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David G. Hodges

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HIGH SEAS AND HIGH RISKS: PROLIFERATION IN A POST-9/11 WORLD

*David G. Hodges**

I. INTRODUCTION

One of the biggest threats that the world faces is the proliferation of weapons of mass destruction (“WMD”) and their use by rogue states and terrorist groups.¹ As the September 11, 2001 terrorist attacks proved, within the span of a few hours, thousands of people can be killed and the direction of the world can be radically changed through the use of unconventional weapons and tactics.² As terrible as the attacks were, however, the carnage and consequences of that day would have seemed like a mere pittance if certain kinds of WMD were used instead.³

Ever since chemical weapons were used to devastating effect in World War I, nations began employing different tactics to control WMD, including legal, political, diplomatic, and military strategies.⁴ One of the

* David G. Hodges is an attorney at CN Communications, a firm in New York City, New York. This Article is dedicated to Alexander and Françoise Gilbert, who made their own journey across the sea.

1. See Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT’L L.J. 131, 136 (2005) (arguing that the use of a WMD “undoubtedly” threatens world peace and security).

2. See Andrew C. Winner, *The Proliferation Security Initiative: The New Face of Interdiction*, THE WASH. QUARTERLY, Spring 2005, 140 (arguing that the attacks reenergized existing efforts to fight WMD proliferation).

3. See William Langewiesche, *How to Get a Nuclear Bomb*, ATLANTIC MONTHLY, Dec. 2006, available at <http://www.theatlantic.com/magazine/archive/2006/12/how-to-get-a-nuclear-bomb/305402/> (last visited Jan. 29, 2014) (noting that in the first nuclear bomb used in the Second World War, “the explosion over Hiroshima yielded a force equivalent to 15,000 tons (fifteen kilotons) of TNT, achieved temperatures higher than the sun’s, and emitted light-speed pulses of dangerous radiation. More than 150,000 people died.”).

4. See Kevin J. Fitzgerald, *The Chemical Weapons Convention: Inadequate Protection from Chemical Warfare*, 20 SUFFOLK TRANSNAT’L L. REV. 425, 430 (Summer 1997) (explaining that the 1.3 million casualties of chemical weapons in the First World War led to the outlawing of chemical and biological weapons in war with the Geneva

latest efforts is the Proliferation Security Initiative (“PSI”), a multilateral agreement with more than one hundred nations to facilitate interdictions of vessels suspected of carrying WMD⁵ (a weapon made of nuclear, chemical, or biological materials).⁶ Created by the Bush Administration and continued by President Barack Obama, the PSI is both a part of, and separate from, the existing anti-proliferation framework⁷—a fact that makes it somewhat controversial, especially when its participants assert its most far-reaching powers on the high seas.⁸

According to longstanding international maritime law, the seas do not belong to any nation and, absent a claim of universal jurisdiction or some other exception, it is illegal to board another ship.⁹ For many years, universal jurisdiction could only be exercised to thwart a limited number of offenses, none of which are closely related to WMD proliferation.¹⁰ In response to September 11, however, some states pushed to broaden international maritime law to allow states to board

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare).

5. Andrew S. Williams, *The Interception of Civil Aircraft Over the High Seas in the War on Terror*, 59 A.F. L. REV. 73, 87 (2007) (explaining that organizing state cooperation to stop the proliferation of WMD and its component parts is the goal of the PSI).

6. See Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT’L L. 507, 511 (2005).

7. See generally Craig H. Allen, *A Primer on the Nonproliferation Regime for Maritime Security Operations Forces*, 54 NAVAL L. REV. 51, 54-56 (2007) (explaining that nonproliferation “generally refers to the international and national regimes that seek to halt and eventually reverse the proliferation of WMD and their delivery systems,” whereas counter-proliferation “generally refers to the more muscular efforts to prevent the movement of WMD materials, technology and expertise from states that fail to conform to nonproliferation norms to hostile states and terrorist organizations.” For the purposes of this Article, the Author combines nonproliferation and counter-proliferation into “anti-proliferation” to save space and avoid the technicalities attendant to discussing the different regimes.); see also Press Release, President Barack Obama, Presidential Statement on 10th Anniversary of the Proliferation Security Initiative (May 15, 2013), available at <http://www.state.gov/documents/organization/210348.pdf>.

8. John Yoo & Glenn Sulmasy, *The Proliferation Security Initiative: A Model for International Cooperation*, 35 HOFSTRA L. REV. 405, 414 (2006) (explaining that some critics regard it as a facilitator of conflict and a danger to freedom of navigation).

9. See Ian Patrick Barry, *The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation Security Initiative*, 33 HOFSTRA L. REV. 299, 306 (2004) (explaining that the principle of the freedom of the open seas took four centuries to develop).

10. See Becker, *supra* note 1, at 204 (explaining that each universal jurisdiction offense has its own history and policy reasons).

vessels to stop WMD proliferation.¹¹ The PSI is at the forefront of this expansionary effort.¹²

This Article considers whether the PSI can be used to expand universal jurisdiction to stop WMD proliferation and, if so, whether such an expansion is desirable. Part II provides background information on the PSI and past conventions, treaties, and multilateral efforts to stem proliferation and delineate maritime jurisdiction. Part III analyzes the ways in which the PSI and its supporting texts affect universal jurisdiction. Part IV offers three recommendations. First, Part IV(A) recommends that universal jurisdiction should expand under the aegis of the United Nations. Second, Part IV(B) argues that if it cannot expand under the United Nations, then universal jurisdiction should expand by increasing the number of states that belong to the PSI. Third, Part IV(C) proposes that if it cannot expand under the United Nations or by increasing the amount of PSI members, then universal jurisdiction should expand through unilateral interdictions. Lastly, Part V of this Article advocates that universal jurisdiction on the high seas should be expanded to include WMD interdiction.

II. BACKGROUND

In May 2003, the PSI was introduced to close loopholes in international law and better facilitate the interdiction of WMD, their precursors, and related materials.¹³ The problem with the existing framework was illustrated in December 2002, when Spanish naval forces on the high seas intercepted the *So San*, a North Korean ship bound for Yemen.¹⁴ After searching the ship's hull, such forces found SCUD

11. Yoo & Sulmasy, *supra* note 8, at 409 (arguing that prior to the creation of the PSI that the “well established U.S. commitment to freedom of navigation on the high seas was at odds with its goal of preventing the proliferation, sale and transport of WMD”).

12. *See id.* (explaining that the impetus for the PSI came after frustration with the United Nations due to past ineffectiveness and its institutional aversion to dealing with non-state problems).

13. *The Proliferation Security Initiative (PSI)*, U.S. DEP'T OF STATE (May 26, 2005), <http://2001-2009.state.gov/t/isn/rls/other/46858.htm> (explaining that the “goal of [the] PSI is to create a more dynamic, creative, and proactive approach to preventing proliferation to or from nation states and non-state actors of proliferation concern”).

14. *See* Joby Warrick, *On North Korean Freighter, a Hidden Missile Factory*, WASH. POST, Aug. 14, 2003, at A1 (noting that the Spanish forces first fired warning shots after the ship tried to flee and then destroyed the ship's mast cables so that the forces could board).

missiles, which are capable of transporting WMD.¹⁵ However, although the Spanish forces had authority under international law to board the ship because it did not display its flag, the naval forces did not have the legal authority to seize the missiles or any WMD-related components.¹⁶

The So San incident exposed a problem: How can responsible states legally stop the transportation and proliferation of WMD and missiles?¹⁷ Under existing international law, there were a number of treaties, resolutions, and agreements that dealt with proliferation, but there was no overarching enforcement regime that pulled all of them together.¹⁸ In response, the United States and an initial group of eleven other countries determined to make such a seizure legal so that an incident like the So San would not happen again.¹⁹

In order to prevent another So San, the PSI framers took the existing legal authorities and used them to create a new framework, one that was both multilateral and voluntary in nature.²⁰ Whereas past authorities and their enforcement mechanisms, like the Non-Proliferation Treaty (“NPT”) and the International Atomic Energy Agency (“IAEA”), are essentially bureaucratic and closely tied to the United Nations, the PSI is more operational and technically outside the existing framework, even as it is also in accord with it.²¹ Termed “an activity, not an organization” by

15. Joyner, *supra* note 6, at 508 (noting that after calling in American military explosives experts, the interdiction revealed that the ship held parts of fifteen SCUD missiles, fifteen warheads, and eighty-five drums filled with a chemical used in SCUD missile fuel).

16. Becker, *supra* note 1, at 153 (noting that nothing in international law made the transport by sea of ballistic missiles or WMD-related materials illegal).

17. See Yoo & Sulmasy, *supra* note 8, at 408 (explaining that the boarding was likely legal, but that any seizure would be illegal); *but see* JOHN BOLTON, SURRENDER IS NOT AN OPTION, 120-1 (2007) (arguing that seizing the cargo would have been legal because the ship was illegally traveling as a commercial vessel, but that someone decided to permit the ship to continue its journey due to Yemen’s cooperation in the war on terror).

18. See Yoo & Sulmasy, *supra* note 8, at 409 (arguing that the gap that the PSI sought to fill permitted WMD proliferation and thus posed a threat to peace and security).

19. Becker, *supra* note 1, at 149 (noting that the original PSI core consisted of Australia, France, Germany, Italy, Japan, The Netherlands, Poland, Portugal, Spain, United Kingdom, and the United States).

20. *Proliferation Security Initiative Frequently Asked Questions (FAQ)*, U.S. DEP’T OF STATE (May 22, 2008), <http://2001-2009.state.gov/t/isn/rls/fs/105213.htm> (last visited Apr. 13, 2014) (explaining that the PSI does not replace existing anti-proliferation tools, but complements them by closing their loopholes).

21. See Yoo & Sulmasy, *supra* note 8, at 410 (arguing that the PSI is built upon the political commitment of nations to fight proliferation, which is manifested in bilateral and multilateral agreements, as well as by respecting customary international maritime law).

one of its supporters,²² the PSI takes its inspiration from international law, existing nonproliferation treaties, counter-proliferation agreements, and the Law of the Sea Convention (“UNCLOS”).²³ In the words of former United States National Security Advisor, Stephen J. Hadley:

[The] PSI is not a replacement for the NPT, the IAEA, or the multilateral export control regimes—but a way to build upon them and give them a new enforcement mechanism they did not have before. In the PSI, cops and criminals do not co-exist in the organization. [It] is a group of nations committed to be cops... a group that defines criminals clearly... and a group committed to hold themselves and each other accountable for results.²⁴

Today, even “[t]hrough the PSI is now a key part of . . . global non-proliferation efforts,” its members “must [continue to] commit to concrete, tangible actions to strengthen the PSI and sustain it as a core element of the non-proliferation regime.”²⁵ In order to become a member of the PSI, a state must follow four interdiction principles, and subsequently enforce them through national laws.²⁶ These PSI members pledge to give each other the right to search and seize other members’ suspect ships, to search suspect vessels that enter their ports and, of course, not to trade in WMD.²⁷ The PSI is not part of any particular

22. John R. Bolton, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century*, 5 CHI. J. INT’L L. 395, 399 (2005) (arguing that the “activity” characterization explains the PSI’s success); see also Becker, *supra* note 1, at 148 (explaining that some supporters define it against existing efforts, characterized as “bloated, top-heavy international organization[s], whose decision-making capabilities or capacity to act are paralyzed by centralization and internal dissent”).

23. See Joyner, *supra* note 6, at 512-17, 525-35.

24. Stephen J. Hadley, Former U.S. Nat’l Sec. Advisor, Remarks at the Proliferation Security Initiative Fifth Anniversary Senior Level Meeting (May 28, 2008), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2008/05/20080528-3.html>.

25. Press Release, President Barack Obama, *supra* note 7.

26. *Proliferation Security Initiative: Statement of Interdiction Principles*, U.S. DEP’T OF STATE, <http://www.state.gov/t/isn/c27726.htm> (last visited Feb. 2, 2014) (providing the PSI’s four main interdiction principles: (1) to “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; (2) to adopt “streamlined procedures for rapid exchange of relevant information”; (3) to review and strengthen both national and international authorities to achieve PSI objectives; and (4) to take specific actions to interdict WMD, their delivery systems and related materials).

27. Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526, 529 (2004) (explaining that the PSI is not just a paper agreement, but an effective enforcement mechanism, both through its training exercises and actual interdictions).

international law, treaty, or organization, but functions with such existing laws to “try[] to interdict WMD materials.”²⁸ Accordingly, it is an enforcement mechanism that functions mostly independent of the non-proliferation regime.²⁹

The legal basis for the PSI comes from a multitude of sources, including some that were installed subsequent to its enactment, such as United Nations Security Council Resolution 1540.³⁰ Its “authority” derives primarily from the NPT, the Chemical and Biological Weapons conventions, UNCLOS, and the United Nations.³¹ These legal authorities are, in turn, bolstered by multilateral export control agreements, including the Nuclear Suppliers Group (“NSG”) and Australia Group.³² To illustrate how these sources interact and the legal underpinnings of the PSI, the following is a brief survey of the authorities that underlie the PSI and the authorities that have affirmed it since its creation.

A. *The Law of the Sea Convention*

Although UNCLOS is not an anti-proliferation treaty, it is crucial to the legality of the PSI because it is one of the most widely accepted pieces of international law.³³ Its authority derives from its codification of longstanding maritime law, which existed in one form or another

28. Kyle Mathis, *The Nuclear Supplier Group: Problems and Solutions*, 4 ALA. C.R. & C.L. L. REV. 169, 181 (2013); see also *Proliferation Security Initiative Frequently Asked Questions (FAQ)*, U.S. DEP’T OF STATE, <http://2001-2009.state.gov/t/isn/rls/fs/46839.htm> (last visited Feb. 1, 2014) (explaining that the PSI strives to be consistent with national legal authorities).

29. Becker, *supra* note 1, at 149 (noting that PSI members need not sign a formal agreement or assume legally binding obligations).

30. See U.N. SCOR, 63rd Sess., 4956th mtg. at 1, U.N. Doc. S/RES/1540 (Apr. 28, 2004); see also S.C. Res. 1673, ¶ 1 U.N. Doc. S/RES/1673 (Apr. 27, 2006) (explaining the origins and effect of 1540).

31. Joyner, *supra* note 6, at 512-17, 525-35 (discussing the PSI’s sources and influences).

32. David S. Jonas, *The New U.S. Approach to the Fissile Material Cutoff Treaty: Will Deletion of a Verification Regime Provide a Way out of the Wilderness?*, 18 FLA. J. INT’L L. 597, 645 (2006) (arguing that such efforts are “relative success[es]” in preventing WMD-related exports).

33. William D. Baumgartner, *UNCLOS Needed for America’s Security*, 12 TEX. REV. L. & POL. 445, 450-51 (2007-2008) (arguing that by formally acceding to UNCLOS, the United States will make the PSI even more powerful due to UNCLOS’s widespread acceptance throughout the world).

dating back to the medieval period.³⁴ However, despite its widespread adherence, some nations, such as the United States, regard it as customary international law, making its effect somewhat weaker than it would be if the United States were a party.³⁵ A customary law, as opposed to a treaty or convention, is a “general and consistent practice of states followed by them from a sense of legal obligation.”³⁶ UNCLOS, which was signed in 1982, was ratified by 157 nations.³⁷

The backbone of maritime law is the idea that no nation owns the seas, even though a nation may claim some amount of jurisdiction from its coastline to the sea.³⁸ Moreover, because the power of the state is at its zenith in its own territory, the closer a vessel is to a state the more power the state has to assert over the vessel.³⁹ To that end, there are four classifications of a state’s jurisdiction under UNCLOS.⁴⁰ First, the

34. Joyner, *supra* note 6, at 526 (“The evolution of [the law of the sea] has continued through to modern times, and in the twentieth century it has [been] codified . . . in a number of significant multilateral treaties as well as through the rule-generating processes of customary international law.”).

35. Baumgartner, *supra* note 33, at 449-51 (arguing that acceding to a treaty is better than customary law because it makes interpretation much easier by clearly delineating the terms of the agreement rather than leaving them subject to interpretation).

36. THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 21 (West Publishing Co. 2002) (1985) (*quoting* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987)) (explaining that a law becomes customary both out of widespread adherence and the fact that states regard it as obligatory).

37. Joyner, *supra* note 6, at 526-27 (explaining that the main reason why the United States has refused to sign UNCLOS—its regulation of the deep sea bed—is unrelated to the parts of UNCLOS that are relevant to the PSI).

38. Barry, *supra* note 9, at 307 (commenting that the hugely influential Dutch jurist, Hugo Grotius, formulated the idea that because the sea belongs to every state, no state can claim it as that state’s exclusive property); *see also* Williams, *supra* note 5, at 94 (providing that this “paramount” principle ensures the mobility of United States forces in times of war and peace).

39. Jonathan C. Thomas, *Spatialis Liberum*, 7 FLA. COASTAL L. REV. 579, 604 (2005-2006) (explaining that a state’s power decreases as the distance from the state’s coastline increases).

40. *See Proliferation Security Initiative: Statement of Interdiction Principles*, *supra* note 26 (Section 4(d) of the PSI, which parallels UNCLOS’s classification of the territorial and contiguous seas, allows PSI members 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.”).

territorial sea, which extends twelve nautical miles from a state's coastal territory, represents the greatest assertion of a state's power.⁴¹ Second, the contiguous sea, which extends for twelve nautical miles from the territorial sea, is territory within which a state may enforce its laws.⁴² Third, the exclusive economic zone ("EEZ"), which extends 200 nautical miles from a state's coastal territory, grants a state limited jurisdiction to conduct scientific research and to use and protect the marine environment.⁴³ Lastly, the high seas constitute an area over which no state can exercise jurisdiction, absent a claim of universal sovereignty.⁴⁴

A corollary to maritime jurisdiction is that a flag state has exclusive jurisdiction over its vessel, meaning that a flagged vessel is akin to a floating piece of a state's territory.⁴⁵ However, this principle is not inviolable, because both international law and UNCLOS recognize that sovereignty is not an end in itself and that some offenses require a breach of sovereignty.⁴⁶

To that end, under Article 110 of UNCLOS, a state has universal jurisdiction over a flagged vessel if it is reasonably suspected of one of the following actions: (1) sailing without a nationality, (2) engaging in piracy, (3) trading in slaves, or (4) participating in unauthorized broadcasting.⁴⁷ These exceptions are essentially the only instances where maritime law grants a nation the power to interdict another nation's ship on the high seas.⁴⁸

41. John Astley III & Michael N. Schmitt, *The Law of the Sea and Naval Operations*, 42 A.F. L. REV. 119, 129 (1997) (explaining that states have the most rights in the area closest to shore).

42. Jeremy Rabkin, *How Many Lawyers Does It Take to Sink the U.S. Navy?*, THE WKLY. STANDARD, Sept. 10, 2007, <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/052guyna.asp> (explaining that in exchange for these benefits a state consents to give other states "innocent passage" through its waters).

43. See United Nations Convention on the Law of the Sea, art. 73, Dec. 10, 1982, 1833 U.N.T.S. 397 (stating that coastal states have the right to enforce their laws).

44. Williams, *supra* note 5, at 94 (noting that the seas are open to any vessel engaged in a lawful purpose).

45. See Barry, *supra* note 9, at 305 (providing that freedom of navigation is the "hallmark principle" of the law of the sea).

46. Becker, *supra* note 1, at 203-204 (explaining that certain offenses are so great that they affect all nations and, therefore, give all nations a license to stop them).

47. Sandra L. Hodgkinson et al., *Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap*, 22 AM. U. INT'L L. REV. 583, 591-92 (2007) (explaining the limited exceptions to freedom of navigation).

48. *Id.* at 592 (noting the belligerent right of visit and search, not relevant for this treatment, where if a warship in an armed conflict reasonably suspects a foreign-flagged vessel of supplying weapons, then it may stop and search that vessel).

B. The Preexisting Anti-Proliferation Framework

In order to explore the different regimes and enforcement mechanisms for WMD, the following section examines nuclear, chemical, and biological anti-proliferation efforts.

1. Nuclear Anti-Proliferation Efforts

After the United States detonated two atomic bombs over Hiroshima and Nagasaki, states sought to control the awesome power of atomic energy.⁴⁹ The most notable effort, the NPT, was signed in 1968 to fight nuclear proliferation and reduce Cold War tensions attendant to nuclear weapons.⁵⁰ The NPT delineated a framework through which states could encourage peaceful nuclear development, manage the disarmament of nuclear weapons, and thwart the proliferation of nuclear weapons and their related technologies.⁵¹ Under the NPT, parties are forbidden from transferring nuclear weapons or explosives to any state, and from assisting or inducing any non-nuclear weapon state to manufacture or acquire nuclear weapons or explosives.⁵² There are 189 signatory states to the NPT.⁵³

The NPT is enforced by the IAEA, which verifies compliance with its safeguards and detects diversions of nuclear technology for non-peaceful purposes.⁵⁴ In theory, if the IAEA discovers that a state violated the NPT then the matter is referred to the United Nations Security Council, which may then decide to exercise its power under

49. Michael Elliott et al., *Living Under the Cloud*, TIME, Aug. 1, 2005 (stating that the detonation of the bombs over Japan “forever serv[ed] as an admonishing reminder of mankind's destructive capacities”).

50. *Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, <http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml> (last visited Jan. 19, 2014) (describing how the NPT was introduced in 1968, came into force in 1970, and was extended indefinitely in 1995).

51. Joyner, *supra* note 6, at 512 (noting that alongside the development of the most destructive weapons were regimes to limit their development and usage).

52. Allen, *supra* note 7, at 58 (pointing out that the global inventory of nuclear weapons exceeds 10,000 despite sustained efforts to reduce it).

53. *Id.* at 59 (noting that the only states not party to the NPT are India, Israel, Pakistan, and North Korea).

54. Taylor Burke, *Nuclear Energy and Proliferation: Problems, Observations, and Proposals*, 12 B.U. J. SCI. & TECH. L. 1, 18-19 (2006) (noting that the IAEA's goal is to promote nuclear safety, security, science, and technology).

Chapter VI or VII.⁵⁵ However, occasionally one of the five permanent members of the Security Council (the United States, United Kingdom, France, China, or Russia) vetoes a Security Council resolution, leaving the NPT unenforced and the violator unpunished.⁵⁶

In 1975, in response to India's detonation of a nuclear bomb, a group of fifteen nations sought additional means to enforce the NPT through the Nuclear Suppliers Group ("NSG"), a voluntary multilateral export control regime.⁵⁷ Because the test showed that nuclear technology used for peaceful purposes could be used to create a weapon instead, NSG supplier states sought to prevent such misuse by implementing proliferation safeguards in their domestic laws.⁵⁸ Although the NSG is not formally part of the NPT, its members help enforce the NPT through a set of guidelines and trigger list to control the export of nuclear weapons and their component materials.⁵⁹ If any item from the trigger list is exported, then both the NSG and the NPT are implicated.⁶⁰ The list was expanded to include dual-use materials in 1992 after many essential components of Iraq's nuclear weapons program were discovered to have originated through legitimate commerce.⁶¹

2. Chemical and Biological Anti-Proliferation Efforts

The Biological Weapons Convention ("BWC"), founded in 1972, came out of existing efforts to ban biological weapons after their use in

55. Allen, *supra* note 7, at 58-60 (stating that although North Korea was party to the NPT for many years, when it withdrew in 2003 the effect was mostly symbolic as it flouted the treaty for years).

56. Harold Brown, *New Nuclear Realities*, WASH. Q., Winter 2007-2008, at 7, 12 (explaining that a state may remain in compliance with the NPT while developing nuclear power until it reaches a stage when it can withdraw from the NPT and rapidly develop a nuclear weapon, as was the case with North Korea).

57. Kate Heinzelman, *Towards Common Interests and Responsibilities: The U.S.-India Civil Nuclear Deal and the International Nonproliferation Regime*, 33 YALE J. INT'L L. 447, 454 (Summer 2008) (providing that India's detonation led to the NSG and an export control policy for nuclear materials).

58. See generally *History of the NSG*, NUCLEAR SUPPLIERS GROUP (NSG), <http://www.nuclearsuppliersgroup.org/Leng/01-history.htm> (last visited Jan. 19, 2014).

59. Becker, *supra* note 1, at 138-39 (explaining that the NSG supplements the NPT by limiting exports to proliferators).

60. Allen, *supra* note 7, at 61-62 (explaining that a suspect export triggers the NPT safeguards, which are set by the IAEA).

61. Joyner, *supra* note 6, at 516 (noting that legitimate commercial transactions of dual-use materials were among the "greatest facilitator[s]" of the Iraqi nuclear weapons program).

World War I.⁶² The BWC's goal is to stop the use, development, production, and stockpiling of chemical and biological weapons through their destruction.⁶³ Unlike the NPT, it does not have a formal enforcement mechanism, but relies on its signatories to recognize the legally binding nature of the agreement.⁶⁴

The Chemical Weapons Convention ("CWC") is newer than the BWC and NPT, but its mission is similar. Founded in 1993, the CWC forbids its members from developing, producing, maintaining, or using chemical weapons, and from permitting their use in any area under a state's control.⁶⁵ Also like the BWC, the CWC does not have an enforcement bureaucracy such as the IAEA, but it does employ international organizations to carry out its mission.⁶⁶ Although violations of the CWC can ultimately be reported to the United Nations Security Council, its enforcement mechanisms are mostly dependent upon states implementing their own anti-chemical weapons legislation.⁶⁷

The Australia Group has a similar relation to the BWC and CWC, as the NSG has to the NPT.⁶⁸ As with the NSG, the Australia Group is a voluntary group of forty like-minded states that seek to stem proliferation and do so by coordinating their laws and national export regimes.⁶⁹ Founded in 1985 after the discovery that chemical weapons used in the Iraq-Iran War partially originated through legitimate trade channels, the

62. *Biological Weapons Convention*, U.S. DEP'T OF STATE, <http://www.state.gov/t/isn/bw/> (last visited Jan 19, 2014).

63. *Id.* (noting that the convention strives, in part, to lessen the horrors of war).

64. Jack M. Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AM. J. INT'L L. 271, 273-74 (2007) (arguing that the use of hard, legal language and soft enforcement language leads to problems in interpreting and enforcing the BWC)..

65. Allen, *supra* note 7, at 65 (explaining that the CWC originated in the 1925 Geneva Gas and Bacteriological Warfare Protocol).

66. See Thomas D. Lehrman, *Enhancing the Proliferation Security Initiative: The Case for a Decentralized Nonproliferation Architecture*, 45 VA. J. INT'L L. 223, 239 (explaining that centralizing anti-proliferation regimes within the United Nations helps reduce costs and harmonize the international legal system)..

67. See Allen, *supra* note 7, at 65; see also *About the CWC*, U.S. CHEMICAL WEAPONS CONVENTION, http://www.cwc.gov/CWC_about.html (last visited Jan. 19, 2014) (explaining that in the United States, for instance, American companies "engaged in activities involving these chemicals may be required to submit declarations and/or reports to the Bureau of Industry and Security ("BIS") and may be subject to inspection by the Organization for the Prohibition of Chemical Weapons, which administers the CWC").

68. Allen, *supra* note 7, at 68 (noting that the CWC requires its signatories to employ export controls through its national laws).

69. Christopher A. Ford, *The Nonproliferation Bestiary: A Typology and Analysis of Nonproliferation Regimes*, 39 N.Y.U. J. INT'L L. & POL. 937, 973 (2007).

Australia Group's goal is to prevent legal proliferation by harmonizing national export controls for chemical and biological weapon precursors.⁷⁰ Its members meet regularly to ensure that member industries do not export chemical and biological weapon precursors, or dual-use chemical and biological weapon materials.⁷¹

C. *The United Nations*

Along with the general mandate from existing treaties and frameworks, the PSI also derives authority from the United Nations⁷² In particular, both the 1992 Presidential Statement and United Nations Security Council Resolution 1540 are key authorities: the statement declared that WMD proliferation is a global threat, and the resolution mandated that all states must prevent WMD proliferation to terrorists.⁷³ The resolution, which the Security Council unanimously passed on April 26, 2004, and reaffirmed with Resolution 1673 on April 27, 2006, established three objectives.⁷⁴ First, it affirmed and updated the NPT, CWC, and BWC.⁷⁵ Second, it required all United Nations members "to punish any 'non-[s]tate actors' dealing in weapons of mass destruction and technology."⁷⁶ Third, it required that all members institute effective laws that "prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes."⁷⁷

70. *The Origins of the Australia Group*, THE AUSTRALIA GROUP, <http://www.australiagroup.net/en/origins.html> (last visited Jan. 19, 2014).

71. *Id.*

72. Becker, *supra* note 1, at 148-49 (explaining that the United States welcomes United Nations support for the PSI even though the initiative is separate from the international body).

73. *Id.*; see also *Proliferation Security Initiative Fact Sheet: Statement of Interdiction Principles*, U.S. DEP'T OF STATE, <http://www.state.gov/t/isn/c27726.htm> (last visited Jan. 19, 2014) (stating that the PSI is "consistent" with the 1992 statement).

74. S.C. Res. 1673, ¶ 1 U.N. Doc. S/RES/1673 (Apr. 27, 2006) (reaffirming and re-endorsing 1540).

75. S.C. Res. 1540, ¶ 1 U.N. Doc. S/RES/1540 (Apr. 28, 2004) (explaining that all parties should fulfill their obligations within the existing framework).

76. *U.N. Security Council Unanimously Passes Resolution on WMD*, U.S. DEP'T OF STATE, <http://iipdigital.usembassy.gov/st/english/texttrans/2004/04/20040428173143frllehctim0.7385828.html#axzz2t38o9fZO> (last visited Jan. 19, 2014).

77. S.C. Res. 1540, ¶ 18 U.N. Doc. S/RES/1540 (Apr. 28, 2004) (explaining that this must be done through export controls and other methods to prevent WMD acquisitions).

In addition to its affirmations and requirements, 1540 universalized the anti-proliferation system.⁷⁸ Although the treaties detailed above are only as strong as the states that are party to them, 1540 bound every United Nations member to fight proliferation.⁷⁹ Accordingly, by creating a legally binding resolution in which all states are responsible for implementing anti-proliferation laws, 1540 made the PSI more powerful than it would be as a multilateral agreement.⁸⁰

III. ANALYSIS

In October 2003, nearly a year after the North Korean incident, the PSI had its most notable success when it interdicted a German-flagged ship, the *BBC China*, on its way to Libya.⁸¹ As a result of international cooperation between the United States, United Kingdom, Germany, and Italy, the ship was diverted to an Italian port where thousands of parts of uranium enrichment equipment were discovered in its hull.⁸² In contrast to the *So San* incident, the *BBC China* interdiction was grounded in international law and, more importantly for PSI advocates, the interdiction seemed to vindicate its mission.⁸³ By interdicting the ship, the PSI proved its worth and effectiveness.⁸⁴ Even more importantly, because the interdiction happened in Italy's territorial sea and the

78. Joyner, *supra* note 6, at 539 (arguing that 1540 improved the existing anti-proliferation system by making it applicable to all states).

79. *Id.*

80. *Id.* ("Resolution 1540 addressed these challenges through the authority of the Security Council under its Chapter VII power, binding upon every [United Nations member] under Article 25 of the [United Nations] Charter. Through this legally binding decision, the Security Council imposed additional continuing international legal obligations on all [United Nations] member states."); see also John Bolton, *An All-Out War on Proliferation*, U.S. DEP'T OF STATE (Sept. 7, 2004), <http://2001-2009.state.gov/t/us/rm/36035.htm> (arguing that 1540 burdens all states with the legal obligation to fight proliferation).

81. Becker, *supra* note 1, at 155.

82. Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 FLA. ST. J. TRANSNAT'L L. & POL'Y 253, 274 (2005) (describing the *BBC China* interdiction as the PSI's most prominent achievement, because it showed that the PSI could operate consistent with international law while simultaneously fighting proliferation effectively).

83. Becker, *supra* note 1, at 156 (noting that shortly after the *BBC China* interdiction, Libya renounced its weapons programs); see also Bolton, *supra* note 22, at 401 (arguing that the interdiction also helped dismantle the A.Q. Khan black market nuclear proliferation network).

84. See Byers, *supra* note 27, at 529.

vessel's flag state gave permission for its search, the interdiction was legal.⁸⁵

But suppose there was a different situation, in which a non-PSI state, to circumvent international law, transferred a WMD to another non-PSI state. Ostensibly, if the vessel stayed in friendly waters, flew a flag, and was not reasonably suspected of a universal jurisdiction offense, it could travel unmolested and deliver the WMD.⁸⁶ Although the PSI sought to close existing loopholes in the anti-proliferation system and the BBC China was clearly a success, it is less clear that the PSI can stop this hypothetical situation.⁸⁷

To address such a situation, this section analyzes how well the PSI closed such loopholes. First, it provides a side-by-side comparison between the PSI and UNCLOS. Second, it measures how well the PSI compares to the preexisting anti-proliferation regime. Third, it examines the PSI's effectiveness following the passage of United Nations Security Council Resolution 1540.

A. The Law of the Sea Convention Provides Only a Limited Basis for Universal Jurisdiction

In addressing UNCLOS's limitations, the PSI makes some improvements by committing nations to making proliferation a universal jurisdiction offense.⁸⁸ In particular, having over one hundred states either to sign the PSI or support some kind of anti-proliferation effort is a major accomplishment toward making WMD proliferation a universal jurisdiction offense.⁸⁹ Moreover, the significant amount of PSI membership satisfies the first requirement of customary law—that the custom is generally, if not universally, practiced.⁹⁰ Accordingly, if more

85. Bolton, *supra* note 22, at 400 (attributing the PSI's success, in part, to its "ample authority to support interdiction actions at sea, in the air, and on land."); *see also* Byers, *supra* note 27, at 529 (noting that the legality of the BBC China interdiction was undisputed).

86. *See* Byers, *supra* note 27, at 527.

87. *See* Becker, *supra* note 1, at 155 (explaining that the success of the BBC China operation was due, in part, to not rocking the international law boat).

88. Hadley, *supra* note 24 (explaining that the PSI deputizes states to fight proliferation by using their own resources and ingenuity).

89. *See Proliferation Security Initiative 10th Anniversary High Level Political Meeting Outcomes*, U.S. DEP'T OF STATE (May 28, 2013), www.state.gov/r/pa/prs/ps/2013/05/210010 (recognizing "the critical role the [PSI] has played in countering the spread of [WMD]").

90. *See* Barry, *supra* note 9, at 301 (defining customary international law as a generally accepted state practice).

states agree to interdict proliferators, then that practice may eventually become generally accepted and, therefore, satisfy the second requirement of international customary law.⁹¹

However, the great number of PSI participants can be misleading.⁹² Although strong membership is beneficial in theory, especially considering that it constitutes over sixty percent of global, commercial shipping tonnage, the problem remains that non-signatory states are the ones most likely engaged in proliferation.⁹³ Additionally, without violating one of UNCLOS's four exceptions under Article 110, a rogue state can still proliferate to another with impunity.⁹⁴ In this way, a state can transport dual-use materials intended for WMD construction, even though it is technically not breaking the law.⁹⁵

In essence, UNCLOS's interdiction power is significantly limited; states do not have the legal authority to board a vessel suspected of proliferation unless: (1) the vessel's flag state gives permission to board, or (2) the vessel is reasonably suspected of violating Article 110.⁹⁶ Moreover, the flag states that are likely to proliferate are also unlikely to permit other states to search their vessels, let alone to grant the power to seize their cargo.⁹⁷

Further, although UNCLOS already has the force of customary international law, none of the four instances in which a state may breach another state's sovereignty is closely related to the interdictions envisioned by the PSI.⁹⁸ Instead, these exceptions reflect the widely

91. *Id.* at 302; *but see* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1114 (Fall 1999) (explaining that it is unclear how a state practice becomes a custom because questions remain as to how many, and how consistently, states must follow the practice).

92. Becker, *supra* note 1, at 164-65 (noting that China, India, Malaysia, and Indonesia are not PSI members, which is problematic due to their influence in southeast Asia).

93. *See* Brown, *supra* note 56, at 7 (explaining how North Korea exploited the law to "legally" develop a nuclear weapon); *see also* *Proliferation Security Initiative Boarding Agreement with Cyprus*, U.S. DEP'T OF STATE (July 25, 2005), <http://m.state.gov/md50274.htm> (noting that a large percentage of vessels may be subject to several boarding, search, and seizure protocols).

94. Becker, *supra* note 1, at 203-204.

95. *See* Henry Sokolski, *Nukes on the Loose*, WKLY. STANDARD, June 23, 2003, at 20 (noting that Iran did not violate the NPT in most of its covert acquisitions).

96. *See* UNCLOS, arts. 95-96 (explaining that warships and vessels conducting governmental, non-commercial services are immune from interdiction).

97. Byers, *supra* note 27, at 531. "The problem with all the treaty-based approaches is that the states most likely to traffic in WMD and associated technologies are unlikely to accord stop-and-search powers to other states." *Id.*

98. Joyner, *supra* note 6, at 532 (arguing that efforts to expand the definition of piracy to include WMD trafficking are unsuccessful due to their "total implausibility").

agreed-upon offenses during UNCLOS's ratification.⁹⁹ For example, the BBC China operation, which stopped nuclear components from being delivered to a state sponsor of terrorism, likely has more resonance post-9/11 than in 1982, when UNCLOS was ratified.¹⁰⁰ Accordingly, that operation, which was completed pursuant to the PSI, would likely not have been successful were it justified solely on Article 110.¹⁰¹ It follows, by extension, that if terrorist operations were attempted on the high seas, where such authorities' power is more attenuated, then the likelihood of success would be even smaller.¹⁰²

A proponent of using UNCLOS to expand universal jurisdiction might point to Article 110, which, in prefacing these exceptions, states that they apply "[e]xcept where acts of interference derive from powers conferred by treaty."¹⁰³ It stands to reason then, that the PSI, as an extension of the anti-proliferation regime, is part of that conferred power.¹⁰⁴ However, being part of that power simply gives a state the ability to rewrite its treaty obligations, rather than UNCLOS itself.¹⁰⁵

Simply put, though the PSI is complementary of, and mindful of, the place of UNCLOS, it cannot really be used to expand universal jurisdiction.¹⁰⁶ At best, the ways in which UNCLOS itself became customary international law, through widespread adherence and the

99. Becker, *supra* note 1, at 204.

100. Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L.J. 257, 258-59 (Winter 2002) (explaining that some early drafts of UNCLOS defined "piracy" to include only commerce, and not political acts, which might be defined as terrorism today).

101. Becker, *supra* note 1, at 204 (stating that "[u]nless proliferation actors engage in piracy to facilitate the trafficking of dangerous materials, or if the trafficking somehow involves manifestations of the modern slave trade (e.g., trafficking in sex workers), these clear expressions of legal authority to override the non-interference principle on the high seas will not have direct application").

102. Tara Helfman, *The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade*, 115 YALE L.J. 1122, 1154 (Mar. 2006) (noting that UNCLOS does not even prohibit non-contraband weapons).

103. UNCLOS, arts. 95-96 (delineating the circumstances in which a vessel has the right of visit); *see also* Joyner, *supra* note 6, at 537 (explaining that "the drafters of Article 110 wished to leave open the possibility that subsequent or already extant treaties among groups of [UNCLOS] signatories might amend as among themselves the right of interdiction covered in Article 110").

104. Byers, *supra* note 27, at 527 (noting that a state can give another state permission to exercise jurisdiction over its vessel).

105. *Id.* at 537 (noting that states can modify Article 110's provisions simply by creating "conflicting principles in other treaty instruments").

106. Helfman, *supra* note 102, at 1154. UNCLOS is silent as to intercepting non-contraband weapons. *Id.*

passage of time, can serve as a model for the PSI and the goal of expanding universal jurisdiction.¹⁰⁷

B. The Preexisting Anti-Proliferation Framework Inadequately Addresses High Seas Proliferation

Before the PSI's creation, the global anti-proliferation system had mixed success.¹⁰⁸ Although the system developed alongside WMD technology, it did not always meet the challenge of anti-proliferation.¹⁰⁹ Indeed, rather than taking a proactive role in preventing WMD development, the system was more often reactive and responsive—dealing with WMD after their use rather than before their creation.¹¹⁰

To some degree, this was understandable. Nations jealously guard and heavily protect their defense secrets, particularly when weapons are built in response to a real or perceived national security threat.¹¹¹ In addition, due to the complexities and suspicions associated with international relations, an intrusive system faces many obstacles when it tries to prevent a state from acquiring weapons that the state perceives as necessary for its national security.¹¹² Moreover, opposing parties are deeply divided, distrustful, hostile, and share little common ground with each other, such as the case of Iran and the U.S.-led negotiating parties.¹¹³ In this context, stopping or even deterring proliferation is a difficult and complicated pursuit.¹¹⁴

107. See generally, Barry, *supra* note 9, at 306-309 (explaining that the law of the sea developed over a period of four centuries with the help of scholars, treaties, and state practice).

108. Allen, *supra* note 7, at 57 (arguing that, for some critics, the preexisting anti-proliferation regime has always been, and will remain, ineffective in stopping or deterring the use of WMD by rogue states or terrorist groups).

109. Heinzelman, *supra* note 57, at 451 (explaining that in the context of nuclear weapons, “proposals for an international nonproliferation system have vacillated between emphasizing arms control and arms oversight”).

110. John R. Bolton, *Conversations with the Forum: Perspectives on Preemption and National Security: Interview with Under Secretary of State John R. Bolton*, 29 FLETCHER F. WORLD AFF. 5, 7 (Winter 2005) (arguing that the existing framework passively and inadequately dealt with the precursors to WMD).

111. Joyner, *supra* note 6, at 525-26.

112. *Id.* at 512 (explaining that during the Cold War, the superpower rivalry between the U.S. and Soviet Union spurred “almost unbridled development” of WMD programs).

113. Geoffrey Kemp, *Desperate Times, Half Measures*, THE NAT'L INTEREST (June 1, 2005), <http://nationalinterest.org/article/desperate-times-half-measures-558>.

114. *When the Soft Talk Has to Stop*, THE ECONOMIST (Jan. 12, 2006), <http://www.economist.com/node/5382479> (noting that if a rogue state fully masters the enrichment process, “the only bar to a military program[] is intent”).

Despite these caveats, however, there is ample room for criticizing the pre-PSI anti-proliferation system.¹¹⁵ In addition to the general bar against the transfer and development of nuclear weapons, the NPT gives its signatories the “inalienable right” to “develop research, produc[e] and use [] nuclear energy for peaceful purposes.”¹¹⁶ In theory, because of the significant number of states that are part of the NPT, which has been ratified by more states than any other similar agreement, it should be an effective tool of the anti-proliferation system.¹¹⁷ In practice, however, its provisions have little effect, absent compliance.¹¹⁸

In particular, the NPT’s biggest loophole is that a state can act entirely consistent with the NPT to develop a nuclear weapon by legally obtaining most of the component parts necessary to build a weapon and then opting out of the NPT when it is time to actually build the weapon.¹¹⁹ In this way, a state can act “legally” as a party to the NPT to develop a nuclear weapon and, thereafter, as a non-party to the NPT and possess such a weapon.¹²⁰ In addition, the NPT does not provide for the universal interdiction of a state for nuclear weapon proliferation.¹²¹

115. Winner, *supra* note 2, at 130 (arguing the PSI responds to a new threat that cannot be addressed just by the NPT); *see also* Amitai Etzioni, *Enforcing Nuclear Disarmament*, THE NAT’L INTEREST (Dec. 1, 2004) <http://nationalinterest.org/article/enforcing-nuclear-disarmament-510>.

116. Treaty on the Non-Proliferation of Nuclear Weapons, art. 4, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT] (noting that the “peaceful purposes” right is subject to compliance with the NPT’s requirement not to manufacture or transfer a nuclear weapon).

117. *Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, <http://www.un.org/disarmament/WMD/Nuclear/NPT/index.shtml> (last visited Feb. 4, 2014) (characterizing the amount of NPT signatories as “a testament to the Treaty’s significance”); *but see* Brown, *supra* note 56, at 18 (arguing that the failure to achieve nuclear disarmament since the NPT was ratified has hindered anti-proliferation efforts); *see also* Wolfgang K. H. Panofsky, *Nuclear Insecurity*, FOREIGN AFFAIRS (Sept. 2007) <http://www.foreignaffairs.com/articles/62832/wolfgang-k-h-panofsky/nuclear-insecurity> (noting that several NPT states are trying to obtain nuclear weapons, and four nuclear weapons states (India, Israel, Pakistan, and North Korea) are not parties to the treaty).

118. Becker, *supra* note 1, at 138; *see also* Elliott, *supra* note 49 (commenting that none of the 1968 nuclear signatories intended to abide by their promise to completely disarm their nuclear weapons).

119. Brown, *supra* note 56, at 12.

120. Becker, *supra* note 1, at 139; *see also* Joyner, *supra* note 6, at 517 (explaining the difficulty of determining which technologies are dual-use where, for example, a civilian space missile program is almost indistinguishable from a military missile program until it is almost fully complete).

121. Adam Treiger, *Plugging the Russian Brain Drain: Criminalizing Nuclear-Expertise Proliferation*, 82 GEO. L.J. 237, 258 (1993).

Indeed, under the NPT, proliferating nuclear material to a terrorist group “is in effect legal.”¹²²

The Chemical and Biological Weapons conventions share many of the NPT’s limitations.¹²³ The conventions, like the NPT, are only as powerful as the number of states that adhere to and willingly comply with them.¹²⁴ Although states adhere to the conventions in different ways, their best chance of success is through informal groups, like the Australia Group, which has produced “mixed” results.¹²⁵

In contrast, the PSI helps guard against proliferation by raising its costs and reducing the amount of states through which materials can be inadvertently proliferated.¹²⁶ Moreover, as the NPT essentially permits proliferating nuclear material to a terrorist group, the PSI hinders such proliferation by drying up the ways in which it can be proliferated.¹²⁷ Although this prevention is limited to PSI states, it makes the ocean ways less amenable to potential proliferators both by reducing the amount of friendly parties who can assist such proliferation efforts, and by setting a precedent, not only by law or agreement, but also by enforcement.¹²⁸

In measuring the value of the anti-proliferation regimes, it is also useful to compare the PSI to the NSG and Australia Group because they each attempt to tackle the limitations of the preexisting system.¹²⁹ The PSI, similar to the NSG and Australia Group, complements the preexisting system by creating a framework through which states can voluntarily close loopholes in the regime.¹³⁰ Additionally, unlike the older anti-proliferation regimes, PSI participants do not have legally binding responsibilities.¹³¹ This, in turn, facilitates the unilateral anti-

122. Etzioni, *supra* note 115.

123. Allen, *supra* note 7, at 66.

124. Nobuyasu Abe, *Existing and Emerging Legal Approaches to Nuclear Weapons in the 21st Century*, 39 N.Y.U. J. INT’L L. & POL. 929, 931 (Summer 2007) (arguing that “[t]he basic weakness of most methods based on joining like-minded countries together is that participation and compliance are essentially voluntary”).

125. Becker, *supra* note 1, at 138.

126. Ford, *supra* note 69, at 589.

127. Etzioni, *supra* note 115.

128. Logan, *supra* note 82, at 256 (explaining that PSI states try to deter rogue states and terrorist groups by making it more expensive to proliferate and requiring greater time and effort to create a WMD).

129. See Gawdat Bahgat, *Nonproliferation Success: The Libyan Model*, WORLD AFFAIRS, June 22, 2005, at 3, 5.

130. Allen, *supra* note 7, at 61.

131. Becker, *supra* note 1, at 149 (explaining that in the absence of formal legal responsibilities, PSI member states frequently confer to trade information, strategize, conduct training exercises, and coordinate and develop legal authorities).

proliferation actions of states acting in their individual capacities or in conjunction with each other.¹³² Thus, by harmonizing international standards and encouraging individual state responsibilities toward proliferation, the PSI, NSG, and Australia Group strengthen the NPT and similar treaties by making it more difficult for a responsible state to unwittingly export WMD components to a rogue state.¹³³

However, there is one important difference. The NSG and Australia Group focus on export controls, whereas the PSI focuses on actually stopping proliferators.¹³⁴ Although each makes proliferation more difficult, only the PSI can physically stop proliferation.¹³⁵ Accordingly, because the other regimes basically consist of only information sharing, the PSI adds a helpful element of force to what would otherwise be a set of voluntary treaties supported only by voluntary export controls.¹³⁶

As a result, voluntary enforcement agreements may appear to already address the limitations of the preexisting regimes.¹³⁷ However, the problem is that the legal effect of the agreements is limited to signatory states, which are already inclined not to develop or assist in the development of WMD for rogue purposes.¹³⁸ In this sense, it is similar

132. *Id.* at 151 (arguing that “while the PSI gives the impression of free-form multilateralism through its decentralized operating structure, the ‘arrangement’ is more accurately understood as a mechanism through which the unilateral actions of participating states can be coordinated and facilitated”).

133. Walter Gary Sharp, Sr., *Proliferation Security Initiative: The Legacy of Operacion Socotora*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 991, 1013 (Spring 2007) (explaining that such frameworks sometimes include a political obligation to prohibit or prevent illegal activities under a state's laws).

134. Bolton, *supra* note 22, at 400 (explaining that PSI activities are carried out by the military, law enforcement, and intelligence agencies, whereas the NSG and Australia Group are diplomatic efforts).

135. See Yoo & Sulmasy, *supra* note 8, at 410 (explaining that the interdiction process may involve intelligence sharing, tracking a vessel, stopping it, and boarding it).

136. Logan, *supra* note 82, at 270 (noting that because the PSI involves preemption action that such an action may be justified by how great a threat the WMD poses to the interdicting state).

137. Abe, *supra* note 124, at 931 (noting that the NSG addresses some of the weaknesses of the NPT by instituting export controls).

138. Sokolski, *supra* note 95, at 21 (noting that when the non-signatory state of North Korea withdrew from the NPT, it was no longer illegal for it to export its nuclear materials). Because of its withdrawal, North Korea could theoretically export a nuclear weapon to another state without either state violating the NPT or international law. *Id.*

to a group of law-abiding people who would never even commit a crime in the first place agreeing not to commit or assist in a crime.¹³⁹

In regard to the use of anti-proliferation resources for universal interdiction, neither the PSI nor NPT's text supports the deputizing of any state to combat proliferation.¹⁴⁰ Instead, such ideas are left to their critics.¹⁴¹ For instance, Henry Sokolski, executive director of the Nonproliferation Policy Education Center, proposes that WMD proliferation should be a crime akin to piracy or slavery.¹⁴² He suggests that "trade in weapons of mass destruction would make one an outlaw—i.e., subject to the enforcing action of any law-abiding citizen."¹⁴³ However, absent such a proposal being instituted, the NPT, its sister agreements, and the enforcement regimes provide little justification for expanding universal jurisdiction.

In sum, the PSI's relation to the existing anti-proliferation regime is akin to an added tool.¹⁴⁴ Although it is not a legal extension of the NPT or CWC, it serves as a useful addition that can make proliferation harder.¹⁴⁵ It does so by, first, making it more difficult to supply a WMD or its component parts to a rogue state and, second, by decreasing the amount of states that will knowingly facilitate such a transfer.¹⁴⁶ Taken by itself, however, the PSI does not address the non-PSI country to non-PSI country transfer hypothetical discussed above because such an

139. Etzioni, *supra* note 115 (analogizing that the "difference between the NPT conception and that of deproliferation is akin to the difference between gun registration and removal of guns from private hands and most public ones").

140. NPT, *supra* note 116, 21 U.S.T. at 485-87 (the text explicitly gives the IAEA with the power to deal with nuclear activities).

141. Sokolski, *supra* note 95, at 21 (proposing that "[a]ny nation's attempt to redeploy chemical, nuclear, or biological warheads outside of its borders or to ship the key means to make them should be deprived the protection of international law"); *see also* Treiger, *supra* note 121, at 257 (arguing that expanding the NPT to include the proposed universal jurisdiction offense of proliferating nuclear expertise could be a useful deterrent).

142. Sokolski, *supra* note 95, at 21 (arguing that an international anti-proliferation prohibition should be developed).

143. *Id.*

144. *See* Yoo & Sulmasy, *supra* note 8, at 407-10 (arguing that the PSI is an improvement over the preexisting system).

145. *See* James Timbie, *A Nuclear Iran: The Legal Implications of a Preemptive National Security Strategy: Iran's Nuclear Program*, 57 SYRACUSE L. REV. 433, 441 (2007) (explaining that, in the case of Iran, the PSI makes it more difficult to procure WMD materials).

146. *See* Press Release, President Barack Obama, *supra* note 7.

interdiction would be a unilateral exercise of power and would not be an act pursuant to the PSI's text.¹⁴⁷

C. The United Nations Takes Positive Steps to Address Proliferation

More than any other source, United Nations Security Council Resolution 1540 ("1540") expands universal jurisdiction.¹⁴⁸ Unlike UNCLOS, it explicitly prohibits all states from helping non-state actors "develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery."¹⁴⁹ Also, unlike the preexisting anti-proliferation regimes, it has the force of binding international law, which affects every state, rather than just the voluntary signatory states.¹⁵⁰ Further, it imposes binding obligations on each state to legislate anti-proliferation controls for the purpose of promoting universal adherence to existing international nonproliferation treaties.¹⁵¹

In addition, by requiring that all states prevent proliferation, 1540 institutes a clear legal standard for the international system, one that goes further in its implications than any voluntary agreement (like the PSI) could do by itself.¹⁵² Indeed, its requirement that all states implement national anti-proliferation laws is, in effect, a demand that states act responsibly, and should they fail to do so, they may have to answer to the United Nations Security Council.¹⁵³ Echoing this, John Bolton, the creator of the PSI,¹⁵⁴ praised 1540 for "rest[ing] on the notion that

147. See NPT, *supra* note 116, 21 U.S.T. at 485-87 (showing that the NPT does not address enforcement outside of the IAEA).

148. See Allen, *supra* note 7, at 73, 75-76 (arguing that 1540 is a crucial part of the anti-proliferation regime because it imposes binding obligations on all states).

149. S.C. Res. 1540, *supra* note 75, ¶ 1 (noting that this applies under the United Nation's Chapter VII power).

150. *Counter-Proliferation in Asia: No Place to Hide, Maybe*, THE ECONOMIST, Oct. 30, 2004, at 43, 43 (noting that though signatories to the NPT, CWC, and BWC are required to institute such laws, that they have not and that 1540 may be the impetus to pass laws regulating "weapons materials and delivery systems").

151. *United Nations Security Council Resolution 1540 (2004)*, UNITED NATIONS, <http://www.un.org/sc/1540/> (last visited Feb. 9, 2014).

152. See Allen, *supra* note 7, at 76 (arguing that the message of 1540 is that all states must do their part to fight proliferation).

153. See Byers, *supra* note 28 (explaining that the United Nations Security Council reserved the power to act in itself).

154. Logan, *supra* note 83, at 265 (explaining that Bolton's goal was for the PSI to "shut down" proliferation).

sovereign states are responsible for writing and implementing laws closing the loopholes exploited by black market WMD networks.”¹⁵⁵

However, though the State Department describes 1540 and the PSI as consistent and reinforcing, there is debate about whether, if they are compatible, the PSI is more far-reaching than 1540.¹⁵⁶ For instance, though all states are required to develop and maintain export controls, the states are only called upon “[t]o promote the . . . strengthening of multilateral treaties to which they are parties”¹⁵⁷ This clause, by being a recommendation, seems like it is only a reaffirmation of the voluntary obligations of a signatory state to the NPT rather than a new obligation to abide by the PSI or any other anti-proliferation framework.¹⁵⁸

In addition, the resolution is notable for what it does not sanction. First, the president of the United Nations Security Council’s states that if 1540 were violated, then other states were not authorized to unilaterally enforce it.¹⁵⁹ Rather the United Nations Security Council as a whole should answer any question about enforcement.¹⁶⁰ Second, in drafting the resolution, a provision that would have explicitly authorized PSI-style activities was stricken in favor of a more general recommendation that states work together in anti-proliferation efforts.¹⁶¹ Both examples seem to narrow the resolution’s power and to only endorse the PSI insofar as it operates within the multilateral, bureaucratic system that it sought to avoid.¹⁶²

155. Bolton, *supra* note 80.

156. See *Proliferation Security Initiative Frequently Asked Questions*, *supra* note 28 (explaining that both the PSI and 1540 seek to strengthen national laws regarding anti-proliferation); see also Byers, *supra* note 27, at 532 (arguing that the “recommendatory nature of [1540’s prevention] provision indicates, together with the references to international law, an absence of any authorization to exceed the existing rules”).

157. Press Release, Security Council, Security Council Decides All States Shall Act to Prevent Proliferation of Mass Destruction Weapons, U.N. Press Release SC/8076 (Apr. 8, 2004), available at <http://www.un.org/News/Press/docs/2004/sc8076.doc.htm>.

158. See Byers, *supra* note 27, at 532 (noting that parts of the resolution are limited in what they require of states).

159. Allen, *supra* note 7, at 76 (noting that in matters of unilateral enforcement that only the United Nations Security Council has the prerogative to act).

160. See *id.*

161. Becker, *supra* note 1, at 166-67 (describing the successful Chinese effort to remove an explicit PSI-style authorization, possibly out of fear that such an authorization could set an interdiction precedent that might disrupt China’s commercial shipping interests in the future).

162. See Yoo & Sulmasy, *supra* note 8, at 409 (explaining that the United States viewed the United Nations as unreliable and inadequate to deal with novel challenges, which necessitated an organization that would act outside the United Nations).

In some sense, this is probably an unavoidable situation. By operating as a voluntary partnership, the PSI has the luxury of setting its own rules and avoiding the legalisms of the international system.¹⁶³ But by its very nature, such a partnership can only have a universal impact if the vast majority of states are party to it or if it is ratified by the United Nations.¹⁶⁴ Accordingly, in the matter of whether a state can interdict a vessel on the high seas that it reasonably suspects of transporting WMD, for now it seems that it is a choice of whether to act unilaterally and outside the international system or 1540.¹⁶⁵ In such a case, John Bolton suggests:

Where there are gaps or ambiguities in our authorities, we may consider seeking additional sources for such authority, as circumstances dictate. What we do not believe, however, is that only the Security Council can grant the authority we need, and that may be the real source of the criticism we face.¹⁶⁶

Given the uncertainty of WMD interdiction, such ambiguity is especially unfortunate.¹⁶⁷ After all, perhaps the most important reason why proliferation is such a challenging issue is the fact that about 95 percent of WMD components are dual-use materials, meaning that they themselves can be subject to interpretation.¹⁶⁸ Therefore, when one state is trying to determine whether to interdict a vessel from another state, it must make two decisions: (1) whether its information is good enough to reasonably suspect that the target materials are illegal and (2) whether it should bear the risk of running afoul of international law if the vessel's

163. See Becker, *supra* note 1, at 165-67 (arguing that the PSI is essentially a system that facilitates unilateral enforcement actions).

164. *Id.* at 155 (contrasting adherence to treaties and United Nations resolutions).

165. *Id.*

166. John R. Bolton, "Legitimacy" in *International Affairs: The American Perspective in Theory and Operation*, U.S. DEP'T OF STATE (Nov. 13, 2013), <http://www.state.gov/t/us/rm/26143.htm>; see also Christopher Kremmer, *High Stakes on the High Seas in Korean Blockade*, SYDNEY MORNING HERALD (July 12, 2003), <http://www.smh.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2003/07/11/1057783354653.html> (citing John Bolton as having argued that self-defense is sufficient to justify a high-seas interdiction).

167. See *supra* Part II.C (noting that Iran and Iraq acquired many parts to build WMD by procuring dual-use items through the exploitation of legitimate trade channels).

168. See Logan, *supra* 82, at 259. "The effort to interdict the rare illicit shipment may require the coastal state to stop and search numerous ships which turn out to pose no threat at all. And further, even if questionable materials are found, the coastal state must then prove that the materials will be used for threatening rather than non-threatening purposes." *Id.*

contents are perfectly legal.¹⁶⁹ Accordingly, the fact that 1540 is limited in its scope and that a vessel's contents may be subject to interpretation create a situation in which the only thing that a vessel proliferating WMD on the high seas has to fear is a hostile state that makes the bold, risky, and illegal move of unilaterally interdicting it.¹⁷⁰ In sum, while 1540 makes definite strides toward universalizing anti-proliferation efforts, it falls short of fully addressing proliferation on the high seas.¹⁷¹

IV. RECOMMENDATIONS

It should by now be clear that the PSI suffers from two limitations. First, despite its many signatories, a determined rogue state or group can flout its strictures by simply being a non-PSI member that complies with international law.¹⁷² Second, without the support of more nations, it will be difficult, if not impossible, to establish WMD interdiction either as a core principle of customary international law or of United Nations-backed international law.¹⁷³ Without addressing these limitations, the PSI will simply be another anti-proliferation tool rather than an initiative that closes the loopholes of the anti-proliferation system. The following are three recommendations aimed at fixing the PSI's limitations.

A. Universal Jurisdiction Should Be Expanded Through the United Nations

Despite its occasional aversion to international law, the United States often looks to international law to justify its actions, solve its problems, or maintain its security.¹⁷⁴ For instance, in the run-up to the Iraq war, the

169. *See id.* (explaining that the interdictor would have to show that the United Nations makes transporting WMD illegal and that the transport is itself a danger); *see also* Becker, *supra* note 1, at 149 (noting that dual-use materials must be clearly described to prevent legitimate materials from being seized).

170. *See infra* Part IV.C (discussing preemptive attacks).

171. *See* Becker, *supra* note 1, at 167 (stating that "it is not clear that the PSI has effectively created a global consensus on acceptable standards and procedures for counter-proliferation interdiction operations at sea").

172. *Id.* at 155 (explaining that anti-proliferation efforts are only as powerful as the states that comply with them).

173. *See* Allen, *supra* note 7, 58-62 (discussing the limitations of non-universal compliance with the PSI).

174. *See* William H. Taft, IV, *A View From the Top: American Perspectives on International Law After the Cold War*, 31 *YALE J. INT'L L.* 503, 503-04 (2006) (arguing that since the end of the Second World War, the United States employed international law to its benefit in military alliances, trade, science, environment, and human rights).

Bush administration made its case at the United Nations.¹⁷⁵ There, the United States argued that because Iraq had violated United Nations Security Council Resolutions, the United Nations or, failing that, a member state, had to take action to enforce the resolutions.¹⁷⁶ Similarly, even though it is not party to UNCLOS, the United States benefits from customary international law because international law ensures the legality of both the mobility of the United States' armed forces and the merchant vessels that travel to and from the country's shores.¹⁷⁷

To some, by going to the United Nations Security Council and obtaining a new resolution, a state would, on the one hand, benefit from a universal law but could, on the other hand, be hindered by another state's veto.¹⁷⁸ In this sense, going to the United Nations might be an anachronistic gesture more appropriate to the Cold War.¹⁷⁹ Such criticism may be misplaced.

Going to the United Nations to expand universal jurisdiction is a natural extension of past efforts to strengthen and act in accord with the international system.¹⁸⁰ The problem with United Nations Security Council Resolution 1540, as detailed above, is that, though it mandates that states close loopholes to proliferation, it does not give express authorization to high seas interdictions.¹⁸¹ A new United Nations resolution (or amendment to 1540) that explicitly backs the PSI and delineates specific circumstances in which a state can interdict another

175. See Winston P. Nagan and Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375, 404-05 (2004).

176. See David B. Rivkin, Jr., *The Virtues of Preemptive Deterrence*, 29 HARV. J.L. & PUB. POL'Y 85, 100-02 & n. 36 (Fall 2005) (arguing that "aside from the legality of preemption, the Iraq war was perhaps the most legally justified war of all time"); *but see* Nagan and Hammer, *supra* note 175, at 413-17 (arguing that the Bush administration's reliance on United Nations Security Council resolutions owed more to tendentious interpretations of the text as opposed to a solid legal basis for the use of force).

177. See Byers, *supra* note 27, at 527 (explaining that the United States' decision to release the So San demonstrated the seriousness with which it regards UNCLOS).

178. See Yoo & Sulmasy, *supra* note 8, at 409-10 (arguing that the United States created the PSI, in part, because the Security Council was unreliable and would possibly veto the initiative).

179. *Id.* (arguing that, in the past, the United Nations was unfit to deal with new challenges to international order).

180. Taft, *supra* note 174, at 505 (noting that the United States "enthusiastically supported the development of new international legal obligations" in the Security Council).

181. Becker, *supra* note 1, at 167 (explaining that China's successful effort to prevent PSI-style interdictions from being expressly authorized frustrated the development of customary international law to include such interdictions).

state's vessel would improve 1540 by closing the high seas gap.¹⁸² In addition, unlike other methods of creating international law, such as through treaties or the development of international norms, it would quickly institute what would otherwise take years to put in place.¹⁸³ For these reasons, a United Nations resolution may be the best way to quickly and effectively expand universal jurisdiction.

*B. Universal Jurisdiction Should Be Expanded By
Increased PSI Membership*

As shown by the obstacles to getting an explicit authorization from the United Nations for PSI-style interdictions, it may be more realistic to expand universal jurisdiction through increasing membership in the PSI and thereby developing customary international law.¹⁸⁴ Although it will not initially bear the imprimatur and authority of international law, the practice of interdiction combined with increasing the number of PSI members will strengthen anti-proliferation efforts by decreasing the amount of states that tacitly permit proliferators to travel the seas unmolested and by increasing the costs of transporting WMD.¹⁸⁵

History provides at least one analogous example for this type of action. In the early 19th century, the British started suppressing the transatlantic slave trade through a campaign that employed both diplomacy and unilateral action.¹⁸⁶ At first, the efforts consisted of unilateral boarding and bilateral interdiction treaties between Britain and

182. *Id.* (noting that a new right of interdiction is unlikely to develop out of customary international law without a Security Council authorization).

183. *Id.* (explaining that developing international customary law is made even more difficult when based off of treaties due to the exceptions that states incorporate into treaties as a condition for signing them).

184. See Barry, *supra* note 9, at 330. "Like the crimes of piracy and slavery, the near universal condemnation of the transfer of WMD, as evidenced by specific multilateral treaties, could indicate that a new principle of *jus cogens* is being formulated, creating a universal jurisdiction over the act." *Id.*

185. See Sharp, *supra* note 133, at 1026 (proposing that PSI states announce the state and non-state actors with which they are concerned, which could make proliferation more difficult by increasing its costs and reducing the number of otherwise friendly states); see also Goldsmith & Posner, *supra* note 91, at 1119 (explaining that customary international law develops over time due to changes in power, technology, and other factors, as when coastal jurisdiction increased from the three-mile cannon-shot rule to the present twelve-mile rule).

186. See Byers, *supra* note 27, at 534-36 (arguing that moral and economic reasons explain how Britain went from being a player in the slave trade to the primary proponent of abolition).

other states.¹⁸⁷ As the campaign went on, multilateral treaties and an enforcement regime supplemented the earlier strategies.¹⁸⁸ Through these efforts, by the end of the 19th century, Britain, along with other states, formed a “near universal” consensus against the slave trade.¹⁸⁹

As with the British and the slave trade, there already exists a consensus of sorts against proliferating WMD in the form of the various anti-proliferation efforts.¹⁹⁰ Perhaps by extension, the wrong that is thwarted by searching a ship of one hundred slaves can also justify searching a vessel that contains either a weapon or parts of a weapon that can kill thousands.¹⁹¹ Accordingly, should universal jurisdiction not be expanded through the United Nations, building upon the existing consensus against proliferation and increasing membership in the PSI may be the next best option.

C. Universal Jurisdiction Should Be Expanded Unilaterally

With all this in mind, some states may not want to take the risk of operating through the international system and may instead decide to act unilaterally.¹⁹² Under these circumstances, if a state feels threatened by a vessel that it reasonably suspects of carrying WMD, it may conclude that it should unilaterally interdict a vessel regardless of the condemnations and criticisms which may accompany such an act.¹⁹³ In a sense, it is breaking one law in order to prevent another law from being broken.

187. Barry, *supra* note 9, at 315 (explaining that Britain’s initial unilateral actions set in motion the abolition of transatlantic slavery).

188. Becker, *supra* note 1, at 208 (explaining that the British used multiple tactics toward the goal of abolishing slavery).

189. Barry, *supra* note 9, at 315 (explaining that the customary international law against slavery came about because Britain was the only nation that had the capability and will to unilaterally prohibit it).

190. Becker, *supra* note 1, at 167 (showing that the goal of nonproliferation is widely shared, if not the means to achieve the goal); *see also* Barry, *supra* note 9, at 330 (arguing that due to the widespread condemnation of proliferation, it follows that there may already be authority to justify stopping proliferation on the high seas).

191. *See* Helfman, *supra* note 102, at 1153 (explaining that one prominent slavery abolitionist, using similar logic, argued that slave traders were equivalent to pirates, which therefore gave the British a license to stop the trade); *see also* Langewiesche, *supra* note 3 (describing the impact of a nuclear bomb).

192. *See* Becker, *supra* note 1, at 229 (conceding that “if the United States and its PSI allies suspect that a vessel is transporting a WMD shipment at sea, they are going to act”).

193. *Id.* at 230 (arguing that non-interference in foreign affairs can be a good tool for promoting peace and security, but that it is not an end in itself).

Although this might do short-term damage to the authority of international law, it will also illustrate how serious states are about ending proliferation, even if it means acting extralegally.¹⁹⁴ More importantly, it will show that anti-proliferation regimes are not just dead letters. Such a showing could, in turn, lead to the practice of interdicting proliferating vessels becoming customary international law.¹⁹⁵

V. CONCLUSION

Even though the PSI is a useful tool in deterring and stopping the proliferation of WMD, it does not do enough to address proliferation on the high seas. Due to the voluntary nature of the PSI, its shortcomings are a reflection of factors that are out of its control. One such factor is the unwillingness of other states to use the United Nations to form a more aggressive anti-proliferation framework. Therefore, in response to the current limitations of international law in combating WMD proliferation, states should expand the doctrine of universal jurisdiction to include WMD interdiction through the United Nations, by increasing membership in the PSI, or by unilateral action. Such an expansion will make the world a safer place by increasing the costs of proliferation and emphasizing the seriousness with which responsible states regard WMD proliferation.

194. See Barry, *supra* note 9, at 322-23 (explaining that Israel's preemptive attacks against hostile Arab states in the Six Day War and Iraq's nuclear program bolstered the case for anticipatory self-defense by proportionately attacking an imminent threat); see also Becker, *supra* note 1, at 209 (noting that even after an adverse court ruling, the British continued to interdict slave vessels and regard slave trading as a universal offense).

195. *But see* Becker, *supra* note 1, at 229-30 (arguing that even though a state may be justified in acting unilaterally, the costs of such action will be more easily borne if done with the blessing of the international community).