



**INSTITUTE FOR ENERGY AND ENVIRONMENTAL RESEARCH**

6935 Laurel Avenue, Suite 201  
Takoma Park, MD 20912

Phone: (301) 270-5500  
FAX: (301) 270-3029  
e-mail: [ieer@ieer.org](mailto:ieer@ieer.org)  
<http://www.ieer.org>

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## **The Function of Treaties in International Security**

**Merav Datan**

**International Physicians for the Prevention of Nuclear War/Physicians for Social Responsibility**

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I am going to focus specifically on nuclear weapons within the context of the function of treaties in international security, because nuclear weapons are such an extreme version of the threat to security. I was struck, while listening to the states' speeches in Conference Room 4 during this NPT PrepComm, by the sense that most of what I want to say actually seems rather obvious, at least to this crowd. These are very common sense ideas about what it takes to live in a society in which we need to mediate our own interests and find ways to resolve conflicting interests. That seems to most of us a pretty common sense approach. When we are talking about treaties, we are looking at a way of making this process more predictable, holding the participants more accountable, and so on.

Some of those themes were coming through very clearly in the speeches that states were giving during the meetings this morning and yesterday, and also during the First Committee meetings in the UN General Assembly in late 2001. As most of you probably know, the First Committee is that committee within the General Assembly that deals with international security and disarmament.

You only need to take a very quick and cursory look at some of the speeches to see that recurring themes reiterate the importance of treaties. One of the themes that has been very strong in the last couple days has been "multilateralism." Obviously, the importance of keeping NPT obligations has also been reiterated. The Anti-Ballistic Missile (ABM) treaty has been mentioned a number of times. Russia once again expressed its unhappiness about U.S. withdrawal.

The way that the ABM treaty was dealt with in the First Committee a couple months ago was interesting. It was the subject of a resolution sponsored by Russia, China and Belarus, calling for adherence to the ABM treaty. The reactions of other states to that resolution were interesting. The resolution passed with a strong majority, but there were a number of European states that abstained. They did, however, take the floor to say, "We really think this treaty is important. We recognize, though, that the ABM treaty is a treaty between states. Therefore, we do not think it is appropriate for us to go on the record making our own statement about it, but we really do believe that it is important." These were largely U.S. allies that took this kind of position,

obviously a mediated position, but I thought that it underscored the importance of even a bilateral treaty to much of the rest of the world.

Another theme we hear over and over again is the call for negative security assurances to be made legally binding. Negative security assurances is the promise that a state with nuclear weapons will not use them against non-nuclear weapons states. Another example, although there are many more, has to do with prevention of an arms race in outer space. This has also been the subject of First Committee resolutions. States that are concerned about an arms race in outer space want to develop a legally binding instrument, a new treaty that would ban the placement of weapons in space.

All this seems to be so obvious, tedious and mundane if you have been listening to it over and over again. Why then do we need to keep repeating these themes and to try to come up with more interesting, catchy, and clever ways of saying them? More and more I am convinced that we need to stretch our imaginations in terms of thinking of not only states as the relevant actors in international law. We are at a time of global transition in a number of ways. It is a bit of a cliché to talk about this globalization, in which transnational bodies cut across political borders, including non-state actors, the media and corporations, and are very much international players. At the same time, states are obviously still playing a very important role. We are challenged to think about new ways of codifying the norms of international law, who the players are and how we hold them accountable. So when we are demanding states to abide by their legal obligations, it is not only a one-way street. Civil society also plays a role. We'll come back to that theme, because it is one that gives us something to work with, besides simply demanding that our governments or other governments abide by their obligations.

This report that IEER and LCNP released is a very important step in this direction, in terms of filling in some of the blanks. A lot of the analysis in it goes below the surface level, so that it is not just a repetition of familiar and tedious arguments. It is a much more detailed analysis and I think it takes us in the direction that we need to be thinking and gives us something real to work with. It is part of what I hope will be a continuing process by which we stretch our imaginations a little bit in terms of thinking about what international law is and who its participants are. And of course, the clearest tool within the toolbox of international law, is treaties.

There is some irony that those of us who are not members of government are actually calling for treaties and calling for the implementation of treaties and compliance with treaties. In a more perfect world, we might be playing a different role. We might be challenging the treaties. We might be arguing that they are not enough. But because of the current international security environment, we are put in this peculiar position of advocating treaties and putting on hold some of our own concerns about how imperfect these treaties might be, about how they might actually institutionalize injustice. For example, we do not need to go very far back in history to see that international law has played a very disturbing role in legitimizing slavery and the slave trade.

So when we are advocating treaties and speaking about the importance of treaties, it is also important sometimes to qualify our arguments. There are two aspects of the problems with treaties. First, treaties themselves can be imperfect because they codify injustices. The UN Charter is an example of this. As much as we talk about the importance of adhering to the

principles of the UN Charter, everybody in this room probably has some very serious criticisms of the Charter itself and the role of the Security Council with veto power. Second, treaties can be imperfect because they are imperfectly applied. Let's take an example from the UN Charter. Article 26 from the UN Charter calls on the Security Council to institute a system for the regulation of armaments in order to minimize the use of resources for warfare or to maximize their availability for more development-oriented human needs. There was recognition as the Charter was being formed of this need, but Article 26 has not come into being. This is another example of something that cuts both ways. Some of us continue to insist on the application of Article 26 and call on Security Council members to comply with that obligation. At the same time, we are not completely comfortable with the role and makeup of the Security Council.

Treaties are important primarily as tools and we need to see them in the proper context, often as part of a process. A very familiar, perhaps slightly overused, example of this is the Ottawa Process and the landmines treaty. This treaty did not just come into being as a legal instrument. It was built very much on a process in which the role of civil society was absolutely crucial. Civil society raised awareness and created the demand, so that when the existing political mechanics and fora were not meeting this demand, the debate could be taken outside the governmental framework, where there was already a context. Some of the work around a Nuclear Weapons Convention builds on these same ideas. Here too, it is ironic that as members of non-governmental organizations, we are trying to promote a treaty, but we are trying to promote it as a tool for encouraging negotiations and for thinking about what needs to take place so that this treaty has some meaning, some validity and a context where it can be applied. It is very important to keep this role of treaties in mind.

Now let's step back a bit to revisit the statement that you may have heard Nicole Deller quote this morning from John Bolton, in which he said that international law is not law. He has published a very substantive law review article basically spelling out the idea that treaties are not law, that they may be morally and politically binding, but they are not legally binding. Why? Because to paraphrase his arguments, the critical components of a legal commitment are a promise and a remedy. According to Bolton, international law does not offer any remedy. Sanctions are not enough; they are not a remedy. There is no coercive element. This was a critical point for Bolton. In other words, it is not enough for me to give my word; you have to be able to force me to comply with my word if I do not. We should challenge that notion and question how often we rely on someone's commitment based on their own recognition of the interests for them in complying with certain obligations or committing themselves to a certain obligation. The idea that there has to be a coercive element is a very troubling analysis.

Bolton's analysis, the idea that security is guaranteed by military might and by the ability to enforce compliance, absolutely falls apart in the context of nuclear weapons. I do not think the people in this room see security as primarily something that you can guarantee through military means. But that is the prevailing notion among states and in the world of Realpolitik, realism and those schools of thought. The word "enforcement" itself carries the word "force," which suggests that you have to be able to force a state to comply.

International law and nuclear weapons cross in a very interesting way. Nuclear weapons point out the cracks in the international legal system. We do not have time to go into detail about the

Advisory Opinion of the International Court of Justice. Basically, the Court said that nuclear weapons are generally illegal, except that it could not resolve the question of extreme circumstances of self-defense. But the judges did spell out that nuclear weapons are not compatible with the principles of international law. It was as if on this point the Court said, "two plus two," but could not say, "equals four." The reason they could not is because of the politics and the political environment in which the court was situated.

In the last few minutes, I would like point to what treaties actually offer us and why they are important, with all of the qualifications that I gave earlier. The process itself of negotiating and agreeing on a treaty is a way of identifying common goals and ways of pursuing those goals. The process of negotiation and compromise is also part of achieving the goals themselves. It helps achieve objectives and articulate the norms that otherwise states might not realize. Security treaties are very much interlocked. For example, the NPT Review Conference in 2000 recognized the importance of a number of treaties, including the Comprehensive Test Ban Treaty (CTBT), the START treaties, and the ABM treaty. These treaties reinforce and support each other. The treaties also underscore the necessity of cooperation and communication between states. They also offer a measure of predictability and a way to measure progress and to build on that progress, through review conferences, etc.

Treaties also provide a method of accountability. As members of civil society, we should think about accountability as a two-way process. If we are demanding governments to be accountable, then we must be willing to be accountable also. I have thought about this in relation to a comment that I heard from a delegate from the United Kingdom, who was really irritated by the fact that the International Campaign to Ban Landmines was sitting at the negotiating table during the Mine Ban Treaty negotiations. Governments, he said, are accountable, but the idea that a self-appointed body was part of the process was very troubling. He questioned who they were accountable to. I hope that he is part of an old-school of thought and that we are moving towards replacing this view with the recognition that NGOs are a part of the development, the evolution of international norms and the application of those norms. And we're willing to be accountable in that context.