

Nuclear Dangers

A Zoom Discussion with Jacqueline Cabasso, John Burroughs, and Andrew Lichterman
Sponsored by Nuclear Age Peace Foundation
October 27, 2022

REMARKS OF JOHN BURROUGHS

I'll start with the basics. Russia's invasion of Ukraine is an aggressive war in violation of the United Nations Charter, as recognized by the UN General Assembly and the International Court of Justice. Russia is therefore obligated to cease military operations, as the Assembly and Court demanded, and withdraw its forces from Ukraine, as the Assembly demanded. Russia has refused to acknowledge that obligation and continues to wage war, and has purported to annex parts of eastern and southern Ukraine after transparently illegitimate referenda.

The purported annexation of Ukrainian territory underlines the wrongfulness and illegality of Russia's war of aggression. Article 2 of the UN Charter prohibits member states from "the threat or use of force against the territorial integrity or political independence of any state...." In 1974, the UN General Assembly adopted by consensus a definition of aggression. Heading the list of acts constituting aggression was "[t]he invasion or attack by the armed forces of the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof...." The definition of aggression further states that "No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful."

The definition of aggression in the Rome Statute of the International Criminal Court closely tracks the 1974 UNGA resolution. All of this dates back to the aftermath of World War II, when the Nuremberg tribunal declared aggression the supreme crime forming the basis for other crimes, war crimes and crimes against humanity.

Following Russian vetoes of Security Council resolutions demanding Russia's withdrawal from Ukraine, the General Assembly has now adopted three resolutions making the same demand. In the third resolution, on October 12, the Assembly declared the purported annexations to be invalid under international law. 143 governments voted in favor of the resolution, 35 abstained, and five states voted against it.

I will not try to address prospects for and elements of a cease-fire or a permanent settlement, but I do want to underline that the US role in ending the war can be crucial. The United States should do all within its power to help bring the war to a close rapidly in order to limit suffering; to eliminate risks that the conflict will widen and escalate, possibly to nuclear war; and to limit the negative global economic and food security repercussions. This implies that the United States and other states must be ready to lift war-related sanctions in connection with a settlement. It also implies that they must be prepared to accept and support some form of neutrality for Ukraine should Ukraine choose that.

A broader reason for determined efforts to end the war is the need to work toward restoring a relationship with Russia enabling cooperation on nuclear arms control and disarmament, climate protection, public health, and other vital matters of global concern. US energy in helping bring the war to a close is also appropriate in view of the political responsibility of the United States, together with NATO, since the late 1990s in helping to create the conditions for a crisis by taking such actions

as precipitously withdrawing from the Anti-Ballistic Missile Treaty in 2003, subsequently establishing missile defense facilities in Romania and Poland, and opening the door to Ukraine's membership in NATO in 2008.

Nuclear Threats

Russia 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.” That statement without question is a legally cognizable threat, both credible and specific in form. 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. Disturbingly, at the end of September Putin made remarks indicating that the nuclear threat extends beyond the survival of the Russian state to protection of Russian territorial integrity, including the regions of Ukraine purportedly annexed in September.

If a use of force would violate the UN Charter, a threat to engage in such force violates the Charter. 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.” It follows that, under the Charter, a threat to use nuclear weapons as part of an aggressive attack is illegal.

Any threat to use nuclear weapons, whether aggressive or defensive, must also be of a use that would comply with the law applicable to the conduct of hostilities by both sides, 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.” The illegality of a threat to use nuclear weapons under IHL therefore depends on the illegality of the use.

We summarized the main points and sources for the illegality of nuclear use in the Lawyers Committee on Nuclear Policy paper, [End the War, Stop the War Crimes](#). Key rules of IHL require that civilians and civilian infrastructure not be attacked, forbid indiscriminate attacks, prohibit the infliction of severe damage to the environment, require proportionality, and require taking precautions to meet those requirements. In short, nuclear weapons cannot be used in compliance with these rules. Given the illegality of use of nuclear weapons under IHL, under the general principle stated by the ICJ, threats to use such weapons are also illegal.

In summary, Russian threats to use nuclear arms are illegal first because they are an element of the unlawful invasion in violation of the UN Charter. They seek 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.

This feature – the integration of threats to use nuclear weapons into an actual and aggressive attack – distinguishes the Russian invasion of Ukraine from episodes in recent years involving threats of use

of nuclear weapons. A frightening episode was the 2017 exchange of nuclear threats by the United States and North Korea. Importantly, however, threats to use nuclear weapons are illegal under law governing the conduct of warfare regardless of whether the circumstance is one in which the threat is made by an aggressor state or a state acting in self-defense. Russia's threats are illegal in that respect as well.

Institutional Responses

The most important thing to do is to bring the war to an end, as I have already said. That unfortunately has been made more difficult by the purported annexation of regions of Ukraine, a position which will be hard for a Russian government to reverse in any permanent settlement.

But it is also worth considering possible legal and institutional responses to Russian aggression and nuclear threats.

In the International Criminal Court, when jurisdiction is established, individuals can be prosecuted for war crimes, crimes against humanity, genocide, and aggression. Russia is not a party to the Rome Statute creating the ICC. Under the Statute's rules regarding aggression, the ICC consequently does not have jurisdiction over the crime of aggression with respect to Russia. However, pursuant to a declaration made by Ukraine in 2014, the ICC appears to have jurisdiction over war crimes and crimes against humanity committed by both sides on Ukrainian territory. That would extend to any use of nuclear weapons in Ukraine by Russia.

Regarding aggression, the establishment of a special tribunal on aggression has been proposed. That could be done by the General Assembly, or failing that, by ad hoc groups of states or possibly an entity such as the Council of Europe. Because nuclear threats are an element of Russia's war of aggression, they should be considered by such a tribunal. If Russia uses nuclear weapons, a tribunal could be given authority to prosecute individuals for such use as well.

Another possibility, especially in response to a nuclear use, is the suspension of Russia's membership rights in the UN, notably its ability to vote, and to veto, as a permanent member of the Security Council. Russia has now vetoed several Security Council resolutions demanding that Russia cease its aggression and withdraw from Ukraine. However, the UN Charter poses obstacles to suspending the voting rights of a permanent member. It appears to set a recommendation of the Security Council – which could be vetoed by Russia - as a condition for General Assembly suspension or expulsion of a member.

Still, if there was an overwhelming majority of UN membership in favor of suspension of voting rights, including all or most members of the Security Council except Russia, suspension might nonetheless be recognized as legitimate and legal in accordance with the purposes and principles of the UN. So far, China, a permanent member, and India, joined by two other members whose identities vary, have abstained on Council resolutions regarding the invasion.

It would be important to somehow signal, if only informally, the possibility of restricting Russian membership rights in advance of any possible nuclear use, to help dissuade Russia from taking that step.

There is more to be said regarding the international legal landscape, but I will stop here.