



## Russia's Broken Pact: Implications for Nuclear Nonproliferation

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Nuclear disarmament has become one of the chief aims of nonproliferation law. While the Nuclear Nonproliferation Treaty's scope has generally been limited to the prevention of the spread of nuclear weapons, subsequent sources of customary law, including public declarations by heads of state, state apparatus behaviors, and Security Council resolutions, have paved a path toward some global obligation to disarm.<sup>1</sup> Most constructivist legal scholars, myself included, generally find this trend towards global disarmament as more than something which is desirable — instead, we tend to view it as an absolute necessity. Even the possibility of the use of nuclear weapons shocks the conscience of humanity. Nuclear warheads are a recognizable threat to the peace and security of human kind, and their prohibition should always be thought to meet the lofty status of *jus cogens* — preemptory norms from which no derogation whatsoever is

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<sup>1</sup> See, e.g., U.S. President Barack Obama, Remarks on Nuclear Nonproliferation and Disarmament at Hradcany Square, Prague, Czech Republic (Apr. 5, 2009), *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered](http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered) (“The basic bargain is sound: Countries with nuclear weapons will move towards disarmament, countries without nuclear weapons will not acquire them, and all countries can access peaceful nuclear energy.”); see also U.N. SCOR, 64th Sess., 6191st mtg. at 1, U.N. Doc. S/PV.6191 (Sept. 24, 2009); see also S.C. Res. 1887, pmbl., U.N. Doc. S/RES/1887 (Sept 24, 2009).

permitted.<sup>2</sup> We hope that the world will be better for it. And yet, as Russian troops march through the streets of the many cities of Ukraine, it is clear that our constructivism has, at times, bled in to a sort of dreamy-eyed naivety.

In the 1990's, world powers promised Ukraine that if it gave up its nuclear weapons, those powers would not violate Ukraine's sovereignty.<sup>3</sup> Now known as the Budapest Memorandum, the agreement rewarded Ukraine's nuclear disarmament with U.S.-U.K.-Russia security promises, including prohibitions against even the mere threat of force.<sup>4</sup> We see today how empty those promises were. Something similar happened in Libya under Gaddafi when Libya gave up its own nuclear weapons in compliance with the Nuclear Nonproliferation Treaty.<sup>5</sup> Of course, Gaddafi was overthrown and executed a few short years later.

Treaty construction attempting to negotiate away war is laudable. After all, such agreements are first steps in rebuilding trust between adversaries. However, attempting to negotiate away war in exchange for nuclear disarmament has demonstrated itself twice now as poor treaty construction. The promise not to invade is an unenforceable promise with disastrous consequences for the promisee. Ukraine's continued possession of nuclear warheads may well have served as a deterrent against any Russian aggression today in 2022, while the surrender of those warheads in exchange for the promise of peace has been the basis of their vulnerability.

Reconciling the needs to stop nuclear proliferation, to generally disarm, and to keep

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<sup>2</sup> See, e.g., Gaeta Normile, *The Non-Proliferation of Nuclear Weapons as Jus Cogens*, 124 Penn St. L. Rev. 277 (2019).

<sup>3</sup> Steven Pifer, *The Budapest Memorandum and U.S. Obligations*, Brookings Inst. (Dec. 4, 2014, 3:57 PM), <http://www.brookings.edu/blogs/up-front/posts/2014/12/04-budapest-memorandum-us-obligations-pifer>.

<sup>4</sup> *Id.*

<sup>5</sup> See generally, Cigar, Norman. *Libya's Nuclear Disarmament: Lessons and Implications for Nuclear Proliferation*. Marine Corps University (02 January 2012). Archived from the original on 07 September 2014.

denuclearizing states safe is a difficult balance, but one lesson has made itself evident in the cases of Ukraine and Libya: a promise of peace is never as reliable as a nuclear warhead.

Perhaps disarmament treaty construction should learn from these failures. Other avenues of peace promotion, including economic interdependence and cultural exchange, may better deescalate tensions prior to the disarmament of a vulnerable country. Perhaps we should seek to make the world whole before we make fragments of it more vulnerable.