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The inadmissibility of nuclear threats within the NPT regime

Working Group 2 Policy Brief

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This paper reflects discussions among members of the ELN's project **Protecting the Non-Proliferation Treaty**. The project seeks to preserve the multilateral nuclear non-proliferation regime and prevent further erosion of the nuclear taboo and the Nuclear Non-proliferation Treaty (NPT). Bringing together an intergenerational, pan-regional Network of experts, it works to identify pathways to success in the eleventh review cycle, taking a holistic approach to the NPT and its three pillars. We are grateful for comments and feedback from several NPT member state officials on drafts of this paper.

For more information on the project please go to www.europeanleadershipnetwork.org/protecting-the-non-proliferation-treaty.

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Introduction

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) is regarded as the cornerstone of the global nuclear non-proliferation regime and an essential foundation for the pursuit of nuclear disarmament. The NPT should also serve as a key forum to manage risks and disagreements surrounding nuclear weapons and technologies, including the threat and risks of use. Since Russia's full-scale invasion of Ukraine in February 2022, the concrete risks of nuclear use have increased, but the international community has yet to find appropriate measures to decrease or evade them. In this context, debate about Russian nuclear threats and the endangerment of nuclear power plants in Ukraine dominated discussions at the NPT Review Conference (RevCon) in August 2022. At the same time, Russian officials denied that the Kremlin's statements constituted a "threat to use nuclear weapons"¹ and defended its defence policy and the role of nuclear weapons in it as "purely defensive in nature."²

Nuclear threats, implicit or explicit, are not new; short of a legal norm, the practice and tradition of nuclear non-use known as the 'nuclear taboo' has been put under stress in the past decade by the normalisation of 'loose talk' surrounding nuclear weapons and their possible use.³ Yet Russian leaders have made that erosion more severe by their implicit and explicit nuclear threats since their full-scale invasion of Ukraine.⁴ In defense of the NPT and the norms underpinning the regime, NPT member states clearly condemned specific nuclear threats by a nuclear weapon state for the first time at the 2022 RevCon.

It is now vital that the NPT RevCon examines what specifically constitutes a 'nuclear threat', and whether the understanding of nuclear threats has changed with Russia's 2022 war of aggression against Ukraine? Is it possible to distinguish between 'defensive' and 'offensive' nuclear threats, politically, legally, and morally? How should NPT member states react to any nuclear threats and what would be achievable goals to set for the next review cycle?

The NPT should serve as a key forum to manage risks and disagreements surrounding nuclear weapons and technologies, including the threat and risks of use.

Nuclear threats in theory and practice

A nuclear threat, implicit or explicit, can either be a threat to use such weapons in order to deter aggression, or it can be used as a shield against aggression.

Nuclear weapons have only ever been used twice in war, when the United States attacked the Japanese cities of Hiroshima and Nagasaki on August 6 and 9, 1945. The practice of nuclear deterrence that has developed since 1945 is based on the credible threat of using nuclear weapons against an adversary. Nuclear threats were repeatedly levied on various occasions early in the Cold War, including by the United States to deter China during both the Korean War and in the 1954-55 crisis in the Taiwan Strait, as well as famously during the 1962 Cuban Missile Crisis, where they were used by both the Soviet Union and the United States.⁵

A nuclear threat, implicit or explicit, can either be a threat to use such weapons in order to deter aggression, or it can be used as a shield against aggression. In practice, nuclear armed states have limited the intended addressees, aims, and objectives of these threats to other nuclear armed states and allies and have exerted degrees of threats in terms of openness and nature of the threat.

In any case, nuclear deterrence, famously referred to by Thomas C. Schelling as “the threat that leaves something to chance”,⁶ is tantamount to threatening to cause an immense amount of harm. Immediate effects of a nuclear weapon explosion include a thermal flash, a blast wave, nuclear radiation, and radioactive fallout. Depending on location, yield, type of explosion, and many environmental factors, nuclear weapons would have varying, but uniquely devastating, consequences. Long-term effects span generations and include rising levels of various types of cancer, profound effects on the reproductive system, and environmental contamination. The detonation of a hundred nuclear weapons would suffice to cause nuclear winter resulting in the starvation of up to two billion people globally due to food shortage.⁷ The further cascading societal and infrastructural effects of a large-scale nuclear conflict on the global economy are still unknown but are predicted to be catastrophic.

While not legally prohibited, the International Court of Justice (ICJ) advised in 1996 that the use of nuclear weapons falls under the general rules of international humanitarian law (IHL), also referred to as the law of armed conflict. The effects and impact of nuclear weapons raise several concerns under IHL, especially when it comes to protecting civilians and civilian objects. This includes the prohibition of indiscriminate attacks, the requirement to take precautions in attacks, and the rule of proportionality. The ICJ Advisory Opinion draws attention to this facet of nuclear threats, stating that “whether a signalled intention to use force if certain events occur is or is not a ‘threat’ [...] depends on various factors [...] 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”.⁸

Another important point of reference, predating the test and use of nuclear weapons, is the UN Charter. Article 2.4. of the Charter states that “[a]ll 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.”⁹

Nuclear deterrence and the nuclear taboo have coexisted for decades. Though seemingly incompatible, each has strengthened and weakened the other at different moments; today they coexist in a delicate balance. Some states justify basing their own (and

their allies’) state security on nuclear weapons by stating that they would only use nuclear weapons for defence purposes or solely in retaliation, in which case the retaliation should be proportionate.¹⁰ For example, the G7 members, who either possess nuclear weapons or are in a security alliance with the United States, stated recently that their policies are “based on the understanding that nuclear weapons, for as long as they exist, should serve defensive purposes, deter aggression, and prevent war and coercion”.¹¹ Similarly, Russian officials argue that Moscow’s recent nuclear threats are simply deterrents to direct NATO or US assistance for Ukraine.¹²

However, whether a nuclear-armed state’s statements constitute legitimate ‘nuclear deterrence’ or illegitimate ‘nuclear threats’ depends on “whether one is making the threat or facing it” and is thus highly political.¹³ This continues today where nuclear threats are either condemned or justified as legitimate, depending on subjective views or contexts. Whether a statement is interpreted as a persuasive or a ‘credible’ threat depends on the successful communication of nuclear capabilities and a degree of psychological ambiguity.

In his address at the outset of Russia’s full-scale invasion of Ukraine on 24 February, 2022, President Putin attempted to leverage this ambiguity when he promised “consequences will be such as you have never seen in your entire history”¹⁴ in the event of outside involvement in defending Ukraine against the Russian Federation. Without even mentioning nuclear weapons, this message was widely interpreted as a threat to use nuclear weapons, despite the uncertainty of their usefulness on the battlefield. President Putin and his administration dressed up their nuclear threats as defensive. They deliberately chose their words and the messenger when referencing the survival of the Russian state as the sole reason for potential nuclear weapons use. Moscow intentionally left the interpretation of his statement up to the listeners and readers, thereby blurring the lines even further.

Generally, any state that possesses nuclear weapons and acknowledges such an arsenal is theoretically (if not practically) constantly threatening to use nuclear weapons, restricted by necessary and sufficient conditions of their choosing. And while one can and should distinguish between rhetoric and action, the capacity and willingness to acquire the bomb has leveraging power in itself – a practice often referred to as hedging.

Many analysts claim that nuclear deterrence is used to maintain the status quo by preventing aggression through the threat of a massive counter-attack. However, the Russian threat to use nuclear weapons in the context of the war of aggression against Ukraine seeks to change the status quo: specifically, their political objective is to facilitate Ukraine’s surrender.¹⁵ This is in line with the common distinction made between nuclear deterrence on the one hand, which is intended to prevent an action from occurring to maintain the status quo, and nuclear coercion on the other, which seeks to force a rival to behave in a certain way.¹⁶

Most Chinese understandings of ‘nuclear deterrence’ diverge from US and other Western understandings of the concept, as they view offensive and defensive nuclear threats as indistinguishable. As Li Bin points out; in the context of territorial disputes, the lines

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between both conventional and nuclear deterrence as well as between nuclear deterrence and coercion can become blurry (as other scholars attest as well), as it is difficult to determine which party first challenged the status quo. Because Chinese nuclear scholars see various issues in a conflict as interrelated, and pay close attention to conflict escalation, they see nuclear coercion and nuclear deterrence as indistinguishable. For them, 'nuclear deterrence' carries the same meanings as 'nuclear coercion' to a Western audience.¹⁷ This informs China's no-first-use policy.

Legal and moral aspects of nuclear threats

The decade-old 'Humanitarian Initiative' is focused on highlighting the humanitarian and environmental consequences of nuclear use, including in tests. It has accelerated the debate on the moral and ethical implications of nuclear weapons. Building on conferences held in Oslo, Nayarit, and Vienna in 2013 and 2014, culminating in the Treaty on the Prohibition on Nuclear Weapons (TPNW), the Humanitarian Initiative has challenged the framework of nuclear deterrence as morally unacceptable, based on the understanding that any use or threat of use of nuclear weapons, like other weapons of mass destruction, is inhumane and is incompatible with IHL. Supporters also argue it is indefensible from a security perspective, given the growing evidence of the catastrophic global effects of nuclear conflict for combatants and noncombatants alike.

With the advent of the Humanitarian Initiative, reference to the inadmissibility of the threat of use of nuclear weapons has been steadily building in UN contexts. In 2014, the UN General Assembly resolution on the 'Convention on the Prohibition of the Use of Nuclear Weapons' reiterated the need for a multilateral, universal, and binding agreement prohibiting the use or threat of use of nuclear weapons.¹⁸ In 2018, the UN Human Rights Committee stated that the "threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law".¹⁹ The TPNW entered into force in 2021, having been adopted by 122 countries at the United Nations General Assembly in 2017, and forbids States Parties from "us[ing] or threaten[ing] to use nuclear weapons or other nuclear explosive devices".²⁰ This effort has helped to broaden the discourse on nuclear weapons to examine the catastrophic effects of any nuclear weapons use.²¹

As the ICJ found that threatening the use of nuclear weapons is generally contradictory to international law applicable in armed conflict, but failed to "definitively conclude whether the threat or use of nuclear weapons would be lawful under extreme circumstances of self-defence in which the very survival of a State would be at stake",²² there is ostensibly a narrow set of scenarios in which nuclear threats could be termed legal. Yet this 'exception' of self-defence seems to have become the rule: even Vladimir Putin's recent statements in the context of Russia's war of aggression against Ukraine reference the justified use of nuclear weapons in a scenario of "existential threat"²³ to Russia. Though the exercise of the right to self-defence is limited by the principles of necessity and proportionality, some legal scholars have argued that this rule, softened by a standard of 'self-defence', was a political calculus to defend the court's legitimacy.²⁴

Addressing nuclear threats within the NPT framework

The suggestion that only disarmament can offer a guarantee against the threat of nuclear weapons use could be interpreted as a recognition that any possession of nuclear weapons presents some degree of a threat of use.

While the ICJ has offered its own definition of nuclear threat in the context of its Advisory Opinion as “a signalled intention to use force if certain events occur”,²⁵ reference to the “threat of use” in NPT official documents has mostly remained limited to the context of negative security assurances. For example, at the 1995 Review and Extension Conference, States Parties declared that “further steps should be considered to assure non-nuclear-weapon-States (NNWS) party to the Treaty against the use or threat of use of nuclear weapons”.²⁶ The 2010 and 2015 Final Documents recall United Nations Security Council resolution 984 (1995), and note “the unilateral statements by each of the nuclear-weapon States, in which they give conditional or unconditional security assurances against the use and the threat of use of nuclear weapons to non-nuclear-weapon States Parties to the Treaty and the relevant protocols established pursuant to nuclear-weapon free zones” – albeit these are not legally binding.²⁷ The United States, for example, provides negative security assurance to non-nuclear NPT member states under the condition of compliance with the treaty.²⁸

In 2000, the NPT RevCon Final Document recognized that complete nuclear disarmament, or the “total elimination of nuclear weapons” constitutes the “only absolute guarantee against the use or threat of use of nuclear weapons”²⁹, a sentiment often repeated by UN Secretary General Antonio Guterres and other high-ranking UN officials.³⁰

This language was reiterated in the 2010 Final Document and Action Plan. Notably, the 2010 Action Plan called for the extension of existing negative security assurances and in Action 7 tasked the Conference on Disarmament (CD) to “immediately begin discussion of effective international arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons, to discuss substantively, without limitation, with a view to elaborating recommendations dealing with all aspects of this issue, not excluding an internationally legally binding instrument”.³¹

The suggestion that only disarmament can offer a guarantee against the threat of nuclear weapons use could be interpreted as a recognition that any possession of nuclear weapons presents some degree of a threat of use. This leads naturally to the question: to what degree does possession of nuclear weapons constitute a nuclear threat, and what might NPT states hope to achieve by determining the (in)admissibility of nuclear threats?

The 2015 and 2022 draft Review Conference Final Documents repeated these questions, highlighting that no progress on reducing nuclear threats had been made.

In August 2022, the P3 states (France, the United Kingdom, and the United States) issued a joint statement in which they reaffirmed their commitment to the security assurances given to NNWS party to the NPT, members of nuclear weapon free zones (NWFZs), or their allies and partners.³² Importantly, these security assurances do not represent legally-binding guarantees.

Additionally, a sub-group of so-called ‘umbrella states’ are NNWS under the NPT, but base their national security on nuclear weapons of other states. These are part of military alliances that include positive security assurances by NWS, and (almost exclusively) are not members of NWFZs. NWS and their allies and partners, as well

as some NNWS, argue that nuclear weapons and deterrence help to safeguard international peace, security, and stability.

NWS outside the NPT regime have chosen different approaches to security assurances: while India proclaims a no-first-use policy, Pakistan maintains negative security assurances towards NNWS. As Israel has opted for opacity regarding its nuclear arsenal, it has not publicly disclosed any information on use scenarios or intentions. North Korea proclaims the defensive nature of its nuclear arsenals but has voiced threats towards both NWS and NNWS (particularly Japan, the United States, and South Korea).³³

Beyond the Final Documents, several other NPT documents, including chairs' summaries, summary records, and reports by the Main Committees in other formal and informal fora, as well as statements by groups of states and individual states have tackled the issue of nuclear threats over the years. For example, the 1995 RevCon Summary Record reflects a shared view that it is in NWS' (security) interest to protect the NPT and these states therefore "had strong motives to refrain from nuclear threats and instead to provide credible assurances designed to allay the concerns of others".³⁴ The document also states that the NPT "built a barrier against nuclear threats by establishing a global norm of non-proliferation", while the Chair Summary of the 2018 PrepCom also named the NPT as "instrumental in containing nuclear threats".³⁵

Recurring themes from statements referring to nuclear threats largely reflect NWS' individual interpretations of 'nuclear risks', which frequently include risks related to proliferation and new nuclear weapons programs (specifically India, Pakistan, Israel, and DPRK) and nuclear terrorism. In the NPT context, NWS tend to see NNWS as having "a legitimate interest in not being subject to nuclear threats or attacks"³⁶ – as long as those NNWS are in compliance with the NPT. Furthermore, NWS' threats of nuclear use towards other NWS (and their allies) are generally seen as acceptable. NWS repeatedly refer to the defensive nature of their nuclear weapons arsenals, with China specifically referencing its no-first-use policy.³⁷

In contrast, many NNWS have steadily criticised this purely declaratory approach by the NWS and have demanded legally binding, unconditional negative security assurances and security guarantees, instead of political declarations pending complete disarmament as envisioned by Article VI.³⁸ This would raise the commitment of NWS to not issue nuclear threats against NNWS to the legal level and would represent a more robust commitment to the nuclear taboo. NWS have historically been reluctant to commit to binding, universal NSAs for fear of constraining potential military options in the future and weakening their security umbrellas.

The Non-Aligned Movement (NAM) is a leading voice in this endeavour towards legally-binding commitments. For example, at the 1995 RevCon, a NAM Working Paper demanded that "a conference should be convened at an early date to work on a protocol to the Treaty on the Non-Proliferation of Nuclear Weapons, on the prohibition of the use or threat of use of nuclear weapons against non-nuclear-weapon States Parties".³⁹ Since 2010, NAM Working Papers have questioned NWS' reliance on nuclear weapons stating that "[u]nless the role of nuclear weapons in the context of security is delegitimised and existing nuclear doctrines

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are abandoned, there will always be a threat of a nuclear arms race and an escalation of nuclear threats”, reiterating the statement that the “total elimination of nuclear weapons is the only absolute guarantee against the use or threat of use of nuclear weapons”.⁴⁰ NPT States Parties should explore to what extent any nuclear threats can be compatible with Article VI obligations and Article 2.4 of the UN Charter, and further clarify whether it is possible to distinguish between varieties of ‘nuclear threats’ and their relationship with such obligations. Other practical proposals by member states included the expansion of “[c]o-operative threat reduction programs [that] have proven to be an effective tool for reducing post-Cold War nuclear threats and pre-empting new ones”⁴¹ and “concrete action to combat the nuclear threats”⁴² through the TPNW instrumentarium.

It is important to note that many civil society organisations have been long argued that possession of nuclear weapons should be considered a threat in itself and only disarmament can help to rid the world of the dangers of nuclear weapons. However, according to lexical data analysis conducted by the authors of this paper, condemnation of concrete nuclear threats in the NPT context, by NPT member states, only began after Russia’s February 2022 invasion of Ukraine.⁴³

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Reactions to Russian nuclear threats in the context of the war of aggression against Ukraine

The first draft of the 2022 RevCon Final Document included this paragraph: “The Conference expresses concern at the increase in nuclear rhetoric and nuclear threats, and its impact on international peace and security as well as the integrity and credibility of the Treaty”.

In June 2022, the states parties to the 2017 TPNW issued a strong consensus political statement at the first meeting of states parties (1MSP). The statement asserts that “any use or threat of use of nuclear weapons is a violation of international law, including the Charter of the United Nations”.⁴⁴ States Parties further condemned “unequivocally any and all nuclear threats, whether they be explicit or implicit and irrespective of the circumstances”.⁴⁵ This ‘Vienna Declaration’ by the TPNW States Parties constituted the most strident multilateral indictment of all nuclear threats, including Russia’s.⁴⁶

Before August 2022, NPT conferences have discussed ambiguity regarding nuclear threats mostly in the context of states not party to the NPT, who could “possess significant unsafeguarded nuclear facilities and might have acquired nuclear weapon capability.”⁴⁷ However, the discussion has shifted in light of Russia’s full-scale invasion and issuance of nuclear threats.

While all TPNW member states are also NPT member states in good standing, the discussion of nuclear threats at the NPT RevCon in August 2022 was more contested than at the TPNW 1MSP. Many statements made with reference to nuclear threats at the 2022 RevCon were solely in reference to Russian threats rather than all nuclear threats. The first draft of the 2022 RevCon Final Document included this paragraph: “The Conference expresses concern at the increase in nuclear rhetoric and nuclear threats, and its impact on international peace and security as well as the integrity and credibility of the Treaty”.⁴⁸ This strong and comprehensive language was replaced by fuzzier wording on how “the threat of nuclear weapons use today is higher than at any time since the heights of the Cold War”⁴⁹ after the first revision. Measures that reduce the risk of nuclear use were emphasised in all versions, though the reference to risk reduction as “an interim measure pending the total elimination of nuclear weapons”⁵⁰, which was present in the first draft, was also removed after first revision. All versions of the Final Document reiterate the 2010 call for strengthening the role of negative security assurances through the work of the CD, yet the latter two versions did not include the urgent call for “effective, universal, non-discriminatory, unconditional, legally binding arrangements to assure non-nuclear-weapon States against the use or threat of use of nuclear weapons by all nuclear-weapon States”⁵¹ as the first version did – again softening the initially strong language. The second draft added a commitment by all NWS “to refrain from any inflammatory rhetoric concerning the use of nuclear weapons”⁵², but the document in all iterations fell short in the condemnation of nuclear threats per se, narrowing the condemnation to “inflammatory rhetoric”.

Statements made by the P5 also showcased how each nuclear power justifies its own nuclear policies as purely defensive. At the outset of the NPT conference, France, the United Kingdom, and the United States issued a working paper that attempted to distinguish between “irresponsible” offensive nuclear threats of Russia and “responsible”⁵³ nuclear threats for defensive purposes of their own nations. In contrast, the Russian delegation defended what they called Russia’s nuclear “warnings”⁵⁴, saying these were simply part of Moscow’s nuclear deterrence strategy.

The politics of Russia’s war of aggression against Ukraine also dominated the discourse on nuclear threats in multilateral fora

outside the NPT. In November 2022, the G20 stated that the “use or threat of use of nuclear weapons is inadmissible”.⁵⁵ By April 2023, however, this statement had become more qualified to make reference particularly to Russia, as the G7 stated that “Russia’s irresponsible nuclear rhetoric, undermining of arms control regimes, and stated intent to deploy nuclear weapons in Belarus are dangerous and unacceptable. We recall the statement in Bali of all G20 leaders, including Russia. In this context, we reiterate our position that threats by Russia of nuclear weapon use, let alone any use of nuclear weapons by Russia, in the context of its aggression against Ukraine are inadmissible”.⁵⁶ By only declaring nuclear threats by Russia in the context of its aggression against Ukraine inadmissible, the G7 statement likely reflected the influence of the P3 and its working paper that distinguished ‘irresponsible’ offensive nuclear threats from their own postures of nuclear deterrence.

As all five NWS continue to justify their own practices of nuclear deterrence as justifiable on the grounds of self-defence, ‘good faith’ discussion and dialogue around nuclear threats becomes more difficult. To reinforce the NPT, it is crucial that the disarmament pillar receives special attention in the upcoming review cycle. It is also vital that ‘good faith’ avenues for dialogue to reduce misperception and misunderstandings are pursued as interim risk reduction measures. Refraining from making nuclear threats, especially in an ongoing war of aggression, would in itself be a risk reduction measure. Importantly, to this effect, NPT state parties should set out to agree on a common definition of ‘nuclear threat’ and discuss whether it is possible to distinguish between varieties of ‘nuclear threats’. While these discussions certainly will be contentious and might not necessarily herald a consensus definition in the near future, the NPT is the ideal forum to hold this debate on the legal, moral, political, and operational approaches and implications of nuclear threats, to work towards a commonly accepted definition. States should take efforts to prevent the erosion of the nuclear taboo, reinforce the principle of the non-use of force, and declare the inadmissibility of all nuclear weapons use and threat of use. To that end, NPT States Parties could implement the following recommendations.

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Recom- mendations for the 2026 Review Cycle

There are measures NPT States Parties can take individually, in like-minded groups or collectively, to address nuclear threats. In this current NPT Review Cycle these measures would help to strengthen the NPT and the nuclear taboo:

1. Reaffirm the statement from the 200 RevCon Final Document and the 2010 Action Plan that the “total elimination of nuclear weapons” constitutes the “only absolute guarantee against the use or threat of use of nuclear weapons.”⁵⁷
2. Establish a common understanding and definition of a ‘nuclear threat’ amongst all NPT member states. This could build on the ICJ’s existing definition and offer a consensus on whether it is possible to objectively distinguish between varieties of ‘nuclear threats’, including whether a legitimate and objective distinction between ‘offensive’ and ‘defensive’ nuclear threats exists, and if so, how it could be defined on a consensus basis amongst all parties. The UN General Assembly could also explore the possibility of submitting a renewed inquiry to the ICJ for an Advisory Opinion on the question of the legality of nuclear threats, given developments in the years since the 1996 Advisory Opinion.
3. Reaffirm that strengthening negative security assurances and NWFZs are necessary interim steps towards a world without nuclear weapons.
4. Reiterate the importance of the nuclear taboo and the principle of non-use of force. This could take place through the NPT and the UN General Assembly, the added value of the latter being that non-NPT weapons states could join.
5. Reiterate the G20 statement that the “use or threat of use of nuclear weapons is inadmissible”⁵⁸ in the NPT RevCon Final Documents. In addition, States could also follow up the 2014 UNGA Resolution on a ‘Convention on the Prohibition of the Use of Nuclear Weapons’, with a new resolution on the inadmissibility of threats of nuclear weapons use. This would strengthen the nuclear taboo.
6. Secure commitments by the P5 to increase transparency about nuclear capabilities; pursue dialogue and cooperation to enhance stability; bolster existing formats for discussion and risk reduction measures; decrease nuclear threats; and reiterate their commitment to deliver on commitments under Article VI.

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