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Mind the gap: The determination, legality and consequences of implicit threats of force

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Abstract

Article 2(4) of the UN Charter prohibits the use of force in international relations and separately bans any threat of force, whether explicit or implicit. However, what constitutes an implicit threat remains ill-defined, undermining the UN Charter's system of collective security. This article addresses the central question: How can implicit threats be more reliably identified? It begins by reviewing the incomplete work of the International Law Commission on threats of force, then develops a framework to distinguish prohibited implicit threats from permissible state behaviour. Grounded in a theoretical understanding of threats of force as forms of communication rather than action, the article offers a clear definition of implicit threats. To exemplify this definition, it adapts the approach of the *Definition of Aggression* resolution, enabling a more precise attribution of *prima facie* responsibility for implicit threats. Subsequently, the article explores possible justifications for implicit threats, identifies their legal consequences and outlines modalities for international responses to such threats. Finally, the article suggests resuming the juridical effort to progressively develop international law in this area.

Keywords: Article 2(4) UN Charter; gaps in law; implicit threats of force; international peace and security; obligations *erga omnes partes*

1. Introduction

Article 2(4) is the centrepiece of the UN Charter's system of collective security, prohibiting any use of force and, separately, any threat of force. The rationale of this separate prohibition is that threats are corrosive of international peace and security, coercing other states as effectively as the actual use of force. However, international practice has tended to condemn threats of force far less consistently than uses of force, often calibrating any condemnation on the seriousness of the threat and broader policy considerations.¹ Stances in the literature are ambiguous, with some scholars disapproving of threats for aggravating existing disputes and others suggesting that they may be used as means to prevent or terminate crises.²

¹See A. Kleczkowska, 'Prohibition of Threats of Force: A Silently Contested Norm?', (2023) 83 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 155, at 156–7.

²See N. Tsagourias, 'The Prohibition of Threats of Force', in N. White and C. Henderson (eds.), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum* (2013), 67 at 73, 87–8; R. Sadurska, 'Threats of Force', (1988) 82 *American Journal of International Law* 239, at 260–6. Specifically on implicit threats see R. Art, 'The Fungibility of Force', in R. Art and K. Waltz (eds.), *The Use of Force: Military Power and International Politics* (2004), 1 at 4.

Threats of force are conventionally divided into two categories, explicit and implicit, which are both prohibited.³ Explicit threats typically involve official statements, such as ultimatums, clearly indicating potential military action. Conversely, implicit threats, often arise from military conduct that lends verisimilitude to a future use of force by the acting state.⁴ These can be more intimidating than explicit statements, as actions often speak louder than less credible words. The military build-up by Russia in December 2021 exemplifies an implicit threat of force.⁵ Despite its size, sophistication and unusual nature, Russia denied plans for invasion, leaving states, including Ukraine, uncertain about its intentions.⁶ The Russian representative to the UN asserted that the positioning of military forces within a state's territory was a sovereign prerogative, not a threatening behaviour - a view shared by China and uncontested by other states.⁷ Without increased international scrutiny, Russia might have coerced Ukraine's political orientation while evading responsibility.

In international law, implicit threats suffer from a high degree of legal uncertainty. The boundary between an unlawful implicit threat and lawful state conduct is often blurred; intent can be difficult to establish,⁸ the underlying action can frequently be framed as a sovereign right. For instance, in the *Nicaragua* case, the International Court of Justice (ICJ) stated that 'in international law there are no rules . . . whereby the level of armaments of a sovereign State can be limited' and concluded that the US military and naval manoeuvres did not contravene international law.⁹

This frames the question that this article will be concerned with: How can implicit threats be more securely ascertained in international law? The purpose of the article is to develop a theoretically grounded and methodologically sound standard for ascertaining implicit threats and distinguishing those from permitted conduct of states in international relations. The discussion begins with a summary of the state of the law of threats. It then develops a standard specifically for implicit threats in three steps. First, it provides a general definition of implicit threats, distinct from explicit ones, and exemplifies the elements of this definition to more securely qualify implicit threats. In the second step, it sets out grounds that could justify threats. Thirdly and finally, it identifies the legal consequences of threats and modalities of international reaction to unlawful threats. In concluding, the article proposes an institutional pathway for progressively developing the prohibition on states to make implicit threats of force in their international relations.

2. Threats of force: An incomplete juridical journey

The international prohibition of threats of force, distinct from the use of force, is well established and grounded in Article 2(4) of the UN Charter, which states:

³See M. Roscini, 'Threats of Armed Force and Contemporary International Law', (2007) 54 *Netherlands International Law Review* 229, 240 (hostile intent required for both). Similarly, M. Walzer, *Just and Unjust Wars* (2000), 81.

⁴The 1954 ILC Draft Code of Offences Against the Peace and Security of Mankind differentiated between the articulated 'threat' and the 'preparations' by the authorities to use force but treated both as offences against peace, in ILC Draft Code of Offences Against the Peace and Security of Mankind, 1954 II YILC 149. More on the distinction between explicit and implicit threats can be found in Section 3, *infra*.

⁵See A. Peters, 'Russia's Threat to Ukraine a Violation of International Law', *Max Planck Law*, 4 February 2022; S. Janković and V. Roeben, 'The Threat of Russia's Force in Ukraine', (2024) 11 *Journal on the Use of Force and International Law* 87.

⁶UN Security Council 8960th Meeting (Threats to International Peace and Security), UN Doc. S/PV.8960 (Russian Representative) (31 January 2022), at 2, 11; M. Quinn, 'Russian Ambassador Insists Kremlin has "No Such Plans" for Invading Ukraine Despite Troop Build-up', *CBS News*, 20 February 2022, available at www.cbsnews.com/news/russia-ukraine-ambassador-anatoly-antonov-no-such-plans-invasion-face-the-nation.

⁷See UN Doc. S/PV.8960, *ibid.* (Ghana's Representative), at 9, (China's Representative), at 10.

⁸On 'manifest intention' see *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objections, Judgment of 22 July 1952, [1952] ICJ Rep. 93, at 106–7; Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015, [2015] ICJ Rep. 3, at 146–50, where the Court was unable to establish the requisite genocidal intent (*dolus specialis*).

⁹*Military and Paramilitary Activities in and around Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, Paras. 227, 269.

All Members shall refrain in their international relations from *the threat* or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.¹⁰

The Charter prohibition of threats of force has been reiterated and reinforced by the UN General Assembly through the Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (1970) and the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations (1987). The first posits a ‘duty’ to refrain from the threat and use of force, emphasizing that both constitute ‘a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues’.¹¹ The second declaration stipulates that the ‘principle of refraining from the threat and use of force in international relations is universal in character and binding’.¹² In a more specific context, UN General Assembly resolutions, in line with the ICJ’s Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, advocate for a multilateral, universal, and binding agreement prohibiting, among others, ‘the use or threat of use of nuclear weapons’.¹³ In addition, Article 8bis of the 1998 Rome Statute of the International Criminal Court (ICC) establishes individual criminal responsibility for acts of aggression, which constitutes an aggravated form of force.¹⁴ The planning and preparation of such acts, characterized by the Rome Statute as a ‘crime of aggression’, may, in certain circumstances, amount to a threat to commit aggression.¹⁵

Despite the systemic importance of the separate prohibition of threats of force for the Charter law of collective security, the term is not defined in any of the above instruments. Nor do the records of the San Francisco Conference on the UN Charter or the records of the General Assembly resolutions interpreting the principle of the non-use of force clarify what constitutes a threat.¹⁶ The ICJ has touched on this part of the Charter in only a handful of judgments, most notably in *Corfu Channel* and *Nicaragua*. In both cases, the Court concluded that there was no unlawful threat but offered minimal reasoning to support these conclusions. In its *Nuclear Weapons* Advisory Opinion, the ICJ set a standard for assessing the legality of threats and provided a few examples in which a threat would be illegal.¹⁷ In reality, the ICJ was more concerned with the prohibition than any definition of threats of force.¹⁸

The International Law Commission (ILC) has undertaken a sustained and detailed effort to define threats of force, although it ultimately abandoned the project. The Commission took up the matter in the context of the Code of Offences against Peace and Security of Mankind (later renamed the Code of Crimes against Peace and Security of Mankind) between 1951 to

¹⁰1945 Charter of the United Nations, XV UNCIO 335, amendments in 557 UNTS 143, 638 UNTS 308 and 892 UNTS 119, Art. 2(4) (emphasis added).

¹¹Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV) (24 October 1970), Principle I.

¹²Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UN Doc. A/42/22 (18 November 1987), Principle I(2).

¹³UN Doc. A/RES/51/45 (10 January 1997), UN Doc. A/RES/76/46 (6 December 2021). See also Draft resolution I ‘Convention on the Prohibition of the Use of Nuclear Weapons’, UN Doc. A/78/410 (10 November 2023), at 5.

¹⁴1988 Rome Statute of the International Criminal Court, 2187 UNTS 90; and 2010 depositary notification C.N.651.2010 Treaties-8.

¹⁵*Ibid.* See ILC Draft Articles Submitted by the Special Rapporteur, 1985 YILC, Vol. I, at 8, 10, 14, 78–9; Cf. Roscini, *supra* note 3, at 230. See also 1949 North Atlantic Treaty, 34 UNTS 243, Art. 1; UNGA Res. 3314(XXIX) ‘Definition of Aggression’ (14 December 1974); 2002 Constitutive Act of the African Union, 12 RADIC 629, Art. 4.

¹⁶O. Corten, *The Law Against War* (2021), 110.

¹⁷The substance of these cases will be discussed throughout this article.

¹⁸But see A. Lagerwall and F. Dubuisson, ‘The Threat of the Use of Force and Ultimata’, in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015), 910 at 914–5 (ICJ’s standard is clear).

1995.¹⁹ In 1985, the ILC Special Rapporteur suggested that a military threat is ‘the intention expressed . . . by a state to commit an act of aggression’.²⁰ The 1989 Commentary to Article 13 of the ILC Draft Code of Offences stipulated that the term ‘threat’ refers to ‘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’.²¹ Article 16 of the ILC’s 1991 Draft Code of Crimes defined all threats in the following way, without distinction between implicit and explicit ones:

Threat of aggression consists of 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.²²

However, this juridical journey remains incomplete. In 1995, the ILC endorsed the Special Rapporteur’s proposal that ‘the crimes of the threat of aggression and intervention should be left aside for the time being because of their vague and imprecise nature’.²³ As a result, the final version of the Draft Code (1996) no longer features a provision on the threat of aggression or force.

In parallel, scholars have sought to establish the ordinary meaning of the term threat in Article 2(4) of the UN Charter, pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), without reaching full consensus.²⁴ In 1963, Brownlie proffered a widely cited definition, characterizing a threat of force as ‘an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government’.²⁵ Sadurska published an influential article in 1988 on threats of force in modern international law. She conceived of a threat as an act of coercion designed to induce ‘a psychological condition in the target of apprehension’, aiming to achieve ‘a genuine reduction in the range of choices otherwise available to states’.²⁶ Stürchler, in one of the few monographs dedicated to the subject, adopted a broad perspective and, in lieu of a single definition, linked threats to the principles of non-intervention, breach of peace, the positive duty of states to negotiate without military pressure, and the use of force itself.²⁷ Stürchler also identified two key qualities of threats: imminence and coercion, emphasizing the need for an existing dispute and credibility. He further noted the presence of threats in practices such as militarization and limited military engagements.²⁸ Grimal, in another monograph, situated the concept of threat within ‘a twilight zone between diplomacy and war’ and concurred with Brownlie’s and Sadurska’s definitions, additionally noting that a threat can also be indirect and concern more than two states (State A supplying State B to threaten State C).²⁹ Grimal explored various dimensions of the issue, including whether preparations for aggression constitute a threat of force, the differential legal and political treatment of threats versus the use of force, the criteria for determining the lawfulness of threats in self-defence, and the legality of non-serious threats. Kleczkowska argued that threats may take the form of physical

¹⁹J. Crawford, ‘The International Law Commission’s Work on Aggression’, in C. Krefß and S. Barriga (eds.), *The Crime of Aggression: A Commentary* (2017), 233 at 234, 237.

²⁰ILC Draft Code of Offences against the Peace and Security of Mankind (Agenda Item 6), Document A/CN.4/387, Third Report on the Draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, 1985 YILC, Vol. II (Part 1), at 73.

²¹ILC Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind, 1989 YILC, Vol. II (Part 2), at 68.

²²ILC Draft Code of Crimes against the Peace and Security of Mankind (Continued), 1991 YILC, Vol. I, at 203.

²³ILC Draft Code of Crimes against the Peace and Security of Mankind (Continued), 1995 YILC, Vol. I, at 15, 20.

²⁴1969 Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331.

²⁵I. Brownlie, *International Law and the Use of Force by States* (1963), 364.

²⁶See Sadurska, *supra* note 2, at 241–2.

²⁷N. Stürchler, *The Threat of Force in International Law* (2009), 37–54.

²⁸*Ibid.*, at 55–64, 259–65.

²⁹F. Grimal, *Threats of Force: International Law & Strategy* (2013), 1, 6–7. See also C. von Clausewitz, *On War* (1982), 157.

actions, written communications, or oral statements, which must be credible and perceived as such by the addressee. The latter subjective elements necessitated a case-by-case analysis.³⁰ Regarding implicit threats, scholars contend that ‘defining the contours of an implicit threat is an inherently difficult task’,³¹ though they largely converge on the concept of a ‘demonstration of force’, which may occur independently or alongside explicit communication, such as an ultimatum. Despite these difficulties, it is widely recognized that implicit threats in the form of actions may exert a greater influence than mere words, whether spoken or written.³²

In sum, the ILC interpretation remains the most precise framework to date for identifying a threat of force and serves as an influential benchmark for scholars and commentators, despite referring to a ‘threat of aggression’ rather than simply force. This definition has four key elements: (i) the action; (ii) credibility; (iii) the author of the threat; and (iv) the single category of threats. Each element warrants critical analysis in light of the international debate and the evolving global context since the 1990s.

First, the ILC conceives of the action underpinning a threat in a notably broad sense, because it also covers ‘other measures than demonstrations of force’, hence non-military means may also fall under this definition. However, it is questionable whether this is consistent with the wording of Article 2(4) of the UN Charter. The international debate has now settled that force within the meaning of the provision refers to armed force, rather than economic or other forms of coercion.³³ Pursuant to the symmetry between uses of force and threats of force, only threats of military (armed) force should be covered. Such symmetry between the two legs of the provision of Article 2(4) of the UN Charter is important for the systematically consistent interpretation mandated by Article 31(1) of the VCLT.

Furthermore, the ILC definition emphasizes credibility. This is clear from the stipulation that there must be a ‘good reason ... to believe that aggression is being *seriously* contemplated’. Similarly, the International Fact-Finding Mission on the Conflict in Georgia of 2008 noted that ‘the emphasis of the practice of states is on credibility. A threat is credible when it appears rational that it may be implemented, when there is a sufficient commitment to run the risk of armed encounter’.³⁴ Yet, while it is convincing to demand credibility and understand it as the probability of armed confrontation, this criterion should not remove low-intensity threats from the ambit of Article 2(4) of the UN Charter. Again, maintaining symmetry with the prohibition on the use of force is important.³⁵ Also, if credibility of the threat is to be assessed from the perspective of the addressee, this invites questions. Thus, what if a state overinterprets a situation, perceiving it as a threat when it is not? Conversely, if a state deliberately chooses to ignore what is objectively a threat, does that obviate the threat? An inter-subjective corrective is required to address these concerns.

Thirdly, the quoted ILC definition does not specify that a threat must originate from a state.³⁶ In contrast, an earlier version had required a ‘threat by the authorities’ of a state.³⁷ By leaving open

³⁰A. Kleczkowska, *Threats of Force and International Law: Practice, Responses and Consequences* (2023), 15–26.

³¹H. Hofmeister, ‘Watch What You Are Saying: The UN Charter’s Prohibition on Threats to Use Force’, (2010) 11 *Georgetown Journal of International Affairs* 107, 110.

³²J. Green and F. Grimal, ‘The Threat of Force as an Action in Self-Defense Under International Law’, (2011) 44 *Vanderbilt Journal of Transnational Law* 285, 295–7.

³³See Section 4.1, *infra*.

³⁴The Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG), Report, Volume II, at 232.

³⁵In *Nicaragua*, the ICJ ruled that ‘skirmishes’ do not constitute an armed attack, the ‘gravest form’ of the use of force, but it did not exclude that this and other less drastic forms of force fall under Art. 2(4) of the Charter. See *Nicaragua v. United States*, *supra* note 9, Paras. 191, 210–1, 247–9. See also *Eritrea–Ethiopia Claims Commission, Jus Ad Bellum (Ethiopia/Eritrea)* (Partial Award) [2005], reprinted in (2006) 45 *International Legal Materials* 430, para. 12; International Law Association, ‘Initial Report on the Meaning of Armed Conflict in International Law’, Rio de Janeiro Conference, 2008, at 9–10, 23–4.

³⁶See also J. Spiropoulos, Second Report of the Draft Code of Offences against the Peace and Security of Mankind, A/CN.4/44 (12 April 1951), reprinted in 1951 YILC, Vol. II, at 58.

³⁷See Report of the ILC on the work of its 6th session, 3 June–28 July 1954, UNGA, 9th session, Supp. No 9, A/2693, 11, Art. 2.2; Cf. Corten, *supra* note 16, at 122 (a threat issued by a low-ranking official does not count as a violation of international law).

the author of the threat, the definition becomes evolutionary. It is true that the inter-state element remains dominant in the use of force domain,³⁸ but the object and purpose of the prohibition to make threats warrant a broader interpretation. Certainly, threats will continue to be primarily issued by states. But the class of potential authors of threats should now encompass non-state actors (NSA), such as insurgencies (e.g. the Polisario Front in Western Sahara), secessionist movements (e.g. the Kosovo Liberation Army (KLA) in Kosovo during the 1990s) and terrorist organizations (e.g. Al Qaeda or Hamas), that are capable of securing arms and can issue credible threats.³⁹ Such entities often rely on threats rather than sustained use of force to compel others. For instance, it was the threat of force by a non-state actor that sparked the debate on anticipatory self-defence.⁴⁰ The reverse scenario is also possible – NSA, or putative states, (e.g. Kosovo, Northern Cyprus, Abkhazia, Taiwan, Nagorno Karabakh) could be the addressees of a threat. Whether these entities qualify as states is debatable, but the scope *ratione personae* of international law has extended to them in certain cases.⁴¹ In sum, the prohibition *ratione personae* exceptionally extends beyond states to other entities where they are capable of making credible threats or being the targets of such threats.

Fourthly, and critically for the purposes of this article, the ILC definition covers the general category of threats without distinguishing between implicit and explicit (or express) threats. It mentions declarations and communications, which may be considered explicit threats of force, as well as demonstrations of force and other measures, which may be considered implicit threats of force. But, it lacks elements that clearly distinguish between the two categories and it is arguably not fine-grained enough to adequately capture implicit threats. In the realm of international relations, implicit threats have gained practical significance. This may have to do with the fact that in the case of implicit threats the dividing line between lawful and unlawful conduct is much blurrier. This ambiguity incentivises powerful states to resort to implicit threats to achieve their objectives while maintaining deniability and avoiding international sanctions.

3. Defining implicit threats of force

This section will develop a definition specifically of implicit threats to reduce this ambiguity. It will build on the ILC's framework, but adapt it to address implicit threats, taking into account the above considerations on action, credibility, and the author of a threat. Section 4 will then provide an exemplifying typology for this general definition.

A starting point for generally defining implicit threats of force is to contrast the terms implicit and explicit. Most dictionaries define explicit as clear and precise and implicit as suggested,⁴² although they acknowledge that these terms may carry different connotations in specific

³⁸See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian-Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, Para. 139.

³⁹Report of the Secretary-General on the situation of Western Sahara, UN Doc. S/2022/733 (3 October 2022). See S. Morel, 'Sahara Occidental: au Front Polisario, la pression monte pour "intensifier la guerre" contre le Maroc', *Le Monde*, 23 January 2023, available at www.lemonde.fr/afrique/article/2023/01/23/sahara-occidental-au-front-polisario-la-pression-monte-pour-intensifier-la-guerre-contre-le-maroc_6158994_3212.html.

⁴⁰A. Haque, 'Self-Defense Against Non-State Actors: All Over the Map Insights from UN Security Council Arria-Formula Meeting', *Just Security*, 24 March 2021.

⁴¹On the application of some aspects of international law to such entities see W. Forster, 'Functional Statehood in Contemporary International Law', (2020) 46 *Brooklyn Journal of International Law* 39; V. Roeben and S. Janković, 'Validity of Contested Title to Territory in Frozen Conflict Zones: The Case of Nagorno Karabakh with Particular Reference to the 2020 War', (2021) 39 *Chinese (Taiwan) Yearbook of International Law and Affairs* 73.

⁴²The *Cambridge Dictionary* (available at dictionary.cambridge.org/) defines the word implicit as 'suggested but not communicated directly'; 'felt by someone or influencing them without them being aware of it', whereas the word explicit as: 'clear and exact'; 'communicated directly in a clear and exact way'. According to the *Collins Dictionary* (available at www.collinsdictionary.com/), the term implicit is defined as something 'expressed in an indirect way', whereas explicit refers to something 'expressed or shown clearly and openly, without any attempt to hide anything'.

contexts.⁴³ A general and intuitive understanding on that basis would be that explicit threats are clear and direct, while implicit threats are inferred or suggested. The follow-on question arises how to determine what makes a threat clear and who determines this clarity.

A possible approach is to define a threat as clear when it is expressed verbally, either orally or in writing, whereas implicit threats are not.⁴⁴ An example could be an ultimatum that clearly articulates the threat of military action should a demand not be met, such the 2023 ECOWAS ultimatum to Niger, which set strict deadlines for the release and reinstatement of deposed President Mohamed Bazoum. The conventional distinction referenced in Section 2 in a similar sense posits that an explicit threat denotes a clearly communicated official statement, while an implicit threat is action. Despite its apparent simplicity, this exclusively formalist approach has shortcomings. In the reality of international relations, such formalism has faded in relevance; formal declarations of war, for instance, have essentially disappeared giving way to less formal and conventional practices.⁴⁵ Therefore, a slight deviation from the formalist approach is needed, allowing for the possibility that a statement can constitute an implicit threat. In state practice, there are examples where opaque or indirect statements were seen as implicit threats of force. For instance, during a debate in the UN Security Council in 1962, Pakistan referred to the official pamphlet issued by India titled 'Kashmir and the United Nations', which stated, 'India is prepared to be patient and tolerant . . . but it is obvious that there is a limit to patience and tolerance.' Pakistan recognized these words to be a threat of force.⁴⁶ One could argue that while the words themselves were not outright threatening, they implied a threat. On the other hand, why should explicit threats be limited to verbal expression and not include actions or other forms of non-verbal communication, as it is the case in many domestic laws?⁴⁷ In conclusion, while an articulated pronouncement - or denial - may be indicative of an explicit threat, this is not decisive in every case.

A more substantive approach that has a sound theoretical grounding is called for. Such grounding can be found in legal theory. Legal realism, for instance, emphasizes the importance of considering the broader context of actions, including power dynamics, inferred intentions, and historical precedent.⁴⁸ These factors are essential for understanding implicit threats because they help explain how actions, rather than explicit statements, can communicate underlying intentions and signals of force. Building on legal theory, international relations provide a more recent and specific contribution to apprehension what characterizes an implicit threat. Thus, the

⁴³See e.g. D. Chandler and R. Munday, *Oxford Dictionary of Media and Communication* (2020).

⁴⁴*Oxford Learner's Dictionaries* (available at www.oxfordlearnersdictionaries.com/) defines the term 'explicit' also in relation to a person, who is saying something clearly, exactly and openly.

⁴⁵See A. Wentler et al., 'Identifying Co-Parties to Armed Conflict in International Law', *Research Paper: International Law Programme*, Chatham House, 6 March 2024, at 10. The ILC definition of military threats includes 'declarations, communications, demonstrations of force'. See 1991 YILC, *supra* note 22, at 203.

⁴⁶India White Paper, 'Kashmir and the United Nations', 1962; see M. A. Khan, 'The Pakistan-American Alliance: Stresses and Strains', (1964) 42(2) *Foreign Affairs* 195, 205.

⁴⁷Art. 222–18 of the French Penal Code (Code Pénal) addresses threats made with a weapon or other means capable of causing death or serious injury, punishable by up to three years of imprisonment and a fine of up to 45,000 euros. Similarly, Section 4 of the UK's Public Order Act 1986 criminalizes the use of threatening, abusive, or insulting words or behaviour intended to cause another person to fear immediate unlawful violence, or to provoke such violence. Courts in Germany and Poland have clarified that general definitions of threats in their respective penal codes include the use of objects like axes, knives, pepper spray, and expandable batons (Germany's OLG Karlsruhe 10th Civil Senate verdict of 5 November 2021, case no. 10 U 6/20; Poland's Supreme Court Judgment of 6 April 2017, case no. V KK 372/16). In the United States, the CA Court of Appeals initially upheld a ruling that simulating the firing of a gun constituted an offense, but the California Supreme Court reversed this decision, finding that such gestures do not violate California Penal Code Section 422, which prohibits criminal threats of harm or death (*People v. Gonzalez*, No. S223763, 2017).

⁴⁸Legal realism is a school of thought in legal theory that emphasizes the role of social, political, and psychological factors in judicial decision-making, suggesting that the law cannot be understood solely by its written rules and formal structures. Consult R.A. Posner, 'Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution', (1986–87) 37 *Case Western Reserve Law Review* 179, 181.

constructivist theory in international relations emphasizes the role of social norms, identities, and discourse in international relations.⁴⁹ Implicit threats may be embedded in a narrative or discourse where states rely on shared understandings and historical contexts to communicate their intentions. By contrast, explicit threats disrupt these narratives by challenging the *status quo* or signalling a significant shift in behaviour.⁵⁰

Insights from strategic studies further shed light on the importance of context in distinguishing implicit and explicit threats. Explicit threats are often integral to a deterrence strategy, where the threatening state seeks to prevent an adversary's action by clearly outlining the consequences. Implicit threats, on the other hand, operate in a more ambiguous space, where the threatening state relies on the adversary's inference of potential consequences without openly stating them.⁵¹ In game theory, explicit threats are akin to moves in a strategic game where intentions and responses are clearly mapped out. Implicit threats, by contrast, introduce uncertainty into the game, forcing the opposing player to guess at the threatening state's intentions and possible moves.

Arguably the most valuable insights can be gained from general theories of communication, such as Grice's Cooperative Principle—based on maxims of clarity, relevance, and truthfulness—or Austin's Speech Act Theory, which suggest that meaning and intent can be inferred from context.⁵² Thus, while a threat that is not verbally communicated might initially be considered implicit, accompanying events on the ground that reveal the coercive intent of the threatening party could render it explicit. The point at which this transition occurs depends on various factors. This focus on the communicative context is further supported by the psychological Theory of Mind, which suggests that individuals recognize that others may have different beliefs, desires, and intentions.⁵³ Implicit threats, therefore, are often analysed through social cues and power dynamics, leading to uncertainty, anxiety, and a prolonged period of strategic calculation—responses that align with Uncertainty Reduction Theory.⁵⁴ In contrast, explicit threats are intended to be understood as direct and unambiguous signals, leaving no room for inference and often triggering immediate defensive reactions, as explained by Stress and Coping Theory.⁵⁵ In the present context, a threatening state assumes that the decision-makers of the target state will infer the intention behind its actions regardless of the form in which the threat is conveyed.

Is this communication-based approach helpful for determining international responsibility under international law? This depends on whether it is consistent with the function of the separate prohibition of threats of force, as distinct from its uses, in Article 2(4) of the UN Charter. The function of this prohibition is to prevent one state from compelling another by threats of force,

⁴⁹J. Brunnée and S.J. Toope, 'Constructivism and International Law', in J.L. Dunoff and M.A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012), 119.

⁵⁰T.C. Schelling, *The Strategy of Conflict* (1960), 59–90; see Grimal, *supra* note 29, at 90–119.

⁵¹Generally, T.C. Schelling, *Arms and Influence* (1966); M.J. Mazarr, 'Understanding Deterrence', Perspective, RAND Corporation 2018, available at www.rand.org/pubs/perspectives/PE295.html.

⁵²See E. Pavlíčková, 'Legal Writing in Light of Grice's Cooperative Principle', in A. Kačmárová (ed.), *English Matters II* (2001), 13 at 15–6. The Speech Act Theory distinguishes between different kinds of speech acts, such as locutionary acts (the actual utterance), illocutionary acts (the intended action performed by the utterance, like promising or ordering), and perlocutionary acts (the effect the utterance has on the listener). For example, a diplomatic statement or a treaty provision might carry a particular illocutionary force, such as a promise, warning, or request, that is understood by other states without being directly stated. See D.W. Harris and R. McKinney, 'Speech-Act Theory: Social and Political Applications', in J. Khoo and R.K. Sterken (eds.), *The Routledge Handbook of Social and Political Philosophy of Language* (2021), 70.

⁵³D. Nabers, 'Towards International Relations Beyond the Mind', (2020) 16 *Journal of International Political Theory* 89; J. Mercer, 'Rationality and Psychology in International Politics', (2005) 59(1) *International Organization* 77.

⁵⁴See C.R. Berger and R.J. Calabrese, 'Some Explorations in Initial Interaction and Beyond: Toward a Developmental Theory of Interpersonal Communication', (1975) 1(2) *Human Communication Research* 99.

⁵⁵R.S. Lazarus and S. Folkman, 'Stress: Appraisal, and Coping', in M.D. Gellman and J.R. Turner (eds.), *Encyclopedia of Behavioral Medicine* (2013), 1913 at 1913–5; H.W. Krohne, 'Stress and Coping Theories', in N.J. Smelser and P.B. Baltes (eds.), *The International Encyclopedia of the Social and Behavioral Sciences* (2001), 15163 at 15163–70.

thereby protecting the free decision-making of state. The prohibition hence focuses on communication between two or more states or equivalent actors. Within the ambit of Article 2(4) of the UN Charter, a use of force is action, whereas a threat is communication. The categories of explicit and implicit threats, therefore, represent different types of communication and coercive messaging. They are distinguished by how the acting state's messaging becomes effective. Thus, explicit threats contain messaging that is straightforward to determine, while implicit threats involve messaging that requires further analysis. For something to qualify as an implicit threat, the acting state's messaging must have an identifiable addressee and refer to a specific future action. This excludes non-targeted phenomena, unsupported assertions, and ambiguous actions from the ambit of implicit threats, as they remain lawful. While some of these phenomena may eventually lead to a threat, they do not constitute a threat to the addressee with force until they are used to convey a targeted message.⁵⁶

Further, explicit threats differ from implicit threats in the way they present gravity, timing, and credibility of the future military action. Gravity refers to the seriousness or severity of the potential consequences, including the scale and impact of the threatened action. Explicit threats often convey the gravity of the potential consequences in a clear and direct manner. The threatening state might specify the extent of the force it intends to use, such as deploying nuclear weapons or launching a full-scale invasion. In the case of implicit threats, the gravity is less clear and must be inferred from actions, context, or the threatening state's capabilities, positioning of forces, or past conduct. Also, in explicit threats the timing is often clearly communicated, whereas implicit threats often lack a clear timeline, creating uncertainty about when or if the threatened action will occur.⁵⁷

On this basis, the following general definition is proposed: An implicit threat of force is a military message aimed at compelling another actor(s) to act, refrain from acting, or tolerate the acts of others. An implicit threat of force must involve coercive messaging with clearly identifiable issuers and addressees. It must also relate to future action that demonstrates a certain level of gravity, imminence, and credibility. State conduct short of this remains lawful.

4. Determining implicit threats of force

This general definition needs to be exemplified to securely determine instances where an implicit threat of force has occurred. Such a two-step approach was employed in the seminal Resolution 3314 (XXIX) defining aggression, which was later replicated in Article 15 of the 1991 ILC Draft Code of Crimes, and Article 8*bis* of the ICC Statute. Resolution 3314, in a first step, provides a general definition of aggression and, in its second step, enumerates acts constituting aggression. Appropriately adapted, this two-step methodology can be applied to threats of force. The first step, the development of a general definition of implicit threats, was undertaken above. This section proceeds to the second step by exemplifying the general definition to formulate a workable test. The proposed test consists of four objective elements and one subjective element. The objective elements require: messaging that targets the addressee's decision-making (Section 4.1.); and reference to a future use of force that is credible, of sufficient gravity, and imminent (Sections 4.2-4.5). Additionally, the subjective element necessitates that the threat be apprehended by the addressee. Each element will now be explored in some depth.

⁵⁶See Section 4.1, *infra*.

⁵⁷See our blog post on Iran's threat of retaliation for Israel's alleged complicity in the killing of a Hamas leader on its soil, highlighting on the uncertainty surrounding whether and when the threat would materialize, S. Jankovic, V. Roeben and F. Grimal, 'Iran's Threat of Retaliation', *Opinio Juris*, 5 September 2024, available at opiniojuris.org/2024/09/05/irans-threat-of-retaliation/.

4.1. The messaging

For implicit threats of force to fall under the proviso in Article 2(4) of the UN Charter, they must be directed against the 'sovereignty, territorial integrity, or political independence' of a state. However, threats are generally issued to compel decision-making by the target state, rather than undermining 'sovereignty' in the abstract. In *Nuclear Weapons*, the ICJ opined that military duress is illegal when used to acquire territory or achieve specific political or economic objectives.⁵⁸ This reasoning can be extended to include messaging aimed at coercing the addressee's social, religious, or other forms of decision-making.

4.1.1. Manifestation of military force

The messaging that characterizes an implicit threat must relate to a future use of force. Force in this sense denotes armed force. This is widely accepted for Article 2(4) of the UN Charter, as well as Articles 1(1) and 39 of the UN Charter that refer to aggression.⁵⁹ Hence, a military message is required. In contradistinction, political or economic pressure do not suffice. In this sense, a bellicose right-wing political party winning an election *per se* does not embody a threat. The dropping of waste on the South Korean part of the border in retaliation for the propaganda leaflets dropped in the North was likewise not a threat. Nor was the organization of a consultative referendum on the annexation of Essequibo to the territory of the Bolivarian Republic of Venezuela tantamount to a threat.⁶⁰ The message of a future use of force may *manifest* itself through a current display of military force.

Military build-ups are the most intuitive type of such manifestation. A dynamic build-up to support a future military operation against an identifiable target stands out qualitatively and quantitatively.⁶¹ Factors such as the size and type of personnel and military equipment deployed, their positioning, and the timing of the deployment are relevant in distinguishing a military build-up from static situations, such as long-established military bases or the longstanding stationing of troops.⁶²

For example, the UK's use of a naval presence to secure compliance with its demand for the evacuation of Taba by Turkish troops was regarded as a 'show of force',⁶³ as was the substantial Iraqi military build-up along the Kuwaiti border in 1994.⁶⁴ More recently, the Russian military build-up in the vicinity of Ukraine in 2022 was perceived as a military threat,⁶⁵ while Belarus characterized NATO's increased military presence on its western and southern borders as becoming threatening in nature, though not yet rising to the level of a threat.⁶⁶ By contrast, the US Camp Bondsteel, established in 1999, would only pose a threat to Serbia if Serbia sought to regain control over Kosovo. Similarly, the militarization of Greek islands in the eastern Aegean Sea,

⁵⁸Cf. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, Para. 47.

⁵⁹C. Kreß, 'Aggression', in R. Geiß and N. Melzer (eds.), *The Oxford Handbook of the International Law of Global Security* (2021), 232 at 236 (who, however, excludes the threat of force from the ambit of aggression). See also Y. Dinstein, 'Aggression', *Max Planck Encyclopedia of International Law*, September 2015, para. 16.

⁶⁰Cf. E. Guapizaca, 'Voting To Annex?: On the Venezuelan 2023 Essequibo Referendum', *Verfassungsblog*, 10 November 2023; N. Tsagourias, 'Essequibo Referendum: An Unlawful Threat of Force?', *EJIL:Talk!*, 18 December 2023. See also *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, CR 2023/23 (14 November 2023). Further, T. Grant, 'Kurdistan After the Referendum of September 25, 2017: Statehood, Recognition, and International Law', (2018) 46 *Georgia Journal of International & Comparative Law* 369, 381–2 (discussing a 'threat' of the new Kurdish State in Iraq after a referendum, which could undermine the territorial integrity of Turkey and Iran).

⁶¹See Green and Grimal, *supra* note 32, at 296–7; B. Slantchev, *Military Threats: The Costs of Coercion and the Price of Peace* (2011), 66–7.

⁶²See Sadurska, *supra* note 2, at 243; See 1989 YILC, *supra* note 21, at 68.

⁶³P.G. Lauren, 'Ultimata and Coercive Diplomacy', (1972) 16 *International Studies Quarterly* 131, 149.

⁶⁴See D. Harris, *Cases and Materials on International Law* (2010), 725.

⁶⁵See UN Doc. S/PV.8960, *supra* note 6, at 6, 7, 20.

⁶⁶*Ibid.*, at 19.

although contrary to the Lausanne Peace Treaty (1923) and the Paris Peace Treaty (1947), is a sign of defensive rather than aggressive intentions. The temporal context is also significant. In the *Corfu Channel* case, the ICJ did not find the UK warships' presence 'at action stations' very close to the Albanian coast to be contrary to international law, considering the immediate post-war period.⁶⁷ However, such demonstrations of force are generally held to be illegal in contemporary state practice.

In contrast to build-ups, aerial, land, and naval manoeuvres are typically not linked to a future armed operation. International practice has developed mechanisms to ensure that such manoeuvres convey routine and non-aggressive messages. Instruments such as the Helsinki Final Act and the Vienna Document encourage states to increase transparency in their military actions through measures including: refraining from organizing major military manoeuvres without prior notice; inviting observers; conducting joint inspections; declaring the levels of armament, and allowing verification missions.⁶⁸ For manoeuvres to be a manifestation of force, they must become 'directed', meaning they communicate to the addressee that they are in preparations for a future operation. Factors such as frequency, sophistication of the weapons and equipment used, and a lack of communication or transparency can contribute to this perception.⁶⁹ At the far end of the spectrum, military parades merely convey a general message of strength to the domestic and international audience, even if they concurrently employ bellicose rhetoric, like those in Iran or North Korea.⁷⁰

An actual use of force can at the same time be a manifestation underpinning the threat of a future military operation. In particular, smaller-scale military incursions into the territory of another state may at the same time constitute a threat of larger-scale aggression. Iraq, Lebanon, and Libya have complained several times to the Security Council using this argument.⁷¹ In fact, many domestic statutes permit the use of force in self-defence in response to foreign military encroachments.⁷² The US Commander's Handbook on the Law of Naval Operations sets forth that 'an aircraft with military markings will be presumed to be conducting a military mission. This is the case both for tactical military aircraft . . . and unarmed military aircraft capable of being used for intelligence-gathering purposes'.⁷³ The Handbook rules operationalize a doctrine of preventive self-defence.⁷⁴ Yet, the mere violation of airspace is better qualified as a threat of force than aggression or a use of force.⁷⁵ The downing of a military or other state aircraft, *a fortiori* a civil aircraft such as a meteorological balloon covered by Article 3*bis* of the Chicago Convention, would require a direct and serious threat to national security as well as the compliance with the proportionality requirements of Article 51 of the Draft Articles on State Responsibility (ARSIWA).⁷⁶ Recurring territorial encroachments that are not acted upon may lose their

⁶⁷*Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949, [1949] ICJ Rep. 4, at 31–2.

⁶⁸See 2011 Vienna Document on Confidence and Security-Building Measures, FSC.DOC. /1/11 (2011).

⁶⁹See Sadurska, *supra* note 2, at 243; see Roscini, *supra* note 3, at 240.

⁷⁰See Reuters, 'Iran Parades New "Longest-Range Drone in the World" in Threat to Israel', *The Jerusalem Post*, 22 September 2023, available at www.jpost.com/middle-east/iran-news/article-760155.

⁷¹Letter dated 1 August 1980 from the *Chargé d'Affaires* A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, Annex, at 2–3, UN Doc. S/14094 (6 August 1980); Letter Dated 13 April 2001 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, UN Doc. S/2001/370 (17 April 2001); Letter Dated 4 February 2003 from the *Chargé d'Affaires* A.I. of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General, UN Doc. S/2003/148 (5 February 2003).

⁷²The 1993 Russian Law on the State Boundary, as amended, in Art. 35 provides for using weapons and combat material, *inter alia*, in the case of an 'armed intrusion'. The 1900 Polish Act on the Protection of State Border, as amended, in Art. 18b(3) provides that a foreign military plane may be destroyed if it ignores commands.

⁷³2022 Commander's Handbook on the Law of Naval Operations, Section 4.4.3.

⁷⁴Critical A.S. Deeks, 'Taming the Doctrine of Pre-Emption', in Weller, *supra* note 18, 661.

⁷⁵O. Dörr, 'Use of Force, Prohibition of', *Max Planck Encyclopedia of International Law*, August 2019, Para. 19.

⁷⁶ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), 2001 YILC, Vol. II (Part 2), Art. 51; 1984 Protocol Relating to an Amendment to the Convention on International Civil Aviation, Art. 3*bis*. Laws allowing

threatening character.⁷⁷ For instance, in 2022, Greece and Turkey accused each other of violating their airspace over 1000 times.

Supplying arms to non-state actors active in another state is a breach of the principle of non-intervention,⁷⁸ but it can also be a use of force. The ICJ in *Nicaragua* established that arming rebels amounts to a use of force.⁷⁹ Similarly, in *Armed Activities on the Territory of the Congo*, the ICJ confirmed that a state providing training and military support to private groups that carry out acts of violence within another state's territory violates the prohibition of the use force.⁸⁰ Hence, messaging that such support will be provided constitutes an implicit threat of force. This principle extends to the provision of arms to states involved in ongoing or probable conflicts, especially when it concerns advanced or nuclear weapons. A pertinent example is the 2023 arms deal between Vladimir Putin and Kim Jong Un.

Finally, emphasis must be placed on the element of attribution, a condition for establishing an internationally wrongful act.⁸¹ The force manifestation must be attributable to a state. Attribution challenges arise when it involves future actions by non-state actors, either acting independently or in coordination with the threatening state's forces. The attribution framework articulated in *Nicaragua* applies here as well. Accordingly, a distinction is to be made between a state's support for non-state actors and the state's control over those actors which would render their actions attributable to the state.

4.1.2. Targeted messaging

This messaging must be targeted. Any force manifestation only constitutes a threat if it specifically targets another state or group of states, for only then can it have coercive effect within the communication framework discussed earlier. Targeting is what differentiates an implicit threat from situations that involve a military element but pose merely a general risk to global stability and peace, such as frozen conflict zones or terrorist organizations.⁸² The question then becomes how to determine that there has been a targeted messaging. The Georgia Report offers valuable guidance, noting that militarized acts become threatening

as soon as they are non-routine, suspiciously timed, scaled up, intensified, geographically proximate, staged in the exact mode of a potential military clash, and easily attributable to a foreign policy message, the hostile intent is considered present and the demonstration of force manifest.⁸³

for the downing of civil aircrafts introduced after the 9/11 terrorist attacks were held unconstitutional, among others, in Germany (Judgment of 15 February 2006 - 1 BvR 357/05) and Poland (Judgment of 30 September 2008, K 44/07). See also B. Foont, 'Shooting down Civilian Aircraft: Is There an International Law', (2007) 72 *Journal of Air Law and Commerce* 695, 698–704.

⁷⁷Cf. A. Kalicka-Mikołajczyk, 'The Good Neighbourliness Principle in Relations Between the European Union and its Eastern European Neighbours', (2019) 9 *Adam Mickiewicz University Law Review* 137. See UNGA Res. 39/78 (13 December 1984) and the four Reports of the Sub-Committee on Good-Neighbourliness, UN Doc. A/C.6/40/L.28; UN Doc. A/C.6/41/L.14; UN Doc. A/C.6/42/L.6; and UN Doc. A/C.6/43/L.11.

⁷⁸M. Bartos, *Medjunarodno javno parvo* (1954), 272. See also Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, UNGA Res. 36/103 (9 December 1981), Ann., Art. 2, Para. f.

⁷⁹See *Nicaragua v. United States*, *supra* note 9, Para. 195.

⁸⁰*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, [2005] ICJ Rep. 168, Paras. 163–5.

⁸¹Cf. ARSIWA, *supra* note 76, Art. 2.

⁸²Since 2005, the Security Council has considered various issues related to threats of international peace and security, focusing on conflict prevention in Africa and on a counter-terrorism strategy. See *Repertoire of the Practice of the Security Council, 2004–2007* (2014), 862.

⁸³See IFFMCG, *supra* note 34, at 232.

Conversely, an inchoate or static fear that may relate to a powerful neighbouring state does not suffice to constitute a threat.

The mere possession of nuclear weapons, for instance, does not normally constitute a threat, as it does not communicate a message specifically targeted at another state. The prevailing opinion among commentators is that nuclear stockpiles and the deterrent policies associated with them are directed *ad omnia* and hence lack the necessary targeting to be a threat of force.⁸⁴ This view is supported by case law. In *Nuclear Weapons*, the ICJ did not consider the mere possession of nuclear weapons to violate Article 2(4) of the UN Charter. A similar conclusion was reached more recently in *Marshall Islands*. In that case, the Marshall Islands had instituted proceedings against the United Kingdom under the compulsory jurisdiction clause, arguing that the UK had failed to meet its disarmament obligations. The ICJ declined jurisdiction due to the lack of a dispute between the parties. In its reasoning, the Court acknowledged the 'suffering' experienced by the Marshall Islands between 1946 and 1958 caused by the US nuclear testing programmes, but determined that the current dormant UK nuclear arsenal, by itself, did not constitute grounds for a dispute.⁸⁵ The Court was not persuaded that the UK's vote against UN General Assembly resolutions on nuclear disarmament or its alleged failure to pursue disarmament negotiations in good faith amounted to sufficient evidence of a dispute.⁸⁶ This rationale can be extended to the substantive law question of whether there was a threat: the UK's nuclear stockpile, on its own, did not present a threat directed at or targeted towards the Marshall Islands. However, several judges in separate opinions suggested that the very ownership of nuclear weapons can be regarded as a threat to international peace and security.⁸⁷ Finally, actual nuclear tests may cross this line and amount to a targeted threat. For instance, in the wake of the war in Ukraine, North Korea's continuous nuclear tests compelled Japan to react by enacting the 2022 National Security Strategy, which 'dramatically transforms Japan's national security policy after the end of WWII'.⁸⁸ Recent Russian threats to use nuclear weapons provide another example. While the addressee is not clearly defined, it could reasonably be Ukraine and NATO.⁸⁹

It is uncontroversial, furthermore, that a warning by state A given to state B that a state C is contemplating an attack against state B is not a threat by state A, but rather an informational communication.

4.1.3. Associated military conduct

Messaging in the form of manifestations of force should be distinguished from associated military conduct, as the latter, on its own, does not suffice to constitute a threat. Examples of such conduct include increases in military budgets, arms purchases, withdrawal from peace treaties, contracting mercenaries, and providing technical support for military operations. This principle is reflected in the *Nicaragua* case where the ICJ held that the level of a nation's armament is a sovereign prerogative and, in the absence of specific international obligations, cannot constitute a threat

⁸⁴A. Hood and M. Cormier, 'Nuclear Threats Under International Law Part II: Applying the Law' (2024) 7 *Journal for Peace and Nuclear Disarmament* 178, 181–2.

⁸⁵*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment of 5 October 2016, [2016] ICJ Rep. 833, Paras. 16, 44, 48–9.

⁸⁶*Ibid.*, Paras. 55–57.

⁸⁷*Ibid.* (Judge ad hoc Bedjaoui, Dissenting Opinion), Paras. 74–8; *Ibid.* (Judge Cançado Trindade, Dissenting Opinion), Paras. 53, 59, 71, 117, 151; *Ibid.* (Judge Sebutinde, Separate Opinion), Para. 3; *Ibid.* (Judge Robinson, Dissenting Opinion), Para. 2.

⁸⁸National Security Strategy of Japan (December 2022), at 3, 9–10, available at www.cas.go.jp/jp/siryou/221216anzenhou/shou/nss-e.pdf.

⁸⁹Note the revised deterrence nuclear policy of Russia, available at www.armscontrol.org/act/2024-12/news/russia-revises-nuclear-use-doctrine.

under Article 2(4) of the UN Charter.⁹⁰ Nevertheless, if there exist reasonable grounds to believe that these arms may be used for aggressive purposes, this could, in exceptional cases, constitute an implicit threat of force. The Nazi *Wehrwirtschaft* in contravention of the 1919 Versailles Treaty met that test.⁹¹ In contrast, Poland's significant increase in military spending in the wake of the Russian aggression in Ukraine serves defensive purposes.

4.2. Credibility

Implicit threats of force must be credible. In this context, credibility refers to the likelihood that the threat will actually be carried out. This likelihood can be concretized through certain factors, including the perceived intent behind the threat, the issuing state's demonstrated willingness and capacity to follow through, its historical behaviour, and the resources available to support the threatened action.

4.2.1. The existence of a dispute and a related demand

An underlying reason is a necessary condition for a threat to be credible. It is unrealistic to expect any state engaging in military action in the absence of any reason. Following Stürchler's analysis,

a threat will not be perceived or even recognised without there being, so to speak, a peg of dispute on which to hang the expectation of the use of force. Consequently, a threat that contains no reference to a particular dispute, no issue to create pressure against and no element of coercion usually appears meaningless.⁹²

In essence, a dispute between the parties is a prerequisite for a credible threat. Without such a dispute, actions cannot convey a targeted demand to influence a certain course of action. The ILC's Special Rapporteur agreed that a military threat might emanate from conflict zones - 'disputes'; or 'situations' referred to in Chapters VI and VII of the UN Charter, especially Article 33 (regarding disputes likely to endanger international peace and security) or Article 39 (concerning threats to peace).⁹³ It is, thus, essential to first understand what may constitute a relevant dispute. The *Guyana/Suriname* arbitration case provides a pertinent illustration. There, the Arbitral Tribunal examined a maritime boundary dispute between the two states over contested territorial waters and exclusive economic zones. Tensions escalated when a Canadian oil company, licensed by Guyana, began exploratory drilling in the disputed area. Suriname responded by sending naval vessels and ordered the company to cease the drilling and leave the area immediately. The Tribunal found that Suriname's alleged 'law enforcement activities' constituted a threat of military action in contravention of the United Nations Convention on the Law of the Sea, the UN Charter and general international law.⁹⁴ In other words, the threat was credible because it served to enforce the demand of one party to an existing boundary dispute.

Further, it becomes important to understand what constitutes a dispute that can lend credibility to a threat. The classic definition frames a dispute as arising from two opposing claims regarding law or fact. Recent jurisprudence from the ICJ provides additional clarity,

⁹⁰See *Nicaragua v. United States*, *supra* note 9, Para. 269.

⁹¹The Treaty of Versailles restricted German ownership of arms and ammunitions and limited the army to just 100,000 men. See 1919 Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), 225 CTS 188, Arts. 159, 160, and 163.

⁹²See Stürchler, *supra* note 27, at 259. Similar, see Brownlie, *supra* note 25, at 364; see Sadurska, *supra* note 2, at 242; A. Randelzhofer, 'Commentary Art. 2(4)', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002), 112 at 129; R. Kolb, *Ius Contra Bellum: Le Droit International Relatif au Maintien de la Paix* (2003), 391.

⁹³See 1985 YILC, *supra* note 20, at 73.

⁹⁴*Guyana v. Suriname*, PCA Case No. 2004-04, Award of 17 September 2007, Para. 445.

particularly on the procedural requirements for recognizing a dispute over which the Court can exercise jurisdiction.⁹⁵ The Court requires specific enough representations that the other party is aware of and cannot wilfully ignore. While this is a procedural definition, an analogy can be drawn to the substantive law context. Thus, general statements devoid of a specific demand, such as Iran's call to 'wipe Israel off the face of the earth' or the North Korean one to sink Japan and reduce the US to 'ashes and darkness', are not disputes that can give credibility to a threat.⁹⁶

4.2.2. *The profile of the party accused of a threat: International reputation, current military capacity and the geographical situation*

A threat becomes more credible if it is likely that the action will be carried out to enforce the demand. At least three factors related to the actor's profile contribute to this likelihood. The first factor is the actor's international reputation, including its record of past military behaviour. If an actor has resorted to explicit or implicit threats of force in the past and followed through on them, it is more likely to do so again.⁹⁷ The second factor is the actor's capacity to perform military operations. A highly armed state with deployable means is more capable of carrying out a threat, whereas an actor without substantial military resources cannot effectively threaten force.⁹⁸ The geographical proximity between the states is the third relevant factor. Generally, states are more capable of conducting military operations in the vicinity of their territories (or from the territory of an ally) than from a distance, making threats between neighbouring states more credible. Indeed, most wars were waged between neighbouring states.⁹⁹ However, this qualification does not apply to military superpowers capable of projecting force and engaging in operations far from their territories.

Against this general backdrop, the likelihood that the acting party will follow through on a threat—and thus lend it credibility—can be analytically assessed. In the literature, Schelling has developed a model for such analysis,¹⁰⁰ drawing on principles reminiscent of game theory.¹⁰¹ According to Schelling, a party evaluates whether a threat is a more effective means of achieving its objective than offering an incentive, and, if so, how to calibrate the threat's intensity.¹⁰² When it becomes evident that the party's payoff is greater if the threat is carried out, the credibility of the threat is significantly enhanced.

⁹⁵This jurisprudence comprises the Marshall Islands case discussed above. See J. McIntyre, 'Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction and Admissibility Before the International Court', (2018) 19 *Melbourne Journal of International Law* 546.

⁹⁶See M. Dixit, 'The Legality of North Korea's Threats to Use of Force', *Cambridge International Law Journal*, 28 November 2017.

⁹⁷This should not be confused with the 'rogue state' phrase that entered the US foreign policy lexicon after the Cold War to describe states posing a threat to world peace. According to the US, these states are ruled by authoritarian or totalitarian governments that severely hamper human rights, sponsor terrorism, or seek to proliferate weapons of mass destruction. See T. Buchwald, 'The Use of Force against "Rogue States"', (2019) 51 *Case Western Reserve Journal of International Law* 177, 178–81. See for a critical approach: P. Minnerop, 'The Classification of States and the Creation of Status within the International Community', (2003) 7 *Max Planck Yearbook of United Nations Law* 79; N. Chomsky, *Rogue States: The Rule of Force in World Affairs* (2000).

⁹⁸Currently 15 states do not maintain armed forces. These are Andorra, Costa Rica, Grenada, Kiribati, Liechtenstein, Marshall Islands, Federated States of Micronesia, Nauru, Palau, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Solomon Islands, Tuvalu, Vatican City. See 'States without Military Forces', available at demilitarization.net/?page_id=100#_ednref1.

⁹⁹C. Gray, *International Law and the Use of Force* (2018), 75.

¹⁰⁰T. Schelling, *The Strategy of Conflict: With a New Preface by the Author* (1981), 40.

¹⁰¹R. Myerson, 'Learning from Schelling's Strategy of Conflict', (2009) 47 *Journal of Economic Literature* 1109, 1109–12, 1119.

¹⁰²T. Schelling, *Randomization of Threats and Promises* (1959), 3–5.

4.3. Gravity

The messaging must also reach a certain level of gravity. The above discussed ILC's definition contains the qualifier 'seriously' to indicate this. While gravity is an essential criterion to exclude *de minimis* events from constituting an implicit threat, calibrating it precisely remains challenging.¹⁰³ How expansive, intense and specific must a threatening message be to meet the minimum gravity threshold? The minimal threshold for a future use of force that can underpin a threat will be pegged to the threshold for actual uses of force. The law on the use of force provides an upward gradation through semantic markers based on scale and effects. For example, aggression is understood as 'the most serious and dangerous form of the illegal use of force'.¹⁰⁴ Further, only the 'most grave forms of the use of force' constitute an 'armed attack', which justify the recourse to self-defence under Article 51 of the UN Charter.¹⁰⁵ This gradation makes it easier to ascertain clear instances where force is used.¹⁰⁶ By contrast, determining the lower threshold for unlawful uses of force is more challenging.¹⁰⁷ Scholars have questioned whether this gradation is transferable to threats¹⁰⁸; others consider it relevant in determining consequences and reactions to threats.¹⁰⁹ It seems, however, convincing that a threat relating to a future aggression or armed attack clears the gravity threshold. On the other hand, a threat related to lower-intensity force is best assessed on a case-by-case basis.

4.4. Imminence

The messaging must pertain to a military action that is sufficiently imminent. Of course, imminence cannot mean a specific time or timeline, for, under the general definition proffered above implicit threats often lack a clear timeline, creating uncertainty about when or if the threatened action will occur. Rather, the criterion of imminence excludes from the category of implicit threats any latent risks that are only realizable at an indeterminate point in the future. This is in line with the object and purpose of Article 2(4) of the UN Charter, as latent situations lack the power to coerce the current decision-making of the addressee.¹¹⁰ The ICJ's advisory opinion in *Nuclear Weapons* refers to exactly this distinction. There, the Court noted the defensive role of nuclear weapons based on deterrence.¹¹¹ The Court acknowledged that such weapons may be used in the future and that their use could be lawful under certain circumstances. However, without an indication of imminent use against a specific target, these weapons constitute a latent risk rather than an implicit threat of force.¹¹² This distinction can be further illustrated by the case of Iran's nuclear programme, which has long been a concern for the international community. Iran's 'inalienable right . . . to develop research, production and use of nuclear energy for peaceful

¹⁰³See Hofmeister, *supra* note 31, at 111; O. Schachter, *International Law in Theory and Practice* (1991), 111. Consult also Crawford, *supra* note 19, at 237–41; M. Milanovic, 'Revisiting Coercion as an Element of Prohibited Intervention in International Law', (2023) 117 *American Journal of International Law* 601, 632–40.

¹⁰⁴See UNGA Res. 3314(XXIX), *supra* note 15, Preamble; RC/Res.6 'The Crime of Aggression' (2010), Annex III (Understandings).

¹⁰⁵See *Nicaragua v. United States*, *supra* note 9, para. 191; *Oil Platforms (Iran v. United States of America)*, Judgment of 6 November 2003, [2003] ICJ Rep. 161, Para. 51. See also K. Zemanek, 'Armed Attack', *Max Planck Encyclopedia of International Law*, October 2013, Para. 4; see Dörr, *supra* note 75, Paras. 17–20.

¹⁰⁶See T. Ruys, 'The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?', (2014) 108 *American Journal of International Law* 159. Cf. M. E. O'Connell, 'The True Meaning of Force', (2014) 108 *AJIL Unbound* 141.

¹⁰⁷See C. Tams, 'Commentary on Art. 2(4)', in B. Simma et al. (eds.), *The Charter of the United Nations* (2024), 289.

¹⁰⁸See Stürchler, *supra* note 27, at 44; see Sadurska, *supra* note 2, at 250.

¹⁰⁹See Section 6, *infra*.

¹¹⁰B. Asrat, *Prohibition of Force under the UN Charter: A Study of Art.2* (1991), 140; see Grimal, *supra* note 29, at 111.

¹¹¹See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 58, Para. 48.

¹¹²See UNSC Res. 1695 (15 July 2006) 'reaffirming that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security'.

purposes' is contested on the presumption of non-peaceful intentions.¹¹³ As a result, the Joint Comprehensive Plan of Action (JCPA) was negotiated between the UN Security Council - with Germany and the EU High Representative - and Iran. The agreement substantially reduced Iran's stockpile of low-enriched uranium and established a framework for regular inspections.¹¹⁴ The JCPA addresses a latent situation that, while marked by ongoing tension, does not yet constitute an imminent threat.

In extant conflicts, it can be problematic to establish at what point a latent situation becomes an acute threat. For instance, in 2018, Qatar accused Saudi Arabia of a military threat emanating from the leaked letter sent by Saudi King Salman to French President Emmanuel Macron stating that Saudi Arabia was prepared to consider all measures, including military action, in response to Qatar's purchase of the S-400 defence system from Russia.¹¹⁵ On the backdrop of the tensions following the partition of British India,¹¹⁶ in 2019, Pakistan's Permanent Representative to the UN complained to the First Committee (Disarmament and International Security) that tensions between Pakistan and India had escalated due to the Kashmir dispute. Pakistan expressed insecurity over statements suggesting that India's 'no first use' nuclear weapons policy might have shifted toward a preventive stance.¹¹⁷ In 2021, US Navy commanders expressed concerns about the bolstering of the Russian and Chinese submarine fleets, describing them as a 'persistent, proximate threat'. This threat was amplified by the advanced cruise missiles deployed on these submarines, which 'have the range and accuracy to strike military and civilian targets throughout the US and Canada.'¹¹⁸ Similarly, both the US and Israel have identified Iran's increased production of standard and long-range drones as a significant security concern.¹¹⁹ At the East Asia Summit in Jakarta in September 2023, South Korean President Yoon Suk Yeol described North Korea's nuclear and missile programs as a grave violation of UN Security Council resolutions, posing "an existential threat" to the Indo-Pacific region and a direct threat to regional peace'.¹²⁰ Moreover, in 2010, Russian President Dmitry Medvedev emphasized that Russia viewed the potential NATO membership of Georgia and Ukraine as a threat to its security and that of Europe.¹²¹ Yet, while military alliances based on collective self-defence, such as NATO, can transfer arsenals, technology, and personnel between member states,¹²² these actions in themselves do not constitute a threat of force.

The immediacy criterion is also relevant in escalating conflicts, where the protagonists react to each other's actions. Each military action then at the same time contains a threat of escalation in

¹¹³1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), 729 UNTS 161, Art. 4.

¹¹⁴Letter dated 16 July 2015 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2015/544 (16 July 2015).

¹¹⁵Reuters Staff, 'Qatar Accuses Saudis of Reckless Behaviour After Military Threat Report', *Reuters*, 5 June 2018, available at www.reuters.com/article/gulf-qatar-idUSL5N1T71EP.

¹¹⁶See, among others, India White Paper, *supra* note 46.

¹¹⁷Statement by M. Akram, Permanent Representative of Pakistan to the United Nations, in the General Debate of the First Committee, 14 October 2020, available at statements.unmeetings.org/statements/11.0010/20201014/G9c0MIX9SmUT/VSmNzcTie78L_en.pdf.

¹¹⁸D. Stancy, 'A "Persistent, Proximate Threat": Why the Navy is Preparing for a Fight Under the Sea', *Navy Times*, 10 September 2021, available at www.navytimes.com/news/your-navy/2021/09/10/a-persistent-proximate-threat-why-the-navy-is-preparing-for-a-fight-under-the-sea/.

¹¹⁹Remarks by Ambassador Linda Thomas-Greenfield at a Briefing on the Threat of Iranian Drone Proliferation Hosted by the United States, 12 October 2023, available at usun.usmission.gov/remarks-by-ambassador-linda-thomas-greenfield-at-a-briefing-on-the-threat-of-iranian-drone-proliferation-hosted-by-the-united-states.

¹²⁰N. Ching, 'Yoon: North Korea's Nuclear Program Is "Existential Threat" to Indo-Pacific', *East Asia*, 7 September 2023, available at www.voanews.com/a/yoon-north-korea-s-nuclear-program-is-existential-threat-to-indo-pacific/7258293.html. See also UNSC Res. 1718 (14 October 2006), UNSC Res. 2270 (2 March 2016), UNSC Res. 2375 (3 September 2017).

¹²¹C. Sweeney, 'Medvedev Objects to "Endless" NATO Expansion', *Reuters*, 25 February 2010, available at www.reuters.com/article/us-russia-medvedev-nato-idUSTRE61O2OQ20100225.

¹²²Note that NATO's nuclear sharing arrangements were already in place by the time negotiations for the Nuclear Non-Proliferation Treaty (NPT) began in the 1960s.

the next round, should the other party react. The question, in these constellations, boils down to immediacy. Is the future, implicitly articulated escalation sufficiently proximate to constitute a threat? The current crisis in the Middle East provides illustration.

4.5. *Apprehension of the threat by the affected state and the international community*

The final criterion is subjective: the threat must be apprehended as such by the targeted state. This is especially crucial for implicit threats due to the communicative nature of such threats, as discussed earlier. If the addressee does not apprehend another state's conduct as containing a threat, then that conduct cannot have any motivating effect on it.¹²³

The subjective element was stressed by the Chilean representative in the debate preceding the adoption of the Friendly Relations Declaration, who observed that 'a threat is any action . . . which tends to produce in the other State a justified fear'.¹²⁴ On a domestic level, penal codes often require a threat to evoke a (justified) feeling of worry in the victim,¹²⁵ with criminal investigations typically requiring the victim's complaint.¹²⁶ The apprehension criterion itself is familiar to the system of the Charter. It is well-established that a state can only invoke the right to individual and collective self-defence when it perceives itself as a victim of an armed attack.¹²⁷ The ICJ stated this first in *Nicaragua* and reaffirmed in *Oil Platforms*,¹²⁸ where the Court ruled that the US could not provide military assistance to neutral states engaged in shipping in the Persian Gulf so long as those did not see themselves as victims and formally requested support.

The apprehension test, however, cannot be entirely subjective. A state may overinterpret the actions of another state as constituting a threat. Hence, the implicit threat must be intersubjectively verifiable. The ILC aptly opined that the government of a state concerned must have a 'good reason to believe' that aggression is 'seriously contemplated'.¹²⁹ In demanding seriousness of the threat, the ILC clarified that 'the threat does not depend on the subjective appraisal by the State which feels threatened, but on objective elements capable of verification by an impartial third party'.¹³⁰ A threat should in this sense be realistic from an objective point of view. This is particularly critical in cases of implicit threats, which, as discussed above, require contextual interpretation. The reaction of third states, usually underpinned by their own or shared intelligence reports, can intersubjectively corroborate the apprehension felt by the threatened state.

The intersubjective verification of a threat comes also into play in the opposite scenario, where the targeted state either does not perceive itself as threatened or decides to ignore the threat and refrains from reacting. A purely subjective view would lead to the conclusion that a disregarded or dismissed threat is no threat at all. The answer to the question whether this is convincing depends on the object and purpose of the prohibition of Article 2(4) of the UN Charter to threaten force. While the provision certainly aims to protect the free decision-making of states, it also seeks to prevent the act of threatening force itself. That purpose excludes any effect on the targeted state. Even if a state wilfully ignores a threat, the threat remains unlawful as long as it is discernible to an impartial observer.

¹²³See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 58, at 541 ('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') (Judge Weeramantry, Dissenting Opinion).

¹²⁴UN Doc. A/AC 125/L23 (22 March 1966), Annexes.

¹²⁵See 1861 UK Offences against the Person Act, Section 16.

¹²⁶See 1997 Polish Penal Code, Art. 190.

¹²⁷Cf. J. Crawford, *The Creation of States in International Law* (2006), 219 (intention material for statehood qualification).

¹²⁸See *Nicaragua v. United States*, *supra* note 9, Para. 199; see *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *supra* note 105, Para. 51.

¹²⁹See 1989 YILC, *supra* note 21, at 68.

¹³⁰Report of the International Law Commission on the Work of its Forty-First Session, Official Records of the General Assembly, Forty-Fourth Session, Supplement No. 10, A/44/10 (2 May –21 July 1989), 181.

Preferably, this verification role should be institutionalized. The UNSC, with its primary responsibility for maintaining international peace and security, is well-suited to assume this function.¹³¹ For example, the Security Council received Iranian concerns over alleged Israeli ‘unlawful and insolent threats’ to attack Iran’s nuclear facilities, though it ultimately did not act on them.¹³²

Alternatively, a court or tribunal can provide verification.¹³³ In the two cases in which the ICJ was concerned with potential threats, it actually did not verify the addressee state’s concerns. It downplayed the Albanian concern about potential aggressive actions by the Royal Navy in the Corfu Strait.¹³⁴ Similarly, the Court did not support Nicaragua’s assertion that it was unable to exercise legal rights in the Exclusive Economic Zone and Continental Shelf due to threats by the Colombian Navy.¹³⁵ In this regard, implicit threats call for a novel assessment of evidence-gathering tools, particularly through the work of intelligence services. Intelligence on the acting party can provide crucial insights into the context of a manifestation of force and whether it is likely to serve as a warning or escalate immediately to military action. Intelligence agencies assess threats from various perspectives and through different methods, such as intercepting secret communications, conducting surveillance through sophisticated programs (e.g., Pegasus), monitoring military movements via satellites, and gathering information from local human sources.¹³⁶ Such intelligence must be robust enough to withstand scrutiny in a court setting. In *Questions relating to the Seizure and Detention of Certain Documents and Data*, the ICJ recognized that intelligence (spying) can be evaluated against international standards, in that case - the right of states to a fair process.¹³⁷ Timor-Leste’s indication of an in-camera proceeding to present evidence on the merits highlights a procedural option that could be explored further in the future.

5. The (il)legality of implicit threats of force

The previous section has proposed a test for ascertaining implicit threats of force. For such a threat to exist, there must be a targeted message indicating a future, attributable aggressive act, and this message must be credible and apprehended as such by the addressee or the international community.¹³⁸ A threat meeting these qualifications falls under Article 2(4) of the UN Charter. This section addresses the logical next question, namely whether an established implicit threat can be justified.

Within the Charter system, threats are *prima facie* illegal but can be exceptionally justified just as *prima facie* unlawful uses of force can be, although the specificity of justification may diverge

¹³¹See the debate in the ILC on the institution of criminal proceedings for offences against peace. Report of the International Law Commission on the Work of its Forty-Third Session, Official Records of the General Assembly, Forty-Sixth Session, Supplement No. 10, A/46/10 (29 April-19 July 1991), 90–3.

¹³²See, among many, Letter dated 1 March 2023 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, S/2023/165 (2 March 2023).

¹³³The ICC Statute does not expressly deal with the crime of a threat of aggression. By contrast, the envisaged tribunal for the crimes in Ukraine would deal with the threat. See European Parliament Resolution of 19 January 2023 on the Establishment of a Tribunal on the Crime of Aggression against Ukraine (2022/3017(RSP)).

¹³⁴See *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Counter-Memorial submitted by the Government of the People’s Republic of Albania, 15 June 1948, at 54.

¹³⁵*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* Judgment of 17 March 2016 [2016] ICJ Rep. 3, at 33. Cf. Memorial submitted by the Republic of Nicaragua, 3 October 2014, 70–8.

¹³⁶Consult M. Herman, *Intelligence Power in Peace and War* (2009).

¹³⁷*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order of 4 March 2014, [2014] ICJ Rep. 147. In response to an East Timorese request for the indication of provisional measures, the ICJ ordered Australia not to interfere with communications between East Timor and its legal advisors in arbitral proceedings and related matters.

¹³⁸See Roscini, *supra* note 3, at 229; see Stürchler, *supra* note 27, at 62–3; Cf. M. Wood, ‘Use of Force, Prohibition of Threat’, *Max Planck Encyclopedias of International Law*, June 2013.

slightly in each scenario. In *Nuclear Weapons*, the ICJ held that ‘if the use of force itself in a given case is illegal . . . the threat to use such force will likewise be illegal’.¹³⁹ It followed through to state that, ‘if it [the threat] 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’, propounding symmetry in justification.¹⁴⁰ In light of this, the established exceptions justifying the use to force - authorization by the UN Security Council under Chapter VII of the UN Charter and self-defence against an armed attack under Article 51 of the UN Charter – also justify a state to threaten force.¹⁴¹

It remains controversial whether, in addition, a state can be justified to use force by invitation from ‘illegitimate’ or ‘incompetent’ authorities, to protect and rescue its own citizens abroad, or for a humanitarian intervention,¹⁴² and, by extension, whether these exceptions are valid for issuing threats, if symmetry is to be maintained. On the other hand, scholars that consider threats a suitable means to prevent a conflict from escalating may feel that a threat could be justified if issued for this purpose, a rationale not easily transposable to the use-of-force ambit.¹⁴³ Accepting such additional justificatory grounds for threats, however, risks weakening the Charter system and leading the law of collective security down a slippery slope. Therefore, Security Council authorization and self-defence shall remain the only valid symmetrical justifications for threats of force, whether explicitly or implicitly made.¹⁴⁴ Still, the particularities of implicit threats throw up distinct questions as to how to apply these two justificatory grounds.

First, the UN Security Council is more likely to authorize a use of force rather than making a threat.¹⁴⁵ For example, United Nations Security Council Resolution 678 (1990) authorized the use of ‘all necessary means’ to enforce Resolution 660 (1990) and subsequent relevant resolutions.¹⁴⁶ The US Congress relied on this as the legal basis for military action against Iraq, though this interpretation remains controversial. On 16 October 2002, Congress passed the ‘Authorization for Use of Military Force Against Iraq Resolution of 2002’ (H.J. Res. 114) authorizing the President to use military force to enforce relevant UN Security Council resolutions and defend US national security, which led to the mobilization of US and coalition forces and the invasion of Iraq in March 2003. In contrast, NATO threats issued to the Federal Republic of Yugoslavia (FRY) between 1998-1999 regarding Kosovo remained illegal without explicit authorization to use force.¹⁴⁷ So, even if the threat was intended to prevent a broader humanitarian crisis, the NATO bombing of the FRY being a breach of international law means that the preceding threat was likewise illegal. However, threats can be legitimized *ex post facto* by the UN Security Council. By way of example, the US military threat to Haiti to bring back the disposed president Jean-Bertrand Aristide in the 1991 Haitian *coup d’état* was legalized in 1994 through Security Council Resolution 940, which authorized ‘Member States to form a multinational force under unified command . . . to facilitate . . . the return of the legitimately elected President’.¹⁴⁸

Second, the legality of implicit threats made in self-defence also requires further clarification. Threats can be issued in individual or collective self-defence only in case of an armed attack.

¹³⁹See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 58, Para. 47.

¹⁴⁰*Ibid.*

¹⁴¹Further see C. O’Meara, *Necessity and Proportionality and the Right of Self-Defence in International Law* (2021).

¹⁴²T. Ruys, ‘The “Protection of Nationals” Doctrine Revisited’ (2008) 13 *Journal of Conflict and Security Law* 233; G. Nolte, ‘Intervention by Invitation’, *Max Planck Encyclopedias of International Law*, January 2010, Paras. 22–34; C. Gray, ‘The Use of Force for Humanitarian Purposes’, in White and Henderson, *supra* note 2, 229.

¹⁴³See note 2, *supra*.

¹⁴⁴Also, see Brownlie, *supra* note 25, at 364; see Green and Grimal, *supra* note 32, at 295.

¹⁴⁵Consult UNSC Res. 1154 (2 March 1998) and 1441 (8 November 2002), in which the UNSC indicated to Yugoslavia and Iraq ‘severest’ and ‘serious’ consequences respectively should they not comply with previous resolutions.

¹⁴⁶UNSC Res. 678 (29 November 1990), Para. 2.

¹⁴⁷See B. Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, (1999) 10 *European Journal of International Law* 1, 9; S. Talmon, ‘At Last! Germany Admits Illegality of the Kosovo Intervention’, (2014) 57 *German Yearbook of International Law* 581.

¹⁴⁸UNSC Res. 940 (31 July 1994), Para. 4.

A threat may be made to stop an armed attack that is occurring or to revert an attack that has already occurred.¹⁴⁹ Threats could also be issued to prevent an attack that is imminent. This is to be assessed *ex ante*, akin to the use of force in anticipatory self-defence.¹⁵⁰ Threats aimed at countering a reasonably anticipated attack remain lawful even if the attack that actually occurred did not meet the threshold of an armed attack, as the threats may have lowered the scale of the attack.¹⁵¹ This is an adaptation of the concept of anticipatory self-defence to the particularities of threats of force, but it safeguards essential symmetry with the law governing the use of force.¹⁵² Finally, any threat made in response to an armed attack must be proportionate and necessary. As Secretary Webster noted in the *Caroline* case, ‘threats issued [in self-defence] must still be necessary and proportionate’.¹⁵³ Threats that do not fall under these conditions are unlawful. That implies that a threat received cannot be countered by a threat unless the initial threat implies an armed attack, although it has to be said that the state practice on this question is thin.

6. Consequences of unlawful implicit threats of force

Once an unlawful implicit threat has been established, this is a breach of a primary international obligation, engaging the acting state’s international responsibility under Article 1 of the ARSIWA.¹⁵⁴ This responsibility entails consequences in the form of secondary obligations for the acting state that the Articles set out.

Accordingly, the acting state must cease making the threat. That would usually require it to remove the military manifestation that underpins the targeted messaging. The acting state could also be required to provide reparation to the victim state for any damage suffered from the implicit threat.¹⁵⁵ In addition, the concerned state may take countermeasures aimed at stopping the threat. Any countermeasures must be non-forcible; a threat received cannot be countered by a threat issued.

A further question is in what instances a third state can be held complicit and bear consequences according to Article 16 of ARSIWA for another state’s breach of the no-threat rule. It seems to some observers of state practice that the threshold for complicity in threats is substantially lower than for complicity in the use of force. Messaging relating to financial or military support for another state could be a breach of the no-threat rule.¹⁵⁶ Uganda, for example, perceived alleged Sudanese military support to the Democratic Republic of the Congo as a ‘grave threat’ to its security.¹⁵⁷ This principle extends to the financing of mercenaries operating on another state’s territory. The 1977 Convention for the Elimination of Mercenarism in Africa

¹⁴⁹After the occupation of Kuwait in 1990, the US declared that force would be used if Iraq did not withdraw from Kuwait.

¹⁵⁰See the UN High-level Panel on Threats, Challenges, and Change report entitled ‘A More Secure World: Our Shared Responsibility’, UN Doc. A/59/565 (2 December 2004), Paras. 188–92. See also D. Rothwell, ‘Anticipatory Self-Defence in the Age of International Terrorism’, (2005) 24(2) *University of Queensland Law Journal* 337. It is distinct from the notion of pre-emptive self-defence, where a threat is not imminent but could potentially develop into an attack in the future.

¹⁵¹See Tsagourias, *supra* note 2, at 81; see Green and Grimal, *supra* note 32, at 305 (characterizing self-defence by way of a threat as ‘non-forcible’) Cf. F. Grimal and M. Pollard, ‘Embodied Artificial Intelligence and Jus Ad Bellum Necessity: Influence and Imminence in the Digital Age’, (2022) 53(2) *Georgetown Journal of International Law* 209.

¹⁵²See Kleczkowska, *supra* note 1, at 158; see Stürchler, *supra* note 27, at 55–7.

¹⁵³Letter from Daniel Webster to Henry S. Fox, 24 April 1841, in (1841–42) 29 *British and Foreign State Papers* 1129–3.

¹⁵⁴See ARSIWA, *supra* note 76, Art. 1. See also Commentary on Article 12, Para. 13 (on the treatment of threats of force as a wrongful act).

¹⁵⁵Such differentiation on the secondary level is common in international investment law, for instance in *MTD v. Chile*, the tribunal reduced the amount of reparation because of the contributory negligence of the claimant. See *MTD Equity Sdn Bhd & MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, Paras. 242–243.

¹⁵⁶See Dörr, *supra* note 75, Para. 19. Consult A. Wentker, ‘At War? Party Status and the War in Ukraine’, (2023) 36(3) *Leiden Journal of International Law* 643.

¹⁵⁷*Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Counter-Memorial submitted by the Republic of Uganda, 21 April 2001, 3.

stresses that mercenaries pose a 'grave threat ... to the independence, sovereignty, territorial integrity and harmonious development of Member States of the Organization of African Unity'.¹⁵⁸ The UN Secretary-General and the UNHCR Special Rapporteur on the use of mercenaries have repeatedly condemned the use of mercenaries, foreign fighters and private military and security contractors, underlining their detrimental impact on human rights, international peace and security, and characterized them as a 'threat'.¹⁵⁹

Article 41 of the ARSIWA provides for additional consequences for serious breaches of peremptory norms (*jus cogens*) by third states. This provision obligates third states to refrain from recognizing situations resulting from such breaches and to cooperate in restoring the status *quo ante*.¹⁶⁰ Under the ILC draft conclusions on the identification of peremptory norms, an international rule acquires peremptory status if it is accepted by the whole international community of states and does not permit any derogation.¹⁶¹ Scholars have questioned whether this is the case for threats of force,¹⁶² particularly as threats are neither mentioned in the Commentaries to Articles 26 and 40 nor featured in the ILC's draft Conclusion 23, which enumerates *ius cogens* norms.¹⁶³ The ILC, however, acknowledged that the list of *ius cogens* norms in Conclusion 23 is non-exhaustive.¹⁶⁴ This ambiguity can be addressed by applying the principle of symmetry between threats of force and the use of force, which likewise still has not found a stand-alone position on the list, but has been mentioned throughout the text of the ILC reports on peremptory norms since 1966 as *jus cogens*. Besides, the use of force could arguably by subsumed under the category of aggression, which is listed as a *jus cogens* norm in Conclusion 23.¹⁶⁵ Accordingly, under a proper construction, the enhanced consequences of a breach for peremptory international law apply to force, regardless of whether force is actually used or threatened. This entails for all states a duty of non-recognition of any territorial changes resulting from a threat. Such non-recognition aligns with the Friendly Relations Declaration, which mandates non-recognition as a sanction for threats. It is also consistent with the status of self-determination as a peremptory norm, which can be violated by the implicit threat of force.¹⁶⁶

Independently of whether the prohibition to threaten force has attained *jus cogens* status, consequences will still ensue because it is an obligation *erga omnes*, meaning all states have a legal interest in its observance. Third states can invoke this responsibility of the acting state. Article 48 of ARSIWA provides for the invocation of responsibility by a state other than the injured state. They can also take countermeasures. For instance, in response to the Russian military threat in

¹⁵⁸1977 OAU Convention for the Elimination of Mercenarism in Africa, Doc. CM/817 (XXIX), Annex II Rev.1.

¹⁵⁹See Secretary-General remarks to Security Council meeting on 'Proliferation of Small Arms and Light Weapons and the Phenomenon of Mercenaries: Threats to Peace and Security in West Africa', 18 March 2003. See also UN Doc. A/HRC/42/42/Add.1 (2 July 2019); UN Doc. A/73/303 (6 August 2018).

¹⁶⁰See ARSIWA, *supra* note 76, Art. 41(2).

¹⁶¹ILC Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), 2022 YILC, Vol. II (Part 2), Conclusion 3.

¹⁶²See Roscini, *supra* note 3, at 256–7; A Green 'Questioning the Peremptory Status of the Prohibition of the Use of Force', (2011) 32 *Michigan Journal of International Law* 215, 225–7.

¹⁶³See ARSIWA, *supra* note 76, Commentaries to Article 26 (compliance with peremptory norms) and Article 40 (international responsibility for the breach of *jus cogens* norms). ILC Peremptory Norms of General International Law (*jus cogens*), UN Doc. A/77/10 (2022), 16, 85.

¹⁶⁴*Ibid.*, at 85.

¹⁶⁵In 1966, the ILC stated that the 'law of the Charter [of the United Nations] concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*'. See ILC Draft Articles on the Law of Treaties, 1966 YILC, Vol. II, Commentary to Draft Article 50, Para. 1, at 247.

¹⁶⁶ILC, Fourth Report on Peremptory Norms of General International Law (*jus cogens*) by Dire Tladi, Special Rapporteur UN Doc. A/CN.4/727 (31 January 2019), 48–55. On considering the threat of force as customary international law see, *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, at 262–5 (Judge Skubiszewski, Dissenting Opinion).

Ukraine, Germany decided to halt the Nord Stream 2 pipeline project,¹⁶⁷ while the EU Parliament, in its resolution of 16 December 2021, condemned the large Russian military build-up and suggested that sanctions against Russia should include suspension from the SWIFT payment system.¹⁶⁸ In *Legality of the Wall*, the ICJ linked the duty of non-recognition of territorial changes to the *erga omnes* character of the breached norm, not necessarily its peremptory status.¹⁶⁹ The Court made this observation with reference to aggression.¹⁷⁰ This principle applies by analogy to territorial changes resulting from threats. Furthermore, states are obligated to cooperate to prevent and stop an implicit threat that has this aim.¹⁷¹

The qualification of the prohibition to threaten force as *erga omnes* also has a procedural consequence. In its recent jurisprudence, the ICJ has significantly strengthened the judicial enforceability of international obligations *erga omnes*. In a series of cases starting with *Belgium v. Senegal*, the Court recognized that any state party may institute compliance proceedings without having to demonstrate standing.¹⁷² This jurisprudence will extend to Article 2(4) of the UN Charter; hence any state has standing to institute proceedings in cases of implicit threats, whether directed against itself or against another state.

6.1. Practice

While the consequences of implicit threats can be delineated as above, there is a considerable gulf with practice. So far, there have been very limited consequences for an unlawful threat of force in state practice. For instance, the 1999 Kumanovo Agreement to put an end to the war in Kosovo was imposed on Serbia under the implicit threat of further NATO bombardments. Yet the validity of the Kumanovo Agreement did not come under scrutiny under Article 52 of the VCLT, which indicates that a treaty is void if its conclusion has been procured by the threat or use of force.¹⁷³ The same pertains to the continuous threat by China to intervene in Taiwan where China has not faced any sanctions. While Taiwan is not formally a state, an armed attack would be contrary to the Friendly Relations Declaration stipulating ‘the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence’.¹⁷⁴ Judicial and arbitral bodies have largely remained silent on the consequences of threats. An exception is the *Guyana v. Suriname* award, where the arbitral tribunal of the Permanent Court of Arbitration found that Surinamese naval actions in the disputed area constituted a threat of force contrary to international law. It did, however, reject Guyana’s request for monetary compensation.¹⁷⁵

¹⁶⁷Radio Free Europe, ‘Scholz Says Germany is Putting Nord Stream 2 on Hold, Following Putin’s Actions on Ukraine’, *Radio Free Europe/Radio Liberty*, 22 February 2022, available at www.rferl.org/a/russia-putin-nord-stream-2-pipeline-ukraine-scholz/31716191.html.

¹⁶⁸European Parliament Resolution of 16 December 2021 on the Situation at the Ukrainian Border and in Russian-Occupied Territories of Ukraine (2021/3010(RSP)).

¹⁶⁹See *Legal Consequences of the Construction of a Wall*, *supra* note 38, Paras. 87, 159.

¹⁷⁰*Barcelona Traction case (Belgium v. Spain)* (Second Phase), Judgment of 5 February 1970, [1970] ICJ Rep. 3, Para. 34.

¹⁷¹M. O’Connell, ‘Russia-Ukraine: Resolving the World’s Most Dangerous Conflict’, *EJIL:Talk!*, 1 February 2022.

¹⁷²*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 7 States intervening)*, Preliminary Objections, Judgment of 22 July 2022, [2022] ICJ Rep. 516 (responsibility for an alleged breach of obligations *erga omnes* partes under the Genocide Convention may be invoked through the institution of proceedings before the Court, regardless of whether a special interest can be demonstrated). More in S. Jankovic, ‘Ewa Salkiewicz-Munnerlyn Jurisprudence of the PCIJ and of the ICJ on Interim Measures of Protection’, (2023) 12(2) *Polish Review of International and European Law* 169.

¹⁷³See E. Milano, ‘Security Council Action in the Balkans: Reviewing the Legality of Kosovo’s Territorial Status’ (2003) 14 *European Journal of International Law* 999, 1001–5; see Kleczkowska, *supra* note 1, at 163.

¹⁷⁴See also D. Scheffer, ‘Does Taiwan Have the Right of Self-Defense?’, *Council on Foreign Relations*, 23 November 2021.

¹⁷⁵See *Guyana v. Suriname*, *supra* note 94, Paras. 445, 452.

Scarce and largely lenient state and institutional reactions towards implicit threats may stem from the conviction that some level of threatened force as a deterrent may be necessary to maintain global stability.¹⁷⁶ Schachter has maintained that Article 2(4) of the UN Charter is so rarely invoked against implicit threats due to ‘the subtleties of power relations and the difficulty of demonstrating coercive intent’ as well as ‘the general recognition of and tolerance for disparities of power and of their effect in maintaining the dominant and subordinate relationships between unequal states’.¹⁷⁷ White and Cryer noted that states often issue a ‘collective sigh of relief that actual force has not been used’, while Roscini remarked that unfulfilled threats are considered unworthy of debate, in comparison to the actual use of force when such threats materialize.¹⁷⁸ They may also arise from legal indeterminacy. Waxman pointed out that implicit threats receive less scrutiny because of a methodological preference to look into ‘cases’ or *post factum* patterns, rather than studying less observable factors such as parties’ intentions, perceptions, and signalling.¹⁷⁹ Kleczkowska, partially on this basis, claimed that the prohibition of threats plays a secondary role in maintaining international peace and security.¹⁸⁰ Corten, on the other hand, cautions against any asymmetry between the threat of force and the use of force in terms of international reaction, as states usually condemned both. Those not condemned, he labels as ‘precedents’.¹⁸¹

6.2. Institutional responses

Against this background of an unsatisfactory state practice in reacting to threats, institutionalized responses to implicit threats ought to be considered. This response is primarily for the UN to decide on, as the guardian of Article 2(4) of the UN Charter. From the perspective of the Charter, the institutional response should address threats as potential precursors of aggression and other uses of force. It should aim to manage the risk of an escalation and to discourage the resort to armed force.¹⁸² This function engages both the UN Security Council and the UN General Assembly.

The UN Security has primary responsibility. Faced with an implicit threat of force, the UN Security Council should take a proactive approach. It should closely monitor the situation, gathering intelligence and reports from UN member states, observers, and relevant international organizations to understand the nature and extent of the threat. On this basis, the Security Council should closely engage in diplomatic dialogue with the involved parties to de-escalate tensions. This may include direct negotiations or facilitating communication between the states involved.

The Security Council can also adopt resolutions condemning the implicit threat of force, if necessary. Such resolutions can call for restraint, the cessation of provocative actions, and adherence to international law. Such resolutions fall within Chapter VI of the UN Charter. Should, however, these recommendatory measures fail to bring result, the Security Council pursuant to Article 39 may

¹⁷⁶J. Barker, *International Law and International Relations: International Relations for the 21st Century* (2000), 129–34 (discussing permissible threats of force); H. McCoubrey and N. White, *International Law and Armed Conflict* (1992), 60–1 (discussing permissible responses to threats of force within the self-defence framework); Cf. S. Helmersen, ‘The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations’, (2014) 61(2) *Netherlands International Law Review* 167. Also J. Green, C. Henderson, and T. Ruys, ‘Russia’s Attack on Ukraine and the Jus ad Bellum’, (2022) 9 *Journal on the Use of Force and International Law* 4, 28.

¹⁷⁷O. Schachter, ‘The Right of States to Use Armed Force’, (1984) 82 *Michigan Law Review* 1620, 1625.

¹⁷⁸N. White and R. Cryer, ‘Unilateral Enforcement of Resolution 687: A Threat Too Far?’, (1999) 29(2) *California Western International Law Journal* 243, 246; see Roscini, *supra* note 3, at 231.

¹⁷⁹M. Waxman, ‘Regulating Resort to Force: Form and Substance of the UN Charter Regime’, (2013) 24 *European Journal of International Law* 151, 184–5.

¹⁸⁰See Kleczkowska, *supra* note 1, at 157.

¹⁸¹See Corten, *supra* note 16, at 129 ff.

¹⁸²See Report of the Secretary-General, In Larger Freedom: Towards Developments, Security and Human Rights for All, UN Doc. A/59/2005 (2005), available at www.un.org/largerfreedom.

‘determine the existence of any threat to the peace, breach of the peace, or act of aggression’ and introduce more severe preventive measures provided by Chapter VII of the UN Charter.

Although the threat of force is not explicitly enumerated in Article 3 of Resolution 3314 defining aggression, the list is not exhaustive, and the Security Council, under Article 4, is empowered to determine that the threat of force constitutes an act of aggression. Note that the Security Council has rarely identified a breach of the peace or an act of aggression under Article 39 of the UN Charter. It typically classifies situations as threats to the peace, even in instances where a breach of the peace or an act of aggression appears evident.¹⁸³ Under Article 41 of the UN Charter, the Council could impose sanctions or arms embargoes to deter further escalation, while under Article 42 it could also resort to military actions to ‘restore’ international peace and security.

In practice, the UN Security Council has condemned the threat of force relatively rarely.¹⁸⁴ However, recent Security Council practice points into this direction, even though it is not conclusive. Thus, the Security Council resolutions on the Iraqi-Kuwait dispute had condemned the deployment of a huge number of Iraqi military forces on the border that preceded the attack. In the context of the Russian-Ukrainian war, at the mentioned UN Security Council meetings on the situation in Ukraine, states grounded their diplomatic language and agendas in the international law of collective security and the management of risks to global stability. Almost all recommended the Normandy format in the context of the implementation of the Minsk agreements.¹⁸⁵ In addition, almost all states reaffirmed the principles of sovereignty, territorial integrity and good neighbourliness. At the UN Security Council meeting on 31 January 2022, all members strongly suggested the return to the negotiation table. Western states preferred a stronger accent. Almost all expressed unwavering support for Ukrainian territorial integrity, including the Donetsk and Lugansk regions.¹⁸⁶ Poland and the Baltic states were at the forefront of more decisive rhetoric against Russia.¹⁸⁷ Other states, to the contrary, appealed for a peaceful diplomatic process. India’s representative to the UN, for instance, stated ‘Quiet and constructive diplomacy is the need of the hour. Any steps that increase tension may best be avoided by all sides in the larger interest of securing international peace and security.’¹⁸⁸ Similarly, the Brazilian representative underlined that ‘Open references to military actions, unilateral economic sanctions and other measures are developments that should be avoided, in accordance with the Charter of the United Nations.’¹⁸⁹ The Mexican representative referred to the UN Resolution 3314 defining aggression and said that such would be cause for the Security Council to act,¹⁹⁰ while the Albanian representative mentioned the Budapest Memorandum, which affirms the territorial integrity of Ukraine and provides that Russia, the UK and the US (signatories) must refrain from the threat or use of force against the territorial integrity or political independence of Ukraine.¹⁹¹

The UN General Assembly, as the representative body of the international community, could play a concurrent role in the process in case of a deadlock in the Security Council.¹⁹² It could

¹⁸³See M. Wood, ‘Peace, Breach of the’, *Max Planck Encyclopedias of International Law*, April 2009, Paras. 6–13.

¹⁸⁴See UNSC Res. 327 (2 February 1973) on Rhodesia; UNSC Res. 347 (24 April 1974) or UNGA Res. 36/27 (13 November 1981) on Israel and UNSC Res. 949 (15 October 1994) on Iraq.

¹⁸⁵The Normandy Four (Germany, France, Russia, and Ukraine) and the Trilateral Contact Group, led by the Organization for Security and Cooperation in Europe (OSCE) sought implementation of the Minsk agreements endorsed by the Security Council in its resolution 2202 (2015) to put an end to the war in the Donbas region of Ukraine.

¹⁸⁶Statements of the US, the UK, Albania, Poland, France, Ireland, Norway, and Lithuania, UN Doc. S/PV.8960, *supra* note 6.

¹⁸⁷Y. Karmanau, Associated Press, ‘Poland, Lithuania Back Ukraine, Urge Russia Sanctions’, 20 December 2022, available at www.usnews.com/news/business/articles/2021-12-20/poland-lithuania-back-ukraine-urge-russia-sanctions.

¹⁸⁸See UN Doc. S/PV.8960, *supra* note 6, at 8.

¹⁸⁹*Ibid.*, at 13.

¹⁹⁰*Ibid.*, at 15.

¹⁹¹1994 Memorandum on Security Assurances in Connection with Ukraine’s Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, UNTS 3007, Points 1 and 2.

¹⁹²See UN General Assembly Resolutions ‘Essentials of Peace’, UN Doc. A/RES/290 (1 December 1949) and ‘Uniting for Peace’, UN Doc. A/RES/377(V) (3 November 1950).

demand the immediate cessation of an implicit threat and assurances of non-repetition. In the Ukraine-Russia war, the General Assembly did not engage with the threat preceding the invasion, but it did condemn the attack that realised the threat. During its eleventh emergency special session, the UN General Assembly passed a resolution on Russia's invasion of Ukraine, which in Point 2 strongly deplored Russian aggression on Ukraine and labelled it as a violation of Article 2(4) of the UN Charter, whereas in Point 3 it demanded that Russia immediately ceases its use of force against Ukraine and refrain from any further unlawful threat or use of force against any Member State.¹⁹³ Russia also lost its seat on the Human Rights Council,¹⁹⁴ as well as membership of the regional Council of Europe.¹⁹⁵ This institutional response to the threat realised could be a precedent, backing up the General Assembly's response to threats in the future.

The international judicial function provides another institutional mechanism to censure unlawful threats, in parallel to its more active stance on uses of force recently. The ICJ has ordered Russia to immediately suspend its military operations under the Genocide Convention.¹⁹⁶ International criminal courts also have a role to play. In the Russia-Ukraine conflict, the ICC Prosecutor launched the investigation for alleged war crimes,¹⁹⁷ while Pre-Trial Chamber II of the ICC issued arrest warrants against Vladimir Putin and Maria Lvova-Belova.¹⁹⁸

7. Completing the juridical journey

Events like Russia's conflict with Ukraine are a stark reminder of the uncertainty regarding threats of force in general and implicit threats in particular. To strengthen the legal framework, it is desirable that the international community resumes the juridical journey towards a codification of the threat of force that it abandoned after almost half a century of work, while being conscious of the use of force developments that have occurred in the meantime. There is a parallel with iterative progressive development of the law on aggression law in the UN Charter. Aggression was defined in General Assembly Resolution 3314 (XXIX) in 1974. The ILC drafted Articles on State Responsibility adopted in 2001, clarifying that an act of aggression invokes state responsibility under Article 40(1). The 2010 Kampala Amendment to the ICC Statute finally codified that aggression entails individual criminal responsibility.¹⁹⁹

The next phase in this journey can build on extant key documents. These are the 1970 Friendly Relations Declaration and the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, which are open to further concretization by the General Assembly. The ILC could resume the work paused some 50 years ago and now distinguish between explicit and implicit threats, consider the division of threats into more and less serious categories based on their gravity, and articulate the

¹⁹³UNGA Res. ES-11/1 (2 March 2022). 141 states voted in favour of the motion, five against and there were 35 abstentions.

¹⁹⁴UNGA Res. ES-11/3 (8 April 2022).

¹⁹⁵Resolution CM/Res(2022)2 of the Committee of Ministers on the Cessation of the Membership of the Russian Federation to the Council of Europe (16 March 2022). On 15 March 2022, the Government of the Russian Federation informed the Secretary General of its withdrawal from the Council of Europe in accordance with the Statute of the Council of Europe and of its intention to denounce the European Convention on Human Rights.

¹⁹⁶*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Request for the Indication of Provisional Measures, Order of 16 March 2022, [2022] ICJ Rep. 211, at 231. On provisional measures see E. Salkiewicz-Munnerlyn, *Jurisprudence of the PCIJ and of the ICJ on Interim Measures of Protection* (2022), 85–114.

¹⁹⁷Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine, available at www.icc-cpi.int/news/state-moment-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening.

¹⁹⁸ICC, 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova', ICC Press Release, 13 March 2023, available at www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and-maria-alekseyevna-lvova-belova.

¹⁹⁹See UNGA Res. 3314(XXIX), *supra* note 15, Arts. 1–3; see ARSIWA, *supra* note 76, Commentary to Article 40, Para. 4; see Rome Statute, *supra* note 14, Arts. 5 and 25 (3)*bis*.

responsibility of states for this wrongful act, and possibly that of individuals as well. In the ICC Statute, what will make a threat justiciable is its subsumption under another prohibition, such as ‘planning or preparation of an act of aggression’.²⁰⁰ This is a matter of judicial interpretation.

8. Conclusions

Threats of force are prohibited by Article 2(4) of the UN Charter yet remain ill-defined and difficult to ascertain in practice. *Implicit* threats of force have emerged as a particularly problematic category as they can be denied or concealed under established principles of international law while still effectively coercing the victim state. The article has developed a framework to more securely ascertain implicit threats of force. This framework is grounded in seeing threats as coercive communication between states, distinct from action that characterizes any use of force. On this basis, the framework generally defines what constitutes an implicit threat and provides an exemplifying standard; it then identifies possible justifications and finally sets out the legal consequences of unlawful threats. By more clearly regulating implicit threats in this way, international law can assist states in addressing conflicts at an earlier stage, preventing their escalating into actual military confrontation.

²⁰⁰Note that although aggression is one of the gravest international crimes, the UN Security Council has never made a formal finding that aggression in the sense of Art. 39 of the UN Charter has occurred, while nobody has so far been charged with the crime at the ICC. See P. Grzebyk, *Criminal Responsibility for the Crime of Aggression* (2013), 110–7, 215 ff.