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Mark R. Shulman Dr.

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**THE PROLIFERATION SECURITY INITIATIVE
AS A NEW PARADIGM FOR PEACE AND SECURITY**

Mark R. Shulman

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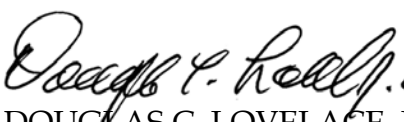
FOREWORD

In this monograph, Dr. Mark R. Shulman offers a novel thesis to explain the value of an important new security initiative with considerable implications for the future use of force in operations other than war. While this initiative is still in its formative stages, it may eventually change the use of force paradigm in which military leaders and political decisionmakers operate. And despite its promise, no one has yet attempted a comprehensive analysis of it. Dr. Shulman's monograph draws on publicly available sources from governmental publications and press releases, the international news media, and think tank strategic analyses, as well the relevant historical materials. Based on this wide review of the literature, Dr. Shulman argues that the Proliferation Security Initiative is changing long-held international norms about the conditions for the use of force to ensure strategic objectives.

To date, the Initiative has drawn mostly on the resources of the Navy, Coast Guard, and the State Department; it offers several important lessons for soldiers as well. Most importantly, Dr. Shulman argues that the Proliferation Security Initiative will help to break down some of the obstacles that currently prevent the United States and its allies from using targeted military missions to achieve critical security objectives without triggering a state of war. Readers familiar with the history of the past 50 years will recall that the general tendency in the law of war has been to expand the protections afforded to those not in uniform. Nuremberg clarified the ban on aggression. The 1949 Geneva Conventions codify the principles of proportionality and discrimination to protect noncombatants. The Additional Protocols of 1977 protect fighters in internal wars even if they are not in uniform. The laudable purpose of these laws is to reduce the sphere of warfare as narrowly as possible, to make it more humane by limiting the scope and scale of its targets. At the same time, however, the laws of war have had the unintended consequence of making it more difficult for law-abiding nations to use highly focused instruments of force. Assassinations have been effectively outlawed, leading to less discriminating coups and the

covert fulmination of revolutions. Embargoes have been abandoned, leading to virtually indiscriminate sanction regimes. The cumulative impact is difficult to calculate but may well add up to more suffering by the innocent and more distrust of the good.

The law of war allows the use of awesome violence under narrow circumstances. The law of peace permits very few and narrowly circumscribed uses of force. In a world with globalized threats, myriad menaces, and ever wider dissemination of weapons of mass destruction, the stark distinctions between these legal regimes is fraying. The Proliferation Security Initiative may offer a way to cover the gap. As it does, each of the military services will need to develop new doctrine and new capabilities. While the Initiative is focusing right now on maritime operations, interdictions on land may not be not far behind. So I encourage you to read this monograph with an eye toward the future.


DOUGLAS C. LOVELACE, JR.
Director
Strategic Studies Institute

BIOGRAPHICAL SKETCH OF THE AUTHOR

MARK R. SHULMAN is Assistant Dean for Graduate Programs and International Affiliations and an Adjunct Professor of Law at Pace Law School. Previously, he has taught at Yale University, Columbia University's schools of Law and International and Public Affairs, and at the U.S. Air War College. In addition, he has conducted studies on behalf of the National Defense University, the U.S. Army War College, and the U.S. Naval War College. He has held appointments and published widely in the fields of history, international affairs, and law. Dr. Shulman has edited *The Laws of War: Constraints on Warfare in the Western World* with the eminent military historian Sir Michael Howard and George Andreopoulos, and edited another volume on General Telford Taylor and the prosecution of war crimes. He studied history at Yale College, where he received his BA, and Oxford University, where he earned a master's degree in the history of the British Empire. Dr. Shulman completed his Ph.D. at the University of California at Berkeley, where he wrote *Navalism and the Emergence of American Sea Power, 1882-1893*. He also graduated from the Columbia University School of Law where he was editor-in-chief of the *Columbia Journal of Transnational Law*.

SUMMARY

Weapons of mass destruction (WMD) have menaced mankind for six decades. Since the end of the Cold War, the threat has changed dramatically with the development of new weapons, with the rise of transnational criminal and terrorist organizations, and with a diminishing capacity of some states to control the weapons they have. In the hands of an Al Qaeda, such a weapon threatens to kill tens of thousands and destroy tens of billions of dollars worth of property. It could bring global trade to a standstill and trigger panic, economic depression, and widespread suffering the likes of which have not been seen for many years.

Containing the threat of WMD requires action on several fronts. States that legitimately possess nuclear, biological, or chemical weapons must work to ensure that they will not be used and that they eventually will be decommissioned. States that illegitimately possess them must abandon them. States that do not possess them must refrain from obtaining them. Nonstate actors must never possess them. One key to achieving these objectives is to halt the flow of WMD across borders.

The U.S.-led Proliferation Security Initiative is a bold and timely multilateral initiative to prevent the proliferation of WMD and the materials used to construct them. To accomplish this objective, the Initiative facilitates information-sharing in order to better identify and locate shipments of WMD. It also contemplates the interdiction of shipments of weapons and materials – by force if necessary. Since announced in 2003, 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.

While a product of a presidential administration infamous for its unilateralism, the Initiative has received widespread support. United Nations (UN) Secretary General Kofi Annan has explicitly endorsed it. At least 60 states are participating in it at one level or another, including Great Britain, but also France, Russia, Germany, Italy, Japan, and Spain. Unfortunately, support is not universal.

The Initiative constitutes one of the most important recent developments in the area of international peace and security, and

may also add up to the most exciting changes in the area of public international law. It has the potential to alter fundamentally the transnational legal framework for the use of force by states. Force may become a more ordinary tool that sits on a spectrum of means by which political objectives can be achieved. By blurring the lines between war and peace, the Initiative eventually may permit states to use highly targeted and entirely proportionate force for limited purposes to further security objectives without triggering war and all the horrors that it entails.

Implementation of this Initiative raises serious legal challenges by questioning the basic principles of the international system: the sovereignty of states in general and freedom of the seas in particular. The Initiative eventually may overcome these challenges by increasing the transparency of its decisionmaking apparatus and criteria, by continuing to expand its base of support through diplomacy and dialogue, and working within the rule of law to create a new base norm that prohibits the proliferation of WMD. This monograph describes the Initiative, its legal status, and its prospects for becoming a significant tool in the quest to prevent mass destruction.

THE PROLIFERATION SECURITY INITIATIVE AS A NEW PARADIGM FOR PEACE AND SECURITY

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, strategic analyst Bernard Brodie took serious stock of the military threats and missions in a world with atomic bombs. He recognized that this new class of weapons would cause intolerable destruction, and therefore the United States could no longer afford to wait for the enemy to strike first. In the half-century that followed, mutual assured destruction served to avert a catastrophic strike. More recently, the threat has changed as enemies who cannot be deterred have sought to possess weapons of mass destruction (WMD). While the range of catastrophic threats has expanded dramatically, 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 WMD as they wish. Without some significant changes to the system, the use of WMD against civilians seems virtually inevitable.

This monograph addresses one significant undertaking that seeks to change the system by enabling concerned states to interdict international trade in WMD. As such, the Proliferation Security Initiative (the "PSI" or "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 monograph proceeds in eight sections. Section I introduces the Initiative and discusses some of the legal, political and strategic issues it raises. Section II discusses the threats that the proliferation of WMD pose and the ways that the Initiative seeks to address them. Section III presents those few operational details publicly available. Section IV takes up the complicated questions raised by 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. Section V examines existing and potential legal arguments that would allow interdictions. Section VI picks up the thread by examining the efforts to overcome any legal obstacles through the essentially political actions of the United Nations Security Council (UNSC). Section VII then looks at the implications for the Department of Defense (DoD), and for the Army in particular. While the PSI's efforts to date have focused on maritime operations, it may eventually involve land-based forces as the counterproliferation norm matures. Finally, Section VIII 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 WMD and the materials used to construct them. "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 nonstate actors of proliferation concern."¹ To accomplish this objective, the PSI establishes links to facilitate information sharing between countries. 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 necessary, using armed force to seize weapons and the materials used to make them. Its *Statement of 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. Its signers also undertake to consider providing consent to boarding and searching vessels carrying their flags. Subsequent bilateral agreements have been signed to allow the United States to board ships bearing flags of convenience under certain circumstances.

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 these exercises 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. A few months later, 11 states signed a *Statement of Principles*, an ambitious document (see appendix) that provides very few details. Since that time, the PSI has gained widespread support from United Nations (UN) Secretary General Kofi Annan and 60 states including those traditionally known as the "Great Powers": Great Britain, France, Russia, Germany, Italy, Japan, and Spain. Unfortunately, some states have not endorsed it. This monograph examines some of the reasons that 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 recent developments in the area of international peace and security and may also add up to the most exciting change in the area of public international law, since 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 further security objectives without triggering war and all that state implies. And yet, despite the Initiative's novelty and importance, it has attracted remarkably little scholarly or policy-

relevant attention.² Moreover, because the Initiative lacks a central office, an international secretariat, an operational handbook and rules of engagement, or even congressional authorization, it remains shrouded in mystery.

While the Initiative constitutes a highly innovative concept for responding to one of the most urgent sets of problems that society faces, its implementation also raises several significant legal and policy issues. 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. 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, and this law has yet to be fully articulated, let alone tested.

As the lead participant, the U.S. 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 as based on the right to collective self-defense. This justification proved to be overreaching. Other PSI core members failed to endorse it, and Secretary Bolton subsequently dropped it.³ More recently, the State Department vaguely has claimed that the "PSI activities will be consistent with domestic and international legal frameworks, many of which, in turn, implement existing nonproliferation structures."⁴ This claim deserves detailed analysis and explanation in order to justify it in the

face of contrary claims and also to spell out some of the opportunities opened by widespread endorsement of the PSI. Going further, this monograph also will argue that in order to implement the PSI, its supporters are altering international law in ways that may increase its very scope and relevance.

To meet a global threat, the PSI is ambitious in its geographic scope. WMD may originate almost anywhere and, in light of the intention of some nonstate actors to obtain them,⁵ 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, and almost any of the former Soviet 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 strategy? The PSI declarations to date leave ambiguous its decisionmaking apparatus. Who will decide when and how to act? What role does the United States play? Is the decisionmaking process entirely ad hoc? The PSI *Statement of Principles* does not establish any detailed policies relating to the Initiative's purpose, decisionmaking apparatus, targets, or means. The *Statement* does elaborate somewhat on the concept:

"States or nonstate 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.

This formal statement begs more questions than it answers. Is there a list of states or nonstate 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 (dirty bombs) subject to interdiction? Why are some states permitted to acquire WMD or 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."

This statement presupposes a legal conclusion that is at best vague. Presumably it means that at least China, Russia, Great Britain, and France will not be subjected to the Initiative's interdiction efforts so long as they do not export these weapons to rogue states or nonstate actors.⁶ As long-time declared nuclear powers under the terms of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and each wielding a UNSC 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 nonstate 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.*⁷

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 this statement are indicative of the fluidity of the Initiative. It does not target any specific country, while at the same time 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. 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 taken on behalf of the PSI and the law that governs those actions will determine the Initiative's legitimacy. The results will illuminate its wisdom.

Likewise, it remains unclear how the PSI's participants would act if faced with information indicating that a shipment originated in a state that is neither a party to the NPT, nor a long-standing nuclear power (Israel), nor a powerful state with considerable international leverage such as India or Pakistan.⁸ 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.⁹ But as

veteran weapons inspector David Kaye 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 goes back 15 to 20 years.” Likewise proliferation expert Gary Milhollin notes that “it seems bizarre that we are letting the Pakistanis get away with nuclear smuggling because we think they’ll help fight terrorism.”¹⁰ The best evidence publicly available suggests that India, Pakistan, and Israel will not be targeted – at least for now.¹¹

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 counterproliferation 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. 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 impaired temporarily (either because they are “failed” states, or client states, or those subject to UN 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 UN 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, while not further undermining their capacity to govern themselves. The United States can neither afford to ignore 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 those that are powerful or 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 solicitousness for the most robust interpretations of the rule of law should not be permitted to cripple the entire effort. Soldiers, diplomats, policymakers, and their lawyers should embrace the PSI and strive to strengthen it as an important counterproliferation tool.

A New Form of Multilateralism.

The Initiative offers a new model for multilateral cooperation that avoids cumbersome treaty apparatus. From the beginning, the George W. Bush administration has been notoriously unfriendly to traditional multilateral conventions. Diplomats and lawyers have been accustomed to drafting and interpreting such treaties for decades. The postwar system of international peace and security is framed in great part by such treaties. Prior to September 11, 2001 (9/11), the Bush administration withdrew the United States from the Anti-Ballistic Missile Treaty, abandoned negotiations on START II, and decided not to ratify the Comprehensive Test Ban Treaty. It has stalled efforts to improve the Biological Weapons Convention regime.¹² It has failed to encourage ratification of the UN Convention on the Law of the Sea despite strong support in Congress and its own Departments of State and Defense. The administration took the unprecedented step of “unsigning” the 1998 Rome Charter of the International Criminal Court. The administration’s antipathy to exposing Americans to charges in international tribunals is so strong that it expended considerable diplomatic capital to ensure blanket exemptions for Americans before the new International Criminal Court, despite the charter’s provisions and political considerations making any such prosecution exceptionally unlikely.¹³

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 that the administration has been ignoring the roles that 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 to which lawyers and diplomats have grown accustomed. While it is beyond the scope of this monograph 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,¹⁴ they include the Container Security Initiative,¹⁵ the Customs-Trade Partnerships against Terrorism,¹⁶ the Regional Maritime Security Initiative,¹⁷ and the Global Threat Reduction Initiative.¹⁸ Also, the PSI has a *nonproliferation* analogue in the Global Partnership against the Spread of Weapons and Materials of Mass Destruction.¹⁹ Each is an activity, not an organization. Not one of the initiatives is established 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 21st century.

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 Einstein²⁰

Terrorists wielding WMD present the greatest threat to our civilization.²¹ If used by 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 presidential 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."²² 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 nonstate actors alike. The threat of widespread disease or

death posed by naturally (or unintentionally) occurring agents such as zoonotic diseases²³ or gigantic meteors²⁴ 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, "on the current path, a nuclear terrorist attack on America in the decade ahead is more likely than not."²⁵ The PSI is one new tool in the effort to prevent such an attack or attacks. One of its strengths is that it does not pretend to be a silver bullet; rather it is 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.

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 60 nations are participating in the Initiative, but a comprehensive statement listing those states and the actual level of participation has not been released. Individual states that participate in the Initiative are discussed. First, however, this monograph discusses the support of the most politically significant international entities: the UN and the European Union (EU). Later in section VI, it will examine the legal arguments to support counterproliferation and the PSI.

The UN has endorsed the PSI concept but stopped short of requiring its member states to pass legislation to enact it when it passed Security Council Resolution 1540 (UNSCR 1540) in April 2004. UN 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."²⁶ 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." Specifically, the report continues, these,

include UN Security Council Resolution 1540 designed to prevent nonstate 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.²⁷

Likewise the UN *Report of the High-Level Panel on Threats, Challenges, and Change* notes that 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.²⁸ 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.²⁹

These statements contribute to the legitimacy of the PSI, politically and morally. Their jurisprudential significance, however, is ambiguous and evolving. At this point, the UN's 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 UN's vast authority under Chapter VII of the Charter will remain dormant with respect to the PSI.

After the UN, the 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 mention the Initiative explicitly 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."³⁰

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."³¹ Somewhat cautiously, this commitment required the EU and its member states to "take the necessary steps in support of interdiction to the extent their national and Community

legal authorities permit and consistent with their obligations under international law.”³² This statement illuminates several important distinctions between the U.S. and EU approaches. These distinctions are notable because they illuminate the different approaches of the United States and the EU 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 Non-proliferation* included no such carve-outs.³³ The addition of the carve outs in the EU’s PSI statement seems like a blunt effort to push the United States to assume a more respectful attitude toward the significance of the rule of international law and the constraints it presents on the use of 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.³⁴ Similarly, at a recent PSI exercise hosted by Japan, the Japanese government insisted that the U.S. Coast Guard play a more prominent role than that of the Navy in an apparent effort to emphasize the law enforcement aspects. Many members of the EU view the Bush administration’s “War on Terror” as a grave mischaracterization of the enemy and how best to neutralize it. Instead, they view the threat posed by Al Qaeda and other nonstate actors as a matter for law enforcement. So, while they have agreed to work with the United States to halt trafficking in WMD, they believe that nonmilitary agencies such as the Coast Guard should conduct its activities, with the military playing supporting roles as necessary.

Third (and related), the EU’s statement is captioned “Non-Proliferation” not “Counterproliferation.” The distinction between nonproliferation and counterproliferation may be significant. The Initiative’s author, John Bolton, has correctly characterized the PSI as a “counterproliferation” strategy, but in the end “nonproliferation” may prove more politically viable (if less accurate).³⁵ The EU’s characterization of the PSI as “Non-Proliferation” raises the concern

that it may reflect an impulse to dilute the Initiative's essentially military mission. Such an impulse should be resisted because the greater strength of the PSI lies in its implicit willingness to use force, if necessary, to prevent proliferation.

Another innovation of the PSI's counterproliferation 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 18th and 19th 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 19th century, it did not embargo the United States, Brazil, or Cuba. Instead it captured slaving ships and returned their human cargo to Africa. In this way, the PSI is less like an embargo or a war and more like a movement for the suppression of a vice. Consequently, it will help formulate a base norm that could rise eventually 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 ultimately must come to an end, while universal norms endure. To construct a strong norm against proliferation, one should look not only to states for support.

Likewise, by targeting the WMD, not countries, the PSI creates a sanctions regime that has considerable advantages over embargoes and other counterproliferation strategies. Because it specifically targets the WMD (and materials used to construct them, as well as the systems used to deliver them), it offers the prospect of an "exceptionally smart sanction." Traditional sanctions generally 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 (i.e., those that are engaged in legitimate activities) unlike other maritime blockades. It also 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 rapidly 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 that the level of enthusiasm or support for the Initiative 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 that 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 railway bombings of March 11, 2004. 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.

National Security.

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

National Security Strategy, 2002

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 *2002 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 weapons of mass destruction, 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.³⁶

Likewise, the *2002 National Strategy to Combat Weapons of Mass Destruction*—a document thin on details or on explanations about how such a strategy can be implemented—is a statement about U.S. interests that lends credibility to the PSI. “Weapons of mass destruction—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.” While the strategy does promise to extend new international arrangements to support nonproliferation, it does not explicitly contemplate new arrangements to support counterproliferation 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 community. For this reason, it is vital that we work closely with like-minded countries on all elements of our comprehensive proliferation strategy.”³⁷ The national strategy’s Manichean 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. It would be hard to agree that Pakistan, Iran, and North Korea are like-minded, but the United States should endeavor to bring these states into the Initiative regardless of their mindset.

Arguably, 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 can reasonably be expected to reduce the threats these weapons pose. The PSI offers to do this by reducing the number of parties who have access to them and by reducing the number and lethality of such weapons as do get shipped. In light of the potential harm these weapons pose, the PSI need not be perfect or perfectly successful to be exceptionally valuable. Once a weapon 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?

The PSI promises to add three significant tools to the counterproliferation kit: (1) increased sharing of intelligence, (2) increased operational cooperation among participating states, and (3) more robust interdiction principles.

Intelligence Sharing and Operational Cooperation.

First, the 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. Should legislation be amended to enable the U.S. Government to share intelligence with those who do not have appropriate clearances or with states that we do not generally share with? Does any of this shared information violate domestic privacy

laws (either in the United States, the EU 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 reported.

Interdiction.

Third, the Initiative's most tangible and contentious contribution is its agenda to interdict WMD shipments when necessary to prevent proliferation. To date, most of the focus has been on this ambitious tool. The need to develop such a mechanism drives the PSI. And while exercises and indeed the few PSI operations have focused on interdiction at sea, these operations eventually may 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 Interdiction Principles agreed to by 11 countries in September 2003.³⁸ These principles call on 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 nonstate actors of proliferation concern.”³⁹

Determining what falls into the category of “materials used for making them” presents myriad complications because most such materials are either dual-use or because various countries may have vested interests in trading them. This is the sort of determination that will ensure that 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 being committed in the 21st century.

In an age of distributed systems (e.g., networks of desktop and laptop computers doing more work in this world than 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 (i.e., inter- and transnational and regional organizations, states, sub-states, multinational enterprises, nongovernment organizations (NGOs), and an increased role for the individual), it seems logical that some important security functions should become more flexible and rely on distributed decisionmaking functions rather than state actors and the UN. And even though there remains only one superpower, its own vulnerability to asymmetric attacks and the limits of its power fall far short of omnipotence and omnicompetence. In several important ways, the UN Security Council, as envisioned by its 1945 Charter, was a model of mid-20th century structures with its highly-centralized, state-dominated decisionmaking apparatus. The PSI seems like a much more appropriate decisionmaking apparatus for the 21st 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 IS 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, its supporters may also be states of proliferation concern for instance, if Chechen separatists were to seek to purchase a nuclear weapon. This section discusses the fluid nature of support for the PSI and what it is doing so far.

Supporters and Participants.

Over 60 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. There appear to be several categories of participants in the PSI. Each participant is a state. Core members are signatories to the *Statement of Principles*, and each has a navy or other maritime defense force that could contribute

militarily to the Initiative. Other states participate at various levels. Five small states that register significant shipping fleets have agreed to participate at still another level by signing boarding agreements with the United States. Other than the *Statement of Principles*, there is no charter. 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.⁴⁰ Dozens of other countries are participating in one way or another. 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 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. Russia currently has some 8,000 nuclear warheads and the materials to assemble an estimated 80,000 more. Russia’s arsenal is far and away the largest potential source of loose nukes. Many of these weapons and materials are secured by nothing more than a padlock and an unarmed guard. Russia’s participation in any counterproliferation effort is critical. Russia’s signing on also facilitated passage of UN Security Council Resolution 1540.

According to the *Economist*, China has “said a few kind words” about the PSI.⁴¹ China, however, is the only member of the UN’s Permanent Five members that has not signed on. Unlike Russia, China does not appear to be at 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. The second arises from China’s role as the principal patron of North Korea. There are also issues related to China’s role as a significant player in the Western Pacific—a vast region of real proliferation concern.

India and Pakistan have both been declared nuclear powers since their respective 1998 tests of nuclear weapons. 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.⁴² Given the historical tensions with its neighbor Pakistan and the recent history of the notorious A.Q. Khan network in exporting WMD, it seems only a matter of time before India joins the PSI. Inexplicably, India may not have been invited to join the Initiative yet.⁴³ Possibly 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.⁴⁴ At the same time, India has expressed some misgivings shared with Pakistan about the legitimacy of UN Security Council Resolution 1540's imposition of obligations on countries that do not have a vote in the Security Council.⁴⁵ Perhaps President Bush's recent decision to allow India to export peaceful nuclear materials will encourage India to sign on.⁴⁶

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. Kahn, Pakistan's leading nuclear scientist, 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. 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 Initiative's work—short of the actual interdictions. At least nine meetings also have been held.⁴⁷ According to the State Department, "dozens of countries have participated in or observed at least one of the PSI interdiction exercises."⁴⁸ 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.⁴⁹ In August 2005, a fifth maritime exercise dubbed Deep Sabre was held in the neighborhood of Singapore.⁵⁰

Early Successes.

Beyond these exercises, the PSI supporters claim that two actual interdictions have already contributed significantly to the promotion of peace and security. John Bolton claimed that the “interception, in cooperation with the United Kingdom, 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 to unravel A.Q. Kahn’s network.”⁵¹ 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 to conform to international norms and Dr. Kahn 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. LAW AND THE SEAS

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. This basic principle underlies much of international law and poses significant issues for those seeking to justify a nonpermissive interdiction on the high seas.

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.⁵² This base norm of international law is subject to several important exceptions developed through custom and treaty over the centuries. However, should anyone find this rule quaint or antiquated, he 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. The 1731 boarding of English Captain Robert Jenkins’ ship, the *Rebecca*, 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 that 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 choices.”⁵³

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. The same concern remains very much alive today. Shortly after the announcement of the PSI, North Korea denounced it as a “brigandish naval blockade” much like “terrorism in the sea and a gross violation of international law.” The official daily, *Rondong Sinmun*, protested, “nobody can vouch that this blockade operation will not lead to such a serious development as an all-out war.”⁵⁴ Notably, North Korea does not have a significant 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.”⁵⁵ 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 destabilize international relations radically, such a risk is sometimes necessary in the effort to develop an important humanitarian norm. The United States and its original PSI supporters have taken an appropriate first step and can now guide the Initiative’s enlargement. In the early 19th century,

hegemonic Britain was the first state to take a strong position against the trans-Atlantic slave trade. 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 the 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. 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. For the PSI to gain effectiveness today, its actions must be grounded in international law and must minimize political instability.

The significance of interdiction of WMD depends on where the acts take place. For interdictions at sea, this depends in turn on the ship'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 12 miles out from the coast. Within its territorial seas, a state's authority is at its zenith. Second, a maritime state's "contiguous zone" extends out across the next 12 miles of ocean. Within this zone, states may police waters to enforce customs, immigration, and sanitation laws.⁵⁶ Third, on the high seas, no one has authority over vessels flying the flag of another state except as discussed below.

In the territorial sea area of a state (up to approximately 12 miles from the coastline) foreign ships in so-called innocent passage generally are presumed exempt from boarding or seizures.⁵⁷ 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).⁵⁸ 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 preauthorization 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 United Arab Emirates could give the policing powers permission to board the ships of smugglers, pirates, and other miscreants sailing within 12 miles of their coastlines in the Persian Gulf. While suspicious vessels would learn quickly 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 boarding, 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 be overcome readily if the state credibly claims that a vessel is carrying WMD. Article 19 of the 1982 UN 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 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.⁵⁹

Article 21 continues to permit:

The 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.⁶⁰

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

In the contiguous zones (extending generally 12 miles out from the territorial seas), a state may “exercise control necessary to (a) prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea; or (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.”⁶¹ 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, and or seizing a ship on the high seas that is suspected of carrying WMD presents a variety of thorny issues. As the UNCLOS⁶² 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.”⁶³ 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, as, for instance, when the boarding party notifies the owner or captain that the ship is suspected of carrying contraband. The owner or captain may not have already known or may decide not to face the consequences of incurring the boarding party’s displeasure. Likewise, permission to interdict could be secured from appropriate authorities of the government that has registered the ship. Interdiction is also permissible where reasonable grounds exist to suspect⁶⁴ a ship of statelessness, engaging in slave trade,⁶⁵ shipping narcotic drugs or psychotropic substances,⁶⁶ committing unauthorized broadcasting,⁶⁷ or piracy.⁶⁸ 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 San*, on the high seas in 2002. They were justified in doing so because the *So San* was flying different flags and otherwise masking its state. 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.

The characterization of certain actors as pirates and terrorist acts as piracy presents a couple of intriguing possibilities for punishing or possibly preventing future acts of terrorism. 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.⁶⁹ While some scholars ridiculed Professor Wedgwood's thesis, it retains considerable heuristic value and may provide a roadmap for building support from all states 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. Likewise, her definition is not particularly useful when seeking to interdict WMD at sea because either a vessel has the protection of a state or it has not. If it has, then it cannot be labeled a pirate.

If a vessel has no state protection, then 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 universal crime.⁷⁰ The challenge of building universal consensus has prevented the UN Security Council from defining terrorism and probably will 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 if it has the will. 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 Resolution 1540.

Interdiction as Self-Defense.

Short of an explicit Security Council Resolution, there are other legal arguments to support interdictions. The 1945 UN Charter acknowledges that “Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations.”⁷¹ The malleability

of this doctrine remains contested. The doctrine of preventive war remains part of the U.S. National Security Strategy, but, as a matter of fact, it appears to have been exhausted when WMD were not found in Iraq and broad support for the U.S.-led war in Iraq failed to materialize. The prospect of a preventive war may reemerge at some late date, but it appears to have no more legitimacy than it would have had prior to 9/11. A preventive seizure merely seems much more defensible than would a preventive war.

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.⁷² As a basis for the use of force, this traditionally has 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 “leaves no choice of means and no moment for deliberation.”⁷³ 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 declaration of war. Short of that clear-cut case, however, anticipatory self-defense may not legitimate an interdiction on the high seas.

Boarding Agreements.

Many merchant ships fly flags of convenience to avoid taxes, laws about the work conditions of their sailors, and/or environmental regulations. Some small states register these ships for small sums that add up to a significant revenue stream. Even though they were selected because of the implied promise that they will not inconvenience ship owners, these states retain the legal authority to board ships carrying their flags. Moreover, they are able to delegate all of their authority if they wish. To date, five leading flag states have signed boarding agreements, including Liberia⁷⁴ and Panama.⁷⁵ 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.⁷⁶ 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 thousands

of ships. If finding WMD is like searching for needles in a haystack, it is worthwhile 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 that Liberia and Panama signed under duress. Such a claim might have the effect of nullifying the agreements.⁷⁷

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 50-year stalemate 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?

VI. 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 could not be higher. 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."⁷⁸ The response, of course, is that, by bringing the law along 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 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.⁷⁹ 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 eventually may become so small that world opinion considers counterproliferation 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.⁸⁰ The Security Council itself did likewise when passing Resolution 1540. But the legal authority 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 decisionmaking on issues related to international peace and security, then it appears more worthwhile to pursue regional arrangements rather than a global solution. Article 52 of the 1945 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 the North Atlantic Treaty Organization (NATO). 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 1945 Charter to authorize the use of “all necessary means” to enforce the regional ban on WMD. Or states in a given region could act without explicit resolution, supported by the claim that they retain the right to do so, much as NATO did in 1999 to prevent genocide in Kosovo. Lately, some states have been working to establish an NFZ throughout the entire Southern Hemisphere. The United States, Great Britain, and France consistently have blocked such efforts in order to ensure that their own nuclear forces remain unencumbered.⁸¹ 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 even other WMD) under certain circumstances? Even in states that ban individual ownership of

guns, law enforcement officers are permitted to carry. 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 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."⁸² 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."⁸³ 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 U.S. Pacific Command's (USPACOM) purview—stretching from the littorals of the Indian 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 over 100 million square miles of earth and sea.⁸⁴ USPACOM is undertaking cooperative efforts with regional partners to increase situational awareness and information-sharing; to develop responsive decisionmaking architecture within the region; to enhance maritime interception capacity; and to increase agency, ministerial, and international cooperation.⁸⁵ Little information is publicly available with which to evaluate the RMSI's progress in these laudable efforts. It seems noteworthy that a military commander (i.e., not a professional diplomat) is taking the lead on this important multilateral diplomatic initiative.⁸⁶ 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.⁸⁷ 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.”⁸⁸ 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.⁸⁹

It will be fascinating to watch how USPACOM 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 UN Security Council.

Security Council Efforts.

On April 28, 2004, the UN Security Council unanimously passed one of the most sweeping resolutions in its history.⁹⁰ Basing its authority on Chapter VII of the 1945 Charter, UN Security Council Resolution 1540 *decided* that all states shall (1) refrain from providing support to nonstates seeking WMD; (2) adopt laws prohibiting nonstate actors from acquiring WMD; and, (3) take measures to prevent proliferation. Only UN Security Council Resolution 1373—passed in the immediate wake of 9/11—comes anywhere close to UN Security Council Resolution 1540 in its ambition.⁹¹ For not only does it take a position 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 UN system . . . That is to say, there

exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.”⁹² Ironically, President Bush and John Bolton, two determined critics of the UN, have radically expanded its capacity to act as a world government.⁹³

Resolution 1540 originated in a proposal made by President Bush to the 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 – WMD, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own borders.”⁹⁴ In doing so, Bush explicitly tied Resolution 1540 to the PSI. There are no established rules of interpretation for Security Council resolutions.⁹⁵ That said, it does seem significant that the resulting resolution actually goes further than merely to “call on all members.” Instead it “*decides* that all States, in accordance with their national procedures, shall adopt and enforce appropriate and effective laws which prohibit any nonstate 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.”⁹⁶ In light of the importance of the issues addressed, the level of public scrutiny involved, and the legal novelty of UN Security Council Resolution 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?

Does UN Security Council Resolution 1540 Fully Legitimate Aggressive Counterproliferation?

Apparently not. Or 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 authorize enforcement action against states or against nonstate 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."⁹⁷ Indeed, the United States dropped a provision explicitly authorizing the interdiction of WMD at sea in exchange for China's vote.⁹⁸ The United States was only able to salvage a provision in paragraph 10 that "calls upon all States, in accordance with their national 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."⁹⁹ Resolution 1540 falls short of authorizing interdictions. The State Department's Andrew Semmel fairly characterized it: "The PSI and 1540 are complementary. Paragraph 10 of the resolution reflects this symbiosis."¹⁰⁰

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. Article 27#2 of the 1945 Charter allows the Security Council to decide "procedural matters" by a mere majority. At some point, the Security Council may decide that the implementation of Resolution 1540 by applying the PSI to specific situations (e.g., North Korean exports) is a mere procedural matter.

Resolution 1540 raises several other significant issues. Most notably, it requires states to prohibit proliferation to nonstate actors — in effect legislating for members. The 1945 Charter, 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.¹⁰¹ Nor does the 1945 Charter provide the UN 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.¹⁰² It seems unfair, however, to categorize Resolution 1540 as undermining existing multilateral treaties merely by binding certain states to limit proliferation.

VII. WHAT CAN ONE MAN'S ARMY DO?

For Americans today, the burden of implementing the PSI falls mainly to the Navy. Nonetheless, the PSI has significant implications for the DoD in general and for the Army in particular. For while the PSI is currently directed at maritime operations, it eventually may be extended to land-based activity in regions where central governments are incapable or unwilling to limit the proliferation of WMD. Secretary of State Condoleezza Rice's most recent statement appears to indicate that the PSI is now being directed toward land-based operations as well.¹⁰³

The PSI and Resolution 1540 may signal a "paradigm shift" in the use of force. For centuries, states exercised a monopoly on the legitimate exercise of force. States could exercise it as part of a police power domestically or in a war context (either abroad or during internal conflicts). Since 1945, states also have had the ability to delegate this war power to the UN. The distinction between police work and warfare remained generally clear. Now Resolution 1540 and the PSI appear to be eroding that distinction by authorizing the use of armed force on the high seas and possibly even within the territory of nonconsenting states in order to staunch the flow of WMD. For this to work, methods must be developed to ensure that the use of force will be proportional and discriminating with no collateral damage. In the past, proportionality and discrimination were important constraints on warfare, but constraints weighed against military necessity.¹⁰⁴ At least for now, it appears that the principle of military necessity may not factor into some operations.

If the Initiative does trigger a serious change in the use of force paradigm, then the Army will need the capabilities to implement it. A portion of the legitimacy that the PSI is developing appears to stem from the great specificity of its operations. To extend use of force to land operations will probably demand an exceptional level of accuracy in its ability to discriminate between targets and nontargets. This suggests new roles for special forces. While some of these functions have presumably been undertaken by nonmilitary intelligence agencies (i.e., the Central Intelligence Agency or other states' foreign intelligence agencies), they may migrate to the more

regular armed forces in order to ensure compliance with the law and responsible oversight. Consequently, military lawyers will need to write new rules of engagement. Special forces will need to arm and train for counterproliferation operations.

Likewise, Army officers in regional commands should help drive and implement the PSI in countries of concern. Such work will require diplomatic skills, technological assistance, and capacity-building. Some of these operations will take place uninvited, i.e., in hostile countries. Some of them will take place in countries where the government is not hostile but cannot control the territory where the proliferation is occurring; soldiers will need to liaise carefully with their in-country partners to ensure that relations do not deteriorate.

Counterproliferation efforts should and will expand dramatically in regions around the world and may soon draw on low-intensity use of force in states where the central governments are ineffective in their own efforts to control WMD. The problems of nuclear proliferation, and especially loose nukes, remain intractable and demand a policy that is coordinated – at least within the U.S. Government. One of the shortcomings of the PSI is that, in the effort to keep it flexible, there does not appear to be a lead agency. If there were a lead U.S. agency, it would likely be the Navy. If it were the Navy, then there could be effective liaison with the Army that should be given the lead on tackling the issue of land-based loose nukes. As it is, the National Security Council must attempt coordination – hardly a situation that is likely to lead to the kind of long-term synergies that these issues merit. A May 2002 U.S. General Accounting Office (GAO) Report surveyed the known incidents of smuggling of materials usable for nuclear weapons since 1992 and examined 20 in some detail. In virtually every incident, police or customs seized the materials on land. This may merely reflect the difficulty of detecting or seizing such materials at sea, or it may reflect a reality that the more important problem is the transit of materials on land. The GAO Report concludes that U.S. efforts are “not effectively coordinated . . . with the result that some countries’ border crossings are more vulnerable to smuggling than others.”¹⁰⁵ Perhaps the Army could take the lead on counterproliferation efforts based on its experience with Nunn-Lugar operations.

VIII. 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 the 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.

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 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, counterproliferation 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 UN Security Council Resolution could endorse interdictions or to embargo North Korea. Perhaps China could be convinced to abstain from a veto if the current negotiations fail.

Embrace International Law.

Counterproliferation 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 145 other nations and all but two

members of NATO, 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 protect U.S. interests insufficiently. As Secretary of Defense in 2003, Rumsfeld reversed this position, deeming the treaty's protection of navigation rights as "critical to the United States Armed Forces."¹⁰⁶ Two years later, however, the administration has not moved to ratify the treaty, despite claims that "it provides the only legitimate international framework for the Initiative."¹⁰⁷ In this instance, it appears 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.

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 so 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.

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 Resolution 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 NGOs 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 UN's general secretariat, the Tribunal of the Law of the Sea, and the International Criminal Court), 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, the 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 in order to conform better to the requirements of Resolution 1540. As noted above, this resolution,

decides also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any nonstate 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.

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 enhanced greatly if it were expanded to provide the means for these states to adopt appropriate legislation. This role easily could 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 available publicly about the Initiative's intelligence sharing or efforts to increase the operational capacity. The Initiative's governance remains 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.

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 eventually may 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.

APPENDIX

INTERDICTION PRINCIPLES FOR THE PROLIFERATION SECURITY INITIATIVE

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 weapons of mass destruction (WMD), delivery systems, and related materials flowing to and from states and nonstate actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UNSC. 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 nonstate actors of proliferation concern. "States or nonstate 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 nonstate 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 nonstate 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 nonstate 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 nonstate 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 nonstate 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.¹⁰⁸

ACRONYMS AND ABBREVIATIONS

CSI:	Container Security Initiative, a U.S. initiative that stations inspectors in major ports around the world to ensure that WMD are not shipped to the United States
C-TPAT:	Customs-Trade Partnership Against Terrorism, a public-private initiative to ensure the integrity and security of the supply chain
EU:	European Union
NATO:	North Atlantic Treaty Organization established under the North Atlantic Treaty of April 4, 1949
NFZ:	Nuclear Free Zone(s)
NPT:	The Treaty on the Non-Proliferation of Nuclear Weapons, done at Washington, London, and Moscow July 1, 1968; entered into force March 5, 1970
PSI:	The Proliferation Security Initiative
RMSI:	U.S. Pacific Command's Regional Maritime Security Initiative
UN:	United Nations
UNCLOS:	United Nations Convention on the Law of the Sea, done at Montego Bay, Jamaica, 10 December 1982; entered into force, November 16, 1994
US PACOM:	United States Pacific Command, a joint regional war-fighting command that spans from the Indian Ocean through the Pacific Ocean
WMD:	Weapons of Mass Destruction (generally biological, chemical, nuclear, and arguably radiological)

ENDNOTES

1. In September 2003, 11 “countries agreed to and published the Proliferation Security Initiative Statement of Interdiction Principles. These identify specific steps for effectively interdicting WMD shipments and preventing proliferation facilitators from engaging in this deadly trade. Participation is voluntary.” See Press Release, U.S. Department of State, Proliferation Security Initiative (May 26, 2005, www.state.gov/t/np/rls/other/46858.htm, last visited August 23, 2005). An extensive bibliography of the Proliferation Security Initiative and UN Security Council Resolution 1540 is available at library.law.pace.edu/research/psi_bibliography.pdf.

2. 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, 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, PSI has received scores of mentions in the national media but little analysis.

3. See Jofi Joseph, “The Proliferation Security Initiative: Can Interdiction Stop Proliferation?” *Arms Control Today*, June 1, 2004, p. 7, available at www.armscontrol.org/act/2004_06/joseph.asp. On the other hand, the PSI’s defenders found authority in the UN Security Council Presidential Statement of January 1992 (stating that WMD proliferation is a threat to international peace and security and emphasizing the need for its prevention) and various political statements originating in the UN and elsewhere. See John Harrington, “Arms Control and National Security,” *International Law*, Vol. 38, 2004, pp. 391, 392.

4. Stephen G. Rademaker, Assistant Secretary of State for Arms Control, “Proliferation Security Initiative (PSI): A Record of Success,” Testimony before the House International Relations Committee, Subcommittee on International Terrorism and Nonproliferation, June 9, 2005, www.state.gov/t/ac/rls/rm/47715.htm last visited August 18, 2005.

5. See Graham Allison, *Nuclear Terrorism: The Ultimate Preventable Catastrophe*, New York: Henry Holt and Company, Ch. 1, 2004, providing a distressing litany of nonstate 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; Hezbollah, active in Lebanon and throughout the Middle East; Majlis-e-Amal and other pro-Taliban anti-U.S. organizations operating in and around Pakistan and Afghanistan; and “countless doomsday cults around the world,” similar to Aum Shinrikyo or the Branch Davidians. Others might add Andean drug cartels. In other words, the threat is global.

6. The July 2003 PSI Meeting in Brisbane cited North Korea and Iran as two states of particular concern. See Press Release, U.S. Department of State, “Proliferation Security Initiative: Chairman’s Statement at the Second Meeting,” July 10, 2003,

www.state.gov/t/np/rls/other/25377.htm, last visited August 2, 2005; John R. Bolton, Under Secretary for Arms Control and International Security, Remarks to the First Anniversary Meeting of the Proliferation Security Initiative, May 31, 2004, www.state.gov/t/us/rm/33046.htm, last visited August 2, 2005; see Prosser, *infra* note 80. For 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.

7. Letter from Matthew Hamlyn, Head, Parliamentary Relations and Devolution Department, Foreign and Commonwealth Office, to Committee Specialist, July 5, 2004, www.publications.parliament.uk/pa/cm/200304/cmselect/cm/aff/441/441we27.htm.

8. Until North Korea's unprecedented withdrawal in February 2005, India, Pakistan, and Israel were the only major states not party to the NPT. All state parties are required to permit inspectors to ensure that their nuclear materials are not diverted to illegal weapons programs.

9. See Prosser, *infra* note 80, p. 6. Pakistan's participation is important. If President Pervez Musharraf believes that signing up would be unpopular domestically, he could sign up 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.

10. Josh Meyer, "Illegal Nuclear Deals Alleged," *Los Angeles Times*, March 26, 2005, p. A1.

11. See Wade Boese, Research Director, Arms Control Association, Presentation to the Institute of Nuclear Materials Management Panel Discussion: Implications of UN Security Council Resolution 1540, March 15, 2005, www.armscontrol.org/events/20050315_1540.asp, citing author's recent interview with John Bolton.

12. See Chaffee, cited *infra* note 81.

13. See, Press Release, U.S. Department of State, Bureau of Political-Military Affairs, American Service-Member's Protection Act, July 30, 2003, www.state.gov/t/pm/rls/othr/misc/23425.htm. All this in addition to the protections embodied both in the U.S. veto at the Security Council and the Rome Charter's provisions for complementarity, i.e., that it authorizes indictments only when the state does not have the capacity, etc. . . . [T]hat the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." *Rome Statute of the International Criminal Court Preamble*, adopted July 17, 1998, U.N. Doc. A/CONF.183/9, available at www.un.org/law/icc/statute/romefra.htm.

14. See Prosser, *infra* note 80, p. 2, citing to Wade Boese, *The New Proliferation Security Initiative: An interview with John Bolton*, Arms Control Association, November 4, 2003, available at www.armscontrol.org/aca/midmonth/November/Bolton.asp, last visited August 5, 2005; and Press Release, U.S. Department of State,

"Proliferation Security Initiative: Chairman's Statement at the Second Meeting," July 10, 2003, www.state.gov/t/np/rls/other/25377.htm, last visited August 5, 2005; and U.S. Department of State, "Proliferation Security Initiative: Statement of Interdiction Principles," *White House Fact Sheet*, launched by the Group of Eight (G8) in June 2002.

15. See U.S. Customs and Border Protection, "Keeping Cargo Safe: Container Security Initiative," www.customs.gov/xp/cgov/border_security/international_activities/csi/, last visited August 23, 2005, follow "Downloadable CSI Fact Sheet" hyperlink.

16. See U.S. Customs and Border Control, "Partnership to Secure the Supply Chain: Customs-Trade Partnership Against Terrorism," www.customs.gov/xp/cgov/import/commercial_enforcement/ctpat/, last visited August 23, 2005.

17. See Commander, U.S. Pacific Command, "RMSI: The Idea, The Facts," www.pacom.mil/rmsi/, last visited May 30, 2005.

18. See IAEA Staff Report, "IAEA Welcomes US New Global Threat Reduction Initiative," May 27, 2004, available at www.iaea.org/newscenter/news/2004/GTRI_Initiative.html, last visited September 14, 2005.

19. See Press Release, U.S. Department of State, "The G8 Global Partnership against the Spread of Weapons and Materials of Mass Destruction," June 27, 2002, www.state.gov/e/eb/rls/othr/11514.htm, last visited August 23, 2005.

20. Einstein, quote in Allison, *supra* note 5, p. 1.

21. A note on terminology: any strategy to prevent WMD attacks has several components, traditionally labeled "deterrence," "nonproliferation," "counterproliferation," 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 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. *Counterproliferation* "focuses on more aggressive activities, such as covert action and military strikes." See the prescient CSIS Report written by Frank J. Cilluffo, *et al.*, *Combating Chemical, Biological, Radiological and Nuclear Terrorism: A Comprehensive Strategy*, 2001, pp. ix, xi.

22. Presidential Debate in Coral Gables, Florida, 40 Weekly Comp. Pres. Doc. 2175, 2192, September 30, 2004; See also Allison, *Nuclear Terrorism*, *supra* note 5; Graham Allison, *The Gravest Danger, The American Prospect*, March 2005, p. 48.

23. Zoonotic diseases "originated in animals but have crossed the species barrier to infect people." William B. Karesh and Robert A. Cook, "The Human-

Animal Link," *Foreign Affairs*, July/August 2005, p. 40. For such threats generally, see also Laurie Garrett, "The Next Pandemic," *Foreign Affairs*, July/August 2005, p. 3.

24. 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," *Columbia Journal of Transnational Law*, Vol. 41, 2003, pp. 735, 794, discussing the legal consequences of catastrophic events.

25. Allison, *supra* note 5, p. 15.

26. Kofi A. Annan, "A Global Strategy for Fighting Terrorism," *The Hindu*, March 12, 2005, www.hindu.com/2005/03/12/stories/2005031206711100.htm, last visited August 5, 2005.

27. See Report of the Secretary-General, "In Larger Freedom: Towards Development, Security, and Human Rights for All," UN GAOR, 59th Sess., Agenda Items 45 and 55, U.N. Doc. A/59/2005, March 21, 2005, available at www.un.org/largerfreedom/report-largerfreedom.pdf. Emphasis added to note the recognition of an emerging norm that may ripen into customary international law.

28. The father of the Pakistani or the "Islamic bomb," Dr. Abdul Qadeer Khan, has confessed to 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.

29. See Report of the Secretary-General's High Level Panel, *Threats, Challenges, and Change*, U.N. GAOR, 59th Sess., Agenda Item 55, U.N. Doc. A/59/565, Dec. 2, 2004, available at www.un.org/secureworld.

30. Council Common Position No. 2003/805/CFSP, *EU Strategy against Proliferation of Weapons of Mass Destruction*, The Council of the European Union, available at ue.eu.int/ueDocs/cmsUpload/st15708.en03.pdf.

31. The General Affairs and External Relations, *Non-proliferation – Support of the Proliferation Security Initiative (PSI)*, May 17, 2004, europa.eu.int/comm/external_relations/nuclear_safety/intro/gac.htm.

32. *Ibid.*

33. See Japan-E.U. Joint Declaration on Disarmament and Non-Proliferation, E.U.-Japan, June 22, 2004, europa.eu.int/comm/external_relations/japan/summit13_22_06_4/disarm.htm, assigning cooperation in the context of PSI as a priority area.

34. See E.U.-U.S. Declaration on the Non-Proliferation of Weapons of Mass Destruction, Dromoland Castle, E.U.-U.S., June 26, 2004, europa.eu.int/comm/external_relations/us/sum06_04/decl_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."

35. See John Bolton, "An All-Out War on Proliferation," *Financial Times*, September 7, 2004, www.state.gov/t/us/rm/36035.htm, last visited August 2, 2005.

36. Release, Bureau of Public Affairs, "The National Security Strategy of the United States of America," September 2002, www.state.gov/documents/organization/15538.pdf, last visited September 2, 2005.

37. Release, Office of the Press Secretary, "National Strategy to Combat Weapons of Mass Destruction," December 2002, www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf, last visited September 2, 2005.

38. In September 2003, 11 countries – Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States – agreed to and published the PSI Statement of Interdiction Principles. See generally, *supra* note 1.

39. See *ibid.*, App. I.

40. See generally, *ibid.*

41. "When the partying has to stop: Dealing with North Korea," *The Economist*, www.economist.com/agenda/displayStory.cfm?story_id=3651863, last visited August 3, 2005. Also see William Hawkins, "Hu's Running the Show?" *National Review online*, September 12, 2005, claiming that China eviscerated UN Security Council Resolution 1540's support for the PSI.

42. See "Guarding against Shipments of WMDs," *Indian Express*, January 31, 2005. See also "India Soon to Join A U.S.-Led Security Group," *Indian Express*, January 30, 2005, referring to PSI as more politically sensitive than another U.S.-led initiative, the Container Security Initiative.

43. "No Military Supplies to Nepal delivered: Ahamed," *Press Trust of India*, March 10, 2005, "Junior Minister for External Affairs Rao Inderjit Singh said there has been no formal invitation to India to join the U.S.-led Proliferation Security Initiative."

44. Premvir Das cites this concern as well as a general concern that PSI may not be lawful. Premvir Das, "PSI from an Indian Perspective," *Issues & Insights*, July 2004, vol. 04-05, available at www.csis.org/pacfor/issues/v04n05_ch3.cfm.

45. Siddharth Varadarajan, "India, Pak Join Forces Against U.S. Move," *The Times of India*, April 24, 2004, available at 2003 WL 6574893.

46. John R. Bolton, Under Secretary of Arms Control and International Security, "The Bush Administration's Non-Proliferation Policy: Successes and Future Challenges," Testimony Before the House International Relations Committee, March 30, 2004, www.state.gov/t/us/rm/31029.htm, last visited September 2, 2005.

47. Henry J. Cordes, "19 Nations Hold Talks in Omaha on WMD Spread," *Omaha World-Herald*, March 27, 2005, p. B3. See also Prosser, *infra* note 80, p. 2.

48. Press release, U.S. Department of State, Bureaus of Nonproliferation and Public Affairs, "U.S. Initiatives to Prevent Proliferation," May 27, 2005, www.state.gov/t/np/rls/other/45456.htm, last visited August 3, 2005.

49. Mark T. Esper and Charles A. Allen, "The PSI: Taking Action against WMD Proliferation," *The Monitor*, Vol. 10, No. 1, p. 4, Spring 2004, available at www.uga.edu.

edu/cits/documents/pdf/monitor/monitor_sp_2004.pdf. The authors are, respectively, Deputy Assistant Secretary of Defense for Negotiations Policy and Deputy General Counsel for International Affairs in the U.S. Department 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.

50. Press Release, U.S. Department of State, "Singapore Hosts Multinational Maritime Interdiction Exercise," August 12, 2005, usinfo.state.gov/is/Archive/2005/Aug/15-878756.html, last visited September 20, 2005.

51. Bolton, *supra* note 35. Secretary of State Condoleezza Rice has announced that the PSI was "responsible for 11 interdictions." The issue of whether this operation should be attributed to the PSI remains in debate, the State Department is now backing off this claim. Wade Boese, letter to the editor, "False Claims of PSI Success," *Washington Times*, August 17, 2005, p. A16. See also, Sharon Squassoni, *CRS Report for Congress, Proliferation Security Initiative*, June 7, 2005, p. 3.

52. 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*, ch. 1, New York: Cornell University Press, 1981.

53. *Ibid.*, p. 20.

54. See Rebecca Weiner, *Proliferation Security Initiative to Stem Flow of WMD Matériel*, Center for Non-Proliferation Studies, July 16, 2003, available at cns.miis.edu/pubs/week/030716.htm, citing to Samantha Maiden, *The Advertiser*, July 14, 2004; and Nicholas Kralev, "U.S. Seeks Asian Aid for Ship Searches," *The Washington 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 recently has 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.

Harrison, "Did North Korea Cheat," *Foreign Affairs*, January/February 2005, p. 99, available at www.foreignaffairs.org/20050101faessay84109/selig-s-harrison/did-north-korea-cheat.html, arguing that the administration has exaggerated intelligence that may only prove lower levels of enrichment that are permitted under the Nonproliferation Treaty. 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—a claim which 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," *Chronicle of Higher Education*, April 1, 2005, p. 12, available at <https://www.brookings.edu/views/articles/ohanlon/20050401.htm>. Likewise, journalist Tom Friedman argues that

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," *New York Times*, May 11, 2005, p. A19. In fact, Beijing tolerates the North Korean weapons program. This tolerance may be ascribed merely to solidarity among two of the few remaining Communist governments or as a more invidious form of collaboration designed to shore up influence in the region.

55. Michael A. Becker, "The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea," *Harvard Journal of International Law*, Vol. 46, 2005, pp. 131, 221.

56. See Joel A. Doolin, "Operational Art for the Proliferation Security Initiative," unpublished student paper, U.S. Naval War College, May 3, 2004, p. 4, www.fas.org/man/eprint/doolin.pdf, last visited August 4, 2005. Also extending 188 miles beyond the 12-mile limits of the territorial seas can be found an exclusive economic zone.

57. "Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea." U.N. Convention on the Law of the Sea, pt. II, § 3, subsec. A, art. 17, 1833 U.N.T.S. December 10, 1982, p. 3, 436 (Hereinafter UNCLOS).

58. "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state." See *Ibid.*, art. 19.

59. See *ibid.*, art. 19.

60. See *ibid.*, art. 22.

61. *Ibid.*, art. 33.

62. Among the few nations not party to this convention is the United States, 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.

63. See *ibid.*, art. 87.

64. The reasonable ground to suspect standard for establishing a right to visit is found in *ibid.*, art. 110.

65. See *ibid.*, art. 99.

66. See *ibid.*, art. 108.

67. See *ibid.*, art. 109.

68. See *ibid.*, 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 nonstate actors or other entities that should not have them.

69. See Ruth Wedgwood, "A Pirate is a Pirate," *Wall Street Journal*, December 16, 2002, p. A12.

70. See Douglas R. Burgess, Jr., "The Dread Pirate Bin Laden: How Thinking of Terrorists as Pirates Can Help Win the War on Terror," *Legal Affairs*, July/August 2005, available at 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 52 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 on the walls of a ship. For more on the technological transformations of this era, see Mark Russell Shulman, *Navalism and the Emergence of American Sea Power, 1882-1893*, Annapolis, MD: Naval Institute Press, 1995. Coincidentally, Paris is also where the PSI Statement of Interdiction Principles was originally announced.

71. U.N. Charter, art. 51.

72. See Michael Byers, "Policing the High Seas: The Proliferation Security Initiative," *American Journal of International Law*, Vol. 98, 2004, p. 541.

73. For the context and correspondence surrounding this seminal case, see "The Avalon Project at Yale Law School," www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm; then follow "Letter with enclosures-Webster to Ashburton."

74. "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.-Liberia*, February 11, 2004, www.state.gov/t/np/trty/32403.htm, last visited August 4, 2005.

75. "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.-Panama*, May 12, 2004, www.state.gov/t/np/trty/32858.htm, last visited August 4, 2005. 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.

76. Michael A. Becker, "The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea," *Harvard International Law Journal*, Vol. 48, 2005, p. 182. And see generally Doolin, *supra* note 56, p. 5.

77. Vienna Convention on the Law of Treaties, art. 52, adopted May 23, 1969, 1155 UNTS 331, available at www.un.org/law/ilc/texts/treatfra.htm.

78. Thomas M. Franck, "Humanitarian and Other Interventions," *Columbia Journal of Transnational Law*, Vol. 43, 2005, p. 325.

79. See Esper and Allen, *supra* note 49, p. 5.

80. See Andrew Prosser and Herbert Scoville, Jr., "Peace Fellow, The Proliferation Security Initiative in Perspective," June 16, 2004, Center for Defense Information, www.cdi.org/pdfs/psi.pdf, last visited August 5, 2005, citing to S/23500, January 31, 1992.

81. Indeed, these and other powers also have worked to preserve the right of unfettered transit of nuclear materials through the high seas and Exclusive Economic Zones of coastal states. See Devon Chaffee, "Freedom or Force on the High Seas?" *Arms Interdiction and International Law*, August 15, 2003, summary of a longer piece pending publication, available at www.wagingpeace.org/articles/2003/08/15_chaffee_freedom-of-force.htm, last visited August 5, 2005.

82. See RMSI, *supra* note 17. See also Toshi Yoshihara and James Holmes, "Islands Only Look Peaceful," *Atlanta Journal-Constitution*, February 18, 2005, p. A19.

83. *Ibid.*

84. See *ibid.*; then follow “U.S. Pacific Command Strategy for Regional Maritime Security,” last visited August 5, 2005. Also see Yoshihara and Holmes, *supra* note 82, p. 9. See also Naval Meteorology and Oceanography Command Homepage, “Oceans of the World,” pao.cnmoc.navy.mil/pao/Educate/OceanTalk2/indexoceans.htm, last visited August 23, 2005.

85. See RMSI, *supra* note 17, p. 9.

86. The State Department is the lead agency on this initiative, although all the information I have been able to locate originates with USPACOM.

87. See RMSI, *supra* note 84, p. 13.

88. *Ibid.*, p. 7.

89. In January 2002, the Commissioner of Customs and Border Protection announced the creation of the Container Security Initiative (CSI). Through the CSI, “maritime containers that pose a risk for terrorism are identified and examined at foreign ports before they are shipped to the United States.” See Container Security Initiative, *supra* note 15.

90. The ultimate resolution was cosponsored by France, the Philippines, Romania, the Russian Federation, Spain, the United Kingdom, and the United States.

91. Passed on September 28, 2001, UNSCR 1373 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.

92. Stefan Talmon, “Note and Comment: The Security Council As World Legislature,” *American Journal of International Law*, Vol. 99, 2005, p. 175, citing *Prosecutor v. Tadic*, No. IT-94-1-AR72, Appeal on Jurisdiction, Sec. 43, October 2, 1995; 35 ILM 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 *ibid.*, p. 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.

93. Expanding the legal capacity, however, does not imply expanding the organizational capacity to ensure compliance with the “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 report effectively 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.

94. President George W. Bush, Address to the United Nations General Assembly, September 23, 2003, available at www.un.org/webcast/ga/58/statements/usaeng030923.htm, last visited August 5, 2005.

95. The UN Charter is a treaty and, as such, should be interpreted in good faith, in accordance with ordinary means, and in light of its purpose. Vienna Convention on the Law of Treaties, art. 31(1) and 3(b), adopted May 23, 1969, 1155 UNTS 331, available at www.un.org/law/ilc/texts/treatfra.htm, last visited August 5, 2005. Presumably, resolutions passed under its authority should also be interpreted in light of their purpose.

96. UNSCR 1540.

97. Adam Thomson, Deputy Permanent Representative of the United Kingdom Mission of Great Britain and Northern Ireland, Statement to the Security Council of the U.N., April 22, 2004, available at www.ukun.org/articles_show.asp?SarticleType=17&Article_ID=744, last visited August 5, 2005. Recall that this discussion followed the intense debate about Security Council Resolution 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.

98. See Sean D. Murphy, "Contemporary Practice of the United States Relating to International Law: Use of Force and Arms Control: UN Security Council Resolution on Nonproliferation of WMD," *American Journal of International Law*, Vol. 98, 2004, p. 606, citing Colum Lynch, "Weapons Transfers Targeted," *Washington Post*, April 29, 2004, p. A21.

99. UNSCR 1540, App. III, p. para. 10.

100. Andrew Semmel, Principal Deputy Assistant Secretary 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, October 12, 2004, available at www.state.gov/t/np/rls/rm/37145.htm.

101. See Murphy, *supra* note 98, p. 607.

102. See Statement of John Burroughs, Executive Director, Lawyers' Committee on Nuclear Policy, UN Correspondents' Association, New York, March 31, 2004, available at www.reachingcriticalwill.org/political/SC/SC.html#john_statement, last visited August 5, 2005.

103. Condoleezza Rice and George Iacovou (foreign minister of Cyprus), "Safeguarding Nuclear Arsenals: Multinational Proliferation Security Initiative Proving Critical," *Washington Times*, August 12, 2005, p. A19, employing an example of chemical weapons being transported by train through Poland to the

landlocked Czech Republic. Also see Esper and Allen, *supra* 49, p. 5, authors note that the Department of Defense is conducting legal analysis of potential options for air and ground interdictions.

104. See generally, Michael Howard, George Andreopoulos, and Mark R. Shulman, eds., *The Laws of War: Constraints on Warfare in the Western World*, New Haven, CT: Yale University Press, 1994.

105. *Nuclear Nonproliferation: U.S. Efforts to Help Other Countries Combat Nuclear Smuggling Need Strengthened Coordination and Planning*, GAO-02-426, Washington, DC: U.S. General Accounting Office, May 2004, p. 11, available at www.gao.gov/new.items/d02426.pdf, last visited August 5, 2005.

106. John A. Duff, "A Note on the United States and the Law of the Sea: Looking Back and Moving Forward," *Ocean Development and International Law*, Vol. 35, 2004, pp. 195, 199, 201.

107. Lawrence J. Korb, "Bush Failing at Nuclear Security," *Boston Globe*, January 2, 2005, p. C11. The Senate Foreign Relations Committee voted 19-0 to recommend the United States enter the UNCLOS. See also Senator Richard G. Lugar, "Law of the Sea Treaty Balances U.S. and World Interests," *Shared Oceans, Shared Future: An Electronic Journal of the U.S. Department of State*, Vol. 9, No.1, April 2004, usinfo.state.gov/journals/itgic/0404/ijge/gj02.htm.

108. Release, U.S. Department of State, Fact Sheet, "Proliferation Security Initiative: Statement of Interdiction Principles," September 4, 2003, www.state.gov/t/np/rls/fs/23764.htm, last visited August 22, 2005.