THE STRATEGIC DEFENSE INITIATIVE AND INTERNATIONAL LAW[1]

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INTRODUCTION

President Reagan's Strategic Defense Initiative (SDI), whatever one ultimately concludes as to its workability and wisdom, has had the salutary effect of offering a possible way out of the insane logical trap of deterrence theory. Deterrence-based strategies such as Mutual Assured Destruction have, for more than three decades, held the world hostage to the devastating nuclear capability of the superpowers. SDI, nominally, would replace U.S.-Soviet mutual vulnerability with mutual invulnerability as the basis of the nuclear *modus vivendi*. As alluring as this may appear, a myriad of factors need be considered before risking such a radical, if not transcendental shift in the underpinnings of global security.

This article reviews the multilateral and bilateral international legal obligations bearing upon President Reagan's Strategic Defense Initiative, more commonly known as "Star Wars," and analyzes current U.S. plans for the development of high-technology anti-ballistic missile defense systems in light of these obliglations.[2] The analysis will show that current SDI work does not in itself now violate international law, but that the direction of U.S. strategic planning, and future SDI work envisioned in current plans, will certainly soon become unlawful.This impending illegality will be shown to have serious implications for the negotiation

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1. The author wishes to express his appreciation to Professor Abram Chayes of Harvard Law School for making available a draft paper related to the issues discussed herein. That paper, in later form, has been published as Chayes, Chayes & Spitzer, *Space Weapons: The Legal Context*, 114 DAEDALUS 193 (1985).
2. Though I do not intend to comment at length on the wisdom of Star Wars, intellectual integrity requires that I inform the reader of my stance on this issue. Though I am one who views the logic of deterrence-based mutual assured destruction as insane, I note that the SDI-based mutual assured defense, the Holy Grail of President Reagan's vision, has the same acronym — MAD — and, for the sake of honesty, I confess that I have strong doubts as to its wisdom or workability, at least as it is now presented by the Reagan administration.

process now underway between the United States and the Soviet Union in Geneva.

I. THE RELEVANCE OF INTERNATIONAL LAW

The decision-making calculus that determines whether the SDI space-based high technology defense system becomes reality ought to weigh technical, strategic, political, economic, military and legal factors. No one of these, alone, will likely decide the issue. Legal considerations, however, ought to rank as one of the most important considerations — especially in view of the significant number of relevant international legal obligations already undertaken by the United States and the Soviet Union, and the frequent suggestions by each of these nations that they resolve outstanding differences by way of new international legal undertakings (e.g., proposed arms control treaties).

International law enables the global community to order itself and construct a network of reasonable behavioral expectations that yield stability and predictability — the indispensable prerequisites for peace and security.[3] Through treaties and customary international law, nations voluntarily accept limitations on their sovereignty upon which other nations may then rely. International law, and the rule *pacta sunt servanda*[4] bind all nations, including both superpowers. Thus, the task of an international lawyer addressing SDI is to review relevant treaty texts and state practice so as to ascertain fairly the intentions of the parties and the resulting legal obligations; and, then, analyze subsequent practice with a view to furthering the good faith performance of such obligations.

Unfortunately, however, there has been a disturbing trend among many close to the Reagan Administration to denigrate the importance of international law as a controlling factor in key governmental decisions such as those related to war and peace or the nuclear arms race.[5] The administration's attitudes toward, and plans for, SDI evidence this disrespect for legal considerations. In the context of SDI, however, failure to conform with the requirements of international law could cause the Soviets and others to question the believability and intentions of the United States, and this, in turn, could have a destabilizing effect of such magnitude that it would more than outweigh the stabilizing benefits of even

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3. *See generally* L. HENKIN, HOW NATIONS BEHAVE (2d ed. 1979).
4. Agreements (treaties) between the parties must be observed.
5. U.S. practice under President Reagan has evidenced disrespect for international law in a number of instances outside of the SDI context, including the invasion of Grenada, the mining of Nicaraguan waters, and the attempt to avoid Nicaragua's suit against the United States before the International Court of Justice in violation of the terms of U.S. recognition of the Court's compulsory jurisdiction.

the most optimistic vision of a world built upon mutual assured invulnerability.

II. STAR WARS

SDI, announced to the world as U.S. policy on March 23, 1983,[6] is a vigorous, comprehensive, and intensive research effort which has as its goal the ability "to interrupt and destroy [nuclear armed] ballistic missiles before they reach our soil."[7] As a consequence, many areas of very sophisticated technology related to ballistic missiles defense have been brought together under the SDI, and are now being studied and developed in projects with such bizarre sounding names as "the Airborne Optical system," "the Hypervelocity Launcher Project," "the High-altitude Endoatmospheric Defense Interceptor," "the Exoatmospheric Reentry Vehicle Interception System," "the Space Based Hypervelocity Launcher," and "the Space-Based Kinetic Kill Vehicle."[8]

Current schedules call for testing of devices developed by these programs during the late 1980s and early 1900s. This testing will violate the Anti-Ballistic Missile Treaty[9] and other international legal obligations of the United States.[10] As with most medium- to long-term scientific projects, many details regarding the end-product remain uncertain during early stages of work because the final nature of the system and its date of deployment depend on the results of research and feasibility studies. Nevertheless, the ultimate goal of SDI is clear: to provide the United States with a space-based shield impermeable to Soviet ballistic missiles.

III. THE MULTILATERAL FRAMEWORK

Though the United States and Soviet Union control the course and pace of the nuclear arms race, the international legal regime which orders the global community within which these two nations compete is the product of the will, consent, and practice of all nations. Despite the privileged position created for the two superpowers by their nuclear dominance, the family of nations has nevertheless undertaken to create

6. *Address to the Nation by President Ronald Reagan, March 23, 1983: Peace and National Security*, 83 DEP'T OF STATE BULL. 8 (1983) (hereinafter cited as Reagan, *Peace and National Security*).

7. *Id.*

8. *See* T. LONGSTRETH, J. PIKE & J. RHINELANDER, THE IMPACT OF U.S. AND SOVIET BALLISTIC MISSILE DEFENSE PROGRAMS ON THE ABM TREATY 42-51 (1985).

9. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-U.S.S.R., 23 U.S.T. 3434, T.I.A.S. No. 7503 (hereinafter cited as ABM Treaty). *See infra* notes 28-45 and accompanying text.

10. *See infra* notes 14-27 and accompanying text.

law, both hard and soft,[11] to constrain the U.S. and the USSR and to point the way toward disarmament. Thus, multilateral treaties, obligations undertaken unilaterally and bilaterally to all nations by the superpowers, and a host of General Assembly resolutions provide the context within which to judge the U.S.-Soviet arms race and the progress of bilateral talks to slow down or reverse it.

Disturbingly, both the United States and the Soviet Union seemingly regard nuclear arms control and disarmament as matters to be resolved between themselves and as raising issues for which they alone are the parties directly at interest. Nothing could be further from the truth. For example, SDI, which, depending upon the administration spokesperson you choose to believe, is designed to protect either the entire U.S. or only our strategic missile fields, might well create a situation in which the nuclear arms race, for which the United States and Soviet Union share responsibility, endangers everyone on the planet except those living in the United States. All nations have a direct stake in the outcome of the Geneva talks as they relate to Star Wars.

In fact, the global community has, on numerous occasions, made clear its concern for control of nuclear weaponry and for the peaceful utilization of outer space. The elaboration and approval of a number of arms control treaties under the auspices of the United Nations General Assembly,[12] and various U.N. General Assembly resolutions,[13] exemplify this concern. Moreover, the threatened extinction of humankind in the event of a nuclear war, and the status of outer space as part of the common heritage of humankind not subject to national appropriation or claim of sovereignty, suggests that where nuclear weapons and outer space intersect, all nations have a profound interest indeed.

With regard to the arms control negotiation process, the multilateral Non-Proliferation Treaty sets forth the essence of global expectations; it requires states "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race."[14] Putting theory into

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11. On the notion of soft law, *see* Dupuy, *Declaratory Law and Programmatory Law: From Revolutionary Custom to "Soft Law,"* in DECLARATIONS ON PRINCIPLES: A QUEST FOR UNIVERSAL PEACE 247 (R. Akkerman, P. Van Krieken & C. Panneborg eds. 1977).
12. *See infra* notes 15-18.
13. For a list of General Assembly resolutions expressing nations' resolve to prohibit, or at least limit, the use of nuclear weapons, *see* Weston *Nuclear Weapons Versus International Law: A Contextual Reassessment*, 28 McGILL L.J. 542, 569 n.110, *reprinted in* NUCLEAR WEAPONS AND LAW 133, 159 n.110 (A. MILLER & M. FEINRIDER eds., 1984). *See also* Feinrider, *International Law as Law of the Land: Another Constitutional Constraint on Use of Nuclear Weapons*, 7 NOVA L.J. 103, 116 n.46 (1982), *reprinted in* NUCLEAR WEAPONS AND LAW 83, 96 n.46 (A. MILLER & M. FEINRIDER eds., 1984).
14. Treaty on the Non-Proliferation of Nuclear Weapons, art. VI, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (hereinafter cited as NPT).

practice, a large number of nations have become parties to multilateral treaties limiting or prohibiting nuclear weapons. Examples include the Non-Proliferation Treaty itself,[15] the Antarctic Treaty,[16] the Outer Space Treaty,[17] the Seabed Arms Control Treaty,[18] and the Treaty of Tlatelalco[19] creating a Nuclear Free Zone in Latin America. Clearly, should the U.S. and Soviet negotiators in Geneva produce an agreed-upon text, they will not have written on a clean slate.

Though Washington and Kremlin decision-makers may arrogantly dismiss the views and practice of the non-nuclear world as nothing more than soft law graffiti, U.S. and Soviet lip-service acknowledgements of the non-nuclear view may have created legal obligations *erga omnes* to move toward disarmament.[20] The suggestion of some superpower lawyers that law is irrelevant in the face of nuclear might is nothing more than a claim by the powerful to be above the rule of law, a claim that cannot coexist with any pretense of civility and order.

The multilateral law governing anti-ballistic missile defense systems comes primarily from the Outer Space Treaty.[21] This treaty, as described in the Arms Control Impact Statements submitted annually by the President to Congress, "establishes a general norm for peaceful uses of outer space."[22] Though (U.S. and Soviet) state practice confirms that the

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15. *Id.* More than 120 states have ratified the NPT.
16. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4790, 402 U.N.T.S. 71. More than 30 states have ratified the Antarctic Treaty.
17. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (hereinafter cited as Outer Space Treaty). More than 90 states have ratified the Outer Space Treaty.
18. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337 (hereinafter cited as Seabed Treaty). More than 80 states have ratified the Seabed Treaty.
19. Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelalco), Feb. 14, 1967, 634 U.N.T.S. 281. 24 states have ratified the Treaty of Tlatelalco.
20. *See* Nuclear Test Cases, (Austl. v. Fr.) 1974 I.C.J. 253, (N.S. v. Fr.) 1974 I.C.J. 457 (hereinafter cited as Nuclear Test Cases). In these cases, the International Court of Justice held that a unilateral declaration "may have the effect of creating legal obligations . . . [when] it is the intention of the State making the declaration that it should become bound according to its terms." *Id.* at 267-68, 472-73. The Court ruled that France was legally bound by the public statements of several of its governmental officials to the effect that there would be no further atmospheric testing of nuclear weapons in the South Pacific once the test series at issue in the cases had been concluded. *See also* Franck, *Word Made Law: The Decision of the ICJ in the Nuclear Test Cases*, 69 AM. J. INT'L L. 612 (1975). On the issue of the legal effect of unilateral declarations, in a different context, see Case Concerning Military and Paramilitary Activities in and Against Nicaragua [Jurisdiction], (Nicar. v. U.S.) 1984 I.C.J. 392, 418, *reprinted in* 24 INT'L LEGAL MATERIALS 59, 72.
21. Outer Space Treaty, *supra* note 17.
22. FISCAL YEAR 1985 ARMS CONTROL IMPACT STATEMENT, 98th Cong., 2d Sess. 294 (1984) (hereinafter cited as 1985 ACIS).

Outer Space Treaty's "peaceful uses" injunction allows "passive" military missions in space, such as those engaged in by reconnaissance satellites,[23] purportedly defensive battlestations envisioned in the President's Star Wars plan would certainly violate this norm.

It would be disingenuous to pretend that a multi-billion dollar central element of the U.S. strategic military posture, which might put the Soviet Union at a severe strategic nuclear disadvantage, is consistent with the U.S. obligation to all state parties to the Outer Space Treaty to restrict itself to peaceful uses of space. SDI, which has as its goal the ability to render harmless Soviet nuclear-armed missiles, whether they be part of a first or a retaliatory second-strike, hardly qualifies as "peaceful," or as coming within the recognized exception for passive military missions.

Obligations emanating from the multilateral Outer Space Treaty, alone, could well determine the legality of SDI. The family of nations has reserved outer space for peaceful purposes, not for use to military advantage. Sophistic arguments aside, no case can be made for a space-based anti-ballistic missile system consistent with this norm, which I believe binds the U.S. not only as conventional law but also as international custom.

Nuclear arms control treaties between the two nuclear superpowers may create more than obligations *inter se*, they may well also engage obligations *erga omnes*. Thus, for example, the undertaking in the ABM Treaty for the U.S. and the Soviet Union not to develop, test, or deploy space-based ABM systems or their components[24] may constitute not only a promise between the parties but also a joint statement binding the parties to other nations led to rely upon it. The decision of the International Court of Justice decision in the French Nuclear Tests Cases would support such a conclusion.[25]

Similarly, joint statements by the United States and the Soviet Union, as well as the unilateral statements by each, may also create binding legal obligations *erga omnes*. For example, the 1961 McCloy-Zorin Joint Statement on Agreed Principles for Disarmament,[26] aspirational and unrealistic though it may have been, was reported to the General Assembly by the two major nuclear powers presumably in recognition of their obligations to non-nuclear states. That statement, along with subsequent

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23. CHAYES, CHAYES & SPITZER, *supra* note 1, at 196-97.
24. ABM Treaty, *supra* note 8, art. V.
25. *See supra* note 20.
26. Joint Statement of Agreed Principles for Disarmament (McCloy-Zorin Agreement), Sept. 20, 1961, United States-U.S.S.R., 16 U.N. GAOR (No. 19), U.N. Doc. A/4879 (1961), *reprinted in* 45 DEP'T OF STATE BULL. 589 (1961).

unilateral statements of the U.S. and the Soviet Union, and a variety of General Assembly resolutions, including those produced at the U.N. Special Sessions on Disarmament,[27] make clear that the nuclear rivalry of the superpowers endangers all humankind and therefore is of global concern. Moreover, they reflect the insistence of the international community that the nuclear powers abide by agreements between them to limit the arms race and move inexorably toward deescalation. We need to measure the conformity of President Reagan's Star Wars plan with the bilateral ABM Treaty against this community yardstick.

The United States and the Soviet Union cannot threaten the family of humankind with extinction and then regard dissipation of that threat as a matter for themselves alone. Nor can they pretend that what little progress they have made toward such dissipation can be undone without violating the expectations of all nations on earth.

IV. THE BILATERAL FRAMEWORK

Turning now to the relevant law created bilaterally between the United States and the Soviet Union, the 1972 Anti-Ballistic Missile Treaty,[28] as explicated by the 1974 Protocol thereto,[29] is the only legally operative permament bilateral agreement between the superpowers to limit strategic arms. It prohibits deployment of ABM systems for the defense of each party's national territory,[30] and restricts each nation to one fixed ground-based ABM system to protect either a national capital or an ICBM silo field.[31] Further, "to curb strategic defense arms competition"[32] it prohibits testing, development, and deployment of ABM systems or their components which are sea-based, air-based, space-baced, or mobile land-based.[33] The Strategic Defense Initiative, if it accomplishes the goal set for it by President Reagan, will undoubtedly violate these provisions at the heart of the ABM Treaty.

V. SDI IN LIGHT OF INTERNATIONAL LAW

Reagan Administration spokespersons and others have put forward a number of arguments and theories which they contend would render the planned SDI program lawful. Among these are the following:

27. *See supra* note 13; *see also* Final Act of the U.N.G.A. Special Session on Disarmament, G.A. Res. S-10/2 (s-x), 10 (special) U.N. GAOR, Supp. (No. 4) at 3, U.N. Doc. a/s-10/4 (1978).
28. ABM Treaty, *supra* note 9.
29. Protocol to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the limitation of Anti-Ballistic Missile systems (1974), July 3, 1974, 27 U.S.T. 1645, T.I.A.S. No. 8276 (hereinafter cited as 1974 Protocol).
30. ABM Treaty, *supra* note 9, art. III.
31. 1974 Protocol, *supra* note 29, art. I.
32. 1985 ACIS, *supra* note 22, 210.
33. ABM Treaty, *supra* note 9, art. V.

A) ABM Treaty prohibitions do not reach SDI and its components;

B) SDI work will remain lawful for the forseeable future, research being unrestricted by the ABM Treaty;

C) SDI will, in the end, serve as a "bargaining chip" in U.S.-Soviet negotiations;

D) SDI is lawful as a reprisal for Soviet material breaches of the ABM Treaty;

E) the ABM Treaty can be amended to allow for SDI deployment; and,

G) Certain dual-purpose SDI components may lawfully be tested in their non-ABM mode.

Let us look at each of these in turn, bearing in mind the expectations of the global community, as set out above.

A) ABM TREATY PROHIBITIONS DO NOT REACH SDI AND ITS COMPONENTS.

Some have suggested that SDI work now underway does not involve ABM systems or components of the kind addressed by the ABM Treaty, but something less or different. This view is based on a strained and narrow reading of ABM Treaty Article II, which provides that

> an ABM system is a system to counter strategic ballisitic missiles or their elements in flight trajectory, *currently consisting of*:
> a) ABM interceptor missiles . . . ;
> b) ABM launchers . . . ; and
> c) ABM radars.[34]

Because SDI projects do not involve ABM interceptor missiles, launchers or radars, but exotic technology alternatives thereto,[35] the argument goes, they are entirely unrestricted by the ABM Treaty. This assertion, however, ignores the plain meaning of the Article II words "currently consisting of" which makes clear that the specification of missiles, launchers, and radars was intended as an illustrative rather than exhaustic list of prohibited ABM system components. In fact, the Presidential Communication that transmitted the ABM Treaty to the U.S. Senate[36] indicated that the United States government understood the treaty to ban "devices

34. *Id.* art. II (emphasis added).

35. *E.g.*, a missile-intercepting laser or particle beam, it is contended, is not an "ABM interceptor missile."

36. *Communication from the President of the United States, Transmitting Copies of the Treaty on the Limitation of Anti-Ballistic Missile Systems and the Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms*, H.R. DOC No. 311, 92d Cong. 2d Sess. (1972).

. . . capable of substituting for one or more of these components."[37] Moreover, the possibility of technological breakthroughs based on exotic technologies was foreseen and provided for in Agreement D, a part of the treaty elaborated "to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty."[38] Agreement D makes ABM systems based on new "physical principles" and "components capable to substituting for ABM interceptor missiles, . . . launchers or . . . radars" subject to discussion in the Standing Consultative Commission established by the treaty.[39] In view of the SDI goal of providing a complete ABM shield for the United States, it is dishonest to call the goal of SDI something other than an ABM system and inaccurate to call the foci of various SDI projects anything other than components.

B) SDI WORK WILL REMAIN LAWFUL FOR THE FORESEEABLE FUTURE.

The ABM Treaty does not restrict research, and therefore leaves current U.S. Star Wars work legally unimpeded. To the U.S. government, at least according to the 1985 Arms Control Impact Statement, the treaty allows research occurring in the laboratory, and prohibits development and testing occurring at later stages of work when "field-testing is initiated on either a prototype or a broad-board model."[40] Though we cannot say now with precision when SDI work will cross the line from permissible research to impermissible development, testing, and deployment, current SDI plans, if followed, will certainly eventually cause that line to be crossed within the next several years: current plans envision air- and space-based testing of various SDI projects sometime between 1988 and 1993.[41]

The U.S. government seems to acknowledge this eventuality.[42] Administration assertions that SDI work is compatible with the ABM treaty, for example, often specifically focus on "current" work. Thus, the 1985 Arms Control Impact Statement, commenting on the Strategic Defense Initiative, states that "*[f]or the near future*, this effort will consist of research and development totally consistent with the ABM Treaty."[43] Yet, the Arms Control Impact Statement also acknowledges that "the

37. ABM Treaty, *supra* note 9, at Agreed Statement [D].
38. *Id.*
39. *Id.*
40. 1985 ACIS, *supra* note 22, at 212 n. (*quoting* Ambassador Gerard Smith, Statement to the Senate Armed Services Committee, July 18, 1972).
41. *See* T. LONGSTRETH, J. PIKE and J. RHINELANDER, *supra* note 8, at vi-vii.
42. *See* 1985 ACIS, *supra* note 22, at 252.
43. *Id.* at 255 (emphasis added).

strategic defense initiative . . . is a very long term effort."[44] As for beyond, "the near future," the Impact Statement understatedly admits that directed energy weapons, such as high energy lasers and particle beams, central components of the Star Wars defense, "could eventually create a conflict" with U.S. obligations under the ABM Treaty.[45]

C) SDI WILL IN THE END SERVE AS A "BARGAINING CHIP IN U.S.-SOVIET NEGOTIATIONS."

It is true that testing and development of Star Wars components and systems is still several years away, and the possibility remains that such testing and development may never occur. In fact, there has been much speculation that SDI is available, perhaps even intended, to serve as a bargaining chip in the current Geneva negotiations, to be abandoned in the end in exchange for some comparable Soviet concession. Though various Reagan Administration spokespersons have given mixed signals regarding this option, often contradicting each other, the possibility that they have collectively engaged in "constructive ambiguity" as part of the U.S.-Soviet negotiation process cannot be dismissed.[46] Thus, we must consider the legality of threatened violation of the ABM Treaty to obtain concessions in negotiations, looking back to its impact on the ABM Treaty, and forward to its impact on the U.S.-Soviet talks.

The Vienna Convention on the Law of Treaties,[47] in Article 26, requires that every treaty in force must be performed by the parties to it in good faith. Similarly, the U.N. Charter provides that states shall seek "to establish conditions under which justice and respect for the obligations arising from treaties . . . can be maintained"[48] and to this end are required to "fulfill in good faith the obligations assumed by them."[49]

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44. *Id.*
45. *Id.* at 251.
46. To be sure, Presidential misstatements about the U.S. position for the November 1985 summit meeting with General Secretary Gorbachev, *see* N.Y. Times, Nov. 5, 1985, at 1, col. 5 and N.Y. Times, Nov. 7, 1985, at 1, col. 1, and internecine conflicts among Secretaries Shultz and Weinberger and National Security Adviser McFarlane concerning whether to take an expansive or purportedly restrictive view of the obligations imposed by the ABM Treaty, *see* N.Y. Times, Oct. 17, 1985 at 6, col. 1, strongly suggest that something(s) other than constructive ambiguity underlie the public posture(s) of U.S. government officials regarding the Strategic Defense Initiative. *See* N.Y. Times, Nov. 17, 1985, at 1, col. 1.
47. Vienna Convention on The Law of Treaties, *opened for signature* May 27, 1969, *entered into force* Jan. 27, 1980, art. 26, U.N. Doc. A/Conf./39/27 at 289. The United States has signed but not yet ratified the Vienna Convention. However, the Convention, for the most part, merely codifies custom. *See generally* Kearney and Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).
48. U.N. CHARTER preamble.
49. *Id.* art. 2(2).

Threatened violation of the ABM Treaty by the United States, even for the purpose of gaining negotiational advantage, violates the obligation to perform the ABM Treaty in good faith. Moreover, in view of the Non-Proliferation Treaty requirement "to pursue negotiations in good faith,"[50] SDI, as a threatened violation of the ABM Treaty, undercuts the current Geneva talks by giving the Soviets the impression that treaties are viewed by the U.S. not as binding law, but rather as promises to be maintained only as long as they remain convenient, an impression reportedly viewed with consternation by some State Department officials.[51]

Put simply, a nation does not act in good faith when it threatens to disregard the rule *pacts sunt servanda* and violate an extant treaty commitment to the nation with which it has embarked on a new round in the law-creation process of treaty negotiation. Thus, even if the SDI is merely to serve as a bargaining chip, it nevertheless would result in U.S. violation of its international legal obligations. This not only may offend the Soviets sitting across the table from our arms control negotiators, but also violates multilateral obligations undertaken by the U.S.

D) SDI IS LAWFUL AS A REPRISAL FOR SOVIET MATERIAL BREACHES OF THE ABM TREATY.

The Reagan Administration has charged for a couple of years now that the Soviets violate their arms control obligations. It was only during the Spring of 1985, however, that this was officially suggested as possible grounds for relieving the United States of its own ABM Treaty obligations. Presumably, the illegal Soviet activity would serve as the basis for invoking the international legal doctrine of reprisal, which would render otherwise illegal U.S. activity lawful, thereby clearing the way for SDI.[52]

In the past, U.S. objections to Soviet arms practice raised in the Standing Consultative Commission have, according to information publically available, either resulted in the Soviets successfully persuading the U.S. that the practice was lawful, or resulted in Soviet cessation of the activity questioned.[53] Since 1983, however, the Reagan Administration has unsuccessfully raised in the Consultative Commission allegations of

50. NPT, *supra* note 14, art. VI.
51. N.Y. Times, April 21, 1985, at 1, col. 6.
52. Under international law, reprisal is an otherwise unlawful retaliatory action one state may take against another when the state against which it is directed has committed an international delinquency. The state engaging in the reprisal must have first requested the delinquent state to give satisfaction for the wrong committed, and the reprisal itself must be proportional to the wrong. *See* J. G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 548-51 (8th ed. 1977).
53. T. LONGSTRETH, J. PIKE & J. RHINELANDER, *supra* note 8, at 52.

Soviet violations of the ABM Treaty involving a large phased-array radar under construction near Krasnoyarsk in central Siberia.[54]

Though experts differ in their evaluation of Soviet explanations of the radar as non-ABM related, both the full facts as well as the technical expertise to appreciate them are, I confess, beyond this author. Nevertheless, the Soviet radar is not expected to be operational until 1988 or 1989.[55] This leaves several years yet for Consultative Commission discussions to resolve differences between Soviet and U.S. views on the Krasnoyarsk radar, not an unrealistic goal given what is known about the successful outcomes of past discussions in the Commission.

Even if we take the administration's more cynical view for a moment, that this radar does or will violate the ABM Treaty, this position still seems at best a slim thread of legal justification for the Star Wars megabillion dollar twenty-year comprehensive ABM program. The United States would have difficulty using the Krasnoyarsk radar to justify SDI as a reprisal. Reprisal doctrine requires for its invocation that the state against which it is invoked had engaged in a prior international delinquency. In the Krasnoyarsk context, this appears lacking: President Reagan announced SDI several months *before* the U.S. ever raised the Krasnoyarsk issue in the Standing Consultative Commission, as required by the ABM Treaty.[56] Moreover, multilateral obligations of the United States require it to avoid such ready resort to any excuse for arms control back-sliding.

Several administration officials, including Secretary of Defense Caspar Weinberger, have recently alleged that the Soviets themselves are engaged in a Star Wars-type program. Such activity by the Soviets, if true, and if on a massive scale, might appear to justify SDI as a direct and proportionate reprisal. Disclosure of such a Soviet program long after President Reagan had already committed the United States to SDI, however, strongly suggests, as in the Krasnoyarsk case, the lack of a prior delict by the Soviets, the predicate element for justifying resort to reprisal.

E) THE ABM TREATY CAN BE AMENDED TO ALLOW FOR LAWFUL DEPLOYMENT OF SDI.

The administration has suggested that the ABM Treaty could be amended with Soviet agreement to allow for lawful deployment of a defensive system. In none-too-subtle preparation for making this case to

54. *Id.* at 53.
55. *Id.* at 52.
56. *See id.* at 53.

Congress and the public, Arms Control Impact Statements describe provisions of the ABM Treaty as preventing deployment of certain systems unless "agreement is reached to amend the Treaty,"[57] a rather strange and back-handed description of a legal constraint freely undertaken by this nation.

At any rate, while the United States and Soviet Union are certainly free to agree on lifting prohibitions imposed on them by the ABM Treaty, the notion of amending a treaty prohibiting anti-ballistic missile systems to allow for the deployment of such systems is nonsensical. This would be akin to a lawyer drafting a codicil to a will to provide for the estate to pass under the laws of intestacy.[58] The proposed amendment would entirely undo the restraints of the ABM Treaty, a rather bizarre approach to altering the legal relations established by that treaty. The appropriate way to actualize such intentions would be for one of the parties to give six months' notice of its intention to denounce the ABM Treaty because of "extraordinary events," as provided for in the treaty.[59] In fact, administration efforts appear directed toward accomplishing a thinly veiled equivalent result: unilateral violation of the ABM Treaty by the United States.

F) CERTAIN DUAL-PURPOSE SDI COMPONENTS MAY LAWFULLY BE TESTED IN THEIR NON-ABM MODE.

As for administration claims that various SDI projects are lawful because they may serve dual purposes and can be tested in a non-ABM-component mode, here too the good faith performance standard obtains. To be sure, the dual-purpose capabilities of many technologies present difficult and legitimate questions under the ABM Treaty,[60] and the Standing Consultative Commission was created to deal with just such questions of treaty and technology interpretation as were bound to arise. On the other hand, to claim legality disingenuously under this guise, as the administration appears to be doing, hardly conforms with the requirement of good faith. The Reagan administration's unwavering commitment to use these components to construct an unlawful space-based ABM system eludes no one.

57. 1985 ACIS, *supra* note 22, at 213.
58. Consider, in this regard, the Advisory Opinion in the Case Concerning Reservations to the Genocide Convention, 1951 I.C.J. 15. In that case, the International Court of Justice held that, with regard to a multilateral treaty making no provision for reservations, a nation is free to enter a reservation so long as it is not incompatible with the treaty's object and purpose, and provided that some other party to the treaty agrees to consider the reserving state a party.
59. ABM Treaty, *supra* note 9, art, XV(2).
60. *See* Chayes, Chayes & Spitzer, *supra* note 1, at 205-10.

CONCLUSION

As shown above, the stated goal of President Reagan's Strategic Defense Initiative is unlawful. Work toward that goal, testing, will become similarly unlawful. The Soviets most assuredly have reached these same conclusions, and must now harbor grave doubts regarding the reliability of the United States as a treaty partner. The price to be paid for such a reckless disregard by the United States for its international legal obligations will go beyond the difficulties produced for current U.S.-Soviet arms control negotiations. It undoubtedly will also come in the form of a marked diminution in both the predictability of state behaviour and the global stability that international law seeks to engender. The Strategic Defense Initiative thus threatens to undermine hopes for a world order of peace and security.