

# Establishing a Global Quarantine Against Weapons of Mass Destruction

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## INTRODUCTION

Faced with mounting international insecurity, Franklin Delano Roosevelt gave his famous “Quarantine Speech” in 1937, likening the rise of fascism to an outbreak of world lawlessness. “When an epidemic of physical disease starts to spread,” FDR remarked, “the community approves and joins in a quarantine of the patients in order to protect the health of the community against the spread of the disease.”<sup>1</sup> Fearful of becoming embroiled in another world war, the United States was slow to shed its isolationism, only gradually increasing the provision

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<sup>1</sup> For the text and audio of FDR’s speech, see <http://history.sandiego.edu/gen/text/us/fdr1937.html> (last visited Oct. 4, 2005).

of arms to its allies and restricting exports to the Axis powers.<sup>2</sup> When war finally came at Pearl Harbor, Nazi and Japanese forces had expanded like a cancer throughout Europe and Asia, requiring far more than a quarantine to eliminate the malignancy.

Today the proliferation of weapons of mass destruction (WMD<sup>3</sup>) represents another danger that is on the brink of developing into an epidemic. With the Indian and Pakistani nuclear tests in 1998, the clandestine nuclear progress of North Korea and Iran, and over a dozen nuclear-capable states waiting indecisively on the sidelines, the world has arrived at what is fairly described as a “nuclear tipping point,” where a few decisions to produce WMD could spark a cascade of proliferation.<sup>4</sup> Such an outcome could have some stabilizing effects through the functioning of nuclear deterrence, but it would also create an expanding supply of material for catastrophic terrorism as well as raise the stakes between adversaries with fingers on the WMD trigger when conflicts do occur. Since convincing nascent WMD-states to disarm is an

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<sup>2</sup> See ROBERT A. DIVINE, *RELUCTANT BELLIGERENT: AMERICAN ENTRY INTO WORLD WAR II* (1979). For instance, although the United States instituted a “moral embargo” against Japan as early as July 1938, it was not until July 1941 that it imposed a complete embargo.

<sup>3</sup> Use of the collective term WMD carries the risk of overlooking important distinctions among nuclear, biological, and chemical weapons. At the same time, WMD is a simple, commonly understood, and analytically useful shorthand. I will note differences among the types of WMD when relevant, but will primarily focus on nuclear weapons.

<sup>4</sup> See *THE NUCLEAR TIPPING POINT: WHY STATES RECONSIDER THEIR NUCLEAR CHOICES* (Kurt M. Campbell et al. eds., 2004).

uncertain prospect,<sup>5</sup> I argue that the United States and the international community should lay the foundation for a global quarantine<sup>6</sup> against WMD, prohibiting all forms of transfer.

Unfortunately, current conceptions of international law—limited to a consent-based system for maritime interdiction on the high seas and a general prohibition against WMD transfers to non-state actors, but not other state actors—do not provide adequate support for a global quarantine regime. This article addresses these potential deficiencies, explaining why a global quarantine is needed, why it is legitimate under international law, and how it can be established in an effective and ideally multilateral manner. Part I assesses the legal and institutional options currently available to the United States in combating the proliferation of WMD, briefly analyzing the strengths and weaknesses of each. It concludes that the inherent inadequacies of existing arms control tools require the creation of a new regime centered upon a robust interdiction authority. Part II then explores how the international community can legally justify a global quarantine upon principles of self-defense, construing the deliberate transfer of WMD as a threat to world peace. Finally, Part III proposes options for practically integrating the global quarantine concept into existing institutions.

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<sup>5</sup> Reaching a negotiated settlement with states like North Korea and Iran along the lines of the December 2003 agreement with Libya would clearly be the most desirable outcome. *See infra* note 13. The September 2005 six-party joint statement concerning the North Korean nuclear program is undoubtedly a step in the right direction, but leaves several issues unresolved that could derail the disarmament process. *See* Joseph Kahn & David E. Sanger, *U.S.-Korea Deal on Arms Leaves Key Points Open*, N.Y. TIMES, Sept. 20, 2005, at A1. Agreements between the European Union and Iran regarding inspections have been equally inconclusive. *See* Nazila Fathi & Joel Brinkley, *Atomic Activity Resumes in Iran Amid Warnings*, N.Y. TIMES, Aug. 9, 2005, at A1.

<sup>6</sup> Inspiration to apply the quarantine concept to this topic is drawn partly from Ruth Wedgwood, *A Pirate is a Pirate*, WALL ST. J., Dec. 16, 2002, at A12. Although conceptually the principles behind a global quarantine apply equally to interdiction on land, sea, and air, this article will focus primarily on maritime interdiction.

## I. EXISTING FRAMEWORKS TO COMBAT WMD PROLIFERATION

The proliferation of WMD is a multi-layered phenomenon, fueled by indigenous research and development, global trade, arms sales, and covert transfers to non-state actors. Defending against such a complex threat, in turn, involves a wide array of legal, institutional, and strategic mechanisms. States can adopt export controls to reduce proliferation generally, issue threats to deter the use of WMD, build defenses to minimize the damage from a WMD attack, take military action to disarm a potential adversary, or police the channels proliferators use to exchange weapons. This Part will analyze these frameworks, concluding that although each has merit, interdiction in particular is emerging as a crucial but legally underdeveloped option.

### A. *Export Controls*

Some observers recommend strengthening export controls to keep sensitive technologies off the international market, thereby restraining the ability of states to develop WMD.<sup>7</sup> While effective to an extent, the trouble is that increasingly proliferation is fueled by “dual-use” items—goods with civilian purposes as well as military applications—that many states are reluctant to deny to willing buyers.<sup>8</sup> For instance, the Non-Proliferation Treaty (NPT) enables states to acquire sophisticated nuclear reactors and technology that are ostensibly for civilian power production, but which a state can ultimately divert to weapons development either in secret or if it chooses to terminate NPT safeguards. This potential loophole has led to proposals

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<sup>7</sup> See, e.g., Daniel H. Joyner, *Restructuring the Multilateral Export Control Regime System*, 9 J. CONFLICT & SECURITY L. 181 (2004).

<sup>8</sup> Companies and governments, often more attuned to the immediate prospect of financial gain than the long-term security risks of questionable sales, also do not always ensure that buyers are using their products for the intended purpose. See U.S. General Accounting Office, *Post-Shipment Verification Provides Limited Assurance That Dual-Use Items Are Being Properly Used*, GAO Doc. GAO-04-357 (Jan. 2004), <http://www.iwar.org.uk/news-archive/gao/export-controls/d04357.pdf> (last visited Oct. 4, 2005).

to place the supply of fissile material under international control, rather than continue to promote complete indigenous development.<sup>9</sup> Even if it were possible to reach international agreement over how to restrict dual-use items and regulate fissile material, however, the reality is that we live in a post-proliferation world and so in a sense the horse is out of the barn. North Korea is effectively a de facto nuclear state, likely to be in possession of sufficient reprocessed plutonium to create half a dozen bombs and hard at work developing enriched uranium as well.<sup>10</sup> Most analysts also suspect Iran of being well on its way toward mastering the enrichment process and hence on the verge of becoming a shadow, if not actual, nuclear power.<sup>11</sup> The international bazaar of Pakistani nuclear mastermind Dr. A. Q. Khan may be no more, but it certainly appears to have had brisk sales while it was open for business.<sup>12</sup> This does not mean that export controls are futile; the success of Dr. Khan demonstrates how crucial it is to prevent a future repetition of

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<sup>9</sup> See, e.g., UNITED NATIONS, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY, *Report of the Secretary-General's High-level Panel on Threats, Challenges and Change* 44 (2004), <http://www.un.org/secureworld/report2.pdf> (last visited Oct. 4, 2005); George Bush, Remarks on Weapons of Mass Destruction Proliferation (Feb. 11, 2004), <http://www.whitehouse.gov/news/releases/2004/02/20040211-4.html> (last visited Oct. 4, 2005).

<sup>10</sup> Glenn Kessler, *More N. Korean Bombs Likely, U.S. Official Says*, WASH. POST, July 16, 2004, at A18; David E. Sanger & William J. Broad, *North Korea Said to Expand Arms Program*, N.Y. TIMES, Dec. 6, 2004, at A1.

<sup>11</sup> See *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, IAEA Doc. GOV/2004/83 (Nov. 15, 2004), [http://www.iaea.org/Publications/Documents/Board/2004/gov2004-83\\_derestrict.pdf](http://www.iaea.org/Publications/Documents/Board/2004/gov2004-83_derestrict.pdf) (last visited Oct. 4, 2005); see also Douglas Frantz, *Iran Moving Methodically Toward Nuclear Capability*, L.A. TIMES, Oct. 21, 2004, at A1; Barbara Slavin, *Iran's Nuke Plans May Be Unstoppable*, USA TODAY, Aug. 30, 2004, at 13A.

<sup>12</sup> See Central Intelligence Agency, *Unclassified Report to Congress on the Acquisition of Technology Relating to Weapons of Mass Destruction and Advanced Conventional Munitions, 1 July Through 31 December 2003* (2004), [http://www.cia.gov/cia/reports/721\\_reports/pdfs/721report\\_july\\_dec2003.pdf](http://www.cia.gov/cia/reports/721_reports/pdfs/721report_july_dec2003.pdf) (last visited Oct. 4, 2005).

such proliferation. However, except for a disarmament agreement along the lines of that reached with Libya,<sup>13</sup> export controls will not turn back the clock on these nascent nuclear states.

### B. *Deterrence*

It does not necessarily follow that if some states acquire WMD, they will elect to use them. One might expect that the fear of devastating retaliation from a military superpower like the United States would dampen any aggressive impulses on the part of a regional power with WMD. In fact, it is very plausible that states like Iran and North Korea desire nuclear capabilities because they may help in deterring the United States from intervening in their affairs or initiating an invasion similar to that carried out against Iraq. The trouble with this perspective is that it risks neglecting the role of third-party actors; a regime like the Taliban in Afghanistan may have been effectively deterred from attacking the United States, but it did not feel compelled to move against Al Qaeda, enjoying sanctuary within its borders at the time. Other states unwilling to face the virtually certain retaliation that a direct strike would invite may be willing to run the risk that an indirect attack might be difficult to trace to its origin. Also, even if a proxy attack is not a state's intention, there may be financial incentives for states to attempt to sell nuclear materials on the black-market. This would be a remarkably dangerous game to play, but a state like North Korea may feel that it has no other choice given its dire economic situation.<sup>14</sup> This threat cannot be brushed aside, for if WMD were to end up in the hands of a terrorist organization like Al Qaeda, there can be little doubt that it would attempt to use them. In sum, relying on the power

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<sup>13</sup> See James G. Lakely, *Libya Will Dismantle Its Weapons*, WASH. TIMES, Dec. 20, 2003, at A1.

<sup>14</sup> North Korean WMD sales are not merely a pessimistic hypothetical. Not only did North Korea reportedly sell uranium to Libya and uranium hexafluoride to Pakistan, but in negotiations with the United States a North Korean official threatened that its willingness to sell nuclear materials would depend on U.S. actions. See David E. Sanger, *North Korea Says it Now Possesses Nuclear Arsenal*, N.Y. TIMES, Apr. 25, 2003, at A1; Donald Kirk, *N. Korea Flirts With "Red Line,"* CHRISTIAN SCI. MONITOR, May 28, 2004, at 7.

of deterrence to prevent WMD attacks places a great deal of faith in a doctrine that is far from infallible and of little meaning to terrorists.

### *C. Defenses*

Relying on deterrence would not be as worrisome if there were robust defensive systems in place to prevent WMD attacks or minimize their damage when deterrence failed. The Bush Administration's multi-billion dollar national missile defense system lies at the center of controversy, as skeptics claim that its low reliability<sup>15</sup> and susceptibility to countermeasures will not provide any meaningful strategic benefits.<sup>16</sup> The critical issue is whether potential adversaries will rely on a long-range missile threat, as opposed to other means of delivery such as cruise missiles or infiltration. The United States is a soft target with many points of vulnerability,<sup>17</sup> and there is an understandable concern that missile defenses might embody a "Maginot Line" mentality that aggressive states could easily bypass altogether. This is not to say that the United States has failed to take steps to protect itself—the Department of Homeland

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<sup>15</sup> Thus far, test results of the missile defense system have not been promising. *See* David Stout & John H. Cushman, Jr., *Defense Missile For U.S. System Fails to Launch*, N.Y. TIMES, Dec. 16, 2004, at A1.

<sup>16</sup> *See* Richard L. Garwin, *A Defense That Will Not Defend*, WASH. Q., Summer 2000, at 109; George Lewis, Lisbeth Gronlund, and David Wright, *National Missile Defense: An Indefensible System*, FOREIGN POL'Y, Winter 1999-2000, at 120.

<sup>17</sup> For instance, customs officials inspect only about two percent of containers shipped to the United States. Justin S.C. Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT'L L. REV. 341, 342 (2002). *See also* STEPHEN FLYNN, AMERICA THE VULNERABLE: HOW OUR GOVERNMENT IS FAILING TO PROTECT US FROM TERRORISM (2004); GARY HART & WARREN B. RUDMAN, COUNCIL ON FOREIGN RELATIONS, AMERICA STILL UNPREPARED—AMERICA STILL IN DANGER (2002).

Security has implemented many important reforms<sup>18</sup>—but to point out that policy makers should not see domestic defensive measures as a reliable failsafe. The attacks of September 11, 2001 were a harsh reminder of how difficult it is to predict the manner in which terrorists choose to strike, and it may be that no amount of defense will suffice against a determined attacker.

#### D. Counterforce

Fearing that none of these largely defensive measures will be adequate, some commentators maintain that the risk of certain states using WMD or supplying them to terrorists may be substantial enough to justify disarmament by air strikes or even outright invasion.<sup>19</sup> Putting aside the legality of such attacks, the potential for devastating reprisals makes them increasingly unlikely. For example, besides its uncertain nuclear forces, North Korea possesses an artillery arsenal believed to contain some 10,000 long-range rockets, capable of devastating the South Korean capital of Seoul, a mere fifty miles from the De-Militarized Zone.<sup>20</sup> Also, nascent WMD states are increasingly dispersing their weapons facilities, placing them in hardened underground bunkers or locating them near civilian buildings to pose the risk of collateral damage.<sup>21</sup> For instance, Iran's suspected enrichment facilities are effectively immune from air strikes, hidden in large government complexes and in other secret locations.<sup>22</sup> Granted,

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<sup>18</sup> Press Release, Dep't of Homeland Security, Fact Sheet: A Better Prepared America: A Year in Review (July 20, 2004), [http://www.dhs.gov/dhspublic/interapp/press\\_release/press\\_release\\_0465.xml](http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0465.xml) (last visited Oct. 4, 2005).

<sup>19</sup> See, e.g., William C. Bradford, 'The Duty to Defend Them': A Natural Law Justification For the Bush Doctrine of Preventive War, 79 NOTRE DAME L. REV. 1365, 1470 (2004); Guy B. Roberts, *The Counterproliferation Self-Help Paradigm: A Legal Regime for Enforcing the Norm Prohibiting the Proliferation of Weapons of Mass Destruction*, 27 DENV. J. INT'L L. & POL'Y 483, 518 (1999); John C. Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 794 (2004).

<sup>20</sup> Kim Myong Chol, *Kim Jong Il's Military Strategy for Reunification*, COMP. STRATEGY, Oct. 2001, at 303, 313.

<sup>21</sup> See Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFF., Jan./Feb. 2004, at 147.

<sup>22</sup> David E. Sanger, *U.S. vs. a Nuclear Iran*, N.Y. TIMES, Dec. 12, 2004, at 8.

an outright invasion would probably uproot the WMD development of both Iran and North Korea, but in the wake of the war in Iraq, this appears politically, militarily, and financially unlikely for the near future.

*E. Interdiction*

Given these grim conclusions—the failure of export controls, the inadequacy of deterrence, the uncertainty of defenses, and the impracticality of counterforce—it is crucial that the United States have robust interdiction capabilities to prevent the transfer of WMD. Recognizing this need, President Bush announced on May 31, 2003 in Krakow, Poland the Proliferation Security Initiative (PSI), a multinational effort to equip states to prevent WMD proliferation.<sup>23</sup> The founding participants of the PSI issued a “Statement of Interdiction Principles,” identifying specific areas of cooperation, particularly in sharing intelligence information and providing mutual consent in interdiction missions.<sup>24</sup> Already the PSI has had some notable successes, including the September 2003 interception of a freighter bound for Libya with a shipment of parts for centrifuges used in uranium enrichment, which some observers believe was responsible for Libyan leader Moammar Gaddafi’s decision to accept inspections and disarm.<sup>25</sup>

The PSI is meant to “be consistent with existing national legal authorities and international law and frameworks.”<sup>26</sup> Generally, while a state has complete jurisdiction over its

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<sup>23</sup> See Press Release, U.S. Dep’t of State, Bureau of Nonproliferation: The Proliferation Security Initiative (July 28, 2004), at <http://www.state.gov/t/np/rls/other/34726.htm> (last visited Oct. 4, 2005).

<sup>24</sup> The White House, Office of the Press Secretary, Fact Sheet: Proliferation Security Initiative: Statement of Interdiction Principles (Sept. 4, 2003), <http://www.state.gov/t/np/rls/fs/23764.htm> (last visited Oct. 4, 2005).

<sup>25</sup> See Robin Wright, *Ship Incident May Have Swayed Libya*, WASH. POST, Jan. 1, 2004, at A18.

<sup>26</sup> U.S. Dep’t of State, Bureau of Nonproliferation, Fact Sheet: Proliferation Security Initiative Frequently Asked Questions (FAQ) (May 24, 2004), at <http://www.state.gov/t/np/rls/fs/32725.htm> (last visited Oct. 4, 2005).

airspace, territory, and internal waters, its authority diminishes in relation to the distance from its coastline.<sup>27</sup> Under the principle of exclusive flag state jurisdiction, vessels on the high seas<sup>28</sup> “are subject to no authority except that of the State whose flag they fly.”<sup>29</sup> The primary exceptions to this rule are listed in Article 110 of the U.N. Convention on the Law of the Sea (UNCLOS), granting warships the right to board and search a vessel when there is reasonable ground for suspecting that it is engaging in piracy, slave trading, unauthorized broadcasting, lacks a flag, or is flying a false flag.<sup>30</sup> Thus, unless one is willing to expand the definition of piracy to include WMD proliferation, which is probably quite a stretch,<sup>31</sup> this means that international law bars any state from interdicting suspected WMD traffickers on the high seas without the consent of the ship’s flag state.

The potential consequences of this restriction were brought into sharp relief in December 2002, when U.S. intelligence identified an unflagged North Korean freighter (the *So San*) crossing the Arabian Sea and contacted the Spanish government to request that its navy stop the

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<sup>27</sup> See Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation and International Law*, 30 YALE J. INT’L L. 507, 525-526 (2005).

<sup>28</sup> According to the U.N. Law of the Sea Convention, the high seas are beyond a state’s “exclusive economic zone,” which is a maximum of 200 nautical miles from its twelve-mile territorial sea. United Nations Convention on the Law of the Sea, art. 3, 57, 86, U.N. Doc. A/CONF. 62/122, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 (1994) [hereinafter UNCLOS].

<sup>29</sup> S.S. Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 25 (Sept. 7). This principle was codified in UNCLOS *supra* note 28, art. 92(1). See Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526, 527 n.9 (2004). Byers also notes that the regime of high seas freedom also applies to aircraft beyond a state’s territorial seas. *Id.* at 527 & n.13.

<sup>30</sup> UNCLOS, *supra* note 28, art. 110(1).

<sup>31</sup> See Joyner, *supra* note 27, at 533.

vessel and inspect it for illicit cargo.<sup>32</sup> Spanish special forces boarded the ship, uncovering a cache of Scud missiles hidden beneath sacks of cement. Shortly thereafter, Yemeni government officials came forward and claimed ownership, declaring that they had purchased the missiles from North Korea for defensive purposes. Since international law does not bar such a sale, the United States and Spain allowed the *So San* to proceed, accepting an agreement from the Yemeni president not to make further purchases. This incident was disturbing not for its specific facts—the boarding itself was legal because the ship was flagless—but rather because it highlighted the limited legal authority that would exist for similar operations in the future. If the *So San* had been flying a North Korean flag, and refused to consent to boarding, international law would prohibit interdiction, even if there was a strong certainty that it carried WMD.

Making the best of its limited legal authority, the PSI is focusing on streamlining the process for acquiring the consent of flag states to board their vessels, thereby satisfying the conditions of UNCLOS. Besides the provisions addressing mutual consent in the PSI's "Statement of Interdiction Principles,"<sup>33</sup> the United States has signed six ship-boarding agreements including some of the world's major shipping registry states, establishing bilateral procedures for boarding vessels suspected of carrying WMD or related materials.<sup>34</sup> Modeled

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<sup>32</sup> See Jofi Joseph, *The Proliferation Security Initiative: Can Interdiction Stop Proliferation?* ARMS CONTROL TODAY, June 2004, at 7; Thom Shanker, *Threats and Responses: Arms Smuggling; Scud Missiles Found on Ship of North Korea*, N.Y. TIMES, Dec. 11, 2002, at A1.

<sup>33</sup> See *supra* note 24.

<sup>34</sup> The United States has signed agreements with Liberia (Feb. 11, 2004), Panama (May 12, 2004), the Marshall Islands (Aug. 13, 2004), Croatia (June 1, 2005), Cyprus (July 25, 2005), and Belize (Aug. 4, 2005). Each of these agreements enables a party to request that the other confirm the nationality of the ship in question and, if needed, authorize interdiction. For the text of the agreements, see U.S. Dep't of State, Ship Boarding Agreements, at <http://www.state.gov/t/np/c12386.htm> (last visited Oct. 4, 2005).

after counter-narcotics arrangements, these agreements have the effect of limiting the number of flag states a proliferating state can rely upon in transporting illicit materials under the protection of UNCLOS. Despite this initial progress, securing the assent of the remaining key shipping registry states could be difficult given that many states that offer “flags of convenience” (allowing registration with little regulation or oversight) are highly dependent on the earnings from such transactions and may be reluctant to grant consent.<sup>35</sup> Unless the United States can reach ship-boarding agreements with virtually all flag states, traffickers will retain options for shipping WMD effectively immune from interdiction authority.<sup>36</sup> Moreover, even if universal participation were possible, the most likely proliferators, such as Pakistan, Iran and North Korea, could always elect to transport WMD shipments under their own flag, thereby guaranteeing that consent would not be forthcoming.

Realistically, if the United States were to receive intelligence reports indicating that a North Korean ship was transporting a completed nuclear device on the high seas, the lack of consent would surely not be a barrier to its decision to interdict. This poses a gap between the stated objectives of the PSI and its legal authority to achieve them. The threat posed by WMD is simply too great to allow a pocket of immunity under UNCLOS to prevent all interdiction efforts without consent, regardless of the magnitude of the threat. The notion that some states should profit from lending the use of their flag as a shield against inspection is likewise untenable in an age of WMD. Instead, there should be a global norm against WMD proliferation that is all-

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<sup>35</sup> See ANDREAS PERSBO & IAN DAVIS, *SAILING INTO UNCHARTED WATERS? THE PROLIFERATION SECURITY INITIATIVE AND THE LAW OF THE SEA* 8-9 (2004).

<sup>36</sup> See Joel A. Doolin, *Operational Art for the Proliferation Security Initiative* 5 (2004) (unpublished final paper, Naval War College), *available at* <http://www.fas.org/man/eprint/doolin.pdf> (last visited Oct. 4, 2005).

inclusive, holding any state that transfers WMD responsible, regardless of nationality. The rest of this article will focus on achieving this goal through a global quarantine.

This is not meant to imply that interdiction will suffice as an exclusive or even primary strategy to combat WMD. Interdiction missions require extraordinary intelligence, timing and coordination to be successful. Detecting plutonium is incredibly difficult given its faint radiation emission,<sup>37</sup> and monitoring biological and chemical weapons is even more challenging since their precursor elements are often dual-use in nature, posing the same dilemmas that plague export control decisions.<sup>38</sup> Far preferable are negotiated disarmament agreements or confidence building measures that could eliminate the desire of states to acquire WMD in the first place. However, given the limitations of arms control measures illustrated in this Part, if states do choose to develop and sell WMD, interdiction may be the last viable line of defense against their use.

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<sup>37</sup> See Michael Levi, *Uncontainable: North Korea's Loose Nukes*, NEW REPUBLIC, May 26, 2003, at 11.

<sup>38</sup> Interview with Ashley Roach, Attorney-Adviser, Office of the Legal Adviser, U.S. Dep't of State, in Washington D.C. (Oct. 25, 2004).

## II. INTERNATIONAL LAW, SELF-DEFENSE, AND INTERDICTION

Given that the provisions of UNCLOS will not support a robust interdiction regime, the key issue is how to establish a legal foundation for a global quarantine against WMD. According to some scholars, the specter of terrorists gaining access to WMD necessitates a re-conceptualization of Article 51<sup>39</sup> of the U.N. Charter, the main provision concerning self-defense.<sup>40</sup> Along these lines, the U.S. *National Security Strategy* aims to re-conceptualize the notion of imminent threat, reserving what it describes as an option to take preemptive (or, more accurately, preventive<sup>41</sup>) actions against threats to national security.<sup>42</sup> Others believe that Article 51 should remain intact. For instance, the U.N. High-level Panel on Threats, Challenges and Change, a blue ribbon commission convened by Secretary-General Kofi Annan to analyze emerging security concerns, stated unequivocally in its December 2004 report that Article 51

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<sup>39</sup> U.N. CHARTER art. 51, <http://www.un.org/aboutun/charter/> (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

<sup>40</sup> See, e.g., Michael J. Glennon, *The Fog of War: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 541 (2002).

<sup>41</sup> See Lawrence Freedman, *Prevention, Not Preemption*, WASH. Q., Spring 2003, at 105.

<sup>42</sup> U.S. GOVERNMENT, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 15 (2002), <http://www.whitehouse.gov/nsc/nss.pdf> (last visited Oct. 4, 2005).

“needs neither extension nor restriction of its long-understood scope.”<sup>43</sup> This Part will assess these clashing positions, outlining how a global quarantine is supported by international law.

To provide a sense of perspective, it is worth noting that the drafters of the U.N. Charter, which celebrates its sixtieth anniversary on June 26, 2005, faced a very different security environment from today, centered on the threat of land invasion and aerial bombardment. The terminology of Article 51 was thus enmeshed in an international context with a very conspicuous and unambiguous notion of what qualified as an armed attack.<sup>44</sup> Today, the prime danger to the United States is not an army charging across the border, but an individual stepping off a plane with a suitcase of plutonium. Against what columnist Thomas Friedman artfully describes as “people of mass destruction,”<sup>45</sup> there is likely to be little warning, limited ability to defend, and an uncertain target for retaliation.

Such changing conditions often lead states to consider whether they should adapt their existing security frameworks to meet the new threat. W. Michael Reisman notes that innovations in science and technology often create a “legal gap in which authority becomes uncertain. . . . When some of these factors change to the point that communities can no longer assure their defense within the ambit of inherited law, those charged with national defense inevitably demand changes in the law.”<sup>46</sup> The unique security circumstances surrounding air travel, for instance,

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<sup>43</sup> UNITED NATIONS, A MORE SECURE WORLD, *supra* note 9, at 3.

<sup>44</sup> Similarly, although based on ancient maritime principles, UNCLOS is also product of the Cold War. For instance, today it may seem a bit anachronistic for a document to authorize the boarding of a ship and prosecution of individuals if they are broadcasting illegally, but not if they are transporting a nuclear bomb. *See* UNCLOS, *supra* note 28, art. 109.

<sup>45</sup> Thomas L. Friedman, *The Suicide Supply Chain*, N.Y. TIMES, Dec. 9, 2004, at A41.

<sup>46</sup> W. Michael Reisman, *Editorial Comment: Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82, 82 (2003).

have required corresponding modifications in the interpretation of privacy law.<sup>47</sup> The inherent difficulties of border control, likewise, have necessitated a relaxed standard of reasonable suspicion for checkpoint searches.<sup>48</sup> It is inevitable that the threats posed by WMD and terrorism will also open up legal gaps that policy makers and national security officials will draft legislation to bridge.<sup>49</sup> The USA Patriot Act,<sup>50</sup> officially titled “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism,” is one such example.

The crucial issue is how to ensure that such legal remedies do not extend beyond the apparent gap and begin to overreach, perhaps infringing upon civil liberties.<sup>51</sup> In the domestic setting, courts assist legislators in determining the proper constitutional bounds of enforcement activity; the U.S. Supreme Court has upheld brief, suspicion-less searches at highway checkpoints to combat drunk driving,<sup>52</sup> but has declined to extend that authority to interdict

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<sup>47</sup> See, e.g., *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1984).

<sup>48</sup> See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

<sup>49</sup> See Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777, 777 (2004) (“The traditional Fourth Amendment search-and-seizure doctrine was fine for an age of flintlocks, and maybe even for an age of automatic weapons. . . . But one must wonder whether our traditional constitutional doctrine, without more, is up to the task of governing all searches and seizures in an age of weapons of mass destruction and potential terrorism.”); Ronald J. Sievert, *Meeting the Twenty-First Century Terrorist Threat Within the Scope of Twentieth-Century Constitutional Law*, 37 HOUS. L. REV. 1421 (2000).

<sup>50</sup> USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>51</sup> See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J., 23, 34 (2002).

<sup>52</sup> *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

illegal narcotics.<sup>53</sup> This kind of fine-tuned balancing is particularly problematic in the international arena, which lacks comparable institutional authorities. Within the anarchic international system, guiding rules are more malleable and in the shadow of the constant potential resort to military force. In modern international law, Reisman observes, “Doctrines are positioned at the interface of law and power.”<sup>54</sup>

The United Nations Charter includes provisions meant to balance competing interests in international affairs. On the one hand, the U.N. Charter incorporates the “inherent right of individual or collective self-defense” into Article 51, acknowledging that there may be instances when a state cannot wait for the United Nations to act before defending itself.<sup>55</sup> On the other, the U.N. Charter protects the notion of sovereignty, based on the principle that a state should be free from interference in its domestic affairs if it has not violated the rights of another state.<sup>56</sup> It is not always clear what degree of deference to sovereignty is appropriate, however, given the U.N. Charter’s parallel mandate in Article 2(4) that all member states shall refrain from the threat of force “against the territorial integrity or political independence of any state.”<sup>57</sup> Certainly sovereignty should not act as a shield protecting a state from all foreign intervention up until the point that it attacks another state, regardless of its other actions. If a modern-day Hitler were to come to power and begin to develop nuclear weapons, FDR’s quarantine notion—and perhaps yet more active measures—would be only sensible. Increasingly, scholars are defining

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<sup>53</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

<sup>54</sup> Reisman, *supra* note 46, at 90.

<sup>55</sup> U.N. CHARTER, *supra* note 39, art. 51.

<sup>56</sup> *Id.*, art. 2(7).

<sup>57</sup> *Id.*, art. 2(4).

sovereignty as a source of responsibility as much as a claim of immunity.<sup>58</sup> Under this conception, states may lose their sovereign status if they fail to protect their citizens or become a menace to the international community by trafficking in WMD. A correlated duty of other states might be to forcibly prevent such nations from carrying out genocide against their citizens or selling WMD.<sup>59</sup>

Arguably, despite the fact that there is no customary rule against acquiring WMD, such weapons in the hands of brutal and aggressive regimes may pose an inherent threat to world peace, placing them at odds with Article 2(4). The question, though, is where to draw the line that triggers the authority of other states to respond in self-defense. Article 51 on its face allows self-defense only in response to an armed attack.<sup>60</sup> The main rationale for a plain reading of Article 51 is to eschew the unavoidable elasticity of self-interested interpretations of what constitutes a threat to a state's security. As Michael Glennon puts it, "What is self-defense to one state is aggression, armed reprisal, armed attack, intervention, or forcible counter-measures to another."<sup>61</sup> States with axes to grind may set the threshold of danger artificially low, instigating wars that might have been avoided through diplomacy, containment, or other means.<sup>62</sup> Instead, requiring the actual employment of force establishes a bright-line rule that is at least theoretically

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<sup>58</sup> See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 13 (2001), available at <http://www.dfait-maeci.gc.ca/iciss-ciise/pdf/Commission-Report.pdf> (last visited Oct. 4, 2005).

<sup>59</sup> See Feinstein & Slaughter, *supra* note 21, at 137.

<sup>60</sup> See *supra* note 39.

<sup>61</sup> Glennon, *supra* note 40, at 558.

<sup>62</sup> This, of course, is the charge many legal scholars level against the United States regarding Operation *Enduring Freedom* in Iraq. See, e.g., Lucy Martinez, *September 11th, Iraq, and the Doctrine of Anticipatory Self-Defense*, 72 U. MO. KANSAS CITY L. REV. 123, 182 (2003).

unambiguous.<sup>63</sup> The trouble with this standard is that such a restrictive notion of self-defense is becoming increasingly difficult to sustain. According to one scholar, “The destructive nature of [WMD] requires that the point of unacceptable danger move further in time from the actual moment of aggressive use.”<sup>64</sup> The United States cannot be expected to wait until an attack like September 11th occurs before acting against a terrorist organization like Al Qaeda. In such circumstances, deterrence is untenable and there is little chance of reaching settlement or providing an adequate defense.

To provide flexibility to Article 51’s bright-line rule, the U.N. High-level Panel invoked customary law to identify a state’s right to defend itself against imminent threats.<sup>65</sup> Based upon former U.S. Secretary of State Daniel Webster’s principles articulated in the famous Caroline Case, states can respond with proportionate force to a threat that leaves no choice of means and not a “moment for deliberation.”<sup>66</sup> Again, the problem is that even the standard of imminent threat may be inadequate in responding to WMD proliferation, since it is difficult to conceive of

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<sup>63</sup> In practice, the bright-line rule has been difficult to apply. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 (June 27, 1986) (Merits Phase).

<sup>64</sup> Roberts, *supra* note 19, at 538.

<sup>65</sup> UNITED NATIONS, A MORE SECURE WORLD, *supra* note 9, at 63 (“[A] threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate.”) (emphasis in original). *See also* DEREK W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 185 (1958); Richard G. Maxon, *Nature’s Eldest Law: A Survey of a Nation’s Right to Act in Self-Defense*, PARAMETERS, Autumn 1995, at 55.

<sup>66</sup> Letter from Daniel Webster to Lord Ashburton. Aug. 6, 1842, reprinted in John Bassett Moore, ed., 2 INT’L L. DIGEST 412 (1906). For a discussion of the case, see R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82, 89 (1938).

many real-world scenarios that would satisfy the Caroline criteria.<sup>67</sup> As Elaine Bunn points out, “the closer to the ‘imminent use’ end of the spectrum a situation falls, the easier preemption is to justify politically, but the harder it may be to be operationally decisive, because the adversary will likely have protected the intended targets of preemption . . . .”<sup>68</sup> A traditional standard of imminence still requires the United States to wait until the September 11th terrorists are about to board their planes, rather than go after the source of the threat. President George Bush articulated this concern in his 2003 State of the Union address: “Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike?”<sup>69</sup> At the same time, this does not mean that WMD possession is any more practical of a standard than use or imminent use. As Part I illustrated, counterforce against states with WMD is extremely problematic, meaning that to be feasible the United States would probably have to attack a state as it was in the process of developing WMD, a remarkably expansive form of self-defense that is particularly liable to abuse and flawed intelligence assessments.

The High-level Panel acknowledged that “The problem arises where the threat in question is not imminent but still claimed to be real . . . .”<sup>70</sup> In such cases, the Panel urged not the abandonment of Article 51, but recourse to Article 39 of the U.N. Charter. Since Article 39 empowers the Security Council to recommend military measures in response to “any threat to the

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<sup>67</sup> See W.T. Mallison, Jr., *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 GEO. WASH L. REV. 335, 348 (1962).

<sup>68</sup> M. Elaine Bunn, *Preemptive Action: When, How, and to What Effect?*, STRATEGIC FORUM, July 2003, at 4. Moreover, the level of force required to destroy a terrorist threat may not always be strictly proportional.

<sup>69</sup> George W. Bush, State of the Union Address (Jan. 28, 2003), <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html> (last visited Oct. 4, 2005).

<sup>70</sup> UNITED NATIONS, A MORE SECURE WORLD, *supra* note 9, at 63.

peace, breach of the peace, or act of aggression,”<sup>71</sup> a state that cannot legally pursue independent action under Article 51 can always turn to the Security Council for authorization, even for a preventive military operation.<sup>72</sup> The dilemma with this alternative, as the world is well aware from the wrangling at the Security Council in the months prior to the 2003 U.S. invasion of Iraq, is the potential for Council stalemate or a veto in an authorization vote. According to the Panel, if the Security Council elects to withhold its consent for a preventive action, “there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment—and to visit again the military option.”<sup>73</sup> While this reasoning might be convincing in considering whether to attack and disarm a state that is gradually developing a WMD arsenal, in which case there might be time to make a subsequent request to the Security Council down the road, with interdiction missions there may be no second chance; once the weapons go they are gone and the intelligence goes stale.

Article 39 alone, then, is insufficient to deal with fleeting windows of opportunity of the kind associated with interdiction. Without a more robust and streamlined process, rather than risk delay and dissension at the Security Council, the United States would probably act on its own (or with other PSI participants), claiming a rationale of self-defense.<sup>74</sup> To prevent this outcome, the United Nations should provide an avenue for multilateral interdiction efforts, adopting a bright-line rule against the transfer of WMD. Such a reform is in accord with the U.N. Charter because the proliferation of WMD is not defensive; rather, it is a form of aggression against world order that merits a limited form of protection in the same vein. When a state elects not merely to build

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<sup>71</sup> U.N. CHARTER, *supra* note 39, art. 39.

<sup>72</sup> UNITED NATIONS, A MORE SECURE WORLD, *supra* note 9, at 62.

<sup>73</sup> *Id.*, at 63.

<sup>74</sup> *See infra* Part III.C.

but to transfer WMD, placing other states in danger, it sacrifices the sovereignty its ships and planes would traditionally enjoy in international waters and airspace. In a sense, even though there may not be a traditional state of belligerency, the United Nations should treat WMD as international contraband, permitting search and seizure when there is reasonable suspicion of their presence.<sup>75</sup> To be sure, the potential for an abuse of interdiction power will remain, even when carried out multilaterally. Establishing a global quarantine in principle will not eliminate the problems of proof surrounding authorization of interdiction operations in practice, but it is a step in the right direction. The next Part will attempt to map out a potential path for those steps to take.

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<sup>75</sup> See Ruth Wedgwood, *Self-Defense, Pirates, and Contraband*, WALL ST. J., May 29, 2003, at A22.

### III. BUILDING BLOCKS OF A GLOBAL QUARANTINE

An effective global quarantine system will require an integrated framework of initiatives, supplying both the legal foundation to establish a global norm against WMD proliferation and the needed capabilities to carry out interdiction missions. There are doubtless numerous combinations of means to achieve this end, but this final Part will focus on those I believe are most promising: first, the International Maritime Organization (IMO) can articulate general principles forbidding the transfer of WMD on the high seas; second, the U.N. Security Council can pass a resolution binding the international community to these rules; finally, the PSI can enforce these provisions, acquiring a U.N. mandate as needed. These three proposals are not mutually exclusive, since the PSI can always act independently as a last resort, but they would ideally operate complementarily.

#### *A. International Maritime Organization*

The London-based IMO, established in 1948 to promote maritime safety, has adopted about forty conventions and protocols since its inception.<sup>76</sup> At a December 2002 Conference on Maritime Security,<sup>77</sup> IMO members approved a number of amendments to the 1974 Safety at Sea Convention<sup>78</sup> (SOLAS), establishing a comprehensive new security regime for international shipping that entered into force in July 2004. The centerpiece of these changes is the International Ship and Port Security Code (ISPS Code), requiring all vessels and port facilities to

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<sup>76</sup> PERSBO & DAVIS, *supra* note 35, at 70.

<sup>77</sup> See Press Release, International Maritime Organization, IMO Adopts Comprehensive Maritime Security Measures (Dec. 17, 2002), at [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=583&doc\\_id=2689](http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689) (last visited Oct. 4, 2005).

<sup>78</sup> International Convention for the Safety of Life at Sea, Nov. 1, 1974, 1184 U.N.T.S. 276 (entered into force May 25, 1980).

develop security plans in order to reduce their vulnerability to terrorism.<sup>79</sup> Initial reports indicate that by August 2004 nearly 90% of the over 9,000 declared port facilities had approved security plans.<sup>80</sup> The ISPS Code also requires a number of tracking, monitoring, and security alert systems that should be useful in WMD interdiction missions.<sup>81</sup>

Perhaps more relevant to a quarantine regime is the IMO's 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation<sup>82</sup> (SUA). Originally drafted to ensure the extradition and prosecution of persons who attacked or attempted to seize ships at sea, the IMO's Legal Committee began reviewing the SUA Convention in the wake of September 11th to consider amendments that would broaden the range of covered offenses to include acts of terrorism and introduce provisions for boarding vessels suspected of being involved in terrorist activities.<sup>83</sup> Specifically, the United States proposed including boarding provisions that would streamline the process of gaining consent from flag states to inspect their vessels, similar to those included in its agreements with Liberia, Panama, the Marshall Islands, Croatia, Cyprus, and Belize.<sup>84</sup> At its October 2002 meeting, the Legal Committee also discussed seven proposed criminal offenses, two of which concerned the use of a ship to transport WMD.<sup>85</sup>

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<sup>79</sup> Press Release, IMO Adopts Comprehensive Maritime Security Measures, *supra* note 77.

<sup>80</sup> Press Release, International Maritime Organization, Security Compliance Shows Continued Improvement (Aug. 6, 2004), at [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=892&doc\\_id=3760](http://www.imo.org/Newsroom/mainframe.asp?topic_id=892&doc_id=3760) (last visited Oct. 4, 2005).

<sup>81</sup> PERSBO & DAVIS, *supra* note 35, at 71.

<sup>82</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222 (entered into force Mar. 1, 1992).

<sup>83</sup> PERSBO & DAVIS, *supra* note 35, at 72.

<sup>84</sup> Mark T. Alper & Charles A. Allen, *The PSI: Taking Action Against WMD Proliferation*, THE MONITOR, Spring 2004, at 5. See *supra* note 34.

<sup>85</sup> PERSBO & DAVIS, *supra* note 35, at 72.

The Legal Committee's response to the American proposals has been mixed. At a meeting in April 2004, the Committee "[R]ecognized that the inclusion of boarding provisions implied a substantial inroad into the fundamental principles of freedom of navigation on the high seas and the exclusive jurisdiction of flag States over their vessels."<sup>86</sup> Resolution of these issues will likely come in October 2005, when the IMO will hold a diplomatic conference to consider adopting the proposed SUA amendments.<sup>87</sup> Ideally, there will be a clear pronouncement condemning the transport of WMD as a threat to maritime security.<sup>88</sup> The IMO should also take a firm stance against the abuse of flag state privileges, developing rules that hold flag states and shippers responsible if their cargo contains WMD.<sup>89</sup> These provisions will then form the normative substructure for building a global quarantine regime.

#### B. U.N. Security Council

In April 2004, the U.N. Security Council unanimously passed Resolution 1540, its strongest proclamation against the proliferation of WMD to date.<sup>90</sup> Acting under Chapter VII of the U.N. Charter, Resolution 1540 mandates that "all States shall refrain from providing any

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<sup>86</sup> Press Release, Legal Committee, International Maritime Organization (Apr. 19-23, 2004), at [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=280&doc\\_id=3352](http://www.imo.org/Newsroom/mainframe.asp?topic_id=280&doc_id=3352) (last visited Oct. 4, 2005).

<sup>87</sup> Press Release, International Maritime Organization, Amendments to Suppression of Unlawful Acts (SUA) Treaties Set for Adoption in October 2005, at [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=848&doc\\_id=4416](http://www.imo.org/Newsroom/mainframe.asp?topic_id=848&doc_id=4416) (last visited Oct. 4, 2005).

<sup>88</sup> Of course, the SUA rules will need to permit certain military activities such as the updating of U.S. nuclear forces abroad and the movement of U.S. nuclear submarines. They will also need to allow for currently legitimate commerce in fuel enrichment technology supervised by the International Atomic Energy Agency. Such exceptions, carefully delineated, should not subsume the rule itself.

<sup>89</sup> PERSBO & DAVIS, *supra* note 35, at 90.

<sup>90</sup> SC Res. 1540, UN Doc. S/RES/1540 (2004).

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.”<sup>91</sup> It also requires all states to “adopt and enforce appropriate effective laws” to prevent assisting non-state actors and to “establish domestic controls to prevent the proliferation of [WMD].”<sup>92</sup> A special committee of the Security Council is responsible for monitoring the resolution’s implementation based on reports from member states, the first of which were due in October 2004.<sup>93</sup> On the positive side, Resolution 1540 is a step forward because “it makes strong national controls and enforcement a requirement rather than an option.”<sup>94</sup> At the very least, it reaffirms the universal appreciation of the threat posed by WMD, and forces states to examine their own nonproliferation laws and practices. The United States should work together with its fellow members on the implementation committee to seriously examine the reports submitted and offer model legislation to states that fall short of compliance.<sup>95</sup>

At the same time, Resolution 1540 only addresses part of the WMD threat. By far the most glaring limitation is the specific restriction of several portions of the document to transfers

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<sup>91</sup> *Id.*, para 1.

<sup>92</sup> *Id.*, para 2, 3.

<sup>93</sup> *Id.*, para 4. By the October deadline, only fifty-four countries had submitted their reports, a response rate of less than one-third. *See* Andrew Semmel, Remarks to the Asia-Pacific Nuclear Safeguards and Security Conference, Sydney, Australia (Nov. 8, 2004), at <http://www.state.gov/t/np/rls/rm/38256.htm> (last visited Oct. 4, 2005). As of March 2005, a total of 105 countries had reported to the committee. *See* Nuclear Threat Initiative, WMD 411, Provisions of Resolution 1540, at [http://www.nti.org/f\\_wmd411/f2n1.html](http://www.nti.org/f_wmd411/f2n1.html) (last visited Oct. 4, 2005).

<sup>94</sup> Andrew Semmel, Remarks at Conference on Global Nonproliferation and Counterterrorism: United Nations Security Council Resolution 1540 (Oct. 12, 2004), at <http://www.state.gov/t/np/rls/rm/37145.htm> (last visited Oct. 4, 2005).

<sup>95</sup> *See* UNITED NATIONS, A MORE SECURE WORLD, *supra* note 9, at 45.

to non-state actors. It may be true that non-state actors represent the most serious WMD threat, but this restriction clashes with Resolution 1540's unqualified opening statement that proliferation—of all forms—constitutes a threat to international peace and security.<sup>96</sup> Even if a WMD transfer takes place between states, it represents proliferation and is a threat to international security. Every sale, every shipment, leads to a greater supply of WMD materials and further opportunities for diversion onto the black-market. A follow-on resolution could thus expand the scope of Resolution 1540 to apply to all transfers of WMD, regardless of the status of the proliferation recipient.<sup>97</sup> It would explicitly declare that no transportation method—by sea, land, or air—in the pursuit of WMD transfer will receive sovereign protection, being an affirmative danger to the security of all states.

Resolution 1540 is also very conservative in its enforcement procedures, merely calling 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 [WMD].”<sup>98</sup> Given that current international law does not allow for any form of nonconsensual interdiction on the high seas, this provision may be little restraint on WMD suppliers and flag-state traffickers. Although it is always possible that the Security Council could authorize a one-time interdiction

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<sup>96</sup> SC Res. 1540, preamble.

<sup>97</sup> As mentioned in note 88, the resolution would need to have some exception for peaceful transfers of nuclear material such as under the auspices of the International Atomic Energy Agency. Alternatively, the Security Council could pass a resolution expanding interdiction authority in dealing with a specific state—a more focused quarantine. There are some indications that the United States is considering pushing for such a resolution vis-à-vis North Korea. See David E. Sanger, *White House May Go to U.N. Over North Korean Shipments*, N.Y. TIMES, Apr. 25, 2005, at A13.

<sup>98</sup> SC Res. 1540, para 10.

mission under Article 39 and 42 of the U.N. Charter,<sup>99</sup> states will be reluctant to bring an interdiction request if the legal and institutional framework is not in place to support it, inviting stalemate in the Council.

Instead, the Security Council should either attempt to take a leading role itself in institutionalizing interdiction operations, or loosely coordinate with the PSI which can carry out its own missions, along the lines of NATO's military action in Kosovo in 1998.<sup>100</sup> On balance, the former route is preferable in order to ensure the Security Council's continued relevance in nonproliferation matters. By embracing Resolution 1540's implementation committee, the Security Council could institutionalize it and establish an "interdiction committee" empowered to decide cases on short notice.<sup>101</sup> In effect, the committee could serve to expedite interdiction requests, reviewing the supporting intelligence (which is often of a fleeting nature) and making a rapid recommendation.<sup>102</sup> Of course, even if the interdiction committee meets in secret, many states will be reluctant to divulge sensitive intelligence in a multinational setting. In such an event, if a state elects to pursue an interdiction mission outside the auspices of the Security Council, perhaps through the PSI (as discussed in Part III.C, *infra*), the committee could review the results of the interdiction, declaring an appropriate level of compensation if the search turns up empty-handed. Such a regime has precedent in UNCLOS itself, which in the section that deals with exceptions to the flag state exclusivity rule requires compensation to the boarded ship

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<sup>99</sup> See *supra* note 71.

<sup>100</sup> See PERSBO & DAVIS, *supra* note 35, at 75-76.

<sup>101</sup> *Id.*, at 91; Andrew Prosser, The Proliferation Security Initiative in Perspective (June 16, 2004) (unpublished manuscript), at <http://www.cdi.org/pdfs/psi.pdf> (last visited Oct. 4, 2005).

<sup>102</sup> Voting in the interdiction committee could perhaps parallel the Security Council itself, with veto-holding permanent members and a limited number of additional seats on a rotating basis.

“for any loss or damage that may have been sustained” if suspicions prove unfounded.<sup>103</sup> Such a policy essentially transforms a form of property rule protection for ships suspected of transporting WMD into a liability regime, with a basis for accountability both before and after the interdiction mission.<sup>104</sup> Setting monetary compensation for a violation of sovereignty is surely not a simple task, but the alternative of never allowing searches regardless of the level of suspicion is untenable.

### *C. Proliferation Security Initiative*

An integrative approach securing Security Council authorization for any interdiction mission would be ideal, particularly given that multilateral cooperation in tasks such as freezing assets of WMD traffickers and providing access to air space and foreign bases is likely integral to its success.<sup>105</sup> Especially if the Security Council integrates the SUA Convention amendments into an expanded version of Resolution 1540, partnerships like the PSI would enjoy new legal authorities to act upon as opposed to the current limitations imposed by UNCLOS. Although the PSI’s gradual accumulation of bilateral boarding agreements may at some point form the basis for a universal right of interdiction based on customary law, this is unlikely for the foreseeable future.<sup>106</sup>

Realistically, it may be that the United States has to “go it alone” in the event that the Security Council does not authorize an interdiction mission that U.S. leaders believe is vital to its

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<sup>103</sup> UNCLOS, *supra* note 28, art. 110(3); *see also* R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 216 (3d ed. 1999), 210.

<sup>104</sup> *See* Allen Buchanan & Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, *ETHICS & INT’L AFF.*, Winter 2004, at 1.

<sup>105</sup> *See* Michael Byers, *Preemptive Self-defense: Hegemony, Equality and Strategies of Legal Change*, *J. POL. PHIL.*, June 2003, at 171, 174.

<sup>106</sup> *See* Byers, *Policing the High Seas*, *supra* note 29, at 532-540.

national security. Even the U.N. High-level Panel acknowledged that the Security Council “may well need to be prepared to be much more proactive on [threats to international peace and security,] taking more decisive action earlier, than it has been in the past.”<sup>107</sup> In such an event, the United States may need to explore alternative avenues to support its action. One option is to turn to regional organizations, perhaps built on the PSI framework, and invoke Article 52(1) of the U.N. Charter: “Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action . . . .”<sup>108</sup> During the Cuban Missile Crisis of 1962, for example, the United States legitimized its maritime quarantine based on the provisions of the Rio Treaty of the Organization of American States, which sanctioned assistance to meet threats of aggression in the region.<sup>109</sup> Although some legal scholars were deeply critical of this justification,<sup>110</sup> a similar strategy could serve to impose an inspection zone in a troubled region, perhaps if intelligence indicated that North Korea was engaging in widespread sales of WMD materials. As legal scholar Ruth Wedgwood wryly observed, “If a maritime quarantine against offensive weapons was legal enough for John Kennedy, some might say, it should be legal enough for Ari Fleischer.”<sup>111</sup>

If even regional cooperation is not forthcoming, the United States would either assert a revised conception of self-defense or ultimately rely on what Michael Byers termed “exceptional

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<sup>107</sup> UNITED NATIONS, A MORE SECURE WORLD, *supra* note 9, at 64.

<sup>108</sup> U.N. CHARTER, *supra* note 39, art. 52(1).

<sup>109</sup> See Leonard C. Meeker, *Defense Quarantine and the Law*, 57 AM. J. INT’L L. 515, 516 (1963).

<sup>110</sup> See C. JOHN COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 470 (6th ed. 1967); THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 107 (2002).

<sup>111</sup> Wedgwood, *A Pirate is a Pirate*, *supra* note 6, at A12.

illegality,” wherein a state simply chooses to violate the law rather than seek to modify it.<sup>112</sup> Considering the politically sensitive nature of interdiction operations, and the need for international cooperation in such missions, it is crucial that the United States do everything it can to avoid this situation and maximize the possibility that action can be taken through the PSI and/or the Security Council.<sup>113</sup> A sensible starting point is to ensure that all interdiction decisions are based upon sound criteria. Numerous authors have put forward factors for consideration,<sup>114</sup> but the High-level Panel has produced a list that is the most relevant in this context, including (1) the seriousness of the threat; (2) the legitimacy of the purpose behind using military force; (3) whether the action is a last resort; (4) whether the means are proportional to the threat; and (5) whether there is a reasonable chance of success.<sup>115</sup>

Given the immense danger posed by WMD, the relative lack of ulterior motives for interdiction, the inability to defend against WMD use, and the focused nature of interdiction

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<sup>112</sup> See Byers, *Policing the High Seas*, *supra* note 29, at 543.

<sup>113</sup> Gareth Evans, *When is it Right to Fight?*, SURVIVAL, Autumn 2004, at 59, 78.

<sup>114</sup> See, e.g., *Id.*, at 75; Mallison, *supra* note 67, at 358; Terrence Taylor, *The End of Imminence?* WASH. Q., Autumn 2004, at 57, 68.

<sup>115</sup> UNITED NATIONS, A MORE SECURE WORLD, *supra* note 9, at 67 (“(a) Seriousness of threat: Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? (b) Proper purpose: Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes may be involved? (c) Last resort: Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed? (d) Proportional means: Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question? (e) Balance of consequences: Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences on inaction?”).

missions, these criteria should not be as hostile to interdiction as they may first appear. They are specific enough, however, to be preferable to a cost-benefit framework that boils down all the variables to the question of whether a state believes that the expected harm of a potential attack has reached an unacceptable level.<sup>116</sup> One appropriate sliding variable might be the nature of the WMD or precursor material, with nuclear weapons requiring a lesser degree of threat/imminence than chemical weapons or dual-use items.<sup>117</sup> Overall, these criteria should serve as a guiding principle for any actor or institution deciding on interdiction, be it the United States, the PSI, or the Security Council interdiction committee.

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<sup>116</sup> See Yoo, *supra* note 19, at 757.

<sup>117</sup> See GEORGE PERKOVICH ET AL., UNIVERSAL COMPLIANCE: A STRATEGY FOR NUCLEAR SECURITY 77 (Mar. 2005).

## CONCLUSION

Even before FDR applied the term to international affairs, states used quarantines to protect themselves from threats on the high seas, requiring the temporary detention of incoming ships and sailors to ensure that they did not pass on the plague or other infectious diseases. Today, since a local system of quarantine is impractical with the flood of international trade and travel, the quarantine must take on a global character, aiming to prevent the spread of WMD altogether. This article began in Part I by showing why a new framework is needed, analyzing how export controls, deterrence, defenses, or even more active disarmament measures may not suffice to contain the WMD threat. The potential for devastating retaliation cautions against offensive measures to counter the WMD build-up of states like North Korea and Iran, but equally a defensive posture of containment places enormous faith that those states will not attempt further proliferation, perhaps to non-state actors.

Part II then examined the legal principles behind a global quarantine, demonstrating that Article 51 of the U.N. Charter rests upon a notion of self-defense that may need to adapt in order to respond to catastrophic but non-imminent threats. The principle enshrined in the U.N. Charter of states waiting for the Security Council before taking action does not mesh well with the special characteristics of interdiction, rooted in speed and secrecy. To bring the concept of self-defense in line with present security needs, Part III explored the various international institutions available to serve as a framework for a global quarantine, proposing that the IMO can articulate principles which the Security Council can extend and universalize, relying on the PSI for enforcement.

As I acknowledge in Part III, this article does not claim to identify the sole path for achieving a global quarantine. Its main purpose is to demonstrate the urgency and sound legal basis for a quarantine, as well as offer some initial ideas for how to begin making it a reality.

Some observers may contend that my proposals go too far and there is only a modest chance that they will gain widespread approval. It may be that IMO members will refuse to make reforms to the SUA Convention, and that Resolution 1540 represents the furthest the Security Council is willing to go in countering proliferation. As Part III.C reflects, though, in that event the default situation is ever-increasing reliance on the PSI, since the threat posed by WMD will not go away and cannot be ignored. The prospect of a more robust role for the PSI, given the prominent position of the United States within it, may be disconcerting to much of the world. Many people are fearful of granting the United States any greater latitude in confronting proliferation and terrorism than it already possesses, especially in light of its failure to find any WMD in Iraq. However, as explained in Part III.B, the best way to maintain the relevance of international institutions like the Security Council is to frame them so that the United States and others have an incentive to use them. If the U.N. cannot expedite interdiction claims through a special committee, there is little chance at all that PSI nations will turn to it for authorization.

Other critics may object that these proposals do not go far enough. As mentioned in Part I.E, since interdiction relies heavily on intelligence capabilities and good fortune, some might conclude that forcible disarmament is the only reliable solution. Especially if a series of WMD terrorists attacks were to occur, I fear that victimized states would believe they had no other choice but to eliminate all WMD supplies beyond their allies. Given the incredible risk and likely damage from such a course, as outlined in Part I.D, I believe a global quarantine offers a middle ground approach with the best matching of ends and means. To avoid leaving interdiction to the United States alone, and to forestall more drastic disarmament measures, the world community should join together to draw a clear line in the sand, on the water, and in the air forbidding all forms of WMD transfer.