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The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law

Daniel H. Joyner[†]

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I. INTRODUCTION

In a speech given at Wawel Royal Castle in Krakow, Poland, on May 31, 2003, U.S. President George W. Bush declared:

The greatest threat to peace is the spread of nuclear, chemical and biological weapons. And we must work together to stop proliferation When weapons of mass destruction or their components are in transit, we must have the means and authority to seize them.

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So today I announce a new effort to fight proliferation called the Proliferation Security Initiative. The United States and a number of our close allies, including Poland, have begun working on new agreements to search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies. Over time, we will extend this partnership as broadly as possible to keep the world's most destructive weapons away from our shores and out of the hands of our common enemies.¹

The speech was given approximately five months after the U.S. Navy had participated in an incident involving a North Korean merchant ship, which was to serve as the catalyst for this significant change in U.S. policy related to the proliferation of weapons of mass destruction (WMD).

II. THE *SO SAN*

At dawn on Monday, December 9, 2002, two Spanish Navy ships, the *Navarra* and the *Patino*, signaled the freighter *So San*, which was at the time approximately 600 miles off the Yemeni coast in international waters. U.S. intelligence satellites and Navy ships had been tracking the ship since it had left the North Korean port of Nampo in mid-November. The ship was registered in Cambodia but was sailing without a flag. When the freighter attempted to evade capture, the Spanish ships fired warning shots, first into the water in front of the ship and then across its bow. When the *So San* failed to respond, a helicopter was dispatched carrying seven Spanish Special Forces troops, who boarded the ships using fast ropes.²

The crew of about twenty was put under guard, and the ship was searched. It was evident that the ship's original name and identification number had been painted over and equally clear that the ship was crewed by North Koreans. The captain claimed that the last port of call had been China and that the ship was transporting 2000 pounds of concrete to Yemen, information verified by the ship's manifest. When Spanish troops began to inspect the ship's cargo, however, they found, partially hidden by the 40,000 bags of cement also in the hold, large containers of missile parts and additional containers of an unknown chemical. The captain of the *Patino* then called in U.S. military explosives experts aboard the *USS Nassau*, who were able to verify the items as composite parts of fifteen mid-range SCUD missiles, with fifteen conventional warheads and eighty-five drums of a chemical called inhibited red fuming nitric acid—used as an oxidizer in SCUD missile fuel.³

Then commenced a flurry of communiqués and phone calls through which it was discovered that the ship was indeed headed for Yemen and that the Yemeni government openly confirmed the order of the missile components. It had apparently agreed to purchase them in 1999 to help upgrade the small number of SCUD missiles it already possessed. Yemeni

1. President George W. Bush, Remarks at Wawel Royal Castle in Krakow, Poland, at <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html> (May 31, 2003).

2. See Thomas Ricks & Peter Slevin, *Spain and U.S. Seize N. Korean Missiles*, WASH. POST, Dec. 11, 2002, at A1; Al Goodman et al., *Scud Missiles Are Ours, Says Yemen*, CNN.com, at <http://edition.cnn.com/2002/WORLD/asiapcf/east/12/11/scud.ship/> (Dec. 11, 2002).

3. *North Korea: U.S., Spanish Forces Seize Scud Shipment*, NTI GLOBAL SECURITY NEWSWIRE, at http://www.nti.org/d_newswire/issues//2002/12/11/7p.html (Dec. 11, 2002).

officials denied any intent to conceal the shipment, blaming the deceptive storage underneath bags of cement on North Korea. Yemeni Foreign Minister Abubakr al-Qirbi stated: "The shipment is part of contracts signed some time ago It belongs to the Yemeni government and its army and is meant for defensive purposes."⁴ Al-Qirbi summoned the U.S. ambassador to the capital of Sanaa to lodge a formal protest over the seizure of the shipment.⁵

For the next two days, Washington officials debated a course of action in light of the discovery and of the Yemeni government's claim of right. After consulting with key foreign-policy makers as well as lawyers at the State Department and elsewhere, President Bush signed off on the decision to release the ship and its cargo. Speaking at a luncheon in Washington on December 11, 2002, Secretary of State Colin Powell stated:

[A]fter getting assurances directly from the President of Yemen, President Salih, that this was the last of a group of shipments that go back some years and had been contracted for some years ago, this would be the end of it and we had assurances that these missiles were for Yemeni defensive purposes and under no circumstances would they be going anywhere else. And on that basis, and also in acknowledgement of the fact that it was on international water and it was a sale that was out in the open and consistent with international law, a little while ago we directed the ship to continue to its destination. And I conveyed that to the President of Yemen just a little while ago.⁶

III. THE PROLIFERATION SECURITY INITIATIVE

In the aftermath of these events, head-scratching ensued in Washington, as the full import of what had just happened became disturbingly clear. Here had been a ship from North Korea—commonly thought to be the worst proliferator of missile technology—found conclusively to be transporting a cargo of concealed missile components capable of being assembled and armed with warheads carrying any one of a number of dangerous chemicals, biological agents, or even nuclear weapons, on its way to a region of the world at the top of Washington's worry list. Yet when action was taken to seize the weapons and prevent their delivery, it was discovered that there was no justification under international law for doing so. There was in fact nothing illegal going on—no treaties were violated. In the eyes of existing law, it was simply a sale of goods from one state to another, and, if anything, the Spanish and U.S. ships involved in the forced inspection had arguably crossed over a legal line in abridging the *So San's* right to free passage through international waters. There was a common consensus among senior U.S. officials, particularly at the Department of Defense, that this was simply an unacceptable status quo and that something had to be done.⁷

Thus was born the Proliferation Security Initiative (PSI), through which, according to then–Under Secretary of State John Bolton, the United States expressed its hope to

4. *Id.*

5. *Id.*

6. Secretary of State Colin L. Powell, Remarks at the American Academy of Diplomacy Annual Awards Presentation Luncheon, at <http://www.state.gov/secretary/former/powell/remarks/2002-15887.htm> (Dec. 11, 2002).

7. Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L. L. 526, 527-28 (2004).

work with other concerned states to develop new means to disrupt the proliferation trade at sea, in the air, and on land. The initiative reflects the need for a more dynamic, proactive approach to the global proliferation problem. It envisions partnerships of states working in concert, employing their national capabilities to develop a broad range of legal, diplomatic, economic, military and other tools to interdict threatening shipments of WMD- and missile-related equipment and technologies.⁸

After President Bush's announcement of the initiative in May 2003, meetings were held in the summer of 2003 in Brisbane and Madrid. Australia and Spain were among the eleven states initially signing on as members of the "small core group of countries" taking up this U.S.-led initiative—Australia, France, Germany, Italy, Japan, The Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States.⁹ By September, the group had moved on to conducting collaborative exercises, in which mock interdictions were staged by ships and troops from various member nations working in concert. On September 4, the White House issued the *Statement of Interdiction Principles*, which outlined the joint commitment of PSI members and invited other similarly minded states likewise to commit to "[u]ndertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern."¹⁰ The *Statement of Interdiction Principles* lays out in some detail the "actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials" that PSI members and participants are contemplated to undertake.¹¹

Plans have been made to increase the complexity and broaden the scope of these exercises, with future mock interdictions to take place in areas of the world most highly trafficked by traders and smugglers of WMD-related materials—notably in the Mediterranean and Arabian seas and the Pacific Ocean. Then—Under Secretary of State Bolton has confirmed that interdictions under the PSI framework have already occurred with more to follow, explaining that most such interdictions will not be made known to the public out of concern for the ongoing effectiveness of the program.¹²

However, the solidarity of this coalition of the willing has begun to be shaken as the commonly agreed general principles at the heart of the PSI become operationalized. Officials in a number of national capitals as well as nongovernmental members of the international community have become more aware and concerned about the questionable existence of an international legal

8. *U.S. Efforts To Stop the Spread of Weapons of Mass Destruction: Testimony Before the House Comm. on Int'l Relations*, 108th Cong. (2003) (statement of John R. Bolton, Under Secretary of State for Arms Control and International Security).

9. Acronym Inst. for Disarmament Diplomacy, Proliferation Security Initiative (PSI) Meeting, Brisbane, July 9-10, at <http://www.acronym.org.uk/docs/0307/doc04.htm> (last visited Apr. 20, 2005).

10. Press Release, White House Office of the Press Secretary, Fact Sheet: Proliferation Security Initiative, Statement of Interdiction Principles, at <http://www.whitehouse.gov/news/releases/2003/09/print/20030904-11.html> (Sept. 4, 2003) [hereinafter Press Release, Statement of Interdiction Principles].

11. *Id.*

12. Wade Boese & Miles Pomper, *The Proliferation Security Initiative: An Interview with John Bolton*, ARMS CONTROL TODAY, Dec. 11, 2003, at 37, available at http://www.armscontrol.org/act/2003_12/PSI.asp.

basis on which to legitimize interdictions of merchant ships and aircraft operating in sea zones in which national authority is not absolute.¹³

This Article will examine these concerns and provide an analysis of relevant international legal frameworks, specifically those concerning the international law of the sea and the law regulating international uses of force. It will also provide commentary on the utility of the PSI as a part of international efforts to prevent the proliferation of WMD-related technologies and materials. Before commencing this discussion, however, it is preliminarily important to locate the PSI within the broader context of national and multilateral efforts to limit the proliferation of weapons of mass destruction.

IV. NONPROLIFERATION AND COUNTERPROLIFERATION

A. *Weapons of Mass Destruction*

With the detonation of atomic bombs at Hiroshima and Nagasaki in 1945, the world was changed forever, and the international community entered a new era heralded and defined by technological advances that were to have revolutionary implications for the international and domestic security environment.¹⁴ These new technologies, some entirely unprecedented and others simply increasing the effectiveness of older destructive technologies, would fundamentally alter strategic calculations regarding uses of force, both aggressive and defensive, and understandings of the power projection capabilities of states and non-state actors.

These marked changes to the character of international security were brought about through the development by a number of states in the closing months of World War II, and increasingly in its aftermath, of weapons the destructive capabilities of which required the new and separate nomenclature of “weapons of mass destruction” to distinguish them from the weapons conventionally in use before that time. Under this heading came to be grouped instruments derived from certain uses of nuclear fissionable materials, poisonous chemical compounds, and biological agents the destructive capacities of which compressed the amount of time and effort required to kill massive numbers of people through much more indiscriminate means than had previously been possible.¹⁵

The acquisition of such weapons by an increasing number of states in various regions of the world was disconcerting to the most powerful members of the international community—not only due to the distant possibilities of the use of such weapons against them in an aggressive fashion, but also as it became clear that the latent utility of these weapons itself had fundamentally altered the strategic calculus employed in the former days of what came to be known as conventional weapons. Under this previous calculus, the ability of an international actor to wield and to project power could be derived through a fairly simple assessment of the physical and territorial resources of that actor.

13. Michael Evans, *US Plans To Seize Suspects at Will*, *TIMES* (London), July 11, 2003, at 23.

14. See, e.g., NAOMI SHONO, *THE LEGACY OF HIROSHIMA: ITS PAST, OUR FUTURE* (1986).

15. See RANDALL FORSBURG ET AL., *NONPROLIFERATION PRIMER: PREVENTING THE SPREAD OF NUCLEAR, CHEMICAL AND BIOLOGICAL WEAPONS* 12-13 (1995).

Now, however, it became possible for smaller states and even some non-state actors to change this security dynamic through the possession and threat of using WMD. Through these means, international actors with relatively small resource bases could gain useful leveraging and deterrent capabilities, wholly disproportionate to their conventional military arsenals, against a larger state or group of states.¹⁶

B. *Nonproliferation*

1. *Treaties*

During the period of East-West superpower rivalry that came to be known as the Cold War, while on one level there was almost unbridled development of WMD programs and production and operational fielding of the most lethal WMD systems ever seen by the superpowers, there were concurrently at another level significant efforts involving those actors as well as other members of the international community to limit the proliferation of WMD outside of a very select group.¹⁷ The clearest example of this effort is found in the nuclear weapons area, particularly in the advent of the Treaty on the Non-proliferation of Nuclear Weapons (Nuclear Nonproliferation Treaty or NPT) in 1970, which forms the cornerstone of the modern multilateral nuclear nonproliferation regime.¹⁸

The NPT was signed after twenty-five years of Cold War tensions for several purposes: to provide a normative basis for the coordination of peaceful uses of nuclear technology; to encourage international efforts of both disarmament and decommissioning of existing nuclear stockpiles; and to prevent the further proliferation of nuclear weapons. The NPT's provisions established two classes of state signatories. Article I obligated the five acknowledged nuclear weapon states (China, France, the Soviet Union, the United States, and the United Kingdom) not to transfer nuclear weapons, other nuclear explosive devices, or their technology to any recipient state not of their number and prohibited them "in any way to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices."¹⁹ Non-nuclear weapon state signatories to the NPT obligated themselves under Article II not to acquire from any other state, or to

16. *Id.* at 19-23.

17. See generally JULIE DAHLITZ, NUCLEAR ARMS CONTROL WITH EFFECTIVE INTERNATIONAL AGREEMENTS (1983); INTERNATIONAL ARMS CONTROL (Coit D. Blacker & Gloria Duffy eds., 2d ed. 1984); JOZEF GOLDBLAT, ARMS CONTROL: THE NEW GUIDE TO NEGOTIATIONS AND AGREEMENTS (2d ed. 2002); NON-PROLIFERATION: THE WHY AND THE WHEREFORE (Jozef Goldblat ed., 1985); NUCLEAR NON-PROLIFERATION AND THE NON-PROLIFERATION TREATY (M.P. Fry et al. eds., 1990); REGIONAL APPROACHES TO DISARMAMENT (Jayantha Dhanapala ed., 1993); 1 J.P. ROBINSON, THE PROBLEM OF CHEMICAL AND BIOLOGICAL WARFARE (1971); Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry*, 43 AM. U. L. REV. 755 (1994).

18. Treaty on the Non-proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT]. For an in-depth discussion of the NPT and its historical context, see THE FUTURE OF THE NON-PROLIFERATION TREATY (John Simpson & Darryl Howlett eds., 1995); GOLDBLAT, *supra* note 17, chs. 4-6; JOZEF GOLDBLAT, TWENTY YEARS OF THE NON-PROLIFERATION TREATY (1990).

19. NPT, *supra* note 18, art. I.

produce on their own, nuclear weapons or nuclear explosive devices and not to receive foreign assistance in weapon development programs. Currently, 189 states are signatories to the NPT.²⁰

In the context of chemical and biological weapons as well, there emerged during this era and afterward multilateral legal instruments addressing both the proliferation and, in more absolute terms, the development and possession of related materials and technologies. Building from the 1925 Geneva Protocol, which addressed the use of chemical and biological agents in war,²¹ the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on Their Destruction (Biological Weapons Convention or BWC) banned the development, production, stockpiling, acquisition by other means, or retention of microbial or other biological agents or toxins, as well as of weapons, equipment, and means of delivery designed to use such agents and toxins for hostile purposes in armed conflict.²² It further prohibited the transfer of such agents, toxins, weapons, equipment, and means of delivery to “any recipient whatsoever.”²³ Unlike the NPT, however, the BWC does not separate states party into categories, with some having privileges of retention that others lack.

Like the NPT, the BWC is a multilateral disarmament and nonproliferation treaty that addresses both vertical (intrastate) and horizontal (interstate) proliferation. While it does include a commitment to engage in “the fullest possible exchange of equipment, materials and scientific and technological information” regarding biological agents, toxins, and equipment for the processing, use, and production of such agents,²⁴ its prohibition on transfers is controlling. In terms of disarmament, the BWC’s central and most remarkable feature is the blanket requirement that all parties destroy or divert to peaceful purposes (such as non-military scientific research) all biological agents, toxins, weapons, equipment, and means of delivery no later than nine months after the entry into force of the convention or the party’s later accession.²⁵

Similarly, following the 1990 U.S.-Soviet Chemical Weapons Agreement—which provided for a bilateral halt to the production of chemical weapons, a reduction of chemical weapon stockpiles to equal, low levels, and for a mechanism to verify compliance²⁶—and building upon a number of other regional initiatives, the multilateral Chemical Weapons Convention

20. Arms Control Ass’n, *The Nuclear Nonproliferation Treaty at a Glance*, at <http://www.armscontrol.org/factsheets/nptfact.asp> (Apr. 2005).

21. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571.

22. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

23. *Id.* art. III.

24. *Id.* art. X(1).

25. *Id.* art. X(2).

26. Agreement on Destruction and Non-production of Chemical Weapons and on Measures To Facilitate the Multilateral Convention on Banning Chemical Weapons, June 1, 1990, U.S.-U.S.S.R., arts. I-V, 29 I.L.M. 932, 934-38 (1992).

(CWC) was opened for signature in January 1993.²⁷ The CWC prohibits all signatories from the development, production, other acquisition, stockpiling, retention, or transfer to anyone of weapon-grade toxic chemicals and their precursors, except where intended (as shown through consistent types and quantities) for non-prohibited peaceful purposes such as industry, agriculture, medicine, and related research.²⁸ To implement the provisions of the CWC, toxic chemicals and their precursors are listed in three attached schedules corresponding to the level of concern applicable to them and detailing their respective destruction and transfer requirements.²⁹ States party are further obligated to enact national laws prohibiting natural or legal persons anywhere in their territory, elsewhere under their jurisdiction, or of their nationality from undertaking any activity prohibited to a state party.³⁰

2. *Safeguards and Export Controls*

Recognizing the characteristic (and politically necessary) vagueness and non-specificity of these binding multilateral legal instruments, further related efforts at nonproliferation have included supplementary mechanisms for verifying compliance with treaty obligations and for coordinating and harmonizing national export control laws and policies. Article III of the NPT, for example, explicitly provides for these additional mechanisms. Under Article III(1), non-nuclear weapon states are required to accept the imposition of safeguards administered by the International Atomic Energy Agency (IAEA) to verify compliance with the provisions of the NPT and specifically to detect diversions of nuclear materials from peaceful uses, such as civilian power generation, to the production of nuclear weapons.³¹ Under Article III(1), each non-nuclear weapon state agrees to conclude an independent bilateral safeguards agreement with the IAEA. Under the terms of these

27. Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 21 (1993), 1974 U.N.T.S. 45 [hereinafter CWC]. For more information on the CWC, see generally THOMAS BERNAUER, *THE PROJECTED CHEMICAL WEAPONS CONVENTION: A GUIDE TO THE NEGOTIATIONS IN THE CONFERENCE ON DISARMAMENT* (1990); HERBICIDES IN WAR: THE LONG-TERM ECOLOGICAL AND HUMAN CONSEQUENCES (Arthur H. Westing ed., 1984); MALVERN LUMSDEN, *INCENDIARY WEAPONS* 72-73 (1975).

28. CWC, *supra* note 27, arts. I(1)(a), II(1)(a), II(9).

29. *Id.* app. B.

30. *Id.* art. VII(1). In addition to these instruments, during this era and up to the present, a complex web of treaties and agreements has been concluded to address in a more targeted fashion vertical proliferation through measures of strategic arms control and limitation. For notable examples of such agreements in the nuclear context, see Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions (SORT), May 24, 2002, U.S.-Russ., S. TREATY DOC. NO. 107-8 (2002); Treaty on Further Reduction and Limitation of Strategic Offensive Arms (START II), Jan. 3, 1993, U.S.-U.S.S.R., S. TREATY DOC. NO. 103-1 (1993); Treaty on Reduction and Limitation of Strategic Offensive Arms (START I), July 31, 1991, U.S.-U.S.S.R., S. TREATY DOC. NO. 102-20 (1992); Treaty on the Limitation of Strategic Offensive Arms and Protocol Thereto (SALT II), June 19, 1979, U.S.-U.S.S.R., S. EXEC. DOC. Y, 96-1 (1979); Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (SALT I), May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3462.

31. NPT, *supra* note 18, art. III(1). On safeguards, see generally FRANK BARNABY ET AL., *NUCLEAR ENERGY AND NUCLEAR WEAPON PROLIFERATION* (1979); DAVID FISCHER, *HISTORY OF THE INTERNATIONAL ATOMIC ENERGY AGENCY: THE FIRST FORTY YEARS* (1997); DAVID FISCHER & PAUL SZASZ, *SAFEGUARDING THE ATOM: A CRITICAL APPRAISAL* (1985).

safeguards agreements, all nuclear materials put to peaceful use at civilian facilities within the jurisdiction of the non-nuclear weapon state must be declared to the IAEA, whose inspectors are to be given regular access to the facilities for purposes of monitoring and inspections. Because of its comprehensive character, this NPT structure is referred to as the Full Scope Safeguards System.³² Compliance with IAEA safeguards agreements is verified under this inspection scheme, and reports are submitted to the IAEA Board of Governors. If that body determines that there has been a breach either of a safeguards agreement or of the provisions of the NPT itself, it can, in accordance with its statutory procedures, refer the matter to the U.N. Security Council for that body's deliberation, action, and potential authorization of measures to remedy the breach, including at the extreme the use of the Security Council's powers under Chapter VII of the U.N. Charter.³³

Article III(2) of the NPT provides the international legal basis for all nuclear export controls.³⁴ It specifies that parties to the treaty will not transfer nuclear (fissionable) materials, or any "equipment or material especially designed or prepared for the processing, use or production of special fissionable material," to any non-nuclear weapon state for peaceful purposes unless such material is subject to the safeguards specified in Article III(1).³⁵ Although not formally a part of the NPT treaty regime, shortly after the NPT entered into force a group of NPT-signatory supplier states and potential supplier states of nuclear materials gathered to clarify the technical implications of NPT export controls as well as to establish a continuing forum for the interpretation of Article III(2)'s broad export control provisions. The participants at this meeting formed the nucleus of a group that came to be known as the Zangger Committee.³⁶ The Zangger Committee continued to meet periodically and eventually established both a set of understandings adopted by all committee members, and a "Trigger List" composed of items the export of which should trigger the requirement of safeguards.³⁷

32. See Fritz Schmidt, *NPT Export Controls and the Zangger Committee*, NONPROLIFERATION REV., Fall-Winter 2000, at 136, 137.

33. Statute of the International Atomic Energy Agency, Oct. 26, 1956, art. III(b), 8 U.S.T. 1093, 276 U.N.T.S. 3.

34. On the role that export controls can play in nonproliferation efforts and on their limitations, see generally GARY K. BERTSCH & SUZETTE GRILLOT, *ARMS ON THE MARKET: REDUCING THE RISK OF PROLIFERATION IN THE FORMER SOVIET UNION* (1998); PETER VAN HAM, *MANAGING NON-PROLIFERATION REGIMES IN THE 1990S: POWER, POLITICS AND POLICIES* (1994); ERIC H. NOEHRENBERG, *MULTILATERAL EXPORT CONTROLS AND INTERNATIONAL REGIME THEORY: THE EFFECTIVENESS OF COCOM* (1995); Kathleen Bailey, *Nonproliferation Export Controls: Problems and Alternatives*, in *PROLIFERATION AND EXPORT CONTROLS* (Kathleen Bailey & Robert Rudney eds., 1993); David S. Gualtieri, *The System of Non-proliferation Export Controls*, in *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* (Dinah Shelton ed., 2000); Richard Cupitt & Suzette Grillo, *COCOM Is Dead, Long Live COCOM: Persistence and Change in Multilateral Security Institutions*, 27 BRIT. J. POL. SCI. 361 (1997); Daniel H. Joyner, *Restructuring the Multilateral Export Control Regime System*, 9 J. CONFLICT & SECURITY L. 181 (2004); Michael Lipson, *The Reincarnation of COCOM: Explaining Post-Cold War Export Controls*, NONPROLIFERATION REV., Winter 1999, at 33.

35. NPT, *supra* note 18, art. III(2).

36. See generally Schmidt, *supra* note 32; Fritz Schmidt, *The Zangger Committee: Its History and Future Role*, NONPROLIFERATION REV., Fall 1994, at 38; CTR. FOR NONPROLIFERATION STUDIES, *Zangger Committee (ZAC)*, in *INVENTORY OF INTERNATIONAL NONPROLIFERATION ORGANIZATIONS AND REGIMES* (2002), available at http://www.nti.org/e_research/official_docs/inventory/pdfs/zang.pdf.

37. CTR. FOR NONPROLIFERATION STUDIES, *supra* note 36.

The explosion of a nuclear device by India in May 1974, in addition to increased activity among other non-nuclear weapon states to create a full nuclear fuel cycle, led to heightened concern among supplier states regarding nuclear proliferation.³⁸ In 1975, a new group of supplier states met in London with the purpose of supplementing the Zangger Committee's work in the field of nuclear export controls. Over successive meetings, this group became known unofficially as the London Club and officially as the Nuclear Suppliers Group (NSG).³⁹

In 1976, NSG member states produced a document entitled *Guidelines on Nuclear Transfers*, which was accepted by all fifteen members in 1977 and published in February 1978. The NSG guidelines incorporated the Zangger Committee's trigger list and largely mirrored the committee's understandings. The document also went beyond the context of the NPT to cover nuclear transfers to any non-nuclear weapon state.⁴⁰

In 1992, the NSG produced a supplementary regime for the coordination and harmonization of national export controls on dual-use items—those materials and technologies with both legitimate commercial and potential WMD-related uses. The group felt an imperative to take this step after it became clear that one of the greatest facilitators of the formidable yet clandestine Iraqi nuclear weapons program was the importation, through various methods ranging from open purchase to covert indirect acquisition, of dual-use items from Western companies.⁴¹ This arrangement was formally adopted by the what had by then grown to twenty-seven NSG members at their 1992 plenary meeting in Warsaw, and both the resulting guidelines and trigger list were published by the IAEA in July 2002.⁴²

A comparable system of safeguards and a multilateral export control regime exists in the chemical weapons area, coordinated through and monitored by the Organization for the Prohibition of Chemical Weapons and the Australia Group, with the Australia Group covering under its mandate the coordination and harmonization of national export controls in the areas of both chemical and biological weapons-related materials.⁴³

3. *Delivery Means*

It is significant to note in this context that—as U.S. officials discovered to their dismay upon consultation with their lawyers in the *So San* case—there is no multilateral treaty regulating the possession, development, or trade of

38. See Tadeusz Strulak, *The Nuclear Suppliers Group*, NONPROLIFERATION REV., Fall 1993, at 2; Nuclear Suppliers Group, History of the NSG, at <http://www.nuclearsuppliersgroup.org/history.htm> (last visited Apr. 20, 2005).

39. Strulak, *supra* note 38, at 2.

40. *Id.* at 3.

41. David Albright & Mark Hibbs, *Iraq's Shop-Till-You-Drop Nuclear Program?*, BULL. OF ATOM. SCIENTISTS, Apr. 1992, at 26-37; David A. Kay, *Denial and Deception of WMD Proliferators: Iraq and Beyond*, WASH. Q., Nov. 1994, at 85, 90; James Holmes & Gary Bertsch, *Tighten Export Controls: Loose Standards Will Breed New Saddams*, DEFENSE NEWS, at <http://www.defensenews.com/-sgmlparse2.php?F=archive2/20030505/atpc4401624.shtml> (May 5, 2003).

42. See Daniel H. Joyner, *The Nuclear Suppliers Group: History and Functioning*, 10 INT'L TRADE L. & REG. (forthcoming 2005).

43. GOLDBLAT, *supra* note 17, at 142-43, 149, 323-24, 330-31.

missile technologies. Such technologies, in addition to their capacities for carrying conventional weapon payloads, are relevant to WMD regulation as the most strategically useful and lethal means of delivery of many WMD systems. This particular area has always bedeviled and resisted efforts at multilateral normative regulation, due largely to the fact that missile technologies are by far the most dual-use in character among all WMD-related technologies.⁴⁴ Missile components—unlike, for example, nuclear weapon-grade fissile materials—have many legitimate civilian uses quite apart from their military uses, many of which are themselves widely considered to be legitimate. These uses include, most importantly, peaceful space exploration and development programs.⁴⁵ To add to the difficulty, there is virtually no means available to distinguish between a civilian space missile program and a military missile program until the very late stages of its development. Thus normative progression in this area has been effectively stalled over difficulties in addressing the specific technologies involved by means of formally binding instruments due to the inability of such instruments to distinguish effectively between legitimate materials and technologies and those that should be subject to regulation in this rapidly changing technological landscape.⁴⁶

However, the Missile Technology Control Regime (MTCR) was founded as a non-binding political arrangement in 1987 for the purpose of controlling the proliferation of rocket and unmanned air vehicle systems capable of delivering WMD and their associated materials and technology. Its membership currently stands at thirty-three countries that use the MTCR as a forum for the coordination of export control measures specifically related to the two categories of missile-related items contained in the MTCR annex. Its intended goal is to restrict exports of these sensitive items and therefore inhibit their proliferation outside the boundaries of MTCR membership.⁴⁷

At the fifteenth plenary meeting of MTCR member states in October 2000, a draft International Code of Conduct generating demand-side norms was circulated and discussed, and by April 2002, eighty countries had purportedly agreed on a draft of the code at a meeting in Paris. The draft code was to contain a recitation of agreed-upon principles, commitments,

44. See *id.* at 346-48; see also AARON KARP, *BALLISTIC MISSILE PROLIFERATION: THE POLITICS AND TECHNICS* 52-56 (1996) (observing that “[b]y its very nature, rocket technology is equally suitable for civilian and military applications”); Wyn Bowen, *U.S. Policy on Ballistic Missile Proliferation: The MTCR’s First Decade (1987-1997)*, *NONPROLIFERATION REV.*, Fall 1997, at 21, 23 (recognizing the possibility of a “diversion of [missile] technology” from civilian to military uses); Deborah A. Ozga, *A Chronology of the Missile Technology Control Regime*, *NONPROLIFERATION REV.*, Winter 1994, at 66, 67 (noting that the Missile Technology Control Regime permits sales of dual-use technology so long as recipient states furnish “sufficient end-use guarantees”).

45. *PEACEFUL AND NON-PEACEFUL USES OF OUTER SPACE: PROBLEMS OF DEFINITION FOR THE PREVENTION OF AN ARMS RACE* (Bhupendra Jasani ed., 1991).

46. See Victor Zaborosky, *Missile Proliferation Risks of International Space Cooperation*, 165 *WORLD AFF.* 185, 194 (2003) (“From the technical and technological point of view [one can] never develop a ‘threshold’ that would divide ‘safe’ civilian transfers . . . from exports used in a weapon program.”); see also Mark Smith, *Rules for the Road? The International Code of Conduct Against Ballistic Missile Proliferation*, *DISARMAMENT DIPLOMACY*, Mar.-Apr. 2002, at 10, available at <http://www.acronym.org.uk/dd/dd63/63op3.htm> (difficult to set international norms for missile control due to perceived discrimination).

47. GOLDBLAT, *supra* note 17, at 122-24.

incentives for compliance, and confidence-building measures.⁴⁸ While the commitments were carefully worded so as to avoid the attachment of legal obligations to their terms, they did include commitments by signatory states to ratify a number of international treaties on space exploration, to undertake measures to prevent the proliferation of WMD-capable missiles, to reduce national holdings of the same, to exercise vigilance in the consideration of assistance to space-launch vehicle programs in other countries (a notorious front for military-use missile and WMD-delivery system programs), and not to support ballistic missile programs in countries that “might be developing or acquiring weapons of mass destruction in contravention of the obligations under, and norms established by, the disarmament and non-proliferation treaties.”⁴⁹ The resulting Hague International Code of Conduct Against Ballistic Missile Proliferation has since come into force as a non-binding arrangement among its ninety declarants.⁵⁰

C. *Counterproliferation*

Notwithstanding all the effort and resources expended by the international community in concluding and maintaining these treaties and other normative regimes, along with their significant utility in accomplishing the nonproliferation of WMD and related materials and technologies, serious students of WMD proliferation have long understood that the nonproliferation regime they comprise is not a perfect system and was never designed or expected to bring about a zero proliferation reality. Borders are too porous, corruption at both high and low levels is too rampant in places where WMD materials and technologies are already insufficiently secure, and both legitimate commercial and illicit trafficking in WMD-related and dual-use items and technologies are too big a business for states to hope to control it completely and effectively through state-to-state treaties and supply-side export control regimes. Adding to the difficulties faced by the international community in efforts to prevent proliferation through multilateral normative regimes is the increasing phenomenon of secondary proliferation, or proliferation from non-traditional supplier states, many of which remain outside the existing regime structures.

Indeed, leakages and transfers to places and groups of concern to many powerful countries, both of materials and of intangible technological know-how, are disturbingly commonplace. There are currently nine declared or suspected nuclear weapon states and many more states that possess chemical and biological weapons; a number of others are suspected of having mature clandestine weapon development programs.⁵¹ When U.N. inspectors entered

48. See Smith, *supra* note 46.

49. Draft International Code of Conduct Against Ballistic Missile Proliferation § (b)(5) (2002), <http://projects.sipri.se/expcon/drafcoc.htm> (last visited Apr. 20, 2005).

50. International Code of Conduct Against Ballistic Missile Proliferation (2002), <http://projects.sipri.se/expcon/hcocfinal.htm> (last visited Apr. 20, 2005).

51. China, France, Russia, the United Kingdom, and the United States have been officially recognized as possessing nuclear weapons. States widely believed to possess nuclear arsenals are India, Israel, North Korea, and Pakistan. Iran is suspected of undertaking an active program to produce nuclear

Iraq after the 1991 Gulf War, they found a covert WMD program of staggering proportions, the development of which, as previously noted, had been significantly facilitated by dual-use goods obtained from Western companies, in many cases through transactions that were arguably legal under national export control laws.⁵²

Concerns flowing from the reality of WMD proliferation have been aggravated in recent years due to the emergence of state actors as well as sophisticated and maturing groups of non-state actors with both the resource base and either the ideological or the strategic incentive to acquire and contemplate the use of WMD for the accomplishment of objectives perceived by many of the most powerful members of the international community as inimical to international peace and security. The rise to prominence and capability of complex and well-funded crossborder organizations—the practices of which include the use of terroristic and violent actions calculated to bring about desired objectives grounded in what are alleged by their intended victims to be non-rational ideologies—that are suspected of having access to or being in the process of developing WMD has in recent years formed a threat nexus continually on the lips of international officials.⁵³

Since the attacks of September 11, 2001, a number of voices in the international community, particularly from states that feel especially threatened by and vulnerable to WMD attacks staged by the aforementioned variety of ideology-driven non-state actors, have called for a refocusing of attention and lesser reliance on the traditional treaties and regimes approach to stemming the proliferation of WMD. These commentators point to the previously described limitations of classical nonproliferation efforts and argue that, either as a supplement to or as a replacement of this system of diplomatic relations and normative multilateral frameworks, states should increase their emphasis on and employment of proactive and forceful efforts of counterproliferation, including the use of both preemptive and preventive strategies for dealing with potential threats of WMD proliferation and use.⁵⁴

A word on definition is in order. The terms nonproliferation and counterproliferation, as used herein and elsewhere in the literature on WMD proliferation, represent attempts to give some categorization to a variety of often-interlinked concepts and policies. In this sense, the distinction may rightly be challenged as largely arbitrary and semantic. However, the purpose of this categorization is essentially to recognize sometimes subtle (and sometimes not-so-subtle) differences in both methodology and purpose found

weapons. Arms Control Ass'n, Nuclear Weapons: Who Has What at a Glance, at <http://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat.asp> (Apr. 2005).

52. See Albright & Hibbs, *supra* note 41; Holmes & Bertsch, *supra* note 41.

53. U.N. Security Council Resolutions 1540 and 1373 are examples of heightened international concern. S.C. Res. 1540, U.N. SCOR, 59th Sess., 4956th mtg., U.N. Doc. S/RES/1540 (2004); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

54. See Jason D. Ellis, *The Best Defense: Counterproliferation and U.S. National Security*, WASH. Q., Spring 2003, at 115 (noting that “the best defense against proliferation and terrorism is a good offense”); see also JASON D. ELLIS & GEOFFREY D. KIEFER, *COMBATING PROLIFERATION: STRATEGIC INTELLIGENCE AND SECURITY POLICY* 192-214 (2004); Brad Roberts, *Proliferation and Nonproliferation in the 1990s: Looking for the Right Lessons*, *NONPROLIFERATION REV.*, Fall 1999, at 70, 72 (noting that counterproliferation is “an essential new tool of policy, one made necessary by the fact that nonproliferation and arms control have not fully prevented proliferation”).

in the policies and philosophies of various policymakers relative to WMD proliferation. Thus nonproliferation activities may be broadly described as efforts calculated—if not always perfectly or effectively implemented—to slow the proliferation of WMD-related technologies and preferably to effect a reversal of proliferation trends through requiring the disarmament of existing material stockpiles. Activities under this category include possession and proliferation treaties, safeguards and inspection regimes, export control regimes, export control assistance measures, and economic sanctions.

Counterproliferation activities may be broadly defined as efforts either to preclude specific actors from obtaining WMD-related materials and technologies, or to degrade and destroy an actor's existing WMD capability. The blurry distinction between the two concepts is made clearer through a listing of activities usually classified as counterproliferation, in juxtaposition to the treaties and regimes frameworks described previously. Under the heading of counterproliferation activities can be grouped traditional efforts of deterrence and containment, efforts of defense and mitigation of attack, use of early detection technologies, interdiction of suspected transfers of sensitive items, and preemptive and preventive acts of force against either actual or potential possessors of WMD.

As is evident from the listing of activities subsumed under the two headings, neither is a newcomer to policy circles, and both varieties of activities have been carried out, to greater or lesser extent, for many years through both national and international efforts. However, there is substantial evidence to support the assertion that the call of the aforementioned counterproliferation advocates has been heard. Particularly in the policy positions of the United States and some other powerful states, the momentum has begun to swing toward an increased emphasis on proactive and often unilateral or small-coalition-based counterproliferation activities, and away from nonproliferation efforts based on diplomacy and international law.⁵⁵

In both the September 2002 *National Security Strategy* and the December 2002 *National Strategy to Combat Weapons of Mass Destruction*, U.S. policymakers have signaled a significant shift in WMD-related policies toward counterproliferation principles. As stated in the latter document:

We know from experience that we cannot always be successful in preventing and containing the proliferation of WMD to hostile states and terrorists

. . . .

Because deterrence may not succeed, and because of the potentially devastating consequences of WMD use against our forces and civilian population, U.S. military forces and appropriate civilian agencies must have the capability to defend against WMD-armed adversaries, including in appropriate cases through preemptive measures.⁵⁶

This document, interestingly, mentions counterproliferation techniques first and includes an exhaustive explanation of policies to be pursued with

55. See Ellis, *supra* note 54, at 116-17.

56. NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 2-3 (2002), available at www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf.

regard to interdiction, deterrence and defense, and mitigation. *The National Security Strategy* discusses the concept of preemption further:

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile attacks by our adversaries, the United States will, if necessary, act preemptively.

. . . [I]n an age where the enemies of civilization openly and actively seek the world’s most destructive technologies, the United States cannot remain idle while dangers gather.⁵⁷

As Jason Ellis has succinctly written:

[T]he rise of counterproliferation to national stature really begins with the current administration

. . . .

. . . The Bush version gives continued importance to “strengthened” nonproliferation efforts but downgrades the prior treaties-and-regimes approach, elevating the status of proactive counterproliferation efforts to deter and defend against WMD and missile threats as well as effective consequence management should such weapons be used.⁵⁸

The PSI is part of this resetting of emphasis in the United States and in a limited number of other countries to favor counterproliferation efforts. It is closely akin to what has become known as preemption policy, as iterated *inter alia* in the above-mentioned U.S. policy documents.⁵⁹ Both the PSI and preemption policy more generally share the classic, broad nonproliferation aim of preventing the development and use of WMD; yet they differ from traditional nonproliferation approaches in that they prescribe action in situations in which that use is not an imminent reality but rather is perceived as a serious, developing threat.⁶⁰

V. INTERNATIONAL LAW

A. *Self-Defense*

This distinction and emphasis on anticipatory activity instead of preventive normativity—the very appeal to counterproliferation proponents—make both the general policy of preemption and the particular strategies embodied in the PSI a focus of concern for international lawyers.⁶¹ It is to

57. NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

58. Ellis, *supra* note 54, at 116-17.

59. See Robert S. Litwak, *The New Calculus of Pre-emption*, SURVIVAL, Winter 2002, at 53.

60. The 2002 *National Security Strategy* argues for a changed conception of the principle of imminence in light of the “capabilities and objectives of today’s adversaries.” NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, *supra* note 57, at 15.

61. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 702 (6th ed. 2003); Michael Byers, *Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, 11 J. POL. PHIL. 171 (2003); Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT’L. L. 590 (2003).

these legal concerns that this Article now turns. Since self-defense has been offered as one justificatory rubric for not only preemptive action in the broader sense but also for the PSI specifically,⁶² this Section will proceed to consider briefly the contours of the modern right of self-defense, particularly as it bears upon the use of force by states against other states before an attack by the target state has commenced.

A review of the principles of law currently governing international uses of force reveals a significant legal distinction between two categories of actions and related justificatory rubrics often discussed under the heading of preemption. Properly distinguished, these categories are anticipatory self-defense and preventive self-defense.⁶³

Anticipatory self-defense may be defined as an attack on a state that actively threatens violence and has the capacity to carry out that threat, but which has not yet materialized or actualized that threat through force. Anticipatory self-defense has a solid historical foundation in international law as a principle developed in state practice throughout the classical period, and it was originally an extension of states' understanding of their right to self-preservation.⁶⁴ By the mid-nineteenth century, however, the right of anticipatory self-defense as a matter of customary international law had been circumscribed by at least two important limiting principles—necessity and proportionality.

The correspondence between U.S. Secretary of State Daniel Webster and British officials during the famous *Caroline* incident is widely understood as offering a correct iteration of customary international law pertaining at the time:

Mr. Webster to Mr. Fox (April 24, 1841)

It will be for . . . [Her Majesty's] Government to show a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorised them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.⁶⁵

Ian Brownlie has suggested that state practice between 1841 and 1945 served to limit the flexibility of the principle of anticipatory self-defense even further, leaving it in a tenuous state of existence at the time the U.N. Charter

62. Greg Sheridan, *US "Free" to Tackle N. Korea*, THE AUSTRALIAN, July 9, 2003, at 1.

63. See ANTHONY AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 71-79 (1993); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 257-59 (1963); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 111-15 (2000).

64. See BROWNLIE, *supra* note 63, at 257.

65. THE PAPERS OF DANIEL WEBSTER, DIPLOMATIC PAPERS, 1841-1843, at 43 (Kenneth E. Shewmaker et al. eds., 1983). The *Caroline* was a U.S.-registered steamer hired to ferry provisions across the Niagara River to supply Canadian rebels taking part in the insurrection against British colonial rule in 1837. On December 29, 1837, several boatloads of British soldiers came across the river onto the U.S. side and set fire to the *Caroline*, dragged her into the river current, and sent her blazing over Niagara Falls, killing one man in the process. The ensuing diplomatic correspondence between U.S. and U.K. officials has come to be regarded as a reliable statement of contemporary customary international law on self-defense. For discussion of the *Caroline* incident, see WILLIAM BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 916-17 (3d ed. 1971).

was drafted.⁶⁶ This position would seem to be supported through even more recent events, such as the 1981 preemptive attack by Israel against a suspected Iraqi nuclear weapons site at Osirak. Resolution 487 of the U.N. Security Council, which was adopted unanimously, denounced the incident as a “clear violation of the Charter of the United Nations” notwithstanding Israel’s believable (and later validated) claim regarding Iraq’s clandestine WMD program and its connection to the site.⁶⁷

For signatories of the U.N. Charter, resort to a right of anticipatory self-defense must be seen as highly questionable in light of the plain meaning of the text of Article 51⁶⁸ of that document.⁶⁹ Nevertheless, some have contended that the “inherent right” language in Article 51 has worked a retention of the rights of self-defense operable under pre-Charter customary law for U.N. Charter signatories.⁷⁰ This is a plausible position, but in the final analysis it

66. BROWNLIE, *supra* note 61, at 702.

67. S.C. Res. 487, U.N. SCOR, 36th Sess., 2288th mtg., U.N. Doc. S/RES/487 (1981); *see also* Louis Rene Beres & Yoash Tsiddon-Chatto, “*Sorry*” *Seems To Be the Hardest Word*, JERUSALEM POST, June 5, 2003, at B8.

68. Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.

69. [W]here the Charter has a specific provision relating to a particular legal category, to assert that this does not restrict the wider ambit of the customary law relating to that category or problem is to go beyond the bounds of logic. Why have treaty provisions at all? . . . It is submitted that a restrictive interpretation of the provisions of the Charter relating to the use of force would be more justifiable and that even as a matter of “plain” interpretation the permission in Article 51 is exceptional in the context of the Charter and exclusive of any customary right of self-defence.

BROWNLIE, *supra* note 63 at 273; *see also* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 803-04 (Bruno Simma ed., 2d ed. 2002); AHMED RIFAAT, INTERNATIONAL AGGRESSION: A STUDY OF THE LEGAL CONCEPT; ITS DEVELOPMENT AND DEFINITION IN INTERNATIONAL LAW 124-27 (1979). The Vienna Convention on the Law of Treaties specifies that the plain (ordinary) meaning of a treaty provision, in context and in light of its object and purpose, should be given preeminence in interpretation. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 321, 340. Article 32(b) of the Vienna Convention stipulates that supplementary means of interpretation, including preparatory work on the treaty, can be employed only when the foregoing analysis of ordinary meaning leaves the meaning ambiguous or obscure, or “leads to a result which is manifestly absurd or unreasonable.” *Id.* art. 32(b).

70. It is . . . fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except in so far as they have surrendered them under the Charter . . . [T]he view of Committee I at San Francisco was that this prohibition [Article 2(4)] left the right of self-defense unimpaired.

DEREK BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 185 (1958); *see also* Steven Schwebel, *Aggression, Intervention and Self-Defense in Modern International Law*, 136 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONALE 411, 478-83 (1972). Although addressing a different substantive question at the time, the International Court of Justice (ICJ), in its 1986 *Military and Paramilitary Activities* decision, held:

Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature . . . Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures

does little to help those wishing to justify a broad preemptive right. For even if this contention is granted, the right of anticipatory self-defense must still be limited at least by the *Caroline* factors of necessity and proportionality, if not in an even more restrained fashion.⁷¹

Particularly under these limiting factors, anticipatory self-defense would seem an inapposite and unworkable principle in the context of the PSI. The entire thrust of the principles underlying the PSI is a preventive one—to preclude the acquisition of potentially dangerous technologies by states and non-state actors. There has never been expressed by proponents of the PSI an understanding of an imminence of threat from particular foreign target vessels which under the *Caroline* formula would trigger even the customary right of anticipatory self-defense on the part of interdicting states.

Preventive self-defense may be described as an attack against another state (or in the PSI context, a vessel under the jurisdiction and flag of another state) farther back along the *ex ante* chronological line—when a threat is feared or suspected, but there is no evidence that materialization of the threat is imminent. The doctrine was never a part of either moral or legal rights argumentation in the classical period. It finds no foundation as a principle of customary international law in modern times, and any attempt to justify this extreme interpretation of a right includable in the legal concept of the right of self-defense by reference to the U.N. Charter is a clear exercise in futility.

Admittedly, this is a difficult area, in which significant tensions exist between current international legal principles as described above and what many feel is a set of modern security realities that has made effective regulation of international uses of force by reference to those principles both practically and politically unfeasible. Although this is an interesting and important debate, and one that will likely shape international use-of-force law going forward, it cannot be done justice here. In the present examination, the current status of international law must be employed for the purpose of legal analysis, as it is the normative foundation currently binding upon states in their policy considerations.

The point of the current discussion is that the right of states to self-defense is not sufficient to act as a broad justifying principle for the PSI. The sort of preventive right that would be necessary for the task is not found in modern international law regulating the use of force. Moreover, law exists on

that are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the "armed attack" which, if found to exist, authorizes the exercise of the "inherent right" of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which "subsumes and supervenes" customary international law. It rather demonstrates that in the field in question . . . customary international law continues to exist alongside treaty law.

Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27). However, while standing for the principle that custom influences Charter interpretation for U.N. members in this area, the ICJ's opinion in *Military and Paramilitary Activities* does not establish a rule for circumstances in which there is a clear conflict between custom and treaty law. In such a situation, it could still be argued that the treaty constitutes a special and separate regime and that for treaty signatories a conflict between treaty law and customary law must be resolved in favor of the treaty rule.

71. On the principles of necessity and proportionality in customary international law, see BROWNLEE, *supra* note 63, at 257-64.

the particular subjects at issue that is both *lex specialis* and *lex posteriori*, and that therefore takes priority as a governing legal framework.⁷² The international law of the sea—specifically the 1958 Geneva Conventions,⁷³ the 1982 Law of the Sea Convention (LOS Convention),⁷⁴ and related custom—addresses in a much more focused manner the rights and duties of both coastal states and seagoing vessels, including aircraft, and provides concrete and developed provisions regarding interdiction of foreign vessels. It is within the parameters of this body of law, and not the law of self-defense generally, that the PSI must be legitimized, if at all.

B. *The Law of the Sea*

Since the signing of the Treaty of Westphalia in 1648 and the establishment of the principle of state sovereignty as a geopolitical paradigm, states have jealously guarded and defended the right to be the sole source of legal prescription over their subject territory and to rule legitimately within their borders without the interference of outside authorities.⁷⁵ Within this sphere of entitlement, international law has come to classify state authority as near-absolute and exclusionary. This classification applies not only to the land territory of a state but also to its internal waters (e.g., rivers, bays, harbors), with extremely limited exceptions.⁷⁶ In recognition of this authority, international law does not accord foreign ships a general right of access to a state's ports. States have a wide authority to prescribe conditions regulating entry to ports and may close ports to all international trade, if they so desire. Once a foreign vessel has entered a state's port, it surrenders itself to the territorial jurisdiction of the state; the state may enforce its national laws upon the ship and with respect to those on board, subject to the normal considerations of diplomatic and sovereign immunities that most often come into play in the case of warships.⁷⁷

Along with a state's rights to control its land and internal waters, it quickly became generally accepted that states also had rights to control the sea area directly adjacent to their territory. For centuries, however, international law determined both the breadth of the sea area to which this right of control attached and the precise nature of states' juridical competence over it. In time, a legal distinction was drawn between the territorial sea directly adjacent to a state's coastline and the sea area farther away from its coast. The breadth of

72. See D.J. HARRIS, *CASES & MATERIALS ON INTERNATIONAL LAW* 901 (5th ed. 1998) ("The 1982 Law of the Sea Convention, Article 110(1), makes no provision for jurisdiction over vessels on the high seas on the basis of self-defense.")

73. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 [hereinafter Geneva Conventions].

74. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention].

75. See generally STEPHEN D. KRASNER, *SOVEREIGNTY* 3-42 (1999).

76. See LEO JOSEPH BOUCHEZ, *THE RÉGIME OF BAYS IN INTERNATIONAL LAW* 1 (1963); MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 327-73 (1962).

77. See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 61-62 (3d ed. 1999).

the territorial sea was eventually determined to extend up to twelve miles from the baseline,⁷⁸ and all sea area farther than twelve miles out came to be considered part of the high seas, or international waters, subject to an entirely different regime of legal prescriptions with much greater limitations on the authority of states to unilaterally regulate.⁷⁹

1. Sources

First, a note on the sources of international law in this area is due. The law of the sea is one of the oldest areas of international law. The history of normative regulation of the sea lanes stretches back to medieval pronouncements of rules governing maritime commerce found in collections such as the *Consolato del mare* and the English *Black Book of the Admiralty*.⁸⁰ The evolution of international legal principles in this area has continued through to modern times, and in the twentieth century it has found codified expression in a number of significant multilateral treaties as well as through the rule-generating processes of customary international law.⁸¹

In terms of treaty law, the 1958 Geneva Conventions—consisting of the Convention on the Continental Shelf, the Convention on Fishing and Conservation of the Living Resources of the High Seas, the Convention on the High Seas, and the Convention on the Territorial Sea and the Contiguous Zone (Territorial Sea Convention)—were a landmark achievement of international regulation of the world's seas in terms of comprehensiveness of both subject matter covered and number of signatories.⁸² The increasing presence in the United Nations of newly independent states that had had no say in the drafting of the 1958 Geneva Conventions, particularly in the area of national authority to regulate the sea bed, however, led to initiatives in subsequent decades to amend the law contained in the 1958 conventions. Thus in 1970, General Assembly Resolution 2750 called for a U.N. conference to produce a new, comprehensive convention on the law of the sea.⁸³

The result of the Third United Nations Conference on the Law of the Sea was the signing in 1982 of the LOS Convention.⁸⁴ The number of states party to the convention currently stands at 157, including almost all of the major

78. See W. MICHAEL REISMAN & GAYL S. WESTERMAN, STRAIGHT BASELINES IN INTERNATIONAL MARITIME BOUNDARY DELIMITATION 102-03 (1992).

79. See LOS Convention, *supra* note 74, art. 3; BROWNLIE, *supra* note 61, at 180-81.

80. See R.P. ANAND, THE ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA 2-3 (1983).

81. On the history, evolution, and guiding principles of the international law of the sea, see generally *id.*; DEREK BOWETT, LAW OF THE SEA (1967); E.D. BROWN, THE INTERNATIONAL LAW OF THE SEA (1994); C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA (6th ed. 1967); A HANDBOOK ON THE NEW LAW OF THE SEA (René-Jean Dupuy & Daniel Vignes eds., 1991); THOMAS WEMYSS FULTON, THE SOVEREIGNTY OF THE SEA (1911); MCDUGAL & BURKE, *supra* note 76; 1-2 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA (I.A. Shearer ed., 1984); SHIGERU ODA, INTERNATIONAL LAW AND THE RESOURCES OF THE SEA (1979); J.R.V. PRESCOTT, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD (1985); H.A. SMITH, THE LAW AND CUSTOM OF THE SEA (1959); JAMES C.F. WANG, OCEAN POLITICS AND LAW (1992).

82. Geneva Conventions, *supra* note 73.

83. G.A. Res. 2750, U.N. GAOR, 25th Sess., Supp. No. 28, at 26, U.N. Doc. 28/A/8028 (1970).

84. LOS Convention, *supra* note 74.

seagoing nations of the world.⁸⁵ For signatories of both the 1958 Geneva Conventions and the LOS Convention, the latter takes preeminence by its terms.⁸⁶

However, important to discussions regarding the United States and its obligations under the international law of the sea is the somewhat anomalous fact that, while a signatory of the 1958 Geneva Conventions, the United States has never acceded to the LOS Convention. As previously noted, the main differences between the 1958 Geneva Conventions and the LOS Convention regard the regulation of the deep sea bed, and indeed, it is this sensitive issue area that has prevented the United States from signing the 1982 treaty.⁸⁷ The two legal regimes, however, are virtually identical on matters of the right of innocent passage and interdiction, rendering this anomaly irrelevant to the aims of this Article. With respect to areas in which the treaty regimes do differ, it is important to note that the 1982 LOS Convention has arguably, and quite likely, passed in its entirety into customary international law, thereby binding the United States to its provisions.⁸⁸

2. Territorial Sea

Over the area of the territorial sea, states have asserted, and international law has come to recognize, the essential extension of state sovereignty beyond land territory.⁸⁹ The 1958 Territorial Sea Convention expresses this understanding:

The sovereignty of a state extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

This sovereignty is exercised subject to the provisions of these articles and to other rules

85. See United Nations, Division for Ocean Affairs and the Law of the Sea, at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (last updated Jan. 5, 2005).

86. LOS Convention, *supra* note 74, art. 311.

87. See CHURCHILL & LOWE, *supra* note 77, at 237.

88. *Id.* at 24.

89. See *id.* at 71-101; see also FULTON, *supra* note 81, at 537-58 (discussing the development of Great Britain's claims to its territorial waters); P.C. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 115-208 (1927) (analyzing the validity of sovereignty over territorial waters); J.K. OUDENDIJK, *STATUS AND EXTENT OF ADJACENT WATERS* (1970); J. ASHLEY ROACH & ROBERT W. SMITH, *UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS* (2d ed. 1996); Philip Allott, *Language, Method and the Nature of International Law*, 45 BRIT. Y.B. INT'L L. 79, 80 (1971); W.E. Butler, *Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy*, 81 AM. J. INT'L L. 331, 335-39 (1987) (discussing Soviet legislation implementing the LOS Convention's provisions); P.T. Fenn, *Origins of the Theory of Territorial Waters*, 20 AM. J. INT'L L. 465 (1926); Erik Franckx, *The U.S.S.R. Position on the Issue of Innocent Passage of Warships Through Foreign Territorial Waters*, 18 J. MAR. L. & COM. 33 (1987) (noting the limitation on state sovereignty imposed by the right of innocent passage); L.T. Lee, *Jurisdiction over Foreign Merchant Ships in the Territorial Sea: An Analysis of the Geneva Convention on the Law of the Sea*, 55 AM. J. INT'L L. 77 (1961) (discussing the validity of exercising sovereign power over merchant ships in territorial waters); D.P. O'Connell, *The Juridical Status of the Territorial Sea*, 45 BRIT. Y.B. INT'L L. 303, 304 (1971) (noting, with reference to the LOS Convention, that "[t]he function of international law is not to invest States with legal regimes but to secure recognition of regimens contrived by action of individual members"); D.R. Rothwell, *Coastal State Sovereignty and Innocent Passage: The Voyage of the Lusitania Expresso*, 16 MARINE POL'Y 427 (1992) (discussing Indonesia's attempt to assert its sovereignty to prevent the passage of the *Lusitania Expresso* through its territorial waters).

of international law.⁹⁰

The most significant principle compromising the sovereignty of states over their territorial sea is the right of innocent passage, as that concept developed both in the 1958 Territorial Sea Convention and in other sources of international law. As a preliminary point, it should be noted that the right of innocent passage through the territorial sea is limited to sea vessels and does not extend to aircraft in the space above the territorial sea. Due to the danger to states inherent in the abilities of aircraft to travel and maneuver at high speed and avoid detection, no right of innocent passage, either over a state's land territory or the territorial sea, has ever been conceded. Over aircraft in these areas, therefore, state sovereignty is at its apex.⁹¹

However, a right of innocent passage through territorial waters has long been maintained for sea vessels and has achieved the status of a legal entitlement in international law. This passage principle has evolved to include both direct passage through the territorial sea and passage with the intent of anchoring at port, inasmuch as that anchoring is incident to normal navigation or trade, or to force majeure.⁹²

The concept of innocence as an element of this right has been more complicated in its evolution. During the nineteenth and early twentieth centuries, the concept of innocence in passage through the territorial sea was thought to refer primarily to the disposition of the passage relative to the national law of the state having sovereignty over the territorial sea: innocence was lost when the laws of the coastal state were violated.⁹³ The 1930 Hague Conference adopted a text that loosened this strict tie to national law: "Passage is not innocent when a vessel makes use of the territorial sea of a coastal state for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that state."⁹⁴ While not requiring a breach of national law for innocence to be lost, this provision did require some act on the part of the vessel, other than the mere act of passage, for a loss of innocence to occur.⁹⁵ The International Law Commission's 1956 draft articles essentially adopted this view.⁹⁶

The commission's draft article on innocent passage was not accepted at the 1958 conference, however, and Article 14(4) of the Territorial Sea Convention was constructed to read: "[P]assage 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 these articles and with other rules

90. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 73, art. 1.

91. CHURCHILL & LOWE, *supra* note 77, ch. 4.

92. *Id.*

93. *Id.*

94. *The Legal Status of the Territorial Sea*, League of Nations Doc. C.351(b) M.145(b), art. 3 (1930), reprinted in 4 LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW 1415 (Shabtai Rosenne ed., 1975) (1930).

95. CHURCHILL & LOWE, *supra* note 77, at 83.

96. *Report of the International Law Commission to the General Assembly*, [1956] 2 Y.B. Int'l L. Comm'n 272, U.N. Doc. A/3159; see also *Corfu Channel* (Gr. Brit. v. Alb.), 1949 I.C.J. 4 (Apr. 9) (discussing the concept of innocent passage).

of international law.”⁹⁷ In their seminal work on the law of the sea, Churchill and Lowe comment on this provision:

This final text, which seems to be consistent with the actual practice of states, and so with customary law, clearly does not require the commission of any particular act, or violation of any law, before innocence is lost. Nor does violation of a coastal law necessarily remove innocence, unless the violation actually prejudices coastal interests.⁹⁸

The 1982 LOS Convention added to this relatively vague provision of the 1958 Territorial Sea Convention. Article 19 of the LOS Convention incorporates the text of Article 14(4) into its first paragraph. In its second paragraph, however, Article 19 goes on to provide that “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,”⁹⁹ proceeding to list, *inter alia*: weapons practice; spying; propaganda; launching or taking on board aircraft or military devices; embarking or disembarking persons or goods contrary to customs, fiscal, immigration, or sanitary regulations; and interference with coastal communication or other facilities. Article 19 then lists two broader additions to this list:

Article 19(2)

- (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 Charter of the United Nations; . . .

. . . .

- (l) any other activity not having a direct bearing on passage.¹⁰⁰

The addition of a delineated list of activities was intended to add objectivity to determinations regarding this right and to make such judgments less open to interpretation by the coastal state.¹⁰¹ As drafted, it appears to condition loss of innocence on some action or activity over and above mere passage. However, in the absence of language explicitly rebutting the presumption, the list must be interpreted as non-exhaustive. Moreover, the retention of the 1958 language in the first paragraph indicates that passage alone may justify interdiction, after all.¹⁰² In particular, Article 19(2)(a) is arguably wide enough to include threats of force against states other than the coastal state.¹⁰³

Interestingly, the question of the import of the activities listed in Article 19 of the LOS Convention was addressed in a bilateral treaty between the United States and the Soviet Union in 1989. Paragraph 3 of the Uniform Interpretation of Rules of International Law Governing Innocent Passage

97. Convention on the Territorial Sea and the Contiguous Zone, *supra* note 73, art. 14(4).

98. CHURCHILL & LOWE, *supra* note 77, at 85.

99. LOS Convention, *supra* note 74, art. 19(2).

100. *Id.* art. 19(2)(a)-(l).

101. CHURCHILL & LOWE, *supra* note 77, at 85.

102. *Id.*

103. *Id.*

states that "Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage."¹⁰⁴ While the binding weight of this interpretive declaration is certainly confined to the two treaty parties, its influence on customary international law is likely to be significant.¹⁰⁵

As the 1958 Territorial Sea Convention states in Article 16(1), in a provision echoed by Article 25(1) of the 1982 LOS Convention, once innocence is lost, so too is the right of innocent passage, and the foreign vessel is at that point subject to the full sovereignty of the coastal state, which may arrest the vessel for breach of its national laws.¹⁰⁶

3. *The Exclusive Economic Zone*

The Exclusive Economic Zone (EEZ) is a fairly recent concept in the law of the sea, and it represents a compromise of sorts reached among those states that desired a territorial sea extending 200 miles from the coastal baseline and those states that were wary of the extension of state sovereignty over so vast an area.¹⁰⁷ The EEZ is something of a hybrid between the classical concepts of the territorial sea and the high seas, and it can be claimed by states in an area not to exceed 200 miles beginning at the twelve-mile territorial sea mark. As regards the freedom of navigation, which is most pertinent to the discussion and analysis here, Article 58 of the LOS Convention, describing this freedom in the EEZ context, brings the convention regime into almost complete harmony with corresponding provisions regarding freedom of navigation, including aircraft overflight, on the high seas and indeed references those high seas provisions.¹⁰⁸ Thus for the purposes of this treatment, the areas of the EEZ—with the EEZ including the contiguous zone, if any—and the high seas will be considered subject to the same legal regime.

104. Uniform Interpretation of Rules of International Law Governing Innocent Passage, Sept. 23, 1989, U.S.-U.S.S.R., para. 3, 89 DEP'T ST. BULL. 25, 26 (Nov. 1989), reprinted in 28 I.L.M. 1444, 1446 (1989).

105. CHURCHILL & LOWE, *supra* note 77, at 6.

106. *Id.* at 87.

107. On the Exclusive Economic Zone, see generally DAVID JOSEPH ATTARD, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW 1-31 (1987); CHURCHILL & LOWE, *supra* note 77, at 161-80; BARBARA KWIATKOWSKA, THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA 19-24 (1989); E.D. BROWN, *The Exclusive Economic Zone: Criteria and Machinery for the Resolution of International Conflicts Between Different Users of the EEZ*, 4 MARITIME POL'Y & MGMT. 325 (1977); William T. Burke, *National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea*, 9 OCEAN DEV. & INT'L L. 289, 290 (1981) (noting that state claims with respect to the EEZ "sometimes depart significantly from the negotiating texts produced in the LOS conference or any other indication of shared expectations about coastal authority"); Jonathan I. Charney, *The Exclusive Economic Zone and Public International Law*, 15 OCEAN DEV. & INT'L L. 233 (1985) (stating that the EEZ "in public international law is at a formative stage of development"); Lawrence Juda, *The Exclusive Economic Zone and Ocean Management*, 18 OCEAN DEV. & INT'L L. 305, 306 (1987) (claiming that states with an established EEZ are now "turning to the matter of implementation"); Bernard H. Oxman, *An Analysis of the Exclusive Economic Zone as Formulated in the Informal Composite Negotiating Text*, in LAW OF THE SEA: STATE PRACTICE IN ZONES OF SPECIAL JURISDICTION 57-78 (Thomas A. Clingan, Jr. ed., 1982).

108. LOS Convention, *supra* note 74, art. 58.

4. *The High Seas*

As previously mentioned, since the recognition of a legal delineation between the territorial sea (and later the EEZ) and the sea area beyond, two quite different legal regimes have evolved to govern the two separate areas.¹⁰⁹ Most noteworthy is the fact that “[t]he legal concept of the high seas includes not only the water column but also the superadjacent airspace as well as the sea bed and subsoil subject.”¹¹⁰ The legal regime governing the high seas has classically been defined by its primary emphasis on the principles of freedom of universal usage and exclusivity of jurisdiction over vessels of the flag state.¹¹¹ The dominance of these principles in the high seas regime stands in marked contrast to the character of legal regulation of the territorial sea discussed earlier and indicates a significant decrease in the authority of states over foreign vessels. This decrease reflects a historical recognition of the importance to all seagoing states of an ordered system of regulation of the high seas to assure unmolested commerce and transit over the vast expanses of water that cover two-thirds of the globe. It is a subject to which states have traditionally granted special accord, in recognition of the inability of any one state to police so large an area unilaterally and the consequent reliance of states on mutual good faith in upholding the principles of law laid down in treaties and customary practice.¹¹²

The 1958 Convention on the High Seas and the 1982 LOS Convention share largely identical provisions outlining the high seas legal regime.¹¹³ For the purposes of the present discussion of the PSI, Article 92 of the LOS Convention is perhaps the most noteworthy of these provisions. It stipulates that “[s]hips shall sail under the flag of one state only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”¹¹⁴ Generally, the

109. On the high seas regime and related issues, see CHURCHILL & LOWE, *supra* note 77, at 203-22; NICHOLAS GRIEF, PUBLIC INTERNATIONAL LAW IN THE AIRSPACE OF THE HIGH SEAS 8 (1994) (noting that “the airspace above territorial waters and the airspace of the high seas are subject to very different legal regimes”); Natalino Ronzitti, The Law of the Sea and the Use of Force Against Terrorist Activities, in MARITIME TERRORISM AND INTERNATIONAL LAW 7-11 (Natalino Ronzitti ed., 1990); 1 O’CONNELL, *supra* note 81, at 18-20; 1 OPPENHEIM’S INTERNATIONAL LAW 719-825 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); NICHOLAS M. POULANTZAS, THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW 187-98 (1969); C.H. Alexandrowicz, *Freitas versus Grotius*, 35 BRIT. Y.B. INT’L L. 162 (1959) (discussing Freitas’ response to Grotius’ *Mare liberum*); Barbara Kwiatkowska, *Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice*, 22 OCEAN DEV. & INT’L L. 153 (1991) (discussing the conditions under which states may exceed the 200-mile jurisdiction limit); Emanuel Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 YALE L.J. 629 (1955) (discussing the relationship between hydrogen bomb experiments and freedom of the seas); Ted L. McDorman, *Stateless Fishing Vessels, International Law and the U.N. High Seas Fisheries Conference*, 25 J. MAR. L. & COM. 531, 531 (1994) (noting that stateless vessels constitute an international law problem only while on the high seas because “within the 200 nautical mile zone the adjacent coastal State has unquestioned authority to deal with all vessels engaged in fishing activities”); I.A. Shearer, *Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels*, 35 INT’L & COMP. L.Q. 320, 336-39 (1986).

110. CHURCHILL & LOWE, *supra* note 77, at 203-04.

111. *Id.* at 203.

112. *Id.* at 203-08.

113. Compare Convention on the High Seas, *supra* note 73, arts. 6, 11, 27-29, with LOS Convention, *supra* note 74, arts. 92, 97, 113-15.

114. LOS Convention, *supra* note 74, art. 92.

rule of exclusive jurisdiction in the flag state of a vessel is binding and applicable in the context of both legislative and enforcement jurisdiction.¹¹⁵ However, this exclusivity of jurisdiction is not absolute. Exceptions to this broad norm, under which other states may share jurisdiction over a vessel with its flag state and may under that jurisdiction exercise authority to visit the vessel—that is, to interdict its passage by arresting and boarding it—are listed in detail in Article 110 of the LOS Convention.¹¹⁶ The LOS Convention lists these exceptions explicitly and exhaustively, in contrast to its treatment of the freedoms alluded to in Article 87¹¹⁷:

Article 110

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship . . . is not justified in boarding it unless there is reasonable ground for suspecting that . . .¹¹⁸

The Article proceeds to list five grounds of suspicion that can trigger the further procedures laid out for verification of the vessel's right to fly its flag and, potentially, for a search of the ship. Interestingly, Article 110 does not explicitly grant to an interdicting state the right of subsequent arrest or detention of a vessel, nor seizure of its cargo, even if its suspicions of listed activity are confirmed. This omission is consistent with the title of Article 110, which is conspicuously termed Right of Visit. Particular note should also be taken of Article 110(4), which states that “[t]hese provisions apply *mutatis mutandis* to military aircraft.”¹¹⁹

The five listed grounds for suspicion are the following: the vessel's engagement in piracy; engagement in the slave trade; engagement in unauthorized broadcasting; being without nationality; or a case in which “through flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.”¹²⁰ Of these grounds, only two are even colorable candidates for providing a basis for interdiction in a situation in which PSI-related objectives are being pursued—piracy and being without nationality (the “stateless ship” exception).

There has been some mention of attempts to expand the notion of piracy to cover activities related to WMD trafficking.¹²¹ While it would certainly be helpful for the prosecution of PSI principles to have such activities covered by the established law on piracy, the issue is in fact deserving of little attention due to the total implausibility of this effort. Piracy is a long-standing offense under international law and has received a vast amount of treatment both in

115. CHURCHILL & LOWE, *supra* note 77, at 208.

116. *Id.* at 209-10.

117. LOS Convention, *supra* note 74, art. 87 (providing for the freedoms of navigation, overflight, laying of submarine cables and pipelines, construction of artificial islands and other installations permitted under international law, fishing, and scientific research).

118. *Id.* art. 110.

119. *Id.* art. 110(4).

120. *Id.* art. 1.

121. Wade Boese, *The Proliferation Security Initiative: An Interview with John Bolton*, ARMS CONTROL TODAY, Dec. 11, 2003, at 37 available at http://www.armscontrol.org/act/2003_12/PSI.asp.

legal sources and in academic literature.¹²² It is defined explicitly in Article 15 of the Convention on the High Seas and Article 101 of the LOS Convention. The definition of piracy in these sources, with LOS Convention Article 101 as the operative source for the Article 110 right of interdiction, in no way permits the sort of interpretive freedom necessarily wielded in attempts to include within the offense of piracy the simple shipment of WMD-related materials and technology without some additional act to bring the case under this established rubric.¹²³

Second, and more significantly, much attention has been given to the possibility of using the stateless ship exception in Article 110 as a basis for interdictions under the PSI framework.¹²⁴ Into this stateless category are assimilated unflagged vessels, vessels that have either had their right to sail under a particular flag revoked or had their desired flag unrecognized, and vessels that sail under two or more flags, changing them according to convenience.¹²⁵ Of such stateless ships, Churchill and Lowe have written:

Ships without nationality are in a curious position. Their "statelessness" will not, of itself, entitle each and every State to assert jurisdiction over them, for there is not in every case any recognised basis upon which jurisdiction could be asserted over stateless ships on the high seas [I]t has been held, for example, . . . that such ships enjoy the protection of no State, the implication being that if jurisdiction were asserted no State would be competent to complain of a violation of international law. Widely accepted as this view is, it ignores the possibility of diplomatic protection being exercised by the national State of the individuals on such stateless ships. The better view appears to be that there is a need for some jurisdictional nexus in order that a State may extend its laws to those on

122. See, e.g., BARRY HART DUBNER, *THE LAW OF INTERNATIONAL SEA PIRACY* 2 (1980) (noting that only in the twentieth century was piracy "framed within an international convention on the law of the sea"); Ronzitti, *supra* note 109, at 1-2; ALFRED P. RUBIN, *THE LAW OF PIRACY* (1988) (tracing the development of the concept of piracy from ancient times through the twentieth century); 1 T.A. WALKER, *A HISTORY OF THE LAW OF NATIONS* 41, 118, 164 (1899); Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 272-91 (1988). For current treaty law, see also Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, *reprinted in* 27 I.L.M. 668 (1988) [hereinafter Convention on the Suppression of Unlawful Acts].

123. Article 101 of the LOS Convention provides:

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - i. on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - ii. against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with the knowledge of facts making it a pirate-ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

LOS Convention, *supra* note 74, art. 101. Clearly, the mere act of transporting WMD-related materials in no way satisfies the above definition.

124. See, e.g., John R. Bolton, "Legitimacy" in International Affairs: The American Perspective in Theory and Operation, Remarks to the Federalist Society, at <http://www.state.gov/t/us/rm/26143.htm> (Nov. 13, 2003).

125. CHURCHILL & LOWE, *supra* note 77, at 213-14; H. MEIJERS, *THE NATIONALITY OF SHIPS* 309-23 (1967); Ted L. McDorman, *Stateless Fishing Vessels, International Law and the U.N. High Seas Fisheries Conference*, 25 J. MAR. L. & COM. 531 (1994).

board a stateless ship and enforce the laws against them.¹²⁶

In the context of the PSI, it is conceivable that an arguable assertion of such a jurisdictional link might be made, as it has been in the context of drug trafficking, of the severity of the threat produced by the activity, and that in a case in which a ship meets the criteria for statelessness, interdictions and inspections could be conducted under the authority of LOS Convention Article 110. Again, however, the issues of further detention, arrest, and confiscation of goods are not clarified by Article 110 and are only clarified with regard to verified pirate vessels in other articles of the LOS Convention and the 1958 Convention on the High Seas, which allow for their seizure and for the prosecution of individuals on board suspected of piracy.¹²⁷

Other than through this described process of establishing a jurisdictional link in the context of the assertion of a right of interdiction of stateless ships, however, nothing in LOS Convention Article 110 justifies interdictions of vessels on the high seas for the purposes contemplated by the PSI. In fact, as previously stated, Article 110 is explicitly exhaustive of the bases for interdiction on the high seas and thus creates a significant legal stumbling block to any assertion of authority to interdict foreign ships and aircraft under the PSI.

VI. LEGALITY OF ACTIONS PURSUANT TO THE PSI

Having reviewed the relevant principles of international law in the areas of both use-of-force law and the law of the sea, this Article now turns to a more targeted examination of the principles of the PSI—as laid out in the *Statement of Interdiction Principles* released by the United States¹²⁸ and in other statements by officials involved in the PSI—and to the legality of actions to be taken in pursuance thereof. To begin with, it must be noted that the scope and character of the actions contemplated under the PSI framework remain unclear. For example, some statements, particularly by former then-Under-Secretary Bolton, have seemed to indicate that the PSI could include interdictions of vessels believed to be carrying WMD-related materials on the high seas.¹²⁹ Other iterations of the policy parameters of the PSI, such as the above-referenced unclassified version of the *Statement of Interdiction Principles*, have conspicuously avoided reference to interdiction on the high seas (although not ruling out the possibility), focusing instead on interdiction efforts within states' land territory, internal waters, and territorial sea. In light of these contradictory statements, and the further fact, as noted previously, that most interdictions will not be reported for public response and critique, this Section will proceed to consider possibilities for the interdiction of vessels in transit through the entire range of possible legal regimes, from areas of clear state territorial jurisdiction out to and including the high seas.

126. CHURCHILL & LOWE, *supra* note 77, at 214 (internal citation omitted).

127. Convention on the High Seas, *supra* note 73, arts. 19-21; LOS Convention, *supra* note 74, arts. 105-07.

128. Press Release, Statement of Interdiction Principles, *supra* note 10.

129. Boese, *supra* note 121, at 37.

A. *State Territory*

As previously discussed, within the territory of a state—including land territory, internal waters, and superadjacent airspace—the state has virtually complete jurisdiction both to legislate and to enforce.¹³⁰ Thus national laws could be constructed at the discretion of national lawmaking bodies and in accordance with constitutional or other national legal sources in order to provide for interdictions of PSI-related suspect shipments in land, sea, or air transit through these areas. This competence to legislate and enforce would of course extend to any vessel, foreign or domestic, and to any foreign or domestic national involved in these transactions, subject only to sovereign and diplomatic immunity protections under international law. Up to this point there is very little contention, and what legal questions exist are generally related to the harmonization of such provisions with national foundational legal authorities.

Also, as previously noted, states may prescribe conditions on entry to their ports and airfields, including customs-related requirements for the boarding and searching of vessels prior to entry, and for the seizure of items the possession or importation of which is proscribed by national law.¹³¹ Properly constructed national laws, therefore, could legitimize many PSI-related interdictions of both domestic and foreign vessels and aircraft in transit through areas of state territory.

B. *Territorial Sea*

As the scope of possible interdiction activities moves out beyond the area of states' territorial jurisdiction to include interdictions within the territorial sea, analysis of the legitimacy of those activities becomes more complicated. Based on the principles of law previously reviewed, it should be possible to construct national legal principles legitimizing coastal state interdiction of both foreign and domestic aircraft in transit through airspace over the coastal state's own territorial sea under the PSI framework without running afoul of international law. It should also be possible through these national legal sources to legitimize the seizure of goods made illegal by those sources, which could include WMD-related items. Furthermore, it should be possible for a coastal state to interdict seagoing vessels under its flag in its own territorial sea as long as the principles creating such a right to interdict are established in national legal sources. Seagoing vessels as well as aircraft are of course subject to the jurisdiction of their flag state wherever they are found.

The interdiction of foreign seagoing vessels in the territorial sea by a coastal state, however, will necessitate either obtaining the consent of the flag state to the interdiction or, in the absence of consent, overcoming those vessels' right of innocent passage described above. Notwithstanding the significant presumption of retention of the right of innocent passage, in the final analysis, in the particular case of suspected WMD-proliferation

130. See *supra* notes 75-77 and accompanying text.

131. See *supra* note 77 and accompanying text.

activities, this presumption would likely not present too great a hurdle for coastal states to clear. As explained above, Article 19 of the LOS Convention is subject to an interpretation that would allow a coastal state to deem the right of innocent passage lost simply by virtue of the character of the passage of a vessel through the territorial sea, and would not require some additional act by the vessel for this purpose.¹³² In the modern climate of concern regarding the proliferation of WMD and the transit of WMD-related materials as threats to the security of both the coastal state and—drawing upon the particular language of Article 19—other states as well, it should be relatively unproblematic for coastal states to legitimize overcoming the right of innocent passage through their territorial waters of seagoing vessels regarding which there is a reasonable basis to suspect involvement in these activities. Short of an egregious abuse of this discretion, such a determination would likely not be found in excess of a coastal state's rights to safeguard its security.

In a case in which the right of innocent passage has been lost, seagoing vessels in the territorial sea are subject to the full legislative and enforcement jurisdiction of the coastal state. As long as these principles are established in national law, the arrest, boarding, searching, and seizure of illegal items found on board, as well as the prosecution of crew members, should be possible for the coastal state to legitimize under international law.

C. *High Seas*

The analysis thus far of the legality of actions contemplated under the PSI should be relatively welcome to proponents of the program, as within the full sovereignty zone and in the territorial sea area there should be fairly wide latitude under international law for activities falling under the PSI's mandate. However, this latitude essentially ceases when consideration turns to the high seas and its relevant legal regime. As the foregoing analysis shows, states may exercise their legislative and enforcement jurisdiction over both seagoing vessels and aircraft flying under their flag on the high seas and thus practice the principles of the PSI upon them, including boarding, searching, and seizure of goods. States may also be able to use the principle of stateless vessels to legitimize visitations (arrest and boarding) of aircraft and seagoing vessels not flying their flag on the high seas. However, the right of a state to effect a continuing arrest of the vessel or aircraft and to confiscate items found under this entitlement is quite tenuous.¹³³

Other than in this latter class of cases, interdictions of foreign-flagged vessels or aircraft on the high seas, unless sanctioned *ex ante* by the flag state, are illegal under international law not only for members of the 1982 LOS Convention but, due to the customary law status likely achieved by those principles, for any state. The only available means of legally exempting interdiction activities on the high seas from the relevant confines of Article 110 of the LOS Convention for signatories of the same would be to take advantage of the Article's first clause: "[e]xcept where acts of interference

132. See *supra* notes 94-96 and accompanying text.

133. See CHURCHILL & LOWE, *supra* note 77, at 205-18. On the stateless ship exception, see *supra* notes 124-126 and accompanying text.

derive from powers conferred by treaty.”¹³⁴ Here the drafters of Article 110 wished to leave open the possibility that subsequent or already extant treaties among groups of LOS Convention signatories might amend as among themselves the right of interdiction covered in Article 110. Thus states upon which the principles of the LOS Convention are legally binding can essentially rewrite the interdiction principles of Article 110 pursuant to this provision through the establishment of conflicting principles in other treaty instruments.

This recognition has been the impetus behind recent efforts, particularly on the part of the United States, to achieve consensus on amendments to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (ICSUA)¹³⁵ to include in that instrument provisions allowing for interdiction of vessels trafficking in weapons and WMD-related goods.¹³⁶ Thus far, such efforts have met with little success. Even if these efforts were successful, they would not necessarily remedy the problem of legitimizing interdictions on the high seas. For an amendment of the ICSUA to exempt a state from the strictures of Article 110 of the LOS Convention, not only the interdicting state but also the target state (the flag state of the interdicted vessel) would have to be a member of the ICSUA.¹³⁷ The only other means of legitimizing high seas interdictions through the ICSUA, although both practically and legally more questionable, would be for the amended provision of the ICSUA to achieve the status of customary law in derogation of both the treaty and parallel customary law of LOS Convention Article 110.

Also under this clause, however, could arguably be included the authorization and direction of interdictions by the U.N. Security Council acting under Chapter VII of the U.N. Charter, as the Charter specifies in Article 25 that all decisions of the Security Council including Chapter VII resolutions are binding upon all Charter signatories¹³⁸ and are thus arguably member-state obligations or entitlements under a separate treaty framework. Although the members of the PSI have up to the present declined to seek the Security Council’s support for the PSI, then—Under Secretary Bolton indicated that Security Council action under Chapter VII could provide supplementary authority for PSI-related actions in the future in cases in which sufficient authority cannot be found elsewhere.¹³⁹

D. Chapter VII

In this context it bears brief mention that arguments that have been made for the passing of a Security Council resolution under Chapter VII, essentially establishing a legal framework for the PSI to be applied chronologically *ad infinitum* and in whatever cases appear to match whatever standards might be

134. LOS Convention, *supra* note 74, art. 10.

135. Convention on the Suppression of Unlawful Acts, *supra* note 122.

136. Boese, *supra* note 121, at 37.

137. Intern’l Maritime Org., Conventions, Status of Conventions—Summary, at <http://www.imo.org/home.asp> (last updated Mar. 31, 2005).

138. U.N. CHARTER art. 25.

139. Boese, *supra* note 121, at 37.

laid out in such a resolution, misunderstand the conception that body has always had of its rightful exercise of authority. The U.N. Charter grants the Security Council the authority and responsibility to “maintain [and] restore international peace and security,” and for that purpose it is granted the power under the articles of Chapter VII to authorize member states to take forceful action.¹⁴⁰ These powers have always been understood to be properly exercised only to remedy breaches of international peace and threats to international security that have already begun to take place or that appear imminent. The Security Council has never taken upon itself the mantle of a legislative body, setting up legal frameworks reference to which may justify international acts of force in situations not specifically contemplated in the authorizing resolutions.¹⁴¹ In this context, it must be remembered that all members of the United Nations are bound in the first instance by the broad non-intervention obligation embodied in U.N. Charter Article 2(4). This Article, as well as Article 2(7), establishes a clear presumption in favor of states’ territorial integrity and sovereignty.¹⁴² The exceptions to this obligation provided for in Chapter VII of the Charter must be made clear and explicit through a resolution by the Security Council, and states must take care not to act beyond the clear mandate provided by the relevant resolution, lest they run afoul of Article 2(4). This assertion indeed is the chief argument in opposition to recent efforts to legitimize the intervention in 2003 by Western powers in Iraq on the basis of Security Council Resolution 678.¹⁴³

However, temporary and ad hoc authorizations of force by the Security Council under Chapter VII could, through Article 110 of the LOS Convention, establish a legal basis for interdiction of particular vessels suspected of trafficking in WMD-related materials. The process of obtaining such a resolution, along with the attendant transaction costs of persuading a sufficient number of Security Council members, including all permanent members, to allow the measure to pass, is clearly not an attractive one for PSI participants, particularly as time is of the essence after the detection of a suspect vessel. This is not to mention the groaning among national intelligence agencies that would accompany any proposal to share intelligence with a group as disparate as the Security Council, as would be necessary to establish a reasonable basis for belief of a target vessel’s suspect activity and obtain the support of that body for an interdiction. Thus the Security Council route, while an option for legitimizing PSI interdictions on the high seas in the absence of authority elsewhere, is not likely to be a mode of choice among PSI participants even though they have few other authorities on which to rely.

140. U.N. CHARTER art. 42.

141. Cf. BROWNIE, *supra* note 61, at 663-65.

142. U.N. CHARTER arts. 2(4), 2(7); see Jochen A. Frowein, *Unilateral Interpretation of Security Council Resolutions—A Threat to Collective Security?*, in LIBER AMICORUM GÜNTHER JAENICKE—ZUM 85. 98 (Volkmar Götz et al. eds., 1998).

143. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990). *But see* William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT’L L. 557 (2003).

E. Security Council Resolution 1540

Before moving on, it is important to note the most recent addition to the corpus of international law operating in the area of WMD proliferation. On April 28, 2004, the U.N. Security Council passed Resolution 1540.¹⁴⁴ The resolution was approved—not coincidentally—shortly after the revelation in February of that year of the existence of a long-standing clandestine nuclear materials smuggling ring headed by the father of Pakistan’s gas centrifuge program, Dr. Abdul Qadeer Khan.¹⁴⁵

In Resolution 1540, the Security Council undertook to address a number of fundamental limitations of the existing nonproliferation treaties and regimes system. The first is the problem of the non-universality of the system, a result of the fact that all such treaties and regimes were traditionally adopted only voluntarily by states, and that for a variety of reasons many states, including some of significant proliferation concern, have elected to remain outside the regime system.¹⁴⁶ A second major challenge to the nonproliferation treaties and regimes system is the fact that all existing regime restrictions on the manufacture, possession, and trafficking of weapons-related technologies are addressed to states themselves. Thus at the international level, there is no substantive restriction on the ability of private parties, including business entities as well as other non-state actors, to engage in any of these activities. The ability of non-state actors in many countries to engage in WMD development programs and activities, essentially legally, can be seen as a major shortcoming of the classical nonproliferation regime system.

Resolution 1540 addressed these challenges through the authority of the Security Council under its Chapter VII power, binding upon every U.N. member under Article 25 of the U.N. Charter. Through this legally binding decision, the Security Council imposed additional continuing international legal obligations on all U.N. member states. The resolution addresses the non-state actor problem described above in Operative Paragraph 1, which provides that “all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery.”¹⁴⁷ Furthermore, Operative Paragraph 2 provides:

[A]ll States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.¹⁴⁸

144. S.C. Res. 1540, *supra* note 53.

145. Gary Milhollin & Kelly Motz, *Nukes ‘R’ Us*, N.Y. TIMES, Mar. 4, 2004, at A29.

146. See Daniel H. Joyner, *International Legal Responses to Weapons Proliferation*, in GLOBALIZATION AND VIOLENCE (Christopher Hughes & Richard Devetak eds., forthcoming 2005).

147. S.C. Res. 1540, *supra* note 53, para. 1.

148. *Id.* para. 2.

Operative Paragraph 3 goes on to impose an obligation on states to establish and maintain effective export control laws and regulations at the national level,

including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing . . . as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations.¹⁴⁹

The passage of Security Council Resolution 1540 marks a significant milestone in the development of international law on the subject of WMD proliferation, and there is a great deal to be said by way of analysis of its implications, not only for the substantive regulation of WMD proliferation but also as an example of a marked drift in the jurisprudence of the Security Council itself, following a trend begun with the passage of Resolution 1373.¹⁵⁰ However, this Article will forebear from undertaking such a detailed analysis. Interested readers are referred to the author's more complete analysis of Resolution 1540 published elsewhere.¹⁵¹

For the purposes of the present treatment, however, there is one further significant provision of Resolution 1540 that has been argued by some to represent additional or independent international legal authority for the prosecution of the PSI. In Operative Paragraph 10, the Security Council "*calls upon* all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials."¹⁵²

While at first blush Operative Paragraph 10 may seem to provide additional legal support to the PSI, which was no doubt the intent of some of the resolution's drafters,¹⁵³ its legal character can be distinguished from that of Operative Paragraphs 1 through 3, where the Council "*decides that* all states shall" take specific actions related to the regulation of WMD proliferation within their domestic legal systems.¹⁵⁴ This language signifies that the Council is exercising its Chapter VII authority to impose obligations on states in their capacity as signatories of the U.N. Charter and to issue binding new decisions on matters of both substance and procedure. In Operative Paragraphs 4 through 7, the Council then further decides to establish a committee to accept compliance reports from member states and takes other

149. *Id.* para. 3.

150. See *supra* note 53 and accompanying text. Resolution 1373 represents the first time the U.N. Security Council behaved more like a legislature than an executive, in that it codified long-standing norms and commanded member states to enact domestic laws in compliance with those norms. This contrasts with the Security Council's usual modus operandi—ad hoc, temporary authorization of force. Resolution 1540 is another example of this shift in the Security Council's role. For a discussion of Resolution 1373, see Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT'L L. 593 (2003).

151. Joyner, *supra* note 146.

152. S.C. Res. 1540, *supra* note 53, para. 10 (emphasis in original).

153. For a general discussion of interpretation of U.N. Security Council resolutions, see Michael Byers, *Agreeing To Disagree: Security Council Resolution 1441 and International Ambiguity*, 10 GLOBAL GOVERNANCE 165 (2004).

154. S.C. Res. 1540, *supra* note 53, paras. 1-3 (emphasis in original).

steps aimed at implementation.¹⁵⁵ However, in Operative Paragraphs 8 through 10, the Council only “*calls upon*” states to take much more ill-defined and broadly termed action to counter the general threats of proliferation,¹⁵⁶ in the manner of an exhortation to states made on behalf of the United Nations in its capacity as an international organization, signifying a change in the legal character of the text from obligation-imposing to invitation-making.

Thus the text of Operative Paragraph 10 does not bestow any additional authority upon states to enforce the PSI and does not exempt states from any international legal obligations they otherwise have. It is simply an invitation from the U.N. Security Council to states to cooperate in efforts to combat WMD proliferation in a manner consistent with existing domestic and international laws.

VII. CONSIDERATIONS

At least two sets of questions are raised by the foregoing analysis of the legality of actions contemplated under the PSI framework. The first has to do with the soundness of proceeding against the threat of WMD proliferation along the path outlined by the PSI, according to which legal efforts are expended primarily on justifying interdictions of vessels thought to be carrying WMD-relevant items in place of efforts to in fact make illegitimate the transfer of the items themselves. In legal terms this reasoning is cart-before-the-horse logic. Interdiction, under either domestic or international law, is essentially an enforcement mechanism, not a substantive judgment on the legality of the target activity. Thus LOS Convention Article 110 limits the legitimate subjects for interdiction to those vessels engaged in only five possible activities—activities that other sources of law make substantively illegal.¹⁵⁷

The clearest example of this notion is found in the area of drug trafficking—one of the activities listed for justifiable interdiction in Article 110. Drug trafficking on the high seas is an illegal activity under a number of international conventions, most notably the 1988 Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which both defines the activities covered under its proscriptive terms and lays out detailed measures authorized for their suppression.¹⁵⁸ Similarly, the crime of piracy is defined in detail in Article 15 of the Convention on the High Seas (Article 101

155. *Id.* paras. 4-7.

156. *Id.* paras. 8-10 (emphasis in original).

157. See note 119 and accompanying text.

158. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, S. TREATY DOC. NO. 101-4 (1989), 1582 U.N.T.S. 164; see also William C. Gilmore, *Drug Trafficking by Sea: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 15 MARINE POL'Y 183 (1991). For discussions of international efforts to combat drug traffic, see William C. Gilmore, *Narcotics Interdiction at Sea: The 1995 Council of Europe Agreement*, 20 MARINE POL'Y 3 (1996); William C. Gilmore, *Narcotics Interdiction at Sea: UK-US Cooperation*, 13 MARINE POL'Y 218 (1989); John Siddle, *Anglo-American Cooperation in the Suppression of Drug Smuggling*, 31 INT'L & COMP. L.Q. 726 (1982) (discussing the exchange of notes between the United States and the United Kingdom regarding combating the drug trade); J.D. Stieb, *Survey of United States Jurisdiction over High Seas Narcotics Trafficking*, 19 GA. J. COMP. & INT'L L. 119 (1989) (discussing the 1986 Maritime Drug Law Enforcement Act).

of the LOS Convention) and Article 3 of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.¹⁵⁹ Analogous sources address the illegality under international law of other activities subject to interdiction actions in LOS Convention Article 110.¹⁶⁰ The LOS Convention is therefore best read narrowly as simply providing non-flag states the legal justification under some circumstances for interdiction of these already illegal activities.

Trafficking in WMD-related items and technology, however, is an entirely different matter. Here the answer to the counterproliferation question of interdiction in fact depends on the substantive legality of transfers of such items between states, which of course leads directly back to the discussion above on the existing nonproliferation treaties and regimes framework.¹⁶¹ As seen in that discussion, with few exceptions there is very little hard or formal international law not only on the question of transfers of nuclear, chemical, and biological materials, agents, and compounds and the associated myriad dual-use items and technologies that could be used to turn those materials into weaponized devices, but even more fundamentally on the question of the possession of such technologies. What rules that exist are as a general matter quite vague, at a level prohibitive of effective application to particular fact situations, and are given some specificity only in the norms of multilateral export control regimes, which are non-binding under international law.¹⁶² Even the newest source of international nonproliferation law, U.N. Security Council Resolution 1540, only binds U.N. member states to establish laws in their domestic jurisdictions regulating sensitive exports and the behavior of non-state actors with regard to sensitive items and technologies, and to deny those actors state support. This resolution does establish international legal obligations for states, although it is not clear exactly what those obligations are with regard to direct and official state transfers of WMD-related items and technologies. These obligations may in fact not be covered by domestic export controls, which are as a rule focused on regulating exports by private parties and can generally be overridden by state policy imperatives. However, even more poignantly, non-state actor behavior is still not made the subject of international legal coverage such as to give rise to breaches of international law by private parties engaging in WMD-related materials transfer.

These facts beg the implementation question of which shipments would be the focus of PSI efforts. Would shipments from all countries or only a select few be candidates for interdiction? Similarly, information on transfers of which items and technologies would trigger a reasonable suspicion of illegitimate sensitive items transfer? In the absence of objectively verifiable law on the subject, according to what standard would such determinations be made? Perhaps most importantly, who would make these determinations? In fact the very same considerations that have bedeviled efforts to treat the

159. See *supra* notes 122-123 and accompanying text on piracy.

160. See, e.g., European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories, Jan. 22, 1965, 634 U.N.T.S. 239; Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, 60 U.N.T.S. 253. On stateless vessels, see *supra* notes 109, 124-126

161. See *supra* Section IV.B.1.

162. On export controls, see *supra* note 34.

subject of WMD-related materials transfer through the nonproliferation treaty and regimes system with specificity and objectivity are the same considerations that make these questions in the PSI context unanswerable, except to reply that such determinations would be made either unilaterally or in consultation with a small number of other PSI participants and on no objective international legal basis whatsoever.

As a domestic law analogy, imagine a statute authorizing police forces to stop and search all automobiles traveling on public roads that are suspected of carrying children to soccer practice, and providing for the seizure of all athletic equipment found in the vehicle. The reverse logic in this hypothetical of sanctioning interdictions of substantively legal activities is readily apparent. The application to the PSI context is of course that while trafficking in WMD-related items and technologies is perhaps more sinister than the conduct described above, in many cases it is in fact no more illegal under relevant law and therefore as illustrative of corrupted logic in the establishment of interdiction principles. In the domestic context, such enforcement action upon activity not substantively illegal would likely be in breach of constitutional or other foundational protections against unreasonable searches and seizures and would constitute a failure to accord due process of law to the subject of the enforcement action. These rights of course do not exist in a general sense in international law, and certainly not in the particular context of the commercial transit of goods under the law of the sea. Still, the presence of such analogous protections under the domestic legal frameworks of most liberal democratic states (i.e., as general principles of law) might bolster arguments made by a target of PSI interdiction activities before an international tribunal about the illegitimate character of such activities under LOS Convention Article 110.¹⁶³

This observation of the logic and jurisprudential correctness of having norms on substantive illegality precede norms on interdiction tends to support arguments for the strengthening of nonproliferation norms as a matter of great priority and shared emphasis with modern counterproliferation efforts, both in the context of nonproliferation regimes themselves and also as a foundation upon which to build counterproliferation programs.

The second set of questions goes to the utility of the PSI as a policy matter but has bearing on the legal questions discussed above. The fundamental inquiry is whether there is sufficient utility in the potential operation of the PSI to justify such theoretical difficulties in enforcement as well as potential destabilization, particularly of the high seas regime, through overly virulent or even abusive application of PSI interdiction principles.

As described above, established rules of international law all but prohibit PSI interdictions of vessels on the high seas by non-flag states.¹⁶⁴ These rules then leave open the possibility of negotiating *ex ante* boarding agreements with flag states, though such agreements are likely to require the expenditure of a great deal of political capital and will likely be achieved only with states that are not of great proliferation concern. The rules also leave some rights in

163. See, e.g., Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 33 U.N.T.S. 993 ("The Court . . . shall apply . . . the general principles of law recognized by civilized nations.").

164. See *supra* Section V.

coastal states, as discussed, regarding both flag and non-flag vessels in the territorial sea and, of course, enforcement actions in state territory. The question must therefore be asked: Of what utility is the new initiative if its aim is significantly to decrease international shipments of WMD-related items and technologies by or to states of proliferation concern?

In this context, it is important to note that transfers of completed weapons systems of the type seen in the case of the *So San* are quite exceptional and do not fairly represent what are the most commonly used modes of sensitive technology transfer as well as (at the same time) the most difficult ones to combat. A generalized statement can be made to the effect that the greatest facilitator of WMD development programs in the nuclear, chemical, or biological weapons context is not single-use items—fissile materials, poisonous chemicals, or dangerous biological agents. Rather, the greatest concern is the transfer to states of the means of indigenous production of these materials as well as the technology to turn them into WMD. For this purpose, dual-use goods of a wide variety, ranging from aluminum tubes to microscopes to machine tools, are both requisite to obtain and increasingly difficult to regulate on both the national and multilateral level. The international transfer of such items and the proliferation threat caused thereby are not most effectively targeted through principles of interdiction in transit. They are rather better addressed through the developed and maturing system of multilateral export controls, which aims to coordinate the national export control systems of member supplier states in their comprehensive regulation of dual-use items and technologies export.

It is true that the problem of secondary proliferation is not well addressed through the existing structure of multilateral export control regimes and associated proliferation treaty instruments. Proponents of the PSI will also argue that even if interdictions cannot legally be staged against all ships, there is utility in the program in that it may force proliferators to use only ships under the flag of non-PSI participants for proliferation activities, thus potentially raising transaction costs. They may point as well to the potential deterrent effect upon commercial shipping companies which even a limited number of interdictions would have, motivating such actors to increase their diligence in acquiring information on cargo and creating a disincentive to enter into questionable freight contracts.¹⁶⁵ The marginal utility of these possible effects is not denied. However, the question is again raised: In a reality of scarce resources, both physical and political, are gaps in the nonproliferation regime better addressed through resource allocation to an interdiction program, the principles and motivations of which are likely to give rise to actions of questionable legality in an area of law of great importance to international order, and which is to be prosecuted among a handful of states whose territorial waters, state territory, and boarding agreement coalitions could be fairly easily avoided by savvy and determined smugglers? Or, might gaps be better addressed through an increased emphasis on, and resource allocation to, additional nonproliferation efforts such as

165. Telephone Interview with a senior official, U.S. Defense Dep't (Feb. 12, 2004) (on condition of anonymity).

export-control assistance programs, aid and development programs, and less invasive counterproliferation programs such as the U.S. Commerce Department's Container Security Initiative, pursuant to which U.S. Customs officials are posted at a growing number of foreign ports—including important transshipment points—with inspection powers granted by the host government?

In point of fact, the PSI seems almost tailor-made to deal with only one threat—the proliferation of missile technologies. There is, to be frank, only one state that has consistently sold missiles to other states and actors requiring delivery over long distances by sea. It is the same state of origin of the missiles on board the *So San*. This is not to say that the threat posed by North Korean proliferation of missile technologies is not a serious one. North Korea is in possession of both short and medium range missiles, with further development of ballistic missile capabilities reportedly advancing.¹⁶⁶ The proliferation of such advanced delivery systems to states with WMD development programs is clearly a legitimate concern for foreign-policy makers of states that are potential targets of these technologies. As discussed above, proliferation of missile technologies has been the issue area least effectively addressed by export controls.¹⁶⁷ However, recognition of the limited utility of the PSI to the missile proliferation threat from North Korea does decrease in measure the justifiability of actions under the PSI framework which violate settled principles of international law, and particularly principles as vital to the ordered character of international commerce as those under the umbrella of the law of the sea.

VIII. NONPROLIFERATION AND COUNTERPROLIFERATION REPRISED

Returning to the subject discussed at length above of the shift in some influential states' policies toward counterproliferation programs and strategies and a lessening emphasis on traditional nonproliferation efforts, the observation is made that the PSI can be taken at least to some extent as a representative case study that, while not of course comprehensively exemplary, is useful in its illustration of a number of poignant distinctions between the methodologies imperfectly differentiated above as falling into these two categories. It further raises significant questions, sure to be recurring as an understanding of the proper place of counterproliferation principles in both national and international policies continues to be played out, of the harmony of such policies, both in their specific application through discrete methodologies and programs and also in their theoretical foundations, with international law

Squaring nonproliferation efforts with international law has not classically been problematic, due largely to the consensual nature of international legal instruments and other normative regimes that form their foundation and reference. And even nonproliferation-related sanctions programs, while not usually consensual on the part of target states, have as a

166. See Monterey Inst. of Int'l Studies, Overview of North Korea's Ballistic Missile Program, at <http://cns.miis.edu/research/korea/overview.htm> (last visited Apr. 20, 2005).

167. See *supra* notes 44-46 and accompanying text.

general rule been conducted under the auspices of international legal regimes, most notably the U.N. Security Council, and have not been found to be in breach of states' obligations under Article 2(4) of the U.N. Charter to refrain from acts violating the "territorial integrity or political independence" of other states.¹⁶⁸

Counterproliferation strategies, because of fundamental aspects of their character, design, and purpose, are often much harder to square with international law.¹⁶⁹ This observation includes not only the PSI but also the larger issues of preemption discussed above. Counterproliferation tactics tend generally to be more forceful, interventionist, and non-consensual. They also tend to be carried out either unilaterally or by small coalitions, due in no small part to the difficulties of intelligence-sharing among large numbers of diverse partner states at the grade of sensitivity necessarily involved in the detection of WMD-related materials possession or transfer. The question becomes how to square this fact of disharmony with established international law and the rules of international legal regimes with the fairly well-supported imperative expressed by many, both within government and without, that despite its virtues and successes, the current nonproliferation regime system is ineffective at curbing WMD proliferation to a troubling degree. And even the promised effectiveness of the less invasive strategy of economic sanctions—which it should be noted has received a positive shot in the arm through recent revelations of the crippled state of Iraqi WMD development programs¹⁷⁰—must be understood to be limited in its attractiveness as a policy option due to its lengthy timetable and collateral damage to civilian economies and infrastructure.¹⁷¹

As much as one—particularly if that one is an international lawyer—attempts to avoid it, the observer is led down a path of analysis that almost inescapably leads to the conundrum that, at least in reference to some of the more modest and persuasively supported applications of counterproliferation principles, a calculus must be employed by which the value of maintaining compliance with international law must be set against the value of increasing the effectiveness of efforts to stop WMD proliferation, where those are mutually exclusive but sincerely desired outcomes.

In some cases as in the case of the PSI, the question seems to become one of fairly limited marginal contribution to anti-proliferation efforts on one hand as compared to the cost in terms of the strategy's rather considerable potential violence to the substance of international law in an important area of legal regulation and the consequences—likely more long-term than immediate—flowing therefrom. Thus the relevance of the sort of utility arguments discussed above in the PSI context. As here, where there cannot be shown to be a significant marginal contribution to the international community's efforts to stem the proliferation of WMD's, yet the danger of either per se or potential abuse of settled and important provisions of

168. U.N. CHARTER art. 2(4).

169. See *supra* Section V.

170. See George A. Lopez & David Cortright, *Containing Iraq: Sanctions Worked*, FOREIGN AFF., July/Aug. 2004, at 90, 91.

171. *Id.* at 95.

international law is great, this balance would seem to tilt away from the supportability of the maintenance of such counterproliferation policies.

In other cases, such as in some of the better argued cases for propriety of application of preemptive strike principles, there is a much stronger argument to be made that an international legal right to act against WMD possession and proliferation could be of significant strategic usefulness and national security prudence for states that genuinely feel they are intended targets of such weapons in the not distant future.¹⁷² This is a harder case as it is difficult to argue against the legitimate interest of states to defend themselves under circumstances of threat wildly altered from those obtaining in 1945 when Article 51 of the U.N. Charter was written and accepted as a norm sufficient to protect state interests and allowing of adequate measures of defense against conventional attack by means in customary usage at the time. The WMD age, however, particularly in its current advanced moment, has forced a very different set of security realities upon states, and it is not unreasonable for governments both to expect and to demand that international law recognize this fact and give legitimacy to reasonable state actions done in consideration of it.

This conclusion obviously leads directly to considerations of changing current international law to reflect modern proliferation realities. And such efforts may be both prudentially sound and even practically feasible in some such persuasive cases, and worth the potentially immense political capital the expenditure of which will be necessary to bring such changes about. However, particularly poignant in this regard is the fact that it is very unclear whether a system of international use-of-force law could possibly be developed that would allow the kind of flexibility (including on issues of intelligence-sharing mentioned above) that an effective preemption doctrine would require, while keeping any semblance of an objectively verifiable rule of law in the regulation of international uses of force.

Although the confines of the present examination will not permit a thorough discussion of these important larger issues, in the present author's opinion it is unclear whether we can much longer spare ourselves the rather imposing question of whether it is possible to have in the modern "post-proliferated" age a real and viable international use-of-force law system, based upon rule-of-law principles, that yet legitimizes the kinds of actions that would reasonably need to be allowed states in order to significantly increase the effectiveness of international anti-proliferation efforts.¹⁷³ The author thus agrees with U.N. Secretary-General Kofi Annan in his judgment when speaking of the proposed logic of preemption as a counterproliferation strategy and the argued legitimacy of its prosecution by states acting unilaterally or through ad hoc coalitions (i.e. outside the framework of the United Nations.) In considering these proposals the Secretary General has insightfully stated:

172. Israel's destruction of the Iraqi nuclear reactor at Osirak in 1981 presents a compelling case. See Louis Beres & Tsiddon-Chatto, *supra* note 67.

173. See Daniel H. Joyner, *The Future of International Use of Force Law* (unpublished manuscript, on file with author).

This logic represents a fundamental challenge to the principles on which, however imperfectly, world peace and stability have rested for the last 58 years If it were to be adopted, it could set precedents that resulted in a proliferation of the unilateral and lawless use of force, with or without justification But it is not enough to denounce unilateralism, unless we also face up squarely to the concerns that make some states feel uniquely vulnerable We must show that those concerns can, and will, be addressed effectively through collective action. We have come to a fork in the road. This may be a moment no less decisive than 1945 itself, when the United Nations was founded.¹⁷⁴

IX. CONCLUSION

This Article has attempted to provide a review of the Proliferation Security Initiative and to address issues raised by its present and forthcoming implementation through interdictive actions particularly targeting seagoing vessels and aircraft. It has located the PSI in the context of efforts toward nonproliferation and counterproliferation, as those concepts are defined to distinguish activities and strategies aimed at combating the proliferation of weapons of mass destruction. It has also conducted a review of principles of international law relevant to the activities contemplated under the PSI framework and has shown the limits of their permissibility. Finally it has addressed certain jurisprudential and policy questions that arise from this analysis and has offered some thoughts relative to the PSI as a representative case study of differences in character and application of nonproliferation versus counterproliferation strategies, including the current and future relationship of counterproliferation strategies particularly with international law.

It is hoped that the examination conducted herein will be of use both in shaping understanding and opinion among observers in the international community regarding the legitimacy and prudence of the PSI as a counterproliferation measure, and possibly in aiding policymakers in their consideration of larger issues of concern to proliferation specialists and international lawyers alike.

174. *What They Said in New York; Iraq*, TIMES (London), Sept. 24, 2003, at 17.