

The Threat of Force as an Action in Self-Defense Under International Law

James A. Green*
Francis Grimalt†

ABSTRACT

Self-defense is a universally accepted exception to the prohibition of the use of force in international law, and it has been subjected to careful academic scrutiny. The prohibition of the threat of force, although equally important in terms of its normative status to the prohibition on use, has attracted far less academic commentary to date. This Article examines the relationship between the two prohibitions—of the use and threat of force—and considers the largely unexplored possibility of states utilizing a threat of force as a means of lawful defensive response: self-defense in the form of a threat. The status of this concept under international law is assessed, and the criteria that may regulate it are analyzed. This Article is based on an analogy between traditional “forcible” self-defense and the notion of threats made in self-defense. However, one cannot automatically apply the well-established rules of self-defense to a defensive threat, largely because of the practical differences between a threatened response and a response involving actual force.

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* University of Reading, U.K.

† University of Buckingham, U.K. The authors would like to thank Thomas Koller for his invaluable research assistance in helping to prepare this Article.

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*A bully is not reasonable.
He is persuaded only by threats.*

–Marie de France, late twelfth century

I. INTRODUCTION

The prohibition of the threat of force stands directly alongside its loftier counterpart, the prohibition of the use of force, in Article 2(4) of the United Nations Charter.¹ Yet, although states continually reference the prohibition of the use of military force (even while breaking it), the scope and nature of the prohibition of the threat of force has found little articulation in state practice. This discrepancy is also apparent in the writings of scholars. As such, numerous questions remain unanswered with regard to the status of threats of force in international law. This Article considers one such issue: the relationship between the prohibition of the threat of force and the international law governing self-defense.

In contrast to the legal status of threats of force generally, the lawfulness of forcible self-defense taken in response to a threat of force has been exhaustively, and exhaustingly, discussed in the academic literature. This debate over the lawfulness of “anticipatory” and “preemptive” self-defense has raged all the more fiercely since the atrocities of September 11, 2001, and the subsequent “war on

1. U.N. Charter art. 2, para. 4.

terror.”² However, the literature has left the inverted question, whether self-defense can be *manifested by way of a threat of force*, almost entirely unasked.³ Therefore, it is not our intention to examine the question of whether military force taken in self-defense may be lawful in response to a threat. Instead, we ask whether a threat of force (a prima facie unlawful action under Article 2(4)⁴) can gain the status of lawfulness if taken as a defensive response, and, assuming that it can, we ask what criteria may be used to determine the lawfulness of such a defensive threat. This Article thus examines the legality of threats made in self-defense, which may also be referred to as “countervailing threats.”⁵

In 1996, as discussed in Part II, the International Court of Justice (ICJ) concluded that a threat of force is unlawful when the

2. Maogoto gives a useful overview of the main arguments concerning this issue and provides a survey of the vast literature. JACKSON N. MAOGOTO, *BATTLING TERRORISM: LEGAL PERSPECTIVES ON THE USE OF FORCE AND THE WAR ON TERROR* 111–49 (2005); see also Christine Gray, *The US National Security Strategy and the New “Bush Doctrine” on Preemptive Self-Defense*, 1 CHINESE J. INT’L L. 437, 438 (2002) (describing the “radical new doctrine of international law on the use of force”); Christopher Greenwood, *International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT’L L.J. 7, 8 (2003) (noting that some commentators have called for amendment to the UN Charter); Christian M. Henderson, *The 2006 National Security Strategy of the United States: The Pre-Emptive Use of Force and the Persistent Advocate*, 15 TULSA J. COMP. & INT’L L. 1, 2 (2007) (characterizing the 2006 reassertion of the doctrine of preemptive military action as “surprising”); Abraham D. Sofaer, *On the Necessity of Pre-Emption*, 14 EUR. J. INT’L L. 209, 210 (2003) (noting that traditional deterrence is ineffective against terrorists); see generally Miriam Sapiro, *Iraq: The Shifting Sands of Pre-Emptive Self-Defense*, 97 AM. J. INT’L L. 599 (2003) (arguing that the United States should refine its position on the preemptive use of force).

3. A limited number of scholars have briefly discussed the notion of threats of force made in self-defense. Currently, the only systematic treatment of the issue is in Nikolas Stürchler’s landmark book on the threat of force. NIKOLAS STÜRCHLER, *THE THREAT OF FORCE IN INTERNATIONAL LAW* 218–51 (2007). *But see* FRANCIS GRIMAL, *THREATS OF FORCE: INTERNATIONAL LAW AND STRATEGY* (forthcoming 2012) (manuscript on file with author). For more limited comment, see J. CRAIG BARKER, *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: INTERNATIONAL RELATIONS FOR THE 21ST CENTURY* 129–34 (2000) (discussing permissible threats of force); HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 60–61 (1992) (discussing permissible responses to threats of force within the self-defense framework); Dino Kritsiotis, *Close Encounters of a Sovereign Kind*, 20 EUR. J. INT’L L. 299, 306–08 (2009) (discussing threats as a form of self-defense); Matthew A. Myers, *Deterrence and the Threat of Force Ban: Does the UN Charter Prohibit Some Military Exercises?*, 162 MIL. L. REV. 132, 169 (1999) (discussing the scholarly debate on the continuing importance of UN Charter Article 2(4)); Marco Roscini, *Threats of Armed Force and Contemporary International Law*, 54 NETH. INT’L L. REV. 229, 237 (2007) (discussing threats as self-defense); Romana Sadurska, *Threats of Force*, 82 AM. J. INT’L L. 239, 250–51, 256–57 (1988) (identifying this type of action as “self-help” rather than “self-defense”).

4. U.N. Charter art. 2, para. 4 (prohibiting “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”).

5. STÜRCHLER, *supra* note 3, at 218.

force threatened would itself be unlawful, and that, correspondingly, the threat to use force in a lawful manner is itself lawful.⁶ If this conclusion is accepted, “not only is every threat illegal where force is illegal, but, obviously, any justification put forward for the use of force will work equally well for the threat of such force.”⁷ Self-defense is a universally accepted exception, enshrined in both Article 51 of the UN Charter and in customary international law, to the general prohibition of the use of force.⁸ Therefore, countervailing threats of force may be lawful if the threatened force meets the criteria regulating the actual use of force in self-defense.

Although a handful of other writers have also reached this conclusion,⁹ none have taken the obvious next step and considered the criteria by which such a concept would be assessed. This Article aims to take that step, based on the core premise that defensive threats should be viewed as broadly analogous to “traditional” self-defense through the use of force. Having said this, it is not simply the case that the rules for the use of force in self-defense can be directly transposed to instances where a threat is employed. The use of force and the threat of force, while conceptually cut from the same legal cloth, are practically different actions with practically different consequences.¹⁰ Therefore, the analogy to “traditional” self-defense is, on occasion, necessarily departed from or stretched.

This basic assumption is nonetheless an important starting point because there is little legal guidance beyond it as to the criteria required to turn an unlawful threat of force into a lawful one. As previously noted, there is only a very small amount of literature on the notion of threats made in self-defense. Moreover, states simply do not make the explicit legal claim that the wrongfulness of any given threat is precluded because that threat constituted an act of self-defense. Analysis of state practice provides little to indicate how customary international law treats threats in self-defense, because states do not tend to respond to this issue in legal terms: “Practice does not seem sufficiently unambiguous to make unfailingly intelligible distinctions among genuine approval of acts of self-help,

6. See *infra* text accompanying note 40.

7. STÜRCHLER, *supra* note 3, at 41; see also IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 364 (1963).

8. Christopher P.M. Waters & James A. Green, *International Law: Military Force and Armed Conflict*, in THE ASHGATE RESEARCH COMPANION TO MODERN WARFARE 289, 294–98 (George Kassimeris & John Buckley eds., 2010).

9. See, e.g., sources cited *supra* note 3.

10. The authors take the position that a threat of force simply cannot “have the same destructive consequences as the use of force.” Sadurska, *supra* note 3, at 250. However, for a contrary view, see Roscini, *supra* note 3, at 245 (“Reactions [by states] to violations of Article 2(4) differ not depending on whether the victim is the object of a threat or of a use of force, but on the political interests of the concerned states and on the outcome of the conduct.”).

reluctant acquiescence in them and resigned recognition of a fait accompli.”¹¹ Therefore, the discussion that follows is necessarily speculative and, indeed, somewhat tentative.¹²

Nevertheless, states certainly do make threats, in a manner analogous to a use of force in self-defense, in response to a prior use (or threat) of force against them.¹³ The question, then, is whether such threats should be considered lawful and, if so, on what basis. In tackling that question, it is important to note that this Article does not propose a reform of the current legal regime. Instead, it examines whether the existing framework already provides for the lawfulness of threats of force in the context of a defensive response and how the regulation of such actions should be explicitly assessed.

Part II briefly sets out the nature and scope of the prohibition of the threat of force in international law and its relationship to the prohibition of the use of force. Part III outlines the key traditional criteria for self-defense. Part IV examines whether the notions of non-forcible self-defense, generally, and self-defense by way of a threat, specifically, are even conceptually possible. It concludes that there is nothing to preclude states from manifesting self-defense in this way and, moreover, that countervailing threats are a logical aspect of the existing system. Part V argues that the threat of force in self-defense is not only conceptually possible under the current law, but that it is a desirable feature of it. Finally, Part VI examines how such a manifestation of the right of self-defense may be regulated, based on the existing criteria for self-defense as commonly understood.

II. THE THREAT OF FORCE IN INTERNATIONAL LAW

The absolute prohibition against the inter-state threat of force is contained in the first limb of Article 2(4) of the UN Charter.¹⁴ Unfortunately, Article 2(4) itself offers little concrete guidance as to what conduct triggers a breach of the prohibition of the threat of force. Indeed, the Charter remains silent as to how international law

11. Sadurska, *supra* note 3, at 252.

12. This also means that the “state practice” approach, taken by Stürchler in the most comprehensive attempt to date to analyze the question of countervailing threats, is ultimately of relatively limited value; the lack of clear legal state argumentation in this context means the conclusions Stürchler reaches based on the practice he cites, *see* STÜRCHLER, *supra* note 3, at 218–51, are inevitably somewhat tenuous. Therefore, this Article deliberately approaches the issue from a more abstract perspective, applying the existing law of self-defense, so far as possible, to the question of countervailing threats.

13. *See infra* Part IV for some examples of this state practice.

14. *See* U.N. Charter art. 2, para. 4 (prohibiting “the threat or use of force against the territorial integrity or political independence of any state”).

defines (or should define) a threat of force. This deficiency has led to academic debate as to what a threat of force actually entails and at what point a “threat” violates Article 2(4).¹⁵ To constitute a breach of the prohibition, must a threat of force be delivered as a classic verbal ultimatum—“comply or else”? Can nonverbal actions, such as conducting military exercises, also constitute threats of force in prima facie violation of the prohibition? This second question is particularly relevant to the relationship between threats and self-defense: a state may nonverbally communicate a defensive threat, for example, by positioning troops on its borders.¹⁶

This Part briefly sets out general understandings of the threat of force as regulated by international law. It first considers the legal source of the prohibition of the threat of force, through reference to the UN Charter and other quasi-statutory material. It then considers the extent to which the ICJ has examined the threat of force and highlights how the Court has conceptually “coupled” threats with the use of force. Finally, this Part sets out a typology of threats to use force that states may make in international relations.

A. *The Source of the Prohibition of the Threat of Force*

Like the prohibition of the use of force, the prohibition of the threat of force is binding on all members of the United Nations because it is explicitly provided for in Article 2(4) of the UN Charter: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁷

15. For example, Sadurska’s approach is very much one of categorization and is based on the type of behavior that may constitute a threat. Sadurska, *supra* note 3, at 245. Conversely, Lauren posits that threats of force rest on a scale ranging from the innocuous to the more extreme threat of force. Paul G. Lauren, *Ultimata and Coercive Diplomacy*, 16 INT’L STUDIES Q. 131, 145 (1972). Others are more concerned with the purpose of the threat. STÜRCHLER, *supra* note 3, at 218–51; Roscini, *supra* note 3, at 235.

16. Take, for example, recent defensive posturing by the Lebanese army on its borders with Israel in response to what was termed Israeli “war games.” *Lebanon Boosts Defense Near S Border*, PRESSTV (May 27, 2010, 9:32 AM), <http://edition.presstv.ir/detail/127951.html>.

17. U.N. Charter art. 2, para. 4. It is generally accepted that the prohibition of the use of force is also universally binding under customary international law. See, e.g., Michael Bothe, *Terrorism and the Legality of Pre-Emptive Force*, 14 EUR. J. INT’L L. 227, 228 (2003) (“[T]he prohibition of the use of force is a valid norm of customary international law . . .”); Hermann Mosler, *The International Society as a Legal Community*, 140 RECUEIL DE COURS 1, 283 (1974). Whether this is also true for the prohibition of the threat of force is debatable given the lack of clear articulation of the prohibition in state practice. However, for the suggestion that the prohibition does exist in custom, see STÜRCHLER, *supra* note 3, at 92–126. It is also generally agreed in the literature that the prohibition of the use of force is a *jus cogens* norm (a

The prohibition of the threat of force has also been restated, albeit in a soft law format, in subsequent international instruments, such as the 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States¹⁸ and the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.¹⁹

However, neither of these soft law instruments goes beyond a restatement of Article 2(4). The 1970 Declaration sets out that every state “has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the purposes of the United Nations.”²⁰ It proceeds to confirm that “[s]uch 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.”²¹ Similarly, the 1987 Declaration provides that “[e]very State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”²² At this juncture, it is enough to note that neither Article 2(4) of the UN Charter nor the declarations that reinforce the prohibition give any obvious guidance as to when a threat of force is unlawful or under what circumstances it would be permissible.²³

peremptory norm of international law from which no derogation is possible). See, e.g., ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 50 (2006) (“The prohibition of the use of force by States *undoubtedly* forms part of *jus cogens*.”). Some scholars have taken this further and argued that the prohibition of the threat of force is similarly a *jus cogens* norm. See, e.g., STÜRCHLER, *supra* note 3, at 63 (“It is . . . safe to conclude that article 2(4) of the UN Charter is *jus cogens* as a whole, without distinction to be made between the threat of force and the actual use of force.”). However, the peremptory status of the prohibition of the use of force is in fact debatable, and the prohibition of the threat of force is certainly not peremptory. See generally James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT’L L. 215, (2011) (regarding the peremptory status of the prohibition of the use of force); *id.* at 225–29 (specifically regarding the peremptory status of the prohibition of the threat of force).

18. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

19. Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, G.A. Res. 42/22, U.N. Doc. A/42/22/766 (Nov. 18, 1987) [hereinafter Use of Force Declaration].

20. Friendly Relations Declaration, *supra* note 18, at 122.

21. *Id.*

22. Use of Force Declaration, *supra* note 19, ¶ 1.

23. See OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 93 (2010) (“Neither the Charter,

B. *The Jurisprudence of the ICJ and the “Coupling” of Use and Threat*

It is therefore useful to turn to the jurisprudence of the ICJ for guidance as to the nature and scope of threats of force. However, only a few ICJ decisions even refer to threats of force, let alone discuss them in detail or provide any substantial guidance in terms of defining the lawfulness of a threat of force. Of the decisions that do refer to threats of force, the Court’s analysis is generally rather superficial. As these decisions are well documented, our factual discussion is kept to a minimum. This subpart, therefore, primarily concentrates on distilling the ICJ’s position in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,²⁴ which is crucial for our subsequent analysis.

The first case to consider threats of force in international law, though, was the *Corfu Channel* merits decision of 1949, which arose from the destruction of two British destroyers by mines off the Albanian coast.²⁵ In response to the United Kingdom’s application to the ICJ, Albania asserted that British warships in the Corfu Straits had twice violated Albanian sovereignty in breach of international law.²⁶ First, Albania alleged that the threatening nature of the tactical “diamond formation” adopted by the British destroyers and other supporting vessels, prior to the two destroyers striking Albanian mines, was a breach of its sovereignty.²⁷ With regard to this claim, the ICJ took the view, in light of the circumstances, that the British action was threatening but nonetheless lawful.²⁸

The second incident alleged as a breach of sovereignty by Albania was known as Operation Retail. This operation involved the sweeping for and removal of mines in the Corfu Straits by the Royal Navy following the initial sinking of the British destroyers.²⁹ The ICJ viewed this incident “as the manifestation of a policy of force . . . [that cannot] find a place in international law.”³⁰ However, the Court went on to state that it did not see this action as “an unnecessarily large display of force” and therefore did “not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania.”³¹ As a result, the Court found the minesweeping action to be an unlawful breach of

nor its *travaux préparatoires*, nor the General Assembly resolutions to interpret the principle of the non-use of force lay down any definition of ‘threat.’”).

24. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

25. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 10 (Apr. 9).

26. *Id.* at 12.

27. *Id.* at 31.

28. *Id.* at 30–31. For more on this finding, see *infra* Part IV.

29. *Corfu Channel*, 1949 I.C.J. at 13, 32.

30. *Id.* at 35.

31. *Id.*

Albanian sovereignty because it was a use of force.³² Rather confusingly, though, the Court implied that this use of force was not itself threatening, or, at least, that it was not intended to be threatening.³³ This aspect of the *Corfu Channel* judgment could be interpreted as indicating that the prohibition of the use of force was breached, but that the prohibition of the threat of force was not. Of course, this interpretation is speculative because the Court did not phrase its findings in these terms; indeed, it did not refer directly to Article 2(4) or its prohibitions at all.

Part IV returns to the *Corfu Channel* decision, but for present purposes, it is enough to note that the Court was not especially explicit in its examination of threats of force. The judgment may cause more confusion than clarity on the issue. Nonetheless, what is clear is that the ICJ indicated—albeit rather equivocally—that not all threatening behavior is necessarily a breach of Article 2(4). *Corfu Channel*, therefore, underlines the difficulty of determining whether any given action constitutes an unlawful threat of force, but it does little to resolve that difficulty.

In *Nicaragua v. United States*, a 1986 case concerning support of the Contra guerillas by the United States, the first reference to the threat of force occurs in paragraph 195 of the judgment, where the Court defined the concept of an “armed attack.”³⁴ According to the Court, an “armed attack” does not include “assistance to rebels in the form of the provision of weapons or logistical or other support.”³⁵ Instead, the Court deemed such “assistance” to be a “threat or use of force, or . . . intervention in the internal or external affairs of other States.”³⁶ It is unlikely that either the provision of weapons or other forms of logistical support involve the actual use of force. For example, if state A supplies machine guns to a paramilitary organization for use against state B, there has been no use of force by state A against state B, even indirectly. However, this action is clearly a threat: supplying the paramilitary organization with weaponry indirectly threatens state B. Therefore, this aspect of the *Nicaragua* judgment does little more than indicate one possible manifestation of an unlawful threat of force.

The Court’s most important decision regarding the status of threats in international law is the *Nuclear Weapons* advisory opinion of 1996, in which it considered whether the threat or use of nuclear

32. *Id.*

33. *See id.* (finding the British actions to be proportional reactions to “serious outrages”).

34. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14, ¶ 195 (June 27). The concept of an armed attack will be discussed *infra* notes 81–87 and accompanying text.

35. *Nicaragua*, 1986 I.C.J. ¶ 195.

36. *Id.*

weapons was “permitted” under international law.³⁷ The ICJ recognized that “states sometimes signal that they possess certain weapons to use in self-defence against any state violating their territorial integrity or political independence.”³⁸ One issue before the Court, therefore, was whether such a “signalled intention” constituted a threat within the ambit of Article 2(4):

Whether a signalled intention to use force if certain events occur is or is not a “threat” within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4 . . . [equally] if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.³⁹

This statement clearly establishes that a threat to use force can constitute a lawful action, and, moreover, that the lawfulness of any threat of force is contingent upon the prospective lawfulness of the force threatened. The Court’s 1996 finding is the most authoritative statement of this position, but it was far from novel. Indeed, the Court briefly noted in the 1986 *Nicaragua* case that the threat of force “is equally forbidden by the principle of non-use of force.”⁴⁰ Although this statement seems somewhat nonsensical—it would seem illogical for the prohibition of use to also prohibit threats because use and threat are different things—it can reasonably be interpreted to mean that the Court viewed the threat of force as being “equally forbidden” by Article 2(4), or that the threat of force and the use of force are “equally forbidden.”

The conceptual “coupling” of the prohibitions of threat and use of force, to the extent that lawful force can be lawfully threatened and vice versa, has also long since been the majority position taken in the (admittedly limited) academic commentary on threats in international law. For example, in 1963, Ian Brownlie stated that “[i]f the promise is to resort to force in conditions in which no justification for the use of force exists, the threat is itself illegal.”⁴¹ More recent literature reaffirms this position,⁴² although some scholars admittedly take an alternative view.⁴³

Ultimately, despite the lack of clarity in the international instruments prohibiting the threat of force and the ambiguity of state practice on this issue, it seems evident, from both the *Nuclear*

37. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 1 (July 8).

38. *Id.* ¶ 47.

39. *Id.*

40. *Nicaragua*, 1986 I.C.J. ¶ 227.

41. BROWNLIE, *supra* note 7, at 364.

42. See, e.g., YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 81 (2005).

43. Sadurska, *supra* note 3, at 239, 250.

Weapons opinion and the wider literature, that if actual force is unlawful, then, retroactively, so is the threat to use that same force.⁴⁴ Similarly, lawful force can be lawfully threatened.⁴⁵ Article 2(4) is a binding normative provision prohibiting the threat or use of force, and the only universally accepted means of lawfully justifying the use of force are under Articles 42 and 51 of the Charter.⁴⁶ Thus, we argue that the same proposition must apply for threats. All threats of force are *prima facie* unlawful.⁴⁷ A threat is therefore permissible only if the actual force threatened is permissible—meaning that it falls under Article 42 or 51.⁴⁸

C. Typology of Threats of Force

At this juncture, it is useful to briefly identify several categories of threats that are apparent in state practice. Given that Article 2(4) and other international instruments are essentially silent on the issue and the ICJ has provided only minimal guidance, this subpart provides a brief typology of actions that potentially violate the prohibition of the threat of force.

The fact that Article 2(4) fails to define a threat of force has led legal commentators to attempt to clarify the concept. Romana Sadurska, for example, defined a threat of force as “a message, explicit or implicit, formulated by a decision maker and directed to the target audience, indicating that force will be used if a rule or demand is not complied with.”⁴⁹ Brownlie similarly defined the threat of force as “an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government.”⁵⁰ This type of action represents the first possible category of threat: the clear communication (oral or by *communiqué*)⁵¹ that failure to comply with a request, obligation, or ultimatum will result in force being employed.⁵² For example, state A threatens state B with force unless it complies with state A’s demands. This is the most intuitively representative and recognizable understanding of a threat of force, and it is the “type” of

44. See, e.g., *supra* text accompanying note 39.

45. See Sadurska, *supra* note 3, at 250–51 (“[I]nternational actors demonstrate varying degrees of approval or more or less reluctant tolerance for unilateral threats.”).

46. Waters & Green, *supra* note 8, at 294–98.

47. U.N. Charter art. 2, para. 4.

48. Waters & Green, *supra* note 8, at 294–98.

49. Sadurska, *supra* note 3, at 242.

50. BROWNLIE, *supra* note 7, at 364.

51. As Lauren confirms, “a communication need not be restricted to a requirement that it be written.” Lauren, *supra* note 15, at 136. He also notes that in practice, ultimatums have occasionally “been issued orally or, to use the French phrase, in the form of a ‘note verbale.’” *Id.* at 137.

52. Myers, *supra* note 3, at 143.

threat that international law academics most commonly reference.⁵³ There is little doubt that such threats violate Article 2(4), at least *prima facie*.⁵⁴

Second, a threat may be apparent if a state enters into a defensive treaty alliance, such as the Warsaw Pact.⁵⁵ A more contemporary example is the Russian Federation's position concerning Georgian and Ukrainian accession to the North Atlantic Treaty Organization.⁵⁶ In context, these defensive pacts are self-evidently "threatening," but this practice seems not to fall within the concept of an unlawful threat,⁵⁷ because defensive pacts have long been widely accepted in state practice. This acceptance may, of course, be based on the fact that these agreements are threats of force made in self-defense, as this Article discusses. However, as Randelzhofer cautions, a treaty may have both offensive and defensive purposes, and it may be difficult to distinguish between the two.⁵⁸ Therefore, it is perhaps better to view these defensive pacts as not breaching Article 2(4) at all.

A third possible category is essentially implicit in nature, but it is perhaps more important in practice than verbal communication. Certain positive actions (such as a state increasing its military budget or undertaking military maneuvers) may be intended or perceived as a threat of force. Lauren, for example, explains that "[n]aval demonstrations . . . often afford evidence of threats involving an exemplary show of force as punishment for noncompliance with ultimata demands."⁵⁹ Similarly, as Harris notes, Iraq's 1994 buildup

53. As Corten points out, this type of explicit ultimatum is the "definition of threat that is often cited." CORTEN, *supra* note 23, at 103; *see, e.g.*, BROWNLIE, *supra* note 7, at 364; Myers, *supra* note 3, at 143.

54. CORTEN, *supra* note 23, at 106.

55. Sadurska, *supra* note 3, at 243.

56. In 2008, the Russian Federation made clear that it saw the potential NATO membership of Georgia and Ukraine as a threat to its security and the security of Europe in general. *See, e.g., Medvedev Warns on NATO Expansion*, BBC NEWS (March 25, 2008), <http://news.bbc.co.uk/2/hi/europe/7312045.stm>.

57. *See* Sadurska, *supra* note 3, at 243–44 (including defensive pacts among possible types of threats, but concluding that "[o]nly communications that . . . trigger a reaction of stress that leads to accommodating or adapting behavior" constitute threats).

58. Albrecht Randelzhofer, *Article 2(4), in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 112, 124 (Bruno Simma et al. eds., 2d ed. 2002).

59. Lauren, *supra* note 15, at 149. Lauren's example is that in the years preceding the Young Turk Revolution, Great Britain frequently coerced the Ottoman Empire with displays of force. *Id.*

Charging that it was "trifling with his Majesty's Government," Great Britain issued an ultimatum to the Empire in 1906. The demands included the evacuation of Taba by Turkish troops and the acceptance of the Sinai boundary with Egypt within a time limit of ten days. The threat for noncompliance was "the immediate dispatch of a British ship of war" to the locality in question.

of troops along the border of Kuwait was viewed by the United Kingdom as a breach of the prohibition of the threat of force.⁶⁰

It is therefore clear that troop buildups and other forms of military posturing can constitute an unlawful threat of force. Equally, it seems that not all such actions are necessarily unlawful. For example, the extensive report produced by the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG),⁶¹ which was established by the Council of the European Union to investigate the 2008 Russia–Georgia conflict,⁶² took the view that, “[a]ccording to State practice[,] . . . not all militarised acts amount to a demonstration of force and thus to a violation of Art. 2(4) of the UN Charter. Many are routine missions devoid of any hostile intent and are meaningless in the absence of a sizable dispute.”⁶³ Similarly, it has been noted that “[s]ecret military exercises or maneuvers might amount to the preparation of aggression but are not threats under the terms of Article 2(4) if they are unknown to the victim.”⁶⁴ In other words, it may be that even deliberately threatening military behavior should only be labeled as an unlawful threat if it can be (or is) perceived as a threat.⁶⁵

In the context of these implicit threats, it is possible to distinguish technical threats of force from planning and preparation.⁶⁶ In certain situations, the threat of force can form part of the preparations for using force.⁶⁷ Roscini cites the Japanese threats against French Indo-China from 1940 to 1941 to illustrate this distinction.⁶⁸ These threats were carried out in order to secure a staging point for attacks against the Philippines, Malaya, and the Netherlands East Indies.⁶⁹ He takes the view that the difference between threats and preparations for war is that “[w]hile in the latter the decision to use force has already been taken, threats are not intended as preparatory acts in view of subsequently using force, but

Id.

60. DAVID J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 725 (7th ed. 2010).

61. 1–3 INDEP. INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEOR., REPORT (2009), available at <http://www.ceiig.ch/Report.html>.

62. Council Decision 2008/901, Concerning an Independent International Fact-Finding Mission on the Conflict in Georgia, 2008 O.J. (L 323) 66.

63. 2 IIFFMCG, *supra* note 61, at 232.

64. Roscini, *supra* note 3, at 237–38.

65. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 541 (July 8) (Weeramantry, J., dissenting) (“[A] secretly harboured intention to commit a wrongful or criminal act does not attract legal consequences, unless and until that intention is followed through by corresponding conduct.”).

66. Roscini, *supra* note 3, at 230.

67. *Id.*

68. *Id.*

69. *Id.*

as a coercive means *alternative* to it.”⁷⁰ It is unclear what legal consequences flow from this distinction, and legally whether “pure threats” should be treated any differently from “preparatory threats.” In any event, this distinction is useful for understanding the typology of military threats.

Again, although it is clear that international law prohibits the threat of force, it is less clear what in fact constitutes a threat of force (in the technical legal sense) in violation of Article 2(4). There are a variety of types of action that may be viewed as threats of force, but the extent to which these types of action are *prima facie* unlawful is not altogether evident. Nonetheless, the above typology is important to keep in mind during the subsequent analysis.

III. SELF-DEFENSE INVOLVING THE USE OF FORCE

This Part turns from the concept of the threat of force to examine the right of self-defense, as it is commonly understood in international law, and the criteria that regulate its exercise. The right of self-defense under international law is relatively well-trodden ground. As such, this Part is deliberately brief and aims simply to provide the criteria that underpin our later discussion of threats made in self-defense. First, the rules governing self-defense are set out with regard to the relatively uncontroversial situation of force in response to a prior use of force. Second, this Part touches upon the contentious notion of using force in response to a prior threat (actions that may be termed “anticipatory” and “preemptive” self-defense).

A. “Traditional” Self-Defense: The Use of Force in Response to the Use of Force

Self-defense taken in response to a prior use of military force is universally accepted as an exception to the prohibition of the use of force, assuming that such action meets certain criteria.⁷¹ These criteria stem from both conventional and customary international law⁷² and are well known. Admittedly, their exact scope and

70. *Id.*

71. As is stated in the commentary produced by the International Law Commission (ILC) concerning its Articles on State Responsibility: “The existence of a general principle admitting self-defense as an exception to the prohibition against the use of force in international relations is *undisputed*.” Rep. of the Int’l Law Comm’n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10, at 177; GAOR, 56th Sess., Supp. No. 10 (2001) (emphasis added).

72. The ICJ reaffirmed this in *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 34 (June 27).

application have been—and continue to be—extensively debated.⁷³ It is not the purpose of this Article to revisit these debates or to go into detail with regard to self-defense generally. Nonetheless, it is necessary to briefly set out the primary criteria that are applied to assess the lawfulness of forcible actions avowedly taken in self-defense.

To understand self-defense today, it first must be noted that the rules deriving from the two key sources of international law—convention and custom—do not necessarily correspond.⁷⁴ As such, the modern international legal regime concerning self-defense is an amalgamation of the pre-1945 customary international law and Article 51 of the UN Charter.⁷⁵ Taken together, these sources of law provide the three primary criteria against which self-defense claims must be tested.⁷⁶

Looking first at treaty law, the core provision regarding self-defense is found in Article 51 of the UN Charter: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.”⁷⁷ Article 51 therefore indicates that self-defense is only lawful “if an armed attack occurs.”⁷⁸ As such, a state acting in self-defense must have suffered (or, arguably, must be faced with the imminent threat of suffering⁷⁹) an armed attack against it.⁸⁰

73. For a useful summary of these debates, see CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 128–60 (3d ed. 2008).

74. Something the ICJ also pointed out in *Nicaragua*, 1986 I.C.J. ¶ 175.

75. JAMES A. GREEN, *THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENCE IN INTERNATIONAL LAW* 129–38 (2009).

76. James A. Green, *Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice*, 58 *INT'L & COMP. L.Q.* 163, 178 (2008).

77. U.N. Charter art. 51.

78. *Id.*

79. *See infra* Part III.B.

80. It should be noted that in addition to the criterion of an armed attack, Article 51 sets out two other criteria for the exercise of self-defense. The first of these is that measures taken in self-defense must be reported to the Security Council. U.N. Charter art. 51. This criterion is essentially procedural, and is not determinative as to lawfulness. As such, it will not be further discussed with regard to self-defense by threat. Second, Article 51 holds that the right of self-defense is terminated once “the Security Council has taken measures necessary to maintain international peace and security.” *Id.* In other words, any action of self-defense must end once the Security Council has taken measures to alleviate the defensive necessity. Leaving aside the debate as to whether such measures must be “effective” or not, it would logically hold that this aspect of Article 51 would apply equally to responses involving either the threat or use of force. It therefore needs to be discussed no further here. For a discussion of both of these additional criteria in Article 51, see Don W. Greig, *Self-Defence and the Security Council: What Does Article 51 Require?*, 40 *INT'L & COMP. L.Q.* 366, 366 (1991).

Since the adoption of the UN Charter, the term “armed attack” has been interpreted to mean a qualitatively grave use of force.⁸¹ As the ICJ has held, an armed attack constitutes “the most grave form of the use of force,”⁸² in contrast with “less grave forms,” which do not trigger the right.⁸³ Therefore, it is not enough for a state to suffer a use of force against it: the responding state must face an attack of a “grave” level, beyond that of a use of force *simpliciter*.

Turning to the customary roots of self-defense, the crucial element of the pre-Charter regime was that for a response to be lawful, it must have been both necessary and proportional. These two criteria stretch well back into international legal theory.⁸⁴ However, they appeared on the landscape of modern international law with a much-quoted 1841 letter by Daniel Webster, the then-U.S. Secretary of State, concerning the 1837 sinking of the steamship *Caroline*.⁸⁵ Webster insisted that a state claiming self-defense must:

[S]how a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that . . . [it] did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.⁸⁶

The concepts of necessity and proportionality are clearly discernable from this famous statement. Since the time of the *Caroline*, these criteria have developed legal content through cumulative state practice and *opinio juris*.⁸⁷

Today, the necessity criterion requires that the responding state show that it exhausted non-forcible measures or that the extremity of the situation meant that it would have been wholly unreasonable to expect the responding state to attempt non-forcible measures of

81. AVRA CONSTANTINOU, THE RIGHT OF SELF-DEFENCE UNDER CUSTOMARY INTERNATIONAL LAW AND ARTICLE 51 OF THE UN CHARTER 57 (2000). An assessment of state practice concerning self-defense supports this position as to the nature of armed attack. See GREEN, *supra* note 75, 112–29.

82. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 191 (June 27). This statement was also reemployed in the *Oil Platforms* decision. *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, ¶ 51 (Nov. 6).

83. *Nicaragua*, 1986 I.C.J. ¶ 191.

84. For example, Vattel discussed the notion of “necessity” and the exhaustion of peaceful measures before resorting to war in the eighteenth century. 3 EMERICH DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS 305 (James B. Scott ed., Charles G. Fenwick trans., Carnegie Institution of Washington 1916) (1758).

85. Letter from Daniel Webster to Henry S. Fox (Apr. 24, 1841), in 29 BRITISH AND FOREIGN STATE PAPERS (1841–42), 1129–39 (1857) [hereinafter Webster Letter].

86. *Id.* at 1137–38.

87. For a detailed examination of the developmental process of these criteria from their appearance in Webster’s letter to elements of customary international law, see generally James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 CARDOZO J. INT’L & COMP. L. 429 (2006).

resolution.⁸⁸ In other words, a forcible response must be a last resort with no practical or reasonable alternative.

The criterion of proportionality requires the state to act in a manner that is proportional to the established defensive necessity.⁸⁹ This means that the proportionality criterion does not merely require a numerical equivalence of scale or means, but rather that the force employed must not be excessive with regard to the goal of abating or repelling the attack.⁹⁰

As a further aspect of both the necessity and proportionality requirements, self-defense is lawful only until the attack being responded to has ended.⁹¹ Force used in self-defense is only necessary until the attack (or the injurious consequences of it, such as the occupation of territory) has abated. This is fairly straightforward: it cannot be necessary to continue to respond in self-defense once there is no longer a situation creating a defensive necessity. Similarly, given that proportionality requires a balance between the force used in response to an attack and the need to abate that attack, it is logical that once the attack is abated, further forcible action is disproportional.

Both necessity and proportionality are flexible and context-specific criteria that are based, to an extent, on notions of acceptability and reasonableness.⁹² Despite this degree of indeterminacy and the fact that Article 51 mentions neither necessity nor proportionality, it is uncontroversial that these criteria survived the inception of the United Nations and persist as criteria governing the lawful exercise of self-defense.⁹³

88. This interpretation of the necessity criterion may be discerned from state practice. *See id.* at 450–57 (using historical examples to frame the necessity criterion).

89. *See, e.g.*, JUDITH G. GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 142 (2004); Ruth Wedgwood, *Proportionality and Necessity in American National Security Decision Making*, 86 AM. SOC. INT'L L. PROC. 58, 59 (1992).

90. *See* sources cited *supra* note 89.

91. CONSTANTINOU, *supra* note 81, 159–61; Gamal M. Badr, *The Exculpatory Effect of Self-Defense in State Responsibility*, 10 GA. J. INT'L & COMP. L. 1, 25–26 (1980); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171, 187–88 (2005).

92. On the flexibility of these criteria, *see* GARDAM, *supra* note 89, at 20–22; DANIEL P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER, 64 (1975) (discussing the criteria in the context of naval warfare); Richard R. Baxter, *The Legal Consequences of the Unlawful Use of Force Under the Charter*, 62 AM. SOC'Y INT'L L. PROC. 68, 74 (1968) (discussing the difficulty of defining proportionality).

93. *See, e.g.*, GARDAM, *supra* note 89, at 6, 11 (“[T]here has been consistent agreement ever since the adoption of the United Nations Charter on the need for any forceful action, irrespective of legal basis, to be proportionate.”); GRAY, *supra* note 73, at 148–49 (noting that the parties in *Nicaragua* “agreed that any exercise of self-defence must be necessary and proportionate”); Oscar Schachter, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity: Remarks*, 86 AM. SOC'Y INT'L L. PROC. 39 (1992) (stating that proportionality and necessity are an undisputed part of the analysis).

As such, when the treaty-based requirement of an armed attack is coupled with the continuing customary international law criteria expressed in the *Caroline* exchange, self-defense is governed by three primary criteria:

- (1) Armed attack: did the responding state suffer a grave use of force against it?
- (2) Necessity: did that grave use of force create a defensive necessity to which force was the only reasonable response of last resort?
- (3) Proportionality: was the force used the minimum required to meet the defensive necessity created by the attack?

If all three questions can be answered in the affirmative, then, broadly speaking, a use of force in response to a prior use of force will amount to a lawful self-defense.⁹⁴

B. *Anticipatory and Preemptive Self-Defense: The Use of Force in Response to the Threat of Force*

This Article does not attempt to examine the deep divisions that exist among both states and scholars over the lawfulness of a forcible response in self-defense against a threat rather than an actual use of force.⁹⁵ Whether an actual attack must have “occurred,” as Article 51 indicates,⁹⁶ or whether the preexisting manifestation of the right—allowing for force to be used against a threat⁹⁷—has survived the adoption of the UN Charter, goes beyond the scope of this Article. As such, we follow the ICJ’s policy of abstaining from taking a position on the lawfulness of self-defense in response to a threat.⁹⁸ However, to support our analysis of countervailing threats, it is necessary to briefly touch upon the question.

It is worth noting that the terminology used to describe this possible manifestation of self-defense varies across the literature; different scholars use different terms to mean different things.⁹⁹

94. *But see supra* note 80 (noting two other criteria in relation to self-defense).

95. *See supra* note 2.

96. U.N. Charter art. 51 (permitting the use of force in self-defense “if an armed attack occurs”).

97. Under the *Caroline* formula, and therefore traditional customary international law rules governing self-defense, the anticipatory use of force in response to an imminent threat was clearly permissible. For discussion, see Green, *supra* note 87, at 463–73.

98. In *Nicaragua*, for example, the Court stated that it “expresses no view on the issue” of self-defense in response to a threat. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 194 (June 27). This statement was referred to, and the same stance was taken, in *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, ¶ 143 (Feb. 3).

99. GRAY, *supra* note 73, at 211–12.

Therefore, this Article uses the following terminology: “anticipatory self-defense” refers to action taken in response to an imminent threat, while “preemptive self-defense” refers to action taken in response to a perceived threat that is more temporally remote.¹⁰⁰

Although the ICJ has not endorsed the use of force in the context of anticipatory defensive action,¹⁰¹ the Court has nonetheless appeared to take the view, as can be seen from paragraph 35 of *Nicaragua*, that an “armed attack” would be the relevant standard if such action were lawful:

[I]n the circumstances of the dispute now before the Court, what is in issue is the purported exercise by the United States of a right of collective self-defense in response to an armed attack on another State. The possible lawfulness of a response to the imminent threat of an *armed attack* which has not yet taken place has not been raised.¹⁰²

This statement implies that if anticipatory action is lawful, it is lawful only in the case of a threatened armed attack, and Gill states that “[t]here can be no doubt that an armed attack, or at any rate the threat of an imminent armed attack is an *absolute precondition* for the exercise of the right of self-defense.”¹⁰³

Assuming, then, that anticipatory self-defense can be lawful at all, it must be taken in response to a threatened armed attack, rather than any threat of force whatsoever. In addition, it seems apparent that when self-defense in response to a threat has been advanced as a justification by states post-1945—which, admittedly, has not happened often¹⁰⁴—other states have tended to accept or reject the claim based on whether the perceived threat was imminent.¹⁰⁵ This

100. This particular terminological distinction is employed by Constantine Antonopoulos, *Force by Armed Groups as Armed Attack and the Broadening of Self-Defence*, 55 NETH. INT’L L. REV. 159, 172 (2008); and Niaz A. Shah, *Self-Defence, Anticipatory Self-Defence and Pre-Emption: International Law’s Response to Terrorism*, 12 J. CONFLICT & SECURITY L. 95, 111 (2007).

101. See *supra* note 98 and accompanying text.

102. *Nicaragua*, 1986 I.C.J. ¶ 35 (emphasis added); see also *id.* ¶ 194 (quoting drafting history as including the “armed” language).

103. Terry D. Gill, *The Law of Armed Attack in the Context of the Nicaragua Case*, 1 HAGUE Y.B. INT’L L. 30, 35 (1988) (emphasis added).

104. Indeed, some of the incidents often cited as examples of anticipatory self-defense were not justified as anticipatory measures by the involved states. See GRAY, *supra* note 73, at 112–15 (discussing the rarity of invocations of anticipatory self-defense by states who appear to have taken preemptive action).

105. The best example of this followed the 1981 Israeli attack upon the Iraqi Osiraq nuclear reactor, after which Israel explicitly justified its action as anticipatory self-defense. See U.N. SCOR, 36th Sess., 2288th mtg. ¶¶ 79–84, U.N. Doc. S/PV.2288 (June 19, 1981) (“Israel had full legal justification to exercise its inherent right of self-defense . . .”); GRAY, *supra* note 73, at 115. In doing so, Israel itself argued that the danger posed by the Iraqi reactor was imminent. See U.N. SCOR, 36th Sess., 2280th mtg. ¶ 102, U.N. Doc. S/PV.2280 (June 12, 1981) (“We [Israel] waited until the eleventh hour after the diplomatic clock had run out. . .”). States almost universally condemned the action, but, notably, most states did so on the basis that the threat to Israel was,

idea, termed in this Article as “anticipatory self-defense,” conforms to the *Caroline* formula, which held that to respond to a threat, the threat must be “instant . . . leaving no moment for deliberation.”¹⁰⁶

Although forcible self-defense in response to a threat is far from universally accepted as lawful, those that support the doctrine generally employ the concept of imminence as a vital part of any attempt to establish the lawfulness of such action.¹⁰⁷ This conclusion, that imminence is required before self-defense in response to a threat can even be considered lawful, is supported by the international reaction to the “Bush Doctrine,” first advanced by the United States in 2002.¹⁰⁸ In its *National Security Strategy* of that year, the United States stated that it would resort to the preemptive use of force “even if uncertainty remains as to the time and place of the enemy’s attack.”¹⁰⁹ In other words, it argued for the lawfulness of self-defense in response to a non-imminent threat. We term this type of action “preemptive self-defense.” It is uncontroversial that this “doctrine” of preemptive self-defense has not met with general acceptance, either from states¹¹⁰ or scholars.¹¹¹

contrary to what Israel had claimed, not imminent. *See, e.g.*, U.N. SCOR, 36th Sess., 2288th mtg. ¶¶ 28–30, U.N. Doc. S/PV.2288, (June 19, 1981) (noting that while Israel may have legitimately felt threatened, there were still non-military solutions available); U.N. SCOR, 36th Sess., 2284th mtg. ¶¶ 44–47, 11 U.N. Doc S/PV.2284 (June 16, 1981) (“Today the Israelis attack Baghdad for having a nuclear reactor centre that was described by the . . . IAEA . . . as ‘peaceful nuclear facilities.’”); U.N. SCOR, 36th Sess., 2283d mtg. ¶¶ 53–56, U.N. Doc. S/PV.2283 (June 15, 1981) (referring to the air raid on Iraq’s capital as an “unprovoked” act of terrorism). Of course, a number of other states argued that the action was unlawful because self-defense against a threat is unlawful per se; for example, the Soviet Union referred to such actions as “the law of the jungle.” *Id.* ¶ 63.

106. Webster Letter, *supra* note 85, at 1138.

107. For example, while Gazzini does not conclude upon the lawfulness of anticipatory self-defense one way or another, he does hold that such action *may* be lawful once the point is reached where there is a “concrete and immediate threat.” TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 174 (2005).

108. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf>.

109. *Id.* at 115. This position was restated, essentially unmodified in 2005 and 2006. *See* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 18, 23 (2006), <http://www.presidentialrhetoric.com/speeches/nss2006.pdf>; U.S. DEP’T OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 9–12 (2005), <http://www.defenselink.mil/news/Apr2005/d20050408strategy.pdf>.

110. *See*, for example, the categorical rejection of the notion of preemptive attack by the Non-Aligned Movement in the declaration that emerged from the Fourteenth Summit of Heads of State or Government of the Non-Aligned Movement. Non-Aligned Movement, *Final Rep. Covering the 14th Conference of Heads of States or Governments of the Non-Aligned Movement*, ¶ 22.5 (July 30, 2008), available at <http://www.cubanoal.cu/ingles/index>.

111. *See, e.g.*, GAZZINI, *supra* note 107, at 238 (“State practice is neither quantitatively nor qualitatively consistent enough to affirm the existence of a right to anticipatory self-defence, a development that would stretch beyond recognition the

Therefore, it seems that forcible self-defense in response to a threat of force is controversial but arguably lawful. However, even those who accept the lawfulness of forcible self-defense in response to a threat generally require that the threat be grave (a threatened armed attack) and imminent.¹¹² These requirements are additional to the requirements that the response be necessary and proportional, as with a response taken to a prior use of force.¹¹³

IV. IS NON-FORBIBLE SELF-DEFENSE CONCEPTUALLY POSSIBLE?

Having set out—so far as is possible—the international law governing the threat of force and outlined the criteria for “traditional” forcible self-defense, this Part turns to the central question of whether an otherwise unlawful threat of force is lawful if taken as a defensive response to the prior action of another state.

The first issue is whether “non-forcible” self-defense by way of the threat of force is conceptually possible as an aspect of current international law. Of the few scholars who have indicated that self-defense may be manifested by way of a threat, most view this conclusion as self-evident under the existing law. For example, Stürchler states that such a reading of Articles 2(4) and 51 is a “traditional” approach.¹¹⁴ It is difficult to support Stürchler’s claim here because no other scholars have tackled the issue in any detail. We too take the view that the notion of threats in self-defense is conceptually acceptable (and even desirable). However, this conclusion is certainly not self-evident.

Indeed, the concept of non-forcible self-defense by way of a threat is initially counterintuitive. The literature governing the inherent right of self-defense—and the criteria that have developed over hundreds of years of treaty and customary international law evolution to regulate that right—points towards the view that self-defense is an inherently “forcible” exercise.¹¹⁵

notion of self-defence itself.”); Greenwood, *supra* note 2, at 12–16 (“[T]he right of anticipatory self-defense is confined to instances where the armed attack is imminent.”); Sapiro, *supra* note 2, at 599–603 (“Although the law can be interpreted to permit defensive action in the face of an imminent threat, it is difficult—and dangerous—to stretch it farther.”).

112. See Shah, *supra* note 100, at 101–04, 111–19 (describing the gravity and immediacy of the threat required to justify self-defense under international law).

113. Dominika Svarc, *Anticipatory and Preventative Force Under International Law*, 19 PEACE REV.: J. SOC. JUST. 217, 219 (2007).

114. STÜRCHLER, *supra* note 3, at 219. Stürchler offers nothing in support of this claim. See also Myers, *supra* note 3, at 135 (stating that threats may be used as a form of self-defense).

115 See, e.g., BROWNLIE, *supra* note 7, 254 (referring to self-defense as being “exercisable through the medium of armed force”); DINSTEIN, *supra* note 42, 176 (defining self-defense as “a permissible form of armed self-help”); MYRA WILLIAMSON,

As a rule, states do not claim that they are responding in self-defense by way of a threat; instead, they threaten to respond in self-defense by way of force. In other words, state A may articulate to state B that if state B attacks, state A will respond *in self-defense* (meaning with force), but state A will not claim that the threat itself is self-defense. This response suggests that state A does not perceive its threat as an action of self-defense.¹¹⁶ Similarly, the general (and largely unquestioned) academic position is that self-defense must, by its very nature, be forcible.¹¹⁷

Nonetheless, occasionally throughout the UN era, scholars have invoked a notion of “non-forcible self-defense.” For example, in 1958, Derek Bowett argued that the right of self-defense can be activated if a state suffers “economic aggression” that does not constitute an actual use of force.¹¹⁸ Bowett proceeded to argue that, in the majority of such instances, any response taken in self-defense must itself be non-forcible to meet the requirements of necessity and proportionality.¹¹⁹ Therefore, he conceptually accepted the notion of non-forcible self-defense. Specifically, Bowett envisaged a response consisting of some form of otherwise unlawful economic coercion: “For example, a state may on grounds of self-defense justify discrimination against products of another state despite a duty of non-discrimination assumed towards that state under treaty.”¹²⁰

It is unlikely that the right of self-defense can be stretched to cover economic measures in this way, because the right of self-defense provides an exception to the prohibition found in Article 2(4),¹²¹ and it is clear that Article 2(4) does not regulate economic coercion.¹²² It

TERRORISM, WAR AND INTERNATIONAL LAW: THE LEGALITY OF THE USE OF FORCE AGAINST AFGHANISTAN IN 2001, 108 (2009) (“[E]ven if the Charter had preserved a right of customary self-defence, the customary right would probably only have entitled states to use force in response to an armed attack from another state”); and Rep. of the Int’l Law Comm’n, 32d Sess., May 5–July 25, 1980, July 2–Aug. 10, 2001, U.N. Doc. A/35/10, at 54 (“[S]elf-defense almost by its very nature involves the use of armed force.”).

116. For example, take Iran’s 2007 statement that if the United States launched airstrikes against it, Iran would respond in self-defense. *Iran to Use “All Means” to Defend Itself if Attacked*, REUTERS (Sept. 19, 2007), <http://www.reuters.com/article/idUSBLA93839720070919>

117. See sources cited *supra* note 115.

118. DEREK W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 110–11 (1958).

119. *Id.*

120. *Id.* at 111.

121. As noted, for example, in WILLIAMSON, *supra* note 115, at 105 (stating that Article 51 provides an “exemption to the general prohibition on the use of force”).

122. See, e.g., STÜRCHLER, *supra* note 3, at 23 (noting that a proposal to include economic coercion in Article 2(4) was rejected); Eduardo J. de Arechaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 140 (1978) (stating that no principle of international law prohibits a state from breaking off diplomatic or economic relations with another); Tom J. Farer, *Political and Economic Coercion in*

would be nonsensical for a particular manifestation of a type of conduct to constitute an exception to a rule that does not prohibit that type of conduct in the first instance. Therefore, if economic measures in response to prior wrongs are to be seen as lawful, it is more logical to classify such actions as non-forcible countermeasures.

However, this conclusion does not extend to threats of force because Article 2(4) explicitly prohibits the threat of force.¹²³ As such, Article 2(4) is not a conceptual bar to a notion of self-defense by way of the threat of force. Self-defense is an exception to the prohibition contained in Article 2(4),¹²⁴ and the threat of force is covered by that prohibition.¹²⁵ Similarly, nothing in Article 51 of the UN Charter requires that measures taken on its authority be forcible; it simply holds that the right of self-defense is to be unimpaired by the UN Charter.¹²⁶

Moreover, since Bowett wrote in the 1950s, it is notable that some writers have explicitly accepted the concept of a threat of force in self-defense.¹²⁷ Admittedly, relatively few scholars have taken this stance, but the concept is evident in the literature.¹²⁸ Roscini states that “the warning of a forcible defensive reaction by the victim of an armed attack would not breach Article 2(4).”¹²⁹ Dinstein similarly underlines that “if a State declares its readiness to use force in conformity with Charter, this is not an illegal ‘threat’ but a legitimate warning and reminder.”¹³⁰

This concept was also explicitly noted and endorsed by the independent fact-finding mission set up by the European Union to investigate the conflict in the Caucasus in 2008 (IFFMCG).¹³¹ The mission’s report concluded that “[i]n principle, threats can be justified either as a measure of self-defense or when authorized by the UN

Contemporary International Law, 79 AM. J. INT’L L. 405, 408–13 (1985) (arguing that economic coercion is outside the scope of Article 2(4)).

123. U.N. Charter art. 2, para. 4.

124. WILLIAMSON, *supra* note 115, at 105.

125. U.N. Charter art. 2, para. 4.

126. *Id.* art. 51. Moreover, if one examines the debates at the 1945 San Francisco conference on the drafting of the UN Charter, there is nothing to indicate that self-defense was necessarily limited to a forcible response. In a typical example, the delegate of the United States, Senator Vandenberg, stated that his state recognized “the inherent right of self-defense, whether individual or collective, which permits any sovereign state among us . . . to ward off attack” with no mention of *how* a state was to ward off such an attack. See 11 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANISATION, U.N. Doc. 972, III/6, 53 (1945). Of course, the failure of states at the San Francisco conference to insist that self-defense be taken as a forcible response could also be the result of an assumption on the part of these states that self-defense is self-evidently a forcible exercise.

127. See *supra* note 3.

128. See *supra* note 3.

129. Roscini, *supra* note 3, at 237.

130. DINSTEIN, *supra* note 42, at 81.

131. 2 IFFMCG, *supra* note 61, at 236.

Security Council.”¹³² On the facts, IFFMCG found that neither the threats made by Russia nor those made by Georgia prior to the conflict could be lawfully justified as self-defense.¹³³ Nonetheless, by considering the issue at all, the IFFMCG clearly indicated the conceptual possibility of threats as lawful self-defense.

Returning to the jurisprudence of the ICJ, in more than one decision, the Court has accepted—at least implicitly—the possibility of self-defense manifested by a threat of force. This apparent acceptance can be traced back to the Court’s discussion, in *Corfu Channel*, of the Albanian claim that the passage of the British warships on October 22, 1946, was not “innocent.”¹³⁴ Although the Court did not find, on the evidence, that the British vessels were in a “combat formation,”¹³⁵ it did take note of the fact that the warships were “at action stations” very close to the Albanian coast.¹³⁶ The Court went on to say that “[t]he intention [of the United Kingdom] must have been, not only to test Albania’s attitude, but at the same time to demonstrate such force that she [Albania] would abstain from firing again on passing ships.”¹³⁷ The ICJ seemingly saw the threats by the British as actions of the sort that would generally be viewed as being unlawful; however, in view of an earlier firing from an Albanian battery, the Court concluded that it could not “characterize these measures taken by the United Kingdom authorities as a violation of Albania’s sovereignty.”¹³⁸ In other words, the Court appeared to take the view that the United Kingdom’s otherwise-unlawful threat of force should be considered lawful because of the preceding use of force by Albania.

More recently, in its *Nuclear Weapons* advisory opinion of 1996, the ICJ held, as previously discussed,¹³⁹ that not all threats of force amount to breaches of Article 2(4) *per se*.¹⁴⁰ The Court made clear that if the use of the threatened force would be lawful, then the threat to use that force is likewise a lawful threat of force.¹⁴¹ Indeed, the Court specifically linked this relationship between use and threat

132. *Id.* (citation omitted).

133. *Id.* at 237–38. The IFFMCG also pointed out the rather self-evident fact that no authorization had come from the Security Council either. *Id.* at 236.

134. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 12 (Apr. 9); see *supra* Part II.B. For further discussion of this case, see also *supra* notes 25–33 and accompanying text.

135. *Corfu Channel*, 1949 I.C.J. at 30–31.

136. *Id.* at 31.

137. *Id.* (emphasis added).

138. *Id.*

139. See *supra* text accompanying note 39.

140. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (July 8) (discussing situations where threats of force would be lawful).

141. *Id.*

to the right of self-defense.¹⁴² Like *Corfu Channel*, then, the *Nuclear Weapons* opinion indicates that a threat can be a lawful action if it is taken for a defensive purpose.

In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion of 2004 (*Wall* opinion), the construction of a separation barrier by Israel constituted a non-forcible action, which the ICJ held to be unlawful.¹⁴³ Israel argued, *inter alia*, that the construction of the wall constituted an action taken in self-defense.¹⁴⁴ The ICJ rejected this claim, not on the basis that non-forcible measures inherently fall outside of the scope of self-defense,¹⁴⁵ but rather because the threat perceived by Israel emanated from within its territory and not from an external state.¹⁴⁶

By not dismissing the claim that the construction of the wall could constitute self-defense on the simple basis that it was a non-forcible measure, the Court may again have indicated that an action taken in self-defense need not necessarily involve the use of military force. Whether the construction of such a barrier could be considered a threat of force under Article 2(4) is debatable.¹⁴⁷ In any event, the *Wall* opinion offers additional support for the general viability of non-forcible self-defense.¹⁴⁸

Based upon these decisions, it is evident that the Court has viewed the threat of force, irrespective of its status as a *prima facie* breach of Article 2(4), as lawful in certain circumstances. Moreover, these circumstances appear to include the threat of force as a defensive measure. The Court's implicit acceptance of non-forcible self-defense was criticized by Judge Higgins in her separate opinion to the *Wall* opinion: "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."¹⁴⁹

Although Judge Higgins was patently correct that the normal understanding of Article 51 is that action taken in self-defense will be

142. See *id.* (noting that states make known their ability to deploy certain weapons as a deterrence method of self-defense).

143. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 135, ¶ 142 (July 9).

144. A claim explicitly made to the UN General Assembly. U.N. GAOR, Emergency Special Sess., 21st mtg. at 6, UN Doc. A/ES-10/PV.21 (Oct. 20, 2003).

145. *Wall*, Advisory Opinion, 2004 I.C.J. ¶¶ 138–39.

146. *Id.*

147. We would argue that the construction of a separation barrier does not constitute a breach of the prohibition of the threat of force because such a barrier could not manifest as a use of force in itself, unlike, say, the deployment of a nuclear weapon, which could clearly be seen as a threat of force.

148. This is what Judge Higgins inferred from this aspect of the judgment. *Wall*, Advisory Opinion, 2004 I.C.J. ¶ 35 (separate opinion of Higgins, J.).

149. *Id.*

inherently forcible,¹⁵⁰ she did not elucidate what makes this normal understanding a desirable one, and she did not indicate any reason why non-forcible self-defense is legally incoherent. As previously noted, one possible problem in this context is that Article 2(4) does not prohibit certain non-forcible actions (such as economic coercion or, perhaps, the building of a wall), and therefore such actions cannot comfortably fall within the scope of one of the exceptions to that article. As noted, though, this is not the case with regard to the specific non-forcible measure that is the threat of force, because this is itself prohibited by Article 2(4). Therefore, this Article argues that there is nothing to prevent a conception of lawful self-defense by way of a threat.

V. IS THE THREAT OF FORCE IN SELF-DEFENSE DESIRABLE?

Although there is no legal reason to reject the notion of non-forcible self-defense by threat, it is questionable whether, from a policy perspective, it is desirable for the law to allow for countervailing threats. The inherent difficulty of determining whether a “threat of force” within the meaning of Article 2(4) has occurred at all,¹⁵¹ coupled with the existing flexibility of the rules governing traditional self-defense,¹⁵² may suggest that including threats of force within the inherent right is undesirable. It has been argued, on this basis, that “the justification of self-defense would lend itself even more easily to abuse for the threat of force than for the actual use of force.”¹⁵³

In itself, this problem is undeniable: self-defense would offer states a clear legal basis for threatening force, and this basis would be open to abuse. However, it is a truism that states threaten force all the time.¹⁵⁴ The fact that the limits on when threats may be permissible are blurred (and largely unexplored in the literature) is all the more reason to set out a clear framework to determine whether a threat of force is a lawful self-defense measure. At the very least, under a more explicit framework, threats that obviously fall outside of a defensive scope can be convincingly labeled as unlawful.¹⁵⁵ Moreover, it is nonsensical to allow for the lawful use of

150. See, e.g., sources cited note 115.

151. See BARKER, *supra* note 3, at 129 (discussing the controversy surrounding the interpretation of “force” in Article 2(4)); see generally *supra* Part II.

152. See *supra* text accompanying note 92.

153. STÜRCHLER, *supra* note 3, at 42.

154. Thus, “threats of force are a ubiquitous element of international relations.” Sadurska, *supra* note 3, at 239–40.

155. See U.N. Charter art. 2, para. 4 (“All Members shall refrain from the threat or use of force . . .”).

force in certain circumstances, where the criteria for self-defense are met, but to absolutely prohibit the threat of force in the same circumstances. Given that both Article 2(4) and the ICJ's interpretation of it indicate that the use and threat of force are conceptually equal,¹⁵⁶ it must be the case that both actions are equally lawful in the correct circumstances.

Although the threat and the use of force are conceptually the same in international law, this Article has already argued that they are very distinct in practice.¹⁵⁷ The use of force concerns actual manifest violence (potentially on a large scale), while the threat of force does not.¹⁵⁸ It therefore seems—taking the policy stance of seeking to minimize the use of military force wherever possible—that in most instances it will be desirable that states respond in self-defense through non-forcible means rather than with actual violence.¹⁵⁹ Indeed, the desirability of this solution appears self-evident.

Threats in self-defense not only offer a clear alternative to the actual use of force, they also offer a potentially more effective alternative to other non-forcible countermeasures, because they indicate that an actual use of force may follow. A threat of force can be a very effective—but ultimately non-forcible—means of settling a dispute.¹⁶⁰ As such, a threat of force may (admittedly, somewhat counterintuitively) facilitate the peaceful settlement of conflicts. A basic tenet of the UN system is that states are obliged to resolve their disputes peacefully.¹⁶¹ It seems both logical and desirable to view the threat of force as a lawful, non-forcible defensive option. Quite simply, “successful deterrence prevents war.”¹⁶²

VI. THE CRITERIA FOR SELF-DEFENSE INVOLVING THE THREAT OF FORCE

As previously concluded, there is no legal requirement that self-defense actions constitute a use of military force, and, in the majority

156. *See id.* (treating threats of force and the use of force the same); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 227 (June 27) (stating that a threat of force “is equally forbidden by the principle of non-use of force”).

157. *See supra* note 10 and accompanying text.

158. *See supra* note 10 and accompanying text.

159. CONSTANTINO, *supra* note 81, at 123.

160. Sadurska, *supra* note 3, at 246–47.

161. The most obvious expression of this obligation being Article 2(3) of the UN Charter.

162. Myers, *supra* note 3, at 178. On the “virtues” of threats of force generally (even potentially unambiguously unlawful threats), see Kritsiotis, *supra* note 3, at 308–16.

of instances, it is desirable that states exercise the inherent right of self-defense by way of a threat of force rather than an actual use of force.

This Part addresses the somewhat more problematic issue of how to assess such a manifestation of self-defense. Against what criteria should the lawfulness of a countervailing threat, avowedly made in self-defense, be tested? As has already been noted, this Article starts from the position that self-defense manifested by a threat of force should be analogous to self-defense manifested by a use of force and, therefore, that the same criteria should be applied to determine lawfulness. This analogy is conceptually logical, because if a threat and a use of force are equally breaches of Article 2(4)—and are thus potentially equally exercises of Article 51—then the same criteria should apply to either manifestation of self-defense. More practically, there is little specific guidance in conventional or customary international law as to how to assess threats in self-defense, and an analogy to the use of force in self-defense thus offers a useful framework. Traditional forcible self-defense provides an “identifiable normative anchor . . . to which the threat or threats of force can be tied.”¹⁶³ However, this analogy is not as straightforward as it sounds.

A. *In Response to What?*

The first challenge is to determine what may trigger a lawful threat of force in self-defense. Rather self-evidently, a response taken in self-defense must be taken in response to something.¹⁶⁴ Logically, this must be as true for a threat of force as for an actual use. A threat of force that is not correlated to some prior delict by the threatened party cannot conceptually be defensive; such a threat would simply be unlawful under Article 2(4).¹⁶⁵

Part III.A noted that traditional forcible self-defense cannot be taken in response to merely any use of force against the responding state; instead, an armed attack—a grave use of force—must have occurred.¹⁶⁶ Indeed, even those who make the controversial claim of anticipatory self-defense cannot sidestep this requirement of gravity.¹⁶⁷ In other words, if forcible self-defense in response to a

163. Kritsiotis, *supra* note 3, at 311.

164. DINSTEIN, *supra* note 42, at 183–84; Jean Combacau, *The Exception of Self-Defence in UN Practice*, in *THE CURRENT LEGAL REGULATION OF THE USE OF FORCE* 9, 20–22 (Antonio Cassese ed., 1986); David J. Scheffer, *The Use of Force After the Cold War: Panama, Iraq, and the New World Order*, in *RIGHT VERSUS MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 109, 137 (Louis Henkin et al eds., 1991).

165. See U.N. Charter art. 2, para. 4 (“All Members shall refrain from the threat or use of force . . .”).

166. See *supra* notes 78–83 and accompanying text.

167. See *supra* notes 102–03 and accompanying text.

threat is lawful, it is only lawful in response to a threatened armed attack.¹⁶⁸

An assessment of the lawfulness of a threat made in self-defense requires a determination of the “type” of delict that may be responded to with a countervailing threat. There are numerous options available and little guidance as to which of these options are appropriate. As such, a conclusion must be reached based upon a combination of common sense and our pervading analogy with forcible self-defense.

The following represent the possibilities of prior wrongs in response to which a threat of force could be potentially lawful:

- (1) A grave use of force/an armed attack
- (2) A “less grave” use of force
- (3) A threat of imminent grave force/a threatened armed attack that is imminent
- (4) A threat of imminent “less grave” force
- (5) A threat of non-imminent grave force
- (6) A threat of non-imminent “less grave” force

As previously noted, according to the ICJ, a threat of force is lawful only if the use of the threatened force would be lawful.¹⁶⁹ Under a strict formalistic interpretation of this dictum, a threat taken in self-defense would therefore be lawful only in response to number (1) on the above list: the actual occurrence of an armed attack. If a use of force is only lawful when an armed attack has occurred, then that attack must have already occurred when the threat to use force in response is made, otherwise *at the time the defensive threat was made* the force threatened (if it actually materialized) would be unlawful. If a responding state threatened force before force had been used against it, this analysis would negate the potential lawfulness of the threat.¹⁷⁰

For example, under this analysis, the 1990 buildup of coalition troops and the threats made to the Iraqi regime as part of Operation Desert Shield, prior to the commencement of Operation Desert Storm, would constitute lawful threats in self-defense.¹⁷¹ Troop buildups of

168. See *supra* note 112.

169. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (July 8).

170. A position noted as a possible argument but not actually adopted in STÜRCHLER, *supra* note 3, at 50.

171. The buildup of coalition forces, primarily in Saudi Arabia, ultimately reached around 543,000 troops prior to the actual use of force. Barry R. Schneider, *Deterrence and Saddam Hussein: Lessons from the 1990–1991 Gulf War* (U.S. Air Force Counterproliferation Center, Counterproliferation Paper No. 47, 2009) <http://www.au.af.mil/au/awc/awcgate/cpc-pubs/schneider3.pdf>.

this kind can clearly be a type of unlawful threat of force, as discussed in Part II.C. Yet, given that the ultimate use of force in Operation Desert Storm was almost undeniably a lawful act of self-defense,¹⁷² and given that these threats were made after the armed attack against Kuwait, the threats constituted lawful self-defense.¹⁷³ As Roscini writes, these threats were “lawful in the light of collective self-defense,”¹⁷⁴ even though the coalition states did not defend the action in this way.

There is a caveat to this reading of the ICJ’s dictum if one accepts the lawfulness of anticipatory self-defense. This Article does not take a position on this question, but it is argued that if one accepts that anticipatory self-defense is lawful, the threat being responded to in self-defense must be a threatened armed attack and, moreover, the threatened armed attack must be imminent.¹⁷⁵ If the use of force in response to the threat of an imminent armed attack is lawful, then, under the *Nuclear Weapons* advisory opinion, a threat in response to the threat of an imminent armed attack (number (3)) must be equally lawful.¹⁷⁶ As an example of the type of action here envisaged, Constantinou highlights the threatening military posture adopted by Guinea in 1971 in the face of an imminent armed attack against it, a posture that ultimately deterred the aggressor state.¹⁷⁷

In state practice, as previously noted, a threat of force is not treated the same as a use of force.¹⁷⁸ One may well argue on policy grounds that it is undesirable to allow for the use of force in response to a mere threat: the opponents of anticipatory self-defense argue that a good case can be made for limiting the use of state-directed

172. The legal basis for the coalition action in the Gulf was based both on authorization from the UN Security Council (following Security Council Resolutions 660 and 678) and collective self-defense. The United States, for example, was explicit that Operation Desert Storm was a measure taken under Article 51. Alexander F. Watson, Deputy Permanent Representative of the United States to the United Nations, Letter dated Aug. 16, 1990 from the Chargé d’affaires a.i. of the United States Mission to the United Nations addressed to the President of the Security Council, UN Doc. S/21537 (Aug. 16, 1990). In any event, the validity of the self-defense justification is difficult to refute, given that Security Council Resolution 661 conspicuously reaffirmed the right of individual and collective self-defense. S.C. Res. 661, pmbl., U.N. Doc. S/RES/0061 (Aug. 6, 1990). As Gray points out, “The USA and the UK could act in collective self-defense of Kuwait even before specific authorization . . . was given by the Security Council.” GRAY, *supra* note 73, at 125.

173. Roscini, *supra* note 3, at 237.

174. *Id.*

175. See *supra* notes 102–13 and accompanying text.

176. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (July 8).

177. CONSTANTINO, *supra* note 81, at 122.

178. See *supra* note 10 and accompanying text.

violence to responses to actual military force.¹⁷⁹ This position becomes more difficult to maintain if the response is itself non-forcible. Anticipatory self-defense by way of a threat is likely to be much more palatable than anticipatory self-defense by force, even to those who reject, on policy grounds, the concept of anticipatory self-defense. As the European Union's IIFFMCG argued in its report on the 2008 Russia–Georgia conflict:

At face value, [Article 51] implies that no justification can be gained for any threat of force until an armed attack is underway, and not before. However, it makes sense that a threat, narrowly construed to deter an attack and thus to prevent an unlawful use of force, is not prohibited.¹⁸⁰

Another way of approaching the issue of “a threat in response to a threat” is that—even if the notion of anticipatory self-defense is rejected in the context of the use of force—a threat of force in response to a *threatened* armed attack could be retroactively lawful. In other words, the force threatened in response to a threatened armed attack might not be lawful at the time that the defensive threat is made, but if the threatened armed attack actually takes place, then any (necessary and proportional) response would also become lawful. A slightly less strict reading of the *Nuclear Weapons* dictum “coupling” threats and use, then, would mean that potential armed attacks could be responded to with potential uses of force, as the actual manifestation of force in response would become lawful should the armed attack in fact occur.

Therefore, a threat of force may be lawful if taken in response to actions that can be classified as falling under numbers (1) or (3) on the above list. This result appears logical and generally concurs with the ICJ's position on the lawfulness of threats of force.¹⁸¹ In other words, a strict application of the criteria for self-defense as they exist for the use of force, coupled with the view that only threats of lawful force are themselves lawful, leads to the conclusion that actual armed attacks (number (1)) and probably also imminent armed attacks (number (3)) can give rise to lawful countervailing threats. Yet, these would be the only actions that could be lawfully responded to with a threat, as they are the only two possible types of actions to which actual defensive force might lawfully be used in response.

However, given that a threat of force in self-defense is of an inherently different character than a use of force, it is possible to stretch this argument further. The threat of force may form an

179. A useful summary of the various policy arguments against lawful anticipatory self-defense is provided by Lucy Martinez, *September 11th, Iraq and the Doctrine of Anticipatory Self-Defense*, 72 UMKC L. REV. 123, 163–65 (2003).

180. 2 IIFFMCG, *supra* note 61, at 236.

181. For a discussion of the ICJ's position on threats and force, see *supra* Part II.B.

acceptable response to actions other than an armed attack or a threat of an armed attack. There are good policy grounds for arguing that the *use* of force should only be lawful in response to extreme situations of high gravity (in other words, situations involving an armed attack); these arguments aim to limit the use of military force whenever possible.¹⁸² However, it seems illogical that if a state suffers a comparably “minor”—but still actual—use of force against it (number (2) on our list), then force cannot be threatened in response.

For example, a few troops controlled by state A are camped just within state B’s borders and have been involved in a minor border incident with state B’s forces. A “mere frontier incident” of this kind, to use the term employed by the ICJ in the *Nicaragua* case,¹⁸³ would not allow state B to respond with force, because the incident would not constitute an armed attack.¹⁸⁴ Thus, if the threat of force is lawful only if the threatened force is lawful, a threat by state A to attack state B unless it removed its troops from state A’s territory would also be unlawful. A practical example of this scenario—although Iran has hotly rejected it—is Tehran’s alleged supply of logistical support and weaponry to insurgents operating inside both Iraq and Afghanistan.¹⁸⁵ Under a strict application of the notion that a threat is only lawful if the force threatened would be lawful, any threat to respond forcibly against Iran would be unlawful because Iran has not committed or threatened an armed attack.

Yet, given that a threat of force is an action of less gravity than a “less grave” use of force because no violence occurs at all, a good argument can be made that a non-forcible threat in response to a less grave attack should be seen as lawful. It must surely be acceptable for a state to respond to violence in a manner that is nonviolent and thus inherently less grave than the action to which it is responding. State A should be entitled to indicate to state B that the frontier incidents must end or a forcible response will result, irrespective of

182. This policy rationale is outlined, for example, by W. Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT’L L. 171, 194–97 (1988). See also GREEN, *supra* note 75, at 135 (discussing the issue but not necessarily subscribing to these policy considerations).

183. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 195 (June 27).

184. See *id.* (stating that the scale of the border incident has a bearing on whether it should be classified as an armed attack).

185. For news reports on allegations against Iran, see Michael R. Gordon & Scott Shane, *U.S. Long Worried that Iran Supplied Arms in Iraq*, N.Y. TIMES, Mar. 27, 2007, <http://www.nytimes.com/2007/03/27/world/middleeast/27weapons.html?pagewanted=all>; Thomas Harding, *Iraqi Insurgents Using Austrian Rifles from Iran*, TELEGRAPH (London), Feb. 13, 2007, <http://www.telegraph.co.uk/news/worldnews/1542562/Iraqi-insurgents-using-Austrian-rifles-from-Iran.html>; Mark Townsend, *Special Forces Find Proof of Iran Supplying Taliban with Equipment to Fight British*, OBSERVER (London), Jun. 22, 2008, at 9.

the fact that implementing that threat would not constitute a lawful action of traditional self-defense. This result would not fall foul of the policy objection to allowing the use of force in response to “minor” attacks (the rationale behind the “armed attack” criterion).¹⁸⁶

As Myers put it, “aggression, and not [non-forcible] deterrence, is the scourge to be eliminated by the world community.”¹⁸⁷ A threat aimed at deterring any use of force must surely be a desirable alternative to escalation of that force or a forcible response (which, under the rules of self-defense, would be unlawful¹⁸⁸). Indeed, given the UN Charter’s focus on the restriction of actual force, “one could argue that holding the view that unilateral threats are conditional upon a prior armed attack is incompatible with the rationale of the Charter.”¹⁸⁹

In practice, it is unlikely that a state will employ a threat as a defensive measure if an armed attack has actually occurred (number (1)). Although a non-forcible response to an actual armed attack is conceptually possible (and potentially desirable), in reality once a state has suffered a grave attack against it, in a majority of instances the actual use of force will be required to meet the defensive necessity caused by that armed attack. Some scholars argue that the occurrence of an armed attack itself establishes the necessity for the use of force.¹⁹⁰ Although this Article takes the view that the criterion of necessity does not inevitably correspond with the requirement of an armed attack,¹⁹¹ in most instances an armed attack will give rise to a necessity to use force. Therefore, the right to threaten force in such cases appears largely redundant.¹⁹² For any right to threaten force in self-defense to have practical worth, it is important for it to be available in less serious instances, in which the actual use of defensive force would be unlawful. It seems logical from a number of perspectives, therefore, to hold that a threat of force should be lawful if it is made in response to numbers (1), (2), or (3).

The question of whether this position should be further stretched to encompass a response to an imminent threat of “less grave” force

186. See *infra* note 191 and accompanying text.

187. Myers, *supra* note 3, at 156.

188. Given that, as previously noted, under Article 51 forcible self-defense can only be taken in response to an armed attack, and that an armed attack is interpreted to mean a grave use of force—thus excluding forcible responses to comparatively minor attacks. See *supra* notes 78–83 and accompanying text.

189. STÜRCHLER, *supra* note 3, at 50.

190. See, e.g., CONSTANTINOU, *supra* note 81, at 158.

191. It is conceivable that an armed attack could occur without creating the necessity to respond forcibly given alternative non-forcible options. The ICJ has confirmed that a distinction exists between the criteria of armed attack and necessity. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 194 (June 27).

192. STÜRCHLER, *supra* note 3, at 42.

(number (4)) is highly debatable. Again, it could be argued that, so long as the defensive threat is necessary and proportional to the “less grave” threat suffered, it is acceptable for a state to make such a threat even though a defensive use of the threatened force in such circumstances would be unlawful. However, the use of force in response to a “less grave” threat would be doubly controversial, in that it would be anticipatory and it would not be in response to a (threatened) armed attack. As such, allowing for responses to imminent threats of “less grave” force would mean straying still further from the ICJ’s policy that the lawfulness of the threat of force should correspond to the lawfulness of the use of force threatened.¹⁹³ It does not seem possible to conclude with any certainty even whether it would be *desirable* to allow for threatened responses to imminent minor threats. Whether countervailing threats in response to “minor” threats would lessen or increase the possibility of the actual use of force can only be speculated. In any event, this conclusion would considerably stretch the analogy to traditional forcible self-defense.

Having said this, Stürchler and Myers make a distinction that is useful in this context: both take the view when considering a response to a threat of force (rather than an actual attack) that there is a legal difference between a “purely” defensive response and a response taken aggressively.¹⁹⁴ In other words, a threatened defensive response (“if your imminent threat manifests itself as an attack, then we will respond with force”) should be distinguished from an aggressive threatening stance (“we are going to attack you *because* you have threatened us”).

The former action puts the threatening state on notice and is a pure defensive deterrent: the threat is only that force will be used if the threatening state uses force first. This type of response can be seen, for example, in the countervailing threat made in December 2010 by South Korea towards North Korea following the North Korean bombardment of Yeonpyeong Island.¹⁹⁵ South Korea’s Defense Minister-Designate made clear that “[i]f North Korea provokes again, we will definitely use aircraft to attack North Korea.”¹⁹⁶ This defensive threat was clearly premised upon the threat to which it was responding becoming manifest.

The latter type of response requires no further trigger: it threatens force based on the initial threat alone and therefore

193. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (July 8).

194. Myers, *supra* note 3, at 173 (making this distinction specifically with regard to threats made by the United States directed against North Korea since the Korean War); STÜRCHLER, *supra* note 3, at 250–51, 267–68.

195. *South Korea Vows Air Strikes if North Attacks*, BBC NEWS (Dec. 3, 2010), <http://www.bbc.co.uk/news/world-asia-pacific-11909581>.

196. *Id.* (emphasis added).

amounts to flexing “military muscle aggressively.”¹⁹⁷ This is well illustrated by the threats made by Israel (following its destruction of the Iraqi Osiraq nuclear power plant in 1981¹⁹⁸) to use force against other comparable installations in the region, which Israel also perceived as threats.¹⁹⁹ In this instance, Israel’s countervailing threats were made on the basis of the perceived threat of the nuclear installations itself and required no additional trigger.²⁰⁰

If one refers to this distinction, the difference between a lawful and an unlawful “threat in response to a threat” becomes not based on the “gravity” of the defensive threat, as it would be in the context of the defensive use of force.²⁰¹ Instead, it is based upon the nature of the threat taken in response. Such a distinction allows for threats in response to “minor” threats (threats of imminent attacks of a lower gravity than an armed attack), as long as the responses are directed toward deterring the “less grave” use of force. This approach makes sense because a threat of force—even if given in response to a threat to use “less grave” force—is preferable to the actual use of force.

This distinction between deterrent threats and aggressive threats, while admittedly somewhat artificial, offers a solution to the question of whether states can respond to threats of “less grave” force in kind. It also corresponds to an extent with the ICJ’s policy that the lawfulness of threats must be premised on the actual use of force,²⁰² because the threat of force in response to a “less grave” imminent threat would be lawful only if used to deter an actual use of force rather than to respond in kind to another threat. This more closely links the response to the actual use of force in self-defense and thus to the position of the ICJ.

However, the risk of allowing states to respond to any and all threats (even threats of a very minor nature) is that this allowance might lead to an escalation of threats in otherwise innocuous situations, and this escalation could ultimately increase the likelihood of the actual use of force. It is ultimately impossible, then, to say with any certainty whether threats are (or should be) allowed in response to “less grave” imminent threats, either as a matter of law or as a matter of policy.

197. See Myers, *supra* note 3, at 173 n.234 (citing MCCOUBREY & WHITE, *supra* note 3, at 61) (“[M]ilitary preparations . . . are not a ‘threat.’”).

198. See *supra* note 105.

199. CORTEN, *supra* note 23, at 99.

200. It is notable that the UN General Assembly took the unequivocal view that the Israeli threats were unlawful. G.A. Res. 38/9, ¶ 3, U.N. Doc. A/RES/38/9 (Nov. 2, 1983) (“[A]ny threat to attack and destroy nuclear facilities in Iraq and in other countries constitutes a violation of the Charter of the United Nations . . .”).

201. See *supra* notes 78–83 and accompanying text.

202. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (July 8).

Finally, it is argued here that a threat of force cannot be made in response to a non-imminent threat, grave or otherwise. In other words, a threat may not be made in response to actions falling under numbers (5) or (6) on the above list. This is in part because, as with non-imminent “preemptive” forcible self-defense,²⁰³ such a policy offers states a green light to threaten to attack whomsoever they wish based upon little or no evidence. In addition, threats made in preemptive self-defense may again lead to the escalation of innocuous situations, which could increase the likelihood of the use of force in situations that otherwise may have led to no actual violence.

Of course, a threat to use force against a state based on a perceived but temporally remote threat is far less consequential than an actual use of force in the same circumstance. Nonetheless, it is surely undesirable for states to resort to something expressly prohibited by Article 2(4)²⁰⁴ in instances where no demonstrably imminent threat has occurred: as Kritsiotis states, “otherwise we are left with a situation where the concept of an unlawful threat of force covers a staggering multitude of sins—all of which may be able to be met by a threat but not a use of force in self-defense.”²⁰⁵

Myers appears to accept that a countervailing threat of force can be lawful even in such temporally remote circumstances, again so long as this threat is a latent one, indicating that force will be employed only if an attack occurs.²⁰⁶ However, the requirement of necessity renders this proposition insupportable.²⁰⁷ If the threat to which a state responds is not imminent, there can be no necessity to act in an otherwise unlawful manner.²⁰⁸ The responding state can attempt a lawful response because, if the threat is not imminent, time is inherently on its side.

203. Numerous scholars have critiqued the notion of forcible self-defense in response to a non-imminent threat (what we here term “preemptive self-defense”) on the basis that it is open to abuse in this way. An excellent summary of this view in the literature is given by TOM RUYS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE, 322–24 (2010).

204. See U.N. Charter art. 2, para. 4 (“All Members shall refrain from the threat or use of force . . .”).

205. Kritsiotis, *supra* note 3, at 308 (emphasis removed).

206. See Myers, *supra* note 3, at 175–79 (discussing the legality of threats). Sadurska similarly holds that a threat may be lawful even in circumstances that would not justify anticipatory self-defense (in other words, in the case of a non-imminent threat). See Sadurska, *supra* note 3, at 257, 260 (suggesting that the American response to the Cuban Missile Crisis was justified in part because “legitimate concern for security may be caused by situations that cannot justify even anticipatory self-defense”).

207. On the requirement of necessity, see *supra* notes 84–88 and accompanying text.

208. On the basis that the necessity criterion requires that actions in self-defense be taken only as a last resort. See *supra* notes 84–88 and accompanying text.

Thus, for example, the threats made by the United States against Iran in response to the perceived threat of nuclear armament must be a breach of Article 2(4), because the Iranian threat is at best only potential and is certainly not imminent.²⁰⁹ Irrespective of whether Iran has breached its obligations under the Nuclear Non-Proliferation Treaty,²¹⁰ it is difficult to argue, until weaponization takes place,²¹¹ that it is “necessary” to threaten Iran with military force. The United States must first attempt other diplomatic solutions.²¹²

In conclusion—based on this mixture of common sense and an analogy with the law governing forcible self-defense—a state may make a threat in self-defense in response to any actual use of force against the state (grave or otherwise)²¹³ or an imminent grave threat (a threatened armed attack). It is also arguable that a state may respond to an imminent threatened less grave use of force with a countervailing threat, so long as the threat in response is contingent on an actual attack. However, a state may not respond to perceived non-imminent threats with a threat of force.

B. *Necessity and Proportionality*

Even once it is established that a threat has been made in response to an acceptable forcible action or threatened forcible action, “[t]hreats issued [in self-defense] must still be necessary and proportionate.”²¹⁴ As in the previous subpart, it becomes clear from an analysis of the criteria of necessity and proportionality that a strict application of the ICJ’s dictum—that the threat of force is

209. See Julian Borger, *US Will Take “Crippling Action” if Iran Becomes Nuclear, Says Clinton*, GUARDIAN (London), July 22, 2009, <http://www.guardian.co.uk/world/2009/jul/22/clinton-protect-gulf-iran-nuclear>; Colin Brown, *Bush Threatens Iran with Military Action*, INDEPENDENT (London), Jun. 17, 2008, at 6.

210. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S. 161.

211. Here, we use the term “weaponization” to mean that a state not only has weapons grade uranium but also has the missiles or other platforms capable of delivering that payload. See William Walker, *International Nuclear Relations After the Indian and Pakistani Test Explosions*, 74 INT’L AFF. 505, 518 n.33 (“Weaponization refers to the insertion of warheads in operational delivery systems.”).

212. Another useful example in this context is the international response to the threats made by Israel to use force against nuclear installations in the Middle East, following its 1981 attack on the Osiraq reactor in Iraq. These threats were clearly made in response to a non-imminent perceived threat. It is therefore notable that the Israeli threats in response were condemned as unlawful by the General Assembly. See *supra* note 105 and accompanying text.

213. Stürchler also takes this position, but goes further than the present writers would by arguing that there is “no ambiguity of the law” at all with regard to whether a threat can be made to coerce the discontinuation of an actual attack. STÜRCHLER, *supra* note 3, at 265.

214. 2 IFFMCG, *supra* note 61, at 236.

lawful only if the force threatened is lawful²¹⁵—is conceptually impracticable. For example, under a strict interpretation of this dictum from the *Nuclear Weapons* opinion, a threat made in self-defense would only be lawful if it is necessary to use force, because that is the only situation in which the use of force would be lawful.²¹⁶ Yet, a necessity to use force can exist only if there are no alternative non-forcible measures available—such as, for example, the threat of force. Thus, a strict reading of the *Nuclear Weapons* dictum creates a paradox: a state may make a threat only once it is clear that a threat will not suffice and that a use of force is the only reasonable defensive option. The threat of force thus becomes obsolete as a defensive measure, something that is undesirable, given that in certain circumstances a defensive threat of force can deter actual use.²¹⁷ Conversely, it may well be necessary to threaten force when it is not necessary to use it.²¹⁸

It is important to note that the necessity criterion is less crucial in the context of the threat of force than in the context of the use of force. The use of force, because of the harm that it causes, should be restricted only to circumstances where it is unavoidable, whereas the threat of force is less damaging. A better way of understanding necessity in this context is by reference to the *reasonableness* of the response, or the idea of “last resort.” As discussed in Part V.A, for a threat to be defensive, it must be made in response to a prior action. For that response to also be necessary, it must be a reasonable response to that wrong: the responding state must be able to justify the threat made as a defensive measure—one directed at deterring

215. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (July 8).

216. The necessity criterion undoubtedly applies to forcible responses taken in self-defense. For a discussion, see *supra* note 93 and accompanying text.

217. An example would be Guinea in 1971. See *supra* text accompanying note 177.

218. See, for example, the 1962 Cuban Missile Crisis concerning the deployment of Soviet nuclear weapons on Cuban territory. The United States viewed the weapons deployment as an unlawful threat of force. U.N. SCOR, 17th Sess., 1025th mtg. at 6, U.N. Doc. S/PV.1025 (Oct. 25, 1962) (“[T]he Soviet Union secretly introduced this menacing offensive military build-up into the island of Cuba . . .”). However, many states viewed the quarantine measures the United States took in response, under which vessels in the exclusion zone were threatened with coercive force, as being lawful. See, for example, the positions taken by France, U.N. SCOR, 17th Sess., 1024th mtg. at 3–6, UN Doc. S/PV.1024 (Oct. 24, 1962), and China, *id.* at 6. Had the United States actually used force against Cuba, however, it would seem unlikely that this would have been considered a necessary action given that non-forcible options remained available. On the necessity criterion and the need for forcible self-defense to be taken as a “last resort,” see *supra* text accompanying note 88. The availability of non-forcible alternatives in the context of the Cuban Missile Crisis can be seen from the negotiations that ultimately resolved the crisis. For a critique of the diplomatic resolution to the crisis, see Richard M. Pious, *The Cuban Missile Crisis and the Limits of Crisis Management*, 116 POL. SCI. Q 81 (2001).

the attack or threat. Moreover, there cannot be an obvious, less drastic measure (such as an attempt at mediation) that the state could reasonably take to achieve the same goal.

Although this approach treats the use and threat of force as separate entities, it is still analogous to the way in which the necessity requirement is applied to the use of force in self-defense. The necessity of self-defense is determined by a context-specific appraisal of the options available to the responding state and the reasonableness of its resort to force.²¹⁹ Of course, measuring such “reasonableness” is difficult given the flexibility and context-specific nature of the question.²²⁰ This difficulty is compounded when applied to a threat—an action that is comparatively abstract in scope.

Therefore, the question of necessity is extremely flexible and largely dependent on the acceptability of a threat in the eyes of other states. Nonetheless, that acceptability is based, at least in part, on whether the other states see the threat as meeting a defensive need, or, in other words, whether it is an action of last resort. This concept is illustrated by the United Kingdom’s threats of force against Argentina during the 1982 conflict over the Falkland Islands. Following the Argentinean invasion, British Prime Minister Margaret Thatcher made clear that Argentinean forces would be forcibly removed from the Falklands if they did not withdraw from the islands (including the exclusion zone created by the British around the islands),²²¹ and this explicit ultimatum was coupled with the implicit (but very notable) threat of increasing numbers of British forces in the region.²²² Given that Argentina had already used force when these threats were made, it was clear that the British threats were intended as a final attempt at a non-forcible solution—a last resort—prior to the use of force in self-defense. The British threats received

219. As this was phrased in the “Principles of International Law on the Use of Force by States in Self-Defence” document prepared by the Chatham House International Law Programme in 2005 after a consultation with thirteen eminent international legal scholars in the United Kingdom: “There must be no practical alternative to the proposed use of force that is likely to be effective in ending or averting the attack.” Elizabeth Wilmschurst et al., *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INT’L & COMP. L.Q. 963, 966 (2006).

220. A discussion of this difficulty can be found in the sources cited *supra* note 92.

221. As Thatcher stated: “If the zone is challenged, we shall take that as the clearest evidence that the search for a peaceful solution has been abandoned. We shall then take the necessary action. Let no one doubt that.” Margaret Thatcher, Prime Minister of Gr. Brit., Speech in the House of Commons (Apr. 14, 1982), available at <http://www.margaretthatcher.org/document/104918>.

222. THE FALKLAND ISLANDS: NEGOTIATIONS FOR A PEACEFUL SETTLEMENT, 1982, ¶ 3 (U.K.), <http://www.margaretthatcher.org/document/D33C7BD518CA4D0DAF6A6DCB29AD4335.pdf>.

essentially no international censure²²³ and have been viewed as clear examples of defensive threats.²²⁴

Turning to the proportionality requirement, it is, of course, possible to link the application of the criterion to the actual use of force. However, the requirement of proportionality makes no sense if threats must be premised upon the lawfulness of the force threatened. This condition would take us into what Kritsiotis calls “projected proportionality.”²²⁵ Under a rigid reading of the dictum in the *Nuclear Weapons* opinion, the assessment would be whether the threatened force is itself proportional to the force (actual or threatened) to which the threat responds.²²⁶ Such abstractions make for an impossible calculation that can be sensibly considered only once actual uses of force have manifested; before this point, it is impossible to know if the force threatened in response will be reasonably proportional.²²⁷ This calculation is clearly not viable when assessing threats at the time they are made or threats that do not go on to become actual uses of force.

The primary issue with regard to proportionality is, therefore, to what must the action be proportional? This Article has already argued that in the context of a use of force in self-defense, an action need not be proportional in scale to the armed attack to which it responds; instead, any action in response must be proportional to the defensive necessity created by that attack.²²⁸ It stands to reason that this also holds true for threats made in self-defense. Therefore, a threat need not be commensurate to that to which it responds. Instead, the threat must constitute no more than is required to meet the defensive necessity. In other words, the threat made in response must be an effective deterrent (to stop a future attack or to end an attack, as the situation may require). This approach makes sense, as a threat that is not a realistic deterrent has no value.

For example, state A could threaten to launch a nuclear weapon against state B if state B had launched a large scale but conventional attack against state A, provided that a nuclear threat is the only reasonable means of deterring state B from continuing that attack. Such a threat may not be commensurate in terms of scale, but it would nonetheless be proportional. This result is logical because a threat—even the threat of nuclear devastation—is not as onerous as

223. Indeed, when the threats of force failed, the subsequent use of force was widely accepted by other states. See Michael J. Levitin, *The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention*, 27 HARV. INT'L. L.J. 621, 638 (1986) (discussing the general acceptance by other states of the lawfulness of the actions of the United Kingdom in relation to the Falklands).

224. Roscini, *supra* note 3, at 237.

225. Kritsiotis, *supra* note 3, at 311.

226. *Id.*

227. *Id.*

228. See *supra* text accompanying notes 89–90.

an actual attack. It is very difficult to say that a state should refrain from an explicit threat of this kind if the threat is a reasonable means of deterring continuing force. However, an actual nuclear attack in such circumstances would likely be disproportionate to the defensive necessity created by the prior conventional assault.²²⁹

A more concrete example occurred in 1990, when the United States sent forces to Saudi Arabia in response to the appearance of Iraqi troops along the Saudi border.²³⁰ The initial appearance of troops can clearly be perceived as an implied threat by Iraq. Similarly, the United States' response of also positioning troops (another implied threat) can be, under this analysis, uncontroversially viewed as proportional to the Iraqi action. The threat in response was enough to deter Iraq from acting on its original threat to use force.²³¹ However, had the United States actually used force against the Iraqi troops, it would be highly debatable whether such a response would have been proportional. Again, because of the differences in character and effect between the threat of force and the use of force, a strict holding that a threat of force is lawful if the threatened force is lawful does not lead to logical results.

Finally, in the context of "traditional" self-defense involving the use of force, the criteria of necessity and proportionality together require that the response be of a limited duration: a response in self-defense must end when the defensive necessity ends.²³² As an obvious extension of this principle, it is reasonably straightforward that a threat of force must end when the action to which it was responding ends. There are, of course, problems inherent in determining when a defensive necessity has ended, but these problems are inherent in any defensive response. However, once again, an additional problem emerges in the context of threats in self-defense: it is also difficult to conclude when a countervailing threat of force has ended.

It is usually reasonably clear when a use of force has ended, for obvious reasons. However, in the case of a threat—implied or explicit—the termination is far more difficult to determine. Most threats to use force are open ended. For example, in the summer of 2008, prior to the August conflict in the Caucasus over the Georgian

229. This theoretical example is developed from one set forth in Sadurska, *supra* note 3, at 250.

230. Thomas R. Pickering, Permanent Representative of the United States, Letter dated Aug. 10, 1990 from the Permanent Representative of the United States to the President of the Security Council, U.N. Doc. S/21492 (Aug. 10, 1990).

231. This can be seen from the fact that Iraq opted not to mount an offensive use of force against Saudi Arabia; instead its troops adopted a defensive posture in response to the American military buildup. See Schneider, *supra* note 171, at 18 (describing Iraq's decision not to invade Saudi Arabia).

232. See *supra* note 91 and accompanying text.

breakaway regions of South Ossetia and Abkhazia, Georgia engaged in a number of threatening activities: the buildup of troops, aircraft surveillance, military posturing, and so on.²³³ These actions were directed both at the de facto autonomous regions and at the Russian Federation itself.²³⁴ Given previous Russian threats toward Georgia,²³⁵ a good case can be made that the Georgian threats were defensive in nature.²³⁶ In any event, these threats constituted “open-ended” aggressive displays toward Russia, and this open-endedness is a common manifestation of threats (defensive or otherwise) in state practice.²³⁷

Yet, if a threat must end when the goal of deterrence has been achieved, must it be explicitly retracted to conform to the requirements for self-defense? Such retraction has little basis in state practice; even in a defensive context, states do not retract their threats. Indeed, from a strategic perspective, such a retraction is undesirable.²³⁸ It is therefore unlikely that a requirement for withdrawal of threats forms an aspect of the law.

It is far more common for a retraction condition to be built into the threat. For example, a state threatens that “unless you do X, we will use force,” implying that the threat is retracted once X is done. This type of implicit conditional retraction is a clear feature of state practice, as was evident in the conduct of the United States and the United Kingdom in response to the Lockerbie incident of 1988. In 1992, Libya alleged before the ICJ that, *inter alia*, threats of force had been made against it in an attempt to pressure the extradition of its nationals that the United States and United Kingdom believed to be the perpetrators of the Lockerbie bombing.²³⁹ A more recent example is the buildup of coalition troops and the forty-eight hour

233. 2 IFFMCG, *supra* note 61, at 233.

234. *Id.*

235. *Id.* at 234–35.

236. Although, ultimately, the IFFMCG report concluded that the Georgian threats could not be justified in self-defense and were therefore unlawful. *Id.* at 236–38.

237. The IFFMCG report noted that Georgian threats were probably intended, at least *inter alia*, to pressure the removal of Russian peacekeepers that remained on Georgia’s territory after the Abkhazian conflict. *Id.* at 233. However, it is evident that Georgia did not indicate that the threat would be “withdrawn” if the peacekeepers were removed. *Id.*

238. See, e.g., THOMAS SCHELLING, *ARMS AND INFLUENCE* 44 (1966) (discussing “commitment”).

239. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, ¶ 6 (Apr. 14).

ultimatum²⁴⁰ given to Saddam Hussein to leave Iraq prior to Operation Iraqi Freedom in 2003.²⁴¹

However, it seems unlikely that states feel legally bound to tailor their defensive threats in this way. Instead, this practice again relates to the acceptability or reasonableness of the threat. When a threat is made in a limited manner, explicitly with respect to a defensive objective, then other states are far more likely to conclude that the response is necessary and proportional (although states do not actually use these terms in this context) and thus lawful.

The above analysis suggests that it is extremely difficult to apply the criteria of necessity and proportionality to a countervailing threat. A direct application of these criteria, as they are applied to forcible responses, can lead to absurd results. Therefore, they must be applied in a more flexible manner, analogous to the way they are used in “traditional” instances of self-defense, but with reference to the reality that threat and use of force may need to be treated differently.

C. Note on Collective Self-Defense

Before concluding, it is worth noting that this Article does not deal directly with the possibility of collective self-defense through threats.²⁴² However, it is clear that states do threaten to use force on behalf of other states—take, for example, the 1990 coalition threats against Iraq as part of Operation Desert Shield.²⁴³ Additionally, it is possible that a militarily “weaker” state could threaten to invoke forcible collective self-defense. That is to say, a state that is unable to defend itself could potentially threaten an aggressor with the possibility of declaring itself the victim of an armed attack and requesting the forcible aid of a more powerful benefactor.²⁴⁴ However, the question of collective self-defense through threats is not discussed here, and is left for others to further consider.

240. A discussion of which can be read at *Bush Gives Saddam 48 Hours to Leave Iraq*, CNN (Mar. 18, 2003), <http://edition.cnn.com/2003/US/03/17/sprj.irq.bush.speech/index.html>.

241. Of course, the authors would argue that this particular threat was a violation of Article 2(4) in any event, on the basis that the actual use of force envisaged by the threat (and ultimately employed) in this instance was, in our view, unlawful. This is not a debate to enter into here, but for an analysis of the lawfulness (or otherwise) of Operation Iraqi Freedom, see DOMINIC MCGOLDRICK, FROM ‘9-11’ TO THE ‘IRAQ WAR 2003’: INTERNATIONAL LAW IN AN AGE OF COMPLEXITY 53–67 (2004).

242. The UN Charter explicitly provides for collective self-defense. U.N. Charter art. 51.

243. See *supra* notes 171–74 and accompanying text.

244. The ICJ held in the *Nicaragua* decision that, for collective self-defense, the victim state must declare itself to have suffered an armed attack and explicitly request the aid of the state acting on its behalf. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 195, 199 (June 27).

VII. CONCLUSION

This Article has argued that a threat of force made for the purpose of self-defense is not only conceptually possible, but that it may in many circumstances be desirable from a policy perspective. Permitting the use of defensive threats of force has the advantage of upholding the cornerstone principle embedded in Article 2(4) of the UN Charter, because it is a non-forcible alternative to military action.

As a result of the varied typology of threats of force, it is difficult to determine what behavior may constitute a lawful defensive threat. Specifically, while the literature and jurisprudence of the ICJ have alluded to the notion of a “threat of force in self-defense,” it is largely unclear how the lawfulness of such an action is to be assessed.

To determine the lawfulness of a threat of force that is made in self-defense, this Article has adopted the starting proposition that such an act must comply with the requirements of traditional “forcible” self-defense. This analogy logically flows from both the wording of Article 2(4) and the jurisprudence of the ICJ (particularly in the *Nuclear Weapons* advisory opinion). It is also the best guide as to how defensive threats should be regulated, given that states have not been explicit about the criteria in customary international law. However, this analogy only takes us so far. 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 difference between threatened force and actual force. As such, this Article has applied the analogy to forcible self-defense in a nuanced manner, with consideration of this difference throughout.

As discussed in detail in Part VI, the main complexity in this context lies in determining what actions may justify the threat of force in self-defense. We have argued that—subject to the criteria of necessity and proportionality—a defensive threat would be lawful if it were made in response to three types of action: (1) a grave use of force/an armed attack, (2) a “less grave” use of force, and, finally, (3) a threat of imminent grave force/a threatened imminent armed attack. It is also arguable that a threat should be lawful when made as a response to (4) a threat of imminent “less grave” force, but only if the threat is purely a deterrent. The acceptability of countervailing threats in response to threatened imminent “less grave” force is far from clear, however, and would essentially turn on policy arguments. If the threat of force constitutes a response to a perceived non-imminent threat (grave or otherwise), we argue that the threat taken in response would be unlawful.

In addition, as with forcible self-defense, countervailing threats must meet the criteria of necessity and proportionality. However, again, for defensive threats, strict adherence to these requirements as they would be applied to force in self-defense is not entirely

appropriate. These criteria are essential reference points for an analysis of defensive threats, but they cannot be applied in exactly the same way as they are to the use of force; application of necessity and proportionality, again, must reflect the practical difference between threatening to “push the button” in self-defense and actually doing so. Necessity is therefore akin to the “acceptability” of the threat and whether it meets a genuine defensive need. Proportionality is based not on the scale of the future force but rather on what is required to deter aggressors. Finally, it would seem that there is no requirement (or at least no explicit requirement) to withdraw a threat after the defensive necessity has been met.

Ultimately, although threats of force are *prima facie* unlawful under the UN Charter, it is clear that states do make defensive threats of force and these threats are often accepted as lawful. This is true in spite of the fact that such actions are not generally framed in the language of self-defense. There remains little to indicate what differentiates unlawful threats under Article 2(4) and acceptable forms of non-forcible deterrence, but it is apparent that, to some extent, the existing law governing forcible self-defense actions can be applied to clarify the lawfulness of defensive threats.