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## The Proliferation Security Initiative and the Evolution of the Law on the Use of Force

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# THE PROLIFERATION SECURITY INITIATIVE AND THE EVOLUTION OF THE LAW ON THE USE OF FORCE

*Mark R. Shulman\**

I. INTRODUCTION: THE PROLIFERATION SECURITY INITIATIVE AND ITS OBJECTIVES .....	774
A. <i>A New Form of Multilateralism</i> .....	783
II. THE GRAVEST DANGER: WEAPONS OF MASS DESTRUCTION .....	786
A. <i>Political Support from International Institutions</i> ....	787
B. <i>National Security</i> .....	794
III. HOW DOES THE PSI WORK? .....	795
A. <i>Intelligence Sharing and Operational Cooperation</i> .	796
B. <i>Interdiction</i> .....	797
IV. WHO SUPPORTS THE PSI AND WHAT ARE THEY DOING? .	798
A. <i>Supporters and Participants</i> .....	798
B. <i>Early Successes?</i> .....	802
V. THE LAW OF INTERDICTION .....	803
A. <i>Freedom of the Seas</i> .....	803
B. <i>Exceptions to Freedom of the Seas</i> .....	804
C. <i>Interdiction as Self-Defense</i> .....	811

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D. <i>Boarding Agreements</i> .....	813
E. <i>Strengthening the PSI's Legitimacy</i> .....	814
VI. UNITED NATIONS AND PROLIFERATION.....	818
A. <i>Security Council Efforts</i> .....	818
B. <i>Does UNSCR 1540 Fully Legitimate Forceable Counter-proliferation?</i> .....	820
VII. CONCLUSIONS AND RECOMMENDATIONS.....	822
A. <i>Put the Cat Back in the Bag</i> .....	822
B. <i>Embrace International Law</i> .....	823
C. <i>Broaden the Base</i> .....	824
D. <i>Open up the Discussion</i> .....	824
E. <i>A Final Word</i> .....	826
VIII. APPENDIX: INTERDICTION PRINCIPLES FOR THE PROLIFERATION SECURITY INITIATIVE .....	826

*Thus far the chief purpose of our military establishment has been to win wars. From now on its chief purpose must be to avert them.*

Bernard Brodie

*The Absolute Weapon: Atomic Power and World Order*  
1946

Sixty years ago, the strategic analyst Bernard Brodie took serious stock of the military threats and missions in a world with atomic bombs. Brodie recognized that this new class of weapons would cause intolerable destruction, and therefore that the United States could no longer afford to wait for an enemy to strike first. For much of the half century that followed, the United States and its allies relied on deterrence and when necessary limited conflicts to avert strikes such as the attack on Pearl Harbor that had brought the United States reluctantly into the Second World War. More recently, the nature of threats that the United States and its allies face has changed; now, enemies who cannot be deterred are seeking to possess weapons of mass destruction. While the prospect of non-state messianic

actors obtaining these weapons dramatically expands the range of catastrophic threats, the means the military establishment has to avert wars has not grown accordingly.

Because the international security system is premised on exceedingly strong notions of national sovereignty, the United States may not seize a shipload of nuclear weapons moving from North Korea to Iran for ultimate use by terrorists. Russia may not force the landing of an airplane carrying anthrax from the Sudan to Chechnya until that craft enters Russian airspace. In other words, terrorists, revolutionaries, and rogue states are virtually free to ship weapons of mass destruction (WMD) as they wish. Without some significant changes to the system, the use of WMD against civilians seems all but inevitable.

This Article addresses one significant undertaking that seeks to change the system by enabling concerned states to interdict international trade in weapons of mass destruction. As such, the Proliferation Security Initiative (PSI or the Initiative) not only addresses one of the most urgent threats to peace and security that the world has ever witnessed, but it does so in an innovative way that has the potential to change the basic paradigm of peace and security by legitimizing the proportional and discriminating use of force to prevent a great harm.

This Article proceeds in seven Parts. Part I introduces the Initiative and discusses some of the legal, political and strategic issues it raises. A more detailed legal analysis follows in Part VI but only after some analysis of the political and strategic issues that drive the Initiative. Part II discusses the threats that the proliferation of weapons of mass destruction pose and the ways that the Initiative seeks to address them. Precisely because the PSI is “an activity not an organization” its structure and activities have not been articulated with much detail. The PSI’s founding document is a Statement of Interdiction Principles reproduced in the appendix to this Article. Part III presents those few operational details that are publicly available. Likewise, the PSI’s amorphous structure leaves considerable ambiguity about what it means to participate in the Initiative. Part IV addresses what is entailed in joining the PSI. Part of the Initiative’s brilliance lies in its flexibility, but this design element makes it difficult to identify who is participating and at

what level. It also leaves open questions about whom the Initiative targets. To date, the Initiative has focused on operations to interdict the flow of weapons at sea, a prospect that raises significant legal concerns because a theoretical interdiction might contravene the strong tradition of freedom of the seas. As noted above, Part V examines the legal framework in which the PSI operates: the existing and potential legal arguments that would or would not permit interdiction shipments of WMDs. Part VI picks up the thread by examining the efforts to deal with these legal issues through the essentially political actions of the United Nations Security Council. Finally Part VII draws some conclusions and makes a few concrete recommendations about how to build support and improve the fit between the PSI and its critical mission.

#### I. INTRODUCTION: THE PROLIFERATION SECURITY INITIATIVE AND ITS OBJECTIVES

The Proliferation Security Initiative is a multilateral initiative intended to prevent the proliferation of Weapons of Mass Destruction (WMD) and the materials used to construct them.<sup>1</sup> “The goal of the PSI is to create a more dynamic, creative, and proactive approach to preventing proliferation transfers to or from nation states and non-state actors of proliferation concern.”<sup>2</sup> To accomplish this objective, the PSI establishes links to facilitate information sharing between countries.<sup>3</sup> The Initiative organizes multinational exercises to train for the interdiction of these weapons on the high seas or the airspace above them. The PSI’s activities are intended mostly to enable its supporters to identify cross-border trafficking in WMD and to halt it. It explicitly contemplates boarding ships and, if

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1. U.S. DEP’T OF STATE, INT’L INFO. PROGRAMS, THE PROLIFERATION SECURITY INITIATIVE (June 2004), *available at* <http://usinfo.state.gov/products/pubs/proliferation> [hereinafter U.S. DEP’T OF STATE, INT’L INFO. PROGRAMS].

2. *Id.* In September 2003, eleven “countries agreed to and published the Proliferation Security Initiative Statement of Interdiction Principles. These identify specific steps for effectively interdicting weapons of mass destruction shipments and preventing proliferation facilitators from engaging in this deadly trade. Participation is voluntary. *Id.*

3. *Id.*

necessary, using armed forces to seize weapons and the materials used to make them.<sup>4</sup> Its Statement of Interdiction Principles also includes undertakings by its participants to board and search vessels reasonably suspected of transporting WMD, including their delivery systems, and to refrain from transporting WMD themselves.<sup>5</sup> Its signatories also undertake to consider providing consent to boarding and searching vessels carrying their flags.<sup>6</sup> Subsequent bilateral agreements have been signed to allow the United States to board ships bearing flags of convenience under certain circumstances.<sup>7</sup>

Since its inception, the Initiative's efforts have focused on halting the flow of WMD across the world's oceans. In the future, its activities may extend to land-based interdictions. Most of the participants in PSI exercises like these are the naval and air forces of the United States and the various regional powers that would presumably undertake any interdiction in the future.

President George W. Bush announced the Initiative in Krakow, Poland, on May 31, 2003.<sup>8</sup> A few months later, eleven states signed a *Statement of Interdiction Principles*, a document ambitious in scope but providing very few details.<sup>9</sup> Since that time, the PSI has gained widespread support from U.N. Secretary General Kofi Annan and more than seventy states, including those traditionally known as the "Great Powers," including Great Britain, France, Russia, Germany, Italy, Japan,

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4. *Id.*

5. U.S. DEP'T OF STATE, THE PROLIFERATION SECURITY INITIATIVE, STATEMENT OF INTERDICTION PRINCIPLES (Sept. 4, 2003), *available at* <http://usinfo.state.gov/products/pubs/proliferation#statement> [hereinafter STATEMENT OF INTERDICTION PRINCIPLES]. This material is reproduced in the appendix of this Article.

6. *Id.*

7. *See, e.g.*, John R. Bolton, Under Secretary for Arms Control and International Security, Remarks with H.E. Arnulfo Escalona, Minister of Government and Justice of Panama: Signing of the U.S.-Panama Ship Boarding Agreement to Support the Proliferation Security Initiative (PSI) (May 12, 2004).

8. George W. Bush, President of the United States, Remarks by the President to the People of Poland (May 31, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>.

9. *See* STATEMENT OF INTERDICTION PRINCIPLES, *supra* note 5.

Turkey, and Spain.<sup>10</sup> Unfortunately, some states have not endorsed it. This Article examines some of the reasons the Initiative has not garnered universal support and proposes ways to achieve it.

The Initiative is both bold and timely. It constitutes one of the most important positive recent developments in the area of international peace and security to date and may also add up to the most exciting change in the area of public international law. In particular, it may fundamentally alter the transnational legal framework for the use of force by states. As it gains acceptance, force may become a more ordinary tool for ensuring compliance with the dictates of international security. By blurring the lines between war and peace, the PSI permits the use of force to advance security objectives without triggering the rubric of war. And yet, despite the Initiative's novelty and importance, it has attracted remarkably little scholarly or policy-relevant attention.<sup>11</sup> Moreover, because the Initiative lacks a central office, an international secretariat, an operational handbook, rules of engagement, and congressional authorization, it remains somewhat shrouded in mystery.

While this novel Initiative is highly innovative in its conceptualization, responding to one of the most urgent sets of problems society faces, the PSI raises several significant legal

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10. U.S. DEPT OF STATE, FACT SHEET, PROLIFERATION SECURITY INITIATIVE FREQUENTLY ASKED QUESTIONS (FAQ) (2005), available at <http://www.state.gov/t/isn/rls/fs/46839.htm>; U.S. Strategy to Combat the Proliferation of Weapons of Mass Destruction: Hearing on Fiscal 2007: Emerging Threats Before the Subcomm. on Emerging Threats and Capabilities of the S. Comm. on the Armed Servs., 109th Cong. (2006) (statement of Robert G. Joseph, Under Secretary of State for Arms Control and International Security); Fabrice Pothier, *The Proliferation Security Initiative: Towards A New Anti-Proliferation Consensus?*, BASIC (BR. AM. SECURITY INFO. COUNCIL) NOTES, Nov. 18, 2004, available at <http://www.basicint.org/pubs/Notes/BN041118.htm>.

11. The PSI has been the subject of almost no in-depth reporting. The most attention the Initiative has received from the media is in respect to the nomination of its progenitor, then Under Secretary of State for Arms Control and International Security Affairs John Bolton, to serve as U.S. Ambassador to the United Nations. In this respect, the PSI has received scores of mentions in the national media but little analysis. For a bibliography of the PSI and U.N. Security Council Resolution 1540, see Mark R. Shulman, *Proliferation Security Initiative and U.N. Security Council Resolution 1540* (Oct. 2005) (unpublished bibliography), [http://library.law.pace.edu/research/psi\\_bibliography.pdf](http://library.law.pace.edu/research/psi_bibliography.pdf).

and policy issues in its implementation. The fact that it raises issues should not be surprising. Significant changes to international norms have always faced obstacles; that is the nature of complex systems. Historical examples abound. For instance, consensus was slow to form around such momentous issues as the outlawing of piracy, the slave trade, and eventually, genocide. More recently, the international community has been hesitant to outlaw aviation piracy or other acts of terrorism. And now the international community is halting and unsure about how to proceed in the face of nuclear proliferation. The PSI is acting as a catalyst for the development of a new norm that allows the use of force to interdict the flow of WMD.

A definitive conclusion about the legal status of the Initiative is elusive for several reasons related to its lack of a discernable structure. Different states have presented diverging views of the relevant law that governs the Initiative's activities.<sup>12</sup> Also, because the PSI seeks to address proliferation events as they arise, no one knows yet what actions its members will take and, therefore, what legal arguments will be required to support them. Finally, the PSI contains the seed of a new kind of law—a universal ban on the proliferation of WMD<sup>13</sup>—and this law has yet to be fully articulated, let alone tested.

As the lead participant, the United States' legal position is critical and has been evolving since 2003. Then Undersecretary of State John R. Bolton defended the PSI's legality at the time based on the right to collective self-defense.<sup>14</sup> This justification proved to be overreaching. Other PSI core members failed to

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12. See, e.g., Barry W. Coceano, *The Proliferation Security Initiative: Challenges and Perceptions*, ATLANTIC COUNCIL OF THE U.S. (OCCASIONAL PAPER), 14–16 (2004), available at [http://www.acus.org/docs/0405%20Proliferation\\_Security\\_Initiative\\_Challenges\\_Perceptions.pdf](http://www.acus.org/docs/0405%20Proliferation_Security_Initiative_Challenges_Perceptions.pdf) (discussing debates on the legal issues surrounding the Proliferation Security Initiative).

13. STATEMENT OF INTERDICTION PRINCIPLES *supra* note 5.

14. John R. Bolton, Under Sec'y for Arms Control and Int'l Sec., U.S. Dep't of State, Remarks to the Federalist Society: "Legitimacy" in International Affairs: The American Perspective in Theory and Operation (Nov. 13, 2003), available at <http://www.state.gov/t/us/rm/26143.htm>.



endorse it, and Secretary Bolton subsequently dropped it.<sup>15</sup> More recently, the U.S. State Department has vaguely claimed PSI activities will be consistent with domestic and international legal frameworks, many of which in turn implement existing nonproliferation structures.<sup>16</sup> While this claim is generally accurate, it deserves detailed analysis and explanation to justify it in the face of contrary claims and also to spell out some of the opportunities that widespread endorsement of the PSI opens. Going further, this Article will also argue that in order to implement the PSI, its supporters are altering international law in ways that may increase the scope and relevance of regulation of the international security regime.

To meet a global threat, the PSI is ambitious in its geographic scope. Traffic in WMD may originate almost anywhere and, in light of the intention of some non-state actors to obtain them,<sup>17</sup> they may be bound for almost anywhere. Countries of origin could include North Korea, Iran, China, Syria, Pakistan, India, Israel, Vietnam, Sudan, Egypt, Yemen, Cuba, Russia, and almost any of the other former Soviet

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15. See Jofi Joseph, *The Proliferation Security Initiative: Can Interdiction Stop Proliferation?*, ARMS CONTROL TODAY, June 1, 2004, available at [http://www.armscontrol.org/act/2004\\_06/Joseph.asp](http://www.armscontrol.org/act/2004_06/Joseph.asp). On the other hand, the PSI's defenders found authority in the U.N. Security Council Presidential Statement of January 1992, which stated that WMD proliferation is a threat to international peace and security and emphasized the need for its prevention, and various political statements originating in the United Nations and elsewhere. John Harrington, *Arms Control and National Security*, 38 INT'L L. 391, 392 (2004).

16. *The Proliferation Security Initiative (PSI): A Record of Success* (2005) (testimony of Stephen G. Rademaker, Assistant Sec'y of State for Arms Control, Before the H. Int'l Relations Comm., Subcomm. on Int'l Terrorism and Nonproliferation), <http://www.state.gov/t/ac/rls/rm/47715.htm>.

17. See Jon B. Wolfsthal, *The Next Nuclear Wave*, FOREIGN AFF., Jan-Feb. 2005, available at <http://www.foreignaffairs.org/20050101fareviewessay84114a/jon-b%20wolfsthal/the-next-nuclear-wave.html> (citing GRAHAM ALLISON, NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE Ch. 1 (2004) (providing a distressing litany of non-state actors seeking to acquire nuclear weapons)). This list includes: Al Qaeda, its various related organizations and copycats operating around the world; Jemaah Islamiyah (active in Southeast Asia); Chechen nationalists; and Hezbollah (active in Lebanon and throughout the Middle East). *Id.* The list could also include Majlis-e-Amal and other pro-Taliban anti-U.S. organizations operating in and around Pakistan, Afghanistan, and countless doomsday cults around the world (similar to Aum Shinrikyo or the Branch Davidians). Others might add Andean drug cartels.

republics. From there, the weapons could be transshipped anywhere on earth before arriving at their ultimate destination or target. Therefore, the threat is global.

In the face of a global threat, who sets the strategy? The PSI declarations to date leave ambiguous its decision-making apparatus. Who will decide when and how to act? What role does the United States play? Is the decision-making process entirely ad hoc? The Statement of Interdiction Principles does not establish any detailed policies relating to the Initiative's purpose, decision-making apparatus, targets, or means.<sup>18</sup> The Statement of Principles does elaborate somewhat on the concept:

"States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.<sup>19</sup>

This formal statement begs more questions than it answers. Is there a list of states or non-state actors of concern? What is required in order to establish that they should be subject to interdiction activities? Are radioactive materials that could be used to create radiological devices (i.e. dirty bombs) subject to interdiction? Why are some states permitted to acquire WMD and transfer them? Which states?

Informal statements do provide additional insights into the Initiative's objectives. Its architect, John Bolton, has stated that the Initiative will not target states that possess WMD "legitimately."<sup>20</sup> This statement presupposes a legal conclusion about legitimacy that can only be vaguely drawn in the absence of established rules. Presumably it means that at least China, Russia, Great Britain, and France will not be subjected to the

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18. *See id.*

19. *Id.*

20. Wade Boese, *The Proliferation Security Initiative: An Interview with John Bolton*, ARMS CONTROL TODAY, Dec. 2003, available at [http://www.armscontrol.org/act/2003\\_12/PSI.asp](http://www.armscontrol.org/act/2003_12/PSI.asp).

Initiative's interdiction efforts so long as they do not export these weapons to rogue states or non-state actors.<sup>21</sup> As long-time declared nuclear powers under the terms of the Treaty on the Non-proliferation of Nuclear Weapons (NPT) and each wielding a U.N. Security Council veto, they appear to be insulated from the reach of the PSI.

Other informal statements about the PSI's objectives are less vague but are self-contradicting. A British government expert states that the PSI does

*not target any country or countries in particular. Rather, the goal is to prevent the development or acquisition of WMD by all non-state actors (such as terrorists) and states of concern, together with those who supply such programmes through trafficking in sensitive materials, equipment and technology—whether states, individuals, private companies or other entities.*<sup>22</sup>

The fact that there are some “states of concern” appears to belie the claim that the PSI does not target any countries in particular. The ambiguity and tension inherent in that statement are indicative of the fluidity of the Initiative. It does not target any specific country while at the same time

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21. The July 2003 PSI Meeting in Brisbane cited North Korea and Iran as two states of particular concern. See Press Release, U.S. Dep't of State, Proliferation Security Initiative: Chairman's Statement at the Second Meeting (July 10, 2003), <http://www.state.gov/t/isn/rls/other/25377.htm> [hereinafter PSI Chairman's Statement]; see also *The Proliferation Security Initiative: A Vision Becomes Reality* (May 31, 2004) (remarks of John R. Bolton, Under Sec'y for Arms Control and Int'l Sec., to the First Anniversary Meeting of the Proliferation Security Initiative, <http://www.state.gov/t/us/rm/33046.htm> (citing North Korea, Iran and Syria as “states of proliferation concern”); Andrew Prosser & Herbert Scoville, Jr., *The Proliferation Security Initiative in Perspective*, CTR. FOR DEF. INFO., June 16, 2004, <http://www.cdi.org/pdfs/psi.pdf> (citing to S/23500, Jan. 31, 1992). For the purposes of this Article, WMD will include those materials targeted by the PSI as components of WMD. Eventually, the distinction may be enormous, but those distinctions will only arise with specific situations. It is also worth noting that the sources may not be state actors, and that even governments have elements that may be capable of proliferation without such acts being sanctioned by state policy.

22. Letter from Matthew Hamlyn, Head, Parliamentary Relations and Devolution Dep't, Foreign and Commonwealth Office, to Committee Specialist (July 5, 2004), <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmaff/441/441we27.htm> (emphasis added).

preventing proliferation to or from states of concern. It is this sort of ambiguity—and the apparent discretion it permits—that causes some commentators to question whether the PSI conforms to the rule of law.<sup>23</sup> Vague policy statements about states of concern, however, are not the same thing as acts of violence, and the PSI's legitimacy cannot be prejudged on the basis of these statements alone. Ultimately, the actions on the behalf of the PSI and the law that governs those actions will determine the Initiative's legitimacy. The outcomes will illuminate its wisdom.

Likewise, it remains unclear how the PSI's participants will act if faced with information indicating that a shipment of WMD originated in a state that is neither a party to the NPT, a long-standing nuclear power (Israel), nor a powerful state with considerable international leverage such as India or Pakistan.<sup>24</sup> Given Pakistan's recent history and its apparent inability or unwillingness to halt the export of WMD, claims that it will get a free pass seem premature.<sup>25</sup> But as proliferation expert David Albright notes, "This is the age-old problem with Pakistan and the U.S. Other priorities always trump the United States from coming down hard on Pakistan's nuclear proliferation. And it

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23. Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT'L L. & POL'Y 253, 256-63 (2005); see also Ian Patrick Barry, *The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation Security Initiative*, 33 HOFSTRA L. REV. 299, 301 (2004); Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507 (2005).

24. Until North Korea's unprecedented announcement of its intention to withdraw in 2003, India, Pakistan and Israel were the only major states not party to the NPT. Devon Chaffee, *North Korea's Withdrawal from Nonproliferation Treaty Official*, WAGINGPEACE.ORG, Apr. 10, 2003, [http://www.wagingpeace.org/articles/2003/04/10\\_chaffee\\_korea-npt.htm](http://www.wagingpeace.org/articles/2003/04/10_chaffee_korea-npt.htm). All state parties are required to permit inspectors to ensure their nuclear materials are not diverted to illegal weapons programs. *U.S. Statement at the 2005 Nuclear Non-Proliferation Treaty Review Conference* (2005) (remarks of Stephen G. Rademaker, Assistant Sec'y of State for Arms Control), <http://www.state.gov/t/ac/rls/rm/45518.htm>.

25. See Prosser & Scoville, *supra* note 21, at 6. Pakistan's participation is important. If President Pervez Musharraf believes that signing the PSI would be domestically unpopular, he could sign it clandestinely. There is no reason that the parties to the PSI must each sign a public declaration. In fact, private deals may make sense and would be entirely legitimate—at least under international law.

goes back 15 to 20 years.”<sup>26</sup> Likewise, proliferation expert Gary Milhollin notes “it seems bizarre that we are letting the Pakistanis get away with nuclear smuggling because we think they’ll help fight terrorism.”<sup>27</sup> However, the best evidence publicly available suggests that India, Pakistan, and Israel will not be targeted—at least for now.<sup>28</sup>

The case of Pakistan illustrates the PSI’s potential for changing the use of force paradigm to achieve international peace and security. Clearly, from a counter-proliferation perspective, the PSI should not grant Pakistan a free ride. Other important considerations arise, however, because of Pakistan’s role as a critical ally in the struggle against terrorism.<sup>29</sup> One of the PSI’s greatest strengths is the flexibility it offers. The traditional international security order viewed the world as governed by fully sovereign states with a small number of states whose sovereignty is temporarily impaired—either because they are “failed” states, client states, or those subject to U.N. sanctions. Traditionally international law does not offer much support to those seeking to discriminate between the rights of different states based on an interpretation of their so-called legitimacy. Instead it treats the legitimacy and sovereignty of all states with equal dignity except in those few instances in which states violate obligations that are either self-imposed by custom or treaty, or imposed upon them by the U.N. Security Council. In contrast, the PSI implies a less rigid concept of sovereign autonomy in which a state no longer has complete freedom to engage in reckless activities that endanger another’s security. The PSI must prevent weak states from trafficking in WMD without further undermining their capacity to govern themselves. The United States can neither afford to ignore

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26. Josh Meyer, *Illegal Nuclear Deals Alleged*, L.A. TIMES, Mar. 26, 2005, at A8.

27. *Id.*

28. See Wade Boese, Research Dir., Arms Control Ass’n, Presentation to the Institute of Nuclear Materials Management Panel Discussion: Implications of U.N. Security Council Resolution 1540 (Mar. 15, 2005), [http://www.armscontrol.org/events/20050315\\_1540.asp](http://www.armscontrol.org/events/20050315_1540.asp) (citing speaker’s recent interview with John Bolton).

29. See, e.g., Press Release, White House Office of the Press Sec’y, President Bush and President Musharraf of Pakistan Discuss Strengthened Relationship (Mar. 4, 2006), <http://www.whitehouse.gov/news/releases/2006/03/20060304-2.html>.

Pakistan's proliferation nor to destabilize or alienate its government.

Eventually the PSI must develop enough support that it can halt proliferation from all countries, including powerful ones or those that have special influence as allies in the global struggle against terrorism. Granting free passes to oneself or one's friends runs contrary to the basic principles of the rule of law. It sets the grantor and the grantee above the law. The rule of law is premised upon the notion that no one is above it, and for the PSI to support a transnational order based on this principle, it should do everything feasible to abide by the rule of law itself. On the other hand, it may take years for supporters of the PSI to establish the legal capacity to target important countries that proliferate. In the meantime, an excess of solicitousness for the most robust interpretations of the rule of law should not be permitted to cripple the entire effort. This Article proposes that the best course is to embrace the objectives of the PSI and strive to strengthen it as an important counter-proliferation tool.

#### *A. A New Form of Multilateralism*

The Initiative offers a new model for multilateral cooperation that avoids cumbersome treaty apparatus. The postwar system of international peace and security is framed in great part by such treaties. From the beginning, the presidential administration of George W. Bush has been notoriously unfriendly to traditional multilateral conventions. Prior to September 11, 2001, the Bush Administration abandoned negotiations on START II,<sup>30</sup> decided not to ratify the Comprehensive Test Ban Treaty,<sup>31</sup> and soon thereafter withdrew the United States from the Anti-Ballistic Missile Treaty.<sup>32</sup> It stalled efforts to improve the Biological Weapons Convention

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30. Michael R. Gordon & David E. Sanger, *To Sway Russia, Bush Will Propose Cuts to Nuclear Arsenal*, N.Y. TIMES, Nov. 2, 2001, at A6 (noting that Start II had still not taken effect).

31. Tom Shanker & David E. Sanger, *White House Wants to Bury Pact Banning Tests of Nuclear Arms*, N.Y. TIMES, Jul. 7, 2001, at A1.

32. Press Release, White House Office of the Press Sec'y, ABM Treaty Fact Sheet: Announcement of Withdrawal from the ABM Treaty (Dec. 13, 2001), <http://www.whitehouse.gov/news/releases/2001/12/20011213-2.html>.

regime.<sup>33</sup> It failed to encourage ratification of the U.N. Convention on the Law of the Sea despite strong support in Congress, the Department of State, and the Department of Defense.<sup>34</sup> The Bush Administration took the unprecedented step of “un-signing” the 1998 Rome Charter of the International Criminal Court. The Administration’s antipathy to exposing Americans to charges in international tribunals is so strong it expended considerable diplomatic capital to ensure blanket exemptions for Americans before the new International Criminal Court despite the Rome Charter’s provisions and political considerations making any such prosecution exceptionally unlikely.<sup>35</sup>

At the same time, the Administration’s efforts to build multinational coalitions have been widely derided as fig leaves for unilateral action. These complaints, whatever their merit, do not mean the Administration has been ignoring the roles other states can play in maintaining peace and security. The PSI represents a prominent example of the Administration’s thinking about how to build transnational support to protect American interests. It envisions a new kind of multilateral security agreement—one with considerable advantages over the heavily negotiated and thus cumbersome treaties that lawyers and diplomats are accustomed to creating. While it is beyond the

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33. See Devon Chaffee, *Freedom or Force on the High Seas? Arms Interdiction and International Law*, WAGINGPEACE.ORG, Aug. 15, 2003, [http://www.wagingpeace.org/articles/2003/08/15\\_chaffee\\_freedom-of-force.htm](http://www.wagingpeace.org/articles/2003/08/15_chaffee_freedom-of-force.htm).

34. MARJORIE A. BROWNE, CONG. RES. SERV., THE U.N. LAW OF THE SEA CONVENTION AND THE UNITED STATES: DEVELOPMENTS SINCE OCTOBER 2003 (2005), available at <http://www.fas.org/sgp/crs/row/RS21890.pdf> (noting that though it had been voted favorably out of committee in the Senate and pushed by Department of State officials, it languished in the 108th Congress).

35. See U.S. DEP’T OF STATE, BUREAU OF POLITICAL-MILITARY AFFAIRS, AMERICAN SERVICE-MEMBER’S PROTECTION ACT (2003), available at <http://www.state.gov/t/pm/rls/othr/misc/23425.htm>. All this is in addition to the protections embodied both in the United States’ veto at the Security Council and the Rome Charter’s provisions for complementarity, that is authorization for indictments only when the state does not have the capacity to indict or investigate. The Rome Statute emphasizes “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” Rome Statute of the International Criminal Court, PmbI., July 17, 1998, U.N. Doc. A/CONF.183/9, available at <http://www.un.org/law/icc/statute/romefra.htm>.

scope of this Article to explore them all, other U.S.-led transnational security initiatives since 9/11 should at least be noted to give the reader an idea of their range and scope. In addition to the PSI,<sup>36</sup> they include the Container Security Initiative,<sup>37</sup> the Customs-Trade Partnerships against Terrorism,<sup>38</sup> the Regional Maritime Security Initiative,<sup>39</sup> and the Global Threat Reduction Initiative.<sup>40</sup> Also, the PSI has a nonproliferation analogue in the Global Partnership Against the Spread of Weapons and Materials of Mass Destruction.<sup>41</sup> Each is an activity, not an organization. Not one of the initiatives established is chartered by a multilateral treaty that has been signed and ratified by each participant. And yet, cumulatively, these initiatives may be building a new system that responds effectively and legitimately to the security demands of the twenty-first century.

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36. See generally Prosser & Scoville, *supra* note 21, at 2; PSI Chairman's Statement, *supra* note 21; STATEMENT OF INTERDICTION PRINCIPLES, *supra* note 5.

37. See U.S. CUSTOMS AND BORDER PROTECTION, FACT SHEET (2006), [http://www.customs.gov/linkhandler/cgov/border\\_security/international\\_activities/csi/csi\\_fact\\_sheet.ctt/csi\\_fact\\_sheet.doc](http://www.customs.gov/linkhandler/cgov/border_security/international_activities/csi/csi_fact_sheet.ctt/csi_fact_sheet.doc) [hereinafter U.S. CUSTOMS FACT SHEET].

38. See U.S. CUSTOMS AND BORDER CONTROL, PARTNERSHIP TO SECURE THE SUPPLY CHAIN: CUSTOMS-TRADE PARTNERSHIP AGAINST TERRORISM, [http://www.customs.gov/xp/cgov/import/commercial\\_enforcement/ctpat/](http://www.customs.gov/xp/cgov/import/commercial_enforcement/ctpat/) (last visited Apr. 2, 2006).

39. See *Regional Maritime Security Initiative*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/ops/rmsi.htm> (last visited Apr. 2, 2006) [hereinafter *RMSI*].

40. See IAEA STAFF REPORT, IAEA WELCOMES US NEW GLOBAL THREAT REDUCTION INITIATIVE (2004), [http://www.iaea.org/newscenter/news/2004/GTRI\\_Initiative.html](http://www.iaea.org/newscenter/news/2004/GTRI_Initiative.html).

41. See Group of Eight Leaders, The G8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction (June 27, 2002), <http://www.state.gov/e/eb/rls/othr/11514.htm>.



## II. THE GRAVEST DANGER: WEAPONS OF MASS DESTRUCTION

*Since the advent of the Nuclear Age, everything has changed save our modes of thinking and we thus drift toward unparalleled catastrophe.*

Albert Einstein<sup>42</sup>

Weapons of mass destruction in the hands of terrorists present the greatest threat to our civilization.<sup>43</sup> In the hands of a terrorist group, chemical, biological, or nuclear weapons could cause the deaths of thousands, or even millions, of innocent people. During a debate with Senator John F. Kerry during the 2004 campaign, President Bush said, "I agree with my opponent that the biggest threat facing this country is weapons of mass destruction in the hands of a terrorist network."<sup>44</sup> The more widely such weapons are distributed, the more likely their use. These weapons, or the means to build them, are increasingly accessible to states and non-state actors alike. The threat of widespread disease or death posed by naturally or

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42. Robert Holt, *Can Psychology Meet Einstein's Challenge?*, POL. PSYCHOL. 5(2), 1984, at 199-225 (citing a fund-raising letter for the Emergency Committee of Atomic Scientists written by Albert Einstein in May 1946).

43. A note on terminology: any strategy to prevent WMD attacks has several components, traditionally labeled "deterrence," "nonproliferation," "counter-proliferation" and "preemption." *Deterrence* remains basically unchanged from its classic Cold War formulation in which a potential adversary is dissuaded from launching an attack for fear of a response that would more than negate the advantages gained by such an attack. The concept of *preemption* has evolved over the years and is, indeed, in flux, due mostly to the U.S. arguments (mostly related to the distinctions between preemption and prevention) and actions in early 2003 leading up to the Iraq war. *Nonproliferation* is a more complex set of efforts to limit the spread of technology, expertise, and weapons through such means as classifying weapons technology and otherwise limiting its export or accessibility, enhancing border technologies and training personnel at border crossings, sponsoring peaceful work of nuclear scientists, or building and maintaining international verification systems. *Counter-proliferation* "focuses on more aggressive activities, such as covert action and military strikes. . . ." Frank J. Cilluffo et al., CSIS REPORT, COMBATING CHEMICAL, BIOLOGICAL, RADIOLOGICAL AND NUCLEAR TERRORISM: A COMPREHENSIVE STRATEGY xi (2001).

44. Presidential Debate in Coral Gables, Florida, 40 WEEKLY COMP. PRES. DOC. 2175, 2192 (Sept. 30, 2004); see also Graham Allison, *The Gravest Danger*, AM. PROSPECT, Mar. 2005, at 48.

unintentionally occurring agents such as zoonotic diseases<sup>45</sup> or gigantic meteors<sup>46</sup> may eventually prove more deadly, but the likelihood of these threats seems impossible to establish. The eventual use of WMD against civilians seems likely. Harvard's Graham Allison grimly forecasts that "on the current path, a nuclear terrorist attack on America in the decade ahead is more likely than not."<sup>47</sup> The PSI is one new tool in the effort to prevent such attacks. One of its strengths is that it does not pretend to be a silver bullet; rather it forms part of a growing network of networks, each adding layers of security. A silver bullet might miss its target, but a network of defenses would reduce the threat with every layer.

#### *A. Political Support from International Institutions*

International support for the PSI is widespread but ambivalent. As noted above, the U.S. government claims that at least seventy nations are participating in the Initiative, but a comprehensive statement listing those states and the actual level of participation has not been released.<sup>48</sup> Individual states that participate in the Initiative are discussed below. First, however, this Article discusses the support of the most politically significant international entities: the United Nations and the European Union. Later, in Part VI, it will examine the legal arguments to support counter-proliferation and the PSI.

The United Nations has endorsed the PSI concept but

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45. William B. Karesh & Robert A. Cook, *The Human-Animal Link*, FOREIGN AFF., July/Aug. 2005, at 38, 40 (explaining that zoonotic diseases "originated in animals but have crossed the species barrier to infect people"); see also Laurie Garrett, *The Next Pandemic*, FOREIGN AFF., July/Aug. 2005, at 3 (explaining such threats generally).

46. See Evan R. Seamone, *The Duty to "Expect the Unexpected": Mitigating Extreme Natural Threats to the Global Commons Such as Asteroid and Comet Impacts with the Earth*, 41 COLUM. J. TRANSNAT'L L. 735, 794 (2003) (discussing the legal consequences of catastrophic events).

47. GRAHAM ALLISON, NUCLEAR TERRORISM: THE ULTIMATE PREVENTABLE CATASTROPHE 15 (2004).

48. *U.S. Strategy to Combat the Proliferation of Weapons of Mass Destruction: Hearing on Fiscal 2007: Emerging Threats Before the Subcomm. on Emerging Threats and Capabilities of the S. Comm. on the Armed Servs.*, 109th Cong. (2006) [hereinafter *U.S. Strategy to Combat WMD*] (statement of Robert G. Joseph, Under Sec'y of State for Arms Control and Int'l Sec.).

stopped short of requiring its member states to pass legislation to enact it when it passed Security Council Resolution 1540 (UNSCR 1540) in April of 2004.<sup>49</sup> Secretary General Annan has endorsed the PSI as integral to the nonproliferation regime: "President Bush's Proliferation Security Initiative is another important step. These measures must be fully enforced."<sup>50</sup> The Secretary General's report, *In Larger Freedom*, noted that while the NPT "remains the foundation of the non-proliferation regime, we should welcome recent efforts to supplement it."<sup>51</sup> Specifically, the report continues:

These [efforts] include Security Council Resolution 1540 (2004), designed to prevent non-state actors from gaining access to nuclear, chemical and biological weapons, technology and materials, and their means of delivery; and the voluntary Proliferation Security Initiative, under which *more and more States are cooperating* to prevent illicit trafficking in nuclear, biological and chemical weapons.<sup>52</sup>

Likewise the United Nations' *Report of the High-Level Panel on Threats, Challenges and Change* notes:

Recent experience of the activities of the A.Q. Khan Network has demonstrated the need for and the value of measures taken to interdict the illicit and clandestine trade in components for nuclear programmes. This problem is currently being addressed on a voluntary basis by the Proliferation Security Initiative. We believe that all States should join this voluntary initiative.<sup>53</sup>

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49. See S.C. Res. 1540, U.N. SCOR, 59th Sess., 4956th Mtg., U.N. Doc. S/RES/1540 (2004).

50. Kofi A. Annan, *A Global Strategy for Fighting Terrorism*, THE HINDU, Mar. 12, 2005, available at <http://www.hindu.com/2005/03/12/stories/2005031206711100.htm>.

51. See The Secretary General, *Report of the Secretary-General, In Larger Freedom: Towards Development, Security, and Human Rights for All*, ¶ 100, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005), available at [www.un.org/largerfreedom/report-largerfreedom.pdf](http://www.un.org/largerfreedom/report-largerfreedom.pdf) (emphasis added to note the recognition of an emerging norm that may ripen into customary international law).

52. *Id.*

53. The Secretary General, *Report of the Secretary-General's High-level Panel on Threats, Challenges, and Change*, ¶ 132, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf>. The father of the Pakistani, or the "Islamic bomb," Dr. Abdul Qadeer Khan, has confessed to

These statements contribute to the legitimacy of the PSI, politically and morally. Their jurisprudential significance, however, is ambiguous and evolving. At this point, the United Nations' contributions to promoting the PSI, therefore, have been essentially limited to the Secretary General's voicing of support. And as long as China remains opposed, the United Nations' vast authority under Chapter VII of the U.N. Charter will remain dormant with respect to the PSI.

After the United Nations, the European Union (EU) is probably the next most significant source of the PSI's political legitimacy. The EU's position has evolved quickly over the past couple of years with each new statement increasingly supportive. The *EU Strategy against Proliferation of Weapons of Mass Destruction* promulgated by the European Council in December 2003, did not explicitly mention the Initiative in its position against proliferation. An otherwise comprehensive document, it endorsed treaties and encouraged expansion of the EU's role in enhancing verification regimes, assistance programs, export controls, and other initiatives intended to improve the security of WMD materials, equipment, and expertise. It also included an ambiguous reference to considering "measures aimed at controlling the transit and transshipment of sensitive materials [and supporting] international initiatives aimed at the identification, control and interception of illegal shipments."<sup>54</sup>

On the first anniversary of the Krakow announcement, the EU and its member states went further and committed "themselves to contribute to the PSI and . . . take the necessary steps in support of interdiction efforts."<sup>55</sup> Somewhat cautiously, this commitment required the EU and its member states to

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selling nuclear weapons technology to Iran, Libya, and North Korea. Pakistan's President Pervez Musharraf has confirmed that these transactions occurred but has denied knowing about them at the time. See Esther Pan, *Nonproliferation: The Pakistan Network*, COUNCIL ON FOREIGN REL., Feb. 12, 2004, <http://www.cfr.org/publication/7751/>.

54. The Council of the European Union, *EU Strategy Against Proliferation of Weapons of Mass Destruction*, Council Common Position No 2003/805/CFSP, at 12, available at <http://ue.eu.int/ueDocs/cmsUpload/st15708.en03.pdf>.

55. General Affairs & External Relations Council (GAERC), *Non-proliferation—Support of the Proliferation Security Initiative (PSI)* (May 17, 2004), [http://europa.eu.int/comm/external\\_relations/nuclear\\_safety/intro/gac.htm](http://europa.eu.int/comm/external_relations/nuclear_safety/intro/gac.htm).

“take the necessary steps in support of interdiction efforts to the extent their national and Community legal authorities permit and consistent with their obligations under international law...”<sup>56</sup> This statement illuminates several important distinctions between the U.S. and EU approaches to security and terrorism issues generally. It is also notable because the EU overcame these differences in defining the ultimate shape of the still inchoate PSI.

First, the legal carve-outs in the EU endorsements are so prominent as to raise questions about the EU’s willingness to commit at all. In contrast, only a few days earlier, a Japan-EU Declaration on Disarmament and Nonproliferation included no such carve-outs.<sup>57</sup> The addition of the carve-outs in the EU’s PSI statement seems like a blunt effort to cajole the United States to assume a more respectful attitude toward the significance of the rule of international law and the constraints it imposes on decisions to use force. This difference implies that the EU is willing to abandon the PSI if it engages in military activities that are inconsistent with international law.

Second, the EU’s endorsement emphasizes the intelligence and law enforcement aspects of the PSI—not its military measures.<sup>58</sup> Similarly, at a recent PSI exercise hosted by Japan, the Japanese government insisted that the Coast Guard play a more prominent role than the Navy in an apparent effort to emphasize the law enforcement aspects of the operation.<sup>59</sup> Many members of the EU view the Bush Administration’s “War on Terror” as a grave mischaracterization of the enemy and how

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56. *Id.*

57. See Japan & The E.U., Japan-EU Joint Declaration on Disarmament and Non-proliferation (June 22, 2004), [http://europa.eu.int/comm/external\\_relations/japan/summit13\\_22\\_06\\_04/disarm.htm](http://europa.eu.int/comm/external_relations/japan/summit13_22_06_04/disarm.htm) (assigning cooperation in the context of PSI as a priority area).

58. See EU-U.S. Declaration on the Non-Proliferation of Weapons of Mass Destruction (June 26, 2004), [http://europa.eu.int/comm/external\\_relations/us/sum06\\_04/d ecl\\_wmd.pdf](http://europa.eu.int/comm/external_relations/us/sum06_04/d ecl_wmd.pdf). (“We fully subscribe to the Proliferation Security Initiative Statement of Interdiction Principles and support efforts to interdict WMD shipments and enhance cooperation against proliferation networks, including in intelligence and law enforcement.”).

59. See Dr. James A Boutilier, *Reflections on the New Indo-Pacific Maritime and Naval Environment*, POINTER (2004), available at <http://www.mindef.gov.sg/imindef/publications/pointer/journals/2004/v30n2/features/feature6.html>.

best to neutralize it. Instead, they view the threats posed by Al Qaeda and other non-state actors as principally a criminal matter best dealt with by law enforcement authorities, not the military. So, while they have agreed to work with the United States to halt trafficking in WMD, they believe nonmilitary agencies such as the U.S. Coast Guard should conduct its activities with the military playing supporting roles only as necessary.

Third, the EU's statement is captioned "Non-proliferation" not "Counter-proliferation." The distinction between nonproliferation and counter-proliferation may be significant. The Initiative's architect, John Bolton, has correctly characterized the PSI as a "counter-proliferation" strategy, but in the end "nonproliferation" may prove more politically viable (if less accurate).<sup>60</sup> The EU's characterization of the PSI as nonproliferation raises the concern that it may reveal an impulse to dilute the Initiative's military mission. Such an impulse should be resisted because the greatest strength of the PSI lies in the willingness of its supporters to use force if necessary to prevent proliferation.

Another innovation of the PSI's counter-proliferation regime is its focus on the weapons and materiel and not on the states. The PSI targets the weapons—not the parties interested in acquiring them. The source or intended recipients are legally and effectively significant but only insofar as certain intended recipients are privileged to receive WMD. When the maritime powers sought to end piracy in the eighteenth and nineteenth centuries, they did not destroy harbor cities such as New Orleans, Cartagena and Port-au-Prince that welcomed pirates. Instead, they hanged pirates. When Great Britain sought to end the trans-Atlantic slave trade in the nineteenth century, it did not embargo the United States, Brazil or Cuba.<sup>61</sup> Instead it captured slave ships and returned their passenger-cargo to Africa.<sup>62</sup> In this way, the PSI is less like an embargo or a war

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60. See John Bolton, *An All-Out War on Proliferation*, FIN. TIMES, Sept. 7, 2004, available at <http://www.state.gov/t/us/rm/36035.htm>.

61. Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L.J. 131, 208 (2005).

62. *Id.*

and more like a movement for the suppression of a vice. Consequently, it will help formulate a base norm that could eventually rise to the level of universal norms, much as the bans on piracy and slave trade did. The PSI does not appear to target states as an embargo or war would. Embargoes and wars must ultimately come to an end while universal norms endure. To construct a strong norm against proliferation, one should not look only to states for support. Also, the suppression of vice metaphor helps to explain in part the U.S.-EU split over how to characterize the challenge. The U.S. government views the PSI as part of a war on terror because of the military means necessary to implement it, while the EU mostly views it as a law enforcement issue because the enemy is not a state against which one declares war. The PSI may have achieved such widespread support in part because it need not characterize its actions as either war or law enforcement.

Likewise, by targeting WMD rather than countries, the PSI creates a sanctions regime that has considerable advantages over embargoes and other counter-proliferation strategies. Because it specifically targets WMD, as well as materials used to construct them and the systems used to deliver them, it offers the prospect of an "exceptionally smart sanction." Traditional sanctions have become disfavored as tools of coercion. They overreach, preventing any goods from moving into a country or region, even necessities such as food, infant formula, or medicine. This lack of discrimination harms and alienates innocent people who have little or no ability to affect their government's behavior. So-called smart sanctions have similar shortcomings. They feed corruption and fail to alter the policy or behavior in question. An interdiction of WMD at sea would not constrain the flow of food, clean water, or medicine. Consequently, it does not lead to any collateral damage. Likewise, a specific interdiction does not threaten the health and safety of sailors on untargeted ships—those that are engaged in legitimate activities—unlike other maritime blockades. Also, it avoids the perils of smart sanctions because no new trading system is required; it creates no incentives or mechanisms for corruption. Although there is always the risk of mistakes, abuses, and the outbreak of war or other escalations of conflict, the PSI does appear to offer an almost perfectly

discriminating sanction.

Another significant advantage of the PSI over more traditional nonproliferation regimes is that it was brought into being swiftly and can adapt deftly to changing circumstances. Revising treaties to bring them into alignment with changed circumstances is at best a lengthy process. On the other hand, the ability to adapt quickly means the level of enthusiasm or support may also change quickly; participants can drop out at virtually any time and for any reason. Participants are bound neither by custom nor by treaty—at least until a strong norm develops. Indeed, it will be interesting to see whether some mechanism evolves for ensuring signatories remain in the PSI and adhere to its principles even when doing so would be awkward, inconvenient, or perilous for a member or a nonmember participant. States may wish to find ways to bind themselves in order to insulate their governments from political pressures to defect. No doubt the Bush Administration has been frustrated by the withdrawal of Spanish troops from Iraq following the attack bombings of March 11, 2004.<sup>63</sup> Hence the principal shortcoming of coalitions of the willing: the enemy can alter a coalition member's willingness to persist. The same can be said for many of the legacy, nonproliferation regimes. Export control regimes, for instance, are entirely voluntary in an international system in which state sovereignty is nearly sacrosanct; effective enforcement of security norms remains exceptionally difficult—in multilateral regimes as in coalitions of the willing. One way to reduce the freedom to defect would be for the strong states to sign agreements with longer termination periods or with obstacles such as binding arbitration. In the end, however, state sovereignty will always trump any such efforts.

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63. For a detailed account of the Madrid train attacks that occurred on March 11, 2004, see *Madrid Train Attacks*, [http://news.bbc.co.uk/1/hi/in\\_depth/europe/2004/madrid\\_train\\_attacks/default.stm](http://news.bbc.co.uk/1/hi/in_depth/europe/2004/madrid_train_attacks/default.stm) (last visited Mar. 31, 2006).



## B. National Security

*History will judge harshly those who saw this coming danger but failed to act.*

*National Security Strategy of the United States of America*<sup>64</sup>

The integrity of the PSI, therefore, depends on the extent to which it promotes national interests. The U.S. commitment to the PSI is reflected in the *National Security Strategy of the United States of America*:

The gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking [WMD], and evidence indicates that they are doing so with determination. The United States will not allow these efforts to succeed . . . . In the new world we have entered, the only path to peace and security is the path of action.<sup>65</sup>

Likewise, the *National Strategy to Combat Weapons of Mass Destruction*—a document which is relatively thin on details or explanations about how such a strategy can be implemented—includes a statement about U.S. interests that lends credibility to the PSI. “Weapons of mass destruction (WMD)—nuclear, biological, and chemical—in the possession of hostile states and terrorists represent one of the great security challenges facing the United States . . . . We will not permit the world’s most dangerous regimes and terrorists to threaten us with the world’s most destructive weapons.”<sup>66</sup> While the strategy does promise to extend new international arrangements to support nonproliferation, it does not explicitly contemplate new arrangements to support counter-proliferation except to note that “WMD represent a threat not just to the United States, but also to our friends and allies and the broader international

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64. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), available at <http://www.state.gov/documents/organization/15538.pdf>

65. *Id.*

66. WHITE HOUSE, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION (2002), available at <http://www.whitehouse.gov/news/releases/2002/12/WMDSstrategy.pdf>.

community. For this reason, it is vital that we work closely with like-minded countries on all elements of our comprehensive proliferation strategy.”<sup>67</sup> The national strategy’s Manichaeian use of the term “like-minded,” however, undermines its credibility as an expression of U.S. interests. Peoples’ minds change often. States do not possess minds. The United States would be better served by a document and a strategy premised on cooperation with those sharing our interests in peace and security. Pakistan, Iran, and North Korea are not like-minded with the PSI’s supporters, but the United States and its allies should endeavor to bring these states into the Initiative regardless of their mindset.

Virtually all states share an interest in keeping WMD out of the hands of those who would use them. While the ultimate objective of the PSI is to halt the flow of WMD and those materials used to create them, merely making proliferation more difficult and expensive should reduce the threats these weapons pose. The PSI offers to do this by reducing the number of parties that have access to them and by reducing the number and lethality of such weapons that do get shipped. In light of the potential harms these weapons pose, the PSI need not be perfectly drafted or perfectly successful to be exceptionally valuable. Once a weapon of mass destruction is used, every effort to reduce the number and severity of subsequent attacks will seem even more urgent than preventing the first such attack appears today.

### III. HOW DOES THE PSI WORK?

As articulated in the *Statement of Interdiction Principles*, the PSI adds three significant tools to the counter-proliferation kit.<sup>68</sup> First, it increases the sharing of intelligence between participating states to track the flow of WMD, including the components and tools to make them and the systems to deliver them. Second, it promotes increased operational cooperation among participating states to prepare for and plan to interdict WMD if necessary. Third, it promulgates robust interdiction

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67. *Id.*

68. STATEMENT OF INTERDICTION PRINCIPLES, *supra* note 5.

principles that commit participants to use force if necessary to halt the flow of WMD. This subpart will discuss these tools in order.

*A. Intelligence Sharing and Operational Cooperation*

First, the Initiative's intelligence-sharing component has drawn widespread praise as a step in the right direction. Who is against breaking down the intelligence stovepipes to increase operational effectiveness? However, there exists precious little information on which to base a discussion about what, how, by whom, and with whom intelligence is shared. Instead, we are left with questions, some of which raise legal issues. Congress has not authorized the PSI or any funds for its activities.<sup>69</sup> Should legislation be amended to enable the U.S. Government to share intelligence with those lacking appropriate clearances or with states with which we do not generally share? Does any of this shared information violate domestic privacy laws, either in the United States, the European Union or elsewhere? Are suspected traffickers in WMD due any special process? For instance, what constitutes the reasonable suspicion standard for boarding a vessel? Presumably this suspicion can be based on secret information that the boarding party is unwilling to disclose, but where is this standard expressed? And as for the information shared, are there limitations on what can be shared or with whom? Must they be states? Can the United States share misinformation to test the integrity of those with whom it shares the information?

Second, the Initiative's operational elements are not widely understood because they have not been widely reported. Elsewhere in this Article the various exercises are mentioned, but little detail is available to explain the operational elements of the PSI. Presumably, operational detail will only be available upon specific instances of interdictions. To date, attention has focused on the interdiction principals themselves.

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69. Robert Gard, *Non-Proliferation Agenda for Congress: The FY 2005 Budget Process*, CENTER FOR ARMS CONTROL AND NON-PROLIFERATION, Apr. 1, 2004, <http://www.armscontrolcenter.org/archives/000233.php>.

### B. Interdiction

Third, the Initiative's most clearly articulated and contentious contribution is the commitment to interdict WMD shipments when necessary to prevent proliferation.<sup>70</sup> To date, most of the attention has been on this ambitious tool. The need to develop such a mechanism drives the PSI. And while exercises and the few PSI operations have focused on interdiction at sea, these operations may eventually mean that armies enter sovereign and neutral countries to seize a shipment of WMD. The PSI's institutional basis lies not in a charter or a treaty but in the *Statement of Interdiction Principles* signed by eleven countries in September 2003.<sup>71</sup> This agreement commits signatories to interdict nuclear, biological, and chemical weapons and the delivery systems or materials used for making them as they move from or to "states or non-state actors of proliferation concern."<sup>72</sup>

Determining what falls into the category of "materials used for making" weapons presents innumerable complications because most such materials are dual-use or because various countries may have vested interests in trading them. This sort of determination will ensure the PSI never becomes a clear-cut enterprise, nor is there any reason to believe it could or should be simple or easy. Indeed, if this type of determination were simple, then there would be no need for either the International Atomic Energy Agency or the World Trade Organization. Likewise, this kind of complexity explains in part why slaves are still traded and piracy is still committed in the twenty-first century.

In an age of powerful distributed systems (that is, networks of desktop and laptop computers, rather than individual supercomputers), and in which the once near-complete dominance of the nation-state is giving way to a variety of entities with overlapping jurisdictions at multiple levels—for example, international, transnational, and regional

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70. See STATEMENT OF INTERDICTION PRINCIPLES, *supra* note 5.

71. See generally SHARON SQUASSONI, CONG. RESEARCH SERV., REPORT FOR CONGRESS: PROLIFERATION SECURITY INITIATIVE (PSI) 2 (2005).

72. *Id.* at 6.

organizations; states, sub-states, multinational enterprises, and nongovernmental organizations; and an increased role for the individual—it seems logical that some important security functions should become more flexible and rely on distributed decision-making functions rather than state actors and the United Nations. In several important ways the U.N. Security Council, as envisioned by its 1945 Charter, was a model of mid-twentieth century structures with its highly-centralized, state-dominated decision-making apparatus. The PSI seems like a more appropriate decision-making apparatus for the twenty-first century. Its authority is diffused and opportunistic. The means at its disposal are more diverse, and the dichotomy between the law of war and the law of peace is blurred.

#### IV. WHO SUPPORTS THE PSI AND WHAT ARE THEY DOING?

As noted above, the PSI's flexible design and lack of a formal organization make it difficult to evaluate the support it receives. In some instances, supporters and targets may even be the same if, for instance, Chechen separatists were to seek to purchase a nuclear weapon. In that case, Russia is a supporter *and* a state of concern. This Part discusses the fluid nature of support for the PSI and what it is doing so far.

##### A. *Supporters and Participants*

Over seventy countries—constituting a majority of the world's maritime fleet and the vast preponderance of its naval might—are participating in the PSI at some level.<sup>73</sup> There appear to be several categories of participants in the PSI. Each participant is a state. Core members are signatories to the *Statement of Interdiction Principles*, and each has a navy or other maritime defense force that could contribute substantially to an interdiction operation. Other states participate at various levels. At least five states that register significant shipping fleets have signed bilateral agreements to allow the United States to board ships in their fleet in order to halt WMD

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73. See Mark T. Esper & Charles A. Allen, *The PSI: Taking Action Against WMD Proliferation*, THE MONITOR 4 (2004), available at [http://www.uga.edu/cits/documents/pdf/monitor/monitor\\_sp\\_2004.pdf](http://www.uga.edu/cits/documents/pdf/monitor/monitor_sp_2004.pdf); see also *U.S. Strategy to Combat WMD*, *supra* note 48.

shipments.<sup>74</sup> Other than the *Statement of Interdiction Principles* and these boarding agreements, the PSI has no charter or other foundation document. The PSI is neither an organization nor is it governed by a treaty.

The participants include: Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Russia, Singapore, Spain, and the United Kingdom, as well as the United States.<sup>75</sup> According to the State Department, dozens of other countries are participating in one way or another.<sup>76</sup> And while a coalition of the willing may not be a particularly meaningful phrase when it comes to manning or supporting combat operations in Iraq, there may well come a day when the participation of Bulgaria or Bosnia-Herzegovina in the PSI's activities does make a significant difference.

Russia joined the PSI in May 2004—a signal moment in the Initiative's history in terms of increasing its legitimacy and effectiveness.<sup>77</sup> Russia currently has some 8,000 nuclear warheads and the materials to assemble an estimated 80,000 more.<sup>78</sup> Russia's arsenal is far and away the largest potential source of "loose nukes."<sup>79</sup> Many of these weapons and materials are secured by nothing more than a padlock and an unarmed guard.<sup>80</sup> Russia's participation in any counter-proliferation effort is critical. Russia's signing on also facilitated passage of UNSCR 1540.

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74. CHATHAM HOUSE, SHIP-BOARDING: AN EFFECTIVE MEASURE AGAINST TERRORISM AND WMD PROLIFERATION 1–2 (2005), <http://www.chathamhouse.org.uk/pdf/research/i/ILP241105.doc>.

75. U.S. DEPT OF STATE, INT'L INFO. PROGRAMS, *supra* note 1; *see also* Robert G. Joseph, Remarks to the Fletcher School Conf. on the Proliferation of Weapons of Mass Destruction: Applying the Bush Administration's Strategy to Combat Weapons of Mass Destruction to Today's Challenges (2005), <http://www.state.gov/t/us/rm/55601.htm>.

76. John R. Bolton, Under Sec'y for Arms Control and Int'l Sec., Stopping the Spread of Weapons of Mass Destruction in the Asian-Pacific Region: The Role of the Proliferation Security Initiative, Remarks at Tokyo America Center (Oct. 27, 2004), <http://www.state.gov/t/us/rm/37480.htm>.

77. Wade Boese, *Russia Joins Proliferation Security Initiative*, ARMS CONTROL TODAY, July-Aug. 2004, available at [http://www.armscontrol.org/act/2004\\_07-08/psi.asp](http://www.armscontrol.org/act/2004_07-08/psi.asp).

78. Allison, *supra* note 44.

79. RICHARD A. CLARK, ET AL., DEFEATING THE JIHADISTS: A BLUEPRINT FOR ACTION, 135–36, 141 (2004).

80. Allison, *supra* note 44.

According to *The Economist*, China has “said a few kind words” about the PSI.<sup>81</sup> China is the only member of the U.N. Security Council’s permanent five members that has not signed on.<sup>82</sup> Unlike Russia, China does not appear to pose a significant risk as a source of loose nukes. While it has a significant nuclear arsenal, these weapons appear to be relatively well secured. For China, then, there are really two significant issues. First is the role China can play in bolstering or denying legality and legitimacy to the PSI. At the most obvious level, with China’s support, the U.N. Security Council could pass a resolution that would explicitly authorize the use of all necessary means to halt the proliferation of WMD—a “super” Resolution 1540 that would alleviate any concern about the PSI’s legality. The second issue arises out of China’s role as the principal patron of North Korea. Without China’s protection, North Korea’s government would face the full force of the international community. It seems, however, that absent the emergence of a new threat to China from a non-state entity with access to WMD, the People’s Republic will not fully endorse the PSI.

India and Pakistan have both been declared nuclear powers since their respective 1998 tests of nuclear weapons.<sup>83</sup> Neither had signed the NPT, so no legal obligations were violated. While India has not yet joined the PSI, it appears to be laying the groundwork for doing so by constructing a series of sensors designed to detect the passage of nuclear materials near its vast coastline.<sup>84</sup> Given the historical tensions with its neighbor

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81. *Dealing with North Korea, Again: When the partying has to stop*, THE ECONOMIST, Feb. 12, 2005, at 39, 40. *But see* William Hawkins, *Hu’s Running the Show?*, NAT’L REV. ONLINE, Sept. 12, 2005, available at <http://www.nationalreview.com/comment/hawkins200509120808.asp> (claiming that China eviscerated UN Security Council Resolution 1540’s support for the PSI); Edward Lanfranco, *China won’t sign on to PSI*, WASH. TIMES, Sept. 2, 2005 (citing China’s concerns about the legality of interdictions).

82. *See* Wade Boese, *The Proliferation Security Initiative (PSI) at a Glance*, ARMS CONTROL ASS’N, Sept. 2005, <http://www.armscontrol.org/factsheets/psi.asp>.

83. Michael L. Feeley, Note, *Apocalypse Now? Resolving India’s and Pakistan’s Testing Crisis*, 23 SUFFOLK TRANSNAT’L L. REV. 777, 777 (2000).

84. *See Guarding Against Shipments of WMDs*, FIN. EXPRESS, Jan. 31, 2005; *see generally* *India Soon to Join A US-Led Security Group*, INDIAN EXPRESS, Jan. 30, 2005 (referring to PSI as more politically sensitive than another U.S.-led initiative, the Container Security Initiative).

Pakistan, and the fact that A.Q. Khan, Pakistan's leading nuclear scientist, has already exported atomic weapons and the tools and materials to fabricate them, it seems only a matter of time before India joins the PSI.<sup>85</sup> Possible Indian concerns that Pakistan will be given a free pass by the PSI may be causing it to withhold its participation until it is assured that Pakistan will be included in any list of states of concern.<sup>86</sup> At the same time, India has expressed some misgivings it shares with Pakistan about the legitimacy of UNSCR 1540's imposition of obligations on countries that do not have a vote in the Security Council.<sup>87</sup> Perhaps President Bush's recent decision to allow India to export peaceful nuclear materials will encourage India to sign on.<sup>88</sup>

Pakistan presents a more complex story in great part because of its inability to control its own nuclear materials. When news broke that A.Q. Khan was at the center of a transnational trading network and that he had made numerous trips to Pyongyang, the government of Pervez Musharraf averred that it was unaware of and had no control over the deals being struck.<sup>89</sup> This lack of control is troubling—more than the kind of control Pyongyang exerts over its own subjects' ability to export WMD.

The PSI activities consist of meetings, exercises, efforts toward planning or sharing information, and any interdictions that eventuate. PSI exercises are the most visible display of the

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85. MINISTRY OF EXTERNAL AFFAIRS, NEW DELHI, Q. 2543 PROLIFERATION SECURITY INITIATIVE (2005), <http://meaindia.nic.in/parliament/rs/2005/03/24rs30.htm> (stating "[t]here has been no formal invitation to India to join the PSI so far").

86. Premvir Das, *PSI From an Indian Perspective*, in 4 CSIS ISSUES & INSIGHTS, at 32, 33–34, July 2004, available at <http://www.csis.org/media/csis/pubs/v04n05%5B1%5D.pdf> (citing a concern that PSI might not be lawful).

87. Siddharth Varadarajan, *India, Pak Join Forces Against US Move*, TIMES OF INDIA, Apr. 23, 2004, available at <http://timesofindia.indiatimes.com/articleshow/636138.cms>

88. *The Bush Administration's Non-Proliferation Policy: Successes and Future Challenges* (2004) (testimony of John R. Bolton, Under Sec'y of Arms Control and Int'l Sec., Before the House Int'l Rel. Comm.), available at <http://www.state.gov/t/us/rm/31029.htm>.

89. *Implication of U.S.-India Nuclear Energy Cooperation*, 109th Cong. (2005) (testimony of Ashton B. Carter, Co-Director, Preventive Defense Project, Hearing Before the Comm. on Senate Foreign Relations).



Initiative's work—short of the actual interdictions. At least nine meetings have also been held.<sup>90</sup> According to the State Department, “dozens of countries have participated in or observed at least one of the PSI interdiction exercises.”<sup>91</sup> As of spring 2004, the PSI participants had completed four maritime (in the Pacific, the Mediterranean, and the Arabian Sea), and one air interception exercise (over Italy) as well as one tabletop air interception exercise.<sup>92</sup> In August 2005, a fifth maritime exercise dubbed Deep Sabre was held in the neighborhood of Singapore.<sup>93</sup>

### *B. Early Successes?*

Beyond these exercises, the PSI supporters claim that two actual interdictions have already contributed significantly to the promotion of peace and security. Most notably, John Bolton claimed that the “interception, in cooperation with the U.K., Germany, and Italy, of the *BBC China*, a vessel loaded with nuclear-related components, helped convince Libya that the days of undisturbed accumulation of WMD were over, and helped unravel A.Q. Khan’s network.”<sup>94</sup> While Mr. Bolton’s claim may gloss over a number of details that would tell a more nuanced story, the fact is that Libya is moving with great speed

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90. Henry J. Cordes, *19 Nations Hold Talks in Omaha on WMD Spread*, OMAHA WORLD-HERALD, Mar. 27, 2005, at B3; note 141, at 2.

91. BUREAU OF NONPROLIFERATION, U.S. DEPT OF STATE, UNITED STATES INITIATIVES TO PREVENT PROLIFERATION, May 2, 2005, <http://www.state.gov/t/isn/rls/other/45456.htm>.

92. Esper & Allen, *supra* note 73. The authors are respectively Deputy Assistant Secretary of Defense for Negotiations Policy and Deputy General Counsel for International Affairs in the U.S. Dep’t of Defense. THE MONITOR is a publication of the Center for International Trade and Security of the University of Georgia. This issue was dedicated to a survey of the PSI.

93. U.S. DEPT OF STATE, SINGAPORE HOSTS MULTINATIONAL MARITIME INTERDICTION EXERCISE (2005), <http://usinfo.state.gov/is/Archive/2005/Aug/15-878756.html>.

94. Bolton, *supra* note 60. Secretary of State Condoleezza Rice has announced that the PSI was “responsible for 11 interdictions.” SQUASSONI, *supra* note 71, at 3. The issue of whether this operation should be attributed to the PSI remains controversial; the State Department is now backing off this claim. Wade Boese, Letter to the Editor, *False Claims of PSI Success*, WASH. TIMES, Aug. 17, 2005, at A16.

to conform to international norms,<sup>95</sup> and Dr. Khan is out of business. Any contribution made by the PSI to these significant steps should be highly encouraging. In light of such successes, one might wonder why the PSI was not launched years ago. The answer to such a question may be revealed in a discussion of the political and legal obstacles it faces.

## V. THE LAW OF INTERDICTION

The supporters of PSI must contend with the fact that a ship flying the flag of one state on the high seas is generally immune from interference by forces of another state.<sup>96</sup> This basic principle underlies much of international law and poses significant issues for those seeking to justify a nonpermissive interdiction on the high seas.

### A. *Freedom of the Seas*

The first principle of maritime law remains that ships flying the flag of one country are immune to the jurisdiction of another.<sup>97</sup> This base norm of international law is subject to several important exceptions developed through custom and treaty over the centuries.<sup>98</sup> However, should any reader find this rule quaint or antiquated, she should recall that throughout history boarding another country's ships without legal justification has been deemed an act of war and responded to in kind.<sup>99</sup> The 1731 boarding of the English ship *Rebecca*, and the severing of Captain Robert Jenkins' ear, sparked general war in Europe. Likewise, the British embargo of Napoleonic Europe earned it unintentional enemies: the United States entered into a side war in 1812, principally to defend freedom of the seas. A leading scholar of the subject notes:

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95. See Gawdat Bahgat, *Nuclear Proliferation and the Middle East*, 4 J. OF SOC., POL., AND ECON. STUD. ¶4 (2005).

96. For a valuable history of this principle and the wider context, see John W. Coogan, *THE END OF NEUTRALITY: THE UNITED STATES, BRITAIN, AND MARITIME RIGHTS, 1899-1915*, at 17 (Cornell Univ. Press 1981).

97. *Id.*

98. See generally *id.* at 17-29.

99. *Id.* at 17, 31.

If the world wars of 1793–1815 established one legal principle beyond challenge, it was that neither belligerents nor neutrals could dictate maritime law. Future law, like past law, would be shaped by belligerents and neutrals balancing contradictory interests on the seas against the political and strategic implications of possible policies.<sup>100</sup>

### *B. Exceptions to Freedom of the Seas*

Sensitive to the importance of freedom of the seas, President John F. Kennedy meticulously crafted the “quarantine” of Cuba in October 1962 and had the Organization of American States authorize it in order to minimize the risk that the Soviet Union would view the seizure of ships as an act of war.<sup>101</sup> The same concern remains very much alive today. Shortly after the launching of the PSI, North Korea described it “as a ‘brigandish naval blockade’ akin to ‘terrorism in the sea and a gross violation of international law.’ The official daily *Rondong Sinmun* proclaimed, ‘nobody can vouch that this blockade operation will not lead to such a serious development as an all-out war.’”<sup>102</sup> Notably, North Korea does not have a significant

100. Coogan, *supra* note 96, at 20.

101. Becker, *supra* note 61, at 215.

102. See Rebecca Weiner, *Proliferation Security Initiative to Stem Flow of WMD Matériel*, CENTER FOR NON-PROLIFERATION STUDIES, July 16, 2003, available at <http://cns.miis.edu/pubs/week/030716.htm> (citing to Samantha Maiden, *THE ADVERTISER*, July 14, 2003, and Nicholas Kravlev, *U.S. Seeks Asian Aid for Ship Searches*, WASH. TIMES, (June 17, 2003). While I cannot read Korean, I would be very interested to know who translated the Korean characterizations, particularly the word “brigand.”

Intriguingly, Selig S. Harrison has recently called into question whether North Korea is actually developing a program to enrich uranium to weapons grade—a question already settled in the court of public opinion:

Much has been written about the North Korean nuclear danger, but one crucial issue has been ignored: just how much credible evidence is there to back up Washington’s uranium accusation? Although it is now widely recognized that the Bush Administration misrepresented and distorted the intelligence data it used to justify the invasion of Iraq, most observers have accepted at face value the assessments that the Administration has used to reverse the previously established U.S. policy toward North Korea.

Selig S. Harrison, *Did North Korea Cheat*, FOREIGN AFF., Jan./Feb. 2005, at 99, available at <http://www.foreignaffairs.org/20050101faessay84109/selig-s-harrison/did-north-korea->

naval force that could somehow retaliate in kind were a PSI member to interdict one of its otherwise lawful shipments. This inability to respond proportionately could actually backfire and trigger general war on the Korean Peninsula. If the United States wishes to gain legitimacy for the PSI as a multilateral initiative, it must strive for “both wider international participation and institutional safeguards to restrain its own power.”<sup>103</sup> Until then, states such as North Korea will be able to denounce the PSI as an arbitrary tool for powerful states to wield unilaterally against weaker states.

While unilateral action can radically destabilize international relations, instability is sometimes necessary to develop a humane new norm. The United States and its original PSI have taken an appropriate first step and can now guide the

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cheat.html (arguing that the Administration has exaggerated intelligence that may only prove lower levels of enrichment that are permitted under the NPT). If North Korea is not capable of exporting WMD, then PSI does not have much of a purpose. Unfortunately for Harrison's thesis, however, North Korea's government acknowledged its nuclear weapons program in February 2005. Robert S. Norris & Hans M. Kristensen, *North Korea's Nuclear Program*, BULL. ATOMIC SCIENTISTS, May–June 2005, at 64, available at [http://www.thebulletin.org/article\\_nn.php?art\\_ofn=mj05norris](http://www.thebulletin.org/article_nn.php?art_ofn=mj05norris). This claim could be fraudulent and intended to secure, for North Korea, the deterrence that such a program would provide.

On the other hand, most analysts accept the North Korean government's word (and that of the U.S. Government) on this subject. Brookings Scholar Michael O'Hanlon, for instance, takes Korean nuclear weapons as a given and expresses concern that “the economic pressures that help motivate North Korea's arms sales, counterfeiting, and drug smuggling remain powerful.” Michael O'Hanlon, *The North Korean Nuclear Threat*, CHRON. HIGHER EDUC., Apr. 1, 2005, at B12, available at <https://www.brookings.edu/views/articles/ohanlon/20050401.htm>.

Likewise, journalist Tomas Friedman argues:

North Korea's nuclear program could be stopped tomorrow by the country that provides roughly half of North Korea's energy and one-third of its food supplies—and that is China. All China has to say to Kim Jong Il is: ‘You will shut down your nuclear weapons program and put all your reactors under international inspection, or we will turn off your lights, cut off your heat and put your whole country on a diet. Have we made ourselves clear?’ One thing we know about China—it knows how to play hardball when it wants to, and if China played hardball that way with North Korea, the proliferation threat from Pyongyang would be over.

Thomas L. Friedman, *Brussels Sprouts*, N.Y. TIMES, May 11, 2005, at A19. In fact, Beijing tolerates the North Korean weapons program.

103. Becker, *supra* note 61, at 221.

Initiative's enlargement. In the early nineteenth century, hegemonic Britain was the first state to take bold and destabilizing steps to end the trans-Atlantic slave trade.<sup>104</sup> Over the years that followed, Britain was able to transform this moral preference into a universal norm. The impulse to end proliferation, however, faces two obstacles that the opposition to slave trade never had to address. First, as noted above, today's robust system of international law strongly favors noninterference in other states' affairs and freedom of the seas.<sup>105</sup> Second, also noted above, it seeks to implement change in the long-standing and comprehensive global political system in which each state has equal status. Britain's unilateral policy to halt the slave trade was developed at a time when the legal, political, and military systems governing international relations were inchoate.<sup>106</sup> For the PSI to gain effectiveness today, its actions must be grounded in international law and minimize its destabilizing effects.

The significance of an interdiction of WMD depends on where the acts take place. For interdictions at sea, this depends in turn on the vessel's location and the flag it flies. The location presents the first threshold issue. There are three categories of waters in which a vessel might be found. First, a country's "territorial sea" includes its ports and harbors and extends twelve miles out from the coast.<sup>107</sup> Within its territorial seas, a state's authority is at its zenith. Second, a maritime state's "contiguous zone" extends out across the next twelve miles of ocean.<sup>108</sup> Within this zone, states may police waters for customs, immigration and sanitation laws.<sup>109</sup> Third, on the high seas, no

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104. See Lee A. Casey & David B. Rivkin, Jr., *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 VA. J. INT'L L. 63, 69 (2003).

105. Cf. Coogan, *supra* note 96, at 31, 32.

106. See Patricia M. Muhammad, Esq., *The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law*, 19 AM. U. INT'L L. REV. 883, 930 (2004).

107. U.N. Convention on the Law of the Seas, arts. 2-3, 11, Dec. 10, 1982, U.N. Doc. A/Conf. 62/122, 1833 U.N.T.S. 3, reprinted in 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

108. *Id.* art. 33.

109. See Joel A. Doolin, OPERATIONAL ART FOR THE PROLIFERATION SECURITY INITIATIVE 4 (May 3, 2004) (unpublished student paper, Naval War College), available at

one has authority over vessels flying the flag of another state except as discussed below.<sup>110</sup>

In the territorial sea area of a state—up to approximately twelve miles from the coastline—foreign ships in so-called innocent passage are generally presumed exempt from boarding or seizures.<sup>111</sup> A government may search and seize a vessel found within its own territorial waters, subject only to 1) a reasonable claim that such vessel's transit is "prejudicial to the peace, good order or security of the coastal State" and to 2) any domestic law constraints, such as criminal procedure, due process, unlawful searches, and takings.<sup>112</sup> If either of these conditions is met, then the coastal state may board a ship or permit another state to do so. With permission or even pre-authorization from the government of the state in whose territorial waters the ship is sailing, another power may search and even seize that vessel. For example, Kuwait and the Emirates could give the policing powers permission to board the ships of smugglers, pirates, and other miscreants sailing within twelve miles of their coastlines in the Persian Gulf. While suspicious vessels would quickly learn of this possibility, their course adjustments to avoid these waters might give the United States additional insights about which ships to track. While this information may not lead to an immediate interdiction, it might prove useful at a later date. It would also raise additional obstacles and thus the costs of trafficking in WMD.

The first of these conditions—a claim that the ship poses a threat to safety or security—can readily be overcome if the state credibly claims that a vessel is carrying WMD. Article 19 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) defines innocent passage:

- (1) Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this

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<http://www.fas.org/man/eprint/doolin.pdf>. Also extending 188 miles beyond the twelve-mile limits of the territorial seas is an exclusive economic zone. *Id.* at 17.

110. Coogan, *supra* note 96, at 17.

111. UNCLOS, *supra* note 107, art. 17.

112. See UNCLOS, *supra* note 107, art. 19 ("Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state.").

Convention and with other rules of international law. (2) Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities: (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the [1945] Charter of the United Nations.”<sup>113</sup>

Article 21 continues to permit

[t]he coastal State [to] adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following: (a) the safety of navigation and the regulation of maritime traffic; . . . (d) the conservation of the living resources of the sea; . . . (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof; . . . [or] (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.<sup>114</sup>

While none seem to be precisely on point in the abstract, in actuality, a state should have no difficulty shoehorning the threat of WMD into one of these justifications.

In the contiguous zones—extending generally twelve miles out from the territorial seas—a state may “exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.”<sup>115</sup> Once again, lawyers will likely find justifications for boarding a ship carrying WMD in the contiguous zone of their state.

On the other hand, stopping, boarding, or seizing a ship on

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113. *Id.*

114. See UNCLOS, *supra* note 107, art. 21.

115. UNCLOS, *supra* note 107, art. 33.

the high seas that is suspected of carrying WMD presents a variety of thorny issues. As the UNCLOS<sup>116</sup> explicitly notes, "The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States: (a) freedom of navigation . . . ."<sup>117</sup> There are notable exceptions to the general rule of freedom of navigation. First of all, the captain or the owner of a ship can waive it. There may be instances when that permission could be secured; for instance, when the boarding party notifies the owner or captain that the ship is suspected of carrying contraband. The boarding party may board the ship by surprise or the owner or captain may voluntarily submit his ship to boarding so as to avoid the consequences of incurring the boarding party's displeasure. Likewise, permission to interdict could be secured from appropriate authorities of the government that have registered the ship. Interdiction is also permissible where reasonable grounds exist to suspect<sup>118</sup> a ship of statelessness,<sup>119</sup> engaging in slave trade,<sup>120</sup> shipping narcotic drugs or psychotropic substances,<sup>121</sup> committing unauthorized broadcasting,<sup>122</sup> or piracy.<sup>123</sup> The legal test for seizure is higher.

Indeed, it was an event such as this that triggered the formation of the PSI. Acting on a tip from U.S. intelligence, Spanish special forces boarded a North Korean vessel, the So

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116. The United States is among the few nations not party to this convention, but it is bound by many of its provisions to the extent that they codify customary international law or that it is a party to other relevant treaties. Jack I. Garvey, *The International Institution Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative*, 10 J. OF CONFLICT & SEC. L. 125, 147 n.27 (2005).

117. See UNCLOS, *supra* note 107, art. 87.

118. The reasonable ground to suspect standard for establishing a right to visit is found in UNCLOS, Art. 110. See UNCLOS, *supra* note 107, art. 110.

119. See *id.* art. 92.

120. See *id.* art. 99.

121. See *id.* art. 108.

122. See *id.* art. 109.

123. See *id.* arts. 100–10 (Piracy is defined clearly and narrowly and cannot easily be read to include acts that would put WMD in the hands of non-state actors or other entities that should not have them).



*San*, on the high seas in 2002.<sup>124</sup> They were justified in doing so because the *So San* was flying different flags and otherwise masking its state.<sup>125</sup> However, once the Spanish determined that the *So San* was carrying Scud missiles to Yemen and that there was no legal justification for keeping these missiles from Yemen's government, the Spaniards were obliged to let the *So San* continue its voyage and deliver the Scuds.<sup>126</sup>

The characterization of certain actors as pirates and certain terrorist acts as piracy presents a couple of intriguing possibilities for punishing or preventing future acts of terrorism. Professor Ruth Wedgwood labeled Al Qaeda a pirate organization and the attacks of 9/11 piracy, concluding that members of Osama Bin Laden's network were enemies of civilization.<sup>127</sup> While Professor Wedgwood's thesis was not universally accepted, it retains considerable heuristic value and may provide a roadmap for building support for the policing of those who engage in terrorist acts. At the level of a plain language interpretation, it is, however, incorrect in light of the UNCLOS's narrow and explicit definition of piracy.<sup>128</sup> Likewise, her definition is not particularly useful when seeking to interdict WMD at sea because either a vessel does or does not have the protection of a state. If it has that protection, then it cannot be labeled a pirate ship.

If a vessel has no state protection, international law offers no protection other than the dictates of universal human rights. One way to make use of piracy laws, along with universal jurisdiction, lies in getting every state to renounce any organization that uses or threatens to use violence against civilian noncombatants. The same sort of step was taken in the Paris Declaration of 1856 when the major maritime powers forever renounced privateering and effectively made piracy a

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124. See Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT'L L. & POL'Y 253, 253 (2005).

125. See UNCLOS, *supra* note 107, art. 92.

126. Logan, *supra* note 124, at 253–54.

127. See Ruth Wedgwood, *Agora: Military Commissions: Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 329 (2002).

128. See UNCLOS, *supra* note 107, art. 100–10.

universal crime.<sup>129</sup> The challenge of building universal consensus has prevented the U.N. Security Council from defining terrorism and will probably prevent the building of consensus for labeling WMD trafficking as piracy. On the other hand, the Security Council already has the authority to permit interdictions of WMD on the high seas. The Security Council could simply pass a resolution authorizing all necessary means to staunch the flow of WMD—an option it failed to exercise when it passed UNSCR 1540.

### C. Interdiction as Self-Defense

Short of an explicit U.N. Security Council Resolution, there are other legal arguments to support interdictions. The 1945 Charter itself seeks not to ban the use of force but merely to “ensure, by the acceptance of principles and the institution of methods, that *armed force shall not be used, save in the common interest . . .*”<sup>130</sup> It goes on to acknowledge that “[n]othing in the

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129. See Douglas R. Burgess, Jr., *The Dread Pirate Bin Laden: How Thinking of Terrorists as Pirates Can Help Win the War on Terror*, LEGAL AFF., July/Aug. 2005, available at [http://www.legalaffairs.org/issues/July-August-2005/feature\\_burgess\\_julaug05.msp](http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp). Burgess unfortunately seems to think that the problem is as simple as getting all states to agree that something called terrorism is akin to piracy and should be banned. He seems oblivious to the difficulty states have in defining terrorism and that states support these acts because they believe the acts to be in their interest. In 1856, the United States actually refused to accept the Declaration of Paris formally because it was unready to forswear privateering. See Coogan, *supra* note 96, at 22. Customary international law quickly developed on this matter as the U.S. government renounced privateers once and for all during the Civil War when the Confederate states used this tool of war to great effect. In its opposition to the Confederacy's privateers, the U.S. government gave up its claim to persistent and unambiguous objections to the new norm against privateers. Customary international law progressed apace unimpeded by American constraints. The evolution of technology helped in this process as ships of war became increasingly expensive and specialized. It no longer made sense for commercial ships to pick up a few cannons and join a war effort. The guns grew too large for retrofitting and were of little use without armor plating the walls of a ship. For more on the technological transformations of this era, see MARK R. SHULMAN, *NAVALISM AND THE EMERGENCE OF AMERICAN SEA POWER, 1882–1893* (1995).

Coincidentally, Paris is also where the PSI Statement of Interdiction Principles was originally announced. John R. Bolton, Under Sec'y for Arms Control and Int'l Sec. Affairs, Remarks at Proliferation Security Initiative Meeting (Sept. 4, 2003), <http://www.state.gov/t/us/rm/23801.htm>.

130. U.N. Charter art. 51 (emphasis added).

present charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . .”<sup>131</sup> The definition of those principles and methods as well as the significance of this inherent right remains contested.

Perhaps the inherent right includes a right to launch preventive war under some circumstances. The doctrine of preventive war remains an arrow in the quiver of U.S. national security strategy. But as a matter of operational reality, it appears to have been exhausted—at least for now. The failure to find WMD in Iraq, the lack of broad support for the U.S.-led war in Iraq, and the serious drain on resources imposed by the ongoing operations in Afghanistan and Iraq makes preventive war extremely unlikely in the near future. The prospect of a preventive war may re-emerge at some late date, but it appears to have no more political legitimacy than it would have had prior to 9/11. In light of the embarrassing failure to locate WMD, it seems unlikely that preventive war will develop the political support necessary to help promote the tenuous legal argument. On the other hand, efforts to legitimate a preventative seizure of a shipment of previously identified WMD would not face such high hurdles.

The use of force under the PSI may or may not fall under the classical definition of anticipatory self-defense, depending on the circumstances and facts.<sup>132</sup> As a basis for the use of force, the justification for self-defense has traditionally been judged by the rule of the *Caroline*: the use of force in anticipation of an attack is constrained by proportionality and by a requirement that the threat “leav[es] no choice of means, and no moment for deliberation.”<sup>133</sup> Surely, anticipatory self-defense would justify U.S. destruction of a North Korean naval vessel carrying nuclear tipped missiles toward San Francisco, even absent a

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131. U.N. Charter pmbl.

132. See Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526, 541 (2004).

133. Letter, with enclosures, from Daniel Webster to Lord Ashburton (July 27, 1842) (compiled by the Avalon Project at Yale Law School), available at <http://www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm> (giving context and correspondence surrounding this seminal exchange).

declaration of war. Short of that clear-cut case, however, anticipatory self-defense may not legitimate an interdiction on the high seas.

#### *D. Boarding Agreements*

Many merchant ships fly flags of convenience to avoid taxes, laws regulating work conditions of their crew, or environmental regulations, or any combination thereof. Some small states register these ships for small sums that add up to a significant revenue stream. Even though they were selected based on the implied promise that they will not inconvenience ship owners, these states retain the legal authority to board ships carrying their flags.<sup>134</sup> Moreover, they are able to delegate all of their authority if they wish. To date, five leading flag states have signed boarding agreements, including Liberia<sup>135</sup> and Panama.<sup>136</sup> As a consequence, a large portion of the global merchant fleet is flagged by states that either support the PSI or have signed boarding agreements. More than half the world's shipping fleet, by weight, is liable to boarding with minimal obstacles.<sup>137</sup> Interdiction of WMD aboard these vessels no longer presents serious legal obstacles.

One should pause to note the tremendous feat of diplomacy that has given the PSI members legal authority to board any of

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134. UNCLOS, *supra* note 107, at 94, 217.

135. Agreement Between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation To Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Liber., Feb. 11, 2004, <http://www.state.gov/t/isn/trty/32403.htm>.

136. Amendment to the Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice, U.S.-Pan., May 12, 2004, <http://www.state.gov/t/isn/trty/32858.htm>. As of July 25, 2005, five countries have signed ship-boarding agreements with the United States in conjunction with the PSI. Cyprus was the fifth country to sign a ship-boarding agreement; previous agreements have been concluded with Liberia, Panama, the Marshall Islands, and Croatia. Media Note, U.S. Dep't of State, The United States and the Republic of Cyprus Proliferation Security Initiative Ship Boarding Agreement (July 25, 2005), <http://www.state.gov/r/pa/prs/ps/2005/50035.htm>.

137. Becker, *supra* note 61, at 182; see generally Doolin, *supra* note 109, at 5.

thousands of ships. If finding WMD is like searching for needles in a haystack, it is worth noting that the PSI members may now X-ray large portions of that haystack. The timid might demur at the level of persuasion that may have been applied in order to obtain signatures on these boarding agreements, but no one has claimed Liberia and Panama signed under duress. Such a claim might have the effect of nullifying the agreements.<sup>138</sup>

This situation also raises the interesting issue as to whether one state can simply purchase some of another state's rights. International law does not specifically disallow the purchase from a state of the right to board a vessel bearing its flag. So what is to stop South Korea from offering to purchase this right from North Korea in exchange for a steady supply of food and energy? For those trying to figure out how the fifty-year war in Korea might end in a whimper rather than in a bang, this could present an intriguing possibility. Likewise, what is to keep the United States from making boarding permission a condition of continued participation in regional security or even free trade areas?

### *E. Strengthening the PSI's Legitimacy*

A political scientist may question why the PSI should seek legal authority in the first place. After all, laws are not death pacts, and the consequences of WMD falling into the hands of a terrorist organization are unfathomable. Moreover, even leading international rule of law jurists recognize that "a violation of the law is not necessarily always deplorable and may even be a good thing."<sup>139</sup> The response, of course, is that by bringing the law in accord with policy, one continues to support a system of laws—one which generally benefits those seeking to maintain peace and security.

More formal and traditional initiatives to permit interdictions are also being pursued. Along with the United

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138. Vienna Convention on the Law of Treaties, May 23, 1969, art. 52, 1155 U.N.T.S. 331, available at [http://untreaty.un.org/ilc/texts/instruments/english/convention/s/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/convention/s/1_1_1969.pdf) [hereinafter Vienna Convention].

139. Thomas M. Franck, *Humanitarian and Other Interventions*, 43 COLUM. J. TRANSNAT'L L. 321, 325 (2005).

States, the London-based International Maritime Organization has proposed amending the *International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* to criminalize the illegal proliferation of WMD at sea.<sup>140</sup> This laudable effort may succeed but only to the extent of permitting boarding or interdiction upon flag state consent. What proliferating state will voluntarily give up this right? Each of these PSI agreements is shrinking the sphere of freedom in which proliferation can occur. At the present rate of progress, that space may eventually become so small that world opinion considers counter-proliferation to be a base norm. This shift would make it much easier for the United States or “like-minded countries” to seek a specific resolution of the Security Council to target the ships of one rogue state. Making a similar argument, the Bush Administration has cited the Security Council Presidential Statement of 1992 as authority for such interdictions.<sup>141</sup> The Security Council itself did likewise when passing UNSCR 1540. But the value of the Presidential Statement is debatable and highlights the fact that much work remains to establish the authority to interdict WMD at sea.

On the other hand, if the PSI does signal a move away from centralized decision-making on issues related to international peace and security, then it may be more worthwhile to pursue regional arrangements rather than a global solution. Article 52 of the 1945 U.N. Charter preserves the right of regional organizations or arrangements to deal with the maintenance of international peace and security as appropriate for regional action such as that performed by NATO.<sup>142</sup> So a regional security organization, acting with the specific authorization of each state in the region, might declare a Nuclear Free Zone (NFZ) and request that the Security Council help enforce it. The Security Council could in turn pass a resolution pursuant to its authority under Chapter VII of the Charter to authorize the use of all necessary means to enforce the regional ban on WMD.<sup>143</sup> Or, states in a given region could act without explicit resolution,

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140. See Esper & Allen, *supra* note 73, at 5.

141. See Prosser & Scoville, *supra* note 21.

142. U.N. Charter art. 52.

143. *Id.* art. 40.

supported by the claim that they retain the right to do so, much as NATO did in 1999 to prevent genocide in Kosovo.<sup>144</sup> Lately some states have been working to establish an NFZ throughout the entire southern hemisphere. The United States, Great Britain, and France have consistently blocked such efforts in order to ensure that their own nuclear forces remain unencumbered.<sup>145</sup> What would happen if the Security Council were able to establish such an NFZ in which it could license certain states to carry nuclear weapons or other WMD under certain circumstances? Even in states that ban individual ownership of guns, law enforcement officers are permitted to carry them. Such a system would allow the nuclear states to have their proverbial cake (WMD), and eat it too (refuse WMD to others).

The United States is already pursuing a different and yet equally innovative regional policy. Pacific Command's (PACOM) Regional Maritime Security Initiative (RMSI) is building a "coalition of the willing" to counter transnational threats, including terrorism, maritime piracy, illegal traffic in narcotics, weapons, humans, and illicit cargo and other criminal activities in the Asia-Pacific region.<sup>146</sup> The overall goal is to develop a partnership of willing nations who work together "to identify, monitor, and intercept transnational maritime threats under international and domestic law."<sup>147</sup> By increasing the range of states and organizations participating in this initiative and by expanding the scope of activities it undertakes, the United States appears to be creating the structure upon which the PSI can be implemented. Given the vast portion of the world within PACOM's purview—stretching from the littorals of the Indian

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144. William H. Taft, IV, *Symposium Remark "The United States and International Law: Confronting Global Challenges,"* 36 GEO. J. INT'L L. 659, 661 (2005).

145. Indeed, these and other powers have also worked to preserve the right of unfettered transit of nuclear materials through the high seas and Exclusive Economic Zones of coastal states. See Chaffee, *supra* note 33.

146. See RMSI, *supra* note 39; see also Toshi Yoshihara & James Holmes, *Islands Only Look Peaceful; Japan Needs U.S. to Anchor Territorial Tug-of-War With China*, ATLANTA J.-CONST., Feb. 18, 2005, at A19.

147. Admiral Tom Fargo, USN Commander, U.S. Pacific Command, Address at Military Operations and Law Conference, (May 3, 2001), <http://131.84.1.218/speeches/sst2004/040503milops.shtml>; see also RMSI, *supra* note 39.

Ocean through the South Pacific and as far north as the Bering Sea—the ambition is breathtaking. It is one thing for Washington to issue a directive with global scope. It is entirely another to develop operational capacity to implement it in dozens of countries and nearly one-hundred million square miles of earth and sea.<sup>148</sup> U.S. PACOM is undertaking cooperative efforts with regional partners to increase situational awareness and information sharing, to develop responsive decision-making architecture within the region, to enhance maritime interception capacity, and to increase agency, ministerial, and international cooperation.<sup>149</sup> Little information is publicly available with which to evaluate the RMSI's progress in these laudable efforts. Yet it seems noteworthy that a military commander—not a professional diplomat—is taking the lead on this important multilateral diplomatic initiative.<sup>150</sup> While the RMSI's official strategy paper mentions the PSI only as one of a number of “cooperative security activities” it “complements,” the RMSI appears to be the principal mechanism through which the United States is institutionalizing the PSI agenda.<sup>151</sup> At the same time, it offers an innovative next step. One of its stated objectives is to “develop seamless partnerships between governments and the private sector to balance maritime safety and security with free trade.”<sup>152</sup> As such it echoes other U.S. initiatives such as the Container Security Initiative and the Customs-Trade Partnership Against Terrorism in their efforts to bridge the divides between the government and the private sector.<sup>153</sup>

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148. See Yoshihara & Holmes, *supra* note 146, at A19; see also Naval Meteorology and Oceanography Command Homepage, Oceans of the World, <http://pao.cnmoc.navy.mil/pao/Educate/OceanTalk2/indexoceans.htm> (last visited Apr. 2, 2006).

149. Tom Fargo, Commander, U.S. Pacific Command, Speech at the Military Operations and Law Conference, Victoria, British Columbia (May 3, 2004), <http://www.pacom.mil/speeches/sst2004/040503milops.shtml>.

150. See generally U.S. Pacific Command, <http://www.pacom.mil> (containing various documents and reports on RMSI) (last visited Apr. 2, 2006).

151. U.S. Pacific Command, *RMSI*, *supra* note 39, at 13.

152. *Id.* at 7.

153. In January 2002, the Commissioner of Customs and Border Protection announced the creation of the Container Security Initiative (CSI). Through the CSI



It will be fascinating to watch how U.S. PACOM handles a public-private partnership. It will also be interesting to see how various agencies of the U.S. government coordinate these initiatives, given their overlapping interest in maritime security. Likewise, it will be interesting to see if the PSI serves as a model for the formation of peace and security policy and international law in an era increasingly characterized by weak global organizations and renewed challenges to international law.

## VI. UNITED NATIONS AND PROLIFERATION

The Initiative's supporters are pursuing a variety of means to build legitimacy and political support. In addition to the boarding agreements, international conventions, and regional arrangements discussed above, they have been working to build support in the U.N. Security Council.

### A. Security Council Efforts

On April 28, 2004, the U.N. Security Council unanimously passed one of the most sweeping resolutions in its history.<sup>154</sup> Basing its authority on Chapter VII of the 1945 Charter, UNSCR 1540 decided that all states shall (1) refrain from providing support to non-states seeking WMD; (2) adopt laws prohibiting non-state actors from acquiring WMD; and (3) take measures to prevent proliferation.<sup>155</sup> Only UNSCR 1373—passed in the immediate wake of 9/11—comes anywhere close to UNSCR 1540 in its ambition.<sup>156</sup> Not only does it take a position

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maritime containers that pose a risk for terrorism are identified and examined at foreign ports before they are shipped to the United States. *See* U.S. CUSTOMS FACT SHEET, *supra* note 37.

154. For the complete text of this path breaking resolution, see S.C. Res. 1540, *supra* note 49. The ultimate resolution was cosponsored by France, the Philippines, Romania, the Russian Federation, Spain, the United Kingdom, and the United States.

155. S.C. Res. 1540, *supra* note 49.

156. Passed on September 28, 2001, the resolution required states to ensure that their banks do not facilitate the financing of terrorist operations, that they do not permit terrorists to travel, and that terrorists are unable to train within their territory. Resolution 1373 appears to be the first attempt of the Security Council to do anything resembling legislating, but this innovation has not been widely commented upon, probably because it was passed in the shadow of 9/11. *See* S.C. Res. 1373 U.N. Doc.

on behalf of the Security Council, it requires all states to pass domestic legislation to support its policy determinations. Prior to these resolutions, most experts would have agreed with the conclusion that there is “no legislature, in the technical sense of the term, in the United Nations system . . . . That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.”<sup>157</sup> Ironically, President Bush and John Bolton, two determined critics of the United Nations, have radically expanded its capacity to act as a world government.<sup>158</sup>

UNSCR 1540 originated in a proposal made by President Bush to the U.N. General Assembly in September 2003. He explained the new PSI briefly and requested that the Security Council “adopt a new anti-proliferation resolution . . . [that would] call on all members of the U.N. to criminalize the proliferation of weapons of mass destruction, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own

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S/RES/1373 (Sept. 28, 2001).

157. Stefan Talmon, *The Security Council As World Legislature*, 99 AM. J. INT’L L. 175, 175 (2005) (citing *Prosecutor v. Tadic*, Case No. IT-94-1-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 43 (Oct. 2, 1995) *reprinted in* 35 I.L.M. 32 (1996)).

As Talmon notes, the new “legislation” differs from previous requirements that states enact legislation in that it does not refer to specific targets of such enactments by name. The obligations imposed are general and abstract. *See id.* at 176. Instead of enacting sanctions against Libya or the applicability of the Fourth Geneva Convention to the Palestinian territories, 1373 and 1540 refer to “terrorist” organizations. *Id.* at 176.

158. Expanding the legal capacity, however, does not imply expanding the organizational capacity to ensure compliance with this virtual “legislation.” Both Resolutions 1373 and 1540 require extensive reporting requirements of each state. And, like unfunded mandates, they do not provide the support necessary for poor countries to report—let alone to comply with their terms. At least for 1540, PSI can provide material assistance in complying. But there remains a yawning gap in the ability of poor countries to effectively report on their efforts. Without adequate resources for reporting, there is little ability for the United States and other concerned powers to benchmark or otherwise improve compliance. As a consequence, there is a real need for some nongovernmental organization, philanthropy or pro bono practice to help the poor countries report on their efforts to enact and abide by Resolutions 1373 and 1540. *See* S.C. Res. 1540, *supra* note 49; *see also* S.C. Res. 1373, *supra* note 156.

borders.”<sup>159</sup> In doing so, President Bush explicitly tied UNSCR 1540 to the PSI. There are no established rules of interpretation for Security Council resolutions.<sup>160</sup> That said, it does seem significant that the resulting resolution actually goes further than merely to “call on all members.” Instead it “[d]ecides . . . that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes . . . .”<sup>161</sup> In light of the importance of the issues addressed, the level of public scrutiny involved, and the legal novelty of UNSCR 1540, it seems fair to conclude that the Security Council was endorsing the PSI. Does this comprehensive endorsement extend to a delegation of Chapter VII authority to the PSI’s decision makers? Would it allow the United States and other directly interested states to use force to interdict passage of a nuclear weapon (or a Scud missile) on its way to Yemen or Somalia?

*B. Does UNSCR 1540 Fully Legitimate Forceable Counter-proliferation?*

Apparently not. Or rather, not yet. A British statement issued at the time was intended to reassure those who resisted an explicit authorization of interdictions on the high seas. “What this resolution does not do is authorise enforcement action against states or against non-state actors in the territory of another country. The resolution makes clear that it will be the Council that monitors its implementation. Any enforcement action would require a new Council decision.”<sup>162</sup> Indeed, the

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159. George W. Bush, President of the U.S., Address to the United Nations General Assembly (Sept. 23, 2003), *available at* <http://www.un.org/webcast/ga/58/statements/usaeng030923.htm>.

160. The U.N. Charter is a treaty and as such should be interpreted in good faith, in accordance with ordinary means, and in light of its purpose. Presumably, resolutions passed under its authority should also be interpreted in light of their purpose. Vienna Convention, *supra* note 138, arts. 3(b), 31.

161. S.C. Res. 1540, *supra* note 49, ¶ 2.

162. Adam Thomson, Deputy Permanent Representative of the U.K. Mission of Gr.

United States dropped a provision explicitly authorizing the interdiction of WMD at sea in exchange for China's vote.<sup>163</sup> The United States was only able to salvage a provision in paragraph ten that "*calls upon* all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials . . . ."<sup>164</sup> UNSCR 1540 falls short of authorizing interdictions. But, State Department Principal Deputy Assistant Secretary Andrew Semmel's characterization seems fair: "The PSI and 1540 are complementary. Paragraph ten of the resolution reflects this symbiosis."<sup>165</sup>

What further authorization would be required to authorize interdictions? While a new resolution pursuant to Chapter VII would undoubtedly suffice, perhaps a less sweeping measure would also work. Paragraph 2 of Article 27 of the 1945 Charter allows the Security Council to decide "procedural matters" by a mere majority.<sup>166</sup> At some point, the Security Council may decide that the implementation of UNSCR 1540 by applying the PSI to specific situations (for example, to North Korean exports) is a mere procedural matter.

UNSCR 1540 raises several other significant issues. Most notably, it requires states to prohibit proliferation to non-state actors—in effect legislating for members. The 1945 Charter,

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Brit. and N. Ir., Statement to the Security Council of the U.N. (Apr. 22, 2004), *available at* [http://www.ukun.org/articles\\_show.asp?SarticleType=17&Article\\_ID=744](http://www.ukun.org/articles_show.asp?SarticleType=17&Article_ID=744). Recall that this discussion followed the intense debate about UNSCR 1441's authorization of force to compel Saddam Hussein's Iraq to abandon its WMD programs. Much of the Iraq debate turned on whether 1441 sufficed to authorize military action or a second resolution was required. *See* S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

163. Sean D. Murphy ed., *UN Security Council Resolution on Nonproliferation of WMD*, 98 AM. J. INT'L L. 606, 606 (2004) (citing Colum Lynch, *Weapons Transfers Targeted*, WASH. POST, Apr. 29, 2004, at A21).

164. S.C. Res. 1540, *supra* note 49, ¶ 10.

165. Andrew Semmel, Principal Deputy Assistant Sec'y of State for Nuclear Nonproliferation, U.N. Security Council Resolution 1540: The U.S. Perspective, Remarks at Conference on Global Nonproliferation and Counterterrorism: United Nations Security Council Resolution 1540 delivered at Chatham House, London (Oct. 12, 2004), *available at* <http://www.state.gov/t/isn/rls/rm/37145.htm>.

166. U.N. Charter art. 27, para. 2.

however, does not grant the Security Council authority to legislate. As a nuclear power and a nonpermanent member of the Security Council, Pakistan raised this issue.<sup>167</sup> Nor does the 1945 Charter provide the United Nations with the democratic apparatus generally required for legislatures to make legitimate law—at least in many states. Some arms control advocates worry that Security Council legislation is inherently undemocratic, that 1540 may undermine the multilateral treaties already binding states to limit proliferation, and that 1540 undervalues the significant obligation of states to reduce and eventually eliminate their own nuclear arsenals.<sup>168</sup> It seems unfair, however, to categorize UNSCR 1540 as undermining existing multilateral treaties merely by binding certain states to limit proliferation.

## VII. CONCLUSIONS AND RECOMMENDATIONS

The PSI's participants are building legal and political support for highly-focused use of force operations to counter the proliferation of WMD. Eventually, these efforts may mature into the formation of clear and substantive law permitting highly-focused military operations anywhere in the world in order to halt the flow or prevent the use of WMD. Analogous movements in previous centuries took decades to ripen into universal bans on piracy and the international slave trade. Over the past half century, a similar norm has been developing to prevent genocide. The struggles to end piracy, the slave trade, and genocide have required decades. The threat of WMD is so great and so imminent that we do not have decades for the norm to mature. This recognition leads to several tentative conclusions.

### A. *Put the Cat Back in the Bag*

Certainly international peace and security would be well served were North Korea to abandon its nuclear weapons program. Should that objective not be achieved, any agreement

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167. See Murphy, *supra* note 163, at 607.

168. See John Burroughs, Executive Dir., Lawyers' Comm. on Nuclear Policy, Statement at U.N. Correspondents' Association (Mar. 31, 2004), [http://www.reachingcriticalwill.org/political/SC/SC.html#john\\_statement](http://www.reachingcriticalwill.org/political/SC/SC.html#john_statement).

with North Korea that acknowledges its right to retain its nuclear weapons program should include a requirement that North Korea consent to having its outbound vessels boarded and any WMD seized. After all, counter-proliferation makes sense only where the cat has not already been let out of the bag. In the case of North Korea, the cat is out of the bag, so the concern now is to bag the cat on the Korean Peninsula. In the alternative, a specific U.N. Security Council Resolution could endorse interdictions or an embargo on North Korea. Perhaps China could be convinced to abstain from a veto if the current round of negotiations fail.

### *B. Embrace International Law*

Counter-proliferation will be best served by harnessing international conventions, not marginalizing them. The UNCLOS should be supported in part because it offers a legal framework for further legitimating the PSI. Unlike all but two members of NATO and 145 other nations, the United States is not a party to the UNCLOS. When the treaty opened for signature in 1982, President Ronald Reagan's Special Envoy on the Law of the Sea Treaty, Donald Rumsfeld, worked to dissuade other countries from signing based on the claim that it would insufficiently protect U.S. interests.<sup>169</sup> As Secretary of Defense in 2003, Mr. Rumsfeld reversed this position, deeming the treaty's protection of navigation rights as "critical to the United States Armed Forces."<sup>170</sup> Two and a half years later, however, the Administration has not moved to ratify the treaty, despite claims that "it provides the only legitimate international framework for the [I]nitiative."<sup>171</sup> In this instance, it appears

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169. See Ed Feulner, *Out to Sea*, WASH. TIMES, Mar. 8, 2005.

170. John A. Duff, *A Note on the United States and the Law of the Sea: Looking Back and Moving Forward*, 35 OCEAN DEV. & INT'L L. 195, 201 (2004) (quoting U.N. Convention on the Law of the Sea Hearing, Testimony of Mark T. Esper, Deputy Assistant Sec'y of Def. for Negotiation Policy (Oct. 21, 2003), <http://foreign.senate.gov/testimony/2003/EsperTestimony031021.pdf>).

171. The Senate Foreign Relations Committee voted nineteen to zero to recommend the United States enter the UNCLOS. Lawrence J. Korb, *Bush Failing at Nuclear Security*, BOSTON GLOBE, Jan. 2, 2005, at C11; see also Senator Richard G. Lugar, *Law of the Sea Treaty Balances U.S. and World Interests*, GLOBAL ISSUES, Apr. 2004, <http://usinfo.state.gov/journals/itgic/0404/ijge/gj02.htm>.

that the Administration's antipathy to multilateral conventions is undermining its capacity to develop a robust coalition of the willing. The United States should ratify the UNCLOS.

### *C. Broaden the Base*

The PSI has made great progress in terms of effectiveness and gaining international legitimacy. Widening the coalition beyond states would only enhance its effectiveness and may also accelerate the formation of norms essential for its eventual acceptance as entirely legitimate. If the PSI is to succeed, it means rethinking certain elemental components of the international legal regime. It means authorizing actions that previously would have been undertaken only under the rubric of war or deniable covert action. It means continuing to build a robust coalition of willing states that have few or no strong obligations to each other and one based on limited common interests or purposes. Some of the Initiative's participants, such as the small countries that offer flags of convenience, may even have been coerced into joining. PSI's supporters should work toward universal acceptance of its principles.

### *D. Open up the Discussion*

Exposing the PSI to a wider range of input should increase international confidence in it and enhance its effectiveness. Building it into a formal agreement with North Korea would give it additional legitimacy and help limit the proliferation of WMD. Revealing the levels of support for the PSI around the world would help establish the norm necessary for the creation of universal law. Dedicating resources to help poor or weak states conform to the requirements of UNSCR 1540 would give additional legitimacy to the Security Council's ambitious legislative effort and presumably give the PSI supporters more congenial legal frameworks. Likewise, opening up the Initiative to participation by nongovernmental organizations would also accelerate the norm-setting process and increase the PSI's capabilities.

To ensure responsiveness, efficiency, effectiveness, and fairness—and to capture the most synergies—the PSI's leaders should convene some sort of congress to discuss it, to bring up

new and useful ideas, and to work through the concerns of participants. Moreover, participation in the PSI and in this congress ought not to be limited to states' governments. Many international organizations, such as the United Nations' General Secretariat and the Tribunal of the Law of the Sea, regional organizations, humanitarian organizations, and other elements of civil society are effectively stakeholders, whose opinions should be consulted. The marketplace of ideas may well yield ways to improve the PSI. In the end, governments may ignore their advice, but inviting intelligent and well-intentioned people with different expertise and interests to share their views may bring significant and useful insights.

At the same time, the supporters of the PSI could work to help individual states reform their laws so that they better conform to the requirements of UNSCR 1540. As noted above, this resolution

[d]ecides also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them. . . .<sup>172</sup>

The Security Council has established a 1540 committee to monitor compliance. But, many states lack the legal or institutional capacity to conform in a timely fashion. The PSI's effectiveness would be greatly enhanced if it were expanded to provide the means for these states to adopt appropriate legislation. This role could easily fit under the Initiative's mission of information sharing.

The PSI has great potential. To date, however, some of its potential has been masked by a hesitation to be exposed to the marketplace of ideas. Little information is publicly available about the Initiative's intelligence sharing or efforts to increase the operational capacity. The Initiative's governance remains

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172. S.C. Res. 1540, *supra* note 49.



obscured. No complete list of states participating publicly exists, let alone an official description of what constitutes support or participation. Exposing the PSI to public scrutiny could help generate additional new ideas and greater support.

#### *E. A Final Word*

The Initiative can play an important role in helping to staunch the dangerous proliferation of WMD and the means to create or deliver them. Whether through effective interdictions or by simply raising the cost above what some terrorists can afford to pay, it may eventually avoid untold destruction, suffering, and deaths. At the same time, the PSI can help reform the international security system by making it more flexible and responsive to the challenges of the twenty-first century. To maximize the chances to achieve these critical objectives, policymakers, soldiers, diplomats, and lawyers should embrace dialogue and international law, not shun it.

### VIII. APPENDIX: INTERDICTION PRINCIPLES FOR THE PROLIFERATION SECURITY INITIATIVE

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council. They call on all states concerned with this threat to international peace and security to join in similarly committing to:

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. "States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear

weapons and associated delivery systems or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.
3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.
4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:
  - a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.
  - b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.
  - c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other

- states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.
- d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.
  - e. At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.
  - f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.<sup>173</sup>

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173. STATEMENT OF INTERDICTION PRINCIPLES, *supra* note 5.