The developing system of treaty regimes underpinning global security is under assault. The Comprehensive Test Ban Treaty is far from entering into force; negotiations have halted on a compliance protocol for the Biological Weapons Convention; several states have placed restrictions on inspections under the Chemical Weapons Convention; the Statute of the International Criminal Court is about to enter into force without support from several of the world’s most powerful states; the Treaty Banning Anti-Personnel Mines similarly lacks participation by a number of large states; the United States has announced its imminent withdrawal from the Anti-Ballistic Missile Treaty; and the Kyoto Protocol is opposed by the United States and in any event is only a modest step toward stopping global warming. And, as these presentations by civil society organizations underline, NPT disarmament commitments are being ignored.

The security of individuals by the billions around the world is at risk. It is therefore urgent, as a report made available to delegates explains,\(^1\) to convince governments and the public of the need for creation of and compliance with global security treaties – that is, adherence to the rule of law on a global scale. Multilateral agreements are certainly not the only means available to meet today’s extremely serious challenges like the risk of accidental nuclear war, global warming, and massacres of civilians, but they have several important advantages:

- **Global treaties and the regimes they establish clearly and publicly embody universally applicable expectations, articulating important global norms, for instance against genocide, aggressive war, and weapons of mass destruction, and for preservation of the environment.**

- **They provide predictability and accountability and promote learning; progress on a particular issue can be measured over time, and a foundation is laid for further progress, as states gain expertise and confidence and trust is built.**

- **They contribute to the development of international consensus on both goals and methods, and provide criteria to guide states’ activities and a focal point for public discussion.**

These advantages are demonstrated by the development of the NPT regime. At the outset, the nuclear weapon states understood the NPT as an asymmetrical bargain, imposing specific, enforceable obligations in the present on non-nuclear weapon states, while requiring of them only a general and vague commitment to good faith negotiation of nuclear disarmament, to be brought to fruition in the distant future if ever. The 1995 and 2000 Review Conferences, reinforced by the 1996 International Court of Justice opinion, decisively rejected this view. It is now established that the NPT has a symmetry of obligations: Article VI is an obligation to be met in accordance with criteria of transparency, verification, and irreversibility, with specific measures embedded in legally binding agreements, so as to “bring to a conclusion,” in the words of the ICJ, “nuclear disarmament in all its aspects under strict and effective international control”.

Measured against these reasonable standards, the nuclear weapon states, especially the United States, are failing to comply with the NPT disarmament obligation, not only due to the lack of progress in particular areas, but above all, by reason of the failure to make disarmament the driving force in national planning and policy with respect to nuclear weapons. There is no sign that the Article VI obligation as now understood in light of its authoritative interpretation by the ICJ and the 2000 unequivocal undertaking to eliminate nuclear arsenals has been integrated into national nuclear planning. Rather its invocation remains a rhetorical flourish for international settings. Thus the official overseeing the U.S. nuclear weapons complex testified in February to Congress that the new Nuclear Posture Review “reaffirms that nuclear weapons, for the foreseeable future, will remain a key element of U.S. national security strategy.”

Compliance with law in the nuclear sphere is not only about disarmament and nonproliferation. There is also the unlawfulness of threat or use of these terrifying devices. Here recent developments are most disturbing. Russia’s January 2000 Security Concept stated that nuclear weapons could be used to “repulse armed aggression, if all other means of resolving the crisis have been exhausted.” Since the 2000 Review Conference, Russia has made no moves to reverse or limit its reliance on a first use option. The United States continues to plan for massive retaliation or a preemptive counterforce attack in response to an actual or imminent nuclear attack, and for first use of nuclear weapons against an overwhelming conventional attack. In addition, the recently released Nuclear Posture Review states that nuclear weapons “could be employed against targets able to withstand nonnuclear attack,” or in retaliation for use of nuclear, biological, or chemical weapons, or “in the event of surprising military developments.” In the past, the United States had indicated that nuclear weapons could be used in retaliation to a chemical or biological weapons attack. Now that option has been stated plainly. Beyond that, the United States has identified a circumstance for a preemptive use of nuclear weapons against targets like underground bunkers containing command and control facilities or stocks of biological and chemical weapons.

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3 See Philip C. Bleek, “Russia Adopts New Security Concept; Appears to Lower Nuclear Threshold,” Arms Control Today, January/February 2000
In addition to violating the NPT commitment to diminishing the role of nuclear weapons in security policies, the U.S. plans undermine the negative security assurance offered to non-nuclear weapon states parties to the NPT. Those assurances are at a minimum political commitments essential to the bargain underlying the NPT, and arguably have become legally binding, notably because they were reiterated in connection with the indefinite extension of the NPT in 1995. Use of nuclear weapons against any NPT-compliant state not acting in association with a nuclear weapon state would violate the assurances. Yet the Nuclear Posture Review identifies five non-nuclear weapon states parties to the NPT as potential targets. None of these states has been authoritatively and conclusively determined to be presently in violation of the NPT by the IAEA, NPT states parties acting collectively, or the Security Council.

Regarding nuclear use in response to a chemical or biological attack, the United States has indicated that it could be justified as a “reprisal,” that is, an otherwise unlawful act carried out to prevent further unlawful acts by the state using chemical or biological weapons in violation of international law. However, the use of nuclear weapons, or any weapon, including in reprisal, must always meet fundamental requirements of necessity, proportionality, and discrimination.

_Necessity_ requires that there be no less destructive course of action available. In most cases, there would be such alternatives, and if not, they should be developed. And do not forget about preventive action before a chemical or biological attack occurs – thus the imperative of strengthening, not weakening as is the present trend, the treaty-based regimes for elimination of chemical, biological, and nuclear arms.

_Proportionality_ requires that the response not be excessive in relation to the scale of the attack and to the objective of preventing further attacks. In most cases, a nuclear response would involve orders of magnitude more destruction and suffering, and is therefore barred.

_Discrimination_ requires, as the International Court of Justice affirmed, that states must “never use weapons that are incapable of distinguishing between civilian and military targets.” Given that the radioactive effects of nuclear explosions are, as the ICJ observed, uncontainable in space and time, there is no realistic situation in which nuclear weapons could meet this requirement.

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7 This view was the basis for the White House statement on signing the non-use protocol to the Pelindaba treaty establishing the African Nuclear Weapon Free Zone that the protocol “will not limit options available to the United States in response to an attack by an ANFZ party using weapons of mass destruction.” _Id._, pp.11-12 and note 116
8 Legality of the Threat or Use of Nuclear Weapons, ICJ Reports, July 8, 1996, para. 78 (emphasis added)
9 _Id._, para. 35
10 Sidney Drell, Raymond Jeanloz, and Bob Peurifoy, “Bunkers, Bombs, Radiation,” Los Angeles Times, Commentary, March 17, 2002 (“a 1 kiloton warhead – 1/20 the yield that destroyed Hiroshima – detonated at a depth of 20 feet would eject about 1 million cubic feet of radioactive debris from a crater about the size of ground zero at the World Trade Center”; “there is no possibility of a so-called ‘clean’ attack [on buried targets], free of extensive radioactive contamination spreading in the atmosphere”). Sidney Drell is an emeritus professor of physics at Stanford University and a member of the JASON group of eminent scientists which advised the Departments of Energy and Defense on scientific matters.
Finally, regardless of whatever hypothetical scenarios of retaliatory nuclear use with limited "collateral damage" can be conjured up, in general making nuclear weapons more usable as a matter of policy and operation risks unleashing nuclear chaos in the world that among other unacceptable consequences could result in nuclear explosions on the soil of the country executing the nuclear use.

In conclusion, this is an age fraught with the risk of use of nuclear weapons. It is a time when the world faces climate change whose consequences could range from severe to catastrophic. There is a global economy in which a few hundred of the world's richest people have combined wealth greater than the poorest two billion, and there are vast and growing differences between haves and have-nots within and between countries. Technology makes information about these gaps easily available, as it does data about weapons of mass destruction. To take on these and other problems, coordinated local, national, regional and global actions and cooperation are necessary.

Treaties like all other tools in this toolbox are imperfect instruments. 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. The consequences of such a course for security will be disastrous. To marginalize 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 world’s states, including the most powerful, reject this path and make global treaties crucial instruments in meeting the security challenges of the 21\textsuperscript{st} century.

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