CHAPTER 42

THE THREAT OF THE USE OF FORCE AND ULTIMATA

FRANÇOIS DUBUISSON
ANNE LAGERWALL

I. INTRODUCTION

THERE is no doubt that the UN Charter requires that states refrain not only from the use of force but also from the threat of force.[1] The principle embodied in Article 2(4) is generally recognized as customary[2] and peremptory.[3] The disposition stipulates that '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'. The Charter prohibits the threat of force in the same way as it prohibits the actual use of force.

[1] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Rep 1996, 244, para 38.

[2] Krysztof Skubiszewski, 'Use of Force by States. Collective Security. Law of War and Neutrality' in Max Sorensen (ed), *Manual of Public International Law* (New York: Macmillan, 1968), 745. *Contra*, Romana Sadurska, 'Threats of Force' (1988) 82 *American Journal of International Law* 248.

[3] International Law Commission, *Yearbook of the International Law Commission*, 1966, vol II, 270; Individual Opinion of Judge Bruno Simma, *Case Concerning Oil Platforms (Iran v. US)*, ICJ Rep 2003, 161, para 6.

The threat of force has not been given a great deal of attention in international law; rather, authors have studied the prohibition of the use of force and its exceptions, such as self-defence.[4] The threat of force has sometimes been analysed in the context of the right to pre-emptive defence, which supposedly allows a state to react, not to an effective armed attack but to a simple threat to trigger an armed attack.[5] But monographs[6] and articles[7] devoted specifically to the threat of force remain scarce. Yet, instances where states complain about unlawful threats of force are not as rare as one might think. For example, in a letter sent to the President of the Security Council in 2008, Thailand affirmed that 'the Prime Minister of Cambodia publicly issued an ultimatum against Thailand to withdraw by 1200 hours of 14 October 2008 or Cambodia would turn the border area into a "death zone"', in contradiction with the prohibition of the threat of force enshrined in the Article 2(4) of the UN Charter.[8] During the oral proceedings of the International Court of Justice (ICJ) in the case concerning *Certain activities carried out by Nicaragua in the Border Area*, the agent of the Republic of Nicaragua recalled that the Security Minister of Costa Rica had stated that 'these people will withdraw either through reason or by force...'[9] Media have reported threatening discourses from Iran and Israel[10] as well as from North Korea and the US.[11] These examples illustrate the practical importance of the subject. This chapter aims at clarifying the exact conditions under which an act may qualify as a threat of force contrary to the UN Charter (Section II) and unveils the trends adopted in different instances where states, arbitrators, or experts

[4] See eg Josef Mrazek, 'Prohibition of the Use and Threat of Force: Self-Defence and Self-Help in International Law' (1989) 27 *Canadian Yearbook of International Law* 81.

[5] See Thomas M. Franck, *Recourse to Force. State Action Against Threats and Armed Attacks* (Cambridge: Cambridge University Press, 2002), 99 ff; Belatchew Asrat, *Prohibition of Force under the UN Charter. A Study of Art. 2(4)* (Uppsala: Iustus Forlag, 1991), 222 ff.

[6] Nicolas Stürchler, *The Threat of Force in International Law* (Cambridge: Cambridge University Press, 2007); Francis Grimal, *Threats of Force. International Law and Strategy* (London/New York: Routledge, 2013).

[7] Sadurska, 'Threats of Force'; Major Matthew A. Myers Sr, 'Deterrence and the Threat of Force Ban: Does the UN Charter Prohibit some Military Exercises?' (1999) 162 *Military Law Review* 132; François Dubuisson and Anne Lagerwall, 'Que signifie encore l'interdiction de recourir à la menace de la force?' in Karine Bannelier et al (eds), *L'intervention en Iraq et le droit international* (Paris: Pedone, 2004), 83; Mario Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54 *Netherlands International Law Review* 229; Dino Kritsiotis, 'Close Encounters of a Sovereign Kind' (2009) 20 *European Journal of International Law* 299; 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.

[8] Letter dated 16 October 2008 from the Permanent Representative of Thailand to the United Nations addressed to the President of the Security Council, S/2008/657 (17 Oct 2008), para 2.

[9] *Certain activities carried out by Nicaragua in the Border Area (Costa-Rica v. Nicaragua)*, CR 2011/2, 11 Jan 2011, 4, para 30.

[10] 'Iran's leader threatens to level cities if Israel attacks, criticizes US nuclear talks', *Fox News*, 21 Mar 2013. See Kritsiotis, 'Close Encounters of a Sovereign Kind', 316–22.

[11] 'North Korea threatens to strike without warning', *CNN*, 15 Apr 2013.

have commented on certain acts in relation to the prohibition of the threat of force (Section II).

In addition, there have been a number of quite spectacular instances of formal ultimata. For instance, NATO threatened the use of air power in Bosnia and Herzegovina, in relation to the demand made to ethnic Serb forces to withdraw heavy weapons from exclusion zones surrounding the so-called safe areas by a specified date and time. Most spectacularly, NATO threatened the use of force against Serbia or alternatively the Kosovo Liberation Army in the run-up to the Rambouillet negotiations on Kosovo. It threatened to use force against whichever side would obstruct reaching an interim settlement for Kosovo within a short, concentrated time frame. When the Kosovo negotiations produced no result, it actually employed force in accordance with that threat on a large scale.[12] However, as the cases of Bosnia and Herzegovina and Kosovo were, at least in part, linked to demands made through the UN Security Council, they will not be considered in any detail in this chapter, which focuses on the threat of force outside of the context of collective security.

II. What Constitutes a Threat of Force Contrary to the United Nations Charter?

Article 2(4) raises two main questions. What particular acts may qualify as 'threats' of force (Section II.A)? And under what conditions are these acts unlawful (Section II.B)?

A. What Acts Qualify as a 'Threat' of Force?

It is generally admitted that 'force' in Article 2(4) of the Charter means *armed* force.[13] The threat which the Charter prohibits can therefore only be an armed threat.[14]

[12] See Marc Weller, *Contested Statehood* (Oxford: Oxford University Press, 2009), 111 f.

[13] See Bert V. A. Röling, 'The Ban of the Use of Force and the U.N. Charter' in Antonio Cassese (ed), *The Current Regulation of the Use of Force* (Dordrecht: Martinus Nijhof, 1986), 4 and Antonio Tanca, 'The Prohibition of Force in the U.N. Declaration of Friendly Relations of 1970' in Cassese, 400–2; Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge: Cambridge University Press, 2011), 88; Asrat, *Prohibition of Force under the UN Charter*, 40; Albrecht Randelzhofer and Oliver Dörr, 'Article 2(4)' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (3rd edn, Oxford: Oxford University Press, 2012), 208–210.

[14] Kritsiotis, 'Close Encounters of a Sovereign Kind', 304–5.

According to Ian Brownlie: 'A threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government'.[15] In a more flexible fashion, Romana Sadurska considers that the mere conclusion of collective defence treaties, such as the North Atlantic Treaty, may be seen as a threat to resort to armed measures.[16] Most authors agree, however, that the threat should be formulated in precise and direct terms to the attention of a clearly identifiable state or group of states, hence excluding threats which are too vague or general.[17] Moreover, the threat should be coercive[18] and accompanied by specific demands for the targeted state(s) to adopt a particular conduct.[19] Examples of threats frequently include, under certain circumstances, rearmament,[20] military manoeuvres,[21] establishment of military bases on the territory of a foreign state,[22] bellicose declarations,[23] concentration of troops along the borders,[24] general mobilization,[25] and propaganda in favour of a war of aggression.[26]

[15] Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 364.

[16] Sadurska, 'Threats of Force', 243. See also Randelzhofer and Dörr, 'Article 2(4)' in Simma et al, *The Charter of the United Nations: A Commentary*, 218; Grimal, *Threats of Force*, 43; Green and Grimal, 'The Threat of Force as an Action in Self-Defense Under International Law', 296.

[17] See Asrat, *Prohibition of Force under the UN Charter*, 140; Randelzhofer and Dörr, 'Article 2(4)' in Simma et al, *The Charter of the United Nations: A Commentary*, 218; Olivier Corten, *Le droit contre la guerre* (Paris: Pedone, 2008), 125–50; Olivier Corten, *The Law against War. The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart, 2010), 94–111; Robert Kolb, *Ius contra bellum. Le droit international relatif au droit de la paix* (2nd edn, Brussels: Bâle, Bruylant, Helbing Lichtenhahn, 2009), 243; Stürchler, *The Threat of Force in International Law*, 258–60.

[18] See Dinstein, *War, Aggression and Self-Defence*, 89; Randelzhofer and Dörr, 'Article 2(4)' in Simma et al, *The Charter of the United Nations: A Commentary*, 218; Sadurska, 'Threats of Force', 245.

[19] See Randelzhofer and Dörr, 'Article 2(4)' in Simma et al, *The Charter of the United Nations: A Commentary*, 218; Corten, *Le droit contre la guerre*, 145–6; Eduardo Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159 *Recueil des cours de l'Académie de droit international* 88. *Contra*, Dinstein, *War, Aggression and Self-Defence*, 89.

[20] See Randelzhofer and Dörr, 'Article 2(4)' in Simma et al, *The Charter of the United Nations: A Commentary*, 218; Jean-Gabriel Castel, *International Law* (3rd edn, Toronto: Butterworths, 1976), 1220.

[21] Skubiszewski, 'Use of Force by States', 780; Jiménez de Aréchaga, 'International Law in the Past Third of a Century', 88; Sadurska, 'Threats of Force', 243; Grimal, *Threats of Force*, 43–4; Stürchler, *The Threat of Force in International Law*, 172–217; Roscini, 'Threats of Armed Force and Contemporary International Law', 239–40; Myers, 'Deterrence and the Threat of Force Ban'.

[22] Castel, *International Law*, 1220.

[23] Jiménez de Aréchaga, 'International Law in the Past Third of a Century', 88; Grimal, *Threats of Force*, 42–3.

[24] Jiménez de Aréchaga, 'International Law in the Past Third of a Century', 88; Sadurska, 'Threats of Force', 243; Asrat, *Prohibition of Force under the UN Charter*, 140.

[25] Jiménez de Aréchaga, 'International Law in the Past Third of a Century', 88.

[26] Asrat, *Prohibition of Force under the UN Charter*, 139.

The ICJ's case law clarifies the definition of a 'threat' of force. In the *Corfu Channel* case, the Court had to decide whether minesweeping operations led by UK vessels were carried out in conformity with international law.[27] Albania underlined that it had not consented to the operation which therefore violated its sovereignty and argued that the presence of military vessels escorting the minesweepers constituted 'an unnecessarily large display of force, out of proportion to the requirements of the sweep'.[28] Condemning the minesweeping operation, the Court nevertheless rejected Albania's contentions on this particular aspect:

> The Court thinks that this criticism is not justified. It does not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania. The responsible naval commander, who kept his ships at a distance from the coast, cannot be reproached for having employed an important covering force in a region where twice within a few months his ships had been the object of serious outrages.[29]

In the *Nicaragua* case, the Court had to determine the conditions under which military manoeuvres or rearmament could be constitutive of threats of force.[30] Between 1982 and 1985, the US had conducted troop movements in Honduran regions located close to Nicaraguan borders and deployed vessels off the Nicaraguan coast.[31] Nicaragua contended that these operations were unlawful threats of force. The Court, however, was 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'.[32] Moreover, the US maintained that its operations were justified owing to the 'excessive militarization' of Nicaragua 'such as to prove its aggressive intent'. The Court held that such justification could not stand:

> It is irrelevant and inappropriate, in the Court's opinion to pass upon this allegation of the United States, since in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.[33]

In its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons*, the Court explained that the threat of force is characterized by 'a signalled intention to use force if certain events occur' or if there was a 'stated readiness to use it'.[34] As an example, the Court affirmed that 'it would be illegal for a State to threaten force

[27] Grimal, *Threats of Force*, 54–7; Stürchler, *The Threat of Force in International Law*, 68–74; Kritsiotis, 'Close Encounters of a Sovereign Kind', 322–9.

[28] *Corfu Channel (UK v. Albania)*, ICJ Rep 1949, 35.

[29] *Corfu Channel (UK v. Albania)*, ICJ Rep 1949, 35.

[30] See Grimal, *Threats of Force*, 58–9; Stürchler, *The Threat of Force in International Law*, 74–9; Corten, *The Law against War*, 101–3.

[31] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, ICJ Rep 1986, 53, para 92.

[32] *Nicaragua*, 118, para 227.

[33] *Nicaragua*, 135, para 269.

[34] ICJ Rep 1996, para 47. On this case, see Stürchler, *The Threat of Force in International Law*, 79–90.

to secure territory from another State, or to cause it to follow or not follow certain political or economic paths'.[35]

In sum, the threat of force is defined in strict terms by the ICJ. To qualify as a threat, demonstrations of force must be accompanied by particular circumstances showing that these demonstrations amount to political pressure in order to obtain something from the targeted state by declaring a willingness to react if certain events occur.[36] For conduct to be considered as a threat of force, a signalled intention or a declaration stating these aims is required.[37] Implicit terms should not, in principle, be considered as threats of force,[38] unless particular circumstances so justify.[39]

B. Under What Conditions is a Threat of Force Unlawful?

Article 2(4) of the UN Charter implies that a threat is unlawful when the use of force contemplated by the threat would itself be unlawful. The threat of force is contrary to the Charter when the use of force cannot be justified, either because no authorization has been granted by the Security Council or the conditions required by the Charter's Article 51 with regard to self-defence are not met.[40] In that respect, the prohibition of the threat of force is symmetrical to that of the use of force.[41]

Some authors have questioned this symmetry by asserting that the threat of force is accepted in broader[42] or stricter[43] terms than the corresponding use of force in practice. The prohibition of the threat of force has also been said to have no autonomy from the prohibition of the use of force; any distinction between the two remaining 'virtual' as only threats which have been implemented are generally condemned.[44] Romana Sadurska even considers that a state may sometimes threaten

[35] ICJ Rep 1996, para 47.

[36] Dubuisson and Lagerwall, 'Que signifie encore l'interdiction de recourir à la menace de la force?' in Bannelier et al, *L'intervention en Iraq et le droit international*, 85–8.

[37] Kritsiotis, 'Close Encounters of a Sovereign Kind', 306; Corten, *The Law against War*, 108.

[38] *Contra* Stürchler, *The Threat of Force in International Law*, 260–1.

[39] Corten, *The Law against War*, 108–9.

[40] See Dinstein, *War, Aggression and Self-Defence*, 88; Brownlie, *International Law and the Use of Force by States*, 364; Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 10–11; Grimal, *Threats of Force*, 37–8; Kolb, *Ius contra bellum*, 243, Roscini, 'Threats of Armed Force and Contemporary International Law', 254–8; Kritsiotis, 'Close Encounters of a Sovereign Kind', 305; Green and Grimal, 'The Threat of Force as an Action in Self-Defense Under International Law', 292–5.

[41] See Dubuisson and Lagerwall, 'Que signifie encore l'interdiction de recourir à la menace de la force?' in Bannelier et al, *L'intervention en Iraq et le droit international*, 88–93; Corten, *The Law against War*, 111–24.

[42] Randelzhofer and Dörr, 'Article 2(4)' in Simma et al, *The Charter of the United Nations: A Commentary*, 218.

[43] Stürchler, *The Threat of Force in International Law*, 273.

[44] Jean Combacau and Serge Sur, *Droit International Public* (5th edn, Paris: Montchrestien, 2001), 629.

force, despite the use of force contemplated being unlawful, as such threats prove to be effective tools in facilitating the resolution of certain disputes and form symbolic substitutes to effective recourses to force.[45] When the threat is exercised reasonably and carefully, in order to maintain peace and security within the parameters of the UN objectives or to sustain the legitimate right of a state, it is not unlawful.[46]

These different stances are difficult to support. State practice, since the adoption of the UN Charter, as well as the case law of the ICJ, show that the prohibition of the threat of force has frequently been reaffirmed as an autonomous obligation and that the prohibition is conceived in similar terms, whether the conduct is a threat or a recourse to force.[47] The Security Council has adopted numerous resolutions condemning threats of force or demanding that states refrain from such threats, as in Resolutions 186 and 187 (Cyprus),[48] Resolutions 326 and 411 (Southern Rhodesia),[49] Resolution 487 (Iraq/Israel),[50] and Resolution 573 (Tunisia/Israel).[51] Without referring explicitly to the prohibition of the threat of force, other resolutions adopted by the Security Council have called on concerned states to restrain themselves in extremely tense situations and avoid any incident or provocative declaration which could aggravate the situation, in conformity with the principle of peaceful resolution of disputes.[52] In addition, the symmetrical prohibition of the threat and the use of force has been reaffirmed in general international instruments, such as resolutions adopted by the General Assembly,[53] the United Nations Convention on the Law of the Sea,[54] the Final Act of Helsinki,[55] and the Charter of Paris for a New Europe adopted by the Organization for Security and Co-operation in Europe (OSCE) in 1990.[56] The advisory opinion rendered by the ICJ in the *Nuclear Weapons*

[45] Sadurska, 'Threats of Force', 246.

[46] Sadurska, 'Threats of Force', 260–6.

[47] See Dubuisson and Lagerwall, 'Que signifie encore l'interdiction de recourir à la menace de la force?' in Bannelier et al, *L'intervention en Iraq et le droit international.*

[48] S/RES/186 (1964), Preamble and para 1; S/RES/187 (1964), Preamble and para 1.

[49] S/RES/326 (1973), para 1: 'The Security Council condemns all the acts of provocation and harassment, including economic blockade, blackmail and military threats, against Zambia by the illegal regime in collusion with the racist regime of South Africa'; S/RES/411 (1977), paras 1–2.

[50] S/RES/487 (1981), paras 1–2: 'The Security Council strongly condemns the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct; calls upon Israel to refrain in the future from any such acts or threats thereof'.

[51] S/RES/573 (1985), paras 1–2: 'The Security Council condemns vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct; demands that Israel refrain from perpetrating such acts of aggression or from threatening to do so'.

[52] S/RES/395 (1976); S/RES/1177 (1998); S/RES/1226 (1999).

[53] See eg Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, A/RES/20/2131 (21 Dec 1965); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/25/2625 (24 Oct 1970); Peaceful settlement of disputes between States, A/RES/37/10 (15 Nov 1982).

[54] Convention, Art 301.

[55] OSCE, Helsinki Final Act, 1 Aug 1975, available at <http://www.osce.org/node/39501>, Principle II.

[56] OSCE, Charter of Paris for a New Europe, 1990, available at <http://www.osce.org/mc/39516>.

case provides an even clearer illustration of the perfectly symmetrical prohibition of both the threat and the use of force:

> The notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal. In short, if 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.[57]

On this particular matter, the Court has underlined that 'no State... suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.'[58] The principle of symmetry is again reaffirmed in unequivocal terms with regard to the threat of using nuclear weapons:

> Whether this is a 'threat' contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.[59]

Authors who doubt such symmetry sometimes ground their position on the Cuban Missile Crisis and the *Corfu Channel* case. But in the case of the Cuban quarantine, the US justified its blockade by referring to the authorization supposedly obtained from the Organization of American States (OAS) by virtue of Chapter VIII of the UN Charter. Whether or not the argument is valid, suffice to say that the US did not intend to dissociate the appreciation of the legality of the threat of force from that of the effective use of force, both in their view being justified under the Charter.[60] In the *Corfu Channel* case, it is highly questionable whether it can be inferred from the Court's decision that the Court accepted the legality of a threat of force from the circumstance that the threat was intended to strengthen a recognized right. If the Court decided that the passage of British warships through the channel did not violate Albania's sovereignty, it was because their conduct could qualify as an *innocent passage*[61] and because the UK's demonstration of force was intended to prevent Albania from continuing to fire at the vessels.[62] From the perspective of the prohibition of the threat of force—which was not the angle chosen by the ICJ—it may be said that if such a threat existed, it could be considered as formulated in relation to self-defence.[63] The Court did not examine the admissibility of the use of force to compel a state to admit or execute an existing right.[64]

[57] ICJ Rep 1996, 246, para 47. [58] *Nuclear Weapons*, Advisory Opinion, para 47.

[59] *Nuclear Weapons*, Advisory Opinion, 246–7, para 48.

[60] See Leonard C. Meeker, 'Defensive Quarantine and the Law' (1963) 57 *American Journal of International Law* 515–24.

[61] ICJ Rep 1949, 31. [62] *Corfu Channel*, 31.

[63] In diplomatic correspondence, the UK warned the Albanian government that 'if Albanian coastal batteries in the future opened fire on any British warship passing through the Corfu Channel, the fire would be returned' (ICJ Rep 1949, 27).

[64] See Article 50 of the Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission, Annex to GA Res 56/83, A/RES/56/83: 'Countermeasures shall not

III. The Application of the Rule Prohibiting the Threat of Force in Particular Cases

Given that the ICJ case law suggests that the prohibition of the threat of force is interpreted in rather strict terms, it could be questioned whether such a classical interpretation has been adopted in instances where particular acts have been commented on in relation to this prohibition. Three specific cases have been studied in that respect: state practice with regard to the US and British threats of force against Iraq in 2002 and 2003 (Section III.A), the Permanent Court of Arbitration's findings in the case between Suriname and Guyana in 2007 (Section III.B), and the Report issued by the Independent International Fact-Finding Mission on the conflict in Georgia in 2009 (Section III.C).

A. Iraq (2002–3)

During the Gulf crisis, both British and US authorities frequently signalled their intention to use force against Iraq if Saddam Hussein did not leave the country or disarmament was not duly pursued.[65] This readiness to use force became clearly apparent when the US Congress adopted 'the authorization for use of military force against Iraq resolution of 2002'.[66] Commenting on the resolution, President Bush affirmed that 'Iraq must disarm and comply with all existing UN resolutions, or it will be forced to comply'.[67] In similar terms, Tony Blair declared that 'Saddam must now make his choice. My message to him is this: disarm or you face force'.[68] The US and the UK then deployed troops in countries surrounding or close to Iraq. The pressure finally reached its peak when President Bush declared his country's readiness to launch a military operation unless Saddam Hussein and his sons left the territory within 48 hours.[69] Such declarations and acts made abundantly clear that the

affect... the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations'.

[65] *New York Times*, 16 Feb 2002.

[66] *Authorization for Use of Military Force Against Iraq Resolution of 2002*, Public Law No 107–243, 116 Stat 1498 (16 Oct 2002), HJRes 114.

[67] 'Bush Says Confronting Iraq Is *Matter of National Security*', radio address to the nation, 12 Oct 2002, available at <http://iipdigital.usembassy.gov>.

[68] 'Prime Minister statement on Iraq following UN Security Council resolution', 8 Nov 2002, available at <http://webarchive.nationalarchives.gov.uk>.

[69] 'Bush Gives Saddam Hussein and Sons 48 Hours to Leave Iraq', 17 Mar 2003, available at <http://iipdigital.usembassy.gov>.

two states intended to use force in the event that Iraq did not conform with certain conditions and can therefore be qualified as a 'threat of force' under Article 2(4) of the Charter.[70] Its lawfulness depends on the use of force contemplated. If the US and British threats had been formulated in similar terms to those expressed by Security Council's Resolution 1441 (2002) which warned Iraq 'that it will face serious consequences as a result of its continued violations of its obligations'[71]—consequences to be decided by the Security Council[72]—the threats would have been lawful. However, the declarations expressed the intent to use force even in the absence of Security Council authorization.[73] The US representative to the Security Council affirmed that: 'We hope and expect that the Council will act and play its proper role as a safeguard of our common security. If it fails to do so, then we and other States will be forced to act.'[74] For that reason, the threat of force formulated was in violation of the UN Charter as the unilateral use of force contemplated was contrary to Article 2(4).[75]

States remained relatively silent with regard to such bellicose declarations, and such silence may support the hypothesis that the threat of use of force was not generally condemned as such. It should be recalled that a number of states explicitly disapproved of the intention of the US and the UK to operate unilaterally. The 118 states of the Non-Aligned Movement (NAM) reiterated 'their firm condemnation... of threats of military action against the sovereignty, territorial integrity and independence of Member States of the Movement which constitute acts of aggression and blatant violations of the principle of non-intervention and non-interference.'[76] The Organisation of the Islamic Conference, counting 57 member states, expressed 'its categorical rejection of any... threat to the security and safety of any Islamic State and emphasized the need to settle the Iraqi question by peaceful means within the framework of the United Nations'[77]. However, a number of states did admit—not

[70] 'U.S. Stands Behind UN Inspectors, Says Powell', 31 Oct 2002, available at <http://iipdigital.usembassy.gov>; 'Prime Minister statement opening Iraq debate', 18 Mar 2003, at <http://webarchive.nationalarchives.gov.uk>.

[71] S/RES/1441 (2002); See Olivier Corten, 'Opération *Iraqi Freedom:* peut-on admettre l'argument de l'"autorisation implicite" du Conseil de sécurité?' (2003) 36 *Belgian Review of International Law* 211–12.

[72] See eg Declarations of the representatives of France, the UK, Mexico, Russia, Norway, Syria, Cameroon, China, and Colombia, S/PV.4644 (8 Nov 2002); Chile, Angola, Bulgaria, and Pakistan, S/PV.4714 (7 Mar 2003); and Malaysia, South Africa, League of Arab States, Algeria, Egypt, India, Libya, Iran, Australia, and Brazil, S/PV.4717 (11 Mar 2003). See Serge Sur, 'La résolution 1441 du Conseil de sécurité et l'affaire iraquienne: un destin manqué' (2003) *Dalloz* 836; Corten, 'Opération *Iraqi Freedom*', 205 ff.

[73] A/57/PV.2 (12 Sept 2002), 10.

[74] S/PV.4625 (Resumption 3) (17 Oct 2002), 13.

[75] See 'Appeal by international jurists concerning the use of force against Iraq' (2003) 36 *Belgian Review of International Law* 271.

[76] Final document of the XIII Conference of Heads of State or Government of the Non-Aligned Movement, Kuala Lumpur, 24–25 Feb 2003, available at <http://www.nam.gov.za/media/030227e.htm>.

[77] Second extraordinary session of the Organisation of the Islamic Conference, Doha, 5 Mar 2003, available at <http://www.oic-oci.org>.

to say encourage—the threat of force formulated by the US and the UK as a tool capable of persuading Iraq to disarm. Nevertheless, this may be explained by the fact that until February 2003 the threats referred to Security Council action as well as to Resolution 1441[78] and did not clearly present themselves as threats to use force unilaterally. France declared that 'the American and British military presence in the region lends support to our collective resolve. We all recognize the effectiveness of the pressure that is being exerted by the international community'.[79] Similarly, Canada affirmed that

> The record leaves no doubt that the Iraqi authorities have begun to cooperate only because they face heavy outside pressure, including the indispensable build-up of military force by the United States, the United Kingdom, Australia and others, and the willingness of the international community to back diplomacy with force if necessary.[80]

In other words, states that welcomed the threat of force generally understood the threat as being a multilateral one decided within the context of the UN. For that reason, it seems rather difficult to view their behaviour as showing a tendency to apprehend threats independently from the uses of force that such threats contemplate. The Iraq crisis cannot therefore be interpreted as a sign of flexibility towards the threat of force. On the contrary, it shows rather that the prohibition of the threat of force is reaffirmed and still envisaged autonomously and symmetrically to the prohibition of the use of force, in conformity with the classical approach retained by the ICJ.[81]

B. *Guyana/Suriname* Award (2007)

The arbitral tribunal constituted for the *Guyana/Suriname* case also examined certain acts in relation to the prohibition of the threat to use force. Guyana claimed that Suriname had resorted to the use of force on 3 June 2000 to expel a Canadian oil exploration company's rig and drill ship named *C.E. Thornton* from a disputed maritime area and had threatened other licencees.[82] The rig supervisor described the incident:

> Shortly after midnight on 4 June 2000, while this coring process (drilling for core samples) was underway, gunboats from the Surinamese Navy arrived at our location. The gunboats

[78] UK, S/PV.4707 (14 Feb 2003), 20; US, S/PV.4707 (14 Feb 2003), 22–3.

[79] Declaration of the representative of France, S/PV.4714 (7 Mar 2003). See also Declarations of the representatives of Spain, S/PV.4714 (7 Mar 2003), Cameroon, S/PV.4707 (14 Feb 2003), Angola, S/PV.4707 (14 Feb 2003), Greece, S/PV.4709 (18 Feb 2003), Argentina, S/PV.4709 (18 Feb 2003), Macedonia, S/PV.4709 (Resumption 1) (19 Feb 2003).

[80] Declaration of the representative of Canada, S/PV.4717 (10 Mar 2003).

[81] Corten, *The Law against War*, 123–4.

[82] Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII of the UN Convention on the Law of the Sea (Guyana and Suriname) (2007) 139 ILR 566, 140, para 426.

established radio contact with the C.E. Thornton and its service vessels, and ordered us to 'leave the area in 12 hours,' warning that if we did not comply 'the consequences will be yours.' The Surinamese Navy repeated this order several times. I understood this to mean that if the C.E. Thornton and its support vessels did not leave the area within twelve hours, the gunboats would be unconstrained to use armed force against the rig and its service vessels.[83]

The Tribunal also considered a testimony from Major Jones, the Commander Staff Support of the Suriname Air Force and Navy who recorded his exchange with the drilling platform:

This is the Suriname navy. You are in Suriname waters without authority of the Suriname Government to conduct economic activities here. I order you to stop immediately with these activities and leave the Suriname waters. The answer to this from the platform was: 'we are unaware of being in Suriname waters'. I persisted saying that they were in Suriname waters and that they had to leave these waters within 12 hours. And if they would not do so, the consequences would be theirs. They then asked where they should move to. I said that they should retreat to Guyanese waters. He reacted by saying that they needed time to start up their departure. I then allowed them 24 hours to leave the Suriname waters. We then hung around for some time and after about one hour we left for New Nickerie.[84]

Given that the commander and two captains of Surinamese patrol boats clearly specified that they had no intention nor instructions to use force,[85] it is somehow difficult to understand the reasons justifying that the Tribunal 'is of the view that the order given by Major Jones to the rig constituted an explicit threat that force might be used if the order was not complied with'.[86] All the more so when the Tribunal makes explicit references to the *Nicaragua* case together with the *Nuclear weapons* case, where the ICJ adopted a rather restrictive approach to what constitutes a threat of force contrary to the UN Charter. More specifically, the Tribunal did not determine the conditions under which a threat directed at a private company could fall within the scope of application of Article 2(4) of the Charter which only prohibits threats formulated by one state against another. To Suriname, the measures were of the nature of law enforcement measures adopted to preclude unauthorized drilling in the disputed area. Suriname argued that their lawfulness could be grounded on the case law of international courts and tribunals such as the *Fisheries Jurisdiction* cases[87] and *Saiga* case.[88] Without providing any specific argument, the Tribunal only stated that:

the action mounted by Suriname on 3 June 2000 seemed more akin to a threat of military action rather than a mere law enforcement activity. This Tribunal has based this finding

[83] Award, 142, para 433. [84] Award, 142, para 436. [85] Award, 143, paras 437–8.
[86] Award, 143, para 438. [87] *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Rep 1998.
[88] *The M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, available at <https://www.itlos.org>.

primarily on the testimony of witnesses to the incident, in particular the testimony of Messrs Netterville and Barber. Suriname's action therefore constituted a threat of the use of force in contravention of the Convention, the UN Charter and general international law.[89]

In the absence of clear motivation, it is not easy to make sense of the Award in relation to the prohibition of the threat of force. One could say, however, that the Tribunal adopted an interpretation of Article 2(4) which is much more extensive than that traditionally used by the ICJ.

c. Russia/Georgia Report (2009)

The outbreak of hostilities between Georgia and the Russian Federation in August 2008 was preceded by an escalation of tensions involving all actors in the conflict.[90] These facts were analysed in great detail by the Independent International Fact-Finding Mission on the Conflict in Georgia in the report the Mission delivered in September 2009.[91] It follows from the report that the Mission contemplates what might constitute an unlawful threat of force in broad terms, underlining that such a threat might be implicit and result from the context as long as it appears credible.[92] The report makes clear that a threat is not required to adopt the form of an ultimatum.[93] Concerning Georgia, the following acts were taken into account:

(1) launched air surveillance over the Abkhaz conflict zone in spring 2008, (2) participated in repeated exchanges of fire in South Ossetia, and (3) had engaged in a comprehensive military build-up with the assistance of third parties such as the US, including the acquisition of modern weaponry.[94]

In the Mission's opinion, these elements taken together constituted a threat of force contrary to Article 2(4) of the Charter:

Taken together, Georgia's actions amounted to a threat of force. That Georgia was hardly in a position to substantially harm Russian political and territorial integrity by military means is not relevant. It suffices that Georgia signalled a readiness to use force against its adversaries, which may have included Russian troops on Georgian soil, if they were not withdrawn.[95]

[89] Award, 147, para 445.

[90] See Vaios Koutroulis, 'The Prohibition of the Use of Force in Arbitrations and Fact-Finding Reports', Chapter 26 in this volume.

[91] Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, Sept 2009, vol II, ch 6, 'Use of force', available at <http://www.ceiig.ch/Report.html>. See François Dubuisson and Anne Lagerwall, 'Le conflit en Géorgie de 2008 au regard du *jus contra bellum* et à la lumière du rapport de la mission d'enquête internationale de 2009' (2009) 42 *Belgian Review of International Law* 448–98; Olivier Corten, 'Le rapport de la mission d'enquête internationale indépendante sur le conflit en Géorgie: quel apport au *jus contra bellum*?' (2010) 114 *Revue Générale de Droit International Public* 35–62.

[92] Report, 231–2. [93] Report, 232–3. [94] Report, 233. [95] Report, 233.

With regard to Russia, the report mentions the following acts:

(1) In April, Russia warned Tbilisi that Georgian NATO membership would result in the permanent loss of its breakaway territories and that Russian military bases would be established there. (2) Also in April, the Russian Foreign Ministry issued a warning stating that Moscow was prepared to use military force if Georgia started an armed conflict with Abkhazia and South Ossetia. (3) Russian warplanes repeatedly flew over Abkhaz and South Ossetian territory in a clear warning to Tbilisi. Moscow claimed a right to conduct the flights, while denying Georgia the right to fly reconnaissance drones in the same area. At least one Georgian drone was shot down by a Russian combat plane. (4) In May, Russia increased its troop levels in Abkhazia and sent railway construction troops on a 'humanitarian mission' into the region, without permission of Georgia. In July, Russian troops performed the 'Kavkaz 2008' military exercise. Although it was declared as a regular exercise, numerous features made it appear an extraordinary threat. Moreover, after completion of the exercise, some Russian troops remained in the area and on increased levels of alert.[96]

Taken together, these facts were also considered as an unlawful threat of force:

By any reasonable definition, the sum of actions undertaken by Russia by mid-2008 amounted to a threat of force vis-à-vis Georgia. For Tbilisi, both official statements by Moscow and the military operations it authorised on the border and within Georgian territory generated a definite sense that, within the context of earlier experiences and of the latest developments, Georgia ran a substantial risk of Russian military intervention. This risk involved the de facto partition of Georgia and thus a re-definition of its territorial boundaries. While some of the political steps undertaken by Russia, such as the granting of Russian nationality, did not in and of themselves constitute a threat of force because they lacked a specific reference to the use of force, they contributed to a perception of a threat and to crisis escalation. The Russian side did not limit its threats to the exclusive objective of discouraging an armed attack, but sought to gain additional political concessions.[97]

These conclusions appear to be grounded on a definition of the conditions under which a threat of force is unlawful which is more extensive than that derived from the case law of the ICJ. Moreover, they do not seem to differentiate between the multiple facts taken into account. The overall approach adopted by the Mission makes it hard to understand what acts do specifically qualify as a threat of force. A clarification would have been of great help since military surveillance or overflights, arms acquisitions or military exercises are not traditionally considered to be threats of force unless accompanied by a clear and precise intention to use force. Other elements (eg the warning from Moscow on the eventuality of force) could have been studied individually to verify if they met the relevant criteria (terminology used, context of the declaration, on the ground situation, credibility of the threat, etc). Besides and more importantly, the report suggests that the threats referred to could not have been lawful even though the use of force contemplated was lawful: 'in situations of severe crisis between longstanding adversaries, governments must refrain

[96] Report, 234. [97] Report, 235.

from any kind of military threat, even when their actual use of force might be justified'.[98] According to the report, this is so because in a prolonged conflict 'no real distinction between aggressor and victim of aggression can be made and thus no scenario exists where the justification of self-defence can meaningfully be applied'.[99] On this particular point, the report also adopts an approach to the prohibition of the threat of force which is very different from the classical approach adopted by the ICJ.[100]

IV. Conclusion

Even though the prohibition of the threat of force has not been frequently subject to judicial or doctrinal attention, its substance has been clearly defined in the few instances where the ICJ was invited to apply it. The level which should be reached in order for acts to be qualified as threats is high as it should leave no doubt as to the determination of a state to resort to force if the targeted state does not adopt certain conduct. The ultimate criteria will be the existence of coercion. The conditions under which the threat is unlawful are in perfect symmetry to those of the use of force. A threat is legal only if the envisaged force is conceived as a response to aggression or authorized by the UN Security Council. In this regard, state practice shows no tendency towards a change in the rule. Given the principles set by the ICJ, it is surprising that the majority of authors consider that the criteria are very unclear and difficult to apply to particular cases. It should be also noted that the international bodies, which had to apply the principle of the prohibition of the threat of use of force, as was the case of the Arbitral Tribunal and the European Union Inquiry Mission in Georgia, did it in a very confused way, departing from the criteria set by the ICJ.

[98] Report, 235. [99] Report, 237.

[100] See also Corten, 'Le rapport de la mission d'enquête internationale indépendante sur le conflit en Géorgie', 51–3.