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# The Proliferation Security Initiative: Counterproliferation at the Crossroads

*Strategic Insights*, Volume III, Issue 7 (July 2004)

by Erin E. Harbaugh

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## Introduction

On May 23, 2003, President George W. Bush announced the establishment of the Proliferation Security Initiative (PSI), which would pave the way for a dramatic transformation of American foreign policy. The PSI aims to combat proliferation through the interdiction of both air and maritime transport suspected of carrying illegal weapons and/or technologies that could be used to make weapons of mass destruction (WMD) and their delivery systems. The PSI's goal is, as John Bolton remarks, to "lengthen the time that proliferators need to acquire new weapons capabilities, increase their cost, and demonstrate our resolve to combat proliferation[1]."

With the establishment of a series of new agreements and partnerships, the PSI attempts to create a legal framework for intercept operations as a counterproliferation strategy. The premise of the PSI lies in the assumption that proliferation is a universal threat and pro-active, collective action must be taken to ensure that deadly weapons do not fall into the possession of terrorists or rogue states.

While the PSI is a pragmatic policy solution to the security threats proliferation poses, it does create significant challenges. Currently international law does not explicitly permit the use of interdiction as a tool of counterproliferation. Therefore, the legal ramifications and considerations of the PSI must be examined and an analysis of the possible alternatives and policy options must be made so that U.S. security planners can best address current proliferation threats, while maintaining their international commitments.

## Context for Concern: WMD Proliferation

Advancements in communications and transportation have facilitated the flow of technology, information, ideas, and people across borders. The same global infrastructure has also enabled the proliferation of dangerous capabilities, such as advanced technical knowledge and weapons of mass destruction. Sam Tangredi asserts that globalization has affected all aspects of human civilization, creating an increase in non-state and transnational threats to the United States, increased traffic and trade on the seas, new areas of military intervention, a restructuring of alliances, and the proliferation of information, technology, and weapons[2].

One of the most profound aspects of globalization is the volume of international trade, facilitated by a complex global transportation system. Ninety percent of the world's goods are moved by cargo ships, demonstrating the importance of the maritime transport system in the modern world[3]. While the maritime transport system has been a critical component of the global economy, it is wrought with security

vulnerabilities, permitting terrorists to smuggle drugs, people, contraband, and arms, critical to financing their operations. Al-Qaeda currently controls a formidable fleet of ships, including approximately fifteen freighters, which have been used to ferry operatives, explosives, money, and commodities[4]. The diffusion of technology has also created significant international insecurity, as new actors acquire new capabilities to research, develop, or acquire dangerous weapons and their delivery means. The nonproliferation regime, which has been in existence for decades, has sought to inhibit the spread of advanced technologies through export controls and international treaty mechanisms, such as verification and compliance. However, such regimes have driven proliferation underground, creating a thriving black market economy, which operates in the shadows of the international nonproliferation regime. The case of North Korea clearly demonstrates how a rogue nation can develop and proliferate advanced nuclear weapon and ballistic missile capabilities from technologies purchased through underground economies. North Korea has continued its nefarious proliferation in spite of the international community's aggressive diplomacy and incentives to cease its activities.

As Tangredi has indicated, the ease with which dangerous technology and weapons can be transported has enabled horizontal proliferation. Therefore, the United States has opted to restructure its alliances to alleviate the emerging threats proliferation of WMD pose. By legitimizing the use of collective counterproliferation action, through a flexible, more dynamic, ad-hoc alliance, such as the PSI, the United States will have a policy prescription intended to mitigate the threats that traditional nonproliferation policies have failed to adequately address.

### **The Nuts and Bolts of PSI**

The Proliferation Security Initiative seeks to build "on efforts by the international community to prevent to prevent proliferation" such as "existing treaties and regimes[5]." The PSI is a dramatically different foreign policy approach. The *Wall Street Journal* states, "[D]o not mistake PSI for a multilateral institution in the conventional sense. There's no headquarters, no secretary-general, no talkfests - and, perhaps most important of all, no French or Russian veto[6]."

While the PSI incorporates multiple forms of cooperation on diplomatic, economic, legal, military and other efforts, there are two primary policy objectives. The first is the establishment of legal instruments to legitimize collective counterproliferation efforts through the codification of such intentions written into multilateral agreements. The United States spearheaded this effort on 4 September 2003, with the "Statement of Interdiction Principles."

The "Principles" attempt to establish international authority for multilateral intercept operations by demonstrating a multilateral commitment to a series of four principles including the undertaking of unilateral or multilateral interdiction of WMD and their delivery systems, the adoption of streamlined procedures for information exchange and coordination of interdiction efforts, the strengthening relevant national legal authorities and international law, and the taking of specific actions in support of interdiction efforts[7]. It has been adopted by eleven nations: Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States[8].

The second primary policy objective of the Proliferation Security Initiative includes the coordination of procedures to execute successful multilateral intercept operations. Although the PSI does attempt to create international authority for the policy, a senior Bush administration official reminds us that the "PSI is an activity, not an organization[9]." While the PSI does include the development of a legal framework, there is a principal focus on action over diplomacy. Action taken by Proliferation Security Initiative participants has been focused on conducting and coordinating intercept operations, especially of maritime vessels.

Feege and Truver describe maritime intercept operations or MIOs as:

...the ability to detect, track, arrest, and board suspect vessels at will, both off our coasts and in deepwater regions farther offshore. Interdiction at sea is a sequential process that

includes surveillance of often broad ocean areas, detection of targets that might be potential threats to U.S. security or sovereignty, sorting of these targets (mostly surface platforms, but occasionally aircraft), identification of targets of interest, and finally interception and boarding if necessary[10].

Interdiction, as seen through maritime intercept operations, is part of a complex military strategy, involving multiple areas of expertise, and includes intelligence, surveillance, and operations execution. Technology is critical to the execution of successful operations with recent developments in naval architecture, including smaller, faster, more maneuverable craft, combined with satellite communications have enabled the United States and its allies to more easily coordinate maritime and aircraft interdiction on a multilateral level.

As of yet, the PSI's eleven participants have completed three of ten planned maritime intercept operations exercises[11]. In addition to completing multilateral exercises, participants have already been successful in executing actual interdictions. The first publicized interdiction executed under the banner of the PSI took place on August 8, 2003 when the North Korean cargo vessel, *Be Gaehung*, was detained in the Kaosung Harbor in Taiwan after American intelligence indicated that the ship contained chemicals used in the manufacture of rocket fuel. During the interdiction, the vessel was boarded and inspected by Taiwanese naval forces, and 158 barrels of phosphorus pentasulfide was unloaded and confiscated by government officials[12].

Other notable achievements of the PSI include the Liberia Accord, intended to give "teeth" to the counterproliferation strategy by legalizing interdiction of ships sailing under the Liberian flagship. This agreement, signed in February of 2004, allows the United States the right to board any vessel suspect of carrying contraband cargo, after giving two hours notice. Liberia is the world's second largest registry and a major "flag of convenience"[13]."

Possibly the greatest accomplishment of the PSI may be compelling Moammar Gadhafi to allow inspection of weapons sites after participants interdicted an illegal shipment of uranium-enrichment equipment, destined for the country's nuclear weapons program[14]. While it is unknown exactly to what extent the interdictions precipitated Gadhafi's decision to allow U.N. inspections, the suggestion that the use of interception operations to influence state behavior to abide by internationally-established norms and treaties, such as the Nonproliferation Treaty, may be a galvanizing force behind legalizing interdiction as a multilateral counterproliferation strategy.

### **The Legality of Intercept Operations**

Interdiction strategy, whether unilateral or multilateral, is controversial in international law and poorly defined. The U.N. Law of the Sea Convention (UNCLOS), attempts to establish specific zones of territorial sovereignty for coastal states, granting jurisdiction over certain activities, including maritime interdiction, depending on the proximity to the coastal state's shores. The territorial sovereignty codified in the treaty allows a coastal state to seize and confiscate cargo, such as drugs or illegal weapons, destined for insurgents, terrorists, or any criminal organization. Under international law, the state must intercept shipments to terrorists within their sovereign territory, even if the terrorist group is not considered a domestic threat. These interdictions fall under the rubric of domestic and international law enforcement, even if military forces are employed in the operations[15].

UNCLOS, however, restricts interdiction by a sovereign state on the high seas, as "no state may validly purport of subject any part of the high seas to its sovereignty...[16]" Article 110 of UNCLOS does, however, permit interdiction by a sovereign state on the high seas if a ship is suspected to be engaged in slave trade, piracy, illegal broadcasting, or does not bear, or refuses to show, its flag[17]. While the interdiction of WMD and their delivery systems destined for non-state actors is more clearly codified in international law, the legal authority for interdiction of such shipments to state actors remains murky. However, the United Nations Security Council may authorize a resolution allowing sovereign

armed authority to interdict vessels suspected of violating specific treaties or sanctions giving international legal authority for interdiction. According to Tangredi and Thachuck:

The legality of interdiction is bound to treaty enforcement or U.N. action... Under U.N. sanctions or international treaty enforcement, any state may seize weapons (or contraband) bound for a sanctioned state or materials whose transfer violates international treaty such as the transfer of nuclear weapons in contradiction to the nonproliferation of weapons control regimes[18].

U.N. resolution-backed interdictions have been carried out by U.S. and allied forces for almost forty years[19], with the most significant authorizing the long-standing naval blockade of contraband trafficking in and out of Iraq, first established by U.N. resolution 661, in 1990. As part of these intercept operations all vessels sailing the northern Persian Gulf have been subject to search, and any contraband was found it would be turned over to admiralty courts in the United Arab Emirates (although the legitimacy of these courts has remained in question). Since the First Gulf War, the United States and its allies have been conducting MIO's in the Arabian Sea, Red Sea, and Western Indian Ocean, yielding 42,409 queries, 2,917 boardings, and 2,299 diversions[20].

### **Is the PSI Legal?**

The impetus to create an internationally-acceptable modern counterproliferation policy was directly precipitated by an incident in December of 2002, when the Spanish Navy interdicted the vessel, *Sanso*, containing North Korean missiles headed for Yemen in Arabian Sea. After searching its contents, the navy released the vessel because they did not have the legal authority to confiscate the cargo under the existing international legal framework. The incident prompted President Bush to authorize a classified order to increase legal authority for the United States and its allies to interdict the proliferation of missiles and WMD.

The "Statement of Interdiction Principles," soon followed in September, 2003. attempting to codify a set of internationally-agreed-upon standards for interdiction. Although the PSI's founding document purports to be "consistent with the implementation of the United Nations Security Council Presidential Statement of January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for member states of the U.N. to prevent proliferation[21]," only eleven nations have signed on. Although the doctrine of the PSI claims to be consistent with internationally-established norms, articulated by the U.N., the lack of universal support and participation have called into question its legitimacy. John Bolton recently remarked, however, that "50 countries have "indicated support" for the PSI and are "ready to participate in interdiction efforts[22]."

The verdict on whether the Proliferation Security Initiative is "legal" under international law has yet to be established. Since international law is often vague, and difficult to enforce, it will be impossible to determine legality of the PSI. However, through a variety of perspectives including a discussion of international customary law, the United Nations Charter, as well as a review of the policy alternatives, we may make assumptions regarding certain aspects of the PSI.

When discussing the acceptability of interdiction as counterproliferation strategy, Frank Goldman asks whether legitimizing multilateral intercept operations is preferable in the first place. He states that while "while unilateral counter-proliferation efforts risk the condemnation of the international community, any attempt to legitimize counterproliferation internationally might provide other states with the type of political cover needed to launch military attacks that are adverse to U.S. interests[23]." Therefore, there may be an inherent disincentive for the United States to fully legitimize and legalize interdiction in international law.

As we already know, there are significant legal obstacles to developing a legal framework for intercept operations, with the most significant relating to the issue of protecting state sovereignty, a fundamental pillar of international law. Article 2(4) of the U.N. Charter states that, "all Members shall refrain in the

international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations[24]."

While the U.N. Charter is a cornerstone of international law, its original intent may not be consistent with managing current security problems. Goldman describes this dilemma:

The current norm is the product of a perceived need by post-World War II leaders to protect the principle of sovereignty. These leaders attributed the cause of World War II to the refusal of Germany and Japan to respect international borders. Following the war, leaders of the Allied nations recognized a need to construct international institutions that would prevent future erosion of sovereignty by making unilateral intervention illegitimate. Not surprisingly, the creators of the United Nations fashioned a legal system that could deal effectively with the type of problems, such as invasion, which sparked WW II; however, this system, with its emphasis on the principle of sovereignty, necessarily limits the ability of states to deal with different dilemmas, including the proliferation of nuclear weapons[25].

As we can see from Goldman's critique, on one hand, the U.N. Charter protects state sovereignty from potential aggressors, while on the other hand, limits state use of force, and the ability of a state to preempt proliferation. Therefore, we see that international statutory law, vis-à-vis the U.N. Charter, limits the legality of the PSI.

Conversely, traditions found in international customary law lend legal authority to interdiction as a counterproliferation strategy. The right to self-defense is a pillar of international customary law, and is codified in Article 51 of the U.N. Charter. It states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security[26].

Clearly, a contradiction regarding the use of force as it pertains to counterproliferation strategy exists in current international law. Goldman proposes the concept of "anticipatory self-defense" as an acceptable justification for the use of force in counterproliferation strategy, which draws on international customary law. He states that "if overwhelming evidence exists that demonstrates an attack is forthcoming then so long as preemptive action is proportional to the threat, it should be legal pursuant to international law. The United States has adopted this view, believing that anticipatory self-defense is permissible in at least certain contexts[27]." The United States has justified its actions in Afghanistan and Iraq on these conditions. Former Secretary of State George P Shultz has articulated that the U.S. policy of anticipatory self-defense can be justified "when no other means are available[28]."

Claire Rak notes that there is an entire continuum of counterproliferation options to which the rubric of "anticipatory self defense" could be applied. These options include preventive war, preventive strikes, and interdiction. On one end of the spectrum is preventive war, involving the most aggressive strategy and use of force, with interdiction being "the least invasive and most proactive approach to counterproliferation strategy[29]." When assessing the range of options to counter the proliferation of WMD and their delivery systems, it is clear that interdiction requires relatively less use of force than other counterproliferation strategies. Therefore, based on Rak's continuum, interdiction is relatively more justifiable, and "moral," than other policy alternatives that require a greater degree of force, such as

preventive war and preventive strikes. Thus, a strategy of interdiction would be the most preferable option by universal standards lending greater legitimacy to counterproliferation policies.

It must be emphasized that legitimacy, however, is not tantamount to legality. While the Bush administration has been successful at creating a series of legal documents to give authority to the strategy, Benjamin Friedman asserts that a fundamental error of the Bush administration's efforts to gain multilateral support for the Proliferation Security Initiative has been the failure to recognize this distinction and the specific strategies which are necessary for facilitating the legitimacy of the policy. He states:

Legitimacy is not legality. Legality is conformity to established rules. Legitimacy is more vague..... Legitimacy is a measure of a rule's morality and commitment to the rule. A law may be legal but perceived as illegitimate[30].

A key example of the Bush administration's failure to conceptualize the process of creating legitimacy as a necessary part of creating a legal framework can be seen in John Bolton's November, 2003 speech entitled, "*A Response to 'Legitimacy' in International Affairs: The American Perspective in Theory and Operation.*" In his remarks, Bolton asserts that the "legitimacy" of the PSI, and U.S. foreign policy, is "grounded in existing domestic and international authorities," of which the "Statement of Interdiction Principles" is included. However, he argues that only Americans determine the legitimacy of American foreign policy[31]. Clearly the United States alone cannot determine the legitimacy of its actions. Legitimacy must come from both domestic and internationally accepted ideals.

Friedman cautions U.S. policymakers, such as Bolton, from exhibiting American exceptionalism, because as he puts it "in nonproliferation, unilateralism [or the suggestion thereof] is worse than useless[32]." Therefore the United States must develop legitimacy for intercept operations through multilateral fora. U.S. policymakers have a compelling case to support the legitimization of the PSI, especially in light of the policy alternatives. However, creating international acceptability for strategies which have traditionally been stigmatized by modern international statutory law, which was born from the ashes of WWII, will be an enormous challenge.

If the United States, however, wishes to see the viability and sustainability of its PSI, it must serve to facilitate more universal acceptability of counterproliferation strategy as a means of addressing critical international security threats. Without this legitimacy, the United States will never be able to give the PSI the international legal authority it needs to become an effective policy.

Is the PSI legal? As it stands today, the legality of the policy still hangs in the balance. International customary law, which trumps the caveats of international statutory law, provides a solid foundation for which a legal framework for counterproliferation strategy can be built. However, without more universal acceptance to increase its legitimacy, the policy will never survive. The PSI has enormous potential to become both a legal and effective policy, however, much more work by American policymakers must be done to ensure this.

### **Prospects for the PSI: Counterproliferation at the Crossroads**

Regardless of one's beliefs on whether collective interdiction is and should be legal, we are forced to recognize that existing strategies of ensuring international security, such as the nonproliferation regime, are failing, as seen through the existence of secondary proliferators such as rogue states and potentially terrorists. To simply abandon the nonproliferation regime, with all of its flaws, would prove to be a costly mistake and is not a policy option. The nonproliferation regime serves to legitimize norms against the proliferation of weapons and seeks to create strong disincentives for this proliferation. Therefore, it is critical that the United States continue to strengthen the international nonproliferation regime. However, executing only a policy of nonproliferation at the exclusion of other options would serve to be a costly mistake as well. While the nonproliferation regime may serve to deter most actors, it has been proven that it does not and probably will not deter some states and potential terrorist organizations from proliferating. Therefore, it is imperative that the United States adopt a policy of counterproliferation in

addition to its nonproliferation objectives. The use of the PSI in potentially compelling Gadhafi to allow weapons inspections may serve as an example of how these two strategies can complement, and possibly enhance one another.

When looking at the continuum of counterproliferation options, a policy of interdiction, as seen by the Proliferation Security Initiative, is the most justifiable option. As primary proponent of the PSI, the United States must demonstrate the acceptability of interdiction over the alternatives, such as preventive strikes or even preventive war. When the PSI is seen in the context of other counterproliferation options, it becomes more preferable as opposed to other options. By demonstrating its relative acceptability, the United States can create increased legitimacy for the PSI by gaining the support of other nations through multilateral institutions and fora.

Once legitimacy for the PSI has been established, the United States should continue to negotiate treaties similar to the Liberia Accord, to provide legal instruments by which to execute the policy. These treaties should be negotiated on a multilateral level (as opposed to a bilateral level). Not only will multilateral treaties make the PSI more effective, they will also serve to establish the policy as universally-acceptable. Counterproliferation is clearly at a crossroads. Every decision and action made by the United States and its partners will determine how interdiction will be used to fulfill counterproliferation ends, and how acceptable this strategy will be in the future. Therefore, it is imperative that U.S. policymakers recognize their critical role in shaping international law and the precedent it sets forth through its brave new policy to combat proliferation.

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