

Of Fire and Fury: The Threat of Force and the Korean Missile Crisis

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Wars of Words and Tweets

The recent escalation of tensions on the Korean Peninsula provides an opportunity to reflect on the prohibition on the threat of the use of force. In less than a month, virtually every form of threat of force was either expressed or exercised by the United States and North Korea. Pyongyang precipitated the crisis on July 4th and 28th, 2017 by test-firing ballistic missiles reportedly capable of reaching **the contiguous United States**. The initial US response was measured. The White House issued a **statement** affirming that the US “will take all necessary steps to ensure the security of the American homeland and protect our allies in the region.” The US and South Korea also **test-fired** missiles, including South Korea’s Hyunmoo-2 missile, in response to the North Korean tests. Then, on August 5th, acting under Chapter VII, the UN Security Council adopted **resolution 2371**. The resolution determined that the situation threatened international peace and security and imposed new sanctions on North Korea.

On August 8th, the war-of-words between the US and North Korea escalated. **Echoing** President Truman’s warning that Japan would suffer “a rain of ruin” if it failed to surrender, President Trump warned that North Korea would be met with **“fire and fury”** if it threatened the US. Seemingly undeterred, North Korea **announced** that it was preparing plans to attack Guam, in response to which President Trump **took to twitter to warn** that “military solutions are now fully in place, locked and loaded.” The next morning, another **Presidential tweet** further flexed American military muscle by showcasing the readiness of US Pacific Command’s B-1B bombers based in Guam to execute operations against North Korea.

Meanwhile, in what is either evidence of confusion within the American administration or an exercise of ‘good-cop, bad-cop’ tactics, the US Secretaries of State and Defense **issued statements** that were less bellicose than the President’s. **They expressed** Washington’s preference for a diplomatic solution to the crisis and declared that the US was not seeking regime change in North Korea. Shortly thereafter, it was **announced** that North Korean leader Kim Jong-Un decided to delay plans to strike Guam. The next week, the US and South Korea commenced the annual **Ulchi-Freedom Guardian** exercises that simulate operations to repel a North Korean attack. Pyongyang **condemned** these exercises and affirmed that “The Korean Peoples’ army is keeping a high alert, fully ready to contain the enemies. It will take resolute steps the moment even a slight sign of preventive war is spotted.”

The US administration appeared to have interpreted North Korea’s backing down from attacking Guam and the lack of an immediate provocative or forceful response to its joint exercises with South Korea as a conciliatory gesture. President Trump declared that Kim Jong-Un **“is starting to respect us,”** and Secretary of State Tillerson expressed satisfaction at Pyongyang’s restraint and hinted at the possibility of dialogue with North Korea in the near future. Days later, however, North Korea proved that President Trump’s triumphalism and Secretary Tillerson’s optimism were premature. On Saturday, August 25th, North Korea test-fired **several short-range missiles**, and then in the early hours of Tuesday, August 29th, it test-fired a longer range missile that overflew Hokkaido, prompting the Japanese government to sound air raid sirens and to instruct civilians to seek shelter. Japanese Prime Minister Shinzo Abe **called** North Korea’s escalation, which is the third time that North Korea fired a missile over Japan, a “reckless action [that is] an unprecedented, serious, and grave threat.” Meanwhile, **President Trump declared** that “threatening and destabilizing actions only increase the North Korean regime’s isolation in the region and among all nations of the world. All options are on the table.”

The Prohibition on the Threat of Force

Unlike the prohibition on the *use* of force, the *threat* of force is an undertheorized area of *jus ad bellum*. Despite the efforts of some scholars who have written in this area (see notably **here**), the content of the prohibition on the threat of force is ambiguous. Both the definition of threats of force and the threshold separating legal and illegal threats remain uncertain. Even the few judicial statements on the matter have left many questions unanswered. As is well known, the International Court of Justice (ICJ) reflected on threats of force on a few occasions, most notably in the Nicaragua Case and in the Advisory Opinion on the Threat and Use of Nuclear Weapons. In both instances, the Court linked the legality of threats of force to the legality of the actual use of force. As it explained in the Nuclear Weapons Opinion: “The notions of ‘threat’ and ‘use’ of force ... stand together in the sense that if the use of force itself in a given case is illegal ... the threat to use such force will likewise be illegal.”

While this formulation offers some guidance on the content of the prohibition on threats of force, it is insufficiently developed to enable a thorough legal evaluation of the infinite variety of threatening behavior that occurs in inter-state relations. For instance, should threats of force involving weapons of mass destruction be subjected to the same legal standards as threats to use conventional weapons? Does the form of threat matter? In other words, is a physical threat, in the form of, for example, military maneuvers, more serious than a threatening statement, or in the case of North Korea, a **photograph** or **video** threatening an attack against the US? How do the principles of necessity and proportionality, which govern the use of force, apply to threats of force? Can force be threatened to preempt armed attacks, or to deter less grave uses of force that do not amount to armed attacks? Can threats be wielded to achieve legally permissible policy objectives that enjoy the support of the international community, such as the denuclearization of North Korea? (For an insightful discussion by James Green and Francis Grimal see: **here**)

These are some of the issues that are unanswered by existing judicial consideration of the prohibition on threats of force. One possible approach to examine these issues and to reflect on the legality of threats, such as those recently exchanged between the US and North Korea, is to construct an escalating scale that includes three levels of threats: (1) non-coercive threats, (2) demonstrations of force, and (3) prohibited threats of force.

An Escalating Scale of Threats

Non-Coercive Threats

This category is legally unproblematic. Not every hostile statement, menacing act, or antagonistic policy constitutes a prohibited threat of force. It is widely recognized that Article 2(4) of the UN Charter prohibits threats of *armed* force. This means that the non-coercive tools of diplomacy employed by states to affect the policies of their adversaries, or even their allies, such as political and economic pressure or diplomatic censure, broadcasting propaganda, unilateral or multilateral sanctions, trade, travel, and arms embargoes, are not affected by the prohibition on threats of force.

Demonstrations of Force

Demonstrations of force have many forms. These include troop movements, mobilization, and troop concentrations or constructing military bases, including in areas bordering an adversary; putting the armed forces on heightened alert; conducting military exercises, including using live ammunition; increasing defense budgets; developing weapons systems and conducting tests of conventional and/or unconventional weapons.

Demonstrations of force are the most challenging category of threats of force. In addition to *jus ad bellum*, these activities are governed, *inter alia*, by arms control agreements, environmental law, the law of the sea, and bilateral peace treaties. Thus, while the latest North Korean missile test of August 29th 2017 that overflew Japan was not a prohibited threat of force, which is discussed below, it violated the sovereignty of Japan over its maritime and territorial airspace. Also, in some cases such as North Korea, there are Security Council resolutions that prohibit demonstrations of force such as nuclear detonations and missile tests. Determining the legality of demonstrations of force is also challenging given the endless purposes that they serve. These include: demonstrating a WMD first or second strike capability, signaling the credibility of conventional and unconventional deterrents, showing casing force-projection abilities, reinforcing a commitment to a mutual defense treaty, displaying force readiness, rejecting certain policies of adversaries (think of [US naval operations in the South China Sea](#) to challenge China's claims in the area), and training for offensive and defensive operations.

Further complicating discussions on the legality of demonstrations of force is the ambiguity of the political message that these threats are intended to signal. Whatever their form, all demonstrations of force include an element of political messaging. Whether they are routine exercises or exceptional maneuvers, demonstrations of force send signals to specific adversaries or to general domestic or foreign audiences, or some combination thereof. Ultimately, whatever the content and political context of that signal, the purpose of demonstrations of force is to affect and shape the policy, preferences, and perceptions of the target state or audience.

Demonstrations of force are not merely tools of self-defense and deterrence, but are also an exercise of political influence. As [Thomas Schelling put it](#): "It is *latent* violence that can influence someone's choice – violence that can still be withheld or inflicted, or that a victim believes can be withheld or inflicted. The threat of pain tries to structure someone's motives."

Given the ubiquity of demonstrations of force in international relations and the general tolerance of such behavior by states, it appears that these forms of threats are not proscribed by international law. (See *contra* [Marco Roscini](#)) Even if they occur in the context of a protracted conflict or a hostile relationship, as long as demonstrations of force do not rise to the level of prohibited threats of force such as ultimatums, which are discussed next, it appears that these practices are generally permissible. This is supported by the brief discussion in the Nicaragua Case on a series of acts and statements that constitute demonstrations of force. Although the Court did not use the label 'demonstrations of force', it examined the legality of US military exercises with the Honduran army close to the Nicaraguan border and US naval maneuvers involving thousands of troops, which led the Nicaraguan government to put its armed forces on alert. The ICJ also examined what it termed "the militarization of Nicaragua" through increasing arms purchases. The Court found that neither of these demonstrations of force constituted impermissible threats of force. The US exercises and maneuvers, which took place amidst a hostile relationship between Washington and the Sandinistas, did not violate of the prohibition on the threat of force, and Nicaragua's arms-buildup was not illegal because there are no general rules "whereby the level of armaments of a sovereign State can be limited."

Prohibited Threats of Force

A prohibited threat of force is a clear act or an unambiguous statement that communicates an intention to use armed force unless a specific demand, that is impermissible under international law, is met. (See Oscar Schachter [here](#) p.1625) This definition of a prohibited threat of force is akin to ultimatums, which were a widely wielded instrument in the pre-Charter era. (See [here](#))

Defining prohibited threats of force in this manner is supported by the observations of the ICJ in its Nuclear Weapons Advisory Opinion. The Court stated that "whether a signalled intention to use force if certain events occur is or is not a 'threat' within Article 2, paragraph 4, of the Charter depends upon various factors." It is noteworthy that the Court used the term "signaled intention to use force" and later in the same paragraph, the phrases "stated readiness" and "declared readiness" to use force, to describe threats falling within the ambit of Article 2(4). This suggests that the ICJ sought to exclude implicit threats, ambiguous signals, and menacing behavior that is intended to relay political messages without amounting to a clear and unambiguous sign of an intention to use force, which are hallmarks of demonstrations of force. Moreover, the phrase "whether a signalled intention to use force *if certain events occur*" indicates that not only should there be a signaled, stated, or declared readiness to use force, but that this threat should be accompanied with a specific demand which if not fulfilled would lead to the use of force. Finally, by requiring that this demand be impermissible under international law, the aforementioned definition allows for threats of force in situations where the actual use of

force would be lawful, such as self-defense against an armed attack or against an occupation or to enforce a Chapter VII Security Council resolution. (See Dino Kritsiotis here)

Determining the legality of threats of force will always depend on their political context and strategic circumstances. This is because the threshold between permissible demonstrations of force and prohibited threats is not a bright-line. States rarely issue unequivocal ultimatums of the kind made by George Bush against Saddam Hussein on the eve of the [invasion of Iraq](#). More often, states express positions or adopt physical postures that, in combination with other statements or policies, could constitute a prohibited threat, even if the determination to use force remains ambiguous or equivocal. One example of this is US National Security Adviser H.R. McMaster's threat of "[preventive war](#)" against North Korea if it develops the capacity to deliver nuclear weapons to the US. Although not phrased as a clear ultimatum – "*relinquish your nuclear weapons, or else*" – explicitly threatening preventive war to denuclearize North Korea, which if executed would constitute an illegal use of force, potentially amounts to a prohibited threat of force.

Conclusion

Viewed on this escalating scale of threats, it appears that the recent war of words, tweets, videos, missile tests, and military maneuvers between the US and North Korea did not, for the most part, involve prohibited threats of force. These acts and statements appear to be demonstrations of force that each party used to communicate political messages to its adversary and to affect its strategic calculus. Finally, I should note that it is not my intention to extoll the value of demonstrations of force as a tool of statecraft or to underestimate the dangers of this practice, especially in a context that involves nuclear weapons and unpredictable leaders. Nonetheless, we do live in an anarchic international system in which violence is pervasive and where threats of force perform an important, if regrettable, function in inter-state relations, and it appears that international law reflects this unfortunate reality.

"The supreme art of war is to subdue the enemy without fighting" – Sun Tzu

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