

4.2 Interdiction activities

US Under-Secretary of State John Bolton has acknowledged that some interdictions have already taken place,¹⁹² but for operational reasons such interdictions are rarely announced or discussed in public. The exception was the successful interdiction in October 2003 of centrifuge parts bound for Libya (as described in Box 4), which undoubtedly contributed to Libya's decision three months later to terminate its WMD programmes.

It is expected that future interdiction activities will focus on key “choke” points – strategic passages and harbours on the busiest trade routes, although the geographic limitations of the current ‘membership’ suggests that many sea routes between the countries of proliferation concern are not presently covered. The fact is that most current PSI interdictions will be limited to the territorial waters of participating states.

Moreover, although these activities demonstrate that the PSI is not just a series of meetings, such exercises and interdictions were being carried out prior to the arrival of the PSI, and it is hard to see what value-added it brings. Canada, for example, has recent pre-PSI experience of high-seas interdictions—and is seeking legal changes to allow such interdictions, following on its efforts in the mid-1990s to save the fish stocks of the North Atlantic.

The French and German governments have also been actively cooperating in interdiction efforts for some time, successfully intercepting several cargoes of dual-use materials suspected of being part of North Korean unconventional weapons acquisition programme.¹⁹³ Similarly, NATO has been engaged in maritime interdiction training exercises for decades, and as part of operation ‘Active Endeavour’ NATO ships have been patrolling in the Eastern Mediterranean monitoring shipping to detect and deter terrorist activity since October 2001.

In April 2003, NATO's mission in the Mediterranean was expanded to include the systematic boarding of suspect ships, but only with the compliance of the ships' masters and flag states. And as discussed in section 2.3 above, 33 boardings took place between April and November 2003. NATO is also to open a Maritime Interdiction Operations Training Centre in Crete.¹⁹⁴ Despite being in its infancy, the PSI does seem to have had some impact in halting the spread of WMD. If the PSI is to meet the challenge of improving its operational effectiveness, it will need to extend the scope of the initiative beyond its current ‘patchwork’ membership.

CHAPTER 5 The Future of the PSI

On 27 January 2004, the US and Polish presidents issued a joint statement in which they noted with satisfaction “...the growing support worldwide for our shared efforts to implement the Proliferation Security Initiative, announced by President Bush in Krakow in May 2003”.¹⁹⁵

The initiative can be strengthened in various ways. The most obvious is by increasing the ‘membership’ and securing the participation of key flag states and states that control geographically important areas, such as international straits. To say that the PSI has ‘worldwide’ support is a gross exaggeration of the current state of play, however. The participants need to secure support in the Middle East, in Africa and in South America, and to expand support in South and South East Asia, in order to claim that the PSI has become a worldwide movement.

However, given that many ‘flags of convenience’ are located in developing countries, many of which rely on the registration of ships to boost foreign currency earnings, convincing them to join the PSI will not be easy. In Panama, for instance, the fees charged for the registry in 1996 contributed five percent of the national budget.¹⁹⁶ In Liberia, where revenue from the registry accounted for approximately ten percent of the national budget before the civil war, in 1998 it contributed to up to 30 percent.¹⁹⁷

The current participants are mainly rich ‘first world’ nations in the North, and they may need to consider offering economic or other security incentives in order to widen participation to the South. It is not known, if Liberia and Panama received any such incentives from the United States in exchange for the recent bilateral boarding agreements, but Panama has just elected a new president and is currently negotiating a free trade agreement with the United States. Thus, the opportunity for horse-trading on this issue was certainly a possibility in the case of Panama.

Also, it is not only a matter of broadening participation, but deepening links between members, especially in relation to law enforcement and intelligence cooperation. As in any new regime or intergovernmental framework, getting the right balance be-

tween seeking to broaden and deepen the relationship is a difficult task. Two ways forward, which are certainly not mutually exclusive, are to work with the International Maritime Organisation in amending the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (as discussed in section 5.1 below), while at the same time seeking a resolution on counter-proliferation in the UN Security Council (as discussed in section 5.2).

Another option is to review the principle of 'state of necessity' and to admit that the PSI may, on certain occasions, conduct illegal operations. The illegality would be excused, however, by the grave threat that weapons of mass destruction constitute (as discussed in section 5.3 below)

A third way forward is to expand the concept of 'pre-emptive self defence'. This would be a risky and highly contentious approach, since outside of the United States, United Kingdom and a few of their close allies, there is widespread distrust of this agenda in the international community. This distrust has been exacerbated by the way that the US-led coalition handled the run up to war in Iraq and the current post-combat complications in achieving stability in that country. In short, the concept of 'pre-emptive self defence' is highly controversial and is subject to intense scrutiny and debate. Its applicability in the context of the PSI is discussed in section 5.4.

Finally, the linkage between movement on nuclear disarmament commitments under the NPT and broadening support for the PSI is discussed in section 5.5.

5.1 The International Maritime Organisation and the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation

The International Maritime Organisation (IMO), based in London, is the permanent international body established in 1948 to promote maritime safety. Maritime legislation is one of the IMO's most important concerns, having adopted about 40 conventions and protocols since its inception. These are amended regularly to keep them up to date with changes in world shipping. The IMO has also introduced measures to improve implementation of legislation by, for example, assisting flag states and encouraging the establishment of regional port state control systems.

In addition, the IMO renewed its focus on security issues in the wake of the terrorist attacks against the United States in September 2001, and agreed in December 2002 a new, comprehensive security regime for international shipping. That regime will enter into force in July 2004 and includes a number of mandatory security measures,

including several amendments to the 1974 Safety at Sea Convention (SOLAS). One of these amendments introduces the new International Ship and Port Security Code (ISPS Code).¹⁹⁸ According to the IMO, the Code provides several ways to reduce vulnerability:

Ships will be subject to a system of survey, verification, certification, and control to ensure that their security measures are implemented. This system will be based on a considerably expanded control system as stipulated in the 1974 Convention for Safety of Life at Sea (SOLAS). Port facilities will also be required to report certain security related information to the Contracting Government concerned, which in turn will submit a list of approved port facility security plans, including location and contact details to IMO.¹⁹⁹

Other amendments to the SOLAS are not only expected to enhance maritime security more generally, but also have the potential for further development as a global tracking and monitoring system to aid WMD interdictions on the high seas. These amendments include:

- A new timetable for the fitting of Automatic Information Systems (AIS) on ships;
- A requirement for ships' identification numbers to be permanently marked in a visible place either on the ship's hull or superstructure;
- A new requirement for ships to be issued with a Continuous Synopsis Record (CSR), which is intended to provide an on-board record of the history of the ship; and²⁰⁰
- A new requirement for all passenger and cargo ships above 500 gross tonnage to be provided with a ship security alert system by 2006.

According to the IMO, when activated the ship security alert system shall:

initiate and transmit a ship-to-shore security alert to a competent authority... , identifying the ship, its location and indicating that the security of the ship is under threat or it has been compromised. The system will not raise any alarm on-board the ship. The ship security alert system shall be capable of being activated from the navigation bridge and in at least one other location.²⁰¹

In addition to being tasked with developing performance standards for these ship security alarms, the IMO is also exploring performance guidelines for long-range ship identification and tracking systems.

Given all these important developments in maritime security measures, the IMO would seem to be the natural place to further develop the PSI, and especially to seek the authority necessary to engage in high seas interdictions. One option would be to amend the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention). The SUA Convention was introduced to ensure that appropriate action is taken against persons committing unlawful acts against ships, including the seizure of ships by force, acts of violence against passengers and crew, and the placing of explosive devices on board a ship.

Contracting Governments are obliged either to extradite or prosecute alleged offenders, thereby ensuring that they will be brought to justice wherever in the world they seek to hide. The importance attached to the Convention by the international community is shown by the fact that 95 states have become parties, 37 of them since 11 September 2001.²⁰² All PSI participants are parties to the Convention.²⁰³

The IMO's Legal Committee has been reviewing the SUA Convention and its related Protocol in the wake of 9/11. The proposed amendments, developed by a Correspondence Group, would significantly broaden the range of offences to include acts of terrorism which threaten the security of passengers and crews and the safety of ships; expand the extradition and prosecution obligations of Contracting Governments; and introduce provisions for boarding of vessels suspected of being involved in terrorist activities.²⁰⁴

At its October 2002 meeting, the Legal Committee discussed seven new proposed offences, four of which were concerned with terrorist activities, while the other three were directly relevant to the PSI. One of the new offences concerned the presence of tools or substances not usually used on a ship but useful in a weapon of mass destruction. Two other new proposed offences concerned the use of the ship for transport of substances to be used for mass destruction. The Committee agreed that work on the proposed amendments should continue in the Correspondence Group ahead of the spring 2003 Committee meeting, but since then progress appears to have stalled.

However, the UK Secretary of State for Foreign and Commonwealth Affairs has confirmed that the British government (presumably with the support of other PSI participating states) is working in the IMO to secure amendment to the SUA Convention to make it an "internationally recognised offence to transport WMD, their delivery systems and related materials on commercial vessels".²⁰⁵

Expanding the current amendment negotiations of the SUA Convention to enable boarding of vessels suspected of carrying WMD materials would seem to be an obvious solution. In addition, any country that refused to accept the amended treaty could, if its shipments posed a threat to international peace and security, be made the subject of a UN Security Council resolution that provides the necessary stop-and-search powers to other states.

5.2 Gaining legitimacy through the UN Security Council

Most, if not all, issues of legality would be set aside if the PSI participants could pass an appropriate resolution through the UN Security Council. The UN Charter provides that:

*The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security.*²⁰⁶

The Security Council has already, on several occasions, taken the view that the proliferation of WMD constitutes a threat to international peace and security – most recently in adopting Resolution 1540 (2004), discussed below. It could potentially go further, therefore, and authorise measures, including the use of armed force, to maintain that security by curbing or interdicting the trade in WMD materials. Decisions taken by the Security Council under Chapter VII of the Charter are legally binding on all UN members.

The Security Council has the authority to decide on the use of force by member states. This has happened on several occasions in the past. On 25 June 1950, for example, the Security Council considered the rapidly escalating war on the Korean peninsula, and determined that the armed attack on the Republic of Korea by forces from North Korea constituted a breach of the peace and called for the immediate cessation of hostilities.²⁰⁷ Two days later, the Security Council adopted a resolution recommending:

*that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and restore international peace and security in the area*²⁰⁸

On 2 August 1990 Iraqi forces invaded Kuwait. On the same day, the Security Council demanded “that Iraq withdraw immediately and unconditionally all its forces”²⁰⁹ and a little over three months later, on 25 November 1990, the Security Council passed a resolution authorising the use of force to oust the Iraqi forces occupying Kuwait:

*The Security Council ... [a]cting under Chapter VII of the Charter ... [a]uthorizes Member States ... to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area ...*²¹⁰ (emphasis added)

These resolutions all focus on the use of force. However, the Security Council has acted and decided on other issues under Chapter VII of the Charter as well. The Council has used this power to establish the Rwandan and Yugoslavian tribunals and regularly appoints judges by invoking Chapter VII. The exemption of peacekeepers of certain nationalities from the jurisdiction of the International Criminal Court (resolution 1422 (2002)) is also based on the Council’s authority under Chapter VII. It can be said, therefore, that the Council has adopted a broad interpretation of the notion of ‘threat to the peace’.

US President Bush drew on this broad interpretation in his 2003 address to the General Assembly:

*I ask the UN Security Council to adopt a new anti-proliferation resolution. This resolution should call on all members of the UN to criminalize the proliferation of weapons – weapons of mass destruction, to enact strict export controls consistent with international standards, and to secure any and all sensitive materials within their own borders. The United States stands ready to help any nation draft these new laws, and to assist in their enforcement.*²¹¹

The US government first submitted a draft ‘counter-proliferation resolution’ to the Council during December 2003, and a later version was co-sponsored by the United Kingdom in March 2004.²¹² Nearly three months after the uncovering of the “nuclear supermarket” operated by the Pakistani scientist, A Khan, the UNSC unanimously approved a non-proliferation resolution on 28 April 2004 (see Appendix 4). Resolution 1540 (2004) – co-sponsored by France, Romania, Russia, Spain, United Kingdom and the United States – urges all member states to take strong action to stop WMD proliferation, particularly for terrorist purposes. It calls on all states to establish domestic controls to prevent the proliferation of such weapons, including new legislation, enhanced export controls, new enforcement procedures and international cooperation.

The resolution also establishes a special committee of the UNSC (for a period no longer than two years) to oversee the implementation of the resolution. Modelled on a similar counter-terrorism committee set up in the wake of the September 11 attacks on the United States, this new committee is tasked with presenting a first report within six months. The resolution also explicitly affirms that it is complementary to existing non-proliferation treaties and their implementing organizations, and calls on all states to “develop appropriate ways to work with industry and the public regarding their obligations under such laws”.

There is also a suggestion that the resolution may help to plug some important gaps in the non-proliferation system. For example, by explicitly elevating “means of delivery” to the same level as nuclear, chemical and biological weapons, greater attention can be given to the control of missile technology (which is not banned by any international treaty and is only restricted by an agreement among supplier states).

However, the resolution does not introduce any new groundbreaking ideas in the field of counter proliferation or enforcement of existing treaties. Most countries in the world have already criminalized the use, possession or transfer of WMD materials. Also, many countries have enacted export controls on technology and materials which may be used in a WMD programme. And many countries take extraordinary steps in securing sensitive materials within their own borders. Resolution 1540 (2004) certainly does not give authority for PSI countries to seize WMD cargoes on the high seas, although it might make such interdictions easier to agree in certain circumstances (as discussed in chapter 3) by reinforcing the message that WMD trafficking is illegal.

What needs to be introduced in order to give the PSI a legal framework? One option is a Security Council resolution that expands the criminal jurisdiction of states beyond the territorial sea. In that way, WMD proliferation could be combated in the same manner as states now combat piracy or international drugs trafficking. Whether the UNSC is authorised to make this decision is unclear. Chapter VII of the Charter was originally designed to identify breaches of the peace and take forceful action to counter it.²¹³ At the time of the drafting of the Charter, it seems as if the founding fathers only had actual armed conflicts in mind. All other grievances and disputes between states were to be solved peacefully and in accordance with Chapter VI of the Charter. This is an important distinction, since UNSC decisions made under Chapter VII of the Charter are considered legally binding.²¹⁴

However, the current interpretation of the Charter is a little bit different. For instance, it is commonly accepted that it falls within the powers of the UNSC to impose economic sanctions. For example, on 31 March 1998 the UNSC adopted resolution 1160 (1998), imposing an arms embargo against the Federal Republic of Yugoslavia:

*all States shall, for the purposes of fostering peace and stability in Kosovo, prevent the sale or supply to the Federal Republic of Yugoslavia, including Kosovo, by their nationals or from their territories or using their flag vessels and aircraft, of arms and related matériel of all types, such as weapons and ammunition, military vehicles and equipment and spare parts for the aforementioned, and shall prevent arming and training for terrorist activities there*²¹⁵

Note that the text, prima facie, does not allow actual enforcement measures. Nevertheless, NATO conducted enforcement operations related to the resolution, while US and coalition forces similarly enforced the UN embargo on Iraq during the 1990s. No state, except those targeted, has objected to this practice. And the UNSC itself has raised no objections to it. Indeed, the Council has subsequently expressively authorised states to enforce its embargoes. It can therefore be claimed that an authorisation from the UNSC would nullify the rights of flag states to have their ships exempted from boarding at sea, provided that the boarding is in line with the resolution. In addition, a Council resolution may provide rules pertaining to the handling and eventual seizure of goods, thereby making the traditional rules of blockades, search and seizures superfluous.

Going further than Resolution 1540 (2004), along the lines suggested above, may be one of the options that the two-year follow-up mechanism will consider. However, according to the President of the Council, during the debate about Resolution 1540 (2004), "...many speakers had underlined that the resolution was not about enforcement actions".²¹⁶ This implies that securing a vote on such an enforcement resolution in the Council will be difficult. Decisions of the UNSC on substantial matters are made by an affirmative vote of nine members including the concurring votes of the permanent members.²¹⁷ It is not possible for a permanent member to actively oppose a resolution without causing it to fail; permanent members may abstain, however, since an abstention does not count as opposition.

Resolution 1540 (2004) clearly reflects what is currently achievable in the UNSC and the need to compromise, especially with Russia and China. For instance, all references to the word 'interdiction' are carefully avoided and it is not targeted at any specific states. By focusing on illicit activities by non-state actors, the resolution also steers clear of controversy. Any new resolution jointly drafted by PSI participants would currently gain the support of at least five votes (the participants themselves), including the votes of three permanent members.²¹⁸

The main opposition is likely to come from the other two permanent members, neither of which has formally taken a position on the PSI. Both China and Russia support the general idea of enforcing international non-proliferation frameworks but have ex-

pressed doubts about the legality and practicability of the initiative.²¹⁹ It may therefore be difficult to find common ground among the permanent members of the Council. Both Russia and China are advocating a more traditional approach to the non-proliferation question. For instance, the Russian Federation has already stated that the solutions to non-proliferation problems are already 'well known':

*These include further universalisation of the existing non-proliferation regimes, the strengthening of international verification instruments, and the introduction of safe technology in nuclear production and energy. By and large, it is renunciation by States of excessive arsenals and military programmes capable of undermining the politico-military balance and trigger an arms race.*²²⁰

On the other hand, it should be noted that the Chinese traditionally are very restrictive in the use of their veto power. From 1972 to present, China has only used the veto on four occasions.²²¹ Nevertheless, the Chinese government reiterated its traditional position on proliferation during the 2003 General Assembly debate:

*Such non-traditional security concerns as ... weapons proliferation ... have become more pronounced. Given modern conditions, they can easily spread within regions or even across the world, making the security situation of human communities even more complicated ... We should cultivate a new security concept featuring mutual trust, mutual benefit, equality and cooperation. Security should be maintained through cooperation and disputes resolved peacefully through dialogue. Frequent use or threat of force should be avoided and building one's own security at the expense of others rejected.*²²²

In conclusion, the PSI participants may find fewer difficulties in securing the required nine votes than convincing the remaining two permanent members not to use their veto. A UNSC resolution infringing on the rights of the flag states may be so contrary to the interests of many of the concerned states, that even China may utilise its veto. Therefore, it is of utmost importance that any follow-up resolution to Resolution 1540 (2004) carefully balances the rights of the flag states against the interests of the international community to curb the trade in WMD and related materials. In order to do that, the purpose and scope of the resolution needs to be openly set out and all terms need to be clearly defined.

5.3 PSI and the doctrine of ‘necessity’

In essence, the doctrine of ‘necessity’ is an international version of national criminal laws that excuse criminal behaviour caused by distress. For instance, if it were illegal to break a window belonging to a third person, the illegality would be excused if it were prompted by the need to escape a fire. In another example, illegal speeding in a motor vehicle might be excused if it were caused by the need to transport a seriously ill person to a hospital. The doctrine of necessity is quite old in international law and was originally outlined by Hugo Grotius.²²³

During the Napoleonic wars, a British warship seized the Neptune, an American freighter heading for France loaded with foodstuffs. The British warship subsequently seized the cargo pursuant to British laws regarding neutral ships heading towards enemy ports and invoked that both the capture and the seizure of goods were a necessity due to the perilous situation of the state. The American owners sued the British government and claimed the difference between the compensation given by the British and the amount they would have received had the cargo reached its intended destination. An arbitration commission later upheld the American ship-owners claim.²²⁴ The lessons of the case have been summarized as follows:

1. When the existence of a State is in peril, the necessity of self-preservation may be a good defence for certain acts which would otherwise be unlawful.
2. This necessity “supersedes all laws,” “dissolves the distinctions of property and rights” and justifies the “seizure and application to our own use of that which belongs to others.”
3. This necessity must be “absolute” in that the very existence of the State is in peril.
4. This necessity must be “irresistible” in that all legitimate means of self-preservation have been exhausted and proved to be of no avail.
5. This necessity must be actual and not merely apprehended.
6. Whether or not the above conditions are fulfilled in a given case, is a proper subject of judicial inquiry. If they are not, the act will be regarded as unlawful and damages will be assessed in accordance with principles governing reparation for unlawful acts.²²⁵

On 18 March 1967 the tanker Torrey Canyon struck Pollard’s Rock off the British coastline. She was carrying a cargo of 120,000 tons of oil, which leaked from the ship and spread along the sea between England and France, killing most of the marine life it touched along the whole of the south coast of Britain and the French beaches. After various attempts at averting the impending disaster had failed, the British Royal Air Force was ordered to bomb the vessel in order to burn off the oil remaining on board. In this case, it is clear that the danger of the oil spill did not pose a threat to the very existence of the United Kingdom. Rather, the spill threatened one of the state’s interests, namely, the protection of the marine and coastal environment. The International Law Commission later dealt with the incident:

*Whatever other possible justifications there may have been for the British Government’s action, it seems to the Commission that, even if the ship-owner had not abandoned the wreck and even if he had tried to oppose its destruction, the action taken by the British Government would have had to be recognized as internationally lawful because of a state of necessity.*²²⁶
(emphasis added)

The International Court of Justice has since worked on the assumption that the threat of an ecological catastrophe could establish a state of necessity, and that such necessity could provide a valid excuse for a state’s conduct in violation of its international obligations.²²⁷ The International Law Commission has summarised the amended principle accordingly:²²⁸

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
 - (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
 - (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.
2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
 - (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
 - (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes

the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.

Hypothetically, if the PSI participants were to acquire solid intelligence proving that WMD materials were being shipped on international waters, could they claim that an interception at that time would be ‘the only means’ of safeguarding their interests against a ‘grave and imminent peril’? The case for interdiction in the case of illicit nuclear materials seems strongest, since a nuclear device in the hands of an international terrorist network would indeed constitute a ‘grave and imminent peril’ to the security of the PSI participants. Indeed, such a scenario would constitute a grave and serious threat to the security of most Western nations and, indirectly, the rest of the world. And given the seriousness of such a situation coupled with the many obscurities regarding the law that govern the subject, an interdiction would most likely be justified.

Yet, post-Iraq, there would also be questions as to the validity of the intelligence and the significance of the suspected materials in advancing any NBC programme. Even where solid information is available on the type and quantity of WMD technology that forms part of a suspect cargo a number of problems remain:

- The end destination or use of the technology may not be certain, especially where dual-use technologies are concerned;
- Even if the destination and end-use is known, how the technology is integrated into the overall WMD research and development or production effort may not be clear; and
- In many cases there is no clear way to know whether a programme is R&D, production or weapon deployment.

Thus, major uncertainties are likely to remain regarding the lethality and quality of a proliferating state’s NBC activities, especially around key issues such as nuclear weapons design, quality of biological or chemical agent development, and missile reliability. These uncertainties will also apply to the extent to which the illicit transfer of technology makes a difference, i.e. to what extent will it enhance the effectiveness or advance deployment of an NBC weapon? And, ultimately, at what point does such a programme constitute a ‘grave and imminent peril’? This was a difficult judgement call in Iraq in relation to a nation’s entire NBC procurement programme, which had been subject to unprecedented international inspections and monitoring for over a

decade. It will be much more difficult to make a case for interdiction against a single shipment on grounds of imminent threat.

In any case, it has to be cautioned that the doctrine of necessity is a ‘last resort’ option, only valid when all other options have been exhausted. To systematically lean on this doctrine to justify high seas interdiction would not be in accordance with international law since international law rests on the presupposition that all states carry their obligations ‘in good faith’.

5.4 PSI and the doctrine of ‘pre-emptive self defence’

Closely connected to the principle of the ‘state of necessity’ is the principle of ‘self defence’. The right of self-defence traditionally recognised in international law affords a state the right to take proportionate measures, including the use of force, that are necessary to protect itself from imminent harm. No other article in the UN Charter has been so widely debated and so intrusively analysed as article 51, which reads:

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.

Especially when read in conjunction with article 2(4) of the Charter, which reads:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The US government, in its 2003 National Security Strategy, pushed the interpretation of these two provisions to their limit when it stated that:

The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national

*security. The greater the threat, the greater is the risk of inaction— and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.*²²⁹

It can be clearly argued that the words ‘armed attack’ in Article 51 strictly limit the extent of self-defence under the Charter, and indicate that the right cannot be justification for pre-emptive or anticipatory military strikes. This is widely considered as the general rule.

However, there are exceptions to this general rule. In 1837 British forces attacked the *Caroline*, an American merchant ship. The British government later claimed that it had been acting in self-defence since the passengers of the ship were supporters of a rebellion in Canada against British rule. In the subsequent correspondence between London and Washington, US Secretary of State Daniel Webster argued that a nation could only justify such pre-emptive hostile action if there were a necessity “instant, overwhelming, leaving no choice of means and no moment for deliberation”.²³⁰

In June 1981 the Israeli Air Force bombed a nuclear plant in the Iraqi town of Osirak and justified the raid on the grounds that the reactor was designed to build nuclear weapons, which eventually would be used on Israel. The Israeli government said that “...the atomic bombs which that reactor was capable of producing whether from enriched uranium or from plutonium, would be of the Hiroshima size. Thus a mortal danger to the people of Israel progressively arose”. Iraq denied that the reactor would be used to produce nuclear weapons.²³¹

The ensuing debate in the UNSC was heated and many states were invited to participate in the meeting. A complete analysis of the debate is not possible here, but a few arguments can be brought forward. For instance, Mr. Oumarou (Niger) held that:

*Israel committed a premeditated military act which neither what it calls the preservation of its security nor its avowed fear of a supposedly forthcoming Iraqi atomic bomb suffices to justify today. And its reference to Article 51 of the Charter is not merely abusive but also misleading. In this case, there was no legitimate self-defence; there was aggression, because, Israel was in no way facing an imminent attack, irrefutably proved and demonstrated.*²³²

While Mr. Arcilla (Philippines) held that:

*Granting, for the sake of argument, that the Iraqi reactor was designed to produce atomic bombs and that it was about to go “hot”, we would still find it extremely difficult to accept Israel’s reasons for the armed attack. It was against the basic tenets of international law and the provisions of the Charter of the United Nations.*²³³

The United States was more cautious in its remarks. Jeanne Kirkpatrick, US Ambassador to the UN, held that:

None the less, we believe the means Israel chose to quiet its fears about the purposes of Iraq’s nuclear program have hurt, and not helped, the peace and security of the area. In my Government’s view, diplomatic means available to Israel had not been exhausted and the Israeli action has damaged the regional confidence that is essential for the peace process to go forward. All of us with an interest in peace, freedom and national independence have a high stake in that process. Israel’s stake is highest of all.

In the end, the UNSC unanimously adopted a resolution, which strongly condemned “the military attack by Israel **in clear violation of the Charter** of the United Nations and the norms of international conduct”²³⁴ (emphasis added). The Council further considered “that the said attack constitutes a serious threat to the entire IAEA safeguards regime which is the foundation of the non-proliferation Treaty”.²³⁵

It is difficult to see how the doctrine of ‘pre-emptive self defence’ has grown more legitimate since 1981. The United States has argued that the crimes of 11 September 2001 changed the debate. However, the US assertion of its right to pre-emptive self defence has been widely criticised and is not accepted by the international community as a whole. The Israeli government’s continued practice of pre-emptive targeting of Palestinian militants is widely condemned and is due to be reviewed by the Israeli Supreme Court.

Not even the emerging concept of ‘humanitarian intervention’ is completely accepted in international law, since it is seen as an infringement of the right to territorial integrity and political independence of the attacked state. The argument that tyrants hide behind the protection of the UN Charter may be true in practice, but it does not change the law. The essence of international law since 1945 is that the use of force should be authorised as a last resort, as a means for self-protection against an ongoing or imminent attack. The key lesson from Iraq is that intelligence is not yet

sufficiently reliable or adequate to support military operations against proliferating powers or to make accurate assessments of the need to pre-empt. To utilise force on the basis of sketchy intelligence or mere accusations of wrongdoing or bad intent weakens the foundation of the law and presents, in the long run, a grave threat to international stability.

5.5 PSI and the need for comprehensive nuclear disarmament

The PSI participants may find it difficult to gather support for an anti-proliferation resolution while the United States opposes the establishment of a WMD-free Middle East and while it remains lax on enforcing export controls vis-à-vis the only de facto nuclear weapon state in that region: Israel.

Generally, the issues of nuclear weapons proliferation and disarmament are related. It is unreasonable to expect other nations not to acquire a weapon that the nuclear weapon states find essential for their own security. On the contrary, emerging and worrying concepts of ‘pre-emptive wars’ and ‘first strikes’ may prompt countries to acquire a nuclear deterrent in order to defend the country against what they perceive as Western aggression. And in particular, the development of new US strategies and new technologies to use low-yield nuclear weapons against hard and buried targets will in effect blur the distinction between conventional and unconventional weapons.²³⁶

The connection between non-proliferation of nuclear weapons and the ultimate goal of complete nuclear disarmament has been highlighted on numerous occasions during the ongoing review of the NPT. And during the 2000 NPT Review Conference, the nuclear weapon states committed themselves to the ultimate goal of nuclear disarmament. Current policies in at least four of the nuclear weapon states are running against that commitment.²³⁷

The non-proliferation aspects of the NPT has always been given undue weight in the review process, while the nuclear weapon states have dodged their responsibility to take forceful action to rid this world of a true weapon of mass destruction. At the same time, the international community has been successful in agreeing legal regimes outlawing chemical and biological weapons, which are cheaper and easier to manufacture than nuclear arms.

At the 2000 NPT Review Conference, the parties successfully moved the focus back to questions of nuclear disarmament. However, this was temporary since the focus moved rather dramatically back to the issue of non-proliferation, culminating with

the Second Gulf War. Or, as US Secretary of State, Colin Powell, put it to the 2003 NPT Preparatory Committee:

We meet at a time of considerable challenge to the NPT and to international peace and security.

NPT Parties – weapon states and non-weapon states alike – must take strong action to deal with cases of non-compliance and to strengthen the Treaty’s non-proliferation undertakings. We cannot allow the few who fail to meet their obligations to undermine the important work of the NPT.

The NPT can only be as strong as our will to enforce it, in spirit and in deed. We share a collective responsibility to be ever vigilant, and to take concerted action when the Treaty – our treaty – is threatened.

Now, the focus has shifted from ‘non-proliferation’ to ‘counter-proliferation’. Not only does this imply that ‘non-proliferation’ has failed, it also validates arguments that forceful military action remains the only resort in a world full of weapon proliferators. It completely ignores the fact that the NPT regime has been relatively successful and that it has made the world a much safer place by reducing the number of nuclear aspirant states – largely through multilateralism, dialogue and peaceful action. The number of states that are suspected of being nuclear cheaters is a handful at most. This may change, however.

The PSI should not be seen as a separate activity in a losing war against weapons proliferation. It needs to be seen and analysed in the wider context of non-proliferation. It purports to be grounded in current legal authorities, of which the NPT is one, and efforts to widen, develop and refine the initiative should be taken with that in mind.