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John Yoo

Glenn Sulmasy

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## THE PROLIFERATION SECURITY INITIATIVE: A MODEL FOR INTERNATIONAL COOPERATION

*John Yoo\* & Glenn Sulmasy\*\**

### I. INTRODUCTION

International law enforcement can work without any involvement from the U.N. Security Council (“UNSC”). Cooperation between nations does not require a formal organizational structure or extensive international bureaucracy, and bypassing this establishment would reduce the delay or inaction caused by the veto of the UNSC’s permanent members. One way to improve international law would be to look at the relative success of the Proliferation Security Initiative (“PSI”). This Idea will proceed in three parts. Part II will discuss the dangers of the international proliferation of weapons of mass destruction (“WMD”), particularly with regard to rogue states and international terrorists. Part III will discuss why it has been difficult for the U.N.-centered system to effectively respond to these concerns; and will describe the PSI’s effort to overcome them. Part IV will address criticism of the PSI.

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\* John Yoo is Professor of Law, University of California at Berkeley School of Law (Boalt Hall) and a Visiting Scholar at The American Enterprise Institute. He is the author of *War by Other Means: An Insider’s Account of the War on Terror* (2006).

\*\* Commander Glenn Sulmasy is an Associate Professor of Law at the United States Coast Guard Academy. He is co-editor of *International Law Challenges: Homeland Security and Combating Terrorism* (Thomas McK. Sparks & Glenn M. Sulmasy eds., 2006). The views he expresses herein are his own and not necessarily those of the Department of Homeland Security, the U.S. Coast Guard or the U.S. Coast Guard Academy.

## II. THE DANGER OF WMD PROLIFERATION

The proliferation of WMD has become a great concern for both the United States and the international community. Since the collapse of the Soviet Union, the potential for the spread of WMD has increased. Several nations have since acquired nuclear weapons or begun clandestine development programs. The possible harm from WMD proliferation was amplified by the attacks carried out by al Qaeda on September 11, 2001, which raised the specter of rogue nations transferring WMD technology to international terrorists. The Taliban permitted al Qaeda to train, staff, equip and carry out its international terrorist operations from bases within Afghanistan.<sup>1</sup> Al Qaeda showed its ability to reach across borders to carry out attacks with even more devastating effect. Preventing the proliferation of WMD has become one of the U.S. government's highest national security priorities.<sup>2</sup>

A primary focus of the Bush Administration's national security strategy has been to prevent rogue nations from transferring WMD to international terrorists. The 2003 *National Strategy for Combating Terrorism* ("NSCT") notes: "Some irresponsible governments—or extremist factions within them—seeking to further their own agenda may provide terrorists access to WMD."<sup>3</sup> The 2002 *National Security Strategy* similarly represents a shift in thinking from traditional nation-state threats to combating newly emerging threats to the United States: "America is now threatened less by conquering states than we are by failing ones. We are menaced less by fleets and armies than by catastrophic technologies in the hands of the embittered few."<sup>4</sup>

The United States's answer to the problem is to disrupt these networks of non-state actors and rogue nations who support them at the earliest possibility rather than employing a "wait and see" approach. This overall strategy is developed in two White House documents, the *National Strategy to Combat Weapons of Mass Destruction*,<sup>5</sup> issued in December 2002, and the NSCT, issued in February 2003. These

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1. John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 565 (2003).

2. WHITE HOUSE, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 1 (2002), available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf> [hereinafter WHITE HOUSE, COMBAT WEAPONS]; see also Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 HARV. J.L. & PUB. POL'Y 737, 743 (2004).

3. WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING TERRORISM 21 (2003), available at [http://www.whitehouse.gov/news/releases/2003/02/counter\\_terrorism/counter\\_terrorism\\_strategy.pdf](http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf).

4. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2002), available at <http://www.whitehouse.gov/nsc/nss/2002/nss.pdf>.

5. WHITE HOUSE, COMBAT WEAPONS, *supra* note 2.

documents develop a pre-emptive approach to disrupt imminent attacks and to interdict WMD before they get into the hands of international terrorists. President Bush made it clear in his State of the Union Address, in January 2002, that an axis of evil had emerged that threatened peace and security, specifically referring to Iran, Iraq and North Korea.<sup>6</sup> These three nations were perceived as the “rogue nation-states” who had the desire, capability and irresponsibility to transport WMD technology to the international terrorists.

Prior to 9/11, various nations had ratified agreements designed to address the growing threat of WMD proliferation. Most had adopted the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological Weapons Convention. However, the new threats required new action from the Security Council. In 2004, the United States sponsored Security Council Resolution 1540 to update these conventions. On April 28, 2004, the U.N. Security Council unanimously called for the punishment of those who traffic in nuclear, chemical and biological weapon components.<sup>7</sup> It required “all 191 members of the U.N. to punish any ‘non-[S]tate actors’ dealing in weapons of mass destruction and technology.”<sup>8</sup> It further required nations to “adopt and enforce laws to prevent terrorists and black marketeers from being able to ‘manufacture acquire, possess, develop, transport or use nuclear, chemical or biological weapons and their means of delivery.’”<sup>9</sup>

### III. PROLIFERATION SECURITY INITIATIVE

The idea for a new, more flexible international “entity” emerged after fifteen SCUD missiles were found onboard a North Korean freighter. The North Korean vessel, *So San*, was stopped and boarded in international waters by the Spanish Navy. At the time of the boarding, the *So San* was approximately 600 miles from the coast of Yemen—its intended destination. The missiles were discovered mixed in with the main cargo that the vessel claimed to be transporting—cement. After Yemen claimed that its right to receive cargo and equipment was

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6. See President George W. Bush, State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html>.

7. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

8. USInfo.State.gov., U.N. Security Council Unanimously Passes Resolution on WMD, Apr. 28, 2004, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2004&m=April&x=20040428174321FRlllehctiM0.2683374> [hereinafter U.N. Security Council] (quoting S.C. Res. 1540, *supra* note 7).

9. *Id.* (quoting S.C. Res. 1540, *supra* note 7).

permissible under international law, the *So San* was released and permitted to continue its journey.<sup>10</sup>

Existing international law did not permit confiscation of the missiles and their components. Secretary of State Powell stated:

[A]fter getting assurances directly from the President of Yemen . . . this was the last of a group of shipments that go back some years and had been contracted for some years ago . . . and we had assurances that these missiles were for Yemeni defensive purposes and . . . in acknowledgement of the fact that it was on international water and it was a sale that was out in the open and consistent with international law . . . we directed the ship to continue to its destination.<sup>11</sup>

The maritime boarding of the vessel was probably legal, but the seizure of the weapons was not. Specifically, Yemen had acceded to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (generally known as the “SUA Convention”), but North Korea was neither a signatory nor a contracting party.<sup>12</sup> Regardless, the scope of that Convention still does not apply to the content or destination of cargoes. Yemen is a party to the United Nations Convention on the Law of the Sea (“UNCLOS”), but Article 110 of the treaty provides that boarding a vessel on the high seas is permitted only where 1) there is “reasonable ground for suspecting that” a vessel is engaging in piracy, the slave trade or unauthorized broadcasting; 2) a vessel is de facto stateless because it either lacks a flag or is flying multiple “flags”; or 3) by the consent of the flag state of the vessel to board.<sup>13</sup>

Without the consent of Yemen or North Korea, any seizure of the material onboard was not authorized under existing international law.<sup>14</sup> The International Court of Justice (“ICJ”) stated in 1927: “It is certainly true that—apart from certain special cases which are defined by

10. See Glenn Kessler & Thomas E. Ricks, *U.S. Frees Ship with North Korean Missiles; Stand Is Reversed After Yemen Protests Seizure of 15 Scuds*, WASH. POST, Dec. 12, 2002, at A1.

11. Colin L. Powell, Sec’y of State, Remarks at the American Academy of Diplomacy Annual Awards Presentation Luncheon (Dec. 11, 2002), available at <http://www.state.gov/secretary/former/powell/remarks/2002/15887.htm>.

12. See INT’L MAR. ORG., STATUS OF MULTILATERAL CONVENTIONS AND INSTRUMENTS IN RESPECT OF WHICH THE INTERNATIONAL MARITIME ORGANIZATION OR ITS SECRETARY-GENERAL PERFORMS DEPOSITARY OR OTHER FUNCTIONS 354-58 (2005).

13. United Nations Convention on the Law of the Sea, art. 110, Dec. 10, 1982, 1833 U.N.T.S. 397, available at <http://www.gc.noaa.gov/unclos.pdf>.

14. See Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526, 526-27 (2004).

international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly.”<sup>15</sup> Other institutions claimed there was no “legal authority” upon which to prevent such transportation of WMD. A gap in international maritime law existed that would threaten global peace and security by allowing the proliferation of WMD. The well established U.S. commitment to freedom of navigation on the high seas was at odds with its goal of preventing the proliferation, sale and transport of WMD.

In Krakow, Poland in May 2003, President Bush announced his intention to create an entity to help prevent the transport of WMD by rogue nation-states on the seas into the hands of terrorists.<sup>16</sup> The creation of a novel “concept”—not a new law or international regulatory body, but an idea—to increase cooperation among nation-states and to “remind” nations to use and implement existing legal authorities would best prevent the transportation of WMD. The motivation of the PSI is to prevent rogue nations from supporting and supplying terrorists with the technology or supplies needed to create WMD.<sup>17</sup>

Frustrated with the U.N. Security Council’s inability to act, the United States created an “entity” that would have no headquarters, no staff and no bureaucracy.<sup>18</sup> The United States viewed the Security Council as too unwieldy and likely to be crippled by the veto power if it sought a resolution for such activity.<sup>19</sup> Past experience has demonstrated the inability of the UNSC to effectively meet the challenges of traditional or new threats to international security. One of us has written elsewhere that the U.N. Security Council has not helped to reduce war or conflict.<sup>20</sup> In addition, the United Nations was created in the age of the nation-state and is not adequately suited to help prevent the threats associated with international terrorism. Rogue states now often “share

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15. *Id.* at 527 (quoting Case of S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 25 (Sept. 7)).

16. President George W. Bush, Remarks to the People of Poland (May 31, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>.

17. See Press Release, White House Office of the Press Sec’y, Fact Sheet, Proliferation Security Initiative: Statement of Interdiction Principles (Sept. 4, 2003) [hereinafter Interdiction Principles], available at <http://www.whitehouse.gov/news/releases/2003/09/20030904-11.html>.

18. Supporters of the PSI often use this lack of structure as being one of its greatest assets. For example, see Admiral Mike Mullen, Remarks at the RUSI Future Maritime Warfare Conference (Dec. 13, 2005), available at <http://www.navy.mil/navydata/cno/mullen/speeches/mullen051213.txt>.

19. China was likely to have vetoed any resolution calling for interdiction of illegal proliferation components, technology or parts on the seas.

20. See John C. Yoo, *Force Rules: U.N. Reform and Intervention*, 6 CHI. J. INT’L L. 641, 644-45 (2006).

the undeterrable character of terrorist organizations, because they have removed themselves from the international system.”<sup>21</sup> This heightened the need to develop new methods to combat threats to international security outside of the UNSC framework.

#### IV. INTERDICTION PRINCIPLES FOR THE PROLIFERATION SECURITY INITIATIVE

It was against this backdrop that the PSI was created. It coordinates action against proliferation without interfering with existing customary international maritime law (including freedom of navigation) or Article 110 the Law of the Sea Convention. It builds upon the political commitment of nations in bi-lateral or multi-lateral agreements permitting boardings of their vessels (whether in the territorial waters or upon the high seas), while still relying upon existing authorities in UNCLOS. It relies on greater sharing of intelligence among participants to make tracking and boarding of vessels with WMD material more effective.<sup>22</sup>

The major obligation of the PSI participants is to abide by the Statement of Interdiction Principles—the primary purpose of which is to exercise existing domestic authority in order to interdict weapons and materials that could be used for the production or use of WMD.<sup>23</sup> The Principles specifically require all member states concerned with this threat to international peace and security to commit to the following principles:

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.
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.

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21. *See id.* at 647.

22. *See supra* note 9 and accompanying text; *see also* Wolf Heintschel von Heinegg, *The Proliferation Security Initiative: Security vs. Freedom of Navigation?*, in INTERNATIONAL LAW CHALLENGES, HOMELAND SECURITY AND COMBATING TERRORISM 55, 55-71 (Thomas McK. Sparks & Glenn M. Sulmasy eds., 2006) [hereinafter INTERNATIONAL LAW CHALLENGES].

23. *See* Interdiction Principles, *supra* note 17.

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 laws 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 concerns, 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) 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.<sup>24</sup>

PSI promotes cooperation and intelligence sharing between participating members.<sup>25</sup> It is consistent with the U.N. Security Council Presidential Statement of January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security.<sup>26</sup> The PSI is also consistent with 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.<sup>27</sup> Through the implementation of the Interdiction Principles, participants engage in cooperative efforts to stop the flow of these items to and from states and non-state actors of proliferation concern.

PSI formalizes cooperation by nation-states whose vessels, flags, ports, territorial waters, airspace or land might be used for illegal WMD proliferation.<sup>28</sup> As of this writing, over sixty nation-states have signed on to PSI.<sup>29</sup> There are fifteen nations that form the core of the PSI—including the United States, Russia, Japan, France, Germany and the United Kingdom. Equally important, the PSI has spurred numerous bi-lateral agreements between nation-states to support this effort. For example, six nations (a majority of vessels fly these nations' flags) have signed bi-lateral Mutual Ship Boarding Pacts with the United States, permitting boarding operations to occur (even upon the high seas) for

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24. *Id.*

25. For a discussion of the need for increased intelligence collection and sharing, see SIMON CHESTERMAN, LOWY INST. FOR INT'L POLICY, SHARED SECRETS: INTELLIGENCE AND COLLECTIVE SECURITY (2006).

26. See Security Council, Note by the President of the Security Council, U.N. Doc. S/23500, at 4-5 (Jan. 31, 1992), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNRO%20S23500.pdf> [hereinafter Note by the President].

27. See G8, Gleneagles Statement on Non-Proliferation (2005), [http://www.fco.gov.uk/Files/kfile/PostG8\\_Gleneagles\\_CounterProliferation.pdf](http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_CounterProliferation.pdf) (“[T]he proliferation of weapons of mass destruction (WMD) and their delivery means, together with international terrorism, remain the pre-eminent threats to international peace and security. The threat of the use of WMD by terrorists calls for redoubled efforts.”); Note by the President, *supra* note 26, at 4-5.

28. See BUREAUS OF NONPROLIFERATION & PUB. AFFAIRS, U.S. DEP'T OF STATE, PUBL'N NO. 11254, UNITED STATES INITIATIVES TO PREVENT PROLIFERATION 2 (2005), [www.state.gov/documents/organization/47000.pdf](http://www.state.gov/documents/organization/47000.pdf).

29. *Id.*

ships sailing under the flags of the nations included (the United States, Belize, Croatia, Cyprus, Liberia, the Marshall Islands and Panama).<sup>30</sup> These agreements are critical to overcoming many of the obstacles observed in the *So San* incident. Flag state consent will ensure the legality of boarding on the high seas, and arguably, permit many of the seizures as well.

The most unique component of the PSI is that it has no bureaucracy, no permanent staff and no treaty obligations. The PSI represents an initiative by the United States to utilize existing tools under customary international law and the Law of the Sea Convention. Under UNCLOS, participating members are permitted to board vessels of other nationalities operating within their territorial waters (12NM) and even the Contiguous Zone (24NM—used for Fiscal, Immigration, Customs and Sanitations purposes) or when given consent.<sup>31</sup> PSI coordinates exercise of these two authorities to allow the United States and cooperating nations to search vessels suspected of carrying WMD-related materials.

The PSI advances the concepts of collective action and intelligence sharing. It creates a system for states to work together in naval exercises, interdiction planning and coordination, and lays the groundwork for ensuring that flag states consent to such boarding and seizures (even if upon the high seas through bi-lateral and multilateral agreements). PSI has produced eleven successful interdictions since its inception.<sup>32</sup> One in particular was the interception (conducted in coordination with the United States, the United Kingdom, Germany and Italy) of the vessel *BBC China* that was loaded with nuclear-related materials enroute to Libya. Undersecretary of State John Bolton asserted that this interdiction “helped convince Libya that the days of undisturbed accumulation of WMD were over,” and that this had helped unravel Dr. A.Q. Khan’s proliferation network.<sup>33</sup> These successes demonstrate that the PSI can advance international peace and security, but without the costs of

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30. See U.S. Dep’t of State, Ship Boarding Agreements, <http://www.state.gov/t/isn/c/12386.htm> (last visited Apr. 11, 2007) (including links to each of the agreements with these countries).

31. See United Nations Convention on the Law of the Sea, arts. 27, 73, 110, Dec. 10, 1982, 1833 U.N.T.S. 397, available at <http://www.gc.noaa.gov/unclos.pdf>.

32. SHARON SQUASSONI, CONG. RESEARCH SERV., REPORT FOR CONGRESS: PROLIFERATION SECURITY INITIATIVE (PSI) 3 (2005) (citing Sec’y Condoleeza Rice, Remarks on the Second Anniversary of the Proliferation Security Initiative (May 31, 2005), available at <http://www.state.gov/secretary/rm/2005/46951.htm>).

33. See John Bolton, *An All-Out War on Proliferation*, FIN. TIMES (London), Sept. 7, 2004, at 21.

permanent bureaucracy and the delay of formalized decision-making processes.

## V. CRITICISMS OF THE PSI

Critics of the PSI assert that the effort is an attack on the freedom of navigation on the seas; is ambiguous and has no structure; is nothing more than a “power grab” by the United States; or that it violates existing international law regarding self-defense.<sup>34</sup> We suggest that these concerns are mistaken.

Concerns often deal with violations of freedom of navigation.<sup>35</sup> Specifically, critics refer to Article 19 of UNCLOS guaranteeing innocent passage for ships through the territorial waters of coastal countries. They assert that the boardings conducted as part of the PSI contradict UNCLOS (which the United States has not ratified but considers customary international law nonetheless, with the exception of the deep sea bed mining provisions). Critics also refer to Article 88 of UNCLOS, which declares that “[t]he high seas shall be reserved for peaceful purposes.”<sup>36</sup> The critics assert that the aggressive nature, not necessarily of the boarding itself, but of the seizure of goods, will act as a catalyst for conflict. Kim Jong Il has asserted that if a North Korean vessel is boarded, he will construe the boarding as an act of war.<sup>37</sup>

The criticisms are misplaced. The Interdiction Principles do not impact the existing international law of the sea, but rather embrace it and act as a commitment of nations to work together to utilize their enforcement powers already embodied within UNCLOS. The PSI does not in any way impact freedom of navigation. It carefully balances the legitimate needs of freedom of navigation and the need to prevent the transport of WMD. It does not alter or change the existing requirements in UNCLOS under Article 110. Under the PSI, if boardings or subsequent seizures of WMD do occur on the high seas, they would still have to conform to international law. Through the increased collaboration of participants, however, flag states of these vessels are

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34. See generally, e.g., Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507 (2005) (critiquing the methods employed by the PSI and contemplating its limits under international law); Dan Smith, *A Challenge Too Narrow: The Proliferation Security Initiative*, FOREIGN POL'Y IN FOCUS, Oct. 16, 2003, <http://www.fpif.org/pdf/reports/PRprolif2003.pdf> (same).

35. See, e.g., Michael Evans, *U.S. Plans to Seize Suspects at Will*, TIMES (London), July 11, 2003, at 23.

36. See United Nations Convention on the Law of the Sea, art. 88, Dec. 10, 1982, 1833 U.N.T.S. 397, available at <http://www.gc.noaa.gov/unclos.pdf>.

37. See Smith, *supra* note 34.

now likely to consent to such actions at the time of the boardings or through the creation of multi-lateral agreements. In addition, the Interdiction Principles predominately emphasize that the participants use existing international legal authority to support such boardings. Specifically, the Principles refer to intelligence sharing (Principle 2), strengthening domestic legal authorities for boardings/seizures within participants' waters (Principle 3) and to take actions to support interdiction within their domestic authority (Principle 4).<sup>38</sup> None of these principles contradicts existing international law.

Professor Mark Shulman asserts many critics are, in reality, concerned about the lack of formality and structure of the PSI.<sup>39</sup> For many international scholars and practitioners, this ambiguity and lack of structure is a means for the United States to impose a unilateral approach to security. In addition, they are concerned there can be no real impact due to the "soft" nature of the PSI. Such critics mistakenly believe that the promotion of international security requires a bureaucracy in order to be effective. As Colin Powell noted in *Foreign Affairs*, initiatives such as the PSI are actually a part of the "Strategy of Partnerships" that the United States has embraced in order to win the war on terror.<sup>40</sup> The proliferation of WMD is a global problem—not one that the United States can unilaterally solve. The PSI is a voluntary, multi-national commitment by sixty or so participants working toward the elimination of the illegal transport of WMD.

Other critics view the PSI as being an overly broad interpretation of the right to self-defense articulated in Article 51 of the U.N. Charter. Some see it as an expansion of the concept of self-defense to formally include anticipatory self-defense or pre-emption as accepted doctrine. Applying the celebrated *Caroline* incident on anticipatory self-defense, necessity and proportionality would still need to be a component of the decision-making process, and, they argue, the PSI violates the immediacy of the threat to constitute the lawful right of self-defense.<sup>41</sup> Daniel Joyner asserts that the right of self-defense, through the plain reading of the text of Article 51, is not sufficient to act as a broad principle justifying the PSI. Further, he asserts there is nothing within existing customary international law to provide the requisite legal

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38. See *supra* note 24 and accompanying text.

39. Mark R. Shulman, *The Proliferation Security Initiative and the Evolution of the Law on the Use of Force*, 28 HOUS. J. INT'L L 771, 776-77 (2006).

40. Colin L. Powell, Essay, *A Strategy of Partnerships*, FOREIGN AFF., Jan./Feb. 2004, at 22, 24, 34.

41. Joyner, *supra* note 34, at 521-25.

authority for these measures.<sup>42</sup> The PSI, however, never specifically asserts that the procedures are conducted in self-defense. But if it did, the PSI could be justified upon a self-defense argument—not through a strict reading of Article 51 but rather by the evolving customary application of self-defense in the world today.<sup>43</sup> Measures to prevent global insecurity are more important today than ever before, whether or not such operations conducted in peacetime are labeled as “self-defense” or not.

## VI. CONCLUSION

The PSI should serve as a model for future cooperation in international affairs. It offers a way to avoid many of the weaknesses inherent in the structure of the Security Council. It promotes global security, cooperation and enhanced intelligence sharing by nation-states. It also strikes an appropriate balance between nation-state sovereignty and international law by preventing the spread of WMD by those who operate outside the community of nations. As threats from nations such as North Korea and Iran continue to undermine peace and security in the twenty-first century, the PSI’s lack of structure is its greatest asset. As the United Nations struggles to enhance its effectiveness, the PSI offers an example of international cooperation by nation-states without the politicization and bureaucracy so prevalent in the global body today.

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42. *See id.*

43. *See* John Yoo, *Using Force*, 71 U. CHI. L. REV. 729 (2004). For a detailed discussion of the use of force within the PSI framework, see also Craig Allen, *Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives*, in INTERNATIONAL LAW CHALLENGES, *supra* note 22.