Florida Journal of International Law

Volume 4 | Issue 3 Article 4

June 1989

The ABM Treaty and "Star Wars": May the Force of International Law Be With Them?

Anthony John Mutchler

THE ABM TREATY AND "STAR WARS": MAY THE FORCE OF INTERNATIONAL LAW BE WITH THEM?

I. INTRODUCTION 515
II. HISTORY 517
III. STATUS QUO 517
IV. ANALYSIS 521
V. CONCLUSION 528

I. INTRODUCTION

As if viewed through a prism, the Anti-Ballistic Missile (ABM) Treaty[1] has been the subject of varying descriptions by persons viewing it from various perspectives.[2] Those who would interpret the Treaty's provisions for the rest of the world almost invariably adhere to one of two basic paradigms: the "restrictive" interpretation or its "broad" counterpart.[3] Proponents of the former include such disparate parties as Soviet legal scholars,[4] members of the Nixon administration,[5] and current U.S. Senators.[6] The latter view is shared almost exclusively by members of the Reagan administration and Reagan era defense specialists.[7] The supposed legitimacy of the ABM Treaty as an

1. *See* Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-Union of Soviet Socialist Republics, 23 U.S.T. 3435, T.I.A.S. No. 7503.

2. *See generally* Sherr, *Legal Issues of the "Star Wars" Defense Program*, 16 U. TOL. L. REV. 125 (1984).

3. *See* Karas, *Resolving the "Star Wars"/ABM Dispute: May the Source Be With You, President Reagan*, 25 DUQ. L. REV. 677, 677-78 (1984). The position taken by pro-Star Wars partisans is deemed "broad" because it departs from the "traditional," or "restrictive," interpretation of the ABM Treaty. Ironically, the so-called broad concept narrowly perceives the Treaty as prohibiting only certain aspects of missile defense, limited in scope and frozen in time. *See infra* note 40. In a similar paradox, the restrictive view broadly construes within the Treaty's ban virtually any tangible manifestation of missile defense. According to the restrictive construction, the only permissible deviation from this blanket ban is that Moscow and Washington, D.C. may be protected by very basic, earth-based ABM systems, as specifically delineated under a later-ratified ABM Treaty protocol. *See* Protocol on the Limitation of Anti-Ballistic Missile Systems, July 3, 1974, art. I, 27 U.S.T. 1645, 1648, T.I.A.S. No. 8276.

4. *See* G. ZHUKOV & Y. KOLOSOV, INTERNATIONAL SPACE LAW 54-61 (1984).

5. *See generally* Sherr, *supra* note 2, at 685-86. Gerard Smith, head of the U.S. delegation which negotiated the ABM Treaty, and John Rhinelander, a legal advisor with the group, are strong proponents of the traditional, i.e., restrictive, view.

6. *See* Karas, *supra* note 3, at 696. Mr. Karas relates that Senators Nunn and Levin, for example, view the ABM Treaty restrictively.

7. *See, e.g.*, Furniss, *President Reagan's Strategic Defense Initiative*, 16 U. TOL. L. REV. 149. Mr. Furniss served as Special Assistant to the Assistant Secretary for International Security

international instrument has been assessed according to each standard.[8]

Adherents to both positions agree that the ABM Treaty applies at least peripherally to the "Star Wars" plan.[9] However, commentators have examined the relationship between the ABM Treaty and Star Wars without seriously exploring deeper implications of international law.[10] Those inclined toward the broad end of the spectrum tend to fit the ABM Treaty into the Star Wars concept, while those at the restrictive end fit Star Wars under one or more of the ABM Treaty's prohibitions.[11] Unfortunately, the resulting diatribes fail to shed light into that less visible realm of international law beyond the ABM Treaty's text.[12]

To limit assessment of the international legal status of Star Wars to its comportment with the ABM Treaty may be likened to the fabled blind man grasping only the elephant's trunk and then confidently pronouncing the animal a snake. The legitimacy of Star Wars, and of the ABM Treaty itself,[13] must be judged according to general interna-

---

Policy. Other Reagan team members who have advocated the broad construction are Deputy National Security Advisor Robert McFarlane, Secretary of State George Schultz and Defense Secretary Caspar Weinberger. *See infra* note 85. Interestingly, the Nixon administration predecessors of Mr. Schultz and Mr. Weinberger, William Rogers and Melvin Laird, have unstintingly supported the traditional approach. *See* Gross, *infra* note 11, at 36 & 50.

8. *See, e.g.*, Sherr, *supra* note 2, for an assessment of the traditional ABM Treaty as an international legal document. *See also*, Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 93 HARV. L. REV. 1973 (1986), for an example of a similar, if opposing, assessment of the "broad" Treaty.

9. *Id.* As popularly employed, Star Wars refers to the space-based portion of the United States' ABM program. The more general Strategic Defense Initiative (SDI) relates to terrestrial- and space-based systems, and thus encompasses Star Wars. The designations are often used interchangeably, though inaccurately, by the media. This comment focuses on Star Wars to the exclusion of other SDI systems. For a technical study of SDI and Star Wars technology, see Fletcher, *The Technologies for Ballistic Missile Defense*, 1 ISSUES IN SCI. & TECH. 15 (1984).

10. *See, e.g.*, Sofaer, *supra* note 8.

11. *See generally* Gross, *Negotiated Treaty Amendment: The Solution to the SDI-ABM Conflict*, 28 HARV. INT'L L.J. 31, 32. Mr. Gross indicates that both sides in the Star Wars debate have "manipulated the Treaty's language and meaning to coincide with their preferred meaning." *Id.* He suggests that the Treaty be reconstituted, if necessary, to comprise "an agreed understanding" between the two superpowers. *Id.*

12. *See, e.g.*, Sofaer, *supra* note 8.

13. Some commentators suggest, as an alternative to the broad ABM Treaty interpretation, that the U.S. might declare the AMB Treaty void. This contention is generally framed in terms of the internationally recognized doctrine of *rebus sic stantibus*. *Rebus Sic stantibus* represents the international legal articulation of the doctrine of changed conditions. *See, e.g.*, Goldman, *The Strategic Defense Initiative: Star Wars and Star Laws*, 9 HOUS. L. REV. 111, 127-30. *See also, infra* note 25.

tional law principles. This comment examines the ABM Treaty and Star Wars without prismatic distortion, and looks beyond the treaty to the whole of international law in assessing the program's legality.

II. HISTORY

In 1969, during the SALT I series of arms-limitation negotiations, the U.S. and the U.S.S.R. engaged in dialogue aimed at curtailing ABM-related activity.[14] The ABM Treaty thus came to fruition two years later, and remains in effect today after having weathered the reigns of nine heads-of-state and occasional avalanches of criticism.[15] Despite the historic tenor of the recent Intermediate-Range Nuclear Forces (INF) Treaty, the ABM Treaty "remains the centerpiece of the U.S.-Soviet arms control."[16]

President Ronald Reagan publicly christened the Star Wars concept as part of a nationally televised speech in March of 1983.[17] His predecessors had proposed and even partially implemented rudimentary ABM systems, but without the explicit intention of nullifying the threat of nuclear attack.[18] The president's "Grand Vision"[19] focused on a space-based network of satellites equipped with exotic weaponry which would literally blow Soviet ballistic missiles out of the sky.[20]

III. STATUS QUO

The Star Wars controversy that boiled over in the aftermath of Mr. Reagan's speech has settled to a steady simmer. Opponents of the plan continue to cite astronomical expense, technical infeasibility, and outright illegality as reasons to ground the system.[21] From their

---

14. *See, e.g.*, Jacobson, *The Crisis in Arms Control*, 82 MICH. L. REV. 1588 (1984) (for general information regarding arms-related talks between Soviet Russia and the United States).

15. *See, e.g.*, Goldman, *supra* note 13.

16. Lodal, *An Arms Control Agenda*, 1 FOREIGN POL'Y 152 (Fall 1988).

17. *President's Speech on Military Spending and a New Defense*, N.Y. Times, Mar. 24, 1983, at 20, col. 1. Mr. Reagan's characterization of Star Wars, and SDI generally, as a means "to achieve our ultimate goal of eliminating the threat posed by strategic nuclear missiles" was perhaps the salient point of the entire speech. *Id.*

18. Nike-Zeus was Eisenhower's land-based version of Star Wars that literally never got off the ground. President Johnson briefly considered, and then discarded, various would-be Star Wars precursors (actually Nike-Zeus offshoots). *See* Burrows, *Ballistic Missile Defense: The Illusion of Security*, 62 FOREIGN AFF. 843, 845-47 (1984).

19. The "Grand Vision" moniker was first applied by Edward Linenthal, apparently in response to the soaring terms and almost-mystical manner employed by the president in revealing Star Wars to the American public. E. LINENTHAL, SYMBOLIC DEFENSE 14, at n.8 (1989).

20. *See President's Speech on Military Spending and a New Defense*, *supra* note 17.

21. *See generally* Sherr, *supra* note 2.

restrictive perspective, Star Wars directly contravenes the substance and intent of the ABM Treaty, which opponents consider a binding international agreement.[22] Star Wars proponents argue that any plan should be vigorously pursued which could prevent "the Big One" from landing on houses, schools, and people.[23] Their broad construction of the ABM Treaty deems Star Wars legal;[24] alternately, they interpret the doctrine of changed conditions as sanctioning the document's abrogation.[25]

Any attempt at assessing the legality of Star Wars must be predicated upon establishment of the ABM Treaty — the prescriptive instrument most applicable to the program — as legally binding in the international forum. Similar instruments, somewhat less relevant in this context, include the Outer Space Treaty,[26] the Moon Treaty,[27] and

---

22. *Id.*

23. *See, e.g.*, Almond, *The Strategic Defense Initiative: What if the United States Terminates Its Program to Defend Itself?*, 16 J. SPACE L. 1 (1988).

24. *See, e.g.*, Goldman, *supra* note 13.

25. *Id.* at 127-30. Commentators have wielded the doctrine of *rebus sic stantibus* as a weapon in attempting to pierce the validity of the ABM Treaty by arguing that Soviet transgressions have materially breached the ABM Treaty. According to Goldman and other commentators, these breaches may have altered the state of relative ABM techno-parity that existed at the time the ABM Treaty was inked. They suggest that the changed conditions therefore warrant invocation by the U.S. of *rebus sic stantibus* to escape unilateral, strategically unfavorable compliance with ABM Treaty provisions. While Goldman and a number of other commentators note that Reagan cabinet members Caspar Weinberger and George Schultz repeatedly decried Soviet violations of the ABM Treaty, none have related any *official* declarations of the ABM Treaty's outright nullity. *See infra* note 82.

26. This is the popular designation for the 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. [hereinafter Outer Space Treaty], which itself is the subject of two polemic, uncannily familiar interpretations. However, the Outer Space Treaty has not generated the intensely divisive debate that the ABM Treaty has; in fact, even hawkish commentators agree that the Outer Space Treaty at a minimum forbids stationing ABM-related components on, or in orbit around, the Moon or any other heavenly bodies. *See, e.g.*, Gallagher, *Legal Aspects of the Strategic Defense Initiative*, 111 MIL. L. REV. 11, 47 (1986). Because no heretofore publicized Star Wars configuration has been postulated as using a planetary or subplanetary platform, the Outer Space Treaty's applicability to the Grand Vision is more philosophical than technical.

27. The U.S. is not a signatory to the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 5, 1979, U.N. Doc. A/Res. 34/68. *But see infra* note 71 (indicating that parties may be bound by international agreements which they have not expressly ratified). The Moon Treaty is a full-blown, though slightly more restrictive, version of the Outer Space Treaty's proscription of Moon-related activities. *See* Goldman, *supra* note 13, at 119.

the Nuclear Test Ban.[28] Also, any system of missile defense would seemingly challenge the internationally recognized, if not acclaimed, doctrine of Mutual Assured Destruction (MAD).[29]

Although a complex document, the ABM Treaty is surprisingly unambiguous. The Treaty's creators presciently appended "Agreed Statements" to the document in hopes of clarifying those few ostensible ambiguities within its text.[30] The agreement's stated objective of prohibiting ABM systems in defense of national territory[31] at once appears to dim Star Wars' prospects. Nevertheless, those who have seen the light of the Grand Vision insist that specific substantive provisions of the ABM Treaty fail to proscribe development of *this* anti-ballistic missile system.[32]

The significance of any executed document at once emanates from its intrinsic wording.[33] The ABM Treaty defines banned ABM systems as those "currently consisting of" interceptor missiles, launchers, and radars.[34] Star Wars defenders construe the "currently consisting of" in Article II as synonymous with "only consisting of."[35] Their adversaries in the Star Wars debate point to the general tone of the ABM Treaty's words, modified by ex post facto statements from actual

---

28. Officially known as the Treaty Banning Nuclear Weapons in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, United States-U.S.S.R., 14 U.S.T. 1313, T.I.A.S. No. 543, 480 U.N.T.S. 43, the Test Ban Treaty places a significant but technologically surmountable obstacle in Star Wars' path. Specifically, Article I of the Test Ban Treaty prohibits the deployment or testing in space of any weapon which derives its potency or power from an atomic source. Although nuclear-driven ABM systems, which would literally fight fire with fire, occupy a theoretical niche in the greater Star Wars framework, more "exotic" weaponry, such as chemically derived lasers and particle beams, form the vanguard of Star Wars hardware. *Id.* art. I. *See also* Fletcher, *supra* note 9.

29. MAD amounts to a simultaneous mutual-suicide/survival pact between the U.S. and the Soviet Union, whereby each party is deterred from launching a first-strike nuclear attack on the other by the threat of automatic retaliation in kind. *See* Gross, *supra* note 11, at 693 n.5.

30. *See* Treaty on the Limitation of Anti-Ballistic Missile Systems, *supra* note 1 (Agreed Statements).

31. *Id.* art. I.

32. *See, e.g.*, Sofaer, *supra* note 8.

33. A familiar truism states that the effect of any statute, deed, contract, or treaty — indeed, any executed, agreed-upon statement of intentions — is to be considered first according to the document's "four corners." The Vienna Convention on the Law of Treaties, an international "summit" convened to thoroughly standardize treaty law, essentially encodified this truism in Article 31 of its guidelines. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27.

34. *See* Treaty on the Limitation of Anti-Ballistic Missile Systems, *supra* note 1, art. II.

35. *See, e.g.*, Goldman, *supra* note 13, at 121-22.

36. *See, e.g.*, G. SMITH, DOUBLETALK: THE STORY OF SALT I 344 (1980). As noted, Mr. Smith served as one of the U.S. negotiators at the ABM Treaty-spawning SALT I talks. *See supra* note 5 and accompanying text.

negotiators,[36] in equating "currently consisting of" with "currently consisting of, but not limited to."[37] Other sources of conflict between the opposing camps are the terms "component," used in Article II of the Treaty, and "development," in Article V.[38] Pro-Star Wars parties construe the former term to conform with their perception of "currently consisting of," effectively limiting prohibited components to those which existed at the time the ABM Treaty was executed.[39] The ABM Treaty's reference to development, in their estimation, prohibits only the actual creation of a workable ABM system.[40] By contrast, those opposed to Star Wars view both "components" and "development" as prospective, open-ended concepts.[41]

According to the Pentagon's own estimation, four of five contemplated stages in the evolution of Star Wars technology explicitly involve development.[42] Another Department of Defense analysis has revealed that a seminal component of the system unavoidably contravenes the Treaty's ban on ABM-oriented radar.[43] Soviet transgressions likewise may threaten the very existence of the ABM Treaty.[44]

---

37. *See, e.g.*, Sherr, *supra* note 2, at 132.

38. Treaty on the Limitation of Anti-Ballistic Missile Systems, *supra* note 1, arts. II & V.

39. *See generally* Goldman, *supra* note 13.

40. *Id.* Goldman, like many Star Wars supporters, axiomatically suggests that essentially any activity short of emplacement of a fully operable anti-ballistic missile system is permitted by the ABM Treaty. *See also* Furniss, *supra* note 7, at 150. This belief, like that held by the same parties limiting applicability of the ABM Treaty to only vintage-1972 weaponry, tends to trivialize the document. In conjunction, these conceptions effectively render the ABM Treaty an oxymoron: on the one hand, the agreement supposedly applies only to operational Star Wars systems, which will not exist until many years in the future; and on the other, it is presumed to apply only to technology as it existed in the past.

41. *See, e.g.*, Sherr, *supra* note 2, at 130-35.

42. *Id.* at 131. Sherr identifies the four stages of development as (1) exploratory, (2) advanced, (3) engineering, and (4) operational systems.

43. *See* DEPARTMENT OF DEFENSE, DEFENSE AGAINST BALLISTIC MISSILES: AN ASSESSMENT OF TECHNOLOGIES AND POLICY IMPLICATIONS 15-16 (1984), *reprinted in* Gross, *supra* note 11, at 31. The crucial task of tracking incoming ballistic missiles by radar necessitates such an immediate contravention.

44. Recently, the long-harbored suspicions of U.S. observers that the Soviets had violated the ABM Treaty in constructing a massive radar complex at the interior city of Krasnoyarsk were substantiated by a rather surprising source: Soviet Foreign Minister Eduard Shevardnadze. The Foreign Minister admitted in an October 23, 1989 speech to Soviet legislators that the installation was, in fact, a violation of the ABM Treaty. General Secretary Gorbachev had indicated a month earlier that the Soviets would dismantle what he had nevertheless insisted at that time was Krasnoyarsk's "legal" radar system. *See Moscow Says Afghan Role was Illegal and Immoral; Admits Breaking Arms Pact*, N.Y. Times, Oct. 24, 1989, at A1-A4. While the Soviets' disingenuous denial of the system's existence exacerbated an already-grave infringement upon treaty rights guaranteed to the U.S., their unprecedented candor must be viewed as a positive step by all who construe the ABM Treaty a worthy agreement. Far from vindicating

Yet, if statements by Mikhail Gorbachev and Ronald Reagan are to be believed, the ABM Treaty remains legal and effective.[45]

IV. ANALYSIS

As noted, determination of the legality of Star Wars begins with consideration of the ABM Treaty, which in turn must be calibrated as a legal document. Supporters and detractors of the space-based system concur that the ABM Treaty looms as its largest potential impediment.[46] To be effective as a proscription of law, any enactment or agreement must be fortified by some degree of enforceability or be accorded general recognition, or both.[47]

In the modern-day international legal forum, recognition is a far more relevant concept than enforcement.[48] Enforceability lacks pertinence where treaties are involved, because, unlike commercial contracts, treaties are not subject to meaningful enforcement by some higher authority.[49] Instead, recognition of mutual interests and responsibilities between signatory states forms the essence of any effective treaty.[50]

Treaties in general are highly regarded in the international arena; in fact, they are perceived as singularly well-suited to the task of instilling legal obligations in states and state-like entities.[51] The United

---

the opinions of those who hold the ABM Treaty as voidable by the U.S., the Soviets' admission of fault and subsequent reaffirmation of treaty integrity should reinforce the document. In addition, the Soviet's actions may stimulate the convening of a Standing Consultative Commission to clarify the two countries' understandings and expectations. *See also*, Goldman, *supra* note 13 and text accompanying note 25. The Soviets have thus doubly bound themselves: even as their treaty obligations continue unabated, they also have a legal duty to abide by their unilateral good-faith statement of intent to dismantle the Krasnoyarsk station. *See* DEP'T OF STATE BULL. No. 2105 (Dec. 1985), at 32-33; *see also infra* note 82 and accompanying text.

45. *See* N.Y. Times, Oct. 15, 1986, at A12, col. 1. *See also President's Speech on Military Spending and a New Defense*, *supra* note 17. In the course of these speeches, the heads-of-state confirmed their recognition of the ABM Treaty as viable.

46. *See, e.g.*, Gross, *supra* note 11, at 32. *See also*, Goldman, *supra* note 13, at 111.

47. *See* M. MCDOUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 1-7 (1981). For example, the Volstead Act was validly enacted legislation which nevertheless was never truly part of "the law." Widespread lack of recognition of the technical prohibition on alcohol consumption rendered enforcement impossible. *See* D. WALLECHINSKY & I. WALLACE, THE PEOPLE'S ALMANAC 449-50 (1978). A closer potential analogy is the Russo-German Mutual Non-Aggression Pact of 1939, which never comprised a bona fide expression of international law because Hitler and Stalin never intended to recognize each other's interests. *See* W. CHURCHILL, THE GATHERING STORM 349-52 (1961).

48. *See* M. MCDOUGAL & W. REISMAN, *supra* note 47, at 301-431.

49. *Id.*

50. *Id.*

51. *Id.* at 1119-1269.

Nations (U.N.) bestowed upon treaties official pre-eminence in 1969 by assembling the Vienna Convention on the Law of Treaties.[52] From its inception, though, the U.N. has echoed the long-standing customary international law principle that treaties are viable legal documents.[53]

The U.N.'s own governing instrument, the Charter, includes an overarching presumption favoring the effectiveness of international agreements, including treaties.[54] In Article 103, its definitive treaty-related provision, the Charter implicitly maintains that only those treaties in direct conflict with states' Charter-mandated obligations will be deemed void.[55] Incorporating this presumption of validity into a matrix of customary international law and general contract law tenets, the U.N.'s Vienna Convention codified substantive standards and modes of interpretation.[56] As a result, any treaty which comports with Convention-promulgated guidelines shall be considered "legal" by U.N. reckoning.[57]

Of course, the U.N.'s General Assembly, which sanctioned the Vienna Convention, lacks the prescriptive power of such national legislatures as, for example, the British Parliament or the Israeli Knesset.[58] Like treaties, pronouncements by the U.N. and affiliated commissions derive authority from recognition. Significantly, the Convention's guidelines have been recognized, and thus validated, throughout the world.[59] Through the synergistic effect of widespread recognition and a long legal pedigree, the Vienna framework comprises *the* legal prescription for gauging the legitimacy of treaties.

Those customary international law precepts reflected in Vienna Convention provisions include assurances against allowing treaties to

---

52. *See* Vienna Convention on the Law of Treaties, *supra* note 33.

53. *See generally* U.N. CHARTER, arts. 102-103.

54. *Id.*

55. *Id.* art. 103. Article 103 states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." *Id.* In establishing its own predominance, the Charter in effect presumes that any treaty is valid which does not conflict with the Charter's own provisions or purpose.

56. *See* Vienna Convention on the Law of Treaties, *supra* note 33.

57. The legality of the Convention itself is confirmed by the U.N. Charter. U.N. CHARTER, art. 7, ¶ 2. This section of the Charter specifies that "such subsidiary organs as may be found necessary may be established in accordance with the present Charter."

58. *See* M. MCDOUGAL & W. REISMAN, *supra* note 47.

59. *See* Gross, *supra* note 11, at 48. While neither the United States nor the Soviet Union has formally ratified the Convention's "treaty on treaties," the document reflects the will of the general world community. Furthermore, the Convention's guidelines embody principles "well established in general international law," according to Mr. Gross.

bind non-parties and against "immoral obligations."[60] Among contract law canons embodied by Convention guidelines are those rendering voidable any treaty secured under conditions of unequal bargaining power, duress, misrepresentation, or mistake.[61]

Accepting at face value the chief executives' proclamations referred to previously, as well as comments by other officials, the U.S. and U.S.S.R. continue to recognize mutually beneficial interests manifested in the ABM Treaty.[62] Therefore, the legality of the agreement rests upon its validity according to the Vienna Convention. The ABM Treaty obligates no third-parties — only its signatories, Russia and the United States. The instrument's avowed purpose of decreasing the risk of nuclear war[63] hardly qualifies as an "immoral obligation;" in fact, no greater moral obligation exists. Despite the protestations of patriots from both countries, the Soviet Union and the United States stand on essentially equal footing as bargaining parties.[64] Not surprisingly, no reports of duress or executory misrepresentation have surfaced in the aftermath of the ABM Treaty's signing. The issue of mistake[65] arguably justifies the broad interpretation of the Treaty,

---

60. *See* M. McDOUGAL & W. REISMAN, *supra* note 47, at 1175-77. McDougal, a noted international legal scholar suggests that Article 53 of the Vienna Convention, relating to the preservation of peremptory norms of general international law, impliedly encompasses these principles. *Id.*

61. *See* Vienna Convention on the Law of Treaties, *Declaration on the Prohibition of Military, Political, or Economic Coercion in the Conclusion of Treaties.* Also, Articles 48, 49, 51 & 52 apply to claims of mistake, misrepresentation and duress. Vienna Convention on the Law of Treaties, arts. 48, 49, 51 & 52.

62. *See, e.g., Moscow Says Afghan Role was Illegal and Immoral; Admits Breaking Arms Pact*, N.Y. Times, Oct. 24, 1989, *supra* note 44, at A4. Soviet Foreign Minister Schevardnadze expressed renewed interest in mutual security in the course of his Krasnoyarsk "confession" speech. *See also Baker Seeing in Gorbachev New Opportunity for Peace*, N.Y. Times, Oct. 24, 1989, at A4. U.S. Secretary of State James Baker implicated the same interest in a contemporaneous speech in San Francisco. Persons who nevertheless suggest renunciation of ABM Treaty obligations by the U.S. based on the *rebus sic stantibus* doctrine would be well-advised to review the ABM Treaty's six month notice-of-withdrawal requirement, set forth in Article XV. Similarly pertinent is Article XIII of the ABM Treaty, which states that Standing Consultative Commissions, comprised of representatives from both countries, should be empaneled to resolve disputes as to precise treaty applicability. Conjunctively, these two provisions mandate negotiation *prior* to unilateral abrogation; that is, neither party can simply opt out of the ABM Treaty because it thinks the other party is "cheating." *See* Treaty on the Limitation of Anti-Ballistic Missile Systems, *supra* note 1, arts. XIII & XV.

63. *Id.* art. I.

64. *See generally*, Daggett & English, *Assessing Soviet Strategic Defense*, 1 FOREIGN POL'Y 129 (Spring 1988).

65. *See generally* Raffles v. Wichelhaus, Ct. Excheq. (1864), in J. DAWSON, W. HARVEY & S. HENDERSON, CONTRACTS — CASES AND COMMENTS 353 (1987). The famous *Peerless* case typifies the problem of mistake, where no meeting of the minds has occurred. In that

but neither commentators nor government officials have claimed that the U.S.S.R. or the U.S. mistakenly agreed to be bound by the ABM Treaty.

Just as the ABM Treaty falls squarely outside the prohibitions articulated by the Vienna Convention, it falls precisely within the positive pronouncements of Article 53, a key Convention promulgation.[66] The article prefaces treaty validity upon comportment with peremptory norms of international law.[67] In light of its explicit goal of arms-limitation, the ABM Treaty expressly embodies those norms which prescribe "minimum order" within the world community.[68]

Interestingly, because the U.S. technically is not a party to the Vienna Convention compact,[69] U.S. treaties arguably need not pass Convention muster. This argument collapses, however, under the weight of general international law, with which the ABM Treaty does comport, and to which the U.S. and U.S.S.R. are unquestionably subject.[70] Also, the very comportment of the ABM Treaty with Convention guidelines may signify acquiescence therein by the two superpowers.[71]

Establishment of the ABM Treaty as a bona fide legal instrument does not dispose of the issue of Star Wars' lawfulness. The matter of alternative interpretations obscures the ABM Treaty's ultimate significance. Under such circumstances, the Vienna agreement provides procedural mechanisms for gleaning treaties' substance.[72] Most notably,

---

instance, two parties mistakenly made contractual arrangements based on shipment of cargo aboard the *Peerless*. Their mistake arose because, unknown to either party, there were two ships named *Peerless* plying the merchant seas. Those parties who entertain the broad view of the ABM Treaty *could* suggest that U.S. and Soviet negotiators actually entertained distinct beliefs as to the true significance of the document they were executing. *See also* RESTATEMENT (SECOND) OF CONTRACTS §§ 151-54 (1981).

66. *See* Vienna Convention on the Law of Treaties, *supra* note 33.

67. *Id.*

68. *See* Treaty on the Limitation of Anti-Ballistic Missile Systems, *supra* note 1. *See also* M. MCDOUGAL & W. REISMAN, *supra* note 47, at 1175-76 (for a discussion of peremptory norms in the international legal order).

69. *See* Gross, *supra* note 11, at 48.

70. *Id.* (Mr. Gross aptly relates that the Convention's Article 31, for instance, conforms with general international law).

71. As with their good-faith declarations, parties' actions may determine their subsequent responsibilities in the international legal forum. For example, customary international law, or compliance therewith, may be established "as a result of reiterated actions of states," according to a noted Soviet legal scholar. *See infra* note 80 and accompanying text. *See also* Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CALIF. L. REV. 419, 426-29.

72. *See* Vienna Convention on the Law of Treaties, *supra* note 33.

Article 31 of the agreement appears to vindicate the restrictive — that is, anti-Star Wars — interpretation of the ABM Treaty in mandating that a treaty should be read in light of its underlying purpose.[73] According to this simple test, Star Wars by its very nature contravenes the ABM Treaty.[74] Similarly, resort to "supplementary means of interpretation," is suggested by Article 32 if a treaty's "meaning [is] ambiguous or obscure."[75] As an embodiment of the "shared expectations of parties,"[76] a treaty is essentially what its creators *think* it is. Supplementary testimony of U.S. negotiators who actually helped create the ABM Treaty unambiguously supports restrictive construction, and not coincidentally condemns Star Wars as illegal.[77] In-depth analyses of Star Wars according to both broad and traditional ABM Treaty interpretations span entire commentaries and books.[78]

As indicated, however, analysis of Star Wars legitimacy should not be truncated by comparison to ABM Treaty provisions alone. Particularly apropos among other international agreements, the Outer Space Treaty contains no categorical restrictions on the Reagan Grand Vision.[79] Yet, in urging that space be utilized for peaceful purposes,[80] the Outer Space Treaty echoes Article I of the ABM Treaty and implicitly condemns the Star Wars concept.

The principle of good faith,[81] long an international legal fixture, further points to the ultimate illegality of Star Wars. Contrary indications aside, top Reagan aides at last indicated grudging acceptance of the restrictive ABM Treaty approach as controlling U.S. policy.[82] Of

---

73. *Id.* art. 31. This article provides that "[a] Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." *Id.*

74. *See* Smith, *Legal Implications of a Space-Based Ballistic Missile Defense*, 15 CAL. W.L. REV. 52, 62-63 (1985).

75. Vienna Convention on the Law of Treaties, *supra* note 33, art. 32.

76. *See* M. MCDOUGAL & W. REISMAN, *supra* note 47, at 1194.

77. *See generally* Sherr, *supra* note 2.

78. *See, e.g.*, Sofaer, *supra* note 8. *See generally*, T. LONGSTRETH, THE IMPACT OF U.S. AND SOVIET MISSILE DEFENSE PROGRAMS ON THE ABM TREATY (1985).

79. *See* Outer Space Treaty, *supra* note 26.

80. *Id.* art. 21.

81. *See* M. MCDOUGAL & W. REISMAN, *supra* note 44, at 37. The *Temple of Preah Vihear* case, 1961 I.C.J. 17, highlights the importance of good faith in the international arena. The International Court of Justice held that "the sole relevant question [where a good faith statement is at issue] is whether the language employed in any given declaration does reveal a clear intention." *Id.*

82. *See* DEPT OF STATE BULL. No. 2105 (Dec. 1985), at 32-33. In October of 1985, Deputy National Security Advisor Robert McFarlane asserted that "testing, as well as development [of

course, they simultaneously insisted on reserving the discretionary right to construe the ABM Treaty more broadly.[83] Unlike playground ethics, which allow finger-crossing behind one's back to nullify a good faith declaration, international law binds parties to unilateral good faith declarations.[84]

The International Court of Justice (I.C.J.) utilized this principle in holding France to its word in the *Nuclear Test* cases.[85] In issuing its opinion, the Court deemed the French bound by their statements that the country would cease atmospheric nuclear testing.[86] Article 94 of the U.N. Charter establishes the competence of the I.C.J. and obligates parties before the Court to accept its pronouncements.[87] Not merely a glorified international traffic court, the I.C.J. effectively prescribes international legal precedents, as well.[88]

The fundamental legitimacy of any activity which, like Star Wars, appreciably impacts international affairs, transcends international conventions and courtrooms. Recognized by U.S. courts[89] and referred to by the *Restatement (Second) of Foreign Relations Law*,[90] the standard of "reasonableness" has emerged in the twentieth century as perhaps *the* overriding concern of international law.[91] Extolled by international legal scholars,[92] whose words are expressly recognized by

---

Star Wars] are approved and authorized by the Treaty." *Id.* Comments from the White House during the same period seemed to indicate a clear policy change afoot. However, later that month Secretary of State George Schultz indicated at a NATO meeting that the Reagan administration would continue to observe the traditional approach to the ABM Treaty. He added, though, that the expansive interpretation was nonetheless "fully justified." *Id. See also* Karas, *supra* note 3, at 678-79.

83. *Id.*

84. *See generally* M. MCDOUGAL & W. REISMAN, *supra* note 47, at 29-44.

85. *Id.*

86. *Id.*

87. U.N. CHARTER, art. 94.

88. *See* Reisman, *Nullity and Revision*, 819-21 (1971), *reprinted in* M. MCDOUGAL & W. REISMAN, *supra* note 47, at 1537-38.

89. *See, e.g.*, Continental Ore Co. v. Union Carbide, 370 U.S. 690 (1962); Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976) (Both cases were internationally flavored and involved the application of the principle of reasonableness to questions of jurisdiction. Particularly noteworthy is Judge Choy's reference in *Timberlane* to Professor Kingman Brewster's articulation of the "jurisdictional rule of reason.").

90. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 321 & 325 (which refers to good faith as a relevant consideration in matters of international importance).

91. *See* M. MCDOUGAL & W. REISMAN, *supra* note 47, at 15-20, 983 & 1339. Mr. McDougal variously explores the application of reason, or reasonableness, to freedom of the seas (frequently analogized to freedom of outer space), self-defense, and, as indicated, where a conflict of laws, or jurisdictional issue, is implicated. *Id.*

92. *Id.*

the U.N. and the I.C.J. as a primary source of international law,[93] the appropriateness of the reasonableness standard cannot be questioned in a forum where conflict of laws is inevitable.

Is Star Wars accordingly reasonable in the final analysis? A comprehensive answer to this query could occupy volumes. However, a cursory evaluation of the missile-defense system in the reasonableness context suggests that it is not. The amenability of converting Star Wars into an offensive threat immediately tags the system unreasonable.[94] Also, in spite of its intrinsic repulsiveness, the MAD policy has presided over a quarter-century undeniably free from nuclear conflict. Star Wars represents an outright repudiation of that policy which can only portend dynamic changes in the current nuclear weapons stalemate. The effect of MAD's demise would be potentially twofold. Under a best-case scenario, a neurotic arms race could surely ensue in which nations longing for their former nuclear security blankets would amass vast numbers of nuclear weapons calculated to overwhelm an ABM system.[95] In the alternative, any country having a hair-trigger grip on its atomic weaponry might be nudged by preliminary development of Star Wars into launching the pre-emptive first-strike.[96] Either scenario fails the most significant portion of the reasonableness test.

---

93. Statute of the I.C.J., art. 38(1), *reprinted in* M. MCDOUGAL & W. REISMAN, *supra* note 47, at 7 (identifing international conventions, international custom, general principles of law as recognized by civilized nations, and judicial decisions, in addition to "the teachings of the most highly qualified Publicists," as bona fide sources of international law).

94. Numerous commentators have recognized the offensive potentialities of Star Wars. *See, e.g.*, Meredith, *The Legality of a High-Technology Missile Defense System: The ABM and Outer Space Treaties*, 78 AM. J. INT'L L. 418, 422. As Mr. Meredith suggests, such an offensive deployment might be specific (e.g., conversion of anti-ballistic missile weaponry into anti-satellite weaponry) or general (e.g., the use of offensive nuclear weapons against a foe under the assurance that the foe's own nuclear weapons could not pierce the Star Wars umbrella). Then-Secretary of Defense Caspar Weinberger ingenuously claimed that the Soviets somehow "know" that the U.S. will not launch a first-strike nuclear barrage against them. A Weinberger assistant likewise strongly disavowed the possibility that the U.S. could easily apply Star Wars technology to offensive weaponry, not on any technical basis, but simply because "offense and aggression are not the American way." *See* E. LINENTHAL, *supra* note 19, at 48. These comments represent a self-centered, unreasonable approach to world affairs, and yet would probably not be questioned by the bulk of the American public, who view offense and aggression as decidedly un-American. Like far too many U.S. officials, Mr. Weinberger and his assistant fail to appreciate that there are many players and just as many perspectives in the international arena. Additionally, what Americans somehow "know" is true may not be as clear to a Soviet general or, for that matter, a Vietnamese peasant.

95. *See* Gross, *supra* note 11, at 40-41.

96. *Id.*

V. CONCLUSION

Without question, the idea of ridding the world of the paranoiac MAD policy is, at heart, a noble one. Unfortunately, in serving to make that idea reality, Star Wars would leave in MAD's stead a void of instability. And stability, however tenuous, has been MAD's lone redeeming feature.

Mere research into the Star Wars concept realistically cannot be judged contrary to the ABM Treaty.[97] Honest assessment of the nearly impossible task of rebottling the nuclear weapons genie, as well as lingering chills from the Cold War,[98] necessitates a pragmatic approach to the missile-defense option. Thus, investigation into the theoretical viability of this option, in the context of continuing dialogue, should not and obviously will not be ignored by either the Soviet Union or the United States.

However, unabashed support of the Grand Vision, as exhibited at times by high-ranking members of the Reagan administration, could be construed as tantamount to criminal conspiracy in the domestic legal forum. Development of Star Wars would be not only illegal under the ABM Treaty and general international law, but practically insane in view of the unreasonable consequences it quite likely would spawn.[99] And, after all, insanity is no defense in the international legal forum.

Anthony John Mutchler

---

97. *See* Furniss, *supra* note 7, at 150 (quoting Gerard Smith).

98. Despite a record thaw in recent years, the Cold War could re-emerge in the manner of an ice age from incidents like the recent "lasings" of U.S. aircraft by Soviet sources. *See Laser firings suspected*, Tallahassee Democrat, Nov. 10, 1989, at 1A & 4A. The Pentagon claims that Soviet marine vessels in the Pacific were responsible for blinding flashes of light aimed at four U.S. air vessels in late October and early November 1989.

99. A 1983 *St. Louis Post-Dispatch* editorial warned that the instability resulting from development of Star Wars would inevitably increase tension between the U.S. and the Soviet Union. Rather poignantly, the article stated: "This is no Star Wars, this is madness." *See* E. LINENTHAL, *supra* note 19, at 14.