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The Proliferation Security Initiative: Security vs. Freedom of Navigation?

Wolff Heintschel von Heinegg*

Introduction: Object and Purpose of the Proliferation Security Initiative

The Proliferation Security Initiative (PSI) was announced by President Bush in Krakow, Poland, on May 31, 2003.¹ It is generally conceived of as a US reaction to the *So San* incident that occurred in December 2002 and that involved a Cambodian-registered vessel en route to Yemen suspected of illicitly transporting weapons of mass destruction (WMD) components that were ultimately destined for Iraq.² As a matter of fact, the intercepting Spanish frigates, upon boarding and searching, discovered SCUD missile parts on board the vessel. However, the *So San* was released after it had become clear that the missiles, though coming from North Korea, were destined for Yemen.

The announcement by President Bush triggered a series of meetings of the (originally eleven and now fifteen³) States participating in the initiative. During the Brisbane meeting they seemed to be prepared to follow a proactive course of action with the aim to effectively impede and stop shipments of WMD, delivery systems, and related materials.⁴ However, a far more cautious approach was chosen during the Paris meeting in September 2003. There the participating States agreed upon the so-called “Interdiction Principles” which, in general terms, provide the political basis for unilateral or concerted activities aimed at the prevention of WMD proliferation.⁵ It needs to be emphasized here that PSI is neither a treaty nor some

* Charles H. Stockton Professor of International Law, US Naval War College.

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form of an international body, least of all an international organization. It is to be seen as a concerted effort by the participating States to supplement, not to substitute, existing treaties and regimes dealing with the problem of WMD proliferation.⁶

PSI's ultimate goal is to effectively "interdict the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern." The term "states and non-state actors of proliferation concern" refers to

[T]hose 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.⁷

As regards "states of proliferation concern" it is more or less evident that this term refers to Iran and North Korea and to other States striving to acquire WMD and their delivery systems.⁸ At first glance, the term "non-state actors of proliferation concern" seems to cover transnational terrorists and their organizational structures. However, in view of the fact that transnational terrorism is subject to a special international regime the correct understanding is that it relates to all private persons, like the notorious Pakistani Dr. Khan,⁹ and entities involved in clandestine proliferation activities, regardless of a terrorist background. Therefore, PSI is not to be mistaken for an exclusively counter-terrorism activity. While the Initiative may trigger concerted actions of the participating States if there are reasonable grounds to suspect that, e.g., WMD transported on board a vessel are ultimately destined to a terrorist group, its scope is certainly not limited to such scenarios.

The means by which the participating States intend to reach the Initiative's goal comprise: exchange of information; if necessary, modification of the respective domestic law and of international law; and "specific action."

Of course, exchange of information is subject to the protection "of the confidential character of classified information." Still, the principal readiness of the participating States to rapidly exchange information should not be underestimated because the information concerned is usually classified and not too easily shared with other States even if they are close allies. Equally important, and far from being a matter of course, is the willingness of the participating States to modify their domestic law in order to enable them to fulfill their commitments under the Initiative. If the modification of domestic rules does not suffice because rules and

principles of international law prove either insufficient or an obstacle for the Initiative's objectives, the participating States have to be prepared to take the necessary steps on the international level. First efforts in that respect have been initiated by the United States and may eventually result in an amendment of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation¹⁰ at the end of 2005.¹¹

The Initiative's core commitments, however, are laid down in Interdiction Principle 4 on "specific action," i.e., the participating States will:

Not transport or assist in the transport of WMD;

Board their own vessels in their respective internal waters and territorial sea areas as well as on the high seas, if there is reasonable ground for suspicion that they are engaged in proliferation activities;

Consider to provide consent to boarding of their vessels by the authorities of other participating States;

Take measures against foreign vessels in the sea areas covered by their territorial sovereignty and in their respective contiguous zone; and

Take measures against foreign aircraft in their respective national airspace.

At first glance, none of these commitments seems to imply insurmountable legal problems—the more so because the participating States have stressed that their interdiction activities will be "consistent with . . . relevant international law and frameworks, including the UN Security Council." Indeed, international lawyers seem to widely agree that in view of its rather limited scope PSI finds a sufficient basis in the existing law.¹² This is certainly correct insofar as interdiction measures are taken against vessels and aircraft belonging to one of the participating States. Vessels flying a State's flag and aircraft bearing a State's markings are subject to that State's sovereignty.¹³ Accordingly, they may be visited and searched by that State's organs in sea areas and in airspace not covered by the territorial sovereignty of another State. The said position is also correct if the flag or home State has consented to interdiction measures by another State¹⁴ or if the foreign vessel or aircraft is traveling in the internal waters or national airspace of a participating State.¹⁵ However, some doubts remain with regard to interdiction measures taken against foreign vessels within the territorial sea because the rules of the law of the sea on enforcement measures by the coastal State are less clear than they seem to be. These questions will be addressed in the second part of this article. Moreover,

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the question arises whether States participating in PSI are excluded from interdicting foreign vessels and aircraft in high seas areas and in international airspace. It is true that, according to the wording of the Interdiction Principles agreed upon in Paris, there is no indication that they are prepared to interdict the transport of WMD and related material in those areas if on board a vessel or aircraft not belonging to one of them. Still, this does not necessarily mean that the participating States have for once and for all excluded that possibility. Therefore, the third part of this paper will deal with the legality of interdiction measures on the high seas and in international airspace. However, before dealing with these legal problems it is important to first establish the relationship of PSI and the international anti-proliferation regime. As will be shown in the first part, the Initiative is far from being a fundamentally novel approach by States sharing a common concern with regard to the threat posed by the proliferation of WMD and their delivery systems. Some of the voices raising (legal) concerns with regard to PSI seem to ignore the fact that a comparatively small group of States has a long history of close cooperation with the aim of preventing the proliferation of WMD and their delivery systems. PSI is but a small tessera in the mosaic that is the international anti-proliferation regime.

The International Anti-Proliferation Regime

It is a fact all too often ignored that there already exists a rather sophisticated international regime aimed at the prevention of the proliferation of WMD. This regime covers not only nuclear weapons and nuclear material but also chemical and biological weapons, including their components, as well as delivery systems and the related technology. It consists of “hard law obligations” and of a number of supplementing agreements of a merely political character. Most of those formal and informal agreements pertain to specific weapons and materials. It should be mentioned, however, that there are three further instruments that are based on a comprehensive approach but that will not be dealt with here because they only indirectly contribute to counter-proliferation of WMD: the International Ship and Port Facility Code (ISPS Code),¹⁶ the Container Security Initiative (CSI),¹⁷ and the “Customs-Trade Partnership Against Terrorism” (C-TPAT) Program.¹⁸

Nuclear Weapons and Nuclear Material

According to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT),¹⁹ nuclear-weapon States are prohibited from making available, either directly or indirectly, to non-nuclear-weapon States “nuclear weapons or other nuclear explosive devices” (Article I). Non-nuclear-weapon States, in turn, are under

an obligation not to “manufacture or to otherwise acquire such weapons or devices” (Article II). According to Article III, paragraph 1, a non-nuclear-weapon State is obliged to “accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency (IAEA) in accordance with the Statute of the International Atomic Energy Agency and the Agency’s safeguards system, for the exclusive purpose of verification of the fulfillment of its obligations assumed under” the NPT. The IAEA has safeguards agreements in force with more than 145 States around the world. Most of these are comprehensive safeguards agreements concluded pursuant to the NPT. Other types of agreements are known as item or facility safeguards agreements and voluntary offer agreements. Also in place is a Model Additional Protocol to safeguards agreements that grants the IAEA complementary verification authority.²⁰

The NPT-IAEA system is supplemented by the Zangger Committee and by the Nuclear Suppliers Group (NSG), both informal groups of States that aim at strengthening the counter-proliferation efforts. The Zangger Committee²¹ was formed in 1971 and consists of 35 States. Its main task is to harmonize the interpretation of nuclear export control policies by specifying the meaning of Article III, paragraph 2, of the NPT. Accordingly, the so-called “trigger list”²² relates to source or special fissionable materials and to equipment or materials especially designed or prepared for the processing, use, or production of special fissionable materials. By interpreting and implementing Article III, paragraph 2, the “trigger list” helps to prevent the diversion of exported nuclear items from peaceful purposes to nuclear weapons or other nuclear explosive devices. Such material may only be exported by one of the participating States if three conditions are met: (1) non-explosive use assurance, (2) observance of the IAEA safeguards requirement, and (3) commitment to re-transfer. The Nuclear Suppliers Group²³ comprises 40 nuclear supplier countries. It seeks to contribute to the non-proliferation of nuclear weapons through the implementation of guidelines for nuclear exports. In view of NSG’s informal character the guidelines are not legally binding; they are, however, implemented by the participating governments that take the necessary decision at the national level according to their respective domestic law.

Finally, there are two draft conventions that, if ever accepted by a representative number of States, will certainly contribute to strengthening the international regime against the proliferation of nuclear weapons and of nuclear material: the Draft Convention for Suppression of Nuclear Terrorism (CNT)²⁴ and the Draft Fissile Material Cut-Off Treaty (FMCT).²⁵

The Draft CNT would exclusively address acts by individuals. Therefore, its scope would not include the issue of the non-proliferation of nuclear weapons or nuclear threats posed by States or intergovernmental organizations. States parties

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would be obliged to cooperate in preventing or prosecuting acts of nuclear terrorism by, *inter alia*, adopting necessary legislative and technical measures to protect nuclear material, installations and devices, and to forestall unauthorized access to them by third parties. It would supplement the 1980 Convention on the Physical Protection of Nuclear Material.²⁶

Fissile material, e.g., enriched uranium, is a key component in the development of nuclear warheads. After the General Assembly of the United Nations had passed a resolution on the prohibition of fissile material for nuclear weapons or other explosive devices²⁷ an *ad hoc* committee was established by the Conference on Disarmament in 1998, with a view to negotiating a treaty banning the production of fissile material for nuclear weapons. While it is unclear whether the work on the FMCT will produce results, the FMCT would cap the amount of fissile materials in nuclear weapons States and non-parties to the NPT. However, it would not apply to plutonium and Highly Enriched Uranium for non-explosive purposes and to non-fissile material (e.g., Tritium). It would not address existing stockpiles.

Chemical and Biological Weapons

Chemical weapons and biological weapons are governed by the

1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (GP 1925),²⁸

1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BTWC),²⁹ and

1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1993 CWC).³⁰

The Australia Group (AG)³¹ is an informal arrangement of 39 States and the European Commission which aims to allow exporting or transshipping countries to minimize the risk of assisting chemical and biological weapon (CBW) proliferation. Its task is to ensure, through licensing measures on the export of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment, that exports of these items from their countries do not contribute to the spread of CBW.

Delivery Systems

With regard to WMD delivery systems, there is no treaty or other legally binding instrument either prohibiting or restricting the transfer of such delivery systems or of related technologies. However, there are three informal arrangements aiming at the prevention of their proliferation.

The Missile Technology Control Regime (MTCR)³² is an informal non-treaty association of 34 States that have agreed on the prevention of the proliferation of missiles, unmanned aerial vehicles (UAVs) and of related technologies. Similar to the Zangger Committee and the NSG, the MTCR is functioning on the basis of guidelines that are amended by an Equipment and Technology Annex. In addition, the Hague Code of Conduct against the Proliferation of Ballistic Missiles (HCOC) was adopted in November 2002.³³ The object and purpose of the HCOC is to curb the proliferation of WMD-capable ballistic missiles and to exercise maximum restraint in developing, testing, and deploying such missiles.³⁴

Security Strategies of NATO, the United States and the European Union

At the end of this overview of the international regime it needs to be emphasized that proliferation of WMD and their delivery systems has been identified as a major security threat in NATO's new Strategic Concept of April 1999,³⁵ in the US National Security Strategy of September 2002,³⁶ and in the European Security Strategy of December 12, 2003.³⁷ The US National Strategy to Combat Weapons of Mass Destruction of December 2003 provides that: "U.S. military and appropriate civilian agencies must possess the full range of operational capabilities to counter the threat and use of WMD by states and terrorists against the United States, our military forces, and friends and allies." The EU member States, according to the European Security Strategy, have recognized that "[a]ctive policies are needed to counter the new dynamic threats. We need to develop a strategic culture that fosters early, rapid, and when necessary, robust intervention."

Moreover, the European Union has adopted the EU Strategy Against Proliferation of Weapons of Mass Destruction which provides for a strengthened identification, control and interception of illegal trafficking in WMD. Hence, the European Union is prepared to adopt "common policies related to criminal sanctions for illegal export, brokering and smuggling of WMD-related material"; to consider "measures aimed at controlling the transit and transshipment of sensitive materials"; and to support "international initiatives aimed at the identification, control and interception of illegal shipments."³⁸

The EU approach towards the proliferation issue may be less proactive than the US approach. Still, both EU strategies clearly indicate that the European Union will

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not restrict itself to diplomatic means but that it is prepared to also make use of armed force whenever this may prove necessary.

PSI as a further Cornerstone of the International Counter-Proliferation Regime

It has been shown that PSI is a common effort of a group of States that fits well into the already existing counter-proliferation regime.³⁹ Subject to the final determination of its legality under international law, PSI is without doubt to be considered an additional step towards an effective prevention of the proliferation of WMD and their delivery systems. Its informal character enhances the participating States' ability to flexibly react to proliferation activities by States and individuals of concern and thus contributes to an effective implementation of their national and international security strategies.

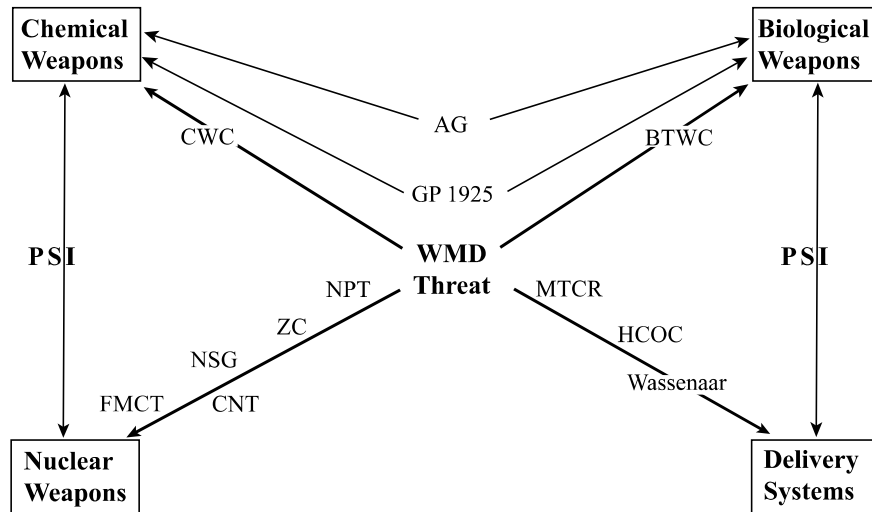


Figure 1: PSI as Part of the International Counter-Proliferation Regime

Interdicting the Transport of WMD in the Territorial Sea

The success of PSI is, of course, dependent on the firm political will of the participating States. However, some of them, e.g., Russia and Germany, have continuously stressed that their active participation in the Initiative presupposes the legality of the measures taken under international law. As long as interdiction measures are taken in the respective territories, national airspaces, and internal waters they are in conformity with international law.⁴⁰ The same holds true if ships and

aircraft are intercepted in international sea areas and in international airspace either by, or with the consent of, their respective flag or home State.⁴¹

However, when it comes to intercepting foreign vessels within the territorial sea, the question arises whether the law of the sea provides a sufficient legal basis. It needs to be emphasized that interference with foreign shipping, even if it occurs in the territorial sea of the intercepting State, will always have to be measured against the freedom of navigation, especially against the well-established right of innocent passage. Since all States participating in PSI are heavily dependent upon free sea lanes and unimpeded maritime commerce, they will certainly not too easily infringe upon those freedoms and rights. The precedent they set may be copied by other States and could contribute to a new form of “creeping jurisdiction” that may ultimately prove counterproductive. It is, therefore, vital for PSI that interdiction measures are in compliance with the regime of the territorial sea as set forth in the 1982 United Nations Convention on the Law of the Sea⁴² (1982 LOS Convention) and in the corresponding customary law.⁴³

Without prejudice to the inherent right of self-defense, the right of coastal States to interfere with foreign vessels in their territorial sea is regulated in Articles 25 and 27 of the 1982 LOS Convention.⁴⁴ According to the latter provision, the coastal State may exercise its criminal jurisdiction on board a foreign ship, i.e., it may arrest persons, conduct investigations, and temporarily detain the vessel, if crimes have been committed on board during passage that impact upon the coastal State. In view of the fact that coastal States are entitled to prevent infringement of, *inter alia*, their customs, fiscal, immigration and sanitary laws and regulations (Article 21, paragraph 1), enforcement measures taken against vessels suspect of transporting WMD, WMD components or delivery systems, do not seem to pose any problems. If the States participating in PSI enact legislation prohibiting the transport of such material they would be in a position to enforce these regulations against suspect vessels. It may, however, not be left out of consideration that the mere breach of the domestic (criminal) law of the coastal State will justify the exercise of its criminal jurisdiction only in cases where the crime has been committed on board a ship passing through the territorial sea after leaving the coastal State’s internal waters (Article 27, paragraph 2). If the vessel concerned has not left a port of the coastal State the exercise of criminal jurisdiction, according to Article 27, paragraph 1, is limited to one of the following cases:

- (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;

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- (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.

In the context of PSI, the coastal State will therefore be obliged to prove that the prohibited transport of WMD and related material meets the conditions of either subparagraph (a) or (b). An analogy to subparagraph (d) is not justified in view of the restricted scope of that exception. In view of the fact that the coastal State's enforcement jurisdiction in the territorial sea is in principle complete,⁴⁵ and in view of the dangerous character of such cargoes, the coastal State will in most cases be in a position to provide sufficient evidence that the said conditions are met. Still, it should not be left out of consideration that there is no general and complete prohibition of the transport of such material. Therefore, the coastal State that wishes to interdict the transport of WMD through its territorial sea should give prior notification of its domestic legal rules prohibiting such transports.⁴⁶

If the crime has been committed before entry into the territorial sea and if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters, the coastal State may not take any steps on board the ship.⁴⁷ However, this rule will in most cases not be an obstacle for interdiction measures because the transport of WMD or of delivery systems constitutes a permanent crime, i.e., the perpetration continues during passage.

Finally, the question remains whether the coastal State would be entitled to take enforcement measures against foreign vessels by referring to a "non-innocent" passage if there is no domestic law or regulation prohibiting the transport of the items in question. According to Article 25, paragraph 1, of the 1982 LOS Convention, the coastal State "may take the necessary steps in its territorial sea to prevent passage which is not innocent." Article 19 of the Convention provides that passage is not innocent if it is "prejudicial to the peace, good order or security of the coastal State" (paragraph 1) or if the vessel is engaged in one of the activities listed in Article 19, paragraph 2. Transporting missiles or WMD is not mentioned in paragraph 2 which, e.g., the United States considers "an exhaustive list of activities that would render passage not innocent."⁴⁸ Accordingly, some authors have serious doubts as to whether interdiction measures may be based upon the assumption of the non-innocent character of the transport of WMD.⁴⁹ However, this position is not very convincing. According to UN Security Council Resolution 1540⁵⁰ "proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security." Daniel Joyner argues,

therefore, that it “should be relatively unproblematic . . . for coastal states to justify overcoming seagoing vessels’ right of innocent passage through their territorial waters when there is a reasonable basis for suspicion that they are involved in proliferation.”⁵¹ Although the coastal State’s reaction, according to Article 25, paragraph 1, will be limited to “preventing” such innocent passage, this does not mean that the suspect vessel may only be ordered to immediately leave the territorial sea. Such a restriction merely applies in cases of warships not complying with the coastal State’s laws and regulations because warships, even if within a foreign territorial sea, enjoy sovereign immunity.⁵² With regard to merchant vessels that do not enjoy sovereign immunity, the coastal State will therefore be entitled to take all necessary steps, including the arrest of the vessel and seizure of its cargo.⁵³

Interference with Foreign Vessels and Aircraft in High Seas Areas

As seen, the interdiction measures agreed upon in the Paris Interdiction Principles⁵⁴ are consistent with existing international law.⁵⁵ The participating States do not yet envisage interdiction activities in high seas areas or in international airspace unless their own vessels and aircraft are concerned or unless the flag or home State has consented in a boarding or interception by another participating State. As a matter of fact, such consent was the legal basis for the interception the *BBC China* in September 2003.⁵⁶ Consent, including presumed consent, will also be the decisive legal argument for the interception, boarding, search, diversion, and arrest of Liberian- and Panamanian-flagged vessels according to bilateral agreements concluded by the United States with the two States.⁵⁷ The same holds true for an amendment of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention)⁵⁸ that is expected to be agreed upon in the end of 2005.

It needs to be emphasized here that no considerable legal problems are involved if there are reasonable grounds for suspicion that a vessel encountered on the high seas (or a civil aircraft in international airspace) is engaged in the transport of WMD and their delivery systems and that the cargo is destined to transnational terrorists. There is today widespread agreement that in case of a terrorist background interception, boarding, search, or arrest of vessels and aircraft finds its legal basis either in the (inherent) right of self-defense or in the international law of counter-measures (in combination with United Nations Security Council Resolution 1373 (2001)⁵⁹).

However, it remains to be seen whether the PSI States would be entitled to also interdict the transport of WMD on the high seas or in international airspace if

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there is neither a terrorist background nor a (presumed) consent by the flag or home State.

Law of the Sea

Merchant vessels on the high seas are subject to the sovereignty of their respective flag State.⁶⁰ The same holds true with regard to civil aircraft in international airspace.⁶¹ Therefore, third States are not entitled to interfere with such vessels and aircraft unless such interference is justified by the consent of the flag or home State or by a special agreement.⁶² There is, as yet, no express treaty prohibition of the transport of WMD and their delivery systems.⁶³ Moreover, such activities may not be equated with piracy.⁶⁴ Therefore, the only provision of the 1982 LOS Convention serving as a basis for interdicting such transports in high seas areas is Article 110, paragraph 1 (d) and (e). Hence, as was the case in the *So San* incident,⁶⁵ the vessel must be without nationality or, though flying a foreign flag or refusing to show its flag, it must, in reality, be of the same nationality as the intercepting warship. It remains to be seen whether the proposed amendments of the SUA Convention⁶⁶ will also result in a modification of the LOS Convention or contribute to the emergence of a new rule of customary international law. At present, however, the international law of the sea does not provide a legal basis beyond the scope of Article 110 of the 1982 LOS Convention.

Self-Defense

As in cases with a terrorist background, the right of self-defense will serve as a legal basis if the conditions triggering that right are met. Hence, if the transport of WMD is sufficiently linked to a given threat of an armed attack its interdiction will be justified, because there will be a “necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment of deliberation.”⁶⁷ This will be the case if a merchant vessel is sailing in the immediate vicinity of the outer limit of a State’s territorial sea and if there are reasonable grounds for suspicion that there is a nuclear weapon on board. Under the right of self-defense the coastal State will certainly be entitled to take all necessary measures, including the capture of the vessel, in order to effectively counter the threat.⁶⁸ The same holds true if the suspect vessel is destined to a third State whose government has shown an aggressive attitude and has given sufficient evidence that it would make use (or would consent in the use) of WMD as soon as it disposes of such weapons. Accordingly, the Cuban Quarantine could have been justified as a necessary measure of preemptive/interceptive⁶⁹—not preventive—self-defense.⁷⁰ It may well be that in some near or distant future the customary right of self-defense will also apply to less immediately threatening circumstances. The US National Security Strategy may then be

characterized as the first precedent contributing to a progressive development of international law. For the time being, however, coercive measures of a purely preventive character are not in compliance with the right of self-defense. The mere shipment of WMD and their delivery systems will in most cases not meet the threefold test of immediacy, necessity and proportionality.⁷¹ Hence, except for extraordinary circumstances, an extension of PSI to interdictions of foreign vessels and aircraft in the high sea and in international airspace cannot be based upon the right of self-defense.⁷² It needs to be emphasized that any extensive interpretation, claim or application of the right of self-defense to situations traditionally not covered by that right may serve as a welcome precedent for other States. Even if they display a certain conduct that the PSI States are unwilling to tolerate, the latter will be in a most unpleasant and difficult situation because they will certainly be reminded of their prior conduct. Moreover, all States, including the PSI States, should be aware of the tremendous achievements of the past three years. Prior to September 11, 2001 most international lawyers and governments would have agreed that the right of self-defense does not apply to attacks by a group of private persons. Today nobody would doubt that this is the case. A further extension of the right of self-defense to situations not meeting the test of imminence would not only be premature but, ultimately, counterproductive.

Counter-Measures Short of Self-Defense

However, the above findings do not rule out the possibility of a further legal basis justifying the interdiction of WMD transports on the high seas and in international airspace that is all too often left out of consideration: counter-measures short of self-defense.

Admittedly, in its Resolution 1540 the UN Security Council has not authorized the boarding or capture of vessels and aircraft suspected of transporting WMD and their delivery systems.⁷³ Had the Security Council provided such an authorization—either in general terms or with regard to vessels and aircraft of a given nationality—the resolution would be a perfect legal basis.⁷⁴ However, the continuous plea for an express authorization by the Security Council whenever security issues are at stake is unrealistic. It is based upon an erroneous perception of the UN system of collective security. Of course, a functioning institutionalization of the use of force, including measures short of self-defense, may be an ideal worth working for. However, at present the system is far from perfect. It would amount to wishful thinking to believe that, e.g., the People's Republic of China will ever vote in favor of a Security Council resolution aimed at the proliferation activities by North Korea and authorizing the interdiction of North Korean ships and aircraft suspected of being engaged in such transports. Moreover, the present system of international

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law is far from excluding unilateral or multilateral action outside the UN system of collective security.

Be that as it may, with Resolution 1540 there now exists a legally binding document that unambiguously specifies the obligations of all States with regard to the prevention of the proliferation of WMD by non-State actors. Contrary to the views expressed by some politicians⁷⁵ and international lawyers⁷⁶ the Security Council is not limited in making use of its powers under Chapter VII of the UN Charter in situations in which a specific State threatens the peace. In other words, the Security Council may, in view of its primary responsibility for peace and international security, act as a quasi-legislator if the only means to counter a threat to the peace is a general and abstract resolution. The international community has not protested against either Resolution 1373 or Resolution 1540, thus acquiescing in the performance of such powers.

It may be recalled that, in Resolution 1540, the Security Council, acting under Chapter VII, has identified a series of obligations with regard to the prevention of WMD proliferation by non-State actors⁷⁷:

1. [A]ll 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. . . . 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. . . . 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

Accordingly, every State that either allows or otherwise—actively or passively—assists in the transport of WMD and their delivery systems by non-State actors will violate its international obligations under Resolution 1540. A justification based on an assertion that the State in question does not possess the necessary means to comply with its duties is immaterial because Resolution 1540, in paragraph 7, specifically:

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.

Therefore, a State that knowingly allows the transport of WMD and of their delivery systems or that does not intervene by preventing such transports on board vessels flying its flag or on board aircraft bearing its markings commits an internationally wrongful act. According to the well-established principles of the law of State responsibility,⁷⁸ as codified in the 2002 rules prepared by the International Law Commission (ILC),⁷⁹ the State injured by a violation of international law is entitled to take the necessary countermeasures in order to either induce the wrongdoer to comply with its obligations or to reestablish the legal *status quo ante* instead of the delinquent State.⁸⁰ Since all forms of WMD proliferation activities by non-State actors are to be considered a threat to peace and international security

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and since the vast majority of States, including the People's Republic of China, agrees that such activities pose a considerable danger, the category of "injured State" is not limited to potential target States. Consequently, countermeasures and reprisals involving visit, search and capture may be taken against vessels and aircraft for the mere reason that they are flying the delinquent State's flag or that they are bearing that State's markings (genuine link). However, in view of the importance of the freedom of navigation and overflight such measures must be necessary and strictly proportionate. That will only be the case if there are reasonable grounds for suspicion that the vessels or aircraft concerned are indeed engaged in illicit activities of WMD transportation, i.e., that they are acting without the legal authority of any State.⁸¹

Conclusions

There are some who are skeptical about the Proliferation Security Initiative, which they consider a too proactive and, thus, dangerous undertaking.⁸² However, they also agree that proliferation of WMD and their delivery systems constitutes a concrete threat to international security. Still, they are not prepared to admit that the Initiative has been built on a sound legal basis. PSI, as it now stands, is in perfect conformity with both the international law of the sea and, though in exceptional cases only, the right of self-defense. Its legal basis has further been strengthened by UNSC Resolution 1540, thus enabling the participating States to extend their interdiction activities to the high seas and to international airspace. *A fortiori*, they may interdict transports of WMD and their delivery systems in areas covered by their respective territorial sovereignty, i.e. in their national airspace and in their territorial sea areas. Such interdictions—wherever conducted—presuppose that there are reasonable grounds for suspicion that the vessel or aircraft is engaged in proliferation activities not legally authorized by any State. The freedom of navigation is a principle far too important and vital for the national economies and for national and multilateral security interests to be interfered with easily.

Of course, the silver bullet is a treaty based approach. As seen, the United States has succeeded in concluding bilateral agreements with the two most important flag of convenience States—Liberia and Panama.⁸³ It is to be expected that further bilateral agreements will follow, thus enabling the US Coast Guard to effectively interdict the transport of WMD and of WMD-related cargoes by non-State actors. If the IMO member States succeed in amending the 1988 SUA Convention there will be a multilateral treaty serving as a further legal basis. However, the States of the highest proliferation concern, e.g., North Korea and Iran, will hardly be prepared to conclude or accede to such treaties. For an indefinite period of time,

interdictions involving those States and their shipping and aviation will have to be based upon the rules and principles identified in this article. In view of their highly delicate character they should, however, be conducted in a most cautious and restricted manner.

Notes

1. US DEPARTMENT OF STATE, PROLIFERATION SECURITY INITIATIVE, Sept. 15, 2003, *available at* <http://www.state.gov/r/pa/ei/rls/24134.htm>. *See also* Contemporary Practice of the United States, *Proliferation Security Initiative for Searching Potential WMD Vessels*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 355 (2004).
2. For a discussion of the facts surrounding the *So San* incident, see *Threats and Responses: Arms Smuggling; Scud Missiles Found on Ship of North Korea*, NEW YORK TIMES, Dec. 11, 2002, at A1; P. Kerr, *U.S. Stops Then Releases Shipment of N. Korean Missiles*, http://www.armscontrol.org/act/2003_01-02/yemen_janfeb03.asp (last visited Feb. 8, 2005).
3. The original eleven PSI participating States are: Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. Canada, Norway, Russia, and Singapore now also belong to the core group. Denmark and Turkey participated only in some of the meetings. 60 additional States have reportedly agreed to cooperate on an ad hoc basis.
4. At the Brisbane meeting (July 2003) the participants agreed on (a) a global initiative with global reach, (b) direct, practical measures to impede the trafficking in WMD, missiles and related items, (c) interdicting shipments of these items at sea, in the air or on land, and (d) robust and creative steps to prevent trafficking in such items. *See* Special Press Summary: Proliferation Security Initiative Meeting, *available at* <http://www.vic-info.org/RegionsTop.nsf/0/f5d0af10159ebd530a256d65000a5571?OpenDocument> (last visited Feb. 8, 2005).
5. US DEPARTMENT OF STATE, PROLIFERATION SECURITY INITIATIVE: STATEMENT OF INTERDICTION PRINCIPLES, <http://www.state.gov/t/np/rls/fs/23764.htm> (last visited Feb. 6, 2005) [hereinafter *Interdiction Principles*].
6. This has been repeatedly emphasized by former Undersecretary of State, John Bolton. *See* The New Proliferation Security Initiative—an Interview with John Bolton, <http://www.armscontrol.org/aca/midmonth/November/Bolton.asp> (last visited Feb. 6, 2005).
7. *Interdiction Principles*, *supra* note 5, Principle 1.
8. For an assessment of the North Korean weapons program, see John Chipmann, International Institute for Strategic Studies (IISS) Director, *available at* <http://www.iiss.org/showdocument.php?docID=324>. On February 11, 2005 North Korea announced that it possesses nuclear weapons. For an overview of the Iranian nuclear program, see <http://www.iaea.org/NewsCenter/Focus/laeaIran/index.shtml> (last visited Feb. 12, 2005). Libya was a “State of proliferation concern” until Muammar el-Qaddafi abandoned the WMD program in late 2003.
9. Dr. Abdul Qadeer Khan is known as the father of Pakistan’s nuclear weapons program. However, he also was involved in an extensive international network for the proliferation of nuclear technology and know-how. The network sold centrifuges to enrich uranium, uranium hexafluoride, and technological know-how to Iran, Libya and North Korea.
10. Mar. 10, 1988, 1678 U.N.T.S. 221, *reprinted in* 27 INTERNATIONAL LEGAL MATERIALS 668 (1988).
11. *See infra* p. 65 and note 58.

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12. Robert M. Chesney, *The Proliferation Security Initiative and Weapons of Mass Destruction Interdiction on the High Sea*, 13 NATIONAL STRATEGY FORUM REVIEW 5 (Fall 2003), reprinted in 25 NATIONAL SECURITY LAW REPORT 5, 5–8 (Oct. 2003); Erin Harbaugh, *The Proliferation Security Initiative: Counterproliferation at the Cross Roads*, III STRATEGIC INSIGHTS, Issue 7 (July 2004), available at <http://www.ccc.nps.navy.mil/si/2004/jul/harbaughJul04.asp> (last visited Feb. 8, 2005); Daniel H. Joyner, *The PSI and International Law*, 10 THE MONITOR 7 (Spring 2004), available at <http://www.uga.edu/cits/documents/pdf/monitor-sp-2004.pdf>; Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 526–545 (2004); Christian Schaller, *Die Unterbindung des Seetransports von Massenvernichtungswaffen*, SWP-STUDIE (May 2004). Doubts as to the Initiative’s legality are raised by Benjamin Friedman, *The Proliferation Security Initiative: The Legal Challenge*, Bipartisan Security Group, Global Security Institute (September 2003), available at <http://www.nautilus.org/DPRKBrifingBook/terrorism/PSI-brief.html#top>.
13. Schaller, *supra* note 12, at 9. The flag State principle was characterized as “the most venerable and universal rule of maritime law” by the US Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953). See also *S.S. Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).
14. See, *inter alia*, Byers, *supra* note 12, at 529; Chesney, *supra* note 12, at 6. It should be noted, however, that there is no general agreement whether the consent of the flag State is necessary or whether the master’s consent would suffice.
15. Joyner, *supra* note 12, at 8.
16. The International Maritime Organization’s (IMO) Diplomatic Conference of December 2002 adopted the ISPS Code by amendments to Chapters V and XI of the International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. 9700. The full text of the ISPS Code, formally entitled the International Code for the Security of Ships and of Port Facilities, is available at <http://www.turkloydu.org/EN/SEA/ISPS-Code-en.pdf>.
17. CSI was announced by the US Commissioner of Customs and Border Protection in January 2002 as a means to extend the US zone of security outward so US borders are the last line of defense, not the first. Through CSI, US customs authorities may examine suspect containers in the port of origin of participating States. At present, CSI has been implemented in 34 international ports. For a discussion of CSI and a current listing of participating ports, see Homeland Security, Container Security Initiative (CSI), available at <http://www.globalsecurity.org/security/systems/carg-inspect.htm>. See also John F. Frittelli, *Maritime Security: Overview of Issues* 5 (2003), Congressional Research Service Report RS21079, available at <http://fas.org/sgp/crs/RS21079.pdf> (last visited Feb. 8, 2005).
18. C-TPAT allows for better cooperation between US customs authorities and private enterprises. See US GENERAL ACCOUNTING OFFICE, GAO-03-770, CONTAINER SECURITY EXPANSION OF KEY CUSTOMS WILL REQUIRE GREATER ATTENTION TO CRITICAL SUCCESS FACTORS (2003), available at <http://www.gao.gov/new.items/d03770.pdf> (last visited Feb. 8, 2005). See also J. Ashley Roach, *Container and Port Security: A Bilateral Perspective*, 18 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 341 (2003).
19. July 1, 1968, 21 U.S.T. 483; 729 U.N.T.S. 161; T.I.A.S. 6839 (entered into force Mar. 5, 1970).
20. The texts of the safeguards agreements and additional protocol are available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/inf153.shtml> (last visited Feb. 10, 2005).
21. For an overview of the Zangger Committee, see <http://www.zanggercommittee.org>.
22. The term means that the export of listed items “triggers” IAEA safeguards as a condition for supply. The “trigger list” and the Zangger Committee’s understandings are published by the IAEA in its Information Circular 209 (INFCIRC/209) entitled “Communication Received from members regarding the Export of nuclear material and of Certain Categories of Equipment and

Other Materials”, available at <http://www.iaea.org/Publications/Documents/Infcir/Others/inf209.shtml>.

23. For an overview of the Nuclear Suppliers Group, see <http://www.nuclearsuppliersgroup.org>.

24. The text of the CNT is available at <http://www.fas.org/nuke/control/nt/docs/> (last visited Feb. 8, 2005).

25. For an overview and assessment of the FMCT, see <http://www.fas.org/nuke/control/fmct/> (last visited Feb. 8, 2005).

26. Mar. 3, 1980, T.I.A.S. 11080 (entered into force Feb. 8, 1987).

27. G.A.Res. A/RES/48/75, Dec. 16, 1993, available at <http://www.un.org/documents/ga/res/48/a48r075htm>.

28. June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061; *reprinted in* DOCUMENTS ON THE LAWS OF WAR 158 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

29. Apr. 10, 1972, 1015 U.N.T.S. 164; T.I.A.S. No. 8062, *reprinted in* THE LAWS OF ARMED CONFLICTS 137 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) (entered into force on Mar. 26, 1975).

30. Jan. 13, 1993, 1975 U.N.T.S. 469, *reprinted in* 32 INTERNATIONAL LEGAL MATERIALS 800 (1993). For an overview of the work of the Organisation for the Prohibition of Chemical Weapons, see <http://www.opcw.nl/>.

31. An overview of the AG and a listing of its members is available at <http://www.australiagroup.net/en/intro.htm>.

32. A discussion of the MTCR and a current listing of its members are available at <http://www.mtcr.info>.

33. The text of the HCOC is available at <http://projects.sipri.se/expcon/hcocfinal.htm> or http://www.minbuza.nl/default.asp?CMS_ITEM=MBZ460871 (last visited Feb. 8, 2005). *See also* US DEPARTMENT OF STATE, FACT SHEET, INTERNATIONAL CODE OF CONDUCT AGAINST BALLISTIC MISSILE PROLIFERATION (2004), available at <http://www.state.gov/t/np/rls/fs/27799.htm> (last visited Feb. 9, 2005).

34. Christer Ahlström, *Non-Proliferation of Ballistic Missiles: The 2002 Code of Conduct*, STOCKHOLM INTERNATIONAL AND PEACE INSTITUTE YEARBOOK 749 (2003).

35. The Strategic Concept is the product of NATO Alliance’s Strategic Concept, which was approved by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, D.C., on April 23 and 24, 1999. Paragraph 22 provides:

The proliferation of NBC weapons and their means of delivery remains a matter of serious concern. In spite of welcome progress in strengthening international non-proliferation regimes, major challenges with respect to proliferation remain. The Alliance recognises that proliferation can occur despite efforts to prevent it and can pose a direct military threat to the Allies’ populations, territory, and forces. Some states, including on NATO’s periphery and in other regions, sell or acquire or try to acquire NBC weapons and delivery means. Commodities and technology that could be used to build these weapons of mass destruction and their delivery means are becoming more common, while detection and prevention of illicit trade in these materials and know-how continues to be difficult. Non-state actors have shown the potential to create and use some of these weapons.

36. According to the National Security Strategy of the United States, the comprehensive approach to combat WMD includes “proactive counterproliferation efforts,” “strengthened nonproliferation efforts to prevent rogue states and terrorists from acquiring the materials, technologies, and expertise necessary for weapons of mass destruction,” and “effective consequence management to respond to the effects of WMD use, whether by terrorists or hostile

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states.” OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 14 (2002).

37. The text of the European Security Strategy is available at <http://ue.eu.int/uedocs/cmsUpload/78367.pdf> (last visited Feb. 8, 2005). The EU Strategy reads, in pertinent part, as follows: “Proliferation of Weapons of Mass Destruction is potentially the greatest threat to our security. . . . The most frightening scenario is one in which terrorist groups acquire weapons of mass destruction. In this event, a small group would be able to inflict damage on a scale previously possible only for States and armies.”

38. The text of the Strategy Against Proliferation is available at http://www.sipri.org/contents/expcon/eu_wmdsstrategy.pdf.

39. Seema Gahlaut, *The PSI Will Parallel the Multilateral Export Control Regimes*, 10 THE MONITOR 12 (Spring 2004).

40. See *supra* notes 12 and 13.

41. See Joyner, *supra* note 14.

42. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 833 U.N.T.S. 396, reprinted in 21 INTERNATIONAL LEGAL MATERIALS 1261 (entered into force Nov. 16, 1994) [hereinafter 1982 LOS Convention]. See also the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, UN Doc. A/RES/48/263 of Aug. 17, 1994, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindxAgree.htm (entered into force July 28, 1996).

43. The rules of the 1982 LOS Convention on the territorial sea and on innocent passage are generally considered to be customary in character. Hence they are binding on all States. For an appraisal of the customary character, see especially the Joint Statement by the United States of America and the Union of Soviet Socialist Republics, Jackson Hole, Wyoming, Sep. 23, 1989, reprinted in 28 INTERNATIONAL LEGAL MATERIALS 1444 (1989) [hereinafter US-USSR Joint Statement].

44. In the context of PSI, Article 28 of the 1982 LOS Convention on civil jurisdiction is, if at all, of only minor relevance.

45. ROBIN R. CHURCHILL & ALAN V. LOWE, THE LAW OF THE SEA 98 (3d ed. 1999); Schaller, *supra* note 12, at 11.

46. This will regularly be achieved by making use of a Notice to Mariners and by a Notice to Aviators. The obligation to notify is based on the assumption that interference with foreign shipping will, *a priori*, constitute an infringement upon the flag State principle and the right of innocent passage. For a general duty to warn third States’ shipping of dangers within the territorial sea, see *Corfu Channel (UK v. Albania)*, Merits, 1949 I.C.J. 4, 22 (Apr. 9).

47. 1982 LOS Convention, *supra* note 42, art. 27 (5). Note, however, that this restriction does not apply to cases provided for in Part XII of the Convention pertaining to the protection of the marine environment or with respect to violations of laws and regulations adopted in accordance with Part V (the EEZ).

48. See Joint US-USSR Statement, *supra* note 42, ¶ 3.

49. Friedman, *supra* note 12, at 3.

50. UN Doc. S/RES/1540 (2004) of Apr. 28, 2004.

51. See Joyner, *supra* note 12, at 8.

52. 1982 LOS Convention, *supra* note 42, art. 30. Sovereign immunity of warships is specifically recognized in Article 236. See also *The Schooner Exchange v. McFadden & Others*, 11 U.S. 116 (1812).

53. CHURCHILL & LOWE, *supra* note 45, at 98; Joyner, *supra* note 12, at 8; Schaller, *supra* note 12, at 12.

54. *Supra* note 5.
55. The same view is taken by Byers, *supra* note 12, at 529; Joyner, *supra* note 12, at 8; and Schaller, *supra* note 12, at 19.
56. For the facts surrounding the interception and boarding of the *BBC China*, see Mark Esper & Charles Allen, *The PSI: Taking Action Against WMD Proliferation*, 10 THE MONITOR 4, 6 (Spring 2004).
57. Agreement between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, Feb. 11, 2004, *available at* <http://www.state.gov/t/np/trty/32403.htm>. Amendment to the Supplementary Arrangement between the Government of the United States of America and the Government of Panama to the Arrangement between the Government of the United States of America and the Government of Panama for Support and Assistance from the United States Coast Guard for National Maritime Service of the Ministry of Government and Justice, May 12, 2004, *available at* <http://www.state.gov/t/np/trty/32858.htm>.
58. 1678 U.N.T.S. 221, *reprinted in* 27 INTERNATIONAL LEGAL MATERIALS 668 (1988). The proposed amendment will include a criminalization of the transport of WMD and their components and rules on (a presumed) consent by the flag State to interception measures if there are reasonable grounds of suspicion that the vessel is engaged in such activities.
59. Rudger Wolfrum, *Fighting Terrorism at Sea: Options and Limitations under International Law*, in NEGOTIATING FOR PEACE. LIBER AMICORUM TONO EITEL 649–668 (Jochen A. Frowein et al. eds., 2003); Wolff Heintschel von Heinegg, *Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships and Maritime Neutrality*, 34 ISRAEL YEARBOOK ON HUMAN RIGHTS 151 (2004).
60. See the references *supra* note 12.
61. Bin Cheng, *Air Law*, in I ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 66, 69 (Rudolf Bernhardt ed., 1992).
62. *E.g.*, according to the bilateral agreements between the United States on the one side and Liberia and Panama on the other side (*supra* note 57).
63. Subject to an amendment to the 1988 SUA Convention at the end of 2005.
64. Transport of WMD even if performed for private ends will not meet the conditions laid down in Article 101 of the LOS Convention. Moreover, there is no indication—either in State practice or in the literature—of an emerging consensus to that effect.
65. See the references *supra* note 2.
66. *Supra* note 58.
67. Robert Y. Jennings, *The Caroline and McLeod Cases*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82, 91 (1938). For an appraisal of the *Caroline* formula, see YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 169 (3d ed. 2001).
68. For such a scenario, see Byers, *supra* note 12, at 532.
69. For the concept of interceptive self-defense, see DINSTEIN, *supra* note 67, at 219.
70. Carl Q. Christol & Charles R. Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Matériel to Cuba, 1962*, 57 AMERICAN JOURNAL OF INTERNATIONAL LAW 525 (1963).
71. For these legal limits of the right of self-defense, see DINSTEIN, *supra* note 67, at 207.
72. Friedman, *supra* note 12, at 5; Byers, *supra* note 12, at 532, 540; Schaller, *supra* note 12, at 20; Joyner, *supra* note 12, at 7; Harbaugh, *supra* note 12, at 5; Chesney, *supra* note 12 at 7.
73. U.N.S.C. Res. 1540 (Apr. 28, 2004).
74. Byers, *supra* note 12, at 531; Schaller, *supra* note 12, at 17.

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75. E.g., in September 2004 the chairperson of the Swiss Department of Foreign Affairs, Micheline Calmy-Rey, criticized the Security Council for gradually usurping the role of a “world legislator” in referring to UNSC Resolution 1373.

76. E.g., Klaus Dicke, *Weltgesetzgeber Sicherheitsrat (Kommentar)*, in 49 VEREINTE NATIONEN 163, 168 (2001).

77. In a footnote to the Resolution, the term “non-State actor” is defined as an “individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.”

78. For an assessment of the customary character of the rules and principles of State responsibility it suffices here to refer to IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 419 (6th ed. 2003); Karl Zemanek, *Responsibility of States: General Principles*, in *IV ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 219, 221 (Rudolf Bernhardt ed., 2000).

79. G.A. Res. A/RES/56/83, Jan. 28, 2002, Annex: Responsibility of States for internationally wrongful acts.

80. Article 49 of the ILC rules reads as follows:

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Note, however, that the restriction in paragraph 1 is not part of customary international law because States have continuously claimed a right to resort to counter-measures in order to reestablish the legal *status quo ante* in cases in which the obliged State has been either unwilling or unable to comply with its international obligations.

81. For a similar argument in the context of counter-terrorism, see Heintschel von Heinegg, *supra* note 59.

82. E.g., Friedman, *supra* note 12, *passim*; Harbaugh, *supra* note 12, *passim*.

83. See *supra* note 59.