

**The Threat of Use of Nuclear Weapons and Russia's War on Ukraine:
Meeting the Legal and Political Challenge
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It is imperative to end the war in Ukraine and the suffering and devastation that comes with it as well as the risk of escalation to nuclear war. Lawyers Committee on Nuclear Policy recently released a paper on this subject, entitled [End the War, Stop the War Crimes](#). Ending the war, however, is not my subject today, but rather legal analysis of nuclear threats. International law on basics of war, peace, and disarmament is not faring well, now and indeed in the last 25 years. Still we must look forward, and international law is an important lens for doing so.

I will not attempt to survey and assess the many forms that nuclear signals have taken over the decades, but rather will concentrate on the quite straightforward issues presented by Russian statements in connection with its invasion of Ukraine. And I'll talk about possible international institutional responses.

President Putin on several occasions has raised the possibility of Russian resort to nuclear weapons should the United States and NATO states intervene militarily in the war in Ukraine. On the day of the invasion, February 24, Putin said: “[F]or those who may be tempted to interfere in these developments from the outside, ... they must know that Russia will respond immediately, and the consequences will be such as you have never seen in your entire history.”

This is a legally cognizable threat, both credible and specific in form. Statements like Putin's are clearly illegal because they signal the intent to commit an illegal act—here the use of nuclear weapons—should certain conditions be met. The message is: If you do not refrain from X or if you do Y, we will resort to nuclear arms – not as a matter of general policy, but in a concrete context, additionally here one of armed conflict. In its 1996 Advisory Opinion, the International Court of Justice observed: “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.”

In the context of the invasion of Ukraine, Putin's threat is illegal in a second way. It is an element of the unlawful invasion, the use of force against the territorial integrity and independence of a state in violation of Article 2(4) of the UN Charter. The threat seeks to shield unlawful Russian conventional military operations by deterring the US and NATO

states from a direct military intervention to assist in Ukraine's lawful self-defense pursuant to Article 51 of the Charter.

So far I have talked about threats in terms of general international law examined in the 1996 ICJ opinion. The conclusion reached by the ICJ is that threat or use of nuclear weapons is generally contrary to international humanitarian and other law; the Court did not opine on nuclear threat or use in an extreme circumstance of self-defense in which the survival of a state is at risk, nor did it address the policy of "nuclear deterrence". A more categorical statement came from the UN Human Rights Committee in 2018: "The **threat** or use of weapons of mass destruction, in particular nuclear weapons, ... is incompatible with respect for the right to life and may amount to a crime under international law."

There is also some pertinent treaty law. Under Protocol I to the Geneva Conventions, "[a]cts or *threats* of violence the primary purpose of which is to spread terror among the civilian population are prohibited." Also prohibited is threatening that there shall be no survivors. These provisions, however, do not definitively capture most nuclear threats. Protocols to the regional nuclear-weapon-free zone treaties commit nuclear-armed states not to use or *threaten* to use nuclear arms against members of the regional zones. The Treaty on the Prohibition of Nuclear Weapons requires states parties never "to use or threaten to use nuclear weapons". However, neither the protocols or the TPNW as it now stands apply universally.

Going forward, what can be done in terms of international law and institutions to address the problem of threat of nuclear arms? The basic solution is the global abolition of nuclear weapons.

Short of that, first of all it would be possible for the **UN General Assembly** to take up the problem. One setting could be its current Uniting for Peace session, which has already produced two resolutions condemning the Russian invasion of Ukraine as aggression in violation of the UN Charter. The first one, in its preamble, condemned decision of Russia to increase the readiness of its nuclear forces. The problem could be addressed in a regular session too. The Assembly has adopted many, many resolutions over the years condemning use of nuclear weapons going back to the seminal resolution 1653 of 1961. The main problem, whether in a regular or special session, is that states relying on nuclear weapons even when sympathetic to the need to condemn recent Russian nuclear threats, will not want to support any resolution that undermines that reliance. But a resolution could be adopted over their opposition or without their support.

Another possible path would be for the General Assembly to request another nuclear weapons-related advisory opinion from the **International Court of Justice**, at least in part

on the subject of threat. However, the Court has already addressed threat in its 1996 opinion. It will be reluctant to depart dramatically from that opinion. Moreover, within the context of international law, the Court is inherently somewhat conservative, because by practice the Court normally has five judges put forward by the permanent members of the Security Council.

The final approach I'll mention is amending the Rome Statute of the International Criminal Court. In 2009, Mexico proposed amending the Statute to include a specific crime of using or **threatening** to use nuclear arms. Use of nuclear weapons would at least in most circumstances constitute a crime under the general crimes set out in the Statute. However, specifically listing nuclear weapons, along with other weapons already in the Statute, would remove any ambiguity about use of nuclear arms in all circumstances.

In 2011, Mexico changed its proposal to remove the reference to threatening to use nuclear arms. I have not seen an explanation by Mexico. But it probably reflects the fact that "threat" standing alone is not criminalized in the Rome Statute or elsewhere in international law. The fact that a threat is illegal, for example under the Protocol I provision barring the threat of violence to terrorize a civilian population, does not require its prosecution as a war crime. Also, actions related to threat such as preparation generally are not criminalized standing alone. In the case of the crime of aggression, its prosecution under the Rome Statute encompasses "planning and preparing" aggression – so long as the aggression has taken place.

Mexico has not proposed active consideration of its amendment since 2011, while keeping it on the list of possible amendments. Mexico's view appears to be that pursuing an amendment will make more sense when the Treaty on the Prohibition of Nuclear Weapons has a considerably larger number of states parties. If at some stage the Statute is amended to add nuclear weapons, it will only apply to states parties that accept the amendment; further, Russia, China, the United States, India, Pakistan, DPRK, and Israel are currently not parties to the Statute.

I will close with the observation that 77 years of experience with nuclear weapons since the United States used them in war has taught us that threat and so-called nuclear deterrence are the primary function of the weapons. First of all, let us devoutly hope and pray that that remains the case. And secondly, let us grapple more deeply with the problem of nuclear threat, and all the risks entailed by policies and practices that rely on threat, as we work to leave the nuclear age behind.