

IISL-00-IISL.4.03

THE LAW and U.S. POLICY ON NATIONAL MISSILE DEFENSE

by

Jonathan F. Galloway*

Abstract

The question of whether the U. S. should deploy a national missile defense (NMD) in the coming years is one of the most contentious issues in domestic politics within the United States and in international relations. This controversy raises questions of international law, specifically the standing and interpretation of the 1972 Treaty on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty). NMD is concerned with the issue of the existence of friends and enemies after the end of the Cold War and thus the question of what the foreign policy of the U. S. is and how it will be conducted – unilaterally or multilaterally. Further, the question of the appropriate military strategy for the U. S. is raised. In addition, how technological change and feasibility affects the law, policy and strategy has to be considered. In short, we must view the

NMD decision in a wide, interdisciplinary context in order to understand the law and its evolution.

Legal Background

Back in 1972, the U. S. and the U.S.S.R., the only two parties to the ABM Treaty, believed that a prohibition on ABM systems, with limited exceptions, would mean that a rational actor would never launch a nuclear attack because of the fear of retaliation. The treaty in effect legitimized the military strategy of mutually assured destruction (MAD) and codified the fact of the bipolar structure of power and enmity during the Cold War period.

In 1983, President Reagan proposed the creation of the Strategic Defense Initiative (SDI) to make nuclear weapons “impotent and obsolete.”¹ The deployment of such a system would have violated the ABM Treaty² but, in spite of the bitter and polemical controversy about this during the 1980s, the technology was never there to render the idea feasible.³

Then in the period 1989 to 1991 the Cold War ended. The Soviet Union broke up into its fifteen constituent parts. On September 26, 1997, the Department of State issued the following concerning the effect of the U.S.S.R.’s demise on the ABM Treaty regime.

Copyright © 2000 by Jonathan F. Galloway.
Prepared for delivery at the 43rd Colloquium on the Law of Outer Space at the 51st International Astronautical Congress in Rio de Janeiro, October 2-6, 2000. Published by the American Institute of Aeronautics and Astronautics, Inc., with permission. Released to AIAA to publish in all forms.

*Professor of Politics, Lake Forest College, Lake Forest, IL, USA

The Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, commonly known as the ABM Treaty, was a bilateral agreement between the two states. When the USSR dissolved at the end of 1991, and its constituent republics became independent States, the only operationally-deployed ABM system was at Moscow, while a number of its early warning radars and an ABM test range were located outside of the Russian Federation. Although the ABM Treaty continues in force, it nevertheless has become necessary to reach agreement as to which New Independent States (NIS) would collectively assume the rights and obligations of the USSR under the Treaty.

The Memorandum of Understanding on Succession (MOUS) establishes that the Parties to the ABM Treaty shall be the United States, Belarus, Kazakhstan, the Russian Federation, and Ukraine. For the purposes of the MOUS and the ABM Treaty, the latter four states are considered to be the USSR Successor States. Pursuant to the MOUS provisions, the USSR Successor States collectively assume the rights and obligations of the USSR. This means that only a single ABM deployment area is permitted among the four Successor States; in addition, only 15 ABM launchers at ABM test ranges are collectively permitted. Russia will be able to continue to operate any existing early warning radars, as well as the ABM test range, located within other states with the permission of those governments.

States that become bound by the MOUS also are bound to observe the provisions of both the First and Second Agreed Statements, which deal with lower-velocity and higher-velocity theater ballistic missile defense systems, respectively. These agreements will now be subject to ratification or approval by the signatory states in accordance with the appropriate constitutional procedures of each state, and will enter into force on the date when the governments of all five signatory states have deposited instruments of ratification or approval of the Memorandum of Understanding on Succession. The MOUS will remain in force as long as the ABM Treaty remains in force. The ABM Treaty is of unlimited duration.⁴

So the ABM regime remained in place. But political and technological developments were ushering in possible new ABM systems that might or might not lead to the abrogation of the 1972 Treaty.

The Political Context

We may examine the political context from two vantage points – within the United States and between the U. S. and other countries. Within the U. S. a consensus developed that a land-based NMD system should be deployed to counter the threat from so-called “rogue states,” these being identified as North Korea, Iran and Iraq. In addition, there were other rogue states. Syria, Cuba and Sudan which had been so labeled by the Department of State.⁵ But they did not present a ballistic missile threat. There was no desire to establish a full-scale “Star Wars” type ballistic missile defense as this would antagonize Russia and China. Now relations between former enemies and now friends⁶ were based on a confusing mixture of trust, i.e., economic cooperation in

the WTO and distrust, i.e., nuclear deterrence through adherence to MAD and the ABM Treaty.

In May 1999, Congress passed the National Missile Defense Act which was signed by President Clinton on July 29. The Act provides

It is the policy of the United States to deploy as soon as is technologically possible an effective National Missile Defense system capable of defending the territory of the United States against limited ballistic missile attack (whether accidental, unauthorized or deliberate) with funding....⁷

The consensus within the U. S. expressed in law was undermined by the politics of the 2000 Presidential election campaign. President Clinton was expected to make a decision to go ahead with the initial work on the radar for the NMD but testing of the system was fraught with errors and his decision was delayed (see section on technology below). In the meantime, the Republican candidate for President, George W. Bush, governor of Texas, called for a more robust full-scale ballistic missile defense of the country and talked of withdrawing from the ABM Treaty while the Democratic nominee Vice President Albert Gore, defended the idea of a limited defense against a few missiles.⁸

Internationally, one must examine the relations between the U. S. and its allies, former enemies, and "states of concern" in order to understand the politics of NMD. All the allies of the U. S. are opposed to NMD because they see it as undermining the stability of the nuclear balance as it currently exists and ushering in a new arms race.⁹ Parenthetically, it should be noted that in order to deploy the system the

agreement of Denmark and Britain would be absolutely essential because the radars for the system would have to be based there as well as in the U. S.¹⁰

The former enemies of the U. S. also oppose the system and a highly classified U. S. intelligence report warns that deploying NMD "could prompt China to expand its nuclear arsenal tenfold and lead Russia to place multiple warheads on ballistic missiles that now carry only one...."¹¹ China is especially opposed because its arsenal of ICBMs numbers about 24 and thus this deterrent would be thwarted by the limited NMD while Russia's arsenal of over 3,000 deliverable warheads would not be affected.

The third category of states – what used to be called rogue states – has been evolving recently. Iran has elected a reformist President¹² North Korea is in negotiations with South Korea about reunification and has offered to cease its launcher program if other states will launch its satellites.¹³ The only recalcitrant state is Iraq, and some wonder whether this state does present an ICBM threat to the U. S. in the next 15-20 years.

In summary, within the U. S. there is a consensus for building NMD but the exact parameters of such a system will probably not unfold this year as was initially thought but will await the priorities of the new administration taking power in January 2001.

On September 1, 2000 President Clinton decided to put off work on NMD. While maintaining that there was a "real and growing" threat from states such as Iraq and North Korea, the President determined that the United States should not move forward "Until we have absolute confidence that the system will work."¹⁴ This decision leaves to President Clinton's successor in office the option to go ahead with the current option, decide against NMD, or

build a more robust system. The decision was praised by Britain and Germany, noted by France and seen as a victory for President Putin of Russia.¹⁵

Technological Feasibility and the Law

Some commentators believe that technological change is driving policy and law rather than the other way around. In fact it is part of the conventional wisdom in some circles to say that technology determines law and policy, but as this writer argued at the 28th Colloquium in 1985 in Stockholm, “while new scientific findings and technological change affect developments in the law, the law can also affect which technological developments are chosen for commercial and/or military uses.”¹⁶ With this perspective in mind, we should examine NMD not only in terms of technological feasibility but in terms of legal feasibility, i.e., is a new technology application legal in light of principles of international law? Is it wise?

The United States believes that a full-scale NMD system would violate the ABM Treaty, but an initial deployment of the first stages of a x-band radar on a remote island in the Aleutians in Alaska would not -- at least until the spring of 2001.¹⁷ This is a system based on intercepting ICBMs in outer space with kinetic kill capacities. This would be a violation of the ABM Treaty under Article III. There could be an amendment to the treaty legitimizing such a system but the Russians are opposed to this. Instead, after the failure of the NMD test on July 7, 2000, Russia’s President, Vladimir Putin, proposed ballistic missile defense but by shooting down missiles in their “boost phase, that is, within three to five minutes after launch, before the rockets reach outer space.”¹⁸ Some Republicans favor this approach because then the defender would not have to worry about distinguishing decoys from real warheads in outer space and the U. S. could

use Aegis cruisers, moving them around to trouble spots around the globe as the situation demands.¹⁹

Other Clinton administration critics want to scrap the ABM Treaty altogether and move towards a more global system defense, a position George W. Bush seems to favor.²⁰

As one can see from this narrative, technological change is not determining law and policy. Rather it is setting the context in which political decisions will be made on NMD or an alternative both within the U. S. and by other countries. The question for the law of outer space is whether the 1972 treaty system will remain in tact, be amended, or abrogated. It is to be hoped that change will occur in an environment where international cooperation and consensus building will be uppermost in states’ policies rather than the politics of zero-sum game scenarios.

Military Strategy

Ballistic missile defense systems can fit into three different military strategies. The first is MAD mentioned above and legally legitimized by the 1972 ABM Treaty. In this case, missile defenses are severely limited so that the system of nuclear deterrence can remain symmetrical and enemies can pursue their conflicts of interest without annihilating each other, assuming – and this is a big if – that both sides are rational. So nuclear deterrence is stable if enemies are rational and they believe that each can be deterred by the threat of retaliation.

The second strategy, sometimes called Nuclear Utilization Target Selection (NUTS)²¹ envisions using abm systems as a defense while fighting and winning a nuclear war. Thus many commentators pointed out that President Reagan’s Strategic Defense Initiative proposal, if it became a reality, would enable the U. S. to

attack an enemy and then not fear retaliation. This possibility then encourages enemies to escalate the arms race and can create irrational fears and paranoia during crisis situations.

The third strategy is one of abolishing nuclear weapons altogether as is called for in Article VI of the NPT of 1968.²² This strategy was indicated when President Reagan said that it was immoral to retaliate against innocent civilians and that the purpose of SDI was to make nuclear weapons "impotent and obsolete." It is also the goal of the abolition movement as represented by the writings of Jonathan Schell.²³ In this case, an efficient BMD system, perhaps organized internationally, would be a stage on the road to nuclear disarmament rather than arms control per se.

Currently the U. S. has no well thought out strategy for the use of nuclear weapons, even though the Cold War has been over for a decade.²⁴ Insofar as the ABM Treaty remains intact, the military strategy by default becomes MAD. If NMD is added against "rogue states" or "states of concern," then we could have a situation of MAD vis-a-vis former enemy states which are currently our friends and NUTS against the rogue states. If a SDI type bmd system is researched a la the views of George W. Bush, then there would be a NUTS system against major nuclear powers on the prescription that even if they are our friends now, there is no such thing as permanent friendship in international relations, only permanent national interests.

The third possibility is represented not only by the NPT Art. VI, the Outer Space Treaty Article 4²⁵ but also by the implications of the 1996 ICJ decision on nuclear weapons "that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."²⁶ In this eventuality through good faith and over

time nuclear weapons and the means of delivering them will become atavistic because there will be no major enemies in international relations and conflicts will be settled by law and negotiation rather than by force or the threat of force as envisaged in the UN Charter Article 2(4).²⁷

INTERDISCIPLINARY SYNTHESIS

In this paper, I have analyzed NMD from the perspectives of law, policy, politics, technological feasibility and military strategy. If we dichotomize these perspectives, we can see that one approach leads down the road to more risks and threats to the peace and the other to more cooperation and consensus building.

Interdisciplinary Synthesis

World Politics	Realism	Idealism
International Law	Westphalian Sovereignty	Interdependence
Technology	Deterministic	Voluntary
Military Strategy	National Security	Collective Security

As I wrote in my 1991 paper on protecting the ozone layer, the synthesis on the left takes us down the old road of power politics and the unintended consequences of arms races which become de facto intended effects over time.²⁸ The synthesis on the right takes us down a path which emphasizes interdependence and cooperation between nations. It is to be hoped that nations will view their national security in a more global fashion in the future – one which represents not the negative politics of zero sum games but one which emphasizes the positive politics of win-win possibilities and potentialities. This is the future as envisioned in, inter alia, the Outer Space Treaty and the UN Charter.

ENDNOTES

¹President Ronald Reagan, "National Security Address to the Nation," Weekly Compilation of Presidential Documents, vol. 19, no. 12, March 23, 1983, 442-448.

²³UST 3435 TIAs No. 7503. "Each party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based or mobile land-based."

³Frances Fitzgerald, Way Out There in the Blue: Reagan, Star Wars and the End of the Cold War (New York: Simon & Schuster, 2000), 403.

⁴U. S. Department of State Fact Sheet on Memorandum of Understanding on Succession, September 26, 1997. See Sean D. Murphy, "Status of the U. S. - U.S.S.R. Anti-Ballistic Missile System Treaty," American Journal of International Law, vol. 93, no. 6 (October, 1999), 910-912.

⁵Christopher Marquis, "U. S. Declares 'Rogue nations' Are Now 'States of Concern'," The New York Times, June 20, 2000, A8.

⁶For instance, the U. S. now includes Russia in its foreign aid budget. See Glenn P. Hastedt, American Foreign Policy: Past, Present, Future (Upper Saddle River: Prentice Hall, 2000), 343.

⁷Pub. L. No. 106-38, 113-Stat - 205 (1999), see Murphy, *op. cit.*, 912.

⁸David E. Sanger, "Decision on Defense System May Fall to Next President," The New York Times, July 7, 2000, A4.

⁹Eizabeth Becker, "Allies Fear U. S. Project May Renew Arms Race," The New York Times, July 7, 2000, A4.

¹⁰Gopal Ratnam, "Deadline May Postpone NMD," Space News, August 7, 2000, 44.

¹¹Stevens Lee Myers, "Study Said to Find U. S. Missile Shield Might Incite China," The New York Times, August 10, 2000, A1 and A6.

¹²Andrew J. Bacevich, "Without 'Rogue States,' U. S. Strategy Loses Its Focus," The Wall Street Journal, June 22, 2000, A22.

¹³Michael B. Gordon, "North Korea Reported Open to Halting Missile Program," The New York Times, July 20, 2000, A6.

¹⁴Eric Schmitt, "President Decides to Put Off Work on Missile Shield," The New York Times, September 2, 2000, A1, A6.

¹⁵Patrick E. Tyler, "European Leaders Praise U. S. Antimissile Decision," The New York Times, September 2, 2000, A7.

¹⁶Jonathan F. Galloway, "Nuclear Winter, Ballistic Missile Defense and the Legal Regime For Outer Space," Proceedings of the Twenty-Eighth Colloquium on the Law of Outer Space (Washington, DC: AIAA, 1986), 20.

¹⁷Ratnam, *op. cit.*

¹⁸John Diamond, "Russian Missile Plan Throws U. S. a Curve," Chicago Tribune, June 10, 2000, 1, 17.

¹⁹Richard Perle, "A Better Way to Build a Missile Defense," The New York Times, July 13, 2000, A29.

²⁰Elizabeth Becker and Eric Schmitt, "G.O.P. Senators Tell Clinton They Oppose Him on ABM Treaty and Defense Systems," The New York Times, April 22, 2000, A5.

²¹Spurgeon M. Keeny, Jr. and Wolfgang K. H. Panofsky, "MAD Versus NUTS," Foreign Affairs, vol. 60, no. 2 (Winter 1981/82), 287-304.

²²1UST483; TIAs No. 6839; 729UNTS 61.

²³Jonathan Schell, The Gift of Time: The Case for Abolishing Nuclear Weapons Now (New York: Metropolitan Books, 1998).

²⁴Eric Schmitt, "The Cold War Lives; In Search of a Missing Link in the Logic of Arms Control," The New York Times, July 16, 2000, Sect. 4, p. 3.

²⁵18UST2410; TIAs 6347; 810UNTS 205.

²⁶ICJ, advisory opinion, "Legality of the Threat or Use of Nuclear Weapons," 35 ILM 809 (1996)

²⁷"All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

²⁸Jonathan F. Galloway, "Protecting the Ozone Layer: The 1990 Revisions to the Montreal Protocol," Proceedings of the Thirty-Fourth Colloquium on the Law of Outer Space (Washington, DC: AIAA, 1992), 177-182, 181.