

Post-1996 Scholarly Interpretations of the Legal Status of Threat of Force

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International norms prohibiting the use of armed force pre-date the Charter of the United Nations (see: the Kellogg-Briand Pact¹), but the Charter of the United Nations (“the Charter”) distinctly codified the prohibition of the use of force in Article 2(4) leaving only two legal methods by which to pursue force.² Concurrently addressed in the text—but disproportionately ignored in legal analyses—is the additional prohibition of *threats* of force. While both the use and threat of force are prohibited in parallel form in the Charter, many scholars and practitioners disagree as to whether the lawfulness of threats of force is properly interpreted as identical to the lawfulness of use of force. In considering threats specifically, identifying the threshold that distinguishes acceptable defensive military preparedness from a readiness to exert illegal armed force in a particular situation can be convoluted and often requires a heavy, contextual analysis. Nonetheless, the standard for the legality or illegality of a threat of force—established in Article 2(4) of the Charter—remains the same; it is the application of this standard that relies on context and the particular facts of any conflict. As such, understanding the proper legal standard is essential.

¹ *General Treaty for the Renunciation of War as an Instrument of National Policy* (August 27, 1928)

² *The Charter of the United Nations*, art. 2, para. 4. (1945).

Threats of force carry particular weight when issued (or inferred) in reference to weapons of mass destruction like nuclear warheads. In 1996, the International Court of Justice (ICJ) issued an advisory opinion on the legality of nuclear weapons after the General Assembly requested guidance.³ Twelve years later, though, ambiguity persists, nuclear deterrence policies remain the status quo, and states continue to threaten nuclear destruction with varying levels of credibility. Particularly as we move into a world where nuclear weapon states are modernizing rather than disarming, and multi-polarity challenges the status quo of previous decades, it is important to thoughtfully consider an appropriate interpretation of the legal prohibition of threats of force and its implications.

This paper will consider the legal status of the prohibition on threats of force as interpreted by scholars and demonstrated through certain case studies. The first section will identify and consider the relevant legal instruments to this analysis, as well as more general policies at issue, like nuclear deterrence. The next section will consider several of the leading academic voices on the legality of threats of force in international law. While many scholars have analyzed the legality of *use* of force since the codification of the general prohibition in the Charter, fewer have conducted in-depth analyses of the legality of *threats*. The third

³ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, 226 - 227.*
See: <https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>

section will consider a few instances of illegal threats highlighted by the authors, including findings of a tribunal and independent fact-finding mission pertaining to specific conflicts. Fourth, I will briefly analyze the current scholarship to identify the most persuasive arguments. Finally, I will conclude with my view of the strongest interpretation of the legal status of threat of force generally as well as in relation specifically to threats of nuclear force. I will conclude that threats of force are illegal certainly when issued as a challenge to the territorial integrity or political independence of a state, as expressly stated in the Charter, and also likely illegal in many scenarios beyond these two circumstances, so long as the “envisaged use of weapons” would be contrary to humanitarian law.⁴ To that end, I will specifically conclude that threats of nuclear force are *always* unlawful.

Relevant Legal Instruments and Institutions

The instruments and institutions that provide a foundation for understanding the prohibition on threats of force include the Charter of the United Nations—specifically Articles 2(4) and 51, the International Court of Justice (ICJ)—in particular the Court’s 1996 *Nuclear Weapons Advisory Opinion*, the Rome Statute of the International Criminal Court (ICC) and its Kampala Amendments, the Nuclear Non-Proliferation Treaty (NPT), and the

⁴ *Legality of the Threat of Use of Nuclear Weapons Advisory Opinion*, I.C.J. Reports 1996.

2017 Treaty on the Prohibition of Nuclear Weapons (TPNW). It is also helpful to understand policies of nuclear deterrence generally.

First, the Charter of the United Nations sets the legal foundation for the prohibition on the threat of force. Held concurrently in the text with the prohibition on the use of force, the legal status of the threat of force is often subsumed in the prohibition of use—meaning many would consider that where use of force is illegal, so is the threat of the same force. The Charter's prohibition lies in Article 2(4) and states:

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 6}

While Article 2 does not make clear whether the proscribed threat or use of force is exclusive to military action or also includes economic, political or other variations of force, read in the context of the Charter as a whole (“armed force shall not be used...”),⁷ most scholars interpret Article 2 as referring to armed force. In the context of the Charter as

⁵ *The Charter of the United Nations*, art. 2, para. 4. (1945).

⁶ A. Randelzhofer, B. Simma, ed., *The Charter of the United Nations. A Commentary*, 200, vol. I (Oxford, OUP 2002).

⁷ *The Charter of the United Nations*, preamble (1945).

whole, when interpreting the legality of threats of force specifically, it is important to note that the threat of force is prohibited not only against the territorial integrity or political independence of any state, but also prohibited in broader way—that is, when the threat operates in any way inconsistent with the purposes of the UN. As such, threats of force may *still* be unlawful even if the territorial integrity or political independence of a state is not threatened.

The prohibition of use of force finds two explicit exceptions in the Charter: the Security Council's authority under Article VII and Article 51 (self-defense). Similarly, scholars cite both exceptions to the prohibition on threat of force as well, in particular Article 51. Article 51 establishes the legal standard for self-defense, and reads:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.⁸

⁸ *The Charter of the United Nations*, art. 51 (1945).

Several of the authors below discuss when a threat of force (whether or not followed by actual use of force) may be lawful in self-defense and when such a threat on its own constitutes illegal action. James Green and Francis Grimal, whose work is further discussed below, look particularly closely at when a threat of force may qualify as an appropriate legal strategy of self-defense.

The International Court of Justice (ICJ) is the primary judicial body of the UN. The ICJ hears and decides cases between member-states and may also issue advisory opinions when requested. The advisory opinions serve an important purpose in interpreting international law on the whole and identifying developing norms. The ICJ's 1996 *Nuclear Weapons Advisory Opinion* is of particular relevance to any discussion on threat of nuclear force.⁹ Scholars also refer to the Court's 1986 *Nicaragua* opinion as well as the *Corfu Channel* case—one the court's earliest decisions—for guidance interpreting the prohibition of threats of force in international law.¹⁰

In the ICJ's 1996 *Nuclear Weapons* opinion, issued in response to a 1994 request from the UN General Assembly, the Court concluded that while international law does not

⁹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, 226 - 227. See: <https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>*

¹⁰ *Corfu Channel Case (United Kingdom v. Albania), I.C.J. Reports 1949; Nicaragua v. United States of America, I.C.J. Reports 1986.*

specifically proscribe the threat or use of nuclear weapons, international law pertaining to force—including humanitarian law—applies to nuclear weapons as it would to other weaponry.¹¹ The Court, though, largely abstained from issuing any clarifying guidance on the legal status of nuclear weapons generally. While the Court found that threat or use of nuclear weapon would “generally” be in conflict with international law, it would “not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.”¹² The language “the very survival of a State” raises more questions than it offers answers regarding what circumstances threaten a state’s survival. The Court’s judges were divided over this issue, and multiple judges issued separate opinions in addition to the main *Advisory* opinion. While the court abstained from declaring nuclear weapons or their possession inherently illegal or unlawfully threatening, the ICJ president at the time, Mohammed Bedjaoui, said: “I cannot sufficiently emphasize that the Court’s inability to go beyond this statement of the situation in no way can be interpreted to mean that it is

¹¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, 257.

¹² *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, 266.

leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons.”¹³

Next, the Rome Statute and its definition of the crime of aggression—codified in the Kampala Amendments in 2010—are relevant when analyzing threats of force as well. The Rome Statute is one of the primary instruments of international law to develop after the Charter. In 2010, the Kampala Amendments to the Rome Statute defined and codified aggression; legal accountability for the international crime finally went into force in July 2018. The crime of aggression is committed by “the planning, preparation, initiation, or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression, which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”¹⁴ An act of aggression is defined as “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.”¹⁵ Marco Roscini, discussed below, notes that many state parties to the Rome Statute were reluctant to include any reference to

¹³ Sauer, Tom and Joelen Pretorius. “Nuclear weapons and the humanitarian approach” in *Global Change Peace & Security* Sept. 2014.

¹⁴ UNGA, *Rome Statute of the International Criminal Court* (amended 2010), 17 July 1998, art. 8(1).

¹⁵ *Id.*

threats in the definition of the crime of aggression. Indeed, threats of force were explicitly excluded when the statute was updated with a definition through the Kampala Amendments¹⁶ The preambular paragraph of the Statute, though, does reference threats, but exclusively by way of referring to the Statute's foundation in the principles of the UN Charter, including Article 2(4).¹⁷

While many of the preparatory meetings proposed—and rejected—drafts of a definition that included threats of aggression; ultimately the definition that succeeded allows us to properly interpret the Statute to criminalize only actual aggression. The Statute splits aggression into stages, such as “planning and preparation”; however, if any of the earlier stages, including planning and preparation do not evolve into armed force-aggression, it would not constitute the crime. The scholars discussed below agree that the Statute does not directly implicate interpretations of the threat of force, not even through planning and preparation; as aggression is understood to require the actual use of force as detailed in the statute.¹⁸ As any actual implementation of aggression would be unlawful, however, so likewise would be any threat to engage in aggression.

¹⁶ Roscini, 268.

¹⁷ Roscini 244; *see also: Rome Statute*, preamble.

¹⁸ UNGA, *Rome Statute of the International Criminal Court* (amended 2010), 17 July 1998, Art. 8(2)

The Treaty on the Non-Proliferation of Nuclear Weapons, or the Non-Proliferation Treaty (NPT), is an effort to bridge the gap between the nuclear weapons states and non-nuclear weapons states while controlling the peaceful use of nuclear energy. While not textually-specified among its preamble and eleven articles, the Treaty rests on three overarching themes. These substantive “pillars” are: 1) non-proliferation of nuclear weapons; 2) disarmament; and 3) development of peaceful uses of nuclear energy.¹⁹ The disarmament obligations of the nuclear weapon states are established in Article VI of the NPT, which requires the pursuit of “good faith” negotiations to halt the nuclear arms race and nuclear disarmament.²⁰ The nuclear powers—the United States and Great Britain in particular—advocate for a “step-by-step” approach to meeting their Article VI obligations for nuclear disarmament, while the non-nuclear weapon states have repeatedly proposed, generally unsuccessfully, resolutions that would end nuclear arms development entirely in order to begin implementing Article VI’s further call for total disarmament.²¹

The 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW) is the first legal instrument that attempts to more fully enact the NPT’s disarmament provisions by calling

¹⁹ *Id.*, 47.

²⁰ UNGA, *Treaty on the Non-Proliferation of Nuclear Weapons*, art. VI (1970).

²¹ Burns, Richard. *The Challenges of Nuclear Non-Proliferation* (London: Rowman & Littlefield, 2015), 59.

for a complete prohibition on nuclear weapons—their possession, development, and, of course, use. The preamble of the Treaty recalls that:

In accordance with the Charter of the United Nations, States must refrain in their international relations *from the threat* or use of force against...any State...and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources"²² (emphasis added).

The text of the TPNW includes crucial language to proscribe threats of nuclear force specifically, justifying its proscription with the basic tenets of international humanitarian law.

While it is unlikely that the nuclear weapon states will sign on to the treaty in the foreseeable future, the adoption of the TPNW by 122 UN member-states in July 2017 solidifies the existing prohibitory norm against threats of nuclear force. The TPNW, though, will not be a binding instrument until it enters into force upon its 50 required ratifications. Even then, the treaty will only bind those member-states who have ratified it. Its entry into

²² *Treaty on the Prohibition of Nuclear Weapons*, preamble (2017).

force, nonetheless, will reinforce the norms against the use and threat of use of nuclear force.

In line with the humanitarian principles that provide the foundation for the TPNW, the UN Human Rights Committee recently adopted a new general comment on the right to life. The comment specifically refers to the threat or use of nuclear weapons, among other weapons of mass destruction, as incompatible with respect for the right to life and states that such threat or use is likely criminal under international law, as nuclear weapons by their nature are “indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale.”²³ While nuclear weapons still number close to fifteen thousand today and several countries maintain policies of nuclear deterrence, relying heavily on their continued weaponization, the TPNW along with the UNHRC’s newly-revised stated understanding of the right to life work in tandem to reinforce the norm against nuclear weapons, including the threat of their use.

Finally, the nuclear powers have stalwartly implemented policies of nuclear deterrence for decades, illustrated through positions like mutually-assured destruction (MAD) that promise nuclear retaliation upon attack. While MAD was a hallmark of the Cold

²³ UN Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life. para. 66 (2018).

War and the height of the nuclear arms race, deterrence policies remain the standard among nuclear weapon states today. Deterrence refers generally to the policy of maintaining a nuclear arsenal that a state intends to use if subject to a nuclear or even a conventional attack.²⁴ The rationale of deterrence policies is that if a state is prepared to launch nuclear weapons, potential enemy states will refrain from attacking or infringing on the nuclear weapon-possessing states' sovereignty to avoid retaliation. In 1996, the ICJ abstained from making any notable remarks on the legality of policies of deterrence, stating that while the readiness and intention to use nuclear weapons must be "credible" to be effective, whether that threat would be illegal per Article 2(4) depends on how the actual use of the implied or threatened force would be implemented.²⁵ While the ICJ explicitly said in its *Nuclear Weapons* opinion that they could not decide the legality of deterrence, the Court noted a growing movement in favor of nuclear-free zones and disarmament generally.²⁶ While the nuclear weapon states in particular tend to argue that deterrence policies effectively serve their named purpose, the growing international consensus outside

²⁴ Drummond, Brian, "Is the United Kingdom Nuclear Deterrence Policy Unlawful," *New Zealand Yearbook of International Law* 109, vol. 11 (2013).

²⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, 246-247.

²⁶ *Id.*, 255.

the nuclear powers is that deterrence is insufficient to prevent the use of nuclear weapons; many states and disarmament advocates believe that the only way to ensure against a nuclear attack or accident is to proscribe the possession of weapons entirely.²⁷ Under a regime where nuclear weapons are peremptorily prohibited, possession or development of weapons is more likely to constitute a threat than it is today.

Literature Review

In recent decades, several scholars have considered the legality of threats of force as distinct from use, and several lines of legal reasoning have developed as a result. Some scholars and practitioners view threats in the international context as wholly unlawful save for the two explicit exceptions in the Charter. Marco Roscini and Nikolas Stürchler, discussed below, tend to fall into this category. Others argue that threats of force actually hold an important place in international relations and can serve the beneficial purpose of preserving peace and preventing war, as seen in Romana Sadurska's arguments. These voices argue that under slightly more expansive circumstances, threats should be legal, in part because they are already condoned and usefully so. While Sadurksa published her analysis of the legal status of threats of force years before the ICJ's *Nuclear Advisory* opinion,

²⁷ Vail, Christopher. "The Legality of Nuclear Weapons for Use and Deterrence," *48 Geo. J. Int'l L.* 839 at 864. (2017).

contemporary voices continue to promulgate her thesis. Additional voices, such as Dino Kritsiotis, consider threats between states, whether or not ultimately illegal, as somewhat inevitable and find that evolving legal interpretations should be tailored to account for this.

Central to this discussion is, of course, defining what actually constitutes a threat of force. Among the literature below, each author establishes their own working definition. Commonalities among definitions include that a threat comprises an express or implied credible assertion, from one state to a target state, of readiness to engage in force, should the targeted state trigger a particular condition, usually within the context of a dispute.

Romana Sadurska writes that it is important for scholars to distinguish between the international principle prohibiting the threat of force and the actual practice that occurs more ambiguously and pragmatically by states.²⁸ The types of threats that would violate Article 2(4) of the UN Charter, according to the Charter's own rationale, are only those that produce the same or similar *results* to the illegal actual use of force. This means that unless a threat of force leads in and of itself to the jeopardizing of peace or "massive violations of human rights," it is likely permissible, according to Sadurska.²⁹ This is an expansive reading

²⁸ Sadurska, Romana. "Threats of Force," *The American Journal of International Law*, vol. 82, no. 2 (April 1988), 239-268.

²⁹ Sadurska, 250.

of the Charter's text and allows extraordinary room for argument that a certain threat is lawful, so long as it lessens the likelihood of conflict—a notoriously difficult proposition to prove. Sadurska, though, finds that if the Charter prohibits the threat of force in order to prevent international instability and human rights abuses, then so long as a threat does not violate this underlying purpose of the Charter, a state may issue a threat and still remain in compliance with the general prohibition.³⁰ Her permissive definition claims that many threats of force actually function as a better alternative to the actual use of force and have diplomatic value that should be—and has been—supported by the international community.³¹

Sadurska claims that states consider not only Article 2(4) in determining the legality of a threat but go beyond the text and also consider threats lawful if they 1) are made to protect the security of the state, providing that the internal self-determination of the target is not violated; 2) are made to vindicate a denied right of a state; or 3) are “prudent,” balancing individual and community values.³² Sadurska references specific instances of each

³⁰ *Id.*

³¹ *Id.*

³² Sadurska, 262-65.

of these lawful expressions of threat through the Cuban Missile Crisis, the Falklands War, and the *Corfu Channel* case.³³

Sadurska claims that the legal analysis of a threat of force would only equate to the analysis of actual use of force when they produce comparable results—and a threat will rarely have the same destructive results as the use of force, she says.³⁴ She cites policies of nuclear deterrence as compatible with UN purposes to the extent that they discourage aggression.³⁵ Ultimately, Article 2(4)'s black letter law cannot exclusively define the legal bounds of threats of force, and any actions that further peace and stability “deserve legal blessing” says Sadurska.³⁶ Sadurska regards threats—at least under some circumstances—as not only inevitable, but as a desirable tool of international relations. While some scholars dismissed Sadurska's argument that threats can often promote security and peace after the 1996 ICJ *Nuclear Advisory* opinion, in which the court chose not to adopt such an expansive view, many others continue to trace her logic and apply her calculus of threat utility today.

Marco Roscini, on the other hand, finds that the ICJ's *Nuclear Advisory* opinion largely upended Sadurska's theories that prohibitions on the threat of force are and should

³³ *Id.*, 254-263

³⁴ Sadurska, 250.

³⁵ Sadurska, 247-50.

³⁶ *Id.*, 266-68.

be considered distinct from use of force. Roscini finds the ICJ's *Nuclear* opinion to clearly state that if a threat of force is to be lawful, it must be a threat of force that, if carried out, would be in full conformity with the Charter.³⁷ Whether possessing nuclear weapons or maintaining a policy of deterrence equates to a threat depends upon whether the envisioned use of force would violate the Charter (i.e. if the force would be directed against the territorial integrity or political independence of the State, against the purposes of the UN, or, if intended as a defense, if the use of force in defense would violate the principles of necessity and proportionality).³⁸ Roscini views Sadurska's utilitarian analysis as counterproductive, claiming that interpretations like hers, and states that likewise support the use of threats of force as a tool of de-escalation, "prevent the prohibition of the threat of force from being qualified as a peremptory norm of general international law."³⁹

Roscini defines unlawful threats as "explicit or implicit promise[s] of a future and unlawful use of armed force against another state, the realization of which depends on the threatener's will."⁴⁰ He claims that even if threats can contribute to international order or

³⁷ Roscini, Marco "Threats of Armed Force and Contemporary International Law," *Netherlands International Law Review* 229, 255, vol. 54, 2007 (revised 2009).

³⁸ *Id.*, 255.

³⁹ *Id.*, 256.

⁴⁰ Roscini, 256.

equilibrium, that does not unequivocally mean they are not also unlawful.⁴¹ In particular, Roscini is concerned with the snowball effect of threats that can lead to armed conflict. Such a scenario is exemplified in the Russo-Georgian War of 2008, discussed in the case study section below. Roscini argues that there are degrees of threat, just as there are degrees of force (the strongest being aggression). It follows, he says, that a prohibition of threats of aggression at least logically holds as a peremptory norm, just as the use of force constituting aggression does.⁴² On the whole, Roscini subscribes to the view that Article 2(4) *does* reflect the customary international law principle that threats of force are prohibited along the same lines as use of force, even though this prohibition is not *jus cogens*. The prohibition on threats of aggression specifically, though, does represent a *jus cogens* norm.

As one of the two Charter-recognized exceptions to the prohibition of threat or use of force, self-defense offers an interesting opportunity to analyze how threats of force may be interpreted differently from use of force. James Green and Francis Grimal analyze the conceptual possibility—and the desirability—of threats of force made in self-defense.⁴³ They find that threats of force for the purpose of self-defense are both logically possible and in

⁴¹ *Id.*, 254.

⁴² *Id.*, 257.

⁴³ Green, James A. and Francis Grimal, "The Threat of Force as an Action in Self-Defense under International Law," *Vanderbilt Journal of Transnational Law*, vol. 44:285 (2011).

some cases appropriate policy. In harmony with Sadurksa's reasoning, the authors emphasize that defensive threats can uphold and promote the foundational principles of Article 2(4) and the Charter as a whole as a non-forcible alternative to military action.⁴⁴ Green and Grimal acknowledge, though, that there are inherent difficulties in determining what behavior constitutes a lawful (non-forcible alternative to force) versus unlawful defensive threat. Throughout their analysis, Green and Grimal analogize threats of defensive force to actual defensive force and find that, as a starting point, threats of force must comply with the requirements of actual force (similarly to Roscini).⁴⁵ They, like Roscini, base this starting point on both Article 2(4) and the ICJ *Nuclear Advisory* opinion. Direct application of the ICJ's opinion, though, could lead to "absurd results" and counterintuitive outcomes, Green and Grimal say, because of the "inherent consequential difference between threatened and actual force."⁴⁶

Green and Grimal examine the legal status of threat of force in six hypothetical scenarios, when a threat is made in response to: 1) a grave use of force (an armed attack); 2) a "less grave" use of force; 3) a threat of imminent grave force; 4) a threat of imminent

⁴⁴ Green and Grimal, 239.

⁴⁵Green and Grimal, 295.

⁴⁶ *Id.*, 327.

"less grave" force; 5) a threat of non-imminent grave force; 6) a threat of non-imminent "less grave force."⁴⁷ The authors conclude that a defensive threat would be lawful if made in response to the first three scenarios. They also argue that the fourth action—a threat in response to another's threat of imminent less grave (i.e. something less than armed force) force—may sometimes justify use of defensive threats as well, so long as the defensive threat used is purely a deterrent would not escalate to actual use of force.⁴⁸ The authors offer the example of South Korea issuing a counter-threat against North Korea in 2010 following North Korea's bombardment of Yeonpyeong Island. The South Korean threat was issued in response to North Korea's persistent threat of imminent "less grave" force and was issued with a defensive posture—only if North Korea provoked *again* did South Korea threaten to attack. The threat by South Korea was only intended to come to fruition if North Korea provoked again (even if North Korea's threatened action did not necessarily envision actual "armed force"—hence "less grave" force).⁴⁹ Finally, according to Green and Grimal,

⁴⁷ Green and Grimal, 313.

⁴⁸ *Id.*, 318.

⁴⁹ Green and Grimal, 318.

defensive threats in response to any non-imminent threats of force would be unlawful (scenarios five and six).⁵⁰

Threats of force made in self-defense should also meet the criteria of necessity and proportionality, Green and Grimal say. These requirements must be considered more flexibly than they would be for actual force used in self-defense, though. Necessity, the authors posit, turns on the “acceptability” of the threat according to other states, including whether the defensive threat is perceived as meeting a genuine defensive need.⁵¹ Proportionality should be considered, they say, based on what is minimally required to effectively deter an aggressor—*not* based on the scale of the future force threatened.⁵² “Projected proportionality” (what the ICJ in the *Nuclear Weapons* opinion supports) in contrast requires “impossible” calculations at a point before states have used force, say Green and Grimal.⁵³ The authors pull from an example that originates with Sadurska and argue that a threat of nuclear force may be lawful *even if* the use of force would not be proportional (as it could not be), so long as the nuclear threat was considered the “only reasonable means” to deter

⁵⁰ *Id.*, 320.

⁵¹ *Id.*, 323.

⁵² Green and Grimal, 324.

⁵³ *Id.*

an aggressor state that had launched an attack—even a conventional attack.⁵⁴ Sadurska—and Grimal and Green—improperly fail to account for the indiscriminately lethal implications of threatening nuclear force by advancing this interpretation of proportionality, which completely disregards humanitarian law as well as the ICJ and the Charter’s roles in upholding the principles of humanitarian law.

Grimal, in a separate book, offers his interpretation of threats in the nuclear context specifically.⁵⁵ He starts by identifying the general legal test for a threat of force’s legality as beginning with a presumption of illegality. “A state threatening another starts in a position of unlawfulness and has to justify the lawfulness of its threats by arguing that actual force would be lawful.”⁵⁶ The threat will only be lawful if the envisioned use of force would itself be in conformity with the Charter; in this case, Grimal determines that the threat is a “legitimate warning and reminder”—and so does not violate the Charter and is not unlawful.⁵⁷ International instruments do not provide an affirmative basis for legal threats, generally speaking. Grimal refers to the view of international lawyer Ian Brownlie that one

⁵⁴ *Id.*

⁵⁵ Grimal, Francis. *Threats of Force: International Law and Strategy*. Routledge, Taylor & Francis Group, 2014.

⁵⁶ Grimal, 37.

⁵⁷ *Id.*

can only determine the legality of a threat of force retroactively or through hypothetical analysis—if the use of force threatened would be in conformity with the Charter, then the threat of such force would likewise be lawful under the Charter. Alternatively, if there is no justification for the use of force threatened, “the threat itself is illegal.”⁵⁸

In applying this framework to nuclear threats in particular, Grimal considers three questions: 1) what is the point at which a state’s nuclear program may constitute a threat of force?; 2) could withdrawal from the NPT constitute a threat of force?; and 3) could being a non-signatory to the NPT alone constitute a threat of force? Grimal concludes that development of a nuclear weapon program by a non-nuclear weapon state could never constitute a breach of Article 2(4), nor could possession of a nuclear weapon.⁵⁹

On the second question, Grimal interestingly first proposes that withdrawal from the NPT *may* constitute a threat of force. While it does not form a *prima facie* threat, he relies on an argument, again first posited by Sadurska, that even *signing* a treaty may constitute a threat (i.e., if a state becomes a party to a treaty like the Warsaw Pact, a neighboring state may “feel threatened” if it was opposed to communism).⁶⁰ If signing a treaty can be a threat,

⁵⁸ Grimal, 38. *citing to* Ian Brownlie, *International Law and the Use of Force by States*, 364 (1963).

⁵⁹ Grimal, 121.

⁶⁰ Grimal, 131.

so can withdrawal potentially, Grimal says, offering the example of North Korea's withdrawal from the NPT. Ultimately, whether a withdrawal is a threat depends on which state is withdrawing and the context of the decision, Grimal says. He clarifies, though, that even if other states "feel threatened," withdrawal is, ultimately, *not* a threat of force per se. Further, while developing nuclear weapons may constitute a threat, it does not constitute an *unlawful* threat.⁶¹

Grimal recognizes, though, the severe implications of threatening use of nuclear weapons above and beyond conventional weapons. "It is still arguable that any violation of the NPT could still constitute a threat of force *given the nature and purpose of a nuclear weapon*" (emphasis added).⁶² Grimal here, acknowledges the inherent risks of threatening nuclear force, even if such threat was never intended to result in actual use of force. A breach of the NPT that is "serious and persistent"—qualifiers that are unsettled and debatable, Grimal admits—is much more likely to constitute a threat of force.⁶³ Ultimately, Grimal is unsatisfied with the lack of precision offered in Article 2(4) for determining when

⁶¹ *Id.*,132.

⁶² Grimal, 132.

⁶³ *Id.*

an illegal threat of force has occurred, but finds that when nuclear weapons are at issue, any threat is more likely than not unlawful.

Dino Kritsiotis, Professor of Law at the University of Nottingham, analyzes threats of force since the Cold War and uses several case study examples to explore the effect of threats of force since the 1990s on international politics.⁶⁴ He begins with the admission that the legal background prohibiting threats of force is often contrasted by accepted state practice. Kritsiotis cites to Judge Bruno Simma saying that effectiveness of the Charter in terms of threat or use of force has reached a "breaking-point," as illustrated by the prevalence of force and threats of force today, despite the prohibition.⁶⁵ States seem to accept threats as positive contributions to international political life, despite their black-letter prohibition, to the extent that they prevent actual force. Kritsiotis focuses in particular on threats of force in the context of "unresolved" international crises, for example, Iraq and the U.S. in the 1990s, Iran and the U.S. throughout the Bush and Obama administrations, and also the *Corfu Channel* case.⁶⁶

⁶⁴ Kritsiotis, Dino, "Close Encounters of a Sovereign Kind," *European Journal of International Law* 299, vol. 20, no. 2 (2009).

⁶⁵ Kritsiotis, 300.

⁶⁶ *Id.*, 303.

Kritsiotis acknowledges that the legal standard from the Charter and the ICJ's 1996 *Advisory* opinion is that where the envisioned force would be unlawful, the threat of such force would be likewise prohibited. He affirms the Court's finding that not all threats of force are unlawful per se—the clearly unlawful threats are those that threaten to secure territory from another State or aim to cause another State to follow or not to follow certain political or economic paths ("territorial integrity and political independence"). One must consider each case of a signaled intention to use force separately, in its context, to determine whether there is an unlawful threat. Kritsiotis also cites to Oscar Schachter and says that Article 2(4) has not often been invoked as "clearly" prohibiting implied threats, like the deployment of military forces or missiles.⁶⁷ Again, context is key—blanket prohibitions on threat are very narrow according to Kritsiotis. Evaluating the circumstances of any alleged threat of force, case-by-case, including state reactions, is necessary to determine their legality, he claims. Kritsiotis recognizes that there is often no means of telling whether a threat of force will become actual force, but even so agrees with Sadurska that states have

⁶⁷ Kritsiotis, 306.

in some instances seemingly recognized threats of force as not only tolerable, but virtuous alternatives to actual force⁶⁸

Finally, in one of the more comprehensive tomes considering the legality of threat of force, Nikolas Stürchler systematically analyzes theoretical conceptions of threats alongside in-depth case studies demonstrating lawful and unlawful threats.⁶⁹ Stürchler pushes back against the argument that state silence in reaction to possible Charter violations of the prohibition of threat of force equates to tacit approval, countering Kritsiotis and Sadurska among others.⁷⁰ He furthermore notes that dissenting state voices have grown in volume and number, in particular with the growth of the Non-Aligned Movement (NAM).⁷¹ Stürchler approaches the legality of threats from a two-pronged approach instead, considering first where the violation threshold of Article 2(4) lies, and second, exploring under what circumstances, once the threshold has been passed, there might be a legal justification for violation of the prohibition.⁷²

⁶⁸ *Id.* 308-309.

⁶⁹ Stürchler, Nikolas, *The Threat of Force in International Law*. Cambridge University Press. 2007.

⁷⁰ Stürchler, 257-258.

⁷¹ Sturchler, 257 (footnote 10).

⁷² Stürchler, 258.

First in his analysis is the threshold of violation. When is a threat of force unlawful per the Charter? Stürchler finds that the primary test for a Charter-violating threat must consider whether a state credibly communicates its readiness to use force in a particular dispute.⁷³ A threat is credible when it appears rational to implement it, when there is a sufficiently serious commitment to run the risk of an armed encounter, he argues. This is about calculated expectation—one does not need *certainty* as to whether force will be carried out nor does one need specific demands or tight deadlines imposed by the threatening country.⁷⁴ There are two ways a government can render its threats credible, Stürchler says: the state can openly commit to carrying out a threat to a domestic audience, increasing the political costs of a bluff, or it may declare to other governments its willingness to use force, putting its international reputation on the line.⁷⁵ While open and explicit intent to use force may constitute a credible threat, inflammatory speeches are likely not enough to fulfill the specific-language requirement of a credible threat, Stürchler says.⁷⁶

Legally, the issue with relying on the credibility of a threat in determining whether it is lawful is that credibility is subjective. For example, many took President Trump very

⁷³ *Id.*, 259.

⁷⁴ *Id.*

⁷⁵ Stürchler, 260.

⁷⁶ *Id.*

seriously when he threatened the total destruction of North Korea in his speech at the United Nations General Assembly in September 2017. While this is certainly an inflammatory speech (which Stürchler would likely classify as not-credible), it also very likely *did* constitute a serious and illegal threat of force. The indiscriminate severity of nuclear force in particular makes threats of that kind inherently more dangerous regardless of variations in credibility. Finally, according to Stürchler, actual use of force may sometimes constitute a threat, too.⁷⁷ Scholars continue to discuss whether measures of “coercive diplomacy,” including micro-level or limited uses of force (i.e. border clashes, retaliatory strikes, or naval blockades) constitute actual or threatened force or whether they violate the Articles 2(4) or 51 of the Charter at all.⁷⁸

Stürchler also considers the point at which, if any, amassing armaments or militarizing might constitute a breach of Article 2(4). He points out that a defiance to disarm, if anything, is more likely to constitute a threat to the peace under Chapter VII than a violation of Article 2(4).⁷⁹ History has also proven quite permissive of arms building and militarizing as sovereign acts. In the absence of a specific treaty obligation, he finds that

⁷⁷ Stürchler, 262

⁷⁸ *Id.*

⁷⁹ Stürchler, 263.

states likely retain the right to acquire weapons, including nuclear, in whatever quantity.⁸⁰

Notably, nuclear weapon states party to the NPT have an obligation to disarm under Article VI—and non-nuclear weapon states have an obligation not to develop weapons—however the acquisition of these weapons does not constitute a threat alone, Stürchler says.⁸¹ After all, states party to the NPT, as any treaty, are free to withdraw; treaty obligations alone cannot constitute a peremptory norm establishing the building of arms as a threat in violation of Article 2(4), he says.

On the second prong, Stürchler considers the two main exceptions to the prohibition of use of force as applied to the prohibition of threat of force: self-defense under Article 51 and Security Council authorization under Chapter VII.⁸² He focuses on self-defense. Stürchler identifies the clearest iteration of a lawful threat in self-defense as one issued in response to an armed attack.⁸³ The more nuanced question, he says, is whether states may reciprocate a threat lawfully when there has been no armed attack. States consistently consider a few characteristics of the conflict at-issue when deciding whether issuing a threat is more likely to assuage rather than exacerbate the conflict. In these scenarios, states are concerned

⁸⁰ *Id.*, citing to the ICJ's *Nuclear Weapons* opinion.

⁸¹ Stürchler, 263.

⁸² *Id.*, 265.

⁸³ Stürchler, 265.

about the “dynamics of escalation” as well as the possibility that a threat will offer an aggressor state the “pretext for military retaliation.”⁸⁴

Finally, recognizing that many argue that the post-9/11 world shifted how threats are legally interpreted, Stürchler addresses the myth of the threat-permissive 21st century, noting in particular the heavy criticism of the U.S.-UK invasion of Iraq in 2003. Ultimately, there is not a convincing record showing that the law governing threats of force was substantially revised at all, he says.⁸⁵

Case Studies and Institutional Findings from the Literature

While states regularly invoke the prohibition on use of force, and often do so by coupling the prohibition of threat and use of force, “the threat of force has found little articulation in state practice,” assert Green and Grimal.⁸⁶ Stürchler, though, in reviewing Kritsiotis’s article, refers to two recent iterations of threats of force that were ultimately classified as unlawful.⁸⁷ The first: a 2007 arbitration tribunal under the UN Convention on the

⁸⁴ *Id.*, 266.

⁸⁵ *Id.*, 271-72.

⁸⁶ Green and Grimal, 286.

⁸⁷ Stürchler, Nikolas. “Law’s Labours Lost? Comment on Dino Kritsiotis, Close Encounters of a Sovereign Kind.” *Blog of the European Journal of International Law*. 25 Mar. 2010.

<https://www.ejiltalk.org/laws-labours-lost-comment-on-dino-kritsiotis-close-encounters-of-a-sovereign-kind/>.

Law of the Sea that determined that the Suriname Navy engaged in prohibited threats of force against Guyanese oil ships.⁸⁸ Stürchler secondly references the 2008 fact-finding mission established by the Council of the European Union that determined both Russia and Georgia had issued unlawful threats of force prior to the 2008 Russo-Georgian War.⁸⁹

In 2007, the Suriname navy forcibly evicted personnel from an oilrig that Guyana had allowed into the waters. Suriname and Guyana disputed ownership over that section of the sea, and Guyana alleged that Suriname engaged in both use of force against certain of its licensed ships and threats of force against others. The arbitration tribunal analyzing the incident between Suriname and Guyana made its determinations after taking testimony from several actors involved in the communication between the Suriname and Guyanese ships.⁹⁰ While Suriname characterized their actions as intended only to achieve legitimate objectives, the tribunal found that Suriname did engage in unlawful threats of force against the Guyanese-associated ships. The tribunal agreed that even though Guyana could not have known specifics about what “consequences” they might face—based on Suriname’s limited

⁸⁸ *Id.*

⁸⁹ Stürchler, Nikolas. “Law’s Labours Lost?”

⁹⁰ “Reports of International Arbitral Awards regarding the delimitation of the maritime boundary between Guyana and Suriname,” (Sept. 2007), 121. See: http://legal.un.org/riaa/cases/vol_XXX/1-144.pdf

communication—for refusing Suriname’s orders to leave the sea, the threat was still credible and in contradiction to Suriname’s obligations to engage in peaceful negotiation where possible; as such, the threats of force issued by Suriname were deemed unlawful.^{91 92}

The fact-finding mission of the Georgia-Russia conflict maintained that the most important element in interpreting whether an iteration of state practice is a threat is credibility.⁹³ “A threat is credible when it appears rational that it may be implemented, when there is a sufficient commitment to run the risk of armed encounter.”⁹⁴ Credibility *does not* require certainty as to whether force will be used, what conditions will trigger force, or whether the threatened force is imminent, the findings stated.⁹⁵ There need not be specific demands or a deadline. “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.”⁹⁶ Credibility is best understood in the

⁹¹ “Reports of International Arbitral Awards regarding the delimitation of the maritime boundary between Guyana and Suriname,” (Sept. 2007), 123. Note: the report also cites to the ICJ’s *Nuclear Weapons* and *Nicaragua* opinions.

⁹² *Id.*, 126-27.

⁹³ Independent International Fact-Finding Mission on the Conflict in Georgia. Vol. II, Ch. 6: Use of Force, 232. See: http://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf.

⁹⁴ *Id.*, 232.

⁹⁵ Independent International Fact-Finding Mission on the Conflict in Georgia. Vol. II, Ch. 6: Use of Force, 232.

⁹⁶ *Id.*, 233.

context of an existing dispute.⁹⁷ The fact-finding mission here found that Georgia issued credible—and illicit—threats by engaging in air surveillance over the Abkhaz conflict zone, participating exchanges of fire, and engaging in “comprehensive” military build-up, including acquiring new weapons, with the assistance of a third-party state (the United States).⁹⁸ The fact-finders analyzed these actions in the context of Georgian behavior historically, finding that because Georgia tended to “aggravate, rather than alleviate” tensions, Georgia’s actions—considered under the totality of the circumstances—constituted threats of force.⁹⁹ Notably, the report emphasized that even though Georgia may not have been *able* to substantially harm Russian integrity through force, their readiness to use force, signaled through their actions, still constituted a credible and unlawful threat.¹⁰⁰

The mission likewise found that the Russian Federation also consistently issued credible and unlawful threats that contributed to the mounting tensions between the two states. Russia’s actions that summed to a threat of force targeting Georgia included: warning that Georgian NATO membership would result in the loss of territories and the establishment of Russian military bases; another warning that Moscow would engage in

⁹⁷ *Id.*, 232.

⁹⁸ *Id.*, 233.

⁹⁹ *Id.*

¹⁰⁰ Independent International Fact-Finding Mission on the Conflict in Georgia. Vol. II, Ch. 6, 232.

force if Georgia initiated a conflict with Abkhazia and South Ossetia; Russia's flying of warplanes over Abkhazia and South Ossetia; Russia's mobilization of troops to Abkhazia; and finally, the Russian troops' performance of a purportedly "regular" military exercise.¹⁰¹

The mission ultimately found that the threats issued from both sides leading to the Russo-Georgian War did not fall under the Charter's self-defense exception (neither were they supported by the Security Council's Article VII powers) and so were illegal.¹⁰² The report goes on in great detail about the continuation and escalation of the conflict, indicating that the mutual threats helped heavily to foster a "climate of mistrust" that escalated into a crisis.¹⁰³ Such escalation is one element that the prohibition of threats of force is meant to discourage.

Critical Assessment

Often times, as in the Russo-Georgian fact-finding mission, the illegality of threat is best discerned when it is either issued (like Russia's warnings) or demonstrated (Georgia's air surveillance and arms acquiring; Russia's military exercises) *in the context of a dispute*. Standalone military exercises or troop mobilization, for example—and even warnings

¹⁰¹ *Id.*, 234.

¹⁰² *Id.*, 237.

¹⁰³ *Id.*, 238.

detached from any relevant dispute—likely do not amount to a threat of force. Preexisting disputes tend to enable the states involved—and the rest of the international community—to more accurately discern credibility and rationality, two factors that can prove quite difficult to pin down, especially in independent instances of threat outside of any ongoing dispute.

The scholars discussed above differ in the latitude they offer to states to issue what they interpret to be legal threats of force that comport with the Charter and international law on the whole. Sadurska, while attempting to take a pragmatic approach by recognizing the inevitable continued existence of threats (some of which may support the purpose the Charter, she asserts), disregards the principle that some threats—even those considered legal and in legitimate self-defense—remain unlawful because the force envisioned within the threat (regardless of its actual manifestation) would be to such a degree that it violates international humanitarian law.¹⁰⁴ The overarching theme of Sadurska's argument seems to rest, properly, on an understanding of one of the main purposes of the UN: maintaining peace; however, she stretches this understanding to allege there is a wider legal margin of

¹⁰⁴ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, 257.*

threat-making, effectively ignoring the relevant texts proscribing threats of force and the subsequent interpretations of this proscription by the ICJ.

Generally, the largest challenge in interpreting the legal status of threats of force is to balance the limited guidance provided by the legal instruments with the evidence of often seemingly unlawful state practice. Stürchler, though, points out that state practice often operates distinctly from the black letter law on threats of force, but contradictory state practices (including state silence in the face of another state's alleged violation of the prohibition on threat) does not negate the law. Silence in reaction to apparent violations of the prohibition is often a result of innumerable political factors within and among the states rather than a disregard for the legal prohibition of threats of force.

Roscini and Stürchler tend to identify the most persuasive threads of interpretation in general by arguing for an interpretation of the proscription of threats parallel to the proscription of use of force with limited exceptions. Grimal furthermore provides a tangible basis for exploring nuclear threats of force in particular, properly acknowledging that acts such as withdrawal from the NPT or amassing arms, even in the face of treaty obligations, do not inherently violate the prohibition on threats found in Article 2(4). Practically, Grimal offers a compellingly detailed breakdown of how to classify various threats of force and

their likelihood of legality when describing the six various scenarios in response to which a state may issue a threat. Grimal also, though, recognizes—in alignment with the recent UN general comment on the right to life—that the inherently indiscriminate nature of nuclear weapons makes any threat of their use particularly insidious and likely unlawful. In light of the ICJ's consistent evasion of requests seeking specific analysis of threats of nuclear force or the implications of deterrence policies in light of the prohibition on threats, it is all the more important to maintain a realistic understanding of the immediate, catastrophic, and irreversible effects of nuclear weapons. Remembering Stürchler's discussion pertaining to the thin line between threats that effectively stave off conflict and those that escalate into further conflict, nuclear threats must be considered much more strictly. Threats of nuclear force, under the Charter and the ICJ's support for principles of proportionality and humanitarian law in general, are always unlawful, as the risks of escalation associated with nuclear threats are too high and too extreme.

Conclusion

Returning to the underlying goal of this article: what is the proper legal interpretation of the prohibition against threats of force codified in the Charter of the United Nations? In analyzing the text of Article 2(4) along with post-Charter instruments and

interpretations, the baseline prohibition of threats of force, including nuclear force, is undeniably clear. The only threats of force that *may* have textual justification for legality are those offered in narrow circumstances of self-defense and those authorized by the UN Security Council. While threats of force issued in self-defense may sometimes be legal, *even if* the threat is issued in response a prior threat or attack on a state's territorial integrity or political independence, the threat is still held to a standard by which it must comport with both the general purposes of the United Nations, including the maintenance of peace, and international humanitarian law. If a threat otherwise in compliance with a state's right to self-defense violates these additional principles, it is very likely unlawful. So, threats of force are illegal certainly when issued as a challenge to the territorial integrity or political independence of a state, as expressly stated in the Charter, and threats are also likely illegal in many scenarios beyond these two circumstances, because *any* "envisaged use" of force that would be contrary to humanitarian law is unlawful.¹⁰⁵

To that end, threats of nuclear force are *always* unlawful. Furthermore, I would argue that nuclear deterrence policies held closely by the nuclear weapons states in and of themselves constitute ongoing, unlawful threats of force. Recognizing the purposes of the

¹⁰⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, 257.*

UN, the tenets of humanitarian law, and the proclamations (however limited) of the ICJ on this point, there is no possibility of a legally-justified threat of nuclear force, regardless of what may have provoked the threat. Proportionality, as recognized by the ICJ, among other components of international law, simply does not leave room for lawful threats of nuclear force.

Sources

Drummond, Brian, "Is the United Kingdom Nuclear Deterrence Policy Unlawful," *New Zealand Yearbook of International Law* 107, vol. 11 (2013).

Green, James A. and Francis Grimal, "The Threat of Force as an Action in Self-Defense under International Law," *Vanderbilt Journal of Transnational Law* 285, vol. 44 (2011).

Grimal, Francis. *Threats of Force: International Law and Strategy*. Routledge, Taylor & Francis Group, 2014.

- Kritsiotis, Dino, "Close Encounters of a Sovereign Kind," *European Journal of International Law* 299, vol. 20, no. 2 (2009).
- Matheson, Michael, "The ICJ Opinion on Nuclear Weapons," *Transnational Law and Contemporary Problems* 353, vol. 7 (1997).
- Nystuen, Gro, Stuart Casey-Maslen and Annie Golden Bersagel (eds.), *Nuclear Weapons Under International Law*. Cambridge University Press. 2014.
- Pretorius, Joeliën and Tom Sauer, "Nuclear Weapons and the Humanitarian Approach," *Global Change, Peace & Security: formerly Pacifica Review: Peace, Security & Global Change* 233 (2014).
- Roscini, Marco, "Threats of Armed Force and Contemporary International Law," *Netherlands International Law Review* 229, vol. 54, 2007 (revised 2009).
- Sadurska, Romana, "Threats of Force," *The American Journal of International Law* 239, vol. 82, no. 2 (1988).
- Simma, Bruno (ed.), *The Charter of the United Nations: A Commentary*. vol. I. Oxford University Press. 2002.
- Schachter, Oscar, "In Defense of International Rules of the Use of Force," *University of Chicago Law Review*, 113, vol. 53, no. 1 (1986).
- Stürchler, Nikolas, *The Threat of Force in International Law*. Cambridge University Press. 2007.
- Stürchler, Nikolas. "Law's Labours Lost? Comment on Dino Kritsiotis, Close Encounters of a Sovereign Kind." *Blog of the European Journal of International Law*. 25 Mar. 2010.
<https://www.ejiltalk.org/laws-labours-lost-comment-on-dino-kritsiotis-close-encounters-of-a-sovereign-kind/>.
- Waxman, Max, "The Power to Threaten War," *Yale Law Journal* 1626, vol. 123, no. 6 (2014).
- Waxman, Max, "Regulating Resort to Force: Form and Substance of the UN Charter Regime," *European Journal of International Law* 151, vol. 24, no. 1 (2013).

Vail, Christopher, "The Legality of Nuclear Weapons for Use and Deterrence," 48 *Georgetown Journal of International Law* 839 (2017).