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International Organizations and the Threat of Force
–
Concealing or Not Concealing Threats of Force – That is the Question

Master thesis
30 credits

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International Law

Spring 2008

Contents

Abstract

According to international treaty law as well as international customary law, threats of (armed) force are considered as one of the gravest violations of international law. Yet, threats of force frequently occur in international relations, often lacking condemnation by the international community.

There are a number of reasons to why threats of force are sometimes passed by unconsidered by the international community. One reason is that a threat of force often is claimed by the threatening State to be a measure of self-defense, which, if it is true, would make the threat legal. To distinguish an offensive threat from a defensive threat can be difficult for the international community as it might not be aware of all the circumstances behind the threat. Another reason is that threats of force might sometimes have the strange effect of creating instead of thwarting stability in international relations and if peace can be preserved by a threat of force, the international community has from time to time preferred to turn a blind eye to the threat and chosen not to condemn the violation that the threat constitutes.

However, as the grave violation of international law a threat of force actually is, States cannot count on being able to evade State responsibility by, for instance, merely claiming the right to self-defense without considerable proof. A threat of force is an offence not only against the target State but the international community as a whole and the possible reparations for a violation of the prohibition of the threat of force can be harsh.

In order to make actions that actually lack legal mandate appear legal, States tend to prefer acting collectively in international (regional) organizations, as it seems it is usually easier to defend an action based on a collective decision than an action based on a unilateral decision. Therefore, with the growing importance of international organizations as actors on the international arena, it has been considered necessary to set up detailed regulations concerning the responsibility of international organizations for international wrongful acts and the responsibility of individual States for the conduct of such organizations. States should not be able to set aside their international obligations and evade State responsibility by acting through an international organization.

In regard to threats of force, this thesis shows that international organizations can fortunately not be used by States with an intention to conceal their threats of force by acting in the name of an international organization in order to evade State responsibility.

Sammanfattning på svenska

Enligt såväl den internationella traktaträtten som den internationella sedvanerätten anses hot om (militärt) våld utgöra en av de allvarligaste kränkningarna av internationell rätt. Trots detta förekommer det ofta hot om våld i internationella relationer, ofta utan världssamfundets fördömande.

Det finns ett antal orsaker till varför hot om våld inte alltid uppmärksammas och fördöms av världssamfundet. En anledning är att den hotande staten ofta hävdar att hotet yttrats som en självförsvarsåtgärd, vilket, för det fall det vore riktigt, skulle göra hotet förenligt med gällande rätt. Eftersom världssamfundet i de flesta fall inte känner till hela bakgrunden till hotet, kan det vara svårt att avgöra om hotet egentligen är en kränkning eller en rättmätig självförsvarsåtgärd. En annan anledning är att hot om våld ibland har den något märkliga effekten att skapa istället för att förebygga stabilitet i internationella relationer, varför världssamfundet ibland väljer att se genom fingrarna när ett hot om våld visat sig leda till ett upprätthållande av freden.

Men, med tanke på hur allvarlig kränking av internationell rätt ett hot om våld fakiskt är, kan stater inte räkna med att kunna kringgå statsansvar genom att, till exempel, bara åberopa rätten till självförsvar utan att ha väsentlig bevisning för detta. Ett hot om våld är en kränkning inte bara gentemot den hotade staten utan väl hela världssamfundet och de skadestånd och gottgörelser som eventuellt följer en kränkning av våldsförbudet kan vara stränga.

För att få handlingar som egentligen inte är lagenliga att framstå som lagenliga, har det visat sig att stater tenderar att föredra att agera kollektivt genom internationella (regionala) organisationer, då det förefaller vara lättare att försvara en handling som utförts på basis av ett kollektivt beslut än en handling som utförts i enlighet med ett ensidigt beslut. Således, med tanke på internationella organisationers växande betydelse som aktörer på den internationella arenan, har det ansetts nödvändigt att ta fram detaljerade regler kring internationella organisationers ansvar för kränkningar av internationell rätt samt regler avseende ansvaret för de stater som styr den internationella organisation vars handlingar medfört en kränkning av internationell rätt. Stater skall inte ha en möjlighet att åsidosätta sina skyldigheter enligt internationell rätt och kunna kringgå statsansvar genom att agera genom en internationell organisation.

När det gäller hot om våld visar denna uppsats att internationella organisationer lyckligtvis inte kan användas av stater vars avsikt är att dölja sina hot om våld genom att agera i en internationell organisations namn för att kunna kringgå statsansvar.

Abbreviations

/CN./	Commission
/PV.	Verbatim Records
/RES/	Resolution
A/	General Assembly
ACO	Allied Command Operations
AJIL	American Journal of International Law
DPRK	Democratic People's Republic of Korea
EJIL	European Journal of International Law
FRD	Friendly Relations Declaration
FRY	Federal Republic of Yugoslavia
GA	General Assembly
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ILC	International Law Commission
KFOR	Kosovo Force
NATO	North Atlantic Treaty Organization
NPT	Non-Proliferation Treaty
NYT	The New York Times
OAS	Organization of American States
OAU	Organisation of African Unity
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
PRC	People's Republic of China
S/	Security Council
SC	Security Council
SCO	Shanghai Cooperation Organization
SEATO	Southeast Asia Treaty Organization
SHAPE	Supreme Headquarters Allied Powers Europe
SG	Secretary-General (of the UN)
UN	United Nations
UNTS	United Nations Treaty Series
USSR	United Soviet Socialist Republics
UNCIO	United Nations Conference on International Organization
WEU	Western European Union
WHO	World Health Organization

Preface

On November 30, 2007 I got the message that my application for internship at the United Nations Headquarters in New York during spring 2008 had been accepted. I had been assigned to the Security Council Practices and Charter Research Branch (SCPCRB) at the Department of Political Affairs, where I was to work with the *Repertoire of the Practice of the Security Council*, which is the only analytical record of the practice of the Security Council published by the United Nations. I was to study the practice of the Security Council in relation to Article 2 (4) during the period 2004-2007. For me, this was a dream come true.

The people working at SCPCRB gave me an unforgettable experience. From mid-January to late April this year I was on a journey of a lifetime. All that I had read so much about and dreamed about doing during my years of law studies was all of a sudden within reach. I attended meetings of the Security Council, I met and got to talk with Under-Secretary-General for Political Affairs Mr. Lynn Pascoe and many other people from all over the world and I was given the opportunity to work with tasks I found very interesting and which suited me perfectly considering my educational background. The work at SCPCRB really opened my eyes to the frequency of threats of force in international relations and the indispensible role of the United Nations as mediator in international disputes and guardian of peace.

I want to thank Gregor Boventer, Anita Mathur, Silva Kantareva, Daniel Gilman and everybody else working at the SCPCRB during my period of internship. I am honoured and forever grateful to you for letting me be a part of your work.

I would also like to thank Dr. Nikolas Stürchler for promptly answering my questions. I read your book and I think it is great!

Last but not least, I would like to thank my supervisor Dr. Olof Beckman for always being very supportive and helpful.

Thank you all.

Malmö in August 2008

Cecilia Anderberg

1 Introduction

Realpolitik in political games, public fear and anxiety and a paralysed Security Council – all characteristics of the Cold War, the war of threats of force. The two superpowers of that time – the United States of America in the West and the Soviet Union in the East continued to threaten each other with the use of force during a thirty year long period. Behind the political scenes, the two superpowers of the northern hemisphere fought each other indirectly through proxy wars carried out all over the world – Angola, Korea, Viet Nam, Nicaragua – just to mention a few of them, and continued to threaten each other in public.

International relations were built on this dualistic superstructure, affecting relations between States over the whole globe – either you were an allied with the capitalistic West, or you were an allied with the socialistic East.[1] The North Atlantic Treaty Organization (NATO) was created in the name of collective self-defense, with the United States of America in the foreground. As a response to this, the Soviet Union and other eastern European States established the Warsaw Pact, also with the purpose of collective security of the member States.

Today only one of the two former superpowers still remains. Since the fall of the Soviet Union in 1989, and the Warsaw Pact with it, the USA has been the hegemonic State of the world. NATO remains to exist along with other regional military organizations with interests in collective security. The end of the Cold War that followed the fall of the Soviet Union brought joy to the public of the two blocs, which had for three decades been terrified by the possible implementations of the grave threats of force that where uttered during that period. It also made the Security Council able, finally, to carry out its responsibility in relation to threats to the peace much more often than during the Cold War.

The fall of the Berlin Wall in 1989 was a symbolic dismantling of the line that separated the East bloc and the West bloc during the Cold War. Yet, this only erased the concrete lines. Many of the abstract lines remained. Maybe one could say that this was obvious ten years later when NATO showed an urging need to intervene in Kosovo, without UN mandate, on grounds of humanitarian intervention to repel the Serbian *socialist* forces, while Russia and other socialist States strongly opposed the use of force. The possible legality of the humanitarian intervention in Kosovo is not the issue here – maybe an intervention such as the NATO intervention in Kosovo could be justified on humanitarian grounds. However, in this regard one could ask, how can it be that NATO chose to intervene in Kosovo on grounds of humanitarian intervention, while not intervening in Rwanda,

[1] Shaw, *International Law*, p. 36.

where there, unlike the situation in Kosovo, existed a mandate of the UN to intervene in order to alleviate the human suffering?[2]

Of course, not only actions by NATO, actions by many international organizations have been questionable throughout the history of international organizations. As threats of force in international relations surely did not cease with the end of the Cold War, but remains as powerful means of coercion and it is obvious that international organizations become more and more important and powerful international actors by every day, the use of threats of force by international organizations indeed becomes interesting to study further.

1.1 Purpose

As long as I have studied international law, I have been very interested in how it can be that threats of force – one of the gravest violations of international law – repeatedly occur in international relations, most often without any particular condemnations from the international community. As the extremely powerful tool of coercion that a threat of force can be, it has struck me as very remarkable that so many of the threats of force expressed today can pass by almost unnoticed. Still, at the same time, it seems like States are careful not to say too much, as they are afraid that the reactions of the international community might turn into an invocation of State responsibility for the violation.

I have also found it very interesting to see how States from time to time seem to use various international organizations to perform actions that actually lack legal mandate, yet such actions are usually not considered by the international community to a greater extent, as it seems it is usually easier to defend an action based on a collective decision than an action based on a unilateral decision.[3]

My interest in these two fields, the relatively frequent occurrences of threats of force on one hand and actions of international organizations on the other, led me to state the question that this thesis serves to answer, namely:

Can a threat of force be concealed by an international organization, i.e. can States hide their intention to threaten with force by acting in the name of an international organization and thereby evade State responsibility?

[2] Beckman, *Armed Intervention – Pursuing Legitimacy and the Pragmatic Use of Legal Argument*, p. 18.
[3] Ibid., p. 37.

In order to be able to answer this question, I will do a study of these two fields of threats of force and international organizations respectively. Before answering the question at issue, there are many related questions that first need to be answered. For instance, I will have to investigate what a threat of force actually is and how it can be stated; what the prohibition of threat of force in international law looks like; which rules applies to the responsibility of States for international wrongful acts; and furthermore, I will have to study the role of international organizations on the international arena; the different types of international organizations; and the responsibility of international organizations.

When these fields have been explored, I should be able to state an answer to my question at issue.

1.2 Method

In the search of an answer to the question at issue in this thesis, I will begin to study the threat of force. I will focus upon the development and existence of the prohibition of the threat and use of force in international law and the occurrence of threats of force in international relations. After having studied the threat of force, I will move on to study international organizations and their role in international relations.

The study of the threat of force and international organizations respectively are built on empirical facts. Among the facts collected, international instruments and documents of the United Nations, such as resolutions and meeting records of the Security Council, constitute an important source. Within the doctrine of international law, a large number of books and articles touching upon the threat and use of force as well as international organizations have been studied and chosen on comparative and qualitative basis. However, it must be emphasized that, the doctrine on the threat and use of force mainly focuses upon the use of force, and not so much on the threat of force. Actually, the doctrine on threats of force is not far from non-existent. The international law doctrine can be said to hold only two major works concerning the threat of force – Romana Sadurska's article *Threats of Force* from 1988 and Nikolas Stürchler's recently published book *Threats of Force in International Law* from 2007. This makes Sadurska and Stürchler respectively two pioneers on this topic and their contributions to the doctrine of international law are invaluable.

In the analysis, personal thoughts and arguments are weaved in with the empirical facts gained from the study of the threat of force and international organization respectively. Thus, parts of the analysis contain not only empirical statements, but also rational argumentation.

1.3 Limitations

The threat of force and international organizations respectively are two very extensive fields of international law. More focus will be laid upon the threat of force than international organizations, since international organizations mainly are of interest as to what extent they can constitute means for States to conceal their threats of force.

When studying the threat of force, it is important to remember that, a threat does not have to involve the use of force in order to be illegal. If a State threatens to take actions that do not involve the use of force, the threat per se is still illegal, as long as it is pronounced in order to affect the political decision-making process of another State, thus causing a breach not of the prohibition of the threat or use of force, but of the principle of non-intervention.[4] However, this thesis will only focus on threats involving the use of force.

[4] Cf. Bring, *FN-stadgan och världspolitiken*, p. 71.

2 Threats of Force

Threats of force are frequently disregarded violations of international law. Despite the fact that threats of force – i.e. *unauthorized* threats of force – usually are regarded as grave violations of international law as the actual use of force is, threats of force often pass by unnoticed by the international community. This is due to a number of reasons. One reason is that a threat of force that is followed by the use of force mostly gets absorbed in the legal consequences that arise when a breach of the prohibition of the use of force has taken place. Another reason is that when no actual use of force occurs in due course of time after a threat of force has been stated, the threat often gets forgotten, or at least neglected. Yet another reason is that a threat of force under some circumstances may have the somewhat strange effect of creating instead of thwarting stability in international relations.[5] When a conflict between two or more States emerges, threats of force have in some cases proven themselves to serve as inhibiters to further disturbances. Thus, it may take a violation of international law to maintain world order – a most paradoxical situation, yet not uncommon.

Some might claim that the end justifies the means. When world order might be in danger, threats of force may be justified to preserve peace. One has to admit, that even if a threat of force involve a breach of international law, it may be disregarded if it can serve as a substitute to the use of force and all the unnecessary suffering and damage that usually occurs when force is used. As R. Sadurska[6] has put it when commenting the consequences of a threat of force,

> "In a world full of tensions and sadly lacking in mutual trust, actions that further peace and stability deserve legal blessing."[7]

However, the most common reason to why threats of force often get disregarded by the international community is yet to come. According to Article 51 in the Charter of the United Nations, a threat of force may be used if used in self-defense.[8] Thus, Article 51 speaks of *authorized* threats of force. To separate an offensive threat of force – i.e. an unauthorized threat of force – from a defensive threat of force – i.e. an authorized threat of force – is most often very difficult, if not impossible. To recognize the casual relationship between a threat of force and the behaviour of the target State and thereby determine whether the threat is offensive or defensive is usually hard to the outside spectator who does not know all the

[5] Sadurska, *Threats of Force*, pp. 239-240.
[6] Romana Sadurska is often quoted in texts concerning threats of force due to her expertise in this specific field.
[7] Sadurska, p. 266.
[8] See Article 51 in supplement, under chapter I.

circumstances that have caused the threat.[9] So it seems, that due to this difficulty, the easiest way out is to turn a blind eye to the situation and regard the threat, offensive or not, as an act of self-defense. Simply put – disregard it.

Reflecting on what just has been presented, it may be easy – maybe even tempting – to consider threats of force as a phenomenon of international law that does not require much attention. Threats of force – apparently even offensive ones – might just be beneficial to world order. So is it then only – "much ado about nothing"? No, threat of force still remain one of the most effective means of oppression available in international relations and therefore deserve careful attention. In spite of some threats' ability to thwart the use of force – which, of course, ought to become "legally blessed" – one cannot take the gravity of threats of force too easily. Much too often threats of force are used not in the interest to preserve peace or in self-defense, but in self interest of the threatening State, subjugating the threatened State to act in accordance with the will of the threatening State.

2.1 Regulation of Threats of Force in International Agreements – Threat of Force in Theory

The Hague Peace Conferences of 1899 and 1907 are known as very important turning points regarding the freedom to resort to war. For the first time in the war-rich history of mankind, States came together in an attempt to set up restrictions to this freedom.[10]

This marked a renaissance for the modern public international law, born about four hundred years earlier. The existence of just and unjust wars had for long been a popular and lively discussed subject among well-known philosophers – such as Francisco Vitoria during the 15th century and Hugo Grotius during the 17th century – but never had it been of any particular interest to States.[11] Now, at the Hague Peace Conferences, a new era began

[9] Simma, *The Charter of the United Nations – A Commentary*, p. 118.
[10] Simma, p. 109.
The signatory States were astonishing many: The German Empire; Prussia; The Austrian Empire; Bohemia; Hungary; Belgium; China; Denmark; Spain; the United States of America; the United Mexican States; the French Republic; the United Kingdom of Great Britain and Ireland (and India); the Hellenes (Greece); Italy; Japan; Luxembourg (and Nassau); Montenegro; the Netherlands; Persia; Portugal and of the Algarves; Romania; Russia; Serbia; Siam; Sweden and Norway; the Swiss Federation; the Ottomans Empire; and Bulgaria.
[11] Shaw, pp. 22-23.
An interesting aspect is that during the Middle Ages the Catholic Church in order to justifying crusades commonly referred to the theory of *bellum iustus*. A theory of just war

– an era with international agreements regulating conditions for the use of force.[12]

The outcome of the Hague Peace Conferences was not a ban of war – in fact it was quite far from it. Nevertheless, a great achievement by the participating States was the agreement that war between them was not to begin unless there had been an unambiguous warning before the outbreak of the hostilities.[13] An even greater achievement was the expressed prohibition of recourse to armed force for the recovery of contract debts.[14] However, none of the altogether nineteen (!) Hague Conventions and Declarations established during the Hague Peace Conferences of 1899 and 1907 mentioned the threat of force. Still, this should not be considered too remarkable. After all, it was the first time States tried to restrict the use of force. Two of the conventions did however decree that "if a serious dispute *threatens* to break out between two or more of [the signatory states]" (emphasize added) the parties concerned should be reminded of the possibility of pacific settlement of the dispute.[15] This decree along with the restriction on the right to use force and a seed for the prohibition of threat of force had been planted.

After the horrors of the 1914-1918 Great War, war-ravaged States saw the urgency in establishing international institutions to preserve and secure peace, and so, the League of Nations was created in 1920 on basis of the 1919 Peace Treaty (the Treaty of Versailles).[16] The Covenant of the League of Nations might seem to have come close to a prohibition of threat of force. Members of the organisation were put under the obligation to refrain from external aggression and respect the territorial integrity and existing political independence of any other Member, and if there existed any war or threat of war the Council of the League of Nations was to take any necessary action to safeguard the peace.[17] A war or a threat of war was no longer a matter of concern for the disputing States only, but a matter for the world community as a whole.[18]

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ought *e contrario* mean that the common view must have been that wars in general were unjust. However, there existed no international law prohibiting the resort to war.

[12] It should be emphasized, that the Hague Conventions established at the Hague Peace Conferences were by no means the first international agreements concerning war. Prior to these conventions there were e.g. the *Declaration of Paris* of 1856 and the *Declaration of St. Petersburg* of 1868, which both mainly concerned how to behave in times of war to behave in accordance with laws of humanity. The Hague Conventions on the other hand, marked the birth of international agreement restricting the right to use force.
(see <http://www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm>, last visited 2008-06-30)

[13] Article 1 of the Hague Convention III of 1907, see supplement supra chapter III; Simma, p. 109.

[14] Article 1 of the Hague Convention II of 1907, see supplement supra chapter III.

[15] Article 27 of the Hague Convention I of 1899, see supplement supra chapter III; Article 48 of the Hague Convention I of 1907, see supplement supra chapter III.

[16] Shaw, p. 30; Brownlie, *International Law and the Use of Force by States*, p. 49; <http://www.un.org/aboutun/unhistory/>, last visited 2008-06-30.

[17] Article 10 and 11 of the Covenant of the League of Nations, see supra supplement, chapter II.

[18] Brownlie, p. 57.

This, however, sounded better than it really was. The only actual means available for the Council in trying to safeguard the peace were to *unanimously* adopt a report with proper recommendations how to solve the dispute (which it seldom succeeded in doing) or to refer the dispute to the newly founded Permanent Court of International Justice (PCIJ) for judicial settlement. Only if at least one of the parties to the dispute fully complied with such a report given by the Council or an award rendered by the PCIJ, a definite prohibition of war could exist.[19] If not – war could begin. Furthermore, the possibility of the Council to sanction a State neglecting a report or award was proven limited by political considerations (read economic interests) of the member States of the Council, and therefore became unused.[20]

Yet, the Covenant of the League of Nations had a major weakness – the use of the term "war" instead of the term "force". At that time, an act of aggression had to be declared a war to be considered a war, and per definition a state of war requires more acts of violence than the use of force.[21] The Covenant focused upon war, not force. The problem with this is well illustrated by the Sino-Japanese wars of 1931 and 1937. Despite obvious military operations – which normally ought to be defined as war – both the Chinese and Japanese governments insisted on that no state of war existed and continued their diplomatic relations.[22] This made the Council unable to act to put an end to the hostilities. Thus, there still was no authentic prohibition, neither of the use or the threat of force.

The shortcomings of the Covenant of the League of Nations – an insufficient sanction system and the use of the term "war" instead of "force" – got repeated in the Kellogg-Briand Pact of 1928, which otherwise ought to be praised as an international agreement of outmost importance. Concisely and precisely it stated the first ever general prohibition of war with the right to self-defense as the only exception.[23] But still there were no signs of a prohibition of threat of force. Nevertheless, one could argue that a threat of force not ought to be counted as such a pacific mean as the Pact decreed the signatory States to solve their disputes with, and thus could to be regarded as being contrary to the object and purpose of the Pact. To interpret the Pact like this is however a bit risky since the *travaux préparatoires* do not mention the threat of force at all and the Pact prohibited "war" and not "force". However, the subsequent practice could very well be said to indicate a common opinion among the signatories that threat of force also was prohibited by the Pact.[24] Thus, even if there still was no explicit prohibition of threat of force put down in black and white,

[19] Articles 15(6) and 13(4) of the Covenant of the League of Nations, see supplement supra chapter II.
[20] See Article 16, see supplement supra chapter II; Brownlie pp. 58-59.
[21] Shaw, p. 1018.
[22] Simma, p. 111; Brownlie, p. 60.
[23] Simma, pp. 110-111; Cf. Article 1, see supplement chapter IV.
[24] Brownlie, p. 89.

the Kellogg-Briand Pact could be said to have brought about an implicit prohibition of the threat of force, which should not be underestimated.

With the gained knowledge of the inadequacy in using the term 'war' instead of 'force' in the Covenant of the League of Nations and in the Kellogg-Briand Pact along with the horrible memories of yet another World War fresh in mind, one was now, at the end of the Second World War, fully convinced of the importance of a powerful international institution as an indispensable aid in maintaining world order. The United Nations – a modified and much improved version of the League of Nations – was established. The United Nations had what the others did not – a prohibition of force and an advanced sanction system.

And so, it was in the Charter of the United Nations that an explicit prohibition of threat of force first saw the light of day. This Charter, set up in 1945, constitutes the core of international law, as we know it today.

2.1.1 The Charter of the United Nations

At the time for its establishment – on 26 June 1945 – the Charter of the United Nations (UN) had 50 signatory States.[25] During the sixty years that have passed since the Charter[26] was established, both old and newly founded States have signed the Charter and at present, the number of the signatory States has grown to 192 – a vast majority of the States of the world today.[27] This makes the Charter *the* international agreement that by far has most signatory States.

According to the Charter, the Charter shall prevail in case there is a conflict between the obligations of the members of the UN under the Charter and their obligations under another international agreement.[28] The Charter also expresses that the UN shall guarantee that non-members act in accordance with the Charter to such an extent that may be deemed necessary in order to maintain international peace and security.[29] As a matter of fact, it happens from time to time that the UN addresses resolutions not just to its member States, but to "all States".[30]

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[25] <http://www.un.org/aboutun/unhistory/>, last visited 2008-06-30.
Poland signed the Charter soon after the United Nations Conference on International Organization in San Francisco, making the number of the original Member States 51 when the Charter came into force on 24 October 1945.
[26] From now on, the Charter of the United Nations is referred to only as "the Charter".
[27] <http://www.un.org/members/list.shtml>, last visited 2008-06-30.
[28] Article 103 of the Charter, see supplement chapter I.
[29] Article 2(6), see supplement chapter I.
[30] Shaw, p. 1018.
When acting under Chapter VII (Actions with respect to threats to the peace, breaches of the peace, and acts of aggression) of the Charter, the Security Council often turns to "all States" and not just Member States, e.g. resolution 757 which imposed sanctions upon the Federal Republic of Yugoslavia (Serbia and Montenegro) for failing to fulfil the

The prohibition of the threat and use of force is stated in article 2(4) of the Charter. It declares that:

> "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."

This decree is a cornerstone of international law. This sole sentence – containing an explicit prohibition of the threat and use of force – might very well be the most important sentence there is in international law. Due to the importance of this rule, it is considered a peremptory norm of international law (*jus cogens*), making a breach of the rule an offence not only against the target State but the international community as a whole.[31] In case this rule is transgressed, Chapter VII of the Charter provides for a harsh sanction system, with both economic sanctions and sanctions involving the use of force as possible measures to be taken towards the offending State.[32]

Article 2(4) turns to "All Members…" – and the members are States, since only States can become members of the UN.[33] International organizations can be given an observatory status, but they cannot become members. Thus, all member *States* are bound and protected by Article 2(4). Also non-member States are protected by the provision, due to the formulation "any state". It should be noted that, usually even *de facto* governments – presumed to possess a stabilized authority – are considered bound and protected by Article 2(4).[34]

However, it is important to keep in mind that the most fundamental principle of the Charter itself is not Article 2(4), but the preceding Article 2(3), which is a cogent rule, but not a *jus cogens*-rule.[35] Article 2(3) states that the members of the UN shall solve their international disputes with peaceful means.[36] The peace is not to be endangered. Thus, Article 2(4) is *usually* not brought to the fore unless there first is a failure of meeting the obligation in Article 2(3) to solve a dispute peacefully – the two paragraphs can be said to be interdependent.[37] Nevertheless, Article 2(4) does not only prohibit the threat and use of force that might follow an international

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requirements of resolution 752 (stop fighting and withdraw troops from Bosnia-Herzegovina).

[31] In the *Nicaragua-case*, the ICJ came very close to a statement that Article 2(4) has the status of *jus cogens*. See *Military and Paramilitary Activities in and against Nicaragua*, Merits, *ICJ Reports* 1986, para. 190.

[32] Article 41 and Article 42, see supplement chapter I.

[33] Article 4, see supplement chapter I.

[34] Simma, p. 115; Brownlie, p. 380.

[35] Bring, p. 47.

[36] Ibid., p. 53.
In Article 33(1) of the Charter there is a complement to Article 2(3), appropriating examples of peaceful means to solve international disputes. See supplement chapter I.

[37] Kelsen, *The Law of the United Nations*, pp. 781-782

dispute, but also "unprovoked" aggression – such as the Iraqi invasion of Kuwait in 1990 – and thus preserves its role as the probably single most important sentence in international law.

2.1.2 Exceptions From the Prohibition of Threat and Use of Force

In case of "unprovoked" aggression or any other *illegal* threat or use of force, it must be kept in mind that Article 2(4) is not absolute. The exception confirms the rule – almost every rule has one or more exceptions and so does also Article 2(4).[38] There can be a *legal* threat and use of force.

The right to self-defense – both individual and collective – is considered an inevitable lawful departure from the prohibition of the threat and use of force until remedial actions in accordance with the Charter can be taken (which can take quite some time).[39] The right to self-defense is put forward in Article 51 of the Charter, which reads as follows:

> "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, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

The right to self-defense was nothing new for the Charter. Since long back, the right to self-defense has been regarded as an inherent right in international law and thus – as already shown – was a matter of course in the Kellogg-Briand Pact of 1928.

As usually is the case with exceptions, the right to self-defense in Article 51 is to be interpreted narrowly. The notion of "armed attack" involves a much

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[38] Due to the fact that derogation of a *jus cogens*-rule is not permitted, it is here important to emphasize that the exceptions to this *jus cogens*-rule were made before to the rule got the status of *jus cogens*. As submitted above, prior to the establishment of the Charter there did not exist a prohibition of the use – and surely not of the threat – of force in contemporary international treaty law. Thus, the Charter constitutes the origin of this rule and on basis of the Charter along with States' repeatedly expressed *opinio juris* that this rule constitutes a cardinal principle of international law, the rule can now be said to possess the status of *jus cogens* (this was the significance of the discussion upon the status of Article 2(4) of ICJ in the Nicaragua-case). The exceptions to this rule were set up at the same time as the rule itself, i.e. when the rule was not *jus cogens*. This is important to remember when considering the different pro and con arguments concerning humanitarian intervention as a new exception to the prohibition of the threat and use of force. See Shaw p. 118; Nicaragua-case, para. 188-191.

[39] Asrat, *Prohibition of Force Under the UN Charter: A Study of Art. 2(4)*, p. 198.

more extensive use of force than the concept of "threat or use of force" does. Thus, an armed attack always presupposes a violation of Article 2(4), whereas such a violation not always constitutes an armed attack.[40]

Then, is it not possible to respond – by acting in self-defense – to an illegal/unauthorized threat of force due to the lack of an actual armed attack? Or in other words, is Article 51 – despite the apparently equal graveness in the threat respectively the use of force – only of interest when force has been used?

The answer to these questions is that in order not to be a sitting duck waiting for the enemy to strike, anticipatory self-defense is considered legal as long as the threat is of such a nature that – considered in good faith – an armed attack appears imminent.[41] This right to anticipatory self-defense has been put forward in a report of the Secretary-General of the UN:

> "Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened."[42]

Furthermore, another statement upon this matter, which makes perfectly sense, says:

> "If the breach of the prohibited threat of force is not primarily answerable to measures of self-defense, the prohibition would for all practical purposes be of little value." [43]

Thereby it can be concluded that the existence of a right to anticipatory self-defense is acknowledged in contemporary international law and there is no need for an armed attack prior to an exercise of self-defense, since an imminent threat of an armed attack is enough to trigger the right to self-defense.

At first glance, the concept of the right to self-defense may not seem too indigestible, but it is actually quite complex. Self-defense is the only justifiable unilateral use of force and is strictly limited.[44] For instance, measures taken in self-defense must always meet with three conditions in order to be legal: they must be taken *immediately* after the armed attack, they must be *necessary* and – probably the most important condition of them all – they must *stand in proportion* to the force used by the offending

[40] Simma, p. 669.
[41] Asrat, pp. 222-223.
Pre-emptive self-defense on the other hand, is not considered legal according to contemporary international law.
[42] Cf. Annan, *In Larger Freedom*, p. 33, para. 124.
[43] Asrat, p. 223, supra fn 129.
[44] Ibid., p. 198.

state.[45] To evaluate what force can be said to stand in proportion to the armed attack must be done in the light of many various factors and is almost impossible. Despite the somewhat complicated nature of the right to self-defense, this right is the most important exception to the prohibition of the threat and use of force.[46]

Another exception to the prohibition of the threat and use of force is the right of the Security Council (SC) of the UN to resort to force in order to restore and/or preserve peace. According to Article 24(1) of the Charter, it is the SC that carries the primary responsibility for the maintenance of international peace and security and as put forward in Article 39 – the preamble of Chapter VII of the Charter – it is the SC that determines the existence of a threat to the peace, a breach of the peace or an act of aggression.[47]

Chapter VII of the Charter prescribes enforcement actions and decisions made by the SC under this chapter are cogent upon all member States.[48] The sanction system laid down under Chapter VII marks a distinct difference from the sanction system of the Covenant of the League of Nations, which was more or less totally depended upon the willingness of the member States of the League to take measures, either independently or collectively, against a law-breaking state.[49] The proved inefficiency of this sanction system caused the extensive authority of the SC to implement necessary military measures. This right of the SC to resort to force if considered necessary is laid down in Article 42, but is only brought to the fore in case the measures provided for in the preceding article, Article 41 – measures not involving the use of force, e.g. economic sanctions – have proven themselves insufficient for the preservation/restoration of the peace. Naturally, the force ordered by the SC must also meet the requirements of proportionality and necessity in order to be justified.[50]

The 'enemy state' clauses of Articles 53 and 107 once constituted yet another exception to the prohibition of the threat and use of force. With roots in the Atlantic Charter of August 12, 1941 – which among other things stated that to accomplish the abandonment of use of force, it is essential that all States that threaten or may threaten aggression outside their frontiers

[45] The demands for proportionality and necessity were laid down by ICJ in the *Nicaragua-Case*, in which the Court stated that "there is a specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law". ICJ Reports, p. 94, para. 176. These conditions have later in *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* by the ICJ been said to apply "equally to Article 51 of the Charter, whatever the means of force employed", ICJ Reports 1996, p. 245, para. 41.
[46] Simma, p. 121.
[47] See Article 24(1) and 39 respectively in supplement, under chapter I.
[48] Actually, according to Article 25 of the Charter, all decisions made by the SC are legally binding upon all member States. However, the principal rule is that decisions not made under Chapter VII are only recommendatory. See Bring, pp. 249-250.
[49] Simma, p. 606.
[50] Simma, pp. 630-631.

shall be disarmed – the two articles established that the Charter did not prevent any actions that might be deemed necessary towards any State which during the Second World War had been an enemy state to any of the signatory States of the Charter (Article 107). Actions of this kind could be performed in accordance with regional arrangements and did not need any prior authorization of the SC (Article 53).[51] The two articles were of a mere transitional character, and since all former enemy States – mainly Germany and Japan – now are members of the UN the articles have become obsolete and it has been suggested that they should be removed from the Charter.[52]

The exceptions to the prohibition of Article 2(4) mentioned above are exceptions that explicitly appear in the Charter. Whether or not humanitarian intervention can be accepted as a legal exception to Article 2(4) – in spite of it not being explicitly mentioned in the Charter – has for long been and still is a lively discussed topic and is much dependent upon whether Article 2(4) is given a restrictive or extensive interpretation.[53]

2.2 Interpretation of Article 2(4)

The law of treaties constitute one of two parallel sources of international law and hence international treaties hold a position of outmost importance to the development of international law. A world community with international relations of ever-changing appearances makes the interpretation of treaties an inevitable process of international law. Although treaties usually are just a bunch of papers, they are alive as long as they are applied and in order to be applied they need constant adjustment to be able to respond to new circumstances.[54]

The Charter is no exception. The world is not the same as it was in 1945 when the Charter was established and to avoid the Charter from, as B. Asrat has put it, 'remain fixed within its 1945 frame' the Charter must continually be interpreted along with new circumstances.[55] However, as is the case with all treaty interpretations, the Charter shall always be interpreted in the light of its object and purpose.[56]

A provision as important as Article 2(4) draws much attention among actors in the field of international law research and it has been subject to many

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[51] <http://www.yale.edu/lawweb/avalon/wwii/atlantic.htm>, last visited 2008-06-30.
See Articles 53 and 107 in the supplement, chapter I.
[52] Also Bulgaria, Finland, Italy, Romania, and Hungary have been considered enemy states. See Simma, pp. 739, 751 and 1157; *In Larger Freedom*, para. 217
[53] Bring, p. 126.
[54] Asrat, p. 59.
[55] Asrat, p. 59
[56] See Article 31(1) Vienna Convention on the Law of Treaties.

suggestions of interpretation. There are differing opinions on both the individual concepts used in the article as well as the scope of the prohibition of threat and use of force at large.

2.2.1 The Notion of 'force'

This essay evolves around threats of force – threats of what? What is actually the scope of the notion 'force' that States according to the Charter can threaten about? Does it merely consist of armed force, i.e. force exercised by the use of arms, or are other forms of force, such as political and economic force, included as well?

'Force' in general is frequently used interchangeably with a great amount of other common concepts of international law – 'aggression', 'invasion', 'attack', 'coercion', 'violence', 'armed force', 'physical force', 'political force', 'economic force', 'indirect force' – the list seems almost endless.[57] The confusion of what is meant by 'force' in the Charter is not hard to understand and the matter is far from undisputed between both authorities on the international law arena as well as States. The question arose as early as at the San Francisco Conference on International Organization (UNCIO) of 1945, at which the UN was established. At this time, Brazil proposed an amendment, which would result in economic measures being included in the prohibition as well. The proposal was rejected, however without any specific reasons.[58]

I. Brownlie has pointed out, that assuredly the *travaux préparatoires* of the Charter do not indicate that the prohibition of the threat or use of force only applies to armed force, but still, when considering the discussions at the UNCIO or the practice of States and the UN, there is no proof either of a wider scope of the notion 'force' than just armed force. Thus, Brownlie states that it is very doubtful that the intention of the drafters should have been that 'force' in Article 2(4) concerns more than armed force.[59]

B. Asrat on the other hand, has expressed an opinion on the scope of 'force' in line with one once stated by H. Kelsen, namely that the notion 'force' in Article 2(4) cannot possibly just concern armed force, but also force *not* involving the use of arms, such as political and economic force. Asrat points out that, if other modes of coercion than that of armed force are not considered comprised within the legal protection rendered by Article 2(4), the protection would appear illusory. Asrat further claims, that the intention of the delegates at UNCIO might very well have been a prohibition of armed force and nothing else, but since the number of member States has almost quadrupled since the UNCIO was held, the *opinio juris* of the

[57] Brownlie, p. 361; Asrat, p. 94; Simma, p. 112.
[58] Asrat, p. 39.
[59] Brownlie, p. 362.

member States of today might be different from that of the drafters and thus revised interpretation should be considered. Asrat refers to an annex to General Assembly resolution 2625 (XXV) – also known as Friendly Relations Declaration (FRD) – signed at 24 October 1970.[60] The FRD recalls,

> "The duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State."[61]

However, as also pointed out by Asrat, other parts of the resolution can be used equally well for a more restrictive interpretation of 'force'. Furthermore, the resolution, being an international agreement of outmost importance adopted in consensus, is not a legally binding instrument.[62] Hence, too much attention should not be paid to the resolution for the interpretation of concepts in the Charter.[63] Still, Asrat emphasizes, the FRD is far from the only international instrument to indicate a wider scope of 'force'.[64]

Nevertheless, the view of a limited scope of 'force' is considered the prevailing view of today.[65] The prohibition of threat and use of force of the Charter hence only concerns events, in which armed force is employed, e.g. acts of aggression.[66] This does not mean that the prohibition cannot expand to comprise more than armed force, it just means that hitherto it has not done so.

Before leaving the notion 'force' it should be emphasized, that it is an accepted fact that 'armed force' comprises both *direct and indirect* force, meaning that force not necessarily have to be exercised by the law-breaking State per se (i.e. direct force), but can also be performed by a person or a group of persons – usually irregular movements or rebels – acting under instructions, directions or control of the law-breaking State within the target State.[67] Furthermore, a State can transgress the prohibition of force if putting its territory at the disposal of another State in order to enable that State to act violent against a third State. Such force performed by another

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[60] Asrat, pp. 115-117, 127, 131.
[61] Ninth preambular paragraph of FRD.
[62] It is however important to keep in mind, that even though GA resolutions are not legally binding, they usually express States' *opinio juris* at the time of their adoption. Cf. Beckman, p. 58.
[63] As pointed out by O. Schachter, an interpretation of concepts of the Charter ought not to be done in the light of individual principles taken out of their contexts, but in the factual context. Cf. *United Nations Law*, p. 7.
[64] Asrat, pp. 117-120.
[65] Simma, p. 112.
[66] The notion 'aggression' has in Article I in an annex to GA resolution 3314 (XXIX) been defined to be "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition".
[67] Cf. Article 8 of ILC-draft on State Responsibility.

State or by persons in the target State is considered indirect force by the State enabling it.[68]

2.2.2 The Phrase 'territorial integrity or political independence'

Not as controversial as the notion 'force', but surely not overlooked is the phrase 'territorial integrity or political independence'. Does it or does it not limit the scope of the prohibition of the threat and use of force? Some say yes, but the majority says no – it does not limit the scope of the prohibition. However, no further discussion shall here be undertaken on how this phrase might or might not diminish the scope of the prohibition, but it is worth noting that the predominant view of today – which has support in the *travaux préparatoires* of the Charter – is that the phrase cannot, in any way, be taken to limit the prohibition.[69]

While mentioning it, it would not be out of place to give a short description of 'territorial integrity' and 'political independence'. These two terms are closely linked to and often used interchangeably with 'sovereignty' – an almost sacred principle of international law, which States always are on their guard to protect.[70] The principle of State sovereignty is expressed in Article 2, paragraphs 1 and 7 respectively of the Charter. Article 2(1) states that the principle of sovereign equality of all member States constitutes the base of the organization, while Article 2(7) states that the organization is not to interfere in matters that essentially fall within the domestic jurisdiction of any State – unless an enforcement measure under Chapter VII is at hand.[71] The latter of these two regulations is very much like the principle of non-intervention, which follows with the principle of State sovereignty. The principle of non-intervention gives that States are obliged not to intervene in matters in which another State has the exclusive right to exercise authority.[72] Thus, 'territorial integrity' and 'political independence' would mean that – supported by the principles of State sovereignty and non-intervention – the territory and the organic powers of a State are inviolable from the interference of others – States and international organizations – with the exception of legal interference according to (valid) international agreements.[73]

[68] Simma, pp. 113-114.
[69] Simma, pp. 117-118; Asrat, p. 147.
[70] Asrat, p. 146; Beckman, p. 58.
[71] See the articles in the supplement, chapter I.
[72] In the *Nicaragua-case*, the ICJ has described the principle of non-intervention as being a 'right of every sovereign State to conduct its affairs without outside interference' and further underlined that the principle 'has moreover been presented as a corollary of the principle of the sovereign equality of States'. See Merits, p. 96, para. 202.
[73] Asrat, pp. 148-149, 157-158.

As States grow closer than ever, they become more and more interdependent. Joint efforts in areas, which transcend borders – such as commerce and communication, not to mention the environment – are necessary. Nowadays, internal issues of a State frequently, in one way or another, affect other States. Naturally, the respect for the fundamental sovereignty of States remains, that ought to be a prerequisite for international progress. But due to the extensive external influences the actions of a State may have (even actions concerning domestic matters), sovereignty – as is rather self-evident – will be affected too. Limitations of the sovereignty are inevitable. States must find a balance between their interdependency and their sovereign rights.[74] It is, of course, a matter of give and take.

Another, very sensitive area, in which the justification of limitations on sovereignty is much discussed, is the field of human rights. With the role as sovereign follows a responsibility towards the population of the State to provide and care for human rights. The ICISS – International Commission of Intervention and State Sovereignty – states that,

> It is acknowledged that sovereignty implies a dual responsibility: externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.[75]

However, if these requirements of basic human rights are not met, other States may have a 'responsibility to react' in order to meet the needs of a suffering population.[76] The principle of non-intervention may then yield for a 'humanitarian intervention'. If a State is committing grave violations of human rights, this might call for a humanitarian intervention.[77]

As already mentioned, the rightfulness of humanitarian (armed) interventions has been very much debated and the legality of a humanitarian intervention, in which armed force is used, can be said to be much dependent upon whether Article 2(4) is given a restrictive or extensive interpretation.

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[74] Cf. Statement of the UN Secretary General Boutros-Boutros Ghali in *An Agenda for Peace*, para. 17.

[75] ICISS Report, *The Responsibility to Protect*, p. 8, para. 1.35.
The ICISS also points out – as a basic principle – that 'State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.', see p. XI of the report.

[76] Beckman, p. 55.
E.g. the prohibition of genocide is a *jus cogens*-rule, making a transgression of the prohibition an offence against the whole international community. In spite of some of them being controversial, the ICISS also considers the prohibition of systematic racial, religious, and gender discrimination; slavery; crimes against humanity; war crimes; enforced disappearances; murder; torture (including sexual violence); prolonged arbitrary detention; and denial of the right to self-determination to be other such peremptory norms of international law. Cf. <http://www.iciss.ca/03_Section_C-en.asp#chapter_6>, last visited 2008-06-30.

[77] ICISS Report, p. XI

2.2.3 Restrictive or Extensive Interpretation?

An *extensive* interpretation of Article 2(4) would give an almost absolute prohibition of the threat and use of force, with self-defense and force authorized by the SC as the only two exceptions to the prohibition, while a *restrictive* interpretation would enable to discern possible implied exceptions, such as humanitarian intervention.[78]

Advocates of the restrictive interpretation points out that if force is not aimed at the territorial integrity *or* the political independence of another State *or* if an armed intervention can be done not inconsistent with the Purposes of the UN, then an armed intervention can be exercised without a transgression of the prohibition of Article 2(4) taking place.[79] According to this view, it is up to the acting State to decide whether or not the intervention can be considered lawful according to Article 2(4).[80]

Furthermore, a *bona fide*-interpretation of the Purposes of the Charter could give that, if genuinely intended to be exercised in order to safeguard human rights or democracy or to fight terrorism, an intervention could be lawful.[81]

Those advocating an extensive interpretation of the prohibition watch the restrictive interpretation with great alarm, afraid of arbitrary use and misuse of alleged implied exceptions. A right for States to decide by themselves when it might be in order to act unilateral or collective in groups to safeguard for instance human rights would enable illegal interventions, performed in the self-interest of the acting State or States while disguised as 'humanitarian' interventions.[82] Furthermore, these spokesmen claim, the phrases 'the territorial integrity or political independence' and especially the later 'or in any other manner inconsistent with the Purposes of the United Nations' must be considered designed to make the prohibition watertight – not allowing any other exceptions than the exceptions explicitly stated in the Charter.[83] The very *raison d'être* of the prohibition is the protection of the territorial integrity and political independence of States.[84]

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[78] Bring, pp. 72-73.
[79] Safeguarding human rights is one of the main Purposes of the UN and has been used as a ground for the right of humanitarian intervention. See Article 1(3) of the Charter.
[80] Bring, p. 72.
[81] Bring, pp. 72, 140-141.
Support to such an interpretation can be found in Articles 1, 55 and 56 of the Charter – however, these Articles assume prior authorization of the SC. See supplement chapter I.
[82] Cf. ICISS Report, where it is stated that 'Collective intervention blessed by the UN is regarded as legitimate because it is duly authorized by a representative international body; unilateral intervention is seen as illegitimate because self-interested', p. 48.
[83] EJIL, Simma, *NATO, the UN and the Use of Force: Legal Aspects*, p. 3.
[84] Bring, p. 73.

In addition it is worth noting that, where humanitarian crises do not constitute imminent threats of force or convey armed attacks on other States, recourse to self-defense is not permissible. As stated by Simma,

> "As long as humanitarian crises do not transcend borders … and lead to armed attacks against other states, recourse to Article 51 is not available. For instance, a mass exodus of refugees does not qualify as an armed attack."[85]

Thus, trying to justify a humanitarian intervention on the ground of self-defense will most likely be done without success, unless there is very much to suggest that self-defense is necessary.

When considering the dispute between Nicaragua and the USA in the *Nicaragua-case*, the ICJ applied an extensive interpretation of the prohibition of threat and use of force, admitting individual and collective self-defense as the only exceptions applicable to States. This was done supported by the formulations of Article 2(4), as well as the States' *opinio juris* as expressed in the FRD – that nothing in that resolution were to be regarded as enlarging or diminishing the scope if the provisions of the Charter.[86] This suggests that States of today have to interpret the prohibition of threat or use of force extensively, and if they are to carry out legal humanitarian interventions, they must first have an authorization from the SC to do so. The SC has the authority to make – to use the words of the ICISS – 'the hard decisions in the hard cases about overriding state sovereignty' and deal with military interventions when it might be deemed necessary for human protection.[87] This authority provided by the Charter is a matchless authority, possessed by no other legal person in international law. This indeed gives the Charter a character of a treaty *sui generis*.

However, in case of a humanitarian intervention not authorized by the SC – i.e. an illegal intervention – all relevant circumstances in the particular case must be carefully considered and weighed with the graveness of the breach of the prohibition of threat or use of force. If the breach can be regarded as not being 'too far away from the law' and the advantages of the intervention outweighs the disadvantages, the intervention might – out of a moral and political perspective – be regarded as legitimate and the intervention ought then to get an *ex-post-facto* authorization.[88]

All that said, it would seem that a State acting unilaterally or a group of States acting together, will have to interpret the prohibition in Article 2(4) extensively, while the SC can use a restrictive interpretation.

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[85] EJIL, Simma, p. 5.

[86] Nicaragua-case (Merits), pp. 92-93, para. 193; Cf. Bring, p. 75.
The Court also held that the use of force could not be the appropriate method to monitor or ensure respect for human rights in Nicaragua, thus taking a reluctant position in regard to humanitarian intervention, see Nicaragua-case (Merits), para. 268.

[87] ICISS Report, p. 49, para. 6.14.

[88] EJIL, Simma, pp. 4-6

2.2.4 The Friendly Relations Declaration

Leaving the Charter behind, it is now time to look at another international agreement also regulating the threat of force – the already mentioned Declaration on Principles of International Law Concerning Friendly Relations, also known as Friendly Relations Declaration (FRD).

Being closely related to the Charter, the FRD is a milestone of international law. It was adopted unanimously by the General Assembly on the day of the 25th year anniversary of the adoption of the Charter and it constitutes an invaluable evidence of the member States' acknowledgement of the Charter provisions concerning international relations.[89] In a world with a whole new appearance than the one twenty-five years earlier, this resolution became a document of outmost importance, indicating that the provisions of the Charter at issue still corresponded to the *opinio juris* of States – among old as well as new.[90]

The prohibition of threat or use of force was the first of the Charter provisions to be proclaimed in the resolution. The resolution states 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. Such 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."

The scope of this provision is wider than that of Article 2(4), as evident already in the beginning – the prohibition is directed not just to 'All Members', but to 'Every State', which is due to the fact that the majority of the world's States had become members of the UN in 1970, while the States still not members had, as pointed out by Rosenstock, 'pledged themselves to adhere to the basic rules of the Charter'. Thus, these basic rules of the Charter, especially the prohibition of the threat or use of force, were in 1970 considered binding upon all States – even non-member States of the UN.[91] However, the scope of the prohibition *per se* was not extended – or limited. On the contrary, it was clearly stated that,

> "[N]othing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter…"

[89] Shaw, p. 228; Cf. UN Doc. A/RES/2625 (XXV), preamble.
[90] Beckman, p. 58.
[91] Rosenstock, *The Declaration of International Law Concerning Friendly Relations: A Survey*, p. 717.

As also observed earlier, since being a GA resolution, the resolution is – despite many brave attempts among international lawyers claiming the opposite – not a legally binding document.[92] Thus, it can never in any way affect the scope or the validity of the prohibition of the threat or use of force as stated in Article 2(4) of the Charter, but it does indeed serve as an important reminder of this very same prohibition.

2.2.5 Regional Agreements

The UN Charter and the related FRD are two international agreements of universal character – concerning the whole international community. Due to the acknowledged right of precedence of the UN Charter in relation to every other international agreement, the impact of the UN Charter and its prohibition of threat and use of force in Article 2(4) cannot be compared with any other agreement in international law.[93]

Still, not to be forgotten is the huge amount of regional agreements also prohibiting the threat or use of force, which by their sole presence in international law – and often by their formulations – substantiate the prohibition of the UN Charter. An illuminating example is the OSCE's Charter for European Security, which states that,

> "We [the member States of the OSCE] recognize the primary responsibility of the United Nations Security Council for the maintenance of international peace and security and its crucial role in contributing to security and stability in our region. We reaffirm our rights and obligations under the Charter of the United Nations, including our commitment on the issue of the non-use of force or the threat of force."[94] (emphasize added)

Moreover, in the final act of the Conference on Security and Co-operation in Europe – the Helsinki Final Act of 1975 – setting up the OSCE, the Declaration on Principles Guiding Relations between Participating States was inserted. The second paragraph of this declaration says that,

> "The participating States will refrain in their mutual relations, as well as in their international relations in general, 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 and with the present Declaration. No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle."[95]

An interesting part of this declaration is the sixth paragraph, which explicitly prohibits the member States from exercising political and

[92] Bring, p. 26; Cf. Rosenstock, pp. 714-715.
[93] Cf. Article 103 of the Charter, see supplement, chapter I.
[94] Charter for European Security, Chapter II, para. 11.
[95] Helsinki Final Act, supra chapter "Questions relating to Security in Europe", para II.

economic coercion.[96] Another regional agreement containing a similar prohibition is the Charter of the Organization of American States (OAS). Article 19 of this Charter gives that,

> "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements."[97]

These two provisions of non-intervention indicate a more extensive prohibition of force than the one steaming from the UN Charter.[98] Before jumping to any conclusions in this respect, an interpretation must be done in the light of the object and purpose of the two charters respectively, which not will be done here. However, it is an interesting aspect, due to the possible contribution of these two charters to the eventual (future) development of the scope of the threat or use of force of the UN Charter.

A relatively new regional agreement also containing a prohibition of the threat or use of force is the Declaration on Establishment of Shanghai Cooperation Organisation (SCO), signed on 15 June 2001 at a meeting in Shanghai by the "Shanghai Five" member States – China, Kazakhstan, Kyrgyzstan, Russia and Tajikistan – and Uzbekistan.[99] The prohibition of this agreement is formulated in accordance with the prohibition of the UN Charter. The SCO Establishment Declaration gives that,

> "The SCO member States shall abide by strictly the purposes and principles of the Charter of the United Nations, mutually respect independence, sovereignty and territorial integrity, not interfere in each other's internal affairs, not use or threaten to use force against each other, adhere to equality and mutual benefit, resolve all problems through mutual consultations and not seek unilateral military superiority in contiguous regions"[100]

The agreements mentioned here is just a selection of many. Evidently, the prohibition of threat or use of force as stated in the UN Charter is reiterated in both old and new regional agreements, which are spread all over the world. This constant recurrence of the prohibition of threat or use of force in regional agreements does not only support the prohibition of threat or use of force in the UN Charter, but also strengthens the counterpart of the Charter prohibition in international customary law.

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[96] Helsinki Final Act, supra chapter "Questions relating to Security in Europe", para. VI.
[97] 1997 Charter of the OAS, Article 19, an amendment to the 1948 Pact of Bogata, which constitutes the founding charter of the OAS.
[98] Simma, p. 112, supra fn. 29.
[99] Cf. Chinese JIL, Al-Qahtani, M., *The Shanghai Cooperation Organization and the Law of International Organizations*, p. 130.
[100] SCO Establishment Declaration, para. 5, <http://www.sectsco.org/html/00088.html>, last visited 2008-06-30.

2.3 Threat of Force in Customary law – Threat of Force in Practice

Despite the fact that international agreements and international customary law often ought to and often do go hand in hand, the two sources of international law are to be regarded as two distinct, yet parallel, law systems in international law, which function independent of each other.[101]

The stated prohibition of war in the Kellogg-Briand Pact should be recalled here. As shown, it tended to make States reluctant towards threats of force – a State practice that ought to be counted as the birth of the prohibition of threat of force in pre-Charter international customary law.[102]

About four decades after the adoption the UN Charter and its prohibition of the threat or use of force, the ICJ settled a dispute between the USA and Nicaragua in the already mentioned *Nicaragua-case*. In this case, the ICJ laid down that a prohibition of the threat or use of force similar to that of Article 2(4) of the UN Charter exists in international customary law. This conclusion was reached much due to the consensus adoption of the FRD, from which – 'with due caution' – the *opinio juris* of States could be deduced. This *opinio juris* was taken to prove a corresponding prohibition of threat or use of force – bearing the character of *jus cogens* – in international customary law.[103] However, the Court carefully pointed out, that the statement of the existence of a corresponding customary prohibition of force does not have to mean that the two prohibitions are equally extensive. On the contrary, it was noticed that,

> "[O]n a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content."[104]

Then again, when the Court discussed the customary prohibition of force, it continuously returned to the formulation of Article 2(4) and did not try to

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[101] Cf. Nicaragua-case (Merits), paras. 177-179. In this case the ICJ refers to its earlier judgement in the *North Sea Continental Shelf* cases, in which it was stated that two identical rules can exists in international treaty law and customary law.

[102] See supra subchapter 2.1.1; Cf. Asrat, p. 50.

[103] Nicaragua-case (Merits), para. 188.
It was the 'Vandenberg reservation' of 1946 that caused the ICJ to do this statement on the correspondence of the prohibition of Article 2(4) and the prohibition of customary law. This reservation, submitted by the USA, deprived the ICJ jurisdiction in "disputes arising under a multilateral treaty, unless (1) all the parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction". The reservation forced the ICJ to refrain from applying Article 2(4) of the Charter and instead apply international customary law in order to reach a verdict. Cf. Nicaragua-case, para. 42; Bring, p. 24.

[104] Nicaragua-case, para. 175; Cf. Simma, p. 127.

determine the scope of the customary prohibition – a fact that can be taken to support the idea that the two prohibitions do not differ in scope.[105]

Nevertheless, the scope of the contemporary international customary prohibition of force is considered smaller than that of Article 2(4). It should be pointed out, that this is not an uncontroversial matter, but the prevailing view of today finds the scope of the customary prohibition to be smaller than the prohibition of the UN Charter. This means that, besides the right to self-defense (individual and collective) – which the Court found to be a part of international customary law as well – other areas, which in the light of the prohibition of Article 2(4) are subject to controversy – such as humanitarian intervention – possibly can be considered legal according to international customary law.[106] However, if such an action will stand a chance of meeting the requirements of being legal according to international customary law, it ought to be a prerequisite that the action is collective, not unilateral.[107]

If now the customary prohibition is smaller in scope, can there then be a larger acceptance of threats of force in international customary law? Indeed, despite the early practice of the signatory States of the Kellogg-Briand Pact, the practice of today may be another – perhaps a practice accepting threats of force? R. Sadurska has pointed out that, since the ICJ can be said to have reached a rather diffuse conclusion concerning the correspondent prohibition of Article 2(4) in international customary law, the existence of a prohibition of threat of force in international customary law is dubious.[108] B. Asrat on the other hand, claims that, since anticipatory self-defense is available under international customary law, this must mean that – in order for this type of defense to be legal – the threat of force evidently must be considered illegal under international customary law as well.[109]

For a certainty, it can be claimed that threats of force are prohibited in international customary law. Besides, since treaty law and international customary law have separate applicability – i.e. the two law systems do not replace each other – an action that can be deemed to stand in accordance

[105] Nicaragua-case, paras. 188 and 227.
[106] Nicaragua-case, para. 176; Simma, pp. 126-127.
Another area of controversy is the protection of nationals abroad. It has for long been debated if an intervention can be considered legal, if performed in order to rescue the lives of the intervening State's nationals abroad, if their lives are endangered and they lack protection of the foreign State. The number of such rescue operations that have taken place is vast. An example is the US attempt to intervene in Iran in 1980 in order to free its diplomatic staff in Teheran, which had been taken hostage. A rescue operation may not always be unlawful, but there exists no approval in international law – neither treaty law nor customary law – of such operations. See Simma, pp. 124-126.
[107] A collective intervention is usually easier to defend than a unilateral intervention, since the self-interest of a State can be ruled out faster. See Beckman, p. 37.
[108] Sadurska, pp. 248-249.
[109] Asrat, pp. 138 and 211.

with international customary law, might still cause a breach of a treaty obligation, thus invoking State responsibility.[110]

2.4 State responsibility

It is well established that if the prohibition of (imminent) threat of force, in treaty law and customary law, or, most likely, both of them simultaneously, is transgressed, the target State can, by itself or with help of others, respond in self-defense. The SC can in response authorize enforcement measures.[111] In addition to this, State responsibility can be invoked to oblige the law-breaking State to repair the injury caused by the transgression. This responsibility has been recalled in a GA resolution, stating 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 from acting in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and of the Charter of the United Nations and entails international responsibility."[112]

The International Law Commission (ILC) has in its draft on the Responsibility of States for International Wrongful Acts[113] put forward that, since an international obligation as important as the prohibition of the threat or use of force – arising under a peremptory norm of international law (*jus cogens*) – is of fundamental interest of the whole international community, not only the target State, which suffers the direct damages of the breach, any State may invoke State responsibility.[114]

The first and foremost obligation of the responsible State is to cease the unlawful act and guarantee that it will not be repeated. Meanwhile, other States are to co-operate to look after the cessation of the unlawful act and not to recognise the act as lawful.[115]

What will be the most appropriate form of reparation in case of a breach of the prohibition of the threat of force is naturally much dependent on the circumstances in each specific case. Some threats may cause the target State to take extensive (read expensive) safety measures, while other threats may not be considered equally grave, yet the anxiety caused by theses threats

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[110] Cf. Nicaragua-case, para. 175.
[111] See supra subchapter 2.1.2.1.
[112] See *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations*, UN Doc. A/RES/42/22, supra Annex, para. 1.I.1; Cf. Articles 1 and 2 respectively in the ILC-draft, see supplement chapter V.
[113] From now on referred to only as the ILC-draft.
[114] Article 48.1 (b) ILC-draft, see supplement chapter V.
[115] Shaw, pp. 714, 721; ILC-draft Arts. 30, (33), 40, and 41, see supplement chapter V.

still deserves to be made up for. A suitable form of reparation in every case – even if no assessable financial damages can be derived from the breach causing a need for compensation – must be a satisfying expression of regret and a formal apology.[116] It is, however, as pointed out by the ILC, important to remember that,

> "[S]atisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."[117]

To sum up, when adequate reparation of the breach of the prohibition is to be estimated, consideration of the graveness of the threat is of decisive importance in every case. When considering the graveness of the threat, it is of outmost importance to know the criteria of threats of force in order not to confuse a threat of force and a warning.

2.5 Criteria of Threats of Force

Now well familiar with the existence of the prohibition of threat of force in international law, from its creation until its present status, it is still not clear how a threat of force should be defined. I. Brownlie has characterized a threat of force as being,

> "…an express *or implied* promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal."[118] (emphasis added)

This description of threats of force has later become known as "the Brownlie formula". Apparently, threats of force must not be stated explicitly. In fact, threats of force may be pronounced with many different methods in many different forms. N. Stürchler, who has criticized the Brownlie formula as he finds that the threat of force and the use of force are not directly coupled as suggested in the formula, has put forward a credibility test that is of interest when considering if a statement delivered by a government might constitute a threat of force: *does a state credibly communicate its readiness to use force in a particular dispute*?[119] In this regard, Stürchler notes that,

> "A threat is credible when it appears rational to implement it, when there is a sufficiently serious commitment to run the risk of armed encounter. A calculated expectation is created that an unnamed challenge might incur the penalty of military force; no certainty is required as to whether force really will be used, or under what conditions it will be triggered or that there be an

[116] Cf. Art. 36 ILC-draft, see supplement chapter V.
[117] Art. 37(3) ILC-draft, see supplement chapter V.
[118] Brownlie, p. 364.
[119] Stürchler, pp. 38-42 and 259.

> urgent and imminent danger of its deployment. [...] All that matters is that the use of force is sufficiently alluded to and that it is made clear that it may be put to use. On the other hand, a threat will not be perceived or even recognised, without there being, so to speak, a peg of dispute on which to hang the expectation of the use of force."[120]

Before considering different methods and possible forms of expressing a threat of force, it must be emphasized that, it is very important to separate an illegal threat of force from a *warning*, which according to contemporary international law is considered legal.[121]

2.5.1 Warnings

Recalling what was said about The Hague Peace Conferences, it is clear that warnings have been a part of international law ever since these conferences.[122] But how are we to differ a threat from a warning? R. Sadurska has stated the difference between a threat of force and a warning as follows,

> "The threatener holds itself out as both willing and able to occasion the loss of values to the target if the latter does not comply with the former's demand; while the warner merely puts the audience on notice to behave with proper caution so as to avoid damage or injury."[123]

This is a subtle distinction, to say the least. In fact, a message of a threatener containing a general threat can operate both as a threat of force and a warning – threatening one audience while merely warning another. Such threats of force might very well not be directed towards any particular State – the target is usually disclosed in the context. Actually, what most often determines if a threat or merely a warning is at hand is the perception of the addressee. A threat can only be effective when the target State sees no other choice but to obey the will of the threatener.[124] If the target does not regard the message of the threatener as a threat, the rest of the international community surely will not react, if the threat not obviously violates the prohibition of threat of force and the target has a an irrational way of assessing it. However, what the threatener chooses to call it does not really matter – a threatener should not be able to conceal a threat of force by dressing it as a warning. Hence, the target State should be careful if receiving a warning, as this very well could be a threat of force.[125]

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[120] Ibid., p. 259.
[121] Cf. Sadurska, p. 245
[122] See supra subchapter 2.1.1.
[123] Sadurska, p. 245
[124] Ibid.
[125] For instance, during the Korean War, both the PRC and the US "warned" each other at several occasion, though they actually expressed real threats of force. On 2 October 1950, Chinese Premier Zhou Enlai declared that if the north of Korea was invaded, the PRC would not remain passive. The day after, the US via the Indian embassy received a private "warning" (not made public), stressing that the PRC would join the war if the US forces

2.5.2 Ways of Expressing a Threat of Force

When studying threats of force, the threats that probably first and foremost come to mind are the ones clearly (explicitly or implicitly) expressed in an oral or written statement. However, since States often strive to conceal their threats in order not to attract the attention of the international community, this way of expressing a threat of force is far from always employed. For instance, another way of expressing a threat can be done through a series of messages, which not individually expresses a threat, but taken together can be said to constitute a threat.[126] Now some threats of force – old as well as new – will be studied and notice will be taken of how threats of force can be expressed in many different ways – by speeches transmitted in television or radio, by news papers, by letters or not by messages but by mere actions.

2.5.2.1 Threats of Yesterday

The Cuba Crises – The beginning of the 1960's must be said to have one of the coldest periods of the Cold War, as the world then faced and was very close to a nuclear war. In 1961, US-trained exiles attempted an invasion in the Bay of Pigs in Cuba. The USSR expressed that it would support Cuba to repel the attack, and in connection with this warned the USA of a possible chain reaction. The USA responded that, if a military intervention would occur, it would protect the hemisphere.[127] The year after, during the Cuban Missiles Crises, the USA expressed an explicit threat of force against Cuba and the USSR as the USA had found out that a secret nuclear programme was implemented on Cuba. The USA made clear that if not dismantled, the missiles would be taken out by force. The USA also took action by imposing a maritime blockade against shipments from USSR destined to Cuba.[128]

The Brezhnev doctrine – A general threat of force, not aimed at any particular State, at least not explicitly, can be said to have been expressed by the USSR in connection with the Soviet invasion of Czechoslovakia during 1968. The invasion was executed as Czechoslovakia had tried to reform the State towards more liberal politics and economics with greater independence in relation to the "socialist democracy".[129] At the 1441st meeting of the SC, on 21 August 1968, the USSR claimed that the invasion was a measure of collective self-defense, since Czechoslovakia, according

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were to cross the 38th parallel. The US considered the message a mere warning, a bluff, which indeed not should be disregarded, but neither taken too seriously. On 19 October, the PRC joined the war with 200 000 troops, overwhelming the American troops at the border. Cf. Stürchler, p. 133.

[126] Cf. Sadurska, pp. 242-243.

[127] Stürchler, Annex, Table 1, p. 294.

[128] Ibid.

[129] Stürchler, pp. 184-185.

to the USSR, had appealed for assistance from its allies in the Warsaw Pact, as it experienced a threat from foreign and domestic reactions against the socialist social order in the State.

The representative of Czechoslovakia expressed that the government of Czechoslovakia never had consented to the intrusion and demanded an immediate withdrawal of the troops. At the same meeting, the representative of the USSR expressed that the USSR had repeatedly warned that it would not tolerate imperialist interference in the domestic affairs of the Czechoslovak Socialist Republic, nor in the relations between socialist States and that such attempts would be firmly rebuffed.[130] In a speech in November later that year, at the Fifth Congress of the Polish United Workers' Party in Warsaw, Leonid Brezhnev, General Secretary of the Communist Party of the USSR, repeated what had been stated earlier in August in the SC. He held that,

> "...when the internal and external forces hostile to socialism seek to revert the development of any socialist country toward the restoration of capitalist order, when a threat to the cause of socialism in that country, a threat to the security of the socialist community as a whole, emerges, this is not longer a problem of the people of that country but also a common problem...for all socialist states."[131]

This statement became known as the Brezhnev doctrine.[132] The promise of response to an attempt to revert the socialist structure can be regarded as a general threat of force. There were no threats of force, nor any force used, against the political independence of Czechoslovakia that would justify an action of collective self-defense.

Items relating to Operation Entebbe – In connection with the hijacking of an Air France flight, which was on its way from Israel to France, Israel on 3-4 July 1976 conducted a raid against Entebbe Airport in Uganda where the plane had landed and the hijackers held some of the passengers hostages. The already tense relation between Uganda and Kenya got tenser as Israeli planes that had conducted the raid refuelled in Nairobi on their way back to Israel. This caused the Ugandan President Idi Amin, in a radio speech on 5 July, to claim a right to retaliate and to redress the aggression performed by Israel and States collaborating with Israel, amongst which, he claimed, Kenya was one. It was repeatedly claimed that Kenya had aided Israel, an allegation which was firmly rejected by Kenya. The relations grew even tenser as Kenya with support of the USA put an economic

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[130] UN doc S/PV.1441, paras. 3 and 142; Cf Stürchler, p. 187.

[131] Cf. AJIL, Schwebel, *The Brezhnev Doctrine Repealed and Peaceful Co-Existence Enacted*, pp. 816-817.

[132] Ibid.

The Brezhnev doctrine is not very unlike the Monroe doctrine. Yet, as noted by Schwebel, these two declarations ought not to be compared as they were stated during very different circumstances, the Monroe doctrine in the mid-19th century and the Brezhnev doctrine more than a century later, when the international law looked very different from that of the mid-19th century.

blockade on Uganda, which made Amin threaten to invade Kenya. However, with growing domestic disturbances, Amin had to cease his threats and give in for Kenyan demands of reparation.[133]

2.5.2.2 Threats of Today

Threats relating to the situation in the Middle East – In connection with the tense relation between Iran and Israel, extremely grave threats of force have been stated in recent years, explicitly as well as implicitly. In two letters dated 27 October 2005, addressed to the President of the SC and the SG respectively from the permanent representative of Israel to the UN, the representative made references to statements of the President of Iran, Mahmoud Ahmadinejad, in which he, among other things, had declared that "Israel must be wiped off the map of the world ... and God willing, with the force of God behind it, we shall soon experience a world without the United States and Zionism".

The representative of Israel expressed that Israel found it appalling that a leader of a Member State of the UN would call for the destruction of another Member State and demanded a strong and resolute response from the international community.[134] The Iranian President had also at a later occasion denied the Holocaust, which, according to Israel, taken together with other circumstances, such as continuous support for terrorism, constituted a direct confrontation against Israel.[135]

In another letter dated 25 October 2006, Israel again referred to statements by the Iranian President, as reported in the Iranian Republic News Agency. The Iranian President was said to have declared that "This regime [Israel] is destined to end and it has no purpose. This regime is like a grounded battle vehicle that needs to be taken out of service" and that "The Zionist regime is doomed". The representative of Israel pointed out that these hateful comments and the poisonous words of the Iranian President contradicted Article 2(4) and further held that the lack of formal protest of the international community was undermining the stability in the region.[136] At a meeting, held by the SC on March 24 2007, the representative of USA strongly protested against the Iranian statements.[137]

In a letter dated 10 November 2006, addressed to the SG from the representative of Iran to the UN, the representative claimed that the Israeli letter of 25 October 2006 contained various distortions and baseless

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[133] Stürchler, pp. 143-145.
[134] UN doc. S/2005/681.
[135] UN doc. S/2005/776.
[136] UN doc. S/2006/841.
[137] Cf. UN doc. S/PV.5647, p. 10.
At the meeting, the representative of the US asserted that the call of the Iranian President to have Israel "wiped off the map" was a violation of Article 2(4) and stood "in stark contrast to everything this body [the UN] stands".

allegations, which actually were meant to distract the attention of the international community from the real threats that Israel posed to international peace and security. The representative of Iran continued with highlighting a number of statements by Israeli officials that Iran held to be unlawful and dangerous threats of force.

For instance, Iran invoked a statement of 10 November 2006 by Ephraim Sneh, a Deputy Minister in the Israeli cabinet. According to Iran he had threatened that Israel might launch a pre-emptive military strike against Iran's nuclear programme and said "I consider it a last resort. But even the last resort is sometimes the only resort". Moreover, the representative of Iran pointed out that on 21 April 2006, an Israeli newspaper, *Haaretz*, called for the assassination of the President of Iran. According to Iran, the newspaper had written that: "... his [the Iranian President's] elimination is therefore likely to contribute more to stability than to detract from it. The international condemnation of an Israeli assassination attempt on him would be limp and tolerable and is an alternative that seems more and more reasonable". The representative of Iran held that, as the Israeli policy and practices constituted a blatant defiance of the most basic and fundamental principles of international law and the UN Charter, these threats required an urgent and resolute response from the UN and especially the SC.[138] In a similar letter, dated 14 June 2007, the representative of Iran again condemned statements of Israel and demanded that Israel immediately cease and desist from threats of force.[139]

The DPRK nuclear programme – On 29 January 2002, US President Bush held a speech in which he claimed that States like Iran, Iraq and the DPRK (Democratic People's Republic of Korea) constituted an "axis of evil". In his speech he claimed that there was a grave and growing danger as these three States were striving to obtain weapons of mass destruction. He pointed out that every nation should know that America will do what is necessary to ensure the safety of the nation[140] – a statement that surely must be regarded as a general threat of force. When a US delegation was on a visit to the DPRK in October that same year, it was disclosed that DPRK had a nuclear programme by which it was trying to develop nuclear weapons. The USA and the Republic of Korea claimed that the programme constituted a violation of DPRK's international commitments, among them the NPT (Non-Proliferation Treaty). This led DPRK to withdraw from the NPT on 10 January 2003.[141] This in its turn triggered a crisis that made US President Bush threaten to use force if it turned out that diplomacy would fail.[142] On 9 October 2006 DPRK conducted its first nuclear test.[143] The

[138] UN doc. S/2006/884.
[139] UN doc. S/2007/354.
[140] Cf. <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>, last visited 2008-06-17.
[141] Journal of Conflict & Security Law, Asada, M., *Arms Control Law in Crisis? A study of the North Korean Nuclear Issue*, pp. 339-341
[142] Cf. Stürchler, p. 310.

nuclear test caused the SC to, already five days after the test, put harsh economic sanctions on DPRK.[144]

2.6 Conclusion

In this chapter, it has been established that the obligation of States to refrain from the threat of force in their international relations is well rooted as one of the most fundamental principles in international law. It has been demonstrated how the prohibition has evolved and how it looks today. How a threat of force can be expressed has been investigated and the right of not only the target State but the whole international community to invoke State responsibility in case the obligation is violated has been looked at.

What now remains to study in order to be able to answer the question of this thesis – if international organizations can be used in the interest of separate States to evade the responsibility of a violation of the prohibition of the threat of force – is the existence and regulations of international organizations on the international arena.

[143] NYT, O'Neil, J. and Onishi, N., *U.S. Confirms Nuclear Claim by North Korea*, Oct. 16 2006.
[144] UN doc. S/RES/1718.

3 International Organizations

Since the end of the Second World War the number of international organizations has grown significant. Often when a problem arises in international relations, an organization intended to solve the problem is established or an already existing international organization undertakes to deal with the problem[145] – "international organizations are the product of a targeted and systematic effort to ensure synergies of cooperation at the international level".[146]

Due to these problem-solving tasks, public international organizations (*hereafter* international organizations) have come to play an important role in international law. Not only have they proven themselves as often indispensable actors for mediation in international disputes, but also as important assistants in the development of international law. By observing the actions of States taken in international organizations, States' *opinio juris* in various fields of international law can often be distinguished. Thus, the work within an international organization contributes to the formation of international customary law.[147]

It is important to keep in mind that international organizations should and must not be regarded as a group of homogeneous international actors as they are far from alike. Despite the fact that most of them can be said to strive for greater global economic prosperity and security, the very nature of international organizations varies a great deal, as various conditions such as membership, purpose, results and values differs greatly from one organization to another.[148] The international organizations that this thesis will focus upon are mainly regional military organizations, as they are established to safeguard the security of the member States and – if considered necessary – use or threaten to use force.

3.1 Legal Personality

As actors on the international arena, it is essential for international organizations to be subjects of international law and enjoy legal personality – i.e. the capability of possessing and exercising rights and obligations

[145] Amerasinghe, *The Law of International Organizations: A subject which needs exploration and analysis*, pp. 10-11.
[146] Coicaud, *The Legitimacy of International Organizations*, p. 520.
[147] Shaw, International Law, p 1186.
[148] Coicaud, *The Legitimacy of International Organizations*, p. 520.

under international law – in order for the organizations to conduct their tasks and functions effectively.[149]

However, as international organizations are entities of international law created by States, for these organizations to be legitimate, they are fully dependent upon the recognition of States – if there is no State recognizing the organization it cannot be legitimate. Thus, international organizations have a secondary and derivative status *vis-à-vis* States.[150] In this form of derived personality, an international organization does not enjoy any "general competence" as that of States, but instead, the scope of the personality of the organization is to be found in the constitution of the organization.[151] This derived personality with restricted capacities was considered in 1996 by the ICJ in *Advisory Opinion on the Legality of the Threat of Nuclear Weapons in Armed Conflict*, in which the Court stated that,

> "The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[152]

The Court continued, however, adding an interesting remark concerning the scope of the capabilities, assuring that the competences of the organizations might not just be what have been explicitly stated in the constitution of the organization, but the constitution might also provide for implicit powers. The court held that,

> The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers.[153]

This was not the first time the court discussed the implied powers doctrine. It had been considered by the Court already during the *Reparations for Injuries Case* in 1949. In connection with the assassination of Count Bernadotte in 1948, in his employment as an agent of the UN during the Arab-Israeli conflict in 1947-1948, the question arose whether the UN as an organization was entitled to invoke State responsibility and bring claims of reparation of injuries before a court. Hence, the GA turned to the Court for

[149] Dixon, Textbook on International Law, p. 113.
[150] Coicaud, p. 523.
[151] See Dixon, pp. 104 and 114.
[152] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Advisory opinion of 8 July 1996, para. 25.
[153] Ibid., para. 25.

an advisory opinion on the matter.[154] After having determined that the UN was an international person enjoying legal personality, noting that it was a supreme type of international organization which could not carry out the intentions of its founders if it was devoid of international personality, the Court stressed that, the rights and duties of the UN were not the same as those of States, which possessed the totality of international rights and duties recognized by international law. Instead, the Court continued, the purposes and functions as specified or *implied* in the constituent documents and developed in practice set up the scope of the rights and duties of the organization.[155]

In this regard, it must be emphasized that what might be of importance for the legal personality is not merely the subjective intention of the member States, as stated in the constituent documents of the organization, but what also might be of relevance is the number of the member States of the organization. If the number of member States is substantial, the organization might be said to possess objective personality, which means that the personality of the organization can be maintained not only against members, but non-members as well.[156] In the *Reparations for Injuries Case*, the Court held that due to the fact that the signatory States of the UN at that time represented the vast majority of the members of the international community, they had the power to create an entity possessing objective international personality, not only recognized by the signatory States themselves.[157] On the other hand, if the members are few or the organization is regional in a region to which a State does not belong, it has been suggested that the State does not have to recognize the legal personality of that organization.[158]

However, as of today, what actually does determine whether an entity does possess legal personality or not is usually the constituent documents of the entity, whether it is specified or implied, along with the subsequent practice. And nowadays, certain international organizations, such as the UN, can actually be said to possess all capacities of legal personality almost to the fullest degree.[159]

It can thus be concluded that international organizations are subjects of international law possessing legal personality. A necessary consequence of this legal personality is the responsibility, not only towards the organization as in the *Reparation for Injuries Case*, but also the responsibility of the organization.[160]

[154] GA resolution 258 (III), para. 1.
[155] Reparations for Injuries Case, pp. 179-180.
[156] Shaw, p. 1189.
[157] Reparations for Injuries Case, p. 185.
[158] Cf. Shaw, p. 1189, supra fn 110.
[159] Dixon, p. 104.
[160] Shaw, p. 1199.

3.2 Responsibility for an International Wrongful Act

In their role as subjects of international law and actors on the international arena, it is only reasonable that international organizations are responsible for their actions in their relations with States or other international organizations. As this thesis is being written, there exists no instrument in international law concerning the responsibility of international organization corresponding to the ILC-draft on State responsibility.

Instead, to this day, when a question of responsibility of an international organization has arisen, analogies drawn from the law on State responsibility have been imposed.[161] F. Morgenstern once made an interesting comment in regard to the responsibilities of international organizations as she held that,

> There is no reason why rules of international law which are generally recognized as applicable by between States and which are not by their nature unsuitable for international organizations should not be automatically binding on the latter.[162]

In connection with this, Morgenstern asserted that,

> Such a conclusion has been justified on the ground that States bound by the rules of international law should not be able to evade them collectively.[163]

The observation made in this latter sentence is of particular interest here, as it seems an answer to the question of this thesis is approaching. International organizations must be held responsible for their actions as States should not be able to commit international wrongful acts by acting in the name of an international organization.

As early as 1963, when the ILC began working on the draft on State responsibility, the question arose whether the responsibility of other subjects of international law, such as international organizations, should be included as well. However, it was decided that the study of the responsibility of other subjects of international law should be postponed.[164] About thirty years later, the possibility of drawing analogies to the law of State responsibility was considered insufficient and this unsatisfying lack of regulation on responsibility of international organizations in the light of the ever growing importance and appearance of international organizations on the international arena, especially after the end of the deadlock in international relations caused by the Cold War, the need for regulations in this field became obvious. After a suggestion of the Working Group on the long-term programme of work of the ILC, the Commission, at its 52nd

[161] Shaw, p. 1200.
[162] Morgenstern, *Legal Problems of International Organizations*, p. 32.
[163] Ibid.
[164] A/CN.4/532, paras. 3-4.

session in 2000, decided to include the topic "Responsibility of international organizations" in its long-term programme of work.[165] After having received a mandate from the GA, the ILC began drafting on the topic in 2002, a work that is still in progress to this day.[166]

So far, the ILC has drafted and provisionally adopted a number of articles on the topic. According to Article 1 of these articles, which sets up the scope of the draft articles, the drafts articles apply to the international responsibility of an international organization for an act that is wrongful under international law and they also apply to the international responsibility of a State for the internationally wrongful act of an international organization.[167] In the commentary to this article it is underlined that, as it was never considered in the draft on State responsibility, that the responsibility of a State which is a member of an international organization responsible for a wrongful act is to be covered by the draft on the responsibility of international organizations.[168]

In the same commentary it is also highlighted that an international organization may be held responsible if it aids or assists a State in committing an international wrongful act.[169] According to Article 3, there is an internationally wrongful act of an international organization when conduct consisting of an action or omission, firstly, is attributable to the international organization under international law, and secondly, that act or omission constitutes a breach of an international obligation of that international organization.[170] However, if an international organization has been found responsible for an international wrongful act, this does not necessarily have to mean that, in the same set of circumstances, the parallel responsibility of other subjects of international law is excluded. Thus, if a State and an international organization have cooperated in the violation of an obligation imposed on them both, they are both responsible for that action.[171]

There are, however, two preconditions for the responsibility of an international organization, which aids or assists a State in the commission of an international wrongful act by the State. The international organization can only be held responsible if the organization assists the State with knowledge of the circumstances of the internationally wrongful act, and further, the act would be internationally wrongful if committed by that organization.[172] The State that directs or controls the organization in the commission of the wrongful act will be held responsible in accordance to

[165] A/55/10, para. 729.
[166] A/RES/55/152, para. 8; A/RES/56/82, para. 8.
[167] A/58/10, p. 34, para. 54.
[168] Ibid., p. 36, para. 6; Cf. ILC-draft on State responsibility, article 57, see supplement chapter V.
[169] Ibid., p. 35.
[170] Ibid., p. 45.
[171] Ibid., p. 47.
[172] Cf. A/60/10, p. 96, article 12.

Article 26 under the same preconditions as for the assisting organization, i.e. the State must be aware of the circumstances of the wrongful act and the act must be internationally wrongful if committed by that State.[173]

Article 26 concerns both member States and non-member States of the organization. In the case of member States, article 28 holds a most interesting provision, as it states that a State member of an international organization incurs international responsibility if it circumvents one of its international obligations by providing the organization with competence in relation to that obligation, and the organization commits an act that, if committed by that State, would have constituted a breach of that obligation.[174]

This provision applies whether or not the act in question is internationally wrongful for the international organization.[175] Actually, even if there is no specific intention of the State to circumvent the obligation, the State will be held responsible if an obligation, which the State is obliged to obey is violated by an act of the organization. However, what is required for responsibility to arise according to Article 28 is that the organization has been provided with competence to act in the field which cover the violated obligation. The possible overlap of responsibility according to Article 26 and Article 28 respectively has not been considered problematic, rather the contrary, it would only imply the plurality of bases for holding the State responsible.[176]

Just like in the case of a State responsible of a wrongful act, an international organization too has to cease the act if it is continuing and possibly also has to offer assurances and guarantees of non-repetition.[177] The organization is also obliged to make full reparation for the injury caused by the act.[178] It ought to be emphasized that responsibility of international organizations can arise in relation to both member States and non-member States. If the organization is non-universal, it has been considered more likely that responsibility occurs in relation to a non-member State.[179]

Yet, also similar to the situation of States, there can exist circumstances that preclude wrongfulness of an act that would otherwise be in breach of an international obligation. For instance, in accordance with Article 18 of the draft articles on the responsibility of international organizations, the wrongfulness of an act of an international organization is precluded if the act constitutes a lawful measure of self-defense taken in conformity with the principles of international law embodied in the UN Charter.[180]

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[173] A/61/10, pp. 280-281; Cf. ILC-draft on State Responsibility, article 17.
[174] A/61/10, p. 283, article 28, para. 1.
[175] Ibid., article 28, para. 2.
[176] Ibid., pp. 283 and 285-286.
[177] A/62/10, cf. Article 33, p. 202.
[178] Ibid., cf. Article 34, p. 203.
[179] A/57/10, para. 467.
[180] A/61/10, p. 265, Article 18.

There exists no rule in international law that *per se* prohibits an international organization to threaten to use or use force, corresponding to that of States in Article 2(4) of the UN Charter, but as should be considered obvious, peremptory norms of international law bind international organizations in the same way as States.[181] An international organization is thus as obliged as a State to comply with the prohibition of the threat or use of force. At the same time, an international organization also has the right to self-defense in case an armed attack occurs. If one of the member States of the organization is the target of an armed attack, the organization can invoke collective self-defense and may then resort to force – all in accordance with the principles of international law as embodied in the UN Charter.[182]

It is now clear that the obligation concerning the prohibition of the threat or use of force applies for international organizations in the same way as for States and also that the responsibility concerning a violation of this prohibition. Hence, the question of this thesis could already be given an answer, but before doing so, a closer look at the international organizations which are most likely to state a threat of force, namely regional organizations empowered to take military actions in the strive of collective security will be taken.

3.3 Regional Organizations – Military Measures and Collective Security

It almost goes without saying, the threat of force that may emanate from an international organization that is of interest in this thesis is a threat that actually is directed from one of the organizations member States against a third party, i.e. a State not member in the organization. Of course, scenarios in which a member State of an organization threatens another member State of the same organization can occur, yet the probability that the threatening State can use that organization to threaten one of its own members must be seen very unlikely.

In this regard, it is important to observe that there are two kinds of regional organizations on the international arena which work with collective security – regional organizations which, in accordance with Article 52[183] of the UN Charter, aim to maintain peace and security among the members of the organization and regional organizations which, in accordance with Article 51 of the UN Charter, aim to defend their members in case of an armed

[181] Cf. A/61/10, p. 275, Article 23; A/CN.4/564, paras. 47-48; Cf EJIL, Simma, p. 3.
[182] A/61/10, pp. 266-267; Cf. Simma, *NATO, the UN and the Use of Force: Legal Aspects*, p. 3.
[183] See supplement, chapter I.

attack of a third party. The former are thus internally focused, whereas the latter are externally focused systems of collective self-defense.[184]

Examples of regional organizations established to maintain peace and security among its members are OAS, OAU and the Arab League, while organizations such as NATO, WEU and SEATO are examples of regional organizations set up as collective (self-)defense alliances. These organizations with purposes of external defense are the ones that are of interest here, as their work concern not the relations among the members, but the relation between the members and a third state. Still, it is important to observe that regional organizations working with internal collective security sometimes also undertake to defend the members in case of external attacks. For instance, all of the aforementioned regional organizations – OAS, OAU and the Arab League – also exercise a function of collective self-defense under Article 51, although this is not the main purpose of the respective organizations.[185]

These kinds of organizations dealing with the threat and use of force are the ones most likely to express a threat of force – authorized as well as unauthorized. However, the practice that here is of interest is limited. Indeed, on a number of occasions during the 20th century the ICJ has considered various questions concerning responsibilities of as well as responsibilities towards international organizations,[186] yet the practice of the responsibility of international organizations assisting or aiding States in the commission of wrongful acts is very limited.[187]

The case that in this regard must be considered the most interesting here is the NATO bombings during the Kosovo war 1999. Already during 1998, when the humanitarian crises in Kosovo began, NATO threatened to strike by air if the Yugoslav President Milosevic and the Serbian security forces not ceased the suppression of the Albanian ethnic groups in Kosovo and withdrew the Serbian forces from the territory. At first, a large number of the Serbian troops withdrew, but in the beginning of 1999, the Serbian troops began reinforcements in Kosovo. The NATO threats were then repeated. When peace talks between the Kosovar Albanians and the Serbian forces failed and the Serbian forces intensified their atrocities against the Albanian groups, NATO launched the air strikes.[188]

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[184] Simma, p. 699.
[185] Simma, pp. 694-696.
[186] Cf. e.g. *Reparation for Injuries Case*, see under subchapter 3.1; Also confer *WHO v. Egypt Case*, in which ICJ, upon an request of the World Health Assembly, delivered an advisory opinion concerning the interpretation of an agreement of 25 March 1951 between WHO and Egypt, in order to elucidate the respective responsibilities of the WHO and Egypt according to the agreement, see Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, p. 73.
[187] A/CN.4/553, para. 28.
[188] <http://www.nato.int/shape/about/background2.htm#4>, last visited 2008-06-13.
In connection to this, just to highlight one of many critics to the NATO intervention in Kosovo 1999, an article by the well-known left-wing writer and critic Noam Chomsky shall be mentioned. Like many others, Chomsky in his article claims that a humanitarian

The military actions and bombings – the so called Operation Allied Force – which took place between 23 March 1999 and 10 June 1999,[189] was a new form of use of force by NATO, not supported on the grounds of self-defense. Instead, as the intervention lacked UN authorization, justification was sought on grounds of humanitarian necessity.[190] The NATO claim of rightful humanitarian intervention, in support of the repressed ethnic Albanian population, was not condemned by the UN, but it did not gain much support either.[191] As has already been discussed above, the rightfulness of humanitarian intervention is a highly disputed topic within international law.[192] States in general seem reluctant to use force in the safeguarding of human rights. It is not considered the right way to tackle a problem of human rights violations, since it probably only will make the situation worse for the suffering people.[193]

Furthermore, there is a widespread anxiety among weaker States that the right to humanitarian intervention will be used arbitrarily by forceful States, maybe not so much in the interest of protection of human rights as in the interest of the intervening States, rendering the forceful States a possibility to evade the peremptory norm in Article 2(4).[194] Interestingly enough, some States, e.g. Russia, before the bombings indicated that they would accept the threat of force if that could bring about a settlement between the parties, yet they would not accept an implementation of such a threat. As held by Stürchler, controversy over the threat of force in case of the NATO bombings was focused on its justification and not so much over the threshold of Article 2(4).[195]

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crisis cannot be solved by the use of force. Chomsky notes that the atrocities by the Serbian troops against the Albanian groups escalated after the NATO threats – something the NATO had predicted and thus actually was a way for the US/NATO to substantiate humanitarian intervention. See Chomsky N., *Judge US by deeds, not words*, New Statesman, April 9, 1999.

[189] <http://www.nato.int/kosovo/history.htm>, last visited 2008-06-10

[190] Shaw, pp. 1046-1047.

In connection to this, it ought to be mentioned that NATO was established in accordance with the right to self-defense as stated in Article 51 of the UN Charter. Cf. Article 5 of the North Atlantic Treaty.

[191] Ibid.

A draft resolution on the condemnation of the NATO bombings was submitted to the SC by Belarus and the Russian Federation (with support of India) for the SC's consideration (see UN doc. S/1999/328). However, the draft resolution was rejected by twelve votes against three. In favour were China, Namibia, the Russian Federation and against were Argentina, Bahrain, Brazil, Canada, France, Gabon, Gambia, Malaysia, Netherlands, Slovenia, United Kingdom, United States of America (see UN doc. S/PV.3989).

[192] See subchapters 2.1.2.2.2 and 2.1.2.2.3.

[193] Cf. Nicaragua-case (Merits), para. 268.

[194] Cf. Shaw, p. 1046.

Nevertheless, as claimed by Shaw, in cases of extreme humanitarian need the international community probably will accept a humanitarian intervention despite the violation of Article 2(4) that would follow such an intervention.

[195] Stürchler, p. 157.

On 29 April 1999, during the NATO bombings, the Federal Republic of Yugoslavia (FRY) submitted an application to the ICJ against ten of the (then nineteen) NATO States. The states – Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States of America – were in the application accused of having violated the obligation not to use force.[196] The same day, FRY also made a request for an indication of provisional measures against the same States and asked the Court to indicate that they immediately should cease the acts of use of force and refrain from any threats or use of force against FRY.[197] When considering the request for provisional measures, the Court removed two of the States – Spain and the United States of America – from the list since these States had never accepted the jurisdiction of the Court and without their respective consent the Court lacked jurisdiction.[198] In the remaining eight cases, the Court found that it had no prima facie jurisdiction on grounds invoked by FRY in the application and that the Court, at that stage of the proceedings, could not take account of additional basis of jurisdiction invoked by FRY or indicate any provisional measure in order to protect the rights claimed by FRY. Therefore, on 2 June 1999, the request for provisional measures was rejected.[199]

On 5 January 2000, FRY submitted a Memorial against the eight States still on the list, by which the FRY repeated its request as stated in the application.[200] In the Memorial FRY also invoked events that had occurred after 10 June 1999, i.e. the last day of Operation Allied Force and the NATO bombings. Among other things, FRY claimed that the respondent States were responsible of killings of Serbs and other non-Albanian groups, by FRY classified as an act of genocide, as the killings took place in an area controlled by KFOR[201], which FRY held, in its turn, was controlled by NATO and that acts of NATO were imputable to the respondent States.[202]

In its Preliminary Objections, France asserted that, "Operation Allied Force was devised, decided and carried out by NATO as such" and maintained

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[196] See e.g. ICJ Reports, 1999, General List No. 107, (Yugoslavia v. France).
In the application, the participation in the bombing of the territory of FRY was only one of a number of actions of the States invoked by FRY as violations of the prohibition of the threat or use of force.

[197] Request for the indication of Provisional Measures, 29 June 1999. Also see Preliminary Objections of the French Republic, 5 July 2000, para. 5.

[198] Request for the indication of provisional measures (Yugoslavia v. Spain), Order of 2 June 1999, paras. 34-35 and 40; Request for the indication of provisional measures (Yugoslavia v. United States of America), Order of 2 June 1999, paras. 27-29 and 34.

[199] See e.g. (Yugoslavia v. Belgium), Request for the indication of provisional measures, Order of 2 June 1999, paras. 45 and 51.

[200] Memorial, pp. 351-352.

[201] KFOR is a peace-keeping force in Kosovo deployed after the end of Operation Allied Force. KFOR was established on a mandate by the UN and is led by NATO. As this thesis is being written KFOR has 34 participating countries, of which 24 are member States of NATO. Cf. S/RES/1244; <http://www.nato.int/issues/kfor/index.html>, last visited 2008-06-13; <http://www.nato.int/kfor/structur/nations/placemap/kfor_placemap.pdf>, last visited 2008-06-13.

[202] Memorial, see sections 2.8.1.1, 2.8.1.2., 2.8.1.2.1. and 3.2.12.

that "France never acted either individually or autonomously".[203] In relation to the actions of KFOR (which is considered an international organization), France claimed that the responsibility lay with NATO and the UN, as it was NATO that was responsible for the "direction" of KFOR and the UN for the "control" of it. Hence, all acts by French contingents were carried out in the name of NATO.[204]

In connection to this, France invoked Article 28 of the ILC-draft on State responsibility as applicable *mutatis mutandis*, meaning that an internationally wrongful act committed by an international organization in a field of activity in which that international organization is subject to the power of direction or control of another international organization entails the international responsibility of that other international organization. Thus, maintained France, the Court could not rule without having determined the responsibility of the two respective organizations and as these organizations had not consented to the jurisdiction of the Court, and further pointed out that, since only States could be parties in cases before the Court, the Court lacked jurisdiction to rule the application.[205]

When finally considering the application of 29 April 1999 on the legality of the use of force by the NATO member States, the Court found that it still lacked jurisdiction in all cases. Thus, on 15 December 2004 it rejected the application.[206]

What has been illustrated when studying the NATO intervention in Kosovo is an example of how threats of force and the use of force – be it considered lawful or not – can be used by an international organization against a third State. Much more could also be said about NATO as such, e.g. issues relating to the organization's actions in Afghanistan after the terrorist attacks on September 11 2001, but as actions of individual actors then inevitably will be touched upon and these are not included in this thesis, this will be left aside.

However, before leaving NATO and this section about regional organizations, SHAPE (Supreme Headquarters Allied Powers Europe) and ACO (Allied Command Operations) ought to be mentioned, as it is of interest in regard to threats of force. At SHAPE, which is located in Brussels, Belgium, a multi-national group, ACO, is working to assess eventual threats of force against the NATO member States and devise plans how to act in various situations. SHAPE was established and initiated its work in the beginning of the Cold War, in 1951, as the NATO member States found it necessary to have a common working group assessing threats

[203] Preliminary Objections, p. 32, para. 41.
[204] Ibid., p. 33, paras. 45-46.
[205] Ibid., pp. 33-34, paras. 46-48.
[206] The Respondents did not consent to the jurisdiction of the Court in this specific case and invoked the *Monetary Gold-principle*, which gives that if a State does not consent to the jurisdiction of the Court in a specific case, the Court is prohibited from considering the case.

from the Warsaw Pact against the Western European countries. For instance, when the Soviet Union invaded Czechoslovakia in 1968, SHAPE informed NATO about military implications of the invasion.[207] The top post of ACO is held by SACEUR (Supreme Allied Commander Europe), which in its turn is a post always assigned to the USA.[208] Interesting to note is that France during the 1960's withdrew from the integrated military structure of NATO, as it found that it was dominated by the United Kingdom and the USA. French President de Gaulle claimed that SHAPE subordinated France to the US policy.[209] However, during spring 2008, French President Sarkozy expressed his wish for a French return to the military command of NATO.[210]

3.4 Conclusion

It has been established that international organizations play a very important role as actors on the international arena. Some of them enjoy a legal personality with a scope of right and duties almost as vast as that of States. Due to their growing influence on international relations, it has been considered necessary to draw up an international instrument concerning the responsibility of international organizations for international wrongful acts. A reason among others that a regulation on the responsibility of international organizations has been considered necessary was that States should not be able to evade their international obligations by acting collectively in the name of an international organization.

With these rules in mind, what now remains is to analyse if there is any possibility for States to conceal their threats of force by acting in the name of an international organization.

[207] <http://www.nato.int/shape/about/background2.htm>, last visited 2008-06-15; <http://www.nato.int/shape/about/structure.htm>, last visited 2008-06-15.
[208] <http://www.nato.int/shape/about/structure.htm>, last visited 2008-06-15.
[209] <http://www.nato.int/shape/about/background2.htm>, last visited 2008-06-15.
[210] The Economist, *Europe: Gaullist no more?; France and defense.*

4 Threats of Force and International Organizations

The prohibition of the threat or use of force, bearing the status as one of the most fundamental principles of international law, considers the threat of force and the use of force equally grave. However, that is theory. As has been seen, this does not stand in accordance with reality. In fact, it is quite far from it. When studying the practice of States, it is obvious that deeds are considered more than words.

Indeed, States have from time to time expressed their *opinio juris* concerning threats of force, for instance by adopting universal international agreements such as the FRD as well as regional agreements such as the Helsinki Final Act and The SCO Establishment Declaration, whereby the prohibition of the threat or use of force as stated in Article 2(4) of the UN Charter has been confirmed. These repeated actions have created a prohibition of the threat or use of force in international customary law and they indicate States' continuously reluctant attitude towards threats of force. Nonetheless, the frequent use of threats of force in international relations tells us a different story.

4.1 The inconsistency

The inconsistency between the prohibition of force in law and the threats in practice by States is apparent.

Are we to be perplexed by the inconsistency between law and practice? Well, I started out aware of the fact that threats of force often seem to pass by unnoticed or, which probably is worse, neglected. States and the international community often seem to turn a blind eye to threats of force. But can it really be as bad as it seems – that States and the international community do not care especially about such grave violations of international law as threats of force? No, it is not.

First of all, what I have learned when studying threats of force is that the very essence of a threat and the effect of it are much dependent upon the perception of the target State. If the target State does not consider the threat grave, or does not consider it a threat at all (but merely a warning, which is legal), the international community most assuredly will not do it either. Thus, it could be argued, that the primary responsibility to react on a threat of force and invoke State responsibility lies with the target State. Still, bear in mind that due to the graveness of a threat of force in itself, as the

violation of a *jus cogens*-rule it actually is, the target State does not necessarily have to condemn the threat, invoke State responsibility and demand reparation in order for the international community to be able to do the same.

As has been demonstrated, a threat of force is not just an offence against the target State, but the whole international community. The ILC-draft on State responsibility has showed us that other States are obliged to cooperate to look after the cessation of the unlawful act and not to recognize the threat as lawful. However, it seems that, if threats of force are left to pass by neglected, this is more to be blamed on the lack of invocation of State responsibility by the target State than on the blind eye turned by the international community. An efficient threat of force does indeed imply that the target State sees no other way than to yield to the will of the threatener, but this does not mean that the target State is not able to condemn the threat and invoke State responsibility. It must be considered unlikely that the target State, out of fear of the threatener, would refrain from such measures.

If there is to be more consistency between law and practice, the target State must react to and object to the threat of force. It must begin invoking State responsibility and demand reparation more often. The international community should not only react to support the target State, but also to preserve its own interests.

Of course, condemnations occur. In this regard, the indispensible role of the SC must be emphasized. Even if the SC from time to time is prevented from taking action due to the right of the permanent five to veto sanctions, the role of the SC for States to air their opinions must never be forgotten. It is a forum without comparison on the international arena, available for every State that wants to complain about actions it does not agree with. It is the best place for a State falling victim of an illegal threat of force to seek support from the international community. Though the complaints theoretically could end in sanctions but unlikely will, the targeted State at least have a valuable possibility to gain support from other States in the condemnation of the threat. Surely, if it complains, it most probably will get support from at least a few States. For instance, in the dispute between Israel and Iran threats were condemned by third States.

4.2 Self-defense and the Danger of Misuse

But then we are confronted with the right to self-defense and the danger of misuse of this right.

If the prohibition of threat or use of force has been violated, the offended State has an inherent right to self-defense. It is clear that it does not take an armed attack, i.e. an extensive use of force, in order for the right to self-

defense to become actualized. It is enough that a State is the target of an imminent threat of such an armed attack.

At first glance, it may seem like not just any threat of force can lead to a right to self-defense. As it takes a threat of force that almost has been carried out before the right to self-defense can be invoked, it appears that other threats of force, not that imminent, does not bring about a right to respond in self-defense. As a matter of fact, we saw that not just any use of force will lead to a right of self-defense either. The offended State must have been a target of an armed attack, which involves much more force than the mere use of force necessarily does.

Thus, it is apparent that, a threat of an imminent armed attack are considered worse than the use of force not involving so much force that it can be called an armed attack. An interesting comparison indeed, as it tells us that a threat of force can be considered graver than a use of force, if the threat involves much more force than the force that has been used.

However, this doctrine of the right to self-defense in case of an imminent threat of an armed attack seems to focus on the right to use force when responding in self-defense. Most probably, a threat of force taken as a measure of self-defense to another threat of force, whether it is imminent or not, would be considered lawful. As was demonstrated by Stürchler's credibility test, it is not necessary that the threat is imminent to be credible. Yet, it could be argued that reasonably the threat taken in self-defense should follow the conditions that are set up for the use of force in self-defense, i.e. it should be stated *immediately* after the violation has occurred, it should be *necessary* and it should stand in *proportion* to the threat or use of force it refers to, in order to be lawful and not considered a new, unauthorized, threat of force. If these conditions are met a threat of force in response to another threat of force must be considered lawful as a measure of self-defense.

A State could misuse the right to self-defense by accusing another State of having expressed a threat of force and then claim that it is entitled to express a threat of force in self-defense, although this is not true. To avoid such deplorable misuses of the right to self-defense, it could be argued that if the target State is to be entitled to invoke self-defense, the target State first and foremost should fulfil the three conditions stated above and further, the target State should have a burden of proof to show that the threat of force actually did take place. It should be no difficulty to a target State that has been offended by a real threat of force to prove the offence.

4.3 Merely a warning

One also encounter a problem in the fact that some States may try to dress a threat of force as a warning in order to try to make it appear as legal. Surely,

a situation in which a State expresses a warning, which the target State perceives as a threat of force can also occur. In such a case, the matter must be solved by an assessment of the statement. Considering Sadurska's description of the difference between a threat and a warning, it appears that what actually differs a threat from a warning is that a warning merely expresses that force *could* occur if due caution is not showed, while a threat tells the target State that force *will* occur if conditions to avoid the force are not met. Thus, it seems that the threatener must have expressed some form of willingness to use force, if the statement is to be regarded as a threat. This is a very subtle and thus also a very unsatisfactory distinction, yet the best we can achieve.

4.4 Acceptable threats

It is a fact that a number of threats of force deserve to be legally accepted as the consequences of a threat of force cannot be considered as destructive as those of the use of force. This seems to be the opinion not only among scholars of international law but among States as well. For instance, in connection with the discussions prior the NATO bombings during the Kosovo war, we observed such a legal blessing expressed by Russia. Strongly opposing the use of force in the specific case, Russia held that it would accept a threat of force if this could bring about a settlement between the parties.

It can concluded that, in general, States do not consider the threat of force as grave as the use of force. Nevertheless, some threats can be considered even graver than a use of force.

Although, State responsibility and demands for reparation seldom is invoked in regard to threats of force expressed by a State against another State, the possibility exists. This possibility of having to repair the damages caused by the threat, as well as the possibility of having to face a condemnation of the international community and the humiliation this can bring about, are two circumstances that can make a State reluctant to express a threat of force. This leads us to the question at issue in this thesis:

Can a threat of force be concealed by an international organization, i.e. can States hide their intention to threaten with force by acting in the name of an international organization and thereby evade State responsibility?

The role of international organizations on the international arena is considered more and more important by every day. As the important actors they are, many of them enjoy legal personality with a scope of right and duties almost as vast as that of States. Some of them are given the authority

to handle matters involving the threat and use of force – under the precondition that that is made in accordance with the UN Charter.

One can establish the fact, naturally, that the obligation not to violate the prohibition of the threat or use of force applies to an international organization to the same extent as for a State. Furthermore, as held by F. Morgenstern, there is no reason why rules of international law, which are applicable between States should not be binding upon international organizations as well, as to prevent States from trying to evade these rules collectively. This is of particular importance in regards to peremptory norms such as the prohibition of the threat or use of force. Surely, one could further argue that an international organization should not be able to invoke the right to exercise measures of collective self-defense unless it was under a duty to comply with the obligation to refrain from the threat or use of force, since the right to self-defense is an exception to the prohibition of the threat or use of force, in international treaty law as well as international customary law.

When it comes to the possibility of a State to conceal a threat by acting in the name of an international organization, we can conclude, without any particular doubts, that this ought to be rather impossible. Whether a threat of force is expressed by a State acting individually or an international organization – commissioned by one or more of its member States, or even a non-member State – the threat is always dependent upon the perception of the target State. At first glance, it might appear that it ought to be a bit confusing to the target State to locate from which State or States the threat originates, when a threat is expressed by an international organization. However, as pointed out by Stürchler in his credibility test, a threat will not be perceived or even recognised, without there being, so to speak, a peg of dispute on which to hang the expectation of the use of force. The threat of force thus ought to steam from an already existing dispute. Thereby, it will be easier for the target State to locate the origins of the threat by revising its foreign relations and see in which State or States interest the threat of force has been expressed if expressed by an international organization.

It can thus be concluded that it is not possible for a State to conceal a threat of force by acting in the name of an international organization.

4.5 Responsibility

Before considering the possibility of invoking responsibility of collaborating international organizations and States, it is important to note that since the work of ILC on the responsibility of international organization is still in progress as this thesis is being written and the articles have not been finally adopted, the articles shall be considered with due caution.

However, there ought not to be any reason to doubt that the articles I have studied will be applicable in a relatively near future.

If a State has been offended by a threat of force expressed by an international organization and is able to locate the threat as originating from a particular State, I have learned that, according to the ILC-draft articles on responsibility of international organizations, parallel responsibility can be invoked both in regard to the international organization and the State. If an international organization has aided a State to express a threat of force in order to try to conceal the threat, both the organization and the State are responsible.

However, if the target State is unable to locate the origins of the threat and thus unable to invoke the responsibility of a specific State, it should of course at least invoke the responsibility of the international organization. Yet, a precondition for the responsibility of an international organization when aiding a State in committing an international wrongful act is that the organization is aware that the act is wrongful. In the case of a threat of force there ought to be no doubt that the international organization should be aware of the wrongfulness of the threat.

Nevertheless, one could ask if there maybe exists a possibility that a State could deceive an international organization by claiming that it had been threatened and thus demanding the international organization to state a threat of force as a measure of collective self-defense. It may very well be so. However, when it comes to grave violations of international law such as the threat of force, the international organization must be considered to be under an obligation to control that the claim of the State demanding collective self-defense can be proven to be correct.

Thus, one could argue that, if an international organization, after having revealed from which State the threat originates, was to be excused from the wrongfulness of a threat of force it thought was a measure of self-defense, it should, before expressing the threat, carefully have looked into the claim of the so-called offended State to see if a right to collective self-defense really existed. Still, it must be considered very unlikely that the international organization would manage to escape the responsibility.

Moreover, if an international organization has been provided with competence in relation to a breached obligation, the member States incurs international responsibility. Even if a member State did not mean to violate the obligation, it will be held responsible for the acts of the organization. Hence, if an international organization such as a regional defense alliance, which is empowered to threat and use force in self-defense, expresses a threat of force, all its members will be held responsible. The threatened State thus has a possibility to invoke State responsibility of each and every one of the member States and the member States will not manage to be let off responsibility on grounds that they thought the measures were executed as collective self-defense.

Familiar with these rules of the draft articles, an argumentation such as the one put forward by France concerning the responsibility of the actions of KFOR and NATO appear untenable and must be considered further. France asserted that if the responsibility of the NATO member States were to be considered by the Court, the Court would first have to rule on the responsibility of KFOR and NATO respectively for the alleged wrongful acts. France underlined that, as international organizations are not and cannot be parties in cases before the Court, the Court lacked jurisdiction.

Is this the deplorable truth? It would be deplorable, as it would mean that international wrongful acts carried out by States acting collectively in the name of an international organization never could be ruled on by the ICJ as the Court cannot rule on the acts of international organizations. One must argue, that although it is not possible for the ICJ to rule on the responsibility of international organizations, it is only reasonable that the Court should be able to consider if an international wrongful act has been committed by an international organization and further rule on the responsibility of States for the direction of the organization that has lead to the wrongful act.

It is clear that the Court has given advisory opinions in which both the responsibility of and the responsibility towards an international organization have been considered. Once again, according to the draft articles, the responsibility of an international organization and the responsibility of the States directing the organization are two parallel responsibilities, although the responsibilities concern the same wrongful act. Thus, though it cannot rule on the responsibility of the international organization, it should not be a problem for the Court to consider if an international organization has committed an international wrongful act and rule on the responsibility of the directing States.

4.6 The Necessary Consent

Another circumstance to deplore is that the jurisdiction of the ICJ is as dependent upon the consent of States as it is. Having been afraid of losing too much of their sovereignty, some States have not accepted the jurisdiction of the Court, and other States that have accepted the general jurisdiction of the Court sometimes claim the right of not having to consent to the jurisdiction of the Court in specific cases. If we are to overcome the threat of force in international relations the jurisdiction of the ICJ must be less dependent upon the consent of States.

As deplorable as it is, I can observe that States cherish the principle of State sovereignty higher than the prohibition of the threat or use of force.

It might not sound that serious, but let us do an interesting comparison. Picture the scenario that a burglar threatened to use or used force to get into your house. It would appear extremely ridiculous if the burglar later had to consent to the jurisdiction of a court before being put on trial for the threat or use of force. However, as there is no international institution standing above States and their sovereignty, this is the case in international relations. Still, every State – whether it is large or small, whether it is rich or poor, whether it is militarily strong or weak, whether it belongs to a strong military alliance or not – has the same obligation towards other States and the whole international community just like a civil citizen has obligations in a State towards other citizens and the State itself to refrain from the threat and use of force.

In this regard, the UN and its sanctions system is invaluable and indispensible. However, as the *sui generis* organization the UN is with a universal membership, it must be argued that more extensive powers ought to be given the organization and its organs, of which the ICJ is one. Of course, to give the UN more extensive powers would acquire a reform of the structure of the SC to make it look more like the international community of the 21st century than that of 1945. As Article 2(1) of the UN Charter states that that the principle of sovereign equality of all member States constitutes the base of the organisation, it appears rather remarkable that the constitutional system of the organization is permeated by the unique position that the permanent members of the SC hold.

Fortunately, such a reform is currently under consideration. What will determine the outcome of this consideration is how States, when guarding the principle of sovereignty, choose to play their political games.

5 Conclusion

International politics and international law are two sides of the same coin. International politics have an inevitable influence on international law and international law sets up limits on how international politics is allowed to be performed. However, international law must never have to subdue to realpolitik. Far too often threats of force are used by States in their international relations in order to affect the targets to behave in line with the interests of the States expressing the threats.

International organizations, which have been created in the interest of promoting peace and security, have from time to time been used by States to execute actions that appear remarkable and questionable as they do not comply with international law. International organizations have then not been used as much to guard the peace as in the interest of the States directing the organizations. However, in regard to the threat of force, international organizations can fortunately not be used by States to conceal the threats in order to evade State responsibility.

It would be unfair not to praise the international community for its extraordinary development of international law during the second half of the 20th century, all built on the political will of States. Though much remains to improve, it must be underlined that never before has for instance human rights been as protected as they are today, nor have armed attacks on States been as condemned as they are today. Much of this of course rest upon the globalization and the possibility of the civil citizens of States to participate in both national as well as international events to a far greater extent than before.

Nevertheless, one must argue that, as long as the principle of sovereignty has a right of precedence in relation to the prohibition of the threat or use of force and the jurisdiction of ICJ has to stand aside when the Court lacks consent, States are given too much room – whether they are acting individually or with the help of other States in the name of an international organization – to exercise realpolitik when playing their political games.

Supplement

I. Charter of the United Nations

Article 1
The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2
The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. 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.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.

Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Article 24

1. In order to ensure prompt and effective action by the United Nations,its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 39
The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41
The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42
Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 51
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, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 52
“1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their

activities are consistent with the Purposes and Principles of the United Nations. (…)"

Article 55
With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
a. higher standards of living, full employment, and conditions of economic and social progress and development;
b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56
All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Article 103
In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 107
Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

II. Covenant of the League of Nations

THE HIGH CONTRACTING PARTIES,

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,
by the prescription of open, just and honourable relations between nations,
by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and
by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another,
Agree to this Covenant of the League of Nations.

(…)

Article 10
The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

Article 11
Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.

It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

(…)

Article 13
1. The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement.

2. Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.

3. For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.

4. The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.

(…)

Article 15

1. If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof.

2. For this purpose the parties to the dispute will communicate to the Secretary General, as promptly as possible, statements of their case with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

3. The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

4. If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

5. Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

6. If a report by the Council is unanimously agreed to by the members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

7. If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

8. If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

9. The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within fourteen days after the submission of the dispute to the Council.

10. In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

Article 16
Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

III. The Hague Conventions

Hague Convention I of 1899

Article 27
The Signatory Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the conflicting parties of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

Hague Convention I of 1907

Article 48
The Contracting Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

In case of dispute between two Powers, one of them can always address to the International Bureau a note containing a declaration that it would be ready to submit the dispute to arbitration.

The Bureau must at once inform the other Power of the declaration.

Hague Convention II of 1907

Article 1
The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration, fails to submit to the award.

Hague Convention III of 1907

Article 1

The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

IV. Kellogg-Briand Pact

Article 1
The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

Article 2
The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

V. Responsibility of States for Internationally Wrongful Acts (ILC-draft)

Article l
Responsibility of a State for its internationally wrongful acts
Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2
Elements of an internationally wrongful act of a State
There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and
(b) Constitutes a breach of an international obligation of the State.

Article 17
Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) The act would be internationally wrongful if committed by that State.

Article 30
Cessation and non-repetition
The State responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;
(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31
Reparation
1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 33
Scope of international obligations set out in this part
1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Article 36
Compensation
1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37
Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 40
Application of this chapter
1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41
Particular consequences of a serious breach of an obligation under this chapter
1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

Article 48
Invocation of responsibility by a State other than an injured State
1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
(b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Article 57
Responsibility of an international organization
These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

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