

# Russia's Nuclear Threats, Russia-Occupied Territories and International law

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*During the Russo-Ukrainian war, all information about it may contain content favorable to Ukraine or Russia, which cannot be objectively verified due to the mass production of propaganda and false war information by both sides of the conflict and their allies.*

## Putin's nuclear "non-bluff"

While arranging pseudo-referendums in the occupied territories of Ukraine and announcing "partial mobilization, the Russian dictator resorted to nuclear threats. The situation was analyzed by ARC expert in the field of international law Oleksiy Plotnikov.

The author of this essay occasionally enjoys playing poker with friends and is aware that a player who professes not to bluff is likely doing so. When authoritarian leaders believe they are losing, they frequently threaten democratic nations with nuclear annihilation.

We can recall Nikita Khrushchev during the Suez, Berlin, and Caribbean crises, Boris Yeltsin, who was powerless to halt NATO operations in Yugoslavia, and Kim Jong Un, for whom threatening a nuclear strike is almost the only way to be visible in the world. Evidently, none of these threats materialized.

However, none of them initiated a big conflict with another state, so let's not overestimate Putin's mental fitness and instead assess the potential repercussions of the arrival of

Russian tactical nuclear weapons on Ukrainian territory.

## **Are there Russian tactical nuclear charges on the territory of Ukraine?**

There is no precise response to this question, yet one may exist. The reconstruction of the former Soviet nuclear ammunition storage facility Feodosia-13 in Crimea and the deployment of nuclear weapons carriers, including bombers, ships, and submarines, are evidence of this [2]. As previously reported by ARC [3] [4], the sinking of the cruiser “Moscow” poses a threat of a nuclear incident, as the wrecked flagship may have been outfitted with nuclear weapons.

In addition, potential nuclear weapons carriers have been spotted in Donetsk and Luhansk oblasts. To conquer Mariupol in particular, the attacker employed self-propelled mortars “Tulip” that can shoot nuclear tactical charges [5]. The Russian invaders in Ukraine also employ the Tochka-U missile system, which is capable of carrying a 100-kiloton nuclear bomb.

As the most probable nuclear assault scenario against Ukraine, the use of tactical nuclear weapons tailored to strike the front line and adjacent rear areas [7], or for other targets in the regime of nuclear terrorism is assessed. Under these conditions, both the transporters of nuclear charges and the nuclear charges themselves may be located on occupied Ukrainian territory. From the perspective of international law, this creates a number of concerns, which are examined below.

# Illegality of placement Russian nuclear weapons in Ukraine

The 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) is the primary international instrument regulating the spread of nuclear weapons in the world [8]. There are currently 188 member states, including Ukraine and the Russian Federation. The pact prevents nuclear states from transferring, aiding in the manufacture of, or supporting the acquisition of nuclear weapons by non-nuclear states. Each non-nuclear state agreed not to accept, create, or acquire nuclear weapons in any way. In 1994, Ukraine renounced nuclear weapons and joined the 1968 Treaty as a non-nuclear state.

The question arises whether the placement of Russian nuclear weapons on the territory of Ukraine can be considered a violation by Russia of the Non-Proliferation Treaty. On the one hand, the nuclear warhead is located in a non-nuclear country, on the other hand, the weapon is not transferred to that country, because it was delivered to the territory occupied by another country.

Ukraine adheres to the position that the violation will take place. The Ukrainian delegation stated this during the Tenth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, held in New York from August 1 to 26, 2022, separately emphasizing that the placement of nuclear charges in Crimea is contrary to the principle of non-proliferation [9].

What are the grounds of this Ukraine's the position? It is well-known, for instance, that NATO has a system of agreements known as "nuclear sharing" under which the United States places nuclear weapons on the territory of other NATO nations, namely Italy, Germany, and Turkey. These charges should stay under US control and serve as an "umbrella" for non-nuclear Alliance members. NATO does not consider these agreements to

be a violation of the principle of non-proliferation because they were signed prior to the NPT and because the charges are merely put on the territory of non-nuclear states but are not transferred under their control [10].

Such agreements are criticized by other countries, in particular communist China, which believe that nuclear sharing violates the principle of non-proliferation [11], but this issue has never been the subject of independent consideration, for example in an international court. In addition, there is an obvious difference between the consensual placement of nuclear weapons on a military base and their placement on the occupied territory of another country during an armed conflict, aggression and occupation, not for the protection of this country, but with diametrically opposite aggressor's goals.

The Non-Proliferation Treaty simply does not provide for such a situation, therefore, as in most other issues related to the international legal regime of nuclear weapons, the answer to this question will depend on particular circumstances of Russia's aggression, that must be researched separately.

## **Can Ukraine attack nuclear weapons on the occupied territories?**

In principle, nothing prevents Ukraine from hitting nuclear charges or their carriers if they are brought to its occupied territory by the occupying power. According to the rules of war, any enemy weapon is a lawful military target. The elimination of nuclearweapon carriers will be unquestionably legal. Regardless of whether a nuclear weapon strike results in an explosion, one must account for the costs associated with nuclear pollution.

If the potential contamination remains within the internationally recognized territory of Ukraine, there will be

no violation of international law by Ukraine, as there will be no victim affected by violation. In the case that pollution crosses state borders, environmental law governing transboundary pollution may come into effect, and we will highlight them also.

## **Liability of the aggressor for environmental damage from nuclear weapons**

One can imagine two scenarios in which there is a risk of transboundary nuclear contamination in this conflict. The first is Russia's use of nuclear weapons against Ukraine. The second is a strike by the Armed Forces against Russian nuclear warheads, as a result of which cross-border contamination may occur.

In the first scenario, paradoxically, international law on nuclear arms control is silent on responsibility for the very fact of using nuclear weapons. The International Court of Justice has already answered this question in detail in the Advisory opinion on the legality of the threat or use of nuclear weapons in 1996, concluding that international law does not prohibit the use of nuclear weapons as such. At the same time, its use may lead to a violation of the law of war, since nuclear weapons are indiscriminate and strike all objects in a certain radius, including civilians. Also, it can cause excessive suffering of combatants in violation of the principles of humanity [12].

In addition, Russia's threats to use nuclear weapons, its possible placement by Russia in Ukraine, and the hypothetical use of such weapons by Russia, violate both the requirements of the UN Charter regarding the inadmissibility of the use of force or the threat of force. Russia's political demands on the authorities of Ukraine in this dimension should be

qualified as nuclear terrorism.

After all, according to clause “iii” of part “b” of Article 2 of the International Convention for the Suppression of Acts of Nuclear Terrorism, 2005 in force for Russia, any person (that is, Putin and any of his subordinates) commits a crime under the terms of this Convention, if it is illegal and intentionally uses radioactive material or a device in any way, if there is a release or a risk of release of radioactive material with the intent to compel an international organization or a State to do or refrain from doing an act [18].

Therefore, in this dimension, the relevant actions of Russia will be not only illegal, but also criminal as a component of aggression and nuclear terrorism. Moreover, in the light of the International Convention of 2005, the actions of the Russian political and military leadership can be considered precisely as acts of nuclear terrorism, which will entail individual criminal responsibility of these persons under Ukrainian and international criminal law.

The second aspect is that the use of nuclear weapons causes long-term negative environmental consequences that can cross national borders. Such pollution is also possible under the second scenario, in which the nuclear charge will be destroyed even before its intended use with the risk that nuclear materials will contaminate the air and water.

Existing international norms regarding liability for transboundary pollution are most fully expressed in the Draft articles on Prevention of Transboundary Harm from Hazardous Activities [13] developed by the UN International Law Commission in 2001. This draft reflects the principles of customary international law, which has been repeatedly confirmed by the International Court of Justice of the United Nations, for example, in the Pulp Mills Case [14].

The main principle that applies to transboundary damage is the principle of prevention, which is that "the State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof". That is, cross-border damage in itself may not be a violation of the principles of international law, provided that the state of origin does everything possible to prevent it or reduce it.

In the event of a military conflict that potentially result in transboundary nuclear pollution, the aggressor state would likely be liable for any contamination, as aggression blatantly contravenes the need to "minimize risk". As for the defending party, the proportionality principles of international humanitarian law may be applicable here.

According to this principle, "launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited".

Such a military advantage must be evaluated on the case by case basis, as there is no uniform rule for Ukrainian Army. It is difficult to conceive, however, that a nuclear strike would do less damage than its prevention through the destruction of a nuclear bomb. Therefore, the destruction of a nuclear charge by a strike of the Armed Forces will clearly not breach the concept of proportionality and will satisfy Ukraine's commitment to reduce cross-border pollution impact.

Therefore, if Ukraine strikes Russian nuclear weapons on its own territory and at the same time takes reasonable and proportionate measures to limit pollution, then the responsibility for such pollution for third countries, in particular in terms of pollution of the Black Sea or the atmosphere, will be borne by the aggressor state, because it is it illegally placed sources of pollution on the territory

of Ukraine as part of an aggressive war.

In addition, it should be taken into account that aggression is an international crime and all forms of reasonable and proportionate counteraction to such a crime are legitimate, while the qualification of Russia's actions since February 2022 as a crime of aggression in international law is currently indisputable, it is recorded in a number of international documents.

Therefore, any actions of a third state against Russia in response to such an usage will by definition be legitimate if they take into account the principles of humanitarian and environmental law.

## **And what if nuclear charges will become trophies of Ukrainian Armed Forces?**

In armed conflict, every enemy weapon is a legitimate military target that can be destroyed or seized. From the perspective of international humanitarian law, nuclear weapons are not exempt, and therefore Ukraine has every right to seize nuclear weapons as a trophy during an armed conflict.

However, if Ukraine receives a nuclear warhead as a trophy, the norms of the second article of the NPT should be examined – namely, the obligation not to “receive the transfer of nuclear weapons” and not to “otherwise acquire nuclear weapons”. The analysis of these norms shows that the seizure by force of arms cannot be interpreted either as “receiving the transfer” or as “acquisition” of nuclear weapons.

At the same time, the requirement of Article 60 of the Vienna Convention on International Treaties of 1969 applies to the NPT, which gives a state the right to withdraw from an international treaty in relation to a state that violates it,



in particular by terminating it or suspending it in relation to the violating state [19]. Russia's violation of the NPT in this dimension is that it is obliged not to encourage or induce any non-nuclear state to produce or use nuclear weapons.

It is obvious that the real threats from the Russian Federation to Ukraine regarding the use of such weapons, which have already been made, and the probable Russia's transfer of such weapons for the purpose of possible use in the combat zone already violates this requirement on the part of the aggressor and it prompts Ukraine to respond proportionately. After all, Russia has already violated Article 1 of the NPT, and at the same time, Ukraine has the right to self-defense guaranteed by the UN Charter, and such self-defense can be proportional to the level of aggression.

Therefore, Russia's actions encourage Ukraine to self-defense within the framework of military expediency and thereby Russia already violates the requirements of Article 1 of the NPT. Therefore, Ukraine can obviously terminate or suspend on the NPT requirement against Russia, while Russian aggression continues, under the conditions of proportionality of such termination.

If Ukraine decides to use Russia's own nuclear weapons against the aggressor within the framework of the ongoing conflict, it must take into account the requirements of international humanitarian and international environmental law regarding its use. Responsibility for third countries in this dimension should also be placed on the aggressor state, provided that the Ukrainian Army and authorities take the above-described measures of reasonableness and proportionality.

At the same time, if Ukraine will keep the captured nuclear weapons without use for a long time, in particular after the end of the conflict, then the Treaty on the Non-Proliferation of Nuclear Weapons should be taken into account, and under

such circumstances, the best way out here is either the conclusion of additional agreements or the transfer of the captured nuclear charge to the control of international structures, such as the IAEA.

## **Can international mechanisms prevent nuclear escalation in Ukraine?**

The United Nations Security Council is the primary international organization charged with prevention of armed conflicts including nuclear warfare, yet it has already proved its ineffectiveness in preventing the aggression of one of its permanent members. International procedures, such as the veto power, remain ineffective, and Security Council reform remains elusive and ARC wrote about this in a recent article [15]. The Security Council is likely to engage in yet another pointless discussion about Russia's nuclear threats.

The International Atomic Energy Agency (IAEA) is the primary international organization that monitors and aids states in their peaceful use of nuclear energy. However, the IAEA lacks the ability to regulate nuclear weapons per se. It has no influence over the aggressor, as evidenced by the fact that its representatives' visit to the Zaporizhzhya nuclear power plant had no real effect on the presence of Russian forces at the station or their conduct of hostilities [16]. A state can only accept assistance from the IAEA if it desires such assistance. IAEA can accept nuclear charges from Ukraine if they are seized as trophies, but it can't remove by force nuclear charges from Russia and trophy charges from Ukraine. Therefore, in terms of the storage of such trophy weapons, Ukraine can conclude agreements with other nuclear powers, for example with the USA and Great Britain.

Theoretically, Russia's nuclear weapons might be controlled

within the scope of Russian-American nuclear arms limitation accords, such as START III [17]. In the current context, however, it is inconceivable to foresee American inspectors being granted access to Russian nuclear weapons. Consequently, this technique will not be effective in the Russian-Ukrainian conflict.

It should also be noted about the mechanisms of the International Criminal Court and international human rights law, since Russia's criminal use of nuclear weapons, would certainly be the subject of consideration both within the framework of the Rome Statute and in the regime of UN Human Rights Council's conventional and political-legal mechanisms. But these forms of international legal response are now difficult to call at least as operational ones.

In conclusion, it must be stated that each of the aforementioned international conventions has a basic fault. They are ineffective if a permanent member of the United Nations Security Council and nuclear state goes insane, commits aggression, takes a portion of the territory of another state, and resorts to nuclear threats. These principles are intended to promote cooperation, not conflict. In a conflict, the only effective means of persuading the aggressor is force. And now, only the Armed Forces of Ukraine and Ukraine's partners possess this power.

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