

THREATENING TO USE FORCE ILLEGALLY

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The prohibition on the threat of force under international law is typically understood as barring threats to resort to war in an unlawful manner, i.e., in violation of jus ad bellum rules in the U.N. Charter. Much less attention has been paid to threats to use force in an unlawful manner, i.e., in violation of jus in bello international humanitarian law (IHL) rules.

Neither Article 2(4) of the U.N. Charter nor international law generally prohibits threats to use force in contravention of IHL. But for parties to the 1949 Geneva Conventions or 1977 Additional Protocol I, threatening to use force in blatant or manifest violation of IHL would violate the obligation under Common Article 1 to ensure respect for those treaties.

This has important implications for nuclear deterrence, as a review of U.S. nuclear targeting policy reveals. For parties to Additional Protocol I, threats contemplating blatant or manifest violations of the rules of distinction, proportionality, and precaution would breach the duty to ensure respect for the Protocol.

Even where threats to use force in violation of international law would not be unlawful, there are sound policy reasons not to threaten to use force in violation of IHL. Such threats offer doubtful security benefits and could have the collateral effect of weakening compliance with IHL during the course of actual armed conflicts.

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I. INTRODUCTION	52
II. THE PROHIBITION ON THE THREAT OF FORCE IN ARTICLE 2(4) OF THE UNITED NATIONS CHARTER.....	55
A. Defining “Threats of Force” under International Law	55
B. The Relationship between the Legality of a Threat to Use Force and the Legality of the Use of Force	57
C. The Relationship between the Legality of a Threat and the Legality of the Means and Methods of Using Force	59
D. The Better Interpretation: Article 2(4) Does Not Prohibit Threats to Use Force in Violation of International Humanitarian Law	60
III. OTHER POSSIBLE SOURCES OF A PROHIBITION ON THREATS TO VIOLATE IHL RULES	62
A. International Law Contains No General Prohibition on Threatening to Violate Rules of International Law.....	62
B. International Humanitarian Law: Some Specific, But No General, Prohibition on Threats.....	63
C. The Duty to Ensure Respect for the Geneva Conventions and Additional Protocols.....	64
IV. LEGAL IMPLICATIONS FOR NUCLEAR DETERRENCE	67
V. POLICY CONSIDERATIONS REGARDING THREATS TO USE FORCE IN A MANNER THAT VIOLATES INTERNATIONAL HUMANITARIAN LAW	71
A. The Doubtful Effectiveness of Threats to Use Force in an Illegal Manner in Enhancing Security	72
B. The Collateral Damage of Threats to Use Force in an Illegal Manner to the Integrity of International Humanitarian Law	75
VI. CONCLUSION.....	76

I. INTRODUCTION

The foundation of the contemporary legal framework governing the use of force, familiar enough to international lawyers to be recited by heart, is set out in Article 2(4) of the United Nations Charter: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹ Nearly all of the focus on the international law

¹ U.N. Charter art. 2, ¶ 4. The “Purposes of the United Nations” referred to in Article 2(4) are set out in Article 1 of the Charter:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights

security regime is on the *use* of force. In comparison, relatively little attention is paid, by either states or scholars, to legal issues associated with the nearly silent partner of the use of force, namely, the *threat* of force.² And when international lawyers do consider the legality of threats of force, they focus almost exclusively on whether it would be lawful to threaten to *initiate* an armed conflict under the law governing recourse to force, or the *jus ad bellum*. In contrast, very little attention has been paid to the question of whether the lawfulness of a threat to use force depends on the means and methods a state says it will employ in using force, i.e., the *jus in bello*.

The distinction between *jus ad bellum* and *jus in bello*, also referred to as international humanitarian law (IHL) or the law of armed conflict (LOAC), is a well-settled feature of the legal regime covering war. As the ICRC explains, while *jus ad bellum* “seeks to limit resort to force between states,” *jus in bello* seeks “to limit the suffering caused by war by protecting and assisting its victims.”³ IHL is “independent from questions concerning the justification or reasons for war or its prevention, which are covered by *jus ad bellum*.”⁴ Although both bodies of law apply in armed conflicts, international lawyers who have investigated issues related to threats of force have shed little light on the question of whether it is unlawful to threaten to use force illegally—i.e., in a *manner* that would be illegal—even if the underlying recourse to force is lawful.

Recent history reveals prominent instances of states threatening to use force in a manner that would violate IHL, or the *jus in bello*. In one prominent example, President Trump in 2017 responded to perceived North Korean security threats by declaring: “North Korea best not make any more threats to the United States . . . They will be met with fire and fury like the world has never seen.”⁵ The statement was widely viewed as a thinly-veiled threat of the use of indiscriminate force against North Korea, in contravention of IHL principles of distinction and proportionality. In 2020, following the killing of Iranian Quds Force commander Qassem Soleimani, President Trump noted on the social media platform X that Iran was “talking very boldly about targeting certain USA assets as revenge for ridding the world of their terrorist leader.”⁶ In response, President Trump issued a threat meant to deter Iran from attacking U.S. assets or interests. The threat indicated that the United States had “targeted 52 Iranian sites . . . , some at a very high level & important to Iran & the Iranian culture, and those targets, and Iran itself, WILL BE HIT VERY FAST AND VERY HARD.”⁷ North Korean officials, for their part, in 2024 reportedly vowed that

and for fundamental freedoms for all without distinction as to race, sex, language, or religion;
and

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

² James Crawford, *Foreword* to NIKOLAS STÜRCHLER, *THE THREAT OF FORCE IN INTERNATIONAL LAW*, at xi-xii (2007).

³ *Jus ad Bellum and Jus in Bello*, International Committee of the Red Cross, <https://www.icrc.org/en/law-and-policy/jus-ad-bellum-and-jus-bello> [https://perma.cc/UPN5-NAQN] (last visited Feb. 19, 2026).

⁴ *Id.*

⁵ Peter Baker and Choe Sang-Hun, *Trump Threatens ‘Fire and Fury’ Against North Korea If It Endangers U.S.*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/08/world/asia/north-korea-un-sanctions-nuclear-missile-united-nations.html> [https://perma.cc/LH4J-V65A].

⁶ Donald J. Trump (@realDonaldTrump), X (Jan. 4, 2020, at 02:52 PM PT), <https://x.com/realDonaldTrump/status/1213593965838163968> [https://perma.cc/D3UY-WBFY].

⁷ Donald J. Trump (@realDonaldTrump), X (Jan. 4, 2020, at 02:52 PM PT), <https://x.com/realdonaldtrump/status/1213593975732527112?mx=2> [https://perma.cc/HZC8-G8AM].

in the event of war with South Korea and the United States, North Korea would launch an “overwhelming attack on the enemy anytime and without delay and totally destroy them once the respected Supreme Commander Kim Jong Un gives an order.”⁸

In this Article, I explore the question of whether it is unlawful to threaten to use force illegally, i.e., in violation of rules governing the conduct of war (under the *jus in bello*), as distinct from the question of whether it is unlawful to threaten an illegal resort to force (under the *jus ad bellum*). Although it is clear that international law prohibits *using* force in a manner that violates IHL, I argue that the prohibition on the threat of force under Article 2(4) of the U.N. Charter does not prohibit making threats to violate IHL.⁹ Nor does international law contain a general prohibition on threatening to engage in actions that would violate international law if they were carried out. Although IHL contains a limited number of express prohibitions on threatening to commit particular violations of IHL, these few provisions do not amount to a general prohibition on threatening to use force in a manner that would violate IHL.

There is, however, one limited but key exception to the position that threats to use force in violation of IHL do not violate international law. For states that are parties to the 1949 Geneva Conventions or their 1977 Additional Protocols, threatening to use force in a manner that would be a blatant or manifest breach of the obligations in those instruments would violate their Common Article 1 obligation to “ensure respect” for those conventions. I explore in Section III.C what the obligation to “ensure respect” for the conventions means, and elaborate on how that obligation limits the ability of states to make certain kinds of threats to use force in a manner that would violate IHL.

As we see in Section IV, understanding the status under international law of threats to use force in an illegal manner is particularly pertinent in the context of nuclear deterrence, since many historical, and some contemporary, declared policies regarding the use of nuclear weapons would violate IHL.¹⁰

Whatever *legal* conclusions we reach about the legality of threatening to use force in an unlawful manner, however, should not end our inquiry about whether states *should* threaten to use force in ways that would violate IHL. I also consider the policy implications of making threats to use force in a manner that would violate IHL. The only principled justification for threatening to use force in an illegal manner is the claim that such threats would prove more effective at deterring the harms they are intended to prevent than alternative deterrent strategies that are compatible with IHL.

⁸ Reuters, *North Korea Vows “Total Destruction” of Enemy on Korean War Anniversary*, REUTERS (July 27, 2024, 05:38 PM PT), <https://www.reuters.com/world/asia-pacific/north-korea-vows-total-destruction-enemy-korean-war-anniversary-2024-07-28/> [<https://perma.cc/UG3Z-FBA3>].

⁹ I acknowledge at the outset that this position is contrary to statements in the International Court of Justice’s (ICJ) Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) [hereinafter *Nuclear Weapons Advisory Opinion*]. I address the ICJ Advisory Opinion’s discussion of this issue *infra* Section II.C.

¹⁰ In evaluating threats to use nuclear weapons in a manner that would violate international law, I focus on United States nuclear policy because the U.S. is unique among nuclear powers in publicly announcing some aspects of its nuclear targeting policies. In addition, some historical United States nuclear targeting doctrine, although originally classified, has since been declassified. To the extent other nuclear powers have declared their nuclear use policies, these policies tend to focus on the circumstances under which states would use nuclear weapons, not the means by which they would be used, i.e., what targets nuclear weapons would be directed against. See, for example, the excerpt from Russia’s declared nuclear policy quoted *infra* note 73.

But there are a number of serious reasons to doubt that making threats to use force in a manner that would violate IHL would enhance international security. Reasons to doubt why making threats to use force illegally would bolster security include: concerns about the credibility of threats to use force in a manner that violates IHL; the danger that such threats could, if perceived to be credible, prove to be escalatory; and the danger that making such threats may enhance pressure on leaders to carry out the threatened illegal acts. In addition, such threats may well produce the collateral damage of undermining compliance with IHL during the actual conduct of hostilities, thereby generally weakening the protection of noncombatants in wartime. This means that even if there are only limited international law restrictions on threatening to use force in a manner that violates IHL, there are sound policy reasons not to do so.

II. THE PROHIBITION ON THE THREAT OF FORCE IN ARTICLE 2(4) OF THE UNITED NATIONS CHARTER

The prohibition on the threat of force shares equal status and placement in Article 2(4) of the U.N. Charter with the prohibition on the use of force. Despite this, threats of force—unlike actual uses of armed force between states, which have declined since 1945—are, in the words of one scholar, “a ubiquitous element of international relations” which the international community countenances with an “attitude of apparent tolerance.”¹¹

A. Defining “Threats of Force” under International Law

A threshold question in assessing the role of threats in international relations is determining what statements or actions constitute “threats” for purposes of international law. Ambiguity about what constitutes a “threat of force” arises in part because the U.N. Charter itself contains no definition. Ian Brownlie defines a threat of force as “an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government.”¹² Ramona Sadurska defines a threat of force as “a message, explicit or implicit, formulated by a decision maker and directed to the target audience, indicating that force will be used if a rule or demand is not complied with.”¹³ Such messages can of course be “clearly articulated—orally or in a document or communiqué—by stating the claim and indicating the potential consequences of failure to comply.”¹⁴ In the post-U.N. Charter era, however, it has been rare for a state to make explicit demands of this type; states do not ordinarily issue ultimatums—reminiscent of Hitler’s demand to Czechoslovakia—that other states cede territory or face invasion. Nor is it common for a state to declare that another state must align its position on a major foreign policy issue with that of the *demandeur* or face naval bombardment. As Nikolas Stürchler observes, in the post-Charter era, “there has been a tendency to clothe

¹¹ Romana Sadurska, *Threats of Force*, 82 AM. J. INT’L L. 239, 240 (1988).

¹² IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 364 (1963).

¹³ Sadurska, *supra* note 11, at 242.

¹⁴ *Id.*

verbal threats in a mantle of ambiguity.”¹⁵ Implicit threats are recurrent elements of international relations.

For example, during U.S. Secretary of State Antony Blinken’s 2023 remarks on U.S. policy towards Iran’s widely reported efforts to develop a nuclear weapon, he stated:

We continue to believe that diplomacy is the best way to verifiably, effectively, and sustainably prevent Iran from getting a nuclear weapon. In parallel, economic pressure and deterrence reinforce our diplomacy. If Iran rejects the path of diplomacy, then—as President Biden has repeatedly made clear—all options are on the table to ensure that Iran does not obtain a nuclear weapon.¹⁶

For his part, Russian President Putin has, following Russia’s 2022 invasion of Ukraine, made a number of statements aimed at deterring states from assisting Ukraine that were interpreted to be threats to use nuclear weapons, including a September 2022 statement that “We will certainly use all the means available to us, and I’m not bluffing.”¹⁷

Threats of force can also be made via conduct rather than verbal or written communications. A “state may threaten another state by entering into a defense treaty alliance,”¹⁸ such as the Warsaw Pact or the Treaty of Washington that established NATO, that includes a commitment to provide military assistance to a treaty party that is attacked by another state. Actions such as “moving army units into proximity with the target audience, engaging in military maneuvers, increasing a military budget, or deploying certain weapons” may also constitute threats.¹⁹ Threats can include “demonstrations of force,” i.e., situations in which “state A, in the form of non-routine military deployments, build-ups, manoeuvres, tests or other militarised acts, signals preparedness and resolve to use force on a particular issue under dispute with state B.”²⁰

Since the purpose of a threat is to induce the target to modify its behavior, a statement or other action will constitute a threat to use force only if it is communicated to the other side. Although, as noted, threats can be conveyed either explicitly or implicitly, an essential requirement for a threat is that it “must be communicated in some form.”²¹ A separate question, distinct from whether a communication or action qualifies as a threat, is whether the threat is perceived as credible. For some commentators, threats that lack credibility are ineffective, and

¹⁵ STÜRCHLER, *supra* note 2, at 128-29.

¹⁶ Antony J. Blinken, *Secretary Antony J. Blinken at the 2023 American Israel Public Affairs Committee Policy Summit* (June 5, 2023), <https://2021-2025.state.gov/secretary-antony-j-blinken-at-the-2023-american-israel-public-affairs-committee-policy-summit> [<https://perma.cc/4GD3-PDP8>].

¹⁷ President Vladimir Putin, *Address by the President of the Russian Federation* (Sept. 21, 2022), *quoted in* Olivia Yanchik, *Putin’s Russia Must Not Be Allowed to Normalize Nuclear Blackmail*, ATLANTIC COUNCIL (Aug. 31, 2023), <https://www.atlanticcouncil.org/blogs/ukrainealert/putins-russia-must-not-be-allowed-to-normalize-nuclear-blackmail/> [<https://perma.cc/7WGC-TN5A>].

¹⁸ FRANCIS GRIMAL, *THREATS OF FORCE: INTERNATIONAL LAW AND STRATEGY* 43 (2012).

¹⁹ Sadurska, *supra* note 11, at 243.

²⁰ STÜRCHLER, *supra* note 2, at 113.

²¹ *Id.* at 37.

should perhaps not be “treated as” threats of force at all.²² Others argue such communications do amount to threats, but that state practice suggests that states do not treat incredible threats as illegal, i.e., as violations of the prohibition on the threat of force under Article 2(4) of the U.N. Charter.²³

Threats are not limited to demands that another state *do* something; they may also encompass demands that another state *not do* something. Deterrence, which involves a commitment to use force to prevent another state from taking action—typically, using force in some manner—constitutes a threat. Reflecting this understanding, the U.S. Department of Defense expressly defines “deterrence” as: “The prevention of action by the existence of a credible *threat* of unacceptable counteraction and/or belief that the cost of action outweighs the perceived benefits.”²⁴

The question of what constitutes a threat is of particular relevance for the role of nuclear weapons and nuclear deterrence. The mere possession of nuclear weapons does not necessarily amount to a threat, since it might not be clear what demands the possession of nuclear weapons seeks to buttress, or to whom any such demands are directed. Beyond the mere possession of nuclear weapons, however, any nuclear deterrent doctrine or operational plan that is conveyed to potential adversaries qualifies as a threat. As such, the position articulated in the 2022 United States Nuclear Posture Review (NPR) regarding deterrence directed at Russia—that “flexible, tailored [U.S. nuclear] capabilities are key to ensuring that Russia’s leadership does not miscalculate regarding the consequences of nuclear use on any scale, thereby reducing their confidence in both initiating conventional war against NATO and considering the employment of non-strategic nuclear weapons in such a conflict”²⁵—is a threat of force. So, too, is the statement in the 2022 NPR that the United States is prepared to use nuclear weapons to deter “not only nuclear attack[s], but also a narrow range of other high consequence, strategic-level attacks.”²⁶ In other words, standing nuclear deterrent policy—and not just flamboyant statements like President Trump’s 2017 “fire and fury” threat—ordinarily constitutes a threat to use nuclear weapons.

B. The Relationship between the Legality of a Threat to Use Force and the Legality of the Use of Force

The fact that states frequently threaten to use force in international relations generally—and in their nuclear deterrence policies in particular—does not necessarily resolve the question of whether all such threats are illegal under Article 2(4). Given that the prohibition on the *use* of force is not categorical—because the U.N. Charter recognizes the legality of the use of force in certain circumstances (i.e., in self-defense in response to an armed attack, or if authorized by the Security Council acting pursuant to its Chapter VII powers)—it is implausible to suggest that the prohibition on *threats* of force is categorical. The predominant view on when a threat to use force is unlawful focuses on whether the actual use of force that is

²² GRIMAL, *supra* note 18, at 92.

²³ STÜRCHLER, *supra* note 2, at 273.

²⁴ OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 63 (2021) (emphasis added).

²⁵ U.S. DEPARTMENT OF DEFENSE, 2022 NUCLEAR POSTURE REVIEW 11 (2022).

²⁶ *Id.* at 8.

threatened would be unlawful; in other words, the assessment of the legality of the use of force must be tied to an assessment of the lawfulness of the contemplated use of force.²⁷ This is what is referred to in the literature as the “coupled” view of Article 2(4)’s prohibition on the threat of force. Under the coupled view, if a proposed use of force would be illegal if it were carried out, a threat to use force in those circumstances would be illegal.²⁸ Brownlie sets out a widely-cited formulation of the coupled view: “If the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal.”²⁹

The “coupled” view, which I endorse, is dominant among international lawyers. The converse of the Brownlie formulation is that if a contemplated use of force would be lawful if carried out, the threat to use force in those circumstances would be lawful. The clearest example is the right of self-defense. Under Article 51 of the U.N. Charter, states have an “inherent right” to exercise “individual or collective self-defence if an armed attack occurs.” Under the coupled view, if a state has the right to use force in self-defense if it is attacked, it would also have the right to threaten a would-be attacker that it will use force in self-defense if it is attacked. Similarly, a state can threaten another state that is contemplating attacking a third country that it will use force in the exercise of collective self-defense of the victim state if such an attack takes place and the victim state requests assistance. Additionally, a state can declare that it will engage in the use of force against another state pursuant to a future authorization by the Security Council under Chapter VII of the U.N. Charter. Under the coupled view, such threats of force would all be permissible.³⁰

The International Court of Justice (ICJ) most recently considered the legality of threats to use force in its Nuclear Weapons Advisory Opinion.³¹ It is worth, as a preliminary matter, saying something about the legal status of an ICJ advisory opinion.³² Advisory opinions are just that—advisory—and are meant to provide guidance on legal questions to the United Nations body that has requested them. The

²⁷ STÜRCHLER, *supra* note 2, at 38-43.

²⁸ See Crawford, *supra* note 2, at xi (“international lawyers have tended to rest on the linkage between” the legality of a use of force and the legality of the threat of force).

²⁹ BROWNLIE, *supra* note 12, at 364.

³⁰ Some international lawyers embrace the alternative to the coupled view, i.e., the “uncoupled view.” Most prominent among these is Ramona Sadurska. She argues that although the text of the U.N. Charter equates the threat of force and the use of force, in practice states recognize “a separate [and less stringent] set of criteria of lawfulness for the threat of force.” Sadurska, *supra* note 11, at 240. Sadurska argues that threats to use force may in some cases serve to de-escalate conflicts, or may induce the threatened state to comply with its international law obligations. Threats, according to this view, should be judged by their net effects—their “benefits for the overall security and welfare”—on the international system. *Id.* at 266. For Sadurska, accordingly, there are cases in which it would be lawful for states to threaten to use force even in circumstances where the actual use of force would be illegal.

³¹ Nuclear Weapons Advisory Opinion, *supra* note 9, at 226. The International Court of Justice has addressed the threat of force in only two other cases, Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4 (Apr. 9), and Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27), but the question of the legality of the threat of force was not a significant issue in either case. In any event, neither case addressed the question of threats to use force in an illegal manner, i.e., in violation of IHL.

³² I offer these preliminary views about the legal effect of ICJ advisory opinions because—although I find some aspects of the ICJ’s Nuclear Weapons Advisory Opinion to be highly persuasive—I find other conclusions in the Opinion not to be especially well-reasoned or supported, and thus do not see those conclusions as sound authority for the interpretation of the international law rules in question.

Court itself acknowledges that its advisory opinions have “no binding force,” although it adds that such opinions “nevertheless carry great legal weight and moral authority.”³³ Such opinions, in the parlance of a U.S.-trained lawyer, have persuasive authority. However, the persuasiveness of an advisory opinion—or any particular element of such an opinion—depends on how well-reasoned and well-supported its conclusions are, not on the mere fact the opinion was issued by the Court.

Throughout its lengthy Nuclear Weapons Advisory Opinion, the ICJ generally referred to the “threat or use” of force together, and offered only limited interpretive guidance on the question of when a threat of force itself would be unlawful. To the extent the Court did focus on threats, it endorsed the “coupled” view: “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.”³⁴ The Court similarly viewed the threat and use of force as coupled for ascertaining when a threat of force would be lawful: “[I]f [a threat of force] 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.”³⁵

Central to this understanding of the legality of threats to use force is that it focuses on a state’s threat to have *recourse* to force. The key determinant is the legality of the threatened use of force under the law governing resort to force, i.e., the *jus ad bellum*. As noted at the outset, almost no rigorous analysis has been devoted to the question of whether a threat to engage in conduct that violates the law governing the means and methods of conducting war, i.e., IHL, or *jus in bello*, would amount to a violation of the prohibition on the threat of force in Article 2(4).

C. The Relationship between the Legality of a Threat and the Legality of the Means and Methods of Using Force

To the extent international courts or international law scholars have addressed the relationship between the legality of threats of force and the threatened means and methods of using force, they have done so in an almost off-hand manner. For example, in the passage in the *Nuclear Weapons Advisory Opinion* in which the ICJ “coupled” the legality of threats and uses of force, the Court stated: “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.”³⁶ The highlighted passage (the added emphasis is mine) suggests the Court considers that a threat of force would be illegal not only if the threatened use of force would violate the law governing recourse to force, but also if it violated other legal constraints related to the use of force, including rules of IHL. But the Court did not elaborate at all on its reasoning for this conclusion, which does not seem to follow from—and seems to go beyond the reasoning underlying—the conclusion the Court reaches about the legality of threats in the sentence that follows in the Opinion: “In short, if

³³ *Advisory Jurisdiction*, I.C.J., <https://www.icj-cij.org/advisory-jurisdiction> (last visited Mar. 21, 2026) [<https://perma.cc/V4FL-9HUA>].

³⁴ Nuclear Weapons Advisory Opinion, *supra* note 9, ¶ 47.

³⁵ *Id.*

³⁶ *Id.* ¶ 47 (emphasis added).

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*.³⁷ The reference to a use of force “in conformity with the Charter” seems to limit judgments about the legality of a threat to its connection to the rules governing recourse to force—the *jus ad bellum*—since the U.N. Charter is the source of those rules. The rules of IHL, in contrast, do not derive from the Charter.

The Court’s Opinion offers no further analysis of the relationship between the prohibition on threats of force in Article 2(4) of the Charter and the threatened means of using force. As Gro Nystuen observes “[t]he Court did not . . . explain why it would reach such a conclusion.”³⁸ Nevertheless, when the Court later turned to an examination of the legality of the *use* of nuclear weapons under IHL, it explicitly affirmed—albeit in a one-sentence conclusion—that a threat to violate IHL constitutes an illegal threat of force: “If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.”³⁹

Despite the Court’s failure to engage in depth with the question of the legality of a threat to use of force in a manner that violates IHL, “in the three decades since the ICJ’s Advisory Opinion was issued, many commentators have uncritically accepted the ICJ’s view as the correct articulation of the law.”⁴⁰ John Burroughs, for instance, highlights the Court’s “important holding” that a threat of the use of force that would violate IHL is prohibited.⁴¹ This, in his view, “fatally undermines the doctrine of deterrence with respect to such central and openly declared elements as threatened first use against conventional aggression by a nuclear weapon state, threatened first use in defence of ‘vital interests’ in confrontations with non-nuclear weapon states, and threatened massive retaliation against a nuclear attack.”⁴² However, if I am right that the Court’s statement on the legality of threats to use force in an illegal manner is not legally correct, a claim I advance in the next subsection, the legal prohibition on the threat of force in Article 2(4) of the Charter does not necessarily generate such sweeping legal implications for nuclear deterrence.

D. The Better Interpretation: Article 2(4) Does Not Prohibit Threats to Use Force in Violation of International Humanitarian Law

Despite the glancing suggestion in the ICJ’s Nuclear Weapons Advisory Opinion, with due respect to the Court, the better view is that the prohibition on threats in Article 2(4) of the Charter does *not* itself make it unlawful to threaten to use force in violation of IHL. For purposes of Article 2(4), the legality of a threat to use force is determined by whether it would be lawful for a state to have recourse to

³⁷ *Id.* (emphasis added).

³⁸ Gro Nystuen, *Threats of Use of Nuclear Weapons and International Humanitarian Law*, in *NUCLEAR WEAPONS UNDER INTERNATIONAL LAW* 157 (Gro Nystuen, Stuart Casey-Maslen & Annie Golden Bersagel eds. 2014).

³⁹ Nuclear Weapons Advisory Opinion, *supra* note 9, ¶ 78.

⁴⁰ Anna Hood & Monique Cormier, *Nuclear Threats Under International Law, Part I: The Legal Framework*, 7 J. PEACE & NUCLEAR DISARMAMENT 157, 173 (2024).

⁴¹ JOHN BURROUGHS, *THE LEGALITY OF THREAT OR USE OF NUCLEAR WEAPONS: A GUIDE TO THE HISTORIC OPINION OF THE INTERNATIONAL COURT OF JUSTICE* 41 (1998).

⁴² *Id.* at 43.

force under the circumstances threatened, under the *jus ad bellum* rules. The starting point for this position is the text of the Charter itself. Article 2(4) prohibits “the threat or use of force.” The prohibition relates to the use “of force,” which naturally suggests a concern with the initiation of force. Had the Charter been focused in Article 2(4) on the various issues that might arise regarding the manner in which force is used, it would presumably have used broader language, and might have referred instead to “actions *related to* the threat or use of force.” Or it might have prohibited “the use of force or threats arising in connection with the use of force.”

The subject matter of the prohibition on the *threat* of force in Article 2(4) should be interpreted in conformity with the scope of the subject matter of the Article’s prohibition on the *use* of force. As we have seen, the law governing recourse to force is independent from the law governing the conduct of force (*jus in bello*), and the rules governing the conduct of war derive from sources other than the U.N. Charter, namely, customary international and an extensive array of IHL treaties.⁴³ When states engage in armed conflict using means and methods that violate international law, i.e., when they violate IHL, other states and commentators may accuse them of violating provisions of customary law, or treaties like the 1949 Geneva Conventions or their 1977 Protocols. But they do not charge them with violating Article 2(4) of the U.N. Charter. If an actual violation of IHL does not fall within the scope of the Charter’s prohibition on the use of force, it is untenable to contend that a threatened violation of IHL would fall within the scope of the Charter’s prohibition on the threat of force.⁴⁴

Accordingly, the statement by the ICJ in the Nuclear Weapons Advisory Opinion that “[i]f an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law”⁴⁵ does not, in my view, accurately reflect international law.⁴⁶ Perhaps more precisely, that statement is not sustainable if, as the Court suggested, the prohibition on such threats is rooted in the prohibition on the threat of force under the U.N. Charter. As such, we would be able to conclude that a threat to use force in a manner that violates

⁴³ The International Committee of the Red Cross affirms that international humanitarian law derives from sources other than the U.N. Charter:

International humanitarian law is part of international law, which is the body of rules governing relations between States. International law is contained in agreements between States—treaties or conventions—, in customary rules, which consist of State practise considered by them as legally binding, and in general principles.

International humanitarian law applies to armed conflicts. It does not regulate whether a State may actually use force; this is governed by an important, but distinct, part of international law set out in the United Nations Charter.

INT’L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004), https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/what_is_ihl.pdf [<https://perma.cc/H9TG-FN6R>].

⁴⁴ Nor does the uncoupled view described in note 30 *supra* link the legality of a threat to its conformity or nonconformity with IHL. That view permits states to use threats more expansively than does the coupled view by focusing on the potential contribution of a threat to security. The uncoupled view does not assess the legality of threats by considering the connection of the threat to the means and methods of war that a state threatens to use.

⁴⁵ Nuclear Weapons Advisory Opinion, *supra* note 9, ¶ 78.

⁴⁶ Nystuen similarly concludes that “the statement in the ICJ Advisory Opinion . . . that ‘If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law,’ seems to be largely without legal support . . .” Nystuen, *supra* note 38, at 170; *see also* Hood & Cormier, *supra* note 40, at 173.

IHL would be unlawful only if we can locate a separate basis in international law that would prohibit such a threat. I consider some possible alternative sources in the following section, and argue that while most of them would not prohibit threats to use force in an illegal manner, there is one international law rule—the obligation to “ensure respect” for the 1949 Geneva Conventions and their 1977 Additional Protocols—that does impose important limits on threats to use force in violation of IHL.

III. OTHER POSSIBLE SOURCES OF A PROHIBITION ON THREATS TO VIOLATE IHL RULES

If a threat to use force in violation of IHL is not prohibited by Article 2(4) of the Charter, one might ask whether there are other legal grounds for concluding that a threat to use force in an illegal manner is unlawful. In Subsection A, I demonstrate that there is no general prohibition on threatening to violate international law. Rather, we would need to identify specific prohibitions on threatening to violate particular rules of international law in order to judge such threats to be prohibited. In Subsection B, I show that there are a number of important rules of IHL which the law explicitly prohibits states from threatening to breach. However, these rules do not amount to a general prohibition on threats to engage in illegal activity that would preclude states from threatening *any* violation of IHL. There is, however, at least one source of international law that does impose important limits on the ability of states to make certain threats to use force in a manner that violates IHL. As I show in Subsection C, the obligation in Common Article 1 to “ensure respect” for the 1949 Geneva Conventions and Additional Protocol I prohibits states parties from making threats to use force in a manner that would amount to a blatant or manifest violation of those conventions.

A. *International Law Contains No General Prohibition on Threatening to Violate Rules of International Law*

As a general matter, international law does not include a categorical prohibition on making a threat to engage in action that is unlawful.⁴⁷ The International Law Commission (ILC) addressed the question of whether threats (along with incitement or attempts) to violate international law were *per se* illegal in its

⁴⁷ Nystuen concurs that “[n]ormally, threatening non-compliance with international law obligations would not constitute a violation in itself.” Nystuen, *supra* note 38, at 160.

Nor does domestic law contain a categorical prohibition on threatening to violate the law, at least in the United States. Rather, there are statutes that explicitly prohibit making specified kinds of threats. U.S. federal law, for example, prohibits such acts as threatening to assault, kidnap, or murder federal officials, 18 U.S.C. § 115, threatening by force to impede the administration of justice, 18 U.S.C. § 1503, or threatening a witness in an official proceeding to withhold testimony or tamper with evidence, 18 U.S.C. § 1512. Many states have laws that criminalize threats to injure or kill another person, *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-1202 (2026); CAL. PENAL CODE § 422 (West 2026); MICH. COMP. LAWS § 750.483a(2)(b) (West 2026), or threats to engage in terrorist acts, *see, e.g.*, GA. CODE ANN. § 16-11-37 (West 2026); 18 PA. CONS. STAT. ANN. § 2706 (West 2026), WIS. STAT. ANN. §§ 947.019 (West 2026). Nevertheless, there is no general crime of “threatening to violate the law” (except, perhaps, in Massachusetts, where it is a criminal offense to “threaten[] to commit a crime against the person or property of another,” MASS. GEN. LAWS ANN. ch. 275 § 2 (West 2026)).

commentaries to the Draft Articles on Responsibility of States for International Wrongful Acts. That question, the ILC explained,

can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct, incitement or attempt, in which case the threat, incitement or attempt is itself a wrongful act. On the other hand, where the internationally wrongful act is the occurrence of some event . . . mere preparatory conduct is not necessarily wrongful.⁴⁸

The ILC relied in this regard on the ICJ's decision in the *Gabčíkovo-Nagymaros* case, where the Court observed:

A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act . . . and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act."⁴⁹

According to the ILC, "[p]reparatory conduct does not itself amount to a breach if it does not 'predetermine the final decision to be taken.'"⁵⁰

B. International Humanitarian Law: Some Specific, But No General, Prohibition on Threats

Nor does the body of IHL, as a categorical matter, prohibit threats to violate IHL. That said, there are a number of particular IHL rules—"primary rules," in the parlance of the ILC—that do specifically prohibit threats. The 1949 Geneva Convention on Prisoners of War, for instance, stipulates that prisoners "who refuse to answer [questions] *may not be threatened*, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."⁵¹ Article 51(2) of Additional Protocol I to the 1949 Geneva Conventions, in a rule that has acquired customary international law status, provides that "[a]cts or *threats* of violence the primary purpose of which is to spread terror among the civilian population are prohibited."⁵² Article 40 of Additional Protocol I also makes it unlawful to threaten that no quarter will be given to enemy soldiers.⁵³ Finally, Article 75 of Additional Protocol I, which establishes certain

⁴⁸ *Report of the International Law Commission to the General Assembly on the Work of Its Fifty-Third Session*, U.N. GAOR Supp. No. 10, at 61, U.N. Doc. A/56/10 (2001), reprinted in [2007] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

⁴⁹ *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, ¶ 79 (Sept. 25).

⁵⁰ *Report of the International Law Commission to the General Assembly on the Work of Its Fifty-Third Session*, *supra* note 48, at 61-62.

⁵¹ Geneva Convention Relative to the Treatment of Prisoners of War art. 17, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (emphasis added).

⁵² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 51(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (emphasis added).

⁵³ "It is prohibited to order that there shall be no survivors, [or] to *threaten* an adversary therewith" *Id.* art. 40 (emphasis added).

minimum protections against acts like murder, torture, and outrages upon personal dignity, also prohibits “threats to commit” any of the prohibited acts. Key for our purposes is that Article 75 applies only to “persons who are in the power of a Party” to an international armed conflict,⁵⁴ i.e., persons in a state’s own territory or in occupied territory. Article 75’s prohibition on threats thus would not cover a state’s threats to use force against targets that are not in that state’s control. This means that IHL does not prohibit threats to carry out attacks in violation of such key IHL rules as the principles of distinction, proportionality, and precaution.

C. The Duty to Ensure Respect for the Geneva Conventions and Additional Protocols

There is, however, one important international law rule that would, in at least some circumstances, make it unlawful to threaten to use force in violation of IHL. The 1949 Geneva Conventions and the 1977 Additional Protocols each contain an identical first article (“Common Article 1”) which includes a requirement that “[t]he High Contracting Parties undertake to respect and to ensure respect for this [agreement] in all circumstances.” The notion of “respecting” the relevant treaty reflects the general international law obligation for states “to apply [the convention] in good faith from the moment it enters into force.”⁵⁵ Michael N. Schmitt and Sean Watts observe that the language in Common Article 1 obligating states to respect the conventions “in all circumstances” also requires that states comply with the applicable treaty “even in situations in which the enemy does not do so.”⁵⁶

The distinct obligation to “ensure respect” for the 1949 Conventions and Additional Protocol I has generally been understood to require states to adopt internal implementing mechanisms to ensure compliance with their IHL obligations. The official ICRC commentary to 1977 Additional Protocol I, which codifies the core IHL principles of distinction, proportionality, and precaution, captures this understanding of the parties at the time of the Protocol’s adoption: “The obligation means not only that preparatory measures must be taken to permit the implementation of the Protocol, but also that such implementation should be supervised. In this respect, the phrase ‘to ensure respect’ essentially anticipates the measures for execution and supervision laid down in Article 80 [of the Protocol].”⁵⁷ (Article 80 of Additional Protocol I obligates states to “take all necessary measures for the execution of their obligations under the [1949 Geneva] Conventions and this Protocol,” to “give orders and instructions to ensure observance of the Conventions and this Protocol,” and to “supervise their execution.”⁵⁸) The original 1952 commentary to the 1949 Geneva Conventions similarly captures the notion that the obligation to “ensure respect” was directed at domestic implementation and execution of the treaties:

⁵⁴ *Id.* art. 75.

⁵⁵ CLAUDE PILLOUD, ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 35 (1987).

⁵⁶ Michael N. Schmitt & Sean Watts, *Common Article 1 and the Duty to “Ensure Respect,”* 96 INT’L L. STUD. 674, 681 (2020).

⁵⁷ PILLOUD ET AL., *supra* note 55, at 35.

⁵⁸ Additional Protocol I, *supra* note 52, art. 80.

The use of the words “and to ensure respect” was . . . intended to emphasize and strengthen the responsibility of the Contracting Parties. It would not, for example, be enough for a State to give orders or directives to a few civilian or military authorities, leaving it to them to arrange as they pleased for the details of their execution. It is for the State to supervise their execution.⁵⁹

Yet the obligation to “ensure respect” for the obligations in the 1949 Geneva Convention and 1977 Additional Protocol I plausibly can, and should, be read more broadly. The duty to “ensure respect for” the conventions can reasonably be interpreted as obligating states to take actions not specifically mandated by the relevant treaty that are nevertheless essential for realizing their goals. Similarly, the obligation to ensure respect can also plausibly be read to obligate states to avoid taking action that undermines the goals of the treaties.

Similar language in other treaties, such as the International Covenant on Civil and Political Rights, providing that each party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,”⁶⁰ has been interpreted to support broad interpretations of the terms of the Covenant in order to advance its underlying purposes.⁶¹ For instance, the Human Rights Committee has interpreted Article 2 of the ICCPR as imposing an obligation on states not to extradite, deport, expel, or otherwise remove a person from their territory when there are substantial grounds to believe that doing so would expose them to a real risk of irreparable harm—such as violations of the rights protected under Articles 6 and 7 of the Covenant—either in the country of destination or any subsequent country of removal.⁶² In another context, the duty to “respect” and “ensure” the right to life under Article 6 has also been invoked to support the view that states have an obligation to take measures to protect the environment. This includes safeguarding against harm, pollution, and climate change caused by both public and private actors, reinforcing the broader interpretation of state responsibilities under the Covenant.⁶³

⁵⁹ JEAN S. PICTET, COMMENTARY ON (I) GENEVA CONVENTION 26 (1952).

⁶⁰ International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171.

⁶¹ PAUL M. TAYLOR, A COMMENTARY ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: THE UN HUMAN RIGHTS COMMITTEE’S MONITORING OF ICCPR RIGHTS 59 (2020) (arguing that Article 2 extends the rights guaranteed substantively in the Covenant by establishing certain obligations of general application).

⁶² The Committee stated:

[T]he article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed

Human Rights Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 12, U.N. Doc. CCPR/C/GC/31 (May 26, 2004). Note, however, that the United States has opposed this specific interpretation. See U.S. Dep’t of State, *U.S. Observations on Human Rights Committee General Comment 31* (Dec. 27, 2007), <https://2001-2009.state.gov/s/l/2007/112674.htm> [<https://perma.cc/5DEY-83TT>].

⁶³ According to the Human Rights Committee:

The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.

An interpretation of the duty to “ensure respect” that obligates states to avoid taking action that undermines the goals of the Geneva Conventions and Additional Protocol I is most consistent with the humanitarian object and purpose of those conventions, and thus conforms with international law principles of treaty interpretation.⁶⁴ Under such an interpretation, making threats to use force in a manner that would violate IHL, such as threats to blatantly violate the principles of distinction, proportionality, or precaution in Additional Protocol I, would not be compatible with the duty to ensure respect for that Protocol.

This view reflects the soundest interpretation of Common Article 1. It is difficult to see how a state that makes threats to use force in a manner that would blatantly or manifestly violate its IHL treaty obligations is ensuring respect for the treaty that sets out those obligations. For example, were a state party to Additional Protocol I to adopt the targeting policy that has been advanced by Charles Glaser, James Acton, and Steve Fetter, under which it would “threaten . . . to damage or totally destroy an adversary’s society and infrastructure . . . [by] target[ing] its adversary’s economic and industrial infrastructure, including energy and communication systems, ports, and transportation nodes,”⁶⁵ that policy would manifest clear disregard for that state’s IHL obligations. Declaring nuclear policy that threatens such targeting practices cannot be reconciled with the obligation to ensure respect for the basic principles of distinction, proportionality, and precaution set out in Additional Protocol I. This is so even if the state adopting such a policy argues that it is not “encouraging” violations of IHL, which the International Court of Justice has indicated would itself constitute a violation of IHL,⁶⁶ because the threatening state hopes that its deterrent posture will be sufficiently effective that it will not have to use force at all. Officially declaring an intention to violate core IHL principles in Additional Protocol I manifests the state’s disregard for those principles, which for state parties to Additional Protocol I amounts to a breach of the obligation to ensure respect for that convention.

Apart from the facial disregard for IHL rules embodied in Additional Protocol I that a policy threatening to damage or totally destroy an adversary’s society and infrastructure represents, if that threat is credible, it may increase the risk that the threat will be carried out if the predicate conditions occur, for the reasons set out in Section V.A. Even if that is not the desired outcome of the state making the threat, the possibility that threatening to use force in blatant violation of IHL will increase the risk that those IHL violations will occur is the antithesis of the obligation to “ensure respect” that the Geneva Conventions and Additional Protocol I require.

Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors.

Human Rights Comm., *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, ¶ 62, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018). See also Ginevra Le Moli, *The Human Rights Committee, Environmental Protection and the Right to Life*, 69 INT’L & COMP. L.Q. 735, 740-41, 745-47 (2020).

⁶⁴ Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

⁶⁵ Charles L. Glaser, James M. Acton & Steve Fetter, *The U.S. Nuclear Arsenal Can Deter Both China and Russia: Why America Doesn’t Need More Missiles*, FOREIGN AFFS. (Oct. 5, 2023), <https://www.foreignaffairs.com/united-states/us-nuclear-arsenal-can-deter-both-china-and-russia> [https://perma.cc/JJ36-XTLQ] (last visited Feb. 19, 2026).

⁶⁶ Military and Paramilitary Activities in and against Nicaragua, *supra* note 31, ¶ 220.

The updated 2016 version of the ICRC's commentary to 1949 Geneva Convention I captures the notion that the obligation to "ensure respect" requires states to take measures to *prevent* violations from occurring, rather than making them more likely:

This sets a clear standard, as "ensuring" means "to make certain that something will occur or be so" or inversely "make sure that (a problem) does not occur." States are thus required to take appropriate measures to prevent violations from happening in the first place. Accordingly, the High Contracting Parties must—starting in peacetime—take all measures necessary to ensure respect for the Conventions.⁶⁷

This is not an absolute obligation. A state would violate its Common Article 1 obligation to ensure respect for the 1949 Geneva Conventions or Additional Protocol I only if it threatens acts which it knows or reasonably believes it would violate its IHL obligations under the treaty for which it is obligated to ensure respect. The threshold of failing to ensure respect for the conventions would not be crossed, in contrast, where a state adopts a targeting policy which can be defended as being compatible with IHL obligations by good faith arguments, provided they are at least plausible. Where a state makes good faith and plausible efforts to align its targeting policy with IHL—even though others might disagree with the legal judgments it has made—the state cannot be fairly said to be disregarding its obligation to ensure respect for the relevant convention.

Accordingly, although the ICJ's conclusion in the Nuclear Weapons Advisory Opinion that threats to use force in a manner that violates IHL are unlawful is not, in my view, a correct interpretation of Article 2(4) of the Charter or of international law generally, threats to use force in a manner that would amount to blatant or manifest violations of IHL would constitute violations of the obligation under Common Article 1 of the 1949 Geneva Conventions and 1977 Additional Protocol I to ensure respect for those treaties. This is admittedly an interpretation of these treaties which has not yet been widely endorsed by the practice or statements of states, which means the obligation not to make threats to commit blatant or manifest violations of international law cannot be said to have acquired customary international law status. As such, the obligation applies only to states parties to the conventions that contain the relevant rules that a state threatens to violate.

IV. LEGAL IMPLICATIONS FOR NUCLEAR DETERRENCE

As I suggested in the Introduction, the legality of threatening to use force in an illegal manner is a particularly pertinent issue in the context of nuclear weapons. First, in contemporary international relations, threats to use force are the primary means by which nuclear weapons are employed. Apart from the atomic bombing of Hiroshima and Nagasaki, states have employed nuclear weapons not by using them, but by threatening to use them. To the extent that states' nuclear deterrent policies, declared doctrines, or operational nuclear plans constitute threats to use force, the

⁶⁷ KNUT DÖRMANN ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION 44 (2016).

permissibility of such threats is a legal question that arises every day. Second, nuclear deterrence is particularly likely to be grounded on planned uses of force that would violate IHL. Indeed, some international law experts—such as the Council of Delegates of the International Committee of the Red Cross—take the position that it is “difficult to envisage how *any* use of nuclear weapons could be compatible with the rules of IHL, in particular the rules of distinction, precaution and proportionality.”⁶⁸ But even for those who do not embrace so categorical a view, and who believe that there are scenarios under which nuclear weapons could be used in accordance with IHL, there is no shortage of examples of threatened uses of nuclear weapons that cannot be reconciled with IHL. During the 1962 Cuban Missile Crisis, for example, President Kennedy declared that the United States would regard “any nuclear missile launched from Cuba against any nation in the Western Hemisphere as an attack by the Soviet Union on the United States, requiring a *full retaliatory response* upon the Soviet Union.”⁶⁹ A full retaliatory response, under the nuclear war plans in effect at the time, would have included attack options “capable of destroying the Soviet urban society”⁷⁰ in violation of the prohibition on targeting civilian objects. President Trump’s more recent 2017 declaration that North Korean threats against the United States “will be met with fire and fury like the world has never seen”⁷¹ and the 2024 statement by North Korean officials that the DPRK would launch an “overwhelming attack on the enemy anytime and without delay and totally destroy”⁷² are both widely viewed as threatening the indiscriminate use of nuclear weapons, in contravention of IHL principles of distinction and proportionality. Apart from these lurid threats, both past and contemporary U.S. nuclear deployment policies or nuclear plans have more generally contemplated using nuclear weapons in ways that would violate IHL.

What are the implications of the analysis set forth above of the legality of threatening to use force in a manner that violates IHL for nuclear plans and postures meant to deter action by adversary states? My focus in this section will be on United States nuclear deterrence policies, since less information is publicly available about the nuclear use postures and targeting practices of other nuclear-weapon states. Those states that have published nuclear use policies focus primarily on the circumstances under which they would have recourse to nuclear weapons, not the *means* by which they would use them.⁷³ And at least in China’s case, it appears, according to “dated

⁶⁸ Int’l Comm. of the Red Cross, *Council of Delegates 2011: Resolution 1 - ICRC*, ¶ 2 (Nov. 11, 2011) (emphasis added), <https://www.icrc.org/en/doc/resources/documents/resolution/council-delegates-resolution-1-2011.htm> [<https://perma.cc/PK2K-F3XC>].

⁶⁹ John F. Kennedy, U.S. President, *The Soviet Threat to the Americas* (Oct. 22, 1962), in 47 DEP’T ST. BULL. 715, 718 (1962) (emphasis added).

⁷⁰ Memorandum to President John F. Kennedy from Secretary of Defense Robert S. McNamara, *Recommended Long Range Nuclear Delivery Forces, 1963-67* (Sept. 23, 1961), quoted in Scott D. Sagan, *SIOP-62: The Nuclear War Plan Briefing to President Kennedy*, 12 INT’L SEC. 22, 38 (1987).

⁷¹ See *supra* note 5 and accompanying text.

⁷² See *supra* note 8 and accompanying text.

⁷³ For example, Russia’s declared nuclear policy, most recently updated in November 2024, states: The Russian Federation reserves the right to employ nuclear weapons in response to the employment of nuclear and (or) other types of weapons of mass destruction against itself and (or) its allies, as well as in the event of aggression against the Russian Federation and (or) the Republic of Belarus as participants in the Union State with the employment of conventional weapons, which creates a critical threat to their sovereignty and (or) territorial integrity.

but authoritative descriptions,” that “China’s nuclear operations do not consider law as a factor in target selection.”⁷⁴ This makes it much more difficult to assess the precise manner in which other nuclear powers are threatening to use nuclear weapons.⁷⁵

In the case of the United States, for which more information is publicly available, it is clear that through much of the nuclear era, U.S. nuclear war plans have contemplated uses of force that would have violated international law, at least as it stands today. Judging whether past U.S. nuclear doctrine was compliant with IHL turns on when the fundamental principles of distinction, proportionality, and precaution had acquired status as customary international law; although this is not entirely clear, it certainly seems plausible to argue those principles had acquired customary status by the 1970s. As early as 1968, a U.S. official characterized General Assembly Resolution 2444 (XXIII)—which affirmed early expressions of the principles of distinction and precaution—as “a reaffirmation of existing international law.”⁷⁶ Yet, even during the 1970s, long after U.S. nuclear weapons doctrine no longer called for direct attacks on the Soviet population, nuclear targeting plans sought to destroy the USSR’s ability to produce food and its industries that would be necessary for the Soviet Union’s long-term recovery in the event of a nuclear war.⁷⁷ As Theodore Richard recounts, Walter Slocombe, a senior Carter Administration official, confirmed that the “[m]assive attacks on industrial production, transportation, and material resource targets” contemplated by U.S. nuclear doctrine “were needed to destroy the Soviet economy; these ‘would not be distinguishable from attacks on the population as such.’”⁷⁸

By 1995, the United States began to advert specifically to the requirement that U.S. nuclear targeting policy would have to comport with international humanitarian law rules. The Clinton Administration’s “Doctrine for Joint Theater Nuclear Operations” stipulated: “[T]o comply with the law, a particular use of any weapon must satisfy the long-standing targeting rules of military necessity, proportionality, and avoidance of collateral damage and unnecessary suffering.”⁷⁹ By the time of the Obama Administration, U.S. nuclear posture stated explicitly that:

MINISTRY OF FOREIGN AFFS. OF THE RUSSIAN FEDERATION, FUNDAMENTALS OF STATE POLICY OF THE RUSSIAN FEDERATION ON NUCLEAR DETERRENCE, ¶ 18 (2024).

⁷⁴ Fiona S. Cunningham, *Other than Law: Legitimizing China’s Nuclear Strategy*, 34 SEC. STUD. 899, 902 (2025).

⁷⁵ Deepening our understanding of the nuclear targeting policies of other nuclear weapons states would be very instructive, but because there is little publicly available information about whether and how other nuclear weapons seek to apply IHL in the nuclear domain, this is an extremely challenging area for additional research.

⁷⁶ The U.S. official is quoted in Theodore T. Richard, *Nuclear Weapons Targeting: Evolution of Law and U.S. Policy*, 224 MIL. L. REV. 862, 923 (2016). Resolution 2444, on “Respect for Human Rights in Armed Conflicts,” affirmed, among other things, the principle that “distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.” G.A. Res. 2444 (XXIII), (Dec. 19, 1968). Although a General Assembly resolution such as this has no binding legal force as a source of international law, such resolutions can serve as evidence of customary international law.

⁷⁷ Richard, *supra* note 76, at 927.

⁷⁸ *Id.* at 932.

⁷⁹ JOINT CHIEFS OF STAFF, DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS I-1 (1996).

“[A]ll [nuclear war] plans must also be consistent with the fundamental principles of the Law of Armed Conflict. Accordingly, plans will, for example, apply the principles of distinction and proportionality and seek to minimize collateral damage to civilian populations and civilian objects. The United States will not intentionally target civilian populations or civilian objects.”⁸⁰

The Trump Administration’s 2018 Nuclear Posture Review reaffirmed the U.S. commitment to “adhere to the law of armed conflict” in any “initiation and conduct of nuclear operations.”⁸¹ Similarly, the 2022 Biden Administration Nuclear Posture Review stated that “[l]ongstanding DoD policy is to comply with LOAC in all armed conflicts . . . , and the DoD Law of War Manual recognizes that ‘[t]he law of war governs the use of nuclear weapons, just as it governs the use of conventional weapons.’”⁸²

Despite the stated willingness of the United States to abide by international humanitarian law rules in its nuclear targeting policies, Scott Sagan and I have argued that aspects of the 2018 U.S. Nuclear Posture Review included potential uses of nuclear weapons that were inconsistent with IHL, including the threat to bring about “the end of the [Kim] regime” if the Democratic People’s Republic of Korea used nuclear weapons against the United States or South Korea. The destruction of the governing “regime” in North Korea, as opposed to just its military forces, appears to contemplate impermissible attacks on civilian political targets. Also problematic is the reservation of the option to use nuclear weapons in response to “significant non-nuclear strategic attacks.”⁸³ It seems implausible that nuclear weapons would be required to halt or prevent such non-nuclear attacks—presumably involving chemical, biological, or cyber weapons—meaning that a nuclear response in such circumstances would not comport with the requirements of proportionality. Both of these legally problematic features of the 2018 Nuclear Posture Review were retained in the Biden Administration’s 2022 Nuclear Posture Review.⁸⁴ With respect to other aspects of IHL, as Janina Dill and Scott Sagan argue, “leading US government officials have interpreted LOAC in highly unusual ways (by international standards) that enable them to say and believe that US nuclear targeting plans comply with LOAC.”⁸⁵ In short, U.S. nuclear doctrine has, throughout the nuclear era, included threats to use force in ways that would be incompatible with international humanitarian law—even where there would be a lawful *jus ad bellum* basis, such as individual or collective self-defense, for the threatened recourse to force.

⁸⁰ U.S. DEP’T OF DEF., REPORT ON NUCLEAR EMPLOYMENT STRATEGY OF THE UNITED STATES SPECIFIED IN SECTION 491 OF 10 U.S.C. 4-5 (2013).

⁸¹ U.S. DEP’T OF DEF., NUCLEAR POSTURE REVIEW 23 (2018).

⁸² U.S. DEP’T OF DEF., NUCLEAR POSTURE REVIEW 8 (2022).

⁸³ Scott D. Sagan & Allen S. Weiner, *The Rule of Law and the Role of Strategy in U.S. Nuclear Doctrine*, 45 INT’L SEC. 126, 161-63 (2021).

⁸⁴ U.S. DEP’T OF DEF., NUCLEAR POSTURE REVIEW 12 (2022) (“Any nuclear attack by North Korea against the United States or its Allies and partners is unacceptable and will result in the end of that regime.”); *id.* at 9 (referring to the potential use of nuclear weapons in the context of “strategic attacks using non-nuclear capabilities”).

⁸⁵ Janina Dill & Scott D. Sagan, *Credos and Contestation: How US Nuclear and Legal Doctrine Influence Each Other*, 34 SEC. STUD. 833, 835 (2025).

Even if aspects of United States nuclear targeting policies entail threats to use force that would in the past have violated—or that today would violate—applicable international humanitarian law rules, those threats would not, for the reasons set out in Section II.D, violate Article 2(4) of the Charter. Nor does U.S. nuclear doctrine appear to involve a threatened use of force that contravenes one of the IHL rules that specifically preclude making such threats. Some aspects of U.S. nuclear targeting policies, especially during the “assured destruction” days of the early Cold War, arguably amounted to “threats of violence the primary purpose of which is to spread terror among the civilian population,” which as noted above are today prohibited under customary international law, a prohibition that has been codified in Article 51(2) of Additional Protocol I. But it is not clear that this prohibition had acquired customary international law status when U.S. targeting policy embraced “assured destruction.” With respect to U.S. nuclear targeting strategies since at least the 1990s, it seems implausible to argue that the “primary purpose” of those strategies has been to spread terror among the civilian population. Rather, the purpose of U.S. threats to use nuclear weapons—even if elements of those threats still entail possible uses of nuclear weapons that are incompatible with IHL—has been to deter the initiation of war by the Soviet Union/Russia and other nuclear-armed adversaries. As such, contemporary U.S. nuclear targeting policy does not appear to make threats to use force in a manner which IHL specifically prohibits states from making.

With respect to the obligation to “ensure respect” for Additional Protocol I, because the United States is not a party to that convention, it is not bound as a matter of treaty law by prohibitions on threats to use force in violation of IHL that are grounded in Article 1 of the Protocol. As such, even Carter-era nuclear targeting doctrine contemplating attacks that would be indistinguishable from attacks on the civilian population—even though that doctrine threatened to use force in manifest violation of IHL—would not have breached any legal obligations by which the United States was bound. With respect to the aspects of contemporary U.S. nuclear doctrine that Sagan and I have argued are incompatible with IHL, or the “highly unusual” interpretations of IHL identified by Janina Dill and Scott Sagan,⁸⁶ the United States can advance sufficiently plausible legal interpretations of IHL that it would be doubtful, in my view, to conclude that those policies amount to a breach of the obligation to ensure respect for Additional Protocol I, even if the U.S. were a party. In other words, although I believe U.S. nuclear doctrine includes elements that are not compatible with the most sound interpretations of international humanitarian law, that doctrine does not threaten to use force in a manner that would blatantly or manifestly violate IHL.

V. POLICY CONSIDERATIONS REGARDING THREATS TO USE FORCE IN A MANNER THAT VIOLATES INTERNATIONAL HUMANITARIAN LAW

Section III demonstrated that threats to use force in a manner that contemplates blatant or manifest violation of the principles of distinction,

⁸⁶ *Id.*

proportionality, or precaution would violate the duty to ensure respect for Additional Protocol I, at least for parties to that treaty, but otherwise would most likely not violate international law. However, even in circumstances where it would not be unlawful to make threats to use force in a manner that violates international law, it does not follow that it would be sensible as a matter of policy to do so. A threat to use force in an illegal manner “could be legal but unwise; it could be lawful but awful.”⁸⁷ In this section, I briefly explore several key policy implications of threatening to use force in an illegal manner.

The main principled justification for threatening to use force in violation of IHL would be the claim that such threats will prevent harmful action that would otherwise be taken by an adversary, and that such threats will not themselves cause harms that outweigh their purported benefits. This means we must in the first instance evaluate the likely efficacy of threats to use force in a manner that violates IHL in deterring an adversary from engaging in action that would produce grave harms, such as launching an aggressive war or engaging in a nuclear first strike. Beyond that, we must assess the value of such threats in terms of the incremental advantage they purportedly offer over alternative policies—including nuclear deterrence policies—that do *not* threaten to use force in an illegal manner. It is key in this regard to recall that the United States, at least, has the capacity to cause devastating harm to an adversary whose harmful conduct it seeks to deter even while remaining in compliance with IHL. Even if the purpose of a threat is to deter an adversary’s potential nuclear strike, “no one should underestimate the extreme costs that leaders considering launching nuclear strikes against the United States would suffer if the Pentagon executed nuclear or conventional retaliation options against strictly legitimate military and leadership targets,”⁸⁸ i.e., if its deterrent threats are limited to IHL-compliant options.

Judged against that standard, there are sound reasons to doubt that threats to use force in an illegal manner possess meaningful incremental deterrent value compared to targeting policies that do not contemplate violations of IHL. And against their dubious benefits, threats to use force in an illegal manner pose significant detrimental countervailing harms, at least for a state like the United States that has historically been generally committed to upholding the role of international law in international relations.

A. The Doubtful Effectiveness of Threats to Use Force in an Illegal Manner in Enhancing Security

There are serious reasons to doubt that threats to use force in an illegal manner would serve as a more effective deterrent than threats that are IHL compliant. First, it may be that threats to use force illegally will not be credible, and thus will fail to deter an adversary. At least in the United States, military personnel “have a legal duty to disobey orders, including nuclear strike orders, that violate law of war.”⁸⁹

⁸⁷ Sagan & Weiner, *supra* note 83, at 150.

⁸⁸ *Id.* at 163-64.

⁸⁹ *Id.* at 131. Although there may be reason to question whether operational launch officers—such as those aboard a submarine carrying nuclear missiles—would have sufficient knowledge of the circumstances under which a launch has been ordered to judge that such an order is manifestly illegal, it

Such legal constraints raise questions about whether the United States, or other states that value compliance with international humanitarian law, would in fact execute a threat that would entail using force in an illegal manner. This is not to suggest that it is certain that military personnel in the United States, or in other states, would not carry out a threat to launch an attack that would violate IHL.⁹⁰ But the existence of the obligation to disobey illegal orders can be expected to raise some doubts about whether a state committed to compliance with IHL will follow through on such threats. And because the “effectiveness of a deterrent threat is based on an adversary’s estimate of . . . the likelihood of the threat being implemented,”⁹¹ these doubts serve to undermine the deterrent value of such a threat.

Second, even if an adversary *does* perceive threats to use force in an illegal manner as credible, such threats still may not advance the goal of preventing aggression, or even a nuclear first strike, by the adversary. To the contrary, there is a danger that such threats might escalate rather than deter the risk of conflict. Consistent with the logic of the “security dilemma,”⁹² a threat aimed at increasing a state’s security may induce an adversary state, which may feel more vulnerable as a result of the threat, to react by adopting more aggressive action. Threatening behavior can accordingly exacerbate tensions. A state that sees another state as an “adversary” or a “menace,” Robert Jervis notes, “will react more strongly and more quickly than a state that sees its environment as benign.”⁹³ Threats to use force in violation of IHL—such as a threat to destroy an adversary’s society or to target its population centers—will almost certainly be perceived as highly aggressive and will undermine the target state’s “subjective security.”⁹⁴ The target state can be expected to respond with increasingly aggressive measures of its own. This creates a risk of a spiral of measures and countermeasures that would undermine, rather than enhance, security.⁹⁵

The risks of the security dilemma are admittedly inherent as a general matter in any policy of deterrence. Nevertheless, a threat to target objects that international law recognizes as entitled to special protection, like President Trump’s threat to attack cultural objects in Iran,⁹⁶ may heighten the sense of enmity between rival states. A threat to use nuclear weapons in a manner that would visit vast devastation on civilian populations that should be entitled to protection under international humanitarian law of the kind that Charles Glaser, James Acton, and Steve Fetter have

is more plausible that senior military officials would not unquestioningly follow directions to order a nuclear attack that would violate IHL.

⁹⁰ One scholar who has written on the question of the obligation to disobey illegal orders suggests that soldiers who seek to defend themselves against allegations that they committed war crimes on the basis that they were following orders “will have a difficult time,” based on “the weight of history [and] US case law.” Gary Solis, *Obedience to Orders: History and Abuses at Abu Ghraib*, 2 J. INT’L CRIM. JUSTICE 988, 998 (2004). In the nuclear domain, others have argued that soldiers have a legal obligation to disobey illegal nuclear strike orders. Anthony J. Colangelo, *The Duty to Disobey Illegal Nuclear Strike Orders*, 9 HARV. NAT’L SEC. J. 84 (2018); see generally MARK J. OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE AND THE LAW OF WAR* (1999).

⁹¹ Sagan & Weiner, *supra* note 83, at 163.

⁹² John H. Herz, *Idealist Internationalism and the Security Dilemma*, 2 WORLD POL. 157, 157 (1950).

⁹³ Robert Jervis, *Cooperation Under the Security Dilemma*, 30 WORLD POL. 167, 175 (1978).

⁹⁴ *Id.*

⁹⁵ PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS (Robert Jervis ed. 2017).

⁹⁶ See *supra* note 7 and accompanying text.

endorsed,⁹⁷ i.e., a threat that would entail a blatant or manifest violation of IHL, may generate strategic pressure on an adversary to use nuclear weapons first, in the hopes of launching a decisive blow that would forestall a societally devastating nuclear attack. The very fact that nuclear targeting in violation of IHL will hold at risk what an adversary values most—which is precisely what the threatening state may believe renders it effective—makes those threats especially highly charged; this not only significantly increases risks of miscalculations about the parties’ intentions in a crisis, but exacerbates emotional demands for revenge that can prove highly escalatory.⁹⁸ As such, although we cannot be certain about the effect that threats to use force in violation of IHL will have on the adversary, there is at least a serious risk that such threats will prove destabilizing and thus will undermine, rather than enhance, international security.⁹⁹

Third, announcing threats to use force in a manner that violates international humanitarian law could “perversely . . . wind up committing a [U.S.] president”¹⁰⁰ to carry out such an attack by locking the president into a “commitment trap.”¹⁰¹ In his work on nuclear deterrence, Scott Sagan explains the power of threats—even threats to engage in action a leader does not necessarily wish to carry out—to compel the leader to follow through on those threats:

[Nuclear] threats . . . increase the likelihood that the leader will feel compelled—for both reasons of his or her domestic political interests and the state’s international reputation—to follow through on retaliatory threats if the action to be deterred occurs despite the threat. In short, a president’s deterrent threat does not just reflect a commitment to retaliate; it creates a commitment.¹⁰²

Although this commitment enhances the credibility of the threat, it also “increases the likelihood that the United States will use nuclear weapons in scenarios

⁹⁷ Charles L. Glaser, James M. Acton & Steve Fetter, *The U.S. Nuclear Arsenal Can Deter Both China and Russia*, FOREIGN AFFS. (2023).

⁹⁸ See THOMAS J. SCHEFF, BLOODY REVENGE: EMOTIONS, NATIONALISM, AND WAR (1994) (highlighting the importance of the emotional sources of conflict).

⁹⁹ Not all security strategists share this assessment of the risks of IHL-compliant versus IHL-noncompliant doctrines. Steve Fetter and Charles Glaser, for example, argue that counterforce nuclear attacks—as opposed to countervalue attacks—“eliminate the defining feature of nuclear weapons: their ability to inflict tremendous economic and societal damage.” Steve Fetter & Charles Glaser, *Legal, but Lethal: The Law of Armed Conflict and U.S. Nuclear Strategy*, 45 WASH. Q. 25, 31 (2022). They argue that a “countervalue” doctrine—one that “targets civilians and the infrastructure that is necessary for their survival” is a more effective deterrent and better serves United States interests. *Id.* at 27. The contested conceptual and game-theoretic arguments about different deterrence formulas do not, in my view, offer definitive answers about which strategies deter most effectively. Under the circumstance, I believe those who advocate deterrent strategies that call for attacks against civilian population centers in violation of IHL bear the burden of conclusively demonstrating that such strategies enhance international security, a burden Fetter and Glaser have in my judgment not met.

¹⁰⁰ Scott D. Sagan & Allen S. Weiner, *The U.S. says it can answer cyberattacks with nuclear weapons. That’s lunacy*, WASH. POST (July 9, 2021), <https://www.washingtonpost.com/outlook/2021/07/09/cyberattack-ransomware-nuclear-war/> [<https://perma.cc/AR67-NN9Y>].

¹⁰¹ Scott D. Sagan, *The Commitment Trap: Why the United States Should Not Use Nuclear Threats to Deter Biological and Chemical Weapons Attacks*, 24 INT’L SEC. 85, 85 (2000).

¹⁰² *Id.* at 98.

in which it otherwise would not have done so” should deterrence fail.¹⁰³ The logic of the commitment trap applies in non-nuclear scenarios, as well. For example, some have argued that in the years after the 9/11 attacks on the United States, the United States sought not only to pursue counter-terrorism actions against al-Qaeda, but also committed to pursue more far-reaching policies of “state-building and social engineering.”¹⁰⁴ Although the objective of “restructure[ing] the domestic affairs of Afghanistan” was, in the words of one commentator, “destined to fail,”¹⁰⁵ the United States nevertheless continued to pursue its stated objectives for over two decades, in no small part because it was difficult for leaders who had committed to this vision of victory in Afghanistan to abandon it. Because of similar dynamics, in the nuclear targeting context, even though the purpose of making a threat to use weapons in a way that violates IHL is to deter an adversary from taking action that would lead to weapons being used in such a manner in response, making that threat might in fact increase the risk of such use.

B. The Collateral Damage of Threats to Use Force in an Illegal Manner to the Integrity of International Humanitarian Law

Particularly for those states that are generally committed to upholding the rule of international law, and to upholding international humanitarian law in particular,¹⁰⁶ deterrent threats to use force in violation of IHL would cause the collateral policy harm of undermining their commitment to complying with IHL in the course of the actual use of force. As this Article has shown, many threats to use force in a manner that would violate international law are issued in the nuclear domain, i.e., a realm in which states hope nuclear weapons will never be used, either lawfully or unlawfully. Proponents of such nuclear deterrence policies might argue that threats to use nuclear weapons in a manner that would violate IHL thus have no bearing on how conventional wars are fought.¹⁰⁷

But because the same rules that apply to uses of force with nuclear weapons apply equally to all other uses of armed force, the positions states adopt in threatening to use nuclear weapons in a manner that would violate IHL cannot be confined to the

¹⁰³ *Id.*

¹⁰⁴ NAZANIN AZIZIAN, EASIER TO GET INTO WAR THAN TO GET OUT: THE CASE OF AFGHANISTAN 18 (2021), <https://live-hksbelfer.pantheonsite.io/sites/default/files/2021-08/EasyWar.pdf> [<https://perma.cc/LP39-6474>].

¹⁰⁵ *Id.*

¹⁰⁶ The United States historically has been such a state, and the Department of Defense affirms that it is “DoD policy that . . . [m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.” U.S. DEP’T OF DEF., LAW OF WAR MANUAL 1082 (2015, rev’d July 2023).

¹⁰⁷ Steve Fetter and Charles Glaser advance a variation of this position; they argue that the purpose of IHL

is to [sic] not to deter or prevent war, but rather to moderate the conduct of armed conflict and to mitigate the suffering it causes. The premise is that war will occur, but that the horrors of war can be limited through applying certain legal and ethical principles. This would appear to make [IHL] less relevant to nuclear strategy, for which the primary goal is to prevent nuclear war in the first place.”

Fetter & Glaser, *supra* note 99, at 27.

nuclear domain.¹⁰⁸ Nuclear deterrent threats to use force in violation of IHL could be cited as evidence that states have adopted interpretations of international humanitarian law that would treat such uses of force as permissible in conventional armed conflict—even though states might not in fact favor such expansive interpretations of how the law applies to conventional armed conflict. Including threats to use force in an illegal manner in nuclear deterrent policies might serve more radically to suggest that the states making these threats are aware that these policies are incompatible with IHL, but that those states do not believe they must comply with IHL, at least in the nuclear domain. (For a party to Additional Protocol I, such knowing and intentional disregard of IHL in nuclear doctrine would, as I argue in Section III.C, support a claim that the state is in breach of its duty to ensure respect for the Protocol.)

But it is not possible to limit implausible interpretations of IHL, or disregard of IHL, to potential uses of nuclear weapons. The interpretations advanced in the nuclear sphere would proliferate to the context of conventional conflicts. The result would be to undermine the protective force of IHL in the conventional realm, where (unlike the nuclear realm) IHL routinely operates to regulate the actual use of force—not merely the threat of force—during armed conflict. As a result, threatening to use force in a manner that would violate IHL, even if such threats purport to be confined to nuclear deterrent policies, poses a danger of generally weakening the protections of IHL in armed conflicts. This would have the powerful negative consequence of generally increasing the risk of harm faced by noncombatants in wartime.

VI. CONCLUSION

International law prohibits states from using force in violation of Article 2(4) of the U.N. Charter. It also prohibits states from threatening to initiate the use of force in circumstances that would violate Article 2(4) if that threat were carried out. In addition, international law prohibits states from using means and methods of war that violate the rules of international humanitarian law. But the link in Article 2(4) between legality of threat and legality of action does not extend further; neither Article 2(4) nor international law generally prohibits states from threatening to wage war by employing means and methods that violate international humanitarian law.

There is a key exception. For states that are parties to the 1949 Geneva Conventions or 1977 Additional Protocol I, making threats to use force in blatant or manifest violation of international humanitarian law would violate those states' obligation under Common Article 1 to ensure respect for those treaties. Threats contemplating blatant or manifest violations of the rules of distinction, proportionality, and precaution—principles codified in Additional Protocol I—are those most likely to run afoul of this duty.

While these conclusions apply to all threats to use force, they have particularly important implications for nuclear deterrence. At least for the United States, there are many historical examples of declared U.S. nuclear targeting policies that have contemplated uses of nuclear weapons that would violate IHL. Despite the assertion by the United States in its most recent nuclear posture reviews that U.S.

¹⁰⁸ As the U.S. government observes: "The law of war governs the use of nuclear weapons, just as it governs the use of conventional weapons." U.S. DEP'T OF DEF., *supra* note 106, at 426.

nuclear plans must comply with the law of armed conflict, aspects of even current U.S. nuclear policy seem incompatible with IHL. Even so, because the U.S. is not a Party to Additional Protocol I, and because its current nuclear posture does not contemplate blatant or manifest violations of IHL, its nuclear threats do not violate international law.

But that is not the end of the inquiry. Even if threats, in either the nuclear or conventional realm, that contemplate violations of IHL would not amount to violations of international law, this does not mean that such threats are sound as a policy matter. The key policy questions are whether making such threats is likely to be effective in deterring action by an adversary that the threat is designed to prevent, and whether such threats ultimately enhance or undermine international security.

There are serious reasons to question the soundness of a policy of threatening to use force in a manner that would violate IHL. It is doubtful that such threats offer deterrent protection beyond that afforded by a deterrent policy that complies with IHL. Because an adversary may doubt a state's willingness to go through with a threat to violate IHL, such threats may lack credibility, and accordingly carry limited deterrent force. Alternatively, the threat to engage in IHL violations, which could be enormously costly to the adversary if carried out, may enhance the adversary's perception of threat; this may lead it to adopt increasingly threatening activity of its own. This could give rise to an escalatory spiral that increases, rather than decreases, the risk of conflict. Finally, the very act of threatening to use force in a manner that violates IHL puts pressure on leaders—because of domestic political audience costs and concerns about international reputation—to carry out that threat, even if the leader would not be inclined to use force in violation of IHL had the threat not been announced.

Apart from the question of whether threats to use force in an illegal manner would be effective in preventing the harmful conduct they are meant to deter, making such threats poses serious costs to the broader international humanitarian law regime. Threatening to use force in a manner that violates IHL creates a risk that parties to armed conflict will come to see such uses of force as permissible in the course of actual armed conflict, and thus could undermine the protection IHL is designed to provide. This is true even if a state seeks to confine its threats to use force in a manner that violates IHL to the domain of nuclear deterrence policies. The potential spillover effects of the implicit endorsement of illegal conduct by states that make threats to use force in violation of international humanitarian law could weaken the role of IHL in minimizing humanitarian suffering in war generally. As such, for a state like the United States that wishes to maintain a reputation for respect for IHL, it must recognize that threatening to use force in a manner that violates international law, whether in its nuclear deterrence policies or otherwise, undermines the global integrity of IHL. States that value respect for international law should accordingly eschew threats to use force in a manner that violates international humanitarian law.

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