The Legal Status of the Anti-Ballistic Missile Treaty

Remarks by Ambassador Thomas Graham, Jr., President of the Lawyers Alliance for World Security

Washington -- October 22, 1998

We live in a dangerous world. As Walter Pincus said in his recent *Washington Post* article, we face many threats, from international financial collapse and possible global depression to Saddam Hussein purchasing enough fissile material to make an atomic weapon truck bomb and threatening the obliteration of New York City. Certainly the threat of the spread of weapons of mass destruction is the principal national security threat facing the United States and the world community. With the nuclear tests in South Asia there is now a possibility that nuclear weapons -- at least the possession of crude weapons like the Hiroshima bomb -- will spread widely around the world, creating a true nightmare for the United States and world security. Chemical weapons and biological weapons being relatively simple could come into the possession of almost anyone. And the Rumsfeld Commission has reported that there is a recognizable thre at of long-range or strategic ballistic missiles being acquired by rogue states in just a few years -- contrary to CIA estimates which put this unwelcome development quite a few years further off.

However, we must recognize gradations in these threats. Chem ical weapons, while an ideal terrorist weapon can affect only a limited area and are not well suited for strategic ballistic missile attack. Also, while easy to make, they are prohibited by the Chemical Weapons Convention which has far reaching verification measures. The same is true for biological weapons, an ideal terrorist weapon but one not well suited for strategic ballistic missile attack. In their current state of development, they act slowly and inoculations are available. In addition, they are prohibited by the Biological Weapons Convention, an older agreement without effective verification provisions but which the world community is attempting to strengthen.

By contrast, nuclear weapons are not universally prohibited. Some countries have thousands, others have hundreds. Regrettably, many see nuclear weapons as the principal indication of power -- what distinguishes a state that is listened to and that has a seat at the table from one that is not and does not. Witness the declarations by India's leaders after their tests -- we are a big country now, we have the bomb. And nuclear weapons -- at least sophisticated weapons -- make excellent mates for strategic ballistic missiles with their light weight and their instant and massive destructive power.

The real enemy here are nuclear weapons in general and particularly in the hands of rogue states, terrorist organizations, religious cults, violent sub-national groups and criminal conspiracies, a likely development if proper policies are not followed. Thus, the premier objective must be to reduce the political value of nuclear weapons in the process of reducing their numbers and safeguarding all fissile materials. It is imperative that in the near future the United States take the leading role in proposing and ultimat e ly implementing, along with the other presently existing nuclear weapon states, a policy of negotiating deep cuts in the numbers of nuclear weapons, down to the low hundreds for the United States and Russia, less for the United Kingdom, France and China in the context of which the Indian and Pakistani programs would be rolled back and account taken of Israel's unsafeguarded nuclear program. We must stop referring to nuclear weapons as the centerpiece of our security and start considering our stockpile, as well as those of the others, a problem to be solved. Only in this way can we safeguard our security and that of future generations. Only in this way can the far too high political value of nuclear weapons be reduced. Only in this way will the threat of attack by nuclear weapons carried by strategic ballistic missiles pass away.

But in the interim, development and deployment of ballistic missile defenses is a legitimate topic of national debate, as it has been for the last 40 years. In fairness it must be recognized that much more than the ABM Treaty has thus far prevented the establishment of a nationwide defense against ballistic missile attack. The United States has spent more than $100 billion in 1998 dollars on BMD programs, more than half of that since President Reagan announced the Strategic Defense Initiative in 1983. The United States still lacks the demonstrated capability to reliably destroy incoming ICBM warheads. The reason for this has little to do with the ABM Treaty and much to do with unsolved technical problems. And even should nationwide ballistic missile defense be proven technically feasible, it may be the case that it will be more expensive for the United States to deploy such a defense than it would be for a potential adversary to defeat it by delivering nuclear weapons -- or chemical and biological weapons\emdash by cruise missile, boat, aircraft or truck-or in the case of some weapons possibly even back pack. The best defense against these threats are strong international treaty regimes -- such as the Nuclear Non-Proliferation Treaty (NPT) regime -- with attendant verification arrangements, international cooperation, strong intelligence capability and effective conventional forces with a will to use them.

Whether we build a nationwide ballis tic missile defense system is a policy issue not a legal issue. If the United States has money to spend on BMD after it has competed for dollars against funding international verification systems, strengthening our intelligence community and providing fo r strong conventional forces and if we believe it will strengthen our security -- keeping in mind the importance of reducing the Russian arsenal of strategic nuclear forces -- we may decide to deploy it. And it may be the case that BMD will have a role to play in the all-important task of reducing nuclear weapons world-wide to the lowest level possible, as soon as possible -- the essential task if we are to reduce the nuclear threat against the United States not only by ballistic missile attack but also by other means of delivery such as cruise missile, boat, aircraft or truck.

In all of this, the legal status of the ABM Treaty should be a minor issue, not a major one. The ABM Treaty has a supreme interests

withdrawal clause -- as do all modern arms control agreements -- which the President could exercise as part of a national decision to build rton-treaty compliant BMD. The subject of missile defense has had, however, an unfortunate history of having policy debates dressed up as legal debates. In the 1980s for a time, a ttended by severe controversy, the United States adopted a policy of declaring that the ABM Treaty permitted exactly what it was designed to prevent, a nationwide BMD system, as long as it was based on future technology. This position was taken contrary to the express language of the Treaty, not substantiated by the negotiating record and directly refuted by the far more important subsequent practice of the United States and the U.S.S.R.

The real issue was whether we should proceed ahead rapidly with BMD -given the technical complexities and the fact that the Soviet Union was linking opposition to BMD to further reductions in strategic forces. In that context the President could have withdrawn from the ABM Treaty if that had been judged appropriate. But instead this legitimate debate became arcane, misguided, and confrontational, characterized by legalities in the place of the straightforward and reasoned consideration our national defense deserves. It ultimately led to the destruction of the then SDI program itself as a 1988 report of the Strategic Defense Initiative Organization suggested.

Today we are engaged in another legal debate as to whether the ABM Treaty has gone away because of the collapse of the former Soviet Union. This asserted disappear ance of the Treaty is alleged to have occurred without any involvement of the President and in fact contrary to his expressed policies. Again, the real issue is not the ABM Treaty, but whether the United States should promptly build a nationwide BMD syst e m and in that context either renegotiate the ABM Treaty or withdraw from it pursuant to its terms. This, in our system of Government, is a presidential decision just as would be declaring that United States is no longer bound by the ABM Treaty because of fundamental change of circumstance and/or impossibility of performance as a result of the dissolution of the former Soviet Union. Congress has a role here through its power over the purse, but it cannot on its own declare a treaty null and void or force the president to withdraw from a treaty. If any President and his Administration are believed to be pursuing an unwise course on an issue such as this, there is a remedy -- elections.

It is recognized in the Constitution and has been recognized in our nation al life for over two hundred years that Congress has the power to declare war, but the President is the supreme national authority in foreign policy. Treaties are made by the President with the advice and consent of the Senate, but the Senate's role generally ceases after its consent is given, as recognized by Professor Louis Henkin, our foremost authority on the Constitution and the treaty process. The sole power of the President to suspend or terminate international agreements for the United States has been recognized in the Restatement of Foreign Relations Law of the United States and elsewhere as being implied by his Office. In Goldwater vs. Carter, it was argued that the president did not have the power to withdraw from a treaty absent a two-thirds vo te of the Senate. The Supreme Court dismissed this case as one presenting a political question. Likewise it is part of the foreign policy power of the President to recognize successor states and governments, and to recognize successor states as treaty p arties for the United States. Presidents have done this many, many times for both bilateral and multilateral treaties consistent with recognized principles of international law.

Determination of succession is part of the foreign policy power of the Presid ent. The Vienna Convention of the Law of Treaties does provide that a state may withdraw from a treaty on, among other grounds, fundamental change of circumstance or impossibility of performance, and as stated before the ABM Treaty has a withdrawal claus e permitting a party to withdraw on six months notice if it judges its supreme interests to be threatened. But treaties just do not vanish or go away, a party must declare that it is withdrawing or that it regards itself as no longer bound for one of the above or some other legitimate reason. It is the head of a state or of its government that makes this decision and declaration\emdash in our case the President.

Thus, the ABM Treaty remains in force and neither action or inaction by the U.S. Senate on the Memora ndum on Succession signed in New York in September, 1997, nor a declaration by the Senate or the Congress that the ABM Treaty is null and void, will affect the legal standing of the Treaty. Continued U.S. adherence to the ABM Treaty is a matter of national policy; absent a decision by the President to withdraw from the Treaty our obligation is to abide by its provisions.

Succession under international law is a question of fact and agreement and the United States on one hand and Russia, Ukraine, Belarus, and Kazakhstan on the other have agreed that the latter four states are the duly constituted successors to the Soviet Union for the ABM Treaty. Signature of the MOU in September 1997 by the President's authorized representative reflected the fact that succession had occurred for the ABM Treaty as a matter of law. For the United States, this is a Presidential function which does not involve the Senate as it is not a question of a new Treaty, rather it is a continuation of the old Treaty.

This President -- but not necessarily his successor -- is obligated to submit the MOU to the Senate because of his agreement as reflected in the Senate Resolution of Advice and Consent for the Conventional Armed Forces in Europe (CFE) Treaty -- and he should do so. And the President sho uld respect the expressed view of the Senate relating to the terms of succession, procedures and the like, but Senate action on the MOU will have no clear legal effect on the fact of succession. Succession has already taken place and the ABM Treaty conti nues to be in force -- as recognized by the President.

The following is worthy of note. In Moscow on January 29, 1992 shortly after the dissolution of the former Soviet Union, President Yeltsin said "Russia regards itself as the legal successor to the USSR in the field of responsibility for fulfilling international obligations. We confirm all obligations under bilateral and multilateral agreements in the field of arms limitation and disarmament which were signed by the Soviet Union and are in effect at present." In reply, U.S. Secretary of State, James Baker, indicated "I made the point to the President that the United States remains committed to the ABM Treaty. The fact of the matter is we've made the point that we expect the states of the Commonwealth to abide by all of the international treaties and obligations that were entered into by the former

Soviet Union, including the ABM Treaty."

The Memorandum of Law prepared for and distributed by the Heritage Foundation which contends that the ABM Treaty is no longer in force because only the former Soviet Union could carry out its terms as the Treaty partner for the United States is a serious document but simply in error. There are numerous important multilateral and bilateral international arms control ag reements to which Russia -- and, as appropriate others of the Newly Independent States (NIS) -- have succeeded in place of the former Soviet Union, to begin with Russia vice the former Soviet Union as party to the United Nations Charter with a permanent seat on t he Security Council. The United States did not recognize the Baltic States as being incorporated into the former Soviet Union, so the U.S. regards the Soviet Union as being replaced by 12 new states referred to as the NIS. To address only arms control a greements, with respect to the NPT, Russia has been recognized as the sole successor to the Soviet Union\emdash because we only wanted to recognize one nuclear weapon state successor -- and the other NIS joined the NPT as separate non-nuclear weapon state parties to the NPT. For the Intermediate Range Nuclear Forces Treaty, a bilateral Treaty like the ABM Treaty, the U.S. has recognized all 12 of the NIS as successors, six active in its continued implementation and six inactive-because while there were INF bases only on the territory of the active six, the U.S. judged it important that the prohibition on INF systems run to all twelve. For the CFE Treaty all of the NIS that have territory in the zone of application of the Treaty are recognized successors, while only Russ ia is recognized as successor to the Hot Line Agreement.

As with these other agreements, the succession arrangement agreed to by the United States for the ABM Treaty is appropriate. While it is true that the former Soviet Union posed a unique threat owing to its ideological hostile totalitarian government that Russia does not, its dissolution did not alter the potential for a strategic situation that it is the purpose of the Treaty to avoid: strategic instability stemming from concern that a potential opponent with a massive nuclear arsenal might acquire a first-strike capability by building a nationwide BMD system. At least as long as Russia has thousands of nuclear weapons and strategic delivery vehicles, it remains a unique partner in maintaining strategic stability. And it is appropriate that Ukraine, Belarus, and Kazakhstan are successor states for the ABM Treaty in addition to Russia as it was on their territory that strategic offensive nuclear systems were located after the dissolution of the former Soviet Union. It is the mutual stability of the two superpower strategic arsenals -- both of which still exist seven years after the end of the Cold War -- that was and is the object and purpose of the ABM Treaty and this remains an essential objective today. Thus, the dissolution of the former Soviet Union did not establish impossibility of performance of the ABM Treaty.

In conclusion, the issue of whether to deploy a nationwide BMD system is a matter of policy not law. The issues are, therefore, whether o r not there is a system demonstrably capable of defeating real threats to the national security, how much deployment of this system would cost, and what is the likelihood that potential adversaries could circumvent such a system by foregoing ballistic mis s ile delivery in favor of alternative means of delivery. If after considering these issues and taking into account the effect on the effort to reduce the superpower strategic nuclear arsenals and any attempt at treaty amendment, deployment of a BMD system not compliant with the ABM Treaty appears to be the correct course for U.S. security, withdrawal from the ABM Treaty would be the appropriate option. In the meantime, the object and purpose of the ABM Treaty remains valid. Treaty succession has been est a blished as a matter of law and the Treaty continues in force. And all of this should be subordinated to the fundamental objective of reducing nuclear weapons to the lowest practical level in the shortest possible period of time, so as to safeguard the se curity of future generations.