Executive Summary

An Overview of U.S. Policies Toward the International Legal System

Under Article VI of the U.S. Constitution, U.S. treaties are part of the "supreme law of the land," along with federal statutes and the Constitution itself. Regardless of whether a treaty is enforced within the United States, courts recognize that it is a legal obligation of the United States on the international plane. For a treaty to become U.S. law, two-thirds of the Senate must give its "advice and consent" to its ratification. Ratification occurs when the President gives formal notice of U.S. acceptance of a treaty to other signatories.

The United States can be credited as one of the founders of the modern system of international law. Its own founding as a country was based on the idea that a system of constitutional law is superior to rule by a king. Nevertheless, the history of the past century reveals that the U.S. desire to participate in and help create a global framework of law that builds national and global security is counteracted by fears that international obligations will injure U.S. interests and sovereignty.

With respect to the United Nations, twenty-five years prior to the adoption of the UN Charter, the Senate declined to approve ratification of the Versailles Treaty establishing the League of Nations. The United States agreed to be part of the United Nations only on condition of a veto in its highest political body, the Security Council. Despite the U.S. role as host to the UN, and the general support that the U.S. public has expressed in favor of the UN, a vocal faction of the U.S. government expresses wariness, and oftentimes hostility, toward the UN. In the 1980s and 1990s, the United States withheld dues from the UN, citing a need to reduce bureaucracy and ensure preservation of U.S. sovereignty. After the September 2001 terrorist attacks, Congress approved payment of a large sum of back dues, on the basis that international cooperation through the UN is needed to fight terrorism.

With respect to international criminal law, the United States took the leading role following World War II in convening the Nuremberg trials of major Nazi war criminals. In the 1990s, the United States also supported the Security Council's establishment of ad hoc tribunals to try persons accused of war crimes, crimes against humanity, and genocide in the former Yugoslavia and Rwanda. However, the United States now opposes the International Criminal Court, largely due to its objection to the fact that U.S. nationals, along with those of other states, will be subject to the Court's jurisdiction.

With respect to international human rights law, U.S. citizens, including Eleanor Roosevelt, played key roles in the elaboration of international human rights instruments following World War II. Acceptance within the U.S. political system has been slow to follow. The United States did not ratify the 1948 Genocide Convention until 1988. The Senate imposed significant reservations and conditions when it approved ratification of the Covenant on Civil and Political Rights and the Convention Against Torture. The United States has not yet ratified the Convention on Discrimination against Women, the Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child (Somalia is the only other state not to have ratified the last treaty).

With respect to the International Court of Justice, the UN judicial branch that adjudicates disputes among countries, when in 1946 the United States accepted the general jurisdiction of the International Court of Justice, it sought to exempt matters "within [U.S.] domestic jurisdiction as

determined by the United States." In the 1980s, after the Court ruled that it had jurisdiction to decide a case brought by Nicaragua charging that the United States violated international law by supporting the contras in their effort to overthrow the Nicaragua government, the United States withdrew from the case and from the jurisdiction of the Court.

With respect to the war on terrorism, there are multilateral elements to the U.S. response to the September 2001 terrorist attacks. Under U.S. leadership, the Security Council adopted a resolution requiring all states to suppress financing of terrorist operations and to deny haven to terrorists. The Bush administration submitted two anti-terrorism treaties, on bombings and finance, to the Senate, and the Senate has approved ratification. The United States is now a party to all 12 global treaties on terrorism, which in large measure require states either to prosecute or extradite persons accused of various specific acts of violence. On the other hand, the United States has declined *a priori* to treat captured members of Taliban forces as prisoners of war under the Third Geneva Convention, though it requires that, in case of doubt, determination of status be done by a competent tribunal. The United States also essentially sidelined the Security Council with respect to military operations in Afghanistan.

The heated debate over U.S. involvement in the international legal system, now nearly a century old, continues, continues with an influential segment of opinion now contending strongly that the United States must rely on its own capabilities rather than treaties to protect its interests and sovereignty. As described in detail with respect to the treaties analyzed in the following chapters, resistance to law-governed multilateralism is manifested both in disregard of obligations imposed by treaties to which the United States is a party, and by a pattern of shaping treaties during negotiations only to later reject them.

Nuclear Nonproliferation Treaty (NPT)

The 1970 Nuclear Nonproliferation Treaty bars almost all states in the world from acquiring nuclear weapons, and commits states parties that do possess nuclear weapons (Britain, China, France, Russia, and the United States) to negotiate their elimination. Only four states are outside the regime, Cuba and three nuclear-armed countries, India, Pakistan, and Israel. In return for agreeing not to acquire nuclear weapons and to accept safeguards to ensure that nuclear materials are not diverted to weapons from non-military programs, non-nuclear weapon states insisted that the NPT include a promise of assistance with peaceful nuclear energy, set forth in Article IV, and a promise of good-faith negotiation of cessation of the nuclear arms race "at an early date" and of nuclear disarmament, set forth in Article VI. Also part of the bargain are declarations by the NPT nuclear weapon states that they will not use nuclear weapons against non-nuclear weapon states parties. In 1995, in connection with indefinite extension of the treaty, a commitment was made to complete negotiations on the Comprehensive Test Ban Treaty (CTBT) by 1996. In 1996, the International Court of Justice unanimously held that Article VI obligates states to "bring to a conclusion negotiations leading to nuclear disarmament in all its aspects." In the 2000 Review Conference, all states agreed upon a menu of 13 disarmament steps, including an "unequivocal undertaking" to "accomplish the total elimination" of nuclear arsenals pursuant to Article VI, ratification of the CTBT, U.S.-Russian reductions of strategic arms, application of the principle of irreversibility to disarmament measures, further reduction of the operational status of nuclear weapons, and a diminishing role for nuclear weapons in security policies.

Since 1970, the record of compliance with the non-acquisition obligation and safeguards agreements is reasonably good, with the exception of Iraq and North Korea. In contrast, the nuclear weapon states, including the United States, are now clearly are out of compliance with the Article VI disarmament obligation as specified in 1995, 1996, and 2000.

The U.S. Senate rejected the CTBT in 1999. As set forth in the U.S. 2002 Nuclear Posture Review (NPR), reductions of deployed strategic arms will be *reversible*, not irreversible, because they will be accompanied by the maintenance of a large "responsive force" of warheads capable of being redeployed in days, weeks, or months. There are no announced plans to employ dealerting measures to reduce the operational status of the large deployed strategic forces that will remain after reductions. The NPR expands options for use of nuclear weapons against non-nuclear weapon states, including preemptive attacks against biological or chemical weapon capabilities and in response to "surprising military developments," and to this end provides for development of warheads including earth penetrators. This widening of use options is contrary to the pledge of a diminishing role for nuclear weapons in security policies, the declaration of non-use of nuclear weapons against non-nuclear weapon states parties, and the obligation to negotiate cessation of the arms race at an early date. The NPR also contains plans for the maintenance and modernization of nuclear warheads and missiles and bombers for the next half-century. Above all, the lack of compliance with Article VI lies in the manifest failure to make disarmament the driving force in national planning and policy with respect to nuclear weapons.

Recommendations:

1. The United States and Russia should drastically reduce strategic nuclear arms in a verifiable way codified by treaty, account for and destroy or dismantle reduced delivery systems and warheads, and engage other nuclear-armed states in a process of reductions leading to verified elimination of nuclear forces.

2. The United States, Russia, and other nuclear-armed states should verifiably dealert their nuclear forces by such means as separating warheads from delivery systems, to achieve a condition of "global zero alert."

3. The United States should reject the expansion of nuclear weapons use options set forth in the 2002 Nuclear Posture Review, and together with other nuclear-armed states adopt a policy of no first use of nuclear weapons.

4. The United States and other nuclear-armed states should make the achievement of total elimination of nuclear arsenals through good-faith negotiation the centerpiece of their national planning and policy with respect to nuclear weapons.

Comprehensive Test Ban Treaty (CTBT)

After four decades of discussions and partial test ban agreements, negotiations on the Comprehensive Test Ban Treaty were completed in 1996. The achievement of a CTBT in 1996 was an explicit commitment made by the nuclear weapons states to all parties to the NPT, in connection with the indefinite extension of the NPT in 1995. The CTBT bans all nuclear explosions, for any purpose, warlike or peaceful. Though it contains no explicit definition of a nuclear explosion, the public negotiating history makes it clear that any nuclear explosive yield must be much less than four pounds of TNT equivalent and that the achievement of a nuclear criticality in explosive experiments involving fissile materials is prohibited.

In order to enter into force, the CTBT must be signed and ratified by 44 listed countries that have some form of nuclear technological capability, including commercial or research nuclear reactors. The CTBT still requires the ratification of 13 out of 44 nuclear capable states, including the

United States, for entry into force. Of these, India, Pakistan, and North Korea have not signed the treaty. Of the five NPT nuclear weapon states, Russia, Britain, and France have ratified the treaty. The United States and China have signed but not ratified it.

India was included on the list of 44 countries, though it had explicitly rejected the CTBT during the negotiations. India claimed that while the treaty was originally intended to contribute to both nonproliferation and disarmament, it became a discriminatory instrument designed to promote non-proliferation but enable existing nuclear weapons states to maintain their nuclear arsenals. A similar problem in the 1960s led to India's refusal to sign the NPT. During the negotiations, India pointed to the stockpile stewardship program of the United States and similar, if less extensive, programs in other nuclear weapons states, that have the explicit purpose of maintaining nuclear design capability and existing nuclear arsenals for the long-term. India tested nuclear weapons on May 11 and 13, 1998 and Pakistan followed with its own tests less than three weeks later.

Despite appeals from allies and large sections of U.S. opinion, the U.S. Senate voted in October 1999 to reject ratification of the CTBT, sending a dangerous message to the rest of the world. The Bush administration opposes the CTBT, and does not plan to ask the Senate to re-consider ratification. However, the United States has not made a formal notification of intent not to ratify the treaty and is maintaining the test moratorium, as are the other nuclear weapons states.

The defeat of the CTBT in the Senate reflects a general underlying argument that the United States should rely first of all on its own military strength, including nuclear weapons, even if this conflicts with its treaty obligations to others. The merits of the CTBT as an instrument of non-proliferation and to a modest extent as an instrument of disarmament are reasonably clear. While the design of rudimentary nuclear weapons can be done without testing, it is essentially impossible to build an arsenal of the type that might be delivered accurately by intercontinental ballistic missiles without testing. Hence, in this regard, countries that have tested extensively, notably the five nuclear weapons states that are parties to the NPT, have an advantage in having previously tested nuclear weapons designs that can be put on intercontinental missiles.

The issues at stake in the arguments against the CTBT are not technical ones, but an assertion by the United States of the right to continue over the long haul not only to possess but to further develop an already extensive nuclear weapons capability despite its commitments for disarmament under the NPT. This approach was most recently codified in the Bush administration's Nuclear Posture Review (see above).

In our analysis, the United States and France are preparing to violate Article I, para 1 of the CTBT because they are building large laser fusion facilities (the National Ignition Facility, NIF, and Laser Mégajoule, LMJ, respectively) with the intent of carrying out laboratory thermonuclear explosions of up to ten pounds of TNT equivalent. They also appear to be currently violating Article I, para 2 of the CTBT because by building these facilities they are engaged in the process of causing nuclear explosions. Britain appears to be violating the CTBT because it is providing funds to the NIF program. Japan and Germany also appear to be in violation because they are the home countries of corporations whose subsidiaries are providing glass for the NIF and LMJ lasers.

Nothing in the public negotiating record or in the language of the CTBT provides for exceptions allowing laboratory thermonuclear explosions. Yet the United States has claimed, based on the NPT record, that they are permitted. That explanation does not withstand close scrutiny. There

appears to be a secret negotiating record of the CTBT. It is possible that not all countries that have signed the CTBT are aware of the entire record.

Recommendations:

1. The entire negotiating record of the CTBT should be published. In particular, the record of any confidential discussions and any confidential agreements (if they exist) between or among sub-groups of countries regarding inertial confinement fusion explosions should be made public.

2. All countries should maintain the nuclear test moratorium until such time as the CTBT enters into force.

3. All countries should *unconditionally* ratify the CTBT. This would be in the spirit the achievement of both non-proliferation and disarmament that animated the decades long, worldwide demand for a comprehensive nuclear test ban.

4. The United States, France, Britain, Japan and Germany should stop all preparations for carrying out laboratory thermonuclear explosions.

5. The matter of laboratory thermonuclear explosions should be taken up explicitly by the parties to the CTBT, so as to reaffirm the complete ban on all nuclear explosions.

Anti-Ballistic Missile (ABM) Treaty

The ABM Treaty was created by the United States and the Soviet Union in 1972 in the context of their growing armories of missiles that had several warheads, each of which could be independently targeted. These weapons raised the theoretical possibility of a surprise first strike by one of the Cold War antagonists that might wipe out most of the strategic nuclear forces of the other side. An extensive defense system could then prevent the remaining nuclear warheads of the adversary's retaliatory strike from harming its territory.

The ABM treaty was supposed to maintain the credibility of retaliatory deterrence based on the threat of a successful second strike, also known as the policy of Mutually Assured Destruction (MAD). The ABM treaty was unusual in also putting limits on future technological development in the interests of preserving the "strategic balance" between the United States and the Soviet Union.

During the 1990s, sentiment in the United States grew that the policy of mutually assured destruction should be replaced by a more flexible nuclear doctrine that included missile defenses at a variety of levels including defenses against strategic missile far beyond the very limited defenses permitted by the ABM Treaty.

For some years, the United States pursued a policy of attempting to negotiate changes in the ABM treaty while researching missile defense technology. The Bush administration was less favorably inclined toward maintaining the treaty at all. In December 2001 the United States notified Russia of its intent to withdraw from the treaty in six months pursuant to a treaty provision permitting withdrawal based upon extraordinary events jeopardizing the withdrawing state's supreme interests. The unilateral U.S. decision to withdraw came despite the fact that

many of the remaining missile defense tests could have been implemented within the constraints of the treaty.

The U.S. withdrawal from the ABM Treaty is the first formal unilateral withdrawal of a major power from a nuclear arms control treaty after it has been put into in effect. The U.S. action is especially troubling in the context of its decision to make a list of countries that may be targeted with nuclear weapons in its Nuclear Posture Review. One of the rationales in the targeting strategy is the possession of weapons of mass destruction by countries contrary to their treaty commitments. But what if North Korea, following the U.S. example, gave three months notice of withdrawal from the NPT and then proceeded to build a nuclear arsenal because it felt its national survival threatened by the U.S. policy?

The problem of preventing the deliberate or accidental use of weapons of mass destruction is a complex one. The risks of the use of weapons of mass destruction by terrorist groups or by states that do not now possess them are real. But so are the risks that nuclear weapons states would use them. The risks of nuclear war by accident or miscalculation because the United States and Russia maintain large numbers of nuclear weapons on hair-trigger alert are also significant. Moreover, the nuclear posture of the United States includes possible first use of nuclear weapons in a variety of circumstances and does not rule out a first strike. U.S. development and deployment of missile defenses will impede further U.S.-Russian arms reductions and may stimulate an arms race in Asia. In this overall context, the U.S. withdrawal from the treaty jeopardizes the most important treaty preventing the spread of nuclear weapons and nuclear materials – the NPT.

In a different context that included complete, verified de-alerting of nuclear weapons and a commitment to complete disarmament, including missile control, it is possible to imagine missile defenses, globally applied, as theoretically positive, though it is not clear whether that would be a worthwhile priority even then. At the present time, justifying a unilateral withdrawal from the ABM Treaty as an act of defense stretches credibility beyond the limit, especially when taken in combination with the U.S. record on other treaties detailed in this report.

We recommend that the United States:

1. Recommit itself to the ABM Treaty.

2. Seek any changes to the ABM Treaty by negotiation with Russia in a manner that also takes into account the need to prevent further nuclear arms races and to reduce the risks of nuclear war by miscalculation.

3. Pursue verified de-alerting of all nuclear weapons and make a commitment to complete nuclear disarmament in order to get the global cooperation needed to prevent non-state groups and non-nuclear states from acquiring or using nuclear weapons.

Chemical Weapons Convention (CWC)

The Chemical Weapons Convention bans the development, transfer and use of chemical weapons and creates a regime to monitor the destruction of chemical weapons and to verify that chemicals being used for non-prohibited purposes are not diverted for use in weapons.

The CWC contains three basic obligations:

(1) Prohibition of Weapons. States parties agree to never develop, acquire or use chemical weapons or transfer them to anyone;

(2) Destruction of Weapons. States parties agree to destroy all of their existing chemical weapons production facilities and stockpiles;

(3) Declarations and Inspections. Each state party must declare any chemical weapons facilities or stockpiles. States parties are not restricted in the use of chemicals and facilities for purposes other than the manufacture/use of chemical weapons, but must allow routine inspections of declared "dual-use" chemicals and production facilities that could be used in a manner prohibited by the convention. The annexes of the Convention set forth the list of such chemicals and facilities.

In addition to the routine inspections, the treaty also gives states parties the right to request a challenge inspection of any facility, declared or undeclared, on the territory of another state party that it suspects of possible non-compliance.

The United States played a significant role in negotiating the CWC, advocating a treaty broad in scope and with a thorough verification and inspection regime. The CWC was supported by three presidential administrations, Democratic and Republican. The treaty enjoyed public support, and endorsement from the intelligence community, the Department of Defense and the chemical industry. Despite the widespread support, several influential Senators, including Jesse Helms, then Chair of the Senate Foreign Relations Committee, threatened to prevent ratification of the CWC unless U.S. commercial and national security interests were better safeguarded. After lengthy negotiations, the treaty was ratified, but Congress imposed limitations on how the United States will implement its terms.

Several of the restrictions imposed by Congress amount to a refusal to comply with terms of the treaty relating to inspections. Under CWC Article VI, states parties are required to subject specified toxic chemicals and facilities to verification measures (inspections and declarations) as provided in the Verification Annex. Pursuant to the implementing legislation, however, the President has the right to refuse inspection of any U.S. facility upon the determination that the inspection may "pose a threat to the national security interests." Another restriction narrows the number of facilities that are subject to the inspection and declaration provisions. Also, the United States refuses to allow samples to be "transferred for analysis to any laboratory outside the territory of the United States," even though the Verification Annex permits, if necessary, "transfer [of] samples for analysis off- site at laboratories."

These limitations may prevent accurate inspection results. Also, it is in the interest of the United States to foster thorough inspections of other states parties, but they may seek to apply the U.S. limitations to their own inspections. For example, in its implementing legislation, India prohibits samples from being taken out of the country and Russia proposed similar legislation.

Finally, no state party has used the challenge inspection provision of the CWC to address alleged treaty violations by other states parties. The United States has alleged that states parties, including Iran, have violated the prohibitions of the CWC, but has not addressed the matter using the CWC. Use of the challenge inspection mechanism would bolster the treaty as a tool for gathering information and deterring the spread of chemical weapons. On the other hand, the longer the challenge inspection goes unused, the less credible the treaty will appear as a protection for the international community.

Recommendations:

1. The United States should commit to full inspections of the subject chemicals and facilities according to the terms of the Verification Annex.

2. The United States should avail itself of the challenge inspections to investigate allegations of violations by other states parties.

Biological and Toxin Weapons Convention (BWC) and the BWC Protocol

The BWC was signed in 1972 and came into force on March 26, 1975. Article I states that:

> Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:
>
> (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
>
> (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

Although the BWC allows possession of biological weapon materials in small amounts needed for defensive purposes, such as development of vaccines, the BCW contains no mechanisms for verifying that states parties are complying with these prohibitions. The need for such measures has long been evident.

Over the past seven years, a committee open to all BWC states parties (the Ad Hoc Group) has worked toward the creation of a legally binding agreement to strengthen the BWC, known as the "BWC Protocol." The parties agreed that the Protocol would include declarations of national bio-defense programs, facilities with high biological containment, plant pathogen facilities and facilities working with certain toxic agents, on-site visits to encourage the accuracy of declarations, and rapid investigations into allegations of noncompliance. Although difficult issues remained, the Ad Hoc Group had hoped to present a draft of the Protocol to the conference of BWC States Parties in November 2001.

The United States had initially endorsed the general approach contained in the Protocol, but neither the Clinton nor Bush administrations took a leading role in negotiations. Many national security officials opposed a verification protocol because it required information relating to bio-defense work, and biotechnology firms raised concerns about the protection of their propriety information. In May 2001, the Bush Administration performed a policy review regarding the BWC Protocol, and in July 2001 announced that it could no longer endorse the Protocol, even if it were revised. The justification for rejecting the Protocol was that it did not adequately protect bio-defense and industrial information, and also that the verification measures would not be effective in detecting cheating. As an alternative to the Protocol, the United States proposed voluntary undertakings that would only minimally improve the existing biological weapons control regime.

The stated reasons for the U.S. opposition to the Protocol are suspect at best and do not stand up to serious scrutiny. They are contrary to the very positions taken by the U.S. government over a considerable period while the Protocol was being negotiated. Negotiators from the United States and other countries fully recognized that the treaty could not detect all instances of cheating; the very nature of biological weapons makes their detection exceptionally difficult. No treaty is foolproof, but through its provisions for declarations and clarifications, the Protocol would promote transparency of a state's biological activity and would help to deter proliferation. Moreover, during negotiations, the United States advocated weaker verification procedures in the interest of protecting industrial and biodefense information. If the United States were genuinely interested in creating a technically feasible Protocol that would also safeguard its information, it could have conducted extensive trials of the possible monitoring regime. Indeed, the U.S. was called upon to do so in a 1999 U.S. law.

The United States not only rejected the specific text of the Protocol under consideration, in November 2001, at the end of the BWC Review Conference, it called for the termination of the Ad Hoc Group, meaning complete abandonment of the process that had been created seven years ago to strengthen the BWC through a legally binding instrument. The fate of the Ad Hoc Group, and thus the ability of the states parties to create a legally binding verification regime, is now up in the air.

The United States does not endorse a mandatory regime of openness with regard to biological agents and equipment. The policy might be explained by the U.S. commitment to biodefense work (much of which has been carried out in secret) that the U.S. fears may be exposed by a verification regime. As part of its biodefense program, the United States has already constructed a model bio-bomb, weaponized anthrax, built a model agent-producing laboratory and begun developing a genetically enhanced super-strain of anthrax. All of this was done in secret and without notification to other BWC states parties. At least the first two of these activities may be seen as violating the BWC, because, although the stated purpose for all the activities is defensive, the BWC does not permit the production of weapons. The U.S. program may prove to be a dangerous model, as states parties may undertake similar covert biodefense programs, citing the U.S. example. Any party could then easily divert such programs for offensive purposes.

Recommendations:

1. The United States should withdraw the request for the termination of the Ad Hoc Group, and commit to the earliest possible completion of a Protocol establishing a verification regime including declarations, on-site visits and challenge inspections.

2. To that end, the United States should conduct trials to ensure that any monitoring regime in place will be capable of producing accurate results.

3. The United States should terminate immediately all biodefense programs to construct biological weapons.

Mine Ban Treaty

In 1996, a group of like-minded countries working with non-governmental and humanitarian relief organizations commenced a process for the creation of a treaty banning anti-personnel landmines. This process resulted in the creation of the Convention on the Prohibition of the use,

stockpiling, production and transfer of antipersonnel mines and on their destruction (The Mine Ban Treaty).

The Mine Ban Treaty, which bans all anti-personnel landmines without exceptions, entered into force in March 1999. States parties are required to make implementation reports to the UN Secretary-General within 180 days, destroy stockpiled mines within four years, and destroy mines in the ground in territory within their jurisdiction or control within 10 years. The Mine Ban Treaty also requires states parties to take appropriate domestic implementation measures, including imposition of penal sanctions.

Although President Clinton was the first world leader to call for the "eventual elimination" of landmines, during negotiations of the Mine Ban Treaty, the Clinton administration demanded that certain types of antipersonnel mines be permitted, that Korea be exempted from the ban, and that an optional nine-year deferral period for compliance be established. The U.S. demands were rejected, and the United States declined to sign the treaty.

The U.S. landmines policy was refined in 1998 when President Clinton committed the United States to cease using antipersonnel mines, except those contained in "mixed systems" with antitank mines, everywhere in the world except for Korea by the year 2003. By the year 2006, if alternatives have been identified and fielded, the United States will cease all use of all antipersonnel mines, including those in mixed systems, and join the Mine Ban Treaty.

Current U.S. policy hinders efforts to universalize the core prohibitions of the Mine Ban Treaty on the production, use, stockpiling, and transfer of antipersonnel mines. Many military experts have argued that antipersonnel mines have little to no utility in the war fighting principles currently being developed and adopted by the U.S. military for the 21st century. The unique exceptions that United States claims as critical are also reflected in the justifications used by other non-parties. Moreover, the multi-year $820 million program to identify and field alternatives to antipersonnel mines may not meet the 2006 objective and may result in munitions that would, in any case, be banned under the Mine Ban Treaty. Significantly, compliance with the Mine Ban Treaty is not a criterion for any of the alternatives programs. In 1999, as a condition of ratification of a separate treaty which regulates but does not prohibit landmines, Protocol II to the Convention on Conventional Weapons, President Clinton agreed that the search for alternatives to antipersonnel landmines would not be limited by whether they complied with the Mine Ban Treaty. The contradiction between the policy objectives established under President Clinton and the subsequent interpretation of his instructions will jeopardize the overall success of the alternatives program and threatens the 2006 target date.

The fate of the alternatives program and the 2006 target date is now in question because the Bush administration is currently conducting a review of U.S. mine policy. As the U.S. policy currently stands, the United States keeps company with Russia, China, Iran, Iraq, Libya, North Korea, Burma, Syria, and Cuba by refusing to join the Mine Ban Treaty. The United States joins Turkey as the only members of NATO not to have signed the treaty, though Turkey has pledged to accede to the accord. The United States is one of just fourteen countries that have not forsworn production of mines. It possesses the third largest stockpile of antipersonnel mines in the world, totaling more than 11 million, including 1.2 million of the long-lasting "dumb" mines. The United States stockpiles at least 1.7 million antipersonnel mines in twelve foreign countries, five of which are party to the Mine Ban Treaty. The United States exported over 5.6 million antipersonnel mines to thirty-eight countries between 1969 and 1992. The United States manufactured antipersonnel mines that have been found in twenty-eight mine-affected countries or regions.

Recommendations:

1. President Bush should submit the Mine Ban Treaty to the Senate for its advice and consent for accession (essentially one-step signing and ratification, done after the period for signature has ended), and should through executive actions begin immediate implementation of the treaty's provisions.

2. Short of joining the treaty, there are other important steps in the right direction that President Bush could take:

    - Set a definitive deadline for joining the Mine Ban Treaty, not a conditional objective. Instruct the Department of Defense to develop plans to meet this deadline, using concrete milestones. Better still, make the deadline no later than 2003, instead of 2006;
    - Declare a ban or an indefinite moratorium on the production of antipersonnel mines. Call upon Congress to make the declared permanent ban on the export of antipersonnel mines a law this year;
    - Immediately commit the United States to a policy of no use of antipersonnel mines in joint operations (NATO and otherwise) with states that have signed the Mine Ban Treaty. Similarly, commit the United States to a policy of no transiting of antipersonnel mines across the territory, air space, or waters of Mine Ban Treaty signatory states. Instruct the Department of Defense to immediately withdraw all stockpiles of antipersonnel mines from countries that have signed the Mine Ban Treaty;
    - Take steps necessary to ensure that any systems resulting from the Pentagon's landmine alternative programs are compliant with the Mine Ban Treaty.

UN Framework Convention on Climate Control (UNFCCC) and the Kyoto Protocol

The 1992 United Nations Framework Convention on Climate Change (UNFCCC) and the 1997 Kyoto Protocol are linked treaties relating to climate change. The former is the fundamental treaty on climate change, since it sets forth a framework of basic obligations. The Kyoto Protocol was signed pursuant to those obligations. A chapter on the Kyoto Protocol is included in this report on security-related treaties because climate change could have vast security implications. For instance, it could cause millions or even tens of millions of people to become refugees because of flooding or changing food production patterns.

The United States ratified the UNFCCC in 1992; it entered into force in 1994. It recognizes that "the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low." Therefore it puts the burden of taking "the lead" in reducing those emissions on the developed countries. Such action was to be taken despite uncertainties relating to climate change. Over the past decade, evidence has accumulated that global climate is changing due to human activities. The possibility of very rapid change and consequences far more catastrophic than were commonly discussed only a decade ago now seems within the range of possibility.

The 1997 Kyoto Protocol was designed to be the first step to give specificity to that commitment. It is generally recognized that the emissions reductions it requires are moderate, that further

reductions to protect the climate will be required, and that developing countries would need to be brought into the framework in subsequent steps. Under the Kyoto Protocol, the developed countries agreed to reduce their greenhouse gas emissions relative to 1990 by at least five percent by the period 2008 to 2012. The Clinton administration signed the treaty but did not seek ratification since it was likely to be defeated. The Bush administration has rejected the Kyoto Protocol altogether. The other developed country parties completed their negotiations for specific targets in 2001 and have announced their determination to achieve them.

Regardless of whether it accepts the Kyoto Protocol, the United States, as a party to the UNFCCC, is obligated to take "precautionary measures to anticipate, prevent or minimize the causes of climate change." In response to a request from the Bush administration, the U.S. National Academy of Sciences concluded in 2001 that human activities were indeed contributing to global climate change, thus confirming the premise of the UNFCCC. The Bush administration has announced plans to reduce greenhouse gas "intensity" of the U.S. economy. This goal would reduce emissions per unit of economic output, but the target for the reduction in intensity is so low that total emissions would still continue to grow. Indeed, the announced target is in line with historical trends in decreased emissions per unit economic output and increasing total emissions. In other words, the plan maintains the status quo of modestly increasing energy efficiency and rising greenhouse gas emissions.

The U.S. rejection of the Kyoto Protocol coupled with its publication of a plan that will actually result in increased greenhouse gas emissions over the next decade puts the Untied States in violation of its commitments under the UNFCCC.

Recommendations:

1. The United States should create policies and targets for actually reducing total greenhouse gas emissions. This will require reductions in greenhouse gas intensity at a rate faster than the anticipated rate of economic growth.

2. The United States should announce a process by which it would re-engage with the world community to find ways to reduce greenhouse gas emissions globally over the next three to four decades by far larger absolute amounts than now envisioned in the Kyoto Protocol for the next decade.

Rome Statute of the International Criminal Court (ICC)

The Rome Statute creates the world's first permanent criminal court to try individuals for genocide, war crimes, and crimes against humanity, as well as aggression once that crime is defined. It recognizes no immunities; therefore even heads of state, traditionally insulated from prosecution, can be brought to justice for committing atrocities when their countries are unable or unwilling to address the crimes at the national level. The ICC also includes as crimes violent acts against women that had long been overlooked as war crimes. Together with associated improvement of capabilities in national legal systems, the ICC will bolster global security by deterring the commission of serious international crimes. It will "end the culture of impunity," the assumption that atrocities can be committed without fear of legal consequences. A functioning ICC will strongly reinforce the existing taboo against use of weapons of mass destruction.

One of two conditions must be met for the Court to exercise jurisdiction in most cases: (1) the State where the crimes occurred ("territorial state") must be party to the Rome Statute or consent to the jurisdiction of the Court *or* (2) the State of nationality of the accused is party to the Statute or consents to the jurisdiction of the Court. These "pre-conditions" do not apply when the Security Council refers a case to the ICC acting under Chapter VII of the UN Charter. There are three ways cases may come before the Court: (1) when a state party has referred a situation to the Prosecutor; (2) when the Prosecutor initiates an investigation; and (3) when the Security Council, acting under Chapter VII of the UN Charter, refers a case. The Rome Statute addresses in several ways concerns that individuals will be the subjects of politically motivated prosecutions, including by requiring Court approval of investigations initiated by the Prosecutor. Nor will the Court infringe upon a state's interest in prosecuting crimes. The ICC is a court of last resort, and has jurisdiction only when the corresponding country is unable or unwilling to prosecute.

The ICC will be an independent institution and not an arm of the United Nations. In contrast to the *ad hoc* international criminal tribunals for the Former Yugoslavia and Rwanda, the ICC will also be largely independent of the Security Council. The United States had argued for a court that would be made dependent on the UN Security Council for the cases that could come before it. However, the role of the Security Council was greatly circumscribed in the final text of the Rome Statute. It is this aspect – the degree of independence of the Council – that caused the United States to oppose the permanent court at the same time that it fully supported the creation and maintenance of the *ad hoc* tribunals.

Even before formal negotiations commenced on the draft statute in 1996, the U.S. attempted to thwart the process toward a permanent and independent court altogether. During the negotiations, the United States unsuccessfully sought amendments to limit the Court's jurisdiction over nationals of non-states parties and to require consent of the state in question prior to exercising jurisdiction over officials and military personnel. The United States voted against the Statute at the Rome Conference.

After the treaty was adopted by the Rome Conference, the United States engaged in intensive diplomatic pressure tactics and other efforts to alter the statute long after it had been adopted. Nevertheless, President Clinton opted to sign the Rome Statute hours before the period for signature expired on December 31, 2000. In treaty law, signature of a treaty signifies an intent to ratify and not to engage in activities or enact laws that would go against the terms of the treaty. Yet Clinton simultaneously backtracked from the prospect of U.S. ratification at the same time that he authorized signature: "I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied." U.S. opposition boils down to one problem: U.S. nationals (the primary concern is with officials and high-ranking military) would be subject, like those of other states, to the jurisdiction of an international court.

When the Bush administration entered office, it undertook a high-level policy review of the Statute. A decision about the Bush administration's strategy with respect to the ICC was expected in September 2001 but the discussions were eclipsed by the events of September 11. The options under consideration ranged from do-nothing opposition to an all-out global anti-ratification campaign. By early September there was reportedly a growing consensus toward "unsigning" the Statute.

Since the signing of the Rome Statute in 1998, the United States has followed several avenues to limit the jurisdiction and power of the ICC. The United States began introducing provisions prohibiting the extradition to the ICC of U.S. personnel in the negotiations of Status of Forces

Agreements (agreements providing for the placement of U.S. military personnel in other countries). Legislation was introduced to prevent any U.S. cooperation with the future ICC, prohibit military assistance to most countries that ratify the statute, bar U.S. participation in UN peacekeeping missions; and authorize the President to use "all means necessary and appropriate" to free individuals held by or on behalf of the ICC (generally interpreted to mean military force). The legislation was not adopted, but observers fear that it may resurface. Meanwhile, legislation has been adopted to assure that certain funds authorized by Congress are not used to support the ICC or any related activity. When the Senate voted to ratify treaties relating to terrorism in December 2001, the Senate included reservations to prohibit the transfer of any person, or consent to the transfer of any person extradited by the United States, to the ICC.

The current direction of U.S. policy is therefore not only to keep U.S. citizens out of the Court's jurisdiction but also to make it as difficult as possible for participating countries to cooperate with the Court. U.S. policy seems to be drifting in a direction that would make it especially difficult for developing countries, which need U.S. support in other arenas (such as the World Bank and the IMF), to cooperate with the ICC. Regardless of U.S. opposition, the International Criminal Court will soon be a reality. The Rome Statute is expected to enter into force in 2002. Fifty-six countries have ratified it and the remaining ratifications necessary for entry into force will occur in April 2002. By the fall of 2002, it is expected that the first meeting of the Assembly of States Parties will convene with the first election of judges to be held in early 2003 while the United States watches from the sidelines.

Recommendations:

1. The United States should ratify the Rome Statute and fully participate in the establishment of the International Criminal Court.
2. Short of total participation, the United States should take the following measures: end the pursuit of bilateral agreements to prohibit the extradition of U.S. nationals to the ICC; repeal legislation prohibiting future support for the ICC; and refrain from enacting legislation which conditions military or financial support on a state's non-participation in the ICC.

Treaties and Global Security

The evolution of international law since World War II is largely a response to the demands of states and individuals living within a global society with a deeply integrated world economy. In this global society, the repercussions of the actions of states, non-state actors, and individuals are not confined within borders, whether we look to greenhouse gas accumulations, nuclear testing, the danger of accidental nuclear war, or the vast massacres of civilians that have taken place over the course of the last hundred years and still continue. Multilateral agreements increasingly have been a primary instrument employed by states to meet extremely serious challenges of this kind, for several reasons. They clearly and publicly embody a set of universally applicable expectations, including prohibited and required practices and policies. In other words, they articulate global norms, such as the protection of human rights and the prohibitions of genocide and use of weapons of mass destruction. They establish predictability and accountability in addressing a given issue. States are able to accumulate expertise and confidence by participating in the structured system offered by a treaty.

However, influential U.S. policymakers are resistant to the idea of a treaty-based international legal system because they fear infringement on U.S. sovereignty and they claim to lack confidence in compliance and enforcement mechanisms. This approach has dangerous practical

implications for international cooperation and compliance with norms. U.S. treaty partners do not enter into treaties expecting that they are only political commitments by the United States that can be overridden based on U.S. interests. When a powerful and influential state like the United States is seen to treat its legal obligations as a matter of convenience or of national interest alone, other states will see this as a justification to relax or withdraw from their own commitments. If the United States wants to require another state to live up to its treaty obligations, it may find that the state has followed the U.S. example and opted out of compliance.

Undermining the international system of treaties is likely to have particularly significant consequences in the area of peace and security. Even though the United States is uniquely positioned as the economic and military sole superpower, unilateral actions are insufficient to protect its people. For example, since September 11, prevention of proliferation of weapons of mass destruction is an increasing priority. The U.S. requires cooperation from other countries to prevent and detect proliferation, including through the multilateral disarmament and nonproliferation treaties.

No legal system is foolproof, domestically or internationally. While violations do occur, "the dictum that most nations obey international law most of the time holds true today with greater force than at any time during the last century." And legal systems should not be abandoned because some of the actors do not comply.

In the international as in the domestic sphere, enforcement requires machinery for deciding when there has been a violation, namely verification and transparency arrangements. Such arrangements also provide an incentive for compliance under ordinary circumstances. Yet for several of treaties discussed in this report, including the BWC, CWC, and CTBT, one general characteristic of the U.S. approach has been to try to exempt itself from transparency and verification arrangements. It bespeaks a lack of good faith if the United States wants near-perfect knowledge of others' compliance so as to be able to detect all possible violations, while also wanting all too often to shield itself from scrutiny.

While many treaties lack internal explicit provisions for sanctions, there are means of enforcement. Far more than is generally understood, states are very concerned about formal international condemnation of their actions. A range of sanctions is also available, including withdrawal of privileges under treaty regimes, arms and commodity embargoes, travel bans, reductions in international financial assistance or loans, and freezing of state or individual leader assets. Institutional mechanisms are available to reinforce compliance with treaty regimes, including the U.N. Security Council and the International Court of Justice. Regarding the latter, however, the United States has withdrawn from its general jurisdiction.

One explanation for increasing U.S. opposition to the treaty system is that the United States is an "honorable country" that does not need treaty limits to do the right thing. This view relies on U.S. military strength above all and assumes that the U.S. actions are intrinsically right, recalling the ideology of "Manifest Destiny." This is at odds with the very notion that the rule of law is possible in global affairs. If the rule of power rather than the rule of law becomes the norm, especially in the context of the present inequalities and injustices around the world, security is likely to be a casualty.

International security can best be achieved through coordinated local, national, regional and global actions and cooperation. Treaties like all other tools in this toolbox are imperfect instruments. Like a national law, a treaty may be unjust or unwise, in whole or in part. If so, it can be amended. But without a framework of multilateral agreements, the alternative is for states to

decide for themselves when action is warranted in their own interests, and to proceed to act unilaterally against others when they feel aggrieved. This is a recipe for the powerful to be police, prosecutor, judge, jury, and executioner all rolled into one. It is a path that cannot but lead to the arbitrary application and enforcement of law. For the United States, a hallmark of whose history is its role as a progenitor of the rule of law, to embark on a path of disregard of its international legal obligations is to abandon the best that its history has to offer the world. To reject the system of treaty-based international law rather than build on its many strengths is not only unwise, it is extremely dangerous. It is urgent that the United States reject this path and join with other countries in making global treaties crucial instruments in meeting the security challenges of the 21st century.