UNIVERSIDADE CATÓLICA PORTUGUESA

Threats and International Law: A New Exchange Currency?

Francisca Mota de Sousa

Mestrado em Direito

Faculdade de Direito | Escola do Porto

2021

UNIVERSIDADE CATÓLICA PORTUGUESA

Threats and International Law: A New Exchange Currency?

Francisca Mota de Sousa

Orientador: Prof. Dr. José Alberto Azeredo Lopes

Mestrado em Direito

Faculdade de Direito | Escola do Porto

2021

Acknowledgements

In the beginning of dissertation, I was constantly reminded of how this was an individual and lonely work. However, even in this abnormal circumstance of the pandemic it could not be further from the truth. This paper is the result of the help and care of many people that deserve my recognition.

Firstly, my deep and sincere gratitude to my family for their love and unparalleled support. I would like to thank my parents for believing in me, for all the sacrifices to give all the opportunities that made me who I am and for keeping the freezer filled with ice-cream throughout these last six months. I am also extremely grateful to my sister, my role model and inspiration for cheerleading me and always be present. To my cousins, Margarida and Matilde, for all the hours listening to this work and for all the coffee breaks via videocall, and Zé who made me feel like the cool cousin when said "Wow, you study war!" I could not have done it with you all.

I am also grateful to my college friends: Bárbara, Beatriz, Carla, João Jorge, Mariana, Marta e Rita for all the memories we have shared thought out these years and for being the ones who really understood.

To Inês, my best friend, "the Frodo to my Sam", whose patience cannot be underestimated. Thank you for listening to every word and theory of this paper and the many others who luckily will never see the light of day. I truly believe that you became the first designer who can cite from heart the ICJ jurisprudence of this case.

I'm deeply indebted to Diogo, for all the conversations in the balcony, the constant encouragement and for celebrating with me in the days I could only finish one sentence, the completion of this work with not have been possible without your support.

I would also like to thank Prof. Isabel Tavares for her valuable insight and for teaching me that although it can be frustrating and even heartbroken sometimes, the existence of International Law is the biggest proof of Humanity.

Finally, my deepest gratitude goes to my advisor Prof. Azeredo Lopes, whose enthusiasm and passion in International Law made me leave every class as if I was seeing the world for the first time, making my career choice obvious. I will forever cherish this opportunity to work with you. Thank you for your guidance, for encouragement and patience that made the work worth it.

Abstract

The legal figure of prohibition of threat of force contained in article 2(4), the pillar of the UN Charter has been purposed neglected by the legal system and the legal literature which resulted in the instability of the legal system feed by the assumption that norm does not reflect the reality: threats are a mundane instrument of international policy.

With a combination of the fragments of jurisprudence regarding this figure and the little and polarized legal literature, the concept and scope of the prohibition can be defined and the couple of threat and use of force is establish.

From this assessment the legal status of the figure unveils, and the test of its peremptory status is compared with the new ICL reports on the matter.

The attempt of the creation of a clear framework for threats in self-defence reveals that the lack of use of this figure results from the myths among States and the reality that in case of empty threats or cases where the figure materializes into actual use of force poses no danger.

As a result, the study unveils the inconsistencies in practice and how this innocuous neglect is jeopardizing the entire legal system and the way States behave.

Keywords: threat of force; self-defence; jus cogens norms;

Resumo

A figura jurídica da proibição da ameaça de força contida no artigo 2º (4), pilar da Carta das Nações Unidas, tem sido negligenciada pelo ordenamento jurídico e pela literatura jurídica, o que resultou na instabilidade do ordenamento jurídico alimentado pela presunção de que a norma não reflete a realidade: as ameaças são um instrumento mundano da política internacional.

Com uma combinação dos fragmentos da jurisprudência a respeito dessa figura e a pouca e polarizada literatura jurídica, o conceito e o escopo da proibição podem ser definidos e a interligação entre a ameaça e uso da força é estabelecido.

A partir dessa avaliação, o estatuto jurídico da figura é determinado e comparado com os novos relatórios do ICL relativamente a normas peremptórias.

A tentativa de criação de um quadro para as ameaças em legítima defesa demonstra que a não utilização desta figura resulta dos mitos entre os Estados e da realidade que em caso de ameaças vazias ou casos em que a figura se materializa em uso efetivo da força, esta não representa perigo.

Como resultado, o estudo desvenda as inconsistências na prática e como essa negligência inócua está de facto a prejudicar todo o sistema jurídico internacional e influenciar o comportamento dos Estados.

Palavras-Chaves: ameaça do uso da força; jus cogens; legitíma defesa.

Índex

Abbreviations

DARS- Draft Articles on State Responsibility

G.A- General Assembly

ICJ- Internantional Court of Justice

ILC- International Law Commission

NATO- North Atlantic Treaty Organization

NPT- Non-Proliferation Treaty

OCIAFTPSN- Ordinance Containing Instructions for the Armed Forces in Times of Peace and in State of Neutrality

SD-Self-defence

UN- United Nations

VCLT- Vienna Convention on the Law of Treatries

WHO- World Health Organization

WWII- World War II

Introduction- Pre-Charter

This chapter will provide an introduction, to the study, by first briefly discussing the background and context of threats of force.

The Charter of the United Nations represents a turning point in international law by introducing the first twin prohibition on the threat and the use force, making article 2(4) one of the main pillars of the international legal system.

The construction of the norm was not only a direct and natural response to interstate conflicts that came with the outbreak of WWII but also a reflection on the previous attempts to regulate and restrain the use of force. The deliberate substitution of the term "war" for "force", putting an end to self-declaratory formalism, represents a conquest covering all forms of hostilities, both technical wars and incidents falling short of an official state of war. This new wording in the UN Charter was created to overcome the deficiency that governments could deny the existence of a state of war by simply omitting to attribute that word to their military actions.

While the evolution towards the prohibition of the use of force is easily traced and evolved almost naturally, it was the prohibition on threats of force that made the norm pathbreaking.

Before the Charter, threats were a synonym for ultimatum[1] a common and lawful practice being even instrumentalized in Hague Convention's as a requirement in the opening of hostilities[2]. Despite the Covenant of the League of Nations's expansion of the concept to short measures of war, threats were still left out of consideration in the treaties.

More than seventy years later, the no-threat rule remains incognito. While in Nuclear Case, the legality of threats was conditioned upon the legality of the use of force, connecting these two legal figures, it left many issues unresolved, such as the dilemma of nuclear deterrence and guidance into how this link between the two figures should be analyzed. Recently, the ILC adopted a set of Draft conclusions on the *jus cogens* norms

[1] The most cited definition of ultimatum is Oppenheim's that considered as the "technical term for a written communication by one state to another which ends amicable negotiations respecting a difference, and formulates for the last time, and categorically, the demands to be fulfilled if other measures are to be averted." apud (Stu ̈rchler, 2007, p.13).
[2] Article 1 Convention Relative to the Opening of Hostilities, 2 Am. JIL Supp. 85–90 (1908) (18 Oct. 1907).

which only deepened the problem of ascertain the legal status of threats of force and subsequently the implications to the legal status of article 2(4).

The discrepancies between the attention and concern given to the phenomenon of threats when compared to the use of force is mirrored by the lack of academia discussion surrounding the subject. Even when analyzing the residual literature on this provision it is marked by polarized doctrines: Those who view threats as tolerated evil that can in fact serve the purposes of Charter by deterring conflicts and those who firmly believe in threats as are catalyzer to war. As a result, the existing research is inadequate from the basis of the prohibition: what constitutes a threat and what is the scope of the prohibition, let alone when trying to define its legal status.

This body of theory presents a problem: by neglecting one segment of the structure norm that is agreed as one of the fundamental conquests of the international legal system it jeopardizes it as a whole.

The aim of this dissertation is to understand the reasons that make the prohibition on the threats of force such a daring and complex subject. For the purposes of this paper, we will focus only on threats as a component of article 2(4), that should not be confused with the concept of threats embodied in Chapter VII of the Charter.

We purpose a deep study on the concept of threats in order to establish a framework of criteria to the legal scope of the Charter prohibition, followed by an evaluation of the prohibition against the article 51 and determination of the cases where a lawful threat in SD can occur.

Only then it becomes possible test the limitations invoked by legal literature regarding its legal status as a peremptory norm. By invoking this problematic and compared them to the real perception that the international community has of this figure, we hope to understand the role that threats of force have in the relations between States by stretching the concept of threats to its instrumentalization.

1.Definition of threat

Despite the pioneering prohibition of the threat of force in the Charter, it was left with many ambiguities. While the *trauvaux préparatoires* reveal a towering consensus among the delegates of the San Francisco Conference that only the double prohibition would succeed in maintaining international peace and order, no answer regarding the content of the prohibition was contemplated. We can only gather that the prohibition of threat was meant to prevent short of war measures and that the article was referencing specifically to military threats.

In order to understand the legal scope of the prohibition is important to unveil the notion of threat.

Since no definition is provided it becomes necessary to look to other sources of law. Despite the multiplicity of treaties containing a prohibition of threat of force[3] the vast majority only replicates the Charter norm, providing no further details that help expose the concept of threat or the application of such norm. There is also a lure to focus on the ILC drafts for enlightenment that can be risky. Not only little consensus is found amongst members but also there is a clear choice to be stay bonded to the UN Charter, the principles enunciated in the Nuremberg trials and Resolution 3314[4] closing the eye to other traditional sources of international law.

1.1Legal Literature

Starting with literature, the most cited definition of threat, proceeding from the notion of ultimatum, is Ian Brownlie's who considered it as "an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise to resort to force in conditions for which no justification for the use of force exists, the threat itself is illegal" [5].

This approach is not only consistent with the Commentary to article 13 of the ILC Draft Code of Offences against Peace and Security of Mankind that perceives threats as "acts undertaken with a view to making a state believe that force will be used against it if

[3] As example: Helsinki Pact, 1970 and Friendly Relations Declaration, General Assembly Resolution 2625 (XXV), 25 RGA 121, 122 (1970).
[4] A/RES/3314.
[5] (Brownlie,1963 p. 361).

certain demands are not made by that state"[6] but also sustained by the position of the ICJ that will be further developed latter on.

From the main definitions in literature is possible to identify five traversal elements: the existence of a threating State and a target State; a list of demands; a promise to resort to force and a solution less inexorable.

Being a threat is a form of coercion which aims to reduce the range of choices otherwise available to states, it is possible to conclude that we are facing a type of coercion where the purpose and outcome are more relevant than the force applied.[7]

One of the main features of threats is the fact that they are not bound by any formalism, allowing a State to convey the massage in various manners. As ICJ foresees threats can be made in "declarations, that is to say expressions made public in writing or orally; communications, that is to say messages sent by authorities of on government to the authorities of another government, by no matter what mean of transmission; and finally, demonstrations of force such as concentrations of troops near the frontier"[8].

Bronwlie's definition serves as a starting point to the concept of threat. However, as we navigate through his definition it will proved to be insufficient and flawed. One of the limitations of his approach is considering the existence of a demand as a main criterion. It has become commonplace to distinguish compellent from deterrent demands: the first intending to coerce the target to refrain from acting, while the latter compels the victim State to actively engage in a specific conduct. "While deterrence tends to be indefinitive, compellence has to be definitive".[9] As much as demands are easily associated with threats of force, serving as a good indicator on the existence of a threatening behaviour by a State they are not preconditions. A threat can in fact be composed without explicitly mention the behaviour that can revoke the actions of the threatening state.

The view is developed by Diestien's, when trying to unhook the notion of threat from *ultimatum,* introduced the duology of implicit and explicit threats.[10]

[6] *ILC Yearbook* (1989-II, pt. 2) p. 68.
[7] (Sarduska,1988 p.242).
[8] Supra note 6.
[9] (Schelling, 2008 p.69-78).
[10] (Diestien 2012, p.82,89).

1.2Explicit threats

An explicit threat[11] is closer to the classical form of ultimatum being characterized by an unequivocal message listing the demands that the targeting State need to comply with in order to suppress it. Therefore, the message sent by the threatening state is easily identifiable, generally unproblematic and considered *prima facie* a violation of article 2(4). Still, an explicit threat goes beyond ad hoc threating statements and can be present, though more general-mannered, if they are still legally identifiable and sufficiently precise regarding targets and content, in defensive alliance treaties[12] and even in national legislation[13] or policy instruments.

With the advances of technology Grimal[14] theorized the possibility of threats being expressed through social media by a Head of State account could indeed violate Article 2(4) of the UN Charter. According to the 2018 Twiplomacy study mentioned in his paper[15], more than 97 per cent of all 193 UN member states have an official presence on Twitter. Most of the legal literature agrees that cyber operations can amount to a violation of article 2(4) can in fact occur in the cyber sphere which naturally includes threats of force.

The author identifies two obstacles in these types of threats: discern if the post is issued from the Head of a Government as official or as a personal account, which in most cases linking the conduct of the State to the content of the messages and past activity of the account is easily resolved and if retweets could also be considered a threat or an endorsement form a State. Without diving deep into the subject, the author opens the dialogue to the prospect of these social media constitute evidence of costumary law. However, he promptly rejects that retweet could never constitute an endorsement which under our view could be one of the most interest forms of this "social media diplomacy".

---

[11] Other authors prefer the term threats by "clear communication" defining it as "the type of threat most intuitively representative and recognizable understanding of a threat of force...". (Green and Grimal, 2011 p. 295,296).

[12] Sarduska suggests that alliance pacts cannot fall under the scope of unlawful threats given they are widely accepted and that only conducts "that triggers a reaction of stress that leads to (a State) accommodating or adapting behavior" cannot be held for violating the charter norm. Also confirmed by the French Government claiming that defensive military alliances are lawful despite implying a deterrent threat. Supra note 7 at 247 and See. (*Nuclear Weapons*, written statement of the Government of the French Republic, 20 June 1995, p. 25).

[13] An example often used and relevant currently is the 2005 Chinese law against the separation of Taiwan. apub. (Roscini, 2007 p. 246-247)

[14] (Grimal 2019, 83-192)

[15]Burson, Cole, and Wolfe, "Twiplomacy Study 2018: Executive Summary", https://twiplomacy.com/blog/twiplomacy-study-2018/ (accessed 1 January 2021).

Finally, a threat can also result from accumulation of a series communications, be deduced from certain positive actions[16].This is certainly true in the case of the deployment of the Soviet missiles to Cuba that lead to naval blockade of the island by the United States.

1.3Implicit threats

One the other hand, an implicit threat is difficult to identify, creating a threshold for States to hide their conducts behind misinterpretation through non-verbal actions. They can also manifest by addressing the threat to a proxy audience at first while aiming at a specific adversary.

Disparities of power between States are not a violation of article 2(4), neither the militarization of a State implies a threating conduct[17]. Still, threats can be carried out through demonstrations of force: military maneuvers, moving army units into proximity with the target, deploying certain weapons, imposition of a blockade, or even increasing a military budget.

Consequently, in order to access what type of military actions can constitute an implicit threat is important to distinguish in theory, threat from acts of planning and preparation where the decision on the use of force has already been taken and is normally conducted with secrecy[18] and from mere warnings where a State "if a State declares its readiness to use force in conformity with the Charter, this is not an illegal threat".[19]

Despite the difference between general militarization and specific military build-ups in practice is not easy to trace. A threat cannot be deduced from the action alone. The circumstances of each case together with the political relations between the States are crucial for qualify a conduct as threat of force. Location timing, and frequency of the military maneuvers are further criteria to take in consideration. Taking for instance acquisition of weapons by a State, this conduct can be considered an unlawful threat, planning/preparation of aggression or even a lawful

[16] Supra note 7 at 243.
[17]As stated by the ICJ: "since in international law there are no rules...the level of armaments of a sovereign State can be limited." *Nicaragua*, Merits, Judgment of 27 June 1986, *ICJ Reports* (1986) para. 269.
[18] Supra note 11 at. 234-238.
[19] Supra note 9 p.35.

act, depending on the scenario. This analysis can only occur *post facto* which is problematic given that most threats end up not being judged, whether because they are eclipsed by an actual use of force, whether because they never materialize. Is still rather nebulous what legal consequences arise from such distinction.[20]

1.4Hostile Intention

The previous section has shown how a threat can adopted multiple forms and elucidated some of the difficulties that arise solely in identifying a threat which only aggravate when trying to establish a set of requirements in order to examine what types could amount to a violation of the Charter. We also briefly mention that, since the threat does not need to by blatant, one of main difficulties emerges from a subjective criterion: "a threat of force derives its wrongful and unlawful character from the element of coercion which must be established". Is this subjective element of coercion or hostile intention, that can be impossible to track or prove that a conduct amounts to breach of article 2(4) notably in implicit threats[21].

This criterion if often linked with requisite of a threat to reach the target State[22]. It is undeniable that in order to threat to produce any kind of effect they need to be communicated. The way a threat is formulated affects how the victim State views the threat and subsequently how he accesses the conduct he should engage. In cases of more general demands or in cases where no demand is clearly State the victim can fail to understand what conduct can suppress such threat. Moreover, the victim can simply doubt the seriousness of the threat or disbelieve thar is directed at it.

However, we believe that such criteria are being extrapolated. Regardless of how the message is receive, even if it fails to produce the desired effects on the threatened State it does not change the lawfulness of a threat. It would be dangerous to restrict a threat to the understanding of the victim State placing the burden of proof on the target.

---

[20] Supra note 10 at p.296-297.

[21]"A threat intrinsically possesses an "intention (that) provides the mental element implicit in the concept of threat." *Legality of the Threat or Use of Nuclear Weapons* [hereinafter Nuclear Weapons Case] (Dissenting Opinion of J. Weeramantry's), I.C.J. Reports 1996, p.54 International Court of Justice (ICJ), 8 July 1996.

[22]Roscini on the other end, underlines the importance of the target state being aware of such conducts otherwise, they can be considered preparation of aggression since there is no hostile intention. See supra note 13 at p.234-238. Sarduska considers that a threat must "trigger of a stress reaction". Supra note 7 at p.244.

1.5-Imminence

Finally, imminence is often suggested as a precondition of threat. The creation of a sense of urgency prevents the target from equating inertia to avoid complying with the requirements. By stipulating a deadline, the target State bars this hypothesis but simultaneously marking the date which upon he supposed to fulfill its promise demonstrating earnestness in its words. Still, this feeling can be transmitted regardless of a deadline. Although we consider that it cannot pose as a final criterion[23], it constitutes a good indicator on the existence of a threat of force and can be included in the subsequent section where we will discuss what features increase the chances of a triumphant threat. Imminence of a threat would prove its importance in the study of threats as acts of SD.

1.6-Enabling conditions

With the understanding of the content of a threat and its volatile nature raises the question of what elements can impact its success. These are not to be considered prerequisites but rather enabling conditions that can influence the outcome of effectiveness of a threat.[24]

It has become commonplace to distinguish between the conditions that shape credibility, such as context and character of the threat, from the conditions that shape the target perception of the threat and degree of difficulty of compliance. The test of credibility together with the degree of difficulty of the demands determine the balance between cost of compliance and cost of defiance that the victim State establishes define the potency of a threat.[25]

Is important to keep in mind that a threat is rarely an isolated incident and can be made in conjunction with complementary actions to further pressure its target, like for example: economic sanctions or inflammatory propaganda since the threatner is likely to try to convince the international community of the legitimacy of his conduct.[26]

[23](Hofmeister 2010 p.112,113).
[24] Sarduska argues that a "threat is effective when the target perceives it as being so grave as to leave no reasonable option but compliance" which shifts the onus to the target state. Supra note 7.
[25] (Blecham Wittes,1999, p. 6-11).
[26] Supra note 7 at p. 244

Regarding the context: The state must be in the position to carry out the threat so it must have the capability and commitment to implement it, provoking in the target State the "believe that aggression is seriously contemplated against that State"[27]. The evidence of capability is more objective so it can be clearly seen in the case of a state threating with a military power that it does not possess. Diversely, the commitment of the prospective aggressor in using force is not as evident. A legitimate way to ascertain this commitment to run an armed encounter is through context which includes: the reputation of that State; previous past behavior and public and international community support.

Historical precedents of former forceful measures and threating actions mold the perspective of the target State, affecting negatively or positively the effectiveness of the threat in its mind.[28] Blechaman and Wittes denote that reaffirmations of long-standing positions are more likely to be taken seriously than announcements of new demands that can allure the target State to want to call the bluff and test the claimant's seriousness.[29]

Finally, the support or opposition of third nations can also influence the view of the victim state so the State might try to manipulate it. Despite the tendency of silence in international community in regards of threating behavior, the opposition or endorsement of a conduct can affect how the state perceives the seriousness of the threat that is made upon it.

Moving to the character of a threat, which is the manner how it is conveyed as was mentioned, imminence increases credibility. The choice to comply is inevitable dependent on the degree of difficulty of the demand. Although a demand is not mandatory in a threat is favorable to State to at least imply the results he's trying to obtain. A threat clearly articulated and specified is favorable for both parties. A set of demands unrealistic for the victim state would never suffice. In these cases, the self-guard of reputation will also influence the victim state perception. Compliance threats that require a public action by the victim state can be seen as humiliating counting as a negative factor in the choice to comply. Taking as example the retreat of troops, that can be cases where proud and the fear of demeaning towards the international community are costs that the victim state is not capable of doing. By analogy deterrent threats are likely more effective since the exposition is minor.

[27] ILC, *Yearbook of the International Law Commission 1989, vol.* 2 p.68.
[28] Supra note 9 at p.68.
[29] Supra note 25.

When testing explicit and implicit threats across the credibility test, the latter prove to be more credible, since they require a certain action being costly and indicating commitment. The deployment of military force for instance shows the seriousness of the state in carrying out the conduct in case of non-compliance. Despite the risks of mis interpretation and the difficulties in identifying this type of threats they proven to be more credible when comparing to verbal threats alone. One well known strategy is complementing verbal threats with military actions as a form to increase pressure.[30]As we have seen States can conduct a series of actions that amount to an illegal threat but also direct multiple threats to the same target.

With literature the concept of threat unveils as a complex matter with too many variants to enable a creation of a clear framework that covers all forms of unilateral threats. With the elucidation of some features arises all the difficulties of this subject matter that can be seen as an impossible matter. The neglect towards this figure is now understood. Still, with concept is on the table is possible to move to the reasons that can make a threat illegal under the charter. Even by dissecting the concept of threat the question remains of what conducts triggers a breach of the prohibition set in the Charter norm.

2.Jurisprudence

Turning to jurisprudence of the ICJ despite the scarcely number of decisions on the matter it remains a valuable source on the scope of legality of the threats of force. There are only three cases refer or imply threats of force and even in those threats were not a central part of deliberations[31]: Corfu Channel Case[32], Nicaragua Case[33] and Nuclear Weapons Case[34]. For the purpose of this dissertation the follow study of these cases will solely focus on the conclusions relevant to the subject matter and analyzed as they become relevant.

[30]During the conflict over the Falkland Islands the United Kingdom pose a clear ultimatum towards Argentina while simultaneously increasing the number of British Forces in the region, which constitutes an implicit threat. See. *The Falkland Islands: Negotiations for A Peaceful Settlement*, 1982, p. 3 (U.K.),
[31] Supra note 1 at p.66.
[32] Corfu Channel Case (United Kingdom v Albania), Merits, 1949 ICJ Rep. 4 (9 Apr. 1949).
[33] Supra note 37.
[34] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 ICJ Rep. 226 (8 Jul. 1996).

2.1The Nicaragua Case

The 1986 Nicaragua Case regarding the support by the United States to the Contra Guerrillas against the state of Nicaragua. This case if often mentioned as a pillar in international jurisprudence on article 2(4). It also constitutes a clear example of a judgment where threats were obscured by the use of force itself. Still, the ICJ held that military maneuvers could amount to a violation of article 2(4) even though in the case that was not verified and in principle states were free to determine their own militarization.

Not only the concept on an armed attack was drafted as the gravest form of use of force but the "spectrum of gravity" was stipulated to "...distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms." [35]Analogously, threats could be considered in a "scale from the innocuous to the more extreme threat of force", considering only the latter as a violation of the charter norm.[36]

2.2Nuclear Weapons Case

The first attempt of institution of an embargo on nuclear weapons was raised in June 1950 to the ILC.[37] Likewise, the Polish government requested this issue to be examined as a crime against the peace of mankind.[38]

Nonetheless, The Nuclear Weapons Case started with the request from WHO in 1993 to the ICJ on advice on the the health and environmental effects of nuclear weapons. However, the court declined a judgment deeming it *ultra vires*, since the WHO was behaving outside its legal ability. Later in 1994, the G.A. place before the ICJ the follow request: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[39] This request was not only vague but constructed around a hypothetical and abstract situation which was atypical for the G.A who normally present the requests related to a specific situation or operational problem.[40]

The ICJ was left in a very uncomfortable position with a request that widen from the problematic of nuclear weapons to the use and threat of force in any circumstance. As Stürchler observed the ICJ felt trapped between the dichotomize views of States between

[35] Supra note 31 at para.191.
[36] (Lauren, 1972 p.145)
[37] Yearbook of the ILC, 1950, Vol I, p. 131.
[38] *Ibid*, p.162
[39] *Request for Advisory opinion*, The Hague: International Court of Justice, 19-12-1994.
[40] (Matheson, 1997 p.420,421).

the ones who believed that the Court was not entitled to comment on nuclear deterrence only on the legality of compellence, and the ones who believed that since nuclear usage would never pass the legality standards, threating the deployment of such would, by consequence be unlawful. In that sense as for deterrence, the court was capable to declare if it was illegal as well.41 This division of opinions was mirrored in the incompatible opinions of the judges proving the contradictory views in the international community about this issue.

In 1996 the court finally judged upon the question, who many criticized as a political question framed in legal terms42. Despite the controversial decision, who many scholars define as disappointing but not surprising, along with the central question of permissibility of nuclear weapons the court also touched upon other issues.

Firstly, is important to denote that the ICJ in its substantive response to the request by the G.A concluded that "there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."43 However, the court considered the international agreements44 that restrict the utilization or certain type of nuclear weapons "as foreshadowing a future general prohibition of the use of such weapons ..."45 Still, in practical terms a scenario where de use or threat of nuclear weapons passes all tests on the rules of discrimination, proportionality, and necessity is almost inconceivable although Judge Schwebel uses Operation Desert Storm as a "most recent and effective threat of the use of nuclear weapons." [46]

Secondly, the ICJ formulated what can be considered a retroactive mechanism to test the lawfulness of threats, created based on hypothetical grounds. Stating that the "notions of "threat" and "use" of force...stand together in the sense that if the use

[41] Supra note 1 at p.79 ss.
[42] Judge Ora posed against the acceptance of the request by the ICJ seeing the request as for "endorsing a legal axiom" in order to achieve the pollical purpose of some States and international organizations of a ban of nuclear weapons. Supra note 34, Dissenting Opinion of Judge Oda, para. 43,51-53.
[43]Supra note 32. para.105
[44]The notable example being the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). See. Supra note 34 (Dissenting Opinion Vice-President Schwebel) p.92.
[45]Supra note 32 at para.62
[46] Supra note 44 p.101-107.

of force itself in a given case is illegal -for whatever reason- the threat to use such force will likewise be illegal."[47] inextricably linking these two figures.[48]

On the question of general law of armed conflict naturally the Court asserted that "the threat or use of nuclear weapons would *generally be contrary* to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law"[49]. The use of the term "generally" was clearly intended as a means of avoiding the assertion that all uses of nuclear weapons would be illegal[50], though it is not clear what types of uses it believed would or would not be prohibited." Still, by coupling the two legal figures together we can deduce that threats in general are prima facie unlawful. Firstly, even though nuclear weapons are not a synonym of nuclear bombs, they are characterized by the uncontrollable effects against a military objective. Transposing to the necessity requirement "if a State cannot control the level of destructiveness of a weapon, then it cannot assure that the use of the weapon will involve only such a level of destructiveness as is necessary in the circumstances" and subsequently, cannot assure that principle of proportionality is fulfilled.[51]

The ICJ went further by stating that the mere possession on nuclear weapons could constitute a threat under article 2(4)[52]. This would mean that if such possession falls under the scope of 2(4), automatically acquisition, assembly, installation, deployment and testing are also prohibited under the Charter norm[53]. By doing so the problematic shifts to the justifications of such action listed by the Court: "an extreme circumstance of SD,

[47]Ibid. para.47

[48]This result goes in hand with Brownlie's claims that "if the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal." Supra note 5 and with the ICJ statement in Nicaragua Case where that threats and use of force were considered as "equally forbidden" supra note 7 para.227.

[49] Even though the Court limited such acts to the fundamental principles of humanitarian law it refused to rule that proportionality by itself could exclude the use of Nuclear Weapons in all circumstances. Judge Weeramantry's strongly opposed to this conclusion stating in his dissenting opinion: "I regret that the Court has not held directly and categorically that the use or threat of use of the weapon is unlawful in all circumstances without exception". Supra note 32, Dissenting Opinion Judge Weeramantry at p.443.

[50]Once again Judge Weeramantry's challenged this decision in his dissenting opinion viewing nuclear weapons as forms of "Total devastation admits of no scales of measurement. We are in territory where the principle of proportionality becomes devoid of meaning." Ibib. p.550.

[51] (Moxley, 2002, p.449-450.)

[52] Supra note 34, at para.48. This conclusion differs from the ICJ findings in Nicaragua Case supra. note 7. Still, legal literature agrees that the mere possession of any other type of weapons would by no means amount to a violation of the charter norm.

[53] On his dissent opinion Judge Weeramantry's distinguishes possession or stockpiling from deterrence since latter in his view encompasses possession of weapons in a state of readiness for actual use. Supra note 49 p.540

in which the very survival of a State would be at stake"[54] ; question of deterrence and response in case of a belligerent reprisal.

Regarding the case of State survival, the court did not provide any definition. Considering this as the extreme situation where the use of threat of nuclear weapons would be in legal under article 51 and 42 in conformity with Charter VII of the Charter.

As to the policy of deterrence, the Court did "... not intend to pronounce here upon the practice ..." [55] cautiously deviating from the main problems that a decision would imply. "In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible"[56], otherwise is loses credibility and becomes obsolete. The reasons behind this decision are clear since it would jeopardize the former conclusions on possession of nuclear weapons and the coupling of threat with the use of force[57]..

The debate among the judges and their polarized views on this theme becomes more relevant than the actual decision of the court given the inclusion of several scenarios where the use or threat of nuclear weapons would be considered licit or not and the discussion to differentiate the various types of nuclear weapons.[58]

The Nuclear case provided clarity in some areas while leaving many others unresolved, as for instance, the application of the couple of the two figures.

3.Legal Status of the Threat of Force

During this paper we will be forced to look beyond the UN Charter in order to understand the scope of the prohibition of the threat of force. However, the legal status of this phenomenon remains unanswered. Although deeply connected with the prohibition of the use of force in the same way we showed that we cannot simply transpose the findings of the use of force to threats, since they remain different figures. Article 2(4) is often mentioned as the archetypal example of a jus cogens

[54]Supra note 34 at para.97, *disposiff* 105 (1) E.
[55] Deterrence was used as evidence for the costumary law in favor of the use and threat of nuclear weapons. "... The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent opinio juris on the one hand, and the still strong adherence to the practice of deterrence on the other." Ibid Para 73
[56] Ibid. para.48
[57] Regardless, implicitly with the silence towards the legal status of deterrence the ICJ negates the Lotus Presumption. Taking this into account it was expected for the ICJ to concluded different and stating that without conclusive custom states were free to practice nuclear deterrence. See. Ibid para 52 and Stürchler, supra note 1 p.87.
[58] See supra note 44 (Dissenting Opinion of Judge Higgs) para.21.

and the prohibition of the use of force classified in such legal standard by all of those who believe in the existence of the norm.[59]

In order ascertain the legal status of the threat of force and since Customary law is the most common basis for peremptory norms[60] we first need to verify if the prohibition reflects costumary law.

3.1Threats as customary law

Providing a definition of costumary law could be in itself the subject of an extended study. Although no unanimous definition exist is seen as a main source of international law, together with treaties and "general principles of law".[61]

According to Higgins "The emergence of a customary rule of law occurs where there has grown up a clear and continuous habit of performing certain actions in the conviction that they are obligatory under international law."[62] This makes it a dynamic source of law dependent of a casual relation between *opinio juris*[63] and state practice

When trying to determine the concept of threat we mention the multiplicity of international agreements and instruments of soft law that replicated the prohibition on threats of force. This pattern can be considered one of the first aspects to the indication of State practice regarding the subject. According to Brownlie evidence of state practice can be found in multiple sources from diplomatic correspondence, policy statements to state legislation , which value depends on the circumstances.[64]

3.2Opinio juris on the prohibition of threats

One of the main differences showed in the first Chapter was, that contrary to the use of force, threats had never been legally limited in any form prior to the creation of the Charter. Given that treaties can be evidence of costumary law it can allude to the creation of a paradox since no empiric evaluation can be made regarding how States would behave

[59] Ronzitti apub (Green, 2011, p.218).
[60] Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens)*, *Report of the International Law Commission*, Seventy-first Session, General Assembly Official Records (A/74/10), Chapter V. at p.143.
[61] Article 38 of the ICJ Statue is often mention as defining "international custom, as evidence of a general practice accepted as law." Article 38(1)(b) ICJ Statute. See (D'Amato, 1971 p.61-63).
[62] Higging,1995 apud (Lepard, 2010 p.6)
[63] According to the ICJ "in order to achieve this result *(opinio juris),* two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and The Netherlands), Merits, 1969 ICJ Rep. 3 (20 Feb. 1969), at para. 77.
[64] (Crawford & Brownlie, 2012 p.371 ss.)

if they were not bind to Charter. However, when reading article 31 3(b) of the VCLT which states that "shall be taken into account (...) subsequent practice in the application of a treaties" [65] and article 38 of the Convention[66] makes it clear that treaties can have a dual role: they can codify a norm that has previously accepted as costumary law or can help create new costumary law. [67]

As indicated previously, authors often described the indisputable tolerance and neglect that threats succumb to what is explain by the volatile and hypothetical nature of threats. The fear that acting on an empty threat or misinterpreting a warning could provoke further hostilities, chose to be impartial to support mediation and even solidarity with allies are all factors that contribute to the silence of the international community towards unilateral threats which makes the boundary between international law and politics becomes blurred when opinio juris of states is not expressed properly and promptly. Plus, in cases where threats materialized, the subsequent use of force absorbers the threat and when threats never materialized pos condemnation can seem unnecessary. All these factors difficult the study of state practice regarding threats.

However, Roscini challenges Sadurska's position that "threats are a lesser international wrong in comparison to use of force" is a misconception. The silence of third states and the presumed lack of condemnation cannot serve as indicators when in multiple cases of actual use of force, we meet the same lack of reaction and judgement.[68] For this reason we cannot consider the absence of protest or approval by States as an indicator of *opinio juris* against the prohibition. Furthermore, that silence or lack of condemnation is not enough to advocate for the emerge of a new custom regarding threats and that article 2(4) does no longer represents the law.[69]

---

[65] Article 31(3)(b) of Vienna Convention on the Law of Treaties, 1155 UNTS 331 (23 May 1969).
[66] Ibid. art.38. "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such." See also ILC commentary, where the process of crystallization of costumary law is addressed. International Law Commission, 1966 Report, p.230–31.
[67] The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in multiple cases: "There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed." supra note 61 para 71;"To a large extent, those cases turned on the question whether a rule enshrined in a treaty also existed as a customary rule, either because the treaty had merely codified the custom, or caused it to "crystallize", or because it had influenced its subsequent adoption. The Court [...] considered it to be clear that certain other articles of the treaty in question "were ... regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law"" supra note 17 para.177.
[68] Supra note 13 p. 245,246.
[69] (White and Cryer, 1999, p.245.247).

As the ICJ concluded "if a State acts in a way prima facie incompatible with a recognized rule but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the e significance of that attitude is to confirm rather than to weaken the rule."[70]

Turning to international organizations as a source of custom the number of occasions where the prohibition is considered as general international pills up. The Security Council emanated multiple resolution condemning threats of force. For instance, Resolution 573 demanding that Israel refrained for their threating conducts against Tunisia. This view is also shared by ICJ with various Declarations by the General Assembly confirming this prohibition. Although, under article 13 of the Charter resolutions of the General Assembly have no binding legal force and should be seen as merely recommendations it can still provide evidence of opinio juris.[71]

To conclude this section, the prohibition of the threat of force as prime example of a costumary law and is accepted as such. Is important to denote that by identifying the acceptance a norm as of costumary nature we cannot assume automatically the that the norm is accepted as of *jus cogens* norm. However, for the purposes of the following section, we chose to presume that such requirements are fulfilled since: as the ICL Conclusion 7(2) denotes: "Acceptance and recognition by a very large majority of States is required(...); by all States is not required."[72] and as Beyer affirms jus cogens rules derive from the process of customary international law, in itself a part of international constitutional order.[73]

3.3Threats of force as peremptory norms

We comment that article 2(4) is often mentioned as the prime example of a jus cogens norm74 so in this segment of this paper, we propose to test the nature of the prohibition of threats of force as peremptory norms. This is a controversial topic, some authors choose to view only the prohibition of the use of force alone rather than Article

[70] Supra note 17 at para.186.
[71]Some authors disagree with this position recalling that G.A resolutions are not by absolute majority so they cannot serve as indicators of the States beliefs. See. Supra note 62, p.30-44.
[72] Supra note 60 at p.165.
[73] (Byers, 1997 p.222).
[74] On the commentary to draft article 50 (latter article 53 of the VCLT) article 2(4) was considered as a "conspicuous example of a rule in international law having the character of jus cogens".

2(4) which seems preferable as it excludes the problematic issue of the threat of force, regardless of whether the writers taking this approach have acknowledged it.[75]

With the 2019 Draft Conclusions on Peremptory Norms of General International Law of the ICL, that analyzed in detail the methodology for the identification of peremptory norms and their consequences in the hope of providing some clarification in this delicate issue concluding in a non-exhaustive list the prohibition of aggression as a norm that achieved peremptory status.[76] The ILC work feed another side of literature that prefers to dissect article 2(4) into the criteria of aggression which erodes article 2(4) by considering only acts or threats of aggression as *jus cogens* norm.

Although some skeptical authors have questioned the sole existence of such norms[77] or their functionality and other even announced the death of article 2(4) [78], as our starting point we will automatically accept their existence. Before beginning to test the prohibition of threats as a norm of peremptory status is still important to briefly grasp the concept of peremptory norms.

3.3.1 The concept and consequences of *jus cogens* norms

All definitions of a peremptory norms are born from article 53 of the VCLT which states: "peremptory norm *of general international law* is a norm *accepted and recognized by the international community* of States as a whole as a norm from which *no derogation is permitted* and which can be modified only by a subsequent norm of general international law having the same character"[79]. Despite the norm being constructed to resolve conflicts between treaties and jus cogens article 53 is "accepted as a general definition which applies beyond the law of treaties."[80]

Peremptory norms reflect and protect the fundamental values of the international community, hierarchically superior to other rules of international law and are universally applicable.[81] Referred as "super" norms or "descenders of natural law" they work as a compliance pull[82] reflecting ethical principles so essential that

[75] Supra note 59 p.228.
[76] (Taldi 2020 p. 254-255).
[77] (Linderflak, 2007 p.854)
[78] "Yet today the high-minded resolve of Article 2(4) mocks us from its grave." (Frank 1970 p.809).
[79] Art 53 Vienna Convention of the Law of the Treaties.
[80] Supra note 60 p.148.
[81] Ibid.
[82] Supra note 59 at p.219-220.

states should not be allowed to violate them unilaterally or through treaties.[83] Yet, the mere nature of a norm do not confer jurisdiction to the ICJ.

The draft conclusions on the legal consequences of peremptory norms were divided into three sections: treaties; other sources of obligation under international law and state responsibility.

In order to stay within the scope of this paper we find that is important to dive into the consequences regarding the law of treaties separably while mentioning the other ones during the examination of threats of force.

Looking at consequences on law of treaties: according to article 52 of the VCLT, a treaty signed by influence of the use or threat of force is void *ab initio.* This applies both to the conclusion and execution of the treaty as concluded in Lockerbie case, as Roscini mentions. In this case, the consequences whether by use of threat of force appear to be equal. [84]

The only problematic in this case is the procedural requirement of article 65 of the Convention that requires that only the victim state can initiate the procedure of invoking the nullity of treaty and can be threatened not to do so.

The author uses the acceptance by Yugoslavia of the Holbrooke and Kumanovo agreements as example where "threats of force played a major role". We found that his conclusions might have been far much relevant if he used the Rambouillet Agreements as an example. The former ones where actually signed after the materialized use of force by NATO which existed only because the ultimatum that was the Rambouillet Agreements failed. Is not a euphemism look at the agreement as classic ultimatum[85] and even that originated from other failed threats of force. In this case he should have affirmed that the case agreements ware a result of consecutive threats of force and a failed ultimatum that materialized into force. Threats did not play a huge role; they were the core of all the events.[86]

The main feature of these norms is the non derogability. Some authors question this feature in the case of article 2(4) and the right of SD. However, we believe that this

[83]Supra note 62 at p.243-244.
[84] Supra note 13 at p.259,262.
[85] (Lopes, 2003, p.965-972); See also supra note 1 at p.150-157.
[86]Becker goes even further by addressing to the agreement "as declaration of war disguised as a peace agreement since the purpose was not to have Yugoslavia sign the document being another step into preparation to war. By putting the onus, unfairly, on the Yugoslav side for the failure to achieve a peaceful resolution, in order to justify the massive bombing". (Richard Becker, *The Rambouillet Accord: A Declaration of War Disguisedas a Peace Agreement, available at http://www-personal.umich.edu/~lormand/agenda/9905/16.pdf).*

problematic is merely semantic. As Helmersen denotes is a question on the level of generality: "Derogations" are limitations on the scope. Specific acts or rules that diverge from and supplant the content of a more general rule, done by treaty or by consent. Exceptions are a special situation excluded from the cover-age of an otherwise applicable rule."[87] Following this line of thought article 51 does not impair the peremptory status of article 2(4). The ILC comes to the same conclusion but by viewing SD not as an exception but as a supplement to article 2(4).[88]

Returning to the test of threat of force we have three possibilities regarding this prohibition: threats are not a jus cogens norms; threats as the whole article 2(4) has peremptory status or only aggression and therefore threat of aggression has acquired such status. We opt to only look further into the last two options since we believe the first can easily be dismissed.

Starting with threat of aggression give that the ILC's Drafts seem to be taking this path, this would mean that only the "most grave" form forms of threats would have peremptory status which is the safest choice. Following this narrative nuclear and other military deterrence and as a lawful practice would be preserved, so the approach provides a viable solution. However, they are many inconsistencies in this approach.

First, in practice it would create a "matryoshka" effect. We would have acts and threats outside the prohibition of article 2(4) and inside the provision we would have break apart the article into violations of the norm and violations with peremptory status. With tendential rapprochement of aggression, force and armed attack this idea seems unattainable. It would also assent onto the creation of so many draws standing in such blurred lines that abuse by States would be almost automatic imperil not only article 2(4) but the *jus cogens* concept.

Secondly, state responsibility not only entails obligations and rights for the involving States equal to the use of force, but it provides the obligation in article 41 to third States to not recognize as lawful a situation created by a breach of a peremptory norm. While in the Declaration on Friendly Relations States that a territorial acquisition by threat must not be recognized by third States as legal and was considered *erga omnes* by the ICJ on the Legality on the Wall Case. This would

[87]Supra note 77 at, p.175,176.
[88] *Report of the Study Group on the fragmentation of international law: difficulties arising from the diversification and expansion of international law* (A/CN.4/L.682) para.95 p.53.

mean that unless threats, at minimum threats of aggression were consider jus cogens norms modifications of territory by threats could be recognized by third States since it would fall under the scope of the norm.[89]

Moving to the theory that article 2(4) entirely has peremptory status. Being a broader thesis, it would assent on the idea mentioned that force, aggression and armed attack are merging concepts, so technically it would not clash with the ICL's conclusions. In addition, it would not disrupt the Charter norm so we would only have threats that fall under the prohibition but are still considered costumary law and threats violating the peremptory norm which would be a coherent approach to intimate connection between the use of force and threats. Unlike the other theory the lawfulness of deterrence would pose as obstacle since it consists in a threat perpetuated in time and would likely question its current legal status.

Everything considered, both theories are open to criticism covering different aspects while leaving some loopholes. We can securely assume that the path chosen by the ILC is to grant only threat of aggression the peremptory Status. While this is without a doubt the safest and most uncontroversial option we must disagree. Although is true that the proving that Sate Practice and the opinio juris sees threats as costumary law does not mean that it perceives it as having peremptory Status, the obstacles posed in the former chapter are the same. Plus, even the ICJ was timid is mentioning jus cogens norms and that never really impacted the belief on their existence, so the lack of loud advocating from States regarding the status of States should not either. Even by agreeing that is the evidence is not overflowing compared with the use of force we can still concluded that threats as the entirety of article 2(4) is a *jus cogens*.

The idea of dissecting the norm by levels would not only endanger article 2(4) and the entirely legal system of the charter but would jeopardize the authority of peremptory norms in general. This idea of fissuring the norm would only create instability and room for abuse. Even the nuclear deterrence with the NPT and the new notion of the myth of security that creates among States would not pose a threat to the reality that the prohibition on threats of force has peremptory Status. This would only pull the States into be more vocal regarding this prohibition.[90]

[89] Supra note
[90] See (Blackwel and Constanzo 2015).

4.Relation between threats and SD under article 51

With the coupling of threat and the use of force the legal literature began to consider the prospect threats as a lawful defensive response.[91] It is worth noting, that being this legal figure so neglected, this approach was only briefly discussed among academics making it an unresolved matter. Furthermore, state practice provides little guidance in understanding how customary law interacts with countervailing threats[92] given that neither states explicitly try to preclude a wrongfulness threat by invoking self-defense nor there is cohesive response of approval by the international community to these conducts.

Threats are a component figure of article 2(4), which was formulated considering two exceptions: unilateral and collective SD established in article 51 and under the auspices of a UN Security Council authorization to use force under Article 42 which goes beyond the purpose of this work.

In theory, is easy to convey that unlawful threats can be precluded as acts of SD. Despite conceptually use of force and threat are considered equal, we cannot make the mistake of directly transpose the rules of use of force in self-defense to a threat since they are different actions with distinct implications.

Before testing the possibility of self-defensive threats, it is also necessary to note that it goes beyond the scope of this dissertation to examine self-defense as general concept and study all the forms of application, prerequisites or discuss the vast debates around this legal figure. Nonetheless, it becomes necessary to summarily dive into such. Given that terminology varies among literature, in this paper we will consider anticipatory self-defense as a reaction to an imminent threat, and preemptive self-defense a response to threat that cannot be place in a time frame. We will follow the majority of literature and only accept the lawfulness of self-defensive response in anticipatory form.

Under article 51: *"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by*

[91] Common terminology for defensive threats See. Stürchler, supra note. 1 at 267 Actions of "self-help" is also used although in broader terms. See supra note 7.
[92] Supra note 11 at p. 288,289.

Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."[93]

The first question to consider is if self-defense by threat is in fact conceptually possible. While Stürchler[94] maintains that the correlation between articles 2(4) and 51 is self-evident, Green and Grimal challenged this view pointing out that self-defense was constructed as an inherently exercise of a right "through the medium of armed force"[95] despite ending up accepting the possibility.

Even though both scholars bring valid arguments we tend to agree Stürchler given that the lack of study on this issue does not change the rational read of the norm. If the use of force can become lawful by fulfilling the criteria for self-defense, barring this possibility to a threat in the same situation appears ludicrous. Plus, being self-defense an inherent right and threat of force a legitime forceful option in deterring an attack, restraining self-defense to be conducted only by actual armed force is to say at least against the sole purpose of the norm.

In addition, we cannot adhere to Brownlie's doctrine of self-defense as armed response when the sole letter precondition of a prior armed attack as evolved. Not only the notion of what constitutes an armed attack has evolved, taking as example the inclusion cyber-attacks, but the concept has become diluted in the notions of force and aggression.

The ICJ jurisprudence as also, even that implicitly, accepted this view. In Corfu Channel case regarding the United Kingdom threating conduct it stated, "the intention must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing ships."[96]

Furthermore, in the Construction of a Wall Case where Israel claimed that the wall was constructed in SD, which was rejected by the Court on different grounds that non-forceful measures would not qualify as self-defense. It is truth that the wall itself could never be considered a manifestation of use of force so its construction would never

[93] UN Charter art.51.
[94] Supra note 1 at p.282.
[95] Supra note 11 at 305.
[96] Supra note 32 at para.30-

constitute a breach of the prohibition of the threat of force however, in its Advisory Opinion Judge Higgins clearly states "I remain unconvinced that non-forcible measures (such as the building of a wall) fall within self-defense under Article 51 of the Charter as that provision is normally understood."97 With this statement it becomes unmistakable that the Court in fact judged the case considering Israel claims as of non-forcible self-defense. [98]

Having concluded that there are no legal grounds to discard non-forcible self-defense by threat, it is still questionable if is desirable for the law to allow this type of conducts and what negative consequences could arise from this new approach. That is why before trying to explore how threats of force would act under article 51 is worth signaling the difficulties inherent to this system and which do not arise in the case of the classic use of force in self-defense.

4.1Difficulties arising from the coupling of threats in a self-defensive scenario

As mentioned, the Nuclear Weapons Case stated that the unlawfulness of a threat is contingent upon the unlawfulness of the prospective force threatened which in reverse implies that a lawful use of force can be lawfully threatened. This would mean that a threat for force is permissible if the force threatened falls under article 51 of the Charter.

A serious weakness with this argument, however, is that by applying the reverse scenario, that is if all justifications for the use of force will equally preclude the wrongfulness of a threat. In conflicts composed by multiple and simultaneous threats parties would be able to continue with the conviction of perfect legal authority until one of the nations used actual force. The preventive role of article 2(4) would not be observed since only when tensions culminated in actual force the norm would be triggered.

Furthermore, threats do not comport the same destructive effects of the actual use of force, which makes the idea of threating with an unlawful force appealing as we will further discuss and the uncoupling of threat and the actual use of force worth noting.

[97] Wall, Advisory Opinion, 2004 I.C.J. 1 p. 35 (separate opinion of Higgins, J.).
[98] Supra note 11 at p.310.

Being SD one of the few exceptions to the prohibition in article 2(4), the change of abuse by states of this legal figure increases. Also, as we acknowledged it is an inherent difficult task to identify threats of force that fall under the scope of article 2(4) and in cases of threats trough demonstrations of force the line between preparation of aggression is almost impossible to trace even *post facto*.[99]

Is important to remember that article 51 sits on the duology of victim-aggressor which in the case of threats it can rarely be applied. Is not possible to affirm *ante facto* that a countervailing threat is going to prevent the conflict and will not increase tension between the actors. The aim in these cases is to prevent the conflict however, the State can intend to use it as retaliation or wrongly end up provoke further hostilities. Since such analysis can only be made post facto, countervailing threats can be seen as a dangerous instrument to be left at use by states.

Plus, threats entail supplementary challenges given that is rare to have a unilateral threat. The cases regularly develop into an outgoing process, such as in the case of a protracted conflict becoming impossible to identity the "threat zero" that originated tension between the two States[100]. Plus, the duology of victim and perpetrator becomes blurred while both take turns as the threatener. Is important to look to threats not as a precursor of war, but an end in themselves. They are a foreign policy tool in situations where nations joust over influence in matters that affect their core interests.

Another major drawback of this approach is that the entire legal literature surrounding this subject undeniably agrees that threats are a recurring practice tolerated by the international community. Even if we consider that this permissibility is created based on a fear of harming SD, denying this approach is deliberately failing international legal system by not trying to set-out a clear framework to what threats can be precluded by article 51 when one for the legality of the use of force is already established.

4.2What triggers a countervailing threat?

On the question of what cases can triggers a lawful response under article 51 we will consider three variables: the existence or not of an imminent attack, the degree of gravity

[99] A notable example of this diabolic distinction is the outbreak of the 6 days War where Israel perceives the mobility of Egypian troops as acts of preparation to aggression and decides to react forcefully.

[100] Shurtler believes that in cases of protracted conflicts that are characterized as *"long-standing conflicts with a history of escalatory clashes where the parties would likely perceive any militarized act as a provocation requiring a firm response", the "aggressor-victim distinction is hard to apply, and that blame is often attributable to both sides. The self-defense reference, which is implicitly premised on the ability to distinguish between aggressor and victim, does not suit these situations..."* See. Supra note 1 at p.219,266.

of the force of the triggering attack and if the conduct in question is a threat or an actual use of force.

In order to go through each scenario, we need to detach ourselves as mentioned, from the strict formalism that SD needs to be a response to an armed attack otherwise we would only consider the first proposition.

Green and Grimal equate this result in six different possibilities of prior conducts that can lead to a potential lawful threat of force and that should be individually studied: an armed attack; a "less grave" use of force; a threat of an armed attack that is imminent; a threat of imminent "less grave" force; a threat of non-imminent grave force and threat of non-imminent "less grave".[101]

Starting with the most uncontroversial scenario, a threat in response to an armed attack, would undoubtably be lawful even though in practice it is doubtful that a State that suffered an armed attack would respond with a threat and not with a forcible measure.

Regarding the possibility of response to a "less grave" use of force with a threat if that a state could never respond by force in this situation the first instinct is to bar such application to threats as well. However, this dilemma is a question of how we measure the gravity of an act that would lead to different answers.

As was pointed out previously, it is established a spectrum of gravity of force being the most serious form an act of "aggression". This implicates that we can have conducts that fall short from article 2(4) , that could not trigger article 51[102] and even inside the umbrella of the norm we can find conducts that go from "grave", equivalent to an armed attack, armed attack in the classical form and finally acts of aggression. Plus, we need to consider the theory of accumulation of events that is also raises the question of gravity.[103]

While this way of thought prevents from States abusing the Charter norms and almost instantly triggering article 51, if almost any conduct was considered a violation of prohibition of the Charter at the same time, being aggression a broader concept the armed attack it expands the range of defensive action. This shows the inescapable dilution of these three concepts is occurring.

---

[101] Supra note 11 at p.313.
[102] Also known as the Nicaragua Gap Supra note 17 at para. 195.
[103] Oil Platforms Case (Islamic Republic of Iran v. United States of America), Merits, 2003 ICJ Rep. 191,192. See also (separate opinion by Simma, J.) at para.12 challenging the Nicaragua Gap.

When comparing this spectrum to the one of threats, which can be also vary in gravity, the issues start to arise.

A useful example is comparing the gravity of a conduct of State A which threated State B with a clear-cut ultimatum in which the threat in cause is a standard act of aggression which State C that had a frontier incident with State D. It is even possible to go further by introducing threats of nuclear force into the equation. It is hard in these scenarios to comply with the spectrum that legally prevails in this subject matter and not to affirm that in these examples' threats should be consider "more grave".[104]

The use of force of any gravity is still an act of violence so the idea to respond to it with a "less violent" conduct, such as by a threat, is not derisory. Plus, we cannot disregard that the purpose of article 51 is to contemplate the inherent right of States to defend themselves. The Charter does not object to defiance against aggression and that the right to self-defence can override the obligation of self-restraint. It can also be said that responding with a threat in these cases is a "more peaceful" way to try to conduct this situation.

Taken together, we suggest that in fact that can be cases where in "less grave" conducts render the victim State the right to lawfully threat its attacker. Still, caution must be applied in cases of implicit threats since as we have been mentioning back-to-back in this paper, the same conduct could in fact be preparation for an attack or a mere warning. Given the obligation to report the situation to the SC this issue is only partially resolved, since we always need to consider room for abuse by States.

Before proceeding to examine threats in response to threats we will discard all the options that evolve a non-imminence use or threat of force. We already establish that imminence, although not a requisite in the concept of threat, is still a factor to be taken in consideration. Plus, since we reject the theory of preemptive self-defence and the risks of responsive conduct in these scenarios are self-evident.[105]

[104] I owe the clarification of this point to Professor Azeredo Lopes.

[105] With distinct opinion Sarduska uses the american response in Cuban Missile Crisis and the Sweden Act on Foreign Submarines as examples of scenarios where the international community tolerated a threating behavior by States that could not be considered as self-defense acts despite the Cuban missile crises often being mention as an example of anticipatory self-defense the author implicitly adheres to a preemptive notion of such figure. S upra note 7, p.257.

We are left to the legal appraisal of the legality of threats in cases of a prior imminent threats of force with a significant degree of gravity or an imminent threat of a "less grave" force.

The idea of response to a threatened armed attack is dependent of the acceptation the doctrine of anticipatory self-defence. As mentioned briefly in the chapter above, according to this doctrine the use of force would be considered lawful against an imminent threat of an armed attack. Like us, most literate accepts this way of thought, agreeing that if facing a threating attack that so direct and overwhelming that creates an urgent necessity of self-defence by using force in order to deter such attack. If the State chooses to engage in a threating behavior rather than an actual use of force, we do not see how it should not be perceived as a lawful conduct.[106]

By contrast, the case of a threat of "less grave" force needs a more cautious approach. Some scholars try to scrutinize this possibility by dividing threats with purely defensive response and a response taken aggressively as the criteria that could allow latter type of threating response to fall under article 51. In this case the onus would be based on the nature of the countervailing threat and not on the threat that trigger such response. Although we recognize this as a valid approach it failed to consider not only that the line between a threat and a mere warning would cease to exist but, most importantly that the risks of a "ping pong" effect doubtless escalating into an actual use of force by one of the parties in the conflict which would obliterate the nature and concept of a lawful self-defensive action.[107] Likewise, this hypothesis drifts completely from the Nuclear Case conclusion.

Finally, this mechanism fails to consider that clean-up ultimatums are an almost extinct practice, which means that the legality of the threat would be all evaluated on a basis of a vague reference to force and the analysis of hypothetical circumstances that can easily be poorly defined.

Overall, almost all scenarios contemplated support a self-responsive conduct by threat with the exception of non-imminent conducts, whether actions by force or threat, and imminent threats of "lesser grave" uses of force given the risks of abuse that encompasses.

---

[106] (Svarc 2006, p.178-180)

[107] (Green and Grimal 2011) go even further by stating that even by rejecting the anticipatory self-defense doctrine a threat in response to a threatened armed attack could be retroactively lawful if the attack materializes.

4.2.1Necessity and Proportionality criteria

Having discussed how to identify a lawful countervailing threat, the final section of this chapter addresses the additional criteria of necessity and proportionality that needs to be fulfilled for a lawful conduct in SD[108] as reinforced by the ICJ

Starting with necessity, it requires a State to have exhausted all the non-forcible measures, that the situation is so extreme that such measures were not even an option or such are clearly futile[109]. This is determined by an appraisal of the situation in question and the assertion of the options available which is harder to apply in the case of threats for their abstract and unpredictable nature.

Necessity as a general proposition can appear as straightforward, however, in the case of an imminent threat or armed attack involving a danger and where demands appear unreasonable or even perverse to deny that by responding with a forceful threat the necessity requirement is not fulfilled regardless of the probabilities of a successful peaceful settlement seems irrational.[110]

Furthermore, by considering threats as a viable option we further restrain the actual use of force as a necessary conduct to deter the threat. Green and Grimal make a very interesting point by reflecting on the paradox that is created when we try to strictly apply the statement on Nuclear Weapons Case. According to this assertion a lawful threat in self-defense would imply that is necessary to use force since is the only situation in which such use of force would be lawful. Considering that the necessity of the use of force is born from the lack of alternative non-forcible measures then a can only issue a threat when he knows that it will not suffice and that resorting to force is the viable option. Thus, in this case threats are obsolete unless we accept that is reasonable that in some cases it becomes necessary to threaten with a force that is not necessary to use it.[111]

Moving on now to consider proportionality by the same token as the necessity requirement, applying analogously the coupling of the use and threat of force, the

[108]These concepts have evolved through state practice and opinion iuris since the Webster Doctrine in Caroline incident that argued that preventive military action is lawful exists "a necessity of self-defence instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Being considered as customary law. (Gray, 2008 p.354ss.)
[109] (Schachter 1974 p.1635)
[110]Ibid.
[111] Supra note 1. p.321-322.

lawfulness of the threat is contingent upon whether if such force was proportional to the threat or force that is responding to. This type of assessment is impossible to calculate. Thus, the threatened force must be a proportional response to the need that the attack creates and not to the attack itself, it must be capable of deterring the attack which makes it more likely to pass such test, the criteria need to be flexible.[112]

It is important to bear in mind that with act of self-defence comes the obligation to report to the SC although is not a condition for lawfulness[113] and from the criteria of necessity and proportionality comes the requirement to the response be of a limited duration ending when the defensive necessity ends. However, in the case of a threat implied or explicit, the point of termination is far more difficult to determine.

In conclusion, a direct application of the ICJ's finding that a threat is lawful if the force threatened is lawful (and vice versa) can lead to counterintuitive outcomes because of the inherent consequential differences between threatened force and actual force. By disconnecting the two figures, which would have to naturally occur to consider nuclear deterrence as a legal practice, we concluded that self-defence by threats much be subjected to an entirely different approach from the one given to use of force. Only with the disruption of the two legal figures it is possible to accurately evaluate the scenarios where countervailing threats can be lawful and safeguard the specificities of the prohibition.

5.The instrumentalization of the threat of force

During this paper, we recognized the differences between threat and actual use of force gravitating towards the uncoupling of these two figures only when strictly necessary. The risks of abuse if a nation could threaten with a force that itself was illegal are evidently clear and would erode the purposes of article 2(4) itself by creating an undesirable loophole. [114]

Sarduska is one of the pioneer authors advocating for a broader, and therefore a permissive understanding of a threat of force departing it from article 2(4). In her view, threats of force are beneficial and should be instruments of policy to serving

[112] Supra note 10 at p.232.
[113] Supra note 31 Para.200.
[114] As Judge Higgins states: “there have been countless abusive claims of the right to self-defence. That does not lead us to say that there should be no right of self-defense today . . . We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made.” (Higgins, 1991 p.315)

proposes such as: operate as notice for a potential sanction; speed up the resolution of a dispute by nonforcible measures and as a ritualized substitute for violence;[115] The author claims that threat should be evaluate through its own legal standards derive from two interconnected claims: threats can substitute and prevent war because threats are not of the same gravity of the use of force. Therefore, if they are less harmful, they can be easily justified given that do not compromise the UN Charter's peace objective. This perspective is dependent upon following the deterrence model, latter analyzed.[116]

Even though these claims have been strongly contested in recent years by several writers,[117] we believe nonetheless that they deserve attention for the purposes of stretching the concept and test the interfaced between threats and uses of force.

The author classified three distinct motives that can lead states to pursue a threat of force apart from self-defense: considerations for security, vindication of a denied right and prudence an economy. Regarding the first motive, the author justification lays on the failure of the Collective Security System as key to States unilaterally impose sanctions or threating a State. When a right is denied, it is natural to turn to the authority with capacity to enforce such right. When a state believes that another state has refused to carry out its legal responsibilities and the international system did not enforce the law, the instinct for the victim State is to protect his interests.

DASR article 49 permits, when redress cannot be achieved by peaceful means, to apply countermeasures. However, the subsequent article reinforces the obligations that cannot be overruled when applying countermeasures such as "The obligation to refrain from the threat or use of force as embodied in the United Nations Charter ..."[118].

Reason suggests that self-help and countermeasures remain necessary remedies of last resort. Nevertheless, the text and context of the UN Charter seem to indicate otherwise. Article 2(4)'s ban on resort to force brooks no exception for states enforcing their rights when UN collective measures have not been taken or have failed. The lack of effective enforcement, the limited capability of international institutions in imposing sanctions are deficiencies that should be considered. However, using such deficiencies as justifications to elevate threats to an unlimited instrument of international policy is major leap.

---

[115] Supra note 7 260-266.
[116] A/RES/2625(XXV).
[117] Supra note 69 at p.248-251.
[118] State Responsibility, 31 May 2001, International Law Commission article 49.

The question of vindication of a denied right emerges from a dissimilar vision on one of the few cases where the ICJ touched upon the threat of force, the Corfu Channel case. This case took place in 1946, regarding the North Channel in Corfu that originated a climate of tension between the United Kingdom and the new state of Albania. While Albania asserted exclusive territorial sovereignty over the strait maintaining that, without prior notice and permission foreign warships and merchant vessels could not pass through the strait, the United Kingdom view the location as international waters claiming that their innocent passages in line with international law. After the diplomatic efforts failed, Britain dispatched four warships through the Channel after coupled a written statement threating Albania with dispatching warships through the Channel. The dispute was submitted to ICJ within which was asked to respond on whether the passage constituted a violation of the sovereignty of Albania. Although the court recognized the threat of force conducted by Britain, the Court held that the sovereignty of Albania was not violated.[119] Sarduska compares the case to the Sweden's OCIAFTPSN[120] as examples of vindication of rights that preclude the unlawfulness of a threat and were tolerated by the international community.

However, despite the ambiguous response of the Court as Schachter points out the court rejected United Kingdom claims of self-help and no reference to being an act of self-defence was made.[121]

In addition, considering the vision of the scholar towards threats, it is important to ask if article 2(4) should interpreted in connection with the principle in article 2(3) which states. At first glance, a joint interpretation of the articles suggests that states have a positive duty to conduct negotiations by peaceful means, free from any reference to military force which feeds the proposition of the author.

However, even if a threat is viewed as a less harmful in comparison to the use of force, as stated in Resolution 2625 preamble a "threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues". Even if such threat is not

[119] Supra note 32 at para.32.
[120] In 1983 Sweden's government adopted a legislation where it states that if necessary armed force would be used, without prior warning in cases of foreign submarine found submerged is Sweden internal waters with in 12 miles of the territorial waters. Despite being a clear violation of article 2(4) that would never pass the requirements of SD, the legislation was tolerated by the international community, with no reports on any state protesting this conduct. See. Supra note 7 p.255-256
[121] Supra note 110 at p.1626.

relevant to trigger article 2(4) it can never be characterized as peaceful way to conduct a conflict.

In this section, we have analyzed the inconsistencies of this new prospect of utilizing and normalizing threats as a tool to serve the interests of States. The core of this segment is not to merely point the weaknesses of the author findings but to show that this theory evolves from the failure and negligence of international law in the treatment of this legal figure. The author is accurate when pointing out the sense of tolerance that exists upon threats of force, using such apathy to disrupt with the conventional understanding of the norm so it can meet the complex, often ambiguous and rather pragmatic code applied in international practice considering threats as an reiterate practice that will always exist between States. Is this permissiveness that needs to be scrutinized. If we concluded that, despite the Charter prohibition, States behave as allowing and accepting threating behavior the author's idea of trying to turn benign becomes alluring.

6.How threats are perceived in the legal sphere

As was mentioned international law does not aim towards an absolute coercion ban and considers some types of threats legal, such as economic or political ones which can even produce more devastating effects. Still the prohibition in article 2(4) aims to restrict threats of military force although we cannot affirm that a no-threat ban exists. From jurisprudence we have also concluded from that conceptually the use and threat force are equal and are hold to the same legal standards which means that not all threats amount to a violation of the charter norm and that a threat is considered unlawful if the force imperiled would be consider unlawful. However, considering that that in practice these legal figures differ from one we cannot blindly analyze threats as we would the actual use of force.

The chapter that follows moves on to consider how international order views threats in the order to grasp the reasons behind the esteem reputation that threats are tolerated, a mundane practice among States or even they can be considered desirable.

Firstly, there is a belief that in general threats escalate into actual uses of force and as a result, it is overshadowed in legal evaluations making the legal appraisal to be based on that use of force rather than the preliminary threat. A classic example being Nicaragua

Case[122] where the ICJ while acknowledged U.S conducts as threatening, focused on the actual use of force. Secondly, even by considering that threats cause less harm than actual uses of force they are still extremely volatile which validates the fear to meddle and add to a forceful action by one of the parties. Thirdly, is important to recognize the existence of "empty threats" that are not going to be taken serious or threats that are not followed by any action which can be due to various reasons. In these cases, the International Community is likely to feel reassurance and not even condemn the action individually.[123]

Furthermore, threats evolved from the classic form of ultimatum being able to be conceived in so many different forms that, when they are not materialized is unreal trying to prove a coercive intent or a causal link that leads to the damage and in general end up camouflaged as mere warnings.

6.1 Spiral and Deterrence Model

As a fundamentally consequentialist phenomenon threats of force can be comprehended into two distinctive models: spiral and deterrence[124]. These purely theoretical international relations models focus on the causes that lead to the outbreak war. While the deterrence model sustains a more permissive view of threats, the spiral model is behind the scholars who advocate for a threat ban. Both models are polarized and contradicting in every point aiming to be unconditionally applied, canceling each other out.

According to the deterrence model threats may play a substantial role in the prevention of war by creating the belief in the other State that engaging in conflict would be unsustainable. Even though all types of militarization can be used to compel the other state to refrain from using force, deterrence by the mere possession of nuclear weapons is the most common manifestation of these tactic. In these cases, threats are perpetuated in deterring conflict and creating a continuous sense of security. Whether is an asymmetrical conflict or the parties in question share have corresponding military capabilities, this model can show results.

[122] Supra note 17.
[123] Supra note 69 at p.246.
[124] (Jervis, 2017 p. 58-113).

On the opposite view, the spiral model considers threats as an inherently unpredictable conduct that can easily escalate into war. Threats thrive in the creation of a climate of instability and tension among the international community that can be showed for example in arms races that trough the deterrence lens is benign. As we have seen in the chapter above when considering the impact of credibility and reputation in the success of threats, we also enlighten to the dangers of a failed threat in creating in the belief in the threating State that is necessary to fulfil the prophecy to preserve threating State status. This model weights nations pride as another risk factor linked to threating behavior.

Both these narratives find support in the Charter in different terms: the deterrence model pushes threats away from the scope of article 2(4), asserting that they indirectly serve the peace's objectives in Charter. In contrast the spiral model, enlarges the umbrella of the Charter prohibition aiming at a threat ban. However, if is true that the Charter can rely on deterrence to dissuade from the use of force, we cannot affirm that drafter's intention was to instrumentalize military threats as form of compliance and intended for unlimited deterrence. The UN Charter was draft with the preoccupation of military build-ups and preparations of aggression setting an obligation to settle disputes peacefully.

There are as many cases in which arms have been increased, aggressors deterred, significant gains made, without setting off spirals as there are instances in which the use of power and force has not only failed or even left the state worse off than it was originally but has led to mutual insecurity and misunderstandings that harmed both sides.

Returning briefly to the analysis of self-defensive threats, the results would substantially vary if we chose to strictly follow one of the models. For instance, deterrence model would provide a free card for all responsive threats while the spiral model would bar any right of further provocations in self-defense between States in order to prevent a bigger conflict.[125]

The aim with this distinction is not to provide a categorical answer to one of the theories but to understand how these presumptions are the base for the distinct conceptions of threats. Is a combination of both models, or at least the knowledge of their strengths and weaknesses that render guidance in testing the range of possibilities and limits of the roles that threats can assume.

[125] Supra note 1at p.144.ss

Conclusion

This dissertation started by the study of the concept of the legal figure of threats aiming to comprehend the scope of the prohibition of article 2(4) of the Charter.

Limited by the lack of attention given by the legal system and the lack of jurisprudence on this legal figure we were forced to combine it with the efforts of legal literature in order to obtain a satisfactory answer.

From this first part of the paper the shapeshifter and ethereal nature of threats foreshadowed the challenges that would emerge from trying to create a clear framework for the prohibition by at the same time showing the problems that the lack of such framework was developing.

We concluded that concept of threat and its prohibition was dependent on a variety of subjective criteria and enabling conditions that affected its nature to the point that the same conduct made by two different States would likely create opposite results.

Being a hypothetical phenomenon, a promise that can or not consubstantiate and can be eclipsed by the actual use of force, a *post facto* judgment was not always sufficient or could in fact be accurately made. The effects of a threats in most cases could only be presumed. We also enlighten to nebulosus line between threats of force and acts preparation for aggression and mere warnings.

Despite the obstacles presented it was possible to clearly define the concept and scope of the prohibition of threats of force which led us to the application of such norm and its limitations.

From the lawfulness test provided by the Nuclear Case, a test that reinforced the article 2(4) by coupling the two prohibitions and created a dependence on the lawfulness of a threat to the legality of the force that was announcing, we found a starting point for the study of the applications of threats.

However, when faced with the analysis of countervailing threats and what role they could perform, such test was promptly failing and compromising a study that allowed to accommodate all legal specification of this norm. For this reason, we opt for a cautious uncouple of the two legal figures granting a consistency in the results of what scenarios a lawful self-defensive respond could exist. Ironically this procedure not only resolve the issues common to the use of force but reveled further problematics exclusive to threats, such has the impact of protracted conflicts and the

need to look at the necessity and proportionality requirements dissimilarly from the cases concerning typical forceful self-defence. Still, we concluded that there are in fact many situations where threats can legally be used to deter and imminent threat or attack.

With the recent work of the ICL the analysis of the legal status of the prohibition became imperative. We were faced with a timid approach by de Commission and polarized views in legal literature feeding on the neglect that threats of force have receiving in the past decades and the idea of tolerance or even acceptance of this phenomenon as a current practice by the international system.

Although no definitive answer was given to whether the prohibition of threats and consequently article 2(4) has achieve the status a peremptory norm or whether it must be a compartmentalization of the norm into violations of the norm and violations of the norm with peremptory status we concluded that unless we agree with the first proposition, the risks of detonating the integrality of the notion of jus cogens norms and handicapping the purpose of article 2(4) left no choice but to conclude that article 2(4) including threats of force has acquired the legal status of a peremptory norm.

Still, we must admit that the most important limitation lies in the fact that there is a lack of a deep research on state practice which in the future could help to suppress the different views of legal scholars and reinforce the role of this prohibition in the international legal system.

With the polarized views in legal literature, we also tested the instrumentalization of the more comprehensive view on threats of force which provide a useful inside on the limitations of this figure and reasons of the so-called manifest of threats as beneficial instruments of international policy present in everyday life of the international community which proved to be a misconception.

Finally, we moved back to a theoretical field of the study of the deterrence and compliance models which are the foundation to every approach of the legal figure concluding that only a combination of both would serve the reality of the role of the prohibition on threats of force.

This dissertation aim was not to provide a categorical answer to the way that threats should be assessed but to enumerate the main issues that have been raised regarding the subject matter and how they can be resolved, even if only partially.

More importantly this research showed that despite the degree of tolerance of the international community it is a consequence of the legal neglect that it has been subjected to, and not the reverse. We have also enlightened that this neglect impacts not only article

2(4) but the whole legal system of the Charter when one of its pillars is considered to complex or ambiguous to be studied or invoked.

Bibliography

AZEREDO LOPES, J., (2003)., Entre A Solidão E O Intervencionismo: "*Direito de autodeterminação dos povos e reações de estados terceiros",* Porto Universidade Católica Editora.

BLACKWELL, J., & COSTANZO, C. (2015)., Busting Myths about Nuclear Deterrence. *Strategic Studies Quarterly, 9*(1), 17-25.

BLECHMAN, B., & WITTES, T. (1999)., Defining Moment: The Threat and Use of Force in American Foreign Policy. *Political Science Quarterly, 114*(1), 1-30.

BROWNLIE, I., International Law and the Use of Force by States (Clarendon Press, 1963).

CRAWFORD, J., & BROWNLIE, I. (2012). Brownlie's principles of public international law.

D'AMATO, A., (1971) The Concept of Custom in International Law. (Cornell University Press.)

DINSTEIN, Y. (2011)., War, Aggression and Self-Defence (5th ed.). Cambridge: (Cambridge University Press.)

DIRE TLADI (ED.), *Peremptory Norms of General International Law: Perspectives and Future Prospects* (Bril Nijhoff 2021).

FRANCK, T. M. (2002)., Recourse to Force: *State Action against Threats and Armed Attacks.* Hersch Lauterpacht Memorial Lectures. Cambridge: Cambridge University Press.

'Who Killed Article 2(4)? or: *Changing Norms Governing the Use of Force by States'*, 64 Am. JIL 809–37 (1970).

GREEN, A. (2011) *Questioning the Peremptory Status Of The Prohibition Of The Use of Force*, 32 Mich. J. Int'l L. 215

GREEN, J. A., & GRIMAL, F. (2011). The Threat Of Force As An Action In Self-Defense Under International Law. *Vand. J. Transnat'l L.*, *44*, 285.

GRIMAL.F (2019)., Twitter And The Jus Ad Bellum: *threats of force and other implications,* Journal on the Use of Force and International Law, 6:2,

HELMERSEN, S. (2014)., The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations. *Netherlands International Law Review, 61*(2), 167-193.

HOFMEISTER, H. (2010)., Watch What You are Saying: The UN Charter's Prohibition on Threats to Use Force. *Georgetown Journal of International Affairs, 11*(1), 107-114.

IN DÖRR, O., & IN SCHMALENBACH, K. (2018). Vienna convention on the law of treaties: A commentary.

JERVIS, R. (1976). *Perception and Misperception in International Politics: New Edition*. (Princeton; Oxford: Princeton University Press.)

LAUREN, P. (1972). Ultimata and Coercive Diplomacy. *International Studies Quarterly, 16*(2), 131-165.

LEPARD, B. D. (2010)., Customary International Law: *A New Theory with Practical Applications. ASIL Studies in International Legal Theory.* Cambridge: Cambridge University Press.

LINDERFALK, U. (2007)., The Effect Of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About The Consequences?. *European journal of international law*, *18*(5), 853-871.

MATHESON, M. (1997)., The Opinions Of The International Court Of Justice On The Threat Or Use Of Nuclear Weapons. *The American Journal of International Law, 91*(3), 417-435.

MOXLEY, C. (2002). The Unlawfulness Of The Use Of Threat Of Use Of Nuclear Weapons. ILSA Journal of International & Comparative Law, 8(2), 447-472.

OPPENHEIM, L. International Law: A Treatise, 2 vols. (1st edn, Longman, 1906). International Law: A Treatise, 2 vols. (7th edn, Longman, 1952).

ROSCINI, M. (2007). Threats Of Armed Force And Contemporary International Law. Netherlands International Law Review, 54(2), 229–277. T.M.C. Asser Press.

SADURSKA, R. (1988). Threats Of Force. *American Journal of International Law*, *82*(2), 239–268. Cambridge University Press.

SCHACHTER, O. (1984). The Right Of States To Use Armed Force. *Michigan Law Review, 82*(5/6), 1620-1646.

SCHELLING, THOMAS C., The Strategy of Conflict (Harvard University Press, 1960). Arms and Influence (Yale University Press, 1966).

STÜRCHLER, N. (2007). The Threat Of Force In International Law. Cambridge Studies in International and Comparative Law. Cambridge: Cambridge University Press.

SVARC, D. (2006) "Redefining Imminence: The Use Of Force Against Threats And Armed Attacks In The Twenty-First Century," *ILSA Journal of International & Comparative Law*: Vol. 13 : Iss. 1 , Article 8.

TLADI, D. (2020). The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (jus cogens): *Making Wine from Water or More Water than Wine, Nordic Journal of International Law*, *89*(2),

VÄRK, R. (2003). The Use of Force in the Modern World: Recent Developments and Legal Regulation of the Use of Force. *Baltic Defence Review*, *10*(2), 27.

WHITE, N. (1999). The Legality Of The Threat Of Force Against Iraq. Security Dialogue, 30(1), 75-86.

WHITE, NIGEL D. AND ROBERT CRYER, 'Unilateral Enforcement of Resolution 687: A Threat Too Far?', 29 Cal. WJIL 243–83 (1999).

Official Documents and Jurisprudence

‘Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat *Caroline*.—March, April, 1841’, (1857) 29 *British and Foreign State Papers (1840–1841).*

A/RES/25/2625, UN Doc. A/8028 (1970) 121.

A/RES/2625 (XXV) Declaration on the Principles of International Law concerning Friendly Relations and Co-operation Among States In Accordance With the Charter of the United Nations (24 Oct. 1970).

A/RES/3314 (XXIX) Definition of Aggression (14 Dec. 1974).

A/RES/42/22 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations (18 Nov. 1987).

Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004,

Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986,

Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America, International Court of Justice (ICJ), 6 November 2003,

Case of the SS Lotus, ICJ Series A No 10.

Corfu Channel Case (United Kingdom v. Albania), Merits, 1949 ICJ Rep. 4 (9 Apr. 1949),

D. Tladi, *Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law* (*Jus Cogens*) (A/ CN.4/727),

Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) (with commentaries), *Report of the International Law Commission*, Seventy-First Session, General Assembly Official Records, Supp No 10 (A/74/10),

Fisheries Jurisdiction case (Jurisdiction) (United Kingdom v. Iceland), [1973] ICJ Rep. 3, 14.

Hague Convention (III) Relative to the Opening of Hostilities, 1907, Hague Conventions 96, i

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ GL No 95, [1996] ICJ Rep 226, ICGJ 205 (ICJ 1996), 8th July 1996, United Nations [UN]; International Court of Justice [ICJ]

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996,

Nations, U. (1993). Yearbook of the International Law Commission 1989, Vol. II, Part 1. UN.

Report of the 1956 Special Committee on the Question of Defining Aggression, UN Doc. A/3574, GAOR, twelfth session, Suppl. No. 16,

United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI,