

The Ukraine crisis, the nuclear threat and the ICJ Opinion of 1996

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Abstract

The Russian aggression against Ukraine has unleashed new fears of a nuclear war and also due to direct and indirect threats by the Russian side. As a consequence, it seems appropriate to re-open the debate about the legality of the threat or use of nuclear weapons, a debate led to somewhat inconclusive results by the ICJ Opinion of 1996 on the 'Legality of the Threat or Use of Nuclear Weapons'. If some elements of rationality are left in this war, nuclear weapons will not be employed in Ukraine. The major casualty of this rhetoric could, however, be the far-reaching de-legitimisation of nuclear warfare achieved in the past. Therefore, the time has come to re-examine the ICJ assessments of 1996 and to take a clearer stance in this regard which should be more appropriate as to the exigencies of modern international society. It is argued here that now the ICJ would come to different conclusions if seized again with the same questions as in 1996.

1 | AN EARLY WARNING

To read today Professor Mearsheimer's analysis of 'The Case for a Ukrainian Nuclear Deterrent', published nearly 30 years ago (Mearsheimer, 1993, pp. 50–66), might leave a somewhat ghastly impression: How is it possible that a political analyst, shortly after Ukraine had become independent, developed such an accurate prediction of the events that would unfold, slowly but inevitably, in the following decades? A development that would end up in the disastrous Russian aggression against Ukraine (Mearsheimer, 1993, pp. 50–66)? At the center of Professor Mearsheimer's prophecy stood the prescience that abandoning her nuclear deterrent capacity would expose Ukraine, sooner or later, to an invasion by her ancient nemesis Russia. Contrary to what was argued in the early 1990s, it is not a nuclear armed Ukraine who causes a threat of an atomic war but rather the unilateral access to these arms by the aggressor, emboldened also by loopholes left open by the ICJ Opinion on the 'Legality of the Threat or Use of Nuclear Weapons' of 1996.

The nuclear threat is perhaps one of the most insidious elements overshadowing the whole Ukrainian crisis. It is difficult to grasp: Initially, not even Russian President Putin wanted to throw in the nuclear option explicitly. After a series of military defeats of the Russian troops in September 2022, Putin became more explicit as to this threat by stating the following:

If the territorial integrity of our country is threatened, we will without a doubt use all available means to protect Russia and our people. [...] This is not a bluff (Hennigan, 2022).

This is still no clear announcement that the nuclear option is on the table, but it comes close to such a declaration. No doubt, from the beginning of the invasion on February 24, 2022, the nuclear threat was there conditioning all other options by Ukraine, its neighbours and potential allies. This conditioning imposes a restraint on the help extended to Ukraine and to the very measures of self-defence available to this country, a non-nuclear

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power having always to fear not to provoke its neighbour too much with a humbling defeat. This paradoxical situation continues within the United Nations, which should provide the floor for a rules-based solution. In view of the blatant violation of international law by Russia, demands have increased to eliminate this country's veto power within the UN SC (Nollkaemper, 2022). Russia's factual position as one of the strongest nuclear powers furnishes a decisive argument for leaving the situation as it is.

The war in Ukraine could have been stopped before long had Western countries established a no-fly-zone as asked by Ukraine President Zelensky from the very beginning of the conflict. No doubt, such a measure would have saved thousands of innocent lives and spared uncountable children, women and the elderly from atrocities and heinous crimes. US President Joe Biden repeatedly remarked that such a measure would lead to WW III (Wingrove, 2022), which would most likely be a nuclear war.

Thus, it appears that the nuclear threat is the elephant in the room, a threat hardly anyone wants to openly address but which everyone was fearful of. What is most frightening from a lawyer's point of view: This threat seemed to give life to a 'double standard' according to which different rules should apply to parties of a conflict depending on whether nuclear powers (Agence France-Presse, 2022) are involved or not. The same basic rules of international law, such as the prohibition of the use of force according to Article 2 (4) of the UN Charter or the obligation not to recognise as lawful a situation created by a serious breach of international law as set forth in Article 41 of the ILC Draft Articles on State Responsibility should be construed differently in dependence of that question.

In the following it shall be examined how realistic these assumptions are, what national (Russian) and international law says about the nuclear option and finally whether would now be the time for a thorough reassessment of the role nuclear weapons can play as an *ultima-ratio* option in international law and in international relations.

2 | IS THE NUCLEAR THREAT REAL?

As already set out, most recently the Russian President Putin shed off most of his earlier ambiguity as to his preparedness to take recourse to the nuclear option, even though an express and unmistakable stance as to this issue has so far been avoided. Nonetheless, if all elements so far on the table are put together, a worrying picture emerges that warrants the utmost alert:

1. Already the Russian-Belarus military manoeuvre immediately preceding the Russian attack against

Ukraine had a connotation of an exercise in nuclear warfare (Bender, 2022).

2. When aggression started on February 24, 2022, President Putin voiced the so far most explicit threat as to whether Russia will also consider the nuclear option when he warned that any country interfering in Ukraine would 'face consequences greater than any you have faced in history (Rathbun, 2022)'.
3. The nuclear option was afterwards brought into play also by the former Russian President Dmitry Medvedev who, referring to Russia's nuclear doctrine, emphasized that his country could take recourse to atomic weapons even in case of an attack with conventional arms (Boffey, 2022).
 - a. This audacious rhetorical playing of the nuclear card requires a closer look at Russia's nuclear doctrine as set forth in the 'Foundations of State Policy of the Russian Federation in the Area of Nuclear Deterrence (2020)'. A detailed examination of this document reveals, however, that Medvedev's warnings appear to be mostly brinkmanship. The nuclear option for the Ukraine war, even if measured only against the relevant national Russian legal standards (and therefore without further international law considerations), is hardly at hand.
 - b. The Russian nuclear doctrine of 2020 clearly distinguishes between 'nuclear deterrence' and the actual deployment of nuclear weapons. While the former applies to a broad range of threats, the latter option is available only under very restrictive conditions. It is true that according to the Russian nuclear doctrine actual deployment of nuclear weapons appears to be possible beyond the conditions where it is allowed according to international law but nonetheless these conditions are manifestly not given in the Ukraine case. As to the situation where Russia intends to take recourse to nuclear deterrence, this superpower leaves no doubt that nuclear arms are an important, if not an essential element of its security strategy. The at least theoretical option to use nuclear arms shields the whole Russian security policy in peacetime and in wartime:

Nuclear deterrence is carried out continuously in peacetime, during the period of direct threat of aggression, and in wartime, up to when nuclear weapons begin to be used.
(CNA, 2020)

Nuclear deterrence goes so far as to be employable even against 'the uncontrolled proliferation of nuclear weapons, their means of delivery, technologies and equipment for their production (CAN, 2020)' or against 'the deployment of nuclear weapons and their means of delivery on the territories of non-nuclear states (CNA, 2020)'.

In sum, for Russia the nuclear component of its army is the backbone of its military apparatus, designed to compensate, to a certain extent, for the deficiencies of its conventional forces (especially if compared to the firepower of the whole NATO bloc), which came to the light in a dramatic way when the war against Ukraine started on 24 February.

A totally different issue is the actual deployment of nuclear weapons. In this regard, Russia shows more restraint even though the licence contained in the 2020 doctrine goes beyond what was set as the outer border for such a use by the ICJ in its 1996 Opinion on the 'Legality of the Threat or Use of Nuclear Weapons'.

According to Russia's nuclear doctrine, the conditions that make it possible for Russia to deploy nuclear weapons are essentially based on self-defence against existential threats (both by nuclear and conventional arms) against Russia or its allies (CNA, 2020).

As will be shown in the following, this existential threat has been confined more restrictively by the ICJ in its Opinion of 1996 but nonetheless, also in the version presently in force, national Russian rules set a rather high threshold for the use of atomic weapons. In case of aggression by conventional forces, this doctrine requires that 'the very existence of state is in jeopardy (CNA, 2020)' and this formula closely reminds the one chosen by the ICJ in 1996 when it spoke about 'an extreme circumstance of self-defence, in which [the State's] very survival would be at stake (International Court of Justice: LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS 1996, para. 97)'.

At this point, one could object that little is left of the 'nuclear threat' in the Ukraine crisis and consequently this issue could be shelved. Nonetheless, the sabre rattling is real and political commentators continue to emphasize that the nuclear threat should be taken seriously (Korb & Cimbala, 2022). The use of nuclear weapons would not be a rational choice for the Russian government but, on the other hand, the Russian aggression itself, starting on February 2022, was beyond all rational explicability (Horowitz & Wachs, 2022, p. 2).¹ Furthermore, it should not be overlooked that for the aggressor there might be some rationality in the nuclear threat, as he might thereby achieve his objective of territorial conquest more easily, even if this further compounds the illegality of the war. And in the end, the logic of a threat bears in itself also the need to give credibility to the menace.

But there is more to this threat: Tinkering with the idea of a nuclear war, as implicit as the threat may come across, lends a dangerous twist to the general discussion on nuclear weapons, having been characterized in the last decades by attempts to repudiate nuclear arms as legitimate instruments of warfare (A new era, 2022, p. 16).

In view of the disastrous consequences of such a war, there must be a strong interest from the outset to

inhibit access to the rhetoric that is possibly conducive to such a conflict.

In this context, first of all, an inquiry appears to be necessary as to the extent to which the international legal situation contributes to uncertainties and threats present in this area. To this end, a square look has to be taken at the ICJ Opinion of 1996 which has set the legal bedrock from which each discussion on the legality of the threat or the use of nuclear weapons has to start.

3 | THE ICJ OPINION ON THE 'LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS' OF 1996 – STRENGTHS AND WEAKNESSES

The 1996 Opinion is to be praised for the fact that it basically delegitimizes the use of nuclear weapons. It has, however, also been criticised for the loopholes it leaves open and for uncertainties in this area it may have contributed to.

But first to its strengths: The Court examined in particular the conditions posed by international humanitarian law and elaborated on three elements the use of nuclear weapons would clearly conflict with: the principle of distinction, according to which indiscriminate attacks on civilians are prohibited, the prohibition of causing unnecessary suffering and the principle of humanity in warfare, enshrined in the Martens clause (Art. 1 (2) Protocol Additional to the Geneva Conventions of August 12, 1949, p. 3; Bothe, 2016).

According to the ICJ, in view of the unique characteristics of nuclear weapons the use of such weapons seems scarcely reconcilable with respect to these requirements.² The Court, in the operative paragraph (2) E of the Opinion famously stated that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conduct, and in particular the principles and rules of humanitarian law'. While the use of the word 'generally' has given rise to considerable debate as to the meaning and reach of the prohibition mentioned the better interpretation seems to be to see in this term not an emphasis on the prohibition³ but rather an expression of the intent to leave certain room for the prohibition not fully to apply. The extent of this limitation is to be directly related to the following sentence, introduced by the word 'however':

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

Further above, in its considerations at para. 95, the Court stated that it 'does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance'. The Court referred furthermore to the 'policy of deterrence' by which nuclear powers were able to assure a rather long period of peace, relying on their atomic stockpile without actually having to make use of it (Koroma, 1996).

These findings are remarkable in several senses:

1. On a positive note, it has to be emphasized that rejecting the admissibility of nuclear weapons as permissible means of legitimate warfare is already a great step forward.
2. On the other hand, however, it is surprising to see that the Court has introduced a new concept in international law, the 'State survival' that should constitute a cause of justification in exceptional circumstances. It is difficult to fathom what this concept of State Survival really means (Koroma, 1996, p. 571).
3. Furthermore, it is dogmatically problematic to argue that humanitarian law overrides other interests in principle but not in general. In other words, State survival could trump humanitarian law, also some of its main tenets, even though this might happen only under very limited circumstances.⁴ This assumption must give rise to strong objections (Koroma, 1996, p. 563). It can well be argued that such an assumption, contestable as it might have been in 1996, is utterly unsustainable in the year 2022.
4. A further point of criticism regards the other consequences of the use of nuclear involves outside the realm of humanitarian law. This regards in particular environmental law on which the Opinion of 1996 is weak. Also, in this regard, it can be argued that we are now faced with a far larger sensibility that should further corroborate the position according to which the use of nuclear weapons is generally prohibited in international law with no exception given.

In her dissenting opinion, Judge Higgins opined about the lack of detailed reasoning on the basis of which the Court had come to the conclusions mentioned.⁵ This might have implied a sophisticated examination of the reach of humanitarian law in the context of self-defence to assure 'state survival', and a balancing of the respective values and goals according to the principles of proportionality. Very appropriately, it has been remarked that the Court was well advised not to follow this 'Higgins approach' as this would have implied further legalization of a factual situation, relating to the 'killing of the innocent' that should not be legalised at all (Koskenniemi, 1999, p. 488; Ranganathan, 2017, pp. 409–433). To preserve the 'narrative of progress' and to defend the 'utopian perspective, it appears to

be better not to explicitly acknowledge and thereby maybe to codify state practice that raises fundamental moral and value issues. On the other hand, this apparent 'non-liquef' only scarcely managed to cover the fact that nonetheless a stance was taken. Not to defend the fundamental values here at stake in an uncompromising form meant also to legitimize the underlying compromise to a certain degree, if only in the sense that thereby the sovereign freedom to act according to the Lotus principle would be strengthened. While recourse to such 'constructive ambiguity' might have been acceptable in 1996, the time might have now come to take a bolder stance, also in view of events like the Ukrainian conflict.

4 | CONCLUSIONS

Professor Mearsheimer actually warned not to misunderstand his plea for a nuclear armed Ukraine as a general advocacy for nuclear proliferation in Europe or elsewhere (Mearsheimer, 1993, p. 51) It is rather the case that ways have to be found to engage in a process of worldwide nuclear disarmament, accompanied by credible guarantees for those countries which abandon nuclear arms and by an uncompromising repudiation of the use of nuclear arms or the threat with them. The world community has sorely missed out on the last two requirements.⁶

There can be no doubt that the very narrow escape gate opened by the ICJ in 1996 in order to allow the use of nuclear weapons under absolute exceptional circumstances is predicated upon conditions surely not present in the Ukraine case.

Nonetheless, we were confronted with extreme distortions of reality, beginning with the abuse of history tales that should justify aggression (Hilpold, 2015) and with the attempt to portray the victim of a blatant aggression as the real perpetrator of the violation while the aggressor should be the protective power intervening to the rescue of the alleged victim.

It is not really difficult to divine what is to be meant by 'State Survival' but nonetheless this concept seems to lend itself to easy abuse. Based on Russia's nuclear doctrine and President Putin's denial of Ukraine's right to sovereign existence Western intervention in support of Ukraine, strong enough to repel Russian intervention forces, could easily be interpreted as a justification for the use of nuclear weapons.

No doubt, this would be a self-destructive, suicidal act by the Russian government but how should lawyers ensure or even impose rational behaviour if all acts set so far stand in outright contrast to common sense or even sanity?

Furthermore, as remarked above, already allowing a seemingly 'abstract' and 'objective' discussion about the conditions for a permissible use of or threat with nuclear

weapons is not neutral at all because it is predicated on at least theoretical permissibility of such use or threat.

Consequently, the following approach is suggested: The time has come to close the loopholes opened by the ICJ Opinion of 1996 and to bring clarity to an area which is of essential importance to mankind. It is argued here that already in 1996 the principles of humanitarian law have been much firmer than the ICJ then dared to admit.⁷ In the meantime, they have become even stronger, together with the requirements posed by international environmental law, by the introduction of the sustainable development goals (SDGs)⁸ and the formation of a new set of norms of international criminal law. If read together, these norms evidence a mutually reinforcing character presenting the questions submitted to the Court in an entirely new light (Skiljan, 2021, pp. 418–444). Constructive ambiguity may be useful to create a common platform for further dialogue when interests are in conflict. But there must be also a moment when clarity has to be created in face of reckless abuse risking undermining the very basis of civilisation. This time is now.

As to the options available to bring about such a clarification, they are multi-layered. In this, a prominent role can be played by the UN General Assembly which has already taken a clear stance as to the Ukraine war by demanding that Russia immediately end its military operations in Ukraine.⁹ The legal basis for this action can be found immediately in the UN Charter as interpreted by the 'Uniting for Peace'-Resolution 377 A (V) of 3 November 1950, explicitly cited in UNGA Res. ES-11/1 of 2 March 2022.¹⁰ The nuclear threat could be addressed in a follow-up resolution also in view of the growing number of elements hinting at this threat since 24 February 2022.¹¹

Of considerable value could be an attempt to seize again the ICJ with the question this Court examined in 1996.¹² This would be an unprecedented move but in view of the developments international law has undergone since 1996, it is highly likely that an ensuing opinion would look quite different on many points than the previous document (Falk, 2021, p. 333).¹³

Another path worthy of exploring could also concern the question of whether the Responsibility to Protect (R2P) could be revitalised in this context. As is well known, this concept, formally endorsed by the State Community in the 'Outcome Document' of the World Summit 2005,¹⁴ was attributed a rather narrow meaning as it applies only to genocide, war crimes, ethnic cleansing and crimes against humanity. Far-reaching hopes set into this concept were subsequently dashed as worries have come up that the implementation of R2P, often misunderstood as a right to humanitarian intervention in new clothes, could entail too far-reaching encroachments on sovereignty (Hilpold, 2014).

In light of the fact that the use of nuclear weapons implies one of the most radical threats to human life, to

the environment and to the very survival of mankind, the suitability of R2P for extensive construction or, if necessary, of a new definition, could at least be considered. The use or threat of use of nuclear arms could furthermore constitute a crime falling under the jurisdiction of the International Criminal Court (Skiljan, 2021, pp. 418–444). A clear condemnation of the use of or the threat with nuclear weapons, by the way, contained already in the Human Rights Committee General Comment No. 36 of 2018 (General Comment No. 36, CCPR/C/GC/36, para. 66),¹⁵ could open up a whole toolbox of soft law instruments designed to lead to stricter value orientation in international relations (Black-Branch, 2021, p. 297).¹⁶ 'Stigmatizing' nuclear weapons (Black-Branch, 2021, p. 180) could generally increase the costs of this instrument rendering it less attractive and in the long run economically and politically perhaps unsustainable.

The Russian aggression against Ukraine has raised a larger number of urgent and pivotal questions of international law. Even though the questions associated with the possible use of nuclear weapons have fortunately maintained an abstract character as of yet, the related threats are real, in particular also as to the fact that thereby the 'sense of the innate wrongness of nuclear weapons' is going to diminish, creating a dangerous precedent for the future (The Economist, 2022, 16). The state community would be well advised to provide a more consistent answer to this threat than the one that can be deduced from the 1996 ICJ Opinion.

ACKNOWLEDGEMENTS

The author thanks the anonymous reviewer for constructive comments on an earlier version of this contribution. Open Access provided by the University of Innsbruck.

DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analyzed in this study.

ENDNOTES

- ¹ As it was very aptly said, the more one doubts rationality in this Russian politics, the greater the risks of a nuclear escalation appear.
- ² ICJ Reports 1996, para. 95.
- ³ This seems to be the position taken by Judge Ranjeva in his separate opinion, at 294.
- ⁴ Very explicitly in this sense Sep.Op. Judge Fleischhauer, p. 306.
- ⁵ See Diss.Op. Judge Higgins, para. 9.
- ⁶ See the 'Budapest Memorandum' of December 5, 1994 signed by Ukraine, Russia, Britain and the United States, containing security assurances for Ukraine in exchange for Ukraine becoming a non-nuclear weapon state.
- ⁷ See only the erudite study by Judge Weeramantry in his Diss.Op. of 1996 as well as Cancado Trindade (2010), 416–418.
- ⁸ For example, the Sustainable Development Goals (SDGs) of 2015 (A/RES/70/1, Resolution adopted by the General Assembly on Sep-

tember 25, 2015, Transforming our world: the 2030 Agenda for Sustainable Development), Goal 3 ('Ensure healthy lives and promote well-being for all at all ages') and Goal 16 ('Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels') seem to be particularly relevant in this context. As important as it may be, the relationship between the permissibility of the use of nuclear arms and the SDGs has yet to be explored.

⁹ See UNGA Res. ES-11/1 of March 2, 2022, adopted with 141 votes in favour, 5 against and 35 abstentions. The requests set forth in this resolution were reiterated in UNGA Res. ES-11/2 of March 24, 2022.

¹⁰ It has to be remarked that UNGA Res. ES-11/1 explicitly emphasizes that 'lack of unanimity of the permanent members of the Security Council at its 8979th meeting has prevented it from exercising its primary responsibility for the maintenance of international peace and security'.

¹¹ At least indirectly, Res. ES-11/1 already hinted at this issue when it referred to the 'Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Budapest Memorandum) of 5 December 1994'. By giving up its nuclear capacity in the early 1990s, Ukraine made an advance concession built on good faith. If, in hindsight, this act of good faith should appear to be an act of credulity (as of yet this is not fully clear as at least the assurances by Western states could be seen to materialize by the consistent military, economic and financial aid given by these countries) general distrust in assurances of this kind could result disrupting a central pillar on which global nuclear disarmament is built.

¹² As is well known, in 2016, the ICJ denied jurisdiction in a contentious case raised by the Marshall Islands against India, Pakistan and the United Kingdom ('Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament') concerning a somewhat related issue meaning of the 'obligation to negotiate in good faith' under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons. However, in a proceeding requesting an advisory opinion jurisdiction would most probably not be an issue.

¹³ Already in 1997, Richard Falk envisaged a general banning of nuclear arms as an immediate need resulting from an emerging 'global law of peoples' (Falk, 1997).

¹⁴ A/60/L.1, September 20, 2005, paras. 138–140.

¹⁵ According to the HRC, the use of threat of use of nuclear arms may even amount to a crime under international law.

¹⁶ An example in kind, applicable in particular in the area of economic relations, are the rules of Corporate Social Responsibility (CSR) intended to nudge economic actors to socially responsible behaviour. The consistent application of these rules could create considerable costs for nuclear weapon states (NWS).

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How to cite this article: Hilpold, P. (2023) The Ukraine crisis, the nuclear threat and the ICJ Opinion of 1996. *Global Policy*, 14, 396–402. Available from: <https://doi.org/10.1111/1758-5899.13201>

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