
Close Encounters of a Sovereign Kind

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Abstract

This article considers the prominence that threats of force have had in international political life since the end of the Cold War, and how we tend to overlook these threats in favour of the actual uses of force. Security Council Resolution 678 of November 1990 is one such example. Emblematic of the rule of law and its New World Order, it is often invoked for the 'authorisation' it gave to Member States of the United Nations 'co-operating with the Government of Kuwait ... to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area' – but this provision was made contingent upon whether 'Iraq on or before 15 January 1991 fully implements [previous] resolutions'. We examine the range of circumstances in which threats of force have arisen and find that these go beyond the archetypal 'close encounter' between states – such as the Cuban Missile Crisis of 1962 and the 'threats of force' directed against Iraq prior to Operation Desert Fox (1998) and Operation Iraqi Freedom (2003). Making use of the jurisprudence of the International Court of Justice from its Nuclear Weapons advisory opinion (1996), we advance the idea of a prohibition of the application of force, and consider the logistics of its operation in state practice; first, in the recent relations between the United States and Iran and, then, through a modern reprise of the facts of the Corfu Channel Case of April 1949. We allude to the importance of the legislative background and purpose behind this prohibition, constantly reflecting upon the intricacies of state relations in which this provision of the United Nations Charter seeks to make its mark.

1 An Introduction to the Frequency of Force

In the period which has succeeded the Cold War, it has become common fare to remark on the frequency that force has assumed in international political life, so much so that in his Separate Opinion in the *Oil Platforms Case* (2003), Judge Bruno Simma contended that the effectiveness of the relevant rules of the United Nations Charter has

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been ‘challenged to the breaking-point’.¹ Such statistical observations tend to take their cue from the regularities of the *use* of force in contemporary state relations, but it is striking how much of a pervasive presence that *threats* to use such force continue to have in the decades that have intervened since the end of the Cold War. At times, as if in a perfect choreographed sequence, these threats of force have preceded the actual use of force between states; at other times, they have stood alone and free from any use of force as that term has come to be used and understood under Charter law.²

It could, of course, be argued that the frequency of *threats* of force does not in fact mark a behavioural turn in the practice of states, for the proclivity of states for and partialities toward threats of force is a matter of record and is well-known.³ We would have no means of telling whether or not this is so from the deliberations and decisions of the International Court of Justice, since the Court’s jurisprudence does not shadow – it does not faithfully and systematically track – each of the veritable minutiae of state practice. To be sure, the Court can only really entertain the ‘disputes’ which are referred to it under its rules for contentious jurisdiction,⁴ and it is perhaps no accident of history

¹ And the use of force did form the overall point of his focus: see Separate Opinion of Judge Bruno Simma in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 161, at 329 (para 8). ‘What we cannot but see outside the courtroom’, Judge Simma continued, ‘is that, more and more, legal justification of use of force within the system of the United Nations Charter is discarded even as a figleaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force’, as he lamented the ‘exercise [of] inappropriate self-restraint’ on the part of the Court (at 328 (para 6)). Judge Simma felt that the Court had lost an opportunity to ‘strengthen the Charter prohibition on the threat or use of armed force, in straightforward terms’: at 328 (para 7). The Court had been much more sanguine about such matters in its judgment in *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* [1986] ICJ Rep 14, where it concluded (at 98 (para 186)) that ‘[i]f a State acts in a way *prima facie* incompatible with a recognized rule but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule’.

² See Randelzhofer, ‘Article 2(4)’, in B. Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, 2002), i, at 112–136. We shall therefore focus our attention on state threats, mindful of the growth in the threats of force of non-state actors: Cooper and Rohter, ‘McCain, Iraq War and the Threat of Al Qaeda’, *New York Times*, 19 Apr. 2008, A1, and Schmitt and Perlez, ‘Strikes Worsen Qaeda Threat, Pakistan Says’, *New York Times*, 25 Feb. 2009, A1. See, further, President George W. Bush’s 2002 State of the Union Address, *infra* note 98.

³ Schachter, ‘The Right of States to Use Armed Force’, 82 *Michigan L Rev* (1984) 1620 (observing that ‘[t]hreats of force, open or implicit, pervade the relations of States’) and Sadurska, ‘Threats of Force’, 82 *AJIL* (1988) 239 (on threats of force as a ‘ubiquitous element of international relations’). See, also, Roscini, ‘Threats of Armed Force and Contemporary International Law’, *LIV Netherlands Int’l L Rev* (2007) 229, at 231.

⁴ And, even then, the Court is at the mercy of the facts at its disposal: in the *Nicaragua Case*, the Court considered ‘the existence of military manoeuvres held by the United States near the Nicaraguan borders; and Nicaragua has made some suggestion that this constituted a “threat of force”, which is equally forbidden by the principle of non-use of force. The Court is however not satisfied that the manoeuvres complained of, in the circumstances in which they were held, constituted on the part of the United States a breach, as against Nicaragua, of the principle forbidding recourse to the threat or use of force’: *Nicaragua Case*, *supra* note 1, at 118 (para 227). Nevertheless, the fact that the neck of the Court stretched this far must speak to the customary status of the prohibition of the threat of force: *Nicaragua Case*, *supra* note 1, at 99 (para 188). On the significance of the Court after the *Nicaragua Case* consult Gray, ‘The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force After *Nicaragua*’, 14 *EJIL* (2003) 867.

that it is through an advisory opinion that the Court has spelt out some of its most important insights on the legal status of threats of force. This occurred in the *Nuclear Weapons Case* in July 1996,⁵ where, faithful to the text of the Charter, the Court argued for the identical treatment of the 'threat' as well as the 'use' of force in public international law, to the point where it may now be advisable to speak in terms of the Charter prohibition as if it concerned the *application of force*.⁶

We examine this element of the Court's ruling and explore its logistical implications for threats of force which have often been interwoven with the authority of, if not the authorization for force from, the United Nations.⁷ We have seen this dynamic at work, for instance, in the dispatch of the armed forces of the United States to the shores of Haiti in September 1993, before the Security Council had authorized the use of force;⁸ and, in June 1998, in the preparations for Operation Allied Force against the Federal Republic of Yugoslavia in March 1999, when NATO defence ministers commissioned a demonstration of force of simulated bombing, strafing raids and mock troop deployments in the neighbouring states of Albania and Macedonia.⁹ The ensuing intervention occurred *sans* the authorization of the United Nations, but after the Security Council had admitted, in Resolution 1199 of September 1998, the 'need to prevent [a humanitarian catastrophe] from happening'. Typical to form, our readings of these events have tended to sensationalize the *moment* of visible and audible force – the hour, the minute, the second of its consummation – rather than to reflect upon the forbidding complexities of the experience of which that use of force has come to form so essential a part.¹⁰

⁵ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

⁶ Rather than the inelegant fashioning of the Court, of 'the principle forbidding recourse to the threat or use of force': *Nicaragua Case*, *supra* note 1, at 118 (para 227). One could argue that the 'threat of force' is not awarded its rightful distinction if, as the Court said, it is 'equally forbidden by the principle of non-use of force' (*ibid.*), since this does appear to conflate the propositions in issue. *Quaere* what the Court meant earlier in its deliberations when it addressed itself in terms of 'the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations' and its status as *jus cogens*, as proclaimed by the International Law Commission, *Nicaragua and the United States: ibid.*, at 100 (para 190).

⁷ *Contra* the episodes of the Cold War and thereafter examined in N. Stürchler, *The Threat of Force in International Law* (2007).

⁸ Adams, 'Unease Over Mandate as US Troops Sail for Haiti', *The Times*, 1 Oct. 1993, 17. Acting under Chaps VII and VIII of the Charter in Res 875 (16 Oct. 1993), the Security Council called upon 'member states acting nationally or through regional agencies or arrangements ... to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to ensure strict implementation of the provisions of Resolutions 841 (1993) and 873 (1993)'. See, further, A. Aust, *Modern Treaty Law and Practice* (2nd edn, 2007), at 318. The US followed its initial deployments with the dispatch of 6 naval warships to Haiti: Robinson, 'US Sends Blockade Warships to Haiti', *Daily Telegraph*, 16 Oct. 1993, 1. An infantry company was also placed on stand-by at the naval base of Guantánamo Bay, Cuba. Cf. Roscini, *supra* note 3, at 237.

⁹ Whitney, 'NATO to Conduct Large Manoeuvres to Warn Off Serbs', *New York Times*, 12 June 1998, A1. See also Causholli, 'NATO Jets Stage a Show of Force Near Kosovo', *Boston Globe*, 16 June 1998, A29. An 'activation warning' was issued as part of these exercises: see Butcher, 'NATO Warns Milosevic of Kosovo Air Strikes', *Daily Telegraph*, 25 Sept. 1998, 19. See also 'UK, US in New Warning to Milosevic', *Financial Times*, 9 Oct. 1998, 2, and Black and Walker, 'Talk or Face Air Strikes', *The Guardian*, 29 Jan. 1999, 13.

¹⁰ Typical to the form, that is, of the 'crisis' model of international lawyering richly explored in Charlesworth, 'International Law: A Discipline of Crisis', 65 *MLR* (2002) 377.

The differential is nowhere more apparent than in our preoccupation with the ‘authorization’ for force contained in Security Council Resolution 678 of November 1990 – the resolution emblematic of the rule of law and the inauguration of the New World Order at the end of the Cold War, but which itself rested on a threat of force in its communication to Member States ‘co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements [previous] resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area’.¹¹ Iraq was to be afforded ‘one final opportunity’, announced the Council, ‘as a pause of goodwill, to do so’.¹² Perhaps this resolution was a heralding of new times, of the significance that the threat as well as the use of force would have in the reign of the sole superpower – a sign of things to come. Yet, it might have also exposed the tedious complacencies which have often greeted threats of force, for – after all the attention that was paid to this flagship resolution of the United Nations – how many of us made much of the fact that a threat, albeit (we can presume) a lawful threat, of force had been addressed to Iraq?¹³

Of more recent vintage is, of course, Security Council Resolution 1441 of November 2002, which reminded Iraq of the repeated warnings it had received of the ‘serious consequences’ which would result from ‘its continued violations of its obligations’.¹⁴ For its part, and immediately prior to the commencement of hostilities with Operation Iraqi Freedom in March 2003, the United States had addressed itself in rather forthright terms to the leadership of Iraq; on the eve of the intervention, President George W. Bush gave a televised broadcast in which he declared that ‘Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict commenced at a time of our choosing’.¹⁵ It was a repeat performance of the response of the United States to the terrorist attacks of September 2001, when President Bush had warned that ‘[t]he Taliban must act and must act immediately. They will hand over the terrorists or they will share in their fate’.¹⁶ These words were spoken before the United States Congress on 20 September 2001, and in the presence of British Prime Minister Tony Blair; Operation Enduring Freedom against Afghanistan came to pass on 7 October 2001.

The temptation, then, might be to award relevance to threats of force as and when they materialize into a use of force – as they did in the examples of Iraq

¹¹ SC Res 678 (1990), 2nd operative para (emphasis added). See Byers, ‘The Shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq’, 13 *EJIL* (2002) 21. The ‘uncertainty’ as to the legal basis of Res 678 (1990) is remarked upon in C. Gray, *International Law and the Use of Force* (3rd edn, 2008), at 265.

¹² SC Res 678 (1990), 1st operative para.

¹³ See Y. Dinstein, *War, Aggression and Self-Defence* (4th edn, 2005), at 31.

¹⁴ SC Res 1441 (2002), 13th operative para.

¹⁵ President George W. Bush’s Address to the Nation on Developments in Iraq (17 Mar. 2003), available at: www.whitehouse.gov/news/releases/2003/03/20030317-7.html.

¹⁶ See, further, Steele, MacAskill, and Norton-Taylor, ‘Threats of US Strikes Passed to Taliban Weeks before NY Attack’, *The Guardian*, 22 Sept. 2001, 1.

and Afghanistan that we have presented above – or when they form the basis of a close encounter between states, as occurred between the United States and the Soviet Union during the Cuban Missile Crisis of 1962.¹⁷ We consider one such instance after the Cold War concerning Iraq and its obligations on weapons inspection, but we shall reflect further on how the ‘threat of force’ had already suffused international relations with Iraq well before that time, coming as it did in the context of Iraq’s treatment of its own population following the 1990–1991 Gulf Conflict. That episode reveals how threats of force can be used simultaneously with and just as effectively as force itself, before we take up the case of Iran’s allegations of the threats of force the United States made against it during the troubled tenure of the Bush Administration. We realize how problematic it is to form reliable legal diagnoses of these morsels of practice without the hindsight gathered from an actual use of force, or of a fully worked definition of the concept of the threat of force,¹⁸ or of the usual normative indicators which states advance on occasion of the use of force. That will become all the more evident as we return to, and offer a modern reading of, the *Corfu Channel Case* between the United Kingdom and Albania of April 1949 – the first contentious case to come before the International Court of Justice. We reflect on this jurisprudence as well as on the background to the *idea* of legislative action against threats of force, from where the source of much of the disillusionment about the practical worth of this proscription might well lie.

2 The Prohibition of the Application of Force

It is (or ought to be) apparent that the prohibition of force contained in the Charter is in fact not a singular legal proposition – for, in addition to its banishment of the *use* of force, Article 2(4) of the Charter also prohibits the *threat* of force: ‘[a]ll members shall refrain in their international relations’, it provides, ‘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’. The provision was therefore intended to address different typologies of state action, though, in July

¹⁷ Indeed, the apparent inspiration of Stürchler, *supra* note 7, at p. xiii, which also forms an element of the analysis of B. Asrat, *Prohibition of Force under the UN Charter: A Study of Art. 2 (4)* (1991), at 140. See also Christol and Davis, ‘Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Matériel to Cuba’, 57 *AJIL* (1963) 525.

¹⁸ Though the bare bones of the Court’s conceptualization of a threat of force are discussed below, at *infra* notes 30 to 33 (and accompanying text). Note, however, the impressionistic stance of the Court in the *Nicaragua Case* in respect of the military manoeuvres of the US near the Nicaraguan borders in autumn 1982; Feb. 1983 (‘Ahuas Tara I’); Aug. 1984 (‘Ahuas Tara II’); Nov. 1984; Feb. 1985 (‘Ahuas Tara III’); Mar. 1985 (‘Universal Trek ’85’) and June 1985: *Nicaragua Case*, *supra* note 1, at 53 (para 92)—though the Court did there emphasize ‘the circumstances in which [these exercises] were held’. The Court later referred to Nicaragua’s claim that these actions were ‘efforts by direct and indirect means to coerce and intimidate the Government of Nicaragua’, which included overflights—but, on this matter, the Court said nothing further: *ibid.*, at 128 (para 250). In Nicaragua’s view, the ‘overflights’ of its territory by US aircraft were ‘not only for purposes of intelligence-gathering and supply to the *contras* in the field, but also to intimidate the population’: *ibid.*, at 22 (para 21). See, further, the Court’s remarks *ibid.*, at 51–53 (paras 87–91).

1996, the approach of the International Court of Justice was to treat both of these aspects in one and the same breath:

Whether a signalled intention to use force if certain events occur is or is not a ‘threat’ within Article 2, paragraph 4, of the Charter depends on various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of ‘threat’ and ‘use’ of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State – whether or not it defended the policy of deterrence – suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.¹⁹

It is for this reason – the idea of our two prohibitions standing together – that we find it attractive to develop the encompassing concept of the *application of force*. The position of the International Court of Justice is clear in this passage: what goes for the one manifestation of force must go for the other.²⁰ To speak of the application of force is to reflect the Court’s commitment to the ‘idiomatic unity’ of both the propositions which we have identified.²¹

The significance of the Court’s position is that, in the first instance, the Court binds the concept of ‘threat’ to the *form* of force as that term been interpreted for the ‘use’ of force under Article 2(4) of the Charter.²² Its scope is therefore no more and no less than that, such that what we are concerned with here is the threat of *armed* force.

¹⁹ *Nuclear Weapons* (Advisory Opinion), *supra* note 5, at 246 (para 47).

²⁰ And follows from the innovative formulation contained in Art. 2(4) when set against the terms of the 1928 Kellogg–Briand Pact’s proscription of the ‘recourse to war for the solution of international controversies’. However, the appeal of this logic was evident even at that time, since Art. 2 of the Budapest Articles of Interpretation of the Kellogg–Briand Pact of Sept. 1934 provided that ‘a signatory State which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact’. The Articles were adopted under the auspices of the International Law Association and can be found at: 20 *Trans Grotius Soc* (1934) 205. See, further, Lauterpacht, ‘The Pact of Paris and the Budapest Articles of Interpretation’, 20 *Trans Grotius Soc* (1934) 178, at 182 (who maintains that the object of interpretation ‘is to discover whether a fact or set of facts fall logically within the rule’). For Lauterpacht, Art. 2 of the Budapest Articles might be ‘regarded as a proper instance of genuine interpretation’, although ‘[s]uch a threat in fact amounts to an anticipatory, although conditional, repudiation of the Treaty’. See, however, Art. 11 of the 1919 Covenant of the League of Nations which declared that ‘[a]ny 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’ (emphasis added). Cf. Roscher, ‘The “Renunciation of War as an Instrument of National Policy”’, 4 *J Hist Int’l L* (2002) 293, at 305.

²¹ Stürchler, *supra* note 7, at 2 (although the use of the disjunctive ‘or’ as opposed to the conjunctive ‘and’ in the formulation is somewhat curious; perhaps it is no more than a stylistic choice, intended to emphasize that each of these propositions can as a matter of fact and law exist independently of one another). As did Ian Brownlie in *International Law and the Use of Force by States* (1963), at 364, where he wrote that ‘[i]f the promise to resort to force in conditions for which no justification for the use of force exists, the threat itself is illegal’.

²² Of armed force as opposed to other forms of force. See Schachter, *supra* note 3, at 1624, and Randelzhofer, *supra* note 2, at 117–119. See also Sadurska, *supra* note 3, at 242.

Those threats which concern other matters, such as the Russian Federation's recent 'gas ultimatum' to the Ukraine,²³ or the intimation of the United States that it would move NATO's headquarters out of Brussels on account of Belgium's system of universal jurisdiction,²⁴ or the more recent suggestion concerning the United States that it would no longer share intelligence with the United Kingdom if details of the treatment of Guantánamo detainee Binyam Mohamed were made public²⁵ fall beyond our purview. We are also outside the realm of cyberforce, and the threat of cyberforce.²⁶

The second observation we can make in respect of the above *dictum* relates to the general legal framework the Court adopts for its assessment of threats of force. It is identical to that which is in place for the use of force,²⁷ and the Court summons it here in order to reinforce its claim of the need to distinguish between *lawful* and *unlawful* threats of force; in other words, the Court proceeds from the position that not all threats of force are unlawful *per se*.²⁸ The Court then seeks to provide an illustration of the sort of unlawful threats of force on its mind; 'it would be illegal', the Court announced, 'for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths'.²⁹

²³ Harding, 'Russia Issues Gas Ultimatum to Ukraine', *The Guardian*, 3 Oct. 2007, 27.

²⁴ Wastell, 'America Threatens to Move NATO after Franks is Charged', *Daily Telegraph*, 18 May 2003, 1. According to US Secretary of Defence Donald H. Rumsfeld, '[i]f the civilian and military leaders of member states [of NATO] can not come to Belgium without fear of harassment by Belgian courts entertaining spurious charges by politicised prosecutors, then it calls into question Belgium's attitude about its responsibilities as a host nation for NATO and Allied forces. ... Certainly until this matter is resolved we will have to oppose any further spending for construction for a new NATO headquarters here in Brussels until we know with certainty that Belgium intends to be a hospitable place for NATO to conduct its business, as it has been over so many years': See US Department of Defence, Office of the Assistant Secretary of Defence (Public Affairs), News Transcript: Secretary of Defence Rumsfeld at NATO Headquarters, available at: www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2742 (12 June 2003).

²⁵ If, of course, true: the allegation was rejected as false by the British Foreign Secretary David Miliband. See Norton-Taylor, 'US Made No Threat over Torture Evidence', *The Guardian*, 6 Feb. 2009, 8.

²⁶ See Landler and Markoff, 'After Computer Siege in Estonia, War Fears Turn to Cyberspace', *New York Times*, 29 May 2007, A1. See, further, Schmitt, 'Computer Network Attack and the Use of Force in International Law: Thoughts on A Normative Framework', 37 *Columbia J Transnat'l L* (1999) 885, at 902–923.

²⁷ And to which I have given considerable attention in 'Topographies of Force', in M.N. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines—Essays in Honour of Yoram Dinstein* (2007), at 29.

²⁸ The same can be said for Art. 52 of the Vienna Convention on the Law of Treaties. See, further, I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, 1984), at 180, and Aust, *supra* note 8, at 318.

²⁹ *Supra* note 19. The first of these illustrations coincides with the stipulation in the 1970 GA Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations that '[t]he territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.' See GA Res 2625 (XXV) GAOR, 25th Sess., Supp. 28, 121 (1970). The second illustration recalls an earlier iteration of the Court's jurisprudence, from its judgment in the *Nicaragua Case*, that '[t]he Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system': *Nicaragua Case*, *supra* note 1, at 133 (para 263). The Court went on to reflect that texts such as GA Res 2625 (XXV) (1970) and the 1975 Helsinki Final Act 'envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies': *ibid.*, at 133 (para 264).

As the Court invites us to consider these illustrations, we turn to our third observation of how the Court appears to set down the provisional components of a legal definition for the threat of force: note how, in its approach to these illustrations, the Court adverts to those ‘signalled intention[s]’ which amount to a ‘threat of force’ for the purposes of Article 2(4) of the Charter – and of how this ‘depends on various factors’.³⁰ Importantly, it would seem that the Court is locating itself within a certain genre of state activity – that of ‘a signalled intention to use force if certain events occur’ – but that the Court is not prepared to regard all signalled intentions to use force as threats of force because of its commitment to a contextual analysis.³¹ Nevertheless, we do gain a sense from these words of how explicit a threat of force needs to be in order to be counted as such, and the Court follows this up with its references to the ‘stated’ and the ‘declared’ readiness of a state to use force.³² The Court then builds on this component in the examples it provides of threats of force, so that the declared readiness to use force is cast in specific as opposed to general terms: note how the Court mentions threats of force *for* the securing of territory and *for* the following or not following of certain political and economic paths.³³ To this end, Oscar Schachter had already written of how ‘in many situations the deployment of military forces or missiles has unstated aims and its effect is equivocal’:

Curiously, [Article 2 (4) of the Charter] has not been invoked much as an explicit prohibition of such implied threats. The explanation may lie in the subtleties of power relations and the difficulty of demonstrating coercive intent. Or perhaps more realistically, it may be a manifestation of the general recognition of and tolerance for disparities of power and of their effect in maintaining dominant and subordinate relationships between unequal States. Such toleration, however, wide as it may be, is not without its limits. A blatant and direct threat of force, used to compel another State to yield territory or make substantial political concessions (not required by law), would have to be seen as illegal under Article 2 (4), if the words ‘threats of force’ are to have any meaning.³⁴

The final observation to make concerns the relationship the Court emphasizes between threats of force and the exceptions to the prohibition of force found in the Charter, in particular the right of self-defence. This reflects the Court’s commitment to the notion of lawful threats of force, and, in the Court’s opinion, ‘if it is to be lawful’ a threat to use force ‘must be a use of force that is in conformity with the Charter’.³⁵ The Court is therefore viewing the possibilities of a threat of force as one instance of the

³⁰ *Supra* note 19.

³¹ See Sadurska, *supra* note 3, at 245.

³² *Supra* note 19. See, further, Roscini, *supra* note 3, at 231. Note the dissenting opinion of Judge Padilla Nervo, though, in the *Fisheries Jurisdiction Case (United Kingdom v. Iceland)* [1973] ICJ Rep 49, at 91 (that ‘certain “Notes” delivered by the government of a strong power to the government of a small nation[] may have the same purpose and the same effect as a threat or use of force’).

³³ Cf. Sadurska, *supra* note 3, at 243 (that a ‘threat’ can be included in a defensive alliance treaty such as the 1949 North Atlantic Treaty, the 1954 Southeast Asia Treaty Organization or the 1955 Warsaw Pact), and Roscini, *supra* note 3, at 235.

³⁴ Schachter, *supra* note 3, at 1625, and O. Schachter, *International Law in Theory and Practice* (1991), at 111.

³⁵ *Supra* note 19.

right of self-defence in action, as it had earlier explained how, '[i]n order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence'.³⁶ Perhaps it is along this line of reasoning that we can read the position of the League of Arab States at the time of the adoption of the Beirut Declaration in March 2002, when the United States had begun amassing its armed forces in the Persian Gulf and with Iraq firmly in its sights:³⁷ the League concluded that an armed attack upon Iraq would be considered as an armed attack against all members of the League.³⁸ It rejected 'the threat of an aggression on some Arab countries, particularly Iraq, and assert[ed] the categorical rejection of attacking Iraq or threatening the security and safety of any Arab State, and consider[ed] it a threat to the national security of all the Arab States'.³⁹

The prospect of a threat of force under these conditions would have pitted the right of self-defence against an opposing claim of the right of self-defence,⁴⁰ very different from how the 'threat of force' is constructed in the following passage drawn from the ninth edition of *Oppenheim's International Law*:

If an imminent violation [of a State's territory], or the continuation of an already commenced violation, can be prevented and redressed otherwise than by a violation of another State on the part of the endangered State, this latter violation is not necessary, and therefore not excused and justified. When, to give an example, a State is informed that a body of armed men is being organised on neighboring territory for the purpose of a raid into its territory, and then the danger can be removed through an appeal to the authorities of the neighboring country or to an appropriate international organisation, no case of necessity has arisen. But if such an appeal is fruitless or not possible, or if there is danger in delay, a case of necessity arises, and the threatened State is justified in invading the neighbouring country for the purpose of disarming the intending raiders.⁴¹

In this example, the threat of force is put into service in order to explain how the 'necessity' of an action – one of the customary requirements for the right of self-defence – must be clear and how it must be met; in its July 1996 advisory opinion, the court concluded

³⁶ *Nuclear Weapons* (Advisory Opinion), *supra* note 5, at 246 (para 47). See Randelzhofer, *supra* note 2, at 124 ('some of the most obvious threats of force are legitimised by the right of self-defence embodied in Art. 51 of the Charter').

³⁷ Schmitt, 'U.S. Plan for Iraq is said to Include Attack on 3 Sides', *New York Times*, 5 July 2002, A1 (reporting 'an advanced state of planning in the military' of the United States).

³⁸ Cf. Sadurska, *supra* note 33.

³⁹ MacFarquhar, 'Pact over Kuwait: By Embracing Baghdad, League Deals Rebuff to Bush's Efforts', *New York Times*, 29 Mar. 2002, A1.

⁴⁰ For at that time the US had rested the core of its case on the right of pre-emptive self-defence. Its argument of authorization for action from the UN was a later development: Kritsiotis, 'Arguments of Mass Confusion', 15 *EJIL* (2004) 233, at 244–245 and 250–252. And, as Yoram Dinstein has written, '[u]nder no circumstances can the actual use of force by both parties to a conflict be lawful simultaneously': *supra* note 13, at 178. In *US v. Von Weizsaecker et al.*, the American Military Tribunal at Nuremberg concluded that 'there can be no self-defence against self-defence': 14 Trials of War Criminals before Nuremberg Military Tribunals under Control Council Law No. 10, 314, at 329. See also Stürchler, *supra* note 7, at 42.

⁴¹ R. Jennings and A. Watts, *Oppenheim's International Law* (9th edn, 1992), i (Peace), at 421 (para 127).

that '[a] threat or use of force ... that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful'.⁴² However, the question is raised whether force can ever be *used* in self-defence in response to an unlawful threat of force, that is whether the right of self-defence knows of some anticipatory form and function.⁴³ We can only speculate on this point in the absence of precise guidance from the Court, but if a state can lawfully threaten the use of force in self-defence in such situations, then one must wonder whether, in an extenuation of the logic at work in the *Nuclear Weapons* advisory opinion,⁴⁴ it is lawful to *use* force in self-defence in these circumstances as well. Perhaps the answer to this challenge lies somewhere in the dichotomization of the uses of force which the Court made in the *Nicaragua Case*, where it distinguished 'the most grave forms of the use of force' from 'other less grave forms'.⁴⁵ The Court did so in order to consider which violations of the prohibition of the use of force gave rise to the right of self-defence and which did not. It concluded that 'the most grave forms of force' constituted armed attacks which activated the right of self-defence – an approach which it followed in the *Oil Platforms Case*.⁴⁶ One wonders whether the same reasoning could not and should not be developed for threats of force, so that the 'most grave' threats of force are those which are imminent or 'sufficiently proximate' in character;⁴⁷ otherwise, we are left with a situation where the concept of an unlawful threat of force covers a staggering multitude of sins – all of which may be able to be met by a *threat but not a use of force in self-defence*. For now at least, and for good reason, we are left with the Court's decision to reserve its position on, as it has put it, 'the issue of the lawfulness of a response [of the use of force] to the imminent threat of armed attack'.⁴⁸

3 The Virtue of Threats of Force: Iraq and the Perfect Peacekeepers

All of this said, it is incumbent on us to take a step back and reflect upon the extent to which this thinking of the Court has been reflected in, or even translated into, practice. It has often been observed that there exists a longstanding tradition of the toleration of threats of force,⁴⁹ that states have exhibited greater accommodations of threats of force than they have the uses of force. Toleration, however, is one thing; it is quite

⁴² *Nuclear Weapons* (Advisory Opinion), *supra* note 5, at 266 (para. 105(2)(C)).

⁴³ Randelzhofer's 'offensive and defensive preparations': *supra* note 2, at 124.

⁴⁴ *Supra* notes 5 and 21.

⁴⁵ *Nicaragua Case*, *supra* note 1, at 101 (para 191).

⁴⁶ *Case Concerning Oil Platforms*, *supra* note 1, at 187 (para 51).

⁴⁷ R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edn, 1999), at 426. See, for instance, Stürchler's view on the matter: *supra* note 7, at 254.

⁴⁸ Which had not been in issue before it: *Nicaragua Case*, *supra* note 1, at 103 (para 194).

⁴⁹ The general tenor of Sadurska's position: *supra* note 3, at 250 is that '[i]t seems that as long as the threat of force does not jeopardise peace or lead to massive violations of human rights, international actors demonstrate varying degrees of approval or more or less reluctant tolerance for unilateral threats'. Also the theme of Randelzhofer, *supra* note 2, at 124, that 'State practice reveals a relatively high degree of tolerance towards mere threats of force'.

another to speak of the *virtue* of such threats – that is, to celebrate their perceived advantages and to consider their value in more of a utilitarian light.⁵⁰ Yet, it is precisely this which seems to me to have occurred in February 1998 – and in the words of the United Nations Secretary-General Kofi A. Annan no less – during the tense diplomatic stand-off between the United States, the United Kingdom, and Iraq after President Saddam Hussein had denied access to the United Nations Special Commission on the disarmament of Iraq of certain ‘presidential and sovereign sites’.⁵¹

This refusal had occurred in December 1997,⁵² and both the United States and the United Kingdom responded with levelling threats of force against Iraq for its recalcitrant behaviour,⁵³ coupled with an increase in their military presence in the Persian Gulf.⁵⁴ It is this feature of the episode, so starkly apparent during the exchanges between the countries concerned and so defining of its immediate outcome, which makes it especially apposite for study.⁵⁵ President Hussein remained intransigent, however, and the use of force did seem all but inevitable. It is at this point that Secretary-General Annan decided on his personal intervention in the matter and, in an eleventh-hour bid to secure the peace,⁵⁶ he headed for Baghdad *via* Paris ‘acting on the basis of the Secretary-General’s authority’ as well as his ‘good offices’.⁵⁷ There, on 23 February 1998, he managed to obtain Iraq’s acceptance of the businesslike terms

⁵⁰ We would therefore argue for a careful dissection of the consequences stemming from the ‘more or less reluctant tolerance for unilateral threats’ and the ‘varying degrees of approval’ identified by Sadurska: *supra* note 3, at 250 (or, at 239, of the ‘beneficial’ consequences of threats of force). Note that Schachter considers ‘[t]he last twenty-three words’ of Art. 2(4) – i.e. 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’ – in respect of the *uses* of force and of how force used for benign ends ‘has found very little support among governments and scholars’: *supra* note 3, at 1626–1627.

⁵¹ For a helpful summary of the factual background see Condron, ‘Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox’, 161 *Military L Rev* (1999) 115, at 120–124.

⁵² Difficulties had arisen in Oct. 1997, when President Hussein expelled American members of the Special Commission, which led, in turn, to the suspension of the Commission’s work: Myers, ‘Iraq Carried Out Threat to Expel U.S. Inspectors’, *New York Times*, 14 Nov. 1997, A1. It was not the first time that Iraq had presented difficulties on this front: see SC Res 707 (1991). The Commission resumed its business after successful diplomatic entreaties were made with Iraq by Russia.

⁵³ And supported in some measure by some 20 other states: see Vulliamy and Wintour, ‘Saddam’s Last Stand: They Both Blinked At the Brink of War’, *The Observer*, 22 Feb. 1998, 9 – although this support has been described as ‘political’ in nature. See White and Cryer, ‘Unilateral Enforcement of Resolution 687: A Threat too Far?’, 29 *California Western Int’l LJ* (1999) 243, at 244, and at 280.

⁵⁴ See Wren, ‘U.N. Official Doubts Team Can Verify Iraq Arms’, *New York Times*, 24 Jan. 1998, A3, and Myers, ‘Clinton Is Sending 2d Carrier to Gulf’, *New York Times*, 15 Nov. 1997, A1. See also Myers, ‘U.S. Forces Ready to Strike, Pentagon Says’, *New York Times*, 4 Feb. 1998, A8.

⁵⁵ And the epicentre of focus for Wedgwood, ‘The Enforcement of Security Council Resolution 687: The Threat of Force against Iraq’s Weapons of Mass Destruction’, 92 *AJIL* (1998) 724, and of White and Cryer, *supra* note 53.

⁵⁶ Silber and Khalaf, ‘Annan Seeks Support for Mission’, *Financial Times* (New York), 17 Feb. 1998, 8. See, further, Crossette, ‘U.N. Rebuffs U.S. on Threat to Iraq If It Breaks Pact’, *New York Times*, 3 Mar. 1998, A1.

⁵⁷ Wren, ‘Annan to Go to Iraq to Seek a Solution to Arms Impasse’, *New York Times*, 18 Feb. 1998, A8. On the background to his mission see Sciolino, ‘For U.N. Chief, Scarcely Room for Negotiating’, *New York Times*, 19 Feb. 1998, A1.

of a memorandum of understanding in which the Government of Iraq undertook to accord to the Special Commission and to the International Atomic Energy Agency ‘immediate, unconditional and unrestricted access in conformity with [relevant] Security Council Resolutions’.⁵⁸ Secretary-General Annan’s contribution was hailed as a resounding diplomatic triumph – and this was no ordinary triumph since it had salvaged Iraq and the world from the precipice of hostilities.⁵⁹

Upon his return to the headquarters of the United Nations in New York, Secretary-General Annan was greeted by the spontaneous applause of his colleagues and of well-wishers as he stood to address them, during which he thanked both United States President William J. Clinton and British Prime Minister Tony Blair – and, then, he congratulated them for being ‘perfect U.N. peacekeepers’. ‘U.N. peacekeepers’, he said, ‘in the sense that we taught our peacekeepers that the best way to use force is to show it in order not to have to use it.’⁶⁰ No chance remark was this for, soon after the conclusion of the memorandum of understanding, Secretary-General Annan had observed that ‘[y]ou can do a lot with diplomacy but of course you can do a lot more with diplomacy backed by fairness and force’.⁶¹ This occurred in the presence of Tariq Aziz, the Deputy Prime Minister of Iraq, who preferred to see things somewhat differently, attributing the accord of the parties to the ‘goodwill involved, not the American or the British build-up in the Gulf and not [to] the policy of sabre-rattling’.⁶² Nevertheless, both remarks of Secretary-General Annan offer poignant reconstructions of the episode, and immortalize the significance which Secretary-General Annan attached to the role that the threat – or threats – of force of the United States and the United Kingdom had had in underpinning his own accomplishment.⁶³ As he did so, the Secretary-General invoked the sacred language of ‘peace-keepers’ which brought this experience into clear line with one of the main success stories of the United Nations.⁶⁴ These *threats* of

⁵⁸ United Nations–Iraq Memorandum of Understanding, 37 ILM (1998) 501, Art. 3 (which included, in an annex to the Memorandum, the 8 Presidential Sites of the Republican Palace Presidential Site (Baghdad); Radwaniyah Presidential Site (Baghdad); Sijood Presidential Site (Baghdad); Tikrit Presidential Site; Tharthar Presidential Site; Jabal Makhul Presidential Site; Mosul Presidential Site and Basrah Presidential Site). See, further, Gordon and Sciolino, ‘A Wary U.S. Came Around on Annan Trip But Set Terms’, *Int’l Herald Tribune* (Paris), 26 Feb. 1998, 1. The Resolutions specifically referred to – in Art. 1 of the Memorandum – were Res 687 (1991) and Res 715 (1991).

⁵⁹ Ratnesar, ‘A Star Turn for The Peace Broker’, *Time*, 9 Mar. 1998.

⁶⁰ Severeid, ‘Annan Briefs Security Council’, *Washington Post*, 24 Feb. 1998. A remark which seems to say as much about *what* the peacekeepers of the UN are being taught in the view of Secretary-General Annan as it does about the virtue of the threat of force.

⁶¹ See the Unofficial Transcript of the Joint Press Conference by Secretary-General Annan and His Excellency Deputy Prime Minister of Iraq Tariq Aziz (Baghdad: 23 Feb. 1998), available at: www.un.org/NewLinks/sgpc.htm, and Crossette, ‘Annan’s Candor Makes His Iraqi Hosts Wince’, *Int’l Herald Tribune* (Paris), 24 Feb. 1998, 1.

⁶² Unofficial Transcript, *supra* note 61.

⁶³ Though oddly elided in the accounts of White and Cryer, *supra* note 53, and Condrón, *supra* note 51.

⁶⁴ There is a paradox here: note how Cassese describes peacekeeping operations as ‘useful for the purpose of making the contending parties stop fighting thereby avoiding more bloodshed [but] [t]hey are not designed to compel the parties to accept a solution imposed by the UN’: see A. Cassese, *International Law in A Divided World* (1986), at 226 (para 130).

force, then, were viewed not as equivalents of the *use* of force, but as a real and even realistic means for *avoiding* the use of force when it appeared at its most inevitable, its most likely. And, for Secretary-General Annan, their value could not be doubted in bringing to heel the close encounter alluded to in the title of this article.

We do not doubt the characterization of the actions of the United States and the United Kingdom as threats of force in a legal sense, but, as we have learnt from the jurisprudence of the Court, these need not have been unlawful. According to the Court, their lawfulness can be measured only against the calculus of whether the 'envisaged use of force is itself unlawful',⁶⁵ a rather challenging concept one would have thought given that a judg(e)ment of this kind invariably concerns *projected* uses of force, and, presumably, would at some point need to take account of the *proportionality* of the aforementioned projected action as part of its assessment. For this is an inexorable indicium of the lawfulness of force,⁶⁶ and, in theory at least, it is a quantification that may fully reveal itself only once an action has been completed or brought to a close.⁶⁷ By these words, however, the Court might have also meant or intended something else – apart from how an existing right (of self-defence, for example) or mandate (from the Security Council) is exercised or executed in practice. We can infer an additional concern of the Court here, one which relates to whether, at the point at which the threat or threats of force take place, there exists in law a *prima facie* justification for the *use* of force for an equivalent action in the first place – i.e. where the law provides some identifiable normative anchor, such as the right of self-defence under Article 51 of the Charter or an authorization from the Security Council, to which the threat or threats of force can be tied, and tied as a preliminary matter.⁶⁸

If this is so, it does raise the interesting question of how the Court – at this moment, the moment of its advisory opinion in July 1996 – appreciates the power and potential of each episode of the *use* of force to contribute to the development of public international law, that is to issue a change in, or clarification to, a particular point of law on the regulation of force. For, in June 1986, in its ruling in the *Nicaragua Case*, the Court had hailed the salience for public international law of state practice on intervention when it said that '[r]eliance by a State on a novel right or an unprecedented exception

⁶⁵ *Supra* note 19.

⁶⁶ J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2006), at 138–187. And which the Court accepts, as it did in its advisory opinion in *Nuclear Weapons*: '[the] dual condition [of necessity and proportionality] applies equally to Article 51 of the Charter, whatever the means of force employed': *supra* note 5, at 245 (para 41). Contrast this formulation with what the Court concluded in part of its *dispositif* to the opinion, that '[a] threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful': *supra* note 5, at 266 (para 105(2)(C)) (emphasis added).

⁶⁷ Although there is no reason in principle why *prima facie* determinations on proportionality cannot be made earlier than this (during an unduly prolonged exercise of force, for example). Note, further, that President Ehud Olmert of Israel announced in Feb. 2009 that his cabinet's position 'from the outset was that if firing continues against residents of the south, there would be a sharp Israeli response that would be disproportionate to the firing': Buck, 'Olmert Threatens Fierce Response to Rockets', *Financial Times*, 2 Feb. 2009, 6 (emphasis added). See, further, the discussion of Stürchler, *supra* note 7, at 42.

⁶⁸ Hence Brownlie's 'conditions for which no justification for the use of force exists': *supra* note 21.

to the principle [of non-intervention] might, if shared in principle by other States, tend towards a modification of customary international law'.⁶⁹ Yet, here, a mere decade later, the Court approaches its analysis of threats of force as if the law on the use of force were conveniently set in aspic, somehow immune or oblivious to the changing dispensations which may occur from time to time in state practice.⁷⁰ This is perhaps one of the main difficulties of the discourse which the Court has opened up on threats of force in its jurisprudence;⁷¹ it seems to marginalize the seminal opportunities which inhere in the uses of force for the *constituting* of new law, or for the refining of the law in one particular direction or another. And, as we have intimated, it is often in the actual recourse to force that a particular legal proposition is brought alive in the minds of states, where the implications of force are impressed upon their legal imaginations – enough for them to form an official view and to express themselves in terms of their *opinio juris sive necessitatis*. The use of force, then, is what tends to precipitate these expressions, to bring them brimming to the fore, so that we can discern (for example) whether the right of self-defence extends to cover the protection of a state's own nationals (as witnessed in the wake of the Israeli raid on Entebbe in July 1976);⁷² the parameters of the right of anticipatory self-defence (*pace* Israel's strike on the Iraqi nuclear reactor at Osiraq in June 1981);⁷³ or, as happened with Operation Desert Fox (December 1998) and Operation Iraqi Freedom (March 2003), whether the Security Council had indeed authorized the actions ultimately taken in its name.⁷⁴

If Secretary-General Annan had negotiated an improbable peace in February 1998, it proved not to be a durable one for – less than a year later, in December 1998 – the United States and the United Kingdom made good these and additional threats of force against Iraq with the launch of Operation Desert Fox in December 1998.⁷⁵

⁶⁹ *Nicaragua Case*, *supra* note 1, at 109 (para 207). The Court was here addressing the principle of non-intervention, but its approach is no less significant for the prohibition of force: see *supra* note 1.

⁷⁰ And as understood in T.M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002).

⁷¹ Another is what we are to make of situations where states offer a 'fact-based factors' or 'elements' approach of varied justifications for the use of force, where 'no single argument quite carries the day, even while the ensemble seems sufficient': Wedgwood, 'NATO's Campaign in Yugoslavia', 93 *AJIL* (1999) 828, at 829. This possibility cannot be entirely discounted, given the state of relations between the US and Iran, which we consider in our next section.

⁷² Dinstein, *supra* note 13, at 233–234.

⁷³ Jennings and Watts, *supra* note 41, at 422 (para 127).

⁷⁴ Lobel and Ratner, 'Bypassing the Security Council: Ambiguous Authorisations to Use Force, Cease-fires and the Iraqi Inspection Regime', 93 *AJIL* (1999) 124, at 125.

⁷⁵ White and Cryer, *supra* note 53, at 244 and 262. For the further round of threats of force consider Shehon and Myers, 'U.S. Says It was Just Hours Away from Starting Attack against Iraq', *New York Times*, 15 Nov. 1998, A1, and Myers and Crossette, 'Iraq is Accused of New Rebuffs to U.N. Team: U.S. Repeats Warnings of Striking Baghdad', *New York Times*, 16 Dec. 1998, A1. To be sure, in the 3rd operative para of Res 1154 (1998), the Security Council had stated that 'any violation' by Iraq of its obligations in Res 687 (1991) 'would have severest consequences for Iraq'. Michael Matheson, Office of the Legal Adviser of the U.S. Department of State, informed the 92nd Annual Meeting of the American Society of International Law that this reference was 'obviously referring to the possible use of force': 92 *Proceedings ASIL* (1998) 136, at 139.

Nevertheless, his position on the threat of force in February 1998 deserves to be set against the verdict which he delivered rather dramatically in September 2004 in respect of Operation Iraqi Freedom, in many senses the logical successor to Operation Desert Fox, which, the Secretary-General maintained, was 'not in conformity with the [United Nations] Charter [and] [f]rom our point of view and from the Charter point of view it was illegal'.⁷⁶ To recollect, the formal argumentation presented on that occasion, i.e., in March 2003, was cut from precisely the same cloth as that for Operation Desert Fox over four years previously,⁷⁷ and, yet, here is Secretary-General Annan upholding the virtue of the prior threat of force when he views the ultimate *realization* of that force as unlawful and against the Charter. There is therefore some dissonance here in the treatment of the threat and the use of force, one which is hard to reconcile with the principle of equivalence of treatment sought by the International Court of Justice in July 1996.⁷⁸ Or could it be that Secretary-General Annan was simply addressing the *virtue* of a specific threat of force without prejudice to the position of its permissibility under public international law? And what *use* of force are we meant to connect our assessment of the lawfulness of the threats of the United States and the United Kingdom to? To Operation Desert Fox or to Operation Iraqi Freedom?⁷⁹ Or may it be that the time is now upon us where, as has so often persisted with the use of force in recent years,⁸⁰ we have to start thinking and talking in terms of *illegal* but *legitimate* threats of force?

Secretary-General Annan is no stranger to the lauding of threats of force in circumstances when the lawfulness of the use of force is or becomes controversial; in the context of the threats of force which accompanied Operation Allied Force over the 'humanitarian catastrophe' of Kosovo, he declared that '[i]f it becomes necessary to use force, that is something we will have to look at [but] the threat of force is essential and [it] is there'.⁸¹ To be sure, this is not in the same league of linguistic accolade as the 'perfect peacekeepers' we have encountered before, but it does strike the same note of quiet approval: the threat of force is regarded as being 'essential' to

⁷⁶ MacKaskill and Borger, 'Iraq War Was Illegal and Breached UN Charter, Says Annan', *The Guardian*, 16 Sept. 2004, 1. The 'shock' of the statement derived in part from the fact that the Secretary-General 'is an inherently cautious individual': 'The War Was Illegal', *The Guardian*, 17 Sept. 2004. Contrast Secretary-General Annan's position on Operation Desert Fox, which was a 'sad day' for the UN: '[t]hroughout this year,' he said, 'I have done everything in my power to ensure peaceful compliance with Security Council resolutions and to avert the use of force.' See Goldman, "'This Is A Sad Day for the United Nations,'" Annan Says', *Los Angeles Times*, 17 Dec. 1998, A45 (emphasis added).

⁷⁷ Though one might hazard that the legal position might have strengthened, given the unanimous adoption of SC Res 1441 (8 Nov. 2002) – though to what effect this is so remains to be seen. See Spiliopoulou Åkermark, 'Storms, Foxes and Nebulous Legal Arguments: Twelve Years of Force Against Iraq, 1991–2003', 54 *ICLQ* (2003) 221, at 231–232.

⁷⁸ *Supra* note 21.

⁷⁹ Assuming, of course, that there is a difference in the lawfulness of these operations: *supra* note 77.

⁸⁰ See Roberts, 'Legality Versus Legitimacy: Can Uses of Force be Illegal But Justified?', in P. Alston and E. MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (2008), at 179.

⁸¹ BBC News Online, 'Annan Backs Military Threat', available at: www.news.bbc.co.uk/1/hi/world/europe/264402.stm (28 Jan. 1999).

the needs of the moment,⁸² with Secretary-General Annan making his evaluation independent of any appreciation, legal or otherwise, of how he would receive the use of force in identical circumstances. And these circumstances related more to the possibilities of the evolution of a right of humanitarian intervention than they did to any ‘authorization’ from the Security Council,⁸³ of the order we had experienced with the coalition response to ‘the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas’ following the 1990–1991 Gulf Conflict.⁸⁴

Such was the Security Council’s depiction of ‘the magnitude of the human suffering’ in Iraq which followed the conclusion of hostilities of Operation Desert Storm,⁸⁵ but the response that this solicited was staggered in terms of time as it was in kind. The United States had put into use military aircraft to assure the delivery of humanitarian supplies before the adoption of Security Council Resolution 688 (1991) in April 1991, and, after the adoption of the resolution, it went on to declare the existence of a ‘no-fly zone’ north of Iraq’s 36th parallel with an injunction against the use of helicopters and fixed-wing aircraft in this airspace by Iraq.⁸⁶ In the meantime, in order further to facilitate the passage of humanitarian supplies and encourage the return of the thousands of Kurdish refugees who had fled to Iran and Turkey, British Prime Minister John Major proposed the establishment of ‘safe havens’, or, in his preferred terminology, ‘enclaves’, in northern Iraq which would ‘provide protection for Kurdish and other refugees within Iraq from the treatment that they have received in recent weeks’.⁸⁷ Contingents of armed forces from the United States, the United Kingdom, France, and the Netherlands, amongst others, entered Iraq for this purpose. Operation Provide Comfort had come into being.⁸⁸

This was not the end of the matter, for Iraq’s ‘repression’ did not stop there; in August 1992, in correspondence with the United Nations Secretary-General, Iran

⁸² As we noted in our introduction, in Res 1199 (1998) the Security Council had identified the ‘need to prevent [a humanitarian catastrophe] from happening’.

⁸³ For this evidently was not forthcoming in Res 1199 (1998). Furthermore, it would appear that the Secretary-General was more partial to this intervention than he was to either Operation Desert Fox or Operation Iraqi Freedom: see Annan, ‘Two Concepts of Sovereignty’, *The Economist*, 18 Sept. 1999, 49.

⁸⁴ SC Res 688 (5 Apr. 1991), 3rd preambular para. The Res was adopted by a vote of 10 in favour, 3 against (Cuba, Yemen, and Zimbabwe) and 2 abstentions – those of China and India. See, further, S.D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996), at 171, and S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001), at 197.

⁸⁵ SC Res 688 (5 Apr. 1991), 4th preambular para.

⁸⁶ Sciolino, ‘U.S. Warns Against Attack by Iraq on Kurdish Refugees’, *New York Times*, 11 Apr. 1991, A10. The US was acting in concert with the UK and France: Franck, *supra* note 70, at 153.

⁸⁷ Statement by the UK Prime Minister: A Safe Haven for the Kurds (8 Apr. 1991), reproduced in M. Weller (ed.), *Iraq and Kuwait: The Hostilities and Their Aftermath*, Cambridge International Documents Series, iii (1993), at 715–716. See also Freedman and Boren, ‘“Safe Havens” for Kurds in Post-War Iraq’, in N.S. Rodley (ed.), *To Loose the Bands of Wickedness: International Intervention in Defence of Human Rights* (1992), at 43.

⁸⁸ Greenwood, ‘New World Order or Old? The Invasion of Kuwait and the Rule of Law’, 55 *MLR* (1992) 153, at 176. See Murphy, *supra* note 84, at 174, reporting that, ‘at the height of the operation, more than 20,000 forces from 13 different states were involved’.

announced that '[t]he campaign of total annihilation of large segments of the Iraqi population, which has recently been intensely escalated in the southern marshlands of Iraq against the mostly Shiite inhabitants ... can lead to conditions similar to those in the spring of 1991, threatening regional and international peace and security.'⁸⁹ With the backing of both the United Kingdom and France, the United States accused Iraq of transgressing Resolution 688 (1991),⁹⁰ but it also informed the Government of Iraq that:

coalition aircraft, including those of the United States, will begin flying surveillance missions in southern Iraq, south of the 32 degrees North latitude to monitor the situation there. This will provide coverage of the areas where a majority of the most significant recent violations of [R]esolution 688 have taken place. The coalition is also informing Iraq's government that in order to facilitate these monitoring efforts, it is establishing a no-fly zone for all Iraqi fixed and rotary-wing aircraft. We continue to look forward to working with a new leadership in Baghdad, one that does not brutally suppress its own people and violate the most basic norms of humanity. *Until that day, no one should doubt our readiness to respond decisively to Iraq's failure to respect the no-fly zone.*⁹¹

These, then, are the details of the 'intervention' which occurred in Iraq after Operation Desert Storm, and the value of reciting them here is to demonstrate how variegated that intervention actually was and what it meant in real time – of how, at one and the same time, it combined *both* elements of the threat as well as the use of force. The actual dispatch of armed forces into Iraq was accompanied by the careful orchestration of the threat of force in relation to the 'no-fly zones' north of Iraq's 36th parallel and south of its 32nd parallel,⁹² and the increase in the use of force over time served to underscore these dualities of the intervention.⁹³ What is important for present purposes is to acknowledge how the threat of force was harnessed as an appropriate and (we could argue) proportionate mechanism to attend to the repressive practices of Iraq; it was summoned as a means not only of validating a particular principle (or 'right') of humanitarian intervention for public international law, but also of illuminating

⁸⁹ UN Doc. S/24414 (10 Aug. 1991) – a clear reference by Iran to the preambular stipulations of Res 688 (1991) (of the refugee traffic 'most recently [from] Kurdish populated areas' which 'threaten international peace and security in the region') and of the need for the equivalence of treatment in respect of Iraq's Shiite population. Res 688 (1991) would seem to have covered this with its reference to 'the repression of the *Iraqi civilian population in many parts of Iraq*' (emphasis added), although there was no 'mass exodus' from this part of Iraq; Murphy, *supra* note 84, at 178. See also Stromseth, 'Iraq's Repression of Its Civilian Population: Collective Responses and Continuing Challenges', in L.F. Damrosch (ed.), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (1993), at 77.

⁹⁰ *Supra* note 85.

⁹¹ US Press Release: Coalition to Impose 'No-Fly' Zone in Southern Iraq (26 Aug. 1992), reproduced in Weller, *supra* note 87, at 724–725 (emphasis added).

⁹² Extended to the 33rd parallel in Sept. 1996; Boileau, 'To the Suburbs of Baghdad: Clinton's Extension of the Southern Iraqi No-Fly Zone', 3 *ILSA J Int'l & Comp L* (1997) 875. And one that proved rather effective: Harden, 'Marines Building Iraqi Refugee Sites', *Washington Post*, 21 Apr. 1991, A1.

⁹³ As in Operation Desert Strike in Sept. 1996; see White, 'Comment on the Protection of the Kurdish Safe-Haven: Operation Desert Strike', 1 *J Armed Conflict L* (1996) 197. See, further, Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council', 3 *Max Planck UN Ybk* (1999) 59, at 71 and 73–79.

how this right might operate in practice, beyond its classic tropes or iterations.⁹⁴ The International Court of Justice has tended to view the threat of force as speaking to a particular principle or point of law; here, we have an important instruction in viewing the threat of force as a particular *modus operandi*.⁹⁵ What is more, the experience of Iraq has educated us in the versatilities of threats of force, of how they not only need be associated with the ‘close encounters’ discussed earlier in this article, but how they might well have a more durable function in the close and sustained management of a continuing risk or potential harm.⁹⁶

4 The Case of the Extended Hand and the Unclenched Fist

During his inaugural address in January 2009, President Barack Obama spoke of ‘those who cling to power through corruption and deceit and the silencing of dissent’, and, in an evocative turn of phrase widely believed to be intended for the leadership of Iran, he advised: ‘know that you are on the wrong side of history, but that we will extend a hand if you are willing to unclench your fist’.⁹⁷ There is a double metaphor at work in these words – of the United States extending its hand, and of Iran clenching its fist – and, at least in terms of tone, this representation marked a considerable change from the rhetoric of the past and from President George W. Bush’s designation of Iran as a member of the ‘axis of evil’ in his State of the Union Address of January 2002: ‘[s]tates like these, and their terrorist allies’, President Bush had declared, ‘constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack

⁹⁴ There is no reason why the modalities of an operation should affect or deny the legal principle – or right – that is at stake: Brownlie and Apperley, ‘Kosovo Crisis Inquiry: Memorandum on the International Law Aspects’, 49 *ICLQ* (2000) 878, at 898, argue that ‘[t]he modalities selected [in Operation Allied Force] disqualify the mission as a humanitarian one. Bombing the populated areas of Yugoslavia, using high performance ordnance and anti-personnel weapons, has nothing in common with humanitarian intervention. Moreover, bombing from a height of 15,000 feet endangers civilians and this operational mode is intended to prevent risks to combat personnel.’ It is not at all clear why this is so; it is not at all clear why this should be so. Nor should the size and scale of an operation detract from the principle or right which is under investigation: V. Lowe, *International Law* (2007), at 281.

⁹⁵ See the discussion of Stürchler, *supra* note 7, at 44.

⁹⁶ See, further, Helprin, ‘Make Sudan An Offer It Can’t Refuse’, *New York Times*, 25 Mar. 2008, A27. We note that when the Security Council declared Sarajevo ‘and other threatened areas, in particular the towns of Tuzla, Zepa, Gorazde, Bihac as well as Srebrenica, and their surroundings’ to be safe areas in Res 824 of May 1993, it declared (in the 7th operative para of the Res) its ‘readiness, in the event of the failure by any party to comply with the present resolution, to consider immediately the adoption of any additional measures necessary with a view to full implementation, including to ensure respect for the safety of United Nations personnel’. The Security Council subsequently decided, in June 1993, to extend the ‘mandate’ of the UN Protection Force ‘in order to enable it, in the safe areas referred to in Resolution 824 (1993), to deter attacks against the safe areas’: 5th operative para of Res 836 (1993).

⁹⁷ Office of the White House, President Barack Obama’s Inaugural Address (20 Jan. 2009), available at: www.whitehouse.gov/blog/inaugural-address. See, further, Black, ‘Iran Declares Readiness for US Talks’, *The Guardian*, 11 Feb. 2009, 22.

our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.⁹⁸

It is around the proliferation of weapons of mass destruction – specifically, Iran’s nuclear wherewithal and its longer term ambitions – that the Bush Administration focused its relations with Iran,⁹⁹ a routine which has involved the adoption of economic sanctions through the United Nations but also acts of robust posturing on the part of the United States.¹⁰⁰ This has not gone unnoticed by Iran for, in March 2006, it informed United Nations Secretary-General Annan of *its* legal appraisal of the situation:

In the recent several months, various senior officials of the United States have used false pretexts to make public and thinly veiled threats to resort to force against the Islamic Republic of Iran in total contempt of international law and fundamental principles of the Charter of the United Nations. The statements delivered at the meeting of the American Israel Public Affairs Committee, held in Washington D.C., from 5 to 7 March 2006, by the Vice-President of the United States and the Permanent Representative to the United Nations, threatening Iran with ‘tangible and painful consequences’ and using the phrases ‘use all the tools at our disposal’, ‘rest assured, though, we are not relying on the Security Council as the only tool in our toolbox to address this problem’ and ‘already beefing up defensive measures’, are simply the latest and more vulgar in a series of statements and publications which resort to such unlawful, unacceptable and dangerous threats of use of force. These statements, furthermore, make self-evident the contempt of the United States for the Security Council and other multilateral mechanisms as well as its intention to abuse the very same mechanisms.¹⁰¹

What is useful for present purposes is the concentration that Iran places on the *idiom* of the threat of force in this depiction of events, deeming it ‘regrettable that past failures have emboldened senior United States officials and even others to consider as an “option on the table” the threat or use of force, *both of which are specifically rejected by Article 2 (4) of the Charter as violations of one of the most fundamental principles of the*

⁹⁸ Office of the White House, President Delivers State of the Union Address (29 Jan. 2002), available at: www.georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html. Alongside Iran, Iraq and North Korea were designated as the original members of this axis; Iran ‘aggressively pursues these weapons and exports terror, while an unelected few repress the Iranian people’s hope for freedom’. See, however, Sciolino and Myers, ‘Decision to Join International Talks on Iran Signals A Shift in U.S. Policy’, *New York Times*, 17 July 2008, A10.

⁹⁹ ‘Iran and the Inspectors’, *New York Times*, 28 May 2008, A22.

¹⁰⁰ Myers and Kulish, ‘Iran Unmoved by Threats Over its Atomic Program’, *New York Times*, 12 June 2008, A16. Also in respect of Iran’s involvement of Iraq see ‘Bullying Iran’, *New York Times*, 1 Feb. 2007, A22.

¹⁰¹ Letter dated 17 Mar. 2006 from M. Javad Zarif, Permanent Representative of the Islamic Republic of Iran to the UN, addressed to the Secretary-General: UN Doc. A/60/730 – S/2006/178 (22 Mar. 2006). Annexed to this letter was a *note verbale* dated 13 Mar. 2006 from the Ministry of Foreign Affairs of Iran to the Embassy of Switzerland (US Interests Section) in Tehran, reporting that Ambassador John R. Bolton, the Permanent Representative of the USA to the UN, had stated on 5 Mar. 2006 that ‘Iran’s regime must be made aware that if it continues down the path of international isolation, there will be tangible and painful consequences’. According to the *note verbale*, Ambassador Bolton repeated these threats in a meeting with British MPs visiting the US in Mar. 2006, when he said: ‘[t]hey [the Islamic Republic of Iran] must know everything is on the table and they must understand what that means. We can hit different points along the line. You only have to take out one part of their nuclear operation to take the whole thing down.’ The inclusion of the *note verbale* reinforced the claim contained in the letter – that Vice President Cheney’s remarks were ‘simply the latest and more vulgar in a series of statements and publications which resort to such unlawful, unacceptable and dangerous threats of use of force’.

Organisation'.¹⁰² This emphasis is quite unusual in the cut and thrust of international politics, it would seem,¹⁰³ and it should be separated out from the reaction of third states to such developments,¹⁰⁴ and the extent to which they are prepared to implicate *this* component of the Charter's prohibition of force.

For what it is worth, in its letter of March 2006 Iran was careful to construct its claim around the *context* in which these developments had occurred, arguing that 'such dangerous words go beyond callous statements before single-issue constituencies', and needed to be set against the official strategies of the United States appearing in such documents as the Doctrine of Joint Military Operations (March 2005) and the National Security Strategy (March 2006).¹⁰⁵ We therefore have some sense of the legal definition awarded to the concept of the threat of force in this formulation, of Iran's *opinio juris sive necessitatis* as it were, and of the need to distinguish between 'dangerous words' which fall foul of the Charter prohibition of threats of force and 'callous statements' which do not. Iran, we can presume, had the option of combining all of these ingredients together into a single fold in order to argue that the United States had issued an unlawful threat of force against it.¹⁰⁶ However, in its letter, Iran preferred to speak of the 'public and thinly veiled *threats* of force' which had been made against it by the United States – that is of a plurality of threats, of the 'resort to such unlawful, unacceptable and dangerous *threats* of use of force'.¹⁰⁷ It is a theme to which Iran returned in a subsequent letter to Secretary-General Annan, in April 2006, when it claimed that 'the use of false pretexts by various senior officials of the United States of America to make public and illegal threats of force against the Islamic Republic of Iran[] is continuing unabated in total contempt of international law and fundamental principles of the Charter of the United Nations':

In this regard, on Tuesday, 18 April 2006, in a question-and-answer session in the White House, when asked whether United States options regarding Iran 'include the possibility of

¹⁰² *Ibid* (emphasis added). See also the *note verbale* of the Ministry of Foreign Affairs:

The Ministry of Foreign Affairs of the Islamic Republic of Iran expresses its strong protest against such threatening statements and emphasises the necessity for countries to observe their international commitments. It further recalls that such threats are contrary to the principles of the United Nations Charter, particularly paragraph 4 of Article 2 of the Charter, which clearly states 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. The Islamic Republic of Iran considers the recent statements and threats of the American officials against Iran as a gross violation of the United States international commitments and wishes to convey its strong protest, in this regard, to the United States Government through the Embassy of Switzerland in Tehran.

Ibid.

¹⁰³ Note Randelzhofer's 'fact' that 'so far the mere threat of force has never led in State practice to a case that has been argued under Art. 2 (4)': *supra* note 2, at 124.

¹⁰⁴ The concern of Stürchler, *supra* note 7, at 96–104 (on the 'test of communal reaction' (at 97), 110, 113, and 123). See also White and Cryer, *supra* note 53, at 246.

¹⁰⁵ *Supra* note 101.

¹⁰⁶ Though, in his separate opinion in the *Oil Platforms Case*, Judge Simma observed that 'there is in the international law on the use of force no "qualitative jump" from iterative activities remaining below the threshold of Article 51 of the Charter to the type of "armed attack" envisaged there': *supra* note 1, at 333 (para 14). See, however, Sadurska, *supra* note 3, at 243.

¹⁰⁷ *Supra* note 101.

a nuclear strike' and whether his Administration is planning for such a prospect, President [Bush] refused to rule out a United States nuclear strike on Iran and instead replied, 'All options are on the table.' Moreover, on Thursday, 20 April 2006, the Secretary of State of the United States, Condoleezza Rice, speaking to the Chicago Council on Foreign Relations, and in reply to a question on Iran said '... we are prepared to use measures at our disposal – political, economic and others', and yet again she reiterated the United States President's view that 'all options remain on the table'.¹⁰⁸

The striking fact of these observations is how precious they are in their dissection of practice, how relevant they make the Charter's prohibition on the threat of force to what has happened – and the implicit weight that is given to formal pronouncements on threats of force by a state which has (or so it maintains) been the *target* of those threats.¹⁰⁹ It is therefore up to Iran to speak in the first instance, to flesh out its position on why it believes the United States has been responsible for *multiple* violations of the Charter's prohibition on the threat of force. After all, the first of these letters chronicles 'the latest and more vulgar in a *series* of statements and publications' which amount to 'threats of use of force';¹¹⁰ its sequel considers that the threats of force are recurrent and that it is 'regrettable that past failures of the United Nations in responding to these illegal and inexcusable threats [of force] have emboldened senior United States officials to go further and even consider the use of nuclear weapons as an "option on the table"'.¹¹¹

How have these threats of force come into being from Iran's point of view? Importantly, it appears that the identification of the *authors* of each of these threats had some relevance to the overall reckoning of Iran; the first letter refers to the source of the threats (or alleged threats) of force as 'senior officials of the United States', or 'senior United States officials', such as US Vice-President Dick Cheney and Ambassador John R. Bolton.¹¹² '[V]arious senior officials of the United States of America' make another appearance in the second letter, which specifically identifies President Bush and Secretary of State Rice.¹¹³ Yet, as we have said, Iran did not treat these utterances in isolation

¹⁰⁸ Letter dated 27 Apr. 2006 from M. Javad Zarif, Permanent Representative of the Islamic Republic of Iran to the UN, addressed to the Secretary-General: UN Doc A/60/834 – S/2006/273 (1 May 2006) (emphasis added).

¹⁰⁹ Hoge, 'Iran Urges United Nations to Oppose American "Threats"', *New York Times*, 2 May 2006, A10.

¹¹⁰ *Supra* note 101 (emphasis added).

¹¹¹ *Supra* note 108.

¹¹² *Supra* note 101. The letter does refer to the kindred behaviour of 'even others' (*supra* note 102), leaving us to wonder how Iran would have placed Senator Hillary Rodham Clinton's remark during her campaign for the Democratic nomination for the US Presidency that, '[i]n the next 10 years, during which [the Iranians] might foolishly consider launching an attack on Israel, we would be able to totally obliterate them. That's a terrible thing to say but those who run Iran need to understand that, because that perhaps that will deter them from doing something that would be reckless, foolish and tragic.' See MacAskill, "'Obliteration" Threat to Iran in Case of Nuclear Attack', *The Guardian*, 23 Apr. 2008, 17. Consider, too, Senator Obama's comment during his campaign for the Democratic nomination where he said in respect of Pakistan that '[t]here are terrorists holed up in those mountains who murdered 3,000 Americans. They are plotting to strike again ... If we have actionable intelligence about high-value terrorist targets and President Musharraf won't act, we will.' See MacAskill, 'Pakistan Criticises Obama After Warning on Military Strikes', *The Guardian*, 4 Aug. 2007, 26.

¹¹³ *Supra* note 108.

from other considerations, for both letters attempted to connect them to the context in which they had been made – such as the public documentation of the strategies and policies of the United States.¹¹⁴ We might also want to emphasize that, as part of the overarching normative context, the prohibition of the application – i.e. of the threat and the use – of force assumes its relevance from the existence of a condition of peace; we have entered different terrain when we find ourselves in the midst of an international armed conflict¹¹⁵ or in the context of a cease-fire *inter partes*.¹¹⁶

That said, the correspondence refers to ‘publications’ as it does ‘statements’, carrying the implication that, in and of themselves and as far as Iran is concerned, the former are as responsible for constituting ‘threats of use of force’ as are the latter.¹¹⁷ It is an impression reinforced with the second letter, which proclaims that ‘[t]hese insolent threats’ have ‘entered a new phase with the publication of the recent news in United States newspapers revealing the consideration of nuclear strikes in the United States’ aggressive policy against the Islamic Republic of Iran, and the subsequent refusal of senior United States officials to deny it’.¹¹⁸ ‘These statements and documents’, Iran had earlier maintained, ‘constitute matters of utmost gravity that require an urgent, concerted and resolute response on the part of the United Nations and particularly the Security Council’.¹¹⁹ However, what is crucial for any analysis is where Iran sets the bar for ‘unlawful, unacceptable and dangerous threats of force’, for, we learn, this includes the mere statement of the United States and its officers that all ‘options on the table’ – no matter how real or realistic each of these options is in matter of fact. Can this be so? And ought this to be so, or should some scope be accorded to some *locus poenitentiae*?¹²⁰ Can any scope be accorded to *locus poenitentiae* with threats of force?

¹¹⁴ *Supra* note 101. In the second letter, the ‘dangerous statements’ were ‘widely considered in political and media circles as a tacit confirmation of the shocking news of the Administration’s possible contemplation of nuclear strikes against certain targets in Iran’: *supra* note 108.

¹¹⁵ See, for instance, the relationship between Greece and Albania after the Second World War suggested in the *Corfu Channel Case (United Kingdom v. Albania)* (Merits) [1949] ICJ Rep 4; see *infra* note 147.

¹¹⁶ As appears to have been the case in Mar. 1991 following the provisional cease-fire with Iraq, when US Secretary of State James A. Baker threatened to attack helicopters in use by President Saddam Hussein *after hostilities had ended*: Balz, ‘Bush Criticises Iraq’s Use of Helicopters on Rebels’, *Washington Post*, 15 Mar. 1991, A37. For Art. 40 of the Regs annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, 205 CTS (1907) 277, provides that ‘[a]ny serious violation of [an] armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately’. A threat of force made in the circumstances of an armistice, defined in Art. 36 of the Convention as a suspension of military agreement between the belligerent parties, might therefore take on a different legal character since it could be viewed as part of the ‘right’ of which Art. 40 speaks. It should be pointed out that the ‘armistice’ is the original term for what is today understood as a ‘cease-fire’: see Dinstein, *supra* note 13, at 56–57, and Bailey, ‘Cease-Fires, Truces, and Armistices in the Practice of the UN Security Council’, 71 *AJIL* (1977) 461, at 462. See also Stürchler, *supra* note 7, at 287.

¹¹⁷ *Supra* note 101.

¹¹⁸ *Supra* note 108.

¹¹⁹ *Supra* note 101.

¹²⁰ As discussed in relation to the right of anticipatory self-defence in Brownlie, *supra* note 21, at 259. Iran’s correspondence preceded Secretary of State Rice’s initiative for multilateral talks announced on 31 May 2006. See, further, Cooper and Sanger, ‘Strategy on Iran Stirs New Debate at White House’, *New York Times*, 16 June 2007, A1.

Be this as it may, we may also wish to consider how our impression of Iran's allegations might be affected by the fact that – weeks after the initial correspondence had made its way to the United Nations – the Bush Administration decided to increase its clandestine activities within Iran and to intensify its planning for a major assault on that country.¹²¹ And what of the plans of the United States at that time for joint military exercises in the region with Turkey,¹²² or of its sending of additional warships to the Persian Gulf, as happened later that year, in December 2006?¹²³ Consider, too, following all of these events, the statement of Ayatollah Ali Khamenei, the supreme leader of Iran, that '[o]ur enemies know very well that any aggression will have a response from all sides by Iranian people on their interests all over the world'.¹²⁴ Would this constitute a lawful threat against all previous unlawful threats of the United States? Or is it an unlawful threat against all previous lawful ones?¹²⁵ Or does it not register as a threat of force at all according to the predicates of public international law?

Finally, the standard at which Iran pitches its conception of the threat of force in these expositions must be telling as against its *own* actions and behaviour elsewhere, where, for instance, President Mahmoud Ahmadinejad has described Israel as a 'disgraceful blot' which should be 'wiped off the face of the earth'.¹²⁶ Is this a mere sampling of a 'callous statement before single-issue constituencies' on behalf of Iran, or does it reflect something more sinister and portentous? And what if it is read together with Iran's nuclear ambitions – at least, and in the spirit of Iran's correspondence with the United Nations, as perceived by Israel? What, also, of President Ahmadinejad's subsequent utterance, in April 2006, that '[t]he Zionist regime is an injustice and by its very nature a permanent threat', and that, '[w]hether you like it or not, the Zionist

¹²¹ As per the details in Hersh, 'The Iran Plans', *New Yorker*, 17 Apr. 2006, 30.

¹²² Weisman, 'U.S. Exercise With Turkey Is Aimed At Iran', *New York Times*, 22 May 2006, A6.

¹²³ Shanker, 'U.S. and Britain to Add Ships to Persian Gulf in Signal to Iran', *New York Times*, 21 Dec. 2006, A1. In Jan. 2007, American forces stormed Iranian government offices in northern Iraq, which Iran took to be a 'declaration of war': Penketh, 'Bush's Tough Tactics Are A "Declaration of War" on Iran', *The Independent*, 12 Jan. 2007.

¹²⁴ Fathi, 'Iran's Leader Warns the U.S. About Carrying Out Any Attack', *New York Times*, 9 Feb. 2007, A10.

¹²⁵ See the discussion in Stürchler, *supra* note 7, at 41.

¹²⁶ MacAskill and McGreal, 'Israel Should Be Wiped off Map, Says Iran's President', *The Guardian*, 27 Oct. 2005, 1. This is not to mention Iran's allegiance to Hezbollah: Solomon and Leggett, 'Amid Ties to Iran, Hezbollah Builds Its Own Identity', *Wall Street Journal*, 21 July 2006, A1; or its involvement in Iraq: Schmitt, 'Some Bombs Used in Iraq are Made in Iran, U.S. Says', *New York Times*, 6 Aug. 2005, A5. See, further, 'Bullying Iran', *supra* note 100.

Note that, in Mar. 2008, N. Korea threatened to reduce S. Korea to 'ashes' in the event that it made the 'slightest move' against N. Korea: Sang-Hun, 'North Korea Threatens to Reduce South Korea to "Ashes" at Slightest Provocation', *New York Times*, 31 Mar. 2008, A11 (in response to the statement of Kim Tae-young, the Head of the South's Joint Chiefs of Staff, that his military would have no hesitation in striking at suspected nuclear weapons locations in N. Korea if there was any attempt at a nuclear strike against S. Korea). Does this constitute a threat of force, and is it an *unlawful* threat of force – and, if so, on what basis is it unlawful? On the ground that a use of force in such circumstances is unlawful or that the use of force is lawful in principle, but that N. Korea is here threatening a *disproportionate* amount of force? Note, further, that in Feb. 2003, N. Korea warned the US of 'total war' in the event that the latter attacked the former's nuclear facilities: Ward and Dinmore, 'Pyongyang Warns of "Total War" if US Attacks', *Financial Times*, 7 Feb. 2003, 3.

regime is on the road to being eliminated’?¹²⁷ These statements have come with their own contexts to be sure, such as Iran’s Revolutionary Guards fire-testing nine missiles in military manoeuvres in the summer of 2008,¹²⁸ but should this not be interpreted as Iran’s response to Israel’s deployment of more than 100 F-16 and F-15 fighters in the eastern Mediterranean several weeks earlier?¹²⁹ What, though, of Israel’s justification for that action of June 2008?

5 The Corfu Channel Case: A Modern Reprise

Given the ritual uncertainties concerning the *scope* of the concept of the threat of force, it is worthwhile to return to the earliest jurisprudence of the International Court of Justice on the application of force – and of the reasons for the Charter rules on the application of force. The *Corfu Channel Case*, the merits of which were decided in April 1949, resulted in a ‘nuanced judgment’ from the Court,¹³⁰ far too nuanced for some, since the Court ‘failed to express itself in the clearest of terms on such a vital subject as the law relating to the use of force’.¹³¹

The case involved the damage caused to the British destroyers *Saumarez* and *Volage* by anchored automatic mines located near the Bay of Saranda in the North Corfu Channel as they sailed northward through the strait on 22 October 1946.¹³² It was the contention of the United Kingdom that the mines had been recently seeded there by or with the connivance or knowledge of the Government of Albania; Albania was of the view that the mines might have been floating mines, coming from proximate old minefields, or magnetic ground mines, moored mines, or

¹²⁷ Fathi, ‘Iranian Leader Renews Attack on Israel At Palestinian Rally’, *New York Times*, 15 Apr. 2006, A5 (President Ahmadinejad also referred to Israel as a ‘rotten, dried tree’ which would collapse ‘in one storm’). See further Rivkin Jr. and Casey, ‘A Legal Case Against Iran’, *Washington Post*, 6 June 2006, A15. Consider the notion that what President Ahmadinejad said was actually lost in translation: Bronner, ‘Just How Far did They Go, Those Words Against Israel?’, *New York Times* (Week in Review), 11 June 2006, 4. Since then, President Ahmadinejad has once again predicted the collapse of Israel: Fathi, ‘Ahmadinejad Says A-Plant Will Open in A Year and Belittles Israel’, *New York Times*, 31 Jan. 2008, A12.

¹²⁸ Cowell and Broad, ‘Iran Launches 9 Missiles in War Games, One With Range Said to Include Israel’, *New York Times*, 10 July 2008, A10.

¹²⁹ Gordon and Schmitt, ‘U.S. Says Exercise by Israel Seemed Directed At Iran’, *New York Times*, 20 June 2008, A1 (and perceived as a rehearsal for a potential strike at Iran’s nuclear facilities) – or to ‘the daily barrage of illegal Israeli threats to resort to force, as well as its horrendous cases of resort to force, occupation and aggression, against the countries in the region’, which Iran had accused Israel of in its Letter dated 10 Nov. 2006 from M. Javad Zarif, Permanent Representative of the Islamic Republic of Iran to the UN, addressed to the Secretary-General: UN Doc. A/61/571 – S/2006/884 (13 Nov. 2006).

¹³⁰ Stürchler, *supra* note 7, at 255.

¹³¹ Brownlie, *supra* note 21, at 283 (the sentiment of Judge Simma in Nov. 2003, *supra* note 1). Cf. Jones, ‘The *Corfu Channel Case*: Merits’, 26 *British Ybk Int’l L* (1949) 447.

¹³² Munro, ‘The Case of the Corfu Minefield’, 10 *MLR* (1947) 363. For a fuller exposition of the facts consult *Corfu Channel Case (United Kingdom v. Albania)* (Merits), *supra* note 115, at 12–13, and Jones, *supra* note 131, at 447. Saranda is some 7 miles from the Albanian coast: Munro, above, at 370. According to the Court, both the bay and the channel can therefore be ‘easily watched’: *Corfu Channel Case*, at 20.

German GR mines.¹³³ The British Admiralty had believed the route to be safe: it had sent two of its cruisers through the strait on 15 May 1946,¹³⁴ and, in October 1946, it followed this up with the dispatch of a squadron of ships – including *Saumarez* and *Volage*, and the cruisers *Mauritius* and *Leander* – along the same route. Forty-four men lost their lives and 42 were injured as a consequence of the mining of *Saumarez* and *Volage*.

In respect of the earlier episode of May 1946, the British cruisers *Orion* and *Superb* had come under fire from batteries located on the Albanian shore as they made their way southward through the Channel. Neither of them was hit, but the Court noted the ‘close watch over the waters of the North Corfu Channel’ which Albania had kept;¹³⁵ it spoke of the ‘vigilance’ of Albania over these waters and the fact that Albania had gone ‘so far as to involve the use of force: for example the gunfire in the direction of the British cruisers *Orion* and *Superb* on May 15th, 1946 ... was not seriously contested’.¹³⁶ The cruisers did not return fire. However, the United Kingdom offered an immediate protest against the action, and claimed that it had a right of innocent passage through the strait as a matter of public international law.¹³⁷ A *note verbale* was then addressed to the United Kingdom by Albania later that month, revealing the existence of the General Order which had underpinned the decision of the Coastal Commander to order fire on the British cruisers. It insisted on the need for permission to be given prior to any passage through the territorial waters of Albania, and a note of similar content was sent to the United Kingdom in June 1946.¹³⁸ This diplomatic correspondence culminated in a note from the United Kingdom to Albania, dated 2 August 1946, proclaiming the right of innocent passage and, according to the Court, it ‘ended with the warning that if Albanian coastal

¹³³ *Ibid.*, at 13 (a claim which the evidence rebutted: *ibid.*, at 14). The UK Government had earlier claimed that the mines had been laid at the hands of the Government of Albania: Jones, *supra* note 131, at 449. The Court said, however, that the UK never ‘abandoned’ this contention, but that ‘very little attempt was made by the [UK] Government to demonstrate this point’: *Corfu Channel Case*, *supra* note 115, at 15. For further details of the minefield see Munro, *supra* note 132, at 365–367.

¹³⁴ The British Navy had swept the North Corfu Channel in Oct. 1944 and no mines were found: *Corfu Channel Case*, *supra* note 115, at 13. In Jan. and Feb. 1945, the Channel was check-swept by the British Navy with negative results: *ibid.*, at 13–14.

¹³⁵ *Corfu Channel Case*, *supra* note 115, at 18. Albania maintained that the warships were unidentified as they sailed close to the coast near Saranda. They were warned by coastal authorities to extend outward but refused to comply: Munro, *supra* note 132, at 370.

¹³⁶ *Corfu Channel Case*, *supra* note 115, at 19. The Court also mentioned the shots fired at the UN Relief and Rehabilitation Administration (UNRRA) tug and barges on 29 Oct. 1946: *ibid.* A report of the commanding naval officer of 29 May 1946 suggested that the firing started when the ships had already passed the Albanian battery located in the vicinity of Saranda. See, further, the events as related by the Court in *ibid.*, at 27.

¹³⁷ *Ibid.*, at 27.

¹³⁸ *Ibid.*, at 19. For further details of the General Order see *ibid.*, at 27.

batteries in the future opened fire on any British warship passing through the Corfu Channel, the fire would be returned'.¹³⁹

Following the developments of October 1946, the United Kingdom sent a note to the Government of Albania announcing its intention to sweep the Corfu Channel for mines; Albania responded by saying that it would not give its consent to the operation unless it occurred outside the territorial waters of Albania.¹⁴⁰ The Royal Navy nevertheless undertook its action on 12 and 13 November 1946, during which 22 moored mines were cut.¹⁴¹ As part of the defence for this action, which came to be known as Operation Retail, the Government of the United Kingdom argued that 'the *corpora delicti* must be secured as quickly as possible'.¹⁴² The Court discerned that there were two discrete elements to this argument: one was the presentation of 'a new and special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task'.¹⁴³ The Court did not take kindly to this suggestion, for it could 'only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law'.¹⁴⁴ The other element of the argument related to 'methods of self-protection or self-help',¹⁴⁵ and the Court felt it had no option but to 'declare that the action of the British Navy constituted a violation of Albanian sovereignty'.¹⁴⁶

¹³⁹ *Ibid.* The Court noted, *ibid.*, that the contents of the note were communicated by the British Admiralty to the Commander-in-Chief, Mediterranean, on 1 Aug. 1946, with the instruction that he should not use the Channel until the note in question had been presented to the Government of Albania. 9 days later, on 10 Aug. 1946, the Commander-in-Chief received from the Admiralty a telegram which specified: '[t]he Albanians have now received the note. North Corfu Strait may now be used by ships of your fleet, but only when essential and with armament in fore and aft position. If coastal guns fire at ships passing through the Strait, ships should fire back': *ibid.*

¹⁴⁰ *Ibid.*, at 33. The precise legal characterization of this space took up some of the energies of the Court: 'one fact of particular importance', it said, 'is that the North Corfu Channel constitutes a frontier between Albania and Greece, that a part of it is wholly within the territorial waters of these States, and that the Strait is of special importance to Greece by reason of traffic to and from the port of Corfu': *ibid.*, at 29. However, the decisive criterion for the determination of an international strait is its geographical situation 'as connecting two parts of the high seas and the fact of its being used for international navigation': *ibid.*, at 28.

¹⁴¹ *Ibid.*, at 13.

¹⁴² *Ibid.*, at 34. Additional to the authority of an agreement between the Governments of the United Kingdom, France, the Soviet Union, and the USA of Nov. 1945 in respect of regional mine clearance organizations such as the Mediterranean Zone Board, for further details of which see Maher, 'Half Light Between War and Peace: Herbert Vere Evatt, The Rule of International Law, and the Corfu Channel Case', 9 *Australian J Legal History* (2005) 47, at 48–49. Albania was not a member of the Board.

¹⁴³ *Ibid.*, at 34.

¹⁴⁴ *Ibid.*, at 35.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.* In consequence, the Court unanimously held that 'by reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th, 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania': *ibid.*, at 36.

What passes for the 'Corfu Channel Case' in the legal imagination therefore involved a succession of facts and intricate incidents in the space of six months – all of which bore close relation to one another in the overall context of the relationship between the United Kingdom and Albania after the Second World War. The events occurred in the North Corfu Channel which, in the opinion of the Court, should be considered as belonging 'to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace'.¹⁴⁷ Nevertheless, it was also the Court's position that the 'exceptional circumstances' in which Albania had found itself with Greece would have justified the issue of regulations in respect of the traffic of warships through the Channel, 'but not in prohibiting such passage or in subjecting it to the requirement of special authorisation'.¹⁴⁸ It is this that Albania had done, and had sought to do, and, because of this, the Court found itself 'unable to accept the Albanian contention that the Government of the United Kingdom ha[d] violated Albanian sovereignty by sending the warships through the Strait without having obtained the previous authorisation of the Albanian Government'.¹⁴⁹

Furthermore, the Court rejected Albania's claim that the passage of the British warships in October 1946 had not been *innocent*,¹⁵⁰ that it had been a political mission. The Court reasoned as follows:

It is shown by the Admiralty telegram of September 21st ... and admitted by the United Kingdom Agent, that the object of sending the warships through the Strait was not only to carry out a passage for purposes of navigation, but also to test Albania's attitude. As mentioned above, the Albanian Government, on May 15th, 1946, tried to impose by means of gunfire its view

¹⁴⁷ I.e. as applicable between the UK and Albania at the time of these events: *ibid.*, at 29. Cf. Albania's relations with Greece – 'which did not maintain normal relations'. This is because Greece had made territorial claims to part of Albanian territory which bordered the Channel, and that Greece had announced it was in a state of war with Albania. Furthermore, Albania was concerned about Greece making certain incursions into its territory: *ibid.* The Court had earlier concluded that the two ships were mined 'in Albanian territorial waters in a previously swept and check-swept channel': *ibid.*, at 15.

¹⁴⁸ *Ibid.*, at 29.

¹⁴⁹ *Ibid.*, at 29–30.

¹⁵⁰ *Ibid.*, at 30. The Court found by 14 votes to 2 that the UK did not violate the sovereignty of Albania 'by reason of the acts of the British Navy in Albanian territorial waters' in Oct. 1946: *ibid.*, at 36. The Court had paid close heed to the 'manner' in which passage was carried out in order to assess whether it was innocent or not:

It is known from the order issued by the British Admiralty on August 10th, 1946, that ships, when using the North Corfu Strait, must pass with armament in fore and aft position. That this order was carried out during the passage on October 22nd is stated by the Commander-in-Chief, Mediterranean, in a telegram of October 26th to Admiralty. The guns were, he reported, 'trained fore and aft, which is their normal position at sea in peace time, and were not loaded.' It is confirmed by the commanders of *Saumarez* and *Volage* that the guns were in this position before the explosions. The navigating officer on board *Mauritius* explained that all guns on that cruiser were in their normal stowage position. The main guns were in the line of the ship, and the anti-aircraft guns were pointing outwards and up into the air, which is the normal position of these guns on a cruiser both in harbour and at sea. In the light of this evidence, the Court cannot accept the Albanian contention that the position of the guns was inconsistent with the rules of innocent passage.

Ibid., at 31. For additional discussion see Churchill and Lowe, *supra* note 47, at 81–92.

with regard to the passage. As the exchange of diplomatic notes did not lead to any clarification, the Government of the United Kingdom wanted to ascertain by other means whether the Albanian Government would maintain its illegal attitude and again impose its view by firing at passing ships. The legality of this measure taken by the Government of the United Kingdom cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. The ‘mission’ was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage.¹⁵¹

It has been argued that there are ‘unfortunate implications’ of this aspect of the judgment since the Court appeared to acknowledge ‘the forcible exercise of rights’, and to condone an action involving ‘a threat to or breach of the peace and to regard it as lawful [which] is to contradict the general trend of legal developments since the appearance of the League Covenant’.¹⁵² This would, of course, include the United Nations Charter. However, from the modern perspective, what is instructive about the case is the limited extent to which the Court (and, we can presume, the states appearing before it) engaged the specifics of the prohibition of the application of force in the Charter. It is true that, before the Court, the United Kingdom had argued that Operation Retail had ‘threatened neither the territorial integrity nor the political independence of Albania’,¹⁵³ and the Court’s condemnation of Operation Retail does suggest that the Court was ‘not in sympathy’ with the interpretative antics of the United Kingdom.¹⁵⁴ This must be subliminal jurisprudence at its finest, but it may well be that it was sufficient in and of itself to deter states from practising the ‘evasion of obligations by means of a verbal profession’ both before the Court and outside it.¹⁵⁵ The Court did in fact mention at one point the ‘use of force’ – of Albania that is, as against the British cruisers *Orion* and *Superb* in May 1946¹⁵⁶ – but the case is not one where the full significance of either of the *prohibitions* of Article 2(4) of the Charter is configured, let alone conveyed. The same can be said for their relationship with the right of self-defence,¹⁵⁷ but, then, there was no argument by either of the states concerned that an ‘armed attack’ had occurred.¹⁵⁸

¹⁵¹ *Ibid.*, at 30.

¹⁵² Brownlie, *supra* note 21, at 287. Or, at 288: ‘the forcible exercise of disputed rights’. See also Sadurska, *supra* note 3, at 264.

¹⁵³ *Corfu Channel Case*, Pleadings, Vol. III, at 296 (for, the UK argued, ‘Albania suffered thereby neither territorial loss nor [loss to] any part of its political independence’).

¹⁵⁴ As is maintained by D.J. Harris, *Cases and Materials on International Law* (6th edn, 2004), at 892. For additional discussion see Fitzmaurice, ‘The Corfu Channel Case and the Development of International Law’, in N. Ando, E. McWhinney, and R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (2002), i, at 119, 143–144, and Schachter, *supra* note 50.

¹⁵⁵ Brownlie, *supra* note 21, at 268.

¹⁵⁶ *Supra* note 136.

¹⁵⁷ Schachter, *supra* note 3, at 1626 (noting that the case involved a claim of self-protection or self-help – not of the right of self-defence). Note how Brownlie defines self-help as the ‘coercion of a state which is a party to a dispute with the object of terminating the dispute by means of a forcibly imposed settlement’: Brownlie, *supra* note 21, at 287.

¹⁵⁸ Stürchler, *supra* note 7, at 73. But see also White and Cryer, *supra* note 53, at 249. Cf. the facts of the *Oil Platforms Case*, *supra* note 1, and Raab, ‘“Armed Attack” After the *Oil Platforms Case*’, 17 *Leiden J Int’l L* (2004) 719.

The answer to this must lie in the substantive lead the Court had taken from the parties litigating before it,¹⁵⁹ no doubt affected by the fact that Albania did not become a party to the United Nations Charter until December 1955, just under a decade after all of these events had occurred. This presents the complication of the customary status of the prohibition on the threat of force in the period between May and November 1946.¹⁶⁰ Still, the bare recitation of the ‘facts’ of this case does alert us to the prospect of *multiple* threats of force in the context of relations between the United Kingdom and Albania, and all occurring in circumstances where ‘there was clearly a dispute as to the existence of a legal right’.¹⁶¹ The facts provide a platform for keen and purposeful exploration, for testing the extent to which each of these facts can be worked into a legal narrative of a ‘threat of force’¹⁶² – including Albania’s ‘use of force’ in May 1946. For the Court, this meant that Albania had ‘tried to impose by means of gunfire its view with regard to the passage’,¹⁶³ leaving us to wonder whether a threat of force can in fact and in law inhere in a given use of force.¹⁶⁴ There is, too, the matter of Albania’s correspondence with the United Kingdom in May and June 1946,¹⁶⁵ but the Court seemed content to regard this as ‘evidence of [Albania’s] intention to keep a jealous watch on its territorial waters’.¹⁶⁶

For its part, the United Kingdom had delivered a parting shot to Albania in its correspondence of August 1946,¹⁶⁷ but of equal interest to us here is how the Court recalled that the ‘object of sending the warships through the Strait’ by the United Kingdom in October 1946 ‘was not only to carry out a passage for purposes of navigation, but also to test Albania’s attitude’; ‘the Government of the United Kingdom wanted to ascertain by other means [than the diplomatic correspondence] whether the Albanian Government would maintain its illegal attitude and again impose its view by firing at passing ships’.¹⁶⁸ Is there therefore a threat of force present here? And what of the Court’s subsequent recital of these self-same facts from October 1946 in the following terms:

In view of the firing from the Albanian battery of May 15th, this measure of precaution [of the United Kingdom] cannot, in itself, be regarded as unreasonable. But four warships ... passed in this manner, with crews at action stations, ready to retaliate quickly if fired upon. They passed one after another through this narrow channel, close to the Albanian coast, at a time of political tension in the region. *The intention must have been, not only to test Albania’s attitude, but at the same time, to demonstrate such force that she would abstain from firing again on passing ships.* Having regard ... to all the circumstances of the case, as described above, the Court is

¹⁵⁹ Where Albania did not argue that the UK had threatened it with force: Stürchler, *supra* note 7, at 70.

¹⁶⁰ Cf. *supra* note 4.

¹⁶¹ Brownlie, *supra* note 21, at 286.

¹⁶² Along the lines of J.L. Briery, *The Law of Nations: An Introduction to the International Law of Peace* (H. Waldock ed., 6th edn, 1963) at 429. Stürchler sees the case as ‘an early test for the infant UN Charter rules on force’: *supra* note 7, at 68.

¹⁶³ *Supra* note 151.

¹⁶⁴ Stürchler, *supra* note 7, at 262.

¹⁶⁵ *Supra* note 18.

¹⁶⁶ *Corfu Channel Case*, *supra* note 115, at 19.

¹⁶⁷ *Supra* note 139.

¹⁶⁸ *Supra* note 151 (though the Court did specify that the legality of its measure was ‘provided that it was carried out in a manner consistent with the requirements of international law’).

unable to characterise the measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.¹⁶⁹

Can a demonstration of force occur without either a threat or use of force? And what of the background fragments behind the larger swathe of facts which has been recounted here, for '[t]he naval force acted on specific orders from the government in London with the object of "testing" Albania's attitude [and] Albania was a small state with no navy and small caliber coastal batteries: the British force making the passage on 22 October consisted of four warships at action stations and ready to fire if attacked'.¹⁷⁰ Or of the Court's characterization of Operation Retail of November 1946:

The method of carrying out Operation Retail has also been criticised by the Albanian Government, the main ground of complaint being that the United Kingdom, on that occasion, made use of an unnecessarily large display of force, out of proportion to the requirements of the sweep. The Court thinks that this criticism is not justified. It does not consider the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania. The responsible naval commander, who kept his ships at a distance from the coast, cannot be reproached for having employed an important covering force in a region where twice within a few months his ships had been the object of serious outrages.¹⁷¹

Setting aside the question of the customary status of the prohibition on the threat of force contained in the Charter, it may well be that had this proposition been the applicable law in April 1949, it would have had a qualified impact on how both these states – and, in turn, the Court – would have viewed the facts before them. For, in truth, we must speculate on the psychological adjustment necessitated for states by the letter of Charter law, where not only has the *threat* of force been given a conventional footing, but the concept of *force* has come of age. This is no insignificant development for public international law, for 'force' is 'a more factual and wider word to embrace military action' than 'war',¹⁷² and it is precisely this new and broader phenomenon that the Charter's concept of the 'threat' in Article 2(4) must relate to.¹⁷³ Understood as such, it is perhaps worth our while to reflect on how its potential relevance – as applied to the facts of the *Corfu Channel Case* and all the other episodes we have related thus far – compares with that entombed in the minds of the authors of the Charter,¹⁷⁴ and, just

¹⁶⁹ *Corfu Channel Case*, *supra* note 115, at 19 (emphasis added). One is reminded of Elihu Root's observation during the *North Atlantic Coast Fisheries* arbitration of 1910, that 'warships may not pass without consent into [the] zone [of the territorial sea] because they threaten. Merchant ships may pass because they do not threaten' – an approach that steered US policy until 1941: see D.P. O'Connell, *The Influence of Law on Sea Power* (1975), at 139.

¹⁷⁰ Brownlie, *supra* note 21, at 286–287.

¹⁷¹ *Corfu Channel Case*, *supra* note 115, at 35.

¹⁷² Schachter, *supra* note 3, at 1624. Perhaps the scope of this psychological adjustment is deeper than we give it credit for: in Dec. 1974, the GA adopted its resolution on the definition of aggression, in which it defined aggression as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations': GA Res 3314 (XXIX), GAOR 29th Sess., Supp., 31, at 142 (14 Dec. 1974).

¹⁷³ *Supra* note 22. To be distinguished from 'threat to the peace' in Art. 39 of the Charter, on which see Gray, *supra* note 12, at 256–258.

¹⁷⁴ Stürchler, *supra* note 7, at 34–36.

as importantly, with the menace of threats of war and threats of measures short of war which came so to dominate the approach to the Second World War and which have been so powerfully revived of late by Nicholson Baker in *Human Smoke: The Beginning of World War II, the End of Civilisation* (2008).¹⁷⁵

6 Conclusion

Threats of force, it is clear, form part of the repertoire of 'the uses of power and the perception of interest' in state relations,¹⁷⁶ and this article has sought to demonstrate the extent of their presence in practice since the end of the Cold War. We have attempted a detailed handling of select instances of this practice in this period, aware that candidates for consideration as *threats of force* arise in a host of diverse and diverging circumstances, ranging from the location of a long-range bomber of the Russian Federation 125 miles from Canada over the Beaufort Sea in the Arctic,¹⁷⁷ to the Anti-Secession Law of the Third Session of the Tenth National People's Congress of China, adopted in March 2005, which declared that '[i]n the event that the "Taiwan independence" secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary means to protect China's sovereignty and territorial integrity'.¹⁷⁸ As with our detailed studies of practice, these examples reflect how threats of force can precipitate close – at times, very close – encounters between states, and, at other times, not: some threats of force are transient but palpable; others are latent, lurking, enduring.

We have also had to consider the ritualization of threats of force in certain state relations – as with those of the United States and Iran – where we appear to have been locked in some sort of 'precarious game',¹⁷⁹ rather remote from the formal condition of peace that the *jus ad bellum* and its prohibition of the application of force is premised upon. Yet, it is the same set of rules set out in the Charter, and interpreted with varying degrees of persuasion by the International Court of Justice, that we have to rely upon for the task of sorting threats of force from non-threats, lawful threats from unlawful. That has not formed the entire frame of our enquiry, since we have also considered the extent to which threats of force have been welcomed – even celebrated – in practice.

¹⁷⁵ See, further, Fischel, 'Questioning the Good War', 84 *Virginia Quarterly Rev* (2008) 273.

¹⁷⁶ Schachter, *supra* note 3, at 1624.

¹⁷⁷ As occurred in Feb. 2009: Austen, 'Canada: Russian Bomber Chased', *New York Times*, 27 Feb. 2009, A9 (the Russian Defence Ministry claimed that Canada had been notified about the flight and that its aircraft had complied with international regulations).

¹⁷⁸ Art. 8 of the Anti-Secession Law (13 Mar. 2005); the full text of the Law is available at: www.english.peopledaily.com.cn/200503/14/eng20050314_176746.html. See, further, Zou, 'Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti-Secession Law', 4 *Chinese J Int'l L* (2005) 455, and Roth, 'Taiwan's Nation-Building and Beijing's Anti-Secession Law: An International Law Perspective', in C. Chi-sen *et al.* (eds), *Sovereignty, Constitution, and the Future of Taiwan* (2006), at 1.

¹⁷⁹ Sadurska, *supra* note 3, at 247.

And this has occurred in circumstances where the lawfulness of the use of force is far from clear. We have explored the scope, indeed the realities, of a ‘ritualised substitute for violence’,¹⁸⁰ and we have found that it is some distance from the Court’s cool and confident articulation of the law’s formalities. Even so, we have reached back to an earlier item of the Court’s jurisprudence to demonstrate how layered the difficulties are with the prohibition of the threat of force in public international law, where there is no means of telling – there is no guarantee – whether the close and other encounters we have examined here will remain or end so, or whether they will mutate or metamorphosize into a use of force pure and proper.

¹⁸⁰ *Ibid.*, at 246.