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RESEARCH & DEBATE

IS THE PSI REALLY THE CORNERSTONE OF A NEW INTERNATIONAL NORM?

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This essay was written in response to the article “The Proliferation Security Initiative: Cornerstone of a New International Norm,” by Joel Doolin, published in the *Naval War College Review* (Spring 2006, vol. 59, no. 2, pp. 29–57).

Doolin’s article contains some serious substantive flaws in interpretation, logic, and conclusions. The general thrust and conclusion of the paper is that through the Proliferation Security Initiative (PSI) it has become or is becoming customary international law to be able to interdict and board vessels on the high seas without flag-state consent to search for and seize weapons of mass destruction (WMD) and related materials. This contention, however, is not supported by the relevant facts and is deleterious to the regime of freedom of navigation, which the U.S. Navy has held sacrosanct and zealously defended for centuries.¹

Doolin’s specific arguments marshaled to support the contention that interdiction of vessels on the high seas without flag-state consent has become or is becoming customary international law include widespread support for the PSI, state sovereignty in its territorial sea, an “overwhelming majority” of nations having signed conventions “outlawing” the proliferation of WMD, United Nations Security Council (UNSC) Resolution 1540, and Article 51 of the UN Charter (Right of Self-Defense). The following summarizes problems with these arguments.

The paper repeats without analysis the U.S. government contention that “more than sixty countries have signaled that they support the PSI and are ready to participate in interdiction efforts” (page 31). As Sharon Squassoni of the U.S. Congressional Research Service has pointed out, it is unclear what “support” for the PSI means and how robust it is.² The “concrete steps” for contribution to the PSI listed on the U.S. State Department website are rather vague and conditional.³

First and foremost, participating states are encouraged formally to commit to and publicly endorse, *if possible* [my italics], the Statement of Interdiction Principles. Follow-up steps are also replete with conditional language, such as “indicate willingness,” “as appropriate,” “might contribute,” and “be willing to consider.”

It is true that sixty-six countries attended a closed-door meeting in Warsaw on 23 June 2006, marking the third anniversary of the initiation of the PSI.⁴ However, no list of participating countries has been made available, and the definition of “supporting” countries remains unclear. Indeed, it is nigh impossible to obtain an “official” list of PSI-supporting countries. Apparently this is because some—perhaps many—so-called supporting states have not publicly endorsed the PSI principles. Reasons given include not wanting to provoke North Korea, wanting to avoid possible reprisals for cooperating with the United States, fearing that interdictions on the high seas will jeopardize international trade and undermine international law, and not perceiving the PSI as a top security priority.⁵ This reluctance to publicly endorse the PSI principles in itself indicates less than stalwart support in general, let alone in time of specific need. Indeed, given the flexibility of cooperation, many if not most of the so-called supporters would not automatically participate in interdictions of vessels or aircraft at the behest of the United States. Thus, in a pinch, support could easily evaporate. In any case, such soft support does not warrant a conclusion that PSI activities will change international practice regarding interdiction on the high seas without flag-state consent.

Moreover, while there is indeed a growing list of nations willing to associate themselves with different aspects of the PSI on a case-by-case basis, support in Asia—a major focus of proliferation concern—is weak. Despite considerable U.S. pressure to participate fully and publicly, key countries like China, India, Pakistan, Indonesia, and Malaysia remain outside the “coalition of the willing,” and the cooperation of others that have nominally joined, such as Japan, South Korea, and Russia, for various reasons is lukewarm at best.

A state may “approach, visit, and search any vessel in its territorial sea and contiguous zone” (page 35). Navigation in the territorial waters of any coastal state is subject to the innocent-passage regime—that is, it is allowed as long as it is not prejudicial to the coastal state’s peace, good order, or security.⁶ Specific non-innocent acts are listed in the 1982 United Nations Convention on Law of the Sea (1982 UNCLOS) Article 19, and transporting WMD components or missiles is not among them. Moreover, the 1982 UNCLOS Article 23 implicitly gives ships carrying nuclear weapons the right of innocent passage. These articles were a U.S.-led compromise with those nations that wanted the Convention to explicitly declare carriage of nuclear weapons in foreign territorial seas to be

non-innocent. Thus for a coastal state to legally interdict a vessel in its territorial sea without flag-state consent because the vessel is thought to be carrying WMD or related materials, the coastal state would probably have to have in place legislation criminalizing WMD transport or demonstrate that the vessel is threatening its security due to the presence on board of WMD destined for persons intending to undertake terrorist activities in areas under its jurisdiction.⁷ Perhaps in a stretch the coastal state could argue that because the recipient of the WMD is unknown, it has to assume they are bound for an enemy. But a coastal state cannot, as the author contends, simply “approach, visit, and search any vessel in its territorial sea.”

WMD are subject to seizure because “the overwhelming majority of nations have signed treaties outlawing the proliferation of nuclear, chemical, and biological weapons” (page 37). *“The NPT [Nuclear Nonproliferation Treaty], CWC [Chemical Warfare Convention], and BWC [Biological Weapons Convention] are arguably enforceable against nonsignors. The implication for military operations would seem to be that seizure of WMD items found aboard foreign ships or aircraft may be authorized”* (page 37). Doolin provides his own counterargument to this extreme statement. “No interpretation is permitted when the text of a treaty is clear—and none of the WMD or terrorism conventions authorizes maritime interdiction. Each treaty was the product of negotiation by states, and subsequently changed security needs, however compelling, cannot add a right to maritime interdiction that does not exist in its language” (page 38). Indeed!

UNSC Resolution 1540 strengthens the evolution of customary international law toward accepting “the boarding of vessels on the high seas to search for [WMD]” (page 51). Doolin hedges by implying that flag-state consent is still needed. Indeed, this is made clear in the background to UNSC Resolution 1540.

In March 2004 the United States tried to obtain a UN Security Council resolution specifically authorizing states to interdict, board, and inspect any vessel or aircraft if there were reason to believe they were carrying WMD or the technology to make or deliver them, and to seize or impound missiles or related technology or equipment. This was a difficult—and, as it turned out, frustrating—tacit admission by the United States that it needs a UN mandate to legitimize high-seas PSI interdictions.

There were several initial objections to the draft. Foremost was the question of what constitutes “weapons-related materials”—a definitional problem that continues to undermine the legitimacy of the PSI. Another particular area of debate was the text’s proposal that parties “to the extent consistent with their national legal authorities and international law” cooperate on preventing, and if necessary interdicting, shipments of WMD and related materials. In other words, the United States sought UN support for PSI interdictions. The text did

not include a British proposal for a UN counterproliferation committee or a French proposal for a permanent corps of UN weapons inspectors. In other words, according to the U.S. proposal, enforcement would be outside the UN system.

After considerable debate in and outside the Security Council, a revised draft resolution emerged that asked all UN members to “criminalize” the proliferation of WMD, enact strict export controls, and secure all sensitive materials within their own borders.⁸ The final resolution that emerged after further debate was introduced to the Security Council on 24 March 2004 and passed on 28 April 2004 (UNSCR 1540). It requires all 191 UN members to “adopt and enforce appropriate effective laws to prevent any nonstate actor from being able to manufacture, acquire, possess, develop, transport or use nuclear, chemical or biological weapons and their means of delivery.”⁹ Specifically, it compels all countries to adopt laws to criminalize the spread of weapons of mass destruction, to ensure that they have strong export controls, and to secure sensitive materials within their borders.¹⁰

Significantly, Russia and China prevented a specific endorsement of interdiction and the PSI in the resolution.¹¹ Indeed, the text was agreed upon only after the United States accepted China’s demand under a threat of a veto to drop a provision specifically authorizing the interdiction of vessels suspected of transporting WMD, a cornerstone of the PSI. China also objected to any suggestion that the Council would endorse ad hoc frameworks like the PSI.

With these amendments, China, France, and Russia supported the revised draft. However, a vote was delayed because Council members wanted every UN member state to be briefed on the resolution.¹² Ironically, Pakistan, a prominent U.S. ally in the war on terror, led opposition to the resolution until it was assured it would not be retroactive and a provision allowing intrusive inspections was deleted.¹³ Opponents of the resolution were also concerned by the Security Council’s assumption of the authority essentially to make national law and by possible sanctions against UN members that do not comply. They also objected to the secret and arrogant manner in which the text was negotiated among only the Permanent Five before its introduction. In the end, the resolution did little to strengthen the effectiveness of the PSI, since it focused only on nonstate actors and did not clearly authorize interdiction or any action outside current international law.

Without a clearly worded UNSC resolution specifically authorizing high-seas interdiction, any such interdiction over the objection of the flag state would be tantamount to aggression and could be considered an act of war. Even if a country were to enforce the PSI principles only in its own territorial waters, each

interdiction may require Security Council approval,¹⁴ or only be legal in very specific circumstances.

Kofi Annan, the Secretary General of the United Nations, supports the goals of the PSI.¹⁵ But he would prefer that such issues and actions be addressed and undertaken collectively through and by the United Nations.¹⁶ He has said that the Security Council must be “the sole source of legitimacy on the use of force.”¹⁷ Other core PSI members such as France favor this approach and have proposed a Security Council summit meeting to frame a UN action plan against proliferation and to create a corps of inspectors to carry it out.

Article 51 of the UN Charter could be used “as a trump card” [to interdict without flag-state consent vessels on the high seas carrying WMD] (page 46). Preemptive self-defense includes anticipatory self-defense and preventive self-defense.¹⁸ For an action to be compatible with current international legal interpretations of anticipatory self-defense, the United States and its coalition partners would probably have to demonstrate not only that the interdicted cargo required such action because it posed a specific and imminent threat of attack on the United States or its allies, but also that the necessity of self-defense was instant and overwhelming, leaving no choice of means, and no time for deliberation.¹⁹ That is, a response was necessary, proportional to the threat, and the threat was imminent.²⁰ Otherwise such action and argument would be greatly expanding the traditional definition of self-defense to include preemptive self-defense regarding non-imminent threats and would set a very dangerous precedent that could undermine the very foundations of the United Nations. In fact, Article 51 provides the right of self-defense only in the case of an armed attack, and only until the UN “Security Council has taken measures necessary to maintain international peace and security.”²¹

Doolin himself acknowledges that “universal condemnation of [WMD] and terrorism cannot be used as justification for violation of another state’s sovereignty” (page 48). Indeed, as he says, the only time national defense could be used to justify maritime interdiction on the high seas without flag-state consent would be “if the facts established that the transport of [WMD] toward the coastal nation constituted an imminent threat of an armed attack” (page 48).

In sum, the underpinnings of Doolin’s argument are not substantiated. International law does not permit high-seas interdictions and boardings without flag-state consent except in very specific circumstances that do *not* include transport of “WMD, related materials and delivery systems.” It is highly questionable whether such interdictions are allowed even for a vessel in innocent passage in the territorial sea. Neither the PSI, existing nonproliferation treaties and weapons conventions, UNSC Resolution 1540, nor Article 51 support interdiction on

the high seas in violation of the freedom-of-navigation regime. Such interdiction without flag-state consent is not, and is not likely in the foreseeable future to become, customary international law.

As for amending Article 110 of the 1982 UN Convention on the Law of the Sea as suggested by Doolin (pages 50, 51), the United States as a non-party has no official role in the matter. Indeed, one of the most egregious inconsistencies of this piece is that it frequently cites the 1982 UNCLOS to support its arguments. The United States is not a party to this grand bargain and cannot “pick and choose” which provisions it will follow.

The sad fact is that the PSI and ancillary measures have done little or nothing to restrict the movement of WMD and closely related materials on flagged ships and planes of North Korea, Iran, or other “countries of proliferation concern,” especially those owned and operated by their governments.²² Another sad fact is that the implementation, if not the conception, of the PSI was and is seriously flawed. Yet the PSI’s proponents and its defenders continue to ignore many of its problems and to exaggerate its progress and effectiveness.

All this is not to say that trade in WMD and related items should be ignored, although it may not be possible to prevent it altogether. To help nonconsensual high-seas interdictions for WMD transport to become customary international law, wider and more robust state support is required. To engender this support, the PSI’s shortcomings must be acknowledged and addressed. Most of the PSI’s shortcomings stem from its ad hoc, extra–United Nations, U.S.-driven nature. Bringing it into the UN system would rectify many of these shortcomings by loosening U.S. control, enhancing the initiative’s legitimacy, and engendering near-universal support. Whether or not the PSI is formally brought into the UN system, its reach and effectiveness could be improved by eliminating hypocrisy and double standards (e.g., when it comes to India, Pakistan, and Israel), and increasing transparency. Needed is a neutral organization to assess intelligence, coordinate and fund activities, and to make decisions regarding specific or generic interdictions. Such an organization could provide more objective and legitimate definitions of states “of proliferation concern” and “good cause” (for interdiction). It would also help avoid erroneous judgments, resolve disagreements, provide consistency and a concrete structure and budget, and ensure compliance with international law—or be a vehicle for any agreed changes therein.

NOTES

Parts of this commentary are derived from Mark J. Valencia, *The Proliferation Security Initiative: Making Waves in Asia*, Adelphi Paper 376 (London: International Institute for Strategic Studies, October 2005).

1. This regime is customary international law, and several of its relevant components are also enshrined in the 1982 United Nations Convention on the Law of the Sea. Freedom of the high seas comprises among others the freedoms of navigation and of overflight (art. 87 and art. 90). The right of visit is severely constrained (art. 110). Ships on the high seas are subject to the exclusive jurisdiction of the flag state (art. 92). And ships owned or operated by a state, and used only on government noncommercial service, shall, on the high seas, have complete immunity from the jurisdiction of any other state (art. 96).
2. Sharon Squassoni, "Proliferation Security Initiative," Congressional Research Service, 7 June 2005, Order Code RS21881.
3. U.S. State Dept., *The Proliferation Security Initiative* (Washington, D.C.: Bureau of Nonproliferation, 26 May 2005), available at www.state.gov/E/np/rls/fs/46839.htm.
4. "Proliferation Security Initiative High Level Political Meeting," Cracow, Warsaw, 23 June 2006, available at www.psi.msz.gov.pl/.
5. Brendon Pearson, "Tokyo Treads Warily in Use of Interdiction Force," *Australian Financial Review*, 12 July 2003; Takashi Ono and Yoshiro Mino, "Japan Nervous as Star of WMD and Exercise," *Asahi Shimbun*, 15 September 2003; "Russian Diplomat Says Interception Training May Prolong Nuclear Crisis," *ABCNews Radio Online* (Australia), 11 September 2003; "China Voices Concern over WMD Non-proliferation Plan's Legality," 9 December 2003, as quoted in Andreas Persbo and Ian Davis, "Sailing into Uncharted Waters: The Proliferation Security Initiative and the Law of the Sea," *BASIC Research Report 2004*, 2 June 2004, available at www.basicint.org/pubs/Research/04PSI.htm; Ye Ru'an and Zhao Qinghai, "The PSI: Chinese Thinking and Concern," *Monitor* 10, no. 1 (Spring 2004), p. 23; Stephen Rademaker, Assistant U.S. Secretary of State for Arms Control, Testimony before the House Internal Relations Committee, Subcommittee on International Terrorism and Nonproliferation, Washington D.C., 9 June 2005, available at www.State.gov/t/ac/rls/rm/47715.htm.
6. United Nations, *Official Text of the United Nations Convention on the Law of the Sea* (New York, 1983), Article 19, available at ww.un.or/Depts/los/convention_agreements/texts/unclos/closindx.htm.
7. Natalino Ronzitti, "The Law of the Sea and the Use of Force against Terrorist Activities," in *Maritime Terrorism and International Law*, ed. Natalino Ronzitti (New York: Kluwer Law International, 1990), pp. 1–15; Benjamin Friedman, "The Proliferation Security Initiative: The Legal Challenge," *Bipartisan Security Group*, 4 September 2003, available at www.fas.org/nuke/control/npt/text/npt2.htm.
8. Mark Turner, "U.S. Drafts UN Move to Reduce Flow of Weapons," *Financial Times*, 18 December 2003.
9. Colum Lynch, "U.S. Urges Curb on Arms Traffic," *Washington Post*, 25 March 2004, p. A20; Jim Wust, "U.N. Draft Resolution Could Require States Deny Terrorists WMD," *U.N. Wire*, 25 March 2004.
10. Maggie Farley, "Resolution Seeks Ban on Spread of Weapons," *Los Angeles Times*, 29 April 2004.
11. Ralph Cossa, introduction to "Countering the Spread of Weapons of Mass Destruction: The Role of the Proliferation Security Initiative," *Issues and Insights* 4, no. 5 (July 2004), pp. 1–6.
12. Evelyn Leopold, Reuters, 25 March 2004.
13. William Varner, "Pakistan Leads Opposition at UN to Terrorism Measure," *Bloomberg*, 5 April 2004; *Daily Times*, editorial, 1 May 2004.
14. Foreign Policy Association, *Proliferation Security Initiative: Principles and Practices*, 7 September 2003.
15. "World Leaders Urged to Act Boldly," *Financial Express*, 22 March 2005.
16. "Listen to Annan," *International Herald Tribune*, 26 September 2003, p. 8.

17. Quoted in John R. Bolton, "Remarks at Proliferation Security Meeting," Paris, France, available at www.state.gov/t/us/rm/23801.htm.
18. Anticipatory self-defense is an attack upon another state that actively threatens violence and has the capacity to carry out the threat but has not yet done so; preventive self-defense is an attack against another state when a threat is feared or suspected but there is no evidence that the threat is imminent. Daniel H. Joyner, "The PSI and International Law," *Monitor* 10, no. 1 (Spring 2004), pp. 7–9.
19. Gerald F. Seib, "A Bush Doctrine Is Put in Jeopardy by Weapons Hunt," *Asian Wall Street Journal*, 9 October 2003; Robert A. Hamilton, "International Maritime Expert: Law Supports War on Terror—German Law School Vice Dean Speaks to Coast Guard Class," *The Day* website, 9 November 2003.
20. *Ibid.*
21. United Nations, "Charter of the United Nations," chap. VI, art. 51.
22. UNSC Resolution 1695 of 15 July 2006 does prohibit all UN member states from providing to or receiving from North Korea WMD and related materials or technology, specifically including missiles. But this resolution was passed after the Doolin paper was published. Besides, it is not part of the PSI (although it has similar objectives), it does not authorize the use of military force to ensure compliance, and it does not apply to other states seeking or supplying WMD-related materials (except to North Korea). Edith M. Lederer, "U.N. Imposes Limited Sanctions on N. Korea," Associated Press, 15 July 2006; Warren Hoge, "U.N. Demands End to North Korean Missile Program," *New York Times*, 15 July 2006. Although the United States insists that the resolution is "mandatory" and "binding" and that all UN member states are "required" to comply, it is unclear if and how it will be enforced. "UN Resolution on North Korea Result of Multilateral Efforts," *USINFO*, available at www.state.gov, 16 July 2006; "U.S., Japan Turn Up Heat on N. Korea," *Asahi.com*, 18 July 2006; Kwang-Am Cheon, "U.S. Mulls Own Sanctions on N. Korea," *Asahi.com*, 24 July 2006. Moreover, enforcement by military means would be counter to both the intent of the compromise Resolution and to the 1982 UNCLOS.