PISM | POLSKI INSTYTUT SPRAW MIĘDZYNARODOWYCH
THE POLISH INSTITUTE OF INTERNATIONAL AFFAIRS

BULLETIN

No. 66 (916), 19 October 2016 © PISM

Russia's Military Exercises and the Prohibition on the Threat of Force

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Staging military exercises which include certain offensive elements or deployment of ballistic missiles in direct proximity of a border of another state do not constitute a violation of the prohibition of the threat of force stipulated in Article 2, Para. 4 of the Charter of the United Nations. However, their legality could be questioned if they were accompanied by a demand of a certain conduct by other entities. It would be difficult to prove that Russian exercises held close to the borders of the members of NATO constitute a violation of said prohibition or any other treaty norms. Still, NATO member states should jointly assess Russian actions as to their compliance with the legal prohibition of threats of force as an instrument of the foreign policy.

The increased tension in relations between NATO states and Russia in the last few years has manifested itself in part in the form of Russia's controversial decisions to redeploy ballistic missiles closer to NATO territory and increase the frequency and scale of its military manoeuvres. Publicly available information indicates the number of troops participating in these exercises is growing and reveals the close proximity of these provocative Russian actions to objects (e.g., airplanes) and the territory of members of the Alliance. They also point to concerning offensive elements that have appeared more often in the Russian exercise scenarios in which the use of nuclear weapons is envisaged. These factors contribute to an atmosphere of danger. Thus, it seems natural to ask whether these kinds of actions may be interpreted as violations of the norms of international law, specifically those prohibiting the threat of force.

Legal Nature of the Prohibition. Various treaties frame the prohibition of the threat of force, in particular the Charter of the United Nations (UNC) and the founding instruments of regional organisations such as the Organisation of American States (OAS), the African Union (AU), and the Association of Southeast Asian Nations (ASEAN). So far, however, this prohibition has not been reflected in any international agreement that refers to the European continent alone. It was expressed only in a non-legally binding declaration attached to the 1975 Final Act of the Conference on Security and Cooperation in Europe. Neither does it enjoy the status of a rule of customary international law.

Still, the fact remains that both the NATO states and Russia are bound in their relations by Article 2, Para. 4 of the UNC. This provision imposes on all members of the United Nations an obligation to refrain "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". It is assumed in the judicial decisions and literature of international law that this provision relates to all threats of force regardless of their aim and that the three cases mentioned in the text are only examples.

Due to Russia's suspension in 2007 of the Treaty on Conventional Armed Forces in Europe (CFE), there are no other treaty norms through which to assess the legality of its actions. Instruments adopted within the framework of the Organization for Security and Cooperation in Europe (OSCE), such as the 2011 Vienna Document on Confidence and Security-Building Measures, do not have any legal status.

International Practice. Threats of force generally do not meet with a firm response from the international organisations established to protect the peace and security on a global or regional scale. They usually become a matter of interest for these relevant institutions only after the actual use of force. Even then, charges of the use of

threat are normally considered to be less important than those concerning real actions, or are even completely left aside.

A good example of this is the international reaction to Iraq's rhetoric starting in July 1990 about launching an attack against Kuwait, combined with demands that the latter cease its encroachment on Iraq's oil reserves and the concentration of several dozen Iraqi troops on the border between the two states. These actions did not meet with any response from the UN. The Security Council issued its first response to this conflict only when the Iraqi forces began the invasion of Kuwait. What is more, neither this UN resolution nor later ones, mentioned the threats that preceded the attack. One can, therefore, notice a serious discrepancy between the strict wording of the UNC and common practice.

International Case Law. This rift between wording and practice becomes more understandable in light of the case law of international courts. Particularly significant is the judgment of the International Court of Justice (ICJ) in the 1986 *Nicaragua v. US* case. Nicaragua tried to convince the court that the military exercises held by the US in Honduras with minor breaks since 1982 constituted a threat of force against the claimant within the meaning of Art. 2 Para. 4 of the UNC. Nicaragua claimed there was an unprecedented number of troops and equipment participating in the manoeuvres in the region, that they were conducting offensive amphibious assaults, that certain activities were undertaken only five kilometres from its border with Honduras, and that the tone of the statements made by American authorities was confrontational. It also indicated repeated attacks by American intelligence forces on strategic targets (ports, pipelines) on Nicaraguan territory and active support of rebels (so-called *contras*) by the U.S. Still, these arguments turned out to be insufficient to persuade the ICJ to declare that the American troops' manoeuvres constituted an unlawful threat of force. Instead, it ruled that in the circumstances in which these exercises were held, their legality could not be questioned.

This conclusion can be understood in light of a 1996 advisory opinion by the ICJ on the legality of the threat of or use of nuclear weapons. According to this opinion, the possibility to treat a threat as an intent to use force within the meaning of Article 2 Para. 4 of the UNC depends on two factors. The first is whether the threat if carried out constitutes a violation of international law. If a given state declares its readiness to commit aggression against another state, its behaviour may be considered a threat. However, if it expresses a willingness to undertake an action in self-defence or to use force under the authorisation of the UN Security Council, its behaviour may be interpreted only as a warning and not a violation.

The second factor is whether the state in question conditions use of force on the addressee state's compliance with a specific demand, for example, the transfer of territory or the implementation of a given policy. This requirement for conditionality makes it possible to explain why in the 1949 *Corfu channel case (UK v. Albania*) the ICJ treated the passage of British warships close to the Albanian seacoast with their crews at action stations, ready to fire, only as a projection of force. It also helps to explain the conclusions of the award by the arbitration tribunal in the 2007 *Guyana v. Suriname* case. In it, the tribunal held that Surinam's request that exploratory oil drilling by ships operating under a license from Guyana cease their activities, made by gunboats of the Surinamese navy and combined with a warning that non-compliance meant "the consequences would be theirs", constituted a threat of force and was in violation of Article 2 Para. 4 of the UNC.

One cannot, therefore, qualify as threats in the legal sense of the term North Korea's declarations to transform the capital of another state into a "lake of fire" because they were not accompanied by a demand for a certain behaviour from the subject of the intimidation. The lack of any unambiguous demand is probably the reason why in the *Nicaragua* case the manoeuvres held by the U.S. were not considered a threat of force contrary to the UNC provision.

Conclusions. In light of the analysed judgments above, the possibility to consider Russian military exercises as constituting a threat of force that violates the UNC principle is very difficult. The ICJ and other international courts are reluctant to rule on such matters as the redeployment of ballistic missiles or holding high-intensity military exercises that include offensive elements and are conducted in the direct proximity of another state. In order to discuss their legality, these actions should be accompanied by an unequivocal intent to extort a certain concession from a given entity.

It would be difficult to demonstrate in fact the existence of such a demand from Russia towards NATO if judged by an analysis of the statements of its representatives and the circumstances in which it has taken various actions in the last few years. The Russian authorities deliberately take advantage of the weaknesses of international obligations. They avoid conditioning holding manoeuvres or the deployment of missiles upon fulfilment of their demands in order not to be accused of illegal threats. They also formally divide the manoeuvres into smaller groupings in order not to be obliged to give notification in accordance with the rules in the Vienna Document.

In order to answer the challenges posed by the Russian exercises, NATO could prepare and publish a catalogue of actions that it views as constituting threats contrary to the UNC provision or abuses of Russia's political obligations. This step could have a deterrent effect on the Russian authorities, limiting their propensity to abuse the imprecise wording of treaties or agreements of a non-legal character.