

The ICC and Nuclear Weapons

December 2022

The 2022 session of the Assembly of the States Parties to the Rome Statute is being held amid an alarmingly increased risk that nuclear weapons will be used. With Russia's threats to use nuclear weapons against anyone intervening in the the Ukraine conflict, responses from other governments that imply possible retaliation with nuclear weapons, commentary and analysis examining scenarios in which nuclear weapons might be used, military exercises involving nuclear weapons, and testing by North Korea of nuclear-capable ballistic missiles, the idea of using nuclear weapons is being normalized, and the decades-old taboo against their use is being eroded. We believe that the risk of nuclear conflict is now as high as it has ever been.

Consequences of use of nuclear weapons

Any use of nuclear weapons, however "limited" or "tactical", would have wide-ranging and catastrophic humanitarian consequences. There is no way to use a nuclear weapon without causing widespread civilian injury, loss of life, and severe environmental damage. A single nuclear detonation would likely kill hundreds of thousands of civilians and injure many more; radioactive fallout could contaminate large areas across multiple countries. Studies and analyses over many years by UN agencies and the International Committee of the Red Cross have consistently found that there could be no effective humanitarian response following the use of a nuclear weapon. Medical and emergency response capacities would be immediately overwhelmed, exacerbating the already massive number of casualties. Widespread panic would trigger mass movements of people and severe economic and social disruption.

Multiple detonations would be much worse, killing millions of people and injuring tens or hundreds of millions, causing devastating environmental damage, and triggering climate change and global famine. A study published in *Nature Food* in August 2022 found that even a limited, regional nuclear conflict could lead to the deaths of over 2 billion people.

Nuclear weapons and the Rome Statute

Use of nuclear weapons is not explicitly covered by the Rome Statute, in contrast to the other forms of weapons of mass destruction – chemical and biological weapons – the use of either of which is explicitly defined as a war crime by Article 8 (b) (xviii) and (xxvii) respectively.

Nevertheless, given the immense and indiscriminate destructive power of nuclear weapons and their wide-ranging catastrophic humanitarian consequences, use of nuclear weapons would constitute a war crime under several other provisions of Article 8 (b), including:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe

damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

In some circumstances, use of nuclear weapons could constitute a crime against humanity as defined in Article 7.

These provisions of the Rome Statute should also be viewed in light of the 1996 International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, which stated that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law”.

Russia’s actions have also highlighted another way in which nuclear weapons may be connected with war crimes. Russia has used the threat of use of nuclear weapons as a means to facilitate its illegal aggression against Ukraine and to restrict the range of possible responses from the international community, thereby providing a cover for war crimes and violations of human rights. Any of the world’s nine nuclear-armed states could employ a similar strategy at any time.

Change in legal status of nuclear weapons

The international legal regime surrounding weapons of mass destruction has recently changed significantly in ways which states parties to the Rome Statute may wish to consider. With the entry into force on 22 January 2021 of the United Nations Treaty on the Prohibition of Nuclear Weapons (TPNW), nuclear weapons are now comprehensively prohibited under international law, in exactly the same manner that chemical and biological weapons are prohibited by the 1993 Chemical Weapons Convention and the 1972 Biological Weapons Convention respectively. This change has rendered the Rome Statute’s different treatment of nuclear weapons anomalous. It has also altered the basis for the ICJ’s 1996 conclusion that “There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such”.

Further information

Consequences of use of nuclear weapons:

https://www.icanw.org/catastrophic_harm

<https://www.nature.com/articles/s43016-022-00573-0>

UN Treaty on the Prohibition of Nuclear Weapons:

<https://www.un.org/disarmament/wmd/nuclear/tpnw/>

https://www.icanw.org/the_treaty

ICJ Advisory Opinion on the on the Legality of the Threat or Use of Nuclear Weapons:

<https://www.icj-cij.org/en/case/95>