

THE PROLIFERATION SECURITY INITIATIVE (PSI)

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On December 2002, a merchant ship flying no flag was sailing in the Gulf of Aden. American authorities requested two Spanish warships that were following it, to search the freighter, based on the suspicion that it was carrying ballistic missiles and components from North Korea to the Middle East. Spanish Special Forces stopped and searched the vessel about 600 miles off the coast of Yemen. Inside, 15 complete SCUD missiles, 15 missile warheads, 23 nitric acid tanks (1) and 85 barrels of other North Korean chemical compounds were found, hidden under cement bags (2). Two days later, Yemen admitted to be the cargo's final destination, declared that weapons were legally purchased and requested the release of the ship (3); American and Spanish authorities allowed the ship to continue its course, after considering that there was no provision under international law authorizing the seizure of its cargo (4).

This kind of experiences led some countries to gather in Madrid in June 2003 to establish an information exchange and coordination mechanism to restrict the illegal transport (5) of weapons of mass destruction (WMD) and its components, both by state and non-state actors (6). Initially created by 11 states (7), the Proliferation Security Initiative (8) currently has 95 member states, including the recent joining of the Republic of Korea (9); ten of them

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References

- (1) Oxidant agent used for missile launchers.
- (2) The boat, named "So San" and registered in Cambodia, was being followed by the American Intelligence from North Korea. Shanker, Thom: "Threats and responses: arms smuggling; Scud missiles found on ship of North Korea", *The New York Times*, December 11, 2002; Robbins, Carla A.: "Why U.S. gave U.N. no role in plan to halt arms ships", *The Wall Street Journal*, October 21, 2003; Kirgis, Frederic L.: "Boarding of North Korean Vessel on the High Seas", *ASIL Insights*, December 12, 2002. In 1999, India captured an undeclared North Korean shipment of missile components and blueprints for Pakistan, that were discovered when the boat – the "Ku Wol San", with North Korean flag- was in one of the country's western ports: "Impounded Korean ship had Scud-type missile material", *The Indian Express*, September 05, 1999, available at: http://www.indianembassy.org/press/New_Delhi_Press/September_1999/Impounded_Korean_Sept_05_1999.htm; Mohan, Raja: "India and proliferation security", *The Hindu*, October 06, 2003. Available at: <http://www.thehindu.com/2003/10/06/stories/2003100605081100.htm>.
- (3) Sanger, David E. & Shanker, Thom: "Threats and responses: war materiel; reluctant U.S. gives assent for missiles to go to Yemen", *The New York Times*, December 12, 2002.
- (4) "There is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea. While there is authority to stop and search, in this instance there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen. And therefore, the merchant vessel is being released". Fleischer, Ari: Press briefing, December 11, 2002. Available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2002/12/20021211-5.html>. For an analysis applicable to this case: Byers, Michael: "Policing the High Seas: The Proliferation Security Initiative", *American Journal of International Law*, Vol. 98, 2004, p. 526.
- (5) The PSI may be seen as an extension to transportation on international waters, of the existent export controls already established by non proliferation mechanisms such as the Nuclear Suppliers Group, the MTCR or the Australia Group.
- (6) Members also agreed to perform joint exercises on international waters. Weisman, Steven R.: "U.S. to send signal to North Korea in naval exercise", *The New York Times*, August 18, 2003. For a list of exercises performed since the PSI was created: <http://www.state.gov/t/isn/c27700.htm>. Deterrence and containment are also part of the PSI's strategy.
- (7) Germany, Australia, United States, France, Great Britain, Italy, Japan, The Netherlands, Poland and Portugal.
- (8) "Iniciativa de Seguridad contra la Proliferación" in Spanish.
- (9) For actual Member countries, see: <http://www.state.gov/t/isn/c27732.htm>. The Argentine Republic attends PSI meetings since March 22, 2005.

from the Americas (10).

PSI objectives are reflected on the “Interdiction Principles” adopted in September of 2003, that establish as subjects of proliferation concern “state and non-state actors” (11) which are defined as “those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials” (12).

Notwithstanding the fact that coordinated international efforts to reinforce non-proliferation through mechanisms like the PSI were welcomed favorably by the “High-level Panel on Threats, Challenges and Change” (13) and the then UN Secretary General Kofi Annan (14), as shown in the “So San” case, actions undertaken by PSI members may, eventually, infringe laws and principles of International Law, such as the right to innocent passage through territorial waters and the freedom of navigation on international waters and airspace.

Interdiction measures are consistent with international law if they are held within national borders or on vessels and aircrafts flagged at home, or if the flag State has given its consent or if a third State has been authorized by a bilateral or multilateral treaty or a UN Security Council Resolution to do so (15). The main legal challenge for PSI members is to intercept outside its national territory (16) a ship or aircraft that is not registered in the state that practices the right of visit, search and eventually seizure of its cargo, even based on reasonable evidence (17), without the consent of the flag State (18), because International Conventions that regulate interna-

(10) The only permanent member of the Security Council not part of the Initiative is China; as for the “BRIC” countries, neither Brazil nor India are members.

(11) The following year (April 28, 2004), SC Resolution 1540 defined as a “non-state actor” an “individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution”, and “related materials” as “materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery.” The Resolution also evokes the PSI in its tenth paragraph: “Further to counter that threat, calls upon all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials”. On both this matter and the legislative character of the resolution see: Oosthuizen & Wilmshurst: “Terrorism and Weapons of Mass Destruction: UN Security Council Resolution 1540”, In: Chatham House, September 2004.

(12) The interdiction principles can be consulted at: <http://www.state.gov/t/isn/c27726.htm>

(13) “132. Recent experience of the activities of the A.Q. Khan network has demonstrated the need for and the value of measures taken to interdict the illicit and clandestine trade in components for nuclear programmes. This problem is currently being addressed on a voluntary basis by the Proliferation Security Initiative. We believe that all States should be encouraged to join this voluntary initiative”. Report of the High-level Panel on Threats, Challenges and Change, Doc. A/59/565.

(14) “I applaud the efforts of the Proliferation Security Initiative to fill a gap in our defenses”. Kofi Annan: “Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security”, Madrid, March 10, 2005.

(15) For an analysis on the rules of engagement for maritime interception, see: Craig H. Allen: “Limits on the Use of Force in Maritime Operations in Support of WMD Counter- Proliferation Initiatives”. In: *Israel Yearbook on Human Rights*, 2004, p.115-180.

(16) By extension, interception could be applied to international ground transportation.

(17) To carry weapons, including nuclear (and the missiles that launch them) on national warships is allowed by the United Nations Convention on the Law of the Sea, art. 23: “Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements”.

(18) On June 2003, the ship “Baltic Sky” (formerly registered as “Sea Runner” in Cambodia) was boarded by Greek officials in their territorial waters. They discovered 680 tons of explosives and 8.000 detonators. At the end, Sudan and Tunisia declared to be the cargo’s buyers. Andrew Persbo & Ian Davis: “Sailing into uncharted waters?. The proliferation security initiative and the law of the sea”, *British American Security Information Council*, Research Report, 2004, pages 1-72; Al-Ahram: “Black ship’ down”, 10-16 July 2003. Available at: [http:// weekly.ahram.org.eg/2003/ 646/in3.htm](http://weekly.ahram.org.eg/2003/646/in3.htm). On October, 2003, the United States intercepted a shipment of centrifuge parts directed to Libya on board a German flagged ship (the “BBC China”) coming from the Persian Gulf. The German Government asked the ship-owner to divert the freighter to an Italian port, where cargo was seized. “U.S. seized shipload of nuclear equipment for Libya in October”, *The New York Times*, Jan 1, 2004.

tional maritime and air flight spaces do not allow it as a general principle (19).

The PSI has tried to cope these shortcomings by widening the number of participant countries; signing Ship Boarding Agreements with countries with major commercial fleets registered in their territory for the interdiction of suspect weapons of mass destruction-related cargoes (20); new conventions (21) and international regulations and UN Security Council resolutions that may allow interdiction on specific cases. As the current American Administration has renewed American support for the work of the PSI (22), it is reasonable to expect that initiatives aimed at the establishment of an international control system devoted to the proliferation of WMD, technologies and materials associated to their production will be encouraged. Recent Security Council Resolution 1874 (23) applies the PSI interdiction principles to North Korea: it reaffirms that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security (24); determines that North Korean activities constitute a clear threat; calls all the members states to inspect all cargo to and from the DPRK, in their territory (25); to inspect vessels, with the consent of the flag State, on the high seas, if they

(19) A state may plead the right to "legitimate precautionary self-defense", which is the right to respond using armed force to an imminent illegal use of force. The difference with self-defense is that the attack described in art. 51 of the U.N. Charter is yet to be consummated. Legitimate precautionary self-defense has five variables (the classic doctrine formula; the Webster formula, interception, anticipation and accumulation of events). If used without the existence of an already launched attack, the variant of interception would be controversial in present international law. The application of the Webster formula has its origin in an incident that involved an American ship assisting Canadian rebels in 1837. According to this variant, legitimate precautionary self-defense defense needs that the threat must be overwhelming and leave no room for deliberation nor allow the choice of the means to respond. The application of the formula is very difficult in the current reality of commercial vessel and aircraft interdiction. See: Jennings, R. Y.: "The Caroline and McLeod Cases", *American Journal of International Law*, Vol. 32, N°1, 1938, pages 82-99; Dinstein, Yoram: "War, Aggression and Self-Defense", Cambridge University Press, 2001. The whole question is analyzed in: Alberto E. Dojas: "Amenazas, respuestas y régimen político. Entre la legítima defensa y la intervención preventiva" (forthcoming).

(20) The Agreement between the United States and Panama establishes: "The Parties agree that the Government of the Republic of Panama may extend, mutatis mutandis, all rights (...) concerning vessels suspected of proliferation by sea, claiming its nationality and located seaward of any State's territorial sea, to such third States as it may deem appropriate (...)". Similar Agreements have been signed with Bahamas; Belize; Croatia; Cyprus; Liberia; Malta; Marshall Islands; Mongolia y Panama. See: <http://www.state.gov/t/isn/c27733.htm>.

(21) Within the frame of the IMO, the 2005 Protocols on the "Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988)" and on the "Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988)", (known as the "SUA Protocols"), grant a legal base for the interception of WMD. See: http://www.imo.org/home.asp?topic_id=910; within the ICAO framework, there are also initiatives for the criminalization of transport of WMD and related materials. See: ICAO, Special Subcommittee for the preparation of one or more instruments on new and emergent menaces: Report, Second Meeting, Montreal, February 19-21, 2008. Available at: http://www.icao.int/icao/en/leb/mtgs/2008/LC_SC_NET2/docs/LC_SC-NET2_Report_es.pdf. Also on this subject: Williams, Andrew S.: "The interception of civil aircraft over the high seas in the global war on terror". *Air Force Law Review*, 2007; Allen, Craig H.: "Maritime counter-proliferation operations and the rule of law", In: Praeger Publishers, June 2007. In fact, interdiction of proliferating transport is just one of the different aspects of a larger and wider control mechanism (not completely institutionalized) of materials, technology and capital flux regarding terrorism and WMD. See: Shulman, Mark R.: "The PSI and the evolution of the law on the use of force", *Houston Journal of International Law*, Vol. 28, N°3, 2006, page 772; Busch, Nathan E. & Joyner, Daniel H. (ed). "Combating Weapons of Mass Destruction. The future of International Nonproliferation Policy", The University of Georgia Press, January 2009.

(22) "We must also build on our efforts to break up black markets, detect and intercept materials in transit, and use financial tools to disrupt this dangerous trade. Because this threat will be lasting, we should come together to turn efforts such as the Proliferation Security Initiative and the Global Initiative to Combat Nuclear Terrorism into durable international institutions. And we should start by having a Global Summit on Nuclear Security that the United States will host within the next year". Barack Obama, April 5, 2009.

(23) The resolution declares that the members act under Chapter VII and adopt measures under article 41 ("measures not involving the use of armed force") of the Charter. The Chinese preventions could be observed in the affirmative vote explanation: ZHANG YESUI (China): "I wish to stress that the issue of cargo inspection is complex and sensitive. Countries need to act prudently and in strict accordance with domestic and international law and on the condition of reasonable grounds and sufficient evidence. All parties should refrain from any word or deed that could exacerbate the conflict. Under no circumstances should force be used or threatened": S/PV.6141, page. 3. Similar ideas were raised during the debate on Resolution 1540: Hoge, Warren: "Ban on Weapons of Doom Is Extended to Qaeda-Style Groups", *The New York Times*, April 29, 2004.

(24) On January 31, 1992, Security Council Head of States declared that "the proliferation of all weapons of mass destruction constitutes a threat to international peace and security": "Note by the President of the Security Council", Doc. S/23500.

(25) "11. Calls upon all States to inspect, in accordance with their national authorities and legislation, and consistent with inter-

have information that provides reasonable grounds to believe its cargo contains WMD (26); and that if the flag State does not consent to inspection on the high seas, the flag State shall direct the vessel to an appropriate and convenient port for inspection (27), the cargo should be seized and the Security Council duly notified about actions taken to this end.

These actions are steps taken towards the establishment of a certain public order on the oceans and airspace, in which non-proliferation may be added to the existing regulations against slavery and piracy (28). The peculiar aspect of the PSI, as emphasized by Amitai Etzioni in a recent article (29), is that it is, by nature, a voluntary mechanism without formal institutionalization, in which States gather to agree on policies regarding shared interests (30). It's a process that may constitute a model to organize global society in the years to come, in which advances would be made through a variable geometry (30), that creates a new international legality. This tendency is accompanied by the Security Council, whether it is dictating resolutions under Chapter VII for specific cases or general rules through its new legislative functions (32). It's a tendency that should be carefully and permanently analyzed, since our country enjoys the eight territorial surface of the world, that includes vast maritime and air spaces.



national law, all cargo to and from the DPRK, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by paragraph 8 (a), 8 (b), or 8 (c) of resolution 1718 or by paragraph 9 or 10 of this resolution, for the purpose of ensuring strict implementation of those provisions”.

(26) ”12. Calls upon all Member States to inspect vessels, with the consent of the flag State, on the high seas, if they have information that provides reasonable grounds to believe that the cargo of such vessels contains items the supply, sale, transfer, or export of which is prohibited by paragraph 8 (a), 8 (b), or 8 (c) of resolution 1718 (2006) or by paragraph 9 or 10 of this resolution, for the purpose of ensuring strict implementation of those provisions”.

(27) ”13. Calls upon all States to cooperate with inspections pursuant to paragraphs 11 and 12, and, if the flag State does not consent to inspection on the high seas, decides that the flag State shall direct the vessel to proceed to an appropriate and convenient port for the required inspection by the local authorities pursuant to paragraph”.

(28) According to press information, a ship to which the 1874 Resolution could be applied to was detected: Sang-Hun, Choe: “Test Looms as U.S. Tracks North Korean Ship”, *The New York Times*, June 22, 2009.

(29) UN Convention on the Law of the Sea, art. 110. Today, the general rule of flag-state jurisdiction has yielded to the universal interest of combating the slave trade, piracy and drug trafficking. In the future, non-proliferation of WMD may also be added to this list: Christer Ahlström: “The Proliferation Security Initiative: international law aspects of the Statement of Interdiction Principles”, *SIPRI Yearbook*, 2005, page 764.

(30) Etzioni, Amitai: “Tomorrow’s Institution Today. The promise of the Proliferation Security Initiative”, *Foreign Affairs*, May/June 2009.

(31) Powell, Colin: “A strategy of partnerships”, *Foreign Affairs*, Jan/Feb 2004.

(32) Grégoire, Bertrand: “L’initiative américaine de sécurité contre la prolifération (PSI)”, *Défense Nationale*, N°10, 2004, page 112 ; Winner, Andrew C.: “The Proliferation Security Initiative: The New Face of Interdiction”, *The Washington Quarterly*, 2005, pages 129-143.

(33) Resolutions 1373; 1422; 1487 and 1540 are examples of this modality unforeseen in the Charter. Szasz, Paul: “The Security Council Starts Legislating”, *American Journal of International Law*, Vol. 96, N°4, 2002, page 905; Talmon, Stefan: “The Security Council as a World Legislature”, *American Journal of International Law*, Vol. 99, N°1, 2005, pages 179-183; Remarks by Scott, Shirley V.: “United Nations Security Council Resolution 1540 and Political Legitimacy”, *International Institutional Reform: 2005 Hague Joint Conference on Contemporary Issues of International Law*, edited by Fijalkowski, A. T. M. C. Asser Press, 2007, pages 63-67; for an analysis on the widening of Security Council competences: Johnstone, Ian: “Legislation and Adjudication in the UN Security Council: Bringing down the Deliberative Deficit”, *The American Journal of International Law*, Vol. 102, N° 2, 2008, pages 275-308.