



A program of the
Global Security Institute

Bipartisan Security Group Policy Brief

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The Proliferation Security Initiative The Legal Challenge

September 2003



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September 11, 2003

Dear Reader:

On behalf of the Bipartisan Security Group, we wish to bring to your attention the enclosed article on the North Korean nuclear issue and the enclosed analysis of some of the legal issues raised by the administration's Proliferation Security Initiative (PSI).

The recent announcement of the PSI released in early September 2003 in Paris by the 11 States involved in the PSI makes reference to the UN Security Council Presidential Statement of January 1992, which states that the proliferation of all WMD constitutes a threat to international peace and security, and underlines the need for member states of the UN to prevent proliferation. Some believe that this statement will serve as both the policy basis and legal basis for interdicting boats and planes in the skies and high seas, as well as territorial waters. This is a very serious matter and a series of questions thus arise:

Is this the only Security Council authorization claimed to be needed to exercise the use of force to interdict ships on the high seas from nations of concern? It is not even a resolution. If so, how is the decision to interdict made? If not, then is it the intention of the members of the PSI to bring the issue formally before the Security Council? How else is a state to be determined to be "of concern" and thus have its ships subject to interdiction? Who is concerned and does this concern extend to commercial ventures trading with such states, commercial ventures originating from such states, commercial ventures flying under the flag of such states? Is "of concern" a legal classification? What is there to stop any state from saying it is concerned with another state and exercising the same right of interdicting ships and planes? If not, then what exactly is the mechanism to determine which states and vessels flying under flags of states not "of concern" but with shipments from states "of concern" will be interdicted? If WMD are the threat, then how are decisions to be made regarding stopping shipments from states (or entities from states) not party to the BWC or the CWC that ship dual use chemicals or pathogens? What if a neighbor of Israel decided to stop its ships and look at their cargo on the grounds that Israel is not sufficiently constrained under the NPT or other treaties?

The PSI raises extremely important questions. The way in which they are answered by our practices, in our opinion, will have a significant impact on whether we strengthen or diminish international law and security. For this reason we are sharing with you the attached policy brief by Benn Friedman and OPEd by Amb. Robert Grey, Jr.

Sincerely,


Ambassador Thomas Graham, Jr. (Ret.)
Chair, Bipartisan Security Group


Jonathan Granoff
President, Global Security Institute



U.S. DEPARTMENT of STATE

Fact Sheet

The White House, Office of the Press Secretary
Washington, DC
September 4, 2003

Proliferation Security Initiative: Statement of Interdiction Principles

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

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

Interdiction Principles for the Proliferation Security Initiative

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

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. "States or non-state actors of proliferation concern" generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.
2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.
3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.
4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or

related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:

- a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.
- b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.
- c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.
- d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.
- e. At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.
- f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.

[Also: [Principles for the Proliferation Security Initiative](#) and [Proliferation Security Initiative – Paris Meeting of Core Participants, September 3-4, 2003](#)]

[End]

North Korea Up In Arms

By Robert T. Grey Jr.

Op/Ed - The Washington Times

August 14, 2003

The Bush administration and its critics agree that the viability of the Nuclear Non-Proliferation Treaty (NPT) is crucial to prevent the spread of nuclear weapons and nuclear materials. Any actions to prevent nuclear proliferation must reinforce the treaty and not weaken it.

North Korea's withdrawal from the treaty and its claim that it has and will continue to produce weapons grade nuclear material put the NPT and international security at risk. A nuclear armed North Korea with excess weapons grade nuclear material available for export would be an intolerable threat and must be dealt with promptly and firmly. The issue is how to deal with the threat. There are no easy answers, only difficult choices, and even with prudence, patience and the best of intentions it may not be possible to get North Korea to give up the nuclear option.

As a first step, it is imperative that the international community speak with one voice to make it unmistakably clear to North Korea that its only realistic choice is to seek, through negotiations and dialogue, a non-nuclear solution to its security and economic problems. North Korea must understand that absent a diplomatic solution, the international community is prepared, however reluctantly, to use force to put an

end to North Korea's pursuit of nuclear weapons.

The administration recently put forward the Proliferation Security Initiative (PSI) in an effort to constrain proliferation by steps that include permitting interdiction of weapons shipments on the high seas. There are 11 states (Australia, Japan, France, Germany, Italy, the Netherlands, Poland, Portugal, Spain, the United Kingdom and the United States) that have joined the PSI. The PSI will only be successful if it operates in the context of the NPT and in compliance with international law.

There are those who argue that the North Korean threat is so immediate that the United States and others should invoke the doctrine of self-defense under Article 51 of the U.N. Charter and use the PSI to interdict North Korean shipping now. This pushes the self defense doctrine well beyond its narrow limits and creates a dangerous precedent. North Korea's conduct threatens the entire world, not just the United States and a handful of its allies. China, Russia and all the other members of the international community have a direct stake in this issue.

North Korea has repeatedly stated that any interdiction of its vessels or aircraft would be regarded as an act of war and that it would react accordingly. Given the nature of

the North Korean regime and the desperate condition of the country, forcing a premature confrontation without a clear legal mandate that will guarantee maximum political support carries with it the grave risk of igniting a major war on the Korean peninsula, and if indeed the North Koreans have nuclear weapons, a war which could become a nuclear one.

The Nuclear Non-Proliferation Treaty states that when a signatory state withdraws from the treaty, as North Korea did, the matter should be referred to the Security Council. It is imperative that the Security Council be involved now.

A Security Council resolution calling for North Korea to return to and comply with the NPT is the best way to go. The resolution should also make it clear that in the event that North Korea refuses to comply, its shipping will be interdicted. Such a resolution offers North Korea an opportunity to achieve a peaceful outcome and involves the entire international community. Such a Security Council resolution with the backing of all five permanent members would carry great weight and send a powerful message.

China and Russia may be difficult to persuade. The options appear to be either a negotiated diplomatic settlement which brings North Korea back into the NPT fold or an outcome which could result in the creation of as many as three additional nuclear weapons states in the area or another Korean War, which could involve nuclear weapons.

But for the United States and its allies, the worst outcome would be a preemptive interdiction of North Korean shipping without overwhelming international political support followed by another Korean War.

As a country that was instrumental in establishing both the United Nations and the nuclear non-proliferation regime, we have an obligation to try to make them work before attempting to round up a posse and going it alone.

Robert T. Grey Jr., a former ambassador for the Clinton and current Bush administrations, is director of Bipartisan Security Group, a program of the Global Security Institute.

The Proliferation Security Initiative: The Legal Challenge

Written by Benjamin Friedman
for the Bipartisan Security Group

September 4, 2003

1. Introduction

On December 10, 2002, in the Indian Ocean, Spanish forces acting in concert with the United States seized a North Korean cargo ship called the So San. Beneath the deck and 40,000 sacks of cement, naval inspectors found 15 scud missiles and 15 conventional warheads. A day later, US officials made a surprising decision: they let the ship and its cargo sail to its destination, Yemen.¹

The decision surprised the Spanish, who complained that their sailors had needlessly risked their lives.² And many Americans wondered why the United States allowed missile sales by a country President Bush had placed in “the axis of evil.” As a legal matter, however, the decision was correct.

Under the Law of the Sea Convention, vessels on the high seas can be stopped by ships of their flag state.³ A ship may also be stopped if it is without nationality – that is, it flies no flag and does not otherwise demonstrate its state of registration.⁴ Because the So San flew no flag, it was subject to inspection. But the cargo was not illicit. Carrying weapons at sea does not violate international law unless the transporting state has agreed under treaty not to transport such goods.⁵ North Korea is not a party to the Missile Technology Control Regime, and hence had a right to transport the scuds.

The North Korean regime is pressed for cash. Missile sales, along with other export products, like heroin, help the government pay its way. Along with Yemen, buyers of North Korean missiles have included Iran, Pakistan, Syria and probably others.⁶

Given its economic desperation, North Korea might hawk an even more dangerous product: nuclear weapons components. In recent months North Korea has probably begun reprocessing plutonium. North Korea also maintains a program to enrich uranium.⁷ Either substance could bring a high price from a state or group hoping to build nuclear weapons.

Were a North Korean ship carrying nuclear weapons components stopped today, the materials probably could not be seized under prevailing law. North Korea is no longer party to the Nuclear Non-Proliferation Treaty. But regardless of legality, no President would be likely to let such a shipment sail. But current international law may not give the United States and its allies sufficient justification to act against proliferators like North Korea.

The international community cannot allow North Korea to ship nuclear weapons components. The proliferation of nuclear materials raises the odds that terrorists will acquire them. Chances are that the North Koreans will not sell nuclear materials directly to terrorists and invite a U.S. invasion, but the United States and its allies cannot gamble on the odds.

And while the world has tolerated North Korean missile sales for years, those sales threaten international security as well. Missile sale revenue hardens the regime against economic pressure and creates instability as buyers like Iran and Pakistan compete with their rivals to deploy more powerful and longer range weapons.

Nations need more tools to stop the proliferation of missiles and especially nuclear weapons. This problem presents both a challenge and an opportunity. By addressing the threats posed by North Korea, the international community, with US leadership, can strengthen both international law and security. But United States leaders must recognize the distinction between the inadequacy of international law as a system and the inadequacy of the state of international law as it now stands. The problem we face stems from the later. The solution will come not from abandoning the rule of international law but from reinterpreting legal doctrines or creating new laws. This paper discusses issues pertinent to this process.

Negotiating with North Korea, even under ideal circumstances, has always been an uncertain venture. If confidence in the present negotiation process diminishes, the need to attain a legal basis to stop proliferation will heighten. The North Koreans have claimed that they will soon test a nuclear device. If they do so, the United States will likely respond by ratcheting up economic pressure, a fact that will involve cutting off North Korea's weapons shipments. A legal basis to do so will be needed.

But even if North Korea ceased all weapons shipments tomorrow, the United States and its allies would probably seek authority to intercept shipments involving other proliferators, like Iran. The problem of proliferation is not limited to one state. The international community requires authority to interdict shipments regardless of the outcome of the talks in with North Korea.

2. The Proliferation Security Initiative

The Proliferation Security Initiative (PSI), announced by President Bush on May 31, 2003 in Krakow, is an effort among 11 states (Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom and the United States) to improve cooperation against proliferators and change legal standards to interdict weapons shipments.⁸ The initiative does not explicitly focus on the North Koreans, but they are the obvious target. Negotiations continue among the 11 states, but the plan will likely aim to work under existing international law to justify intercepting shipments and to create a new legal regime to expand the power to interdict.

The initiative will have several facets. The participants will cooperate more closely to share intelligence to identify suspect ships. The states will likely agree to inspect North Korean ships in port. On long trips to the Middle-East, North Korean ships may have to dock. Once in port, the host state has the power to inspect the ships and seize cargo that violates its laws.

The states may also try to deny North Korea the ships themselves. North Korea purchases most of its ships from foreign entities. National governments have the power to restrict such sales. Thus the international community could deny North Korea the ships it needs to deliver its products – but this prohibition would likely have little effect in the short term.

The most difficult elements of the PSI will be finding a legal mechanism to interdict weapons materials in territorial waters or on the high seas.⁹ The primary obstacle to interdicting North Korean shipments is the Law of the Sea Convention, which gives ships the rights of freedom of seas and innocent passage. These rights are essential to global commerce. Were the United States and a handful of its allies to violate the treaty, all states could do so, cutting off shipments where it served their purposes. The international community must find a way to cut off North Korean shipments without violating the Convention.

A. Territorial Waters

States have jurisdiction to prescribe law within their territory – that is, within its territory the state can determine what is legal and what is not. Territory includes territorial waters, which extend 12 nautical miles from the shoreline, meaning the state can theoretically set rules for what constitutes illegal cargo in this area – what is contraband – and when ships can be boarded. But states have long allowed ships a right of innocent passage through their waters. States recognized this right so widely that it became part of customary international law and is now codified in the Law of the Sea Convention.¹⁰

In Article 19, the Convention gives ships the right of innocent passage through territorial waters. The concept is simple: ships may pass through territorial waters so long as their intentions are innocent. Passage is innocent under the convention where passage is “not prejudicial to the peace, good order, or security of the coastal state.”¹¹ Coastal state here refers to the state whose territory the ship passes through. Article 19 then lists the ways in which passage could be deemed prejudicial to peace, good order or security.

The list includes threat to the sovereignty of the territorial state, fishing, willful pollution, surveying, interference with the communications of the state, the taking aboard or launching of military craft, a military exercise, collecting information prejudicial to the security of the coastal state, propaganda against the coastal state, unloading or taking on cargo contrary to the law of state, violating the UN charter, or any other activity not having a direct bearing on passage.¹² Transporting missiles or WMD components is not mentioned, and it is difficult to assert that such transport fits into any of the prohibited activities. In Article 23 of the Convention, ships carrying nuclear weapons are explicitly given the right of innocent passage.¹³ Arms shipments to other countries cannot be said to violate the UN Charter, but sales to terrorists might – given the many UN Security Council statements against aiding terrorism and the fact that the Charter makes Security Council resolutions binding law on all parties. Unless the suspect shipments are intended for terrorists, the right of innocent passage will give opponents of the PSI powerful legal ammunition.

Some press reports have suggested that the United States and its allies might also act by intercepting suspect shipments as they pass through narrow straits controlled by cooperating nations. In straits, the same issues arise as in territorial waters. The convention gives shipping passing through straits the right of transit passage, which is much like the right of innocent passage through territorial waters.¹⁴ Thus seizing weapons materials in these waters would be legally difficult.

Legality aside, convincing states like China and Indonesia, through whose waters North Korean vessels are likely to pass, to enact legislation allowing them to stop North Korean ships will be difficult. And convincing these states to use that legislation to act on intelligence tips from the United States and others to stop ships will be arduous as well.

B. The High Seas

The high seas are a commons for all nations, where all enjoy freedom of the seas subject to some strictly tailored reservations. Freedom of the seas includes freedom of overflight. Like the right of innocent passage, freedom of the seas is an ancient right tied to global commerce – a right that wealthy trading states like the United States and Britain are loath to undermine.

Ships on the high seas are subject to the exclusive jurisdiction of their flag state. The flag state can give the United States or its allies the right to stop and search a ship flying its flag. The

limitations to freedom of the seas are piracy, the slave trade, unauthorized broadcasting, and drug trafficking.¹⁵

There are a series of legal approaches the United States and its allies might use to allow cooperating nations to stop North Korean ships on the high-seas and within territorial waters. Some of these approaches could harm international law.

3. Potential Legal Justifications for Interdiction

A. United Nations Security Council Resolution

The easiest means to justify stopping North Korean ships is to get a UN Security Council resolution authorizing interdiction. Were the UN to declare North Korean weapons proliferation a threat to international peace and security and authorize the interdiction of these shipments, that authorization would trump existing treaty limitations on interdiction and allow the United States and its allies to stop North Korean ships on the high seas or in territorial waters. The challenge would then be getting the cooperation of those states through whose waters North Korean ships are likely to pass – China being perhaps the most critical. China is critical in another way; it would be the likeliest stumbling block for a Security Council resolution in the first place. China might veto the resolution.

Even a vague Security Council resolution calling North Korean shipments a threat to peace and security, without clear authorization to stop ships, might give the allied states the justification they need to interdict. Like UN Security Resolution 1441, which the United States and Britain used to justify the war in Iraq, the authorization implicit in such a resolution would be debatable. Of course, debatable authorization would not create broad international cooperation to interdict. An explicit authorization would, on the other hand, strongly enhance the international nonproliferation regime.

Another approach is to introduce a resolution that calls on North Korea to return to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and comply with its terms, or face consequences. On January 10, 2003, North Korea withdrew from the NPT, an international accord prohibiting the acquisition and proliferation of nuclear weapons.¹⁶ The withdrawal was largely symbolic because North Korea had violated the treaty by having a secret nuclear weapons program.¹⁷ According to the treaty, withdrawal should occur only if “extraordinary events” related to the subject of the treaty jeopardize the interests of the withdrawing nation. North Korea cited the threat of U.S. blockade or preemptive use of force including allegations of a possible nuclear strike as its reason to withdraw. One could debate on whether these are the kind of extraordinary events Article X references.¹⁸ But even if the withdrawal was valid, the Security Council could declare North Korea’s withdrawal a threat to international peace and security.

Because the treaty has broad international support, a resolution framed to support it might make it through the Security Council. On the other hand, when the Security Council took up the issue of North Korea’s withdrawal from the NPT in April 2003, the Chinese blocked efforts to adopt a statement critical of North Korea’s actions.¹⁹ If a resolution passed today, even a vaguely worded warning threatening consequences for refusal to comply would give the United States and its allies an argument that international law had allowed the interdiction of North Korean shipments.

B. General Assembly Resolution

During the Cold War, the US-Soviet rivalry deadlocked the Security Council. Both states often blocked each other's resolutions. To address this problem, the United States pushed the UN General Assembly (the states not on the Security Council) to pass the "Uniting for Peace Resolution." The resolution said that where a threat of international peace and security arises and the Security Council fails to act, the General Assembly can authorize a response, even the use of force.²⁰ Although the legality of the Uniting for Peace Resolution is questionable, the United States used it to pass additional resolutions in the General Assembly and get legal backing, albeit dubious, for many actions which the Soviets would have blocked, particularly during the Korean War. The resolution fell into disuse after 1960.²¹

The United States and its allies could use the Uniting for Peace Resolution to get legal justification for stopping North Korean ships. General Assembly resolutions on war and peace require a two-thirds majority, however, and the PSI might not get that support. Moreover, the Uniting for Peace Resolution is a Cold War relic. If its legal justification was ever tenable, that justification may not have survived the Cold War.

C. Changing Custom

Ruth Wedgwood, an international law scholar close to members of the administration, wrote an op-ed in *The Wall Street Journal* in April arguing that the United States should interdict North Korean ships. She argues that the stoppage would be justified by self-defense. She also argues by analogy to the nineteenth century British practice of intercepting slave ships. She writes that "Britain needed no justification beyond a moral one."²² But the law of seas was more amorphous in the nineteenth century than today, where the law is codified.

While the practice of states can change customary international law over time, that process does not occur instantly. Customary international law changes as states begin to feel compelled to avoid certain actions.²³ A customary international law norm against trafficking in nuclear materials may have formed – but claiming the same as to trafficking in missiles is a leap.²⁴ And even if a norm against trafficking in nuclear weapons exists, it is another matter to assert a right to interdict shipments based on that norm. Basing interdiction of nuclear components and especially missiles on customary international law is then a legally dubious route for the PSI to take.

D. The Right of Self-Defense

Article 51 of the UN Charter allows states under attack to take military action in self-defense.²⁵ The right to self-defense trumps other obligations, such as those under the law of the sea. An American lead interdiction strategy might rely in part on a self-defense rationale. John Bolton, the lead US negotiator on the Proliferation Security Initiative, has said the right of self-defense justifies interdicting North Korean ships.²⁶

This justification would create a dangerous precedent. A self-defense argument for interdiction vastly expands the traditional definition of self-defense, pushing it toward a point where it could justify anything. Given the international war on terrorism, any shipment bound for terrorists might be stopped under a self-defense doctrine. But using this theory to stop weapons bound for states under some extended preemption doctrine stands on shaky legal ground.

The exact parameters of self-defense are not clearly defined under international law, but it is generally agreed that self-defense actions should respond to an armed attack or an imminent armed attack. This latter sort of self-defense can be termed anticipatory self-defense because

the attack defended against has not occurred. Even if action taken in self-defense can be anticipatory, stopping North Korean weapons shipments would not work under existing doctrine. There is no imminent attack. Moreover, self-defense actions traditionally may be taken only when the necessity of self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.²⁷

Expanding self-defense to allow interdiction of shipping would allow other nations to justify any military action based on self-defense. India could use the doctrine to attack Pakistan; China could use it to attack Taiwan. The doctrine of self-defense could go from being a brake on military attacks to perfunctory semantics after an attack.

E. Declaring that North Korean Shipments Threaten Peace

Article 88 of the Law of the Sea Convention states, "The high seas shall be reserved for peaceful purposes."²⁸ "Peaceful" is not defined in the article. The United States and its allies could assert that because weapons trafficking is not peaceful, weapons-bearing ships lose their right to freedom of the seas, and the ships can be seized.

Even if some right to stop ships could be read into Article 88, however, it is not clear to whom the power to stop shipping would fall. Any state? Any group of states authorized by the UN? The state whose peace was threatened? Many scholars would argue that groups of states do not have the authority to assert such a right. But if the United States asserted such a right based on this justification along with a large group of states, the action might have sufficient political cover to quell questions about its legal validity.

The United States and its allies could also assert that North Korean weapons shipments threaten the peace, good order and security of coastal states, allowing those states to stop the shipments within their territorial waters. Bush administration officials indicate that this is one approach they may take.²⁹

Using this justification for stopping ships will be tricky.³⁰ As indicated above, the situations where a ship violates innocent passage and thus threatens the peace, good order or security of the coastal state are laid out in detail in the Law of the Sea Convention. Shipping missiles or nuclear materials is not listed. The convention expressly gives ships bearing nuclear weapons the right of innocent passage.

How then can North Korean weapons shipments be said to violate innocent passage? The Convention lists threats or the use of force against the sovereignty, territorial integrity or political independence of the of the coastal state first among the ways a ship can threaten the peace, good order or security of that state and thus lose its right to innocent passage.³¹ The United States and its allies could claim the shipments constitute a threat of force against the territory of the coastal state. That state would then, presumably, give permission to one of the allied states to stop the ship.³²

But can an arms shipment bound for a far-off state really threaten the security of a coastal state along the route? If, for instance, North Korea ships missile technology or enriched uranium to Iran, could Japan assert that their territory is threatened by the passage of those materials? Iran, like most states North Korea might ship to, has neither a known animus towards Japan, nor the delivery capability to hit it with missiles. It may be that the interdicting state can plausibly assert that because recipient of the weapons is hidden, precaution necessitates assuming the weapons are bound for an enemy.

Even if that logic stands, how can the United States convincingly argue that North Korean missile shipments are a threat, while US nuclear weapons crisscross the world on submarines? According to Bush administration officials, determining what constitutes a threat is a fact specific inquiry – meaning that US nuclear submarines or German weapons sales are not threatening, but North Korean shipments, because of the character of that regime, are a threat to some states.

Whether this argument has merit or not, having one set of standards for friendly nations and another for rogues contradicts the idea of sovereign equality – the principle that all states are entitled to the same rights and protections in international law. Moreover, justifying the interdiction of weapons shipments based on a threat to a coastal state whose waters are far from the weapons' destination manipulates the idea of what constitutes a threat. Other states could follow suit, undermining the idea of innocent passage. Based on this precedent, China might declare weapons shipments to Taiwan a threat to its territorial integrity and interdict them. Policy-makers in the international community may believe that the North Korean threat justifies the potential for these consequences, but they should consider those consequences carefully.

F. Creating a New Treaty or Altering an Existing One

The United States and its allies could put forward a new treaty or a protocol to the Law of the Sea Convention itself. Either route could alter the right of innocent passage and freedom of the seas. This approach would face two problems. The first is time. The Law of the Sea Convention took decades to write. Changing it or writing another treaty could take years. That is too long. Secondly, even if the treaty were broadly signed and ratified, the North Koreans and those receiving their ships would not become parties. Hence their ships would not be subject to seizure. If almost every other state signed the treaty or protocol to a treaty, it might be considered customary international law binding on all states, but getting the level of support needed to create customary international law is unlikely.

Writing in the *Globe and Mail*, Professor Michael Byers of Duke Law School suggests altering the International Maritime Organization's Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation to allow interdiction. He writes,

With U.S. leadership, [the treaty] could readily be amended to permit the interdiction of undeclared weapons shipments. 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 United Nations Security Council resolution that provides the necessary stop-and-search powers to other states.

As Byers implicitly acknowledges, altering a treaty cannot itself authorize interdicting weapons shipments. Interdiction requires an additional step, a Security Council Resolution. Because a Security Council Resolution can itself authorize interdiction, the benefit of creating or altering a treaty is merely political, namely a means of encouraging the Security Council nations to pass a resolution authorizing interdiction.

G. The Law of Blockade

Stopping North Korean ships might be considered a blockade. But the law of blockades, an ancient part of the law of war, does not offer a legal justification for stopping North Korean ships. Blockades are a type of military action, not a legal mechanism. Because blockades are traditionally considered a use of force, even if stopping North Korean ships could be considered

a blockade, it would likely require Security Council authorization.³³ Once the Security Council authorizes an action, the use of term “blockade” is just semantics. The United States and its allies are therefore unlikely to use the law of blockades to justify stopping North Korean ships.

H. North Atlantic Treaty Organization Action

The United States and its allies could try to use NATO to stop North Korean ships. The UN Charter has been said to allow regional organizations to authorize force when the Security Council fails to act. In the Cuban Missile Crisis, the United States used this argument to stop Soviet ships, relying on authorization from the Organization of American States (OAS). It is worth noting here that the United States avoided using a self-defense argument in the Cuban Missile Crisis, fearing that that argument would undermine the idea of self-defense.³⁴

Such justifications for the use of force have historically been seen as legally dubious, even where they are politically wise. The UN Charter does not explicitly allow regional organizations to act in the Security Council’s stead. Moreover, regional organizations may be geographically confined – NATO might only be able to act in the Atlantic and Eastern Pacific, although it has lately begun carrying out a mission in Afghanistan. NATO action might also be confined to its membership, meaning that states like Japan and China could not act under this rationale.

5. Conclusion

There is a gap between the necessities of international security and the current limits of international law. The North Koreans may sail their ships right through that gap. By limiting proliferation and giving the United States leverage in negotiations with the North Koreans, interdicting weapons shipments could lessen dangers posed by both rogue states and terrorists – but doing so lawlessly will cause as many problems as it solves.

Absent a UN Security Council resolution, or clear evidence that shipments are bound for terrorists, the legality of stopping shipments in territorial waters or on the high seas will be questionable. A Security Council resolution achieves the best of both worlds: unquestionable consistency with international law and interdiction of deadly weapons. A resolution based on North Korea’s abrogation of the NPT might succeed. But given the Chinese veto power, passing the resolution is far from assured.

Without a resolution, the United States and its allies will be forced to try other legal justifications. If North Korea ships missiles or nuclear weapons to terrorists who have attacked the United States or its allies, a self-defense argument under Article 51 of the UN charter authorizes interdiction. But if the eleven states use a self-defense argument to interdict North Korean weapons shipments to nations we have no conflict with, they will have corrupted the concept of self-defense to the point where it justifies aggression. States like the United States wrote the UN Charter precisely to prevent aggression. As dangerous as it is, North Korea’s weapons proliferation does not merit destroying the limits of Article 51.

Without a UN Security Council resolution or evidence that the shipment is bound for terrorists, the PSI nations will have to parade out more dubious arguments to authorize interdiction – arguments whose merits are debatable under international law. Eleven powerful states may be able to bend international law, but they cannot rewrite it. Bending international law is dangerous even for powerful states because other states might use the same arguments to justify their aggressive action. Down the road, the United States and its allies may have to ask whether the danger posed by North Korean shipments outweighs the damage to international law that weak legal arguments for interdiction create. But the time for that inquiry arrives only after the Security Council and other legal options have been exhausted.

If the United States and its allies cannot get a Security Council Resolution allowing interdiction of North Korean shipments, what legal justification can they use? For one, the United States could argue that there is a rule of customary international law against selling nuclear weapons components. That argument probably fails for missiles, however. The states could also try to obtain a UN General Assembly justifying interdiction. Leaving aside the legal problems with that option, it would face an uphill battle to gain sufficient support to pass and become a resolution.

Third, the cooperating states can argue that weapons shipments lose their right to freedom of the seas because these shipments are inherently not peaceful under Article 88 of the Law of the Sea Convention. While this argument stretches the idea of what constitutes a threat and might be subject to abuse by other states, it is less dangerous than a self-defense argument.

There are risks to such an interdiction strategy, regardless of its justification. First, it could provoke a war. Stopping a ship by force may amount to an act of war under international law.³⁵ The North Koreans have said that in response to an economic blockade they will take “merciless retaliatory measures,”³⁶ and that interdiction could result in war.³⁷ These claims are likely a bluff, but they must be considered. Second, the economic pressure wrought by cutting off missile sales might hasten the very result the initiative tries to avoid, the sale of nuclear materials to terrorists or a state like Iran. Plutonium and uranium are easier to hide and smuggle than missiles. Starved of its missile profits, North Korea might risk selling these products to anyone.

How can these dangers be avoided? The simple answer is that risks cannot be avoided. The North Koreans are unpredictable and potentially irrational. But a US strategy of rolling out the initiative in tandem with the multilateral negotiations underway in Beijing and offering concessions would create a carrot and stick approach to the crisis that could help mitigate danger. Within negotiations, the United States can offer the North Koreans the kind of conditional assistance that might allow them to seek settlement of their grievances at the table.

International law is pliable. It should be a tool to enhance security, not a hindrance. There is perhaps no greater way to honor law than to seek to change it. But between changing the law and breaking it there is fine line, a line the United States and its allies should be careful not to cross. If the international community, under US leadership, can rise to occasion and create a real legal response to the danger posed by North Korea, both international security and international law will be the better for it.

Notes

¹ Tony Karon, "Scud Seizure Raises Tricky Questions," Time.com, December 11, 2002 (<http://www.time.com/time/world/article/0,8599,398592,00.html>).

² "Scud Affair Draws US Apology," BBC News, December 12, 2002 (http://news.bbc.co.uk/2/hi/middle_east/2569687.stm).

³ U.N. Convention on the Law of the Sea, 1833 UN Treaty Series 3, 21 ILM 1261, Article 92 (<http://www.un.org/Depts/los/index.htm>).

⁴ Frederick Kirgis, "Boarding of North Korean Vessel on the High Seas," The American Society of International Law, ASIL Insights, December 12, 2002, www.asil.org.

⁵ Ibid.

⁶ David E. Sanger and Thom Shanker, "U.S. Aides Remain Divided As They Weigh Korea Risks," *New York Times*, May 11, 2003.

⁷ Glenn Kessler, "No Support for Strikes against N. Korea," *Washington Post*, January 2, 2003.

⁸ These states will likely seek to add to their number.

⁹ The PSI also aims to interdict shipments by plane. For purposes of space, the legal questions involved in that effort are not discussed here in detail. Flights within states' territories are governed by a complex amalgamation of treaties and domestic law.

¹⁰ It is worth noting that neither the United States nor North Korea is party to the Law of the Sea Convention. North Korea signed but never ratified the treaty, and the United States never signed it. The United States was heavily involved in negotiating the treaty, however, and adheres to it. Despite not being parties, both states are probably bound by the principles in the Convention because they generally reflect customary international law. The rights of innocent passage and the freedom of the seas, the elements of the Convention most relevant to this paper, almost certainly reflect customary international law and thus bind the two states. The other states negotiating the PSI are parties.

¹¹ U.N. Convention on the Law of the Sea, Article 19

¹² Ibid, Article 19.

¹³ Ibid, Article 23.

¹⁴ Ibid, Article 37.

¹⁵ Ibid, Articles 99-109.

¹⁶ Article X, paragraph 1 of the NPT instructs signatory states to give three months notice of intent to withdraw. North Korea claimed its withdrawal was effective immediately. Even so, North Korea's withdrawal from the Treaty probably took effect three months after it announced its withdrawal. Frederic Kirgis, "North Korea's Withdrawal from the Nuclear Nonproliferation Treaty," The American Society of International Law, ASIL Insights, January, 2003, www.asil.org

¹⁷ "US Followed the Aluminum," *Washington Post*, October 18, 2002

¹⁸ Frederic Kirgis, "North Korea's Withdrawal from the Nuclear Nonproliferation Treaty," The American Society of International Law, ASIL Insights, January, 2003, www.asil.org

¹⁹ Jean du Preez and William Potter, "North Korea's Withdrawal from the NPT: A Reality Check," Center for Non-Proliferation Studies, April 9, 2002, www.cns.miis.edu/pubs/week/030409/htm

²⁰ Barry Carter and Phillip Trimble, *International Law*, Aspen Law & Business, New York, 1999, 1223-1224

²¹ Ibid, 1224. The Uniting for Peace Resolution may contradict the UN Charter.

²² Ruth Wedgwood, "Review & Outlook: Interdicting North Korea," *Wall Street Journal*, April 28, 2003.

²³ According section 102(a) of the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States (1987), "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."

²⁴ Additionally, it may be difficult for any nuclear-weapons state to assert a moral right to interdict nuclear weapons components shipments. At the 2000 Review Conference of the Nuclear Nonproliferation Treaty (NPT) all parties agreed to, "An unequivocal undertaking by the nuclear-weapons States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament to which all States parties are committed under Article VI." Because the US administration currently aspires to build new nuclear

weapons, mini-nukes, has failed to push the ratification of the Comprehensive Test Ban Treaty, and refuses to renounce first use of nuclear weapons, serious doubts have arisen regarding the strength of US commitment to its NPT commitments. As a result asserting a moral right to interdict shipments is especially difficult for the United States.

²⁵ Article 51 states: "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 United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

²⁶ Rachel Weiner, "Proliferation Security Initiative Ito Stem Flow of WMD Matériel," Center for Non-Proliferation Studies, July 16, 2003. (<http://cns.miis.edu/pubs/week/030716.htm>)

²⁷ Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), quoted in 2 John Bassett Moore, A Digest of International Law 412 (1906).

²⁸ Law of the Sea Convention, Article 88.

²⁹ This statement is based on conversation with a member of the State Department Legal Advisor's Office who is involved in negotiations of the Proliferation Security Initiative.

³⁰ Such a stance might violate customary international law. The first contentious case taken by the International Court of Justice, The Corfu Channel Case, gave British warships the right to pass without interference through straits controlled by Albania. The Albanians were ordered to compensate the British for damages Albanian mines caused to the warships. Although the decision dealt with warships, as opposed to cargo ships carrying weapons, and straits, as opposed to territorial waters, the case might apply to interdiction of North Korean ships, especially those bearing missiles. The case may stand for the idea that ships outfitted for war, or bearing weapons, have a right to innocent passage so long as they mean no harm toward the coastal state. The Corfu Channel Case: United Kingdom v. Albania, (ICJ Reports, 1949).

³¹ Law of the Sea Convention, Article 19

³² Article 25 of the Law of the Sea Convention states that the coastal state "may take the necessary steps in its territorial sea to prevent passage which is not innocent."

³³ Michael Schmitt, Blockade Law: Research Design and Sources, William S. Hein & Co., Buffalo, New York, 1991, 9-10

³⁴ Carter, 1240.

³⁵ Some have suggested that stopping shipments without sufficient justification is piracy. That argument is wrong. Piracy applies only when private actors are acting for private ends. The PSI involves government run entities acting for public ends. See, Law of the Sea Convention, Article 100.

³⁶ "N.Korea threat to abandon '53 armistice," www.cnn.com, July 1, 2003.

³⁷ Nicholas Kralev, "U.S. Seeks Asian Aid for Ship Searches," *The Washington Times*, June 17, 2003.



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