Prohibition of Threats of Force: A Silently Contested Norm?

Agata Kleczkowska*
Department of Public International Law, Institute of Law Studies, Polish Academy of Sciences, Warsaw, Poland
agata.kleczkowska@inp.pan.pl

Abstract

The prohibition of threats of force, although included in Article 2 of the United Nations (UN) Charter, among the principles upon which the United Nations is built, often plays a secondary role in the maintenance of international peace and security. The aim of the present paper is to verify how violations of the prohibition of threats of force influence its current status. To this end, the paper is divided into three major parts. The first briefly discusses the conditions of the legality of threats of force. The second presents two examples of threats of force: when threats of force were followed by the use of force, as well as when no use of force took place after the threats of force were made. The final part of the paper discusses the status of the prohibition, examining whether it is a case of non-application, falling into desuetude, silent contestation, or mere violation of a legal norm.

* Assistant Professor at the Institute of Law Studies of the Polish Academy of Sciences. The author is very grateful to Max Lesch and Christian Marxsen for their invaluable comments.

Keywords

contested norm – *desuetude* – threats of force – use of force

I. Introduction

The prohibition of the threat of force is one of the least discussed norms of peace and security law.[1] Despite States constantly making use of threats of force in their international relations (recent examples include threats to use nuclear power made by Russia[2] and North Korea[3]), they rarely submit complaints concerning specific threats of force. As for the reasons behind such a state, it has been mentioned that threats of force and their effects often involve unobservable factors, such as 'parties' intentions, perceptions, and implicit signalling',[4] and have an 'oblique and veiled character'.[5] Moreover, threats of force are frequently followed by the actual use of force, so States report on the latter conduct; and if threats are not followed by the use of force, there is a 'collective sigh of relief that actual force has not been used, or sheer indifference if the threat is of a minor sort and relates to two States'.[6] It has also been stated that unfulfilled threats of force are not urgent and States are not willing to debate them;[7] as well as that threats of force are absorbed by the subsequent use of force.[8] Finally, it has been claimed that to

1 The Prohibition of the threats of force was included in Article 2 (4) of the UN Charter: '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.' Charter of the United Nations and Statute of the International Court of Justice, 16 UNTS 1.

2 'Factbox: Has Putin threatened to use nuclear weapons?', Reuters, 27 October 2022 <https://www.reuters.com/world/europe/has-putin-threatened-use-nuclear-weapons-2022-10-27/>; 'Kremlin spokesman Dmitry Peskov stated that these territories are under Moscow's nuclear umbrella. Russia says seized Ukrainian lands are under its nuclear protection', Reuters, 18 October 2022 <https://www.reuters.com/world/europe/kremlin-annexed-ukrainian-lands-protected-by-russian-nuclear-weapons-2022-10-18/>.

3 Josh Smith, 'North Korea says U. S. drills threaten to turn region into "critical war zone"', Reuters, 2 February 2023 <https://www.reuters.com/world/asia-pacific/north-korea-says-us-drills-have-pushed-situation-extreme-red-line-kcna-2023-02-01/>.

4 Matthew C. Waxman, 'Regulating Resort to Force: Form and Substance of the UN Charter Regime', EJIL 24 (2013), 151-189 (184).

5 Marco Roscini, 'Threats of Armed Force and Contemporary International Law', NILR 54 (2007), 229-277 (231).

6 Nigel D. White and Robert Cryer, 'Unilateral Enforcement of Resolution 687: A Threat Too Far?', Cal. W. Int'l L. J. 29 (1999), 243-283 (246).

7 White and Cryer (n. 6).

8 Roscini (n. 5), 231.

 DOI 10.17104/0044-2348-2023-1-155

a certain degree threats of force are a regular feature of inter-State diplomacy and a necessary deterrent to maintain stability in the face of inter-State tensions.[9]

Taking that into account, the prohibition of threats of force, although included in Article 2 of the UN Charter, i. e. among the principles upon which the United Nations is built, often plays a secondary role in the maintenance of international peace and security. Lack of profound interest in the legality of threats of force, the failure to submit justifications for threats of force to other States or international organs, and the treatment of some threats as part of the normal language of diplomacy, suggest the diminished significance of the prohibition of threats of force.

The aim of this paper is to verify how violations of the prohibition of threats of force influence its current status. To this end, the paper is divided into three major parts. The first briefly discusses the conditions of the legality of threats of force. The second presents two examples of threats of force: when threats of force were followed by the use of force, and when no use of force took place after the threats of force. The final part of the paper discusses the status of the prohibition, examining whether it is a case of non-application, falling into *desuetude*, silent contestation, or mere violation of a legal norm.

II. The Legality of Threats of Force – General Remarks

The majority of commentators[10] view a threat of force as illegal if, under the same circumstances, the use of force is also illegal. Likewise, the Interna-

9 Waxman (n. 4), 184.

10 Statements made in the case on Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion submitted by the World Health Organization) and Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations) by: Indonesia (Public sitting held on Friday 3 November 1995, at 10 a. m., at the Peace Palace, Verbatim Record 1995/25, 37); UK (Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Comments of the United Kingdom, para. 3.119); France (Public sitting held on Wednesday 1 November 1995, at 10 a. m., at the Peace Palace, Verbatim Record 1995/23, 65); Lesotho (Letter dated 20 June 1995 from the Permanent Representative of Lesotho to the United Nations, 2); USA (Public sitting held on Wednesday 15 November 1995, at 10 a. m., at the Peace Palace, Verbatim Record 1995/34, 79); Malaysia (Note Verbale dated 19 June 1995 from the Embassy of Malaysia, together with Written Statement of the Government of Malaysia, 8); and Nauru (Letter dated 15 June 1995 from counsel appointed by Nauru, together with Written Statement of the Government of Nauru: Memorial of the Government of the Republic of Nauru, 2, 11). See, e. g. Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon

tional Court of Justice stated in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that 'if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter'.[11] Since there are two exceptions to the prohibition of the use of force – the right to self-defence, as defined in Article 51 of the UN Charter, and collective action authorised by the United Nations Security Council (UNSC) under Chapter VII of the UN Charter – the same exceptions also apply to the prohibition of threats of force.

To put it differently, the threat of force is legal when the legal grounds for the actual use of force have already materialised.[12] Thus, if the UNSC has not yet issued authorisation for a collective armed intervention, a State is not entitled to threaten another with conducting such an intervention. Similarly, it is not permissible to issue threats of the use of force in self-defence due to the threat of an armed attack. The use of force in self-defence is legal only after an armed attack has occurred; thus, a threat of the use of force in self-defence is also only legal in its aftermath. The latter finding is in line with a literal reading of Article 51 of the UN Charter, against the legality of anticipatory/pre-emptive/preventive self-defence. In addition, any threat of force should also comply with the criteria for the legality of self-defence: proportionality and necessity.

Finally, one should observe that the fact that the prohibition of the use of force and the prohibition of the threat of force share exceptions means that States should attempt to save the use of force as a last resort. This would mean that if circumstances arise justifying the right to self-defence, a State should first choose to threaten the attacking State with the use of force; and if this measure turns out to be ineffective it is then entitled to use force in self-

---

Press 1963), 364; Hilaire McCoubrey and Nigel D. White, *International Law and Armed Conflict* (Aldershot, Brookfield VT, Hong Kong, Singapore, Sydney: Dartmouth Publishing Company 1992), 57; Anne Lagerwall, 'Threats of and Actual Military Strikes Against Syria – 2013 and 2017' in: Tom Ruys and Olivier Corten (eds), *The Use of Force in International Law: A Case-based Approach* (Oxford: Oxford University Press 2018), 828-854 (842); Matthew A. Myers, 'Deterrence and the Threat of Force Ban: Does the UN Charter Prohibit Some Military Exercises?', Mil. L. Rev. 162 (1999), 132-179 (172).

11 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Reports 1996, 226 (para. 47). See also the finding made by the ICJ in the *Nicaragua* case that '"threat of force" […] is equally forbidden by the principle of non-use of force' (ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), merits, judgement of 27 June 1986, ICJ Reports 1986, 14 (para. 227).

12 It should nevertheless be noted that also other proposals on the interdependency of the legality of threats and use of force are presented in the doctrine of law. For instance, Nikolas Stürchler discusses the possibility that '[a] threat could be illegal even if the projected use would not be […]' (See Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge: Cambridge University Press 2007), 38, 43-51).

 DOI 10.17104/0044-2348-2023-1-155

defence.[13] Likewise, if the UNSC authorised a collective action under Article 42, States should first attempt to threaten to carry out such an intervention, and if the threat does not produce the intended effects, only then resort to the use of force. The opposite situation is not permissible, i. e. when a State has already used force in self-defence or States have conducted an armed intervention authorised by the UNSC, but still continue issuing threats of force based on the conditions that allowed them to use force. When a State employs the most far-reaching tool it has at its disposal – i. e. the use of force – it is no longer allowed to use threats of force for the same reason and on the same grounds, since such threats would only serve to exacerbate tensions between States.

III. Threats of Force and Their Consequences

The list of cases of threats of force is a long one. Among many other examples, one may mention the alleged threats of force issued by Syria against Israel in March 1962, in order to 'prevent the normal activities of Israel citizens and authorities inside Israel and on Lake Tiberias', as Israel claimed.[14] States have also recognised that the aggressive conduct of South Africa, part of their apartheid policy, amounted to threats of force.[15] Another case may be Libya's claim that the United States of America (USA) and the United Kingdom (UK) made threats of force against them when Libya attempted to establish its jurisdiction in the *Lockerbie* case.[16] One final example may be seen in Iran's claims that the Israeli Deputy Prime Minister and Minister of Transportation made threats to resort to force against Iran in a newspaper interview.[17]

This section discusses in detail two examples of threats of force: a case when threats of force were followed by the use of force; and when the use of

13 See James A. Green and Francis Grimal, 'The Threat of Force as an Action in Self-Defense Under International Law', Vand. J. Transnat'l L. 44 (2011), 285-329 (307).

14 Letter dated 21 March 1962 from the Permanent Representative of Israel Addressed to the President of the Security Council, S/5098, p. 1; UNSC Official Records, 999th Meeting, 28 March 1962, S/PV.999, paras 83-84.

15 UNSC Provisional Records, 2661st Meeting, 12 February 1986, S/PV.2661, 32, 42, 58; UNSC Official Records, 2598th Meeting, 21 June 1985, S/PV.2598, paras 8, 14. See also the UNSC Res 581 of 13 February 1986, S/RES/581, preamble, para. 1.

16 Letter dated 18 January 1992 from the Permanent Representative of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, S/23441, 3.

17 Letter dated 6 June 2008 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the President of the Security Council, S/2008/377, 1.

force did not occur as a follow-up to a threat. The comparison between these two types of situations is important for the problem of contestation of the prohibition of threats of force for a few reasons. Firstly, it is often claimed that when the threat of force is followed by the use of force, the significance of the threat of force is diminished. So how do States act when the threats are not followed by the use of force? Do they in such cases employ a different approach to the prohibition of threats of force? Do they focus on the prohibition of the threats of force, providing elaborated justifications for the use of threats of force? Secondly, scholars tend to suggest that unfulfilled threats of force are less urgent, important, or should be discussed less than the ones that were carried out. But is it so? Do unfulfilled threats of force have no consequences? Is an unfulfilled threat of force 'less' illegal, if made without legal grounds, than the one that was carried out? Thirdly, do States employ threats of force because they believe the use of force should remain the last resort, or just because threats are cheaper and equally effective measures when compared to the use of force itself?

The two examples discussed below – the threats against the Federal Republic of Yugoslavia (FRY) which were carried out, and threats against Iraq, which ultimately were not fulfilled – were chosen for a more detailed investigation because they somehow provide answers to all these questions, and are a good illustration of the way most States approach threats of force.

1. Threats of Force that Were Carried Out

The threats of airstrikes by the North Atlantic Treaty Organization (NATO) Member States and the Organization itself against the FRY in connection with the situation in Kosovo is one of the most well-known examples of threats of force. The aim of these threats was to force the FRY to accept the Rambouillet Accords. Under the agreements, *inter alia*, citizens of Kosovo were supposed to be given the right to democratic self-government (Article 1 (4)); use of force in Kosovo would have to immediately cease (Article II (1)); and all replaced persons would have the right to return to their homes (Article II (3)).[18] The FRY did not agree to sign the Accords. The first threats of force were made during a press conference in October 1998.[19]

18 Letter dated 4 June 1999 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, S/1999/648.

19 Ian Brownlie and C. J. Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects', ICLQ 49 (2000), 878-905 (903). Serbia claimed that the threat of force against it was made for the first time on 28 August 1998, when there was an internal NATO decision to use air strikes if necessary (Public sitting held on Friday 23 April 2004, at 3 p. m., at the Peace Palace, Verbatim Record 2004/23, 24, para. 9).

NATO Secretary-General Javier Solana stated that '[t]he Allies believe that in the particular circumstances with respect to the present crisis in Kosovo as described in UNSC Resolution 1199, there are legitimate grounds for the Alliance to threaten, and if necessary, to use force'.[20] Threats of force were also voiced by the NATO Member States: in the House of Commons on 23 March 1999, British prime minister Tony Blair said that '[l]ast October, NATO threatened to use force to secure Milosevic's agreement to a ceasefire and an end to the repression that was, at that time, in hand. That was successful – at least, for a while'.[21] The Czech representative in the UNSC also stated that 'The threat of air strikes cannot be seen in isolation. It is a part of a broader set of measures and does not, in and of itself, amount to a solution. […]. The threat has been issued, in particular, to prevent the strangulation of Sarajevo, which in turn will make it possible to place the city under United Nations administration, […]'.[22]

NATO carried out its threats and conducted bombings against FRY from 24 March 1999 to 9 June 1999.[23] The aim of this action, code-named 'Operation Allied Force', was to weaken the Serb military capabilities. According to NATO, the strikes were supposed to have an 'immediate effect in disrupting the ethnic cleansing of Kosovo'.[24] Even though in reality this goal was not immediately achieved (the ethnic cleansing continued, or as some claim, even accelerated despite the airstrikes),[25] ultimately, after 78 days of NATO bombing, Slobodan Milosevic agreed to sign a ceasefire agreement (less favourable than the Rambouillet Accords proposal). Serb forces withdrew from Kosovo and replaced Albanian Kosovars were allowed to return to their homes.[26]

After the bombing started, the Netherlands, one of the States that participated in Operation Allied Force, stated that '[t]he threat of the use of force, embodied in this NATO decision, should be seen first of all as a political means to convince parties to withdraw their heavy weapons or place them under United Nations control. It is a clear signal to all parties that the

20 NATO HQ Brussels, 'Transcript of the Press Conference, by Secretary General, Dr. Javier Solana', 13 October 1998.

21 Serbia, Verbatim Record 2004/23 (n. 19), 24-25, paras 10-14.

22 UNSC Provisional Records, 3336th Meeting, 14 February 1999, S/PV.3336, 66.

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

24 Lord Robertson of Port Ellen, 'Kosovo One Year On: Achievement and Challenge', 13 <https://www.nato.int/kosovo/repo2000/report-en.pdf>.

25 Lord Robertson of Port Ellen (n. 24), 16-17.

26 Benjamin S. Lambeth, *NATO's Air War for Kosovo: a Strategic and Operational Assessment* (Santa Monica, CA, Arlington, VA, Pittsburgh, PA: RAND 2011), 224-227.

escalation of violence against the civilian population and threats against United Nations personnel will not be tolerated'.[27] The USA claimed that '[w]e must acknowledge that a credible threat of force was key to achieving the OSCE and NATO agreements[28] and remains key to ensuring their full implementation'.[29]

While some of the States who participated in Operation Allied Force attempted to legitimise it on the basis of international law, the legal positions they offered were neither consistent nor had justification in the circumstances of the operation and international legal framework.[30] The use of force carried

27 UNSC Provisional Records, 3336th Meeting, 14 February 1994, S/PV.3336 Resumption 1, 134.

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

29 UNSC provisional Records, 3937th Meeting, 24 October 1998, S/PV.3937, 15.

30 According to Belgium, UNSC Resolutions 1160, 1199, and 1203 constituted an 'unchallengeable basis for the armed intervention' (Legality of Use of Force (Serbia and Montenegro v. Belgium), Public sitting held on Monday 10 May 1999, at 3 p. m., at the Peace Palace, CR 1999/15, 11), but in fact neither of them authorised the use of force. Moreover, Belgium and the UK claimed that the operation was a case of humanitarian intervention. In this regard, Belgium asserted that NATO intervened to safeguard *jus cogens* norms such as the right to life and physical integrity, as well as the prohibition of torture in order 'to prevent an impending catastrophe recognized as such by the Security Council' (CR 1999/15, 11-12). On the other hand, the UK stated in the UNSC that the action was legal as it was 'justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe.' (UNSC Provisional Record, 3988th Meeting, 24 March 1999, S/PV.3988, 12.). However, neither Belgium nor the UK explained whether they grounded their claims on the customary norm which allows states to undertake 'humanitarian intervention', how it was formed, etc. Several other States also referred to the humanitarian aspect of the NATO action (e. g. the Netherlands, (S/PV.3988 (n. 30), 8) and Canada (UNSC Provisional Records, 4011th Meeting, 10 June 1999, S/PV.4011, 5-6, 13)) stating that it justified the operation on the grounds of international law; none of them elaborated on the specific legal grounds (customary or treaty norm) that authorised the bombing. Before the ICJ, Belgium alternatively invoked the 'state of necessity' as the grounds of the NATO operation. Here, Belgium referred to the ILC works on the responsibility of States; however, the Commission recognised it as 'inconceivable' that a state of necessity could serve as the justification for the breach of the prohibition of the use of force (ILC, 'Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (part 1)', A/CN.4/318/Add.5-7, paras 16, 55, 61, 79.).

out by NATO may be recognised as illegal;[31] consequently, the threats of force that preceded the bombings were also illegal.

It has already been mentioned that if a threat of force is followed by the actual use of force, it is often claimed that it is the use of force which should be discussed, not the preliminary threat.[32] Why then should the threats made by NATO against the FRY be investigated? Because the threats of force do not disappear and the State is not exempted from responsibility for threats of force just because it later used force. Thus, first of all, in cases like the NATO bombings, States should bear responsibility not only for the illegal use of force, but also for illegal threats of force: they threatened FRY with the use of force for months without legal grounds, and only later used force. Secondly, it is important to highlight the consequences if these threats of force had turned out to be effective, i. e. FRY would have signed the Rambouillet Accords. Under Art. 52 of the Vienna Convention on the Law of Treaties,[33] the Rambouillet Accords would be void as they were procured by the threat of force. Thus, the peace agreement, which provided protection for Kosovo and settled the terms that restored peace, could have been challenged at any moment, potentially reigniting the Kosovo conflict. This case demonstrates how threats of force are a great threat to international peace and security.

Operation Allied Force is also a perfect illustration of how different States adopt varying approaches toward the prohibition of the use of force and the prohibition of the threats of force. When it comes to the former prohibition, as demonstrated, at least some States which participated in Operation Allied Force attempted to justify it by referring to international law. However, regarding the latter norm, no State tried to present a legal justification for the threats. Conversely, blatant threats against the FRY that were supposed to force the State to adhere to the Rambouillet Accords were viewed as an acceptable element of NATO's strategy, not a violation of the law. None of the States which made threats or commented on the use of threats of force against FRY invalidated the prohibition of the threats of force, but also none of them noted that the prohibition of threats of force is one of the Principles of the United Nations and that threats of force are illegal.

Thus, settling the situation in Kosovo was the primary goal for NATO States, while threats of force were tools allowing them to achieve this goal.

31 However, some scholars formed arguments in favour of the legality of intervention, see, e. g., Dino Kritsiotis, The Kosovo Crisis and Nato's Application of Armed Force against the Federal Republic of Yugoslavia, ICLQ 49 (2000), 330-359; Richard A. Falk, Kosovo, World Order, and the Future of International Law, AJIL 93 (1999), 847-857; David Wippman, Kosovo and the Limits of International Law, Fordham Int'l L. J. 25 (2001), 129-150 (131-135).

32 White and Cryer (n. 6), 246.

33 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

However, even if restoring peace and order in Kosovo was an important objective at that time, it did not justify the violation of the prohibition of threats of force.

2. Threats of Force not Followed by the Use of Force

In 1990 Iraq invaded Kuwait, but the next year the coalition of Western States intervened and repelled the invasion. Nevertheless, in 1994, the States were again concerned with the possible threat of Iraqi action against Kuwait, as Iraq assembled between 40,000 and 50,000 soldiers about 30 miles from the Kuwait border.[34] This manifestation of force was supposed to be an argument for the UN to lift the harsh economic sanctions they had imposed on Iraq after its 1990 invasion of Kuwait. A statement was published, according to which '[…] the Iraqi leadership does not have any other alternative but to reconsider a new stand which will restore justice and relieve the Iraqi people from the distress imposed upon it […]'.[35] On 27 September, Saddam Hussein was also noted to say 'When the patience of some Iraqis begins weaken, or when we feel that Iraqis may become hungry, we will, by God, open the world's silos for them and let he who hears us know that Saddam Hussein has spoken'.[36]

Kuwait interpreted the Iraqi statements as 'a clear and unequivocal threat directed not only at Kuwait but also at the relations between Iraq and the United Nations with regard to Iraq's compliance with the Security Council resolutions concerning the Iraqi aggression against Kuwait'.[37] Because they were not capable of defending themselves against the Iraqi army if these threats of force were carried out, Kuwait appealed to the UNSC for assistance, in accordance with the methods of peaceful settlement disputes.[38]

34 Michael R. Gordon, 'U.S. Sends Force as Iraqi Soldiers Threaten Kuwait', The New York Times, 8 October 1994, <https://www.nytimes.com/1994/10/08/world/us-sends-force-as-iraqi-soldiers-threaten-kuwait.html>.

35 Letter dated 6 October 1994 from the Permanent Representative of Kuwait to the United Nations Addressed to the President of the Security Council, S/1994/1137, 1-2.

36 Quotation after: Joseph Kostiner, *Conflict and Cooperation in the Gulf Region* (Wiesbaden: VS Verlag für Sozialwissenschaften 2009), 122.

37 Letter dated 6 October 1994 from the Permanent Representative of Kuwait to the United Nations Addressed to the President of the Security Council, S/1994/1137, 1-2.

38 'We therefore call upon the Security Council to exercise its authority and respond to these threats, to condemn them and ask Iraq to refrain from repeating them while fulfilling all its obligations under the Security Council resolutions dealing with its aggression against Kuwait'. (S/1994/1137 (n. 37), 1-2). A similar appeal was made in one of the further statements: 'The State of Kuwait […] requests the Security Council to shoulder its responsibility to put an end to the violations and threats of the Iraqi regime against the State of Kuwait and the States of

 DOI 10.17104/0044-2348-2023-1-155

The other States also recognised the Iraqi actions as a threat of force, foreshadowing another invasion of Kuwait.[39] Among them, the USA decided on an immediate response to the Iraqi threats of force, sending forces to the region.[40] It is estimated that at least 36,000 USA troops were prepared to respond to any new hostilities in the Persian Gulf.[41]

Ultimately, Iraq backed down from the strike, did not obtain any relief from the sanctions imposed, and was forced to withdraw its troops from the Kuwait border region. Moreover, on 10 November 1993, Iraq recognised the sovereignty of Kuwait within the borders demarcated by the United Nations Iraq-Kuwait Boundary Demarcation Commission.[42] There are allegations that the demonstration of force made by Iraq was only a bluff, and that Hussein never intended to use force again against Kuwait.[43] However, some would argue that the invasion might have taken place without the USA's strong response.[44]

When it comes to the USA's action, gathering an immense amount of armed forces in the region was supposed to be a demonstration of force, which in turn is one of the forms of the threats of force.[45] Was this threat legal? When the USA assembled its forces, the UNSC had not authorised the action under Article 42 of the UN Charter; also the UNSC Resolution 899 of 4 March 1993 did not call upon States to take 'all necessary measures'.[46] It is unclear whether the USA wished to justify the threats of force with the right

---

the region by taking effective steps under Chapter VII of the Charter of the United Nations to guarantee the security of Kuwait, respect for its sovereignty and independence and the integrity of its international frontiers, and the security of the States of the region'. (Letter dated 14 October 1994 from the Permanent Representative of Kuwait to the United Nations Addressed to the President of the Security Council, S/1994/1165, annex).

39 See statements made by the USA (UNSC Provisional Records, 3438th Meeting, 15 October 1994, S/PV.3438, 4); New Zealand (S/PV.3438(n. 39), 9); UK (S/PV.3438(n. 39), 11); Argentina (UNSC Provisional Records, 3439th Meeting, 17 October 1994, S/PV.3439, 11) and Czech Republic (S/PV.3439 (n. 39), 11).

40 Gordon (n. 34).

41 Michael R. Gordon, 'Threats in the Gulf: The Last Military Buildup; At Least 36,000 U.S. Troops Going to Gulf to Respond to Continued Iraqi Buildup', The New York Times, 10 October 1994, <https://www.nytimes.com/1994/10/10/world/threats-gulf-military-buildup-least-36000-us-troops-going-gulf-response.html>.

42 Letter dated 13 November 1994 from the Permanent Representative of Iraq to the United Nations Addressed to the Secretary-General, S/1994/1288, annex.

43 Gordon (n. 41).

44 W. Eric Herr, *Operational Vigilant Warrior: Conventional Deterrence Theory, Doctrine, and Practice*, A Thesis Presented to the Faculty of the School of Advanced Airpower Studies, Air University, Maxwell Air Force Base, Alabama, June 1996, 16-23 <https://apps.dtic.mil/sti/pdfs/ADA360732.pdf>.

45 Branislav L. Slantchev, *Military Threats: The Costs of Coercion and the Price of Peace* (Cambridge: Cambridge University Press 2011), 66-67.

46 UNSC Res 899 of 4 March 1994, S/RES/899.

to self-defence. On one hand, according to president Bill Clinton the USA was taking 'necessary steps as a precaution' in order to not allow Iraq 'to intimidate the United Nations Security Council' into lifting the sanctions imposed on Iraq.[47] On the other hand, Madeleine Albright, the USA ambassador to the UN at that time, during the UNSC meeting stated: '[…] let me assure this Council that pursuant to the resolutions of this Council and Article 51 of the United Nations Charter, my Government will take all appropriate action if Iraq fails to comply with the demands of this resolution'.[48] Although there are no reasons to conclude that the USA's manifestation of force was in any way inconvenient for Kuwait, the fact remains that Kuwait did not claim to exercise the right to collective self-defence or appeal to any concrete State, but instead resorted to the UNSC. Given that, the right to collective self-defence could not have been the grounds for the USA's action.

What about the fact that the USA's threats of force were only a reaction to threats of force made by Iraq? Maybe the USA's threats were legal as 'counter-threats'? Under the framework of international law, it does not matter if threats of force are the first communication, or whether they are only a reply to previous threats of force. The order in which threats are issued does not determine their legality. What matters is whether threats of force have legal grounds, as discussed in the first section of this paper. And since mere threats of force are not a prerequisite for the right to self-defence, it is illegal to react to them with threats of force. In such cases, States are obliged to resort to peaceful means of settling disputes; adverse conduct could lead to an endless spiral of threats, and consequently, to a threat to international peace and security.

Taking all this into account, the USA's threat of force against Iraq did not have legal grounds.

3. Conclusions

No matter if threats of force are followed by the use of force or not, approaches to the prohibition of the threats of force do not differ much. The

47 The President's News Conference, 7 October 1994, <https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-1233>.

48 S/PV.3438 (n. 39), 6. Most probably, M. Albright was referring to Resolution 687 (1991). Also the UK's representative mentioned that his government, 'along with the United States, France and other members of the coalition, responded immediately to Kuwait's request for assistance' (S/PV.3438 (n. 39), 11), but he did not articulate what 'request for assistance' he meant, nor whether the 'assistance' was provided with the framework of collective self-defence.

 DOI 10.17104/0044-2348-2023-1-155

cases of threats of force described in this section have proved that despite States not explicitly challenging the prohibition of threats of force, in reality, they effectively ignore it, and certainly do not attach as great significance to it as they do to the prohibition of the use of force. Threats of force are issued with no justification, while States go to great efforts to explain the use of force on the grounds of international law. Moreover, States try to prevent threats of force from being carried out by making their own, even more credible, threats of force. Finally, threats of force are not treated as harmful measures which escalate tensions in relations between States, but instead as persuasive tools of argumentation which can convince disobedient States to comply with certain rules, or act in a specific way. The exact aim of the prohibition of threats of force was to prevent such use of threats of force in inter-State relations.

IV. The Prohibition of Threats of Force: an Example of Non-Application, *desuetude*, or Contestation?

How do all the examples mentioned in the previous section evidence the condition of the prohibition of threats of force? The answer to this question may be provided by examining whether the prohibition of threats of force is a case of non-application, *desuetude*, or contestation of a norm.

Non-application designates a situation when States do not employ a certain norm and never find it to be applicable under any circumstances. Given this definition, this is not the case with the prohibition of threats of force. Firstly, States invoke the ban when they are the target of threats of force. For instance, in October 1948 the UK stated before the UNSC that 'the Government of the USSR has resorted to the threat of force to prevent the other Occupying Powers from exercising their legitimate rights and discharging their legal and humanitarian responsibilities. That is contrary to Article 2 of the Charter.'[49] In a telegram dated 16 September 1950, Israel complained about the 'violation by Egypt and Jordan of their respective Armistice Agreements with Israel by officially and publicly threatening aggressive action contrary to article I, sub-paragraph 2' of the agreements.[50] In 2002, Georgia requested a reaction from the President of the UNSC and the UN Secretary-

49 UNSC Official Records, 364th Meeting, 6 October 1948, S/PV.364, 35. The UK statement was connected with the Soviet blockade of Berlin.

50 Telegram dated 16 September 1950 from the Representative of Israel Addressed to the Secretary-General Regarding the Inclusion of Additional Items on the Agenda of the Security Council, S/1794, para. 3.

General to the 'statement of the President of the Russian Federation made on 11 September 2002 in which President Putin, while relying exclusively on the Russian version of the situation in the Pankisi Gorge in eastern Georgia, resorted to an undisguised threat of force towards a neighbouring State – a member of the United Nations'.[51] In March 2003, Iraq claimed that it was the target of a 'threat of aggression'.[52]

Secondly, third States point out the illegality of threats of force. When at the end of 1960 Cuba complained about the possibility 'within a few hours, [of] direct military aggression'[53] by the USA, the Union of Soviet Socialist Republics [USSR] spoke about the 'direct threat of aggression'.[54] In the case of the FRY bombing, Belarus stated that 'there are no grounds for threats of the use of military force against Yugoslavia […]'.[55]

Thirdly, questions about the meaning and role of threats of force were raised by States during the preparatory work on different legal instruments, such as the definition of aggression,[56] Draft Code of Offences Against the Peace and Security of Mankind,[57] world treaty on the non-use of force in international relations,[58] and Principles of International Law concerning Friendly Relations and Co-operation among States.[59] States, *inter alia*, pointed to the fact that Article 2 (4) included not only the prohibition of the use of force, but also the prohibition of threats of force.[60]

---

51 Identical letters dated 15 September 2002 from the Permanent Representative of Georgia to the United Nations addressed to the Secretary-General and the President of the Security Council, A/57/408-S/2002/1033, 2.

52 UNSC Provisional Records, 4717th Meeting, 11 March 2003, S/PV.4717, 3.

53 Letter of 31 December 1960 Addressed to the President of the Security Council by the Minister for Foreign Relations of Cuba, S/4605, 1.

54 UNSC Official Records, 922nd Meeting, 4 January 1961, S/PV.922, para. 84.

55 Letter dated 23 March 1999 from the Permanent Representative of Belarus to the United Nations addressed to the Secretary-General, A/53/870 – S/1999/309, annex. Similar statement was also made by Ukraine (Letter dated 23 February 1999 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General, S/1999/194, annex).

56 See, e. g. 'Report of the Special Committee on the Question of Defining Aggression, 24 February – 3 April 1969', A/7620, para. 33.

57 See, e. g. ILC, 'Third Report Relating to a Draft Code of Offences Against the Peace and Security of Mankind by J. Spiropoulos, Special Rapporteur', A/CN.4/85, para. 116; ILC, 'Report of the International Law Commission Covering the Work of its Sixth Session', A/CN.4/88, 151.

58 The Yearbook of the United Nations 1978, 171.

59 See e. g. 'Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States', 16 November 1964, A/5746, paras 40-41, 61.

60 UNGA Official Records, Twenty-Fourth Session, Sixth Committee, 1168th Meeting, 3 December 1969, A/C.6/SR.1168, para. 18.

So, if it is not a case of non-application, it is nevertheless legitimate to ask whether the prohibition of threats of force has fallen into *desuetude*.

Scholars present varying definitions of *desuetude*. Some of them view Article 54 of the Vienna Convention of the Law of Treaties as its example:

> 'The termination of a treaty or the withdrawal of a party may take place:
> (a) in conformity with the provisions of the treaty; or
> (b) at any time by consent of all the parties after consultation with the other contracting States.'[61]

For other scholars, 'desuetudo denotes a situation in which a treaty obligation is terminated by an opposing rule of customary international law'.[62] Finally, M. G. Kohen claims that the most traditional understanding of this term is 'the termination of treaties by virtue of the passing of considerable lapse of time during which the treaty is not applied by the treaty parties'.[63] This practice must be coupled with *opinio juris*, that is 'the conviction by the parties that the treaty has been extinguished'.[64] However, at the same time, M. G. Kohen states that *desuetude* 'does not find place in international law', as 'mere passage of time without any reference to a treaty or even without its application does not lead to its termination'.[65] This position is confirmed by the practice of States which refer to centuries-old treaties as binding legal acts.[66]

---

61 ILC, 'Draft Articles on the Law of Treaties with Commentaries', (1966) ILCYB, Vol. II, 237; Kerstin Odendahl, 'Article 42' in: Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: Commentary* (Heidelberg Dordrecht London New York: Springer 2012), 733-744 (742); Thomas Giegerich, Article 54, in: Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: Commentary* (Heidelberg Dordrecht London New York: Springer 2012), 945-962 (959).

62 Bruno Simma, 'Termination and Suspension of Treaties', GYIL 21 (1978), 74-96 (93). See also Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (London and New York: Routledge 2002), 56.

63 Marcelo G. Kohen, 'Desuetude and Obsolescence of Treaties' in: Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press 2011), 350-359 (351-352).

64 Kohen (n. 63), 352. This is also where the difference between *desuetude* and non-application may be spotted: while non-application designates a situation when States simply do not employ a specific norm, regardless of how old the norm is and what is their attitude towards the status of the norm, *desuetude* describes the situation when a treaty norm is not applied for a long time and States consider the treaty to be no longer binding. Thus, these terms partially overlap but their meaning is not the same.

65 Kohen (n. 63), 359.

66 For instance, the list of 'Traités et accords de la France' published by the Ministry of Europe and Foreign Affairs of France, has been identified as the first treaty signed by France, 'Sentence arbitrale de limites', signed on 15 July 1304 between France and Mallorca (<https://basedoc.diplomatie.gouv.fr/exl-php/recherche/mae_internet___traites>). From among the oldest treaties concluded by France, the earliest one, signed by France and a State, that currently

Without settling which view should prevail, one may try to analyse the situation of the prohibition of the threat of force under these three proposals for the understanding of *desuetude*. When it comes to the first one, supporters of the view that Article 54 of the Vienna Convention on the Law of Treaties covers *desuetude* point to the fact that *desuetude* may refer to the termination of an agreement by the consent of all parties. If applied to the present case, it would have to mean that the prohibition of the threat of force has fallen into *desuetude* by the consent of all parties to the UN Charter, reached only after joint consultation. It goes without saying that this did not take place. Secondly, a subsequent, opposing rule of the customary norm could also terminate the validity of the prohibition. Thus, a customary norm allowing for threats of force (even if under some specific conditions, like the protection of fundamental human rights, etc.) would have to emerge. Again, even if some States have used threats of force in order to achieve certain aims and others accepted it, none of them has specifically argued that the threats of force they formulated were legal. Finally, the last understanding of *desuetude* also does not cover the status of the prohibition of threats of force. While it is true that States violate the prohibition, nevertheless, in numerous actions they have also highlighted its binding force.

This analysis allows for the following conclusion to be drawn: prohibition of the threat of force has not fallen into *desuetude*, regardless of the meaning attached to this notion.

Next, one has to consider whether the prohibition of threats of force may be called a contested norm. To start with, one has to determine what it means to claim that a norm is contested. In general, one can state that contestation implies that different actors 'adhere to different views of the correct use of some concept'.[67]

Antje Wiener and Uwe Puetter mention three sources for the contestation of norms: firstly, the application and implementation of norms are mostly carried out on the domestic level and in the domestic context. Consequently, it may turn out that even if a specific norm is recognised domestically, when States meet on an intergovernmental level, the meaning they attach to the norm and the way they see it as applicable may considerably differ. Secondly, diverging interpretations of the same legal norm among States is possible. Thirdly, 'norm contestation may emerge as the conflict between two or multiple (equally) recognized international norms'. Recognition of the superiority of one norm over other(s) is a result of the divergent application

exists is the Traité de paix entre le roi d'Angleterre et le duc de Bourgogne sur le fait du royaume de France of 1419 (ref. no. TRA14190002).

67 Walter Bryce Gallie, 'Essentially Contested Concepts', Proceedings of the Aristotelian Society New Series 56 (1955-1956), 167-198 (172).

and interpretation of norms.[68] All three situations can be related to the prohibition of the threat of force. States recognise the significance of the ban,[69] but the meaning they attach to threats of force differs on many levels. To pick just one example, States disagree over whether threats of force must always be 'backed up by concrete acts of an unmistakably warlike nature',[70] or whether any oral and written statement may amount to a threat of force.[71]

Even if to use a different method to examine the meaning of contestation, the qualification of the prohibition of the threat of force as a contested norm does not change: in the typology of contestation employed by Max Lesch and Christian Marxsen,[72] this last example would fall under 'applicatory contestation', so 'uncertainty about the application of norms'. However, these authors claim that the prohibition of the threats of force would actually fit into a different category of contestation – 'legislative contestation' – which refers to 'controversies over the abstract general scope of the legal concepts'. This statement is also correct, as States are not unanimous when it comes to the status of the prohibition of threats of force. Some claim that it is a customary norm[73] or even a peremptory

68 Antje Wiener and Uwe Puetter, 'The Quality of Norms Is What Actors Make of It Critical – Constructivist Research on Norms', Journal of International Law and International Relations 5 (2009), 1-16 (13-14).

69 See statement made by the USA (UNGA Official Records, Eighteenth Session, Sixth Committee, 808th Meeting, 11 November 1963, A/C.6/SR.808, para. 27).

70 UNGA Official Records, Twentieth Session, Sixth Committee, 884th Meeting, 29 November 1965, A/C.6/SR.884, para. 27.

71 See, e. g. statements made by China and Russia (Letter dated 18 August 2009 from the Permanent Representative of China and the Permanent Representative of the Russian Federation to the Conference on Disarmament addressed to the Secretary-General of the Conference, transmitting answers to the principal questions and comments on the draft "Treaty on Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force against Outer Space Objects (PPWT)", introduced by the Russian Federation and China and issued as document CD/1839 dated 29 February 2008, 2); Madagascar (Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, First Session, Summary Records of the Ninth Meeting, 16 October 1964, A/AC.119/SR.9, 17) and Cyprus (UNGA Official Records, Eighteenth Session, Sixth Committee, 822nd Meeting, 29 November 1963, A/C.6/SR.822, para. 7).

72 See Max Lesch and Christian Marxsen, 'Norm Contestation in International Peace and Security Law: Towards an Interdisciplinary Analytical Framework', Introduction to the Symposium 'Norm Contestation in International Peace and Security Law', held at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, on 23-24 September 2021, HJIL 83 (2023), 11-38.

73 Ian Brownlie speaking on behalf of Libya before the ICJ, Public sitting held on Monday 3 March 1997, at 10.00 a. m., at the Peace Palace, 17; Legality of the Threat or Use of Nuclear Weapons, Letter dated 20 June 1995 from the Minister of Foreign Affairs of the French Republic, together with Written Statement of the Government of the French Republic 26, para 15; Roscini (n. 5), 252-255; J. Craig Barker, *International Law and International Relations* (London New York: Continuum 2000), 128.

norm,[74] while others assert that through Article 2 (6) of the UN Charter the prohibition extends to non-UN members.[75] The three categories of contestation they distinguish[76] 'are not neatly separated from each other', just like the prohibition of the threats of force can be contested on many levels.

Thus, one can preliminarily assume that the prohibition of threats of force is a contested norm. But is it something harmful? Does contestation prompt negative consequences? Not necessarily. 'Norms are […] contested by default'.[77] Contestation means merely that different States interpret and implement the same norms in a different way.[78] If a view regarding the interpretation of a norm is accepted by other members of the international community, contestation does not take place; otherwise, if different actors chose varying arguments according to their needs and interests, contestation occurs.[79] Moreover, contestation may benefit the legal system: some norms, initially

74 Indonesia (Verbatim Record 1995/25 (n. 10), 19); Iran (Legality of the Threat or Use of Nuclear Weapons, Note Verbale dated 19 June 1995 from the Embassy of the Islamic Republic of Iran, together with Written Statement of the Government of the Islamic Republic of Iran, 1); Philippines (Public sitting held on Thursday 9 November 1995, at 10 a. m., at the Peace Palace, Verbatim Record 1995/28, 60); Nauru (Letter dated 15 June 1995 from counsel appointed by Nauru (n. 10), 3-4); Ecuador (UNGA Special Committee on the Question of Defining Aggression, 26 June 1969, A/AC.134/SR.25-51, 74); and Czechoslovakia (UNGA Official Records, Eighteenth Session, Sixth Committee, 802nd Meeting, 29 October 1963, A/C.6/SR.802, 12). See also Stürchler (n. 12), 63; Albrecht Randelzhofer and Oliver Dörr, 'Article 2 (4)' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press 2012), 200-234 (203); Nigel D. White, 'Self-Defence, Security Council Authority and Iraq' in: Richard Burchill, Nigel D . White and Justin Morris (eds), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey*, (Cambridge: Cambridge University Press 2005), 235-264 (259); François Dubuisson and Anne Lagerwall, 'Que signifie encore l'interdiction de recourir à la menace de la force?' in: Karine Bannelier, Théodore Christakis, Olivier Corten and Pierre Klein, *L'intervention en Irak et le droit international* (Paris: Pedone 2004), 85-106 (84).

75 Iran, Public sitting held on Monday, 6 November 1995, at 10 a. m., at the Peace Palace, Verbatim Record 1995/26, 22.

76 Apart from 'applicatory contestation' and 'legislative contestation', they also distinguish 'systemic contestation'.

77 Antje Wiener, 'Contested Meanings of Norms: A Research Framework', Comparative European Politics 5 (2007), 1-17 (6).

78 Contestation may also have slightly different reasons behind it than those discussed above, as it may be the consequence of lack of specificity in a norm (Wiener (n. 77), 9), or lack of recognition of a norm by the relevant actors (Susan Park, 'The World Bank, Dams and the Meaning of Sustainable Development in Use', Journal of International Law and International Relations 5 (2009), 93-122 (100)). Norms contested for these reasons will not have any impact (Guido Schwellnus, 'Domestic Contestation of International Norms – An Argumentation Analysis of the Polish Debate Regarding a Minority Law', Journal of International Law and International Relations 5 (2009), 123-154 (126)).

79 Ingo Venzke, 'Legal Contestation about Enemy Combatants – On the Exercise of Power in Legal Interpretation', Journal of International Law and International Relations 5 (2009), 155-184 (162, 180).

 DOI 10.17104/0044-2348-2023-1-155

contested and challenged as inconsistent with the current state of law, may in the course of time be accepted and adopted according to current needs;[80] some norms simply require time to acquire stability.[81] Norm contestation, understood as the interaction between conflicting views on the meaning, interpretation, and implementation of legal norms, is also a part of building the legitimacy of the international legal order[82] and specific norms. Nevertheless, contestation may also bring negative consequences. Some contested norms may not be strong enough to sustain conflicting interactions, turn out to be inadequate to meet current challenges, and as a result, are discredited.[83]

Which situation applies to the prohibition of threats of force? Has contestation enforced its legitimacy, or on the contrary, has it discredited this norm? Two groups of views may be distinguished when it comes to the interpretation and implementation of the prohibition: on one hand, there are States which consistently highlight the significance of the prohibition of threats of force, as well as indicate that threats of force are legal only when the use of force itself would be legal. On the other hand, some States use threats of force to achieve specific aims, violating the prohibition. Most importantly, there are States which belong to both groups, depending on the circumstances. On these grounds, one may state that the prohibition of threats of force is at a point where one can clearly observe different views expressed by States regarding its meaning and implementation, but it is too early to determine the consequences of this situation for the prohibition – whether it will ultimately be reinforced, or potentially become a fully neglected norm by the end of the process.

In addition, it often happens that States do not justify their threats of force on the grounds of international law, or do not communicate their position when they witness threats of force made by others. In this context, it is relevant to consider the meaning of 'silent contestation'.[84] Apart from its rudimentary understanding, 'silence' also means 'a state of refusing to talk about something or answer questions, or a state of not communicating'.[85] Given that, 'silent contestation' means that States challenge the content, status, and/or application of a norm, but they do not openly express their approach; they do not explicitly communicate how and why they challenge

80 Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism', IO 58 (2004), 239-275 (251).

81 Wiener (n. 77), 6.

82 Arturo Santa-Cruz, 'Contested Compliance in a Liberal Normative Structure – The Western Hemisphere Idea and the Monitoring of the Mexican Elections', Journal of International Law and International Relations 5 (2009), 49-92 (52).

83 Acharya (n. 80), 251.

84 See the article of Max Lesch and Christian Marxsen (n. 72).

85 <https://dictionary.cambridge.org/pl/dictionary/english/silence>.

the norm, although the contestation of a norm may be construed from their conduct. That definition seems to be close to the approach adopted by States toward the prohibition of threats of force.

The question is how contestation (or silent contestation) differs from mere violation of international law. The concepts of 'violation' and 'contestation' are not alternatives to one another, rather they describe different positions towards the same conduct: 'contestation' describes the discursive approach, that is the position articulated by States (explicitly or implicitly) about a specific norm, while 'violation' expresses an assessment of whether certain conduct is legal or not. Thus, different situations are possible: a State may be violating a norm and contesting it, but it may also be violating the norm while not contesting it. In the context of the prohibition of threats of force, these findings indicate that the mere assessment of the State's conduct as a violation of the prohibition (like in the cases described in the previous section) does not give evidence on whether the State contests (or not) the prohibition of threats of force. This dilemma seems especially difficult to solve with regard to a situation when the same States fail to comply with the prohibition of threats of force and claim that it remains an important norm of international security law: are they 'silently contesting' the prohibition, are they violating the norm without contesting it or is their practice simply internally inconsistent?

In summary, to determine whether States silently contest the prohibition of threats of force, one would have to dwell on the intent of States every time they refuse to comply with the plain meaning of the prohibition of threats of force, i. e. beyond the two exceptions to the prohibition envisaged in the UN Charter. If the prohibition of threats of force is a silently contested norm, then in the future its interpretation on the grounds of the Charter may evolve, or a new customary norm may be formed that is less strict than the reading of the UN Charter. However, if the States' non-compliance with the prohibition amounts only to its violation, it seems that due to the inconsistent practice (simultaneous violations of the prohibition and confirmations of its binding force) the status of the prohibition will not change.

V. Final Conclusions

Threats of force may be regarded as a useful method to compel a State to comply with international law or act in a specific way, and only if these threats prove ineffective does the use of force come to the fore. Thus, threats of force may seem to be an attractive international policy tool, since, thanks

to the threats of force, States may achieve the same results as by the use of force, but with far less effort. Contrary to the use of force, States rarely offer any justification for threats of force, like in two cases of threats of force discussed in the second section. On the other hand, it should also be highlighted that States have never negated the existence and significance of the prohibition.

It is legitimate to state that at this moment the prohibition of threats of force is neither fully respected, nor discredited. No matter which option is closer to the current status of the prohibition, this is certainly not the standing that the drafters of the UN Charter sought, especially when they included the prohibition of threats of force among the Principles of the United Nations.

DOI 10.17104/0044-2348-2023-1-155