First Meeting of States Parties to the Treaty on the Prohibition of Nuclear Weapons

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Threats to Use Nuclear Weapons: Unacceptable and Illegal

Working paper submitted by International Association of Lawyers Against Nuclear Arms

I. Introduction

1. Not for the first time in recent years, in 2022 threats to use nuclear weapons have loomed large in global affairs. Such threats are utterly unacceptable, above all because they greatly increase the risks of a humanitarian and environmental catastrophe resulting from use of nuclear weapons, whether "limited" or extensive. The Treaty on the Prohibition of Nuclear Weapons recognizes this reality by explicitly prohibiting both threatening to use and using nuclear weapons. Threats to use nuclear weapons are illegal too under universally applicable international law reflected in and reinforced by the TPNW, as set out in this working paper submitted by the International Association of Lawyers Against Nuclear Arms (IALANA).[1] We support inclusion of a strong statement on the unacceptability and illegality of threats to use nuclear weapons in the political declaration of the First Meeting of States Parties to the TPNW.

II. The Illegality of Threats to Use Nuclear Weapons

2. The United Nations Charter, Article 2(4), provides: "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." The obligation is recalled in the TPNW preamble. If a use of force would violate Article 2(4), a threat to engage in such force violates that article. As the International Court of Justice (ICJ) stated broadly in its 1996 nuclear weapons Advisory Opinion, "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."[2]

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[2] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 1996 I.C.J. 226, ¶ 47 (July 8).

3. It follows that, under the modern *jus ad bellum* codified in the UN Charter, a threat to use nuclear weapons as part of an aggressive attack[3] is illegal. As the ICJ explains, it is also the case that a use or threat of force in self-defense must be necessary and proportional.[4] Thus a defensive threat to use nuclear weapons that does not meet those criteria would also be illegal under *jus ad bellum*.

4. Any threat to use nuclear weapons, whether aggressive or defensive, must also be of a use that would comply with the *jus in bello*, the law applicable to the conduct of hostilities, or international humanitarian law (IHL). In general, as the ICJ found: "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."[5] The illegality of a threat to use nuclear weapons under IHL therefore depends on the illegality of the use.

5. That the use of nuclear weapons is contrary to international humanitarian law is powerfully communicated by the TPNW's prohibition of use, recitation of relevant principles and rules of IHL in the preamble, and clear and central aim of avoiding the catastrophic humanitarian consequences of such use. We will not further examine the illegality of use under IHL here; for a recent summary of the main points and sources supporting such illegality, see the 21 April 2022 Lawyers Committee on Nuclear Policy paper, *End the War, Stop the War Crimes*, pp. 5-6. The paper finds: "Considering [IHL] rules, and taking into account as well the role in international law of 'elementary considerations of humanity'[6] and the 'dictates of the public conscience,'[7] a 'limited' use of one or more nuclear weapons would violate IHL and constitute a war crime. It need hardly be said that a large-scale exchange of nuclear weapons … would be a catastrophe beyond history whose sheer madness, immorality, and illegality would be manifest."

6. Given the illegality of use of nuclear weapons under IHL, under the general principle stated by the ICJ, quoted above, threats to use such weapons are also illegal.[8] The illegality of nuclear threats under IHL is reinforced by certain provisions of a key IHL treaty, Protocol I to the Geneva Conventions. It provides that "[a]cts or *threats* of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[9] Also prohibited is threatening that there shall be no survivors.[10]

7. Other international law, not traditionally considered part of *jus ad bellum* or *jus in bello*, also is relevant. The TPNW preamble reaffirms "the need for all States at all times to comply with applicable international law, including international

[3] In Security Council resolution 984, 11 April 1995, adopted in connection with the 1995 indefinite extension of the Nuclear Non-Proliferation Treaty, the Council committed to come to the aid of non-nuclear weapons states which are the object of aggression or *threatened* aggression with nuclear weapons. The resolution thus tracks the Article 2(4) obligation to refrain from the aggressive threat or use of force.

[4] *Legality of the Threat or Use of Nuclear Weapons, supra,* ¶¶ 41, 48.

[5] *Id.* at ¶ 78.

[6] *Id*. at ¶ 79.

[7] Part of the Martens Clause, most recently codified in Protocol I to the Geneva Conventions, Art. 1(2). See *Legality of the Threat or Use of Nuclear Weapons, supra*, ¶ 78.

[8] As to whether the illegality of threats to use nuclear weapons extends to "nuclear deterrence," the ICJ stated that "it does not intend to pronounce here upon the practice known as the 'policy of deterrence'." *Id.* at ¶ 67. The view of IALANA concerning both specific threats and ongoing, general reliance on nuclear weapons is set out in the 2011 Vancouver Declaration: "Threat as well as use of nuclear weapons is barred by law. As the ICJ made clear, it is unlawful to threaten an attack if the attack itself would be unlawful. This rule renders unlawful two types of threat: specific signals of intent to use nuclear weapons if demands, whether lawful or not, are not met; and general policies ('deterrence') declaring a readiness to resort to nuclear weapons when vital interests are at stake. The two types come together in standing doctrines and capabilities of nuclear attack, preemptive or responsive, in rapid reaction to an imminent or actual nuclear attack."

[9] Article 51(2) (emphasis supplied).

[10] Article 40.

humanitarian law and international human rights law." It thus recognizes the role of human rights law as well as IHL. The illegality of threat as well as use of nuclear weapons under human rights law was recently stated by the UN Human Rights Committee. In its 2018 General Comment on the right to life, the Committee found: "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."[11]

8. Nuclear weapons-related treaties also bear on the illegality of threats to use nuclear weapons. Protocols to the regional nuclear-weapon-free zone treaties obligate nuclear-armed states not to use or *threaten* to use nuclear arms against members of the regional zones.[12] Further, as already noted, the TPNW itself requires states parties never "to use or threaten to use nuclear weapons".

9. The nuclear-armed states and their allies have not accepted the proposition that threats to use nuclear weapons, whether defensive or aggressive, are comprehensively illegal. Nonetheless, in IALANA's view, that proposition is correct. It is well grounded in the above sources, noting in particular the trend since the 1996 ICJ Advisory Opinion of the articulation and affirmation of the applicable law by the International Committee of the Red Cross,[13] the TPNW, and the UN Human Rights Committee.

III. Recent Threats to Use Nuclear Weapons

10. Contradicting the widespread and complacent belief that the risks of the nuclear age are on the decline, recent years have seen a number of invocations of possible use of nuclear weapons, including the following episodes. In the summer and autumn of 2017, the United States of America and the Democratic People's Republic of Korea (DPRK) exchanged incendiary threats of nuclear destruction.[14] In September 2019, Pakistan referred to possible nuclear war in connection with the dispute with India over Kashmir.[15] Finally, the Russian Federation on more than one occasion has referred to Russian resort to nuclear weapons should the United States and NATO states intervene militarily in the conflict in Ukraine**.** Notably, on the day of the Russian invasion of Ukraine, 24 February 2022, President Vladimir 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."[16]

12. Of these episodes, Russia's threats are the most alarming, because they occur in the context of a full-scale armed conflict arising out of Russia's invasion of Ukraine. Putin's 24 February statement without question is a legally cognizable threat, both

[11] UN Human Rights Committee, General Comment No. 36, ¶ 66, adopted 30 October 2018, CCPR/C/GC/36, 3 September 2019 (emphasis supplied). Lawyers Committee on Nuclear Policy with other groups has made submissions to human rights bodies regarding several countries, including to the UN Human Rights Committee regarding the Russian Federation and to the UN Human Rights Council regarding the United States.

[12] See Protocols to the Nuclear-Weapon-Free Zone Treaties | United Nations Platform for Nuclear-Weapon-Free Zones.

[13] See *End the War, Stop the War Crimes*, *supra*, p. 5.

[14] See Andrew Lichterman and John Burroughs, "Trump's Threat of Total Destruction Is Unlawful & Extremely Dangerous," Inter Press Service, 25 September 2017.

[15] "Pakistan's Khan warns of all-out conflict amid rising tensions over Kashmir; demands India lift 'inhuman' curfew," UN News, 27 September 2019.

[16] See "Putin's Case for War, Annotated," New York Times, 24 February 2022. See also similar remarks made by Putin on 27 April as reported in an Agence France-Press story, 28 April 2022, "Putin warns of 'lightning response' to intervention in Ukraine." In reply to Putin's 24 February statement, French Foreign Minister Jean-Yves Le Drian said that "Vladimir Putin must also understand that the Atlantic alliance is a nuclear alliance. That is all I will say about this." "France says Putin needs to understand NATO has nuclear weapons," Reuters, 24 February 2022.

credible and specific in form.[17] In a concrete context, one of armed conflict, the message is: If you do not refrain from X or if you do Y, we will resort to nuclear arms. It expresses a readiness to resort to nuclear force should addressee states "interfere" in Russian military operations in Ukraine.

13. Putin's threat is illegal under *jus ad bellum* because 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 NATO states from a direct military intervention to assist in Ukraine's lawful self-defense pursuant to Article 51 of the Charter. Such an intervention would be lawful if requested by Ukraine.

14. This feature—the integration of threats to use nuclear weapons into an actual and aggressive attack—distinguishes the Russian invasion of Ukraine from other recent episodes involving threats of use of nuclear weapons. Importantly, however, threats to use nuclear weapons are illegal under *jus in bello* regardless of whether the circumstance is one in which the threat is made by an aggressor state or a state acting in self-defense. Putin's threat is illegal in that respect as well.

IV. Conclusion

15. The threat of use of nuclear weapons has been a central factor in international affairs since the United States detonated the weapons in war in 1945. That centrality has not subsided, as demonstrated by the Russian threats this year, and the threats made by DPRK, United States, and Pakistan in recent years. Signals of possible resort to nuclear weapons are unacceptable and illegal manifestations of risk-laden reliance on weapons of mass destruction. They should be condemned by the First Meeting of States Parties to the TPNW and monitored and condemned in the future as necessary, with a view towards freeing the world of nuclear terror and upholding human rights-based peace.

[17] On the legal concept of threat, see Ariana Smith, *Post-1996 Scholarly Interpretations of the Legal Status of Threat of Force* (December 2018).