

TRANSCRIPT

REFLECTIONS ON LAW AND POLICY

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This is a transcript of the Reflections on Law and Policy of the 2023 conference “Nuclear Weapons and International Law: The Renewed Imperative in Light of the Ukraine War.” The speakers’ remarks have been edited for readability and clarity by the Georgetown Journal of International Law Digital Committee staff as well as by the speakers themselves.

The Consequences of Violating *Pacta Sunt Servanda*

JONATHAN GRANOFF:

The subject of our day was framed as nuclear weapons in Ukraine, and it’s interesting that there’s actually a [very recent statement](#) formally entered into by the United States and Russia. and almost all the states with nuclear weapons [G20 New Delhi Leaders’ Declaration]. In fact, all the states with nuclear weapons except Pakistan, North Korea, and Israel, because it was done in Delhi when India hosted the G20.

They [the members of the G20] said in a relevant part to this issue, and I quote from it, “Concerning the war in Ukraine, while recalling the discussion in Bali where they had also said something similar, we reiterated our national positions and resolutions adopted at the U.N. Security Council and the U.N. General Assembly and underscored that all states must act in a manner consistent with the purposes and principles of the U.N. Charter in its entirety. In line with the U.N. Charter, all states must refrain from the threat or use of force to seek territorial acquisition against the territorial integrity and sovereignty or political independence of any state. *The use or threat of use of nuclear weapons is inadmissible.*”

Russia and the United States both signed that, and they went further. “We call on all states to uphold the principles of international law including territorial integrity and sovereignty, international humanitarian law, and the multilateral system that safeguards peace and stability. The peaceful resolution of conflicts and efforts to address crises as well as diplomacy and dialogue are critical. We will unite in our endeavor to address the adverse impact of the war on the global economy and welcome all relevant and constructive initiatives that support a comprehensive, just, and durable peace in Ukraine that will uphold all the purposes and principles of the U.N. Charter for the promotion of peaceful, friendly, and good neighborly relations among nations in the spirit of one Earth, one family, one future.”

My concern is really this and it is very deep, because this is in a sense making a mockery of language, of *pacta sunt servanda*, that good faith compliance with statements by nations and their relations to one another, well to go back to Grotius, in *The Rights of War and Peace*, he said that in destroying good faith in promises between nations you “destroy the intercourse of mankind,” and he quotes Aristotle in that. My concern goes back to the failure of the States

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parties to the NPT to live up to the very, relatively modest, threat-reducing, law-enhancing, security-enhancing promises that were made in compliance with [Article VI of the NPT](#). That part of the bargain of the indefinite extension of the treaty in '95 was the review process and in 2000 thirteen practical steps were made. Then several dozen more were made in 2010 and they remain unfulfilled. That degrades the third most important legal instrument of the 20th century, the NPT specifically dealing with our subject. Was there good faith compliance with prohibiting testing of nuclear weapons? Our domestic process precluded ratification but couldn't we have championed a Security Council resolution declaring that any further testing would be a threat to international security pursuant to a fully ratified treaty, the U.N. Charter? Couldn't we have done that? And what about really making efforts to push for negotiating with China and pushing for commencing negotiations on a fissile material cut-off treaty or lowering the political currency of nuclear weapons, clearly inconsistent with the arms race that modernization is stimulating?

The ability to persuade the rest of the world that the P5 are living up to their bargain under that treaty is being stretched. What I've heard today from our colleagues in the defense establishment is finding ways of rationalizing the policies that we have, instead of trying to use law as a means of constraining and curtailing this very dangerous venture that by accident, design, or madness could lead to the destruction of the world. But remember, these weapons that we're talking about are essentially 1930's physics, 1940's technology, and science has not stood still in these last 70 years. There will be other forms of means in which fewer people with less resources and less time can do more damage. Nuclear weapons leave a footprint. They're relatively expensive to create, it takes an enterprise to do it at scale. And the reason that Einstein and Oppenheimer and Bertrand Russell and Joseph Rotblat and people like that created the World Academy of Art and Science, was that they realized that science was running faster than the arts of law and morality could constrain it.

We hear the rationale for policies based on strategic stability and the rule of law. That's the argument that the P5 gives to the rest of the world, and yet I sort of view that as strategic stability as like a turtle and there's a stallion pursuing military superiority. And military superiority is trumping, no pun intended, in the capitals of the states with nuclear weapons pursuing military superiority because the political commitments under the NPT are argued as not being legally binding. The constraints of common-sense application to these horrific devices is being legalistically marginalized by looking at the exceptional circumstance and trying to argue that it destroys the norm against their deployment and use. The rest of the world looks at this and says well, the United States is stretching it. The United States invaded Iraq, the United States did not constrain the overreach in attacking Libya, which gave up its WMD. The United States did not stand up and protect Ukraine despite the 1994 Budapest agreement to honor and protect the integrity of Ukraine. The United States pulled out of Open Skies, ABM, INF. And we certainly can't trust Russia, because I mean they just seem to say anything. They use language performatively. And China, we don't even understand, but we know they're not out for the common good.

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Well, if you're a developing nation and you're in that situation, what is your security establishment going to do? It is going to say we're on our own, we need more weapons, and thus weapon sales in the world are booming. That is the consequence of violating *pacta sunt servanda*. There is distrust in the stability of the international order and the first thing we as lawyers have to do is point out to the political class and the military that nothing could be worse in the nuclear age than a breakdown of trust and using law and diplomacy to make us safer. We need law only to constrain activity that otherwise would take place. That's the reason we have law, and it must be consistent with the values that we have, and there couldn't be any more basic value than to constrain weaponry which, if used by accident, design, or madness would end political organization.

Approaches Moving Forward

Those are just my thoughts and one other thought that I wanted to share: I cannot conceive of any first use of a nuclear weapon by the United States that would not violate the War Powers Act. But our President ran on a sole purpose ticket, and one step that could move us to degrading the status of nuclear weapons and make strengthening international law and prohibitions against their use that would be meaningful would be a 'No First Use Policy' by the United States, challenging all other states with the weapons to come to a similar position. De-alerting the weapons as much as possible, and as fast as possible instituting renegotiations and a process of rebuilding trust. It's not insignificant that we have gone down from over 65,000 weapons to the number we have today. It's an 80% reduction. Even when the Cold War was winding down, the magnitude of that accomplishment was uncertain. But it is an accomplishment that's been done relatively quickly, not to be treated lightly. But the first thing you have to do if you're in a hole is to stop digging it, and one of the things that is digging the hole is the alleged value of nuclear weapons. They simply are more of a problem than any problem they seek to solve and law should be one of the tools that we need to constrain and eliminate them.

Let me finish by saying that if you're driving 65 miles an hour and all of a sudden you see that the street sign says you're in a 35 miles per hour zone, you don't smash on your brakes, you'll flip the car. You gradually come into compliance but you know the goal is to get into compliance. It was those very very sober promises made in the context of the NPT that could have taken us much, much closer toward a nuclear weapons free world and certainly a world in which the risk was dramatically reduced. Since the institution still continues, that's a place we have to utilize to reinvigorate those promises and fulfill them. Otherwise, as I said earlier, bullets become our only verbs.

PROF. CHARLES MOXLEY:

Jonathan, thank you so much for taking us beyond the law into these broader pictures and particularly your vision, which certainly many of us share I think, as to the potential of law to make a difference. So thank you.

JONATHAN GRANOFF:

Thank you Charlie. Let me just point out to our colleagues who might be cynical about my pedagogy. I do have law review articles with plenty of footnotes guys, so don't you worry. But I think that we have to contextualize this civilization-transforming device that we've created and step back and look at the tool. Look at what we have and look at the tools that we have. We have no other tool to bring us to a safer world than law. We're not going to become Leviathan and force everybody to do what we want, and developing laws involves negotiations, compromises, give and take, and the stakes in this issue demand give and take.