

BRITISH AMERICAN SECURITY INFORMATION COUNCIL  
**BASIC RESEARCH REPORT**

## **Sailing Into Uncharted Waters?**

### **The Proliferation Security Initiative and the Law of the Sea**



**Andreas Persbo and Ian Davis  
Research Report 2004.2  
May 2004**

# **Sailing Into Uncharted Waters?**

## **The Proliferation Security Initiative and the Law of the Sea**

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## Foreword

Ambassador James E. Goodby (Ret.),  
Washington, D.C.

Those of us who worked to create a nuclear restraint regime during the Cold War saw, to our regret, much of that edifice pulled down in recent years. In the name of an ill-defined "new strategic framework", norms and rules that could have still served a useful purpose in influencing national behaviour were thrown to the winds. Belatedly, in the past year, the Bush administration has recognized that something has to be created to provide the ground rules for an international anti-proliferation campaign. Preventive war has been shown to be limited, to say the least, in its applicability.

Three presidential initiatives in the past year suggest that the administration has seen the need for a framework that includes other nations and relies more on law and diplomacy than force. The three are:

- a. Resolution 1540, adopted on April 28, 2004 which is designed to strengthen the non-proliferation regime, particularly with regard to non-state actors;
- b. the president's speech at the U.S. National Defense University on February 11, 2004, in which he called for new measures to control the front end of the nuclear fuel cycle; and
- c. the Proliferation Security Initiative, announced by President Bush in Krakow on May 31, 2003.

Each of these initiatives is essentially at the starting gate with much hard work yet to be done to make them real, rather than rhetorical. The Proliferation Security Initiative (PSI), however, already has resulted in interdicting a shipment of nuclear -related equipment to Libya. Early evidence suggests that this idea has much merit and growth potential.

This study provides a unique and timely examination of how the PSI could be made more effective and more congruent with international law. Effectiveness and legality go hand-in-hand in democratic societies. As the authors point out, PSI could have a major impact as an anti-proliferation tool but only if it is done right. Doing it right is what this report is all about. PSI looks as though it will be a valuable instrument in the international community's fight to prevent proliferation of dangerous materials. It is not just the property of the United States anymore. Its success means that its future development must be an international project. The authors have provided an excellent guide for those who will now be involved in this effort.

*James E Goodby served as a career diplomat, holding a number of ambassadorial-rank positions, several concerning nuclear weapons issues. Currently, he is associated with the*

*Center for North East Asian Policy Studies at the Brookings Institution and the Securities Studies Program at MIT. He is the winner of the Heinz Award in Public Policy, the Commander's Cross of the Order of Merit of Germany, and the Presidential Distinguished Service Award and the holder of an honorary Doctor of Laws from the Stetson University College of Law.*

# **Executive summary and key conclusions**

## **Introduction**

### **What is the Proliferation Security Initiative (PSI)?**

The Proliferation Security Initiative (PSI) is a US-led proposal to establish a comprehensive enforcement mechanism which aims to restrict trafficking of weapons of mass destruction (WMD) and related materials in the air, on land and at sea. The initiative was originally taken forward by 11 participants - Australia, Britain, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain and the United States - and have since been joined by Canada, Denmark, Norway, Singapore and Turkey, bringing the total number of participants to 16 (although approximately 60 states in total have indicated their support for it). Key states still outside the PSI include China and Russia.

Ultimately, the success or failure of the PSI will be judged in terms of its effectiveness on the ground: is it resulting in concrete actions to stem the flow of WMD materials and delivery systems to those states and non-state actors with ambitions to procure illicit unconventional arsenals? Is it increasing the political and economic costs of trafficking in WMD materials and delivery systems? Although the initiative is still in its infancy, with most attention having been focused on planning and organizational matters, the participants have also undertaken a series of training exercises (at least ten to date) and a number of interdiction operations. Such interdictions are rarely announced or discussed in public, the exception being the successful interdiction in October 2003 of centrifuge parts bound for Libya.

### **About this report**

This report reviews the PSI story to date and discusses possible avenues of progress. The PSI has the potential to be part of an effective multi-faceted approach to preventing proliferation and non-compliance: an approach that is consistent with existing arms control regimes and other cooperative international agreements. We focus on its impact on maritime shipping, with particular emphasis on the United Nations Convention on the Law of the Sea (UNCLOS). Roundtable discussions will be organised to review the main findings.

## **The Interdiction Principles**

The terror attacks of 11 September 2001 heralded a new threat based on the nexus between terrorism and weapons of mass destruction, and the possibility of access to such weapons through failed states or 'rogue' regimes. The extent to which this new 'nexus orthodoxy' captures the reality of the new international strategic environment is open to question, although it clearly provides the strategic context within which the PSI was born. President Bush formally announced the PSI during a speech in Poland in May 2003. Frustrated efforts to seize a shipment of missiles en route to the Yemen from North Korea in December 2002 provided the final impetus for its launch.

### **Inter-governmental PSI plenary meetings**

Five PSI plenary meetings have taken place so far: in Madrid, Spain (June 2003); Brisbane, Australia (July 2003); Paris, France (September 2003); London, UK (October 2003); and Lisbon, Portugal (March 2004), although the initiative now appears to have moved on from "set piece meetings" to "operational expert meetings", such as the one that took place in Washington, DC, United States, in December 2003.

### **'Membership' of the PSI**

The PSI is an activity and not an organisation, consisting of an ad hoc coalition of states. It is mainly a transatlantic venture, with heavy representation from within the G-8, EU and NATO. Only three non-western countries currently participate in the initiative: Australia, Japan and Singapore. *Prima facie*, the PSI reflects earlier Cold War divisions, although this may change if the Russian Federation were to join the initiative.

The focal point of the PSI is a set of politically binding interdiction principles, which the parties agreed at their third meeting in Paris in September 2003. The principles outline core objectives and methods, including:

- *Targeting “states and non-state actors of proliferation concern”* – with no formal ‘targets’ or ‘black lists’, the initiative primarily targets the same group of countries that have concerned Western governments for over a decade.
- *Targeting “Weapons of Mass Destruction”* – a term used interchangeably throughout the principles with “chemical, biological and nuclear weapons”.
- *Effective measures for interdiction and adoption of streamlined intelligence procedures* – tracking the many thousands of ships of all designations and sizes is a difficult task, but experience suggests that the participants may face considerable difficulties in streamlining and coordinating their intelligence procedures.
- *Reviewing relevant national and international law* - participants are obliged to review and strengthen their relevant national legal authorities and to work to strengthen international law and frameworks to support the development of the initiative.
- *Guidelines on “Specific Actions”* – maritime interdictions are expected to focus on key ports and sea-lanes that are crucial to current trafficking networks.

The territorial application of the PSI is potentially far-reaching and covers the following sea zones: internal waters; territorial seas; contiguous zones; exclusive economic zones (EEZ); and international waters (the high seas).

In the internal waters, territorial seas and contiguous zones, participants can stop and search suspect vessels flying the flag of any nation, but on the high seas, the participant is only authorised to board and search vessels flying its own flag. Thus, the principles commit participants to seriously consider mutual boarding arrangements. The United States has signed two such agreements recently: with Liberia (February 2004) and Panama (May 2004). A relatively small number of such agreements could potentially cover a large proportion of the world’s shipping. Even so, participating states are almost certainly going to need to explore ways of expanding the territorial scope of the initiative. One of the big remaining legal uncertainties is whether or not the initiative can be applied on the high seas.

## **The PSI and the Law of the Sea**

All PSI participants except Denmark, Turkey and the United States have signed and ratified UNCLOS, which allows each state criminal and civil jurisdiction over ships flying its own national flag. In most cases, therefore, interdiction would be legal only when carried out by, or with the permission of, the target ship’s own flag state. Since many anticipated PSI operations on the high seas are likely to be undertaken by states other than the flag state, this may necessitate a change in international law.

### **Criminal jurisdiction over ships carrying WMD materials**

The legal jurisdiction for interdiction of shipping suspected of carrying WMD materials is different for each of the maritime zones, and in general the situation becomes more complex and less certain the further a ship is away from the coast. Participating states have full

jurisdiction to interdict suspect ships in their own *internal waters*, and such seizures under civil lawsuits are not uncommon. An illustration of such a seizure in relation to illicit weapons trafficking is the ‘Ku Wol San’ incident in India in 1999 (discussed in Box 1 on page    of the full report).

In *territorial waters* the grounds for instigating criminal proceedings are more limited, especially by the right of innocent passage. But if national laws have been enacted to criminalise WMD proliferation, then naval interdiction of foreign ships in the participating state’s own territorial waters is usually permissible. An example of such an interdiction is the Baltic Sky incident in Greek territorial waters in June 2003 (discussed in Box 2 on page    ).

In order to intercept a ship carrying WMD components in the *contiguous zone* the state must have enacted laws making an unauthorised cargo an infringement of its customs laws, and the cargo needs to be heading towards the mainland or must have originated on the mainland heading towards international waters.

The *exclusive economic zone* (EEZ) is designed to protect the economic benefits that a country can gain from its adjoining oceans. When it comes to interdiction of WMD and related materials, the EEZ can be regarded as *international waters*. The rights of a coastal state to stop and board vessels in these two maritime zones are limited to specific circumstances prescribed by UNCLOS. In these waters, a ship is normally under the “exclusive jurisdiction” of the state whose flag it flies. Stateless merchant ships and those not flying colours or showing proper identification can be boarded. A recent example of an involved a Cambodian registered ship, the Sosan, which was boarded by Spanish commandos (discussed in Box 3 on page    ). However, it was not permissible to confiscate the cargo, and there is a danger that the naval power of PSI states might be used to harass ‘legitimate’ shipping. If so, this would challenge two of the key tenets of the Law of the Sea: *innocent passage* and *freedom of navigation*.

### ***Is transporting nuclear materials ‘innocent passage’?***

The right of innocent passage has been questioned by several states when it involves nuclear-powered ships or ships carrying nuclear or other inherently dangerous or noxious substances. In fact, some coastal states have argued that passage of hazardous radioactive cargo is in fact prejudicial to the security of the coastal state, thus rendering the passage non-innocent.

One reason why UNCLOS lacks clarity on this issue is that, at the time it was drafted, the US and former Soviet Union wanted to safeguard the movement of their own nuclear-armed submarines, nuclear powered vessels and vessels carrying WMD and related materials primarily through international straits and other chokepoints. While the PSI aims to restrict that right for others, the nuclear weapon states—especially those within the PSI, will undoubtedly try to simultaneously maintain their existing rights to nuclear-free passage.

### ***Limiting freedom of navigation***

Bilateral or multilateral agreements can place limits on freedom of navigation without jeopardising the legal regimes governing the use of territorial waters. Securing such agreements between interdicting states and flag states has a relatively long history, from Britain’s attempt to curb the international slave trade in the 19<sup>th</sup> century to current US counter-narcotic interdictions in the Caribbean. The successful interception of centrifuge equipment en route to Libya in October 2003 is another recent ad hoc example of the interdicting state seeking the permission of the shipper prior to the interdiction (as discussed in Box 4 on page    ).

The case for the seizure of illicit materials, including “absolute contraband”, is weak in peacetime, and a more solid legal ground to facilitate the seizure of WMD and related materials may need to be established.

## **The Future of the PSI**

There are various options for strengthening the initiative. The most obvious is by increasing the 'membership' and securing the participation of key flag states and states that control geographically important areas, such as international straits. However, given that many 'flags of convenience' are located in developing countries, many of which rely on the registration of ships to boost foreign currency earnings, convincing them to cooperate with the PSI will not be easy and will probably require offers of economic or other security incentives. Deepening links between members, especially in relation to law enforcement and intelligence cooperation, is also needed.

### ***Working with the International Maritime Organisation (IMO) in amending the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention).***

The IMO agreed a new, comprehensive security regime for international shipping in December 2002. The regime will enter into force in July 2004 and includes a number of mandatory security measures, including several amendments to the 1974 Safety at Sea Convention (SOLAS) which are expected to enhance maritime security. These measures also have the potential for further development as a global tracking and monitoring system to aid WMD interdictions on the high seas. Given all these important developments in maritime security, the IMO would seem to be the natural place to further develop the PSI.

One option would be to amend the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention). The SUA Convention was introduced to ensure that appropriate action is taken against persons committing unlawful acts against ships. Ninety-five states have become parties, 37 of them since 11 September 2001. Proposed amendments to the SUA Convention have been under consideration for several years and would significantly broaden the range of offences to include acts of terrorism against shipping. Three of the proposed amendments are directly related to illicit WMD trafficking, and at least one PSI participating state (the UK) has publicly acknowledged that it is working in the IMO to secure amendment to the SUA Convention to make it an "internationally recognised offence to transport WMD, their delivery systems and related materials on commercial vessels".

### ***Gaining legitimacy through the UN Security Council***

Any country that refused to accept an amended SUA Convention could, if its shipments posed a threat to international peace and security, be made the subject of a UNSC resolution that provides the necessary stop-and-search powers to other states. The UNSC has already taken the view that the proliferation of weapons of mass destruction constitutes a threat to international peace and security – most recently in adopting Resolution 1540 (2004). It may consider building on this resolution in the future by agreeing measures, including the use of armed force, to maintain that security by curbing or interdicting the trade in WMD materials.

What needs to be introduced in order to give the PSI a legal framework is a UNSC resolution expanding the criminal jurisdiction of states beyond the territorial sea. This would allow WMD proliferation to be combated in the same way as states now combat piracy or international drugs trafficking. UNSC Resolution 1540 by no means achieves the comprehensive approach that the US seeks, but is reflective of the need for compromise. It is likely to be difficult to find common ground with both China and Russia in formulating any follow-up enforcement resolution of the type that would authorise PSI activities. It is of utmost importance that any future resolution carefully balances the rights of the flag states against the interests of the international community to curb the trade in WMD and related materials.

### ***PSI and the doctrine of 'necessity'***

Another option is to review the principle of 'state of necessity' and to admit that some PSI interdictions may be illegal. However, the illegality would be excused by the grave threat that

weapons of mass destruction constitute. The doctrine of 'necessity' is an international version of national criminal laws that excuse criminal behaviour caused by distress. If the PSI participants were to acquire solid intelligence proving that WMD materials were being shipped on international waters, could they claim that an interception at that time would be 'the only means' of safeguarding their interests against a 'grave and imminent peril'? The case for interdiction in the case of illicit nuclear materials seems strongest, since a nuclear device in the hands of an international terrorist network would indeed constitute a 'grave and imminent peril' to the security of the PSI participants.

But post-Iraq, there would also be questions as to the validity of the intelligence and the significance of the suspected materials in advancing any NBC programme. Major uncertainties regarding the lethality and quality of a proliferating state's NBC activities, especially around key issues such as nuclear weapons design, quality of biological or chemical agent development, and missile reliability, suggest that it will be extremely difficult to make a case for interdiction against a single shipment on grounds of imminent threat. In any case, the doctrine of necessity is a 'last resort' option, only valid when all other options have been exhausted. To systematically lean on this doctrine to justify high seas interdiction would not be in accordance with international law.

### ***PSI and the doctrine of 'pre-emptive self defence'***

A third way forward is to expand the concept of 'pre-emptive self defence'. This would be a risky and highly contentious approach, since there is widespread distrust of this agenda following the way that the US-led coalition handled the run up to war in Iraq and the current post-combat complications in achieving stability.

Not even the emerging concept of 'humanitarian intervention' is completely accepted in international law, since it is seen as an infringement of the right to territorial integrity and political independence of the attacked state. The argument that tyrants hide behind the protection of the UN Charter may be true in practice, but it does not change the law. The essence of international law since 1945 is that the use of force should be authorised as a last resort, as a means for self-protection against an ongoing or imminent attack. The key lesson from Iraq is that intelligence is not yet reliable or adequate to support military operations against proliferating powers or to make accurate assessments of the need to pre-empt. To utilise force on the basis of sketchy intelligence or mere accusations of wrongdoing or bad intent weakens the foundation of the law and presents, in the long run, a grave threat to international stability.

### ***PSI and the need for comprehensive nuclear disarmament***

The linkage between movement on nuclear disarmament commitments under the NPT and broadening support for the PSI needs to be explored. It is unreasonable to expect other nations not to acquire a weapon that the nuclear weapon states find essential for their own security. On the contrary, emerging and worrying concepts of 'pre-emptive wars' and 'first strikes' may prompt countries to acquire a nuclear deterrence. The development of new US strategies and new technologies to use low-yield nuclear weapons against hard and buried targets will in effect blur the distinction between conventional and unconventional weapons.

The non-proliferation aspects of the NPT has always been given undue weight in the review process, while the nuclear weapon states have dodged their responsibility to take forceful action to rid this world of a true weapon of mass destruction. At the same time, the international community has been successful in concluding legal regimes outlawing chemical and biological weapons, which are cheaper and easier to manufacture than nuclear arms.

The number of states suspected of being nuclear cheaters is a handful at most. This may change, however. The PSI should not be seen as a separate activity in a losing war against weapons proliferation, but as a tool in the wider context of non-proliferation.

## **Conclusions and recommendations – building on a positive start**

If implemented correctly, the PSI could be a credible enforcement mechanism and a logical and solid expansion of the current non-proliferation and disarmament regimes. If implemented incorrectly, it may prove counterproductive by hampering free trade and the rights of all humankind to use the resources of the ocean freely, and by reinforcing discriminatory non-proliferation practices.

The problem of trade, technology transfer and proliferation in WMD materials is real and should not be underestimated. Neither should the problem be overestimated. An intrusive regime hampering global trade needs to be proportional to the potential gains from applying it. Other avenues for curbing WMD proliferation must also be explored or expanded: remodelling and strengthening the enforcement capabilities of the IAEA and the OPCW; greater international harmonization and strengthening of criminal laws and export control regulations; and accelerated implementation of the cooperative threat reduction agenda. And the nuclear weapon states need to renounce their weapons and work harder towards the goal of a nuclear free world.

There is currently no clear-cut basis to use force in order to interdict ships transporting WMD and related materials on the high seas. The participants need to use a variety of tools in order to establish a favourable legal environment for the initiative, since it is apparent that some major seafaring nations object to the initiative. Twelve specific recommendations are made here for strengthening the PSI and expanding the global norm of combating and preventing WMD trafficking.

### **Recommendation 1: Continue to expand PSI ‘membership’ through regional outreach activities**

The London plenary meeting reiterated that further co-ordinated outreach would be needed to broaden international understanding of and co-operation with the initiative, and stated that further regionally based meetings and activities would be valuable. Outreach activities in Central and Eastern Europe and Asia are welcome developments and ought to be replicated in other regions where PSI participation is under-represented.

### **Recommendation 2: Focus on specific nuclear, biological or chemical technologies**

A more authoritative definition of targeted contraband is required than the vague term WMD. Greater clarity on the ‘nuclear, biological and chemical’ components and materials being targeted would make the initiative more predictable, minimise wrongful application (especially regarding dual-use technologies) and increase potential support.

### **Recommendation 3: Consider enlarging the scope to include other illicit trafficking activities**

Participants should consider incorporating other forms of illicit activity under the PSI interdiction framework, such as slavery, illegal immigration, small arms and drugs trafficking. It is worth thinking about ways of expanding the PSI at this stage, rather than later, when the initiative may already be formalised.

### **Recommendation 4: Seek a wider mandate for interdiction through new multilateral negotiations and agreements**

The PSI and other ‘coalitions of the willing’ are trying to combine the flexibility of unilateral action with multilateral credibility. But as currently configured the PSI may have difficulty in preventing a recurrence of incidents like the temporary seizure of the *Sosan* en route to Yemen, which the Spanish navy was obliged to release because there was no mandate for the interdiction. Achieving a higher degree of multilateral support will tend to enhance

international political goodwill and support for the PSI. One possibility is to use the UNSC as a global legislature and negotiate a resolution on WMD trafficking in general, another would be to conclude a multilateral agreement relating to the use of the seas, preferably through the IMO (see recommendation 5).

#### **Recommendation 5: Work with the IMO in further developing the PSI**

The IMO ought to be at the heart of the PSI. It is encouraging that the United Kingdom is working through the IMO to secure amendment to the SUA Convention to make it an internationally recognised offence to transport WMD, their delivery systems and related materials on commercial vessels. However, the IMO also has the potential to work on other aspects of the PSI agenda, such as enhancing tracing and identification of suspect shipping.

#### **Recommendation 6: Place the burden of proof on flag states, shippers and masters to ensure WMD-free cargoes**

The IMO would also be a suitable forum to negotiate rules that place a legal responsibility on flag states, shippers and masters to ensure that their cargo is clean of WMD. Rules of this kind could be negotiated within the framework of the safety at seas convention and could be supplemented with suitable and credible liability rules.

#### **Recommendation 7: Undertake a feasibility study for the development of an international maritime tracking system with global coverage**

The many technological innovations suggest that a global tracking and tracing system to monitor suspect shipping and provide data to law enforcement agencies in all nations may become technically feasible in the near future. The real hurdles are likely to be political. But new civilian maritime security systems being pioneered by the IMO provide a starting point for the development of an international maritime tracking system with global coverage.

#### **Recommendation 8: Promote technical cooperation and assistance**

Assistance programmes to developing countries for training and the improvement of their maritime and port security infrastructure should be introduced as a carrot to attract new PSI participants, possibly as part of the IMO's existing Integrated Technical Co-operation Programme. This would not only advance goodwill for the PSI, but also help to enhance effective implementation of, and compliance, with international non-proliferation and maritime security norms.

#### **Recommendation 9: Consider establishing a UN interdiction committee**

Resolution 1540 (2004) establishes an ad-hoc committee to implement its non-proliferation provisions, while resolution 1373 (2001) established a Counter-Terrorism Committee. It would undeniably give the PSI more legitimacy if the participants were to push for the establishment of an 'interdiction committee' under a UNSC resolution. This might even be a future role for the new committee established under resolution 1540.

#### **Recommendation 10: Negotiate towards a common position on 'states of concern'**

More needs to be done to try and reach a consensus definition of 'states of concern'. Sensitive destination lists within export control regimes may provide some way forward. An agreed target list of countries would enhance the predictability of the initiative, although naming and shaming target states may have unforeseen consequences and further alienate and isolate countries of concern.

#### **Recommendation 11: Increase the visibility of national contributions to PSI activities and enhance parliamentary oversight**

In order to ensure proper parliamentary oversight and to help evaluate the effectiveness of the PSI, participating states should include a line item for the PSI in their defence budgets, as well as a description of PSI activities carried out in any annual reporting mechanisms. Should participation in the initiative continue to grow, the 'members' may find it necessary to set up a coordinating body.

#### **Recommendation 12: Expand bilateral and multilateral boarding agreements**

One immediate way forward is to conclude bilateral or multilateral boarding agreements with the major commercial flag states, including the so-called flags of conveniences. This would facilitate lawful boarding of vessels on the high seas and could be concluded expediently with a minimum of negotiations. This appears to have been the case with the two boarding agreements that the United States has recently concluded with Liberia and Panama. For the flag state, a boarding agreement should give political goodwill as well as economic benefits.

## Abbreviations

AIS	Automatic Information Systems
BASIC	British American Security Information Council
BWC	Biological and Toxin Weapons Convention
CEIP	Carnegie Endowment for International Peace
CSR	Continuous Synopsis Record
CWC	Chemical Weapons Convention
EEZ	Exclusive Economic Zone
EU	European Union
FOC	Flags of Convenience
G-8	Group of Eight
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
IMO	International Maritime Organisation
ISPS Code	International Ship and Port Facility Security Code
MTCR	Missile Technology Control Regime
NATO	North Atlantic Treaty Organisation
NBC	Nuclear, Biological and Chemical
NGO	Non-Governmental Organisation
NOSS	Naval Ocean Surveillance System
NPT	Nuclear Non-Proliferation Treaty
NWS	Nuclear Weapon States
OPCW	Organisation for the Prohibition of Chemical Weapons
PCIJ	Permanent Court of International Justice
PSI	Proliferation Security Initiative
SALW	Small Arms and Light Weapons
SOLAS	International Convention for the Safety of Life at Sea
SUA Convention	Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WMD	Weapons of Mass Destruction

## Glossary of Terms

Contiguous Zone	A belt of water adjacent to the territorial waters, which may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured
Exclusive Economic Zone	A body of water that cannot extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured
Flag State	The state that enjoys jurisdiction over a naval vessel. The ship indicates which state it belongs to by flying its flag
Horizontal Proliferation	A flow of technology, equipment, knowledge and strategic goods from countries possessing the commodity to countries lacking them
Internal Waters	Waters on the landward side of the baseline of the territorial sea (i.e. lakes, harbours and rivers)
Non-State Actor	Negatively defined by the concept of state, see state actor
Nuclear Weapon States	A state which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January, 1967
Proliferation	A process in which a new type of weaponry is introduced into an area where it was previously not yet available
State Actor	An entity that acts internationally and has a permanent population, a defined territory, government and capacity to enter into relations with other states
Territorial Seas	The territorial sea usually extends to a limit of 12 nautical miles, measured from baselines, most commonly being the low-water line along the state's coast
Unrecognised Nuclear Weapon States	A state that is not a party to the NPT and has manufactured and exploded a nuclear weapon or other nuclear explosive device after 1 January, 1967
Vertical Proliferation	The quantitative or qualitative enhancement of existing arsenals of a possessor state

# Chapter 1: Introduction

## 1.1 What is the Proliferation Security Initiative (PSI)?

The Proliferation Security Initiative (PSI) is a US-led proposal to establish a comprehensive enforcement mechanism which aims to restrict weapons of mass destruction (WMD) trafficking in the air, on land and at sea, and thereby increase the political and economic costs of such trafficking. The 11 original members - Australia, Britain, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain and the United States - have been joined by Canada, Denmark, Norway, Singapore and Turkey, bringing the total number of participants to 16.<sup>1</sup> At a two-day meeting in Krakow, Poland, on 31 May- 1 June 2004, the participants will mark the initiative's first anniversary.

According to Guy Roberts, director of negotiations policy at the Pentagon, instead of operating with a central administrative or office or organisational control centre, the PSI is being driven by several international working groups. An operational experts group and an intelligence group are developing PSI procedures, while a legal group is determining what actions PSI members may legally take outside their own territorial boundaries.<sup>2</sup>

In September 2003 the initiative participants agreed to a set of 'interdiction principles',<sup>3</sup> which "... builds on efforts by the international community to prevent proliferation of such items, including existing treaties and regimes".<sup>4</sup> This sentence suggests that the PSI is not a separate and new approach to non-proliferation, but rather an enforcement mechanism for the existing web of treaties and international agreements to limit the spread of nuclear, biological and chemical weapons.

The assumption, especially among the current US administration and some of its allies (including the British government) is that the multilateral global non-proliferation regime<sup>5</sup> is unable to deter hostile states or terrorists from acquiring these weapons.

This alleged failure of the arms control system is said to be partly due to the unwillingness of the international community to take action against treaty violations and non-compliance, something which Don A. Mahley, the US State Department's special negotiator for chemical and biological arms control, describes as the "greatest threat to the arms control regime and the rule of law",<sup>6</sup> and partly due to the changed nature of the threat, post 9/11. Critics also argue that developments in technology and globalisation trends exacerbate these defects and threaten to render current treaties unenforceable.

But for all the faults, most experts agree that the existing arms control treaties, are vital to stopping the most dangerous states and groups from getting the most dangerous weapons. Moreover, the critics often downplay the many non-proliferation successes,<sup>7</sup> and avoid the Bush Administration's role in undermining international attempts to strengthen some of these treaties.<sup>8</sup> Nonetheless, there is general acceptance that the international arms control treaty-based system has its

shortcomings, and the PSI is one of a range of innovative measures in the non-proliferation toolbox designed to address the new challenges.

In that respect, the PSI participants also claim that the principles are "...a step in the implementation of the UN Security Council Presidential Statement of January 1992"<sup>9</sup> and that, more important, the initiative is "... consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council".<sup>10</sup> The initiative has been described as a "collective political commitment",<sup>11</sup> rather than a legally binding document. It has also been said that the initiative "is an activity not an organisation" which "should be open to any state or international body that accepts the Paris Statement of Principles and makes an effective contribution".<sup>12</sup>

However, the wording of the principles suggests that the PSI is intended to be more than a political framework. Indeed, the principles give the impression that it is the embryo of a new legal regime. Notwithstanding the political character of the principles, the participants must still observe international law and regulations when they are conducting their 'activity'. There are a multitude of legal frameworks regulating the use of the air and the sea. Initially, however, participants have chosen to focus on interdiction and shipping and the most relevant international legal framework is the United Nations Convention on the Law of the Sea (the UNCLOS).<sup>13</sup> Most PSI participants have signed and ratified the convention<sup>14</sup> and those who stand outside have admitted that the convention in many respects mirrors international custom.

The PSI has already gained momentum. In December 2003, BASIC rhetorically asked if the initiative were "dead in the water or steaming ahead?".<sup>15</sup> A few weeks later, the White House announced the accession of new initiative partners and proclaimed that the initiative was "ongoing and accelerating".

However, there is still lot of work to be done. For instance, China is one potentially important and absent partner to the initiative. The Chinese view on the PSI is mixed; The Chinese foreign ministry spokesman has said that China "... can understand the worries by some countries over the proliferation of weapons of mass destruction ... [but it is also China's view that] ... some countries of the world have doubts over the legality and effectiveness of the measure".<sup>16</sup> He went on to argue that the best way to curb WMD proliferation is to "... safeguard and promote international security through consultations and dialogue".<sup>17</sup> It seems inconceivable that the US Administration and other PSI participants will continue without consulting China on this issue at some stage in the near future.<sup>18</sup>

Another potentially important absent partner is Russia. As the only G-8 member currently standing outside the initiative, the Russian Federation seems to be sceptical regarding its legality: "We have questions about this initiative's compliance with international legal norms ... [but in] general, the idea of intercepting vehicles shipping dangerous substances meets Russia's interests. We share the direction of this initiative".<sup>19</sup> What the Federation means when it states that they "share the direction" of this initiative remains unclear. It implies that the Federation not only shares the initiative's aim and purpose but also approves of its practicality.

However, a senior US State Department official has said that the Russians "are not ready to join the process" because they are "raising a lot of questions".<sup>20</sup> The official

added that it is “no secret that [the US] have imposed sanctions on Russian companies and individuals”, but the Federation is also both “part of the problem and part of the solution”.<sup>21</sup> Without doubt, the PSI partners consider Russia’s military resources, geopolitical location and permanent membership in the UN Security Council as assets that would greatly contribute to the success of the initiative. Thus, according to another senior US official, “The Russians are interested in knowing more about it and perhaps even participating”.<sup>22</sup> Indeed, at the time of writing, there is some speculation that Russia may be invited to join the PSI at the anniversary meeting in Poland at the end of May.<sup>23</sup>

## **1.2 About this report**

### **Objectives**

The main purpose of this report is to review the PSI story to date, including its legal and strategic implications, and to discuss possible avenues of progress. It is our view that the PSI has the potential to be part of an effective multi-faceted approach to preventing proliferation and non-compliance. This is an approach that is consistent with existing arms control regimes and other cooperative international agreements.

In order to keep this specific study within manageable proportions, it focuses exclusively on the initiative’s impact on maritime shipping, with particular emphasis on the United Nations Convention on the Law of the Sea (UNCLOS). The naval interdiction of merchant vessels on the waters of involved parties and beyond for the sole purpose of curtailing the proliferation of WMD arms, materials and delivery systems may be a viable enforcement supplement to the various existing international arms control treaties, provided that it is carefully implemented and based on multilateral consensus. On the other hand, if the initiative is not carefully implemented it may have profound implications for freedom of navigation on the high seas and the right to innocent passage through all territorial waters. In that regard, the initiative may have adverse effects on global trade, which is heavily dependent on open sea lines of communication.

In focusing on maritime interdiction, this report does not cover other aspects of the PSI, which are also of high importance, such as the question of WMD interdiction at land and in the air. The reasons for this are twofold. First, the role of interdiction on land is essentially a question of national sovereignty, since all states have exclusive jurisdiction over their own land. While there is an ongoing debate about the limits to such sovereignty and the legitimacy of ‘preventive’, ‘pre-emptive’ or ‘humanitarian’ interventions, there is no indication that PSI participants are considering unauthorised land interdictions in third states.<sup>24</sup>

Second, transport of WMD materials in the air is already outlawed through the 1944 Chicago Convention and subsequent national legislation.<sup>25</sup> Transportation of WMD and related materials on the seas, however, is largely unregulated.

However, additional research is planned as part of this BASIC project on the PSI in order to address other key aspects of the problem of illicit trafficking in WMD materials. For example, a follow-on report will address the role of ‘flags of

convenience' (FOC) in illicit trafficking of WMD, and what can be done to tighten their regulation.

The specific questions that this first report seeks to address are as follows:

- Is the PSI a significant new contribution to the WMD non- and counter-proliferation toolbox or simply 'smoke and mirrors' with little practical value on the ground?
- What is the legal basis for the use of force to interdict ships on the high seas?
- Should suitable cases for interdiction be brought before the United Nations Security Council (UNSC) or another international forum before an actual interdiction?
- How are 'states of concern' to be defined? Is it possible to reach a consensus or should participating states be allowed to interpret the phrase on an ad-hoc basis?
- What mechanisms will be adopted in support of interdiction? For example:
  - Since the initiative calls for multinational naval coordination, is there an existing organisation, for instance, NATO, that can handle this role, or do participants need to found a new organisation?
  - Is loose cooperation between states sufficient for an effective PSI or is a more formal framework necessary?
  - As the initiative needs accurate intelligence to be effective, what capacity do participants have to survey the world's oceans, which occupy nearly 71 percent of our planet's surface?
- What precedents are likely (in terms of other nations adopting the same criteria and boarding any ship that it declares to be 'of concern')?
- Since more than 90 percent of the trade between countries is carried by ships and about half the communications between nations use underwater cables, is the establishment of new maritime custom of value or is it a dangerous development?

The US Undersecretary for Arms Control, Mr. John Bolton, has outlined the US State Department's perception of the initiative in recent remarks to American organisations.<sup>26</sup> Initially, the initiative was presented as a new multilateral approach to a common problem. Since the introduction of a draft boarding agreement at the coalition's London meeting, however, along with emerging doubts on the initiative's legality, the position of the United States has begun to sound more unilateralist.

It is important that the initiative is implemented multilaterally, since such an approach is more likely to enhance its impact and effectiveness. It is hoped that this research will help to bridge the divide between unilateralist and multilateralist approaches, and help to raise awareness of both the benefits and pitfalls among a wider group of governments, as well as non-governmental organisations. It is particularly important

to raise awareness about the initiative with concerned media, parliamentarians and the general public within participating states, in order that decisions are taken with the informed consent of citizens.

## **Methodology**

This report is based on open-source materials and some initial discussions with government officials. Further interviews with officials and other interested parties are planned, and it is our intention to organise two roundtable discussions to review the main findings. The discussions will be held under Chatham House rules and will focus on the opportunities this initiative provides to reduce the danger of WMD proliferation, and in particular, how to bridge different interpretations of the Law of the Sea. Details of these consultations and updates to this report will be published on BASIC's website (<http://www.basicint.org>).

Other planned activities under this BASIC PSI research project include:

- A survey of European government and public attitudes to the PSI;
- Updates on the project's progress and the dissemination of interim findings, through BASIC's established publications, e-mail updates, and web site; and
- International advocacy and media work around the main research findings and recommendations.

## **Structure**

The report starts with a critical analysis of the interdiction principles (chapter 2), and then discusses the implications of PSI on the Law of the Sea (chapter 3). This section also discusses the various interpretations of the Law of the Sea and examines how the PSI might be able to navigate some of its more choppy legal waters: in particular through individual waiver of freedom of navigation. The extent of the practical implementation of the initiative, in terms of exercises and interdictions carried out so far, are outlined next (chapter 4). In the last chapters, the future options for developing the initiative are discussed (chapter 5), including the relationship it has, or could develop, with the International Maritime Organisation, the UN Security Council, the doctrines of 'necessity' and 'preventive or pre-emptive self-defence', and the issue of nuclear disarmament. The report finally lists a number of conclusions and recommendations (chapter 6).

## Chapter 2: The Interdiction Principles

The focal point of the PSI is a set of interdiction principles, which the parties agreed at their third meeting in Paris in September 2003. The principles—reproduced in full at Appendix 1—raise a number of questions:

- What is the drafting background to the principles and to whom do they apply?
- Which states and what physical goods do they target?
- What do they require from the participating states?

This section attempts to answer these questions, although the analysis, which is based largely on open sources, is by no means comprehensive.

### 2.1 International strategic context to the birth of the PSI

The participants have described their efforts as seeking to implement the UN Security Council Presidential Statement of January 1992. The Presidential Statement was delivered during a time of flux and turbulent change in the international system and has to be read in that context. The Soviet Union had recently dissolved and a US-led coalition of many nations had ousted an Iraqi aggressor from Kuwait, with the authority of the UN. Ten months prior to the Presidential Statement, a triumphant US President proclaimed:

[T]he world we've known has been a world divided – a world of barbed wire and concrete block, conflict and cold war. Now, we can see a new world coming into view. A world in which there is the very real prospect of a new world order. In the words of Winston Churchill, a "world order" in which "the principles of justice and fair play ... protect the weak against the strong ..." A world where the United Nations, freed from cold war stalemate, is poised to fulfil the historic vision of its founders. A world in which freedom and respect for human rights find a home among all nations.<sup>27</sup>

In the spirit of the times, with the United Kingdom then holding the chair of the Council, Prime Minister John Major personally delivered the address, touching on this subject, and stating that the "meeting takes place at a time of momentous change. The ending of the Cold War has raised hopes for a safer, more equitable and more humane world".<sup>28</sup> Fearful of regressive developments in the former Soviet Union and elsewhere, the Council President (John Major) also said that the members "... recognize that change, however welcome, has brought new risks for stability and security. Some of the most acute problems result from changes to state structures".<sup>29</sup>

Importantly, the Security Council established that "proliferation of all weapons of mass destruction constitutes a threat to international peace and security". However, the Council also enjoined member states to "resolve peacefully in accordance with the Charter any problems concerning these matters threatening or disrupting the maintenance of regional and global stability".<sup>30</sup> Primarily, the threat of weapons of mass destruction was to be combated by non-military means. But what means did the Security Council have in mind in 1992?

The Council President (John Major) stressed the importance of adhering to the Non-Proliferation Treaty and emphasised the need for fully effective IAEA safeguards. He touched on the importance of effective export controls and warned that the “members of the Council will take appropriate measures in the case of any violations notified to them by the IAEA”.<sup>31</sup> In addition, the President stated that the Council supported the conclusion of a comprehensive Chemical Weapons Convention (CWC) by the end of 1992.<sup>32</sup>

Following the UK Presidency of the Council, and the optimistic, and in hindsight, misjudged proclamation of a “new world order”, the international community during the remainder of the 1990s settled into a world of growing regional and intra-state conflicts. These conflicts were often incorrectly attributed to the vacuum created by the fall of the Soviet Union. For example, civil wars erupted in Yugoslavia and Somalia, a massive genocide occurred in Rwanda and the civil war escalated in Afghanistan. The subsequent seizure of control of Afghanistan by the Taliban was cautiously welcomed by most of the great powers, partly because the Taliban promised to bring a degree of stability to a troubled country. And so, the world settled in to a ‘new order’ of low intensity conflicts around the world, that only received international attention when they began to spiral out of control and/or affected Western interests.

The terror attacks of 11 September 2001 dramatically changed the course of world events. They have led to a re-definition of the threat to US and European security as the nexus between terrorism and weapons of mass destruction, and the possibility of access to such weapons through failed states or ‘rogue’ regimes. The greatest danger identified in almost all defence and foreign policy statements coming out of Western governments is the “crossroads of radicalism and technology,” or the fear that terrorists aided by despots will acquire and use nuclear, chemical, or biological weapons.

The extent to which this new ‘nexus orthodoxy’ captures the reality of the new international strategic environment is open to question.<sup>33</sup> Certainly open source evidence linking these three complex issues is hard to find, although it is clear that it does provide the strategic context within which the PSI was born.

The PSI was prefigured in the Bush administration’s December 2002 National Strategy to Combat Weapons of Mass Destruction, where ‘interdiction’ is listed first among various ‘counter-proliferation’ strategies. However, President Bush formally announced the PSI during a speech in Poland in May 2003, in advance of the G-8 summit:

And I call on America’s G-8 partners to follow through on their financial commitments so that we can stop proliferation at one of its sources. When weapons of mass destruction or their components are in transit, we must have the means and authority to seize them. 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.<sup>34</sup>

While the PSI had been in the planning stage for some time, it appears that the frustrated efforts to seize a shipment of missiles en route to the Yemen from North Korea in December 2002 provided the impetus for its launch (see Box 3 on page ).

## **2.2 Inter-governmental PSI plenary meetings**

Four follow-up PSI plenary meetings, and one experts meeting took place in 2003. The first plenary meeting was in Madrid, Spain, in June 2003, where the 11 initial participating states agreed to establish the initiative and outlined some of the strategies for interdicting suspicious cargoes, including those that might include chemical, biological or nuclear weapons or missiles, as well as missile components. The officials assessed existing national authorities and export control regimes under which the new initiative could operate.

The second plenary meeting a month later in Brisbane, Australia, focused on the most effective methods for interdiction activities. The meeting recognised that information sharing would be essential to effective interdiction, and supported steps for strengthening domestic nonproliferation laws and export controls in participating states.<sup>35</sup> The meeting also agreed to initiate a series of air and sea training exercises in the Mediterranean, the Indian Ocean and the Pacific to begin in September (see chapter 4). However, it was the Paris plenary meeting in September that proved to be the most significant, as this is where the principles governing the PSI were established.

A fourth plenary meeting of the PSI took place at Lancaster House in London in October 2003, in the form of a three-day conference consisting of a table-top exercise, a meeting of officials and a plenary session to discuss how to broaden support for the principles adopted in Paris. Finally, an expert group meeting took place in Washington, DC, in December on the conduct of interdiction activities. Deputy Secretary of Defense Paul Wolfowitz committed the US at this meeting "to making interdiction [under the PSI] an essential mission for [the US] military".<sup>36</sup>

The first PSI plenary meeting of 2004 took place in Lisbon, Portugal, in March, where participants agreed to continue their efforts to broaden international support for the initiative. To this end, Poland held an information meeting in Warsaw in January 2004 to present the objectives and development of the PSI for the countries of Central and Eastern Europe.<sup>37</sup>

The initiative now appears to have moved on from "set piece meetings" to "operational expert meetings".<sup>38</sup> Some ship owners are also said to have endorsed the initiative, apparently because it has led to a reduction in insurance costs.<sup>39</sup>

Chairman's Statements from all the PSI meetings to-date are reproduced in Appendix 2.

## **2.3 'Membership' of the PSI**

Government officials within participating states are keen to stress that the PSI is an activity not an organisation, and as such consists of an ad hoc coalition of states rather than a formal membership. However, in terms of current ‘membership’, the PSI is a mainly transatlantic venture, with heavy representation from within the G-8, EU and NATO. As currently constituted, there are only three non-western countries participating in the initiative, and these are all from the Asia-Pacific rim, namely Australia, Japan and Singapore. And as mentioned in the introduction, two of the most important great powers – China and Russia – remain outside of the PSI for the time being. *Prima facie*, the PSI reflects earlier Cold War divisions.

The intentions and strategies of the Group of Eight (G-8)<sup>40</sup> can be seen as the embryo of the PSI. (The G-8 also includes Russia, which is the only member that currently stands outside of the PSI). On 2 June 2003 the G-8 issued a declaration entitled: ‘Non-proliferation of weapons of mass destruction’.<sup>41</sup> In that document, the G-8 declared the proliferation of WMD and their means of delivery, together with the spread of international terrorism, as the pre-eminent threat to international security.<sup>42</sup> It also acknowledged a range of tools available to tackle that threat, including existing international treaty regimes and inspection mechanisms, internationally co-ordinated export controls and diplomatic efforts but also, if necessary, other measures in accordance with international law could be used.

In particular, the G-8 described the NPT, the CWC and the BWC as “essential instruments” for the maintenance of international peace and security.<sup>43</sup> In addition to those instruments, the G-8 called for the “establishment of **effective procedures** and machinery **to control the transfer of** materials, technology and expertise which may contribute to the development, production or use of WMD and their means of delivery”<sup>44</sup> (emphasis added). In short, the G-8 came to the conclusion that existing arms control and disarmament frameworks constitute both a cornerstone of international peace and security and a starting point for new non- and counter proliferation efforts.

The June 2003 conclusions were merely a refinement of the conclusions drawn at the previous meeting on 27 June 2002. At that meeting, the G-8 agreed on a set of principles to prevent terrorists, or those that harbour them, from gaining access to weapons or materials of mass destruction.<sup>45</sup> The terror attacks of 2001 had shown the G-8 that “terrorists are prepared to use any means to cause terror and inflict appalling casualties on innocent people”.<sup>46</sup> Among other steps taken, the G-8 agreed to develop and maintain “appropriate **effective measures** to account for and **secure [WMD] items in ... domestic and international transport**”<sup>47</sup> (emphasis added) and to develop and maintain “effective border controls, law enforcement efforts and international cooperation to detect, deter **and interdict in cases of illicit trafficking** in such items”<sup>48</sup> (emphasis added). The G-8 declaration lists a number of concrete detection and interdiction measures:

- The installation of detection systems;
- The training of customs and law enforcement personnel and cooperation in tracking WMD items; and
- The provision of assistance to states lacking sufficient expertise or resources to strengthen their capacity to detect, deter and **interdict in cases of illicit trafficking** in these items.<sup>49</sup> (emphasis added)

But the PSI draws from other sources as well. It is important to note that approximately one-third of the enlarged European Union (EU)<sup>50</sup> are also PSI members. On 20 June 2003 the EU endorsed a 'declaration on weapons of mass destruction',<sup>51</sup> stating that the proliferation of WMD is a growing threat to international peace and security. The member states also held that the risk of terrorists acquiring chemical, biological, radiological or nuclear materials added a new dimension to this threat.<sup>52</sup> Thus, EU member states agreed to focus on "**strengthening** identification, control and **interception of illegal shipments**, including national criminal sanctions against those who contribute to illicit procurement efforts"<sup>53</sup> (emphasis added). Five days later, on 25 June 2003, the EU and the United States issued a joint statement on the proliferation of WMD.<sup>54</sup> This statement reiterated the earlier EU declaration.

While it is not unreasonable to assume that PSI objectives are attracting considerable support among European states, it is surprising to note that the PSI has only acquired two-thirds open support from NATO<sup>55</sup> member states. Belgium, the Czech Republic, Greece, Hungary, Iceland and Luxembourg remain outside the initiative. This anomaly is even more peculiar considering that NATO for some time has conducted interception manoeuvres in the Mediterranean. The operation, codenamed 'Active Endeavour', conducted its first boarding manoeuvre on 29 April 2003, followed by another the next day.<sup>56</sup> According to NATO, 33 boardings have been performed since then.<sup>57</sup> The NATO operations are very similar to those planned under PSI, albeit geographically limited to the Mediterranean.

## 2.4 Targets of the PSI: States and non-state actors of proliferation concern

The aim of the PSI is to "establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials".<sup>58</sup> The targets of this initiative are "states and non-state actors of proliferation concern".<sup>59</sup> How states and non-state actors of proliferation concern should be defined is still an unresolved question. According to the agreed principles, the term:

**generally** refers to those countries or entities **that the PSI participants involved establish** should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.<sup>60</sup> (emphasis added)

The wording is, at best, vague and ambiguous. The PSI participants themselves decide the targets of the initiative. Does that mean that the participating states have to sit down and reach a decision in advance as to which states should be targeted or can that decision be taken in retrospect? Does it mean that the participants have to be in consensus or will a majority suffice? In what way do the participants intend to protect, or at least take in account, minority views? Can one state decide that 'Country A' should be targeted, and at the same time rely on the other participants to agree enforce the decision?

The wording implies that the participants themselves may not have the final say on the issue. Although the inclusion of the word 'generally' in the text suggests that

target states will be identified on an ad-hoc basis by participating states, it could also be understood to imply that another party, for instance, the UN Security Council or the General Assembly, can define the states of concern. Or does the wording simply mean that the definition can be redefined and elaborated upon at any given moment?

These questions remain unanswered, and it seems clear that the principles have been drafted to maximise flexibility. This is in keeping with the current US Administration's new approach to arms control: forming 'coalitions of the willing' around specific counter-proliferation goals rather than seeking multilateral, treaty-based solutions.<sup>61</sup>

Generally, international lawyers refer to a 'state' as an entity with:

- (a) A permanent population;
- (b) A defined territory;
- (c) Government; and
- (d) Capacity to enter into relations with other states.<sup>62</sup>

Arguably, a non-state actor is defined as all other personal and legal entities, from terrorist cells to legitimate organisations and firms. Thus, the scope of the initiative pertaining to the potential targets appears to be all-encompassing. It does not differentiate between a private person, a firm or a state. Interestingly enough, the Statement of Interdiction Principles uses the words 'non-state actor' and 'entity' more or less as synonyms. Another arms control regime that uses the word 'entity' is the Missile Control Technology Regime, and the US government uses the word 'entity' in its export control legislation.

Does this mean that the PSI, MCTR and US and other national legislation target the same group of entities? The answer is: probably not. The phraseology merely highlights one of the difficulties in assessing this initiative from a standpoint of international law. Although the principles were drafted with maximum flexibility in mind, in order to avoid confusion the term 'non-state actor' should have been used throughout.

As previously noted, PSI participants may identify specific countries that will be subject to interdiction activities. The principles also state that such target countries should be subjected to interdiction because they are 'engaged in proliferation' through the following activities:

- 1 Efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems, or
- 2 Transfers (selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

John Bolton, US Under Secretary for Arms Control and International Security, said: "We are obviously worried about some places more than others as proliferants or would-be proliferants. In fact in Brisbane, at the meeting there, the 11 PSI participants said that North Korea and Iran were two states of particular concern".<sup>63</sup>

When asked whether the PSI in fact is a blockade of certain countries and therefore of questionable legality, Bolton replied: "We've never contemplated that the initiative would involve anything other than the trafficking of WMD-related material, and it was never contemplated as a blockade of any place".<sup>64</sup>

Identifying states that are proliferators is a highly contentious business. While there have been numerous reports recently indicating that a nuclear proliferation network has been operating out of Pakistan, the Pakistani government denies being party to these activities. The US government has labelled states like North Korea, Iran, Iraq and Libya as states of immediate proliferation concern,<sup>65</sup> and Cuba and Sudan have also been mentioned in this context. The on-going hunt for evidence of weapons of mass destruction in Iraq has shown exactly how unpredictable and unreliable some of the intelligence that underpins these assumptions is. The extent of the Iranian and North Korean nuclear programmes also remains uncertain. With the Iraq precedent, the standard of proof when it comes to accusing a country of proliferation activities appears to have become worryingly low.

Indeed, the list of suspected proliferators could be made considerably longer. The unrecognised nuclear-weapon states,<sup>66</sup> India, Israel and especially Pakistan, could also be labelled of proliferation concern. And if the presupposition that there are 'responsible' and 'irresponsible' nuclear weapon states is abandoned, and vertical proliferation is added as a concern,<sup>67</sup> the list could be extended to include China, France, Russia and the United States, and possibly the United Kingdom.<sup>68</sup>

Therefore, it could be argued that a 'country of proliferation concern' is just a rewording of the old term 'rogue states' and that it simply denotes a state belonging to the 'axis of evil', as defined by US President Bush.

The term 'rogue state' was controversial in itself when the Clinton Administration first presented it in the 1990s. The term implies a government that is dismissive of international law and whose leadership is hostile to western interests. It also implies that the hostile and erratic behaviour of such states needs to be countered by unconventional methods. The current US Administration defines 'rogue states' as those that:

- brutalize their own people and squander their national resources for the personal gain of the rulers;
- display no regard for international law;
- threaten their neighbours, and callously violate international treaties to which they are party;
- are determined to acquire weapons of mass destruction, along with other advanced military technology, to be used as threats or offensively to achieve the aggressive designs of these regimes;
- sponsor terrorism around the globe; and
- reject basic human values and hate the United States and everything for which it stands.<sup>69</sup>

The US State Department regularly lists states that 'sponsor terrorism'. These currently include Syria, Iran, Sudan, Cuba and North Korea. (Libya, having recently come in from the cold, is no longer listed). The 'axis of evil', as defined by George Bush in his 2002 State of the Union Address, constituted Iraq, Iran and North Korea. This 'axis' is clearly based on the old notion of 'rogue states' but the phrase itself

refers to the Second World War and the Axis powers. It is also draws from President Reagan's labelling of the Soviet Union as an 'Empire of Evil'.<sup>70</sup>

On 6 May 2002 Mr. Bolton gave a speech entitled 'Beyond the Axis of Evil', in which he added three more nations (Libya, Syria, and Cuba), which were "pursuing or who have the potential to pursue weapons of mass destruction or have the capability to do so in violation of their treaty obligations".<sup>71</sup>

The UK government's position is that the term 'countries of concern' is preferable to 'rogue states':

**Llew Smith:** To ask the Secretary of State for Foreign and Commonwealth Affairs what his definition of rogue states is; and which states fall within that definition. [93903]<sup>72</sup>

**Mr. Mike O'Brien:** The term "Rogue State" was first used by the Clinton Administration in the US to describe states which were pursuing illicit programmes to develop weapons of mass destruction (WMD) and those which the US Administration considered posed a threat to the US. The term has become widely used by media and commentators to describe states of proliferation concern and those which provide succour and support for terrorism. The Government generally prefers to use the phrase "Countries of Concern" to describe such states, although "Rogue States" has also been used for this purpose.

We continue to be concerned by the proliferation of WMD and the means for their delivery in several regions including the Middle East, South Asia and the Korean Peninsula.

We are also concerned about state support for terrorist activity in a number of countries. In the light of the continuing campaign against terror, it is not possible at this time to specifically name publicly any of the countries about which we are concerned or to speculate on any action that might be taken to counter our concerns.<sup>73</sup>

In order to be singled out for interdiction activities, the target state has to have clearly sought to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems. With the inclusion of the word 'effort' in the definition, it is implied that the 'country of proliferation concern' has to be involved in an earnest and conscientious activity to this end. Does this wording set up a certain standard of proof in regards to the proliferation activities of a suspected state? This question remains unanswered, but as previously stated, recent practice suggests that the standards of proof in regards to 'WMD proliferation' are worryingly low. Also, the case of Iraq has seriously called into question the reliability of the evidence provided to make the case for intervention.<sup>74</sup>

As noted previously, the Statement of Interdiction Principles uses the words 'non-state actor' and 'entity' more or less synonymously. It is reasonable to assume therefore, that the participants already had specific entities in mind when they drafted the interdiction principles. Or does the word non-state actor imply that there exists a wider circle of actors of concern than those previously defined? For example, the US Department of Commerce maintains an "Entity List" of suspect end users that "have been determined to present an unacceptable risk of diversion to developing weapons of mass destruction or the missiles used to deliver those weapons".<sup>75</sup> This list names a number of institutes and corporations in China, India, Israel, Pakistan and Russia.<sup>76</sup> Is it to be understood that goods shipped from these entities may be subject to interdiction? Such an interpretation is not unlikely.

The assurances of the US government notwithstanding, it seems clear that the initiative primarily targets the same group of countries that have concerned Western governments for over a decade. Iran and North Korea top that list. In order to bolster the credibility of the initiative, participants need to further define the term 'proliferation concern'. It is important that the PSI is not perceived as just another measure against a few core states of concern. Rather, the initiative needs to be applied generally and objectively. It is necessary, therefore, to spell out the general characteristics of a 'country of concern'; to provide an objective rule that enables other concerned actors (both state and non-state) to assess their own behaviour and adjust it accordingly. Naturally, this rule will not stop the proliferators from proliferating. Enforcement mechanisms can punish trespassers, but they seldom stop the trespassing (much like a rule against unlawful killings does not stop murder).

## **2.5 Targeting 'Weapons of Mass Destruction'**

The initiative uses the description 'weapons of mass destruction' interchangeably with the term 'chemical, biological and nuclear weapons'. But it is not clear that the two terms are meant to be synonymous. The term WMD has become shorthand for various arms systems, and it should be noted that neither treaty law nor customary international law contains an authoritative definition of WMD. The main reason for this is that international law focuses on each category of weapon technology. Thus, there exist distinct sets of rules for nuclear, biological and chemical weapon technologies. Certainly, general principles of international law also apply to weapons of mass destruction, especially humanitarian international law, in relation to the use of these weapons.

The term is thought to have been first used in 1937, when British newspapers referred to German bombers in action in Spain as 'weapons of mass destruction', but later, during the cold war, it was used almost exclusively in respect to nuclear weapons.<sup>77</sup>

In the context of the PSI, the grouping together of various types of weapon systems under the broad definition of 'WMD' is unfortunate. For a given payload, the scale of death and destruction caused by a nuclear weapon is unmatched by any other weapon system.<sup>78</sup> The proliferation of nuclear weapons has been a major concern since the detonation of the first nuclear weapon in New Mexico on 16 July 1945. The yield of the Trinity device was a mere 21 kilotons. But the yields rapidly increased, and the detonation of 'Ivy Mike', the first hydrogen bomb, was 10.4 megatons. The detonation of a crude nuclear device over New York, for example, would have terrible consequences with deaths amounting to tens of thousands – see Figure 1. And this would be the destructive capability of a relatively simple nuclear weapon. The casualty rate would, naturally, increase with the yield of the weapon.

In contrast, chemical weapons are likely to produce limited casualties, while the unpredictable nature and limited tactical and strategic value of biological weapons make them a potential WMD in the future rather than the present. Of course, civilians remain vulnerable to chemical and biological weapons used either in wartime or as a terrorist tool, but civilians always have been and will be vulnerable to any weapon system used by a terrorist. Given that terrorist use of chemical and biological

weapons has been both infrequent and less than 'massive'—the anthrax attacks of October 2001 in the United States, for example, were limited to 22 infected people and only five deaths, should the future employment of chemical and biological weapons be viewed as “distinct, relatively small-scale targeted releases likely to result in limited casualties (albeit with high-impact results, both during military operations and terrorist incidents against civilian populations), rather than ‘weapons of mass destruction’”?<sup>79</sup>

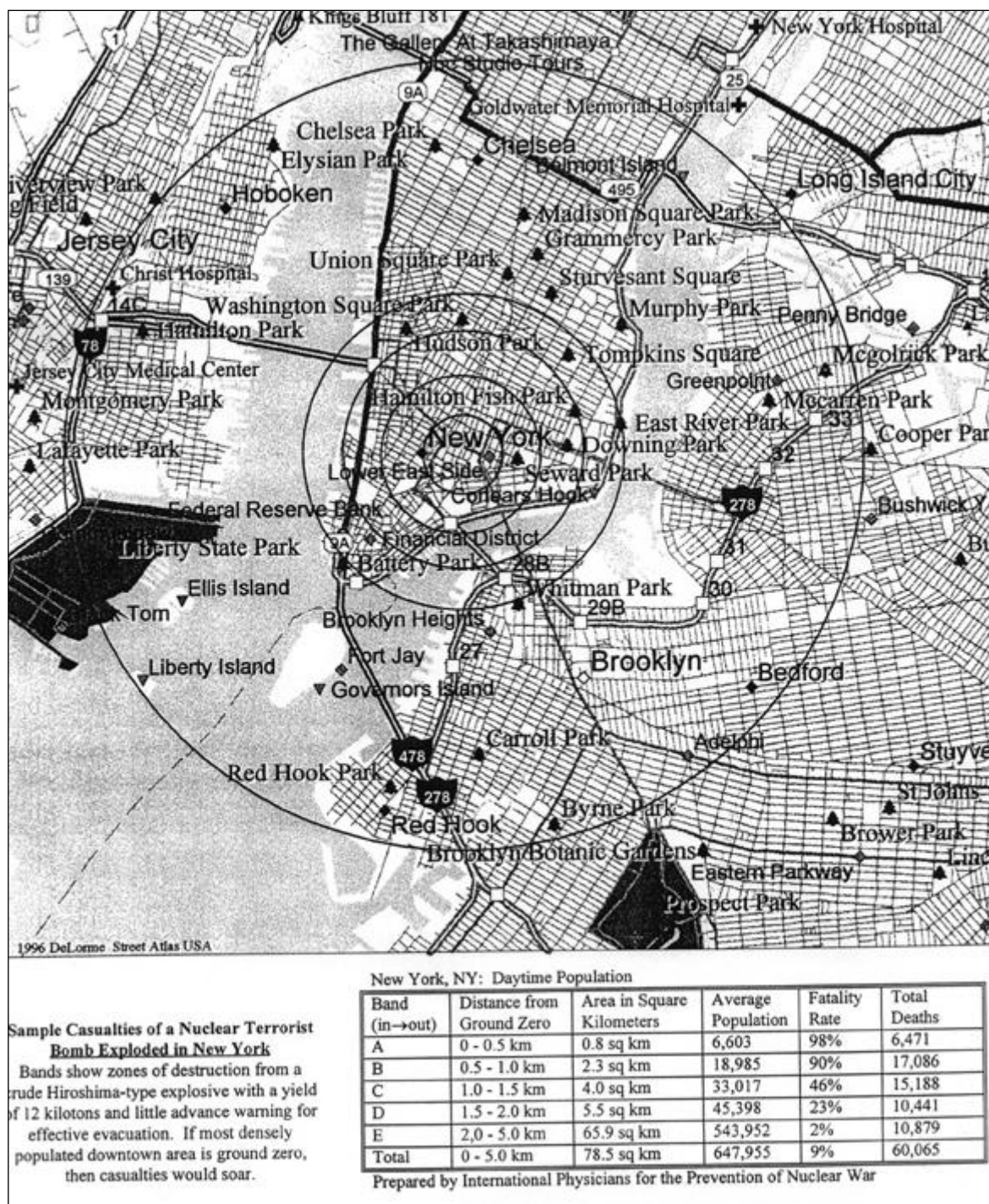


Figure 1: Zones of Destruction of a Nuclear Terrorist Bomb Exploded in New York

The debate over the inclusion of chemical and biological weapons in the concept of 'weapons of mass destruction' is not new, and a range of both broad and narrow definitions does exist. For instance, the US Code refers to 'WMD' as:

The term "weapon of mass destruction" means any weapon or device that is intended, or has the capability, to cause death or serious bodily injury to a significant number of people through the release, dissemination, or impact of -

(A) toxic or poisonous chemicals or their precursors;

(B) a disease organism; or

(C) radiation or radioactivity.<sup>80</sup>

The US Federal Bureau of Investigation sometimes uses an even broader definition of WMD, which they argue can be "explosive, chemical, biological, or radiological in nature".<sup>81</sup> Indeed, the so-called 'Oklahoma City Bomber', Timothy McVeigh, was charged with "knowingly, intentionally, wilfully and maliciously conspire, combine and agree together and with others ... to use a weapon of mass destruction, namely an explosive bomb placed in a truck (a 'truck bomb')".<sup>82</sup> He was later convicted for the crime of conspiracy to use a weapon of mass destruction and sentenced to death.

Similarly, in the criminal code of the Russian Federation, a weapon of mass destruction is defined as a nuclear, chemical, biological or other weapon with a high effect, which use causes mass casualties and/or destruction.<sup>83</sup> NGOs and some states have also argued that small arms and light weapons (SALW) are weapons of mass destruction, since they are the largest cause of actual conflict casualties in the post World War II environment.<sup>84</sup>

The principles of interdiction do refer to nuclear, biological and chemical weapons when it comes to defining which entities are of 'proliferation concern'. However, should the PSI develop into a more formal arrangement, the parties have to consider that international treaty law provides that a treaty shall be "... interpreted ... in accordance with the ordinary meaning to be given to the terms ... in their context and in the light of its object and purpose".<sup>85</sup>

## **2.6 Effective measures for interdiction and adoption of streamlined intelligence procedures**

The Statement of Interdiction Principles calls for:

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.

This requirement has to be seen in the context of the practical interdiction measures that the states have to take (discussed in more detail in section 2.8 below). More interesting, the Interdiction Principles also call upon the participating states to:

Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts

Napoleon Bonaparte once said that "...the secret of war lies in the communications". There are many thousands of ships of all designations and sizes traversing the globe at any given moment. Many of those contain cargoes without an owner. It is said that the cargo of an oil tanker can change hands up to seven times during one journey. Many ships are hazardous to the environment and its crew. Needless to say, the PSI participants have a hard task trying to track these ships. Most of the surveillance has to be done via satellite systems such as the Naval Ocean Surveillance System (NOSS)<sup>86</sup> combined with active and vigorous patrols by national coast guards and navies.

However, according to US analyst John Pike:

We have a global maritime surveillance capability that was basically designed to keep track of a few hundred big Soviet warships ... Now you've got thousands of little no-name ships all over the world and you have no idea who they belong to and what they're carrying.<sup>87</sup>

It can also be quite easy to deceive 'the eyes in the sky'. The head of the former Federal Republic of Yugoslavia's Third Army division, Colonel-General Vladimir Lazarevic, said that during the 1999 Kosovo conflict, the Yugoslav army used dummies of soldiers filled with hay standing next to fake anti-aircraft guns made out of various metal parts, including old water pipes, and multiple rocket launcher with rusty vegetable cans as barrels. Another Yugoslav army official said, "It looks primitive, but it was very effective ... The results were very good".<sup>88</sup>

Also, it should be obvious by now that single source human intelligence is highly unreliable, especially so if the intelligence has been coerced from the source. Even multi-source material collected from dissidents of a current regime can be highly dubious and requires a throughout analysis of the sources' motives for handing over the information.

And even if the participants are capable of collecting reliable intelligence through signal-, imagery- or human intelligence, the question remains as to whether they are willing to share it with other PSI members. Sometimes the intelligence may be sensitive, which will usually prevent a state from sharing it, even with its most loyal allies. Moreover, even setting aside the hard cases involving national security concerns or protection of sources, states often prefer to shroud their national intelligence gathering capabilities in a cloak of secrecy. This is done partly to stop the 'enemy' from developing effective countermeasures (such as new camouflage techniques) and again, partly to protect sources – and sometimes to hide its activities from domestic scrutiny and accountability. Nonetheless, it is a fundamental rule in the intelligence community that careless use of collected intelligence not only risks the life and physical integrity of the source, but also hampers future recruitment processes. Intelligence agencies need to contain the information in order to protect the source and there is an old saying that the risk of a leak increases with the square of the number of people holding the information.

Finally, even if the participant state decides to share the information with the other participants, the intelligence needs to be assessed and acted upon. In order to truly make the initiative successful, intelligence, command and control have to be properly integrated. Therefore, in an effort to improve procedures, PSI participants have during 2003 and early 2004 conducted several live exercises combined with command and control tabletop exercises. The lessons learned from these exercises in regards to intelligence sharing are, for obvious reasons, not accessible in the public domain. An educated guess is that the participants will continue to face considerable difficulties in streamlining and coordinating their intelligence procedures.

## **2.7 Review of relevant national and international law**

The Statement of Interdiction Principles provides that the participants are obliged to review and strengthen their relevant national legal authorities and to work to strengthen international law and frameworks in appropriate ways to support the development of the initiative. This is a call for member states to enact legislation which strengthens not only the participant's ability to intercept ships in its national waters but also to enhance its capability to seize interdicted cargoes and punish those involved in the trafficking. A number of participating countries have already enacted laws in that respect, mostly as a result of obligations in existing international agreements that relate to the spread of nuclear, biological and chemical weapons. It is the responsibility of that state to carry them out.

One way of regulating the trafficking in NBC materials and international non-proliferation commitments is by enacting export controls. Most PSI members have enacted export control legislation on the basis of the lists provided by the Nuclear Suppliers Group, the Australia Group and the Missiles Technology Control Regime (MCTR), and all PSI states have enacted criminal legislation to enforce these export controls.

As far as is known, most national export control legislation focuses on materials manufactured in the country and exported abroad. It says nothing of nuclear materials transiting the country's territory or territorial waters. Therefore, several states have enacted criminal legislation prohibiting unauthorised transports of NBC materials on their territory. In Australia, for instance, the relevant piece of legislation is the Nuclear Non-Proliferation (Safeguards) Act of 1987. This legislation was enacted to give effect to certain obligations that Australia has under the NPT. The act is applicable to all nuclear materials and associated items<sup>89</sup> and defines which activities relating to the handling of nuclear materials constitutes a crime under Australian law. For instance, the possession of nuclear materials or associated items carries a maximum sentence of imprisonment for a period not exceeding five years.<sup>90</sup>

## **2.8 Specific actions in support of interdiction efforts**

The PSI participating states are committed to taking 'specific actions' in support of interdiction efforts.<sup>91</sup> This principle is closely connected to operative paragraph 1 of the initiative, which calls for 'effective measures', and can be seen as an extension

and clarification of that paragraph. It is important to note that the commitment in this paragraph, unlike operative paragraph 1, only extends to what is actually permitted by the respective national laws of participating states. Also, the participants' 'specific actions' have to be consistent with their obligations under international law and frameworks. Although the document enumerates six specific interdiction cases, it is possible that this list is only illustrative. Indeed, read in the light of operative paragraph 1, operative paragraph 4 should only be seen as a guideline for the participant's interdiction efforts.

Interdiction efforts appear to be focusing on 'hub trafficking' – those key ports and sea-lanes that are crucial to current trafficking networks. And according to UK officials interviewed, the vast majority of interdictions are expected to take place in key transfer ports, rather than at sea.<sup>92</sup> There are several benefits to this. First, a majority of the world's shipping passes through these ports, and concentrating PSI assets in a few, geographically small, areas will greatly enhance the participant's intelligence gathering capability. Second, since the port state has exclusive jurisdiction over its own territory there are likely to be fewer legal complications carrying out searches and seizing goods while a ship is moored to a dock. Where appropriate, PSI participants could assist port states in drafting suitable national customs and criminal legislation. Third, fewer legal complications may also have political benefits. It may reduce the concerns of third states if implementing legislation is balanced and contains appropriate legal safeguards. National legislation that is too flexible may permit unwarranted searches, which in turn may lower international confidence in the initiative. And fourth, it may leave the current international legal regime intact. Major seafaring nations may view this as more favourable than the modification or invalidation of the law of the sea.

However, the territorial application of the PSI is potentially far-reaching and covers the following sea zones:

- the internal waters of the participant state;
- the territorial seas of the participant state;
- the contiguous zone of the participant state; and
- international waters.

The territorial application does not explicitly exclude 'specific actions' in the internal and territorial waters of a third state. However, since the intention of the parties is to conduct interdiction activities in a manner consistent with relevant international law, it seems unlikely that their navies will conduct such manoeuvres in the territorial waters of third states.

The material scope of the agreement is mainly focused on the internal waters, territorial seas and contiguous zones of the participants, where the participants are required to stop and search suspect vessels flying the flag of any nation.<sup>93</sup> On the high seas, the participant is only authorised to board and search vessels flying their own flag.<sup>94</sup> In order to complement that principle, the agreement commits participants to seriously consider mutual boarding arrangements. Principle 4 (c) reads:

To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.

In other words, this would allow participating state A to board and search vessels flying the flag of participating state B, wherever those vessels may be.<sup>95</sup> And according to Foreign Secretary Jack Straw, "Shipping of the ten largest commercial flag states covers some 70 per cent of maritime trade. So with a relatively small number of such agreements, a large proportion of the world's shipping would be covered".<sup>96</sup> But even if 70 per cent coverage could be secured it may not be enough. Since the PSI is aiming high and seeks "to impede and stop trafficking of WMD ... at any time and in any place", and because WMD are "a global threat which calls for a global response",<sup>97</sup> the participating states are almost certainly going to need to find ways of expanding the territorial scope of the initiative in the future.

In this context, it is important to note that the interdiction principles are not legally binding. At the London Meeting the participants had an initial exchange of views on a possible Boarding Agreement that could facilitate practical implementation of the initiative. However, they were unable to complete work on a model agreement due to differing interpretations on what is permissible.<sup>98</sup> The participants characterised the lack of an agreement as a reflection of the flexible and informal nature of the initiative.<sup>99</sup>

However, the big question remains whether or not this initiative can be applied on the high seas. Professor Paul de Waard, retired professor of law at Amsterdam University, argues that:

States by themselves cannot act in that way in my view because we have the freedom of the high seas. Under the Law of the Sea Convention, it's not permitted that individual states decide what is legal and what isn't in that respect. That is a matter of power politics and not of international law.<sup>100</sup>

The Australian Minister for Defence, Senator Robert Hill, has recognised this problem:

In international waters [the legal question] becomes more complex. You get into issues as to whether the ship is flagged and the like. But it's for the international lawyers to determine what would be the set of rules that each of the states is prepared to accept. Efforts are being made in that regard at the moment.<sup>101</sup>

A senior US official has been quoted saying that the PSI "...will be focused on those activities which require no additional laws, no new international treaties, no going to the United Nations Security Council".<sup>102</sup> He added: "Look at the Japanese, who can't stop transfers of money on North Korean ships, but suddenly discovered they can do 'safety inspections'".<sup>103</sup> This view, if truly representative of US opinion, seems peculiar given that the Statement of Interdiction Principles requires the participants to review their national legislation. And it seems difficult to see how the initiative can succeed without some modification to international law. Even if a revision is out of the question, the participants will need to reinterpret certain provisions, especially in relation to the Law of the Sea – which is discussed in more detail in the next section.

## **Chapter 3: The PSI and the Law of the Sea**

All PSI participants except Denmark, Turkey and the United States have signed and ratified the United Nations Law of the Sea (UNCLOS). Australia ratified it on 5 October 1994 and Canada on 7 November 2003.<sup>104</sup> The provisions contained in the Law of the Sea are to a large extent a codification of customary international law. Non-signatory states have raised objections regarding issues other than freedom of navigation and innocent passage. In the case of Denmark, for example, the issue has been fishing rights in the North Atlantic. Turkey and Greece have a long-standing dispute over delimitation in the Aegean Sea, while the United States, as discussed further below, has raised concerns regarding sea-bed mining and related issues. Thus, as far as is known, all non-signatory nations recognise the right to freedom of navigation and innocent passage and have on occasions proclaimed themselves bound by these principles under customary international law.

The reluctance of US lawmakers to ratify the convention has little direct impact on the questions discussed in this report, therefore. In order to simplify the structure of this report, issues regarding the Law of the Sea will be discussed as if the non-signatories were parties to it. Lack of space precludes analysis of the extent to which each non-signatory is bound to the provisions through customary law or preceding conventions (such as the 1950s convention on the territorial sea).

Since each state enjoys criminal and civil jurisdiction over ships flying its own national flag, according to the principal rule under UNCLOS, the initiative mainly raises questions pertaining to the criminal and civil jurisdiction of foreign vessels in the territorial waters of coastal states. UNCLOS also touches on the right of ships from all states to innocent passage through the territorial sea.

In 1927, the Permanent Court of International Justice (PCIJ) decided that, generally, “vessels on the high seas are subject to no authority except that of the State whose flag they fly”.<sup>105</sup> Any assertion of a right to stop and search a vessel on the high seas is in conflict with this rule. If taken as an absolute principle, interdiction would be legal only when carried out by the target ship’s own flag state. Most anticipated PSI operations on the high seas are likely to fail this test, since they will be undertaken by states other than the flag state. As discussed further in chapter 4, this may necessitate a change in international law.

### **3.1 The sovereignty and jurisdiction of the Coastal States**

The concept and definition of ‘sovereignty’ is central in international law, and a crucial element of the PSI. States are considered as both creators and subjects of international law, with their own ‘legal personality’. Closely connected to ‘sovereignty’ is the concept of ‘jurisdiction’. Basically, jurisdiction can be divided into three categories:

- A jurisdiction to prescribe laws;
- A jurisdiction to adjudicate laws; and
- A jurisdiction to enforce laws.

The basis of jurisdiction can, in a similar way, be subdivided along four lines:

- *Territoriality principle*: A state asserts jurisdiction by reference to the place where the offence is committed (e.g. if a murder is committed in Country X, its courts would have the jurisdiction to adjudicate the case on the basis of the laws in Country X).
- *Nationality principle*: A state asserts jurisdiction by reference to the nationality of the person accused of committing the offence (e.g. if an act of terrorism is committed by a citizen from Country X in another country, the courts in Country X have the jurisdiction to adjudicate the case on the basis of the laws in Country X).
- *Protective principle*: A state asserts jurisdiction by reference to the national interest injured by the offence (e.g. if an act of terrorism is committed by a citizen from Country X in Country Y against an embassy from Country Z, the courts in Country Z have the jurisdiction to adjudicate the case on the basis of the laws in Country Z).
- *Passive personality principle*: A state asserts jurisdiction by reference to the nationality of the victim (e.g. if a citizen of Country X murders a citizen of Country Y, the courts in Country Y have the jurisdiction to adjudicate the case on the basis of the laws in Country Y).

According to UNCLOS, the sovereignty of a coastal state extends beyond its land territory and internal waters to an adjacent belt of sea, described as the territorial sea.<sup>106</sup> The territorial sea usually extends to a limit of 12 nautical miles, measured from baselines, most commonly being the low-water line along the state's coast.<sup>107</sup> Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the state.<sup>108</sup> As far as ports are concerned, the outermost working part of the permanent harbour, which forms an integral part of the harbour system, is regarded as forming part of the coast.<sup>109</sup> Accordingly, as soon as a vessel passes the 'outermost permanent harbour works' and continues towards the docks, it enters that state's internal waters.

The jurisdiction of the coastal state fades the further away a ship is from the state's coast. Sovereignty over internal waters is not explicitly defined in the convention, although it can be inferred that states are entitled to exercise the same absolute sovereignty in internal waters as they are on their land territory. Sovereignty over the territorial sea is not, however, absolute as the "sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law". One limitation on a coastal state's sovereignty in the territorial sea is the right of innocent passage, whereby "ships of all states ... enjoy the right of innocent passage through the territorial sea".<sup>110</sup> Passage is defined as innocent only "so long as it is not prejudicial to the peace, good order or security of the coastal state".<sup>111</sup> Outside the territorial sea is the contiguous zone, where a coastal state "...may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea".<sup>112</sup>

Outside the contiguous zone lie the Exclusive Economic Zone ("EEZ") and the high seas. The sovereign rights granted to coastal states with respect to the EEZ are limited to those specified in the Convention. These primarily relate to the economic resources of the EEZ. Outside the EEZ lie the high seas where "no state may validly purport to subject any part of the high seas to its sovereignty".<sup>113</sup> The rights of a

coastal state to stop and board vessels on the high seas are limited to those circumstances prescribed by UNCLOS article 110, which provides:

... a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity ... is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

### **3.2 Criminal jurisdiction over ships carrying WMD materials**

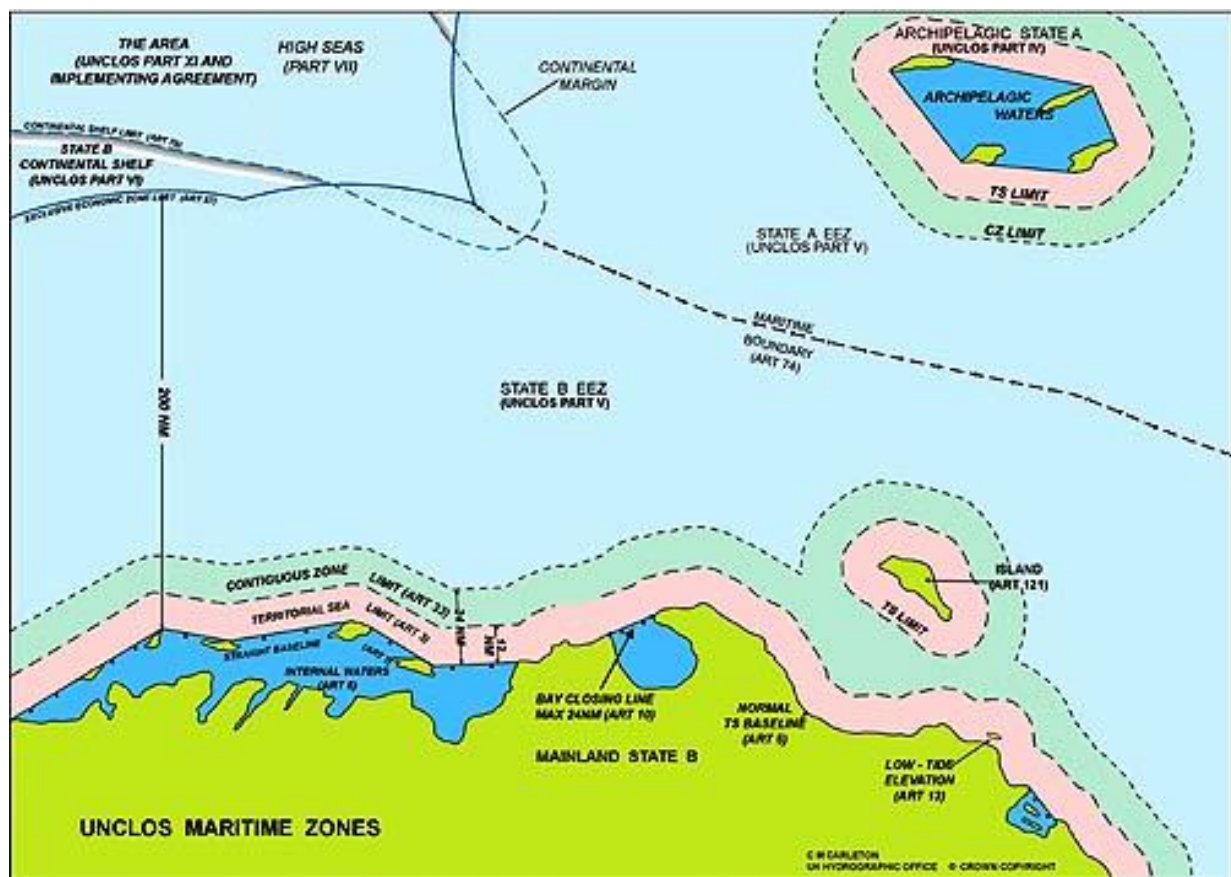
At the December 2003 Operational Meeting of the PSI, US Under-Secretary of State, John Bolton held that "...legal experts will analyse their authorities against real world scenarios and examine any gaps in authorities that can be filled either through national legislation or policy or international action". And when it comes to the participant's territorial waters, he held that, "... we can find a variety of ways to interdict illegal shipments when the vessels carrying them come to port, given that sovereign power is at its greatest in national waters".<sup>114</sup> The statement is of course true, but fails to address the fact that in reality the situation is different for each zone – internal waters; territorial waters; contiguous zone; exclusive economic zone; and international waters – and in general the situation becomes more complex and less certain the further a ship is away from the coast. The different UNCLOS maritime zones are shown in Figure 2. This section assesses the legal jurisdiction for interdiction of shipping suspected of carrying WMD materials in each of these zones.

#### **Internal waters**

Initiative partners that have ships suspected of carrying illicit WMD and/or associated delivery systems in their internal waters enjoy full criminal jurisdiction over them. That means that they are free to board and search those vessels as long as they remain in the port area, which forms part of the coastal states internal waters.

It is not uncommon for ships to be seized while in the internal waters of the coastal state. Usually, the seizure is prompted by a civil lawsuit, for example, a creditor wanting to secure repayment of outstanding loans. At times, however, a ship can be seized due to a criminal offence. Naturally, cargoes brought into the internal waters of the coastal state can be seized, if the transport of the goods in question is contrary to national laws. An illustration of such a seizure in relation to illicit weapons trafficking is the 'Ku Wol San' incident – see Box 1.

Figure 2: UNCLOS Maritime Zones



### Box 1: The 'Ku Wol San' incident

On 25 June 1999, at the height of the Indian - Pakistani conflict along the line of control in Jammu & Kashmir, the 9,600-ton steamer 'Ku Wol San', owned by the Puhung Trading Company of North Korea, docked at an Indian port on the West coast, and began unloading sugar taken aboard in Bangkok, Thailand. The vessels' final destination was Malta, and was scheduled to go there via the port of Karachi, in Pakistan. It later turned out that the recipient address on the cargo manifesto was fabricated.<sup>115</sup>

Indian authorities boarded the vessel and started to search the cargo hold, at which point, the crew 'turned hostile and violent' prompting the arrest of the entire 44 crew.<sup>116</sup> Indian officials from the Defence Research and Development Organisation (DRDO) and the Directorate of Revenue Intelligence (DRI) noted that the equipment found—missile production blueprints, drawings and instruction manuals, in addition to a sizeable shipment of missile components and production materials<sup>117</sup>—had Chinese markings.<sup>118</sup> Indian officials later held that carrying military cargo for a third country, after proper declaration, constituted no offence under the Customs law, but that a faulty cargo manifest certainly amounted to a criminal offence.<sup>119</sup> The cargo was confiscated and the ship's master and chief officer were arrested and held on remand under the Arms Act and also on the charge of improper declaration of goods. After being held on remand for a period of nearly three months, the officers were released on 17 September 1999 and were allowed to return to the ship. An Indian magistrate said that no charges would be pressed but did not provide reasons for the decision.<sup>120</sup> Later, the 'Ku Wol San' was released on a large sovereign guarantee.<sup>121</sup>

Notwithstanding the outcome of the affair, it is important to note that no state, except North Korea, raised any objections to the Indian authorities handling of the incident, indicating that the approach was indeed permissible under international law.

## **Territorial waters**

In territorial waters, however, the grounds for instigating criminal proceedings are more limited. The principal rule is that a foreign ship passing through the territorial sea is not under the criminal jurisdiction of the coastal state.<sup>122</sup> Note that the ship has to be 'passing through' the territorial sea. If it is leaving a port of the coastal state and is steaming towards international waters, the coastal state may still exercise jurisdiction over it.<sup>123</sup> The opposite does not apply, however. That is to say, a coastal state may not exercise jurisdiction over a foreign ship that intends to make port in the coastal state. The coastal state gains its powers at the time the ship traverses into internal waters. It should also be noted that there is an uncertainty on whether this principal rule is one of comity or of law.<sup>124</sup> In practice, common law countries seem to follow the rule as one of comity, whereas civil law countries regard them as binding. To quote an example from Australia, Justice Barwick has stated, "The concept of territorial waters ... derives entirely from international law, based on international comity. It is not a concept which, in my opinion, has any place in the domestic or municipal law of a country".<sup>125</sup>

It seems perfectly acceptable, therefore, for the common-law parties to the PSI to criminalise the proliferation of weapons of mass destruction and to enact strict export controls consistent with international standards. This will enable them to legitimise naval interdiction of foreign ships on their territorial waters in accordance with the assumption that coastal states have unlimited criminal jurisdiction within their own territorial seas. Indeed, during his address to the UN General Assembly on 23 September 2003, President Bush asked the UN Security Council to adopt a non-proliferation resolution calling on member states to enact such criminal laws. Such a resolution was adopted unanimously on the 28 April 2004 and is discussed in more detail in section 5.2. Resolution 1540 (2004) is also reproduced in full in Appendix 4.

According to UNCLOS, there are some circumstances under which the coastal state, irrespective of its interpretation of the rule as such, has criminal jurisdiction over a foreign vessel in its territorial waters, irrespective of where the vessel is heading or has been, namely:

- (a) if the consequences of the crime extend to the coastal State;
- (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
- (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.<sup>126</sup>

Note that paragraph (c) closely corresponds with PSI principle 4(c) which provides that the participating state should, “seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states”. Thus, if one PSI participant suspects a ship transiting its territorial waters and flying the flag of another PSI participant of carrying WMD related cargoes, it can ask for a diplomatic agent of the other state to ‘request their assistance’.

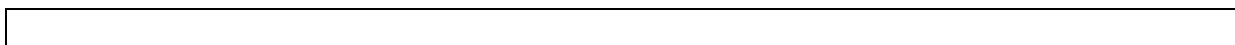
It is when the suspected ship belongs to a nation that refuses to provide consent for a boarding action that paragraphs (a) (b) & (d) come into play. While the wording of paragraph (d) is particularly diffuse and can give rise to a multitude of interpretations, a few cases are clear-cut. For example, most countries have enacted legislation prohibiting ships to clean their tanks in territorial waters. In many cases, the master of the ship bears a criminal responsibility for such an activity, while the shippers may face liability in the form of fines and damages. Provided that, first, the act of cleaning a ship’s tanks in the coastal state’s territorial waters is a criminal activity in that state, and second, that the released oil spill actually spreads to the shores of that state, then ‘the consequences’ can clearly have been seen to extend to the coastal state. In turn, the coastal state has the legal jurisdiction to dispatch units to investigate.

Another example is less clear-cut. But if you could argue that the consequences of illegal immigration extend to the coastal state, then this provision would allow coastal states to stop and arrest vessels in the territorial sea if they are in breach of domestic immigration legislation.

In terms of WMD, most PSI participating countries already have criminal laws governing the transfer of such weapons. In the United Kingdom, for example, participation in the transfer of nuclear weapons already constitutes an offence according to the 2000 Anti-terrorism, Crime and Security Act, participation in the transfer of biological weapons constitutes an offence according to the 1974 Biological Weapons Act and participation in the transfer of chemical weapons an offence under the 1996 Chemical Weapons Act. And in the case of another participating state, Australia, according to the Australian Weapons of Mass Destruction (Prevention of Proliferation) Act of 1995, section 11, any services rendered that may assist a WMD-programme, may, under certain circumstances, be an offence.

The key question then is whether or not the said offence can be said to ‘extend to the coastal state’.

In any event, before any criminal investigation is instigated, the master of the ship may request that the coastal state notify a diplomatic agent or consular officer of the flag state. The coastal state is also obligated to facilitate contacts between such an agent and officer and the ships crew. Only in cases of emergency may this notification be communicated while the coastal states are taking measures.<sup>127</sup> One example of an interdiction in territorial waters is the Baltic Sky incident – see Box 2.



## Box 2: The 'Baltic Sky' incident

The 'Baltic Sky' had previously been registered under the name 'Sea Runner', flying a Cambodian flag. The 'Sea Runner' had a poor maintenance record and had been detained in the United Kingdom from 6 August 2002 to 7 March 2003. British authorities found that the ship had insufficient documentation and maps, that its lifeboat system was corroded and that the monkey island and other areas of the vessel showed severe corrosion.<sup>128</sup> The ship was eventually released (apparently the faults had been corrected) and shortly thereafter started to sail under a new name and a new flag. It turned up again on 23 June 2003 when Greek forces seized the 'Baltic Sky' in its territorial waters.<sup>129</sup> The ship had left Albania on 22 April 2003 and made port in Gabes, Tunisia, on 12 May 2003. The ship then sailed around the Mediterranean for over a month. It was spotted by the Turks near the Dardanelles before it turned towards Greece.<sup>130</sup> Now, the ship was sailing under a flag of convenience from Comoros.



It turned up again on 23 June 2003 when Greek forces seized the 'Baltic Sky' in its territorial waters.<sup>129</sup> The ship had left Albania on 22 April 2003 and made port in Gabes, Tunisia, on 12 May 2003. The ship then sailed around the Mediterranean for over a month. It was spotted by the Turks near the Dardanelles before it turned towards Greece.<sup>130</sup> Now, the ship was sailing under a flag of convenience from Comoros.

Greek authorities started to track the vessel on 18 June 2003, and when Greek military personnel boarded the ship five days later, they found about 680 tonnes of explosives and some 8,000 detonators onboard. Naturally, the Greek Coast Guard officials wanted to know what the ship was doing in the waters between Turkey and Greece when it was supposed to be delivering its cargo in Sudan. The captain and crew were put in remand by a Greek court pending full investigation. Subsequently, they were charged with illegally transporting explosives and failing to notify authorities it was carrying dangerous cargo.<sup>131</sup> Later the recipient company insisted that the explosives were for routine projects such as road construction, cement and oil production, and telecommunications, while the Sudanese Foreign Ministry held that they had cleared the acquisition and transportation of the explosives.<sup>132</sup>

## The contiguous zone

The contiguous zone is described as the belt of water adjacent to the territorial waters, which may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.<sup>133</sup> In the contiguous zone the coastal state may only exercise control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; and

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.<sup>134</sup>

As previously noted, the jurisdiction of the coastal state diminishes substantially in the contiguous zone. In essence, the coastal state may only exercise its powers to prevent certain infringements on its sovereignty in its territorial waters.

In order to intercept a ship carrying WMD components in these waters, the state must have enacted laws making an unauthorised cargo an infringement of its customs

laws. However, that is not enough to warrant an interception. In addition, the cargo needs to be heading towards the mainland or must have originated on the mainland heading towards international waters. Ships merely passing through the contiguous zone may not be intercepted on the basis of national customs laws. Neither can a ship loitering in the contiguous zone without entering territorial waters.<sup>135</sup>

### **The exclusive economic zone (EEZ)**

Adjacent to the contiguous zone lays the exclusive economic zone (EEZ). It is up to each coastal state to determine the length of this zone. However, the EEZ cannot extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.<sup>136</sup> Not every country has a territorial sea claim and/or an EEZ. The size of the claim also varies between countries.

In the EEZ the coastal state may only exercise jurisdiction relating to:

- (i) the establishment and use of artificial islands, installations and structures;
- (ii) marine scientific research;
- (iii) the protection and preservation of the marine environment.<sup>137</sup>

Thus, in particular an EEZ is designed to protect the economic benefits that a country can gain from its adjoining oceans, particularly those linked to fishing and mining. When it comes to interdiction of WMD and related materials, the EEZ can be regarded as international waters. Only with great difficulty could a state argue that an interdiction of a ship carrying WMD is necessary to protect and preserve the marine environment.

### **International waters**

International waters, or 'high seas', embody all waters that are not part of a nation's territorial waters, contiguous zone or EEZ.<sup>138</sup> PSI participants will find that the Law of the Sea severely restricts the coastal state's options to enforce its laws on these waters. To determine jurisdiction over ships on the high seas, it is necessary to know the nationality of the vessel and whether it is operated by a government or by a private entity. Ordinarily, on the high seas, a ship is under the "exclusive jurisdiction" of the state whose flag it flies.<sup>139</sup> The PCIJ confirmed this in 1927 in the widely cited case of the SS 'Lotus':

"It is certainly true that - apart from certain special cases which are defined by international law - vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them."<sup>140</sup>

The Court also held, however, that this in no way excludes the jurisdiction of other nations:

“... it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas ... there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects ... in foreign territory, the same principles must be applied as if the territories of two different States were concerned ...”<sup>141</sup>

And the Court concluded that:

“...there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent. This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principle stated above ... In the Court's opinion, the existence of such a rule has not been conclusively proved”.<sup>142</sup>

In the context of the PSI, this ruling suggests that even where state ‘X’ may consider that WMD trafficking is likely to have an impact on its own territory, if the alleged offence is being committed on a foreign ship on the high seas, state ‘X’ is not authorised to indict and convict the WMD traffickers while the ship remains on the high seas. This is because the legal basis for interdicting or interfering with ships on the high seas is severely restricted and is only permissible in a few cases.

In regards to the interference of warships, there is only one exception to this non-interventionist rule; a warship can be attacked during times of war. In regards to merchant shipping, a few justified interdiction situations have materialised over the years. Stateless ships can be interdicted, and accordingly a naval vessel can also interdict a ship to ascertain its nationality. Also, a naval vessel can exercise the right of ‘hot pursuit’, hunting a ship from the coastal state’s territorial waters onto the high seas. Finally, a right to interdict a merchant vessel can be based on bi- or multilateral treaty law.

US Under-Secretary of State John Bolton has maintained that it, “is not the case that all of the interdictions will take place in international waters or international airspace”<sup>143</sup> but ships, “... may, under well-accepted principles of customary international usage, be boarded by any navy if they do not fly colours or show proper identification”.<sup>144</sup> However, “The question of what is permissible for seizure and what is not must be determined on a case-by-case basis”.<sup>145</sup> A recent example of an interdiction in international waters involved a Cambodian registered ship, the *Sosan* – see Box 3.

### **Box 3: The ‘Sosan’ incident**

On 9 December 2002 the *Sosan*, bound for Yemen, was intercepted in the Arabian Gulf by a combined Spanish and American naval force. The vessel was suspected of carrying missile parts for North Korea, but the legal basis for the interdiction was the failure of the vessel to fly its flag. Accordingly, in the case of the *Sosan*, there existed objective reasons for investigation and boarding – but not seizure of the cargo.

At the time of the boarding of the Sosan, the United States and Yemen were not at war. Thus, although US suspicions were confirmed—missile parts were discovered on board—the case for confiscation was weak, as confirmed by the White House on 11 December 2002: "There is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea. While there is authority to stop and search, in this instance there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen. And therefore, the merchant vessel is being released".<sup>146</sup>

As established by article 101 of the Convention, the US warship was able to proceed to verify the Sosan's right to fly its flag. The US authorities were also permitted to send a boat under the command of an officer to the Sosan to check its documents. And if the suspicions remained after the documents had been checked, the US warship could have conducted further examinations on board the Sosan. These examinations "must be carried out with all possible consideration" and if the suspicions prove to be unfounded, the ship boarded is entitled to redress. In this case, the grounds for confiscation of the cargo were weak.

Spanish commandos board a North Korean ship carrying Scud missiles and other weaponry in the Arabian Sea.



John Bolton has stated that, "Properly planned and executed, the interception of critical technologies can prevent hostile states and terrorists from acquiring these dangerous capabilities. At a minimum, interdiction can lengthen the time that proliferators will need to acquire new weapons capabilities, increase their cost, and demonstrate our resolve to combat proliferation".<sup>147</sup> What this might mean in practice is the use of US and other Western naval power to harass 'legitimate' shipping by boarding vessels, such as the Sosan, even if the cargo cannot be confiscated. If so, this would challenge two of the key tenets of the Law of the Sea: innocent passage and freedom of navigation. But as discussed below, while both provisions allow some scope for interdiction of WMD materials on the high seas, the legal situation is by no means certain.

### 3.3 Innocent passage

The existence of the right to innocent passage within the territorial waters of a foreign state is not questioned under customary law.<sup>148</sup> Ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea, which, for the purposes of UNCLOS, is defined as a 'continuous and expeditious' navigation through the territorial sea for the purpose of either traversing that sea without entering internal waters or proceeding to or from internal waters.<sup>149</sup> The passage is considered non-innocent if it is prejudicial to the peace, good order or security of the coastal state and the convention enumerates which activities are regarded as non-

innocent. This enumeration has been interpreted in a joint statement issued by the United States and the Soviet Union,<sup>150</sup> in which the parties held that the enumeration is an exhaustive list of activities that would render passage not innocent (reproduced in full in Appendix 3). Paragraph 3 of the joint statement reads:

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.<sup>151</sup>

The validity of this statement has never been challenged by the United States since it was adopted in 1989 and has also been authoritatively cited in the international legal literature.<sup>152</sup>

Accordingly, UNCLOS article 19 (2) lists non-innocent activities as follows:

- (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;
- (b) any exercise or practice with weapons of any kind;
- (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) any act of propaganda aimed at affecting the defence or security of the coastal state;
- (e) the launching, landing or taking on board of any aircraft;
- (f) the launching, landing or taking on board of any military device;
- (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
- (h) any act of wilful and serious pollution contrary to this Convention;
- (i) any fishing activities;
- (j) the carrying out of research or survey activities;
- (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) any other activity not having a direct bearing on passage.<sup>153</sup>

When a ship 'carrying nuclear or other inherently dangerous or noxious substances' passes through a state's territorial waters while exercising its right to innocent passage, it is required to "carry documents and observe special precautionary measures established for such ships by international agreements".<sup>154</sup> The mere passage of a warship, nuclear-powered ship or ship carrying nuclear or other inherently dangerous or noxious substances is not included in the list of activities contained in article 19(2) and therefore considered innocent. This conclusion seems to reflect the US standpoint:

Innocent passage is a navigational right that may be exercised without requirement to provide prior notification to or obtain permission from the coastal state. This right applies to all ships, regardless of flag, type, means of propulsion, cargo, destination, armament,

or purpose of voyage. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Passage is considered to be prejudicial to the peace, good order or security of the coastal state if a foreign ship engages in one of twelve specific activities listed in article 19(2) of the 1982 Convention. **Mere passage of a warship, nuclear-powered ship or ship carrying nuclear or other inherently dangerous or noxious substances is not included in the list of activities contained in article 19(2).** The United States also wishes to recall that a coastal state may, consistent with international law, adopt laws and regulations relating to innocent passage to the extent such requirements do not hamper innocent passage or do not have the practical effect of denying or impairing the right of Innocent passage.<sup>155</sup> (emphasis added)

It must be noted, however, that the right of innocent passage is questioned by several states when this involves nuclear-powered ships or ships carrying nuclear or other inherently dangerous or noxious substances:

Whether Article 23 authorizes the coastal State to insist on prior permission as an aspect of its regulatory competence, or whether such 'permission' is determined by the uncertain rules of customary international law, was a matter of major concern to subsequent State practice and a key item in the Third United Nations Conference on the Law of the Sea.<sup>156</sup>

At the third UN Conference on the Law of the Sea, some states did push for a clearer wording of article 23. Subsequently, they abandoned this effort, since the clearer wording did not get the required majority vote at the conference.<sup>157</sup> It is unlikely, however, that these states have changed their opinion on the need for clarity, since it was the president of the conference who requested the states not to push the issue and thereby potentially endanger the treaty itself.<sup>158</sup> Indeed, over two-dozen states have since voiced opposition to, or taken action against to prevent, high-level nuclear waste shipments from passing through their territorial waters and/or EEZ.<sup>159</sup> In fact, some coastal states have even argued that passage of hazardous radioactive cargo is in fact prejudicial to the security of the coastal state, thus rendering the passage non-innocent. For instance, the Commonwealth Caribbean High Commissioners have said that shipments of nuclear waste are threats to the "safety of Caribbean people, the fragility of the coral ecosystems and the economy of Caribbean countries".<sup>160</sup>

In addition, Canada passed a law in 1970 containing certain restrictions on transport in the Arctic citing the "overriding right of self-defence of coastal states to protect themselves against grave threats to their environment".<sup>161</sup> This, however, was over 20 years ago, and the responsibility of the coastal state to protect the maritime environment has been considerably strengthened since then, primarily through UNCLOS and related agreements. Thus, the Canadian argument may be even more valid today given that the environmental protection bar has been significantly raised.

In any case, it is important to note that the issue of transporting radioactive materials through territorial waters, and even through the EEZ, is more or less unresolved. Naturally, at the time of the US – USSR joint statement, the superpowers wanted to safeguard the movement of nuclear-armed submarines, nuclear powered vessels and vessels carrying WMD and related materials primarily through international straits and other chokepoints. The PSI aims to restrict that right for others, and it is a fair assumption that the nuclear weapon states will try to simultaneously maintain their existing rights to nuclear-free passage.

In one sense, an interpretational change of the Law of the Sea could have adverse effects in regards to the nuclear weapons states' own shipments of WMD and related materials. International custom has a general effect and applies to all countries. Clearly, the nuclear weapon states do not want this to lead to restrictions on their existing freedom of navigation. Therefore, it may be desirable for them to push for a revision of the UNCLOS or the conclusion of some sort of additional protocol that protects their own rights of nuclear passage.

Another avenue would be to convince the Security Council to act under Chapter VII of the UN Charter, outlawing illicit transports of WMD on the seas. A resolution of that kind, however, is likely to meet some resistance from the non-PSI permanent members; the Russian Federation and China. Non-nuclear weapon states can also be expected to object since it would maintain the status quo and enshrine the right of nuclear weapons states to nuclear passage, while denying it to others.

### **3.4 Freedom of navigation**

UNCLOS guarantees 'freedom of navigation' through the high seas,<sup>162</sup> exclusive economic zones,<sup>163</sup> straits used for international navigation,<sup>164</sup> and archipelagic sea lanes,<sup>165</sup> while it permits the exercise of 'innocent passage' through territorial seas<sup>166</sup> and archipelagic waters.<sup>167</sup> As mentioned earlier, the breaking of this 'freedom of navigation' by way of boarding or interdiction of a suspect ship is generally only permitted if the interdiction is undertaken by the flag state. There are only a few exceptions to this rule in international law, and these are clearly identified in UNCLOS (as reviewed above).

It is worthwhile noting that UNCLOS contains no definition of 'navigation', but it is reasonable to assume that the motions and presence of ships traversing the high seas is considered 'navigation'.<sup>168</sup> It is also reasonable to assume that this definition does not take in account factors such as the type of the ship or the content of its cargo, nor the activities in which the ship is or intends to be engaged in.<sup>169</sup>

As noted above, three PSI participants are not parties to UNCLOS. However, it is widely accepted that the principal provisions of the Convention are already customary international law. For example, the United States did not sign UNCLOS in 1982 due to its dissatisfaction with the deep-seabed mining provisions in Part XI, especially the provisions for the sharing of profits and of technology, as well as the lack of guarantees that the United States and other mining nations would have a sufficient voice in decisions.<sup>170</sup> And while the US position initially was that the treaty was "fatally flawed and cannot be cured",<sup>171</sup> it later held that early "adherence by the United States to the Convention and the Agreement is important to maintain a stable legal regime for all uses of the sea ... Maintenance of such stability is vital to U.S. national security and economic strength".<sup>172</sup>

In 1983, President Reagan issued the US Ocean Policy Statement,<sup>173</sup> which declared, in essence, that the United States would follow the non-seabed-mining provisions of the Convention because they reflected 'traditional uses of the oceans' and 'generally confirm existing maritime law and practice'. The US Department of State has argued that adherence to the convention would, "provide the predictability

and stability which international shippers and insurers depend upon in establishing routes and rates for global movement of commercial cargo. Increased costs of goods and services resulting from coastal state restrictions on navigation and communications would adversely impact [the U.S.] economy".<sup>174</sup> Accordingly, the US government has always maintained its right to freely navigate on international waters. For example, in his Annual Report to the President and Congress in 2001 the US Secretary of State for Defense maintained that:

For over 20 years, the United States has reaffirmed its long-standing policy of exercising and asserting its freedom of navigation and overflight rights on a worldwide basis. Such assertions by the U.S. preserve navigational freedoms for all nations, ensure open access to the world's oceans for international trade, and preserve global mobility of U.S. armed forces.<sup>175</sup>

He also claimed that,

Over the years, many nations have commented favorably upon the U.S.'s actions to maintain high vigilance of countries making maritime claims that exceed the provisions of the UN Convention on the Law of the Sea and to ensure that coastal regimes inconsistent with freedom of navigation do not become accepted as the customary norm.<sup>176</sup>

The UN Security Council has upheld freedom of navigation through international canals. In 1951 the Egyptian government decided to interfere with the passage through the Suez Canal of goods destined for Israel. In short, they closed the canal for all ships, irrespective of nationality, that were steaming towards Israel. This measure was taken irrespective of the fact that an armistice between Egypt and Israel had already been in effect for two and a half years. At the time, the international community considered the truce as being of a permanent character. The Security Council did not act under Chapter VII of the Charter, but nevertheless adopted resolution 95 on 1 September 1951. The resolution reads, in relevant parts:

... further noting that the restrictions on the passage of goods through the Suez Canal to Israel ports are denying to nations at no time connected with the conflict in Palestine valuable supplies required for their economic reconstruction, and that these restrictions together with sanctions applied by Egypt to certain ships which have visited Israel ports represent **unjustified interference with the rights of nations to navigate the seas and to trade freely with one another**, including the Arab States and Israel,

Calls upon Egypt to terminate the restrictions on the passage of international commercial shipping and goods through the Suez Canal wherever bound and to cease all interference with such shipping beyond that essential to the safety of shipping in the Canal itself and to the observance of the international conventions in force (Emphasis added)

Freedom of navigation has also been upheld by the International Court of Justice (ICJ) in the *Nicaragua Case*, where it stated that the mining of coastal states territorial waters endangers the customary right of freedom of navigation and the subsequent right of access to port.<sup>177</sup> It is necessary to note that the US government never accepted this ruling of the court.

In summary, therefore, freedom of navigation constitutes an important tenet of international maritime law. Over the years, it has not only guaranteed unimpeded free trade, it has also allowed countries to project naval power worldwide.

Would the emergence of a new general rule (permitting interdiction under specific circumstances), customary or otherwise, threaten this tenet? Clearly, a restricting rule can never promote freedom of movement on the high seas; it can only limit it. The question is to what extent?

### 3.5 Waiver of freedom of navigation

There are options available by which freedom of navigation can be limited without jeopardising the legal regimes governing the use of territorial waters. For example, states may waive freedom of navigation by agreement with one another. An agreement can take the form of a treaty or exchange of diplomatic notes specifying the circumstances in which interdiction would be permitted. States can also agree upon specific actions to be taken by the interdicting party or parties, in circumstances where WMD materials are found.

Generally, confiscation of cargo is not allowed unless a state of war exists between the interdicting state and the flag state. Thus, states have always been careful not to label their interdiction efforts as a 'blockade'. For example, on 22 October 1962, President Kennedy announced a *de facto* naval blockade of Cuba to prevent the arrival of Soviet strategic missiles. However, the president referred to the action as a "strict quarantine on all offensive military equipment under shipment to Cuba",<sup>178</sup> while warning that that the "quarantine will be extended, if needed, to other types of cargo and carriers".<sup>179</sup>

The alternative approach of securing an agreement between the interdicting state and the flag state has been utilized on several occasions in history. The British used it during the 19<sup>th</sup> century in order to curb the international slave trade,<sup>180</sup> while the US government currently uses it in the Caribbean in its counter-narcotics efforts.

If such agreements cannot be secured, the PSI participants may instead use a more ad-hoc approach to the problem – as was the case with the one acknowledged success so far: the interception of centrifuge equipment en route to Libya (see Box 4).

#### **Box 4: The Successful Interdiction of Centrifuge Parts Bound for Libya**

In October 2003, American and British intelligence services received information that centrifuge equipment, which is essential in enriching uranium to weapons-grade, had been loaded onto a freighter flying a German flag.<sup>181</sup> The ship had left Dubai and was heading towards the Mediterranean. The British and Americans contacted the German government, which in turn contacted the German shipper, BBC Chartering and Logistic GmbH. The shipper ordered the ship to divert to an Italian port. Once at port, the ship was searched and the equipment, apparently not noted in the ship's manifest, was found and confiscated.<sup>182</sup>

This particular *modus operandi* consists of the interdiction state or states seeking the permission of the master of the target vessel itself or the government of the flag state. Given that the flag state has near absolute sovereignty over its vessels, this

approach is legal to the extent that the flag state's laws and regulations permit. However, under this *modus operandi*, the participants run the risk of the master or the flag state denying the request for an interdiction and search. In addition, it is not entirely certain that, even if such a request is granted, any illicit equipment found can always be confiscated. Whether or not contraband can be confiscated depends on the national legislation of the granting state as well as the remit of the permission itself.

This procedure is also slow, and may give the target crew the opportunity to dispose of the contraband. However, it is an approach that is clearly in accordance with international law, and offers the opportunity of increasing the efficiency of the PSI, albeit only on a temporary basis. It also maintains friendly relations with the flag state since all activities are voluntary.

In recent months the United States has concluded bilateral boarding agreements with both Liberia (in February 2004) and Panama (in May 2004). These are two major FOC states, registering more than 2,000 and 13,000 ships respectively, with the latter also being home to the strategically important canal linking the Atlantic and Pacific oceans. According to John Bolton:

The combination of Panama, Liberia and PSI core partner countries means that now almost 50 percent of the total commercial shipping of the world measured in dead weight tonnage is subject to the rapid action consent procedures for boarding, search, and seizure.<sup>183</sup>

At the signing ceremony with Panama, the Panamanian Justice Minister stated that the agreement (which supplements an existing maritime agreement between the United States and Panama) is in line with Panama's support for "all regional and international efforts in relation to security and in disarmament" and that the agreement is a sign of their "efforts in support of UN Security Council Resolution 1540" (see chapter 5.2. below).<sup>184</sup> The agreement is mutually applicable and is expected to streamline boarding procedures: each party may refuse a request to board one of their flagged ships, but must do so within two hours from the time they are contacted. Otherwise the other party is automatically authorised to go ahead and board, search and possibly detain the vessel and its cargo.<sup>185</sup>

These two agreements show that the PSI participants view the signing of bilateral boarding agreements as a feasible way forward. However, to date no other PSI participants have concluded similar agreements (although the UK has expressed interest in "piggybacking" onto the US agreements<sup>186</sup>), and it would certainly bolster the effectiveness of the initiative if other participants were to do so. Under the current situation, a Japanese or British warship would not be allowed to board and search a Panamanian or Liberian vessel. Ideally, the participants should approach the various flags in concert and sign multilateral boarding agreements. Presently, it very much appears as if the United States is progressing along a unilateral path, leaving participant allies in its wake.

### **3.6 Seizure of goods**

In wartime, international law provides that combatants have the right to seize and destroy the enemy's ships and aircraft. This includes the right to seize commercial crafts. Also, the combatant has the right to stop and search neutral vessels for contraband. These rights may be exercised on the high seas or on the opponent's territorial waters. The right does not extend to international straits or the territorial sea of a neutral state. According to former JAG-officer Burdick Brittin, in war:

There is bound to be some conflict between the interests of the belligerents whose purpose is the destruction of one another's naval power and maritime commerce, and the legitimate interest of neutrals, who seek to carry on their ordinary commerce with each other, and to the extent permitted by International Law, with the belligerents. ...<sup>187</sup>

But even in wartime the rights and security of neutral shipping have to be respected:

if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law ...<sup>188</sup>

The right to seize goods transported on neutral shipping during wartime is also limited in regards to the nature of the goods. For instance:

The clearest form of contraband, "absolute contraband," consists of arms, ammunition and other purely military equipment. These items could be interdicted in wartime. "Conditional contraband" includes oil and other items that could have civilian as well as military uses, and could be interdicted only if destined for the military.<sup>189</sup>

Thus, the case for the seizure of illicit materials, including "absolute contraband", is weak in peacetime. A more solid legal ground to facilitate the seizure of WMD and related materials may need to be established, either through a revision to an appropriate IMO Convention or a new Security Council resolution (as discussed in sections 5.1 and 5.2 below).

Does the current 'war on terrorism' constitute wartime in this context? Certainly, the US administration and some of its allies regularly describe their fight against terrorist organisations as a 'war'. Mirroring the language often used by Israel, the US government has argued that it is fighting a shadowy enemy bent on destroying the entire United States. Thus, since the enemy act like combatants, so the argument goes, they should be treated as combatants. Whether or not they are wearing a uniform or other distinguishing marks is said to be irrelevant.

Furthermore, NATO invoked article V of the North Atlantic Charter on 12 September 2001 and declared that the crimes perpetrated in New York on the previous day amounted to an armed attack on them all. Article V reads, in relevant parts:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

The UN Security Council took a similar, but not identical, stance in resolution 1368, adopted on the same day. It recognised that terrorist acts are a threat to international peace and security and expressed its determination to combat that threat using all means. In that context, the Security Council recognised the inherent right of individual or collective self defence in accordance with the UN Charter.

In the turmoil that followed the New York crimes, very few analysts questioned the legal basis for the argument that this was a 'war on terror' and whether or not this gave the US and its allies 'carte blanche' to conduct the 'war' against terrorism in a manner solely of their own choosing, and without recourse to international legal obligations. Instead, almost the entire western world became engaged in combat with an invisible enemy hiding in places scattered over the world. As it turned out, some of them were indeed hiding in the remote, war-torn and nearly forgotten Afghanistan. However, others were and still are hiding in the capitals and cities of Europe and America.

But is the 'war on terrorism' really a war in the classic sense? War and combat are powerful words used in a variety of political contexts. Politicians talk about the 'war on poverty' or the 'war on Aids'. They speak of 'trade wars' without implying that military force will be used to bring down export and import tariffs. Nevertheless, the US government is increasingly using the laws of armed conflict in its effort to combat terrorism. For instance, the detainees at Guantanamo Bay are being held, without trial, as 'enemy prisoners of war', and are subject to harsh interrogation and severe restrictions.

A reasonable assumption is that the 'war on terrorism' is not a war in the legal sense at all. Rather, a multitude of agreements, conventions, domestic legislation and case law comes into effect with each individual terrorist incident. Clearly, the law of armed conflict (*jus in bello*) was applicable during the US-led coalition attack on Afghanistan. But these same rules are not applicable when, for example, the UK police raid a terrorist safe house in London. And it is most uncertain if those rules are applicable on the high seas. Therefore, seizure of goods on the high seas would probably not be permitted solely on the grounds of the 'war on terrorism'.

## Chapter 4: Exercises and Interdictions – The Story So Far

Ultimately, the success or failure of the PSI will be judged in terms of its effectiveness on the ground: is it resulting in concrete actions to stem the flow of WMD materials and delivery systems to those states and non-state actors with ambitions to procure illicit unconventional arsenals? Is it increasing the political and economic costs of trafficking in WMD materials and delivery systems, or is it simply a gimmick dreamt up in a White House under pressure to act? Although the initiative is still in its infancy, with most attention having been focused on planning and organisational matters, the participants have also undertaken a series of training exercises and interdiction operations.

### 4.1. Training exercises

At least ten training exercises have been undertaken by PSI participating states since the adoption of the interdiction principles in September 2003 (as shown in Table 1). After some criticism from China in advance of the first training exercise in the Coral Sea in September, the US administration was quick to dispel the notion that the exercises are limited to the US and a few key allies like Australia and Japan, and expressed confidence that all PSI countries would be involved "in some capacity".<sup>190</sup>

The Coral Sea exercise involved aerial searches for a simulated Japanese-flagged commercial merchant vessel suspected of carrying WMD-related items. The vessel was trailed by combined military and law enforcement assets from the four participating nations: The Japan Coast Guard, working with French, US and Australian counterparts, requested and executed a boarding and search of the vessel on the high seas.

Table 1: PSI Training Exercises (2003-2004)

<i>Lead Nation</i>	<i>Other Participating Nations</i>	<i>Type of Exercise</i>	<i>Date of Exercise</i>
Australia	France, US, Japan	Maritime training interdiction in the Coral Sea	Sep 2003
Britain	Not known	Air interdiction command post exercise in London	Oct 2003
Spain	Not known	Maritime training interdiction in the Mediterranean Sea	Oct 2003
France	Not known	Maritime training interdiction in the Mediterranean Sea	Nov 2003
US	Singapore, Australia, Canada, France, Italy, Japan, Netherlands, Spain, UK	Maritime training interdiction in the Arabian Sea	Jan 2004
Italy	Not known	Air interdiction training exercise	Feb 2004
Germany	Not known	International airport exercise	Mar 2004
<i>Future Activities</i>			
Poland	Not known	Ground interdiction training exercise	Spring 2004
Italy	Not known	Maritime training interdiction in the Mediterranean	Spring 2004
France	Not known	Air interdiction training exercise	Spring 2004

Sources: Various media and government open sources

However, recent press reports indicating that Japan postponed the hosting of a naval interdiction exercise in the Western Pacific in May 2004 reveal the sensitive nature of these activities. Concerns about the reactions of Asian neighbours, and especially the impact on relations with China and North Korea, were cited as the reason for the postponement.<sup>191</sup>

## **4.2 Interdiction activities**

US Under-Secretary of State John Bolton has acknowledged that some interdictions have already taken place,<sup>192</sup> but for operational reasons such interdictions are rarely announced or discussed in public. The exception was the successful interdiction in October 2003 of centrifuge parts bound for Libya (as described in Box 4), which undoubtedly contributed to Libya's decision three months later to terminate its WMD programmes.

It is expected that future interdiction activities will focus on key "choke" points – strategic passages and harbours on the busiest trade routes, although the geographic limitations of the current 'membership' suggests that many sea routes between the countries of proliferation concern are not presently covered. The fact is that most current PSI interdictions will be limited to the territorial waters of participating states.

Moreover, although these activities demonstrate that the PSI is not just a series of meetings, such exercises and interdictions were being carried out prior to the arrival of the PSI, and it is hard to see what value-added it brings. Canada, for example, has recent pre-PSI experience of high-seas interdictions—and is seeking legal changes to allow such interdictions, following on its efforts in the mid-1990s to save the fish stocks of the North Atlantic.

The French and German governments have also been actively cooperating in interdiction efforts for some time, successfully intercepting several cargoes of dual-use materials suspected of being part of North Korean unconventional weapons acquisition programme.<sup>193</sup> Similarly, NATO has been engaged in maritime interdiction training exercises for decades, and as part of operation 'Active Endeavour' NATO ships have been patrolling in the Eastern Mediterranean monitoring shipping to detect and deter terrorist activity since October 2001.

In April 2003, NATO's mission in the Mediterranean was expanded to include the systematic boarding of suspect ships, but only with the compliance of the ships' masters and flag states. And as discussed in section 2.3 above, 33 boardings took place between April and November 2003. NATO is also to open a Maritime Interdiction Operations Training Centre in Crete.<sup>194</sup> Despite being in its infancy, the PSI does seem to have had some impact in halting the spread of WMD. If the PSI is to meet the challenge of improving its operational effectiveness, it will need to extend the scope of the initiative beyond its current 'patchwork' membership.

## Chapter 5: The Future of the PSI

On 27 January 2004, the US and Polish presidents issued a joint statement in which they noted with satisfaction "...the growing support worldwide for our shared efforts to implement the Proliferation Security Initiative, announced by President Bush in Krakow in May 2003".<sup>195</sup>

The initiative can be strengthened in various ways. The most obvious is by increasing the 'membership' and securing the participation of key flag states and states that control geographically important areas, such as international straits. To say that the PSI has 'worldwide' support is a gross exaggeration of the current state of play, however. The participants need to secure support in the Middle East, in Africa and in South America, and to expand support in South and South East Asia, in order to claim that the PSI has become a worldwide movement.

However, given that many 'flags of convenience' are located in developing countries, many of which rely on the registration of ships to boost foreign currency earnings, convincing them to join the PSI will not be easy. In Panama, for instance, the fees charged for the registry in 1996 contributed five percent of the national budget.<sup>196</sup> In Liberia, where revenue from the registry accounted for approximately ten percent of the national budget before the civil war, in 1998 it contributed to up to 30 percent.<sup>197</sup>

The current participants are mainly rich 'first world' nations in the North, and they may need to consider offering economic or other security incentives in order to widen participation to the South. It is not known, if Liberia and Panama received any such incentives from the United States in exchange for the recent bilateral boarding agreements, but Panama has just elected a new president and is currently negotiating a free trade agreement with the United States. Thus, the opportunity for horse-trading on this issue was certainly a possibility in the case of Panama.

Also, it is not only a matter of broadening participation, but deepening links between members, especially in relation to law enforcement and intelligence cooperation. As in any new regime or intergovernmental framework, getting the right balance between seeking to broaden and deepen the relationship is a difficult task. Two ways forward, which are certainly not mutually exclusive, are to work with the International Maritime Organisation in amending the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (as discussed in section 5.1 below), while at the same time seeking a resolution on counter-proliferation in the UN Security Council (as discussed in section 5.2).

Another option is to review the principle of 'state of necessity' and to admit that the PSI may, on certain occasions, conduct illegal operations. The illegality would be excused, however, by the grave threat that weapons of mass destruction constitute (as discussed in section 5.3 below)

A third way forward is to expand the concept of 'pre-emptive self defence'. This would be a risky and highly contentious approach, since outside of the United States, United Kingdom and a few of their close allies, there is widespread distrust of this agenda in the international community. This distrust has been exacerbated by the

way that the US-led coalition handled the run up to war in Iraq and the current post-combat complications in achieving stability in that country. In short, the concept of 'pre-emptive self defence' is highly controversial and is subject to intense scrutiny and debate. Its applicability in the context of the PSI is discussed in section 5.4.

Finally, the linkage between movement on nuclear disarmament commitments under the NPT and broadening support for the PSI is discussed in section 5.5.

### **5.1 The International Maritime Organisation and the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation**

The International Maritime Organisation (IMO), based in London, is the permanent international body established in 1948 to promote maritime safety. Maritime legislation is one of the IMO's most important concerns, having adopted about 40 conventions and protocols since its inception. These are amended regularly to keep them up to date with changes in world shipping. The IMO has also introduced measures to improve implementation of legislation by, for example, assisting flag states and encouraging the establishment of regional port state control systems.

In addition, the IMO renewed its focus on security issues in the wake of the terrorist attacks against the United States in September 2001, and agreed in December 2002 a new, comprehensive security regime for international shipping. That regime will enter into force in July 2004 and includes a number of mandatory security measures, including several amendments to the 1974 Safety at Sea Convention (SOLAS). One of these amendments introduces the new International Ship and Port Security Code (ISPS Code).<sup>198</sup> According to the IMO, the Code provides several ways to reduce vulnerability:

Ships will be subject to a system of survey, verification, certification, and control to ensure that their security measures are implemented. This system will be based on a considerably expanded control system as stipulated in the 1974 Convention for Safety of Life at Sea (SOLAS). Port facilities will also be required to report certain security related information to the Contracting Government concerned, which in turn will submit a list of approved port facility security plans, including location and contact details to IMO.<sup>199</sup>

Other amendments to the SOLAS are not only expected to enhance maritime security more generally, but also have the potential for further development as a global tracking and monitoring system to aid WMD interdictions on the high seas. These amendments include:

- A new timetable for the fitting of Automatic Information Systems (AIS) on ships;
- A requirement for ships' identification numbers to be permanently marked in a visible place either on the ship's hull or superstructure;
- A new requirement for ships to be issued with a Continuous Synopsis Record (CSR), which is intended to provide an on-board record of the history of the ship; and<sup>200</sup>

- A new requirement for all passenger and cargo ships above 500 gross tonnage to be provided with a ship security alert system by 2006.

According to the IMO, when activated the ship security alert system shall:

initiate and transmit a ship-to-shore security alert to a competent authority... , identifying the ship, its location and indicating that the security of the ship is under threat or it has been compromised. The system will not raise any alarm on-board the ship. The ship security alert system shall be capable of being activated from the navigation bridge and in at least one other location.<sup>201</sup>

In addition to being tasked with developing performance standards for these ship security alarms, the IMO is also exploring performance guidelines for long-range ship identification and tracking systems.

Given all these important developments in maritime security measures, the IMO would seem to be the natural place to further develop the PSI, and especially to seek the authority necessary to engage in high seas interdictions. One option would be to amend the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention). The SUA Convention was introduced to ensure that appropriate action is taken against persons committing unlawful acts against ships, including the seizure of ships by force, acts of violence against passengers and crew, and the placing of explosive devices on board a ship.

Contracting Governments are obliged either to extradite or prosecute alleged offenders, thereby ensuring that they will be brought to justice wherever in the world they seek to hide. The importance attached to the Convention by the international community is shown by the fact that 95 states have become parties, 37 of them since 11 September 2001.<sup>202</sup> All PSI participants are parties to the Convention.<sup>203</sup>

The IMO's Legal Committee has been reviewing the SUA Convention and its related Protocol in the wake of 9/11. The proposed amendments, developed by a Correspondence Group, would significantly broaden the range of offences to include acts of terrorism which threaten the security of passengers and crews and the safety of ships; expand the extradition and prosecution obligations of Contracting Governments; and introduce provisions for boarding of vessels suspected of being involved in terrorist activities.<sup>204</sup>

At its October 2002 meeting, the Legal Committee discussed seven new proposed offences, four of which were concerned with terrorist activities, while the other three were directly relevant to the PSI. One of the new offences concerned the presence of tools or substances not usually used on a ship but useful in a weapon of mass destruction. Two other new proposed offences concerned the use of the ship for transport of substances to be used for mass destruction. The Committee agreed that work on the proposed amendments should continue in the Correspondence Group ahead of the spring 2003 Committee meeting, but since then progress appears to have stalled.

However, the UK Secretary of State for Foreign and Commonwealth Affairs has confirmed that the British government (presumably with the support of other PSI participating states) is working in the IMO to secure amendment to the SUA

Convention to make it an “internationally recognised offence to transport WMD, their delivery systems and related materials on commercial vessels”.<sup>205</sup>

Expanding the current amendment negotiations of the SUA Convention to enable boarding of vessels suspected of carrying WMD materials would seem to be an obvious solution. In addition, any country that refused to accept the amended treaty could, if its shipments posed a threat to international peace and security, be made the subject of a UN Security Council resolution that provides the necessary stop-and-search powers to other states.

## 5.2 Gaining legitimacy through the UN Security Council

Most, if not all, issues of legality would be set aside if the PSI participants could pass an appropriate resolution through the UN Security Council. The UN Charter provides that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security.<sup>206</sup>

The Security Council has already, on several occasions, taken the view that the proliferation of WMD constitutes a threat to international peace and security – most recently in adopting Resolution 1540 (2004), discussed below. It could potentially go further, therefore, and authorise measures, including the use of armed force, to maintain that security by curbing or interdicting the trade in WMD materials. Decisions taken by the Security Council under Chapter VII of the Charter are legally binding on all UN members.

The Security Council has the authority to decide on the use of force by member states. This has happened on several occasions in the past. On 25 June 1950, for example, the Security Council considered the rapidly escalating war on the Korean peninsula, and determined that the armed attack on the Republic of Korea by forces from North Korea constituted a breach of the peace and called for the immediate cessation of hostilities.<sup>207</sup> Two days later, the Security Council adopted a resolution recommending:

that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and restore international peace and security in the area<sup>208</sup>

On 2 August 1990 Iraqi forces invaded Kuwait. On the same day, the Security Council demanded “that Iraq withdraw immediately and unconditionally all its forces”<sup>209</sup> and a little over three months later, on 25 November 1990, the Security Council passed a resolution authorising the use of force to oust the Iraqi forces occupying Kuwait:

The Security Council ... [a]cting under Chapter VII of the Charter ... [a]uthorizes Member States ... *to use all necessary means* to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area ...<sup>210</sup> (emphasis added)

These resolutions all focus on the use of force. However, the Security Council has acted and decided on other issues under Chapter VII of the Charter as well. The Council has used this power to establish the Rwandan and Yugoslavian tribunals and regularly appoints judges by invoking Chapter VII. The exemption of peacekeepers of certain nationalities from the jurisdiction of the International Criminal Court (resolution 1422 (2002)) is also based on the Council's authority under Chapter VII. It can be said, therefore, that the Council has adopted a broad interpretation of the notion of 'threat to the peace'.

US President Bush drew on this broad interpretation in his 2003 address to the General Assembly:

I ask the UN Security Council to adopt a new anti-proliferation resolution. This resolution should call on all members of the UN to criminalize the proliferation of weapons -- weapons of mass destruction, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own borders. The United States stands ready to help any nation draft these new laws, and to assist in their enforcement.<sup>211</sup>

The US government first submitted a draft 'counter-proliferation resolution' to the Council during December 2003, and a later version was co-sponsored by the United Kingdom in March 2004.<sup>212</sup> Nearly three months after the uncovering of the "nuclear supermarket" operated by the Pakistani scientist, A Khan, the UNSC unanimously approved a non-proliferation resolution on 28 April 2004 (see Appendix 4). Resolution 1540 (2004)—co-sponsored by France, Romania, Russia, Spain, United Kingdom and the United States—urges all member states to take strong action to stop WMD proliferation, particularly for terrorist purposes. It calls on all states to establish domestic controls to prevent the proliferation of such weapons, including new legislation, enhanced export controls, new enforcement procedures and international cooperation.

The resolution also establishes a special committee of the UNSC (for a period no longer than two years) to oversee the implementation of the resolution. Modelled on a similar counter-terrorism committee set up in the wake of the September 11 attacks on the United States, this new committee is tasked with presenting a first report within six months. The resolution also explicitly affirms that it is complementary to existing non-proliferation treaties and their implementing organizations, and calls on all states to "develop appropriate ways to work with industry and the public regarding their obligations under such laws".

There is also a suggestion that the resolution may help to plug some important gaps in the non-proliferation system. For example, by explicitly elevating "means of delivery" to the same level as nuclear, chemical and biological weapons, greater attention can be given to the control of missile technology (which is not banned by any international treaty and is only restricted by an agreement among supplier states).

However, the resolution does not introduce any new groundbreaking ideas in the field of counter proliferation or enforcement of existing treaties. Most countries in the world have already criminalized the use, possession or transfer of WMD materials. Also,

many countries have enacted export controls on technology and materials which may be used in a WMD programme. And many countries take extraordinary steps in securing sensitive materials within their own borders. Resolution 1540 (2004) certainly does not give authority for PSI countries to seize WMD cargoes on the high seas, although it might make such interdictions easier to agree in certain circumstances (as discussed in chapter 3) by reinforcing the message that WMD trafficking is illegal.

What needs to be introduced in order to give the PSI a legal framework? One option is a Security Council resolution that expands the criminal jurisdiction of states beyond the territorial sea. In that way, WMD proliferation could be combated in the same manner as states now combat piracy or international drugs trafficking. Whether the UNSC is authorised to make this decision is unclear. Chapter VII of the Charter was originally designed to identify breaches of the peace and take forceful action to counter it.<sup>213</sup> At the time of the drafting of the Charter, it seems as if the founding fathers only had actual armed conflicts in mind. All other grievances and disputes between states were to be solved peacefully and in accordance with Chapter VI of the Charter. This is an important distinction, since UNSC decisions made under Chapter VII of the Charter are considered legally binding.<sup>214</sup>

However, the current interpretation of the Charter is a little bit different. For instance, it is commonly accepted that it falls within the powers of the UNSC to impose economic sanctions. For example, on 31 March 1998 the UNSC adopted resolution 1160 (1998), imposing an arms embargo against the Federal Republic of Yugoslavia:

all States shall, for the purposes of fostering peace and stability in Kosovo, prevent the sale or supply to the Federal Republic of Yugoslavia, including Kosovo, by their nationals or from their territories or using their flag vessels and aircraft, of arms and related matériel of all types, such as weapons and ammunition, military vehicles and equipment and spare parts for the aforementioned, and shall prevent arming and training for terrorist activities there<sup>215</sup>

Note that the text, *prima facie*, does not allow actual enforcement measures. Nevertheless, NATO conducted enforcement operations related to the resolution, while US and coalition forces similarly enforced the UN embargo on Iraq during the 1990s. No state, except those targeted, has objected to this practice. And the UNSC itself has raised no objections to it. Indeed, the Council has subsequently expressively authorised states to enforce its embargoes. It can therefore be claimed that an authorisation from the UNSC would nullify the rights of flag states to have their ships exempted from boarding at sea, provided that the boarding is in line with the resolution. In addition, a Council resolution may provide rules pertaining to the handling and eventual seizure of goods, thereby making the traditional rules of blockades, search and seizures superfluous.

Going further than Resolution 1540 (2004), along the lines suggested above, may be one of the options that the two-year follow-up mechanism will consider. However, according to the President of the Council, during the debate about Resolution 1540 (2004), "...many speakers had underlined that the resolution was not about enforcement actions".<sup>216</sup> This implies that securing a vote on such an enforcement resolution in the Council will be difficult. Decisions of the UNSC on substantial matters are made by an affirmative vote of nine members including the concurring

votes of the permanent members.<sup>217</sup> It is not possible for a permanent member to actively oppose a resolution without causing it to fail; permanent members may abstain, however, since an abstention does not count as opposition.

Resolution 1540 (2004) clearly reflects what is currently achievable in the UNSC and the need to compromise, especially with Russia and China. For instance, all references to the word 'interdiction' are carefully avoided and it is not targeted at any specific states. By focusing on illicit activities by non-state actors, the resolution also steers clear of controversy. Any new resolution jointly drafted by PSI participants would currently gain the support of at least five votes (the participants themselves), including the votes of three permanent members.<sup>218</sup>

The main opposition is likely to come from the other two permanent members, neither of which has formally taken a position on the PSI. Both China and Russia support the general idea of enforcing international non-proliferation frameworks but have expressed doubts about the legality and practicability of the initiative.<sup>219</sup> It may therefore be difficult to find common ground among the permanent members of the Council. Both Russia and China are advocating a more traditional approach to the non-proliferation question. For instance, the Russian Federation has already stated that the solutions to non-proliferation problems are already 'well known':

These include further universalisation of the existing non-proliferation regimes, the strengthening of international verification instruments, and the introduction of safe technology in nuclear production and energy. By and large, it is renunciation by States of excessive arsenals and military programmes capable of undermining the politico-military balance and trigger an arms race.<sup>220</sup>

On the other hand, it should be noted that the Chinese traditionally are very restrictive in the use of their veto power. From 1972 to present, China has only used the veto on four occasions.<sup>221</sup> Nevertheless, the Chinese government reiterated its traditional position on proliferation during the 2003 General Assembly debate:

Such non-traditional security concerns as ... weapons proliferation ... have become more pronounced. Given modern conditions, they can easily spread within regions or even across the world, making the security situation of human communities even more complicated ... We should cultivate a new security concept featuring mutual trust, mutual benefit, equality and cooperation. Security should be maintained through cooperation and disputes resolved peacefully through dialogue. Frequent use or threat of force should be avoided and building one's own security at the expense of others rejected.<sup>222</sup>

In conclusion, the PSI participants may find fewer difficulties in securing the required nine votes than convincing the remaining two permanent members not to use their veto. A UNSC resolution infringing on the rights of the flag states may be so contrary to the interests of many of the concerned states, that even China may utilise its veto. Therefore, it is of utmost importance that any follow-up resolution to Resolution 1540 (2004) carefully balances the rights of the flag states against the interests of the international community to curb the trade in WMD and related materials. In order to do that, the purpose and scope of the resolution needs to be openly set out and all terms need to be clearly defined.

### **5.3 PSI and the doctrine of 'necessity'**

In essence, the doctrine of 'necessity' is an international version of national criminal laws that excuse criminal behaviour caused by distress. For instance, if it were illegal to break a window belonging to a third person, the illegality would be excused if it were prompted by the need to escape a fire. In another example, illegal speeding in a motor vehicle might be excused if it were caused by the need to transport a seriously ill person to a hospital. The doctrine of necessity is quite old in international law and was originally outlined by Hugo Grotius.<sup>223</sup>

During the Napoleonic wars, a British warship seized *the Neptune*, an American freighter heading for France loaded with foodstuffs. The British warship subsequently seized the cargo pursuant to British laws regarding neutral ships heading towards enemy ports and invoked that both the capture and the seizure of goods were a necessity due to the perilous situation of the state. The American owners sued the British government and claimed the difference between the compensation given by the British and the amount they would have received had the cargo reached its intended destination. An arbitration commission later upheld the American ship-owners claim.<sup>224</sup> The lessons of the case have been summarized as follows:

1. When the existence of a State is in peril, the necessity of self-preservation may be a good defence for certain acts which would otherwise be unlawful.
2. This necessity "supersedes all laws," "dissolves the distinctions of property and rights" and justifies the "seizure and application to our own use of that which belongs to others."
3. This necessity must be "absolute" in that the very existence of the State is in peril.
4. This necessity must be "irresistible" in that all legitimate means of self-preservation have been exhausted and proved to be of no avail.
5. This necessity must be actual and not merely apprehended.
6. Whether or not the above conditions are fulfilled in a given case, is a proper subject of judicial inquiry. If they are not, the act will be regarded as unlawful and damages will be assessed in accordance with principles governing reparation for unlawful acts.<sup>225</sup>

On 18 March 1967 the tanker *Torrey Canyon* struck Pollard's Rock off the British coastline. She was carrying a cargo of 120,000 tons of oil, which leaked from the ship and spread along the sea between England and France, killing most of the marine life it touched along the whole of the south coast of Britain and the French beaches. After various attempts at averting the impending disaster had failed, the British Royal Air Force was ordered to bomb the vessel in order to burn off the oil remaining on board. In this case, it is clear that the danger of the oil spill did not pose a threat to the *very existence* of the United Kingdom. Rather, the spill threatened one of the state's interests, namely, the protection of the marine and coastal environment. The International Law Commission later dealt with the incident:

Whatever other possible justifications there may have been for the British Government's action, it seems to the Commission that, even if the ship-owner had not abandoned the wreck and even if he had tried to oppose its destruction, the action taken by the British Government **would have had to be recognized as internationally lawful because of a state of necessity.**<sup>226</sup> (emphasis added)

The International Court of Justice has since worked on the assumption that the threat of an ecological catastrophe could establish a state of necessity, and that such necessity could provide a valid excuse for a state's conduct in violation of its international obligations.<sup>227</sup> The International Law Commission has summarised the amended principle accordingly:<sup>228</sup>

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.

Hypothetically, if the PSI participants were to acquire solid intelligence proving that WMD materials were being shipped on international waters, could they claim that an interception at that time would be 'the only means' of safeguarding their interests against a 'grave and imminent peril'? The case for interdiction in the case of illicit nuclear materials seems strongest, since a nuclear device in the hands of an international terrorist network would indeed constitute a 'grave and imminent peril' to the security of the PSI participants. Indeed, such a scenario would constitute a grave and serious threat to the security of most Western nations and, indirectly, the rest of the world. And given the seriousness of such a situation coupled with the many obscurities regarding the law that govern the subject, an interdiction would most likely be justified.

Yet, post-Iraq, there would also be questions as to the validity of the intelligence and the significance of the suspected materials in advancing any NBC programme. Even where solid information is available on the type and quantity of WMD technology that forms part of a suspect cargo a number of problems remain:

- The end destination or use of the technology may not be certain, especially where dual-use technologies are concerned;
- Even if the destination and end-use is known, how the technology is integrated into the overall WMD research and development or production effort may not be clear; and
- In many cases there is no clear way to know whether a programme is R&D, production or weapon deployment.

Thus, major uncertainties are likely to remain regarding the lethality and quality of a proliferating state's NBC activities, especially around key issues such as nuclear weapons design, quality of biological or chemical agent development, and missile reliability. These uncertainties will also apply to the extent to which the illicit transfer of technology makes a difference, i.e. to what extent will it enhance the effectiveness or advance deployment of an NBC weapon? And, ultimately, at what point does such a programme constitute a 'grave and imminent peril'? This was a difficult judgement call in Iraq in relation to a nation's entire NBC procurement programme, which had been subject to unprecedented international inspections and monitoring for over a decade. It will be much more difficult to make a case for interdiction against a single shipment on grounds of imminent threat.

In any case, it has to be cautioned that the doctrine of necessity is a 'last resort' option, only valid when all other options have been exhausted. To systematically lean on this doctrine to justify high seas interdiction would not be in accordance with international law since international law rests on the presupposition that all states carry their obligations 'in good faith'.

#### **5.4 PSI and the doctrine of 'pre-emptive self defence'**

Closely connected to the principle of the 'state of necessity' is the principle of 'self defence'. The right of self-defence traditionally recognised in international law affords a state the right to take proportionate measures, including the use of force, that are necessary to protect itself from imminent harm. No other article in the UN Charter has been so widely debated and so intrusively analysed as article 51, which reads:

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.

Especially when read in conjunction with article 2(4) of the Charter, which reads:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The US government, in its 2003 National Security Strategy, pushed the interpretation of these two provisions to their limit when it stated that:

The United States has long maintained the option of pre-emptive 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 acts by our adversaries, the United States will, if necessary, act pre-emptively.<sup>229</sup>

It can be clearly argued that the words 'armed attack' in Article 51 strictly limit the extent of self-defence under the Charter, and indicate that the right cannot be justification for pre-emptive or anticipatory military strikes. This is widely considered as the general rule.

However, there are exceptions to this general rule. In 1837 British forces attacked the *Caroline*, an American merchant ship. The British government later claimed that it had been acting in self-defence since the passengers of the ship were supporters of a rebellion in Canada against British rule. In the subsequent correspondence between London and Washington, US Secretary of State Daniel Webster argued that a nation could only justify such pre-emptive hostile action if there were a necessity "instant, overwhelming, leaving no choice of means and no moment for deliberation".<sup>230</sup>

In June 1981 the Israeli Air Force bombed a nuclear plant in the Iraqi town of Osirak and justified the raid on the grounds that the reactor was designed to build nuclear weapons, which eventually would be used on Israel. The Israeli government said that "...the atomic bombs which that reactor was capable of producing whether from enriched uranium or from plutonium, would be of the Hiroshima size. Thus a mortal danger to the people of Israel progressively arose". Iraq denied that the reactor would be used to produce nuclear weapons.<sup>231</sup>

The ensuing debate in the UNSC was heated and many states were invited to participate in the meeting. A complete analysis of the debate is not possible here, but a few arguments can be brought forward. For instance, Mr. Oumarou (Niger) held that:

Israel committed a premeditated military act which neither what it calls the preservation of its security nor its avowed fear of a supposedly forthcoming Iraqi atomic bomb suffices to justify today. And its reference to Article 51 of the Charter is not merely abusive but also misleading. In this case, there was no legitimate self-defence; there was aggression, because, Israel was in no way facing an imminent attack, irrefutably proved and demonstrated.<sup>232</sup>

While Mr. Arcilla (Philippines) held that:

Granting, for the sake of argument, that the Iraqi reactor was designed to produce atomic bombs and that it was about to go "hot", we would still find it extremely difficult to accept Israel's reasons for the armed attack. It was against the basic tenets of international law and the provisions of the Charter of the United Nations.<sup>233</sup>

The United States was more cautious in its remarks. Jeanne Kirkpatrick, US Ambassador to the UN, held that:

None the less, we believe the means Israel chose to quiet its fears about the purposes of Iraq's nuclear program have hurt, and not helped, the peace and security of the area. In my Government's view, diplomatic means available to Israel had not been exhausted and the Israeli action has damaged the regional confidence that is essential for the peace process to go forward. All of us with an interest in peace, freedom and national independence have a high stake in that process. Israel's stake is highest of all.

In the end, the UNSC unanimously adopted a resolution, which strongly condemned "the military attack by Israel in **clear violation of the Charter** of the United Nations

and the norms of international conduct”<sup>234</sup> (emphasis added). The Council further considered “that the said attack constitutes a serious threat to the entire IAEA safeguards regime which is the foundation of the non-proliferation Treaty”.<sup>235</sup>

It is difficult to see how the doctrine of ‘pre-emptive self defence’ has grown more legitimate since 1981. The United States has argued that the crimes of 11 September 2001 changed the debate. However, the US assertion of its right to pre-emptive self defence has been widely criticised and is not accepted by the international community as a whole. The Israeli government’s continued practice of pre-emptive targeting of Palestinian militants is widely condemned and is due to be reviewed by the Israeli Supreme Court.

Not even the emerging concept of ‘humanitarian intervention’ is completely accepted in international law, since it is seen as an infringement of the right to territorial integrity and political independence of the attacked state. The argument that tyrants hide behind the protection of the UN Charter may be true in practice, but it does not change the law. The essence of international law since 1945 is that the use of force should be authorised as a last resort, as a means for self-protection against an ongoing or imminent attack. The key lesson from Iraq is that intelligence is not yet sufficiently reliable or adequate to support military operations against proliferating powers or to make accurate assessments of the need to pre-empt. To utilise force on the basis of sketchy intelligence or mere accusations of wrongdoing or bad intent weakens the foundation of the law and presents, in the long run, a grave threat to international stability.

## **5.5 PSI and the need for comprehensive nuclear disarmament**

The PSI participants may find it difficult to gather support for an anti-proliferation resolution while the United States opposes the establishment of a WMD-free Middle East and while it remains lax on enforcing export controls vis-à-vis the only *de facto* nuclear weapon state in that region: Israel.

Generally, the issues of nuclear weapons proliferation and disarmament are related. It is unreasonable to expect other nations not to acquire a weapon that the nuclear weapon states find essential for their own security. On the contrary, emerging and worrying concepts of ‘pre-emptive wars’ and ‘first strikes’ may prompt countries to acquire a nuclear deterrence in order to defend the country against what they perceive as Western aggression. And in particular, the development of new US strategies and new technologies to use low-yield nuclear weapons against hard and buried targets will in effect blur the distinction between conventional and unconventional weapons.<sup>236</sup>

The connection between non-proliferation of nuclear weapons and the ultimate goal of complete nuclear disarmament has been highlighted on numerous occasions during the ongoing review of the NPT. And during the 2000 NPT Review Conference, the nuclear weapon states committed themselves to the ultimate goal of nuclear disarmament. Current policies in at least four of the nuclear weapon states are running against that commitment.<sup>237</sup>

The non-proliferation aspects of the NPT has always been given undue weight in the review process, while the nuclear weapon states have dodged their responsibility to take forceful action to rid this world of a true weapon of mass destruction. At the same time, the international community has been successful in agreeing legal regimes outlawing chemical and biological weapons, which are cheaper and easier to manufacture than nuclear arms.

At the 2000 NPT Review Conference, the parties successfully moved the focus back to questions of nuclear disarmament. However, this was temporary since the focus moved rather dramatically back to the issue of non-proliferation, culminating with the Second Gulf War. Or, as US Secretary of State, Colin Powell, put it to the 2003 NPT Preparatory Committee:

We meet at a time of considerable challenge to the NPT and to international peace and security.

NPT Parties – weapon states and non-weapon states alike – must take strong action to deal with cases of non-compliance and to strengthen the Treaty's non-proliferation undertakings. We cannot allow the few who fail to meet their obligations to undermine the important work of the NPT.

The NPT can only be as strong as our will to enforce it, in spirit and in deed. We share a collective responsibility to be ever vigilant, and to take concerted action when the Treaty – our treaty – is threatened.

Now, the focus has shifted from 'non-proliferation' to 'counter-proliferation'. Not only does this imply that 'non-proliferation' has failed, it also validates arguments that forceful military action remains the only resort in a world full of weapon proliferators. It completely ignores the fact that the NPT regime has been relatively successful and that it has made the world a much safer place by reducing the number of nuclear aspirant states – largely through multilateralism, dialogue and peaceful action. The number of states that are suspected of being nuclear cheaters is a handful at most. This may change, however.

The PSI should not be seen as a separate activity in a losing war against weapons proliferation. It needs to be seen and analysed in the wider context of non-proliferation. It purports to be grounded in current legal authorities, of which the NPT is one, and efforts to widen, develop and refine the initiative should be taken with that in mind.

## **Chapter 6: Conclusions and recommendations – Building on a positive start**

The rationale of the PSI is indeed appealing. If implemented correctly it could be a credible enforcement mechanism and a logical and solid expansion of the current non-proliferation and disarmament regimes. If implemented incorrectly, however, it may prove counterproductive by not only hampering free trade and the right of humankind to use the resources of the ocean freely, but by reinforcing discriminatory practices in non-proliferation.

Whenever a new initiative is launched, the founders, and those considering joining it, have to balance the advantages of the measure against its disadvantages. When it comes to the PSI, the advantages are certainly great. Almost the whole of the international community has rejected the idea of acquiring nuclear weapons and other WMD as a means of enhancing national security. With the exception of the five declared nuclear states, the three undeclared nuclear states and a handful of 'states of concern', most states have reached the conclusion that nuclear weapons threaten security at all levels: national, regional and global. In short, they consider that the effects of their use are too terrible to fathom.

On the other hand, the tactical benefits of having a weapon capable of such destruction must be tempting for certain international terrorist organisations and a few 'states of concern'. Therefore, the problem of trade, technology transfer and proliferation in WMD materials is real and should not be underestimated.

Neither should the problem of WMD proliferation be overestimated. An intrusive regime hampering global trade needs to be proportional to the potential gains from applying it. Other avenues for curbing WMD proliferation must also be explored or expanded. Several examples:

- Remodelling and strengthening the enforcement capabilities of the IAEA and the OPCW;
- Greater international harmonisation and strengthening of criminal laws and export control regulations; and
- Accelerated implementation of the cooperative threat reduction agenda.

Finally, in order to cure a disease, the disease itself has to be targeted not just the symptoms. The nuclear weapon states need to renounce their weapons and work harder towards the goal of a nuclear free world, as stressed by both the Chilean and Brazilian statements accompanying UNSC Resolution 1540 (2004). At a minimum, the nuclear weapon states need to assure the non nuclear weapon states that nuclear arms will never be used against them in a first-strike. Under international humanitarian law, the use of a nuclear weapon is generally illegal. The ICJ has pronounced that use of them may be acceptable only in situations in which the very survival of the state may be at stake. It is difficult to imagine such a scenario.

This report does not aspire to be an authoritative statement of the law. On the face of it, there is currently no clear-cut basis to use force in order to interdict ships transporting WMD and related materials on the high seas. Thus, the participants need to use a variety of tools in order to establish a favourable legal environment for the initiative. It is naïve to wait for the emergence of a new custom, since it is apparent that some major seafaring nations object to the initiative, including China and India. Therefore, other measures need to be taken.

Here are twelve specific recommendations to strengthen the PSI and expand the global norm of combating and preventing WMD trafficking:

**Recommendation 1: Continue to expand PSI ‘membership’ through regional outreach activities**

PSI participants are committed to seeking the support of other states for the initiative, and over 60 countries have already done so.<sup>238</sup> The London plenary meeting also reiterated that further co-ordinated outreach work would be needed to broaden international understanding of and co-operation with the Initiative, and stated that further regionally based meetings and activities would be valuable. The information meeting organised by Poland in January 2004 for the countries of Central and Eastern Europe, and similar efforts in the Asian region being undertaken by Japan and Australia, are welcome developments and ought to be replicated in other regions where PSI participation is under-represented.

**Recommendation 2: Focus on specific nuclear, biological or chemical technologies**

The review in section 2.5 of how states and non-state groups use the term WMD leads to the conclusion that a more authoritative definition of targeted contraband is required. Most likely, WMD will be interpreted narrowly, but in the interest of clarity participants should consider using the term ‘nuclear, biological and chemical weapons’ throughout future PSI agreements instead of the term WMD. A clear and precise phraseology is essential for several reasons. Of course, it is good to know what the participants are talking about when they use the word, but better phraseology would also:

- Make the initiative more predictable. States as well as shipping companies will be more confident in knowing that certain goods will not be subject to interdiction. They will also be certain that shipping some cargoes increases the likelihood of interdiction.
- Minimize the risk that the PSI will be wrongfully used. With the current definition, nothing stops the participants from interdicting a ship of materials within the grey-area, such as high explosives or industrial parts, and calling it ‘WMD related materials’. This particularly applies to technologies required for the development and production of chemical and biological weapons, which are by their very nature often ‘dual-use’.<sup>239</sup>

- Increase potential support for the initiative. When states and other concerned parties know what the participants intend to interdict, they may be more willing to join. Presently, use of the term WMD may deter countries that feel that they may be targeted (such as China and Russia) from joining.

### **Recommendation 3: Consider enlarging the scope to include other illicit trafficking activities**

In addition to greater specificity in relation to WMD technologies, the participants may also want to incorporate other forms of illicit activity under the PSI interdiction framework. For example, they may want to use the initiative as a starting point to facilitate interdictions of ships carrying slaves and illegal immigrants, small arms, or even narcotics. It is worth thinking about ways of expanding the PSI at this stage, rather than later, when the initiative may already be formalised.

### **Recommendation 4: Seek a wider mandate for interdiction through new multilateral negotiations and agreements**

The PSI and other ‘coalitions of the willing’ are trying to combine the flexibility of unilateral action with multilateral credibility. It is not necessarily a bad or unlawful approach. However, while the path of unilateralism or limited plurilateral actions may allow greater flexibility and fast-track decision making than multilateral agreements in the short term, in the longer term it can be self-defeating or even exacerbate existing tensions. Thus, as currently configured the PSI may have difficulty in preventing a recurrence of incidents like the temporary seizure of the *Sosna* en route to Yemen, which the Spanish navy was obliged to release because there was no mandate for the interdiction.

Obviously, reaching universal agreement on any new initiative is very difficult, but achieving a higher degree of multilateral support will tend to enhance international political goodwill and support for it. One possibility is to use the UNSC as a global legislature and negotiate a resolution on WMD trafficking in general (targeting states as well as non-state actors). Currently, the authority of the UNSC in this regard seems a little unclear, and it may be that the Council finds that it lacks authorisation to pass a resolution of that kind.

Another option would be to conclude a multilateral agreement relating to the use of the seas, preferably through the IMO (see recommendation 5). This has been done before, most notably in order to suppress terrorism at sea, and has proved successful.

A third way forward would be to engage on a trail of reinterpretations and restatements: tweaking the law to the participant’s advantage much as a lawyer argues his or her case in a national court. This may be an easier route but is unlikely to gain the support of a broad grouping of countries.

### **Recommendation 5: Work with the IMO in further developing the PSI**

The IMO ought to be at the heart of the PSI. It is encouraging that at least one participating state, the United Kingdom, is working through the IMO to secure

amendment to the SUA Convention to make it an internationally recognised offence to transport WMD, their delivery systems and related materials on commercial vessels. However, the IMO also has the potential to work on other aspects of the PSI agenda, such as enhancing tracing and identification of suspect shipping. It should not be dissuaded from doing so on misplaced ideological grounds.<sup>240</sup>

**Recommendation 6: Place the burden of proof on flag states, shippers and masters to ensure WMD-free cargoes**

The IMO would also be a suitable forum to negotiate rules that place a legal responsibility on flag states, shippers and masters to ensure that their cargo is clear of WMD. Rules of this kind could be negotiated within the framework of the safety at seas convention and could be supplemented with suitable and credible liability rules. The work could also focus on enacting or strengthening national criminal legislation relating to the act of transporting WMD on the high seas and beyond.

**Recommendation 7: Undertake a feasibility study for the development of an international maritime tracking system with global coverage**

In an ideal world, a global tracking and tracing system would be able to monitor suspect shipping and provide data to law enforcement agencies in all nations. Indeed, the many technological innovations and changes in communications technology suggest that this may become technically feasible in the near future, and that the real hurdles are likely to be political. The IMO, for example, has introduced major improvements to the maritime distress system,<sup>241</sup> and other automatic information systems are being introduced as part of a new comprehensive maritime security regime (as discussed in section 5.1). These new civilian systems, in addition to the NOSS, provide a starting point for the development of an international maritime tracking system with global coverage.

**Recommendation 8: Promote technical cooperation and assistance**

Assistance programmes to developing countries for training and the improvement of their maritime and port security infrastructure should be introduced as a carrot to attract new PSI participants. In particular, shipping and port industries in the United States, EU and other wealthy participating states could be encouraged to provide financial, human or in-kind resources to such programmes, possibly as part of the IMO's existing Integrated Technical Co-operation Programme. This would not only advance goodwill for the PSI, but also help to enhance effective implementation of, and compliance, with international non-proliferation and maritime security norms. Similar technical cooperation and assistance programmes for increasing the effectiveness of national non-proliferation export control regimes in newly independent countries in Central and Eastern Europe, and in other regions vulnerable to illicit trafficking, have proved successful in the past. Finally, UNSC Resolution 1540 (2004) also calls for international assistance to those states unable to implement the provisions of that resolution.

**Recommendation 9: Consider establishing a UN interdiction committee**

Resolution 1540 (2004) establishes an ad-hoc committee to implement the non-proliferation provisions contained therein. Previously, in September 2001, the UNSC also adopted resolution 1373 which established the Counter-Terrorism Committee. Both committees, comprised of the members of the UNSC, monitor the implementation of the respective resolutions and will seek to increase the capability of states to combat proliferation and fight terrorism. It would undeniably give the PSI more legitimacy if the participants were to push for the establishment of an 'interdiction committee' under a UNSC resolution. This might even be a future role for the new committee established under resolution 1540.

This committee could be ready, on short notice, to decide interdiction cases. Preferably, the members of the committee would have an equal vote without the possibility of a veto. However, it seems unlikely that the permanent members would agree to such an arrangement. Therefore, the obvious drawback with the establishment of a committee is the overriding threat of a state vetoing an interdiction. This might decrease the effectiveness of the initiative as a whole. On the other hand, the establishment of such a committee might bolster international and public support for the initiative, silence some of its critics and encourage new states to join it.

#### **Recommendation 10: Negotiate towards a common position on 'states of concern'**

More work also needs to be done on trying to reach a consensus definition of 'states of concern'. Utilising sensitive destination lists within export control regimes may provide some way forward. The EU, for example, has achieved partial convergence of the national lists of sensitive destinations, although the utility (and even existence) of such listings continues to be controversial. In the UK, for example, the sensitive destination list was withdrawn in 1998 on the grounds that it might cause diplomatic difficulties with some of the countries listed, and some other EU member states do not officially have such a list (although clearly officials in all member states have to make a judgement about the country of destination when considering an export licence application, and thus *de facto* sensitive destination lists do exist throughout the community).

Moreover, the reasons why a country is designated sensitive are rarely stated explicitly. A 1995 analysis of the sensitive country lists of four major exporters of arms (Germany, Japan, the UK and US) sought to identify and explain the concerns that led to the inclusion of countries on those lists.<sup>242</sup> The findings in relation to Germany and the UK were that a total of 57 countries were listed (50 by the UK and 48 by Germany) with 41 common to both lists. The nine countries on the UK list but not on the German lists were Angola, Argentina, Brazil, Croatia, Egypt, Slovenia, South Africa, South Korea and Taiwan. The seven countries on the German lists but not the UK list were Chile, Comoros, Djibouti, Jordan, Oman, UAE and Vanuatu. These differences were largely a reflection of the different foreign policy concerns of Germany and the UK and confirm the difficulties that the PSI participating states will have in reaching a common perspective in such matters.

However, if the participants were able to agree a target list of countries, and made this list publicly available, it would enhance the predictability of the initiative. It would

reassure shipping companies and exporting states that they could conduct business as usual without having to factor in the risk of a wrongful interdiction in their estimates. On the other hand, naming and shaming target states may have unforeseen consequences and further alienate and isolate countries of concern.

### **Recommendation 11: Increase the visibility of national contributions to PSI activities and enhance parliamentary oversight**

For the time being, there is no real need to establish a new organisation (a PSI-authority) to oversee the initiative. The participants have reiterated over and over again that this is an activity, not a club. What the initiative mostly requires states to do is to enforce their own laws and update them where needed. A large part of the initiative pertains to customs and border controls. A small but high profile part relates to the use of armed force on the high seas. But there are no plans for participating states to dedicate specific personnel or funding to support this role. In the United States, for example, the Pentagon has said that the Defense Department could handle its PSI responsibilities with existing capabilities, and there is no separate line item for PSI in the fiscal 2005 budget request.<sup>243</sup>

However, in order to ensure proper parliamentary oversight and to help evaluate the effectiveness of the PSI, participating states should include a line item for the PSI in their defence budgets, as well as a description of PSI activities carried out in any annual reporting mechanisms.

In addition, should participation in the initiative continue to grow, the 'members' may find it necessary to set up a coordinating body of some description. Also, if they choose to set up a counter-proliferation committee in the UN, there would probably be a need for military liaison between the committee and the interdicting state.

### **Recommendation 12: Expand bilateral and multilateral boarding agreements**

One immediate way forward is to conclude bilateral or multilateral boarding agreements with the major commercial flag states, including the so-called flags of conveniences. This would facilitate lawful boarding of vessels on the high seas and could be concluded expediently with a minimum of negotiations. This appears to have been the case with the two boarding agreements that the United States has recently concluded with Liberia and Panama.

It may, however, prove costly. International organisations have for a long time tried to combat the poor wages and dangerous working conditions onboard these ships, and boarding agreement trade-offs may hamper their efforts. For the flag state, a boarding agreement should give political goodwill as well as economic benefits.

Finally, there is a danger that the PSI could establish a dangerous precedent regarding boarding on the high seas. International custom can be applied by all states, not only PSI participants. And if a new custom emerges, it could be used to conceal illegitimate boardings carried out with other intentions than the fight against the proliferation of WMD and related materials. This would naturally be a most undesirable development.

# Endnotes

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## Chapter 1: Introduction

<sup>1</sup> 'Australia agrees to new WMD exercises', *ABC News Online*, 18 December 2003.

<sup>2</sup> David McGlinchey 'Anti-proliferation effort will receive no separate funding, personnel', *Government Executive Magazine*, 15 March 2004.

<sup>3</sup> The White House, Office of the Press Secretary: 'Proliferation Security Initiative: Statement of Interdiction Principles', Fact Sheet, Washington, DC, 4 September 2003 (cit PSI principles).

<sup>4</sup> PSI principles, para 1.

<sup>5</sup> In summary, the Nuclear Non-Proliferation Treaty (NPT), the Chemical Weapons Convention (CWC), the Biological and Toxin Weapons Convention (BWC), the Comprehensive Nuclear Test Ban Treaty (CTBT), their international secretariats and governing bodies, a number of other treaties, and various other international arrangements designed to limit the spread of critical materials for the production of weapons of mass destruction.

<sup>6</sup> Quoted by Judith Miller, 'Time and Technology', *New York Times*, 6 December 2003.

<sup>7</sup> For example, since its inception in 1968, the NPT has been the main legal framework for preventing the proliferation of nuclear weapons to additional states. There are only five recognised nuclear weapons states, and only four states with the non-recognized nuclear weapons capability outside the NPT. Without the NPT, there could have been at least 28 additional states with nuclear weapons. This alone is a significant achievement. Several states, including South Africa, Belarus, Ukraine, Kazakhstan, Brazil, and Argentina have voluntarily given up their nuclear weapons programs. Libya has recently become another convert. There are now four regional nuclear weapon-free zones, which cover virtually the entire southern hemisphere, not to mention treaty regimes that prohibit the stationing of nuclear weapons on the seabed, in Antarctica, in orbit or on the moon and other celestial bodies, or the testing of such weapons at sea, in the atmosphere, or in space. Thus, as Jon Wolfsthal, deputy director of the Non-Proliferation Project at the Carnegie Endowment for International Peace (CEIP) concludes, "While today's proliferation challenges are real and acute, the track record in uncovering, confronting and reversing proliferation with established tools is actually quite strong". Jon Wolfsthal, 'The Key Proliferation Questions', *Proliferation Brief*, Volume 7, Number 6, CEIP, March 24, 2004.

<sup>8</sup> Many analysts argue that the US Administration has undermined nonproliferation norms and alliances by its policies, including: its determination to develop an antiballistic missile shield and a new class of nuclear weapons; its abandonment of an international, six-year effort to strengthen the bioweapons treaty; and its attack on Iraq as part of its doctrine of preventive war. See, for example, Daryl Kimball, 'Curb Nuclear Weapons Excess', *Arms Control Today*, May 2004; and 'Bush's New Plan to Stop Proliferation', *Proliferation Brief*, Volume 7, Number 5, CEIP, February 20, 2004.

<sup>9</sup> The White House, Office of the Press Secretary: 'Proliferation Security Initiative: Statement of Interdiction Principles', Fact Sheet, Washington, DC, 4 September 2003.

<sup>10</sup> *Ibid*, paragraph 3.

<sup>11</sup> Proliferation Security Initiative: Chairman's Statement at the Second Meeting, Second Meeting of the PSI, July 9-10, 2003, Brisbane, Australia.

<sup>12</sup> Proliferation Security Initiative: Chairman's Conclusions at the Fourth Meeting, Fourth Meeting of the PSI, October 9-10, 2003, London, United Kingdom.

<sup>13</sup> The United Nations Convention on the Law of the Sea, 10 December 1982, in force from 16 November 1994.

<sup>14</sup> The United States and Turkey has neither signed nor ratified the convention while Denmark has signed but not yet ratified it.

<sup>15</sup> 'The Proliferation Security Initiative: Dead in the water or steaming ahead?', *BASIC Notes*, 12 December 2003.

<sup>16</sup> 'Foreign Ministry Spokesperson's Press Conference', 4 September 2003. The full transcript may be found at <http://www.fmprc.gov.cn/eng/xwfw/2510/2511/t25626.htm>.

<sup>17</sup> *Ibid*.

<sup>18</sup> 'Proliferation Security Initiative: Next Experts Meeting, China's Role', Office of the Spokesman, US Department of State, Washington, DC, 3 December 2003. The full transcript may be found at <http://www.state.gov/r/pa/prs/ps/2003/26867.htm>. If nothing else, PSI participants may need to make sure that China doesn't utilise its veto in the event that they choose to introduce a resolution on the PSI in the UNSC.

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<sup>19</sup> 'US lobbies Russia to join campaign against illicit arms shipments', *SpaceWar Wire*, 29 January 2004. The full article is available at <http://www.spacewar.com/2004/040129082721.dcagh536.html>.

<sup>20</sup> Nicholas Kravov, 'Russia hesitant to seize materials terrorists desire', *The Washington Times*, 11 January 2004.

<sup>21</sup> *Ibid.*

<sup>22</sup> Carol Giacomo, 'U.S. Presses Russia to Join Arms Body', *Moscow Times*, 29 January 2004.

<sup>23</sup> 'Russia Likely to Join PSI, Japanese Source Says', *NTI Global Security Newswire*, 30 April 2004.

<sup>24</sup> Having said this, the possibility of a targeted land 'interdiction' in a third country using missiles or special forces has probably not been ruled out by US defence planners. Neither is such a scenario too far removed from other illegal precedents, such as the targeted assassination of suspected terrorists in their own countries with missiles (e.g. six men suspected of membership in a militant Islamic network were killed in Yemen in November 2002 when their car was hit by a Hellfire missile fired from an unmanned Predator aircraft operated by the CIA, see 'Rights Group Questions Attack - Amnesty Says U.S. Missile Strike in Yemen May Be Illegal', *Reuters*, 9 November 2002) or the bombing of suspected WMD production facilities (e.g. in August 1998 the Clinton Administration used cruise missiles to bomb a Sudanese chemical plant 'suspected' of creating VX nerve gas, although the evidence to back this assertion was weak and vigorously disputed, see Ed Vulliamy, Henry McDonald, Shyam Bhatia and Martin Bright, 'Clinton knew target was civilian', *The Observer*, 23 August 1998; and 'Sudan wants U.N. to probe U.S. bombing of drug factory', *CNN.com*, 18 August 1999).

<sup>25</sup> See, in particular, article 35 (a) – (b) of the Convention on International Civil Aviation, signed at Chicago, on 7 December 1944.

<sup>26</sup> See, for example, John Bolton, 'The New Proliferation Security Initiative', interview by Wade Boese and Miles Pomper, *Arms Control Today*, 4 November 2003; and John R. Bolton, "Legitimacy" in International Affairs: The American Perspective in Theory and Operation', Remarks to the Federalist Society, 13 November 2003.

## Chapter 2: The Interdiction Principles

<sup>27</sup> President Bush, 'The New World Order', speech to Congress, 6 March 1991.

<sup>28</sup> UNSC, 'Note by the President of the Security Council', UN doc S/23500, 31 January 1992.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.* The IAEA board is required to report all cases of member state non-compliance to the UNSC and UNGA, see IAEA Charter, article III (B) (4) and XII (C).

<sup>32</sup> The CWC was concluded on schedule. As of the beginning of 2004, 158 countries are parties to it.

<sup>33</sup> A future BASIC Research Report will examine this issue in greater detail.

<sup>34</sup> The White House, 'Remarks by the President to the People of Poland', 31 May 2003.

<sup>35</sup> 'Chairman's Statement from PSI Meeting in Brisbane on 9-10 July', 16 July 2003.

<sup>36</sup> US Department of Defense, 'Deputy Secretary Wolfowitz Remarks to PSI Conference', 17 December 2003.

<sup>37</sup> Representatives of the following countries attended the Warsaw meeting: Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Romania, Serbia and Montenegro, Slovakia, Slovenia and Ukraine. Communique after the Information Meeting of the Countries of Central and Eastern Europe on the development of Proliferation Security Initiative, Warsaw, 12 January 2004.

<sup>38</sup> Interview with UK Foreign and Commonwealth Office officials, April 2004.

<sup>39</sup> *Ibid.*

<sup>40</sup> The G-8 is composed of Canada, France, Germany, Italy, Japan, Russia, the United Kingdom and the United States. The European Union is also represented in the G-8 and acts as one member, and is represented by the head of the European Commission.

<sup>41</sup> 'Non Proliferation of Weapons of Mass Destruction - A G8 Declaration', Evian, 2 June 2003.

<sup>42</sup> *Ibid.*, para 1.

<sup>43</sup> *Ibid.*, para 6.

<sup>44</sup> *Ibid.*, para 9.

<sup>45</sup> 'The G8 Global Partnership: Principles to prevent terrorists, or those that harbour them, from gaining access to weapons or materials of mass destruction', Kananaskis, Canada, 27 June 2002.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*, principle 2.

<sup>48</sup> *Ibid.*, principle 4.

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<sup>49</sup> *Ibid.*

<sup>50</sup> Pre-2004 membership (EU15): Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden and the United Kingdom. Additional Member States as of May 1, 2004 (the EU25): Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. Candidate Countries: Bulgaria, Romania, and Turkey. Applications Pending: Croatia and Former Yugoslav Republic of Macedonia.

<sup>51</sup> Thessaloniki European Council, 'Presidency Conclusions', Thessaloniki, Greece, 19-20 June 2003, Chapter VIII and Annex II.

<sup>52</sup> Annex II, para 1.

<sup>53</sup> Annex II, para 5 (5).

<sup>54</sup> EU-USA Summit, 'Joint Statement on the Proliferation of WMD', By Simitis, Prodi and Bush, Washington DC, 25 June 2003.

<sup>55</sup> As of May 2004, NATO comprised the following states: Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey, UK and US.

<sup>56</sup> AFSOUTH Press Release, 'NATO Ships start boarding operations in Mediterranean', 31 July 2003.

<sup>57</sup> NATO Briefing, 'Active Endeavour', December 2003.

<sup>58</sup> PSI principles, para 3.

<sup>59</sup> *Ibid.*

<sup>60</sup> PSI principles, operative para 1.

<sup>61</sup> Contrast, for example, the 2002 Strategic Offensive Reduction Treaty (SORT) and the 1991 Strategic Arms Reduction Treaty (START I). The latter is a detailed treaty 19 articles long not including annexes and additional protocols, while the former is comprised of five articles. The operative part of the SORT treaty contains one single article.

<sup>62</sup> Montevideo Convention on the Rights and Duties of States, Signed at Montevideo, 26 December 1933, Entered into Force, 26 December 1934.

<sup>63</sup> 'The New Proliferation Security Initiative: an interview with John Bolton', *Arms Control Today*, December 2003. See also 'Proliferation Security Initiative: Chairman's Statement at the Second Meeting', Second Meeting of the PSI, July 9-10, 2003, Brisbane, Australia.

<sup>64</sup> 'The New Proliferation Security Initiative: an interview with John Bolton', *Arms Control Today*, December 2003.

<sup>65</sup> See 'The State of Nuclear Proliferation 2001', ACA Fact Sheet 2001.

<sup>66</sup> *Ibid.*

<sup>67</sup> Military technologies show both vertical and horizontal proliferation, but the question of controlling the latter continues to receive little or no attention. Most arms control agreements to date have dealt with existing rather than future weapons, and the number of such weapons as opposed to their qualities. With the exception of the CTBT and BWC, the vertical proliferation of weapons technology is virtually unconstrained. This continual process of weapons innovation endangers existing arms control agreements and undermines efforts to control horizontal proliferation.

<sup>68</sup> All P5 states are modernising their nuclear forces and remain committed to retaining their nuclear arsenals. See Hans Kristensen and Shannon Kile, 'World nuclear forces', Appendix 15A, *SIPRI Yearbook 2003: Armaments, Disarmament and International Security*, Oxford University Press 2003, pp610-638; and 'Vertical Proliferation', NGO presentation at the 2004 NPT PrepCom meeting in New York, delivered by Jacqueline Cabasso, Western States Legal Foundation (WSLF), convened by Martin Butcher, Physicians for Social Responsibility (PSR), at <http://www.reachingcriticalwill.org/legal/npt/prepcom04/NGOpres.html#vertical>.

<sup>69</sup> National Security Strategy of the United States of America, 2002, p 14.

<sup>70</sup> David Frum, *The Right Man: The Surprise Presidency of George W. Bush*, Random House Inc, January 2003. Frum wrote the 'axis of evil' speech and explains in his book that few words were changed from his original text. Essentially, the story begins in late December 2001 when head speechwriter Mike Gerson gave Frum the assignment of articulating the case for dislodging the regime of Saddam Hussein in Iraq in only a few sentences for the upcoming State of the Union address. Frum says he began by rereading President Franklin Roosevelt's '*date that will live in infamy*' speech given on 8 December 1941, after the Japanese surprise attack on Pearl Harbour. While Americans needed no convincing about going to war with Japan, Roosevelt saw the greater threat to the United States coming from Germany, and he had to make the case for fighting a two-ocean war. Frum's original wording was, however, 'axis of hatred' rather than 'axis of evil'.

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<sup>71</sup> 'Beyond the Axis of Evil: Additional Threats from Weapons of Mass Destruction', John R. Bolton, Under Secretary for Arms Control and International Security, remarks to the Heritage Foundation, 6 May 2002.

<sup>72</sup> U.K. House of Commons, Hansard (House of Commons Daily Debates), 4 February 2003, Column 205W.

<sup>73</sup> *Ibid.*

<sup>74</sup> Much of the human intelligence came from defectors or organisations working to topple the Hussein regime. Some of the information seems to be single source. With regard to the possibility that human sources knowingly provided false information on weapons of mass destruction as well as Saddam's whereabouts on the opening night of the war, see Bob Drogin, 'U.S. Suspects It Received False Iraq Arms Tips', *Los Angeles Times*, 28 August 2003. See also Bill Gertz and Rowan Scarborough, 'Inside the Ring', *Washington Times*, 2 January 2004, p.A7.

<sup>75</sup> 'Entities of proliferation concern listed in Supplement No. 4 to part 744 of the Export Administration Regulations', U.S. Department of Commerce, Bureau of Industry and Security.

<sup>76</sup> *Ibid.*

<sup>77</sup> 'WMD: Words of mass dissemination', BBC News, 12 February 2003.

<sup>78</sup> Developments in both conventional weapons technology (especially area impact munitions, cluster bombs and fuel air explosives) and smaller yield nuclear weapons (so-called 'mini-nukes') are beginning to blur the boundaries, however.

<sup>79</sup> Al Mauroni, 'Weapons of Mass Delusion?', *Armed Forces Journal*, March 2004, p36.

<sup>80</sup> US Code, Title 50 'War and National Defense', Chapter 40 'Defense against weapons of mass destruction', Section 2302 'Definitions'.

<sup>81</sup> Statement of special agent in charge James F. Jarboe on 'Homeland Security: Facilitating and Securing Seaports' before the U.S. House of Representatives, Subcommittee on National Security, Veterans Affairs and International Relations in Washington, 5 August 2002.

<sup>82</sup> Indictment, Count One, United States of America v. Timothy James McVeigh and Terry Lynn Nichols, Case No CR 95-110, United States District Court for the Western District of Oklahoma.

<sup>83</sup> Presidential Decree No. 1203 of 30 November 1995, see also article 355 of the Criminal Code of the Russian Federation.

<sup>84</sup> SALW are now widely recognised as one of the most pressing humanitarian challenges of our time. These weapons are responsible for 90 per cent of the deaths in today's conflicts; combatants in 43 of the last 47 conflicts have relied on them almost exclusively. See *Small Arms Survey 2002: Counting the human cost*, Oxford University Press 2002.

<sup>85</sup> Vienna Convention on the Law of Treaties (1969), Section III, article 31 (1).

<sup>86</sup> It is believed that NOSS satellite systems use radio interferometry (or a similar technique) to detect, locate and track ships at sea by their radio transmissions. For more information, see 'NOSS Double and Triple Satellite Formations' at the Visual Satellite Observer's Home Page at <http://satobs.org/noss.html>.

<sup>87</sup> Global Security Director John Pike, quoted in Makki Beckker, 'Terror Lurks on the High Seas', *NY Daily News*, 21 September 2003.

<sup>88</sup> 'Yugoslav Army Displays Decoys Said To Have Fooled NATO', *Reuters*, 15 June 2000.

<sup>89</sup> Nuclear Non-Proliferation (Safeguards) Act of 1987, section 8, §§ 1-2.

<sup>90</sup> Nuclear Non-Proliferation (Safeguards) Act of 1987, section 23, § 1(a) and 1(d).

<sup>91</sup> PSI Principles, operative para 4.

<sup>92</sup> Interview with FCO officials, April 2004.

<sup>93</sup> PSI Principles, operative paragraph 4 (d) (1).

<sup>94</sup> PSI Principles, operative paragraph 4 (b).

<sup>95</sup> PSI Principles, operative paragraph 4 (c).

<sup>96</sup> Jack Straw, Written Ministerial Statements, Foreign & Commonwealth Affairs, *Hansard*, 25 February 2004: Columns 46 & 47ws.

<sup>97</sup> 'Proliferation Security Initiative: Chairman's Conclusions at the Fourth Meeting', Fourth Meeting of the PSI, October 9-10, 2003, London, United Kingdom.

<sup>98</sup> Wade Boese, 'Interdiction Initiative Participants Agree on End, Differ on Means', *Arms Control Today*, November 2003.

<sup>99</sup> *Ibid.*

<sup>100</sup> Josh Maiyo and Theo Tamis, 'War on terror on the high seas', Radio Netherlands, 5 September 2003.

<sup>101</sup> Senator the Hon. Robert Hill, 'Transcript: Media Conference for PSI exercise', on board the HMS Melbourne, 13 September 2003.

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<sup>102</sup> 'North Korea Says It Seeks to Develop Nuclear Arms', *New York Times*, 10 June 2003.

<sup>103</sup> *Ibid.*

### Chapter 3: The PSI and the Law of the Sea

<sup>104</sup> 'Table over the status of the convention', Division for Ocean Affairs and the Law of the Sea, 23 December 2003, see also *appendix A* of that report.

<sup>105</sup> Permanent Court of International Justice, 'The Case of the S.S. "Lotus"', Judgment No. 9, 1927 PCIJ, Series A 10, Part IV.

<sup>106</sup> UNCLOS, Part II, Section I, article 2 (1).

<sup>107</sup> UNCLOS, Part II, Section I, articles 3 and 5.

<sup>108</sup> UNCLOS, Part II, Section I, article 8 (1).

<sup>109</sup> UNCLOS, Part II, Section I, article 11.

<sup>110</sup> UNCLOS, Part II, Section III, article 17.

<sup>111</sup> UNCLOS, Part II, Section III, article 19 (1). See also article 19 (2) (a)-(l).

<sup>112</sup> UNCLOS, Part II, Section IV, article 33 (a)-(b).

<sup>113</sup> UNCLOS, Part VII, article 88.

<sup>114</sup> John Bolton, "'Legitimacy" in International Affairs: The American Perspective in Theory and Operation', Remarks to the Federalist Society, Washington, DC, 13 November 2003.

<sup>115</sup> Center for Defense and International Security Studies, 'More on seized North Korean ship and possible nuclear missile exchange between Islamabad and Pyongyang', 23 July 1999.

<sup>116</sup> Ramnarayan Gopalkrishnan, 'The Pakistan-North Korea ballistic missile nexus', July 1999.

<sup>117</sup> Center for Defense and International Security Studies, 'Update on North Korean ship seized in India', 29 September 1999.

<sup>118</sup> Center for Defense and International Security Studies, 'India seizes North Korean ship carrying missile components, 9 July 1999.

<sup>119</sup> D.V. Maheshwari, 'North Korean ship case gets curiously', *Financial Express*, 9 July 1999.

<sup>120</sup> D.V. Maheshwari, "'Scud case' is a dud, dropped without thud", *Financial Express*, 17 September 1999.

<sup>121</sup> A direct or sovereign guarantee transfers the financial burden of the guaranteed firm directly to the government's national treasury in the event the firm is unable to pay its contractual debts. Thus, a sovereign guarantee is simply the transfer of any obligation from the ship-owner to the government should the former fail to pay its debt or honour its commitments.

<sup>122</sup> UNCLOS, Part II, Section 3, article 27 (1).

<sup>123</sup> UNCLOS, Part II, Section 3, article 27 (3).

<sup>124</sup> The 'comity of nations' is the courtesy by which nations recognise within their own territory, or in their courts, the peculiar institutions of another nation or the rights and privileges acquired by its citizens in their own land. By some authorities private international law rests on this comity, but the better opinion is that it is part of the common law of the land, and hence is obligatory as law. Simply said, a rule of comity is a 'show of good will'.

<sup>125</sup> New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania v. The Commonwealth [1975]HCA 58; (1975) 135 CLR 337 (judgment 17 December 1975).

<sup>126</sup> UNCLOS, Part II, Section 3, article 27 (1) (a)-(d).

<sup>127</sup> UNCLOS, Part II, article 27 (3).

<sup>128</sup> Maritime and Coastguard Agency, 'Foreign merchant ships in detention in UK ports', March 2003.

<sup>129</sup> 'Nato 'terror' tipoff on explosives ship sailing to Sudan', *The Guardian*, 24 June 2003.

<sup>130</sup> 'Greece traces route of seized ship', *CNN*, 24 June 2003.

<sup>131</sup> Roger Wilkinson, 'Ship's Crew Charged With Illegally Transporting Explosives', *VOA News*, 23 June 2003.

<sup>132</sup> 'Black ship' down', *Al-Ahram Weekly On-line*, Issue no 646, 10-16 July 2003.

<sup>133</sup> UNCLOS, part II, article 33 (2).

<sup>134</sup> UNCLOS, part II, article 33 (1) (a)-(b).

<sup>135</sup> International Tribunal for the Law of the Sea, "The M/V Saiga (No. 2) Case" (Saint Vincent and the Grenadines v Guinea), Case No 2, 1 July 1999.

<sup>136</sup> UNCLOS, part V, article 57.

<sup>137</sup> UNCLOS, part V, article 56 (1) (b) (i)-(iii).

<sup>138</sup> UNCLOS, part VII, article 86.

<sup>139</sup> UNCLOS, part VII, article 92.

<sup>140</sup> Judgment No. 9, The Case of the S.S. "Lotus", P.C.I.J. Series A No. 10, 1927, sec. IV ('the Law').

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- <sup>141</sup> *Ibid.*
- <sup>142</sup> *Ibid.*
- <sup>143</sup> Arms Control Association, 'The New Proliferation Security Initiative: an interview with John Bolton', 4 November 2003.
- <sup>144</sup> John R. Bolton, "'Legitimacy" in International Affairs: The American Perspective in Theory and Operation', Remarks to the Federalist Society, 13 November 2003.
- <sup>145</sup> *Ibid.*
- <sup>146</sup> Ari Fleischer, White House Press Briefing, 11 December 2002.
- <sup>147</sup> 'Nuclear Weapons and Rogue States: Challenge and Response', Under Secretary Bolton's remarks to the Conference of the Institute for Foreign Policy Analysis, 2 December 2003.
- <sup>148</sup> E.D. Brown, 'The International Law of the Sea', Vol. 1, p 64; and F. Ngantcha, 'The Right of Innocent Passage and the Evolution of the International Law of the Sea', p 38.
- <sup>149</sup> UNCLOS, Part II, Section 3, article 17.
- <sup>150</sup> 'Union of Soviet Socialist Republics - United States: Joint Statement with attached uniform interpretation of rules of International Law governing innocent passage', 28 I.L.M. 1444 (1989).
- <sup>151</sup> *Ibid.*
- <sup>152</sup> See Brownlie, *Principles of Public International Law*, Oxford University Press, 2003.
- <sup>153</sup> See UNCLOS, Part II, Section 3, article 19 (2) (a)-(l).
- <sup>154</sup> UNCLOS, Part II, Section 3, article 23.
- <sup>155</sup> US telegram 'concerning certain provisions of Maldives law not in conformity with international law as reflected in the 1982 United Nations Convention on the Law of the Sea', June 21, 2001.
- <sup>156</sup> F. Ngantcha, 'The Right of Innocent Passage and the Evolution of the International Law of the Sea', p 142.
- <sup>157</sup> S.N. Nandan and S. Rosenne, eds., *United Nations Convention on the Law of the Sea 1982, A Commentary*, Vol. II, Dordrecht 1993, at 21.8f, and E.D. Brown, p 68f.
- <sup>158</sup> The Presidential Statement (at the 176th meeting) read: "They would, however, like to reaffirm that their decision is without prejudice to the rights of coastal States to adopt measures to safeguard their security interests ...".
- <sup>159</sup> The states which have voiced opposition to shipments are, according to Greenpeace International: Uruguay, Colombia, Argentina, Brazil, Indonesia, Portugal, Ecuador, Fiji, Dutch Antilles, Jamaica, Philippines, Chile, Spain, Puerto Rico, Martinique, Commonwealth of Dominica, Dominican Republic, Federated States of Micronesia, British and US Virgin Islands, Honduras, Aruba, Hawaii, Ethiopia, South Africa, Republic of Nauru, Mauritius, Antigua and Barbuda and Chile.
- <sup>160</sup> Statement by His Excellency Ronald Michael Sanders CMG, High Commissioner for the Antigua and Barbuda High Commission on 30 January 1998. Members of the commission were Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St Kitts-Nevis, St Lucia, St Vincent and the Grenadines and Trinidad and Tobago.
- <sup>161</sup> Canadian Arctic Waters Pollution Prevention Act of 1970.
- <sup>162</sup> UNCLOS, Part VII, article 87.
- <sup>163</sup> UNCLOS, Part V, article 58 (1).
- <sup>164</sup> UNCLOS, Part III, article 45.
- <sup>165</sup> UNCLOS, Part IV, article 53.
- <sup>166</sup> UNCLOS, Part II, Section 3, articles 17-19.
- <sup>167</sup> UNCLOS, Part IV, article 52.
- <sup>168</sup> Compare UNCLOS, Part II, article 18, regarding 'innocent passage'.
- <sup>169</sup> Dupuy, R-J; Vignes, D, *A Handbook of the New Law of the Sea*, Kluwer Academic, Netherlands 1991, p. 845.
- <sup>170</sup> See, *inter alia*, Congressional Records, 103rd Congress, 2d. Sess., 1994, page S14467, 6 October 1994.
- <sup>171</sup> James Malone, 'Who Needs the Sea Treaty?', *Foreign Policy*, Spring 1984.
- <sup>172</sup> Congressional Record, 103rd Congress, 2d. Sess., 1994, page S14475, 6 October 1994.
- <sup>173</sup> 19 Weekly Comp. Pres. Doc. 383-385 (Mar. 10, 1983); see also 'Statement by the President dated 10 March 1983', DOALOS, Office of Legal Affairs, United Nations, New York.
- <sup>174</sup> Congressional Record, 103rd Congress, 2d. Sess., 1994, page S14472, 6 October 1994.
- <sup>175</sup> US Secretary of Defence, 'Annual Report to the President and Congress', appendix H, Washington, DC, 2001.
- <sup>176</sup> *Ibid.*
- <sup>177</sup> International Court of Justice, Case of Nicaragua v. United States of America (*Nicaragua Case*), Judgment on 27 June 1986. See paras 174 and 214.

<sup>178</sup> 'President John F. Kennedy's Speech Announcing the Quarantine Against Cuba', 22 October 1962. Available on-line at: <http://www.mtholyoke.edu/acad/intrel/kencuba.htm>.

<sup>179</sup> *Ibid.*

<sup>180</sup> The 'Abolition of the Slave Trade Act' was passed by the British Parliament on 25 March 1807. The Act imposed a fine of £100 for every slave found aboard a British ship. The intention was to entirely outlaw the slave trade within the British Empire, but the trade continued and captains in danger of being caught by the Royal Navy would often throw slaves into the sea to reduce the fine. In 1827 Britain declared that participation in the slave trade was piracy and punishable by death. Parliament passed the Slavery Abolition Act in 1833. This Act gave all slaves in the British Empire their freedom. The British government paid compensation to the slave owners, the amount received being dependent on the number of slaves that they had. For example, the Bishop of Exeter's 665 slaves resulted in him receiving £12,700. After 1838, the 'British and Foreign Anti-Slavery Society' worked to outlaw slavery overseas and to pressure the government to help enforce the suppression of the slave trade by declaring slave traders as pirates and pursuing them.

<sup>181</sup> Early news reports indicated that the flag was German. However, the BBC Chartering & Logistics website states that the 'BBC China' flies a flag of convenience (Antigua & Barbuda), see <http://www.bbc-online.de/everyship/schiffansicht.php3?art=crane&nr=86>.

<sup>182</sup> See, *inter alia*, Barry Schweid, 'U.S. Nabbed Libya Nuke Parts', *CBS News Online*, 1 January 2004.

<sup>183</sup> John R. Bolton, Under Secretary for Arms Control and International Security, Remarks with H.E. Arnulfo Escalona, Minister of Government and Justice of Panama, Treaty Room, Washington, DC, 12 May 2004.

<sup>184</sup> *Ibid.*

<sup>185</sup> Carol Giacomo, 'Panama Said to Let US Board Its Flagged Ships', *Reuters*, 10 May 2004.

<sup>186</sup> *Ibid.*

<sup>187</sup> Brittin, Burdick H, *International Law For Seagoing Officers*, p 243, (4th Ed), Naval Institute Press, 1981.

<sup>188</sup> International Court of Justice, Case of Nicaragua v. United States of America, 27 June 1986.

<sup>189</sup> Frederic L. Kirgis, 'NATO Interdiction of Oil Tankers Bound for Yugoslavia', *ASIL Insights*, April 1999.

## Chapter 4: Exercises and Interdictions – The Story So Far

<sup>190</sup> See Sridhar Krishnaswami, 'U.S. `allays' fears on Coral Sea exercises', *Hindu Times*, 21 August 2003; David Sands, 'U.S., 10 allies plan series of exercises to stop illegal arms', *Washington Times*, 5 September 2003; and Hamish McDonald, 'Beefed-up exercises in Coral Sea making Beijing nervous', *Sydney Morning Herald*, 9 September 2003.

<sup>191</sup> 'Japan postpones sea drills on stopping WMD smuggling', *The Asahi Shimbun*, 31 March 2004.

<sup>192</sup> John Bolton, 'The New Proliferation Security Initiative', interview by Wade Boese and Miles Pomper, *Arms Control Today*, 4 November 2003.

<sup>193</sup> 'The Proliferation Security Initiative', *IISS Strategic Comments*, Volume 10, Issue 2.

<sup>194</sup> 'Combating terrorism at sea', NATO Briefing, December 2003.

## Chapter 5: The Future of the PSI

<sup>195</sup> 'The Polish-American Alliance for the 21st Century', joint statement by president George W. Bush and Polish president Aleksander Kwasniewski, 27 January 2004.

<sup>196</sup> Jim Morris, 'Lost at Sea: 'Flags of Convenience' Give Owners a Paper Refuge', *Houston Chronicle*, 22 August 1996.

<sup>197</sup> Aviva Freudmann, 'Liberia Taps DC Lawyers to Handle Registry', *Journal of Commerce*, 21 December 1998.

<sup>198</sup> The ISPS Code contains detailed security-related requirements for Governments, port authorities and shipping companies in a mandatory section (Part A), together with a series of guidelines about how to meet those requirements in a second, voluntary section (Part B). The purpose of the Code is to provide a "standardized, consistent framework for evaluating risk, enabling governments to offset changes in threat with changes in vulnerability for ships and port facilities". For further information see the IMO web site: [www.imo.org](http://www.imo.org).

<sup>199</sup> IMO adopts comprehensive maritime security measures, [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=583&doc\\_id=2689](http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689), 22 April 2004.

<sup>200</sup> The CSR is required to contain: the name of the ship and the state whose flag the ship is entitled to fly; the date on which the ship was registered with that state; the ship's identification number; the port at which the ship is registered; the name of the registered owner(s) and their registered address; and any changes to any of these details.

<sup>201</sup> IMO adopts comprehensive maritime security measures, [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=583&doc\\_id=2689](http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689), 22 April 2004.

<sup>202</sup> *Ibid.*

<sup>203</sup> IMO Status of Conventions. A complete list is available at [http://www.imo.org/Conventions/mainframe.asp?topic\\_id=248](http://www.imo.org/Conventions/mainframe.asp?topic_id=248).

<sup>204</sup> IMO adopts comprehensive maritime security measures, [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=583&doc\\_id=2689](http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689), 22 April 2004.

<sup>205</sup> Jack Straw, Written Ministerial Statements, Foreign & Commonwealth Affairs, Hansard, 25 February 2004: Columns 46 & 47ws.

<sup>206</sup> Charter of the United Nations, Chapter VII, article 39.

<sup>207</sup> UNSC Resolution 82 (1950) adopted on 25 June 1950.

<sup>208</sup> UNSC Resolution 83 (1950) adopted on 27 June 1950.

<sup>209</sup> UNSC resolution 660 (1990) adopted on 2 August 1990.

<sup>210</sup> UNSC Resolution 678 (1990) adopted on 25 November 1990.

<sup>211</sup> President Bush Address to the UNGA, New York, 23 September 2003. The full transcript of the speech is available at: <http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html>.

<sup>212</sup> 'US tables UN draft resolution on WMD', *XINHUA online*, 25 March 2004. See also 'UN weapons resolution introduced', *BBC News*, 25 March 2004.

<sup>213</sup> See, in particular, article 39 of the Charter which reads: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

<sup>214</sup> See, for instance, article 48 (1) of the Charter, which reads: "The action required to carry out the decisions of the Security Council for the maintenance of international peace and security **shall** be taken by all the Members of the United Nations or by some of them, as the Security Council may determine" (emphasis added).

<sup>215</sup> Security Council resolution 1160 (1998) adopted on 31 March 1998, op § 8.

<sup>216</sup> Statement of the President of the Council, Gunter Pleuger (Germany), Security Council 4956th Meeting, UN Press Release SC/8076, 28 April 2004.

<sup>217</sup> UN Charter, Chapter V, article 27 (3).

<sup>218</sup> France, Germany, Spain, the United Kingdom and the United States.

<sup>219</sup> For more on Russia's attitude to the PSI, see Michael Roston, 'Russia and the Proliferation Security Initiative', *RANSAC Briefing*, 16 March 2003.

<sup>220</sup> H.E. Mr. Vladimir V. Putin, President, 25 September 2003.

<sup>221</sup> 'Changing Patterns in the Use of the Veto in the Security Council', Global Policy Forum, 2003. <http://www.globalpolicy.org/security/data/vetotab.htm>.

<sup>222</sup> H.E. Li Zhaoxing, Foreign Minister, 24 September 2003.

<sup>223</sup> Hugo Grotius, *De Jure Belli Ac Pacis, Libri Tres*, book II, chapter I.

<sup>224</sup> The Neptune, reprinted in IV International Adjudications: Modern Series 372 (John Bassett Moore ed., 1931).

<sup>225</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) p 71.

<sup>226</sup> Report of the International Law Commission on the work of its thirty-second session, UN Doc A/35/10 (1980), § 15.

<sup>227</sup> Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia), ICJ reports 1997.

<sup>228</sup> ILC Draft Articles on State Responsibility, article 33.

<sup>229</sup> National Security Strategy of the United States of America, 2002, p 15.

<sup>230</sup> Letter from Mr. Webster to Lord Ashburton, 27 July 1842. The entire correspondence is available on the Avalon Project, Yale Law School website: <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>.

<sup>231</sup> '1981: Israel bombs Baghdad nuclear reactor', On this day – 7 June 1981, *BBC online*.

<sup>232</sup> UN Doc S/PV.2284, 16 June 1981, para 11.

<sup>233</sup> *Ibid.*, para 25.

<sup>234</sup> Resolution 487 (1981) adopted on 19 June 1981, op. para 1.

<sup>235</sup> *Ibid.*, op. para 3.

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<sup>236</sup> Mark Bromley, David Grahame and Christine Kucia, 'Bunker Busters: Washington's Drive for New Nuclear Weapons', *BASIC Research Report*, July 2002.

<sup>237</sup> See, for instance, Shannon N. Kile, 'Nuclear arms control, non-proliferation and ballistic missile defence', *SIPRI Yearbook 2003*, p 577.

## Chapter 6: Conclusions and recommendations – building on a positive start

<sup>238</sup> Jack Straw, Written Ministerial Statements, Foreign & Commonwealth Affairs, Hansard, 25 February 2004: Columns 46 & 47ws.

<sup>239</sup> 'Dual use' refers to the tangible and intangible features of technology that enable it to be applied, or have potential application, to both peaceful and hostile purposes. The 'dual use dilemma' in terms of chemical and biological weapons non-proliferation is that many of these dual-use technologies are spreading across the world as part of normal commerce and globalisation trends. Policing dual-use technology transfers therefore poses a serious policy design problem: the regulatory regime needs to balance suppression of negative applications (in order to reduce the risk of germ or chemical warfare) without hindering the development of technology for positive economic purposes.

<sup>240</sup> For an analysis largely driven by ideological bias against multilateral agencies, see Baker Spring, 'Harnessing the Power of Nations for Arms Control: The Proliferation Security Initiative and Coalitions of the Willing', *The Heritage Foundation*, Backgrounder No.1737, 18 March 2004.

<sup>241</sup> The Global Maritime Distress and Safety System (GMDSS) became fully operational in 1999. A ship that is in distress anywhere in the world can now be virtually guaranteed assistance, even if the ship's crew do not have time to radio for help, as the message is transmitted automatically. For further information, see the IMO web site: [www.imo.org](http://www.imo.org).

<sup>242</sup> Overall the study found a wide variety of discrepancies amongst the four lists, indicating that the criteria for deciding which countries should be subject to special procedures are not uniformly applied by these four exporting countries. Deltac Limited and Saferworld, *Proliferation and Export Controls: An analysis of sensitive technologies and countries of concern*, Chertsey: Deltac/Saferworld, 1995, pp.xiii-xiv.

<sup>243</sup> David McGlinchey 'Anti-proliferation effort will receive no separate funding, personnel', *Government Executive Magazine*, 15 March 2004.

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# Appendices

## Appendix 1: Statement of Interdiction Principles

Paris - 2-3 September 2003

The Proliferation Security Initiative (PSI) is a response to the growing challenge posed by the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide. The PSI builds on efforts by the international community to prevent proliferation of such items, including existing treaties and regimes. It is consistent with and a step in the implementation of the UN Security Council Presidential statement of January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for member states of the UN to prevent proliferation. The PSI is also consistent with recent statements of the G8 and the European Union, establishing that more coherent and concerted efforts are needed to prevent the proliferation of WMD, their delivery systems, and related materials. PSI participants are deeply concerned about this threat and of the danger that these items could fall into the hands of terrorists, and are committed to working together to stop the flow of these items to and from states and non-state actors of proliferation concern.

The PSI seeks to involve in some capacity all states that have a stake in non-proliferation and the ability and willingness to take steps to stop the flow of such items at sea, in the air, or on land. The PSI also seeks cooperation from any state whose ships, flags, ports, territorial waters, airspace, or land might be used for proliferation purposes by states and non-state actors of proliferation concern. The increasingly aggressive efforts by proliferators to stand outside or to circumvent existing non-proliferation norms, and to profit from such trade, requires new and stronger actions by the international community. We look forward to working with all concerned states on measures they are able and willing to take in support of the PSI, as outlined in the following set of "Interdiction Principles".

### Interdiction Principles for the Proliferation Security Initiative:

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

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. "States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through : (a) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (b) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.
2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.
3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international laws and frameworks in appropriate ways to support these commitments.
4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:

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- a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.
  - b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas or areas beyond the territorial seas of any other state that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concerns, and to seize such cargoes that are identified.
  - c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.
  - d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.
  - e. At their own initiative or upon the request and good cause shown by another state, to (1) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (2) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.
  - f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.

## **Appendix 2: Chairman's Conclusions from other PSI Meetings**

### **Proliferation Security Initiative: Chairman's Statement at the First Meeting**

#### **Foreign Ministry of Spain**

#### **First Meeting of the PSI, Madrid, June 12, 2003**

The International Community is deeply concerned by the proliferation of weapons of mass destruction [WMD] and related materials, as well as by the risk that these may fall into the hands of terrorists. There exists a wide-spread consensus that this menace, together with terrorism, constitutes the greatest challenge to International Security.

In this context, the Government of Spain hosted a meeting of countries on June 12, where, building on the Proliferation Security Initiative announced by U.S. President Bush May 31 in Krakow, participants agreed on the need to take more active measures to stop the flow of WMD and missiles to and from states and non-state actors of proliferation concern. Participants recalled G-8 efforts, including the Global Partnership Against the Proliferation of Weapons of Mass Destruction, and the EU Strategy and Action Plan against Proliferation of Weapons of Mass Destruction.

The group included Australia, France, Germany, Italy, Japan, Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States.

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All agreed that proliferation of weapons of mass destruction, their means of delivery, and related materials and equipment is a serious threat to national and international security and that trafficking in these items by certain countries or non-state actors must be stopped.

They agreed to assess existing national authorities under which such practical measures could be pursued, and to encourage the various export control regimes to take this initiative into account in strengthening the regimes.

They expressed the desire to broaden support for and, as appropriate, participation in the Proliferation Security Initiative to include all countries that are prepared to play a role in preventing this dangerous commerce, and that can contribute to proactive measures to interdict shipments.

### **Brisbane Meeting, 9-10 July 2003**

#### **CHAIRMAN'S STATEMENT**

The participants in the Proliferation Security Initiative (PSI) meeting in Brisbane on 9-10 July reiterated their strong political support for the initiative, and underscored that the PSI is a global initiative with global reach. They agreed to move quickly on direct, practical measures to impede the trafficking in weapons of mass destruction (WMD), missiles and related items.

This was the second meeting of the eleven PSI countries. The first meeting was in Madrid on 12 June. Participants are Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the UK and the US.

The Madrid meeting was unanimous on the need to take active measures to stop the flow of WMD, missiles and related items to and from proliferators. This reflected the international alarm at the growing trade in WMD, missiles and related items, including the risk that these might fall into the hands of terrorists.

Under Australian chairmanship, the Brisbane meeting built on the results from the Madrid meeting and moved forward in translating the collective political commitment of PSI members into practical measures.

The Brisbane meeting focused on defining actions necessary to collectively or individually interdict shipments of WMD or missiles and related items at sea, in the air or on land. Participants emphasised their willingness to take robust and creative steps now to prevent trafficking in such items, while reiterating that actions taken would be consistent with existing domestic and international legal frameworks.

The Brisbane meeting made good progress in considering interdiction modalities, particularly in the information sharing and operational arenas. Participants emphasised that effective information sharing is vital to interdiction, and agreed to strengthen and improve capabilities for the exchange of information and analysis between participants as a basis for cooperative action to impede WMD and missile trade. Participants acknowledged that although interdiction efforts have been under way for some time, there is a need to further develop and enhance the capabilities of PSI nations to conduct actual air, ground and maritime interdiction operations in partnership against WMD and delivery systems. To that end, they agreed in principle to the concept of a series of interdiction training exercises, utilising both military and civilian assets as appropriate, and that such exercises should take place as soon as practicable.

Participants agreed on the importance of building a broad and effective partnership of countries prepared to play a part in disrupting and stopping the trafficking in WMD, missiles and related items. They agreed effective implementation of the PSI will require the active involvement of countries around the world. As the PSI moves forward, they aim to involve all countries that have the will and ability to take action to address this menace. It also will be crucial to involve countries that are key flag, coastal or transit states, and others that are used by proliferators in their WMD and missile trafficking efforts.

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Participants underlined that the spread of weapons of mass destruction, their means of delivery, and related materials and equipment is a serious threat to national, regional and global security.

Participants expressed concern that WMD and missiles are increasingly being acquired by states of concern which reject international standards against the acquisition, use and proliferation of such weapons.

PSI participants considered the question of states and non-state actors of proliferation concern. They referred to the relevant statements of the G-8 Evian summit on 1-3 June and the EU-US Joint Statement on the Proliferation of Weapons of Mass Destruction of 25 June which addressed countries of proliferation concern and non-state actors with particular reference to North Korea and Iran.

The Brisbane meeting strongly supported the strengthening of the existing framework of national laws and export controls, multilateral treaties and other tools which remain the international community's main means for preventing the spread of WMD and missiles. They emphasised that the increasingly aggressive and sophisticated efforts by proliferators to circumvent or thwart existing non-proliferation norms, and to profit from the trade of WMD and missiles or related items, requires new and stronger enforcement action by law-abiding nations. The PSI was therefore welcomed as a necessary and innovative approach to the problem of countries which cheat on their international obligations, refuse to join existing regimes or do not follow international norms, and for non-state actors seeking to acquire WMD.

Participants acknowledged that the PSI is a fast-track initiative that will require continued interaction among experts and policy makers in the days and weeks ahead, and agreed to a next high-level meeting in early September.

## **PROLIFERATION SECURITY INITIATIVE: LONDON, 9-10 OCTOBER**

### **CHAIRMAN'S CONCLUSIONS**

Participants in the Proliferation Security Initiative (PSI) met at Lancaster House, London, on 9-10 October. Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the UK and the US were represented. The meeting was preceded on 8 October by an air interception command post exercise (CPX), organised by the UK.

The London meeting was the fourth meeting of the PSI, consolidating and building on the foundations laid at Madrid (12 June); Brisbane (9-10 July); and Paris (3-4 September).

#### **Outreach**

Following the publication of the Statement of Interdiction Principles on 4 September 2003, PSI participants approached other countries to seek their support for the Statement, and their views on how they might contribute to the Initiative.

Participants agreed that the response had been very encouraging. The Initiative had been well received. Over 50 countries had already expressed support for the Statement of Principles.

It was agreed that further co-ordinated outreach work would be needed to broaden international understanding of and co-operation with the Initiative. In this context, further regionally based meetings and activities would be valuable. In this regard the meeting welcomed planned efforts in the Asian region by Japan and Australia. The possibility was discussed of inviting additional participants to specific PSI exercises or other activities, on an ad hoc basis.

#### **Participation**

The meeting agreed that the PSI was a global initiative with an inclusive mission. Successful interdiction of trafficking in WMD, their delivery systems and related materials requires the widest possible co-operation between states.

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Participation in the PSI, which is an activity not an organisation, should be open to any state or international body that accepts the Paris Statement of Principles and makes an effective contribution.

The meeting noted that participation would vary with the activity taking place, and the contribution participants could provide. Some countries had particular experience, assets or expertise relevant to all PSI activities; other countries or organisations could be expected to contribute according to their particular capabilities.

It was noted that a number of countries which had expressed particularly keen interest in participating in future PSI activities and meetings had experience and capabilities which would be of value to the Initiative, and which should be taken into account in future decision making.

#### Focus of efforts

The Statement of Interdiction Principles, agreed at Paris in September, outlines the scope of the Initiative. It makes clear that 'States or non-state actors of proliferation concern' generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

Participants agreed that the Initiative aimed to impede and stop trafficking of WMD, their delivery systems and related materials by any state or non-state actor engaged in or supporting WMD proliferation programmes, at any time and in any place.

WMD is a global threat which calls for a global response. Participants looked forward to working with all concerned states on developing the specific measures they were able and willing to take in support of the PSI.

#### Operational matters

Participants had an initial exchange of views on a possible Boarding Agreement, presented by the US, which could facilitate practical implementation of the Initiative. They agreed that participants should make comments as rapidly as possible, so that states which are interested can move forward with concluding the agreement.

Participants agreed that future interdiction exercises should build on the successful exercises that have already taken place: an Australian-led maritime interdiction training exercise in the Coral Sea in September, and a UK-led air interception command post exercise in London. Future exercises should seek to integrate civil, military, and law enforcement decision making, as appropriate.

The meeting agreed further steps to plan training exercises that will take place in the coming months:

- Spanish led maritime interdiction training exercise in the Mediterranean, 14-17 October
- French led maritime interdiction training exercise in the Mediterranean, 24-28 November
- Italian led air interception training exercise, 3-4 December
- US led maritime interdiction training exercise in the Arabian Sea, January 2004
- Polish led ground interdiction exercise, early 2004
- Italian led maritime interdiction exercise in the Mediterranean, Spring 2004
- French led air interception exercise, Spring 2004
- German led interdiction exercise, at an international airport, March 2004

It was noted that there could be lessons to be learnt from NATO's maritime interdiction operations.

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## Contacts with international organisations

Participants agreed that all relevant fora should be kept informed of significant developments under the Initiative. To this end, the chair of each PSI Plenary meeting should, as appropriate, circulate its conclusions.

Recalling the 1992 UN Security Council Presidential Declaration on the proliferation of WMD, the meeting noted the value of securing an expression of support in relevant international fora for greater international co-operation against trafficking in WMD, their delivery systems and related materials.

## Future meetings

Concluding, the Plenary Chair noted that the broad direction of the PSI had now been agreed. Plenary meetings might therefore become less frequent. But exercises and expert discussion of specific operational and policy issues under the PSI umbrella would continue, with the broadest possible participation by states committed to PSI Principles and to making effective contributions.

The offer by the United States to host an operational experts' meeting in December was warmly welcomed. A number of countries, beyond the original 11 participants, that support the PSI Principles and have concrete contributions to make to PSI activities will take part in that meeting.

Participants warmly welcomed Portugal's offer to host the next PSI Plenary meeting in early 2004.

## **Proliferation Security Initiative: Chairman's Statement at the Fifth Meeting**

Palácio Foz  
Fifth Meeting of the PSI, March 4-5, 2004  
Lisbon, Portugal  
March 5, 2004

1. The fifth Plenary meeting of the Proliferation Security Initiative (PSI) took place at Palácio Foz, Lisbon, on March 4-5, 2004, building on deliberations at Madrid (December 6, 2003); Brisbane (July 9-10, 2003); Paris (September 3-4, 2003) and London (October 9-10, 2003). Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Norway, Poland, Portugal, Singapore, Spain, the UK, and the U.S. were represented.
2. The participants reaffirmed their strong determination to respond effectively to the threat represented by proliferation and trafficking of WMD [weapons of mass destruction], their delivery systems, and related materials worldwide. Recent developments leave no doubt as to the seriousness of the danger posed by such proliferation activities. The PSI [Proliferation Security Initiative] has been successful in raising worldwide awareness to this threat and in fostering the international cooperation that is required to stop WMD-related shipments as well as the proliferation networks. Trafficking in WMD constitutes a global threat to international peace and security. It is an unacceptable activity and should be addressed by all countries. If linked to terrorism, it can represent a random threat to anyone, in any continent.
3. Deterring trafficking is therefore in the interest of all peace-loving countries. The open nature of this Initiative is reiterated and the contributions from countries that share PSI concerns, principles and goals continue to be welcomed. This is a global endeavor with an inclusive nature and it relies on the widest possible cooperation between states from different parts of the world. Participants considered that geographical balance and regional diversity are assets that need to be preserved, as they represent an important added value to PSI effectiveness. In this spirit, the strengthened commitment of Canada, Norway, and Singapore to the PSI is warmly welcomed.
4. Participants supported the call by U.S. President Bush to expand the role of the PSI to not only interdict shipments of WMD, their delivery systems and related materials, but to cooperate in preventing WMD proliferation facilitators (i.e. individuals, companies, and other entities) from engaging in this deadly trade. They also warmly welcomed contributions by other participants namely

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the UK. Participants agreed to pursue greater cooperation through military and intelligence services and law enforcement to shut down proliferation facilitators and bring them to justice. PSI participants agree to begin examining the key steps necessary for this expanded role, including:

- identifying national points of contact and internal processes developed for this goal;
- developing and sharing national analyses of key proliferation actors and networks, their financing sources, and other support structures;
- undertaking national action to identify law enforcement authorities and other tools or assets that could be brought to bear against efforts to stop proliferation facilitators.

#### Outreach

5. The participants agreed that it was essential to continue broadening the international consensus in favor of the fight against the proliferation of WMD, their delivery systems, and related materials, as well as to the widening of the international political and operational support for PSI aims and actions. This will be carried out notably by building on previous outreach activities (over 60 countries have expressed support for the Paris Statement of interdiction Principles until now). This may also be done by concluding bilateral agreements with interested States, notably in view of obtaining their consent for expeditious procedures for the boarding of vessels flying their flag, as required. The first examples of such bilateral agreements seem to indicate that this is an approach that can bear fruit most rapidly and which participants could/should usefully pursue.

6. Regarding significant developments related to the fight against WMD-related trafficking, complementary efforts by all relevant international organization and information sharing with such organizations should be pursued as appropriate.

7. Regional outreach activities have shown to be an effective awareness-raising tool. They provide a useful framework for enhancing the involvement in the PSI activities and create a link between its global aims and the various regional contexts. Participants are encouraged to host further meetings to present and promote the PSI along the lines of those organized by Japan and Poland. The Portuguese announcement of one such outreach meeting for the African continent was welcomed.

8. While continuing to promote wide support for the Initiative, participants agreed to focus their outreach efforts particularly on states that have potentially unique contributions to make to interdictions efforts (i.e. flag states, transshipment states, overflight states, transit states, and coastal states). The support of all countries interested in PSI and cooperation in interdiction is welcome and states are encouraged to consider the following practical steps that can establish the basis for involvement in PSI activities:

- Formally commit to and publicly endorse the PSI and its Statement of Interdiction Principles and indicate willingness to take all steps available to support PSI efforts.
- Undertake a review and provide information on current national legal authorities to undertake interdictions at sea, in the air or on land.
- Indicate willingness to strengthen authorities where appropriate.
- Identify specific national assets that might contribute to PSI efforts (e.g. information sharing, military and/or law enforcement assets).
- Provide points of contact for PSI interdiction requests and other operational activities. Establish appropriate internal government processes to coordinate PSI response efforts.
- Be willing to actively participate in PSI interdiction training exercises and actual operations as opportunities arise.
- Be willing to consider signing relevant agreements (e.g. boarding agreements) or to otherwise establish a concrete basis for cooperation with PSI efforts (e.g. MOU on overflight denial).

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9. The participants discussed the proposed amendments to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) that would criminalise the transport of weapons of mass destruction, their delivery systems, and related materials on commercial vessels at sea.

#### Operational Activities

10. The participants noted with satisfaction that the PSI is by now operationally active. They also recognized that specific, significant progress was thereby obtained in fighting proliferation activities and that PSI partners had contributed decisively to recently disclosed successes in the disruption or indeed dismantling of some previously covert WMD programs.

11. The meeting heard a report from the chairman of the operational experts meeting that took place in Washington, DC on December 16-17, 2003. It encouraged the operational experts to pursue their work at the meeting that was announced in Canada, to take place in April, notably in view of reaching conclusions on the improvement and rationalization of the PSI exercise program, providing for improved thematic and geographical balance, as well as on several other steps identified at the Washington meeting.

12. Training is required for operational effectiveness. Six exercises took place in different parts of the world since the launching of the PSI and further important operational activities are foreseen in the months to come. The Plenary took note with satisfaction that the UK, Australia, Spain, France, Italy, the U.S., Germany, and Poland, have organized or will organize PSI exercises. Other participants are encouraged to take similar initiatives, in the framework of a coordinated and rationalised exercise program.

13. The Plenary particularly drew the participants' attention to the fact that the attainment of the PSI goals requires continued efforts within the operational experts group to work through operational legal issues, as commenced at the Washington meeting. All countries are encouraged to take the necessary steps to improve their legal systems and practical tools to strengthen their capacity to effectively act as and when required to take action consistent with the PSI Statement of Interdiction Principles. Bearing in mind our common goals, appropriate consultations might be required in this regard.

#### Future of PSI

14. Not yet one year from the moment it was launched, the Proliferation Security Initiative has established itself as a crucial instrument to respond effectively to some of the most serious security challenges of the XXI century. This is reflected in the growing number of countries supporting the PSI. All participate in this sense in the Initiative and all their contributions are warmly welcomed. Just like proliferation can be a multifaceted phenomenon, the responses may have to be flexible and may need to take many shapes and forms.

15. PSI is an activity, not an organization. Progress since the London Plenary demonstrates that the main lines of the PSI are now well established and that several directions of action can be pursued separately but still in a mutually reinforcing mode. However, to further build the PSI as an activity, political vision and strategic guidance remain necessary. Further consideration shall be given to the suggestion of establishing a network of contact points at policy level among participants.

#### Next Meeting

16. To commemorate the anniversary of the launching of the PSI Poland offered to host a meeting in Krakow that will bring together all countries that support the PSI.

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### **Appendix 3: Union of Soviet Socialist Republics - United States: Joint Statement with attached uniform interpretation of rules of International Law governing innocent passage**

Since 1986, representatives of the United States of America and the Union of Soviet Socialist Republics have been conducting friendly and constructive discussions of certain international legal aspects of traditional uses of the oceans, in particular navigation.

The Governments are guided by the provisions of the 1982 United Nations Convention on the Law of the Sea, which, with respect to traditional uses of the oceans, generally constitute international law and practice and balance fairly the interests of all States. They recognize the need to encourage all States to harmonize their internal laws, regulations and practices, with those provisions.

The Governments consider it useful to issue the attached Uniform Interpretation of the Rules of International Law Governing Innocent Passage. Both Governments have agreed to take the necessary steps to conform their internal laws, regulations and practices with this understanding of the rules.

Jackson Hole, Wyoming

September 23, 1989

#### **UNIFORM INTERPRETATION OF RULES OF INTERNATIONAL LAW GOVERNING INNOCENT PASSAGE**

1. The relevant rules of international law governing innocent passage of ships in the territorial sea are stated in the 1982 United Nations Convention on the Law of the Sea (Convention of 1982), particularly in Part II, Section 3.
2. All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.
3. 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.
4. A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time.
5. Ships exercising the right of innocent passage shall comply with all laws and regulations of the coastal State adopted in conformity with relevant rules of international law as reflected in Articles 21, 22, 23 and 25 of the Convention of 1982. These include the laws and regulations requiring ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may prescribe where needed to protect safety of navigation. In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage.
6. Such laws and regulations of the coastal State may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Convention of 1982.
7. If a warship engages in conduct which violates such laws or regulations or renders its passage not innocent and does not take corrective action upon request, the coastal State may require it to leave the territorial sea, as set forth in Article 30 of the Convention of 1982. In such case the warship shall do so immediately.

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8. Without prejudice to the exercise of rights of coastal and flag States, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed means.

## Appendix 4: UN Security Council Resolution 1540 (2004)

*"The Security Council,*

*"Affirming* that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery,\*\* constitutes a threat to international peace and security,

*"Reaffirming*, in this context, the Statement of its President adopted at the Council's meeting at the level of Heads of State and Government on 31 January 1992 (S/23500), including the need for all Member States to fulfil their obligations in relation to arms control and disarmament and to prevent proliferation in all its aspects of all weapons of mass destruction,

*"Recalling also* that the Statement underlined the need for all Member States to resolve peacefully in accordance with the Charter any problems in that context threatening or disrupting the maintenance of regional and global stability,

*"Affirming* its resolve to take appropriate and effective actions against any threat to international peace and security caused by the proliferation of nuclear, chemical and biological weapons and their means of delivery, in conformity with its primary responsibilities, as provided for in the United Nations Charter,

*"Affirming* its support for the multilateral treaties whose aim is to eliminate or prevent the proliferation of nuclear, chemical or biological weapons and the importance for all States parties to these treaties to implement them fully in order to promote international stability,

*"Welcoming* efforts in this context by multilateral arrangements which contribute to non-proliferation,

*"Affirming* that prevention of proliferation of nuclear, chemical and biological weapons should not hamper international cooperation in materials, equipment and technology for peaceful purposes while goals of peaceful utilization should not be used as a cover for proliferation,

*"Gravely concerned* by the threat of terrorism and the risk that non-State actors\*\* such as those identified in the United Nations list established and maintained by the Committee established under Security Council resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery,

*"Gravely concerned* by the threat of illicit trafficking in nuclear, chemical, or biological weapons and their means of delivery, and related materials,\* which adds a new dimension to the issue of proliferation of such weapons and also poses a threat to international peace and security,

*"Recognizing* the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security,

*"Recognizing* that most States have undertaken binding legal obligations under treaties to which they are parties, or have made other commitments aimed at preventing the proliferation of nuclear, chemical or biological weapons, and have taken effective measures to account for, secure and physically protect sensitive materials, such as those required by the Convention on the Physical

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Protection of Nuclear Materials and those recommended by the IAEA Code of Conduct on the Safety and Security of Radioactive Sources,

*"Recognizing* further the urgent need for all States to take additional effective measures to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery,

*"Encouraging* all Member States to implement fully the disarmament treaties and agreements to which they are party,

*"Reaffirming* the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

*"Determined* to facilitate henceforth an effective response to global threats in the area of non-proliferation,

*"Acting* under Chapter VII of the Charter of the United Nations,

"1. *Decides* 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;

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

"3. *Decides also* that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall:

(a) Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;

(b) Develop and maintain appropriate effective physical protection measures;

(c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;

"(d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, 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, and transporting that would contribute to proliferation, 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;

"4. *Recognizes* the utility in implementing this resolution of effective national control lists and calls upon all Member States, when necessary, to pursue at the earliest opportunity the development of such lists;

"5. *Recognizes* that some States may require assistance in implementing the provisions of this resolution within their territories and invites States in a position to do so to offer assistance as appropriate in response to specific requests to the States lacking the legal and regulatory infrastructure, implementation experience and/or resources for fulfilling the above provisions;

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"6. *Calls upon* all States:

(a) To promote the universal adoption and full implementation, and, where necessary, strengthening of multilateral treaties to which they are parties, whose aim is to prevent the proliferation of nuclear, biological or chemical weapons;

(b) To adopt national rules and regulations, where it has not yet been done, to ensure compliance with their commitments under the key multilateral non-proliferation treaties;

(c) To renew and fulfil their commitment to multilateral cooperation, in particular within the framework of the International Atomic Energy Agency, the Organization for the Prohibition of Chemical Weapons and the Biological and Toxin Weapons Convention, as important means of pursuing and achieving their common objectives in the area of non-proliferation and of promoting international cooperation for peaceful purposes;

(d) To develop appropriate ways to work with and inform industry and the public regarding their obligations under such laws;

"7. *Calls upon* all States to promote dialogue and cooperation on non-proliferation so as to address the threat posed by proliferation of nuclear, chemical, or biological weapons, and their means of delivery;

"8. Further to counter that threat, *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;

"9. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, for a period of no longer than two years, a Committee of the Security Council, consisting of all members of the Council, which will, calling as appropriate on other expertise, report to the Security Council for its examination, on the implementation of this resolution, and to this end calls upon States to present a first report no later than six months from the adoption of this resolution to the Committee on steps they have taken or intend to take to implement this resolution;

"10. *Expresses* its intention to monitor closely the implementation of this resolution and, at the appropriate level, to take further decisions which may be required to this end;

"11. *Decides* that none of the obligations set forth in this resolution shall be interpreted so as to conflict with or alter the rights and obligations of State Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention or alter the responsibilities of the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons;

"12. *Decides* to remain seized of the matter."

\* The 4955th Meeting was closed

\*\* Definitions for the purpose of this resolution only:

Means of delivery: missiles, rockets and other unmanned systems capable of delivering nuclear, chemical, or biological weapons, that are specially designed for such use.

Non-State actor: individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.

Related materials: materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery.

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## **The British American Security Information Council**

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*BASIC in the US is a non-profit organization constituted under  
Section 501(c)(3) of the US Internal Revenue Service Code*

### ***Acknowledgements***

The authors would like to thank Elizabeth Block, Andrew Cottey, Jim Leonard, Matt Martin, Colin Smith and Angela Woodward for valuable comments on an earlier draft of this report. Responsibility for the report's contents, of course, falls only on the shoulders of the authors.

### ***Support***

This publication was made possible through funding from the Joseph Rowntree Charitable Trust, The Ploughshares Fund and Polden Puckham Charitable Trust. We are grateful to these three foundations for their long-standing support of our work.

### ***Sailing Into Uncharted Waters?***

#### ***The Proliferation Security Initiative and the Law of the Sea***

By Andreas Persbo and Ian Davis

Published by the British American Security Information Council  
BASIC Research Report 2004.2 - May 2004

Price: \$16/£10 individual  
\$32/£20 institution/corporate

ISBN: 1 874533 49 0

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## ***The Authors***

### **Andreas Persbo**

Andreas is a Swedish qualified lawyer with work experience in the Swedish National Courts Administration and the United Nations. He has field experience with UN peacekeeping missions in Lebanon and Macedonia and is a specialist in international disarmament law and human rights. He wrote the BASIC Briefing Paper, *The Proliferation Security Initiative: Dead in the water or steaming ahead?* in December 2003, and has made several other notable contributions since joining BASIC as a part-time consultant in the fall of 2003.

### **Dr Ian Davis**

Ian is Executive Director of BASIC, and brings an extensive background in government, academia, and the non-governmental organisation (NGO) sector. He received both his Ph.D. and B.A. in Peace Studies from the University of Bradford, and was formerly Program Manager at Saferworld before being appointed as the new Executive Director of BASIC in October 2001. He has published widely on British defence and foreign policy, European security, the international arms trade, arms export controls, small arms and light weapons and defence diversification.

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The Grayston Centre, 28 Charles Square, London N1 6HT, UK  
T +44 (0)20 7324 4680; F +44 (0)20 7324 4681; [basicuk@basicint.org](mailto:basicuk@basicint.org)

110 Maryland Ave, NE, Suite 205, Washington DC 20002, USA  
T +1 202 546 8055; F +1 202 546 8056; [basicus@basicint.org](mailto:basicus@basicint.org)  
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