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The threat of Russia's force in Ukraine

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ABSTRACT



In December 2021, Russia's military build-up near Ukraine, accompanied by explicit denials of any plans for an incursion, presents a significant case study on hidden threats of force. The Russian Representative to the United Nations argued that positioning military forces within its sovereign territory was a domestic matter and not a threat-an argument supported by China and uncontested by a few other member states (India, Ghana and Belarus). Such representations were presented despite the strong evidence of an impending invasion, including troop deployments along the Ukrainian border, strategic use of locations (such as Belarus) and medical personnel involvement. This case study raises important legal questions: how can threats of force, which violate the prohibition in Article 2(4) of the UN Charter, be more clearly identified? Furthermore, how can the international community improve its ability to censure such disguised or denied threats, as in Russia's case?

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1. Introduction

Before the Russian invasion of Ukraine in February 2022, there were several actions by Russia that can be considered as constituting a threat of force. These actions created a climate of tension and intimidation. For example, Russia amassed a significant number of troops along its border with Ukraine in the months leading up to the invasion.¹ Satellite images and intelligence reports indicated the presence of heavy military equipment, including tanks, artillery, and combat aircraft, which suggested preparations for a large-

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¹Anne Peters, 'Russia's Threat to Ukraine a Violation of International Law', *Max Planck Law* (4 February 2022) <https://law.mpg.de/perspectives/russias-threat-to-ukraine-a-violation-of-international-law/>.

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scale military operation.² In addition, Russia conducted extensive military exercises near the Ukrainian border. These exercises, often described as ‘routine’, involved large numbers of troops and equipment.³ Finally, there were reports of increased cyberattacks on Ukrainian infrastructure, attributed to Russian actors. These cyber operations disrupted communications and critical services, adding to the overall pressure on Ukraine.⁴ Russian officials, including President Vladimir Putin, made various statements that implied a willingness to use military force if certain demands were not met.⁵

This article is solely concerned with the immediate pre-war manifestation of Russia’s threat of force against Ukraine, namely that of the military build-up (later: Russia’s threat of force/military threat). Since this arguable threat of force was officially denied by the alleged threatening party (and overlooked by other states, including Ukraine), this problem is analytically intriguing.⁶ When do military build-ups, as in this case, entail a state’s international responsibility for violating the prohibition to threaten force?⁷ How is it possible to determine (in the absence of clear statements to use force), the malevolent intent of the build-up—was it a strategic military exercise or was it conducted for coercive or signalling purposes which perhaps even constituted a preparation for aggression?

The article will first discuss the concept of threats of using force and the principal indicators of such threats.⁸ It will then reflect on the lawfulness of threats of force, which will permit to adjudge whether Russia could have lawfully maintained a massive army in the vicinity of the Ukrainian border without breaching Article 2(4), or indeed Article 2(3) of the UN Charter.

²Paul McLeary, ‘Russian Buildup Near Ukraine Gains Steam, New Satellite Images Show’ *Politico* (23 December 2021) <https://www.politico.com/news/2021/12/23/russia-buildup-ukraine-satellite-images-526109>.

³See, among others, Felix K. Chang, ‘Are the Russians Coming?: Russia’s Military Buildup Near Ukraine’, *Foreign Policy Research Institute* (25 February 2019) <https://www.fpri.org/article/2019/02/are-the-russians-coming-russias-military-buildup-near-ukraine/>.

⁴Cf. Kristen E. Eichensehr, ‘Ukraine, Cyberattacks, and the Lessons for International Law’ (2022) 116 *American Journal of International Law Unbound* 145–49.

⁵The Defence Post, ‘Putin Warns West of Military Measures Over Ukraine Threats’ (21 December 2021) <https://thedefensepost.com/2021/12/21/putin-warns-military-measures-ukraine/>.

⁶UN Security Council 8960th meeting (Threats to international peace and security) (31 January 2022) UN Doc S/PV.8960 (Russian Representative) 2, 11. Holding the debate was opposed by Russia and China; India, Gabon and Kenya abstained, while ten other countries voted in favour. See Melissa Quinn, ‘Russian Ambassador Insists Kremlin has “No Such Plans” for Invading Ukraine Despite Troop Build-up’, *CBS News* (20 February 2022) <https://www.cbsnews.com/news/russia-ukraine-ambassador-anatoly-antonov-no-such-plans-invasion-face-the-nation/>.

⁷Since 1945, the prohibition of the threat of force has been restated and reaffirmed frequently: Article 2 (4) of the UN Charter, 1 UNTS XVI (24 October 1945); Article 1 of the North Atlantic Treaty, 34 UNTS 243 (4 April 1949); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UN Doc A/RES/2625 (XXV) (24 October 1970); Definition of Aggression, UN Doc A/RES/3314(XXIX) (14 December 1974); Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UN Doc A/42/22 (18 November 1987); Article 4 of the Constitutive Act of the African Union, 12 RADIC 629 (11 July 2002).

⁸Consult UN, ‘Pursuing Peace: Commemorating Dag Hammarskjöld’ (2011) 48 *UN Chronicle* <https://www.un.org/en/issue/402>.

Finally, the article will elaborate on the response by the international community towards Russia's threat of force and consider whether (a) they were sufficiently robust and (b) what might be a more appropriate response in dealing with future instances of military threats.

2. Russia's threat of using force against Ukraine

Article 2(3) of the UN Charter obliges states to settle their disputes peacefully while Article 2(4) prohibits the use of threats and force in relations among states. However, the concept as to what precisely may constitute a threat of force that would potentially breach the prohibition within Article 2(4) remains somewhat underdeveloped. Of particular interest are military actions by a state that may constitute a threat. Even though the International Court of Justice (ICJ) in *Corfu Channel* and *Nicaragua* was unwilling to consider the UK naval demonstration of force near the Albanian shore and the military exercises and manoeuvres by the US and its allies near the Nicaraguan borders respectively as unlawful threats of force,⁹ the International Fact-Finding Mission on the Conflict in Georgia set a more elaborate threshold within which, Russia's actions undoubtedly fit. As the Mission noted, if actions are 'non-routine, suspiciously timed, scaled up, intensified, geographically proximate, staged in the exact mode of a potential military clash, and easily attributable to a foreign policy message, the hostile intent is considered present and the demonstration of force manifest'.¹⁰

International legal scholarship views a military threat as a message, whether explicit or implicit, crafted by a decision maker and directed at a target audience, signaling that force will be employed if a rule or demand is not adhered to.¹¹ Positive military actions may or may not accompany the explicit official communique, but it is generally agreed that they exert more influence than words expressed orally or in writing.¹² Frequently cited examples of threats of force through positive actions include (a) military build-ups; (b) aerial, land and naval training and manoeuvres; (c) encroachment into the territory of another state; (d) increase in military budget (e) sudden conscriptions; (f) purchase of armaments and contracting of military and specialized personnel; and (g) indirect recourse to nuclear weapons.¹³

⁹*Corfu Channel (UK v Albania)* (judgment) [1949] ICJ Rep 4, 31–32 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (merits) [1986] ICJ Rep 14, paras 227, 269.

¹⁰The Independent International Fact-Finding Mission on the Conflict in Georgia (IIFMCG), Report, Volume II, 232 https://www.mpil.de/files/pdf4/IIFMCG_Volume_II.pdf.

¹¹Romana Sadurska 'Threats of Force' (1988) *American Journal of International Law* 242; James Green and Francis Grimal, 'The Threat of Force as an Action in Self-Defense Under International Law' (2011) 44 *Vanderbilt Journal of Transnational Law* 295.

¹²Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press, 2009) 173, 209; Green and Grimal (n 11) 296; Hannes Hofmeister, 'Watch What You are Saying: The UN Charter's Prohibition on Threats to Use Force' (2010) 11 *Georgetown Journal of International Affairs* 110.

¹³Consult Stürchler, *The Threat of Force* (n 12) 172–217; Agata Kleczkowska, *Threats of Force and International Law Practice, Responses and Consequences* (Routledge 2023) 64–73.

Naturally, many of the examples are interdependent and can coexist, subject to the strategy of the party.¹⁴ It has been posited that threats of force should be analysed in the relevant context and that a threatening message should be regarded by the addressee and/or the international community as a threat.¹⁵ What increases the credibility of a threatening action, and helps to delineate it from a bluff, is the existence of a dispute or demand, the military capacity and political reputation of a threatening party as well as the imminence and gravity of a threatening action.¹⁶ For example, would the increase in military spending in Switzerland be treated the same as that of a state with prior military actions? Nevertheless, less credible military threats (e.g. those more distanced and of lower intensity) should not be excluded from the ambit of Article 2(4) of the UN Charter.

Which of the mentioned prerequisites did the Russian pre-invasion actions meet, despite the official denial of any invasion plans? First and foremost, there was a significant military build-up. The reported size of the forces posed a threat to Ukraine or even to NATO, potentially discouraging its enlargement plans. Military personnel, estimated to be between 100,000 and 190,000 soldiers, were stationed in Crimea and Belarus, indicating potential planning for a strategic attack given the proximity to Kyiv. Moreover, NATO Secretary-General Jens Stoltenberg stated that the troops are with ‘enabling capabilities, including medical units, command and control, and logistics’.¹⁷ Sergiy Kyslytsya, Permanent Representative of Ukraine to the United Nations, argued that Russian armaments included the Iskander missile divisions, S-400 Triumf and Pantsir anti-aircraft systems, Sukhoi Su-35 4++ generation fighters, whereas the Russian fleet started military drill in the Black Sea with the involvement of frigates, patrol ships, missile ships, assault landing ships and minesweepers.¹⁸ This clearly deviates from the practices of ordinary military exercises, suggests imminence (implied in the French version of the UN Charter)¹⁹ and corroborates a threat of military force. In addition, this was in breach/ violation of the Helsinki Final Act

¹⁴See Thomas Schelling, *The Strategy of Conflict: With a New Preface by the Author* (Harvard University Press, 1981) 40.

¹⁵Francis Grimal, *Threats of Force: International Law & Strategy* (Routledge, 2013) 44–47, 51–52.

¹⁶Article 13 of the ILC’s Draft Code of Offences against Peace and Security of Mankind, stating that threats need to evoke real fear in the addressee, supports the *de minimis* rule. 1989 2(2) *Yearbook of the International Law Commission* 68. Cf. Tom Ruys, ‘The Meaning of “Force” and the Boundaries of the Jus ad Bellum: Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?’ (2014) 108(2) *American Journal of International Law* 159–210. For Roscini, the presence of a hostile intent (*animus aggressionis, animus minandi*) predetermines the existence of a threat. Marco Roscini, ‘Threats of Armed Force and Contemporary International Law’ (2007) 54 *Netherlands International Law Review* 238, 240. Similarly, Michael Walzer, *Just and Unjust Wars* (Basic Books, 2000) 81.

¹⁷NATO, ‘NATO Secretary General Discusses Russian Military Build-up with President of Poland’, *NATO News* (7 February 2022) https://www.nato.int/cps/en/natohq/news_191438.htm.

¹⁸S/PV.8960 (n 6) 17.

¹⁹‘la menace de la force’, where menace derives from *minicia, ergo*, the Latin word for imminence. See also 1989 2(2) *Yearbook of the International Law Commission* 68–69.

and the Vienna Document, which provide that states should increase the transparency of their military actions, inter alia by (a) the non-organisation of major military manoeuvres without notice, (b) the invitation of observers, (c) the conduct of joint inspections, (d) declaring the levels of armament, and (e) verification missions.²⁰

Confirming the Russian threat arising from the military build-up by virtue of the apprehension of the addressee of the threat is more problematic. In December 2021, Brig. Gen. Kyrylo Budanov, head of Ukraine's defense intelligence, warned that Russia was preparing to attack Ukraine by late January. He predicted that the attack would involve 'airstrikes, artillery and armour attacks followed by airborne assaults in the east, amphibious assaults in Odesa and Mariupol and a smaller incursion through neighbouring Belarus'.²¹ However, this warning did not prompt a corresponding reaction from the political authorities. On the contrary, Ukraine's President Volodymyr Zelensky urged the world 'not to panic' and asked those who had information about the Russian invasion to share it with him or make it public.²² In view of this, it is doubtful whether any reliable intelligence about the attack existed. It is possible that Russia initially tried to conduct a 'hybrid threat of force', which was perceived as such by the Ukrainian leader. It is also possible that the Ukrainian President was unsure about the potential aggression but preferred not to incite panic, which could have detrimental effects on the economy.²³

The identification of an unlawful threat of force by third parties may corroborate the existence of a threat in cases when the addressee is unaware of the threat, or indeed affirm it when the addressee decides to ignore it. Information about the threat of the Russian invasion mainly stemmed from US politicians and intelligence. The US Secretary of State, Antony Blinken, issued invasion warnings repeatedly starting as early as December 2021,²⁴ through January 2022, when he claimed that Russia may attack under 'the false flag' (justifying the military intervention),²⁵ to February when he

²⁰See Vienna Document on Confidence and Security-Building Measures, 2011 (VD11) <https://www.osce.org/fsc/74528> <https://www.osce.org/files/f/documents/5/c/39501.pdf>.

²¹Howard Altman, 'Russia Preparing to Attack Ukraine by Late January: Ukraine Defense Intelligence Agency Chief', *Military Times* (20 November 2021) <https://www.militarytimes.com/news/2021/11/20/russia-preparing-to-attack-ukraine-by-late-january-ukraine-defense-intelligence-agency-chief/>.

²²'If you, or anyone else, has additional information regarding a 100% Russian invasion starting on the 16th, please forward that information to us.', *Associated Press* (13 February 2022) <https://www.politico.com/news/2022/02/13/flights-to-ukraine-halted-or-redirected-00008458>.

²³*Cf. Law Debenture Trust Corporation v Ukraine* [2023] UKSC 11 (where Ukraine's defence pleaded to be under Russian military threat in the period around the annexation of Crimea).

²⁴Shane Harris and Paul Sonne, 'Russia Planning Massive Military Offensive Against Ukraine Involving 175,000 Troops, U.S. Intelligence Warns', *The Washington Post* (3 December 2021) https://www.washingtonpost.com/national-security/russia-ukraine-invasion/2021/12/03/98a3760e-546b-11ec-8769-2f4ecdf7a2ad_story.html.

²⁵Joel Gehrke, 'Blinken Warns of Possible Russian False Flag Attack against Ukraine', *Washington Examiner* (7 January 2022) <https://www.washingtonexaminer.com/policy/defense-national-security/blinken-warns-of-possible-russian-false-flag-attack-against-ukraine>.

stated that the invasion ‘could begin at any time, including during the Beijing Winter Olympics’.²⁶ Along similar lines were statements by the White House press secretary, Jen Psaki,²⁷ the director of national intelligence, Avril D. Haines,²⁸ and also the US President, Joseph Biden.²⁹ Quite a few Western leaders shared that view. The then UK Foreign Secretary, Liz Truss, tweeted on 15 February that ‘latest information suggests Russia could invade at any moment and we urge the Kremlin to deescalate’,³⁰ while the Polish Prime Minister, Mateusz Morawiecki, gave an interview to the Daily Telegraph newspaper on 13 February in which he remarked that ‘Poland braces for a massive influx of refugees fleeing Ukraine as fears of Russian invasion mounts’.³¹ On the other hand, Russia openly and constantly denied any plans of military intervention in Ukraine. The Russian Foreign Ministry spokeswoman, Maria Zakharova, labelled reports about Russia’s invasion of Ukraine as a ‘mass disinformation campaign’,³² while the French President, Emmanuel Macron, announced that Russian President Vladimir Putin assured him that Russia will not intervene in Ukraine.³³ Turkey’s President, Recep Tayyip Erdogan, likewise termed the Russian invasion as ‘unrealistic’.³⁴

Such statements by third states merit several observations. First, they are usually corroborated by evidence (intelligence reports etc.), which lends credence to the existence of the threat. However, in case of the lack of unanimity, the question arises whose statements matter? It is also worth remembering that these are political statements, which are usually interest-driven and espoused according to geopolitical preferences. Secondly, one might

²⁶Humeyra Pamuk and Kirsty Needham, ‘Blinken Says Russian Invasion of Ukraine Could Come at any Time’ *Reuters* (11 February 2022) <https://www.reuters.com/world/russian-invasion-ukraine-could-come-any-time-blinken-2022-02-11/>.

²⁷Alexandra Hutzler, ‘Jen Psaki Walks Back Previous Comment on ‘Imminent’ Invasion of Ukraine’, *Newsweek* (2 February 2022) <https://www.newsweek.com/jen-psaki-walks-back-previous-comment-imminent-invasion-ukraine-1675520>.

²⁸Julian Barnes and Helene Cooper, ‘U.S. Battles Putin by Disclosing His Next Possible Moves’, *The New York Times* (12 February 2022) <https://www.nytimes.com/2022/02/12/us/politics/russia-information-putin-biden.html>.

²⁹Julian Borger and Dan Sabbagh, ‘US Warns of ‘Distinct Possibility’ Russia Will Invade Ukraine Within Days’, *The Guardian* (11 February 2022) <https://www.theguardian.com/world/2022/feb/11/biden-ukraine-us-russian-invasion-winter-olympics>.

³⁰Liz Truss: ‘Today I chaired a COBR meeting on the serious Russian threat to Ukraine. Latest information suggests Russia could invade at any moment and we urge the Kremlin to deescalate. Our focus is on prioritising the safety and security of British nationals in Ukraine’, *Twitter* (14 February 2022) <https://twitter.com/trussliz/status/1493233540049162242>.

³¹James Rothwell and Tim Wallace, ‘Poland Braces for Massive Influx of Refugees Fleeing Ukraine as Fears of Russian Invasion Mount’, *The Telegraph* (13 February 2022) <https://www.telegraph.co.uk/world-news/2022/02/13/poland-braces-massive-influx-refugees-fleeing-ukraine-fears/>.

³²Maria Zakharova: ‘Kiev and its Western patrons are pursuing their disinformation campaign against our country’, *Twitter* (19 January 2022) https://twitter.com/mfa_russia/status/1538486678846849024.

³³Caroline Davies, ‘Ukraine Crisis: Macron Says Putin Pledges No New Ukraine Escalation’, *BBC* (9 February 2022) <https://www.bbc.com/news/world-europe-60299790>.

³⁴Tavan Gumrukcu, ‘Turkey’s Erdogan Says Russian Invasion of Ukraine Not Realistic -NTV’, *Reuters* (18 January 2022) <https://www.reuters.com/world/middle-east/turkeys-erdogan-says-russian-invasion-ukraine-not-realistic-ntv-2022-01-18/>.

conduct a credibility inquiry of actors issuing statements and reach conclusions on that basis, but this is a hard task, and it is questionable if firm results in the present case can be reached. In conclusion, the external ex-ante opinion on the threat of force, especially if divided, is of limited value in determining the threat of force and establishing a violation of the prohibition of the use of threat of force.

There were also concrete reactions by third states, which corroborated the credibility of the threat. One category of reaction might be the decisions and practice of the United States,³⁵ the United Kingdom³⁶ and Canada³⁷ to withdraw their diplomatic personnel from Kyiv and recommend the evacuation of their citizens from Ukraine. In addition, states announced scenarios in the event of invasion, including heavy economic sanctions, halting the Nord Stream 2 pipeline, but also military intervention.³⁸ On the other hand, the Ukrainian foreign ministry spokesperson, Oleg Nikolenko, referred to the staff withdrawal decision as premature and a ‘display of excessive caution’,³⁹ while the EU High Representative for Foreign Affairs and Security Policy, Joseph Borrell, said that the EU diplomats and their families would remain in Kyiv.⁴⁰ It might be also the case that the states which did not recommend their citizens to leave Ukraine were afraid of retaliation in view of amplifying the threat and presenting Russia in a bad light internationally. However, this does not explain why over time more states, including Japan, Israel and Saudi Arabia that remained relatively neutral, decided to ask their citizens to leave. South Korea banned travelling to Ukraine, which was put on a level 4 travel alert, the highest in the four-tier system,⁴¹ while several state airlines communicated that they would not be flying over Ukraine.⁴²

³⁵Katie Benner, Edward Wong and Lara Jakes, ‘U.S. Orders Family Members of Embassy Staff to Leave Ukraine’, *The New York Times* (23 January 2022) <https://www.nytimes.com/2022/01/23/us/politics/ukraine-us-embassy-russia.html>.

³⁶BBC, ‘Ukraine: UK Withdrawing Some Embassy Staff from Kyiv’ (24 January 2022) <https://www.bbc.com/news/world-europe-60106416>.

³⁷Mike Blanchfield, ‘Canada Orders Children and Families of Ukrainian Diplomats to Leave Amid Tension with Russia’, *National Post* (25 January 2022) <https://nationalpost.com/news/canada/canada-orders-kids-families-of-ukrainian-diplomats-to-leave-amid-russia-tensions>.

³⁸See EU Press Release, ‘Package of Sanctions in Response to Russian Recognition of the Non-government Controlled Areas of the Donetsk and Luhansk Oblasts of Ukraine and Sending of Troops into the Region’ (23 February 2022) Doc 151/22.

³⁹Oleg Nikolenko: ‘We have taken note of @StateDept’s decision re departure of family members of @USEmbassyKyiv staff. While we respect right of foreign nations to ensure safety & security of their diplomatic missions, we believe such a step to be a premature one & an instance of excessive caution’, *Twitter* (24 January 2022) https://twitter.com/OlegNikolenko_/status/1485528934330605569.

⁴⁰Foreign Affairs Council, ‘Press Remarks by High Representative Josep Borrell After the Meeting’ (21 February 2022) https://www.eeas.europa.eu/eeas/foreign-affairs-council-press-remarks-high-representative-josep-borrell-after-meeting_en.

⁴¹Katie Wermus, ‘South Korea Bans Travel to Ukraine, Joins U.S. in Asking Citizens to Leave’, *Newsweek* (2 November 2022) <https://www.newsweek.com/south-korea-bans-travel-ukraine-joins-us-asking-citizens-leave-1678448>.

⁴²NDTV, ‘Governments Urge Citizens to Leave Ukraine Amid Fears of Invasion’ (14 February 2022) <https://www.ndtv.com/world-news/governments-urge-citizens-to-leave-ukraine-amid-fears-of-invasion-2766747>.

Thus, the reaction of states to the Ukrainian crisis was indicative of the existence of the Russian threat, as compared, for instance, to the 1976 Uganda-Kenya sabre-rattling relating to the aftermath of Operation Entebbe, to which the international community turned a blind eye.⁴³ Nevertheless, it must be stressed that although the threat was taken seriously by many states, the reaction remained inconclusive due to contradictory and non-unanimous decisions.⁴⁴ The subsequent apologetic attitude of Western states for failing to respond to Polish and Baltic states' continuous warnings testifies to the previous existence of the Russian threat. It also increases the chances of future identification of such threats through enhanced trust and cooperation.⁴⁵

Russia's threat of force also needs further consideration within the overall historical context. First, what are the reasons that might have triggered Russia's threat of force? And, was there an underlying dispute and a specific demand? Regarding the dispute (as seen through the Russian lens) it is the transition towards the real independence of the former USSR states and the expansion of the Western influence in this region, which was perceived to undermine Moscow's political influence. During Putin's presidency, Russia's primary goal has been to restore power within the ambit of the disintegrated Soviet Union.⁴⁶ The expansion of NATO to the East was identified as one of the 'main external military dangers' in the renewed Military Doctrine of the Russian Federation.⁴⁷

The dispute and related demands are not solely confined to current security concerns but also revolve around a broader historical claim to 'Rus lands'.⁴⁸ Already in the 15th and 16th centuries, the Tsars, and earlier, the grand princes of Moscow, believed that providence had given them the right to subjugate subsequent Russian lands. By doing so, they found themselves in conflict with the Grand Duchy of Lithuania, which was inhabited by Orthodox Ruthenians. In the second half of the sixteenth century, this led to wars with the Polish-Lithuanian Commonwealth, lasting almost until the end of the seventeenth century. They ended with Moscow's success, which took over today's eastern part of Ukraine and Kyiv. The remaining part of the Rus lands was

⁴³The rescue operation of the hijacked Israeli plane, which landed in Uganda, was launched from Kenya. Uganda sided with the hijackers' demands of the release of Palestinian detainees. See UN Doc S/PV/1942 (16 July 1976).

⁴⁴It is hard to assess whether those refusing to react predicted that the war would be waged exclusively in the Donbas territories.

⁴⁵Ian Lovett, Drew Hinshaw and Natalia Ojewska, 'For Years, Poland Warned of the Russian Threat. Now, the West Is Listening', *The Wall Street Journal* (24 March 2022) <https://www.wsj.com/articles/for-years-poland-warned-of-the-russian-threat-now-the-west-is-listening-11648140891>.

⁴⁶Oliver Bullough, 'Vladimir Putin: The Rebuilding of 'Soviet' Russia', *BBC* (28 March 2014) <https://www.bbc.com/news/magazine-26769481>.

⁴⁷The Military Doctrine of the Russian Federation, Russian Federation presidential edict (5 February 2010) 3. https://carnegieendowment.org/files/2010russia_military_doctrine.pdf.

⁴⁸Consult Charles Halperin, *The Rise and Demise of the Myth of the Rus' Land* (Arc Humanities Press, 2022).

taken over by Russia following the partitions.⁴⁹ Since 1795, Russia controlled the entire territory of today's Belarus and five-sixths of modern Ukraine. Its politicians considered all Rus lands to be Russian. In the nineteenth century, court historians 'documented' this position, and publicists disseminated it, regardless of the centuries-long presence of Ruthenians in Lithuania, the Polish Crown, and the Commonwealth, which altered their culture and, in reality, distanced them from the Russian mentality, which heavily drew from the Mongol heritage.⁵⁰

The ramification of the historical claim to lands and security concerns translates to the present-day thrust to control Ukraine and Kyiv (a city of special significance for Russia) politically and economically,⁵¹ not excluding military and coercive means, at the expense of independence, *nota bene*, guaranteed by several bilateral and multilateral treaties. The 1991 Alma Ata Declaration provides for the respect for signatories'

state sovereignty and sovereign equality, the inalienable right to self-determination, principles of equality and noninterference in internal affairs, the rejection of the use of force, the threat of force and economic and any other methods of pressure, a peaceful settlement of disputes'.⁵²

The 1994 Budapest Memorandum and the 1997 Treaty of Friendship in like manner guarantee the territorial integrity of Ukraine and forbid any military threats or economic coercion against the political independence of Ukraine, requiring consultations in case of any misunderstandings among the parties.⁵³

The next factor that heightened the probability of Russia's military threat against Ukraine in late 2021 was the overall bilateral relationship, which deteriorated in the wake of the incorporation of Crimea into the Russian Federation and the commencement of the military conflict in Donbas in 2014. One specific legal ramification was the non-renewal of the 1997 Treaty of Friendship between Ukraine and the Russian Federation by Ukraine in 2018.⁵⁴ Thereby the guarantees contained in Article 3 regarding

⁴⁹The Partitions of Poland were three divisions of the Polish–Lithuanian Commonwealth in the late 18th century, which resulted in the dissolution of the state and the disappearance of sovereign Poland and Lithuania for 123 years.

⁵⁰Andrzej Chwalba, 'Historia w Konfliktcie Rosyjsko-Ukraińskim Odgrywa Dużą Rolę', *Dzieje.pl* (27 February 2022).

⁵¹*Ibid.* 'Kiev was and is a holy city for Russians. The heart of Russia. The place of her actual birth (...). Józef Piłsudski [first Marshal of Poland] rightly believed that Russia without Ukraine and its resources and access to the Black Sea would never be strong and imperial, hence his idea, not necessarily a happy one, of an expedition to Kiev. But on the other side of the barricade, Lenin had the same opinion.' (authors' own translation).

⁵²Alma-Ata Declaration (21 December 1991) 31 *International Legal Materials* 148.

⁵³Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons (5 May 1994) 3007 UNTS 167, Points 1–3, 6; Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation (31 May 1997) 3007 UNTS 117, Articles 2–5.

⁵⁴Yulia Ioffe, 'Termination of the Treaty of Friendship between Ukraine and Russia – Too Little Too Late?', *OpinioJuris* (1 May 2019) <http://opiniojuris.org/2019/05/01/termination-of-the-treaty-of-friendship-between-ukraine-and-russia-too-little-too-late-%EF%BB%BF/>.

a peaceful resolution of disputes, the non-use of force or threat of force, non-interference in internal affairs, and the right of peoples to control their own destiny ceased to apply. At the same time, Ukraine ceased to be bound by 'loyalty' towards Russia stipulated in Article 6 in view of not entering into agreements with third countries against Russia and using its territory to the detriment of the security of Russia. Such withdrawal from treaty obligations, regardless of which party withdraws, indicates a dispute.⁵⁵ Given the long-lasting character of the military conflict in Ukraine, where Russia and Ukraine have in fact been in a state of war, there was an ongoing dispute and a permanent threat.⁵⁶

The heightened likelihood and severity of Russia's military threat of force could also be further evidenced in light of Russia's military activities past and present. It had deployed its military in the Kaliningrad exclave, performed joint military training in Belarus in the vicinity of Polish borders, and breached the airspace of the Baltic states with its fighters.⁵⁷ Russia also intervened in the region of the former USSR (Transnistria, and more recently in South Ossetia and Abkhazia). Furthermore, Russia was not quite transparent in its military action in Crimea. It initially rebuffed the involvement, while after it was credibly revealed (by the presence of 'green men'), Russia was compelled to change the argument towards the protection of its nationals in the Crimean Peninsula.⁵⁸ The intervention in Lugansk and Donetsk, now Russia's puppet states, was more outright, based on the same narrative.⁵⁹

The military capacity to perform military operations is yet another criterion that might be crucial in corroborating the threat of force. Regarding the Russian threat of aggression, one certainly needs to point to its current position as a global military superpower, which competes for dominance with China and the US. In terms of military capacity, Russia is the world's fifth-largest military (judging by active-duty personnel, with at least 2 million reserve personnel).⁶⁰ Russia possesses the largest stockpile of

⁵⁵On 28 April 1941 Germany renounced the Agreement on Non-Aggression with Poland of 26 January 1934, which made the threat of aggression imminent.

⁵⁶According to Common Article 2 of the Geneva Conventions (1949), the application of these conventions is prompted by 'declared wars' as well as 'armed conflict'. States cannot evade their obligations laid down in the rules and regulations on international humanitarian law by not declaring war or by refusing to acknowledge the existence of a state of war.

⁵⁷Jasper Hufschmidt Morse, 'Russia's "Catch Me If You Can" over the Baltic Sea', *Australian Institute of International Affairs* (24 April 2024) <https://www.internationalaffairs.org.au/australianoutlook/russias-catch-me-if-you-can-over-the-baltic-sea/>.

⁵⁸Sava Janković, 'Prawo Międzynarodowe A Zmiany Terytorialne. Kazus Krymu' (2016) 14 *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 74ff.

⁵⁹Consult Sava Jankovic, Volker Roeben, 'Russia's Recognition of the DPR and LPR: The Revival of the Constitutive Theory of Recognition?', *OpinioJuris* (12 March 2022) <https://opiniojuris.org/2022/03/12/russias-recognition-of-the-independence-of-the-donetsk-peoples-republic-and-the-luhansk-peoples-republic-the-revival-of-the-constitutive-theory-of-recognition/>.

⁶⁰International Institute for Strategic Studies, *The Military Balance* (Routledge 2021) 191.

nuclear weapons in the world⁶¹ and the second-largest fleet of ballistic missile submarines.⁶² In light of Russia's strategic and military capabilities, it is not implausible to conclude that the possibility of threat materialising into actual force was highly likely.

Therefore, the 'positive' action in terms of Russia's significant military build-up (with accompanying personnel) taken together with the specific bilateral context and alongside Russia's military capabilities, confirmed the existence of a 'clear and present' military threat and its credibility—notwithstanding Russia's denial.

3. The (un)lawfulness of Russia's threat of force

The ICJ in its landmark *Nuclear Weapons* advisory opinion established the standard for determining the lawfulness of a threat of force.⁶³ The advisory opinion, despite its non-binding nature, is one of very few that considered the lawfulness of both the threat and use of under international law (here nuclear weapons) providing clarity regarding an actual test.⁶⁴ The ICJ reached a conclusion that for a threat to be lawful, it must meet the same criteria as the actual use of force. Therefore, a threat of force to use nuclear weapons would only be considered lawful if (a) the actual use of nuclear weapons in that context would itself be lawful under international law, and (b) the threat is made in a manner consistent with the principles of necessity, proportionality, and distinction.⁶⁵ Essentially, the ICJ linked the hypothetical threat of force with the actual use of force, applying the same standards of unlawfulness and any exceptions to both.⁶⁶ In practice, this means that a threat of force would have to fall within one of the two accepted exceptions to Article 2(4): UN Security Council authorisation under the United Nation's Chapter VII powers (via Article 42) of the UN Charter, or the threat would have to be made in individual or collective self-defence against an imminent threat of force that would be qualitatively grave enough to satisfy the armed attack threshold of Article 51.⁶⁷ In the present

⁶¹According to Article 23 of the UN Charter, there are 5 permanent members of the Council, including Russia. On top of that, Russia is recognized as a nuclear-weapon State under Article IX of the NPT. The Treaty on the Non-Proliferation of Nuclear Weapons (1968) 729 UNTS 161.

⁶²Arms Control Association, 'Nuclear Weapons: Who Has What at a Glance' <https://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat>; Lowy Institute, Asia Power Index 'Ballistic Missile Submarines Data' (2021) <https://power.lowyinstitute.org/data/military-capability/signature-capabilities/ballistic-missile-submarines/>.

⁶³*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, para 47.

⁶⁴While the ICJ's finding in *Nuclear Weapons* advisory opinion is undoubtedly the leading authority, to suggest that this is the only statement regarding threats of force would be misleading. See, e.g. *Military and Paramilitary Activities in and Against Nicaragua* (n 9) (in which the ICJ, albeit very briefly, recognised that the threat of force 'is equally forbidden').

⁶⁵*Nuclear Weapons* (n 63) para 48.

⁶⁶Cf. Article 1 of the UNGA Res. 3314 (Defining Aggression) where prima facie determination of aggression could be 'invalidated' by the UNSC on the basis of insufficient gravity of the force used.

⁶⁷This remains the prevailing view within the literature. See Ian Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963). But see, e.g. Sadurska 'Threats of Force' (n 11) 239–68.

context, neither Ukraine nor NATO (or other) forces' actions could be deemed to have constituted an armed attack (or at the very least a qualitatively grave threat of force) against Russia, so it is difficult for Russia to clearly invoke Article 51 in light of both Charter and customary rule requirements.⁶⁸

The arguments of humanitarian intervention or the protection of own nationals, which have not found international recognition, were in any event not corroborated by substantial evidence that Russian citizens were being subjected to cruel treatment in Ukraine.⁶⁹ Even if one accepts that both sides have committed human rights violations on the territory of Donbas, that Kyiv banned Russian TV stations and the like, the Russian aim to demilitarise and 'denazify' (the whole of) Ukraine certainly transgresses the defence purposes and thus fails to meet the proportionality criterion.⁷⁰ The ICJ will rule on the merits in the *Ukraine v. Russian Federation* 'reverse genocide case', whether Russia used a false genocidal pretext for commencing the special military operation.⁷¹

The only possible justification could be sought in the so-called preventive self-defence concept, connoting a military action against a serious future threat of an armed attack, without clarity when and where that attack may emerge, which is different from the anticipatory self-defence that aims to respond to an imminent threat of a grave use of force.⁷² Russia might have felt threatened by the expansion of the antagonist military alliance (NATO), which would position Moscow within the perilous proximity of the potential installation of rockets/shields or performing fighter training if Ukraine secures membership.⁷³ A similar rationale is mirrored in the Monroe Doctrine, which pretends to keep the US free of any sort of foreign unwanted presence, patently evidenced during the Cuban missile crisis.⁷⁴ Israel sustains a 'defensive occupation' of the Golan Heights to

⁶⁸See Russia's letter to the UN Secretary-General on the measures taken with regard to the self-defence right. UN Doc S/2022/154 (24 February 2022). See also James Green, Christian Henderson and Tom Ruys, 'Russia's Attack on Ukraine and the Jus ad Bellum' (2022) 9(1) *Journal on the Use of Force and International Law* 8–10.

⁶⁹See Peters (n 1); Green, Henderson and Ruys, 'Russia's Attack on Ukraine and the Jus ad Bellum' (n 68) 23–27; Adil Ahmad Haque, 'An Unlawful War' (2022) 116 *American Journal of International Law Unbound* 155–59.

⁷⁰Marko Milanovic, 'What is Russia's Legal Justification for Using Force Against Ukraine?', *EJIL:Talk!* (24 February 2022), comments www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine. On a 'genocide' in Donbas see 'Statement of the Presidium of the Russian Association of International Law' (7 March 2022) www.ilarb.ru/html/news/2022/7032022.pdf original Russian version, published three days earlier (4 March 2022) www.ilarb.ru/html/news/2022/4032022.pdf.

⁷¹Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Preliminary Objections, Judgement (2024) paras 50–52, 58.

⁷²Chris O'Meara, 'Reconceptualising the Right of Self-Defence Against "Imminent" Armed Attacks' (2022) 9(2) *Journal on the Use of Force and International Law* 282–7.

⁷³Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development (4 February 2022) Point III (regarding security) <http://en.kremlin.ru/supplement/5770>.

⁷⁴The United States viewed the weapons deployment as an unlawful threat of force. UN SCOR, 17th Sess., 1025th mtg, UN Doc S/PV.1025 (25 October 1962) 6 ('[T]he Soviet Union secretly introduced this

prevent potential attacks.⁷⁵ This may mean that the occupied territories have been experiencing both express and implicit threats of force.⁷⁶ However, such justifications for the use of threats and force interfere with sovereignty and political independence of the other state, in this context enjoyed by Ukraine.⁷⁷ Critically, although anticipatory self-defence has managed to garner some support in doctrine, preventive self-defence is almost universally rejected. Hence, any potential non-impending threats, such as those stemming from Ukraine's political and military orientation, clearly do not fall within the ambit of allowed self-defence.⁷⁸ On the other hand, the stringency in interpreting anticipatory self-defence predicates on the peril inherent in the use of force. It is questionable whether threats of force carry a similar peril in terms of gravity and consequences. Therefore, it is debatable whether the standard set by the Nuclear Weapons advisory opinion and the practice of states and commentators regarding anticipatory self-defence should be applicable to threats.

The Ukrainian conflict entails the possible scenario of the recourse to nuclear weapons. The implicit threat here has existed both before the commencement of military hostilities in February 2022 as well as during them. Such an implicit threat has been mitigated in Ukraine by no direct confrontation with NATO (e.g. the introduction of the no-fly zone) or no dispatch of strategic weapons capable of tipping the balance in the conflict.⁷⁹ The ICJ's *Nuclear Weapons* advisory opinion allows both threats and the use of force, including with nuclear weapons, as the last resort when the very survival of the state is at stake.⁸⁰ Russia's threat of nuclear weapons to support its military offensive in another state would seemingly not meet the condition of the extreme circumstances as envisaged by the ICJ. Thus, it would be probably unlawful, as well as contrary to humanitarian law and the basic *jus in bello* principles of distinction, proportionality, and duty to take all feasible

menacing offensive military build-up into the island of Cuba'). Sadurska holds that a threat may be lawful even in circumstances that would not justify anticipatory self-defence – 'legitimate concern for security may be caused by situations that cannot justify even anticipatory self-defence'. Sadurska (n 11) 257, 260.

⁷⁵See Eliav Lieblich, 'The Golan Heights and the Perils of "Defensive Annexation"', *Just Security* (4 April 2019) <https://www.justsecurity.org/63491/the-golan-heights-and-the-perils-of-defensive-annexation/>.

⁷⁶See Separate Opinions of Judges Elaraby and Owada, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (advisory opinion) [2004] ICJ Rep 125, 138.

⁷⁷Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, 'Exploring the Limits of International Law relating to the Use of Force in Self-defence' (2005) 16(3) *European Journal of International Law* 499–524.

⁷⁸Marko Milanovic, 'When did the Armed Attack against Ukraine become "Imminent"?', *EJIL:Talk!* (20 April 2022) <https://www.ejiltalk.org/when-did-the-armed-attack-against-ukraine-become-imminent/> (discussing also reactions to the theory of preventive self-defence in the context of the US/UK invasion of Iraq in 2003).

⁷⁹Consult Oona A. Hathaway and Scott Shapiro, 'Supplying Arms to Ukraine is Not an Act of War', *Just Security* (12 March 2022) <https://www.justsecurity.org/80661/supplying-arms-to-ukraine-is-not-an-act-of-war/>.

⁸⁰*Nuclear Weapons* (n 63) para 97.

precautions.⁸¹ In general, the threatened use of nuclear weapons can hardly be squared with Article 51 of the UN Charter, whereas the mere possession of nuclear weapons and well-established deterrence policies do not count as threats.⁸²

In conclusion, Russia's military threat of force was unlawful under international law as there was no valid reason to use force against Ukraine, while the retaliatory threat from any other state was justified on the grounds of collective self-defence.

4. International reactions to Russia's threat of force

Once established as unlawful, the question of immediate reactions and *ex post* consequences for resorting to threat by Russia arises. The reactions to Russian actions will be presented first. Next, the article will consider what could be done to augment the international community's capacity to censure threats. This is significant, because, as a rule, the responses to threats of force are either minimal in case of an unrealised threat or become overshadowed by a response to the ensuing use of force.⁸³

4.1. Immediate and *ex post* reactions

Ex post reactions to Russia's threat of force were significant, but they cannot be compared with incomparably stronger reactions that followed the full-scale war commenced by Russia on 24 February 2022.

At the aforementioned UN Security Council meeting on the situation in Ukraine, states grounded their diplomatic language and agendas in the international law of collective security and the management of risks to global stability. Almost all recommended the 'Normandy format' in the context of the implementation of the Minsk agreements.⁸⁴ The Normandy Four (Germany, France, Russia and Ukraine) and the Trilateral Contact Group,

⁸¹See Philippe Sands, and Helen Law, 'The United Kingdom's Nuclear Deterrent: Current and Future Issues of Legality, *Peace Rights* (24 December 2005) <https://archive.ph/20130113035419/http://www.peacereights.org/reports/195#selection-293.143-293.225>; International Review of the Red Cross, 'The ICRC's Legal and Policy Position on Nuclear Weapons' (June 2022) <https://international-review.icrc.org/articles/the-icrcs-legal-and-policy-position-on-nuclear-weapons-919>.

⁸²See Anna Hood, Monique Cormier, 'Nuclear Threats Under International Law Part II: Applying the Law' (2023) *Journal for Peace and Nuclear Disarmament* 3–6.

⁸³See Agata Kleczkowska, 'Prohibition of Threats of Force: A Silently Contested Norm?' (2023) 83 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 155ff.

⁸⁴See Letter dated 24 February 2015 from the Permanent Representative of Ukraine to the United Nations Addressed to the President of the Security Council, UN Doc S/2015/135 (25 February 2015) annex I ('Protocol on the Outcome of Consultations of the Trilateral Contact Group on Joint Steps Aimed at the Implementation of the Peace Plan of the President of Ukraine, P Poroshenko, and the Initiatives of the President of the Russian Federation, V Putin') ('Minsk I'); Letter dated 12 February 2015 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, UN Docs A/69/778 and S/2015/110 (13 February 2015) annex II ('Package of Measures for the Implementation of the Minsk Accords').

led by the Organisation for Security and Cooperation in Europe (OSCE) were institutions that tried to ensure the implementation of the Minsk agreements endorsed by the Security Council in its resolution 2202 (2015) and put an end to the war in the Donbas region of Ukraine.⁸⁵ In addition, almost all states reaffirmed the principles of sovereignty, territorial integrity and good neighbourliness. The Mexican representative referred to UN Resolution 3314 defining aggression and said that such would be cause for the Security Council to act,⁸⁶ while the Albanian representative mentioned the Budapest Memorandum, which affirms the territorial integrity of Ukraine and provides that Russia, the UK and the US (signatories) must refrain from the threat or use of force against the territorial integrity or political independence of Ukraine.⁸⁷

Russia's threatening actions have also been addressed through economic sanctions. For instance, within the ambit of economic pressure in the context of the Russian military threat, Germany decided to halt its Nord Stream 2 pipeline project,⁸⁸ while the EU Parliament in its resolution of 16 December 2021, condemning the large Russian military build-up, suggested that sanctions against Russia should include a suspension from the SWIFT payment system.⁸⁹

Yet, as posited, the incommensurable and more powerful reaction of the international community came after the actual use of force. During its 11th emergency special session, the UN General Assembly passed a principal resolution on Russia's invasion of Ukraine (141 states voted in favour of the motion, 5 against and 35 abstained), which in point 2 strongly deplored Russian aggression on Ukraine and labelled it as a violation of Article 2(4) of the UN Charter, whereas in point 3 demanded Russia to cease its use of force against Ukraine immediately and to refrain from any *further* unlawful threat or use of force against any Member State,⁹⁰ yet it did not condemn the threat preceding the attack *per se*. The UN General Assembly adopted additional resolutions: (a) on the humanitarian consequences of the aggression against Ukraine,⁹¹ (b) on the suspension of the rights of membership of the Russian Federation in the Human Rights Council,⁹² (c) on the illegality of

⁸⁵S/PV.8960 (n 6) Ms. DiCarlo (Under-Secretary-General for Political and Peacebuilding Affairs) 4, Mr. Hoxha (Albania) 7, Mr. De Rivière (France) 8, Mr. Tirumurti (India) 8, Ms. Byrne Nason (Ireland) 9, Mr. Agyeman (Ghana) 9, Mr. Costa Filho (Brazil) 13, Mr. De la Fuente Ramírez (Mexico).

⁸⁶S/PV.8960 (n 6) 6.

⁸⁷Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons (5 December 1994) UNTS 3007, point 1 and 2.

⁸⁸Radio Free Europe, 'Scholz Says Germany is Putting Nord Stream 2 on Hold, Following Putin's Actions on Ukraine' (22 February 2022) <https://www.rferl.org/a/russia-putin-nord-stream-2-pipeline-ukraine-scholz/31716191.html>.

⁸⁹European Parliament resolution of 16 December 2021 on the situation at the Ukrainian border and in Russian-occupied territories of Ukraine (2021/3010(RSP)).

⁹⁰UNGA Res ES-11/1, UN Doc A/RES/ES-11/1 (2 March 2022).

⁹¹UNGA Res ES-11/2, UN Doc A/RES/ES-11/2 (24 March 2022).

⁹²UNGA Res ES-11/3, UN Doc A/RES/ES-11/3 (7 April 2022)..

so-called referendums in regions within the internationally recognised borders of Ukraine,⁹³ (d) on the remedy and reparation for aggression against Ukraine,⁹⁴ and (e) on finding a comprehensive, just and lasting peace in Ukraine in line with the principles of the Charter of the United Nations.⁹⁵ None of the above resolutions, however, go beyond the reiteration that states must not recourse to threats or uses of force and that no territory acquired through threats or uses of force should be recognised as legal. The positions and statements of international organisations, among others, the Organisation of American States, the African Union or the Economic Community of West African States have been broadly along the lines of condemning the aggression, calling for the respect of the territorial integrity of Ukraine and immediate ceasefire – even Ukraine in its recent submission to the ICJ did not in any way amplify the issue of the threat preceding the aggression.⁹⁶

Besides, Russia faced heavy economic sanctions (the EU shut airspace to Russian planes, cut off most of the Russian oil imports and hugely curtailed the export of its goods and services to Russia),⁹⁷ linked to political and institutional ostracism (avoidance of meetings with President Putin, the removal from the Council of Europe).⁹⁸ Furthermore, the ICJ ordered provisional measures that Russia should immediately suspend its military operations,⁹⁹ the Prosecutor of the International Criminal Court (ICC) launched the investigation for alleged war crimes,¹⁰⁰ while the Pre-Trial Chamber II of the ICC issued arrest warrants against Vladimir Putin and Maria Lvova-Belova.¹⁰¹

Consequently, there have been quite limited practical consequences in response to Russia's unlawful threat of force in Ukraine: either in state

⁹³UNGA Res ES-11/4, UN Doc A/RES/ES-11/4 (12 October 2022).

⁹⁴UNGA Res ES-11/5, UN Doc A/RES/ES-11/5 (14 November 2022).

⁹⁵UNGA Res ES-11/6, UN Doc A/RES/ES-11/6 (23 February 2023).

⁹⁶*Allegations Of Genocide Under the Convention on the Prevention and Punishment of The Crime of Genocide (Ukraine v. Russian Federation)* Memorial submitted by Ukraine (1 July 2022) 74–76.

⁹⁷See Elena Chachko and J. Benton Heath, 'A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield' (2022) 116 *American Journal of International Law Unbound* 135–9.

⁹⁸Resolution CM/Res(2022)2 of the Committee of Ministers on the cessation of the membership of the Russian Federation to the Council of Europe (16 March 2022). On 15 March 2022, the Government of the Russian Federation informed the Secretary General of its withdrawal from the Council of Europe in accordance with the Statute of the Council of Europe and of its intention to denounce the European Convention on Human Rights.

⁹⁹*Allegations Of Genocide* (n. . .) Request for the Indication of Provisional Measures (16 March 2022). On the effectiveness, and consequences for non-abiding by provisional measures see Ewa Salkiewicz-Munierlyn, *Jurisprudence of the PCIJ and of the ICJ on Interim Measures of Protection* (Springer, 2022) 85–114.

¹⁰⁰Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: 'I have decided to proceed with opening an investigation' (28 February 2022) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

¹⁰¹ICC, 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova', *ICC Press Release* (13 March 2023) <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

practice or through any judicial or arbitral pronouncements. It cannot be entirely excluded that the preceding threat amplified the reaction of the international community, however, given its omission in statements, its role seems hardly consequential.¹⁰²

4.2. What can be done to augment the international community's capacity to censure military threats?

Augmenting the international community's capacity to censure threats involves legal, diplomatic, and cooperative frameworks to more effectively address and mitigate such threats.

First, the reaction to military threats by states requires solid legal underpinnings. Without a comprehensive and acceptable legal framework, the efforts to eliminate such threats are largely diminished.¹⁰³ Indeed, in comparison to domestic laws, which in penal codes proscribe and penalise with imprisonment explicit or implicit threats against individuals, international law clearly lags behind.¹⁰⁴ In key international law documents dealing with wrongful acts or crimes evoking individual responsibility, namely the International Law Commission's (ILC) Articles on State Responsibility and the ICC Statute, the question of the threat of force is left out. What makes a threat justiciable is only its subsumption under another prohibition, such as 'planning or preparation of an act of aggression'.¹⁰⁵ But, this would in practice require the capability of a decisive distinction between the military threat of the preparation of aggression, which is more plausible during *ex post* analysis and has limited influence in affecting the 'present' threats. To strengthen the legal framework, it is highly desirable that the international legal community, possibly through the ILC, resumes the attempt at the codification of the threat of force that it abandoned after almost half a century of work,¹⁰⁶ while being conscious of the use of force developments that have occurred in the meantime. Accordingly, the work should embrace both the responsibility of states

¹⁰²Green, Henderson and Ruys (n 68) 28 (defending international law and the collective security system from accusations of failure to prevent the Russian military invasion).

¹⁰³Note that 'none of the Drafting Committee's efforts to produce a suitable definition of the threat of aggression had ever met with the approval of Governments'. 1995 (I) *Yearbook of the International Law Commission* 51, para 9.

¹⁰⁴See Article 305 of the Portuguese penal code (Código Penal); Article 241 of the German penal code (Strafgesetzbuch); Article 190 of the Polish penal code (Kodeks karny).

¹⁰⁵Note that although aggression is one of the gravest international crimes, the UN Security Council has never made a formal finding that aggression in the sense of Article 39 UN Charter has occurred, while nobody has so far been charged with the crime at the ICC. See Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression* (Routledge, 2013) 110–17, 215ff.

¹⁰⁶In 1995, most members of the ILC endorsed the Special Rapporteur's proposal that the crimes of the threat of aggression and intervention should be left aside for the time being because of their vague and imprecise nature. 1995 (I) *Yearbook of the International Law Commission* 14, para 29 (Mr. Mahiou); 15, para 10 (Mr. Mikula); 205, paras 74–75 (Mr. Yankov); 265, para 19 (Mr. Tomuschat).

and individuals, consider the division of threats into more and less serious categories based on their gravity, and distinguish between explicit and implicit threats.

Pending an accepted legal definition, states and international organisations could recall the applicable international law.¹⁰⁷ The state or other actor should be reminded of their principal legal obligations. The cornerstone documents are the UN Charter and the soft-law re-affirmations of Article 2(4) via the 1970 Friendly Relations Declaration and the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, together with any specific treaty arrangements.

Furthermore, the international community has the responsibility to protect (R2P). Under the R2P obligation, states should strive to protect people from genocide, war crimes, ethnic cleansing, and crimes against humanity, which could result from a military conflict.¹⁰⁸ The preventive phase is a cornerstone of the R2P concept, and in line with the Report of the International Commission on Intervention and State Sovereignty (ICISS), 'prevention options should always be exhausted before intervention is contemplated'.¹⁰⁹ As such, it is a much less divisive concept than humanitarian intervention, which does not exclude the use of force from the beginning and makes it permissible even without the authorisation of the Security Council. Accordingly, states should do everything to prevent a military threat from materialising into the actual use of force.

The aim of the reaction to military threats of force is to discourage the resort to armed force and maintain peace. Accordingly, the maintenance of international peace and security should prevail over the interests of states.¹¹⁰ The cooperation to prevent and stop a military threat is an obligation *erga omnes*, in which all states have a legal interest. An *erga omnes* obligation exists because of the universal interest in maintaining the critical rights of states (and the prevention of their breach). The ICJ in the *Legality of the Wall* linked the duty of non-recognition to the *erga omnes* character of the breached norm.¹¹¹ The ICJ there stated this with reference to the obligation resulting from aggression.¹¹²

¹⁰⁷Mary O'Connell, 'Russia-Ukraine: Resolving the World's Most Dangerous Conflict', *EJIL:Talk!* (1 February 2022) Russia-Ukraine: Resolving the World's Most Dangerous Conflict – EJIL: Talk! (ejiltalk.org).

¹⁰⁸2005 World Summit Outcome Document, UN Doc 60/1 (16 September 2005) para 138. See also International Commission on Intervention and State Sovereignty (ICISS) Report 'The Responsibility to Protect' (December 2001) XI.

¹⁰⁹ICISS Report, XI, 19ff. See also Ban Ki-moon, Address to the Stanley Foundation Conference on Responsibility to Protect, New York (18 January 2012) <https://www.un.org/sg/en/content/sg/speeches/2012-01-18/address-stanley-foundation-conference-responsibility-protect>.

¹¹⁰See Report of the Secretary-General, 'In Larger Freedom: Towards Developments, Security and Human Rights for All', UN Doc A/59/2005 (21 March 2005).

¹¹¹*Legal Consequences of the Construction of a Wall* (n 76) paras 87, 159.

¹¹²*Barcelona Traction case (Belgium v Spain)* (second phase) [1970] ICJ Rep 3, para 34.

To effectuate this cooperation, states and international organisations can take stock of an ongoing situation. In particular, the faster the determination of a threat, pronouncement of its illegality, and indication of appropriate reaction, the higher the chances of conflict prevention. The UN Security Council should convene immediate meetings in case of military threats and can pursue corresponding actions within its powers stemming from Chapter VII, that is, to ‘determine the existence of any threat to the peace, breach of the peace, or act of aggression’ and to take military and nonmilitary action to ‘restore international peace and security’.¹¹³ Although the threat of force is not explicitly enumerated in Article 3 of Resolution 3314 defining aggression, the list is not exhaustive, and the Council, under Article 4, is empowered to determine that the threat of force constitutes an act of aggression (especially if purposeful and grave as Russia’s).¹¹⁴ The UN General Assembly, as the representative body of the international community, could play a concurrent role in the process, in particular in case of a deadlock in the Security Council,¹¹⁵ as it has in the Ukraine-Russia war regarding aggression.¹¹⁶ Additionally, the General Assembly could pass a resolution on the necessity of the use of veto being in conformity with international law, especially in cases which may lead to crimes against humanity or genocide.¹¹⁷ It could also request an advisory opinion from the ICJ and even recommend the establishment of a special tribunal.¹¹⁸ States should strive to overcome any institutional obstacles, including the veto, by adhering to Article 27(3) of the UN Charter, which requires obligatory abstention in cases concerning themselves. They should demand the immediate cessation of any military threat and assurances of non-repetition.¹¹⁹

Furthermore, reactions to threats should be underpinned by a coordinated and goal-oriented strategy. Unfortunately, this is not always the case, as illustrated by the Ukrainian conflict. Divergent strategies (slow vs.

¹¹³UN Charter, Article 39.

¹¹⁴The hostile intent has been a defining feature of the breach of the use of force norm in the context of military presence in another state’s territory. Consult Claus Kreß, ‘Aggression’ in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (Oxford University Press, 2021) 236.

¹¹⁵See UN General Assembly Resolutions ‘Essentials of Peace’ UN Doc A/RES/290 (1 December 1949) and ‘Uniting for Peace’ UN Doc A/RES/377(V) (3 November 1950).

¹¹⁶Note, for instance, the commitment of the US, Russia and the UK to seek immediate UNSC action to provide assistance to Ukraine if it becomes a victim of threat of aggression in which nuclear weapons are used. The 1994 Budapest Memorandum (n 53), Point 4.

¹¹⁷See Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocities presented by France and Mexico. See also UNGA Res 70/621-S/2015/978 (14 December 2015) UN Doc A/70/621-S/2015/978.

¹¹⁸Jennifer Trahan, ‘The Role of the UN Security Council & General Assembly in Responding to the Invasion of Ukraine’ (2023) 12(2) *Polish Review of International and European Law* 44–54.

¹¹⁹Anne Peters, ‘The War in Ukraine and Legal Limitations on Russian Vetoes’ (2023) 10(2) *Journal on the Use of Force and International Law* 162–72.

fast, pressure vs. incentives, proof of threat vs. lack of evidence) pose a significant challenge to eliminating threats and maintaining peace.¹²⁰

At the UN Security Council 8960th meeting on 31st of January 2022, all members strongly suggested the return to the negotiation table. Western states preferred a stronger accent, based on accusations, historical misdeeds of Russia, or availed of threats if the situation unfolded contrary to their expectations. There was also less on the negotiation table, as almost all expressed unwavering support for Ukrainian territorial integrity, including Donetsk and Lugansk regions.¹²¹ Poland and the Baltic states were at the forefront of more decisive rhetoric against Russia.¹²² Other states, to the contrary, appealed for a peaceful diplomatic process. India's representative to the UN, for instance, stated 'quiet and constructive diplomacy is the need of the hour. Any steps that increase tension may best be avoided by all sides in the larger interest of securing international peace and security'.¹²³ Similarly, the Brazilian representative underlined that 'Open references to military actions, unilateral economic sanctions and other measures are developments that should be avoided, in accordance with the Charter of the United Nations'.¹²⁴

Finally, responses to military threats should involve a wide range of actors, extending beyond states and international governmental organisations to include NGOs. Through research, highlighting the situation, and disseminating information via various channels, such as regarding the intent of the threatening party, the threat becomes better understood, thereby increasing the likelihood of appropriate responses from relevant stakeholders.¹²⁵

5. Conclusions

Russia's military build-up in late 2021 constituted an unlawful military threat of force, yet this occurrence has attracted scant institutional and scholarly attention. This article has argued that military threats of force, especially if denied by a threatening party, can be legally challenging phenomena within the scope of Article 2(4) of the UN Charter. Such threats should be assessed on a case-by-case basis, taking into account the specifics of the threatening actions as well as the context of a threat, its imminence alongside

¹²⁰Matthew Waxman, 'Regulating Resort to Force: Form and Substance of the UN Charter Regime' (2013) 24(1) *European Journal of International Law* 183–4; Sean Murphy, 'Protean Jus Ad Bellum' (2009) 27 *Berkeley Journal of International Law* 42.

¹²¹S/PV.8960 (n 6), statements of the US, the UK, Albania, Poland, France, Ireland, Norway and Lithuania.

¹²²Yuras Karmanau, 'Poland, Lithuania Back Ukraine, Urge Russia Sanctions', *Associated Press* (20 December 2022) <https://www.usnews.com/news/business/articles/2021-12-20/poland-lithuania-back-ukraine-urge-russia-sanctions>.

¹²³S/PV.8960 (n 6) 8.

¹²⁴*Ibid.*, 13.

¹²⁵See Herbert Kelman, 'The Role of the Individual in International Relations: Some Conceptual and Methodological Considerations' (1970) 24 *Journal of International Affairs* 1–17; Shireen Mazari, 'The Centrality of Non-State Actors in Promoting Peace & Stability' (2007) 27(4) *Strategic Studies* 1–4.

the military potential and reputation of a party issuing a threat, as suggested by the International Fact-Finding Mission on the Conflict in Georgia. Military threats of force must be experienced and confirmed by the addressee to produce legal effects, which may, however, in certain circumstances require corroboration by external actors, i.e. when the addressee might feel immune to such threats or threats are denied, as was the case in the context of Russia and Ukraine.

All established military threats are deemed unlawful unless a justification can be provided. The Russian threat of force in Ukraine could not be credibly justified against the lawfulness bar set by the *Nuclear Weapons* advisory opinion. However, it remains doubtful whether exceptions applicable to the use of force should unreservedly be transposed to the ambit of threats of force. The most problematic aspect remains the reaction to military threats, which may depend on the determination of a threat and its (un)lawfulness, geopolitical considerations, and the overall position one takes on threats. States and international organisations clearly failed to appropriately react to the Russian military threat, a move that could perhaps change the optics of the present conflict. To prevent the escalation of conflicts to actual military confrontation, states should alter their viewpoints on threats and react duly, opportunely, and in coordination towards this erga omnes concern. The lead-up to the war in Ukraine provides ample reason to draw a clearer line of allowed behaviour and address this blind spot in the UN Charter's security law,

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