THE PROLIFERATION SECURITY INITIATIVE AND UNITED NATIONS SECURITY COUNCIL RESOLUTION 1540: INTERNATIONAL LAW AND THE WORLD’S RECENT EFFORTS TO COMBAT THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION

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Abstract

Efforts to combat the proliferation of weapons of mass destruction (WMD) have existed ever since the first WMD were created. In recent years, the proliferation of WMD has been recognized as a threat to international peace and security. The recognition of this threat led to recent efforts by the international community to create two new mechanisms for combating the proliferation of WMD. The new mechanisms are the Proliferation Security Initiative and United Nations Security Council Resolution 1540. These new mechanisms were instituted to fill gaps in the existing nonproliferation regime, though they approach nonproliferation by different methods. One utilizes a small voluntary coalition, while the other imposes mandatory obligations of a universal nature. Both were created through international legal methods, but arguably exist due to novel legal authorities. Their bases in international law will be crucial to their effectiveness in the nonproliferation regime. If they do not adhere to existing international law and comport with the existing nonproliferation regime, then their success in combating WMD proliferation will be limited. This thesis provides background on the nonproliferation regime and these two recent mechanisms and then analyzes their adherence to international law. I then argue that in order for a WMD non-proliferation instrument to be successful, it must comport with international law. In this respect, Resolution 1540 may be superior to The Proliferation Security Initiative.

Résumé

Depuis l’apparition des toutes premières armes de destruction massive (ADM), des efforts sont déployés pour contrer leur prolifération. Depuis quelques années, il est reconnu que la prolifération des ADM constitue une menace envers la paix et la sécurité internationale. La reconnaissance de cette menace a incité la communauté internationale à créer deux nouveaux mécanismes pour combattre la prolifération des ADM, soit l’Initiative de sécurité contre la prolifération et la résolution 1540 du Conseil de sécurité de l’ONU. Ces mécanismes ont été mis en place pour combler les lacunes présentes dans le régime de non-prolifération, mais ils abordent la non-prolifération à l’aide de méthodes différentes. Le premier se fonde sur une petite coalition de volontaires, tandis que l’autre impose des obligations à teneur universelle. Les deux mécanismes ont été créés à l’aide de moyens juridiques internationaux, mais on peut considérer qu’ils existent en fait depuis l’émergence de nouvelles autorités légales. Leur enracinement dans le droit international sera crucial pour assurer leur efficacité au sein du régime de non-prolifération. Si ces mécanismes ne se conforment pas au droit international et qu’ils concordent avec le régime de non-prolifération actuel, leur efficacité pour contrer la prolifération des ADM sera restreinte. La présente thèse propose une étude des fondements du régime de non-prolifération et de ces deux nouveaux mécanismes, pour ensuite analyser leur conformité respective au droit international. Je soumet ensuite que pour assurer le succès d’un instrument contre la prolifération des armes de destruction massive, il faudra que cet instrument se conforme au droit international. Sur cette considération, la résolution 1540 de l’ONU est peut-être bien supérieur à l’Initiative de sécurité contre la prolifération.
Acknowledgements

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### Abbreviations

<table>
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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ABM</td>
<td>Anti-ballistic missile</td>
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<tr>
<td>BW</td>
<td>Biological weapon/warfare</td>
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<td>BTWC</td>
<td>Biological and Toxin Weapons Convention</td>
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<td>CD</td>
<td>Conference on Disarmament</td>
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<tr>
<td>CTBT</td>
<td>Comprehensive Nuclear-Test-Ban Treaty</td>
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<tr>
<td>CTBTO</td>
<td>Comprehensive Nuclear-Test-Ban Treaty Organization</td>
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<tr>
<td>CTR</td>
<td>Cooperative threat reduction</td>
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<tr>
<td>CW</td>
<td>Chemical weapon/warfare</td>
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<td>CWC</td>
<td>Chemical Weapons Convention</td>
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<td>FMCT</td>
<td>Fissile material cut-off treaty</td>
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<td>G8</td>
<td>Group of Eight, group of eight leading industrialized states</td>
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<td>GTRI</td>
<td>Global Threat Reduction Initiative</td>
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<tr>
<td>HCOC</td>
<td>Hague Code of Conduct</td>
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<td>HEU</td>
<td>Highly enriched uranium</td>
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<td>IAEA</td>
<td>International Atomic Energy Agency</td>
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<td>ICBM</td>
<td>Intercontinental ballistic missile</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<tr>
<td>INF</td>
<td>Intermediate-range Nuclear Forces (Treaty)</td>
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<td>LEU</td>
<td>Low-enriched uranium</td>
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<td>MAD</td>
<td>Mutual assured destruction</td>
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<td>MTCR</td>
<td>Missile Technology Control Regime</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<tr>
<td>NBC</td>
<td>Nuclear/biological/chemical</td>
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<tr>
<td>NGO</td>
<td>Non-governmental organization</td>
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<tr>
<td>NPT</td>
<td>Non-Proliferation Treaty</td>
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<td>NSG</td>
<td>Nuclear Suppliers Group</td>
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<td>NWFZ</td>
<td>Nuclear-weapon-free zone</td>
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<td>NWS</td>
<td>Nuclear-weapon state</td>
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<tr>
<td>OPCW</td>
<td>Organization for the Prohibition of Chemical Weapons</td>
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<tr>
<td>P5</td>
<td>Five permanent members of the United Nations Security Council</td>
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<td>PSI</td>
<td>Proliferation Security Initiative</td>
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<td>PTBT</td>
<td>Partial Test-Ban Treaty (Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water)</td>
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<tr>
<td>SALT I, II, III</td>
<td>Strategic Arms Limitation Treaty (Soviet-US)</td>
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<td>SORT</td>
<td>Strategic Offensive Reductions Treaty</td>
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<td>START</td>
<td>Strategic Arms Reduction Treaty</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<tr>
<td>UNMOVIC</td>
<td>United Nations Monitoring, Verification and Inspection Commission</td>
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<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>WMD</td>
<td>Weapon(s) of mass destruction</td>
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Introduction

Recent developments within the international weapons of mass destruction (WMD) nonproliferation regime are the creation of the Proliferation Security Initiative and the adoption of United Nations Security Council Resolution 1540. They are the most important and monumental developments in combating WMD proliferation in recent years. Both the Proliferation Security Initiative and Resolution 1540 represent a departure from multilateral treaty regimes that the international community has utilized for over 100 years in attempts to curb the proliferation of WMDs or chemical and biological weapons. These new mechanisms have been developed as recent increased global security threats have highlighted the consent-based treaties’ futility and ineffectiveness.

The Proliferation Security Initiative is a voluntary coalition of states that formed to coordinate efforts to stop shipments of WMD and related materials by sea, air, and land. Among its most notable and controversial activities is the interdiction of ships at sea which are suspected of transporting WMD materials. Such activities raise several legal issues under international law and provide examples of the difficulties that can arise at the intersection of international law and international politics. United Nations Security Council Resolution 1540 obligates all nations to implement laws to prevent the proliferation of WMD and related materials, especially to non-state actors. The resolution is a vast undertaking and seeks to take the existing WMD nonproliferation regimes to another level, with an ultimate goal of universalizing the WMD nonproliferation regime.

Both the Proliferation Security Initiative and Resolution 1540 are problematic with regard to international law. Resolution 1540 has been criticized as an attempt by the Security
Council to legislate beyond its powers as an executive body. Likewise, the Proliferation Security Initiative suffers from a lack of legal legitimacy through its conflicts with existing international law, lack of transparency and accountability, and outright opposition. While both the Proliferation Security Initiative and Resolution 1540 are problematic with regard to international law, Resolution 1540 is arguably more congruent with international law through its utilization of United Nations’ mechanisms. However, these mechanisms’ failure to comport with international law results in less states being willing to abide by them, and a politically-driven exercise of power that lacks legitimacy in the face of international law. Hence, the success of both of these new mechanisms designed to combat WMD proliferation will depend on their adherence to, and compatibility with, existing international law. The new mechanisms add another layer to the nonproliferation regime that may clarify and focus efforts where greater effort is needed, or create more political divisiveness and ultimately undermine existing nonproliferation regimes. If the new mechanisms do not adhere to international law, the result will probably be the latter.

This thesis analyzes the shift in nonproliferation and counter-proliferation regimes from multilateral treaty regimes adhering to traditional notions of sovereignty and state consent to the more recent mechanisms, namely, the Proliferation Security Initiative and Resolution 1540. While acknowledging the weaknesses of the multilateral treaty regime previously used, this thesis questions whether the current mechanisms’ questionable legal legitimacy will ultimately undermine their usefulness. Despite its controversy as international legislation, because Resolution 1540 attempts to work within the prescribed strictures of international law to a greater extent than the Proliferation Security Initiative, it may have more long term effectiveness.
Chapter 1 of this thesis lays out the pre-existing multilateral treaty regime used to combat the proliferation of WMDs. Chapter 2 analyzes the generally agreed-upon weaknesses of these treaties, including the lack of universality, the lack of verification and enforcement, and the lack of compliance. Chapter 3 describes negotiations, texts, and participation in the Proliferation Security Initiative and Resolution 1540. Chapter 4 analyzes the interplay between these mechanisms and existing international law, highlighting potential conflicts between the Proliferation Security Initiative and the law of the sea, and the claim that Resolution 1540 is unacceptable legislating by the Security Council. Chapter 4 further discusses potential long-term consequences of these mechanisms’ nonconformity with international law, including states’ lack of willingness to participate and an aura of illegitimacy generally. Chapter 4 also discusses the long-term consequences for of compliance only when convenient. To conclude, since Resolution 1540 is more congruent with international law than the Proliferation Security Initiative, it may ultimately have more success as a long term solution to the proliferation of WMDs.
CHAPTER 1 -- Background on WMDs and Existing Nonproliferation Regimes

A. WMD Terms and Background

A brief discussion of the relevant terms and possession of WMDs by states is useful in contextualizing the different mechanisms utilized to combat the proliferation of WMDs. This chapter begins with a brief discussion of relevant terms and provides basic statistics regarding the amount of WMDs currently possessed by several states. This chapter then discusses the multilateral treaty regime that predated the Proliferation Security Initiative (PSI) and Resolution 1540, including a discussion of the four major treaties addressing WMDs and biological weapons: the Non-Proliferation Treaty, the Biological Weapons Convention, the Chemical Weapons Convention and the Comprehensive Nuclear Test Ban Treaty. This chapter provides background information to facilitate Chapter 2’s discussion of these treaties’ weaknesses. These weaknesses gave rise to a new generation of nonproliferation measures discussed in Chapter 3 and Chapter 4.

Definitions and Statistics Regarding WMDs and Nonproliferation

The terms “proliferation” and “weapons of mass destruction” have become quite common in recent times. They are used and heard repeatedly and they are generally believed to be understood by most people without further question. However, many would be surprised by what actually constitutes proliferation and by the more technical definitions that arise in dealing with WMDs and proliferation. The same technicalities apply for the term “nonproliferation.”

To better understand the issues surrounding WMD proliferation, it is important to understand what WMD are, where they are, and how many there are. WMD generally refers to nuclear, biological, and chemical weapons, and somewhat increasingly radiological weapons.
All other weapon types, even if they may be capable of killing massive number of humans or cause much destruction, are considered conventional weapons. WMD are known and feared for their capacity to indiscriminately kill large numbers of human beings.

It is important to know how proliferation has occurred, is occurring, and what efforts have been made towards nonproliferation. This helps put into perspective the current efforts towards combating WMD proliferation and demonstrates their existing strengths and weaknesses.

*Disarmament, nonproliferation, and counter-proliferation*

Issues of nonproliferation and disarmament are intertwined. Perhaps most closely related and widely discussed are nuclear nonproliferation and nuclear disarmament, so nuclear weapons will be used to illustrate the nonproliferation and disarmament distinctions.

The goal of nuclear disarmament, literally ridding the world of nuclear weapons, was explicitly laid out in the Nuclear Non-Proliferation Treaty of 1970. Nuclear disarmament calls for the undeployment and dismantling of nuclear weapons and has a long history beginning quickly after the advent of the first nuclear bombs. In fact, President Truman of the United States backed a plan for nuclear disarmament in 1946, called the Baruch Plan. The Baruch plan called for the renunciation and disposal of nuclear bombs, then referred to as atomic bombs, and proposed making it illegal to possess atomic bombs and atomic material suitable for bombs.¹ By 1955, leading scientists and philosophers who expressed concerns over nuclear weapons and arms races issued the Russell-Einstein Manifesto. Among the notable authors of this manifesto were Albert Einstein; Bertrand Russell, a prominent British philosopher, mathematician, and writer; and Joseph Rotblat, the only scientist to quit work on the Manhattan Project.

Project on moral grounds. During the Cold War, calls for disarmament could not compete with the arms race between the United States and the Soviet Union, yielding to the global security theory of mutually assured destruction (MAD).

Today, many organizations exist to promote disarmament, repeating the same concerns that all those before have expressed now for decades. These include international organizations such as the United Nations Conference on Disarmament and dozens of non-governmental organizations. Additionally, a vast majority of member states of the United Nations promote nuclear disarmament.

Proliferation is the term used to describe the spread of weapons and weapons-related materials, technology, and information. Therefore, nonproliferation attempts to stop that spread. Like disarmament, nuclear nonproliferation began soon after the first nuclear bombs were developed. The International Atomic Energy Agency, the world’s nuclear watchdog, was created in 1957. Efforts throughout the 1960s to conclude an international agreement concerning nuclear power and nuclear weapons began slowly, but were increased following the detonation of a nuclear bomb by China in 1964. This led to serious negotiations, and finally, the opening of the Nuclear Non-Proliferation Treaty for signature in 1968.

The nuclear superpowers have naturally focused most attention on nonproliferation efforts, merely paying occasional lip service to their disarmament obligations under the Nuclear Non-Proliferation Treaty. Many others agree, however, that the two pursuits cannot be so independently dealt with and provide strong arguments that nonproliferation efforts cannot

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2 The Manhattan project was the term used for the development of the atomic bomb during World War II by the United States, the United Kingdom and Canada.

3 See Daniel Joyner, “The Proliferation Security Initiative: Nonproliferation, Counterproliferation and International Law” (2005) 30 Yale J. Int’l L. 507 at 520 (“nonproliferation activities may be broadly described as efforts calculated . . . to slow the proliferation of WMD-related technologies and preferably to effect a reversal of proliferation trends through requiring disarmament of existing material stockpiles”).
succeed without simultaneous disarmament efforts. After all, it seems difficult to expect other states to not acquire, or desire to acquire, weapons that the nuclear weapon states have so ardently relied upon for their own power and security. A common analogy used today is that nuclear disarmament and nonproliferation are two sides of the same coin, meaning that the best way to assure nuclear weapons will never proliferate into the wrong hands is to irreversibly destroy existing nuclear weapons.

“Counter-proliferation” is the most recent development in terminology and activity related to combating WMD. Counter-proliferation refers to military efforts, enforcement efforts, or similar proactive efforts to combat weapons proliferation by “preclud[ing] specific actors from obtaining WMD-related materials and technologies, or to degrade and destroy an actor’s existing WMD capability”. Nonproliferation most often takes the form of treaty mechanisms, export controls, and inspection regimes. Counter-proliferation represents efforts to cut-off WMD materials from being obtained by certain actors or destroying certain actors’ WMD capabilities or related materials. The current administration of the United States has promoted a counter-proliferation approach that places a greater emphasis on proactive coalition-based activities, or even unilateral activities as opposed to traditional nonproliferation efforts based on multilateral treaties and diplomacy. Generally speaking, the Proliferation Security Initiative is the most recent effort in combating WMD proliferation with a counter-proliferation approach, while United Nations Security Council Resolution 1540 is the most recent effort to combat WMD proliferation by more traditional nonproliferation means.

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4 For a more in-depth discussion of counter-proliferation methods and definitions see Nobuyasu Abe “Existing and Emerging Legal Approaches to Nuclear CounterProliferation in the Twenty-First Century” (2007) 39 N.Y.U. J. Int’l L. & Pol. 929 at 929-930 (discussing three nonproliferation methods, including “multilateral”, “plurilateral” and “unilateralist”).

5 Joyner, supra note 3 at 520.
Worldwide proliferation status

Despite the efforts which have taken place over the years to combat the dangers of proliferation, WMD are still quite prolific around the world. Over 27,000 nuclear weapons, with several thousand on hair-trigger alert, exist today. Over 49,000 metric tons of chemical weapons remain stockpiled around the globe.

There are 8 states with nuclear weapons stockpiles. These states are China, France, India, Israel, Pakistan, Russia, the United Kingdom, and the United States. The estimated numbers of nuclear warheads combine for a global total of approximately 27,600 nuclear weapons. North Korea reportedly tested a nuclear device in October 2006 and has openly pursued a nuclear weapons program in recent years. Iran is believed by many to be pursuing a nuclear weapons program despite its assertions that its current nuclear ambitions are entirely for peaceful purposes.

South Africa secretly produced six nuclear weapons in the 1980s before renouncing and terminating its nuclear weapons program in 1991. The post-Soviet era states of Belarus, Kazakhstan, and Ukraine transferred the nuclear weapons in those territories to Russia in the early 1990s. At various times in the latter half of the twentieth century, Argentina, Brazil, Egypt, Libya, Iraq, Romania, South Korea, Spain, Sweden, Taiwan, and Yugoslavia all actively pursued nuclear weapons programs, with Libya being the last state to finally terminate such pursuits in 2003.

Several states that formerly had biological weapons programs, but have now terminated and destroyed them, include Canada, France, Germany, Iraq, Japan, South Africa, Russia, the

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United Kingdom, and the United States. Possible active biological weapons programs may exits in Israel and North Korea, while Russia may still have biological weapons that are not declared. A few countries are suspected of pursuing biological weapons research programs, including China, Egypt, Iran, and Syria. Some states, including the United States, pursue bio-defense research which leads some to suspect the existence of covert biological weapons programs.

States with chemical weapons programs that have been terminated and eliminated, or are in the process of being eliminated, include Albania, Canada, France, Germany, India, Italy, Iraq, Japan, Libya, Russia, South Africa, South Korea, the United Kingdom, and the United States. Albania, Libya, India, Russia, South Korea, and the United States still have significant quantities of chemical weapons that they are in the process of destroying. Possible undeclared chemical weapons or covert chemical weapons programs may exist in China, Egypt, Ethiopia, Iran, Israel, Myanmar, North Korea, Pakistan, Saudi Arabia, Sudan, Syria, Taiwan, and Vietnam.

B. The International WMD Nonproliferation Regime

Until just a few years ago, multilateral treaties were the dominant mechanisms used to address proliferation of WMDs. The international nonproliferation regime includes three major multilateral treaties: the Nuclear Non-Proliferation Treaty, the Biological Weapons Convention, and the Chemical Weapons Convention. Additional multilateral treaty regimes include Nuclear-Weapons-Free Zones, the Comprehensive Nuclear-Test-Ban Treaty, and the Fissile Materials Cut-Off Treaty. Other mechanisms that have previously been used concurrently with these multilateral treaties include export control regimes, bilateral treaties, and various other initiatives and programs that deal with particular nonproliferation aspects.
The Non-Proliferation Treaty and the International Atomic Energy Agency

The Non-Proliferation Treaty (NPT)\(^7\) has been the historical cornerstone of nonproliferation law since entering into force in 1970. The purpose of the NPT is to prevent the spread of nuclear weapons to those states that do not have them, while ensuring access to peaceful nuclear energy according to established safeguards.\(^8\) Presently, there are 188 states parties to the NPT. Four countries with nuclear weapons have chosen to remain outside the treaty regime: India, Pakistan, Israel, and North Korea. North Korea is the only state to have withdrawn from the NPT, doing so in 2003.

The parties to the treaty are classified as either nuclear weapon states (NWS) or non-nuclear weapon states (NNWS). The NWS are those that tested a nuclear weapon before the treaty entered into force and include the United States, Soviet Union (now Russia), United Kingdom, France, and China. At its basis, the NPT is an agreement between the NWS and the NNWS. Under the agreement, the NWS may maintain their own nuclear arsenals while committing to negotiations in good faith towards nuclear disarmament and ending the nuclear arms race.\(^9\) Additionally, they may not transfer nuclear weapons to anyone or assist anyone in acquiring, manufacturing, or controlling nuclear weapons.\(^10\) The NNWS agree to not acquire, manufacture, or possess nuclear weapons, but have the right to research and pursue nuclear energy for peaceful purposes in accordance with safeguards, which include audits and on-site monitoring to verify that nuclear programs are not being used for nuclear weapons.\(^11\)

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\(^7\) Treaty on the Non-proliferation of Nuclear Weapons, 1 July 1968, 729 U.N.T.S. 161, 21 U.S.T. 483 [Non-Proliferation Treaty].

\(^8\) See Joyner, supra note 3 at 512 (“The NPT was signed . . . to provide a normative basis for the coordination of peaceful uses of technology; to encourage international efforts of both disarmament and decommissioning of existing nuclear stockpiles; and to prevent the further proliferation of nuclear weapons”).

\(^9\) Non-Proliferation Treaty, Art. VI.

\(^10\) Ibid. Art. I.

\(^11\) Ibid. Art. II-IV.
Other provisions of the NPT allow for the establishment of regional treaties banning nuclear weapons in certain territories now known as Nuclear-Weapons-Free Zones.\(^{12}\) The NPT also established review conferences to be held every five years, with seven taking place thus far between 1975 and 2005.\(^{13}\) Finally, the NPT required the NNWS to conclude agreements with the International Atomic Energy Agency (IAEA) accepting the Agency’s safeguards for verifying and monitoring peaceful nuclear energy activities.\(^{14}\)

The IAEA is an autonomous international organization under United Nations (UN) auspices which was founded in 1957.\(^{15}\) The IAEA provides the verification mechanisms that monitor the obligations of the NNWS under the NPT. The verification methods include satellite imagery, seismic monitoring, on-site inspections, and accounting and auditing procedures for all nuclear materials. These safeguards are to ensure that no nuclear materials or technology are transferred to use for weapons programs.

However, the IAEA safeguards cannot monitor a state’s acquisition of nuclear arms by other means, such as a direct purchase of a nuclear missile, even though such an acquisition would violate its NPT obligations. Additionally, the IAEA safeguards have been circumvented at times by states pursuing undeclared nuclear weapons programs.\(^{16}\) This has led to a broadening of IAEA authority over the years to include special inspections for undeclared nuclear programs. This expanded inspection authority is the substance of the IAEA Additional

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\(^{12}\) Ibid. Art. VII.
\(^{13}\) Ibid. Art. VIII, Section 3.
\(^{14}\) Ibid. Art. III, Section 1.
\(^{15}\) See generally <http://www.iaea.org>.
Protocol, which was adopted by the IAEA in 1997. The Additional Protocol is voluntary for NPT member states, though the IAEA strongly encourages all members to adopt it.

Specifically, the Additional Protocol greatly expands the amount and type of information member states are required to report to the IAEA. It also allows for inspections to take place on short notice and enables access to undeclared facilities to confirm that there are no undeclared nuclear activities or materials. As of July 2007, 112 states have signed the Additional Protocol agreements, although only 82 states have fully implemented the expanded Additional Protocol measures.

The Biological Weapons Convention

The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BTWC) entered into force in 1975. The BTWC builds on the prohibitions against the use of biological weapons as agreed in The Hague Declaration of 1899, and the Treaty of Versailles in 1919, and the Geneva Protocol of 1925. The BTWC bans the development, production, acquisition, transfer, retention, and stockpiling of biological and toxin weapons, as well as referencing the already existing prohibitions against their use. It was the first multilateral disarmament treaty to ban an entire category of weapons. There are 155 states parties to the convention, with 16

18 See IAEA.org Safeguards and Verification, available at <http://www.iaea.org/OurWork/SV/Safeguards/sg_protocol.html. A great amount of legal scholarship has discussed the effectiveness and weaknesses of the NPT since its inception in 1970. The issues raised by the NPT, and analyses of its weaknesses, will be discussed in Chapter 2.
additional treaty signatories. Currently, 24 countries remain completely outside of the BWTC regime.

States parties to the BTWC are obligated not to develop, produce, stockpile, or otherwise acquire or obtain microbial or other biological agents or toxins of types and in quantities that have no justification for prophylactic, protective, or other peaceful purposes. States are further obligated not to develop, produce, stockpile, or otherwise acquire or obtain weapons, equipment, or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.\textsuperscript{23} State parties are also required to destroy, or to divert to peaceful purposes all agents, toxins, weapons, equipment, and means of delivery. Finally, state parties may not transfer to any recipient, and not in any way to assist, encourage, or induce to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment, or means of delivery; and to take necessary measures to prohibit the above within their own territories.\textsuperscript{24}

There is no formal verification regime or monitoring body for the BTWC. Instead, the convention relies on cooperation and confidence building measures among states. The confidence building measures were put in place at various BTWC Review Conferences, which take place every five years.\textsuperscript{25} The measures include information and data exchanges, national implementation declarations, and facilities declarations. States may lodge complaints for breaches of treaty obligations with the UN Security Council, although this course of action has never been taken.\textsuperscript{26}

\textsuperscript{23} \textit{Biological Weapons Convention}, Art. I. See also Joyner, supra note 3 at 513 (noting that the convention addressed both “vertical (intrastate) and horizontal (interstate) proliferation”).

\textsuperscript{24} \textit{Ibid.} Art. II-IV.

\textsuperscript{25} \textit{Ibid.} Art. XII.

\textsuperscript{26} \textit{Ibid.} Art. VI.
Further efforts to strengthen verification of the BWTC occurred in 1994, with the establishment of the Ad Hoc Group, charged with creating a legally binding protocol to the convention. After six years of negotiations, a draft protocol emerged establishing a formal verification regime with a governing body. However, consensus could not be reached on certain issues. Then, in 2001, the United States withdrew its support for an additional verification protocol entirely. Shortly thereafter, at the 2001 Review Conference, the U.S. delegation headed by then Undersecretary of State for Arms Control and International Security, John Bolton, called for the termination of the Ad Hoc Group. The Review Conference ended in disarray and the entire binding verification protocol effort now appears to be completely derailed. The 2006 Review Conference made positive progress on efforts towards universalization and national implementation, but the BWTC regime still is hampered with verification and compliance issues. The BWTC and its weaknesses are discussed in Chapter 2.

The Chemical Weapons Convention

The Convention on the Prohibition on the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction (CWC) entered into force in 1997. Formation of the CWC took many years, demonstrating the slow motion of large multilateral treaty regimes. Negotiations towards the CWC stretch back to 1980, while the actual treaty was concluded and opened for signature in 1993. As per treaty provisions, the CWC entered into force after being ratified by the 65th state party, thus bringing the treaty into force 1997.

To date, there are 182 fully implemented states parties out of the 188 signatories, while only 7 countries remain entirely out of the CWC regime.\(^\text{29}\)

As the full convention title describes, states parties to the CWC are prohibited from developing, producing, stockpiling, acquiring, transferring, and using chemical weapons directly or indirectly under any circumstances.\(^\text{30}\) It is prohibited to assist, encourage, or induce others to engage in the banned activities as well. State parties are also required to destroy any chemical weapons they possess and any facilities used to produce chemical weapons.\(^\text{31}\) Finally, each state party undertakes not to use riot control agents as a method of warfare.\(^\text{32}\)

The CWC created the Organization for the Prohibition of Chemical Weapons (OPCW) as its monitoring and verification body.\(^\text{33}\) Headquartered in The Hague, the OPCW is comprised of representatives of all states parties to the CWC. The OPCW collects required declarations from state parties concerning their chemical weapons stockpiles, chemical weapons production facilities, and relevant chemical industry facilities.\(^\text{34}\) The declarations must group any chemical weapons activities into three “categories” and must group all chemical industry activities into three “schedules” based on the risks posed for their use as chemical weapons.\(^\text{35}\) Generally, schedule 1 chemicals are entirely for weapons use, while schedules 2 and 3 consist of “dual use” chemicals, having industrial and commercial uses.

These groupings are also used to establish timelines for the chemical weapons destruction requirements under the convention. States parties which declared chemical

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\(^{29}\) Signatories to the CWC that have not yet ratified the convention include: Bahamas, Congo, Dominican Republic, Guinea-Bissau, Israel, and Myanmar. Non-signatory states include: Angola, North Korea, Egypt, Iraq, Lebanon, Somalia, and Syria.

\(^{30}\) *Chemical Weapons Convention*, Art. I, Sections 1(a)-(d).


\(^{33}\) *Ibid.* Art. VIII.

\(^{34}\) *Ibid.* Art. III.

weapons programs or facilities are required by binding deadlines to destroy them no later than 10 years after the entry into force of the convention, although states parties may request an extension of up to five years.  

In addition to the state party reporting procedures, verification of CWC obligations is carried out by OPCW inspectors. On-site inspections include “routine inspections” and “challenge inspections” called by states parties. Routine inspections are performed to verify and confirm the content of state party declarations and obligations under the convention. Having yet to occur, challenge inspections may be performed at facilities and locations, declared or undeclared, to clarify or answer questions of possible noncompliance. These challenge inspections may be requested by any state party, although the OPWC has the power to halt challenge inspections to prevent abuse.

The convention requires states parties to implement national legislation of CWC provisions and establish a national authority to oversee the implementation. The national authority works with the OPCW and escorts OPCW inspectors at its sites and facilities. National authorities continue to submit annual declarations to the OPCW and work to foster the peaceful pursuits of the chemical industry.

Issues of noncompliance are dealt with by the OPCW, which may take measures ranging from requesting a state party to redress a particular situation to a referral of the situation to the UN Security Council. The latter action would be reserved for only the most

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36 Ibid. Annex on Verification and Implementation, Part IV(A), Section 17.
37 Ibid. Art. IX.
38 Ibid. Art. VII.
39 Ibid. Art. XII.
serious violations. In case of a dispute arising between state parties, or state parties and the OPCW, the matter may also be referred to the International Court of Justice.\textsuperscript{40}

While providing extensive declaration, verification, compliance, and enforcement mechanisms to combat the use and proliferation of chemical weapons, the CWC regime is still a work in progress. Aside from universality, discussed in detail in Chapter 2, challenges for the CWC include the effects and consequences of potential destruction deadline violations, increasing the adoption of domestic legislation by states parties, dealing with many states’ increasing interest in developing and possessing riot control agents, and adapting to terrorist threats since the convention has limited applicability to non-state actors.

Under the CWC, six countries currently have declared chemical weapons programs.\textsuperscript{41} Twelve countries have declared chemical weapons production facilities.\textsuperscript{42} Several more countries have declared old or abandoned chemical weapons within their territory.\textsuperscript{43} Nearly 90\% of all former production facilities have been certified by the OPCW as destroyed or fully converted to peaceful uses. Of all declared production facilities, 100\% have been inactivated and 100\% of all declared chemical weapons stockpiles have been inventoried and verified, with roughly 25\% of stockpiles already verifiably destroyed.\textsuperscript{44} Those states with declared materials to be destroyed have binding schedules and deadlines for their destruction, which range from 2007 to 2012.

\textsuperscript{40} Ibid. Art. XIV.
\textsuperscript{41} Albania, India, Libya, Russia, the United States, and an unidentified state party.
\textsuperscript{42} Bosnia and Herzegovina, China, France, India, Iran, Japan, Libya, Russia, Serbia, the United Kingdom, the United States, and an unidentified state party.
\textsuperscript{43} Belgium, Canada, Germany, Italy, Panama, and Poland.
\textsuperscript{44} See generally http://www.opcw.org/ for chemical weapon inspection and destruction figures.
Comprehensive Nuclear-Test-Ban Treaty and the Fissile Materials Cut-Off Treaty

The Comprehensive Nuclear-Test-Ban Treaty (CTBT) bans any nuclear weapon test explosion, or any other nuclear explosion.\(^{45}\) It also establishes an International Monitoring System to detect nuclear tests and allows for on-site inspections on short notice.\(^{46}\) The CTBT was opened for signature in 1996, but has not yet entered into force. It has widespread international support with 178 signatories and 138 ratifications.\(^{47}\) However, its entry into force requires ratification by all 44 designated nuclear capable states, and 9 of those states have yet to ratify the treaty.\(^{48}\) Yet, Article 18 of the Vienna Convention on the Law of Treaties obliges signatories to treaties not yet in force to not defeat the object and purpose of the treaty, so there exists near universality on this prohibition of nuclear test explosions.\(^{49}\) Of the 44 designated nuclear capable states required for entry into force of the CTBT, 41 are signatories.

Although not yet in force, the CTBT holds significant importance in the international nonproliferation regime. It is considered to be an important practical step towards fulfilling the NPT goal of nuclear disarmament and the NPT Article VI obligation for nuclear weapon states to pursue negotiations on disarmament. Banning nuclear tests would make it more difficult for the nuclear powers to develop new weapons, as tests are necessary to develop compact nuclear warheads for ballistic missiles. The International Monitoring System would deter any would-


\(^{46}\) Ibid. Art. IV.


\(^{48}\) States requiring ratification for the CTBT to enter into force that have not yet ratified are China, North Korea, Egypt, India, Indonesia, Iran, Israel, Pakistan, and the United States.

\(^{49}\) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, 25 I.L.M. 543 [VCLT].
be nuclear powers with the high risk of detection and subsequent condemnation, substantially raising the political cost of nuclear weapons testing.

The CTBT is currently the frontline in the fight for nuclear nonproliferation and disarmament. When the 2000 NPT Review Conference adopted the “13 Practical Steps on Nonproliferation and Disarmament,” the first and most important step was agreed to be ratification of the CTBT to allow its entry into force.\textsuperscript{50} With widespread international support and an informal moratorium on nuclear testing by the five nuclear weapons states since 1996, an international norm against nuclear weapon testing has arguably been established.\textsuperscript{51}

The Fissile Materials Cut-Off Treaty (FMCT) is currently under discussion in the UN Conference on Disarmament. While the CTBT takes a qualitative approach to ban nuclear weapons tests, the FMCT has a quantitative approach that would ban the production of weapons-grade fissile material for anything other than verified peaceful purposes. It would reinforce the NPT and promote nuclear nonproliferation in the non-NPT states of Israel, India, Pakistan, and North Korea, as well as in all nuclear capable states since the quantity of available fissile material would be limited and under greater control. Although there is overwhelming international support for the treaty, discussions have stalled as states differ on the substance of the treaty’s verification methods. In 1980, the Convention on the Physical Protection of Nuclear Material opened for signature to provide physical protection and cooperation for international transport of nuclear materials.\textsuperscript{52} The Convention obligates states to protect nuclear material. These obligations relate to the prevention, detection and

\textsuperscript{50} The 13 Practical Steps on Nonproliferation and Disarmament, available at \url{http://www.reachingcriticalwill.org/legal/npt/13point.html}.

\textsuperscript{51} President George H. W. Bush signed into law a unilateral declaration to forego full-scale nuclear weapons testing October 2, 1992. The United Kingdom and Russia joined the moratorium, with France and China joining in 1996. India and Pakistan announced a moratorium in 1998. However, in 2001, the Administration of President George W. Bush hinted toward abandoning the moratorium.

punishment of certain offenses in handling nuclear material. In 2005, the Convention’s provisions were strengthened, making it legally binding for states parties to protect nuclear facilities and material in peaceful domestic use, in storage, and in transport. There is now expanded cooperation between and among states regarding rapid measures to locate and recover stolen or smuggled nuclear material.\footnote{For further information see IAEA.org, Convention on the Physical Protection of Nuclear Material, available at <http://www.iaea.org/Publications/Documents/Conventions/cppnm.html>.
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C. Other Mechanisms Used Concurrently with Multilateral Treaties

States have utilized several other mechanisms concurrently with multilateral treaties addressing nonproliferation. These include regional agreements, bilateral treaties, and export control regimes. One reason complementary measures were introduced was the “vagueness and non-specificity” of many of the multilateral treaties.\footnote{Joyner, supra note 3 at 514.} More concrete measures were necessary to ensure compliance with the obligations of states pursuant to these treaties. This section explores some complementary measures of these multilateral instruments.

**Nuclear-Weapon-Free Zones**

Nuclear-weapon-free zones (NWFZ) are specific zones completely without nuclear weapons, established in accordance to Article VII of the NPT. Article VII guarantees the right of any groups of states to conclude regional agreements banning nuclear weapons in their respective territories.\footnote{Non-Proliferation Treaty, Art. VII.} States parties to a NWFZ treaty promise not to develop, manufacture, stockpile, acquire, possess, or control any nuclear explosive device within the zone. States also promise not to offer assistance with the research, development, manufacture, stockpiling, acquisition, or possession of such weapons within the zone. States are allowed to pursue nuclear energy for peaceful purposes under IAEA supervision and safeguards.
To date, five NWFZ treaties have been concluded: the Treaty of Tlatelolco, covering Latin America and the Caribbean; the Treaty of Rarotonga in the South Pacific; The Treaty of Bangkok for Southeast Asia; the Treaty of Pelindaba, covering the African continent; and the Central Asian NWFZ Treaty recently signed in five Central Asian states. Additionally, Mongolia has declared itself a single state NWFZ and has been officially recognized as such. Other states have similar declarations, including New Zealand and Japan, and several cities in the United States and Europe are self-declared NWFZ. Though politically significant, these local declarations are not legally binding NWFZ under international law.

Four other agreements, similar to a NWFZ, are the Antarctic Treaty, the Seabed Treaty, the Outer Space Treaty, and the Moon Agreement. These agreements have banned nuclear weapons in their respective areas. The primary objectives and purposes of a NWFZ as formally recognized by the UN are to enhance the security of member states within the zone, strengthen the international nuclear nonproliferation regime, and to contribute toward the goal of complete nuclear disarmament under international verification and control. Regional security is enhanced by prohibitions against deployments and testing of nuclear weapons, as well as negative security agreements, which member states within the zone may obtain from the five nuclear weapon states. The negative security agreements assure the member states within the zone that a NWS will not use, or threaten to use, nuclear weapons against them. NWFZs contribute to the international nuclear nonproliferation and disarmament regimes by supplementing the NPT with regional approaches and enforcement, and by establishing additional layers of binding commitments towards these goals.

56 Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan.
Export Control Regimes

Since most states require at least some form of foreign assistance to pursue a WMD program and missile technologies, export controls over WMD related materials are an important nonproliferation mechanism. Export controls refer to any laws, regulations, or treaties that restrict the transfer of WMD related materials and technologies between countries. Most common are multilateral treaties and national export control regimes.

The NPT established the NPT Export Committee, commonly known as the Zangger Committee. Begun in 1971, the Zangger Committee, named after its first Chairman Professor Claude Zangger, drew up a “Trigger List” of materials and equipment to aid in the interpretation of Article III(2) of the NPT, which refers to “(a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material.” The Trigger List identifies materials which may only be exported in conformity with IAEA safeguards. The Zangger Committee also worked to establish conditions and procedures that would govern exports of such equipment or material in order to meet the obligations of Article III(2). Although the Zangger Committee has 36 member states, it is an informal organization, and its decisions are not legally binding upon the member states.

The Nuclear Suppliers Group (NSG) was established in 1975 in response to India’s test explosion of a nuclear device, demonstrating that nuclear technology was being transferred for non-peaceful purposes. The NSG adopted much of the Zangger Committee’s work, including the Trigger List, but established more robust requirements for its member states. Member states implement NSG Guidelines at the national level according to national export licensing

57 Non-Proliferation Treaty, Art. III, Section 2.
controls, giving legal effect to their commitments. NSG members may not trade in nuclear materials with a government that does not accept IAEA safeguards and inspections. Potential recipients must have physical security measures in place to prevent theft or unauthorized use of nuclear imports and guarantee that nuclear materials and information will not be transferred to a third party without the explicit permission of the original exporter. The NSG has 45 member states and operates by consensus. All the nuclear weapon states are members, though some states with significant nuclear programs remain outside the NSG regime.\textsuperscript{58}

The Australia Group (AG) began in 1985 to aid exporting and transshipment states in stemming the proliferation of chemical and biological weapons-related materials.\textsuperscript{59} Similar to the NSG, the 39 AG member states enact export controls at the national level requiring licenses for items on the agreed upon “Common Control Lists” of potential chemical and biological weapons precursors. National authorities must then determine whether the export item is to be used for a legitimate peaceful purpose before granting the export license. The AG works to harmonize the export controls of the member states to ensure that the national measures are effective, practical, reasonably easy to implement, and economically efficient so as to not overly burden legitimate trade. Membership in the AG does not create any legally binding obligations for states beyond what they enact nationally. There is no compliance or verification regime. However, all AG members are also states parties to the BWC and CWC.

Ballistic and cruise missiles, a primary means of delivery for WMD, are controlled by the Missile Technology Control Regime (MTCR) and The Hague Code of Conduct against Ballistic Missile Proliferation. The MTCR was established in 1987 and has 34 member

\textsuperscript{58} India, Israel, Pakistan, and North Korea are not members of the NSG.
\textsuperscript{59} See generally, \textless http://www.australiagroup.net\textgreater .
states. It is an informal and voluntary group of states that share the goal of nonproliferation of WMD unmanned delivery systems using national export controls of missile equipment and related technologies. Member states adhere to the MTCR Guidelines and have developed a list of controlled items known as the Equipment and Technology Annex. As an informal association, national implementation of export controls varies somewhat from state to state and there is no formal verification or compliance mechanism.

MTCR member states began work on The Hague Code of Conduct, which was adopted in 2002. The Code is meant to supplement the MTCR and is open to any state, not just those with advanced missile technologies. Currently, there are 124 signatories. Under the Code, states make politically binding commitments to curb the proliferation of WMD-capable ballistic missiles and to exercise maximum restraint in developing, testing, and deploying such missiles. States are encouraged to report annually on their ballistic missile programs and to notify other signatories before conducting any missile testing.

**Bilateral Agreements**

There are many bilateral agreements with smaller participation, lesser reach, or coverage that may be considered part of the international nonproliferation regime. Numerous bilateral agreements exist in various forms, including those between the United States and the former Soviet Union such as the Strategic Arms Limitation Talks (SALT I, SALT II), the Strategic Offensive Reductions (START I, START II), and the Strategic Offensive Reductions Treaty (SORT). Other bilateral agreements include the India-Pakistan Non-Attack Agreement against any nuclear installation or facility, the Joint Declaration of South and North Korea on

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Cooperative Threat Reduction programs were established by the United States after the break-up of the Soviet Union to help secure and monitor the Soviet era WMD programs. These programs have expanded in recent years to help other states, including Albania, Libya, and the former Yugoslavia destroy chemical weapons. Finally, international terrorism treaties and international shipping and port security measures provide ongoing and increasing support for the nonproliferation effort. Efforts have been enhanced by the International Convention for the Suppression of Acts of Nuclear Terrorism\(^\text{61}\) and other new measures such as the Container Security Initiative adopted in 2002 and the International Ship and Port Facility Security Code of 2004.

**Conclusion**

The purpose of this chapter was to illustrate binding treaties that are ineffectual to the extent that they require consent and are products of hard-fought negotiations that often result in watered-down obligations. Complementary measures to these treaties are largely political or regional nonbinding agreements that do not address the most pressing need in nonproliferation – to combat non-state actors and proliferating states. Chapter 2 explores these weaknesses in detail. Chapter 3 analyzes the Proliferation Security Initiative and UN Resolution 1540, which arose as the next generation of nonproliferation instruments due to these traditional measures’ weaknesses. Chapter 4 explores the newest generation of mechanisms and their adherence to international law, as well as the potential long term consequences of their failure to comply with international law.

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CHAPTER 2 -- Nonproliferation Weaknesses

Weaknesses, gaps, loopholes, failures, inadequacies, and ineffectiveness have been terms used to describe aspects of the multilateral treaty regime attempts at nonproliferation. These issues become increasingly dangerous with regard to non-state actors interested in using WMDs. The main criticisms of the multilateral treaty regimes include (1) nonuniversality, (2) verification and enforcement, and (3) compliance, or the lack thereof. Nonuniversality is a major issue since treaties and multilateral regimes are traditionally voluntary, thus allowing states to remain outside of the regimes for various reasons. Enforcement and verification issues constantly arise for states within the regimes. The obvious lack of compliance is also problematic, as is the treaties’ failures to prevent trading, smuggling and trafficking of WMDs and WMD-related materials. With regard to complementary measures instituted concurrently with multilateral treaties, related weaknesses include the adequacy of domestic measures and technologies, which vary greatly from state to state, and questions of the effectiveness of national export controls and national enforcement efforts. It is these weaknesses that have given rise to the Proliferation Security Initiative and UN Security Council Resolution 1540. Building from Chapter 1’s description of the nonproliferation multilateral treaties and complementary mechanisms, this chapter discusses weaknesses of the existing treaties and complementary mechanisms.

62 See Joyner, supra note 3 at 518 (discussing porous borders, corruption in states where WMDs are trafficked, sold or traded, proliferation from “non-traditional supplier states” outside existing regime structures, leakages and transfers of knowledge and materials to problematic places and groups).
63 Ibid. at 519.
A. **Nonuniversality**

Universality refers to the aspiration of all countries being party to a treaty. Because the treaties and regimes at issue are “adopted only voluntarily by states, and for a variety of reasons many states, including some of significant proliferation concern, have elected to remain outside the regime system,” universality cannot be achieved.\(^{64}\) Even though there are benefits to the status that goes along with joining multilateral nonproliferation regimes,\(^{65}\) this benefit is not enough to override various reasons countries choose not to sign onto nonproliferation treaties. One scholar has even suggested that “[s]ome governments, such as that of North Korea – and, increasingly, Iran – almost seem to relish the prospect of being considered pariah states.”\(^{66}\)

Without universality, the effectiveness of a WMD regime is undermined. There is an inherent and irresolvable tension between the concept of universality and consent-based multilateral treaty mechanisms.\(^{67}\) As scholars have pointed out, any compromise that even a majority of proliferators would agree to would be so watered down as to be rendered ultimately ineffective.\(^{68}\)

The cornerstone of nonproliferation, the NPT, has experienced monumental challenges in recent years and epitomizes certain struggles that the nonproliferation regime is having through multilateral treaty-based efforts. The 2005 NPT Review Conference ended without a single substantive agreement reached among the states parties, leading some critics to question

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\(^{64}\) _Ibid._ at 539.


\(^{66}\) _Ibid._ at 943.

\(^{67}\) See Abe, _supra_ note 4 at 930 (“[t]he basic drawbacks of the multilateral method are the difficulty of achieving a near-universal consensus among the diverse countries around the world, the time it would take to achieve such consensus, and the comprise that would be required to form a consensus that would necessarily include would-be or active nuclear proliferators.”).

\(^{68}\) _Ibid._. See also Ford, _supra_ note 65 at 952 (describing this phenomenon as resulting in the “lowest common denominator” of instruments).
the effectiveness and credibility of the NPT. Differences in priorities among regional groups, among political groups, and between nuclear haves and have-nots paralyzed the discussions. Several issues of recent times remain very contentious, such as fulfilling the disarmament obligation by NWS; dealing with India, Pakistan, and Israel, which remain outside of the NPT; North Korea’s recent withdrawal from the NPT; possible clandestine nuclear activities in North Korea, Iraq, Iran, and Libya; and the dangers of non-state actors or terrorist groups acquiring nuclear materials. The failure of the 2005 Review Conference to respond to these pressing challenges was not a good sign.

Although permissible under it provisions,69 the actual withdrawal of North Korea from the NPT undermined faith in the treaty’s effectiveness and importance, presenting a major challenge to the nuclear nonproliferation regime. Another recent challenge to the NPT has been the India-United States nuclear cooperation deal that has been in negotiation for the last two years. India is not a party to the NPT, and simply put, the cooperation deal circumvents certain aspects of the NPT, further undermining the regime.70 Neither India, Israel, nor Pakistan are signatories to the NPT, and these countries regularly object to UN General Assembly attempts to adopt a resolution establishing the universality of the NPT.71

Similarly, the BTWC and CWC face challenges of universality, compliance, and verification. Clearly, the lack of a verification regime and monitoring body for the BTWC weakens the effectiveness of the treaty, leading to creation of the Additional Protocol. Now, negotiations of the Additional Protocol have stalled, due primarily to the U.S. withdrawal of

69 Non-Proliferation Treaty, Art. X, Section 2.
71 Abe, supra note 4 at 929.
support. With regard to the CWC, universality is a top priority, with ongoing efforts by the international community to bring the few remaining non-signatory states and non-ratified states into the regime. This priority is largely due to the geo-political context of the Middle East in which several of the remaining states exist.

B. Compliance Enforcement and Verification

No treaty regime is effective if the treaty terms cannot be enforced and it cannot be verified whether parties are in compliance. Especially in the realm of WMDs, enforcement and verification are essential components of effective multilateral instruments. One of the hallmark weaknesses of the multilateral regimes discussed above is continuing problems in this area. Further, international inspectors are largely dependent on a host government for information, and discovering undeclared activities can be very difficult, if not impossible.\(^\text{72}\)

Since the inception of the BTWC, the number of states in possession or pursuing biological weapons has more than doubled. The Soviet Union and Iraq actively pursued biological weapons programs after signing the BTWC. Although it solidifies an international norm prohibiting biological weapons, the BTWC is ineffective in enforcing the member states’ obligations. Further weakening the BTWC goals is the fact that the treaty provisions do not prohibit bio-defense programs and do not adequately deal with “dual-use” biological programs, which is becoming more difficult due to the ever-increasing advances in biotechnology.

The CWC incorporated a verification and monitoring regime, a lesson learned from the BTWC lacking one, but still faces several challenges. Several states of concern remain outside the treaty, namely Egypt, Israel, North Korea, and Syria. Many member states fail to comply with submitting declarations, implementing proper national legislation or establishing an

\(^{72}\) Ford, *supra* note 65 at 944. Ford also points out the catch-22 that the more time inspectors spend in a country, the better that country’s officials become at learning ways to evade inspection. *Ibid.*
appropriate National Authority, and some attempt to interpret the treaty regarding inspections in self-serving ways, which undermines confidence and effectiveness.

Those states with significant chemical weapons stockpiles to destroy are struggling to meet the schedules for doing so. Albania became the first state to miss its obligatory deadline of April 29, 2007, for total elimination. Both the United States and Russia are expected to violate their deadlines in 2012, given their current rate of chemical weapons destruction. It is yet to be seen how the OPCW and the international community will deal with this, but important precedents and tests for the effectiveness of the regime will surely be set.

Ratifying the CTBT remains step #1 of the “13 Practical Steps” adopted by the NPT Review Conference, signifying its role in the nonproliferation regime. The United States (one of the required states parties) is a catalyst to the entry into force of the treaty. It was the first signatory, but ratification of the treaty was narrowly defeated in the U.S. Senate in 1999. The current administration is not supportive of this nonproliferation effort and has actually discussed breaking the informal moratorium on nuclear testing to test new low-yield nuclear devices. Consequently, the lack of U.S. ratification has led other requisite states to withhold ratification, so this significant nonproliferation mechanism remains not in force.

Even where noncompliance is found, no effective sanction works for noncompliance.73 Because noncompliance has not been effectively sanctioned in the past, states today see that no real harm comes from noncompliance.74 There is no uniform sanction regime for noncompliance with consent-based treaties; indeed the very notion of automatic sanctions for


74 Ibid. at 587 (“[t]he proliferators of today have learned lessons from how the international community has handled noncompliance in the past, and it seems clear that tomorrow’s would-be proliferators will learn from the choices we make in responding to today’s proliferation challenges”).
behavior and consent-based treaties are at odds. Further, not all noncompliance is equally egregious, and effective responses to noncompliance do not come in a one-size-fits-all package, which further complicates sanctioning noncompliance. This results in compliance being merely a cost-benefit analysis for states.

C. Stalled Multilateral Negotiations

All the multilateral treaty-based regimes often suffer from their own largess and slow actions due to operational consensus requirements and international politics. Political differences combined with a need for consensus among member states has the potential to derail nearly every multilateral nonproliferation negotiation that now takes place.

A recent example was the annual NPT Preparatory Committee meeting to plan for the 2010 NPT Review Conference. The meeting, scheduled to be held for two weeks in April 2007, was postponed for several days and on the verge of cancellation when the Iranian delegation objected to wording in the proposed agenda. Difficulties reaching agreement on meeting agendas, let alone final documents and substantive measures, as was the case with the 2005 NPT Review Conference and the stalling of the BWC Additional Protocol movement, jeopardizes the nonproliferation regime’s effectiveness. Political sensitivities have prevented components of verification regimes from being used. This includes the “challenge inspections” option under the CWC and referrals to the UN Security Council, which is an option for many nonproliferation mechanisms, but always entails sensitive political implications. This weight of international politics over treaty obligations opens the door to criticism of the multilateral nonproliferation system.

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75 Ibid. at 588 (arguing for contextual responses to noncompliance).
Lacking the political will to sign, ratify, implement, or strengthen nonproliferation treaty obligations remains one the greatest challenges to the nonproliferation regime. Additionally, political will is often insufficient. Many states that have the political will may lack the financial or technological resources to fully implement their nonproliferation obligations, creating yet another weakness for the treaty regimes. Assistance programs exist with most major conventions, but they still fall short of that which is needed for maximum effectiveness, and they constantly must compete with the numerous other forms of international assistance. Implementing national legislation is a difficult and costly task for many states and often times is not a high priority within their domestic agenda. Many states have never had WMD programs and prefer to expend their governing resources on pressing matters other than implementing effective nonproliferation measures.

D. Failure to Prevent Trading, Smuggling, and Trafficking

A major weakness of existing multilateral regimes that the next generation of nonproliferation instruments is attempting to address is trading, smuggling and trafficking of WMD related materials. No multilateral regime before the PSI and Resolution 1540 directly addressed these crucial avenues by which WMD materials are traded. The matter was largely left to the law enforcement and border patrol in individual nation-states.

An example of trading is the A.Q. Khan network. In 2004, it was revealed that Pakistani scientist Abdul Qadeer Khan, who headed Pakistan’s nuclear program for over 20 years, had been providing nuclear weapons-related technology to several states, including Iran, Libya, and North Korea.77 Khan’s clandestine activities began in the 1970’s when he smuggled centrifuge plans for enriching uranium and a list of technical equipment suppliers out of a

Dutch nuclear plant in which he worked. He then brought the information to Pakistan after being invited to establish the country’s nuclear weapons program. Over the years, he successfully built-up Pakistan’s nuclear weapons program, then turned to helping others.

The nuclear black market came to light following Libya’s renunciation of its weapons program. In Libya, IAEA inspectors found nuclear materials that could only come from somewhere with an advanced nuclear program. Soon they traced a complex web of international transactions, which involved factories in Malaysia, Turkey, Europe, and South Africa, transshipments through the port of Dubai, shipments delivered to Iran, and A.Q. Khan.

As seemingly shocking as the selling of nuclear weapons technology to states such as Iraq, Iran, Libya, and North Korea may be, Khan’s activities were not all illicit, clandestine, or illegal as is commonly portrayed. As discussed, all the multilateral nonproliferation treaties and export control regimes are voluntary and directed towards state actors.

Although definitions of smuggling and illicit trafficking may vary, the general notion is that illicit trafficking refers to ordinarily legal movement of items, but which are used for proscribed purposes or with criminal intent. Smuggling refers to the attempt to completely circumvent border controls and customs regulations, or minimize customs controls by falsifying cargo manifests, usually for financial gain.

Incidents of illicit trafficking of WMD related materials occur more often than one might think. The IAEA established the Illicit Trafficking Database (ITDB) in 1995 and has thus far confirmed nearly 1000 incidents involving nuclear and radioactive materials.78 These incidents are voluntarily reported and confirmed by member states of the IAEA, so more incidents have likely occurred that are unknown. In 2006, there were 149 reported incidents,

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85 of which involved theft or loss of nuclear or radioactive materials. Some of these incidents involved attempts to illegally sell the materials on the black market or smuggle the materials across international borders.

Five incidents involved highly enriched uranium (weapons grade uranium), one of which took place in the Republic of Georgia, an illicit trafficking hotbed, where criminals were arrested trafficking 80 grams of weapons grade uranium. Incidents in Georgia demonstrate the constant battle to combat WMD materials trafficking that began after the breakup of the Soviet Union, which resulted in the possession of numerous nuclear facilities by the former satellite republics. Difficulties with border controls, especially in remote regions, currently present huge nonproliferation challenges.

Other parts of the globe present difficult challenges as well. The UN reports that significant amounts of uranium have been smuggled within and out of The Democratic Republic of Congo. The frequency and amount of smuggling incidents reflects organized efforts, and the likelihood that the Government is turning a blind eye. Loose controls at closed uranium mines, as well as an atmosphere of warring rebels, warlords and government create a dangerous environment in which it is difficult to secure and account for the uranium. Consequently, the region may have become one of the largest sources for the black market.

Even the United States is not free from proliferation dangers. In January 2007, an employee at a Tennessee industrial plant in which nuclear materials and equipment are broken

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down for decommission was arrested for stealing nuclear related materials and trying to pass them to a foreign agent.\textsuperscript{81}

E. Summary

Chapter 1 outlined the multilateral regimes that existed prior to the PSI and Resolution 1540. This chapter addressed the well-known weaknesses of these multilateral regimes, including nonuniversality, enforcement and verification problems, and the continued trading, smuggling and trafficking of WMD related materials. Chapter 3 analyzes the PSI and Resolution 1540, new mechanisms that have been developed in recent years to combat proliferation in response to the multilateral treaty regimes’ weaknesses. Chapter 4 then discusses those new mechanisms compliance with international law and long-term prospects for success.

CHAPTER 3 -- The New Mechanisms

Revelations about the A.Q. Khan network and the dangerous status of weapons proliferation in general, combined with the shocking events of September 11th and the realization of what terrorist networks were capable of, made it evident to the international community that the nonproliferation mechanisms in place were clearly inadequate for these new security dilemmas.\textsuperscript{82} Cold War security dynamics, multiple instances of states violating their nonproliferation obligations, increases in WMD smuggling occurrences, and the rise of non-state actors seeking to acquire WMD have all led to the calls for new strategies to combat WMD proliferation in one way or another before it is too late.

This Chapter describes two recent mechanisms that states have developed to combat proliferation: The Proliferation Security Initiative (PSI) and UN Security Council Resolution 1540.\textsuperscript{83} After discussing these new mechanisms’ background, Chapter 4 analyzes them in relation to international law, and asks whether their relative incongruence with international law will result in long-term failure, or whether they, indeed, are the next and necessary generation of nonproliferation measures.

The PSI and Resolution 1540 are complimentary in many ways. Resolution 1540 is an exercise in legislating, or law-making, to combat WMD proliferation at the UN level, whereas the PSI is a cooperative law enforcement measure at the state level to combat WMD proliferation. Resolution 1540 was initially proposed in direct response to the creation of the

\textsuperscript{82} Accord Mark R. Shulman, “The Proliferation Security Initiative and the Evolution of the Law on the Use of Force” (2006) 28 Hous. J. Int’l L. 771 at 785 (explaining the PSI as a “new kind of multilateral security agreement – one with considerable advantages over the heavily negotiated and thus cumbersome treaties that lawyers and diplomats are accustomed to creating”); Ford, supra note 65 at 975 (“PSI-style approaches, however, have advantages over universalist regimes . . . in not being entirely hamstrung by participants whose nonproliferation seriousness flags”).

\textsuperscript{83} For other scholars’ descriptions on the backgrounds and texts of the PSI and Resolution 1540, see Douglas Guilfoyle, “Maritime Interdiction of Weapons of Mass Destruction” (2007) 12 J. Conflict & Security L. 1.
PSI to serve as the legal authority for PSI law enforcement activities. Both mechanisms pursue a similar goal to stop illicit trafficking of WMD and related materials and to develop international legal norms in the area of WMD proliferation. Both have adopted new strategies to combat WMD proliferation in their respective ways. Resolution 1540 harnesses the massive authority and apparatus of the UN system taking a universal approach. The PSI takes the opposite approach, seeking to act within small coalitions, or even unilaterally if necessary. The PSI has no governing body, secretariat, headquarters, or chairperson; it is simply defined as an activity, not an organization. Resolution 1540 not only is a measure taken by the UN Security Council, but it also is administered by its own UN Committee.

The PSI was introduced in the spring of 2003. Resolution 1540 followed a year later in the spring of 2004, in part to provide a greater legal authority to the PSI. While it is not clear what effect the mechanisms will have on WMD proliferation, the roles of these two new mechanisms are now beginning to be clarified, with the results being revealed in the years to come. The success of these measures requires participation by as many states as possible. The likelihood of such participation will increase the more these mechanisms adhere to existing international law, an argument that will be made in Chapter 4. In this Chapter, the negotiation, adoption, text and present-day success of these two mechanisms is described to provide background information for the subsequent analysis of these measures’ potential success.

A. The Proliferation Security Initiative

The PSI represents a new generation of multilateral approaches to combating weapons of mass destruction. Whether one is a proponent or critic of the PSI, it is undeniable that it

“may fundamentally alter the transnational legal framework for the use of force by states”.\textsuperscript{85} Put simply, the PSI is a program “that calls on participating states to block dangerous shipments of WMD material in their ports, territory, airspace or on their vessels”.\textsuperscript{86} Although the PSI attempts to fight the transport of WMDs and related materials by both air and sea, the “likely venue for interdiction” is marine transport.\textsuperscript{87}

On May 31, 2003, U.S. President George W. Bush introduced the PSI during a speech at the G8 Summit in Krakow, Poland.

When weapons of mass destruction or their components are in transit, we must have the means and authority to seize them. So today I announce a new effort to fight proliferation called the Proliferation Security Initiative. The United States and a number of our close allies, including Poland, have begun working on new agreements to search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies. Over time, we will extend this partnership as broadly as possible to keep the world’s most destructive weapons away from our shores and out of the hands of our common enemies.\textsuperscript{88}

The new initiative was led by the U.S. and consisted of 10 other states that sought to stem the proliferation of WMD and their components. The 11 original members were Australia, Britain, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, and the United States. The PSI had a primary aim to restrict trafficking of WMD in the air, on land, or at sea by raising the stakes, both politically and economically, of weapons trafficking, thus becoming a major deterrent to would-be proliferators. The U.S. architect of the PSI, then Under Secretary of State John Bolton, stated that the PSI

\textsuperscript{85} Shulman, \textit{supra} note 82 at 777.
\textsuperscript{86} Garvey, \textit{supra} note 84 at 126.
\textsuperscript{87} \textit{Ibid.} at 126-27.
reflects a need for a more dynamic, proactive approach to the global proliferation problem. It envisions partnerships of states working in concert, employing their national capabilities to develop a broad range of legal, diplomatic, economic, military and other tools to interdict threatening shipments of WMD and missile-related equipment and technologies.\textsuperscript{89}

PSI working groups held three meetings during the summer of 2003. The first was in Brisbane, Australia, the second in Madrid, Spain, and the third in Paris, France, where the Statement of Interdiction Principles was adopted. On September 4, the Statement of Interdiction Principles was released, becoming the PSI’s core document.\textsuperscript{90} It formally stated the commitment of the PSI core members and outlined a framework for action against proliferation.

In December 2003, Canada, Denmark, Norway, and Singapore joined the PSI, with the Czech Republic and Russia joining in the spring of 2004. In addition to the core membership, the PSI counts several nations as participants on an ad hoc basis, and many nations have concluded bilateral ship boarding agreements under the PSI Principles. In all, the PSI now claims the support of almost 80 nations.\textsuperscript{91}

Although support for the PSI has slowly grown, the initiative has also been criticized for its secrecy, its questionability under international law, its undermining of the UN system, its necessity, and its effectiveness. The Statement of Interdiction Principles raises several definitional issues, as well as issues of interpretation. Questions exist as to how the PSI can be reconciled with the law of the sea, namely the UN Convention on the Law of the Sea.


(UNCLOS) and the Suppression of Unlawful Acts Against the Safety of Maritime Navigation Convention (SUA Convention). These issues are discussed in detail in the following chapter.

**Statement of Interdiction Principles**

The PSI participants must agree to the PSI Statement of Interdiction Principles (Principles), which outlines its purpose and operation. The PSI Principles are the focal point of the initiative’s activities, authority, and legitimacy. Therefore, substantial issues have immediately arisen from the text itself.\(^92\)

**Development**

The Principles were adopted by the PSI members at their third meeting in September 2003. Origins of the PSI and its Principles can be traced in the U.S. to the Bush administration’s 2002 National Security Strategy to Combat Weapons of Mass Destruction. Counter-proliferation and interdiction are listed as the first strategies to combat proliferation of weapons of mass destruction.\(^93\) Efforts had begun on the formation of the PSI before it was formally launched by President Bush at the G-8 Summit in May 2003, and two meetings took place before the adoption of the PSI Principles.

The first plenary meeting after the formal PSI formation took place in Madrid on June 12, 2003. It was comprised of the 11 initial members, and proposals were put forth regarding strategies for interdiction of suspect vessels, searching ships and aircraft, and seizing illegal weapons or weapons technologies. Potential national and international authorities were discussed for the operational measures of the PSI.\(^94\)

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\(^92\) *See Appendix - A for the full text of the Statement of Interdiction Principles.*


The second meeting took place in Brisbane on July 9-10, 2003. The same participants took further steps to define necessary actions for collectively and individually interdicting shipments of WMD and related materials. The need for improved information sharing and analysis was established, as well as the need for operational training exercises. Additionally, participants declared that the PSI was a necessary approach to fill gaps in the existing nonproliferation regimes, particularly the problems of non-state actors seeking to acquire WMD and of countries that do not fulfill their international obligations, do not join existing regimes, or do not follow international legal norms.95

While emphasis was placed on proactive and creative action, it was reiterated that all actions would conform to existing national and international law.96 However, a split began to emerge regarding the authorities that PSI activities might operate under. One group led by the Australia and the United States supported a “potential structure outside the current system” as stated by PSI Brisbane Chairman Paul O’Sullivan, deputy secretary of the Australian Department of Foreign Affairs and Trade.97 Supporting this view was John Bolton, leader of the U.S. delegation. Bolton stated that “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.”98

Other delegations expressed reservations regarding “outside” or “additional” authorities. They stressed the need for adherence to international law and would not support U.S. proposed measures for interdiction in international waters. This insistence on conforming to international law along side the more aggressive and creative U.S. viewpoints put forward at these early meetings, were the earliest glimpse into the legal issues that persist to this day for PSI activities.

**Statement Text**

Agreement was reached on the Statement of Interdiction Principles at the third meeting of the PSI in Paris on September 4, 2003. Accordingly, PSI participants made a concrete commitment to:

- undertake effective measures to interdict the suspected transfer or transport of WMD, their delivery systems, and related systems from states or non-state actors of proliferation concern;
- adopt streamlined procedures for rapid exchange of information regarding suspected proliferation activity;
- review and strengthen both national legal authorities and relevant international law to support PSI commitments; and
- take specific actions to support interdiction of cargoes of WMD, delivery systems, and related materials consistent with national and international laws— including not transporting such cargoes, boarding and searching vessels flying their flags that are reasonably suspected of carrying such cargoes, allowing authorities from other states to stop and search vessels in international waters, interdicting aircraft transiting their airspace that are suspected of carrying prohibited cargoes, and inspecting all types of

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All of these commitments are to be carried out in a manner consistent with international law and all international legal obligations.\textsuperscript{102}

Soon after the adoption of the Principles, participants met for the fourth time, in London, to discuss how to strengthen and expand support for the principles.\textsuperscript{103} Participants were pleased with the international response toward the PSI and the Principles after their recent publication, with over 50 countries expressing forms of support. It was confirmed that the PSI was a global initiative with an inclusive mission which any state may join by accepting the Statement of Interdiction Principles and making an effective contribution. Significantly, it was agreed that the aim of the PSI was to impede and stop WMD trafficking “at any time and in any place.”\textsuperscript{104}

\textit{Textual Issues}

Several terms in the PSI Principles raise questions of interpretation and intention including “delivery systems,” “related materials,” “good cause,” “reasonably suspected,” “non-state actors,” and “actors of proliferation concern.” The terms “delivery systems” and “related materials” are used in other proliferation documents and create difficult definitional issues since they can encompass dual-use goods that would be perfectly legal for trade and transport. Definitions for these exist in other proliferation texts, including UN Security Council Resolution 1540, which defines “related materials” and “means of delivery,” which is synonymous with “delivery systems.” The PSI Principles do not define these terms, however,
nor do they make reference to their definitions in other instruments. So apparently, what constitutes “related materials” is left up to the PSI participants, which is a bit troubling in its subjectivity.

Even more troubling are the terms “good cause” and “reasonably suspected.” There is no standard or definition for “good cause” or “reasonably suspected.” But, most troubling of all may be the language specifically targeting “actors of proliferation concern” and “non-state actors.” The PSI Principles define “states or non-state actors of proliferation concern” as

*those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (a) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (b) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.*

Basically, any country or entity that a PSI country felt was of concern. All these definitions are quite troubling legally speaking and could easily lead to double standards. Plus, given the political implications of WMD issues and the mistrust among many weaponized nations, any hint of unequal application of nonproliferation laws, norms, or enforcement will exacerbate the issues and mistrust.

These concerns have limited PSI participation and effectiveness. There appears to be ample opportunity to abuse the PSI Principles that are vague, resulting in double standards and unequal application. The subjectivity of these terms does not enhance the legal legitimacy of the PSI.

**PSI Activities**

Since the initial plenary meetings of the PSI, operational aspects of PSI activities have transformed. The activities now include quarterly meetings of an operational group of experts,
and training exercises and simulations, as well as arranging for and negotiating ship boarding agreements.

*Exercises*

PSI participants have conducted more than two dozen training exercises since the adoption of the PSI Principles. These exercises, as well as simulations, are a key function of the PSI. Training exercises and simulations are developed by the PSI operational group of experts (OEG), which was established at the July 2003 meeting in Brisbane, Australia. The OEG meets quarterly and has thus far developed over 24 exercises.

The first official PSI exercise was hosted by Australia in September 2003. Named *Exercise Pacific Protector*, the exercise included warships and customs vessels from Australia, Japan, the United States, and maritime aircraft from France. Subsequent multilateral exercises have been led by Britain, Spain, France, the U.S., Italy, Germany, Portugal, Singapore, and Poland, which simulate maritime interdictions, air interdictions, or ground interdictions. More than 40 states have participated in one or more PSI exercises and simulations.¹⁰⁵ A few non-PSI participants have been invited to witness PSI exercises as well.

*Ship Boarding Agreements*

Several ship boarding agreements have been concluded by the United States with key maritime nations.¹⁰⁶ Ship boarding agreements are bilateral agreements that facilitate cooperation for boarding and searching vessels of the involved states. Under the bilateral agreements, if a vessel of either state is suspected of carrying WMD related cargo, either party can authorize the boarding, search, and possible detention of the vessel and the cargo. Points of

¹⁰⁶ Mark Shulman describes these boarding agreements as “tremendous feat[s] of diplomacy” that have “given the PSI members legal authority to board any of thousands of ships”. Schulman, *supra* note 82 at 813-14.
contact are established between the states and expedited procedures for requests to board and
search are put into place. Authorization must still be granted, but the authorization is
automated according to the agreement.

The United States, which appears to be alone in their pursuit of concluding such
agreements, currently has seven bilateral ship boarding agreements. The agreements are with
Belize, Croatia, Cyprus, Liberia, Malta, the Marshall Islands, Mongolia and Panama. Mongolia
signed an agreement most recently in October, 2007. More agreements are in the negotiation
stages.  

B. United Nations Security Council Resolution 1540

United National Security Council Resolution 1540 attempts to deal with the
problems, gaps, or inadequacies of the WMD nonproliferation regime at the highest and most
universal level. Working through the UN apparatus not only gives the Resolution universality,
but also international legitimacy. Aside from the general issues with the previous
nonproliferation regimes, Resolution 1540 specifically sought to deal with the proliferation
activities of non-state actors, and the previous regimes’ inability to regulate them.

The UN Security Council adopted Resolution 1540 on April 28, 2004. The Resolution
was passed under Chapter VII of the UN Charter and is legally binding upon all UN member
states. It is a new mechanism designed to supplement existing nonproliferation regimes,
reinforce norms and obligations, and bolster enforcement.

109 Joyner, supra note 3 at 539.
110 Pertinent Security Council powers under Chapter VII of the UN Charter include:
Resolution 1540 imposes three key obligations on all member states, which are:

1. to refrain from providing any support to non-state actors that attempt to manufacture, possess, transport, or use WMD and their means of delivery;
2. to prohibit in their domestic law such activities by non-state actors, in particular for terrorist purposes, and to prohibit any participation, assistance, or financing of such activities; and
3. to adopt domestic measures to prevent the proliferation of WMD, their means of delivery, including by accounting for and physically protecting such items, establishing and maintaining effective border controls and enforcement measures, and maintaining national export and shipment controls, all with appropriate penalties. 111

Operative Paragraphs (OP) 1 and 2, paraphrased above, address the problems of non-state actors in proliferation, an aspect that has traditionally fallen outside of the state-based nonproliferation treaty regimes thus far. OP3 addresses the non-universality of the treaty regimes by requiring all UN member states to implement domestic measures to control any WMD materials. These are the two primary ways in which Resolution 1540 is meant to “fill the gaps” in the WMD nonproliferation regime.

Adoption Background

Several months of negotiations led to the final text of Resolution 1540. The United States first pushed the idea of criminalizing WMD proliferation in September 2003, during

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Article 39 The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measure shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41 The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. . . .

Article 42 Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. . . .

Article 48(1) The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

111 See Appendix – B for full text of Resolution 1540.
President George W. Bush’s speech before the UN General Assembly. He urged the Security Council to take this action, as WMD proliferation had been increasingly accepted as a threat to international peace and security. Included in this initial idea was the hope that a resolution would aid the nascent PSI with international legal authority for WMD related interdictions.

Russia produced the first draft of the Resolution. Early diplomatic discussions revealed concerns over potential economic and military sanctions for non-compliance and use of terms such as “interdiction.” China insisted that the word “interdiction” be deleted, diminishing the direct authority for PSI activities that the resolution might have provided.

While only Security Council members were directly involved in the negotiation and drafting processes, the General Assembly was invited to an open Security Council meeting on April 22, 2004. About 30 states attended to debate and express concerns over the Resolution. First among the most significant concerns was the ever-lacking disarmament effort by the nuclear weapon states. Many states argued that nonproliferation and disarmament efforts must go hand in hand, and that strengthened efforts to stem proliferation should not undermine or replace disarmament efforts. This concern did result in the mention of disarmament obligations in the Resolution preamble, continuing the recent pattern of championing nonproliferation while ignoring disarmament by a few powerful states. The final draft that would become Resolution 1540 was sponsored by France, the Philippines, Romania, Russia, Spain, the United Kingdom, and the United States. In the end, Resolution 1540 was adopted by a unanimous Security Council vote.

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The 1540 Committee

The 1540 Committee was established by Resolution 1540 in accordance with rule 28 of the Security Council’s provisional rules of procedure. The Committee was to be made up of all members of the Security Council and operate on a consensus basis for a period of two years.\(^{113}\) In 2006, the Security Council passed Resolution 1673, which extended the 1540 Committee’s mandate another two years, until April 27, 2008.\(^{114}\) On April 25, 2008, the 1540 Committee’s mandate was renewed, this time for three years.\(^{115}\) In addition to the 15 Security Council members, a group of experts, originally numbering four, but now eight, assists the Committee.

The Committee was given little definition or direction from the text of the Resolution, but it draws upon experiences of the 1373 Committee established under Resolution 1373 in the wake of September 11\(^{th}\) and committees which have previously been established to monitor mandatory arms embargoes. The basic charge of the 1540 Committee is to monitor and report to the Security Council on member states’ fulfillment of their obligations under Resolution 1540. The Resolution called upon states to produce their first reports within six months of its adoption, on the steps they have taken and plan to take to implement the Resolution. As with the 1373 Committee, the 1540 Committee can facilitate the requests and offers for assistance that Operative Paragraph (OP) 7 recommends.

Once established, the Committee set up guidelines for the conduct of its work and periodically adopts work plans. The Committee has established guidelines for preparing national reports as well as a comprehensive database of submitted reports and respective

\(^{113}\) The current members are Belgium, Burkina Faso, China, Costa Rica, Croatia, France, Indonesia, Italy, Libya, Panama, Russian Federation, South Africa, United Kingdom of Great Britain and Northern Ireland, United States of America, and Vietnam. The chairman is currently Jorge Urbina of Costa Rica.


national legislation which are accessible through the Committee’s UN website.\textsuperscript{116} The legislative database contains links to the original texts of laws, ordinances, decrees and decisions related to activities for implementing Resolution 1540. The database is updated regularly and provides a great resource among member states and the Committee in working towards full implementation.

Another tool developed by the Committee is a matrix, which structurally follows the obligations set forth in OP 2 and OP 3, which helps the Committee examine national reports and provides a road map towards what would be considered full implementation of Resolution 1540. It also helps member states identify exactly what their obligations are and track their own progress.

\textit{Full Implementation}

A major question, if not \textit{the} major question, regarding member states’ obligations under Resolution 1540, and therefore the 1540 Committee’s major question, is what will constitute full implementation of the Resolution’s obligations. The Security Council anticipated difficulties with implementation, which led to OP 7 and its call for offers of assistance.

Fears that a failure to fully implement might lead to the use of force, since this Resolution was adopted under Chapter VII of the UN Charter, have been put to rest. Although earlier drafts of the Resolution did seek to authorize forcible interdictions as advocated by the PSI, the final draft of the Resolution dropped any reference to interdiction and the typical language used in Security Council resolutions that do authorize any use of force is absent from Resolution 1540. The Security Council must explicitly authorize the use of force, which is often done with language that states may use “all necessary means.”

\textsuperscript{116} Available at <http://disarmament2.un.org/Committee1540/index.html>. 
No state has fully implemented all the obligations of Resolution 1540. Not all states have submitted first reports to the 1540 Committee. The universal approach of this Resolution, which might be its greatest strength, is also a major weakness in that its goals may appear out of reach and lead to non-compliance or minimal efforts for a number of reasons. The lack of capacity and resources to implement the obligations, ambiguity regarding compliance and full implementation, individual state priorities, and the politics of the Security Council provide significant obstacles in achieving universal implementation.

Setting such a high bar may be unreachable, but too low a bar may render the Resolution useless. With compliance levels and even reporting efforts varying greatly among states thus far, how would an appropriate level of sufficient implementation be determined? The 1540 Committee is not empowered to make determinations of compliance, just monitor, analyze and report on compliance, leaving any final determination to the Security Council. Time will tell if any action is ever taken in response to non-compliance with Resolution 1540 obligations. For now, emphasis is being placed on national implementation efforts and implementation assistance without any discussion of consequences for failures in implementation.

One theory that recognizes the immenseness of the task is to prioritize the obligations, rather than pursuing a seemingly endless piecemeal approach toward full implementation.¹¹⁷ This would be an attempt to maximize the effectiveness of Resolution 1540 sooner rather than later. Indeed, the actual maximum effect that universal implementation would achieve may never be reached.

This Security Council Resolution is equally binding on all member states and must be applied equally as a matter of law to uphold its legitimacy. Yet, prioritizing certain obligations with certain states would make sense. A few key states fulfilling a few obligations could be more beneficial than many states fulfilling a large number of other obligations. Compare states with no nuclear capabilities or facilities with those that do under the obligation in OP 3 to develop effective measures to account for, secure and store the relevant materials. A state with nuclear facilities failing to fully implement these pertinent measures would create a far more significant proliferation gap and risk that the state which has no such facilities.

The prioritization theory submits that not all obligations of Resolution 1540 are of equal relevance for each state, so a risk-based approach should focus on key proliferation risks first. This approach identifies key states, specifically states of primary origin that have WMD or related facilities and materials, and transit states through which high volumes or cargo are transported.118 States of primary origin should focus first on accounting, securing, and physical protection measures, while transit states should first focus on border and export controls. Key states should also focus on enforcement measures and strongly consider joining other nonproliferation treaty mechanisms they are not a party to.

While prioritizing and high-lighting those states that present greater risks than others may be too sensitive and not be politically feasible through UN mechanisms, states themselves, regional organizations, and other international organizations can take the lead in attempting to channel resources towards areas of highest priority. The IAEA and the OPCW have taken a leading role in cooperating with the 1540 Committee and assisting member states with implementation. Additionally, several regional seminars have recently been held in the

118 Peter Crail’s risk-based approach identifies 84 key states, 78 of which may be categorized as primary origin states, with 36 categorized as transit states, see Crail at ibid.
Caribbean, South America, and Africa to aid implementation efforts and have been sponsored by various regional organizations and governments.

*Reporting by Member States*

137 member states have submitted reports to the 1540 as of June 2008, leaving 54 states that have yet to submit their first report. At the end of 1540 Committee’s first two year mandate in April, 2006, 126 states had submitted reports and 79 had submitted additional information in response to the examination of their first report. The initial deadline for first reports, which was to be six months after the adoption of Resolution 1540, was met by 59 states.

Given the short time frame and the early lack of guidance on reporting requirements, some first reports were minimal at best and not necessarily any more sufficient than not reporting. For example, the report of Yemen merely consisted of a few lines which stated that it does not possess WMD of any kind.\(^{119}\) The United Kingdom set out early to provide assistance in reporting by example. It distributed its report to several states as a model format that followed the operative paragraphs of Resolution 1540 and then was divided into categories of actions taken and planned, or ongoing actions.

Since the initial early reports of 2004, the reporting format has advanced and with the help of the matrix of obligations developed by the 1540 Committee, states now have much clearer guidelines as to reporting and what is expected. Outreach activities of the Committee and the work of regional organizations have been successful in enabling more states to submit reports. Aiding and encouraging those states that have yet to submit a first report remains a primary goal of the Committee.

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119 S/AC.44/2004/(02)/97.
The most comprehensive report on the overall implementation of Resolution 1540 remains the 1540 Committee’s report to the Security Council at the end of its initial two year mandate on April 25, 2006.\textsuperscript{120} The examination of states’ reports regarding OP 2 and OP 3, the bulk of the Resolution 1540 obligations, revealed some predictable inadequacies. Concerning OP 2, the prohibition of non-state actors involved in WMD matters, most states’ relevant national legislation had been in place before the adoption of Resolution 1540 and was generally derived from obligations under the NPT, BWTC, and CWC. Many states have these major treaty obligations implemented into their national legislation in accordance with their constitutional procedures. However, adherence to the obligations of those three treaties does not address the issue of non-state actors since those treaties deal primarily with state-to-state activities. This leads back to one of the primary reasons for adopting Resolution 1540—prohibiting non-state actors from involvement with WMD. Obviously, the obligations of OP 2 cannot simply be fulfilled by adherence to the three primary nonproliferation treaties. Further specific legislation is needed.

Many states have implemented legislation in response to the threat of WMD falling into the hands of terrorists in the form of anti-terrorism laws. This is a step in the right direction, but does not fill the entire gap in the nonproliferation regime for non-state actors. Not all non-state actors are terrorists, and legislation defining terrorists, or prohibiting acts for terrorist purposes can be overly restrictive and hard to prove. Black market networks or business entities engaged in illicit transfers of WMD materials could still fall through the gaps in such national legislation. The same may be said of anti-terrorism financing laws that do not address financing of proliferators.

\textsuperscript{120} S/2006/257.
Concerning OP 3, which requires states to establish domestic controls to prevent WMD proliferation, most states referred to national licensing or registration procedures for the peaceful use of nuclear, biological, and chemical related materials and any national authorities that control them. National measures that have been taken to secure and protect WMD related materials come under a variety of legislation, often related to health or environmental protection.

Of significance for state reports concerning OP 3 is the issue of states that do not possess any WMD related materials and the obligation to implement specific legislation for accounting for, securing, and physically protecting materials they do not have. Some reports reflect a resistance to this issue. However, the Committee stands firm as to the binding nature of this obligation and points out that the measures are still prudent to prevent states’ territories from providing a proliferation pathway or safe harbor for proliferators. Finally concerning OP 3, states’ reports revealed a significant lack of border and export controls. The Committee recognizes that establishing effective border controls is difficult and requires tremendous resources, but has continued to emphasize their importance and strongly encourage progress in this area.

Of the 129 reports submitted by April 25, 2006 it is interesting to compare those that are or are not parties to the three major WMD non-proliferation treaties. OP 8 of Resolution 1540 calls upon states to promote universal adoption and full implementation of these multilateral treaties to which they are parties. Of the 129 states that submitted first reports, 126 are parties to the NPT, 112 are parties to and 7 are signatory states of the BWTC, and 120 are parties to and 3 are signatories of the CWC. Of the 62 that had not submitted reports, all 62 are states
parties to the NPT, 42 are parties to and 9 are signatories of the BWTC, and 55 are parties to and 5 are signatories of the CWC.\textsuperscript{121}

Examination of the states’ reports reaffirms what a long endeavor implementation of Resolution 1540 is and will be. Although a number of states already have pertinent legislation in place and are members of several nonproliferation regimes that fulfill some Resolution 1540 obligations and many states are revisiting legislation to fulfill their new obligations, much still needs to be done. Even the most comprehensive reports are not considered entirely satisfactory. An estimate of the percentage of complete fulfillment of obligations for the United States is about 77\%, while estimates for universal full implementation of all states’ Resolution 1540 obligations are about 23\%.\textsuperscript{122}

\textbf{Conclusion}

This chapter looked at the negotiation and text of the PSI and Resolution 1540, which arose due to the weaknesses of existing multilateral regimes discussed in Chapters 1 and 2. In the next chapter, potential issues with the PSI and Resolution 1540 related to compliance with existing international law are analyzed, and it is argued that the long term success of these instruments will depend, in large part, on their compliance with international law.

\textsuperscript{121} \textit{Ibid.}
\textsuperscript{122} See Crail, \textit{supra} note 117.
CHAPTER 4 -- The Relationship Between the PSI and Resolution 1540
and International Law

Mechanisms attempting to curb WMD proliferation will likely be more successful in the
long term if they comply with international law. This issue has two aspects: (1) the
mechanisms’ harmonizing with existing international law and (2) legitimate legal justifications
for the creation and activities of the mechanisms. States are hesitant to sign onto mechanisms
that threaten their sovereignty, do not comply with established principles of international law,
and are generally viewed as legally illegitimate political maneuvers outside of international
law’s framework. While the PSI has been somewhat successful in gaining support, its lack of
compliance with international law and the lack of a legitimate legal basis for its activities pose
potential problems for its long term effectiveness. Likewise, the characterization of Resolution
1540 as overreaching international legislation by the Security Council poses problems with
both its legitimacy and imposition on state sovereignty. However, since Resolution 1540
operates, albeit somewhat controversially, within the scope of existing UN protocol, it is more
harmonious with international law than the PSI. This may result in it achieving greater success
long term as more countries implement its measures.

Beginning with the premise that WMD nonproliferation mechanisms will meet with
more success when compliant with international law, this Chapter analyzes the relationship
between existing international law and the PSI and Resolution 1540. International law issues
analyzed include the law of the sea, traditional notions of sovereignty, and compliance with UN
procedure. The result of this analysis is that while both mechanisms may fail to abide by
international law in some aspects, Resolution 1540 is ultimately more acceptable and should
lead to greater success.
A. The PSI and Resolution 1540 will have increased long-term success if they comply with existing international law

It has become apparent that, generally speaking, older nonproliferation efforts have been quite consistent with international law, while newer counter-proliferation efforts have encountered more difficulty in attaining international legal justifications. Nonproliferation has traditionally relied on consensual international legal instruments and regimes. Counter-proliferation by its design tends to be more non-consensual since it attempts to forcefully intervene and is typically carried out by small coalitions or even unilaterally.

International law as a consent-based system of law with sovereign actors will perhaps always be at odds with counter-proliferation efforts to the extent that countries want to possess, sell or trade WMDs and related materials. Despite this inherent tension, powerful countries cannot ignore and override international law to institute counter-proliferation measures that they think will be effective. It is in situations like nonproliferation and counter-proliferation that international law must be followed and respected if international law as a whole is to have legitimacy. Like domestic law, international law cannot function if it applies only when convenient, or the entire system will be undermined. The PSI and Resolution 1540 have emerged as the next generation of non- and counter-proliferation regimes because of an obvious need for more effective methods than the existing ones. This need is real and substantial, but should not override the need for powerful players like the United States and other Security Council members to follow the “rules of the game”. Countries and international organizations need to feel a sense of international order in order to feel comfortable in the realm of international law and international relations.123 This order cannot simply be “whatever

123 Christopher A. Ford makes a related point in his 2007 article by stating “[t]he very fact of a universalist regime’s existence seems to provide psychological value for many, for it arguably speaks not only to governments’
the U.S. thinks is best”. Growing resentment toward U.S. attitudes about international law and U.S. actions suggesting the U.S. is above it will only mushroom and ultimately weaken these new mechanisms if they do not comport with international law.124

One example of nations’ trepidation regarding the PSI’s legality is Russia. Russia delayed its support for the PSI due to concerns over international legality, joining one year after the initial members. Its concerns focused on whether the PSI had legitimate legal underpinnings and whether its activities would impinge upon universally accepted laws of commerce and safe passage.125 It still has not taken a prominent role in PSI activities. Like Russia, Japan’s support for the PSI has been less than enthusiastic, while WMD significant nations like China, India, Indonesia, Pakistan, and South Korea remain outside the PSI coalition of participants. This is a large detriment to PSI goals given that Asia and its surrounding seas have considerable WMD trafficking patterns.

B. Existing international law and its relationship with the PSI

The most obvious issue with the legality of the PSI is its potential infringement on the Law of the Sea, and the rights the Law of the Sea gives both seafarers and sovereign states. Another glaring weakness of the PSI is its lack of legal legitimacy. Accordingly, this section addresses these two issues of international law potentially infringed by the PSI. I also discuss other maritime conventions that potentially conflict with the PSI, and attempts to use Resolution 1540 as a legal justification for the PSI.

formal commitment to a specific substantive end, such as nuclear nonproliferation, but also to mankind’s aspirations to a just international order in which substantive and procedural fairness count for more than the prerequisites of power and circumstance.” Ford, supra note 65 at 943.

124 Indeed, one scholar has suggested that this process has been occurring as the PSI has “become operationalized”. See Joyner, supra note 3 at 510-11 (“the solidarity of this coalition of the willing has begun to be shaken as commonly agreed principles at the heart of the PSI become operationalized” and “concerned about the questionable existence of an international legal basis on which to legitimize interdictions of merchant ships and aircraft operating in sea zones in which national authority is not absolute”).

The law of the sea and the PSI

Despite the PSI’s lip-service to following established international law, interdiction pursuant to the PSI arguably violates the law of the sea, in that maritime interdiction of a ship pursuant to the PSI may violate a country’s rights under the Law of the Sea. Nearly all participants in the PSI are parties to the UN Convention on the Law of the Sea (UNCLOS). In large part, this convention is a codification of international customary law, with the law of the sea being one of the oldest areas of international law. UNCLOS in its entirety could arguably be considered customary international law itself, but at the very least, its provisions on innocent passage, freedom of navigation, and interdiction are universally accepted as customary international law. Therefore, although PSI participants Denmark, Turkey and the United States are not parties to UNCLOS, they are bound by custom to the law of the sea principles that have an effect on PSI operations.

A state’s sovereignty in relation to others often manifests itself through the concept of jurisdiction, essentially the right to prescribe, adjudicate, and enforce laws. Under the law of the sea, a state’s jurisdiction has developed into several tiers, beginning with a state’s internal waters. Internal waters and ports, which are considered to be in internal waters, are under jurisdiction of the coastal state. UNCLOS extends a coastal state’s sovereignty beyond its

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126 See The White House, Statement by the Press Secretary: Principles for the Proliferation Security Initiative, 4 Sept. 2003, at http://www.whitehouse.gov/news/releases/2003/09/20030904-11.html (“PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the United Nations Security Council.”). See also Garvey, supra note 84 at 129 (discussing the PSI’s principles’ claim of comporting with the law of the sea); Abe, supra note 4 (pointing out that the PSI Interdiction Principles require that “PSI actions must be within the bounds of existing international law”).


128 Ibid. Part II, Section 1, Article 2(1) and Article 11.
land into the sea for 12 nautical miles, or the state’s territorial waters. The next tier beyond the territorial sea is the contiguous zone, another 12 nautical miles outside the territorial sea boundary. In the contiguous zone a state’s powers are reduced to actions necessary to enforce its immigration, customs, fiscal, or sanitation laws. These rights were also recognized in the 1958 Convention on the Territorial Sea and Contiguous Zones.

Outside the contiguous zone is the Exclusive Economic Zone (EEZ), a more recent addition under the law of the sea. The EEZ extends up to 200 nautical miles beyond the territorial waters and reflects elements of territorial waters and the high seas. State sovereignty over the EEZ is limited to actions specified in Part V of UNCLOS. The exercise of sovereignty in the EEZ centers on natural resource rights, so it remains under the legal regime of the high seas for all navigational purposes and, therefore, for PSI purposes. Lastly, there remain the vast majority of the earth’s waters known as the high seas. No state may assert sovereignty over any part of the high seas and the high seas are open to all states, whether coastal or land-locked.

A final fundamental law of the sea right is that ships on the high seas are under the exclusive jurisdiction of the ship’s flag state. Hence, neither warships nor law-enforcement vessels may board a foreign vessel in international waters without flag-state consent. Likewise, consent is required for interdictions by coastal states of foreign vessels even within the coastal states EEZ and contiguous zones. Without consent or express agreement by the

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129 UNCLOS, Part II, Section 2, Article 3.
130 Ibid. Part II, Section 4, Article 33.
132 UNCLOS, Part V, Article 56 and Article 58.
133 Ibid. Part VII, Section 1, Article 87 and Article 89.
134 See Guilfoyle, supra note 83 at 5 (discussing law of the sea in the context of nonproliferation mechanisms and interdiction of WMDs).
135 Ibid.
flag-state, there is no authority to interdict WMD proliferators. Limited exceptions do exist under UNCLOS and may be established by treaty, but otherwise any boarding by a foreign state on the ship in violation of international law could be viewed as an act of war, like an infringement upon the state’s sovereign territories.

The aim of the PSI to stem the flow of illicit WMD shipments would include interdictions at sea. Stopping a foreign vessel at sea requires a legal basis that is determined first of all by the location of the vessel. The legal basis for jurisdiction differs according to the location in internal waters, territorial waters, contiguous zone, EEZ, or the high seas. Generally, the further the location is from the coast, the more complex the basis may become for legal interdiction since the coastal states jurisdiction diminishes.

*Internal waters*

A coastal state has full legal authority and jurisdiction to stop, board, and search ships within the internal waters, and any illicit weapons cargo could be seized according to national laws. This includes ports, as they are considered internal waters of coastal states. A relevant example of such seizure took place on the *Ku Wol San*, a steamship owned by a North Korean company. In 1999, the ship was docked at a port in Kandla, India, preparing to depart for its next stop in Karachi, Pakistan, when fabrications of the cargo manifesto were discovered. Indian authorities boarded and searched the vessel against the crews’ will, discovering missile components and production materials of Chinese origin which were in crates labeled “water refinement equipment.” Officials believed the cargo was bound for Libya. The weapons materials were confiscated and the crew detained for a short time. Although transporting the

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136 Ibid.
military cargo was not an offence under Indian customs law, falsifying the manifesto was a criminal offense allowing for the seizure. No parties, other than North Korea raised any objections of the incident, indicating that the weapons seizure was acceptable under international law.

*Territorial waters and innocent passage*

The right to innocent passage is well established in customary international law. In general, a foreign vessel may pass through a coastal state’s territorial waters without being subject to the coastal state’s jurisdiction for a crime on the ship. Several exceptions exist that do allow the coastal state to exercise jurisdiction. If the ship is leaving a coastal state port, not simply passing through, the coastal state may still exercise jurisdiction while in its territorial waters. However, when a ship enters into territorial waters en route to a coastal state port, the coastal state does not acquire jurisdiction until the ship enters internal waters.

If the ship is merely passing through territorial waters or en route to a coastal state port, other jurisdictional exceptions delineated in UNCLOS Article 27(1) include:

- (a) if the consequences of an onboard crime extend to the coastal state,
- (b) if the crime is of a kind to disturb the peace of the coastal state or the good order of the territorial sea,
- (c) if the assistance of the coastal state authorities has been requested by the master of the ship or a diplomat or officer of the ship’s flag state, or
- (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

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138 UNCLOS, Part II, Section 3, Article 27(1). It is worth noting that aircrafts do not have a right of innocent passive above the territorial sea “due to the danger to states inherent in the abilities of aircraft to travel and maneuver at high speed and avoid detection”. Joyner, *supra* note 3 at 528.

139 *Ibid.* Part II, Section 3, Article 27(2).

140 *Ibid.* Part II, Section 3, Article 27(1).
These provisions give coastal states wide authority over vessels in territorial waters. Many arguments can be made concerning the consequences of crimes extending to the coastal state, disturbing the peace of the coastal state, or the good order of the territorial sea. Several of the most common include immigration and sanitation violations.

If a foreign state’s vessel passes through the coastal state’s territorial waters and triggers none of the exceptions above, its passage is deemed innocent and the vessel’s right of innocent passage must be honored. However, UNCLOS Article 19 delineates specific acts that would be prejudicial to the peace, good order, or security of the coastal state, rendering the passage non-innocent. This mirrors Article 27(1)(b), but is not limited to a kind of crime. These prejudicial acts are:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
(b) any exercise or practice with weapons of any kind;
(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
(d) any act of propaganda aimed at affecting the defence or security of the coastal State;
(e) the launching, landing or taking on board of any aircraft;
(f) the launching, landing or taking on board of any military device;
(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
(h) any act of wilful and serious pollution contrary to this Convention;
(i) any fishing activities;
(j) the carrying out of research or survey activities;
(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; or
any other activity not having a direct bearing on passage.\textsuperscript{141}

This list has been interpreted as an exhaustive list.\textsuperscript{142}

Since the transport of WMD materials is not listed and does not neatly fit into any of the prohibited activities, it would appear to be permissible. In fact, Article 23 specifically permits foreign ships to carry nuclear materials or other inherently dangerous or noxious substances through territorial waters if documented and in accordance with applicable international agreements.\textsuperscript{143} As recently as 2001, the United States has strongly championed this right, reiterating that the passage of a ship carrying nuclear or other inherently dangerous substances is not included in the Article 19(2) list and therefore, cannot be hampered by coastal state law.\textsuperscript{144} Other states do not share this view and express concern over Article 23 and its design to allow the nuclear weapon states innocent passage for their submarines and warships. Many PSI participants have laws prohibiting the transfer of WMD through their territory, although exceptions for international agreements exist and such laws cannot impair the right to innocent passage. A newer angle that some coastal states have expressed is their right to protect the environment of their territorial waters from dangerous or radioactive materials. This attempts to draw upon Article 27(1) of UNCLOS.

\textit{The high seas and freedom of navigation}

The legal regime on the high seas is well established customary international law, with both the 1958 Convention on the High Seas and UNCLOS having nearly identical provisions.

\textsuperscript{141} \textit{Ibid.} Part II, Section 3, Subsection A, Article 19(2).


\textsuperscript{143} UNCLOS, Part II, Section 3, Subsection A, Article 23.

All states are guaranteed the right of freedom of navigation on the high seas.\textsuperscript{145} UNCLOS provides for the same right through straits used for international navigation and archipelagic sea lanes.\textsuperscript{146} Freedom of navigation also extends to international canals, which was reinforced by the UN Security Council in reference to the Suez Canal.\textsuperscript{147}

UNCLOS states that ships shall be subject to the exclusive jurisdiction of their respective flag state on the high seas.\textsuperscript{148} International case law has continuously supported this norm with the Permanent Court of International Justice declaring in the 1927 \textit{Lotus Case}\textsuperscript{149} that “vessels on the high seas are subject to no authority except that of the State whose flag they fly” and the International Court of Justice reinforcing the customary right of freedom of navigation in the \textit{Nicaragua Case}.\textsuperscript{150}

Additionally, warships are under exclusive jurisdiction of the flag state and have complete immunity on the high seas from any other state.\textsuperscript{151} However, this exclusive jurisdiction does have exceptions which are listed in Article 110. Article 110, entitled \textit{Right of visit}, states that a warship, or aircraft, is not justified in boarding a foreign ship on the high seas unless there is reasonable ground for suspecting that:

\begin{itemize}
\item[(a)] the ship is engaged in piracy;
\item[(b)] the ship is engaged in the slave trade;
\item[(c)] the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
\item[(d)] the ship is without nationality; or
\item[(e)] though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.\textsuperscript{152}
\end{itemize}

\begin{thebibliography}{99}
\bibitem{145} UNCLOS, Part VII, Section 1, Article 87(1)(a).
\bibitem{146} \textit{Ibid.} Articles 45 and 53.
\bibitem{147} SC Res. 95, UN SCOR 6th Sess., 558th Mtg., UN Doc. S/RES/95 (1951).
\bibitem{148} UNCLOS, Part VII, Section 1, Article 92.
\bibitem{149} \textit{S.S. Lotus Case (France v. Turkey)} (1927) P.C.I.J.(Ser. A) No. 10.
\bibitem{151} UNCLOS, Part VII, Section 1, Article 95.
\bibitem{152} \textit{Ibid.} Article 110(1).
\end{thebibliography}
A final authority for stopping a foreign vessel on the high seas exists under the “hot pursuit” provisions of UNCLOS. If the vessel is reasonably believed to have violated the laws or regulations of the coastal state while in the coastal states internal or territorial waters, the coastal state may pursue it into international waters under certain conditions. The provisions of Article 110, which are recognized as exhaustive, do not provide any support or authority for interdicting a properly flagged vessel suspected WMD shipments on the high seas.

To the extent the PSI purports to authorize interdictions of vessels that may be carrying WMD-related materials on the high seas, it directly violates the law of the sea. The prospect of interdiction of a properly flagged vessel without permission on the high seas is such an egregious breach of a state’s rights pursuant to the law of the sea, that North Korea “has declared that it would regard interdiction of one of its ships on the high seas as an act of war”. This claim must be taken seriously, and one cannot simply dismiss by labeling North Korea “evil”. Although the U.S. has responded to this issue by securing agreements from states to cooperate when their flagged vessels are interdicted on the high seas, with an emphasis on “flag of convenience states”, these are only band-aids on the larger problems with the PSI’s failure to adhere to the law of the sea.

Seizing WMD cargo

Another aspect of the PSI that potentially infringes the law of the sea is the seizure of cargo on a vessel pursuant to the PSI. Article 110 of UNCLOS, with its list of circumstances to which a foreign vessel may be boarded on the high seas, does not grant a right of subsequent

153 Ibid. Article 111.
154 See Shulman, supra note 82 at 803 (“[t]he supporters of PSI must contend with the fact that a ship flying the flag of one state on the high seas is generally immune from interference by forces of another state”).
155 Garvey, supra note 84 at 132.
156 Ibid. at 132-33 (discussing further weaknesses of these agreements).
detention of the vessel or seizure of its cargo. Generally, cargo may only be seized if the interdicting state and the flag state vessel are at war. Neutral vessels may even be stopped and searched for contraband in wartime. Although the “war on terror” is very real and the attacks of September 11th and the Madrid and London bombings are considered armed attacks, the war on terror is not considered a war in the legal sense. In peacetime, the right of visitation is limited and the right to search or seize a vessel for suspected WMD cargo is not granted by Article 110.

An illustrative example that led to the formation of the PSI took place in 2002 with a vessel called the So San. The vessel, which departed from a North Korean port, was observed by the U.S. Navy in the Western Indian Ocean. It had a painted-out North Korean flag and presently was not flying any other flag. A nearby Spanish warship agreed to check on the ship, which it found to be “stateless” since the So San was not registered in international registries, nor was it registered in Cambodia, where the captain claimed the ship was registered. The Spanish attempted to board, but the So San tried to evade them until Spanish rapellers successfully boarded from helicopters.

The ship was found to be registered in Cambodia, but under a different name. It was bound for Yemen with the ship manifest indicating its cargo was 40,000 bags of cement. About two dozen containers were aboard that were not reflected in the manifest, which the Spanish boarding party opened to find 15 Scud missiles along with 24 tanks of rocket fuel. This was an alarming discovery, but not surprising as North Korea was widely known to be a missile technology proliferator, especially to the Middle East. Yemen officials confirmed they

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158 See Joyner, supra note 3 at 508-10.
had ordered and purchased the missiles from North Korea. U.S. authorities took control of the vessel, but then reluctantly let it continue, as it could find no legal authority to stop the shipment.\textsuperscript{159} The cargo could not be seized, since neither the U.S. nor Spain was at war with North Korea, Cambodia, or Yemen. Boarding the ship to verify its nationality is all that could legally be done.

While the PSI effectively provides a solution to such situations, it does it in direct contravention to UNCLOS Article 110. This emphasis on substance and practical solutions to WMD trafficking and dismissal of form in the sense of adherence to international law is precisely the type of activity that undermines international law’s legitimacy and angers other countries. If a “coalition of the willing” can violate ancient customary international law and interdict vessels without regard for the ship’s location or flag state consent, an Orwellian piracy of strong states could emerge. It is these weaknesses that ultimately may result in the demise of the PSI, especially as more countries sour on the U.S.-based, self-interested, unilateral approach to fixing the world’s problems.

\textit{Maritime Convention}

Several aspects of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) apply to PSI activities and the law of the sea.\textsuperscript{160} Specifically, the 2005 Protocol to the SUA Convention, which was proposed by the U.S. to address WMD trafficking and recently entered into force, created new offenses concerning intentional and unlawful transport of WMD and related materials. Although this convention applies only to states parties and nonmilitary vessels, it is the first treaty to combat

the use of nonmilitary ships in transporting WMD materials or as weapons for terrorist attacks. It also makes it an offense to transport a known offender of this, and several other treaties, aboard ship. Still, the provisions do not allow for unauthorized boarding or the use of force to enforce the Convention prohibitions.

**Attempts to justify the legality of the PSI**

Three potential grounds exist to justify the PSI’s legality. The first is Resolution 1540, the second is the inherent right of self-defense, and the third is customary international law. These are contentious grounds that have caused extensive debate, and I discuss their merits here.

**Resolution 1540**

What became UN Security Council Resolution 1540 began as a direct attempt to authorize states to interdict, board, and inspect any vessel or aircraft believed to be transporting WMD or related materials. Buttressing the PSI’s legitimacy would be particularly useful because, as the relevant international legal regime reveals and as discussed above, authorization for interdiction on the high seas is quite limited and proliferators may legally remain outside most existing regimes.

Early draft provisions of Resolution 1540 included specific interdiction authorization and an attempt to stop UN member states from purchasing, receiving, assisting, or allowing the transfer of WMD from specified states. The final adopted text simply calls upon states to take cooperative action in preventing illicit trafficking of WMD. This is supportive of PSI

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161 A fourth potential legal justification is Article 88 of UNCLOS, which states that the high seas shall be reserved for peaceful purposes. It may be argued that trafficking in WMD materials is not for peaceful purposes, but this too easily gets into arguments of warships at sea and whether they are for “peaceful” purposes. Because this line of justification has not been pursued seriously by PSI advocates, it is not discussed in detail in this chapter.

162 Accord Guilfoyle, supra note 83 at 15 (“[i]t has been said that one, essentially American, objective of Resolution 1540 was to increase the international legitimacy of the PSI”).
activities, as those activities are cooperative actions to prevent illicit trafficking, but no explicit authorization for interdiction exists in the Resolution. Nevertheless, the more states that criminalize WMD trafficking, the more a legal basis for interdiction may be supported. Therefore, PSI advocates list Resolution 1540 among the legal sources authorizing its activities.

The UN Security Council Presidential Statement of January 1992 has been purported to provide legal authority for PSI interdictions and is referenced in the Statement of Interdiction Principles. The statement says that proliferation of WMD constitutes a threat to international peace and security and that UN member states need to prevent WMD proliferation. The PSI is viewed as implementing that statement. That statement has since been reiterated in numerous international texts concerning WMD proliferation.

The inherent right of a state to self defense

Article 2(4) of the UN Charter prohibits states from threatening to use or using force against another state. One exception to this blanket ban on the use of force is the right to self-defense against an armed attack found in Article 51 of the UN Charter. Specifically, Article 51 affirms the “inherent right of individual or collective self-defense”\(^\text{163}\). Two crucial requirements of such self defense are necessity and proportionality.\(^\text{164}\) In essence, self-defense is only justified where it is necessary and proportional to the armed attack it is defending against. PSI proponents claimed a right of collective and pre-emptive self-defense to authorize PSI interdictions in some early comments. The argument is that because WMDs will be used

\(^{163}\) UN Charter, Article 51.

\(^{164}\) See ICJ Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶41 (“the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law”); ICJ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.) ICJ Reports 1986, p. 94, ¶176 (there is a ‘specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law”).
in a use of force, the interception of them and related materials is a pre-emptive act to defend the intercepting state, as well as other states that may be victims to the eventual use of force.

Some scholars have further broken pre-emptive self-defense into two areas: (1) anticipatory self-defense and (2) preventative self-defense. Anticipatory self-defense, which is generally accepted in international law, is defined as “an attack on a state that threatens violence and has the capacity to carry out that threat, but which has not yet materialized or actualized that threat through force”. Preventative self-defense, which is generally not accepted in international law, is “an attack against another state [or vessel of that state] . . . when a threat is feared or suspected, but there is no evidence that materialization of the threat is imminent.”

To the extent that a PSI participant interdicts a vessel or aircraft of a nation that had publicly threatened use of WMDs on a specific country or countries, and had the capacity to carry out such threats, the PSI could rely on self-defense as a legal justification. This scenario is highly unlikely, however, because countries generally do not threatened use of WMDs on other countries. Any use of this defense, therefore, would fall under preventative self-defense, which is not a valid legal justification. Further, to the extent that a PSI participant interdicts a vessel or aircraft with WMD materials to or from non-state actors, even if the non-state actor has threatened action against a country, without a proven tie between a country and the non-state actors, anticipatory self-defense will not justify the interdiction.

165 Joyner, supra note 3 at 522.
166 See Michael Byers, “Policing the High Seas” (2004) 98 Am. J. Int’l L. 526 at 541 (“[t]he Bush doctrine of preemptive self-defense is controversial [and] . . . has, generally speaking, not received the widespread support needed to change customary international law”).
167 Joyner, supra note 3 at 524.
168 One scholar points to the U.S.’s failed use of the preventative war doctrine in Iraq as resulting in the doctrine’s “lack of political legitimacy”. Schulman, supra note 82 at 812.
Understandably, the justification of self-defense has been widely criticized as U.S. rhetoric masking the fact that the U.S. really does not care whether its actions comport with international law. Pre-emptive self defense, especially pre-emptive collective self defense, is not readily accepted under international law. It pushes the envelope too far from the prerequisite that “an armed attack” occur, or be imminent, before action may be taken in self-defense. Legal justification relying on the shaky ground of pre-emptive and/or collective self-defense against potential use of force does not help, and in fact, hurts, the PSI’s chances long-term success.

Customary international law

Customary international law refers to norms that have emerged based on the repeated observance of such norms by nation states with a sense of obligation (“opinio juris”) to abide by them. If an emerging norm against WMD proliferation attains the level of customary international law, then taking action to prevent it may be justified under customary international law. The argument that the PSI can create customary international law is explained by one scholar as follows: “[i]f the major powers around the world established the practice of seizing illicit weapons of mass destruction on the high seas and if there were general international acceptance of such seizure as lawful, this practice could become a new order of customary international law.” With WMD proliferation widely considered a threat to international peace and security, Resolution 1540 obliging states to criminalize WMD related

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169 See e.g., Garvey, supra note 84 at 134 (“this assertion of the self-defence justification is at the unilateralist extreme of claims to the pre-emptive use of force and, consequently, the lowest level of international legitimacy”).

170 UN Charter, Article 51. Even advocates of the PSI admit that collective self-defense as a justification “proved to be overreaching”. Shulman, supra note 82 at 777.

171 ICJ Continental Shelf Case (Libyan Arab Jamahia/Malta, 1986 I.C.J. 29, ¶27 (“ the substance of that law must be "looked for primarily in the actual practice and opinio juris of States".

172 Abe, supra note 4 at 932. See also Shulman, supra note 82 at 815 (“at the present rate of progress, the space [in which proliferation can occur] may eventually become so small that world opinion considers counter-proliferation to be a base norm.”).
trafficking, the SUA Convention criminalizing WMD related trafficking, and the establishment of the PSI to stop illicit WMD related trafficking, there is a strong argument that a norm has emerged.

The ever increasing numbers of PSI participants may be evident of such an emerging norm to take action and legitimize counter-proliferation approaches, but given the need for consent and a sense of legal obligation for states to be bound by customary international law, countries could consistently object to it and reject its application. The tricky aspect of this argument is that the Law of the Sea that the PSI violates is quintessential customary international law, and therefore, actions that violate it have cannot be readily deemed to transform this existing customary international law. The Law of the Sea is “one of the oldest areas of international law” dating back to “medieval pronouncements of rules governing maritime commerce” that has evolved to modern times.\textsuperscript{173} Such entrenched international law is not easily changed, especially by dramatically circumscribing sovereign rights the law allows. State practice over time with a sense of obligation is required for the creation of customary international law. In order to keep customary international law meaningful, these requirements must be fully met before a norm can rise to this level. We are clearly not at this phase yet, and still in the phase of the PSI in violation of, as opposed to creating, customary international law.\textsuperscript{174}

\textsuperscript{173} Joyner, supra note 3 at 525-56.

\textsuperscript{174} Accord Garvey, supra note 84 at 136 (“at present, it is incontrovertible that the forcible interdiction on the high seas that the PSI would have to invoke is at odds with state practice, customary principles of freedom of the seas and the Law of the Sea Convention”). Garvey also points out that “even if state practice would support such an interdiction, there would still be a need for articulation of substantive and procedural standards with an organizational format”).
C. **Measuring Success and the Future of the PSI**

When assessing the PSI, it is important to distinguish between form and substance. Substantively, the PSI appears to be making progress, despite the fact that the success of the PSI is difficult to measure due to the secretive nature of its actual activities, or actual interdictions.\(^{175}\) With regard to form, however, the PSI is largely thought of as a U.S. tool to control counter-proliferation in its own way, without regard to international law.

**Substance**

By the second anniversary of the PSI in May 2005, successful PSI activities were taking place. Reportedly, PSI cooperation stopped the transshipment of material and equipment bound for ballistic missile programs in countries of proliferation concern. Eleven interdictions had taken place among 11 PSI participants.\(^{176}\) One year later the PSI had played a role in interdicting more than 30 shipments according to the United States.\(^{177}\) However, this represents the extent of the information revealed thus far for PSI activities.

One highly championed success took place in October 2003, when a German-flagged vessel named the *BBC China*, was interdicted by PSI participants en route to Libya.\(^{178}\) Permission was granted to board by the German company which owned the vessel. Discovered on board were thousands of parts of uranium enrichment equipment. This interdiction resulted in Libya’s formal abandonment of its clandestine nuclear program shortly thereafter. The *BBC*

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\(^{175}\) *Accord* Guilfoyle, *supra* note 83 at 18-19 (noting that many PSI high-sea interdictions have not been, and “may never be publicly reported or discussed” as it “may not be in the interests of the boarding states, flag states or shipowners to publicize such operations even when successful”); Shulman, *supra* note 82 at 776 (“because the [PSI] lacks a central office, an international secretariat, an operational handbook, rules of engagement, and congressional authorization, it remains somewhat shrouded in mystery”).


China interdiction was also touted as a component in the unraveling of the A.Q. Khan network, reportedly a source of the enrichment equipment.

But, a former U.S. State Department official later revealed that this operation was not a PSI operation, but largely stemmed from existing efforts to track the Khan network, a revelation corroborated by foreign officials. Still, according to Assistant Secretary of State John Rood, recent PSI successes have included blocking “some exports to Iran of controlled equipment relating to its missile programs, dual-use goods and heavy water.”

**Form**

Despite some successes, the PSI is still criticized for lack of transparency and accountability, and lack of legal justification. As to the latter complaint, the PSI arguably stretches if not violates some principles of international law, impedes legal trade, weakens the UN system, and undermines other nonproliferation efforts. The view that the PSI is simply a tool “by the U.S. for the U.S.” with little more than lip service regarding compliance with international law puts states in the difficult position of choosing between a potentially useful counter-proliferation tool and supporting multilateralism and existing international law. If the PSI attempted to take international law compliance seriously, states would not have to choose between joining a potentially useful endeavor and observing international law. As one scholar has noted, “[t]he PSI has been consistently characterised as ‘an activity, not organization’, as ‘a collection of interdiction partnerships’ and by the phrase the Bush Administration has used to

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179 Wade Boese, “Key U.S. Interdiction Initiative Claim Misrepresented,” *Arms Control Today*, July/August 2005, available at <http://www.armscontrol.org/act/2005_07-08/Interdiction_Misrepresented.asp>. For an example of the positive response to this interdiction, see Guilfoyle, *supra* note 83 at 20-21 (stating “[t]his incident exemplifies the PSI’s probable practical operation: it was an action by only some PSI participants, based on intelligence sharing and creative use of existing national and international law.”).

sidestep international organisation throughout the last five years, ‘a coalition of the willing’”. 181 For those who view the PSI in direct contradiction to international law, the U.S. vague claims to comply with international law add insult to injury. 182 As discussed above, the PSI Principles claim to comply with the Law of the Sea, despite clear and plain evidence that they does not.

Perhaps the goals of the PSI could have been achieved through existing mechanisms, such as amendments to UNCLOS or further amendments to the SUA Convention. As one scholar has argued: “[c]ounter proliferation will be best served by harnessing international conventions, not marginalizing them”. 183 These routes could have been used, but the goal of avoiding weighty, multilateral institutions would then not be achieved. The PSI has streamlined many aspects of WMD related inspection and enforcement, and it has enhanced cooperation among many states in a way that probably would not have happened through a multilateral treaty amending process. It has also raised awareness and intensified the WMD nonproliferation debate in a way that a call for treaty amending may not.

Some scholars have proposed simply institutionalizing standards for interdiction as a potential avenue for enhancing the PSI’s legitimacy. 184 While not going so far as to create multilateral behemoths such as the instruments discussed in Chapters 1 and 2, the PSI could surely transition from “a collection of interdiction partnerships” to an organization with institutionalized standards. 185

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181 Garvey, supra note 84 at 129.
182 See e.g., Ibid. (“close inspection of the claimed adherence to the law of the sea reveals, to the contrary, a significant departure from the established legal ordering of the seas that severely compromises international legitimacy for the use of force”).
183 Schulman, supra note 82 at 823.
184 See e.g., Garvey, supra note 84.
185 Ibid. at 138.
D. **Legality of Resolution 1540**

Resolution 1540’s main issue is its sweeping nature imposing obligations on all UN member states, regardless of previous WMD activity, and thereby potentially infringing on member states’ sovereignty. It further provides little to no resources to countries to create new laws, and provides only vague standards for countries to determine whether their efforts are adequate. Despite all of these issues, Resolution 1540 has been generally accepted as a valid exercise of power by the Security Council, and the creation of the 1540 Committee has tempered issues regarding vague standards for compliance.

**Sovereignty and Jurisdiction and Resolution 1540**

The concept of state sovereignty, drawing from the Treaty of Westphalia in 1648, is the foundation of international law as a consent-based system of nation-state actors. States rigorously defend their right to alone prescribe laws over their territories, including internal waters. Under international law, states both prescribe and become subjects to international law. Because Resolution 1540 was decided by the Security Council alone, but requires every UN member state to pass domestic legislation supporting its policy determinations, it arguably infringes on non-security council member states by requiring them to make and enforce new national laws.

**Resolution 1540 as unauthorized legislating by the Security Council**

A major concern voiced by many UN member states and scholars was the legislative nature of the Resolution. One scholar has termed Resolution 1540 as “an extraordinary exercise in law-making” with “a legislative character”.\(^{186}\) Security Council resolutions are binding upon all members of the UN. The Security Council consists of 15 members, five

\(^{186}\) Guilfoyle, *supra* note 83 at 14.
permanent members and 10 rotating members. Under the UN Charter, all members agreed that international peace and security issues would be dealt with by the Security Council, which would act on their behalf and therefore, Security Council resolutions are binding upon all members.  

To the extent that the Security Council alone has ordered all UN members to enact national legislation, it has impermissibly usurped nation-states’ sovereign rights to legislate within their own territory. International legislating is defined as “obligations imposed . . . akin to obligations entered into by states in international agreements”, but without the consent given by treaty parties. International legislating mandates action in generic and sweeping terms, as opposed to individualized situations.  

It was vigorously questioned whether it was the role of the Security Council to prescribe such legislative action over member states, most of which had no input into drafting the Resolution. The Security Council had done so just once before with Resolution 1373, a broad anti-terrorism measure adopted in the aftermath of September 11th. At the time,  

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187 UN Charter, Articles 24(1), 2(5), 25, and 49.  
189 Ibid. at 177  
190 Ibid. at 176-77 (comparing Resolution 1390, which required states to freeze assets of Osama bin Laden, members of Al Qaeda and the Taliban, and Resolution 1373, which requires states to “freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts”; and arguing that the former is individualized, and not international legislation, but the latter, which “does not name as single country, society or group of people” is international legislation).  
191 Ibid. at 177.  
193 It is also important to note Resolutions 1422 and 1487, which arguably were close to the level of international legislating seen in Resolutions 1373 and 1540 by obligating member states not to take any action in violation of the 12-month moratorium on investing or prosecuting cases involving officials from a state not party to the ICC relating to a UN-related operation. SC Res. 1422, reprinted at 41 ILM 1276 (2002) and SC Res. 1487, reprinted at
scholars and UN members called Resolution 1373 an “unprecedented step” by the Security Council to the extent that it bound all UN members to take actions, including the prevention and suppression of terrorist financing, criminalizing terrorist fundraising, freezing assets of terrorists, preventing terrorist movement and providing safe havens for terrorists. Realizing the similarities to other unanimously adopted Security Council resolutions and widely subscribed to multilateral treaties diminishes the sense of newness of approach taken by the Security Council with Resolution 1540. The Resolution finally gives effect to what began with the 1992 Security Council Presidential Statement declaring WMD proliferation a threat to international peace and security. It actually reflects approaches, such as universality, that nonproliferation regimes and many international organizations have been advocating and supporting for many years.

Understandably, during debate on Resolution 1540, many member countries voiced dismay and concern. The representative from the Philippines, for example, stated that “those who are bound should be heard” and advocated open dialogue and the use of regional working groups before proceeding “on a resolution that demands legislative actions and executive measures from the 191 Members of the United Nations”. The representative from Spain also voiced the opinion that “[w]e believe that, since the Council is legislating for the entire international community, this draft resolution should preferably, although not necessarily, be

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42 ILM 1025 (2003). See also Talmon, supra note 188 at 177-78 (arguing that these resolutions also rise to the level of international legislating). Because these Resolutions do not require member states to implement legislation and were not relied upon as justification and precedent for Resolution 1540, however, they do not rise to the same intrusive level of legislating for member states, and are not discussed in detail here. See e.g., Eric Rosand, “Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism” (2003) 97 Am. J. Int’l L. 333 at 333-34; Statement by the Representative of Angola, April 22, 2004, in UN Doc. S/PV .4950 at 9-10 (2004). UN Doc. S/PV .4950, p. 2.
adopted by consensus and after consultation with non-members of the Council”.

In a more overt statement, the representative from Algeria stated:

It is understood that, in shouldering this responsibility, the Security Council is acting in an exceptional manner, since, clearly, the Charter does not give it a mandate to legislate on behalf of the international community, but simply gives it the principle responsibility for the maintenance of international peace and security.

Similarly, Pakistan’s representative stated:

Although the resolution is designed to address proliferation by non-State actors, it seeks to impose obligations on States. There are grave implications to this effort by the Security Council to impose obligations on States, which their Governments and sovereign legislatures have not freely accepted, especially when some of these obligations could impinge on matters relating to their national security and to their right of self-defence.

These sentiments express potential long-term problems with the Resolution perhaps better than any other source. Countries are not, and will not, be receptive to being told what to do without their consent or input. As long as international law is a system that functions at the level of sovereign nations as participants, this type of mechanism will face an uphill battle.

Accordingly, some scholars have argued that adopting Resolution 1540 through “[u]nanimous consensus in the General Assembly” would have been less problematic than the rare occurrence of the “Security Council impos[ing] such sweeping legal obligations upon UN member states.”

Not only does Resolution 1540 impose obligations on member states to enact legislation, but it does not provide clear and detailed guidance to members as to what the

196 Ibid. at p. 7.
197 Ibid. at p. 5.
198 Ibid. at p. 15.
199 Abe, supra note 4 at 930.
legislation should look like, nor does it provide states resources to do the research and drafting necessary to enact effective legislation. The national implementation procedures, legislation text, and relevant penalties are all left to the discretion of the respective parliaments, legislature, or governing bodies of the member states, many of whom do not have adequate resources. The Security Council simply outlined the parameters for the member states’ obligations and established a mechanism for helping fulfill those obligations.

There are strong arguments that the Security Council acted beyond its authority in adopting both Resolutions 1373 and 1540. Before these resolutions, the Security Council had only ever acted as an executive body. Its charge was to take action when necessary to maintain or restore international peace and security. This had always been done on a case-by-case basis in response to specific threats for specific periods of time. Not until the adoption of Resolution 1373 in 2001 and Resolution 1540 in 2004, had the Security Council taken a legislative action that is of a continuing nature and that is so indefinitely preventative rather than responsive. The obligations are mandatory and indefinite for all member states.

There is no clear mandate or legal precedence for this type of Security Council action, which is compounded by the undemocratic representation, often referred to as the “democratic deficit,” and power balances of that body. Although an open meeting was held for discussion on Resolution 1540, such a meeting is not a formal procedure for Security Council actions and is not typical. In the end, it is just the 15 members who vote and adopt a resolution, whether or not other member states or the General Assembly are consulted, not to mention the fact that

200 See Schulman, supra note 82 at 825 (noting that “many states lack the legal or institutional capacity to conform in a timely fashion,” and “the supporters of the PSI could work to help individual states reform their laws so that they better conform to the requirements of [Resolution] 1540”).
there exist five permanent members each with a veto power. This type of representative body is, perhaps, not designed to universally legislate for the world.

Most importantly of all is the overarching idea that international obligations are being imposed on states without their direct consent, which is contrary to traditional concepts of international law and sovereignty. States are not to be bound by international principles they have not consented to. However, as Article 24 of the UN Charter states, members confer on the Security Council the responsibility to deal with international peace and security on their behalf. So states have consented to be bound by Security Council resolutions, if the Security Council acts within its mandate.

The threat that WMD proliferation poses to international peace and security has been constantly and quickly established in recent years, thus dealing with WMD proliferation would now fall within the Security Council purview. Additionally, the Security Council itself may determine the existence of any threat to the peace or act of aggression and decide what measures to take to maintain or restore international peace and security.

State practice and international norms, sources of international law, can change with time. The threats of WMD proliferation and terrorism combined with ever changing dynamics of international relations have led many to believe that new international norms should be developed and that new approaches are necessary. This includes the role of the Security Council in taking action like Resolution 1540.

Security Council precedent should be viewed in context and with caution. The role of politics can lead to precedent that may not be legally sound. It can be argued that much Security Council precedent is based on old dynamics of the Cold War and not directly applicable to post-Cold War threats. The Security Council is often known more for its inaction,
due to the required consensus needed from the five permanent members, than for taking action. This has established the idea that measures taken should be ad-hoc or in response to specific peace and security threats, though the UN Charter has no such restrictions. No definition or guidance is offered as to what measures the Security Council can or cannot take to maintain international peace and security.

**Textual Issues of Resolution 1540**

While the preamble of Resolution 1540 contains none of the binding legal obligations imposed on member states, it does contain wording with international legal implications. The first and last paragraphs affirm that WMD and their means of delivery constitute a threat to international peace and security. This is the common language that is now used in virtually all UN and other international organizations’ statements concerning WMD, which serves to strengthen the invocation of the Security Council’s use of its Chapter VII powers. The preamble goes on to reaffirm the Security Council’s Presidential Statement of 1992 to the same effect. There are affirmations of prior mechanisms of the nonproliferation regime, including multilateral treaties and an affirmation of member states’ rights to nuclear, biological, and chemical material and technology for peaceful purposes.

Disarmament advocates were successful in including two mentions of certain states’ disarmament obligations, although as usual, those states wishing to push disarmament measures with as much vigor as nonproliferation measures were left wanting. Perhaps most notable in the preamble is the use of footnotes to define several terms common in WMD nonproliferation regimes which, unsurprisingly, created difficulties during the months of draft resolution negotiations. It was settled and is stated that the definitions are for use in this Resolution only, avoiding differences of definition used in other instruments.
The first definition is “means of delivery” for WMD. “Means of delivery” is commonly used in WMD related instruments and is also often referred to as “delivery systems” as it is in the PSI Statement of Interdiction Principles. Resolution 1540 defines “means of delivery” as “missiles, rockets and other unmanned systems capable of delivering nuclear, chemical, or biological weapons, that are specially designed for such use.” The phrasing mirrors that used in the BTWC and CWC, while protecting uses related to conventional arms missiles and unmanned drones.

“Related materials” is another common term also seen in the PSI Principles. In the Resolution it refers to “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.” Here, deference is given to the work of the BTWC, the CWC, and the various export control regimes that maintain the lists of “related materials” and help deal with dual-use goods.

The final definition is a “non-state actor,” corresponding to one of the central approaches taken by Resolution 1540 to combat WMD proliferation. “Non-state actor” is defined as an “individual or entity, not acting under the lawful authority of any state in conducting activities which come within the scope of this resolution.” The preamble also refers to the Security Council prior references to non-state actors in Resolutions 1276 and 1373, which focus on terrorist groups, but the 1540 definition also encompasses commercial entities. This enables the Resolution to cover nonproliferation beyond just preventing terrorist acquisition.
Operative paragraph (OP) 1 simply requires states to not provide any form of support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer, or use WMD or their means of delivery. OP 2 and 3 require the implementation of domestic laws and controls for all WMD related materials and activities. OP 4 establishes the 1540 Committee and lays out the reporting process. OP 5 states that none of the new obligations arising from the Resolution may be interpreted so as to conflict with or alter the rights and obligations of states parties to the NPT, BTWC, and CWC, nor alter the responsibilities of the IAEA and OPCW. OP 7 recognizes the need for assistance by some states to help implement the measures and invites states that are in a position to help, to do so. OP 8 and 9 call upon states to promote the already existing nonproliferation frameworks and promote dialogue and cooperation.

OP 10 calls upon states to take cooperative action to prevent illicit trafficking in WMD and related materials. This paragraph is most reminiscent of the PSI Statement of Interdiction Principles and is where initial drafts attempted to authorize interdiction in support of the PSI. This paragraph now has no reference to interdiction and merely calls upon states to take cooperative action, a much watered down version than some proponents of the PSI initially strived for with this Resolution.

In the wording of OP 2, the Security Council:

*Decides also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which 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, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;*
The phrase “in particular for terrorist purposes” raises a question of interpretation. It is difficult to legally interpret the rational of this phrase. It appears as though the phrase is unnecessary, as the prohibitions of OP 2 are comprehensive and not limited to any particular purposes.

Additionally, the difficulty the international community has had trying to define “terrorist” creates another layer of interpretation within the already questionable use of the phrase. It seems to be a well meaning phrase, but it is of questionable legal importance.

OP 3 requires member states to implement measures controlling WMD materials including accounting for any materials, providing physical protection of materials, and establishing border and export controls for any transported materials. It also requires states to establish criminal or civil penalties for export control violations. This raises a general concern as to why the resolution does not address the nature of penalties for violations of obligations in OP 2, or why penalties are addressed just in OP 3(d) regarding export controls.

Questions have been raised regarding the nature of penalties to be imposed, as some states such as the United States and the United Kingdom continually have called for the criminalization of illicit WMD trafficking. OP 3(d) states that criminal or civil penalties shall be established and enforced. Illicit trafficking in something as potentially deadly as WMD materials would seem to merit both criminal and civil penalties. The option for civil penalties may be an attempt to keep in line with the other major nonproliferation treaties, which do not place any requirements on penalty type, helping avoid conflicts that OP 5 addresses regarding the rights of states parties under those treaties. Nonetheless, the United States and the United Kingdom have claimed that criminalization was intended and no other states have contradicted
those statements. This could create a difficulty for states that do not allow criminal law to apply to business, or legal entities.

OP 4 “calls upon” member states to submit a first report to the 1540 Committee within six months. An issue may be raised under this wording as to whether states are required to report. In resolutions, binding obligations are typically set out in paragraphs beginning with “decides” as OP 4 does. However, the thrust of the paragraph refers to establishing the 1540 Committee and only at the end of the paragraph does it state that the Security Council “calls upon” states to submit a report. The “calls upon” language is typically non-binding and similar to Generally Assembly resolutions or non-binding sections of Security Council resolutions requesting states to promote dialogue or cooperation, or renew commitments.

OP 4 does not use the word “shall” in reference to submitting reports, whereas the binding obligations in OP 1, 2 and 3 are set out using the word “shall.” Recognition that the use of “shall” in legal text creates binding obligations may lead states to consider an obligation non-binding due to the absence of the word “shall” and the use of “calls upon” instead. The difference of interpretations among member states could undermine the 1540 Committee’s mandate, productiveness, and effectiveness as discussed below.

Thus far it appears as though these textual issues have not caused undue complications. This may be due to general agreement on the spirit of Resolution 1540 and its accepted role as a new nonproliferation effort to enhance international peace and security. The success or failure of the 1540 Committee and Resolution 1540 will not likely be the result of textual ambiguities, inaccuracies, or differences of interpretation, but rather that of political will and sufficient resources.

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202 See Lavalle, supra note 201.
203 Ibid. at 435.
E. Conclusions regarding 1540’s likelihood of future success based on international law

While the 1540 Committee has established a solid program of work and its efforts continue in monitoring and examining national implementation reports, the future of the Committee and Resolution 1540 implementation is difficult to ascertain. There are constant signs of what a monumental effort universal implementation is. During a February 23, 2007 Security Council open debate on Resolution 1540 implementation, these concerns were voiced.\footnote{204 See Security Council press release, SC/8964 (23 February 2007), available at <http://www.un.org/News/Press/docs//2007/sc8964.doc.htm>.}

Even given the acknowledgement of lack of capacity and resources many states face, plus the offers and availability of assistance from those states and organizations able to assist, it was expressed by many that the task was still very difficult and the level of assistance in the last three years could be improved. Japan and Pakistan stated their belief that the 1540 Committee had reached its capacity to lend assistance and expertise. Emphasis is now being placed on the regional seminars and workshops designed to urge governments into action, along with promoting greater assistance from international organizations such as the IAEA and the OPCW. Three years on from the adoption of Resolution 1540, some states, albeit few, still voice concern over the legitimacy of the Resolution. Indonesia stated its continued concern over the legislative role the Security Council assumed. Cuba expressed concern over the deliberately ambiguous provisions of the Resolution that may lead to actions that could undermine existing multilateral agreements.\footnote{205 \textit{Ibid.}}
A few scholars have argued that the question of legitimacy will undermine Resolution 1540 itself and potentially render it ineffectual. However, the widely accepted idea of its long-term nature has transformed it into a legitimate work in progress. Reaching the final goal of universal implementation may not be as important as continually striving to close more gaps in the nonproliferation regime.

Future enforcement of the obligations under Resolution 1540 will have significant implications. There is no clear indication of how states or the Security Council might proceed in this area. OP 10 calls upon states to take cooperative action to prevent illicit WMD trafficking and OP 11 expresses the Security Council’s intention to take further decisions that may be required. Some states advocate for the PSI-like interdictions or collective security enforcement, while others hold fast to concerns of sovereignty and non-interference in states’ internal affairs. Fears are likely to persist that the Resolution may be used as a pretext for powerful countries to attain authorization to use military force against proliferators. Yet, the Security Council will likely fulfill its role as the authorizer to use force and have the final say regarding Resolution 1540 obligations.

Measuring success thus far and in the future is a relevance task. The submission of 135 reports may be a success, or perhaps the lack of 55 states reports may be a failure. It should be viewed as a success so far as it has raised awareness among many governments, among the public, and among the industrial and scientific communities on a variety of issues relating to WMD nonproliferation. There has also been enhanced intelligence sharing and technical assistance in combating proliferation. States are now forced to take greater responsibility in

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206 See Joyner, supra note 201.
nonproliferation efforts and can now be more aggressively questioned by the international community if they do not do so.

Resolution 1540 succeeds in promoting the NPT, BWTC, and CWC. Steps taken to implement the Resolution 1540 obligations can enable states to become parties to other nonproliferation treaties since many applicable measures are now required to be taken. This promotion toward treaty universality successfully strengthens nonproliferation norms and affects customary international law relevant to WMD. It has also established a stronger UN presence in combating WMD proliferation and enforced a global governance approach to issues of international peace and security, since it appears the Security Council will not sit and wait for a breach of international peace and security caused by WMD proliferation.

Implementing the pertinent legislation is just one step towards success for Resolution 1540. There must also be effective enforcement and prosecution in order to succeed. Local authorities or international coalitions like the PSI can give effect to successful enforcement.

For the time being, efforts must be prioritized, first toward the enforcement of reporting requirements and then towards implementation and enforcement of effective measures.

F. Conclusion: Resolution 1540 will ultimately meet with more success than the PSI based on its association with the UN and adherence to international law

The PSI and UNSCR 1540 are the most important developments of the international WMD nonproliferation regime. They are the most monumental developments in combating proliferation in recent years and will be at the forefront of nonproliferation efforts for years to come. The success or failure of both of these mechanisms designed to combat WMD proliferation will depend on their adherence to and compatibility with existing international law. The mechanisms add additional layers to the nonproliferation regime that may clarify and
focus efforts where greater effort is needed, and fill the gaps in the existing regimes. However, they may also create more political divisiveness and undermine or contradict those existing regimes. If the new mechanisms do not adhere to international law, the result will likely be the latter.

PSI efforts to stop shipments of WMD and related materials by sea, air, and land could be a double-edged sword. While reports of success exist, the question of legal authorities for PSI interdictions may do more harm than good to nonproliferation efforts. The PSI is still criticized for lack of transparency and accountability. It clearly violates established rules of international law with no convincing legal justification. Its activities may impede legal trade, weaken the UN system, and undermine other nonproliferation efforts.

The strengths of the PSI, thus far, are the greater cooperation and information sharing channels it has established. The PSI has streamlined many aspects of WMD related inspection and enforcement, and it has enhanced cooperation among many states in a way that probably would not have happened through a multilateral treaty amending process. Additionally, it has raised greater awareness of WMD proliferation and trafficking in a way that attempting to modify a large existing treaty would not. However, its encroachment on the longstanding laws of the sea and other international norms have been its greatest weakness and will continue to challenge and undermine its credibility unless it gains the specific legal authority it would need to achieve its ultimate goal of stopping WMD proliferation anytime and anywhere.

Resolution 1540 obligates all nations to implement laws to prevent the proliferation of WMD, especially to non-state actors. The resolution is a vast undertaking, an aspect that may lead to its downfall. The vast, comprehensive approach leads to difficulties in the legal context,
including interpretations and obligations, but more significantly it raises questions of what constitutes full implementation and eventually, future enforcement.

Despite Resolution 1540’s problematic status as international legislating, it lies further within the confines of international law than the PSI, and threatens both sovereignty and international law to a lesser extent. Unlike the PSI, which operates completely outside and without actual regard to international law, Resolution 1540 was passed within a well-established and recognized body the Security Council, within the paradigm of international organizations (the UN). With resolution 1373 as a precedent and open dialogue by General Assembly members, the Security Council acted with just enough assuaging and legal justification to keep good will among members. In this way, Resolution 1540 lies between the old generation of multilateral instruments situated well within international law and the PSI with no regard for it whatsoever. This smaller step away from previous multilateral regimes may be more successful long term than PSI’s giant leap away from existing international law.
APPENDIX A -- Proliferation Security Initiative: Statement of Interdiction Principles

Agreed at Paris, 4 September 2003

The Proliferation Security Initiative (PSI) is a response to the growing challenge posed by the proliferation of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide. The PSI builds on efforts by the international community to prevent proliferation of such items, including existing treaties and regimes. It is consistent with and a step in the implementation of the UN Security Council Presidential Statement of January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for member states of the UN to prevent proliferation. The PSI is also consistent with recent statements of the G8 and the European Union, establishing that more coherent and concerted efforts are needed to prevent the proliferation of WMD, their delivery systems, and related materials. PSI participants are deeply concerned about this threat and of the danger that these items could fall into the hands of terrorists, and are committed to working together to stop the flow of these items to and from states and non-state actors of proliferation concern.

The PSI seeks to involve in some capacity all states that have a stake in nonproliferation and the ability and willingness to take steps to stop the flow of such items at sea, in the air, or on land. The PSI also seeks cooperation from any state whose vessels, flags, ports, territorial waters, airspace, or land might be used for proliferation purposes by states and non-state actors of proliferation concern. The increasingly aggressive efforts by proliferators to stand outside or to circumvent existing non-proliferation norms, and to profit from such trade, requires new and stronger actions by the international community. We look forward to working with all concerned states on measures they are able and willing to take in support of the PSI, as outlined in the following set of "Interdiction Principles."

Interdiction Principles for the Proliferation Security Initiative

PSI participants are committed to the following interdiction principles to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and nonstate actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the UN Security Council. They call on all states concerned with this threat to international peace and security to join in similarly committing to:

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. "States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.
3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.

4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:

   a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.

   b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.

   c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.

   d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.

   e. At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.

   f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.

Adopted by the Security Council at its 4956th meeting, on 28 April 2004

The Security Council,
Affirming that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery,* constitutes a threat to international peace and security,

Reaffirming, in this context, the Statement of its President adopted at the Council’s meeting at the level of Heads of State and Government on 31 January 1992 (S/23500), including the need for all Member States to fulfil their obligations in relation to arms control and disarmament and to prevent proliferation in all its aspects of all weapons of mass destruction,

Recalling also that the Statement underlined the need for all Member States to resolve peacefully in accordance with the Charter any problems in that context threatening or disrupting the maintenance of regional and global stability,

Affirming its resolve to take appropriate and effective actions against any threat to international peace and security caused by the proliferation of nuclear, chemical and biological weapons and their means of delivery, in conformity with its primary responsibilities, as provided for in the United Nations Charter,

Affirming its support for the multilateral treaties whose aim is to eliminate or prevent the proliferation of nuclear, chemical or biological weapons and the importance for all States parties to these treaties to implement them fully in order to promote international stability,

Welcoming efforts in this context by multilateral arrangements which contribute to non-proliferation,

Affirming that prevention of proliferation of nuclear, chemical and biological weapons should not hamper international cooperation in materials, equipment and technology for peaceful purposes while goals of peaceful utilization should not be used as a cover for proliferation,

Gravely concerned by the threat of terrorism and the risk that non-State actors* such as those identified in the United Nations list established and maintained by the Committee established under Security Council resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery,

Gravely concerned by the threat of illicit trafficking in nuclear, chemical, or biological weapons and their means of delivery, and related materials,* which adds a new dimension to the issue of proliferation of such weapons and also poses a threat to international peace and security,

Recognizing the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security,

* Definitions for the purpose of this resolution only:
Means of delivery: missiles, rockets and other unmanned systems capable of delivering nuclear, chemical, or biological weapons, that are specially designed for such use.
Non-State actor: individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.
Related materials: 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.
Recognizing that most States have undertaken binding legal obligations under treaties to which they are parties, or have made other commitments aimed at preventing the proliferation of nuclear, chemical or biological weapons, and have taken effective measures to account for, secure and physically protect sensitive materials, such as those required by the Convention on the Physical Protection of Nuclear Materials and those recommended by the IAEA Code of Conduct on the Safety and Security of Radioactive Sources,

Recognizing further the urgent need for all States to take additional effective measures to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery,

Encouraging all Member States to implement fully the disarmament treaties and agreements to which they are party,

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Determined to facilitate henceforth an effective response to global threats in the area of non-proliferation,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;

2. Decides also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which 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, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;

3. Decides also that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall:
   (a) Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;
   (b) Develop and maintain appropriate effective physical protection measures;
   (c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;
   (d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations;

4. Decides to establish, in accordance with rule 28 of its provisional rules of procedure, for a period of no longer than two years, a Committee of the Security Council, consisting of all members of the Council, which will, calling as appropriate on other expertise, report to the Security Council for its examination, on the implementation of this resolution, and to this end calls upon States to present a first report no later than six months from the adoption of this resolution to the Committee on steps they have taken or intend to take to implement this resolution;

5. Decides that none of the obligations set forth in this resolution shall be interpreted so as to conflict with or alter the rights and obligations of State Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention or alter the responsibilities of the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons;

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6. Recognizes the utility in implementing this resolution of effective national control lists and calls upon all Member States, when necessary, to pursue at the earliest opportunity the development of such lists;

7. Recognizes that some States may require assistance in implementing the provisions of this resolution within their territories and invites States in a position to do so to offer assistance as appropriate in response to specific requests to the States lacking the legal and regulatory infrastructure, implementation experience and/or resources for fulfilling the above provisions;

8. Calls upon all States:
   (a) To promote the universal adoption and full implementation, and, where necessary, strengthening of multilateral treaties to which they are parties, whose aim is to prevent the proliferation of nuclear, biological or chemical weapons;
   (b) To adopt national rules and regulations, where it has not yet been done, to ensure compliance with their commitments under the key multilateral nonproliferation treaties;
   (c) To renew and fulfil their commitment to multilateral cooperation, in particular within the framework of the International Atomic Energy Agency, the Organization for the Prohibition of Chemical Weapons and the Biological and Toxin Weapons Convention, as important means of pursuing and achieving their common objectives in the area of non-proliferation and of promoting international cooperation for peaceful purposes;
   (d) To develop appropriate ways to work with and inform industry and the public regarding their obligations under such laws;

9. Calls upon all States to promote dialogue and cooperation on nonproliferation so as to address the threat posed by proliferation of nuclear, chemical, or biological weapons, and their means of delivery;

10. 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;

11. Expresses its intention to monitor closely the implementation of this resolution and, at the appropriate level, to take further decisions which may be required to this end;

12. Decides to remain seized of the matter.

Adopted by the Security Council at its 5429th meeting, on 27 April 2006

The Security Council,

Having considered the report of the Security Council Committee established pursuant to resolution 1540 (2004), hereafter the 1540 Committee (S/2006/257), and reaffirming its resolution 1540 (2004) of 28 April 2004,

Reaffirming that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security,

Endorsing the work already carried out by the 1540 Committee, particularly in its consideration of the national reports submitted by States pursuant to resolution 1540 (2004),

Recalling that not all States have presented to the 1540 Committee their reports on the steps they have taken or intend to take to implement resolution 1540 (2004),

Reaffirming its decision that none of the obligations in resolution 1540 (2004) shall be interpreted so as to conflict with or alter the rights and obligations of State Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention or alter the responsibilities of the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons,

Noting that the full implementation of resolution 1540 (2004) by all States, including the adoption of national laws and measures to ensure the implementation of these laws, is a long-term task that will require continuous efforts at national, regional and international levels,

Acting under Chapter VII of the Charter of the United Nations,

1. Reiterates its decisions in and the requirements of resolution 1540 (2004) and emphasizes the importance for all States to implement fully that resolution;

2. Calls upon all States that have not yet presented a first report on steps they have taken or intend to take to implement resolution 1540 (2004) to submit such a report to the 1540 Committee without delay;

3. Encourages all States that have submitted such reports to provide, at any time or upon the request of the 1540 Committee, additional information on their implementation of resolution 1540 (2004);

4. Decides to extend the mandate of the 1540 Committee for a period of two years, with the continued assistance of experts, until 27 April 2008;

5. Decides that the 1540 Committee shall intensify its efforts to promote the full implementation by all States of resolution 1540 (2004) through a work programme which shall include the compilation of information on the status of States’ implementation of all aspects of resolution 1540 (2004), outreach, dialogue, assistance and cooperation, and which shall address in particular all aspects of paragraphs 1 and 2 of that resolution, as well as of paragraph 3 which encompasses (a) accountability, (b) physical protection, (c) border controls and law enforcement efforts and (d) national export and trans-shipment controls including controls on providing funds and services such as financing to such export and trans-shipment, and in that regard:

(a) encourages the pursuit of the ongoing dialogue between the 1540 Committee and States on the full implementation of resolution 1540 (2004), including on further actions needed from States to that end and on technical assistance needed and offered;

(b) invites the 1540 Committee to explore with States and international, regional and subregional organizations experience-sharing and lessons learned in the areas covered by resolution 1540 (2004), and the availability of programmes which might facilitate the implementation of resolution 1540 (2004);
6. Decides that the 1540 Committee will submit to the Security Council a report no later than 27 April 2008 on compliance with resolution 1540 (2004) through the achievement of the implementation of its requirements;

7. Decides to remain seized of the matter.

Adopted by the Security Council at its 5877th meeting, on 25 April 2008

The Security Council,


Reaffirming that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security,

Reaffirming the Statement of its President adopted at the Council’s meeting at the level of Heads of State and Government on 31 January 1992 (S/23500), including the need for all Member States to fulfil their obligations in relation to arms control and disarmament and to prevent proliferation in all its aspects of all weapons of mass destruction,

Reaffirming that prevention of proliferation of nuclear, chemical and biological weapons should not hamper international cooperation in materials, equipment and technology for peaceful purposes while goals of peaceful utilization should not be used as a cover for proliferation,

Affirming its resolve to take appropriate and effective actions against any threat to international peace and security caused by the proliferation of nuclear, chemical and biological weapons and their means of delivery, in conformity with its primary responsibilities, as provided for in the United Nations Charter,

Reaffirming its decision that none of the obligations in resolution 1540 (2004) shall be interpreted so as to conflict with or alter the rights and obligations of State Parties to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention or alter the responsibilities of the International Atomic Energy Agency or the Organization for the Prohibition of Chemical Weapons,

Noting also that international cooperation between States, in accordance with international law, is required to counter the illicit trafficking by non-State actors in nuclear, chemical and biological weapons, their means of delivery, and related materials,

Endorsing the work already carried out by the Committee established pursuant to resolution 1540 (2004), hereafter the 1540 Committee, in accordance with its fifth Programme of Work,

Bearing in mind the importance of the report requested in paragraph 6 of resolution 1673 (2006),

Noting that not all States have presented to the 1540 Committee their national reports on implementation of resolution 1540 (2004), and that the full implementation of resolution 1540 (2004) by all States, including the adoption of national laws and measures to ensure implementation of these laws, is a long-term task that will require continuous efforts at national, regional and international levels,

Recognizing in that regard the importance of dialogue between the 1540 Committee and Member States and stressing that direct contact is an effective means of such dialogue,

Recognizing the need to enhance coordination of efforts on national, regional, subregional and international levels, as appropriate, in order to strengthen a global response to this serious challenge and threat to international security,

Emphasizing in that regard the importance of providing States, in response to their requests, with effective assistance that meets their needs and stressing the importance of ensuring that the clearinghouse function for assistance is efficient and accessible,
Taking note of international efforts towards full implementation of resolution 1540 (2004), including on preventing the financing of proliferation-related activities, taking into consideration the guidance of the framework of the Financial Action Task Force (FATF),

Acting under Chapter VII of the Charter of the United Nations,

1. Reiterates its decisions in and the requirements of resolution 1540 (2004) and emphasizes the importance for all States to implement fully that resolution;

2. Again calls upon all States that have not yet presented a first report on steps they have taken or intend to take to implement resolution 1540 (2004) to submit such a report to the 1540 Committee without delay;

3. Encourages all States that have submitted such reports to provide, at any time or upon the request of the 1540 Committee, additional information on their implementation of resolution 1540 (2004);

4. Encourages all States to prepare on a voluntary basis summary action plans, with the assistance of the 1540 Committee as appropriate, mapping out their priorities and plans for implementing the key provisions of resolution 1540 (2004), and to submit those plans to the 1540 Committee;

5. Encourages States that have requests for assistance to convey them to the 1540 Committee, and encourages them to make use of the Committee’s assistance template to that effect; urges States and international, regional and subregional organizations to inform the Committee as appropriate by 25 June 2008 of areas in which they are able to provide assistance; calls upon States and such organizations, if they have not done so previously, to provide the 1540 Committee with a point of contact for assistance by 25 June 2008;

6. Decides to extend the mandate of the 1540 Committee for a period of three years, with the continued assistance of experts, until 25 April 2011;

7. Requests the 1540 Committee to complete its report as set out in paragraph 6 of resolution 1673 (2006), and to submit it to the Security Council as soon as possible but no later than 31 July 2008;

8. Requests the 1540 Committee to consider a comprehensive review of the status of implementation of resolution 1540 (2004) and to report to the Council on its consideration on the matter by no later than 31 January 2009;

9. Decides that the Committee should submit an annual Programme of Work to the Security Council before the end of each January;

10. Decides that the 1540 Committee shall continue to intensify its efforts to promote the full implementation by all States of resolution 1540 (2004), through its Programme of Work which includes the compilation of information on the status of States’ implementation of all aspects of resolution 1540 (2004), outreach, dialogue, assistance and cooperation, and which addresses in particular all aspects of paragraphs 1 and 2 of that resolution, as well as of paragraph 3 which encompasses (a) accountability, (b) physical protection, (c) border controls and law enforcement efforts and (d) national export and trans-shipment controls including controls on providing funds and services such as financing to such export and trans-shipment;

11. Decides in that regard to:
(a) encourage the pursuit of the ongoing dialogue between the 1540 Committee and States on their further actions to implement fully resolution 1540 (2004) and on technical assistance needed and offered;
(b) request the 1540 Committee to continue to organize and participate in outreach events at the regional, subregional and, as appropriate, national level promoting States’ implementation of resolution 1540 (2004);
(c) urge the 1540 Committee to continue strengthening the Committee’s role in facilitating technical assistance for implementation of resolution 1540 (2004), including by engaging actively in matching offers and requests for
assistance through such means as assistance templates, action plans or other information submitted to the 1540 Committee;

(d) *encourage* the 1540 Committee to engage actively with States and relevant international, regional and subregional organizations to promote the sharing of experience and lessons learned in the areas covered by resolution 1540 (2004), and to liaise on the availability of programmes which might facilitate the implementation of resolution 1540 (2004);

(e) *request* the 1540 Committee to provide opportunities for interaction with interested States and relevant international, regional and subregional organizations to promote implementation of resolution 1540 (2004):

12. *Reiterates* the need to enhance ongoing cooperation between the 1540 Committee, the Security Council Committee established pursuant to resolution 1267 (1999), concerning Al-Qaeda and the Taliban, and the Security Council Committee established pursuant to resolution 1373 (2001), concerning counter-terrorism, including through, as appropriate, enhanced information sharing, coordination on visits to countries, within their respective mandates, technical assistance and other issues of relevance to all three committees, and expresses its intention to provide guidance to the committees on areas of common interest in order better to coordinate their efforts;

13. *Urges* the 1540 Committee to encourage and take full advantage of voluntary financial contributions to assist States in identifying and addressing their needs for the implementation of resolution 1540 (2004), and requests the 1540 Committee to consider options for developing and making more effective existing funding mechanisms, and to report to the Council on its consideration of the matter by no later than 31 December 2008;

14. *Decides* that the 1540 Committee will submit to the Security Council a report no later than 24 April 2011 on compliance with resolution 1540 (2004) through the achievement of the implementation of its requirements;

15. *Decides* to remain seized of the matter.
Treaties, Conventions, and United Nations Documents


Books


Murphy, John Francis. *The United States and the Rule of Law in International Affairs* (Cambridge: Cambridge University Press, 2004).


**Articles**


———. “Treaty Amended to Outlaw WMD at Sea” *Arms Control Today* (December 2005).

———. “Interdiction Initiative Results Obscure” *Arms Control Today* (September 2006).


Other


