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THREATS OF ARMED FORCE AND CONTEMPORARY INTERNATIONAL LAW

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There is no terror, Cassius, in your threats;
For I am arm'd so strong in honesty
That they pass by me as the idle wind,
Which I respect not.

W. Shakespeare, *Julius Ceasar*, IV, iii

1. INTRODUCTION

A wrongful act is often preceded by some preliminary conduct that is not always unlawful. In most cases, the preliminary actions amount to a breach of international law only when they 'predetermine the final decision to be taken'.[1] However, certain rules also specifically prohibit threats, planning, preparation, incitement or attempt, thus making such conduct unlawful in itself, even if the principal offence will not be committed.[2] This is the case of Article 2(4) of the Charter of the United Nations, which expressly prohibits a state's threat to use armed force against another state, regardless of whether or not the threatened use of force eventually materializes.

Threats of force must be distinguished from planning and preparation.[3] While in the latter the decision to use force has already been taken, threats are not intended as preparatory acts in view of subsequently using force, but as a coercive means *alternative* to it.[4] As observed by a member of the International Law Commission (ILC), '[i]t might even be said that the threat of force was more treacherous than its employment. In the latter case, the aggressor ran risk; if threat enabled him to obtain the same result without running them it was a more cowardly way of making an attempt on the sovereignty of States.'[5]

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1. *Gabčíkovo-Nagymaros Project* (*Hungary* v. *Slovakia*), Judgment of 25 September 1997, *ICJ Reports* (1997) para. 79.

2. Report of the International Law Commission on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), UN Doc. A/56/10, GAOR, fifty-sixth session, Suppl. no. 10, p. 143.

3. *ILC Yearbook* (1950-I) p. 59 (remarks by Liang). In some situations, threats of force can be part of a plan or preparation to wage war: see, e.g., the 1940-1941 Japanese threats against French Indo-China, carried out in order to secure a 'jumping-off place' for attacks against the Philippines, Malaya and the Netherlands East Indies (International Military Tribunal for the Far East, Judgment, 4-12 November 1948, reprinted in B.V.A. Röling and C.F. Rüter, eds., *The Tokyo Judgment*, Vol. I (Amsterdam, University Press Amsterdam 1977) (hereinafter 'Tokyo Judgment') pp. 381, 440).

4. As noted by the UN Secretary-General, 'the threat of force differs from the employment of force in the same way as the threat to kill differs from murder. The person who utters the threat may not intend to carry it out, and the threat is then only a form of intimidation and "blackmail"' (Report of the Secretary-General on the question of defining aggression, UN Doc. A/2211 (3 October 1952), GAOR, seventh session, Annexes, Agenda item 54, at p. 68.

5. *ILC Yearbook* (1950-I) p. 58 (remarks by Yepes).

Another difference is that the state threatening the use of force must make sure that the target state knows its intentions to allow the threat to produce its coercive effect, while the planning and preparation are often kept secret.

Threats of force under Article 2(4) must also be distinguished from threats to the peace under Article 39 of the UN Charter. A threat of force can well be qualified as a threat to the peace by the Security Council, since it is likely to escalate into actual use of force.[6] However, the 'threat to the peace' concept is much broader and is not necessarily linked to a use of force or even to a violation of international law. The Security Council could also decide that a threat of force does not amount to a threat to the peace: for instance, in December 1963 Turkey threatened to use force against Cyprus and to invade the island if the rights of Turkish Cypriots were not safeguarded. Warships and aircraft were also sent off the coasts of Northern Cyprus.[7] The situation was described by the Security Council as 'likely to threaten international peace and security', but not as an actual threat to the peace.[8] Only when Turkey actually invaded the island in 1974 was the situation qualified by the Security Council as a threat to international peace.[9]

Although the threat of force permeates the relations among states, it has been an issue largely neglected by international lawyers. This is so especially if compared to the almost endless literature on the use of force. This paucity of scientific interest has mainly two reasons: the (false) assumption that only very rarely do threats of force meet any reaction by the international community, because in most cases they are absorbed by the subsequent use of force; and their often oblique and veiled character, which makes it difficult to detect them (but which does not necessarily render them less effective). A purely 'positivist' approach to the problem, which considers the threat of the use of force either lawful or unlawful once and for all, is not helpful, since it does not take adequately into account the function of the threat and its role as a 'ritualized substitute for violence'.[10] Indeed, threats of force are 'an effort to use military power so that otherwise unobtainable goals may be reached without actually fighting'.[11] Therefore, one should first ask if and how the threat of force under certain circumstances can contribute to the primary purpose of international

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6. See, e.g., SC Res. 581 (13 February 1986) with regard to the threats of South Africa against its neighbouring states, which were qualified by the Council as a threat to the peace. South Africa's aggressive policies against neighbouring states had already been qualified as a threat to international peace and security in SC Res. 418 (4 November 1977), although in this resolution the link between threat of force and threat to the peace was less explicit.

7. H. McCoubrey and N.D. White, *International Law and Armed Conflict* (Aldershot, Dartmouth Publishing 1992) p. 57.

8. SC Res. 186 (4 March 1964).

9. SC Res. 353 (20 July 1974).

10. R. Sadurska, 'Threats of Force', 82 *AJIL* (1988) p. 246.

11. P. Karsten, P.D. Howell and A.F. Allen, *Military Threats: A Systematic Historical Analysis of the Determinants of Success* (Westport, Conn., Greenwood Press 1984) p. 4.

law, i.e., maintaining a minimum world order; and second, if in such a case the threat is accepted by the international community at least as legitimate, if not as legal. This is why the present article will try to examine threats of force by adopting a 'functionalist' approach, i.e., by taking into account their function and consequences, as well as the purposes pursued by the threatener.

It is well-known that the 1907 Hague Conventions largely left *jus ad bellum* unaffected. However, even though they did not make the resort to war illegal, some modest, mainly procedural restrictions to the freedom to use force were introduced in Conventions I and II. The main idea behind these instruments, which would subsequently be developed in the Covenant of the League of Nations, is that resort to war should be conditional on the unsuccessful exhaustion of peaceful means of settlement. According to Convention I, the contracting parties agree to use 'their best efforts' to ensure the pacific settlement of international differences (Art. 1) and, to that aim, they agree to use good offices or mediation of friendly states 'as far as circumstances allow' before an appeal to arms (Art. 2).[12] Article 9 also provides that, in international disputes not settled by diplomatic means and not involving the honour or vital interests of the parties, an international commission of inquiry should be instituted as far as circumstances allow, in order to facilitate a solution of these disputes by elucidating the facts. As to disputes of legal nature, Convention I recognizes that arbitration is the most effective and equitable means of settling them when diplomacy has failed (Art. 38), but does not provide for an obligation on States Parties to submit such disputes to an arbitral tribunal.[13] Hague Convention II prohibits the use of force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals. However, the prohibition does not apply 'when the debtor state refuses or neglects to an offer of arbitration, or, after accepting the offer, prevents any compromis from being agreed on, or, after the arbitration, fails to submit to the award' (Art. 1(2)). As to the threat of force, not only is its resort not limited in Conventions I and II, but it is also formalised in Convention III on the opening of hostilities, Article 1 of which provides that '[t]he Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war'.[14]

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12. The 1907 Hague Convention I revised the 1899 Hague Convention I on the Pacific Settlement of International Disputes.

13. Obligatory arbitration is only mentioned in the declaration contained in the Final Act of the Conference.

14. See E.C. Stowell, 'Convention Relative to the Opening of Hostilities', 2 *AJIL* (1908) pp. 50-57. See also *infra* n. 44. There are currently 34 States Parties to this Convention, while 17 states have signed but not ratified it. The Nuremberg and Tokyo International Military Tribunals included the 1907 Hague Conventions I and III among the treaties violated by Germany and Japan (Nuremberg International Military Tribunal, Judgment, 1 October 1946, reprinted in 41 *AJIL*

The present article will try to explore how the illegality of the threat of force has developed since the 1907 Hague Peace Conference, and in particular after the entry into force of the UN Charter.[15] Indeed, no threat of force, not even *ultimata* issued in conformity with Hague Convention III, would today be legal unless they comply with the customary and Charter provisions on *jus ad bellum*.[16] After determining what conduct amounts to a 'threat of the use of force', the status of its prohibition in the framework of the sources of international law will be investigated. Sections 4 and 5 will then discuss the consequences of the threat of force under the law of treaties, the law of state responsibility and international criminal law, as well as the remedies at the disposal of the victim state.[17]

(1947) (hereinafter 'Nuremberg Judgment') pp. 214-215; Tokyo Judgment, *supra* n. 3, at pp. 46-47, 378-380).

15. The prohibition of threats of force in international relations was included neither in the 1928 General Treaty for the Renunciation of War as an Instrument of National Policy (Pact of Paris) nor in the Covenant of the League of Nations. However, Art. 10 of the League of Nations Covenant made threats of aggression and of war a matter of concern for the Organization and all members (Arts. 10 and 11). As to the Pact of Paris, it has been suggested that 'a threat to resort to war for political motives would seem to be a[n] [illegal] "recourse to war for the solution of international controversies" and "as an instrument of national policy"' and would thus be implicitly prohibited by the Pact (I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press 1963) p. 364). Unlike the Covenant, the Pact of Paris is still in force.

16. Oppenheim argues that '[i]f it is unlawful for Members of the United Nations to threaten another State with the use of force', they cannot be 'in a position to comply with the obligation to issue an ultimatum prior to resorting to war' and therefore 'as between Members of the United Nations these provisions of the Hague Convention, although not directly conflicting with the Charter, are substantially obsolete'. This is because 'there is hardly room for an ultimatum' in case of a self-defence action under Art. 51 of the UN Charter, while in the case of Chapter VII operations 'the ultimatum will be replaced by the numerous warnings and resolutions preceding the enforcement action' (L. Oppenheim, *International Law: A Treatise* (H. Lauterpacht, ed.), Vol. II (London, Longmans, Green and Co. 1952) p. 297).

17. It is well-established that Art. 2(4) of the UN Charter only covers armed force, and not other forms of coercion. Therefore, only threats of the use of *armed* force will be discussed in this article. This author does not share the view according to which 'palpable threat of economic measures that could cause a serious disruption of the trade of a certain country, and scare away, for instance, indispensable investors, should also be held to constitute an illegal threat of force' (B. Asrat, *Prohibition of Force Under the UN Charter: A Study of Article 2(4)* (Uppsala, Iustus 1991) p. 139). Such a view is not consistent with the drafting history of the Charter and, in particular, with the rejection of a Brazilian amendment prohibiting also 'the threat or use of economic measures in any manner inconsistent with the purposes of the UN' (*Documents of the United Nations Conference on International Organization, San Francisco, 1945*, Vol. VI (London, United Nations Information Organizations 1945-1955) pp. 559, 720-721).

2. DEFINITION OF THE THREAT OF FORCE

The 'threat of the use of force' is nowhere defined in the Charter, nor are the *travaux préparatoires* helpful. According to the *Random House Dictionary of the English Language*, a threat is 'a declaration of an intention or determination to inflict punishment, injury, death or loss on someone in retaliation for, or conditionally upon, some action of course; an indication of probable evil, violence, or loss to come'.[18] The *Oxford Dictionary of Law* defines a threat as '[t]he expression of an intention to harm someone with the object of forcing them to do something'.[19] In the proceedings before the International Court of Justice (ICJ), France argued that the threat of force is '*coercition pour amener un Etat à une conduite ou à des actes différents de ceux qu'il pouvait librement choisir*'.[20] During the drafting of the General Assembly Declaration on Friendly Relations, Chile submitted a proposal with regard to the content of the principle of the non-use of force which specified that '[t]he expression "threat" of force shall refer to any action, direct or indirect, whatever the form it may take, which tends to produce in the other State a justified fear that it or the regional community of which it is a part will be exposed to serious and irreparable harm'.[21] The ILC Report on the Draft Code of Offences against Peace and Security of Mankind points out that 'the word "threat" denotes acts undertaken with a view to making a State believe that force will be used against it if certain demands are not met by that State'.[22] As to legal literature, the most quoted definition of 'threat of the use of force' is probably Brownlie's: 'an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government'.[23] In Sadurska's opinion, 'a threat of force is a message, explicit or implicit, formulated by a decision maker and directed to the target audience, indicating that force will be used if a rule or demand is not complied with'.[24]

According to almost all the quoted definitions, a threat implies the existence of demands by the threatening actor.[25] It is true that, in most cases, the

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18. J. Stein and L. Urdang, eds., *The Random House Dictionary of the English Language* (New York, Random House 1967) p. 1478.

19. E.A. Martin and J. Law, eds., *A Dictionary of Law* (Oxford, OUP 2006) p. 535.

20. *Legality of the threat and use of nuclear weapons* (hereinafter '*Nuclear Weapons*'), written statement of the Government of the French Republic, 20 June 1995, at p. 25. The ICJ written and oral proceedings are available on line at the Court's website, <www.icj-cij.org>.

21. UN Doc. A/AC.125/L.23, in Report of the 1966 Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, 27 June 1966, GAOR, twenty-first session, Annexes, Vol. III, Agenda item 87, pp. 30-31.

22. *ILC Yearbook* (1989-II, pt. 2) p. 68.

23. Brownlie, *supra* n. 15, at p. 364.

24. Sadurska, *supra* n. 10, at p. 242.

25. This is also suggested by Randelzhofer where he writes that '[o]nly a threat directed towards a specific reaction on the part of the target State is unlawful under the terms of Art. 2(4)'

threatened harm is presented as an alternative: either to suffer it or to accept the other state's demands. In such situation, the target perceives that the threat, if implemented, would result in a more serious harm than if it complied with the threatening state's demands. From this point of view, deterrent threats should be distinguished from compellent ones: the former aim to coerce the target not to do something (for instance, not to militarily resist an invasion, or not to enter into an alliance), while the latter force it to take some kind of action (e.g., to cede a territory, to accede to a certain treaty, or to modify the constitution).[26] Nonetheless, it is this author's opinion that demands are not a necessary requirement for the existence of a threat of force under Article 2(4).[27] Indeed, one cannot see why declarations by a delirious dictator to annihilate a certain state should not fall within the concept of 'threat' and thus be prohibited, only because no alternatives are offered to the target.

Hence, it is this article's contention that a threat of force under Article 2(4) can be defined as an explicit or implicit promise of a future and unlawful use of armed force against one or more states, the realization of which depends on the threatener's will. Given the low threshold of Article 2(4) as far as threats of force are concerned, any declaration or conduct falling within this definition would be unlawful, whether or not it produces the intended result or is followed by the actual use of force.

The suggested definition requires some explanation. First of all, the realization of the threatened harm must depend on the threatener's will, i.e., it can be caused or prevented by it. This is what distinguishes a threat from a (lawful) warning. For instance, state A has knowledge through its intelligence that state B is preparing an armed attack against state C and warns the latter about it. Such declaration would not amount to a threat by state A against state C, since the armed attack is being prepared by state B over which state A has no control.

Furthermore, the threatened harm must be future.[28] If it has already occurred, it would not be a threat, but an actual use of force. However, the threat itself

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(A. Randelzhofer, 'Article 51', in B. Simma, ed., *The Charter of the United Nations. A Commentary*, Vol. I (Oxford, OUP 2002) p. 124).

26. It has been suggested that deterrent threats are usually more successful than compellent ones, since they are used to prevent actions that would not be carried out in any event (B.M. Blechman and T. Cofman Wittes, 'Defining Moment: The Threat and Use of Force in American Foreign Policy', in D.J. Caraley, ed., *The New American Interventionism* (New York, Columbia University Press 1999) p. 19).

27. This opinion is also maintained by Y. Dinstein, *War, Aggression and Self-Defence* (Cambridge, CUP 2005) p. 86, and by N.D. White and R. Cryer, 'Unilateral Enforcement of Resolution 687: A Threat Too Far?', 29 *California Western ILJ* (1999) pp. 253-254. See also the remarks by Indonesia (Verbatim Record, CR/95/25, 3 November 1995, p. 34) and Qatar (Verbatim Record, CR/95/29, 10 November 1995, p. 27) in the oral proceedings before the ICJ in the *Nuclear Weapons* Advisory Opinion.

28. The point is made by S. Suy, counsel for Libya, before the ICJ in the *Lockerbie* case (*Questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie* (*Libyan Arab Jamahiriya* v. *UK*; *Libyan Arab Jamahiriya* v. *US*)

could cause damage to the target state even before the threatened use materializes: for instance, the threat of invasion could cause internal turmoil or an economic crisis. In July-August 1995, China carried out two series of missile tests in an area about 85 miles north of the island of Taiwan. In November 1995, before the Taiwanese legislative elections, military exercises by the Chinese armed forces were carried out to simulate a landing on the island.[29] In March 1996, the first direct democratic presidential elections were due to take place in Taiwan: a few days before, China had resumed its missile tests and live ammunition military exercises near Taiwan's two largest ports and in the Taiwan Strait, warning ships and planes to steer clear of the testing areas.[30] The tests took place in waters adjacent to Taiwan's nuclear power plants. As a result of these actions, the Taiwanese stock market and the local currency fell abruptly, 30% of the foreign tourists and investors were scared off, some fish prices went up 60% and there was widespread panic buying to stockpile food and withdrawing savings.[31]

The use of force envisaged in the threat must also be unlawful.[32] In its 1996 *Nuclear Weapons* Advisory Opinion, the ICJ has linked the legality of threats

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(hereinafter '*Lockerbie*'), Preliminary Objections, Verbatim Record, CR 97/24, 22 October 1997, p. 35). In spite of a contrary opinion (Asrat, *supra* n. 17, at p. 140, who quotes the Cuban and 'Osirak' cases), it does not appear that the threat of force must necessarily possess some degree of immediacy, i.e., that the harm should materialize in the *near* future. See also White and Cryer, *supra* n. 27, at p. 253, according to whom '[i]mmediacy may be good evidence of a real threat [but] it would be too restrictive to see immediacy as an essential component'.

29. The Taiwanese opposition parties were supporting independence from the mainland, so the purpose of the Chinese actions was allegedly to intimidate the Taiwanese and influence the outcome of the elections.

30. Y. Song, 'The PRC's Peacetime Military Activities in Taiwan's EEZ: A Question of Legality', 16 *International Journal of Marine and Coastal Law* (2001) pp. 631-635; S. Zao, 'Military Coercion and Peaceful Offence: Beijing's Strategy of National Reunification with Taiwan', 72 *Pacific Affairs* (1999) pp. 497-498. It has been suggested that this amounted to a partial blockade against Taiwan (Y.-h. Song, 'China's Missile Tests in the Taiwan Strait: Relevant International Law Questions', 23 *Marine Policy* (1999) pp. 84-89). Taiwan established its exclusive economic zone only in January 1998, therefore the legality of those exercises under the law of the sea has to be evaluated with reference to the regime of the high seas.

31. Y.-h. Song, 'China's Missile Tests', *supra* n. 30, at p. 82; J.A. Bosco, 'The International Law Implications of China's Military and Missile Exercises in the Taiwan Strait under the 1982 United Nations Law of the Sea Convention and the United Nations Charter', 16 *Chinese Yearbook of International Law and Affairs* (1997-1998) p. 52. China's aggressive declarations were aimed not only at Taiwan but also at the US. In particular, Beijing threatened a 'sea of fire' if the American carriers entered the Taiwan Strait and warned of nuclear missiles on Los Angeles if the US defended Taiwan (ibid., at p. 51). The threats of force in the South China Sea were condemned, among others, by the XII Ministerial Conference of the Movement of Non-Aligned Countries, New Delhi, 4-8 April 1997, para. 146. On the subsequent 2005 Chinese Anti-Separation Law, see *infra* n. 43.

32. Dinstein notes that 'if a State declares its readiness to use force in conformity with the Charter, this is not an illegal "threat" but a legitimate warning and a reminder' (Dinstein, *supra* n. 27, at p. 86).

to the legality of the use of force in the same circumstances.[33] The warning of a forcible defensive reaction by the victim of an armed attack would not breach Article 2(4).[34] An example is the British Prime Minister Margaret Thatcher's dispatch of military forces together with her declarations threatening to remove Argentina's troops from the Falkland Islands by force if they had not withdrawn.[35] Similarly, after the occupation of Kuwait in 1990, the United States (US) repeatedly and clearly declared that force would be used if Iraq had not withdrawn from Kuwait, it sent naval, land and air troops in the region, formed a broad coalition and determined a deadline for compliance: those threats were, however, lawful in the light of the right of collective self-defence. The Security Council can also authorize the use of force by states or international organizations, the threat of which would not run counter Article 2(4).[36] The US threat to use force against Haiti should General Cedras not step down had indeed been authorized by the Security Council.[37] On the contrary, the issuance of the NATO Activation Order on 13 October 1998 for air strikes against Serbia was a clear example of an illegal threat of force, since it was not an action in self-defence and the Security Council had not authorized the member states to take coercive measures to enforce its resolutions.[38] The US and United Kingdom (UK) threats of force against Iraq before the beginning of Operation Iraqi Freedom would be lawful only if one accepts the view that a Security Council authorization to use of force resulted from the combined effects of Resolutions 678 (1990), 687 (1991) and 1441 (2002).[39]

Finally, it is necessary that the threat reaches the target state. Threats must be somehow communicated in order to produce their effects, i.e., to intimidate and genuinely reduce 'the range of choices otherwise available to states'.[40] Secret

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33. *Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* (1996) para. 47. The same view was taken by some members of the ILC during the works for the Draft Code of Offences Against the Peace and Security of Mankind (*ILC Yearbook* (1951-I) p. 236).

34. The French government pointed out that defensive military alliances are lawful even though they imply a deterrent threat (*Nuclear Weapons*, written statement of the Government of the French Republic, 20 June 1995, p. 25).

35. Karsten, Howell and Allen, *supra* n. 11, at p. 117. However, the threats failed and the UK had to use force to regain control of the archipelago.

36. Of course, threats can also be lawfully made directly by the Security Council when exercising its powers under Chapter VII of the Charter: to cite well-known examples, in Res. 1154 (2 March 1998) and 1441 (8 November 2002), the Council threatened Yugoslavia and Iraq with 'serious' and 'severest' consequences should they not comply with previous resolutions.

37. SC Res. 940 (31 July 1994).

38. J. Currie, 'NATO's Humanitarian Intervention in Kosovo: Making or Breaking International Law?', 36 *Can. YIL* (1998) p. 320.

39. It is well-known that this opinion was argued by the UK Attorney General, Lord Goldsmith (54 *ICLQ* (2005) pp. 767-778).

40. Sadurska, *supra* n. 10, at p. 242, who adds that '[o]nly communications that arouse the anticipation of severe deprivation or destruction of values in the target audience and, hence, trigger a reaction of stress that leads to accommodating or adaptive behaviour as the only reasonable alternative can be regarded as a threat' (ibid., at p. 244). See also San Marino's statement according

military exercises or manoeuvres might amount to the preparation of aggression but are not threats under the terms of Article 2(4) if they are unknown to the victim.[41] It is not relevant how threats reach their target, as long as they are able to be perceived: they can consist of explicit declarations or result implicitly from certain actions.[42] As far as the former are concerned, they might be contained not only in *ad hoc* statements but also in national legislation or policy instruments, providing that they are legally identifiable and sufficiently precise as to targets and content.[43] As to *ad hoc* threatening declarations, the most evident

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to which 'the threat does not work unless it is credible' (*Nuclear Weapons*, Verbatim Record, CR 95/31, 13 November 1995, p. 20).

41. This view is also maintained by Judge Weeramantry: 'a secretly harboured intention to commit a wrongful or criminal act does not attract legal consequences, unless and until that intention is followed through by corresponding conduct. Hence such a secretly harboured intention may not be an offence. If, however, the intention is announced, whether directly or by implication, it then becomes the criminal act of threatening to commit the illegal act in question' (Dissenting Opinion, *Nuclear Weapons*, p. 541). For instance, in 1971 Guinea denounced the threat of imminent attack by Portugal against its territory. The representatives of Somalia and Syria in the Security Council held that the Portuguese threat against Guinea 'should be taken seriously … because of the history of continued aggression by Portugal against Guinea' (25 *Yearbook of the United Nations* (1971) p. 119). However, Portugal's actions amounted to preparation of aggression and not to a threat of force against Guinea, as the Portuguese Foreign Ministry and the Governor of Guinea Bissau denied that any invasion was being prepared (*Keesing's Contemporary Archives* (1971-1972) p. 24940).

42. According to the ILC, the threat may consist in 'declarations, that is to say expression made public in writing or orally; communications, that is to say messages sent by the authorities of one Government to the authorities of another Government, by no matter what means of transmission; and, finally, demonstrations of force such as concentration of troops near the frontier' (*ILC Yearbook* (1989-II, pt. 2) p. 68).

43. See, e.g., the 2005 Chinese Law against the Separation of Taiwan, adopted on 14 March 2005 by the Third Session of the Tenth People's National Congress and entered into force on the day of its adoption. Art. 8(1) of the Law provides that '[i]n the event that the "Taiwan independence" secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity' (text in 4 *Chinese JIL* (2005) pp. 461-463). Section 2008 of the 2002 American Servicemembers' Protection Act (dubbed 'Hague Invasion Act') might also be recalled here, where it provides that the US President can use 'all means necessary and appropriate to bring about the release' of covered US and allied persons detained or imprisoned by, on behalf of, or at the request of the International Criminal Court (text at <www.state.gov/t/pm/rls/othr/misc/23425.htm>). See also the Russian policy to reserve the right to use armed force in the territory of the CIS republics if other means have been exhausted (press conference of the Russian Defence Minister Ivanov, Colorado Springs (9 October 2003), *Radio Free Europe/Radio Liberty Reports*, vol. 4, no. 41 (14 October 2003), at <www.rferl.org/reports/securitywatch/2003/10/41-141003.asp>). Section 15 of the 1983 Swedish Ordinance Containing Instructions for the Armed Forces in Times of Peace and in State of Neutrality, which was adopted in response to a series of Soviet intrusions, threatens to use force with or without prior warning against foreign submarines found submerged in Sweden's internal and territorial waters. However, states do not appear to have protested against the adoption of the Ordinance. For a discussion, see R. Sadurska, 'Foreign Submarines in Swed-

example is of course an ultimatum, i.e., 'a written communication by one State to another which ends amicable negotiations respecting a difference, and formulates, for the last time and categorically, the demands to be fulfilled if other measures are to be averted'.[44] However, there is no reason why threatening declarations should only be 'blatant and direct'.[45] As noted by Judge Padilla Nervo in his Dissenting Opinion in the *Fisheries Jurisdiction* case, 'certain "Notes" delivered by the government of a strong power to the government of a small nation, may have the same purpose and the same effect as the use or threat of force'.[46] Oblique declarations such as 'we are exploring a full range of options', 'we have not ruled out anything', 'we must keep our options open', 'we will use all tools at our disposal', especially if this phraseology is repetitive and consistent, can well amount to a threatening strategy.[47] According to Iran,

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ish Waters: The Erosion of an International Norm', 10 *Yale JIL* (1984-1985) pp. 34-58 (the text of Section 15 is at p. 49).

44. Oppenheim, *supra* n. 16, at p. 295. There are two types of *ultimata*: the ones mentioned in the 1907 Hague Convention III amounting to a conditional declaration of war and setting a specific deadline after which war will follow immediately if the demands are not accepted; and *ultimata* that contain no deadlines or references to automatic consequences and must thus be interpreted in the light of the existing circumstances (N. Hill, 'Was There an Ultimatum Before Pearl Harbor?', 42 *AJIL* (1948) pp. 357-359; Dinstein, *supra* n. 27, at pp. 30-31). Hague Convention III implies that the latter type must be followed by a formal declaration of war, the absence of which, however, does not *per se* make the war illegal. There have been several examples of post-World War II *ultimata*, such as the Anglo-French 24 hour ultimatum to Egypt on 30 October 1956 (Q. Wright, 'Intervention, 1956', 51 *AJIL* (1957) pp. 257-259). Nicaragua also argued that President Reagan's peace proposal of 4 April 1985 'was in reality an ultimatum announcing recourse to military measures if certain demands are not accepted' (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *US*) (hereinafter '*Nicaragua*'), *ICJ Pleadings* (1991-IV) p. 120). More recently, NATO threatened to launch air strikes against heavy weapons located in the exclusion zone surrounding Sarajevo after the expiration of a 10-day deadline. The ultimatum was reiterated two months later (T. Gazzini, 'NATO Coercive Military Activities in the Yugoslav Crisis (1992-1999)', 12 *EJIL* (2001) pp. 399-400). In the Kosovo crisis, the North Atlantic Council issued an Activation Order for Phased Air Operation and Limited Air Option (13 October 1998) to begin in ninety-six hours should the Federal Republic of Yugoslavia not fully comply with SC Res. 1199 of 23 September 1998.

45. O. Schachter, 'The Right of States to Use Armed Force', 82 *Michigan L Rev.* (1984) p. 1625. According to the UN Secretary-General, a threat of force does not necessarily have to be made openly, as in certain occasions 'veiled threats … may be very effective, but … difficult to detect' (Report of the Secretary-General on the question of defining aggression, *supra* n. 4, at p. 68).

46. *Fisheries Jurisdiction* (*United Kingdom* v. *Iceland*), Jurisdiction, Judgment of 2 February 1973, *ICJ Reports* (1973) p. 91. See, e.g., the note sent by the British government to Egypt during the Cairo riots in 1952 (N. Ronzitti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* (Dordrecht, Nijhoff 1985) p. 28).

47. The point was made by Brownlie on behalf of Libya in the *Lockerbie* case, Preliminary Objections, Verbatim Record, CR 97/21, 17 October 1997, pp. 51-54, in particular at p. 53 ('a statement that force may be used if it proves necessary … is … in fact, and in law, a threat of force'). According to the UK, however, 'to repeat, parrot-fashion, a series of stale allegations … as if the repetition constituted proof' would not provide evidence of the existence of a threat of force,

even the publication of certain news in the newspapers revealing that the use of force is being considered by a certain state and the subsequent refusal of that state's officials to deny it can amount to a threat of force.[48]

As to threats resulting implicitly from certain actions, 'a demonstration of force for the purpose of exercising political pressure'[49] could well amount to a threat under the terms of Article 2(4), providing that such conduct is accompanied by a hostile intention: indeed, the mere fact than one power has more military strength than others and makes sure that the international community knows is not *per se* a violation of Article 2(4).[50] The same conduct could thus be a threat in certain circumstances but not in others:[51] military manoeuvres, the presence of naval forces off the cost of another state, or the acquisition of certain weapons could amount to the preparation of aggression (if they are a preparatory step in view of the crossing of the border to attack another state), or to a threat of force (if the only aim is to put abusive pressure on the victim state without a predetermined intention to use force) or be a perfectly lawful act (if the state in question has no hostile intention whatsoever). What distinguishes the three situations is the intention of the state taking that conduct: *animus aggressionis*, *animus minandi*, or no *animus* at all.[52] The relevance of

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and '[i]t will simply not do … to offer ambiguous public utterances as proof of so serious an allegation as an imminent threat to use force in the face of the observable *facts*' (Verbatim Record, CR 97/22, 20 October 1997, p. 14). The US maintained that no decision had been made on any option at the time and that thus those expressions did not amount to a threat of the use of force (Verbatim Record, CR 97/23, 20 October 1997, p. 9). The ICJ did not pronounce on the point as it decided that it was bound to dismiss Libya's request for provisional measures of protection because the Security Council had taken concrete enforcement action under Chapter VII (Order of 14 April 1992, *ICJ Reports* (1992) pp. 3-16). Declarations similar to those made by the UK and the US towards Libya in the *Lockerbie* case were also employed by NATO against Yugoslavia during the Kosovo crisis (Gazzini, *supra* n. 44, at p. 406). See also the British declarations towards Iran during the 1946 and 1951 crisis (Ronzitti, *supra* n. 46, at pp. 26-27). More recently, Iran argued that 'threatening Iran with "tangible and painful consequences" and using the phrases "use all the tools at our disposal", "rest assured, though, we are not relying on the Security Council as the only tool in our toolbox to address this problem" and "already beefing up defensive measures"' are 'unlawful, unacceptable and dangerous threats of use of force' (Letter dated 17 March 2006 from the permanent representative of Iran to the UN Secretary-General, A/60/730-S/2006/178 (22 March 2006), pp. 1-2, at <www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Iran%20S2006178.pdf>).

48. Letter dated 27 April 2006 from the permanent representative of the Islamic Republic of Iran to the UN Secretary-General, A/60/834-S/2006/273 (1 May 2006), p. 1, at <daccessdds.un.org/doc/UNDOC/GEN/N06/334/42/PDF/N0633442.pdf?OpenElement>.

49. *Corfu Channel* (*UK* v. *Albania*), Merits, Judgment of 9 April 1949, *ICJ Reports* (1949) para. 35.

50. As highlighted by Nauru, 'not every disparity of power between persons or economic or political units constitutes a threat actionable at law' (*Nuclear Weapons*, Memorial of the Government of Nauru, 15 June 1995, at p. 26).

51. M. Walzer, *Just and Unjust Wars* (New York, Basic Books 2000) p. 81.

52. This seems to be incidentally suggested also by Schachter, *supra* n. 45, at p. 1625. Walzer points out that there must be 'a manifest intent to injure' and 'a degree of active preparation

the subjective element has been indirectly recognized in Article 2 of the 1974 General Assembly Definition of Aggression, where it states that, apart from the first use of armed force, the Security Council may take 'other relevant circumstances' into account when determining the existence of an act of aggression.[53] The Nuremberg Judgment and the Subsequent Proceedings also stressed the importance of the intent in determining whether the conduct is unlawful or not. In particular, in the *German High Command Trial* the US Military Tribunal openly held that '[a]s long as there is no aggressive intent, there is no evil inherent in a nation making itself militarily strong'.[54] The importance of the threatener's intention is also emphasized by Judge Weeramantry in his Dissenting Opinion in the *Legality of the threat or use of nuclear weapons*, where he writes that '[s]uch intention provides the mental element implicit in the concept of a threat'.[55] In order to demonstrate the threatening character of the UK/US actions and declarations, Brownlie, as a counsel for Libya in the *Lockerbie* case, referred to the *Nuclear Tests* case to specify that '[t]he intention of a Government may be derived from statements made by ministers and the Head of State to the media'.[56]

The factual circumstances of each case in the framework of the relations between the concerned states play a fundamental role in determining whether there is *animus minandi* and thus whether the conduct can be qualified as a

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that makes that intent a positive danger' (Walzer, *supra* n. 51, at pp. 80-81). Randelzhofer (*supra* n. 25, at p. 124) recognizes the importance of 'coercive intent' in order to determine the existence of a threat under Art. 2(4), but specifies that this intent must be directed towards a specific behaviour on the part of the target state, which, in this author's opinion, is not always necessary (*supra* nn. 25 et seq. and corresponding text). The relevance of the intention to threat was also highlighted by some members of the ILC during the drafting of Art. 13 of the Code of Crimes against Peace and Security of Mankind (*ILC Yearbook* (1989-I) pp. 292-294). It is to be pointed out that intention (*animus*) is different from motive: '[m]otive … is the reason for which an act of aggression is committed …: e.g., the destruction of a State, the annexation of a territory, the establishment of a protectorate … Intention exists only when the State committing the act has acted deliberately' (Report of the Secretary-General on the question of defining aggression, *supra* n. 4, at p. 68). The motive of the preparation and of the threat of aggression could be the same (e.g., the annexation of a territory) but the intention would necessarily be different (to eventually use force in the former, only to threaten it in the latter).

53. Para. 2 was added as a compromise between those states maintaining that intent was an essential element of aggression and those who argued that only due regard had to be given to it, as the first use of armed force would suffice (J. Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression', 71 *AJIL* (1977) pp. 228-230). According to the Special Rapporteur on the Draft Code of Offences Against the Peace and Security of Mankind, '[t]hat the *animus aggressionis* is a constitutive element of the concept of aggression needs no demonstration. It follows from the very essence of the notion of aggression as such' (*ILC Yearbook* (1951-II) p. 68). See also A. Cassese, *International Law* (Oxford, OUP 2005) p. 273.

54. In re *Von Leeb et al.* (28 October 1948), 15 *ILR* (1948) pp. 379-380. The Nuremberg Judgment also held that rearmament is a crime against peace only when it is part of the plans to wage aggressive wars (Nuremberg Judgment, *supra* n. 14, at p. 300).

55. *Supra* n. 33, at p. 54.

56. Verbatim Record, CR 97/24, 22 October 1997, p. 44.

threat of force. For instance, the Greek Prime Minister's declaration of 27 March 1987 according to which the Greek armed forces could 'teach the Turks a very hard lesson' if Turkey continued with her 'aggressive acts' assumed a threatening character if seen in the context of the escalation of the crisis in the Aegean Sea.[57] Similarly, the Russian Foreign Minister's declaration of 18 April 1995 warning the Baltic republics that 'there may be cases where direct military force will be needed to defend our compatriots abroad' might be qualified as a threat of force if one considers that three months earlier the Estonian parliament had passed a citizenship law allegedly discriminating Estonia's Russian-speaking community.[58] The importance of the existing circumstances in order to determine whether certain conduct amounts to a threat of force has been emphasized in several occasions. The Drafting Committee of the Draft Code of Crimes Against the Peace and Security of Mankind noted that the determination of the existence of a threat of aggression would 'naturally depend on the circumstances of each case and could only be made *post facto* by the judge in the light of those circumstances'.[59] In the *Corfu Channel* case, the ICJ held that the passing of four British warships through the Channel on 22 October 1946 did not amount to 'a demonstration of force for the purpose of exercising political pressure on Albania' (and thus to a 'threat'), because the methods of execution were not unreasonable in view of the previous firing from the Albanian battery.[60] In its Memorial in the Merits phase before the ICJ, Nicaragua claimed that the 'continuous US military and naval maneuvers adjacent to Nicaraguan borders, officially acknowledged as a program of "perception management"' amounted to a threat of force under Article 2(4) as they formed part of a 'general and sustained policy of force, publicly expounded, intended to intimidate the lawful Government of Nicaragua into accepting the political demands of the United States Government, and resulting in substantial infringements of the political independence of Nicaragua'.[61] However, the Court concluded that, 'in the circumstances in which they were held', the US military manoeuvres did not amount to a breach of the principle forbidding the recourse to the threat or use of force.[62] Libya argued before the ICJ that the US/UK declarations in 1991-1992 constituted 'a pattern of threats' because of a 'background which included the bombing of Libyan cities in 1986'.[63] Similarly, according to the UK and New Zealand's representatives in the Security Council the 1994 large-scale deployment of Iraqi artillery and tanks in positions pointing towards and within range of Kuwait constituted an 'aggressive threat'

57. *Keesing's Contemporary Archives* (1987) p. 35129.
58. *Keesing's Contemporary Archives* (1995) pp. 40373, 40513.
59. *ILC Yearbook* (1989-I) p. 291.
60. *Corfu Channel*, *supra* n. 49, at p. 35.
61. *ICJ Pleadings* (1991-IV) pp. 117, 120.
62. *Nicaragua*, Merits, Judgment of 27 June 1986, *ICJ Reports* (1986) para. 118.
63. Declaration by I. Brownlie, counsel for Libya (*Lockerbie*, Preliminary Objections, Verbatim Record, CR 97/21, 17 October 1997, p. 51).

to Kuwait and a breach of the Charter provisions because of the events of 1990 and because Iraq 'has stubbornly failed to recognize Kuwait's sovereignty and its borders'.[64] Finally, in 2006 Iran qualified as threats some US statements and documents that did not rule out the use of force against the Islamic Republic 'in view of the past illegal behaviour of the United States'.[65]

3. THE PROHIBITION OF THE THREAT OF FORCE IN THE FRAMEWORK OF THE SOURCES OF INTERNATIONAL LAW

After determining what constitutes a threat of force under Article 2(4), it is necessary to investigate what status its prohibition has achieved in the system of the sources of international law. In order to do so, an examination of the practice of states and international organizations is necessary. This practice will then be evaluated in order to ascertain whether the prohibition under examination reflects customary international law.

3.1 **Practice of states and international organizations**

The first aspect of state practice to be considered is the existence of 'a pattern of treaties in the same form' and their ratification by states.[66] Apart from Article 2(4) of the UN Charter, the prohibition of the threat of force in international relations is included in Article 301 of the 1982 UN Convention on the

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64. S/PV.3438, 15 October 1994, pp. 9, 11. The UK pointed out that Iraq had a 'record of aggression', which entailed that 'the deployment of such large units of the Iraqi army, with their heavy sophisticated weaponry, cannot be considered, under any circumstances, a purely internal affair or one that falls within the purview of inviolable sovereignty, particularly in the light of the Iraqi Revolutionary Council's statement of 6 October, which contained a clear threat to Kuwait and the States of the region' (ibid., at p. 13). The US also linked the 1994 threats to the events of 1990 (S/PV.3439, 17 October 1994, p. 7). The movements of Turkish troopships in the vicinity of Cyprus accompanied by the Turkish Prime Minister's aggressive declarations was also considered a threat of force by the representative of Cyprus in the Security Council (*Repertoire of the Practice of the Security Council*, Suppl. 1964-1965 (New York, United Nations 1968) p. 202).

65. Letter dated 17 March 2006 from the permanent representative of the Islamic Republic of Iran to the UN Secretary-General, *supra* n. 47, at p. 2; Letter dated 27 April 2006 to the UN Secretary-General, *supra* n. 48, at p. 2.

66. I. Brownlie, *Principles of Public International Law* (Oxford, OUP 2003) p. 6. According to Section 102(3) of the *Restatement (Third) of US Foreign Relations Law*, 'international agreements … may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted' (American Law Institute, *Restatement (Third) of Foreign Relations Law*, Vol. I (St. Paul, Minn., American Law Institute Publishers 1987) p. 24). Comment (i) specifies that '[i]nternational agreements constitute practice of states and as such can contribute to the growth of customary law' when a multilateral agreement is 'designed for adherence by states generally, is widely accepted and is not rejected by a significant number of important states', or when there is a 'wide network' of similar bilateral arrangements (ibid., at p. 27).

Law of the Sea,[67] Article 3(2) of the 1979 Moon Treaty, Article 1 of the 1947 Inter-American Treaty of Reciprocal Assistance, Article 1 of the 1948 Inter-American Treaty on the Pacific Settlement of Disputes (Pact of Bogotà), Article 1 of the 1949 North Atlantic Treaty, Article 1 of the now defunct 1955 Warsaw Pact, Article I of the 1954 Manila Pact establishing the Southeast Asia Treaty Organization, Article II of the 1972 Charter of the Organization of the Islamic Conference, Article 1 of the 1978 Protocol on Non-Aggression additional to the 1975 ECOWAS Treaty,[68] Article 1 of the 1951 Security Treaty between Australia, New Zealand and the United States, Article 2 of the 2002 Charter of the Shanghai Cooperation Organization, Article 4 of the 2002 Constitutive Act of the African Union, and in the seventh preambular paragraph of the 1998 Rome Statute of the International Criminal Court (ICC). Article 19 of the Charter of the Organization of the American States (OAS) also contains the prohibition under examination, although it is differently worded and covers any 'attempted threat against the personality of the State or against its political, economic, and cultural elements'. The Protocols additional to the treaties establishing nuclear weapon-free zones require the nuclear weapon states which have ratified them not to threaten the use of such weapons against the denuclearized states or within the nuclear weapon-free zones.[69] Threats of force are also implicitly prohibited by those treaties which reserve certain areas exclusively for peaceful purposes and which ban 'any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, as well as the testing of any type of weapons'.[70] Finally, the prohibition of threats of force is contained in three important soft-law documents: the 1975 Helsinki Final Act, the 1990 Paris Charter for a New Europe and the 1994 Budapest Summit Declaration (all adopted within the framework of the Conference on Security and Co-operation in Europe). The above mentioned instruments have been accepted by a significant number of states

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67. Art. 19(2) (a) also provides that the passage of a foreign ship which engages, *inter alia*, in 'any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations' is not innocent. Furthermore, Arts. 58(2) and 88 provide that the high seas and the exclusive economic zone shall be reserved for peaceful purposes: this language was meant to reflect the meaning of Art. 2(4) of the UN Charter (F. Francioni, 'Peacetime Use of Force, Military Activities, and the New Law of the Sea', 18 *Cornell ILJ* (1985) p. 223; T. Treves, 'La navigation', in R.-J. Dupuy and D. Vignes, eds., *Traité du nouveau droit de la mer* (Paris, Economica 1985) pp. 747-748).

68. Threats of 'aggression' (not of other forms of the use of force) also trigger the mechanism for conflict prevention, management, resolution, peace-keeping and security provided in Art. 25 of the 1999 Lomé Protocol additional to the ECOWAS Treaty.

69. Protocol II to the 1967 Tlatelolco Treaty, Protocol 2 of the 1985 Rarotonga Treaty, the Protocol Additional to the 1995 Bangkok Treaty, Protocol I to the 1996 Pelindaba Treaty and the Protocol Additional to the 2006 Semipalatinsk Treaty. See M. Roscini, *Le zone denuclearizzate* (Turin, Giappichelli 2003) pp. 301-338.

70. Art. 1 of the 1959 Antarctic Treaty. See also Art. 4 of the 1967 Outer Space Treaty.

and constitute a wide network of universal, regional and bilateral arrangements proscribing the threat of armed force against other states.

The second aspect of state practice to be analysed is the legal justifications of the threateners, the protests by the victim states (if any) and the attitude of third states. In 1988, Sadurska wrote that 'the threat of force is in actuality treated as a lesser international wrong, even if its consequences are comparable to the lasting effects of the use of force'.[71] I do not share her view. Reactions to violations of Article 2(4) differ not depending on whether the victim is the object of a threat or of a use of force, but on the political interests of the concerned states and on the outcome of the conduct. If it is true that there have been cases of threats of force which have met no reaction from the international community, the same holds true for many cases of use of force: in both situations, this happens when the benefits of the violation are believed to overrule the harm done or when victim or third states do not suffer any significant negative consequences. Furthermore, it is a common misconception that condemnations of threats have been rare and that states and international organs tolerate threats to a greater degree than uses of force. As noted by Judge Weeramantry, '[t]he principle of non-use of threats is … firmly grounded as the principle of non-use of force and, in its many formulations, it has not been made subject to any exceptions'.[72]

Condemnations of threats both by the victims and by third states do arise when there is a significant period of time between the threat and the actual use of force or when the threatened use of force does not eventually occur. In 1946 and 1951, Iran qualified as a violation of its sovereignty and of the UN Charter the sending of British troops and warships in the vicinity of the Iranian territorial and maritime borders in order to 'persuade' the Persian government to protect the foreign nationals on its territory from violence.[73] During the Cold War, the US and its allies protested against certain USSR declarations threatening the use of force and reaffirmed 'their conviction that all outstanding international questions should be settled not by the use or threat of force but by peaceful means through negotiations'.[74] On its part, the USSR reacted denying that such declarations were 'threats or a menace … or a dictate'.[75] In the discussion in the Security Council, several states condemned the Turkish threat of force against Cyprus in 1964 as a violation of Article 2(4).[76] In 1977, Libya and Algeria protested against France's threat of intervention in Western Sahara

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71. Sadurska, *supra* n. 10, at p. 258.

72. Dissenting Opinion, *Nuclear Weapons*, *supra* n. 33, at p. 526.

73. Ronzitti, *supra* n. 46, at pp. 26-27.

74. M.M. Whiteman, *Digest of International Law*, Vol. 5 (Washington, DC, Department of State Publication 1965) pp. 711-716 (quotation at p. 715).

75. Ibid., at pp. 713-714.

76. *Repertoire of the Practice of the Security Council*, Suppl. 1964-1965 (New York, United Nations 1968) pp. 201-202.

to free two French citizens captured by the Polisario Front.[77] Argentina argued that the exclusion zone established by the UK around the Falkland Islands in 1982 was an unlawful threat of force.[78] In 1994, several members of the Security Council qualified the deployment of weapons and artillery by Iraq on the border with Kuwait as a threat to that state.[79] Before the ICJ, Nicaragua claimed that the US-Honduras military exercises near the Nicaragua-Honduras frontier were a violation of Article 2(4) because they were part of a 'general and sustained policy of force' intended to intimidate and coerce Nicaragua into accepting the US demands.[80] North Korea complained before the Security Council about the alleged US threats to use nuclear weapons against the Asian country and about the large-scale military exercises near the Korean peninsula.[81] A significant number of states condemned as unlawful threats the US and UK statements towards Iraq in 1997-1998 and 2002-2003.[82] When in 1998-1999 the NATO Council threatened the Federal Republic of Yugoslavia with air strikes if the relevant Security Council resolutions with regard to Kosovo were not implemented, the Yugoslav authorities, backed by China[83] and the Russian Federation,[84] claimed that such declarations were an 'open and clear threat of aggression'.[85] The debates in the Security Council that preceded Operation Allied Force also provide evidence of widespread condemnation of the threat

77. Ronzitti, *supra* n. 46, at p. 40.

78. Sadurska, *supra* n. 10, at p. 261.

79. See the statements of Argentina, Djibouti, Kuwait, New Zealand, Pakistan, Spain, UK, US (S/PV.3438, 15 October 1994, pp. 4-5, 8-11, 13).

80. *Nicaragua*, Merits, *supra* n. 62, para. 92. See also Nicaragua's Memorial (Merits), *ICJ Pleadings* (1991-IV) pp. 119-120.

81. S/PV.5551, 14 October 2006, p. 8.

82. In 1998, Iran and Libya qualified the threats as a violation of the Charter (White and Cryer, *supra* n. 27, at p. 262). See also the declarations by China (S/PV.3831, 12 November 1997, p. 15, and S/PV.3858, 2 March 1998, p. 14) and the Russian Federation (S/PV.3831, 12 November 1997, p. 13). With regard to Operation Iraqi Freedom, see the declarations by the representatives of Lebanon (S/PV.4717, 11 March 2003, p. 33), Malaysia (S/PV.4625 (Resumption 1), 16 October 2002, p. 6), Nepal (S/PV.4625 (Resumption 2), 17 October 2002, p. 26), Nigeria (S/PV.4625 (Resumption 1), 16 October 2002, p. 20), Yemen (S/PV.4709, 18 February 2003, p. 29). The Summit of the Non-Aligned Movement held in Kuala Lumpur (24-25 February 2003) also condemned the threat of military action, as well as the Arab Summit held at Sharm el-Sheikh on 1 March 2003, the Annual Coordination Meeting of Foreign Ministers of Member States of the Organization of the Islamic Conference (New York, 17 September 2002) and the Beirut Summit of the League of Arab States of 27-28 March 2002.

83. S/PV.3937, 24 October 1998, p. 14. As it has been observed, 'although the sharp division between the members of the Security Council prevented that organ from taking any position on the legality of the NATO military threat, the strong Chinese and Russian opposition greatly reduced the relevance of the NATO initiative as a case of departure from the prohibition of the threat of force' (Gazzini, *supra* n. 44, at p. 430).

84. Russia called for the immediate rescission of the NATO Activation Order (S/PV.3937, 24 October 1998, p. 12).

85. B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) p. 9.

of force against a sovereign state.[86] In the proceedings before the ICJ, Uganda qualified the alleged Sudanese military support to the Democratic Republic of the Congo (DRC) as a 'grave threat'.[87] In 2006, Iran harshly complained to the President of the Security Council and to the UN Secretary-General about the alleged UK, US and Israeli threats to resort to force against the Islamic Republic in violation of Article 2(4).[88] Congo also stigmatized the resort to threats of force to solve the crisis over the Iranian nuclear programme.[89] Iran has been itself the object of criticism when President Ahmadinejad openly called for Israel to be 'wiped off the map'.[90] Finally, the international response to the adoption of the 2005 Chinese Law against the Separation of Taiwan was criticised, among others, by Australia,[91] Japan,[92] Belgium, Italy, Sweden, the UK and the US,[93] which all emphasized their opposition to any use of force and urged China to settle the dispute by peaceful means.[94] Most cases where threats of force have not met significant reactions were due not to some sort of acquiescence, but rather to the fact that the concern about the threat was absorbed by that about the subsequent use of force. In other cases, 'the collective sigh of relief that actual force has not been used, or sheer indifference if the threat is of a minor sort and relates to two States, outweighs any desire to condemn the threat'.[95]

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86. See the declarations by China (S/PV.3937, 24 October 1998, p. 14, and S/PV.3988, 24 March 1999, p. 12), India (S/PV.3988, 24 March 1999, p. 16), Malaysia (S/PV.3988, 24 March 1999, p. 9) and the Russian Federation (S/PV.3988, 24 March 1999, pp. 2-3).

87. *Armed activities on the territory of the Congo* (*DRC* v. *Uganda*) (hereinafter '*DRC-Uganda*'), Counter-memorial submitted by the Republic of Uganda, Vol. I, 21 April 2001, p. 3.

88. See the letter dated 17 March 2006 from the permanent representative of the Islamic Republic of Iran to the UN Secretary-General, *supra* n. 47, at pp. 1-2; Letter dated 31 July 2006 to the President of the UN Security Council, S/2006/603 (2 August 2006), p. 3, at <www.iranwatch.org/international/UNSC/unsc-s2006603-irancomm-080206.pdf>); Letter dated 10 November 2006 to the UN Secretary-General, A/61/571-S/2006/884 (13 November 2006), p. 1, at <daccessdds.un.org/doc/UNDOC/GEN/N06/614/45/PDF/N0661445.pdf?OpenElement>.

89. S/PV.5647, 24 March 2007, p. 3.

90. France, UK, US, Russia and Australia also condemned the declarations (P. Weckel, 'Condamnation des propos du Chef d'Etat iranien appellant à "rayer Israël de la carte"', *Sentinelle*, 30 October 2005, at <www.sfdi.org/actualites/Sentinelle%2039.htm>; see also S/PV.5647, 24 March 2007, p. 10). Ahmadinejad's declarations can be read at <english.aljazeera.net/English/archive/archive?ArchiveId=15816>. In December 2001, Iranian President Rafsanjani had already called on the Muslim states to use nuclear weapons against Israel, assuring that it would result in the annihilation of the Jewish state and in damages only to them ('Rafsanjani says Muslims should use nuclear weapons against Israel', *Iran Press Service*, 14 December 2001, available at <www.iran-press-service.com/articles_2001/dec_2001/rafsanjani_nuke_threats_141201.htm>).

91. See <www.foreignminister.gov.au/transcripts/2005/050314_sky.html> (14 March 2005). However, the Australian Minister for Foreign Affairs pointed out that 'what is going to be important is whether they [the Chinese] actually do attack Taiwan or they don't'.

92. See <taiwansecurity.org/Reu/2005/Reuters-150305.htm> (15 March 2005).

93. *Keesing's Contemporary Archives* (2005) pp. 46520-46521.

94. On the 2005 Anti-Separation Law, see *supra* n. 43.

95. McCoubrey and White, *supra* n. 7, at p. 58. The best example of this scenario is the (non) reaction of the international community to the US threat to use force against Cuba during the 1962

As to states carrying out threats of force, none has ever claimed that the prohibition of the threat contained in Article 2(4) has been abrogated or modified. Violators defended themselves by relying on the exceptions to the prohibition, or more simply by denying that a threat of force had occurred at all.[96] Although they have not denied the existence of the prohibition, however, some states have also maintained that threats of force for the limited purpose of enforcing certain obligations of the threatened state would not run counter the Charter, even without the authorization of the UN Security Council. In the debates preceding the beginning of Operation Allied Force and Operation Iraqi Freedom, several states observed that 'a credible threat of force was key to achieving the OSCE and NATO agreements and remains key to ensuring full implementation' and that 'the only way that we can achieve its [Iraq's] disarmament of weapons of mass destruction … is by backing our diplomacy with the credible threat of force'.[97] Even more explicitly, the UK representative expressed the view that supporting a diplomatic process with a credible threat of force 'is doing what the United Nations Charter requires of us'.[98] Threats of force were also seen by the US representative as a useful tool that 'must remain', while force 'should always be a last resort'.[99] Even those states which opposed the use of force against Iraq were 'content for the inspection process to have continued, a process that was only possible due to a threat of force':[100] the argument can be made that those states accepted the legality of a unilateral *threat* of force if its aim is to enforce UN resolutions, but not of the unilateral *use* of force, not even to pursue such a goal.[101] Several states – including

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missile crisis. Only the Soviet representative in the Security Council qualified the proclamation of the naval blockade of the island and the military measures taken on the instructions of the US President as a threat of force against the territorial integrity and political independence of Cuba, in violation of the principles of the UN Charter and of the 'elementary' principles of international law (*Keesing's Contemporary Archives* (1961-1962) p. 19065).

96. See the UK and US arguments before the ICJ in response to Libya's allegation of being the victim of threats in order to be compelled to surrender two Libyan nationals (*Lockerbie*, Preliminary Objections, Verbatim Record, CR 97/16 (*Libya* v. *UK*), 13 October 1997, p. 19; CR 97/22 (*Libya* v. *UK*), 20 October 1997, pp. 13-14; and CR 97/23 (*Libya* v. *US*), 20 October 1997, p. 9).

97. Declaration by the US representative with regard to Kosovo (S/PV.3937, 24 October 1998, p. 15) and by the UK representative with regard to Iraq (S/PV.4714, 7 March 2003, p. 27), respectively. Other states supporting the threat of force to persuade Iraq to disarm were Bulgaria (S/PV.4714, 7 March 2003, p. 31), the Former Yugoslav Republic of Macedonia (S/PV.4709 (Resumption 1), 19 February 2003, p. 18) and Spain (SP/PV.4714, 7 March 2003, p. 24).

98. S/PV.4707, 14 February 2003, p. 18.

99. Ibid., at p. 21.

100. N.D. White, 'Self-Defence, Security Council Authority and Iraq', in R. Burchill, N.D. White and J. Morris, eds., *International Conflict and Security Law. Essays in Memory of Hilaire McCoubrey* (Cambridge, CUP 2005) p. 261.

101. Ibid.

China,[102] France,[103] Germany,[104] Israel,[105] Tunisia,[106] UK[107] and US[108] – have

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102. See the above mentioned 2005 Chinese Law against the Separation of Taiwan. According to Beijing, one of the purposes of the Law, which threaten the use of force against Taiwan should it achieve formal independence, is maintaining peace and stability and thus preventing armed hostilities in the Taiwan Strait (Art. 1). As observed, '[i]n China's view, the threat to use force is an effective deterrent in China's overall Taiwan policy to curb Taiwan's independence' (Zou Keyuan, 'Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti-Secession Law', 4 *Chinese JIL* (2005) p. 457). It is however to be noted that the Chinese position is not always consistent: see, e.g., the statement in the Security Council with regard to the 1998 US/UK air strikes against Iraq, according to which 'China has always strongly advocated peaceful settlement of international disputes and is against the use or the threat of use of force in international relations' as 'such acts contravene international law and norms governing international relations' (S/PV.3955, 16 December 1998, p. 5).

103. On 19 January 2006, President Chirac declared that France might use nuclear weapons against states sponsoring a terrorist attack against French interests. The notion of 'vital interests' which fall under the protection of the nuclear programme includes not only the territorial integrity, the protection of the population and the free exercise of French sovereignty, but also 'strategic supplies' and the 'defence of allied countries'. A use of terrorist means or weapons of mass destruction against such interests would entail an armed response which would not necessarily be a conventional one. Chirac adds that the 'credible threat' of the utilization of nuclear weapons 'permanently hangs over those leaders who harbour hostile intentions against us' (the full text of the speech can be read at <www.elysee.fr/elysee/root/bank/print/38447.htm>).

104. According to the German Foreign Minister Kinkel, the NATO threats of force against Yugoslavia followed the 'sense and logic' of the Security Council resolution on the matter and legitimately (if not legally) backed them (quoted in B. Simma, *supra* n. 85, at p. 12).

105. The threat to employ 'means other than diplomacy' has been used to try to stop Iran's nuclear program (see Letter dated 31 July 2006 from the permanent representative of the Islamic Republic of Iran to the President of the UN Security Council, *supra* n. 88, at p. 3).

106. According to Tunisia, 'it would be wise to deal with every aggression' in the Bosnian 'safe areas' with the threat of the use of force by NATO (S/PV.3336, Resumption 2, 15 February 1994, p. 160). On the positive role of the threat of force in the war in Bosnia, see also the declaration of Senegal (ibid., at p. 172), Croatia (S/PV.3367, 21 April 1994, at p. 6), the Chairman of the Islamic Conference (ibid., at p. 20), Malaysia (S/PV.3336, Resumption 1, 14 February 1994, p. 81), the Netherlands (S/PV.3336, Resumption 1, 14 February 1994, p. 134), Pakistan (S/PV.3370, 27 April 1994, p. 4), UK (S/PV.3454, 8 November 1994, p. 7), US (Opening remarks by the US Secretary of State at the London International Conference on Bosnia (21 July 1995), 6 *US Department of State Dispatch* (1995) p. 583). On the contrary, China constantly opposed to any threat of force throughout the crisis (see, e.g., S/PV.3336, Resumption 1, 14 February 1994, p. 70; S/PV.3344, 4 March 1994, p. 11; S.PV/3367, 21 April 1994, p. 55).

107. See the threats of intervention in Iran (1946 and 1951) and Egypt (1952) in order to enforce those states' duty to maintain law and order and to protect foreign residents from violence (Ronzitti, *supra* n. 46, at pp. 26-28).

108. See the declarations of the US Secretary of State James A. Baker to the Iraqi Prime Minister Tareq Aziz, according to which he 'purposely left the impression that the use of chemical or biological agents by Iraq could invite tactical nuclear retaliation', as 'the best deterrent of the use of weapons of mass destruction by Iraq would be a threat to go after the Ba'ath regime itself' (J.A. Baker III, *The Politics of Diplomacy. Revolution, War and Peace, 1989-1992* (New York, G.P. Putnam's Sons 1995) p. 359, quoted in Judge Schwebel's Dissenting Opinion in *Nuclear Weapons*, *supra* n. 33, at p. 324). The US threats to use nuclear weapons against Iraq apparently succeeded: 'Iraqi officials claimed they decided not to use the weapons after receiving a strong

emphasized that threats might play a positive role in international relations in certain situations by deterring unlawful acts without the negative consequences entailed by the use of force.

Finally, the practice of international organizations should also be considered, as this too is a material source of custom.[109] Organs of international organizations have condemned threats of force in several occasions. Security Council Resolution 326 of 2 February 1973 condemned Southern Rhodesia's military threats against Zambia and qualified the deployment of South African armed forces on the border with Zambia as a threat to its sovereignty and territorial integrity. In other resolutions, the Security Council condemned South Africa for its threats against neighbouring countries and called upon Turkey to refrain from any threat against Cyprus.[110] In Resolution 573 of 4 October 1985, the Security Council demanded that Israel refrains from threatening further acts of aggression against Tunisia. Again, after Israel's bombing of the 'Osirak' nuclear reactor under construction in Iraq in 1981, the General Assembly and the Security Council condemned the Israeli threats to repeat such attacks if and when necessary.[111] Moreover, according to one commentator, the failure by the Security Council to authorize the use of force against Iraq in 2003 could be seen 'as a rejection of that threat that preceded it'.[112] The League of Arab States condemned the 2002 threats to resort to force against Iraq as a violation of Article 2(4).[113] In 1996, the European Parliament condemned the Chinese military exercises opposite Taiwan right before the presidential elections on the island.[114] Moreover, in 2005 it expressed its concern for the 'recent threats by China against Taiwan and the ongoing stationing of hundreds of missiles in the southern provinces of China facing Taiwan' and criticised the Anti-Separation Law as not consistent with international law.[115] In 2002, the European Parliament had already adopted two resolutions rejecting China's claim to reserve the right to use military force and called for a peaceful resolution of the dispute, making the European Union's adherence to the one China principle dependent on the People's Republic of China's commitment to a

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but ambiguously worded warning from the Bush administration on 9 January 1991, that any use of unconventional warfare would provoke a devastating response' (*The Washington Post*, 26 August 1995, quoted ibid., at p. 326).

109. Brownlie, *supra* n. 66, at p. 6.

110. Res. 581 (13 February 1986) with regard to South Africa and Res. 186 (4 March 1964) with regard to the situation in Cyprus (McCoubrey and White, *supra* n. 7, at pp. 57, 62).

111. GA Res. 36/27 (13 November 1981).

112. White, *supra* n. 100, at p. 261.

113. S/PV.4625 (Resumption 1), 16 October 2002, p. 7.

114. See <europa.eu/bulletin/en/9603/p104078.htm>.

115. Resolution on Relations Between the European Union, China and Taiwan and Security in the Far East, P6_TA(2005)0297 (7 July 2005), preambular para. A and para. 5. The European Parliament resolutions are available on line at <www.europarl.europa.eu>.

peaceful settlement.[116] The above mentioned Iranian President's threatening statements against Israel were condemned by the Presidency of the European Union,[117] by the UN Secretary-General[118] and by the Security Council, which also reaffirmed the obligations of member states to refrain from the threat and use of force against the territorial integrity or political independence of any state.[119] Like certain states, however, some organs of international organizations have emphasized that threats for specific law enforcement purposes might play a positive role in international relations. In the Kosovo crisis, for instance, the NATO Secretary-General claimed that the Organization put the threat of force 'at the service of diplomacy', which helped 'to create the conditions for the Rambouillet talks to make progress'.[120] Even more significantly, he also 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'.[121] The UN Secretary-General appears to have supported this view when he said that 'you can do a lot with diplomacy, but of course you can do a lot more with diplomacy backed up by firmness and force'.[122] The adoption by the Security Council of Resolutions 1203 of 24 October 1998 and 1244 of 10 June 1999, which endorsed the agreements accepted by Yugoslavia thanks to the NATO military threat, also seems to suggest that at least in certain situations the threat of force has been considered as having a positive function.[123]

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116. Resolution on the European Union's Strategy Towards China, P5_TA(2002)0179 (11 April 2002), para. 26; Resolution on the Commission Communication on Europe and Asia: A Strategic Framework for Enhanced Partnerships, P5_TA(2002)0408 (5 September 2002), paras. 17, 37.

117. Statement by the Presidency on behalf of EU leaders meeting at Hampton Court (27 October 2005), available at <www.eu2005.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1107293561746&a=KArticle&aid=1129043426235>.

118. See <www.un.org/apps/sg/sgstats.asp?nid=1759> (27 October 2005) and <www.un.org/apps/sg/sgstats.asp?nid=1831> (8 December 2005).

119. SC/8542 (28 October 2005) and SC/8576 (9 December 2005).

120. NATO Press release (99), 23 February 1999, p. 21.

121. NATO Secretary-General Press conference, 13 October 1998, <www.nato.int/docu/speech/1998/s981013b.htm>.

122. Quoted in White and Cryer, *supra* n. 27, at pp. 279-280. Judge Schwebel, in his Dissenting Opinion, argues that the US threats to use nuclear weapons against Iraq dissuaded Saddam Hussein from using chemical weapons, and asks: '[c]an it seriously be maintained that Mr. Baker's calculated – and apparently successful – threat was unlawful? Surely the principles of the United Nations Charter were sustained rather than transgressed by the threat' (*Nuclear Weapons*, *supra* n. 33, at p. 327).

123. See, however, the criticism of the Chinese delegate, S/PV.4011, 10 June 1999, at p. 9.

3.2. **Evaluation of the practice**

From the above analysis, it can be concluded that the prohibition of the threat of force contained in Article 2(4) has achieved customary status in contemporary international law. Indeed, not only is state practice 'both extensive and virtually uniform',[124] but it is also followed because of a sense of legal obligation. The *opinio juris* may be inferred from several sources. First, many states (including Bosnia and Herzegovina,[125] China,[126] DRC,[127] France,[128] Iran,[129] Marshall Islands,[130] Mexico,[131] Nicaragua,[132] Qatar[133] and the US[134]) have explicitly argued that the prohibition of the threat of force, specifically or together with that of the use of force, reflects customary international law. Second, no state

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124. *North Sea Continental Shelf* (*Federal Republic of Germany* v. *Denmark and the Netherlands*), Merits, Judgment of 20 February 1969, *ICJ Reports* (1969) para. 74.

125. In its Application in the *Genocide* case before the ICJ, Bosnia and Herzegovina claimed that the threat of force by Yugoslavia (Serbia and Montenegro) was not only inconsistent with Art. 2(4) of the UN Charter, but also with customary international law (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Merits, Judgment of 26 February 2007, para. 64(f)(g), available at <www.icj-cij.org>). In the Memorial, Bosnia and Herzegovina did not reiterate these claims, as Serbia and Montenegro had accepted the ICJ jurisdiction under the terms of the Genocide Convention (para. 65).

126. The Chinese representative in the Security Council argued that the NATO threats against Yugoslavia were a violation of the UN Charter 'as well as international law': 'international law' as distinct from the Charter should be interpreted as a reference to custom (S/PV.3937, 24 October 1998, p. 14). In the 1971 Shanghai Communiqué, China and the US agreed that, notwithstanding 'essential differences' between them in their social systems and foreign policies, they both recognized the existence of a duty to settle international disputes without the use or the threat of force and declared themselves prepared to apply this principle to their mutual relations (11 *ILM* (1972) p. 444). Similarly, in April 2005, China and India agreed that their border disputes should be resolved through peaceful means, instead of resorting to force or threat of force (Hu Qian, 'Chinese Practice in Public International Law', 4 *Chinese JIL* (2006) p. 773). Threats of force have however been used against Taiwan, because China considers the island a secessionist province, to which Art. 2(4) of the UN Charter (prohibiting the threat of force 'in international relations') does not apply.

127. *DRC-Uganda*, DRC Memorial, July 2000, pp. 133-135.

128. *Nuclear Weapons*, written statement of the Government of the French Republic, 20 June 1995, p. 24.

129. Letter dated 10 November 2006 from the permanent representative of Iran to the UN Secretary-General, which lists the Israeli statements threatening to use force against Iran and qualifies them 'in total defiance of international law *and* the fundamental principles of the Charter of the United Nations' (*supra* n. 88, at p. 2; emphasis added). See similarly the letter dated 17 March 2006 to the UN Secretary-General, *supra* n. 47, at p. 1.

130. *Nuclear Weapons*, written statement of the Government of the Marshall Islands, 22 June 1995, para. 5.

131. *Nuclear Weapons*, written statement of the Government of Mexico, 19 June 1995, p. 8.

132. *Nicaragua*, Merits, Memorial, *ICJ Pleadings* (1991-IV) pp. 118-119.

133. *Nuclear Weapons*, Verbatim Record, CR/95/29, 10 November 1995, p. 29.

134. *Nicaragua*, Jurisdiction and Admissibility, Counter-memorial, *ICJ Pleadings* (1991-II) pp. 94-95.

has ever claimed that the prohibition of the threat of force contained in Article 2(4) has been abrogated.[135] Violators defended themselves by denying that the declarations or the conduct were actually 'threatening' or by relying on the exceptions contained within the rule itself, thus confirming and not weakening the prohibition.[136] Third, as shown above, the violations have met widespread condemnation. Cases of non-reaction can be justified on political or practical grounds and in any case – as observed by two commentators – '[r]eluctant tolerance does not evidence *opinio juris*'.[137]

The ICJ has also held in several occasions that the whole of Article 2(4) of the Charter reflects general international law, thus including not only the prohibition of the use of force, but that of the threat of force too.[138] The ILC has shared this view.[139] Several General Assembly Declarations have re-asserted the prohibition of the threat of force.[140] In particular, the 1970 Declaration on Friendly Relations makes clear that 'a threat or use of force constitutes a viola-

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135. In the *Nuclear Weapons* Advisory Opinion, the ICJ acknowledged that 'no State whether or not it defended the policy of deterrence suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal' (*supra* n. 33, at para. 47).

136. *Nicaragua*, Merits, *supra* n. 62, at para. 186.

137. White and Cryer, *supra* n. 27, at p. 246.

138. *Nicaragua*, Merits, *supra* n. 62, at paras. 187-190; *Legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion of 9 July 2004 (hereinafter '*Legality of the Wall*'), *ICJ Reports* (2005) para. 87. However, in the *Oil platform* case, Judge Simma regretted in his Separate Opinion that the Court did not restate the customary nature of the UN principles on the use of force 'in a context and at a time when such a reconfirmation is called for with the greatest urgency' (*Oil Platforms* (*Iran* v. *US*), Merits, Judgment of 6 November 2003, *ICJ Reports* (2003) para. 6).

139. *ILC Yearbook* (1966-II) p. 246: 'The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, rules of general international law which are to-day of universal application.'

140. Declaration on the Inadmissibility of Intervention in the Domestic Affairs States and the Protection of their Independence and Sovereignty (Res. 2131 (XX), 21 December 1965); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (Res. 2625 (XXV), 24 December 1970), which is considered an authoritative interpretation of the relevant Charter provisions (M. Virally, 'Article 2, Paragraphe 4', in J.-P. Cot and A. Pellet, eds., *La Charte des Nations Unies* (Paris, Economica 1991) p. 119); Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations (Res. 42/22, 18 November 1987), paras. 1-2. See also the Declaration on Essentials of Peace (Res. 290 (IV), 1 December 1949), the Declaration on the Inadmissibility of Intervention and Interference in the International Affairs of States (Res. 36/103, 9 December 1981), the Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in This Field (Res. 43/51, 5 December 1988), the Declaration on the Strengthening of International Security (Res. 2734 (XXV), 16 December 1970) and the Final Document of the First Special Session of the UN General Assembly on Disarmament, 1978, para. 26. In the *Nicaragua* case (Merits), the ICJ implicitly acknowledged that these resolutions, and in particular the Friendly Relations Declaration, might reflect customary international law (*supra* n. 62, at para. 188). At least some provisions of the Friendly Relations Declaration were considered by the ICJ as declaratory of customary international law in *DRC-Uganda*, Judgment of 19 December 2005, para. 162, at <www.icj-cij.org>.

tion of international law and the Charter of the United Nations': 'international law', as opposed to the Charter, can reasonably be interpreted as a reference to customary international law. More recently, General Assembly Resolution 56/152 of 19 December 2001 stressed that the obligation to refrain from the threat of force in international relations is incumbent on 'all States', and not only on UN members.[141]

Nevertheless, if the vast majority of states have argued that threats of force are prohibited under any circumstances, a few states have claimed that threats for certain law enforcement purposes (the maintenance of international peace and security and the prevention/repression of *jus cogens* violations) are not necessarily unlawful. This position reflects the view maintained by Sadurska in 1988. In her pioneering study, she concludes that 'there is no reason to assume that the threat will always be unlawful if in the same circumstances the resort to force would be illicit'. Taking state practice into account, she argues that Article 2(4) is not the only parameter against which the legality of a threat of force is assessed by states. States tend to consider threats lawful if: 1) they are made to protect the security of the state, providing that the internal self-determination of the target is not violated; 2) they are made to vindicate a denied right; 3) they are prudent and balance individual and community values.[142] If the main purpose of the Charter is the preservation of peace and security and not the freedom of states from external pressure, and if '[t]he Charter prohibits the use of force in violation of the political independence and territorial integrity of a state *because* it may lead to international instability, breach of the peace and/or massive abuses of human rights', then there is no reason why the threat and the use of force should be treated equally.[143] The legal appraisal of the threat would be similar to that of the use of force only when they produce comparable results, which is not often the case, as 'even an effective threat will not have the same destructive consequences as the use of force': on the contrary, the threat 'may be an economical guarantee against open violence'.[144] Sadurska makes the example of nuclear deterrence, which is perceived as compatible with the UN purposes as long as it discourages aggression.[145]

This view, however, is not persuasive. Sadurska's criteria for the legality of threats of force seem to be more political than legal. Even if 'states may be inclined to consider as licit those threats which help to restore an upset equilibrium in the international order',[146] this fact does not *per se* exclude the wrongfulness of the conduct: as observed by the Russian representa-

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141. Para. 2. See also GA Res. 2936 (XXVII) (29 November 1972), the preamble of which states that the renunciation of the use or threat of force is an obligation that all states should respect.
142. Sadurska, *supra* n. 10, at pp. 260-266.
143. Ibid., at p. 250.
144. Ibid.
145. Ibid.
146. Ibid., at p. 260.

tive before the Security Council, '[i]t would be unthinkable for a national court in a civilized democratic country to uphold illegal methods to combat crime'.[147] Even assuming, for the sake of argument, that threats are acceptable when they contribute to the maintenance of international peace and security, one can hardly see how a non-defensive threat not authorized by the Security Council can be an effective tool to that aim. Indeed, in the words of White and Cryer, threats often have a 'snowballing effect' and easily degenerate in armed conflict.[148] Sadurska's view has eventually been disproved by the 1996 *Nuclear Weapons* Advisory Opinion. The ICJ held: '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.'[149] Therefore, whether the possession of nuclear weapons and the policy of deterrence are a threat under the terms of Article 2(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'.[150] Several states, including Czech Republic,[151] Iran,[152] Nauru,[153] Malaysia,[154] Mexico,[155] Qatar,[156] San Marino[157] and the US,[158] have also maintained that the threat of force is prohibited under the same circumstances as the use force. According to the Colombian member of the ILC, '[t]here was only a difference of degree between the threat of employment of armed force and the actual employment of it. The two should be put on an equal footing.'[159]

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147. S/PV.3988, 23 March 1999, p. 3.

148. White and Cryer, *supra* n. 27, at p. 281.

149. *Nuclear Weapons*, *supra* n. 33, at para. 47.

150. Ibid., at para. 48. See also the Dissenting Opinion of Judge Weeramantry, according to whom 'the United Nations Charter draws no distinction between the use of force and the threat of force. Both *equally* lie outside the pale action within the law' (para. 3, emphasis added). He also adds that '[i]f an act is wrongful, the threat to commit it and, more particularly, a publicly announced threat, must also be wrongful'.

151. The Czech Republic 'rejects the threat of force as an instrument of international policy', so even if it is for a good purpose (S/PV.3439, 17 October 1994, p. 11).

152. *Nuclear Weapons*, Verbatim Record, CR/95/26, 6 November 1995, at p. 24.

153. According Nauru, the threat 'is itself a kind of use' (*Nuclear Weapons*, Memorial of the Government of Nauru, 15 June 1995, pp. 11, 23).

154. *Nuclear Weapons*, written statement of the Government of Malaysia, 19 June 1995, p. 8.

155. Written statement by the Government of Mexico, 19 June 1995, at p. 7.

156. *Nuclear Weapons*, Verbatim Record, CR 95/29, 10 November 1995, p. 27.

157. *Nuclear Weapons*, Verbatim Record, CR 95/31, 13 November 1995, p. 20.

158. *Nuclear Weapons*, Verbatim Record, CR 95/34, 15 November 1995, p. 79.

159. Remarks by J.M. Yepes, *ILC Yearbook* (1951-I) p. 58. The same view is shared by Brownlie, *supra* n. 15, at p. 364; and White and Cryer, *supra* n. 27, at p. 254.

Be that as it may, the fact remains that a minority of states have carried out or approved threats of force for certain law enforcement purposes in the conviction that they were a useful and lawful tool. This prevents the prohibition of the threat of force from being qualified as a peremptory norm of general international law: as one commentator points out in another context, 'whenever a component [of the international community] claims that a particular kind of conduct is permitted, the kind of conduct in question might possibly be prohibited by the customary rule forbidding use of force; however, it cannot be regarded as being prohibited by the peremptory rule banning the use of force'.[160] Indeed, if one looks at the definition contained in Article 53 of the Vienna Convention on the Law of Treaties, a 'peremptory norm of general international law' must be 'accepted and recognized by the international community of States *as a whole*' as a norm which cannot be derogated *under any circumstances*:[161] as we have seen, some states have argued that, in certain situations, threats are a positive and lawful means. Furthermore, if most states accept that the prohibition of the threat of force reflects customary international law, only a few – Nicaragua,[162] Nauru,[163] Iran,[164] Indonesia,[165] Malaysia[166] and Qatar[167] – have implicitly or expressly qualified it as *jus cogens*, while other states have limited the peremptory character to the prohibition of the use of force:[168] the 'as a

160. Ronzitti, *supra* n. 46, at p. 75.

161. Emphasis added.

162. *Nicaragua*, Merits, *ICJ Pleadings* (1991-IV) p. 115. However, it is not at all clear from the Memorial whether it is believed that only the prohibition of the use of force reflects *jus cogens* or the whole of Art. 2(4).

163. *Nuclear Weapons*, Memorial of the Government of Nauru, 15 June 1995, pp. 3-4.

164. *Nuclear Weapons*, Verbatim Record, CR/95/26, 6 November 1995, p. 22.

165. *Nuclear Weapons*, Verbatim Record, CR/95/25, 3 November 1995, p. 19.

166. *Nuclear Weapons*, written statement of the Government of Malaysia, 19 June 1995, p. 3.

167. *Nuclear Weapons*, Verbatim Record, CR/95/29, 10 November 1995, p. 30.

168. See the argumentations of Yugoslavia (Serbia and Montenegro)'s Co-Agent, de Waart, before the ICJ, according to whom 'the international prohibition of the *use* of force arises out of a peremptory norm of international law' (*Legality of use of force* (*Serbia and Montenegro* v. *Belgium et al.*) (hereinafter '*Legality of use of force*'), Verbatim Record, CR 99/14, 10 May 1999, p. 47; emphasis added). Libya's position is more ambiguous. While in the *Lockerbie* proceedings it at first only qualified as '*droit international général de caractère impératif*' the rules of general international law prohibiting the *use* of force (*Lockerbie,* Libya's Memorial, 20 December 1993, p. 242), it subsequently referred to the '*violation des principes impératifs du droit international général qui interdisent le recours à la menace de l'emploi de la force*' (*Lockerbie*, Libya's Reply, 29 June 2000, p. 86). As to the US, the memorandum of the Department of State's Legal adviser to the acting Secretary of State with regard to the USSR military intervention in Afghanistan (29 December 1979) states that '[w]hile agreement on precisely what are the peremptory norms of international law is not broad, there is universal agreement that the exemplary illustration of a peremptory norm is Article 2, paragraph 4' (M.L. Nash, 'Contemporary Practice of the United States Relating to International Law', 74 *AJIL* (1980) p. 419). The situation to which the memorandum referred to, however, was a case of aggression, and not of a threat: it is not clear, thus, whether the Legal adviser actually meant to include the prohibition of a threat of aggression within the 'exem-

whole' requirement is thus far from being met. This conclusion is supported by Opinion No. 10 of the Badinter Commission on the former Yugoslavia, which qualified as an 'imperative of general international law' only the prohibition of the use of force and did not mention the prohibition of the threat.[169]

Nonetheless, although this appears to be the safest conclusion, the argument could possibly be further developed. If there are more and less serious forms of the use of force (the most serious of all, prohibited by *jus cogens*, being aggression),[170] there must be different degrees of seriousness with regard to threats as well.[171] What virtually *all* states agree on is that threats of *aggressive* use of force (e.g., to annex territory) are prohibited under any circumstances. This being the common denominator of every state's practice and *opinio juris*, it might be concluded that at least threats of aggression are prohibited by a peremptory norm of general international law. Threats of aggression share the same rationale and purpose of aggression, and if the latter is prohibited by a peremptory norm of general international law, the same must logically holds

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plary illustration of a peremptory norm'. The US Counter-memorial in the jurisdiction stage of the *Nicaragua* case does not expressly state that Art. 2(4) reflects *jus cogens*, but more ambiguously quotes commentators who have held this view (*ICJ Pleadings* (1991-II) pp. 94-95). Be that as it may, even assuming that this was the US' position until the 1980s, it was later rejected as shown by the strategy of threats carried out against Yugoslavia and Iraq in the 1990s.

169. 4 *EJIL* (1993) p. 90. See also the ILC commentaries on the Draft Articles on the Law of Treaties and on the 2001 Articles on State Responsibility, which only mention the prohibition of aggression or of the use of force as examples of peremptory norms (see, respectively, *ILC Yearbook* (1966-II) p. 247, and Report of the International Law Commission on the work of its fifty-third session, *supra* n. 2, at p. 208). In the *Nicaragua* case (Merits), the ICJ referred to frequent statements by state representatives arguing that the prohibition to *use* force as contained in Art. 2(4) of the Charter is not only a principle of customary international law, but also 'a fundamental or cardinal principle of such law' (*supra* n. 62, at para. 190). It is far from clear whether that means *jus cogens* and, if so, whether the Court shared this view: although President Singh, in his Separate Opinion, seems to support this conclusion (ibid., at p. 153), this is contradicted by Judge Sette-Camara when he argues that 'I firmly believe that the non-use of force as well as non-intervention … are *not only* cardinal principles of customary international law but could *in addition* be recognised as peremptory rules of customary international law which impose obligations on all States' (Separate Opinion, ibid., at p. 199; emphasis added). The *jus cogens* character of the prohibition of the *use* of force was maintained by Judge Elaraby in his Separate Opinion in the *Legality of the Wall* Advisory Opinion (*supra* n. 138, at para. 3.1) and by Judge Simma in the *Oil Platforms* case (Separate Opinion, *supra* n. 138, at para. 9).

170. Fifth preambular paragraph of the Declaration on the Definition of Aggression (GA Res. 3314 (XXIX), 14 December 1974). This is the opinion of R. Ago, 'Eight Report on State Responsibility', *ILC Yearbook* (1980-II, pt. 1) p. 44; R. Müllerson, 'Jus ad bellum: Plus Ça Change (Le Monde) Plus C'Est la Même Chose (Le Droit)?', 7 *Journal of Conflict and Security Law* (2002) p. 169; and N. Ronzitti, *Diritto internazionale dei conflitti armati* (Turin, Giappichelli 2006) p. 33. See also the Report of the International Law Commission on the work of its fifty-third session, *supra* n. 2, at p. 283.

171. It is to be recalled that according to Art. 2 of the Definition of aggression, the Security Council may determine that some uses of force do not amount to aggression if such acts or their consequences are not of sufficient gravity. One cannot see why the same rationale should not apply to threats, too.

true for preliminary conduct: any form of aggression, be it threatened, planned or executed, is prohibited by *jus cogens*.[172] On the other hand, threats of other uses of force, i.e., those serving 'only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression'[173] (e.g., in order to protect the threatener's nationals who are in danger because of the conduct of the threatened state, to pursue an armed band based in foreign territory, or to enforce certain UN resolutions without the Security Council authorization), are still a violation of Article 2(4), as this provision generically prohibits all threats of force regardless of their purpose or intensity, but not of its *jus cogens* core: this is because a group of states maintain their lawfulness. This conclusion presents two advantages. First, it is aligned with the widely accepted point made by the ICJ in its Advisory Opinion on the *legality of nuclear weapons*, according to which the legality of the threat mirrors that of the use of force.[174] Second, it allows to reconcile the apparent inconsistency between the law of treaties and the law of state responsibility in this field, as it will be demonstrated in section 4.2.

4. LEGAL CONSEQUENCES OF THE VIOLATION OF THE PROHIBITION OF THE THREAT OF FORCE

Does the violation of the prohibition of the threat of force entail the same legal consequences as the violation of the prohibition of the use of force? The problem will be discussed in the context of the law of treaties, the law of state responsibility and international criminal law.

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172. This argument finds support in the *travaux préparatoires* of the Definition of aggression. Some delegations suggested during the negotiations that at least some threats (those which are 'of a certain magnitude' and are 'directed against the territorial integrity or political independence of another State or against the territorial integrity or political status of a territory under an international regime') amounted to aggression. On the other hand, the delegations that opposed the inclusion of the threat of aggression in the definition did so only because they feared that this could be used as a pretext to commit aggressive acts under the cloak of self-defence (Report of the 1956 Special Committee on the Question of Defining Aggression, UN Doc. A/3574, GAOR, twelfth session, Suppl. No. 16, p. 7, paras. 53-56).

173. Report of the International Law Commission on the work of its thirty-second session (5 May-25 July 1980), UN Doc. A/35/10, GAOR, thirty-fifth session, Suppl. No. 10, p. 44. According to the Commission, the common features of these less serious forms of the use of force are their limited character 'as regards both duration and the means employed' and the purpose of eliminating a 'grave and imminent danger to the State, some of its nationals or simply to human beings' which the target state is unable or unwilling to eliminate.

174. *Supra* nn. 149 et seq. and corresponding text.

4.1 **Law of treaties**

The threat of force has been used in several occasions to compel a state to sign a treaty. Traditional examples are the 1910 Annexation Treaty Between Korea and Japan,[175] the 1915 Sino-Japanese Treaty incorporating the 'Twenty-one Demands',[176] the 1935 Ho-Umezu Agreement whereby the Nationalists agreed to withdraw their armed forces and government institutions from parts of China's Hebei Province,[177] the Munich Treaty of 29 September 1938, which coerced Czechoslovakia to surrender the Sudeten region to Germany and the consequential German-Czechoslovak Berlin Treaty of 20 November 1938, which imposed German nationality upon Sudeten-Germans,[178] the agreement which established the German protectorate over Bohemia and Moravia, signed by the Czechoslovak President Hácha on 14-15 March 1939 under the Nazi threat of destruction and of aerial bombardment of Prague,[179] and the agreements accepted by French Indo-China under the Japanese threat of force during the Pacific War.[180] More recently, NATO's threats of force played a major role in the acceptance of the Holbrooke Agreements and of the Kumanovo and 3 June 1999 Agreements by Yugoslavia.[181]

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175. Y. Kawasaki, 'Was the 1910 Annexation Treaty Between Korea and Japan Concluded Illegally?', 3 *Murdoch University Electronic Journal of Law* (1996), at <www.murdoch.edu.au/elaw/issues/v3n2/kawasaki.html>.

176. Tokyo Judgment, *supra* n. 3, at pp. 38-39.

177. Ibid., at pp. 246-247, 463.

178. After the outbreak of World War II, Czechoslovakia, France and Britain explicitly declared that the Munich Treaty was void. Czechoslovakia regarded the Sudeten region as a territory temporarily occupied by Germany. The invalidity of the Munich and Berlin Agreements on grounds of duress was upheld by several Dutch courts which had to determine whether the Sudeten Germans had acquired German nationality as a consequence of those treaties: see District Court of Arnhem, *Nederlands Beheers-Instituut* v. *Nimwegen and Männer* (18 November 1952), 18 *ILR* (1951) p. 250 (the decision was however quashed by the Court of Appeal on 18 November 1952: ibid., at p. 251); District Court of The Hague, *Amato Narodni Podnik* v. *Julius Keilwerth Musikinstrumentenfabrik* (31 December 1955 and 11 December 1956), 24 *ILR* (1957) p. 437; Judicial Division of the Council for the Restoration of Rights, *Ratz-Lienert and Klein* v. *Nederlands Beheers-Instituut* (29 June 1956), 24 *ILR* (1957) pp. 537-539 (in a similar decision, the Judicial Chamber of the Council for the Restoration of Legal Rights decided that the petitioners could not be regarded as enemy nationals but it did not explicitly base its decision on the invalidity on the 1938 Treaty: ibid., at pp. 431-433). In *Land Registry of Waldsassen* v. *The Towns of Eger (Cheb) and Waldsassen* (23 March 1965), the Supreme Court of Bavaria did not take position on the question of the invalidity of the Munich Agreement, although the argument was made by the defendants (44 *ILR* (1972) p. 55). The above mentioned decisions are commented by B. Conforti and A. Labella, 'Invalidity and Termination of Treaties: The Role of National Courts', 1 *EJIL* (1990) pp. 51-55.

179. Nuremberg Judgment, *supra* n. 14, at pp. 196-197.

180. Tokyo Judgment, *supra* n. 3, at pp. 334-335, 340-341.

181. On 13 October 1998, the North Atlantic Council issued an Activation Order for Phased Air Operation and Limited Air Option to begin in ninety-six hours should the Federal Republic of Yugoslavia not fully comply with SC Res. 1199 of 23 September 1998 (NATO had already issued

Article 52 of the 1969 Vienna Convention on the Law of Treaties provides that a treaty is void *ab initio* if its conclusion has been procured by either the threat or the use of force in violation of the principles of international law embodied in the Charter of the United Nations.[182] This provision has been considered *lex lata* in today's international law by the ILC[183] and by the ICJ.[184] If a treaty is void, rather than voidable, it is not opposable in any way and cannot be subsequently confirmed or acquiesced by the victim state (Art. 45 of the Vienna Convention).[185] Otherwise, the threatening state could not only force the victim to conclude a treaty under threat, but also to subsequently confirm it.[186] However, the state invoking the nullity of the treaty must initiate the procedure

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an Activation Warning on 24 September). Under such threat to use force, Yugoslavia signed two agreements: one with NATO on 15 October, which established a NATO air surveillance mission over Kosovo and defined the technical aspects of the operation, and another the following day with the Organization for Security and Co-operation in Europe (OSCE) establishing the Kosovo Verification Mission in order to monitor compliance with SC Res. 1199. The agreements were subsequently endorsed by the Security Council in Res. 1203 of 24 October 1998. Yugoslavia came into compliance with the agreements and Res. 1199, but subsequently security forces started re-entering Kosovo. The North Atlantic Council thus decided to maintain the Activation Order for air strikes. Notwithstanding the on-going threat of force (see NATO Press release (99) p. 11, paras. 6-7; NATO Press release (99) p. 12, para. 5; NATO Press release (99) p. 20; NATO Press release (99) p. 21), and unlike the Kosovo Albanian delegation, Yugoslavia did not sign the Rambouillet Interim Agreement for Peace and Self-Government in Kosovo of February 1999. After the outbreak of the hostilities, threats were combined to the use of force: in particular, the threat was to continue the use of force should Yugoslavia not accept a detailed schedule of withdrawals (the NATO spokesman's statement can be read at <www.cnn.com/world/europe/9906/06/kosovo.04/index.html> (6 June 1999)). Yugoslavia eventually accepted the Kumanovo Agreement for the withdrawal of any security forces from Kosovo and the deployment of a NATO-led military force and the Agreement on Political Principles of 3 June 1999.

182. It has been noted that coercion could also originate with a third party, in particular non-state actors (G. Sacerdoti, 'States' Agreements with Terrorists in Order to Save Hostages: Non-Binding, Void or Justified by Necessity?', in N. Ronzitti, ed., *Maritime Terrorism and International Law* (Dordrecht, Nijhoff 1990) p. 33). Sacerdoti refers to the 1985 Agreement between Egypt and Italy by which the latter accepted the terms of the safe conduct for the *Achille Lauro* hijackers.

183. *ILC Yearbook* (1966-II) p. 246.

184. According to the ICJ, '[t]here can be little doubt, as implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void' (*Fisheries Jurisdiction*, *supra* n. 46, at para. 24). The Court dismissed Iceland's argument that the 1961 Exchange of Notes was signed under duress because of lack of sufficient evidence. The same conclusion was reached by the Court in a parallel case (*Federal Republic of Germany* v. *Iceland*, Jurisdiction, Judgment of 2 February 1973, *ICJ Reports* (1973) para. 24).

185. *ILC Yearbook* (1966-II) pp. 239-240. Of course, the parties might freely negotiate a new treaty in a position of equality and without recurring to threats: as noted by the ILC, '[i]f … the treaty were maintained in force, it would in effect be by the conclusion of a new treaty and not by the recognition of the validity of a treaty procured by means contrary to the most fundamental principles of the Charter of the United Nations' (*ILC Yearbook* (1966-II) p. 247).

186. As noted by Schachter, '[A]rticle 52 was explicitly drafted to ensure that the victim state would *not* have the option to validate the void treaty. The assumption was that there would be a

provided in Article 65 and third states have no right to assert that the treaty is void.[187] The victim state could thus be compelled by threats not to initiate such procedure. This has led Dinstein to argue that 'any competent forum should be authorized to recognize the treaty as void, even if no attempt to invoke invalidity has been made by the State directly concerned'.[188]

In the *Lockerbie* case, Libya argued that Article 52 applies not only to the conclusion of a treaty but also to its execution: the provision is therefore violated if a state party to a treaty threatens the use of force to coerce another party not to exercise its rights under that treaty.[189] Be that as it may, the treaty is void only if the threat of force is 'in violation of the principles of international law embodied in the Charter of the United Nations'.[190] Accordingly, the Port-au-Prince Agreement of 18 September 1994 on the restoration of the constitutional government of Haiti, signed by the Provisory President of Haiti Jonassaint and by the US chief negotiator Jimmy Carter, is valid even though it was concluded under the threat of force by the US. In effect, Security Council Resolution 940 of 31 July 1994 had previously authorized member states to use all necessary means to restore the legitimately elected President of Haiti. The threat of force must also be the reason of the conclusion of the treaty for Article 52 to be applicable: as observed, 'it is not the imposition itself which makes an agreement null and void, but the extortion of the consent through the use [or the threat] of force'.[191] For instance, a Memorandum of Understanding was signed by Iraq and the UN on 23 February 1998 under the threats of force by the US and the UK.[192] However, the Iraqi deputy Prime Minister affirmed that the agreement was reached thanks to the diplomatic efforts of the

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continuing effect of the threat or use of force' ('The Settlement with Iran', Conference held at the University of Miami School of Law, 6-7 March 1981, 13 *Lawyer of the Americas* (1981) p. 60).

187. L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Helsinki, Finnish Lawyers' Publishing Company 1988) pp. 294-295.

188. Dinstein, *supra* n. 27, at pp. 41-42.

189. *Lockerbie*, Preliminary Objections, Verbatim Record, CR 97/20, 17 October 1997, p. 57.

190. *ILC Yearbook* (1966-II) pp. 246-247. One of the consequences is that the notion of 'force' under Art. 52 is limited to 'armed force' and does not extend to political and economic pressures (S.S. Malawer, 'A New Concept of Consent and World Public Order: "Coerced Treaties" and the Convention on the Law of Treaties', 4 *Vanderbilt Journal of Transnational Law* (1970-1971) pp. 16-25). Indeed, Art. 52 only delegitimises 'imposed' treaties, and not all unequal treaties.

191. E. Milano, *Unlawful Territorial Situations in International Law* (Leiden, Nijhoff 2005) p. 244. In Bothe's words, '[a] treaty is only procured by coercion if the use or threat of force is directly intended to bring about the treaty or if the treaty is aimed at maintaining a situation which was created by an illegal use of force' (M. Bothe, 'Consequences of the Prohibition of the Use of Force. Comments on Arts. 49 and 70 of the ILC's 1966 Draft Articles on the Law of Treaties', 27 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1967) p. 513).

192. In the Memorandum, Iraq reaffirms its acceptance of all relevant resolutions of the Security Council and its commitment to cooperate fully with the United Nations Special Commission (UNSCOM) and the International Atomic Energy Agency (text at <www.un.org/NewLinks/uniraq.htm>).

UN Secretary-General, and not because of the American and British threats of force.[193] Moreover, the agreement was concluded with the UN, and not with the US or the UK: it could not thus be considered void under Article 52.[194] By the same token, the settlement agreements between the US and Iran concluded in 1981 after the hostage crisis cannot be considered a ransom exacted by Iran under the threat to use force against the hostages and indirectly against the US, since – as Schachter notes – '[t]he conclusion of the settlement agreements was "procured" because each party had what the other wanted', and not because of the threat.[195] The same considerations apply to the 3 June 1999 Agreement accepted by Yugoslavia under the NATO threat to continue the use of force, as the principles contained therein represent a compromise between NATO's demands on one side, and Russia and Yugoslavia on the other.[196] On the contrary, it appears that the existence of a causality link between NATO's threat and use of force and the acceptance of the Kumanovo Agreement by Yugoslavia is confirmed by the wording of its Article II, by NATO's statements and by Yugoslavia's and other states' declarations in the Security Council.[197]

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193. White and Cryer, *supra* n. 27, at p. 280.

194. Ibid.

195. O. Schachter, 'International Law in the Hostage Crisis: Implications for Future Cases', in W. Christopher, et al., eds., *American Hostages in Iran, The Conduct of a Crisis* (New Haven and London, Yale University Press 1985) p. 372. However, Schachter maintains that, even though Art. 52 does not apply to the 1981 settlement agreements because of the particular circumstances of the case, agreements involving a payment to release hostages or property would generally be void because of coercion.

196. Milano, *supra* n. 191, at pp. 244-245.

197. Ibid., at pp. 243-244. Since the coercion exercised by NATO on Yugoslavia was 'in violation of the principles of international law embodied in the Charter of the United Nations', the Kumanovo Agreement is thus null and void under Art. 52 of the Vienna Convention. However, it appears that China implicitly admitted that neither agreement was invalid under Art. 52 by founding its decision not to veto the adoption of SC Res. 1244 of 10 June 1999 (which endorsed the Kumanovo and the 3 June Agreements and decided the establishment of a UN civil administration) on the consent given by Yugoslavia (S. Zappalà, 'Nuovi sviluppi in tema di uso della forza armata in relazione alle vicende del Kosovo', 82 *Rivista di diritto internazionale* (1999) pp. 988-989). The same considerations apply to the support given by the Russian Federation to the conclusion of the Holbrooke Agreements notwithstanding the possible role played by the NATO's Activation Order in Yugoslavia's acceptance (S/PV.3937, 24 October 1998, p. 11). In the proceedings before the ICJ in the *Legality of use of force* case, Yugoslavia invoked the violation of Art. 52 of the 1969 Vienna Convention only in relation to the attempts to coerce it into signing the draft Interim Agreement for Peace and Self-Government in Kosovo, and not to the Holbrooke, Kumanovo or 3 June Agreements (see *Legality of use of force*, Verbatim Record, CR 99/14, 10 May 1999, pp. 41-44, 60). The Court did not pronounce on the merits of the case but in the decision on provisional measures it declared itself to be 'profoundly concerned with the use of force in Yugoslavia [which] raises very serious issues of international law' (*Legality of use of force*, Order on Request for the Indication of Provisional Measures of 2 June 1999, *ICJ Reports* (1999) para. 17).

4.2 **Law of state responsibility**

Under the law of state responsibility, the state that unlawfully threatens to use force has the obligation to cease such threat if it is continuing and to offer appropriate assurances and guarantees of non-repetition.[198] In addition, if damage has been caused (for instance, an economic crisis because tourists have been scared off), the responsible state is under an obligation to make full reparation.[199] On the other hand, the victim state has the right to claim the cessation of the threat, assurances and guarantees of non-repetition and full reparation, and the right to resort to countermeasures.[200] If a state has been coerced by another state to commit an unlawful act under the threat of force, which one is responsible for such act? This case of derived responsibility is covered by Article 18 of the ILC Articles on State Responsibility.[201] According to this provision, the coercing state is co-responsible for the actions of the coerced state towards the victim of the coerced act, regardless of whether or not the coercing state is also bound by the breached obligation. The state exercising the threat of force to coerce another state to commit an unlawful act would thus be responsible for the violation of Art. 2(4) towards the coerced state and for the violation of the obligation in question towards the victim of the coerced act.[202] However, the coercing state 'must be aware of the circumstances that would, but for the coercion, have entailed the wrongfulness of the coerced state's conduct'.[203] As the commentary to Article 18 makes clear, the reference to 'circumstances' means the factual situation and not the coercing state's judgment of the legality of the act.[204] If the coercion amounts to *force majeure*, i.e., if the coerced state had no other choice apart from succumbing to the threats of the coercing state, the responsibility of the coerced state towards the victim state will be exclud-

198. See the letter dated 10 November 2006 from the Iranian permanent representative to the UN Secretary-General, by which Iran asked the Security Council to demand Israel to 'cease and desist immediately' from the threats of force against the Islamic Republic (*supra* n. 88, at p. 2).

199. See, e.g., Bosnia and Herzegovina's requests in its Application to the ICJ in the *Genocide* case, where, *inter alia*, it requested the ICJ to declare that Yugoslavia (Serbia and Montenegro) was under an obligation to cease and desist immediately from all threats of force against Bosnia and Herzegovina and to pay reparations for damages to persons, property and the Bosnian economy and environment (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* n. 125, at para. 64(q)(r)). As mentioned above, however, these requests were not reiterated in the Memorial because Serbia and Montenegro had accepted the ICJ jurisdiction under the terms of the Genocide Convention.

200. Remedies against threats are discussed *infra*, section 5 of this article.

201. The text of the Articles, with commentaries, can be read in Report of the International Law Commission on the work of its fifty-third session, *supra* n. 2, at pp. 43 et seq.

202. Otherwise the injured third state might be deprived of any redress, as the coerced state might rely on *force majeure* as a circumstance precluding the wrongfulness of its conduct.

203. Report of the International Law Commission on the work of its fifty-third session, *supra* n. 2, at p. 167.

204. Ibid.

ed.[205] Nonetheless, a state coerced by the threat of force to participate in the aggression of another country could not invoke *force majeure* as a ground for excluding its responsibility, as the circumstances precluding wrongfulness do not authorize or excuse any violation of a peremptory norm of general international law (Art. 26 of the ILC Articles).

As to the obligations incumbent on states other than the delinquent one, the Declaration on Friendly Relations provides that 'no territorial acquisition resulting from the threat or use of force shall be recognized as legal'.[206] In *Namibia*, the ICJ supported the existence of a duty of non-recognition with regard to unlawful territorial situations in general,[207] but in its 2004 Advisory Opinion on the *Legality of the Wall* the Court linked the duty of non-recognition to the *erga omnes* character of the breached norm.[208] This apparently more restrictive approach would, however, still entail an obligation not to recognize territorial situations arising from an unlawful threat of force, as the prohibition of threats of force is an *erga omnes* one.[209]

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205. Indeed, '[c]ertain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the requirements of article 23. In particular, the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects' (ibid., at p. 184).

206. The principle is also contained in GA Res. 2734 (XXV) (16 December 1970) and in the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations (GA Res. 42/22 (19 November 1987), para. 10).

207. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *ICJ Reports* (1971) para. 126 ('The termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law: in particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effect of such relationship, or of the consequences thereof'). The Court referred the *erga omnes* notion to the effects of non-recognition, not to the character of the breached norm giving rise to the duty of non-recognition. The Court also made clear that the duty of non-recognition does not extend to 'those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory' (ibid., at para. 125).

208. *Legality of the Wall* Advisory Opinion, *supra* n. 138, at para. 159 ('Given the [*erga omnes*] character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction'). This approach is criticised by Judge Higgins in her Separate Opinion, where she argues that '[t]he obligation upon United Nations Members of non-recognition and non-assistance does not rest on the notion of *erga omnes*' (Judge Higgins's Separate Opinion, ibid., para. 38).

209. The Court concluded that the duty not to recognize as legal any territorial acquisition resulting from the threat or use of force reflects customary international law (*Legality of the Wall* Advisory Opinion, *supra* n. 138, at para. 87). The same view was taken by Judge Skubiszewski in his Dissenting Opinion in the *East Timor* case (*East Timor* (*Portugal* v. *Australia*), Judgment of 30 June 1995*, ICJ Reports* (1995) pp. 262-265), although the majority of the Court did not address

A different view, however, seems to be contained in Article 41 of the 2001 ILC Articles on State Responsibility, which provides for the obligation of all states not to recognize and not to render aid or assistance in maintaining those situations created by a serious breach of a peremptory norm of general international law. This provision differs from the Friendly Relations Declaration in that it is not limited to territorial acquisitions involving a transfer of sovereignty and could also cover other modifications of a territorial status regardless of whether or not the sovereign has changed (for instance, the imposition of a demilitarization status). Furthermore, it contrasts with the ICJ approach in the *Legality of the Wall* Advisory Opinion as it relates the duty of non-recognition to the peremptory, and not *erga omnes*, character of the obligation breached.[210] If – as argued by several commentators[211] – only the prohibition of aggression has achieved *jus cogens* status, then one has to conclude that under Article 41 an annexation obtained through the threat of armed force does not entail the obligation for third states not to recognize it (unless, of course, the annexation violates other *jus cogens* provisions, such as the principle of self-determination). It is interesting to note that the ILC Commentary to Article 41 only includes, as examples of situations created by serious breaches of an obligation under peremptory norms of general international law, 'territorial acquisitions brought about by the *use* of force' such as the occupation of Manchuria by Japan and the annexation of Kuwait by Iraq (and not, one could point out, the well-known seizure of the Sudeten region by Germany), and that, when referring to the Declaration on Friendly Relations, the Commentary only mentions the duty not

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the issue. However, it is this commentator's opinion that the customary character of the duty not to recognize territorial situations created through the mere threat of force (as opposed to the use of force) can be doubted. The practice usually mentioned to provide evidence of the existence of such a customary norm only relates to cases of territorial situations produced by the use, and not the threat, of force. The only instances of territorial acquisitions obtained through the mere threat of force date back to the pre-Charter period, the less controversial examples being the above mentioned annexation of Korea by Japan and the surrender of the Sudeten region by Czechoslovakia to Germany, which were both accepted by the international community (strictly speaking, the *Anschluss* of Austria to the German *Reich* on 13 March 1939 was only the indirect result of the Nazi threats: the threat of an invasion caused the Austrian Chancellor Schuschnigg to resign and to be replaced with the Nazi Seyss-Inquart, who eventually signed the law for the reunion of Austria with Germany after German troops had entered Austria (Nuremberg Judgment, *supra* n. 14, at pp. 192-194, 318)). A recent confirmation of the lack of *opinio juris* on this issue is contained in the 1991 Declaration on the guidelines on the recognition of new states in Eastern Europe and in the Soviet Union adopted by the Ministries for Foreign Affairs of the European Community member states, which provides that the Community and its member states would not recognize only territorial entities which are a result of *aggression*, and not of other uses of force, let alone the mere threat of force (31 *ILM* (1992) p. 1487).

210. As to the relationship between *erga omnes* obligations and *jus cogens*, Pellet has pointed out that 'if all norms of *jus cogens* are certainly *erga omnes*, there is no reciprocity; one can think of many obligations *erga omnes* which could hardly be seen as deriving from peremptory norms' ('Can a State Commit a Crime? Definitely, Yes!', 10 *EJIL* (1999) p. 429).

211. *Supra* n. 170.

to recognize acquisitions of territory brought about by the use of force (and not also by the threat of force, although the Declaration explicitly mentions both).[212]

If this conclusion with regard to Article 41 is correct, one cannot fail to note the inconsistency between the law of treaties and the law of state responsibility in this field, which might lead to paradoxical results. In particular, under Articles 52 and 45 of the 1969 Vienna Convention the victim state would not be able to confirm or acquiesce to a treaty of territorial cession concluded under the threat of force, while under Article 41 of the Articles on State Responsibility third states could recognize the situation arising from that treaty as it would fall outside the scope of that provision. The only way to partly reconcile the two positions would be to consider at least threats of aggression as prohibited by a peremptory norm of general international law, as suggested in section 3.2 of this article. The inconsistency would however not be eliminated as far as threats of other uses of force are concerned, but the problem would be mostly academic, as it is unlikely that a use of armed force for limited purposes (such as an intervention to protect nationals abroad) or of limited intensity (e.g., a border incident) will lead to permanent territorial modifications.

4.3 **International criminal law**

If aggression (including its planning and preparation) is widely recognized as a crime under international law entailing individual responsibility in addition to state responsibility,[213] this conclusion is difficult to reach with regard to the threat of aggression, let alone the threat of other uses of force.[214] Article 6 of the Charter of the Nuremberg Tribunal and Article 5 of the Charter of the Tokyo Tribunal both included in the category of crimes against peace activities preliminary to the waging of aggressive war, such as planning, preparation and participation in a common plan or conspiracy for the accomplishment of the foregoing, but not the mere threat of aggression. Accordingly, although the Nuremberg judges pointed out that 'the threat of war … was an integral

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212. Report of the International Law Commission on the work of its fifty-third session, *supra* n. 2, at pp. 288-289 (emphasis added).

213. See A. Cassese, *International Criminal Law* (Oxford, OUP 2003) pp. 111-117; Dinstein, *supra* n. 27, at pp. 117-125.

214. The threats under examination are of course those against other states. Some threats against persons or groups of persons could amount to breaches of international humanitarian law and entail individual criminal responsibility. Art. 51(2) of the 1977 Protocol I additional to the 1949 Geneva Conventions and Art. 13(2) of Additional Protocol II prohibit threats of violence the primary purpose of which is to spread terror among the civilian population. Furthermore, Art. 75(2)(e) of Additional Protocol I and Art. 4(2)(h) of Additional Protocol II prohibit the threat to commit certain acts against protected persons. The ICJ *Nuclear Weapons* Advisory Opinion confirmed that '[i]f an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law' (*supra* n. 33, at para. 78).

part of the Nazi policy',[215] the German threats against Austria and Czechoslovakia were not charged *per se*, but were considered relevant only as evidence of participation in a common plan or conspiracy to commit the subsequent aggressive wars.[216] Similarly, the 1940-1941 threats of force to compel French Indo-China to accept the Japanese demands for the right to station troops and to establish air and naval bases in the French-controlled territories were seen by the Tokyo Tribunal only as elements of the planning and preparation to wage wars of aggression.[217] Article II of the Control Council Law No. 10 for Germany added the 'initiation of *invasions* of other countries' (emphasis added) to the category of crimes against peace, which allowed the tribunals of the occupying powers to consider the Nazi actions against Austria and Czechoslovakia as crimes against peace, even if not linked to the subsequent wars of aggressions and even though they met no or scarce resistance.[218] Threats were not however prosecuted *per se*, but were taken into account as factors determining the aggressive character of Germany's conduct.

The 1954 and 1991 versions of the Draft Code of Offences Against the Peace and Security of Mankind both incorporated the threat of aggression as a separate and specific offence.[219] Article 16(2) of the 1991 Draft defined the threat as 'declarations, communications, demonstrations of force or any other measures which would give good reason to the Government of a State to believe that aggression is being seriously contemplated against that State'.[220] However, the provision on the threat of aggression was eventually omitted in the final 1996 version of the Draft Code transmitted to the General Assembly, because certain

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215. Nuremberg Judgment, *supra* n. 14, at p. 223.

216. The invasion and annexation of Austria and the seizure of Czechoslovakia were not charged as 'aggressive wars' but as 'aggressive acts' or aggressive steps 'in furthering the plan to wage aggressive wars against other countries', as they met no or only scarce resistance by the victim states (Nuremberg Judgment, *supra* n. 14, at pp. 186, 192, 284; see also Indictment, Count One, para. IV(F)(3)).

217. As the Japanese demands were accepted without resistance, the 1940-1941 events were qualified as 'acts of aggression', while the events in 1945 were considered 'war of aggression' against France, as the Japanese ultimatum backed by the threat of military action was rejected and the French troops resisted and engaged in fighting (Tokyo Judgment, *supra* n. 3, at pp. 380-382).

218. See *US* v. *Ernst von Weizsäcker et al.* (the *Ministries* case) (14 April 1949), 16 *ILR* (1949) p. 347 ('[i]t is not reasonable to assume that an act of war, in the nature of an invasion, whereby conquest and plunder are achieved without resistance, is to be given more favourable consideration than a similar invasion, which may have met with some military resistance … We hold that the invasion of Austria was aggressive and a crime against peace within the meaning of Control Council Law No. 10').

219. *ILC Yearbook* (1954-II) p. 151; *ILC Yearbook* (1991-I) p. 203. The Draft Code applies to crimes committed by individuals, but – as noted by Koroma – '[t]hreat of aggression could be imputed both to an individual and to a State, even if, for the time being, only acts attributable to individuals fell under the code' (*ILC Yearbook* (1989-I) p. 295).

220. *ILC Yearbook* (1991-I) p. 203. The reference to 'good reason' was introduced in what was then Art. 13 of the Draft Code in order to distinguish threats from mere verbal excesses (*ILC Yearbook* (1989-I) p. 291).

delegations felt that the concept of 'threat' was too vague to entail individual criminal responsibility.[221] Furthermore, while a few states have included the preparation, planning and incitement of a war of aggression in their criminal codes,[222] the only national legislations criminalizing the threat of force against a foreign state are Article 316 of the Austrian Criminal Code[223] and Article 1(b) of Iraq's Law No. 7 of 9 August 1958, which is also referred to in the Statute of the Iraqi High Tribunal.[224]

The above considerations lead us to agree with Cassese when he argues that the planning of aggressive war without it being followed by action or at least attempt is not an international crime, although it may constitute an internationally wrongful act.[225] Indeed, if this conclusion is correct as far as planning is concerned, it must be valid *a fortiori* for threats of aggression. As to the Rome Statute establishing the International Criminal Court, it is well-known that it does not contain a definition of aggression: such definition should be subsequently adopted consistently with Articles 121 and 123 of the Statute and should also determine the conditions under which the Court will exercise jurisdiction over this crime (Art. 5(2)).[226] The definition must be in accordance with the UN Charter: this would preclude not the criminalization of threats as such (as Art. 2(4) prohibits them), but only of those in self-defence or authorized by the Security Council under Chapter VII. From the works of the Special Working Group on the Crime of Aggression, it is however still not possible to predict whether the threat of aggression will be included in the definition of aggression under the ICC Statute, although it appears that states are reluctant to do so.[227]

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221. *ILC Yearbook* (1993-II, pt. 1) pp. 64 (Australia), 92 (Paraguay), 97 (Turkey), 101 (UK), 103 (US), 108 (Switzerland).

222. See, e.g., Arts. 384-385 of the Armenian Criminal Code, Art. 409 of the Bulgarian Criminal Code, Section 80 of the German Criminal Code, Section 72 of the Latvian Criminal Code, Art. 139 of Moldova's Criminal Code, Arts. 353-354 of the Russian Federation's Criminal Code, Arts. 395-396 of Tajikistan's Criminal Code, Art. 437 of Ukraine's Criminal Code, Art. 151 of Uzbekistan's Criminal Code. Texts at <www.legislationline.org>.

223. The use or threat of force must be aimed at changing the Constitution of a foreign state or to break up its territorial integrity.

224. The Tribunal has thus jurisdiction over 'the abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country' (Art. 14(c)). Even more clearly, Law No. 7 criminalizes 'using the country's armed forces against the brotherly Arab countries threatening to use such forces' (quoted in Cassese, *supra* n. 53, at p. 448). See C. Kress, 'The Iraqi Special Tribunal and the Crime of Aggression', 2 *Journal of International Criminal Justice* (2004) pp. 347-352.

225. Cassese, *supra* n. 213, at p. 114. A proposal on the definition of aggression submitted by Bosnia and Herzegovina, New Zealand and Romania at the Rome Conference on the ICC also suggested that 'planning for aggression that is never carried out would not be enough to found individual criminal responsibility for this crime' (Preparatory Commission for the International Criminal Court, PCNICC/2001/WGCA/DP.2, 27 August 2001, p. 3).

226. Amendments can be considered only after seven years after the entry into force of the Statute and their adoption requires a two third majority of states parties (Art. 121).

227. Informal inter-sessional meeting of the Special Working Group on the Crime of Aggres-

Indeed, no definition of aggression proposed so far explicitly incorporates it, although some of them criminalize the planning and preparation of aggression.[228]

5. REMEDIES AGAINST THREATS OF FORCE

The state victim of a threat of force could refer the situation to the Security Council, which might qualify it as a threat to the peace under Article 39 of the UN Charter and decide to take all necessary steps to maintain or restore international peace and security.[229] For example, in 1967 Cyprus requested the President of the Security Council to convene an immediate emergency meeting in order to discuss the threat of the invasion of the island by Turkish forces,[230] while in November 2006 Iran asked the Security Council to react to the alleged Israeli threats 'by unequivocally condemning them and demanding that the said regime … cease and desist immediately from the threat of the use of force against Members of the United Nations'.[231]

The threatened state could also adopt retortions and non-coercive countermeasures against the threatening state, for instance economic sanctions or the suspension of cooperation agreements.[232] The suspension of or withdrawal from a disarmament treaty can also be a remedy against a threat of force. On 12 March 1993, North Korea announced its intention to withdraw from the Nuclear Non-Proliferation Treaty as a response to the threat implied in the joint and combined US 'Team Spirit' military exercise, that took place in South Korea

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sion, fifth session, ICC-ASP/5/SWGCA/INF.1, pp. 9-10; Report of the Special Working Group on the Crime of Aggression, fifth session, ICC-ASP/5/SWGCA/1, 29 November 2006, p. 2 (at <www.icc-cpi.int/asp/aspaggression.html>).

228. The draft definitions submitted by the States Parties to the ICC Statute can be read at <www.un.org/law/icc/documents/aggression/aggressiondocs.htm>.

229. According to the ILC, '[t]here would … be nothing to prevent a State threatened with aggression from taking any preventive measure not involving the use of force, including recourse to the Security Council and possibly an appeal to regional solidarity arrangements' (*ILC Yearbook* (1989-II, pt. 2) p. 68). By including the expression 'threat to the peace' in Art. 39, the Charter has authorized the Security Council to take not only anticipatory, but also preventive actions, regardless of the imminence of the threat ('In Larger Freedom: Towards Development, Security and Human Rights for All', Report of the Secretary-General, UN Doc. A/59/2005 (21 March 2005), p. 33).

230. *Repertoire of the Practice of the Security Council*, Suppl. 1966-1968 (New York, United Nations 1971) p. 108. The representative of Greece argued that 'the immediate task of the Security Council was to prevent the use of force and to put an end to threat of its use' (ibid., at pp. 108-109). According to the USSR, '[u]nder Article 2, paragraph 4 of the Charter, Cyprus had every right to request the Security Council's protection from the threats against its independence and territorial integrity' (*Repertoire of the Practice of the Security Council*, Suppl. 1964-1965 (New York, United Nations 1968) p. 201).

231. Letter dated 10 November 2006 from the permanent representative of the Islamic Republic of Iran to the UN Secretary-General, *supra* n. 88, at p. 2.

232. McCoubrey and White, *supra* n. 7, at p. 61.

each year from 1976 to 1993 and the aim of which was often to 'persuade' the North Korean government to stop its military nuclear programme and participate in reunification negotiations.[233] The withdrawal was subsequently suspended, but in January 2003 North Korea eventually lifted the suspension as – according to Pyongyang – the US was threatening its security with a blockade and a preventive nuclear attack.[234]

Furthermore, the state victim of a threat of force could resort to verbal counter-threats and/or individually or collectively carry out military exercises and mass troops on the border with the threatening state in preparation for self-defence, without this amounting to a violation of Article 2(4).[235] This scenario materialized in August 1990, when the US government sent troops to Saudi Arabia at its request to help that country face a possible attack by Iraq, which had just occupied Kuwait and was massing armed forces on the Saudi border.[236] Again in 1994, Iraq sent armoured troops at the Kuwaiti border and UK, US and France reacted by deploying naval, air and ground forces in the Persian Gulf following Kuwait's request for assistance, stating that they would resist any new invasion by force.[237] It is true that Article 50(1) of the ILC Articles on State Responsibility provides that countermeasures cannot affect the obligation to refrain from the threat and use of force as embodied in the UN Charter, but the situation the ILC had in mind appears to be that, for instance, of a state threatening to resort to force against the previous violation of a commercial treaty by the other party. It would indeed be unreasonable to expect that the state victim of threats could not respond in kind. It is worth recalling that the above mentioned Declaration on Friendly Relations affirms that states have a

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233. M.A. Myers, Sr., 'Deterrence and the Threat of Force Ban: Does the UN Charter Prohibit Some Military Exercises?', 162 *Military L Rev.* (1999) pp. 133, 140.

234. F.L. Kirgis, 'North Korea's Withdrawal from the Nuclear Nonproliferation Treaty', *ASIL Insights*, January 2003, <www.asil.org/insights/insigh96.htm>. See also M. Asada, 'Arms Control in Crisis? A Study of the North Korean Nuclear Issue', 9 *Journal of Conflict and Security Law* (2004) p. 343.

235. This conclusion is supported by the ICJ decision in the *Corfu Channel* case, *supra* n. 49, at p. 31. Significantly, para. 3 of the USSR draft definition of aggression provided that '[i]n the event of the mobilization or concentration by another State of considerable armed forces near its frontier, the State which is threatened by such action shall have the right to recourse to diplomatic or other means of securing a peaceful settlement of international disputes. It may also in the meantime adopt requisite measures of a military nature similar to those described above, without, however, crossing the frontier' (UN Doc. A/C.6/L.208 (5 January 1952), GAOR, sixth session, Annexes, Agenda item 49, at p. 13).

236. N.D. White and H. McCoubrey, 'International Law and the Use of Force in the Gulf', 10 *International Relations* (1991) p. 351.

237. Blechman and Cofman Wittes, *supra* n. 26, at p. 24. According to Spain, '[t]he Iraqi troop movements and the threat they implied forced the States in the region … to react immediately through preventive and defensive deployment to protect Kuwait' (S/PV.3438, 15 October 1994, p. 8). See also the declaration by the UK representative in the Security Council (S/PV.3438, 15 October 1994, p. 11).

duty to refrain from acts of reprisal involving the *use* of force, and not also the threat of force, and that the same view was taken by the ICJ in *Nicaragua*.[238]

Can the state victim of a threat of force also adopt countermeasures involving the use of force against the threatening state? As such measures are considered unlawful in contemporary international law,[239] the answer would be affirmative only if one should conclude that a threat of force triggers the right to self-defence. Unlike Article 2(4) and Article 39, Article 51 of the UN Charter makes no reference to 'threats' and submits the right to self-defence to the existence of an armed attack: it appears, then, that states facing a threat of force could react coercively only with the authorization of the Security Council.[240] The ILC also stressed that a threat of aggression does not allow a threatened state to resort to force in self-defence under Article 51,[241] and this view has been shared by several states.[242] Nonetheless, in *Nicaragua* the ICJ did not take position on the

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238. *Nicaragua*, Merits, *supra* n. 62, at para. 249.

239. Art. 50(1) of the ILC Articles on State Responsibility. See also the ICJ *Nuclear Weapons* Advisory Opinion, *supra* n. 33, at para. 46.

240. Bothe argues that 'the power to authorize the use of force in the case of a mere threat lies with the Security Council alone', since '[s]uch case remains below the threshold at which a state may decide to use force unilaterally' (M. Bothe, 'Terrorism and the Legality of Pre-emptive Force', 14 *EJIL* (2003) p. 229). According to Singh and McWhinney, a UN member state 'could not possibly be permitted to use force against a threat in the face of the clear provisions of Article 2(3), (4) and Chapter VI of the Charter' (N. Singh and E. McWhinney, *Nuclear Weapons and Contemporary International Law* (Dordrecht, Nijhoff 1989) p. 89). These authors add that '[a]s the general intention of the Charter is to rule out force, including the threat of force, that aspect of self-defence which is based on a threat has been expressly negatived by providing that the exercise of the right before an armed attack takes place would be impaired by other provisions of the Charter and would therefore not be permissible' (ibid., at p. 90). See also the Dutch AIV/CAVV Advisory opinion on pre-emptive action, according to which '[i]t is clear from an analysis of the normal meaning of the terms used in Article 51 that an "armed attack" is not the same as "a threat of an armed attack"' (Netherlands Advisory Council on International Affairs/Advisory Committee on Issues of Public International Law, 'Pre-emptive Action', Advisory opinion, July 2004, <www.aiv-advice.nl>, at p. 15).

241. *ILC Yearbook* (1989-II, pt. 2) p. 68. Some states have quoted verbatim the ILC's words in the proceedings of the *Nuclear Weapons* Advisory Opinion (written statement of the Government of Mexico, 19 June 1995, p. 8; Memorial of the Government of Nauru, 15 June 1995, p. 15; oral statement of Indonesia, Verbatim Record, CR/95/25, 3 November 1995, p. 26).

242. See, e.g., the position of the Non-Aligned Movement, 28 February 2005 and 21 June 2005, at <www.un.int/malaysia/NAM/NAM.html>. Furthermore, Indonesia argued that 'nothing in Article 51 sanctions a standing threat – a threat *in futuro* – by one State against another, named or unnamed. It sanctions only the use of retaliatory force once an armed attack occurs' (*Nuclear Weapons*, Verbatim Record, CR/95/25, 3 November 1995, p. 18; see also Nauru's Memorial, 15 June 1995, p. 3). In *DRC-Uganda*, the DRC argued that 'any military action based on the need to prevent or anticipate forthcoming attacks *cannot be justified on the basis of self-defence*' (*DRC-Uganda*, Verbatim Record, CR 2005/12, 25 April 2005, p. 18). The opposite interpretation 'completely distorts the contemporary conception of self-defence and, indirectly, the entire system prohibiting the use of force established by the United Nations Charter' (Verbatim Record, CR 2005/3, 12 April 2005, pp. 25, 35-37). However, the DRC seems to implicitly acknowledge a right of anticipatory self-defence when it claims that Uganda has no right of self-defence because it

matter, since 'the issue of the lawfulness of a response to the imminent threat of armed attack' was not raised.[243] Similarly, in the case concerning *armed activities in the territory of the Congo* the Court expressed no view on the issue of anticipatory self-defence, as Uganda eventually claimed that its actions were in response to armed attacks that had already occurred.[244] However, the Court was aware that the security needs that Uganda aimed to protect were 'essentially preventative'[245] and held that 'Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters.'[246]

The problem deserves further analysis. The crux of the matter is how imminent the threatened attack is, which determines whether the reaction is anticipatory or preventive.[247] The present writer is among those who assert that a right to anticipatory self-defence against an *imminent* armed attack is consistent not only with customary international law,[248] but also with Article 51 of the UN Charter.[249] It is true that, under a literalist, suicidal reading of

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failed to demonstrate that 'an attack had been carried out, was on the point of being carried out, or was even planned against it' (Verbatim Record, CR 2005/3, 12 April 2005, p. 36).

243. *Nicaragua*, Merits, *supra* n. 62, at para. 194.

244. *DRC-Uganda*, *supra* n. 140, at para. 143; Verbatim Record, CR 2005/7, 18 April 2005, pp. 28-29.

245. *DRC-Uganda*, *supra* n. 140, at para. 143. Indeed, in September 1998 Uganda augmented its forces in eastern Congo and secured control of airfields and river ports in the region as a measure of self-defence against, *inter alia*, 'irresponsible threats of invasion' by the joint Congolese and Sudanese armies (ibid., at paras. 39, 109; and Uganda's Counter-memorial, vol. I, 21 April 2001, pp. 40-43). See also the DRC position, Verbatim Record, CR 2005/3, 12 April 2005, pp. 24-25.

246. *DRC-Uganda*, *supra* n. 140, at para. 148.

247. Although the terminology is controversial in this field, I will refer to self-defence against imminent attacks as 'anticipatory' or 'pre-emptive', and to self-defence against non-imminent attacks as 'preventive'. As rightly observed, the 2002 US National Security Strategy (*infra* n. 255) refers to 'pre-emptive' self-defence with regard to non-imminent attack because it tries to expand the concept of 'imminence' to include the 'new threats' (AIV/CAVV Advisory opinion, *supra* n. 240, at p. 5).

248. 'A More Secure World: Our Shared Responsibility', Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2 December 2004), p. 63.

249. 'In Larger Freedom', *supra* n. 229, at p. 33. Among the states supporting anticipatory self-defence, one can mention Australia, Liechtenstein, Singapore, Switzerland, the UK and the US (C. Gray, 'A Crisis of Legitimacy for the UN Collective Security System?', 56 *ICLQ* (2006) p. 163). Some delegations also made this point during the negotiation of the Definition of aggression (Report of the 1956 Special Committee on the Question of Defining Aggression, *supra* n. 172, at p. 7). In legal literature, see C.H.M. Waldock, 'The Regulation of the Use of Force by Individual States in International Law', 81 *Recueil des Cours* (1952-II) pp. 500-501; J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford, Clarendon Press 1955) p. 315; D.W. Bowett, 'Collective Self-Defence Under the Charter of the United Nations', 32 *BYIL* (1955-1956) pp. 148; S.M. Schwebel, 'Aggression, Intervention and Self-Defence in Modern International Law', 136 *Recueil des Cours* (1972-II) pp. 478-483; R. Higgins, *Problems and*

this provision, the armed attack must 'occur', but under Article 32 of the 1969 Vienna Convention on the Law of Treaties the application of the Article 31 criteria should not lead to an interpretation which is 'manifestly absurd or unreasonable'. It is unrealistic to expect that states will in all circumstances await an attack before reacting. The rationale of self-defence is to avert an armed attack: if the threat of an attack is 'instant, overwhelming, leaving no choice of means, and no moment for deliberation',[250] if, in other words, it is necessary to react in that very moment because otherwise it would be too late, the victim state should be entitled to invoke self-defence.[251] The imminence of the attack must be assessed not only against the time factor but also on the basis of the circumstances of each specific case. In particular, one should take into account the nature and seriousness of the threat, i.e., the weapons and technology that might be employed, the capability of the potential victim to react, the geographical situation, the degree of hostility between the concerned states, the probability that the threat will be implemented if action is not taken, the terrorist nature of the threat, the possible use of alternative, non-coercive means to settle the dispute, and so on.[252] Of course, the state acting in anticipatory self-defence would be required to provide strong evidence, otherwise any unfriendly declaration or conduct might be easily used by a state as a pretext to commit aggression claiming self-defence.[253] Furthermore, the defensive reaction should not be disproportionate with respect to the harm reasonably expected if the threat is put into practice, taking into account 'all circumstances, in particular the scale, kind and location of the threat'.[254]

Nevertheless, the 2002 United States National Security Strategy, as reaffirmed in 2006, tries to expand the definition of 'imminence' of armed attack

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Process: International Law and How We Use It (Oxford, Clarendon Press 1994) p. 242; C. Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', 4 *San Diego ILJ* (2003) p. 15; Ronzitti, *supra* n. 170, at pp. 35-36; T. Gazzini, 'The Rules on the Use of Force at the Beginning of the XXI Century', 11 *Journal of Conflict and Security Law* (2006) pp. 328-329; T.D. Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-emption, Prevention and Immediacy', 11 *Journal of Conflict and Security Law* (2006) p. 366.

250. Letter from Daniel Webster to Henry S. Fox (24 April 1841), 29 *British and Foreign State Papers* pp. 1137-1138.

251. Examples of imminent threats are an advancing army or ships on the horizon or a large-scale mobilisation of troops by an unfriendly neighbouring state on its frontiers (W.H. Taft, IV, 'The Legal Basis for Preemption', 18 November 2002, at <www.cfr.org/publicationphp?id=5250>).

252. See Greenwood, *supra* n. 249, at p. 16; A.D. Sofaer, 'On the Necessity of Pre-emption', 14 *EJIL* (2003) p. 220.

253. It was for this reason that Switzerland opposed to the inclusion of the threat of aggression in the Draft Code of Crimes against the Peace and Security of Mankind, as 'by criminalizing the threat of aggression it may encourage recourse to force in exercise of the right to self-defence, with all the unfortunate consequences that this may entail' (*ILC Yearbook* (1993-II, pt. 1) p. 108).

254. Oral statement of the British Attorney General, *Nuclear Weapons*, Verbatim Record, CR/95/34, 15 November 1995, p. 34.

well beyond the *Caroline* requirements to cover cases where 'uncertainty remains as to the time and place of the enemy's attack'.[255] The Strategy claims a right to 'confront the worst threats before they emerge' and to take 'pre-emptive' (*rectius*: preventive) action when necessary.[256] The main idea behind the doctrine of preventive self-defence is that threats have changed so that now 'if we wait for the threats to fully materialise, we will have waited too long'.[257] As it has been suggested, 'the emphasis is no longer on the imminence of the attack but on the magnitude of the threat'.[258] However, the doctrine of preventive self-defence, which goes well beyond pre-emption, has no basis in international law, either customary or conventional.[259] Indeed, it is hard to see how the requirement of proportionality, which is essential to establish the lawfulness of any reaction in self-defence, could be assessed in case of vague or future threats.[260] It is to be recalled that, forty years ago, the US itself was against a right to preventive self-defence. Even though the installation of Soviet missiles in Cuba was qualified as a threat to the security of the American continent, the US did not invoke the right of preventive self-defence to justify the blockade on the island.[261] As explained by the then Legal adviser to the State Department, '[n]o doubt the phrase "armed attack" must be construed broadly enough to permit some anticipatory response. But it is a very different matter to expand it to include threatening deployments or demonstrations that do not

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255. The National Security Strategy of the United States of America, 20 September 2002, at <www.whitehouse.gov/nsc/nss.pdf> (hereinafter 'US National Security Strategy (2002)'), p. 15. The 2006 version of the document reaffirms the place of 'pre-emption' (The National Security Strategy of the United States of America, March 2006, <www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>, p. 23). Unlike the 2002 document, the 2006 version makes no express reference to international law or the UN (C. Gray, 'The Bush Doctrine Revisited: The 2006 National Security Strategy of the USA', 5 *Chinese JIL* (2006) p. 563).

256. 'Remarks by the President at the 2002 Graduation Exercise of the United States Military Academy at West Point', 1 June 2002, available at <www.nti.org/e_research/official_docs/pres/bush_wp_prestrike.pdf>.

257. Ibid.

258. White, *supra* n. 100, at p. 236. The example made in the Strategy is the acquisition of weapons of mass destruction by a 'rogue state' that supports international terrorism (US National Security Strategy (2002), *supra* n. 255, at pp. 14-15).

259. 'A More Secure World', *supra* n. 248, at p. 63; 'In Larger Freedom', *supra* n. 229, at p. 33; AIV/CAVV Advisory opinion, *supra* n. 240, at p. 20.

260. It has been rightly argued that '[i]f proportionality is applicable in the case of vague threats, the very concept of proportionality disappears; it loses all meaning. Any counter-measures whatsoever may become appropriate to deal with an undefined threat', especially if the proportionality of the counter-measures should be left to the 'subjective sentiment' of the state which considers itself threatened (remarks by O. Corten on behalf of the DRC, *DRC-Uganda*, Verbatim Record, CR 2005/3, 12 April 2005, pp. 46-48). According to Indonesia, the threat of nuclear weapons can never satisfy the principle of proportionality, since 'the magnitude of the event to which a pre-emptive strike is being made is necessarily a matter of speculation' (*Nuclear Weapons*, Verbatim Record, CR/95/25, 3 November 1995, p. 34).

261. N. Ronzitti, 'Forza (uso della)', *Enciclopedia delle discipline pubblicistiche*, Vol. VII (Turin, UTET 1991) p. 18.

have imminent attack as their purpose or probable outcome.'[262] Things might be different now, but it is worth noting that, according to another Department of State's Legal adviser, the 2002 National Security Strategy should be interpreted consistently with the *Caroline* requirements, providing for a right of self-defence only 'in the face of overwhelming evidence of an imminent threat' and 'after the exhaustion of peaceful remedies and a careful, deliberate consideration of the consequences', and exclusively in order to prevent nationals from suffering 'unimaginable harm', and that '[t]he simple fact that a state possesses significant military power or seeks to enhance it would not, in the absence of any evidence that it intends to use its power against others aggressively, justify a preemptive strike against it'.[263] The same position was taken by the UK Attorney General in his advice to the British government on the legality of the war against Iraq.[264]

It is interesting to note that, unlike other defensive alliance treaties that only call for mutual military assistance when an armed attack against a party occurs,[265] Article 2 of the 1981 Protocol on Mutual Assistance in Defence additional to the ECOWAS Treaty provides that 'any armed *threat* … directed against any Member State shall constitute a threat … against the entire Community' and triggers the obligation to give mutual aid and assistance for defence.[266] This provision should however be interpreted consistently with Article 51 of the Charter so to allow only anticipatory, and not preventive, collective self-defence. In any case, according to Article 103 of the UN Charter '[i]n the event of a conflict between the obligations of the Members of the United Nations

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262. A. Chayes, *The Cuban Missile Crisis* (London, OUP 1974) p. 65.

263. Taft, *supra* n. 251. The Legal adviser's words are in clear contrast with those of the Secretary of State, according to which the US 'will seek to dissuade any potential adversary from pursuing a military build-up in the hope of surpassing, or equalling, the power of the United States and our allies' ('Dr. Condoleeza Rice Discusses President's National Security Strategy', 1 October 2002, <www.whitehouse.gov/news/releases/2002/10/20021001-6.html>).

264. Lord Goldsmith argued that '[f]orce may be used in self-defence if there is an actual or imminent threat of an armed attack'. However, 'there must be some degree of imminence', which may depend on the circumstances. He also added that, if the US doctrine of a right to use force to prevent future dangers 'means more than a right to respond proportionately to an imminent attack … this is not a doctrine which … exists or is recognised in international law' (54 *ICLQ* (2005) p. 768). The only states that appear to have somehow supported the doctrine of preventive self-defence are Australia, Israel, Japan and Russia (Gray, *supra* n. 255, at pp. 566-569). North Korea also claimed it was entitled to a preventive strike in the face of a US impending attack (*Keesing's Contemporary Archives* (2003) p. 45238). Also, in January 1997 Turkey threatened to carry out a preventive military strike on any air defence system installed on Cyprus ('Athens and Ankara', *The Times*, 13 January 1997). For states against any wide interpretation of Art. 51 of the Charter, see Gray, *supra* n. 249, at pp. 163-164.

265. See, e.g., Art. 5 of the North Atlantic Treaty, Art. V of the Brussels Treaty establishing the Western European Union, Art. IV of the ANZUS Treaty, Art. IV(1) of the SEATO Treaty and Art. 4 of the Warsaw Pact.

266. Emphasis added.

under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

6. CONCLUSIONS

It is this article's contention that the prohibition of the threat of force against states has a status distinguishable from the prohibition of the use of force and should not be confused with it. This is why it deserves separate analysis. A threat of force can be defined as an explicit or implicit promise of a future and unlawful use of armed force against another state, the realization of which depends on the threatener's will. However, if it is easy to identify explicit threats, such as the *ultimata* referred to in Article 1 of the 1907 Hague Convention III, it might prove difficult to determine the real character of ambiguous declarations and, even more, of certain actions: demonstrations of force such as military exercises or the massing of troops at the border could constitute preparation of aggression, a threat of force or a perfectly lawful act. This article has demonstrated that what distinguishes the threat of force from the other two situations is the existence of *animus minandi* on the part of the state carrying out those actions, i.e., of an intention to put abusive pressure on the victim state without a predetermined decision to use force. Such intention can be inferred from official declarations and documents as well as from the specific factual circumstances of each case in the light of the context of the relations between the concerned actors.

The practice of states and of international organizations analysed in section 3 has clearly shown that the prohibition of the threat of force contained in Article 2(4) reflects customary international law. The fact that a few states have supported the legality of threats for certain law enforcement purposes (the maintenance of international peace and security and the prevention/repression of *jus cogens* violations) prevents the prohibition of *any* threats of force from being qualified as *jus cogens*. This status should be limited to the prohibition of the threat of aggression, which constitutes the common denominator of the practice and *opinio juris* of all states.

Threats of force produce the same consequences as the use of force as far as the law of treaties is concerned: treaties the conclusion of which has been obtained by either the threat or the use of force in violation of the UN Charter are void *ab initio*. Furthermore, like the use of force, threats entail the obligation of the violator to cease this wrongful act if it is continuing, to provide adequate assurances and guarantees of non-repetition, and, if economic or moral damage has been caused by the threat, to provide full reparation. Nevertheless, Article 41 of the ILC Articles on State Responsibility confines the third states' duty of non-recognition and non-assistance exclusively to situations created by a serious breach of a peremptory norm of general international law. This provision would thus apply to territorial modifications procured by a threat only if one accepts – as we suggest – that not only aggression, but also threats of

aggression are prohibited by *jus cogens*. This conclusion would allow to at least partly reconcile the inconsistency between the law of treaties and the law of state responsibility in this field. Finally, unlike the planning, preparation and execution of aggression, threats of aggression (let alone threats of less serious forms of the use of force) cannot be qualified as international crimes entailing individual responsibility. In contemporary international criminal law, they become relevant only if they are followed by action or at least attempt, and exclusively as evidence or elements of planning, preparation, participation or conspiracy in carrying out acts of aggression.

A state victim of a threat of force could refer the situation to the UN Security Council, adopt retortions or non-coercive countermeasures and also counter-threaten the use of force, without this amounting to a violation of Article 2(4). Armed responses to threats of force would be lawful only within the limits of self-defence and only if the *Caroline* requirements are met, i.e., if the threatened armed attack is so imminent and overwhelming to leave no choice of means and no moment for deliberation, elements which should be assessed not only against the time factor but also taking into account the specific circumstances of each case. On the other hand, coercive responses to non-imminent armed attacks are still prohibited under contemporary international law.