they prefer to submit a complaint to an international organization and request that specific organ, especially the UNSC or the UNGA, to undertake measures, or whether they want to deal with the threats of force through their own

115 Treaty of Friendship, Co-operation and Mutual Assistance between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian's People's Republic, the German Democratic Republic, the Polish People's Republic, the Romanian People's Republic, the Union of Soviet Socialist Republics and the Czechoslovak Republic (adopted 14 May 1955, entered into force 6 June 1955) 219 UNTS 23.

116 'Letter dated 23 February 1979 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General' (27 February 1979) UN Doc A/34/98, 2.

117 Article 1a of the treaty stated in a general way that the UK and Brunei 'shall: (a) Consult together on matters of mutual concern.' Moreover, Article 2 claimed that the UK

> shall, until the Government of the State of Brunei can make alternative arrangements, and in such manner as shall in no way affect the sole responsibility of the Government of the State of Brunei for the external relations of the State, give sympathetic consideration to any specific request by the Government of the State of Brunei for diplomatic or consular assistance in the conduct of those relations.
>
> (Treaty of friendship and co-operation (adopted 7 January 1979, 31 December 1983) (1985) 1404 UNTS 233)

means. A combination of these two options is also possible. There are a few factors that can be discerned about choosing between these modes of operation. Overall, regardless of the measures that the targeted State perceives will be effective, if it desires to apply pressure to the threatening State and draw the attention of the international community, it should always choose recourse to an international organization. If a State wants to coerce the threatening State to undertake certain conduct, it should resort to the UNSC, as it is the only organ that may bind States with its decisions. On the other hand, if a targeted State only wishes to start the peaceful procedure of settling a dispute, it may also choose between the UNGA and the UN Secretary-General. Nevertheless, States should bear in mind that processes within international organizations, as in any institutionalized body, may be slow moving and require consensus between States with conflicting political interests. Thus, ultimately, deliberations within an international organization may result in no decisive action against the threats of force. In this context, unilateral measures undertaken by State may prove to be faster and more effective.

International law does not envisage any specific measures tailored to be an effective reply to threats of force. Thus, States are forced to use the general measures that are available in case of the use of force or any other breach of international law. However, with regard to measures undertaken individually by States, the borderline between legal and illegal actions may turn out to be very thin and ill-defined, and the targeted State may itself be accused of making illegal threats of force. Thus, the recourse of bringing the situation to an international organization, that is, when the case is taken over by an organ such as the UNSC, may be safer and ensure that a State does not risk breaching international law through its reaction to threats of force.

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5 Consequences of threats of force

Introduction

The aim of this chapter is to discuss the consequences of threats of force, namely, the legal repercussions that follow the threats of force issued by one State against another. The most rudimentary question is what the consequences of threats of force are, both in cases where they were not followed by the use of force and in cases where the use of force did indeed occur. Secondly, the chapter will discuss two consequences of the principle *ex injuria jus non oritur* with regard to illegal threats of force – the prohibition of illegal territorial acquisitions and the invalidity of treaties concluded as a result of illegal threats of force.

5.1 Consequences of threats of force when they were and were not followed by the use of force

The aim of this section is to discuss threats of force from the perspective of their aftermath: firstly, when threats of force appeared as arguments in the discourse between States but ultimately were not carried out. It is necessary to assess whether they were not carried out because they were sufficient to achieve the aims or perhaps, on the contrary, whether their author States had such a weak position that the further use of threats of force as an argument was pointless, not to mention an inability to escalate to a successful use of force itself. Secondly, this section also covers threats of force that were ultimately carried out, that is, they were precursors to the actual use of force.

5.1.1 Threats of force that were not followed by the use of force

It was previously claimed that threats of force may not always be a prelude to the use of force for States, as they may constitute a tool by themselves – a cheaper and less engaging measure that may turn out to be no less effective than the actual use of force in achieving certain aims or compelling other States to comply with specific demands. Thus, in essence, if the threats of force are productive, that is, their objectives are achieved, there is no need to initiate

DOI: 10.4324/9781003376026-6

the use of force. One may try to verify this hypothesis using the following meaningful, actual example.

In 1990 Iraq invaded Kuwait, but in the following year the coalition of Western States intervened and repelled the invasion. Nevertheless, in 1994, the States were again concerned with the possible threat of Iraqi action against Kuwait, as Iraq had positioned 10,000 troops about 30 miles from the Kuwait border, gathering in total between 40,000 and 50,000 soldiers in the area.[1] This manifestation of force was supposed to be an incentive for the UN to lift the harsh economic sanctions imposed on Iraq after its 1990 invasion of Kuwait. On 6 October 1994, Kuwait sent a letter to the president of the Security Council, informing him about a statement issued at meeting chaired by Saddam Hussein describing how harmful the sanctions were that were imposed against Iraq after the Kuwait invasion. Hussein stated that to this end, 'the Iraqi leadership does not have any other alternative but to reconsider a new stand which will restore justice and relieve the Iraqi people from the distress imposed upon it.'[2] Saddam Hussein was also alleged to have said on 27 September that

> [w]hen the patience of some Iraqis begins to weaken, or when we feel that Iraqis may become hungry, we will, by God, open the world's silos for them and let he who hears us know that Saddam Hussein has spoken.[3]

Kuwait interpreted the Iraqi statements as 'a clear and unequivocal threat directed not only at Kuwait but also at the relations between Iraq and the United Nations with regard to Iraq's compliance with the Security Council resolutions concerning the Iraqi aggression against Kuwait.'[4] At the same time, not only Kuwait but other States also recognized the Iraqi actions as a threat of force and a forecast of another invasion against Kuwait.[5] Among them, the USA decided on an immediate response to the Iraqi threats of force, sending Navy and Marine forces to the region.[6] It is estimated that at least

1 Michael R Gordon, 'U.S. Sends Force as Iraqi Soldiers Threaten Kuwait' (*The New York Times*, 8 October 1994) <www.nytimes.com/1994/10/08/world/us-sends-force-as-iraqi-soldiers-threaten-kuwait.html> accessed 1 September 2022.

2 'Letter dated 6 October 1994 from the Permanent Representative of Kuwait to the United Nations addressed to the President of the Security Council' (6 October 1994) UN Doc S/1994/1137, 1–2.

3 Quotation after Joseph Kostiner, *Conflict and Cooperation in the Gulf Region* (VS Verlag für Sozialwissenschaften 2009) 122.

4 'Letter dated 6 October 1994 from the Permanent Representative of Kuwait to the United Nations addressed to the President of the Security Council' (6 October 1994) UN Doc S/1994/1137, 1–2.

5 See the statements made by the USA (UNSC Provisional Records (15 October 1994) UN Doc S/PV.3438, 4); New Zealand (Ibid 9); the UK (Ibid 11); Argentina (UNSC Provisional Records (17 October 1994) UN Doc S/PV.3439, 11); and the Czech Republic (Ibid 11).

6 Gordon (n 1).

36,000 US troops were prepared to respond to any new hostilities in the Persian Gulf.[7] Ultimately, Iraq backed down from the strike, did not obtain any relief from the imposed sanctions, and was forced to withdraw its troops from the Kuwait border region. Moreover, within the next month, Iraq recognized Kuwait's statehood within the borders established in 1993.[8] There are allegations that the demonstration of force made by Iraq was only a bluff and that Hussein never intended to use force again against Kuwait. On the other hand, however, there is also the view that without the USA's strong response the invasion might have taken place.[9]

Other examples of threats of force that did not end with the use of force include the threats of force made by India against Pakistan in 1951.[10] Similarly, during the dispute over the exploitation of the continental shelf in 1981, Malta reported that Libya threatened the use of force against operators of oil rigs for which Malta issued concessions.[11] Also, after the Syrian regime used chemical weapons on a large scale for the first time in August 2013, the USA, the UK and France publicly considered military action against Syria. These three States claimed that this 'credible military threat'[12] led to the promise of destruction of all stocks of chemical weapons by the Syrian regime.[13] Many more cases could be invoked.

The cases of threats of force that were not followed by the use of force, both discussed here and in the remaining parts of this book, vary considerably when it comes to the scale of threats and possible interventions, the subject of the dispute and the aim that the threatening State wished to achieve. In most cases, it is impossible to definitively state whether the use of force did not follow because the demands of the threatening State were met or because there was never a real intention to start an armed intervention and the threats were

7 Michael R Gordon, 'Threats in the Gulf: The Last Military Buildup; At Least 36,000 U.S. Troops Going to Gulf to Respond to Continued Iraqi Buildup' (*The New York Times*, 10 October 1994) <www.nytimes.com/1994/10/10/world/threats-gulf-military-buildup-least-36000-us-troops-going-gulf-response.html> accessed 1 September 2022.

8 Kostiner (n 3) 123.

9 W Eric Herr, 'Operational Vigilant Warrior: Conventional Deterrence Theory, Doctrine, and Practice' (DPhil thesis, Air University 1996) 16–23 <https://apps.dtic.mil/sti/pdfs/ADA360732.pdf> accessed 1 September 2022.

10 'Cablegram dated 15 July 1951 from the Permanent Representative of Pakistan to the President of the Security Council and the Secretary-General' (16 July 1951) UN Doc S/2245.

11 'Letter dated 1 September 1980 from the Permanent Representative of Malta to the United Nations addressed to the President of the Security Council' (1 September 1980) UN Doc S/14140; UNSC Official Records (4 September 1980) UN Doc S/PV.2246, para. 25; 'Letter dated 11 September 1980 from the Permanent Representative of Malta to the United Nations addressed to the President of the Security Council' (12 September 1980) UN Doc S/14170.

12 UNGA Official Records (24 September 2013) UN Doc A/68/PV.5, 12.

13 UNSC Provisional Records (27 September 2013) UN Doc S/PV.7038, 7. Only the use of chemical weapons in 2017 prompted US airstrikes (see in general Arms Control Association, 'Timeline of Syrian Chemical Weapons Activity, 2012–2022' <www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity> accessed 1 September 2022).

only supposed to reinforce political arguments. Thus, it can be concluded that threats served both these aims, and a case-by-case analysis is needed in order to determine which one prevailed.

5.1.2 Threats of force followed by the use of force

Two examples of threats of force discussed in detail in this book, those against the FRY in 1999 and against Iraq in 2003, ended with the use of force being carried out by the threatening States. However, many more examples can be listed here in addition to those two. For instance, in a press release on 14 June 1985, Botswana announced that during a raid by members of the South African Defence Force (SADF), a total of 12 persons were killed and six injured; members of the SADF had also fired indiscriminately at passing motorists and set a number of vehicles on fire, and four houses were completely demolished during the raid. According to Botswana,

> This act of brutality and violence perpetrated by the South African Government is particularly deplorable considering the repeated assurances of the Botswana Government that it does not permit its territory to be used for launching attacks against neighbouring countries. The Botswana Government sees this attack as South Africa's fulfilment of its threat in February this year to invade Botswana.[14]

14 'Letter dated 14 June 1985 from the Permanent Representative of Botswana to the United Nations addressed to the President of the Security Council' (14 June 1985) UN Doc S/17274, 2.

The example of the chemical plant in Libya should also be mentioned here. In the communiqué dated 3 January 1989 sent by the Co-ordinating Bureau of Non-Aligned Countries, which expressed deep concern over the 'current disinformation campaign; and threats of aggression directed by the USA against Libya,' the Bureau recalled that 'similar threats and media campaigns had preceded the aerial and naval attacks by the United States on 15 April 1986' against Tripoli and Benghazi, so 'the current campaign and threats might serve as a pretext for launching fresh acts of aggression' against Libya ('Letter dated 4 January 1989 from the Permanent Representative of Zimbabwe to the United Nations addressed to the Secretary-General' (4 January 1989) UN Doc A/44/66-S/20369, 2). Even though the Bureau did not mention the background of these threats of aggression, one may speculate that they were connected with the USA's concerns over the chemical plant 40 miles south of Tripoli, allegedly built for the production of chemical weapons. At that time, the USA considered how to deal with the factory and did not exclude bombing (Stephen Engelberg, 'U.S. Says Libya Moves Chemicals for Poison Gas Away from Plant' (*The New York Times*, 4 January 1989) <www.nytimes.com/1989/01/04/world/us-says-libya-moves-chemicals-for-poison-gas-away-from-plant.html> accessed 1 September 2022). The problem was resolved two months later when, in mid-March, the chemical plant was burnt to the ground. The USA government denied allegations of sabotage, and a technical fault was reported as the possible cause of the fire (Michael R Gordon, 'Plant Said to Make Poison Gas in Libya Is Reported on Fire' (*The New York Times*, 15 March 1990) <www.nytimes.com/1990/03/15/world/plant-said-to-make-poison-gas-in-libya-is-reported-on-fire.html> accessed 1 September 2022). Whatever the cause of the incident, the fact is that the production of chemical weapons was not renewed by the Qaddafi regime, at least not in the same place.

Another example is threats of force made by India, reported by the representative of the government of Hyderabad[15] in September 1948.[16] Ultimately, on 13 September 1948, Hyderabad informed the UN Secretary-General that the Indian invasion had commenced.[17]

Contrary to the examples discussed in the previous section, it seems possible here to draw a more general conclusion – that the threats of force were made by threatening States not as less coercive measures than the use of force itself with the hope that, if the demands presented by the threatening States were met, the intervention(s) would not take place. What is characteristic is that either the threatening States presented demands that were impossible to fulfil (eg, the US claims about the possession by Iraq of weapons of mass destruction based on false accusations), or they knew in advance that the targeted State would not meet the demands (eg, resignation from independence by Hyderabad). Thus, the threats of force instead constituted a prelude to the unavoidable use of force and served to build the narrative for the upcoming armed intervention.

5.1.3 Conclusions

This section has proved that in most cases in which threats of force are followed by the actual use of force, the threats are coupled with demands that are impossible to achieve. The threatening State is aware that the demands will not be met, but that is not the purpose of the menaces – they rather serve as a kind of justification for the further use of force. On the other hand, if the use of force does not follow the threat, it may be not only because the demands were met but also because the threatening State might have not planned for an intervention at all, and the threats were just a tool of policy or diplomacy. To sum up, it is difficult to draw clear and uniform conclusions from the analysis of State practices regarding the aftermath of the use of threats of force.

5.2 Ex injuria jus non oritur

The principle *ex injuria jus non oritur* is equally applicable on the grounds of threats of force as in any other field of international law. Its legal effects are visible in two areas – with regard to the prohibition of illegal territorial acquisitions and the invalidity of treaties concluded as a result of illegal threats of force.

15 Hyderabad became an independent State in August 1947. As a result of the 1948 intervention, it was annexed to India (SK Pachauri, 'Representation of Hyderabad State in United Nations Organization, September 1948' (1993) 54 *Proceedings of the Indian History Congress* 458, 458–59.

16 See, eg, 'Cablegram dated 21 August 1948 from the Hyderabad Government to the President of the Security Council' (24 August 1948) UN Doc S/986; 'Cablegram dated 12 September 1948 from the Hyderabad Government to the President of the Security Council' (13 September 1948) UN Doc S/998.

17 'Cablegram dated 13 September 1948 from the Hyderabad Government to the Secretary-General' (14 September 1948) UN Doc S/1000.

5.2.1 Prohibition of illegal territorial acquisitions

Alongside the prohibitions of the threat or use of force, the obligation of non-recognition of illegal territorial acquisitions achieved as a result thereof has emerged. Even though the UN Charter itself does not mention recognition or any obligation of non-recognition of illegal territorial acquisitions gained via a prohibited threat or use of force, the obligation of non-recognition nowadays is considered a logical corollary to Art. 2(4).[18]

Despite the fact that the overwhelming majority (or even all) of the cases concerning illegal territorial acquisitions are discussed in the context of the illegal use of force, territorial acquisitions gained via illegal threats of force are equally subject to the obligation of non-recognition[19] and the principle of *ex injuria jus non oritur*.[20]

18 *East Timor (Portugal v. Australia)*, Dissenting Opinion of Judge Skubiszewski, para. 125; Anne Lagerwall, *Le principe ex injuria jus non oritur en droit international* (Bruylant 2016) 149; Vera Gowland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (Martinus Nijhoff 1990) 289; Maurizio Arcari, 'The Relocation of the US Embassy to Jerusalem and the Obligation of Non-Recognition in International Law' (2018) 50 QIL Zoom-in 1, 5. Interestingly, however, Vera Gowland-Debbas also finds the Charter's grounds for the obligation of non-recognition in Art. 2(5), which states that

> [a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
>
> (Gowland-Debbas (n 18) 289–90)

19 When discussing the obligation of non-recognition, authors usually refer to the 'non-recognition of territorial acquisitions obtained by the threat or use of force,' mentioning the illegal threat or use of force together (Ian Brownlie, *Principles of Public International Law* (7th ed, OUP 2008) 739), but sometimes they emphasize that the obligation of non-recognition covers territorial acquisitions gained through not only the use of force but also the threat of force [Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 364; see also statements made by States: 'Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States' (26 September 1967) UN Doc A/6799, 28; UNGA Official Records (5 July 1967) UN Doc A/PV.1549, para. 131]. UNGA resolutions have also confirmed that territorial acquisitions gained through illegal threats of force are subject to non-recognition [eg, UNGA Res. 2625(XXV) 'Declaration on the Principles of International Law Governing Friendly Relations between States' (24 October 1970) UN Doc A/RES/2625, first principle; UNGA Res. 2628 (XXV) 'The Situation in the Middle East' (4 November 1970) UN Doc A/RES/2628, preamble; UNGA Res. 2799 'The Situation in the Middle East' (13 December 1971) UN Doc A/RES/2799(XXVI), preamble; UNGA Res. 2949 'The Situation in the Middle East' (8 December 1972) UN Doc A/RES/2949(XXVII), preamble; UNGA Res. 2734 (XXV) 'Declaration on the Strengthening of International Security' (16 December 1970) UN Doc A/RES/2734, para. 5; UNGA Res. 42/22 'The Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations' (18 November 1987) UN Doc A/RES/42/22, para. 10]. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Report 136, para. 87; Draft Declaration on Rights and Duties of States with Commentaries, Yearbook of the International Law Commission 1949, 288; UNGA Res. 3314 'Definition of Aggression' (14 December 1974) UN Doc A/RES/29/3314; Helsinki Final Act (adopted 1 August 1975) <www.osce.org/files/f/documents/5/c/39501.pdf> accessed 1 September 2022.

20 'Rapport sur le Droit de Traités par H Lauterpacht, Rapporteur Special' UN Doc A/CN.4/63, 196, paras. 3, 4.

As mentioned in Chapter 1, prior to 1945 there were cases of illegal territorial acquisitions gained by the threat of force. Probably the most widely known and discussed concerns the threat of force issued by Germany against Czechoslovakia. The follow-up to this situation was the Treaty of Mutual Relations Between the Federal Republic of Germany and the Czechoslovak Socialist Republic, signed in Prague on 11 December 1973, which recognized in the preamble 'that the Munich Agreement of 29 September 1938 was imposed on the Czechoslovak Republic by the National Socialist regime under the threat of force' and stated that both parties deem it void (Article 1), as well as reiterating the commitment of all States to the peaceful settlement of disputes and the prohibition of the threat or use of force, in accordance with Articles 1 and 2 of the UN Charter.[21]

When it comes to illegal territorial acquisitions gained by the threat of force after 1945, during the ILC works, J. Barboza gave a theoretical example of such a situation:

> [I]f the governor of a small island, badly protected by a handful of soldiers, yielded his territory in the presence of a warship of a major Power, and even if there had been no gun-fire, it could hardly be said that there had been no use of force.[22]

The present author is not aware of any real-life situation illustrating the prohibition of illegal territorial acquisitions gained under threats of force after the Second World War.

5.2.2 Invalidity of treaties concluded as the result of illegal threats of force

Another consequence of the principle *ex injuria jus non oritur* is the invalidity of treaties concluded as the result of the threat of force.[23] This principle was included in Article 52 of the Vienna Convention on the Law of Treaties, which states that '[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.'[24]

21 Treaty of Mutual Relations Between the Federal Republic of Germany and the Czechoslovak Socialist Republic (adopted 11 December 1973) <www.cvce.eu/de/obj/the_treaty_of_prague_11_december_1973-en-0714c937-28b6-452a-86d2-ed164f64fcae.html> accessed 1 September 2022.

22 ILC Summary Record of the 2,060th meeting (10 June 1988) UN Doc A/CN.4/SR.2060, 103, para. 1.

23 Olivier Corten, '1969 Vienna Convention: Article 52' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. II (OUP 2011) 1201, 1202; A/CN.4/63 (n 20) 196, para. 4.

24 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (1980) 1155 UNTS 331. Some commentators observe that treaties concluded under the threat or use of force belong to the category of so-called 'unequal treaties.' Stuart S. Malawer argues that the term 'unequal treaties'

Even though some commentators claim that the invalidity of treaties concluded under the threat of force was recognized even before the UN Charter came into force,[25] during the preparatory works on the Vienna Convention on the Law of Treaties, there were some doubts concerning this principle. It was claimed that the terms used in the proposed Article 52, including 'threat of force,' might be interpreted in a discretionary manner by States, leading to 'unilateral nullification of a treaty which might not in fact have been vitiated in that way.'[26] To this end, the UK emphasized

> the over-riding need for some kind of objective machinery to determine whether or not a treaty had been procured by the threat or use of force. A charge of coercion against another State was very serious, and

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is often understood to denote treaties falling into at least one of the following categories: 1) treaties containing formally equal treaty provisions, but in practice, unequal obligations which may occur as a result of unforeseen developments; 2) treaties containing formally unequal obligations, regardless of the actual effect of the treaty; (points 3) and 4) are identical to 1) and 2), except that it refers to either economic or military force threatened or used in order to conclude such agreements); 5) treaties not otherwise unequal, concluded through the use of economic force alone; 6) treaties not otherwise unequal, concluded through military force alone.

(Stuart S Malawer, 'Imposed Treaties and International Law' (1977) 7(1) *California Western International Law* 2, 9)

See also Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed, Routledge 1997) 140. Although the term is sometimes used by States (see, eg, the statement made by Ukraine, United Nations Conference on the Law of Treaties (3 May 1968) UN Doc A/CONF.39/C.1/SR.50, para. 2), there are some doubts concerning its appropriateness (Lucius Caflisch, 'Unequal Treaties' (1992) 35 *German Yearbook of International Law* 52, 58–9).

25 Opinion of ILC member Alfred Verdross (Yearbook of the International Law Commission 1963, 53, para. 2); statement made by Bulgaria (United Nations Conference on the Law of Treaties (2 May 1968) UN Doc A/CONF.39/C.1/SR.49, para. 31). See also the opinion expressed by Antonio de Luna (Yearbook of the International Law Commission 1963, 60, para. 77). However, some authors [Giovanni Distefano, 'Le Conseil De Sécurité Et La Validation Des Traités Conclus Par La Menace De La Force' in Charles-Albert Morand (ed), *Crise des Balkans de 1999: les dimensions historiques, politiques et juridiques du conflit du Kosovo* (Bruylant 2000) 167, 169; Bradford W Morse and Kazi A Hamid, 'American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine' (1990) 5(2) *Connecticut Journal of International Law* 407, 435; Malawer (n 24) 7–8), as well as some States [see statements of Ukraine (A/CONF.39/C.1/SR.50 (n 24) para. 2); Chile (Ibid, para. 49); Cyprus (A/CONF.39/C.1/SR.49 (n 25) para. 61); Sweden (Ibid, para. 51); and Iraq (United Nations Conference on the Law of Treaties Vienna (2 May 1968) UN Doc A/CONF.39/C.1/SR.48, para. 53)] claim that the principle from Article 52 emerged only after the introduction of the prohibition of the threat or use of force to international law. In this context, see also A/CN.4/63 (n 20) 193, para. 1; 'Report of the International Law Commission on the work of its Fourteenth Session: Report of the Sixth Committee' (14 November 1962) UN Doc A/5287, para. 42.

26 Yearbook of the International Law Commission 1963, 54, para. 17; A/5287 (n 25) para. 43. Similar doubts were also expressed by Spain (United Nations Conference on the Law of

> could not be left simply to allegation and counter-allegation, for that would introduce an unacceptable element of uncertainty into the law of treaties.[27]

Canada also expressed some mistrust by stating that Art. 52 'must not be adopted in a context that would in effect permit a State unilaterally to claim coercion and to insist on being judge and jury in its own claim.'[28] To this end, some States suggested the role of the United Nations, and especially the UNSC, in establishing that the conditions for the invalidity of treaties were met.[29] Doubts about the recognition of the invalidity of treaties due to threats of force were only strengthened after suggestions that a treaty should be invalid not only due to the threat of armed force but also due to economic, diplomatic and other types of non-military coercion.[30] This proposal raised concerns that such an interpretation of Art. 52 could potentially allow for abuse of this provision.[31] The issue has never been settled,[32] as Art. 52 does not mention what type of coercion prompts the invalidity of a treaty. Nevertheless, the majority of commentators support the interpretation that takes into account only armed force.[33]

Ultimately, States supported incorporation of the principle of invalidity of treaties concluded under the threat or use of force in Art. 52,[34] and today this principle is considered to have the status of a customary norm,[35]

Treaties (3 May 1968) UN Doc A/CONF.39/C.1/SR.51, para. 36) and The Netherlands (A/CONF.39/C.1/SR.49 (n 25) para. 20).

27 A/CONF.39/C.1/SR.50 (n 24) para. 36. See also the statement made by Italy (A/CONF.39/C.1/SR.51 (n 26) para. 18).

28 A/CONF.39/C.1/SR.50 (n 24) para. 5.

29 See the statements made by Japan (A/CONF.39/C.1/SR.48 (n 25) para. 45) and Mongolia (A/CONF.39/C.1/SR.49 (n 25) para. 43).

30 See also the statement made by the FRY before the ICJ (*Legality of Use of Force (Yugoslavia v. Belgium) (Yugoslavia v. Canada) (Yugoslavia v. France) (Yugoslavia v. Germany) (Yugoslavia v. Italy) (Yugoslavia v. Netherlands) (Yugoslavia v. Portugal) (Yugoslavia v. Spain) (Yugoslavia v. United Kingdom) (Yugoslavia v. United States of America)*, Public sitting (10 May 1999) Verbatim Record 1999/14, 41).

31 'Third report by GG Fitzmaurice Special Rapporteur' (18 March 1958) UN Doc A/CN.4/115, 38, para. 62.

32 Corten (n 23) 1205–11. In the end, the amendment specifying the types of coercion that would cause the invalidity of treaties was withdrawn. Instead, the committee adopted the declaration that was added to the Final Act of the Conference, condemning pressure in any form used by one State against another to coerce it to conclude a treaty (Richard D Kearney and Robert E Dalton, 'The Treaty on Treaties' (1970) 64(3) *American Journal of International Law* 495, 533–535).

33 See, eg, Distefano (n 25) 172.

34 See the statements made by the USSR (A/CONF.39/C.1/SR.51 (n 26) para. 13) and Cuba (A/CONF.39/C.1/SR.49 (n 25) para. 13).

35 *Fisheries Jurisdiction (United Kingdom v. Iceland)* (Jurisdiction) [1973] ICJ Report 24; Caflisch (n 24) 76; Corten (n 23) 1204; Herbert W Briggs, 'Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice' (1974) 68(1) *American*

which means that it binds all States, not only parties to the Vienna Convention on the Law of Treaties (VCLT).[36]

When it comes to the application of Art. 52 of the VCLT, it is important to highlight that, firstly, coercion that leads to the invalidation of a treaty can originate not only from the acts of a party to the treaty but also from a third State, as well as from an international organization.[37]

Secondly, as O. Corten observes, to employ Art. 52 there must be a causal link between the threat of force and the conclusion of a treaty.[38] However, Art. 52 'demands that the conclusion of a treaty "has been procured" – and not has been either "exclusively" or "essentially" procured – by an act of coercion.' Thus, 'it would suffice to establish a decisive influence of the alleged coercion, without the necessity to demonstrate the total absence of choice by the victim.'[39] This procurement based on coercion may be demonstrated by subjective criteria (eg, intention of an author of an illicit act), as well as by objective criteria (for instance, the protest of the targeted State at the moment the threat of force was issued).[40] If the threat of force was not a decisive factor that compelled one of the parties to conclude a treaty, Art. 52 is not applicable.

Thirdly, a treaty concluded under the threat of force not only is invalid between the parties to the treaty but is also void in absolute terms, vis-à-vis the international community.[41]

Fourthly, if a treaty was concluded under the threat of force, it cannot be subsequently confirmed or acquiesced to by the victim state (Art. 45 of the VCLT),[42] because the treaty is void *ab initio*.[43] 'Otherwise, the threatening state could not only force the victim to conclude a treaty under threat, but also to subsequently confirm it.'[44]

Journal of International Law 1974 51, 62–3. See also statements made by Romania (A/CONF.39/C.1/SR.50 (n 24) para. 39) and the FRY (Verbatim Record 1999/14 (n 30) 41).

36 Corten (n 23) 1204.

37 Ibid 1211.

38 Ibid.

39 Ibid 1213.

40 Ibid.

41 ILC member Mustafa Kamil Yasseen (Yearbook of the International Law Commission 1963, 56, para. 37).

42 Article 45:

> A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts: (a) It shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or (b) It must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

43 Caflisch (n 24) 71.

44 Marco Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54(2) *Netherlands International Law Review* 229, 260–61.

Fifthly, under the fifth paragraph of Art. 44 of the VCLT, 'no separation of the provisions of the treaty is permitted,' which means that the whole treaty is void and it cannot be divided into valid and invalid parts.[45]

Sixthly,

> only a party to the treaty, and not a third State, can invoke either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it, or suspending its operation, and it must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.
>
> (Art. 65(1) of the VCLT)

Finally, a void treaty concluded under the threat of force may be renegotiated in order to remedy the legal defect from which it suffered.[46] Some authors suggest that the new treaty may have the same content as the original, invalid one,[47] but this would mean that in the end the threatening State would be able to keep all of the provisions of the original treaty extorted by the threat of force and have the treaty labelled valid. Such a situation is certainly not in line with the objective of either Art. 52 of the VCLT or the prohibition of threats of force. Thus, the renegotiated treaty should exclude any provisions to which the targeted State did not freely consent.

As has been stated several times herein, a threat of force is legal when the use of force would be legal too. This rule also affects the principle from Art. 52 of the VCLT. Thus, a treaty is void if it was concluded under the illegal threat of force, meaning that a threat of force was not issued in circumstances of self-defence or under UNSC authorization. This latter point has important implications for the law of treaties, as it means that not all treaties concluded under threat of force would be void. Both States and the doctrine of law discuss so-called 'peace treaties' in this context, that is, treaties that mark the termination of an armed conflict, as victorious States often impose certain obligations on the losing side under such treaties. In such a case, peace treaties, in order to be valid, must, like any other international agreement, have been concluded only under a legal threat of force.[48] As an example, one may invoke here the previously mentioned Rambouillet Accords.[49] Ultimately, the agreement was not signed by the FRY, as it claimed that NATO and its member States had

45 Distefano (n 25) 174.

46 ILC member Yansseen (Yearbook of the International Law Commission 1963, 56, para. 37).

47 Distefano (n 25) 174.

48 Ibid 173–174; Corten (n 23) 1211; ILC member Grigory I Tunkin (Yearbook of the International Law Commission 1963, 57, para. 55); 'Second report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur' UN Doc A/CN.4/156 and Add. 1–3, 52, para. 7. Cf ILC member Yansseen (Yearbook of the International Law Commission 1963, 56, para. 32).

49 See Chapter 4, Section 4.1.1.1.3.

attempted to compel it to sign the Accords under an illegal threat of force in violation of the UN Charter.[50] According to the FRY, 'Even if Yugoslavia would have signed it, the Interim Agreement would have been null and void under current international law,' meaning Art. 52 of the Vienna Convention on the Law of Treaties.[51]

When it comes to the scope of application of Art. 52 of the VCLT, some claim that it refers not only to the conclusion but also to the execution of treaties.[52] This argument was raised by Libya during the ICJ proceedings in the Lockerbie case. Libya wanted to exercise jurisdiction over two suspects in the case, while the USA and the UK attempted to compel Libya to extradite the suspects – according to Libya under the pressure of the threat of force. Libya mentioned several examples of such threats[53] and claimed that, through these threats, the USA and the UK wanted to avoid their obligations under the 1971 Montreal Convention arising from the Aerial Incident as well as to hamper the exercise of Libya's rights stemming from the Montreal Convention, especially including Arts. 5, 6 and 11 of the Convention.[54] The view that a threat of force affects not only the conclusion but also the execution of treaties seems to be an extension of the principle included in Art. 52 of the VCLT and in line with the principle *ex injuria jus non oritur*.

Last, but not least, it should be mentioned that international law has recognized the invalidity of treaties concluded under threat of force not only with reference to States but also with reference to international organizations. Article 52 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[55] reiterates exactly the same wording as the Vienna Convention on the

50 Verbatim Record 1999/14 (n 30) 41. There was a direct link between the threats of the use of force against the FRY and the demands addressed to the FRY (Ian Brownlie and CJ Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 49(4) *The International and Comparative Law Quarterly* 878, 896).

51 Verbatim Record 1999/14 (n 30) 41. The same conclusion was also reached by Brownlie, Apperley (n 50) 896–897.

52 Roscini (n 44) 261.

53 See, eg, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Memoire soumis par la Grande Jamahiriya Arabe Libyenne Populaire Socialiste, 33 para. 2.26. For instance, on 15 December 1991, the USA Secretary of Defense Dick Cheney – when asked by a journalist, 'Is military retaliation against Libya a real option?' – answered that

> [w]e have never ruled any option in or any option out. Obviously, we have continued to pursue that. As the President has indicated, we care very much about bringing to justice those people who were responsible for the bombing of Pan Am 103.
>
> (Ibid 10, para. 2.8)

54 Ibid 53–7, paras. 3.5–3.11.

55 Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Documents of the Conference), vol. II, UN Doc A/CONF.129/15. Accordingly, the remarks regarding Article

Law of Treaties. During the ILC works on the former Vienna Convention, examples were put forward of both threats of force made by States against international organizations and threats made by international organizations against States.

Insofar as regards the former situation, it was stated that during civil war or international hostilities occurring in States where the headquarters of an international organization is located, the organization 'might be induced to consent by treaty to give up some of its rights, privileges and immunities, in order to avoid the worst.' Such a treaty, concluded under the threat of force, would be void.[56] The ILC Special Rapporteur Paul Reuter even provided a specific example:

> In the event of riots in France, if the French armed forces had to intervene and suspects took refuge in the UNESCO building, it was not inconceivable that the French authorities, under the threat of armed force, might persuade the Director of UNESCO to amend the headquarters agreement between that organization and France in such a way as to allow the French armed forces to coerce UNESCO in a manner contrary to the United Nations Charter.[57]

Obviously, an international organization can only issue threats of force if the organization has the necessary means at its disposal.[58] Particular concerns were expressed with regard to Art. 53 of the UN Charter, which allowed for the threat or use of force through regional arrangements or agencies,[59] especially where the UN recognized that the activities of those arrangements and agencies could in fact violate the principles of international law embodied in the Charter.[60] Thus, a military alliance could proclaim its intention to use force against a State or against a group of States,[61] or 'an organization that had sent peace-keeping forces into a territory might make use of their presence to secure the host country's signature to a treaty.'[62] An example here could again

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52 of the 1969 Convention also apply to Art. 52 of the 1986 Convention (Olivier Corten, '1986 Vienna Convention: Article 52' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. II (OUP 2011) 1221).

56 'Report of the International Law Commission on the work of its Thirty-first session, 14 May–3 August 1979' UN Doc A/34/10, 431, para. 5.

57 ILC Summary Record of the 1,547th meeting (7 June 1979) UN Doc A/CN.4/SR.1547, 72, para. 20. See also ILC Summary Record of the 1,722nd meeting (8 June 1982) UN Doc A/CN.4/SR.1722, 142, para. 13.

58 A/34/10 (n 56) 156, para. 6.

59 Statement by ILC member Stephen Schwebel (ILC Summary Record of the 1,558th meeting (22 June 1979) UN Doc A/CN.4/SR.1558, 129, para. 13).

60 A/34/10 (n 56) 156, para. 7.

61 Statement by ILC member Schwebel (A/CN.4/SR.1558 (n 59) 129, para. 13). See also the statement made by Francis Vallat (Ibid 129, para. 9).

62 Statement made by Francis Vallat (Ibid 130, para. 19).

be the threats of force issued by NATO against the FRY.[63] Also, during the Cuban Missile Crisis, the USSR called the resolution adopted by the Ninth Meeting of Consultation of Ministers of Foreign Affairs of the OAS States on 25 July 1964[64] a 'direct threat of resort to armed force against the Republic of Cuba.'[65]

Some ILC members have suggested that 'when reference was made to the coercion of an international organization, what was, in fact, meant was the coercion of that organization by its member States.'[66] However, one needs to differentiate here between the subjectivity of the international organization and its members. For instance, under Art. 15 of the Regulations for the United Nations Emergency Force, 'The Secretary-General of the United Nations shall have authority for all administrative, executive and financial matters affecting the Force and shall be responsible for the negotiation and conclusion of agreements with Governments concerning the Force.' Thus, the UN Secretary-General could be compelled, under the threat of force, to conclude agreements concerning peace-keeping forces[67] that would be void under Art. 52 of the Vienna Convention on the Law of Treaties between States and

63 The fact that NATO communications towards the FRY amounted to threats of force was openly confirmed by some of the member States and other actors, like the UN Secretary-General. In a report, the UN Secretary-General stated that

> [o]nly after the tragic shelling of the Sarajevo market square, the letter sent by the Secretary-General to the North Atlantic Treaty Organization (NATO) on 6 February 1994, and the resultant threat of NATO intervention, was it possible to negotiate an agreement between the Bosnian government and Serb forces.

It also noted that '[a]fter much effort on the part of UNPROFOR, coupled with the further threats of NATO air strikes at the request of the Secretary-General, an agreement was ultimately achieved between UNPROFOR and the Bosnian Serb authorities' ('Report of the Secretary-General pursuant to Resolution 844 (1993)' (9 May 1994) UN Doc S/1994/555, paras. 8–9). See also Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *The European Journal of International Law* 1, 2.

64 The fifth paragraph of the resolution stated as follows:

> [I]f it [the government of Cuba] should persist in carrying out acts that possess characteristics of aggression and intervention against one or more of the member states of the organization, these states shall maintain their essential rights as sovereign nations by means of the use of individual or collective self-defense, which could go so far as resort to armed force, until such time as the organ of consultation takes measures to insure the peace and security of the continent.
>
> ('Text of O.A.S. Resolution for Sanctions on Cuba' (26 July 1964) <www.nytimes.com/1964/07/26/archives/text-of-oas-resolution-for-sanctions-on-cuba.html> accessed 1 September 2022)

65 'Letter dated 9 August 1964 from the Acting Permanent Representative of the Union of Socialist Soviet Republics addressed to the President of the Security Council' (9 August 1964) UN Doc S/5867, 3.

66 Statement made by Alexander Yankov (A/CN.4/SR.1722 (n 57) 142–143, para. 17).

67 Ibid 144, paras. 23, 25.

International Organizations or between International Organizations. Such agreements would be void because there was a threat of force made against the UN itself, not against the UN member States.

To sum up, the principle that treaties concluded under the threat of force – regardless of whether issued by a State or an international organization or against a State or an international organization – are void is firmly established under contemporary international law and constitutes an important extension of the prohibition of threats of force. Despite some doubts expressed by the States during the preparatory works on the Vienna Convention on the Law of Treaties, the principle has not been abused and is applied only in the most severe situations in order to revert an injustice caused by the use of a threat of force imposed to compel the conclusion of a treaty.

5.3 Conclusions

The consequences of threats of force are no less serious than those stemming from the use of force. Indeed, the effects and aims of threats of force may be more difficult to predict, although this does not influence the legal assessment of threats of force themselves. The prohibition of threats of force prevents States from concluding treaties, giving up territories or complying with demands solely for the reason that a more powerful or better-armed State made a demand while expecting that other States will comply with it because of its argument of force, not of law.

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Final conclusions

The prohibition of threats of force – even though it is included in Article 2(4) of the UN Charter and is among one of the most fundamental rules of contemporary legal order – is discussed, analyzed and invoked far less often than the prohibition of the use of force. This, however, does not mean that it is less important or that the consequences of its breach are less serious than those in the case of the use of force. It has been the aim of this work to prove that even though the prohibition of threats of force is often omitted or merged with the prohibition of the use of force, it has its own place in the international legal order, even if its status and significance vary from the ban on the use of force.

Because the term 'threat' is often used in different contexts and phrases, from the perspective of this research it was important both to define the difference between 'threats of force' and other notions associated with the word 'threat' and to focus only on those cases of State practice that undoubtedly related to a 'threat' in the meaning of Article 2(4). Thus, even though the present book distinguishes between a 'threat of force' and a 'threat to international peace and security,' 'threat to the peace,' 'threat to territorial integrity and political independence' and so on, only one section is devoted to these notions. On the other hand, it discusses *in extenso* those situations in which States have referred to 'military threats,' 'threats of attack,' 'threats of invasion,' 'armed threats' and similar.

The prohibition of 'threats of force' and the prohibition of the 'use of force' – despite being connected in Article 2(4) – are two separate rules and have developed at different paces. While no State or international organization has ever denied the binding force of the prohibition of threats of force, contrary to the prohibition of the use of force, the prohibition of the threats of force did not transform from a treaty norm to a customary norm, and, frankly speaking, there are no signs that such a transformation will take place in the foreseeable future. There are two main reasons for this. Firstly, States often breach the prohibition of threats of force but do not offer any legal justification to explain the legal grounds for the threats made. There have been only a few cases in which States have justified their threats with reference to international law; in the rest of the situations they remained silent. Secondly, States often use threats of force

DOI: 10.4324/9781003376026-7

as a regular tool to back up political solutions they are trying to achieve. States feel free to use threats of force, caring only about the credibility of the menaces they create. It is also interesting to observe that while there is a quite narrow group of States that use force or support the use of force, threats of force are often endorsed by a very broad coalition of States – from different continents and with different interests (often conflicting ones) – that are hard to call allies.[1] Thus, despite the fact that States have, on a number of occasions, underlined the importance and binding force of the prohibition of the threat of force,[2] they have also blatantly breached it many times.

1 As mentioned in Chapter 2, Section 2.4, threats of force against the FRY made by NATO and NATO member States were supported by, *inter alia*, Tunisia and Senegal. On the other hand, eg, Colombia endorsed the armed intervention in Iraq in 2003.

2 Among many other statements, one can mention claims made by Ecuador:

> The threat of the use of force, like the use of force itself, as in the case of political pressure exercised by the dozens of armed divisions stationed by imperialist States among weaker peoples in order to prevent their self-determination, was also unacceptable.
>
> ('Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations' (1982) UN Doc A/37/41, para. 32)

Statements made by the USA: 'The threat of force, as well as the use of force, was proscribed, for a State which chose a policy of force could, by making a threat, infringe the provisions of the Charter even before any force had been used' (UNGA Official Records, Sixth Committee (11 November 1963) UN Doc A/C.6/SR.808, para, 27) and the Solomon Islands:

> [I]nternational law prohibits the following "threats": to act in such a way as to threaten international peace and security (this prohibition is implicit in Articles 1(1) and 39 of the UN Charter); to threaten the use of force in violation of Article 2(4) of the UN Charter; to make other threats prohibited by the UN General Assembly Declaration on the Principles of International Law Governing Friendly relations between States (resolution 2625(XXV), 24 October 1970), including prohibitions relating to: threat or use of force (Principle 1, paras. 1, 4, 5 and 10); and the prohibition on intervention (Principle 3, para. 1).
>
> (Letter dated 19 June 1995 from the Permanent Representative of *Legality of the Threat or Use of Nuclear Weapons*, Letter dated 19 June 1995 from the Permanent Representative of Solomon Islands to the United Nations, together with the Written Statement of the Government of Solomon Islands 25, paras 3.8., 3.10)

I Brownlie, speaking on behalf of Libya, stated that

> [t]he threat of force is contrary to the principles of the Charter of the United Nations and, in so far as they may be distinct, the principles of customary or general international law. The obvious references include United Nations Charter, Article 2, paragraph 4, and the first principle of the Declaration on Principles of International Law Concerning Friendly Relations, UNGA resolution 2625 (XXV), which is an authoritative interpretation of the Charter.
>
> (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Public sitting (28 March 1992) Verbatim Record 92/5, 17)

Statements from Belgium: 'The threat of force is, *ex hypothesi*, just as illegal as the use of force' (*Legality of Use of Force (Yugoslavia v. Belgium)*, Public sitting (10 May 1999) Verbatim Record 1999/15, 11).

It is often claimed in the doctrine of law that States report threats of force far less often than the use of force. While this is true, it should be highlighted that, since 1945, States have nonetheless submitted a considerable volume of complaints about threats of force made by other States, as has been demonstrated in the present work. Although some authors claim that acts called 'threats of force' should be limited by their form or circumstances, States' submissions have proved that any act – both verbal and written as well as factual deeds – may amount to the threat of force. Moreover, threats of force do not have to be direct, as they are subject to the abstract evaluation of States.

What can be certainly said about the complaints concerning threats of force is that States have limited their demands towards international organs when it comes to the measures that they should apply in reaction to threats. Not only are these demands themselves quite modest, but the replies of international organizations have been very restricted, and in the case of the UN, they usually come down to the dissemination of States' communications about the threats of force. Debates about the threats of force are rare; even less frequent are mentions of threats of force in UN resolutions. When it comes to the harshest measures, envisaged in Articles 41 and 42 of the UN Charter, it is noteworthy that they have never been applied so far. Thus, international organizations and their main organs, including the UNSC, are reluctant to react strongly to threats of force. The reason behind this may be that international organizations themselves sometimes support threats of force,[3] they consider complaints about threats as a subjective evaluation of the situation by the complaining State, which may not necessarily be confirmed by an objective assessment of the situation, or they deem such threats as less important breaches that – if brought to forum like the UNSC and intricately discussed and analyzed – may worsen the relations between States and sharpen international tensions.

Apart from the submission of a complaint to an international organization, a targeted State may also choose to deal with threats of force on its own. The range of tools it has at its disposal is the same as in the case of any violation of international law.

Even though States sometimes make use of threats of force as though it is a regular tool of diplomacy, the consequences of illegal threats of force are defined by the principle *ex injuria jus non oritur*. In the case of threats of force, this means that territorial acquisitions, as well as the imposition of treaties under the threat of force, are prohibited, and such acts remain invalid.

3 See Chapter 2, Section 2.4.

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