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Weapons of Mass Destruction Counterproliferation: Legal Issues for Ships and Aircraft

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Weapons of Mass Destruction Counterproliferation: Legal Issues for Ships and Aircraft

Summary

President Bush outlined a specific plan to counter WMD proliferation in his *National Strategy to Combat Weapons of Mass Destruction* of December, 2002. The Administration's plan combines efforts aimed at counterproliferation, nonproliferation, and WMD consequence management. The intent, it says, is to eliminate or "roll back" WMD in the possession of certain States and terrorist groups, including potentially the use of force and aggressive methods of interdiction of WMD-related goods, technologies, and expertise. The use of interdiction as a counterproliferation measure appears to be part of a strategy that foresees the U.S. taking "anticipatory action to defend ourselves" against terrorists and rogue States, "even if uncertainty remains as to the time and place of the enemy's attack," and "to detect and destroy an adversary's WMD assets before these weapons are used." A recent refinement of the WMD strategy is the Proliferation Security Initiative (PSI), which would involve cooperation among friendly nations to interdict transfers of restricted weapons and related technologies "at sea, in the air, and on land." However, the Administration has recognized that cooperation may not always be forthcoming, and has intimated that it will act unilaterally, if necessary.

Aspects of this national security strategy raise questions related to the international law of jurisdiction, the law of the sea (which also references airspace), and international civil aviation agreements. The right of States to conduct self-defense and law enforcement activities abroad has the potential to collide with the rights of other States to maintain their sovereign integrity and conduct free navigation and commerce. These rights are not absolute. This report provides an overview of the international law of the sea and other agreements as they relate to the permissible range of methods for interdicting WMD-related contraband. After a short summary of the current legal regime for international arms control related to WMD, the report outlines the basic concepts of jurisdiction in international law. Next, the report describes concepts central to the law of the sea, including the division of the world's waters and airspace into "international" and "national" territory, and a description of the rights, duties and limitations that apply depending on where the conduct takes place. The report then turns to the international legal framework limiting the conduct of nations as it applies during times of war and peace, and during what has been called "quasi war."

Contents

Introduction	1
Weapons of Mass Destruction – International Legal Regime	3
Nuclear Weapons	4
Chemical Weapons	6
Biological Weapons	7
Limitation on Enforcement	8
Jurisdiction under International Law	8
The Law of the Sea	10
Legal Divisions of Waters	11
Territorial Seas	11
Contiguous Zones and Exclusive Economic Zones (EEZ)	12
Straits	13
The High Seas	13
Legal Status of Vessels	13
Nationality	14
Status of Warships	14
Airspace and Aircraft	14
Law of the Sea Conventions	15
Chicago Convention	15
Nationality of Aircraft	16
State Aircraft	17
Enforcement Options	17
Law Enforcement in National Waters and Airspace	17
Law Enforcement on the High Seas	18
Unlawful Acts on the High Seas	18
Right of Approach and Visit	19
Enforcement Measures	19
The Proliferation Security Initiative	21
Belligerent Rights	23
The Right of Visit and Search	24
Naval Blockades	24
Air Blockade	25
Blurring the Boundary between War and Peace	25
The Right of Self Defense	25
Pacific Blockade	26
Self-help Paradigm in International Law	27
Collective Action Under Security Council Mandate	32
Conclusion	33
Appendix A – Interdiction Principles for the Proliferation Security Initiative ..	35

Weapons of Mass Destruction Counterproliferation: Legal Issues for Ships and Aircraft

Introduction

After the collapse of the Soviet Union, the world's security landscape is said to have undergone a transformation from the seeming stability of the bi-polar balance of power to a system in which not only any nation, but sub-national groups as well, may be able to acquire weapons of mass destruction (WMD). Strategies based on containment and deterrence, it is argued, are insufficient to guarantee security in the twenty-first century threat environment; terrorists and "rogue" nations are not amenable to being deterred or contained.¹ The need to prevent the proliferation of chemical, biological, and nuclear weapons was highlighted in the *National Security Strategy of the United States of America* issued in September, 2002.² According to the Bush Administration, in order to strengthen nonproliferation efforts to prevent rogue States and terrorists from acquiring weapons of mass destruction,

[w]e will enhance diplomacy, arms control, multilateral export controls, and threat reduction assistance that impede states and terrorists seeking WMD, and when necessary, interdict enabling technologies and materials.³

Toward that end, President Bush issued his *National Strategy to Combat Weapons of Mass Destruction* in December, 2002. The Administration's plan combines efforts aimed at counterproliferation,⁴ nonproliferation, and WMD consequence management. Its purported intent is to eliminate or "roll back" WMD from certain states and terrorist groups who possess such weapons or are close to

¹See Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 515-18 (2003) (describing the Bush Administration's assessment of national security priorities).

²White House, *The National Security Strategy of the United States of America* (September, 2002)[hereinafter "NSS"], available at [<http://www.whitehouse.gov/nsc/nss.html>].

³*Id.* at 14.

⁴See White House, *National Strategy To Combat Weapons of Mass Destruction 2* (December, 2002) [hereinafter "WMD Strategy"] available at [<http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf>], noting that

[e]ffective interdiction is a critical part of the U.S. strategy to combat WMD and their delivery means. We must enhance the capabilities of our military, intelligence, technical, and law enforcement communities to prevent the movement of WMD materials, technology, and expertise to hostile states and terrorist organizations.

acquiring them, including potentially the use of force and aggressive methods of interdiction of WMD-related goods, technologies, and expertise.⁵ The use of interdiction as a counterproliferation measure appears to be part of a strategy that foresees the U.S. taking “anticipatory action to defend ourselves” against terrorists and rogue states, “even if uncertainty remains as to the time and place of the enemy’s attack,”⁶ and “to detect and destroy an adversary’s WMD assets before these weapons are used.”⁷

A high-profile incident involving the interception of Scud missiles and rocket fuel on board a ship traveling from North Korea in December, 2002, however, illustrated possible legal impediments to the strategy. Acting on intelligence from the United States, a Spanish frigate stopped and boarded the *So San*, an unmarked North Korean commercial vessel, and discovered the missiles. However, after confirming that the missiles were purchased by Yemen, the United States allowed the vessel to proceed on its voyage. The Bush Administration concluded that there was no legal basis to arrest the vessel or seize its cargo, because North Korea had not violated any law.⁸

In May 2003, President Bush announced a new facet of the WMD strategy, to be known as the Proliferation Security Initiative (PSI).⁹ The PSI is an effort to reach agreements among nations to allow searches of ships and aircraft carrying suspected weapons-related cargo.¹⁰ Undersecretary of State for Arms Control and International Security John Bolton told Congress:

The initiative reflects the need for a more dynamic active approach to the global proliferation problem. It envisions partnerships of states working in concert, employing their national capabilities to develop a broad range of legal, diplomatic, economic, military and other tools to interdict threatening shipments of WMD and missile related equipment and technologies.

To jump-start this initiative, we have begun working with several close allies and friends to expand our ability to stop and seize suspected WMD transfers. 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 enemies. We aim ultimately, not just to prevent the spread of weapons of mass

⁵See NSS, *supra* note 2, at 21.

⁶*Id.* at 15.

⁷WMD Strategy, *supra* note 4, at 3.

⁸See Ari Fleischer, White House Press Briefing, Dec. 11, 2002, *available online at* 2002 WL 31764110 (F.D.C.H.)(Westlaw).

⁹President George W. Bush, Remarks to the People of Poland (May 31, 2003), *available at* [<http://www.whitehouse.gov/news/releases/2003/05/20030531-2.html>] (Last visited Sep. 8, 2003).

¹⁰See White House Press Release, Iran's Nuclear Program Concerns Bush Administration, June 18, 2003, *available at* [<http://usinfo.state.gov/topical/pol/arms/03061804.htm>] (Last visited Sept. 2, 2003) (indicating that negotiations are underway to design a plan for a cooperative interdiction effort).

destruction, but also to eliminate or roll back such weapons from rogue states and terrorist groups that already possess them or are close to doing so.¹¹

Rather than seeking to change existing treaties or negotiate new ones, the PSI appears to rely on international agreements that will enhance cooperation in interdiction efforts, including sharing information and conducting exercises using military or civilian assets to develop the participating nations' ability to conduct air, ground, and maritime interception.¹² However, recognizing that cooperation may not always be forthcoming from all nations whose assistance is requested, the Administration has intimated that it will act unilaterally, if necessary.¹³

These developments raise questions related to the international law of jurisdiction. International law outlines the bounds of the permissible conduct for purposes of self-defense and law enforcement activities abroad, insofar as some activities could be viewed as unwarranted or unlawful interference with the rights of other nations to conduct international commerce and maintain sovereignty over their territory. This report provides an overview of the international law of the sea as it relates to the permissible range of methods for interdicting WMD-related contraband on the sea and in the air, and also of selected pertinent international regimes and agreements. After a short outline of the current legal regime for the international control of WMD, the report outlines the basic concepts of jurisdiction in international law. Next, the report describes concepts central to the law of the sea, the rights and limitations. The report then turns to the international legal framework limiting the conduct of nations as it applies during times of war and peace, as well as during what might be called "quasi war," as is often deemed to be the case today.

Weapons of Mass Destruction – International Legal Regime

From a U.S. perspective, the problem of controlling the proliferation of WMD is particularly thorny because, unlike the control of illicit drugs, it does not suffice to keep the materials from entering the United States or to prevent their manufacture and dispersal on U.S. territory. Complete security from the dangers of a WMD attack

¹¹*Nonproliferation Policy after Iraq, Hearings before the House Committee on International Relations*, 108th Cong., June 4, 2003 (testimony of John R. Bolton), available online at 2003 WL 21299971 (Westlaw).

¹²See Australian Department of Foreign Affairs and Trade, Chairman's Statement, Brisbane Meeting of the Proliferation Security Initiative, available at [<http://www.dfat.gov.au/globalissues/psi/index.html>] (Last visited Sept. 2, 2003). Participants include Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom and the United States. The PSI countries reached an initial agreement at their third meeting, held in Paris September 3-4, 2003, and released a "Statement of Interdiction Principles."

¹³See NSS, *supra* note 2, at 6 ("While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against ... terrorists, to prevent them from doing harm against our people and our country...").

would require that dangerous materials be kept out of the hands of any potential enemy. Moreover, some materials that can be used in the production of WMD also have peaceful uses, and may even be necessary for the operation of wholly legitimate industries. Interference in the trade of “dual use” materials could impair the ability of other States to carry out legitimate trade, possibly leading to international discord. Finally, under international law, sovereign States have the right in general to possess weapons for their self-defense. Only the use of such weapons is constricted by customary international law.¹⁴ While many States have agreed to limit their production and possession of some types of WMD and conventional weapons, they may have conditioned their consent on the conduct of other States, and may be able to revoke their consent in accordance with any such conditional agreement. While secret development of WMD on the part of a State that has agreed not to engage in such conduct would constitute a breach of a treaty obligation, it is not necessarily a crime or an act of aggression under international law merely to possess such weapons.

Nuclear Weapons

The center of the nuclear nonproliferation regime is the Nuclear Nonproliferation Treaty (“NPT”).¹⁵ The treaty defines nuclear weapons States as those States that had manufactured and detonated a nuclear weapon prior to January 1, 1967.¹⁶ The treaty thus allows five nuclear powers – the United States, Great Britain, Russia, France and China – to manufacture and possess nuclear weapons, but prohibits the transfer of such weapons to other States.¹⁷ All other States Parties to the NPT have agreed not to acquire nuclear weapons in return for assistance in developing peaceful uses for nuclear power.¹⁸ The five declared nuclear powers are committed under the treaty to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and

¹⁴See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226 (July 8), *reprinted in* 35 ILM 809 (1996)(possession of nuclear weapons not *per se* unlawful; use of nuclear weapons must conform to the U.N. Charter and the law of war) .

¹⁵Treaty on the Non-Proliferation of Nuclear Weapons, 21 UST 483 (1970) [hereinafter “NPT”] .

¹⁶For a review of the nonproliferation framework, see generally *Proliferation Control Regimes: Background and Status*, CRS Report RL31559.

¹⁷The NPT states that

Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

NPT, *supra* note 15, art. I.

¹⁸As of December, 2002, the NPT had 188 members. Information about membership can be found at [http://www.iaea.org/worldatom/Documents/Legal/npt_status.shtml].

effective international control.”¹⁹ States Parties may withdraw from the NPT on three months’ notice if “extraordinary events, related to the subject matter of [the NPT], have jeopardized the supreme interests of its country.”²⁰

The chief means of verification is through inspections carried out by the International Atomic Energy Agency (“IAEA”). Non-nuclear-weapon States Parties may stockpile weapons-grade nuclear material, provided that the nuclear material is subject to IAEA safeguards. Each non-nuclear State Party is required to negotiate a set of safeguards for verification and accounting of nuclear materials at its declared nuclear sites. No State Party is permitted to transfer nuclear materials or equipment for processing them to any non-nuclear State for peaceful purposes unless the transferred goods are subject to IAEA safeguards.²¹ The IAEA is empowered to conduct “special inspections” if a State Party reports a loss of inspected material, but is not empowered to take any action if it suspects that clandestine nuclear programs are taking place at undisclosed sites. In the event it discovers a violation, the IAEA is to report the noncompliance to the U.N. Security Council and General Assembly, as with other arms control agreements. Neither the NPT nor IAEA regulations provides for any penalty in case of breach.²²

The restriction on the transfer of nuclear weapons and related technology is implemented at the national level through export control laws.²³ Some nations have joined together to form multilateral export control groups in order to coordinate nonproliferation efforts.²⁴ These groups harmonize lists of sensitive materials and technologies that must be controlled in order to prevent proliferation of nuclear weapons and methods by which member countries are to prevent their transfer. Regime members agree to restrict such trade by implementing laws, regulations, and licensing requirements applicable to citizens and residents. They may also agree to share information about exports and licenses. The regimes are voluntary and non-binding.²⁵

¹⁹NPT, *supra* note 15, art. VI.

²⁰*Id.* art. X. North Korea withdrew from the NPT in January, 2003. See North Korea's Nuclear Weapons Program, CRS Issue Brief IB91141.

²¹NPT, *supra* note 15, art. III(2).

²²See Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry*, 43 AM. U. L. REV. 755, 805 (1994).

²³For an overview of U.S. proliferation sanctions, see Nuclear, Biological, Chemical, and Missile Proliferation Sanctions: Selected Current Law, CRS Report RL31502.

²⁴See U.S. General Accounting Office, Nonproliferation: Strategy Needed to Strengthen Multilateral Export Control Regimes, GAO-03-43, October 2002 (assessing principal multilateral export regimes).

²⁵See *id.* at 1.

Chemical Weapons

International efforts to prohibit the use of chemical weapons began more than a century ago as part of the effort to regulate warfare. The Hague Convention of 1907 explicitly forbade the use of poison or poisoned weapons.²⁶ The 1925 Geneva Protocol prohibited the use of asphyxiating, poisonous, or other gases, all analogous liquids, materials or devices, and bacteriological methods of warfare.²⁷ The first convention to prohibit the manufacture and stockpiling of chemical weapons is the Chemical Weapons Convention (“CWC”).²⁸ The CWC calls for all State Parties to eliminate their chemical weapons supplies by 2007 and restrict their trade in “precursors” – chemicals that can be used in the production of weapons as well as for peaceful uses – to other States Parties. States Parties agree to cease production and stockpiling of weapons, declare all facilities that produce restricted chemicals for non-prohibited uses, submit to verification inspections, and pass legislation implementing the CWC, including criminalizing violations.²⁹

The convention also creates the Organization for the Prohibition of Chemical Weapons (“OPCW”) to monitor the implementation of the convention. The OPCW carries out routine inspections of the relevant facilities on the territory of States Parties to verify the accuracy of annual declarations regarding scheduled chemicals. The OPCW may also carry out a “challenge” inspection in response to allegations of noncompliance by one State Party with respect to another. The Conference of States Parties addresses concerns over noncompliance, but other than requesting a breaching member to comply or requesting action on the part of the U.N. Security Council, the

²⁶See “Regulations Respecting the Laws and Customs of War on Land,” annexed to Hague Convention No. IV art. 23(a), 36 Stat. 2277 (1907).

²⁷Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, 26 U.S.T. 571 (1925) [“Geneva Protocol”]. The United States ratified the Protocol in 1975.

²⁸Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter “CWC”]. The United States ratified the CWC in 1997. There are currently 153 States Parties. For a current status of members, visit [http://www.opcw.org/html/db/members_frameset.html].

²⁹*Id.* art. VII(1) requires each member State to:

- (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;
- (b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and
- (c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

For details on U.S. implementing law for the CWC, see Chemical Weapons Convention: Issues for Congress, CRS Issue Brief IB94029.

extent of remedial measures that might be imposed by the Conference is not defined.³⁰

Biological Weapons

Biological weapons were first addressed in the Geneva Protocol of 1925,³¹ which banned only their use and not their manufacture, stockpiling, or transfer to other States. The Biological Weapons Convention (“BWC”)³² addresses the development, production, acquisition, or stockpiling of “[m]icrobial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes” as well as “[w]eapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.”³³ States Parties to the BWC undertake to prohibit the above conduct, destroy biological weapons supplies already on hand, and “not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in article I of [the BWC].”³⁴

The BWC does not contain provisions for verifying compliance of member States. Efforts are underway to negotiate a protocol to strengthen the BWC by creating a body to inspect compliance based on the model of the CWC.³⁵ The Bush Administration rejected the BWC Protocol while it was being drafted, objecting to its “approaches to the issue.”³⁶ A State Party that believes another State Party to be in breach of its obligations may complain and present evidence to the U.N. Security Council. The Security Council may initiate an investigation, with which the accused

³⁰See Kellman, *supra* note 22, at 815.

³¹See Geneva Protocol, *supra* note 27 (States Parties agree to refrain from use of “bacteriological” weapons).

³²Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter “BWC”]. As of October 2002, there were 146 States Parties. For membership status, visit [<http://www.opbw.org/>].

³³BWC, *supra* note 32, art. I.

³⁴*Id.* art. III.

³⁵See (Draft “Rolling Text” of a) Protocol to the Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their destruction, BWC Doc. BWC/AD HOC GROUP/55-1, Annex I, at [<http://www.opbw.org/ahg/docs/rolling%20text%20and%20annexes.pdf>] [hereinafter BWC Protocol]; Jeremy Ostrander, *Changing Direction on Non-nuclear Arms Control? American Exceptionalism, Power, and Constancy*, 21 BERKELEY J. INT’L L. 495, 501-02 (2003)(providing overview of BCW Protocol).

³⁶See Statement by the United States to the Ad Hoc Group of Biological Weapons Convention States Parties, Ambassador Donald Mahley, U.S. Special Negotiator for Chemical and Biological Arms Control Issues, July 25, 2001, *available at* [<http://www.state.gov/t/ac/rls/rm/2001/5497pf.htm>] (Last visited Sept. 3, 2003).

is bound to cooperate,³⁷ but no further remedial measures are specified. States may withdraw from the BWC on three months' notice.³⁸

Limitation on Enforcement

Although most observers conclude that arms control treaties have had important restraining effects on the proliferation of weapons of mass destruction, it is apparent that the conventions only apply to States that choose to join them and remain party to them. Non-member States may have difficulty procuring WMD-related technology and materials from States Parties to the respective treaties, but may trade freely among themselves and are under no legal bounds to refrain from stockpiling such weapons or transferring them to terrorist organizations and other entities, or from conducting research to develop new ones. States Parties participate on a voluntary basis, and may choose to back out of the conventions at any time, as was the case when North Korea backed out of the NPT. The success of the arrangements depends on the cooperation of member States and their ability and willingness to enforce their own laws prohibiting acquisitions and exports of WMD-related materials.

Jurisdiction under International Law

The concept of 'sovereignty' lies at the heart of the international political system. Nation-states (States) are considered the "international persons" who are both the creators and the subjects of international law. Each State is independent and has supreme authority over its territory and general authority over its citizens. The term "jurisdiction" refers to the authority of the State to affect the legal interests of individuals and entities. Jurisdiction may describe a State's authority to make its law applicable to certain actors, events, or things (jurisdiction to prescribe); a State's authority to subject certain persons or things to the processes of its courts (jurisdiction to adjudicate); or a State's authority to compel compliance with its laws and punish transgressors (jurisdiction to enforce).³⁹ The ability to interdict, seize, and destroy weapons would most significantly implicate the jurisdiction to prescribe and enforce under international law.

A State's ability legally to assert jurisdiction over persons and things within its reach depends on principles of international law designed to prioritize the rights of various States which may have a claim to jurisdiction over a matter. Historically, the most commonly asserted basis for jurisdiction is the "territoriality principle" (determining jurisdiction by reference to the place where the offense is committed).⁴⁰ Other bases of jurisdiction include the "nationality principle" (determining

³⁷BWC, *supra* note 32, art. VI.

³⁸*Id.* art. XIII.

³⁹See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401 [hereinafter "RESTATEMENT"].

⁴⁰See *id.* § 402, at comment c.

jurisdiction by reference to the nationality of the person accused of committing the offense); the “protective principle” (determining jurisdiction by reference to the national interest injured by the offense); and the “passive personality principle” (determining jurisdiction by reference to the nationality of the victim). Where more than one State can assert jurisdiction over a particular matter, the State with the greatest interest should prevail.⁴¹

The right of each state to control its sovereign territory and the territorial waters extending no more than 12 miles from its coast (“territorial sea”) is well-recognized in international law. States may also exercise extraterritorial jurisdiction under certain circumstances, but in general, this does not include the right to enforce laws on the territory of another State without that State’s permission. For certain crimes, there may exist “universal jurisdiction” permitting a State to try crimes that occurred outside of its territory that did not involve any of its nationals, but the scope of universal jurisdiction is not well-settled, and may not include the authority to take enforcement action on the territory of another state without its permission. At any rate, the possession or delivery of WMD or related materials is not generally recognized as a crime subject to universal jurisdiction, like such international crimes as piracy or slave trade.

Under international law, the United States clearly has authority to regulate the possession or transfer of WMD materials within or across its borders and, subject to any right to innocent passage,⁴² within its territorial waters and airspace. The United States can also place restrictions on the conduct of U.S. citizens anywhere in the world⁴³ with regard to WMD under the principle of nationality;⁴⁴ however, that authority does not encompass a right to carry out law enforcement activities in another State without its permission. Furthermore, if U.S. law enforcement or military forces encounter WMD trade outside the territory of the United States, even

⁴¹See *id.* § 403. An evaluation of whether exercise of jurisdiction is reasonable, or to determine which country has the greatest interest in pursuing a case, includes the territorial link between the State and the regulated conduct or its effects; the connection between the State and the person principally responsible for the regulated conduct or the persons the regulation is designed to protect (such as nationality or residence); the relative importance for the State to regulate the activity; the extent to which another State may have an interest in regulating the activity; and the likelihood of conflict with regulation by another State, among other considerations.

⁴²Foreign flagged vessels have a right of unimpeded passage through the territorial sea of a coastal state provided their voyage is “innocent.” UNCLOS, *supra* note 47, art. 17; see generally Donald R Rothwell, *Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice* in NAVIGATIONAL RIGHTS AND FREEDOMS AND THE NEW LAW OF THE SEA 74 (2000). The coastal State may impose regulations for ships carrying “inherently dangerous or noxious substances” or limit these ships to the special sea lanes. UNCLOS, *supra* note 47, art. 22(2). See *infra* section entitled “Territorial Seas.”

⁴³U.S. citizens abroad are also subject to the jurisdiction of the State on whose territory they are present, and may also be liable for crimes against a State or its citizens even when the crime is committed outside of the territory of that state. Citizens traveling abroad may find themselves subject to conflicting obligations.

⁴⁴See RESTATEMENT, *supra* note 39, § 402(2).

if the activity is unlawful under the laws of the State where it takes place or violates the international obligations of any State, there is no automatic authority under international law for U.S. forces to take action to thwart it.

Efforts to interdict WMD-related materials outside the territory of the United States would fall within the boundaries of customary international law, including the law of the sea, and any relevant multilateral or bilateral agreements the United States has entered into. Specific instances determined by the United Nations Security Council to constitute aggression or a threat to international peace and security may be dealt with through action under Chapter VII of the U.N. Charter.⁴⁵ Specific threats to the United States that amount to an armed attack or imminent threat of an armed attack may justify a belligerent response, such as the implementation of a blockade or the use of armed force in self defense. Such a response could draw reactions from other States and possibly escalate into a full-blown armed conflict.

Thus, the permissibility of options available to combat the proliferation of WMD varies according to where the action takes place and whose laws are said to be broken. While enforcement activity by a sovereign power over its own territory has relatively few international implications, actions in the territory of another State would implicate the sovereignty of that State, and would be subject to that State's terms of agreement or willingness and capacity to resist. Enforcement action in places where no State has sovereign authority, such as the high seas, may meet with relatively light resistance from other States, but remains subject to international law.

The Law of the Sea

The law of the sea divides authority among nations to conduct activity in or above the oceans and external waterways that both divide and connect nations. The basic rules of international law with respect to jurisdiction over vessels on the high seas are set forth in the Convention on the High Seas⁴⁶ and the more recent United Nations Law of the Sea Convention (UNCLOS).⁴⁷ The United States is a Party to the first convention and is a signatory, but not a Party, to UNCLOS.⁴⁸ However, even while objecting to certain parts of the latter convention when it was first concluded in 1982, the United States has acknowledged that its provisions concerning

⁴⁵For example, in 1990 the U.N. Security Council authorized member states to enforce sanctions against Iraq. Coalition naval forces intercepted more than 15,000 vessels pursuant to Security Council resolutions 661, 665, and 670. See Lois E. Fielding, *Maritime Interception Centerpiece of Economic Sanctions in the New World Order*, 53 LA. L. REV. 1191, 1192-94 (1993)(suggesting the "Persian Gulf interception" could serve as a paradigm for maritime interdiction to maintain peace and stability of the world order).

⁴⁶Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

⁴⁷United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc A/CONF.62/122 (1982) (entered into force Nov. 16, 1994)[hereinafter "UNCLOS"]; S. TREATY DOC. 103-39 (Oct. 7, 1994).

⁴⁸For a discussion of issues surrounding possible U.S. ratification, see The Law of the Sea Convention and U.S. Policy, CRS Issue Brief IB95010.

navigation and the uses of the oceans “generally confirm existing maritime law and practice and fairly balance the interests of all states.”⁴⁹ Both conventions affirm that the high seas are open to all States, that freedom of navigation is a basic freedom of the high seas, and that every State has “the right to sail ships under its flag on the high seas.”⁵⁰ The law of the sea balances the rights of maritime States to navigate freely with the rights of coastal States to maintain security. It also deals with some aspects of air transportation, applying to aircraft some, but not all, of the rules that apply to maritime vessels.

Legal Divisions of Waters

Under the law of the sea, the world’s waters are divided into two basic categories: national and international waters.⁵¹ The legal status of the waters determines the rights and obligations of States and their vessels, public and private. National waters include internal waters (lakes and rivers, some harbors and bays, and other waters that lie between the actual shoreline and the claimed baseline⁵²) of a coastal State and its territorial sea. The State has complete sovereign control over internal waters, and consent must be given for any vessel to enter or for aircraft to fly over it except in cases of emergency.⁵³ Any private vessel that enters the internal waters of a coastal State is subject to the jurisdiction of that State and may be stopped and searched by military or law enforcement personnel in accordance with the domestic law of the State.

Territorial Seas. A coastal State may claim sovereignty over the waters extending “up to a limit not exceeding 12 nautical miles” beyond the baseline as its territorial sea.⁵⁴ A State may exercise sovereignty over its territorial sea, but its rights are subject to foreign vessels’ right of *innocent passage*. UNCLOS provides that foreign flagged vessels have the right of unimpeded passage through the territorial sea of a coastal State provided passage is “innocent,” meaning the ship’s conduct is “not prejudicial to the peace, good order or security of the coastal State” and takes

⁴⁹“Statement on United States Oceans Policy of March 10, 1983,” PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES – RONALD REAGAN 1983, Book I, at 378. After renegotiation of the part of UNCLOS concerning deep seabed mining, President Clinton submitted the convention to the Senate for its advice and consent in 1994; it remains pending in the Senate Foreign Relations Committee. S. TREATY DOC. 103-39 (Oct. 7, 1994).

⁵⁰Convention on the High Seas, *supra* note 46, arts. 2 and 4; UNCLOS, *supra* note 47, arts. 87 and 90.

⁵¹See ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 14 (A.R. Thomas and James C. Duncan, eds., 1999)[hereinafter CDR’S HANDBOOK].

⁵²Baselines are ordinarily set at the low-water mark of a coast as annotated on large-scale charts issued by the coastal State. See John Astley and Michael Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F. L. Rev. 119, 122 (1997) (explaining how maritime baselines are drawn and why they are frequently subjects of dispute).

⁵³See CDR’S HANDBOOK, *supra* note 51, at 215 (ports may not be closed to genuinely distressed vessels).

⁵⁴UNCLOS, *supra* note 47, art. 3.

place in conformity with international law.⁵⁵ The right of innocent passage does not apply to aircraft. Conduct that is considered prejudicial includes military exercises, launching of aircraft or weapons, intelligence collection, research, fishing, or dumping pollutants.⁵⁶ Submarines must remain on the surface during their voyage through territorial seas.⁵⁷ Vessels may drop anchor or participate in a rescue mission only in case of distress.⁵⁸ It is worth noting that cargo, destination, or ultimate purpose are not among the criteria to be used to determine whether passage is innocent.⁵⁹

The coastal State is permitted to implement certain regulations in its territorial sea if necessary to protect resources, for example, so long as the restrictions are necessary and reasonable, are implemented in a non-discriminatory fashion, and do not have the practical effect of denying or impairing the right of innocent passage. While the conventions do not require notification or permission of the coastal State in order for foreign flagged vessels to transit through a territorial sea, some States have nonetheless prescribed special measures with respect to warships.⁶⁰ The United States takes the position that such measures do not comport with the law of the sea, and frequently carries out Freedom of Navigation (FON) exercises to demonstrate its non-acquiescence to the claimed rights.⁶¹

Contiguous Zones and Exclusive Economic Zones (EEZ). The Conventions also recognize that every coastal State may lay more limited claim to a number of maritime zones in the international waters extending beyond the territorial sea. A State may establish a zone adjacent to its territorial sea as a “contiguous zone.” Within this zone the coastal State is not sovereign, but it may exercise the control necessary to prevent and punish infringements of the customs, fiscal, immigration, and sanitary laws and regulations that apply in its territorial sea. The contiguous zone may extend up to 24 miles from the coast. Up to 200 miles from the coast may be claimed as an Exclusive Economic Zone (EEZ), in which the coastal State may exploit the natural resources. For the purpose of exercising jurisdiction to enforce the law, the areas beyond the territorial sea of any coastal State are treated as the high seas.

⁵⁵*Id.* arts. 17-19.

⁵⁶*Id.* art. 19.

⁵⁷*Id.* art. 20.

⁵⁸United Nations Convention on the Territorial Sea and the Contiguous Zone 29 April 1958, art. 14(3), 15 UST 1606; Convention on the High Seas, *supra* note 46, art. 12.; UNCLOS, *supra* note 47 art. 18.

⁵⁹See U.S. ARMY JUDGE ADVOCATE GENERAL’S SCHOOL, OPERATIONAL LAW HANDBOOK, Chapter 7, at 6 (2003). Some countries have taken the position that nuclear powered warships and vessels carrying nuclear materials may be subject to special requirements. See A.V. Lowe, *The Commander’s Handbook on the Law of Naval Operations and the Contemporary Law of the Sea*, in THE LAW OF NAVAL OPERATIONS 109, 115-16 (Robertson ed. 1991)(noting that regulations that amount to a denial of passage are likely unlawful).

⁶⁰See Astley and Schmitt, *supra* note 52, at 132.

⁶¹*Id.*

Straits. Straits overlapped by the territorial seas of coastal nations that are used for international navigation from one part of the high seas or an exclusive economic zone to another similar area are subject to a special regime different from that of ordinary territorial seas, known as *transit passage*.⁶² The vessels and aircraft of all nations have the right to unimpeded transit through the straits in their ordinary mode of travel (submarines may remain submerged). Ships and aircraft navigating through straits must proceed without delay, must refrain from using or threatening to use force, and may not engage in any activities other than those incident to their normal and expeditious travel.⁶³ Coastal nations may not suspend or hamper the right of transit when they are not at war, even with respect to warships of belligerent nations at war with others.⁶⁴ However, coastal States may impose requirements for safe navigation, such as requiring ships to use delineated shipping lanes.⁶⁵ Archipelagic waters are treated similarly.⁶⁶

The High Seas. According to the 1958 Convention on the High Seas, the term “high seas” means “all parts of the sea that are not included in the territorial sea or in the internal waters of a state.”⁶⁷ Incorporating customary international law, the 1958 Convention further states that “no State may validly purport to subject any part of them to its sovereignty.” The ships of all nations, whether coastal or land-locked, enjoy the freedom to navigate, fish, and lay pipelines or cables.⁶⁸ UNCLOS adds two new freedoms: to conduct scientific research and to build artificial islands and other installations (subject to Part IV of UNCLOS).⁶⁹ These freedoms are to be exercised with “due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.”⁷⁰

Legal Status of Vessels

For determining 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 some private entity. Ordinarily, on the high seas, a ship is under the “exclusive jurisdiction” of the State whose flag it flies.⁷¹ Warships and State-owned or operated vessels “used only on government non-commercial service” are said to enjoy

⁶²UNCLOS, *supra* note 47, arts. 37 *et seq.* The Convention on the High Seas did not include a right of transit passage.

⁶³UNCLOS, *supra* note 47, art. 39(1). Ships may drop anchor or carry out other necessary activities in case of distress or *force majeure*.

⁶⁴UNCLOS, *supra* note 47, art. 44; *see* CDR’S HANDBOOK, *supra* note 51, at 125.

⁶⁵UNCLOS, *supra* note 47, art. 41.

⁶⁶*See id.* art. 53.

⁶⁷Convention on the High Seas, *supra* note 46, art. 1.

⁶⁸*Id.* art. 2.

⁶⁹UNCLOS, *supra* note 47, art. 87.

⁷⁰*Id.*

⁷¹Convention on the High Seas, *supra* note 46, art. 11; UNCLOS, *supra* note 47, art. 94.

“complete immunity” from the jurisdiction of non-flag States.⁷² Merchant ships, on the other hand, are subject to a number of exceptions to exclusive flag State jurisdiction.

Nationality. The Convention on the High Seas and UNCLOS both mandate that ships may sail “under the flag of one State only” and that “[a] ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of its registry.”⁷³ Both further mandate that every State “shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag.”⁷⁴ States may maintain “open registries” of vessels, meaning a foreign national may register a vessel and have the right to fly that State’s flag as a “flag of convenience,” enjoying the protection of that State.⁷⁵ A ship that flies the flags of two or more States, or that flies no flag at all, is considered stateless.

Status of Warships. Warships are defined as ships belonging to the armed forces of a State and bearing its flag, commanded by a commissioned officer of that State and operated by a crew that is under the discipline of that State’s armed forces.⁷⁶ Warships enjoy sovereign immunity and are not subject to arrest and search by the warships of other States on the high seas or in territorial seas. Police and port authorities may only board a warship with the permission of the Commanding Officer. Warships are exempt from foreign regulations but are bound to comply with established principles of international law. A warship is in effect the sovereign territory of the country to which it belongs whether it is at sea or pierside in a foreign port. A warship whose conduct does not conform with international principles may be asked by the coastal State to leave its territorial waters, and is bound to comply with such a request.⁷⁷

Airspace and Aircraft

Prior to the advent of the airplane, the concept of sovereignty primarily concerned rights over land and sea. As aerospace technologies developed at the start of the twentieth century, making it possible for nations to exert some actual control over activities in the skies above them, the concept of exclusive sovereignty over

⁷²Convention on the High Seas, *supra* note 46, arts. 8 and 9; UNCLOS, *supra* note 47, arts. 95 and 96.

⁷³Convention on the High Seas, *supra* note 46, art. 6; UNCLOS, *supra* note 47, art. 92.

⁷⁴Convention on the High Seas, *supra* note 46, art. 5; UNCLOS, *supra* note 47, art. 91.

⁷⁵There must be a genuine link between the vessel and the flag State. Convention on the High Seas, *supra* note 46, art. 5. The United States the position that only the flag State may challenge the validity of a registration. See Restatement, *supra* note 39, § 501 (citing *Lauritzen v. Larsen*, 345 U.S. 571 (1953)).

⁷⁶Convention on the High Seas, *supra* note 46, art. 82; UNCLOS, *supra* note 47, art. 29.

⁷⁷UNCLOS, *supra* note 47, art. 30; Convention on the Territorial Sea and the Contiguous Zone, *supra* note 58, art. 23.

airspace super-adjacent to the territory of a State quickly coalesced into customary international law.⁷⁸ While freedom of navigation for commercial purposes was supported in theory, States also saw the military threat made possible by air power as a concern.⁷⁹ As a result, some parts of the customary law of the sea have adapted to apply to aircraft, but other law has been developed through treaty.⁸⁰

Law of the Sea Conventions. Where airspace is treated in the conventions on the law of the sea, it is generally divided into national and international airspace, with national airspace including that above the territorial sea. There is no right of innocent passage for overflight of the territorial sea of a coastal State, but the rules of transit passage over straits and archipelagic waters apply to aircraft as well as ships, even though the airspace is considered national. The Convention on the High Seas includes the airspace above international waters in the freedom to navigate.⁸¹ It is unclear whether rights and privileges accorded to “ships” extend by analogy to aircraft where the conventions do not specifically address them, such as the right to land an aircraft without permission in situations of distress.⁸²

Chicago Convention. The 1944 Convention on International Civil Aviation (Chicago Aviation) explicitly recognizes that “every State has complete and exclusive sovereignty over the airspace above its territory.”⁸³ “Territory” includes the territorial seas.⁸⁴ Presumably, all non-territorial airspace is international.

The Chicago Convention applies on its face only to civil aircraft, but specifies which aircraft are considered state aircraft (those used in military, customs, or police services) and places some duties and restrictions on them. Article 3 states that “[n]o state aircraft ... shall fly over the territory of another State or land thereon without authorization...” Contracting States commit to “hav[ing] due regard for the safety of navigation of civil aircraft” when issuing regulations for their state aircraft.

⁷⁸See Major Stephen M. Shrewsbury, *September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty*, 68 J. AIR L. & COM. 115, 130 (2003) (arguing that article 1 of the Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173, effectively codified customary law developed over the previous twenty years).

⁷⁹See *id.*

⁸⁰See PAUL STEPHEN DEMPSEY, LAW AND FOREIGN POLICY IN INTERNATIONAL AVIATION 7-8 (1987)(noting that the “freedom of the seas” model was rejected for the airways in favor of “air sovereignty,” insuring that national governments would play a dominant role in aviation development).

⁸¹Convention on the High Seas, *supra* note 46, art. 2; UNCLOS, *supra* note 47, art. 2(2).

⁸²The texts of the conventions are silent on this point, however, States have asserted the right to land aircraft on foreign soil in case of emergency. See, e.g., Collision of U.S. and Chinese Aircraft: Selected Legal Considerations, CRS Report for Congress RS20876.

⁸³Convention on International Civil Aviation, Dec. 7, 1944, art. 1, 61 Stat. 1180, T.I.A.S. No. 1591 [hereinafter “Chicago Convention”].

⁸⁴*Id.* art. 2.

Contracting States also agree “not to use civil aviation for any purpose inconsistent with the aims of [the] Convention.”⁸⁵

While the Chicago Convention did not adopt the liberal freedom of navigation regime for aircraft supported by the United States,⁸⁶ the Convention does permit the civil aircraft of contracting States that are not engaged in scheduled flights to “make flights into” each others’ territories and to make stops for non-traffic purposes without the necessity of obtaining prior permission ...” subject to a possible requirement for landing.⁸⁷ States may regulate air traffic above their territories without distinction based on nationality (with respect to other contracting States).⁸⁸ However, States may designate areas off-limits for reasons of military necessity or public safety, provided no distinction is made between nationality of the aircraft.⁸⁹ Scheduled flight services may be operated over or into the territory of a contracting State only with that State’s permission and in accordance with the terms it may set.⁹⁰ Overflights using pilotless aircraft require special authorization.⁹¹

Nationality of Aircraft. Like ships on the seas, aircraft must be registered in one State only,⁹² and must bear the appropriate markings indicating nationality and registrations.⁹³ Civil aircraft are subject to regulation both by the State of registration and, while flying over the territory of another State, that State’s applicable regulations. Civil aircraft are also required to carry certain documents, including a certification of airworthiness, log book, radio license, a passenger list and a manifest of cargo.⁹⁴ No munitions or implements of war may be carried as cargo over a State’s territory without its permission.⁹⁵ States may make other restrictions with regard to cargo for reasons of public order and safety, provided the rules do not discriminate based on nationality.

⁸⁵*Id.* art. 4. These aims include the avoidance of international friction and the promotion of international cooperation, in furtherance of maintaining peace. *See id.* preamble. However, it does not prevent States from acting in self-defense in accordance with the United Nations Charter. *See id.* art. 89 (“In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council.”).

⁸⁶*See* ANDREAS F. LOWENFELD, *AVIATION LAW: CASES AND MATERIALS* 2-6 (1981); Dempsey, *supra* note 80, at 11 (describing the “five freedoms” called for by American negotiators).

⁸⁷Chicago Convention, *supra* note 83, art. 5.

⁸⁸*Id.* arts. 11-12.

⁸⁹*Id.* art. 9.

⁹⁰*Id.* art. 6.

⁹¹*Id.* art. 8.

⁹²*Id.* arts. 18-19.

⁹³*Id.* art. 20.

⁹⁴*Id.* art. 29.

⁹⁵*Id.* art. 35.

State Aircraft. Under the Chicago Convention, the status of state aircraft is determined according to use rather than strictly by state ownership.⁹⁶ The Chicago Convention does not, however, enumerate rules governing state aircraft. Military aircraft, probably comprising the largest category of state aircraft, are treated much like warships. Military aircraft are defined under international law as those aircraft “operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline,”⁹⁷ and are exempt from other States’ law enforcement measures that apply to civil aircraft flying over their territory.⁹⁸ The crew of military aircraft are immune from the jurisdiction of the territorial sovereign for acts performed during official duties. Foreign officials may not board a state or military aircraft without the consent of its commander, and in the event of a dispute regarding customs, immigration, or quarantine, the host nation is limited to requesting that the state aircraft leave the national territory.⁹⁹

Enforcement Options

The following sections address the rights and obligations of States and non-public vessels and aircraft, which vary depending not only on location and status but according to whether the situation is considered one of war or peace, or somewhere in between. During peacetime, States generally employ law enforcement techniques, for example, to restrict trade or interdict unlawful materials. International law also permits States to enforce certain international prohibitions on or above the high seas.

Law Enforcement in National Waters and Airspace

The ability of a coastal State to assert jurisdiction over vessels of non-flag States that do not enjoy sovereign immunity depends on which maritime zone the vessel is located in and what it is doing. Maritime law enforcement measures may be taken when there are reasonable grounds for believing that a vessel is violating the validly applicable laws of the coastal State.¹⁰⁰ A coastal State may interdict ships suspected of engaging in illicit drug traffic, for example, without obtaining the permission of the flag State, if the suspect vessel is located in the State’s internal waters, archipelagic waters, territorial sea, or, in some circumstances, its contiguous zone.¹⁰¹ Warships of the coastal State are permitted to conduct hot pursuit of a foreign ship

⁹⁶*Id.* art. 4. See also Michel Bourbonniere and Louis Haeck, *Military Aircraft and International Law: Chicago Opus 3*, 66 J. AIR L. & COM. 885, 887-88 (2001)(discussing determination of aircraft status).

⁹⁷See CDR’s Handbook, *supra* note 51, § 2.2.1. Civilian owned and operated aircraft contracted for use of the armed forces may be designated as “state aircraft,” in which case they would also qualify for sovereign immunity. See *id.* § 2.2.3.

⁹⁸See Bourbonniere and Haeck, *supra* note 96, at 891.

⁹⁹See CDR’s Handbook, *supra* note 51, at 114.

¹⁰⁰*Id.* at 235.

¹⁰¹See *id.*

beyond the limits of its territorial sea or contiguous zone if there is reason to believe the ship violated the applicable laws and regulations of that State and the pursuit is not interrupted.¹⁰² The coastal State may not discriminate against ships based on their nationality or based on their cargoes to, from, or on behalf of any State.¹⁰³ The coastal State should not exercise criminal jurisdiction on board a foreign ship passing innocently through its territorial sea for crimes committed on board the ship unless the consequences of the crime extend to the coastal State, the crime disturbs the “peace or good order,” the flag State or the captain of the vessel requests assistance, or such measures are necessary to suppress the illicit traffic of drugs.¹⁰⁴

Law Enforcement on the High Seas

Ordinarily, warships and other vessels used by States to enforce their laws on the high seas may take action only against ships of the enforcing State’s nationality or ships with ambiguous nationality. However, UNCLOS and the Convention on the High Seas both identify certain activities as unlawful and allow States to take enforcement measures to suppress them.

Unlawful Acts on the High Seas. Both conventions mandate all States to take or adopt “effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flags for that purpose”¹⁰⁵ and to “co-operate to the fullest possible extent in the repression of piracy on the high seas.”¹⁰⁶ Piracy is defined as illegal acts of violence, detention, or depredation (plundering, robbing, or pillaging) for private ends in or over international waters.¹⁰⁷ Mutiny and hijacking do not amount to piracy unless the ship or aircraft seized is thereafter used to commit piratical acts.¹⁰⁸ Acts that would constitute piracy if committed for private ends are not piratical if committed for political ends, for example, by insurgents not recognized as belligerents.¹⁰⁹

UNCLOS further mandates that all States “co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions” and “co-operate in the suppression of unauthorized broadcasting from the high seas.”¹¹⁰ Neither convention addresses the transport of weapons of mass destruction or of materials useful in the production of such weapons.

¹⁰²*See id.* at 432.

¹⁰³Convention on the Territorial Sea and the Contiguous Zone, *supra* note 58, art. 15.

¹⁰⁴*Id.* art. 19.

¹⁰⁵Convention on the High Seas, Art. 13; UNCLOS, *supra* note 47, art. 99.

¹⁰⁶Convention on the High Seas, Art. 14; UNCLOS, *supra* note 47, art. 100.

¹⁰⁷CDR’S HANDBOOK, *supra* note 51, at 222.

¹⁰⁸*Id.* at 224.

¹⁰⁹*Id.*

¹¹⁰UNCLOS, *supra* note 47, arts. 108-09.

Right of Approach and Visit. Merchant vessels, whether privately owned or State owned, may be stopped and boarded by the warships of non-flag States under certain circumstances. The Convention on the High Seas specifies that a warship may stop and board a foreign merchant vessel if “there is reasonable ground for suspecting (a) [t]hat the ship is engaged in piracy; or (b) [t]hat the ship is engaged in the slave trade; or (c) [t]hat, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.”¹¹¹ UNCLOS reiterates those justifications and adds two more – (1) “the ship is engaged in unauthorized broadcasting ...,” and (2) “the ship is without nationality.”¹¹² With respect to the latter justification, UNCLOS replicates language in the Convention on the High Seas providing that “[a] ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.”¹¹³

Both conventions provide that in the specified circumstances a warship “may send a boat under the command of an officer to the suspected ship,” “proceed to verify the ship’s right to fly its flag,” and “if suspicion remains after the documents have been checked, ... proceed to a further examination on board the ship, which must be carried out with all possible consideration.”¹¹⁴

Enforcement Measures. With the exception of piracy and international broadcasting, however, neither convention specifies what actions a warship may take if the initial or further examination confirms the suspicions that justified the boarding in the first place. With respect to piracy, both conventions state that

[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.¹¹⁵

In the event the suspected pirate ship fleeing the pursuit of a warship enters a foreign territorial sea, the pursuing warship should attempt to obtain the permission of the State with sovereignty over the area prior to entering. If circumstances do not allow such communication, the warship may be able to enter the territorial waters of another state if necessary, but must depart immediately upon the request of the coastal State.¹¹⁶ A similar rule applies to piratical aircraft that flee into the national airspace of another State.

¹¹¹Convention on the High Seas, *supra* note 46, art. 21.

¹¹²UNCLOS, *supra* note 47, art. 110.

¹¹³Convention on the High Seas, *supra* note 46, Art. 6; UNCLOS, *supra* note 47, art. 92.

¹¹⁴Convention on the High Seas, *supra* note 46, art. 22; UNCLOS, *supra* note 47, art. 110.

¹¹⁵Convention on the High Seas, *supra* note 46, art. 19; UNCLOS, *supra* note 47, art. 105.

¹¹⁶CDR’S HANDBOOK, *supra* note 51, at 226.

With respect to a ship engaged in unauthorized international broadcasting, UNCLOS provides that a State having jurisdiction¹¹⁷ “may ... arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus.”¹¹⁸ Otherwise, both conventions simply state that “if the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.”¹¹⁹

Although neither convention explicitly says so, it also appears that any warship may seize a merchant vessel that has no nationality. In *United States v. Cortes*,¹²⁰ for instance, the United States Court of Appeals for the Fifth Circuit held that the Convention on the High Seas conferred no rights whatsoever on stateless vessels and upheld the seizure of an unregistered ship found by the Coast Guard to be transporting marijuana. It stated:

To secure the protection afforded foreign merchant vessels on the high seas, a vessel must accept the duties imposed by registration. This the PITER failed to do; her crew cannot complain of the results.¹²¹

Thus, with the exception of piracy, international broadcasting, and stateless vessels, both the Convention on the High Seas and UNCLOS are silent with regard to whether the consent of the flag State or further international agreement is necessary for a State to seize a ship flying the flag of another State, confiscate its cargo, or arrest and prosecute its officers and crew for engaging in other prohibited activities.¹²² Absent consent or agreement, the exercise of jurisdiction over the

¹¹⁷The following states have jurisdiction over cases of unauthorized broadcasting:

- (a) the flag State of the ship;
- (b) the State of registry of the installation;
- (c) the State of which the person is a national;
- (d) any State where the transmissions can be received; or
- (e) any State where authorized radio communication is suffering interference.

UNCLOS, *supra* note 47, art. 109.

¹¹⁸*Id.*

¹¹⁹Convention on the High Seas, Art. 22; UNCLOS, *supra* note 47, art. 110.

¹²⁰588 F.2d 106 (5th Cir. 1979).

¹²¹*Id.* at 110.

¹²²RESTATEMENT, *supra* note 39, § 522 reporter’s note 3 notes that “[a] number of 19th century treaties authorized naval and law enforcement vessels of a state to visit, inspect, and seize vessels of another state engaged in slave trade and to bring the traders for trial before special mixed courts of justice,” but that “[m]ost of these treaties are no longer in force.” The existing slavery conventions to which the United States is a Party do not confer such authority. See Convention to Suppress the Slave Trade and Slavery, 46 Stat. 2183 (1929) and Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 18 UST 3201 (1967).

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, TIAS ____ (1990) does not itself authorize Member States to seize the flagged
(continued...)

allegedly unlawful activities of a merchant vessel appears to remain the prerogative and responsibility of the flag State. Weapons of mass destruction are not mentioned in UNCLOS or the Convention on the High Seas. It therefore appears that the visit, search, and possible seizure of ships on the high seas that might be engaged in transporting weapons of mass destruction or materials useful in the production of such weapons would not be authorized under the law of the sea as it currently stands. The subject also does not appear to be directly addressed by the agreements and informal arrangements that address the proliferation of weapons of mass destruction,¹²³ nor by the existing multilateral conventions on terrorism.¹²⁴ Such an authorization might well be negotiated on a bilateral or multilateral basis, could be obtained on an *ad hoc* or more permanent basis, and, conceivably, could be given by action of the Security Council.¹²⁵ Otherwise, the interdiction of vessels and aircraft on or over the high seas that are suspected of carrying WMD may only be valid as a legitimate act of self defense or under a theory of “self-help,” as described below.

The Proliferation Security Initiative

The exact contours of the PSI have not yet been finalized, but the eleven PSI States have held three meetings so far and have reportedly reached an agreement in principle, releasing a “statement of interdiction principles” (see Appendix) committing member States to take action “consistent with national legal authorities

¹²²(...continued)

vessels of other States suspected of engaging in the illicit traffic of narcotics but authorizes (1) the flag State to request the assistance of other States on an *ad hoc* basis, (2) a State with reasonable grounds to suspect that a vessel is engaged in such illicit commerce to inform the flag State and to seek permission to take “appropriate measures” on an *ad hoc* basis, and (3) the negotiation of agreements among the Parties permitting each Party to board, search, and take other “appropriate action” regarding the merchant vessels of the other Parties to the agreements suspected of engaging in narcotics trafficking. *See id.* art. 17. The United States has since 1974 reportedly conducted a maritime narcotics interdiction program on the high seas which routinely obtains flag state consent to the search and possible seizure of suspect vessels on a case-by-case basis. *See* DEPARTMENT OF STATE, CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988, Book II (1994), at 1386-99. The U.S. has also entered into bilateral treaties concerning narcotics trafficking that grant standing authority for such searches and seizures. *See, e.g.,* Agreement To Facilitate the Interdiction by the United States of Vessels of the United Kingdom Suspected of Trafficking in Drugs, 33 UST 4224 (1981) and Agreement for the Interdiction of Narcotics Trafficking, TIAS 11123 (1985) (concluded with the Bahamas).

¹²³*See, e.g.,* NPT, *supra* note 15; BWC, *supra* note 32; CWC, *supra* note 28; *see also* Missile Technology Control Regime (MTCR) and International Code of Conduct Against Ballistic Missile Proliferation (ICOC): Background and Issues for Congress, CRS Report RL31848. For a discussion of these and other non-proliferation efforts, *see* Proliferation Control Regimes: Background and Status, CRS Report RL31559.

¹²⁴*See, e.g.,* the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, TIAS ____ (1995) and the Vienna Convention on the Physical Protection of Nuclear Material, TIAS 11080 (1987).

¹²⁵For example, the U.N. Security Council authorized the enforcement of sanctions against Iraq in response to the Iraqi invasion of Kuwait. *See* Fielding, *supra* note 45, at 1200 - 01 (describing Security Council Resolutions authorizing enforcement of sanctions against Iraq).

and relevant international law and frameworks, including the U.N. Security Council.”¹²⁶ According to the PSI nations’ statement, the initiative will target “States or non-state actors of proliferation concern,” which are defined as

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.¹²⁷

The Bush Administration emphasized that the initiative is an effort to coordinate export control regimes that are already in place, rather than a major departure from the current nonproliferation regimes. This statement may represent a reconsideration of the initial goal of the PSI; in announcing the initiative, President Bush explained that the PSI would give member countries the capability to “search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies.”¹²⁸

To the extent that the searches and seizures are carried out on the high seas, the law of the sea would clearly allow a PSI nation warship to stop and search vessels flying its flag or no flag at all, or flying the flag of a State that consents to searches of its ships for that purpose. Presumably, the PSI member States will allow ships flying their flags to be searched for WMD materials prohibited by their laws where reasonable suspicion exists, and non-member States could be asked to consent on an *ad hoc* basis. However, it appears unlikely that States of proliferation concern, such as the Democratic Republic of Korea or Iran, would consent to having their ships boarded and searched for WMD materials, and even if consent were obtained, there is no clear legal authority under international law, as it currently stands, for a State to seize WMD materials it finds on board, even if the flag State is a member of the relevant nonproliferation treaty.

PSI States carrying out interdiction activities at their port facilities have broad authority to inspect vessels and prescribe law restricting the kinds of cargo vessels are permitted to carry into port. However, for a PSI State to stop and search a vessel traveling through its territorial sea could impede the vessel’s right of innocent passage. According to the PSI statement of principles, participating States are encouraged to “stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying [WMD-related] cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified,” and 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.” These activities,

¹²⁶White House Fact Sheet, Proliferation Security Initiative: Statement of Interdiction Principles, Sep. 4, 2003, *available at* [<http://www.whitehouse.gov/news/releases/2003/09/20030904-11.html>] (*See infra* Appendix A).

¹²⁷*Id.*

¹²⁸*See* Bush, *supra* note 9.

however, are to be conducted only “to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks.”

Under traditional international law, the right of coastal States to prescribe law applicable in their territorial seas and contiguous zones are restricted by the vessels’ flag State’s right of free navigation. The PSI States’ ability to intercept and search vessels in those zones may require the consent of the flag-State, unless the vessels’ passage is non-innocent. It is open to debate whether coastal nations have the jurisdiction to prohibit the carrying of all WMD-related materials through their contiguous zones.¹²⁹ Non-participating States may object to a requirement that their vessels submit to inspection prior to entering the territorial seas of a coastal State as an effective suspension of the right of innocent passage.

The interdiction of aircraft suspected of carrying WMD-related materials that occurs in national airspace raises fewer legal issues, since there is no right of innocent passage through airspace. However, international law calls for “due regard” to the safety of civil aircraft. Measures involving the use of force to deny aircraft passage or to enforce landings for inspections could raise objections from other nations.¹³⁰

Belligerent Rights

During an armed conflict, of course, the rules of international law are transformed. The law of neutrality delineates the rights and responsibilities of belligerent and neutral States. In general, a neutral State maintains the basic rights of inviolable territory and the practice of commerce (unless it involves providing contraband to the belligerents), but the neutral State must abstain from participating in the conflict and maintain its impartiality as to the belligerents. Failure of a neutral ship to act accordingly may result in a determination by a belligerent that the neutral has acquired enemy character. Likewise, a belligerent must respect a neutral’s inviolability and its entitlement to trade, but has the right to insist on the neutral’s impartiality and non-involvement in the conflict.

Belligerents are prohibited from conducting hostilities, establishing a base of operations, or seeking sanctuary in neutral territory. The neutral State is responsible for ensuring that its territory is not being used by the belligerents in a manner inconsistent with its neutral status. In the event a neutral is unable or unwilling to police its territory for that purpose, a belligerent may take action to put an end to the misuse, even if such action requires the belligerent to enter the ordinarily inviolable territorial sea of the neutral State. A neutral may prescribe conditions for belligerent warships transiting its territorial seas – or even prohibit their passage altogether – notwithstanding the customary right of innocent passage, as long as the regulations

¹²⁹See Lowe, *supra* note 59, at 115-18.

¹³⁰See Eric Edward Geiser, *The Fog of Peace: The Use of Weapons Against Aircraft in Flight During Peacetime*, 4 J. INT’L LEGAL STUD. 187, 201 (1998)(using the 1983 Soviet shootdown of KAL 007 to illustrate the higher burden of justification to use force against civil aircraft).

are applied impartially. A neutral is not permitted, however, to impede transit through an international strait or archipelagic sea lane.

Under the traditional law of war, belligerents have a right to seize and condemn or destroy the ships and aircraft of the enemy, including commercial craft,¹³¹ to stop and search neutral vessels for contraband, to close the enemy's ports by means of a naval blockade, and of course, to use military force against enemy warships and military aircraft. These belligerent rights, however, may be exercised only on the high seas or within the territorial seas of the belligerents, not within international straits or the territorial sea of a neutral State.¹³²

The Right of Visit and Search. During an armed conflict between States, the warships of a belligerent State have the right to visit and search merchant ships flying the flag of a neutral State and, if the ships are found to be carrying substantial contraband of war to the enemy, to seize and condemn not only the contraband but the vessels as well.¹³³ Goods deemed to be contraband under such circumstances clearly would include weapons of mass destruction and goods useful in their development and production.

The right of visit and search does not extend into the territorial seas of neutral States or international straits overlapped by neutral territorial seas.¹³⁴ Neutral merchant ships are exempt if they are traveling in a convoy under the protection of a neutral warship flying the same flag. Warships are also exempt, but it is unclear whether other State-operated non-commercial vessels are subject to search.¹³⁵

Military aircraft also have the right of visit and search.¹³⁶ A military aircraft engaged in a visit and search mission would direct a suspected vessel to the vicinity of a friendly warship located on the high seas or within the territorial waters of a belligerent State, allowing its crew to conduct the search, or it might direct the vessel to a belligerent port.¹³⁷ To visit and search another aircraft, the military aircraft would escort the suspect craft to the closest belligerent landing strip.

Naval Blockades. An armed conflict could also empower a belligerent State to set up a blockade to prevent ships of every nation from reaching its enemy's harbors with weapons or any other goods. The blockading State must declare the scope of the blockade and enforce it effectively and impartially. Once a blockade is declared, the ships of neutral States with knowledge of its existence are bound to

¹³¹U.S. DEPARTMENT OF STATE, 10 DIGEST OF INTERNATIONAL LAW 644 *et seq.* (Marjorie Whiteman, ed., 1968); 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 409 *et seq.* (2000) ("Ships: Visit and Search").

¹³²*See* Fielding, *supra* note 45, at 1202-03.

¹³³*Id.*

¹³⁴CDR'S HANDBOOK, *supra* note 51, at 388.

¹³⁵*Id.* (citing conflicting authorities).

¹³⁶*Id.* at 389.

¹³⁷*Id.* at 390.

avoid the demarcated areas. Ships that attempt to run the blockade are subject to capture and condemnation, along with their cargo.¹³⁸ As an act of war carried out during an armed conflict between States, a blockade must be asserted in conformity to the U.N. Charter and carried out within the confines of the law of war, in particular, the principles of military necessity and proportionality.

Air Blockade. A blockade may also be effective with respect to civil aircraft. Civil aircraft entering a blockaded zone may be required to land for a visit and search, and are subject to capture if they are found to be carrying contraband or enemy personnel, are operating under enemy control, orders, charter, employment, or direction; do not present valid documentation; or are violating regulations established by a belligerent within the immediate area of naval operations; or are engaged in a breach of blockade.¹³⁹ Another variation on the concept of a blockade of airspace is the “no fly zone,” such as the restrictions imposed by the Security Council on aircraft flying over Bosnia and Herzegovina during the conflict there.¹⁴⁰

Blurring the Boundary between War and Peace

Historically, two different sets of rules applied regarding the use of force between States; one set applied during war and another during peace. However, since the United Nations Charter commits member States to settling their differences peacefully and allows war only in self-defense, States have sometimes sought to carry out acts ordinarily lawful only in the context of war, while at the same time maintaining that they are at peace. Consequently, the boundary between peace and war has become blurred. Some commentators argue that a new paradigm is necessary to provide rules necessary for the protection of States’ interests in light of these changes in the character of international conflict, the greater destructive power of modern weapons, and the emergence of non-state actors capable of mounting attacks against States. The following sections explore the uncertain legal boundaries concerning the use of military force short of war.

The Right of Self Defense. The right of self-defense traditionally recognized 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.¹⁴¹ Traditionally, that right included the use of force to forestall an anticipated attack as well as to respond to an attack. As Great Britain argued in the Caroline incident in 1837¹⁴² or, more recently, as Israel contended in seizing a ship filled with arms bound for Palestine, that traditional right could include not only the

¹³⁸78 AM. JUR. 2D, War. §§ 114, 117.

¹³⁹See INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA § 153 (Louis Doswald-Beck ed. 1995).

¹⁴⁰U.N. Doc. S/RES/781 (1992).

¹⁴¹ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 131, at 361 (“Self-Defence”).

¹⁴²See International Law and the Preemptive Use of Force, CRS Report RS21314.

visit and search of a vessel but also its seizure or destruction. However, these issues remain unsettled.

The collective security provisions of the Charter of the United Nations to some extent have preempted the traditional right of States to use force aggressively,¹⁴³ but the Charter specifically preserves “the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations”¹⁴⁴ Scholars and publicists argue about whether Article 51 affirms the traditional right of States to act in self-defense in its entirety or, as literally read, to allow it only after an armed attack has occurred. Yet even the more expansive reading still includes a requirement that an attack be imminent, and for some observers, the possession of WMD does not constitute an armed attack. Others argue that the concept of imminence as applied to WMD may require some modification.

Circumstances might be cited in which the transport of weapons of mass destruction poses a threat serious enough to meet that test, notably, as claimed during the Cuban Missile Crisis (see *infra*). But more commonly the threat of an attack with such weapons – particularly if they are still in the process of development – may be distant or inchoate. To the extent that is the case, the traditional doctrine of self-defense may not provide firm support for the use of military means to stop merchant vessels transporting weapons of mass destruction or goods useful in the development of such weapons outside the context of an armed conflict.¹⁴⁵

Pacific Blockade. An exception to the notion of the blockade as an act of war might be the so-called “pacific blockade.” Distinguished from the belligerent or wartime blockade, pacific blockade is not intended as a belligerent act and does not give rise to a condition of belligerency unless the State against which the action is taken chooses to resist with force. A pacific blockade consists of naval action taken in peacetime to apply pressure against another nation by preventing the ships of the blockading and the blockaded nation from entering or leaving specified areas of the

¹⁴³59 Stat. 1031 (1945) (Art. 39 *et seq.*).

¹⁴⁴*Id.* art. 51.

¹⁴⁵It might be noted that the traditional doctrine of self-defense may be a sufficient support for naval interdiction to the extent the goods being transported are related in some fashion to the terrorist attacks on the United States of September 11, 2001. Public Law 107-40 specifically invoked the right of self-defense as the justification for its authorization to the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons” The President has used that authority to employ armed force against the Taliban government in Afghanistan and against the terrorist organization Al Qaeda and its members. Although there may be argument over the extent to which the traditional rules regarding the use of armed force apply to non-State actors such as Al Qaeda, it seems clear that the U.S. has had, pursuant to its exercise of its right of self-defense under international law, a legal right to visit, search, and possibly seize vessels owned or operated by the Taliban government as well as those flying the flags of other States which have been carrying material aid to that government. Moreover, it is tenable to contend that the U.S. has a similar legal right with respect to vessels owned or operated by Al Qaeda, its members, or supporters and other vessels suspected of providing material aid to them.

latter's coast. The blockading State is only entitled to detain ships, not to condemn or confiscate them or their cargo. All ships sequestered pursuant to a blockade are to be restored to their owners when the pacific blockade is lifted.¹⁴⁶ Traditionally, the pacific blockade was effective only with respect to the vessels of the blockaded State; interference with vessels of a third State is generally considered impermissible, though practice has varied.¹⁴⁷

Some international legal scholars have regarded the pacific blockade as lawful only as a *reprisal*, i.e., an otherwise unlawful act of self-help by the blockading State in response to an unlawful act on the part of the target State for the purpose of achieving reparations or otherwise settling an international dispute.¹⁴⁸ The legitimacy of reprisals is said to depend on three conditions: that the purpose was to obtain remedy for injury resulting from illegal action, that non-coercive methods to obtain such remedy had failed and that the measures taken were not out of proportion to the injury suffered.

The “quarantine” of Cuba in 1962 in response to Cuba’s procurement of “offensive missiles” from the Soviet Union did not conform to the traditional model of blockade, belligerent or pacific. The term “quarantine” was used to avoid the implication that the United States intended the move as an act of war, while allowing the United States to assert that the vessels of third States were subject to the prohibitions. The United States did not assert the right to self defense under article 51 of the U.N. Charter as a justification for its actions.¹⁴⁹ The strategy was successful in averting war at the time, and appears to have been accepted as valid by the international community; however, the euphemistic “quarantine” does not appear to have been incorporated as a new concept in international law and it involves a distinctive situation, e.g., Cuba was viewed as a surrogate for its supplier, the USSR. Some observers cite U.S. reaction to the Cuban Missile Crisis as an example of adapting international law to deal with new circumstances.¹⁵⁰

Self-help Paradigm in International Law. Some theorists argue that the U.N. Charter may be construed to allow the use of proportionate force to prevent adversaries from producing, purchasing, or otherwise obtaining weapons of mass destruction.¹⁵¹ Most scholars have interpreted Article 2(4) of the U.N. Charter as a broad prohibition on any use of force against another State, except where authorized by the Security Council acting under its Chapter VII authority, or when the use of

¹⁴⁶See 2 OPPENHEIM’S INTERNATIONAL LAW §47 (7th ed. 1952).

¹⁴⁷See *id.* § 46.

¹⁴⁸See *id.* §§ 33-35.

¹⁴⁹See Schmitt, *supra* note 1, at 545-46.

¹⁵⁰See *id.*; Fielding, *supra* note 45, at 1191; Guy B. Roberts, *The Counterproliferation Self-help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT’L L. & POL’Y 483, 527-29 (1999).

¹⁵¹For an overview of different theories that have been advanced to justify preemptive attacks against nuclear facilities, see David Sloss, *Forcible Arms Control: Preemptive Attacks on Nuclear Facilities*, 4 CHI. J. INT’L L. 39, 50 (2003) (analyzing deficiencies of these theories).

force is justified as necessary for self-defense under Article 51.¹⁵² The alternate view interprets the U.N. Charter prohibition on the use of force narrowly to prohibit only certain kinds of armed attacks, namely, those “against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁵³ A surgical strike against a nuclear facility in a proliferant State, so the argument goes, would threaten neither the territorial integrity nor the political independence of a target State, inasmuch as there would be no effort to annex or occupy territory, nor overthrow the current political leadership.¹⁵⁴ The legitimacy of a preventive attack against WMD or their components would rest on an interpretation of whether their destruction comports with the “purpose of the United Nations.”

To the extent that the elimination of WMD in the hands of a perceived unstable State may be seen to enhance international peace and security by promoting disarmament, some argue that an otherwise unlawful attack might be justifiable. For example, Israel’s 1981 aerial bombardment of an Iraqi nuclear power facility, while condemned by the U.N. Security Council,¹⁵⁵ was viewed by some as justifiable under international law and the U.N. Charter.¹⁵⁶ Others argue, however, that the U.N. Charter created the Security Council and entrusted collective security decisions primarily to that body, leaving to member States the inherent right to defend themselves only in case of an armed attack.¹⁵⁷ According to that view, the role of the Security Council under the Charter and self-defense provision in article 51 seem to contradict a narrow interpretation of article 2(4)¹⁵⁸ that would allow each State to decide for itself when a contemplated use of force is within the purpose of the United Nations.

Some argue that, whatever the original intent of the U.N. Charter, States’ practice since 1945 has shown the prohibition against the use of force to exist only on paper, and voluntary compliance with non-proliferation regimes cannot be counted on to rein in proliferant States and do not in any event apply to non-State actors bent on obtaining WMD. Proponents of this view urge the world community to adopt a paradigm shift that would revert to pre-U.N. concepts of international

¹⁵²See Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663, 670 (2003).

¹⁵³U.N. Charter art. 2(4).

¹⁵⁴*But see* Sloss, *supra* note 151, at 50-51 (noting that the “broad interpretation” – holding that all transboundary acts of force are prohibited unless in self-defense or under authority of the U.N.S.C. – is prevalent among scholars).

¹⁵⁵U.N. Doc. S/RES/487 (1981).

¹⁵⁶See Anthony D’Amato, *Israel’s Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM J INTL L 584, 586 (1983) (arguing the sheer destructive force of nuclear weapons may have justified a limited attack even where a similar attack to destroy conventional weapons would not have been justified). Israel asserted that it was in a state of war with Iraq, justifying the air strike as an act of self defense. See Schmitt, *supra* note 1, at 546.

¹⁵⁷See Kearley, *supra* note 152, at 670 (examination of the intent behind the U.N. Charter).

¹⁵⁸See Sloss, *supra* note 151, at 53.

relations, in which nations with sufficient strength were understood to have the power to take self-help measures, including the use of force, to right international wrongs and enforce compliance with international law.¹⁵⁹ Under this view, States would be justified in using preventive or preemptive force to deter plans to acquire WMD, eliminate acquisition programs or destroy WMD components or sites at any stage in the acquisition effort.¹⁶⁰

The “counterproliferation self-help paradigm” is based on the assumption that non-proliferation has become so entrenched in international law that it has reached the status of customary norm,¹⁶¹ binding on all States whether or not they have agreed, by joining the relevant treaties, to desist from developing or acquiring WMD.¹⁶² Under this view, any State that persists in the development or acquisition of WMD, or permits its citizens and residents to do so with impunity, is committing a wrongful act under international law for which other States may demand redress. Thus, although States Parties retained the right to withdraw from the treaties upon giving notice, participation in the various non-proliferation regimes, under this view, has become *jus cogens* – a mandatory and enforceable requirement of international law.¹⁶³

There is some evidence that might support the argument that nonproliferation has become a customary norm.¹⁶⁴ For example, the number of States that have agreed to participate in the nonproliferation regimes provides an indication of the near universal support for them. Furthermore, in making the argument that international law supports the PSI, the Bush Administration cited a statement by the President of the U.N. Security Council in 1992 indicating that the Council considers proliferation of WMD to be a matter that poses a threat to international peace and security.¹⁶⁵ With respect to disarmament, arms control and weapons of mass destruction, the 1992 Statement said

The members of the Council, while fully conscious of the responsibilities of other organs of the United Nations in the fields of

¹⁵⁹See generally Roberts, *supra* note 150.

¹⁶⁰See *id.* at 485.

¹⁶¹Customary norms develop from “a general and consistent practice of states followed by them from a sense of legal obligation.” See RESTATEMENT, *supra* note 39, § 102.

¹⁶²See Roberts, *supra* note 150, at 499-500 (arguing that “institution building has helped to create and extend an overall norm of non- proliferation – one that is arguably *jus cogens*. That is, a pre-emptory norm of international law...”).

¹⁶³See RESTATEMENT, *supra* note 39, § 102 comment k (defining *jus cogens*, or peremptory norms of international law as rules recognized by the international community as non-derogable). Although it is widely accepted that such a category of international law exists, its content is not agreed. See *id.* reporter’s note 6.

¹⁶⁴See PSI Fact Sheet, *supra* note 126 (“The increasingly aggressive efforts by proliferators to stand outside or to circumvent existing nonproliferation norms, and to profit from such trade, requires new and stronger actions by the international community.”).

¹⁶⁵See *id.* (arguing PSI is “consistent with and a step in the implementation of the UN Security Council Presidential Statement...”).

disarmament, arms control and non-proliferation, reaffirm the crucial contribution which progress in these areas can make to the maintenance of international peace and security. They express their commitment to take concrete steps to enhance the effectiveness of the United Nations in these areas.

The members of the Council underline the need for all Member States to fulfil their obligations in relation to arms control and disarmament; to prevent the proliferation in all its aspects of all weapons of mass destruction; to avoid excessive and destabilizing accumulations and transfers of arms; and to resolve peacefully in accordance with the Charter any problems concerning these matters threatening or disrupting the maintenance of regional and global stability. They emphasize the importance of the early ratification and implementation by the States concerned of all international and regional arms control arrangements, especially the START and CFE Treaties.

The proliferation of all weapons of mass destruction constitutes a threat to international peace and security. The members of the Council commit themselves to working to prevent the spread of technology related to the research for or production of such weapons and to take appropriate action to that end.

On nuclear proliferation, they note the importance of the decision of many countries to adhere to the Non-Proliferation Treaty and emphasize the integral role in the implementation of that Treaty of fully effective IAEA safeguards, as well as the importance of effective export controls. The members of the Council will take appropriate measures in the case of any violations notified to them by the IAEA.

On chemical weapons, they support the efforts of the Geneva Conference with a view to reaching agreement on the conclusion, by the end of 1992, of a universal convention, including a verification regime, to prohibit chemical weapons.

On conventional armaments, they note the General Assembly's vote in favour of a United Nations register of arms transfers as a first step, and in this connection recognize the importance of all States providing all the information called for in the General Assembly's resolution.¹⁶⁶

The Bush Administration also points to positions taken by other international coalitions that may lend some support to the broad notion that nonproliferation is approaching *jus cogens* status. In June, 2002, in response to the threat of terrorist groups obtaining and using WMD, the G8 Leaders announced a new "G8 Global

¹⁶⁶See Statement of the U.K. Prime Minister (John Major) at a summit-level meeting of the Security Council on 31 January 1992 on the maintenance of international peace and security, U.N. Doc. S/23500 (1992), *reprinted at* 31 I.L.M. 758 (1992).

Partnership Against the Spread of Weapons and Materials of Mass Destruction.”¹⁶⁷ The European Union published a set of principles June 10, 2003 for addressing the global threat of WMD, noting that

To address the new threats, a broad approach is needed. Political and diplomatic preventative measures (multilateral treaties and export control regimes) and resort to the competent international organisations (IAEA, OPCW, etc.) form the first line of defence. When these measures (including political dialogue and diplomatic pressure) have failed, coercive measures under Chapter VII of the UN Charter and international law (sanctions, selective or global, interceptions of shipments and, as appropriate, the use of force) could be envisioned. The UN Security Council should play a central role.¹⁶⁸

Finally, some suggest that the Proliferation Security Initiative may also serve as evidence of the progression of international law with regard to WMD,¹⁶⁹ although it remains to be seen what actions it will entail and how other nations might react to its implementation.

However, these international developments may not provide evidence sufficient to prove that nonproliferation has emerged as a non-derogable norm. Notably, the statement by the U.N. Security Council excerpted above may be read as a promise to take action, but does not say what action the Security Council might take, and does not authorize States to enforce treaty commitments on the part of other States. It calls upon States to adhere to their treaty commitments and cooperate toward further international negotiations related to arms control. Moreover, as a statement rather than a formally adopted resolution, it has less binding force on member States under the U.N. Charter. Finally, States’ practice does not appear unambiguously to demonstrate that States consider themselves bound to halt all activity with regard to WMD testing, production or transfer.

The argument that nonproliferation has achieved the status of customary international law seems more plausible with respect to chemical and biological WMD than with respect to nuclear weapons, since the relevant treaties prohibit all possession, trade, and use of such weapons by member States, and require member States to adopt laws criminalizing the possession of banned materials. Nuclear

¹⁶⁷Statement by G8 Leaders, The G8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction, Kananaskis, June 27, 2002, *available at* [<http://www.dt.tesoro.it/Aree-Docum/Relazioni-/G7-e-gli-a/G7/Documentaz/2002/State ment-Global-Partnership.pdf>] (last visited Sep. 8, 2003).

¹⁶⁸Council of The European Union, *Basic Principles for an EU Strategy against Proliferation of Weapons of Mass Destruction*, Doc. 10352/03, Brussels (June 10, 2003), at para. 4, *available at* [<http://register.consilium.eu.int/pdf/en/03/st10/st10352en03.pdf>] (last visited Sep. 11, 2003)[hereinafter “EU Strategy”].

¹⁶⁹See Robert Chesney, The Proliferation Initiative and WMD Interdiction on the High Seas, NATIONAL STRATEGY FORUM (Fall 2003), *available at* [<http://www.nationalstrategy.com/Fall%20NSFR%202003/Chesney.htm>] (noting that “PSI itself might mark an important development in the evolution of ... an exception [to free navigation]”).

weapons, however, are not universally banned.¹⁷⁰ The NPT allows five States to stockpile nuclear weapons, and leaves it to their discretion as to whether possession on the part of their sub-national groups is criminalized under the national laws of member States.¹⁷¹ This inconsistency appears to make the argument that the State possession of nuclear weapons is a *jus cogens* violation less tenable.¹⁷²

Others view the non-proliferation regimes to be more in the nature of a security pact, with weaker nations having agreed to forego WMD programs in exchange for a promise of security to be provided through alliance with one of the great powers, rather than evidence that States participate out of a sense of legal obligation. Part of the bargain, with respect to nuclear weapons, was that the five nuclear powers negotiate to bring about an eventual total disarmament.¹⁷³ Now that the mutual deterrence of the Cold War can no longer be said to be in operation, non-nuclear States may believe their security requirements have increased, or that the strategic value of possessing nuclear weapons outweighs the benefit of remaining party to the NPT.¹⁷⁴

Collective Action Under Security Council Mandate. Adherents of the “broad” interpretation of the U.N. Charter prohibition against the use of force are more likely to view preemptive use of military force against WMD facilities, including the interdiction of ships suspected of transporting elements of an unauthorized nuclear weapons program, to be legitimate only when the U.N. Security Council specifically authorizes it.¹⁷⁵ Under the U.N. Charter, the Security Council has “primary responsibility for the maintenance of international peace and security.”¹⁷⁶ In this view, the Security Council is better empowered to determine that

¹⁷⁰See Barry Kellman, *WMD Proliferation: An International Crime?*, NONPROLIFERATION REV., Summer 2001, at 93, 98 (arguing that “the discriminatory structure of the NPT undermines any argument that state possession of WMD is necessarily a crime”).

¹⁷¹See *id.*

¹⁷²See RESTATEMENT, *supra* note 39, § 102, reporter’s note 6 (noting that some authorities suggest that treaties that create international crimes and obligate all states to proceed against violations may be peremptory).

¹⁷³See Nuclear Nonproliferation Issues, CRS Issue Brief IB10091, at CRS-4-5.

¹⁷⁴In 1996, several non-nuclear States adopted a Statement of Principles and Objectives that would pledge the NPT state-parties to work toward several primary objectives, including universalization of NPT membership and adherence, a reaffirmation of the commitment of the nuclear weapon States to pursue measures toward eventual complete nuclear disarmament, the completion of the Comprehensive Test Ban Treaty (CTBT) by the end of 1996, and other steps to assure the non-nuclear weapon States against the use or threat of use of nuclear weapons. See Ambassador Thomas Graham, Jr., *International Law and the Proliferation of Nuclear Weapons*, 33 GEO. WASH. INT’L L. REV. 49, 55-56 (2000).

¹⁷⁵See Schmitt, *supra* note 1, at 526 (noting that the Security Council has a mandate to counter *threats* to the peace as well as actual uses of force, and that it may order enforcement action to *maintain* international peace and security as well as restore them); Sloss, *supra* note 151, at 52-54.

¹⁷⁶United Nations Charter, art 24(1).

WMD in the hands of only certain States and non-State actors constitutes a threat to the peace, tailoring an enforcement regime against those entities.

The Security Council has multiple options for dealing with a threat it has identified, including economic sanctions, interdiction of weapons, and the use of military force through the forces of member States.¹⁷⁷ It also has some options with respect to enforcement.¹⁷⁸ Under its Chapter VII authority it could authorize a coalition of member States to organize and lead a force to carry out a specific mandate, or it could authorize an organization such as NATO to enforce the action. Another option would entail the creation of a U.N. military force, similar to the U.N. Mission to Sierra Leone.¹⁷⁹ In any case, nine “yes” votes from the U.N. Security Council are needed, with none of the five permanent members exercising their veto.

Conclusion

International law recognizes that States have the right to interdict vessels and aircraft in certain limited circumstances; however, that legal authority exists that would allow PSI nations completely “to halt shipments of dangerous technologies to and from states and non-state actors of proliferation concern – at sea, in the air, and on land”¹⁸⁰ appears doubtful under the current state of international law. The United States and its allies may consider whether to amend the treaties regarding the law of the sea (and air) explicitly to include WMD and missile trade within the prohibitions that may be universally enforced. Other options include amending the proliferation treaties to enhance compliance and, as the European Union stressed in its statement of non-proliferation principles, to reduce the perception among States that WMD are necessary for their own security.¹⁸¹ Probably the firmest legal basis for interdicting

¹⁷⁷U.N. CHARTER art. 42 states:

Should the Security Council consider that measures provided for in Article 41 [non-forceful sanctions] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

¹⁷⁸See Schmitt, *supra* note 1, at 527.

¹⁷⁹See *id.*; U.N. Doc. S/RES/1289 (2000).

¹⁸⁰White House Press Release, Principles for the Proliferation Security Initiative, Sep.4, 2003, *available at* [<http://www.state.gov/t/np/rls/prsrl/23809.htm>] (last visited Sep.8, 2003).

¹⁸¹See EU Strategy, *supra* note 168, para. 8:

The best solution to the problem of proliferation of WMD is that countries should no longer feel they need them. If possible, political solutions should be found to the problems which lead them to seek WMD. The more secure countries feel, the more likely they are to abandon programmes: disarmament measures can lead to a virtuous circle just as weapons programmes can lead to an arms race. To this end, we must actively foster the establishment of regional security arrangements and regional arms control and disarmament processes. Our dialogue with the countries concerned should take account of the fact that in many cases they have real and legitimate security concerns, with the clear understanding that there can never be any justification for the illegal development of WMD. . . .

WMD materials would be provided by explicit authorization by the U.N. Security Council.

Appendix A – 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: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.
2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.
3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.
4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:
 - a. Not to transport or assist in the transport of any such cargoes to or from states or 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 concern, and to seize such cargoes that are identified.

- c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.
- d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or 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 (a) 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 (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.
- f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or 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.

Source: White House Fact Sheet, Sep. 4, 2003, *available at* [<http://www.whitehouse.gov/news/releases/2003/09/20030904-11.html>].